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A TESTING TIME FOR ALL

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Drink not the third glass - which thou canst not tame when once it is within thee.

George Herbert

Shakespeare called one of them "hot and rebellious" [1] and a modern legal writer called the other the "shiny embodiment of values and desires that are reshaping the landscape." [2] In combination, the two form one of the most lethal weapons of our time. Alcohol and the motor car, when used in conjunction, are indisputably responsible for many of the accidents on the road,[3] and this is now the unwritten and assumed premise of all legislative efforts in this area.[4]

It first became a specific offence to be found "drunk in charge of any mechanically driven vehicle" in the Criminal Justice Act (U.K.) 1925 and to be "drunk while in charge in any public place of any carriage, horse, cart or steam engine" in section 43 of the Police Offences Act (N.Z.) 1927. Despite this type of statutory condemnation of drinking-driving, there has been, and remains today, an ambivalence in social opinion on the issue: society abhors the deaths that drunken driving can cause, yet does not seem to regard most motoring offences as "real" crime.[5]

Recent research[6] has confirmed the relationship between drunken driving and motor accidents that the early legislation reflected.

At a time, therefore, when there is concern and informed argument about drinking and driving, it is appropriate to conduct an investigation into some of the legislative efforts in this direction. In view of recent controversy, the desirability or otherwise of random breath testing will be focused on.

It is useful at the outset to explain and clarify the terminology which can apply to the forms of testing.

The Australian Law Reform Commission Report on Alcohol, Drugs and Driving stated [7]

> Random Tests [means] the facility whereby police may conduct roadside tests on any driver or person who has been driving or attempting to drive. No one condition of conduct, accident or offence on the part of a driver would be

> necessary. No significant interposition of reasonable cause or judgment by the police would be required.

It is primarily the lack of a testing prerequisite which distinguishes random testing from other forms of testing. This paper uses "random" in this sense.

Random testing can take two forms: "true" random or "arbitrary"[8] testing, and "strategic" [9] testing. "Arbitrary" itself refers to two types of testing: the practice of setting up roadblocks and testing at will, without any pre-selection of time or place; [10] or completely discretionary testing whereby tests are given to satisfy the personal caprice and whim of an enforcement officer. [11] "Strategic" random testing is so called because, in the words of the New Zealand Ministry of Transport, it is [12]

> the systematic testing of the whole population of drivers on those routes and at those times when alcohol impairment is most likely.

Forms of testing which have to satisfy a testing prerequisite can be labelled "selective" because the enforcement officer has to select the motorist he will test by using that prerequisite.

It is proposed firstly to delineate the state of the law in New Zealand and give the background to, and the legislation in, Great Britain, Victoria and Sweden. These areas were selected to indicate the different types of measures taken to combat the drinking-driving problem. The New Zealand legislation ostensibly gives the narrowest powers, Great Britain extends them a little, and Victoria and Sweden widen them considerably by removing the "cause to suspect" provision. Victoria utilises the strategic form of random testing while Sweden employs the roadblock form of true random testing.

Secondly, an analysis of the effectiveness of each type of measure will be undertaken, based on the research material available.

Thirdly, there will be a consideration of the arguments pertaining to the rights of the individual, with an emphasis on this debate in the context of random breath testing.

It is hoped that an indication of the legislative direction in which New Zealand might head will emerge from the discussion.

While it is recognised that a discussion of the penalties accorded the drinking-driving offences is perhaps desirable in order for a fully valid conclusion to be reached, space requirements demand the exclusion of some arguments.[13]

Into this category also falls the topic of a possible reduction in the blood alcohol level (B.A.C.) stipulation. Initial enquiry indicated that reducing the level to 80mg per 100 ml would, in New Zealand, with the present enforcement patterns, only succeed in the apprehension of a further five percent of drivers, because most offenders apprehended have levels well in excess of this.[14]

I. THE LAW IN NEW ZEALAND, BRITAIN, VICTORIA AND SWEDEN

A. New Zealand

As a result of submissions made by the legal and medical professions in the early 1960's, the Transport Amendment Act 1966 established a B.A.C level of 100 mg per 100 mls as a rebuttable presumption of alcoholic impairment. The Amendment was to assist in[15]

> the detection and conviction of drunken drivers and... to protect the innocent but seemingly intoxicated driver.

The presumption could be rebutted by the usual tests conducted by traffic officers.[16] As stated, the Act merely "assisted" in the apprehension of intoxicated drivers.

In 1969, the Transport Amendment Act established the 100 mg per 100 ml B.A.C as an absolute limit. There was discussion of the Act in the Appropriation Bill of that year and it was noted that traffic "officers ... acted with very great discretion"[17] in enforcing the law.

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It became compulsory in 1971 for blood samples to be taken from motor vehicle drivers brought to hospital because of road accidents. Also included in the Amendment of that year was a provision[18] permitting a breath test to be given to a person who is suspected of being a driver in an accident where an officer is not certain. Together these provisions closed an obvious series of loop holes in the law.

In 1974 the law was amended to require only a suspicion that the driver had recently consumed alcohol, regardless of quantity, before a test could be given.[19] The Minister of Transport at the time said[20]:

> This Amendment does not permit traffic officers to embark upon random testing. The officer must have good cause to suspect that the driver has been drinking. Roadblocks were excluded.[21]

The provision was not expressly intended to allow officers to patrol outside hotels of "lie in wait", but it seems that if an officer is[22]

> ...in the vicinity of a hotel and sees someone leaving by car, he does have good cause to suspect that that person has been consuming alcohol and is therefore a good subject for a breath test.

In Felton v. Auckland City Council[23] Chilwell J. decided that the New Zealand legislation permits what he described as random breath testing. He referred to section 58A of the Transport Act 1962 which gives a constable or traffic officer power to require a specimen of breath for a breath test from a person whom the officer has good cause to suspect has committed an offence while under the influence of drink, or with an excessive amount of alcohol in his blood, or drives or attempts to drive while under the influence of drink or drugs, or drives while his B.A.C exce eds 100 mg per 100 ml. Together with section 66(1) of the same Act, which gives an officer or constable power to stop a user of a vehicle without reason, the officer has power to stop any motorist at will, and upon perceiving evidence of alcoholic impairment, he can demand a breath specimen.

"Good case to suspect" means a suspicion founded on reasonable grounds: Police v. Cooper[24] and the suspicion can arise either during the driving or after it has ceased : Police v. Bradley.[25]

The New Zealand Road Safety Committee in its 1977 Report decided not to recommend random testing as yet, but did concede that the need for such powers should be re-examined.[26]

This it is clear that Parliament has consciously declined to provide legislation for what it understands by the term "random testing", and that there is an apparent conflict between judicial and legislative thinking on the matter.

It is submitted that Chilwell J.'s use of the term random testing in Felton (supra) is not in accord with the literature on the subject. It is clear that the New Zealand legislation gives random powers only in that it enables an officer to check a driver for signs of intoxication. The "reasonable cause to suspect that the person has recently consumed intoxicating liquor" provision is the prerequisite which distinguishes this form of testing from random testing.

B. Great Britain

Introduced into the House of Commons in January 1966 by Mrs Castle, the Minister of Transport, the Road Safety Bill proposed random breath testing in the belief that the threat would be an effective deterrent to those who had drunk a fair amount but felt that they could still drive well enough. The random test provisions were strongly opposed. The dissolution of Parliament interrupted proceedings and when the Bill re-entered the House, these provisions were absent. Mrs Castle insisted that the principle of randomness was still present even after the deletion of the provisions. What the removal of the provisions had done was to[27]

> ...concentrate the operation of the random principle so that those who can now be required to take a road-side test are more likely to include offenders.

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It is section 2(2)(a) and section 2(2)(b) of the Road Safety Act that Mrs Castle was referring to. Section 2(2)(a) allows a constable to demand a breath specimen where an accident has occurred, from a person whom he has reasonable cause to believe was driving at the time of the accident, either at or near the place where the request was made; and section 2(2)(b) allows for a test to be taken at a hospital if the driver is taken there instead of at or near the place that paragraph (a) specifies.

Section 2(a) provides the basic power to call for a first breath test. A specimen can be required where there is reasonable cause to suspect that either there is alcohol in the person's body or that he has committed a moving traffic violation. This is the testing prerequisite which distinguishes this form of testing from random testing. In theory this means that anyone driving with a faulty side-light or dead number-plate light can be asked to provide a specimen.[28] In practice, this section appears to be little used in the absence of a moving traffic violation,[29] for to enforce it appears really to be using random testing. A concrete violation is usually required.

To be able to require a breath test in the case of any moving traffic offence is casting the net very wide. The legislation seems to pose no bar to the police "lying in wait" near hotels, and seeing a person driving away from an hotel could constitute cause to suspect the driver of having alcohol in his body.[30]

"Reasonable cause to suspect" is a matter of particular circumstances which is subjectively determined: McNicol v. Peters.[31] As in New Zealand the suspicion does not have to be aroused during the period of actual driving: Pimmer v. Everett.[32]

A constable can stop the driver of any vehicle without reason, under statute: section 223 of the Road Traffic Act 1960. However this section merely lays down a power, not a duty, and if the officer's conduct was prima facie an unlawful interference with a person's liberty or property, then in the absence of a statutory or common law duty, or if there was an unjustifiable use of powers associated with such a duty, an officer would not be able to stop a motorist : Reg v. Waterfield.[33]

The legislation has given rise to a plethora of cases seeking to probe its loopholes. The Alcotest 80, the

breath screening device used in Britain, contains specific instructions and under the legislation it had to be approved by the Secretary of State. Motorists evaded prosecution by claiming that no evidence had been produced to show that the device used was an approved one.[34] Similarly they tried to plead that the instructions were not complied with, initially a successful defence because the approval by the Secretary of State includes approval of the instructions for use of the instrument: R v. Chapman.[35]

However, this defence was rejected by the House of Lords in D.P.P v. Carey [36] and the court took the opportunity to reduce the importance of the procedure; the policeman only has to act in good faith and endeavouf to use the devise correctly.[37] It seems that in their attempts to comply with the instructions by waiting 20 minutes between tests, the police had opened up new loopholes by detaining motorists: the motorist who walked away from his car was no longer a "driver" under the Act, and the driver who smoked a cigarette could invalidate the test.

C. Victoria

Section 80E of the Motor Car (Driving Offences) Act 1971 empowered a member of the police force to acquire a preliminary breath test if he had reasonable grounds based upon his personal observations for believing that the driver had consumed intoxicating liquor within the two preceding hours and that the ability of such driver or person to drive a motor car could be impaired thereby ; or if the driver was involved in an accident. A full breath test, if reading over 50 mg per 100 ml, was prima facie evidence of intoxication, not an absolute indication.

Section 2 of the Motor Car (Breath Testing Stations) Act 1976 eliminates this type of prerequisite which sets up road blocks, or testing stations, to administer preliminary tests, and failure to undergo a test when required is an offence (section 2(? An officer can stop whom he desires, when he desires, and test without having any cause to suspect alcoholic impairment.

In practice, in Victoria, testing is very strategically arranged with the stations being set up at times when, and places where, drunken drivers are likely to be most prevalent,

with some fair play in regard to taverns and restaurants.[38]

The prima facie rule is an unusual feature of testing legislation. As well as this, there is no irrebutable presumption (or "statutory lie") that the B.A.C. shown on a test subsequent to driving is the same as that present during driving; it is an offence to have consumed enough alcohol after driving to account for the excess B.A.C. above 50mg.

D. Sweden

Sweden possesses true random test legislation. Random tests are just that: sites are not chosen on the basis of frequent violations. Roadblocks are set up anywhere, at times spread over 24 hours. Tests are made in all severe injury accidents, conditions permitting, (there is no hospital blood test law, so some drivers must be missed) and in others when there is cause for suspicion (such as single vehicle crashes).

The first per se law was introduced in Sweden in 1941.[39]

> If said driver is found to have had an alcohol concentration in his blood of 1.5 per mille or higher he shall be deemed to have been impaired....

There was also a second degree offence for those with 0.8-1.5 per mille in their blood. This legislation remained in force until the present law, the only interim change being a reduction to 0.5 p er mille (50 mg per 100 ml) in 1957.

Under the Swedish Code of Statutes, breath tests can take place without any reasonable suspicion of any offence against traffic law. The legislation[40] permits (i) planned checks to take place, (ii) tests to be given in accident situations, and (iii) tests to be given where there is suspicion of an offence bearing on speed of travel, failing to stop a vehicle at the sign of a police officer or at a traffic light or road sign, or failing to have the vehicle lights switched on when obliged.

The legislation was originally intended to self-destruct, that is, to terminate, at the end of a year (the 1975-1976 year), but it has since been made permanent. It is worth noting that the strength of the legislation and the fact that it has been made permanent is in part due to the strong temperance movement in Sweden. (The Union for Non-Alcoholic Traffic is one of the largest

motoring organisations in Sweden).

II. HOW EFFECTIVE ARE THE VARIOUS MEASURES?

By "effective" is meant deterrent effect. The two primary parameters of deterrence are the subjective risk of apprehension (i.e. the perceived risk of apprehension by the offender or the potential offender) and the objective risk of apprehension (i.e. the real risk of apprehension determined by the enforcement level).[41]

Effective deterrence requires a belief on the part of those who drive when intoxicated that violators stand a good chance of being detected and once detected punished.[42] In this process the following three factors are necessary:

(i) Public knowledge as a threshold requirement.

(ii) The applicability of threats e.g. people must believe the threat to be applicable to them.

(iii) The credibility of threats e.g. people must believe that the agency is capable of enforcing the threat by perhaps using a visible threat (such as road blocks).[43]

Objective risks of apprehension also play a part in deterrence. A high risk of apprehension is / due to a high enforcement level and so[44]

> The objective probability of apprehension will tend to increase or decrease along with variations in the presence of enforcement machinery.

And, improved enforcement of prohibitions against drink driving will reduce accidents.[45] However, "improved enforcement" has to create a very large increase in apprehensions of drivers or at least a public belief that the increase is large, in order to be effective.[46]

The publicity campaign, at least in the short term, increases the perceived credibility of the legal threat, but as personal experience accumulates, the perceptions of risk tend to decrease.[47]

These comments represent the views of a little of the traditional literature on deterrence. Data will now be presented from the four legislatures in order to substantiate these opinions.

A. New Zealand

To evaluate effectiveness it is useful to measure what, if any, effect on drinking and driving the legislative changes since 1969 have made.[48]

1. The effect of the 1969 Amendment

The Amendment only took effect in the last eight months of 1969.

In 1968, in fatal accidents the reported level of alcohol involvement was twenty-three percent and in the last eight months of 1969 it was twenty-five percent. In non-fatal injury crashes reported alcohol involvement was eight percent in 1968 and eleven percent in 1969 after enactment of the Amendment. The very small changes following the law are not indicative of a deterrent effect.

Another method of evaluation is to compare the total numbers of fatal and non-fatal crashes in the relevant periods. In 1968 there were 465 fatal crashes and in the last eight months of 1969 the annual rate was 501. The first four month period of 1969 represented an annual rate of 534, and the 1970 figure was 578. It is thus possible that the legislation slowed the increase in fatalities, but again the changes are too small to provide a sure indication. Non-fatal crashes numbered 11,599 in 1968, the 1969 pre-law figure rate 11,971 and the post-law eight months rate was 12,722. Yet again, any change is too slight to support a conclusion.

In general, alcohol is more common in single vehicle road crashes which occur at night, are serious and take place during the weekend.[49] During the eight months after introduction of the new law, there was a reduction in the percent increase in night-time fatalities. In 1970 the rate reached a new high, but it is arguable that the legislation slowed the trend. The night non-fatal injury rate did not decline at the same time so the fatality reduction was probably a chance event. The law had no measurable effect on weekend night crashes, but was followed by a slight decrease in single vehicle crashes, a three percent decrease, when the previous annual rate had been increasing by nine percent.

The legislation had little influence on the proportions of all road deaths and injuries, that occurred during main drinking hours (6 pm to 3 am). In the twelve months after the law was introduced, the proportions declined to 0.92 (fatalities) percent and 0.98 (injuries) percent of the previous year's figures.

2. The 1974 Amendment : suspicion of the consumption of some alcohol

Because of economic fluctuations and the energy shortage at the time, it is difficult to evaluate the effect of the Amendment. However in terms of enforcement activity there was a marked change.[50] Under the new law the number of blood

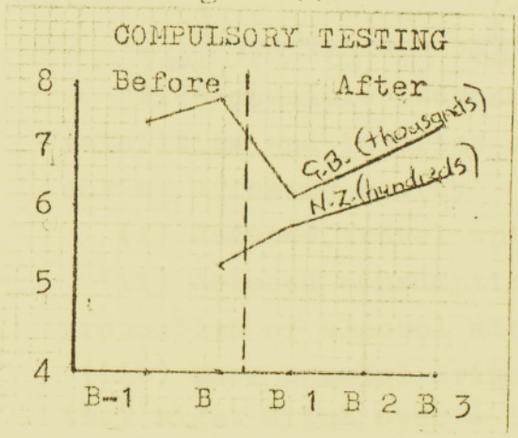
tests revealing levels above 150 mg was sixteen percent higher than before the Amendment, and twenty-seven percent higher for tests giving levels of 150mg and below. Since ninety-six percent of those tested continued to be convicted, the Amendment resulted in a large increase in convictions. It is clear that the 1974 Amendment resulted in an increase in the real risk of apprehension,[51] but due to lack of public knowledge of the law [52] it is doubtful whether the drivers themselves perceived the increase in risk. If the drivers have little knowledge of the law it could scarcely have a deterrent effect.

B. Great Britain

The following results, unlike the New Zealand statistics, all have to be seen in the light of the public controversy surrounding random breath testing and the broad publicity campaign prior to the inception of the Road Safety Act on 9 October, 1967. The advantage here, which added to the drivers' increase in perception of the risk of being apprehended and to the specific deterrent effect, was "the widespread knowledge among drivers of the provisions of the actual legislation."[53]

Great Britain immediately achieved a substantial decrease in total road fatalities. There was a similar trend in injury figures : in the first year of the breath test, overall casualty figures showed a reduction of fifteen percent in deaths, eleven percent in serious injuries and ten percent in slight injuries. The reduction is even more impressive when it is noted that between 1963 and 1966, there was an annual increase of four percent in deaths, four percent in serious injuries and two percent in slight injuries.[55]

Figure 1 [54]

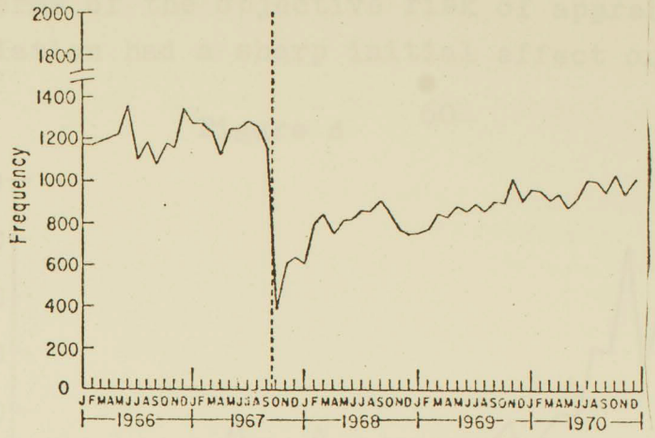


Road Fatalities

B=12 months preceding test law B 1, B 2, etc= 12 months periods.

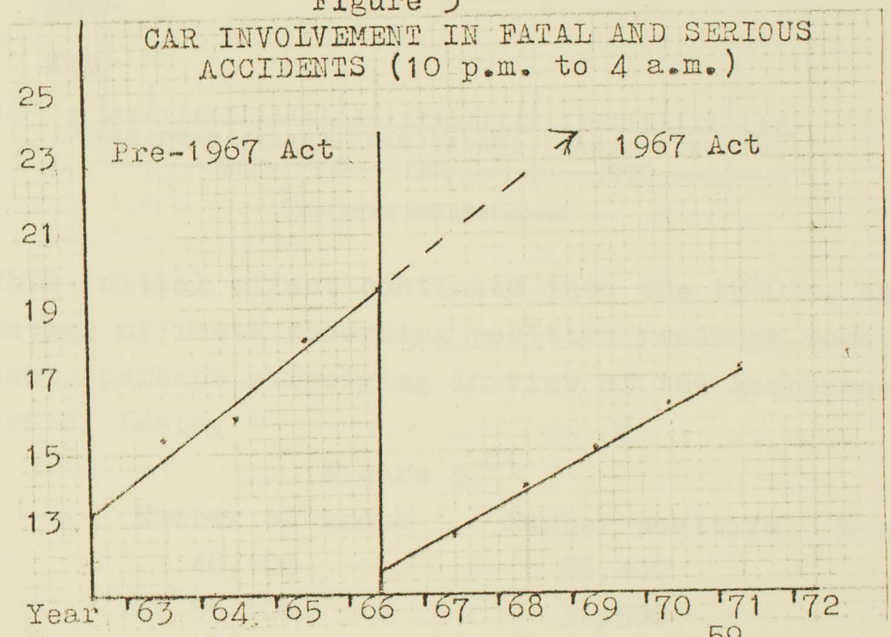
In order to isolate a more precise result of the breath-testing law,[56] fatalities and serious injuries during night-time weekend hours can be measured.

Figure 2 [57]



It is possible to display data which demonstrates the sharp effect of the legislation during drinking hours only. This isolates even more precisely the effect of the legislation at the times it is most likely to be ignored.[58]

Figure 3



Five possible reasons have been given[59] for the drop in fatalities and injuries at night-time weekend hours and during drinking hours:

(i) Reduced travel which led to fewer actual casualties.

(ii) Reduced consumption of alcohol, although not the proportion of alcohol attributable to drinking drivers.

(iii) More careful drinking by drivers before driving so that they might drink over a longer period or have food as well or go longer without a drink. The result is a lower B.A.C.

(iv) Separating drinking and driving while continuing both at the same amounts.

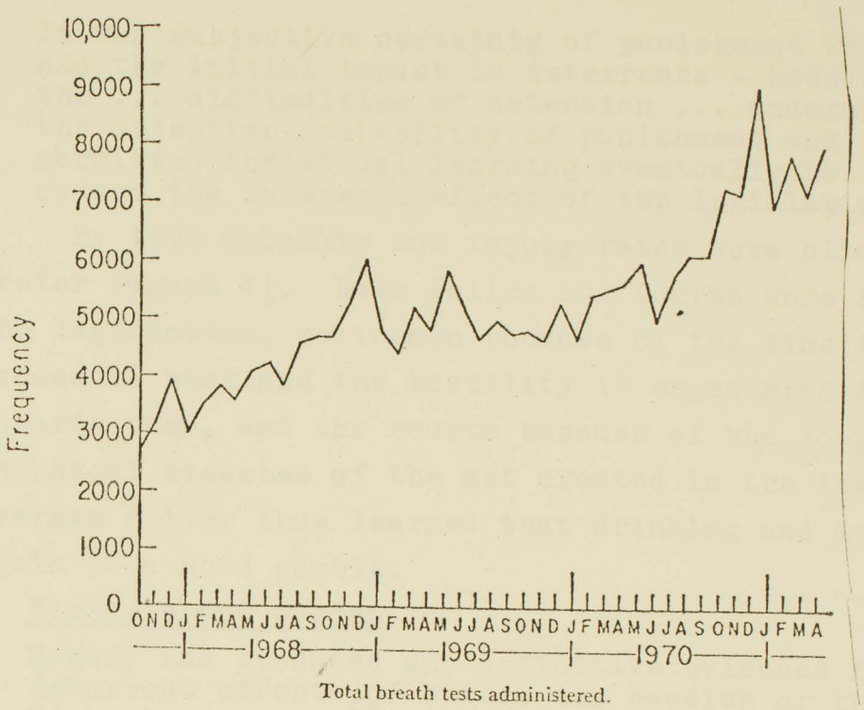
(v) More careful driving after drinking.

(i) and (ii) are unsubstantiated by statistics; it is likely (iv) and (v) did occur.

./13

In terms of the objective risk of apprehension, firstly the legislation had a sharp initial effect on enforcement level.

Figure 4 [60]



Total breath tests administered.

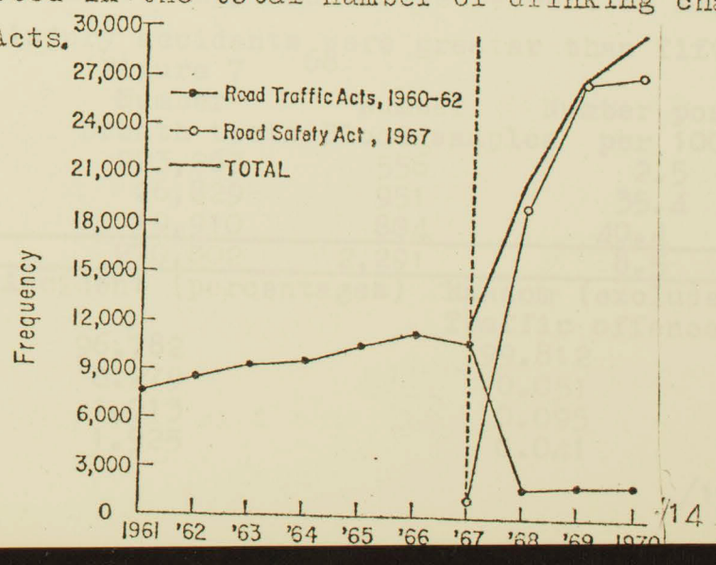
This initial effect continued into the 1970's, and the percentage of tests recording positive readings remained constant, perhaps surprising in view of the increases in numbers of tests.

Figure 5 [61]

Year	Number of tests	Number positive	% positive
1968	48,100	26,400	55
1969	55,100	31,500	58
1970	69,500	39,400	56
1971	91,200	56,300	60
1972	112,700	69,700	62

Secondly, the same high objective risk of apprehension indication is reflected in the total number of drinking charges under the relevant Acts.

Figure 6 [62]



While the number of charges increased greatly, by 1970 there was still only one charge under the Acts for every two million miles driven. It was rather the subjective risk which played an important role in general and specific deterrence.[63]

> It was subjective certainty of punishment which had the initial impact in deterrence - however the ... difficulties of detection ... undermined the objective probability of punishment and permitted individual learning eventually to reduce the deterrent effect of the legislation.

By 1970 fatality and injury rates were climbing again (refer Figure 1). Both Police and Courts were hostile towards the legislation, policemen because of the time the testing procedure took and the hostility it engendered in the public towards them, and the courts because of the loopholes which technical breaches of the act created in the law.[64] The average driver thus learned that drinking and driving could again be a good gamble.

C. Victoria and Sweden

> Nobody has produced any definitive evidence for the deterrent effects of either the Swedish or the Victorian system.[65]

Assessment of the effect of the compulsory testing legislation passed in Victoria in 1976 has been negated by the concurrent change in closing hours of licenced premises, from six p.m. to ten p.m. Unsubstantiated reports have it that night-time injuries dropped thirteen percent and day-time injuries dropped five percent on implementation of the random testing legislation in 1976.[66] We will merely have to "await with interest the results of this programme."[67]

Between 1 January 1975 and 15 February 1976, 270,000 breath tests were administered in Sweden under the new legialation. Of the 223,263 random tests, only 556 (2.5 per 1000) showed B.A.C.s over fifty per 100 ml and also over fifty mg on the ensuing blood test. Only about five percent of all the tests taken in injury accidents were greater than fifty mg.[68]

Figure 7

	Number Breath tests	Number Blood samples	Number positive per 1000
Planned checks	223,263	556	2.5
Traffic Accidents	26,829	951	35.4
Traffic Offences	19,910	804	40.4
Total	270,002	2,291	8.5

B.A.C.	Accident (percentages)	Random (excludes Traffic offences)
Under 50	96.782	99.812
50-80	0.279	0.051
80-150	1.013	0.095
Over 150	1.925	0.041

The 2.5 per 1000 of positive random tests can be interpreted as :

(i) The legislation was successful in deterring people from drinking and driving.[69]

(ii) Depicting the wasteful use of endorcement resources of the random test method

(iii) Both (i) and (ii).

The arbitrary Swedish method makes no selection of driver according to time and place or frequency of violation of laws; therefore its percentage of positive results will necessarily be lower than tests administered only at places and times known for drinking and driving, although the method may not be wasteful in the sense of its effectiveness in general deterrence. The writer submits that view (ii) is more likely to be correct. Studies utilising selectively chosen groups result in considerably higher percentages over fifty mg; that is, the enforcement resources are being used here to apprehend a higher number of drinking drivers than the true random method using the same enforcement machinery would apprehend.

Part of the reason why there is little to show the specific and general deterrent effect of the most recent Swedish legislation is that there is little documentation of the previous Swedish legislation to compare it with. The ostensible deterrent effect of the earlier Swedish per se law is not supported by evidence. There are four principal arguments for its effectiveness:[70]

(i) There is a constancy in the rate of drinking-driving violations despite a general increase in the use of alcohol. This argument can be rejected because it is not known what the rate would be in the absence of the legislation. Perhaps a comparison with the experiences of other countries instead would validate this argument.

(ii) Alcohol is less often found in the blood of fatally injured drivers in Sweden than in other countries. This argument is based on data which has a sample of only forty percent of all drivers' killed. Perhaps a knowledge of the other sixty percent would raise the proportion.

(iii) The law receives strong support in public opinion polls; however "attitudes and behaviour may diverge widely even if the attitudes are held with conviction." [71]

(iv) Convicted people are often those with alcohol problems so that "normal" people have been deterred from drinking and driving. This is not necessarily the effect of the legislation: neither the 1941 introduction of per se legislation nor the 1957 reduction in the legal limit is associated with any marked reduction in fatalities which would indicate deterrence of the "normal" people.[72]

The introduction of random test legislation had no effect on the verbally reported perceived risk of apprehension which was very low: both before and after the initiation of the law, it was one percent in normal driving, twenty-five percent in reckless driving and twenty-five percent in drunken reckless driving.[73] Publicity of the legislation was negligible. Awareness or basic knowledge of the legislation, views as to its legitimacy or fairness, early detection of drinking drivers, as well as visible and publicised enforcement would increase the subjective perception.[74]

Strategic random testing, which admits of the times and conditions when alcohol related accidents do occur (to restate: single vehicle, night and weekend during drinking hours), could well have resulted in a greater perceived risk. It seems to be a more efficient use of enforcement resources.

D. The Blitz

In New Zealand, until July 1978, the only documented blitzes were ones aimed at altering general road behaviour rather than at deterring the impaired driver.[75]

A month long intensive traffic enforcement programme was conducted in Christchurch in October-November 1973. The aims of the blitz were:

(i) To prevent accidents through selective enforcement.
(ii) To publicise current traffic law.

The results included a twenty-three percent drop in the total number of traffic accidents and a sixty-seven percent reduction in the number of serious accidents.

However the problems that the British breath test legislation faced in relation to long term deterrent effects recurred here. A gradual reversion to previous motoring habits was recorded after the blitz. Further, there was no noticeable effect for all accidents nationwide.

./17

Again the point is that rigorous enforcement will increase the effect of whatever legislation is in force.[76]

In the last two weeks of July 1978 (which included thee weekends), a nationwide drinking-driving blitz was conducted. At the date of writing, no evaluation of the statistical evidence had been completed.[77]

In the first six days of the blitz, traffic officers stopped more than 4,500 vehicles. They gave 623 first breath tests, 477 second tests and 401 blood tests.[78] This number of blood tests was about three times the normal number.[79]

Regional statistics differed widely. In Auckland in the first weekend of the blitz, twenty-six blood tests were taken; the second weekend produced fifty blood tests. Christchurch remained static from the first weekend to the second weekend with thirty-four blood samples at both times. In Wellington eleven were given blood tests on the first weekend and nine on the second.[80]

Initial indications were :

(i) The accident rates nationwide were down on the previous years' figures.[81] It seems, however, that the road toll was already lower for the first fortnight in July in this year than last year. (although pre-blitz publicity could have accounted for this by making drivers more careful in either drinking or driving or both).

(ii) There was a substantial drop in the numbers of vehicles on the road at high-risk period.[82]

(iii) There was a reduced occupancy rate of hotel car parks; many hotels reported reduced patronage but bottle stores reported an increase in trade. This <u>possibly</u> indicates that people chose to drink at home rather than drink in hotels.[83]

(iv) Taxi services were being used far more than normal.[84]

(v) There <u>might</u> have been a slight decrease in general violent and anti-social behaviour during the blitz. However, figures on this aspect seem too contradictory (for example, Wellington showed a decrease but Auckland displayed a substantial increase during the blitz period[85]), and any connection between a stated drop in the perjury figures[86] and the blitz seems too dubious for any conclusion to be reached.

./18

The blitz officially concluded at midnight on Monday 31 July, but blitz level enforcement has continued at irregular intervals since. In the week after the blitz, Wellington had two double night blitzes, with 205 motorists being stopped during the first of those blitzes, thirty-one of them receiving a breath test and sixteen having blood samples taken. The second short blitz occurred on 11 and 12 August: thirty-seven drivers gave breath tests of whom twenty were required to give blood samples.[87] The key to blitz effectiveness can lie in its unexpectedness. Reports after the main blitz indicate that because it was not unexpected and because its termination was thought to be the end of the official "crack-down", drivers were slipping back into their previous drinking-driving habits.[88]

Contemporaneously, a blitz was being conducted in Etibicoke, Ontario, Canada, along similar lines.[89] This blitz, however, only formed one part of a two-pronged attack on drinking-driving: the entire programme which was called R.I.D.E. (Reducing Impaired Driving in Etibicoke) also incorporated a campaign which utilised factually presented pamphlets to inform people of the drinking-driving laws and relevant accident statistics. As in the New Zealand blitz, evaluation is not complete, but it is clear that the number of alcohol-related accidents has decreased.

One way of utilising enforcement resources is by focusing them on the particular problem, as in the recent blitz. A second way to focus them geographically as in a general traffic blitz of the type outlined above.

A third way is to focus both on the problem and on a geographical location. This was the situation in the "breathalyser blitz" in Cheshire England in September 1975,[90] a pattern of enforcement based on the 1967 Road Safety Act which was conducted on the basis of removing all discretion for traffic officers: a breath test was to be administered for every moving offence and every accident.

There was a marked difference between routine and blitz enforcement levels.[91]

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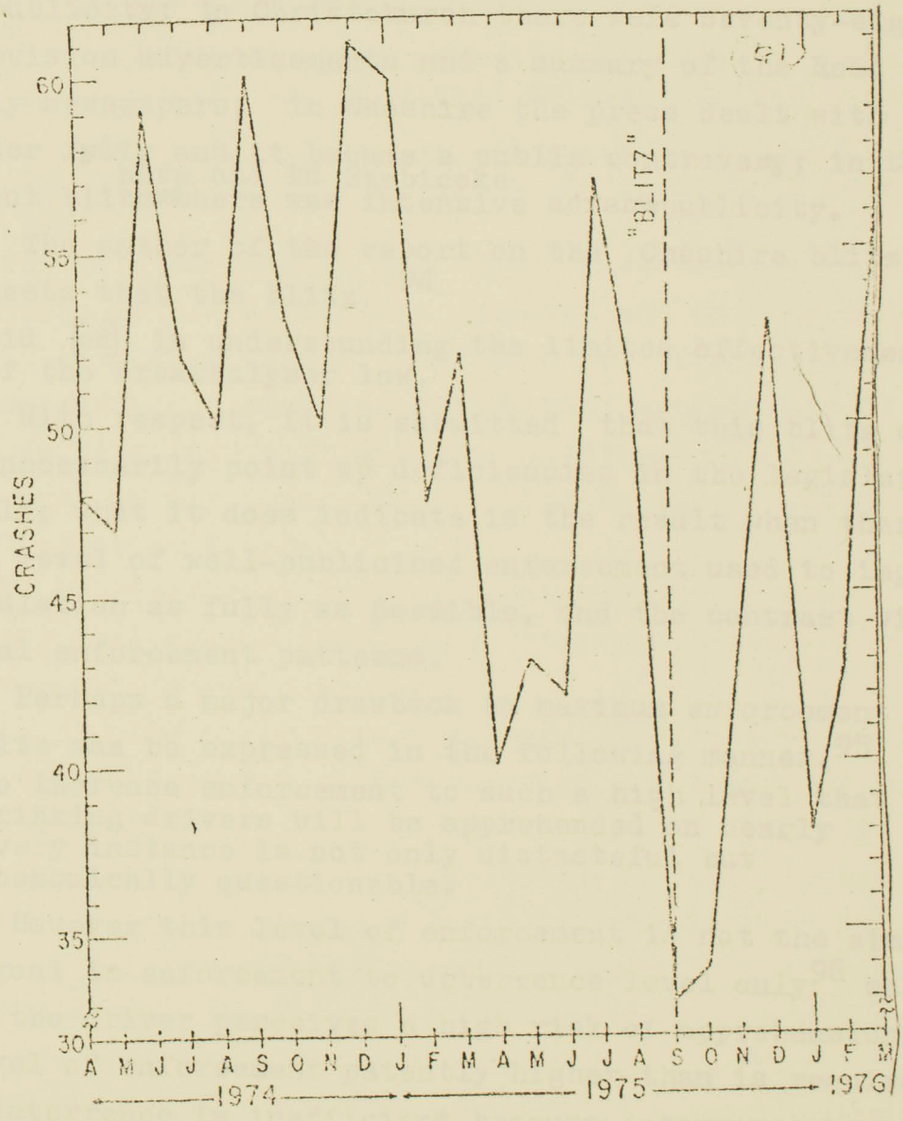
Figure 8 92

REASONS SUPPORTING DEMANDS FOR BREATH TESTS BY POLICE IN CHESHIRE

Reason	Number in September 1975	Number in September 1974
Traffic law violation	970	62
Accident (no injury)	131	15
Accident (injury)	137	41
Suspicion of alcohol	387	35
Total	1625	153

There was a phenomenal reduction in total accidents, as there was in the Christchurch blitz.

Figure 9 93



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There are two further salient points:

(i) Despite a lack of specific instruction on the matter, during the blitz the occasions when there was suspicion of alcohol in the blood rose considerably. There was clearly a wide range of factors policemen were able to interpret as indications of alcohol in the bldy which they do not act on during routine enforcement. As a result the testing total rose to six times the national average during the blitz.

(ii) The greatest increase in breath tests occurred where drivers were suspected of moving violations, an indication that in routine enforcement situations police were not very likely to use their discretion to test.

In all blitzes the campaign was accompanied by a measure of publicity: in Christchurch there were seventy-eight television advertisements and a summary of the Road Code in daily newspapers; in Cheshire the press dealt with the matter fully and it became a public controversy; in the recent blitzes here and in Etobicoke there was intensive advance publicity.

The author of the report on the Cheshire blitz suggests that the blitz,[94]

> ...aid [ed] in understanding the limited effectiveness of the breathalyser law.

With respect, it is submitted that this blitz does not necessarily point up deficiencies in the legislation itself; what it does indicate is the result when there is a high level of well-publicised enforcement used to implement legislation as fully as possible, and the contrast with normal enforcement patterns.

Perhaps a major drawback to maximum enforcement as in a blitz can be expressed in the following manner.[95]

> To increase enforcement to such a high level that drinking drivers will be apprehended on nearly every instance is not only distasteful but economically questionable.

However this level of enforcement is not the aim; the goal is enforcement to deterrence level only[96] so that the driver perceives a high risk of apprehension.[97] A level of enforcement patently higher than is required for deterrence is inefficient because deterrence by penalty is quite possibly the wrong tool to use to deal with persistent drinking drivers as the recidivism rate shows[98] and because repeating a blitz very possibly lessens its impact.

E. The Campaign

One way of reducing drinking and driving before the event is to try to convince people not to use alcohol in conjunction with the automobile, by means of a publicity campaign.

In New Zealand, in September 1974, a campaign was conducted, centred on a specially produced film, 479, which had intensive advance publicity.[99] It was estimated that between fifty-four percent and sixty-eight percent of people normally resident in New Zealand aged fifteen years and over saw the film.

The aims of the campaign were[100]:

(a) To acquaint the public with how little they can safely drink and drive.
(b) To promote the safety value of not driving after drinking.
(c) To start to change a person's attitude from one of sympathy with the convicted drinking driver to one of hostility.
(d) To develop in the convicted drinking driver or the driver with misgivings about his sobriety a sense of shame.

The main conclusion was based on surveys of vehicles used at certain hotels during the campaign and on home interviews after the filming of 479. In the short term the campaign was successful in changing some verbal expressions of attitude relating to drinking and driving, but it did not result in any change in drinking habits or methods of travel after drinking.

It is clear that there is a difficulty in making anything more than a "temporary deterrent effect"[1] appear, and even this seems dubious.

It is also clear that there are important value judgments involved in preparing such a campaign and that these can be of doubtfulvalidity. The comparison in the film 479 between a driver and a child molester is patently exaggerated; and the attempt to engender hostility towards the drinking driver is curious when research has shown that a convicted drinking driver may deserve sympathy because he often has an alcohol problem which requires treatment.[2]

In Britain there was a comprehensive threatening publicity campaign accompanying the 1967 law which emphasised the risk of being apprehended./included This a government pamphlet,

which was much criticised for its too liberal statement of the law.[3] This type of distortion or scaremongering which creates a high subjective risk of apprehension in the short term is effective as long as it does not distort so much as to be ridiculous (as 479 did by use of the child molester metaphor.) A longer effect is hard to achieve, but seems to have been demonstrated in the British campaign at Christmas, 1964, "Don't Ask a Man to Drink and Drive."[4] It incorporated positive efforts to make people aware of the casualties in their locality, was nation-wide and was aimed at all citizens, not only the motorist.

Any discussion of campaigns must be qualified by the statement that[5]

> Too much propaganda has adulling effect, and eventually over-reaches itself. For a successful campaign, the fear of detection induced by propaganda must be balanced by efforts to generate community enthusiasm and a willingness to reduce drinking-driving.

III. THE LIBERTIES QUESTION

> The central concern, of course, is to achieve a balance between the desire to preserve individual liberties and the desire to prevent conduct that is socially harmful.[6]

With this thought in mind it is proposed to examine the need for protection of individual freedoms to be taken cognisance of in the process of breath testing. The discussion of deterrence examined the widths of powers to test; this discussion takes a look at the prepequisite ("cause to suspect") and other safeguards which limit the powers to test and the considerations which argue that powers should be limited. While all the arguments apply to testing in general, it is obvious that they apply even more strongly to random and blitz level enforcement of legislation because these involve more indiscriminate breaches of liberty.

There is an invasion of the accused's body in breath tests. The point is made in the Australian Law Reform Commission's Report on Alcohol, Drugs and Driving that in the absence of justification, taking a test constitutes an assault.[7] This distinguishes random breath testing from

testing for offences by ticket inspections on trains and buses, baggage checks at airports and testing of vehicles on the highways.

The opposing argument is that[8]

> ... in a law abiding society the method by which offenders are "caught" is not particularly important since they will only affect adversely those who offend.

It represents what has been termed the "crime control" model of the criminal law, which places an emphasis on efficient maintenance of order.[9] It reduces the importance of procedural safeguards for the defendant because repression of criminal conduct is the most important function of the criminal system. There is a "mood" or attitude in the law enforcement machinery which presumes the guilt of the offender.[10]

In referring to the efficient maintenance of law and order, the "crime control" model in the breath testing context assumes that the various legislative measures are effective in both specific and general deterrence.[11]

An alternative view of the criminal law, termed the "due process" model,[12] emphasises safeguards for the defendant: the right to legal counsel, the right to know the specific charges, and the right to cross-examine and call witnesses. If the method of treatment is to treat the accused as innocent until proven guilty, then the method of apprehending suspected offenders is very important. And a free society, in this liberal view, must guard against condemnation of the innocent at the expense of freeing some of the blameworthy.

Another way of describing the testing process is as an "invasion of personal freedom"[13]. The Blennerhassett Committee on Drinking and Driving weighed this consideration against the view that British law, as it stands, fosters the delusion that "it is 'safe' to drink and drive ... so long as one believes one can avoid an accident or moving traffic offence."[14]

Referring to the need to provide a flexible framework for the use of police resources, the Committee concluded that an unfettered discretion reposed in officers to administer breath tests is not an unacceptable invasion of liberty.[15]

The major "liberty" argument which opposes the view of invasions of individual liberty being caused by testing is that to implement such legislation would extend another liberty, the societal liberty of safe motoring on the highways; for where there is a threat to general safety, the State may take effective action even when such action may impinge on the liberties of individuals.[16] In this balancing of the individual right against society's needs, traditionally rights are favoured.[17] The most obvious examples of this are the American Constitution and the basic premise of English law that the State has to show explicit authority before it can abrogate any rights of the individual: Entick v. Carrington.[18]

There is a countervailing Social Contract thesis: the driver has a responsibility to drive with no more than the legally permissible B.A.C. It is an implied condition of his licence that he cannot violate, any more than a retailer of food can allow cockroaches on his premises.

The driver must abdicate a freedom, that of driving as he pleases, in favour of the general will; in Rousseau's terms[19]

> ... l'aliénation totale de chaque associé avec tous les droits à toute la communauté.

Social Contract theory establishes the absolute supremacy of the state over all its members.[20] Here society as a collective organ has rights which are favoured. Indeed the individual has no rights except those enjoyed by the body politic; ultimately though, he regains the rights he appears to have surrendered. He has made only a profitable exchange of rights with society.[21]

Thus the driver has an obligation to drive without drinking which is part of his pact to submit to the will of the people. On one level he seems to be abrogating his individual liberty in this, but in the final analysis he regains this liberty he appears to have surrendered.

The individual liberties debate encompasses questions of compliance with international declarations concerning the liberties of the individual.

The Australian Law Reform Commission in its report was obliged to comply with the statute under which it operated. This statute enforces compliance with the

International Covenant on Civil and Political Rights. Part III, Article 9 of the Covenant prevents arbitrary arrest or detention, and Article 17 of the same part prevents arbitrary or unlawful interference with privacy and unlawful attacks on honour and reputation. The Commission said in relation to random testing that the Covenant imposed a duty which was "relevant in the present context."[22]

Requiring breath specimens is perhaps even subjecting a motorist to "cruel, inhuman and degrading treatment" as prohibited by both the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights.[23]

The question of actual legislative oppression of motorists and legislative safeguards for motorists can be mentioned in this context.

As mentioned,[24] there was judicial hostility to the 1967 Road Safety Act in Britain. The legislation gave rise to three innovations in criminal law which occasioned this attitude:

(i) The possibility of arrest in the absence of reason to suspect a law violation (as in the accident situation).

(ii) Forcing the accused to co-operate actively in a proceeding against himself. Non-co-operation (without reasonable excuse) results in a fine not exceeding £50. Even with a reasonable excuse the police can set wide enquiries in motion and the accused who wishes to vindicate himself may have to submit to arrest and the indignity of police procedure followed by a court hearing before he can expect to do so. This is because the police, in arresting for failure to supply a breath specimen, have no concern with reasonable excuse. "This is a matter entirely for the court"[25], and absence of alcohol is not a reasonable excuse: McNichol v. Peters (supra).

In Victoria it is an offence to refuse to undergo a preliminary breath test: section 80EA(7) (b) of The Motor Car (Breath Testing Stations) Act 1976. In New Zealand, failure or refusal to do so leads to a blood test: section 58A(2)(b) of the Transport Act 1962. Failure or refusal to accept a blood test is an offence. "Failure" would cover more than "refusal". It would, it is suggested, include

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someone who was too drunk to provide a breath specimen, a situation "refusal" does not apply to.

(iii) Condemnation as criminal of what is a condition that cannot precisely be known by the violator. He does not necessarily know of his blood-alcohol level.

The British Road Safety Act 1967 and the New Zealand Transport Act 1962 do have safeguards:

(i) Requests for roadside breath tests can only come from a uniformed police constable (in New Zealand, a constable or traffic officer)(section (2) (1) of the Road Safety Act 1967.).

(ii) Tests must be carried out with approved apparatus (Home Secretary in Britain, Minister in New Zealand under section 58A(6)(a) of the Transport Act).

(iii) No patient in hospital can be asked to take the test without the consent of the medical practitioner in charge (New Zealand: section 58D of the Transport Act; in Britain: section 2(2) .(6) of the Road Safety Act 1967.

(iv) Failure to have a roadside breath test leads to an opportunity to provide one at the police station before a blood or urine sample can be demanded (Britain: section 2(7) of the Road Safety Act; New Zealand: "to another place": section 58A(4) of the Transport Act).

(v) Only a registered medical practitioner may take a blood test (New Zealand: section 58B(1) of the Transport Act; Britain: section 2(1) of the Road Traffic Act 1962).

(vi) In Britain the constable must warn the motorist that refusal to supply a blood specimen may make him liable to imprisonment, a fine and disqualification.

(vii) In Britain and New Zealand the person supplying the blood sample is entitled to retain a portion of the sample for a private analysis to be carried out.

Probably the most significant safeguard in legislation is the "good cause to suspect"(New Zealand) or "reasonable cause to suspect"(Britain) provision which random testing lacks. It is this prerequisite which distinguishes the random check situation from what is commonly called the random test situation. It is this stipulation which means that the policeman must have some grounds for impinging upon the individual's liberty. However it has already been made clear that an officer can stop a motorist and by observing his behaviour gain cause to suspect (in New Zealand), or

even test where there has been a moving violation (in Britain, subject to the Waterfield (supra) qualification).[26] There is, in practice, room for very wide enforcement.

It is nearly impossible to gauge the present societal feeling as to the importance of individual liberties in this area. There are perhaps only three indications:
1. Public surveys in New Zealand and ones included in both the Australian Law Reform Commission and Blennerhassett Committee Reports indicate that some form of random testing seems to be favoured. In the Commission's poll, fifty-seven percent of the total sample was in favour of a form of random testing (the definition given being that of the ability to stop motorists at any time, whether or not they have committed an offence - no testing prerequisite) and thirty-nine percent opposed it.[27]

The Blennerhassett Committee included public surveys carried out between 1968 and 1975. There was a trend towards favouring random testing with, in 1975 forty-eight percent advocating and thirty-seven percent opposing it.

In New Zealand several surveys have been conducted. In 1973, the Heylen Research Institute asked the following question of 1000 randomly selected people.

> Should it be made possible for a policeman or traffic officer to stop any vehicle, at any time, and give the driver a random breath test?

Forty-four percent were in favour of this, and fifty-five percent opposed it (one percent had no opinion or did not know).

In September 1975, the Department of Statistics asked the following question of 1000 people.

> Should a breath test be able to be given to any driver, whether or not he appears to have been drinking?

Twenty-four percent said " yes"; sixty-seven percent of the poll sample replied: "no; only when he appears to be under the influence"; four percent said "not at all"; four percent had no opinion.[28]

In September 1977, the New Zealand Herald and the National Research Bureau[29] asked the following question of a randomly selected sample.

> Do you believe that motorists should be chosen at random for breath tests?

Fifty-two percent of the sample replied "yes", forty-five percent replied "no" and three percent remained undecided.

Doubts can be cast upon the utility of such surveys when:
(i) There are widespread misconceptions about the value and even the nature of random testing.[30]

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(ii) There is, of course, no guarantee that English and Australian survey results, or the New Zealand surveys, would be reproduced or even approximated in New Zealand in September 1978 when a recent blitz and considerable publicity have done much to bring the irresponsibility of the drinking driver to the public attention.

(iii) The questions posed differ in strength and emotive content. For instance the 1975 New Zealand poll would quite likely have evoked a different response from the Australian Commission's survey which specifically used the word "random" and thus did tend to conjure up the unpleasant image of roadblocks.

(iv) The road toll at the time of each survey very possibly influenced responses.

The 1973 Heylen poll was conducted in a year of high (837 [31]) road fatalities. It would have been more likely that people would have advocated strong action against drinking drivers in that year than in 1975, (in the Department of Statistics poll), a year in which road fatalities were relatively low (689[32]).

2. Parliamentary feeling is, it will be seen from the statements already given,[33] confusing. It appears that the rights of society to be free from the drunken menace are paramount.[34]

> It certainly is the Government's intention to express more concern for the safety of ordinary road-users than the liberties and rights of bad-risk drivers.

However, members also seem to regard the testing prerequisite as a necessary inclusion in any legislation, *

3. The views of the media, through editorials, and of those who are read, heard or seen through the media possibly provide an indication of the predominant stance in society.[36] Witness the 10 June 1978 issue of The Dominion in which the editorial talked of "misguided civil libertarians" and the 17 June 1978 Evening Post editorial which advocated a tougher line against drinking drivers and talked of "motoring madness".

* because "it is a safeguard for the general public." [35]

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IV. SUMMARY

1. New Zealand and British legislative provisions can be termed random checks. The authorities can stop drivers without reason (subject to the Waterfield qualification in Britain), but if they wish to test they must satisfy the prerequisite of "cause to suspect."

The British legislation is wider than that in New Zealand. Suspicion of a moving traffic violation will suffice as grounds to test.

In practice there are wide powers to test.

2. Victoria and Sweden have random testing powers. Victoria chooses to exercise the powers strategically. Sweden uses true random testing.

3. Neither New Zealand, Victorian nor Swedish legislation has been proven effective in reducing drinking and driving at "normal" enforcement levels.

4. British legislation was effective in the short term. Publicity, visible enforcement and high driver apprehension of the risk contributed to this. In the long term, the effect diminished because the risk decreased in drivers' perceptions.

5. Objective risk of apprehension, that is, the real enforcement level, plays a part in initiating and maintaining the deterrent effect of legislation.

6. Blitz enforcement which raised the subjective and objective risk is in its nature a short term mode. Such an enforcement level is economically questionable over a longer period.

7. Enforcement on a truly random basis is an inefficient use of valuable resources. Strategic or selective testing places resources at sites and times where and when alcoholic impairment is most likely.

8. The civil liberties arguments are very complex and encompass opinions from a view of a breath test as an assault to viewing it as an expression in Social Contract terms of the individual's submission to the social will. It seems that present social views favour liberalising the law and thereby increasingly place the rights of society ahead of those of the individual.

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V. CONCLUSION

When he commenced research for this paper, the writer held the widely accepted view[37] that legislation giving the police an unfettered discretion would be the most effective measure in reducing drinking-driving. But it will be clear by now that research results do not favour random testing.

With the effectiveness of several types of measures examined and the civil liberties controversy discussed, the writer is now able with at least a slightly more informed opinion than was evidenced several months ago, to link these two parts of the argument and attempt a conclusion.

True random testing, it is submitted, is a wasteful use of resources[38] in that the apprehension rate for drinking-drivers cannot be as high as a method which selects times and sites to place enforcement machinery. Of course, this is subject to the qualification that visible true random testing may succeed in general deterrence.

A strategic or selective form of testing seems to make best use of the resources available.

The central concern in assessing the liberties arguments of weighing individual liberties against society's right to be free from a social menace must be taken into consideration. In the absence of evidence for the utility of random testing, to introduce it in either its strategic or arbitrary forms, with or without roadblocks, would appear to be imposing a loss of individual liberty in return for an ineffective counter-measure. The right to mandatorily and without objective cause coerce a person into co-operation with authorities against himself cannot be given lightly.

With the random testing option thus dismissed, it is certainly difficult to decide the direction in whic h New Zealan must head. However two suggestions can be made:
(i) It is submitted that any New Zealand attempt to gain effective drinking-driving legislation could learn much from the British experience. Widening the provisions to include suspicion of a moving traffic violation as reason to test would enable blitzes of the Cheshire[39] type to be undertaken.[40]

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(ii) The legislators could also learn from the recent blitzes conducted in this country and in Etobicoke.[41] Even without a full evaluation of the results undertaken, it is apparent that the New Zealand drinking-driving legislation can be utilised to enable greater subjective and objective apprehension of deterrence. Further, enforcement which is publicised by means of a driver education campaign, as in Etobicoke, and which is visible and increases the driver perception of the risk of being apprehended, is necessary, along with irregular and continued blitzes.

If any single proposition can be derived from the research in this paper, it is that what is needed, above all, is a realisation that the enforcement of legislation and not the legislation itself, determines effectiveness. With this aim in mind, members of the Research Section of the Ministry of Transport have been provided with copies of the "Cheshire Blitz" Report [42] in order to indicate the level of enforcement and the results possible in a country with drinking-driving legislation similar to our own.[43]

Change is underway as a result of the recommendations of the 1977 Report of the New Zealand Parliamentary Road Safety Committee.[44]

That realisation, however, is not apparent in some of the action the Committee / advocates. The Report proposes inter alia to introduce evidential breath testing[45], yet this will only serve to reduce the testing procedure time by approximately thirty minutes.[46] If enforcement is to be improved through an increase in deployment of officers, a selection of sites and a shortened testing procedure so that officers can resume duties (after testing suspected offenders) within a reasonable time, this new suggestion does little to help.

The Report also provides for an offence based on 500 micrograms of alcohol per litre of expired air,[47] yet as noted at the outset ,[48] lowering the level without also encouraging greater enforcement will have little effect on the numbers of drinking drivers apprehended.[49]

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Or perhaps the Road Safety Committee envisages legislation of the type that A.K. Grant thinks our legislators desire.[50]

> If the medical profession and the politicians (not to mention the media) have their way, it will not be long before anybody who drinks rather too much will be subject to the death penalty, on the ground that it is the best way of stopping such people from driving cars.

FOOTNOTES

* B.A.

NOTE. All underlined material is meant to be italicised.

1 Shakespeare, As You Like It, II.3.49.
2 Cramton, "The Drinking Driver" (1968) 54A.B.A.J. 995.
3 See, for introductory purposes, Bailey, "Alcohol and Fatal Road Accidents" in Alcohol in the Blood of New Zealand Drivers (D.S.I.R., 1974),26. Although proof of the causal relation between alcohol and car accidents is not within the scope of this paper, no article on this general area would be complete without a brief mention of the "Grand Rapids" study: Borkenstein et al, Rôle of the Drinking Driver in Traffic Accidents (Indiana, 1968). Conducted in 1964, this study involved a comparison between 6,000 drivers involved in accidents and drivers not involved in accidents but who were stopped at the same places, times of day, or the week and of the year to correspond with the accident sample. The major conclusion was that drivers with low Blood Alcohol Concentrations (B.A.C.s) had a lower risk of accident involvement than drivers with high B.A.C.s.
4 Like the legislation, this paper assumes this relation. However it is worth noting that the assumption that where a person has been drinking and has an accident, alcohol is the cause of the accident has been challenged : see Leeming, Road Accidents: Prevent or Punish? (London, 1969), 178.
5 See R.S.Clark. "Law and Road Toll: A Jurisprude looks at the Road Toll" (1973) Otago L.R.; Parsons, Violence on the Road: A logical extension to the sub-culture of violence thesis Research Series No.6 (Research Section, Department of Justice, 1978); Parsons, Traffic Research Report No.10 Attitudes towards Drinking and Driving in New Zealand Ministry of Transport (Wellington, 1975).
6. For a summary of many of the recent studies see Sanderson, Traffic Research Report No.14 The Alcohol Impaired Driver Ministry of Transport (Wellington, 1975) 2 - 5. For a study of the legislation up to 1970 and the case law, see Bradshaw, LL.B. (Hons) Legal Writing Requirement The Law Relating to Breathalyser Tests in New Zealand (V.U.W., 1970).
7 Report of the Australian Law Reform Commission No.4 (hereinafter referred to as A.L.R.C. Report) (1977), 104 (para.244). Cf. Higgins, "Alcohol, Drugs and Driving: The Australian Law Reform Commission Report" (1977) 1 Crim.L.J.144, who comments (148) that even where there is a testing prerequisite, testing can still be made without aberrant driving, or an accident causing attention to the driving. This is in practice random.
8 A.L.R.C. Report, op.cit.n. 7 , 101.
9 The term used in Havard, "Comparisons of Drinking-Driving Law" in Report of the Proceedings of the Sixth International Conference on Alcohol, Drugs and Traffic (1974), 644.
10 A.L.R.C. Report, op. cit.n.7 used the word "random" in this sense.
11 The Blennerhassett Committee, in contrast to the A.L.R.C. Report, seemed happy to allow such a power; and

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was not anxious to set up roadblocks. The object of this form of testing is simply to facilitate the work of the police by allowing them to pursue their suspicions without encountering "due cause to suspect" problems: Department of the Environment, Report of the Departmental Committee on Drinking and Driving (G.B.) (London, 1976) (hereinafter referred to as the Blennerhassett Committee Report).

12 Parsons, op.cit.n.5, 16.

13 Research indicates that the severity of penalties plays a considerably smaller part in the effectiveness of legislation than the enforcement of the legislation itself: see, for example. Clark, op.cit.n.5, 441; Cramton, "Driver Behaviour and Legal Sanctions: A Study of Deterrence" (1969) 67 Mich.L.R.420; Blennerhassett Committee Report op.cit.n.11; a brief comment on the submissions of the New Zealand Law Society on the Introduction of the 1966 Transport Amendment Act in [1967] N.Z.L.J.255,256. For a general discussion see Andenaes, "Does Punishment Deter Crime?" (1968) Crim. L.Q.76. Furthermore, the penalties in N.Z., U.K. and Victoria are on a theoretical par, all containing similar fines, disqualification and jail terms. Sweden has a tiered system of harsher penalties with a level of over 150mg per 100 mls giving a mandatory 30 days in jail. The actual practice by the courts seems so inconsistent (see Denney, The Truth About Breath Tests (London, 1971), 52-53) and so uncertain as to the deterrent effect of the sanctions themselves (see Clark, op.cit.n.5, 453) that no pattern emerges enabling comparisons between countries to be made.

14 Parsons op.cit.n.5,9.

15 (1968) 349 N.Z.P.D. 3415.

16 These tests included walking a straight line, unlocking a car door, or picking up a five cent piece.

17 (1969) 364 N.Z.P.D. 3491.

18 Transport Amendment Act (No.2) 1971, s.2(1); Transport Act 1962, s.58A(1A).

19 Transport Act 1962, s58A.

20 (1974) 394 N.Z.P.D. 4976 per Hon. Minister of Transport, Sir Basil Arthur.

21 Ibid., 3604.

22 See the comments of Hon. Sir Basil Arthur during the Third Reading debate on the Amendment: (1974) 395 N.Z.P.D. 5320.

23 (1977) Unreported, Auckland Registry, M.133 1/77.

24 [1975] 1N.Z.L.R.216.

25 [1974] 1N.Z.L.R.113.

26 Report of the New Zealand Parliamentary Road Safety Committee, 1977 (hereinafter referred to as N.Z. Road Safety Committee Report), 10.

27 735 H.C. Parl.Deb.(1955-62) (5th Series) 987. It should be noted that the 1967 Act does not supersede the 1960 and 1962 Road Traffic Act. These two Acts are still used when a driver passes a breath test but appears to be impaired. They can also serve as creating alternative charges when a procedural error has invalidated a provision under the 1967 Act and can serve if evidence is that the driver was impaired by drugs other than alcohol. The 1960 Act refers to "unfit to drive through drink or drugs" (s6(1)) and the 1962 Act refers to the B.A.C. as evidence of unfitness (s2(1)).

28 Denney, op.cit.n.13,57.

29 Ross, "Law, Science and Accidents. The British Road Safety Act of 1967" (1973) 2 Journal of Legal Studies 1,38.

30 As noted, ante, p.4, the New Zealand legislation is similarly permissive. From personal experience, in blitzes at least, traffic officers will place chalk mark on car headlights to identify vehicles exiting from hotels and will "pounce" (after secreting themselves around the nearest corner) on perceiving the identifying mark.

31 (1969) S.L.T. 261.

32 [1969] 1 W.L.R. 1266.

33 [1964] 1 Q.B. 1643 per Ashworth J. at 170-171; followed in Hoffman v. Thomas [1974] 1 W.L.R. 376. The Common Law duty of a constable is to prevent the commission of a crime by protecting life or property. In stopping a motorist without reason, a constable is clearly not in the execution of this duty (see the comments of Lord Widgery C.J. in Hoffman at 379).

34 See for example, Scott v. Baker [1968] 2 All E.R.993.

35 [1969] 2 W.L.R. 1004.

36 [1970] A.C.1072.
In New Zealand, "reasonable compliance" with the procedure is sufficient: Transport Act 1962,s.58C(2A). However technical breaches can still lead to acquittals: e.g. if the officer did not personally collect the blood sample from the Medical Superintendent.(case reported 14 April 1978 Evening Post). See also note in [1978] N.Z.L.J. 19.

37 However, this device is not as accurate as would be liked, so that in fact correct procedure is essential to a reliable result: see Denney, op.cit.n.13, 63 et seq.

38 Hurst, Notes of the Proceedings of the Seventh International Conference on Alcohol, Drugs and Traffic Safety, Ministry of Transport (Wellington, 1977), 36.

39 Ross, "The Scandinavian Myth" (1975) 4 Journal of Legal Studies 285, 287. See also Reed, C.L.M. Research Paper A Comparative Study of Blood Alcohol Legislation (V.U.W., 1974) for the legislative history.

40 See Report of the Proceedings of the Second International Conference on Alcohol and Road Traffic (Toronto, 1953), 9.

41 See Zimring, Perspectives on Deterrence (Chicago, 1971), 56-58; Klette, Transcript of paper delivered at the Seventh International Conference.
One can distinguish between general deterrence, that is, the response that legislation produces among the general population; and specific deterrence, that is, the response that the legislation produces among those who have been previously punished: see Cramton. op.cit. n.13; Zimring, op.cit.n.41, 2; Andenaes, op.cit.n.13. Effective legislation depends upon both these components being satisfied. Later discussion will utilise these terms.

42 This subjective belief may rate the chances of being caught as considerably higher than the real chances actually are: see Walker, Sentencing in a Rational Society (London, 1969), 63 et seq for an analysis of the Willcock and Stokes Report; Zimring op.cit.n.41,69 for his comments in this regard on the British drinking-driving legislation.

43 Klette, op.cit.n.41; Zimring, op.cit.

44 Zimring, op.cit.,72. Cf. Manning's view that enforcement strategies make little difference in the crime rate; Police Work: The Social Organisation of Policing, (Massachusetts 1977), 286. Objective probability is simply: $\frac{\text{apprehensions per year}}{\text{offences per year}}$.

45 Cramton op.cit.n.13, 439. N.40 and n.41 thus reinforce the utility of blitzes in this area.

46 Walker, op.cit.n.38, 65.

47 Zimring, op.cit.n.41, 72; Andenaes, "Deterrence and Specific Offences," (1971) 38U. Chic. L.R.539,549.

48 The changes are outlined ante, p.4 . Most of the New Zealand data following is based on a study by Dr. P.M. Hurst, reported in Traffic Research Report No.18 Blood Test Legislation in New Zealand Ministry of Transport (Wellington, 1977).

49 Ibid., 4.

50 Whether the change was brought about only by the new legislation or whether numbers of officers deployed in this area as a result of a tougher departmental policy also contributed is not stated by Hurst.

51 How the increase was spread over night-time drinking period and day-time accidents is not stated. It would, however, be useful to know this in order to gauge the precise effect of the Amendment during drinking hours.

52 This is a factor mentioned in Traffic Research Circular No.10, "Drinking Driving Campaign" (Ministry of Transport, 1974).

53 Ross, op.cit.n.29, 68. These statistics have to be seen in light of the fact that this law was the first of its kind; neither blood nor breath testing had been needed before. In New Zealand, optional blood testing three years before the introduction of compulsory testing meant that the initial impact was likely to be less severe than in Britain.

54 Adapted from Hurst, op.cit.n.48, 10.

55 Statistics here are adapted from Denney, op.cit.n.7, 20 et seq. Safety belt laws, tyre tread laws and driver education may also have contributed to lower injury and fatality rates.

56 The total fatality and injury figures are given to demonstrate the effect that testing legislation can have overall. The following data is designed to show the influence of the law at the times it is most likely to be flouted. Hence a more precise gauge of its deterrent effect is possible.

57 Ross, "The British Road Safety Drinking and Driving Experience" (1974) 60A.B.A. J. 694, 695.

58 Havard, op.cit.n. 9, 650.

59 Ross, op.cit.n.29, 40.

60 Ross, op.cit.n.29, 41.

61 In a paper delivered by Sabey at a Traffic Research Seminar, Wellington, May 1976. Perhaps the enforcement level is low in comparative terms: eg.69,500 tests in a population of 58 million in 1970. Cf. for example, Los Angeles County, 93,000 tests in a population of 7 million.

62 Ross, op.cit.n.29, 46.

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63 Ross, op.cit.n.29,3. Although the number of tests given increased, the proportionfailed by drivers only increased a little. This suggests that more tests could be required without changing the present law; i.e. a higher level of enforcement is quite possible.

64 See ante, at pp.6-7.

65 Hurst, op.cit. n.38.

66 A report of the results of the first year of the Victoria legislation is not available yet. These two figures are personal comments by Dr. P. Hurst, Ministry of Transport, based on newspaper reports.

67 N.Z. Road Safety Committee Report, op.cit.n.26,17. The Report refers to the Victorian legislation as being introduced in 1977. In fact, however, the relevant Act, the Victoria Motor Car (Testing Stations) Act, was dated 8 June 1976.

68 Both sets of statistics are the results of private and as yet unpublished research by Dr P. Hurst, and I am grateful to him for permission to use them.

69 The interpretation taken in Hurst, op.cit.n.38,8.

70 In Ross, op.cit.n.39, 297.

71 Ross, op.cit.n.39,297.

72 Ross' rejection of the arguments was based on his time-series analyses. Klette insists that the conditions were not appropriate for this type of data to be formulated (Klette, op.cit.n.41).

73 Klette, op.cit.n.41. The real risk of apprehension is, in one opinion (Robertson, in Hurst op.cit.n.26,9), one percent in random testing situations.

74 Ibid. Objective risk of apprehension data is not available. Perhaps an indication can be gained from the following: if there are 4.3 million drivers for a population of eight million (the same proportion as in New Zealand: 1.6 million drivers for a population of three million) who drive 10,000 km a year and 200,000 tests are given in any one year, the equation, on these admittedly large assumptions is:

$4.3 \times 10{,}000$ Km per year per driver $= 4.3 \times 10^6 \times 10^4$ km per year $= \frac{4.3 \times 10^{10}\text{km}}{2 \times 10^5 \text{ tests}} = 2 \times 10^5 \frac{\text{km}}{\text{test}} = 200{,}000$ km for every test. If the average trip is 100 km, then there is one random test for every 2000 trips or a random test in 20 years for every driver.

75 Reported in Toomath, Traffic Research Report No.11 Short Term Traffic Blitzes. Ministry of Transport (Wellington, 1975).

76 As in strategic random testing, resources are used in situations where alcohol is most likely to be involved.

77 It appears that the Ministry of Transport is waiting to receive three-monthly (July, August and September) accident admission figures from hospitals before making its evaluation. The following statistics are taken from newspapers reports.

78 26 July, Evening Post.

79 2 August, Evening Post.

80 24 July, Evening Post.

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81 26 July, Evening Post. This indication gains indirect confirmation from a personal comment, Mr B. Jackson, President of the Retail Motor Trades Association, to the effect that for the month of July, the panelbeating trade in the Wellington area suffered a seventy percent downturn in business. Further, the Wellington Free Ambulance Association reported attendance at only eighty-five car accidents in July 1978, cf. 182 in July 1977: 17 August, Evening Post.

82 26 July, Evening Post.

83 Ibid.

84 Idem.

85 11 August, Evening Post.

86 Ibid.

87 11 August, Evening Post; 15 August, Evening Post.

88 1 August, Evening Post.

89 Documented in (1978) 3 A.C.C. Report No.3, 21. The programme was timed to last a year from October 1977. Its most important feature for present purposes is that it generated considerable public support, something not apparent in the New Zealand blitz. The writer has one reservation about this Canadian blitz: of the 32,872 motorists stopped by the second month of the programme only 528 were tested; that is, only 1.6 percent were suspected of drinking and were tested. The New Zealand equivalent figure on the statistics given, averages approximately seventeen percent. The Canadians were less selective in exercising their discretion to stop motorists. This method seems fairly close to the true random Swedish method (ante, p. 8). Subject to the qualifications already stressed in relation to the probable effectiveness in general deterrence of the blitz, the Canadian traffic officers do not seem to be as efficiently utilised, at least in specific deterrence, as their New Zealand counterparts.

90 Ross, "Deterrence Regained: The Cheshire Constabulary's" Breathalyser Blitz" (1977) Journal of Legal Studies, 241.

91 This is because the Road Safety Act permits, but does not require, tests in the cases of moving offences, accidents, or alcohol in the body. This is the essence of the police discretion.

92 Ross, op.cit.n.90,245.

93 Ibid, 247.

94 "Effectiveness" is not defined but seems to be used as a synonym for deterrence - Ross makes no elaboration and gives no reasons to clarify this introductory statement in his article.

95 Little, "Control of the Drinking Driver" (1968)54 A.B.A. J, 555,558.

96 Estimated at thirty percent: Robertson in Hurst, op.cit.n. 38, 9. This figure is disputed by Hurst himself (personal comment): (i) Deterrence level is extremely hard to specify (ii) Surely even five percent would be frightening (ten drunken trips : forty percent likelihood; fifteen trips: fifty-four percent likelihood).

97 With visibility and publicity also playing their parts.

98 Cramton, op.cit.n.2 pursues this aspect. There is conflicting evidence as to the effect sanctioned by legislation has on the problem drinkers. Many such drivers do seem to be clinically alcoholics. Maybe even these motorists get off the road because of the threat, at least for a short period (Hurst, op.cit.n.38, 13). For the view that fines may be more effective than rehabilitative efforts, see Ross and Blumenthal,

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"Sanctions for the Drinking Driver: An Experimental Study" (1975) 4 Journal of Legal Studies 285.

99 Documented in Traffic Research Circular No.10, op. cit.n.52.

100 Ibid., 1.

1 N.Z. Road Safety Committee Report, op.cit.n.26,10.

2 See Cramton op.cit.n.2,996; A.L.R.C. Report, op.cit. n.7,111 (para.259); Report of the Proceedings of the Third International Conference on Alcohol, Drugs and Traffic Safety (1962) for a comment on a Canadian study showing that twenty-eight percent of convicted drinking drivers were clinically alcoholics (335); Leeming, op.cit.n.4, 153.

3 See Walls and Brownlie, Drink, Drugs and Driving (London, 1970) 135.

4 Documented in Cohen and Preston Causes and Prevention of Road Accidents (London, 1966), 208. It appears that the campaign part of the Etobicoke programme (ante,n.89) was similar. Public response in both cases was good with quite marked changes in attitude towards drinking-driving, unlike the long-term response to the 479 film in New Zealand.

5 Leeming, op.cit.n.4,100. Leeming takes a detailed look at the use of propaganda in this area.

6 Little op.cit.n.95, 558.

7 A.L.R.C. Report op.cit.n.7, 108 (para. 254)

8 Parsons, op.cit.n.5,8; to make grammatical sense, "They" must be replaced by "it" or "method" should be made plural.

9 See Packer, The Limits of the Criminal Sanction (Stanford University, 1968), 152 et seq.

10 Ibid., 154.

11 See n. 41 for general and specific deterrence.

12 Packer, op.cit.n.9, 153.

13 Blennerhassett Committee Report, op.cit.n.11, 22.

14 Ibid., 21.

15 Ibid., 22.

16 A.L.R.C. Report op.cit.n.7, 106 (para.247).

17 Report of the Proceedings of Second International Conference on Alcohol and Road Traffic, op.cit.n.40, 86.

18 (1765) 19 ST.TR.1030.

19 Rousseau, Du Contrat Social (Cheval Ailé Édition, 1947), 192; translated thus: "The complete surrender of each associate, with all his rights, to the whole community." (Bair, The Essential Rousseau (New York, 1974), 17).

20 For a discussion of the components of Rousseau's Social Contract theory and a comparison with Hobbesian thought, see Hall, Rousseau: An Introduction to his Political Philosophy (London, 1973), 84-104; also Dodge (ed), Jean-Jacques Rousseau: Authoritarian Libertarian? (Toronto, 1971).

21 See Dodge, op. cit.n.20, 57 -59.

22 A.L.R.C. Report, op.cit.n.7, 110 (para.256).

23 Leeming, op.cit.n.4, 171.

24 Ante, p.14.

25 Report of the Second International Conference on Alcohol and Road Traffic, op.cit. n.40, 86.

26 Ante, pp.6-7.

27 A.L.R.C. Report, op.cit.n.3,105 (para.246).

28 I am grateful to Dr. P. Hurst, Ministry of Transport, for providing information on these two surveys. The purpose of presenting such "old" material is to enable comparison with newer surveys and in that way detect any change in public attitude towards testing and drinking-driving.

29 The survey was reported 5 November 1977, Auckland Herald.

30 This was pointed out in the Blennerhassett Committee Report, op.cit.n.11, 22.

31 1977 New Zealand Official Yearbook (Wellington, 1977), 105.

32 Ibid.

33 Ante, p. 4 .

34 (1974) 395 N.Z.P.D. 5321 per Hon. Sir Basil Arthur, Minister of Transport.

35 (1971) 376 N.Z.P.D. 4284 per Hon. J.B. Gordon, Minister of Transport.

36 See post, n.37 for views of those heard, seen or read in the media.

37 White J. (at N.Z. A.A. Conference, December 1977/ January 1978 Motor World, 29); Automobile Associations in February/March 1978 Motor World); W.E. Rowling, (April/May 1978 Motor World and Evening Post 15 March 1978); Hospital Board (Evening Post 15 April 1978); Opposition Spokesman on Transport, (Evening Post 21 March 1978).

38 The conclusion reached by the A.L.R.C., op.cit.n.7, 110 (para.257). Cf. the Blennerhassett Committee Report, op.cit.n.11, 23.

39 Ross, op.cit.n.90.

40 Subject of course to the qualifications mentioned ante, pp.20, 22 , that blitz level enforcement is economically questionable, that blitzes are more erosive of civil liberties than "normal" enforcement and that frequent blitzes have reduced deterrent effects.

41 Ante, pp.17-18.

42 Ross, op.cit.n. 90.

43 To restate: the British legislation is wider than New Zealand's because suspicion of a moving violation can constitute cause to give a breath test. It must be possible, as was done in the "Cheshire blitz", to utilise the law to its fullest extent. Preferably, however, as discussed earlier in this conclusion, legislation similar to that operating in Britain could be enacted here.

44 N.Z. Road Safety Committee Report, op.cit.n.26.

45 Ibid.,11 (para.5.1.4).

46 Personal comment, Dr. P. Hurst.

47 N.Z. Road Safety Committee Report, op.cit.n.26, 11 (para. 5.1.4).

48 Ante, p. 3 .

49 It may, however, deter drivers because they may be led to believe that a lower level means that officers could exercise their discretion to test in wider circumstances and consequently could apprehend more motorists.

50 A.K. Grant, weekly column in the New Zealand Listener, 16 July 1978.

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Na

NAPIER, W.G.F.
A testing time for all.
368,821

Due	Borrower's Name
19/4	P. LARKMAN J. '80
10/1	W NAPIER
14/3	K. Donnelly
26/8	[illegible]
29/8	C Singh
30/8	C. Singh
19/10	[illegible]
21/8/81	Goh
24/12/81	
15/5/82	
20/5/82	
22/5	
24	