Highway Safety - Menace on Our Highways - Is Implied Consent the Answer?

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LEGISLATION NOTE

HIGHWAY SAFETY—MENACE ON OUR HIGHWAYS—IS IMPLIED CONSENT THE ANSWER?

At this present juncture in United States history we continually hear the outraged cries of those who object to the deaths and injuries of our fellow citizens in a war halfway across the globe. Millions of Americans are protesting against, praying about, or at least vigourously discussing what they consider a senseless wasting of life. Yet, we seldom see protest demonstrations, rarely hear of prayers, and infrequently are involved in discussions regarding an infinitely more senseless, and far bloodier battlefield—the nation's highways. In 1967 approximately 53,100 deaths occurred as the result of motor vehicle accidents,¹ whereas only 14,521 deaths were recorded in the most fatal year of the Viet Nam war.² The immensity of this slaughter may become more apparent by mention of the fact that, "From 1900 through 1967, motor-vehicle deaths in the United States totalled more than 1,650,000. United States military casualties in the principal wars from 1775 through 1967 totalled 1,118,000. Of this total 619,046 were battle deaths..."³

One of the most shocking results arising out of the many studies regarding highway deaths is the concurrence that over one-half of the deaths may be related to a motorist driving under the influence of alcohol.⁴

As an example, the report of a 1964 survey of 19 California counties disclosed that of 1,134 drivers killed in motor vehicle accidents, about 55 per cent had been drinking prior to their accidents, and more than 46 per cent of them had 0.10 per cent or more blood alcohol concentration. Of particular significance, however, are the figures relating to 522 of these dead drivers who were involved only in one-car accidents. Of these, 69 per cent had been drinking and 319 of them, more than 61 per cent, had blood alcohol concentration of 0.10 per cent or more. . . . Such statistics are representative of the results of similar studies made in a number of other parts of the country.⁵

The problem is obvious; the solution is not. Thousands of lives could be

¹ NATIONAL SAFETY COUNCIL, DIGEST OF 1968 TRAFFIC ACCIDENT FACTS.
² This is the statistic of the Department of Defense for the period from January 1, 1968 to December 28, 1968 as reported in U.S. NEWS AND WORLD REPORT, Jan. 13, 1969. at 8.
³ Supra note 1.
⁴ Supra note 1. See U.S. DEPT OF TRANSPORTATION, ALCOHOL AND HIGHWAY SAFETY REPORT 1 (1968) which reaches the same conclusion.
saved every year if drivers would not embark on their journeys until several hours after imbibing alcoholic beverages (the impracticality of preventing alcoholic intake has already been adequately demonstrated in our nation’s history). The requisite self-discipline has not been indicated by our “advanced” society. Therefore the burden must be shouldered by those who lead and represent us, our government officials, to proffer the motivation which will prevent a motorist from operating his vehicle while he is under the influence of an intoxicating beverage. Since highways and roads are a local concern, the state governments are necessarily the agencies to bear the responsibility. The legislatures of those states which have not acted must do something and do it quickly. It is important, however, that the best possible legislation to curb the traffic death rate be passed, otherwise legal complications allowing miscreants to continue their mischief will result. The best possible legislation should be a deterrent sufficient to keep “drunken drivers” off our roads.

Swiftness, certainty, and meaningfulness comprise the requirements of a proper deterrent. As the threat of a nuclear attack did not avert the East Germans from building the “Berlin Wall,” the possibility of a moderately incomed individual being fined $100 at the conclusion of a long-delayed courtroom battle will not deter that individual from driving shortly after an intake of intoxicants. This concept appears to be the inspiration for the rash of states promulgating “implied consent” statutes. The principle of “implied consent” legislation is that a motorist gives his consent to a chemical test of one of his bodily substances if he is arrested for driving while under the influence of alcoholic beverages; if he refuses, his license to drive is automatically revoked for a specified time period. Such a test is desirable because

6 “Drunken driver” or “driving while intoxicated” are phrases which shall be used in this paper as synonymous with the more accurately descriptive phrase of “driving while under the influence of intoxicating liquors.” The first two phrases are ordinarily an inaccurate description of the condition which is violative of the law, however, they are a frequently used “shorthand.”

of the difficulty of obtaining a conviction for violating the prohibition against driving while under the influence of intoxicating liquors unless there is scientific proof. Thus the guilty motorist must either allow the taking of evidence which will render the outcome of a trial on "drunken driving" charges virtually certain, or forego his driving privileges for a specified period. Loss of driving privilege may be a severe penalty in this day and age when so many people rely upon an automobile not only for transportation but for their economic livelihood. Thus, if properly enforced, the swift, sure, meaningful penalty which is necessary might be embodied in "implied consent" legislation. After indicating the constitutional justifications for "implied consent," the formulations for a more efficacious statute than those ordinarily promulgated shall be suggested.

BASIS OF "IMPLIED CONSENT"

In 1953 New York enacted the first "implied consent" statute. Failing its first challenge, the New York State Legislature quickly heeded the recommendations of the judiciary and enacted an "implied consent" statute.

It is a criminal violation in every state to drive while under the influence of intoxicating liquors or to drive while intoxicated. A State Statute to Prevent the Operation of Motor Vehicles by Persons Under the Influence of Alcohol, 4 Harvard Journal on Legislation 280 (1967).

The accuracy of the tests, infra notes 73 and 76, will invariably result in conviction when introduced in evidence, unless the testimony of the tester is impeached in some manner.

Kansas, Massachusetts and New Hampshire revoke for three months; Michigan for three to twenty-four months; Iowa for four to twelve months; California, Colorado, Florida, New Jersey, North Dakota, Ohio, Oklahoma, Rhode Island, and Vermont for six months; Missouri for up to a year; Nebraska, South Dakota, and Utah for one year; Connecticut for an indeterminate time at the discretion of the Commissioner of Motor Vehicles.

Of course "implied consent" legislation will not always provide the necessary certainty to motivate inebriated drivers not to drive in that condition, because: (1) A person may be so influenced by the alcohol he will not remember the statute or at least be unaffected by such knowledge; and (2) in many instances even an alert police force cannot arrest a driver influenced by intoxicants until too late, because that influence is not physically manifested until the accident, such as by slowed reflexes, a sudden loss of control, or a momentary—but fatal—weave into the wrong lane. However, a substantial increase in license revocations has occurred with the introduction of "implied consent" legislation. In 1953 there were 2,384 license revocations for "drunken driving" in New York. In 1956, the first full year after New York's "implied consent" law was held constitutional, there were 4,757 license revocations connected with "drunken driving." In 1967, New York had 9,110 revocations connected with "drunken driving." 1968 Alcohol and Highway Safety Report 113, supra note 4.


which contained the revisions necessary to create a constitutionally acceptable reform. This resulted in a “Uniform Chemical Test for Intoxication Act” which was approved by the National Conference of Commissioners on Uniform State Laws in July, 1957. With a few minor revisions the recommendations of the above Conference were adopted by the National Committee on Uniform Traffic Laws and Ordinances and included in the Uniform Vehicle Code in 1962, which has become the prototype for all other “implied consent” legislation.

The rationale of “implied consent” in regard to “drunken drivers” is the same as that of the so-called “long-arm” statutes, which provide for the sufficiency of constructive service of process on non-residents. “Since . . . Pawloski v. Hess . . . courts generally have held that statutes providing for constructive service of process upon users of the highways . . . are valid.” The underlying premise expressed long before the advent of “implied consent” statutes is that, “The license to operate a motor vehicle was issued . . . not as a contract, but as a mere privilege, and with the understanding that such license may be revoked for due cause by the proper authorities.”

In tandem with the “privilege concept” is the “police power concept,” and only together does a constitutional basis emerge which is sufficient to legitimize the concept of “implied consent” to a chemical test for intoxication or automatic revocation of license. An explicit statement supporting this premise may be witnessed in the first Virginia case upholding that state’s “implied consent” statute:

The right to operate a motor vehicle on the highways of this State is not a property of unrestrained right, but a privilege which is subject to reasonable regulation under the police power of the State in the interest of public safety and welfare.

14 The revised statute was held constitutional in Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct., Montgomery Co. 1955) and in all subsequent cases. See, e.g., Bowers v. Hults, 42 Misc. 2d 845, 249 N.Y.S.2d 361 (Sup. Ct., Oneida Co. 1964).

15 Compare Uniform Vehicle Code § 6-205.1, with the statutes cited in note 7.


Seemingly the well-established precedent supporting the police power to regulate against drunken drivers for the welfare of the state has resulted in a paucity of challenges of "implied consent" legislation on that basis; none of these challenges have been successful. However, many drivers convicted of driving under the influence of intoxicating liquor have contested their conviction, if it resulted from evidence obtained through chemical tests of their blood alcohol, on the constitutional grounds relating to self-incrimination, searches and seizures, and due process.

PRIVILEGE AGAINST SELF-INCrimINATION

Since the prohibition against self-incrimination emanates from the fifth amendment of the United States Constitution, the most definitive statements as to the extent of the privilege would naturally be found in rulings of the United States Supreme Court. The decision in this area which has long been the recognized authority is Holt v. United States, which held that:

"[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material."22

Recently the Court has reaffirmed this doctrine in Schmerber v. California, which is particularly pertinent to the issue at hand. In regard to a blood sample forcibly taken from an unwilling motorist, which was used to obtain a conviction for "drunken driving," the Court said:

"We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to their ends."23

The vast majority of lower federal court and state court decisions have adhered to the doctrine enunciated in Holt and Schmerber, some of them


21 DONIGAN, supra note 5, at 180.


being even more inclusive, and even referring specifically to chemical tests other than a blood sample (i.e., breath, urine, and saliva which are used to determine if a driver was intoxicated while operating his vehicle).

Exceptions to the thesis that the Constitution forbids only testimonial compulsion have arisen, albeit on infrequent occasions, much to the chagrin of such experts as Wigmore, whose analysis that "it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definition, but testimonial compulsion," is frequently cited. A well-known case in Texas, Apodaca v. State, not only ruled that the urinalysis violated the privilege against self-incrimination, but even a non-chemical test whereby the defendant was unable to place his finger to his nose was inadmissible "as obnoxious to the immunity guaranteed by the Constitution. . . ." Although this doctrine was not adopted by the majority of the Supreme Court, Justices Warren and Fortas did dissent in Schmerber on the basis that forcing one to submit to a blood test violates the privilege of self-incrimination.

A different rationale for holding chemical tests of blood alcohol inadmissible may be discerned in Justice Black's dissent in Schmerber. Without altering the historical conception of the scope of the privilege, Justice Black was able to find that blood tests violate the privilege, by finding that they were of a testimonial and communicative nature:

It seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature." The sole purpose of this project . . . was to obtain "testimony" from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly "communicative" in that the analysis of the blood was to supply

25 United States v. Nesmith, 121 F. Supp. 758, 762 (D.C., 1954): "The law is clear . . . that the privilege against self-incrimination is limited to the giving of oral testimony. . . . The conclusion is inevitable that it does not bar the use of secretions of the defendant's body and the introduction of their chemical analysis in evidence." State v. Oleson, 180 Neb. 546, 550, 43 N.W.2d 912, 920 (1966): "The privilege against self-incrimination . . . does not extend to defendant's body, nor to secretions therefrom nor to the introduction of the chemical analysis in evidence."


27 8 WIGMORE, EVIDENCE 2263 (McNaughton revision, 1961).

28 Apodaca v. State, 140 Tex. Crim. 593, 595, 146 S.W.2d 381, 382 (1940).

29 Supra note 23, dissents of Warren and Fortas. See also Cox v. State, 395 P.2d 954 (Okl. Crim, 1964) which held chemical tests inadmissible as violating the uniquely worded self-incrimination prohibition in the Oklahoma Bill of Rights.
information to enable a witness to communicate to the court and jury that petitioner was more or less drunk.\textsuperscript{30}

Another line of reasoning was evidenced by a New York court which held that the defendant's constitutional protections extended to excluding the results of chemical tests admitted in evidence in a criminal proceeding, but not at a civil proceeding, which is what the "implied consent" law provided for.\textsuperscript{31} Although this is an interesting thesis insofar as it delineates between the "crime" of driving while intoxicated and the loss of driving privilege because of performing the same offense, there is little validity in the distinction—a distinction which has met courtroom approval in that same state.\textsuperscript{32} The implications of a Supreme Court ruling, \textit{Boyd v. United States}, denies the ability to delineate between criminal and noncriminal proceedings of this type which would obliterate constitutional protections in the latter instances:

As . . . suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment . . . and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . .\textsuperscript{33}

Thus the same constitutional protections are to be found in criminal and quasi-criminal proceedings.

\textbf{PRIVILEGE AGAINST UNREASONABLE SEARCH AND SEIZURE}

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures . . .," granted by amendment five, applies to all the states as well as the federal government; and the "exclusionary rule"\textsuperscript{34} is equally applicable.\textsuperscript{35} The scope of this privilege is a concommitant to deciding the constitutionality of "implied consent" legislation, for if such legislation allows for unreasonable searches and seizures of the person, the evidence could not be used to penalize drunken drivers.

There are a number of recurrent problems involved with determining the constitutionality of obtaining a chemical sample of a bodily substance from a suspected drunken driver. The idea that no search or seizure is taking place

\begin{itemize}
  \item \textsuperscript{30} \textit{Supra} note 23, at 774.
  \item \textsuperscript{31} Combes v. Kelly, 2 Misc. 2d 491, 152 N.Y.S.2d 934 (1956).
  \item \textsuperscript{32} \textit{Supra} note 14.
  \item \textsuperscript{33} \textit{Boyd v. United States}, 116 U.S. 616, 634 (1886).
  \item \textsuperscript{34} \textit{See Weeks v. United States}, 232 U.S. 383 (1914) which enunciates this doctrine.
  \item \textsuperscript{35} \textit{Mapp v. Ohio}, 367 U.S. 643 (1961).
\end{itemize}
at all has been adequately disposed of by present case law. But whether the test was properly taken in all of its aspects is a frequently controverted problem.

If express consent is obtained for the taking of a bodily chemical substance subsequent to a lawful arrest, the evidence is properly taken. If express consent is denied, "implied consent" legislation provides that no test may be taken. A problem arises, however, in regard to blood samples taken from unconscious suspects, or those in such a physical condition that they have no ability to consent, deny, or physically resist the taking of the sample. The leading case on this problem is *Breithaupt v. Abram* which held:

There is nothing "brutal" or "offensive" in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right.

*Breithaupt*, has led to some "implied consent" statutes including a provision that a blood sample may be taken from a person in an unconscious state and be admitted into evidence in a criminal trial for driving while intoxicated. *Breithaupt* also indicates the test should be supervised by a physician to be properly taken. Provisions to this effect are also a requisite part of properly formulated "implied consent" legislation.

No search and seizure without a search warrant can be reasonable unless:

36 See *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Schmerber v. California*, *supra* note 23; *State v. Johnson*, 135 N.W.2d 518 (Iowa 1965); *State v. Kroenig*, 274 Wis. 266, 79 N.W.2d 810 (1956). This theory has been given some support, however, in regard to breath tests. Because breathing is a natural function and no penetration of the body occurs in gathering the sample, it was thought that the capturing of the atmosphere would not be within the scope of the privilege. See *State v. Berg*, 76 Ariz. 96, 259 P.2d 261 (1953). See also 32 CHICAGO-KENT L. REV. 250 (1954).


38 This may be more a legislative response to the due process implications of *Rochin v. California*, 342 U.S. 165 (1952), than of legislative fear of violating the fourth amendment.

39 *Breithaupt*, *supra* note 36, at 435.

40 California, Colorado, Iowa, Nebraska, New Hampshire, and Ohio are the states which have specifically incorporated this provision. Only North Dakota, however, has specifically stated that an unconscious person is deemed to have withdrawn consent. Two state courts have disagreed with this contention; *State v. Withal*, 228 Iowa 519, 292 N.W. 148 (1940), which was prior to *Breithaupt*, and *Lebel v. Swincicki*, 334 Mich. 427, 93 N.W.2d 281 (1958) which was after *Breithaupt*, but prior to the recently enacted "implied consent" statute in Michigan.
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(1) There is probable cause for the arrest, and (2) it is incident to a legal arrest.\(^{41}\) What is probable cause? What is a search incident to an arrest? Neither question can be answered definitively; both are subject to factual situations, for "[t]he real criteria as to the reasonableness of a search is whether or not . . . under the facts, the police officer has reasonable grounds to believe that defendants may have committed a felony."\(^{42}\) The implications of this may be greater than first anticipated. One North Dakota case held that the acquittal of a motorist suspected of drunken driving meant his arrest was illegal, and thus his license could not be revoked for his refusal to submit to a chemical test of his bodily substances.\(^{43}\) An almost automatic categorization of an arrest as illegal, which precludes a civil proceeding to revoke a driver's license, because it is difficult to prove intoxication beyond a reasonable doubt without scientific verification of the arresting officer's testimony, would effectively nullify "implied consent" statutes. As yet, however, no other court has abided by the reasoning of this North Dakota decision.

The factual situations regarding the question of what is incident to an arrest are equally elusive as far as defining a mold in which everything will fit. "[W]here probable cause exists to arrest the driver without warrant, the fact that the search preceded the arrest is immaterial."\(^{44}\) However, how long before the arrest may the search occur—ten minutes, one hour, two hours, twelve hours, a day, a week, a few weeks? Unfortunately the cases do not answer this question.\(^{45}\)

DUE PROCESS

Due process of law has been defined as notice and opportunity to be heard.\(^{46}\) Thus, to comply with the fourteenth amendment, a prompt hearing must be had to decide whether or not a refusal to submit to the extraction of a bodily substance should result in loss of license. The "implied consent"


\(^{43}\) Colling v. Hjelle, 125 N.W.2d 453 (N.D. 1963).


\(^{45}\) People v. Knox, 178 Cal. App. 2d 502, 3 Cal. Rptr. 70 (1960) (nine day lapse too long); State v. Wolf, 164 A.2d 865 (Del. 1960) (two weeks lapse too long); People v. Young, 42 Misc. 2d 540, 248 N.Y.S.2d 287 (1964) (over one year lapse too long); State v. Kroenig, supra note 36 (nine day lapse too long).

\(^{46}\) Gottschalk v. Sueppel, 140 N.W.2d 866, 870 (Iowa 1966).
logic was held unconstitutional in its first challenge because "there [was] no provision entitling the licensee to an ultimate hearing upon an adequate record before the final taking away of his license." Subsequent legislation has adhered to this doctrine. There is a diversity of opinion, however, as to whether the hearing must precede the revocation. Whereas some courts have upheld statutes which do not require a hearing first, many other courts have ruled the opposite.

Another due process problem which frequently arises concerns the ability of the defendant to obtain a chemical test independent of that conducted by the legislative enforcers. Although it has been said that:

"Due process of law is another name for governmental fair play" [citation omitted]. Fair play requires . . . a respondent charged with operation of a motor vehicle while under the influence of intoxicating liquor . . . to a reasonable opportunity to attempt to procure the seasonable taking of a blood sample for test purposes. To refuse him such reasonable opportunity is to deny him the only opportunity he has to defend himself against the charge.

It is still a litigated point as to what constitutes a "reasonable opportunity." Although all "implied consent" statutes provide for such "reasonable opportunity" a recent decision said, "We do not read the statute to require the police to advise the defendant of his right to take such a test. The right in question on appeal is a statutory and not a constitutional right." Though being advised of the right to take a test is considered a statutory right as yet, and only a few states have such a statute, application of Miranda v. Arizona will increase the number of people who will exercise their prerogative. The consequence of the police informing a person of his immediate right to an attorney will inevitably lead to many clients being promptly counseled of

\[47\] Supra note 13, at 54, 127 N.Y.S.2d at 128.


\[50\] State v. Munsey, 152 Me. 198, 201, 127 A.2d 79, 81 (1956).


\[52\] Supra note 7.


their right to obtain an independent chemical test, whereas pre-Miranda defendants may not have contacted an attorney until it was too late to obtain an auxiliary test.

What happens, however, if the defendant is unable to obtain an independent test? As yet no case has been dismissed on the basis of this contention as long as the police afforded the defendant some opportunity to obtain the test, such as allowing a call, or going to a nearby hospital if the doctor called was not available to take the test within the limited time after the arrest in which a valid test result could be achieved. The rationale that, "If all reasonable efforts fail and no blood sample is in fact procured, no rights of the respondent are infringed, for his right is not to have a test sample taken but only to have a reasonable opportunity to attempt to gather the desired evidence," has received firm support. Although reasonableness is always a factual question, if "implied consent" legislation was to encompass proper guidelines on the issue there could undoubtedly be fewer courtroom challenges.

Another attack on the due process aspects of "implied consent" legislation concerns the apparent violation of immunity from double jeopardy, a protection now applicable to the states. Loss of license due to refusal to allow blood-alcohol tests and the criminal prosecution which will still ensue seems to be a double penal proceeding for the same offense. However this question is adequately disposed of by the reasoning of Atkinson v. Parsekian which stated:

It is well settled that the Legislature has the constitutional power to impose both a criminal and civil or administrative sanction in respect to the same act or omission [citation omitted]. The double jeopardy clause merely prohibits attempting a second time to punish criminally for the same offense. The proceedings before the Director . . . are administrative and not criminal . . . Although the suspension or revocation of a driver's license . . . may appear to be punishment to the wrongdoer . . .

56 People v. Dawson, supra note 51; In re Newbern, supra note 51.
58 Supra note 50, at 201-2, 127 A.2d at 82.
Although one may concede that legislation must be enacted to motivate motorists not to drive while under the influence of intoxicating liquors, and that properly drafted "implied consent" legislation is constitutional, it still must be determined what value a statute serves by requiring chemical tests of the bodily substances of a suspected violator. If the test results are not admissible in court because they are held irrelevant, or the weight of the evidence is slight because the tests are not considered scientifically accurate, then clearly the alternatives offered in "implied consent" statutes would not be viable. In the early stages of the development of such chemical tests both these matters were in controversy. However, the controversy seems to be settled now in favor of the reliability of chemical tests to indicate that a person is under the influence of intoxicants:

It is today agreed by most experts that the blood alcohol content, that is, the amount of the alcohol in the blood, bears a fairly constant relationship with the alcohol in the brain. Since it is the alcohol in the brain . . . that directly causes most of the physical and psychological effects attributable to the presence of alcohol in the body, there is general accord that the blood alcohol content accurately reflects the degree of alcoholic influence.\(^6\)

Conclusions of numerous tests by scientists around the world were compiled to determine exactly what blood alcohol levels indicated that a person's brain was influenced by his alcoholic intake.\(^6\) Initial results led to a recommendation by the National Committee on Uniform Traffic Laws and Ordinances, which was adopted by the Uniform Vehicle Code.\(^6\) With better testing procedures, however, most of the authorities revamped their estimates of the level of impairment. Accordingly, in 1962, the National Committee on Uniform Traffic Laws and Ordinances recommended this change by revision of section 11-902(b) of the Uniform Vehicle Code.\(^6\) Most states have adopted the original statutory presumptions of the Uniform Vehicle Code;\(^6\)

\(^6\) Am. Jur. Proof of Facts, Intoxication 465, 494 (1968). See supra note 5, at 19: "No court has reversed a case on the ground that chemical tests are not valid for the purpose of determining alcoholic influence."

\(^6\) Supra note 5, at 20-23.

\(^6\) Uniform Vehicle Code § 54(b) (1949 version).

\(^6\) Supra note 5, at 23.

a few states have adopted the presumptive levels established in 1962. Such legislative enactment has eliminated the discretionary element as to admissibility of evidence indicating the percentage of alcohol in the blood stream, and thus chemical tests and their results are made admissible by statute in most states.

Admissibility of the test results has not created as great a problem as has the question of the reliability of the chemical tests. Although "chemical tests by experts of body fluids . . . have been approved as having gained that scientific recognition for infallibility as to be admissible in evidence," it is recognized that, "[m]ost unbiased experts agree there are many possible sources of error in testing blood alcohol content chemically . . . ." These errors must be avoided, for a skillful defense attorney will readily reduce the weight of such tests to nil if for any reason the test may not have been accurately performed.

DIRECT BLOOD ANALYSIS

It has been held that "such tests are generally accepted by the medical profession, courts and legislative bodies as reliable, with a direct analysis of the blood, as was here present, being considered the most dependable method." Being that direct blood analysis is considered the most reliable, a majority of states specifically provide for such tests, whereas only two states specifically exclude them. However, there is some evidence indicating that even a properly performed blood test, by an accredited physician, analyzed in a properly equipped laboratory by an experienced technician is not completely reliable as an indicator of the alcohol content of the brain, because it is venous blood which is ordinarily taken, and arterial blood is the blood which goes to the brain.


68 Alabama, Alaska, Louisiana, Mississippi, and Texas are the only states without statutes authorizing the admissibility of chemical tests.


70 AM. JUR. PROOF OF FACTS, supra note 62, at 500. Many of these sources of errors will be discussed in the ensuing pages.


73 See 59 J. CRIM. L. C. & P. S. 57 (1968); AM. JUR. PROOF OF FACTS, supra note 62; ERWIN, supra note 71; Watts, supra note 71; DONIGAN, supra note 63.

74 Pennsylvania and North Carolina.

75 AM. JUR. PROOF OF FACTS, supra note 62, at 497.
BREATH TESTS

Indirect testing of the blood alcohol by breath tests is a method which has increasingly gained acceptance. The principle breath testing instruments in use today... all utilize the basic principle that the concentration of alcohol in the pulmonary blood is proportional to its concentration in the air deep within the lungs [alveolar air]. The foremost machine to perform this test is the "breathalyzer." The breathalyzer is probably the best of the breath methods for determining blood alcohol in that the measuring device for determining the volume of air tested is very well engineered and appears to be quite accurate. It is also the simplest. An indication of how accurate the breathalyzer may be is imputed from a 1953 study by the National Safety Council which was conducted long before the advanced breathalyzer went into operation. The study found that the Intoximeter differed from direct blood analysis made at the same time by only 0.008 per cent; the Alcometer and Drunkometer deviated by about 0.010 per cent. Results of breath tests have been held sufficient for a conviction of driving under the influence of intoxicating liquor. Also indicative of the high regard accredited such instruments as the breathalyzer is the fact that several states have promulgated legislation which provides only for the use of a breath test; no other chemical test need be used.

However, proper administering of a test in the manner necessary to meet all the ordinary restrictions and requirements may still lead to an erroneous result for a variety of reasons. "[F]or example, if the stomach contains a large concentration of alcohol from a recent drink, 'burping, belching, or hiccupping can give high and usually erratic readings . . . ," which will of course negate its value as courtroom evidence.

76 State v. Johnson, 42 N.J. 146, 170, 199 A.2d 809, 822 (1964), "Various devices [breath testers] are now in common use . . . . All are now generally scientifically recognized as sufficiently reliable." Watts, supra note 71, at 55, "I believe that in the United States today breath tests are both more precise and more accurate in indicating blood-alcohol level than most blood and urine tests performed on criminal defendants."

77 Am. Jur. Proof of Facts, supra note 62, at 497. For a good discussion as to the scientific aspect of formulating the ratio and the problems in determining its accuracy, see Erwin, supra note 71 at 358-364 (§ 16.02) and Watts, supra note 71.

78 J. Crim. L., supra note 73, at 59.


81 Pennsylvania and North Carolina rely exclusively on them and Senate Bill 17 introduced January 8, 1969 by Senators Arrington, Coulson and Harris proposes an "implied consent" law for Illinois in which a breath test is the sole means of obtaining a chemical sample.

82 infra note 92.

83 J. Crim. L., supra note 73, at 61.
URINE AND SALIVA TESTS

Possibilities of erroneous test results are even more likely in the chemical tests of the other body substances, urine and saliva, which have been found to be correlative with blood alcohol level. The rare instances in which these tests are used do not warrant a prolonged explanation as to the complexities involved in the testing procedure which lends itself to so many flaws. Suffice it to say that if there is any possibility of contamination in the mouth, or any possibility there is urine in the bladder from a previous and irrelevant intake of intoxicants, the test result will be of no evidentiary value when the defense is conducted by a skilled attorney.

LEGISLATIVE PROPOSAL TO DIMINISH THE PROBLEM

Mere recital of the aspects of "implied consent" legislation which indicate its legitimacy as a proper means of penalizing a dangerous element in our society is insufficient to motivate one to support passage of such legislation. But it is difficult as yet to indicate the imperatives of "implied consent" because correlative statistics linking "implied consent" legislation with a decline in traffic fatalities resulting from drivers under the influence of intoxicating liquors has not been tabulated in this country. A survey of the amount of traffic fatalities in a state before and after the passage of this type of legislation leads to no definitive result, for it does not take into consideration road mileage for the year, the increase in drivers, highway conditions, and highly important enforcement policy. However,

[a] dramatic drop in traffic accidents and deaths in [Great Britain] is seen as conclusive proof in London of the success of Britain's new compulsory breathalyzer test. During a five-day period over Christmas, road deaths fell throughout Britain by 40 per cent—from 158 in 1966 to 98 in the same period of 1967. The number of traffic accidents fell by 25 per cent during that period. . . . Also, traffic injuries decreased by nearly 30 per cent. . . .

In the first year of this law, which gives police the authority to test the breath of anyone driving erratically, serious injuries on the roads fell eleven per cent and deaths by fourteen per cent. Such results, in conjunction with cognizance of this menace to society's well-being, has led the insurance industry in Illinois to contemplate lobbying for a similar bill. Allstate Insurance Company has already begun an advertising campaign to spur the public into supporting an "implied consent" statute.

85 See Erwin, supra note 71, at 569-77 (§§ 22.01 & 22.02).
87 Chicago Sun Times, Dec. 16, 1968, at 27, col. 3.
The prototype for the "implied consent" statutes now in force is the Uniform Vehicle Code, which has remained substantially intact in its promulgation by the twenty-nine states having such legislation. Although it forms a viable basis for future legislation, it is not presently in the most efficacious form for rendering the desired deterrent. The remainder of this paper shall contemplate ideas which might enhance certitude of punishment. For the purpose of fuller comprehension, paraphrasing of appropriate sections of the Uniform Vehicle Code will precede the discussion of possible changes.

Section 6-205.1:

(a) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, urine, or saliva. The test or tests shall be at the direction of a law enforcement officer having reasonable grounds to believe the driver was under the influence of intoxicating liquor. The law enforcement agency shall designate which of the tests will be administered.

To insure the greatest possible dissemination of the law the consent should be explicit as well as implied. Whenever a resident applies for a license, or renewal of one previously issued, he should be required to sign a paper which states that he consents to a chemical test for the determination of his blood alcohol, and that a refusal to consent to a test made incident to his lawful arrest will result in suspension of his license for six months. Signing this paper will not only make drivers aware of the penalty, but will make the possibility of a successful courtroom challenge of this aspect of the legislation even more remote. Non-resident motorists still could only be covered by the law as an "implied consent" bill, but billboards pertaining to this fact could be erected on all highways entering the state.

An aspect of this section which should be maintained, but has been altered by a number of states, is the requirement that consent be to tests of any and all the bodily substances. If only one test is administered, the problem of an erroneous result is magnified. Also, in the states which require only the breath test, there is the possibility that areas of the state may lack the equipment or personnel to administer such a test at all required moments.

88 See A State Statute to Prevent the Operation of Motor Vehicles by Persons Under the Influence of Alcohol, 4 HARV. J. LEGIS. 280, 293-94 for a discussion of the problems which may occur if this innovation of express consent is incorporated into "implied consent" legislation.

89 Connecticut, Massachusetts, North Carolina, Oklahoma, and Virginia are the states with "implied consent" which specifically exempt one or more of the tests from being given.

90 The Chicago Police Department trains specialists in administering breathalyzer tests for 40 hours at the University of Indiana. The Illinois State Police train specialists for 40 hours at their training academy in Springfield. Each of those departments has the
To help obviate the problem of an erroneous breath test it may be wise to incorporate the requirements set by a Washington court for finding a breathalyzer test admissible as prima facie evidence of intoxication, to wit:

(1) [T]hat the machine was properly checked and in proper working order at the time of conducting the test; (2) that the chemicals employed were of the correct kind and compounded in the proper proportions; (3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test; (4) that the test be given by a qualified operator and in the proper manner. . . .

It has been recognized that “unless the above four requirements are satisfied, the result of the test is wholly unreliable.” It has been recognized that “unless the above four requirements are satisfied, the result of the test is wholly unreliable.” But even if these requirements are adhered to, there is no absolute guarantee the test will be accurate. As previously noted, hiccupping or belching will cause the test to go awry, as will recent use of a mouthwash. Also, since a breath test depends upon the use of the air deep within the lungs, it is conceivable that a motorist ostensibly “consenting” would not summon forth the requisite air, thus registering at a level below the presumption levels necessary to obtain a conviction.

Due to the aforementioned problems of inaccurate tests and inadequate testing facilities and personnel, it seems advisable for the police to perform two chemical tests on every person arrested for driving while under the influence of intoxicating liquors. Two different tests are preferable, for the correlation of the two will forge a strong link in the chain of evidence. Use of the direct blood test, which is the most precise test when properly administered, may also ameliorate the difficulties of the rural area police force. With a properly identified blood sample, which is mailed to and tested by a qualified laboratory technician, the necessary evidence can be readily used by police forces lacking the specialist necessary for taking breath tests, but which has a doctor or nurse available. For those who justifiably object to a blood test for medical or religious reasons, a urine or saliva test may be used. Although it is not recommended to use a urine or saliva test alone to prove one guilty of “drunken driving,” it is a proper supplement to the breath test.

resources to purchase the latest equipment, and the manpower to replace a technician who leaves the force. But what about rural police forces which ordinarily lack the resources and the professionalism of the two largest enforcement agencies in the State? It seems highly doubtful that even if all communities obtained a breathalyzer, or similar machine, they could maintain trained personnel all day every day of the year, capable of conforming to the four requirements set forth in the text at note 92.

92 Id. at 852, 355 P.2d at 810.
93 J. CRIM. L., supra note 73, at 61.
94 J. CRIM. L., supra note 73; AM. JUR. PROOF OF FACTS, supra note 62; ERWIN, supra note 71; Watts, supra note 71; DONIGAN, supra note 63.
(b) Any person who is dead, unconscious or otherwise incapable of refusal, shall be deemed not to have withdrawn consent, and the tests may be given.

Presently this provision is constitutional, for the circumstances described have, in essence, been approved by the majority in *Breithaupt* and *Schmerber*. Possibly because of the dissent in those cases the vast majority of states with "implied consent" laws have not adopted this section. However, for the reasons enunciated in *Breithaupt*, it is advisable that legislation include testing those who cannot deny consent:

As against the right of an individual that his person be held inviolable . . . must be set the interests of society in the scientific determination of intoxication, one of the great mortal hazards of the roads. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore . . . the individual's right to immunity from such invasion of the body . . . is far outweighed by the value of its deterrent effect. . . .

(c) If a person under arrest refuses to submit to chemical tests none shall be given, but upon receipt by the appropriate official of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving while under the influence of intoxicating liquor, and that the person had refused to submit to the tests, the license to drive shall be revoked.

The procedure outlined by this section does not sufficiently protect the suspect. No provision is made for the driver to be informed of his rights. Revocations in instances where the person thus deprived had no knowledge of the consequences of a refusal has met courtroom approval, but this type of procedure is fraught with serious due process questions, which can only be obviated by a specific, mandatory statute in which the accused is: informed of his right to have a chemical test taken under the direction of a law enforcement officer, informed of the consequences of refusal, and possibly informed of the *Miranda* warnings. As yet, the courts which have considered this last possibility have ruled that an arrestee does not have the right to legal advice as to whether he should submit to the test or not nor are the other *Miranda* warnings applicable. However, until the United

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06 California, Colorado, Iowa, Nebraska, New Hampshire, and Ohio are the only states which have adopted this provision in their "implied consent" statute.


States Supreme Court is afforded the opportunity to pass upon these matters, it cannot be definitely stated that they are not a due process requirement.

Furthermore, the Code provides for a deprivation of a person's license without an opportunity to be heard. Although there are cases in which it has been held that a hearing is not a condition precedent to suspension of a license,\(^\text{100}\) many other cases indicate it to be so,\(^\text{101}\) regardless of the fact that a license is a privilege and not a right. Thus to insure that due process is adhered to, it is advisable that a procedure be established whereby: (1) the driver is given notice that he will have his license suspended in five days if he does not contest the officer's sworn statement of the facts; (2) the driver has five days within which to formulate a written request for an administrative hearing; (3) within ten days a hearing shall be afforded; (4) within ten days after an adverse ruling the driver may petition for a judicial hearing; (5) a judicial hearing will be granted within thirty days; and (6) if the ruling is still adverse the license will be suspended or revoked. To do otherwise would be to punish a person before proving his guilt, rather than following the revered policy of "innocent until proven guilty."

(d) Upon the written request of a person whose privilege had been denied, the appropriate official shall grant the person an opportunity to be heard. The scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable ground to believe the person had been driving or was in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor, whether the person was placed under arrest and whether he refused to submit to the test. Whether the person was informed that his privilege to drive would be revoked if he refused to submit shall not be an issue. The appropriate official shall order either that the revocation be rescinded or sustained.

The scope of the hearing must be expanded to prevent rather arbitrary results. What if the driver knew that for some reason his test result would not be accurate? What if he is a hemophiliac and the police are only equipped for a blood test? What if submitting to the test would violate his religious beliefs? A multitude of other factors may be conceived of (which can be termed mitigating factors) for refusing to submit to a chemical test. If a recital of mitigating factors is not allowed in evidence how can it be said that a "fair" hearing was granted? Also, as previously intimated, another issue


should be based upon a consideration of whether the person was informed that his privilege to drive would be revoked if he refused to submit to the test. In certain instances it may very well be as natural a reaction for an innocent person to refuse a blood or urine test, or even a breath or saliva test, as it is for a person guilty of driving while intoxicated. However, upon learning the consequences the innocent person may relent in his refusal; not allowing this opportunity appears to be a perversion of justice.

(e) If the revocation is sustained, the person whose license has been revoked may file a petition for a judicial hearing. No evidence additional to that in the administrative hearing may be heard. The court shall affirm unless it finds the evidence insufficient to warrant the conclusion reached.

This section needs no revision except as apropos to the previous section, for here also the court should hear recitation of any mitigating factors as to why a license should not be revoked for the driver's refusal to submit to a test.

Section 11-902:

(b) In any civil or criminal proceeding for a violation relating to driving a vehicle under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood, urine, breath or other bodily substance shall give rise to the following presumptions.

1. If there was 0.05 per cent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor;

2. If there was an excess of 0.05 but less than 0.10 per cent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant;

3. If there was 0.10 per cent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;

4. The foregoing provisions shall not be construed as limiting the introduction of any other competent evidence bearing on the question.

These new statutory presumptions, which substitute the figure 0.10 per cent in place of 0.15 per cent, are a useful adjunct for fulfilling the deterrent aspirations of "implied consent" proponents, for then imbibers should be even more wary of alcohol intake before driving. Thus it is recommended that these presumptions not only be incorporated into new legislation, but supplant legislation with the old presumptions.

(c) Chemical analysis shall only be valid if performed according to methods approved by the State Department of Health and by an individual ascertained as competent to administer the tests.
(d) When a person submits to a blood test only a physician, nurse, or other qualified person may withdraw blood for the purpose of determining alcoholic content.

(e) The person tested may have a qualified person of his own choosing administer a chemical test or tests in addition to those administered at the direction of the law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the tests taken at the direction of the law enforcement officer.

The lack of specificity regarding the procedure afforded a person desiring additional tests may be a pernicious vagueness—a right without an opportunity to exercise that right is purely an illusory right. The police may easily keep an arrestee in the police station during the entire time in which a chemical sample would be relevant to the blood alcohol at the time of arrest. Thus, clear provision should be made for the arrestee to make as many phone calls as are required to obtain a qualified person of his choice to take chemical tests. If it cannot be arranged to have a qualified person come to the jail, and the law enforcement officers intend to keep the prisoner beyond the time span in which a relevant test may be taken, the prisoner, at his request, should be taken to the nearest hospital or doctor available for the test to be conducted.

An additional section, of which there is no mention in the Uniform Vehicle Code should be proposed to deal with those who are caught more than once recklessly endangering the lives of our citizens by driving under the influence of intoxicating liquor. A motorist who twice loses his license subsequent to the provisions and procedures of "implied consent" legislation should be fined $500 to $5,000 and lose his license for one to two years upon the second revocation, for obviously, if there is any deterrent to such a driver, a six month suspension of his driving privilege is an insufficient one. Also, a motorist whose license is suspended pursuant to an "implied consent" law and who violates the sanction imposed should undergo the same penalty as the repeating offender. Vigilant law enforcement would be required to make this latter proposal effective, since periodic checks would be necessary to see if the automobile of the offending motorist is in use, and, if so, by whom. However, for those who may argue the practicality of such a procedure, it must be remembered that if there are far fewer dangerous drivers on the road, law enforcement officers will be spending much less time at the scene of accidents and will have more time for such preventive measures. An alternative plan may be for the Secretary of State, or other appropriate officials, to hire special investigators whose function would be to make the needed inspections. Vigorous enforcement of "implied consent" would do much to enhance its deterrent value, and the effect of public cognizance of such enforcement might far surpass the extra expenditure necessary for implementation.
CONCLUSION

It is hoped that legislators nationwide will harken to proposals such as those expounded by the National Committee on Uniform Traffic Laws and Ordinances, as herein expressed, or by any other authoritative source or pertinent academic work.

As a nation we have become so inured to the tragedies on our highways that our attention is addressed only to the more dramatic events of our day. But this cannot continue!

We are steadily increasing the extent of our motorized mobility; yet twenty-one states are burdened by the anachronistic solutions to problems of a bygone day—a day when this pernicious element in our society, the "drunken driver," was of minor consequence at best in most areas of the country.

The spiralling cost to this nation, both in terms of economics and human intelligence, a most precious resource, bears devout scrutiny by our nation’s lawmakers, for the citizens of our country need and deserve protection from the thoughtless individuals who have turned automobiles into a frighteningly dangerous weapon.

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