

FIXING THE FATAL FLAWS IN OUI IMPLIED CONSENT LAWS

*Tina Wescott Cafaro**

A car swerves from the right lane, into the left and back again. Then, it drifts toward the center of the roadway and straddles the centerline. That's when a police officer turns on his blue lights and stops the car. While talking to the driver, the officer detects the odor of alcohol coming from the driver's breath. As a result, he asks the driver to step out of the car and administers field sobriety tests.¹ The driver complies and is later arrested for operating a motor vehicle while under the influence of alcohol (OUI) (also commonly referred to as DUI, DWI or OWI in some jurisdictions). At the police station, the driver is given the opportunity to take a test to determine his specific measurement of blood alcohol concentration (BAC).² When the driver refuses to provide a breath, blood, or urine sample, his driver's license is suspended pursuant to his state's implied consent laws. Had the driver consented to the BAC test, results would have shown intoxication above the legal limit. Although the driver is penalized through license suspension, the prosecutor is unable to secure an OUI conviction because the jury is hesitant to convict the defendant in the absence of BAC evidence.

Unfortunately, this scenario of alcohol impaired driving plays out all too often on our nation's roadways.³ Once every thirty-one minutes the scenario does not end with a simple motor vehicle stop and arrest, but ends with a car crash resulting in death.⁴ And, once every two minutes, the scenario ends in a car crash that nonfatally injures

* Clinical Professor of Law, Western New England College School of Law. I would like to express my deep appreciation to Lauren Carasik, Bridgette Baldwin, Jamison Colburn, and Neal Eriksen for reading earlier drafts of this article and offering advice. I also wish to thank Natalie Jones, Ryan Wyzik, and Wendi Cline for their research assistance. Finally, I thank Michael, Nicholas, Sara, and Alyssa for their patience and support throughout this project.

1. Field Sobriety Tests are divided attention tests that require an individual to concentrate on mental and physical tasks at the same time. They are used to evaluate an individual's ability to listen to and follow simple instructions as well as to evaluate an individual's coordination and motor skills. See Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp., Development of a Standardized Field Sobriety Test (SFST) Training Management System (2001), http://www.nhtsa.dot.gov/people/injury/alcohol/sfst/appendix_a.htm.

2. The National Highway Traffic Safety Administration explains that "[t]he amount of alcohol in a person's body is measured by the weight of the alcohol in a certain volume of blood. This is the blood alcohol concentration, or 'BAC.' The measurement is based on grams per deciliter (g/dl)." NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., THE FACTS: .08 BAC "PER SE" LAWS 1 (1997), <http://www.nhtsa.dot.gov/people/outreach/safesobr/13qp/facts/fact08.pdf>. "As of July, 2004, all fifty states, along with the District of Columbia and Puerto Rico, have adopted .08 BAC illegal *per se* laws, as the legal level of intoxication in their state. Illegal *per se* means that a BAC level above the set limit is a violation in and of itself—impairment need not be demonstrated." NAT'L CONFERENCE OF STATE LEGISLATURES, State .08 BAC Laws (July 2004), <http://www.ncsl.org/programs/lis/dui/bac08.htm> (last visited Mar. 1, 2008).

3. According to the Centers for Disease Control and Prevention, "[i]n 2005, nearly 1.4 million drivers were arrested for driving under the influence of alcohol or narcotics That's less than one percent of the 159 million self-reported episodes of alcohol-impaired driving among U.S. adults each year." CTR. FOR DISEASE CONTROL AND PREVENTION, DEP'T OF HEALTH AND HUMAN SERV., IMPAIRED DRIVING, <http://www.cdc.gov/ncipc/factsheets/driving.htm> (last visited Mar. 1, 2008).

4. *Id.*

someone.⁵ The National Highway Traffic Safety Administration (NHTSA) reported that in 2006, 17,602 people were killed in the United States in alcohol-related motor vehicle traffic crashes.⁶ This “increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.”⁷

Implied consent laws, in theory, can be a powerful weapon in the arsenal against alcohol impaired driving. However, in practice, the fact is that these laws are not deterring OUI. Even though every state has adopted some form of implied consent law,⁸ the number of people dying at the hands of impaired drivers remains alarmingly high. Alcohol-related accidents constitute approximately forty-one percent of the 42,642 total traffic fatalities.⁹ These statistics illustrate that motorists are continuing to drive while impaired and continue to put everyone at risk of serious injury and death. Furthermore, the aforementioned statistics demonstrate that implied consent laws, as currently applied, are not achieving the deterrent effect they were designed to have.

One impediment to the deterrent effect of implied consent laws is the number of offenders who refuse a breath test.¹⁰ Convincing a judge or jury to convict an individual for committing this crime is not an easy task.¹¹ The result of the BAC test is an extremely valuable piece of evidence in an impaired driving case. If an impaired driver refuses a breath test, convincing a jury of the motorist’s guilt becomes even more difficult. Further exacerbating this problem is the varying manners in which states deal with such a refusal and the loopholes that exist within current implied consent laws. All these factors detract from the aim of the laws, which is deterring impaired driving.

This article explores the use of implied consent laws as a method of deterring and punishing alcohol-impaired driving. Part I introduces the history and purpose of implied consent laws. Part II discusses the inadequacies of current statutory implied consent provisions and their failure to effectively attain their designed purpose. This section also highlights two particularly detrimental aspects of the law as currently

5. *Id.*

6. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT OF TRANSP., TRAFFIC SAFETY FACTS, RESEARCH NOTE, 2006 TRAFFIC SAFETY ANNUAL ASSESSMENT—ALCOHOL-RELATED FATALITIES, www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/RNotes/2007/810821.pdf.

7. *Briethaupt v. Abram*, 352 U.S. 432, 439 (1957).

8. *See infra* note 42 (explaining that the District of Columbia became the last of all the jurisdictions to enact an implied consent law in 1972). *See also* Matthew J. Dougherty, *Constitutional Law-Implied Consent Laws: Fourth Amendment Plus Protection for the Drunk Driver*. *Hays v. City of Jacksonville*, 518 So. 2d 892 (Ala.Crim.App. 1987), 19 Cumb. L. Rev. 177, 177 n.3 (1988) (citing the implied consent laws of the fifty states).

9. Mothers Against Drunk Driving – Campaign to Eliminate Drunk Driving – Statistics, http://madd.org/Drunk-Driving/Drunk-Driving/Statistics/AllStats.aspx#STAT_1 (last visited Mar. 1, 2008).

10. As a result of the number of people refusing to take BAC tests, the NHTSA commissioned a study to determine the impact breath test refusals have on OUI. *See* NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT OF TRANSP. BREATH TEST REFUSALS IN DWI ENFORCEMENT: AN INTERIM REPORT (2005), *available at* <http://www.nhtsa.dot.gov/people/injury/research/BreathTestRefusal/images/BreathTestText.pdf> [hereinafter BREATH TEST REFUSALS].

11. *See* Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 Duke J. Gender L. Pol’y 1, 68 (2002) (discussing the continuing attitude and willingness of jurors to acquit in OUI cases and citing a study that found while “jurors continue to acquit more frequently than do judges, judicial willingness to acquit has increased since 1958”).

implemented: (1) the lack of uniformity in the application of the laws by individual states; and (2) the disparate treatment of persons who refuse to submit to BAC testing, both in terms of consequences of refusal to submit to testing and evidentiary use at trial.

Ultimately, this article espouses the notion that evidence of a defendant's BAC is one of the most valuable and persuasive pieces of evidence in an OUI case and is directly linked to the deterrence function of implied consent laws. BAC evidence may exonerate an individual who is wrongfully charged¹² and may help to convict an individual who is impaired. By denying the prosecution the ability to collect and use this evidence, the likelihood of conviction is greatly reduced. Part III provides statutory guidance to ensure that implied consent laws are meaningful and powerful law enforcement tools that effectively achieve their stated purpose: a reduction in the number of intoxicated drivers on the highways. If a motorist refuses to provide a BAC sample, there should be a separate criminal charge rather than just an administrative penalty. Additionally, the prosecution should be permitted to present evidence to the factfinder about the defendant's refusal to submit to BAC testing.

When death or serious bodily injury results from a car crash, compulsory BAC testing must be administered to the operator. Furthermore, the administrative sanction for refusing to submit to the test should be harsher than the administrative sanction for testing over the legal limit. Finally, when an individual's license is suspended for a refusal, the license should only be reinstated after the entire suspension period is over. These changes to current statutory implied consent provisions are necessary; otherwise, implied consent in an OUI context is meaningless.

OVERVIEW OF IMPLIED CONSENT LAWS

Implied consent laws state that all operators of motor vehicles are deemed to have consented to a BAC test if there are reasonable grounds to believe that the driver is operating a motor vehicle while under the influence of alcohol.¹³ These laws provide "a statutory structure for suspending the license of a driver who refuses to submit to

12. Most states have a provision requiring that a person who tests below a certain limit must be released from custody. *See, e.g.*, Mass. Gen. Laws ch. 90, § 24(1)(e) (2007) ("If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith . . ."). In Minnesota, pursuant to Minn. Stat. § 169A.51 (2007), a BAC of 0.05 percent or less is *prima facie* evidence that driver was not under the influence.

13. For example, Massachusetts is an implied consent state where, under Mass. Gen. Laws ch. 90, § 24(1)(f)(1) (2007), all operators of motor vehicles are deemed to have consented to a breath test if suspected of OUI simply by virtue of driving a car. This statute provides:

Whoever operates a motor vehicle upon any way . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor Such test shall be administered at the direction of a police officer, as defined in section one of chapter ninety C, having reasonable grounds to believe that the person arrested has been operating a motor vehicle upon such way or place while under the influence of intoxicating liquor.

Id. *See also* 75 Pa. Cons. Stat. § 1547 (2006) ("Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle.").

testing for alcohol concentration.”¹⁴ The purpose of these laws is “to reduce the incidence of drunk driving and to protect public safety by encouraging drivers to take alcohol concentration tests; the statute was not meant to protect drivers.”¹⁵

An implied consent statute’s “central feature is that any person who drives on the public highways is deemed to have consented to a chemical test to determine the alcohol or drug content of the person’s blood.”¹⁶ The rationale behind this is that “[t]he right to drive a motor vehicle on the public streets is not a natural right but a privilege, subject to reasonable regulation in the public interest.”¹⁷ The principle that driving is a privilege and not a right has been recognized by courts for almost 100 years.¹⁸ The concept that drivers have impliedly consented to a BAC test grew out of the recognition that impaired driving “occurs with tragic frequency on our nation’s highways[,]”¹⁹ coupled with the “necessity to make the relatively new technology of chemical testing for blood alcohol meaningful.”²⁰ As such, these test results have been admitted in evidence in impaired driving cases since the 1940s.²¹

14. 3A MARYLAND LAW ENCYCLOPEDIA *Automobiles and Motor Vehicles* § 96 (2007); see also *Ruble v. Kan. Dep’t. of Revenue*, 973 P.2d 213, 215 (Kan. Ct. App. 1999) (The suspension of an individual’s driving privileges “is part of the civil regulatory scheme that fosters public safety by restricting the driving privileges of [an individual] who has exhibited dangerous driving behavior.”).

15. 3A MARYLAND LAW ENCYCLOPEDIA *Automobiles and Motor Vehicles* § 96; see also *Furthmyer v. Kan. Dep’t of Revenue*, 888 P.2d 832, 835 (Kan. 1995) (stating that the statute’s purpose is to coerce acquiescence to chemical testing through the threat of statutory penalties such as license revocation and the admission into evidence in a DUI proceeding of the fact of test refusal); *Motor Vehicle Admin. v. Shepard*, 923 A.2d 100, 108 (Md. 2007) (“In response to the public concern about the dangers of drunk driving, the Maryland General Assembly rewrote §16-205.1, referring to the rewritten statute as Maryland’s ‘implied consent’ and ‘administrative per se’ law against drunk driving.”); *Motor Vehicle Admin. v. Richards*, 739 A.2d 58, 68 (Md. 1999) (“The Commonwealth’s interest in public safety is substantially served by the summary suspension of those who refuse in several ways to take a breath-analysis test upon arrest. First, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving. Second, it provides strong inducement to take the breath-analysis test and thus effectuates the Commonwealth’s interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways.”); *Hinnah v. Dir. of Revenue*, 77 S.W.3d 616, 619 (Mo. 2002) (citing *Shine v. Dir. of Revenue*, 807 S.W.2d 160, 163 (Mo. Ct. App. 1991)) (the purpose of implied consent law is “to rid the highways of drunk drivers”); *Todd v. Commonwealth, Dep’t of Transp., Bureau of Driver Licensing*, 723 A.2d 655, 658 (Pa. 1999) (“The implied consent provisions of the Vehicle Code were enacted to address the hazard of impaired drivers on public roads.”).

16. *Hinnah*, 77 S.W.3d at 619.

17. *Standish v. Dep’t. of Revenue*, 683 P.2d 1276, 1281 (Kan. 1984).

18. *People v. Rosenheimer*, 102 N.E. 530, 532 (N.Y. 1913) (“[T]he whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in a case of a privilege the legislature may prescribe on what conditions it shall be exercised.”).

19. *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) (where the Supreme Court acknowledged that “[t]he carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy.”).

20. John Hoffman, *Implied Consent with a Twist: Adding Blood to New Jersey’s Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35 RUTGERS L.J. 345, 356 (2004).

21. *Id.* (citing John H. Williamson, *The Attorney’s Handbook on Drinking and Driving Defense* 50 (2d ed. 1995)); see, e.g., *Touchton v. State*, 18 So. 2d 752 (Fla. 1944) (en banc) (allowing the use of blood chemical tests); *People v. Haeussler*, 260 P.2d 8 (Cal. 1953) (en banc) (allowing the use of blood tests as admissible evidence); *People v. Bobczyk*, 99 N.E.2d 567 (Ill. App. Ct. 1951) (allowing the use of breath tests); *People v. Stringfield*, 185 N.E.2d 381 (Ill. App. Ct. 1962) (finding breathalyzer test results raised a

I. HISTORY OF IMPLIED CONSENT IN THE CONTEXT OF OUI LAW

The Supreme Court first recognized the basic principle of an implied consent law in connection with motor vehicle use in 1927 when it held that a state can condition the use of its highways by finding that an alien motorist had impliedly consented to suit within its jurisdiction.²² Over the ensuing years, the Supreme Court upheld the constitutionality of implied consent laws under the Due Process Clause as well as under the Fourth, Fifth, and Sixth Amendments.²³ The emergence of breathalyzer instruments²⁴ provided a useful tool for law enforcement, and in 1953, New York became the first state to enact an implied consent law requiring a motorist suspected of driving while intoxicated to submit to a BAC test.²⁵ This law was challenged in *Schutt v. Macduff*.²⁶

In that case, the petitioner Louis E. Schutt's driver's license was revoked by the Commissioner of Motor Vehicles after Mr. Schutt refused to submit to a blood test as demanded by a police officer following his arrest for driving while intoxicated.²⁷ The petitioner argued that the implied consent law violated his right to avoid self-incrimination,²⁸ that the collection of such evidence constituted an unlawful search and seizure,²⁹ that the statute violated an individual's right to equal protection of the law,³⁰ and that the statute violated the Due Process Clause.³¹ In discussing the purpose of the statute, the court stated that there was an "urgent need for legislation looking toward the procurement of chemical tests for the purpose of definitely determining whether or not an accused driver was intoxicated to the extent of impairing his driving ability."³² The statute's authority rested upon the notion that a person has a "privilege" to drive and not a protected constitutional "right."³³ Importantly, the court recognized that "[t]he legislature has the undoubted power to reasonably regulate the use of the highways and may impose reasonable conditions to be complied with to entitle one to a license to drive upon the highways."³⁴

presumption of intoxication).

22. See *Hess v. Pawloski*, 274 U.S. 352 (1927) (holding that a state may condition the use of its highways by finding that an alien motorist had impliedly consented to suit within its jurisdiction).

23. See, e.g., *Reitz v. Mealey*, 314 U.S. 33, 36 (1941) (license suspension did not violate Due Process Clause as "[t]he use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent"); *Breithaupt*, 352 U.S. at 432 (implied consent provision did not violate due process protections); *Schmerber v. California*, 384 U.S. 757 (1966) (implied consent provisions did not violate the Due Process Clause or Fourth, Fifth or Sixth Amendment rights).

24. In 1938, Indiana University's Professor Rolla N. Harger introduced the Drunkometer, the first stable instrument for testing breath alcohol. In 1954, Indiana University's Professor Robert F. Borkenstein invented the Breathalyzer. History of Breathalyzer, <http://www.breathalyzer.org/history.html> (discussing the history of the breathalyzer test) (last visited Mar. 1, 2008).

25. N.Y. VEH. & TRAF. LAW §1194.2 (McKinney 2001) (originally enacted by L.1953, c. 854).

26. *Schutt v. Macduff*, 127 N.Y.S.2d 116 (N.Y. App. Div. 1954).

27. *Id.* at 119.

28. *Id.* at 122.

29. *Id.* at 124.

30. *Id.* at 125.

31. *Schutt*, 127 N.Y.S.2d at 125.

32. *Id.* at 121.

33. *Id.* at 121–22 (citing *People v. Rosenheimer*, 209 N.Y. 115, 120, 121, 102 N.E. 530, 532 (1913); *Heart v. Fletcher*, 184 Misc. 569, 53 N.Y.S.2d 369 (1945)).

34. *Id.* at 122.

Ultimately, the court refused to allow the petitioner's claim based upon a violation of the self-incrimination clause,³⁵ search and seizure clause,³⁶ or on grounds of equal protection.³⁷ The court did, however, find that the statute violated the Due Process Clause in two ways. First, the court noted that the statute contained no procedural safeguards, since it did not require reasonable suspicion of impaired driving prior to a request that the motorist submit to a BAC test, nor did the offender have to be arrested.³⁸ Second, the statute failed to provide the driver with a subsequent opportunity to be heard.³⁹

The systemic problem of impaired driving also caught the attention of national politics and on June 26, 1967, the Secretary of Transportation issued the first of thirteen National Uniform Standards for State Highway Safety Programs.⁴⁰ This report provided that "[e]ach state . . . shall . . . implement a program to achieve a reduction in those traffic accidents arising in whole or in part from persons driving under the influence of alcohol" and that each program must provide for an implied consent law.⁴¹ Over the next few years, those states without existing implied consent laws enacted such statutes.⁴² As the states enacted implied consent laws, the Supreme Court was called upon to evaluate the constitutionality of these laws. The implied consent law of Massachusetts was challenged in *Mackey v. Montrym*.⁴³ The statute provided that:

Whoever operates a motor vehicle upon any [public] way . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. . . . If the person arrested refuses to submit to such test or analysis, after having been informed that his license . . . to operate motor vehicles . . . in the Commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal.⁴⁴

The Supreme Court was confronted with a procedural due process claim asserting that automatic suspension of a driver's license upon refusal to submit to an alcohol breath test was a violation of the Due Process Clause. In *Mackey*, the defendant was arrested for OUI.⁴⁵ When asked to submit to a breath test, he refused.⁴⁶ Twenty

35. *Id.* at 123.

36. *Schutt*, 127 N.Y.S.2d at 124.

37. *Id.* at 125.

38. *Id.* at 126.

39. *Id.* at 127.

40. S. REP. NO. 92-1262, at 5 (1972) (citing H.R. DOC. NO. 138, at 9-10 (1966)).

41. S. REP. NO. 92-1262 at 5.

42. On October 4, 1972, the District of Columbia became the last of all the jurisdictions to enact an implied consent law. S. REP. NO. 92-1262, at 4 ("Comparable [implied consent] provisions are now law in all States. The District of Columbia is the sole remaining jurisdiction without an 'implied consent' law.").

43. *Mackey v. Montrym*, 443 U.S. 1 (1977).

44. *Id.* at 3-4 (citing Mass. Gen. Laws ch. 90, § 24(1)(f) (West Supp. 1979)).

45. *Id.* at 5.

46. *Id.*

minutes later, after speaking to his attorney, the defendant said he wanted to take the test.⁴⁷ The officers, having already documented the initial refusal as prescribed by law,⁴⁸ refused to give the defendant a second test.⁴⁹ The defendant claimed the automatic suspension of his license by the Massachusetts Registrar of Motor Vehicles without affording him a hearing violated his due process rights.⁵⁰

The Court analyzed the case according to the factors decided in *Matthews v. Eldridge*.⁵¹ In determining the dictates of procedural due process, *Eldridge* holds that three factors are to be considered: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substituted procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵² Applying this test, the Supreme Court held that while the defendant had a strong property interest in his driver's license,⁵³ "the compelling interest in highway safety justify[d] the Commonwealth in making a summary suspension effective pending the outcome of the prompt post suspension hearing available."⁵⁴

That same year, in *Dixon v. Love*,⁵⁵ the Supreme Court evaluated whether an Illinois statute provided constitutionally adequate procedures for suspending or revoking the license of a driver who was repeatedly convicted of traffic offenses.⁵⁶ This statute allowed the Secretary of State

to exercise discretionary authority to suspend or revoke the license or permit of any person without a preliminary hearing, or to decline to suspend or revoke such driving privileges. In making a determination of the action to be taken, the Secretary of State shall take into consideration the severity of the offense and conviction, the number of offenses and convictions, and prior suspensions or revocations on the abstract of the driver's record.⁵⁷

If a motorist had three moving traffic violations within a twelve month period, the Secretary of State had the authority under this statute to suspend that driver's license.⁵⁸ Upon license suspension or revocation, a motorist was afforded the opportunity to give

47. *Id.*

48. The officers refused to administer the test under the section of Mass. Gen. Laws ch. 90 § 24(1)(f) which provided "[I]f the person arrested refuses to submit to such test or analysis . . . the police officer before whom such refusal was made shall immediately prepare a written report of such refusal." *Mackey*, 443 U.S. at 5 (citing Mass. Gen. Laws ch. 90, § 24(1)(f) (West Supp.1979)) (emphasis added).

49. *Mackey*, 443 U.S. at 5.

50. *Id.* at 1.

51. *Id.* at 10 (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

52. *Id.* at 10 (citing *Matthews*, 424 U.S. at 335).

53. *Id.* at 11.

54. *Mackey*, 443 U.S. at 11.

55. *Dixon v. Love*, 431 U.S. 105 (1977).

56. *Id.* at 106.

57. *Id.* at 107 (referring to 95 1/2 ILL. COMP. STAT. § 6-206(a) (1975) (now codified at 625 ILL. COMP. STAT. 5/6-206 (2007))).

58. *Id.* at 108 (referring to 95 1/2 ILL. COMP. STAT. § 6-206(a)(2) (1975) (now codified at 625 ILL. COMP. STAT. 5/6-206(a)(2) (2007))).

written notice to the Secretary of State requesting a hearing, which was to be scheduled within twenty days of receiving such notice.⁵⁹

In *Dixon*, a twenty-five year old truck driver received three speeding tickets within a twelve month period and received written notice that his license was suspended.⁶⁰ In lieu of requesting a hearing, the driver joined a class action suit seeking declaratory judgment that the Illinois statute was unconstitutional.⁶¹ The Court held that while the Due Process Clause applied to the deprivation of a driver's license,⁶² it was also "equally clear that a licensee in Illinois eventually can obtain all the safeguards procedural due process could be thought to require before a discretionary suspension or revocation becomes final."⁶³ The main issue was not with the violation of due process in total, but rather the timing of the suspension and the lack of an opportunity to be heard before suspension.⁶⁴

Applying the factors of the *Eldridge* test,⁶⁵ the Court first held that the private interest in a driver's license was "not so great as to require us 'to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.'"⁶⁶ Next, the Court held that the risk of erroneous deprivation was minimal. The regulations were largely automatic, and the written objection by the motorist would notify the Secretary of any clerical errors that may have led to an erroneous suspension. Additional safeguards beyond those provided would "be unlikely to have significant value in reducing the number of erroneous deprivations."⁶⁷ Finally, the Court held that the governmental interest was "sufficiently visible and weighty for the State to make its summary initial decision effective without a pre-decision administrative hearing."⁶⁸ In accordance with prior cases, the Court made it clear that the State had the right and the authority to condition an individual's right to operate a motor vehicle.

In *Breithaupt v. Abram*,⁶⁹ the Supreme Court addressed a constitutional challenge to the manner in which an implied consent law is enforced. More specifically, the Court decided whether it was a violation of due process to withdraw blood from an unconscious person who was unable to consent when the sole purpose of doing so was to determine the BAC after that person was involved in a serious car accident.⁷⁰ In *Breithaupt*, the Petitioner was injured when the truck he was driving collided with a passenger vehicle, killing the three passengers in that vehicle.⁷¹ The petitioner, who was unconscious, was taken by ambulance to the hospital. At the hospital, a state police

59. *Id.* at 109.

60. *Dixon*, 431 U.S. at 110-11.

61. *Id.*

62. *Id.* at 112.

63. *Id.*

64. *Id.*

65. See *Mackey*, 443 U.S. at 10.

66. *Dixon*, 431 U.S. at 113 (citing *Matthews v. Eldridge*, 424 U.S. 319, 343 (1976)).

67. *Id.* at 113-14.

68. *Id.* at 115.

69. 352 U.S. 432 (1957).

70. *Id.* at 439-440.

71. *Id.* at 433.

officer noticed the smell of alcohol on the petitioner's breath and asked the doctor to draw blood to test the petitioner's BAC.⁷² The doctor did so, and the results of the blood test yielded a BAC of 0.17 percent.⁷³ The petitioner was charged and convicted of involuntary manslaughter, in part because his BAC was used as evidence against him.⁷⁴

The petitioner claimed that his due process rights were violated when the doctor drew blood at the request of law enforcement. The Court found that "[t]he blood test procedure has become routine in our everyday life. It is a ritual for those going into military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same."⁷⁵ As such, the Court concluded that "a blood test taken by a skilled technician is not such 'conduct that shocks the conscience.'"⁷⁶ Next, the Court looked at the Government interest involved in the issue, noting:

As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of American submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road.⁷⁷

The Court further opined that "[t]he increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."⁷⁸ Ultimately, the Court held that the Government's interest in protecting public safety by combating impaired driving outweighed the minimal intrusion of a blood test taken without consent.⁷⁹

Schmerber v. California was also a case in which police officers requested that a doctor at a hospital withdraw blood from the driver of an automobile involved in an accident.⁸⁰ Here, however, the driver was conscious at the time the blood was withdrawn and objected to the procedure.⁸¹ After his conviction for OUI, the petitioner argued that the involuntary and nonconsensual withdrawal of blood for purposes of determining BAC deprived him of his constitutional protections against unreasonable search and seizure under the Fourth Amendment and self-incrimination under the Fifth Amendment.⁸² He also argued that his right to counsel under the Sixth Amendment was violated.⁸³

The Court, relying on *Breithaupt*, began its analysis by holding that taking blood in

72. *Id.*

73. *Id.* A BAC of 0.17 percent is over twice the current legal limit of 0.08 percent.

74. *Breithaupt*, 352 U.S. at 433.

75. *Id.* at 436.

76. *Id.* at 437 (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

77. *Id.* at 439.

78. *Id.* at 439.

79. *Breithaupt*, 352 U.S. at 439.

80. 384 U.S. 757, 758 (1966).

81. *Id.* at 759.

82. *Id.*

83. *Id.*

the manner done in this case did not offend that sense of justice that shocks the conscience and “nothing in the circumstances of this case or in supervening events persuades us that this aspect of *Breithaupt* should be overruled.”⁸⁴ The opinion further stated, “we ‘cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.’”⁸⁵

The Court then held that the Fifth Amendment 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 these ends.”⁸⁶ The blood test in no way implicated the petitioner’s “testimonial capacity,” since the only act he was compelled to do was “donate” his blood which “was irrelevant to the results of the test, which depend on chemical analysis and on that alone.”⁸⁷ As a result of this finding, the Court held that since the petitioner did not have a right to assert his Fifth Amendment privilege, he likewise could not claim that he should have been afforded counsel during the procedure.⁸⁸

Finally, the Court analyzed whether the chemical analysis of the defendant’s blood should have been excluded from evidence as the product of an unconstitutional search and seizure. It is clear that the taking of a person’s blood is a search of the “person,” specifically within the scope of the protections of the Fourth Amendment.⁸⁹ “[T]he Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.”⁹⁰ In this case, the officer had probable cause to arrest the petitioner and charge him with OUI based upon the petitioner’s appearance, specifically his “bloodshot, watery, sort of . . . glassy” eyes and the smell of alcohol on the petitioner’s breath.⁹¹ The question remained, however, whether the officer was required to obtain a search warrant prior to the blood withdrawal.⁹² The Court found that the attempt to secure the evidence through a blood test was appropriate incident to the petitioner’s arrest in this case because the officer “reasonably believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened ‘the destruction of evidence[.]’”⁹³

In 1983, the Supreme Court decided whether an individual’s refusal to submit to a BAC test was admissible in evidence at a criminal trial, an issue that was not before the Court in *Schmerber*.⁹⁴ In *South Dakota v. Neville*, the Supreme Court was confronted

84. *Id.* at 760.

85. *Schmerber*, 384 U.S. at 760 n.4 (quoting *Breithaupt*, 352 U.S. at 441 (Warren, C. J., dissenting)).

86. *Id.* at 761.

87. *Id.* at 765.

88. *Id.* at 765–66.

89. *Id.* at 767.

90. *Schmerber*, 384 U.S. at 768.

91. *Id.* at 768–69.

92. *Id.* at 770.

93. *Id.* at 770–71.

94. *Id.* at 765 n.9.

with a South Dakota statute that allowed the introduction of such refusal evidence.⁹⁵ The petitioner argued that the introduction of this evidence at trial violated the privilege against self-incrimination.⁹⁶

The Court started its analysis of the issue by affirming the *Schmerber* decision allowing a State to force a person suspected of impaired driving to submit to a blood alcohol test and recognizing that “South Dakota . . . declined to authorize its police officers to administer a blood-alcohol test against the suspect’s will.”⁹⁷ Instead of authorizing police officers to administer nonconsensual BAC tests, South Dakota enacted administrative loss of license sanctions for a refusal and allowed the refusal to be used against the defendant at trial.⁹⁸

The *Neville* Court held that admission of such evidence does not offend one’s privilege against self-incrimination.⁹⁹ The Court opined that the Fifth Amendment only prohibits “the use of ‘physical or moral compulsion’ exerted on the person asserting the privilege”¹⁰⁰ and that “the State did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing.”¹⁰¹ The Court recognized “that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices.”¹⁰² Accordingly, the Court held “that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.”¹⁰³ The Court’s ruling in *Neville* was consistent with the majority of state court decisions on the question of whether to allow refusal testimony into evidence.¹⁰⁴

The Supreme Court has consistently held that implied consent laws are constitutional as long as the statutes provide procedural safeguards to the motorist.¹⁰⁵ It is a waste of public resources and energy to continue debating what is now well-settled law. Instead, public safety would be better served by focusing on efforts to maximize the effectiveness of laws designed to curtail impaired driving.

95. *South Dakota v. Neville*, 459 U.S. 553 (1983).

96. *Id.* at 556.

97. *Id.* at 559.

98. *Id.*

99. *Id.* at 564.

100. *Neville*, 459 U.S. at 562 (quoting *Fisher v. United States*, 425 U.S. 391, 397 (1976)).

101. *Id.*

102. *Id.* at 564.

103. *Id.*

104. *Id.* at 560–61 (“Most courts applying general Fifth Amendment principles to the refusal to take a blood test have found no violation of the privilege against self-incrimination.”). Those that do find a violation of Fifth Amendment principles emphasize that the refusal is “‘a tacit or overt expression and communication of defendant’s thoughts’ . . . and that the Constitution ‘simply forbids any compulsory revealing or communication of an accused person’s thoughts or mental processes, whether it is by acts, failure to act, words spoken or failure to speak.’” *Id.* at 561 (citation omitted).

105. See M. Elizabeth Fuller, Comment, *Implied Consent Statutes: What Is Refusal?*, 9 AM. J. TRIAL ADVOC. 423, 425–27 (1986).

II. RECOGNIZING THE FLAWS IN IMPLIED CONSENT LAWS

BAC tests offer the best, most definitive way to determine if an individual is operating a motor vehicle while impaired.¹⁰⁶ The major impediment to successful prosecution of OUI cases is that many motorists refuse to submit to the BAC tests. In August 2005, the NHTSA issued an interim report regarding the obstacle BAC refusals pose to OUI enforcement.¹⁰⁷ This report documented a study conducted in 2001 of BAC refusal rates in all fifty states.¹⁰⁸ The study reported BAC refusal rates as high as 84.9 percent.¹⁰⁹ The stark results of this study, and others like it, demonstrate the ease and frequency with which people disregard implied consent laws.¹¹⁰ The indifference toward such laws clearly indicates that the current method of implementing and enforcing implied consent laws does little to encourage an OUI suspect to take the BAC test.

The most common mechanism police officers employ to persuade motorists to submit to a BAC test is the threat of administrative suspension of the individual's driver's license in response to a refusal. With the notable exception of Nevada, all states impose administrative sanctions for refusal.¹¹¹ However, current administrative loss of license systems lack uniformity in the structure of these sanctions. The suspension period for a first time BAC refusal varies greatly from state to state, with suspension periods ranging from ninety days¹¹² to eighteen months.¹¹³ Another disparity in the sanctioning process is the distinction between "a 'hard' suspension

106. See Robert B. Beauchamp, Note, "*Shed Thou No Blood*": *The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. Cal. L. Rev. 1115, 1116 (1987) ("In the case of the drinking driver, the collection of evidence is complicated by two factors: (1) the best evidence of intoxication is harbored within the body of the suspect; and (2) evidence of blood alcohol dissipates over time as the result of natural metabolic processes. As a result, the suspected drunk driver who simply refuses to submit to any procedure for determining his or her blood alcohol content, in the absence of some form of coercion, drastically reduces the probability of conviction. Lacking chemical evidence of the precise degree of intoxication at the time of arrest, the state must rely on evidence inherently less accurate."). See also, *Standish v. Dep't of Revenue, Motor Vehicle Div.*, 683 P.2d 1276, 1280 (Kan. 1984) ("The chemical testing system provided under our Implied Consent Law is important because it provides the best available and most reliable method of determining whether a driver is 'under the influence' of alcohol.").

107. See BREATH TEST REFUSALS, *supra* note 10.

108. *Id.* at 6 tbl. 1.

109. *Id.* (documenting refusal rates for the year of 2001 in all fifty states with some of the highest refusal percentages coming from Rhode Island (84.9%), Louisiana (45.9%), Texas (40.6%), Ohio (40.4%), Illinois (38.3%), Florida (37.1%), Idaho (31.6%), and Alabama (31.1%)).

110. See generally NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., IMPAIRED-DRIVING PROGRAM ASSESSMENTS: A SUMMARY OF RECOMMENDATIONS (1991-2003), DOT HS 809 815 (2004), available at <http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/809815/images/Part1.pdf>.

111. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., TRAFFIC SAFETY FACTS, LAWS, BLOOD ALCOHOL CONCENTRATION TEST REFUSAL LAWS, DOT HS 810 723W (2007), available at <http://www.nhtsa.dot.gov/people/injury/TSFLaws/PDFs/810723W.pdf> [hereinafter BLOOD ALCOHOL CONCENTRATION TEST REFUSAL LAWS].

112. See Ala. Code § 32-5-192(c) (2007) ("If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test . . . on the first refusal . . . the director shall deny to the person the issuance of a license or permit, for a period of 90 days . . .").

113. Utah has the longest suspension period for a first time BAC test refuser. See Utah Code Ann. § 41-6a-521(5)(a)(i) (2007) ("If . . . the person was requested to submit to a chemical test or tests and refused to submit to the test or tests . . . the Driver License Division shall revoke the person's license or permit to operate a motor vehicle in Utah . . . for a period of (i) 18 months . . .").

period in which no driving is allowed for a specified period . . . [or] a ‘soft’ suspension period in which drivers can obtain a temporary driving permit for purposes such as work and church. . . .”¹¹⁴ Allowing these hardship licenses works against the purpose and deterrent effect of implied consent laws. When a motorist knows that a BAC refusal revocation is not an absolute loss of license because they can get a hardship license, the sting of the punishment for the refusal is minimal, and the deterrent effect eliminated.

Even in light of the threat of license suspension, many motorists continue to refuse to submit to the test.¹¹⁵ Typically, after an individual is arrested for OUI, the police inform the arrestee of the implied consent law, including the license suspension penalty for refusing to submit to the test, and formally request that the arrestee submit to a BAC test.¹¹⁶ For many people, the minimal administrative penalty, especially in light of its loopholes, is more palatable than a criminal conviction and the accompanying stigma and punishment.¹¹⁷

A BAC reading of 0.08 percent or above provides the prosecution with an important, tangible piece of evidence for use at trial that will help obtain a conviction.¹¹⁸ Many motorists know it is a difficult task for the prosecution to obtain a

114. See BREATH TEST REFUSALS, *supra* note 10, at 3. See, e.g., WIS. STAT. §343.305(10)(b)(2) (2004) (“[F]or the first improper refusal, the court shall revoke the person’s operating privilege for one year. After the first 30 days of the revocation period, the person is eligible for an occupational license under s. 343.10.”) (emphasis added).

115. BREATH TEST REFUSALS, *supra* note 10, at 1 (asserting that the percentage of offenders who refuse a breath test has been a problem in many states).

116. In Massachusetts, law enforcement officers inform an individual of their rights by reading a “Statutory Rights and Consent Form.” As it relates to the Implied Consent Law, it reads:

Pursuant to General Laws Ch. 90, Sec. 24:

1. I am requesting that you submit to a chemical test to determine your blood alcohol concentration.
2. Drivers Age 21 or OVER: If you refuse this test, your license or right to operate in Massachusetts shall be suspended for at least a period of 180 days or up to life for such refusal. The suspension if you take the test and fail it is 30 days.
Drivers UNDER Age 21: If you refuse this test, your license or right to operate in Massachusetts shall be suspended for at least a period of 3 years or up to life for such refusal. The suspension if you take the test and fail it is 30 days. Drivers under age 21 will also face an additional suspension pursuant to General Laws Chapter 90, Section 24P of 180 days to 1 year.
3. If your blood alcohol level is .08 or above, you are in violation of Massachusetts law and may face criminal penalties. Drivers under age 21 have the same legal limit for court purposes, but will face administrative penalties for any blood alcohol concentration of .02 or above.
4. If you decide to take the test and complete it, you will have the right to a comparison blood test within a reasonable period of time at your own expense. The results of this comparison test can be used to restore your license or right to operate at a court hearing within 10 days.

It is not your option which type of chemical test to take. Refusal or failure to consent to take the test that I am requesting is a violation of the Implied Consent Law, and will result in your right to operate a motor vehicle being suspended as I have stated to you. Refusing this test, but requesting some other form of test is a refusal under the law.

Statutory Rights and Consent Form, MA RMV Form No.:21202 (on file with author).

117. BREATH TEST REFUSAL, *supra* note 10, at iii (Individuals refused to take a breath test even though this decision subjected the individuals to implied consent penalties because the refusal “may help offenders avoid a DWI conviction, which carries more severe penalties.”).

118. *Standish v. Dep’t of Revenue*, 683 P.2d 1276, 1281 (Kan. 1984).

conviction in an OUI trial, absent a BAC reading.¹¹⁹ The NHTSA has recognized the impact of a person's refusal:

[When] a person refuses the BAC test, that person is more likely to contest the case. The lack of BAC test results clouds the case just enough to give the defense an advantage it does not have when there are test results. Defense attorneys usually attack the police reports and the behavioral cues reported by the officer or trooper. Without a BAC test, these reported cues are the only evidence the State has of the person's intoxication at the time of arrest.¹²⁰

In addition, when a state refuses to allow the prosecution to introduce evidence of the defendant's refusal at trial, it is extremely difficult for the prosecution to meet its burden of proof.¹²¹ There is wide-spread public information and common knowledge about breathalyzer testing.¹²² Therefore, jurors expect to hear BAC evidence and engage in speculation when such evidence is absent.¹²³ Such speculation can be fatal to the prosecution's case as jurors may believe that "the police didn't offer the breathalyzer to a defendant [because they didn't think the defendant was too intoxicated] or perhaps the breathalyzer was not in working order."¹²⁴

Another problem with administrative sanctions is that they may impact a judge at sentencing after a criminal conviction for OUI. When sentencing a defendant convicted of OUI, "[j]udges in many jurisdictions do not impose the maximum penalties for the first or repeat offenses. They may take the administrative penalties into account when considering criminal penalties by running court-imposed license suspensions concurrently with administrative license suspensions instead of consecutively."¹²⁵ Also undermining the deterrent effect of an administrative loss of license is a loophole in

119. Taslitz, *supra* note 11, at 68.

120. BREATH TEST REFUSALS, *supra* note 10, at 21.

121. Several states do not, as a matter of course, allow such refusal testimony into evidence. See *id.* at App. A. Michigan admits a refusal, but the refusal cannot be used as evidence of guilt. Hawaii considers a test refusal only during an administrative license revocation hearing. Virginia allows admissibility only under very limited circumstances. Rhode Island and Massachusetts do not admit a test refusal in either a civil or criminal case. While some states have implied consent laws that specifically provide for the admissibility or inadmissibility of evidence that the defendant refused to submit to an intoxication test, other states do not specify whether or not refusal evidence is admissible. *Admissibility in Criminal Case of Evidence that Accused Refused to Take Test of Intoxication*, 26 A.L.R. 4th 1112 (1983) (providing a detailed study of the admissibility of BAC refusals). When these laws do not expressly deal with admissibility, the courts have disagreed with respect to the issue. *Id.* In another instance, even though a statute allowed for the admissibility of refusal evidence, the court held such evidence was inadmissible. See *Opinion of the Justices to the Senate*, 591 N.E.2d 1073, 1077-78 (Mass. 1992) (holding a Massachusetts statute making admissible evidence of a refusal to take a breath test unconstitutional); see also Mass. Gen. Laws ch. 90, § 24(e) (2007) ("Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f) or in any proceedings provided for in section twenty-four N.").

122. *Commonwealth v. Downs*, 758 N.E.2d 1062, 1065 (Mass. App. Ct. 2001).

123. *Id.* at 1064.

124. *Id.*

125. BREATH TEST REFUSALS, *supra* note 10, at 20-21. But see MASS. GEN. LAWS c. 90, § 24(1)(f)(1) (2007) ("[A] suspension for a refusal of either a chemical test or analysis of breath or blood shall run consecutively and not concurrently, both as to any additional suspension periods arising from the same incident, and as to each other.").

some states' implied consent laws that allows an individual to regain his license if during the BAC suspension period the individual is brought to trial for OUI and is found not guilty.¹²⁶ Such laws fail "to recognize that the suspension is not punishment for the alleged OUI, but instead is an administrative consequence for failing to take the breath test."¹²⁷ If an individual takes an OUI case to trial and is found not guilty and his license is returned prior to the end of the suspension period, "the system tells the offender that it was acceptable to refuse to take the test. This defeats the purpose of the statute and thwarts any attempt at deterrence."¹²⁸ In order to maximize the deterrent effect, this loophole should be remedied.

Laws that impose a less severe or similar penalty for refusing the BAC test than the penalty imposed for taking and failing the test also weaken the impact of implied consent laws.¹²⁹ In 2005, the NHTSA conducted a study of five states' implied consent laws, including Oklahoma and Florida. Both of these states' implied consent laws had "less-severe combined administrative and criminal penalties for refusal than for those who submit to a breath test and fail."¹³⁰ Because the penalty for refusal and failure were similar, refusal was "the more beneficial option for any offender in Oklahoma and Florida."¹³¹ Legislation addressing this issue "would tip the balance of benefits to the side of those taking the BAC test rather than those who refuse the test" and would take away the benefit to the offender who refuses the BAC test.¹³² When an individual knows that refusing to take a BAC test cannot result in a stiffer penalty, there is no incentive to take the test. This is especially true in light of the fact that, without BAC test results, the likelihood of conviction is significantly reduced.

Implied consent laws are designed to promote submission to BAC tests in order to further deter motorists from engaging in OUI and to provide valuable evidence in the detection of an impaired motorist. The variability of sanctions employed by states to encourage individuals to submit to a BAC test, coupled with the number of individuals who refuse to take the test, clearly indicates that the current system is flawed. This flaw

126. MASS. GEN. LAWS ch. 90, § 24(1)(f)(1) (2007):

[T]he defendant may immediately, upon the entry of a not guilty finding or dismissal of all charges under this section, section 24G, section 24L, or section 13 1/2 of chapter 265, and in the absence of any other alcohol related charges pending against said defendant, apply for and be immediately granted a hearing before the court which took final action on the charges for the purpose of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely endanger the public safety.

127. Tina Wescott Cafaro, *You Drink, You Drive, You Lose: Or Do You?*, 42 GONZ. L. REV. 1, 16 (2006).

128. *Id.*

129. A 2005 study "found that test refusal rates are lower in States where the consequences of test refusal are greater than the consequences of test failure." NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., COUNTERMEASURES THAT WORK: A HIGHWAY SAFETY COUNTERMEASURE GUIDE FOR STATE HIGHWAY SAFETY OFFICES, DOT 809 980 (2006), available at <http://www.nhtsa.dot.gov/people/injury/airbags/Countermeasures/images/Countermeasures.pdf> [hereinafter COUNTERMEASURES THAT WORK] (citing BREATH TEST REFUSALS, *supra* note 10). By way of example, New Hampshire's Implied Consent Law calls for a 180 day loss of license for a first time refusal and a six month loss of license for a BAC result of 0.08 percent or more. N.H. REV. STAT. ANN. §§ 265-A:30, 14 (2007).

130. BREATH TEST REFUSALS, *supra* note 10, at 49. As a potential strategy to reduce BAC refusal rates in Oklahoma, the NHTSA determined that Oklahoma's law needs to change "so that the penalties for refusing the test are again greater than the penalties for taking and failing the test." *Id.* at 47.

131. *Id.* at 49.

132. *Id.*

enables individuals to circumvent punishment for OUI, reinforcing the notion that they can engage in this conduct without consequence, thus encouraging this very dangerous and criminal behavior.

In order to fix this flaw, each state must evaluate its implied consent law. This is not an easy task as OUI laws in general and implied consent laws in particular are extremely complex and inconsistent.¹³³ In evaluating these laws, each state should revise its implied consent law to make it rigorous and straightforward.

III. STRATEGY TO FIX THE FLAWS IN IMPLIED CONSENT LAWS

The flaws discussed in Part II make it clear that implied consent laws need major revisions. Ultimately, obtaining BAC results and using BAC tests as evidence against the motorist at trial must be made easier and refusal by the motorist to submit to the test must be made more difficult. The first step in accomplishing this goal is to pass legislation in each state that discourages a motorist from refusing to submit to the test. In order to achieve this, states must enact uniform and severe penalties for failure to comply. This includes a loss of license period that is substantially greater than the loss of license period for taking and failing the BAC test. It also includes closing the many loopholes in the law including: removal of hardship licenses, barring the imposition of concurrent sentences, and prohibiting the return of an individual's license upon acquittal. Next, refusal evidence must be admissible at the OUI trial without qualification. In addition to license suspensions, the act of refusing to submit to a BAC test should constitute a separate crime. Finally, in terms of collecting BAC evidence, each state should have provisions that mandate the collection of BAC evidence in any case where death or serious bodily injury occurs.

A. Uniform Penalties

The discrepancies and complexities found among OUI legislation in individual states, between states, and between the state and federal levels create loopholes that "make the prosecution of [OUI] cases both problematic and unpredictable."¹³⁴ This sends a message to the public that OUI is not an important issue. This message appears

133. See ROBYN D. ROBERTSON & HERB M. SIMPSON, *TRAFFIC INJURY FOUND, DWI SYSTEM IMPROVEMENTS FOR DEALING WITH HARD CORE DRINKING DRIVERS: PROSECUTION* 79–80 (2002), www.trafficinjuryresearch.com/publications/PDF_publications/Prosecution_Report.pdf ("[T]he statutes associated with DWI offenses are some of the most complex criminal statutes in existence. Even homicide statutes are considerably shorter than DWI statutes. This is because there has been a remarkable growth in the number of DWI laws introduced in recent years. In 1998 alone, legislators in 42 states considered more than 275 bills that specifically target hard core drunk drivers (citation omitted). Further, the Century Council reports that, 'in the 2000 legislative session, 42 states introduced nearly 300 pieces of legislation . . . focusing on the hard core drunk driver.' (citation omitted). While these changes are obviously intended to strengthen DWI laws, an unintended byproduct has been to further complicate an already complex system. Not surprisingly, inconsistencies and incompatibilities have arisen—elements of the system do not mesh smoothly or seamlessly, creating loopholes, which provide opportunities for repeat offenders, in particular, to avoid identification and sanctioning."). See also COUNTERMEASURES THAT WORK, *supra* note 129, at 1–6 (stating that DWI laws and the DWI system are complicated and complex).

134. ROBERTSON & SIMPSON, *supra* note 133, at 83. See also *id.* at 70 ("[A] lack of relatively uniform sentencing structures and penalties undermines the effectiveness of the sanctioning process. Offenders are permitted to essentially circumvent the sanctioning process by appearing before a particular judge.").

to be embraced by the public as the number of people who continue to commit the crime is staggering.¹³⁵

In order to remedy this situation, the first area that needs to be addressed is the length of license suspension for refusing the BAC test. The penalty for refusing to submit to a BAC test must be sufficient to remove any incentive a motorist would have to refuse to submit. When a state has nominal refusal penalties, such as a ninety day loss of license, this does not adequately deter the behavior that the law is attempting to eliminate. This is especially true when viewed in comparison to the substantial penalties an individual faces if convicted of OUI charges.¹³⁶ Many individuals who believe or suspect that they are over the legal BAC limit would rather refuse the test and face a minor administrative license suspension over taking the test and being convicted for OUI and face possible jail time and other sanctions.¹³⁷ This situation is seen most often with a repeat offender who has been through the criminal justice system and knows that it is difficult for a prosecutor to obtain a guilty verdict without a BAC result. In many ways, it is this offender that society should be most concerned about punishing.¹³⁸

The National Committee on Uniform Traffic Laws and Ordinances¹³⁹ advocates for legislation that truly encourages an individual to take the test. For a first time refuser, it mandates a license suspension for a period of twelve months.¹⁴⁰ Subsequent refusals by a repeat offender must be met with enhanced penalties.¹⁴¹ Enacting

135. There were 159 million self-reported episodes of alcohol impaired driving in 2005. Of those 159 million episodes, about 1.4 million drivers were arrested for driving a motor vehicle while under the influence of alcohol or narcotics. Ctr. for Disease Control and Prevention, Dep't of Health and Human Services, Impaired Driving, <http://www.cdc.gov/ncipc/factsheets/driving.htm> (last visited Mar. 1, 2008); see also BUREAU OF JUSTICE STATISTICS, ALCOHOL AND CRIME, AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME ix (1998), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ac.pdf>.

136. For a list of each state's OUI penalties, see NATIONAL SURVEY OF STATE LAWS 137–55 (Richard A. Leiter ed., 6th ed. 2007).

137. ROBERTSON & SIMPSON, *supra* note 133 at 48.

138. Repeat offenders, familiar with the criminal justice system and how to exploit the loopholes, are “slipping through the cracks.” The public is not being protected against these individuals and the behavior of these savvy offenders is not being changed. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., YOU DRINK AND DRIVE. YOU LOSE. DRIVING HOME THE FACTS—ABOUT REPEAT OFFENDERS, <http://www.nhtsa.dot.gov/people/outreach/safesobr/ydydyl/repeatOff.html> (last visited Mar. 1, 2008). “Among drivers involved in fatal crashes, those with BAC levels of 0.08% or higher were nine times more likely to have a prior conviction for driving while impaired (DWI) than were drivers who had not consumed alcohol.” Ctr. for Disease Control and Prevention, Dep't of Health and Human Services, Impaired Driving, <http://www.cdc.gov/ncipc/factsheets/driving.htm> (last visited Mar. 1, 2008).

139. The National Committee on Uniform Traffic Laws and Ordinances (NCUTLO) is a private, non-profit membership organization dedicated to providing uniformity of traffic laws and regulations through the timely dissemination of information and model legislation on traffic safety issues. The NHTSA has acknowledged the importance of this organization and supported the adoption of NCUTLO's proposed laws. See COUNTERMEASURES THAT WORK, *supra* note 129, at 1–14 (“The National Committee on Uniform Traffic Laws and Ordinances has prepared a model DWI law, which has been incorporated into the Uniform Vehicle Code (NCUTLO, 1999). It addresses BAC testing, BAC test refusals, higher penalties for high-BAC drivers, ALR hearing procedures, and many other issues of current interest. States can use the NCUTLO model as a reference point in reviewing their own laws.”).

140. National Committee on Uniform Traffic Laws and Ordinances, <http://www.ncutlo.org> (last visited Mar. 1, 2008).

141. For example, in Arizona:

[a]fter an arrest a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and if the violator refuses the violator shall be informed that the violator's license or permit to drive will be suspended or denied for twelve

legislation that mandates a twelve month suspension period for a first time refusal and a ninety day suspension period for taking the test and failing it will have a substantial deterrent effect on the number of motorists who continue to refuse to submit to the BAC test.¹⁴² Research demonstrates that instituting administrative license suspensions has a positive effect on deterring OUI.¹⁴³

In addition, in order to deter refusals, a “hard” license suspension rule must be imposed. A study conducted by the NHTSA found that “[a]mong States with significant decreases in test refusals . . . [s]ix out of [eight] States with significant decreases [in test refusals] have hard license suspension periods.”¹⁴⁴ Motorists who have their license suspended because they refuse to submit to a BAC test should not be eligible for hardship licenses. By cutting off the opportunity to gain a hardship license, the incentive to take the test will increase significantly. An individual who understands the difficulty in proving an OUI case without BAC results, and who knows that the suspension period can be mitigated with a hardship license, will be more likely to refuse to provide a BAC sample. It is easy to refuse the test when a motorist knows that there is a way to circumvent the penalty for violating the law. In order to encourage BAC tests, hardship licenses should only be granted to a motorist who submits to the BAC test and is subsequently convicted. In contrast, hardship licenses should not be available to motorists whose license has been suspended because of a BAC refusal. Under this system, motorists are encouraged to take the BAC test and are only offered a hardship license after conviction and upon the installation of an ignition interlock device.¹⁴⁵

In an attempt to punish those who are caught operating a motor vehicle with a high BAC level,¹⁴⁶ some states have enacted legislation that distinguishes between levels of intoxication and creates severe sanctions for those demonstrating a higher BAC.¹⁴⁷ The rationale behind this type of legislation is that OUI offenders with higher BAC levels

months, or for two years for a second or subsequent refusal within a period of eighty-four months, unless the violator expressly agrees to submit to and successfully completes the test or tests.

ARIZ. REV. STAT. ANN. § 28-1321B (WEST 2007). In Massachusetts, the penalty for refusing the BAC test is a 180 day loss of license for a first offense, three year loss of license for a second offense, five year loss of license for a third offense, and lifetime loss of license for a fourth offense. MASS. GEN. LAWS ch. 90 § 24(1)(f)(1) (2007).

142. COUNTERMEASURES THAT WORK, *supra* note 129, at 1–10 (“If the penalties for refusal are less severe than the penalties for failing the test, many drivers will refuse.”) (citation omitted).

143. *Id.*

144. BREATH TEST REFUSALS, *supra* note 10, at 11.

145. An ignition interlock is a device that has a breath tester that drivers blow into to measure their blood alcohol level, and if alcohol is detected, the device prevents the vehicle from starting. MARGARET C. JASPER, DRUNK DRIVING LAW 4, 127–129 (1999).

146. M.A.D.D., Mothers Against Drunk Driving – Campaign to Eliminate Drunk Driving - Laws, <http://madd.org/Drunk-Driving/Drunk-Driving/Laws/Law.aspx?law=20> (last visited Mar. 1, 2008) (“High BAC refers to a driver who drives with a blood alcohol concentration of [0.15 percent] or higher at the time of arrest. . . . [Fifty-eight] percent of alcohol-related fatalities involve someone with a [0.15 percent] BAC or higher. This is because a driver at a [0.15 percent] BAC level is 382 times more likely to be involved in a fatal crash than someone who has had nothing to drink.”) (citation omitted).

147. The following states have high BAC laws: Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Maine, Minnesota, Missouri, Montana, North Carolina, North Dakota, Nebraska, New Hampshire, New Mexico, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington. *Id.*

pose a greater risk to the public than offenders with lower BAC levels.¹⁴⁸ The law attempts to target high-risk individuals such as “hard core, persistent, chronic, or repeat drinking drivers.”¹⁴⁹ This type of law may have some specific deterrence benefit,¹⁵⁰ but it ultimately works against the purpose of the implied consent law. High BAC laws effectively discourage drivers from taking the test when the penalty for refusing the test is more lenient than the penalty for operating with a high BAC.¹⁵¹ While the aim behind the high BAC law is admirable, the negative effect it can have on the problem of refusals is not.

As an additional measure to tighten the laws, if the prosecution is able to gain a conviction for OUI, the sentence imposed for that conviction should be consecutive to the suspension period for the BAC refusal as the punishments are for two separate events: refusing a BAC test and conviction for OUI. This issue arises after a criminal adjudication of guilt and at the sentencing phase. Here, judges are typically afforded great discretion in determining what type of sentence to impose.¹⁵² As two commentators have noted:

Broad judicial discretion in DWI cases, as with other criminal cases, often leads to judge-shopping, meaning that a defendant will attempt to have their case heard in front of a judge known to impose lesser sanctions. . . . [The] lack of relatively uniform sentencing structures and penalties undermines the effectiveness of the

148. ANNE T. MCCARTT & VERONIKA SHABANOVA NORTHROP, ENHANCED SANCTIONS FOR HIGHER BACS: EVALUATION OF MINNESOTA’S HIGH-BAC LAW, DOT HS 809 677, at 1 (2004), *available at* <http://www.nhtsa.dot.gov/people/injury/alcohol/EnhancedSanctions/HS809677.pdf> (“There is evidence that DWI offenders with higher BACs are more likely than DWI offenders with lower BACs to be involved in a crash. Data from the National Highway Traffic Safety Administration (NHTSA) indicate that in the year 2000, [sixty-four] percent of drinking drivers who were fatally injured had BACs of .15 or higher.” (citation omitted)).

149. *Id.*

150. COUNTERMEASURES THAT WORK, *supra* note 129, at 1–11 (“In the only evaluation of high-BAC sanctions to date, McCartt and Northrup (2003, 2004) found that Minnesota’s law appears to have increased the severity of case dispositions for high-BAC offenders, although the severity apparently declined somewhat over time. They also found some evidence of an initial decrease in recidivism among high-BAC first offenders. The BAC test refusal rate declined for first offenders and was unchanged for repeat offenders after the high-BAC law was implemented. [The authors point out that] Minnesota’s law has a high threshold of [0.20 percent] BAC, relatively strong administrative and criminal sanctions, and strong penalties for BAC test refusal.”).

151. MCCARTT & NORTHROP, *supra* note 148, at 6 (“The most common concern was that the imposition of high-BAC sanctions might increase the number of alcohol test refusals if the state’s penalties for refusal were insufficiently strong. At least one state, Maine, increased the penalties for test refusals when a high-BAC statute was enacted.”).

152. For repeat offender, some states have mandatory minimum sentences, taking the discretion away from judges in terms of length of imprisonment. *See, e.g.,* Mass. Gen. Laws ch. 90, § 24(1)(a)(1) (2007) (“If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth, or any other jurisdiction because of a like offense two times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment for not less than one hundred and eighty days nor more than two and one-half years or by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one hundred and fifty days of such sentence . . .”).

sanctioning process. Offenders are permitted to essentially circumvent the sanctioning process by appearing before a particular judge.¹⁵³

Even though most OUI statutes include a license suspension for the OUI conviction, many judges will impose concurrent suspensions for the BAC refusal and OUI conviction. The two penalties are separate and distinct for two separate and distinct actions: one penalty is punishment for an OUI conviction while the other is a sanction for a BAC refusal. As such, they should be treated separately. Case law clearly holds that applying separate punishment for these two different matters is not double jeopardy.¹⁵⁴ When the defendant's license revocation is imposed concurrently, the resulting punishment does not deter a motorist from future acts of refusal.

For similar reasoning, an individual's license that was suspended for a BAC refusal should not be reinstated upon an acquittal for OUI. In Massachusetts,

the defendant may immediately, upon the entry of a not guilty finding or dismissal of all charges under this section, section 24G, section 24L, or section 13 1/2 of chapter 265, and in the absence of any other alcohol related charges pending against said defendant, apply for and be immediately granted a hearing before the court which took final action on the charges for the purpose of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely endanger the public safety.¹⁵⁵

Legislation that allows such action fails to recognize "that the suspension is not punishment for the alleged OUI, but instead is an administrative consequence for failing to take the breath test."¹⁵⁶ Reinstating an individual's license in this scenario sends a contradictory and negative message to the offender: that it was acceptable to refuse to

153. ROBERTSON & SIMPSON, *supra* note 133, at 70.

154. See *Luk v. Commonwealth*, 658 N.E.2d 664, 671 n.16 (Mass. 1995) (listing state court decisions finding that double jeopardy is not implicated: *State v. Zerkel*, 900 P.2d 744, 758 (Alaska Ct. App. 1995); *State v. Fox*, No. MV94 31 52 60, 1995 WL 559000 (Conn. Super. Ct. Sept. 13, 1995) (mem.); *State v. Schwander*, Nos. IN94-08-1350-IN94-08-1351, IN94-08-1352, IN94-08-1353, IN94-08-1354, 1995 WL 413248 (Del. Super. Ct. June 15, 1995); *Jackson v. State*, 462 S.E.2d 802 (Ga. Ct. App. 1995); *State v. Higa*, 897 P.2d 928 (Haw. 1995); *State v. Talavera*, 905 P.2d 633 (Idaho 1995); *State v. Funke*, 531 N.W.2d 124, 126 (Iowa 1995) (quoting *State v. Marvin*, 307 N.W.2d 10, 12 (Iowa 1981)); *State v. Jones*, 666 A.2d 128 (Md. 1995); *State v. Parker*, 538 N.W.2d 141 (Minn. Ct. App. 1995); *State v. Young*, 530 N.W.2d 269 (Neb. 1995); *State v. Cassidy*, 662 A.2d 955 (N.H. 1995); *State ex rel. Schwartz v. Kennedy*, 904 P.2d 1044 (N.M. 1995); *People v. Frank*, 631 N.Y.S.2d 1014 (N.Y. Crim. Ct. 1995); *State v. Zimmerman*, 539 N.W.2d 49 (N.D. 1995); *State v. Miller*, No. 2-94-32, 1995 WL 275770 (Ohio Ct. App. May 12, 1995); *State v. Sims*, No. CA94-12-215, 1995 WL 493291 (Ohio Ct. App. Aug. 21, 1995); *Tench v. Commonwealth*, 462 S.E.2d 922 (Va. Ct. App. 1995); *State v. McMaster*, 543 N.W.2d 499 (Wis. Ct. App. 1995)).

155. MASS. GEN. LAWS ch. 90 § 24(1)(f)(1). See also GA. CODE ANN. § 40-5-67.1(g)(4)(2007) ("In the event the person is acquitted of a violation of Code Section 40-6-391 or such charge is initially disposed of other than by a conviction or plea of nolo contendere, then the suspension shall be terminated and deleted from the driver's license record. An accepted plea of nolo contendere shall be entered on the driver's license record and shall be considered and counted as a conviction for purposes of any future violations of Code Section 40-6-391. In the event of an acquittal or other disposition other than by a conviction or plea of nolo contendere, the driver's license restoration fee shall be promptly returned by the department to the licensee.").

156. Cafaro, *supra* note 127, at 16.

take the test.¹⁵⁷ Such a message defeats the purpose of the statute and thwarts any attempt at deterrence.¹⁵⁸ By failing to take the BAC test, the individual has deprived the prosecution of vital evidence and should be punished harshly for doing so. Often an individual's acquittal is premised in large part on the lack of BAC evidence.¹⁵⁹ To give the motorist's license back rewards them for the very act implied consent laws are attempting to deter. As such, the reinstatement of the license upon acquittal is contrary to the purpose behind implied consent laws. Statutes such as these that undercut implied consent laws must be eliminated.

B. Admit BAC Refusal in Evidence

Obtaining a conviction in an OUI case is a difficult task. Given the general public's inclination to sympathize with OUI drivers,¹⁶⁰ the tendency is to "give the defendant a break" and not convict. In arriving at a verdict, many jurors "employ a 'but for the grace of God go I' rationale."¹⁶¹ In addition to contending with public perceptions and inclinations to acquit, prosecutors in some states are forced to contend with laws that bar the admission of BAC test refusal in evidence.¹⁶² At trial, the lack of BAC evidence "makes it more difficult for a prosecutor to refute alternative theories of the crime, such as the suspect was not intoxicated but was, instead, having a diabetic reaction, or was on prescription medication, or had some physical condition that accounts for his/her behavior."¹⁶³ When the prosecution is prohibited from telling the fact-finder that the defendant refused the test, OUI defendants risk little by refusing testing whenever possible. Permitting the prosecution to introduce a defendant's refusal to submit to testing into evidence is not only justified but is fair, as most jurors are "aware of the existence of chemical testing and may refuse to convict when such evidence is not made available by the prosecution."¹⁶⁴ However, "if the prosecution is permitted to explain the absence of test results, jurors would be less likely to acquit on the irrational basis that the prosecution has produced no 'scientific' evidence for conviction."¹⁶⁵ States that allow such evidence at trial do so to ensure that jurors are not misled into drawing such incorrect inferences by the absence of BAC testing.¹⁶⁶

157. *Id.*

158. *Id.*

159. See *supra* notes 118–124 and accompanying text.

160. Susan Waite Crump, *The Admission of Chemical Test Refusals After State v. Neville: Drunk Drivers Cannot Take the Fifth*, 59 N.D. L. REV. 349, 350 (1983) ("[J]urors more readily identify with a[n] OUI defendant than they do with defendants accused of violent crimes. Most jurors, if not their friends and relatives, have engaged in the prohibited conduct themselves.") (citation omitted).

161. Taslitz, *supra* note 11, at 68 (discussing the continuing attitude of jurors regarding OUI cases and citing a study that found that between "1958 and 1993 jurors' leniency—that is, their willingness to acquit—remained substantially unchanged. Interestingly, although jurors continue to acquit more frequently than do judges, judicial willingness to acquit has increased since 1958."). For an analysis of research by sociologists and psychologists regarding the dynamics of jury deliberation and jury decisions versus judge decisions, see Rebecca Snyder Bromley, *Jury Leniency in Drinking and Driving Cases Has It Changed? 1958 Versus 1993*, 20 LAW & PSYCHOL. REV. 27 (1996).

162. See sources cited *supra* note 121.

163. ROBERTSON & SIMPSON, *supra* note 133, at xiv.

164. Crump, *supra* note 160, at 351.

165. *Id.*

166. See, e.g., 75 PA. CON. STAT. ANN. § 1547(e) (2006) ("In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this

C. Criminalize Refusal to Take the BAC Test

One way to make the penalty for refusal to submit to a BAC test harsh is to criminalize such conduct.¹⁶⁷ Among States with significant decreases in test refusals, two have criminalized test refusals (California and Minnesota).¹⁶⁸ As a crime of omission, the State would be required to prove that the defendant failed to perform a mandatory duty and that the defendant was aware of the condition that created such a legal duty to act.¹⁶⁹

Opponents of creating a separate crime for refusal argue that a law compelling an individual “to choose between taking a breath test, which could expose them to criminal liability, or refusing the test, which also carries criminal consequences, presents them with the ‘cruel’ dilemma that the Fifth Amendment is designed to prevent.”¹⁷⁰ This argument fails to take into consideration that BAC refusal evidence is already compelled due to the fact that prior to operating a motor vehicle all motorists agree, albeit impliedly, to submit to testing. When a state decides to forego enforcing the implied consent statute by refusing to physically compel an OUI suspect to produce a BAC sample, it is entirely legitimate that there is a statute criminalizing the refusal to produce a sample voluntarily.¹⁷¹ Where a state “could have taken [the defendant’s] blood by force, it does not ‘compel’ a defendant to testify against himself when it allows him the choice of either producing the evidence or facing criminal charges—and even a mandatory prison sentence . . . for withholding it.”¹⁷² Motorists confronted with this choice are faced with an “unpleasant choice—submit to the breath test and be prosecuted for DUI, or refuse to take the test and be prosecuted for criminal refusal.”¹⁷³ Still, admitting evidence of a refusal “no more violates the Fifth Amendment than

title arising out of the same action, the fact that the defendant refused to submit to chemical testing as required by subsection (a) may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors concerning the charge.”).

167. For a list of states that criminalize the act of refusing to take the BAC test, see BLOOD ALCOHOL CONCENTRATION TEST REFUSAL LAWS, *supra* note 111. Alaska’s BAC refusal statute classifies the crime as a class A misdemeanor with penalties ranging from seventy-two consecutive hours of imprisonment and a fine for a first conviction to 360 days of imprisonment and a fine for a fourth or subsequent conviction for BAC refusal. ALASKA STAT. § 28.35.032 (2007).

168. BREATH TEST REFUSALS, *supra* note 10.

169. See *Yang v. State*, 107 P.3d 302, 309 (Alaska 2005); Alaska Stat. §28.35.032(a) (“If a person under arrest for operating a motor vehicle . . . while under the influence of an alcoholic beverage, inhalant, or controlled substance refuses the request of a law enforcement officer to submit to a chemical test authorized under . . . AS 28.35.031(a), or if a person involved in a motor vehicle accident that causes death or serious physical injury to another person refuses the request of a law enforcement officer to submit to a chemical test authorized under . . . AS 28.35.031(g), after being advised by the officer that the refusal will result in the denial or revocation of the driver’s license, privilege to drive, or privilege to obtain a license, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating a motor vehicle . . . while under the influence of an alcoholic beverage, inhalant, or controlled substance, and that the refusal is a crime, a chemical test may not be given, except as provided by AS 28.35.035.”).

170. *State v. Morale*, 811 A.2d 185, 188 (Vt. 2002) (holding that there was no violation of the Fifth Amendment and *Miranda* did not apply in the prosecution for criminal refusal to submit to breath test).

171. *Id.*

172. *Id.* at 189 (quoting *Deering v. Brown*, 839 F.2d 539, 543 (9th Cir. 1988)).

173. *Id.* at 188.

would evidence of the breath test had defendants submitted to it.”¹⁷⁴ Since nominal penalties for refusal encourage this behavior, especially when compared to the substantial penalties faced upon conviction of OUI charges, imposing criminal sanctions to accompany the administrative penalty of loss of license or fine will increase the costs of refusing and thus encourage more people to take the BAC test.¹⁷⁵

D. Mandatory Testing Where Death or Serious Bodily Injury Occurs

Implied consent laws are built on the premise that an individual does not have the right to refuse a BAC test. The Supreme Court in *Schmerber* recognized that a simple blood-alcohol test is safe, painless, and commonplace, and expressly allowed a state to force a person suspected of OUI to submit to a BAC test as long as the manner employed does not shock the conscience of the court.¹⁷⁶ However, most states do not allow law enforcement to take this evidence by force.¹⁷⁷ The rationale behind forbidding compelled testing is to prevent the police from engaging in violent confrontations with OUI suspects.¹⁷⁸ While this is a legitimate rationale, the resulting deprivation of vital BAC evidence is particularly troublesome when a suspected impaired driver is involved in a motor vehicle accident that causes a death or serious bodily injury.

Improving BAC testing rates for drivers involved in fatal crashes and crashes that cause serious bodily injury is critical to combat impaired driving. For example, in 2004, there were 164 people that died on Wyoming roadways. Fifty-three of those people were killed in crashes involving alcohol. However, seventy percent of the surviving drivers were not tested for impairment.¹⁷⁹ In these instances, BAC testing should be compulsory.¹⁸⁰ Such a law would make a significant difference in preventing impaired drivers from “slipping through the cracks” and would give law enforcement the critical evidence they need to hold the appropriate party accountable.

174. *Id.* (citing *South Dakota v. Neville*, 458 U.S. 553, 564 (1983)).

175. See National Hardcore Drunk Driver Project, *The National Agenda: A System to Fight Hardcore DWI* at 31, available at http://dwwdata.org/downloads/hdd_sourcebook1.pdf (last visited Mar. 1, 2008) (“In Minnesota, where the test refusal rate is 14%, the laws related to test refusals are among the strongest in the nation. Minnesota is one of five states (Alaska, Minnesota, Nebraska, Rhode Island and Vermont) where BAC test refusal carries a criminal penalty.”).

176. *Schmerber*, 384 U.S. at 771.

177. See *U.S. v. Kincade*, 379 F.3d 813, 849 n.6 (9th Cir. 2004) (“Some states have already passed legislation authorizing police to collect blood samples, with or without consent, from any driver reasonably suspected of drunk driving.”). See also Joseph T. Hallinan, *Police Draw Blood, Literally, as They Fight to Put a Stop to Intoxicated Drivers*, L.A. DAILY, Mar. 24, 2004, at 4 (noting that Alaska, Arizona, Florida, Indiana, Iowa, Michigan, Nevada, and Texas have all passed legislation authorizing forcible extraction of blood samples).

178. *Neville*, 459 U.S. at 560.

179. COUNCIL ON IMPAIRED DRIVING, WHITE PAPER – MANDATORY CHEMICAL TESTING FOR ALL DRIVERS IN FATAL AND SERIOUS BODILY INJURY CRASHES 1 (2006), available at http://www.iprwyoming.org/asp/researchtopics/docs/147_Mandatory_Chemical_Testing_of_All_Drivers_in_Fatal_and_Serious_Injury_Crashes.pdf.

180. ADVOCATES FOR HIGHWAY AND AUTO SAFETY, THE 2007 ROADMAP TO STATE HIGHWAY SAFETY LAWS 32 (2007), available at <http://www.saferoads.org/Roadmap2007.pdf> (“Currently, [thirty-seven] states require drivers who are killed in a fatal crash to be tested for the presence of alcohol. . . . Thirty-nine states and DC require that surviving drivers of a crash involving a death have their BACs tested. . . . In total, [twenty-nine] states require that both killed and surviving drivers be tested, and three states (RI, TN and VA) do not require BAC testing in either instance.”).

It is simply unacceptable to allow drivers responsible for fatal and serious-injury crashes to escape prosecution[,] . . . and it is unjust to allow a driver to refuse a [BAC] test after [hurting] another person. Action must be taken to close the loopholes and gaps in our legislative and enforcement systems.”¹⁸¹

CONCLUSION

Implied consent laws represent a “bargain between drivers and the State In exchange for the use of the roads within the State, drivers consent to have their [BAC level] tested if a police officer has reason to believe the driver is intoxicated.”¹⁸² Once this agreement is entered into, drivers should not be able to refuse to produce a BAC sample. Implied consent laws must be given some teeth if they are going to have the intended impact of deterring impaired driving. For implied consent laws to have any meaning, motorists must be required to take the BAC test.

Current modes designed to ensure compliance with BAC testing are failing. This is due, in large part, to the lack of serious and consistent repercussions for refusing the test. A number of measures are possible to fix the fatal flaws in OUI enforcement schemes. In combination, they have the potential to increase the ability of law enforcement and prosecutors to deter and punish the crime of OUI. Many people would rather accept the lighter penalty of administrative loss of license than risk having a BAC test demonstrate intoxication, resulting in a criminal conviction for OUI. Administrative sanctions imposing loss of license for a few months are insufficient to encourage motorists to take the test.

Hardship licenses, concurrent sentences, and the return of a license upon an acquittal also take away the incentive to take the test. Motorists know that the threat of conviction for OUI is tenuous in the absence of BAC evidence. Therefore, when an individual refuses, evidence of that refusal must be admissible in the criminal proceeding. Additionally, the act of refusing must be a crime itself with stiff penalties imposed upon conviction. In cases where a car accident results in death or serious bodily injury, BAC testing must be mandatory even in the face of a refusal.

As the *Neville* Court stated, “the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices.”¹⁸³ Once that difficult choice is made, the defendant must live with the consequences and the consequences should be more than imaginary. Otherwise, implied consent laws are meaningless.

181. *Slipping Through the Cracks, The Need for Mandatory BAC Testing for All Crashes*, DRIVEN MAGAZINE, Spring 2001.

182. *Morale*, 811 A.2d at 188.

183. *Neville*, 459 U.S. at 564.