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Driving Under the Influence of Alcohol: A Model Implied Consent Statute

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DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL: A MODEL IMPLIED CONSENT STATUTE

INTRODUCTION

In response to the growing concern over the drunken driver, during the past decade many states have enacted implied consent statutes.[1] These laws provide that a motorist, by the act of driving, has impliedly consented to a chemical test for determining the alcoholic content of his blood. Properly drafted, an implied consent statute can be a state's most effective weapon in curbing drunken driving.

Unfortunately, the states have drafted their individual statutes with little view to uniformity. Consequently, each state statute has its own peculiar weaknesses and omissions. The purpose of this note is to compare these statutes, examining the major problems and differences, and thereby to propose a model statute which remedies these problems. Particular emphasis is placed upon the statutory language necessary to deal more effectively with the problem of the drunken driver. Less space is devoted to those provisions which have been uniformly adopted by the states, while the more controversial or varied provisions have been emphasized.

The model statute has been fragmented so that each section may be considered separately. No attempt has been made to introduce new provisions in this field; rather, the model statute simply identifies and

1. ALA. CODE tit. 36, § 154 (Supp. 1969); ALASKA STAT. § 28.35.031 (1970); ARIZ. REV. STAT. ANN. § 28-691 (Supp. 1969-70); ARK. STAT. ANN. § 75-1045 (Supp. 1969); CAL. VEHICLE CODE § 13353 (West Supp. 1971); COLO. REV. STAT. ANN. § 13-5-30 (1964); CONN. GEN. STAT. ANN. § 14-227a (1970); FLA. STAT. ANN. § 322.261 (1968); GA. CODE ANN. § 68-1625.1 (Supp. 1970); HAWAII REV. STAT. § 286-151 (1968); IDAHO CODE ANN. § 49-352 (1967); ILL. ANN. STAT. ch. 95½, § 144 (Smith-Hurd Supp. 1969); IND. ANN. STAT. § 47-2003c (Supp. 1970); IOWA CODE ANN. § 321B.3 (Supp. 1970); KAN. STAT. ANN. § 8-1001 (1964); KY. REV. STAT. ANN. § 186.565 (1968); LA. REV. STAT. § 32:661 (Supp. 1970); ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1970); MASS. GEN. LAWS ANN. ch. 90, § 24 (1969); MICH. COMP. LAWS ANN. § 257.625a (Supp. 1970); MINN. STAT. ANN. § 169.123 (Supp. 1970); MO. ANN. STAT. § 564.441 (Supp. 1970); NEB. REV. STAT. § 39-727.03 (1960); N. H. REV. STAT. ANN. § 262-A:69-a (1966); N. J. STAT. ANN. § 39:4-50.2 (Supp. 1970); N. M. STAT. ANN. § 64-22-2.4 (Supp. 1969); N. Y. VEH. & TRAF. LAW § 1194 (1970); N. C. GEN. STAT. § 20-16.2 (Repl. Vol. 1965); N. D. CENT. CODE ANN. § 39-20-01 (Supp. 1969); OHIO REV. CODE ANN. § 4511.19.1 (Page Supp. 1970); OKLA. STAT. ANN. tit. 47, § 751 (Supp. 1970); ORE. REV. STAT. § 483.634 (1965); PA. STAT. ANN. tit. 75, § 624.1 (Supp. 1970); R. I. GEN. LAWS ANN. § 31-27-2.1 (1969); S. C. CODE ANN. § 46-344 (Supp. 1970); S. D. COMPILED LAWS § 32-23-10 (1969); TEX. PEN. CODE art. 802f (Supp. 1969); UTAH CODE ANN. § 41-6-44.10 (1970); VT. STAT. ANN. tit. 23, § 1188 (1967); VA. CODE ANN. § 18.1-55.1 (Supp. 1970); W. VA. CODE ANN. § 17C-5A-1 (Supp. 1970).

consolidates the best features from the implied consent statutes of the various states.

Purpose of an Implied Consent Statute

The drunken driver has been the greatest danger on our nation's highways in recent years. The immediate concern of the police in dealing with this problem is securing the maximum number of criminal convictions of offenders. In order to accomplish this end, it is necessary to provide a reliable means of obtaining evidence of the motorist's condition at the time of the alleged violation. Chemical evidence, based on presumptions and implemented by an implied consent statute, has been demonstrated to effectively accomplish this objective. This effectiveness is largely due to the objective nature of this type evidence as contrasted with the personal observation formerly used. With evidence based only upon personal observations, prosecutors were consistently confronted by the vagaries of conflicting attitudes toward the drinking driver.[2] By increasing the probability of conviction, an implied consent statute effectively deters the public from driving after drinking. Success in achieving this deterrent effect is the standard against which the effectiveness of any implied consent statute must be measured.

Model Statute Provisions[3]

§ 100. Implied consent to a chemical test.

Any person who operates a motor vehicle within this state is deemed to have consented to a chemical test of his breath, urine, saliva or blood in order to determine the alcoholic content of his blood.

The statutes which make the conduct of driving under the influence of alcoholic beverages criminal usually apply everywhere within the state.[4] However, many states have limited the application of their

2. The objectivity of the chemical evidence is very important. In the past prosecutors faced a heavy burden in relying on subjective observations since there are over sixty pathological conditions which produce symptoms similar to intoxication. Smith, *Implied Consent Legislation and the Virginia Experience*, 38 U. Va. News Letter 37 (1962).

3. Due to the length and complexity of the model statute it will be presented in piecemeal sections, each section followed by textual comment. The comments will explain the provisions of the statute while alluding to provisions of the implied consent statutes of various states.

4. *E.g.*, Ala. Code tit. 36, § 2 (1936) (any highway of this state); Hawaii Rev. Stat. § 291-4 (1949) (applies to whoever operates or assumes actual physical control of the operation of any vehicle).

implied consent statutes to persons operating motor vehicles on a *public* highway.[5] Since the purpose of an implied consent statute is to facilitate the prosecution of drunken drivers, and the obtaining of convictions for driving while under the influence of alcoholic beverages, the two statutes should be coextensive. Therefore, the suggested model statute encompasses every motorist, licensed or unlicensed, resident or nonresident, who operates a motor vehicle within the state.

This provision is also the implied consent portion of the statute. Although there has been considerable discussion concerning the theory upon which a state may impose this implied consent, the constitutionality of such statutes seems well established.[6] Undeniably the state has an overwhelming interest in the safety of its highways. A reasonable exercise of the state's police power to safeguard this interest is sufficient justification for limiting the individual's liberty.

The model statute provides four different chemical tests to determine the alcoholic content of the suspected individual's blood.[7] This provision has been incorporated into many of the existing state statutes.[8]

5. *E.g.*, ALA. CODE tit. 36, § 154 (Supp. 1969) ("the public highways"); HAWAII REV. STAT. § 286-151 (1968) ("public highways"); UNIFORM VEHICLE CODE § 6-205. *But see* CONN. GEN. STAT. ANN. § 14-227b (Supp. 1970) ("in the state"); FLA. STAT. ANN. § 322.261 (1968) ("within the state"); IDAHO CODE ANN. § 49-352 (1967) ("in the state"); KY. REV. STAT. ANN. § 186.565 (1968) ("in the state"); MICH. COMP. LAWS ANN. § 257.625a (Supp. 1970) ("within the state"); N. J. STAT. ANN. § 39:4-50.2 (Supp. 1970) ("any public roads, street or highway or quasi-public area").

6. One theory suggests that the constitutional basis for implied consent statutes is the "right-privilege theory" under which the use of the state's highways for the purpose of operating a motor vehicle is considered a privilege rather than a right. It follows that the state may impose conditions on the exercise of that privilege. *See* Comment, *Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication*, 40 ILL. L. REV. 245, 257 (1945); Note, *Chemical Tests for Intoxication: A Legal, Medical and Constitutional Survey*, 37 N.D. L. REV. 212, 252 (1961); 51 MICH. L. REV. 1195, 1200 (1953); 17 WASH. & LEE L. REV. 299, 300 (1960).

Another theory involves a due process analysis. Starting with a recognition of the economic and social importance of the automobile in today's society, this theory asserts that the freedom to use one's automobile "is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law." Wall v. King, 206 F.2d 878, 882 (1st Cir.), *cert. denied*, 346 U.S. 915 (1953). *See* Comment, *Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Content*, 40 ILL. L. REV. 245, 259-62 (1945); Comment, *Admissibility and Constitutionality of Chemical Intoxication Tests*, 35 TEXAS L. REV. 813, 830 (1957).

7. For a thorough examination and explanation of the various tests used to measure the alcoholic content of a person's blood *see* Watts, *Some Observations on Police-Administered Tests for Intoxication*, 45 N.C. L. REV. 34 (1966).

8. *E.g.*, IDAHO CODE ANN. § 49-352 (1967); KAN. STAT. ANN. § 8-1001 (1964).

While the statutes in force in most states provide at least one alternative test,[9] at least one state provides only for a blood test.[10] Although the latter provision eliminates confusion as to who decides which test is to be given, this problem is easily solved by effective statutory draftsmanship, without sacrificing alternative tests.[11] Moreover, modern science is capable of accurately extrapolating the results of other chemical tests to determine the alcoholic content of the subject's blood at an earlier time. The reliability of evidence based upon chemical tests of the breath, urine and saliva is well established.[12] Since these tests do not involve an entry into the body, they are generally less offensive to the person being tested. Alternative tests are provided in order to allow maximum flexibility to the police and to provide a means for obtaining evidence based upon chemical tests from persons who have valid medical reasons for refusing to submit to a blood test.

(a) Grounds for administering the tests.

> *The test shall be incidental to a lawful arrest for any offense committed while operating a motor vehicle and shall be administered at the direction of a law enforcement official when such official has reasonable grounds to believe the arrested person was operating a motor vehicle while under the influence of alcoholic beverages.*

Two basic requirements must be met before the law enforcement official may imply the motorist's consent to a chemical test: (1) a lawful arrest for any offense committed while operating a motor vehicle, and (2) reasonable grounds to believe the motorist was operating a motor vehicle while under the influence of alcoholic beverages. New York's original implied consent law[13] was declared invalid as violative of due process because the statute did not provide that the test was to

9. *E.g.*, NEB. REV. STAT. § 39-727.03 (1969) (breath or urine); UTAH CODE ANN. § 41-6-44.10 (1970) (breath or urine); VT. STAT. ANN. tit. 23, § 1188 (1967) (breath or urine); UNIFORM VEHICLE CODE § 11-902(b) (breath or urine).

10. VA. CODE ANN. § 18.1-55(b) (Supp. 1970). *See also* MO. STAT. ANN. § 564.441 (Supp. 1965) (breath); N.J. STAT. ANN. § 39:4-50.2 (Supp. 1966) (breath); S.C. CODE ANN. 46-344(a) (Supp. 1969) (breath).

11. UNIFORM VEHICLE CODE § 6-205. This section provides for the decision as to which test is to be administered to be made by the law enforcement agency which employs the arresting officer.

12. *See* Slough & Wilson, *Alcohol and the Motorist: Practice and Legal Problems of Chemical Testing*, 44 MINN. L. REV. 673 (1960).

13. Ch. 854, [1953] N. Y Sess. Laws (now N.Y. VEH. & TRAF. LAW § 1194 (1970)).

be made only after arrest upon reasonable grounds.[14] The states now uniformly conform to this requirement by including both of these requirements as part of their implied consent legislation.

(b) Choice of test to be administered.

The law enforcement official shall designate which of the tests shall be administered. However, the motorist will have the option to demand that only a breath test be administered.

Many states have encountered difficulty by failing to designate the party who decides which test is to be given.[15] The model statute clearly empowers the law enforcement official to make this decision. If this choice were left to the motorist he might frustrate the purpose of the statute by demanding a test for which the local law enforcement agency lacked sufficient facilities. Furthermore, a statute which required all local law enforcement agencies to maintain the capability to administer all four chemical tests would place an unreasonable economic burden upon the state. This model statute provision, in conformity with many of the more recent implied consent statutes,[16] permits the law enforcement official to designate a chemical test which he knows can be properly administered in his jurisdiction. By enacting a provision such as this, the state legislatures foreclose judicial challenge to the law enforcement official's authority to designate the test to be given and provide clear guidelines for law enforcement agencies.

The model statute attempts to balance the interests and rights of the individual with the compelling public interest implemented by the statute. This balance is partially achieved by providing the motorist with an option to demand that only a chemical test of his breath be

14. Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

15. This difficulty arises when the statute reads "the test . . . shall be administered at the direction of a law enforcement official." *E.g.*, GA. CODE ANN. § 68-1625.1 (Supp. 1970). In Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961) and Timm v. State, 110 N.W.2d 359 (N.D. 1961) the courts held that similar language gave the choice of tests to the law enforcement official. *But see* Bean v. State, 12 Utah 2d 76, 362 P.2d 750 (1961), and Ringwood v. State, 8 Utah 2d 287, 333 P.2d 942 (1959), where a Utah court dismissed two convictions under the statute because the defendants had not been given a choice of tests. This points out the need for a clear determination by a statute as to who will have the choice of which test is to be administered.

16. *E.g.*, OHIO REV. CODE ANN. § 4511.19.1 (Page Supp. 1970). *But see* ME. REV. STAT. ANN. § 1312 (Supp. 1970) (the accused shall select and designate one of the tests).

performed. This provision[17] removes some of the burden placed on the individual since the test is probably the least offensive of the chemical tests currently available.[18] Although under this provision all local law enforcement agencies must be equipped to administer the breath test, it is probably the least expensive and the most easily administered test available.[19]

(c) Notification to motorist of rights; result of refusal.

Prior to the administration of any chemical test, the motorist shall be advised of his option to demand that only a breath test be administered. In addition he shall be informed of his right to refuse to submit to any chemical test and that such refusal shall result in the suspension of his privilege to operate a motor vehicle within this state for a period of one year.

As previously discussed, an implied consent statute is essentially concerned with getting the drunken driver off the road. However, in adopting measures to accomplish this goal, the interests of the individual must also be considered. This necessitates balancing individual rights against the need for evidence at trial in the form of chemical test results. In attempting to maintain a balance, it is fundamental that a law enforcement official be required to inform the accused motorist of his rights and privileges. The motorist must be informed of his option of tests, or there would be, in fact, no option presented. He must be informed of his right to refuse to submit to any chemical test, or undoubtedly he usually will submit because of the manifestation of police authority. Further, he must be informed of the consequences of his refusal in order to make an intelligent decision whether or not to submit. Many states have failed to provide these fundamental yet minimum standards of notice in their implied consent statutes.[20] Especially in light of the

17. This provision is patterned after MICH. COMP. LAWS. ANN. § 257.625a(6) (Supp. 1970).

18. Michigan has chosen the breathalyzer as the device to be used in all breath tests. Georgia has chosen the intoximeter. For information as to the relative accuracy and simplicity of these and other devices for testing the breath see Slough & Wilson, *supra* note 12, at 678-80; Watts, *supra* note 7, at 56-58, 64-68.

19. For an interesting probe into the implementation of a state-wide breath testing program in Michigan see Dimond, *A Reappraisal of Implied Consent and the Drinking Driver*, 3 PROSPECTUS 139, 159-61 (1969).

20. *E.g.*, ARK. STAT. ANN. § 75-1045 (1969) (motorist given the option to object to a blood test but no provision for notice of this right to be given; nor provision for notice of the right of refusal or of the consequences of refusal); VT. STAT. ANN. tit. 23, § 1188

failure of the courts of most jurisdictions to require that individuals in police custody be fully informed of their rights, the legislatures should provide for this aspect of the problem within the implied consent statute.[21]

(d) Test not to be administered by the arresting officer.

The chemical test given to the motorist for the purpose of determining the alcoholic content of his blood shall not be administered by the arresting law enforcement official.

The model statute provides that the test is to be ". . . administered at the direction of a law enforcement official. . . ." Under this provision, the arresting officer normally will decide if and when to request a motorist to submit to a chemical test. However, in order to insure freedom from bias, the arresting law enforcement official is prohibited from actually administering the test.[22] Under the model statute only a licensed physician, registered nurse, or duly licensed laboratory technologist or clinical laboratory technician may withdraw blood from the subject. Consequently, this problem will not arise if the test to be given is a blood test. However, the urine, breath, and saliva tests may be conducted by any person qualified to do so as prescribed by the state health department. This could and should include a number of law enforcement officials.[23] Forbidding the arresting officer to administer the test in these three instances seems a small price to pay to insure the credibility of the results and to obtain the confidence of the public.

(1967) (section 1194 gives the motorist the option to take a breath or urine test but no notice of the option is provided for; also no notice of the right to refuse or of the consequences of refusal).

21. *See, e.g.*, State v. Corrigan, 4 Conn. Cir. Ct. 190, 228 A.2d 568 (1967); State v. Bliss, —Del.—, 238 A.2d 848 (1968); People v. Mulack, 40 Ill. 2d 429, 240 N.E.2d 633 (1968); State v. Heisdorffer, —Iowa—, 164 N.W.2d 173 (1969); State v. Kenderski, 99 N.J. Super. 224, 239 A.2d 249 (1968); People v. Gielarowski, 58 Misc. 2d 832, 296 N.Y.S.2d 878 (1968); City of Columbus v. Hayes, 9 Ohio App. 2d 38, 222 N.E2d 829, *cert. denied*, 389 U.S. 941 (1967).

In *Kenderski* a breathalizer test was held not subject to the *Miranda* rule since *Miranda* was based on the privilege against self-incrimination while the chemical test is a search of the person and therefore subject only to the test of reasonableness.

For a short discussion of the constitutional applicability of *Miranda* to these types of arrests see Comment, *The Pennsylvania Implied Consent Law: Problems Arising in a Criminal Proceeding*, 74 DICK. L. REV. 219, 237-39 (1970).

22. S. C. CODE ANN. § 46-344 (Supp. 1970).

23. Dimond, *supra* note 19, at 160. Michigan state police have set up a school to train law enforcement officers to serve as technicians qualified to administer the breath test.

(e) Time limit for administering tests.

The chemical tests provided for by this act shall be given within two hours of the alleged violation. The evidence provided by the chemical test shall indicate the alcoholic content of the motorist's blood at the time of the alleged violation.

Several states have failed to provide a statutory time period beyond which the chemical tests may not be administered.[24] This failure promotes laxity on the part of the police which often produces chemical evidence of suspect credibility because the test was administered too long after the time of the alleged violation. The model statute chooses a time period of two hours which begins to run at the time of the alleged violation. The time of the alleged violation is chosen as the beginning point of the time period because this is the time when the motorist's condition is placed in question. The interests of the individual demand that some reasonable limit be placed upon the time which the police may consume in administering these chemical tests. The two-hour period, in line with a recent statute,[25] seems to allow efficient law enforcement agencies ample time in which to conduct the specified tests. Furthermore, the more abbreviated the time between the alleged violation and the administration of the chemical test, the more credibility may attach to the test results.

Chemical tests provide information only as to the alcoholic content of the subject's blood at the time the test is administered. Since this is never the time at which the motorist's condition is in question, these tests must be coupled with a reliable means of relating the results back to the time of the alleged violation. This is accomplished by expert testimony employing the mathematical process of extrapolation.[26]

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24. *See, e.g.*, FLA. STAT. ANN. § 322.261 (1968) (no statutory provision for time limit in administering the test); VA. CODE ANN. § 1811-55.1 (Supp. 1970) (no statutory provision for time limit in administering the test); W. VA. CODE ANN. § 17C-5A-5 (1970) (test must be administered two hours from the time of arrest or of acts alleged).

25. OHIO REV. CODE ANN. § 4511.19 (Supp. 1970) (test must be given within two hours of the time of the alleged violation).

26. The courts generally have approved the admissibility of the expert's estimate reached through the process of extrapolation. *E.g.*, People v. Markham, 153 Cal. App. 2d 260, 314 P.2d 217 (1957); Ray v. State, 233 Ind. 495, 120 N.E.2d 176 (1954); State v. Baron, 98 N.H. 298, 99 A.2d 912 (1953). *See* Slough & Wilson, *supra* note 12, at 682-83 for an explanation and discussion of the process of extrapolation:

> Given a known rate of elimination of blood-alcohol in the average person, an expert can reasonably estimate the percentage of the blood-alcohol in the

(f) **Motorist entitled to test; notice; admissibility of results.**

Any person arrested for the commission of any offense while the person allegedly was operating a motor vehicle while under the influence of alcoholic beverages is entitled to a chemical test for the purpose of determining the alcoholic content of his blood as provided in this act and such person shall be advised accordingly. The results of any test administered under this act shall be admissible in any subsequent civil or criminal action to which the person so tested is a party.

This provision of the model statute assures the motorist of the right to a chemical test for the purpose of determining the alcoholic content of his blood should the arresting law enforcement official decide not to conduct such a test.[27] Thus, the motorist may not be denied valuable evidence which may establish a presumption of non-intoxication at trial.[28] Many states do not have this provision in their implied consent statutes. Often, states having a similar provision emasculate it by failing to provide for proper notice to the arrested motorist of his right to a chemical test,[29] thus destroying the right. Such omissions make implied consent statutes more oppressive than required to protect the public interest. This provision is necessary to prevent arbitrariness on the part of the law enforcement officials. Every effort must be made to insure an individual the full protection of the law in order to justify the imposition of an implied consent statute for the maintenance of public safety.

(g) **The unconscious motorist.**

Any person who is incapable of refusing to submit to a chemical test of his blood by reason of unconsciousness or other mental or

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average person at the time of a certain event, based on the percentage of alcohol in the blood as shown in a chemical test. An expert witness may provide a reasonably accurate estimate of the blood-alcohol concentration of a particular person if he is given definite facts from which he can determine the rate of elimination taking place in the individual's body.

27. MICH. COMP. LAWS ANN. § 257.625(a)(3) (Supp. 1970); W. VA. CODE ANN. § 17C-5A-6 (1970).

28. "The blood test does as much to protect an innocent driver as it does to aid the state in the prosecution of a guilty one." Marbut v. Comm'r, 194 Kan. 620, —, 400 P.2d 982, 984 (1965).

29. W. VA. CODE ANN. § 17C-5A-6 (Supp. 1970) fails to provide notice to the arrested motorist of his right to demand a test. *But see* MICH. COMP. LAWS ANN. § 257.675(a)(3) (Supp. 1970) where it is provided that the motorist ". . . shall be informed that he has the right to demand that one of the tests provided for in paragraph (1) shall be given him. . . ."

physical condition shall be deemed not to have withdrawn his consent to a blood test for the purpose of determining the alcoholic content of his blood. Such a test will only be administered under a physician's care and authorization.

Many of the implied consent statutes currently in effect have no provision which specifically authorizes a blood test to be performed upon an unconscious person.[30] In the absence of such a provision state courts have reached conflicting conclusions as to the admissibility of evidence based upon the results of chemical tests taken from unconscious persons.[31] The Supreme Court decision in *Breithaupt v. Abram*[32] seems to have foreclosed constitutional attack upon this procedure. However, the specific statutory provision is necessary to insure proper interpretation by the state's courts.[33]

Only a blood test is provided in the case of the unconscious person since any other test would present obvious difficulties of administration. Although normally a registered nurse, or duly licensed laboratory technologist or clinical laboratory technician, would be qualified to give the test, only a physician is qualified to administer the blood test to a person who is unconscious. By making the doctor's discretion controlling, this provision provides the extra care and precautions necessary when dealing with a person who is possibly in a dangerous condition.

(h) Qualified consent; inability to take the breath test.

The law enforcement official shall treat any qualified assent by the accused motorist as an absolute refusal to submit to a chemical test. If, however, the motorist demonstrates his inability to take the breath test due to the condition of his health, he must submit

30. *See, e.g.*, COLO. REV. STAT. ANN. § 13-5-30 (1964) (no provision for an unconscious person); CONN. GEN. STAT. ANN. § 14-227b (1970) (no provision for an unconscious person); GA. CODE ANN. § 68-1625.1 (Supp. 1970) (no provision for an unconscious person).

31. A Vermont court in State v. Ball, 123 Vt. 26, 179 A.2d 466 (1962) held that, in spite of the implied consent statute, blood tests taken from those unconscious from injury or drink are inadmissible in evidence in a driving while intoxicated prosecution unless the respondent consents at some point either to the taking or to the admission of the results.

32. 352 U.S. 432 (1957). The Court held that "the absence of a conscious consent, without more, does not necessarily render the taking a violation of a constitutional right. . . ." *Id* at 435.

33. For examples of specific provisions dealing with the unconscious motorist see ALA. CODE tit. 36, § 154(b) (Supp. 1969); ARIZ. REV. STAT. ANN. § 28-691(c) (Supp. 1969-70); FLA. STAT. ANN. § 322.261(b) (1968).

to any other test the law enforcement official selects. Refusal to submit to the test so designated shall result in the suspension of his privilege to operate a motor vehicle for a period of one year.

Implied consent statutes which do not incorporate this provision place the law enforcement official in a dilemma when the motorist's assent to a chemical test is qualified (*e.g.*, assent only if advised to do so by his attorney). The official is forced to choose between treating the qualified assent as a refusal to submit to the chemical test and complying with the motorist's request, thus delaying the chemical test and jeopardizing the validity of the results.[34] The model statute treats a qualified assent as an absolute refusal so that the law enforcement official may act with confidence, secure in the knowledge that at trial the evidence of this refusal will be admissible against the motorist.

A concession is made to the motorist who cannot take the breath test due to medical reasons. If he demonstrates his inability to take the breath test, the law enforcement official must provide another type of chemical test. It is generally recognized that the breath test should always be available to ameliorate the problem of the motorist who can not submit to a blood test due to a heart or blood condition. However, a motorist suffering from emphysema or some other lung disease might have an equally valid medical reason precluding the use of a breath test. The model statute seeks to accommodate these individuals by providing an alternative chemical test.

(i) Admissibility of refusal as evidence.

The refusal of the accused motorist to submit to a chemical test for the purpose of determining the alcoholic content of his blood as provided for by this act is admissible into evidence and may be subject to comment in any subsequent civil or criminal action.

34. *See* State v. Pandoli, 109 N.J. Super. 1, 262 A.2d 41 (1970). Here the court held that anything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take a test constitutes a refusal. *Accord,* Reirdon v. Director, Dep't. of Motor Vehicles, 72 Cal. Rptr. 614 (1968). A motorist's statement to an arresting officer that the motorist would take a chemical test to determine his sobriety on the condition that his attorney be present at the taking of the test amounted to a refusal for the purposes of California's implied consent statute. *But see* Thomas v. Schaffner, 448 S.W.2d 319 (Mo. App. 1969). The driver, upon the officer's request to take a breath test, informed him that he would rather have a blood test. Twenty minutes later he reconsidered and offered to take the breath test. The court held that the driver did not unequivocally refuse to submit to a breath test and that his driver's permit could not be revoked for refusal to submit to a breath test.

There is little uniformity concerning the admissibility in evidence of a motorist's refusal to submit to a chemical test. Among those states which have chosen to treat the problem directly by statute, the trend seems to favor admissibility of such evidence.[35] Many implied consent statutes are silent on this question, leaving the problem of admissibility exclusively in the hands of the state courts.[36] If such refusal were not admissible, a motorist might effectively frustrate the purpose of the statute by refusing the test and simply waiting out the one-year suspension of his driving privilege. This provision achieves the stated purpose of an implied consent statute, implementing the public interest by removing the drunken driver from the roads. By providing the prosecutor with this additional weapon for use in obtaining convictions, some of the advantage lost by permitting refusal under the statute is thereby regained.

(j) Arrest without a warrant.

A law enforcement official of this state may make an arrest at the scene of any motor vehicle accident which did not occur in his presence if upon personal investigation he has reasonable grounds to believe that the person to be arrested has been operating a motor vehicle while under the influence of alcoholic beverages.

The crime of operating a motor vehicle while under the influence of alcoholic beverages is a misdemeanor in most states. Consequently, for an arrest without an arrest warrant to be valid, the offense must be committed in the presence of the law enforcement official.[37] The model implied consent statute requires a lawful arrest as a precondition to administering a chemical test to a motorist. Therefore, if there is no lawful arrest, the motorist's refusal to submit to a test will not result in the suspension of his privilege to operate a motor vehicle. This problem does not exist when the law enforcement official observed the motorist speeding or driving recklessly. However, the law enforcement official has not personally observed the violation when he arrives on the scene of an accident after the fact. In this situation, absent the model statute

35. *See, e.g.*, ALA. CODE tit. 36, § 155(h) (Supp. 1969); ARIZ. REV. STAT. ANN. § 28-692(H) (Supp. 1969-70); LA. REV. STAT. § 32.666 (Supp. 1970). *But see* COLO. REV. STAT. ANN. § 13-5-30(g) (1964); VA. CODE ANN. § 18.1-55.1 (Supp. 1970).

36. *Compare* State v. Holt, —Iowa—, 156 N.W.2d 884 (1968) (refusal held admissible) *and* State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958) (refusal held admissible) *with* State v. Hedding, 122 Vt. 379, 172 A.2d 599 (1961) (refusal not admissible).

37. *E.g.*, OHIO REV. CODE ANN. § 2935.03 (Page Supp. 1970) (person must be "found violating" the law).

provision, there can be no immediate arrest for operating a motor vehicle while under the influence of alcohol even though the law enforcement official may detect the odor of alcohol on the breath of one of the drivers or notice the staggering manner in which he walks. The model statute provision empowers the officer to make such an arrest and thus require a chemical test of the person's blood. Several states have provisions which specifically allow a police officer, without a warrant, to arrest any person at the scene of an accident whom he has reasonable grounds to believe was driving a motor vehicle while under the influence of alcoholic beverages.[38] Such provisions avoid not only the lengthy delay which obtaining an arrest warrant would involve but also the resulting detrimental effect the delay would have on the chemical test results.

Most courts have liberally construed implied consent statutes in the area of arrest without an arrest warrant.

> Judicial determinations are almost uniform that even after an accident, so long as the alleged violator has admitted that he was the operator of the vehicle involved, the police have "found" the motorist committting a misdemeanor within the meaning of the legislative provision, thereby rendering legal an arrest without a warrant.[39]

Since the validity of the arrest is fundamental to the application of the implied consent statute, it should not be left to the discretion of the courts; it should be provided specifically by the statute.

§ 101. Presumptions.

In any prosecution for any offense allegedly committed while under the influence of alcoholic beverages the amount of alcohol in the defendant's blood at the time of the alleged violation as shown by a chemical analysis of the defendant's blood, urine, saliva, or breath in accordance with this act shall be admissible into evidence and shall give rise to the following presumptions:

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38. Mo. ANN. STAT. § 564.443 (Supp. 1970); VA. CODE ANN. § 19.1-100 (Supp. 1970).

39. Comment, *Driving While Intoxicated—Implied Consent Statute in Ohio*, 20 CASE W. RES. L. REV. 277, 293 (1968). The author supports his contention with the case of State v. Williams, 98 Ohio App. 513, 130 N.E.2d 395 (1954), where the court stated that the arresting officer need not have witnessed the defendant driving the car, and the mere fact that he had been found in a state of intoxication was sufficient grounds upon which to arrest him for driving while under the influence of alcoholic beverages.

(1) If there was at the time 0.05% or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of alcoholic beverages;

(2) If there was at the time more than 0.05% but less than 0.10% by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of alcoholic beverages, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant;

(3) If there was at the time 0.10% or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of alcoholic beverages.

The foregoing provisions of this section shall not be construed as requiring that evidence of the amount of alcohol in the defendant's blood must be introduced, nor shall they be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcoholic beverages. However, evidence of the chemical test alone is sufficient and requires no corroboration.

Most earlier chemical test laws established the presumption that the person was under the influence of alcohol if there was 0.15% or more by weight of alcohol in his blood.[40] The 0.15% level was originally used to provide ample tolerance and assure legislative approval.[41] However, today it is scientifically accepted that the normal individual suffers significant impairment when there is 0.10% or more by weight of alcohol in the blood.[42] The current trend is to employ the 0.10% or more by weight of alcohol in the blood as the presumptive level for intoxication.[43] The danger to the public safety involved justifies a heavier burden on the individual's interest. This consideration has prompted at least one state governor to request the state legislature to lower the presumptive intoxication level from 0.15% to 0.10% in an effort to enhance the

40. *E.g.*, CONN. GEN. STAT. ANN. § 14-227(a)(c) (1970); NEB. REV. STAT. § 39-727.14 (1963); VT. STAT. ANN. tit. 23, § 1189 (1967) (amended in 1965 substituting the figure "0.10" for "0.15").

41. Smith, *supra* note 2.

42. "The scientific conclusion has now been reached that the level is attained when the percentage is only 0.10 and the revised Uniform Vehicle Code § 11-902(b)(3) (1962) declares that the presumption shall come into operation at that figure." State v. Johnson, 42 N.J. 146, 153, 199 A.2d 809, 822 (1964).

43. *E.g.*, ALASKA STAT. § 28.35.033 (1970); FLA. STAT. ANN. § 322.262 (1968); S. C. CODE ANN. § 46-344(b)(3) (Supp. 1970).

effectiveness of the state's implied consent statute.[44] The model statute attempts to ameliorate the weight of this burden upon the individual by providing that the presumptions based upon alcohol-blood percentages shall be rebuttable.

§ 102. Persons qualified to administer the tests.

Only a licensed physician, registered nurse, or licensed laboratory technologist or clinical laboratory technician acting at the request of a law enforcement official may withdraw blood for the purpose of determining its alcoholic content. During such a test some type of cleanser or sterilizer other than alcohol or other substance which might in any way affect the accuracy of the test shall be used for the instruments and the part of the body from which the blood is taken. Samples of urine, breath, and saliva shall be taken in a reasonable manner by a person meeting the requirements of the State Health Department.

The model statute insures that elementary physical safety measures will be afforded the motorist by prescribing the qualifications of individuals authorized to administer a blood test.[45] The Supreme Court recognized the necessity of such precautions in holding that there is nothing "brutal" or "offensive" in the taking of a sample of blood when done under the watchful eye of a physician.[46] One state has even seen fit to limit those qualified to administer the blood test to licensed practitioners of medicine and surgery.[47] But such a requirement is unduly burdensome in that it unreasonably restricts the number of administrants available, and frustrates the successful operation of the statute.

In order to insure the validity of the test results, the model statute, following the example of several states, has included a provision limiting the type of disinfectant to be used in administering the test.[48]

The requirements for the urine, breath, and saliva tests are relaxed

44. Daily Press (Newport News, Va.), Sept. 10, 1970, at 55, col. 2.

45. *E.g.*, TEXAS PEN. CODE art. 802f (Supp. 1969) (physician, qualified technician, chemist, registered nurse, or licensed vocational nurse under the supervision or direction of a licensed physician); VA. CODE ANN. § 18.1-55(b) (Supp. 1970) (physician, registered nurse or graduate laboratory technician).

46. Breithaupt v. Abram, 352 U.S. 431, 435 (1957).

47. CONN. GEN. STAT. ANN. § 14-227(a) (1970).

48. *E.g.*, VA. CODE ANN. § 18.1-55 (Supp. 1970) (a sterilizer or cleanser other than alcohol); W. VA. CODE ANN. § 17C-5A-2 (1968) (non-alcoholic antiseptic). The same result has been reached by judicial determination in other jurisdictions. *See, e.g.*, People v. Maxwell, 18 Misc. 2d 1004, 188 N.Y.S.2d 692 (Orange County Ct. 1959).

somewhat leaving certification of those qualified to administer the tests to the State Health Department.[49] These tests do not involve an actual physical invasion of the body so that the risk of injury to the subject is somewhat reduced. Consequently, the qualifications of those who may administer them can be lowered making it more convenient for law enforcement officers to reach qualified administrants.

(a) Immunity for a person qualified to withdraw blood.

A qualified person who withdraws blood or assists in such withdrawal in accordance with this act shall not be liable for any crime or civil damages predicated on the act of withdrawing blood or related procedures unless the withdrawal procedure is performed in a negligent manner.

In order for a statute providing for a blood test determinative of the alcoholic content of a person's blood to be effective, the law enforcement agencies must have the complete cooperation of the medical profession and others qualified to administer such a test. In an attempt to insure such cooperation, many states have included a provision precluding liability against the person assisting or actually withdrawing the blood.[50] Doctors and other qualified administrants in a state without an immunity provision fear liability and hence often keep motorists waiting for prolonged periods of time before administering the blood test. Such inaction jeopardizes the credibility of the results of the test and discourages the police officer from returning to this administrant. The qualified administrant thus avoids potential personal liability simply by evading the responsibility. An immunity provision would eliminate the necessity of such conduct and insure close cooperation between the medical profession and the law enforcement agency.

(b) Motorist's right to an additional test; notice.

The motorist tested may at his own expense within two hours of the alleged violation have a qualified person of his own choosing administer a test in addition to the officially administered test. The motorist shall be advised immediately upon arrest of this right by the arresting officer.

49. *See, e.g.*, OHIO REV. CODE ANN. § 4511.19 (Page Supp. 1970) (breath and urine specimens to be analyzed in accordance with methods approved by the director of health).

50. *E.g.*, FLA. STAT. ANN. § 322.261(2)(e)(1968); MICH. COMP. LAWS ANN. § 257.625(a)(2) (Supp. 1970).

This provision, standard in most implied consent statutes,[51] is designed to protect the motorist by providing a check on the results of the officially administered test. Wide discrepancies in the results of these tests would seriously impeach the validity of the state's evidence. However, the right is of little value to the accused motorist if he is not aware of its existence. Therefore, several states have specifically provided for the accused motorist to be informed of this right.[52]

> **(c) Withdrawal procedure; availability of sample to motorist.**
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> *If the test administered is a blood, saliva, or urine test the sample shall be placed in each of two sealed containers. Upon completion of the taking of the sample, the containers will be sealed in the presence of the accused motorist after calling the fact to his attention. The containers shall be labelled and identified. The label will contain the name of the accused, the date, and the time of the taking. One sample shall be delivered by the person who administered the test to the law enforcement official for testing by the state as approved by the State Health Department; and the other sample shall be delivered to the person accused or his attorney. The accused may deliver the specimen to a laboratory supervised by a pathologist or a laboratory approved by the State Health Department as qualified to test such a specimen.*

In addition to giving the motorist the right to have an additional test administered by a person of his choosing, another safeguard is implemented by providing the person tested with a sample of the specimen withdrawn during the officially administered test.[53] This provides an additional check on the test results and is compulsory under the statute. Such provisions have not been widely adopted by the states. One reason for the recalcitrance may be that the legislatures believe that the right to an additional test is a sufficient check on the accuracy of the results. However, when a state places so heavy a burden on the rights and interests of the individual, it owes those individuals the duty to provide every safeguard reasonable under the circumstances.

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51. *See, e.g.*, ALASKA STAT. § 28.35.033(e) (1970); ARIZ. REV. STAT. ANN. § 28-692(f) (Supp. 1969); S.C. CODE ANN. § 46-344 (Supp. 1970).

52. *E.g.*, ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1970); N.H. REV. STAT. ANN. § 262-A:69-c (1966); N. J. STAT. ANN. § 39:4-50.2(d) (Supp. 1970).

53. This section is patterned after a similar provision in VA. CODE ANN. § 18.1-55.1(d1) (Supp. 1966) (applied only to a blood sample).

(d) Admissibility of results; availability of results to motorist.

The results of the chemical test are admissible in evidence in any criminal or civil action within this state. The results of the chemical test will be sent to the person tested or his attorney as soon as possible.

The modern trend toward open discovery for the criminal defendant has influenced most state legislatures to provide for the availability of chemical test results and information concerning the test or tests given upon request of the person tested.[54] Few of the statutes, however, go as far as the model statute by providing for automatic notice of the test results.[55] The model statute provision places little burden upon the state; indeed, it manifests the concern of the state for the rights of the individual.

§ 103. Refusal to submit; report of arresting officer; suspension of license; hearing.

If the operator of a motor vehicle, after being arrested for any offense committed while allegedly operating a motor vehicle under the influence of alcoholic beverages shall refuse to submit to a chemical test for the purpose of determining the alcoholic content of his blood as provided for in this act when requested to do so, none shall be given, but the arresting law enforcement official shall deliver his sworn report of such refusal to the Director of Motor Vehicles. The report will specify the circumstances of the arrest and the grounds upon which the official based his belief that the person was operating a motor vehicle while under the influence of alcohol. Upon receipt of such report, if the director shall find that the arresting law enforcement official acted in accordance with the provisions of this act, he shall suspend the person's license or permit to operate a motor vehicle, or if such person is a nonresident, the privilege to operate a motor vehicle within this state, or if the person is a resident without a license or permit to operate a motor vehicle in this state, the director shall deny to the person the issuance of a license or permit for a period of one year after the date of the alleged violation. The director shall send the per-

54. *E.g.*, ALASKA STAT. § 28.35.033(f) (1970); ARIZ. REV. STAT. ANN. § 28-692(G) (Supp. 1969); MINN. STAT. ANN. § 169.123(B) (Supp. 1970). *But see* CONN. GEN. STAT. ANN. § 14-227a-b (1970) (no mention of availability of test results).

55. Two states which provide that the person be informed of his right to know the test results are Maine and New Jersey. ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1970); N. J. STAT. ANN. § 39:4-50.2(d) (Supp. 1970).

son a notice of suspension containing a provision informing the person of his right to a hearing on the suspension. If within ten days of the date of suspension the person requests a hearing before the director in writing it shall be granted. The director, upon such request, shall hold a hearing on the issues of whether the law enforcement official had reasonable grounds to believe the person had been driving while under the influence of alcoholic beverages, whether the person was placed under lawful arrest, and whether the person refused to submit to the test upon the request of the law enforcement official. If after such a hearing the director finds in favor of the person on these issues his license shall be re-issued. If after such a hearing the director finds against the person on these issues the suspension of license is final. Such suspension shall be independent of any revocation or suspension imposed as a result of a subsequent conviction for any offense allegedly committed while driving a motor vehicle under the influence of alcoholic beverages.

Currently, every implied consent statute has a provision for an opportunity for the motorist to have a hearing before a state official of the motor vehicle department concerning the suspension of his operator's license due to his refusal to submit to a chemical test of his blood.[56] However, there are several variations as to when the suspension shall become effective.[57] The model statute provision follows those jurisdictions which impose suspension immediately upon receipt of the law enforcement official's report. This procedure more effectively accomplishes the objective of removing the drunken driver from the road as soon as possible. In light of the gravity of the possible consequences of allowing such a driver to continue driving for any length of time, the public interest must prevail.

56. New York's original implied consent statute was declared unconstitutional as a denial of due process because, among other defects, it provided for the revocation of a driver's license without a hearing. Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

57. *See* ARK. STAT. ANN. § 75-1045(d) (Supp. 1969) (revocation after hearing); FLA. STAT. ANN. § 322.261(c) (1968) (no suspension to be effective until 10 days after written notice to the motorist); MO. ANN. STAT. § 564.444(1) (Supp. 1970) (immediate revocation upon receipt of the officer's report by the director); S. C. CODE ANN. § 46-344(d) (Supp. 1970) (suspension effective the day after the motorist receives written notice unless he requests a hearing whereupon suspension does not become effective until the day after the order sustaining his suspension is issued from the hearing); W. VA. CODE ANN. § 17C-5A-3 (1970) (suspension not effective until 10 days after the motorist receives a copy of the order suspending his license).

There is also a provision for the denial of a license or permit to any resident without one who refuses to submit to a chemical test.[58] Few states have such a provision, without which these individuals may completely frustrate the statute since their refusal to submit to a chemical test would go unpunished.

Another important aspect of this section deals with the notice to the person of his right to a hearing on the matter of his suspended license. Granting the motorist the right to a hearing is of very little significance unless there are provisions requiring notice of this right to be given.

(a) **Judicial review.**

If the suspension or determination that there should be a denial of issuance is sustained after a hearing, the person whose license or permit to drive or non-resident operating privilege has been suspended, or the person to whom a license or permit is denied under the provisions of this section, shall have a right to file a petition in the [ ] Court to review the final order of suspension or denial.

This subsection goes one step further in protecting the rights of the individual under the statute by providing for judicial review of the circumstances surrounding the suspension of his privilege to operate a motor vehicle. This provision guarantees the individual procedural due process in determining if the suspension has been rightfully imposed.

CONCLUSION

Implied consent statutes have the possibility of providing the solution to this nation's greatest highway menace—the drunken driver. This possibility alone justifies the imposition of a heavy burden on an individual's rights and liberties in order to implement the overriding public interest. States must be careful in drafting an implied consent statute, however, that they do not lose sight of the fundamental rights of the individual. The delicate balance between the interest of the public and the interest of the individual must be maintained. A statute which provides for notice to the accused motorist of all of his rights and privileges under the statute and for a hearing concerning any penalty imposed strikes this balance

58. The provision providing for a denial of the issuance of a license or permit to a resident without a license or permit is patterned after MO. ANN. STAT. § 564.44(1) (Supp. 1970).

as nearly as is possible. This compromise encourages the cooperation of the citizenry while insuring reliable test results. The overall effect can be salutary and can be accomplished without losing sight of the purpose of an implied consent statute.

WILLARD BERGMAN, JR.