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## Drunk Drivers versus Implied Consent: A Sobering New Illinois Statute, 15 J. Marshall L. Rev. 479 (1982)

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## DRUNK DRIVERS VERSUS IMPLIED CONSENT: A SOBERING NEW ILLINOIS STATUTE

In 1966, the federal government enacted the National Highway Safety Act to develop safety plans and reduce accidents, deaths, and injuries.<sup>1</sup> Although the Act itself did not refer to drunk drivers or implied consent laws, the Secretary of Transportation issued a regulation requiring each state to develop a program to reduce alcohol related accidents.<sup>2</sup> Implied consent statutes are an important part of these programs.

The premise of an implied consent statute is as follows: when a driver obtains the privilege of driving within a state, evidenced by the issuance of a driver's license, he gives his consent to the performance of chemical tests to determine his blood alcohol level if he is arrested for driving while intoxicated (DWI).<sup>3</sup> A chemical analysis of the blood, breath, or urine which indicates a blood alcohol level of .10% or higher creates a presumption of intoxication.<sup>4</sup>

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1. In pertinent part, the National Highway Safety Act, 23 U.S.C. § 403(a) (1970), states:

Each state shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary. Such uniform standards shall be expressed in terms of performance criteria. Such uniform standards shall be promulgated by the Secretary so as to improve driver performance . . . and to improve pedestrian performance.

2. Highway Safety Program Standard No. 8, Alcohol in Relation to Highway Safety, 23 C.F.R. § 204.4-8 (1971), which reads in pertinent part:

Each State, in cooperation with its political subdivisions, shall develop and 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. The program shall provide at least that:

I. There is a specification by the Senate of the following offenses:

A. Chemical test procedures for determining blood alcohol concentrations.

B. (1) The blood-alcohol concentrations, not higher than .10 percent by weight, which define the terms "intoxicated" or "under the influence of alcohol," and (2) A provision making it either unlawful, or presumptive evidence of illegality, if the blood-alcohol concentration of a driver equals or exceeds the limit so established.

II. Any person placed under arrest for operating a motor vehicle while intoxicated or under the influence of alcohol is deemed to have given his consent to a chemical test of his blood, breath, or urine for the purpose of determining the alcohol content of his blood.

3. 23 C.F.R. § 204.4 (1971).

4. *Id.* See *supra* note 2 and accompanying text.

Illinois passed its first implied consent statute in 1972.<sup>5</sup> In 1981 that law was completely revised and expanded.<sup>6</sup> This comment will examine the new statute, discuss likely constitutional challenges, and consider whether the statute can withstand such challenges. To fully understand the impact of this statute, an examination of the old statute is necessary.

#### THE 1972 ILLINOIS IMPLIED CONSENT STATUTE

The original Illinois implied consent statute can be distinguished from the present statute in several aspects. First, it allowed only for analysis of the breath to determine a driver's blood alcohol level. Although a driver impliedly consented to such a test, actual consent had to be obtained by the arresting officer.<sup>7</sup> Second, a refusal to take the test resulted in a suspension of driving privileges for a period of three months for the first refusal and for six months for each subsequent refusal within a five year period.<sup>8</sup>

Additionally, the old statute contained a number of features designed to protect the rights of the accused. First, a suspect had to have been placed under lawful arrest prior to administration of any tests. Further, a suspect was to be informed of the consequences of a refusal to be tested and was given a 90 minute time period in which to consult with an attorney and make a decision whether to refuse the test. During testing, two breath tests were given to ensure that the breathalyzer was working although an accused could refuse the second test after seeing the results of the first. As a result, neither the initial test nor any test refusal could be used as evidence in any criminal or civil matter. After testing, the accused could obtain additional tests on his own. The accused was also entitled to a hearing before a final suspension of his driving privileges. Finally, an unconscious or dead person was deemed to have withdrawn his consent to any form of blood alcohol testing.<sup>9</sup>

Comparison of implied consent statutes of neighboring states indicates the uniqueness of the original Illinois statute. The surrounding states of Indiana,<sup>10</sup> Iowa,<sup>11</sup> Michigan,<sup>12</sup> and

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5. ILL. REV. STAT. ch. 95 1/2, § 11-501.1 (1979).

6. An Act of August 20th, 1981, P.A. No. 82-311, § 11-501--11-501.2 (amending ch. 95 1/2, § 11-501--11-501.1 (1979) (hereinafter cited as P.A. No. 82-311 (1981)).

7. ILL. REV. STAT. ch. 95 1/2, § 11-501.1(a) (1979).

8. *Id.* at § 11-501.1(a)(2).

9. *Id.*

10. IND. CODE ANN. § 9-4-4.5-1 (Burns 1971 & Supp. 1980).

11. IOWA CODE ANN. § 321B.3 (West 1966 & Supp. 1981).

12. MICH. STAT. ANN. § 9.2325(1) (Callaghan 1981).

Wisconsin<sup>13</sup> do not require a 90 minute waiting period in which an accused can decide to take the test or consult with an attorney.<sup>14</sup> Iowa requires that any test be given within two hours of arrest.<sup>15</sup> Indiana and Wisconsin provide for pre-arrest tests.<sup>16</sup> No surrounding state requires that two tests be given after arrest.<sup>17</sup> Wisconsin provides for a test after arrest as well as prior to arrest, but evidence of the pre-arrest test is not admissible at trial.<sup>18</sup> While Illinois allowed only for breath testing,<sup>19</sup> implied consent statutes of the surrounding states permit blood and urine tests.<sup>20</sup> All of the statutes provide for some sort of hearing with regard to the suspension or revocation of driving privileges.<sup>21</sup>

#### THE 1981 ILLINOIS IMPLIED CONSENT STATUTE

The new implied consent statute enacted by the Illinois legislature in August 1981 more closely resembles the statutes of the states surrounding Illinois than does the 1972 statute. Many of the provisions of the original statute are deleted or modified. An additional paragraph contains several new or modified provisions<sup>22</sup> which set out the types of tests permissible for determin-

13. WIS. STAT. ANN. § 343.305 (West Supp. 1981).

14. See *supra* notes 10-13.

15. "[A] peace officer shall determine which of the four substances, breath, blood, saliva or urine, shall be tested . . . . If such Peace officer fails to provide a test within two hours after such arrest, no test shall be required, and there shall be no revocation under the provisions of section 321B.7." IOWA CODE ANN. § 321B.3 (West Supp. 1980).

16. Any person who drives or operates a motor vehicle upon the public highways of this state . . . shall be deemed to have given his consent to tests of his or her breath, blood or urine . . . any such test shall be administered upon the request of a law enforcement officer. A law enforcement officer may administer a preliminary breath test. WIS. STAT. ANN. § 343.305(2)(a) (West Supp. 1980).

Any law enforcement officer authorized to enforce the laws of this state regulating the use and operation of vehicles on public highways who has probable cause to believe that any person has committed the offense of operating a vehicle while intoxicated . . . shall not place such person under arrest for such offense until he has first offered to such person the opportunity to submit to a chemical test.  
IND. CODE ANN. § 9-4-4.5-3 (Burns Supp. 1980).

17. See *supra* notes 10-13.

18. WIS. STAT. ANN. § 343.305(2)(a) (West Supp. 1980). ("Neither the results of the preliminary test nor the fact that it was administered shall be admissible in any action or proceeding in which it is material to prove that the person was under the influence of an intoxicant.").

19. See ILL. REV. STAT. ch. 95 1/2, § 11-501.1 (1979).

20. IND. CODE ANN. § 9-4-4.5.2 (Burns 1980); IOWA CODE ANN. § 321B.3 (West Supp. 1980); MICH. STAT. ANN. § 9.2325(3) (Callaghan 1981); WIS. STAT. ANN. § 343.305(1) (West Supp. 1980).

21. See *supra* notes 17-20.

22. P.A. No. 82-311, § 11-501.2 (1981).

ing blood alcohol levels. While the old statute allowed only for breath tests,<sup>23</sup> the new law permits not only breath tests but also blood and urine tests.<sup>24</sup> A physician or nurse must perform the blood test.<sup>25</sup> Moreover, evidence of a refusal to submit to testing may be used at *any* civil or criminal proceeding.<sup>26</sup> This is a major reversal of the old statute which allowed such evidence only at presuspension hearings.

Other changes have also been made within section 11-501.1 of the original implied consent section. The 90-minute waiting period in which to consent and/or consult with an attorney has been eliminated.<sup>27</sup> Only one test of the breath, blood, or urine is now required,<sup>28</sup> thus, there is no longer any chance to refuse to be tested after seeing the results of the first test.<sup>29</sup> In another major change, a dead or unconscious person is deemed *not* to have withdrawn his consent to be tested for blood alcohol concentration.<sup>30</sup>

Several of the provisions meant to protect the rights of the accused still remain in force. Officers still must inform arrestees

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23. ILL. REV. STAT. ch. 95 1/2, § 11-501.1(a) (1979).

24. P.A. No. 82-311, § 11-501.2(a) (1981).

25. *Id.* at § 11-501.2(a)(2). It is important from a constitutional standpoint that the new statute calls for a physician or nurse to take the blood test if that test is utilized by a police agency. The fact that such a bodily invasion by needle will be done by trained medical personnel under sterile conditions should weaken any constitutional attacks on the law based on unreasonable search. For a further discussion of blood tests and fourth amendment protection against unreasonable search, see *infra* note 74.

26. P.A. No. 82-311, § 11-501.2(c) (1981).

27. ILL. REV. STAT. ch. 95 1/2, § 11-501.1(a)(2) (1979).

28. *Id.* at § 11-501.1(a)(1) (1979).

29. This is one of the strengths of the new statute. Under the old statute a refusal to take the second of the two breath tests was taken as a complete refusal to be tested. The first test was inadmissible as evidence. This allowed an arrested driver to take the first test and then, depending on its result, either continue with the second test or refuse further testing. Thus, if the first test was high and a refusal made to the second test, a valuable and sometimes vital piece of evidence was lost to the prosecution.

30. As with many of the changes in the new law, this particular change has long been called for by law enforcement agencies. Under the old implied consent statute, many drivers escaped punishment under the criminal law for injuries or deaths they caused by driving drunk. Although the blood alcohol test is not required to convict under implied consent, convictions without such tests are based on visual observations made of the driver such as his manner of speech, his ability to walk, and his ability to communicate with the arresting officer. In the case of a dead or unconscious person, the only basis for conviction may well be the result of blood alcohol tests. Under the new law, the dead or unconscious driver has given his consent to such tests. In the long run this will result in the removal of more drunk drivers from the roadways and will ensure punishment of those who kill or maim while driving drunk. For a discussion of this aspect of the new implied consent statute, see Whelan, *Driving Under the Influence of Alcohol: A New Law for the State of Illinois*, N.W. SUB., B.A.J., Dec. 1981, at 7. See also P.A. No. 82-311, § 11-501.1(b).

of the consequences of a refusal to be tested.<sup>31</sup> Also, both the right to a presuspension hearing and the right to secure additional, independent blood alcohol tests remain as provisions of the new statute.<sup>32</sup> The new statute does delete a number of provisions which affirmatively protected the rights of the accused. Although these deletions are likely to raise constitutional questions, the assumption should not be made that the new statute fails to protect the accused's rights or that it cannot withstand constitutional attacks. What the statute does not do is protect these rights with any greater force than the minimum constitutional guidelines set forth by the United States Supreme Court.

#### IMPLIED CONSENT AND THE CONSTITUTION

Constitutional attacks on implied consent statutes focus on fourteenth amendment due process and fifth amendment protections from self-incrimination. The statutes have also been challenged on the basis of equal protection, fourth amendment search and seizure, sixth amendment right to counsel, and admission of evidence of refusal.

#### *Due Process*

The first case to question the constitutionality of an implied consent statute was *Schutt v. MacDuff*,<sup>33</sup> which challenged the first such state enactment.<sup>34</sup> The New York statute was struck down on two due process issues: failure to require that a lawful arrest take place prior to requesting a test, and failure to provide for an administrative hearing prior to the revocation of the driver's license.<sup>35</sup> The court found that the statute allowed a

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31. P.A. No. 82-311, § 11-501.1(c) (1981). The penalties for refusal have been increased to a six month suspension for an initial refusal to be tested and to one year for a subsequent refusal within five years.

32. P.A. No. 82-311, § 11-501.1(c) (1981).

33. 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

34. See 1953 N.Y. LAWS ch. 854, § 1 (current version at N. Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1978-1979)).

The original statute was passed prior to the National Highway Safety Act. It read in pertinent part:

**CHEMICAL TESTS.** 1. Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to suspect such person of driving in an intoxicated condition. If such person refuses to submit to such chemical test the test shall not be given but the commissioner shall revoke his license or permit to drive and any non-resident driving privileges.

35. *Schutt v. MacDuff*, 205 Misc. 43, 52-53, 127 N.Y.S.2d 116, 126-27 (Sup. Ct. 1954). *Schutt* had been arrested for driving while intoxicated and was

driver to be stopped and restrained without process or lawful arrest, and forced the driver to accompany the officer and submit to a blood test.<sup>36</sup> Due process protections were also found lacking in the revocation of the driver's license for refusal to take a test since such revocation was "based solely on hearsay without any other hearing or testimony."<sup>37</sup>

In contrast, the United States District Court in 1978 upheld a provision of the North Carolina implied consent statute which allowed a notice of revocation to be issued prior to any revocation hearing.<sup>38</sup> The distinguishing factor between this statute and others which have been found unconstitutional was that, here, revocation was not automatic; rather, it was held in abeyance if a written request for a hearing was made after receipt of the revocation notice.<sup>39</sup>

The United States Supreme Court examined the question of presuspension hearings in *Mackey v. Montrym*,<sup>40</sup> balancing the

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taken to the police station where he was asked to submit to a blood test. He refused and his driver's license was subsequently revoked. *Id.* at 45, 127 N.Y.S.2d at 120.

36. *Id.* The concern of the court was that under the statute as written, a police officer could stop, detain, and force a driver to submit to chemical tests without the officer even arresting the driver by either warrant or lawful arrest arising out of an act committed within the officer's presence. The practice of "stop and frisk" for weapons absent a lawful arrest when an officer has reasonable grounds to believe a person is armed was upheld by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The practice of detaining a person while chemical tests are performed on him, however, has never been sanctioned without prior lawful arrest.

37. 205 Misc. at 55, 127 N.Y.S.2d at 128. In 1954 the New York statute was amended to correct the deficiencies noted by the court. 1954 N.Y. LAWS ch. 320, § 1 (amending 1953 N.Y. LAWS ch. 854, § 1).

After the amendment of the New York statute, a second constitutional attack was made in *Anderson v. MacDuff*, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1954). The statute as amended withstood this constitutional attack. Since that time the United States Supreme Court has declared that suspension of a driver's license is a state action adjudicating important interests that are not to be taken away without due process required by the fourteenth amendment. *Bell v. Burson*, 402 U.S. 535, 539 (1971).

38. *Montgomery v. North Carolina*, 455 F. Supp. 338, 341 (W.D.N.C. 1978).

39. *Id.* See *Slone v. Kentucky Dep't. of Transp.*, 379 F. Supp. 652 (E.D. Ky. 1974), where the court found Kentucky's implied consent statute unconstitutional because it allowed for revocation of the driver's license prior to any hearing. Further, the statute did not allow for suspension of the revocation pending a requested hearing.

40. 443 U.S. 1 (1979). A Massachusetts statute allowed for a hearing on the suspension of a driver's license for refusal to submit to a breathalyzer test, but only *after* the license was surrendered. A decision from the hearing officer could usually be had in one or two days following the driver's receipt of the suspension notice but in no event later than 10 days. The court did not find any undue harm in the suspension prior to hearing. 443 U.S. at 9 n.5.

interests of the accused against the interests of the state.<sup>41</sup> The state's interest in the expeditious removal of drunk drivers from the highway outweighed any interest the driver had in keeping his privilege to drive until after the hearing.<sup>42</sup> *Mackey* should, therefore, dispel any fears that the new Illinois statute might be struck down for failure to provide due process in the suspension of the driver's license for refusal to be tested. The Illinois statute provides that once a notice of suspension is received, the driver has twenty-eight days to request a suspension hearing,<sup>43</sup> well within the ambit of *Mackey*.<sup>44</sup> Thus, the new Illinois implied consent statute's provisions for license suspension do not violate an accused's rights to due process of the law.

### *The Fifth Amendment*

Fifth amendment attacks have struck at the very heart of implied consent statutes. The attackers contend that because

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41. The balancing test was devised in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which balanced the private interest protected against the interests of the state. *Mathews* dealt with the question whether the due process clause of the fifth amendment required that an evidentiary hearing precede termination of Social Security disability benefits. In weighing the interests, the Court considered the fiscal and administrative burdens versus the countervailing private interests. The Court found that the essence of due process was the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it. In deciding if this requirement had been met, the Court found it necessary to determine when the Constitution required that judicial type proceedings be imposed upon administrative action to assure fairness. This determination was to be made by balancing the state interest against the private interest. 424 U.S. 319.

42. *Mackey v. Montrym*, 443 U.S. 1, 19 (1979). The Court felt that the risk of erroneous observation or deliberate misrepresentation of the facts by the arresting officer was slight in comparison to the state's substantial interest. The state's substantial interest was based on its police function in protecting the safety of its people by preserving the safety of its public highways. The Court recognized that this interest would be seriously undermined if an accused were allowed to continue driving pending a presuspension hearing.

43. P.A. No. 82-311, § 11-501.1(c) (1981).

44. This is especially true in light of the Supreme Court's decision in *Dixon v. Love*, 431 U.S. 105 (1977), where the Illinois Driver Licensing Law was upheld. That law provides for suspension or revocation of a driver's license without prior hearing where the driver's record indicates an inability to exercise ordinary and reasonable care in the operation of a motor vehicle. As in *Mackey*, the Court found that the public interest in safety on the roads and highways was sufficiently weighty for the state to make its summary initial decision effective without a predecision administrative hearing. *Id.* at 115.

In *Holland v. Parker*, 354 F. Supp. 196 (D.S.D. 1973), a South Dakota implied consent statute provided that an arrest, not specifically a lawful arrest, be made before a request to take the test was given. The court reiterated the need for a lawful arrest prior to testing and struck down the South Dakota law as unconstitutional.



refusal to submit to a blood alcohol test results in the suspension or revocation of driving privileges, an accused is forced to forfeit his right against self-incrimination in order to keep his privilege to drive. This *privilege* to drive is also viewed as a *right* on a par with the right against self-incrimination.<sup>45</sup>

The landmark decision of *Schmerber v. California*<sup>46</sup> has helped to defeat these claims. Though *Schmerber* did not involve implied consent, it dealt with the withdrawal of blood for evidentiary purposes. The Court found that the fifth amendment protected only testimonial or communicative evidence. Evidence of a physical nature, although obtained by compulsion, was not violative of protections against self-incrimination.<sup>47</sup> *Schmerber* dealt only with blood tests. Implied consent statutes permitting breath and urine tests, should find *Schmerber* applicable with little difficulty.<sup>48</sup>

In *Bailey v. City of Tulsa*,<sup>49</sup> an Oklahoma court noted the *Schmerber* findings in upholding an implied consent statute and its authorization of breath tests. The Oklahoma constitution's prohibition against self-incrimination was broader in scope than

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45. "[A] basic distinction [has been] made between "rights" and "privileges" . . . . [R]ights involved things government did *to* people, while privileges involved things government did *for* people. Rights could not be abridged without fundamental fair procedures . . . privileges could be given or taken away on the terms set by the government." W. COHEN, J. KAPLAN, BILL OF RIGHTS, 751 (1976) (emphasis added).

There can be little doubt that the "right" to drive must be considered a privilege and not a fundamental right such as the right against self-incrimination. Fundamental rights are those rights embodied in the Bill of Rights and certain other rights which are deemed part of the very essence of life in a free nation. The legal privilege to drive is one bestowed by the State which can be taken away by the State. It must be recognized that driving is an important privilege that may in fact be essential to the holder's livelihood. This recognition of importance, however, does not make the privilege a fundamental right under the Constitution. See *Wells v. Malloy*, 402 F. Supp. 856, 858 (D. Vt. 1975).

46. 384 U.S. 757 (1966). *Schmerber* was arrested for driving a vehicle while under the influence of an intoxicating liquor. Upon advice of counsel he objected to the taking of a blood sample. The blood sample was taken over his objection and was used as evidence in obtaining his conviction.

47. *Id.* The fifth amendment protects a person from being compelled "to be a witness against himself." This protection has been consistently interpreted as preventing compulsion to give oral trial testimony or make oral statements prior to trial which would tend to incriminate. The chemical make-up or physical attributes of a person do not fall under the same protections as oral statements.

48. See *Gilbert v. California*, 388 U.S. 263, 266 (1967); *United States v. Wade*, 388 U.S. 218, 221 (1967) (*Schmerber* cited as authority for finding that self-incrimination protections do not extend to handwriting exemplars, participation in lineups, submission to fingerprinting, photography, or measurements).

49. 491 P.2d 316 (Okla. Crim. 1971).

the federal and was not limited to testimonial evidence.<sup>50</sup> The court also noted that no criminal consequences evolved from refusal to take a test and concluded that there was no forced forfeiture of one right in order to keep another since operation of a motor vehicle was a privilege and not a right.<sup>51</sup> Finally, the court stated that where a test was taken, there was a knowing waiver of the state self-incrimination right.<sup>52</sup>

Thus, case law on the subject suggests that blood alcohol tests do not violate fifth amendment rights. Since *Schmerber* would likely be extended beyond blood tests,<sup>53</sup> the tests provided by the new Illinois statute do not bring it into conflict with the United States Constitution. The remaining question is whether the statute violates the Illinois Constitution.

The situation in Illinois is similar to that faced by the Oklahoma court in *Bailey*. Article I, section 10, of the Illinois Constitution protects against self-incrimination and double jeopardy.<sup>54</sup> The wording of section 10, however, differs from that of the fifth amendment. While the fifth amendment protects a person from "being a witness against himself,"<sup>55</sup> the Illinois Constitution protects a person from giving "evidence against himself." Like *Bailey*, the language of the Illinois Constitution is broader than the federal and might be interpreted to prevent blood alcohol tests.<sup>56</sup>

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50. *Id.* at 318. "No person shall be compelled to give evidence which will tend to incriminate him." OKLA. CONST. art. II, § 21.

51. 491 P.2d at 319. *See supra* note 45.

52. *Id.* For a further discussion of waiver, *see* J. KLOTTER & J. KANOVITZ, CONSTITUTIONAL LAW FOR POLICE, §§ 7.6-7.7 (3d ed. 1977) (a defendant claims his privilege either by not speaking or by not taking the stand at trial: where the defendant chooses to waive his right, the prosecution must show that there was a knowing and intelligent waiver).

53. *See supra* note 48. Extension of the *Schmerber* findings to breath and urine tests is a logical step. Like blood, breath and urine are bodily products. No oral statements are needed either to take or to analyze a specimen of breath or urine. Logic, therefore, dictates that such tests do not fall under fifth amendment protections.

54. ILL. CONST. art. I, § 10. "No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense."

55. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

56. The term "evidence" is an all inclusive one taking in all means by which an alleged matter is proved. A "witness" gives evidence in the form of oral testimony. A witness and his testimony become part of the broader concept of evidence in a criminal or civil action. The fifth amendment protection from compulsion to be a witness against oneself is, therefore, a narrower concept than a protection from compulsion to give any evidence, testimonial or not. Since the Illinois Constitution uses the broader term a strong argument could be made that the Illinois Constitution affords broader protection than the fifth amendment.

This does not mean that the newly adopted implied consent statute is invalid under the Illinois Constitution. If confronted with the issue, the Illinois courts would attempt to construe the law in a way that would make it constitutional.<sup>57</sup> In that case, the interpretation made by the *Bailey* court may be applicable.

Specifically, nothing within the Illinois statute compels a driver to give evidence against himself in the form of a blood test. He is free to refuse the test, and if he does refuse, no criminal sanctions attach. Also, the right against self-incrimination can be knowingly waived.<sup>58</sup> In an implied consent situation, it must be shown that the accused knew the consequences of his decision to waive his right against self-incrimination. Since the Illinois statute requires the arresting officer to inform the accused of the consequences of his refusal to be tested, the accused can make a knowing decision on whether to waive his self-incrimination right.<sup>59</sup> This will protect the statute from fifth amendment and Illinois constitutional attacks.<sup>60</sup>

### *Equal Protection*

Claims based on the equal protection clause of the fourteenth amendment have not been as prevalent as due process claims in challenges to implied consent statutes.<sup>61</sup> The issue

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57. An Illinois court would utilize the method used at the federal level for finding a statute valid under the constitution, *i.e.*, a narrow interpretation of the statute so that it would fall within constitutional limits. The method is used to keep the court from direct conflict with the legislature on questions of constitutional interpretation. *See Bailey v. Tulsa*, 491 P.2d 316 (Okla. Crim. 1971).

The question whether a blood alcohol test under implied consent violates the Illinois Constitution has never been examined directly by the Illinois Supreme Court. Its past interpretations of matters falling under art. I, § 10, however, indicate that no violation would be found and that the Illinois court would follow the findings of the U.S. Supreme Court with regard to fifth amendment rights. *See People v. Kennedy*, 33 Ill. App. 3d 857, 338 N.E.2d 414 (1975) (giving voice samples does not constitute self-incrimination). *See also People v. Schmoll*, 77 Ill. App. 3d 762, 396 N.E.2d 634 (1979), *cert. denied*, 447 U.S. 928 (1980) (§ 10 does not impose higher standard than fifth amendment).

58. *See supra* note 52 and accompanying text.

59. *See Bailey v. Tulsa*, 491 P.2d 316 (Okla. Crim. 1971). (by electing to take a breathalyzer the defendant knowingly waives the self-incrimination privilege).

60. *See Miranda v. Arizona*, 384 U.S. 436 (1966). *See also Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (discussion on voluntary waiver and its requirement that such waiver must merely be free from duress or coercion to be valid).

61. Equal protection claims are based on the idea that implied consent statutes arbitrarily single out drivers and subject them to penalties such as suspension or revocation of driving privileges in violation of equal protection of the law. For further discussion on this point, *see Pepin v. Dept. of*

was raised in the *Schutt*<sup>62</sup> case but was rejected by the New York court. The court there found that the essence of the right to equal protection of the law was that all persons similarly situated be treated alike.<sup>63</sup> New York's statute treated equally all persons similarly situated; since all drivers were affected by the statute in the same way,<sup>64</sup> there was no violation of equal protection rights.

The equal protection claim was again rejected in *Wells v. Malloy*,<sup>65</sup> where a United States District Court in Vermont concluded that driving was not a fundamental right.<sup>66</sup> The court held that the strict scrutiny test of equal protection did not apply to nonfundamental rights;<sup>67</sup> thus the Vermont statute could

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Motor Vehicles, 275 Cal. App. 2d 9, 79 Cal. Rptr. 657 (1969); *Schutt v. MacDuff*, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

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

63. *Id.* at 51, 127 N.Y.S.2d at 125.

64. *Id.* The fact that the law did not apply to unlicensed citizens was immaterial from a constitutional standpoint, since the licensed driver stands in a separate class and is subject to legislation specifically applying to that class.

65. 402 F. Supp. 856 (D. Vt. 1975) (suit was brought challenging the constitutionality of a Vermont statute which provided for a suspension of driving privileges of persons who failed to pay automobile purchase and use taxes).

66. The privilege of driving was not considered a fundamental right. Denial of the privilege did not deny the defendant freedom of movement or travel although such travel might be more difficult. See *supra* note 52 for further discussion of fundamental rights.

67. *Wells v. Malloy*, 402 F. Supp. 856, 858 (D. Vt. 1975). The District Court did not see any problem between its decision and the Supreme Court's finding in *Bell v. Burson*, 402 U.S. 535 (1971), that the right to drive cannot be taken away without procedural due process. The district court saw a distinction between the right to drive and fundamental rights which are protected from suspect classifications based on race, nationality or alienage.

For a complete discussion of equal protection, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978). Tribe notes that two types of equal protection exist: the right to equal treatment and the right to treatment as an equal. The right to equal treatment is limited to a group of interests such as voting rights. It requires that each person have equal *access* to the interest involved. This standard does not apply to all interests; the right to drive is one such interest, since not every person is entitled to drive. The right to treatment as an equal, however, does apply to all interests and requires that the government treat each individual with equal regard as a person.

In balancing interests under equal protection, the classification in question must be rational in regard to the class singled out. These classifications must be reasonable in light of the intended purpose of the law. Under this analysis, a law which fails to include all who are similarly situated with regard to the law may tip the balance toward private interests, making the law unconstitutional. An implied consent statute which did not apply equally to all drivers would be such a statute. Only in cases where burdens are made on fundamental rights or with an apparent prejudice against racial or other minorities must the concept of strict scrutiny be applied to preserve equality and liberty. Where a right is considered fundamental, inequalities in classification will be allowed only upon a showing of a compel-

not be declared unconstitutional. The strict test of equal protection applies only to fundamental rights. For nonfundamental rights, the test to be applied is whether the statute bears a rational relationship to the state interest. The need to remove drunk drivers from the highways provides such a relationship.<sup>68</sup>

The Illinois statute should withstand equal protection constitutional attack. Not only does the statute apply equally to all drivers, but it also bears a rational relationship to state interest. Additionally, the statute provides for due process protection for all those arrested under it.

### *Search and Seizure*

The earliest attack on implied consent statutes based on fourth amendment rights<sup>69</sup> came in *Schutt v. MacDuff*.<sup>70</sup> Schutt contended that a blood alcohol test was an unreasonable search prohibited by the fourth amendment. The New York court rejected this position, finding the "search" to be a reasonable search incident to arrest.<sup>71</sup> Fourth amendment rights were also a major factor in *Schmerber v. California*.<sup>72</sup> There, the Supreme Court found that blood tests were not unreasonable searches and could be taken without any form of consent.<sup>73</sup> These points

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ling governmental justification. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 16-1—16-7 (1978).

68. The state interest is to provide safe highways for all Illinois citizens, be they drivers or otherwise. Removing drunk drivers from the highways is one means of protecting highway users. Implied consent provides the most reasonable means of removing those drunk drivers, providing fair warning of the consequences should a driver decide to drink and drive and applying sanctions to those who fail to heed the warning. See *Vermillion County v. Lenover*, 43 Ill. 2d 209, 251 N.E.2d 175 (1969) (guidelines for legislative classifications under the Illinois Constitution).

69. "The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

70. 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

71. *Id.* (the petitioner, being under lawful arrest, could be searched for evidence of the crime for which he was arrested). Attacks on implied consent statutes based on the fourth amendment contend that obtaining bodily fluids for blood alcohol testing constitute an unreasonable search. The taking of a blood sample is especially open to such attack since it involves an actual intrusion into the body. The *Schutt* court looked at the blood test as a search incident to a lawful arrest. On that basis it found the search outside the fourth amendment protections from unreasonable searches since it interpreted the amendment to protect only against warrantless searches or searches made without lawful arrest.

72. 384 U.S. 757 (1966).

73. The *Schmerber* court regarded the blood test as a fourth amendment search. *Id.* at 767-70. Since the decision, a number of courts have interpreted *Schmerber* to allow states to freely compel drivers to submit to chemical tests for intoxication with or without a lawful arrest. See, e.g., *State v. Mitchell*, 245 So.2d 618 (Fla. 1971) (blood tests may be taken in cer-

become important factors when considering the new statute's permissiveness on testing dead or unconscious persons.

The new Illinois statute,<sup>74</sup> in contrast to the old statute,<sup>75</sup> provides that dead or unconscious persons have not withdrawn their consent to be tested. Since *Schmerber* held that blood tests are not unreasonable searches, the position taken on dead or unconscious persons by the new statute is not constitutionally prohibited. Consent is not required for the testing so long as it is reasonable.<sup>76</sup> Thus, the new Illinois implied consent statute does not violate an accused's fourth amendment rights.

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tain cases without arrest); *State v. Macuk*, 57 N.J. 1, 268 A.2d 1 (1970) (there is a clear legal right to require a blood-alcohol test).

The *Schmerber* decision also acted to remove some of the doubt cast by *Rochin v. California*, 342 U.S. 165 (1952), with regard to searches below the skin. The *Rochin* Court found that a search of the stomach was a violation of due process and that it was similar to a coerced confession. *Id.* at 173. Although the *Schmerber* Court found the blood test to be a fourth amendment search, it found that the search was reasonable. *Schmerber v. California*, 384 U.S. 757, 769 (1966). Consent was not required and the failure to obtain a search warrant was excused because alcohol content subsides quickly after the suspect stops drinking, thus creating exigent circumstances. *Id.* at 770-71.

One note of importance is that the *Schmerber* court rejected the stance taken by the New York court in *Schutt* finding that blood tests could not be justified merely as incident to a lawful arrest. *Id.* at 769-70. Tribe has noted that although certain compulsory intrusions of the body have been upheld, the matters have been taken with enough seriousness to require that the government provide more than the minimal justification for the action. He outlines four factors which may lead to a finding of an unlawful search: "1) that the imposition was deficient in procedural regularity, or 2) that it was needlessly severe, or 3) that it was too novel, or 4) that it was lacking in a fair measure of reciprocity." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 15-9 (1978).

Thus, full searches of the person are valid when made incident to a lawful arrest. Waiver of fourth amendment rights and consent to a search may also be obtained. Where consent is sought, the waiver of fourth amendment rights must be voluntary and must be given by a person having the capacity to consent. See J. KLOTTER, J. KANOVITZ, *CONSTITUTIONAL LAW FOR POLICE*, §§ 4.8-4.9 (3d ed. 1977). See also Lerblance, *Implied Consent to Intoxication Tests: a Flawed Concept*, 53 ST. JOHN'S L. REV. 39 (1978) which points out that the "knowing and intelligent waiver" standard applies to trial rights and that a standard of "voluntary waiver" applies to other rights. This article also provides an excellent discussion of the capacity of an intoxicated person to consent to a blood-alcohol test. *Id.* at 49-60.

74. P.A. No. 82-311, § 11-501.1(b) (1981).

75. ILL. REV. STAT. ch. 95 1/2, § 11.501.1(e) (1979). See *supra* note 30 and accompanying text.

76. Prior to its holding in *Schmerber*, the Supreme Court, in *Briethaupt v. Abram*, 352 U.S. 432 (1957), found that a blood test conducted on an unconscious driver did not violate fourteenth amendment due process. *Briethaupt* was distinguished from *Rochin* in that a blood test was found to be a minor intrusion of the body to which many people voluntarily subjected themselves daily.

Two concepts converge in an implied consent statute. There is the idea that no consent need be obtained to take a blood-alcohol test where such test is incident to a lawful arrest. By this theory, implied consent statutes could be written making blood-alcohol tests mandatory for all persons ar-

### Right to Counsel

Another major change in the new Illinois statute is the deletion of the 90 minute waiting period during which an accused may consult with his attorney. Although the new statute does not specifically deny the accused contact with his attorney, it is silent on this point.<sup>77</sup> The old statute required an arresting officer to inform the accused that he could consult with an attorney.<sup>78</sup> The question whether implied consent is reached by the sixth amendment right to counsel has never been addressed by the Supreme Court.<sup>79</sup> Cases regarding the right to counsel do not clearly indicate which way the Court would go on this issue.<sup>80</sup>

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rested for driving while intoxicated. The wording of statutes such as the one in Illinois, however, do not make these tests mandatory. If the view is taken that the tests are searches, then the statutes treat them not as searches incident to a lawful arrest but as those taken upon consent to a waiver of rights. Consent would not be obtained for a search incident to lawful arrest. As has been noted, waiver must be voluntary. Since a dead or unconscious person cannot consent or refuse a blood-alcohol test, it is difficult to see how they can be deemed not to have withdrawn consent. Even if the tests are considered searches incident to a lawful arrest, it is difficult to justify clauses such as § 11-501.1(b) since a lawful arrest cannot be made on a dead or unconscious person.

77. P.A. No. 82-311, ch. 95 1/2, § 11-501.1 (1981).

78. ILL. REV. STAT. ch. 95 1/2, § 11-501.1(a)(3) (1979).

79. The court granted certiorari in *Washington v. Fitzsimmons*, 449 U.S. 977 (1980), but failed to reach the question whether the right to counsel was required immediately upon arrest under an implied consent statute. It vacated the judgment on the ground that it was unable to determine whether the state decision was based on state or federal constitutional grounds, or both.

The state court had held that an indigent drunk driver must be provided access to counsel promptly upon his arrest. *State v. Fitzsimmons*, 93 Wash. 2d 436, 610 P.2d 893 (1980). The Washington court followed its earlier decision in *Tacoma v. Heater*, 67 Wash. 2d 733, 409 P.2d 867 (1966), where it was held that a person arrested for drunk driving immediately faces a critical stage of the proceeding because evidence of sobriety may be obtained for only a short time after arrest. *State v. Fitzsimmons*, 93 Wash. 2d at 442-43, 610 P.2d at 897.

80. The trend has been to extend the right to counsel well beyond the right to counsel at trial. The concept of counsel being required at critical stages of prosecution is now the norm. The decision whether to submit to a blood alcohol test *must* be deemed a critical stage in an implied consent prosecution. The evidence obtained at this stage may be all that is necessary to convict a driver under the statute. Thus, the blood alcohol test becomes the focal point of the entire prosecution. The weighing of all of the consequences of refusal versus non-refusal is thus critical and merits the right to counsel.

The right to counsel has been expanded beyond the right to counsel at trial.<sup>81</sup> Today, the right to counsel during a critical stage of prosecution,<sup>82</sup> preindictment situations,<sup>83</sup> verbal self-incrimination, and nonverbal matters such as participation in line-ups,<sup>84</sup> is recognized and protected. In *Gerstein v. Pugh*,<sup>85</sup> the Supreme Court identified what constitutes a critical stage: "those pre-trial procedures that would impair defense on the merits if the accused is required to proceed without counsel."<sup>86</sup> Certainly the decision whether to consent to a blood alcohol test would be considered a critical stage under this interpretation.<sup>87</sup>

If the Supreme Court does make such a finding it will not directly impair the Illinois statute. The statute itself does not deny counsel. Police agencies should be forewarned, however, that the new statute's deletion of the 90 minute waiting period does not mean that counsel cannot be contacted by the accused driver. A denial of a request to contact an attorney may result in an exclusion of any blood-alcohol evidence obtained.

#### *Admission of Evidence of Refusal*

The final major change in the new Illinois statute concerns the use of evidence of a refusal to submit to a blood alcohol test. While there is clear authority that the taking of a blood alcohol test is not self-incrimination under the United States Constitution,<sup>88</sup> case law is not so clear with regard to the use of evidence

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81. See e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to counsel at custodial interrogation); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (right to counsel prior to indictment); *Massiah v. United States*, 377 U.S. 201 (1964) (right to counsel in preparation for trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (right to counsel at arraignment).

82. See *Hamilton v. Alabama*, 368 U.S. 52 (1961), where the Court found a right to counsel existed at a crucial stage of prosecution. In this case, arraignment was found to be a critical stage since it was a point where valuable defenses could be lost if the accused were not given benefit of counsel.

83. *Escobedo v. Illinois*, 378 U.S. 478 (1964) (the accused must be provided counsel whenever the police process shifts from investigatory to accusatory).

84. *United States v. Wade*, 388 U.S. 218 (1967) (the line-up is a critical stage and the accused has a right to counsel since absence of counsel may derogate the accused's right to a fair trial).

85. 420 U.S. 103 (1975).

86. *Id.* at 122 (citations omitted).

87. Since the results of a blood test can be the determining factor of whether the accused is convicted, the testing itself can hardly be deemed less than a critical stage of prosecution.

For a further discussion of "critical stage" analysis, see Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935 (1980).

88. *Schmerber v. California*, 384 U.S. 757 (1966) (the fifth amendment protects only against being compelled to testify or give oral evidence against oneself).



of a refusal. A refusal usually requires a verbal statement.<sup>89</sup> Since the purpose of using evidence of a refusal at any but a presuspension hearing is to create an inference that the accused knew he was drunk and so refused to allow confirmation by testing, the verbal refusal appears to act as self-incrimination.

A majority of courts, however, have held that evidence of a driver's refusal to be tested is an admissible nontestimonial act.<sup>90</sup> The reason for the holdings have varied. The Second Circuit reasoned that the state could condition the right to refuse on admission of the refusal into evidence.<sup>91</sup> Other courts have held that the implied consent statutes do not extend a right to refuse, but merely recognize the power to refuse so that admission of the evidence is not precluded.<sup>92</sup>

Other jurisdictions, however, have found that submission of a refusal into evidence violated the fifth amendment.<sup>93</sup> In *Schmerber*, the Supreme Court warned that its holding did not render admissible statements made by defendants in response to police attempts to secure chemical tests.<sup>94</sup> Decisions which find submission of evidence of a refusal violative of the fifth amendment see such communications as just the type of statements referred to in *Schmerber*.<sup>95</sup>

The Supreme Court has refused to review this area.<sup>96</sup> An analogy to decisions based on the admittance of evidence of re-

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89. *Johnson v. Dennis*, 187 N.W.2d 605 (Neb. 1971) (a refusal may also be made by total silence upon the request to submit to testing).

90. *See, e.g., Welch v. District Court*, 594 F.2d 903 (2d Cir. 1979) (right of refusal conditioned on state's correlative right to introduce evidence of that refusal); *Campbell v. Superior Court*, 106 Ariz. 542, 479 P.2d 685 (1971) (refusal to submit is not testimonial communication and comment on refusal does not violate right against self-incrimination).

91. *Welch v. District Court*, 594 F.2d 903, 905 (2d Cir. 1979). *See also State v. Brean*, 136 Vt. 147, 385 A.2d 1085 (1978) (right to refuse is a matter of legislative grace so the right can properly be conditioned on use of a refusal as evidence).

92. *See, e.g., Campbell v. Superior Court*, 106 Ariz. 542, 479 P.2d 685 (1971) (where no statutory right to refuse a test exists, comment on such refusal is admissible evidence).

93. *See Johnson v. State*, 125 Ga. App. 607, 188 S.E.2d 416 (1972) (introduction of evidence of refusal is reversible error); *State v. Andrews*, 297 Minn. 260, 212 N.W.2d 863 (1973), *cert. denied*, 419 U.S. 881 (1974) (admission of evidence which permits a jury to infer that a defendant had refused to submit to chemical testing constitutes prejudicial error); *Dudley v. State*, 548 S.W.2d 706 (Tex. Crim. 1977) (fifth amendment principles including *Miranda* apply to proof of a refusal to be tested).

94. *Schmerber v. California*, 384 U.S. 757 (1966).

95. *E.g., Dudley v. State*, 548 S.W.2d 706 (Tex. Crim. 1977) (any communication which involves accused's consciousness of facts and operations of his mind in expressing it is testimonial and communicative in nature).

96. *Thomas v. New York*, 444 U.S. 891 (1979), *dismissing appeal from* 46 N.Y.2d 100, 385 N.E.2d 584, 412 N.Y.S.2d 845 (1978) (White & Brennan, JJ., dissenting); *State v. Andrews*, 297 Minn. 260, 212 N.W.2d 863 (1973), *cert. de-*

fusal to give other forms of nontestimonial evidence can be made. The trend of the majority permits the admittance of the refusal as evidence.<sup>97</sup> Given this trend, the Illinois implied consent statute should survive Supreme Court scrutiny.<sup>98</sup>

#### CONCLUSION

The original Illinois implied consent statute admirably contained numerous provisions to protect the rights of the accused driver. This is evidenced by the fact that no serious constitutional attacks were made on the statute.<sup>99</sup> Although the new Illinois statute has deleted many of the affirmative protections of the accused's rights, it has adopted the structure of other constitutional statutes in neighboring states.

There are a number of provisions which may be problematic, requiring alteration of the new Illinois statute: the question of self-incrimination rights under the Illinois Constitution; the right to counsel; and whether evidence of a refusal to be tested will be admissible under the fifth amendment. These three areas are likely to be the targets of early attacks on the new statute.

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nied, 419 U.S. 881 (1974). See *supra* note 78 for other areas where the Supreme Court has refused review.

97. See *supra* note 88.

98. Should the Supreme Court encounter this issue, it will be faced with two theories. First, the position taken by the majority of courts is that the act of refusing or not refusing is merely a part of a process which does not fall under fifth amendment protections. Since the testing procedure itself is not encompassed by the fifth amendment, evidence as to what occurs during the procedure, including evidence of verbal statements of refusal is admissible. Second, the theory taken by some courts is that although the procedure of blood-alcohol testing is not protected by the fifth amendment since it is a non-communicative process, refusal to be tested is a communication which should be protected under the fifth amendment. Although the majority of courts adhere to the first theory, prosecutors must not forget the Supreme Court's dictum in *Schmerber* regarding statements made by defendants in response to police attempts to secure tests. The real question will be whether the Supreme Court will follow the majority trend, distinguishing its remarks in *Schmerber*, or whether it will reiterate its *Schmerber* remarks and apply them specifically to the refusal to submit.

99. In fact, the most serious constitutional threat that the implied consent statute faced was not a direct attack on the statute but an attack on the Secretary of State's power to suspend or revoke a license or permit under ILL. REV. STAT. ch 95 1/2, § 6-206(a) (1979). The United States Supreme Court, in *Dixon v. Love*, 431 U.S. 105 (1977), upheld the Illinois practice of suspending or revoking a license without a preliminary hearing. The Court held that since the law also required that a hearing be provided to the licensee if he so requested, due process was not violated. Since the structure of the implied consent statute was similar to the revocation statute with regard to the suspension of a license for refusal to be tested, this case, though not a direct attack on implied consent, has strong implications for the validity of the implied consent statute.

The deletion of many of the provisions of the original implied consent statute does not render the new statute either useless or unconstitutional. First, from an enforcement standpoint, the new law is substantially workable.<sup>100</sup> The difficulties in implementing the old statute led to ineffective results and cries for change.<sup>101</sup> Since the new statute is easier to use, arrests for DWI should increase. An increase in the number of arrests is

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100. Because the new statute deletes the 90 minute waiting period before a blood-alcohol test can be taken and requires only one test to be performed instead of two, the time required for making a DWI arrest is greatly reduced. This may have a dual affect. First, smaller law enforcement agencies that have not been able to afford the time necessary to make a DWI arrest are more likely to use the new law. Second, where an agency might have had time to make only one DWI arrest during a particular tour of duty, it may now be able to make multiple arrests.

The deletion of the second test makes the new statute more workable in another context. Under the old statute, the breathalyzer was used. An arrestee was able to see the results of his first test immediately. For the testing to be admissible as evidence of the accused's intoxication, both tests had to be performed. Therefore, an accused drunk driver could see the results of his first test and then either consent or refuse to take the second test based on the first test's results. This meant that many refusals came after the first test. Because evidence of the results of the blood-alcohol test is important to the obtaining of a conviction, many convictions were lost. The new statute is thus more workable in the area of obtaining convictions.

101. In 1969 there were 297,268 arrests for drunk driving nationwide. By 1980 that number had risen to over one million. United States Dept. of Justice, *1980 Sourcebook*. In 1976, there were a total of 39,452 fatal motor accidents nationwide. Of the driver's in those accidents 13,446 were tested for blood-alcohol concentrations (BAC). United States Dept. of Trans., *Fatal Accident Reporting System: 1976 Annual Report* at 3, 88. Out of this number 603 drivers were from Illinois. Over 57% of the Illinois drivers tested above the .10% BAC level. *Id.* In 1979, 679 drivers killed in Illinois were tested for BAC levels. Of these, 54% tested above the .10% BAC level. Illinois Dept. of Trans., *1979 Accident Facts* at 2, 13. Since the 1976 figures included drivers who were killed, injured, or not harmed, and the 1979 figures were only for drivers killed, it is fair to speculate that were the additional statistics included in the 1979 figures they would show alcohol played a part in well over 54% of Illinois accidents. Because the purpose of the Illinois implied consent statute was to reduce the number of drunk drivers and thus the number of alcohol related accidents, it is clear that the Illinois statute has not been effective.

Further evidence of the ineffectiveness of the old statute is illustrated by the fact that in 1971, the year prior to the enactment of the implied consent statute, there were 15,000 convictions for drunk driving in Illinois. By 1979 that number had dropped to 9,000. At the same time, the number of licensed drivers had increased by 17%. In the City of Chicago, arrests dropped from 14,179 in 1972 to 4,611 in 1979. The conviction rate dropped by more than 50%. See *The Chicago Tribune*, January 4, 1981, at 12, col. 1. While there was a drop in convictions there was an increase in the number of refusals to be tested for blood-alcohol. This number went from 21% of all arrests in 1972 to 47% in 1979. *Id.*

On a nationwide basis, there has been a steady increase in the number of DWI arrests since implied consent statutes were first required. See United States Department of Justice, *Crime in the United States, 1976-1980*; United States Dept. of Justice, *1980 Sourcebook*.

the first step in making this new statute effective.<sup>102</sup>

The second step in making this new statute successful is to ensure that the arresting agencies and the courts apply the sanctions set forth in the statute itself.<sup>103</sup> There is a minimal deterrent factor if an accused knows he will be able to escape the full consequences of his drunk driving, but he is very likely to think twice about driving drunk if he knows he can feel the full impact of the implied consent sanctions.<sup>104</sup>

The ingredients of a successful statute, including ease of application and strong sanctions, are found within the four corners of the new statute. If properly used by law enforcement agencies and courts, the new statute has a high probability of being successful in removing drunk drivers from Illinois highways. This will reduce the number of motor vehicle fatalities and injuries, benefitting all who venture out on our roadways. With this new statute, the innocent motorist or pedestrian will be safer in his travels.

*Katharine Hill*

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102. The changes which have been made in the Illinois implied consent statute have been demanded for some time. See Syer, *The Illinois Implied Consent Law: Reality and Reform*, 63 ILL. BAR J. 276 (1979). See also The Chicago Tribune, January 4, 1981, at 1. Other commentators, however, would do away with implied consent entirely. See generally Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935 (1980).

Additionally, although the need for only one chemical analysis of blood-alcohol concentrations has long been espoused, there is some evidence that such tests are inherently invalid. For a further discussion of this aspect, see E. Fitzgerald & D. Hume, *The Single Chemical Test for Intoxication: A Challenge to Admissibility*, 1981 MASS. L. REV. 23.

103. P.A. No. 82-311, ch. 95 1/2, §§ 11-501(c)--11-501.1(c). If convicted of drunk driving, the driving privileges of the driver are to be revoked. Additionally, the offense of drunk driving is a Class A misdemeanor with a possible sentence of up to one year in jail. The penalties for refusal to be tested have been increased to a six month suspension for a first refusal and a one year suspension for a subsequent refusal within five years.

104. Both plea bargaining and court supervision are regularly used in DWI cases. Although these remedies are normally appropriate in other facets of the law, over use in DWI cases make implied consent useless as a deterrent. In both situations a drunk driver is able to leave the courtroom without any evidence of a DWI arrest on his record. Consequently, the drunk driver can be arrested time and time again without being held to the stricter penalties allowed for repeat offenders. The repeat offender becomes aware that he will not have to face the full consequences of his violation and thus drives drunk again. Therefore, the whole purpose of the statute is defeated.

An important result of drunk driving arrests is the identification of serious problem drinkers. For this portion of the drunk driving population, the sanctions provided in P.A. No. 82-311 are not enough. In these situations, other referral programs are necessary. For an outline of Illinois referral programs for the problem drinker, see Illinois Dept. of Trans., *Illinois Alcohol Countermeasures Program DWI Court Referral Projects*, (1974).

