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Recent Legislation

DRIVING WHILE INTOXICATED — IMPLIED CONSENT STATUTE IN OHIO


The societal climate of the United States has for the past several generations fed upon cliches and epithets to such an extent that the average citizen will utter them without thinking. Two of the most popular (and alternately juxtaposed) are, "When you drink, don't drive," and, "Come on, have one more for the road." Obviously a balance must be sought between the two positions which these statements represent in order to ensure the greatest possible protection of the public welfare and still conform to the prevalent mores and social habits of the citizenry.

The Ohio legislature has recently attempted to strike that needed balance by enacting an "implied consent" statute which, briefly stated, provides that any operator of a motor vehicle on the public highways of Ohio who has been arrested on reasonable grounds for driving while under the influence of alcohol is deemed to have given his consent to submit to a chemical test for a determination of the alcohol content in his bloodstream. If, after a request by police officials and a warning of the consequences upon failure to comply with such request, the operator refuses to take the test, his driver's license shall be revoked for a period of six months. Significantly, under this statute license revocation is an administrative proceeding, totally divorced from the criminal charge of driving while under the influence of alcohol. Thus,


2 The procedure to be followed upon a motorist's refusal to submit to a chemical test is distinctively administrative. CODE section 4511.19.1 provides:
mere refusal to submit to a chemical test will subject the motorist to loss of his license, irrespective of the outcome of the criminal

(D) No chemical test shall be given, but the registrar of motor vehicles, upon the receipt of a sworn report of the police officer that he had reasonable grounds to believe the arrested person had been driving under the influence of alcohol and that the person refused to submit to the test upon the request of the police officer and upon the receipt of the [written form, shown and read to the arrestee and signed by a witness] certifying that the arrested person was advised of the consequences of his refusal, shall revoke his license or permit to drive, or any nonresident operating privilege for a period of six months; or if the person is a resident without a license the registrar shall deny to the person the issuance of a license for a period of six months after the date of the alleged violation.

(E) Upon revoking the license or nonresident operating privilege or upon determining that the issuance of a license shall be denied the registrar shall immediately notify the person in writing and upon his request afford him an opportunity for a hearing in the same manner and under the same conditions as is provided in the cases of discretionary suspension of licenses, except that the scope of such hearing for the purposes of this section shall cover the issues of whether a police officer had reasonable ground to believe the person had been driving while under the influence of alcohol, whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer, and whether he was advised of the consequences of his refusal. The registrar shall order that the revocation or determination that there should be a denial of issuance be rescinded or sustained.

(F) If the revocation or denial of issuance is sustained after such a hearing, the person may file a petition in the municipal court or the county court, or in case such a person is a minor in the juvenile court, to review the final order of revocation or denial by the registrar in the same manner and under the same conditions as is provided in the cases of discretionary revocations and denials of drivers' licenses. Id. (emphasis added).

A recent amendment to the criminal statute penalizing a person for driving while under the influence of alcohol, also effective January 1, 1968, complements the implied consent law and must be read in conjunction with it. This amendment, commonly referred to as a presumptive statute, provides that if the analysis of a chemical test reveals a concentration of less than fifteen hundredths of one percent by weight of alcohol in a driver's bloodstream no presumption of intoxication shall arise but the fact may be considered in a criminal prosecution. If the concentration, however, is fifteen hundredths or more, "it shall be presumed that the defendant was under the influence of alcohol." In addition, certain conditions are prescribed as prerequisites to the conclusiveness of the presumption: the evidence of a chemical analysis is admissible in a criminal prosecution only if the analysis was taken within two hours of the alleged violation; the analysis itself must be made under prescribed methods by one possessing a valid permit issued by the State Director of Health; the arrestee must be advised that he may have his own additional test taken; and, upon his request, the completed results of the state's chemical analysis must be made available to him. While only a physician or registered nurse may withdraw blood, a breath test or urinalysis may be given by anyone authorized by the state to do so. Code § 4511.19. Note the difference between one who may give a test and one who may analyze the test results.

Thus, the above restrictions may be understood as limitations upon the "implied consent" procedure which must be followed in requesting an arrested motorist to submit to a chemical test. Police must strictly adhere to these limitations in order to enable the registrar to make a valid license revocation under the implied consent statute.
proceedings before a court. Such a double-edged sword (that is, both criminal and administrative sanctions) provides the police and judicial systems with a powerful instrument of control and must have been prompted by the immediacy of the problem presented by the drinking driver.

Although statistics may at times be helpful, they need not here be cited to support the proposition that a motorist under the influence of alcohol renders his automobile a dangerous instrumentality. The National Safety Council has for many years considered him to be one of the major problems with which the courts and law enforcement agencies are faced, and the need for regulation in this area should perforce be accepted without argument. Of course, the immediate concern of the police in dealing with this problem is to obtain evidence and proof of the motorist's condition at the time of arrest in order to secure the maximum number of criminal convictions. On the other hand, any workable system of regulation must balance the personal rights of drivers against the public welfare while staving off police abuse of the available methods for obtaining evidence. To strike such a balance is not an easy task, but the authorities are well in accord that attempts should be built around legislation which sets forth

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3 Acquittal on the criminal charge does not affect the validity of the administrative revocation. Finocchiaro v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, cert. denied, 370 U.S. 912 (1962); Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961). Indeed, it has been held that a license revocation is valid under the implied consent provision even though a motorist who was arrested for driving under the influence was never prosecuted criminally on that charge. Bowers v. Hults, 42 Misc.2d 845, 249 N.Y.S.2d 361 (Sup. Ct. 1964). The rationale behind the holding, that a license may be revoked either with or without a criminal prosecution, is that the revocation is a civil proceeding the sole purpose of which is to determine whether the petitioner acted reasonably in refusing to submit to the test as a prerequisite to the privilege of using the state's highways. Marbut v. Motor Vehicle Dep't of Highway Comm'n, 194 Kan. 620, 400 P.2d 982 (1965). There are no problems of procedure, collateral estoppel, or res judicata because of the complete separation and independence of the administrative license revocation. See Gottschalk v. Sueppel, 258 Iowa 1173, 140 N.W.2d 866 (1966); State v. Muzzy, 124 Vt. 222, 202 A.2d 267 (1964). See generally Annot., 88 A.L.R.2d 1064 (1963), for the proposition that this is the majority position taken in the states which have enacted implied consent statutes.


5 See LaPlante, Alcohol Testing: Some Recent Decisions Dealing With Implied Consent Statutes, 59 CONN. B.J. 72, 79-80 (1965); 11 CLEV.-MAR. L. REV. 101 (1962). Also worthy of mention is the fact that the amount of fines which are imposed upon motorists convicted of driving while under the influence of alcohol may substantially increase suburban treasuries, thus providing an added incentive for the municipal police and courts to obtain convictions.

6 Tao, Drunkenness and Criminal Law, 13 WAYNE L. REV. 530, 537 (1967).
a maximum permissible level of alcohol in a driver's bloodstream, as determined by chemical tests, and which provides a proper procedure for obtaining such evidence.\(^7\)

Given the fact that chemical testing is a reliable source of evidence,\(^8\) the problem for the police has been to persuade a person arrested for driving while intoxicated to submit to the testing procedure.\(^9\) Although it has been emphasized that chemical tests should not be the sole basis for arriving at a determination that a driver was under the influence of alcohol,\(^10\) the fact remains that such evidence eases the burden on the state in its attempt to prove a violation. Case law in Ohio under the old statute, which provided neither for implied consent and revocation for refusal nor for submission into evidence of chemical results and a rebuttable presumption of being “under the influence” at a certain alcohol percentage evaluation,\(^11\) amply illustrates the tribulations of the prosecutor.\(^12\)

\(^7\) Penner, supra note 4, at 78. Concerning the personal rights of the motorist, the author stated the view of the Conference: “There was almost no discussion on this subject since in most countries ... it would appear that they had accepted that the personal rights of irresponsible citizens must be forfeited in relation to drinking and driving for the protection of society.” Id. (emphasis added). Mandatory submission to chemical testing, or revocation of licence in lieu thereof, falls into that category of forfeiture. Experts, however, find little wrong with this minor infringement on personal rights; for chemical analysis is considered very valuable and test results may provide exculpatory as well as inculpatory evidence. R. DONIGAN, supra note 4, at 8-12; Slough & Wilson, Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing, 44 MINN. L. REV. 673, 678 (1960). In addition, careful study and regulation of the permissible level of alcohol as an evidentiary matter will do much to ease the degree of infringement. Cf. Forey, Symposium, Breath Alcohol Tests, 5 TRIAL LAW GUID books 1, 15 (1961).

\(^8\) Although prior to the passage of the recent statutes, Ohio courts were reluctant to accept such a conclusion (see note 12 infra), the Ohio Supreme Court in July 1968, asserted its willingness to follow the trend in other jurisdictions and held that chemical tests provided reasonably reliable evidence for proof of intoxication. City of Westerville v. Cunningham, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968).

\(^9\) Comment, 51 MICH. L. REV. 1195, 1197 (1953).

\(^10\) This is the view taken by the National Safety Council and followed almost universally by the courts. See Slough & Wilson, Legal By-Products of Chemical Testing for Intoxication, 11 CLEV.-MAR. L. REV. 1, 7 (1962). The law must depend for the most part on behavior observations of the allegedly intoxicated motorist to provide proof. Since these at times may be easily contradicted on cross-examination by an alert attorney, chemical tests have been employed mainly to supplement and substantiate the inferences drawn from the motorist’s behavior. Tao, supra note 6, at 540.

\(^11\) See note 2 supra.

\(^12\) In City of Cuyahoga Falls v. Mikolajczyk, 90 Ohio L. Abs. 28, 187 N.E.2d 197 (Cuyahoga Falls Mun. Ct. 1962), the question before the court concerned the quantum of weight to be attributed to the results of a breathalyzer test that had revealed an alcohol percentage of 0.15 in defendant’s bloodstream, which under the new law would be sufficient to raise a rebuttable presumption of intoxication. Not only did the
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Now, however, the Ohio legislature has at last recognized the inability of the police and the courts to cope with the problem, and it has designated the implied consent and presumptive statutes as the implements to aid them in the regulation of drinking drivers. Alternatives to these types of statutes have been proposed by several authors; but these proposals, like the old Ohio law, appear court refuse to take judicial notice of the scientific reliability of chemical testing, but it also held that "where the results of a test conducted to determine the percentage of alcohol in a defendant's bloodstream are not explained by a competent witness, such results are of no probative value and should be disregarded by the trier of facts." 90 Ohio L. Abs. at 32, 187 N.E.2d at 200.

Earlier it had been held in Ohio that it was error for the court to give instructions to the jury on the use of chemical testing devices and the manner in which they are to be interpreted. State v. Minnix, 101 Ohio App. 35, 157 N.E.2d 572 (1956). Furthermore, some courts were of the opinion that a certain percentage of alcohol in the bloodstream did not prove that a motorist had been driving under the influence; and since a court could not take judicial notice of the significance of chemical analysis, the jury without the aid of expert testimony should not be allowed to speculate concerning the inferences to be drawn from the results of such analysis. See Parton v. Weilmay, 169 Ohio St. 145, 158 N.E.2d 719 (1959). On the other hand, progressive courts in different county jurisdictions had held that the instructions by a judge to the jury on the effects of alcohol in the bloodstream were not erroneous when it was specifically left for the jury to determine the issue of intoxication from all the evidence, of which the test results were only a part. State v. Titak, 75 Ohio L. Abs. 430, 144 N.E.2d 255 (Ct. App. 1955).

While lamenting the fact that Ohio, unlike many states, still had no statute creating a presumption of intoxication at 0.15 percent, the Mikolajczyk court nevertheless felt constrained to follow the Ohio precedent which required an expert witness to testify as to the meaning of the test results. Significantly, there existed an obvious reluctance on the part of the court "to invade the province of the duly elected legislature." City of Cuyahoga Falls v. Mikolajczyk, 90 Ohio L. Abs. at 30, 187 N.E.2d at 198.

In the usual case, the person who conducted the test testifies as to its manner of taking, and a second expert witness then interprets the results for the benefit of the trier of the facts. . . . The presumptive statutes mentioned above have been enacted to eliminate the necessity of calling the expert witness to interpret the tests. Id.

In one minority case, an Ohio court deemed it permissible to take judicial notice of the results of a urinalysis test and did not require expert testimony as to the effects of 0.40 percent of alcohol in the bloodstream. State v. Szeleyk, 91 Ohio L. Abs. 6, 191 N.E.2d 238 (Oberlin Mun. Ct. 1963). This court, however, did so expressly because it was sitting without a jury; and it still demanded testimony and proof of the defendant driver's behavior and condition at the time the test was taken. It is submitted that even now, under the new Ohio statutes, the courts will similarly require proof of behavior.

One such proposal has been to make written consent to take a chemical test a condition precedent to obtaining a driver's license. Haines, Let's Impose a Limit on Drinking and Driving, 3 Crime L.Q. 60, 62 (1960). Another alternative would be a random sampling of highway drivers, much like a safety inspection check, in which police officials would stop motorists and force them to submit to a breathalyzer analysis. If the alcohol concentration were above a minimum specified level, the police would impound the driver's automobile and merely take him home. If caught in this manner three or more times, the driver would have his license suspended by local officials until he came into a health center for treatment as a problem drinker. Crampton, The Drinking Driver: What Legal Controls?, 12 Law Quad. Notes 8, 10 (Univ. of Mich., 1967).
to be impractical and geared more toward perpetuating the problem than controlling it. Indeed, it seems that the implied consent statute, properly employed, may itself be the best contribution to date for protecting the public and deterring the social drinker from driving.\textsuperscript{14}

It is, therefore, appropriate to examine not only the theory behind such a statute but also its constitutional ramifications. The Supreme Court has upheld the validity of the implied consent theory, in tort situations, as nonviolative of 14th amendment due process of law.\textsuperscript{15} Although it is clear now, as it probably was in 1927 when Hess v. Pawloski was decided, that “implied consent” is really a fiction,\textsuperscript{16} the rationale behind the theory has acquired no disfavor in the courts and is still valid law.\textsuperscript{17} Furthermore, aside from constitutional questions concerning the Bill of Rights, a strong a fortiori argument for the validity and policy of Ohio’s implied consent statute can be made by comparing it with the circumstances of the Hess case. In this case the Court stated:\textsuperscript{18}

Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attenuated by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. . . . Under the statute the implied consent is limited to proceedings growing out of accidents or collisions [growing out of driving while allegedly under the influence of

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The first of the above alternatives fails to take into account the large number of nonresident drivers with which a state must cope. It is to be noted that Ohio’s implied consent law covers nonresident drivers. See Code § 4511.19.1(A)(D). The second alternative above not only would necessitate a cost prohibitive in its administration but also would never succeed in deterring the drinking driver.

\textsuperscript{14} Revocation under the implied consent statute may be viewed as a valuable alternative sanction when the criminal charge of driving while under the influence of alcohol cannot be proven because of the lack of chemical analysis as evidence. See People v. Wagonseller, 25 Misc. 2d 217, 205 N.Y.S.2d 933 (Plattsburg Mun. Ct. 1960). Moreover, the implied consent and presumptive provisions can be enforced as a limitation upon driving habits in much the same manner as a speed limit would be enforced. Cf. Smith, Drinking and Driving, 3 Crim. L. Q. 65, 125 (1960).

\textsuperscript{15} Hess v. Pawloski, 274 U.S. 352 (1927). The case involved a state statute which provided that a nonresident, by acceptance of the privilege of driving on the state highways, impliedly consented to an appointment of the state registrar to receive service of process for him. Such a statute was said to be a valid exercise under the police power of the state to regulate driving for the public welfare. Id. at 356.


\textsuperscript{18} In order to better illustrate the comparison, the writer has taken the liberty of inserting in brackets the applicable facts of implied consent to take a chemical test.
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alcohol] on a highway in which a non-resident [or resident] may be involved.¹⁰

The view that driving is a privilege — not a right — and therefore subject to reasonable regulation under the state's police power has long been the judicial opinion in Ohio,²⁰ as well as in other jurisdictions.²¹ State legislation authorizing chemical tests need only meet the constitutional requirements of due process as embodied in the provisions of the 14th amendment. Moreover, to meet these requirements it is demanded of a legislature "only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."²² Guided by these standards, state courts have consistently held implied consent statutes, similar to the new one in Ohio, to be consonant with constitutional due process of law.²³

¹⁰ 274 U.S. at 356. The last quoted sentence was presented as an argument for the reasonableness and lack of discrimination in the statute itself.

²⁰ See Ragland v. Wallace, 80 Ohio App. 210, 70 N.E.2d 118 (1946). This view stems from the Supreme Court's holding in Hess. Due to Ohio's understandable desire that only qualified drivers be permitted on its highways, any demand upon a motor vehicle operator which is reasonable must be upheld under the inherent police power of the state. City of Cuyahoga Falls v. Church, 10 Ohio App. 2d 9, 225 N.E.2d 274 (1967).

²¹ See, e.g., Escobedo v. California Dep't of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950); Dempsey v. Tyman, 145 Conn. 202, 120 A.2d 700 (1956); Gibson v. Scheidt, 259 N.C. 339, 130 S.E.2d 679 (1963); State v. Seraphine, 226 Wis. 118, 62 N.W.2d 403 (1954). Since licensing is a privilege subject to the police power of the state, there need be no notice to the violator or adjudicatory hearing prior to revocation of a driver's license. Blydenburg v. David, 413 S.W.2d 284 (Mo. 1967).

²² Nebbia v. New York, 291 U.S. 502, 525 (1934). Although it must be noted that the Court was not concerned with the police power of the state to regulate driving, the substantive due process analysis applies equally applicable to the implied consent situation. The police power of the state to regulate pool hall licenses — a fortiori, driver's licenses — has been upheld in Ohio under the Nebbia guidelines. Feinstein v. City of Whitehall, 93 Ohio L. Abs. 353, 198 N.E.2d 479 (C.P. 1964). The maxim upon which the court declared state police power must ultimately rest appears particularly appropriate in judging the legislature's determination that an implied consent statute is the proper means to deter drinking drivers: "Salus populi suprema lex." Id. at 356, 198 N.E.2d at 481 (this writer's translation, "the welfare of the people is the supreme law.").

²³ State v. Buek, 80 Idaho 296, 328 P.2d 1065 (1958); Lee v. State, 187 Kan. 566, 338 P.2d 765 (1961); Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961); Trimm v. State, 110 N.W.2d 359 (N.D. 1961); Stenstand v. Smith, 79 S.D. 651, 116 N.W.2d 653 (1962). Only the courts of New York, which was the first state to enact a statute providing for implied consent to submit to a chemical test for intoxication, have ever declared such a law unconstitutional. Sehutt v. Macduff, 205 Misc. 2d 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954). But once amended to provide for an arrest as a prerequisite to taking a test and more elaborate procedural requirements for the administrative hearing, this statute too was upheld as constitutional. Anderson v. Macduff, 208 Misc. 2d 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955). Moreover, the Supreme Court over a decade ago cited the Kansas implied consent
However, due to the increasing trend of the Supreme Court to incorporate provisions of the Bill of Rights into the 14th amendment, further constitutional questions remain unanswered. Does an implied consent statute violate the fourth amendment right to be free from unreasonable search and seizure, or the fifth amendment privilege against self-incrimination, or the sixth amendment right to the advice of counsel? Although the Court has never passed on these issues in relation to an implied consent statute, it may have supplied the answers in two cases which held that blood tests given to allegedly intoxicated motorists did not violate due process of law.

24 The fourth amendment, with its attendant exclusionary rule of wrongfully obtained evidence, was first made applicable to the states under the due process clause of the 14th amendment in Mapp v. Ohio, 367 U.S. 643 (1961). Similarly, the fifth amendment was held to govern the states in Malloy v. Hogan, 378 U.S. 1 (1964), and the sixth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963).

25 In Breithaupt v. Abrams, 352 U.S. 432 (1957), the Court reached its conclusions without regard to the Bill of Rights because the fourth, fifth, and sixth amendments had not yet been held to govern the states. The applicable standard at the time, therefore, was the subjective due process determination set forth in Rochin v. California, 342 U.S. 165 (1952): whether the circumstances of the case "shock the conscience of the Court" to such an extent that they must be deemed to have violated the 14th amendment. With this as a guideline, the Breithaupt Court stated: "To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more [i.e., without physical coercion or medically improper bloodtaking] does not necessarily render the taking a violation of a constitutional right. . . ." 352 U.S. at 435 (emphasis added). In a footnote to this passage, the Court elaborated further:

It might be a fair assumption that a driver on the highways, in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony. Id. at 435 n.2.

It was here that the Court went on to cite with approval the Kansas implied consent statute. See note 23 supra. In a later portion of the opinion, after observing that almost every state employed chemical tests in cases involving driving while alleged under the influence of alcohol, it was observed that [t]he fact that so many states make use of the test negates the suggestion that there is anything offensive [in the sense of violating due process] about them." 352 U.S. at 437 n.3. An evaluation by the Court of the breathalyzer test, urinalysis, or the saliva test would probably evoke a similar conclusion, since these are also used in almost every jurisdiction. But despite the fact that such inverse reasoning leaves itself wide open for attack in the circumstances of any given case, it is still doubtful that the Court will change its point of view on chemical tests. For the second of the two cases involving blood tests, Schmerber v. California, 384 U.S. 757 (1966), not only forthrightly refused to overrule Breithaupt but — in passing on the issue of whether the testing was so offensive as to violate the due process clause of the 14th amendment — also extended its reasoning to approve the constitutionality of forcing a motorist to submit to a blood test over his conscious objection. Id. at 760.

It should be noted here that Breithaupt — the easier of the two opinions to accept — has been incorporated into the Ohio implied consent provision insofar as
Schmerber v. California, the most recent and important of the two, dealt specifically with privileges guaranteed under the Bill of Rights. Although the Court found the taking of blood for chemical analysis to be a search and seizure within the meaning of the fourth amendment, it determined that even as such the test was not unreasonable under the circumstances of the case. Because there was probable cause to believe that the defendant had been driving under the influence of alcohol, and due to the necessity of conducting the test immediately, no search warrant was deemed necessary. It followed easily, then, that the "search" was incident to a proper arrest, and evidence in court of chemical analysis was not precluded by the fourth amendment.

More significant for purposes of analyzing the constitutionality of any implied consent statute, however, are questions arising under the fifth and sixth amendments. In Schmerber, the Court determined that the "evidence" taken from the defendant was merely physical, rather than testimonial or communicative, and hence his fifth amendment privilege against self-incrimination had not been violated. But the disposition from the bench was not it states that an unconscious motorist is deemed not to have withdrawn his consent. CODE § 4511.19.1 (B). Also, regardless of the fact that the Bill of Rights has been partially incorporated into the 14th amendment, it actually appears that Rochin's "shock the conscience" test — albeit sub silentio — remains with us today.

28 384 U.S. at 757 (1966). Due to the necessity of testing immediately the alcohol content of a driver's bloodstream, the Court would apparently reach the same conclusion on the fourth amendment issue in virtually every instance of a properly conducted chemical test. Thus, the fourth amendment could not operate to defeat the constitutionality of the implied consent statute insofar as the police request a motorist to submit to a "search and seizure" without having first obtained a warrant. But implicit in the Schmerber analysis is the fact that there must be an arrest before a chemical test may be given. Therefore, it should follow that before a request to submit to testing procedures may be made under the implied consent statute a valid arrest must first have been consummated. The Ohio legislature has so read Schmerber and provided for arrest as a prerequisite. CODE § 4511.19.1 (A).

29 Id. at 766. This determination was made despite the fact that the Court admitted the defendant had been compelled to submit to an attempt at discovering evidence which would be used against him in a criminal prosecution. Id. at 761. Such a "compulsion zone" would appear to be the proper instance in which the fourth amendment should combine with the fifth amendment in order to form a tighter web of personal liberty. However, one of the most recent search and seizure cases, Katz v. United States, 389 U.S. 347 (1967), which implicitly incorporated the fifth amendment privilege against self-incrimination into the fourth amendment right to be free from unreasonable searches and seizures, has retained the distinction between that compelled testimony which is merely physical and that which is communicative. Since only in instances of the latter does the fourth amendment combine with the fifth to form a constitutional "right to privacy," the holding in Schmerber that the taking of blood (physical evidence) does not violate the privilege against self-incrimination seems to have been reinforced. The Ohio Supreme Court, being tacitly cognizant of the fact that it may soon be confronted with such an issue under the implied con-
quite so authoritative in its reasoning that the sixth amendment right to counsel had not been abridged. Defendant's claim was predicated on the fact that his objection to the test had been made on the advice of counsel and that he had still been compelled to submit to the blood extraction. Denial of the claim was accomplished by the Court with the utmost of logical brevity: due to the lack of defendant's right to refuse the test under the fifth amendment, there existed no asserted constitutional privilege which counsel could protect.29

The Schmerber decision is currently in a precarious position. Not only has the make-up of the Court changed significantly,30 but several recent decisions appear to have altered the Court's outlook on constitutional privileges. In Spevack v. Klein,31 the Court maintained that the fifth amendment privilege against self-incrimination must be given a broad and liberal construction. The case involved an administrative action against an attorney asserting his fifth amendment constitutional privilege.32 Reasoning that under the fifth amendment a person must be afforded the right to remain silent and to suffer no penalty because of this silence,
the Court went far to clarify prior definitions: "In this context 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'"

The relationship between the Spevack case and proceedings under the implied consent statute is extremely close. License revocation, like disbarment, is an administrative proceeding; and the "evidence" which is requested under the statute, in lieu of imposing the loss of license sanction, could be used against a motorist during a criminal prosecution. Should the motorist refuse to take a chemical test — which is, in effect, an attempt to invoke the fifth amendment privilege against self-incrimination — he will be subject to the "costly sanction" of losing his driving privileges.

Nevertheless, although it is not beyond the realm of possibility, the Court will probably never defeat an implied consent statute through an implementation of the fifth amendment alone. In order to do so, one of the four adamant Justices would have to renege on his determination that the results of a chemical analysis are physical rather than testimonial evidence. Moreover, the Court would be reluctant to depart from the inverse reasoning in Breithaupt v. Abrams that such tests are evidentially necessary, and the fact that so many states now have implied consent statutes "negatives the suggestion that there is anything offensive about them."

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33 385 U.S. at 514-15. Thus, a lawyer could now assert the privilege against self-incrimination and not suffer the costly sanction of being disbarred.

34 It is to be noted that the implied consent statute, similar to the holding in Cohen, provides that while it is permissible to invoke the fifth amendment, such action will subject a motorist to license revocation. CODE § 4511.19.1 The writer submits that the Ohio legislature enacted the statute on the premise that a motorist may refuse consent to take a chemical test due largely to the vulnerable grounds upon which the majority in Schmerber decided the fifth amendment issue.

35 See notes 29 and 30 supra & accompanying text. If the Court should grant the fifth amendment privilege for chemical testing, it undoubtedly would merely provide a motorist with the concomitant right to the presence of counsel to insure only the propriety of the testing. Cf. Miranda v. Arizona, 384 U.S. 436 (1966). Due to the position it has taken on Schmerber (see note 28 supra), the Ohio Supreme Court has recently held that Miranda is not applicable when a motorist is subjected to a chemical test and, thus, such a motorist has no right to counsel at that time. City of Piqua v. Hinger, 15 Ohio St. 2d 110, 238 N.E.2d 766 (1968).

Ohio's new criminal sanction statute which complements the implied consent statute, provides that a motorist may have his own test taken; but this privilege is not made absolute. CODE § 4511.19. Conjecture leads one to believe that if the Court accepted the above Miranda analogy, then that additional test would become an absolute right of the arrested motorist.


37 See note 25 supra. For a list of the states which have enacted implied consent
Even if the Court continues to uphold the physical-testimonial distinction and to designate chemical analysis as physical evidence, the more natural jurisprudential progression would be to grant the sixth amendment right to the assistance of counsel at the time of a request to take a chemical test. Recently in *United States v. Wade* and *Gilbert v. California* the Court held that even before trial, in a lineup identification situation, a suspect must have the right to counsel — despite the fact that only "physical" evidence was being sought — in order to insure against any improper presentation of the suspect by the police. Similarly, the Court could provide that a motorist must have an attorney present when a request is made to submit to a test for intoxication under an implied consent statute, thus guarding against any impropriety on the part of the police. Unfortunately, however, this analogy may also fall prey to the caprice of that one concrete obstacle —

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388 U.S. 218 (1967). The Court determined that while the sixth amendment right to counsel was not advisable for fingerprinting and blood testing because of the minimum risk involved, the presence of counsel was mandatory for a post-indictment lineup, a "critical stage" in the prosecution, because of the possible prejudicial or suggestive manner in which a defendant would be presented to identification witnesses. *Id.* at 227-28. Although the majority determined that there was no fifth amendment privilege attached to the physical presentation of a person at such a line-up, the same four Justices who dissented in *Schmerber* were persuaded strongly in the opposite direction on this self-incrimination issue.

388 U.S. 263 (1967). While upholding the right to counsel for line-up proceedings, the Court refused to grant either a fifth amendment or a sixth amendment privilege for the physical evidence obtained from a defendant through means of a handwriting exemplar. Two dissenting Justices, however, were in favor of granting the sixth amendment right to counsel when filling out an exemplar.

40 In order for the Court to do so, however, it would be necessary for them to assert that *Wade* and *Gilbert* have dissolved the physical-testimonial evidentiary distinction for purposes of applying constitutional privileges. This has not yet occurred. What those two cases actually have done is to further delineate the criteria of the distinction itself. Physical evidence has been divided into two separate categories: one type, which possesses many easily manipulated variables (e.g., a lineup which can be made prejudicial by police), may be referred to as *alterable* physical evidence, and as such counsel's presence is necessary to prevent impropriety; the other type possesses few currently recognized variables (e.g., blood sampling) which an attorney could watch over, so the sixth amendment does not appear needed in these instances of *unalterable* physical evidence.

Thus, the Court need not dissolve the dichotomy which it raised in *Schmerber* until sufficient inroads can be made in the effort to defeat the fallacy, if any, of the *unalterable* physical evidence category. It is submitted that the best approach for a constitutional lawyer to take in an attempt to have the Court grant sixth amendment privileges for motorists confronted with chemical testing would be to prove the existence of the amount of variables which actually may abound in the steps toward a chemical analysis and which, therefore, can and must be protected by counsel.
practicality. The necessity of obtaining a chemical analysis immediately after arrest appears to override the necessity of procuring an attorney and its obvious adjunct of a delay in time. In light of this emergency argument, the requirement in the Ohio implied consent law that the arrested motorist must have been advised in writing of the consequences of his refusal to take a test in order for his license to be revoked could be sufficient to satisfy the minimal fifth and sixth amendment requirements.

The interesting argument has, nevertheless, been made that a person having consumed a large quantity of alcohol and thus "under the influence" will be incapable of understanding an explanation of the statute. Hence, due process could not be satisfied, for the motorist would not knowingly be able to consent or refuse to take a chemical test. At first glance the syllogism, based on the premise that a constitutional prerequisite of consensual capacity is lacking, does appear to be internally logical. But in states that have criminal statutes, like Ohio's new "drunk-driving" statute, which require consent to submit to a test as a prerequisite to the admission of chemical analysis evidence into court, the argument has been quickly dismissed. A person may have consumed a sufficient amount of alcohol to constitute him "under the influence" as determined by a statutory percentage and yet not be so intoxicated that he is incapable of arriving at a rational choice.

This follows the reasoning of the "emergency" doctrine stated in Schmerber, in which the Court held that it was unnecessary to obtain a warrant because the required delay in doing so threatened destruction of the evidence — i.e., the alcohol percentage begins to diminish shortly after the drinking stops. See text accompanying note 27 supra. In a companion case to Wade and Gilbert, the Court also held that under an "emergency" situation there was no right to counsel at pretrial line-up. Stovall v. Denno, 388 U.S. 293 (1967). An additional reason why a motorist could be refused the right to counsel is the fact that driving while under the influence of alcohol is only a misdemeanor.

See also note 35 supra. Because the advice and request must be in writing on a prescribed form, the issue of whether a motorist was in fact requested to take a test may never be in issue at an administrative hearing — at least not so long as the form is submitted into evidence. Other states have similarly upheld the right of an arrested motorist to have the implied consent statute explained to him. See, e.g., State v. Hagen, 180 Neb. 564, 145 N.W.2d 904 (1966); Caldwell v. Commonwealth, 205 Va. 277, 136 S.E.2d 798 (1964). Recent statutes in other jurisdictions have incorporated the requirement of explanation. See also note 35 supra. Indeed, the implied consent statute may be more consonant with guarantees under the Bill of Rights, as incorporated into 14th amendment due process of law, than the circuitous guidelines of Schmerber.


Id. at 24-25. Wells v. State, 239 Ind. 415, 158 N.E.2d 256 (1959); Bowden.
Presumably, then, Ohio's statutory scheme presents no constitutional due process deficiencies relating to the ability of a motorist to assent or dissent when faced with the implied consent procedure. Yet, eventually, at least one additional constitutional question will have to be answered. Consonant with the guarantees of due process of law, will it ever be permissible under the implied consent statute for a motorist to refuse to take a test or to request a test different from that which is offered and still not be subjected to license revocation? Under the Ohio statute, refusal makes revocation automatic and the choice of tests to be taken is left solely to the discretion of the police.45 Furthermore, the majority of other state courts construing similar statutes have held that mere refusal is grounds for revocation and the validity thereof is not affected by failure to provide a motorist with his choice of tests.46

The efficacy of this viewpoint may be questioned in light of the following dicta in Schmerber: "It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force."47 Later in the opinion the Court emphasized that it was not passing on the question of whether the police would have to respect a refusal or request to take a different form of test reasonably based upon "grounds of fear, concern for health, or religious scruple."48 Although these statements wield no authority, it appears reasonable to infer from them that there are several specific conditions (e.g., restrictions of health or sound religious convictions) under which a motorist may

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45 CODD § 4511.19.1 (A). The Attorney General of Ohio has stated that the arrested person has no choice as to which type of test shall be administered since, by the clear wording of the statute, the option must remain with law enforcement officials. 68-037 OP. ATT'Y GEN. (OHIO) 2-43 (1968).

46 See, e.g., Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961); Timm v. State, 110 N.W.2d 359 (N.D. 1961). The courts felt compelled to arrive at this conclusion not only because of the wording of the statute, but also because it would not be economically feasible for all police stations to maintain every possible testing device which a motorist could request. Apparently only one court has reached an opposite determination, thus permitting the arrested driver to have his choice of tests. Ringwood v. State, 8 Utah 2d 287, 333 P.2d 943 (1959).

47 384 U.S. at 760 n.4 (emphasis added).

48 384 U.S. at 771. The Court also intimated that a determination of reasonable-ness should take into consideration whether the testing personnel were authorized or whether testing in a police station was medically abusive. Id. at 771-72.
occasionally refuse or seek his choice of tests without being subject to sanction.\(^{49}\) The fact that a due process analysis, upon which any determination under implied consent proceedings must be based, will always be subjective and dependent upon individual case circumstances,\(^{50}\) provides substantial support for this conclusion. In the usual case, nevertheless, the simple economic fact that most police stations lack the facilities to provide all possible devices will be sufficient to prevent a motorist from requesting a different form of testing (or refusing to take a test) and then later attempting to circumvent revocation proceedings by asserting a violation of due process of law.\(^{51}\)

Aside from the constitutional questions involved, each case under the new Ohio implied consent statute will present interesting questions of fact for the registrar of motor vehicles to decide.\(^{52}\) Since the Ohio statute requires that an officer must have reasonable grounds to believe that a person was driving under the influence of alcohol before a request can be made to submit to a chemical test, facts substantiating an officer's conclusion to that effect will have to be included in his sworn report to the registrar. Under a literal reading of the statute, if such facts are not included in the officer's report, even though a motorist may have refused to take

\(^{49}\) In Lee v. State, 187 Kan. 566, 358 P.2d 761 (1961), the defendant had asserted the fact that he was a diabetic as being reasonable grounds for refusal to take a blood test. However, his revocation was sustained at the administrative hearing because he offered no proof to support this assertion. In Donlick v. Hults, 13 App. Div. 2d 879, 215 N.Y.S.2d 427 (1961), the defendant refused to take a blood test after he had consulted with his physician over the phone and was told by him not to submit. The court held that his refusal constituted a violation of the implied consent statute. It would seem, therefore, that anyone asserting a privileged refusal had best support that claim with documentation of his physical condition.

\(^{50}\) See note 25 supra and the discussion therein of the "shock the conscience" test of due process. Perhaps the police ought always to grant a motorist a reasonable opportunity to seek his physician's advice and/or request a different test if there appear to be valid reasons of health involved. Significantly, high-ranking members of the Ohio State Medical Association have already suggested an amendment to the new statutes which would exempt from taking the tests those persons who suffer from heart or blood ailments, such as diabetes or hemophilia. The Cleveland Press, Feb. 17, 1968, § C, at 3, col. 2.

\(^{51}\) See note 46 supra. The due process argument would relate to the reasonableness of a license revocation under an assertion that the motorist had valid grounds of refusal.

\(^{52}\) Again, the scope of the administrative hearing will be limited to these issues: (1) whether a police officer had reasonable grounds to believe the motorist was driving under the influence of alcohol; (2) whether the person was placed under arrest; (3) whether he refused to submit to the test upon request; and (4) whether he was advised of the consequences of his refusal. CODE § 4511.19.1 (E). As stated earlier, the issue presented in (4) will probably never be difficult to resolve. See note 42 supra.
the test, the registrar may not revoke his driver's license. However, since these facts will be derived from the officer's general observations of the motorist's behavior, it would appear that an officer may easily concoct facts constituting "reasonable grounds" to put in his report. Undoubtedly a wise attorney for the motorist will attend the administrative hearing in order to cross-examine the officer as to his sworn statements.

The Ohio statute also demands that there be reasonable grounds to arrest a motorist. These, of course, will be the same as the reasonable grounds upon which the request to take a test must be made. But the statute goes further than this. There must be an arrest prior to such request, or refusal by the motorist will not subject him to license revocation. Furthermore, the arrest must be a valid one. In this respect it is important to note that the offense of driving while intoxicated is only a misdemeanor. Hence, according to statute, the offense itself must be committed in the officer's presence for an arrest without a warrant to be valid. Paradoxically, however, the approach which the Ohio courts have taken has resulted in an extremely liberal construction of the

63 CODE § 4511.19.1 (A), (D), (E). An officer's report must recite facts, not mere conclusions of law, in order for a license revocation to be valid under an implied consent statute. Thus, the state has not fulfilled its own obligations under the statute, and no revocation may ensue, if the police report merely asserts that "the arresting officer had reason to believe that the defendant was driving under the influence of alcohol." See Application of Grimshaw, 7 Misc. 2d 218, 165 N.Y.S.2d 263 (1957).

64 Examples of indicative behavior would be erratic driving, slurring of words, staggering, and even smelling heavily of alcohol.


66 Schmerber demands "probable cause" to arrest, and also an arrest prior to chemical testing. Thus, for purposes of the implied consent statute, there must be a "probable cause arrest" prior to a request to submit to a test. See note 27 supra. Ohio's standard of "reasonable grounds," however, must be interpreted by the state judiciary as being a degree of persuasion identical to the Supreme Court's traditional interpretation of "probable cause" if an arrest is to be held valid. Cf. Terry v. Ohio, 392 U.S. 1 (1968).

67 The exact wording of the misdemeanor statute is that the person must be "found violating" the law. OHIO REV. CODE ANN. § 2935.03 (Page Supp. 1967). For a case construing this provision, before it was minimally revised within the past year (to the effect that an officer must "find" a person committing a misdemeanor in order to arrest him without a warrant), see Huth v. Woodard, 108 Ohio App. 135, 161 N.E.2d 230 (1958). In this case pursuit and arrest on mere hearsay was held illegal. Presumably, then, if an officer were to arrive at the scene of an accident in which an "intoxicated" motorist was involved, he should not be able to arrest the motorist for driving under the influence of alcohol because he was not actually "found violating" that law.
statute. 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 committing a misdemeanor within the meaning of the legislative provision, thereby rendering legal an arrest without a warrant.\(^5\) Thus, the police may easily use a hindsight approach and find reasonable grounds to believe that the misdemeanor was committed in their presence in order to build a credible record upon which the registrar may base a license revocation.\(^5\)

Again, all an attorney can do is attempt to impeach that record through cross-examination.\(^6\)

Further abstract analytics disclose two additional questions of fact. Did the motorist actually refuse to take a chemical test? If so, at what point in time did he refuse? Although at first glance these inquiries appear to raise moot issues, they could in some cases aid a motorist in justifiably defeating a license revocation. Refusal may be a matter of degree, and an administrative determination that a motorist did in fact refuse must be supported by substantial evidence in order for a valid revocation to be accomplished.\(^6\)

Furthermore, the time of the alleged refusal is of the utmost importance. The new Ohio criminal sanction statute, which proscribe driving while under the influence of alcohol, must be read in conjunction with the implied consent statute.\(^2\)

\(^5\) In State v. Williams, 98 Ohio App. 513, 130 N.E.2d 395 (1954), the court stated that neither the arresting officer nor any other officer must 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 the charge of driving under the influence. For a similar holding, see Columbus v. Glenn, 60 Ohio L. Abs. 449, 102 N.E.2d 279 (Ct. App. 1950). One court has even gone so far as to completely ignore not only the "found violating" provision, but also the provision which states that only in case of felonies and upon reasonable grounds may an officer later pursue a person in order to arrest him. State v. Marshall, 61 Ohio L. Abs. 568, 105 N.E.2d 891 (Piqua Mun. Ct. 1952). The pursuit provision is found in Title 29, § 355.29 (Page 1954). Hopefully, the holding in this case will never be followed.

\(^6\) Lest all faith be lost in law enforcement officials, it should be noted that the Supreme Court's most recent and complete pronouncement on the intricacies of probable cause should negate the possibility of police subverting justice in such a manner. Beck v. Ohio, 379 U.S. 89, 91-96 (1964). See also Terry v. Ohio, 392 U.S. 1 (1968), and Justice Douglas' dissent therein at 35.

\(^1\) It is worthy of note that attacks on the validity of an arrest under the implied consent statute have been largely unsuccessful. Annot., 88 A.L.R.2d 1064, 1071 (1963).

\(^2\) See Application of Scott, 5 App. Div. 2d 859, 171 N.Y.S.2d 210 (1958). A motorist may be deemed to have refused in good faith if his refusal was due to the apparent incompetency of the operator after the test had been partially administered. Underwood v. Kelly, 5 App. Div. 2d 740, 168 N.Y.S.2d 752 (1957).

\(^3\) See note 2 supra.
criminal provision requires that a chemical test for intoxication must be given within two hours after the alleged violation. Hence, it would appear that if the request under the implied consent statute is not made within those same two hours, a subsequent refusal to submit to a chemical test would be meaningless for purposes of license revocation.

In conclusion, it must be stated that, despite the statute's several shortcomings and the possible policy arguments which may be raised to oppose the legislative scheme of "implied consent," Ohio does appear to have chosen one alternative which constitutionally meets the problem of the drinking driver. One would do well, nonetheless to maintain a close watch on the results produced under the statute, for it is inevitable that questions concerning due process requirements will always be in issue at any revocation proceeding.

It has been wisely suggested by many experts that state agencies not only certify and periodically examine the operators of chemical testing devices in order to insure their competency, but they should also provide for continued routine inspection of the devices themselves. The Ohio legislature, nevertheless, has only authorized the State Director of Health to issue permits to operators under regulations promulgated by the Health Department. Hopefully, the latter will shore up the two immediately apparent deficiencies. The state agencies, as well as the legislature, must always keep in mind that an implied consent statute is neither a cure-all to the problem of drunken driving nor an end in itself."}

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63 CODE § 4511.19.
64 Symposium, Breath Alcohol Tests, 5 TR. L. GUIDE 1, 15 (1961).
65 OHIO REV. CODE ANN. § 3701.14.3 (Page, Current Service, 1967). The State Health Director was expected to file his regulations and qualifications for operators with the Ohio Secretary of State in February 1968. Unless challenged in court, these standards were to go into effect on March 1, 1968. The Cleveland Press, Feb. 17, 1968, § C, at 3, col. 2. But in the meantime, many police departments had found themselves in an unenviable position: under the new statutes only certified personnel are permitted to administer or request submission to the tests, but practically no policemen had been certified. One could hardly blame them for making statements such as, "the legislature passed the law without worrying about who was going to administer it." The Cleveland Sun Press, Jan. 25, 1968, § A, at 4, col. 4. The police vowed that in the interim period they would continue to give tests despite the fact that, admittedly, lack of certification could be a good defense in court. Most law enforcement agencies were willing to permit a judicial tribunal to decide whether a test operator's qualifications were adequate. Id.
66 It is for this reason that legislation which is oriented solely toward obtaining more and better evidence of drunken driving or toward imposing stricter sanctions may perpetuate rather than ameliorate the problem. Indeed, it has been opined that the punitive approach is totally self-defeating. The social climate prevalent in the