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A REAPPRAISAL OF IMPLIED CONSENT AND THE DRINKING DRIVER

Paul R. Dimond*

I. Introduction

Motor vehicles provide a vital means of transporting people and goods in this country. Unfortunately, tragic costs resulting from accidents accompany motor vehicular transportation. More Americans have died on United States highways this year alone than on the battlefields of Southeast Asia during this entire decade. The billions of vehicle miles driven annually in this nation result in over 50,000 deaths, hundreds of thousands of personal injuries, and untold sums of property damage and emotional anguish caused by traffic accidents. Drunken driving is of special concern because of the evidence that the risk of accident involvement increases dramatically as blood-alcohol level concentration increases. Several studies suggest that up to seventy-five percent of fatally injured drivers in the United States have blood alcohol concentrations above 0.05%, while up to fifty percent of fatally injured drivers have blood alcohol concentrations of 0.15% or more.¹

Implied consent laws have become popular with legislators who have begun to recognize the special hazards posed by the drinking driver and the need to deter such behavior. Under these laws, operation of a motor vehicle on the highway constitutes implied consent to take, under certain conditions, chemical tests to determine the blood alcohol content of an operator. The theory underlying such a law is, simply, that the normal enforcement procedures may be more effectively implemented if chemical evidence is obtained under these circumstances.

* A.B. 1966, Amherst College; J.D. 1969, University of Michigan.
¹ See R. Borkenstein, The Role of the Drinking Driver in Traffic Accidents (1964). The average 150 pound man must drink 7 ounces of 80 proof whiskey in one hour to reach a blood alcohol level of 0.15%.

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of blood alcohol levels can be obtained. The sanction for failure to comply with the preferred tests is usually revocation of the driver's license for a period of time. In 1967, Michigan enacted such an implied consent law.² This act added two important provisions to the existing state law. First, presumptions from chemical test results for driving under the influence and driving while impaired by intoxicants were established. Second, any operator arrested for intoxication or impairment is deemed to have impliedly given his consent to take such tests.³ These two provisions are designed to provide police and prosecutor with a method to more readily obtain objective evidence pertinent to a trial for intoxication or impairment. At the same time, this act attempts to protect the individual's right to fair and civilized treatment by the law enforcement and prosecuting authorities.

To illustrate the operation of the statute, consider the following hypothetical situation. Drunk N. Driver, after drinking for a few hours at the local tavern, leaves the parking lot with a squeal of his tires, unfortunately in the presence of Patrolman Law. Observing this behavior, Patrolman Law stops Driver and, smelling liquor on his breath, arrests Driver for driving while intoxicated. Law informs Driver that by operating a motor vehicle on the highways of Michigan, he has impliedly consented to tests of his bodily substances. Law also informs Driver of various rights which he has and of the consequence of refusing to submit to a test, that is, revocation of his license. This warning may occur at the scene of the arrest, during the ride to the testing site, or at the police station.

If Driver submits to the breath test offered by Patrolman Law and administered by Sergeant Tester, the results will be recorded by Tester from the face of the breath testing machine. If the result is less than the statutory presumptive level for driving while intoxicated or under the influence, Driver may then be released. If the test result is above the statutory presumptive level, Driver will be bound over for trial.

At the trial, Driver will describe his actions and his perplexity at being arrested. Law will describe the behavior he observed which led to the arrest and Driver's general demeanor. Tester will

describe the theory behind the breath test, the procedure used in taking the test, and the validity of the results as they relate to the presumption at the time of the alleged illegal operation. Direct and cross-examination will require Law and Tester to remain patiently in the courtroom and on the witness stand for long periods of time as prosecution and defense spar over the legality of the procedures. If Driver is convicted, he will lose his license and face other criminal penalties.

If Driver refuses to take any test, the drunken driving charges may be dropped entirely, lowered to a different charge or be pressed without chemical test evidence. On Driver's refusal, Law shall forward a sworn report to the Department of Motor Vehicles stating that he had reasonable grounds to believe that Driver had been driving while under the influence or while impaired and that Driver had refused to submit to a test upon request. The Department, upon receipt of Law's sworn statement, notifies Driver that, if he does not request a hearing within fourteen days of such notice, the Secretary of State shall suspend his license for a period of from ninety days to two years. An immediate appeal by Driver will lead to a hearing before the License Appeal Board. Meanwhile, a trial for drunken driving may be proceeding to a verdict without the benefit of chemical tests.

At the License Appeal Board's hearing, local prosecutors and policemen, as well as representatives from the Secretary of State's office, will rule summarily on Driver's complex arguments. Driver may, at his option, appeal the License Appeal Board's decision to the Circuit Court for a de novo review of the issues considered by the Board. If Driver loses his appeal to the Circuit Court, he may then appeal through the state's appellate courts. Two years later, Driver's appeal may reach the state supreme court. If the revocation of license for refusal to submit to a test is affirmed, Driver may then petition for a hardship license which will grant him limited driving privileges.

The events described above depict a relatively simple example of the implied consent law's operation. This article examines how the law operates, the rights and duties of the state and of the individual, how problems of interpretation should be resolved and whether the present law most effectively balances state and individual interests. The article concludes with suggestions for
reform of the law and a reconsideration of ways to control the drinking driver.

II. Procedural Safeguards under the Implied Consent Law: A Balancing of Interests

The Michigan Legislature has attempted to protect the arrested motorist from the administration of a test or tests which might be objectionable to a majority in the community:

Notwithstanding any other provision of this act, a person requested to take this test shall be advised that he has the option to demand that only a breath test shall be given, in which case his refusal to submit to any other test shall not constitute a refusal for sections 625d and 625f [which provide procedures for the revocation and review of the driver's license for refusal to submit to chemical tests]. [Emphasis added].

This legislative command requires that all police agencies make available a breath test to every person to be tested as a prerequisite to lawfully obtaining evidence of the driver’s blood alcohol content. In contrast to the likely public objection to giving samples of blood, urine, or saliva, the relative ease of exhaling a deep breath into a sterilized mouthpiece makes such a command appear reasonable.

The act utilizes Michigan’s system of review of the Secretary of State’s revocation actions. Under section 625f(1), the Secretary must suspend or revoke, for at least ninety days, the license of a person arrested for intoxication or impairment who refuses to submit to chemical tests and does not request a hearing within fourteen days after notice of the impending revocation has been sent to him. Upon receiving such notification, the person may

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4 MICH. COMP. LAWS § 257.625a(6) (1967).

Sec. 625d. A person under arrest shall be advised of his right to refuse to submit to chemical tests; and if he refuses the request of a law enforcement officer to submit to chemical tests, no test shall be given. A sworn report shall be forwarded to the department by the law enforcement officer stating that he had reasonable grounds to believe that the person had been driving a motor vehicle
request a hearing before the License Appeal Board (hereafter Board) in the county of arrest, the hearing to be held within thirty days of such request. The Board consists of a representative of the office of the Secretary of State, of the office of the Attorney General (usually a member of the local prosecuting attorney's office), and of the local police agency where the arrest occurred. Two members constitute a quorum for action and the requisite decision-making authority. The Board has the power to subpoena witnesses, to hear sworn testimony, and to punish witnesses for contempt. The Board is limited to the consideration of four issues in its review of a license revocation for refusal to submit to chemical tests. The Secretary of State may suspend, revoke, or

on the public highways of the state while under the influence of intoxicating liquor or that he had been driving a vehicle while his ability to operate a vehicle had been impaired due to the consumption of intoxicating liquor and that the person had refused to submit to the test upon the request of the law enforcement officer and had been advised of the consequences of such refusal. The form of the report shall be prescribed and furnished by the Department of State.

Sec. 625e. Upon receipt of the sworn statement, the department shall immediately notify the person in writing, mailed to his last known address, that such sworn statement has been received and that within 14 days of the date of the notice he may request a hearing as provided in section 322.

Sec. 625f. (1) If the person does not request a hearing within 14 days of the date of such notice, the secretary of state shall suspend or revoke such person's operator's or chauffeur's license or permit to drive, or any nonresident operating privilege, for a period of not less than 90 days nor more than 2 years. If the person is a resident without a license or permit to operate a vehicle in this state, the secretary shall deny to that person the issuance of a license or permit for a period of not less than 3 months nor more than 2 years.


8 Mich. Comp. Laws §§ 257.625f(2)(a)-(d) (1967). Such hearing shall cover only the following issues:

(a) Whether the law enforcement officer had reasonable grounds to believe that the person had been driving a
deny issuance of a license of the driver for a period not less than ninety days nor more than two years, depending on the resolution of these four issues at the Board hearing. A person dissatisfied with the Board's decision may file a petition for review of the suspension or revocation decision in the Circuit Court of the county in which the arrest was made. The Circuit Court must hear the case de novo. In the past, the Circuit Courts have often modified the orders of the Secretary of State, allowing petitioners to regain some driving privileges. In recognition of this fact, the legislature amended the statute to limit the Circuit Court's "review" to the same four issues considered by the Board, while explicitly authorizing the restoration of only very limited driving privileges in hardship cases.

The act establishes presumptions in any criminal prosecution

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After the hearing, the secretary may suspend, revoke or deny issuance of a license or driving permit or any nonresident operating privilege of the person involved for a period of not less than 90 days nor more than 2 years. If the person involved is a resident without a license or permit to operate a motor vehicle in this state, the secretary may deny to that person the issuance of a license or permit for a period of not less than 3 months nor more than 24 months.

The person involved may file a petition in the *** circuit court of the county in which the arrest was made to review the suspension, revocation or denial in the same manner and under the same conditions as provided in section 323. All hearings in circuit court shall be de novo and shall be limited to those issues enumerated in subsection (2).

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10 Id.

11 Id.

for intoxication or impairment based upon the amount of alcohol contained in the blood, as determined by chemical tests. If, at the time of the alleged violation, the percentage, by weight, of alcohol in the defendant's blood was 0.05% or less, the presumption is that the defendant was not under the influence of alcohol. If the percentage is more than 0.05% but less than 0.10%, no presumption is made. If the percentage is 0.10% or more, the presumption is that the defendant was guilty of impairment. If the percentage is 0.15% or more, the presumption is that the defendant was guilty of intoxication.13

Although individuals react differently to the same blood alcohol levels, research indicates that an individual's functional ability is severely impaired at a level of 0.08% and that the likelihood of accident involvement increases dramatically as blood alcohol levels rise above 0.04%.14 The Michigan law, therefore, may provide different penalties for similar behavior. If the blood alcohol concentration is below 0.10%, the only likely "penalty" is the contact with police and the nuisance of submitting to a breath test. An impairment conviction, based upon a blood alcohol level of 0.10% or more, may result in a $100 fine, ninety days in jail, and the

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13 MICH. COMP. LAWS §§ 257.625a(1)(a)-(d) (1967).

(a) If there was at that time 0.05% or less by weight of alcohol in the defendant’s blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor.

(b) If there was at that time in excess of 0.05% but less than 0.10% by weight of alcohol in the defendant’s blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(c) If there was at the time 0.10% or more by weight of alcohol in the defendant’s blood, it shall be presumed that the defendant’s ability to operate a motor vehicle was impaired within the provisions of section 625b of this act due to the consumption of intoxicating liquor.

(d) If there was at that time 0.15% or more by weight of alcohol in the defendant’s blood, it shall be presumed that the defendant was under the influence of intoxicating liquor.

addition of points to the person's driving record. An intoxication conviction, based upon a blood alcohol level of 0.15% or more, may result in the same penalties; but, in addition, the person must pay a $50 fine and surrender his driver's license. Consent to take tests is deemed implied only if the person is arrested for intoxication or impairment. The tests are to be administered only at the request of an officer having reasonable grounds to believe the person was driving under the influence of alcohol on the public highways. If the arrested driver is afflicted

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(1) Any person convicted of a violation of this section may be imprisoned in the county jail for not more than 90 days or fined not more than $100.00, or both, together with costs of the prosecution. On a second and subsequent conviction under this section or a local ordinance substantially corresponding thereto, he may be imprisoned for not more than 1 year or fined not to exceed $1,000.00, or both. The division of driver and vehicle services, within 10 days after the receipt of a properly prepared abstract, shall record 4 points for each conviction under this section.


(c) Penalty. Any person who is convicted of a violation of paragraph (a) or (b) of this section shall be punished by imprisonment in the county jail or Detroit house of correction for not more than 90 days or by a fine of not less than $50.00 nor more than $100.00 or both such fine and imprisonment in the discretion of the court, together with costs of the prosecution.

Section (e) provides for the surrender of operator's or chauffeur's license by persons found guilty of violating this act or a substantially similar local ordinance. Such differences in sanctions permit the researcher to attempt to determine whether the drinking-driving behavior, induced by different levels of blood alcohol content, is essentially the same and includes the same type of persons. By studying the subsequent drinking-driving behavior of such persons, the researcher may be able to determine which set of sanctions is most effective in deterring future drinking-driving behavior and whether lower presumptive levels for drunk-driving offenses should be adopted.


Sec. 625c. (1) A person who operates a vehicle upon the public highways of this state is deemed to have given consent to chemical tests of his blood, breath, urine or other bodily substances for the purpose of determining the alcoholic content of his blood if:

(a) He is arrested for driving a vehicle while under the influence of intoxicating liquor, or while his ability to operate a vehicle has been impaired due to the consumption of intoxicating liquor. . . .


(2) The tests shall be administered at the request of a law enforcement officer having reasonable grounds to
with hemophilia, diabetes, or any condition requiring the use of an anticoagulant, he shall not be deemed to have given his consent to the withdrawal of blood.\textsuperscript{19}

The statute balances the State's power, as exercised by the police and prosecutor, to request chemical tests to aid in intoxication and impairment prosecutions with various rights of the individual. The statute's underlying impetus is the difficulty of obtaining proof, other than chemical, to convict an accused of such a "folk-crime" as drunken driving before a sympathetic jury. Chemical evidence, based on presumptions and implemented by an implied consent law, enables the police and prosecution to convict a person by objective evidence rather than forcing them to rely on subjective observations and conflicting attitudes toward the drinking driver.

The act provides several additional safeguards for the arrested driver. The results of any tests taken must be made available to the person or his attorney by the prosecution upon written request.\textsuperscript{20} Samples of urine, breath, and saliva shall be taken in a reasonable manner, and only a duly licensed physician, acting in a medical environment at the request of a police officer, can over-

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believe the person was driving a vehicle upon the public highways of this state while under the influence of intoxicating liquor.
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\textsuperscript{19} \textit{Mich. Comp. Laws} § 257.625c(1)(a) (1967).

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Any person who is afflicted with hemophilia, diabetes or any condition requiring the use of an anticoagulant under the direction of a physician shall not be deemed to have given consent to the withdrawal of blood.
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\textsuperscript{20} \textit{Mich. Comp. Laws} § 257.625a(1) (1967).

Sec. 625a. (1) In any criminal prosecution for driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in such person's blood at the time alleged as shown by chemical analysis of the person's blood, urine, breath or saliva, shall be admissible into evidence and shall give rise to the following presumptions, and in the event any such tests are given, the results of such tests shall be made available to the person so charged or his attorney upon written request to the prosecution, with a copy of the request filed with the court, and the prosecution shall furnish the report at least 2 days prior to the day of the trial and shall be offered as evidence by the prosecution in a criminal proceeding; failure to fully comply with such request shall bar the admission of the results into evidence by the prosecution. 

...
see the withdrawal of a blood sample.\textsuperscript{21} A person charged with intoxication who submits to a chemical test administered at the request of a police officer must be informed that he will be given the opportunity to have a person of his choosing administer one of the chemical tests within a reasonable time after his detention.\textsuperscript{22} A person charged with intoxication shall be informed that he has the right “to demand that one of the tests provided for . . . shall be given him. . . .”\textsuperscript{23} Although the general practice of police officials is to charge the suspect with intoxication, the question is raised whether these safeguards are available to a person charged with impairment. Little reason exists for not explicitly providing the driver arrested for impairment with the same safeguards.

The legislature has attempted to provide a statute which will

\textsuperscript{21} \textsc{Mich. Comp. Laws} § 257.625a(2) (1967).

(2) Samples and specimens of urine, breath and saliva shall be taken and collected in a reasonable manner; but only a duly licensed physician, or a licensed nurse or medical technician under the direction of a licensed physician and duly qualified to withdraw blood, acting in a medical environment, at the request of a police officer, can withdraw blood for the purpose of determining the alcoholic content therein under the provisions of this act. No liability for a crime or civil damages predicated on the act of withdrawing blood and related procedures attaches to a qualified person who withdraws blood or assists in the withdrawal in accordance with this act unless the withdrawal is performed in a negligent manner.

\textsuperscript{22} \textsc{Mich. Comp. Laws} § 257.625a(3) (1967).

(3) A person charged with driving a vehicle while under the influence of intoxicating liquor who takes a chemical test administered at the request of a police officer as provided in paragraphs (1) and (2) hereof, shall be informed that he will be given a reasonable opportunity to have a person of his own choosing administer one of the chemical tests as provided in this section within a reasonable time after his detention, and the results of such test shall be admissible and shall be considered with other competent evidence in determining the innocence or guilt of the defendant.

\textsuperscript{23} \textit{Id.}

Any person charged with driving a vehicle while under the influence of intoxicating liquor shall be informed that he has the right to demand that one of the tests provided for in paragraph (1) shall be given him, and the results of such test shall be admissible and shall be considered with other competent evidence in determining the innocence or guilt of the defendant.
enable the police to gather more easily evidence of a violation, once the person has been arrested, without violating the person's constitutional rights and without violating the individual's reasonable sense of propriety and justice under the circumstances. The state may need a greater evidence-gathering ability as to drunk driving violators because of the difficulties of conviction. However, such need does not mean that the individual should be unduly subjected to unfair, harmful or distasteful experiences with the police, prosecutor, Secretary of State, the Board or the courts. To protect against this possibility, the act established the following rights of the individual: the right to demand only a breath test, to demand some test, to receive the results of the tests, to be deemed to impliedly consent only if arrested for intoxication or impairment, and even to refuse to take such tests if the individual realizes the possible consequences of such refusal. The question remains, however, whether this statute, as written, administered and interpreted, is the most efficacious means of balancing these interests and whether its purpose—the gathering of evidence—is the only feasible, or the most effective, approach to the drinking driving problem.

III. Problems with the Law

A. The Unconscious Person and Enforcement: An Unnecessary Oversight

The act is peculiarly silent on the status of the unconscious person. The drunken driver who passes out immediately after arrest cannot be advised of his right to refuse to take chemical tests or to demand only a breath test. Such a person will be unable to take a breath test. The question arises whether a test taken under such circumstances is admissible into evidence at an intoxication or impairment trial. The test most likely to be given is the blood test in the course of medical treatment. The statute, however, explicitly recognizes that a blood test is dangerous for, and should not be administered to, a hemophiliac, diabetic or a person requiring the use of an anti-coagulant. Saliva and urine tests, although not potentially dangerous, would be awkward to administer to the unconscious driver. In the trial for intoxication
or impairment, however, a chemical test would be desirable to prove that the driving behavior of the unconscious person was the result of high blood alcohol levels and not of some other cause. Such questions of police practice, evidentiary admissibility and individual interests have long plagued the courts in criminal cases. The legislature, in drafting the statute, went to great lengths to balance individual rights against the need for evidence in the form of chemical test results at trial. In the case of the unconscious person, however, where the interest of the state in obtaining such evidence and the need to protect the individual are especially strong and conflicting, the legislature has left the vital balancing decision to the courts. The courts should refuse to admit chemical test evidence obtained from the unconscious person unless that person consents to its admission at trial. This exclusionary rule is based on the reasoning that the person was never given any warnings and he never consented to the test. The legislature should amend the statute to provide guidelines for the situation of the unconscious person with the primary concern being the medical care of the person. The amendment should provide that the tests are to be taken only under the treating physician's care and authorization, and only after meeting this requirement should they be admitted into evidence. Under the present statute, if a test is not taken of the unconscious person's blood alcohol content, such person's inability to take the tests should not be deemed a refusal for revocation proceedings under sections 625d and f. 24

B. Tests Taken After the Fact: the Failure to Explicitly Establish a Two-Test Rule

The presumptions outlined in the act for intoxication and impairment refer specifically to results of tests which show blood alcohol levels "at the time alleged";25 that is, at the time of the suspected illegal operation. Chemical tests, however, can be taken only after the suspect has been observed, arrested and taken to a testing site, if necessary. As individuals vary tremendously in their rates of absorption and oxidation of alcohol over time, the important factor should be whether the test result is higher or

\[^{24}\text{Mich. Comp. Laws \S 257.625d, f (1967).}\]

\[^{25}\text{Mich. Comp. Laws \S 257.625a(1) (1967).}\]
lower than the actual level at the time of operation of the motor vehicle. This fact can be determined by taking two tests separated by a fixed period of time, such as fifteen minutes. The prosecution can be certain that the results of the tests do not reflect a blood alcohol level which was below a presumption level at the time of operation but above a presumption level at the time of the arrest and test only if two tests are given. The two-test rule would indicate whether the blood alcohol level was rising or falling. Without two chemical tests over a period of time, any chemical evidence obtained from a single test has only questionable evidentiary significance.

Although section 625c(1)\textsuperscript{26} states that the arrested person is deemed to have given his consent to the chemical tests, section 625a(6)\textsuperscript{27} states that, notwithstanding any other provisions of the act, a person requested to take the chemical tests has the option to demand that only a breath test be given. Unless the courts interpret "a breath test" to mean that at least two separate samples of breath be taken over time, the implied consent law will be of dubious value in gathering evidence for an intoxication or impairment trial. In view of the necessity of taking two such tests, the courts should weigh heavily the legislative intent to make the gathering of objective evidence easier. The legislative intent to prevent unnecessary harassment certainly should not be invoked to protect the individual from administration of a valid test, which necessarily requires the taking of at least two breath tests. Such a decision in the construction of the statute, however, should not have been left to the courts by the legislature. The legislature should amend the statute to clarify the rule of taking two tests over time.

The police have been instructed and are following the evidentiary necessity of taking two tests over time.\textsuperscript{28} Certain problems resulting from the failure of the legislature to specify a two-test rule will arise when an individual takes the first breath test but refuses to take the second. At the intoxication trial, the evidence from the single test, even if admissible, should not form the basis for the presumption levels. At the same time, the courts,

\textsuperscript{26}MICH. COMP. LAWS § 257.625c(1) (1967).
\textsuperscript{27}MICH. COMP. LAWS § 257.625a(6) (1967).
\textsuperscript{28}Based upon interviews with Captain Brown of the Michigan State Police, on file at the PROSPECTUS office.
upon review of revocation for refusal, should not allow refusal to take the second test to serve as a justification for reversing revocation.

**C. The Person Willing to Take Chemical Tests Other Than a Breath Test**

Another problem of statutory interpretation will arise if the arrested person refuses to take a breath test but is willing or demands to take a saliva, urine or blood test. Police officers presently consider such refusals a proper basis for initiating administrative proceedings to revoke the driver's license for refusal to take a test.\(^{29}\) Section 625c(1) states that the individual has given his consent to tests of his blood, breath, urine or other bodily substances.\(^{30}\) Section 625d states that if the individual refuses the request of the law enforcement officer to submit to chemical tests, no test shall be given and the officer is to initiate the administrative action to revoke the license of such person by sending a sworn affidavit of the refusal to the Secretary of State's office.\(^{31}\) By appealing to the Board and through the circuit court, persons who refuse the breath test will present to the courts the difficult task of balancing the State's interest in coercing the individual to take the test with the sanction of revocation for refusal and the individual's right to be free from unpleasant official harassment. If the person is willing to take other chemical tests, he is willing to comply, substantially, with the purpose of the law; that is, he is permitting the State to ascertain his blood alcohol level by chemical testing. Although the state law contains the explicit statement that the individual has impliedly consented to tests of any of his bodily substances, the police agencies of the state have gone to considerable expense to provide breath testing facilities for all in order to comply with the statutory provision that a breath test is sufficient to avoid revocation for refusal. These agencies are not prepared to provide facilities for extensive testing other than the breath test. This practical problem is accentuated by the refusal of doctors to administer the tests, fearing

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\(^{29}\) *Id.*

\(^{30}\) *Supra* note 26.

possible malpractice liability and loss of time due to court appearances. The legislature has not made it clear that the refusal to take a breath test but a willingness to take another chemical test is a basis for revocation. The ambiguity should not be left to the courts to resolve; instead the legislature should explicitly provide for this situation.

The only guide for administrative and judicial review is "[w]hether the person reasonably refused to submit to the test upon the request of the officer." This standard may be interpreted in a purely negative manner, the test to be whether the refusal was made by a conscious, reasoning person as opposed to an unconscious person. Such an interpretation, however, might do great injustice to certain individuals. The person afflicted with emphysema may have very reasonably refused to take a breath test to protect his health even though willing or demanding to take some other test of his blood alcohol level. Those who would not open the hearing to such affirmative factual issues of the reasonableness of refusal would revoke the emphysema victim’s license solely because he protected his own health by refusing to take a breath test. This interpretation would in effect make the ability to take a breath test safely a prerequisite to driving on the highways of the state of Michigan. Such a view is neither a fair nor reasonable interpretation of the legislative intent and purpose of the act. Under the present statute, refusal based on a valid health reason, even if not expressly recognized in the statute, and a good faith desire to comply with other tests should require reversal of an administrative revocation order.

The Michigan courts could go further and require that before revocation would be permitted, the individual must refuse to submit to any and all chemical tests. Such a reading of the act, however, would be a judicial alteration of the balance which the legislature attempted, no matter how inarticulately, to create between individual tastes and enforcement needs. Yet a Michigan Circuit Court approached such a holding in Collins v. Secretary


33 Such a narrow interpretation should be tempered, however, in the definition of "refusal." The New York Supreme Court ruled in Scott v. Kelley, 171 N.Y.S. 210, 5 A.2d 859 (1938), a case involving a man with false teeth who tried but failed to take the breath test because his teeth prevented the proper exhalation, that such "failure" was not a refusal. The New York Court distinguished inability from refusal.
of State. In Collins, the arrested driver, on the advice of an attorney, offered to submit to a blood test but refused to take a breath test when requested to do so by the police. The circuit court based its decision on two factors: first, the police are not explicitly empowered under the statute to specify which test should be administered; and second, the arrested person has the right to demand that one of the tests be given him. The circuit court held, therefore, that under the circumstances, the arrested person’s refusal to submit to the breath test was not unreasonable and ordered the return of the driver’s license. The case has been appealed by the Secretary of State to the court of appeals and is presently pending. Although such a construction can be made from the ambiguities present in the statute, the result can substantially frustrate the aim of the statute to gather chemical test evidence through the least distasteful means possible—the breath test. As the State presently lacks facilities for testing saliva, and blood tests are not only expensive, but often impossible to administer properly, no evidence can be obtained from persons who refuse to take a breath test but who are willing, or demand, to take only a blood or saliva test. If the holding of the circuit court is affirmed by the higher courts, an arrested driver need only demand a blood or saliva test, while refusing the breath test, to avoid both chemical tests and revocation of license for refusal to submit to a chemical test. Such a result would render the present implied consent law nugatory.*

The courts cannot render such a ruling and comply with the legislative intent of the statute. The legislature intended that breath tests be the primary method of chemical testing, permitting

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* [Ed. Note] The Michigan Court of Appeals reversed the circuit court decision in Collins while this article was in press. The court, while recognizing the ambiguities present, placed much emphasis on the legislative intent. It held, inter alia, that "Proper construction of the statute requires that subsections (3) and (6) be read so as to give police officers the right to request an accused to take a particular chemical test. An accused must: (1) take the test offered by police officers; (2) take a breath test pursuant to subsection (6); or (3) risk revocation or suspension of his license." Collins v. Secretary of State Docket No. 6627 (Mich. Ct. App., Oct. 2, 1969), 7.
the individual the option to demand only a breath test.\textsuperscript{37} The legislature also established the right of the individual to demand a chemical test because the results of such tests could presumptively aid the defendant in gaining an acquittal on an intoxication or impairment charge.\textsuperscript{38} The right of the arrested driver to demand a test is independent of the right of the police to demand that the driver take a test. Consent was deemed implied for all chemical tests. The failure to provide for the refusal to take the breath test for valid health reasons is no basis for permitting every arrested driver to avoid revocation for refusal to take a breath test if he is willing to comply with tests that the legislature never really intended to be used. The courts should uphold the legislative intent, even as the legislature should clarify the rights of individuals who refuse to submit to a breath test for valid health reasons.

\textbf{D. Review of Revocation for Refusal}

The membership of the Board, including local prosecutor and sheriff, is hardly an inherently fair, unbiased body to review a mandatory revocation order. The Board’s very usefulness is questionable in light of the circuit court’s ability to hear the case \textit{de novo}. Local prosecutors and police officers might better spend their time prosecuting and apprehending rather than attempting to act as a quasi-judicial body. The legislature perhaps recognized the inherent bias of the Board in providing for a new trial on review by the circuit court. Such a procedure for review is a waste of time for either the Board or the circuit court. A more efficient and more fair procedure would be to change the Board’s membership or eliminate it.\textsuperscript{39}

If the present membership of the Board is maintained, considerations of efficiency mandate either a tape recorded record of the Board’s hearing, or at least, a short written opinion by the chair-


\textsuperscript{39} Fortunately, \textit{de novo} review of license revocations for refusal to submit to chemical tests has been statutorily limited to the same issues now heard by the Board. \textit{Mich. Comp. Laws} § 257.625f(3) (1967), \textit{as amended} Mich. Pub. Acts No. 335 (1968).
man clarifying the reasons for action by the Board on the four specific issues. Under such a system of recording, the circuit courts might begin to appreciate or depreciate Board decisions for rational, even legal, reasons, instead of blindly accepting either the growth of administrative bureaucracy or the sympathy-seeking pleas of the petitioner. In the first eight months of 1969, 3,101 persons refused to submit to chemical tests. 1,500 of these appealed to the Board. 377 persons appealed the Board's decisions to the circuit court. In view of the massive number of possible appeals from revocation actions of all types, the necessity of an administrative board effectively and fairly screening most cases is clear. The addition of the revocation for refusal to take chemical tests under the implied consent law to the jurisdiction of the Board will hopefully lead to a revision of the procedures and membership of the Board and the standard of review of the courts.

The review by the Board and circuit court of revocations for refusal is the place where the sanctions and impact of the implied consent law may be increased, modified, diluted or emasculated. If the person who has refused to take the chemical tests requests a hearing within the fourteen day time limit, the Board must hold a hearing within thirty days of receipt of such request. The hearing shall cover only the following issues: (a) the reasonableness of arrest, (b) the fact of arrest, (c) reasonableness of refusal, (d) and the proper advice of rights as set forth in sections 625a, 625c, and 625d. One problem related to issues (a) and (b) is the weight to be given an acquittal at the intoxication or impairment trial on the "reasonableness" of the officer's belief

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41 Based upon an interview with Mr. John Foley of the Secretary of State's office, September 19, 1969, on file at the PROSPECTUS office.
42 The slowness of the present appeal procedure is reflected by the fact that the Court of Appeals did not decide the first case arising from the implied consent law until two years after the law became operative.
43 Several examples of this activity have been discussed in previous sections. See the discussion of the unconscious person, p. 8, supra; the two test rule, p. 9, supra; the person willing to take chemical tests other than the breath test, pp. 10-12, supra.
and the fact of arrest. The reasonableness of the officer's belief should be judged solely on his own observations and not on the subsequent intoxication or impairment trial. The fact of arrest should depend only on the reality of detention and charge based upon probable cause at the time. The sanction imposed to force compliance with the statute's purpose should not be affected by the result of a trial, the result of which the person may have altered by refusing to give the desired evidence. Acquittal at the trial should not be the basis for restoration of the license when the driver refused to take the test.\footnote{Another state's courts, under similar provisions, held that the acquittal at the intoxication trial makes the arrest illegal for purposes of revocation based on a refusal, \textit{McDonald v. Ferguson}, 129 N.W.2d 348 (N.D. 1964).} To hold that the acquittal at the intoxication trial makes the arrest illegal for purpose of revocation can only be a show of judicial contempt for the implied consent law, not a rational interpretation of its purposes and sanction. One Michigan court has ruled, properly, in a three-judge court, that dismissal of criminal charges for intoxication and impairment is not binding on the Board in determining whether the officer's belief was reasonable and the arrest valid.\footnote{\textit{Conley v. Sec'y of State}, Docket No. 103409 (Circuit Court, Wayne County, Mich. \textit{Feb. 5, 1969}), at 12.}

The reasonableness of refusal (c) and the advice of rights (d) raise additional problems. If an individual is inebriated when arrested, the police officer's mere reading of the individual's rights may not be enough to permit such an individual to make a reasonable decision. A drunken stupor is not the best frame of mind in which to make a reasonable decision. Perhaps the arrested person should have a lawyer to protect his rights, or at least a sober understanding of his rights, to insure that any refusal be "reasonable." In view of the number of intoxication and impairment arrests and the need for tests taken near the time of suspected illegal driving, furnishing counsel to all would pose an insurmountable burden. Even in cases where the individual refuses to take a test until a lawyer arrives, the delay caused by the lawyer's arrival may render any subsequent tests taken virtually useless in determining the arrested person's blood alcohol level at the time of operation of his motor vehicle. This area of "reasonable" refusal is logically difficult; but, practically, the reviewing body, be it the Board, Circuit Court, Court of Appeals, or State
Supreme Court, may have to be satisfied with a minimally knowledgeable refusal by the arrested driver upon a clear reading of his rights by the police officer. If the individual is conscious and acknowledges understanding, the police can do little more than advise him of his rights. In view of the legislative concern for protecting the individual from any test to which he does not wish to submit, the sanction of the implied consent law, revocation for refusal, should be supported as much as possible, consonant with the individual's right to be free from an unknowing acceptance of punishment.

Technical issues may arise in the warning of rights. Suppose that a healthy individual is not apprised of the fact that if he has hemophilia or is a heart patient being treated with anti-coagulants, his consent is not deemed implied for blood tests. Suppose such person refutes to take a breath test. The issue presented is whether such a person's refusal will result in revocation. Warning of the rights that are germane to the person may be enough to comply with (d), the legislative mandate that the driver be "advised of his rights...." The decision will depend on the extent to which the reviewing body wishes to insure that all individuals are fully advised of their rights and of the sanction available to the reviewing body to force the police to adhere to such procedure. All enforcement agencies plan to warn all individuals of the rights explicitly given in the act. Yet the courts may add new rights, such as for the emphysema victim, heart patient or the unconscious driver. To assure that persons are warned of these new rights, the reviewing court may reverse an otherwise valid revocation order, giving the individual who had refused for other reasons the gift of a high judicial standard.

A final problem is the cost of the hearing by the Board and review by the circuit court. In recognition of this cost, the legislature amended the statute to provide for hearing and review in the place of arrest instead of the place of residence of the petitioner. The amendment is really a recognition of the fact that the four

49 The person charged shall be advised that his refusal to take a test as herein provided shall result in the suspension or revocation of his operator's or chauffeur's license or his operating privilege.


issues to be considered in such hearings are not so narrow that the officer’s sworn statement that the arrested person refused to take a chemical test is sufficient to resolve the controversy. As suggested, the testimony of the arresting officer, the tester and the arrested driver is frequently necessary to resolve the difficult problems inherent in the four “narrow” issues. The State’s hope that refusal to submit to chemical tests would lead to summary revocation without costly review has been dashed. In the first eight months of 1969, 3,101 persons refused tests while 9,740 persons submitted to them.\textsuperscript{52} At the Board hearings, the arresting officer often needs to appear. The simple revocation for refusal can become almost as complicated as a trial for intoxication or impairment.\textsuperscript{53} But that is the price the State must pay to enforce the sanction of revocation for refusal under a statute which attempts, all too awkwardly, to balance state and individual interests.

III. The Implementation of Breath Testing: Cost Analysis Suggests A Possible Reform

A. The Implementation

Between July 12 and November 1, 1967, the enforcement agencies of the State developed a system whereby any person arrested in any part of the State for intoxication or impairment had access to a breath-testing device. Such tests would have to be sufficiently accurate to withstand evidentiary attacks at the intoxication or impairment trial. The Breathalyzer was chosen as the device to be used in all breath tests. In light of the relative accuracy and simplicity of the device, such a choice is commendable.\textsuperscript{54} To meet possible attacks on the validity of breath tests in general and specific tests in particular, the State had to train technicians in the theory and practical operation of the Breathalyzer. The State ordered 190 of these machines at a cost

\textsuperscript{52}See supra note 41.

\textsuperscript{53}To lower costs, provision could be made for the use of depositions to be administered by the petitioner or his attorney before the Board hearing as substitute for the officer’s testimony at the Board hearing.

of $800 per machine. The machines were located throughout the State so that a machine could be reached in fifteen minutes by car from any point in the State. Each operator or tester takes the breath sample, and the result appears immediately on the face of the machine. The State Police set up a school for the training of the uniformed officers of each police agency to serve as technicians capable of operating a testing device. The training school consisted of a one-week course of intensive legal, theoretical and practical training in the operation of the Breathalyzer and the background necessary to testify knowledgeably at hearings or trials. The State paid for the instruction while the local enforcement agencies paid for the time of the trainees. Upon graduation from this course, the trainee is certified and licensed as a valid operator of the Breathalyzer. Matching federal funds of $500,000 were initially made available to set up this program. In the first year, the "book" cost of the program totaled $441,419.

The State Police and local enforcement agencies attempt to have five men trained for each machine under their jurisdiction. All testers are uniformed police officers who must, at all times while on duty, be available to administer the breath tests. Once every three months or once every two hundred tests, whichever occurs first, each operator and his machine is tested by dummy samples supplied by the State. The testers testify at the intoxication or impairment trials as to the results of tests given, as well as to their objectivity, correctness, and theoretical validity. Such testimony often requires more than an afternoon in the courtroom to await the call to testify and then to explain the validity of the procedure used in the specific test.

The arresting officer brings the arrested person to the test site where the tester administers the test if the person does not refuse. Depending upon the results of the test, the arrested person is taken before a magistrate and is charged with the appropriate offense. Unless the presumptive levels are reached in the test, drunk driving charges are dropped. If no test is taken, charges may be dropped unless the driving behavior and demeanor of the driver which led to arrest were clearly "drunken." Under such a procedure the magistrate serves no function other than to act as a catalyst in dismissing drunken driving charges immediately if the
presumptive levels are not reached. The immediacy of the test result permits the prosecutor to drop charges at an early point.

B. The Problems

Under the existing program, the tester must make a subjective reading of every test result as it appears on the face of the machine and then appear in court to defend the result. Such a procedure is not only open to prejudice on the part of the tester, but is unnecessarily open to practical and theoretical evidentiary attacks at trial. It would be fairer and cheaper for the legislature to alter the rules of hearsay evidence for intoxication and impairment trials to permit the sworn, written testimony of a removed, objective analysis of the breath samples. To implement such a system, the legislature must expressly recognize the theoretical validity of the breath test and the accuracy of the Breathalyzer instead of leaving this judgment to the vicissitudes of the courtroom. Provision should be made for a single, central analysis site. Dr. Borkenstein, the inventor of the Breathalyzer, has developed a small, portable capturing device for taking the breath sample. This capturing device costs a fraction of the price of a Breathalyzer analysis machine. The samples taken by such capture devices are collected in a small tube which could easily be shipped to the central analysis site by mail. Such a system could be implemented by purchasing a capture unit for each police car in the state; the cost of such an enterprise would be less than the purchase price of the 190 Breathalyzer machines. Each officer could be trained to operate the capture unit in fifteen minutes. Then only the arresting officer need appear at the intoxication or impairment trial to testify to the driver’s behavior, physical syndrome (breath smell, slurred speech, etc.), and, by a very mechanical explanation, testify as to the manner of taking the sample. The analysis center would send the results of the test to the prosecuting attorney, the court, and the arrested driver by sworn affidavit.

Such a system would delay the prosecutor in dropping or reducing the drunk-driving charges until the results were made available. Such a limitation, however, is relatively insignificant in
view of the greater coverage, accuracy, and simplicity of the suggested plan for administering the test, as well as the increased efficiency of the revocation hearing and trial. More importantly, such a system would free all uniformed police officers, presently relegated to testing duties, for other police activities. This would increase the manpower of the police force available for the execution of other responsibilities while reducing the actual cost of breath-testing. Even though considerable expense has already been incurred in the purchase of Breathalyzer machines and the training of testers, little doubt exists that many police officials would prefer to have the testers freed from their analysis and testifying duties for more pressing enforcement responsibilities, including the initial detection and arrest of persons suspected of operating motor vehicles while under the influence of intoxicants.

A strong argument can be made that the admission of such evidence under the proposed evidentiary procedure deprives the defendant of his Constitutional right to confront witnesses. The author would argue that the right does not extend to this procedure. The state has explicitly recognized, as a matter of substantive law, that Breathalyzer tests are valid if administered and analyzed properly. The defendant has the right to question the proper administration of the taking of a breath sample when the arresting officer appears on the stand. The only right the defendant may forego, then, is the right to question the procedure used in analysis. Since the analysis procedure is by law carried out by a trained technician unaware of the defendant’s identity in the normal course of that technician’s business, the danger of an improperly analyzed test is minimal. An analogy could even be drawn to the common business records exception. Judicial notice could be taken of the validity of the analysis procedure. In any event, the danger to the defendant’s rights under such a procedure should be weighed against not only the state’s interest but the probability that the central analysis will be fairer to the defendant, without confronting the analyst, than tests analyzed under the present procedure, even with a confrontation with the tester.

If the courts require the presence of the analyst in order to satisfy the right to confrontation, the actual total cost of the appearance of the analyst might be assessed against the defendant if the defendant is subsequently convicted. Alternatively, the at-
The attorney could be limited to confrontation by deposition of the analyst. Either alternative would decrease the cost savings of central analysis relative to the present test plan.

IV. The Implied Consent Law: Call For a Supplementary Approach

The odds of apprehension for any moving violation are very low indeed. One study suggested that only 1 in 7,600 persons exceeding speed limits by more than ten miles per hour were given a citation. The odds of apprehending the drunken driver may be no better. The implied consent law does not alter the basic method of initially detecting the drunken driver. Yet, as a legislative expression of increased concern over drunken driving, as a method of gaining evidence more readily once the initial contact is made, and as a cause of huge expenditures and the marshalling of police manpower for a specific duty, the implied consent law should motivate patrolmen to increase the number of drivers arrested and lead to an increase in drunk driving convictions. The only available indicator of such an effect, mandatory suspensions for convictions, supports this hypothesis. In 1966, 6,815 persons had their licenses suspended upon conviction for impairment; in 1968, the number increased to 12,194. Surprisingly, of 9,740 tests administered in the first seven months of 1969, the results of almost eighty per cent were 0.15% or more in blood alcohol level, while the alcohol level was below 0.10% in less than four per cent of those tests. Apparently, officers are either especially adept in deciding who should be arrested for drunk driving or they arrest only those persons whose driving behavior is clearly suspicious.

Hopefully, the law's most important effect will be deterring the public from driving after drinking by increasing the fear in a potential drinking driver that he may be convicted for the offense if apprehended. Such a fear is rational in view of the game of Russian roulette which the implied consent law forces the arrested person to play: either consent to a test which may presumptively prove guilt or face revocation of license for refusing to take such test. This rational fear, however, is very slight if there is

56 See supra note 41.
57 Id.
a low statistical probability of apprehension. Even if arrested, the rational fear may be eliminated unless the courts protect the state's interest in gathering evidence or the legislature moves to clarify and simplify the existing law.

Under the present system, many drivers who are convicted of drunk driving are not removed from the road upon revocation of driving privileges and others persist in the dangerous drinking driving behavior resulting in future violations and accidents. Many researchers suggest that the drinking driver is often a problem drinker who must be dealt with by other than criminal sanctions if his dangerous driving behavior is to be deterred.58 Other researchers suggest that drunken driving is a folk crime which requires not stiffer criminal penalties, but sanctions and a massive education effort which involve the violator's own social environment in disapproval of the behavior.59

Regardless of these theories of remedy, the rational fear of some sanction can be increased by increasing the possibility that any violator is likely to come into contact with some enforcement agency or by increasing the potential violator's fear of apprehension by some enforcement agency. The transformation of the present system of breath testing to portable capture units and a central analysis site would have a direct effect. Yet aside from such minor tinkering with the system and an increase of the highway patrols, the basic difficulty in increasing the number of contacts with violators is the criminal law itself, the requirements of probable cause before a person can be arrested, tested and a further sanction imposed.

To alter this requirement, the contact must be removed from the criminal law, if that is possible, and placed in a fair, non-criminally punitive civil regulatory system. Under such a system, the sanctions need be only bothersome or medically oriented or designed to invoke the coercion of the violator's personal friends and family. As a supplement to the existing criminal sanctions, which are very severe, such sanctions could only add to the fear of potential violators by permitting the increase of

59 Id., at 441-43.
contacts with violators. An implied consent statute could be drafted utilizing, for example, a system of compulsory testing check lanes. Check lanes on randomly selected or dangerous highways, perhaps at the outlets to roadside establishments, set up by a civil agency with the authority to administer chemical tests on penalty of revocation of license for refusal, could increase the fear of apprehension of any drinking-driver.

The presumptive levels could be lowered to 0.05% in line with evidence that the probability of accidents increases at that level at least. Such a lowering of presumptive levels might instill a fear of detection and sanction in the less than heavy but still statistically dangerous drinker who drives.

The development and administration of sanctions that courts will be willing to classify as "non-criminal" poses a difficult problem. Certainly the sanction cannot include incarceration or the assessment of fines. Medical treatment might be prescribed, and, if desired, compliance could be coerced by the penalty of criminal sanction for failure to accept treatment. The civil agency might be empowered to take offending drivers home or to impound the driver's car for safety. The nuisance and embarrassment of such sanctions might prove sufficiently effective not to be labeled criminal. Physical and psychological tests could perhaps be required of offending drivers. The names of offending drivers could perhaps be listed in the newspaper beside the names of those killed in accidents during the year.

The civil agency should be empowered by the legislature to develop such sanctions. The civil agency should publish rules stating the sanctions to be used on persons of varying blood alcohol levels. Persons stopped by the roadblock would be informed that they may either take a breath test, which may result in the imposition of specified sanctions, or refuse to take a breath test, in which case revocation proceedings will be initiated. If the person refuses, the agent files a sworn affidavit with the Secretary of State testifying to such refusal. The procedure used to review revocations for refusal under the existing implied consent law would then be followed, except the only issues for review would be the reasonableness of refusal and the warning of "right". If the

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60 See, e.g., BORKENSTEIN, supra note 1.
person takes the test, sanctions promulgated by the agency can be invoked, depending on the results. The results of such agency tests, however, are not admissible in evidence at an impairment or intoxication trial. Immunity from impairment or intoxication conviction for that contact would be established by the statute. The statute should also provide that contacts outside of the regular course of a general testing check point shall not lead to the imposition of any civil or criminal sanctions. This "regular course" requirement is designed to prevent random and discriminatory enforcement.

Records could be kept of the violators in each system, criminal and civil, comparing them in order to determine which set of sanctions had the greatest effect on the subsequent drinking driving behavior of those apprehended. The sanctions imposed in the civil system could be varied and changed every year, thereby permitting a determination of which civil sanctions most effectively reform drinking drivers. In each system the violators with drinking problems could be isolated as they are apprehended, and, hopefully, treated medically where the rational fear of sanctions has no effect. Such a dual system of detection would hopefully deter more potential violators from driving after drinking.

V. Conclusion

The implied consent law, as enacted in Mich. Comp. Laws § 257.625 is no panacea for the havoc which drinking drivers wreak on this nation's highways. The law is a tool which can aid the police in gaining evidence of drinking driving. Problems arise in the legislature's attempt to balance state and individual interests properly, the failure to lower presumptive levels for guilt, the failure to utilize portable capture units in conjunction with an altered law of evidence at intoxication and impairment trials, and the limited vision in apprehending and dealing with drinking drivers. The following reforms, therefore, should be made:

1. To balance properly state and individual interests, the individual shall impliedly give his consent to chemical tests of his bodily substances and have the right to demand that the police
administer only a breath "test" (to consist of taking two samples over time); he shall be afforded an opportunity, after taking such test, to have an independent test made; and the results of such tests shall be furnished him or his attorney. The individual suffering some physical ailment rendering the administration of the breath tests potentially dangerous shall have the right to demand that another chemical test be given him, the type of test to be decided at the discretion of the police officer. Such tests shall be given in a reasonable manner and, if a blood test, the test is to be supervised by a medical doctor in a medical environment. The unconscious person, because he cannot be properly advised of his rights, may be given a test only by a medical doctor, in the discretion of such doctor, if the unconscious person's condition permits. The unconscious person's failure to take such tests shall not be deemed a refusal for purposes of revocation. The police shall have the right to demand that an arrested driver submit to a breath test, consisting of two breath tests over time, and refusal to submit to such breath tests shall be the basis for revocation, unless the individual is unconscious or refuses for reasons of health. The refusal of the person, having health reasons for refusal to submit to a breath test, to submit to other chemical tests shall be deemed a refusal for purposes of revocation.

The thrust of these statutory reforms is to balance clearly state and individual interests at a single point: the taking of a breath test, consisting of two samples taken over time.

II. To insure the conviction of drivers who are impaired by the consumption of alcohol, the presumption for impairment shall be 0.08%

III. To insure adequate, fair and expeditious review of revocation for refusal, the Board shall consist of three persons appointed by the Secretary of State. The Board shall follow the procedures outlined by the 1969 Administrative Procedures Act, including the keeping of a record and the writing of an opinion by the Board. Review by the Circuit Courts shall be a review, not a de novo trial. The Board's decision shall be reversed only if the decision violates state or federal constitutions, is an abuse of discretion, is made without jurisdiction, is not supported by substantial evidence on the whole record, or is contrary to law.

61 See note 40 supra.
The Board's hearing and judicial review shall be limited to the issues of whether the person was arrested and the reasonable belief of the police officer, whether the person was notified of his rights under the implied consent law, and whether the refusal was reasonable.

IV. To insure a fair and expeditious trial, and to gather and present evidence as fairly and easily as possible, portable capture units shall be used by the arresting officer. Samples of breath shall be taken by the local officer and shipped to a central analysis site. The analysis report shall be admitted in evidence without question of its reliability and validity. Only the arresting officer and the person who took the breath sample from the arrested driver, presumably the same person in most circumstances, need testify at trial as to the procedure used in taking the breath sample.

V. To increase the fear of apprehension, even in drivers who do not drink to the extent that blood alcohol levels reach 0.08%, a civil regulatory system shall be established, with an implied consent law, to administer breath tests. Capture units may be set up at any point in the State on a public highway to detain persons for breath-testing. The presumptive level for the imposition of a non-criminal sanction or treatment shall be 0.05%. The same rights and duties outlined for the intoxication-impairment implied consent, outlined above, shall apply to the individual except that arrest, probable cause and reasonable belief are inapplicable. Review of revocation for refusal shall be the same as outlined above. A person apprehended and tested by the civil regulatory authority shall be immune from prosecution for that violation under the intoxication-impairment laws.

These reforms would lead to the strengthening of the present implied consent law, while protecting individual rights, in addition to the institution of a new system of detection, sanction and treatment of the drinking driver. The civil regulatory system has the potential for abuse, but it also has the potential to place the problem of drinking driving and traffic safety into a new context which, as a supplementary approach, can greatly aid in deterring drivers from drinking and drinkers from driving. The reforms in the present implied consent law can serve to eliminate the difficulties of the present statute and the cumbersome adminis-
tration of testing, thereby eliminating the opportunity which lawyers, police, and courts presently have to rewrite and possibly vitiate the implied consent law.