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IMPLIED CONSENT TO INTOXICATION
TESTS: A FLAWED CONCEPT

PENN LERBLANCE*

INTRODUCTION

First adopted in the 1950's in response to the critical problem of the intoxicated driver,¹ implied-consent statutes² currently are in force in all fifty states.³ The central feature of these statutes, that a

² New York was the first state to adopt an implied-consent statute. See Ch. 854, [1953] N.Y. Laws 1876 (current version at N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1978-1979)); Weinstein, Statute Compelling Submission to a Chemical Test for Intoxication, 45 J. CRIM. L. & P.S. 541, 541 (1959). The original statute provided in pertinent part:

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

driver impliedly consents to submit to a chemical test for intoxication, is now a well-accepted part of American law. Indeed, a recent challenge in the Supreme Court has been unsuccessful, leaving the

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Only two states have found implied-consent statutes unconstitutional. New York's statute was held to be violative of due process on the grounds that arrest was not a prerequisite to a sobriety test and a hearing prior to revocation of the driver's license was not required. Schutt v. MacDuff, 205 Misc. 43, 54, 127 N.Y.S.2d 116, 128 (Sup. Ct. Orange County 1954); see notes 25-31 and accompanying text infra. In response to Schutt, the statute was amended, see ch. 320, § 1, [1954] N.Y. Laws 1009, and has since withstood constitutional challenge, see Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. Montgomery County 1955); note 26 infra.

The Vermont Supreme Court held unconstitutional the statutory provision that a defendant could forfeit his license for refusing to submit to a sobriety test only when he pleaded not guilty to the charge of driving while under the influence of alcohol. Yet, no such penalty was statutorily mandated when a defendant entered a guilty plea. Veilleux v. Springer, 131 Vt. 33, 39, 300 A.2d 620, 624 (1973). The court, however, held this provision to be severable from the remainder of the statute and the offending provision was excised. Id. at 41, 300 A.2d at 626. The statute was later amended, see no. 79, § 5, 1973 Vt. Acts, to delete this provision and has since been held to be valid. State v. Brean, 385 A.2d 1085 (1978). See generally Note, Vermont's Blood Alcohol Test: Illegal Search and Seizure?, 2 Vt. L. Rev. 93 (1977).

In Montrym v. Panora, 429 F. Supp. 393 (D. Mass. 1977), an arrested motorist who had his license suspended for refusing to take a breathalyzer test pursuant to Massachusetts' implied-consent law, Mass. Gen. Laws Ann. ch. 90, § 24(1)(f) (West Supp. 1978-1979), brought a class action to challenge the statute's constitutionality. The plaintiff had not been advised of the consequences of refusal and, although acquitted of the criminal charges against
concept of implied consent virtually unscathed. While most citizens are acquainted with this statutory device permitting a driver to be tested for intoxication, the precise theory and operation of the statute may not be fully appreciated. Thus, it seems appropriate to consider the nature of implied consent. This Article begins with a discussion of the chief features of the typical implied-consent statute and considers the concepts of consent and waiver in the context of such statutes. Through this focus, the implied-consent concept and its impact on broader notions of justice may be analyzed. As a result of this analysis it is suggested that implied consent is a flawed concept. The statutory scheme is not premised on implication. That which is termed consent is in practice express, not implied. Additionally, that which the statutes refer to as consent appears to be the result of coercion rather than voluntary agreement. The faulty designation is not, however, the serious flaw. Rather, it represents the use of a needless fiction and results in a distortion of the image of law as justice which should be corrected.

**IMPLIED CONSENT: FEATURES**

Typically, implied-consent statutes provide that any operator of a motor vehicle is deemed to have consented to “a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content . . . of his blood.” A police officer, having
reasonable cause to believe that a person has been driving while intoxicated, is statutorily authorized, after arresting the motorist, to request that the motorist submit to a chemical test. The motorist does have a choice of submitting to a chemical test or refusing to do so; none of the statutes compel an unwilling motorist to be.

Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor.

CAL. VEH. CODE § 13353(a) (West 1971).


tested. Many statutes, however, require that the officer inform the motorist that refusal to submit to the test will result in a forfeiture of his driver’s license. For the motorist who submits to a test, some states also allow the chemical testing of an individual’s blood, urine, saliva, or “other bodily substance.” For a comprehensive dissertation on the apparatus and procedures involved in these chemical tests, see R. Erwin, supra note 2, chs. 15-25. See generally R. Donigan, supra note 2; Harger, Some Practical Aspects of Chemical Tests for Intoxication, 5 J. Crim. L. C. & P.S. 202 (1944); Muehlberger, Medicolegal Aspects of Alcohol Intoxication, 35 Mich. St. B.J. 36 (1956).


10 See note 22 and accompanying text infra. A number of tests are used to determine blood alcohol content, although the breathalyzer is probably the most popular, as it is the easiest to administer and involves the lowest level of bodily intrusion. In addition to the breath test, some states also allow the chemical testing of an individual’s blood, urine, saliva, or “other bodily substance.” For a comprehensive dissertation on the apparatus and procedures involved in these chemical tests, see R. Erwin, supra note 2, chs. 15-25. See generally R. Donigan, supra note 2; Harger, Some Practical Aspects of Chemical Tests for Intoxication, 5 J. Crim. L. C. & P.S. 202 (1944); Muehlberger, Medicolegal Aspects of Alcohol Intoxication, 35 Mich. St. B.J. 36 (1956).
results will be admissible in any subsequent criminal prosecution on the issue of driving while intoxicated.\textsuperscript{13}

The motorist who refuses to submit to a test forfeits his license to operate a motor vehicle in that state for a time designated by statute.\textsuperscript{14} Frequently, the statutes provide that the immediate for-


Although the results of a properly conducted test are strong evidence in any prosecution in which intoxication is at issue, they are labeled by the statutes as presumptive or prima facie evidence. The effect, therefore, is to raise a rebuttable presumption of drunkenness which the judge or jury may weigh together with any other evidence. See generally 1 B. Jones, Law of Evidence § 3:79 (6th ed. S. Gard 1972); J. Wigmore, Evidence §§ 235, 1707 (3d ed. 1940). The resulting increase in driving-while-intoxicated prosecutions is a success story which some have criticized as being almost too successful. King & Tipperman, supra note 2, at 542. Contra, R. Donigan, supra note 2, at 180. Of course, in those instances where intoxication is not indicated, prosecution can be quickly abandoned without the expense of a trial. Thus, it is argued that both the state and the accused benefit from a system of chemical testing for intoxication.


Similarly, courts have found that license forfeiture is not precluded by a prior determination in a criminal action which was favorable to the defendant. In McDonnell v. Department of Motor Vehicles, 45 Cal. App. 3d 655, 119 Cal. Rptr. 804 (1975), the defendant's license was suspended for refusal to take a sobriety test. He was acquitted of the charge of driving while under the influence of alcohol because he was unaware of the effect his drinking would have when combined with the allergy medication he had taken. The court, however, held that the defendant's guilt or innocence on the underlying charge was irrelevant with respect to the suspension of his license. The Missouri courts have also followed this reasoning. In a case of
feiture of the driving privilege is only temporary, pending final determination at an administrative hearing after formal notice.\(^5\) Most contentions raised at such hearings\(^6\) have been found irrelevant and unpersuasive, since the sole inquiry in most cases is whether the motorist refused to submit to a sobriety test.\(^7\) Although the admin-

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\(^6\) See text accompanying notes 70-71 infra.

\(^7\) The scope of the administrative hearings held concerning license forfeiture is generally prescribed by statute and limited to whether there were reasonable grounds for the arrest, a proper request by the officer that the driver submit to a chemical test, and a refusal to do so by the defendant. See, e.g., MASS. GEN. LAWS ANN. ch. 90, § 24(9) (West 1969 & Supp. 1978-1979); N.J. STAT. ANN. § 39:4-50.4(a) (West Supp. 1978-1979); TEX. REV. CIV. STAT. ANN. art. 6701-5, § 2 (Vernon 1977). Some statutes allow review of a fourth issue: whether the defendant was informed of the consequences of refusal. See, e.g., CAL. VEH. CODE § 13353(b) (West 1971); FLA. STAT. ANN. § 322.261(a) (West 1975 & Supp. 1979); ILL. ANN. STAT. ch. 95-\(\frac{1}{2}\), § 11-501.1(d) (Smith-Hurd Supp. 1978); cf. ALA. CODE tit. 32, § 5-192(d) (1975); N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1978-1979).

In determining whether there are reasonable grounds for arrest, several statutes provide for a preliminary breath test. The officer may administer this test to the suspect and thereby establish the propriety of arrest and subsequent chemical test. There is generally no penalty for refusing to submit to such screening tests and the results of the preliminary tests are not admissible in any subsequent proceedings. See, e.g., FLA. STAT. ANN. § 322.261(1)(b)(1) (West 1975 & Supp. 1979); MINN. STAT. ANN. § 169.121(1)(d) (West Supp. 1978); MISS. CODE ANN. § 63-11-5 (1972); N.C. GEN. STAT. § 20-16.3 (1978); VA. CODE § 18.2-267 (Supp. 1978). But see N.Y. VEH. & TRAF. LAW § 1193-a (McKinney Supp. 1978-1979). See generally Smith, Using the Alcohol Screening Test on Motor Vehicle Operators, 35 ALB. L. REV. 455 (1971).

Although mere refusal to submit to a post-arrest chemical test generally is sufficient to invoke the revocation penalties of the implied-consent laws, one statute mandates consideration of whether the test was “medically inadmissible.” COL0. REV. STAT. ANN. § 42-4-1202(3)(e) (1973). Another statute requires scrutiny of the reasonableness of the refusal. NEB. REV. STAT. § 39-669.16 (Supp. 1977).

Administrative determination to revoke a driver's license is subject to judicial review, it is significant that the loss of the privilege to drive is a civil, not criminal, sanction. The distinction between criminal and administrative or civil sanctions has been the salvation of implied-consent statutes from constitutional challenges.

### Constitutional Challenges

In *Schmerber v. California,* the Supreme Court held that a sobriety test, reasonably performed by competent personnel, may be constitutionally administered without the suspect's consent.


19 See note 19 infra.

Since the “statute provides no criminal consequences from a refusal to take the test,” some courts have reasoned that there is no self-incrimination issue. Bailey v. City of Tulsa, 491 P.2d 316, 318 (Okla. Crim. App. 1971). In Bailey, the defendant was involved in an automobile accident after which the arresting officers advised him of his rights prior to his consenting to a breath test. Bailey appealed from a conviction for driving while intoxicated on the grounds that the implied-consent law forces an individual to give evidence against himself. Id. at 317. In affirming the conviction, the appellate court conceded that such nontestimonial evidence fell within the self-incrimination prohibition of the state's constitution, but that the driver was not under an unconstitutional compulsion to submit. Id. at 318-19.


2 Id. at 772. Historically, administration of involuntary medical procedures has been closely scrutinized by the Supreme Court. In *Rochin v. California,* 342 U.S. 165 (1952), the Court reviewed a conviction for possession of narcotics based on evidence obtained by pumping the defendant's stomach, without his consent. Applying the fourteenth amendment, the Court held that state “convictions cannot be brought about by methods that offend a 'sense of justice.'” Id. at 173. The Court, therefore, reversed the conviction concluding that the police had used “force so brutal and so offensive” that their actions violated the due process clause. Id. at 174. Five years later, however, the Court held the extraction of a blood sample from an unconscious suspect, for analysis by a physician, was not so “brutal” or “offensive” as to violate due process. Breithaupt v. Abram, 352 U.S. 432 (1957). The Breithaupt Court concluded “that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience,' . . . nor such a method of obtaining evidence that it offends a 'sense of justice' . . . .” Id. at 437. The Schmerber Court, citing Breithaupt, found no due-process violation. 384 U.S. at 759-60. In rejecting the contention that the use of the test results violated the privilege against self-incrimination, the Court held that “[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.” Id. at 785. Finally, the defendant's unreasonable search and seizure argument was rejected by the Schmerber Court since the test was made incidental to
RATHER THAN APPLYING SCHMERBER AND COMPELLING ARRESTEES TO SUBMIT TO SUCH TESTS, STATES HAVE "DEEMED FIT TO GRANT SUSPECTED INTOXICATED DRIVERS MORE 'PROTECTION' THAN IS CONSTITUTIONALLY REQUIRED."22 IN THIS WAY THE DRIVER MAY EITHER CONSENT TO A SOBRIETY TEST OR FORFEIT THE PRIVILEGE TO DRIVE.23 IT IS FROM THIS GRANT OF GREATER PROTECTION THAT SIGNIFICANT ISSUES, UNRESOLVED BY SCHMERBER, ARISE.

NEW YORK WAS THE FIRST STATE TO ENACT AN IMPLIED-CONSENT STATUTE.24 ITS JUDICIARY'S RESPONSE TO CONSTITUTIONAL CHALLENGES, THEREFORE, IS USEFUL IN UNDERSTANDING THE REASONING GENERALLY EMPLOYED TO DEFEAT VARIOUS CONSTITUTIONAL OBJECTIONS. IN SCHUTT V. MACDUFF,25 NEW YORK'S STATUTE PREVAILD OVER ALL CHALLENGES EXCEPT FOR A TWO-FOLD DUE PROCESS ATTACK: THE FAILURE TO REQUIRE THAT OFFICERS EFFECT A LAWFUL ARREST PRIOR TO REQUESTING A TEST, AND THE FAILURE TO PROVIDE FOR AN

A LAWFUL ARREST. THE COURT FOUND THAT THERE WAS PROBABLE CAUSE TO ARREST THE DEFENDANT FOR DRIVING WHILE INTOXICATED, THAT THERE WAS INSUFFICIENT TIME TO SEEK OUT A MAGISTRATE AND SECURE A WARRANT BECAUSE OF ALCOHOL'S PROPENSITY TO DISSIPATE IN THE BLOOD, AND THAT A REASONABLE MEANS OF SEIZING THE EVIDENCE HAD BEEN EMPLOYED. ID. AT 768-71.


23 IT IS ALSO IMPORTANT TO DETERMINE WHETHER THIS PROTECTION INCLUDES A RIGHT TO THE PRESENCE OF COUNSEL AT THE TIME A SOBRIETY TEST IS OFFERED. PRIOR TO SCHMERBER, LOWER COURTS GENERALLY HAD CONCLUDED THAT THERE WAS NO CONSTITUTIONAL RIGHT TO ADVICE OF COUNSEL BEFORE DECIDING WHETHER TO SUBMIT TO A SOBRIETY TEST. SEE, E.G., 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). THE REASONING IN SCHMERBER ON THE RIGHT TO COUNSEL ISSUE, HOWEVER, TAKES ON ADDRESSED SIGNIFICANCE IN LIGHT OF THE RIGHT TO REFUSE A TEST CONTAINED IN IMPLIED-CONSENT STATUTES. ACCORDING TO SCHMERBER, SINCE THE DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO REFUSE A PROPERLY REQUESTED CHEMICAL TEST, THERE IS NO ISSUE OF COUNSEL'S ABILITY TO ASSIST DEFENDANT. BUT DO THE IMPLIED-CONSENT STATUTES CREATE A RIGHT TO COUNSEL? SEE NOTE, MIRANDA'S APPLICABILITY TO THE BREATHEyER AND BLOOD TESTS, 7 WAKE FOREST L. REV. 313 (1971). THE ANSWER TO THIS QUESTION INVOLVES A NUMBER OF CONSIDERATIONS. THE FIRST IS WHETHER THE REQUEST TO SUBMIT TO A TEST IS A STAGE OF THE CRIMINAL PROCEEDING WHEREBY THE ABSENCE OF COUNSEL WOULD HARM DEFENDANT'S RIGHT TO A FAIR TRIAL; THE SECOND, WHETHER COUNSEL COULD PROVIDE MEANINGFUL ASSISTANCE AT SUCH A PROCEEDING WOULD HAVE TO BE CONSIDERED; AND finally, WHETHER THE STATE'S INTERESTS OUTWEIGH DEFENDANT'S RIGHTS. SEE NOTE, RIGHT TO COUNSEL UNDER OREGON'S IMPLIED CONSENT LAW, 10 WILLAMETTE L.J. 236 (1974); RECENT Cases—RIGHT TO COUNSEL PRIOR TO SUBMISSION TO BREATHEyER TEST—THE IMPACT OF MISSOURI SUPREME COURT RULE 37. 98, 42 MO. L. REV. 168 (1977). SOME STATUTES PROVIDE THAT A SUSPECT MAY CONFER WITH COUNSEL BEFORE MAKING A DECISION. SEE ILL. ANN. STAT. CH. 95-1/2, § 11-501.1(a)(3) (SMITH-HURD SUPP. 1978); N.C. GEN. STAT. § 20-16.2(a)(4) (1978); VT. STAT. ANN. TIT. 23, § 1202(b) (SUPP. 1978). BUT SEE CAL. VEH. CODE § 13353(a) (WEST 1971); UTAH CODE ANN. § 41-6-44.10(g) (SUPP. 1977).

24 SEE NOTE 1 supra.

administrative hearing prior to license revocation. The Schutt court resolved the self-incrimination claim by quoting from the New York Legislature's committee report: "'[T]he accused is given the choice of waiving his right against self-incrimination—assuming such a right exists—or losing the privilege to continue driving on our highways.'" In addition to this conditioned-privilege answer, the court reasoned that there was no right against self-incrimination "because the decisions of this State have limited the effect of the State constitutional provision against self-incrimination to protect only as against testimony compulsion, that is, as to disclosures by utterance, oral or written." The claim of unreasonable search and seizure was rejected by the Schutt court because the motorist, "being under legal arrest, could be searched for evidences of the crime" and because the statute "is premised upon the consent of the licensee to submit to the test when demanded." Although not expansive in its reasoning, the court's point is clear: by operating the automobile the motorist has consented to a search for evidence of intoxication through a chemical test if probable cause for a search exists.

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28 Id. at 52-53, 127 N.Y.S.2d at 126-27. In Schutt, the petitioner was arrested for driving while intoxicated and was taken to the police station for booking. When requested by the police to go to the hospital for a blood test he refused and his license was subsequently revoked. Id. at 45, 127 N.Y.S.2d at 120. After being exonerated of the criminal charge of driving while intoxicated, Schutt commenced judicial proceedings to annul the revocation of his license and to challenge the constitutionality of the implied-consent statute. Id. at 46, 127 N.Y.S.2d at 121.


Shortly after its enactment, the amended statute was attacked in Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. Montgomery County 1955). Anderson was acquitted of a drunk driving charge prior to the revocation of his license. He challenged the law on the ground that it failed to require a warning of the consequences of refusal. Id. at 273, 143 N.Y.S.2d at 258. The court upheld the statute finding that driving in the state is a privilege and subject to qualification. Id., 143 N.Y.S.2d at 259. A warning requirement was later added to the New York statute. See Ch. 85, § 1, [1968] N.Y. Laws 672 (amending ch. 963, § 1, [1966] N.Y. Laws 3270). See generally King & Tipperman, supra note 2, at 549-56.

29 205 Misc. at 48, 127 N.Y.S.2d at 122 (quoting New York State Joint Legislative Committee on Motor Vehicle Problems, 3 N.Y. Leg. Doc. No. 25, 178th N.Y. Leg., 26 (1953)).

30 205 Misc. at 48-49, 127 N.Y.S.2d at 123.

31 On a less serious challenge, the court concluded that there was no denial of equal protection because the licensed operator "stands in a class different from an unlicensed operator of a vehicle and is subject to legislation specially applying to those persons in his
The Schutt rationale subsequently has been cited in judicial interpretations of implied-consent statutes in other jurisdictions. One court has reasoned the statute in question imposed “the condition upon the holding of a license . . . that the licensee voluntarily consent to taking a sobriety test.” Another court has stated that by “the act of driving his car, [the driver] has waived his constitutional privilege of self-incrimination.” Additionally, some courts have dismissed the self-incrimination issue by reasoning that since the driver may refuse to take a sobriety test, he is not compelled to give evidence against himself.

CONSENT

According to implied-consent statutes, one consents to a sobriety test by operating an automobile. Although this consent can be withdrawn by the refusal to take the test, such a decision results in license revocation. Does this process involve waiver; and if so, what
criteria are to be employed in determining the effectiveness of such a waiver?\textsuperscript{37}

Consent imports the idea of agreement, approval or assent having consequences and involving choice. Not every choice involves waiver, but waiver exists when making a choice carries with it the consequences of abandoning or foregoing certain benefits.\textsuperscript{38} In criminal procedure the act of consent most often means abandoning the ability to claim potentially significant benefits.\textsuperscript{39} Simply stated, if a driver submits to a sobriety test, he abandons his right to be free from bodily intrusion. Thus, it is clear that such consent does, in fact, entail the abandonment of a crucial benefit and therefore implicates the concept of waiver.

The judicial definitions of waiver in criminal procedure are based on the 1938 language of the United States Supreme Court in

\textsuperscript{37} It might be argued that since operating an automobile is a privilege, not a right, the state can simply withdraw the privilege. This notion, however, overlooks the fundamental concept that a state must grant or deny a privilege in a fair and reasonable manner that comports with due process. Bell v. Burson, 402 U.S. 535, 539 (1971). An illustrative parallel is the right to appellate review of criminal convictions in state courts. The Federal Constitution does not mandate that the states provide a system of appellate courts or that the states grant a right to appellate review. McKane v. Durston, 153 U.S. 684, 687 (1894). If a state, however, elects to provide such a privilege, it must do so in a reasonable manner that does not discriminate, since “at all stages of the proceeding the Due Process and Equal Protection Clauses protect . . . from invidious discriminations.” Griffin v. Illinois, 351 U.S. 12, 18 (1956) (citations omitted).

\textsuperscript{38} See generally C. Berry, Arrest, Search and Seizure § 30 (1973); 2 R. Erwin, supra note 2, § 32.05; Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Tex. L. Rev. 193 (1977); Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214 (1977).

\textsuperscript{39} “[O]nce the defendant has made a free and informed decision to forego his constitutional defenses, he may constitutionally be held to the consequences of his election.” Westen, supra note 38, at 1254-55. Waiver can occur in a variety of situations. A suspect may consent to a search and thereby waive his fourth amendment right to be free from unreasonable search and seizure. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Similarly, a suspect may surrender his right to have counsel present during custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966), or at a post-indictment lineup, United States v. Wade, 388 U.S. 218 (1967). A defendant charged with a felony may waive his fifth amendment right to a grand jury indictment under “certain circumstances.” Smith v. United States, 360 U.S. 1, 6 (1959) (footnote omitted). Criminal defendants who proceed to trial may waive the right to a jury. Adams v. United States, 317 U.S. 269 (1942). Additionally, “the privilege [to confront one’s accusers] may be lost by consent or at times even by misconduct.” Snyder v. Massachusettes, 291 U.S. 97, 106 (1934) (citation omitted). A defendant may also waive his privilege to remain silent at trial. See, e.g., United States v. Guajardo-Melendez, 401 F.2d 35, 38 n.5 (7th Cir. 1968); United States v. Pate, 357 F.2d 911, 915-16 (7th Cir. 1966). Once convicted “[a] defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds.” Fay v. Noia, 372 U.S. 391, 428 (1963). This listing, while not all inclusive, indicates the potential for waiver in the criminal process.
Johnson v. Zerbst\(^4\) that "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."\(^4\) To be effective as a waiver, it must be determined that the defendant has competently and intelligently abandoned the right in question.\(^2\) According to prior holdings of the Court, "competency" means voluntarily,\(^3\) and voluntariness is to be judged by the "totality of the relevant circumstances."\(^4\) The state "has the burden of proving that the [waiver] was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."\(^4\) Presuming waiver from a silent record\(^6\) or "presuming waiver of a fundamental right from inaction is inconsistent" with the view that the "[c]ourts should 'indulge every reasonable presumption against waiver.'"\(^4\) In 1973 the Supreme Court, in Schneckloth v. Bustamonte,\(^4\)

\(^{42}\) 304 U.S. 458 (1938).

\(^{41}\) Id. at 464. The petitioners in Zerbst were convicted of possession of counterfeit money and sought a writ of habeus corpus on the grounds that they had been denied the right to counsel. Both petitioners were relatively uneducated, without acquaintances or funds, and residents of states some distance from where they were indicted. After spending approximately 2 months in jail, unable to meet bail and having consulted with an attorney only at a preliminary hearing, they were arraigned, tried, convicted and sentenced in a single day. Id. at 460.

\(^{46}\) Id. at 465. The Court recognized the significance of a waiver of the right to counsel:

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court. . . .

\(^{43}\) United States v. Jackson, 390 U.S. 570 (1968). The Zerbst Court also determined that an intelligent waiver depends upon the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." 304 U.S. at 464.

\(^{45}\) Culombe v. Connecticut, 367 U.S. 568, 606 (1961). In discussing the criteria for determining the voluntariness of a confession, Justice Frankfurter stated:

The ultimate test [is] . . . the test of voluntariness. Is the [decision] the product of an essentially free and unconstrained choice by its maker? . . . [I]f his will has been overborne and his capacity for self-determination critically impaired, the use of his [decision] offends due process. . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature however infused, propels or helps to propel the [decision].

\(^{44}\) Id. at 602 (citation omitted).


\(^{50}\) 412 U.S. 218 (1973).
determined that there are in fact two distinct standards which are utilized to judge the effectiveness of a waiver. Schneckloth involved a conviction for possessing checks with intent to defraud in which the critical evidence was obtained by a warrantless search of an automobile stopped by the police for a traffic infraction. The officers asked to search the car and the driver consented. The State conceded that the only justification for the search was the consent of the driver. Thus, the two issues presented to the Court were the prosecution’s burden with respect to the issue of voluntariness and whether that burden had been carried.

The Court in Schneckloth found that there “is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment.” The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Since “the Fourth Amendment protects the ‘security of one’s privacy against arbitrary intrusion by the police’” the Court found that “[n]othing . . . in the purposes behind requiring a ‘knowing’ and ‘intelligent’ waiver of trial rights . . . suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.” Thus, the Court set forth the two standards by which the validity of a waiver is to be judged: a “knowing and intelligent waiver” test for trial rights and a “voluntary waiver” standard for other rights. The

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4 Id. at 220.
50 Id. at 222.
51 Id. at 223.
52 Id. at 241. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.
54 412 U.S. at 242.
55 Id. (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).
56 412 U.S. at 241.
57 The majority in Schneckloth conceded that “under the doctrine of Johnson v. Zerbst, . . . to establish such a ‘waiver’ the State must demonstrate ‘an intentional relinquishment or abandonment of a known right or privilege.’” Id. at 235 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). But the Court reasoned that the Zerbst Court “explicitly [left] open the question whether a ‘knowing and intelligent’ waiver need be shown.” 412 U.S. at 235 (footnote omitted). This is so, the Schneckloth Court stated, because the Zerbst “requirement of a ‘knowing’ and ‘intelligent’ waiver was articulated in a case involving the validity of a defendant’s decision to forego a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process.” Id. at 236. Certain rights—the right to
latter is to be judged by the totality of all the surrounding circumstances.\textsuperscript{57} Since consent to a sobriety test does not involve a waiver of trial rights, it would appear that this standard is the proper one by which to judge submission to the test.

Leaving aside the more exacting requirements of the knowing-and-intelligent waiver standard,\textsuperscript{58} the less stringent voluntary-waiver test requires a showing that the consent given was not the result of duress or coercion, express or implied. The guide is whether the consent is "the product of an essentially free and unconstrained choice by its maker" and whether "his will has been overborne and his capacity for self-determination critically impaired."\textsuperscript{59} It is difficult to say that a driver's consent to a blood extraction is a free and unconstrained choice when his refusal to consent results in the penalty of license revocation. The potential license revocation constitutes duress, albeit of an official nature. The entire process, even the decision whether to operate a car or forego the privilege, involves choice, but it is choice fraught with coercion.\textsuperscript{60} When an officer

\begin{footnotes}
\item[57] Id. at 234 n.15. The Schneckloth Court stated:
\begin{quote}
[When the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.]
\end{quote}
\item[58] See Miranda v. Arizona, 384 U.S. 436, 475 (1966). The knowing-and-intelligent waiver standard can be met when the record shows that the person was merely advised by the officers of the right at issue. For example, a waiver of the right to counsel during custodial interrogation may be effective if the officers advise the accused of his Miranda rights and nevertheless he expressly elects to make a statement. See Miranda v. Arizona, 384 U.S. 436, 475 (1966).
\item[59] 412 U.S. at 234 n.15. The Schneckloth Court stated:
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\end{quote}
\item[60] Id. at 248-49 (footnote omitted).
\end{footnotes}
requests a driver to submit to a sobriety test there is no free choice; it is merely an election between two evils: abandon the freedom from search and seizure or abandon the privilege to drive. Moreover, in those jurisdictions which admit evidence of a driver’s refusal to submit to a sobriety test in subsequent criminal proceedings, this evidentiary rule appears to be an added penalty. This additional factor further diminishes the free, voluntary consensual nature of the motorist’s election.

It appears the idea of “implying” consent, while of doubtful validity under the knowing-and-intelligent waiver standard, may not even satisfy the less stringent voluntary-waiver concept since “consent to a search, in order to be voluntary, must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred.”

The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice . . . [It is] “likely to exert such pressure upon an individual as to disable him from making a free and rational choice.”

Where the choice is “between the rock and the whirlpool,” duress is inherent in deciding to “waive” one or the other.

“It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress.”

Id. at 496-98 (quoting Miranda v. Arizona, 384 U.S. 436, 464-65 (1966); Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67, 70 (1918)).

But see State v. Brean, 385 A.2d 1085 (1978). The defendant in Brean was convicted of driving while under the influence of alcohol. At trial, evidence of his refusal to submit to a sobriety test was admitted. In affirming the conviction, the court upheld the constitutionality of the provision of the implied-consent statute which allows for the admission of such evidence, stating that the law did not impose “a penalty on the exercise of [the defendant’s] privilege against self-incrimination . . . [since] he had no constitutional right, either state or federal, to refuse to take the test.” Id. at 1088 (citing Schmerber v. California, 384 U.S. 757 (1966); State v. Pierce, 120 Vt. 373, 141 A.2d 419 (1958)).

Rosenthal v. Henderson, 389 F.2d 514, 516 (6th Cir. 1968) (citing Simmons v. Bomar, 349 F.2d 365, 366 (6th Cir. 1965) (per curiam)).

There has been much discussion of the accused’s capacity to commit a crime, that is, whether he had the requisite mens rea, to be held liable for his acts or omission. See generally R. Perkins, Criminal Law 739 (1969). A different concern includes the accused’s capacity to stand trial. See Dusky v. United States, 362 U.S. 402 (1960) (per curiam); Model Penal Code § 4.04. The Supreme Court in Dusky stated that the defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him.” 362 U.S. at 402.

The narrower focus, capacity to waive a legal right, involves the same concept and guidewords. Definitional language for this concept is found in Rees v. Peyton, 384 U.S. 312 (1966) (per curiam), where the Supreme Court addressed the problem of capacity to waive the right to appellate review of a murder conviction. When Rees sought to withdraw his
IMPLIED CONSENT

CAPACITY TO CONSENT

The definition of consent presupposes a defendant’s capacity to choose between the courses of action presented. “Capacity” emphasizes the individual’s ability to do what is necessary to voluntarily consent. By its nature, “capacity” is a somewhat subjective term. That is perhaps why judicial discussion of capacity has at times been vague. In grappling with this issue, courts have established that the person’s present ability to appreciate his position and make a rational choice, made possible by a rational as well as factual understanding of the proceeding, will determine whether he is capable of consenting. Thus, capacity involves not only awareness of choice, but the ability to analyze factual, legal or tactical considerations in light of influences which may or may not be proper, and make a decision to act accordingly.

petition for certiorari, evidence was produced suggesting Rees was psychologically unsound. The Court remanded for a determination of his mental competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Id. at 314. The words “capacity to appreciate his position and make a rational choice,” as qualified by Dusky’s requirement of “a rational as well as factual understanding of the proceeding,” provide a guide by which to evaluate the defendant’s capacity to make the choice to effectuate a legal waiver.

See note 63 supra. Courts have not been helpful in specifically defining some of the key words in this judicial standard. Unfortunately, the courts have been more inclined to engage in conclusionary discussions, describing the facts and coming to a conclusion without analysis. This trend seems to be the result of the Supreme Court’s holding in Schneckloth that the voluntariness of consent is “to be determined from a totality of all the circumstances.” Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); see notes 48-59 and accompanying text supra. As noted by Professor Weinreb, “[t]he product of [Schneckloth] is likely to be still another series of fourth amendment cases in which the courts provide a lengthy factual description followed by a conclusion (most likely, in the current climate, that consent was voluntarily given), without anything to connect the two.” Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 57 (1974).

H.L.A. Hart, in his discussion of responsibility for criminal acts, has stated:

In most contexts, as I have already stressed, the expression he is responsible for his actions is used to assert that a person has certain normal capacities. These constitute the most important criteria of moral liability-responsibility, though it is characteristic of most legal systems that they have given only a partial or tardy recognition to all these capacities as general criteria of legal responsibility. The capacities in question are those of understanding, reasoning, and control of conduct: the ability to understand what conduct legal rules or morality requires, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made.

H. HART, PUNISHMENT AND RESPONSIBILITY 227 (1957).
Knowledge of the statute’s requirement would appear to be necessary before one could consent. Yet it might be said that the act of driving indicated such knowledge, either presumptively or irrefutably. The fundamental concept that all are presumed to know the law, and the criminal law adaptation that ignorance of the law is no excuse, might suggest actual knowledge of the implied-consent statute is necessary. If this be the case, an inquiry into a driver’s knowledge of the statutory requirement would seem to be irrelevant.

Even if actual knowledge of the statutory requirement is irrelevant, there are other considerations of knowledge relevant to the consequences of taking a sobriety test. Need the driver know that test results showing intoxication would virtually conclude guilt in any criminal trial? A person’s decision may be influenced by knowledge of the magnitude of the offense and the potential penalty upon conviction. Additionally, is it necessary that the driver know the consequences of refusing to be tested? Some statutes provide that the suspect need not be advised that test refusal will result in license revocation. Even if so advised, knowledge of the attendant consequences of revocation may not be considered. But such detailed considerations, while clearly relevant to the question of knowledge, have not been the subject of judicial inquiry. It appears that the legislatures and the courts are satisfied with either presumed knowledge or, if the statute requires, the knowledge acquired from the information supplied by the arresting officer.

If the law is so quickly satisfied with this analysis of the first aspect of capacity, what of the second factor, the ability to deliberate, choose and act in a rational manner? If the exercise of a driver’s options—not to drive, to take or refuse to take a sobriety test—is a rational choice, and the consequent action signifies the ability to choose in a rational manner, the inquiry is short lived and the particularized circumstances in each case are irrelevant. A choice is always made—the law compels a choice. Even the failure to respond

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44 See State v. King, 257 N.W.2d 693 (Minn. 1977); State v. Collova, 79 Wis. 2d 473, 255 N.W.2d 581 (1977). See generally MODEL PENAL CODE § 2.04, Comment (Tent. Draft No. 4, 1955); Perkins, Ignorance and Mistake in Criminal Law, 88 U. PA. L. Rev. 35 (1939). The notion that every individual is presumed to know the law and the corollary, that ignorance of the law is no defense, are premised on considerations of societal stability. See Perkins, supra, at 40 (1939).

47 See note 11 supra.

48 Professor Weinreb has observed that what is needed is a “firm principle for deciding in varying circumstances whether ignorance of a highly relevant fact deprives consent of voluntariness.” Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 57 (1974).
when asked to submit to an intoxication test is considered a refusal and, therefore, a choice.\textsuperscript{69} This superficial approach is not a wholly improbable position for a court to take. In fact, a driver's claim that he did not have the capacity to rationally decide whether to take the sobriety test owing to lack of intelligence\textsuperscript{70} or belief of innocence\textsuperscript{71} have been held not to impair the effectiveness of the choice. One reason for this approach is the difficulty in determining a person's state of mind. In considering an accused's state of mind at the time of his act, it is relatively simple to show that he lacked volitional muscular control. It is much more difficult to establish whether a person had the ability to deliberate, choose and consequently act in a rational manner.\textsuperscript{72}

\textsuperscript{69} Lampman v. Department of Motor Vehicles, 28 Cal. App. 3d 922, 105 Cal. Rptr. 101 (1972). In Lampman, the plaintiff, who was arrested for driving while intoxicated, was informed of her right to remain silent, her right to an attorney and was told of her obligation to either submit to one of three chemical sobriety tests or forfeit her license for 6 months. \textit{Id.} at 925, 105 Cal. Rptr. at 102. Although repeatedly informed of her obligation to submit to a sobriety test, she failed to respond to each request to take the test. \textit{Id.} Following the suspension of her license, the plaintiff sued to have the suspension set aside on the ground that her failure to respond did not constitute a refusal, but rather, was the result of confusion created by the arresting officer's initial statement that she had a right to remain silent. \textit{Id.} at 925-27, 105 Cal. Rptr. at 102-03; cf. Rust v. Department of Motor Vehicles, 267 Cal. App. 2d 545, 73 Cal. Rptr. 366 (1968) (where defendant is confused regarding his right to have an attorney present, the arresting officer should make it clear that a right to counsel is inapplicable where administration of a sobriety test is at issue). The Lampman court rejected the plaintiff's contention, stating that once the plaintiff had been informed that she did not have the right to consult with an attorney before deciding whether to submit to a test, it should have been clear to her that she was obliged to respond either affirmatively or negatively to the officer's request. \textit{Id.} at 926, 105 Cal. Rptr. at 103. Moreover, since the plaintiff had spoken to the arresting officer about other matters following her arrest, the court did not find the "fair meaning" of the plaintiff's failure to respond, indicative of confusion. \textit{Id.} at 927, 105 Cal. Rptr. at 103.

\textsuperscript{70} Goodman v. Orr, 19 Cal. App. 3d 845, 857, 97 Cal. Rptr. 226, 234 (1971); see State v. Hurbean, 23 Ohio App. 2d 119, 261 N.E.2d 290 (1970). In Hurbean, the court stated:

An understanding of the advice respecting the consequences of a refusal to take the chemical test is not an element of the mental process of refusal to take the test.

. . . . .

If there was no subjective awareness on the part of the licensee that she was being asked to take the test, then . . . it could not be true that she refused to take it. However, refusal to take a test when requested is a separate factual matter from an understanding of the consequences of the refusal. \textit{Id.} at 126, 261 N.E.2d at 297-99.

\textsuperscript{71} See McGarry v. Costello, 128 Vt. 234, 260 A.2d 402 (1969). In McGarry, the court held that where an arresting officer has a reasonable basis to believe that the driver of a vehicle is under the influence of alcohol, the driver cannot refuse to submit to a sobriety test on the ground that he is "innocent of the offense charged. . . . [I]nnoence, even if vindicated by acquittal, affords no legal justification for refusing the test." \textit{Id.} at 239, 260 A.2d at 405.

\textsuperscript{72} The problems inherent in proving whether an individual was capable of making a rational decision have been observed by H.L.A. Hart:
Aside from general emotional, psychological or intelligence factors that bear on a defendant’s ability to deliberate and act accordingly, there is the effect of intoxication on the driver’s capacity to make rational decisions. Intoxication is a constant factor in the driver’s determination whether to take a sobriety test. The fundamental rule, however, that voluntary intoxication is no excuse for criminal acts has helped to resolve the issue of the legal effect of intoxication on the motorist’s capacity to consent. Generally, it has been held that intoxication does not render the driver incapable of submitting to an intoxication test as long as the driver is given the opportunity to make a choice. Thus, in Washington, where the implied-consent statute requires the arresting officer to advise the motorist of the consequences of a refusal to take a sobriety test, the highest court of the state has reasoned that the requirement provides the arrested driver “the opportunity of exercising an intelli-

Further difficulties of proof may cause a legal system to limit its inquiry into the agent’s “subjective condition” by asking what a “reasonable man” could in the circumstances have known or foreseen, or by asking whether a “reasonable man” in the circumstances would have been deprived (say, by provocation) of self-control; and the system may then impute to the agent such knowledge or foresight or control.

H. Hart, supra note 65, at 103.


1) [Voluntary] intoxication of the actor is not a defense unless it negatives an element of the offense.

2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial.

Id.

See, e.g., Bush v. Bright, 264 Cal. App. 2d 788, 71 Cal. Rptr. 123 (1968); Landin v. Texas Dep’t of Pub. Safety, 475 S.W.2d 594 (Tex. Ct. App. 1971); Hering v. Department of Motor Vehicles, 13 Wash. App. 190, 534 P.2d 143 (1975). In Bush v. Bright the court held that “regardless of the degree of his voluntary intoxication or lack of understanding resulting therefrom, when a driver of an automobile refuses or otherwise manifests an unwillingness to take the required test he is subject to the license suspension provisions . . . .” 264 Cal. App. 2d at 791, 71 Cal. Rptr. at 126. The court reasoned that to permit an extremely intoxicated driver to avoid accountability on the ground that he was too inebriated to exercise intelligent judgment “would lead to absurd consequences” and would “frustrate the purpose of the Legislature.” Id. at ___., 71 Cal. Rptr. at 125.

Hering v. Department of Motor Vehicles, 13 Wash. App. 190, 534 P.2d 143, 146 (1975). In rejecting plaintiff’s contention that extreme inebriation rendered him incapable of making a rational decision concerning whether to submit to a chemical sobriety test, the Hering court ruled that statutory provisions requiring a knowing and intelligent refusal to submit to a sobriety test are met when an individual “is given the opportunity to exercise an intelligent judgment.” The individual’s “inability to do so because of intoxication” is, therefore, “of no consequence.” Id. at 192-93, 534 P.2d at 146.
gent judgment if he is capable of doing so.” The court added that nothing in the statute indicates that “an operator . . . too intoxicated to understand the advice given him and to respond intelligently . . . [should] be excused from the penalty . . . for refusal to comply with the request that he submit to a test.” A driver’s inability to exercise intelligent judgment is not, according to this view, a deterrent to an effective choice and a valid waiver. Similarly, the Ohio courts are satisfied if the officer advises the arrestee of the consequences of a refusal to submit to a sobriety test. As the Supreme Court of Ohio stated: “It is possible for a licensee to be in such a state of intoxication that he does not understand what is happening, and, at the same time, by words, acts and general conduct to manifest an unwillingness or outright refusal to take the test.”

To conclude, it is obvious that intoxication impairs a person’s mental ability, hence the prohibition against driving while intoxicated. To dismiss the impact of intoxication on capacity is to ignore, in many cases, an obviously diminished capacity, thereby calling into question the validity of the process. It has been suggested that,

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76 Department of Motor Vehicles v. McElwain, 80 Wash. 2d 624, 628, 496 P.2d 963, 965 (1972) (en banc). The Washington statute provides in part:
[The arresting] officer shall inform the [driver] of his right to refuse the test . . . . The officer shall warn the driver that his privilege to drive will be revoked or denied if he refuses to submit to the test.

77 Department of Motor Vehicles v. McElwain, 80 Wash. 2d 625, 628, 496 P.2d 963, 965 (1972).

78 The McElwain court explained its position concerning the effect of intoxication on the capacity of an arrested driver to refuse to submit to a sobriety test as follows:
[W]e fail to find anywhere in the statute an expressed intent that an operator who, while not unconscious, is yet too intoxicated to understand the advice given him and to respond intelligently to it, shall be excused from the penalty provided therein for refusal to comply with the request that he submit to a test.
Id. at 628, 496 P.2d at 965. If such an exemption were granted, the court reasoned, the statute’s purpose would be emasculated. Id.

If a person under arrest for the offense of driving a motor vehicle while under the influence of alcohol refuses upon the request of a police officer to submit to a chemical test . . . , after first having been advised of the consequences of his refusal . . . , no chemical test shall be given, but the registrar of motor vehicles . . . shall suspend his license . . . for a period of six months . . . .
OHIO REV. CODE ANN. § 4511.19.1(D) (Page 1973). This “opportunity in name only,” however, may be limited. For example, the California courts have held that a driver’s refusal to submit to a sobriety test results in license suspension “regardless of the degree of his voluntary intoxication . . . .” Bush v. Bright, 264 Cal. App. 2d 788, 791, 71 Cal. Rptr. 123, 126 (1968) (emphasis added).
in recognition of the effect of intoxication, the trier of fact in a
criminal trial should consider a “less than free will” mitigation or
excuse.80 Surely intoxication and its effect on the driver’s capacity
to make a legally significant choice is relevant. Recognition of this
would afford greater fairness to the accused and enhance citizen
“perception of fairness of the law.”81

PERSPECTIVE

Several observations appear justified. Assuming Schmerber to
be correct, it is conceded that the state could compel a chemical test
without the consent and over the express objections of an arrested
motorist. States have not followed this route. Rather, implied-
consent statutes have been enacted which require the driver’s ex-
press consent in order to be tested for intoxication.

Under this statutory scheme, consent suffers from logical defi-
ciencies. The notion that consent—a free, conscious, contemporar-
aneous choice—is to be implied from common and often necessary
conduct, such as driving, is troublesome. Motorists are not a distinct
homogeneous group who have entered into a particular vocation
from which it may be plausibly inferred that various secondary
consequences were considered and accepted. Entering into certain
professions may be said to involve consent to consequences arising
from that profession. For example, a professional football player can
be said to know and accept a certain degree of physical contact
which would otherwise constitute actionable assault and battery.82
In contrast, licensed firearms dealers and liquor dealers are engaged
in vocations long subject to close governmental regulation, yet the
Supreme Court has held that the dealers have not consented to
inspections and searches merely by virtue of their profession.83 Simi-
larly, airplane passengers are not deemed to impliedly consent to
boarding searches for hidden weapons. Courts have rejected the idea
that the government has conditioned a passenger’s exercise of his
rights to travel on voluntary relinquishment of fourth amendment
rights by stating: “[I]mplied consent under such circumstances
would be inherently coercive.”84

81 See J. Raulx, A THEORY OF JUSTIC 3-4 (1971).
83 United States v. Biswell, 406 U.S. 311, 315 (1972); Colonnade Catering Corp. v. United
United States, 315 F.2d 319, 324-25 (5th Cir. 1963); Channel v. United States, 285 F.2d 217,
Aside from the coercive nature of such circumstances, implying consent from conduct requires an evaluation of an individual's actual intent through the application of the average man standard which tends to ignore the individual and reality. This "is to treat men as things, not as persons, as means and not as ends." An effort should always be made to ascertain actual knowledge and capacity of the accused if law is to embody the idea of fairness to individuals without the unnecessary "sacrifice of the individual." Thus, to speak in terms of implying consent from the act of driving would seem unwarranted, logically difficult and potentially dangerous.

If implied-consent statutes are not premised on consent implied from driving, then it may be more accurate to view such statutes as granting a privilege subject to the condition that the driver submit to a sobriety test upon a police officer's demand. The subsequent decision whether to submit to a sobriety test can be described as a compulsory election. If the driver refuses to submit, the resulting license forfeiture can be evaluated in terms of the reasonableness of the condition and the fairness of the revocation process. On the other hand, if the driver submits to an intoxication test, with the results indicating intoxication, it is submitted that there is a sub-

219-21 (9th Cir. 1960); McGinley & Downs, Airport Searches and Seizures—A Reasonable Approach, 41 Fordham L. Rev. 293 (1972). In Lopez, the defendant was designated a potential hijacker by airline boarding personnel and was searched for weapons by United States marshals acting without a warrant. 328 F. Supp. at 1081-82. Although the search of Lopez was found to be unjustified because airline employees departed from neutral and objective criteria for identifying potential hijackers, the district court stated that a properly supervised, neutral and objective hijacking prevention system would be constitutional. Id. at 1102. The Lopez court stated that although justifiable as a protective frisk, such a search could not be predicated on the theory that the passenger impliedly consented to a voluntary relinquishment of his fourth amendment rights: "Consent to search involves a relinquishment of fundamental constitutional rights and should not be lightly inferred." Id. at 1092 (citations omitted). To sustain a search based on consent, it must be shown that consent was "unequivocal, specific, and intelligently given." Id. at 1093 (quoting United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), cert. denied, 372 U.S. 906 (1963)).

As the Court has observed in another context, mere "acquiescence to a claim of lawful authority" cannot be given the effect of consent. Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968) (footnote omitted). In Bumper, the Court held that where an individual consents to a search of his premises, in reliance upon an official's assertion that a valid warrant was issued, such reliance cannot be deemed consent if the warrant was in fact invalid at the time of the search or if the official did not possess a warrant. Id. at 548-50.

H. Hart, supra note 65, at 242.

Id. at 243.

See, e.g., Serenko v. Bright, 263 Cal. App. 2d 682, 70 Cal. Rptr. 1 (1968); Mauldin v. State, 239 Md. 592, 212 A.2d 602 (1965); Beare v. Smith, 82 S.D. 20, 140 N.W.2d 603 (1966). The reasonableness of the condition may be evaluated by weighing the competing considerations of public safety and the deprivation suffered by the motorist whose license has been suspended. Also to be considered is the fairness of the revocation procedure.
stantial question as to the validity of admitting the test results in a subsequent criminal action. At this point actual consent, not implied consent, is at issue. It could be argued that since the decision to submit to a test is made after a custodial arrest, a court should employ the Zerbst knowing-and-intelligent waiver criterion, prior to admitting into evidence sobriety test results. Even using the less stringent voluntary-consent test of Schneckloth, an evaluation of the totality of the circumstances incorporates factors which mitigate against a finding of voluntary consent. Such factors include: compulsory choice between two undesirable alternatives, custodial arrest, physical restraint, absence of counsel, doubtful appreciation of the significance of the choice, ignorance of legal consequences and possible diminished capacity owing to intoxication. Additionally, there may be an equality problem since some motorists, such as the neophyte to such encounters with police officers, might submit to a potentially incriminating sobriety test, while a more informed motorist might refuse to take the test and incur a civil sanction.

The presence of the above factors makes it doubtful that there can be a showing that the driver's decision to submit to a sobriety test was truly a free and unconstrained choice to abandon significant legal rights. The problem of coercion necessitates a viable judicial definition of voluntariness for purposes of determining a valid waiver. It is submitted that the result of an intoxication test and any testimony concerning it should be subject to exclusion from any trial or proceeding if the judge, applying the voluntary standard enunciated in Zerbst, determines that the defendant's decision to submit to a chemical test is not the result of free will. This process would appear to require a non-jury hearing analogous to those mandated on the issue of the voluntariness of a criminal defendant's confession.

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8 See notes 8, 62-64 and accompanying text supra.
9 See text accompanying notes 70-71 supra.
10 Jackson v. Denno, 378 U.S. 368, 394 (1964); People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965); Title II, Crime Control Act of 1968, 18 U.S.C. § 3501(a) (1976). In Jackson, the defendant was convicted of first degree murder. Upon a petition for habeas corpus, the defendant challenged both the admission of his confession at trial and the procedure utilized by New York courts for determining the voluntary character of confessions. The Supreme Court held that “the issue of [the defendant’s] confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence.” 378 U.S. at 394. The Court explained the policy considerations underlying its holding as follows: Expanded concepts of fairness in obtaining confessions have been accompanied by a correspondingly greater complexity in determining whether an accused’s will has been overborne—facts are frequently disputed, questions of credibility are often
These observations warrant the conclusion that the implied-consent nomenclature, as well as the premise that consent may be implied from conduct, should be abandoned. It seems logically and definitionally doubtful that implied-consent statutes are premised on voluntary consent in view of the sanction for refusing to consent and the motorist's questionable capacity to voluntarily consent. This observation, even if deemed essentially accurate, would not be viewed by many as a determinative factor. Rather, for some there is the broader concern of balancing society's interest against an individual's interest. A pragmatic view of this confrontation might quickly lead to the conclusion that society's interests are paramount and the individual's interests must give way. Similarly, a utilitarian assessment would necessitate balancing the interests of the majority—the motorists and pedestrians who could be potential victims of a drunk driver—against the inconvenience and minor sacrifice to those required to either submit to a sobriety test or forfeit their driving privilege. Such an examination would result in a finding for the greater good of the majority.

This conclusion, while readily understandable and apparently justified, should not be accepted without some appraisal of the interests sacrificed in the name of the common good. There is more at stake than the desire of a drunk driver to escape punishment. At issue is whether the government will deal with its citizens fairly and honestly or merely efficiently. Implied-consent statutes are useful as a partial answer to a substantial societal problem and, admittedly, the individual under this scheme is not subjected to wholly unwarranted sanctions; but that should not finalize the inquiry. John Rawls stated: "Each person possesses inviolability founded on justice that even the welfare of society as a whole cannot override. . . . Therefore in a just society . . . the rights secured by justice are not subject to political bargaining or to the calculus of societal interests." Even assuming a "justice-as-fairness" posture, as Rawls argues, one might question whether the individual interest involved in implied-consent statutes is "secured by justice" and rises to the crucial, and inferences to be drawn from established facts are often determinative. The overall determination of the voluntariness of a confession has thus become an exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation and unclouded by other issues and the effect of extraneous but prejudicial evidence.

Id. at 390.


level of Rawlsian inviolability. It may be argued that an individual's privacy interest and an individual's interest in free and voluntary choices constitute substantial societal interests which certainly reflect on the character of justice. Thus, the manner in which the government deals with its individual citizens has a substantial impact on the meaning and image of justice.

To say that implied-consent statutes are not based upon constitutional notions of voluntary consent is not to say that these statutes are unconstitutional. Rather, it is to suggest that the statutes are erroneously labeled and expound a faulty concept. If the state can with impunity label coercion "consent," surely the idea suffers as a normative guide in other contexts as well. This false labeling is not only an affront to the concept of consent, but also damages the integrity of the law as a mechanism for justice. Legal fictions are not uncommon in the law, but they are generally spawned of necessity. In the instant case there is neither necessity nor justification. There is no imperative to clothe this statutory mechanism in the legal fiction of consent. Implied-consent statutes may be desirable, even necessary, but the label and express premise—implied consent—is optional.

It is argued that if the defendant has consented, he will not be heard to complain of the results. This premature termination of the consideration of consent tends to foreclose consideration of other potential problems, such as the reasonableness of the condition, the fairness of the process or the value of what has been forfeited by the individual and society. A straightforward approach, absent the implied-consent contrivance, would encourage a more meaningful analysis. The unnecessary fiction of consent consistently frustrates inquiry, thus inviting overreaching. If this be the case then the sophistic device of implied consent should be abandoned in the interest of legal accuracy and integrity. The law should be freed of patently fictitious contrivances which call into question the veracity of the legal enterprise. Otherwise, the tolerance of substantial distortions on the lexicon of law will breed similar distortions to the point of fatal stress on a system of government dependent upon citizen faith and acquiescence to rules of law.