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Implied Consent-Highway Safety

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difficulty in interpreting the amendments for those who conscientiously wish to comply with the amended election laws.

The best feature of this Act appears to be the provision which requires the county clerks to certify to the Secretary of State that they have complied with the section requiring purging from the rolls the names of those voters who died between 1964 and 1968.¹¹ The intent and purpose behind the enactment of these amendments could be furthered if the Secretary of State would promulgate a regulation (as he has the statutory power to do) that the county clerks certify to him that they have complied with all the duties imposed on them under the West Virginia Election Code each time such a duty arises.

This Act strives to achieve a faster, more effective purge of the registration rolls. Continuous purging of the rolls appears to be a desirable goal.¹² The latent function of the bill seems to be to reduce the opportunities for election frauds by limiting the registration rolls to live, active, qualified voters. Whether the opportunities for election frauds will be diminished by this bill depends on conscientious compliance with the statutes by the clerk of each county court and vigorous enforcement of the election laws by the Secretary of State, under the watchful eye of the public armed with the writ of mandamus.

James Edward Seibert

Implied Consent—Highway Safety

Accidents on the high speed highways of today are taking a prohibitive toll of the driving population. In 1966, there were 52,500 deaths and 1,900,000 disabling injuries resulting from motor vehicle accidents, an increase of over 7 per cent compared with 1965.¹ It has been stated that "more than twice the number of American deaths have been due to automobile accidents during the twentieth century than were due to all the wars since the Declaration of Independence."² Studies show that from 50 per cent to 70 per cent of all fatal accidents involve a driver who has been

¹¹ W. VA. CODE ch. 3, art. 2, § 22 (Michie 1966).

¹² See 22 WASH. & LEE L. REV. 320 (1965).

¹ TRAFFIC SAFETY MARCH 1967 EDITION 9, National Safety Council.

² MAGEE AND BICKELHAUPT, GENERAL INSURANCE 442 (7th ed. 1964).

drinking.³ It is quite evident that the problem of the drinking driver is serious enough to draw close attention from all of us. The legislatures of many of the states have been forced to pass more stringent laws to cope with the problem and to present a stronger deterrent to those who wish to mix gasoline and alcohol.

Early state statutes dealing with the problem of driving while drinking required the prosecutor to prove that the defendant was drunk or intoxicated.⁴ Under these circumstances, it was necessary to produce a witness who would testify that the driver was unable to stand or was unable to walk a straight line.⁵ As the number of automobiles on the road increased and the number of serious accidents increased correspondingly states were forced to enact more severe laws relating to drinking and driving. We have now reached the point where all but three states follow the language set forth in the Uniform Vehicle Code⁶ making it an offense to drive a motor vehicle while "under the influence of intoxicating liquor."⁷

Under the new phrase, "under the influence of intoxicating liquor" it is not necessary to prove the defendant was so intoxicated that he could not drive safely: "all that the statute requires is that the appellant be under the influence while operating a motor vehicle."⁸

Since there are over 60 pathological conditions which produce symptoms similar to intoxication,⁹ and since the new statutes require a lesser degree of intoxication for a conviction, many states have adopted voluntary chemical tests which show scientifically the degree of intoxication of the defendant instead of relying upon testimony of witness for this determination.¹⁰ "The blood test does as much to protect an innocent driver as it does to aid the state in the prosecution of a guilty one,"¹¹ since those who have the symptoms but who have not been drinking will be protected from justifiable reaction of witnesses. It has been said, "In the absence

³ TRAFFIC SAFETY, FEB. 1967 EDITION 8, National Safety Council.

⁴ R. DONIGAN, CHEMICAL TESTS AND THE LAW 2 (2d ed. 1966) [Hereinafter cited as DONIGAN.]

⁵ *Id.*

⁶ UNIFORM VEHICLE CODE § 11-902(A) (1962).

⁷ DONIGAN at 4.

⁸ Commonwealth v. Buoy, 128 Pa. Super. 264, 193 A. 144, 145 (1937).

⁹ Smith, *Implied Consent Legislation and the Virginia Experience*, 38 U. VA. NEWS LETTER 37 (1962) [Hereinafter cited as Smith].

¹⁰ DONIGAN at 10.

¹¹ Marbut v. Comm'n, 194 Kan. 620, 400 P.2d 982 (1965).

of chemical tests even a competent physician cannot swear with certainty that the individual had a drop of alcohol in his body."¹²

Since the early statutes relating to chemical tests were voluntary, they did not prove too successful because many defendants refused to submit to them, thereby depriving the courts of the reliable evidence they afford.¹³ To make the chemical test statutes more useful, New York in 1953 passed the first implied consent law in the United States.¹⁴ Under the implied consent law as a condition to driving upon the highways of a state, a driver is deemed to have impliedly consented to having a chemical test of his blood, breath or urine if charged with driving while under the influence of intoxicating liquor.¹⁵ The implied consent law has been likened to a bilateral contract whereby the state offers the privilege to drive upon its highways in return for the motorist's agreement to submit to the test. It is said that the driver accepts the offer when he drives on the highways.¹⁶

Under the implied consent law as adopted by the National Committee on Uniform Traffic Laws and Ordinances in their Uniform Vehicle Code,¹⁷ the driver may refuse to take the test tendered by the arresting officer, but for such refusal his license or privilege to operate a motor vehicle in that state will be revoked. The driver may contest this action generally by showing that the officer did not have reasonable grounds to request the motorist to submit to the test. Even if the driver, after refusing to submit to the test and having his license or privilege to drive revoked, is acquitted of the charge of driving under the influence of intoxicating liquor, he will still be unable to drive for the prescribed period for the basis of the revocation was the refusal to submit to the test upon reasonable grounds, not his being under the influence.¹⁸ Subsequent acquittal of the driving under the influence charge will not terminate the revocation which is an administrative action not dependent upon a criminal prosecution.

Earlier chemical test laws provided for a presumption that the driver was "under the influence" if the alcoholic content in the

¹² Smith at 37.

¹³ DONIGAN at 175.

¹⁴ Smith at 38.

¹⁵ Moore v. MacDuff, 309 N.Y. 35, 127 N.E.2d 741 (1955).

¹⁶ Smith at 38.

¹⁷ UNIFORM VEHICLE CODE § 6-205.1 (1962).

¹⁸ E.g., Marbut v. Comm'n, 194 Kan. 620, 400 P.2d 982 (1965); State v. Muzzy, 124 Vt. 222, 202 A.2d 276 (1964).

blood was .15 per cent or higher.¹⁹ Although it is scientifically accepted that one is impaired at the .10 per cent of alcohol level,²⁰ the .15 per cent level was originally used to provide ample tolerance and to help assure passage of the bills.²¹ Modern acts acknowledge scientific determinations and accept the .10 per cent level as the presumptive level of being under the influence of alcohol.²²

Modern implied consent laws generally provide for the following tests to determine the percentage of alcohol in the driver's blood: blood, breath, and urine.²³ Since alcohol stored in the brain causes intoxication, the best method for determining the degree of intoxication would be to test the brain, but this is impossible for a living person. Instead, these other tests (blood, breath, and urine) must be used. The best bio-chemical test for influence of alcohol is the concentration of alcohol in the blood. Since the alcoholic content of the urine and breath directly parallel that of the blood all three tests should prove equally satisfactory.²⁴

Constitutionality of the blood tests for alcoholic content have generally been attacked upon three grounds: deprivation of due process of law,²⁵ violation of the privilege against self-incrimination,²⁶ and unreasonable search and seizure.²⁷ In two recent cases, *Breithaupt v. Abram*²⁸ and *Schmerber v. California*,²⁹ the Supreme Court of the United States has upheld the reasonable use of blood tests to determine the degree of intoxication of defendant drivers.

In the *Breithaupt* case, the defendant had been convicted of involuntary manslaughter arising out of an automobile accident wherein the defendant was a driver. At the trial, the results of a blood test, taken by a doctor at the direction of a patrolman who smelled liquor on the unconscious defendant's breath, were admitted into evidence over objection. On habeas corpus the defendant argued violation of due process in that the conduct of the state officers offended the "sense of justice" mentioned in *Rochin v. California*.³⁰

¹⁹ E.g., ARIZ. REV. STAT. ANNOT., § 28-692(B) (1965).

²⁰ Committee Report, *Symposium on Alcohol and Road Traffic*, Indiana University (Dec. 1958).

²¹ Smith at 38.

²² E.g., UNIFORM VEHICLE CODE § 11-902(b) (1962).

²³ *Id.*

²⁴ Smith at 37, DONIGAN at 12.

²⁵ U.S. CONST. amend. XIV.

²⁶ U.S. CONST. amend. V.

²⁷ U.S. CONST. amend. IV.

²⁸ 352 U.S. 432 (1957).

²⁹ 384 U.S. 757 (1966).

³⁰ 342 U.S. 165 (1952).

In the *Rochin* case, police officers illegally entered the home of the defendant, forcibly tried to prevent his swallowing two capsules of morphine, then took him to a hospital where the pills were extracted by means of a stomach pump. Mr. Justice Frankfurter, delivering the opinion of the Court stated that these acts on the part of the police officers were "bound to offend even hardened sensibilities. They are methods too close to the rack and screw. . . ." ³¹ Rochin's conviction was reversed because the methods of the police officers were in violation of due process. But, in the *Breithaupt* case, the Court felt defendant was not denied due process because "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician."³² The Court went on to say that blood tests have become "routine in our everyday life"³³ and that they "would not be considered offensive even by the most delicate."³⁴ In the same case, the Court seemingly gave its approval to the use of implied consent laws by the states.³⁵ In the latest case involving blood tests,³⁶ where blood was taken by a physician *over the objection* of defendant, the court held there was no denial of due process since this case was very similar to that of *Breithaupt*.

Defendant's argument raising his privilege against self-incrimination was rejected in the *Breithaupt* case mainly because at that time, under the decision of *Twining v. New Jersey*,³⁷ the fifth amendment privilege was not obligatory upon the states. But, in the *Schmerber* decision, the court had to face the problem squarely since the case of *Malloy v. Hogan*,³⁸ decided after *Breithaupt* made the fifth amendment applicable to the states through the fourteenth amendment. In deciding that *Schmerber* was not denied his privilege against self-incrimination the court stated:

We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.³⁹

³¹ *Rochin v. Cal.*, 342 U.S. 165, 172 (1952).

³² *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

³³ *Id.* at 436.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Schmerber v. Cal.*, 384 U.S. 757 (1966).

³⁷ *Twining v. New Jersey*, 211 U.S. 78 (1908).

³⁸ 378 U.S. 1 (1964).

³⁹ *Schmerber v. Cal.*, 384 U.S. 757, 761 (1966).

In reaching this decision the court considered the case of *Holt v. United States*⁴⁰ where Mr. Justice Holmes stated, "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."⁴¹ It thus appears the Supreme Court has determined that extraction of blood to use as evidence against a defendant driver does not violate his fifth amendment rights now protected against state action.

In both *Breithaupt* and *Schmerber* the defendant contended that his fourth amendment rights had been violated in that taking blood from one unconscious or over one's objection would be an unreasonable search and seizure, and that any evidence obtained thereby should be excluded. Since at the time of the *Breithaupt* decision the fourth amendment rights were not obligatory upon the states⁴² the Court did not have to decide the question. But, here again as with self-incrimination between the time of the *Breithaupt* decision and the *Schmerber* decision, the decision of *Mapp v. Ohio*⁴³ was handed down by the Court holding that the exclusionary rule⁴⁴ relating to federal courts as set out in *Weeks v. United States*⁴⁵ was obligatory upon the states through the due process clause of the fourteenth amendment. Therefore, the Court was obliged to decide if the blood tests were in violation of the fourth amendment. In *Schmerber*, the Court stated:

We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcoholic content, the Fourth Amendment's proper function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedure employed in taking his blood respect relevant Fourth Amendment standards of reasonableness.⁴⁶

⁴⁰ 218 U.S. 245 (1910).

⁴¹ *Id.* at 252.

⁴² *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁴³ 367 U.S. 643 (1961).

⁴⁴ Evidence obtained in violation of the fourth amendment must be excluded from federal prosecutions.

⁴⁵ 232 U.S. 383 (1914).

⁴⁶ *Schmerber v. Cal.*, 384 U.S. 757, 768 (1966).

In finding that fourth amendment rights had not been violated, the Court stated that the reasonableness standard was complied with in that a competent physician extracted the sample of blood. The Court also stated that since the defendant was arrested after the officer smelled liquor on his breath, there was probable cause, therefore, a valid arrest. Also the Court stated that an officer is allowed to make a search for evidence of crime incident to a lawful arrest, and that in the case of an emergency a search warrant is not necessary. Considering the fact that the alcoholic level will decrease with the passage of time, the Court felt the officer was justified in taking the defendant to a physician to have his blood extracted before the evidence had diminished.

It is therefore evident that if blood tests are administered in a reasonable manner, they will be upheld as constitutional. Based upon the *Breithaupt* and *Schmerber* cases which upheld the use of blood test where properly administered, it would definitely seem that breath and urine tests, which are much less offensive than having the body intruded to obtain blood, would be upheld by the United States Supreme Court so long as these tests are administered in a reasonable manner.

As can be seen, the Supreme Court has upheld the taking of blood from an unconscious driver and over the objection of a conscious driver. In determining the justification of the use of implied consent laws, they can be likened to the long arm statutes which state that a non-resident driver impliedly consents to having an officer of the host state accept service of process for him. The long arm statutes have also withstood the test of the courts.⁴⁷ Implied consent laws have been upheld in state courts as a reasonable regulation under the police powers of the state.⁴⁸ The United States Supreme Court has likewise shown favor toward the implied consent laws by saying that, "It might be a fair assumption that a driver on the highways in obedience to a policy of the State, would consent to have a blood test made. . . ."⁴⁹ It would therefore seem that states would wisely adopt an implied consent law to protect its law abiding citizens from those who persist in abusing their driving privilege. It would also seem wise to have these laws to protect those drivers who have had only a small amount of

⁴⁷ DONIGAN at 177.

⁴⁸ *E.g.*, *Lee v. Comm'n*, 187 Kan. 566, 358 P.2d 765 (1961).

⁴⁹ *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).

alcohol⁵⁰ and who are not under the influence, although they might be convicted if testimony of witnesses was relied upon.

The West Virginia Legislature on February 8, 1968, adopted an implied consent law to be known as Article 5A of Chapter 17c of the Code of West Virginia. In adopting this new law, the Legislature discarded the old voluntary chemical test law.⁵¹ Since many practitioners in this state may be unfamiliar with an implied consent statute, it would seem appropriate to give a brief sketch of how the new law should operate in contrast to the old voluntary one.

At the outset it should be noted that a drinking driver will not be required to take a blood test, but may instead take a breath test or a urine test as designated by the arresting officer.⁵² It should also be noted here for those unfamiliar with West Virginia law that it is an offense "for any person who is under the influence of intoxicating liquor to drive any vehicle on any highway of this State. . . ."⁵³ So as it stands now we have modernized our statutes dealing with the drinking driver.

The new law will operate in the following manner. When one driving upon the public highways of this state is lawfully arrested by (1) a member of the department of public safety of this state, (2) any sheriff, a deputy sheriff of any county, or (3) any member of a municipal police department under civil service,⁵⁴ upon reasonable grounds that the driver is under the influence of intoxicating liquor, he will be requested to take either a blood, breath or urine test within two hours from the time of the arrest. If the arresting officer chooses the blood test, the driver may properly refuse to take it, but, if he refuses to take either the breath or urine test subsequently prescribed by the officer, after being told that his failure to so submit will result in the loss of his privilege to drive for six months, the driver will be in violation of the implied consent law.

⁵⁰ *Payne v. Kinder*, 147 W.Va. 352, 127 S.E.2d 726 (1946), upheld prosecution of a driver who had been drinking beer for driving under the influence of alcohol in face of statute providing beer to be a nonintoxicating beverage; statute being merely for regulation of sale of beer and for collection of taxes.

⁵¹ W. VA. CODE ch. 17c, art. 5, § 2A (Michie 1966).

⁵² Ch. 35, Acts of the West Virginia Legislature, Reg. Sess. 1968.

⁵³ W. VA. CODE ch. 17c, art. 5, § 2 (Michie 1966).

⁵⁴ Ch. 35, Acts of the West Virginia Legislature, Reg. Sess. 1968. Constables are thus excluded.

If the driver refuses to take any test, none will be administered, but the arresting officer will send to the commissioner of motor vehicles a sworn statement that (1) he had reasonable grounds to believe the driver to be under the influence, (2) the driver was lawfully placed under arrest, (3) the driver refused to submit to the test finally designated and (4) the driver was told that his refusal to submit to the test finally designated would result in his losing his privilege to drive for a six month period.⁵⁵ Upon receipt of this statement, the Commissioner of Motor Vehicles will enter an order suspending the operator's privilege to drive for six months, and will forward a copy to the driver, by certified or registered mail. After receipt of the order, the driver has ten days to enter a written request for a hearing which shall be held within twenty days of the commissioner's receipt of the request.⁵⁶ At the hearing, the petitioner may question only the validity of the four statements in the officer's sworn report to the commissioner. If any of these statements can be proven false, the commissioner will rescind his earlier order of revocation of the privilege to drive. If the driver fails to prove the falsity of any of the four statements, the commissioner will enter an order affirming his earlier order of revocation. If the commissioner after hearing the evidence affirms his earlier order of revocation the petitioner may seek judicial review from the Circuit Court and then to the West Virginia Supreme Court of Appeals. The revocation of the privilege to drive shall be stayed during the pending of the hearing and subsequent judicial review.⁵⁷

What if the driver agrees to submit to one of the tests prescribed by the arresting officer? If the officer prescribes that a blood test be given and the driver agrees, the driver will then be taken to a physician, registered nurse, or trained medical technician at his place of employment where the venapuncture must be performed within two hours of the time of the arrest.⁵⁸ An unused, sterile needle and a sterile vessel must be used for the test and a non-alcoholic antiseptic must be used to clean the skin. If the driver wishes, he may, at his own expense, have a blood test made by a qualified person of his own choosing in addition to the officially

⁵⁵ Ch. 35, Acts of the West Virginia Legislature, Reg. Sess. 1968.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

administered one.⁵⁹ One arrested for driving under the influence, although not required by the arresting officer, may *demand* a test of his blood, breath or urine be administered.⁶⁰ If the breath or urine tests are chosen, the strict procedures provided for the blood test will not be applicable.⁶¹ Analysis of the blood, breath or urine must be conducted in accordance with the methods and standards approved by the state department of health.⁶² A chemical analysis of the blood or urine must be conducted by a qualified laboratory or by the state police scientific laboratory.⁶³

If one of the three tests are administered according to the procedure set out in the article, the results will be made available to the defendant upon request, and may be introduced in evidence along with other competent evidence at a trial of any crime or criminal action allegedly arising out of acts committed by the defendant while driving a motor vehicle while under the influence of intoxicating liquor.⁶⁴ The following presumption will arise from the result of the chemical analysis: (1) if .05 per cent or less of alcohol in blood, prima facia evidence that driver was not under influence; (2) if between .05 per cent and .10 per cent relevant evidence of defendant's condition; (3) if .10 per cent or more, prima facia evidence that the driver was under the influence.⁶⁵ One should note that West Virginia has lowered its presumption level of intoxication from .15 per cent⁶⁶ to .10 per cent thereby following the trend mentioned earlier. Although the results of the analysis show content to be .10 per cent or higher both parties to the suit will be able to introduce other competent evidence, and the jury will still have the final determination.⁶⁷

After examining West Virginia's new implied consent statute which becomes effective May 9, 1968, it is evident that this state is taking a step in the right direction toward controlling the

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ W. VA. CODE ch. 17c, art. 5, § 2A (Michie 1966).

⁶⁷ Ch. 37, Acts of the West Virginia Legislature, Res. Sess. 1968; *State v. Garner*, 147 W. Va. 293, 128 S.E.2d 185 (1964); *Holley v. Purity Baking Co.*, 128 W. Va. 531, 37 S.E.2d 729 (1946).

problem created on our highways by the drinking driver. With stiffer laws and enforcement procedures such as these, drivers should be deterred from drinking excessively while driving. The effectiveness of the new law should be shown in the near future by fewer accidents, especially fatal ones.

William Douglass Goodwin

Open Housing

On February 7, 1968, an open housing law was passed to amend article four, chapter eight of the Code of West Virginia. As amended a new section thirty was added. It provides:

The council or similar governing body of any municipality (however created, whether operating under a legislative charter, home rule charter or general law only, and notwithstanding any statutory or municipal charter provisions to the contrary) shall have the power and authority, by ordinance, to prohibit discrimination on the basis of race, creed, color or national origin in the sale, purchase, lease or rental of housing accommodations within the corporate limits of such municipality, and to impose fines for the violation of the provisions of any such ordinance.¹

As the focus in civil rights moves from the streets to the compromise table, many states have taken the initiative to enact fair housing legislation.² The primary purpose of this legislation is to prevent discrimination by vendors and lessors against prospective buyers or tenants because of race, color, or creed. The underlying legal authority of all legislation of this type has been the liberal construction by the United States Supreme Court of the commerce clause, the Bill of Rights and the thirteenth, fourteenth, and fifteenth amendments. The civil rights movement in the United States was unquestionably initiated when the Supreme Court in 1954 handed down the landmark decision of *Brown v. Board of Education*.³

The anti-discrimination act as passed by the West Virginia Legislature is in the form of an enabling act. The act enables municipalities

¹ Ch. 37, Acts of the West Virginia Legislature, Reg. Sess. 1968.

² Note, *Open Housing Meets My Old Kentucky Home*, 56 Ky. L.J. 140, 187 (1967): "As of June 1967, some nineteen states and twenty-eight cities had adopted anti-discrimination laws affecting some part of the private housing market."

³ 347 U.S. 483 (1954).