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## OKLAHOMA'S IMPLIED CONSENT STATUTE— IS DUE PROCESS DUE?

Glenn P. Bernstein

The increasing number of alcohol related road accidents and the discovery of ever more reliable and sophisticated means of detecting degrees of intoxication, have created new incentives and solutions for state legislatures concerned with public road safety. Oklahoma, along with nearly all of the states, has enacted one form of the so-called implied consent statute to deal with the problem.<sup>1</sup> The essential feature of these statutes, put simply, is that any person who operates a motor vehicle upon the public roads impliedly consents to having a chemical blood-alcohol test performed upon his person by any law enforcement officer who has reasonable grounds to believe the motorist was driving while intoxicated (DWI). A refusal to submit to the test or a with-

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1. OKLA. STAT. tit. 47, § 751. See also ALA. CODE tit. 36, § 154 (Supp. 1971); ALASKA STAT. § 28.35.031 (1970); ARIZ. REV. STAT. ANN. § 28-691 (Supp. 1969-70); ARK. STAT. ANN. § 75-1045 (Supp. 1969); CAL. VEHICLE CODE § 13353 (1971); COLO. REV. STAT. ANN. § 13-5-30 (Supp. 1971); CONN. GEN. STAT. ANN. § 14-227b (1967); FLA. STAT. ANN. § 322.261 (1968); GA. CODE ANN. § 68-1625.1 (Supp. 1972); HAWAII REV. STAT. § 286-151 (1968); IDAHO CODE § 49-352 (1967); IND. ANN. STAT. § 47-2003c (Supp. 1972); IOWA CODE ANN. § 32113.3 (Supp. 1972); KAN. STAT. ANN. § 8-1001 (1964); KY. REV. STAT. ANN. § 186.565 (1969); LA. REV. STAT. § 32.6611 (Supp. 1973); ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1972); MD. ANN. CODE art. 66½ § 6-205.1 (Cum. Supp. 1972); MASS. GEN. LAWS ANN. ch. 90, § 24 (Supp. 1972); MICH. COMP. LAWS ANN. § 257.625a (Supp. 1972); MINN. STAT. ANN. § 169.123 (Supp. 1973); MISS. CODE ANN. § 8175-01 (Supp. 1972); MO. ANN. STAT. § 564.441 (Supp. 1972); MONT. REV. CODES ANN. § 32-2142.1 (Supp. 1971); NEB. REV. STAT. § 39-727.03 (1960); NEV. REV. STAT. § 484.385 (1971); N.H. REV. STAT. ANN. § 262-A: 69-a (Supp. 1972); N.J. STAT. ANN. § 39:4-50.2 (Supp. 1972); N.M. STAT. ANN. § 64-22-2.6 (1972); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1972); N.C. GEN. STAT. § 20-16.2 (1972); N.D. CENT. CODE § 39-20-01 (1972); OHIO REV. CODE ANN. 4511.191 (Supp. 1972); ORE. REV. STAT. § 483-634 (1971); PA. STAT. ANN. tit. 75, § 624.1 (1971); R.I. GEN. LAWS ANN. § 31-27-2.1 (1969); S.C. CODE ANN. § 46-344 (Supp. 1972); S.D. COM. LAWS ANN. § 32-23-10 (Supp. 1972); TENN. CODE ANN. § 59-1045 (Supp. 1972); TEX. PENAL CODE art. 802f (Supp. 1972); UTAH CODE ANN. § 41-6-44.10 (1970); VT. STAT. ANN. tit. 23, § 1188 (1967); VA. CODE ANN. § 18.1-55.1 (Supp. 1972); WASH. REV. CODE ANN. § 46.20.308 (1970); W. VA. CODE ANN. § 17C-5A-1 (Supp. 1972); WIS. STAT. ANN. § 343.305 (Supp. 1973); WYO. STAT. ANN. § 31-247.2 (Supp. 1971).

drawal of consent subjects the driver to a summary license revocation for a fixed period of time. While the ostensible function of these laws is to protect the public from the perils of the drunken driver, more practically the process is a means of facilitating the gathering of evidence against a DWI defendant.

Effective only since 1969, the Oklahoma version is a relative newcomer on the implied consent scene,<sup>2</sup> but already it has come under numerous attacks. Primarily, the assaults have challenged its validity in the constitutional sense, covering such areas as self-incrimination, search and seizure, right to counsel, due process and equal protection under the law.<sup>3</sup>

It will be the scope and purpose of this comment to examine these areas of conflict and to indicate other realized or potential problem areas in the Oklahoma implied consent statute. This discussion will be confined to the civil aspects of the statute which are more novel, with only necessary references to the criminal ramifications of the law.

The underlying justification for the current implied consent enactments is that they are a reasonable regulation of motorists within the state pursuant to the state's police power.<sup>4</sup> "The dangers imposed by the drinking driver to the vast number of persons using the highways are such that they warrant a slight infringement upon the liberty of the individual."<sup>5</sup>

Another justification suggested by proponents of implied consent statutes is that driving on state regulated roads is not a right, but merely

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2. New York was the first to enact an implied consent statute as far back as 1954. It was held unconstitutional in *Schutt v. MacDuff*, 205 Misc. 2d 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954). Amended to include added procedural requirements, it was later upheld in *Anderson v. MacDuff*, 208 Misc. 2d 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955).

3. Most courts have rejected the contentions that implied consent statutes:

(1) infringe on the guarantee against self-incrimination. *Lee v. State*, 187 Kan. 566, 358 P.2d 765 (1961); *Prucha v. Dep't of Motor Vehicles*, 172 Neb. 415, 110 N.W. 2d 75 (1961).

(2) violate due process of law. *Blydenburg v. David*, 413 S.W.2d 284 (Mo. 1967); *Ballou v. Kelly*, 12 Misc. 2d 178, 176 N.Y.S.2d 1005 (Sup. Ct. 1958).

(3) deprive a licensee of equal protection. *Schutt v. MacDuff*, 205 Misc. 2d 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

(4) permit an unreasonable search and seizure. *Breithaupt v. Abrams*, 352 U.S. 432 (1957).

(5) interfere with the right to counsel. *Finocchiaro v. Kelly*, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403 (1962), *cert. denied*, 370 U.S. 912 (1962).

4. The police power issue was settled in *Hess v. Pawloski*, 274 U.S. 352 (1927). That case upheld a state statute providing that nonresident motorists had impliedly given their consent to the appointment of a state agent for service of process by their acceptance of the privilege of driving on the state regulated highways and roads.

5. Comment, *Florida's "Implied Consent" Statute: Chemical Tests for Intoxicated Drivers*, 22 U. MIAMI L. REV. 698, 706 (1968).

a privilege which may be granted on terms and conditions considered reasonable by the state.<sup>6</sup>

The initial statute in the Oklahoma implied consent scheme is section 751 of title 47.<sup>7</sup> This section provides that the apprehended driver may elect which of the two chemical tests offered in Oklahoma shall be performed on him.<sup>8</sup> The most persistent point of contention here centers around the issues raised by the self-incrimination prohibition in the fifth amendment to the United States Constitution.<sup>9</sup>

The United States Supreme Court in *Shmerber v. California*,<sup>10</sup> a DWI case where a police-directed physician extracted a blood sample from the defendant over his objection, held that the right against self incrimination

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 did not involve compulsion to these ends.<sup>11</sup> (emphasis added).

This statement is significant in the examination of the Oklahoma situation today.

The coverage of self-incrimination in article II, section 21 of the Oklahoma Constitution differs from the federal fifth amendment and presents an added twist to the controversy.<sup>12</sup> In a recent case involving the Oklahoma implied consent statute, the court took notice of the

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6. The fact that the test may well exculpate the operator as well as incriminate him is a less often used explanation for the validity of these statutes. See, e.g., *Robertson v. State ex rel. Lester*, 501 P.2d 1099 (Okla. 1972).

7. The statute states in full:

Any person who operates a motor vehicle upon the public highways or streets of this state shall be deemed to have given consent subject to the provisions of this act to a chemical test or tests of his blood or breath, at the election of the person proposed to be tested, for the purpose of determining the alcoholic content of his blood. The test or tests shall be administered at the direction of a law enforcement officer after having arrested a person and having reasonable grounds to believe the person driving or in actual physical control of a motor vehicle upon the public highways was under the influence of alcoholic or intoxicating liquor.

8. This presumes that the driver has already made another more critical election, i.e., to submit to a chemical test in the first place. Some states do not offer the motorist a choice of tests. See, e.g., ARK. STAT. ANN. § 75-1045 (Supp. 1969) (law enforcement agency responsible for the arrest designates which of a blood, breath, or urine test shall be taken).

9. The fifth amendment provides in part: "[N]or shall [the accused] be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

10. 384 U.S. 757 (1966).

11. *Id.* at 761 (emphasis added).

12. "No person shall be compelled to give evidence which will tend to incriminate him. . . ." OKLA. CONST. art. II, § 21.

broader, more protective nature of this language against self-incrimination and stated: "It is therefore settled in this jurisdiction that non-testimonial evidence such as a test of defendants' blood for intoxication falls within the scope of the self-incrimination prohibition."<sup>13</sup> This is to say that *no* distinction between physical and testimonial evidence of self-incrimination is made in Oklahoma.

The determinative factor then remains the matter of compulsion. In the case of *Bailey v. City of Tulsa*,<sup>14</sup> the court did not consider the threat of a six-month summary license revocation for a refusal to accede to a chemical test a means of compulsion. The motorist "is not forced to forfeit one right in order to exercise another since operating a motor vehicle is a privilege, not a right, which may be conditioned."<sup>15</sup> The court also added that any idea that compulsion was involved in this statute was clearly refuted by the motorist's ability to elect whether or not to take the test.<sup>16</sup>

However, even in Oklahoma there is some disagreement on the matter of compulsion in section 751. In *R. W. Rine Drilling v. Ferguson*,<sup>17</sup> the court, in commenting upon the degree of independence with which the operator decided to submit to the test said, "In view of the punitive result of failing to give one's consent to the procurement and testing of his blood, . . . it could hardly be said that his consent was voluntary."<sup>18</sup>

The United States Supreme Court has had numerous opportunities to discuss this issue of compulsion by threat of penalty in the context of the fifth amendment. Notably, in *Garity v. State*<sup>19</sup> and *Spevack v. Klein*<sup>20</sup> the Court concluded that the states could not condition the con-

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13. *Bailey v. City of Tulsa*, 491 P.2d 316, 318 (Okla. Crim. App. 1971). *Accord*, *Stewart v. State*, 435 P.2d 191 (Okla. Crim. App. 1967); *Spencer v. State*, 404 P.2d 46 (Okla. Crim. App. 1965); *Lorenz v. State*, 406 P.2d 278 (Okla. Crim. App. 1965). *But see* *Olson v. State*, 484 S.W.2d 756 (Tex. Crim. App. 1972) where the court held that the Texas self-incrimination provision, very similar to Oklahoma's, was not to be construed differently than the federal fifth amendment.

14. 491 P.2d 316 (Okla. Crim. App. 1971).

15. 491 P.2d at 318. On the matter of waiver of constitutional rights in this area see *Robertson v. State ex rel. Lester*, 501 P.2d 1099 at 1103 (Okla. 1972); and *Prucha v. Dep't of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75, 88 A.L.R.2d 1055 (1961).

16. 491 P.2d at 318.

17. 496 P.2d 1169 (Okla. 1972).

18. *Id.* at 1170.

19. 385 U.S. 493 (1967) (police officers warned in a state traffic ticket "fixing" investigation that answers to inquiries might be used against them but that a refusal to answer might also subject them to removal from office).

20. 385 U.S. 511 (1967) (attorney disbarred in a disciplinary proceeding for proof of misconduct for his failure to produce incriminating financial records).

tinuation of a person's livelihood upon his willingness to incriminate himself in a state investigation. The alternatives given to the men, either to incriminate themselves or to forfeit their jobs, constituted "compulsion" within the meaning of the fifth amendment. In the same vein, critics suggest that a similar awkward and weighty decision is placed upon the apprehended motorist. For him the right to drive, like his chosen occupation, may be so intimate an ingredient of his liberty and protection of property that the threat of a summary six-month revocation is very measurable compulsion indeed. In many instances driving may constitute the individual's livelihood or be an integral part thereof. In such cases it seems imperative to apply the *Garity* and *Spevack* reasoning.<sup>21</sup>

Despite this line of attack, advocates of the statutes consistently return to their base proposition: that driving is not a right which is protected by the Constitution in the sense to which *Garity* and *Spevack* apply. This stand, grounded as it is upon the distinction between "right" and "privilege," has been seriously undermined by recent Supreme Court decisions showing a reluctance to recognize even the semantical nature of the distinction.<sup>22</sup> In *Bell v. Burson*,<sup>23</sup> the Court stated: "[R]elevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'."<sup>24</sup>

Apart from the broad constitutional issues outlined above, section 751 presents some practical procedural problems that need to be examined. The suspected driver must be under arrest when the chemical tests are administered in order for the test results to be admissible. Laboratory results of tests of blood samples taken prior to an

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21. In the case of *In re Finley*, 503 P.2d 1273 (Okla. 1973), a salesman for an oil field tool company alleged in defense of his refusal, that the revocation worked a great hardship upon him and his family, but the court upheld the penalty. See discussion of OKLA. STAT. tit. 47, § 755 (1971), *infra*.

22. In *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972), the Court stated: "[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." In *Graham v. Richardson*, 503 U.S. 365, 374 (1971), the Court remarked: "This Court has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'." See also *Goldberg v. Kelly*, 397 U.S. 254 (1969).

23. 402 U.S. 535 (1971) (a state statute which provided that the motor vehicle registration and license of an uninsured motorist involved in an accident shall be suspended unless he posts security for the amount of damages claimed by the aggrieved party and which excludes any consideration of fault or responsibility for the accident at a pre-suspension hearing, was held violative of procedural due process).

24. *Id.* at 539.

actual arrest have generally been ruled inadmissible in a criminal action.<sup>25</sup> Ordinarily, a search and seizure, which is what the chemical testing process amounts to, is proper only when performed incident to a valid arrest or search warrant. However, since in implied consent cases the arrest is usually for a misdemeanor committed in the presence of a law officer, the issue of the validity of the arrest is seldom decisive in these cases. Oklahoma has no decisions relating to arrest in the implied consent field as yet, but it is safe to assume that when the matter finally presents itself, the courts will construe the "arrest" required by section 751 to mean "lawful arrest with probable cause."<sup>26</sup>

The Oklahoma statute permits the chemical tests to be performed only on the driver's breath or blood, at his election.<sup>27</sup> By contrast, several other states offer, in addition to a blood or breath test option, tests upon the person's urine and/or saliva.<sup>28</sup> These further options are relevant when, for some religious or health related reason, a driver cannot submit to a test of his blood<sup>29</sup> and distrusts or otherwise feels he cannot submit to a simple breathalyzer test. It seems an unnecessary restriction to limit the motorist in Oklahoma to just a blood or breath test. At the very least Oklahoma should amend its statute to provide a simple urine analysis option. One argument in favor of retaining the alternatives that we have now is that these substances are among the easiest to obtain from the submitting operator—an important consideration inasmuch as the statute requires that the test specimen be obtained within two hours of the arrest.<sup>30</sup>

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25. *Shores v. State*, 233 So. 2d 434 (Fla. 1970); *State v. Davis*, 108 N.H. 45, 226 A.2d 873 (1967); *State v. Baker*, 184 Neb. 724, 171 N.W.2d 798 (1969).

26. OKLA. STAT. tit. 47, § 754 (1971) prescribes that the arrest shall be a proper issue for contest at the hearing for the license revokee. See *Holland v. Parker*, 354 F. Supp. 196 (D.S.D. 1973); *Anderson v. MacDuff*, 208 Misc. 2d 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955).

27. *Phares v. Dep't of Public Safety*, 507 P.2d 1099 (Okla. 1972).

28. Some states offering tests on the driver's blood, breath, and urine are: Alabama, New York, Arizona, Arkansas, California, South Dakota, and Colorado. In addition, the New York version also includes the option of a saliva test and the South Dakota statute broadly includes "any other bodily substances." N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1972).

29. In *Prucha*, the plaintiff alleged a heart condition to avoid taking the blood test but the court held that his steadfast refusal was not excusable because he could have submitted to a urine analysis. In the Connecticut statute, where the driver may elect a blood or breath test, there is a proviso preventing the imposition of a revocation for refusal if the driver's physical condition is such that, according to competent medical advice, such test would be inadvisable. CONN. GEN. STAT. ANN. § 14-227b (1967).

30. OKLA. STAT. tit. 47, § 756(e) (which will not be discussed in this comment) states: "To be admissible such evidence must first be qualified by establishing that such specimen was obtained from the subject within not more than two (2) hours of the arrest of the subject."

Another potential source of litigation in Oklahoma is the absence of any requirement that the arresting officer, while instructing the motorist as to his options, also warn him of the penal consequences of a refusal to submit to a chemical test. In view of the relatively unique character of the law confronting the driver, such a warning would seem a simple and helpful bit of information that would enable the motorist to make a more intelligent election and at the same time present a minimal threat to the overall enforceability and effectiveness of the statute. Such a warning is a statutory requirement in California, New York, Alaska, Alabama, Nebraska, Kentucky and Colorado.<sup>31</sup> Colorado's statute is constructed in a particularly interesting manner:

At the time of making such request [to submit to a test] the officer orally, and by written notice, which written notice shall be in both English and Spanish, . . . shall inform the person arrested of his rights under the law and the probable consequences of a refusal to submit to such a test.

While the proposition that all persons are presumed to know the law is fixed in our jurisprudential thinking,<sup>32</sup> even in Oklahoma where the lack of warning is made expressly irrelevant to the implied consent proceedings,<sup>33</sup> state law enforcement figures have actually given warnings to their arrestees on occasion.<sup>34</sup>

Several procedural statutes accompany the Oklahoma implied consent act. The first of these, section 752 of title 47,<sup>35</sup> outlines the pro-

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31. Statutes cited note 1 *supra*.

32. 29 AM. JUR. 2d *Evidence* § 211 (1967).

33. OKLA. STAT. tit. 47, § 754 (1971) states in part: "Whether the person was informed that his privilege to drive would be revoked or denied if he refused to submit to the test or test(s) shall not be an issue."

34. The case reports of *Phares v. Dep't of Public Safety*, 507 P.2d 1225 (Okla. 1972) and *Bailey v. City of Tulsa*, 491 P.2d 316 (Okla. Crim. App. 1971) indicate that such warnings were in fact given to the apprehended motorists.

35. The statute states in full:

Only a licensed medical doctor, osteopathic physician, qualified technician, technologist, or registered nurse acting at the request of a law enforcement officer may withdraw blood for purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of breath specimens. The person tested may have a physician or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer, providing the specimen for testing is obtained at the time or is an aliquot of that obtained by the law enforcement officer, and provided further that said aliquot specimen may be delivered to any person qualified to analyze such specimens as the subject may designate, and provided further that such subject makes arrangements for delivery thereof, in order for any evidence under this act to be admissible. The failure or inability to obtain an additional test by a person shall not preclude the admission of the test or tests taken at the direction of a law enforcement officer. The blood specimen shall be tested to determine the alcoholic content therein, and also for the presence of any other substances which might have influenced the behavior of the subject if he



cedures for the blood-alcohol test(s) and other related matters. This section offers the driver in custody reasonable safeguards in the actual administration of the chemical tests. The portion of the statute permitting the driver to provide his own additional test should be read with the understanding that to be admissible the driver's own sample must be obtained as nearly as possible at the same time as the police specimen was procured and that section 756(e) of the statute requires that all the tests be administered within *two* hours of the arrest. The Oklahoma litigation under this section has been minimal and concerned mostly with the qualifications of the chemical test administrators.<sup>36</sup>

The last provision of section 752 prohibits the admission of the chemical test results into evidence in civil actions. A possible explanation for this is that the only civil proceeding anticipated as a result of the implied consent statute is a revocation hearing at the request of the motorist. At that hearing, the results of the test either for or against the driver, are irrelevant because the revocation penalty is imposed only for his refusal to submit to a chemical test and has nothing to do with the possible criminal proceeding for DWI.

Ironically, the only application of this particular portion of section 752 was not in a revocation hearing, but rather in a workmen's compensation proceeding before a state industrial court. In that matter, because the employee was arrested and tested pursuant to the implied consent statute, the court held that it was a civil tribunal within the meaning of the prohibition and excluded the evidence of the test results even though intoxication is a bar to certain remedies under the workmen's compensation statute.<sup>37</sup>

Section 753 is a procedural statute controlling the consequences of a refusal to submit to a chemical test.<sup>38</sup> This section has been the

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so requests. A written report of the results including full information concerning the test or tests taken at the direction of a law enforcement officer shall be made available to the subject. The results of the test or tests as provided for herein shall *not* be admissible in civil actions. (emphasis added).

36. *McGuire v. State*, 504 P.2d 1247 (Okla. Crim. App. 1972) (a practical nurse with 16 years of experience, including the taking of blood samples, was a "qualified technician" under the statute); *Johnson v. State*, 487 P.2d 1005 (Okla. Crim. App. 1971) (a police officer licensed by the state with 40 hours of training connected with the breathalyzer device was qualified to testify as to the results of the test). Other sources dealing in depth with this subject area include: R. ERWIN, *DEFENSE OF DRUNK DRIVING CASES* chs. 15-24 (3d ed. 1972); C. Tessmer, *Transcript Cross Examination of Breathalyzer Operator & Supervisor, and Breath Program*, TEXAS CRIM. DEFENSE LAWYERS ASS'N, July 10, 1972.

37. 496 P.2d 1169 (Okla. 1972).

38. The statute provides:

If a conscious person under arrest refuses to submit to chemical testing, none shall be given, but the Oklahoma Commissioner of Public Safety, upon the re-

greatest source of litigation in Oklahoma and similar renditions across the nation have also been subject to repeated attacks. The complaint most often filed is that this section is violative of fourteenth amendment due process in that the license revocation takes place without a prior notice or hearing for the motorist. Many of the states that have rejected the due process argument and upheld their implied consent statutes have placed considerable reliance on the reasoning that a driver's license is not a property right and so is not subject to the fourteenth amendment.<sup>40</sup> "A driver's license is not a contract or a property right in the constitutional sense, and therefore its revocation does not constitute the taking of property."<sup>41</sup>

It is apparent that once again, the controversy rages over the right-privilege battleground. No implied consent case has yet reached the Supreme Court for determination of the issue of due process, but recently the Court did decide a case concerning a revocation penalty in a motor vehicle statute on the basis of due process.<sup>42</sup> In *Bell v. Burson*,<sup>43</sup> the Court considered a statute which provided that the motor vehicle registration and the driver's license of an uninsured motorist involved in an accident would be suspended unless he posted security for the amount of damages claimed by the aggrieved party and which excluded any consideration of fault or responsibility for the accident at a pre-suspension hearing. The Court found the statute violative of procedural due process. This case is consistent with the current trend of due process decisions in the Court.<sup>44</sup> The *Bell* Court further stated

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ceipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public highways while under the influence of alcohol or intoxicating liquor, and that the person has refused to submit to the test or tests, shall revoke his license to drive and any nonresident operating privileges for a period of six months; or if the person is a resident without a license or a permit to operate a motor vehicle in this state, the Oklahoma Commissioner of Public Safety shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation, subject to review as hereinafter provided.

39. The fourteenth amendment states in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

40. This is the fundamental reasoning behind the decision in *Robertson v. State ex. rel. Lester*, 501 P.2d 1099 (Okla. 1972).

41. 501 P.2d at 1101.

42. The Supreme Court has so far declined to hear the implied consent cases that have come before it on appeal. *People v. Brown*, 485 P.2d 500 (Colo. 1971), *cert. denied*, 404 U.S. 1007 (1972); *Finocchiaro v. Kelly*, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403 (1962), *cert. denied*, 370 U.S. 912 (1962).

43. 402 U.S. 535 (1971).

44. *Goldberg v. Kelly*, 397 U.S. 254 (1969) (no termination of welfare benefits without prior notice and adversary hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (no

that possession of a diver's license involves "important interests of the licensees," that may not be terminated except in accordance with procedural due process of law, which traditionally has included at the very minimum the right to notice and an opportunity to be heard.<sup>45</sup>

There is every reason to afford due process as outlined in *Bell* in implied consent cases and only a tenuous basis for refusing to do so.<sup>46</sup> One rationale for refusing a hearing is the so-called "emergency" doctrine. This excuses the denial of due process where some valid governmental interest is at stake that justifies postponing the hearing until after the fact. The "emergency" doctrine has been successfully argued in several non-implied consent cases,<sup>47</sup> and it applied to implied consent situations on the premise that a drunken driver poses such an immediate threat to the safety of the community that a summary, pre-hearing revocation is within the police power of the state, disregarding any matter of due process. However, the application fails in the implied consent field because the criterion for revocation under these statutes is not drunkenness but rather a mere refusal to take the chemical test. Therefore, in order for the "emergency" doctrine to be considered valid here, there must be a conclusive presumption that all those who refuse to submit to a test are dangerously drunk and a threat to the public. Such a supposition cannot rationally be made the foundation of a statute that so gravely affects the lives of those it ensnares.

Recently, in *Chavez v. Campbell*,<sup>48</sup> a federal district court in Arizona found that state's implied consent law unconstitutional in light of the *Bell* decision. The rationale in *Chavez* was a combined due process-equal protection attack that made the "emergency" doctrine appear even more inappropriate to the implied consent field. The court first noted that at that time in Arizona, a first time conviction

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pre-judgment replevins without prior notice and an adversary hearing); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (no pre-judgment garnishments without prior notice and adversary hearing).

45. 402 U.S. at 539, citing *Goldberg v. Kelly*, 397 U.S. 254 (1969).

46. The California version of implied consent procedure goes about as far as any statute in affording due process to the operator. It requires the state agency to give immediate notice to the driver of his suspension but this suspension is stayed and does not become effective until 10 days after the giving of notice. At this time the motorist must request a hearing which further operates to stay the penalty another 15 days, during which time it is the responsibility of the agency to arrange a hearing. If they fail in this, the suspension is indefinitely stayed until such time as a hearing is provided. See CAL. VEH. CODE § 13353 (1971).

47. *Ewing v. Mytinger*, 339 U.S. 594 (1950); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Yakus v. United States*, 321 U.S. 414 (1944).

48. No. CIV.—73—163 Phx WEC, (D. Ariz.), (decided July 30, 1973).

for DWI did not require a mandatory license revocation. Accordingly, a driver who submitted to the chemical test and was found "under the influence" and convicted could still drive immediately after his conviction, even though the "emergency" doctrine's primary purpose is to keep this class of driver off the road.

Even if the state were to revoke the licenses of all persons convicted of DWI, so long as the suspect submits to the test, the revocation will not take place until later, following conviction on the charge upon a full trial and hearing . . . . If there is time to permit pre-revocation adjudication for the driver found presumptively under the influence of alcohol, then there is no reason why the same opportunity should not be afforded the driver who refuses the test.<sup>49</sup>

Providing the final straw that breaks the "emergency" doctrine's back, is the simple logic that, where the penalty period for refusal is fixed, as it is in Oklahoma, the general public will be protected from the refusing driver for the axtc period of time whether or not that period of revocation begins before or after a proper notice and hearing is received by the motorist.

A recent case at the district court level in Tulsa County, Oklahoma, declared the Oklahoma implied consent statute unconstitutional for failing to provide due process, citing *Bell*, *Chavez*, and *Holland v. Parker*<sup>50</sup> as the authorities.<sup>51</sup> It remains to be seen what the higher level tribunals in Oklahoma will do with the well reasoned decision, particularly in light of the similarities between the Oklahoma statute and the now defunct South Dakota version of implied consent.

The remaining segment of section 753 has also been a source of repeated litigation. It raises questions about the interpretation of the phrase "refuses to submit to chemical testing." One of these questions concerns the right to counsel. It is very often the case that the driver insists upon consulting with legal counsel before either submitting to a test or deciding which test to elect. The courts have uniformly held that there is no right to counsel at these stages of the custody. The usual reason given is that the sixth amendment provides for the right to counsel in criminal cases but not civil.<sup>52</sup> A more pragmatic ground for denying the right to counsel at the testing stage is that, because

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49. *Ibid.*

50. 354 F. Supp. 196 (D.S.D. 1973).

51. *Dablemont v. Dep't of Public Safety*, No. C—73—1338 (Tulsa Cty, decided Nov. 1, 1973).

52. 501 P.2d at 1103.

of the rapidity with which the body rids itself of alcohol, it is not feasible to require law enforcement authorities to wait until the defendant's attorney arrives and a decision is made whether or not to take the test.<sup>53</sup>

The bifurcated (civil and criminal) nature of implied consent statutes has created a great deal of confusion for operators unfamiliar with their rights to counsel. Technically, because criminal charges can result from the roadside arrest, the *Miranda* warnings are required to be given by the officer.<sup>54</sup> This gives the unwary driver the strong impression that he *does* have a right to counsel immediately and that he might well be vindicated in a court of law for having stood up for his rights. A few recent California decisions illustrate the point. In these cases, the courts did not suspend the motorists' licenses for their refusal to submit, because the confusion created by the *Miranda* warnings was the fault of the officer and therefore it was his duty to explain to the suspects their actual rights.<sup>55</sup> The Oklahoma view is that the *Miranda* warnings are not necessary for implied consent arrests because the chemical testing procedures do not involve the threat of a compulsory means of self-incrimination.<sup>56</sup>

The issue of "refusal" takes on many different forms. The *Application of Kunneman*<sup>57</sup> is a fine example of a non-verbal refusal. There, the defendant orally agreed to submit to a breath test at the police station, but given repeated opportunities to blow into the breathalyzer device as instructed, he sucked on the mouthpiece instead. This conduct was deemed a refusal under section 753.<sup>58</sup>

Other cases have designated various acts as refusal, including

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53. *Flynt v. State*, 507 P.2d 586 (Okla. Crim. App. 1973).

54. The warnings derived from *Miranda v. Arizona*, 384 U.S. 436 (1966), are:

1. right to remain silent;
2. anything said may be used against the speaker;
3. right to the presence of an attorney;
4. an attorney may be appointed if the defendant cannot otherwise afford counsel.

55. *Rust v. Dep't of Motor Vehicles*, 73 Cal. Rptr. 366 (1968); *Plumb v. Dep't of Motor Vehicles*, 1 Cal. App. 3d 256, 81 Cal. Rptr. 639 (1969); *Kingston v. Dep't of Motor Vehicles*, 76 Cal. Rptr. 614 (1949). *But see* *Lacy v. Orr*, 81 Cal. Rptr. 276 (1969); *Largomarsino v. Director of Motor Vehicles*, 81 Cal. Rptr. 193 (1969) (where there was no proof that the driver was misled or confused by the *Miranda* warnings and suspension of license was affirmed).

56. *State v. Carson*, 512 P.2d 825 (Okla. Crim. App. 1973).

57. 501 P.2d 910 (Okla. Ct. App. 1972).

58. *See* *Campbell v. Superior Court*, 106 Ariz. 542, 479 P.2d 685 (1971); *Finley v. Orr*, 262 Cal. App. 2d 656, 69 Cal. Rptr. 137 (1968); *State v. Hurbean*, 230 Ohio App. 2d 119, 261 N.E.2d 290 (1970).

delay in agreeing to submit,<sup>59</sup> excessive intoxication,<sup>60</sup> and sometimes physical or medical inability to perform the tests.<sup>61</sup> Several Oklahoma cases state that the admission of the fact of a defendant's refusal into evidence at a criminal trial is reversible error.<sup>62</sup>

Section 754 outlines the initial appellate steps available to a driver whose license has been revoked pursuant to the implied consent provisions.<sup>63</sup> As noted previously, the matter of questionable due process pervades this whole area of the statute's administration. The hearing called for by this section is not automatic but occurs only upon due and timely demand of the motorist. The section then permits the hearing of only three pertinent issues before the Commissioner of Public Safety or his agent:

- (1) Whether the person had been driving or was in actual physical control of a vehicle upon the public highways while under the influence of alcohol or intoxicating liquor
- (2) Whether the person was placed under arrest
- (3) Whether he refused to submit to the test or tests

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59. *Zidell v. Bright*, 264 Cal. App. 2d 867, 71 Cal. Rptr. 111 (1968); *Kruger v. Fulton*, 169 N.W.2d 875 (Iowa 1969); *Sweeney v. Tofany*, 56 Misc. 2d 291, 288 N.Y.S. 2d 649 (Sup. Ct. 1968).

60. *Groff v. Rice*, 20 Ohio App. 2d 309, 49 Ohio Op. 2d 400, 253 N.E.2d 318 (1969); *Bush v. Bright*, 264 Cal. App. 2d 788, 71 Cal. Rptr. 123 (1968); *State v. Normandin*, 284 Minn. 24, 169 N.W.2d 222 (1969).

61. *Application of Scott*, 5 A.2d 859, 171 N.Y.S.2d 210 (1958) (where motorist's false teeth kept getting in the way as he tried to blow up test balloon); *Burson v. Collier*, 226 Ga. 427, 175 S.E.2d 660 (1970) (emphysema prevented driver from being able to blow up balloon). In cases like these where the refusal can be shown to be other than willful, courts are apparently going to be less strict in imposing the penalties for "refusal".

62. *Morris v. State*, 497 P.2d 1108 (Okla. 1972); *Martin v. State*, 487 P.2d 1179 (Okla. Crim. App. 1971). A brief discussion of this point can be found at 10 OKLA. L. REV. 331 (1957). The essence of the majority judicial opinions has been that commentary on the defendant's refusal could make him the victim of prejudice in the verdict of a jury, created by no real facts produced by the chemical test.

63. The statute provides:

Upon the written request of a person whose privilege to drive has been revoked or denied the Oklahoma Commissioner of Public Safety shall grant the person an opportunity to be heard within ten days after the receipt of the request, but the request must be made within thirty days after the revocation. The hearing shall be before the Oklahoma Commissioner of Public Safety or his authorized agent, in the county wherein the alleged events occurred for which the person was arrested, unless the Oklahoma Commissioner of Public Safety or his authorized agent and the person agree that the hearing may be held in some other county. The hearing shall be transcribed and its scope shall cover the issues of (1) whether the person had been driving or was in actual physical control of a vehicle upon the public highways while under the influence of alcohol or intoxicating liquor, (2) whether the person was placed under arrest and (3) whether he refused to submit to the test or tests. *Whether the person was informed that his privilege to drive would be revoked or denied if he refused to submit to the test or tests shall not be an issue.* (emphasis and enumeration added for convenience of reference).

In the adversary ventilation of each of these allowable points of contention, it is not unlikely that the appellant would feel at a real disadvantage.

The hearing on the first issue, the matter of driving under the influence when apprehended, goes to the showing of probable cause for the arrest and not to the actual charge of DWI. This stage of the hearing is very likely to break down into a swearing match between the officer and the driver, unless there were witnesses. And even if there were, there is a real danger here because the fact-finder is not a civil judge, but rather is an administrative officer belonging often to the same department as the arresting officer.<sup>64</sup> Cross-examination is very helpful in this sensitive area but is feasible only if the motorist can afford legal assistance.

The remaining issues of the hearing are subject to the same criticism. All of the intricacies of arrest, especially the many facets of *Miranda*, are theoretically contestable at this point, and yet the ultimate decision at this level will be made by a non-judicial employee of the state.

Aside from these individual weaknesses with the procedure, the most flagrant abuse, the area deserving the most critical comment, is the concept of statutorily limiting the scope of the hearing to just three "black and white" issues. In addition, section 754 expressly excludes consideration of whether a warning was given, an omission which compounds the likelihood that the result will be something less than the fair and just hearing promised by the Anglo-American tradition. There appears to be a cold lack of sensitivity and reality to the hearings prescribed in section 754. In view of the genuine mixed sentiments about due process in the implied consent statute generally, it would be wise for the legislature to inject some humanity into the section by permitting some reasonable deviations from the present three-issue limitation.

Section 755 offers a second, higher level appeal to the county court for the penalized motorist.<sup>65</sup> From an examination of the Oklahoma cases construing this provision, there appears to be a great deal

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64. A student studies this problem in a comment entitled *California's Implied Consent Statute: An Examination & Evaluation*, 1 LOYOLA U.L. REV. (L.A.) 23 (1968).

65. The statute provides:

If the revocation or denial is sustained, the person whose license or permit to drive or nonresident operating privilege has been revoked or denied may file a petition for appeal in the county court in the manner provided in 47 O.S., Section 6-211, and the proceedings upon said appeal shall be the proceedings prescribed by 47 O.S., Section 6-211.

of uncertainty regarding the breadth and scope of the appellate hearing prescribed.

The procedure for entry into and conduct within the appeal is derived from section 6-211 of title 47, a provision developed specially for motor vehicle case appeals. Part (e) of this enactment states:

Upon said hearing said court shall take testimony and examine into the *facts and circumstances, including all of the records on file in the office of the Department of Public Safety relative to the offense committed* and the driving record of said licensee, and determine from said facts, circumstances and records whether the petitioner is entitled to a license or shall be subject to the order of denial, cancellation, suspension or revocation issued by the Department. The court may also determine whether, from such testimony of said licensee's previous driving record in the operation of motor vehicles, said order was for a longer period of time than such facts and circumstances warranted. In case the court finds that said order was not justified, the court may sustain said appeal, vacate the order of the Department and direct said license restored to the petitioner. The court may, in case it determines the order was justified, but that the period of suspension was excessive, *enter an order modifying the same.* (emphasis added).

From a reading of this section it seems clear that the scope of the county court proceeding will be significantly broader than the three-issue lower level hearing. However, in construing the statutes (section 6-211, section 754, and section 755) *in pari materia*, the Oklahoma Supreme Court in *State ex rel. Oklahoma Dept. of Public Safety v. Kopczynski*,<sup>66</sup> reversed a district court decision which modified the operator's period of revocation from six months to 30 days, holding that the district court had no more discretion under section 6-211 than did the Department of Public Safety in the first hearing. The decision therefore intends to limit the scope of hearing pursuant to section 6-211 to the same prescribed issues and factors permissible under section 753 and section 754. As a result, because the six month period is a fixed feature of section 753, the district court had no authority to modify the period to less than six months.<sup>67</sup>

This reasoning, keeping in mind the language of section 6-211 and the wording of section 755 ("and the proceedings upon said appeal shall be the proceedings prescribed by 47 O.S., Section 6-211") is very inadequate indeed. If it is a matter of interpreting legislative intent,

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66. 499 P.2d 1384 (Okla. 1972).

67. *Lewis v. Dep't of Public Safety*, 506 P.2d 1387 (Okla. 1972); *In re Finley*, 503 P.2d 1273 (Okla. 1972).



it would have been simple for the legislature to indicate its desire for another limited hearing. Clearly they intended to expand the hearing at this level by placing at the disposal of the appellant the machinery of section 6-211 with its sweeping power of review.

Illustrating the confusion within the judiciary regarding the meaning of section 755 is the case of *Application of Kunneman*.<sup>68</sup> This court held that the admission into civil evidence of the fact that the motorist vomited in jail after refusing to submit to a chemical test, was not reversible error. Surely this type of information is not relevant to the three limited issues outlined in section 754, but here the court took notice of the differences between that proceeding and the one in section 6-211, and after a thorough review of the record, upheld the revocation. Even though the evidence of the vomiting was unquestionably damaging to the operator and only tenuously related to the scope of a revocation hearing, this court read the probable intent of the legislature more accurately in applying section 6-211 broadly, than did the *Kopczynski* court.<sup>69</sup>

#### CONCLUSION

There are few, if any, persons who would advocate doing away with implied consent statutes entirely. The drunk driver situation in America is too serious to justify taking such a proven weapon away from law enforcement officials charged with combatting the problem on a day to day basis. Unfortunately, legislatures in general have been too hasty and negligent in constructing these weapons. In their zeal to rid the community of the dangerous drunk driver, the legislative creations known as "implied consent statutes" have generated possibly greater dangers that affect our fundamental rights and liberties.

Oklahoma has acted prudently in adopting the concept of the implied consent doctrine to alleviate the drunk driving anathema in this state. But much more needs to be done to protect its citizens from the presently overbearing features of our enacted statute. Oklahoma must

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68. 501 P.2d 910 (Okla. 1972).

69. The preceding section by section analysis of the Oklahoma implied consent statute was intended to concentrate on the civil matters raised by the statute. These sections discussed are accompanied by four other sections consecutively in the statutes. By their titles, they deal with:

Admission of evidence (criminal setting) shown by tests, OKLA. STAT. tit. 47, § 756 (1971).

Other competent evidence—Admissibility, OKLA. STAT. tit. 47, § 757 (1971).

Nonresidents—Notice to other states, OKLA. STAT. tit. 47, § 758 (1971).

Board of Chemical Tests for Alcoholic Influence—Methods—Permits, OKLA. STAT. tit. 47, § 759 (1971).

not allow its good intentions to turn sour because of a few provisions in the statute that are rectifiable at no cost to the statute's overall purpose.

Primarily, the due process enigma must be resolved. The old stumbling block that due process need not apply to "privileges" as opposed to "rights" has at last been overcome by the tenor of recent Supreme Court cases. These decisions make it clear that wherever it is possible to prevent an unjust and unnecessary deprivation of a property interest, the Supreme Court will find a way to do it. The *Bell* decision, involving a motor vehicle statute, anticipates a strict due process approach to implied consent. Its effect can be seen already in the swift incorporation of its language and authority in the *Chavez* and *Dablemont* lower court decisions.

It is time for Oklahoma to revise its statute to provide, along the lines of the California version, the essential prior notice and pre-revocation hearing that minimal procedural due process demands. The "emergency" doctrine cannot be relied on to justify non-revision. Too many faulty presumptions and inconsistencies erode that rationale.

Besides, it is important to note that guaranteeing due process as suggested does nothing to affect adversely the purposes and goals of the implied consent statute. Penalties will be meted out just as before, and even stricter ones may be justified. The sole change will be that the penalty will be invoked only *after* all is said and done for the record.

The due process revisions will necessitate conforming alterations in other areas. These include the opening up of the currently limited adversary hearing to all reasonably contestable issues encompassed by the statute. Another improvement will call for requiring that the ramifications of a refusal to take a chemical test be made clear to the suspected motorist in custody. Implied consent is so novel in its conception and implications for the average citizen who confronts it that requiring a simple sentence by the arresting officer, even as perfunctorily performed as are the *Miranda* warnings, will better enlist the support of those persons who are now uneasy about the statute.

Oklahoma is a neophyte in the implied consent field; many states have long had similar statutes. For the most part, these other states have, in response to decisional law, incorporated into their statutes the features necessary to make them more palatable in the traditional sense of due process. Oklahoma would do well to learn from those with experience.