Kentucky Law Journal

Volume 59 | Issue 2 Article 14

1970

Administrative Law--Kentucky's "Implied Consent" Statute--Revocation of Motor Vehicle Operator's License for Refusal to Take Blood Alcohol Test

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This statute should be amended to include all child custody cases, not just those that are the result of divorce proceedings.

The best interests of the child test is based on vague standards. Standards such as moral fitness, comparative physical environments and emotional ties are very difficult to define. These standards can also be very subjective due to the wide discretionary power of the judge. The best interests of the child test could become, in the discretion of a particular trial judge, a financial best interest test. If a judge subjectively decided that a factor of physical environment such as wealth was the most important interest of the child then the party with the most financial resources would be awarded custody.

> The best interests of the child test is inevitably artificial and tends to reach unfair and even vicious results when applied in fact unless one uses this test as a philosophical concept, and thinks of the child in an abstract or ideal sense, as an Hegelian might do.[37]

An advisory committee working with the trial judge would be more likely to be objective in a custody award than the trial judge alone. Only by a thorough investigation of the best interests of *all* the parties can parental rights and the child's best interests be balanced to determine the award of custody to the proper party.

William Edward Hudson

ADMINISTRATIVE LAW—KENTUCKY'S "IMPLIED CONSENT" STATUE—REVOCATION OF MOTOR VEHICLE OPERATOR'S LICENSE FOR REFUSAL TO TAKE BLOOD ALCOHOL TEST.—"There has been a long felt need for further legislation to clear the highways . . . of the intoxicated driver. A mounting toll yearly in injured and dead has been his responsibility."[1] The drinking driver creates a serious threat to the safety and protection of lives of persons on our nation's highways. Several studies indicate that ten to fifteen percent of all accidents involve a drinking driver, and fifty percent of the drivers judged to be at fault in fatal accidents have been drinking.[2]

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[37] Sayre, *supra* note 7, at 683.

[1] Schutt v. MacDuff, 205 Misc. 43, —, 127 N.Y.S.2d 116, 121 (Sup. Ct. 1954). For other cases in which the problem of the drinking driver has been noted, see Anderson v. MacDuff, 208 Misc. 271, —, 143 N.Y.S.2d 257, 258 (Sup. Ct. 1955); Beare v. Smith, 82 S.D. 20, —, 140 N.W.2d 603, 606 (1956); State v. Muzzy, 124 Vt. 222, —, 202 A.2d 267, 269 (1964).

[2] HOUSE COMM. ON PUBLIC WORKS, 90TH CONG., 2D SESS., 1968 ALCOHOL AND HIGHWAY SAFETY REPORT 11-15 (Comm. Print 1968); KY. LEGISLATIVE RESEARCH COMMISSION, TRAFFIC SAFETY: THE DRINKING DRIVER, RESEARCH REPORT No. 36 at 2, 9 (Sept. 1967).

In reaction to this problem, all fifty states and the District of Columbia have made it a criminal violation to drive while under the influence of alcohol; forty-four states and the District of Columbia allow the evidence obtained from chemical tests to determine intoxication.[3] To further aid in the detection of the drinking driver and in the enforcement of "drunk driver" statutes, thirty-five states, including Kentucky, have passed "implied consent" legislation.[4]

Under the theory of implied consent, any person who operates a motor vehicle on the state's highways[5] is 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, whenever he is arrested for any affense involving the operation of a motor vehicle while under the influence of intoxicating liquor. Refusal to submit to a test for intoxication results in the revocation of the operator's license.

The underlying rationale is:

> [T]o operate a motor vehicle on a public road is not a natural or unrestricted right but rather a privilege granted by the state and subject to reasonable regulation under the police power of the state. Such a license is issued and accepted under the terms and conditions of the statute.[6]

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[3] Alabama, Alaska, California, Mississippi, New Mexico, and Oklahoma do not have chemical test statutes governing the evidentiary presumptions of intoxication based on the alcohol-blood ratio. UNIFORM VEHICLE CODE ANN. § 11-902(b) (Supp. 1969).

[4] ARIZ. REV. STAT. ANN. § 28-691 (Supp. May 1969); CAL. VEH. CODE § 13353 (West Supp. 1968); COLO. REV. STAT. § 13-5-30 (Supp. 1969); CONN. GEN. STAT. REV. § 14-117b (Supp. 1969); FLA. STAT. ANN. § 322-261 (1968); GA. CODE ANN. § 16-1625.1 (Supp. 1968); HAWAII REV. LAWS § 286-151 (1968); IDAHO CODE ANN. § 49-352 (1967); ILL. ANN. STAT. ch. 95½ § 144 (Smith-Hurd Supp. 1969); IND. ANN. STAT. § 47-2003c (Supp. 1969); IOWA CODE § 321.B3 (Supp. 1968); KAN. STAT. ANN. § 8-1001 (Supp. 1968); KY. REV. STAT. § 186.565 (1968); LA. REV. STAT. § 32:661 (Supp. 1970); MASS. GEN. LAWS ANN. ch. 90, § 24 (Supp. 1969); MICH. COMP. LAWS § 257.625 (Supp. 1968); MINN. STAT. ANN. § 169.123 (Supp. 1968); MO. REV. STAT. § 564.441 (Supp. 1968); NEB. REV. STAT.. § 39:4-50.2 (Supp. 1968); N.M. STAT. ANN. § 64-22-2.4 (Supp. 1969); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1969); N.C. GEN. STAT. § 20-139.1 (Supp. 1968); N.D. CENT. CODE § 39-20-01 (Supp. 1969); OHIO REV. CODE ANN. § 4511.19.1 (Page Supp. 1968); OKLA. STAT. ANN. tit. 47 § 751 (Supp. 1968); ORE. REV. STAT. § 483.634 (1968); PA. STAT. ANN. tit. 75, § 624.1 (Supp. 1969); R.I. GEN. LAWS ANN. § 31-27-2.1 (1969); S.D. CODE § 44.0302-2 (Supp. 1960); UTAH CODE ANN. § 41-6-44.10 (Supp. 1967); VT. STAT. ANN. tit. 23 § 1188 (1967); VA. CODE ANN. § 18-1-55.1 (Supp. 1968); W. VA. CODE ANN. § 17C-5A-1 (Supp. 1969).

[5] KY. REV. STAT. [hereinafter cited as KRS] § 186.565(1) (1968):

> Any person who operates a motor vehicle *in this state* is deemed to have given his consent. . . . [Emphasis added.]

[6] Commonwealth v. Mitchell, 355 S.W.2d 686, 688 (Ky. 1962); *accord,* Sturgill v. Beard, 303 S.W.2d 908 (Ky. 1957); Ballow v. Reeves, 238 S.W.2d 141 (Ky. 1951); Withers v. Marshall, 311 Ky. 659, 225 S.W.2d 121 (1949); Commonwealth v. Harris, 278 Ky. 218, 128 S.W.2d 579 (1939). For cases of other

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The United States Supreme Court in upholding the validity of the Massachusetts non-resident motorist statute, a form of implied consent, ruled that "in advance of the operation of a motor vehicle on its highways . . . the state may require" the operator to consent to reasonable conditions to the exercise of this privilege.[7]

There have been few challenges to implied consent legislation on the basis of the state's power to regulate the use of the highways and none have been successful.[8] The courts have looked favorably on these statutes and have consistently rejected constitutional challenges.[9]

The first implied consent law was enacted by the New York State Legislature in 1953 and amended in 1954 to meet judicial criticism.[10] This amended act was incorporated into a "Uniform Chemical Test for Intoxication Act" which was approved by the National Conference of Commissioners of Uniform State Laws in July 1957. These recommendations were adopted by the National Committee on Uniform

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jurisdictions which reiterate this settled principle of law, see Lee v. State, 187 Kan. 566, —, 358 P.2d 765, 769 (1961); Blydenburg v. David, 413 S.W.2d 284, 289 (Mo. 1967); Prucha v. Dep't of Motor Vehicles, 172 Neb. 415, —, 110 N.W.2d 75, 81 (1961) (not a property right); Schutt v. MacDuff, 205 Misc. 43, —, 127 N.Y.S.2d 116, 121-22, (Sup. Ct. 1955); Chmelka v. Smith, 81 S.D. 40, —, 130 N.W.2d 423, 424 (1964); State v. Muzzy, 124 Vt. 222, —, 202 A.2d 267, 269 (1964) (not a property right).

[7] Hess v. Pawloski, 274 U.S. 352, 356 (1927).

[8] DONIGAN, CHEMICAL TESTS AND THE LAW 1 (1966).

[9] The first implied consent statute, enacted by the New York State Legislature in 1953, was held unconstitutional in *Schutt v. MacDuff*, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954). Amended to require a lawful arrest and an opportunity to be heard, the revised statute was declared constitutional in *Anderson v. MacDuff*, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955). Thereafter, all courts have rejected constitutional 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); Schutt v. MacDuffff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

2) violate due process of law. Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961); Blydenburg v. David, 413 S.W.2d 284 (Mo. 1967); Prucha v. Dep't of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961); Ballou v. Kelly, 12 Misc. 2d 178, 176 N.Y.S.2d 1005 (Sup. Ct. 1958).

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

4) permit an unreasonable search and seizure. Breithaupt v. Abram, 352 U.S. 432 (1957); State v. Findlay, 259 Iowa 733, 145 N.W.2d 650 (1966); Lee v. State, 187 Kan. 566, 385 P.2d 765 (1961); Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

5) interfere with the right to counsel. Gottschalk v. Sueppel, 258 Iowa 1173, 140 N.W.2d 866 (1966); Finocchairo 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).

[10] N.Y. VEH. AND TRAF. LAW § 71-a (McKinney 1953), *as amended*, ch. 320 1954 N.Y. Laws, now N.Y. VEH. AND TRAF. LAW § 1194 (McKinney 1969). For a brief judicial history of this statute, see note 9 *supra*.

Traffic Laws and Ordinances and included in the Uniform Vehicle Code in 1962.[11] This has become the prototype of all other implied consent legislation.[12]

In apparent response to federal standards requiring better highway safety programs,[13] the 1968 Kentucky General Assembly passed its implied consent law, Kentucky Revised Statute [hereinafter referred to as KRS] § 186.565,[14] which is modeled after the Uniform Vehicle Code § 6-205.1. Before the enactment of this statute, Kentucky had dealt with the problem of the drinking driver by prohibiting his use of the highways,[15] and by providing for the results of blood alcohol tests to give rise to evidentiary presumptions of intoxication.[16]

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[11] UNIFORM VEHICLE CODE [hereinafter cited as UVC] § 6-205.1(a) (1962):

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given his consent to a chemical test or tests of his blood, breath, urine or saliva. The test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe that the driver was under the influence of intoxicating liquor. . . .

[12] Compare the statutes cited in note 4 *supra* with UVC § 6-205.1(a) (1962), note 11 *supra*.

[13] Pursuant to the *Highway Safety Act of 1966*, 23 U.S.C. §§ 401-04 (1966), the Secretary of Transportation issued a standard requiring each state to develop and implement programs designed to reduce the number of traffic accidents caused by motorists who drive while under the influence of alcohol. The standard, issued June 26, 1967, required each state to (1) strengthen their "drunk driving" statutes, (2) supplement such statutes with "implied consent" authority, and (3) establish an expanded information collection program to determine the extent alcohol is present among drivers and adult pedestrians involved in fatal automobile accidents. H.R. Doc. No. 138, 90th Cong., 1st Sess. 9-10 (1967).

[14] KRS § 186.565(1) (1968):

> Any person who operates a motor vehicle in this state is deemed to have given his consent to a chemical test of his blood, breath, urine or salivia for the purpose of determining the alcoholic content of his blood, if arrested for any offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle in this state while under the influence of intoxicating beverages. . . .

[15] KRS § 189.520 (1968):

> (1) No person under the influence of intoxicating beverages . . . shall operate a vehicle that is not a motor vehicle anywhere in this state.
>
> (2) No person shall operate a motor vehicle anywhere in this state while under the influence of intoxicating beverages. . . .

[16] KRS § 189.520(4) (1968):

> In any criminal prosecution . . . wherein the defendant is charged with having operated a vehicle while under the influence of intoxicating beverages, the amount of alcohol in the defendant's blood, as determined at the time of making a chemical analysis of his blood, urine, breath or other bodily substance, shall give rise to the following presumptions:
>
> (a) If there was 0.05 percent or less by weight of alcohol in such blood, it shall be presumed that the defendant was not under the influence of intoxicating beverages;
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> (b) If there was more than 0.05 percent, but less than 0.10 percent by weight of alcohol in such blood, such fact shall not constitute a pre-

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Although no person arrested for operating a motor vehicle[17] while under the influence of alcohol was to be compelled to submit to a test, his refusal could be commented on by the prosecution at trial.[18] This was held to be a violation of the constitutional provisions which prohibit the compelling of a person to be a witness against himself.[19] Partially to remedy this nullification and to further aid in obtaining convictions, and more emphatically to bolster the deterrence factor in an attempt to reduce the number of drinking drivers, the statute was amended to provide for revocation of the driver's license for refusal to submit to the test[20] and KRS § 186.565 was enacted to imply consent.

The first implied consent case to go before the Kentucky Court of Appeals was *Department of Public Safety v. Powers.*[21] Powers had been arrested for driving under the influence of alcohol. The arresting officer "advised . . . [Powers] of his *right* to take a blood alcohol test . . . if he would *like.*" The officer "offered [Powers] a blood alcohol test" and asked him "if he would be willing to take a blood alcohol test." A second officer asked Powers "*if he wanted* [a blood alcohol test]" and told him "he did not have to take it, it was his privilege." A third officer asked Powers "if he would *like* to have a blood alcohol test."[22] Under Kentucky's implied consent statute, the arresting officer filed an affidavit with the Department of Public Safety [hereinafter Department] stating that Powers had refused to submit to the test upon his request. The Department revoked Powers'

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sumption that the defendant either was or was not under the influence of intoxicating beverages, but such fact may be considered, together with other competent evidence in determining the guilt or innocence of the defendant;

(c) If there was 0.10 percent or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages.

[17] Or a vehicle which is not a motor vehicle. KRS § 189.520(1) (1968).

[18] KRS § 189.520(6) (1958):

No person may be compelled to submit to any test . . . but his refusal may be commented upon by the prosecution in the trial against any person charged with operating any vehicle while under the influence of alcohol.

[19] KRS § 186.520(6) (1958) was held unconstitutional under section eleven of the Constitution of Kentucky and the fifth amendment of the Constitution of the United States in *Hovious v. Riley,* 403 S.W.2d 17 (Ky. 1966), noted at 55 KY. L.J. 891 (1967).

[20] KRS § 186.520(6) (1968):

No person shall be compelled to submit to any test . . . but his refusal to submit to such test shall result in revocation of his license as provided in KRS 186.565(3).

[21] 453 S.W.2d 260 (Ky. 1970).

[22] *Id.* at 262.

driver's license for a period of six months.[23] Power requested a hearing before the Commissioner of the Department.[24] At the hearing,[25] the Commissioner found that Powers had refused to submit to the test upon the request of the officer and entered an order sustaining the suspension of Powers' license. Powers appealed to the Calloway Circuit Court[26] which found that the Commissioner's ruling was arbitrary.[27] Accordingly, the court entered judgment to set aside the order of suspension of Powers' license. On appeal, the Court of Appeals affirmed, holding that the evidence at the hearing before the Commissioner was not sufficient to sustain the finding that Powers had been *requested* to take a blood test and had *refused.*

In reaching its conclusion, the Court found it necessary first to

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[23] KRS § 186.565(3) (1968):

If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test . . . the Department of Public Safety, upon a receipt 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 in this state while under the influence of intoxicating beverages and that the person refused to submit to the test upon the request of the law enforcement officer, shall revoke the license or permit of the person refusing to take the test for a period of not more than six months. . . .

[24] KRS § 186.565(4) (1968):

. . . Within ten days after receiving notice [of revocation], the person may request a hearing before the commissioner. . . .

[25] KRS § 186.565(4) (1968) provides in part:

The scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle in this state while under the influence of intoxicating beverages, whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer. . . .

[26] KRS § 185.565(5) (1968):

If revocation . . . is sustained after the hearing, the person whose license . . . has been revoked . . . may file a petition in the circuit court of the county in which the person resides or in the circuit court of the county in which the alleged offense was committed or in Franklin Circuit Court to review the final order of revocation . . . by the commissioner within twenty days after the final order has been issued. . . .

[27] KRS § 186.565(5) (1968) provides in part:

The [circuit] court's review is limited to whether the commissioner's ruling is supported by substantial evidence and whether his action is arbitrary or capricious. . . .

The circuit court found the Commissioner's ruling to be arbitrary on the grounds that:

(1) the Murray Police Department did not supply the necessary testing equipment;

(2) the Appellee could not have refused since he was never requested to submit to the test within the meaning of the statute; and

(3) the Appellee offered to take the test within an effective time and the police refused to administer it to him.

The circuit court declined to rule on the constitutionality of the statute. Brief for Appellant at 4, Commonwealth, Dep't of Public Safety v. Powers, 453 S.W.2d 260 (Ky. 1970).

define the word "request" as used in context with the word "refuse" in the statute. It was the opinion of the Court that the statute contemplates:

> [S]uch a form of a request as specifically asks the subject person *to* take the test, not merely inquires whether the person would *like* to take it; one that has more of the elements of a *demand* than of a mere *offer*. . . . a direct solicitation, an expression of the officers' desire that the test be taken . . . The normal form of the request would be: 'Will you submit to the test?' . . . so phrased as to call for a response which says 'I will' or 'I will not' . . . a refusal instead of a mere declination.[28]

Although, at first blush, this seems like a technical distinction not worthy of close analysis, it must be remembered that the driver is deemed to have given his consent by his act of driving. It follows that if a person has already consented to a blood test, there is no purpose for the arresting officer to offer him one or ask if he would like to have one. To ask implies consent is needed, when consent has supposedly already been given. Therefore the Court seems to be saying that the defendant should be demanded to take the test, and unless he refuses, the test should be administered.

This same issue was before the Court again a week later for its decision. In applying the semantical rule laid down in *Powers*, the Court held in *Department of Public Safety v. Cheek*[29] that the officer's words ("You are supposed to take a blood alcohol test. . . . Do you mind taking it?")[30] constituted a proper request. The Court's decision in these two cases seems to indicate that KRS § 186.565 will be narrowly construed according to the plain meaning of the words of the statute itself, and in favor of the license holder.

The Kentucky Court of Appeals adheres to the precise words of the statute more strictly than the courts of other jurisdictions. The New York Supreme Court, Orange County, stating dictum in a 1954 case,[31] said a driver's license could be revoked "in the event he shall refuse . . . when *demanded*" to submit to a test. But when the New York Supreme Court, Appellate Division squarely faced this issue, it held that the intent of the statute had been complied with when the officer asked if the driver "*wanted* to take a test."[32] [emphasis added.]

While the Kentucky Court of Appeals was deciding the *Powers*

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[28] Commonwealth, Dep't of Public Safety v. Powers, 453 S.W.2d 260, 262-63 (Ky. 1970).
[29] 451 S.W.2d 394 (Ky. 1970).
[30] *Id.* at 396.
[31] Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116, 122 (Sup. Ct. 1954).
[32] Clancy v. Kelly, 7 App. Div. 2d 820, 180 N.Y.S.2d 923, 924 (1958).

and *Cheek* cases, the 1970 Kentucky General Assembly was amending KRS § 186.565 to require the requesting officer to warn the driver of the effect of his refusal to submit to a blood alcohol test.[33] *Powers* and *Cheek* outline a standard to which the officer's request must conform under a statute which does not require the officer to warn of the effect of refusal to submit to a blood alcohol test. Under this amendment, these two cases serve as a basis from which to speculate as to what new standard the court will delineate, and what form of "request" and "warning" will be upheld.[34]

The amended statute seems to require, on its face, a request, a refusal, a warning, another request and another refusal.[35] Will the Court require strict compliance with this procedure or will one request coupled with a warning and one refusal be sufficient? Although the statutory intent would seemingly be complied with by the latter form of a warning, the Court will probably require strict compliance with the words of the statute, as it did in the previous two cases.[36]

Although many states do not have this statutory requirement, the courts, nevertheless, have upheld the statutes under due process attacks and rejected arguments set forth under *Miranda v. Arizona*.[37] But the courts have often indicated sentiments favoring the giving of such

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[33] Ch. 238, [1970] Ky. Acts. The significant amendments were made in subsection (3) of KRS § 186.565 (as italicized):

> If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test . . . *the requesting officer shall warn the person of the effect of his refusal to submit to the test. If the person again refuses,* none shall be given, but the Department of Public Safety, upon the receipt 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 in this state while under the influence of intoxicating beverages, [and] that the person refused to submit to the test upon the request of the law enforcement officer, *and that the person again refused to submit to the test after the law enforcement officer warned him* of the effect of his refusal, shall revoke the license or permit of the person refusing to take the test for a period of not more than six months . . . the sworn report of the *law enforcement officer stating that he had warned the person under arrest of the effect of his refusal to submit to a chemical test shall be proof that such warning had been given.*

[34] It is assumed that the Court will still require such a form of a request that has more of the elements of a demand than a mere offer as it did in *Powers*.

[35] For the text of the statute as amended, see note 33 *supra*.

[36] Mary Jo Arterberry, counsel for Commonwealth, Dep't of Public Safety in Powers and Cheek, agrees with this prediction. Interview with Mary Jo Arterberry, counsel for the Ky. Dep't of Public Safety, by telephone, April 1, 1970.

[37] 384 U.S. 436 (1966). For cases which hold that a motorist need not be advised of the consequences of his failure to submit to a blood alcohol test, see Hazlett v. Motor Vehicle Dep't, 195 Kan. 439, 407 P.2d 551 (1965); Prucha v. Dep't of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961); Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (1955); Timm v. State, 110 N.W.2d 359 (N.D. 1961).

warnings and have, by way of dictum, stated that it would be a better practice for the police to warn of the consequences of refusal.[38]

In *Powers*, the constitutional issues raised in the court below were not grounds for appeal.[39] Because no mention of these issues was made in *Powers*, nor in *Cheek*, it cannot be presumed that the Court passed on the constitutionality of the statute *sub silentia*. In *Department of Public Safety v. Brent*,[40] the third implied consent case before the Court,[41] Judge Osborne, in a concurring opinion, regretted that the constitutionality of the statute had not been argued. Citing *Schmerber v. California*,[42] he expressed serious reservations concerning the distinction made between "physical" and "testimonial" evidence under the fifth amendment prohibition against self-incrimination.

In that landmark case, the Supreme Court of the United States considered the question of whether the self-incrimination privilege of the fifth amendment is violated by the admission of results of a blood test into evidence. Petitioner Schmerber had been in an automobile accident and taken to a hospital where he was arrested for driving under the influence of intoxicating liquor. He refused to submit to a blood test. Yet, on the direction of the arresting officer, a physician at the hospital withdrew a blood sample for chemical analysis to determine the percentage of alcohol by weight in his body. The Court held that the introduction of the compulsory blood test into evidence was not violative of petitioner's privilege against self-incrimination:

> [W]e 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 the withdrawal of blood and use of analysis in question in this case did not involve compulsion to these ends.[43]

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[38] Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257, 259 (Sup. Ct. 1955).

[39] Note 27 *supra*.

[40] 452 S.W.2d 819 (Ky. 1970). The Kentucky Court of Appeals, in sustaining the revocation of appellee's driver's license by the Department of Public Safety, held that the lapse of time between the incident of driving a motor vehicle and the officer's request that appellee submit to a blood-alcohol test is not a valid legal reason to refuse to submit to the test.

[41] There has been only one other case to go before the Kentucky Court of Appeals under Kentucky's implied consent legislation. In that case, *Dep't of Public Safety v. Bell*, 453 S.W.2d 749 (Ky. 1970), the Court held that judicial review of an administrative order is proper when an aggrieved party is in literal compliance with the special statutory provisions in an attempt to have his operator's license restored, and when the Department of Public Safety is afforded reasonable notice and an opportunity to be heard.

[42] 384 U.S. 757 (1966).

[43] *Id.* at 761.

The Court distinguished between the protection of an accused's communications of a testimonial nature and the use of an accused's body as the source of real physical evidence,[44] which is not within the protection of the fifth amendment. Thus, a defendant may be required to submit to finger-printing, photographing or measurements, and he may be compelled to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a certain gesture.[45] Mr. Justice Brennan, writing for the five man majority, admitted that the evidence from a blood test was an incriminating product of compulsion.[46] Thus a questionable distinction was established.

The Court's narrow construction of the self-incrimination privilege was strongly criticized in a dissenting opinion by Mr. Justice Black, in which Mr. Justice Douglas joined.[47] Without altering the historical concept of the scope of this privilege,[48] Justice Black was able to find that the evidence obtained from the blood tests were of a testimonial or communicative nature. It was from this dissent that Judge Osborne of the Kentucky Court of Appeals found support for his position:

> [T]he compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a 'testimonial' and 'communicative nature.' . . . The analysis of the blood was to supply information to enable a witness to communicate to the court. . . . [The majority] concedes . . . that the fifth amendment bars a statute from compelling a person to produce papers that might tend to incriminate him. It is a strange hierarchy of values that allows a state to extract a human being's blood to convict him . . . but proscribes compelled production of his lifeless papers . . . .[49]

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[44] Real evidence is defined as "evidence furnished by things themselves, on view or inspection, as distinguished from a description of them by a mouth of a witness." BLACK'S LAW DICTIONARY (rev. 4th ed. 1968).

[45] Schmerber v. California, 384 U.S. 757, 764 (1966).

> The distinction which has emerged . . . is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it. *Id.*

[46] *Id.* at 765.

[47] *Id.* at 773-78 (dissenting opinion). *See also* 384 U.S. at 772 (Warren, C.J., dissenting), 384 U.S. at 779 (Fortas, J., dissenting).

[48] The decision in this area which has long been the recognized authority is *Holt v. United States*, 218 U.S. 245 (1910), which held:

> [T]he prohibition of compelling a man in a criminal court to be 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. *Id.* at 252-53.

[49] Dep't of Public Safety v. Brent, 452 S.W.2d 819, 822 (Ky. 1970) (Osborne, J., concurring), *quoting* Schmerber v. California, 384 U.S. 757, 774-75 (1966) (Black, J., dissenting).

Even if the Kentucky Court of Appeals does hold that compulsion to submit to a blood test violates the privilege against self-incrimination (the coercion being revocation of the driver's license), the court will be faced with the issue of consent. As previously stated, "implied consent" legislation has been upheld in other jurisdictions on the theory that the license to drive is a privilege granted by the state subject to such conditions as the state may impose in the interest of public safety and welfare. But can the state condition a privilege upon a waiver of a constitutional right, *i.e.*, the right not to be compelled to be a witness against himself? Under the doctrine of unconstitutional conditions:

> [W]hatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly. As a consequence, it seems to follow that the [fifth] amendment forbids the government to condition its largess on the willingness of the petitioner to surrender a right which he would otherwise be entitled to exercise . . . .[50]

As stated by the United States Supreme Court in *Frost & Frost Trucking Company v. Railroad Commission*:[51]

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold . . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[52]

The central concern, of course, is to achieve a balance between the desire to preserve individual liberty and the desire to prevent conduct that is socially harmful. The policy considerations behind implied consent laws are great. Although they do not alter the basic method of initially detecting the drunken driver, the laws are a desirable method of gathering scientifically reliable evidence once the initial contact has been made. In the past, failure to convict has generally been due to the inability to prove beyond a reasonable doubt that the driver was intoxicated. With the definite evidence now being obtained as a result of the enactment of implied consent

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[50] Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968).
[51] 271 U.S. 583 (1926).
[52] *Id.* at 593-94.

legislation, the law's most important effect will be to increase the number of convictions and thus deter the public from driving after drinking by increasing the fear in a potential drinking driver that he may be convicted for the offense if apprehended. Another benefit of these statutes is that, with the imprecision of subjective observation replaced by objective evidence, the innocent individual is fully protected and the impaired driver is justly adjudicated guilty.

On the other side is the opinion expressed by Judge Osborne that coercion to obtain physical evidence violates the right against self-incrimination. The rationale behind this privilege is that the *words* of the accused could well be unreliable when obtained by compulsory process. But the accuracy of *physical evidence,* in this case blood alcohol content, is in no way affected by the compulsion involved. Therefore, the need to remove the drinking driver from the state's highways requires that the Kentucky Court of Appeals uphold the constitutionality of Kentucky's implied consent statute against fifth amendment challenges, as have the courts of other jurisdictions.[53]

Taft A. McKinstry

CONSTITUTIONAL LAW—THE POWER OF A GOVERNOR TO PROCLAIM MARTIAL LAW AND USE STATE MILITARY FORCES TO SUPPRESS CAMPUS DEMONSTRATIONS.—On April 30, 1970 the war in Indochina came home. It exploded on a thousand[1] college and university campuses as the shock waves of outrage swept the country following the President's announcement of the invasion of Cambodia by the Armed Forces of the United States.[2] While the President attempted to head off the constitutional crisis he had created by his unilateral action,[3] Americans,

[53] See note 9 *supra,* and accompanying text.

[1] The magnitude of the reaction is not exaggerated. NEWSWEEK, May 18, 1970, at 28.

[2] On April 30, 1970, the President, in a nationally televised speech, announced that 20,000 American troops had joined South Vietnamese forces in an invasion of Cambodia. The stated purpose of the invasion was the destruction of enemy sanctuaries in that country. NEWSWEEK, May 11, 1970, at 22-28; NEWSWEEK, May 25, 1970, at 29. The invasion was such an unexpected shock to the American people because just ten days before, in another televised speech, the President had announced that he would *withdraw* an additional 150,000 troops from South Vietnam over the following twelve months. NEWSWEEK, May 4, 1970, at 21-22. Only two days before the announced invasion. Secretary of State William Rogers reassured the Senate Foreign Relations Committee that the United States would not engage in ground military operations in Cambodia. NEWSWEEK, May 11, 1970, at 23.

[3] The President had not consulted Congress before he ordered the invasion of Cambodia by American military forces. He had not even informed members

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