Public Outcry v. Individual Rights: Right to Counsel and the Drunk Driver's Dilemma

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PUBLIC OUTCRY V. INDIVIDUAL RIGHTS: RIGHT TO COUNSEL AND THE DRUNK DRIVER'S DILEMMA

I. INTRODUCTION

Public outcry: "Drunk driving has been a national epidemic and a disgrace long enough!"\(^1\)

\[ \text{v.} \]

Individual "[T]he accused shall enjoy the right... to have the Assistance of Counsel... before submitting to a sobriety test."

Although drunk driving has taken thousands of lives in the past decade, serious attention to this problem was almost non-existent until recently.\(^3\) Disturbed by the problem of the drinking driver, states have pursued more effective means of apprehending and prosecuting offenders.\(^4\) As a result of this public outcry, implied consent statutes have been employed in all fifty states and the District of Columbia.\(^5\) While these statutes serve the legitimate public policy of convicting drunken

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1. This is the feeling of a growing number of politicians, judges, and citizens who are advocating new programs to address a problem that takes 25,000 lives a year. Quade, *War on Drunk Driving: 25,000 Lives at Stake*, 68 A.B.A. J. 1551 (1982).
2. U.S. CONST. amend. VI.
drivers, it is questionable, under current law, whether the rights of the accused are being adequately protected.

Persons arrested for driving while under the influence of alcohol (DWI) are requested to submit to a chemical sobriety test to determine the level of intoxication. Implied consent statutes provide that the accused may refuse the test. Upon refusal, however, the accused's driver's license may be revoked or suspended for some prescribed period of time. Thus, the accused faces a difficult decision which bears significant consequences. Under the current case law, the courts are split as to whether the accused is entitled to make this decision with the advice of counsel. This comment examines the applicable case law, balances the accused's constitutional rights with society's need to deter drunk drivers, and concludes that, due to the serious consequences that may result

6. The immediate purpose of the implied consent statute is to obtain the best evidence of the driver's blood alcohol content at the time of the arrest; the long range purpose is to prevent intoxicated individuals from driving on the highways. Collins v. Secretary of State, 384 Mich. 656, 187 N.W.2d 423, 429 (1971).

The process is completed if a driver complies with the officer's initial request for a chemical test, even though the driver may never have been advised of anything. The purpose of the statute is to provide an effective means, short of physical force, to overcome the driver's refusal. The nonphysical means consist of a penalty, such as an extensive suspension of the driver's license (see infra notes 28-29 and accompanying text), and a warning that the driver's license will be suspended if he or she continues to refuse. Therefore, the consent envisioned by the statute is to be implied and if submission is not forthcoming it is to be coerced through fear of adverse consequences. See State v. Newton, 291 Or. 788, 636 P.2d 393, 401-02 (1981) (discussing Oregon's implied consent statute: OR. REV. STAT. § 487.805(2), which is currently found in OR. REV. STAT. § 813.100 (1985).

7. The courts of many states have addressed the issue of whether a person accused of driving while intoxicated has a right to consult with counsel prior to exercising or waiving the right to refuse the chemical sobriety test. A number of them, including Arizona, Georgia, Kentucky, Oklahoma, Oregon, New Hampshire and Rhode Island, have concluded that no such right to counsel exists. Others, including Missouri, North Carolina, New York, Ohio and Washington, have upheld the right to counsel. See generally Annot., 18 A.L.R.4TH 705 (1982).

8. This comment uses the abbreviation of "DWI" to refer to the offense of driving while under the influence of alcohol. The terminology of drunk driving offenses may vary from state to state. For example, some states abbreviate the offense as "OWI" for operating a vehicle while intoxicated.

9. Normally, the accused has a choice between a breathalyzer test or a blood test to determine the level of alcohol in the body. See supra notes 4-5.

10. Most statutes suspend the license from 90 days to one year. See infra notes 28-29 and accompanying text.

11. See infra notes 22-29 and accompanying text.
from either choice under the statute, a right to counsel should be provided.

II. THE "CRITICAL STAGE" TEST

Some courts have held that a sixth amendment right to counsel does afford a person apprehended for drunk driving a right to communicate with counsel before deciding whether to take a chemical sobriety test. The results of the chemical sobriety test, or the refusal to submit thereto, may give rise to two proceedings. One proceeding is civil in nature, involving the suspension of the operator's license; the other is criminal, resulting in a criminal charge of operating a vehicle while under the influence of alcohol. This section discusses cases involving a criminal penalty where the courts have held that a sixth amendment right to counsel does afford a person apprehended for drunk driving a right to communicate with counsel before deciding whether to take a chemical sobriety test.

Since 1932, the United States Supreme Court has held that the scope of the pretrial right to counsel is to be based on the protection of the accused's sixth amendment right to counsel at trial. If the right to counsel is not provided at a "critical" pretrial stage, the accused's right to counsel may be rendered meaningless. The Court has subsequently extended the "critical stage" test to all state criminal proceedings, whether serious or petty. There are different points in time in the procedural process which have been identified as a "critical stage." The leading case in this area is United States v.

14. U.S. CONST. amend. VI states in part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."
18. The Court has established that sentencing and the first appeal granted as a matter of right are critical post-trial stages. See Mempa v. Rhay, 389 U.S. 128 (1967); Douglas v. California, 372 U.S. 353 (1963). Similarly, the Court has held in-custody
There the Court stated the "critical stage" test as follows:

[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment. ... 20

It is arguable that the pretest period is a "critical stage" of the drunk driving prosecution in that the accused is required, under the implied consent statute, to make a choice between taking or not taking the test. This choice is one which will have a substantial and irreversible impact on the subsequent trial. 21 The decision whether to take the test is a critical stage because if the accused submits and is in fact intoxicated, the chance of winning the criminal case is virtually nonexistent. 22

Penalties for DWI convictions may include heavy fines or imprisonment, revocation of the driver's license, and mandatory sentences for subsequent offenses. 23 If the defendant refuses, loss of license ensues. 24 Worse yet, many states have statutes which allow a refusal to be introduced as evidence in a criminal proceeding. 25 This rule clearly mitigates the advantage gained from refusal, especially by drivers who


20. Id. at 226-27 (footnote omitted).
22. The Department of Transportation (DOT) Highway Safety Program Standard No. 8 requires states to presume intoxication if the suspect's blood alcohol content is 0.10 percent or greater. See generally Comment, The Drinking Driver: An Approach to Solving a Problem of Underestimated Severity, 14 Vill. L. Rev. 97, 104 (1968).
would test below the level that establishes the presumption of intoxication. 6

In addition to the risk that a refusal will be used as inculpatory evidence, drivers face an additional burden—suspension of their driver’s licenses. All of the implied consent statutes 27 provide that upon refusal the state shall suspend the driver’s license from as short as ninety days 28 to as long as one year. 29 A police officer quickly and mechanically reading the accused’s rights cannot assist the accused in making this choice. 30

26. See supra note 22 and accompanying text.
27. An example of a typical implied consent statute is Wis. Stat. § 343.305 (1983-84):

(1) Any person who drives . . . a motor vehicle upon the public highways of this state . . . shall be deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity . . . of alcohol.

. . . .
(3)(a) A law enforcement officer requesting a person to take a test . . . shall . . . inform the person:

. . . .
(2) That if he or she refuses to submit to any such test his or her operating privilege shall be revoked . . . .

. . . .
(9)(a) If the court determines . . . that a person improperly refused to take a test . . . the court shall proceed [to order] . . . .

. . . .
2. [For the first improper refusal the court shall revoke the person’s operating privilege for 6 months.

The Wisconsin Supreme Court has held that there is no right to consult with counsel before deciding whether to submit to a chemical test for intoxication. When a driver receives a driver’s license, it is taken subject to the legislatively imposed condition that upon being arrested for driving under the influence of an intoxicant, the driver consents to submit to the chemical tests. The license is taken subject to the condition that an unreasonable refusal to submit to the tests will result in a revocation of the license. Since a lawyer cannot induce a client to recant a consent previously given knowingly and voluntarily, a lawyer can serve no purpose, consistent with the implied consent law, by advising a client to submit to a chemical test or to refuse it. State v. Neitzel, 95 Wis. 2d 191, 289 N.W.2d 828 (1980).

30. Miranda warnings are given at the time of arrest. It is only after the Miranda warnings that the person is requested to submit to testing and the implied consent statute is read. It may be difficult for the driver to reconcile the apparent contradictions between the Miranda warnings, which allow the right to counsel, and an implied consent statute, which denies the driver the right to consult an attorney prior to making a
The question is how can accused persons make an intelligent decision regarding submission to a chemical sobriety test if they are ignorant of their various rights? The officer is under no duty to fully enlighten an accused. Clearly, the answer is that only through the advice and counsel of an attorney can the accused be expected to make an intelligent and knowledgable decision.

The Washington Supreme Court in *State v. Fitzsimmons* made a strong case for a clear constitutional right to counsel. In *Fitzsimmons*, the defendant was charged with DWI and was denied immediate access to counsel. The defendant refused a breathalyzer test and was subsequently convicted of driving while under the influence of intoxicating liquor. The Supreme Court of Washington reversed and held that crimi-

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decision to submit to testing. Heles v. South Dakota, 530 F. Supp. 646 (D.S.D. 1982), vacated as moot, 682 F.2d 201 (8th Cir. 1982).

31. Although an officer is required to advise the arrestee of the statutory consequences of a refusal to take a chemical test, the officer is not required to advise the arrestee of the effect on the criminal proceedings of either taking the test or refusing to take it. See Siegwald v. Curry, 40 Ohio App. 2d 313, 316, 319 N.E.2d 381, 385 (1974).

32. Attorneys are under an ethical duty to provide legal assistance under these circumstances. See Model Code of Professional Responsibility EC 1-1 (1984) ("A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.").

33. The defendant's constitutional rights to counsel do not depend on whether the attorney is appointed or retained. In other words, the state is required to provide the indigent access to appointed counsel in the same instances in which the solvent driver charged with DWI is allowed to contact a privately retained attorney. State v. Fitzsimmons, 93 Wash. 2d 436, 610 P.2d 893 (1980) (en banc). See also Gideon v. Wainwright, 372 U.S. 335 (1963).

Also, this requirement will not place an "additional burden on the arresting and charging officer, who must simply provide any defendant with access to a telephone and the number of a public defender organization or numbers of individuals willing to act as counsel in this type of case." *Fitzsimmons*, 93 Wash. 2d at __, 610 P.2d at 899 (footnote omitted).

34. 93 Wash. 2d 436, 610 P.2d 893 (1980) (en banc), vacated, 449 U.S. 977 (1980). The case was remanded to the Washington Supreme Court to consider whether its decision was based upon federal or state constitutional grounds, or both. On remand, the Washington Supreme court held that although the constitutional analysis in the *Fitzsimmons* opinion is "persuasive" in character, the state constitutional grounds is an adequate and independent ground for the court's decision. State v. Fitzsimmons, 94 Wash. 2d 858, __, 620 P.2d 999, 1000 (1980) (affirmed the opinion found at 93 Wash.2d 436, 610 P.2d 893 with no alterations or amendments).

35. See supra note 8.

36. *Fitzsimmons*, 93 Wash. 2d at __, 610 P.2d at 896.

37. Id.
nal proceedings were "initiated" when the officer cited the defendant for DWI. The court further held that the period immediately after the arrest and charge was a "critical stage" at which time the right to counsel attached "because of the unique character of the evidence to be obtained and the trial strategy decisions which [had] to be made then, if at all."38 The court went on to discuss United States v. Ash,39 where the United States Supreme Court held that the right to counsel extended only to events during which "the accused required aid in coping with legal problems or assistance in meeting his adversary."40 The Fitzsimmons court held that the time immediately following the arrest and the charging with DWI is certainly the requisite critical event. At that point "[t]he defendant is still in custody and must immediately make the decision whether to submit to a breathalyzer, arrange for further testing and observation of his mental state, or forever lose any defense."41 When the accused is confronted by the adversary, meaningful assistance in the accused's defense is insured only by acknowledging the right to counsel.

In Gerstein v. Pugh,42 the Court discussed the types of pretrial proceedings that constitute critical stages. "The Court has identified as 'critical stages' those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel."43 One who has been accused of DWI and asked to submit to a chemical sobriety test has certain rights. These rights are not cumulative; that is, the exercise of one right may also operate as a relinquishment of another. Thus, this point in time is a "critical stage" in the proceedings because, if left unguided by counsel, the accused may irretrievably lose important rights.44 The possible consequences of a driver's decision whether to submit to a chemical

38. Id. at __, 610 P.2d at 898.
40. Id. at 313.
41. Fitzsimmons, 93 Wash. 2d at __, 610 P.2d at 898-99.
42. 420 U.S. 103 (1975) (a probable cause determination is nonadversarial and is therefore not a "critical stage" warranting a right to counsel).
43. Id. at 122 (citations omitted).
44. For an explanation of the need for the "guiding hand of counsel" at every step of the proceedings, see Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment is a critical stage because defense of insanity must be pleaded or opportunity may be lost).
test clearly affects the merits of the defense, thereby making the decision a critical stage according to the Court’s reasoning in *Gerstein*.

The critical stage concept was limited by the United States Supreme Court in *Kirby v. Illinois*. The Court, in a plurality opinion, held that the right to counsel does not attach until the accused has been “formally” charged. This holding presents a problem for the driver because the decision to commence criminal rather than administrative proceedings is usually not made until after a breathalyzer test is refused or taken and the result known. Hence, many courts, in reliance on *Kirby*, have held that the right to counsel does not materialize when the driver is arrested, but rather when the driver is indicted or some other formal charge has been brought.

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45. Any evidence, notwithstanding how early it is gathered in the investigation or prosecution, “may affect the ultimate adjudication and could therefore logically be regarded as a critical stage. A breathalyzer request and submission is such a process.” *State v. Newton*, 291 Or. 788, __, 636 P.2d 393, 403 (1981) (en banc).


47. Justice Stewart stated that the right arose with “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment . . . . It is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.” *Id.* at 689-90 (footnote omitted).


Only after the driver makes his decision regarding the test does the proceeding divide clearly into its civil and criminal aspects—civil, if testing is refused; criminal, if testing is consented to; or both, if testing is refused, but the prosecutor nonetheless has sufficient evidence to obtain a conviction and elects to do so. *Id.* at 389.

Given these circumstances, there is no reason why evidence gathering for prosecution for DWI is any less subject to constitutional scrutiny than any other evidence gathering procedures such as searches, use of informers, or custodial interrogation. *Id.*

*Prideaux* held that an accused has a right to counsel based upon Minnesota’s general statutory right to counsel. It is important to note that the Minnesota Supreme Court, in light of a 1984 amendment, has recently ruled that a driver arrested for DWI no longer has a limited statutory right to consult with counsel before deciding whether to submit to chemical testing. *Nyflot v. Commissioner of Pub. Safety*, 369 N.W.2d 512, 515 (Minn. 1985) (1984 amendment to the implied consent advisory now allows the driver the right to consult with an attorney after submitting to testing. *Act of May 2, 1984*, ch. 622, § 10, 1984 Minn. Laws 1541, 1546-47).

However, the plurality opinion in *Kirby* dealt solely with pretrial identification procedures and some courts have limited it to those situations.50 "Even if given a broader interpretation, *Kirby* still adheres to the established position that it is necessary in all cases to scrutinize any pretrial confrontation to ensure the fairness of the procedures in light of an accused’s rights to due process of law."51

The Court in *Kirby* held that the sixth amendment right to counsel arises at the "initiation of adversary judicial criminal proceedings."52 It is at this point that the accused is confronted with the prosecutorial forces of society.53 Arguably, the criteria of *Kirby* are met when the police officer prepares a complaint charging the arrestee with the specific crime of DWI. Thus, adversary judicial criminal proceedings have been commenced against the defendant. Clearly, the accused is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law"54 when asked to consent to a chemical sobriety test and when subsequently required to answer a charge in a judicial court.55 Although the sixth amendment right to counsel before submitting to a chemical sobriety test may appear very compelling, recent Supreme Court decisions unfortunately tend to weaken its forcefulness.56

50. A few courts have held that the sixth amendment right to counsel covers the stage at which the accused must decide whether to submit to the chemical test. See, e.g., *Heles v. South Dakota*, 530 F. Supp. 646 (D.S.D. 1982), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982) (failure to allow the accused an opportunity to contact an attorney prior to testing would be inconsistent with the due process demands of the sixth and fourteenth amendments); *Forte v. State*, 686 S.W.2d 744 (Tex. Ct. App. 1985) (the stage prior to testing is a "critical stage" of the pretrial proceeding); *State v. Welch*, 135 Vt. 316, 320, 376 A.2d 351, 354 (1977); (superseded by statutory right to counsel, see *State v. Duff*, 136 Vt. 537, 394 A.2d 1145 (1978)); see Note, *supra* note 21, at 952 (the Supreme Court has not clarified its position since *Kirby*, thereby making its application to implied consent proceedings uncertain); see also *supra* notes 42-43 and accompanying text.


52. *Kirby*, 406 U.S. at 689.

53. *Id.*

54. *Id.*

55. *Fitzsimmons*, 93 Wash. 2d at __, 610 P.2d at 898.

56. The *Kirby* test has been applied in other circumstances and has been reaffirmed by the Supreme Court in a number of later cases. See United States v. Gouveia, 467
The constitutional right to counsel is violated when the defendant is prohibited from contacting an attorney. Even so, not every violation of a constitutional right is "prejudicial." Some constitutional errors are deemed harmless when the court can show that it was harmless beyond a reasonable doubt.

The essence of the "critical stage" test from *Wade* was "[w]hether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." Applying this test to the accused's situation leads one to conclude that the point in time when an accused is requested to submit to a chemical sobriety test is clearly a "critical stage" in the prosecution of a


The United States Supreme Court recently dismissed an appeal on whether a defendant has a right to counsel before deciding whether to consent to a chemical test. The appeal was dismissed for lack of a substantial federal question. However, Justices White and Stevens dissented stating that in light of the varying results among the courts which have considered this issue, they would note probable jurisdiction to settle this issue. *Nyflot v. Minnesota Comm'r of Pub. Safety*, 106 S. Ct. 586 (1985) (White, J., Stevens, J., dissenting).

57. *Gilbert v. California*, 388 U.S. 263 (1967). In *Gilbert*, the Court held that the taking of handwriting exemplars was not a "critical stage" of the criminal proceedings since there is minimal risk that the absence of counsel might derogate from defendant's right to a fair trial.

A similar argument could be made that since a blood alcohol test is a scientifically exact procedure, allowing little or no subjectivity, there is no need for an attorney to be present at the administration of the test because any variation from established procedures can be used to invalidate the test results when they are offered into evidence at trial. Thus, the absence of counsel at the administration of a chemical sobriety test does not pose a serious threat of prejudice to the substantial rights of the defendant.

However, the question of whether the accused has a right to the presence of an attorney at the administration of the chemical sobriety test is a far different one than whether the accused has a right to consult with an attorney before deciding whether to submit to the test.


In deciding what constitutes harmless error, the *Chapman* Court said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23 (citation omitted). Some lawyers have argued that there is a reasonable possibility of harm resulting from the temporary exclusion of defendant's counsel on the night of the arrest. An accused's condition will not last. If one accused of driving while intoxicated is to have witnesses for a defense, the accused must have access to counsel, friends, or some other persons within a relatively short time after the arrest. *State v. Hill*, 277 N.C. 547, __, 178 S.E.2d 462, 466 (1971).

DWI charge. The decision which is made will be crucial to the accused's future handling of the charge. At that point, rights may be gained or lost. Once lost, rights cannot be salvaged and even those rights gained\(^6^0\) can also be lost by failing to timely assert them. Thus, if counsel is not available to the accused at that point, potential defenses may become irretrievable, even to the most skillful of counsel. Also, denying the accused an opportunity to consult with an attorney prevents the accused from obtaining evidence, such as an independent blood alcohol test, which might help to prove innocence\(^6^1\) and which opportunity would have disappeared within the four hours\(^6^2\) the accused was held incommunicado. This possibility clearly demonstrates prejudice.\(^6^3\) The Supreme Court noted the importance of counsel in combatting prejudice when it held in *Powell v. Alabama*\(^6^4\) that a person charged with a crime "requires the guiding hand of counsel at every step in the proceedings against him."

Although it is constitutionally permissible for the state to force the accused to undergo chemical sobriety tests,\(^6^6\) the issue is not addressed in this comment because none of the

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60. An example would be the right to an independent blood alcohol test.

61. It may become necessary for the defendant:

   to present evidence showing that he was not under the influence of intoxicating liquor at the time of his arrest. A most effective way to present such evidence would be through disinterested witnesses who could observe his condition soon after his arrest or after he had been booked for the crime, and by a blood test administered by a doctor. The evidence of intoxication dissipates with the passage of time. The 4-hour rule imposed by the police regulation recognizes that after 4 hours a person under the influence of intoxicating liquor will have reached a state of sobriety . . . .


62. Id.

63. Id. at __, 409 P.2d at 872.

64. 287 U.S. 45 (1932).

65. Id. at 69. This has been interpreted many times as including such stages of criminal prosecution as the "lineup" and other preliminary steps leading to further conduct against the defendant. Narten v. Curry, 33 Ohio Misc. 94, 291 N.E.2d 799 (1972). "As reprehensible as operating a motor vehicle under the influence may be, surely a person accused of such an offense is entitled to the right of counsel equally with a murderer, rapist, armed robber or other perpetrator of criminal act." Id. at __, 291 N.E.2d at 800.

states have provided for mandatory testing. Instead, the states have enacted implied consent statutes to attain their goals. The purpose of the mandatory revocation provision in an implied consent statute is "[t]o encourage the suspected drunk driver to take a blood alcohol test voluntarily." It is arguable that the states have acknowledged the critical nature of the chemical sobriety testing in that they leave the defendant a choice of submitting to testing or suffering the loss of driving privileges. The choice may be rendered meaningless, though, without the guidance of counsel at this critical stage.

The question of whether or not to take the test may, depending upon the facts and circumstances of each case, have [a] very real bearing upon whether a person is or is not convicted of DWI, does or does not lose his license and suffers the penalty of a heavy fine or jail sentence. Only an attorney, with the full knowledge of the facts gained from his client, can weigh the factors of each case and make a proper decision.

III. ADMINISTRATIVE PROCEEDINGS

The second type of drunk driving case involves a civil proceeding which usually results in a noncriminal penalty, such as the revocation of a driver's license, because the driver "refused" to take a chemical sobriety test. This section will discuss what constitutes a "refusal" to take the test. An analysis of the significance of a "civil proceeding" in light of an arrestee who is denied an opportunity to contact an attorney and consequently does not take the test will follow.

67. Despite the decision in Schmerber, implied consent statutes have not been repealed because to do so might threaten the receipt of highway refunds under the Highway Safety Act. State v. Newton, 291 Or. 788, 636 P.2d 393 (1981).

Also, states have elected to give drivers the option of refusing the test in order to avoid the potential for police abuse that might accompany physical compulsion. See Note, supra note 21, at 941-44; see also Lerblance, supra note 4, at 47 n.22. See generally Hunvald and Zimring, Whatever Happened to Implied Consent? A Sounding, 33 Mo. L. Rev. 323 (1968).

68. See supra note 5 and accompanying text.


A. The "Refusal"

Some courts have held that the arrestee's request to speak to an attorney, in response to the officer's request that the arrestee submit to a breathalyzer test, constitutes a refusal under the implied consent statute.71 Other courts have found a refusal to take the test occurs when an arrestee is told, pursuant to Miranda,72 of the right to counsel and then refuses to take the test until given an opportunity to call counsel. However, many courts have held that due to the inherent confusion73 of the arrestee, the refusal to take the test is reasonable and license revocation is improper.74

It seems somewhat ludicrous to hold that a request for counsel constitutes a refusal75 since the sole reason for such a request is to ascertain what the accused's rights are and

71. See Annot., 18 A.L.R.4TH 705, 728-34 (1982) and supplementary cases.
72. Miranda v. Arizona, 384 U.S. 436 (1966). See also Annot., 10 A.L.R.3D 974 (1966) and supplementary cases. The following is an example of part of a Miranda-type warning:
You have the right to consult with or obtain an attorney and have him present with you during the questioning or any part of my investigation. Do you understand that? Do you willingly waive your right to remain silent and your right to have an attorney present with you, or the right to consult with an attorney at this time?
73. In determining whether an arrestee's refusal is the result of confusion, the crucial factor is not the arrestee's state of mind; it is the fair meaning to be given to the response to the demand to submit to the chemical test. See Maxsted v. Department of Motor Vehicles, 14 Cal. App. 3d 982, 986, 92 Cal. Rptr. 579, 581-82 (1971). See supra note 30 for an explanation of how an arrestee might become confused.
Other courts have rejected the contention that the accused was misled by the police regarding the right to counsel and have upheld the suspension or revocation of the driver's license. See McGuire v. Sillas, 82 Cal. App. 3d 799, 147 Cal. Rptr. 354 (1978); Goodman v. Orr, 19 Cal. App. 3d 845, 97 Cal. Rptr. 226 (1971); Augustino v. Colorado Dep't of Revenue, Motor Vehicle Div., 193 Colo. 273, 565 P.2d 933 (1977).
75. At least one court has held that a request to speak to counsel constitutes a refusal because to hold otherwise would weaken the implied consent law and make it practically ineffective. Rusho v. Johns, 186 Neb. 131, 181 N.W.2d 448 (1970). However, the Ohio Court of Appeals in Siegwald v. Curry, 40 Ohio App. 2d 313, —, 319 N.E.2d 381, 388 (1974) held that allowing a person to call an attorney and obtain advice would in no way emasculate the implied consent law. "On the contrary, there would probably be fewer refusals to take tests if the advice of an attorney were secured prior to refusal." Id.
whether the accused should take the test.\textsuperscript{76} Hence, the more logical rule is found in the holdings of the courts which have concluded that there has been no refusal to take a chemical test where the arrested person has merely requested to consult with counsel prior to submitting to a test.\textsuperscript{77}

The question of whether a driver "refused" a test within the meaning of the statute is a question of fact.\textsuperscript{78} Obviously, there is need for the general rule requiring immediate submission and regarding any \textit{substantial} delay as a refusal,\textsuperscript{79} but the rule must be applied with respect for an arrested person's freedom to communicate.\textsuperscript{80} In fact, an unjustified refusal to provide a reasonable opportunity to communicate with an attorney would be a deprivation of the person's liberty.\textsuperscript{81}

\textbf{B. The "Civil" Proceeding}

Since this is a civil proceeding revoking a governmentally granted privilege of the right to drive, the constitutional right to counsel, generally provided in the landmark criminal cases, has not been extended to include this situation.\textsuperscript{82} Therefore, many state courts have denied a right to counsel before taking

\begin{itemize}
\item \textsuperscript{76} Raine v. Curry, 45 Ohio App. 2d 155, 341 N.E.2d 606 (1975).
\item \textsuperscript{78} Walker v. Department of Motor Vehicles, 274 Cal. App. 2d 793, 79 Cal. Rptr. 433 (1969).
\item \textsuperscript{79} The person shall have a reasonable period of time after the request to decide whether to take the test. What is a reasonable period of time will depend on all the facts and circumstances of each case. As the court in Atwell v. State indicated:
\begin{quote}
The police officers are not expected to neglect their other duties and responsibilities and wait indefinitely for the arrested person to decide whether he will take the test or refuse to take the test. All that is required of the police officer is to request that the arrested person take the test and such person has a reasonable period of time in which to make a decision whether to take or refuse to take the test.
\end{quote}
\textsuperscript{35} Ohio App. 2d 221, 230, 301 N.E.2d 709, 715 (1973).
\item \textsuperscript{79} Most states require that a chemical sobriety test must be given within two hours of the driver's apprehension. \textit{See, e.g.}, \textsc{Ohio Rev. Code Ann.} § 4511.19 (Page 1982).
\item \textsuperscript{80} Moore v. State, Motor Vehicle Div. of Dep't of Transp., 293 Or. 715, 652 P.2d 794 (1982).
\item \textsuperscript{81} State v. Newton, 291 Or. 788, __, 636 P.2d 393, 406 (1981) (en banc).
\item \textsuperscript{82} \textit{See, e.g.}, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).
\end{itemize}
a chemical sobriety test. The reasoning behind these holdings has been that the revocation of a license is a civil proceeding and, as a corollary, the taking of a chemical test is not a "critical stage" in a criminal prosecution.

Although driver's license revocation proceedings have been labeled "civil" in nature, the label should not be the decisive factor in determining whether the accused has a right to counsel, especially in light of the important constitutional rights which are involved. Many states impose a severe penalty for a refusal to permit testing, which may impose a greater burden on the driver than conviction of the crime of driving under the influence. For example, the revocation of


84. To say that the person does not have a right to contact an attorney prior to deciding whether to take the sobriety test, because the license revocation proceeding, initiated once the test is refused, is civil in nature totally ignores the fact that the person is in custody pursuant to an arrest on a criminal charge. The proceedings are all criminal in nature until testing is actually refused.


85. Revocation proceedings have been labeled civil because they are conducted by the commissioner of public safety in administrative proceedings and are reviewed in the courts as such. See Prideaux v. State Dep't of Pub. Safety, 310 Minn. 405, 247 N.W.2d 385 (1976).

86. Minnesota has a one-year revocation of a driver's license. MINN. STAT. ANN. § 169.123(4) (West Supp. 1985). Such a revocation may have a devastating impact on the driver. See infra notes 88-89 and accompanying text.

87. For example, Minnesota's drunk driving statute provides in part:

Every person convicted of a violation of this section . . . is punishable by imprisonment of not more than 90 days, or by a fine of not more than $500, or both, and his driver's license shall be revoked for not less than 30 days, except . . . when the violation is found to be the proximate cause of great bodily harm . . . shall be punished by imprisonment for not more than 90 days, or by fine of
a driver's license for six months to a year may have an impact on the ordinary driver as devastating as the traditional criminal sanctions of a fine and imprisonment. A driver's license is no longer considered a luxury or mere privilege to most citizens, but a prerequisite to earning a livelihood. As the United States Supreme Court stated in *Bell v. Burson*:\(^88\)

> Once [driver's] licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.\(^89\)

Although the civil proceedings involving the suspension of driving rights for a failure to take a chemical test are separate and distinct from criminal proceedings\(^90\) involving prosecution for driving while under the influence of alcohol, it may be difficult for the accused to distinguish between the two proceedings until the accused refuses to take a chemical test and is immersed in civil proceedings.\(^91\) Once there has been a submission or refusal to take the test, the benefit of an attorney becomes less meaningful since it is the decision of whether to take or refuse the test that becomes the "critical stage." Since the chemical test itself has apparent and serious consequences, both civilly and criminally, the accused needs the advice and guidance of counsel before taking the test. The decision to refuse or submit to a chemical test will dictate whether the accused is immersed in civil or criminal proceedings. The accused may not understand the consequences of this decision without guidance from an attorney at the "critical stage."

The accused has critical interests at stake when confronted with this civil/criminal dilemma. The accused could submit to the chemical sobriety test and possibly later discover that participation was detrimental. Alternatively, the accused

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not more than $500, or both, and his driver's license shall be revoked for not less than 90 days.

**Minn. Stat.** § 169.121 subd. 3 (West Supp. 1985).


90. *See supra* note 13 and accompanying text.

could refuse to take the test and suffer the loss of driving privileges. Although a number of courts have held that there is no right to counsel in civil proceedings, that implication must be modified. As the court in *Siegwald v. Curry*\(^92\) indicated:

There is an inherent right to counsel as to all matters, be it civil or criminal. In criminal matters, however, both the Ohio and the United States Constitutions expressly provide that a person shall not be denied this right to counsel. In criminal matters, it must frequently and affirmatively appear that the right to counsel has been afforded to a defendant, and, if it does not so appear, a denial of counsel is presumed. In civil matters, however, there is no error with respect to a denial of counsel, unless it appears that the party expressly requested the right to confer with counsel and was unjustifiably denied the exercise of that right. The right is not absolute, but may be controlled as to time and circumstances. However, there exists a right to counsel in civil matters.\(^93\)

**IV. RIGHT TO COUNSEL IN BOTH CIVIL AND CRIMINAL PROCEEDINGS AND ITS LIMITATIONS**

Some courts have argued that the decision to consent to the test is one not requiring legal expertise but simply a “yes” or “no” answer.\(^94\) The choice, however, may be meaningful to an individual driver. For example, the driver who is requested to submit to chemical testing might not know that a reasonable refusal of the test is permitted in certain circumstances where the officer did not have reasonable grounds for arrest or for requesting the test, did not properly disclose the driver’s rights, or confused the driver as to those rights.\(^95\) Furthermore, depending upon the individual driver’s circumstances, the decreased possibility of a criminal conviction\(^96\) may be

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\(^92\) 40 Ohio App. 2d 313, 319 N.E.2d 381 (1974). The good-faith request of a person arrested for DWI to pursue the statutory right to call an attorney before submitting to a chemical test does not constitute a refusal to take the test. *Id.* at —, 319 N.E.2d at 384.

\(^93\) *Id.* at —, 319 N.E.2d at 383-84. The court went on to say that “[a]nother distinction is that in criminal matters a denial of counsel is usually *per se* prejudicial. In civil matters, however, a denial of the right to counsel must be shown to have been prejudicial.” *Id.*


\(^95\) *State, Dep’t of Highways v. Beckey*, 291 Minn. 483, 192 N.W.2d 441 (1971).

\(^96\) The penalty for drunk driving under *WtS. Stat.* § 346.65 (1983-84) is as follows:
worth the six months' loss of the driver's license if the driver does not depend on a driver's license for a livelihood. If the driver was involved in an accident resulting in death, the driver might face serious criminal proceedings in which the test results could be used as inculpatory evidence. The above instances may be uncommon, but are certainly not impossible. When such a situation does arise, a crucial and binding decision must be made regarding chemical testing which will affect the driver in subsequent proceedings. This decision is just as binding and critical as a decision regarding whether to make a verbal statement, a decision which is zealously protected by current case law.\textsuperscript{97}

Even if retained counsel advises the driver to submit to a test, the valuable right to counsel is not wasted. An intoxicated driver may be confused, dazed, or suspicious of the arresting officer, not only because of possible intoxication, but perhaps because of injury as well as other reasons. The right to counsel is eminently fair where such access does not delay or impair the chemical testing.\textsuperscript{98} Thus, it is apparent that the exercise of this important right will not render implied consent statutes ineffective\textsuperscript{99} where the resulting delay does not exceed a reasonable time and will not affect the other important consideration here—an accurate test.\textsuperscript{100}


\textsuperscript{98} People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 415, 418 (1968). Defendant possessed a number of statutory options at the station house in which the advice of counsel, if available, was relevant. The court limited the right to counsel in the following manner: "If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel." \textit{Id.} at 229, 239 N.E.2d at 353, 292 N.Y.2.S.2d at 419.

\textsuperscript{99} \textit{See supra} note 75.

It has been feared that persons accused of DWI will abuse their right to counsel in an effort to delay the administration of the chemical sobriety test until their blood alcohol level has significantly decreased through normal physiological processes.\textsuperscript{101} “Whether or not the request to consult the attorney is made in good faith and whether the exercise of the right will unreasonably delay administering the test are factual issues to be determined from the facts and circumstances of each case.”\textsuperscript{102} For the most part, granting a defendant’s request will not substantially interfere with the investigative procedure since the telephone call can be completed in a matter of minutes.\textsuperscript{103} A telephone call is all that is required since it is not necessary for the defendant’s attorney to be physically present\textsuperscript{104} at the time a chemical sobriety test is administered. However, it is necessary that the defendant is afforded a reasonable opportunity to consult with counsel prior to deciding whether to submit to or refuse a chemical sobriety test.\textsuperscript{105}

In light of current recognition of the importance of counsel in criminal proceedings affecting significant legal rights, law enforcement officials may not, without justification,\textsuperscript{106} prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand.\textsuperscript{107}

\textsuperscript{101} The human body assimilates alcohol in the blood at a fairly rapid rate. \textit{See} Gursey, 22 N.Y.2d at __, 239 N.E.2d at 353, 292 N.Y.S.2d at __.

\textsuperscript{102} \textit{Siegwald}, 40 Ohio App. 2d at __, 319 N.E.2d at 388.

\textsuperscript{103} \textit{See} Gursey, 22 N.Y.2d at 228-29, 239 N.E.2d at 353, 292 N.Y.S.2d at 419.

\textsuperscript{104} Often, telephone consultation will be sufficient to provide the defendant with adequate legal assistance to ensure the defendant’s basic rights to a fair trial. \textit{State v. Fitzsimmons}, 93 Wash. 2d at __, 610 P.2d 893, 900 (1980). \textit{See also supra} note 98.


\textsuperscript{106} The police may lawfully restrict the freedom of an arrested person to communicate to the degree reasonably required for the performance of their duties. For example, where the police are authorized to seize “highly evanescent evidence” . . . and delay caused by an attempt to call counsel would impair their ability to effectively do so, they may require that the arrested person's exercise of the freedom to call be deferred until after completion of the seizure. \textit{State v. Newton}, 291 Or. 788, __, 636 P.2d 393, 406 (1981) (footnote omitted).

\textsuperscript{107} Gursey, 22 N.Y.2d at __, 239 N.E.2d at 352, 292 N.Y.S.2d at 418.
In other words, the defendant may be required to either take the test or suffer the loss of driving privileges without the assistance of counsel, only if the lawyer is not physically present and cannot be reached promptly by telephone.\textsuperscript{108}

Finally, it has been argued that the defendant's right to counsel will hinder enforcement of the drunk driving statutes. For example, the state is already required to inform the defendant that the breathalyzer test need not be taken and of the consequences of refusal.\textsuperscript{109} Access to counsel will merely allow the defendant an opportunity to obtain advice before responding to the warning. It is contended that this is not only a waste of time,\textsuperscript{110} but places a needless burden on the state as well.

However, the nature of the defendant's right to counsel will not overburden the state. For example, the state must merely allow the defendant an opportunity to immediately contact counsel. The state is not required to ensure that the defendant is placed in face-to-face contact with counsel, nor is the state required to select an attorney for the defendant.\textsuperscript{111}

The United States Supreme Court has firmly established that the sixth amendment and fourteenth amendment right to counsel attaches only at or after the initiation of adversary

\textsuperscript{108} Id. at \textsuperscript{109} at 1307, 239 N.E.2d at 353, 292 N.Y.S.2d at 419.


\textsuperscript{110} See supra note 31.

\textsuperscript{111} Fitzsimmons, 92 Wash. 2d at \textsuperscript{117}, 610 P.2d at 899. Although a criminal defendant's right to counsel in most other circumstances will require the state to ensure that the defendant is advised by an attorney in person, that is not the case here, where "[t]he unique nature of the offense of driving while under the influence and the circumstances under which the defendant is likely to be arrested and charged both create the constitutional right and limit the type of effort the state must make to avoid violating that right." Id. at \textsuperscript{118}, 610 P.2d at 900. See also Wolff v. McDonnell, 418 U.S. 539 (1974) (extent of procedural protection constitutionally required varies with the nature of the individual's interest and the factual context in which the interest is asserted).
judicial proceedings against the accused. However, as this section has pointed out, an arrested person's access to legal advice on a critical choice, such as whether to submit to the sobriety test, is of vital importance, especially in this instance where there is no undue burden placed on the state and no possibility of impairing the test.

V. Other Grounds for the Right to Counsel

Some courts have been reluctant to rest their decision concerning the right to counsel on sixth amendment grounds. Instead, they have based their decision on the fourteenth amendment, fifth amendment, or the state's own statutory provisions governing the right and access to counsel.

A. Fourteenth Amendment—Due Process

The due process clause of the fourteenth amendment is an established source of a right to counsel independent of the sixth amendment where the right to counsel is critically important to the fairness of the proceedings. Consequently, some courts have examined the proceedings to see if they meet the due process requirement of fundamental fairness, especially where the early stages of the controversy are similar to criminal proceedings. The United States Supreme Court has held that "consideration of what procedures due process involves may require . . . a determination . . . of the government function involved as well as of the private interest that


113. See supra notes 110-11 and accompanying text.

114. See supra note 107 and accompanying text.


116. See infra notes 134-41 and accompanying text.

117. See infra notes 145-48 and accompanying text.

has been affected by governmental action." The personal interests of the arrestee were addressed by the court in State v. Newton when it held that denial of a defendant's request for an opportunity to phone an attorney is a violation of the privilege of access to counsel under the fourteenth amendment. The court's analysis in Newton specifically addressed the right of an arrestee to call an attorney before deciding whether to submit to a breathalyzer test under the Implied Consent Law. The plurality opinion stated:

Defendant's freedom to call a lawyer before deciding to submit to breathalyzer testing was not safeguarded in this situation by the Sixth or Fourth Amendments, but, under the Fourteenth Amendment, his freedom to do so could not be foreclosed or deferred unless the police were authorized to do so. Defendant's liberty to communicate as he chose was to be free from 'purposeless restraints', but subject to lawful restraints.

A second due process argument can be utilized in states which statutorily provide that the arrestee can have an additional chemical test performed by a physician of personal choice. These state courts recognize that the bodily processes will, within a short time, reduce the blood alcohol level to the point where an untimely blood test will be of little probative value of the accused's condition. Incommunicado

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120. 291 Or. 788, 636 P.2d 393 (1981) (en banc).
122. Although there are four opinions in Newton, all of them recognize the right of an arrestee to call an attorney, although their rationales differ.

The police may lawfully restrict the freedom of an arrested person to communicate to the degree reasonably necessary for the performance of their duties. An example of this is where the police are authorized to seize "highly evanescent evidence." See State v. Heintz, 286 Or. 239, 248, 594 P.2d 385, 390 (1979).

124. Kansas has a statute in this area which provides:

Without limiting or affecting the provisions of K.S.A. 8-1001 to 8-1003, the person tested shall have a reasonable opportunity to have an additional chemical test by a physician of his or her own choosing. In case the officer refuses to permit such additional chemical test to be taken, then the original test shall not be competent in evidence.

125. See supra note 101 and accompanying text.
detention under such circumstances violates due process because it amounts to a suppression of potentially exculpatory evidence.  

A third due process argument is based on the necessity of a driver's license. The continuous possession of a driver's license, as the Supreme Court has noted, may become essential to earning a livelihood; therefore, it is an entitlement which cannot be taken without the due process mandated by the fourteenth amendment.  

In the landmark case of Powell v. Alabama, the Supreme Court held that the due process clause of the fourteenth amendment requires that a person accused of a crime be provided with "the guidance of counsel at every step in the proceedings against him." Consequently, some courts have held that a person apprehended for drunk driving has a due process right to communicate with counsel before deciding whether to submit to a chemical test. Other courts have held to the contrary.  

Whichever of the above three approaches is adopted, it is clear that to unreasonably deny an arrestee's requested right of access to counsel offends a sense of justice which impairs

126. Brady v. Maryland, 373 U.S. 83 (1963). The following cases hold that while the state is not required to provide the accused with a blood test, it may not unreasonably prevent the accused from attempting to obtain one at his or her own expense: State v. Munsey, 152 Me. 148, 127 A.2d 79 (1956); People v. Burton, 13 Mich. App. 203, 163 N.W.2d 823 (1968); Scarborough v. State, 261 So. 2d 475 (Miss. 1972), cert. denied, 410 U.S. 946 (1973); State v. Snipes, 478 S.W.2d 299 (Mo. 1972), cert. denied, 409 U.S. 979 (1972); State v. Johnson, 87 N.J. Super. 195, 208 A.2d 444 (1965); Harlan v. State, 430 S.W.2d 213 (Tex. Crim. App. 1968); City of Tacoma v. Heater, 67 Wash. 2d 733, 409 P.2d 867 (1966).  

128. 287 U.S. 45 (1932).  
129. Id. at 69.  

130. See supra notes 120-21 and accompanying text.  
the fundamental fairness of the proceeding. Thus, there is a strong argument that the due process requirement of fundamental fairness requires that the defendant be allowed to phone an attorney. This fairness factor tips the scales of justice in favor of the individual when weighing the individual interest against the governmental interest referred to in the beginning of this section.

B. Fifth Amendment—Self-Incrimination

Some defendants have argued that evidence of a motorist's refusal to take a sobriety test is a violation of the privilege against self-incrimination and, therefore, is inadmissible. However, it has recently been decided that neither the introduction of the results of a chemical sobriety test, nor the refusal to submit thereto, violates the fifth amendment prohibition against compulsory self-incrimination. In Schmerber v. California, the Court said:

We hold that the privilege [against self-incrimination as contained in the fifth amendment of the Constitution] 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.

132. "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization. . . . [due process] [r]epresent[s] a profound attitude of fairness between man and man, and more particularly between the individual and government . . . .


133. See supra note 119 and accompanying text.

134. U.S. CONST. amend. V provides in part: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."


138. Id. at 761 (footnote omitted).
Hence, most jurisdictions have held that refusal evidence does not violate the fifth amendment and, therefore, is admissible.\textsuperscript{139} This conclusion is based on one of two different rationales: (1) that a refusal is nontestimonial and; (2) that a refusal is not compelled.\textsuperscript{140} A few states, however, have concluded that the evidence is inadmissible.\textsuperscript{141}

\textbf{C. Statutory Grounds—Right to Counsel}

Some courts have not based their decision on the right to counsel on constitutional grounds,\textsuperscript{142} but rather have based it on their own implied consent statute and their general statutory provisions governing the right to counsel.\textsuperscript{143} Therefore, some courts have held, in the cases involving a criminal penalty, that the defendant has a right to counsel based on state statutes which pertain to the right to counsel. In \textit{City of Dayton v. Nugent},\textsuperscript{144} the court, in part, relied upon the state statute\textsuperscript{145} providing for the right to counsel:

After the arrest, detention, or any other taking into custody of a person,\textsuperscript{146} with or without a warrant, such person shall

\begin{itemize}
\item \textsuperscript{139} See Annot., 26 A.L.R.4th 1112 (1983) and supplementary cases.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id. at 383 and supplementary cases.
\item \textsuperscript{142} Arguments for the right to counsel have been advanced on the basis of the sixth amendment, fifth amendment, and fourteenth amendment. See Annot., 18 A.L.R.4th 705 (1982).
\item \textsuperscript{145} Wis. Stat. § 946.75 (1984-85) also provides for a general right to counsel. However, the Wisconsin Supreme Court has held that “[t]he obligations of a driver under the implied consent law are entirely independent and unrelated to the general statutory right to counsel.” State v. Neitzel, 95 Wis. 2d 191, 200, 289 N.W.2d 828, 833 (1980).
\item Wisconsin’s implied consent law does not mention the right to counsel prior to chemical testing. Since the implied consent law is more recent and more specific than the general statutory right to counsel, it is controlling on the issue of the right to counsel prior to deciding whether to submit to chemical testing. Id.
\item \textsuperscript{144} 25 Ohio Misc. 31, 265 N.E.2d 826 (1970) (person arrested for drunken driving had a sixth amendment constitutional and statutory right to consult with an attorney prior to deciding whether to submit to the chemical test).
\item \textsuperscript{145} The language of this statute is typical of many state statutes which provide for the right to counsel. See, e.g., IOWA CODE ANN. § 804.20 (West 1979); N.C. GEN. STAT. § 15A-501 (1983).
\item \textsuperscript{146} No distinction is made in Ohio Revised Code Section 2935.20 between felonies and misdemeanors or between different types of crimes within each classification.
\end{itemize}
be permitted forthwith\textsuperscript{147} facilities to communicate with an attorney at law of his choice . . . or to communicate with any other person of his choice for the purpose of obtaining counsel. Such communication may be made by a reasonable number of telephone calls or in any other reasonable manner. Such person shall have a right to be visited immediately by any attorney at law so obtained . . . and to consult with him privately. No officer . . . shall prevent, attempt to prevent, or advise such person against the communication, visit, or consultation provided for by this section.\textsuperscript{148}

Thus, in states which statutorily provide for the right to counsel, the police department must afford an arrestee, arrested for any type of crime,\textsuperscript{149} the immediate\textsuperscript{150} opportunity to communicate with an attorney.

A number of courts have held that there is a statutory right to counsel before deciding whether to take or refuse a chemical test under implied consent procedures.\textsuperscript{151} Of course, there can be no doubt that, "[o]ne who is detained by police officers under a charge of driving under the influence of an intoxicant has the same constitutional and statutory rights as any other accused."\textsuperscript{152}

However, as Gursey\textsuperscript{153} pointed out, the right to counsel is not absolute. It must be balanced against the practical consideration that a chemical test is to be administered within two hours of the time of arrest or not at all.\textsuperscript{154} Assuming that the test is taken within two hours, and the evidence obtained is sufficient to convict the accused,\textsuperscript{155} the accused may still prevail if the right to counsel was improperly\textsuperscript{156} refused since the

\textsuperscript{147} "Forthwith," by definition, means "immediately." Black's Law Dictionary 588 (5th ed. 1979).


\textsuperscript{149} See supra note 146.

\textsuperscript{150} See supra note 147.


\textsuperscript{153} 22 N.Y.2d at 229, 239 N.E.2d at 353, 292 N.Y.S.2d at 419.


\textsuperscript{155} See supra note 22.

\textsuperscript{156} See supra note 107 and accompanying text.
remedy provided for by a statutory or constitutional right to counsel is to render the evidence obtained inadmissible.\textsuperscript{157}

VI. CONCLUSION

Society's view of drinking drivers is reflected in the laws enacted in an attempt to curtail their activities.\textsuperscript{158} Undoubtedly, the drinking driver is a valid concern in today's society.\textsuperscript{159} Yet, in attempting to inhibit the drinking driver, society and its laws should not neglect the rights and protections afforded those accused of crimes.

The implied consent statute gives a choice to the accused.\textsuperscript{161} The word "choice" implies an opportunity to choose: the power to choose between alternatives.\textsuperscript{162} However, some courts have rendered that choice meaningless by refusing to allow a right to counsel,\textsuperscript{163} thereby leaving the misinformed or uninformed driver no choice at all.

Once a driver is arrested for DWI and makes a decision on whether to submit to a chemical sobriety test, to a large extent the driver's guilt or innocence is determined. While society's need for prosecuting drunk drivers is important, its needs are not abridged, in any significant way, by permitting the ac-

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\item \textsuperscript{157} See, e.g., State v. Vietor, 261 N.W.2d 828, 832 (Iowa 1978). This rule has also been applied to evidence of a refusal to take the test. See generally Annot., 18 A.L.R.4TH 705 (1982) and supplementary cases.
\item \textsuperscript{158} The obvious and intended effect of the implied consent law is to coerce the driver into consenting to chemical testing thereby allowing scientific evidence of blood alcohol content to be used against the driver in a subsequent prosecution for DWI. State Dep't of Highways v. Schlief, 289 Minn. 461, 463, 185 N.W.2d 274, 275 (1971). See also supra note 6.
\item \textsuperscript{159} See generally Quade, supra note 1.
\item \textsuperscript{160} There can be no question that a driver's license is a valuable asset and an important privilege, but one which includes responsibility. This certainly includes the responsibility not to drive while impaired or intoxicated, and a penalty must be imposed if that is the case.
\item \textsuperscript{161} One court stated that the legislature saw fit to provide an agonizing choice for one accused of drunk driving. However, the legislation does allow an arrestee the opportunity to reasonably refuse to take the test. This deliberate legislative alternative takes on significance when one considers that the legislature could have constitutionally set forth the requirement that every person arrested for DWI take a sobriety test. See Hall v. Secretary of State, 60 Mich. App. 431, 231 N.W.2d 396 (1975).
\item \textsuperscript{162} The Random House Dictionary of the English Language, 260 (unabridged ed. 1969).
\item \textsuperscript{163} See supra note 83.
\end{itemize}
cused, within reasonable bounds,\textsuperscript{164} to have counsel present at this critical stage. In essence, there is no harm in allowing the accused a reasonable opportunity to consult with an attorney as to whether or not to submit to the test. The accused, of course, must act reasonably and cannot be allowed to abuse the right in a manner which would unduly delay or unreasonably interfere with the administration of the test.

This comment has examined numerous cases which have held in favor of the driver's right to counsel. Some cases involved the right to counsel when the accused was facing a criminal prosecution for DWI. Others held the right valid in license revocation proceedings before an administrative tribunal. Although constitutional grounds were a predominant reason for the holdings, some of the courts rejected the constitutional grounds and relied instead on state statutes or court rules. Despite these factual and legal differences, these cases support a single, unifying idea: that one accused of DWI has a right to consult with an attorney prior to deciding whether to submit to a chemical sobriety test. Having compared the opposing cases holding against a right to counsel, it is apparent that the cases in favor of the individual's right to counsel possess the more compelling logic and express the fairer rule.

\textbf{Laurie A. MLSNA}

\textsuperscript{164} See supra notes 101-05 and accompanying text.