

Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States

“The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.”¹

I. INTRODUCTION

Over the past few decades, society has begun to recognize and respond to the increasing number of fatalities caused by intoxicated drivers.² During this time, laws regulating drinking and driving have increased in both severity and quantity.³ Even with these new measures, intoxicated drivers still cause a disturbingly high number of deaths.⁴

Drunk driving is the nation’s most commonly perpetrated violent crime.⁵ Officials approximate that a drunk driver kills two people every hour.⁶ In 2003, police arrested one out of every 135 drivers for driving under the

1. *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (internal citations omitted) (discussing increasing number of deaths caused by drinking and driving).

2. ALAN A. CAVAIOLA & CHARLES WUTH, *ASSESSMENT AND TREATMENT OF THE DWI OFFENDER* 30-31 (2002) (outlining major reform to drinking and driving laws during 1980s). In the 1980s, society began to recognize that drinking and driving killed thousands of Americans every year. *Id.* In response, communities applied political pressure to restructure drinking and driving laws. *Id.* During that decade, states passed approximately 1200 new anti-drunk driving laws. *Id.* at 24.

3. *See id.* (stipulating political pressure forced lawmakers to toughen drinking and driving laws). Despite increasing the severity of punishment, a great number of drunk drivers still operate on United States roadways. *Id.* at 1-2.

4. *See* Mother’s Against Drunk Driving (MADD), *Total Traffic Fatalities vs. Alcohol Related Traffic Fatalities – 1982-2004*, <http://www.madd.org/stats/0,1056,1298,00.html> (last visited Nov. 27, 2006) (noting drunk driving caused approximately 40% of traffic deaths since mid-1990s). This statistic reflects an improvement from 1982, when drunk drivers accounted for approximately 60% of all traffic-related deaths. *Id.* However, the percentage remains extraordinarily high when compared to other countries, where drunk drivers play a small role in traffic-related deaths, varying from 3.3% in Portugal to 28% in the Sweden. WORLDWIDE BREWING ALLIANCE, *DRINKING AND DRIVING-REPORT 2005 27-28* (2005), *available at* <http://www.brewersofeurope.org/docs/publications/Worldwide%20Brewing%20Alliance%20Drinking%20and%20Driving%20Report%202005.pdf>.

5. MADD, *Drunk Driving in the United States*, <http://www.madd.org/stats/0,1056,3726,00.html> (last visited Nov. 27, 2006) (estimating three of every ten people in alcohol-related crash during lifetime). The media often portrays drunk drivers as reckless alcoholics, which misrepresents the gravity of the problem. *See* CAVAIOLA & WUTH, *supra* note 2, at 2.

6. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (NHTSA), *TRAFFIC SAFETY FACTS ON ALCOHOL 2004 DATA 1*, *available at* <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF2004/809905.pdf> (last visited Nov. 27, 2006) (averaging one alcohol related fatality every thirty-one minutes).

influence.⁷ In 2004, drunk drivers caused the deaths of thirty-nine percent of individuals involved in fatal motor vehicle accidents.⁸ These statistics suggest that the legislature has not fully achieved its goal of deterring drinking and driving.⁹ Society's interest in protecting communities against drunk drivers compels lawmakers to strengthen drinking and driving laws in order to aid prevention and prosecution across the country.¹⁰

Lawmakers must uphold constitutional guarantees despite their duty to protect citizens from the dire consequences of drinking and driving.¹¹ Many states' drinking and driving laws seemingly infringe upon the Fourth Amendment by permitting officers to use force to obtain a blood test without a warrant, and by declining to give a suspect a choice between the methods used in a chemical test.¹² In contrast, other states' statutes unduly protect the drunk driver with cushiony laws and ambiguity, allowing a drunk driver to escape conviction.¹³ This Note begins by reviewing the development of drinking and driving laws in several states.¹⁴ Next, it analyzes these states' statutes and

7. *Id.* at 2 (noting 1.4 million drivers arrested for drunk driving in 2003); *see also* CAVAIOLA & WUTH, *supra* note 2, at 2 (suggesting wide array of people drink and drive). A great deal of people drink and drive after social events like weddings, family reunions, sporting events, holidays, and work-related socials. CAVAIOLA & WUTH, *supra* note 2, at 2. These social situations inadvertently influence people to drink and drive. *Id.*

8. MADD, Total Traffic Fatalities vs. Alcohol Related Traffic Fatalities – 1982-2004, <http://www.madd.org/stats/0,1056,1298,00.html> (last visited Dec. 20, 2006) (offering comparison of total traffic fatalities and alcohol related fatalities from 1982 to 2005).

9. *See* E. John Wherry, Jr., *Vampire or Dinosaur: A Time to Revisit Schmerber v. California?*, 19 AM. J. TRIAL ADVOC. 503, 504-05 (1996) (highlighting number of people arrested each year for drinking and driving); CAVAIOLA & WUTH, *supra* note 2, at 2 (recognizing necessary modification of current drinking and driving intervention programs). Some states are focusing their modification strategies on high-risk problem drinkers or the chronic drinking and driving offender. CAVAIOLA & WUTH, *supra* note 2, at 2.

10. Adam Silberlight, *Preventing the Inevitable and Avoiding the Protected: The Potential Use of the Inevitable Discovery Theory in Relation to Non-Privileged Blood Samples For Use in Drinking and Driving Related Prosecutions*, 19 ST. JOHN'S J. LEGAL COMMENT. 507, 507-08 (2005) (explaining prevention and prosecution serve vital roles in community). Over the years, preventing drinking and driving has captured "judicial, prosecutorial, and legislative interest." *Id.* at 507.

11. *See* E. John Wherry, Jr., *The Rush to Convict DWI Offenders: The Unintended Unconstitutional Consequences*, 19 U. DAYTON L. REV. 429, 430 (1994) (explaining government's failure to observe own laws destructive). "Once the populace loses confidence in the fairness of adjudicating guilt, confidence is lost in the entire system of government." *Id.*

12. *See, e.g.,* U.S. CONST. amend. IV (requiring probable cause for searches and seizures); IDAHO CODE ANN. § 18-8002 (2004) (imposing penalties for refusal to submit to chemical testing); 75 PA. CONS. STAT. § 1547 (2006) (stressing individual subject to reprimand for refusing various chemical tests); S.D. CODIFIED LAWS § 32-23-10 (2002) (noting officer chooses chemical test and individual's refusal right limited); *see also* State v. Woolery, 775 P.2d 1210, 1215 (Idaho 1989) (distinguishing between right to refuse chemical tests and necessity to allow refusal). Although the statute gives an individual the right to refuse, the Idaho courts have determined the language "if you refuse" merely means that a person has the verbal ability, not a statutory right, to refuse. *Woolery*, 775 P.2d at 1213-15. This right to verbalize resistance does not entitle the individual to resist where an officer has probable cause to believe a person is driving under the influence. *Id.* at 1214.

13. *See* MASS. GEN. LAWS ch. 90, § 24(f)(1) (2004) (stipulating refusal amounts to minimum 180 day suspension of license); R.I. GEN. LAWS § 31-27-2.1 (2002) (stating actual consent required to test blood alcohol content).

14. *See infra* Part II (analyzing laws of several states and discussing various problems). Although this

highlights areas of concern.¹⁵ Finally, this Note proposes a constitutionally sound statute that will reduce litigation over constitutional issues while retaining harsh penalties to deter drunk drivers.¹⁶

II. DEVELOPMENT OF DRINKING AND DRIVING LAW IN THE UNITED STATES

A. Blood Alcohol Content and the Practicality of a *Per Se* Law

Drinking and driving has been problematic since the invention of the automobile.¹⁷ Early criminal laws punishing drinking and driving concentrated on the “grossly intoxicated driver.”¹⁸ This resulted in difficulty convicting an individual of drinking and driving because of the inherent problem with ascertaining a satisfactory definition of the “grossly intoxicated driver.”¹⁹

The Norwegian Legislature first instituted the modern *per se* approach for convicting drunk drivers.²⁰ Norway implemented harsh penalties in an attempt to deter individuals from drinking and driving.²¹ In addition, the country redefined the method of calculating intoxication by basing convictions on the percentage of alcohol found in an individual’s blood.²² When an individual drove with a blood alcohol content (BAC) beyond the level fixed by the state, the state presumed the individual intoxicated *per se*.²³ Early American laws

Note only refers to a limited number of states, the analysis is applicable to all comparable state statutes. *Id.*

15. See *infra* Part II (examining troublesome areas of state statutes and introducing methods of adjustment).

16. See *infra* Part III.C (suggesting new model law for states).

17. See CAVAIOLA & WUTH, *supra* note 2, at 1 (asserting drunk driving major problem beginning with popular use of automobile). Drinking and driving has posed a worldwide threat to safety for approximately one-hundred years. *Id.*

18. See CAVAIOLA & WUTH, *supra* note 2, at 3-4 (stating drinking and driving caused unacceptable societal behavior).

19. See CAVAIOLA & WUTH, *supra* note 2, at 4 (stressing unlikely conviction without actual damage). During the early development of laws relating to drinking and driving, convictions were rare unless the individual was involved in a crash; without such severity, defendants typically avoided trial and pursued settlement negotiations. *Id.*

20. See CAVAIOLA & WUTH, *supra* note 2, at 5 (focusing on certainty of accountability to serve as deterrent); see also BLACK’S LAW DICTIONARY 1178 (8th ed. 1999) (defining “*per se*” as a matter of law). The Norwegian legislature still uses this model for drinking and driving today. CAVAIOLA & WUTH, *supra* note 2, at 5.

21. CAVAIOLA & WUTH, *supra* note 2, at 5 (asserting Norway’s increased apprehension, conviction, and punishment for drinking and driving created deterrent effect). In addition, Norway and Sweden developed a series of punishments for different degrees of drinking and driving crimes: imprisonment for extreme cases, heavy fines for minor incidents, and immediate license revocation for all drinking and driving arrests. *Id.* at 5-6.

22. See CAVAIOLA & WUTH, *supra* note 2, at 5 (outlining Norway’s definition of intoxication based on blood alcohol levels). The Norwegian Legislature drafted the laws to include the assumption that drivers over a certain blood alcohol level were *per se* intoxicated. *Id.* The law convicted drivers based on their blood alcohol level alone, regardless of their actual performance. *Id.*

23. See John Hoffman, Note, *Implied Consent With a Twist: Adding Blood to New Jersey’s Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35

provided for a per se conviction if an individual's BAC exceeded 0.15%.²⁴ As of 2006, every state had lowered this limit to a uniform 0.08% due to pressure from the federal government.²⁵

Because the per se laws relied upon an invasive procedure—drawing blood or breath from an individual—extensive litigation questioning the constitutionality of the process developed.²⁶ Specifically, litigants argued that such an invasive process implicated the Fourth Amendment's prohibition on unreasonable searches and seizures.²⁷ Consequently, courts had to determine the "reasonableness" of obtaining blood or breath samples.²⁸

B. *Drinking and Driving Law as it Pertains to the Fourth Amendment*

The Fourth Amendment prohibits unreasonable searches and seizures.²⁹ Evidence seized in violation of the Fourth Amendment is not admissible in court.³⁰ Historically, the Fourth Amendment did not apply to states, meaning

RUTGERS L.J. 345, 348 (2003) (summarizing historic development of drinking and driving per se statutes). Simply by showing that one's BAC was at or beyond a prohibited limit, prosecutors could convict an individual without having to introduce extrinsic evidence of intoxication. *Id.* at 348.

24. See Hoffman, *supra* note 23, at 349 (observing change from early per se sliding scale to definite figure to determine intoxication). In the early stages of drinking and driving per se laws, if an officer stopped a driver who had an alcohol level under 0.05%, the state presumed the driver sober enough to drive. *Id.* at 349. If the driver had an alcohol level over 0.15%, the state considered the driver intoxicated. *Id.* If, however, the driver fell in between these levels of blood alcohol concentration, the driver could only be convicted with corroborative evidence. *Id.*

25. See 23 U.S.C. § 163 (2000) (codifying measure granting states highway funding for lowering intoxication limit to 0.08%); see also Jennifer Hartunian, Comment, *To Breathe, or Not to Breathe: Passive Alcohol Sensors and the Fourth Amendment*, 39 SAN DIEGO L. REV. 563, 570-71 (2002) (suggesting President Clinton's law setting national standard indicative of America's interest in diminishing drunk driving). If states failed to adopt the alcohol content level set by 23 U.S.C. § 163 by 2004, the states would potentially lose millions of dollars in federal highway funding. Hartunian, *supra*, at 570-71.

26. See CAVAIOLA & WUTH, *supra* note 2, at 6 (commenting on litigation stemming from United States' acceptance of Scandinavian model). The United States Legislature embraced the Scandinavian model of drinking and driving programs to make the United States system more effective. *Id.* They implemented it completely by 1966. *Id.* at 6-7. Many other countries embraced this model in the same time frame: Great Britain in 1967, New Zealand in 1967, Australia in 1968, Canada in 1967, the Netherlands in 1974, France in 1978, Denmark in 1976, and Finland in 1977. *Id.* at 6; see also *Schmerber v. California*, 384 U.S. 757, 768 (1966) (recognizing state's right to forcibly draw blood); *Breithaupt v. Abram*, 352 U.S. 432, 434 (1957) (reviewing defendant's right to refuse blood test).

27. See U.S. CONST. amend. IV (recognizing freedom from unlawful search and seizure).

28. See generally *Schmerber v. California*, 384 U.S. 757 (1966) (assessing reasonableness in obtaining blood against individual's consent); *Breithaupt v. Abram*, 352 U.S. 432 (1957) (finding valid blood test upon police officers' reasonable physical restraint of suspect); *State v. Woolery*, 775 P.2d 1210 (Idaho 1989) (suggesting Idaho gives no statutory right to suspected drunk driver for chemical test refusal); *State v. Lanier*, 452 N.W.2d 144 (S.D. 1990) (finding blood test valid even though suspect physically restrained by numerous police officers).

29. U.S. CONST. amend. IV (establishing citizen's right to be free from unreasonable searches and seizures). The Fourth Amendment provides "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ." *Id.*

30. See *id.* (implying evidence not seized in derogation of Fourth Amendment inadmissible); see also *Weeks v. United States*, 232 U.S. 383, 398 (1914) (confirming via Supreme Court decision exclusion as federal

that state courts permitted the “admission of evidence seized in derogation of the Fourth Amendment”³¹ The United States Supreme Court struggled with mandating an exclusionary rule for the states.³² A long list of case law delineates the Court’s difficulty in determining an individual’s rights with regard to the Fourth Amendment.³³

For example, in *Wolf v. Colorado*,³⁴ police stormed the defendant’s office without a warrant, confiscated documents and arrested him for performing illegal abortions.³⁵ The Court held “that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.”³⁶ This decision exemplified the Court’s reluctance to determine whether the Fourth Amendment “exclusionary rule” was applicable to the states.³⁷

Three years later, the Supreme Court undermined this decision by ruling that evidence obtained by methods that “shocked the conscience” was inadmissible in state courts.³⁸ In the landmark decision *Rochin v. California*, police officers broke into the defendant’s home and observed the defendant place something

remedy for unreasonably obtained evidence).

31. Wherry, *supra* note 9, at 509 (chronicling treatment of Fourth Amendment in past hundred years).

32. See *Weeks*, 232 U.S. at 391-92 (adopting “exclusionary rule” for federal criminal cases); Wherry, *supra* note 9, at 509 (discussing Court’s reluctance in mandating exclusionary rule for state and federal courts). In *Weeks*, several state police officers invaded the defendant’s home without a warrant and seized several papers and articles found inside. 232 U.S. at 386. The officers turned the seized items over to a United States federal marshal, who subsequently entered the defendant’s house with the officers and seized additional letters. *Id.* This evidence was used to convict the defendant in the federal district court for the western district of Missouri. *Id.* at 387. The United States Supreme Court granted certiorari and determined that the federal courts gained jurisdiction only after the police handed the evidence over to the federal marshal. *Id.* at 387-88. This decision established the federal exclusionary rule: if government officials seize evidence without a warrant, then the evidence cannot be used against the defendant in his or her trial. *Id.* at 398.

33. See generally *Schmerber v. California*, 384 U.S. 757 (1966) (admitting, in limited situations, evidence seized in violation of defendant’s Fourth Amendment rights); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying Fourth Amendment to states and prohibiting seizure of evidence contrary to its guarantees); *Breithaupt v. Abrams*, 352 U.S. 432 (1957) (finding authorities may constitutionally seize evidence from unconscious driver); *Rochin v. California*, 342 U.S. 165 (1952) (establishing “shocks the conscience” standard for Fourth Amendment violations); *Wolf v. Colorado*, 338 U.S. 25 (1949) (determining Fourth Amendment federal exclusionary rules inapplicable to states); *Weeks v. United States*, 232 U.S. 383 (1914) (concluding federal officers could not seize evidence from defendant without warrant).

34. 338 U.S. 25 (1949).

35. See *Wolf v. People*, 187 P.2d 926, 927 (Colo. 1947) (explaining circumstances surrounding defendant’s arrest). After evaluating the law enforcement’s conduct, the Colorado Supreme Court determined that the defendant’s Fourth Amendment rights were not violated. *Id.* at 928.

36. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (determining Fourth Amendment exclusionary rule not applicable to states). The United States Supreme Court consistently held that the Fourth and Fifth Amendments did not apply to the states, and for some time, failed to employ the “*Weeks* doctrine” in subsequent state criminal decisions. *Id.* The Court in *Wolf* noted that if Congress passed legislation weakening the *Weeks* doctrine, the outcome of this case would have been different. *Id.*

37. *Id.* (stressing Fourteenth Amendment does not extend Fourth Amendment protection to states).

38. *Rochin v. California*, 342 U.S. 165, 172 (1952) (excluding evidence obtained through unreasonable means). The Court set a restriction on “proceedings [that] . . . do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically.” *Id.*

into his mouth and swallow.³⁹ The officers handcuffed the defendant and drove him to the hospital, where upon the officer's request, the hospital staff pumped his stomach to retrieve the narcotic pills he ingested.⁴⁰ The Court held that this egregious behavior "shock[ed] the conscience" and was "bound to offend even hardened sensibilities."⁴¹ As a result, the Court ruled the search unconstitutional.⁴²

In *Breithaupt v. Abram*,⁴³ the United States Supreme Court applied this new standard to a drinking and driving case.⁴⁴ The Court determined that taking blood from an unconscious driver suspected of driving under the influence did not "shock the conscience."⁴⁵ In *Breithaupt*, the defendant drove his pickup truck on a highway in New Mexico into an oncoming car, killing three passengers in the other vehicle.⁴⁶ The police found a near-empty whiskey bottle in the defendant's glove compartment.⁴⁷ The police took the unconscious defendant to the emergency room for treatment.⁴⁸ At the hospital, an officer ordered medical personnel to draw a sample of the defendant's blood to test for alcohol.⁴⁹ Lab results showed the BAC to be 0.17%, and led to the defendant's conviction for involuntary manslaughter.⁵⁰ On appeal, the defendant contended that admission of the results of the involuntary blood test deprived him of his constitutional rights.⁵¹ The Court, applying the *Rochin* standard, determined that a skilled technician drawing the blood of an unconscious individual does not "shock the conscience" or offend any "sense

39. *Id.* at 166 (recounting series of events leading to arrest). The police entered the defendant's house through an open door, after obtaining a tip that narcotics were in the house. *Id.* The officers entered an upstairs bedroom, finding the defendant and his wife lounging on the bed. *Id.* The officers observed two capsules sitting on the night stand and asked the defendant, "[w]hose stuff is this?" *Id.* At that time, the defendant swallowed the capsules. *Id.*

40. *Id.* (summarizing measures taken once defendant arrived at hospital). A doctor forced a tube down the defendant's throat against his will, forcing him to vomit. *Id.*

41. *Id.* at 172 (establishing new measuring standard for Fourth Amendment). The Court analogized the new measure to the then-recent trend prohibiting the admission into evidence of confessions obtained by coercion. *Id.* at 172-73.

42. *Rochin*, 342 U.S. at 174 (opining unjustified seizures by federal officials violate the Constitution).

43. 352 U.S. 432 (1957).

44. *Breithaupt*, 352 U.S. at 435 (determining law enforcement's conduct reasonable under circumstances).

45. *Id.* (suggesting police conduct not rising to level of *Rochin* behavior). The Court reasoned that when a driver is unconscious, "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done . . . under the protective eye of a physician." *Id.*

46. *Id.* at 433 (describing collision and fatalities).

47. *Id.* (suggesting whiskey bottle originally contained a pint of alcohol).

48. *Breithaupt*, 352 U.S. at 433 (1957) (stating police took unconscious driver to hospital).

49. *Id.* (describing officer's request for blood draw). The physician withdrew twenty cubic centimeters of blood. *Id.* The hospital delivered the sample to a patrolman, who turned it over to a laboratory for analysis. *Id.*

50. *Id.* at 433 (allowing BAC into evidence at trial). An expert testified that the defendant's BAC level was 0.17%. *Id.*

51. *Id.* at 434 (stating defendant's Fourth and Fourteenth Amendment claims).

of justice” and allowed the BAC evidence to be presented at trial.⁵²

In the early 1960s, the Court re-examined past precedent and determined that the Fourth Amendment applied to states through the Due Process clause of the Fourteenth Amendment.⁵³ In *Mapp v. Ohio*, the defendant was wanted by police in connection with a recent bombing in addition to possessing gambling-sensitive material.⁵⁴ The police arrived at the defendant’s house and demanded entry without a search warrant.⁵⁵ Additional officers arrived at the scene and unlawfully raided the defendant’s home.⁵⁶ Although the Ohio court upheld the defendant’s conviction, determining that the “exclusionary rule” did not apply to the states, the United States Supreme Court reversed the decision and held that the entire Fourth Amendment applied to the states.⁵⁷

These earlier decisions established a Fourth Amendment trend that was solidified in the watershed case of *Schmerber v. California*.⁵⁸ In *Schmerber*, police arrested the defendant for drinking and driving while the defendant received treatment at a hospital for injuries suffered in an automobile accident.⁵⁹ One of the officers requested that a hospital technician draw a blood sample from the defendant for police purposes.⁶⁰ The defendant refused

52. *Breithaupt v. Abrams*, 352 U.S. 432, 437-38 (1957) (recognizing blood taken in different situation may lead to different conclusion). The Court found that the “individual’s right to immunity from such invasions of the body as is involved in a properly safeguarded blood test is far outweighed” by the deterrent effect of executing blood draws on drunk drivers. *Id.* at 439-40. It is worth noting that the Court circumvented the issue of applying the Fourth and Fifth Amendment to the facts of the case by reaffirming that the Fourteenth Amendment does not guarantee the Bill of Rights securities to the states. *Id.* at 434. The Court explicitly stated that petitioners wrongly relied on the “‘generative principles’ of the Bill of Rights” extending to protect citizens through the Due Process Clause of the Fourteenth Amendment. *Id.*

53. *See Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (deciding entire Fourth Amendment applicable to states, including exclusionary element); *see also Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (recognizing Fourth Amendment privileges extend to states but failing to impose “exclusionary rule” on states). In 1949, the Court held that the States must implement the right of privacy stemming from the Fourth Amendment into laws regulating government conduct. *Wolf*, 338 U.S. at 27-32. Although the Court determined this right was applicable to the states through the Fourteenth Amendment, the Court nevertheless chose *not* to classify the “exclusionary rule” as an “essential ingredient of the right.” *Id.* at 29.

54. 367 U.S. at 643 (introducing contents of materials leading to defendant’s arrest). The police heard that the defendant was hiding in her house. *Id.* at 644.

55. *Id.* (stressing police knocked first before demanding entry). The defendant phoned her attorney when the police were at her door. *Id.* Her attorney advised her only to let the officers enter her home if they possessed a search warrant. *Id.*

56. *Id.* (noting defendant’s attorney arrived at scene and officers denied him entry). When the officer presented the defendant with a warrant, she grabbed it and stuffed it in her bosom. *Id.* Another officer “retrieved” the alleged warrant from her bosom, while the defendant attempted to resist him. *Id.* As a result, the officers handcuffed the defendant for being “belligerent.” *Id.* At trial, however, the prosecution could not produce evidence of a valid warrant. *Id.* at 645.

57. *Id.* at 657-58 (rejecting Ohio courts’ stance and applying Fourth Amendment to states). The Court noted that the federal courts “have operated under the exclusionary rule . . . for almost half a century . . . [and] it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.” *Id.* at 659-60.

58. 384 U.S. 757, 759 (1966) (setting forth blood drawn from individual without consent constitutional).

59. *Id.* at 758 (contending defendant drank at bowling alley and crashed on way home).

60. *Id.* at 758-59 (describing facts of case).

to have his blood drawn; nevertheless, the technician extracted his blood, complying with police orders.⁶¹ Subsequently, Los Angeles prosecutors convicted the defendant of driving while intoxicated, and the defendant appealed.⁶² The defendant contended that the involuntary blood draw violated several of his constitutional rights, specifically the rights guaranteed by the Fourth, Fifth, and Sixth Amendments.⁶³

The United States Supreme Court determined that the seizure did not offend the defendant's constitutional rights.⁶⁴ The Court explained that the Fourth Amendment's function constrains seizures "not justified [under] the circumstances, or . . . made in an improper manner."⁶⁵ The Court remarked that search warrants are required for searches of property, and "absent an emergency, no less could be required where the intrusions into the human body are concerned."⁶⁶ If, however, law enforcement officials perceive an immediate danger of a concealed weapon or if the evidence is under the direct control of the accused, a warrantless seizure may be justified.⁶⁷ The Court recognized that the percentage of alcohol in a person's blood diminishes shortly after one starts drinking.⁶⁸ Based on this assumption, the Court reasoned that

61. *Id.* (revealing defendant's chemical test had high level of blood alcohol).

62. *Schmerber*, 384 U.S. at 759 (explaining defendant objected to evidence of the chemical test). On advice of counsel, the defendant refused the blood test. *Id.* The police nevertheless ordered the technician to draw the blood. *Id.*

63. *Id.* (asserting Fourth, Fifth, and Sixth Amendment violations). The defendant contended that his due process rights under the Fourteenth Amendment was violated, along with "specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment." *Id.* This Note only focuses on the alleged Fourth Amendment violation. *Infra*, Part II.

64. *Schmerber v. California*, 384 U.S. 757, 772 (1966) (holding no violation of defendant's Fourth Amendment rights). The Court also determined that the police did not violate the defendant's Fifth Amendment rights and rejected his Sixth Amendment claim as well. *Id.* at 765-66.

65. *Id.* at 768 (requiring reasonableness when demanding defendant give blood).

66. *Id.* at 770. (suggesting human body searches at least minimally equivalent to searches of individuals' property) Typically, searching a person and seizing evidence from him or her requires a warrant. *Id.* The requirement of a warrant is derived from the need of a neutral and unbiased magistrate to determine if a search and seizure is necessary under the circumstances. *Id.* The Court further stated that "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Id.*

67. *Id.* at 769 (suggesting evidence of lawful arrest does not end Court's inquiry). The Court furthered stated that these two circumstances generally have "little applicability with respect to searches involving intrusions beyond the body's surface . . . [because] [t]he interests in human dignity and privacy . . . forbid . . . intrusions on the mere chance that desired evidence might be obtained." *Id.* at 770-71.

68. *Schmerber*, 384 U.S. at 770-71 (explaining Court believed percentage of alcohol in blood diminished shortly after drinking stops). *But see* Wherry, *supra* note 9, at 515-16 (rejecting contention blood alcohol level diminishes shortly after consuming last drink). The Court used this assumption to determine that the officer was justified in drawing the blood of the defendant without a warrant. *Schmerber*, 384 U.S. at 770-71. However, recent technological and scientific advancements demonstrate officers have ample time to obtain a warrant before losing evidence. Wherry, *supra* at 514-15. Now, the "length of time for complete absorption of alcohol is generally thought to be from thirty to ninety minutes after the last beverage is consumed." *Id.* at 516. Once alcohol is fully absorbed, it tends to dissipate from the body at a rate of only 0.015%-0.018% per hour.

the officer had a reasonable belief that the evidence, the BAC, could be destroyed before a warrant could be obtained.⁶⁹ Therefore, the circumstances justified the warrantless drawing of blood.⁷⁰ The Court specifically mentioned that it reached its decision based on the facts of this case only, commenting that the decision in “no way indicates that it permits . . . intrusions under other conditions” than these stringently limited circumstances.⁷¹

Despite the careful wording of the test used by the United States Supreme Court, many state appellate courts cite *Schmerber v. California* when upholding the guilty verdict of a drunk driver based on blood seized without consent.⁷² Thus, the *Schmerber* decision has eased the process of convicting drinking and driving offenders.⁷³ Although *Schmerber* does not mandate Fourth Amendment infringements, it opened the door for some states, like Idaho, to exploit these measures to access a suspected drunk driver’s blood.⁷⁴

C. States’ Interpretations of *Schmerber* and the Fourth Amendment

States apply the *Schmerber* decision with variation.⁷⁵ Some states do not utilize the decision at all, denying officers access to a chemical analysis where a suspect consciously refuses to consent.⁷⁶ Other states exploit the decision and

Id. At this rate, it would take anywhere from three-and-a-half to six hours for blood alcohol tests to lose their efficacy. *Id.* at 519.

69. See *supra* note 68 and accompanying text (explaining why reasonable in 1960s for officer’s belief evidence would disappear, and contrasting with present time).

70. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (opining officer reasonably believed evidence would disappear unless he acted). The Court noted that they were not presented with a defendant that requested another form of testing like a breathalyzer. *Id.* at 771. The Court chose not to discuss whether requests of this type would have to be respected. *Id.*; see also *id.* at 778-79 (Douglas, J., dissenting) (suggesting Court used wrong analysis in decision). Justice Douglas stated that the “Fourth Amendment . . . guarantees the right of the people to be secure ‘in their persons,’” and that “[n]o clearer invasion of this right of privacy can be imagined than forcible bloodletting of the kind involved here.” *Id.* at 778-79.

71. *Id.* at 772 (establishing limited circumstances where warrantless blood draw does not violate Fourth Amendment).

72. See generally *State v. Woolery*, 775 P.2d 1210 (Idaho 1989) (deciding Idaho law does not create statutory right to refuse blood test); *State v. Lanier*, 452 N.W.2d 144 (S.D. 1990) (holding blood test valid even though numerous officers restrained unwilling defendant during procedure).

73. See generally Vitauts M. Gulbis, Annotation, *Admissibility in Criminal Case of Blood-Alcohol Test Where Blood Was Taken Despite Defendant’s Objection or Refusal to Submit to Test*, 14 A.L.R.4TH 690 (2006) (compiling various decisions holding warrantless extraction of blood constitutional after *Schmerber*). As a result of *Schmerber*, many states have enacted “implied consent” statutes which provide that by holding a license to drive in a given state, the applicant agrees to submit to a blood-alcohol test of the officer’s choice should the officer suspects drinking and driving. *Id.* The wording of the statutes varies. *Id.* Some states prohibit the officer from choosing the test, and other states permit the accused to refuse to submit to a test in exchange for revocation of the driver’s license for a set period of time. *Id.*

74. See *Woolery*, 775 P.2d at 1215 (suggesting poor practice to prevent state from obtaining evidence to determine defendant’s level of intoxication).

75. See generally *State v. Flannigan*, 978 P.2d 127 (Ariz. Ct. App. 1999) (treating warrantless blood draw as unconstitutional absent probable cause and exigency); *State v. Worthington*, 65 P.3d 211 (Idaho Ct. App. 2002) (presuming officers had reasonable grounds to forcibly draw blood from suspect without warrant).

76. See *Lunceford v. Northport*, 555 So. 2d 246, 248 (Ala. Crim. App. 1988) (explaining chemical test

draw blood against an individual's consent and without a warrant, acquiring evidence in violation of the Fourth Amendment's exclusionary rule.⁷⁷ The following section outlines these two extremes.

1. Search and Seizure in Idaho: An Exploitation of the Schmerber Decision

Idaho courts recognize that a blood alcohol test constitutes a seizure within the language of the Fourth Amendment.⁷⁸ Idaho courts also recognize that a warrantless search or seizure of the person is unreasonable unless it comes within "certain specific and well-delineated exceptions."⁷⁹ However, Idaho courts, like the *Schmerber* Court, analogize the metabolism of alcohol within the blood to the destruction of evidence, and thereby permit warrantless searches in drunk driving incidents.⁸⁰

Idaho, like the majority of states across the country, implemented an "implied consent" statute to address drinking and driving.⁸¹ Before 1984, Idaho's implied consent statute allowed an individual to refuse a chemical test but provided that such a refusal would result in an automatic suspension of an individual's license.⁸² In 1984, Idaho's legislature drafted a new implied consent statute that added the language "[i]f the motorist refuses to submit to or complete evidentiary testing . . ."⁸³ This new language suggested to motorists

admissible only if consensual); *Commonwealth v. Pratt*, No. ESCR2005-0089-011-002, 2005 WL 1459650, at *2 (Mass. Super. June 9, 2005) (recognizing driver, if conscious, must consent for legal blood draw in Massachusetts).

77. See generally *State v. Worthington*, 65 P.3d 211 (Idaho Ct. App. 2002) (asserting Idaho's right to obtain blood alcohol content without defendant's consent and without warrant); *State v. Lanier*, 452 N.W.2d 144 (S.D. 1990) (providing suppression not required even though several officers physically restrained defendant to acquire blood).

78. See *State v. Turner*, 494 P.2d 146, 149 n.9 (Idaho 1972) (acknowledging blood test invasion of person, but not unreasonable invasion).

79. *State v. Harwood*, 495 P.2d 160, 162 (Idaho 1972) (reinforcing Supreme Court's exceptions for weapons and fear of destruction of evidence). Idaho, like most states, also recognizes the following exceptions to the warrant requirement for searches after establishing probable cause: searches where an individual gives consent; searches of fleeing dangerous felony suspect; search of abandoned real estate or personal property; and searches of dwelling under urgent necessity (typically medical emergency or screaming from within). *Id.* at 163.

80. *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989) (stipulating only relevant question whether test conducted reasonably). The Idaho Supreme Court determined reasonableness using the *Schmerber* analysis. *Id.* at 1212-13. The Idaho courts ignored that in 1974, its Legislature expedited the process of securing a warrant by allowing a magistrate to issue a warrant via telephone. IDAHO CODE ANN. § 19-4406 (2004). Even though obtaining a warrant over the telephone would add, at most, an extra ninety minutes to the amount of time it takes to draw the defendant's blood, Idaho courts permit the police to seize an individual's blood against his consent and without a warrant. See Wherry, *supra* note 9, at 522 (mentioning various jurisdictions recognize ninety minutes as reasonable time to secure phone warrant).

81. IDAHO CODE ANN. § 18-8002 (2004) (presupposing consent by virtue of physically controlling vehicle); see also Hoffman, *supra* note 23, at 356 (defining "implied consent").

82. IDAHO CODE ANN. § 49-352 (1983) (repealed 1984) (indicating refusal mandated automatic suspension of license).

83. IDAHO CODE ANN. § 18-8002 (2004) (allowing defendant verbal right to refuse chemical test).

that they have a right to refuse.⁸⁴ However, notwithstanding this new language, in *State v. Woolery*,⁸⁵ the Idaho Supreme Court held that drivers did not have the right to refuse testing.⁸⁶ The court interpreted the statute to mean that the “Idaho Legislature . . . acknowledged a driver’s *physical ability to refuse* to submit to an evidentiary test, but did not create a *statutory right* for [refusal].”⁸⁷ The court reasoned that the Idaho Legislature would not give an individual a statutory right to preclude the state from acquiring important evidence when the officer has reasonable cause to assume that the individual committed a serious crime.⁸⁸ This decision interpreted the recently drafted “implied consent” statute to suggest that if the police suspect an individual of committing a serious crime, like vehicular manslaughter, then the state permits a blood draw without the defendant’s consent.⁸⁹

In 2002, the Idaho Supreme Court’s *State v. Worthington* decision increased the scope of the statute.⁹⁰ The police found the defendant parked on the side of the road and smelling of alcohol.⁹¹ The defendant refused to perform any sobriety or chemical tests.⁹² Two officers transported the defendant to the hospital without obtaining a warrant for testing.⁹³ The defendant became violent at the hospital and forced the police and medical staff to restrain him while drawing his blood without his consent and against his will.⁹⁴ The defendant’s BAC was more than three times the legal limit.⁹⁵

In its opinion, the court first examined whether the blood draw was reasonable, focusing on the lack of a warrant.⁹⁶ The court recited Idaho’s

84. *Id.* (acknowledging defendant may refuse chemical test).

85. 775 P.2d 1210 (Idaho 1989).

86. *Woolery*, 775 P.2d at 1216 (holding no meaningful refusal right for drivers).

87. *Id.* at 1214 (acknowledging new statute also abolishes right to attorney prior to submission to testing).

88. *Id.* at 1215 (maintaining if state complies with driver’s constitutional rights, state not prevented from obtaining relevant evidence). The court further reasoned that although the legislature provided for an administrative revocation of an individual’s license for refusing to consent to a blood alcohol test, it did not intend to thwart the police’s ability to investigate and obtain evidence of serious crimes. *Id.*

89. *Id.* at 1215-16 (adopting language from Montana Supreme Court). Idaho’s Supreme Court agreed with a Montana decision determining that the implied consent prohibition against blood draws without the defendant’s consent were inapplicable when prosecuting for negligent homicide. *Id.* (citing *State v. Thompson*, 674 P.2d 1094 (Mont. 1984)).

90. 65 P.3d 211, 214-16 (Idaho Ct. App. 2002) (subjecting individuals to warrantless seizures).

91. *Id.* at 212 (describing police receipt of reckless driving report matching description of Worthington’s vehicle).

92. *Id.* (explaining Worthington acted belligerently toward officers). Worthington informed the police officer “that if [the officer] was going to get blood out of him, that [the officer] was going to have to fight him.” *Id.* at 212-13.

93. *Id.* at 213 (noting police did not seek warrant).

94. *Worthington*, 65 P.3d at 213 (asserting three police officers and two nurses held Worthington on table so technician could draw his blood). The technician drew blood from Worthington’s ankle because she could not find any other suitable veins. *Id.*

95. *Id.* (illustrating Worthington’s intoxication level as felony DUI material). Worthington’s actual BAC was 0.26%. *Id.*

96. *State v. Worthington*, 65 P.3d 211, 213 (Idaho Ct. App. 2002) (examining preliminary legality of

exigent circumstances exception allowing for warrantless searches: a warrantless search is permitted “when there is a ‘compelling need for official action and no time to secure a warrant.’”⁹⁷ The court then explained that it was well-established that blood draws fall within this exigency.⁹⁸ The court added that, regardless of whether the blood draw was justified under the exigency exception or Idaho’s implied consent statute, the procedure must have also been conducted in a medically-accepted manner without unreasonable force.⁹⁹ The court determined that because of the defendant’s combative behavior, the police used reasonable force against him to draw the blood.¹⁰⁰ The factors required by the *Woolery* court to draw blood without the suspect’s consent enabled the *Worthington* court to hold that it was appropriate for the police to request hospital personnel perform a blood draw against the defendant’s will, regardless of the severity of the crime the defendant commits.¹⁰¹

Both of these cases demonstrate Idaho’s tenacity in prosecuting drunk drivers.¹⁰² In *Schmerber*, the United States Supreme Court held that a rigid guideline should not be followed in deciding whether or not a warrant is required before drawing an individual’s blood or determining whether or not to

Worthington’s blood draw via Fourth Amendment).

97. *Id.* (defining circumstances allowing warrantless search).

98. *Id.* (setting forth blood draws for alcohol concentration as example of exigency). The court also mentioned that, even if blood draws were not examples of exigent circumstances, Idaho’s implied consent statute deems consent to evidentiary testing for alcohol from anyone driving on Idaho roads if pulled over with reasonable cause to infer intoxication. *Id.*

99. *Id.* at 213-14 (asserting Fourth Amendment standards of reasonableness assessed in objective terms by examining totality of circumstances). Worthington argued that the amount of force used to restrain him was unreasonable. *Id.* at 214. Witnesses testified that Worthington kicked, cursed, and flailed about. *Id.* Due to his unreasonable behavior, the technician requested that the police restrain him so she could safely complete the blood draw. *Id.*

100. *Worthington*, 65 P.2d at 214 (finding officers’ actions warranted under existing circumstances). The court noted that the officers did not strike or physically abuse Worthington beyond what was necessary to restrain him. *Id.* It also mentioned that Worthington refused any less intrusive means of testing his blood alcohol content. *Id.* at 214-15.

101. *Id.* at 216 (noting technician’s reluctance to draw blood from defendant). The court discussed that the statute Worthington referenced infringed the technician’s constitutional rights, not his own. *Id.* This statute “permits hospital personnel to delay or terminate an ordered blood draw if, in their reasonable judgment, the procedure might result in serious bodily injury to *hospital personnel* or other patients.” *Id.* at 215-16 (emphasis added). Therefore, because Worthington is not “hospital personnel,” he did not have a cause of action under this statute. *Id.* at 216.

102. *See generally* State v. Worthington, 65 P.3d 211 (Idaho 2002) (affirming mandatory blood draw legal in certain circumstances); State v. Woolery, 775 P.2d 1210 (Idaho 1989) (determining mandatory blood draw legal in any circumstance if reasonable procedure used). In another decision, the Idaho Court of Appeals determined that a warrant is never required to draw a person’s blood because

[the] compelling interest in protecting citizens from the carnage caused by drunk drivers . . . combined with the exigency created by the evanescent nature of blood alcohol, justifies an exception to the warrant requirement in this case despite the state’s admission that a warrant “could” have been obtained through the exercise of due diligence.

State v. Cooper, 39 P.3d 637, 641 (Idaho Ct. App. 2001).

permit a forcible blood draw.¹⁰³ Nonetheless, Idaho courts continue to adhere to set guidelines and consistently allow forcible blood draws without a warrant.¹⁰⁴ Idaho courts disregard the *Schmerber* Court's deliberate statement that, "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."¹⁰⁵ By disregarding this mandate, Idaho's legislature and courts essentially ignore guaranteed rights of the Fourth Amendment.¹⁰⁶

2. *Search and Seizure in Massachusetts: The Fourth Amendment Serving as an Impenetrable Shield*

On one extreme, Idaho and states with similar laws infringe on constitutional guarantees. On the other extreme, some states, like Massachusetts, appear to expand constitutional protections to their citizens that drink and drive.¹⁰⁷ The benefits of deterring drinking and driving are immense and irrefutable.¹⁰⁸ Therefore, the lenient nature of driving-under-the-influence laws in Massachusetts, Rhode Island, and states with similar provisions are counterproductive.¹⁰⁹ In October 2005, Massachusetts ranked as the third most lenient state in the nation for its moderate drinking and driving laws.¹¹⁰

103. See *supra* note 71 and accompanying text (noting explicitly stated unreasonable seizures must be examined on a case by case basis).

104. See *supra* notes 76, 80, 94 and accompanying text (highlighting cases where court allowed forcible blood draws).

105. *Schmerber v. California*, 384 U.S. 757, 770 (1966) (examining when warrantless seizure of person's blood appropriate).

106. See *supra* Part II.B and accompanying text (addressing Fourth Amendment guarantees disappearing).

107. See *supra* Part II.C.2 (analyzing Massachusetts law on drinking and driving and demonstrating its leniency).

108. See Hartunian, *supra* note 25, at 571 (opining no denial of societal benefits of eradicating drunk driving).

109. See MASS. GEN. LAWS ch. 90, § 24 (2004) (setting forth Massachusetts's moderate drinking and driving law); R.I. GEN. LAWS § 31-27-2 (2002) (propounding Rhode Island's relaxed drinking and driving law); see also NHTSA, *supra* note 6, at 7-8 (illustrating traffic fatalities by state and highest BAC in crashes). The national average of traffic fatalities caused by alcohol is 39%. NHTSA, *supra* note 6, at 1. Massachusetts is the eleventh worst state with a 43% fatality rate. *Id.* at 7. Rhode Island is the worst state, with a 50% fatality rate. *Id.*

110. Lewis Evangelidis, *Now It Is Time for Tougher Curbs on Scourge of Drunken Driving*, WORCESTER TELEGRAM & GAZETTE, Oct. 7, 2005, at A11 (mentioning lack of stringent drinking and driving laws in Massachusetts). In Massachusetts, an individual can avoid a drinking and driving conviction by politely refusing a breathalyzer, field sobriety test, and any unnecessary conversation with the police officer. *Id.* The state can still prosecute for drinking and driving based on the suspect's conduct and demeanor, but it is much harder to convict an individual for drinking and driving "beyond a reasonable doubt" when a chemical test is not available. *Id.* In the majority of states, the refusal of a breathalyzer is an automatic one-year suspension of the individual's driver license. *Id.*; see also *In Breath Test Refusals, R.I. Leads Nations*, PROVIDENCE JOURNAL BULLETIN, June 24, 2005, at A1 (noting Rhode Island leads nation in chemical test refusals). Eighty-five percent of drivers suspected of drinking and driving in Rhode Island refuse a breathalyzer, while the national average for refusals is 25%. *Id.* Massachusetts and Rhode Island are the only states that do not admit a refusal of a chemical test into court. NHTSA, *Breath Test Refusal*,

<http://www.nhtsa.dot.gov/people/injury/research/BreathTestRefusal/pages/1Introduction.htm> (explaining

Prior to 2003 in Massachusetts, the .08% BAC level was not a per se law; it was “evidence but not proof of drunkenness.”¹¹¹ In 2003, however, Massachusetts finally adopted a per se BAC law in response to 23 U.S.C. § 163, a statute ratified by President Clinton that would withdraw state highway funding if a state failed to enact the .08 BAC level.¹¹² Despite the per se law, Massachusetts drinking and driving laws remained among the weakest in the country.¹¹³

Some critics opine that Massachusetts constantly remains among the last of states to adopt toughened measures against drunk driving because a large portion of the Legislature consists of defense attorneys who benefit from the potential litigation stemming from looser laws.¹¹⁴ The Senate Minority Leader, Brian P. Lees, stated, “[o]n issues like drunk driving and medical malpractice, things get stalled by the lobby of lawyers who are looking out for their own self-interest and not for their constituents.”¹¹⁵ After much hesitation by the legislature, a new, stricter drinking and driving measure—Melanie’s Law—was enacted on October 28, 2005.¹¹⁶ This measure allows prosecutors to use prior

refusal laws across the United States) (last visited Dec. 23, 2006). Massachusetts’s refusal rate is also exceptionally high, beyond 40%. *Id.* The executive director of the Rhode Island chapter of MADD stated, “[i]t screams that people are very aware that we’re not taking DUI as a serious offense.” *In Breath Test Refusals, Rhode Island leads Nation, supra*, at A1. A Rhode Island state police officer said, “[p]eople tend to refuse the test because the penalties are a lot less than for a DUI, and it’s not criminal.” *Id.*

111. Hartunian, *supra* note 25, at 570 n.52 (examining nationwide BAC levels); Stan Freeman, *Lawyers as Legislatures Walk Tightrope*, THE REPUBLICAN (Springfield), Sept. 25, 2005, at A1 (mentioning impact attorneys have in legislature). Since a BAC of .08% was merely evidence of intoxication, lawyers had cases to litigate in court. Freeman, *supra*, at A1. Any person charged with driving under the influence still could argue in court that they were sober enough to drive despite a breathalyzer reading beyond the legal limit. *Id.*

112. 23 U.S.C. § 163 (2000) (approving government withdrawal of highway funds for failure to adopt .08% BAC level); *see also* Freeman, *supra* note 111, at A1 (explaining Massachusetts one of last states to pass tough drunken-driving standard). Mr. Freeman strongly suggested a correlation between the weak drinking and driving laws and the number of attorneys (highest in the nation) in the Massachusetts legislature. *Id.* The attorneys in the legislature defended their position against the bill by explaining it would adversely affect an individual’s constitutional rights. *Id.* It was not until the federal government strengthened its warnings and threatened to withhold fifty-four million dollars for bridge and road repairs that the measure became a law. *Id.*

113. *See supra* notes 108 & 109 and accompanying text (determining Massachusetts drinking and driving laws among worst). *But see* Carrie Spencer Ghose, *States Try to Toughen Penalties for Refusing Breath Test*, FREE NEW MEXICAN, Jan. 19, 2006, available at http://www.freewmexican.com/story_print.php?storyid=38128 (mentioning Massachusetts’s attempting to toughen refusal law).

114. *See supra* note 111 and accompanying text (finding Freeman among those believing Massachusetts Legislature adversely affected by attorneys); *see also* Noah Schaffer, *Lawyers Looking at Running for Public Office*, MASS. LAW. WKLY., Sept. 11, 2006 (noting Massachusetts Legislature famously full of attorneys). The national average of attorneys in the legislature is approximately seventeen percent. *See* Freeman, *supra* note 111, at A01. Massachusetts’s legislature consists of approximately thirty-three percent attorneys (seventy-five percent of whom currently practice). *Id.*

115. Freeman, *supra* note 111, at A01 (suggesting attorney-composed legislature creates danger to constituents). An attorney recalled that the training tapes for a continuing education program in Massachusetts law explicitly stated that its attorneys should be grateful because they live in the best state for defending drunk drivers. *Id.*

116. MASS. GEN. LAWS ch. 90 § 24 1/2 (2005) (implementing new measures to current law); *see* Steve

convictions when seeking punishment against repeat offenders; it creates new crimes for driving under the influence with a child under the age of fourteen in the vehicle, or knowingly loaning a car to a drunk person; it requires interlock devices for repeat offenders; and it imposes a five year minimum for manslaughter while operating under the influence.¹¹⁷ Although supporters of the bill laud its strict nature, critics accuse the legislature of diluting the bill by leaving out a few key provisions, such as creating tougher penalties for the refusal of a breathalyzer test.¹¹⁸

Massachusetts has a law similar to an implied consent statute—the Chemical Test Refusal Law.¹¹⁹ This statute deems any licensed driver in Massachusetts to have given consent to a breath test upon merely driving his vehicle, and if the driver refuses the breath test, the law mandates the revocation of the individual’s license for 120 days.¹²⁰ A blood test is only warranted if the defendant is hospitalized.¹²¹ Further, the police cannot force a chemical test on a defendant.¹²² Therefore, comparing a 120-day license suspension with the drastic consequences of an operating under the influence conviction, a driver stopped for drinking and driving in Massachusetts is better off simply refusing a chemical test.¹²³

LeBlanc, *Governor Signs “Melanie’s Bill,”* WORCESTER TELEGRAM & GAZETTE, Oct. 29, 2005, at A1 (asserting bill passed after unneeded delay by legislature). Thirteen year-old Melanie Powell was a Girl Scout, soccer player, and cheerleader. Evangelidis, *supra* note 110, at A11. A repeat drunk driver struck Melanie while she was walking home from a friend’s birthday party, killing her. *Id.* Melanie’s death created outrage in her small Marshfield community, prompting residents to enact tougher drinking and driving laws. *Id.*

117. MASS. GEN. LAWS ch. 90, §§ 24, 24 1/2 (2005) (listing new provisions of statute).

118. See LeBlanc, *supra* note 116 (leaving open possibility for more adequate drunk driving statute).

119. MASS. GEN. LAWS ch. 90, § 24(1)(f) (2004) (reciting Massachusetts’s adaptation of implied consent law). The statute provides in pertinent part:

[w]hoever operates a motor vehicle upon any way . . . to which the public has right to access . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor; provided, however, that no such person shall be deemed to have consented to a blood test unless such person has been brought for treatment to a medical facility . . .

Id.

120. *Id.* (outlining Massachusetts’s chemical test refusal statute); *Wasserman v. Registrar of Motor Vehicles*, No. 03-03341-C, 2004 WL 2049771, at *3 (Mass. Super. Sept. 7, 2004) (reaffirming statute means exactly what it says). After performing field sobriety tests, police took the defendant to the station for a chemical test. *Wasserman*, 2004 WL 2049771, at *2. The defendant refused the chemical test and the police informed her that her license would be suspended for 120 days. *Id.*

121. *Commonwealth v. Cronin*, No 04-327, 2005 WL 2740584, at *1-2 (Mass. Super. Sept. 26, 2005) (asserting blood tests only warranted if defendant hospitalized for injury); see also *supra* note 119 and accompanying text (barring blood test unless defendant hospitalized).

122. *Commonwealth v. Pratt*, No. ESCR2005-0089-001-002, 2005 WL 1459650, at *1 (Mass. Super. June, 9 2005) (setting forth consent law required for blood draw).

123. See generally Stephen Jones, *When Pleading Guilty is Not an Option*, <http://www.ouilawyer.com> (last visited Jan. 2, 2007) (referencing numerous techniques for drunk driver to avoid conviction). This website explains why a person should refuse a breathalyzer and weighs a conviction against a refusal. *Id.*; see also Bella English, *They Drink and Drive. He Gets the Call.*, BOSTON GLOBE, Aug. 2, 2005, at E1 (explaining

Much speculation stems from such a progressive political state acting anything but progressively toward a crime that accounts for more than 20,000 accidents on Massachusetts highways each year.¹²⁴ To a layperson, stricter drinking and driving laws appear to be an obvious answer to a recurring problem.¹²⁵ States must balance the extent of force used to prevent drinking and driving and yet still comply with the constitutional guarantees against unreasonable searches and seizures.¹²⁶

III. IS THERE A MIDDLE GROUND IN DRINKING AND DRIVING LEGISLATION?

An examination of both extremes of drinking and driving laws begs the question: Which set of laws protects the citizens of the United States?¹²⁷ Not surprisingly, the answer is not clear.¹²⁸ Laws that infringe on a citizen's constitutional guarantees in order to secure an arrest are equally as damaging as laws that unduly protect a citizen's constitutional rights to the extent that criminals walk free.¹²⁹

A. Idaho: The Deteriorating Fourth Amendment

By allowing state officials to forcibly draw an individual's blood without a warrant and without utilizing other less-intrusive methods of testing, the state has unilaterally broadened the United States Supreme Court decision of *Schmerber v. California*.¹³⁰ In doing so, the impact on drinking and driving

refusal techniques to avoid conviction). Stephen Jones's business card gives tips to drivers stopped for drinking and driving: refuse the field sobriety test, keep silent, insist upon calling an attorney, do not take a breathalyzer, and be polite to the officer. *Id.*

124. See Freeman, *supra* note 111, at A1 (asserting Massachusetts politics normally progressive). Freeman wrote "[e]llecting lawyers to the Statehouse, some might say, is like letting foxes guard the henhouse." *Id.*

125. See Hartunian, *supra* note 25, at 571 (reiterating importance of deterring drunk drivers).

126. See Hoffman, *supra* note 23, at 347 (mentioning fine-tuning needed to reduce loss of life and cost of adhering with evidence laws); Wherry, *supra* note 11, at 430 (stating government must abide by its own laws).

127. See *supra* Part II (contrasting forms of drinking and driving laws).

128. See Wherry, *supra* note 9, at 505 (indicating drunk driving problem fails to justify suppression of constitutional rights). Presently, in drinking and driving arrests and convictions, the Court allows retreat from the exclusionary rule and expansion of the exigent circumstances exception to the warrant requirement. *Id.* at 506. *But see* Freeman, *supra* note 111, at A1 (listing problems associated with lenient drinking and driving laws).

129. See MASS. GEN. LAWS ch. 90, § 24(f)(1) (2004) (highlighting refusal to take chemical test results in only three-month license suspension); *State v. Worthington*, 65 P.3d 211, 214 (Idaho Ct. App. 2002) (stating officers held flailing defendant down to draw his blood against his consent).

130. See generally *State v. Woolery*, 775 P.2d 1210 (Idaho 1989) (approving blood draw of defendant without warrant). The court assumed that the metabolism of alcohol in the blood automatically qualifies as an exigency, thereby justifying a warrantless blood draw. *Id.* at 1212-13. *But see* Wherry, *supra* note 9, at 518-23 (suggesting phone warrants provide police rapid access to warrant). Scientific evidence shows that the alcohol concentration in a person's blood increases for about an hour after the last drink is consumed. *Id.* at 516. Once the last drink is completely absorbed in an individual's blood stream, the body eliminates the alcohol at a rate of less than 0.02% per hour. *Id.* This statistic, compounded with the availability of telephone warrants, suggests that the officers had sufficient time to secure a warrant for the blood draw in Woolery's circumstance.

perpetrators in Idaho is extraordinarily harsh.¹³¹ The Idaho Legislature and courts' intentions in attempting to deter drinking and driving by applying strict penalties are sound.¹³² Unfortunately, the state goes further than the Constitution permits by mandating a warrantless chemical test when the licensed driver refuses to consent.¹³³

The *Schmerber* court correctly allowed the admission of the chemical test in their ruling.¹³⁴ During that time period, alcohol was thought to dissipate quickly from a person's blood.¹³⁵ Now, however, scientists believe alcohol takes some time to metabolize, allowing ample time for an officer to secure a warrant.¹³⁶ Furthermore, the *Schmerber* Court chose not to discuss how they would rule if the defendant requested another means of testing, like a breathalyzer.¹³⁷ States should view the Court's reluctance to decide on such a pertinent issue as an exercise of the utmost caution in employing forcible methods to draw a person's blood.¹³⁸

Many drinking and driving experts opine that Idaho, and states with similar

131. See *State v. Worthington*, 65 P.3d 211, 214-15 (Idaho Ct. App. 2002) (approving officers forcible restraint against Worthington to withdraw blood). Worthington repeatedly denied consent to a chemical test, causing the police to restrain him. *Id.* at 212-13. Neither the court, nor the police, ever mentioned the possibility of securing a warrant. *Id.* at 213. The *Schmerber* Court stated that "[s]earch warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." *Schmerber v. California*, 384 U.S. 757, 770 (1966). However,

where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these *special* facts, we conclude that the attempt to secure evidence of blood-alcohol content was . . . appropriate.

Id. at 770-71 (emphasis added). It seems that if phone warrants were readily available when the *Schmerber* decision was rendered, the decision would have been decided differently. See Wherry, *supra* note 9, at 521 (characterizing access to phone warrants as uncomplicated).

132. See CAVOILA & WUTH, *supra* note 2, at 21-22, 32 (summarizing result of harsher penalties as deterrent against drunk driving).

133. See *Woolery*, 775 P.2d at 1212-16 (justifying blood draw against Woolery's consent); *Worthington*, 65 P.3d at 214 (allowing blood draw against Worthington's consent); *State v. Cooper*, 39 P.3d 637, 641 (Idaho Ct. App. 2001) (subjecting Cooper to blood draw without his consent).

134. See Wherry, *supra* note 9, at 508 (asserting *Schmerber* decided correctly for its time).

135. See Wherry, *supra* note 9, at 515-16 (contending scientists determined alcohol dissipates much slower than originally believed). The Court's finding of rate of alcohol dissipation may have been appropriate based on the available technology during the 1960s. *Id.* at 514-15.

136. See Wherry, *supra* note 9, at 515-16 (demonstrating alcohol metabolizes much more slowly than originally believed). Today's advanced resources greatly increase the window available to secure a search warrant. *Id.* at 514-15. Additionally, telephone warrants were not available when the *Schmerber* decision was rendered. *Id.* at 520. Telephone warrants became readily available to state and federal officers approximately a decade later. *Id.*

137. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (explaining reasons for failing to discuss preference for less intrusive chemical test). The Court determined that because the defendant also refused a breathalyzer and did not request any alternative means of testing that there was no reason to engage in analysis as if he did. *Id.* at 771.

138. *Id.* (explaining value and integrity given to individual). The *Schmerber* Court carefully ended their analysis by warning states that "minor intrusions into an individual's body under stringently limited conditions" does not permit more substantial intrusions or any intrusion under other circumstance. *Id.*

methods, have expanded *Schmerber* beyond the intentions of the Court.¹³⁹ While deterring drinking and driving remains important, utilizing all possible methods, including unconstitutional means, to acquire evidence against a defendant is neither reasonable nor productive.¹⁴⁰ If the State is going to compel a blood draw, the State, at the very least, should be required to secure a warrant.¹⁴¹ In addition, unless the accused is receiving medical treatment at a hospital and a breathalyzer sample is impracticable or impossible, the accused should always be given the choice between a breathalyzer and a blood draw.¹⁴² The United States Constitution grants citizens specific, fundamental rights that the state may not dilute, regardless of a compelling interest.¹⁴³

B. Massachusetts: Piercing the Impenetrable Shield

While infringing upon Fourth Amendment rights creates a disservice to citizens, shielding drunk drivers from the penalties they deserve also puts communities at risk.¹⁴⁴ One would imagine that being ranked the forty-eighth out of fifty states for lenient drinking and driving laws would embarrass Massachusetts into drafting a legitimate law that deters drunk driving.¹⁴⁵ Although Melanie's Law strengthened the prior ineffective statute, the law still lacks one of the most important elements needed to obtain convictions: acquiring a chemical test from the individual.¹⁴⁶

By permitting suspected drunk drivers to refuse any form of field sobriety test or chemical testing in exchange for a three month civil license suspension, the state consistently allows drunk drivers to get away with criminal acts.¹⁴⁷

139. See Wherry, *supra* note 11, at 430 (recognizing government intrusion on individual's rights); see also Silberlight, *supra* note 10, at 507 (explaining when police infringe on constitutional rights evidence normally excluded from trial); Hurtunian, *supra* note 25, at 565-66 (balancing intrusion on individual's Fourth Amendment rights with government's interest in securing evidence).

140. See Wherry, *supra* note 11, at 429-30 (commenting on haste to convict drunk drivers). States rush to convict drunk drivers because of social pressure applied by concerned communities and public interest groups like Mothers Against Drunk Driving and Students Against Drunk Driving. *Id.* The result of the hurried attitude results in states employing all methods, constitutional or not, to obtain convictions. *Id.*

141. See *supra* notes 135 and 137 (suggesting simple process involved to obtain telephone warrant).

142. See *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (hinting breath test could be applicable upon request of defendant).

143. See Wherry, *supra* note 11, at 430 (stressing constitutional rights more important than obtaining convictions).

144. See CAVAIOLA & WUTH, *supra* note 2, at 21-24 (suggesting stricter laws create deterrence to drunk drivers). The "get tough" attitude of the 1980s against drunk drivers made great strides in combating the number of traffic fatalities related to drinking and driving. *Id.* at 13-14.

145. See Evangelidis, *supra* note 110, at A11 (pointing out Massachusetts's weak drinking and driving laws).

146. See LeBlanc, *supra* note 116 (summarizing Melanie's Law's effect on drunk drivers). *But see* Ghose, *supra* note 113 (finding tougher refusal penalties result in states with lower refusal rates). Drunk driving researchers found that "[t]he states with the lowest refusal rates have among the toughest penalties, with jail time in California and Nebraska and revoked vehicle registrations in Hawaii and Maine." *Id.*

147. See Ghose, *supra* note 113 (describing number of times drivers refuse test to avoid conviction). Massachusetts State Representative, Todd Smola, told a reporter, "We are seeing cases where people are being

Most states have a mandatory one-year license suspension for refusal to perform a breathalyzer or blood test, thereby rendering citizens more likely to complete the chosen test in hopes of passing.¹⁴⁸ The fact that Massachusetts ranks significantly over the national average for refusals of sobriety tests indicates that drunk drivers are aware of the inefficacy of the law.¹⁴⁹

Much speculation surrounding the law manifests itself in the large number of attorneys comprising the Massachusetts Legislature.¹⁵⁰ Assisting a client that has pled guilty to a drinking and driving charge does not produce the same paycheck as a drunk driving trial.¹⁵¹ A drinking and driving law with ambiguity acts as a criminal defense attorney's best friend, producing many issues to litigate in court.¹⁵² Although the law endured major reform during the past few years, it still has a long way to go.¹⁵³ Too many Massachusetts citizens are killed on the highways each year.¹⁵⁴ Massachusetts must formulate an effective drinking and driving law that will punish drunk drivers and deter the amount of drinking and driving that takes place.¹⁵⁵

C. *Is there a Solution?*

States with statutes similar to Idaho's contravene our constitutional rights.¹⁵⁶ States with statutes analogous to Massachusetts's, however, unjustifiably protect an intoxicated driver.¹⁵⁷ Several states in this country settled between these two extremes and constructed acceptable laws regulating drunk

stopped 10, 15, 20, 30 times. Every single case they are refusing the breath test, paying their lawyer a few bucks." *Id.* This is because people who, believing they might fail a test, refuse so as to avoid a criminal conviction and possible jail time. *Id.*

148. See Ghose, *supra* note 113 (stipulating most states have strict rules for rejecting breath test).

149. See *supra* note 110 and accompanying text (exposing refusal rate in Massachusetts); see also Ghose, *supra* note 113 (suggesting drivers refuse to avoid criminal convictions).

150. See Freeman, *supra* note 111, at A1 (mentioning high number of lawyers in legislature). Many believe that the number of attorneys in the legislature caused the hesitation in passing a drinking and driving measure in 2003 that has been statistically proven to save lives on the highways. *Id.* Recently, this theory was furthered by the Legislature's reluctance to enact Melanie's Bill as a law. *Id.*

151. See Freeman, *supra* note 111, at A1 (explaining reduced billable hours for attorneys without trials).

152. See Freeman, *supra* note 111, at A1 (admitting gray area of law gives attorneys many issues to litigate). When the BAC level of .08% was merely evidence of intoxication (prior to 2003), Massachusetts attorneys could argue in court that a defendant was not actually drunk, despite failing a breath test. *Id.* After 2003 when the per se law was passed, this defense was eliminated, but because of the continued leniency in drinking and driving laws in the state, attorneys still had many issues to litigate in court. *Id.*

153. See Evangelidis, *supra* note 110, at A1 (determining Massachusetts forty-eighth worst state in nation for lenient drinking and driving laws).

154. See NHTSA, *supra* note 6, at 7 (stating Massachusetts's high fatality rate for accidents caused by drunk drivers). In 2003, forty-three percent of traffic related fatalities were caused by an alcohol-related incident. *Id.* The national average was thirty-nine percent. *Id.*

155. See *supra* note 20 and accompanying text (demonstrating countries reformed drinking and driving laws by implementing stricter penalties).

156. See *supra* note 80 and accompanying text (setting forth a variation of constitutional infringements).

157. See *supra* note 109 and accompanying text (stating Massachusetts and Rhode Island are worst states in country for lenient drinking and driving laws).

driving.¹⁵⁸

After reviewing ample drinking and driving laws throughout the country, the following is a suggested draft of a drinking and driving law derived from numerous sources, but primarily from the North Carolina General Statutes § 20-16.2:

Suggested Implied Consent Statute¹⁵⁹

(a) Any person who drives a vehicle on a highway or public road thereby gives consent to a chemical analysis for the purposes of determining the alcohol content in his or her blood. The officers should give any person arrested for violating this law the choice of blood or breath for the chemical testing; except that the suspected individual shall not have the choice to which test he or she will submit in the event the particular method he or she requests is reasonably unavailable or if the person is taken to a medical facility for treatment, in which case the arresting officer shall choose a test to be administered that is reasonable under the circumstances. When the arresting officer determines a blood analysis is necessary to determine the alcohol level in the individual's blood, the arresting officer will be required to obtain a warrant to draw the blood from the individual.

(1) The person has a right to refuse to be tested.

(2) Refusal to take any required test or tests will result in an immediate revocation of the person's driving privilege for at least 30 days and an additional 12-month revocation by the Division of Motor Vehicle.

(3) The test results, or the fact of the person's refusal, will be admissible in evidence at trial on the offense charged.

(4) The person's driving privilege will be revoked immediately for at least 30 days if:

a. The test reveals an alcohol concentration of 0.08 or more;

b. The person was driving a commercial vehicle and the test reveals an alcohol concentration of 0.04 or more; or

c. The person is under 21 years of age and the test reveals any alcohol concentration.

(5) The person may choose a qualified person to administer a chemical test or tests in addition to any test administered by the arresting officer.

158. MO. REV. STAT. § 577.041 (2003) (approving individual's right to refuse chemical test); N.C. GEN. STAT. § 20-16.2 (2005) (allowing individual right to refuse chemical test).

159. N.C. GEN. STAT. § 20-16.2 (2005) (creating general statute based upon language from North Carolina's drinking and driving law); *see also* MO. REV. STAT. § 566.041 (2003) (implementing language to give individual right to refuse chemical test); Hoffman, *supra* note 23, at 389 (taking provisions and concepts from author's suggested New Jersey statute to create reasonable drinking and driving statute).

(6) The person has a right to call an attorney and select a witness to view for him or her the testing procedures but the testing may not be delayed for these purposes any longer than 30 minutes from the time when the person is notified of his or her rights.

(a) If an arresting officer has reasonable grounds to believe a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the arresting officer may direct the taking of a blood sample by a qualified person or may direct the administration of any other chemical analysis that may be effectively performed. In this circumstance, the arresting officer is required to obtain a warrant from a magistrate before taking a person's blood.

(b) When a person refuses to submit to a chemical analysis or a person's driver's license has an alcohol concentration restriction and the results of a chemical analysis establish a violation of the restriction, the charging officer and the chemical analyst must go before an official authorized to administer oaths and execute an affidavit stating that:

(1) The person was charged with an implied consent offense or had an alcohol restriction on the driver's license;

(2) The arresting officer had reasonable grounds to believe the person committed an implied-consent offense or violated the alcohol concentration restriction on the driver's license.

(3) The person refused the test and was notified of their rights.

Hopefully, states in the process of reforming their drinking and driving laws will take this proposed draft into consideration.

IV. CONCLUSION

Unconstitutional implied consent statutes have been created in some states, like Idaho, in response to the unacceptable number of drinking and driving fatalities and accidents on the public highways of the United States. The United States Supreme Court, however, has thus far refused to intervene because of the inherent social repercussions that are attached to addressing the glaring problem of drinking and driving. Despite the misdirected efforts of the Idaho court, drinking and driving incidents remain high. Consequently, legislatures and courts infer that other drinking and driving prevention methods must be found, without infringing on an individual's constitutional rights. Possible funding for nationwide treatment programs and no- or low-cost taxi services provided by bars and restaurants may be potential answers to this ongoing problem.

Incredibly, other states, like Massachusetts and Rhode Island, allow drunk drivers to continuously avoid prosecution by refusing to administer chemical tests without compelling consequences. In doing so, these states contribute to

the staggering drinking and driving problem across the United States. Although enforcing drinking and driving to the extent it begins to infringe on citizens' Fourth Amendment rights is not acceptable, states must make valiant efforts to curtail the drinking and driving crisis.

The United States has made substantial improvements in deterring drinking and driving since the early 1980s, but must continue to take action if it intends on catching up to the rest of the world. If the drinking and driving problem is not handled soon, the dilemma will continue and potentially grow. "There are risks and costs to a program of action. But they are far less than the long-range risks and costs of comfortable inaction."¹⁶⁰

Kelsey P. Black

160. John F. Kennedy, President of the United States.