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Constitutional Bases for a Right of Access to Counsel at the Pre-trial Stages of Drunk Driving Prosecutions: A Study in Conflicting Rights

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ARTICLES

Constitutional Bases for a Right of Access to Counsel at the Pre-trial Stages of Drunk Driving Prosecutions: A Study in Conflicting Rights

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I. INTRODUCTION

Alcohol-related traffic accidents represent one of the most serious problems in contemporary American society.[1] A widespread and intensive public outcry against the "slaughter on our highways"[2] has been directed at every level of government. Many states have responded to this valid public pressure to reduce the number of deaths and serious injuries caused by the drunk driver by strengthening and vigorously enforcing laws dealing with those driving under the influence of

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1. *See, e.g.*, ALCOHOL ABUSE AND HIGHWAY SAFETY IN MASSACHUSETTS, REPORT OF THE GOVERNOR'S TASK FORCE ON ALCOHOL ABUSE AND HIGHWAY SAFETY (1982) [hereinafter cited as ALCOHOL ABUSE]. The Report points out that in the United States drunk drivers kill 25,000 and injure 750,000 people each year. This "means nearly 70 persons are killed and 2,054 seriously injured [each day] because of the drunk driver." *Id.* at 1.

The United States Supreme Court has commented frequently on the magnitude of the problem. *See, e.g.*, South Dakota v. Neville, 103 S. Ct. 916, 920 (1983) ("The situation underlying this case—that of the drunk driver—occurs with tragic frequency on our nation's highways. The carnage caused by drunk drivers is well documented . . . ."); Perez v. Campbell, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this nation exceeds the death toll of all our wars." *Id.* at 657.); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.").

2. Breithaupt v. Abram, 352 U.S. 432, 439 (1957).

alcohol.[3] An outgrowth of this phenomenon has been an increase in the number of cases reaching appellate courts in which constitutional challenges have been raised questioning the validity of drunk driving laws and the manner of their enforcement. This article addresses one controversial aspect of the "war" against drunk drivers—the procedural rights of a person arrested for drunk driving under state "implied consent" laws which govern the administration of blood alcohol content (BAC) analysis tests.[4] Specifically, the article examines the practical necessity and constitutional justification for a limited right of access to counsel on the part of a person arrested for drunk driving who must decide whether to submit to such tests.[5]

II. IMPLIED CONSENT STATUTES

A. FACTUAL SETTING

Legal and constitutional issues concerning the right to counsel

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3. *See, e.g.*, ILL. REV. STAT. ch. 95½, §§ 11-501 & 11-501.1 (1983); 1982 Mass. Acts, ch. 373, codified in MASS. GEN. LAWS ANN. ch. 90, § 24 (West Supp. 1983-1984); OHIO REV. CODE ANN. §§ 4511.19 & 4511.19.1 (Page Supp. 1982).

4. An "implied consent" law is one which conditions the right to possess a driver's license on the licensee's consenting to some form of blood alcohol content testing in the event of an arrest for driving under the influence of alcohol. Blood alcohol content (hereinafter referred to as "BAC") testing refers to any method of chemical analysis of the percentage, by weight, of alcohol in the blood. The three primary BAC testing methods are blood sampling, breath analysis and urinalysis. *See infra* note 16 and accompanying text.

5. *See generally* Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent,* 58 TEX. L. REV. 935 (1980) (examination of alternative constitutional bases for a right to counsel at testing stage of drunk driving prosecution; article proposed that implied consent statutes should be repealed if courts impose an administratively cumbersome right to counsel); Note, *Right to Counsel for DUI in Nevada: A New Song for Gideon's Trumpet,* 13 PAC. L.J. 1157 (1982) (discussion of the need for a right to counsel at testing stage to facilitate imposition of heightened penalties for second or repeat offenders); Note, *The Right to Counsel Under California's Implied Consent Statute,* 9 U. WEST. L.A. L. REV. 73 (1977) (analysis of a due process right to legal advice under California implied consent statute).

The right proposed by this article is a restricted one. The state has an acknowledged legitimate interest in enforcing drunk driving laws and, in particular, in obtaining evidence of intoxication from BAC tests within a reasonable time after arrest and before the evidence is lost. The contours of the right include: (1) a police duty to inform the suspect that he may attempt to contact a lawyer prior to deciding on submission to the test; (2) a reasonable opportunity for telephonic communication with counsel, with reasonableness measured in terms of time (at least one hour or any period of time not jeopardizing effective testing) and the physical capabilities of the accused; and (3) the establishment of programs by the state to facilitate such communication (e.g., lists of attorneys willing to accept phone calls).

at the BAC analysis stage arise in a fairly common factual context. Ordinarily, the police either observe erratic driving or a violation of the traffic law, or they are summoned to the scene of an auto accident. Routine investigation, including the observation of a driver's physical condition, response to questions, and the results of field sobriety tests,[6] leads to a reasonable belief that a person has been driving under the influence of alcohol (DUIA). An arrest is made. Shortly thereafter the suspect[7] will normally be given *Miranda*[8] warnings and will be asked to undergo blood alcohol content analysis in the form of a breathalyzer test, withdrawal of blood samples, or provision of a urine specimen.[9] The overwhelming majority of jurisdictions rely primarily on the breathalyzer test.[10] Although the timing of the request for a BAC test may vary, it is most likely to occur

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6. *See* Commonwealth v. Brennan, 386 Mass. 772, 774, 438 N.E.2d 60, 62 (1982) (field sobriety tests required accused to touch nose, pick up coins, and walk straight line); State v. Arsenault, 115 N.H. 109, 110, 336 A.2d 244, 245 (1975) (field sobriety tests include "balance, walking, turning, finger-to-nose, and coin pick-up test"); People v. Mulack, 40 Ill. 2d 429, 430, 240 N.E.2d 633, 634 (1968) (visual field tests for drunkenness require suspect to touch nose, pick up coins, walk, and turn); *see also* State v. Macuk, 57 N.J. 1, 14, 268 A.2d 1, 8 (1970) (state has legal right to require DUIA arrestees to submit to physical coordination tests).

Although the nature and type of field sobriety tests vary, the most commonly administered tests require suspects to walk a straight line, heel to toe, and then reverse direction; to stand erect, touch the index finger of each hand to the nose, and then repeat the procedure with eyes closed; to stand erect and tilt head back; and to stand on one leg. F.L. BAILEY, HOW TO PROTECT YOURSELF AGAINST COPS IN CALIFORNIA AND OTHER STRANGE PLACES 51-52 (1982).

7. The terms "suspect," "accused," "detainee," and "arrestee" are used interchangeably in this article. "Defendant" is generally used only when a reference is made by a court; the word technically refers to one who has been formally charged. "Driving under the influence of alcohol" is hereinafter referred to as "DUIA."

8. Miranda v. Arizona, 384 U.S. 436, 467-76 (1966). An in-custody criminal defendant must be advised of his right to remain silent, to have counsel present during questioning, and to have counsel appointed if indigent. He may waive these rights, but must be informed that any statement made after waiver can be used at trial.

9. *See infra* note 16 and statutory references therein.

10. No comprehensive empirical study has been done to determine the degree of reliance on one form of testing over another. However, the unreliability of urine tests and the practical difficulties involved in taking blood samples have led to overwhelming reliance on the breath analysis or breathalyzer test. *See* Fitzgerald & Hume, *The Single Chemical Test for Intoxication: A Challenge to Admissibility, in* PROSECUTION AND DEFENSE OF DRUNK DRIVING CASES PRACTICE HANDBOOK 70 (MCLE, Inc. 1982) [hereinafter *Single Test*]; *accord,* R. ERWIN, DEFENSE OF DRUNK DRIVING CASES (MB) § 25.01 (1977). In view of the extent of police reliance on breathalyzer testing and the near uniform concentration of judicial dispositions of implied consent challenges on such testing, this article will concentrate on the constitutional implications of the breath analysis testing process.

immediately after initial processing or "booking" at the police station. Typically, the arresting officer will continue to handle the case.

Short of immediate submission to the test, the accused may seek some form of help or information prior to making a decision. Responses might include strict invocation of *Miranda* rights by refusal to say or do anything in the absence of counsel; a request for assistance from the police in making the decision on submission; a request to talk to a lawyer, the accused's personal attorney, family or friends prior to proceeding; or a request to have counsel present during the administration of the BAC test.

Courts have generally refused to sanction any of these responses.[11] Under a strict application of "implied consent" statutes, the accused must either submit to testing, expressly refuse, or have delay or silence construed as a refusal.

Actual or constructive refusal of testing will result in an almost automatic loss of the driver's license and will leave the police free to continue to press criminal charges. If the arrestee submits to testing and the results show a blood alcohol content which is above a designated percentage by weight, prosecution and conviction are a virtual certainty.[12] It is only when the test results are below a statutorily specified level[13] that the accused has a chance of avoiding a drunk driving prosecution.

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11. *See* Logan v. Shealy, 500 F. Supp. 502, 504 (E.D. Va. 1980) ("No one has a Constitutional right . . . to have their lawyer present or talk with her on the telephone in re whether or not she should take the required breathalyzer or blood test."); State v. Jones, 457 A.2d 1116, 1120 (Me. 1983) ("[P]roviding an opportunity for consultation with an attorney is not required by Maine's implied consent law."); Spradling v. Deimeke, 528 S.W.2d 759, 764 (Mo. 1975) (no constitutional right "to consult with an attorney prior to deciding whether or not to submit to breathalyzer test," although statutes of state provide such a right); Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, *cert. denied,* 370 U.S. 912 (1962) (because defendant was acquitted, he was not in a position to complain about refusal of his request to talk with counsel); People v. Sweeney, 55 Misc. 2d 793, 286 N.Y.S.2d 506 (Dist. Ct. 1968); State v. Bunders, 68 Wis. 2d 129, 227 N.W.2d 727 (1975) (*Miranda* warnings, including right to counsel, are not required when an arrested driver is asked to submit to a breathalyzer or other test).

12. *See, e.g.,* ALASKA STAT. § 28.35.033(a)(4) (Supp. 1982) (person with 0.10% or more alcohol by weight in blood or 0.10 grams or more alcohol per 210 liters of breath presumed under influence of intoxicating liquor); LA. REV. STAT. ANN. § 32.662(A)(1)(c) (West Supp. 1983) (person with 0.10% or more blood alcohol content by weight presumed under influence of alcoholic beverages); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West Supp. 1983-1984) (person with 0.10% or more alcohol by weight in blood presumed under influence of intoxicating liquor).

13. *See, e.g.,* ALASKA STAT. § 28.35.033(a)(2) (Supp. 1982) (person with greater

B. "IMPLIED CONSENT" LAWS AND RELATED STATUTORY PROTECTIONS

All fifty states and the District of Columbia have laws making it a crime to operate a motor vehicle under the influence of alcohol or other controlled substances.[14] Starting at least as early as 1953, when New York enacted its "implied consent" statute, [15] state

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than 0.05% but less than 0.10% alcohol by weight in blood or greater than 0.05 but less than 0.10 grams of alcohol per 210 liters of breath not presumed under influence of intoxicating liquor); LA. REV. STAT. ANN. § 32.662(A)(1)(a), (b) (West Supp. 1983) (person with greater than 0.05% but less than 0.10% blood alcohol content not presumed intoxicated, but blood alcohol percentage usable with other evidence to determine whether person under influence of alcoholic beverages; if blood alcohol content 0.05% or less person presumed not under influence of alcoholic beverages); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West Supp. 1983-1984) (blood alcohol percentage of greater than 0.05% and less than 0.10% gives rise to no presumption; if blood alcohol percentage 0.05% or less, person presumed not intoxicated).

14. ALA. CODE § 32-5A-191 (1975); ALASKA STAT. § 28.35.030(a)(1) (Supp. 1982); ARIZ. REV. STAT. ANN. § 28-692(A) (Supp. 1983-1984); ARK. STAT. ANN. § 75-2503 (Supp. 1983); CAL. VEH. CODE § 23152 (West Supp. 1983); COLO. REV. STAT. § 42-4-1202(1) (1973); CONN. GEN. STAT. ANN. § 14-227a (West Supp. 1983-1984); DEL. CODE ANN. tit. 21, § 4177(a) (Supp. 1982); D.C. CODE ANN. § 40-716(b) (Supp. 1983); FLA. STAT. ANN. § 316.193(1) (West Supp. 1983); GA. CODE ANN. § 40-6-391 (1981); HAWAII REV. STAT. § 291-4 (Supp. 1982); IDAHO CODE § 49-1102 (Supp. 1983); ILL. REV. STAT. ch. 95½, § 11-501 (1983); IND. CODE ANN. § 9-11-2-1 to -2-5 (Burns Supp. 1983); IOWA CODE ANN. § 321.281 (West Supp. 1983-1984); KAN. STAT. ANN. § 8-1567 (1982); KY. REV. STAT. § 189.520 (1980); LA. REV. STAT. ANN. § 14:98 (West Supp. 1983); ME. REV. STAT. ANN. tit. 29, § 1312-B (Supp. 1983-1984); MD. TRANSP. CODE ANN. § 21-902 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) (West Supp. 1983-1984); MICH. COMP. LAWS ANN. § 257.625 (Supp. 1983-1984); MINN. STAT. ANN. § 169.121 (West Supp. 1984); MISS. CODE ANN. § 63-11-30 (Supp. 1983); MO. ANN. STAT. §§ 577.010, .012 (Vernon Supp. 1984); MONT. CODE ANN. § 61-8-401 (1983); NEB. REV. STAT. § 39-669.07 (1978); NEV. REV. STAT. § 484.379 (1983); N.H. REV. STAT. ANN. § 265:82 (Supp. 1983); N.J. REV. STAT. ANN. § 39:4-50 (Supp. 1983-1984); N.M. STAT. ANN. § 66-8-102 (Supp. 1983); N.Y. VEH. & TRAF. LAW § 1192 (McKinney Supp. 1983-1984); N.C. GEN. STAT. § 20-138.1 (1983); N.D. CENT. CODE § 39-08-01 (Supp. 1983); OHIO REV. CODE ANN. § 4511.19 (Page Supp. 1982); OKLA. STAT. ANN. tit. 47, § 11-902 (West Supp. 1983-1984); OR. REV. STAT. § 487.540 (1983); 75 PA. CONS. STAT. ANN. § 3731 (Purdon Supp. 1983-1984); R.I. GEN. LAWS § 31-27-2 (Supp. 1983); S.C. CODE ANN. § 56-5-2930 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 32-23-1 (Supp. 1983); TENN. CODE ANN. § 55-10-401 (Supp. 1983); TEX. CIV. CODE ANN. § 6701l-1 (Vernon Supp. 1982-1983); UTAH CODE ANN. § 41-6-44 (Supp. 1983); VT. STAT. ANN. tit. 23, § 1201 (Supp. 1983); VA. CODE § 18.2-266 (1982); WASH. REV. CODE ANN. § 46.61.502 (Supp. 1983-1984); W. VA. CODE § 17C-5-2 (Supp. 1983); WIS. STAT. ANN. § 346.63 (West Supp. 1983-1984); WYO. STAT. § 31-5-233 (Supp. 1983).

15. An Act to Amend the Vehicle and Traffic Law, ch. 854, 1953 N.Y. Laws 1876.

legislatures have enacted laws to condition the privilege of holding a driver's license on the licensee's consent to a chemical test or analysis of his breath, blood, or urine if he is arrested on a charge of drunk driving.[16] Although there are many variations among the statutes, the Massachusetts implied consent law[17] is representative of the type of legislation under consideration in this article. It is particularly appropriate to utilize the statute as prototype legislation in the field since certain aspects of the law were reviewed in one of the two recent implied consent cases to reach the United States Supreme Court.[18] The Massachusetts statute also illustrates the "crack down" approach which is currently sweeping the country.

The Massachusetts implied consent statute criminalizes the operation of a motor vehicle while under the influence of intoxicating li-

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16. ALA. CODE § 32-5-192 (1975); ALASKA STAT. § 28.35.031 (Supp. 1982); ARIZ. REV. STAT. ANN. § 28-691 (1982); ARK. STAT. ANN. § 75-1045 (Supp. 1983); CAL. VEH. CODE § 13353 (West Supp. 1983); COLO. REV. STAT. § 42-4-1202(3)(a)-(c) (Supp. 1983); CONN. GEN. STAT. ANN. § 14-227b (West Supp. 1983-1984); DEL. CODE ANN. tit. 21, § 2740 (Supp. 1982); D.C. CODE ANN. § 40-502 (Supp. 1983); FLA. STAT. ANN. § 316.1932(1)(a) (West Supp. 1983); GA. CODE ANN. § 40-5-55 (1981); HAWAII REV. STAT. § 286-151 (Supp. 1982); IDAHO CODE § 49-352 (Supp. 1983); ILL. REV. STAT. ch. 95½, § 11-501.1 (1983); IND. CODE ANN. § 9-11-4-1 (Burns Supp. 1983); IOWA CODE ANN. § 321B.4 (West Supp. 1983-1984); KAN. STAT. ANN. § 8-1001 (1982); KY. REV. STAT. § 186.565 (1980); LA. REV. STAT. ANN. § 32:661 (West Supp. 1984); ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1983-1984); MD. TRANSP. CODE ANN. § 16-205.1 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1983-1984); MICH. COMP. LAWS ANN. § 257.625c (Supp. 1983-1984); MINN. STAT. ANN. § 169.123 (West Supp. 1984); MISS. CODE ANN. § 63-11-5 (Supp. 1983); MO. ANN. STAT. § 577.020(1) (Vernon Supp. 1984); MONT. CODE ANN. § 61-8-402 (1983); NEB. REV. STAT. § 39-669.08 (1978); NEV. REV. STAT. § 484.383 (1983); N.H. REV. STAT. ANN. § 265:84 (Supp. 1983); N.J. REV. STAT. ANN. § 39:4-50.2 (Supp. 1983-1984); N.M. STAT. ANN. § 66-8-107 (Supp. 1983); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1983-1984); N.C. GEN. STAT. § 20-16.2 (1983); N.D. CENT. CODE § 39-20-01 (Supp. 1983); OHIO REV. CODE ANN. § 4511.19.1 (Page Supp. 1982); OKLA. STAT. ANN. tit. 47, § 751 (West Supp. 1983-1984); OR. REV. STAT. § 487.805 (1983); 75 PA. CONS. STAT. ANN. § 1547 (Purdon Supp. 1983-1984); R.I. GEN. LAWS § 31-27-2.1 (Supp. 1983); S.C. CODE ANN. § 56-5-2950 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 32-23-10 (Supp. 1983); TENN. CODE ANN. § 55-10-406 (Supp. 1983); TEX. CIV. CODE ANN. § 6701l-5 (Vernon 1977); UTAH CODE ANN. § 41-6-44.10 (Supp. 1983); VT. STAT. ANN. tit. 23 § 1202 (Supp. 1983); VA. CODE § 18.2-268 (Supp. 1983); WASH. REV. CODE ANN. § 46.20.308 (Supp. 1983-1984); W. VA. CODE § 17C-5-4 (Supp. 1983); WIS. STAT. ANN. § 343.305 (West Supp. 1983-1984); WYO. STAT. § 31-6-102 (1977).

17. MASS. GEN. LAWS ANN. ch. 90, § 24 (West Supp. 1983-1984).

18. Mackey v. Montrym, 443 U.S. 1 (1979); *see also* South Dakota v. Neville, 103 S. Ct. 916 (1983).

quor or controlled substances. Recent amendments to the statute[19] impose increased penalties for its violation including mandatory prison terms for repeat offenders,[20] prohibitions against placing cases on file or continuances without a finding,[21] automatic revocation of the driver's license,[22] and the treatment of death caused by drunk driving as homicide requiring a minimum mandatory sentence.[23] The "implied consent" component of the statute, chapter 90, section 24(f), provides: "Whoever operates a motor vehicle upon any [public] way . . . 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 under the influence of intoxicating liquor . . . ." The police must inform the arrested person that a refusal to submit to such a test or analysis will result in the suspension of his "license . . . to operate motor vehicles . . . in the Commonwealth . . . for a period of ninety days." The sanction of automatic loss of license is designed to serve as a deterrent to drunken driving, a means of removing such drivers from the highways, and a device for "obtaining reliable and relevant evidence for use in subsequent criminal proceedings."[24] This evidence consists of the results of the breath analysis or blood tests authorized by the implied consent provisions.

Chapter 90, section 24(e) makes such results admissible and relevant in a DUIA prosecution. Evidence that the percentage, by weight, of alcohol in the accused's blood, as indicated by the breath analysis or blood test, was ten one-hundredths or more, creates a presumption that the defendant was under the influence of intoxicating liquor for purposes of guilt under the act.[25] However, in Massachusetts,

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19. Massachusetts extensively modified its drunk driving laws in August, 1982. *See* 1982 Mass. Acts, ch. 373. These modifications resulted from an intensive study by an Executive Task Force which gathered data on the effects of drunk driving and examined developments across the county. *See* ALCOHOL ABUSE, *supra* note 1.

20. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) (West Supp. 1983-1984) (minimum sentences range from seven to sixty days in prison).

21. *Id.*

22. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(b) (West Supp. 1983-1984) (conviction of violation of (a)(1) revokes license for at least thirty days).

23. MASS. GEN. LAWS ANN. ch. 90, § 24G(a) (West Supp. 1983-1984) (minimum sentence of one year for crime of homicide-by-motor vehicle by one operating a motor vehicle under the influence).

24. Mackey v. Montrym, 443 U.S. 1, 18 (1979) (construing MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f)).

25. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West Supp. 1983-1984). *See* Commonwealth v. Moreira, 385 Mass. 792, 797, 434 N.E.2d 196, 200 (1982) (courts should avoid the term "presumption" and instead use "inference"); *see also* Com-

evidence of a person's failure or refusal to consent to a breathalyzer or blood test is not admissible for this purpose in the trial of a driving under the influence charge.[26]

The statute also delineates the specific procedures the police must follow when an arrested person refuses to submit to testing. A report of such refusal must be immediately prepared by the officer witnessing the refusal, and must be signed by a third person witness and by the local police chief.[27] The report is forwarded to the Registrar of Motor Vehicles, and, immediately upon receipt, the driver's license of the accused "shall" be suspended for ninety days.[28] Post-suspension review of license revocation is immediately available before the Registrar[29] with an appeal to the Registry Board of Appeal.[30]

Massachusetts law affords two additional statutory rights which interact with the "implied consent" law. Any person held in custody on a charge of operating under the influence shall be informed immediately upon being booked "of the right to an independent medical examination by a physician of his choice" and must be given a reasonable opportunity to exercise that right.[31] The accused must be given a copy of this law or the police must post a copy in a conspicuous place in the police station.[32] Finally, any arrested person who is in custody at a station or place of detention shall be permitted to use a telephone "to communicate with . . . family or friends, or to arrange for . . . bail, or to engage the services of an attorney."[33]

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monwealth v. Brooks, 366 Mass. 423, 426, 319 N.E.2d 901, 903 (1974). The constitutional issues raised by presumptions or inferences of intoxication are discussed in Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes,* 20 SAN DIEGO L. REV. 301 (1983).

26. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West Supp. 1983-1984). *See* Commonwealth v. Scott, 359 Mass. 407, 269 N.E.2d 454 (1971); *cf.* S.D. CODIFIED LAWS ANN. §§ 32-23-10.1 & 19-13-28.1 (Supp. 1983); South Dakota v. Neville, 103 S. Ct. 916 (1983).

27. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1983-1984).

28. *Id.*

29. *Id.* § 24(1)(g).

30. *Id.* § 28; *see also* 540 C.M.R. REGISTRY OF MOTOR VEHICLES § 11.02.

31. MASS. GEN. LAWS ANN. ch. 263, § 5A (West 1970). *See* Commonwealth v. Alano, 388 Mass. 871, 448 N.E.2d 1122 (1983).

32. MASS. GEN. LAWS ANN. ch. 276, § 33A (West 1972).

33. *Id. See* Commonwealth v. Meehan, 377 Mass. 552, 567, 387 N.E.2d 527, 535 (1979) (noncompliance with statutory duty is only one factor in determining whether unfavorable evidence obtained without an opportunity to telephone should be excluded at trial); Commonwealth v. Jones, 362 Mass. 497, 503, 287 N.E.2d 599, 603 (1972) (violation of statute occurs only when defendant is intentionally denied access to a telephone); *see also* Commonwealth v. Daniels, 366 Mass. 601, 610, 321 N.E.2d 822, 829 (1975).

The police must advise the detainee of this right "forthwith upon his arrival" at the police station and must permit use of a telephone "within one hour thereafter."[34]

Provisions of drunk driving laws of other jurisdictions, either by express terms or through judicial interpretation, vary significantly from the Massachusetts approach. Some states expressly make a refusal to consent to testing admissible as evidence of guilt in a subsequent criminal trial.[35] In at least one instance, refusal constitutes a separate criminal offense.[36] In Oregon[37] and Alaska[38] an accused is given no advice on the legal consequences of a decision not to submit to testing until after an initial refusal to test has been made. A request to consult with counsel or to delay for the purpose of gaining outside advice is generally treated as a binding constructive refusal.[39] Some states

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At least one court has expressly held that a statutory right to a phone call does not attach until after sobriety testing has been completed. Copelin v. State, 635 P.2d 492, 493 (Alaska Ct. App. 1981), *rev'd,* 659 P.2d 1206 (Alaska 1983).

A major difference between the statutory right to a phone call and the right of access proposed in this article is the nature of the opportunity offered. A statutory duty would appear to be satisfied if the police allow the suspect one chance to make a single phone call. This article proposes a "reasonable opportunity" to contact counsel which would include a right of repeated access short of frustration of the basic evidence-gathering purposes of the implied consent law. *See infra* text accompanying notes 137-44.

34. MASS. GEN. LAWS ANN. ch. 276, § 33A (West 1972).

35. *See, e.g.,* ALASKA STAT. § 28.35.032(e) (Supp. 1982); ME. REV. STAT. ANN. tit. 29, § 1312(8) (Supp. 1983-1984); S.D. CODIFIED LAWS ANN. §§ 32-23-10.1 & 19-13-28.1 (Supp. 1983).

36. ALASKA STAT. § 28.35.032(f) (Supp. 1982) (refusal to submit to BAC testing is a Class A misdemeanor punishable by a minimum sentence of imprisonment of not less than 72 consecutive hours; subsequent convictions for this offense carry sentences of up to 20 days; conviction also carries mandatory enrollment in an alcohol rehabilitation program).

37. State v. Newton, 291 Or. 788, 803, 636 P.2d 393, 401 (1981). *But see* OR. REV. STAT. § 487.805(1) (1983) (statute subsequently amended to require disclosure to driver of consequences of test).

38. Copelin v. State, 659 P.2d 1206, 1212 n.15 (Alaska 1983) (citing Wirz v. State, 577 P.2d 227 (Alaska 1978)) ("The police are not required to inform the arrestee that he has the right to refuse; however, if he does refuse, he must be advised of the consequences flowing from his refusal and be permitted to reconsider his refusal in light of that information.")

39. *See, e.g.,* Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979); State v. Braunesreither, 276 N.W.2d 139 (S.D. 1979); State v. Heles, 272 N.W.2d 808 (S.D. 1978); Fgeldsted v. Cox, 611 P.2d 382 (Utah 1980); Brewer v. State Dep't of Motor Vehicles, 23 Wash. App. 412, 595 P.2d 949 (1978); *cf.* Sedlacek v. Pearson, 204 Neb. 625, 284 N.W.2d 556 (1979).

specifically preclude consultation with an attorney prior to testing,[40] while others create a right of access by court rule or legislative provision.[41] Many states have lengthened the period of automatic license suspension for refusal to submit to BAC testing and have increased penalties for convictions.[42] One state even provides that failure of a blood alcohol test is conclusive evidence of guilt in a drunk driving prosecution.[43]

These implied consent laws and related statutes apply at a purely criminal stage of a DUIA case. A civil or administrative license revocation proceeding commences only *after* an express or implied refusal to submit to testing.[44] Prior to such refusal, the police are engaged in a criminal investigation the sole purpose of which is to obtain the most essential and probative evidence of guilt—the results of a blood alcohol content test.[45] Thus, a person arrested on a drunk driving

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40. *E.g.,* State v. Jones, 457 A.2d 1116, 1117 (Me. 1983).

41. For example, N.C. GEN. STAT. § 20-16.2(a)(6) (1983) expressly establishes a right to call counsel prior to testing. *See* Seders v. Powell, 298 N.C. 453, 457-60, 259 S.E.2d 544, 547 (1979); *see also* Copelin v. State, 659 P.2d 1206, 1210 (Alaska 1983) (interpreting ALASKA STAT. § 12.25.150(b) (1980) and Alaska Criminal Rule 5(b)); State v. Vietor, 261 N.W.2d 828, 830 (Iowa 1978) (statute required peace officer to "permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of his or her family or an attorney of his or her choice"); Prideaux v. State Dep't of Pub. Safety, 310 Minn. 405, 415, 247 N.W.2d 385, 392 (1976) (statute required officer to "admit any resident attorney retained by or in behalf of the person restrained, or whom he may desire to consult, to a private interview at the place of custody"); Gooch v. Spradling, 523 S.W.2d 861, 865-66 (Mo. Ct. App. 1975) (statute and court rules provided the right "to consult with counsel or other persons in his behalf at all times"); McNulty v. Curry, 42 Ohio St. 2d 341, 346, 328 N.E.2d 798, 802-03 n.3 (1975) (statute required that "[a]fter the arrest, detention, or any other taking into custody of a person . . . such person shall be permitted forthwith facilities to communicate with an attorney at law of his choice who is entitled to practice in the courts of this state."); State v. Fitzsimmons, 93 Wash. 2d 436, 441, 610 P.2d 893, 896, *vacated and remanded,* 449 U.S. 977, *aff'd,* 94 Wash. 2d 858, 620 P.2d 999 (1980) (court rule required that "[a]t the earliest opportunity a person in custody who desires counsel shall be provided access to a telephone . . . and any other means necessary to place him in communication with a lawyer.").

42. *See, e.g.,* ALASKA STAT. § 28.35.032 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 90, § 24 (West Supp. 1983-1984); ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1983-1984); OHIO REV. CODE ANN. § 4511.19 (Page Supp. 1982).

43. ALASKA STAT. § 28.35.030(a)(2) (Supp. 1982).

44. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1983-1984); *id.* §§ 24(1)(g) & 28 (West 1969).

45. A distinction has been drawn between the legal effects of a pre-testing denial of access to counsel in a subsequent DUIA criminal proceeding and those in a civil/administrative license revocation proceeding. Until recently it has generally been held that even if some form of right to counsel exists, its denial has no bearing in the

charge must decide whether to submit to or refuse such a test at a time when the prosecutorial forces of the state are plainly amassed against him. This article will describe how, in the present state of the law, this decision is made without any significant procedural protections beyond those gratuitously afforded by legislative largesse. Specifically, the United States Supreme Court has held that *Miranda* does not apply to police questioning pursuant to implied consent laws.[46] Lower courts have also determined that the accused enjoys no fifth[47] or sixth[48] amendment rights to remain silent or be provided legal counsel; that the administration of BAC tests are permissible searches under the fourth amendment;[49] and that due process limitations on police practices cover only deceitful or outrageous conduct.[50]

The highly vulnerable position of the accused in the unique circumstances of the implied consent testing choice demands a greater

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determination or review of a license revocation based on noncompliance with an implied consent law. *See, e.g.,* Gottschalk v. Sueppel, 258 Iowa 1173, 1180, 140 N.W.2d 866, 869 (1966); Finocchairo v. Kelly, 11 N.Y.2d at 59, 181 N.E.2d at 428, 226 N.Y.S.2d at 403; Seders v. Powell, 298 N.C. 453, 460, 259 S.E.2d 544, 550 (1979); Agnew v. Hjelle, 216 N.W.2d 291, 298 (N.D. 1974); Blow v. Commissioner of Motor Vehicles, 83 S.D. 628, 631-32, 164 N.W.2d 351, 352 (1969). These cases are premised on a distinction that confuses the existence of legal rights with the proper remedy for their violation. As pointed out in Heles v. South Dakota, 530 F. Supp. at 651, the civil and criminal nature of DUIA proceedings are "inextricably intertwined." The *Heles* court stated:

> To say that the [DUIA-detainee] 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.

Id. at 652.

46. South Dakota v. Neville, 103 S. Ct. 916 (1983). "In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda* . . . . The police inquiry . . . is similar to a police request to submit to finger printing or photography." *Id.* at 923 n.15.

47. *E.g.,* Commonwealth v. Brennan, 386 Mass. 772, 776, 438 N.E.2d 60, 65 (1982).

48. *See, e.g.,* State v. Newton, 291 Or. 788, 806, 636 P.2d 393, 403 (1981); *cf.* Heles v. South Dakota, 530 F. Supp. 646, 652 (D.S.D.), *vacated as moot,* 682 F.2d 201 (8th Cir. 1982).

49. *Newton,* 291 Or. at 805, 636 P.2d at 402-03; *cf.* Commonwealth v. Angivoni, 1981 Mass. Adv. Sh. 555, 417 N.E.2d 422 (1981); *see generally* Schmerber v. California, 384 U.S. 757 (1966).

50. *See* South Dakota v. Neville, 103 S. Ct. 916, 924 (1983); *cf.* Rochin v. California, 342 U.S. 165 (1952) (use of stomach pump to retrieve evidence violative of due process).

degree of procedural protection than is currently afforded by existing statutory and case law. This analysis will turn, therefore, to an examination of alternative bases for recognition of a limited right to consult with counsel prior to deciding whether to submit to testing under an implied consent law.

III. The Right to Counsel and the BAC Testing Choice: Federal Constitutional Bases for a Right of Access to Legal Advice

The source of a right to consult with counsel has been a matter of some difficulty for those courts which have addressed the issue. The right may first be based on an explicit court rule or statute, or inferred from the implied consent statutory scheme.[51] In view of the

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51. *See, e.g.,* State v. Fitzsimmons, 93 Wash. 2d 436, 448, 610 P.2d 893, 897, *vacated and remanded on other grounds,* 449 U.S. 977, *aff'd,* 94 Wash. 2d 858, 858, 620 P.2d 999, 1000 (1980). The initial decision in *Fitzsimmons* established a right of access based on court rules and the sixth amendment. According to these rules, promulgated by the Washington State Supreme Court, *see generally* WASH. REV. CODE ANN. § 2.04.18 (West 1981), an accused must be advised of the right to appointed counsel immediately upon being taken into custody and must "[a]t the earliest opportunity . . . be provided access to a telephone, the telephone number of the public defender or official responsible for assigning counsel, and any other means necessary to place him in communication with a lawyer." WASH. CRIM. R. 2.11(c)(2). Under Rule 2.11, "[t]he right to counsel shall accrue as soon as feasible after defendant is taken into custody, . . . when he appears before a . . . magistrate, or . . . when he is formally charged, whichever occurs earliest." *Id.* at 2.11(b)(1). The United States Supreme Court vacated the judgment in this case and remanded for clarification as to whether the decision was "based upon federal or state constitutional grounds or both." *Fitzsimmons,* 449 U.S. at 977.

In response to the Supreme Court's order, the Washington Supreme Court held that "J. Cr. R. 2.11 provides an independent and adequate state ground" for a right to contact counsel prior to making the DUIA testing decision, and reaffirmed its earlier decision. *Fitzsimmons,* 94 Wash. 2d at 859, 620 P.2d at 1000. *See* South Dakota v. Neville, 103 S. Ct. 916 (1983); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1874); *see also* Minnesota v. National Tea Co., 309 U.S. 551 (1940).

A number of courts have adopted this state law approach to the question. *See, e.g.,* Fuller v. State Dep't of Transp., 275 N.W.2d 410, 411 (Iowa 1979) (state is required to permit arrested persons, on their request, the right to consult counsel before deciding whether to submit to a chemical sobriety test pursuant to a statute); Prideaux v. State Dep't of Pub. Safety, 310 Minn. 405, 412, 247 N.W.2d 385, 393 (1976) (limited right to counsel based on the implied consent statute itself and general statutory provisions governing right of access to counsel); Gooch v. Spradling, 523 S.W.2d 861, 865 (Mo. App. 1975) (court rule specifically requires that a person arrested and held in custody shall be permitted to consult with counsel); Seders v.

clear tendency of state legislatures to tighten drunk driving laws and to facilitate prosecution thereunder, even a minimal broadening of the accused's statutory rights seems unlikely.[52] The provisions of state constitutions form a second basis for a right of access to legal advice. Although these provisions often parallel the terms of the federal Constitution, judicial recognition of state constitutional rights which are broader than those established by the Supreme Court under the United States Constitution offers an important alternative basis for greater procedural rights at the BAC testing stage.[53] This article will

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Powell, 39 N.C. App. 491, 250 S.E.2d 690, *aff'd,* 298 N.C. 453, 461, 259 S.E.2d 544, 550 (1979) (the motorist does not have a constitutional right to the assistance of counsel prior to deciding whether to take the test; the right to counsel is purely statutory); McNulty v. Curry, 42 Ohio St. 2d 341, 346-47, 328 N.E.2d 798, 802 n.3 (1975) (state statute allows a person to communicate with an attorney following arrest or detention); Narten v. Curry, 33 Ohio Misc. 94, 95-96, 291 N.E.2d 799, 800 (1972) (a person arrested for DUIA is entitled to the right of counsel equally with those charged with major felonies or other criminal acts).

Clearly, the problems raised in this article concerning the unfairness of implied consent testing procedures could be easily corrected by adoption of an explicit statutory right to consult similar to that recognized in *Fitzsimmons. See* Holmberg v. 54-A Judicial Dist. Judge, 60 Mich. App. 757, 760, 231 N.W.2d 543, 544 (1975) ("The mere allowing of a reasonable phone call to counsel prior to administering the test would be a more commendable practice on the part of the police.") Subsequent treatment of *Fitzsimmons* by the Washington lower courts indicates, however, that even an express statutory right may be very narrowly confined and may, therefore, fail to provide the type of protection needed by the DUIA detainee. *See* State *ex rel.* Juckett v. Evergreen Dist. Ct., 32 Wash. App. 49, 55, 645 P.2d 734, 737 (1982) (*Fitzsimmons* does not require that a DUIA suspect be specially advised of the rights conferred by WASH. CRIM. R. 2.11(b); the accused must make a timely request to call counsel before rule applies); *accord* State v. Wurm, 32 Wash. App. 258, 260, 647 P.2d 508, 510 (1982).

52. State v. Jones, 457 A.2d 1116, 1120-21 (Me. 1983) ("[W]ith each set of amendments [to the implied consent and drunk driving statutes] . . . protection [of the accused] has declined." *Id.* at 1120 (footnote omitted); mere existence of implied consent statute does not support inference that legislature "intended to provide access to counsel prior to test." *Id.* at 1122); *cf.* Copelin v. State, 659 P.2d 1206, 1215 (Alaska 1983) (state statute conferring right to telephone or otherwise communicate with counsel immediately after arrest requires police to honor reasonable request by DUIA suspect to contact a lawyer prior to deciding whether to submit to BAC test).

53. The United States Supreme Court has consistently recognized that the highest courts of the states are free to independently interpret their state constitutions to provide broader rights than those established by federal constitutional law. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) (states may freely impose greater constitutional restrictions on police activity than those required by federal constitution); Sibron v. New York, 392 U.S. 40, 60-61 (1968) (states may develop own constitutional law to meet local law enforcement needs); Cooper v. California, 386 U.S. 58, 62 (1967) (state constitutions may require stricter standards than federal counterpart). A number

focus on a third and final source for a right of access to counsel, the Constitution of the United States. Challenges to implied consent

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of commentators, including a United States Supreme Court Justice and two state supreme court judges, have supported the trend towards greater state constitutional protections. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (state constitutions are an independent force whose protections may extend beyond Supreme Court interpretation of federal law); Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L. Q. 1, 1 (1981) (state charters play important role in constitutional process); Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts,* 33 SYRACUSE L. REV. 731, 732 (1982) (state supreme courts may interpret state constitutions to provide greater protection for individual rights than the U.S. Constitution); Linde, *First Things First: Rediscovering The States' Bills of Rights,* 9 U. BALT. L. REV. 379, 395-96 (1980) (concluding that states need not be satisfied with minimal federal constitutional law); Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution,* 14 SUFFOLK U.L. REV. 887, 925-28 (1980) (reviewing instances where Massachusetts Constitution grants greater protections than U.S. Constitution); DEVELOPMENTS IN THE LAW—THE INTERPRETATION OF STATE CONSTITUTIONAL RIGHTS, 95 HARV. L. REV. 1324, 1368-92 (1982) (state courts free to construe state constitutions as granting safeguards beyond those required by U.S. Constitution; criminal procedure is major area of state constitutional development).

A state court decision based on an independent and adequate state ground is effectively insulated from review by the United States Supreme Court or the lower federal courts. *See* Herb v. Pitcairn, 324 U.S. 117, 128 (1945) (Supreme Court cannot review state court judgment based on adequate and independent state court grounds); *cf.* Montana v. Jackson, 103 S. Ct. 1418, 1418 (1983) (remanding case for clarification of state or federal law basis).

In areas other than constitutional challenges to drunk driving prosecutions, state courts have generally taken an aggressive approach to the development of expanded state constitutional rights. *See* People v. Bustamante, 30 Cal. 3d 88, 102, 635 P.2d 927, 935-36, 177 Cal. Rptr. 576, 585 (1981) (en banc) (right to counsel under state constitution extends to pre-indictment lineup despite contrary federal rule); People v. Belton, 55 N.Y.2d 49, 52, 432 N.E.2d 745, 746, 447 N.Y.S.2d 873, 874 (1982) (expressly rejecting Supreme Court rationale and deciding case involving a permissible search and seizure under the automobile exception to the warrant requirement on state constitutional grounds); Planned Parenthood Ass'n v. Oregon Dep't of Human Resources, 63 Or. App. 41, 57, 64, 663 P.2d 1247, 1257, 1261 (1983) (Supreme Court decisions do not foreclose state constitutional evaluation of rule regulating abortion; although rule valid under federal constitution, it is invalid under state constitution); Hansen v. Owens, 619 P.2d 315, 317 (Utah 1980) (although federal constitution would require defendant to supply handwriting exemplars, evidence inadmissible under state constitution).

State constitutional challenges to DUIA convictions or license revocation proceedings frequently involve reliance on a state privilege against self-incrimination. *See, e.g.,* Commonwealth v. Brennan, 386 Mass. 772, 779, 438 N.E.2d 60, 65 (1982) (relying on Massachusetts Declaration of Rights); State v. Jackson, 637 P.2d 1, 4 (Mont. 1982) (relying on Montana constitution), *remanded for clarification,* 103 S. Ct. 1418 (1983); State v. Franco, 96 Wash. 2d 816, 829, 639 P.2d 1320, 1327 (1982)

procedures or prosecutions based thereon have been variously made under the search and seizure clause of the fourth amendment,[54] the

(en banc) (relying on Washington constitution). State constitutional privileges against self-incrimination may, by their terms, offer more extensive protection than the fifth amendment to the United States Constitution. *Compare* MASS. CONST., pt. 1, art. XII (no person shall "be compelled to accuse, or furnish evidence against himself") *and* WASH. CONST., art. 1, § 8 ("[n]o person shall be compelled in any criminal case to give evidence against himself") *with* U.S. CONST. amend. V (no person "shall be compelled in any criminal case to be a witness against himself").

Despite the acknowledged power of state courts to give expansive interpretations to state constitutions, most state courts have adopted the Supreme Court's approach to the privilege against self-incrimination, reasoning that federal and state provisions are co-extensive, having the same historical genesis, scope and purpose. *See* Commonwealth v. Brennan, 386 Mass. 772, 781-82, 438 N.E.2d 60, 67 (1982) (concluding that state constitution, like federal, permits admission of evidence derived from field sobriety and breathalyzer tests); State v. Arsenault, 115 N.H. 109, 111-13, 336 A.2d 244, 246-47 (1975) (because of common history and rationale behind federal and state privileges against self-incrimination, breathalyzer and field sobriety test results found admissible); State v. Franco, 96 Wash. 2d 816, 825, 639 P.2d 1320, 1327 (1982) (although state constitution may grant greater protections than federal, implied consent law is constitutional under both); *see also infra* notes 205-06, 208, 212 and accompanying text (discussing *Schmerber* holding that blood alcohol testing evidence is nontestimonial and admissible under federal constitution). *But see* State v. Neville, 312 N.W.2d 723 (S.D. 1981), *rev'd and remanded,* 103 S. Ct. 916 (1983), *aff'd,* 346 N.W.2d 425 (S.D. 1984)(state constitution provides broader protection against self-incrimination than federal constitution); State v. Jackson, 637 P.2d 1, 4 (Mont. 1982) (admission of defendant's refusal to take breathalyzer test violates state constitution), *remanded for clarification of basis of decision,* 103 S. Ct. 1418 (1983); Application of Baggett, 531 P.2d 1011, 1021 (Okla. 1974) (refusal to take blood alcohol test not admissible as evidence under state constitution despite contrary federal view).

United States Supreme Court Justice William J. Brennan, Jr., has urged that lawyers recognize the importance of raising state constitutional claims as an explicit litigation strategy. Brennan, *supra,* at 502. To the extent that existing principles of federal constitutional law preclude successful challenges to the BAC testing procedures attacked by this article as fundamentally unfair, future state court litigation must increasingly focus on the alternative provisions of state constitutions governing due process and the right to counsel as the source of greater procedural protections, including a right of access to counsel, for the DUIA accused.

54. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Of the various constitutional bases arguably supporting a right to counsel at the BAC testing stage, the fourth amendment is by far the least tenable. Before determining whether access to counsel would be a meaningful protection for fourth amendment rights, the existence of such rights *vel non* at the breath analysis stage must first be established. DUIA defendants have asserted that the testing of a blood

privilege against self-incrimination protection of the fifth amendment,[55]

or breath sample without a warrant is an unreasonable seizure of evidence which must be suppressed at trial pursuant to the exclusionary rule. *See, e.g.,* State v. Newton, 291 Or. 788, 805, 636 P.2d 393, 402-03 (1981); State v. Arsenault, 115 N.H. 109, 110, 336 A.2d 244, 246-47 (1975). *See generally* Wong Sun v. United States, 371 U.S. 471, 485 (1963); Mapp v. Ohio, U.S. 643, 655 (1961).

Schmerber v. California, 384 U.S. 757 (1966), effectively disposed of this contention so long as certain specified requirements are satisfied. In *Schmerber,* the United States Supreme Court acknowledged that the taking of a blood sample without a warrant implicates the fourth amendment. *Id.* at 767. The Court held, however, that the right to be protected in "personal privacy and dignity against unwarranted intrusion by the State" was not violated by the forced extraction of a blood sample. *Id.* at 770. The Court applied the standard "exigent circumstances" exception to the general warrant requirement of the fourth amendment. The function of the constitutional protection against unreasonable searches and seizures is to guard against only those physical intrusions not justified by exigent circumstances or carried out in a proper manner. *Id.* at 768.

The only inquiries a court must make are: (1) whether the police had probable cause to make an arrest for driving while intoxicated and therefore a "clear indication" that a test would uncover evidence of drunkenness; (2) whether the officer reasonably believed an emergency existed in which the delay necessary to obtain a search warrant threatened the destruction of evidence; and (3) whether the means employed to withdraw the blood was reasonable. *Id.* at 769-71. Answering all queries in the affirmative, the Court held that the police were justified in extracting blood from Schmerber without first having obtained a warrant. *Id.* at 772. *See generally* Note, *Forcible Administration of Blood Tests:* Schmerber v. California, 14 U.C.L.A. L. REV. 680, 689-92 (1967) (discussing *Schmerber* Court's treatment of fourth amendment issue); *Blood-Alcohol Analysis and the Fourth Amendment,* 10 SEARCH & SEIZURE L. REP. 117 (1983) (examining the constitutional and procedural grounds upon which to base a defense against a DUIA charge).

Lower courts addressing the constitutionality of blood and breath tests have concentrated on these three *Schmerber* criteria. *See* People v. Kates, 53 N.Y.2d 591, 594, 428 N.E.2d 852, 853-54, 444 N.Y.S.2d 446, 448 (1981) (taking of blood sample does not violate fourth amendment because search not unreasonable given probable cause, exigent circumstances, and reasonable means); *accord* State v. Arsenault, 115 N.H. 109, 112, 336 A.2d 244, 246-47 (1975); State v. Newton, 291 Or. 788, 805, 636 P.2d 393, 402-03 (1981). These cases have uniformly held that given the highly evanescent nature of alcohol in the blood, the minimal nature of the intrusion into the body caused by blood, breath, and urine tests, and the usually reasonable belief that the test would reveal intoxication, blood and breath tests do not violate the fourth amendment.

The Oregon Supreme Court expressly addressed whether the fourth amendment affords an individual the right to consult with an attorney prior to being subjected to a breathalyzer test. In *Newton,* the court declared that because the police could lawfully seize a sample of the defendant's breath without regard to issues of consent, the assistance of counsel would have no bearing on the validity of the procedure. 291 Or. at 806, 636 P.2d at 403. Because a reasonable search and seizure could be compelled, the court held that the fourth amendment provided no basis for a right to counsel prior to deciding on submission to the breathalyzer test. *Id.*

55. In pertinent part U.S. CONST. amend. V provides: "No person . . . shall

the right to counsel provisions of the sixth amendment,[56] and the general due process clause of the fourteenth amendment.[57]

The Supreme Court of the United States has never addressed the specific question whether a person charged with drunk driving has a constitutional right to speak with a lawyer prior to submitting to or refusing a BAC test. When the Court has been presented with constitutional challenges to the operation of implied consent laws or police practices involved in the gathering of evidence in drunk driving cases, it has declined to broaden the procedural rights of the accused or to extend to the BAC testing stage constitutional guarantees applicable to other steps in the criminal process.[58] State and lower federal courts have generally followed this approach in deciding procedural issues under implied consent laws by giving a restrictive interpretation to Supreme Court decisions in analogous fourth, fifth, sixth and fourteenth amendment cases.[59] In recent years, however, several courts have taken a contrary position in recognizing a limited form of constitutionally-based right of access to counsel for the drunk driver.[60] These decisions highlight both the theoretical difficulties and practical importance of such a right.

A. THE RIGHT TO CONSULT AS AN INCIDENT OF FOURTEENTH AMENDMENT DUE PROCESS

The due process clause of the fourteenth amendment[61] embodies

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be compelled in any criminal case to be a witness against himself . . . ." *See* South Dakota v. Neville, 103 S. Ct. 916, 918 (1983); Commonwealth v. Brennan, 386 Mass. 772, 438 N.E.2d 60 (1982).

56. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." *See* Heles v. South Dakota, 530 F. Supp. 646 (D.S.D.), *vacated as moot,* 682 F.2d 201 (8th Cir. 1982); State v. Fitzsimmons, 93 Wash. 2d 436, 442, 610 P.2d 893, 897, *vacated and remanded,* 449 U.S. 977, *aff'd,* 94 Wash. 2d 858, 859, 620 P.2d 999, 1000 (1980).

57. U.S.CONST. amend. XIV, §1 provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *See* State v. Newton, 291 Or. 788, 808, 636 P.2d 393, 405 (1982).

58. *See* South Dakota v. Neville, 103 S. Ct. 916 (1983); Mackey v. Montrym, 443 U.S. 1 (1979); Breithaupt v. Abram, 352 U.S. 432 (1953).

59. *See supra* note 11 and cases cited therein.

60. *See* Heles v. South Dakota, 530 F. Supp. 646 (D.S.D.), *rev'd and remanded on other grounds,* 682 F.2d 201 (8th Cir. 1982); State v. Newton, 291 Or. 788, 636 P.2d 393 (1982); State v. Fitzsimmons, 93 Wash. 2d 436, 610 P.2d 893, *vacated and remanded,* 449 U.S. 977, *aff'd,* 94 Wash. 2d 858, 620 P.2d 999 (1980).

61. *See supra* note 57. Since implied consent laws are enacted solely by state legislatures, there is no need for this article to discuss restraints imposed on the federal government by the due process clause of the fifth amendment.

societal notions of fundamental fairness and reasonableness.[62] In comparison to other constitutional provisions considered in this article, due process standards for determining restrictions on state governmental action pursuant to the clause are relatively flexible. The context in which the clause applies, the particular circumstances of each case, and a consideration of the governmental interests and individual rights involved define the requirements of due process.[63] Establishment of a limited right to contact a lawyer prior to making the "agonizing choice"[64] required by implied consent laws is consistent with the historic purposes of the fourteenth amendment and provides a very strong basis for future judicial consideration of this issue.

1. Due Process Standards and the Implied Consent BAC Testing Decision

The great virtue of a fourteenth amendment approach—the dynamic, flexible and responsive nature of the concept of "due process"—is also a significant disadvantage. As a result of the amorphous character of the concept, judicial consideration of the due process implications of implied consent laws provides limited guidance on the proper fourteenth amendment standard to be applied to the right proposed by this article. This section will describe the primary fourteenth amendment decisions on issues relating to implied consent

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62. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 425-96, 526-81 (2d ed. 1983) (describing history and purposes of the fourteenth amendment).

63. *See, e.g.,* Hewitt v. Helms, 103 S. Ct. 864, 872 (1983) ("The requirements imposed by the [Due Process] Clause are, of course, flexible and variable dependent upon the particular situation being examined."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972)("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

> In Betts v. Brady, 316 U.S. 455 (1942), the Court stated:
> Due process of law . . . formulates a concept less rigid and more fluid than envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case.

Id. at 492. The fourteenth amendment prohibits practices which are offensive to "common and fundamental ideas of fairness and right." *Id.* at 473. The Supreme Court in Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), reiterated that " ' "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions. . . .' " *Id.* at 895 (quoting Joint Anti-Facist Comm. v. McGrath, 341 U.S. 123, 162-63 (1950) (Frankfurter, J., concurring)).

64. Hall v. Secretary of State, 60 Mich. App. 431, 440, 231 N.W.2d 396, 399 (1975).

laws and will propose an analytical framework for future evaluation of the due process rights of DUIA suspects.

The due process clause of the fourteenth amendment has been expressly relied on in at least three cases to support a limited right of access to counsel at the BAC testing stages of a DUIA prosecution. In *State v. Newton,*[65] a plurality of the Supreme Court of Oregon held that the "opportunity of an arrested person to promptly communicate beyond confinement"[66] included the right of a DUIA defendant "to call a lawyer before deciding to submit to breathalyzer testing."[67] This right to communicate with counsel was characterized as a "significant and substantial liberty"[68] interest within the fourteenth amendment concept of substantive due process.[69] As such, the state,

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65. State v. Newton, 291 Or. 788, 636 P.2d 393 (1981). In *Newton* the defendant was arrested for driving under the influence and immediately given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). Two hours later he was asked to take a breathalyzer test. He then requested an opportunity to talk to a lawyer. Despite the availability of a telephone, the officer in charge, quoting a standard Oregon State Police informational form, informed the accused that he was " 'not entitled to have an attorney present at this breath test and [that] any request for delay [would] constitute a refusal' " of the test. 291 Or. at 793, 636 P.2d at 396. Newton submitted to the test. On appeal from the trial court's suppression of the test results, a plurality of the Supreme Court of Oregon held that the refusal to permit communication with counsel constituted an unconstitutional constraint on the accused's liberty in violation of the fourteenth amendment.

66. *Newton,* 291 Or. at 809, 636 P.2d at 406.

67. *Id.*

68. *Id.*

69. *Id.* at 808, 636 P.2d at 405 n.10. *Newton* is the only case to invoke substantive rather than procedural due process principles in establishing a right of access. These two concepts must be distinguished before continuing the analysis.

In the procedural sense, due process refers to the conditions under which the state may deprive an individual of life, liberty or property. Where such deprivations may result from governmental action, the state must provide fair procedures supporting the basis for and legality of its action. *See, e.g.,* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests"); Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (due process imposes a "duty . . . to follow a fair process of decisionmaking when it acts to deprive a person of his possessions"); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."). *See generally* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Matthews v. Eldridge: *Three Factors in Search of a Theory of Value,* 44 U. CHI. L. REV. 28, 30, 37-57 (1976) (setting forth and critiquing due process standards of *Mathews v. Eldridge*); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection,* 127 U. PA. L. REV. 111, 114-25 (1978) (discussing fairness values that underlie due process).

Substantive due process refers to limitations which extend beyond the methods

represented by police officers, could not place "purposeless re-

of governmental action to the substance or content of that action. *See, e.g.,* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Lochner v. New York, 198 U.S. 45 (1905). *See generally* Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon,* 1976 B.Y.U. L. REV. 43 (discussion of due process in terms of a court's discretion to protect "fundamental rights" not textually found in Constitution).

A plausible argument can be made that the right proposed in this article is supported by fourteenth amendment substantive due process. This species of due process prohibits state denials of fundamental civil liberties unless there is a compelling governmental interest supporting the denial. In its contemporary form, substantive due process involves judicial enforcement of rights which, although not found in any specific textual provision of the Bill of Rights, are deemed to have a "value so essential to individual liberty in our society" that only the most compelling state interest will justify their abridgement. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 62, at 457. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Professors Nowak, Rotunda, and Young assert that the "[Supreme] Court has implicity recognized a right to fairness in the criminal process as a fundamental right although its 'fundamental' nature has not been the subject of a specific decision." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 62, at 460 (footnote omitted). *See generally* Bounds v. Smith, 430 U.S. 817 (1977) (right to legal materials and access to courts); Mayer v. Chicago, 404 U.S. 189 (1971) (right to transcript in misdemeanor appeals); Douglas v. California, 372 U.S. 353 (1963) (right to counsel in first appeal).

Thus, under implied consent laws, the proper inquiry in a substantive due process analysis is whether the fundamental right to basic fairness in criminal proceedings includes the proposed right of a DUIA suspect to have reasonable access to counsel at the breathalyzer stage. This, in turn, depends on the suspect's interests at stake at this point, the effects of a denial of counsel on later stages of a prosecution, and the state's reasons for refusing to provide access. An analysis of these matters, *see infra* notes 119-31 and accompanying text, demonstrates that basic fairness is seriously jeopardized by a failure to allow an opportunity for some consultation with counsel at the BAC testing decision stage. Although this does raise substantive due process objections, the generally disfavored status and highly unstructured nature of this concept make a traditional procedural due process analysis the preferred approach to the issue.

State v.Newton, 291 Or. 788, 636 P.2d 393 (1981), highlights the difficulties of a substantive due process approach. As pointed out by Justice Linde in his dissent, *id.* at 819-24, 636 P.2d at 412-15, the attempt to engraft a right of access onto an amorphous liberty interest in not being held "incommunicado" ignores the substantive due process focus of existing Supreme Court case law on the right to privacy. *See* Roe v. Wade, 410 U.S. 113 (1973) (abortions); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception). "Neither [the Supreme Court] nor any court familiar with federal constitutional law would cite as the source of its 'analysis' [of the right of access issue in DUIA cases] a quotation from a single justice dissenting from a dismissal of an appeal in a birth control case." *Newton,* 291 Or. at 824, 636 P.2d at 415 (referring to Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 543 (1961)). Justice Linde correctly pointed out that the liberty interests of the DUIA suspect are those threatened by potential imprisonment for the com-

straints"[70] on the accused's liberty by either refusing a DUIA suspect's reasonable and timely request to contact a lawyer or by construing that request as a refusal to submit to testing.[71]

The decisions in *Heles v. South Dakota*[72] and *Hall v. Secretary*

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mission of a crime. *Newton,* 291 Or. at 824, 636 P.2d at 415 n.6. Accordingly, constitutional violations, if any, lie in a denial of procedural due process or basic fairness and should be treated as such. *Id.* at 825, 636 P.2d at 416.

70. *Newton,* 291 Or. at 809, 636 P.2d at 406.

71. *Id.*

72. 530 F. Supp. 646 (D.S.D.), *vacated and remanded,* 682 F.2d 201 (8th Cir. 1982). The precedential value of *Heles* is undercut by the unusual procedural posture of the case. The State of South Dakota appealed a district court decision in Heles' favor. During the pendency of the appeal the original plaintiff, Heles, died. Since the action was an individual one for declaratory relief only, the Eighth Circuit dismissed the case as moot. 682 F.2d at 202. "This is not a class action, nor was there a prayer for damages. The controversy is wholly personal to plaintiff and cannot survive him." *Id.* For these reasons the court vacated the judgment and remanded with directions to dismiss the complaint. *See generally* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1238 (1969) (federal courts must be presented with justiciable controversy in declaratory judgment proceeding; Constitution prohibits federal courts from deciding moot questions).

Despite the ultimate disposition of the case, the *Heles* opinion is relied on extensively in this article because of the completeness of its analysis, its precision in addressing many of the important aspects of a right of access, and the paucity of judicial treatment of the rights herein proposed.

Heles is one of only two federal court decisions to directly address the issue of whether DUIA detainees have a constitutional right to consult with counsel prior to making the BAC testing choice. In *Heles,* plaintiffs Heles and Braunsreither were South Dakota citizens whose licenses had been revoked under the South Dakota implied consent law for refusing to take breathalyzer tests. *See* S.D. CODIFIED LAWS ANN. § 32-23-10 (Supp. 1983). Heles was arrested for DUIA in 1975 and immediately read the South Dakota "Implied Consent Warning." In response to a request that he take a breathalyzer test Heles asked the arresting officer for advice, which was refused. He was then transported to the police station and again asked to submit to testing. When he insisted on calling his lawyer, Heles was read the *Miranda* warnings and informed that continued insistence on this right would be construed as a refusal. One hour after his arrest, Heles succeeded in contacting his lawyer who advised him to take the test. The police, however, denied Heles' subsequent request.

Braunsreither's case paralleled that of Heles, with the important difference that his request to call his lawyer was initially honored by the police. Several unavailing attempts to contact counsel were made. At this point, one and one-half hours after the arrest, the police demanded a decision and advised Braunsreither that failure to give a "yes" or "no" answer would be construed as a refusal. This occurred despite the defendant's persistence in wanting to talk with his attorney. This constructive refusal to take the test became binding when the defendant shortly thereafter changed his mind, sought to take the test, and was denied a second chance by the police.

Both defendants appealed the revocation of their licenses. The Supreme Court

of State[73] premise a right of access to counsel on traditional principles of procedural due process. Both cases held that, in view of the far-reaching legal consequences of the BAC testing decision, it was fundamentally unfair to refuse a suspect's request to consult with counsel prior to compelling the testing choice imposed by implied consent laws.[74]

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of South Dakota held that neither arrested driver had a " 'legal or constitutional right to consult counsel before deciding [to take a breathalyzer test], and that a request to delay the test for that purpose is . . . a refusal.' " *Heles,* 272 N.W.2d 808, 810 (S.D. 1978) (quoting Peterson v. State, 261 N.W.2d 405, 410 (S.D. 1977)).

In the § 1983 federal court suit which then followed, it was found that the denial of a reasonable request to attempt to obtain legal advice was "inconsistent with the due process demands of both the Sixth and Fourteenth Amendments." *Heles,* 530 F. Supp. at 652. Senior District Court Judge Nichol recognized a limited right to consult at the pre-testing stage as a basic "matter of fairness." *Id.* at 653.

The other federal suit to directly address the right to counsel of DUIA detainees is Logan v. Shealy, 500 F. Supp. 502 (E.D. Pa. 1980), *aff'd in part and rev'd in part,* 660 F.2d 1007 (4th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982). In this case it was held that a DUIA arrest was not a judicial proceeding for purposes of the sixth amendment, and thus a DUIA detainee had no right to consult with counsel prior to his decision to submit to or refuse BAC testing.

73. 60 Mich. App. 431, 231 N.W.2d 396 (1975). In *Hall,* the accused's license was revoked when he refused to submit to breathalyzer testing. Unlike most of the cases in this area, Hall was given no *Miranda* warnings after his arrest. He was simply denied access to a telephone for any purpose for a period of seven hours. This denial followed a request to the officer in charge to be permitted to make a call to the suspect's lawyer to obtain his opinion prior to submitting to a breathalyzer test. The suspect had expressly agreed to take the test before asking for the opportunity to call. A division of the Michigan Court of Appeals ordered the reinstatement of Hall's driver's license based on a finding that due process had been denied by the unreasonableness of the police officer's conduct in the case.

See also Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, *cert. denied,* 370 U.S. 912 (1962). Judge Van Voorhis concurred in a memorandum order dismissing an appeal from a license revocation for refusal to submit to a blood test on the apparent grounds that any denial of constitutional rights to due process had no bearing on a civil revocation proceeding. The judge noted that a due process right to counsel would require reversal of any criminal prosecution stemming from a refusal to test. *Id.* at 61, 181 N.E.2d at 428-30, 226 N.Y.S.2d at 404. He acknowledged that the attempt to contact counsel occurred during a criminal prosecution since the "respondent [was] . . . arrested on a criminal charge." *Id.* at 60, 181 N.E.2d at 429, 226 N.Y.S.2d at 405. "[F]airness of procedure in a criminal prosecution under the concept of due process of law does require . . . that suitable opportunity to consult with counsel be granted." *Id.* at 61, 181 N.E.2d at 429, 226 N.Y.S.2d at 405.

74. The *Heles* court stated:

> To demand that a licensed driver be subjected to a choice involving important interests [loss of driving privileges, possible criminal penalties], and possibly an intrusion into his or her body, to establish evidence of guilt, without first allowing the person to contact an attorney, would be inconsis-

The United States Supreme Court's recent disposition of two cases involving constitutional challenges to implied consent laws, although not directly deciding whether there is a due process right to consult counsel, shed light on the controlling due process principles and the viability of a constitutionally-based right of access. In *South Dakota v. Neville*[75] the Court found no violation of "fundamental fairness" in the failure of police to expressly warn a DUIA suspect that his refusal to submit to BAC testing could be admitted as evidence of

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tent with the due process demands of both the Sixth and Fourteenth Amendments.

Heles, 530 F. Supp. at 652.

In *Hall,* the court noted that "[t]he Breathalyzer test itself has apparent and serious consequences both civilly and criminally." 60 Mich. App. at 436-37, 231 N.W.2d at 397. It emphasized that it was suggesting

> a reasonable due process approach to a certain set of circumstances. . . . Plaintiff argues strongly that fundamental fairness and the statutory language [MICH. COMP. LAWS ANN. § 257.625f(2)(c) (West Supp. 1983) providing for a hearing to determine "[w]hether the [DUIA suspect] reasonably refused to submit to the test"] require that the tactical choice allowed be knowingly made.

60 Mich. App. at 440, 231 N.W.2d at 399.

Even though these cases were appeals from civil license revocation proceedings, both reviewing courts properly evaluated due process requirements in terms of the unique character of the proceedings at the pre-testing implied consent stage. *Heles,* 530 F. Supp. at 651-52; *Hall,* 60 Mich. App. at 437-38, 231 N.W.2d at 399.

75. 103 S. Ct. 916 (1983). *Neville* arose under another provision of the South Dakota implied consent law attacked in *Heles.* Neville, who refused a blood alcohol test after receiving *Miranda* warnings and an additional warning that refusal to take the test would lead to the loss of his license, challenged a provision of the law specifically declaring that such refusal was admissible in evidence in the trial of a driving under the influence case. *See* S.D. CODIFIED LAWS ANN. § 32-23-10.1 (Supp. 1983). The state supreme court suppressed the refusal evidence. Neville v. State, 312 N.W.2d 723 (S.D. 1981). The Supreme Court reversed, finding that admission of such evidence of refusal did not violate the defendant's fifth amendment privilege against self-incrimination. 103 S. Ct. at 917.

The Court also held that no violation of due process had occurred in the failure of the police to expressly warn the defendant that evidence of refusal could be used against him at a later criminal trial. Justice O'Connor's abbreviated discussion of this aspect of the case emphasized that the warnings that were given the accused contained no misleading implicit assurances that no consequences other than those specified would result from a refusal. In the absence of any unfair "trick" in the police handling of the implied consent stage, the failure to warn "comported with the fundamental fairness required by Due Process." *Id.* at 923-24.

On remand, the South Dakota Supreme Court held that although there had not been compelled self-incrimination so as to violate the state constitutional provisions, Neville's due process rights had been violated by the failure of the officer to warn Neville of the consequences of a refusal. The trial court's suppression of the refusal was affirmed. 346 N.W. 2d 425, 430-31 (S.D. 1984).

guilt in the subsequent trial of a DUIA charge.[76] *Mackey v. Montrym*[77] upheld the provisions of a Massachusetts law which limited review of the propriety of police practices surrounding a refusal to submit to BAC testing and the consequent automatic loss of a driver's license to a post-suspension hearing. The Court found that this form of hearing satisfied the fairness requirements of due process in that it entailed no substantial risk of erroneous denial of driving privileges[78] and reflected the state's paramount interest in enforcing drunk driving legislation.[79]

These cases make it clear that the first requirement for imposition of fourteenth amendment due process limitations, the presence of protectable "liberty" or "property" interests which may be lost as a result of governmental proceedings, is satisfied in the implied consent context.[80] Implied consent laws compel a decision which may either further a criminal prosecution, lead to immediate loss of driving privileges, or both. The possibility of imprisonment, loss of license or fines[81] which is inherent in the testing process is unquestionably sufficient to trigger some form of due process protection. The more difficult issue is the delineation of a standard for measuring the type of "process" that is "due" the DUIA subject.

One significant problem in stating a standard is the fact that implied consent laws in drunk driving prosecutions can lead to criminal and civil consequences. These prosecutions involve a continuum of proceedings ranging from the purely criminal stages of post-arrest investigation, evidence gathering, charging and trial, to the purely civil/administrative process of license revocation. Development of an effective due process standard for measuring the procedural rights of the DUIA suspect within this system is complicated by the interrelationship between the BAC testing decision stage and other phases of the

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76. *Neville,* 103 S. Ct. at 923-24.

77. 443 U.S. 1 (1979). In *Mackey*, Montrym's license was revoked after he refused to take a breath analysis test. The Court rejected his due process attack on statutory suspension procedures which failed to provide a presuspension hearing at which a driver could challenge police compliance with the implied consent law or raise issues regarding the propriety of a refusal to test. *See* MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f), (g) (West Supp. 1983-1984); *see also* Heddan v. Dirkswager, 336 N.W.2d 54 (Minn. 1983) (*Mackey* applied to uphold Minnesota statute providing for automatic revocation of license of driver who "fails" breathalyzer test).

78. *Mackey*,443 U.S. at 17.

79. *Id.* at 17-19.

80. *See, e.g.*, Dixon v. Love, 431 U.S. 105, 112-13 (1977); Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Bell v. Burson, 402 U.S. 535, 541-42 (1971); *cf.* Hewitt v. Helms, 103 S. Ct. 864, 869 (1983); Santosky v. Kramer, 455 U.S. 745, 758-61 (1982); Lassiter v. Department of Social Servs., 452 U.S. 18, 25, 27-28 (1981).

81. *See supra* notes 20-23, 36.

continuum that serve a combination of civil and criminal purposes.

This civil/criminal dichotomy of DUIA proceedings has had a direct bearing on judicial treatment of claims to a right of access to counsel. The fortuitous circumstance of whether the access claim is asserted in the trial or appeal of the DUIA criminal charge, or is raised in a challenge to the administrative suspension of driving privileges, has at times had a controlling effect on a court's willingness to find a violation of due process in police denials of access to counsel.[82]

A number of courts have seized on the civil/criminal distinction in rejecting the argument that because the police failed to honor a request by the accused to contact counsel, the administrative suspension or revocation of a driver's license for refusal to test should be reversed.[83] These decisions treat violations, if any, of the procedural rights of a DUIA suspect at the criminal stage as having no legal effect on subsequent civil proceedings.[84] These jurisdictions disregard the criminal overtones of the BAC testing stage in characterizing the process leading to license revocation as administrative and therefore requiring only minimal procedural protections.[85]

This formalistic view of the implied consent testing process seriously understates the need for due process safeguards and confuses the search for a workable due process standard. *Heles v. South Dakota*[86] provides a methodology for avoiding this confusion.

Heles characterized the criminal and civil proceedings of drunk driving prosecutions as being so "inextricably intertwined" that any meaningful distinction between the two was inevitably "blurred."[87] The court's solution was to measure the rights of the DUIA suspect

82. *See Heles,* 530 F. Supp. at 651 (noting that jurisdictions which hold that DUIA arrestee has no right to consult counsel prior to making BAC testing choice have done so based on a "clear demarcation" between civil and criminal proceedings, and opining that the civil/criminal distinction is actually very blurred). *See generally* Comment, *Constitutional Issues Raised by the Civil-Criminal Dichotomy of the Maine DUI Law,* 35 ME. L. REV. 385, 392-94 (1983) (discussing significance of civil/criminal distinction in state operating-under-the-influence law).

83. *See, e.g.,* Finocchairo v. Kelly, 11 N.Y.2d 58, 58, 181 N.E.2d 426, 428-29, 226 N.Y.S.2d 403, 403, *cert. denied,* 370 U.S. 912 (1962); Seders v. Powell, 298 N.C. 453, 462-63, 259 S.E.2d 544, 550 (1979); Agnew v. Hjelle, 216 N.W.2d 291, 298 (N.D. 1974); Blow v. Commissioner of Motor Vehicles, 83 S.D. 628, 631, 164 N.W.2d 351, 353 (1969).

84. *See supra* note 83 and cases cited therein; *see also* State v. Severino, 56 Hawaii 378, 537 P.2d 1187 (1975); Wolf v. Department of Motor Vehicles, 27 Wash. App. 214, 626 P.2d 688 (1980).

85. *See supra* note 83.

86. 530 F. Supp. 646 (D.S.D.), *vacated and remanded,* 682 F.2d 201 (8th Cir. 1982).

87. *Heles,* 530 F. Supp. at 651.

in light of the fact that "[t]he proceedings are all criminal in nature until testing is actually refused."[88] Judge Nichol held that the basic requirements of criminal due process necessitated an opportunity to contact counsel prior to making the BAC testing decision.[89]

For purposes of a due process formula, *Heles* may go too far in failing to emphasize the uniquely interdependent nature of the criminal and civil components of drunk driving prosecutions. Realistically, when the police inform the suspect that automatic loss of license will follow a refusal to test, the essentially criminal character of the proceeding is modified to include features of a civil or administrative undertaking. As the criminal investigation continues, a refusal to test merely triggers a parallel civil process limited to revocation of driving privileges. The criminal case can still be pursued. A due process standard should reflect both aspects of the BAC testing process.

The overlapping, interrelated criminal and civil functions of DUIA prosecutions give rise to the need for a synthesized due process formula. Such a formula may be constructed from a merger of the generalized elements of procedural due process required in the criminal context with a modified statement of the balancing-of-interests approach utilized in administrative proceedings pursuant to the Supreme Court's decision in *Mathews v. Eldridge*.[90]

The suggested synthesized standard would operate as follows: if a proposed procedural right has a demonstrable beneficial effect in safeguarding important interests of the criminally accused, its denial is fundamentally unfair unless it directly thwarts an overriding interest of the state or is plainly administratively overburdensome. The components of this standard must now be separately analyzed.

The general right to fourteenth amendment due process in criminal cases includes both the specific procedural safeguards contained in the Bill of Rights and applied to the states by "incorporation,"[91] and

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88. *Id.* at 652.

89. *Id.* at 658.

90. 424 U.S. 319 (1976).

91. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 341-43 (1963) (right of an indigent to counsel in a criminal proceeding considered a fundamental right under the fourteenth amendment and must be safeguarded in federal and state proceedings); Mapp v. Ohio, 367 U.S. 643, 655-57 (1961) (fourth amendment guarantee of protection against illegal search and seizures and convictions based on such inadmissible evidence are enforceable against the states); *cf.* Palko v. Connecticut, 302 U.S. 319, 326-28 (1937) (fifth amendment protection against double jeopardy in retrials at the federal level not obligatory on states).

The term "incorporation" refers to the process by which the United States Supreme Court has utilized the general provisions of the due process clause of the

an independent set of procedural protections fashioned from the fourteenth amendment's broad requirement of fundamental fairness.[92] This

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fourteenth amendment to make selected procedural protections afforded by the Bill of Rights applicable to the states. With the exceptions of the fifth amendment requirement of grand jury indictment, Hurtado v. California, 110 U.S. 516 (1884), and the seventh amendment right to jury trial, Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916), the first eight amendments to the Constitution have been found to contain rights which are considered to be "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be fundamental," that they must be considered applicable to both the state and federal governments. *Palko,* 302 U.S. at 325. *See supra* note 69 analyzing substantive due process.

92. An independently functioning concept of "pure" or generalized due process is essential to adoption of the right proposed by this article. Professors Nowak, Rotunda and Young have observed that "[t]he adjudicative process . . . is governed by the specific guarantees of the Bill of Rights and an independent concept of fundamental fairness which is imposed by the due process clause." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 62, at 534. "Additionally, [to the specific guarantees of the fourth, fifth, sixth and eighth amendments] due process requires that all procedures be fundamentally fair. The [state] process must always conform to the twin guarantees of an impartial determination of guilt or innocence and *respect for the dignity of the individual." Id.* at 563 (emphasis added; footnotes omitted). Decisions by the United States Supreme Court in the areas of right to counsel and pre-conviction/post-conviction remedies illustrate these points.

Betts v. Brady, 316 U.S. 455 (1942), is an early example of a pure due process analysis. The issue in *Betts* was whether a *per se* right to counsel should be established for all state criminal defendants. The Court refused to extend sixth amendment protection to these defendants and chose instead to measure the rights of these defendants under a fundamental fairness test, which asked whether trial without counsel in a particular case would be "offensive to the common and fundamental ideas of fairness and right" embodied in the fourteenth amendment. *Id.* at 473. Although the result for the specific defendant in *Betts* was that his trial was not "lacking in . . . fundamental fairness," a generalized due process approach was firmly established. *Id.*

Betts was overruled in Gideon v. Wainwright, 372 U.S. 335 (1963). Although Justice Black thoroughly reviewed the fundamental fairness analysis of the *Betts* Court in his majority opinion, the ultimate conclusion that all state criminal defendants are entitled to counsel at trial was based on an application of the sixth amendment to the states by "incorporation" through the fourteenth amendment. *Id.* at 342. Justice Clark concurred in the result, but indicated that he perceived the question before the Court as one of fourteenth amendment fundamental fairness. *Id.* at 349 (Clark, J., concurring in result). Justice Clark asserted that if the Constitution requires a right to counsel in certain cases, it is unfair to vary this right depending on the sanction the defendant faces.

In Douglas v. California, 372 U.S. 353 (1963), a companion case to *Gideon*, the Court considered the related question of whether indigent criminal defendants had a right to counsel on appeals of right. In extending the *Gideon* decision to such appeals, the *Douglas* Court applied a fourteenth amendment equal protection analysis: "[t]here is lacking that equality demanded by the Fourteenth Amendment where the

latter form of due process has often been applied, as in *Mackey,* to

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rich man, who appeals as of right, enjoys the benefit of counse[l] . . . while the indigent [man] . . . is forced to shift for himself." *Id.* at 357-58. Although *Douglas,* like *Gideon,* did have the flavor of a fundamental fairness decision, it was not a pure due process case.

Any uncertainty about the continued vitality of this form of due process was resolved in two more recent decisions. In Gagnon v. Scarpelli, 411 U.S. 778, 779-81 (1973), the Court considered the propriety of the revocation of Scarpelli's probation without a hearing after he committed a burglary during his probation period. The *Gagnon* Court found that due process principles required that the revocation be reconsidered, and said that for future cases "the decision as to the need for counsel must be made on a case-by-case basis . . . . [T]here will be certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." *Id.* at 790.

In Ross v. Moffitt, 417 U.S. 600 (1974), the Court considered whether inmates had a right to counsel for discretionary appeals, a question left open in *Douglas.* In holding that the due process clause did not require the appointment of counsel for such appeals, the *Ross* Court summarized the due process rationale behind cases since *Douglas. Id.* at 610-12. Writing for the *Ross* majority, Justice Rehnquist summarized the rule thusly:

> [T]he precise rationale . . . [for these cases] . . . has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. *"Due Process" emphasizes fairness between the State and the individual dealing with the State,* regardless of how individuals in the same situation may be treated.

Id. at 608-09 (footnote omitted; emphasis added).

The Supreme Court has also used a pure due process approach to test the fundamental fairness of state practices before and after the conviction of criminal defendants. In Doyle v. Ohio, 426 U.S. 610, 613, 614 n.5 (1975), the prosecution attempted to use the post-*Miranda* warning silence of the defendant, Doyle, to impeach him when he testified at trial. The *Doyle* Court held that this practice violated the due process clause, stating that, because the *Miranda* warnings implicitly assure defendants that their silence will not be used against them, "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach." *Id.* at 618.

Criminal defendants have tried to extend *Doyle* in a number of contexts with varying success. In Anderson v. Charles, 447 U.S. 404, 407-08 (1980) (per curiam), the Court explained why the use of silence for impeachment in *Doyle* was fundamentally unfair. "*Miranda* warnings inform a person of his right to remain silent and assure him, at least implicitly, that his silence will not be used against him . . . . *Doyle* bars the use against a criminal defendant of silence maintained after receipt of government assurances." The Court elaborated on this summation of *Doyle* in Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam), when it stated that, in the absence of *Miranda* warnings, "we do not believe that it violates due process of law for a State to permit cross-examination as to arrest silence when a defendant chooses to take the stand." The Court then held that the state may determine the

civil or quasi-criminal proceedings.[93] *South Dakota v. Neville,* in examining the fairness of not warning a DUIA suspect of certain consequences of a refusal to submit to testing, is a reminder that the procedural rights of the criminally accused must conform to the general fairness strictures of the fourteenth amendment.[94] The problem with due process as an independent source of procedural rights defined in terms of "fundamental fairness" is the lack of meaningful content to any standard based thereon.[95] A modified statement of the *Mathews v. Eldridge*[96] test provides such content and is a viable standard for determining whether procedures which compel a decision on BAC testing and related matters without the guidance of counsel violate the fourteenth amendment's requirement of basic fairness.

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extent to which post-arrest silence may be used to impeach a defendant when no *Miranda* warnings are given.

Finally, in Bearden v. Georgia, 103 S. Ct. 2064, 2067 (1983), the Supreme Court used a due process/fundamental fairness analysis in a post-conviction context. In *Bearden*, the defendant had been placed on probation and required to pay restitution. He had his probation revoked and was sentenced to prison when he was laid off from his job, failed to obtain substitute employment, and was unable to pay his restitutionary obligation. *Id.* at 2067-68. The *Bearden* Court overturned the revocation of the defendant's probation, holding that to deprive Bearden of his freedom for his inability to pay a fine would be "contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 2073.

Taken together these cases indicate that the due process clause alone can provide a substantive standard for judicial review of criminal practices. While the precise nature of this pure due process analysis is ethereal in that the conception of what is fundamental and fair may vary according to the vicissitudes of Court composition and the facts of each case, the decisions do illustrate that when the Court chooses to do so, it can use the due process clause to strike down superficially adequate state practices that fail to meet a constitutional standard of fundamental fairness.

93. *Mackey,* 443 U.S. 1 (1979). *See supra* note 77; *see also* Hewitt v. Helms, 103 S. Ct. 864, 868-69 (1983) (right to adversary hearing prior to removal of prisoners from general prison population to segregated unit); Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (right to counsel at hearing to terminate parental rights).

94. *Neville,* 103 S. Ct. at 923-24.

95. *See supra* notes 63, 69; *see also Lassiter,* 452 U.S. at 24, stating that due process "expresses the requirement of 'fundamental fairness', a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is . . . an uncertain enterprise. . . ."

96. 424 U.S. 319 (1976). In *Mathews,* Eldridge challenged Social Security Administration procedures for termination of benefits under the Social Security Act. The specific issue was whether an evidentiary hearing was required prior to termination of such benefits. The Supreme Court held that due process was provided where the recipient had an effective process for contesting the denial of benefits prior to administrative action and was afforded a hearing and judicial review prior to finalization of denial of benefits. *Id.* at 332-49; *see also* Mashaw, *supra* note 69.

The *Mathews* due process standard for civil proceedings requires a balancing-of-interests test.[97] These interests include the private interests at stake in a state proceeding;[98] the risk that these interests may be improperly lost under existing procedures and the likelihood of removing this risk through changes in such procedures;[99] and any overriding governmental interests which would justify rejecting a proposed procedure modification.[100] An extension of this approach to the general area of criminal due process requires merely a specification of these private interests in terms of the individual values affected by the hybrid DUIA prosecution.[101] That is, *Mathews* need only be redefined to factor in the full range of criminal and civil consequences that flow from events occurring at the BAC testing stage. The modified *Mathews* test would consider, therefore, the DUIA suspect's interest in avoiding unfair imposition of criminal and civil penalties in a DUIA prosecution; the value of a right of access in minimizing such unfairness; and the reasons profferred by the state

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97. *Mathews*, 424 U.S. at 335. *Mathews* measures the fairness of a state procedure by considering three factors:

> First, the private interest that will be affected by . . . official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

98. *Id.*

99. *Id.*

100. *Id. See generally* Clark, Ingraham v. Wright *and the Decline of Due Process*, 12 SUFFOLK U.L. REV. 1151 (1978) (describing withdrawal of Supreme Court from due process intervention except in incorporation and privacy areas as part of return to federalism principles).

101. Nowak, *Forward—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397 (1980). Professor Nowak has offered an expanded and refined statement of *Mathews* in the form of a four stage analysis:

> First, the Court should . . . identify the values that are involved in the case . . . . Second, the Court should determine the importance of the values endangered by the state's [procedural] practice. The opinion should inquire into . . . the nature of the values reflected in . . . general principles of due process, *i.e.*, protection of individual dignity, equality of treatment, and traditional conceptions of fairness. Third, the Court should examine the impact of a ruling . . . on the reliability of the guilt-determination process, and it should evaluate the cost of administering a system with the procedural safeguard . . . sought by the defendant . . . . Fourth, the Court should determine whether the due process . . . values outweigh the social costs of a ruling adverse to the state.

Id. at 401-02 (footnote omitted).

for denying reasonable access. This "model" of due process methodology has the virtue of interjecting an explicit value preference for fundamental fairness into the process of balancing individual rights and state interests established by *Mathews*. Its application to the mixed criminal and civil aspects of DUIA prosecutions provides a workable due process structure for evaluating the proposed limited right of access to counsel at the BAC testing stage.

This article takes the position that the events surrounding the BAC testing decision (the factual background of the case, the decision itself, the test administration, if any, and the uses to which the results may be put) determine such a range of adverse legal consequences, including the possible criminal guilt or innocence of the DUIA defendant, that the denial of an opportunity to obtain legal advice at this stage constitutes a denial of fourteenth amendment due process under this standard. Recognition of a limited right of access will neither interfere with the state's legitimate interest in enforcing drunk driving and implied consent laws nor impose unrealistic administrative burdens on law enforcement personnel. The proposed right is limited to reasonable access after which a testing decision must be made. Reasonable access is practically feasible. Listings of attorneys willing to be contacted, Bar Association programs, or student-organized advisory systems could easily provide the type of access to legal advice contemplated by this proposal.[102]

2. Fundamental Fairness, the Decision to Submit to Testing, and the Need for a Constitutionally-Based Right to Consult with Counsel

The modified *Mathews v. Eldridge* standard for measuring the fundamental fairness of implied consent procedures at the BAC testing stage requires, essentially, consideration of the values attaching to the competing interests of the DUIA suspect and the state, the importance of availability of access to legal advice to the accuracy and

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102. *See, e.g.*, State v. Fitzsimmons, 93 Wash. 2d 436, 610 P.2d 893, *vacated and remanded*, 449 U.S. 977, *aff'd*, 94 Wash. 2d 858, 858-59, 620 P.2d 999, 1000 (1980).

> [A]s a practical matter the requirements [of a right of access] . . . appear to be already met in some counties in the state. In at least three counties . . . 24 hour access to appointed counsel by telephone is provided . . . . In the state's less populated counties a list of attorneys who have expressed a willingness to serve as appointed counsel for indigents could easily be supplied to the defendant by the arresting and charging officer. . . .

93 Wash. 2d at 446, 610 P.2d at 899 n.1.

fairness of the decision-making processes, and the practicability of imposing a specific duty on the state to allow a reasonable opportunity for a DUIA suspect to contact counsel.[103] Application of this standard to the breathalyzer decision suggests that a right of access under the due process clause of the fourteenth amendment should be established for the following reasons. First, at the BAC testing decision stage of a criminal drunk driving prosecution, the DUIA-accused is in such a vulnerable and adversarial position that prejudice to or loss of important legal rights is highly likely without access to legal advice. Second, existing statutory rights provide inadequate protection against such losses. Third, a right of access to counsel, limited by practical considerations, will meaningfully reduce the risk of prejudice or lost rights without compromising the state's ability to effectively prosecute drunk driving cases. These three factors will be subjected to a due process analysis in the following description of the dangers created by the circumstances surrounding the BAC testing decision and the realities of drunk driver prosecutions.

(a) Vulnerability of the DUIA Suspect

The vulnerability of the DUIA suspect arises initially from the very limited statutory rights present at the BAC testing stage. In the majority of jurisdictions, the accused must be given the *Miranda* warnings some time after arrest and, at the station house, must be informed that he has a right to refuse a blood alcohol test. He must also normally be told that refusal to submit will lead to automatic loss of his license and that there is a right to independent medical testing at his own expense. Finally, the suspect must generally be informed that *at some point* he has a right to make a phone call. [104]

In contrast to this summary information, the accused lacks awareness of a number of matters[105] that may profoundly affect subsequent proceedings (civil or criminal) and, in particular, may lead to the providing of highly incriminating, if not conclusive, evidence of intoxication, the essential element of a DUIA criminal offense.[106] In this context, the failure to supply either crucial information on the major consequences of the BAC testing choice, or reasonable access to such information, offends "traditional notions of fair play and

103. *See supra* notes 97, 101 and accompanying text.

104. *See supra* notes 8, 14-43 and accompanying text.

105. Copelin v. State, 659 P.2d 1206, 1213 n.17 (Alaska 1983), contains an extensive list of the consequences of the BAC testing decision.

106. *See, e.g., Heles,* 530 F. Supp. at 652.

substantial justice."[107]

One category of this type of information involves the additional legal consequences of a testing refusal other than loss of license.[108] The decision is now made without any awareness on the part of the accused that he or she may be criminally prosecuted regardless of submission to the test. A refusal may only mean that the accused will suffer *both* automatic loss of license and the additional penalties imposed upon conviction on drunk driving charges.[109] The refusal to submit to testing may also be admissible as evidence of guilt in any subsequent criminal trial.[110] In states following this practice, the government has an overwhelming advantage either way. If the accused submits and fails the test, there is powerful evidence of guilt; if the accused does not submit to testing, the jury may, and most likely will, infer consciousness of guilt from this refusal, thereby substantially strengthening the state's case. Finally, failure to submit to testing may constitute a criminal offense separate from a DUIA charge.[111] In this instance, actual or constructive refusal will cause the accused to unwittingly plead guilty to a crime.

Despite this lack of certain types of specific information, the DUIA-accused certainly does have at least some understanding of the effects of a decision *not* to submit. With regard to the consequences of submission there exists a second, qualitatively different, category of information lacking at the pre-testing stage which compounds the unfairness of the system. The accused has absolutely no awareness that submission to and failure of the test makes a driving-under-the-influence conviction a virtual certainty. If test failure (a designated percentage of alcohol in the blood by weight) is conclusive evidence of guilt, the test is, for all practical purposes, the defendant's only trial. Treating the test results as merely presumptive evidence of guilt will often have the same effect.[112] The accused should at least have an opportunity to weigh the possibility of a conviction and criminal

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107. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457, 463 (1940) ("traditional notions of fair play and substantial justice" implicit in due process).

108. *See supra* notes 34-35 and accompanying text (enumerating jurisdictions where refusal to submit to BAC testing is admissible as evidence in DUIA prosecution and where refusal to submit constitutes a separate criminal offense).

109. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1), (b) (West Supp. 1983-1984).

110. South Dakota v. Neville, 103 S. Ct. 916 (1983); *see also* textual discussion *supra* at 51-71 and accompanying notes.

111. *See, e.g.*, ALASKA STAT. § 28.35.032(f) (refusal to submit is Class A misdemeanor) & § 28.35.030(a)(1) (crime of driving while intoxicated) (Supp. 1982).

112. *See supra* notes 12-13.

record if the test is failed against the certain loss of driver's license and the real threat of criminal prosecution if the test is refused. Similarly, there is currently no awareness that an accused who successfully "passes" the blood alcohol test may still be criminally prosecuted if, for example, the police feel the driver was especially susceptible to the effects of alcohol and therefore not in a condition to drive.[113]

Another problem involves the current emphasis of the required advice on automatic loss of license for refusal. The accused may mistakenly believe that submission will avoid such loss when in fact loss of license is uniformly included as a sanction for a DUIA conviction, and may in some circumstances be mandatory.[114]

A far greater difficulty is raised by the near hysterical public attitude toward drunk drivers and the resultant pressures placed on the police, prosecution and judges to "crack down" in DUIA cases.[115] Rarely does the accused facing the breathalyzer choice have a meaningful understanding of the scope of criminal liability to which he

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113. The crime at issue is driving "*under the influence of intoxicating liquor.*" *See, e.g.,* MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) (West Supp. 1983-1984) (emphasis added). The standards for intoxication contained in implied consent laws, which make certain blood alcohol content readings evidence of intoxication, are generally nonconclusive guidelines for the police and juries. These laws plainly permit prosecutions to be brought against any driver, who, under the facts and circumstances of an individual case, is impaired in his or her driving capabilities as a result of the consumption of alcohol. "Failure" of a BAC test is only one indicator of such impairment.

114. *See supra* notes 16, 22 and accompanying text.

115. This article is premised on the view that drunk driving is a tragic and unnecessary social problem. The author makes no suggestion that it is inappropriate for the public to demand that lawmakers, police and the courts take all possible measures to eradicate this problem. National organizations such as MADD (Mothers Against Drunk Drivers) or SADD (Students Against Driving Drunk) can and should put pressure on the criminal justice system to respond to such demands. It is equally appropriate, however, to note that some forms of solution to the problem may simply go too far in the invasion of individual rights. The recent practice of instituting random road blocks at which drivers are stopped without regard to probable cause, and the ensuing litigation over the legality of this procedure, illustrates the danger of overreaction by the police in responding to public pressures to "get tough" on drunk drivers. *See, e.g.*, State *ex rel.* Ekstrom v. Justice Ct. of State, 136 Ariz. 1, 7, 663 P.2d 992, 996 (1983) (roadblock search for drunk drivers unconstitutional because unduly intrusive upon individual rights); Commonwealth v. McGeoghegan, 389 Mass. 137, 144-45, 449 N.E.2d 349, 353 (1983) (police roadblock search for drunk drivers unconstitutional because state failed to establish adequate police presence, lighting and warning to motorists); State v. Olgaard, 248 N.W.2d 392, 395 (S.D. 1976) (absent judicial warrant, roadblock stops of motorists to search for liquor law violations unconstitutional).

is exposed through submission to testing. Historically, the popular view was that it was more desirable to risk conviction by taking the test rather than suffer immediate loss of license.[116] The severity of recently heightened penalties for DUIA violations, especially for repeat offenders, calls this strategy into question and makes the testing choice vastly more significant.[117] By raising the stakes at the testing stage, legislatures may have correspondingly increased the need for procedural protections for the accused.

Lastly, for other suspects, particularly first-time offenders, one of the positive components of new drunk driving legislation is the

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116. The rationale for this approach centered on the options left open after testing. A DUIA defendant might enter a *nolo contendre* plea or have the case placed "on file" (no formal finding of guilt, but accused subject to conditions, such as counseling, for a specified period after which all criminal charges would be dismissed) and, by so doing, avoid entry of a criminal conviction or any form of criminal penalty while still retaining driving privileges. Compare MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) (West Supp. 1983-1984), which provides that any "prosecution commenced under this paragraph [punishing repeat offenders] may not be placed on file or continued without a finding."

117. There are numerous difficulties in the "take-the-test" strategy. In a state like Minnesota, which imposes automatic loss of license for either refusal to submit to, or failure, of the BAC test, the chance of retaining driving privileges is significantly reduced by taking a BAC test. *See* Heddan v. Dirkswager, 336 N.W.2d 54, 59-63 (Minn. 1983) (state prehearing license revocation statute not violative of due process); MINN. STAT. ANN. § 169.123(4) (West Supp. 1984) (person stopped for probable cause who refuses BAC testing has license revoked for six months; persons stopped for probable cause whose BAC tests indicate alcoholic concentration of .10% or more has license revoked for 90 days).

Repeat DUIA offenses, if convicted, face mandatory imprisonment and loss of license in many jurisdictions. *See, e.g.,* ARIZ. REV. STAT. ANN. § 28-692.01(E)-(F) (Supp. 1983-1984) (person convicted of DUIA within 60 months of first offense must serve 60 days in jail and has driving privileges revoked; person convicted of DUIA three times in space of 60 months must serve at least six months in prison and has license revoked for three-year period); N.H. REV. STAT. ANN. § 265.82-b(I) (1983) (person convicted of DUIA within seven years of first offense must serve a week in jail and has license revoked for three years; person convicted of DUIA more than twice within seven years must serve jail term and has license revoked indefinitely); VA. CODE § 18.2-270 (Supp. 1983) (person convicted of DUIA three times within five years must serve at least one month in jail).

The evidentiary weight that some jurisdictions give unsatisfactory BAC test results further militates against a decision to submit. *See, e.g.,* ALASKA STAT. § 28.35.033(a)(4) (Supp. 1982) (person with 0.10% or more blood alcohol by weight or 0.10 grams of alcohol per 210 liters of breath presumed intoxicated); CONN. GEN. STAT. ANN. § 14-227a(c)(3) (West Supp. 1983-1984) (evidence of 0.10% or more blood alcohol by weight prima facie proof of intoxication); W. VA. CODE § 17C-5-8(c) (Supp. 1983) (evidence of 0.10% or more blood alcohol by weight prima facie proof that person was under influence of alcohol).

establishment of formal alcohol education programs.[118] These programs offer counseling and reeducation for those capable of confronting a drinking-and-driving problem and reforming their behavior. Cooperation with the police, including submission to testing, may be the only means of entry into these programs. Doubts about taking the test might thus be resolved through an awareness of the positive options opened by consenting to testing and not contesting DUIA charges. The DUIA-accused now lacks any understanding of these options.

(b) Effects of Implied Consent BAC Testing Procedures on the Fairness of the Adjudicatory Process

Implied consent statutes impose a choice at a time when the accused has had no communication with the outside world, lacks critically important information, and may be subject to impaired judgment. As indicated in the previous section, the information supplied by the police totally fails to alert the accused to many of the potentially devastating consequences of the testing decision or to the dangers inherent in the circumstances surrounding the choice. The existing system thus creates a substantial risk that important rights will be lost at the pre-testing stage.

A most obvious danger is that the police will fail to comply with the minimal duty to inform the suspect of his or her limited statutory rights. These statutes fail to expressly provide sanctions for noncompliance, and courts have been very reluctant to provide any meaningful remedy for their violation.[119] A right of access to counsel would at least ensure compliance with these threshold statutory duties.

There is also a significant danger of confusion over rights conferred by *Miranda* and the absence of such rights under implied consent laws. The accused is informed of the rights to remain silent and to appointed counsel, but is then told almost immediately that these rights do not extend to the breathalyzer choice. The Supreme Court

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118. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 90, § 24D (West Supp. 1983-1984). Section 24D states, in part:

> Any person convicted of or charged with operating a vehicle while under the influence of intoxicating liquor, may, if he consents, be placed on probation for not more than two years and shall, as a condition of probation, be assigned to a driver alcohol education program . . . and, if deemed necessary by the court, to an alcohol treatment or rehabilitation program or to both . . . .

Id.

119. *See supra* notes 31-33.

has expressly held that *Miranda* does not apply to post-arrest questioning restricted to whether the suspect will submit to testing under implied consent laws.[120] Failure to understand the *Miranda* rights might lead to a refusal to say or do anything prior to having a lawyer present, which might then result in a finding of constructive refusal.[121] Alternatively, submission could lead to the making of statements which the police could construe as a waiver of *Miranda* rights.[122] Although some courts have reversed convictions or license revocations based on confusion over *Miranda* rights and implied consent obligations,[123] this case-by-case approach fails to recognize the practical dilemma facing the DUIA suspect and the harmful effects of the inherently contradictory nature of the proferred advice.[124]

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120. South Dakota v. Neville, 103 S. Ct. at 923 n.15.

121. *See supra* notes 39 & 72.

122. *See* Brady v. United States, 397 U.S. 742, 748 (1970) and Johnson v. Zerbst, 304 U.S. 458, 464 (1938), indicating that a waiver of constitutional rights must be voluntary, knowing and intelligent.

123. *See, e.g.*, Rees v. Department of Motor Vehicles, 8 Cal. App. 3d 756, 87 Cal. Rptr. 456 (1970); Calvert v. State Dep't of Revenue, Motor Vehicle Div., 184 Colo. 214, 519 P.2d 341 (1974); State v. Serevino, 56 Hawaii 378, 537 P.2d 1187 (1975); Swan v. Department of Pub. Safety, 311 So. 2d 498 (La. Ct. App. 1975); State Dep't of Highways v. Beckey, 291 Minn. 483, 192 N.E.2d 441 (1971); *cf.* Shoemaker v. State Dep't of Motor Vehicles, 11 Wash. App. 860, 526 P.2d 908 (1974) (driver's refusal to take BAC test did not result from confusion; therefore the suspension of the driver's license upheld). *See also* Comment, *Criminal Law—Accusatory Stage of Proceedings—Custody Test Requires Miranda Warnings After DWI Arrest*, 57 N.D.L. REV. 673 (1981); Wiseman v. Sullivan, 190 Neb. 724, 211 N.W.2d 906 (1973).

124. *See, e.g.*, Heles v. South Dakota, 530 F. Supp. 646 (D.S.D.), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982). The court stated:

> It is difficult for the Court to reconcile the apparent contradictions between the *Miranda* warnings, which allow the right to counsel, and an implied consent statute, which denies the person the right to consult an attorney prior to making a decision to submit to testing. *It must be impossible for the driver, forced to make an immediate decision which later may be used to convict him or her of a crime, to reconcile these contradictions.*

Id. at 651 (emphasis added).

Postponing administration of the *Miranda* warnings is hardly an effective solution to this dilemma. Attorney F. Lee Bailey, in describing his personal experience in California, has alluded to the consequences of this approach. F.L. BAILEY, *supra* note 6. According to Bailey, the practice at certain times in California is for the police to administer all sobriety tests before interrogating a DUIA suspect. There is no right to counsel directly applicable to the breathalyzer decision, but, under *Miranda*, there is such a right regarding all other questioning of the accused. The probable effect of the California approach is that a drunk driving suspect will be taken into custody without ever having been given an opportunity to explain his activities prior to the arrest. This creates a classic "Catch 22": the police cannot

Some courts and commentators have approached the right to consult issue in terms of the dangers presented by the lack of access to the defendant's ability to effectively defend at trial.[125] In cases in which there is either no statutory right to call counsel, no right to call until preliminary matters including testing have been completed, or noncompliance with the statutory duty to permit a call, the risk exists that exculpatory evidence may be irretrievably lost or aspects of the accused's defense irreparably harmed. Some common examples may be noted.

The prosecution of a DUIA case will typically be built on the results of blood alcohol tests, if any, items of physical evidence, and the testimony of police regarding observations of the defendant's physical appearance, behavior, speech and attitude. On these latter points, it may be essential to obtain a witness who is neither a police officer, suspect or station house inmate, who can provide countervailing testimony of these matters.[126] Any significant delay in contacting such a witness may totally deprive the defendant of the only meaningful evidence available to contradict the police version of facts pertaining to the defendant's actions while in custody.[127]

Similarly, a vital element of the DUIA defense may involve reconstructing the defendant's activities during the period prior to arrest. This may require contacting and interviewing witnesses to the

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engage in general questioning of the accused without offering the *Miranda* rights, yet this questioning might remove any suspicion of intoxication or demonstrate a credible if not conclusive defense to a DUIA charge. *Id.* at 39-41. This practice of foregoing *Miranda* questioning in order to avoid confusion over the absence of a right to counsel at the testing stage is an inefficient use of police resources and can lead to unnecessary infringements on the liberty interests of the DUIA arrestee.

125. *See, e.g., Fitzsimmons*, 93 Wash. 2d at 442-43, 452, 610 P.2d at 897, 902 (citing Tacoma v. Heater, 67 Wash. 2d 733, 739-40, 409 P.2d 867, 871 (1966)); *Heles*, 530 F. Supp. at 652; Copelin v. State, 659 P.2d 1206, 1213-14 (Alaska 1983) ("a violation [of the right to contact counsel] has an effect on the defendant's ability to present a defense at trial"); *see also* F.L. BAILEY, *supra* note 6; Comment, *The Drinking Driver and South Dakota's Implied Consent—The Need for Counsel*, 23 S.D.L. REV. 403, 414 (1978).

126. *See, e.g., Fitzsimmons*, 93 Wash. 2d at 452-53, 610 P.2d at 897.

127. [I] had come to a terrifying realization: The only witnesses in the station were policemen and their prisoners. The hostility of the police officers was about as subtle as the quills on an angry porcupine, and the credibility of the prisoners was not likely to hold much sway with a jury. *I needed a respectable citizen who could at least say that my speech was ordered, coherent, and showed no trace of a slur. The telephone was the only way I could put myself in the presence of such a witness.* . . .

F.L. BAILEY, *supra* note 6, at 23-24 (emphasis added).

accused's conduct, alcohol ingestion, and apparent sobriety during this period. If these witnesses are not personally known to the defendant or are transients, delay in starting an investigation may result in their being permanently lost to the defense.

Alternatively, the police may have conducted a post-arrest search of the accused's car or personal belongings and seized items of physical evidence. These might be inculpatory (empty alcoholic beverage containers) or exculpatory (documents showing the defendant's whereabouts or activities prior to the arrest). In either case, steps may have to be taken to make a record of these items or to preserve them for later use at trial. The danger that helpful evidence may "disappear" cannot be overlooked.

There is also the possibility that the accused's right to a fair trial may be diminished due to his lack of information regarding various aspects of the mechanical administration of blood alcohol tests or the right to have a specimen of the test results. It has been established that malfunctioning of certain breathalyzer testing devices is quite common.[128] The accused's ability to reconstruct the testing process in terms of the type of machine, its location (exposure to radio frequency interference), the warm-up and mechanical steps followed

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128. The inaccuracy, unreliability and variability of breathalyzer blood alcohol content readings is a matter of central importance to this aspect of a due process analysis. This article has emphasized the widespread reliance on breathalyzer testing and the overwhelming evidentiary weight accorded test results. If it is shown that current BAC analysis methods are potentially inaccurate and that a challenge to the reliability of the testing is a substantial defense at trial, a right of access to legal advice prior to testing would have strong fundamental fairness underpinnings. *See generally Single Test, supra* note 10, at 69 (description of the state-of-the-art in breathalyzer testing, the physiological effects of alcohol consumption and the processes of alcohol absorption by the body).

The primary causes of inaccurate readings are improper service or maintenance of breathalyzer machines, administration of the test by untrained personnel, and, most importantly, radio frequency interference (RFI) during testing. *See* Kelly & Trantino, *Radio Frequency Interference and the Breathalyzer: A Case Analysis*, 31 R.I. B. J. 6 (1983) (describing expert studies on breathalyzers presented in civil action to enjoin use in Rhode Island of breath test results made on Smith & Wesson model 900A breathalyzers or breathalyzers not properly certified by State Department of Health); *see also* R. ERWIN, DEFENSE OF DRUNK DRIVING CASES (MB) § 20.03 (1977); LIMITED ELECTROMAGNETIC INTERFERENCE TESTING OF EVIDENTIAL BREATH TESTERS, NHTSA TECHNICAL REPORT (1983); DOT HS-306-400 (9 out of 16 breathalyzer machines tested by U.S. Bureau of Standards found to be susceptible to RFI during use). *Cf.* Heddan v. Dirkswager, 336 N.W.2d 54, 62 (Minn. 1983) (expert testimony established at trial that Smith & Wesson breathalyzer models 900 and 900A, when properly tested and certified, were " 'reliable and accurate means of measuring alcohol concentration.' ").

by the police will directly bear on a successful repudiation of the test results at trial. Valid challenges to the unreliability of the test may be lost if the suspect is not alerted to the need for careful observation of each step of the process. Similarly, if the suspect has a right to a sample of the test specimen or test results,[129] this right must be exercised when the test is made or be permanently lost.

One court has partially premised a limited right of access on the need to guard against police abuse of discretion in the handling of DUIA cases.[130] An officer may be quite flexible in one case in providing access to a phone, offering advice on the accused's situation or otherwise generally protecting the defendant's rights. The same officer, or others on the force, may in other cases openly mislead the accused, fail to offer meaningful recognition of statutory rights, or unreasonably apply the implied consent law (as, for example, by hastily and arbitrarily construing the defendant's uncertainty as a constructive refusal to submit). The court in *Heles* found this potential for abuse in the administration of implied consent laws to be so great that, in the court's opinion, only a uniform right of limited access to counsel in all DUIA cases would remove the risks.[131]

(c) Access to Counsel as a Procedural Protection of the Rights of a DUIA Suspect

If it is accepted that the totality of circumstances existing at the BAC testing decision stage renders the operation of implied consent laws fundamentally unfair, the only remaining question is whether the suggested procedural protection, a limited opportunity for the DUIA suspect to consult with a lawyer, would substantially remove that unfairness without defeating important countervailing governmental interests.[132]

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129. At least two states mandate by statute that a separate breath sample specimen be preserved for use by the defendant. *See* OKLA. STAT. ANN. tit. 47, § 752(5) (West Supp. 1983-1984); VT. STAT. ANN. tit. 23, § 1203(a) (Supp. 1983). A similar right was judicially established in Municipality of Anchorage v. Serrano, 649 P.2d 256 (Alaska 1982); Baca v. Smith, 124 Ariz. 353, 604 P.2d 617 (1979); Gracia v. District Ct., 197 Colo. 38, 589 P.2d 924 (1979). The right was rejected in People v. Miller, 52 Cal. App. 3d 666, 125 Cal. Rptr. 341 (1975); State v. Young, 228 Kan. 355, 614 P.2d 441 (1980); State v. Cornelius, 122 N.H. 925, 452 A.2d 464 (1982). *See generally* Brady v. Maryland, 373 U.S. 83 (1963).

130. *Heles*, 530 F. Supp. at 652-53; *see also* Holland v. Parker, 469 F.2d 1013, 1015 (8th Cir. 1972).

131. *Heles*, 530 F. Supp. at 652-53.

132. The modified *Mathews v. Eldridge* due process methodology and cases considering the right to counsel issue recognize that due process rights are subject to

Clearly, the right of consultation with counsel proposed by this article would cover every one of the matters suggested in the previous sections. The facts of each case, including the type of implied consent statute applicable in the jurisdiction and the scope of the statutory protections available, will significantly affect the nature of the communication between lawyer and detainee. However, the crucial nature of the decisions to be made at the pre-testing stage, and the effects on subsequent judicial proceedings of the circumstances existing prior to, during and immediately after a refusal or submission to testing, create precisely the type of situation to which the right to counsel has historically attached.[133]

Even a short telephone conversation with counsel could cover such matters as the unstated consequences of a decision to submit or refuse, the need to identify and preserve exculpatory evidence, the importance of observation of testing devices and procedures, and the immediate potential criminal consequences of noncooperation. Counsel's presence at the police station or jail house may be necessary and practically possible, or the attorney may send some third party to assist the accused. A right to communicate with the "outside world" would also serve as a check on police arbitrariness or abuse of discretion.

Heles effectively addressed a final element of this due process analysis of the right of access. Where there is a threatened deprivation of important rights which would be substantially removed by imposition of a specified procedural safeguard, the modified *Mathews* test and generalized due process principles require consideration of any overriding governmental justifications for rejecting a proposed procedural right.[134] The state has asserted, and numerous courts have accepted,[135] the argument that provision of a right to counsel would frustrate the state's interest in obtaining evidence of intoxication in a timely fashion.[136] This objection is easily overcome by placing prac-

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overriding governmental interests, even if it is demonstrated that a proposed procedural protection will substantially reduce the risk that important rights will be lost through governmental action. *Mathews*, 424 U.S. at 319.

133. *See supra* notes 44-56 and accompanying text.

134. *See supra* notes 97-101 and accompanying text.

135. *See, e.g.*, Spradling v. Deimeke, 528 S.W.2d 759, 764 (Mo. 1975); Finocchairo v. Kelly, 11 N.Y.2d 58, 61, 181 N.E.2d 427, 429, 226 N.Y.S.2d 403, 405 (Van Voorhis, J., concurring), *cert. denied*, 370 U.S. 912 (1962); Seders v. Powell, 298 N.C. 453, 463, 259 S.E.2d 544, 549 (1979).

136. In the broadest sense, the state's interest expressed in drunk driving legislation, including implied consent laws, is "protecting the safety of its people . . . [by] preserving the safety of its public highways." Mackey v. Montrym, 443 U.S.

tical limitations on a right of access. The flexible nature of due process can accommodate these societal concerns without completely foreclosing expanded procedural protection.

A judicially created right of access would be limited by the exigencies of the BAC testing process and the underlying public policy values expressed in implied consent laws. The primary limitation would take the form of restricting a right of access to a relatively narrow time frame.[137] The exact time period would be influenced by a number of factors. At the very least, BAC testing devices require some "warm-up" period during which access could be provided.[138] Some time must also be spent by the police on miscellaneous administrative matters relating to the suspect's detention. It is particularly important to note that the rate of alcohol dissipation from the body is sufficiently slow that short delays in test administration will not normally prevent effective testing.[139] In certain circumstances a delay may even result in higher BAC readings.[140]

The *Heles* approach reflects these considerations. That court held that the opportunity to call counsel embodied in a right of access would continue until such time as delay would "affect the accuracy of the tests [or] defeat the purpose of the implied consent law."[141] *Heles* noted the minimum twenty minute warm-up period for a breathalyzer[142] while other cases indicate longer periods.[143] Although

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at 17. The specific policies of implied consent laws are deterrence of drunken driving, facilitation of evidence-gathering, and removal of dangerous drivers from the highways. *Id.* at 18; *see also Heles,* 530 F. Supp. at 653; State v. Jones, 457 A.2d 1116, 1120-21 (Me. 1983).

137. *See, e.g., Heles,* 530 F. Supp. at 653; *Hall,* 60 Mich. App. at 440, 231 N.W.2d at 399; *Newton,* 291 Or. at 809, 636 P.2d at 406.

138. *See supra* note 128; *infra* notes 142-43.

139. *See, e.g., Single Test, supra* note 10, at 73.

140. *Single Test, supra* note 10, at 87.

141. *Heles,* 530 F. Supp. at 653.

142. *Id.*

143. *Id.* The outer time limit for a valid test has been defined in terms of hours rather than minutes, and, in some cases, no time limit has been set. *See, e.g.,* People v. Cords, 75 Mich. App. 415, 425, 254 N.W.2d 911, 916 (1977) (blood sample must be "timely taken"); State v. Alexander, 16 N.C. App. 95, 99, 191 S.E.2d 395, 398 (1972) (test almost four hours after accident was "relevant and of probative value"); Commonwealth v. Tylwalk, 258 Pa. Super. 506, 510, 393 A.2d 473, 474 (1978) (test more than four hours after incident leading to arrest held admissible). Time limitations have also been statutorily established. *See* N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1983) (breath, blood, urine or saliva test may be given within two hours after arrest or within two hours after a "screening" breath test has confirmed some alcohol consumption); WIS. STAT. ANN. § 885.235 (West 1966) (test evidence is admissible if sample is taken within two hours "after event to be proved" without

a precise time need not be specified, "[i]f an attorney cannot be reached by telephone within a reasonable period of time, the [DUIA suspect] may need to make an independent decision without aid of counsel, so as not to unnecessarily delay administration of the test."[144]

This form of reasonable access to legal advice after booking and prior to testing will preserve the state's compelling need to remove drunk drivers from the highways and successfully prosecute criminal violations of drunk driving statutes. Such access, however, will respect the individual's right to fundamentally fair procedures within the due process protections of the fourteenth amendment.

B. THE BREATHALYZER DECISION AS A SIXTH AMENDMENT "CRITICAL STAGE" IN THE CRIMINAL PROCESS

Section A contains an extended description of the highly vulnerable position of the DUIA suspect at the breathalyzer testing stage.[145] This analysis of the due process rights of the accused, while constituting an independent and legally self-sufficient basis for a right of access to counsel,[146] also provides a strong foundation for consideration of the sixth amendment[147] implications of the BAC testing decision.[148] Most of the reasons for establishing a due process right apply with equal force to sixth amendment protection.

A due process analysis demonstrates that implied consent procedures are fundamentally unfair in that the imbalance of power between the state and the accused at the testing stage creates a risk

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requiring expert testimony as to its effect, but if taken after two hours, expert testimony is required to establish its probative value).

144. *Heles*, 530 F. Supp. at 653.

145. *See supra* text accompanying notes 105-18.

146. Kirby v. Illinois, 406 U.S. 682 (1972) (plurality opinion), recognized that police pre-trial practices are subject to separate challenges under the sixth and fourteenth amendments. The Court observed that police abuses "are not beyond the reach of the Constitution even if they are not specifically covered by the Sixth Amendment," and identified due process as an alternative basis for their review. *Id.* at 691-92; *see also* United States v. Wade, 388 U.S. 218 (1967); Stoval v. Denno, 388 U.S. 293 (1967); State v. Hall, 93 N.J. 552, 461 A.2d 1155, *cert. denied,* 104 S. Ct. 526 (1983) (pre-arrest detention and lineup procedures subject to due process limitations including right to presence of counsel during pre-indictment line up).

147. See *supra* note 56 for text of sixth amendment.

148. *See generally* Comment, *supra* note 125, at 412-15 (discussing applicability of sixth amendment to implied consent choice); Comment, *The Right to Counsel Under California's Implied Consent Statute,* 9 U. WEST L.A. L. REV. 73, 78-83 (1977) (arguing that the decision on testing required by California law is a "critical stage" under sixth amendment).

of permanent loss of substantive rights and the potential denial of a fair trial.[149] In these circumstances, the values embodied in the sixth amendment right to counsel and the vital role it plays in our system of criminal justice require treatment of the unique circumstances of the pre-testing stage of a drunk driving prosecution as a "critical stage"[150] for sixth amendment right to counsel purposes.[151]

The United States Supreme Court has found critical stages at which the sixth amendment right to counsel attaches at various points prior to the commencement of a formal trial.[152] *Kirby v. Illinois,* however, seems to draw an absolute line limiting critical stages to an encounter "after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[153] With only one

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149. *See supra* notes **105-31** and accompanying text.

150. *Kirby,* 406 U.S. at **683.**

151. This article proposes only that there be a right of reasonable access to counsel. The state's need to promptly administer a blood alcohol test (prior to dissipation of blood alcohol content by passage of time) and its legitimate interest in obtaining highly relevant evidence through fair procedures make the sixth amendment rights of the accused prior to testing something less than the absolute right to the presence of counsel normally imposed by the amendment. *See, e.g.,* Gilbert v. California, 388 U.S. 263, 272 (1967).

The exigencies of the testing situation require a hybrid form of sixth amendment protection structured in the same manner as a due process right of access. *See supra* notes 137-44. That is, the right would be restricted to reasonable access during the period between arrest, booking and the time by which the testing must occur or the sample will be lost.

152. *See, e.g.,* Coleman v. Alabama, 399 U.S. 1, 9-10 (1969) (preliminary hearing prior to indictment); Gilbert v. California, 388 U.S. 263, 272 (1967) (pre-trial lineup); United States v. Wade, 388 U.S. 218, 227-28 (1967) (post-indictment lineup); Massiah v. United States, 377 U.S. 201, 206 (1964) (electronically monitored statements by indicted defendant while free on bail); White v. Maryland, 373 U.S. 59, 60 (1963) (magistrate's preliminary hearing); Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (arraignment); Johnson v. Zerbst, 304 U.S. 458, 459-61 (1937) (arraignment and trial consecutively on same day); *cf.* Gerstein v. Pugh, 420 U.S. 103, 122 (1975) (informal probable cause hearing on prosecutor's information not a "critical stage" where no threat to effective defense on the merits was created).

153. *Kirby,* 406 U.S. at 689. In *Kirby,* the defendant and a companion were charged with robbery of one Willie Shard. The two were initially taken into custody on unrelated charges. An inquiry at the police station revealed a report of the Shard robbery. Kirby had traveler's checks and a Social Security card in Shard's name at the time of arrest. Shard was immediately brought to the police station where, upon entering the room in which defendant was located, he promptly identified the two men as the perpetrators of the robbery the day before. At the time of the identification, neither of the accused had been advised of a right to the presence of counsel nor had they made a request for legal assistance. At trial six weeks later, Shard

exception,[154] every court deciding the issue under a *Kirby* standard has held that the point at which a DUIA arrestee must make the testing choice required by implied consent laws is not a "critical stage" for sixth amendment purposes.[155] A brief description of *Kirby* provides the essential framework for analysis of this constitutional claim.

The *Kirby* plurality[156] refused to extend to pre-indictment lineups the holdings of *United States v. Wade*[157] and *Gilbert v. California*[158] that a post-indictment lineup is a critical stage of a prosecution requiring notice to and the presence of counsel prior to displaying the defendant for identification,[159] and that evidence in the form of in-court identifications based on or influenced by lineups conducted in the absence of counsel is inadmissible at trial.[160] The *Kirby* ruling turned on a broad distinction between "routine police investigation"[161] and the formal "initiation of . . . judicial criminal proceedings."[162] Commencement of adversary judicial proceedings signified to the Court the government's commitment to prosecution and the solidification of the defendant's adverse position.[163] According to Justice Stewart, it is only at this point that the change in the nature of the parties' relationship causes the defendant to be fully "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[164] The need for assistance of counsel, and the existence of a sixth amendment "critical stage,"

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was permitted to testify concerning the police station encounter and to identify the men again in the courtroom. *Id.* at 684-85.

154. State v. Fitzsimmons, 93 Wash. 2d 436, 445, 610 P.2d 893, 898-99, *vacated and remanded*, 449 U.S. 977, *aff'd*, 94 Wash. 2d 858, 620 P.2d 999 (1980). *Heles*, 530 F. Supp. at 652, alluded to the sixth amendment only in terms of its "due process demands."

155. *See, e.g.*, State v. Jones, 457 A.2d 1116, 1118-19 n.5 (Me. 1983); Holmberg v. 54-A Judicial Dist. Judge, 60 Mich. App. 757, 760, 23 N.W.2d 543, 544 (1975); Spradling v. Deimeke, 538 S.W.2d 759, 765 (Mo. 1975); Price v. State Dep't of Motor Vehicles, 36 N.C. App. 698, 700, 245 S.E.2d 518, 521-22 (1978); McNulty v. Curry, 42 Ohio St. 2d 341, 345, 328 N.E.2d 798, 803 (1975); State v. Newton, 291 Or. 788, 807, 636 P.2d 393, 403-04 (1981).

156. Justices Stewart, Burger, Blackmun and Rehnquist were joined by Justice Powell concurring in the result. Justices Brennan, Douglas, Marshall and White dissented.

157. 388 U.S. 218 (1967).

158. 388 U.S. 263 (1967).

159. *Id.* at 272.

160. *Id.* at 273.

161. *Kirby*, 406 U.S. at 690.

162. *Id.* at 689.

163. *Id.*

164. *Id.*

does not arise until such circumstances exist. Since a pre-indictment lineup occurs prior to a formal charge or other judicial proceedings, the Court declined to "import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings."[165]

This tightly mechanical formula for measuring the existence of sixth amendment rights is supported, therefore, by the vaguely stated rationale that the interests of a criminally accused prior to "formal charging" are *always* legally insufficient to require the assistance of a lawyer for " 'consultation, thoroughgoing investigation and preparation.' "[166] This article contends that the BAC testing stage involves much more than routine police investigation.[167] A sensitive application of *Kirby* principles, with their emphasis on confrontations with

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165. *Id.* at 690.

166. *Id.* at 688-89 n.6 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)).

167. *Wade*, 388 U.S. at 227-28, contained dicta which might be construed to remove the BAC testing phase as a "critical stage" without regard to *Kirby*. The Government argued that a post-indictment lineup was merely a "preparatory stage in the gathering of the prosecution's evidence, not different—for sixth amendment purposes—from various other preparatory steps such as systematized or scientific analyzing of the accused's finger prints, blood sample, clothing, hair, and the like." *Id.* at 227. The *Wade* Court rejected this view as applied to lineups, distinguishing scientific testing on the following grounds:

> Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that *the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts.* The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since *there is minimal risk that his counsel's absence at such states might derogate from his right to a fair trial.*

Id. at 227-28 (emphasis added). This article demonstrates that the BAC testing stage is qualitatively different from the "mere preparatory . . . gathering of . . . evidence," involved in the processes referred to in *Wade*. *See supra* notes 105-31 and accompanying text. The significance of the rights at stake at the pre-testing stage, the difficulties of reconstructing certain aspects of the process at trial, and the ensuing risk that lack of access may "derogate from [the] right to a fair trial," 388 U.S. at 228, militate against blind adherence to the Court's position in the *Wade* dicta. *Contra* State v. Jones, 457 A.2d 1116, 1119 n.5 (Me. 1983) ("The test is, in fact, a 'mere preparatory step'; the officers . . . can do nothing to impair the defendants' subsequent fair trial.").

A further distinction lies in the nature of the sixth amendment right at issue here. It is proposed only that the DUIA suspect have access to legal advice; no suggestion is made that the state be required to make counsel "present" at the police station as is normally required by the sixth amendment. *Wade*, 388 U.S. at 228.

state prosecutorial authorities in which the accused needs help facing the "intricacies of substantive and procedural criminal law,"[168] strongly supports some form of sixth amendment protection for the drunk driving suspect.

The Washington case of *State v. Fitzsimmons*[169] is the only post-*Kirby* case to explicitly adopt this position in finding a sixth amendment right to counsel at the pre-testing stage. Even though its precedential value has been diminished by procedural developments in the case,[170] *Fitzsimmons* is a powerful exposition of the reasons why a sixth amendment right of access should be recognized.

Justice Horowitz' opinion for the unanimous court applied a three part standard for measuring the existence of a right to counsel under the amendment. In addition to the *Kirby* criterion of "initiation of judicial criminal proceedings,"[171] existence of the right required a pretrial confrontation in which the accused's "right to a fair trial or other substantial rights"[172] might be affected and a situation in which the advice or presence of counsel would "aid [the accused] in coping with legal problems or . . . in meeting his adversary."[173]

These factors closely parallel the fundamental fairness rationale

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

169. 93 Wash. 2d 436, 610 P.2d 893, *vacated and remanded*, 449 U.S. 997, *aff'd*, 94 Wash. 2d 858, 620 P.2d 999 (1980). Fitzsimmons was stopped by the police at 11:00 P.M. on September 27, 1977, after his vehicle was observed swerving across the center line of the road on which he was travelling. Field sobriety tests were administered based on detection of a strong odor of alcohol on the suspect's breath and the fact that his eyes were watery. Mr. Fitzsimmons was then arrested, placed in custody, and charged by citation with driving under the influence of intoxicating liquor. A mobile DWI van arrived at 11:30 P.M. Fitzsimmons was given *Miranda* warnings, to which he responded by asking for an appointed attorney and "the right to legal advice right now." The police informed him that he could have counsel " 'at the time of pre-trial or at arraignment.' " Fitzsimmons, at some unspecified later time, refused to take a breathalyzer test and was subsequently convicted of DUIA. *Id.* at 439-40, 610 P.2d at 895-96.

170. The United States Supreme Court granted the state's petition for certiorari, vacated the judgment in the case, and remanded for clarification on whether the result in *Fitzsimmons* was based on federal constitutional law or an independent interpretation of state law. 449 U.S. 977 (1980). *See supra* note 53. On remand, the Washington Supreme Court reaffirmed its earlier opinion but pointed out that its result involved "primary independent reliance on [a] state court rule" establishing a right of access to counsel. 94 Wash. 2d 858, 858, 620 P.2d 999, 1000 (1980). The court described its sixth amendment discussion as being "supportive of the analysis of court rule provisions" but refused to repudiate that discussion. *Id.* at 859, 620 P.2d at 1001.

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

172. *Fitzsimmons*, 93 Wash. 2d at 444, 610 P.2d at 898.

173. *Id.* at 445, 610 P.2d at 898 (citing United States v. Ash, 413 U.S. 300,

of a due process analysis in at least two respects. Under the *Fitzsimmons* test, the inquiry is whether there are important individual rights at stake which may be lost at a particular procedural stage and whether an asserted procedural safeguard will provide meaningful protection for those rights. Application of this sixth amendment test leads to conclusions that are strikingly similar to those reached under due process.[174]

Justice Horowitz' consideration of the first requirement, initiation of *Kirby*-type judicial proceedings, is the most technically objectionable aspect of the case. It was found that the issuance of a citation by the police charging the suspect with drunk driving constituted the commencement of formal proceedings for *Kirby* purposes.[175] Regardless of the outcome of subsequent testing procedures, the court accepted the accused's obligation to answer the citation "in a judicial court"[176] as the functional equivalent of a formal charge under *Kirby*.

The Oregon Supreme Court's rejection of this aspect of *Fitzsimmons* in *People v. Newton* asserts that this approach "disregarded the principal holding of *Kirby* that the concept [of "critical stage"] is limited to confrontations after a formal charge is laid."[177] This view, which consistently appears in decisions rejecting sixth amendment claims,[178] may overlook the ambiguity of the *Kirby* standard.

The definition in *Kirby* of the commencement of judicial proceedings in terms of "formal charge . . . indictment, [or] information,"[179] is far from self-explanatory. In *Kirby* the defendant was under arrest and in custody, but not directly charged with having committed a crime at the time the station house identification was made. It could be argued that *Fitzsimmons* is immediately distinguishable in that issuance of a written citation is a more concrete indication of intent to prosecute than the showing of a person to a crime victim either individually or in a lineup with other suspects. The deeper conceptual issue raised by *Kirby*, however, involves consideration of when the transition occurs from investigation to prosecution in criminal cases.

An indictment or information is normally the exclusive method for commencing a serious criminal case.[180] At the very least, Justice

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313 (1973)) (sixth amendment does not require presence of counsel at post-indictment photographic display at which accused is not present).

174. *See supra* text accompanying notes 132-34.

175. *Fitzsimmons*, 93 Wash. 2d at 444, 610 P.2d at 898.

176. *Id.*

177. *Newton*, 291 Or. 788, 806, 636 P.2d 393, 404 n.9 (1981).

178. *Kirby*, 406 U.S. at 684-85.

179. *Id.* at 689.

180. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 263, §4 (West Supp. 1983-1984) which

Stewart must have had some other procedure in mind when he referred in *Kirby* to a third means, "formal charge," as establishing the presence of a "critical stage."[181] In less serious cases, issuance of a complaint by a clerk after an informal probable cause hearing might meet this requirement.[182] *Kirby* may also be open to an interpretation which would place the point of commencement of criminal proceedings earlier in the process and make any accusation against a targeted individual a sufficient charging for right to counsel purposes. If *Kirby* contemplates the likelihood of eventual court appearance as a measure of sixth amendment rights, the arrest, citation and booking of a DUIA suspect would, as in *Fitzsimmons*, satisfy the test.

This reading of *Kirby* would remain true to the plurality's distinction between routine investigation and prosecution.[183] Police procedures designed to identify the accused as the perpetrator of a crime are properly treated as different from those focusing on procuring evidence of guilt directly from a person who is in custody for an arrest based on police observation. With this latter potential defendant, the mere

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states:

> No person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court . . . .
>
> A defendant charged with an offense punishable by imprisonment . . . shall have the right to be proceeded against by indictment except when the offense charged is within the concurrent jurisdiction of the district and superior courts and the district court retains jurisdiction.

Id.

> The Federal Rules of Criminal Procedure read:
>
> An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

FED. R. CRIM. P. 7(a).

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

182. *Compare* Coleman v. Alabama, 399 U.S. 1, 7-10 (1970) (preliminary probable cause hearing prior to presenting case to grand jury is sixth amendment critical stage) *with* Gerstein v. Pugh, 420 U.S. 103, 118-26 (1975) (informal hearing on probable cause to detain arrested person pending further proceedings consistent with fourth amendment is not a critical stage). *Contra* Commonwealth v. Mandeville, 386 Mass. 393, 36 N.E.2d 912 (1982) ("The issuance of a complaint and an arrest warrant does not constitute the commencement of 'adversary proceedings' entitling a defendant to the assistance of counsel."). *See also* Commonwealth v. Smallwood, 380 Mass. 878, 884, 401 N.E.2d 802, 806-07 (1980).

183. *Kirby*, 406 U.S. at 690.

absence of formal prosecutorial charging is of little relevance to the need for legal advice or the risk of prejudice and loss of rights adhering in a pre-trial confrontation such as submission to BAC testing.[184] This is exactly the position adopted in *Fitzsimmons* under the second and third right to counsel criteria—presence of a pre-trial confrontation in which the right to a fair trial is jeopardized, and a role for counsel to play in reducing this threat.[185] These tests, based on Justice Brennan's opinion for the dissent in *Kirby*, represent an alternative to the rigid approach of the *Kirby* plurality.

The *Kirby* dissenters found that the "formal charge" cutoff point for sixth amendment rights established by the plurality wholly ignored both the reasons for extending the protections of counsel to pre-trial proceedings and the fundamental rationales of *Wade*, *Gilbert* and related cases. According to the dissent, the proper sixth amendment right to counsel focus should be on the " 'potential substantial prejudice to defendant's rights [inhering] in the particular [pre-trial] confrontation and the ability of counsel to help avoid that prejudice.' "[186] In particular, it must be asked whether " 'counsel's absence [would] derogate from the accused's right to a fair trial' "[187] because of the difficulty of reconstructing allegedly prejudicial or improper police practices.[188] A strict application of the *Kirby* plurality standard precludes any inquiries along these lines. Ultimately, the rule that there can *never* be a sufficient threat to a fair trial or loss of substantial defenses through the denial of access to counsel prior to commencement of formal judicial proceedings seriously jeopardizes sixth amendment values by potentially isolating from judicial scrutiny oppressive, overbearing or fundamentally unfair police conduct.

Fitzsimmons engages in a particularized analysis of sixth amendment rights under the standards of the *Kirby* dissent as expressed in Justice Horowitz' three part test. The court's conclusion was that failure to provide access to counsel at the BAC testing stage could lead to an unfair trial and that a limited sixth amendment right to consult with a lawyer was the appropriate procedural protection for avoiding this danger.[189]

The reasons for establishment of a form of sixth amendment protection were essentially the same as those supporting a due process

184. *Id.* at 696-97 (Brennan, J., dissenting).
185. *See supra* notes 172-73.
186. *Kirby*, 406 U.S. at 694 (quoting *Wade*, 388 U.S. at 227).
187. *Kirby*, 406 U.S. at 694 (quoting *Wade*, 388 U.S. at 226-27).
188. *Kirby*, 406 U.S. at 695 (citing *Wade*, 388 U.S. at 231-32).
189. *Fitzsimmons*, 93 Wash. 2d at 450, 610 P.2d at 900.

right. The period surrounding the BAC testing stage was a "critical stage" because of "the unique character of the evidence to be obtained and the trial strategy decisions which must be made then [prior to testing], if at all."[190] Access to counsel was particularly critical because of the "importance of intoxication as an element of the offense" of driving under the influence of intoxicating liquor.[191] Effective preparation of the only defense to such a charge, non-intoxication, might require acquisition of testimony by disinterested witnesses to the defendant's condition or police handling of the case, procurement of an independent BAC test, and, perhaps, observation of police administration of a breathalyzer test.[192] Implicit in the court's analysis was the additional assumption that the very decision whether to submit to testing constituted an essential aspect of the structuring of trial defenses.[193] Without some form of legal assistance on these matters "the results [of this confrontation between prosecution and accused] might well settle the accused's fate and reduce the trial to a mere formality."[194]

Fitzsimmons stands for the proposition that this type of fundamental unfairness is as appropriately addressed by the protections afforded by a sixth amendment opportunity to obtain legal advice as it is by the due process protections of the fourteenth amendment. *Kirby* should not be construed as an absolute bar to such protection.[195]

C. FIFTH AMENDMENT ASPECTS OF THE BLOOD ALCOHOL CONTENT TESTING PROCESS

A right to counsel at the breath analysis decision and testing stages

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190. *Id.* at 445, 610 P.2d at 898.

191. *Id.* at 445, 610 P.2d at 899.

192. *See id.* at 442, 610 P.2d at 897 (citing Tacoma v. Heater, 67 Wash. 2d 733, 739-40, 409 P.2d 867, 871 (1966)).

193. *Fitzsimmons,* 93 Wash. 2d at 453, 610 P.2d at 902-03.

> Mr. Fitzsimmons' attorney, had he been allowed to contact one, could have advised him to take the State's proposed Breathalyzer test or arranged for an independent Breathalyzer test . . . . Unbiased observations, blood tests, and supervised Breathalyzer readings could have proved that the defendant was not intoxicated at the time of his arrest and charging.

Id.

194. *Wade*, 388 U.S. at 224.

195. Strict adherence to the *Kirby* standard by federal courts will not preclude state courts from applying the reasoning of this section to reach a contrary result as a matter of state constitutional law. *See supra* note 53; *cf.* People v. Hawkins, 55 N.Y.2d 474, 435 N.E.2d 376, 450 N.Y.S.2d 159, *cert. denied,* 103 S. Ct. 103 (1982) (New York state constitution given same interpretation as sixth amendment in *Wade*; no right to counsel at pre-indictment lineup).

may arise from a finding that at those stages the accused enjoys the protections of the fifth amendment privilege against self-incrimination.[196] *Miranda v. Arizona*[197] is the most noteworthy example of the prophylactic role of counsel in safeguarding fifth amendment rights. In *Miranda* the Supreme Court concluded that an absolute right to the advice and presence of a lawyer prior to custodial interrogation of a criminal suspect was the only effective means of protecting the privilege.[198] If fifth amendment rights are infringed by the operation of implied consent laws in either compelling a decision to submit or producing incriminating evidence of guilt by the administration of BAC tests, a right of access to counsel similar to that established in *Miranda* would properly attach.[199]

The recent United States Supreme Court decision in *South Dakota v. Neville*[200] is a very serious obstacle to the establishment of such a fifth amendment right, or of any other form of expanded procedural protection for DUIA suspects. *Neville* is the only decision of the Court to directly address a constitutional challenge to the criminal consequences of noncompliance with the obligation to submit to BAC testing

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196. *See supra* note 55. The essential underlying policy of the fifth amendment is that the government must "respect the inviolability of the human personality" and "produce . . . evidence . . . by its own independent labors rather than by the cruel simple expedient of compelling it from . . . [the accused's] own mouth." Miranda v. Arizona, 384 U.S. 436, 460 (1966). *See generally* W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968) (historical background material on adoption and purposes of the amendment).

Although the fifth amendment addresses only criminal proceedings, the Supreme Court has held that the privilege against self-incrimination is also applicable in civil, investigatory and juvenile proceedings. *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 444-45 (1972). The Court has declared that the privilege guards "against any compelled disclosures that the witness reasonably believes could be used in a criminal prosecution or [that] could lead to [the production of] other evidence that might be so used." *Id.* at 445. The Supreme Court's refusal to limit the privilege to purely criminal proceedings reflects the Court's belief that an inability to invoke the privilege at one stage of a proceeding might render later invocation futile. *See* Michigan v. Tucker, 417 U.S. 433, 440-41 (1974).

197. 384 U.S. 436 (1966).

198. *Id.* at 469-70.

199. As indicated at several points in this article, *see, e.g., supra* text accompanying note 151, the DUIA suspect would not enjoy a "pure" *Miranda* right to the presence of counsel. The potential delay necessary to locate counsel and arrange for his or her presence at the testing site precludes such protection. A right of access under the fifth amendment, like that under the sixth and fourteenth amendments, is thus limited to an opportunity to consult with an attorney within a reasonable time after arrest.

200. 103 S. Ct. 916 (1983).

imposed by implied consent laws.[201] The Court held that the admission at trial of a DUIA suspect's refusal to submit to testing, as direct evidence of guilt of the substantive offense of driving under the influence, did not violate the fifth amendment privilege.[202] In reaching this conclusion, Justice O'Connor's abbreviated opinion for the Court strongly reaffirmed *Schmerber v. California*[203] as the controlling statement of fifth amendment principles applicable to the pre-trial gathering of evidence by police.[204]

The specific questions in *Schmerber*[205] were whether the police could constitutionally compel an individual arrested for driving while intoxicated to submit to withdrawal of his blood to measure alcohol content, and whether the results of such tests were admissible in court as evidence of guilt. The Court held that the fifth amendment precluded neither forced submission nor introduction of the test results into evidence.[206]

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201. *Id.* at 923-24. Mackey v. Montrym, 443 U.S. 1 (1979), rejected a due process challenge to the civil license revocation procedures initiated after a refusal to test.

202. *Neville*, 103 S. Ct. at 918.

203. 384 U.S. 757 (1966).

204. *See Neville*, 103 S. Ct. at 920-23.

205. The defendant in *Schmerber*, after drinking at a tavern and a bowling alley, was injured when the car he was driving struck a tree. 384 U.S. at 758 n.2. While being treated at a hospital for consequent injuries, the defendant was placed under arrest by police. *Id.* at 758. After the arrest, the police directed a physician to withdraw blood from the defendant, which was done over the defendant's objections. This objection was based on the advice of counsel. *Id.* at 759. Chemical analysis of the blood sample showed a percentage of alcohol which, under California law, indicated intoxication. *Id.*

The defendant, in addition to claiming that his fifth amendment rights had been violated, contended that the non-consensual withdrawal of blood constituted an unreasonable search and seizure. *Id.*; *see* U.S. CONST. amend. IV (citizenry shall not be subjected to unreasonable search and seizure). Although acknowledging that the fourth amendment was applicable, the Court held that the exigent circumstances, the reasonable means the police employed to obtain the evidence, and the probable cause for believing the defendant's blood contained evidence of intoxication justified the warrantless search and seizure. *Schmerber*, 384 U.S. at 767-68. *See generally supra* note 54 (discussing relationships between fourth amendment and blood, breath and urine tests).

Schmerber was decided under a provision of California law, CAL. VEH. CODE § 23102(a), now renumbered as § 23152(a), which made it a misdemeanor to drive while under the influence of intoxicating liquor. California law did not allow for the type of implied consent right to refuse testing considered throughout this article, nor did it treat drunk driving with the degree of severity currently found in state legislation. See *supra* text accompanying notes 109-17 for an analysis of the significance of these differences.

206. *Schmerber*, 384 U.S. at 761.

The essential protection of the fifth amendment is against forced production of incriminating verbal testimony from a criminally accused. This includes the right to remain silent and to "suffer no penalty . . . for such silence."[207] *Schmerber* defined these protections in terms of a distinction between "testimony" or "communications" on the one hand and "real or physical evidence"[208] on the other. Assuming a finding of sufficient compulsion or coercion by the state, a violation of the privilege occurs only when the evidentiary product thereof is characterizable as "testimonial" in the sense that the accused is made to become a "witness against himself"[209] by giving statements or their equivalent. The application of this standard in *Schmerber* led Justice Brennan to the conclusion that "not even a shadow of testimonial compulsion" existed in the forced withdrawal of a blood sample from a DUIA suspect.[210] The defendant's only participation was that of a donor, which in no way implicated his "testimonial capacities."[211] Because the blood analysis tests produced purely physical evidence, no fifth amendment violation had occurred and the evidence was admissible at trial.[212]

The Court has applied the *Schmerber* testimonial/real evidence distinction to other forms of pre-trial procedures. Fifth amendment

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207. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

208. *Schmerber*, 384 U.S. at 763-64.

209. *Id.* at 761. The Court explained that the testimonial/real evidence distinction, although not formally termed such, has been applied historically in both federal and state courts. *Id.* at 762-64; *see* Holt v. United States, 218 U.S. 245, 252-53 (1910) (because privilege against self-incrimination is applicable only to "compulsion to extort communications," court could lawfully require defendant to don blouse in court for purpose of identification). *See generally* Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485 (1957) (analyzing admissibility of voice and writing exemplars).

The *Schmerber* Court noted that forced submission to tests commonly considered to adduce real or physical evidence might implicate testimonial capacities where the "pain, danger, or severity" of such tests "would almost inevitably cause a person to prefer confession to undergoing the 'search'." 384 U.S. at 765 n.9. "Such incriminating evidence might be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds." *Id. See generally* Comment, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074 (1969). The Supreme Court of Minnesota found *Schmerber* inapplicable to the taking of a breath, urine, or blood sample, with the possible exception that an individual might resist the tests on religious grounds. State v. Andrews, 297 Minn. 260, 261-63, 212 N.W.2d 863, 868 (1973) (Peterson, J., dissenting), *cert. denied*, 419 U.S. 881 (1974).

210. *Schmerber*, 384 U.S. at 765.

211. *Id.*

212. *Id.*

claims have been rejected in challenges to compelled utterance of words spoken by an alleged robber in the holding of a lineup,[213] production of a voice exemplar during grand jury proceedings,[214] submission of handwriting samples,[215] and production of a taxpayer's personal papers.[216] In all of these cases the Court found the communicative content of the evidence insufficient to trigger fifth amendment protection. This type of "physical" evidence is neutral with regard to the defendant's thoughts, feelings, mental processes or state of mind.

Given the continued vitality of the *Schmerber* approach, a fifth amendment-based right of access to counsel at the breathalyzer choice stage requires a showing that the breathalyzer test produces testimonial or communicative evidence which is compelled by the state. Although the Supreme Court has never directly ruled on the matter, it is highly likely that the Court would refuse to find fifth amendment violations in the operation of implied consent laws.[217]

The *Schmerber* line of cases, buttressed by a similar approach in the lower courts,[218] strongly suggests that the result of a breathalyzer-type test is physical, non-testimonial evidence similar to the blood samples in *Schmerber*. Breathalyzer and blood withdrawal procedures share the common effect of revealing objective information pertaining to the level of alcohol in the blood and, correspondingly, the coordinative abilities of the driver. Breathalyzer tests are significantly less intrusive than the procedures utilized in *Schmerber* and the earlier case of *Breithaupt v. Abram*.[219] The accused's participation in the

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213. United States v. Wade, 388 U.S. 218, 220-21 (1966).

214. United States v. Dionisio, 410 U.S. 1, 6-7 (1973).

215. Gilbert v. California, 388 U.S. 263, 266-67 (1967).

216. Fisher v. United States, 425 U.S. 391, 408-09 (1976).

217. *Schmerber*, 384 U.S. at 765-66 n.9. The Court refused to rule on Schmerber's contention that evidence relating to his refusal to test was a testimonial by-product of the compulsion to take a breathalyzer test and was thus inadmissible under the fifth amendment. The Court's holding was limited to a finding that the results of a blood extraction procedure were not testimonial. *Id.* at 765. South Dakota v. Neville, 103 S. Ct. 916 (1983), resolved the issue of the admissibility of evidence of a refusal. *Id.* at 922.

218. *See, e.g.*, Palmer v. State, 604 P.2d 1106, 1109 (Alaska 1979) (fifth amendment offers no protection against compulsion to take tests which elicit physical evidence such as breathalyzer); State v. Charette, 110 R.I. 124, 132, 290 A.2d 858, 862 (1972) (because breathalyzer adduces real evidence rather than testimonial, defendant's fifth amendment rights not violated by introduction of test results).

219. 352 U.S. 432 (1957). In this case the Court found nothing constitutionally objectionable in the withdrawal without consent of a blood sample from an unconscious accident victim prior to his being charged with a criminal offense. The Court found no due process violation since the method employed was neither "brutal,"

tests reveals nothing of his "subjective knowledge or thought processes."[220]

Schmerber does provide one possible basis for distinguishing the present day implied consent testing process from the blood withdrawal test in that case. Justice Brennan noted that:

> [s]ome tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed at eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made *to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.*[221]

In practical terms, as noted at several points in this article,[222] police observation of the detainee's behavioral responses after arrest, including the manner in which the accused answers police requests pursuant to the implied consent laws and his actions in actually taking the test, constitutes an independent source of evidence of the defendant's guilt or innocence. Like field sobriety tests, the process of BAC testing "may enable an observer to draw an inference as to guilt or innocence directly from the subject's ability to perform the acts required of him."[223] That these tests require more participation than that involved in blood extraction might lead to the conclusion that in this context the testimonial/real evidence distinction is "not readily drawn."[224]

"offensive" nor one which "shocked the conscience." *Id.* at 435-37; *see also* Rochin v. California, 342 U.S. 165, 172 (1952). The accused's liberty interest in protecting the inviolability of his body was outweighed by society's interest in identifying drunk drivers and removing them from the highways. *Breithaupt*, 352 U.S. at 439-40; *see also* Commonwealth v. Brennan, 386 Mass. at 777, 438 N.E.2d at 64.

220. *Brennan*, 386 Mass. at 777, 438 N.E.2d at 64.

221. *Schmerber*, 384 U.S. at 764 (emphasis added).

222. *See, e.g., supra* text accompanying note 126.

223. *Brennan*, 386 Mass. at 777, 438 N.E.2d at 64.

224. *Schmerber*, 384 U.S. at 764. Since *Schmerber*, the Supreme Court has not clarified the meaning of its warning against forced submission to tests which seek to determine innocence or guilt on the basis of physiological response. The Indiana Supreme Court in Heichelbech v. State, 258 Ind. 334, 340, 281 N.E.2d 102, 104 (1972), rejected the contention that the *Schmerber* admonition was applicable to roadside sobriety tests. The *Heichelbech* court declared that roadside sobriety tests are entirely non-testimonial, and therefore, the police can compel submission to such tests without implicating *Schmerber*. *Id.* at 339-40, 281 N.E.2d at 104-05. Courts have, however, consistently referred to the dicta in *Schmerber* when refusing to allow the state to force a defendant to submit to a polygraph test. *See, e.g.*, Bowen v. Eyman, 324 F. Supp. 339, 341 (D. Ariz. 1970) (admission of testimony that defendant refused to submit to a lie detector test violates privilege against self-incrimination); Com-

Prior to *Neville*, lower court handling of fifth amendment claims did not entirely foreclose this type of analysis or the possibility of a broader finding that, in its totality, the overall process for obtaining consent and administering a BAC analysis test entails the coerced production of testimonial evidence warranting some form of fifth amendment protection. Several cases went at least as far as holding that an actual or constructive refusal to test, as distinguished from the test results, was a potentially incriminating expression of the suspect's state of mind regarding the ability to pass the test, which could be construed as an admission to being intoxicated, and was therefore protected by the privilege.[225] Justice O'Connor's opinion in *Neville* entirely bypassed the testimonial/real evidence aspects of the refusal-to-test evidence.[226] The Court rested its decision on the admis-

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monwealth v. A Juvenile, 365 Mass. 421, 431-32, 313 N.E.2d 120, 127 (1974) (results of polygraph are testimonial in nature and therefore state cannot compel submission to test); *see also* Hermann, *Privacy, The Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 130-31 (1971) (forcing accused to submit to polygraph would be constitutionally infirmed); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 699-700 (1961) (polygraph determines subjective state of mind through analysis of objective criteria).

In United States v. Green, 282 F. Supp. 373 (S.D. Ind. 1968), a federal district court cited *Schmerber* in denying a government motion to require an individual charged with filing fraudulent claims with the United States to submit handwriting exemplars. *Id.* at 375. Declaring the distinction between real and testimonial evidence to be "nebulous," the *Green* court held that where the corpus of the crime alleged requires proof of an unlawful signature, and where the state seeks to compel a signature germane to the prosecution's case, the evidence which the government seeks to compel is sufficiently testimonial to fall under the protective cloak of the fifth amendment. *Id.* at 373-74. *But see* State v. Smith, 16 Wash. App. 425, 430, 558 P.2d 265, 269 (1976) (handwriting exemplar does not become testimonial where form required approximates that of offending instrument).

225. *See* Dudley v. State, 548 S.W.2d 706, 707-08 (Tex. 1977) (silence in response to request to take tests constitutes tacit or overt expression of thoughts; since purpose of admitting refusal in court is to show jury accused's state of mind, evidence should be excluded); *accord* State v. Andrews, 297 Minn. 260, 262-63, 212 N.W.2d 863, 864 (1973), *cert. denied*, 419 U.S. 881 (1974); Johnson v. State, 125 Ga. App. 607, 609, 188 S.E.2d 416, 418 (1972). *But see* Newhouse v. Misterly, 415 F.2d 514, 518 (9th Cir. 1969) (refusal to submit to testing is physical act); Campbell v. Superior Court, 106 Ariz. 542, 553, 479 P.2d 685, 692 (1971) (refusal itself is not testimonial communication).

The *Dudley* court interpreted *Schmerber* as mandating exclusion of evidence of refusal on fifth amendment grounds. *Dudley*, 548 S.W.2d at 707-08. The court construed *Schmerber* as forbidding any compulsory communication of an accused's thought processes, whether such thoughts were indicated by words, acts, or the lack thereof. *Id.*

226. *Neville*, 103 S. Ct. at 921-22 (1983). The Court did favorably cite the ra-

sibility of the evidence solely on the second component of fifth amendment analysis, the use of compulsion to obtain this evidence.[227]

Justice O'Connor found "[n]o impermissible coercion . . . involved when the suspect refuses to submit to the test, regardless of the form of the refusal."[228] This conclusion flowed inexorably from the view that "*Schmerber* . . . clearly allows a state to force a person suspected of driving while intoxicated to submit to a blood alcohol test."[229] If the state possesses a virtually unrestricted right to administer a test against the will of the suspect, it is equally free to limit that right by legislatively offering an option to refuse.[230] In the Court's view, the "compulsion" involved in pressuring the DUIA suspect to take the test was merely that generated by the need to make one of many "difficult choices" imposed by the criminal process.[231] In the absence of legally improper coercion, no fifth amendment rights were implicated.[232]

South Dakota v. Neville summarily treated a most fundamental aspect of the operation of implied consent laws—the nature of the "rights" created by these statutes. There is logical consistency in the proposition that a state's power to physically coerce submission to testing includes the lesser power to promote submission by attaching serious and immediate consequences to the statutorily created option of refusal. It is submitted, however, that the *Neville* analysis fails to satisfactorily analyze several important aspects of the implied consent choice.

First, *Neville* is plainly wrong in its appraisal of the nature and degree of coercion generated by the implied consent testing decision. Lower federal and state courts have gone behind the mere characteriza-

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tionale of a decision by the California Supreme Court that the refusal to submit to a blood-alcohol test is physical circumstantial evidence of guilt similar to flight from captivity. *Id.* at 921-22. *See* People v. Sudduth, 65 Cal. 2d 543, 546, 421 P.2d 401, 404, 55 Cal. Rptr. 393, 396 (1966) (no testimonial element involved in refusal to take blood test), *cert. denied*, 389 U.S. 850 (1967). Other state supreme courts, however, have rejected the analogy between a refusal to take a blood test and flight, reasoning that the latter instance is devoid of compulsion. *See, e.g.*, Dudley v. State, 548 S.W.2d 706, 708 (Tex. 1977); State v. Jackson, 637 P.2d 1, 2 (Mont. 1981), *vacated on other grounds*, 103 S. Ct. 1418 (1983).

227. *Neville*, 103 S. Ct. at 922.

228. *Id.* Justice O'Connor continued that "the state did not directly compel respondent [driver] to refuse the test, for it gave him the choice of submitting to the test or refusing." *Id.*

229. *Id.* at 921.

230. *Id.* at 922.

231. *Id.* at 923.

232. *Id.*

tion of the testing choice as a "right," "power," or "option," and looked at the practical realities of the situation.[233] Implied consent provisions do empower an accused to refuse compliance with the "consent" to testing conferred in accepting the privilege of a driver's license. The general policy behind a refusal option is the avoidance of "violent confrontations" between police and suspect.[234] The entire system, however, is overwhelmingly weighted towards forcing the compliance that the state unquestionably wants.[235] The pressure to submit to testing is neither disguised nor subtle.[236] With practically no meaningful awareness of the consequences and no opportunity to intelligently consider them, the accused must decide whether to produce the single most incriminating item of evidence of guilt, proof of intoxication, or surrender the right to drive, with all that may imply for job and

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233. *See, e.g.*, State v. Andrews, 297 Minn. 260, 262-63, 212 N.W.2d 863, 864 (1973), *cert. denied*, 419 U.S. 881 (1974) (quoting from Comment, *supra* note 209, at 1084, that the provision of the option of refusal which removes the unpleasant burden of undergoing test is an "inducement that casts doubt on the 'voluntariness' " of evidence thereby obtained) (footnotes omitted); *accord* State v. Neville, 312 N.W.2d 723, 726 (S.D. 1981), *rev'd sub nom.* South Dakota v. Neville, 103 S. Ct. 916 (1983).

Further, implied consent statutes commonly provide that a refusal to submit to testing will result in an automatic suspension of a driver's license. *See, e.g.*, MASS. GEN. LAW ANN. ch. 90, § 24(1)(f) (West Supp. 1983-1984) (individual who refuses to submit to chemical test to measure alcohol content subject to ninety day license revocation). The automatic license suspension penalty further demonstrates that the individual does not have a true "choice" when pondering whether to take a breathalyzer. *See* State v. Newton, 291 Or. 788, 804, 636 P.2d 393, 402 (1981) (where consent to seizure is solicited by warning of substantial penalty imposed for refusal, resulting consent is not exercise of free will).

The Supreme Court itself has acknowledged that implied consent statutes are designed to coerce the individual into submitting to testing. Mackey v. Montrym, 443 U.S. 1, 18 (1979); *see also Heles*, 530 F. Supp. at 651.

234. *Neville*, 103 S. Ct. at 921.

235. Judicial recognition of the coercive underpinnings of implied consent laws differs only in the explicitness of the language used by a court to characterize the process. *Compare* Commonwealth v. Brennan, 386 Mass. 772, 779, 438 N.E.2d 60, 65 ("we assume . . . that the 'choice' offered [by the implied consent statute] constitutes compulsion") *and Heles*, 530 F. Supp. at 651 ("The obvious and intended effect of the implied consent law is to coerce the driver . . . to consent.") *with* Mackey v. Montrym, 443 U.S. 1, 18 (1979) (sanctions for the refusal to take the test provide a "strong inducement to take the breath-analysis test . . . [in order to produce] reliable and relevant evidence for use in subsequent criminal proceedings") *and Neville*, 103 S. Ct. at 923 ("The State wants [the driver] to choose to take the test," and "*could legitimately compel the suspect, against his will, to accede to the test.*") (emphasis added).

236. *See supra* note 233.

family.[237] To admit that there is coercion but to then deny that there is legally cognizable compulsion is an affront to fifth amendment values.

Neville also overlooks a second reality of contemporary implied consent laws, the change since *Schmerber* in the climate in which such laws are enforced. Public consciousness of the drunk driver problem may have reached the point at which denial of basic civil liberties is not only tolerated but is openly promoted.[238] The American people are demanding that the police take whatever measures are necessary to eradicate the highly visible and universally condemned phenomenon of the drunk driver. It is facile to think that these pressures will not lead to a predisposition on the part of police, prosecutors and jurors to maximize DUIA convictions regardless of any threat to rights of freedom from persecution or to a fair, impartial determination of guilt. *Neville* manifests no understanding of the practical likelihood that coercive tactics will be employed at the pre-testing stage of drunk driving prosecutions to obtain such convictions.[239]

Finally, the reaffirmation of *Schmerber* in *Neville* gives no consideration to the legislative proliferation of implied consent laws since 1966. Adoption of these statutes may require greater procedural protections than those recognized by *Schmerber*. In another context the Court has found that state creation of statutory rights imposes constitutional restraints which might not otherwise be necessary.[240] Even

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237. The courts acknowledge that the loss of a driver's license can be a weighty hardship. For example, the *Mackey* Court stated that: "[T]he driver's interest . . . in continued possession and use of his license . . .is a substantial one, for the Commonwealth will not be able to make a driver whole for any personal inconvenience and economic hardship suffered" by even a temporary loss of driving privileges. 443 U.S. at 11. *See also* Dixon v. Love, 431 U.S. 105, 113 (1977) ("Unlike . . . social security recipients . . . who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely whole if his suspension or revocation is later vacated."); Bell v. Burson, 402 U.S. 535, 539 (1971) (failure to afford a petitioner a prior hearing on liability denied him procedural due process).

238. *See, e.g., supra* note 115 describing the recent police practice of random roadblocks.

239. *Cf.* Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEXAS L. REV. 935, 956 (1980). This article proposes the repeal of all implied consent laws so that the state may return to a pure *Rochin—Breithaupt—Schmerber* approach of physically coercing participation in testing. One may wonder whether the *Neville* Court's restrictive view of the procedural rights of the DUIA suspect would continue to prevail if the police were to routinely use physical force to gain submission to BAC testing.

240. Griffin v. Illinois, 351 U.S. 12 (1955). The issue in *Griffin* was whether indigent defendants were denied equal protection and due process by a state practice limiting the availability of free stenographic transcripts of trial proceedings to defen-

though a *Schmerber* defendant may have no right to resist the "safe, painless, and commonplace" blood extraction procedure,[241] the introduction of an implied consent choice and its coercive underpinnings require a much closer examination of the constitutional implications of the system than that offered in *Neville*.

In the final analysis, the *Schmerber* line of cases, together with *Neville* probably foreclose a viable fifth amendment challenge to the testing procedures of implied consent laws. Whether based on the nontestimonial character of the evidence produced or the absence of legally cognizable compulsion, it is very unlikely that federal courts will find a need for access to counsel at the BAC testing phase under this amendment.[242] The completely unrealistic nature of the Court's approach to this issue makes it imperative that state courts broadly interpret state constitutional protections against self-incrimination to fill the dangerous gaps created by *South Dakota v. Neville*.[243]

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dants sentenced to death. Such a procedure effectively foreclosed appellate review of trial errors by means of a writ of error. *Id.* at 13-14. In declaring this practice unconstitutional, the Court, in an opinion by Justice Black for four members of the Court, and a concurring opinion by Justice Frankfurter, placed great emphasis on the constitutional consequences of the State of Illinois' adoption of a system of appellate review, a step it was not compelled to take.

> [A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.

Id. at 18. Justice Frankfurter continued:

> [I]t is now settled that due process of law does not require a State to afford review of criminal judgments . . . . Nor does equal protection of the laws deny a State the right to make classifications . . . when such classifications are rooted in reason. . . . [But] Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal. It has thereby shut off means of appellate review for indigent defendants.

Id. at 21-23 (Frankfurter, J., concurring) (citations omitted).

241. *Neville*, 103 S. Ct. at 923 (citing *Schmerber*, 384 U.S. at 771).

242. State courts have consistently rejected fifth amendment challenges to the BAC testing process. *See, e.g.*, Commonwealth v. Brennan, 386 Mass. 772, 779, 438 N.E.2d 60, 65 (1982); State v. Charette, 110 R.I. 124, 132, 290 A.2d 858, 862 (1972); Rodriguez v. State, 631 S.W.2d 515, 517 (Tex. Ct. Crim. App. 1982). The primary approach has been to treat the results of breathalyzer tests as real or physical evidence and thus admissible under *Schmerber*. *See, e.g., Brennan*, 386 Mass. at 777, 438 N.E.2d at 65; Blydenburg v. David, 413 S.W.2d 282, 284 (Mo. 1967); State v. Franco, 96 Wash. 2d 816, 821, 639 P.2d 1320, 1325 (1982); State v. Driver, 59 Wis. 2d 35, 38, 207 N.E.2d 850, 852 (1975); *see also* Beare v. Smith, 82 S.D. 20, 140 N.W.2d 603 (1966); Strelecki v. Coan, 97 N.J. Super. 279, 235 A.2d 37 (1967).

243. Utilization of state constitutional provisions to afford procedural protec-

IV. Specific Contours of a Right of Access

One important restriction on a right of access, its temporal limitation to a reasonable period after which the accused must make an independent decision on submission to a BAC test, has already been identified in this article.[244] If it is accepted that the United States Constitution requires an opportunity to consult with counsel along the lines proposed in the article, two additional limitations must be considered. It must be determined whether the police should be required to advise an in-custody DUIA suspect of the right to an opportunity to obtain legal advice and whether police noncompliance with the rule, by failure to advise or to provide reasonable access, should lead to dismissal of DUIA charges or to some lesser sanction.

A. DUTY TO INFORM

This article has presented three alternative theoretical bases for a limited right of access to legal advice at the BAC testing stage of a DUIA prosecution. Recognition of a fifth[245] or sixth amendment[246] right, or a synthesized form of due process protection,[247] premised on the critical nature of this stage and the importance of legal advice, should carry with it a duty to inform the accused of the existence of the right.[248] The proposition that a procedural right is not

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tions broader than those established by the United States Supreme Court is discussed at *supra* note 53. State courts have thus far not displayed a willingness to interpret state constitutional protections against self-incrimination to provide greater protection than that offered by the fifth amendment. *See generally* Commonwealth v. Brennan, 386 Mass. 772, 438 N.E.2d 60 (1982); State v. Franco, 96 Wash. 2d 816, 639 P.2d 1320 (1982); Rodriguez v. State, 631 S.W.2d 515 (Tex. Ct. Crim. App. 1982); State v. Arsenault, 115 N.H. 109, 336 A.2d 246 (1975).

However, in State v. Neville, 312 N.W.2d 723 (S.D. 1981), *rev'd and remanded*, 103 S. Ct. 916 (1983), *aff'd*, 346 N.W.2d 425 (S.D. 1984), the South Dakota Supreme Court interpreted the state constitutional provision against self-incrimination to have a wider scope of protection than that provided by the federal constitution. Thus, on remand from the United States Supreme Court, the state court affirmed its previous ruling that a refusal to submit to BAC testing falls within the protection of the state constitution.

244. *See supra* text accompanying notes 137-38.

245. *See supra* text accompanying notes 196-243.

246. *See supra* text accompanying notes 145-95.

247. *See supra* text accompanying notes 61-144.

248. Escobedo v. Illinois, 378 U.S. 478, 483-85, 491 (1964) (failure to advise suspect of right to remain silent at commencement of interrogation precludes valid waiver of fifth amendment privilege), and Miranda v. Arizona, 384 U.S. 436, 466-74 (1966) (police must in every case inform in-custody suspect of right to remain silent, to presence of counsel, and to appointment of counsel if indigent, prior to questioning) are most illuminative on the importance of the duty to warn. *See generally* Oregon

meaningful unless its beneficiary is aware of it would seem too obvious to question. The right-of-access cases[249] and *Neville v. South Dakota,*[250] however, require some comment on the duty to inform.

Courts addressing a claimed right of access have not been presented with a direct opportunity to rule on the warning question since the issue has uniformly originated in the police denial of an explicit *request* of a DUIA suspect to contact a lawyer.[251] It is argued that a constitutional violation occurs when the accused is required by the state to make critical decisions and face wide-ranging criminal consequences without any form of legal assistance. Unlike the post-*Fitzsimmons*[252] and post-*Newton*[253] lines of cases, which examine the right

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v. Bradshaw, 103 S. Ct. 2830 (1983), wherein a plurality of the Supreme Court held that initiation of communication with police after invocation of *Miranda* rights was not a *per se* waiver of those rights. The reasons for requiring affirmative warnings of *Miranda* rights include the simple necessity of making sure the accused is aware of these rights and, more importantly, to overcome "the inherent pressures of the interrogation atmosphere." *Miranda*, 384 U.S. at 468, 470-71.

249. *See, e.g.*, State v. Newton, 291 Or. 788, 807, 811, 636 P.2d 393, 404, 407 (1981) ("discouragement of . . . *request* for counsel" found to be an unconstitutional restraint on suspect's liberty; police are not required, however, to "itemize to a [suspect] all the actions he is free to take nor to provide . . . [a] person with the means to exercise his freedom.") (emphasis added); *accord*, Moore v. State, 293 Or. 715, 722, 652 P.2d 794, 799 (1982) (*Newton* prohibits unjustified failure to respect the request of a suspect who "*asks* to speak to counsel.") (emphasis added); Copelin v. State, 659 P.2d 1206, 1209 (Alaska 1983) (statutory rights of access to counsel violated by police denial of requests to speak with attorney); State *ex rel.* Juckett v. Evergreen Dist. Ct., 32 Wash. App. 49, 54, 645 P.2d 734, 737 (1982) (*Fitzsimmons* established a right of access to counsel, but not an affirmative duty on state to advise drivers of that right); State v. Fitzsimmons, 93 Wash. 2d 436, 610 P.2d 893, *vacated and remanded*, 449 U.S. 977, *aff'd*, 94 Wash. 2d 858, 620 P.2d 959 (1980) (reasonable access to counsel necessary only "if . . . [a] *request* is timely.") (emphasis added); *cf.* State v. Wurm, 32 Wash. App. 258, 268, 647 P.2d 508, 512-14 (1982) (McInturff, C.J., dissenting) (accused must be informed of right of access before testing, regardless of request). *See generally* Heles v. South Dakota, 530 F. Supp. 646, 649, 651 (D.S.D.), *vacated and remanded*, 682 F.2d 201 (8th Cir. 1982) (district court's holding phrased in terms of importance of allowing suspect to contact counsel without emphasis on significance of request to consult).

250. 103 S. Ct. 918, 923-24 (1983) (no denial of fundamental fairness in admitting evidence of refusal to test without specifically warning suspect that such refusal could be used at trial as proof of guilt of DUIA charges).

251. *See supra* note 250; *see also* State v. Jones, 457 A.2d 1116, 1118 n.4 (Me. 1983) (Maine implied consent law does not require opportunity for consultation with attorney prior to testing when requested by suspect).

252. State *ex rel.* Juckett v. Evergreen Dist. Ct., 32 Wash. App. 49, 54-55, 645 P.2d 734, 737 (1982); State v. Halbakken, 30 Wash. App. 834, 638 P.2d 584 (1981).

253. Moore v. State, Motor Vehicles Div., 293 Or. 715, 722, 652 P.2d 794, 799 (1982).

in terms of the constitutional implications of refusing to honor a request to consult, the proposed right is an affirmative one based on the vulnerability of the DUIA suspect. It is precisely because the accused is *not* likely to appreciate the need for legal assistance and, therefore, will not ask for it, that an affirmative right must be established.[254] In the final analysis, to condition the existence of a right of access on the fortuity of the accused's request for counsel undercuts the reasons for a right in the first place.[255]

Neville was premised on an interdependence between the duty to warn and the existence of legal rights, and held that it was not a denial of due process to admit a suspect's refusal to test as evidence of guilt of a DUIA charge.[256] The theory behind the due process claim was that fundamental fairness required the police to warn the accused of this consequence of refusal prior to demanding that the testing choice be made.[257] The surface rationale for rejecting this position was that, unlike the prohibition in *Doyle v. Ohio*[258] on the use of post-*Miranda* warning silence for impeachment purposes at trial,[259] the advice given a DUIA suspect pursuant to implied consent laws contains no "implicit" assurances that no adverse consequences would result from a refusal or that the only legal consequence of a refusal to test would be loss of license.[260] In the absence of any unfair "trick" prior to the accused's decision or in subsequent use of refusal evidence at trial, no due process violations occur.[261]

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254. *Miranda* makes the point most succinctly in a fifth amendment context. "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel." 384 U.S. at 470-71.

255. *See, e.g.*, People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965). The court stated:

> [W]e must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it.

Id. at 351, 398 P.2d at 369-70, 42 Cal. Rptr. at 177-78 (footnote omitted).

256. *Neville,* 103 S. Ct. at 923.

257. *Id.*

258. 426 U.S. 610, 618 (1976).

259. *See Neville,* 103 S. Ct. at 923-24. The Court in *Neville* distinguished *Doyle* on the grounds that it involved a direct application of the constitutionally-based *Miranda* warnings and that these warnings gave "no warning of adverse consequences from choosing to remain silent." *Id.*

260. *Neville,* 103 S. Ct. at 924.

261. *Id.*

The *Neville* Court's unwillingness to impose a duty to warn is more specifically traceable to its concept of implied consent laws. Given the Court's earlier treatment of *Schmerber*,[262] it is not surprising to find the rights created by these laws and the information supplied thereunder characterized as "simply a matter of grace bestowed by the . . . legislature."[263] This is, in effect, the suggestion that for constitutional purposes *no* rights inhere in the testing choice process. Clearly, in this view of the process, if there are no substantial rights at stake there is no need to warn the suspect of possible future legal consequences of decisions made at this stage.

In contrast to the *Neville* conception, this article has postulated that there are significant statutory and constitutional rights involved at the BAC testing stage which require for their protection access to legal advice. If *Neville* is construed to mean that, where there is no duty to warn a suspect of the consequences of his actions there is no need for legal advice on those consequences, then the analytical sequence is improperly reversed. The better approach is for courts to first scrutinize the totality of circumstances existing at the BAC testing stage to determine what the rights and obligations of the suspect are. If those circumstances require a right of access to counsel, the accused must be informed of that right.

B. SANCTIONS FOR DENIAL OF ACCESS

A constitutionally-based right of access to counsel imposes a duty on the police to inform the DUIA suspect of his right to seek legal advice and to provide a reasonable opportunity for him to do so. The sanction or remedy that should attach to a failure of the police to meet these obligations is the final question to be addressed.

Various approaches have been taken by those courts which have found a violation of the right of access. In the criminal context, potential sanctions have included reversal of a DUIA conviction and dismissal of all charges,[264] exclusion of evidence obtained subsequent

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262. *Id.* at 920-21. *Schmerber*, 384 U.S. 757 (1966), was characterized as rejecting a fifth amendment challenge to the taking of a blood test based on a finding that such a test produced " 'physical or real' evidence rather than testimonial evidence." The Court went on to extend this conclusion to mean that the state can "force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Neville*, 103 S. Ct. at 920-21.

263. *Neville*, 103 S. Ct. at 924.

264. State v. Fitzsimmons, 93 Wash. 2d 436, 451, 610 P.2d 893, 901-02, *vacated and remanded*, 449 U.S. 977, *aff'd*, 94 Wash. 2d 858, 620 P.2d 999 (1980). The court cited its earlier decision in Tacoma v. Heater, 67 Wash. 2d 733, 751, 409 P.2d 867, 874 (1966), in concluding that the denial of access to counsel caused the suspect to suffer "irreparable prejudice" which precluded there ever being a fair trial.

to a denial of access,[265] and application of a "harmless error" standard to the totality of evidence in the case.[266] In civil or administrative license revocation proceedings, the remedy has been judicial invalidation of the revocation and reinstatement of driving privileges.[267]

Any remedy for infringement of the right to an opportunity to consult with counsel must be responsive to the reasons for establishing the right. It has been demonstrated that the failure to provide access to legal advice may so prejudice the rights of a DUIA suspect that either a criminal conviction or civil loss of license is fundamentally unfair.[268] The only effective method of eliminating this unfairness is to remove the harmful consequences of a refusal to provide access by reversing the conviction or reinstating the driver's license.[269] Any

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265. *Compare Fitzsimmons*, 93 Wash. 2d at 451, 610 P.2d at 902 (rejecting suppression as having "no real ameliorative effect" on the violation of the defendant's right) *with* State v. Newton, 291 Or. at 818, 636 P.2d at 407 (refusing to require exclusion of breath sample because no causal relationship existed between denial of access to counsel and subsequent submission to test; record failed to show that accused could have obtained legal advice if given opportunity to make telephone call). *See* Copelin v. State, 659 P.2d 1206, 1214-15 (Alaska 1983) (suppression required where denial of statutory right of access "has an effect on the defendant's ability to present a defense at trial").

In Prideaux v. State, Dep't of Pub. Safety, 310 Minn. 405, 247 N.W.2d 385 (1976), the court stated:

> When the driver has been coerced into making a complicated decision without the assistance of counsel required by this opinion [interpreting state statute], he should not be bound by that decision, since he might have otherwise made it differently. Therefore, if such a driver elected to take the test, the results should be suppressed.

Id. at 422, 247 N.W.2d at 385; *see also* Miranda v. Arizona, 384 U.S. 436, 475 (1966); Escobedo v. Illinois, 378 U.S. 478, 491 (1964); Mapp v. Ohio, 367 U.S. 643, 655 (1961).

266. *Fitzsimmons*, 93 Wash. 2d at 452-53, 610 P.2d at 902-03.

267. *See, e.g.*, Heles v. South Dakota, 530 F. Supp. at 654. The plaintiff's original complaint sought, *inter alia*, a permanent injunction against the state's revocation of driving privileges. *Id.* at 649 n.2. It appears that by the time the federal court suit was instituted, the one year suspension of driving privileges affirmed by the state court had expired. *See* State v. Heles, 272 N.W.2d 808, 810 (S.D. 1978); State v. Braunesreither, 276 N.W.2d 139, 140 (S.D. 1979). The district court thus struck the request for injunctive relief as moot and *sua sponte* treated the action as merely one for declaratory relief. *Heles*, 530 F. Supp. at 649 n.2. In view of the court's ultimate disposition of the issues, it is clear that Heles' driving privileges would have been reinstated. *Id.* at 654; *see also* Hall v. Secretary of State, 60 Mich. App. 431, 441, 231 N.W.2d 396, 400 (1975).

268. *See supra* notes 119-31 and accompanying text.

269. The remedy of exclusion of BAC testing results is too narrow to address the dangers inherent in the overall pre-testing process. The potential harm to the DUIA suspect includes not only mistaken submission to the test but also the possible

other remedy would fail to protect the rights of the suspect or give proper respect to the constitutional foundations of a right of access.

V. CONCLUSION

Implied consent laws and the proliferating new "get tough" drunk driving statutes represent a valid public policy response to a very serious problem. This article has proposed a slight but important modification in the procedures utilized for enforcement of these laws. A right of access to counsel based on the fifth amendment, sixth amendment, or, most appropriately, the fourteenth amendment due process clause, would require no more than that a DUIA suspect be afforded a reasonable opportunity to obtain vital advice and information when it is most needed. Such a limited right would serve the historic purposes of all constitutional procedural protections— safeguarding individual liberty without sacrificing the public good.

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loss of an opportunity to establish trial defenses or legal justifications for refusing to test. *See supra* notes 119-31 and accompanying text. The author recognizes that even the lesser sanction of exclusion is in great disfavor and may soon be removed from the existing body of federal constitutional law by the Supreme Court. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405 (1984)(exclusionary rule should not bar evidence obtained pursuant to reasonable reliance on search warrant subsequently found to be invalid). Nonetheless, in the special circumstances of implied consent drunk driving prosecutions, the most complete and effective sanction for denial of access to legal advice remains dismissal of charges or reversal of license revocations.