

## Louisiana Law Review

---

Volume 73 | Number 1

*Coastal Land Loss in the Gulf Coast and Beyond: A*

*Symposium*

*Fall 2012*

---

# We Won't Take "No" for an Answer: The Validity of Louisiana's No-Refusal Policy

Katherine L. Cicardo

---

### Repository Citation

Katherine L. Cicardo, *We Won't Take "No" for an Answer: The Validity of Louisiana's No-Refusal Policy*, 73 La. L. Rev. (2012)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol73/iss1/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kayla.reed@law.lsu.edu](mailto:kayla.reed@law.lsu.edu).

## We Won't Take "No" for an Answer: The Validity of Louisiana's No-Refusal Policy

"The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."<sup>1</sup>

### I. INTRODUCTION: THE BATTLE AGAINST DRINKING AND DRIVING

Alcohol—your best friend and your worst enemy. Throughout history, society has acknowledged alcohol's dual role as both friend and foe.<sup>2</sup> But with the advent of the motor vehicle came the realization of alcohol's true potential as a grave threat to human safety.<sup>3</sup> Today, alcohol-impaired driving is still one of the most common crimes both globally and in the United States.<sup>4</sup>

Early in the battle against intoxicated driving, states enacted implied consent statutes to deter motorists from drinking and driving.<sup>5</sup> Implied consent rests on the notion that in exchange for the privilege to drive on state highways, every motorist implicitly consents to a future blood-alcohol test (BAT) upon an officer's request.<sup>6</sup> Under most statutes, however, the arrestee has an alternative: refuse the BAT and face specific consequences, unless a statutory exception bars refusal.<sup>7</sup> In theory, these laws have great potential for deterring motorists from driving while intoxicated (DWI) because they aid the State in gathering intoxication evidence

---

Copyright 2012, by KATHERINE L. CICARDO.

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

2. Dennis R. Cook, *Ouch! Blood Search Warrants After Beeman v. State: An End-Run Around the Texas Legislature Resulting in Judicially Sanctioned Batteries*, 42 TEX. TECH. L. REV. 91, 92 (2009). See also Daphne D. Newaz, *The Impaired Dual System Framework of United States Drunk-Driving Law: How International Perspectives Yield More Sober Results*, 28 HOUS. J. INT'L L. 531, 532 (2006).

3. Cook, *supra* note 2, at 92.

4. Newaz, *supra* note 2, at 532–33. See also Kelsey P. Black, *Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States*, 40 SUFFOLK U. L. REV. 463, 463 (2007).

5. See generally Vitauts M. Gulbis, Annotation, *Admissibility in Criminal Case of Blood-Alcohol Test Where Blood Was Taken Despite Defendant's Objection or Refusal to Submit to Test*, 14 A.L.R. 4TH 690 (1982 & Supp. 2005) (assembling multiple post-*Schmerber* state court decisions upholding the constitutionality of warrantless blood extraction); Tina Wescott Cafaro, *Fixing the Fatal Flaws in OUI Implied Consent Laws*, 34 J. LEGIS. 99, 100 (2008).

6. Holly Hinte, *Drunk Drivers and Vampire Cops: The "Gold Standard,"* 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159, 161 (2011). See also, e.g., LA. REV. STAT. ANN. §§ 32:661–70 (2002 & Supp. 2012).

7. See, e.g., LA. REV. STAT. ANN. § 32:666 (Westlaw 2012).

and provide penalties for chemical test refusal.<sup>8</sup> But in practice, implied consent laws have proven ineffective.<sup>9</sup>

Overall, statistics indicate a universal failure on the part of state governments to eradicate alcohol-impaired driving.<sup>10</sup> Mothers Against Drunk Driving estimates that one out of every three people will be involved in an alcohol-related traffic accident during his or her lifetime.<sup>11</sup> National reports reveal that drinking-and-driving accidents accounted for 31% of fatal crashes in 2010,<sup>12</sup> which translates into one alcohol-related traffic fatality nearly every 50 minutes.<sup>13</sup> In light of these numbers, scholars, law enforcement officials, and members of the public have recognized the need for more stringent action against DWI offenders.<sup>14</sup> Even the United States Supreme Court has acknowledged this nationwide dilemma:

The situation . . . of the drunk driver . . . occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented [;] . . . This Court,

---

8. See Cafaro, *supra* note 5, at 100, 113.

9. *Id.*

10. See Black, *supra* note 4, at 463–64.

11. Mothers Against Drunk Driving, *Campaign to Eliminate Drunk Driving*, MADD.ORG, <http://www.madd.org/drun-driving/campaign/> (last visited Aug. 29, 2011).

12. Nat'l Highway Traffic Safety Admin., *Fatal Crashes and Percent Alcohol-Impaired Driving, by Time of Day and Crash Type*, FATALITY ANALYSIS REPORTING SYSTEM ENCYCLOPEDIA, <http://www-fars.nhtsa.dot.gov/Crashes/CrashesAlcohol.aspx> (last visited Sept. 13, 2011).

13. The Century Council, *Drunk Driving Research*, CENTURYCOUNCIL.ORG, <http://www.centurycouncil.org/drun-driving/drun-driving-statistics> (last visited Sept. 18, 2012).

14. See, e.g., Newaz, *supra* note 2, at 535 (“Drunk drivers create a very serious social and international problem that needs to be corrected. However, the United States’ use of poor investigatory tools to establish proof, ineffectual sanctions for refusal to submit to a breath test, and convictions that are obtained haphazardly and improperly is not acceptable.”); Jim Shannon, *Some in Legal Community Have Issues with “No Refusal,”* WAFB.COM (Sept. 7, 2010, 5:14 AM), <http://www.wafb.com/story/13086102/some-in-legal-community-have-issues-with-no-refusal?redirected=true> (interviewing Jefferson Parish District Attorney Norma Broussard, along with defense attorney and former state trooper, Glynn Deslatte; “[I]n order to deter people from drinking and driving the best thing to do is prosecute them to the fullest extent and getting a conviction.”); John LeBlanc, *Officials Working on New Tactic to Strengthen DWI Prosecutions* (June 21, 2010), available at <http://lahighwaysafety.org/pdf/OP%20Ed%20no%20refusal%20June%2021.pdf> (“The effort to rid Louisiana roads of drunk drivers involves multiple levels of cooperation that range from educating motorists to enforcing the tough DWI laws already on the books to prosecuting offenders.”).

although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy.<sup>15</sup>

Statistics are even more alarming in Louisiana. According to the Louisiana Highway Safety Commission (LHSC), impaired-driving crashes led to approximately 400 deaths and 6,000 injuries in 2009.<sup>16</sup> From 2010 to 2012, 42 to 43% of fatal crashes were alcohol-related, making alcohol a leading cause of traffic deaths in Louisiana.<sup>17</sup> Adding insult to injury, a 2007 survey ranked Louisiana as having the fourth highest DWI refusal rate in the country at 39%.<sup>18</sup> This trend of stubbornly high refusal rates continued in 2008, when nearly one-third of those arrested for drinking and driving (about 8,000 out of 24,736 DWI arrestees) refused to submit to a BAT.<sup>19</sup> As refusal rates continue to increase, the effectiveness of implied consent laws—and in turn, the State's ability to deter DWI—will continue to decrease.<sup>20</sup>

To counteract the rise of BAT refusal rates, the LHSC, parish law enforcement agencies, and local judges joined forces to implement no-refusal programs.<sup>21</sup> *No refusal* refers to a law enforcement policy authorizing police officers to obtain search warrants after suspected DWI offenders decline a BAT.<sup>22</sup>

---

15. *South Dakota v. Neville*, 459 U.S. 553, 558 (1983).

16. Raymond Legendre, *No Refusal Weekend for Those Suspected of DWI Has Critics, Supporters*, WWLTV.COM (Sept. 4, 2010, 5:55 PM), <http://www.wwltv.com/news/local/No-Refusal-weekend-for-those-suspected-of-DWI-case-critics-supporters-102228604.html>.

17. LSU Highway Safety Research Grp., *2010 Alcohol-Related Crashes by Severity*, <http://datareports.lsu.edu/Reports/TrafficReports/2010/A/A5.asp> (last visited Oct. 2, 2012); *2011 Alcohol-Related Crashes by Severity*, <http://datareports.lsu.edu/Reports/TrafficReports/2011/A/A5.asp?p=ci&sec=A&yr=2012> (last visited Oct. 2, 2012); *2012 Alcohol-Related Crashes by Severity*, <http://datareports.lsu.edu/Reports/TrafficReports/2012/A/A5.asp?p=ci&sec=A&yr=2012> (last visited Oct. 2, 2012).

18. Amy Berning et al., *Breath Test Refusals*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2 (Nov. 2007), available at <http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810871.pdf>.

19. LeBlanc, *supra* note 14.

20. *See id.* Motorists who refuse blood-alcohol content (BAC) tests are often the most inclined to drive under the influence of alcohol. They understand that penalties for refusal are less severe than the penalties for DWI conviction. They also understand the high likelihood of DWI conviction when a chemical test shows positive signs of alcohol. Thus, they consciously choose to refuse the test and face license suspension to avoid the alternatively harsher consequences of DWI conviction. *See id.*

21. *See id.*

22. *Id.* Upon refusal, an officer will notify a judge, who is waiting on standby. *Id.* If the officer demonstrates sufficient probable cause of the suspect's intoxication, then the judge will issue a warrant authorizing the withdrawal of the suspect's blood. *Id.* *See also* Shannon, *supra* note 14.

Louisiana officials first sponsored no refusal over two years ago during holiday weekends, a time when alcohol-impaired driving is typically more prevalent.<sup>23</sup> After successful trial runs, several parishes made no refusal a routine procedure with the goal of addressing high refusal rates head-on and thereby minimizing the threat of alcohol-impaired driving.<sup>24</sup> For the most part, government officials, police officers, and members of the legal community have praised no-refusal programs for increasing the number of DWI convictions and for reducing the number of alcohol-related traffic fatalities.<sup>25</sup> The refusal rate in Rapides Parish, for instance, fell from 35% in 2007, when no refusal first began, to virtually zero in 2009.<sup>26</sup> Similarly, after Lafourche Parish implemented no refusal in 2008, the number of drinking and driving fatalities decreased from 18 to 5 between 2008 and 2010.<sup>27</sup>

Despite such successful results, opponents of no refusal attack the program's validity on both constitutional and state law grounds.<sup>28</sup> Meanwhile, Louisiana courts have managed to avoid basic questions concerning the legality of law enforcement no-refusal programs.<sup>29</sup> The judicial silence in the no-refusal legal

---

23. See LeBlanc, *supra* note 14; see also Lee Peck, *Calcasieu DWI "No Refusal Policy" Goes into Effect*, KPLCTV.COM (May 27, 2010, 10:28 PM), <http://www.kplctv.com/story/12558286/calcasieu-dwi-no-refusal-policy-goes-into-effect>.

24. See Peck, *supra* note 23.

25. Ken Thomas, *Gov't Urges 'No Refusal' Policy on Drunken Driving*, ASSOCIATED PRESS (Dec. 13, 2010, 3:44 PM), [http://www.msnbc.com/id/40646098/ns/us\\_news-crime\\_and\\_courts/t/govt-urges-no-refusal-policy-drunken-driving/](http://www.msnbc.com/id/40646098/ns/us_news-crime_and_courts/t/govt-urges-no-refusal-policy-drunken-driving/) (citing Texas District Attorney who credits the no-refusal policy for successfully reducing Montgomery County's refusal rate from 50% to 10% and for eliminating alcohol-related fatalities in the jurisdiction). See also LeBlanc, *supra* note 14.

26. LeBlanc, *supra* note 14. See also Peck, *supra* note 23 ("When Rapides Parish put their 'no refusal policy' into effect two and a half years ago—about 40% of drivers who passed the blow tests with a low reading—refused a drug test. Today, their refusal rate is below 1%.").

27. Thomas, *supra* note 25.

28. See generally Cook, *supra* note 2. No-refusal opponents argue that a blood-evidence search conducted after the suspect refuses to submit to a BAT violates the suspect's constitutional right against unnecessary governmental intrusion and statutory "right to refuse."

29. For example, an association of criminal defense lawyers sued the Calcasieu Parish Sheriff's office seeking an injunction to stop the blood search warrant tactic under Louisiana Revised Statutes section 32:666. Sw. La. Ass'n of Criminal Def. Lawyers vs. Calcasieu, No. CW 11-00031 (La. Ct. App. Mar. 31, 2011). The Louisiana Supreme Court denied writs, essentially agreeing with the Louisiana Third Circuit Court of Appeal that the Southwest Louisiana Association of Criminal Defense Lawyers does not have standing to bring the action. Sw. La. Ass'n of Criminal Def. Lawyers vs. Calcasieu, 64 So. 3d 222 (La. 2011) (writ denied). Furthermore in *State v. Riggelman*, the Third Circuit

debate coupled with the lack of legislative implied consent reform has led to uncertainty regarding the constitutionality and statutory legitimacy of no-refusal search warrants. This confusion leaves the public wondering: Must Louisiana take “no” for an answer? To remedy the uncertainty, this Comment proposes the proper application of Louisiana’s constitutional jurisprudence and implied consent law in light of no refusal.

Chiefly, this Comment posits that no-refusal search warrants are both constitutionally and statutorily valid in Louisiana.<sup>30</sup> Part II explores constitutional arguments against no refusal beginning with an analysis of the U.S. Supreme Court’s most recent decision regarding DWI blood draws, *Schmerber v. California*, and its impact on Louisiana’s constitutional jurisprudence.<sup>31</sup> This section then proposes that, in theory, no refusal actually exceeds the federal and state constitutional requirements for a reasonable DWI search, although modern practices may necessitate a more rigorous standard to better protect against unreasonable searches.<sup>32</sup> Nevertheless, as Part III explains, the validity of no-refusal programs depends on a statutory interpretation of Louisiana’s implied consent law, not the federal or state constitutions.<sup>33</sup> To this end, Part IV examines the legal framework of implied consent in Louisiana and dispels the widespread misunderstanding that individuals enjoy a greater “right to refuse” under the implied

---

refused to deny the suspension of a defendant’s driving privileges. 62 So. 3d 898, 901 (La. Ct. App. 2011). The court reasoned that even though the defendant allowed officers to draw his blood pursuant to a DWI search warrant, this did not constitute “consent” to a test under Louisiana’s implied consent law because he initially refused to submit to a Breathalyzer test. *Id.* at 899–900. That same court also refused to review a trial court’s denial to suppress DWI blood test results from a warrant-based blood draw. *State v. Mobley*, No. KW 11-00146 (La. Ct. App. May 2, 2011) (writ denied). The two-judge majority reasoned that the ability to refuse chemical testing under Revised Statutes section 32:666 does not override the State’s right to obtain a search warrant, while the lone dissenting judge argued that drivers have a statutory “right to refuse.” *Id.* The dissent further opined that the authority to alter the “right to refuse” belongs exclusively to the legislature. *Id.* Nevertheless, the Louisiana Supreme Court denied writs, effectively preventing a current resolution of the issue. *State v. Mobley*, 69 So. 3d 1148 (La. 2011) (writ denied). These cases highlight the controversy surrounding no refusal’s legality, yet none provides a clear answer to the question: is no refusal a valid and legitimate law enforcement policy under Louisiana law? As more parishes implement permanent no-refusal programs, courts will be forced to answer this highly contentious question.

30. See conclusion *infra* Part VI.

31. *Schmerber v. California*, 384 U.S. 757 (1966).

32. See discussion *infra* Part II.B–D.

33. See discussion *infra* Part III.

consent law than they do under the Fourth Amendment or the Louisiana Constitution.<sup>34</sup> Finally, Part V analyzes the text and purpose of Louisiana's implied consent statute in light of similar provisions from other jurisdictions.<sup>35</sup> Ultimately, this Comment concludes that a rational statutory interpretation validates Louisiana's no-refusal policy.<sup>36</sup> Therefore, if state lawmakers wish to prevent this police strategy, a legislative reconstruction of the implied consent statute is necessary to guide courts in addressing no refusal's legitimacy.<sup>37</sup>

## II. CONSTITUTIONALITY OF NO REFUSAL

### A. *Schmerber v. California: The U.S. Supreme Court Decision on DWI Blood Draws*

A common misconception exists among members of the public that no refusal violates a driver's constitutional rights—most notably, the Fourth Amendment right of freedom from unreasonable searches and seizures.<sup>38</sup> While the United States Supreme Court has not directly addressed these constitutional questions in the context of a no-refusal policy, the Court has considered the constitutionality of removing physical evidence from a suspect without his consent.<sup>39</sup> *Schmerber v. California*

---

34. See discussion *infra* Part IV.A.

35. See discussion *infra* Part V.

36. See discussion *infra* Part V.

37. See conclusion *infra* Part VI.

38. See Legendre, *supra* note 16 (“A public dialogue is needed about the constitutionality of programs like ‘No Refusal.’”); see also John Floyd & Billy Sinclair, *No Refusal Blood Draws Spread*, CRIMINAL LAW BLOG (Jan. 3, 2011, 7:18 AM), <http://www.johntfloyd.com/blog/2011/01/03/no-refusal-blood-draws-spread/> (“These kinds of law enforcement strategies are not only an invasion of personal privacy but offend our traditional constitutional principles against unnecessary governmental intrusion.”); Blake Trueblood, *Florida’s “No Refusal” DWI Checkpoints and Your Constitutional Rights*, TRUEBLOOD LAW GROUP (Dec. 30 2010), <http://glades-law.com/florida-s-“no-refusal”-dui-checkpoints-and-your-constitutional-rights/> (“Critics question the constitutionality of the on-the-spot-warrants.”).

39. See generally *Winston v. Lee*, 470 U.S. 753 (1985); *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Rochin v. California*, 342 U.S. 165 (1952). On September 25, 2012, the U.S. Supreme Court agreed to hear an appeal from a Missouri Supreme Court decision requiring police officers to obtain a search warrant before forcing a DWI suspect to submit to a BAT. *State v. McNeely*, 358 S.W.3d 65, 70 (Mo. 2012) (en banc) (per curiam), *cert. granted*, 81 U.S.L.W. 3031 (U.S. Sept. 25, 2012) (No. 11-1425). State courts across the country are divided over whether a warrantless and nonconsensual blood draw violates a DWI suspect's Fourth Amendment rights. David G. Savage, *High Court to Consider Forced Tests in DUI Cases*, THE ADVOCATE, Sept. 26, 2012,

remains the leading Supreme Court case on the constitutionality of DWI blood withdrawals.<sup>40</sup>

In that case, an officer arrested defendant Armando Schmerber for DWI at the hospital where he received treatment for injuries after his car struck a tree.<sup>41</sup> When Schmerber refused to submit to a blood or breath test, the officer ordered a physician to extract Schmerber's blood for chemical testing.<sup>42</sup> The test revealed a blood-alcohol content (BAC) over the legal limit, and the State used this evidence to secure Schmerber's criminal conviction.<sup>43</sup> Schmerber objected to the introduction of the chemical test results, claiming that the forced withdrawal of his blood violated his Fourth, Fifth, Sixth, and Fourteenth Amendment rights.<sup>44</sup> However, the Supreme Court found no constitutional violations in the warrantless taking of Schmerber's blood.<sup>45</sup> The Court held that while an individual's personal integrity is a sacred societal value, the Constitution does not forbid minor bodily intrusions, like the nonconsensual blood draw.<sup>46</sup>

After dispensing with the due process argument, the Court found that the withdrawal of Schmerber's blood and the use of its chemical analysis as evidence did not implicate the Fifth Amendment privilege against self-incrimination.<sup>47</sup> The Court determined that the Fifth Amendment protects an accused from providing mere *testimonial* evidence and that blood, on the other hand, constitutes "real or physical evidence."<sup>48</sup> According to the

---

at 2A. The Supreme Court's decision, due in early 2013, will define the rights of DWI suspects, as well as the power of police officers in performing blood-evidence searches. *Id.*

40. Schmerber v. California, 384 U.S. 757 (1966).

41. *Id.* at 758 & n.2.

42. *Id.* at 758–59.

43. *Id.* at 759.

44. *Id.* Schmerber argued that the blood draw and the admission of the test results in evidence

denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment.

*Id.* This Comment mentions the Court's analysis regarding Schmerber's Fifth Amendment claim but focuses primarily on the Court's analysis of Schmerber's Fourth Amendment claim.

45. *Id.* at 772.

46. *Id.*

47. *Id.* at 760–61.

48. *Id.* at 761, 764.



Court, Schmerber's BAT results did not constitute a communicative act; therefore, the admission of his BAT results into evidence did not compel Schmerber to serve as a witness against himself in violation of the Fifth Amendment.<sup>49</sup>

Next, the Supreme Court discussed the Fourth Amendment's function "to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."<sup>50</sup> To protect against unjustified and improper invasions, the Court devised a standard for determining whether a nonconsensual blood draw satisfies the Fourth Amendment: "whether the police [are] justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood" are reasonable.<sup>51</sup> In essence, the *Schmerber* test requires a two-pronged analysis of: (1) probable cause and (2) reasonableness. Applying this standard to the *Schmerber* facts, the Court found that the officer had probable cause for the search and that the blood-draw conditions were medically acceptable.<sup>52</sup>

Beginning with a detailed discussion of the first prong—probable cause—the Court conceded that the Fourth Amendment typically requires officers to secure a warrant, and "no less could be required where intrusions into the human body are concerned."<sup>53</sup> That is to say, the Fourth Amendment favors an analysis of probable cause by a neutral, detached judge, instead of a potentially biased determination by officers who are "engaged in the often competitive enterprise of ferreting out crime."<sup>54</sup> The Court clearly recognized the "indisputable and great" need for impartial and informed considerations over the invasion of a suspect's body.<sup>55</sup> But the officer's assessment was enough to establish probable cause—even without the evaluation of a neutral magistrate—because of Schmerber's obvious intoxication.<sup>56</sup>

The Court further held that exigent circumstances justified the warrantless blood draw.<sup>57</sup> Due to the quick dissipation of alcohol

---

49. *Id.* at 764–65.

50. *Id.* at 768.

51. *Id.*

52. *Id.* at 768–72.

53. *Id.* at 770.

54. *Id.*

55. *Id.*

56. *Id.* The officer based his probable cause for the arrest on the fact that Schmerber exhibited the telltale signs of drunkenness, including glassy, bloodshot eyes and the smell of alcohol both at the scene of the accident and later at the hospital. *Id.* at 768–69.

57. *Id.* at 770–71.

from the body and the lengthy warrant process, the officer reasonably believed that the potential destruction of BAC evidence necessitated the warrantless search, “[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.”<sup>58</sup> Given these “special facts,” the Court concluded that the warrantless blood draw was an appropriate search incident to Schmerber’s arrest.<sup>59</sup>

Equally important, the officer’s choice to extract Schmerber’s blood was a reasonable method of obtaining evidence.<sup>60</sup> Discussing the second prong of reasonableness, the Court noted: “Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol.”<sup>61</sup> Moreover, blood test procedures are common in everyday life and involve practically no risk or pain.<sup>62</sup> Schmerber did not show signs of fear over the blood extraction, and the hospital physician drew his blood according to standard medical practices.<sup>63</sup> The Supreme Court found the officer’s actions reasonable, but it couched this narrow exception to the warrant requirement to the specific facts in *Schmerber*: this decision “in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other conditions.”<sup>64</sup> Additionally, the *Schmerber* Court did not address questions about the reasonableness of taking blood from a suspect who prefers a different search method because of fear, health concerns, or religious beliefs.<sup>65</sup>

*Schmerber* was a milestone for the Supreme Court. That decision remains the federal constitutional benchmark for determining the validity of a DWI blood search.<sup>66</sup> In practice, *Schmerber* enables officers to perform a warrantless, non-

---

58. *Id.*

59. *Id.*

60. *Id.* at 771.

61. *Id.* (citing *Breithaupt v. Abram*, 352 U.S. 432, 436 n.3 (1957)).

62. *Id.* at 771 & n.13 (“The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.” (citing *Breithaupt*, 352 U.S. at 436)).

63. *Id.* at 771.

64. *Id.* at 772.

65. *Id.* at 771.

66. Robert Brooks Beauchamp, “*Shed Thou No Blood*”: *The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. CAL. L. REV. 1115, 1128 (1987).

consensual blood draw on a DWI suspect without violating his constitutional rights.<sup>67</sup> But *Schmerber* merely represents the *minimum* constitutional standard for a DWI blood-search.<sup>68</sup>

### B. Exceeding Constitutional Expectations

Various judges rely on *Schmerber* to authorize DWI search warrants.<sup>69</sup> However, that case specifically addressed the constitutionality of a *warrantless* DWI search based on the likely destruction of alcohol evidence, whereas no refusal presupposes a warrant-based search.<sup>70</sup> No-refusal searches are distinguishable from the *Schmerber* search because they do not involve the same urgencies to justify a warrantless BAT.<sup>71</sup> A court's reliance on *Schmerber* to rationalize no-refusal warrants is therefore questionable.

Unlike in *Schmerber*, officers do not rely on exigent circumstances as the basis for a no-refusal search. In fact, no-refusal policies require officers to obtain a search warrant authorizing the BAT rather than relying on a warrant exception.<sup>72</sup> But when the Supreme Court decided *Schmerber* in 1966, the process of securing a warrant required far more time and effort than it does today.<sup>73</sup> Officers could not fax or electronically submit affidavits. Instead, they delivered a paper warrant to judges' homes

---

67. See generally *Schmerber*, 384 U.S. 757.

68. See, e.g., Cook, *supra* note 2, at 102 ("The result in *Schmerber* laid the foundation upon which proponents of the blood search warrant have relied.").

69. *Id.* at 106.

70. See generally *Schmerber*, 384 U.S. 757.

71. See Black, *supra* note 4, at 479; see also E. John Wherry, Jr., *DWI Blood Alcohol Testing: Responding to a Proposal Compelling Medical Personnel to Withdraw Blood*, 18 SETON HALL LEGIS. J. 655, 663–68 (1994).

72. See Shannon, *supra* note 14. "With the exception of a few well-delineated situations, officers must obtain a warrant from a neutral and detached magistrate prior to conducting either an arrest or a search." *State v. Warren*, 949 So. 2d 1215, 1225 (La. 2007). A warrantless search is per se unreasonable unless one of the following warrant-exceptions applies: vehicle search based on probable cause, standard inventory search, search incident to lawful arrest, consensual search, search based on exigent circumstances. *Id.* at 1225–26 (citations omitted). However,

[a]bsent one of the foregoing exceptions, a warrant is required because it places the crucial task of making delicate judgments and inferences from facts and circumstances in the hands of a detached and neutral magistrate judge, instead of police officers, who are engaged in the zealous pursuit of ferreting out crime.

*Id.* at 1225–26.

73. See *Schmerber*, 384 U.S. at 770–71.

or offices.<sup>74</sup> Getting proper authorization took hours, during which time the suspect's BAC would begin to diminish.<sup>75</sup> Because of the body's ability to process alcohol quickly, the *Schmerber* Court reasoned that officers could not acquire a warrant quickly enough to accurately determine the suspect's BAC.<sup>76</sup> This possible destruction of evidence constituted exigent circumstances.<sup>77</sup>

However, modern technology and police procedures expedite the warrant process, lessening the exigencies that justified the warrantless *Schmerber* search. For example, states like Arizona have instituted tele-fax warrant systems that enable officers to fax affidavits to a judge after working hours.<sup>78</sup> This new system allows an officer to obtain a search warrant in approximately 30 minutes.<sup>79</sup> In Texas, law enforcement authorities often set up DWI roadblocks with standby judges who are waiting at the scene to sign warrants.<sup>80</sup> Furthermore, Utah judges send PDF electronic warrants directly to officers' cell phones.<sup>81</sup>

The Louisiana procedure for no refusal includes the use of similar technology to streamline the warrant process.<sup>82</sup> The no-refusal process begins when a suspect refuses an officer's request to submit to an initial BAT, which prompts the officer to fax an on-call judge an affidavit detailing probable cause for the stop and arrest.<sup>83</sup> Next, the judge administers an oath to the officer via cell phone and makes his determination of probable cause based on the affidavit and the officer's sworn statements.<sup>84</sup> If the judge finds sufficient probable cause upon which to issue the warrant, he sends the warrant back, and the officer proceeds with gathering blood evidence.<sup>85</sup> Like the modernized warrant process in other states, Louisiana's strategy reduces the exigencies of *Schmerber*.<sup>86</sup>

Additionally, new research may contradict the Supreme Court's assessment of how quickly the body processes and dispels

---

74. Steven DuBreuil, *Controversy Surrounding "No Refusal" Policy for DUI Suspects*, LAW OFFICE OF STEVEN M. DUBREUIL, BLOG (April 6, 2012), <http://dubreuilawfirm.com/blog/>.

75. *Id.* See also *Schmerber*, 384 U.S. at 770–71.

76. *Schmerber*, 384 U.S. at 770–71.

77. *Id.*

78. Hinte, *supra* note 6, at 164.

79. *Id.*

80. Floyd & Sinclair, *supra* note 38.

81. See DuBreuil, *supra* note 74.

82. See Shannon, *supra* note 14.

83. *Id.*

84. *Id.*

85. *Id.*

86. See discussion *supra* Part II.A.

alcohol.<sup>87</sup> While absorption of alcohol into the blood and its transmission to the brain is a fairly quick process (approximately 30–90 minutes after consumption), the elimination of alcohol from the body occurs at a much slower rate.<sup>88</sup> Current scientific evidence shows that the body's complete dissipation of alcohol will take approximately 6 hours and 40 minutes for a suspect with a BAC of 0.10%.<sup>89</sup> Similarly, the cleansing process for blood with a 0.15% alcohol content will take around ten hours to complete.<sup>90</sup> Due to the combination of the actual length of the alcohol-elimination process and an officer's ability to obtain a warrant within minutes, a no-refusal stop does not present an urgent circumstance like the Court found in *Schmerber*.<sup>91</sup> In light of this new research, the *Schmerber* exigent circumstances theory may be an invalid justification for DWI searches.<sup>92</sup> But until the Supreme Court revisits this 40-year-old decision, *Schmerber* still permits the warrantless blood draw of a nonconsenting DWI suspect.<sup>93</sup>

Regardless, no refusal, at least in theory, provides greater Fourth Amendment protection to DWI suspects than *Schmerber* by requiring officers to obtain a BAT search warrant. The Fourth Amendment prefers an impartial consideration of probable cause, so the heightened protection of a no-refusal warrant exceeds the minimal constitutional requirements of *Schmerber*.<sup>94</sup> No-refusal warrants afford motorists the added benefit of neutral judicial

---

87. Wherry, *supra* note 71, at 663.

88. *Id.* at 664.

89. *Id.*

90. *Id.* at 664–65. *See also* Black, *supra* note 4, at 149.

91. *See* Black, *supra* note 4, n.68.

92. *Id.* *See also* Wherry, *supra* note 71, at 663.

93. Courts in several states have addressed the question of whether *Schmerber* permits warrantless, nonconsensual BATs in routine DWI stops. *Missouri v. McNeely*, 358 S.W.3d 65, 70 (Mo. 2012) (en banc) (per curiam), *cert. granted*, 81 U.S.L.W. 3031 (U.S. Sept. 25, 2012) (No. 11-1425). *See also* *State v. Rodriguez*, 156 P.3d 771 (Utah 2007); *Iowa v. Johnson*, 744 N.W.2d 340 (Iowa 2008). As recently as January 2012, the Missouri Supreme Court held that the quick dissipation of alcohol from the body does not, by itself, constitute a per se exigent circumstance under *Schmerber* so as to justify nonconsensual DWI blood draws performed without a warrant. *McNeely*, 358 S.W.3d at 67. The U.S. Supreme Court granted the State of Missouri's petition for certiorari on September 25, 2012 to resolve the question: "Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream." Petition for Writ of Certiorari at 1, *Missouri v. McNeely*, No. 11-1425 (Mo. May 22, 2012), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/11-1425-Missouri-v.-McNeely-Petition.pdf>.

94. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

oversight, which is not required in *Schmerber* exigency searches.<sup>95</sup> Thus, the concept of no refusal should survive constitutional attacks, even if the Supreme Court abandons *Schmerber* and rejects the DWI exigent circumstances theory.

### C. Pushing Constitutional Boundaries

Conceptually, no-refusal search warrants are legitimate under the federal Constitution, but, in practice, the execution of no-refusal warrants may exceed *Schmerber*'s two-part constitutional test.<sup>96</sup> When the Supreme Court established this general standard for DWI searches, the Court did not specify detailed criteria for analyzing probable cause or reasonableness questions on a case-by-case basis.<sup>97</sup> The majority strictly tailored its analysis to the specific facts in *Schmerber*, while implying that a BAT under different circumstances might satisfy the Fourth Amendment as long as the search conditions are reasonable.<sup>98</sup> In some situations, the improper administration of no refusal may raise reasonableness, privacy, or probable cause issues.<sup>99</sup>

For example, an officer's use of excessive force in drawing blood could implicate constitutional questions about the propriety of the search.<sup>100</sup> Whereas typical blood tests are routine and harmless, a forcible, nonconsensual blood draw involves heightened risks.<sup>101</sup> Privacy concerns may also result when police officers use DWI blood evidence to gain medical information they would otherwise be unable to access.<sup>102</sup> Another common attack against no refusal is that on-call judges make predeterminations about the need for a warrant without sufficiently examining probable cause in every case.<sup>103</sup> A situation in which judges give

---

95. *Id.*

96. *Id.* at 768 (holding that a DWI blood draw must be based on probable cause and the means and procedures for the blood draw must be reasonable). *See generally* Hinte, *supra* note 6, at 168–80.

97. *Schmerber*, 384 U.S. at 771–72. The Court even acknowledged “the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse.” *Id.* The Court warned, “To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.” *Id.*

98. *See id.* at 768–72.

99. *See generally* Hinte, *supra* note 6, at 168–80.

100. *See generally* Beauchamp, *supra* note 66.

101. *See* Cook, *supra* note 2, at 114–15.

102. *See* Legendre, *supra* note 16.

103. *Id.*

DWI warrants an “assembly line review” is problematic because the need for an unbiased probable cause examination is “indisputable and great.”<sup>104</sup>

In some cases, special procedural protections are necessary to assess the reasonableness of a compelled intrusion beneath the suspect’s skin for criminal evidence.<sup>105</sup> The forced surgical removal of a bullet in *Winston v. Lee* is one example where the Supreme Court required a preliminary adversarial hearing to decide the necessity of the search.<sup>106</sup> Such procedural protections allow a neutral magistrate to weigh the suspect’s privacy and security interests against society’s interest in retrieving evidence.<sup>107</sup> The *Winston* Court stated, “In a given case, the question whether the community’s need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.”<sup>108</sup> But in the case of a routine blood draw, the Fourth Amendment does not require an adversarial judicial determination.

Unlike the trivial blood test in *Schmerber*, the compelled surgery in *Winston* required a preliminary adversarial hearing to evaluate the procedure’s invasiveness, the risks involved, and the substantial need for evidence.<sup>109</sup> Blood tests, on the other hand, are commonplace in today’s society and do not extensively invade a suspect’s bodily integrity.<sup>110</sup> That is to say, the privacy interest involved in a BAT is much less significant than in surgical cases like *Winston*. Besides, “given the difficulty of proving drunkenness by other means . . . results of the blood test [are] of vital importance if the State [is] to enforce its drunken driving laws.”<sup>111</sup>

---

104. *Id.*; *Schmerber v. California*, 384 U.S. 757, 770 (1966).

105. *Winston v. Lee*, 470 U.S. 753, 760 (1985).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 765–67. The Louisiana Supreme Court has also implied that, at the very least, an adversarial determination may be required to protect the greater individual interest involved in a surgical intrusion. *See State v. Martin*, 404 So. 2d 960, 962 (1981) (“In finding the [surgical removal of a bullet] reasonable and justified under the circumstances, the Court noted that it considered the following salient factors . . . (3) before the operation was performed the trial court held an adversary hearing at which the defendant appeared with counsel, and (4) thereafter, and before the operation was performed, the defendant was afforded an opportunity for appellate review.” (citing *U.S. v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976))).

110. *Winston*, 470 U.S. at 762 (citing *Schmerber v. California*, 384 U.S. 757, 771 n.13 (1966)).

111. *Id.* at 763.

As a result, no-refusal blood draws do not necessitate greater Fourth Amendment procedural protections.

Nevertheless, the Fourth Amendment still imposes certain restrictions on the search for blood evidence: the means and procedures of the blood draw must be reasonable.<sup>112</sup> In *Schmerber*, a physician performed the minor extraction in a hospital setting, which the Court determined was medically acceptable and therefore, reasonable.<sup>113</sup> Many no-refusal strategies mirror the facts of *Schmerber* by directing officers to transport the suspect to a medical facility where a medical technician or nurse will draw his blood.<sup>114</sup> On the other hand, some agencies modify their no-refusal procedures to allow qualified technicians to take blood samples in a mobile police unit at the scene of the stop, or even in a room at the police station.<sup>115</sup> Agencies in several states even train police officers to take blood samples.<sup>116</sup>

By today's standards, no-refusal practices that deviate from the hospital and physician setting in *Schmerber* can still be reasonable. The mobile units and police station rooms contain accommodations for the safe withdrawal and storage of blood.<sup>117</sup> Officers follow hospital standards by sanitizing the areas and by limiting outsider access so that suspects remain undisturbed.<sup>118</sup> Law enforcement officials even videotape these procedures to ensure that officers follow proper protocol.<sup>119</sup> Based on these precautions, such environments pose no heightened risk to an individual's health or safety.<sup>120</sup> Whereas mobile units and station

---

112. *Schmerber*, 384 U.S. at 768.

113. *Id.* at 758–59, 768.

114. Michigan police officers use this procedure. See TWYLA CATON, INST. FOR COURT MGMT.: COURT EXEC. DEV. PROGRAM, COLLIN COUNTY BLOOD WARRANTS: DO THEY REDUCE COURT DOCKETS? 11 (2011), <http://www.ncsc.org/~media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2011/Blood%20Warrants.ashx>. See also *Schmerber*, 384 U.S. at 758–59.

115. Arizona and Texas law enforcement officials deviate from the *Schmerber* procedure in this way. See CATON, *supra* note 114, at 9, 24. See also Warren Diepram, *Anatomy of a DWI “No-Refusal Weekend,”* THE PROSECUTOR (Sept.–Oct. 2007), available at <http://www.tdcaa.com/node/1141>.

116. Officer phlebotomy is common among Arizona law enforcement agencies. See generally Matthew H. Green & James Charnesky, *Blood Bath: Sustaining the Fight Against Law Enforcement Phlebotomy in Arizona* (June 2005) (on file with author); see also CATON, *supra* note 114, at 9.

117. CATON, *supra* note 114, at 24.

118. Diepram, *supra* note 115.

119. *Id.*

120. See, e.g., *People v. Esayan*, 5 Cal. Rptr. 3d 542, 550 (Cal. Ct. App. 2003) (finding that blood draw did not violate Fourth Amendment because defendant did not prove that manner of test was unsanitary or that it caused him any unusual pain or indignity); *State v. Dagget*, 640 N.W.2d 546, 551 (Wis. Ct.



rooms do not entail the same level of regulation as medical facilities, they likely satisfy *Schmerber*'s minimal reasonableness test.

Perhaps more controversial is the practice of allowing non-medically trained professionals to perform no-refusal blood draws. Though they do not receive formal medical education, officer phlebotomists<sup>121</sup> must complete a training course before an agency will allow them to extract evidentiary blood samples.<sup>122</sup> Police departments appoint a high-ranking officer with previous phlebotomy instruction to be the "phlebotomy coordinator."<sup>123</sup> Officer phlebotomists meet regularly with the agency's coordinator and attend annual lessons for continuing phlebotomy education.<sup>124</sup> Also, each law enforcement agency develops a document outlining the department's general blood draw protocol.<sup>125</sup> Agencies do their best to guarantee that officers are fully capable of taking blood evidence samples in a reasonable manner. Because of these stringent training and regulation requirements, the use of police officer phlebotomists should withstand constitutional criticism. Some state courts have even sanctioned the use of officer phlebotomists as a reasonable substitute for medical personnel.<sup>126</sup>

In short, while no refusal theoretically exceeds *Schmerber* in protecting an individual's Fourth Amendment guarantees, the

---

App. 2001) (finding manner of warrantless blood draw performed in booking room of county jail was reasonable, even though environment not sterile, because defendant did not show heightened safety or health risk); *State v. Sickie*, 488 N.W.2d 70, 73 (S.D. 1992) (approving blood draw in poorly-lit "drunk tank" at the jail facility by officer who taught himself to draw blood: "Blood tests do not have to be performed in a hospital; however, we do require the blood test to be performed under conditions 'which provide a medically approved manner for the specific purpose of drawing blood.' A crucial factor in analyzing the magnitude of the intrusion is the extent to which the procedure may threaten the safety or health of the individual." (citations omitted)).

121. In the DWI context, *phlebotomy* refers to the procedure of drawing a suspect's blood for use as evidence. *Green & Charnesky, supra* note 116, at 4. Arizona was the first state to allow officer phlebotomy, but other states like Utah and California have begun passing legislation to authorize officer-phlebotomy programs. *Id.*

122. *Id.* at 7. The phlebotomy discussion will refer to Arizona law enforcement policies and procedures.

123. *Id.*

124. *Id.*

125. *Id.*

126. Several Arizona courts have upheld the use of officer phlebotomists in performing DWI blood draws as long as the officers complete the relevant training. *See State v. Noceo*, 221 P.3d 1036, 1040 (Ariz. Ct. App. 2009); *State v. May*, 112 P.3d 39, 42 (Ariz. Ct. App. 2005).

improper application of this program may violate an individual's constitutional rights.<sup>127</sup> As applied, no refusal highlights potential limits to the Supreme Court's position on DWI blood draws and demonstrates that *Schmerber's* constitutional standard may be too broad to adequately protect motorists from unreasonable DWI searches.<sup>128</sup> The Supreme Court should reevaluate *Schmerber* in light of new police tactics like no refusal. But until the Court revisits its holding in *Schmerber*, a warrant-based no-refusal blood draw does not constitute a per se Fourth Amendment violation. Of course, *Schmerber* provides the floor of federal constitutional rights, and states are free to expand *Schmerber's* minimal protection under their own constitutions and laws.<sup>129</sup>

#### *D. Application of Schmerber in Louisiana*

Presently, Louisiana courts refuse to interpret the state constitution as affording citizens a higher standard of liberty for DWI blood draws beyond what the U.S. Constitution provides.<sup>130</sup> In 1968, only two years after *Schmerber*, the Louisiana Supreme Court held that a compulsory blood draw for BAC testing does not infringe on an individual's state constitutional rights.<sup>131</sup> The Louisiana Third Circuit Court of Appeal agreed with *Schmerber* that an involuntary BAT does not offend the individual guarantees against unreasonable searches if the draw is based on probable cause and performed in a reasonable manner.<sup>132</sup>

---

127. See Hinte, *supra* note 6, at 168–80.

128. In sum, the use of excessive and unreasonable force, the use of blood-test results for purposes other than DWI conviction, or the use of an invalid search warrant based on an improper judicial evaluation of probable cause could render the application of no refusal unconstitutional.

129. See, e.g., Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 603 (1998); see also Cook, *supra* note 2, at 103 (interpreting the dissent in *Beeman v. Texas*, 86 S.W.3d 613 (Tex. Crim. App. 2002) (en banc)).

130. See, e.g., *State v. Graham*, 278 So. 2d 78, 79 (La. 1973) (holding that defendant implicitly consented to BAT performed when he was unconscious and that officer had probable cause and performed BAT in reasonable manner, so no constitutional violation of defendant's due process, self-incrimination, or unreasonable search guarantees occurred); *State v. Dugas*, 211 So. 2d 285, 289 (La. 1968) (“The compulsory extraction of a blood sample for an intoxication test infringes no constitutional rights.”); *State v. Pierre*, 606 So. 2d 816, 818–20 (La. Ct. App. 1992).

131. *Dugas*, 211 So. 2d at 289.

132. *Graham*, 278 So. 2d at 79. Louisiana courts have also considered the issue of compelled blood draws in the context of succession and filiation disputes. The Louisiana Supreme Court has consistently held that courts can compel individuals to submit to a blood test in order to establish or disprove

Notwithstanding these decisions, criminal defendants continue to challenge the constitutionality of nonconsensual searches for physical evidence.<sup>133</sup> For example, after one Louisiana court ordered a rape suspect to provide a blood sample, the suspect attacked the order on state constitutional grounds.<sup>134</sup> The defendant argued that Louisiana Constitution article I, section 16 affords greater protection of individual liberty than the U.S. Constitution because of the language: “No person shall be compelled to give evidence against himself.”<sup>135</sup> However, the Louisiana Supreme Court rejected the defendant’s interpretation.<sup>136</sup> Due to “reasons of overriding state interest, and finding the court-ordered blood test minimally intrusive, relatively painless, and medically safe,” the court refused “to extend the doctrine of a higher standard of individual liberty . . . to include evidence which an accused may be compelled to give,” such as blood.<sup>137</sup> Thus, blood draws performed pursuant to no-refusal search warrants do not violate DWI suspects’ state or federal constitutional rights.

### III. THE REAL ISSUE WITH NO REFUSAL

The *Schmerber* decision prompted the Louisiana Legislature, like many state governments, to enact implied consent statutes.<sup>138</sup> Implied consent is a legal fiction, resting on the notion that driving is a privilege and not a right.<sup>139</sup> Implied consent assumes that in return for the ability to drive, every motorist agrees to a BAT when

---

filiation. The State’s interest in preserving an individual’s constitutional right to inherit through forced heirship or an individual’s compelling interest in determining his heritage overrides the slight privacy invasion involved in a blood test. See *Succession of Robinson*, 654 So. 2d 682 (La. 1995); *Sudwisher v. Estate of Hoffpauir*, 589 So. 2d 474 (La. 1991).

133. See, e.g., *Pierre*, 606 So. 2d at 816.

134. *Id.*

135. LA. CONST. art. I, § 16.

136. *Pierre*, 606 So. 2d at 818.

137. *Id.*

138. See generally *Gulbis*, *supra* note 5. New York became the first state to enact an implied consent law in 1953. N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney 2010). Slowly, other states began to follow suit by passing their own version of New York’s statute. Today, some statutory regime of implied consent exists in every state. See John Hoffman, *Implied Consent with a Twist: Adding Blood to New Jersey’s Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35 RUTGERS L. J. 345, 356 (2003); Donna J. Arnold, *Legislation—Implied Consent Legislation in Drunk Driving Cases: The Case for Repeal—People v. Moselle, People v. Daniel, People v. Wolter*, 6 W. NEW ENG. L. REV. 465, 465–66 (1983).

139. Arnold, *supra* note 138, at 465–66.

an officer has probable cause to suspect the motorist of driving while intoxicated.<sup>140</sup> Unlike true consent, implied consent presupposes the motorist's agreement as a condition for receiving a driver's license, regardless of whether he affirmatively authorizes the test at the time of the stop.<sup>141</sup> Because the State simply infers the driver's consent, the driver can refuse the test and effectively withdraw his or her consent. Nevertheless, driving is a privilege over which the State can exert reasonable control to protect innocent bystanders.<sup>142</sup> For this reason, the State imposes penalties for BAT refusal, including the revocation of a motorist's driver's license.<sup>143</sup>

Scholars argue that implied consent laws are an example of how state legislatures have broadened the *Schmerber* baseline for the protection of individual rights.<sup>144</sup> Although, state legislatures initially enacted these laws to enhance the utility of new BAT technology by using it to rid the streets of dangerous, irresponsible drivers.<sup>145</sup> Implied consent laws were meant to act as a "powerful weapon" against impaired driving by enabling the State to gather BAT results, which usually guarantee a DWI conviction.<sup>146</sup> States hoped that by increasing the likelihood of conviction, these laws would correspondingly increase DWI deterrence.<sup>147</sup>

Yet, implied consent laws have proven unsuccessful due to the high rate of drivers who decline BATs and subsequently challenge their license suspension in court.<sup>148</sup> Refusal is so common because DWI arrestees would rather face relatively short license suspensions than suffer the more serious consequences of DWI convictions.<sup>149</sup> This failure of implied consent laws has led states like Louisiana to implement no-refusal search warrant policies to

---

140. *Id.*

141. *Id.* See also Hoffman, *supra* note 138, at 356.

142. See Arnold, *supra* note 138, at 465–66.

143. *Id.*

144. See Cook, *supra* note 2, at 92.

145. Hoffman, *supra* note 138, at 396. See also Hinte, *supra* note 6, at 162.

146. See Cafaro, *supra* note 5, at 100, 112 ("The result of the BAC test is an extremely valuable piece of evidence in an impaired driving case. If an impaired driver refuses a breath test, convincing a jury of a motorist's guilt becomes even more difficult. . . . [When] a person refuses the BAC test, that person is more likely to contest the case. The lack of BAC test results clouds the case just enough to give the defense an advantage it does not have when there are test results. Defense attorneys usually attack the police reports and the behavioral cues reported by the officer or trooper. Without a BAC test, these reported cues are the only evidence the State has of the person's intoxication at the time of arrest.") (citations omitted).

147. *Id.* at 112.

148. *Id.*

149. *Id.* See, e.g., LA. REV. STAT. ANN. §§ 32:661–70 (2002 & Supp. 2012).

obtain BAC evidence when officers cannot procure test results through implied consent.<sup>150</sup> All 50 states now agree that implied consent is a necessary state restriction on an individual's driving privilege because of the government's need to prevent alcohol-impaired driving.<sup>151</sup> But in light of no refusal, states do not interpret their respective implied consent laws in the same way.<sup>152</sup>

As a result, courts around the country are divided on whether the statutory ability to refuse under state law precludes officers from securing search warrants for blood evidence.<sup>153</sup> Some courts side with opponents of no refusal, holding that citizens enjoy a "right to refuse" under the plain wording of the state's implied consent law.<sup>154</sup> Therefore, if a driver exercises his "refusal right," the State's only recourse is to punish him for declining the BAT in accordance with the statute; the police cannot use a search warrant to circumvent the statute's unambiguous language.<sup>155</sup> But courts in other states have sanctioned no-refusal search warrants, reasoning that the implied consent law neither forbids other constitutional search measures nor grants DWI suspects more rights than the Fourth Amendment.<sup>156</sup>

Despite recent litigation involving DWI search warrants, the Louisiana Legislature has not specifically indicated that the implied consent statute provides greater rights to DWI suspects than the Fourth Amendment. Neither have Louisiana courts ruled that the Legislature enacted the implied consent law to expand protections beyond *Schmerber*.<sup>157</sup> Thus, the validity of no refusal presents a question of legislative intent—specifically, whether Louisiana's implied consent statute affords individuals greater liberties than the federal and state constitutions. Should courts decide that motorists enjoy a greater statutory "right to refuse," then Louisiana's implied consent law will invalidate no-refusal

---

150. See LeBlanc, *supra* note 14.

151. Elizabeth Rubin, *Trying to Be Reasonable About Drunk Driving: Individualized Suspicion and the Fourth Amendment*, 62 U. CIN. L. REV. 1105, 1105–06 (1994).

152. See Cook, *supra* note 2, at 106–08; see also Black, *supra* note 4, at 771–72.

153. See, e.g., *Sosa v. State*, 4 P.3d 951 (Alaska 2000); *State v. DiStefano*, 764 A.2d 1156 (R.I. 2000); *Brown v. State*, 774 N.E.2d 1001 (Ind. Ct. App. 2002); *Beeman v. Texas*, 86 S.W.3d 613 (Tex. Crim. App. 2002) (en banc); *State v. Zielke*, 403 N.W.2d 427 (Wis. 1987).

154. See *State v. Collier*, 612 S.E.2d 281, 283 (Ga. 2005).

155. *Id.* See, e.g., *Sosa*, 4 P.3d 951; *DiStefano*, 764 A.2d 1156; *Combs v. Commonwealth*, 965 S.W.2d 161 (Ky. 1998).

156. See, e.g., *Beeman*, 86 S.W.3d 613; *Brown*, 774 N.E.2d 1001; *Zielke*, 403 N.W. 2d 427.

157. See *supra* note 29.

programs and prevent the State from proceeding with the warrant process in DWI cases.

#### IV. IMPLIED CONSENT AND THE “RIGHT TO REFUSE”

##### *A. Louisiana’s Implied Consent Law*<sup>158</sup>

The Louisiana Legislature passed its first implied consent statute in 1968.<sup>159</sup> Like its counterparts in other states, Louisiana’s law provides that an individual “who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent . . . to a chemical test or tests of his blood, breath, urine, or other bodily substance.”<sup>160</sup> While this legal scheme allows officers to conduct BATs based on probable cause and DWI suspects’ implied consent, Louisiana Revised Statutes section 32:666 simultaneously authorizes the accused to refuse the officer’s BAT request.<sup>161</sup> Refusal, however, is not without consequence.<sup>162</sup> Before requesting that the driver submit to a BAT,

---

158. LA. REV. STAT. ANN. §§ 32:661–70 (2002 & Supp. 2012).

159. *See id.*

160. LA. REV. STAT. ANN. § 32:661 (Supp. 2012). Under Louisiana Revised Statutes section 32:664, “only a physician, physician assistant, registered nurse, emergency medical technician, chemist, nurse practitioner, or other qualified technician” can perform the blood extraction for chemical analysis. *Id.* § 32:664. The statute prevents a law enforcement officer from taking blood samples pursuant to implied consent unless the officer is also a qualified physician or medical technician. *Id.* However, section 32:664 does not apply in a case where a suspect refuses an implied consent test and officers then obtain a search warrant for his blood. The statute clearly operates “[w]hen a person submits to a blood test at the request of a law enforcement officer *under the provisions of this Part.*” *Id.* (emphasis added). Thus, the qualified technician requirement only applies to an implied consent search under Title 32. The only requirement for a warrant-based blood draw is that it be done in a “reasonable manner.” *See, e.g., Schmerber v. California*, 384 U.S. 757, 768 (1966).

161. LA. REV. STAT. ANN. § 32:666 (Westlaw 2012). This statute was amended in the 2012 Louisiana legislative session to state:

The officer may direct a person to submit to a breath test, and if indicated, an additional blood test for the purpose of testing for the presence of alcohol, abused substances, and controlled dangerous substances. A refusal of any such test or tests shall result in the suspension of driving privileges as provided by the provisions of this Part.

Act of June 7, 2012, 2012 La. Sess. Law Serv. Act No. 592 (H.B. 781) (West).

162. *See* LA. REV. STAT. ANN. § 32:666. Refusal results in the seizure of the suspect’s driver’s license and, ultimately, the revocation of his driving privileges. *Id.* Moreover, evidence of the suspect’s refusal “shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person” was driving under the influence of drugs or alcohol. *Id.*

the officer must read a suspect his *Miranda* rights and inform him of the penalties for refusal, as well as the implications of chemical test results indicating a BAC at or above the legal limit.<sup>163</sup> Yet, even if the suspect refuses, the statute includes two exceptions for refusal that allow an officer to draw blood over the suspect's objection in some circumstances.<sup>164</sup> A suspect cannot decline a BAT if he refused on two prior occasions or if he was involved in a motor vehicle accident that results in death or serious bodily injury.<sup>165</sup>

*B. You Have the Right to Remain Silent, but Do You Have the "Right to Refuse?"*

Louisiana judges, administrators, and members of the public have come to believe that motorists enjoy a "right to refuse" DWI chemical tests under Louisiana's implied consent law.<sup>166</sup> Opponents of no refusal argue that because the Louisiana Legislature affords drivers this "right to refuse," the implied consent statute restricts the State from conducting a warrant-based search when a suspect exercises this statutory "right."<sup>167</sup> Even the

---

163. Under Louisiana Revised Statutes section 14:98(A)(1)(a), a test result of 0.08% or more creates a presumption of intoxication. But under Louisiana Revised Statutes section 14:98(A)(1)(b), a test result of 0.08% or more is an element of the offense of driving while intoxicated. *See State v. Broussard*, 517 So. 2d 1000, 1002 (La. Ct. App. 1987) ("The .10 percent or above reading constitutes a violation of LSA-R.S. 14:98, not just a rebuttable presumption." (citing *State v. Singer*, 457 So. 2d 690 (La. Ct. App. 1984))).

164. LA. REV. STAT. ANN. § 32:666.

165. *Id.* The statutory definition of serious bodily injury includes "bodily injury which involves unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death." *Id.*

166. *See, e.g., State v. Alcazar*, 784 So. 2d 1276, 1281–82 & n.4 (La. 2001) ("[T]his refusal *right* is a matter of grace that the Louisiana Legislature has bestowed. . . . [T]his *right* of refusal would be hollow if we were to allow the introduction of the test results even if the police advise the defendant of his *right* to refuse. . . . Notwithstanding, a defendant's exercise of that *right* to refuse the chemical test is not without its consequences." (emphasis added)); *State v. Mobley*, KW 11-00146 (La. Ct. App. 2011) (Genovese, J. dissenting); La. Att'y Gen. Op. No. 90-254 at 2 (Aug. 15, 1990) (referring to the implied consent statute as providing "the *right* to refuse to take a blood test" (emphasis added)); Chase Tettleton, *Louisiana's Drunk Driving "No Refusal" Initiative is Problematic*, THE BABCOCK BLOG (Sept. 14, 2010), <http://www.babcockpartners.com/blog/chase-tettleton/2010/09/14/louisianas-drunk-driving-no-refusal-initiative-problematic> ("In my opinion, Louisiana law allows drivers the right to refuse to a chemical test when accused of a DWI.").

167. *See, e.g., Cook, supra* note 2, at 112–16.

Louisiana Supreme Court has referred to the 32:666 provision as conferring a “refusal right.”<sup>168</sup>

Nonetheless, the Louisiana Supreme Court clearly indicated that an intoxicated driver’s ability to refuse a BAT is not a fundamental constitutional right.<sup>169</sup> By describing it as a legislative “matter of *grace*” the court distinguished the “refusal right” as less than a true entitlement, indicating that DWI suspects are not inherently free to prevent the search for blood evidence under all circumstances.<sup>170</sup> Therefore, those who argue that drivers enjoy a “right to refuse” BATs misinterpret the refusal stipulation.<sup>171</sup> In fact, the text of the implied consent and search warrant statutes contradict the idea of a “refusal right” for three reasons: (1) the plain text of the implied consent statute does not restrict the State’s search capabilities; (2) the implied consent statute imposes penalties and exceptions for refusal; and (3) the search warrant statutes do not contain an exception for implied consent cases.

### *1. Narrow Application of Refusal*

The clear wording of the implied consent statute does not constrain the State’s ability to search by granting DWI suspects the “right to refuse.” While Louisiana Revised Statutes section 32:661 implies a driver’s consent to a warrantless BAT, a driver can withdraw his implied consent through refusal.<sup>172</sup> But during a no-refusal stop, the driver’s withdrawn consent triggers the search warrant process.<sup>173</sup> Therefore, officers can continue the DWI blood draw under the authority of a valid warrant. Interpreting Louisiana’s implied consent regime to afford motorists an absolute right to decline a BAT would severely restrict the State’s search capabilities, when in truth, implied consent expands the State’s methods for procuring criminal evidence.<sup>174</sup>

Implied consent gives the State another predicate for a valid DWI search, as consent is an exception to the State’s requirement to obtain a search warrant.<sup>175</sup> Pursuant to the implied consent

---

168. *Alcazar*, 784 So. 2d at 1281–82.

169. *Id.*

170. *Id.* at 1281 (emphasis added). In the legal sense, *act of grace* means an “act of clemency,” or a matter of kindness and leniency. BLACK’S LAW DICTIONARY 39 (9th ed. 2009).

171. LA. REV. STAT. ANN. § 32:666 (Westlaw 2012).

172. *Id.* See also LA. REV. STAT. ANN. § 32:662 (2002).

173. See, e.g., Shannon, *supra* note 14.

174. *Beeman v. Texas*, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002) (en banc).

175. *State v. Angel*, 356 So. 2d 986, 988–89 (La. 1978) (“A valid consent to search is a well recognized exception to the requirement of a valid search



statute, a driver invokes this consent exception by signing his license application and agreeing to a future warrantless blood search.<sup>176</sup> The statute does not implicate actual consent by compelling the suspect's affirmative agreement. Instead, the statute triggers the consent exception by invoking a driver's *previous* assent in contracting for a license at the time of the DWI stop.<sup>177</sup> Accordingly, the statute legalizes a warrantless blood draw, allowing officers to rely on assumed consent as a predicate for the search without taking extra time and effort to first obtain a warrant.<sup>178</sup> Of course, a suspect's refusal will ultimately prevent the State from utilizing the implied consent exception as justification for the warrantless BAT.<sup>179</sup>

Still, BAT refusal has a narrow application. "[T]he Legislature created a very limited exception in La. R.S. §§ 32:661(C)(1) and 32:666(A) which allows the defendant to refuse to permit the State to gather physical evidence against him" only when the officer does not secure a warrant.<sup>180</sup> Thus, implied consent merely justifies a *warrantless* DWI search for blood evidence. Consent is not necessary for a search to be valid, and a suspect's consent, whether

warrant; a search pursuant to a voluntary consent need not be based on probable cause." (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).

The Declaration of Intent on the Louisiana Department of Motor Vehicle's driver's license application reads as follows:

By my signature affixed below, I certify under penalty of law, that . . . I hereby give my consent, under the provisions of R.S. 32:661 *et. seq.*, to take a chemical test to determine the presence of alcohol or a controlled dangerous substance in my blood while operating a motor vehicle, if requested to do so by a law enforcement officer.

Office of Motor Vehicles, La. Dep't of Pub. Safety & Corr., *Application for License or Identification Card*, <http://dpsweb.dps.louisiana.gov/DPSForms.nsf> (follow "Driver's License" hyperlink; then follow "Application For DL/ID Card" hyperlink). The applicant must sign and date the form in the space provided below the declaration.

176. See LA. REV. STAT. ANN. § 32:666; see also discussion *supra* Part III.B–C.

177. *Beeman*, 86 S.W.3d at 615.

178. *Id.* at 616.

179. When a suspect refuses, he revokes his consent to the search, which he gave at the time of his license application. An officer cannot proceed with an implied consent BAT pursuant to the statute because it only authorizes a warrantless search if the suspect has not refused and the refusal exceptions do not apply.

180. *State v. Alcazar*, 784 So. 2d 1276, 1277 (La. 2001). If the Legislature intended to make refusal a right, rather than a permissive ability, it would not have included penalties and exceptions for refusal. See discussion *infra* Part III.D.2. Furthermore, the Legislature would have created exceptions in the warrant statutes for implied consent cases. See discussion *infra* Part III.D.3.

actual or implied, becomes irrelevant once a judge issues a warrant.<sup>181</sup> Undoubtedly, the State can conduct a reasonable search subsequent to a suspect's refusal by relying on a valid search warrant.<sup>182</sup>

## 2. *Statutory Penalties and Exceptions for Refusal*

Both the statutory penalties for refusal and the refusal exceptions further indicate that impaired motorists do not enjoy a "right to refuse" under Louisiana law. As the court in *State v. Alcazar* observed, "[A] defendant's exercise of that right to refuse the chemical test is not without its consequences."<sup>183</sup> In contrast, true constitutional rights, like free speech and religion, do not stipulate penalties or repercussions for an individual who chooses to exercise those rights.<sup>184</sup> Indeed, the Legislature would not have included penalties for refusal if it desired to create a true "right to refuse."<sup>185</sup> Rather than punishing motorists who decline a BAT, the legislature would protect this "right to refuse" from unnecessary government restriction, as it has done with other fundamental individual liberties.<sup>186</sup>

Similarly, the Louisiana Legislature created an exception to refusal in the event of serious bodily injury or death.<sup>187</sup> In *Alcazar*,

---

181. See, e.g., *Beeman*, 86 S.W.3d at 615–16; see also, e.g., *State v. Wolfe*, 398 So. 2d 1117, 1120 (La. 1981). The *Wolfe* court held: "[N]o exigent circumstances existed that would permit the officers to dispense with the requirement of a search warrant. Hence . . . the warrantless search of defendant's apartment was impermissible unless based upon defendant's consent." *Id.* (emphasis added). Either consent or exigent circumstances were necessary to justify the search in this instance merely because the officers did not previously obtain a warrant. *Id.*

182. See, e.g., *State v. Walker*, 953 So. 2d 786, 790 (La. 2007) ("[A]bsent exigent circumstances or some other well-recognized exception such as consent, the police must obtain a warrant before they . . . intrude on an individual's reasonable and legitimate expectation of privacy."); *State v. Fontenot*, 383 So. 2d 365 (La. 1980) (invalidating the warrantless search of woman's genital canal because woman did not consent and no exigent circumstances existed to waive the warrant requirement).

183. *Alcazar*, 784 So. 2d at 1281 n.4.

184. See, e.g., U.S. CONST. amend. I; U.S. CONST. amend. XIV.

185. The Louisiana Supreme Court has acknowledged, "[S]tatutes using mandatory language prescribe the result to follow (a penalty) if the required action is not taken." See, e.g., *Marks v. New Orleans Police Dep't*, 943 So. 2d 1028, 1035 (La. 2006). Based on this observation, consent to a BAC test is mandatory because the statute stipulates penalties for a suspect's failure to submit to the BAC test. Refusal cannot be an absolute right when drivers suspected of DWI must submit to a chemical test.

186. See, e.g., LA. CONST. art. I.

187. See LA. REV. STAT. ANN. §32:666 (Westlaw 2012).

the court found that the facts did not trigger the refusal exceptions, so the “defendant had a right to refuse testing.”<sup>188</sup> Explaining its analysis, the court remarked: “We observe that the right of refusal does not extend to a person under arrest for [driving while intoxicated] . . . ‘wherein a traffic fatality has occurred or a person has sustained serious bodily injury.’”<sup>189</sup> These exceptions, like the statutory penalties, illustrate that the “right to refuse” is more akin to a privilege than an absolute entitlement. Certainly, if the “right to refuse” does not apply equally to all motorists, and a motorist must meet certain criteria before the statute affords him this right, courts should not classify refusal as an entitlement. Instead, the ability to refuse a BAT is much like the privilege of driving, for it is subject to governmental control and regulation.<sup>190</sup>

### 3. *Absence of Search Warrant Exemption*

Whereas the inclusion of refusal penalties and restrictions indicates the legislature’s unwillingness to create a true right, the exclusion of DWI exceptions in the search warrant statutes also demonstrates that individuals do not enjoy a “right to refuse.” Neither current laws nor jurisprudence give drivers immunity from warrant-based blood or urine searches.<sup>191</sup> Therefore, the implied consent statute merely gives a DWI suspect the authority to withdraw his implied consent to the officer’s initial request for a *warrantless* search—it does not give him the “right to refuse” a *warrant-based* search.<sup>192</sup>

To illustrate, article 161 of the Code of Criminal Procedure explains the property subject to search and seizure under a warrant and provides that “a judge may issue a warrant authorizing the search for and seizure of any thing . . . which . . . [m]ay constitute evidence tending to prove the commission of an offense.”<sup>193</sup> Like every other state’s law, Louisiana’s law criminalizes the operation of a motor vehicle if the “operator’s blood alcohol concentration is 0.08 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood . . . .”<sup>194</sup> In the case of an

---

188. *Alcazar*, 784 So. 2d at 1277 n.1.

189. *Id.* (citing LA. REV. STAT. ANN. § 32:666(A) (Westlaw 2012)).

190. *See* Arnold, *supra* note 138.

191. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 161 (Supp. 2012); LA. CODE CRIM. PROC. ANN. art. 163.1 (Westlaw 2012), *amended by* Act of May 11, 2012, 2012 La. Sess. Law Serv. Act No. 44 (H.B. 74) (West).

192. In fact, this may be considered an obstruction of a court order in violation of LA. REV. STAT. ANN. § 14:133.1 (2004).

193. LA. CODE CRIM. PROC. ANN. art. 161.

194. LA. REV. STAT. ANN. § 14:98 (2012).

impaired-driving suspect, blood can “constitute evidence tending to prove the commission” of DWI by revealing a BAC above the legal limit.<sup>195</sup> Blood may, in fact, be the most valuable evidence to prove a DWI crime because without BAC evidence, “supporting the impaired driving charge ‘is limited to an officer’s observations of the driver’s behavior on the road, visible signs of intoxication, and the driver’s scores on the Standardized Field Sobriety Tests (SFST),” which are often subjective and unreliable.<sup>196</sup> Moreover, the legislature amended the “property subject to seizure”<sup>197</sup> article as recently as the 2011 first extraordinary session.<sup>198</sup> At that time, the Louisiana Legislature could have easily created an exception for blood evidence under a no-refusal policy. However, it decided against statutorily exempting DWI blood evidence from the types of property subject to seizure under a search warrant.

Additionally, Code of Criminal Procedure article 163.1, entitled “Search of a person for bodily samples,” specifies that “[a] judge may issue a search warrant authorizing the search of a person for bodily samples to obtain [DNA] or other bodily samples.”<sup>199</sup> The Legislature amended and reenacted article 163.1 in 2005, essentially approving the use of blood search warrants. The House Legislative Services digest, which summarizes the 2005 legislation, explains that the law “adds an exception for the search of a person for bodily *fluids*.”<sup>200</sup> By its plain meaning, “bodily fluids” includes blood. But like article 161, this statute contains no exception for implied consent cases. In other words, the Legislature refused to immunize DWI suspects from the search-warrant process. Consequently, motorists cannot disobey no-refusal warrants authorizing the search for BAC evidence. Lacking the ability to refuse all DWI blood searches, whether conducted with or without search warrants, motorists do not enjoy a true “right to refuse.”

---

195. LA. CODE CRIM. PROC. ANN. art. 161.

196. Hinte, *supra* note 6, at 164 (citations omitted). See also *State v. Loisel*, 812 So. 2d 822, 825 (La. Ct. App. 2002) (holding that under the facts, officers statements in report were not enough to sustain conviction, but observing that “[w]hether behavioral manifestations are sufficient to support a charge of driving while intoxicated must be determined on a case-by-case basis. . . . It is not necessary that a conviction of D.W.I. be based upon a blood or breath alcohol test, and the observations of an arresting officer may be sufficient to establish the defendant’s guilt.”); discussion *infra* Part V.C.

197. LA. CODE CRIM. PROC. ANN. art. 161.

198. 2011 La. Sess. Law Serv. Act No. 16 (H.B. 22) (West).

199. LA. CODE CRIM. PROC. ANN. art. 163.1 (Westlaw 2012), amended by Act of May 11, 2012, 2012 La. Sess. Law Serv. Act No. 44 (H.B. 74) (West).

200. La. B. Dig. Original, 2005 Reg. Sess. H.B. 106 (West) (emphasis added).

For these reasons, Louisiana's implied consent statute clearly does not give DWI suspects a greater "refusal right" than the Fourth Amendment or the Louisiana Constitution. In actuality, refusal is a permissive *privilege* that allows the driver to decline a warrantless search, not a right to avoid even warrant-based searches. Even so, the statute's plain wording or the policy goals behind its enactment may be inconsistent with a no-refusal policy. Unfortunately, the Louisiana Legislature is silent with respect to the statute's purpose and has failed to adopt legislation regarding the legality of no refusal.<sup>201</sup> Therefore, a final determination of no refusal's validity rests primarily on an interpretation of the implied consent language and the Legislature's intent in enacting this statutory scheme.

## V. STATUTORY INTERPRETATION OF IMPLIED CONSENT

### A. Plain Meaning Approach

The first step in an interpretation of statutory language is to ascertain the statute's plain meaning.<sup>202</sup> According to the Louisiana Civil Code, "[l]egislation is a solemn expression of legislative will."<sup>203</sup> To give effect to the legislative will, "[w]hen a law is clear and unambiguous . . . the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."<sup>204</sup>

---

201. In the 2011 regular legislative session, Representative Seabaugh proposed House Bill 119 to amend Louisiana Code of Criminal Procedure article 163.1. In effect, this bill would have legalized no-refusal policies: "The warrant may be executed any place the person is found or at the location of the person authorized to draw bodily samples, and shall be directed to any peace officer who shall obtain and distribute the bodily samples as directed in the warrant." Further, the legislation sought to immunize "the person who draws the sample" and his hospital or other employer. The House approved the bill in a vote of 94 to 0. Subsequently, the Senate referred H.B. 119 to the Judiciary C Committee and later to the Judiciary B Committee. However, the bill never reached the Senate floor for final passage. LOUISIANA STATE LEGISLATURE, <http://www.legis.state.la.us/> (under "Bill Search," select "2011 Regular Session" then select "HB"; type "119" in search box; follow "View" hyperlink; follow "Text – current" hyperlink; for procedural history of the bill, follow "History" hyperlink).

202. *State v. Bell*, 947 So. 2d 774, 778 (La. Ct. App. 2006) ("[T]he meaning of a law must first be sought in the language employed. If that is plain, it is the duty of the courts to enforce the law as written. Thus, interpretation of any statute begins with the language of the statute itself.").

203. LA. CIV. CODE art. 2 (2011).

204. *Id.* art. 9.

*1. Examples from Other States*

Courts in other states have examined the validity of no-refusal search warrants under their own implied consent laws using a plain meaning approach similar to that required by the Louisiana Civil Code.<sup>205</sup> In *Sosa v. State*, for example, the Alaska Supreme Court found that its implied consent scheme was comprehensive and held that the statute provides the exclusive means for punishing BAT refusal.<sup>206</sup> The officer in *Sosa* procured a search warrant authorizing the withdrawal of the defendant's blood after the police breath-testing device malfunctioned.<sup>207</sup> The State subsequently sued the defendant for his failure to comply with the search warrant.<sup>208</sup> The court examined the Alaska implied consent statute, which provides that drivers impliedly consent to BATs in two limited cases.<sup>209</sup> Because the statute contains no general language implying a driver's consent in other circumstances, the law provides "the exclusive authority for the administration of police-initiated chemical sobriety tests."<sup>210</sup> Consequently, the court refused to punish the defendant for violating the warrant, as the only authority for penalizing BAT refusal exists in the implied consent statute.<sup>211</sup> Without a no-refusal search warrant exception, the unambiguous statutory language barred the court from sanctioning him.<sup>212</sup>

Likewise, the Rhode Island Supreme Court followed a plain meaning analysis in *State v. Distefano*. The court held that the statutory phrase—"[i]f a person having been placed under arrest refuses upon the request of a law enforcement officer to submit to the tests . . . none shall be given"—impedes a warrant-based BAT when a driver refuses the officer's initial request.<sup>213</sup> The Rhode Island Legislature established "an elaborate requirement of consent" but declined to create a statute authorizing the use of a

---

205. See, e.g., *Sosa v. State*, 4 P.3d 951, 955 (Alaska 2000); *State v. Collier*, 612 S.E.2d 281, 283 (Ga. 2005); *State v. Distefano*, 764 A.2d 1156, 1161 (R.I. 2000); see also LA. CIV. CODE art. 9 (2011).

206. *Sosa*, 4 P.3d at 955.

207. *Id.* at 952.

208. *Id.*

209. *Id.* at 953 (citing ALASKA STAT. ANN. § 28.35.031 (Westlaw 2012)) (when an accident causes death or serious injury and when the driver is "unconscious or otherwise . . . incapable of refusal").

210. *Id.* at 954 (citing *Pena v. State*, 684 P.2d 864, 867 (Alaska 1984)).

211. *Id.* at 955.

212. *Id.*

213. *State v. Distefano*, 764 A.2d 1156, 1161 (R.I. 2000) (emphasis added) (citing R.I. GEN. LAWS ANN. § 31-27-2.1 (Westlaw 2012)).

BAT warrant upon a driver's refusal.<sup>214</sup> Accordingly, the court reasoned that the plain statutory wording expressly prohibits no-refusal search warrants.

In contrast, the Texas Criminal Court of Appeals rejected a plain meaning analysis "by allowing the forced compulsion of blood evidence in every DWI arrest when the statute specifically states that a person arrested for DWI may refuse such a request."<sup>215</sup> The *Beeman v. Texas* court concluded that a search warrant is another way officers can conduct a constitutionally valid search in addition to implied consent, even though the statute specifies: "[A] specimen may *not* be taken if a person refuses to submit to the taking of a specimen designated by a peace officer."<sup>216</sup> The *Beeman* defendant argued that the statute expressly forbade the State from taking a suspect's blood after he declined a BAT unless the statutory injury-exception applied.<sup>217</sup> Because the statute contains a specific exception for car-crash injuries and lacks a similar search-warrant concession, the law implicitly prohibits no-refusal searches.<sup>218</sup> For this reason, the defendant argued, the State cannot violate the unambiguous language by conducting a warrant-based BAT.<sup>219</sup> The Texas court refused to accept this textual interpretation and ruled instead that the suspect's consent to a warrant-based blood draw is irrelevant.<sup>220</sup> Moreover, the court held that the Texas implied consent statute does not afford greater protection to DWI suspects than the Fourth Amendment.<sup>221</sup>

## 2. Louisiana Application

Like the Alaska, Rhode Island, and Texas statutes, Louisiana's implied consent law provides a framework for the warrantless withdrawal of a DWI suspect's blood.<sup>222</sup> And while these examples highlight important considerations for a proper interpretation of implied consent, the plain language of Louisiana's implied consent scheme is distinguishable in two primary ways: first, the statutory

---

214. *Id.* at 1169.

215. Cook, *supra* note 2, at 111.

216. TEX. TRANSP. CODE ANN. § 724.013 (West 2011) (emphasis added). *See also* *Beeman v. Texas*, 86 S.W.3d 613, 615 (Tex. Crim. App. 2002) (en banc).

217. *Beeman*, 86 S.W.3d at 615 (citing TEX. TRANSP. CODE ANN. § 724.011-.013). The defendant relied on the implied consent provision that orders officers to take a suspect's blood, even if he refuses, when the suspect is involved in a motor vehicle accident causing serious injury. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 617.

222. *See* LA. REV. STAT. ANN. §§ 32:661–670 (2002 & Supp. 2012).

text does not bar the State from conducting a BAT by other means; second, the statutory text clearly permits the introduction of intoxication evidence other than implied consent BAT results.

*a. Absence of Statutory Preclusion*

Nothing on the face of Louisiana's "refusal to submit" provision inhibits an officer from obtaining blood evidence pursuant to a warrant like the "none shall be given" phrase in Rhode Island's implied consent law.<sup>223</sup> Such language appears to preclude the search warrant process when a suspect withdraws his implied consent.<sup>224</sup> Unlike Rhode Island's implied consent statute, Louisiana's law does not contain this preclusive phrasing.<sup>225</sup> A plain reading of Louisiana's statute does not indicate any search warrant restrictions that a court could use to invalidate the no-refusal process without such a provision.

The plain language of Louisiana's law actually *sanctions* no refusal when: (1) a suspect previously refused to submit to a BAC test in two separate DWI stops; or (2) a motor vehicle accident caused a fatality or serious bodily injury.<sup>226</sup> One might argue, like the *Beeman* defendant, that the statute renders a no-refusal blood draw valid, but only under the limited statutory exceptions.<sup>227</sup> The Louisiana Legislature specifically created two refusal exemptions, so, by implication, the statute clearly excludes a BAT over a suspect's objection in other circumstances.<sup>228</sup> Correspondingly, a warrant-based BAT obtained pursuant to no refusal goes beyond the law's explicit text and violates the rule. This argument rests on the assumption that the *Beeman* majority did not follow the plain

---

223. See LA. REV. STAT. ANN. § 32:666 (Westlaw 2012); *State v. Distefano*, 764 A.2d 1156, 1161 (R.I. 2000).

224. See, e.g., *Distefano*, 764 A.2d at 1161.

225. See LA. REV. STAT. ANN. §§ 32:661–670.

226. LA. REV. STAT. ANN. § 32:666.

227. See generally *Beeman v. Texas*, 86 S.W.3d 613 (Tex. Crim. App. 2002) (en banc).

228. *Expressio unius est exclusio alterius* is the Latin maxim and canon of statutory construction meaning "the inclusion of one implies the exclusion of another." See *State v. La. Riverboat Gaming Comm'n*, 655 So. 2d 292, 302 (La. 1995) ("[S]ettled rule of statutory construction that the mention of one thing in a statute implies the exclusion of another thing. This time-honored maxim, the doctrine of *Expressio Unius est Exclusio Alterius*, dictates that when the legislature specifically enumerates a series of things, such as the Division's enumerated powers in this case, the legislature's omission of other items, which could have easily been included in the statute is deemed intentional."). Based on this principle of reasoning, the inclusion of statutory no-refusal exceptions implies the exclusion, and thus prohibition, of others.



meaning approach when it upheld a warrant-based BAT despite a refusal exception similar to that in Louisiana's statute.<sup>229</sup> Thus, Louisiana courts can easily distinguish this result, since the Civil Code requires adherence to a statute's plain meaning.<sup>230</sup>

While this reasoning is persuasive, it fails to account for the significant *may not be taken* language in the Texas statute.<sup>231</sup> Admittedly, the Texas court did circumvent this obvious statutory mandate by authorizing no-refusal search warrants—*may not be taken* clearly bans an officer from taking a blood-specimen upon refusal.<sup>232</sup> But in contrast, Louisiana's implied consent law lacks an equivalent limitation such as *may not be taken*.<sup>233</sup> Even considering the refusal exceptions, a plain reading of Louisiana's law actually supports the result in *Beeman*, since the statute does not impose such an unequivocal prohibition on the State's search capabilities.

On its face, Louisiana's law does not appear to restrict the no-refusal warrant process, and following this plain meaning approach, Louisiana courts should uphold no-refusal search warrants. Still, if the law contained a similar restriction, *no test shall be given* or *may not be taken* language would only forbid officers from continuing a warrantless search pursuant to the implied consent statute.<sup>234</sup> Quite simply, unless the statute expressly excludes DWI search warrants, the withdrawal of implied consent and the implied consent statute itself have no applicability to warrant-based searches.

*b. Implied Consent Law Is Not the Exclusive Authority for DWI Searches*

Conversely, the lack of a preclusive phrase does not destroy the case against no refusal. Opponents of the policy could cite the Alaska Supreme Court, which held that its implied consent law forbids DWI search warrants despite the lack of a specific ban, such as *upon refusal, no test shall be given*.<sup>235</sup> The *Sosa* court based this conclusion on the fact that the implied consent statute is comprehensive, furnishing the "exclusive authority for the administration of police-initiated chemical sobriety tests to a driver

---

229. See generally Cook, *supra* note 2.

230. See LA. CIV. CODE art. 9 (2011).

231. See TEX. TRANSP. CODE ANN. § 724.013 (West 2011).

232. *Beeman v. Texas*, 86 S.W.3d 613, 616–17 (Tex. Crim. App. 2002) (en banc).

233. See LA. REV. STAT. ANN. § 32:666 (Westlaw 2012).

234. See *City of Seattle v. St. John*, 215 P.3d 194, 197 (Wash. 2009).

235. See *Sosa v. State*, 4 P.3d 951, 953–55 (Alaska 2000).

arrested for acts allegedly committed while operating a motor vehicle.”<sup>236</sup>

Louisiana’s implied consent law, on the other hand, is not the exclusive source for BAC evidence. The statutory text states that the law “shall not be construed as limiting the introduction of any other competent evidence” regarding whether the suspect was driving while intoxicated.<sup>237</sup> Unlike Alaska’s law, the plain language of Louisiana’s implied consent statute does not bar no-refusal search warrants. As these distinctions suggest, a plain meaning analysis of Louisiana’s implied consent law supports the use of no-refusal search warrants. The statute also presents a possibility for conflicting interpretations.

### *B. Examining Legislative Intent*

When the plain language of a statute is unclear or “susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.”<sup>238</sup> The interpretation of ambiguous legislation should honor the overriding legislative objectives in passing the law,<sup>239</sup> as legislation is the “solemn expression of legislative will.”<sup>240</sup>

#### *1. Potential for Ambiguous Interpretations*

The clear text of Louisiana’s implied consent law does not forbid no-refusal search warrants.<sup>241</sup> Though perhaps more importantly, the statute does not explicitly *authorize* the use of a DWI warrant when the suspect declines a BAT.<sup>242</sup> The Legislature’s failure to include a specific no-refusal warrant exception creates a possibility for contradictory interpretations about the policy’s validity, leading no-refusal challengers to argue that the statute’s plain meaning is ambiguous with respect to the legality of DWI search warrants.

A comparison of Louisiana’s implied consent regime to similar statutes in other states demonstrates this potential for ambiguity.<sup>243</sup> The Supreme Court of Washington held that its state legislature did not intend to preclude warrant-based BAT under Washington’s

---

236. *Id.* at 954 (citing *Pena v. State*, 684 P.2d 864, 867 (Alaska 1984)).

237. LA. REV. STAT. ANN. § 32:662 (2002).

238. LA. CIV. CODE art. 10 (2011).

239. *See, e.g., id.* art. 9 (2011).

240. *Id.* art. 2.

241. *See, e.g.,* LA. REV. STAT. ANN. §§ 32:661–70 (2002 & Supp. 2012).

242. *Id.*

243. *See* WASH. REV. CODE ANN. § 46.20.308 (Westlaw 2012).

implied consent law.<sup>244</sup> The Washington Legislature explicitly laid out its policy regarding warrant-based searches for DWI evidence in the implied consent text: “Neither consent nor this section precludes a police officer from obtaining a search warrant for a person’s breath or blood.”<sup>245</sup>

Comparatively, Louisiana’s implied consent law does not include a similar provision clearly demonstrating a legislative intent to allow warrant-based searches.<sup>246</sup> Louisiana Revised Statutes section 32:662, however, does evidence the government’s desire to enlarge the scope of the State’s DWI search tactics.<sup>247</sup> Nonetheless, the wording of Revised Statutes section 32:662 can be misleading. A plain reading of section 32:662’s language indicates that the law supports the admission of “other competent evidence” regarding the suspect’s condition.<sup>248</sup> More specifically, Louisiana courts have found that an arresting officer’s observations can be sufficient to prove a DWI suspect’s guilt.<sup>249</sup> Interpreting the section 32:662 provision, the Louisiana Supreme Court in *State v. Allen* remarked: “[I]ntoxication, with its attendant behavioral manifestations, is an observable condition about which a witness may testify.”<sup>250</sup>

Clearly, the implied consent provisions authorize other *types* of evidence, like sensory observations of a suspect’s behavior and demeanor as well as field sobriety test results.<sup>251</sup> But does the statute acknowledge other competent *means* for obtaining the *same type* of evidence? In other words, does this provision allow BAT test results from a source other than the implied consent statute? The *Allen* court did not answer this question, focusing instead on the admissibility of a suspect’s “behavioral manifestations,

---

244. *City of Seattle v. St. John*, 215 P.3d 194, 197 (Wash. 2009).

245. *Id.*

246. *See* LA. REV. STAT. ANN. §§ 32:661–70.

247. The Louisiana Legislature specified that the implied consent law “shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of alcoholic beverages or any . . . controlled dangerous substance.” LA. REV. STAT. ANN. § 32:662 (2002).

248. *See* LA. REV. STAT. ANN. §§ 32:661–70.

249. *State v. Allen*, 440 So. 2d 1330, 1334 (La. 1983) (citing *State v. Spence*, 418 So. 2d 583, 589 (La. 1982)).

250. *Id.* *See also* *State v. Wiltcher*, 956 So. 2d. 769, 773 (La. Ct. App. 2007) (finding officers observations sufficient to establish guilt of DWI because defense cross-examined officer extensively about potential inaccuracies in field sobriety testing).

251. *State v. Loisel*, 812 So. 2d 822, 825 (La. Ct. App. 2002).

independent of any scientific test.”<sup>252</sup> Moreover, the Louisiana Fourth Circuit Court of Appeal did not even regard BAC proof as essential for the State to secure a DWI conviction.<sup>253</sup>

This ambiguity creates the possibility for multiple interpretations of Revised Statutes section 32:662. Under a narrow reading, the State can introduce other types of evidence—i.e., nonscientific evidence—in addition to implied consent BAT results. Such a construction, however, would only authorize evidence relating to the suspect’s behavior and demeanor. In effect, section 32:662 would limit the introduction of BAT results to those based on an implied consent search or a search pursuant to a statutory refusal exception. On the other hand, a broad application of this provision would allow the state to introduce *any* “competent evidence bearing upon the question whether the person was under the influence of alcoholic beverages.”<sup>254</sup> A broad reading would permit the use of warrant-based BAT evidence, therefore allowing the State to introduce the same type of evidence—BAT results—from mechanisms other than implied consent.

Revised Statutes section 32:662, by implication, appears to sanction the use of alternative means for gathering evidence.<sup>255</sup> Still, Revised Statutes section 32:662 does not specifically acknowledge the use of additional search methods to gather “other competent” BAT evidence in lieu of implied consent.<sup>256</sup> In fact, nowhere in the entire statutory scheme does the Louisiana Legislature directly reference search warrants or other constitutional search procedures. The exclusion of a statutory warrant reference could indicate a legislative intent to preclude no-refusal warrants. However, the absence of a warrant provision similar to Washington’s does not destroy the case for no refusal.

---

252. *Id.* at 825. *See also id.* at 824–26 (examining defendant’s balance, smell of alcohol on breath, slurred speech, misunderstanding of instructions, and other visual observations of behavior in probable cause determination).

253. *Id.* at 824–26.

254. LA. REV. STAT. ANN. § 32:662(B) (2002).

255. *See* discussion *supra* Part IV.A.3; *see also* LA. REV. STAT. ANN. § 32:662 (2002) (“The provisions of Subsection A of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of alcoholic beverages or any abused substance or controlled dangerous substance.”). Since the statute allows for “other competent evidence,” it clearly must also allow other competent means for obtaining evidence. Otherwise, this provision is useless. Officers will be unable to gather other evidence if the statute precludes all other evidence-gathering measures because the implied consent provision only applies to BAT results.

256. *See, e.g.*, LA. REV. STAT. ANN. § 32:662.

## 2. Examples from Other States

In examining the legislative intent of implied consent, several state courts have upheld the use of BAT search warrants because they further the legislation's ultimate purpose. The Washington court based its conclusion primarily on the clear communication of legislative will to keep the search warrant process alive.<sup>257</sup> Importantly, however, the court also recognized that even if the statute did not include the warrant reference, DWI search warrants would still be valid under the implied consent law.<sup>258</sup> To prove this point, the Washington court analyzed the statute's purpose.<sup>259</sup> The court found that the legislative goals of implied consent include: "(1) discouraging DUI, (2) removing driving privileges from those individuals disposed to DUI, and (3) providing an efficient means of gathering reliable evidence of intoxication."<sup>260</sup> Surely, a finding against no refusal would frustrate these goals by preventing officers from using DWI search warrants. In practice, the implied consent law would actually decrease the State's capability of gathering intoxication evidence, which, in turn, would decrease the deterrent force of DWI conviction.<sup>261</sup> Therefore, the court held that the statute's purpose also validates BAT search warrants.<sup>262</sup>

The Indiana Court of Appeals reached a similar result when it engaged in its own assessment of legislative intent.<sup>263</sup> Resembling the Louisiana implied consent legislation, Indiana's statute lacks the direct warrant reference contained in the Washington law; though, the appellate court's scrutiny revealed no legislative intent to prevent the State from seeking a search warrant.<sup>264</sup> Such a prohibition "once a driver has refused to consent to a chemical test would be inconsistent with the implied consent law's underlying goal of protecting the public from the threat posed by the presence of drunk drivers on the highway."<sup>265</sup>

Correspondingly, the Wisconsin Supreme Court's analysis indicated a legislative purpose of enhancing the State's ability to

---

257. See *City of Seattle v. St. John*, 215 P.3d 194, 197 (Wash. 2009).

258. *Id.*

259. *Id.*

260. *Id.* (citing *Dep't of Licensing v. Lax*, 888 P.2d 1190, 1193 (Wash. 1995) (en banc)).

261. *Id.* at 197-98.

262. *Id.* at 198.

263. *Brown v. State*, 774 N.E.2d 1001, 1003-04 (Ind. Ct. App. 2002).

264. *Id.* at 1007.

265. *Id.* The court also distinguished its decision from contradictory rulings in other states by emphasizing the statute's lack of a "no test shall be given" phrase. *Id.* The court construed the absence of this wording as evidence of the legislature's desire to permit search warrants under the statute. *Id.*

collect DWI evidence in furtherance of its ultimate goal of deterring driving while intoxicated.<sup>266</sup> The Wisconsin Legislature, however, did not pass the implied consent scheme “to give greater fourth amendment [sic] rights to an alleged drunk driver than those afforded any other criminal defendant.”<sup>267</sup> Furthermore, Wisconsin’s statute did not create a new ground for excluding evidence of intoxication.<sup>268</sup> The government established implied consent as an additional search tool in DWI cases.<sup>269</sup> And to satisfy this function, the court proposed, Washington’s implied consent law cannot prevent other constitutional search measures like no-refusal warrants.<sup>270</sup>

### 3. Louisiana Application

State courts recognize that the Louisiana Legislature has similar goals for its own implied consent regime, which include increasing highway safety and expanding the State’s search capabilities.<sup>271</sup> Following the lead of states like Washington, Indiana, and Wisconsin, Louisiana courts must resolve questions about no refusal’s legality with an answer that promotes this legislative will.<sup>272</sup>

#### a. Promoting Highway Safety

In *Price v. Department of Public Safety*, the Louisiana Fourth Circuit Court of Appeal rejected an attack on the constitutionality of the implied consent statute by stating the purpose of the law: “The implied consent law was enacted for a legitimate government purpose; i.e., to promote public safety on Louisiana highways.”<sup>273</sup> No refusal likewise advances the goal of highway safety by curbing increasing refusal rates, which presently thwart the State’s ability to perform BATs and reduce the deterrent force of implied consent.<sup>274</sup>

---

266. *State v. Zielke*, 403 N.W.2d 427, 428 (Wis. 1987).

267. *Id.*

268. *Id.* at 434.

269. *Id.*

270. *Id.*

271. *See, e.g.*, *State v. Allen*, 440 So. 2d 1330, 1334 (La. 1983); *Price v. Dep’t of Pub. Safety*, 580 So. 2d 503, 505 (La. Ct. App. 1991).

272. *See* LA. CIV. CODE art. 10 (2011).

273. *Price*, 580 So. 2d at 505.

274. *See* LeBlanc, *supra* note 14. In Jefferson Parish, a no-refusal period during the 2010 Memorial Day weekend resulted in only one refusal, whereas that same weekend the year before, 16 drivers refused a BAC test. *Id.* Furthermore, officials in Rapides Parish implemented a permanent no-refusal policy in 2007, and in two years, the DWI refusal rate dropped from 35% to nearly zero. *Id.*

No refusal deters impaired driving by scaring motorists into BAT submission “even before the actual warrant is issued.”<sup>275</sup> With a no-refusal program in place, motorists can no longer avoid DWI punishment by refusing a BAT. No refusal also enhances the statute’s effectiveness, as officers can conduct a warrantless search based on implied consent when a suspect submits prior to the warrant authorization. Reading the law to prevent no refusal, which promotes highway safety, would frustrate implied consent’s overriding purpose.

*b. Increasing Methods for Evidence Gathering*

Similarly, the goal of public safety will fail if officers cannot discover impaired drivers and impose sanctions to discourage DWI crimes. The Legislature’s public safety goal is inextricably tied to the State’s capability of securing intoxication evidence.<sup>276</sup> The State’s ability to find, prosecute, and punish impaired drivers directly impacts the success of DWI deterrence and conviction.<sup>277</sup> After all, when the State detects intoxicated drivers more frequently, this not only demonstrates its commitment to prosecuting DWI offenders, but in turn, it “force[s] individuals to take their actions more seriously.”<sup>278</sup> The implied consent law should therefore assist officers in discovering intoxicated drivers and removing them from the highways.<sup>279</sup>

In contrast, a reading of the law to preclude no-refusal search warrants contradicts the statute’s ultimate purpose of facilitating the DWI evidence-gathering process. The implied consent statute satisfies the Legislature’s safety goal “when there is no search warrant, since it is another method of conducting a constitutionally valid search. . . . It gives officers an additional weapon in their investigative arsenal, enabling them to draw blood in certain limited circumstances even without a search warrant.”<sup>280</sup> When a suspect

---

275. *Id.*

276. *See generally* Cafaro, *supra* note 5, at 101 (“Ultimately, this article espouses the notion that evidence of a defendant’s BAC is one of the most valuable and persuasive pieces of evidence in an OUI case and is directly linked to the deterrence function of implied consent laws.”).

277. *See* Rubin, *supra* note 151, at 1128.

278. *Id.* at 1133. *See also* Beauchamp, *supra* note 66, at 1116–17.

279. *State v. Duquette*, 994 P.2d 776, 780 (N.M. Ct. App. 1999) (holding that state legislature intended for State to use DWI crime to justify a search warrant under N.M. STAT. ANN. § 66-8-111(A) and that BAT refusal was not a condition precedent for search warrant when officer has probable cause of DWI), *overruled in part on other grounds by* *State v. Williamson*, 212 P.3d 376 (N.M. 2009).

280. *Beeman v. Texas*, 86 S.W.3d 613, 615–16 (Tex. Crim. App. 2002) (en banc). *See also* LeBlanc, *supra* note 14.

refuses and implied consent fails, the State must be able to rely on another constitutional means—like a no-refusal search warrant—to continue the search and to collect evidence of intoxication. If, however, the statute bars the use of search warrants, the State will face an impossible burden in gathering DWI evidence.<sup>281</sup> Without reliable, objective proof of intoxication, the State will be unable to convict DWI offenders.<sup>282</sup> As the State loses its ability “to detect drinking drivers and enforce their drunk driving laws, the deterrent effect is greatly diminished, the laws become less threatening, and the danger of drunk driving remains a major problem for the public’s safety.”<sup>283</sup>

To avoid these harsh results, the government likely anticipated that officers would use implied consent in tandem with other constitutional procedures for obtaining evidence. The Legislature evidenced this intent by including express language that prevents the implied consent laws from restricting the DWI evidence-gathering process.<sup>284</sup> Even the Louisiana Supreme Court recognizes that “the legislature did not intend [the implied consent] procedure [to] be the exclusive evidence of intoxication.”<sup>285</sup> To this end, Louisiana’s statute should support no-refusal search warrants.

### *C. Avoiding Absurd Results*

In addition to honoring the statute’s purpose, courts must also reject any application of the implied consent law that leads to absurd consequences.<sup>286</sup> In particular, Louisiana courts should avoid a construction of the implied consent statute that prohibits no-refusal search warrants. Otherwise, a court’s decision to invalidate no refusal will undoubtedly produce irrational results for a law intended to facilitate DWI investigation and deterrence.

Specifically, a construction of the law that precludes no-refusal warrants would result in a rule that fails to mitigate drinking and

---

281. See Rubin, *supra* note 151, at 1133.

282. *Id.*

283. *Id.*

284. See LA. REV. STAT. ANN. § 32:662 (2002) (“The provisions of Subsection A of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of alcoholic beverages or any abused substance or controlled dangerous substance.”); see also discussion *supra* Part III.B.

285. State v. Allen, 440 So. 2d 1330, 1334 (La. 1983).

286. See LA. CIV. CODE art. 9 (2011) (“When a law is clear and unambiguous and its *application does not lead to absurd consequences*, the law should be applied as written . . . .” (emphasis added)).



driving.<sup>287</sup> Alcohol-impaired drivers would have the statutory ability “to hinder police investigations and the collection of evidence” by simply disobeying a search warrant.<sup>288</sup> Equally problematic, Louisiana Revised Statutes section 32:666 would allow DWI suspects to refuse both voluntary and warrant-based searches.<sup>289</sup> The implied consent statute would essentially give DWI suspects more rights than the average citizen by immunizing them from search warrants.<sup>290</sup> Courts should consequently find that the implied consent provisions do not individually or collectively prohibit no-refusal search warrants.

Finally, a construction of section 32:662 that bars no-refusal search warrants would not only encourage subjective determinations by officers who are “engaged in the often competitive enterprise of ferreting out crime,”<sup>291</sup> but it would also prevent neutral judicial oversight in DWI cases. Louisiana courts have interpreted the language in Revised Statutes section 32:662, which tacitly authorizes the State to use “other competent evidence” of intoxication, to allow officer testimony and video evidence regarding a suspect’s behavior, including field-sobriety test results.<sup>292</sup> But “while the field sobriety test provides objective criteria on which an officer may base his belief that a subject is intoxicated, the officer’s subjective opinion demonstrates whether the subject has passed the test.”<sup>293</sup> A warrant, on the other hand, depends on an objective evaluation of probable cause by a neutral and detached judge, which the law favors over an officer’s potentially prejudicial assessment.<sup>294</sup>

---

287. See LeBlanc, *supra* note 14 (“Louisiana’s rate of alcohol-involved highway crashes remains stubbornly high, accounting for 409 deaths in 2009.”); see also discussion *supra* Part V.B (“If, however, the statute bars the use of search warrants, the State will face an impossible burden in gathering DWI evidence.”).

288. *City of Seattle v. St. John*, 215 P.3d 194, 198 (Wash. 2009).

289. See, e.g., LA. REV. STAT. ANN. § 32:662; see also *City of Seattle*, 215 P.3d at 198.

290. See *Brown v. State*, 774 N.E.2d 1001, 1007 (Ind. Ct. App. 2002) (“Proscribing the use of a search warrant as a means of obtaining evidence of a driver’s intoxication ‘would be to place allegedly drunken drivers in an exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them.’” (quoting *Pena v. State*, 684 P.2d 864, 869 (Alaska 1984))).

291. *Schmerber v. California*, 384 U.S. 757, 770 (1966) (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)).

292. See, e.g., *State v. Allen*, 440 So. 2d 1330, 1334 (La. 1983); *State v. Loisel*, 812 So. 2d 822, 825, 829 (La. Ct. App. 2002); see also LA. REV. STAT. ANN. § 32:662(B); discussion *supra* Parts III.B.1, III.B.3.

293. *Loisel*, 812 So. 2d at 829 (including an officer’s personal observation of a suspect’s behavior, demeanor, and field sobriety test results).

294. *Schmerber*, 384 U.S. at 770.

Jurisprudence indicates the unwillingness of Louisiana courts to exclude even subjective and potentially biased DWI evidence.<sup>295</sup> Thus, courts should have little hesitation in allowing officers to gather “other competent evidence” pursuant to a no-refusal search warrant. No refusal does not give officers *carte blanche* to perform blood draws on every DWI suspect.<sup>296</sup> Such policies merely provide officers with what the federal and state constitutions already allow—“the ability to apply for a search warrant, and if the magistrate finds probable cause to issue that warrant, the ability to effectuate it.”<sup>297</sup> It authorizes officers to “present an affidavit to a magistrate in every DWI case, just like every other criminal offense,” but “[w]hether any search ultimately occurs rests, as always, in the hands of the neutral and detached magistrate.”<sup>298</sup> And, if the warrant is invalid, DWI suspects have the same safeguards as all criminal suspects—they can file a motion to suppress the BAT analysis.<sup>299</sup> Courts should undoubtedly sanction no-refusal policies, rather than force the State to rely on subjective and possibly biased police observations.

In short, the absurdity that will follow from an invalidation of no refusal is primarily threefold: (1) the implied consent statute will be unable to meet its intended goals; (2) the DWI suspect will enjoy greater rights than other citizens; and (3) the DWI investigation process will become more subjective and more burdensome. To avoid these bizarre and potentially unconstitutional results, the implied consent law should not ban no-refusal search warrants.

## VI. CONCLUSION

The simple truth is that Louisiana’s implied consent law cannot sustain the fight against alcohol-impaired driving. The impending danger from increasing refusal rates and DWI mortalities necessitates immediate legislative or judicial action. But without further guidance from Louisiana judges and lawmakers, no refusal is the present answer to defeat the enemy in this DWI battle—alcohol.

As this Comment demonstrates, no refusal is both a constitutional and statutorily valid solution to win Louisiana’s battle with alcohol-impaired driving. No-refusal search warrants offer motorists greater protection than the Fourth Amendment and the Louisiana Constitution in the form of neutral judicial supervision.

---

295. See, e.g., *Allen*, 440 So. 2d at 1334; *Loisel*, 812 So. 2d at 825.

296. *Beeman v. State*, 86 S.W.3d 613, 616 (Tex. Crim. App. 2002) (en banc).

297. *Id.*

298. *Id.*

299. See LA. CODE CRIM. PROC. ANN. art. 703 (2003).

Likewise, no refusal is equally valid under Louisiana's implied consent law, which does not afford DWI suspects superior statutory rights. While the current constitutional paradigm for DWI blood draws is outdated and in need of a judicial reevaluation, Louisiana courts must uphold the validity of no-refusal search warrants absent more stringent constitutional or statutory protections against unnecessary governmental intrusion.

At the same time, this Comment does not hold that no refusal is the exclusive remedy to eliminate the threat of impaired driving. Admittedly, no refusal's antagonists raise valid concerns about its potential abuses.<sup>300</sup> Going forward, the Legislature—not the courts—must assess these considerations, and should the Legislature wish to prevent courts from sanctioning no-refusal search warrants, it must revise the implied consent text to reflect this desire.

Meanwhile, Louisiana courts cannot rationally deny that the clear meaning and statutory aim of the implied consent law support no-refusal search warrants. No refusal currently offers Louisiana the best opportunity to win the battle against intoxicated driving. In the absence of a clear legislative directive, Louisiana won't take "no" for an answer.

*Katherine L. Cicardo\**

---

300. See generally Cook, *supra* note 2, at 112–16 (“[T]he blood search warrant is in all practicality an unwanted intrusion upon the rights of two individuals: the individual having a needle forced into his or her arm and the medical professional forced to push the needle. . . . Today, over one million people in the United States are infected with HIV/AIDS alone. Although the chance of catching such a communicable disease from a blood draw is practically null, the possibility remains, and the fear is real for many people. . . . [A] surprisingly significant percentage of the population (up to 10%) suffer from belonephobia—the fear of needles. The fear of needles can be so great for these individuals that they will actually refuse pain injections after major surgery and even faint at the sight of a syringe. . . . There is a potential for a tremendous level of fear and anxiety to be thrust upon the law-abiding motorist who is forced by a peace officer to submit to a blood search warrant. Moreover, the lengthy process of obtaining a blood search warrant significantly interferes with an individual's right to be left alone and travel freely. Citizens do not give up all rights to privacy when they choose to travel upon public roads. . . . To strike a reasonable balance in deterring DWI offenses, the legislature decided to allow the search for blood in only the most serious of occasions, death or serious bodily injury.” (citations omitted)).

\* J.D./D.C.L., 2013, Paul M. Hebert Law Center, Louisiana State University.

The author thanks Vice Chancellor Cheney Joseph, Judge Thomas Yeager, and Mark Deethardt for their guidance throughout the writing of this piece.