William Mitchell Law Review

Volume 41 | Issue 4 Article 7

2015

Conditions to Drive: The Constitutionality of Minnesota's Implied Consent Statute—State v. Brooks

Chris Florey

CONDITIONS TO DRIVE: THE CONSTITUTIONALITY OF MINNESOTA'S IMPLIED CONSENT STATUTE—*STATE V. BROOKS*

Chris Florey†

I. INTRODUCTION

On October 23, 2013, the Minnesota Supreme Court held Minnesota's implied consent statute to be constitutional in *State v. Brooks*.[1] The court based its holding on two main principles.[2] First, before analyzing whether the statute was constitutional, the court held that Brooks *voluntarily* consented to a chemical test that

† JD Candidate, William Mitchell College of Law, 2015; BSCJS, Criminal Justice Studies, University of North Dakota. The author would like to thank the Volume 41 staff and board for their dedication and hard work. Additionally, the author would like to thank his family and friends for their support and guidance.

1. 838 N.W.2d 563, 573 (Minn. 2013).
2. *See id.* at 568–73.

measured his blood alcohol content (BAC).[3] Second, the court held the statute was constitutional because implied consent statutes—which under certain circumstances require motorists suspected of drunk driving to consent to chemical testing—are a legitimate "legal tool" that states may use to help fight drunk driving.[4]

This Case Note first summarizes the relevant legal history behind implied consent statutes across the United States.[5] In addition, this Case Note analyzes the relevant legal history behind Minnesota's implied consent statute.[6] Further, this Case Note outlines the factual and procedural history of *State v. Brooks*.[7] Finally, this Case Note argues that the Minnesota Supreme Court correctly held that Minnesota's implied consent statute is constitutional.[8] Specifically, this Case Note concludes that the Minnesota Supreme Court's reasoning is sound because the State may attach reasonable conditions for drivers to exercise their privilege to drive.[9] Additionally, numerous public policy arguments exist in favor of Minnesota's implied consent statute.[10]

II. HISTORY BEHIND IMPLIED CONSENT STATUTES

A. *Development Within the United States*

Drunk drivers have gradually become one of the biggest dangers citizens in the United States face.[11] On average, "[e]very day in America . . . 28 people die as a result of drunk driving

3. *See id.* at 568–72.

4. *Id.* at 572 (citing Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013) (plurality opinion)).

5. *See infra* Part II.A.

6. *See infra* Part II.B.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See infra* Parts IV–V.

10. *See infra* Part IV.D.

11. *See* Kelsey P. Black, Note, *Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States*, 40 SUFFOLK U. L. REV. 463, 463 (2007) ("Over the past few decades, society has begun to recognize and respond to the increasing number of fatalities caused by intoxicated drivers."); Katherine L. Cicardo, Note, *We Won't Take "No" For an Answer: The Validity of Louisiana's No-Refusal Policy*, 73 LA. L. REV. 253, 253 (2012) ("Today, alcohol-impaired driving is still one of the most common crimes both globally and in the United States.").

crashes."[12] Nationally, controlling the persistent issue of drunk driving has been a difficult problem for some time.[13] Even today, the task of preventing drunk driving remains even more challenging, given the increase in "vehicles on the nation's roadways[,] . . . budgetary and manpower constraints[,] . . . and crucial constitutional concerns."[14]

In response to this wide-sweeping problem, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense."[15] These statutes are, in part, premised on the long-standing legal principal that the legislature may impose reasonable conditions to be complied with in order to use the state's highways.[16]

Typically, the chemical test may not be given when a suspect refuses to take the test.[17] Refusal to take the test, however, generally

12. *Drunk Driving Statistics*, MADD, http://www.madd.org/drunk-driving/about/drunk-driving-statistics.html (last visited Apr. 21, 2015) (citing NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: 2013 DATA 1 (2014), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf).

13. *See* Eustace T. Francis, *Combating the Drunk Driver Menace: Conditioning the Use of Public Highways on Consent to Sobriety Checkpoint Seizures—The Constitutionality of a Model Consent Seizure Statute*, 59 ALB. L. REV. 599, 601 (1995) ("The battle by states to rid their highways of the menace to public health and safety posed by intoxicated drivers is not a new phenomenon and probably dates back to the dawn of the widespread use of the automobile as a means of public conveyance."); D. C. Barrett, Annotation, *Suspension or Revocation of Driver's License for Refusal to Take Sobriety Test*, 88 A.L.R. 2d 1064, § 1[c] (1963).

14. Francis, *supra* note 13, at 601.

15. Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013); Jonathan M. Purver, Annotation, *Driving While Intoxicated: Subsequent Consent to Sobriety Test as Affecting Initial Refusal*, 28 A.L.R. 5th 459, § 2[a] (1995) (stating that "implied consent statutes . . . provide that any person who operates a motor vehicle upon the public highways is deemed to have given . . . consent to a chemical test of his or her blood, breath, urine, or saliva for the purpose of determining the alcoholic content of the blood").

16. *See* Tina Wescott Cafaro, *Fixing the Fatal Flaws in OUI Implied Consent Laws*, 34 J. LEGIS. 99, 103 (2008) ("The Supreme Court first recognized the basic principle of an implied consent law in connection with motor vehicle use in 1927 when it held that a state can *condition* the use of its highways by finding that an alien motorist had *impliedly consented* to suit within its jurisdiction." (emphasis added)); Cicardo, *supra* note 11, at 253.

17. *See McNeely*, 133 S. Ct. at 1565 ("[W]e have held that medically drawn blood tests are reasonable in appropriate circumstances . . . [but] [w]e have never

results in the motorist's driver's license being "subject to suspension or revocation."[18] As a result, many of the statutes have been challenged for "violat[ing] due process of law, . . . infring[ing] upon the guaranty against self-incrimination, depriv[ing] a licensee of equal protection, . . . [and for providing] an unreasonable search and seizure."[19] The most recent challenges to implied consent statutes primarily involve the Fourth Amendment, which states, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated."[20] This is because the human body implicates privacy interests that are heavily protected.[21]

One of the first pivotal cases with regard to implied consent statutes came from California in 1966.[22] In fact, California's original implied consent statute was adopted based on the Court's decision in *Schmerber v. California*.[23] In *Schmerber*, the United States Supreme Court answered whether police officers had the right to take a blood sample from a non-consenting party, without a warrant.[24] The decision in *Schmerber* was very fact-specific and did not provide law enforcement free reign to take warrantless blood samples in all situations.[25]

---

retreated . . . from our recognition that any *compelled* intrusion into the human body implicates significant, constitutionally protected privacy interests." (emphasis added)); Purver, *supra* note 15, § 2[a].

18. Purver, *supra* note 15, § 2[a].

19. *Id.*

20. U.S. CONST. amend. IV.

21. *See McNeely*, 133 S. Ct. at 1565; Alexander C. Black, Annotation, *Search Conducted by School Official or Teacher as Violation of Fourth Amendment or Equivalent State Constitutional Provision*, 31 A.L.R. 5th 229, § 6[a] (1986) ("[S]ociety recognizes the interest in the integrity of one's person, and the Fourth Amendment applies with its fullest vigor against any intrusion on the human body." (quoting Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 478 (5th Cir. 1982))).

22. *See generally* Schmerber v. California, 384 U.S. 757 (1966) (indicating that certiorari was granted to review Fourth Amendment and other claims in light of constitutional decisions since Breithaupt v. Abram, 352 U.S. 432 (1957)).

23. Berkley v. Miller, No. EDCV 13-1745-JGB (MAN), 2014 WL 2042249, at *13 (C.D. Cal. Apr. 2, 2014).

24. *See Schmerber*, 384 U.S. at 772.

25. *See id.* ("It bears repeating, however, that we reach this judgment *only on the facts of the present record.*" (emphasis added)); *cf. McNeely*, 133 S. Ct. at 1560 (stating that each case requires a fact-specific inquiry).

In *Schmerber*, the defendant was convicted for driving an automobile while under the influence of alcohol.[26] The defendant was arrested at a hospital while being treated for injuries he suffered as a result of an automobile accident.[27] The police obtained a blood sample from the presiding physician, which indicated the defendant was intoxicated.[28] At trial, the defendant objected to the admissibility of the chemical test because the blood sample was taken despite the fact he refused to consent to it.[29]

The United States Supreme Court held the warrantless blood test did not violate the defendant's rights under the Fourth Amendment.[30] The Court recognized that "[t]he integrity of an individual's person is a cherished value of our society."[31] However, the Court went on to say that "the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions."[32] The Court arrived at this conclusion, in part, because given the nature of the evidence, it was reasonable for the officer to believe the delay necessary to receive a warrant may have led to the evidence being lost.[33] For roughly the next fifty years, *Schmerber* remained the leading precedent regarding blood testing.[34]

In 2013, implied consent laws came under heavy scrutiny before the United States Supreme Court in *Missouri v. McNeely*.[35] Prior to this case, warrantless blood tests around the country were often utilized because of fear that the natural dissipation of alcohol from the body would destroy evidence necessary for drunk-driving violations.[36] More specifically, the warrantless searches were upheld under the "exigent circumstances" exception to the warrant

26. *Schmerber*, 384 U.S. at 758.

27. *Id.*

28. *Id.* at 758–59.

29. *Id.* at 759.

30. *Id.* at 772.

31. *Id.*

32. *Id.*

33. *Id.* at 770.

34. *See* Paul A. Clark, *Do Warrantless Breathalyzer Tests Violate the Fourth Amendment?*, 44 N.M. L. REV. 89, 90 (2014).

35. *See id.* ("The *McNeely* decision has wide ranging and significant implications for drunk driving prosecutions in the United States."); *see also* Missouri v. McNeely, 133 S. Ct. 1552 (2013).

36. *See McNeely*, 133 S. Ct. at 1558; *Schmerber*, 384 U.S. at 770; Clark, *supra* note 34, at 101.

requirement.[37] This exception states that "a warrantless entry by criminal law enforcement officials may be legal when there is *compelling need* for official action and *no time to secure a warrant.*"[38]

In *McNeely*, the Court asked "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."[39] The *McNeely* Court held that the natural dissipation of alcohol, by itself, does not "categorically" mandate an exigency in every case.[40] Rather, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."[41] The holding in *McNeely*, however, left many questions unanswered.[42] One gray area that many states may need to address in the near future is whether a warrant will be needed in all DWI cases.[43] Given the recency of *McNeely*, the effect on the states remains unseen.[44] In all likelihood, however, the legal community will see an increase in the amount of warrants applied for.[45]

B. *Minnesota's Implied Consent Statute*

Collectively, Minnesota Statutes sections 169A.50 to 169A.53 are referred to as Minnesota's "Implied Consent Law."[46] "The

37. *See* Clark, *supra* note 34, at 99 ("[M]any courts interpreting *Schmerber* have held as a matter of law that there is never time to obtain a warrant for a blood alcohol test.").

38. Michigan v. Tyler, 436 U.S. 499, 509 (1978) (emphasis added).

39. *McNeely*, 133 S. Ct. at 1556.

40. *Id.* at 1563.

41. *Id.*

42. Aron Hogden, Note, *Reconciling a Split of Authority: A South Dakota Response to Recent Developments in Drunk Driving Law*, 59 S.D. L. REV. 372, 373 (2014) ("[B]ecause *McNeely* was not argued on the facts of the case . . . the Court's analysis fails to provide adequate guidance to either state courts or . . . to police officers contemplating what the Fourth Amendment requires of them.").

43. *See* Benjamin W. Perry, *Fourth Amendment—Warrantless, Nonconsensual Seizures of a DWI Suspect's Blood: What Happens if You Say No to the Breathalyzer?—* Missouri v. McNeely, *133 S. Ct. 1552 (2013)*, 37 AM. J. TRIAL ADVOC. 231, 239 (2013).

44. *Id.*

45. *Id.*

46. MINN. STAT. § 169A.50 (2014); 32 DUNNELL MINN. DIGEST *Motor Vehicles* § 9.00 (5th ed. 2003).

implied consent statute is civil in nature, and therefore imposes a separate" set of procedures that are independent from criminal punishment.[47] In Minnesota, "[a]ny person who drives, operates, or is in physical control of a motor vehicle . . . consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance . . . or a hazardous substance."[48] Test administration, however, must conform to a few requirements.[49]

First, "[t]he test must be administered at the direction of a peace officer."[50] Second, before a test can be required, an officer must have "probable cause to believe the person was impaired while driving, operating, or in physical control of a motor vehicle in violation of [Minnesota Statutes] section 169A.20."[51]

Additionally, the peace officer must inform the person of the "implied consent advisory" at the time the officer requests a test.[52] This advisory requires an officer to inform the suspect of four important legal implications: (1) "Minnesota law requires the person to take [the] test," (2) "refusal to take [the] test is a crime," (3) under some circumstances a test will be administered even without the person's consent, and (4) "the person has the right to consult with an attorney" to the extent that it will not "unreasonably delay administration of the test."[53]

Despite the nature of implied consent, a suspect may choose to withdraw their consent and refuse to comply with chemical testing.[54] Except under certain circumstances,[55] "[i]f a person

47. Jeffrey S. Sheridan & Erika Burkhart Booth, *Revoke First, Ask Questions Later: Challenging Minnesota's Unconstitutional Pre-Hearing Revocation Scheme*, 31 WM. MITCHELL L. REV. 1461, 1463 (2005) (citing DONALD H. NICHOLS, THE DRINKING DRIVER IN MINNESOTA § 3.01 (5th ed. 2004)); *see also* Walek v. Comm'r of Pub. Safety, 361 N.W.2d 482, 484 (Minn. Ct. App. 1985) (noting that the burden of proof is "preponderance of the evidence" in implied consent laws because "[i]mplied consent proceedings are civil").

48. MINN. STAT. § 169A.51, subdiv. 1(a).

49. *See id.* § 169A.51, subdivs. 1–7.

50. *Id.* § 169A.51, subdiv. 1(a).

51. *Id.* § 169A.51, subdiv. 1(b).

52. *Id.* § 169A.51, subdiv. 2(a).

53. *Id.*

54. *See id.* § 169A.52; MARTIN J. COSTELLO, MINNESOTA MISDEMEANORS: DWI, TRAFFIC, CRIMINAL, AND ORDINANCE OFFENSES § 17.11(2)(e)(ii) (Matthew Bender ed., 2014) ("[C]onsent remains in effect until the driver withdraws it."). Officers may still test someone, however, if the person is unconscious or in a condition that prevents them from being able to give refusal, because it is treated as if the person

refuses to permit a test, then a test must not be given . . . ."[56] Refusal to submit to the test, however, constitutes a gross misdemeanor,[57] and the person's license may be revoked for a period of not less than one year.[58] Arguably, the most influential case in Minnesota to deal with implied consent came in 2013 when the Minnesota Supreme Court decided *State v. Brooks*.[59]

III. THE *BROOKS* DECISION

A. *Facts and Procedure*

On July 31, 2009, in Scott County, Minnesota, a Shakopee police officer stopped a white SUV that had just left a bar.[60] The officer noticed the scent of alcohol on the driver, Wesley Eugene Brooks, and asked Brooks to step out of his vehicle.[61] After consulting with his attorney—who was also present in the car—Brooks refused to submit to any field sobriety testing.[62] The officer then took Brooks to the St. Francis Medical Center.[63]

Shortly after, the officer gave Brooks the Minnesota implied consent advisory.[64] After initially refusing to submit to any chemical testing, Brooks eventually provided a urine sample.[65] The alcohol concentration in Brooks' urine came back at 0.14%, above the 0.08% legal limit.[66]

Subsequently, on January 16, 2010, a Minnesota state trooper stopped Brooks while driving on Interstate 35 in Minneapolis.[67]

---

has not withdrawn the implied consent. MINN. STAT. § 169A.51, subdiv. 6.

55. *Id.* § 169A.52, subdiv. 1 ("[I]f a peace officer has probable cause to believe that the person has [committed criminal vehicular homicide], a test may be required and obtained despite the person's refusal.").

56. *Id.*

57. *Id.* § 169A.20, subdiv. 2; *id.* § 169A.26.

58. *Id.* § 169A.52, subdiv. 3.

59. *See generally* State v. Brooks, 838 N.W.2d 563 (Minn. 2013).

60. *Id.* at 565.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* Initially Brooks refused to listen and demanded to speak to his attorney. *Id.* Brooks finally submitted to the testing after the implied consent advisory was given again with his attorney listening on the telephone. *Id.*

66. *Id.*

67. *Id.*

The state trooper stopped Brooks because there were sparks flying out from underneath his vehicle.[68] Once again, Brooks appeared to be under the influence, so the state trooper transported Brooks to the Hennepin County Medical Center.[69] At the Hennepin County Medical Center, the state trooper read the implied consent advisory to Brooks.[70] After he was unable to provide a urine sample, Brooks consulted with his attorney and agreed to provide a blood test.[71] Brooks' blood sample contained an alcohol concentration of 0.16%.[72]

Brooks' final encounter with law enforcement occurred in Scott County, on January 25, 2010.[73] On that date, Prior Lake police responded to reports of an erratic driver who was now sleeping in his car.[74] When the police arrived on the scene, they found Brooks unconscious in the driver's seat with his foot on the brake while the car was running.[75] The officers noticed an odor of alcohol on Brooks' breath, and Brooks' eyes appeared to be bloodshot and watery.[76] In addition, Brooks had trouble keeping his balance and needed assistance walking.[77] Brooks was eventually brought to the Scott County Jail because he became "agitated" and refused to listen as the officers attempted to read the implied consent advisory.[78] After briefly speaking with his attorney and attempting "to tip over a table with his hands," Brooks provided the officers with a urine sample, which contained an alcohol concentration of 0.16%.[79]

In all three incidents between Brooks and the police, the police never tried to secure a search warrant.[80] For each of the three encounters with police, Brooks was charged "with two counts of first-degree driving while impaired."[81]

---

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 565–66.
76. *Id.* at 566.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 565–66.
81. *Id.* at 566.

In each case, "Brooks moved to suppress the results of the blood and urine tests . . . because [the] police took the samples without a warrant."[82] In the Scott County cases, the judge denied the motion to suppress because "the evanescent quality of alcohol in the body created exigent circumstances that excused police from seeking a warrant."[83] The judge in Hennepin County also denied the motion to suppress, but "concluded that Brooks consented to the chemical test at the hospital."[84]

After the motions to suppress were denied, the cases proceeded to trial.[85] Brooks was convicted in each case of first-degree driving while impaired, in violation of Minnesota Statutes sections 169A.20, subdivision 1(5) and 169A.24.[86] Brooks was eventually sentenced separately in Scott County and Hennepin County.[87]

In two independent Minnesota Court of Appeals opinions, Brooks' convictions were affirmed.[88] The Minnesota Court of Appeals supported its opinion on Minnesota Supreme Court "precedent[,] holding that the evanescent quality of alcohol in the body created a single-factor exigent circumstance that on its own allowed police to search drivers suspected of driving under the influence without a warrant."[89]

Initially, the Minnesota Supreme Court denied Brooks' petitions for review.[90] Next, Brooks filed a petition for a writ of certiorari to the United States Supreme Court, and the Court, after granting the petition, vacated and remanded the case for further judgments.[91] Subsequently, the Minnesota Court of Appeals "reinstated Brooks'[] appeals . . . [and the Minnesota Supreme Court] granted the State's petitions for accelerated review."[92]

82. *Id.*
83. *Id.* "The two Scott County cases were heard together . . . ." *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *See id.* at 566–67.
88. *Id.* at 567 (citations omitted).
89. *Id.*
90. *See id.*
91. *Id.*
92. *Id.* (citation omitted).

B. The Minnesota Supreme Court's Reasoning

Considering the totality of the circumstances, the Minnesota Supreme Court affirmed Brooks' convictions based on two separate lines of reasoning.[93] The court held, in part, that "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test."[94] In support of that conclusion, the court stated nothing suggested that Brooks' will had been overborne or that his capacity for self-determination was critically impaired.[95] The court further reasoned that Brooks' discussions with counsel before agreeing to take each test supported the conclusion that Brooks voluntarily consented.[96] Additionally, the court stated that by reading Brooks the implied consent advisory, the police made it clear to Brooks that he could choose whether to submit to the testing.[97]

The court also relied on a second line of reasoning. Brooks argued that even if he did consent, the implied consent statute is unconstitutional.[98] The court, however, disagreed and concluded that the implied consent statute is a legal tool that can be used to enforce drunk-driving laws.[99] The court concluded that these "legal tools" can be used to "condition[] the privilege of driving on agreeing to a warrantless search."[100]

Justice Stras, in his concurring opinion, did not agree with the majority that Brooks voluntarily consented to the tests.[101] Justice Stras, rather, felt this case was the perfect opportunity for the court to adopt a rule set out by the United States Supreme Court which states that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[102] In his opinion, "[i]t is hard to imagine how Brooks'[]

93. *See id.* at 572–73.
94. *Id.* at 570.
95. *Id.* at 571.
96. *Id.* at 571–72.
97. *Id.* at 572.
98. *Id.*
99. *Id.* (citing Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013)).
100. *Id.*
101. *Id.* at 573 (Stras, J., concurring).
102. *Id.* at 574 (quoting Davis v. United States, 131 S. Ct. 2419, 2422 (2011)) (internal quotation marks omitted).

consent could have been voluntary when he was advised that refusal to consent to a search is a crime.[103]

IV. ANALYSIS

A. *Brooks' Consent Was Voluntary*

The Fourth Amendment provides that "the right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."[104] Unless an exception applies, law enforcement must obtain a warrant before invading an area in which people hold an objectively reasonable expectation of privacy.[105] But, "police do not need a warrant if the subject of the search consents."[106]

One of the major differences between *Missouri v. McNeely* and *State v. Brooks* is that the defendant in *McNeely* did not consent to the blood test that was administered.[107] Despite his refusal, the police still ordered the medical lab technician to take a sample of the defendant's blood.[108] In *Brooks*, the defendant received time to consult with his lawyer, became informed of the Minnesota implied consent statute, and became informed that refusal to take the test constituted a criminal offense.[109] Ultimately, Brooks consented to the test on each occasion with the police.[110] One of the most contested issues in the *Brooks* decision, however, was whether—because of the threatened criminal offense for test refusal—Brooks actually consented to take the test.[111]

---

103. *Id.* at 573–74 (citations omitted).

104. U.S. CONST. amend. IV; *see also* MINN. CONST. art. 1, § 10.

105. *See* Katz v. United States, 389 U.S. 347, 351 (1967); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 479 (1991) ("[A] warrantless search is per se unreasonable unless the search falls into an exception.").

106. *Brooks*, 838 N.W.2d at 568 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)); *see* Clark, *supra* note 34, at 105 ("Although government-compelled breath tests are searches for Fourth Amendment purposes, the state or federal government does not violate the Fourth Amendment if the searched person consents to the search.").

107. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1557 (2013).

108. *Id.*

109. *Brooks*, 838 N.W.2d at 565–66.

110. *Id.*

111. *See id.* at 568–72.

It is important to identify what is required for consent to be valid for Fourth Amendment purposes. A citizen's consent to a search must be voluntarily given to the law enforcement officer.[112] Voluntariness on the part of the citizen is the only prerequisite for the validity of the consent to search.[113] Searches are not voluntary when they are "the product of duress or coercion, express or implied."[114] To determine voluntariness, the court must consider the totality of the circumstances.[115]

Some states, and the federal government, have recognized a number of common factors for determining voluntariness.[116] Courts across the country may consider the following factors when analyzing the totality of the circumstances.[117] They include: (1) the "apparent authority of the searching officer,"[118] (2) whether there were a large number of law enforcement officers present,[119] (3) the specific circumstances in place when the search was conducted,[120] (4) "whether the subject was advised of the constitutional right to refuse,"[121] and (5) if "refusal would result in deprivation of a right or benefit."[122]

Applying these factors to the *Brooks* case clearly shows that Brooks voluntarily consented to Minnesota's implied consent

112. *See* State v. Harris, 590 N.W.2d 90, 102 (Minn. 1999) ("If Harris did not give voluntary consent to the search, then the evidence gathered thereafter must be suppressed.").

113. *Id. Compare* State v. Kivimaki, 345 N.W.2d 759, 762 (Minn. 1984) ("In order for a statement taken from an accused during custodial interrogation to be admitted, the prosecution must prove that the accused *knowingly* and *intelligently* waived his right against self-incrimination, and that the statement was *freely and voluntarily* made." (emphasis added)), *with* 42 DUNNELL MINN. DIGEST *Search and Seizure* § 4.02 (5th ed. 2012) ("Consent to search need only be voluntary, that is, uncoerced, and need not be knowing or intelligent.").

114. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); State v. Diede, 795 N.W.2d 836, 846 (Minn. 2011) (internal citations and quotations omitted).

115. *Bustamonte,* 412 U.S. at 227; *Diede,* 795 N.W.2d at 846 (internal citations and quotations omitted).

116. *See* Wheaton v. Hagan, 435 F. Supp. 1134, 1147 (M.D.N.C. 1977) (listing factors courts may consider when determining whether a suspect voluntarily consented to a warrantless search).

117. *Id.*

118. *Id.* (citing Bumper v. North Carolina, 391 U.S. 543 (1968)).

119. *Id.* (citing United States v. Hearn, 496 F.2d 236 (6th Cir. 1974)).

120. *Id.* (citing *Bustamonte,* 412 U.S. at 229).

121. *Id.* (citing Davis v. North Carolina, 384 U.S. 737 (1966)).

122. *Id.* (citing United States v. Albarado, 495 F.2d 799 (2d Cir. 1974)).

statute. When analyzing the facts, it is also important to remember what standard of review applies for determining whether consent was voluntary. The Minnesota Supreme Court has utilized a "clearly erroneous" standard.[123] Therefore, the court will only reverse the trial court's findings "if, on the entire evidence, [the court was] left with the definite and firm conviction that a mistake occurred."[124]

The *Brooks* court correctly decided the case, based on the facts, for the following reasons.[125] First, the responding officers had the requisite authority to ask Brooks for his consent to search.[126] Brooks was arrested for driving while impaired, and the police asked him to submit to testing pursuant to Minnesota's implied consent statute.[127] Second, when Brooks consented on all three occasions, he was only in the presence of a single police officer.[128] Therefore, officer presence should not be an issue in the analysis.[129] Third, the officers read Brooks the implied consent advisory in each case.[130] The United States Supreme Court has specifically stated that knowledge of the right to refuse consent is not required to show voluntariness, but it does help.[131] Finally, although Brooks was in custody when consent was given, he received ample opportunity to talk with his attorney.[132] Therefore, based on the totality of the circumstances, the Minnesota Supreme Court correctly decided that Brooks consented to the chemical testing.

Brooks specifically contended that his consent was not voluntary because he agreed to submit to the testing only after being informed that refusal constituted a crime.[133] Being positioned

123. State v. Diede, 795 N.W.2d 836, 846 (Minn. 2011).

124. *Id.* at 846–47.

125. The court went through these facts but did not address them each in the same way the author has below.

126. *See* Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

127. State v. Brooks, 838 N.W.2d 563, 565–66 (Minn. 2013).

128. *Id.* at 565–66.

129. *See generally* United States v. Hearn, 496 F.2d 236 (6th Cir. 1974) (discussing the presence of officers as a factor to consider when deciding whether consent was given voluntarily).

130. *Brooks*, 838 N.W.2d at 565–66.

131. *See* United States v. Drayton, 536 U.S. 194, 206–07 (2002) ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973))).

132. *See Brooks*, 838 N.W.2d at 565–66.

133. *Id.* at 568.

in an uncomfortable encounter with law enforcement during questioning, however, does not automatically mean consent was given involuntarily.[134] This principle has been applied not only in the context of implied consent statutes, but also in a number of other situations.[135]

For example, in *United States v. DeAngelo*, the United States Court of Appeals for the Fourth Circuit upheld an airport security search of a passenger's bag that revealed possession of marijuana.[136] Despite the fact that the defendant would not be allowed to board the plane if he did not allow the airport authority to search his bag, the court held that the defendant still consented to the search.[137]

While not entirely similar, important analogies between *DeAngelo* and *Brooks* can easily be identified. In *DeAngelo*, the airport security had an important interest in protecting passengers who utilize the airlines.[138] In *Brooks*, the implied consent statute serves the important purpose of protecting drivers from intoxicated drivers on the state's roads and highways.[139] More importantly with respect to consent, the court in *DeAngelo* recognized that passengers "had a choice of traveling by air or by some other means."[140] Similarly, Brooks—along with any other driver in the

134. State v. Diede, 795 N.W.2d 836, 846 (Minn. 2011) (citing State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994)). *But see* State v. High, 287 Minn. 24, 27, 176 N.W.2d 637, 639 (1970) ("Consent must be the product of more than mere *submission to legal authority.*" (emphasis added) (citing United States v. Mitchell, 322 U.S. 65 (1944))).

135. *See* Francis, *supra* note 13, at 644–45 ("[T]hese statutes have spawned regulations to address security and safety at airports, courthouses, concert arenas, sports arenas, and prisons.").

136. 584 F.2d 46, 47 (4th Cir. 1978). *But see* United States v. Kroll, 481 F.2d 884, 886 (8th Cir. 1973) ("Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent [sic] to the search when to do otherwise would have meant foregoing the constitutional right to travel.").

137. *See DeAngelo*, 584 F.2d at 47.

138. *See id.* ("[T]he screening system is designed to deter as well as prevent passengers form carrying weapons or explosives.").

139. Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013) (recognizing a state's ability enact legislation to combat drunk-driving). *See generally* State v. Brooks, 838 N.W.2d 563 (Minn. 2013).

140. *DeAngelo*, 584 F.2d at 47 ("When he voluntarily entered upon the screening process DeAngelo acquiesced in its full potential scope as represented to him, including physical inspection if, as developed, that should be requested.").

State of Minnesota—had a choice from the beginning whether to drive and therefore to consent to Minnesota's implied consent statute, from the time he got behind the wheel of his car.[141]

The question of consent and coercion has also been addressed in the context of the Fifth Amendment.[142] In *South Dakota v. Neville*, two South Dakota police officers stopped a car and noticed the driver appeared to be intoxicated.[143] The defendant, after being asked on numerous occasions by the officers, repeatedly refused to submit to chemical testing.[144] The defendant refused to take the test despite the fact that, in South Dakota, test refusal could be used against him.[145]

At trial, the defendant moved to suppress evidence of his refusal to comply with chemical testing.[146] The trial court granted the motion, and the State appealed.[147] The case eventually came before the United States Supreme Court, and the Court held "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."[148] Essentially, the Court decided that the test refusal evidence could be included at trial and used against the defendant.[149]

The Court came to this conclusion by recognizing "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make."[150] However, "the criminal process often requires suspects and defendants to make difficult choices."[151] The *Neville* decision is factually similar to *Brooks*. The defendants in both cases were faced with tough consequences if they refused chemical testing.[152] Despite these facts, both the

141. *Brooks*, 838 N.W.2d at 572 ("[W]e hold that Brooks voluntarily consented to the searches . . . .").

142. *See* South Dakota v. Neville, 459 U.S. 553, 564 (1983).

143. *Id.* at 554–55.

144. *Id.* at 555–56.

145. *Id.* at 556.

146. *Id.*

147. *Id.*

148. *Id.* at 564.

149. *See id.* at 564–65.

150. *Id.* at 564.

151. *Id.*

152. *See id.* at 556 (noting that evidence of test refusal could be used against the defendant at trial); State v. Brooks, 838 N.W.2d 563, 573–74 (Minn. 2013) (noting that test refusal could result in additional criminal charges against the

United States Supreme Court and the Minnesota Supreme Court found that the defendants were not coerced in their decisions.[153] For the reasons stated above, the Minnesota Supreme Court was correct in holding that Brooks consented to the chemical testing.[154]

B. Implied Consent Statutes Are a Valid Exercise of Police Power

"The concept of police powers did not really exist when the Constitution was created."[155] The concept first emerged over half a century later after lawyers and jurists recognized that sometimes the best way to protect the security of private rights is to enact legislation that tends to promote the public welfare.[156] Among the states, the recognition of a state's "police power" is not a novelty.[157] Precisely defining this term, however, has proven to be challenging.[158] Nevertheless, police power "generally [is] defined as the power of the state to impose such restraints upon private rights as are necessary for the general welfare."[159] A state's police power "is one of the *most essential* of governmental powers and one of the *least limitable.*"[160]

Across the nation, courts have upheld statutes that are supported by the legislature exercising police power.[161] The applicability of police powers affects both civil and criminal issues. For example, in *Kewley v. Department of Elementary & Secondary*

---

defendant).

153. *See Neville*, 459 U.S. at 564; *Brooks*, 838 N.W.2d at 572.

154. *See supra* Part IV.A.

155. Samuel R. Olken, *Charles Evans Hughes and the* Blaisdell *Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 521 (1993).

156. *Id.*

157. *See* Mut. Loan Co. v. Martell, 222 U.S. 225, 232–33 (1911) (recognizing Massachusetts' ability to pass legislation pursuant to its police power in 1911); *see also* Nw. Tel. Exch. Co. v. Minneapolis, 81 Minn. 140, 162, 86 N.W. 69, 74 (1901) (recognizing the State of Minnesota's police powers in the early 1900s).

158. *See* Alexander Co. v. City of Owatonna, 222 Minn. 312, 322, 24 N.W.2d 244, 250 (1946) ("The term 'police power' is not susceptible of precise definition . . . ."), *overruled by* Johnson v. City of Plymouth, 263 N.W.2d 603, 608 (Minn. 1978).

159. *Alexander Co.*, 222 Minn. at 322, 24 N.W.2d at 250.

160. *Id.* (emphasis added).

161. *See, e.g.*, Blaisdell v. Home Bldg. & Loan Ass'n, 189 Minn. 422, 433, 249 N.W. 334, 338 (1933) ("[T]he [l]egislature, under the police power of the state, has authority to enact laws to relieve a public emergency even though such laws temporarily impair obligations of contract . . . .").

Education, the Massachusetts Court of Appeals held that the state's police powers enabled the legislature to adopt legislation that affected teaching licenses within the schools.[162] Additionally, the Wisconsin Supreme Court recently recognized the legislature's ability, through the state's police powers, to enact laws regulating elections.[163] Finally, in *State v. Boushee*, the North Dakota Supreme Court recognized the State's ability, through its police power, to enact statutes aimed at controlling drug abuse.[164]

The court in *Brooks* did not explicitly mention the use of the state's police power in upholding the implied consent statute.[165] The Minnesota Supreme Court, however, has upheld laws passed by the Minnesota State Legislature in the past by recognizing the proper exercise of police power.[166] In fact, the supreme court has specifically referenced the State's ability to limit the operation of motor vehicles on highways pursuant to its police powers.[167] In *Anderson v. Commissioner of Highways*, the supreme court considered whether the Commissioner of Highways, under relevant statutory powers, could suspend the license of any driver without a preliminary hearing upon a sufficient showing that the licensee is a habitual violator of traffic laws.[168] The court held that "[p]ermission to operate a motor vehicle upon the public highways . . . is always subject to such regulation and control as public authority see[s] fit to impose under the police power in the interest of public safety and welfare."[169]

---

162. 15 N.E.3d 224, 230–31 (Mass. App. Ct. 2014).

163. *See* League of Women Voters v. Walker, 2014 WI 97, ¶ 50, 357 Wis. 2d 360, 851 N.W.2d 302 ("[T]he legislature has the power to regulate in ways that affect the mode and manner of conducting elections . . . .").

164. 284 N.W.2d 423, 432 (N.D. 1979) (stating that North Dakota has a sufficient goal in mind when the police power is used to combat drugs).

165. *See* State v. Brooks, 838 N.W.2d 563 (Minn. 2013).

166. *See* State v. Nordstrom, 331 N.W.2d 901, 906 (Minn. 1983) (holding that "[t]he [S]tate has a compelling interest in public safety on the highways and, in the proper exercise of its police power, has enacted [a statute which allows for DWI arrests for acts not committed in the presence of the police]"); *see also* State v. Crawley, 819 N.W.2d 94, 102 (Minn. 2012) (upholding a statute that punished speech as a valid exercise of police power).

167. *See* Anderson v. Comm'r of Highways, 267 Minn. 308, 317, 126 N.W.2d 778, 784 (1964).

168. *Id.* at 309–10, 126 N.W.2d at 779.

169. *Id.* at 317, 126 N.W.2d at 784.

Further, other states have upheld implied consent statutes as a valid exercise of the state's police power.[170] In *State v. Moore*, the Washington Supreme Court faced a challenge to the state's implied consent statute.[171] In *Moore*, the petitioner was arrested for drunk driving and was advised that if he did not submit to a breathalyzer his license would be revoked.[172] The petitioner submitted to the test, but then challenged his conviction based—in part, and consistently with *Brooks*—on the assertion that Washington's implied consent law was unconstitutional.[173]

The Washington Supreme Court affirmed the decision of the trial court.[174] The court specifically reasoned that "the [implied consent] law, with its rights afforded the accused, is constitutionally sustainable as a reasonable exercise of the state's police power."[175] The court further accepted "the reduction of traffic carnage occasioned by the inebriated driver" as a sufficient purpose for having the statute.[176]

Similarly, the New Mexico Court of Appeals specifically decided whether its Implied Consent Act was a valid exercise of the state's police powers.[177] In *Marez v. Taxation & Revenue Department, Motor Vehicle Division*, the appellant's license was revoked after he refused to take a breath-alcohol test.[178] The appellant argued that the Implied Consent Act was unconstitutional because it was a violation of his Fifth Amendment and Sixth Amendment rights.[179] The New Mexico Court of Appeals disagreed.[180] In the opinion, the court specifically stated, "There is a well-established line of cases in both the New Mexico courts and the United States Supreme Court

170. *See, e.g.*, State v. Moore, 483 P.2d 630 (Wash. 1971).
171. *Id.* at 631–32.
172. *Id.*
173. *Id.* at 632.
174. *Id.* at 635.
175. *Id.* at 634.
176. *Id.*
177. *See* Marez v. Taxation & Revenue Dep't, Motor Vehicle Div., 893 P.2d 494 (N.M. Ct. App. 1995).
178. *Id.* at 495.
179. *See id.*
180. *See id.* ("We hold that there was no violation of Marez' [sic] constitutional rights and that Marez has no standing to challenge the constitutionality of [the Implied Consent Act].").

that approves the use of implied consent acts as a valid exercise of the police power of the state."[181]

C. *Driving Is a Privilege, Not a Right*

While the state's police powers are integral to the rationale behind implied consent laws,[182] the principle that driving is a privilege and not a right is also integral to the implied consent rationale.[183] Minnesota Statutes section 171.02 states, "Except when expressly exempted, a person shall not drive a motor vehicle upon a street or highway in this state unless the person has a valid license."[184] Further, the ability to use a motor vehicle on a public highway is a "license or privilege."[185] "The principle that driving is a privilege and not a right has been recognized by courts for almost 100 years."[186]

---

181. *Id.* (citing South Dakota v. Neville, 459 U.S. 553, 564 (1983)); *see In re* McCain, 506 P.2d 1204, 1209 (N.M. 1973); State v. Sandoval, 683 P.2d 516, 518 (N.M. Ct. App. 1984)).

182. *See supra* Part IV.B.

183. Cafaro, *supra* note 16, at 102 ("The rationale behind this is that '[t]he right to drive a motor vehicle on the public streets *is not a natural right but a privilege*, subject to reasonable regulation in the public interest.'" (emphasis added) (quoting Standish v. Dep't of Revenue, 683 P.2d 1276, 1281 (Kan. 1984))).

184. MINN. STAT. § 171.02, subdiv. 1(a) (2014).

185. 32 DUNNELL MINN. DIGEST *Motor Vehicles*, *supra* note 46, § 8; *see also Driving Is a Privilege, Not a Right*, DRIVERSED.COM, https://driversed.com/driving-information/the-driving-privilege/driving-is-a-privilege-not-a-right.aspx (last visited Apr. 9, 2015) ("Driving is not a constitutional right. You get your drivers license based on the skills you have and the rules you agree to follow.").

186. Cafaro, *supra* note 16, at 102; *see, e.g.*, Hugh v. McCarthy, 353 P.2d 276, 290 (Cal. 1960).

> [I]t [is] imperative not to lose sight of or transgress the established principles that "'The 'use of highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right, of which the public and individuals cannot rightfully be deprived . . .' [but that] 'the use of the public highways by motor vehicles, with its constant dangers, renders the reasonableness and necessity of regulation apparent.'"

Id. (quoting Escobedo v. State, 222 P.2d 1, 5 (Cal. 1950)); *see* State v. Garner, 608 P.2d 1321, 1324 (Kan. 1980) ("It is well accepted that the operation of a motor vehicle on the public highways is a *privilege*, and not a right, subject to reasonable regulation . . . in the interest of public safety and welfare."(emphasis added) (citing Lee v. State, 358 P.2d 765, 766 (Kan. 1961))); Harrison v. State, Dep't of Pub. Safety, Drivers License Div., 298 So. 2d 312, 318 (La. Ct. App. 1974) ("The same motor vehicle accident may give rise to . . . proceedings . . . to determine

To fully understand this line of reasoning, it is important to distinguish between what constitutes a "right" and what constitutes a "privilege."[187] One common way of differentiating between a right and a privilege is to identify the ability of third party interference.[188] This country was created on the idea that "all humans have certain rights that are inherent and inalienable."[189]

Many of these rights are inalienable—and generally insulated from third party interference—because they are "'deeply rooted in this Nation's history and tradition.'"[190] Many of these rights are fundamental and cannot be interfered with.[191] Privileges, on the other hand, do not typically attain the same type of protection.[192] In certain contexts—such as professional licensing—privileges are powers "which can be taken away by the relevant authority."[193]

---

whether a person's *privilege to drive* shall be revoked . . . ." (emphasis added) (quoting Bowers v. Hults, 249 N.Y.S.2d 361, 364 (N.Y. Sup. Ct. 1964))); People v. Rosenheimer, 102 N.E. 530, 532 (N.Y. 1913) ("[T]he whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a *privilege* which might be denied him, and not a right, and that in a case of a privilege the Legislature may prescribe on what conditions it shall be exercised." (emphasis added)); Cafaro, *supra* note 16, at 102.

187. *See* Kevin Eggers, *Difference Between 'Individual Rights' and 'Privileges,'* NAPA VALLEY REG. (Oct. 28, 2013, 9:00 PM), http://napavalleyregister.com/news/opinion/mailbag/difference-between-individual-rights-and-privileges/article_07f76ae8-4029-11e3-926c-001a4bcf887a.html ("Understanding the difference between 'individual rights' and government-provided 'privileges' is as important as understanding the difference between freedom and slavery.").

188. *See, e.g.*, Timothy Sandefur, *Does the State Create the Market—And Should It Pursue Efficiency?*, 33 HARV. J.L. & PUB. POL'Y 779, 793 (2010) ("[A] right is not held at the mercy of another, or of the state. . . . Privileges, on the other hand, are accorded to us by one in a superior position, who retains authority to restrict or eliminate those privileges . . . ."); Eggers, *supra* note 187 ("[I]f we as individuals own the 'right,' it's our individual right. If the government owns (or controls) the 'right,' it's really a privilege.").

189. 7 DUNNELL MINN. DIGEST *Constitutional Law* § 10 (5th ed. 2003).

190. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

191. *See* 7 DUNNELL MINN. DIGEST *Constitutional Law*, *supra* note 189, § 10 ("The fourteenth amendment denies the states the power to deprive any person of life, liberty, or property, without due process of law.").

192. *See* Sandefur, *supra* note 188, at 793 (arguing that citizens "do not *deserve* a privilege" and "[p]rivileges . . . are accorded to us by one in a superior position").

193. Sandeep Gopalan, *Skilling's Martyrdom: The Case for Criminalization Without Incarceration*, 44 U.S.F. L. REV. 459, 482 (2010); *see, e.g.*, MINN. STAT. § 122A.18, subdiv. 8(c) (2014) (stating the instances in which the Commissioner of Education

The court in *Brooks* focused most of its analysis on whether Brooks had consented to the chemical test or not.[194] However, the *Brooks* Court itself explicitly recognized *McNeely* and that implied consent laws operate as "legal tools" which states may use to help prevent drunk driving.[195] Despite the court's recognition of "legal tools," the principle that driving is a privilege has already been recognized by Minnesota in *State v. Parker*.[196]

In *Parker*, the defendant was convicted of driving under the influence of alcohol.[197] During a civil proceeding, the trial court sustained the revocation of the defendant's driver's license.[198] The defendant appealed the criminal conviction, arguing that it was unconstitutional—as a violation of the Double Jeopardy Clause—because he had already been punished for the same behavioral incident by having his driver's license revoked.[199]

The Minnesota Court of Appeals disagreed.[200] The court first addressed the Double Jeopardy Clause issue and stated that while civil remedies may be an inconvenience to some, they also serve to deter drunk driving and do not equate to a punishment sufficient to implicate the Double Jeopardy Clause.[201] Further, the court reasoned, "Driving is a *privilege* voluntarily granted by the state."[202]

Given the fact that driving is a privilege—and not a fundamental right—it is sensible for the state to attach certain, reasonable conditions drivers must abide by in order to have a license.[203] In fact, refusing to take a chemical test when an officer has probable cause to believe a driver is impaired is not the only

---

may revoke a teacher's license); *id.* § 148.262, subdiv. 1(2) (stating the circumstances under which a nurse's license may be revoked); *id.* § 518A.66 (describing the procedure for occupational license suspension in Minnesota for failure to pay child support).

194. *See* State v. Brooks, 838 N.W.2d 563, 568–72 (Minn. 2013).

195. *Id.* at 572 (citation omitted).

196. 538 N.W.2d 141, 143 (Minn. Ct. App. 1995); *see Minnesota Driving Law*, ST. DRIVING L., http://www.statedrivinglaw.com/minnesota-driving-law.html (last visited Apr. 9, 2015) ("Driving in Minnesota is a privilege.").

197. *Parker*, 538 N.W.2d at 142.

198. *Id.*

199. *Id.*

200. *Id.* at 144.

201. *Id.* at 143.

202. *Id.* (emphasis added).

203. 24 DUNNELL MINN. DIGEST *Highways* § 5.01 (5th ed. 2007) ("The [Minnesota] statute requires motorists to have a driver's license, which is revocable on grounds of unfitness and other causes.").

situation in which a driver's license may be revoked.[204] Therefore, despite not specifically categorizing driving as a privilege,[205] the court in *Brooks* correctly upheld Minnesota's Implied Consent Law as being constitutional.

D. Implied Consent Statutes Are Necessary as a Matter of Public Policy

Generally, laws dealing with traffic violations are enacted for the purpose of facilitating public safety on the roadways.[206] Much of the controversy surrounding implied consent statutes deals with balancing the state's interest in public safety and preserving evidence against the constitutional rights of the person who has been stopped by the police.[207] Minnesota's implied consent statute strikes a careful balance between both of these important interests.

As stated previously, drunk driving is a major problem in the United States today.[208] In Minnesota, 25,719 impaired drivers were arrested in 2013 alone.[209] A total of "596,170 Minnesota residents

---

204. *See* MINN. STAT. § 171.18, subdiv. 1 (2014) (stating that a driver's license may be suspended for a number of reasons, including but not limited to: (1) being a "habitually reckless or negligent driver," (2) violating many traffic laws, and (3) failing "to report a medical condition that . . . would have resulted in cancellation").

205. *See* State v. Brooks, 838 N.W.2d 563, 569 n.4 (Minn. 2013).

206. *See* Robert Force, *Administrative Adjudication of Traffic Violations Confronts the Doctrine of Separation of Powers*, 49 TUL. L. REV. 84, 135 (1974) ("The principal purpose in traffic laws is to regulate driver behavior and *promote public safety.*") (emphasis added); Dorothy J. Glancy, *Privacy on the Open Road*, 30 OHIO N.U. L. REV. 295, 367 (2004) ("ITS traffic management systems serve such societal interests as traffic safety, environmental protection, as well as preventing traffic congestion.").

207. *See* Daniel Gross, Comment, *Closing the Loophole: Shea's Law and DWI Blood Draws in New York State Under Motor Vehicle and Traffic Law § 1194(4)(A)(1)*, 74 ALB. L. REV. 951, 968–69 (2011) (recognizing the need to "'balance the State's interest in obtaining the necessary evidence against the constitutional rights of the individual.'"(quoting People v. Elysee, 49 A.D.3d 33, 45 (N.Y. App. Div. 2007))); Alison Betts, *Minnesota High Court Reviews Implied Consent in Drunk Driving Cases*, SOBERING UP (Sept. 11, 2014), http://scramsystems.com/blog/2014/09/minnesota-high-court-reviews-implied-consent-drunk-driving-cases/#.VCb0tPldX8s ("Many . . . view implied consent laws as a key tool to prosecuting impaired drivers and keeping the roads safer. But opponents argue that those efforts can't, and don't have to, infringe on a suspect's rights.").

208. *See Drunk Driving Statistics, supra* note 12 ("Drunk driving costs the United States $199 billion a year").

209. OFFICE OF TRAFFIC SAFETY, MINN. DEP'T OF PUB. SAFETY, MINNESOTA IMPAIRED DRIVING FACTS 2013, at 1 (2013), *available at* https://dps.mn.gov/divisions

have one or more impaired driving incidents on their driving record."[210] That amounts to "11.0% of all people living in Minnesota."[211] These numbers are very concerning, particularly when considering a vast number of Minnesota residents are too young to drive.[212] "Out of the 2013 total of licensed drivers in Minnesota, 1 in 7 has one or more incidents on record, 1 in 16 has two or more, and 1 in 35 have three or more."[213] The violators tend to be young adults between the ages of twenty to thirty-four years old.[214] Additionally, males tend to violate impaired driving laws at a much higher rate than females.[215]

The exceedingly high number of impaired driving violations, in part, deals specifically with the offenders themselves.[216] As compared to other categories of criminal offenders, drunk drivers tend to have worse levels of recidivism.[217] These numbers are highly concerning given the cost of incidents involving alcohol. To be sure, not all of the incidents involve impaired drivers—for instance, an accident may involve a drunk pedestrian who was hit by a motor vehicle. However, the costs are still an important consideration. In 2013, the estimated cost of death for alcohol-related driving incidents was $4,538,000.[218] The estimated cost for an

/ots/reports-statistics/Documents/minnesota-impaired-driving-facts-2013.pdf.

210. *Id.* at 18.

211. *Id.*

212. *See id.*

213. *Id.*

214. *See id.* at 1. The report also indicates that a substantial number of violators—1478 to be exact—were underage drivers. *Id.*

215. *See id.* (stating that seventy-three percent of impaired driving violators in 2013 were males).

216. *See* Michael J. Watson, Note, *Carnage on Our Nation's Highways: A Proposal for Applying the Statutory Scheme of Megan's Law to Drunk-Driving Legislation*, 39 RUTGERS L. J. 459, 497 (2008).

217. *See* OFFICE OF TRAFFIC SAFETY, MINN. DEP'T OF PUB. SAFETY, *supra* note 209, at 1 (reporting that in 2013, forty percent of impaired driving violators were recidivists); Watson, *supra* note 216, at 497 ("While the recidivism of sex-offenders remains a debated issue . . . it is well-documented and relatively unchallenged that DUI offenders continue to re-offend."); *see also* Angela Carlisle, *Staggered Sentencing for Repeat DWI Offenders: A New Weapon in the War Against Drunk Driving*, 25 HAMLINE J. PUB. L. & POL'Y 87, 88 (2003) ("[T]he problem of drunk driving, *specifically repeat offenders*, has continued to plague society despite great strides in legislation and law enforcement." (emphasis added)).

218. OFFICE OF TRAFFIC SAFETY, MINN. DEP'T OF PUB. SAFETY, *supra* note 209, at 35.

incapacitating injury was $230,000.[219] Finally, the estimated cost for non-incapacitating injuries was $58,700.[220] For decades, the Minnesota legislature has been working to try and put an end to the drunk-driving epidemic.[221]

When constructing laws to eradicate drunk driving, the Minnesota Legislature also considers the severity of the potential injury suffered as a result of drunk driving.[222] Minnesota has experienced high levels of deaths related to drinking and driving for many years.[223] In 2013 alone, "387 people died in traffic crashes and 81 (21%) were in crashes involving impaired . . . drivers."[224] Several impaired driving incidents resulted in a conviction for criminal vehicular operation of a motor vehicle.[225] Of those charged with criminal vehicular operation of a motor vehicle, thirteen incidents resulted in death and 115 incidents resulted in injuries.[226] A person charged with criminal vehicular homicide in Minnesota "may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both."[227]

Minnesota's implied consent statute represents a trend among states of applying harsher punishments in attempt to decrease the amount of drunk-driving incidents. Similar laws with the same goal have experienced recent success.[228] For instance, in 1993, the Minnesota Legislature passed the "Not-A-Drop" law that made "it illegal for [persons under the age of 21] to drive while having any amount of alcohol in their blood."[229] For the first few years after "Not-A-Drop" law was enacted, the numbers did not indicate a

219. *Id.*

220. *Id.*

221. *See id.* at 45–57.

222. *See id.* ("[The number of traffic deaths related to drinking and driving] began decreasing . . . in response to . . . legislation and programs modeled in some part on the Scandinavian countries' tough approach to drinking and driving.").

223. *See id.* (noting that deaths related to drinking and driving did not begin to decrease until "around 1980").

224. *Id.* intro. letter.

225. *See id.* at 1.

226. *Id.*

227. MINN. STAT. § 609.2112, subdiv. 1 (2014).

228. *See* OFFICE OF TRAFFIC SAFETY, MINN. DEP'T OF PUB. SAFETY, *supra* note 209, at 1 (identifying harsher laws, such as "Not-A-Drop," which are aimed at reducing the number of drunk drivers).

229. *Id.*

significant drop in underage drinking and driving.[230] Recently, however, the number of underage drunk drivers has decreased rapidly.[231]

In 1997, the Minnesota Legislature enacted another harsh punishment for impaired driving offenses, which led to decreases in such offenses.[232] This legislation also proved to be successful over the next fifteen years. The legislation provided for special sanctions applicable to offenders with an alcohol concentration level of "0.20 percent or higher."[233] As a result of this legislation, "[t]here has been a steady decline among high-scoring violators."[234]

Minnesota's implied consent statute is another law that attempts to come down hard on drunk drivers. Even the United States Supreme Court has recognized the importance of implied consent statutes.[235] Overall, however, the results have been mixed as to how well implied consent statutes deter drunk driving.[236] One of the main reasons why some implied consent laws have not lived up to hopes is that refusal rates are very high in some areas of the country.[237]

Minnesota, however, has not experienced as high of rates of test refusal.[238] In fact, between the periods of 1996 to 2001, test refusals in Minnesota dropped from 17.6% to 14.8%.[239] Part of this is because Minnesota's implied consent statute creates a criminal

230. *See id.* (noting "over 3400 violations in 1999").

231. *See id.* ("The number of such violations . . . dropped rather sharply in the past decade to 687 in 2013.").

232. *Id.*

233. *Id.*

234. *See id.* (stating that "high-scoring violators . . . were 6,079 in the over 0.20% category in 1998, then 4,034 in 2013").

235. Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013) (identifying implied consent laws as part of a state's "legal tools [used] to enforce their drunk-driving laws").

236. *See generally* Cicardo, *supra* note 11, at 256 ("[A]fter Lafourche Parish implemented no refusal in 2008, the number of drinking and driving fatalities decreased . . . ."). *But see* Cafaro, *supra* note 16, at 100 ("Implied consent laws, in theory, can be a powerful weapon in the arsenal against alcohol impaired driving. However . . . the fact is that [they] are not deterring [drunk driving].").

237. *See* Cafaro, *supra* note 16, at 110 (noting the highest refusal rate at nearly ninety percent).

238. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., BREATH TEST REFUSALS IN DWI ENFORCEMENT: AN INTERIM REPORT 6 tbl.1 (2004), *available at* http://www.nhtsa.dot.gov/people/injury/research/BreathTestRefusal/images/BreathTestText.pdf.

239. *Id.*

punishment for test refusal.[240] The percentage of test refusal does not totally represent whether Minnesota's implied consent statute is deterring drunk driving. It does show, however, that prosecutors in Minnesota will have an easier time charging people for drunk driving. One of the biggest interferences to a successful impaired driving prosecution is the lack of evidence for blood alcohol content.[241] The chances of a conviction for impaired driving are noticeably reduced when prosecution is denied BAC evidence.[242]

V. CONCLUSION

Drinking and driving has been a problem in Minnesota that dates back to the early 1900s.[243] The severity of drunk-driving incidents, viewed from a public safety standpoint, creates a great need for the Minnesota Legislature to create laws that severely punish people who choose to endanger the public by getting behind the wheel of a motor vehicle when they are intoxicated. As a response, Minnesota's implied consent statute is one of many statutes that aim to help decrease the number of drunk drivers.[244] The Minnesota Supreme Court correctly held in *State v. Brooks* that Minnesota's implied consent statute is constitutional for the following reasons.

First, Minnesota's implied consent statute is a valid exercise of state police power, which is aimed at protecting the public at large.[245] Further, driving is a privilege—not a right—and therefore the State is allowed to attach certain reasonable conditions to the privilege to drive, including the implied consent statute.[246] Finally, Minnesota's implied consent statute needs to be upheld for public policy reasons because it plays an important role in the fight against drunk driving in Minnesota.[247] To date, a sufficiently effective alternative for combating drunk driving has not been

240. *See* MINN. STAT. § 169A.20, subdiv. 2 (2014).

241. *See* Cafaro, *supra* note 16, at 111–12 ("Many motorists know it is a difficult task for the prosecution to obtain a conviction in an OUI trial, absent a BAC reading.").

242. *See id.* at 101.

243. *See* OFFICE OF TRAFFIC SAFETY, MINN. DEP'T OF PUB. SAFETY, *supra* note 209, at 34.

244. *See supra* Part II.

245. *See supra* Part IV.B.

246. *See supra* Part IV.C.

247. *See supra* Part IV.D.

created. Therefore, the court in *Brooks* correctly upheld the constitutionality of Minnesota's implied consent statute.[248]

248. *See* State v. Brooks, 838 N.W.2d 563, 573 (Minn. 2013).