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## COMMENT

### The New Implied Consent Amendments: A Step in the Right Direction

The Wyoming legislature has significantly changed the implied consent provisions of the drunk driving laws. Until July 1, 1985<sup>1</sup> a suspect arrested for driving while under the influence (DWUI) faced the following situation. The arresting officer would ask him to take his choice of a blood, breath, or urine test to determine his blood alcohol content (BAC). If the suspect consented to the BAC test, the prosecution could employ the objective BAC evidence against the suspect in a DWUI trial. Evidence of a BAC of .10<sup>2</sup> or more would also raise a rebuttable presumption of guilt of DWUI.<sup>3</sup> Upon conviction, a first offender could receive a fine of not more than \$750 and/or be imprisoned for up to six months.<sup>4</sup> In addition, a conviction would automatically effect a ninety day suspension of his driver's license.<sup>5</sup> If the suspect refused to take the BAC test, his driver's license would be suspended for thirty days.<sup>6</sup> Although the suspect could still stand trial for DWUI, the prosecution would encounter more difficulty in obtaining a conviction without the BAC evidence.

Under the new amendments to the implied consent law, the arresting officer still asks the suspect to take either a breath, blood, or urine test. If the suspect takes a breath test and the results do not establish impairment by alcohol, he may also be required to take a urine or blood test.<sup>7</sup> In other words, consent to take one test amounts to consent to take the other two. The prosecution may still use the BAC evidence at a DWUI trial. The rebuttable presumption of guilt at .10 BAC remains, and the penalties for conviction of DWUI are unchanged.<sup>8</sup> The law also establishes an automatic administrative suspension of the suspect's driving privileges for ninety days if the test results show a BAC of .10 or more.<sup>9</sup> The suspension will be effective even if the suspect later is found not guilty of DWUI.<sup>10</sup> If he refuses the required tests, his driver's license will be suspended for six months.<sup>11</sup>

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1. Administrative Per Se Law, ch. 211, 1985 Wyo. Sess. Laws § 2; Title 31C Revision, ch. 234, 1985 Wyo. Sess. Laws § 4.

2. Ten one hundredths of one percent by weight of alcohol in a person's blood; hereinafter referred to as .10.

3. WYO. STAT. § 31-5-233(b)(iii) (1977 & Supp. 1984).

4. *Id.* § 31-5-233(d) (subsequent conviction in five years invokes imprisonment of not less than seven days nor more than six months and a fine of not less than \$200 nor more than \$750).

5. *Id.* §§ 31-5-233(e), 31-7-127(d)(i), (ii) (one subsequent conviction within five years invokes a one year suspension), (iii) (three or more convictions within five years invoked a five year revocation).

6. *Id.* § 31-6-102(c) (1977).

7. *Id.* § 31-6-102(a)(i) (Supp. 1985).

8. *See id.* §§ 31-5-122(d), 31-7-127(a)(ii), 31-7-128(a)(i), (ii) (except the period of revocation is now three years).

9. *Id.* § 31-6-102(d).

10. *See id.*

11. *Id.* § 31-6-102(c).

This comment will discuss and evaluate the impact of the new law on the interests of DWUI suspects, the state, and the courts. This comment will also suggest necessary changes in these amendments which will make the implied consent law more effective without imposing a greater burden on the rights of those arrested for DWUI. Before the impact of the new amendments can be evaluated, however, it is necessary to review the purpose and procedure of Wyoming's implied consent law.

#### PURPOSE AND PROCEDURE

On July 1, 1971, Wyoming joined the majority of states by enacting an implied consent law.<sup>12</sup> The general purpose of the law is to facilitate the taking of BAC tests.<sup>13</sup> The law imposes a condition on the right to operate a motor vehicle in Wyoming by deeming each driver to have given his consent to submit to required chemical tests if he is arrested for DWUI.<sup>14</sup> Since the consent is implied by law, the suspect may withdraw it at any time prior to the taking of the test simply by expressing a desire not to take any test.<sup>15</sup>

The right to refuse to take a requested chemical test is granted by statute. It is not a constitutional right of the individual.<sup>16</sup> In fact, the United States Supreme Court has held that a state may physically compel a DWUI suspect to take a BAC test as long as excessive force is not utilized.<sup>17</sup> Obviously, forced compliance may easily lead to tumultuous confrontations between peace officers and DWUI suspects.<sup>18</sup> States avoid confrontations and respect the personal interests of DWUI suspects opposed to such tests by granting them the right to refuse.<sup>19</sup>

Granting a right to refuse, however, results in the loss of highly relevant BAC evidence. Loss of this evidence makes it more difficult for the state to obtain a conviction of DWUI.<sup>20</sup> Since certainty of conviction has proven to be a strong deterrent,<sup>21</sup> the loss of BAC evidence impedes the state's goal of deterring drunk driving. To prevent refusals and to facilitate the taking of the tests, the state suspends his driving privileges when the suspect exercises his right to refuse.<sup>22</sup>

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12. Implied Consent Law, ch. 148, 1971 Wyo. Sess. Laws § 7. A list of the states that enacted an implied consent law prior to 1971 is contained in Note, *Driving While Under the Influence of Alcohol: A Model Implied Consent Statute*, 12 WM. & MARY L. REV. 654 (1971). For a general history of implied consent laws, see Note, *Drunk Driving and Talking the Fine Line in Oregon: Moore v. Motor Vehicles Division*, 19 WILLAMETTE L.J. 803, 804-807 (1983).

13. *State v. Chastain*, 594 P.2d 458, 461 (Wyo. 1979).

14. *Id.*

15. *Id.*; WYO. STAT. § 31-6-102(c) (Supp. 1985).

16. *South Dakota v. Neville*, 103 S.Ct. 916, 921 (1983).

17. *Id.* at 920-921 (citing *Schmerber v. California*, 384 U.S. 757 (1966) (blood test is physical rather than testimonial evidence and unprotected by fifth amendment privilege)).

18. See *South Dakota v. Neville*, 103 S.Ct. 916, 921 (1983) (one of the purposes of implied consent laws is to avoid violent confrontations between suspect and police officer).

19. *Id.*; WYO. STAT. § 31-6-102(c) (Supp. 1985).

20. See *Crum v. City of Rock Springs*, 652 P.2d 27 (Wyo. 1982) (when evidence of BAC was held inadmissible, state evidence became insufficient to prove DWUI).

21. Certainty of conviction of DWUI has been demonstrated to be a strong deterrent. H. ROSS, *DETERRING THE DRINKING DRIVER*, 104-111 (1982).

22. *State v. Chastain*, 594 P.2d 458, 461 (Wyo. 1979).

The evidence derived from a BAC test is important to both the state and the DWUI suspect. To assure that this evidence has been properly obtained, the implied consent law requires that specific procedures be followed. First, there must be a lawful DWUI arrest.<sup>23</sup> Second, certain basic information must be given the suspect, including the right to refuse.<sup>24</sup> Third, only qualified individuals may give the BAC tests according to a prescribed method.<sup>25</sup> Failure to comply with the statutory procedure renders any evidence of the suspect's BAC inadmissible at trial.<sup>26</sup>

The implied consent law attempts to balance the state's interests in obtaining important evidence with the DWUI suspect's interests in refusing to take the BAC tests. As the balance tips toward the interests of the DWUI suspects, the goal of the implied consent law, to facilitate the taking of BAC tests, is frustrated. This obstructs the goal of the DWUI law, which is to deter DWUI and to remove violators from Wyoming's streets and highways. As the balance shifts toward the state's interests, the condition imposed by the implied consent law becomes less implied and more compelled.

While leaving the basic procedure unaffected, the 1985 amendments shift the balance toward the state's interest. Unfortunately, however, the amendments fall short of truly realizing the state's goals. To understand why this is so, it is necessary to discuss several of the most significant changes separately.

#### TESTING FOR CONTROLLED SUBSTANCES

The first major change in the 1985 amendments to the implied consent law is that the law now includes testing for controlled substances.<sup>27</sup> Since 1941, it has been illegal in Wyoming to drive under the influence of controlled substances.<sup>28</sup> However, July 1, 1985 marks the first time that the law has required a DWUI suspect to submit to testing for controlled substances.<sup>29</sup> Now, a driver in Wyoming is deemed to have given his consent to testing not only to determine his BAC, but his controlled substance content as well.<sup>30</sup> The amendment may reflect a legislative concern that Wyoming has a significant problem with drivers impaired by controlled substances, perhaps as serious as that of drivers impaired by alcohol.<sup>31</sup>

23. *Id.*

24. *Id.* at 462; WYO. STAT. § 31-6-102(a)(ii) (Supp. 1985).

25. WYO. STAT. § 31-6-105 (Supp. 1985).

26. *See State v. Chastain*, 594 P.2d 458, 463 (implied consent law is the exclusive means and required procedure for BAC testing when a suspect is arrested for DWUI).

27. WYO. STAT. § 31-6-102(a)(i) (Supp. 1985).

28. *Id.* § 60-414 (1945). The law was first amended to include controlled substances in 1973. *Id.* § 31-129 (Supp. 1973).

29. Administrative Per Se Law, ch. 234, 1985 Wyo. Sess. Laws § 4 (codified at WYO. STAT. § 31-6-102(a)(i) (Supp. 1985)).

30. WYO. STAT. § 31-6-102(a)(i) (Supp. 1985).

31. There are no statistics for controlled substance related accidents, but in 1984 alone, 81 people were killed and 1,016 people were injured in alcohol related traffic accidents in Wyoming. Alcohol was also involved in 55 per cent of all fatal traffic accidents in Wyoming in 1984. Alcohol and Wyoming Traffic Accidents (1984) (pamphlet available from the Wyoming State Highway Patrol).

Now, a peace officer may require the driver to take a urine or blood<sup>32</sup> test if he has probable cause to believe that a driver is impaired by a controlled substance, when a breath test has not established impairment by alcohol.<sup>33</sup> A driver who refuses the urine or blood test will be treated as refusing all tests, even if he consented to take a breath test.<sup>34</sup> While this appears to be an improvement, there is a significant difference in the treatment of alcohol and controlled substances under the DWUI law that will make implementing the new amendment difficult. The difference is that there is no presumptive level of impairment for driving while under the influence of controlled substances.<sup>35</sup>

The DWUI law provides a rebuttable presumption of guilt of DWUI at a BAC of .10 or more.<sup>36</sup> There is also a rebuttable presumption of not guilty if the BAC is below .05.<sup>37</sup> Such presumptions are based on legislative findings concerning the effects of alcohol on the average person's ability to safely drive a motor vehicle.<sup>38</sup> Because of these statutory presumptions, an expert is not necessary to interpret the BAC results.<sup>39</sup> But there are no statutory presumptions for controlled substances, nor are those related to alcohol applicable.<sup>40</sup> Therefore, evidence of controlled substance content will require interpretation.

Proper interpretation of the controlled substance content will require the testimony of qualified experts to explain the effect of that content on the average person.<sup>41</sup> Presumably, both the prosecution and the defense will present their own experts. With conflicting testimony, it will be up to the trier of fact to decide at what content level, if any, an average person can safely drive a motor vehicle.<sup>42</sup>

Such testimony may be feasible for common drugs such as marijuana. But when less common drugs, combinations of drugs, or drugs and alcohol are involved, the whole process will be exceedingly complex. A typical DWUI trial, which now lasts no longer than a day, may turn into a two-day trial resulting in an increase in costs for the defense and the state. There will also be the cost of procuring the expert, assuming one can be found.

Although expert testimony is costly and time-consuming, it is necessary to protect the rights of the DWUI suspect. A driver is not guilty

32. WYO. STAT. § 31-6-102(a)(i)(C) (Supp. 1985) (a urine test may be required if the officer has probable cause to believe the controlled substance is not subject to testing by a blood or breath test).

33. *Id.* § 31-6-102(a)(i).

34. *Id.* § 31-6-102(c).

35. *Id.* § 31-5-233(b) (applies only to alcohol).

36. *Id.* § 31-5-233(b)(iii).

37. *Id.* § 31-5-233(b)(i).

38. *State v. Franco*, 96 Wash. 2d 816, 819-21, 639 P.2d 1320, 1322 (1982).

39. *Dixon v. Stewart*, 658 P.2d 591, 597 (Utah 1982).

40. WYO. STAT. § 31-5-233(b) (Supp. 1985).

41. *Dixon v. Stewart*, 658 P.2d 591, 597 (Utah 1982).

42. WYO. STAT. § 31-5-233(c) (Supp. 1985). Since no presumption can be utilized, the jury would have to decide the degree of controlled substance content which would render a person incapable of safely driving a vehicle.

of DWUI simply for driving after ingesting a controlled substance; he is guilty only if the prosecution proves that he consumed such an amount that he could no longer safely drive a motor vehicle.<sup>43</sup> Without expert testimony as a guide, a jury could find a suspect guilty of DWUI merely for ingesting a controlled substance rather than for driving unsafely because of the drugs. Therefore, a court should admit evidence of the results of controlled substance testing only when it is interpreted by a qualified expert.<sup>44</sup>

Perhaps driving while under the influence of controlled substances has become such a serious problem that specific testing for it is necessary. If this is so, credible scientific studies are necessary to identify the effects of controlled substances on driving skills. Based on those studies, the legislature can develop and enact presumptive levels that are applicable to a given controlled substance.<sup>45</sup> Until then, the new controlled substances amendment looks good but has questionable utility.<sup>46</sup>

#### SIX MONTH SUSPENSION PERIOD FOR REFUSAL

Section 31-6-102(c) increases the penalty for refusing a required test from thirty days<sup>47</sup> to six months.<sup>48</sup> The new suspension period conforms to the period provided in the Uniform Vehicle Code,<sup>49</sup> but is less than the penalty imposed in some other states.<sup>50</sup> Under the new law, more DWUI suspects will probably choose to take the required tests because the suspension period for refusal now exceeds that imposed for a first DWUI conviction.<sup>51</sup> Unfortunately, however, the incentive to take the tests exists only for first time offenders.

The amendment fails to provide an effective incentive to the repeat offender because it lacks an increased penalty provision. Under the DWUI and license suspension laws, a second conviction of DWUI within five years of the first conviction invokes a mandatory suspension of one's driving privileges for one year.<sup>52</sup> A subsequent conviction within five years

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43. *See id.* § 31-5-233(a).

44. The mention of the presence of controlled substances may arouse jury prejudice more than the mention of alcohol. A conviction could be based more on the presence of a controlled substance rather than driving while under the influence of a controlled substance. Therefore, unless an expert explains the results to increase the relevancy, a court should exclude such proffered evidence under WYO. R. EVID. 403.

45. Apparently Florida is now conducting such studies. Interview with Wayne F. Flagg, Wyoming Chief Hearing Examiner (October 11, 1985).

46. Another problem is that controlled substance testing may be less reliable than that of alcohol. If a court finds any test unreliable, the evidence derived from it should be excluded. A court should be assured that a proper foundation of reliability of the given test is made before any evidence of drug testing is admitted.

47. WYO. STAT. § 31-6-102(c) (1977).

48. *Id.* § 31-6-102(c) (Supp. 1985).

49. UNIF. VEH. CODE § 6-205.1(c) (Supp. II 1976).

50. *See, e.g.,* OHIO REV. CODE ANN. § 4511.191(D) (Page Supp. 1983) (one year); ALASKA STAT. § 28.35.032 (Supp. 1985) (first offense: seventy-two hour jail sentence and \$250 fine).

51. Compare WYO. STAT. § 31-6-102(c) with §§ 31-5-233(e), 31-7-129(b)(ii) (Supp. 1985) (six months as compared to three months).

52. *Id.* §§ 31-5-233(e), 31-7-128(b)(ii).

results in revocation of one's driving privileges for three years.<sup>53</sup> In addition, a second conviction of DWUI within five years carries a mandatory jail sentence of at least seven days.<sup>54</sup> The implied consent law, on the other hand, does not increase the penalty for refusing the tests. A six month license suspension is imposed for refusing a required test,<sup>55</sup> regardless of previous DWUI convictions or test refusals.<sup>56</sup> It is still to the advantage of the repeat offender to refuse the requested tests.

The legislature should be commended for finally providing an incentive for DWUI suspects to take the BAC tests.<sup>57</sup> To be truly effective, however, the amendment should increase the suspension period for repeat offenders. Although the Uniform Vehicle Code does not provide for increased penalties for repeat offenders,<sup>58</sup> most other states' implied consent laws<sup>59</sup> increase the suspension period for repeated refusals to take the tests. The United States Congress has urged all states to enact an increased suspension period for such repeat offenders.<sup>60</sup> Imposing longer suspension periods for repeat offenders would further promote the goal of the implied consent law.

#### ADMINISTRATIVE PER SE RULE

Section 1-6-102(d) makes it illegal per se to drive a motor vehicle on a Wyoming street or highway with a BAC of .10 or more.<sup>61</sup> Any driver caught doing so will have his license suspended for ninety days without a trial.<sup>62</sup> Importantly, the suspension remains in effect even if the driver is later found not guilty of DWUI.<sup>63</sup> The amendment is a variant of the criminal per se law enacted by other states that makes it a crime of DWUI to drive with a BAC of .10 or more.<sup>64</sup> The Wyoming amendment, however, imposes only the administrative or civil sanction of license suspension rather than a criminal penalty of a fine or incarceration if the driver has

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53. *Id.* §§ 31-5-233(e), 31-7-127(a)(ii), (b).

54. *Id.* § 31-5-233(d).

55. *Id.* § 31-6-102(c).

56. *Compare id.* § 31-5-233(d) with § 31-6-102(c) (DWUI law has an increased penalty provision whereas the implied consent law has only one penalty that can be imposed for refusal).

57. The six month period was not a unanimous legislative opinion. The house bill enacted a ninety day suspension period for refusal. Title 31C Revision, ch. 234, 1985 Wyo. Sess. Laws § 1.

58. UNI. VEH. CODE *supra* note 49, at § 6-205.1.

59. *E.g.*, OHIO REV. CODE ANN. § 4511.19(D) (Page Supp. 1983); ALASKA STAT. § 28.35.032 (Supp. 1985); CAL. VEH. CODE § 13353 (West Supp. 1985); CONN. GEN. STAT. § 14-227(b) (Supp. 1985).

60. *See* 23 U.S.C.A. § 408 (West Supp. 1985). Congress has provided grants for the development and enforcement of safety programs to states that enact a statute containing certain provisions. A necessary provision is a license suspension of one year for any suspect who refuses a BAC test and is a repeat offender.

61. WYO. STAT. § 31-6-102(d) (Supp. 1985).

62. *Id.*

63. *Id.* If there is a subsequent conviction of DWUI for the same incident, the suspension period for the conviction is reduced by ninety days.

64. *E.g.*, CAL. VEH. CODE § 23152 (West Supp. 1985); FLA. STAT. § 316.193(3) (1985); LA. REV. STAT. ANN. § 14.98 (West Supp. 1985).

a .10 or more BAC.<sup>65</sup> Under any per se law, a person is guilty with a .10 BAC, regardless of how well he can operate a vehicle or how many sobriety tests he can pass.<sup>66</sup>

Although the 1985 amendment invokes administrative rather than criminal sanctions, it must still pass constitutional muster. The United States Supreme Court has clearly stated that even administrative procedures which suspend driving privileges must satisfy the due process clause of the Constitution.<sup>67</sup> The 1985 amendment raises two constitutional issues. First, it may establish an unconstitutional conclusive presumption. Second, it may be unconstitutionally vague by failing to provide fair warning that an activity is illegal and by working a deprivation of property without due process.

### *Conclusive Presumption*

Under the DWUI law a suspect is presumed to be guilty of DWUI if his BAC is shown to have been .10 or more<sup>68</sup>, but this presumption is rebuttable by other evidence.<sup>69</sup> The new administrative per se law makes it conclusively illegal to drive with a BAC of .10 or more.<sup>70</sup> At first glance, the amendment appears to be based on the DWUI presumption. However, the Wyoming Supreme Court has ruled that the presumptions contained in the DWUI law are not applicable to civil proceedings.<sup>71</sup> Presumably then, the per se rule is not legally connected to the DWUI presumption of guilt, nor does it literally presume anything. Rather, the amendment merely defines a given activity, driving with a BAC of .10 or more, as being unlawful.<sup>72</sup>

Still, the amendment essentially establishes an irrebuttable presumption of DWUI, but imposes civil rather than criminal sanctions. In fact, the suspension period imposed under the amendment is identical to that imposed for a first conviction of DWUI.<sup>73</sup> Also, the amendment provides that any later suspension imposed for a DWUI conviction from the same incident will be reduced by the ninety days imposed under it.<sup>74</sup> Because of the close connection between the administrative per se law's penalties and the penalties imposed for DWUI, a person whose driving privileges have been suspended for not taking the BAC tests may have a good argument that the new law establishes an irrebuttable presumption of guilt.

65. See *State ex rel. Motor Vehicle Division v. Holtz*, 674 P.2d 732 (Wyo. 1983) (suspension of a driver's license is an administrative action).

66. See, e.g., *State v. Franco*, 96 Wash. 2d 816, 823, 639 P.2d 1320, 1323 (1982).

67. *Mackey v. Montrym*, 443 U.S. 1 (1979); *Dixon v. Love*, 431 U.S. 105 (1977).

68. WYO. STAT. § 31-5-233(b)(iii) (Supp. 1985).

69. *Id.* § 31-5-233(b)(v).

70. *Id.* § 31-6-102(d).

71. *Combined Insurance Company v. Sinclair*, 584 P.2d 1034, 1047 (Wyo. 1978).

72. See *State v. Franco*, 96 Wash. 2d 816, 823, 639 P.2d 1320, 1323 (1982) (since statutory presumption scheme was abandoned by legislature, .10 DWUI per se law could not presume DWUI but rather defined a way of committing it).

73. Compare WYO. STAT. § 31-6-102(d) with §§ 31-5-233(e), 31-7-128(b)(i) (Supp. 1985).

74. *Id.* § 31-6-102(d).



If a presumption is rebuttable, the defendant is free to offer evidence tending to show that the presumption is not valid in his case.<sup>75</sup> Since the prosecution must still prove the facts that give rise to the presumption beyond a reasonable doubt, the presumption shifts the burden of production but not the burden of persuasion.<sup>76</sup> An irrebuttable presumption, however, requires that the defendant be found guilty of the presumptive fact if the fact giving rise to the presumption is proven beyond a reasonable doubt, regardless of other evidence offered by the defendant.<sup>77</sup> Therefore, an irrebuttable presumption carries a heavy burden to show that it is constitutional.<sup>78</sup> The test of the constitutionality of any presumption is that it "must not undermine the factfinder's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt."<sup>79</sup>

To pass constitutional muster, an irrebuttable presumption of DWUI guilt by a .10 or more BAC requires a finding that beyond a reasonable doubt every person with a .10 or more BAC cannot safely operate a motor vehicle. Some courts feel this standard can be met.<sup>80</sup> The Wyoming Supreme Court, however, has held that the Wyoming legislature may not enact an irrebuttable presumption in a criminal proceeding as it is constitutionally impermissible.<sup>81</sup> Yet, this does not mean that the court necessarily will find the administrative *per se* amendment to be unconstitutional. First, the amendment involves civil rather than criminal proceedings.<sup>82</sup> Although both proceedings must satisfy due process considerations, the burden of proof is not the same. An irrebuttable presumption in a civil proceeding only requires a finding that it is more likely than not that the presumption is true.<sup>83</sup> Second, the court could rule that the amendment is not connected to the DWUI criminal presumptions and does not presume anything but rather defines a given illegal activity, i.e., driving with a BAC of .10 or more.<sup>84</sup>

If the court holds that there is no presumption, then there may be no constitutional barrier to the enactment of a criminal *per se* law. The legislature first needs to delete from the DWUI statute the presumption of guilt of DWUI if the BAC is .10 or more.<sup>85</sup> Such a bill was offered but defeated in the 1985 session.<sup>86</sup> The legislature should have enacted a criminal *per se* law rather than the halfway measure that it did. The amendment raises similar constitutional concerns that a criminal *per se* law would

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75. *Luria v. United States*, 231 U.S. 9, 25-26 (1913).

76. *See Casey v. United States*, 276 U.S. 413, 418 (1928).

77. *County Court of Ulster County v. Allen*, 442 U.S. 140, 147 (1979).

78. *Id.* at 156.

79. *Id.*

80. *Eg.*, *Murray City v. Hall*, 663 P.2d 1314, 1319 (Utah 1983).

81. *O'Neal v. State*, 498 P.2d 1232, 1235 (Wyo. 1972).

82. *See State ex rel. Motor Vehicle Division v. Holtz*, 674 P.2d 732 (Wyo. 1983) (suspension of a drivers license is an administrative action).

83. *Northwest Utilities Co. v. Ashton*, 51 Wyo. 168, 181, 65 P.2d 235, 238 (1937).

84. *See State v. Franco*, 96 Wash. 2d 816, 823, 639 P.2d 1320, 1322 (1982).

85. This would avoid a conflict with *O'Neal v. State*, 498 P.2d 1232 (Wyo. 1972).

86. S. 105, 48th Wyo. Legis. (1985).

raise but does not provide the same benefits in terms of deterrence and less DWUI.

Both certainty of conviction and stringent penalties are necessary to provide an effective deterrent.<sup>87</sup> A criminal per se law would provide both. A person who drove with a BAC of .10 or more would be guilty of DWUI regardless of how successful he was in convincing a jury that he could still safely drive. A criminal per se law would also allow fines and imprisonment to be imposed rather than just the license suspension imposed under the present law. Finally, a criminal per se law would provide an increase in the penalties imposed for the repeat offenders now absent under the administrative per se law. Over forty states have now enacted a criminal per se law.<sup>88</sup> By failing to do so, the Wyoming legislature has fallen short of providing a truly effective amendment. If driving with a BAC of .10 is considered serious enough to invoke a per se license suspension, it is serious enough to be considered a crime.

### *Vagueness*

There are two ways in which the 1985 amendment may be unconstitutionally vague. First, since the suspect may not know when he attains a .10 BAC, he may not know that he is violating the law. Second, the wording of the statute may be so ambiguous that it misleads the suspect into declining the test, thereby depriving him of his property interest in his driver's license.

The due process clause is violated when a statute prohibits an activity in such a manner that people are not provided with fair warning that they are engaging in prohibited conduct.<sup>89</sup> If people of common intelligence are left guessing about when they are engaging in a prohibited activity and avoid engaging in innocent activity for fear of the forbidden, the law is unconstitutionally vague.<sup>90</sup>

The administrative per se law makes it illegal to drive with a BAC of .10 or more, but a person cannot know that he is driving with a BAC of .10 without taking a BAC test. A person usually knows when he is starting to get drunk, but being drunk is not the same as having a .10 BAC. In fact, research indicates that a person has to engage in a considerable amount of drinking to reach a BAC of .10.<sup>91</sup> People can conduct experiments to find out how much alcohol that they can consume before reaching a .10 BAC. Alternatively, they can obtain a BAC chart and estimate how much they can safely drink without being in violation of the law.<sup>92</sup>

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87. Ross, *supra* note 21, at 104-08.

88. Interview with Wayne F. Flagg, *supra* note 45.

89. Jenkins v. Werger, 564 F. Supp. 806, 808 (D. Wyo. 1984).

90. State v. Gallegos, 384 P.2d 967, 968 (Wyo. 1963).

91. To reach a level of .10 it has been estimated that the average adult has to consume eight or nine drinks (a half a pint of whiskey or one and one-half six packs of beer) in two to three hours. State v. Franco, 96 Wash. 2d 816, 820, 639 P.2d 1320, 1322 (1982).

92. *Id.* (court suggested this option).

Due process, however, should not require people to conduct research or guess as to whether or not they are violating the law. Individuals should have the right to know what is and is not illegal simply by being reasonable and knowing the law. Yet courts which have addressed this issue have consistently found that a person may be presumed to know when he is approaching a .10 BAC by his physical and mental impairment.<sup>93</sup> One court has even suggested that the common availability of BAC charts is sufficient justification to assume that due process has been satisfied.<sup>94</sup>

The courts' justifications may appear to be specious, but the destruction caused by DWUI is so prevalent and prominent that courts seem willing to accept answers to constitutional questions posed by DWUI related laws that would be unacceptable in relation to other crimes.<sup>95</sup> If .10 per se laws can deter drunk driving and the senseless death and mayhem it produces, maybe a relaxed standard of due process is necessary, as long as the DWUI suspect's rights are not substantially prejudiced. Although the .10 per se law may leave people guessing as to when they are in violation of it, it is unlikely that the Wyoming Supreme Court would say the law is unconstitutionally vague.

The second vagueness problem with the administrative per se law is that the language may trick suspects into refusing to take the BAC test, causing a six month suspension of their licenses. Recall that before any test may be given under the implied consent law, officers must recite certain basic information to the DWUI suspect.<sup>96</sup> The 1985 amendment requires that a suspect now be told, "[I]f you take the test and the results indicate that you are under the influence of alcohol you may be subject to criminal penalties and your Wyoming driver's license and privilege to operate a vehicle shall<sup>97</sup> be suspended for 90 days."<sup>98</sup>

The United States Supreme Court has stated that there is a property interest in a driver's license for purposes of due process.<sup>99</sup> Since refusal to take a required BAC test results in a mandatory six month suspension of a person's driver's license,<sup>100</sup> there is a denial of a property interest.

93. *E.g., id.*; *Roberts v. State* 329 So. 2d 296 (Fla. 1976); *Greaves v. State*, 528 P.2d 805 (Utah 1974).

94. *State v. Franco*, 96 Wash. 2d 816, 825, 639 P.2d 1320, 1322 (1982).

95. *See State v. Melcher*, 33 Wash. App. 364, 655 P.2d 1169 (1982). Legislation that promotes the safety of the public is given the indulgence of every presumption of its constitutionality. Any person challenging it will have to prove beyond a reasonable doubt that it is unconstitutional. The DWUI law is such legislation.

96. *State v. Chastain*, 594 P.2d 458, 462 (Wyo. 1979).

97. The use of the word "shall" amends the statute in favor of the dissent's view in *State v. Marquez*, 638 P.2d 1292, 1296 (Wyo. 1982). The majority held that a suspect should be told that his license "may be suspended."

98. WYO. STAT. § 31-6-102(ii) (Supp. 1985) provides: "For tests required by the peace officer, the arrested person shall be advised that: . . . (B) If a test is taken and the results indicate the person is under the influence of alcohol, he may be subject to criminal penalties and his Wyoming driver's license and his privilege to operate a motor vehicle shall be suspended for ninety (90) days;"

99. *Dixon v. Love*, 431 U.S. 105, 112 (1977); *But Cf. Department of Revenue and Taxation, Motor Vehicle Division v. Shipley*, 579 P.2d 415 (Wyo. 1978) (driver's license is a privilege).

100. WYO. STAT. § 31-6-102(c) (Supp. 1985).

Therefore, a suspect cannot have his license suspended in a manner which violates due process.

On its face the statute requires that the suspect be told that two forms of sanctions may be imposed for driving with a .10 BAC. First, a suspect must be told that his license shall be suspended, and second, that criminal sanctions may be imposed.<sup>101</sup> The suspect could be tricked into believing that he could be subjected to criminal penalties for a .10 BAC. This is not the law. The suspect may therefore decline the test for fear that his BAC would show .10 or more; the mistaken motorist would avoid what he believes are likely criminal sanctions from a .10 BAC by declining the BAC test, thereby losing his property interest in his license because of this misleading statement. The legislature did not enact a law that would allow the imposition of any criminal sanctions without a trial. Under the present law, only the civil sanction of a ninety day license suspension may be imposed for driving with a .10 BAC.<sup>102</sup> To the extent that the statute dictates that suspects be told criminal sanctions can be imposed per se, it is ambiguous and misleading.

If suspects must guess at the meaning of what they are told, and differ concerning the application of the law, the statute violates an essential principle of due process.<sup>103</sup> Although precise words are not necessary, a suspect must at least be "reasonably informed of his rights, duties and obligations under [the] implied consent law" in order to satisfy due process.<sup>104</sup> Previous attacks under the old implied consent law failed to show that the suspect was misled by what the officer told him.<sup>105</sup> The present statute, however, is not phrased so that a suspect of "normal intelligence will understand the consequences of his actions."<sup>106</sup>

The wording of the amendment needs to be modified. The best solution is to remove the per se rule from the implied consent law and put it in the DWUI law where it belongs. Then, criminal sanctions could and would be imposed for driving with a .10 BAC. This would make the required information given the suspect under the implied consent law informative rather than deceptive. This would also eliminate a possible contradiction in the new implied consent law concerning whether the suspect is to be told he "may" or "shall" be subjected to criminal penalties for driving with a .10 BAC.<sup>107</sup> If the legislature does not enact a criminal per se law, it should simply delete the references to "may be subject to criminal penalties" from the new implied consent law. The words serve no purpose

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101. *Id.* § 31-6-102(a)(iii)(B).

102. *Id.* § 31-6-102(d).

103. *Sanchez v. State*, 567 P.2d 270, 274 (Wyo. 1977).

104. *Olson v. State*, 698 P.2d 107, 113 (Wyo. 1985).

105. *State v. Marquez*, 638 P.2d 1292. (Wyo. 1982).

106. *Id.* at 1295 (citing *Calvert v. State Department of Revenue, Motor Vehicle Division*, 184 Colo. 214, 519 P.2d 341 (1974)).

107. Supporting a conclusion that the original intent of the legislature was to provide for the imposition of criminal sanctions is the language of WYO. STAT. § 31-6-103(b) (Supp. 1985) which seems to indicate that both a license suspension and criminal sanctions are to be imposed for a BAC of .10 or more.

in their present context of informing the suspect about the BAC test. The amended language does not inform the suspect of any change in the law. Instead, it deceives the suspect into believing that there has been a change.

#### ISSUANCE OF A TEMPORARY LICENSE

The 1985 law also effects a different procedure for the issuance of a temporary license for certain DWUI suspects.<sup>108</sup> Before the new implied consent law went into effect, a suspect was supposed to surrender his license to the officer when arrested for DWUI.<sup>109</sup> At the same time, the officer gave the suspect a seven-day permit which could be exchanged for a sixty-day permit by applying in person at a licensing station.<sup>110</sup> The suspension of the suspect's driving privileges became effective once he received written notice from the state.<sup>111</sup> The suspect then had ten days from receipt of the notice of suspension to request a hearing before a county judge.<sup>112</sup>

Section 31-6-102(e) has greatly simplified this procedure.<sup>113</sup> Under the 1985 amendment, the arresting officer confiscates the DWUI suspect's license when he refuses to take a required test or when he takes a test resulting in a BAC of .10 or more. In place of the driver's license, the suspect is issued a non-renewable temporary permit that is valid for thirty days. Unless the suspect demands a hearing within twenty days, all driving privileges are suspended automatically at the expiration of the thirty day period.<sup>114</sup>

The suspension of one's driving privileges without an evidentiary hearing is referred to as a summary suspension.<sup>115</sup> The United States Supreme Court has held that procedures involving the suspension of driving privileges is a taking under the fourteenth amendment and must satisfy considerations of due process.<sup>116</sup> In the two license suspension cases that have come before it, the Court applied the balancing test developed in *Matthew v. Eldridge*<sup>117</sup> and found due process to be satisfied.<sup>118</sup> The *Eldridge* test requires a court to weigh the private interest affected and the likelihood of an erroneous deprivation against the state's interest.<sup>119</sup>

The first step of the *Eldridge* test is to "identify the nature and weight of the private interest affected by the official action."<sup>120</sup> The two private

108. *Id.* § 31-6-102(e).

109. DWUI Arrests, ch. 41, 1984 Wyo. Sess. Laws § 3.

110. WYO. STAT. § 31-7-139(b) (Supp. 1984).

111. *Id.* § 31-6-102(d) (1977).

112. *Id.*

113. *Id.* § 31-6-102(e) (Supp. 1985).

114. *Id.*

115. See *Mackey v. Montrym*, 443 U.S. 1, 17 (1979); See generally J. Reese & J. Borgel, *Summary Suspension of Drunken Drivers' Licenses—A Preliminary Constitutional Inquiry*, 35 AD. L. REV. 313 (1983).

116. *Dixon v. Love*, 431 U.S. 105 (1977); *Mackey v. Montrym*, 443 U.S. 1 (1979).

117. 424 U.S. 319 (1976) (involved the process due before deprivation of social security benefits).

118. *Dixon v. Love*, 431 U.S. 105 (1977); *Mackey v. Montrym*, 443 U.S. 1 (1979).

119. *Mackey v. Montrym*, 443 U.S. 1, 11 (1979).

120. *Id.*

interests affected by the 1985 amendment are driving privileges granted by the state and possession of an issued driver's license.<sup>121</sup> Both of these interests are substantial.<sup>122</sup> A certain amount of intrusion on these interests, however, is permissible under the due process clause.<sup>123</sup>

The degree of permissible intrusion into the private interests depends on the relative length of the suspension period and the relative timeliness of available post-suspension review.<sup>124</sup> The 1985 suspension period for refusal of the required tests is six months.<sup>125</sup> The United States Supreme Court has upheld a statute providing for a longer suspension period.<sup>126</sup> Therefore, the suspension period is not an impermissible intrusion.

The post-suspension review period is also constitutionally adequate. Any suspect who has his driver's license taken has a right to ask for a hearing within twenty days of its confiscation.<sup>127</sup> If a hearing is requested, it must be conducted within forty-five days after the receipt of the request<sup>128</sup> and stays the suspension of driving privileges until all review is completed.<sup>129</sup> The amendment's forty-five day post-suspension appeal period is over twice as long as any period the United States Supreme Court has yet found to be sufficiently timely.<sup>130</sup> However, since a thirty-day temporary permit is issued and the suspension is stayed by requesting a hearing, DWUI suspects should not be erroneously deprived of their driving privileges at all.<sup>131</sup> While the amendment may encroach on personal interests in a driver's license, there is little intrusion into actual driving privileges. Viewed in context, the post-suspension review period is not an impermissible intrusion.

The second step of the *Eldridge* test involves a consideration of the likelihood of an erroneous deprivation of the private interest due to the procedures used.<sup>132</sup> The procedure that initiates the summary suspension is the receipt of a sworn statement by the arresting officer attesting to certain facts concerning the DWUI suspect's arrest.<sup>133</sup> The United States Supreme Court has stated that an erroneous deprivation is unlikely under this type of a procedure.<sup>134</sup>

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121. *Id.* at 12.

122. *Id.*

123. *Id.*

124. *Id.*

125. WYO. STAT. § 31-6-102(c) (Supp. 1985).

126. *Dixon v. Love*, 431 U.S. 105 (1977).

127. WYO. STAT. § 31-6-102(e) (Supp. 1985).

128. *Id.*

129. *Id.* § 31-6-103(a).

130. *Dixon v. Love*, 431 U.S. 105, 109-110 (1977) (twenty days).

131. *See* WYO. STAT. § 31-6-102(e) (Supp. 1985).

132. *Mackey v. Montrym*, 443 U.S. 1, 13 (1979).

133. WYO. STAT. § 31-6-102(c), (d) (Supp. 1985).

134. *Mackey v. Montrym* 443 U.S. 1, 14 (1979). First, officers are trained to identify whether or not the necessary facts are present. Second, officers have little reason to deliberately lie. Third, officers may be subject to criminal and civil actions for swearing to false accusations. Finally, even if an erroneous deprivation may be possible, that does not mean that there is a high likelihood of such occurrences. Due process is tested by the rule, not the exception.

The final step of the *Eldridge* test is to weigh the state's interest served by the summary procedure against the suspect's interests.<sup>135</sup> The Supreme Court has placed a heavy thumb on the scale when weighing the state's paramount interest of providing for the protection of its people on its roads and highways.<sup>136</sup>

The 1985 temporary license amendment advances this paramount interest in several ways. First, the very existence of any summary sanctions serves as a strong deterrent to DWUI. Second, the temporary license amendment encourages suspects to take BAC tests which, in turn, provides important evidence for later criminal proceedings and surer convictions. Third, it removes violators from the roads, if only temporarily.<sup>137</sup> Fourth, it provides reliable notice to DWUI suspects that their license has been suspended and when it will go into effect.<sup>138</sup> Finally, the actual confiscation of the driver's license on the scene of the crime promotes a strong psychological awareness of the seriousness of the crime and thus serves as a deterrent to DWUI.

The amendment passes constitutional muster under the *Eldridge* test. The issuance of a temporary permit adequately protects DWUI suspects from erroneous deprivation of their driving privileges. The procedure implemented should also stop suspects from claiming that they did not receive notice that their license had been suspended. In short, the amendment provides a more simplified and reliable license suspension procedure without affecting the due process rights of DWUI suspects. In fact, the simplified procedures should be a benefit to suspects in the form of convenience.<sup>139</sup>

However, there is a problem with the legislature's enactment of the amendment. They failed to repeal provisions relating to the issuance of a seven-day temporary permit for a DWUI arrestee.<sup>140</sup> Under present Wyoming law, a driver arrested for DWUI may be issued a seven-day temporary permit<sup>141</sup> that can be exchanged for a sixty-day permit.<sup>142</sup> A driver may also be issued a thirty-day temporary permit if he refuses to take a BAC test or the test shows a .10 BAC.<sup>143</sup> The conflict can be resolved by interpreting both provisions to mean that the seven-day permit now should only be issued to suspects whose BAC is below .10.

Since the suspect is given a temporary permit that can be extended until final disposition of the case,<sup>144</sup> there seems little justification for tak-

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135. *Id.* at 17.

136. *See id.*

137. *Id.* at 17-19.

138. *See State ex rel. Motor Vehicle Division v. Holtz*, 674 P.2d 732, 740 (Wyo. 1983) (referring to the problem of notice through department letters and the possible solution of an officer taking the license).

139. The county courts will also appreciate that hearings are now before a hearing examiner. Compare WYO. STAT. § 31-6-102(e) (Supp. 1985) with § 31-6-102(d) (1977).

140. *Id.* § 31-5-1205(k) (Supp. 1985).

141. *Id.*

142. *Id.* § 31-7-138.

143. *Id.* § 31-6-102(c)-(e).

144. *Id.* § 31-7-138.

ing the license of a person who has complied with the required tests and does not have a BAC of .10 or more. Although a suspect with BAC of less than .10 may be found guilty of DWUI, the chance of conviction is lower. Even if a suspect is later found guilty of DWUI—which would have to happen for the suspension to become effective—there is adequate machinery available to have the license taken at that point.<sup>145</sup> The inconvenience caused by the procedure outweighs any benefit derived by the state. The seven-day suspension period should therefore be deleted.<sup>146</sup>

#### CONCLUSION

The 1985 amendments to the implied consent law have made a substantial change in the considerations that DWUI suspects now face. The amendments should produce an increase in the number of suspects who choose to consent to the required tests. More tests will result in surer convictions and fewer drunk drivers on Wyoming's streets and highways.

The amendments are a step in the right direction; it is apparent that the Wyoming legislature is willing to admit the seriousness of drunk driving in Wyoming. For their efforts, the legislature should be commended. But the step is not the solution. Significant changes can and must be made in both the implied consent and DWUI laws that foster their goals without treading on the constitutional rights of DWUI suspects.

The legislature needs to reevaluate its efforts and the problem of drunk driving in Wyoming. The present law reflects a chaotic attempt to deal with a complex and serious dilemma. Amendments that will be truly effective may not be popular, especially with those who like to drink and drive. However, they are necessary if the needless destruction of lives due to drunk driving in Wyoming is to be abated.

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145. *Id.* § 31-7-131.

146. In addition, some officers may feel that they can use either a seven day permit or a thirty-day permit in their discretion. If so, there could be problems of a denial of equal protection. At the very least, the statute should clearly state which permits apply to whom.