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In conclusion, it should be pointed out that extending the due process requirements of *Gault* to the pre-adjudicatory stage of juvenile proceedings would not require a complete re-working of the Juvenile Act or its purposes. A holding that section 3(f) of article 2338-1 is unconstitutionally vague could not form a logical basis for such a conclusion. Nor would such a holding, though it might appear to the contrary from what has heretofore been said, necessarily mean that the benefits accorded juveniles under section 13(3) of article 2338-1 are of no value to the juvenile. On the contrary, we should retain such substantive benefits for the juvenile offender of the State of Texas, but at the same time, we should accord him the best of the other world, as was pointed out in *Gault* and reiterated in *State v. Santana*. No provision in article 2338-1, either expressly or impliedly, requires that juveniles be denied due process of law at any stage of the proceeding.

Finally, it should be pointed out that the Texas Legislature is aware of the constitutional questions presented by section 3(f) of article 2338-1. As the Committee Report of the Senate Youth Affairs Committee of 1969 indicates: the provision in question suggests "strong due process arguments in view of the vague and indefinite nature of the conduct which is prescribed. . . ."⁵³

Raul Garcia

INTOXICATING LIQUORS—IMPLIED CONSENT STATUTE—A CLAIM OF INNOCENCE, EVEN IF VINDICATED BY ACQUITTAL, AFFORDS NO LEGAL JUSTIFICATION FOR REFUSING THE TEST. *McGarry v. Costello*, 260 A.2d 402 (Vt. 1969).

Motorist petitioned for writ of certiorari to review proceedings at which his refusal to submit to a blood test was found unreasonable. Petitioner was involved in a two car accident on a public thoroughfare. The accident was investigated by a policeman, who observed a bottle of vodka and an unopened can of beer in the car. The petitioner was taken by ambulance to the hospital for treatment. At that time the police officer was under the impression that petitioner was under the influence of intoxicating liquor. At the hospital the petitioner, in response to questions of the officer, stated "[H]e had a couple." The petitioner was informed of the provisions of the implied consent law, the consequences of a refusal to submit to a test and his right to an attorney. Upon arrest, he was asked to take the test and he refused. The officer was the only witness called by the state. Against the officer's

⁵³ SENATE YOUTH AFFAIRS COMM., 61ST LEGISLATURE OF TEXAS, REPORT ON SERVICES TO YOUTH IN TEXAS (1969).

testimony, the petitioner explained the vodka bottle had been in the car for more than two weeks, that he was not under the influence of liquor and that he believed the officer had no cause for asking him to submit to the test. He offered to prove by a doctor and other witnesses who observed him at the scene of the accident that he was not intoxicated. These offers were excluded over petitioner's insistence that this evidence had a direct bearing on the reasonableness of his refusal to submit to the test. Held—*Writ denied*. A claim of innocence, even if vindicated by acquittal, affords no legal justification for refusing the test. The issue in the summary proceeding was whether the facts and circumstances provided a reasonable basis for the officer's judgment. The evidence in the proceeding sustained a finding that the arresting officer had reasonable grounds to believe that the motorist was operating the automobile under the influence of intoxicating liquor.

The decision was based on the wording of the Vermont statute, which provides that upon refusal to submit to the test a summary hearing shall be held relating to the reasonableness of the arresting officer's belief that respondent was operating the motor vehicle while under the influence and the reasonableness of the refusal. Upon a finding that the officer had reason to believe the respondent was so operating and unreasonably refused his license shall be suspended.¹ By the terms of the statute, an operator on the highways is deemed to have given his consent to submit to testing, provided the arresting officer has a reasonable basis for the belief that the person was operating in violation of the statute.²

In 1953, New York became the first state to enact what is now known as an "implied consent" statute.³ This statute was based on the theory that a license to drive is a privilege rather than a right.⁴ Although this

¹ VT. STAT. ANN. tit. 23 § 1191 (Supp. 1969):

If the person so arrested refuses, on request, to submit to the test, it shall not be given. If the person is unconscious or incapable of decision, it shall be deemed that his consent is given as provided in section 1188 of this title and that a blood test may be taken. If such person is charged with a violation of the motor vehicle laws and upon arraignment enters a plea of not guilty, the court at such arraignment shall hold a summary hearing, take evidence relating to the reasonableness of the arresting officer's belief that the respondent was operating the motor vehicle while under the influence of intoxicating liquor or drugs and upon the reasonableness of the respondent's refusal to submit to a test. Upon a finding by the court that the arresting officer had sufficient reason to believe that the respondent was so operating and that the respondent unreasonably refused to submit to a test, such respondent's operator's license or non-resident operating privilege or the privilege of an unlicensed operator to operate a motor vehicle shall be suspended for a period of six months and the respondent shall deliver his operator's license, if any, to the court and the court shall forward it forthwith to the commissioner of motor vehicles.

² VT. STAT. ANN. tit. 23 § 1188 (1967).

³ N.Y. VEHICLE AND TRAFFIC LAW § 1194 (McKinney 1960).

⁴ *Schutt v. MacDuff*, 127 N.Y.S.2d 116 (N.Y. App. 1954); 42 N.C.L. REV. 841 (1964).

theory in itself has been challenged in numerous cases,⁵ other states have followed New York's lead in passing implied consent legislation. Several state supreme courts have construed and upheld implied consent statutes against attacks on constitutional grounds,⁶ but the United States Supreme Court has never decided the constitutionality of such statutes.⁷

The purpose of the implied consent statutes relating to chemical tests of intoxicated automobile drivers is to reduce the toll of death and injury resulting from the operation of motor vehicles on highways by intoxicated persons, and the reason for acquiescence in the refusal of such test by a person is to avoid the violence that would often attend forcible tests of recalcitrant inebriates.⁸ Its name comes from the statutory provision that "Any person operating a motor vehicle . . . shall be deemed to have given consent to . . . a chemical test for the purpose of determining the alcoholic content of his blood."⁹ The theory behind these statutes seems to be that the threat of conviction or of revocation are more credible and therefore deter drivers from driving while drunk; thus implied consent reduces drunk driving. Implied consent has been compared to a simple unilateral contract.¹⁰ The state offers the driving privilege in return for the driver's agreement to take the chemical test if requested to do so by a police officer; the driver accepts the offer when he operates a motor vehicle within the state. Performance on the part of the state is allowing him to drive; performance on the part of the driver is submitting to a test under the conditions outlined in the pertinent statute. If the driver subsequently, and contrary to the statute, refuses to submit to the test he has breached his contract—he has refused to perform. The consent is of course fictional; what the law provides is a means of compelling submission to the test, the compulsion being the threat of license revocation for refusal.¹¹

The Texas implied consent statute became effective in September 1969.¹² Many other states have also passed legislation providing for

⁵ Gillaspie v. Dept. of Public Safety, 152 Tex. 459, 259 S.W.2d 177 (1953); In *ex parte* Sterling, 122 Tex. 108, 53 S.W.2d 294 (1932).

⁶ Schutt v. MacDuff, 127 N.Y.S.2d 116 (N.Y. App. 1954).

⁷ See Breithaupt v. Abraam, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957). Mr. Justice Clark did refer to the Kansas statute with apparent approval.

⁸ Bush v. Bright, 71 Cal. Rptr. 123 (1969).

⁹ TEX. PENAL CODE ANN. art. 802f § 1 (1969).

¹⁰ 42 N.C. L. REV. (1964).

¹¹ 33 Mo. L. REV. 182 (1968).

¹² In Texas, the first evidence of concern about drunk driving and chemical tests is found at the state bar convention in 1947. Attorney General Price Daniel, after charging that drunk driving had doubled during the past year, urged the District and County Attorney's sections to organize a statewide fight for punishment and prevention of this "most dangerous and careless crime." (*Convention Report*, 10 Tex. B.J. 313, 1947). The traffic code enacted by the 50th Legislature originally required scientific tests, but court decisions had held such tests, without consent, violated constitutional provisions against self incrimination. The provision was therefore dropped because it was too late for a

implied consent and all statutes are similar to the degree that all provide that consent is deemed given by the operation of a motor vehicle on state highways, and most provide specifically for action upon a refusal to submit to a test and for a hearing upon refusal.¹³ The scope of the hearing is specifically set out in several state statutes; *e.g.*, Florida provides that the question of whether such person lawfully refused to take a chemical test as provided for and the issues determinative shall be: (1) Whether the arresting peace officer had reasonable cause to believe the person had been driving . . . while under the influence. . . . (2) Whether the person was placed under arrest. (3) Whether he refused to submit. . . . (4) Whether he had been told his driver's license would be suspended if he refused.¹⁴ California's implied consent law sets out that upon arrest and refusal there shall be a hearing and the issues shall be: (1) Whether the officer had reasonable cause to believe the person had been driving under the influence, (2) Whether the person was placed under arrest, (3) Whether he refused to submit to the test after being told that he would lose driving privilege for refusing.¹⁵ California has held that the demands of due process are met when the statute pro-

constitutional amendment. At the bar convention in 1954 speaker Charles Batchelor stated, "Chemical tests for intoxication protect the innocent and convict the guilty." (*Dallas Bar Convention*, 17 TEX. B.J. 455, 1954). That same year at the Traffic Courts conference a recommendation was made for new legislation that would: (1) Define limits of intoxication. (2) Either make it mandatory for suspected drunk drivers to submit to a chemical test for intoxication or make his refusal to submit to such a test "proper evidence to be used against him in court." Conference registrants adopted a resolution recommending and supporting the passage of an article providing for certain presumptions arising from amounts of alcohol in defendants' blood at the time of offense (*Traffic Courts Conference*, 17 TEX. B.J. 455, 1954). Again in 1959 the Traffic Court conference recommendation made by speakers included "Pleading for passage of a law requiring a chemical test for intoxication." Inspector Conner explained that more than sixty pathological conditions duplicate the symptoms of drunkenness. Professor McCormick said that "unwillingness of some drivers to consent to test for intoxication presents a substantial obstacle to enforcement of laws designed to reduce the menace of the drunk driver." (Conner and McCormick, *Traffic Courts Conference*, 22 TEX. B.J. 116, 1959). A survey made in 1959 among various judges, trial lawyers, law enforcement officers, and medical men to ascertain their version of the subject of new legislation on chemical tests for intoxication in drunk driving cases showed all persons interviewed agreed that there was a need for legislation. Most law enforcement officers favored legislation making the test mandatory. Most lawyers aware of constitutional privilege against self incrimination, were opposed to any legislation which would do away with the prerequisite of consent. There were some who favored the passage of legislation which would preserve the defendant's traditional right to refuse a test, but would make such refusal grounds for revocation or suspension of one's driver's license on the theory that driving is a "privilege" and not a vested right. (Semaan and Onion, *Chemical Tests for Intoxication and their use in Texas Trials*, 22 TEX. B.J. 561, 1959).

¹³ CONN. GEN. STAT. REV. § 14-227b (1966); IDAHO CODE ANN. § 49-352 (1967); IOWA CODE ANN. 15a *Motor Vehicles* ch. 321 B.7 (1966); KANS. GEN. STAT. ANN. 8-1001 (1964); MINN. STAT. ANN. § 169.123 (1966); MO. ANN. STAT. § 564.444 (1966); NEB. REV. STAT. § 39-727.03 (1960); N.Y. VEHICLE AND TRAFFIC LAWS § 710a, ch. 854 (1966); N.C. GEN. STAT. 20-16.2 (1965); S.D. CODE § 44.030202 (1960); VT. STAT. ANN. tit. 23 § 1191 (1966); VA. UNIFORM VEHICLE CODE § 18.1-55.1 (1966); N.J. STAT. ANN. tit. 39:4-50.4 (1966); FLA. STAT. tit. 22 § 322.261 (1967); DEERING'S CAL. VEHICLE CODE ANN. § 13353 (1966).

¹⁴ FLA. STAT. tit. 22 § 322.261 (1967).

¹⁵ DEERING'S CAL. VEHICLE CODE ANN. § 13353 (1966).

vides for a subsequent hearing or review, even though in a particular case no such hearing or review is asked for.¹⁶

The statutes so providing for the scope of the hearing or review seem to be in complete accord with *McGarry v. Costello*.¹⁷ Although no case is cited where the issue was the admissibility of evidence of innocence at the hearing to revoke license, cases from several jurisdictions have held that innocence of driving while intoxicated is not an issue upon said hearing.¹⁸ More support for the position taken in *McGarry* is found from the cases that hold that if a driver refused to submit to a breathalyzer test, his driving privileges are subject to revocation independent of any revocation imposed by virtue of conviction of drunk driving.¹⁹ California has held that the statute is mandatory and requires suspension of the driving privilege, not for driving while intoxicated, but for refusing to submit to a chemical test for intoxication after arrest.²⁰ One case went so far as to hold that "it is firmly established that a drunken driver has no right to resist or refuse such a [chemical] test."²¹ The theory behind these implied consent statutes becomes clear: A driver has an option either to submit to the administration of the chemical test, or to refuse and to accept the consequences of automatic suspension. Two states, Texas²² and North Carolina,²³ provide in their

¹⁶ August v. Dept. of Motor Vehicles, 70 Cal. Rptr. 172 (1968).

¹⁷ 260 A.2d 402 (Vt. 1969).

¹⁸ Lira v. Billings, 414 P.2d 13 (Kan. 1966); *In re Spencer*, 439 S.W.2d 8 (Mo. 1969).

¹⁹ Bean v. Strelecke, 244 A.2d 316 (1968); *State v. Denderske*, 239 A.2d 249 (N.J. Super. 1968).

²⁰ Serenko v. Bright, 71 Cal. Rptr. 1 (1969).

²¹ Bush v. Bright, 71 Cal. Rptr. 123 (1968).

²² TEX. PENAL CODE ANN. art. 802f (Supp. 1969):

Chemical tests for intoxication; implied consent; evidence. 1. Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent, subject to the provisions of the act, to a chemical test, or tests, of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while a person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor. Any person so arrested may consent to the taking of any other type of chemical test other than a chemical test, or tests, of his breath. The test or tests shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the highways of this state while under the influence of intoxicating liquor. 2. If a person under arrest so refuses, upon the request of a law enforcement officer, to submit to a chemical breath test designated by the law enforcement officer as provided in section 1, none shall be given, but the Texas Department of Public Safety, upon receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual control of a motor vehicle upon the public highways of this state while under the influence of intoxicating liquor and that the person had refused to submit to the breath test upon the request of the law enforcement officer, shall set the matter for a hearing as provided in Section 22(a), Chapter 173, Acts of the 47th Legislature, Regular Session, 1941, as amended (Article 6687b) Vernon's Texas Civil Statutes. If, upon such hearing, the court finds that probable cause existed that such person was driving or in actual physical control of a motor vehicle on the highway while under the influence of intoxicating liquor at the time of arrest by the officer, the Director of the Texas Department of Public Safety shall

statutes that if the person who refused to take the test is acquitted of the charge of driving while under the influence of intoxicating liquor, his license shall not be suspended for refusing to submit to the test. This would seem to imply that upon a hearing to revoke a license for refusal, innocence of driving while intoxicated *is* an issue, contrary to the holding in *McGarry* and the plain wording of other state statutes. Absent from the Texas statute is any provision for the scope of the hearing for refusing to submit to the test. Not only the provision that innocence or dismissal upon trial for driving while intoxicated shall prevent suspension for the refusal to submit, but the wording of the statute ("If upon such hearing, the court finds that probable cause existed that such person was driving . . . under the influence of intoxicating liquor . . . at the time of arrest . . . the director shall suspend. . .")²⁴ would seem to indicate that innocence of driving while intoxicated was meant to be an issue upon the hearing for refusing the test. This is in direct conflict with the majority of the states having implied consent statutes.²⁵ It seems clear that Texas and North Carolina would not follow the holding in *McGarry*, but to the contrary, they would rule that such evidence would be admissible at the hearing for refusing to submit to tests. Does this mean that in Texas one gives his consent only if intoxicated while driving? Of the sixteen state implied consent statutes cited, fourteen provide that the driver arrested for drunk driving has two choices: (1) submit to the test and provide the state with convincing evidence of the degree of intoxication; or (2) refuse and lose one's license for the time specified.²⁶ In Texas it would seem the driver also has two choices: (1) take the test and provide the state with evidence; or (2) refuse the test and take one's chances of the state not being able to convict for drunk driving, thus also preventing the state from revoking the license for refusing the test. This represents quite a different view or

suspend the person's license or permit to drive, or any nonresident operating privilege for the period ordered by the court, but not to exceed one (1) year. If the person is a resident without a license or permit to operate a motor vehicle in this state, the Texas Department of Public Safety shall deny to the person the issuance of a license or permit for a period ordered by the court, but not to exceed one (1) year. Provided however, that should such person be found "not guilty" of the offense of driving while under the influence of intoxicating liquor or if said cause be dismissed, the Director of the Texas Department of Public Safety shall in no case suspend such person's driver's license; or, in the event that proceedings had been instituted resulting in the suspension of such person's driver's license, the Director of the Texas Department of Public Safety shall immediately reinstate such license upon notification of such acquittal or dismissal by the county clerk of the county in which the case was pending. Notification to the Director of Texas Department of Public Safety shall be made by certified mail.

²³ N.C. GEN. STAT. 20-16.2 (1965).

²⁴ TEX. PENAL CODE ANN. art. 802f (1969).

²⁵ Statutes cited note 13, *supra*.

²⁶ For a well reasoned and documented discussion of implied consent, see Hunvald, *Missouri Implied Consent Statute*, American Bar Foundation, prepared for National Highway Safety Bureau, United States Department of Transportation, Washington, D. C.