

The background of the page is a blurred image of a document. At the top of the document, the word "WARRANT" is printed in large, bold, capital letters. Below this, there are several lines of illegible text, suggesting a legal or official document. The document is slightly tilted and has a soft shadow, giving it a three-dimensional appearance.

Refusal of Intoxication Testing

A Report to Congress

September 2008

Technical Report Documentation Page

1. Report No. DOT HS 811 098		2. Government Accession No.		3. Recipient's Catalog No.	
4. Title and Subtitle Refusal of Intoxication Testing: A Report to Congress				5. Report Date September 2008	
				6. Performing Organization Code NTI-130	
7. Authors Berning, A., Compton, R., Vegega, M., Beirness, D., Hedlund, J., Jones, R., and Nichols, J.				8. Performing Organization Report No.	
9. Performing Organization Name and Address U.S. Department of Transportation National Highway Traffic Safety Administration Office of Behavioral Safety Research NTI-130 1200 New Jersey Avenue SE. Washington, DC 20590				10. Work Unit No. (TRAIS)	
				11. Contract or Grant No.	
12. Sponsoring Agency Name and Address				13. Type of Report and Period Covered	
				14. Sponsoring Agency Code	
15. Supplementary Notes					
16. Abstract When a driver is stopped on suspicion of impaired driving, a series of steps takes place, including the request from a law enforcement officer for a blood alcohol concentration (BAC) test. The most typical request is for a breath sample, but blood or urine samples can be requested. In contrast to being stopped by an officer for other driving violations, the result of an impaired driving stop may dramatically impact a person's life. The driver faces an arrest, possible jail time, expensive fines, increased insurance costs, loss of their driver's license, and a criminal record. Thus, the driver's decision whether to provide the breath test has serious consequences. This report discusses the important issue of breath test refusals. It begins with a short background on the impaired driving problem and the issue of missing BAC information for both drivers arrested for impaired driving and drivers involved in fatal or serious injury crashes. Next, various laws governing impaired driving and the role of BAC test information under those laws are reviewed. That is followed by a brief overview of the DWI arrest process to provide a foundation for the discussion of refusals. The results of several recent studies examining the breath test refusal issue, including breath test refusal rates in 2005, and a comparison to rates in 1987 and 2001 are presented; followed by the effect of refusals on prosecution and adjudication of DWI cases; next is a description of a promising strategy to decrease refusals – the use of search warrants for bloods draws. The report concludes with recommendations that would decrease the incidence of missing BAC data.					
17. Key Words Breath Test Refusal, DWI, DUI, implied consent, search warrant, BAC, blood alcohol concentration			18. Distribution Statement Document is available through the National Technical Information Service Springfield, VA 22161 and is free of charge at www.nhtsa.dot.gov		
19. Security Classif.(of this report) Unclassified		20. Security Classif.(of this page) Unclassified		21. No. of Pages 28	
				22. Price	

Refusal of Intoxication Testing

A Report to Congress

Introduction

Section 2003(f) of the Safe Accountable Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) titled “Refusal of Intoxication Testing” directs the Secretary of Transportation to conduct a study of the frequency with which persons arrested for the offense of operating a motor vehicle while under the influence of alcohol and persons arrested for the offense of operating a motor vehicle while intoxicated refuse to take a test to determine blood alcohol concentration levels (BAC) and the effect such refusals have on the ability of States to prosecute such persons for those offenses. The Secretary was also directed to submit a report on the results of the study including any recommendations for legislation and any other recommendations that the Secretary considers appropriate for implementing a program designed to decrease the occurrence of refusals by arrested persons to submit to a test to determine BAC levels. This report documents the study’s findings and recommendations.

In order to make clear why refusal to take a BAC¹ test is an important issue, the report starts with a short background section on the impaired driving² problem and the issue of missing BAC information for both drivers arrested for impaired driving and drivers involved in fatal or serious injury crashes. Next, various laws governing impaired driving and the role of BAC test information under those laws are reviewed. That is followed by a brief overview of the driving while intoxicated (DWI) arrest process to provide a foundation for the discussion on refusals. The results of several recent studies examining the breath test refusal issue are presented, including breath test refusal rates in 2005, and a comparison to rates in 2001 and 1987; the effect of refusals on prosecution and adjudication of DWI cases; and a description of a promising strategy to decrease refusals – the use of search warrants for blood draws. The report concludes with recommendations that would decrease the incidence of missing BAC data, including BAC test refusals.

Background

The issue of alcohol-impaired driving is complex in comparison to most other moving violations. Being stopped by an officer for impaired driving may have serious consequences for a person’s life. If the officer suspects that the driver is impaired by alcohol, the driver faces an arrest (versus a traffic citation), possible jail time, expensive fines and increased insurance costs, loss of the

¹ Measuring the amount or concentration of alcohol present in a driver involves testing a body fluid sample, often breath, blood, or urine. For simplicity, the term BAC will be used in this report to refer to both blood alcohol concentration and breath alcohol concentration, even though they are not the same thing. The relationship between blood and breath alcohol concentration is well understood and documented.

² Impaired driving statutes among the States refer to driving while impaired, driving while intoxicated, and driving under the influence. These all refer to the same offense and the term impaired driving will be used throughout this report to refer to this offense.

driver's license, and a criminal record. The driver is immediately immersed in the criminal justice system with defense attorneys and prosecutors, the State's licensing agency, and the court system. How the driver responds to the officer's request to provide a body fluid sample (typically a breath test, though it may be blood or urine) to determine the concentration of alcohol in the driver, will impact the course of that suspect's prosecution and may affect the resulting sanctions. It is an important decision, but one which many people do not fully understand, or the likely consequences of that decision.

Crash Problem

In 2006, there were 17,602 fatalities in alcohol-related crashes in the United States (National Highway Traffic Safety Administration [NHTSA], 2007).³ This represents 41 percent of all motor vehicle fatalities on our Nation's roads. Some 278,000 vehicle occupants were injured in alcohol-related crashes (11% of all injuries). Almost one quarter of the drivers of passenger cars and light trucks in fatal crashes had a BAC of .08 g/dL⁴ (for motorcyclists it was 25%). Impaired driving is a serious problem in the United States.

In 2005 there were 1,460,498 DWI arrests in the United States (Federal Bureau of Investigation [FBI], 2007). As part of the evidence-gathering process for an impaired driving investigation, a law enforcement officer typically requests the driver take a BAC test. In previous studies, NHTSA has found that the percentage of people who refuse to take a BAC test when arrested for DWI varies considerably across States.

Statutes

There are a variety of different types of statutes that are concerned with impaired driving. All States have traditional laws prohibiting driving while impaired (in some States the language used is under the influence of alcohol, or intoxicated by alcohol). These laws require the State to prove beyond a reasonable doubt that the driver met the statutory and/or case law definition of impairment, being under the influence, or intoxication. To some extent these are subjective judgments made by the judge or jury.

In response to constant challenges by offenders, all States have passed "*illegal per se*" laws that make it a crime to operate a motor vehicle with a BAC concentration at or above .08 g/dL. These laws make no reference to impairment, influence, or intoxication. The BAC test result is sufficient for conviction (as long as the test was properly administered and accurate).

³ NHTSA has routinely reported the number of fatalities in crashes in which a driver, motorcycle rider, pedestrian, or bicyclist had a BAC of .01 or higher. In an effort to focus attention on situations more commonly addressed by impaired driving programs, recent agency publications have reported the number of fatalities in crashes in which a driver or motorcycle rider had a BAC of .08 or higher, the illegal per se limit in every State. In 2006, there were 13,491 fatalities in which the driver or motorcycle rider had a BAC of .08 or higher. In 2007, NHTSA estimates that there were 12,998 fatalities in which the driver or motorcycle rider had a BAC of .08 or higher.

⁴ g/dL – grams per deciliter

In addition, in order to increase the certainty and swiftness of the consequences of impaired driving, 41 States have passed “administrative license revocation” programs that result in an almost immediate licensing action for a suspected impaired driver whose BAC is at or above a specified concentration. Typically, an officer will confiscate the driver license and send it to the State licensing agency. The suspect is issued a temporary driver’s permit (typically good for 15 days) to allow the suspect a due process right to an administrative hearing if s/he should so wish.

A further complication is that the United States Supreme Court determined it was permissible for law enforcement to use force, if necessary, to compel an impaired driving suspect to take a BAC test (*Schmerber v California*, 1966). In this case, the suspect fled the scene of a crash involving serious injury to a young child and then refused to cooperate with a request to take a BAC test. In response to this case, most States enacted laws allowing a driver to *refuse* to provide a body fluid sample for BAC testing, but the act of refusal would subject the driver to an administrative license suspension or revocation. This administrative license action is different from a State’s administrative license revocation (ALR) law which takes effect when a person *fails* a chemical test by being at or above the State’s illegal BAC level. These laws allowing drivers under arrest for impaired driving to refuse to take a BAC test are often termed “*implied consent laws*,” suggesting the driver has consented to be tested as a condition of obtaining a driver license. Since the effect of these laws is to authorize BAC test refusal, where otherwise no such right exists, they have created the BAC test refusal problem.

Clearly, without a BAC test result, no suspected impaired driver can be charged under an “*illegal per se*” statute. Likewise, without a BAC test result, the suspect is not subject to a State’s *Administrative License Revocation* law, though s/he is subject to an administrative license action for refusing to take the test.

There is suspicion that many driving while intoxicated (DWI) offenders refuse to take the BAC test in order to avoid or reduce the chance of facing criminal sanctions upon conviction for DWI; instead they may hope to receive a minor administrative license suspension for their criminal and dangerous behavior, rather than sanctions appropriate with a DWI conviction. In NHTSA’s *Initiatives to Decrease Impaired Driving* (NHTSA, 2003), implied consent laws are noted as often having penalties inadequate to prevent significant refusal rates, and that suspects who avoid testing are often able to avoid serious penalties.

DWI Arrest and BAC Testing Process

When a driver has been stopped either by an officer on patrol or at a sobriety checkpoint for suspicion of impaired driving, a series of steps take place. The officer will engage the driver in conversation, and if appropriate, ask the driver questions regarding whether the person had been drinking, and how much. During this time, the officer will note not just the person’s answers but also observe for cues of recent alcohol use – for example a flushed face, red eyes, slurred speech, odor of alcohol, or alcoholic containers or beverages in the vehicle.

If the officer develops articulatable suspicion to pursue the investigation, the officer will typically request the driver to step out of the vehicle and request that the driver perform a series

of field sobriety tests. NHTSA strongly recommends the NHTSA/International Association of Chiefs of Police (IACP) Standardized Field Sobriety Test (SFST), which consists of the Walk-and-Turn test, One-Leg-Stand test, and Horizontal Gaze Nystagmus test; the combined score of these tests indicates the probability driver's BAC is at or above the illegal level of .08 g/dL BAC.

If the officer has probable cause to support an arrest decision, the officer will place the offender under arrest and read the Miranda Rights. At this point, the officer will request a BAC sample – most typically a breath sample but blood or urine samples could also be requested. The officer may take the offender to a booking location where the sample will be requested, or in many instances, the officer may obtain the sample at roadside in the patrol vehicle or in a BATmobile⁵ or similar setting, if an evidential breath test device is available in the field.

Not all suspects agree to take the BAC test. As noted earlier, under implied consent laws, drivers have the right to refuse a lawful request by a law enforcement officer, though such a refusal may result in the suspension or revocation of their driver license.

The BAC test is one of several pieces of evidence in a DWI arrest. The prosecuting attorney will review the evidence to determine whether to pursue a DWI offense, reduce the case to a lesser offense, or dismiss the case.

BAC Testing in Crashes

Missing BAC data is also a concern in terms of accurately determining the extent of impaired driving crashes. There were 42,642 motor vehicle fatalities in the United States in 2006. Of these, NHTSA has determined that 41 percent or 17,602 were alcohol-related fatalities (NHTSA, 2007). A crash is considered alcohol-related if at least one driver, or non-occupant (such as a pedestrian or pedalcyclist) had a BAC at .01 or higher. Within the 15,945 alcohol-related crashes, 13,470 drivers had a BAC at or above the legal limit of .08 (NHTSA, 2007).

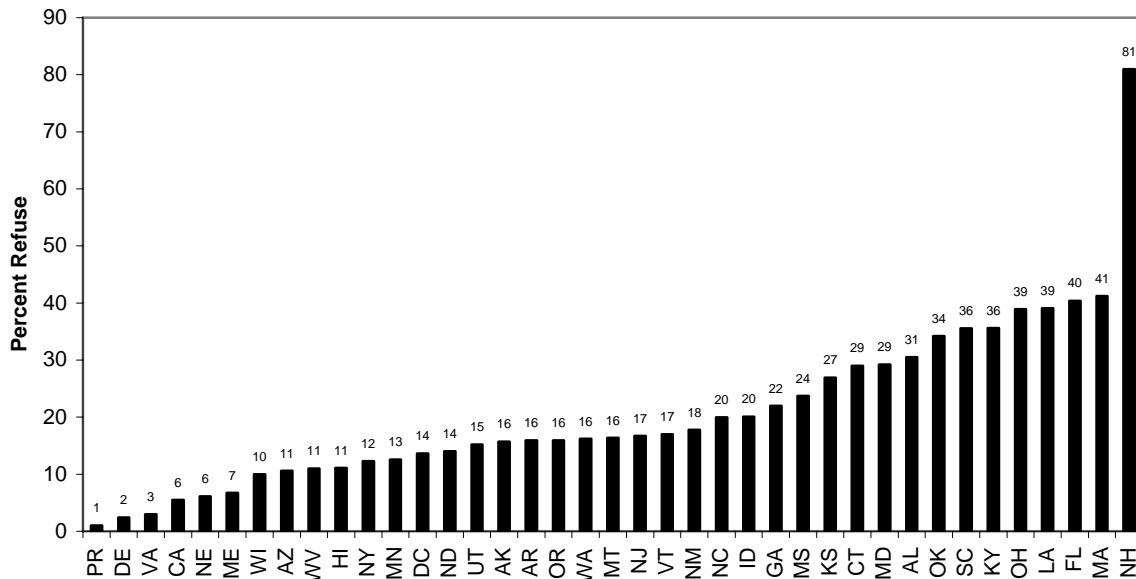
As noted throughout this report, alcohol testing, for both crashes and arrests, has often proved problematic and has been a concern to many. In 2005, approximately 42 percent of drivers involved in fatal crashes were tested for BAC level. In order to obtain a more complete picture of the role of alcohol in fatal crashes, NHTSA uses statistical techniques to impute the missing BAC data to better understand the involvement of alcohol in fatal crashes (Subramanian, 2002). While the procedures used are statistically sound and have been thoroughly tested and peer reviewed, the fact remains that the best estimated values in a census type data base introduce some level of error and provide data that only partially overcomes the limitations caused by missing information. A NHTSA report on ways to decrease alcohol-impaired driving (NHTSAb, 2003) highlights low BAC crash testing as an area for States to make infrastructure improvements.

⁵ A BATmobile is a mobile law enforcement vehicle designed as a self-contained booking station for DWI and other offenses. BATmobiles typically have breath testing devices, communication technology (phone, fax), arrest and processing forms, holding facilities, and other needed equipment to test and temporarily detain DWI offenders.

Breath Test Refusal Rates

In 2006, NHTSA decided to collect recent State BAC test refusal data from each State, the District of Columbia, and Puerto Rico regarding breath test refusal rates. Typically, these data are obtained from a State's Department of Motor Vehicles, but some States will house the information in a court records agency, State laboratories involved in chemical testing, or another State entity involved with traffic safety. The results for 2005 are shown in Figure 1.

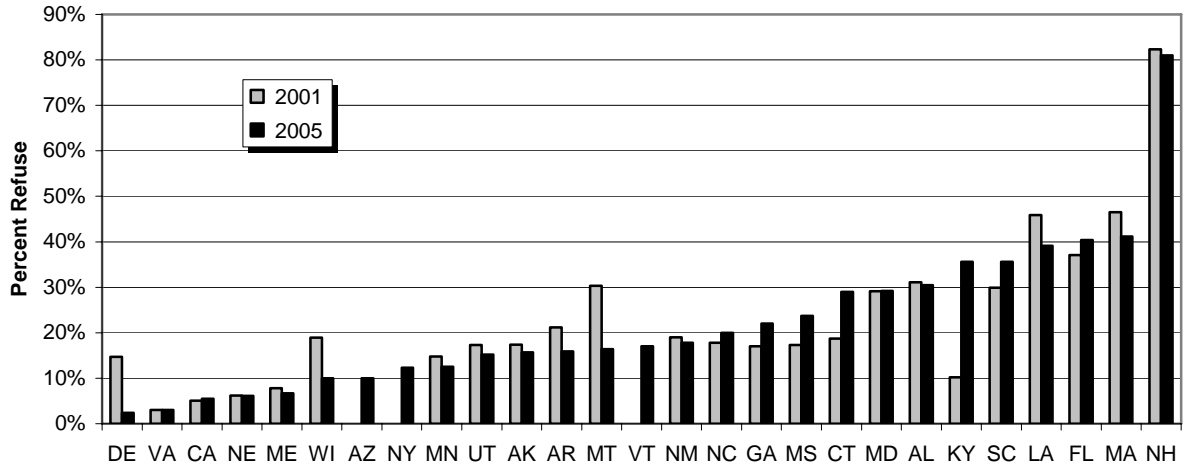
Figure 1. Breath Test Refusal Rates, 2005



Data was received from 37 States, the District of Columbia, and Puerto Rico, and reflects arrests from 2005. State refusal rates varied from 2.4 percent in Delaware to 81 percent in New Hampshire. The average refusal rate was 22.4 percent, and the median refusal rate was 17.4 percent. The weighted mean of the refusal rates based on State populations in 2005 was 20.9 percent.

The information obtained on 2005 breath test refusal rates was compared to data on BAC test refusal rates collected for NHTSA in 2001 (Zwicker, Hedlund, Northrup, 2005). The results, indicating both 2001 and 2005 data for States, are shown in Figure 2. Note that the results for these 2 years are not directly comparable because reporting methods may have changed in a State across time. Also, data was not received from each State for each time frame.

Figure 2. Breath Test Refusal Rates, 2001 and 2005



NHTSA had collected BAC test refusal data for 1987 (Jones, Joksch, and Wiliszowksi, 1991), and these rates are compared to the breath test refusal rates for 2001 and 2005 to examine trends over the twenty year period (shown in Table 1). Again, reporting procedures within States could have changed across these years. However, the major finding is the relatively small change in the refusal rate in the Nation as a whole since 2001, and since 1987. The average rate for 2005 DWI arrests of 22 percent is 3 percentage points lower than for 2001 arrests, and 3 points higher than that the 1987 arrests. Table 1 provides basic statistics on rates from 1987, 2001, and 2005.

Table 1. Breath Test Refusal Rates, 1987, 2001, 2005

Statistic	Year of Data		
	1987	2001	2005
Range	1% - 72%	5% - 85%	2% - 81%
Mean	19%	25%	22%
Median	14%	18%	17%
1 st Quartile	11%	14%	11%
3 rd Quartile	22%	32%	33%

Refusals and Prosecution

NHTSA examined the effect of breath test refusals on the prosecution of DWI cases. Ideally, similar data on arrests and conviction results from each State would be obtained and analyzed, to provide a picture of how missing BAC data, especially breath test refusals, affect prosecution of DWI cases. However, States' impaired driving laws and practices (e.g., plea bargaining to reduced charges) vary widely and comparisons between States are often misleading. Similarly, even within a State, policies may differ between jurisdictions in how impaired driving cases are prosecuted (or even which ones are prosecuted). In addition, to examine whether refusals affect prosecution, it is necessary to match DWI arrest data and court system data, and records within a State's criminal justice system are often not fully linked.

Therefore, to examine this issue, NHTSA obtained arrest and court data from three jurisdictions and analyzed them to determine whether BAC data from the time of arrest had a significant impact on whether a DWI case was prosecuted, and whether the BAC data impacted conviction and sanctions. Offender characteristics and circumstances of the arrest were taken into account in the analyses.

Ramsey County, Minnesota; Bernalillo County, New Mexico; and Omaha, Nebraska were selected for analysis due to several factors, including a sufficient population size to generate enough refusals to support analysis; interest in the study and willingness to provide the required data; and having both arrest and court data that could be matched for each offender. The sites were also selected as they provided a range of geographical locations, DWI and refusal case-processing laws, and refusal rates. Although these sites provide us with information on the effect of refusals on prosecution, the results may not be generalizable to the nation as a whole.

Ramsey County, Minnesota

Minnesota's refusal rate in 2005 was 13 percent. Both DWI and refusals are criminal offenses, and a driver can be convicted on either or both charges. For Ramsey County, refusal and DWI cases are adjudicated and sanctions are imposed by the Second Judicial District Court. This is a unified trial court with general jurisdiction to hear all types of civil and criminal cases. The Criminal and Traffic Division handles the processing of all criminal citations, including those for DWI and BAC test refusal.

According to prosecutors, if the conditions surrounding a DWI case are the same except for test refusal or non-refusal, the decision whether to prosecute for impaired driving or for test refusal is typically independent of the driver's refusing or not refusing the breath test. Those refusing the BAC test are prosecuted for refusal and those complying with the BAC test are prosecuted for DWI. A person refusing the BAC test also may be prosecuted for DWI.

The State's DWI law allows a first-time offender who has been convicted of refusal to "turn around" an administrative revocation of 90 days to 30 days for the criminal conviction of DWI. The offender does this by pleading guilty to DWI after being convicted of refusal. Since the legal consequences of conviction of a criminal refusal are the same as those of a criminal

conviction of DWI, the following analysis of DWI convictions re-defines a conviction of DWI as a criminal conviction of impaired driving or a conviction of a criminal offense of test refusal or both.

To obtain a sufficient number of cases, three years of driver records data were obtained from the Minnesota Department of Vehicle Services. The records indicated the outcomes of all impaired driving stops and arrests in Ramsey County for the years 2003, 2004, and 2005. No significant changes in the pertinent legal environment that might confound the outcome of concern that occurred during those years. The outcome of concern was criminal convictions of DWI as defined above as influenced by test refusal and non-refusal and several other factors.

There were 7,366 arrests for impaired driving in Ramsey County during the three study years, and 1,371 of these arrests (18.6%) resulted in a conviction for criminal test refusal. Those refusing the BAC test were slightly older (34 years versus 32), slightly more frequently male (81% versus 78%), and much more likely to have a prior DWI (54% versus 35%) [See Table 2].

Table 2: Characteristics of Convicted Test Refusers and Non-Refusers – Ramsey County

	Refusers	Non-Refusers	P
All Arrestees	1,371	5,995	--
Mean Age	34	32	0.0001
Sex			
Female	19%	22%	0.0200
Male	81%	78%	
Priors			
Yes	54%	35%	0.0001
No	46%	65%	

Records of sanctions imposed on convicted arrestees were obtained from the State Court Administrator’s Office. Of particular interest are the data for DWI and BAC refusal. Those refusing the BAC test had longer mean jail sentences than DWIs (54.99 days versus 20.57 days) and higher mean fines (\$1,098.74 versus \$793.51), even though the laws specified the same sentencing limit for both offenses.

Bernalillo County, New Mexico

New Mexico had a BAC test refusal rate of 18 percent in 2005. DWI is a criminal violation in New Mexico, but BAC test refusal is an administrative matter handled under the Administrative License Revocation (ALR) Law. In Bernalillo County, DWI cases are adjudicated and sanctions are imposed by two court systems. The Metropolitan Court handles most DWI cases, whereas aggravated DWI cases and cases involving drivers with two or more priors are frequently filed in Second District State Court.

New Mexico has a DWI tracking system for drivers arrested for the criminal offense of DWI or for an ALR violation. The system tracks arrested drivers until case disposition, recording charged offenses, convictions and sanctions. Three years (2003, 2004, 2005) of records for drivers arrested in Bernalillo County were analyzed. Of the 12,522 drivers arrested over the study years, conviction data was available for 10,099 drivers whose cases had been disposed by a court. The DWI conviction rate for those refusing the BAC test was not significantly different from the conviction rate for those taking the BAC test (66.1% versus 64.5%, respectively). In addition, further analyses showed that a refusal, prior DWI, and being male increased the odds of conviction.

Fines and jail sentences were also examined for those refusing the BAC test and those complying with the BAC test. Offenders refusing the test tended to receive longer mean jail times (41.58 days) and higher mean fines (\$73.88) than offenders complying with the test (23.24 days and \$51.61, respectively).

Omaha, Nebraska

Nebraska had a BAC test refusal rate of 6 percent in 2005, one of the lowest of all states surveyed. Both DWI and refusals are criminal offenses. The City Prosecutor virtually always charges a person refusing the BAC test with DWI and test refusal, both of which are felonies and carry the same penalties.

Omaha has a computerized State system for drivers arrested for DWI or for a refusal. The system measures the outcome of each arrest and is used by the City Prosecutor to track cases until case disposition, recording charged offenses, convictions, and sanctions. Records of 601 drivers arrested for refusing the BAC test and 700 drivers complying with the test were analyzed for the years 2003, 2004, and 2005. Eighty-eight percent (527) of the 601 refusers were found guilty of DWI, and another 10 percent (59) were found guilty of refusal. The conviction rate for Omaha for DWI was about as that for the State as a whole.

In almost every case (i.e., 98%), either the DWI or the refusal resulted in a conviction. Because DWI and refusal carry the same sentence, one or the other charge is dismissed by the prosecutor as a standard plea bargain. There is little duplicate penalty if the conviction is for both (potentially an additional fine), so prosecutors normally drop the refusal for a plea to driving under the influence (DUI).

Drivers complying with the BAC test had a slightly lower conviction rate than drivers refusing the BAC test (96.3% compared to 97.5%), but the difference was not statistically significant. An examination of sanctions showed that refusers had longer mean jail times (27 days) and higher mean fines (\$720) than compliers (19 days and \$502, respectively).

Overall Results From Three Sites

While these sites cannot be considered as representative of jurisdictions across the country, they offer some insight on the effects of breath test refusal on subsequent prosecution. Each of the jurisdictions studied had refusal rates below the national average in 2005 (22.4%). While the

sample is too small to draw definitive conclusions, the two jurisdictions (Ramsey County and Omaha) that considered refusal a separate criminal offense, allowed refusal evidence in court, and provided for conviction of both DWI and refusal also had higher conviction rates for both drivers who refused and drivers who complied with the BAC test. Across all three sites, refusers tended to have longer average jail times and higher average fines than those who complied with the BAC test.

These results can not be generalized to the nation as a whole, but it is clear that BAC test refusal does not necessarily lead to lower conviction rates, even if the lack of BAC concentration information makes prosecution more difficult. When refusal is a separate criminal offense, offenders are likely to be convicted on the test refusal charge and perhaps on the impaired driving charge in addition.

A Promising Strategy – Use of Warrants and Blood Draws

Many States have been concerned about breath test refusal rates, and have implemented procedures designed to lower the refusal rates. NHTSA's 2005 study on BAC test refusals, examined State refusal rates, DWI laws, and sanctions (Zwicker, Hedlund, and Northrup, 2005). The report includes a discussion of possible reasons why rates are high in some States. In-depth analyses were conducted in five States, and a complex relationship of laws, procedures, and customs that can influence rates was found. There were differences in how first offenders respond to BAC requests versus how repeat offenders may respond.

One promising strategy that emerged is the use of warrants to obtain blood samples from drivers who refuse to provide breath samples. NHTSA learned of at least six States using this approach in some local jurisdictions, and information was obtained on how well this process works. In a recently completed NHTSA research project, the use of search warrants to obtain blood samples from drivers was studied (Hedlund and Beirness, 2007).

Case studies were conducted in Arizona, Oregon, Michigan, and Utah to determine and document how each State uses a warrant system to obtain blood samples from drivers. Additional information was obtained from California and Nevada, two States in which officers can obtain blood samples without warrants.

In each case study State, meetings and phone discussions were held with officials in the State's Department of Public Safety or the Governor's Highway Safety Office, law enforcement officers, prosecutors, defense attorneys, judges, and others. These individuals provided information on policies and procedures, as well as their opinions on how well the warrant process is working. The study did not include obtaining actual refusal data from each State; however, in some cases, the researchers noted officials' beliefs regarding changes in refusal rates. Telephone interviews with key contacts in California and Nevada were also undertaken regarding their process for refusals.

To obtain a warrant, an officer typically must complete affidavit and warrant forms. In some jurisdictions, the officer would initially contact an on-call prosecutor; in other jurisdictions, the officer would call an on-duty judge or magistrate. The forms can be faxed to the judge or magistrate for review and signature, if granted, or the warrant can be sworn via phone and the forms completed the next day.

Jurisdictions differ somewhat in procedures regarding whether drivers are allowed to change their minds and provide breath samples after initial refusal. However, it was learned from the case studies that generally once an officer has contacted a judge requesting a warrant, the driver's refusal is considered final, and if a warrant is granted, the driver must submit to a blood test. Drivers are also then subject to the State's administrative sanctions for refusal regarding its implied consent law, as well as the State's criminal and administrative sanctions.

Information regarding each of the case study States is described below. More complete information regarding each case study State's laws, penalties for refusals, policies for obtaining a

warrant and a blood sample, and the results of the discussions with representatives from each State, is found in the full NHTSA report.

Arizona

Jurisdictions in Arizona, including Phoenix, Peoria, and Scottsdale, began using warrants in some serious DUI⁶ cases in the mid-1990s. Some Arizona jurisdictions use warrants for all BAC test refusals, and most jurisdictions use warrants for at least some refusals.

Once arrested for DUI, the driver is taken to a police station or a BATmobile where the officer will request a breath test. If the driver refuses, the officer will read Arizona's implied consent provisions and inform the driver that a judge will be contacted for a warrant for a blood test if the driver refuses the officer's request for a breath sample. The driver has the right to contact an attorney but, reportedly, few do. The driver can decide to voluntarily take the test until the time a judge is contacted; otherwise the refusal stands and the officer continues the process for obtaining a warrant.

Prosecutors and district attorneys have established policies encouraging warrants, and a number of judges have been supportive, even being on-call at night. For example, when the officer calls an available judge, the officer is then sworn in over the phone and faxes the warrant forms to the judge. The judge then reviews the information, signs the warrant, and faxes it back to the officer. If the officer does not have access to a fax machine, warrants can be obtained by phone. BATmobiles are equipped with the necessary forms and equipment.

An unusual feature of Arizona's approach is that law enforcement officers may be trained as phlebotomists – professionals trained in taking blood samples. At the time of the study, most Arizona law enforcement agencies had a phlebotomist on staff or had access to one through mutual assistance agreements with a nearby agency.

The officer typically draws the blood at the police station – thus saving a trip to a medical facility. If a trained officer is not available, the driver may be taken to a medical facility or a qualified person may be called to the police station. A possible concern with having an officer draw the blood is that suspects could feel coerced if an authority figure such as an officer is obtaining the sample. No representative in Arizona mentioned that this had been an issue, however, the study did not include interviews with drivers arrested for DUI.

Blood samples are analyzed in laboratories operated by law enforcement agencies and are typically available in five business days.

According to representatives interviewed in the Phoenix area, refusals in that jurisdiction have dropped substantially after warrant use became widespread – from about 30 to 40 percent down to approximately 5 percent since beginning the warrant program.

⁶ Driving under the influence of alcohol or drugs

Arizona's warrant system has been challenged several times in court but none of the challenges have been successful. The Court of Appeals has ruled that law enforcement phlebotomists are qualified to draw blood.

Representatives who were interviewed generally supported the warrant program and expressed few, if any, concerns. The interviews indicated that defense attorneys have adapted to the system and typically advise clients to submit to the breath test. Juries seem comfortable with the warrant process if they hear that the officer explained clearly to the driver that a refusal will lead to a warrant and blood test.

Michigan

Some counties in Michigan have been using warrants for BAC refusals for 10 years. Most county prosecutors have policies requiring officers to obtain warrants for all BAC refusals. Each jurisdiction has policies and procedures for handling refusals and warrant cases.

After arrest, the officer will take the driver to a location where a qualified medical practitioner, such as a physician, nurse, emergency medical technician, or phlebotomist is on duty; or a qualified person is called to the police station.

If the driver refuses to submit to the test, the officer tells the driver that if he or she continues to refuse, the officer will request a warrant for a blood test. When there is a refusal, the officer completes a one-page warrant form, phones a magistrate or judge, and faxes the affidavit (some Michigan courts have a policy that a prosecutor must first review any warrant before it is sent to a magistrate or judge). All counties have a magistrate on-call at all times, and judges are available as backup. The officer is sworn in over the phone and testifies to the facts of the faxed warrant affidavit. The magistrate or judge then signs the warrant if appropriate, and faxes it back to the officer.

Generally, once a judge or magistrate has been contacted to obtain a warrant and a warrant is granted, the driver must provide a blood sample. Drivers do not have a right to call an attorney before deciding to take or refuse a test, but many officers will allow a driver to make a call. Few drivers ask to call an attorney.

Trained medical personnel draw the blood. In most agencies, an officer will transport the driver to a hospital or other medical facility where a nurse, physician, or emergency room technician (EMT) draws blood. Some larger agencies will have a phlebotomist stationed at the jail during certain times. Hospitals and medical facilities do not object to drawing blood, but often the officer and driver must wait in the admissions queue. Some hospital and medical staff have been unwilling to testify in court, or have little experience in providing effective testimony.

Most counties and some cities send blood samples to the State police crime laboratory's toxicology department for analysis. The laboratory may provide BAC test results within seven days.

Michigan's BAC test refusal rate is relatively low. Some officials noted that BAC evidence is available for most impaired driving cases, and some judges and prosecutors noted that "those who used to refuse still refuse, but now we get a warrant, a blood draw, and a BAC."

Those who were interviewed believe that the warrant system is fully accepted in their jurisdictions and noted that there have not been any challenges to the warrant process. The faxed warrant system was challenged and upheld. The judges, prosecutors, and law enforcement officers interviewed strongly supported the warrant system for BAC test refusals.

Oregon

The use of warrants for blood samples in Oregon began more recently and is in effect in a few counties. There is not a specific law that allows for forced blood draws, but Oregon's impaired driving law has been interpreted to allow for warrants and blood draws. The officer must first inform the suspect of the consequences of refusing or failing the test.

If the driver refuses the breath test, the officer uses a template to complete the warrant and either reads it over the phone or sends it by fax to the on-call prosecutor who must approve the warrant. The on-call judge is then called and the call must be recorded. The warrant is printed and signed and either taken to the judge or sent by fax. If the warrant is signed by the judge, the driver is then taken to a location where a qualified medical practitioner, such as a physician, nurse, EMT, or phlebotomist is on duty. Some of the officers who were interviewed indicated that transporting the driver for the blood draw can be a significant time investment, sometimes requiring five to six hours.

The samples are sent to the State lab for analysis. According to officials interviewed, Oregon analyzes approximately 200 blood tests each year, compared to 50,000 to 60,000 breath tests, and BAC results are available within 30 days.

The law enforcement officers who were interviewed liked the search warrant process because they believe it reduces test refusals and provides BAC test evidence, often critical in the successful prosecution of impaired driving cases. Although the process of obtaining a warrant and blood sample can add significantly to the time to process a DUI offender, officers recognized the importance of BAC evidence and those who were interviewed said they are willing to go to the effort of obtaining a warrant to help ensure a conviction. The prosecutors interviewed for this study were also supportive, as were the judges. However, some officials noted that not all judges believe that the use of warrants is appropriate for impaired driving cases. Oregon's warrants procedure has been upheld in two cases.

Utah

In the past, warrants were typically sought only in serious injury or fatality crash cases. However, as of 2006, warrants are used statewide for all categories of refusal cases, although some jurisdictions request them more often. The procedure is not statutory but is based on case law whereby a police officer swears an affidavit before a justice and can be granted a warrant to obtain a blood sample.

The officer reads to the suspect word-for-word the formal arrest and refusal admonishment on the DUI citation, including that failing to provide the requested samples may result in the forcible withdrawal of a blood sample. Depending on the jurisdiction, the officer will then contact the on-call prosecutor who contacts a judge to request a warrant, or the officer will contact the on-call judge directly. The call is recorded and the paperwork is completed later. Some counties have standard forms that simplify the procedure. Many affidavits and warrants can be faxed. If fax facilities are not available, warrants can be obtained by phone.

Once a warrant is obtained, the officer must obtain approval from a supervisor. The supervisor contacts a qualified phlebotomist to draw the sample. As of June 2006, there were 53 active State Troopers in Utah who are trained phlebotomists, and there were plans to train more. Civilian phlebotomists are also used when necessary.

The blood sample is sent to the State laboratory for analysis, and the warrant form is returned to the issuing judge or court within five days.

According to the officials interviewed for this study, the warrant system appears to operate without serious problems in Utah, and they were supportive of the trooper phlebotomist program, believing that it is less expensive and more time efficient to have troopers serve that function.

California and Nevada

These two States allow blood draws for breath test refusals without a warrant. Phone interviews were conducted with knowledgeable individuals in California and Nevada. Law enforcement officers were not contacted.

California law enforcement officers routinely obtain blood samples from drivers who refuse to provide a breath or blood sample voluntarily, and BAC evidence is available for the majority of drivers arrested for DUI. California has few breath test refusals (6% in 2005).

Nevada's law authorizes law enforcement officers to use force if necessary to obtain a blood sample. BAC evidence from a breath or blood test is available for almost every driver arrested for DUI in Nevada. The exceptions are drivers arrested in very rural areas, more than two hours away from the nearest law enforcement agency and evidential breath test instrument.

BAC Testing of Crash-Involved Drivers

NHTSA's *Initiatives to Address Impaired Driving* identified increasing testing of crash-involved drivers as one of five priority infrastructure needs. Without accurate information on the BAC levels of drivers, the ability to identify the alcohol-crash problem is compromised. Better data allows for better identification of the problem, as well as discerning trends over time. As Hedlund, Ulmer, and Northrop (2004, p. 1) noted in a review of States' BAC testing, "The most accurate data come from direct measurements of a driver's BAC from a blood or breath test. Lacking a BAC, inferences about a driver's alcohol use are derived from an investigating law enforcement officer's observations and other information. The quality of these observations varies substantially."

In 2005, the overall BAC testing rate for fatally injured drivers was 65 percent; and the testing rate for surviving drivers was 24 percent. States' testing varies widely and much of this variance is attributable to differences in laws, policies, and practices. In general, if a driver dies at the crash location, a coroner or medical examiner is responsible for obtaining a blood test. If the driver is transported to a hospital, a law enforcement officer is typically responsible for requesting a blood sample. And depending on the State, a warrant may be required. In the case of a surviving driver remaining at a crash scene, a law enforcement officer has the lead in requesting a breath test or obtaining a blood sample (again, often with a warrant).

The reasons for low testing rates vary across communities. The time and requirements for an evidential test are often disincentives for officers, coroners, or medical examiners pursuing a test, especially when there is no obvious indication that the driver is intoxicated. In other instances, the problem is not low levels of testing, but rather low levels of reporting. That is, the BAC data is obtained but then is not tested immediately because of backlogs at the laboratory, or then the result is not properly recorded or processed quickly or efficiently. Thus although a test was taken, the result is not included in the crash report submitted to NHTSA's Fatality Analysis Reporting System (FARS).⁷

For drivers transported to hospitals or trauma care departments, emergency personnel may be hesitant to obtain BACs. As Brewer noted at a national conference of emergency physicians, "Some physicians feel that PR [permissive reporting] makes them agents of the police. It may be argued that it is contrary to the traditions of the doctor-patient relationship for a physician to invoke a process which will result in criminal sanctions against a patient who, in seeking medical care, revealed an illegal condition (DUI). The physician may decide not to report the patient in order to spare him/her the personal turmoil of a criminal prosecution. Conversely, the physician may, in a spirit of retribution, report the patient in order to 'punish' him or her. For these reasons and others, the American College of Emergency Medicine has adopted a policy that opposes

⁷ NHTSA's Fatality Analysis Reporting System (FARS) is a census of fatal traffic crashes within the 50 States, the District of Columbia, and Puerto Rico. To be included in FARS, a crash must involve a motor vehicle traveling on a traffic way customarily open to the public and result in the death of a person (occupant of a vehicle or a non-occupant) within 30 days of the crash.

permissive and mandatory PR” (Brewer, 2004). Brewer also cited a study by Rehm and colleagues⁸ noting factors that decreased the likelihood of detection and prosecution, including increased distance from the crash site to hospital, severity of driver injury, lack of prior DWI convictions, and lack of passenger injuries and property damage. He also spoke of a study⁹, which found that only 7 percent of severely injured impaired drivers were charged with DWI while 33 percent of drivers with minor injuries were prosecuted. The overall prosecution rate was 28 percent.

NHTSA conducted a study to identify best practices for obtaining BAC data for drivers in fatal crashes, and for identifying barriers to obtaining BACs. The study examined States’ laws affecting BAC testing and other information on each State’s practices and results. The authors concluded that for fatally-injured drivers (Hedlund, Ulmer, Northrup, 2004):

- Mandatory testing laws for driver fatalities produce high testing rates only if the laws are understood and followed consistently. Mandatory testing laws by themselves do not assure high testing rates.
- A standard practice for medical examiners or coroners, of testing all drivers involved in fatality crashes, will produce high testing rates if the practice is both understood and followed consistently.

For surviving drivers at crash scenes:

- Mandatory testing laws for surviving drivers produce high testing rates, but these laws are not common.
- Voluntary testing programs can produce testing rates above 50 percent.
- Without either a mandatory testing law or a voluntary testing program, test rates are unlikely to exceed 35 percent and may be considerably lower.
- Rural areas may have lower testing rates for both fatally injured and surviving drivers due to lack of knowledge by coroners or medical examiners, lack of equipment or training, or long travel times to medical facilities or breath testing equipment.

For surviving drivers taken to emergency care centers:

- Law enforcement officers, medical examiners, and coroners seeking blood samples or test results need good communications and relationships with medical facilities.
- State insurance laws or regulations should not deny payment for treating intoxicated persons.

⁸ Rehm CG, Nelson J, MacKenzie D, Ross SE. Failure of the legal system to enforce drunk driving legislation effectively. *Ann Emerg Med* 1993; 22:1295-7.

⁹ Runge JW, Pulliam CL, Carter JM, Thomason MH. Enforcement of drunken driving laws in cases involving injured intoxicated drivers. *Ann Emerg Med* 1996; 27:66-72.

Conclusions

The issue of alcohol-impaired driving is complex in comparison to most other moving violations. Being stopped by an officer for impaired driving may have serious consequences for a person's life. If the officer suspects that the driver is impaired by alcohol, the driver faces an arrest, possible jail time, expensive fines and increased insurance costs, loss of the driver's license, and a criminal record. How the driver responds to the officer's request to provide breath test to determine the concentration of alcohol in the driver, will impact the course of that suspect's prosecution and may affect the resulting sanctions. It is an important decision, but one which many people do not fully understand, or the likely consequences of that decision.

A further complication is that the United States Supreme Court determined it was permissible for law enforcement to use force, if necessary, to compel an impaired driving suspect to take a BAC test (*Schmerber v California*, 1966). In response to this case, most States enacted laws allowing a driver to refuse to provide a body fluid sample for BAC testing, but the act of refusal would subject the driver to an administrative license suspension or revocation. These laws allowing drivers under arrest for impaired driving to refuse to take a BAC test are often termed *implied consent laws* suggesting the driver has consented to be tested as a condition of obtaining a driver license. Since the effect of these laws is to authorize BAC test refusal, where otherwise no such right exists, they have created the BAC test refusal problem.

There is suspicion that many DWI offenders refuse to take the BAC test in order to avoid or reduce the chance of facing criminal sanctions upon conviction for DWI; instead they may hope to receive a minor administrative license suspension for their criminal and dangerous behavior, rather than sanctions appropriate with a DWI conviction.

To examine the extent of breath test refusals, NHTSA obtained data from 37 States, the District of Columbia, and Puerto Rico. Using 2005 arrest data, State refusal rates varied from 2.4 percent in Delaware to 81 percent in New Hampshire. The average refusal rate was 22.4 percent, and the median refusal rate was 17.4 percent. The weighted mean of the refusal rates based on State populations in 2005 was 20.9 percent.

In response to many impaired driving suspects failing to provide BAC tests, some jurisdictions have implemented a promising program – obtaining search warrants to obtain a blood sample. Several States now use warrant programs to some degree. Many jurisdictions allow officers to request a warrant via phone from an on-call judge or magistrate.

NHTSA also examined the effect of refusals on the prosecution of impaired driving cases. Arrest and court data from three sites was analyzed. While these sites cannot be considered as representative of jurisdictions across the country, they offer some insight on the effects of breath test refusal on subsequent prosecution. Each of the jurisdictions studied had refusal rates below the national average in 2005 (22.4%). While the sample is too small to draw definitive conclusions, the two jurisdictions that considered refusal a separate criminal offense, allowed refusal evidence in court, and provided for conviction of both DWI and refusal, had higher conviction rates for both drivers who refused and drivers who complied with the BAC test.

Across all three sites, refusers tended to have longer average jail times and higher average fines than those who complied with the BAC test.

These results can not be generalized to the nation as a whole, but it is clear that BAC test refusal does not necessarily lead to lower conviction rates, even if the lack of BAC concentration information makes prosecution more difficult. Clearly, when refusal is a separate criminal offense, offenders are likely to be convicted on the test refusal charge and perhaps on the impaired driving charge in addition.

Missing BAC data is also a concern in terms of accurately determining the extent of impaired driving crashes. In 2005, approximately only 42 percent of drivers involved in fatal crashes were tested for BAC level. In order to obtain a more complete picture of the role of alcohol in fatal crashes, NHTSA uses statistical techniques to impute the missing BAC data to better understand the involvement of alcohol in fatal crashes (Subramanian, 2002). However, estimated values in a census type data base introduce some level of error and provide data that only partially overcomes the limitations caused by missing information.

Recommendations

This report draws from several studies examining various aspects of refusals or non-testing in cases of DWI arrests or crashes. To increase testing rates for DWI suspects and for drivers involved in fatal crashes, States should have either strong laws against test refusals, strong penalties for test refusal, or simply eliminate legal provisions that allow arrested suspects to refuse to take a BAC test. Based on the results of several studies it is recommended that:

- States should ensure that drivers are aware of the consequences of BAC test refusal.
- States should review their laws and practices to ensure that refusal to take a BAC test is a criminal offense and that the penalties are greater than those for conviction on an impaired driving offense.
- Test refusal should result in driver license suspension or revocation without provision for a restricted license except under the most extenuating circumstances. The period of suspension or revocation should be substantially greater than that provided for upon conviction for impaired-driving.
- Test refusal should be admissible during trial on an impaired driving charge and be treated as a prior impaired driving offense.
- Test refusal should result in prosecution for the test refusal and impaired driving when the evidence supports such a charge.
- Since it is highly likely repeat offenders will not be deterred by the threat of penalties, States should actively support establishment of programs by which law enforcement officers may obtain telephonic warrants for a BAC test of persons arrested for suspicion of impaired driving.
- States should review their laws and remove out-dated provisions designed to impede prosecution of impaired driving offenses. Specifically, provisions that protect criminal offenders from being held responsible for their actions by preventing law enforcement from gathering non-testimonial evidence that would support prosecution under an illegal per se statute should be reviewed to determine if they are in the best interests of public safety (i.e., so called Implied Consent Statutes).
- States should enact the necessary provisions so that all drivers in fatal and serious injury crashes are subject to a BAC test when circumstances warrant.

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DOT HS 811 098
September 2008



U.S. Department of Transportation
**National Highway Traffic Safety
Administration**

