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Brian Fussell Jr.

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Is There a Georgia Supreme Court, Problem? Analyzing the Georgia Supreme Court's New Peculiar Approach Towards Breathalyzers and Implied Consent Law*

I. INTRODUCTION

Alcohol and criminal behavior often accompany each other as anyone with any experience with the justice system (or intoxicated people in general) can attest to. A significant percentage of the population would probably say their worst decisions and mistakes came about while under the influence of booze or other intoxicants, and crime statistics would back this up.¹ Alcohol-related crime statistics in the United States compiled by AlcoRehab show around 500,000 cases of alcohol related violence every year and also demonstrate that an incredible 86% of homicides and 60% of sexual abuse or rape cases were committed under the influence of alcohol.²

Because of the common presence of alcohol in crime, for a great number of criminal prosecutions and civil lawsuits, a significant factor for the trier of fact to determine is whether the defendant was intoxicated or under the influence of alcohol at the time of his alleged crime or misdeed. In most states, law enforcement has sought to determine the amount of alcohol in a person's system through various

*To my parents, Michelle Collins and Brian Fussell, for their support and love throughout my law school career. I would also like to thank Professor Gerwig-Moore for advising me on both of my law review papers these last two years. Finally, I would like to thank all my friends, colleagues, and professors at Mercer Law School for the best three years of law school I could have hoped for.

1. See Brian Obodeze, *Alcohol and Crime: Does the Popular Drug Influence Offence Levels?*, ALCOREHAB, <https://alcorehab.org/the-effects-of-alcohol/alcohol-related-crimes/> (last visited Nov. 16, 2019).

2. *Id.*

tests of the person's breath, blood, or urine.³ In many jurisdictions, the purpose of such tests is to ascertain the ratio of alcohol to blood in a person's body because certain presumptions as to intoxication arise from certain alcohol to blood ratios. Although both blood and urine samples may be tested in order to determine the presence of alcohol in the blood of a suspect, and such tests are in fact conducted on occasion by the police, the use of air (or breath) samples has developed as the most common method of determining the amount of alcohol in a person's system.⁴ Breath tests are prevalent because they are less obstructive and unobtrusive when compared to other methods, and provide for immediate results. A person, simply by blowing or breathing into certain equipment, can provide a sample of the air in his body. Then an analysis of the air can be made and the findings can be correlated to an alcohol to blood ratio.⁵

One of the most common alcohol-related offenses is driving under the influence (DUI). Two recent decisions handed down by the Supreme Court of the United States and the Georgia Supreme Court covered the same area of law concerning constitutional rights and the scourge of drunk driving, and, not for the first time, the two courts came to opposite conclusions. What may surprise some scholars unfamiliar with DUI laws in Georgia is that the Georgia Supreme Court actually expanded constitutional protections concerning criminal rights while the Supreme Court of the United States did not.⁶ The constitutional right in question is the ancient and often thorny right governing self-incrimination by criminal defendants, memorialized in the Fifth Amendment to the United States Constitution⁷ and Article 1, Section 1, Paragraph XVI of the Georgia Constitution.⁸

3. See, e.g., *Brown v. State*, 893 So. 2d 1274, 1277 (Ala. Crim. App. 2004) (holding that under Alabama law defendant had consented to having a sample of his blood taken for the purpose of determining the alcohol content in body); *State v. Bodden*, 877 So. 2d 680, 689 (Fla. 2004) (stating that urine testing was less intrusive than blood testing and less complex than breath testing); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2165 (2016) (stating that "breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests.").

4. *Three Types of BAC Testing*, BACTRACK.COM, <https://www.bactrack.com/blogs/expert-center/35043461-three-types-of-bac-testing> (last visited Nov. 16, 2019).

5. *Id.*

6. See *Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019); *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

7. U.S. CONST. amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself." *Id.*

8. GA. CONST. art. 1, § 1, para. XVI. "No person shall be compelled to give testimony tending in any manner to be self-incriminating." *Id.*

In *Elliott v. State*,⁹ the Georgia Supreme Court held that the admission of evidence consisting of a suspect's refusal to take a breathalyzer test while under the suspicion of driving under the influence violated the state constitution's prohibition against self-incrimination.¹⁰ The court in *Elliott* also further expanded the court's controversial ruling in *Olevik v. State*,¹¹ in which the court held that the right against self-incrimination applied to compelled breath tests and that a suspect's right to refuse such a test was a constitutional right. The decision in *Olevik* overruled decades of previous Georgia case law.¹² Conversely, in *Mitchell v. Wisconsin*,¹³ the Supreme Court of the United States upheld its previous rulings regarding this matter, stating that compelled blood alcohol content (BAC) tests do not violate a defendant's right against self-incrimination, and that a defendant's refusal to submit to a BAC test can be used as evidence against the defendant at trial.¹⁴

This Comment will compare and analyze Georgia law, federal law, and the law of other jurisdictions concerning their approaches to the admission of BAC tests and how such admissions relate to constitutional rights. This Comment will also consider what effect, if any, this type of law has on DUI statistics, crash statistics, and criminal prosecutions relating to alcohol. This Comment will also address the practicality of the Georgia ruling as it relates to the citizens of Georgia and the ability of law enforcement to enforce the laws of the state. The Comment will show that the Georgia Supreme Court's ruling in *Elliott* is markedly different than the majority of other states and the federal judiciary. The reasoning behind the rule, as well as the rule itself, is of new development in the state, though the court went back to common law over a century old to reach its conclusion. This Comment will also argue that the court's attempt to consolidate the realities of the present with the constitutions of the past serve primarily to confuse Georgia's citizens, frustrate its law enforcement, and fascinate its lawyers.

II. A BRIEF HISTORY OF THE RIGHT AGAINST SELF-INCRIMINATION

Upon the passage of the Bill of Rights and the adoption of the Fifth Amendment, for roughly 175 years the federal protections associated

9. 305 Ga. 179, 824 S.E.2d 265 (2019).

10. *Id.* at 179–80, 824 S.E.2d at 267.

11. 302 Ga. 228, 806 S.E.2d 505 (2017).

12. *Id.* at 246, 806 S.E.2d at 520.

13. 139 S. Ct. 2525 (2019).

14. *Id.* at 2533.

with self-incrimination were restricted to federal courts.¹⁵ States were left to come up with their own laws.¹⁶ However, in 1964 the Supreme Court of the United States held that this privilege found in federal law was applicable to the states by way of the Due Process Clause of the Fourteenth Amendment.¹⁷ Two years later, in the seminal case *Schmerber v. California*,¹⁸ the Court analyzed and limited the scope of the privilege. Schmerber, the defendant, was arrested for drunk driving, and his blood was drawn by a physician at the direction of a police officer. Analysis of the blood sample revealed an illegal level of intoxication, and the results of the test were admitted into evidence at trial.¹⁹ On appeal, the Court differentiated between compelling a suspect to produce physical evidence and giving testimony, finding the former to be allowable and coerced testimony to be unconstitutional.²⁰

While at the time of *Schmerber* the majority of states limited the privilege to testimonial compulsion, a few jurisdictions extended the sweep of the self-incrimination protection to nontestimonial evidence.²¹ Georgia provides one example. In *Aldrich v. State*,²² a suspect accused of driving a truck over a statutorily mandated weight level was convicted because he refused to drive onto a scale. On appeal, he argued that this compulsion violated his right against self-incrimination.²³ The Georgia Supreme Court ruled that this compulsion violated his constitutional right against self-incrimination, and has consistently

15. See *Barron v. City of Baltimore*, 32 U.S. 243, 246 (1833).

16. See *Ferguson v. State of Georgia*, 365 U.S. 570, 570 (1961). The Supreme Court of the United States noted with incredulity that Georgia was "apparently the only jurisdiction in the common-law world—to retain the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial." *Id.*

17. *Malloy v. Hogan*, 378 U.S. 1, 3 (1964); U.S. CONST. amend. XIV.

18. 384 U.S. 757 (1966).

19. *Id.* at 758–59.

20. *Id.* at 765. "[F]ederal and state courts have usually held that [the privilege to refuse] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.* at 764.

21. See *Davis v. State*, 31 So. 569, 571 (Ala. 1902).

The statement of witness Goldsmith that defendant declined to consent to his taking away the shoes which he (defendant) was wearing for the purpose of comparison with certain tracks supposed to have been made by defendant should have been excluded. This testimony was clearly illegal upon the principle that the accused cannot be compelled to do or say anything that may tend to criminate him

Id.

22. 220 Ga. 132, 137 S.E.2d 463 (1964).

23. *Id.* at 133, 137 S.E.2d at 464.

held since then that self-incrimination will also apply to compelled acts and compelled testimony.²⁴

III. BREATHALYZERS, REFUSALS, AND WHETHER THEY CAN BE ADMITTED INTO EVIDENCE: A SURVEY OF NOTABLE JURISDICTIONS

A. *The Peach State*

Georgia's long history of self-incrimination law mark it as a clear outlier among the other jurisdictions in the country. Indeed, Georgia prohibited defendants from testifying under oath at their own trial until 1962, while every other state had given defendants the right to testify by the end of the nineteenth century.²⁵ The setting of the decision in *Elliott* occurred, like many gripping stories involving alcohol and local law enforcement, in Clarke County, Georgia.²⁶ Andrea Elliott was stopped by a local police officer after she was observed committing several traffic violations in August of 2015.²⁷ Elliott admitted that she had been drinking earlier, and after the usual gamut of sobriety tests,²⁸ the officer arrested her. The officer then read the statutorily-mandated implied consent notice, which among other things stated that an individual's refusal to submit to a state-administered breath test might be offered as evidence of her guilt at trial.²⁹ Elliott later filed a motion

24. *Id.* at 132, 134, 137 S.E.2d at 463, 464. For other articles looking at the history of self-incrimination and DUI laws, see Kasey Youngentob, Comment, *Changing Lanes: The Criminalization of Refusal in DUI Laws*, 70 VAND. L. REV. EN BANC 121 (2017); Ronald L. Carlson & Michael S. Carlson, *Unconstitutionality and the Rule of Wide-Open Cross-Examination: Encroaching on the Fifth Amendment When Examining the Accused*, 7 J. MARSHALL L. J. 269 (2014); Mariah Haffield, Comment, *Is Warrantless Urine Testing Constitutional?—Reasonableness of Warrantless Urine Testing in Cases Involving Driving While Under the Influence of Alcohol or Drugs*, 97 NEB. L. REV. 860 (2019).

25. *Elliott*, 305 Ga. at 214, 824 S.E.2d at 289–90.

26. Clarke County is the location of the University of Georgia and is well known for its bar scene and college atmosphere. According to the website Blacksheeponline, Athens, the county seat of Clarke County, leads the nation in bars per square mile with over 97 bars in total and 127 places with a liquor license. Anna Hopkins, *A Definitive Guide to Athens Bar Hopping*, THEBLACKSHEEPONLINE (Sept. 8, 2015), <https://thelacksheeponline.com/booze/a-definitive-guide-to-athens-bar-hopping>.

27. *Elliott*, 305 Ga. at 180–81, 824 S.E.2d at 268. Specifically, Elliott failed to maintain her lane. *Id.* at 181, 824 S.E.2d at 268.

28. The officer observed several signs of impairment while administering the tests, including several obvious tells while Elliott was performing a field sobriety test. The officer also reported that he smelt alcohol during the scene. *Id.* at 181, 824 S.E.2d at 268.

29. *Id.* The pertinent language of the then implied consent notice stated:

Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing,

to suppress the breath test at trial, arguing that the introduction of such evidence would violate her rights involving self-incrimination under the Georgia Constitution. The trial court denied this motion,³⁰ while the Georgia Supreme Court overruled the trial court.³¹

The Georgia Supreme Court based its decision on its previous ruling in *Olevik* and its interpretation of the Georgia Constitution.³² The court explained that it interprets the Georgia Constitution based on the original public meaning of the constitutional provision at the time the constitution was ratified, the latest being the 1983 Georgia Constitution.³³ Paragraph XVI bars self-incrimination by criminal defendants and was first ratified in the Georgia Constitution of 1877.³⁴ The Supreme Court of Georgia ruled in *Olevik* that the incrimination clause applies to both incriminating acts as well as testimony, based on the presumption of constitutional continuity, the rulings of two Georgia Supreme Court cases around the same time, and the fact that the clause has not changed since 1887. Therefore, a citizen could not be forced to submit to a breathalyzer test.³⁵ The court's ruling in *Olevik* on the issue overruled decades of previous Georgia case law.³⁶

In *Elliott*, the court upheld the *Olevik* decision, ruling that the refusal to consent to a breath test fell within Paragraph XVI, but it answered separately on whether the admission of that refusal at trial

your . . . refusal to submit to the required testing may be offered into evidence against you at trial.

O.C.G.A. § 40-5-67.1(b)(2) (2018), *declared unconstitutional* by *Elliott v. State*, 305 Ga. 179, 824 S.E.2d 265 (2019).

30. *Elliott*, 305 Ga. at 181, 824 S.E.2d at 268.

31. *Id.* at 180–81, 824 S.E.2d at 267.

32. *Id.* at 180, 824 S.E.2d at 267–68.

33. *Id.* at 181, 824 S.E.2d at 268. Unlike the United States, Georgia has had ten constitutions since the colonies first declared independence from Great Britain. *Id.* at 182, 824 S.E.2d at 268.

34. *Id.* at 182, 824 S.E.2d at 269.

35. *Olevik*, 302 Ga. at 239–41, 806 S.E.2d at 515–18. In *Olevik* the court considered two cases from this time period in order to determine the meaning of Paragraph XVI at that time and concluded based on the cases that the provision applied to incriminating acts. *See Day v. State*, 63 Ga. 668, 669 (1879); *Calhoun v. State*, 144 Ga. 679, 680–81, 87 S.E. 893, 894 (1916).

36. *See Sauls v. State*, 293 Ga. 165, 167, 744 S.E.2d 735, 737 (2013) (stating “this Court has readily acknowledged that to be permitted to refuse to submit to chemical testing is not a right of constitutional magnitude . . .”); *see also Cooper v. State*, 277 Ga. 282, 290, 587 S.E.2d 605, 611 (2003) (stating “[t]his Court has made plain that the Georgia Constitution does not protect citizens from compelled blood or breath testing or from the use of the results of the compelled testing during trial.”); *Klink v. State*, 272 Ga. 605, 606, 533 S.E.2d 92, 94 (2000).

violated the Georgia Constitution.³⁷ The court first examined the 1877 provision, reasoning that when considered in isolation, it did not clearly preclude admission of evidence that a defendant refused a blood test.³⁸ Therefore, the court considered pre-Revolution common law and subsequent developments of the common law for the proper context of the 1877 provision.³⁹ While the court's survey revealed that the pre-Revolution common law right did not forbid admissions of a defendant's refusal to self-incriminate, the court ultimately concluded, based on the development of the common law by the end of the nineteenth century, that the 1877 provision prohibited admission of a defendant's invocation of his privilege against self-incrimination.⁴⁰ Finding no subsequent developments in the last 132 years altering the original meaning of the 1887 provision, and dismissing the persuasive authority of the Supreme Court of the United States, the court concluded that admission of evidence of Elliott's refusal violated the state's constitutional protection against self-incrimination.⁴¹

While the Georgia Supreme Court's analysis in *Elliott* was extensive and covered several centuries of the law, Georgia lawyers may undoubtedly become confused if one were to research the issue more thoroughly. Georgia courts have come to several different conclusions over the years regarding the admissibility of breath test refusals, and this new position is a recent development.⁴²

37. *Elliott*, 305 Ga. at 209, 824 S.E.2d at 287.

38. *Id.* at 211–12, 824 S.E.2d at 288.

39. *Id.* at 212, 824 S.E.2d at 288 (citing *Virginia v. Moore*, 553 U.S. 164, 168 (2008)).

40. *Elliott*, 305 Ga. at 217–18, 824 S.E.2d at 291–92. The Georgia Supreme Court pointed out several cases decided around the same time of the 1877 constitutional convention which indicate this notion: *Bird v. State*, 50 Ga. 585, 589 (1874) (overturning the conviction of a defendant where the court instructed the jury that it may take into consideration the defendant's failure to make a statement in his own defense); *Loewenherz v. Merchants and Mechanics Bank of Columbus*, 144 Ga. 556, 559, 87 S.E. 778 (1916) (stating that “[w]hen the claimant in this case declined to answer the question[s] set forth above, he was merely claiming and availing himself of the privilege guaranteed in the clause of the constitution quoted”). *Id.*

41. *Elliott*, 305 Ga. at 223, 824 S.E.2d at 296. As a result of this conclusion, the court struck down both O.C.G.A. §§ 40-5-67.1(b) and 40-6-392 to the extent that they allowed evidence of this type to be introduced at trial. *Id.*

42. Another recent Georgia Supreme Court decision, *State v. Turnquest*, 305 Ga. 758, 827 S.E.2d 865 (2019), decided just after *Elliott*, confronted the issue of whether the Georgia Constitution's protection against self-incrimination requires law enforcement to warn suspects in custody of their right to refuse to perform a breath test. The court analyzed both the 1887 Georgia Constitution provision and the subsequent legal developments involving the constitutional requirement that law enforcement inform suspects of their constitutional rights. The court's analysis was identical to its procedure in *Elliott* in that sense. The court held that law enforcement officers are not required to

In *Keith v. State*,⁴³ the Georgia Court of Appeals cited and quoted word for word the contemporaneous decision of the Supreme Court of the United States in *South Dakota v. Neville*:⁴⁴ “The admission into evidence of a defendant’s refusal to submit to a blood-alcohol test does not offend the right against self-incrimination.”⁴⁵ In *Keenan v. State*,⁴⁶ the Georgia Supreme Court held that the legislature, through O.C.G.A. § 40-6-392(d) (the “implied consent”⁴⁷ statute), had decreed explicitly that evidence of a defendant’s refusal to take a blood test could be used against them at trial.⁴⁸ The court in essence avoided the constitutional question by deferring to the legislature, a common judicial exercise.⁴⁹ In *Klink v. State*,⁵⁰ later overruled by *Elliott’s* predecessor *Olevik*, the Georgia Supreme Court mandated that “[i]t is clear that the Georgia Constitution does not protect citizens from compelled blood testing or from the use of the results of compelled blood testing at trial.”⁵¹ Finally, just last year, the Georgia Court of Appeals found no difference between the admission of evidence of a defendant’s refusal to take a state-administered chemical test and the refusal to take an “Alco-sensor”⁵² preliminary breath test, stating that either are admissible at trial.⁵³

inform suspects of these rights before undertaking a breath test. *Id.* at 762–69, 827 S.E.2d at 870–74.

43. 173 Ga. App. 462, 326 S.E.2d 826 (1985).

44. 459 U.S. 553 (1983).

45. *Keith*, 173 Ga. App. at 462, 326 S.E.2d at 827 (internal punctuation omitted).

46. 263 Ga. 569, 436 S.E.2d 475 (1993).

47. Implied Consent Law.

A statute establishing a presumption that the operator of a motor vehicle implicitly consents to having a chemical test administered to determine blood alcohol content, as long as the police have reason to believe that the person is intoxicated or otherwise under the influence. When the operator is unconscious, the police may rely on such a statute to justify taking a blood sample without a court order.

Implied Consent Law, BLACK’S LAW DICTIONARY (11th ed. 2019).

48. *Keenan*, 263 Ga. at 571, 436 S.E.2d at 476.

49. *Id.* (stating “[t]he legislature grants the right and determines its nature.”).

50. 272 Ga. 605, 533 S.E.2d 92 (2000).

51. *Id.* at 606, 533 S.E.2d at 94 (citing *Allen v. State*, 254 Ga. 433, 434, 330 S.E.2d 588, 589 (1985)).

52. Alco-Sensor. “The tradename of a handheld device that police use as a preliminary breath test to determine whether a driver has consumed alcohol.” *Alco-Sensor*, BLACK’S LAW DICTIONARY (11th ed. 2019).

53. *MacMaster v. State*, 344 Ga. App. 222, 230, 809 S.E.2d 478, 485–86 (2018).

B. The Supreme Court of the United States' View

Scarcely four months after the *Elliott* decision, the Supreme Court of the United States once again upheld, in *Mitchell v. Wisconsin*, that a defendant's refusal to submit to a blood test may be used against the defendant in court without violating the Fifth Amendment.⁵⁴ The Court was affirming its previous ruling on the matter in the seminal case *South Dakota v. Neville*, decided over thirty years ago. The case concerned the legal exploits of a Madison, South Dakota man who failed to yield at a stop sign and was subsequently arrested when he exhibited behaviors obviously indicative of drunkenness.⁵⁵ Mr. Neville subsequently sought to suppress the evidence of his refusal to submit to a blood test, and both the circuit and the Supreme Court of South Dakota granted the motion.⁵⁶ Since several other jurisdictions had found no Fifth Amendment violations in this type of situation while others had reached the opposite conclusion, the Supreme Court granted certiorari.⁵⁷

The statute at question in *Neville* was very similar to the Georgia implied consent statute ruled unconstitutional in *Elliott*. South Dakota Code § 32-23-10.1⁵⁸ explicitly states that a suspect's refusal to submit to a blood-alcohol test "may be admissible into evidence at the trial."⁵⁹ The Supreme Court began its analysis by stating that "[m]ost courts applying general Fifth Amendment principles to the refusal to take a blood test have found no violation of the privilege against self-incrimination."⁶⁰ The Court chose to base its decision by determining whether the choice between submitting to a test or having a refusal being used against a suspect in court was so "painful, dangerous, or severe" that a suspect would prefer to confess, thereby

54. *Mitchell*, 139 S. Ct. at 2533.

55. *Neville*, 459 U.S. at 554–56. Neville stumbled and fell when he exited the vehicle, informed the police that his license was suspended due to a previous DUI arrest, failed several field sobriety tests, and upon being asked to take a blood alcohol test informed the officers present "I'm too drunk, I won't pass the test." *Id.*

56. *Id.* at 553. Though the evidence was admissible at trial according to the South Dakota statute, the South Dakota Supreme Court held the statute to be in violation of the privilege against self-incrimination. *Id.*

57. *Id.* at 558.

58. S.D. CODIFIED LAWS § 32-23-10.1 (2019).

59. *Id.*; *Neville*, 459 U.S. at 556.

60. *Neville*, 459 U.S. at 560. The Supreme Court notably referred to, but ultimately did not rest its decision on, Judge Traynor's influential opinion in *People v. Sudduth*, 421 P.2d 393 (Cal. 1966), where the California Supreme Court held that a refusal of this sort was a physical act and not a communication and was therefore not protected. *Id.* at 560–61.

producing unconstitutional coerced testimony.⁶¹ Determining that a simple blood-alcohol test was “safe, painless, and commonplace” while at the same time acknowledging that the choice may not be easy for a suspect to make, the Court ultimately concluded that a refusal is not protected by the self-incrimination protections of the Constitution.⁶²

The appellant then made a due process argument, stating that the admission at trial of his refusal violated due process because, during his confrontation with law enforcement, he had not been fully warned of the consequences of a refusal.⁶³ The grounds of his argument were rooted in *Doyle v. Ohio*,⁶⁴ in which the Court ruled that the Due Process Clause prohibited the state from using a defendant’s silence after *Miranda* warnings to impeach his trial testimony.⁶⁵ The Court based its reasoning in *Doyle* on the limited probative value of the evidence as well as the ironic unfairness of assuring a suspect that their silence would not be used against him, and then using his silence against him at trial by impeaching his testimony.⁶⁶ The Court distinguished the situation in *Doyle* from the present case by describing the right to silence as constitutional in nature while the right to refuse an alcohol test as a boon granted by the South Dakota legislature.⁶⁷ Further, while the right to remain silent contained a guarantee that no harm would come of exercising the right, the South Dakota statute specifically stated that to refuse would carry penalties such as the loss of a license, even though the police did not mention an evidentiary penalty.⁶⁸ The Court concluded its opinion by stating that the admission of refusal did not violate due process, and thus solidified the judiciary’s typical approach to this question for the next thirty plus years.⁶⁹

One of the courts influenced by the Supreme Court of the United States’ decision was the Georgia Court of Appeals the same year. In *Wessels v. State*,⁷⁰ a Cobb county defendant convicted of DUI appealed the decision of the trial court to deny his motion for a mistrial due to the admission of evidence of his refusal to take an alcohol test, citing

61. *Id.* at 563 (referring to *Schmerber*, 384 U.S. at 765).

62. *Neville*, 459 U.S. at 564–65.

63. *Id.* at 564.

64. 426 U.S. 610 (1976).

65. *Id.*

66. *Neville*, 459 U.S. at 565.

67. *Id.*

68. *Id.* at 565–66.

69. *Id.*

70. 169 Ga. App. 246, 312 S.E.2d 361 (1980).

the constitutional protection against self-incrimination.⁷¹ The court began its analysis by immediately citing to the decision in *Neville* from earlier in the year. Though the court agreed with the defendant “that the Georgia Constitution affords more protection from self-incrimination than does the United States Constitution,” the court ultimately was persuaded by the Supreme Court.⁷² The court concluded that where a suspect has been informed of his rights, a refusal to submit to a test is not the product of coercion, but one of two options provided by the state as a product of the informed consent statute,⁷³ which at the time was O.C.G.A. § 40-5-55.⁷⁴

Neville has also been cited positively by the Supreme Court of the United States in two subsequent decisions within the last few years regarding the admission of BAC test refusals. In *Missouri v. McNeely*,⁷⁵ Justice Sotomayor cited to *Neville* and stated that “most States allow the motorist’s refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution” in an effort to demonstrate the wide variety of methods the states use to curtail drunk driving.⁷⁶ In *Birchfield v. North Dakota*,⁷⁷ the Court held a North Dakota statute that criminally punished suspects for refusing to submit to a blood test based on implied consent laws to be unconstitutional, while at the same time stating that “[o]ur prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.”⁷⁸

C. The Other Eleventh Circuit States

1. Florida

Like a lot of jurisdictions, Florida allows a suspect’s refusal to submit to alcohol tests to be admitted in court by statute. Florida Statute § 316.1932⁷⁹ makes up the sunshine state’s extensive and broad implied consent law, and the statute explicitly states “[t]he refusal to submit to

71. *Id.* at 246, 312 S.E.2d at 361–62.

72. *Id.* at 246–47, 312 S.E.2d at 362.

73. *Id.* at 247, 312 S.E.2d at 362.

74. O.C.G.A. § 40-5-55 (2019).

75. 569 U.S. 141 (2013).

76. *Id.* at 161.

77. 136 S. Ct. 2160 (2016).

78. *Id.* at 2185 (stating in reference to these types of laws: “Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.”).

79. FLA. STAT. § 316.1932 (2019).

a chemical or physical breath test upon the request of a law enforcement officer . . . is admissible into evidence in any criminal proceeding.”⁸⁰ Despite the statute, the Florida Supreme Court has previously addressed the issue in the context of constitutional protections against self-incrimination.⁸¹ In *State v. Taylor*,⁸² the defendant was arrested for DUI in St. Petersburg and moved to suppress the evidence of his refusal to submit to sobriety tests at trial.⁸³ On appeal, the Supreme Court of Florida applied and cited to the same rationale used by the Supreme Court of the United States in *Neville*, and stated that the use of this evidence at trial did not violate either the federal or state constitutions.⁸⁴

2. Alabama

Alabama, like its fellow Eleventh Circuit sisters Georgia and Florida, sought to deal with the problem of drunk drivers and evidentiary issues arising from police stops by passing an implied consent statute. Alabama Code § 32-5-192⁸⁵ imposes a ninety-day suspension of a suspect’s driver’s license if the suspect refuses to take an alcohol test, and the yellowhammer state went even further by also designating anyone found “dead, unconscious or . . . otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent.”⁸⁶ The statute does not explicitly mention whether evidence of a defendant’s refusal is admissible at the statutorily created hearing concerning the suspension of a suspect’s license, but in *Hill v. State*⁸⁷ the Alabama Supreme Court addressed the issue.⁸⁸ The Georgia Supreme Court referenced *Hill* in *Elliott*, where the Georgia bench declined to follow its sister jurisdiction in a rather condescending manner, stating: “the decisions of sister states cannot change the meaning of a preexisting provision of the Georgia Constitution . . . [the *Hill* Court] that altered course did so without any meaningful analysis.”⁸⁹

80. FLA. STAT. § 316.1932(1)(a)(1)(a) (2019).

81. *See, e.g.*, *State v. Taylor*, 648 So. 2d 701 (Fla. 1995).

82. 648 So. 2d 701 (Fla. 1995).

83. *Id.* at 703.

84. *Id.* at 704; FLA. CONST. art. 1, § 9.

85. ALA. CODE § 32-5-192 (2019).

86. ALA. CODE § 32-5-192(b) (2019).

87. 366 So. 2d 318 (1979).

88. *Id.* at 320.

89. *Elliott*, 305 Ga. at 201, 824 S.E.2d at 281.

While the Alabama Supreme Court did struggle with this question, it would be careless to label its analysis meaningless. Like its fellow members of the Eleventh Circuit, Alabama's state constitution provides that a criminal defendant "shall not be compelled to give evidence against himself."⁹⁰ In *Hill*, the court needed to determine whether the difference in wording in the Alabama constitution and the United States Constitution sections dealing with self-incrimination meant the Alabama protections were broader. The Alabama constitution protects against all, in general, "evidence" while the United States Constitution only protects against self "testimony."⁹¹ This question of semantics, as previously stated, was addressed by the Supreme Court of the United States in *Schmerber*, where the Court distinguished between the compulsion of communications and testimony and the compulsion of acts which lead to real, physical evidence.⁹² Justice Brennan, writing the majority for a split court, concluded the scope of the privilege did not extend to those coerced acts that produce real evidence in the defendant *Schmerber's* case, blood.⁹³ In *Hill*, the Alabama Supreme Court noted this difference in wording, but, relying on its previous ruling in *Hubbard v. State*,⁹⁴ in which the court concluded that the two Constitutions would be interpreted synonymously in this area, ultimately concluded that *Schmerber* controlled and the evidence was admitted.⁹⁵

D. The Other Federal Courts of Appeal

The United States Courts of Appeal have rarely addressed this area of criminal evidence law, given the Supreme Court's ruling on the matter in *Neville*, and the United States Court of Appeals for the Eleventh Circuit has yet to address the issue. Unsurprisingly, the vast United States Court of Appeals for the Ninth Circuit addressed the issue in the context of the Fifth Amendment to the United States Constitution in a rare appeal from the District Court of Alaska.⁹⁶ In *Deering v. Brown*,⁹⁷ an Alaska state trooper arrested defendant Deering for DUI. When he refused to take a breathalyzer, he was charged not only for driving while intoxicated (DWI) but also for the separate

90. ALA. CONST. art. 1, § 7.

91. *Hill*, 366 So. 2d at 321–22.

92. *Schmerber*, 384 U.S. at 761.

93. *Id.*

94. 215 So. 2d 261 (Ala. 1968).

95. *Hill*, 366 So. 2d at 322; *Hubbard*, 215 So. 2d at 266.

96. *See Deering v. Brown*, 839 F.2d 539 (9th Cir. 1988).

97. 839 F.2d 539 (9th Cir. 1988).

criminal offense of refusing to take a breathalyzer test.⁹⁸ Alaska Statute § 28.35.032(g)⁹⁹ makes such a refusal a criminal misdemeanor with a minimum punishment of three days in jail, the implementation of an ignition-interlock device¹⁰⁰ for six months, and a fine for \$1500.¹⁰¹ In a question of first impression for all of the federal circuit courts, the Ninth Circuit examined whether the *Neville* rationale could be applied to a statute that imposed criminal penalties rather than civil.¹⁰² This was a novel question, as at the time, only Alaska and New York imposed criminal penalties for refusing to take a breathalyzer.¹⁰³

On appeal, Deering attempted to convince the court that the effect of Alaska criminalizing refusals to submit to breathalyzer tests was to convert the evidence from non-testimonial to communicative or testimonial under the *Schmerber* and *Neville* line of analysis.¹⁰⁴ Essentially, Deering's argument was that refusing to submit to a breath test in ordinary circumstances amounted to mere evidence of impropriety. On the other hand, where a refusal to submit amounted to a criminal violation, the suspect would be coerced into choosing either to take the test or "outright confess[] . . . guilt"¹⁰⁵ The Ninth Circuit, while stating that Deering's argument was "appealing at first blush," ultimately concluded the conversion of the refusal from evidence to an element of a crime did not transform the right itself.¹⁰⁶ The court likened the Alaska statute to criminal contempt laws for violating court orders to produce physical evidence, a situation where the court previously had ruled that no constitutional right to refuse the order existed.¹⁰⁷ The court also found that the refusal was not "compelled" although it did "acknowledge that the choice in this case appears more coercive than that in *Neville*."¹⁰⁸

98. *Id.* at 541.

99. ALASKA STAT. § 28.35.032(g) (2019).

100. Ignition-interlock device:

A device installed in a motor vehicle to determine the driver's blood alcohol content before the vehicle can be started and to prevent its being started if the blood alcohol level registers as being above the acceptable limit. In some jurisdictions, those convicted of DWI must bear the expense of installing such a device as a condition of being able to have a driver's license.

Ignition-interlock device, BLACK'S LAW DICTIONARY (11th ed. 2019).

101. ALASKA STAT. § 28.35.032(g)(A) (2019).

102. *Deering*, 839 F.2d at 540.

103. *Id.* at 540 n.2.

104. *Id.* at 541.

105. *Id.* at 541–42.

106. *Id.* at 542.

107. *Id.* (citing *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975)).

108. *Deering*, 839 F.2d at 542–43.

The only other Circuit to address this issue happens to be the only other Circuit that Georgia courts may view as less persuasive than the Ninth Circuit: the United States Court of Appeals for the Second Circuit covering the states of New York, Vermont, and Connecticut. In *Welch v. District Court of Vermont*,¹⁰⁹ the defendant was convicted in a Vermont state court of DUI and, pursuant to Title 23 of the Vermont Statutes Annotated § 1205,¹¹⁰ at trial the prosecution admitted evidence of the defendant's refusal to submit to a breathalyzer test over Welch's objection.¹¹¹ The issue on appeal was whether the defendant's refusal to furnish his "breath" constituted testimonial evidence under *Schmerber* as distinguished from the actual real evidence (the "breath" in and of itself) which the defendant accepted as physical evidence under *Schmerber*.¹¹²

While not addressed directly, as the defense counsel had failed to object at trial, in *Schmerber*, dicta in the majority opinion indicated the prosecution "may have to forego the advantage of any Testimonial products in administering the test."¹¹³ This was due to concerns that suspects may reveal incriminating statements or speak confessions brought about due to the possible dread suspects may face because of the potential fear the test may be painful or due to religious opposition.¹¹⁴ Here, the Second Circuit determined there was no evidence that Welch refused because of anxiety or religious views; indeed, the record showed that he never gave the police a reason for his refusal.¹¹⁵ Welch, in the alternative, contended that Vermont's statutorily-created right to refuse to take a chemical test distinguished his case from prior cases where this type of evidence was admitted because a refusal would punish him for simply exercising his rights under the law.¹¹⁶ The Court also dismissed this argument stating that the right to refuse was reciprocal to the statute allowing the evidence to be admitted at trial, and holding that Welch could not contend he was surprised his right to refuse was qualified.¹¹⁷

109. 594 F.2d 903 (2d. Cir. 1979).

110. VT. STAT. ANN. tit. 23, § 1205 (2019).

111. *Welch*, 594 F.2d at 903.

112. *Id.* at 904.

113. *Id.* at 904 (quoting *Schmerber*, 384 U.S. at 765 n.9).

114. *Id.* at 904.

115. *Id.*

116. *Id.* at 904–05.

117. *Id.* at 905.

E. Other Southern States

In terms of jurisdictions that may be more persuasive to Georgia courts than the Ninth and Second Circuits (i.e. those well below the Mason-Dixon Line) the Supreme Court of Mississippi followed the decision in *Neville* in *Ricks v. State*,¹¹⁸ concluding that evidence of a suspect's refusal to take a breath test did not violate the Fifth Amendment, Art. 3, § 26 of the Mississippi Constitution of 1890,¹¹⁹ and Mississippi Rule of Evidence 402,¹²⁰ finding no reason to interpret the scope of the Mississippi Constitution more broadly in this area.¹²¹ Similarly, South Carolina's implied consent statute § 56-5-2950¹²² allows a person's refusal to be used against the person in court and it has never been overturned by the palmetto state's higher courts.¹²³ Finally, Tennessee does not explicitly state in its implied consent statute that this type of evidence is admissible, but the courts of Tennessee have consistently ruled that this type of evidence will be allowed.¹²⁴ In *State v. Wright*,¹²⁵ the Tennessee Court of Criminal Appeals followed the Supreme Court's decision in *Neville* and declared that the courts of the state had "laid to rest this issue."¹²⁶

IV. ANALYSIS

A. The Scourge of Drunk Driving, Statistics, and Public Policy Concerns

The pestilence of drunk driving has galvanized the public and policy leaders in this country for decades, especially in the last twenty years or so. Indeed, many nonprofit organizations and charities formed solely to combat drunk driving have become household names, such as Mothers Against Drunk Driving (MADD) and the Governor's Highway Safety Association (GHSA). The public is constantly assaulted with billboards, television commercials, and public service announcements

118. 611 So. 2d 212 (Miss. 1992).

119. MISS. CONST. art. 3, § 26.

120. M.R.E. Rule 402 (2019). This rule states all relevant evidence is admissible in Mississippi unless it is prohibited by the federal and state constitution or the Mississippi Rules of Evidence. *Id.*

121. *Ricks*, 611 So. 2d at 214–16.

122. S.C. CODE ANN. § 56-5-2950 (2019).

123. S.C. CODE ANN. § 56-5-2950(B)(1) (2019).

124. *See State v. Wright*, 691 S.W.2d 564, 565–66 (Tenn. Crim. App. 1984); *State v. Smith*, 681 S.W.2d 569, 570 (Tenn. Crim. App. 1984).

125. 691 S.W.2d 564 (Tenn. Crim. App. 1984).

126. *Wright*, 691 S.W.2d at 566.

decrying the evils of drunk driving in a manner comparable to the height of the war on drugs in the eighties and early nineties, in which the entire entertainment industry, from arcades to Saturday morning cartoons, implored a generation of children to say no to drugs. The reasons for these measures is the hard fact that every day in the United States, on average thirty people die in drunk driving crashes, about one person every forty eight minutes in 2017, according to the National Highway Traffic Safety Association.¹²⁷ Due to the strict enforcement of drunk driving laws, this number has dropped by a third in the past three decades; however, drunk driving accidents still claim more than 10,000 lives per year in the United States.¹²⁸ According to the most recent year for which available data exists, the death and damages from these accidents cost 44 billion dollars in 2010.¹²⁹

The most common alcohol-related crime in the United States is still driving under the influence, despite stricter laws, and on average around 10,000 people every year are involved in road collisions due to the influence of alcohol.¹³⁰ An additional 1.4 million are arrested for driving while drunk.¹³¹ According to the National Highway Traffic Safety Administration, in 2017, 10,874 people were killed in an alcohol-impaired driving incident, which again results in an average of about thirty fatalities per day.¹³² And in Georgia, statistics by the Governor's Office of Highway Safety reported that 24–25% of all crash fatalities involved some level of alcohol impairment between 2012 and 2016 and that an average of 319 people per year died because of alcohol related crashes during this five-year period.¹³³ These statistics show that drunk driving is clearly something both the federal and state governments should feel compelled to address.

In response to these numbers, every state legislature in the Union has passed some type of implied consent statute and increased the

127. *Drunk Driving: Overview*, NATIONAL HIGHWAY SAFETY TRAFFIC SAFETY ADMINISTRATION, <https://www.nhtsa.gov/risky-driving/drunk-driving> (last visited Nov. 15, 2019).

128. *Id.*

129. *Id.*

130. Obodeze, *supra* note 1.

131. *DUI Statistics*, BACTRACK.COM, <https://www.bactrack.com/blogs/expert-center/35040645-dui-statistics> (last visited Oct 28, 2019). “Unfortunately, that astonishing figure represents just 1% of the 112 million adults in the U.S. who self-report episodes of alcohol-impaired driving each year.” *Id.*

132. *Quick Facts 2017*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, (July 2019) <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812747>.

133. *Alcohol Statistics*, GOVERNOR'S OFFICE OF HIGHWAY SAFETY IN GEORGIA, <https://www.gahighwaysafety.org/research/alcohol-statistics/> (last visited Oct 28, 2019).

harshness of their intoxicated driving penalties in order to deter this type of behavior. On the whole, these measures can be viewed as successful to an extent given the drop in fatalities over the past couple of decades and the social stigma now associated with drinking and driving that did not exist with previous generations. However, in the rush to combat drunk driving, as with any crisis, it is important to step back and properly acknowledge and safeguard the constitutional protections guaranteed to every citizen. Society must balance the interests of combating drunk driving with the constitutional protections against self-incrimination, unreasonable searches and seizures, overbroad statutes, and equal treatment under the law.

There is no societal benefit to drunk driving, and given the fact that the country has long struggled with the question of alcohol in our society, as both the Eighteenth¹³⁴ and Twenty-First Amendment¹³⁵ can attest to, the constitutional protections associated with the prosecution of drunk drivers seem less important than other criminal proceedings and fundamental rights in general. This line of thinking ignores the bare facts of the matter; the total economic impact of the beer, wine, and spirits retail industry in the United States is estimated to total \$363.33 billion annually, a figure which represents 1.65 percent of the U.S. economy based on total gross domestic product.¹³⁶

Americans enjoy their intoxicating liquids. According to the 2017 National Survey on Drug Use and Health (NSDUH), 86.3 percent of people ages 18 or older reported that they drank alcohol at some point in their lifetime; 70.1 percent reported that they drank in the past year; 55.9 percent reported that they drank in the past month.¹³⁷ Alcohol is a blatant fact of society that the country has tried and failed to prohibit in the past. A balance then must be struck between battling the evils of drunk driving and upholding the constitutional protections of those so convicted in a society where alcohol is so prevalent. An essential component of this balance is the need for clarity, uniformity, and unambiguity with regards to the laws surrounding this issue. The

134. U.S. CONST. amend. XVIII (repealed 1933). The Eighteenth Amendment established the prohibition of “intoxicating liquors.” *Id.*

135. U.S. CONST. amend. XXI. The Twenty-First Amendment repealed Prohibition, and remains the only amendment that repealed a prior Amendment. *Id.*

136. AMERICAN BEVERAGE LICENSEES, *America’s Beer, Wine & Spirits Retailers Create 2.03 Million Jobs & \$122.63 Billion in Direct Economic Impact*, (Oct. 23, 2018), <https://www.ablusa.org/americas-beer-wine-spirits-retailers-create-2-03-million-jobs-122-63-billion-in-direct-economic-impact/>.

137. *Alcohol Facts and Statistics*, NATIONAL INSTITUTE OF ALCOHOL ABUSE AND ALCOHOLISM, <https://www.niaaa.nih.gov/alcohol-facts-and-statistics> (last visited Oct. 28, 2019).

recent decision in *Elliott* by the Georgia Supreme Court does not achieve any of these objectives.

B. The Georgia Supreme Court Opens Pandora's Box

To use the Georgia Supreme Court's own words in Justice Boggs's concurrence, "statements in the implied consent notices . . . are likely to become problematic in future cases as a result of *Olevik* or the Court's decision today."¹³⁸ In effect, the court completely called into question the entirety of the implied consent statute, and prosecutors and police were left wondering how to reconcile the new caselaw with established practices. The statutorily mandated implied consent notice before *Elliott* used to require officers to state that a refusal to submit to a breath test may be offered into evidence at trial. After *Elliott*, this statement was called into question, as was any consent to a breath test since the then-current implied consent warning contains language that *Elliott* had found to be unconstitutional. Officers and State prosecutors were left in a bind; should they omit this version of the notice? If a well-meaning officer did omit this part of the notice requirement, would it be proper for a lawyer to argue that this omission violates the statute, and to argue that his client's subsequent punishment or arrest was procedurally flawed? The law does require officers to read the warnings in a "substantively accurate" form.¹³⁹ Or was the statement merely perfunctory until the General Assembly changed what the officers are required to read?

Fortunately, the Georgia General Assembly took notice. As a result of the decision in *Elliott*, the Assembly quickly amended the implied consent statute to say a refusal to "submit to blood or urine testing" could be used against them at trial.¹⁴⁰ Of course this new provision

138. *Elliott*, 305 Ga. at 224, 824 S.E.2d at 296–97 (Boggs, J., concurring).

139. See *Sauls*, 293 Ga. at 167–68, 744 S.E.2d at 737.

140. O.C.G.A. § 40-5-67.1(2) (2019). The new implied consent notice for suspects twenty-one years or older reads in its entirety:

The State of Georgia has conditioned your privilege to drive upon the highways of this state upon your submission to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to blood or urine testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own

opened up its own set of confusing questions. For instance, does this mean that law enforcement should now request a test of a suspect's blood or urine at the scene? The implied consent statute makes it clear that a test should be administered as soon as possible. Should officers now assume that they should carry syringes, blood bags, and urine-testing kits instead of a relatively simple breathalyzer if the state would like to admit evidence of a refusal?

Drawing a distinction between protecting a person's "breath," based on the fact that a person self-incriminates himself by blowing into a machine and does not when the person is forced to give a urine sample or is stuck with a needle, is substantively useless. Regardless of how the sample is taken, the result is the same; a suspect is being forced to give evidence of that person's level of intoxication. If given a choice, most people would choose to simply blow into a breathalyzer. Though the Supreme Court in *Olevik* attempted to clarify that its distinction was not being made between acts that result in "testimony" (i.e. evidence that is spoken) and those that result in "physical evidence," the end result of the statute is the same as if the court had based its decision on this perplexing distinction.¹⁴¹ Semantics aside, the proposition that a person performs an incriminating act or gives testimony by breathing seems far-fetched; in that case, everyone is giving testimony every second of every day. Indeed, regardless of labels, what the citizenry and officials of Georgia have been left with is the requirement of a much more invasive and nonsensical test.

From law enforcement's perspective, having to acquire a blood or urine sample from a potential perpetrator is a much more complicated, bothersome, lengthy, and tricky process than giving a breath test. Many registered nurses and doctors have trouble drawing blood from people due to the differences in every person's circulatory system, and entire businesses are organized around the delicate and invasive process of taking urine samples. It would be preposterous to expect untrained police to perform these types of procedures, especially in the middle of a road block or along the side of a busy highway. This would mean that an officer would be forced to apprehend a suspect and transport him to a place where a professional could take the sample, such as the county jail. Arresting someone is a lot more dangerous and testier than simply requesting a breath test that can easily be performed at the scene.

choosing. Will you submit to the state administered chemical tests of your (designate which test)?

Id.

141. The new statute explicitly omits breath tests and instead states that "[y]our refusal to submit to blood or urine testing may be offered into evidence against you at trial." O.C.G.A. § 40-5-67.1.

Indeed, many drivers suspected of drinking will simply request a breath test to expedite the process.

Also, time becomes a factor in these situations, given that people eventually sober up. A person over the limit when apprehended may well drop below the illegal limit by the time the officer manages to transport him to a place where he may be tested. Given that the test has to be administered as soon as possible, does this mean that police strolling for impaired drivers need to carry along a professional who can perform the invasive and embarrassing test on the side of a public road? Or should the state spend valuable tax money to train police so that they can perform blood and urine tests? Of course not. The invention of the breathalyzer takes care of all these problems. But if the suspect refuses to take the breath test and the police would like admit the suspects BAC at the time of the arrest into evidence for a criminal trial, under *Elliott* the police would have to turn to these less efficient methods. Seeing as the most important piece of evidence to a trier of fact in a DUI case is the suspect's BAC, it is easy to see how this hypothetical could arise.

From the alleged wrongdoer's perspective, the process of giving blood or urine samples is much more meddlesome than breath tests. The drawing of blood requires the use of a needle and may result in the sight of one's own blood, two of the most common and infamous phobias in society. Indeed, as the American Red Cross can attest to, it is hard to get people to donate blood for good causes, let alone to be pricked and forced to give blood to be used as evidence against them. Due to these hardships and burdens, most jurisdictions have ruled that warrantless blood searches violate a person's constitutional rights absent some exigent circumstances.¹⁴² It is also not hard to see why someone would be unwilling to give a urine sample, given privacy and practicality concerns associated with such a test. But consider the situation of a sober driver who is suspected of driving drunk and an officer who would like to admit the results of the alcohol test into trial. The suspect must either give up his license or submit to an invasive test according to the new statute. This situation is ripe for appellate review and further confusion. If the Georgia Supreme Court would hold a breath test to be an unconstitutionally compelled incriminating act then surely a warrantless blood or urine test also would be held as unconstitutional given that the procedures are much more taxing.

So logically, it seems counterintuitive that a person's refusal to take a much more invasive test may be used against that person at trial, while a refusal to take a much easier test could not be used against the

142. See *Mitchell*, 139 S. Ct. at 2531.

person at trial. There may be very good reasons why someone would refuse to take a blood test or urine test other than concealing drunkenness. Many people suffer from blood disorders that may affect their ability to give blood such as anemia or hemophilia. Some suspects may simply fear needles and blood or, understandably, have problems being forced to provide a sample of bodily fluids. Also, imagine if a suspect were to, understandably, request a breath test as an alternative to a blood or urine test; would the results of that test be admissible at trial? Would this situation result in a test that was voluntary or coerced? The confusion surrounding this new statute that came about as a result of *Elliott* may take years to untangle.

C. Constitutional Protections Granted in Elliott are Fundamentally Toothless and Must Give Way to Overwhelming State Interests

As Justice Boggs in his concurrence attempted to clarify, some key components of the consent law were not affected by the *Elliott* decision. The main component unaffected was the provision setting up the administrative scheme in which a suspect's license can be suspended if the suspect refuses to submit to chemical testing. The concurrence also emphasized that the restriction only applied to criminal proceedings and not administrative proceedings, including the license suspension scheme found in the statute. These limitations, coupled with the General Assembly's rewording of the implied consent statute afterwards, leads to the conclusion that in practical terms, the Georgia citizenry's experience with DUI laws and police are unlikely to change fundamentally. The new implied consent law handed down by the legislature represents a rewording of semantics in order to preserve the status quo and avoid any long-term ramifications that may result from the *Elliott* decision.

It is clear throughout the *Olevik* and *Elliott* decisions that the Georgia Supreme Court went through an extensive and thorough analysis of the history of self-incrimination in Georgia in order to reach the conclusion that it did. It is not the purpose of this Comment to analyze the court's statutory and constitutional interpretation methods. The court's analysis of the admission of this type of evidence led to a conclusion that is different from every other jurisdiction. However, it ultimately based its decision on the greater protections granted by Georgia Constitution, which binds no other jurisdiction. Constitutional protections form the backbone of our civilization and should not be limited without overwhelming need. However, constitutional protections must sometimes be limited in the face of compelling governmental interest, especially when those interests substantially outweigh the right asserted.

Forcing a person to take a breath test, or upon refusal suspending the person's license and admitting the refusal into evidence, does not represent a choice between two such taxing and oppressive mandates as to render it unconstitutionally coercive. Any reasonable driver can see the reasons behind, and not object to, a simple and effortless breath test in order to prove his soberness. However, it is clear why an intoxicated driver would object, if the test registers an illegal limit the test functions as an almost certain admission of guilt.¹⁴³ As demonstrated, the carnage inflicted on the country by drunk drivers represents a compelling reason for the government to slightly diminish the right against self-incrimination in cases involving drunk driving. This conclusion can be reached without wading into the morass of the differences between testimony and physical evidence. Every state in the Union passed some type of an implied consent statute in order to combat drunk driving. The reasons behind implied consent laws have not diminished in the decades since they were first implemented. Alcohol and automobiles remain prevalent realities in society, and as long they remain, the need for straightforward and uncomplicated implied consent laws remain. Indeed, the Georgia General Assembly quickly updated the implied consent law in order to lessen confusion in this area, a minor miracle given the partisanship of modern politics.

V. CONCLUSION

Drunk driving remains a serious and costly issue in the present day. In order to address the problem of drunk driving, Georgia, like every other state, passed an implied consent law. The law stated that a driver in Georgia impliedly consents to a blood alcohol test when operating a motor vehicle, and also that a refusal could be used against them at trial. The Georgia Supreme Court in *Elliott* ruled that evidence of a breath test refusal could not be admitted against the defendant in a criminal trial as this violated the state constitution's mandate against self-incrimination. In response, the Georgia general assembly revised the implied consent law so that only the refusal of a blood or urine test could be used against them. This has resulted in a situation where a harmless and unobtrusive breath test has been disfavored and more invasive tests seem to be embraced. The constitutional rights the court upheld so zealously will have little impact on the actual conviction and sentencing of DUI suspects, given the subsequent rewording of the

143. *But see* Stacy Cowley & Jessica Silver-Greenberg, *These Machines Can Put You in Jail. Don't Trust Them*, N.Y. TIMES (Nov. 3, 2019), <https://www.nytimes.com/2019/11/03/business/drunk-driving-breathalyzer.html?smid=nytcore-ios-share>.

statute, the fact that the license suspension scheme remains intact, and the fact that the refusal of a breath test can still be admitted in an administrative proceeding. In its noble effort to uphold Georgia's citizens right against self-incrimination, the Georgia Supreme Court only set about a chain reaction that resulted in a situation of confusion and impracticability, all in the name of expanding a constitutional right which Georgia's citizens will not feel the effects of.

Brian Fussell, Jr.