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I. INTRODUCTION

Implied consent is the name given to a legal fiction often employed to obtain proof in drunk driving cases. This fiction assumes that each motorist consents to the testing of his blood for its alcohol or drug content, whether or not that person actually has consented. The legal justification behind the fiction, and the resulting legislation, is that driving is a privilege subject to the reasonable regulation of the state. In return for the use of that privilege, each motorist is deemed to have given consent to such testing. Refusal to comply with testing results in revocation of the driver's license.

Implied consent legislation was first enacted by New York in 1953. All states eventually followed the New York lead and enacted similar statutes. Today, despite a plethora of constitutional attacks and recodifications, implied consent is alive, if not well, in

1. A fiction of law is an assumption of a fact, which may or may not be true, that the law allows for purposes of justice. BLACK'S LAW DICTIONARY 562 (5th ed. 1979).
3. Id.
7. "Constitutional attacks on implied consent statutes focus on fourteenth amendment due process and fifth amendment protections from self-incrimination. The statutes have also been challenged on the basis of equal protection, fourth amendment search and seizure, sixth amendment right to counsel, and admission of evidence of refusal." See Comment, supra note 2, at 483.
8. An example of legislative efforts to deal with problems arising from implied consent statutes is presented in King & Tipperman, The Offense of Driving While Intoxicated: The Development of Statutory and Case Law in New York, 3 HOFSTRA L. REV. 541 (1975).
It is the contention of this note that implied consent in drunk driving situations is law gone awry. The intent of the legislature, concerned with the menace of the drunk driver, had been to facilitate the means by which blood alcohol, the best evidence of intoxication, could be obtained. Inadvertently, what resulted were statutes that obstructed the use of such evidence by granting more rights to drunk drivers than were constitutionally required. The problem was that tests for blood alcohol involved intrusions into the body, and the scope of constitutional limitations on such intrusions had not been clearly defined. This note examines how the development of implied consent legislation and constitutional law have remained out of sync, and suggests that the time has come for repeal, rather than recodification, of implied consent statutes. The conclusion is that implied consent legislation has actually obstructed the intent of the legislature. Such legislation has become a boondoggle and an historical snowball, doing more to keep the drunk driver on the road than it is doing to get him off the road. People v. Moselle, People v. Daniel and People v. Wolter evidence that this snowball grows larger, threatens to engulf another New York statute and set in motion further unnecessary litigation and recodification of law.

II. FACTUAL BACKGROUND

In People v. Moselle, People v. Daniel and People v. Wolter, the New York Court of Appeals found what may be another first for New York. The court held that the authorization and regulation of the taking of blood samples was foreclosed in New York unless through court-order, pursuant to legislative enactment of section 1194 of the Vehicle and Traffic Law, the implied consent statute, or

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9. See Note, supra note 6, at 935-36.
10. See King & Tipperman, supra note 8, at 549-50.
11. See infra notes 59-86 and accompanying text.
12. Id.
13. 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982). These cases were decided jointly.
17. The relevant portion of New York’s implied consent statute provides that:
section 240.40 of the Criminal Procedure Law, a discovery statute, or a similar court order. Although resolved jointly, each case represents a varying aspect of the right of the prosecution to enter into evidence the results of blood tests in an attempt to demonstrate the alcohol content of the blood. The tests were performed on blood samples taken from the respective defendants following automobile accidents involving fatalities. In each instance, blood was taken from the defendant by qualified medical personnel, without the defendant’s express consent, without court order and pursuant to instructions from a law enforcement official. The significant characteristics of each case are as follows:

In Moselle, there was no consent for the blood test, no prior arrest and no penal charge placed against the defendant. A literal

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1. Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic or drug content of his blood provided that such test is administered at the direction of a police officer.

2. If such person having been placed under arrest or after a breath test indicates the presence of alcohol in his system and having thereafter been requested to submit to such chemical test . . . refuses to submit to such chemical test, the test shall not be given.


18. The relevant parts of the New York discovery statute are as follows:

2. Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment, superior court information, prosecutor’s information or information is pending . . . (b) may order the defendant to provide non-testimonial evidence. Such order may, among other things, require the defendant to:

(i) Appear in a line-up;
(ii) Speak for identification by witness or potential witness;
(iii) Be fingerprinted;
(iv) Pose for photographs not involving reenactment of an event;
(v) Permit the taking of samples of blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto;
(vi) Provide specimens of his handwriting;
(vii) Submit to a reasonable physical or medical inspection of his body.

This subdivision shall not be construed to limit, expand, or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument consistent with such rights as the defendant may derive from the constitution of this state or of the United States.

N.Y. CRIM. PROC. LAW § 240.40(2) (McKinney 1982) (emphasis added).

19. Id. Note that the last sentence above, a caveat sentence, recognizes that a similar court order may be authorized by law in circumstances prior to discovery. See also, In re Abe A., 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982).

20. Id. at 101-03, 439 N.E.2d at 1236-37, 454 N.Y.S.2d at 293-94.

21. Id. at 101-02, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293. Defendant Moselle was involved in an auto collision on March 19, 1978, in which the driver of the other
application of the implied consent statute was used to exclude evidence of the alcohol content in the defendant’s bloodstream in a prosecution under the Vehicle and Traffic Law for driving with .10 of one per centum or more of alcohol in the blood.

In *Wolter*, blood was taken from a fully conscious defendant despite his refusal to consent, but after his arrest and advisement of his constitutional rights. His blood sample revealed an alcohol content of .23 of one percentum by weight. In addition to a charge of driving while intoxicated [hereinafter DWI] under the Vehicle and Traffic Law, Wolter was indicted under the Penal Law for second degree manslaughter and second degree assault. The New York Court of Appeals excluded his blood test results from evidence in the DWI prosecution under the authority of subdivision 2 of the implied consent statute, and did the same in the criminal prosecution under the authority of section 240.40 subdivision 2 of the Criminal Procedure Law.

In *Daniel*, the defendant was in a semi-conscious state, was not under arrest and was not asked for consent at the time the blood sample was taken. He regained full consciousness while blood was being drawn and, hence, neither consented nor refused to give the vehicle, Paul Barrett, subsequently died from the injuries sustained. Both drivers were transported by ambulance to the hospital. At the hospital, Sergeant Caffery of the Erie County Sheriff’s Department, noted alcohol on Moselle’s breath and directed a physician to take a blood sample. The test was taken although Moselle had not been arrested nor had his consent been sought for the test. Id.

22. Subdivision 2 of section 1194 of the New York Vehicle and Traffic Law provides that the presence of either of two prerequisites, an arrest or a positive breath test for the presence of alcohol, will authorize the taking of a chemical blood test. Despite the presence of either prerequisite, however, the statute provides that if the defendant refuses to submit to the test that it shall not be given. N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1982-1983).


24. *Id.* at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294. Defendant Wolter was involved in a head-on collision on January 7, 1980, in which the operator of the other vehicle was killed instantly. An investigating Sheriff’s deputy detected an order of alcohol on Wolter before he was transported to the hospital. At the hospital the deputy arrested the defendant, advised him of his constitutional rights and of the prescriptions of the implied consent statute, whereupon Wolter refused to consent to a blood test. After a phone conversation with the local District Attorney, the deputy directed a physician to draw a blood sample. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 109, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.

28. *Id.* at 103, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293. On October 20, 1979, defendant Daniel operated a van which collided with two other motor vehicles. A passenger in one of those vehicles was killed. Investigating officers found a half full bottle of beer on the van console and two empty bottles on the dashboard. The defendant was
blood sample. Subsequent analysis found .22 of one per centum of alcohol in his blood. These results were excluded from evidence in a criminal prosecution for criminally negligent homicide. Once again the court used section 240.40 subdivision 2 of the Criminal Procedure Law as authority for the exclusion.

In summary, these cases presented the court with two significant issues. The first question was whether the results of blood tests for alcohol content could be used in Vehicle and Traffic Law prosecutions when the statutory prerequisites, namely arrest or positive breath test analysis, had not been met, or having been met, could the results be used when the defendant had refused his consent to the test. These were the questions in issue in the Moselle and Wolter prosecutions. The second question was even if not admissible in a Vehicle and Traffic Law prosecution, could the results of blood tests be used in a subsequent criminal prosecution, when there was neither consent, statutory authority, nor a court order for the taking of the blood sample. This query was posed in both the Daniel and Wolter cases. The majority answered both questions in the negative. Their decision was premised on statutory and non-constitutional principles, and, as a result they found it unnecessary, to consider any constitutional arguments. Their conclusion was that there was "[n]o room . . . left for the taking of blood samples otherwise than pursuant to a court order issued under CPL 240.40 or a court order otherwise authorized by law or in conformity with § 1194." The negative inference is that the taking of blood samples to obtain evidence of intoxication is foreclosed in New York other than by court order, and particularly as provided by these two statutes.

III. ANALYSIS

A. Due Process and the Literal Application of Implied Consent:

People v. Moselle

New York law advises that "[t]he primary consideration of the

transported to the hospital where police requested that a blood sample be taken. Id. at 102-03, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.
29. Id. at 103, 439 N.E.2d at 1236, 454 N.Y.S.2d at 293.
30. Id.
31. Id. at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.
32. Id. at 108-09, 439 N.E.2d at 1239-40, 454 N.Y.S.2d at 296-97.
33. Id. at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.
34. Id.
35. Id. at 110, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.
36. See id.
courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature,"37 and that "[t]he intention of the Legislature is first to be sought from a literal reading of the act itself . . . ."38 Moselle turns on the verbatim provision of subdivision 2 of section 1194.39 That section authorizes the administration of chemical blood tests only after an arrest or after a breath test indicates the presence of alcohol.40 Since neither of these prerequisites were met in Moselle, the statute gave no authority to take the blood sample. Use of the test results was, therefore, inadmissible evidence.41

The court in Moselle simply applied the implied consent statute as the legislature wrote it and should not be faulted. The potent question is whether the written law reflects the intent of the legislature. That is, does it accomplish what the legislature set out to do? There are two relevant determinations in this regard. First, what was the legislative intent? Did the legislature deliberately design to afford drunk drivers more protection than the Constitution?42 Second, was the blood taken in Moselle extracted in a constitutionally permissible fashion, even though prohibited by the implied consent statute? Careful analysis leads to the conclusion that the seizure of blood in Moselle was within constitutional bounds,43 and that the express language of the implied consent statute prohibiting admittance of the blood test results into evidence was not the result of a legislative desire to render greater protection than constitutionally provided. It was, rather, a boondoggle, accomplishing less protec-

37. N.Y. Statutes § 92(a) (McKinney 1971).
38. Id. § 92(b).
40. See supra note 17.
41. See Moselle, 57 N.Y.2d at 107, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296; see also id. at 111, 439 N.E.2d at 1241, 454 N.Y.S.2d at 298 (Jasen, J., dissenting).
42. Since the court found no occasion to consider constitutional arguments and premised its decision on statutory grounds, id. at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294, by implication the Moselle court must have interpreted the statute as conferring more protection than the constitution required. States are free to provide for more protection than the constitution requires, but not less. Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 81 (1980) (citing Cooper v. California, 386 U.S. 58, 62 (1967)). If the statute had provided for less protection than required by the constitution, the court would have had occasion to reach constitutional arguments. If it provided for simply as much protection, and no more, the court's decision would not have been premised on statutory, but constitutional grounds. See People v. Wolter, 83 A.D.2d 187, 189, 444 N.Y.S.2d 331, 333 (1981); People v. Paddock, 29 N.Y.2d 504, 505, 272 N.E.2d 486, 486, 323 N.Y.S.2d 976, 977 (1971).
43. See infra notes 59-86 and accompanying text.
tion for the public and more for the drunk driver than the legislature set out to do. What actually occurred were ill-fated attempts to make the statute constitutionally legitimate by reflecting the course of decisional law. 44 Several historical factors and decisions of precedent support this conclusion. 45

1. The Intent of the Legislature

The New York Legislature addressed the problem of driving while intoxicated as early as 1910. 46 In 1953, a joint legislative committee declared the intoxicated driver the most dangerous highway menace. 47 At the same time, it was recognized that the traditional indicia of intoxication, odorous breath, slurred speech, bloodshot eyes, and lack of balance or stability, were subjective perceptions, difficult both to prove or to refute. The use of chemical tests for blood alcohol content was, therefore, enthusiastically urged. 48

Two impediments were seen, however, to a legislative mandate of such testing. One was a 1941 opinion of the Attorney General which cautioned against the use of force to compel such testing. 49 Another was the 1952 decision of the United States Supreme Court in *Rochin v. California*. 50 The concern caused by *Rochin* was that should the law compel the administration of tests for blood alcohol content, then police efforts in enforcing that law upon an intoxicated, obstreperousmotorist might be found by the court to be such "con-

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44. See King & Tipperman, supra note 8, at 579-80.
45. See infra notes 46-58 and accompanying text.
46. Act of May 31, 1910, ch. 374, § 1, 1910 N.Y. LAWS 684; see King & Tipperman, supra note 8, at 544.
47. See King & Tipperman, supra note 8, at 549 (citing NEW YORK STATE JOINT LEGISLATIVE COMM. ON MOTOR VEHICLE PROBLEMS, CHEMICAL TESTS FOR INTOXICATION, 3 N.Y. LEG. Doc. No. 25, 176th N.Y. Leg. 11 (1953)).
49. See King & Tipperman, supra note 8, at 550 (citing 1941 N.Y. ATTORNEY GENERAL ANNUAL REPORT 143); Brief for Appellant at 5, People v. Wolter, 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982).
50. 342 U.S. 165 (1952). Three deputy sheriffs, having some information that Rochin was selling narcotics, entered his dwelling and then forced open the door to his bedroom. Rochin was sitting partly dressed on the bed on which his wife was also lying. Rochin seized two capsules from a night stand and put them in his mouth. The deputies jumped on him and tried but failed to extract the capsules. They then brought Rochin to the hospital where stomach pumping produced vomiting which revealed the two capsules that proved to contain morphine. Rochin was convicted for possession of morphine. *Id.* at 166. The United States Supreme Court reversed the conviction, because the evidence was obtained by methods held to violate the Due Process Clause of the fourteenth amendment. *Id.* at 166-74.
duct that shocks the conscience . . . [or is] too close to the rack and screw . . . .” to be constitutionally tolerated.\textsuperscript{51}

The New York Legislature saw the resolution to these impediments in the implied consent fiction, and passed the first such statute in 1953.\textsuperscript{52} This fiction assumed the driver's consent to a blood test,\textsuperscript{53} but the mechanics of the statute operated to deprive a driver of his operator's license upon an actual refusal to submit to the test.\textsuperscript{54} The need for any type of police coercion was, therefore, eliminated and so also, was the danger of flouting the constitutional limitation of the \textit{Rochin} decision.

The first implied consent statute in New York failed, however, not because it did not adequately avert the due process problem of compelling administration of blood tests, but because it neglected to provide fundamental procedural protections. The court in \textit{Schutt v. MacDuff}\textsuperscript{55} held that it was an arbitrary and unreasonable action to

\begin{itemize}
\item 51. \textit{Id.} at 172.
\item 52. Act of April 19, 1953, ch. 854, § 1, 1953 N.Y. Laws 1876. This statute provides:
  \begin{enumerate}
  \item § 71-a. Chemical tests. 1. Any person who operates a motor vehicle or motor cycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to suspect such person of driving in an intoxicated condition. If such person refuses to submit to such chemical test the test shall not be given but the commissioner shall revoke his license or permit to drive and any nonresident operating privilege.
  \item 2. Upon the request of the person who was tested, the results of such test shall be made available to him.
  \item 3. Only a duly licensed physician acting at the request of a police officer can withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen.
  \item 4. The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.
  \end{enumerate}
\item 53. See \textit{supra} notes 1-2 and accompanying text.
\item 54. See \textit{supra} note 52.
\item 55. 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. Orange County 1954). On August 10, 1953, Louis E. Schutt, who had been a licensed operator of motor vehicles in New York State for thirty-eight years, was arrested for driving while intoxicated. Mr. Schutt refused to submit to a blood test to determine its alcoholic content. \textit{Id.} at 45, 127 N.Y.S.2d at 120. Prior to any trial or criminal proceeding he was compelled to surrender his driver's license. \textit{Id.} at 45-46, 127 N.Y.S.2d at 120-21. The court found this an infringement upon his constitutional right to due process and commented: "[I]t is the duty of the court to strike [the implied consent statute] down if it provides for summary and substantial infringement upon a prerogative of a free person at the hands of administrative officers without affording him an opportunity of a hearing." \textit{Id.} at 51, 127 N.Y.S.2d at 125.
\end{itemize}
permit revocation of a driver's license without a hearing. The New York Legislature then amended the statute to be compatible with the decision in Schutt.

The conclusion compelled by this history is that the intent of the New York Legislature, in enacting and amending the first implied consent legislation, was to draft a statute which comported with constitutional standards but did not exceed them. This was expressly recognized by the Schutt case which occurred within a year of the enactment of the implied consent statute. That decision stated:

Having in mind the urgent need for legislation looking toward the procurement of chemical tests for the purpose of definitely determining whether or not an accused driver was intoxicated to the extent of impairing his driving ability, this particular statute was enacted. It was the result of a great deal of study and the attempt was made to frame it in the particular way it is written for the purpose of avoiding all possible constitutional objections.

The legislative design to remain within, and to reflect, constitutional bounds was clear. The real dilemma was to define just what those constitutional standards were. The case law that provided the needed insight into those standards developed after the advent of implied consent statutes.

2. The Constitutional Standard

Beithaupt v. Abram, decided approximately four years after New York passed the first implied consent statute, was the first case to reach the Supreme Court that dealt with a blood alcohol test conducted on the driver of a motor vehicle. Breithaupt can be viewed as dealing with what were seen as the two impediments to instituting constitutional objections.

56. Id. at 51-55, 127 N.Y.S.2d at 125-28.
58. Schutt, 205 Misc. at 46-47, 127 N.Y.S.2d at 121. It is both ironic and supportive of the contention of this note that implied consent statutes are legislative boondoggles, and that this law, which was enacted "for the purpose of avoiding all possible constitutional attack," id., has instead invited a plethora of constitutional challenges. See supra note 7.
59. 352 U.S. 432 (1957). Breithaupt was seriously injured when the pickup truck he had been operating on the highways of New Mexico was involved in a collision which killed three occupants of the other vehicle. An almost empty pint whiskey bottle was found in the pickup. Breithaupt was taken unconscious to the hospital where the odor of liquor was detected on his breath. A state patrolman requested an attending physician to take the blood sample which, after analysis, showed a content of .17% alcohol. Id. at 433.
compulsory blood alcohol analysis, namely, the warning against compulsion as possibly unconstitutional by New York's Attorney General, and the inference from the Rochin decision that the means used to extract blood might "shock the conscience." The first impediment, that of compelling submission to the test, is dealt with in the fourth amendment unreasonable search and seizure and fourteenth amendment due process analysis in Breithaupt. There, the Court simply noted that evidence obtained in violation of constitutional rights was excludable in federal criminal prosecutions, but that the exclusionary rule did not apply to state proceedings. New Mexico's rejection of the exclusionary rule in the Breithaupt prosecution was, therefore, valid and the results of the blood tests were admissible in the state prosecution.

Next, in relation to Rochin, the Court distinguished Breithaupt, in that it found blood tests to be slight intrusions, routine in everyday life, that were neither brutal, nor offensive nor shocked the conscience. The implication was that the coerced extraction of blood violated federal constitutional standards but that their results could not be excluded in state prosecutions unless the particular state had adopted the exclusionary rule, or unless the conduct involved in acquiring the blood sample rose to the "shock the conscience" standard of Rochin. However, "a blood test taken by a skilled technician is not such 'conduct that shocks the conscience.'

In 1961, the Supreme Court extended the exclusionary rule to the states in Mapp v. Ohio. At this historical juncture, it would seem that the constitutional standard for the extraction of blood samples and the provisions of implied consent statutes were compatible. That is, the extraction of blood to obtain evidence was not constitutionally foreclosed whereas stomach pumping was, but some form of consent was necessary in order not to run afoul of the constitutional prohibition against unreasonable searches and seizures. Implied consent statutes provided the required ingredient.

60. See supra note 49 and accompanying text.
61. See supra notes 48-49 and accompanying text.
62. 352 U.S. at 435.
63. Id.
64. Id. at 435-39.
65. Id. at 452 (citing Rochin v. California, 342 U.S. 165, 172 (1952)).
67. The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.
In New York, *People v. Young* 68 is an illustrative case of this judicial interpretation. The court there said “that Breithaupt, in the light of *Mapp* . . . is not controlling.” 69 That is, since the *Mapp* decision, the results of a compulsory, non-volitional blood test could be excluded from a state prosecution. The court was then so bold as to predict that if the *Breithaupt* facts were presented to the Supreme Court after its decision in *Mapp*, the police action would be adjudged to be an illegal search and seizure in violation of the fourth amendment. 70 The court held that, as a general proposition, any warrantless search was unreasonable as well as any personal search made before a legal arrest. 71 The *Young* court was stating there could be no coercion to test vested solely by authority of statute. No legal compulsion to submit was viewed as constitutional unless pursuant to a warrant or a search incident to arrest. Consent was the only viable alternative. 72

The question of the necessity for consent to constitutionally administer such tests was not clearly resolved by the Supreme Court until 1966, thirteen years after the advent of the first implied consent statute. In *Schmerber v. California*, 73 the need for consent was elimi-
nated as a constitutional prerequisite to the search and seizure of blood samples in drunk driving situations. There are two keys to the Schmerber decision. First, its concurrence with Breithaupt that blood tests were routine and commonplace in everyday life, and must, therefore, be considered reasonable under the fourth amendment. Second, that an exigency or emergency upheld the warrantless extraction of defendant's blood and not the simple fact that it was a search incident to arrest.

The inescapable conclusion from this analysis is that the legal fiction of implied consent is not necessary to obtain blood samples in a constitutional fashion for the purpose of determining their alcohol content, at least so far as a valid arrest is concerned. Schmerber, however, is not definitive as to whether the blood taken from defendant Moselle in the New York case was constitutionally permissible, charge while in the hospital undergoing treatment following an automobile accident. At the hospital a police officer had directed a physician to take the blood sample. The analysis of the sample indicated intoxication and the results of this analysis were admitted into evidence against Schmerber. Id. at 758-59.

74. See id. at 766-72.
75. Id. at 771 (emphasis added).
76. Id. at 770-71; Brief for Appellant at 17, People v. Moselle, 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982). In Carroll v. United States, 267 U.S. 132 (1925), the Supreme Court recognized an exigent circumstance exception to the warrant requirement. Id. at 149-53. That case upheld the warrantless search of an automobile for contraband based upon probable cause. Id. at 149. It found an exigency in the fact that a vehicle could be quickly and easily removed from the jurisdiction in which a police officer might obtain a warrant. Id. at 153. The Court in Schmerber seemed to rely on the Carroll emergency or exigent circumstance doctrine, but did not explicitly so state. See generally Comment, Arrest Requirement For Administering Blood Tests, 1971 DUKE L.J. 601, 608. The deduction to be drawn from the two cases is that the highly evanescent nature of alcohol in the bloodstream is sufficiently analogous to a vehicle fleeing with contraband for the warrant exception to apply.

77. Schmerber noted the strong suggestion in American law that the government has the right to search the person of the accused in a substantially contemporaneous manner with a lawful arrest. 384 U.S. at 769. The Court held, however, that "the mere fact of a lawful arrest does not end our inquiry." Id. It reasoned that the search incident to arrest exception to the warrant requirement rested on two factors, the "immediate danger of concealed weapons," to the police officer and "the possible destruction of evidence under the direct control of the accused." Id. (citing United States v. Rabinowitz, 339 U.S. 56, 72-73 (1950) (Frankfurter, J., dissenting)). Schmerber found that these considerations had "little applicability . . . to [an intrusion] beyond the body's surface." Id. The object of the search was alcohol in the bloodstream, not weapons, and, as evidence, was subject to destruction only by the body's natural metabolic processes and not by any activity under the direct control of the accused. It would seem, therefore, that a search incident to arrest would never be appropriate justification for an intrusion into the body to secure body fluids for the production of evidence without a warrant. The Court's approval of the search in Schmerber, was, therefore, based on something more, and that something more was the exigency caused by the highly evanescent nature of alcohol in the bloodstream. Id. at 770-71.
because Moselle, unlike Schmerber, was not under arrest. The question posed in Moselle then becomes: Is implied consent legislation the only constitutional means by which blood samples may be obtained in drunk driving situations in which no arrest has been made?

The answer was provided by the Supreme Court decision in Cupp v. Murphy. This case stands for the proposition that a bodily intrusion conducted without a warrant and not incident to arrest is constitutionally permissible provided that: 1) there was probable cause for arrest, 2) that the evidence sought was readily destructible, and 3) that the intrusion was limited to obtaining only the evidence in danger of being destroyed. Applying these three prerequisites, the extraction of blood in Moselle should be constitutionally upheld.

The facts of Moselle indicate that Sergeant Caffery was able, upon investigation, to reconstruct the accident from the position of the vehicles, from the debris strewn about the road, and from measurements at the accident scene. He determined that the Moselle vehicle caused the accident by crossing over into the oncoming lane and colliding head-on with the other vehicle. Sergeant Caffery also observed that the weather was clear and dry, the lighting conditions good, and that there were no skid marks on the road. After proceeding directly to the hospital, he detected a strong odor of alcohol on the defendant. Sufficient probable cause existed for a warrantless arrest.

There can be no doubt that the second requirement, that of readily destructible evidence, was also satisfied. Schmerber specifically found that the percentage of alcohol in the blood diminishes rapidly, and the Court in Cupp cited Schmerber as authority for the necessity of the search “to preserve the highly evanescent evidence

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78. 412 U.S. 291 (1973). In this case the defendant voluntarily submitted to police questioning in the presence of his counsel. His wife had been found earlier at her home strangled, with abrasions and lacerations on her throat. Id. at 292. During questioning the police noticed a dark spot on the defendant’s finger which they suspected might be the decedent’s blood. The police requested to take fingernail scrapings. Defendant Murphy refused, id. at 292, put his hands in his pockets and a metallic sound was heard which was thought to be the rattling of keys or change. Id. at 296. The police then took the fingernail scrapings without a warrant, despite Murphy’s protest. Id. at 292.

79. Id. at 296. In recognizing that such a search, to be permissible, must be limited in its scope, the Court was following the principle acknowledged in Chimel v. California, 395 U.S. 752 (1969), “that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement.” Cupp, 412 U.S. at 195 (footnote omitted).


81. 384 U.S. at 770.
they found under his fingernails.” 82

The final element in 
Cupp necessary to permit a search without an arrest is that the scope of the search must be of a limited intrusion. 83  

Cupp defined that limited intrusion to be “commensurate with the rationale that excepts the search from the warrant requirement.” 84  
The rationale exempting the search is the destructibility or highly evanescent nature of the evidence. 85  
It logically follows, therefore, that a search must be limited to obtaining only that evidence in danger of destruction or dissipation. Nothing more must be searched because nothing more is subject to being destroyed or dissipated. In 
Cupp then, the search was limited to the fingernail scrapings, and in 
Moselle, to the extraction and testing of blood for its alcohol content. 86

These Supreme Court decisions, occurring subsequent to the advent of implied consent laws, have rendered those laws superfluous, and actually obstructionist in obtaining the best evidence to prove intoxication. 
Moselle best exemplifies to what extent this legislation has outgrown its usefulness. Instead of providing the mechanism through which evidence of Moselle’s intoxication could be obtained, the implied consent statute provided the legal technicality through

82. Id. at 296 (citing Schmerber v. California, 384 U.S. 757 (1966)).
83. Id.
84. Id. at 295.
85. Id. at 296.
86. The following deceptively attractive argument was made by counsel for the defense:

[T]he extraction of blood from an individual is a far more serious intrusion than scraping under one’s fingernails. Scraping one’s fingernails can be compared to a pat and frisk for weapons, a limited intrusion for which an arrest need not be made. On the other hand, the extraction of someone’s blood, even in a hospital by a physician or nurse, is a far more serious intrusion into the privacy of an individual. The extraction of blood is akin to a full search which this Court . . . has found requires an arrest, not just probable cause to arrest, prior to said full search.

Brief for Respondent at 12, People v. Moselle, 57 N.Y.2d 97, 439 N.E.2d 1235, 454 N.Y.S.2d 292 (1982). The argument fails for two reasons. First, it neglects the fact that reasonableness is the standard governing application of the fourth amendment, and that the finding of 
Schmerber was that a blood alcohol search was reasonable under the circumstances. 384 U.S. at 771. It does not become unreasonable because a lesser intrusion, such as fingernail scraping, was also reasonable; nor would another lesser, but reasonable, intrusion render the 
Cupp decision invalid. Secondly, the argument misconstrues the nature of a full search which is prohibited, and a limited intrusion which is permitted in an exigent circumstance situation. A full search is one that is usually justified by other than exigent circumstances. A limited intrusion is one which must be “reasonably related in scope to the circumstances which justified the interference in the first place.” 
Cupp v. Murphy, 412 U.S. 291, 295 n.2 (1973) (citing Terry v. Ohio, 392 U.S. 1 (1968)).
which it was excluded. If the constitution does not require such laws, and they unwittingly advance the evil at the expense of the remedy, then legislative reform is in order.

B. *Discovery In The Criminal Procedure Law And Driving While Intoxicated: People v. Wolter*

Unlike defendant Moselle, defendant Wolter was under arrest at the time the blood sample was taken. The literal application of the implied consent statute still operated, however, to exclude the results in a driving while intoxicated prosecution due to the provision expressly providing that if a person placed under arrest refuses to submit to such testing, the test shall not be given. Wolter, unlike Moselle, was also indicted under the Penal Law for second degree manslaughter and second degree assault. The New York Court of Appeals found, in this novel decision, that section 240.40 of the Criminal Procedure Law (CPL 240.40) prohibited blood tests in furtherance of a criminal investigation without a court order.

1. The Literal Interpretation of the Statute

The position of this note is that both the wording of the statute and the interpretation of its legislative history more appropriately support the views expressed by Justice Jasen in the dissent than they do the majority holding. Justice Jasen first noted that CPL 240.40 was a discovery statute which operated only against a defendant once a criminal proceeding had commenced. Absent such commencement there is no defendant, and the authority of the statute does not apply to one who is merely a suspect. This view is supported by the express language of CPL 240.40 subdivision 2 which authorizes “the court in which an indictment, superior court information, prosecutor’s information or information is pending” to require the defendant to submit to giving a blood sample. The terms defendant and suspect are not ambiguous nor interchangeable. The distinction, rather, between the accused in a criminal case and a per-

87. 57 N.Y.2d at 103, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.
88. Id. at 105, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294; see N.Y. VEH. & TRAF. LAW § 1194(1) (McKinney Supp. 1982-1983).
89. Wolter, 57 N.Y.2d at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.
90. Id. at 109, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.
91. Id. at 57 N.Y.2d 97, 111, 439 N.E.2d at 1241, 454 N.Y.S.2d at 298 (Jasen, J., dissenting).
92. Id. (citing N.Y. CRIM. PROC. LAW § 240.40(2) (McKinney 1982)).
son reputed to be involved in a crime is commonly understood. This note has previously determined that the primary concern of the courts in construing statutes is to “give effect to the intent of the Legislature,” and that the intent is “first to be sought from a literal reading of the act itself.” It is not now recommended that these principles be abandoned, and the literal meaning of the term “defendant” be extended to include anyone who is a “suspect.”

Generally, in the construction of statutes, the legislative intent is to be sought and ascertained from the words and language used. Ordinarily the courts are not at liberty to hold that the Legislature had an intention other than its language imports, and new language cannot be imported into a statute. The Legislature is presumed to mean what it says, and if there is no ambiguity in the act, it is generally construed according to its plain terms to its natural and most obvious sense in accordance with its ordinary and accepted meaning.

CPL 240.40 expressly refers to defendants. It is an unnecessary and improper construction to extend its meaning to include those who are deemed merely suspects.

2. The Legislative History of the Statute

In addition to the statute’s literal meaning, the legislative history also reveals an interpretation incongruous with the one imposed by the court of appeals. The decision in Wolter and Daniel was premised on the notion that the purpose of CPL 240.40 was to restrict the parties’ ability to gather information or non-testimonial evidence to those instances where a court order was issued. This is an incorrect premise, for the true impetus behind the bill had been to expand rather than exclude the availability of relevant data or information, including non-testimonial evidence. The Governor’s Program Bill #138 Memorandum clearly sets forth the purpose: “To expand pre-trial discovery in criminal cases.” The Office of Court Administra-

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93. For a definition of these terms see Black's Law Dictionary 377, 1297 (5th ed. 1979).
94. N.Y. Statutes § 92(a) (McKinney 1971); see supra text accompanying note 36.
95. N.Y. Statutes § 92(b) (McKinney 1971); see supra text accompanying note 38.
96. N.Y. Statutes § 94 (McKinney 1971) (footnotes omitted).
98. See 57 N.Y.2d at 109-10, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.
tion had recommended the legislation because it "substitute[d] new, expanded discovery procedures for both defense and prosecution . . . designed to broaden criminal discovery, while accommodating reasonable concerns of prosecutors and defense counsel."100 Similarly, the bill was supported by District Attorneys because "some degree of reciprocity in the people's rights to obtain discoverable material both by demand and by order has been expanded,"101 and because it provided "a reasonable and balanced step forward in broadening pre-trial discovery."102 Most convincing is the statement that "[t]he bills are evenly balanced to avoid giving any undue advantage to either side in a criminal proceeding."103 It is incongruous to believe that district attorneys would rally to support a measure that placed prosecutorial burdens on them that had not previously been imposed, and that caused them to forego use of evidence, not obtained through court order, that was otherwise constitutionally permissible. The apparent legislative motive was not to cramp the prosecutor's nor the defense's ability to obtain evidence after the criminal proceeding commenced, but to facilitate the procuring of what was constitutionally permissible by minimizing needless, unregulated litigation.104 To accept the court of appeals decision is to accept, in the face of the foregoing statements, that the legislature actually sought to establish an advantage for the defense not accorded to them by the Constitution.

As conclusive support that CPL 240.40 was enacted to preempt any other legal authorization or regulation of blood tests in criminal cases, other than by court order, the majority cited the caveat sentence of subdivision 2:

This subdivision shall not be construed to limit, expand or otherwise affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument consistent with such rights as the defendant may derive from the


104. See supra notes 99-103 and accompanying text.
constitute of this state or of the United States.¹⁰⁵

To assert that this provision provides unbridled support for the majority position is certainly refutable. The primary argument against this contention is that the sentence was added to clarify the fact that CPL 240.40 "does not change other existing law governing such procedures especially in the pre-accusatory instrument stage."¹⁰⁶ The entire thrust both of the language and history of the act is that "this CPL article was not enacted to create additional drag on the criminal process but rather to remove some of the barnacles which impede smooth flow."¹⁰⁷ It should not, therefore, be construed to require a court order where previously other legal authorization had required none.

The most supportive aspect of this provision for the majority position is the use of the phrase "before the filing of an accusatory instrument" in conjunction with the term "defendant" in the caveat sentence.¹⁰⁸ From this use of the term "defendant" in the statutory language, the majority gleaned the inference that the legislature was contemplating to foreclose the taking of blood in any manner other than by court order.¹⁰⁹ The problem with such a conclusion is that another inference can also be drawn which expresses the position of the practice commentary that: "A caveat sentence is added to make clear that this prosecutor's motion does not change other existing law governing such procedures especially in the pre-accusatory instrument stage."¹¹⁰ The use of the term defendant is merely an inadvertant reflection of the fact that the drafters were constructing a statute pertaining to an accused in a criminal proceeding. They intended by use of this sentence only to clarify and give notice that the law relating to that defendant before he was accused was not changed, but remained consistent with constitutional standards.¹¹¹ Even if it would be conceded, however, that the subdivision was ambiguous, then the court would still be obliged to construe the act in such a manner "as to suppress the evil and advance the remedy",¹¹² in other words to prefer that construction "which furthers the object,

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¹⁰⁵. 57 N.Y.2d at 110, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297 (citing N.Y. CRIM. PROC. LAW § 240.40(2) (McKinney 1982)).
¹⁰⁶. N.Y. CRIM. PROC. LAW § 240.40 Practice Commentary (McKinney 1982).
¹⁰⁷. Id.
¹⁰⁸. See 57 N.Y.2d at 110 n.4, 439 N.E.2d at 1240 n.4, 454 N.Y.S.2d at 297 n.4.
¹⁰⁹. Id. at 110, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.
¹¹⁰. N.Y. CRIM. PROC. LAW § 240.40 Practice Commentary (McKinney 1982).
¹¹¹. N.Y. CRIM. PROC. LAW § 240.40(2) (McKinney 1982).
¹¹². N.Y. STATUTES § 95 (McKinney 1971).
spirit and purpose of the statute." 113 The thrust behind the legislation was to reduce resort to court orders, and to make available to the parties what they constitutionally and legally had a right to obtain. It should not be presumed that the district attorneys who supported the statute set out to restrict their ability to obtain evidence.

3. The Constitutionality of the Extraction

If the majority's construction of CPL 240.40 is incorrect as this note and the dissent both conclude, then the constitutionality of the extraction of the blood sample in Wolter must be addressed. 114 The pertinent question then becomes: Is it consistent with constitutional standards to extract blood from a suspect for the purpose of obtaining evidence for possible future use in a criminal prosecution? This is precisely the issue answered affirmatively by the Supreme Court in Cupp v. Murphy, 115 provided that three prerequisites are met. 116 First, there must be probable cause for arrest (the odor of alcohol was detected on defendant Wolter's breath), 117 second, that the evidence sought was readily destructible (blood alcohol is of a highly evanescent nature), 118 and third, that the intrusion was limited to obtaining only the evidence in danger of being destroyed (the taking of a blood sample in Wolter was the only body intrusion performed). 119

In the present case, the holding of the court of appeals in its very recent decision, In re Abe A., 120 was also seen to presage the question. There it was decided to be constitutionally permissible to extract a blood sample from a suspect provided that a court order was issued after a showing of "(1) probable cause to believe the sus-

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113. *Id.* at 291. 439 N.E.2d at 1242, 454 N.Y.S.2d at 299.
114. 57 N.Y.2d at 112-13, 439 N.E.2d at 1242, 454 N.Y.S.2d at 299.
116. See supra note 79 and accompanying text.
117. See supra note 24 and accompanying text.
118. See supra notes 81-82 and accompanying text.
119. See supra note 24 and accompanying text.
120. 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982). The respondent in this case, Jon L., was the business partner of the decedent, who, after being reported missing by the respondent, was found bludgeoned to death after what appeared to be a violent struggle. An investigator noticed abrasions, swelling, bruises and tooth marks on Jon L., whose explanation for them could not be validated or corroborated. An analysis of blood found at the scene of the crime showed the two types, one belonging to the deceased, and the other a rare type belonging to less than 1% of the population. After Jon L. refused to voluntarily submit to a blood test, a court order was sought to compel him to take the test and have his blood type identified. *Id.* at 291-92, 437 N.E.2d 266-67, 452 N.Y.S.2d at 8.
pect has committed the crime, (2) a ‘clear indication’ that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable.” Assuming that these prerequisites were fulfilled, the court of appeals, nonetheless, found the taking of blood samples in Wolter to be constitutionally impermissible because there was no court order to authorize the taking.

What remains remarkable about the majority’s application of Abe A. to the circumstances in Wolter, is its seeming disregard of the very basis of its own decision. The decision in Abe A. was premised on five perceptions: first, that the requirement to obtain a warrant is a requirement that there be a prior judicial determination that probable cause exists; second, that in Cupp and Schmerber, the failure to obtain a warrant, that is, the failure to obtain a prior judicial determination of probable cause, was excused by the presence of exigent circumstances; third, that when there is no exigent circumstance, in other words, no imminent danger that the evidence will be destroyed, the rule is to the contrary and a warrant must be obtained; fourth, that although an exigency will excuse the lack of a warrant, it will not excuse the lack of probable cause; fifth, that when the application and relief sought comport with a search warrant, the difference in nomenclature between that and a court order is not material. Applying these perceptions, the court concluded that the standard of probable cause necessary for issuance of a search warrant was necessary for the issuance of a court order to compel the respondent in Abe A. to submit to giving a blood sample, and that such an order must be obtained because no exigency existed. A person’s blood type was not capable of transformation, whereas blood alcohol or fingernail scrapings were capable of dissipation or destruction. The court found it constitutionally permissible, therefore, to extract blood from a suspect for the purpose of obtaining evidence for possible future use in a criminal prosecution

121. Id. at 291, 437 N.E.2d at 266, 462 N.Y.S.2d at 7.
124. Id. at 295, 437 N.E.2d at 269, 452 N.Y.S.2d at 10.
125. See id.
only upon court order.\textsuperscript{126} In the presence of exigent circumstances, however, probable cause, but not a court order, is necessary.\textsuperscript{127} Although cited as authority for the majority position,\textsuperscript{128} it would seem that \textit{Abe A.} more appropriately supports the dissent.\textsuperscript{129}

The focus of the entire decision in \textit{Abe A.} had been on constitutional analysis of search and seizure. The court found no occasion to even mention CPL 240.40. Inexplicably the majority then, both in \textit{People v. Wolter} and \textit{People v. Daniel}, failed to reach constitutional issues,\textsuperscript{130} focusing instead on CPL 240.40 and concluded that the taking of blood was foreclosed other than by court order.\textsuperscript{131} It did this blithely through the simple deduction that the judgment rendered in \textit{Abe A.} also required a court order, but strangely neglected the relevancy in that case of its own lengthy consideration of probable cause and exigent circumstances.\textsuperscript{132} The court of appeals was, remarkably, finding consistency where there was none to be found. In \textit{Abe A.}, which was decided on June 17, 1982, the court did not find CPL 240.40 but standard constitutional principal as the source

\begin{itemize}
\item \textsuperscript{126} Id.
\item \textsuperscript{127} The decision continued on to state:

\begin{quote}
\[\text{It seems appropriate to add, since here there was no exigency, that the course followed by the People in bringing on its original application on notice to the suspect was . . . required by such circumstances. After all, when frustration of the purpose of the application is not at risk, it is an elementary tenet of due process that the target of the application be afforded the opportunity to be heard in opposition before his or her constitutional right to be left alone may be infringed.}\]
\end{quote}

\textit{Id.} at 296, 437 N.E.2d at 269, 452 N.Y.S.2d at 10 (citations omitted) (emphasis added). The inference here is that an application for a court order would not be required in the presence of exigent circumstances.

\item \textsuperscript{128} 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296.
\item \textsuperscript{129} Judge Jasen expressly arguing this point in dissent said:

\begin{quote}
Although \textit{Matter of Abe A.} involved an instance in which a court order was obtained authorizing the test, we emphasized that, unlike the present cases, there were no exigent circumstances which justified the immediate, warrantless removal of the blood sample from the suspect's body.
\end{quote}

Measured by the standards set forth in \textit{Schmerber} and \textit{Matter of Abe A.}, the blood samples taken from defendants Wolter and Daniel should not be suppressed. In both cases, the police had probable cause to believe the defendants had committed a crime. Moreover, there were signs that both defendants had been drinking just prior to the accidents in which they were involved. Thus, there was a "clear indication" that administration of the test would reveal the presence of alcohol in their blood. Finally, there is nothing in the record to suggest that the method used to obtain the sample from either defendant was unsafe or unreliable.

\item \textsuperscript{130} \textit{Id.} at 113-14, 439 N.E.2d at 1242-43, 454 N.Y.S.2d at 299 (Jasen, J., dissenting).
\item \textsuperscript{131} \textit{Id.} at 104, 439 N.E.2d at 1237, 454 N.Y.S.2d at 294.
\item \textsuperscript{132} See supra notes 123-27 and accompanying text.
of authority to issue a court order.\textsuperscript{133} This was in accord with the court's own expectations since the authority of CPL 240.40 was understood to apply to defendants in criminal proceedings and not suspects.\textsuperscript{134} Merely two weeks later, however, on July 1, 1982, in rendering its decision in the \textit{Wolter} and \textit{Daniel} cases, the court found the authority of CPL 240.40 conclusive.\textsuperscript{135} The constitutional issue of exigent circumstances was summarily dismissed with the statement: "While the existence of exigent circumstances may excuse the failure to obtain a court order, their existence does not provide a source of authority to conduct discovery."\textsuperscript{136} This reasoning, however, is circuitous. Furthermore, the judicial thrust of this pre-arrest investigatory situation into discovery is incongruous. The authority of CPL 240.40 (2)(b) is to grant a court order.\textsuperscript{137} That which admittedly excuses the necessity of having a court order, exigent circumstances, cannot logically be expected to provide a source of authority for getting a court order. The extension of discovery to pre-arrest investigatory situations is a dangerous precedent surely due to hamper constitutionally fair and efficient law enforcement.

C. \textit{The Unconscious Driver and the Necessity of Arrest: People v. Daniel}

In \textit{People v. Daniel}, as in \textit{People v. Wolter}, the New York Court of Appeals found dispositive the fact that no court order had been obtained to take the blood sample, and suppressed the evidence.\textsuperscript{138} Although the authority for the finding was section 240.40 of the Criminal Procedure Law, another important issue relating to the implied consent statute is raised by the \textit{Daniel} case that is worthy of discussion. The problem of the unconscious driver is another example of the obstruction to fair law enforcement caused by implied consent legislation. The basic question arising in this context is: Should the unconscious driver's consent to a chemical testing of his blood still be deemed implied or should it be deemed withdrawn? Generally implied consent statutes are either silent on the subject or expressly provide that in such a case consent is either not to be deemed withdrawn or not to be implied. In each case the public interest in protection from drunken drivers is frustrated.

\begin{itemize}
\item\textsuperscript{133} 56 N.Y.2d at 295-99, 437 N.E.2d at 268-71, 452 N.Y.S.2d at 9-12.
\item\textsuperscript{134} \textit{See id.} at 293-94, 437 N.E.2d at 268, 452 N.Y.S.2d at 9.
\item\textsuperscript{135} 57 N.Y.2d at 108-09, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.
\item\textsuperscript{136} 57 N.Y.2d at 109, 439 N.E.2d at 1239-40, 454 N.Y.S.2d at 296-97.
\item\textsuperscript{137} \textit{See supra} note 18.
\item\textsuperscript{138} 57 N.Y.2d at 108, 439 N.E.2d at 1239, 454 N.Y.S.2d at 296.
\end{itemize}
If an implied consent statute provides only for actual consent from an unconscious driver, problems abound. First, there is a sense of absurdity about the requirement. How does one obtain actual consent from an unconscious driver? Second, it puts the unconscious driver in a preferred position and hence invites equal protection attacks, since the intoxicated unconscious driver, unlike his conscious counterpart, will not be penalized for failing to consent to a blood test. Third, it rewards the driver for imbibing past consciousness in that it neither subjects him to the blood test nor to the sanctions for refusal to take it. Fourth, it frustrates the ability of the state to secure the best evidence in criminal trials.

The New York implied consent statute is silent on the subject. Such silent statutes are usually construed in conformity with those expressly providing that consent is not to be deemed withdrawn. Here the logic is that the driver "has impliedly consented to the test by virtue of his driving privilege, and it would seem that such consent is still 'intact' irrespective of whether he is conscious or not." New York recently resolved the issue in accord with this interpretation in People v. Kates, decided October 27, 1981, just several months before People v. Daniel came before the court. In his opinion, Judge Wachtler wrote:

Literally read the statute was not violated . . . because the defendant had not refused consent . . . . [S]ubdivision 2 cannot be read as requiring the driver's express consent because that would effectively nullify the consent implied in subdivision 1 or at least make the statute inherently inconsistent. In any event . . . [t]he legislative committee responsible for this statute noted in its report: "In the case of an unconscious individual, a chemical test can be administered since he is deemed to have given his consent when he used the highway. It is not necessary that a person be given the opportunity to revoke his consent."

The inherent difficulty is that implied consent statutes, including New York's, usually mandate a prerequisite of arrest before a

140. Comment, supra note 48, at 676.
141. Id.
142. See supra note 17.
143. Comment, supra note 48, at 648.
144. Id.
146. Id. at 595-96, 428 N.E.2d at 854, 444 N.Y.S.2d at 448.
blood test can be administered. Such a requirement in the case of an unconscious driver amounts to an elevation of form over substance. There are two problem areas, a misdemeanor arrest situation and a medical emergency.

Laws of most states allow a police officer to arrest without a warrant in the case of a misdemeanor only if it is committed in his presence. If the misdemeanor is not committed in the presence of the officer, he is frustrated from making the arrest. If he cannot make the arrest, the implied consent statute prohibits the blood sample from being taken from either a conscious or unconscious driver. Should the officer later secure a warrant to make the arrest, the blood alcohol is most likely to have disappeared or dissipated significantly. At that point, the probable cause, which was necessary to sustain the warrant, may be insufficient to sustain the charge, which must be proven beyond a reasonable doubt. This occurs because the implied consent statute has operated to effectively prohibit the police from obtaining the best evidence.

The other problem area is the medical emergency, which is most frequent in an unconscious driver situation. Even assuming that it is possible to arrest a semi-conscious or unconscious person, the rule mandating a prior arrest before a blood sample is taken will require police to focus on formal arrest procedure when their attention and efforts are best directed at obtaining medical assistance. In the present case, Lieutenant Brennan and Officer Willis came on the scene moments after the collision and observed defendant Daniel in a semi-conscious state, in a large pool of blood, and lying on the ground. Empty beer bottles were found on the dashboard and floor of his vehicle, and the remainder of an eight pack was on the front seat. Lieutenant Brennan remained at the scene to complete the investigation while Officer Willis accompanied Daniel to the hospital. There it was requested that a blood sample be taken. Officer Willis had made no formal arrest. Although a medical emergency and probable cause for arrest existed, and although it had been decided in New York that blood could be extracted from an unconscious driver without his express consent, the New York implied consent

148. Comment, supra note 76, at 616. The present version of N.Y. CRIM. PROC. LAW § 140.10(1)(b) (McKinney 1981) no longer has this requirement.
149. Note, supra note 139, at 272.
statute provided that an actual arrest, or positive breath test, was a condition precedent to a chemical test of the blood.\textsuperscript{152} The issue was before the court on appeal but went undecided when the discovery statute, CPL 240.40 was held to foreclose the matter.\textsuperscript{153} Its general significance to implied consent legislation, however, is still noteworthy, because, once again, implied consent legislation, rather than helping to procure evidence of intoxication, acts to exclude it.

Law enforcement should not be so frustrated unless a prerequisite of arrest is constitutionally mandated. Case law does not appear to indicate that it is. In \textit{Cupp} and \textit{Abe A.} probable cause, but no prior arrest, was necessary prior to taking the blood sample.\textsuperscript{154} In the present case, defendant Daniel did not challenge the existence of sufficient probable cause, but complained, rather, that blood was extracted prior to arrest which was contrary to the directive of the implied consent statute. In essence, this directive was seen as conferring some “right to be arrested.”\textsuperscript{155} Since the court of appeals reached its decision on other grounds, this question was not addressed. The dissent, however, emphatically noted that there is no constitutional right to be arrested; that law enforcement officials have no constitutional duty to make an arrest as soon as a minimal amount of probable cause is ascertained.\textsuperscript{156} Police are not required to halt the investigation but may gather additional evidence necessary to support a criminal conviction.\textsuperscript{157} There is a legitimate interest in not being prosecuted but there is no such comparable interest in being prosecuted.\textsuperscript{158}

IV. Conclusion

Implied consent is a legal fiction. Legal fictions are desirable only if they aid in furthering some legitimate end. Implied consent, however, has not proven an aid to justice but a frustration, resulting in an unending plethora of litigation involving numerous statutory and constitutional attacks\textsuperscript{159} with various jurisdictions applying con-

\textsuperscript{152} \textit{See supra} note 17.
\textsuperscript{153} 57 N.Y.2d at 109, 439 N.E.2d at 1240, 454 N.Y.S.2d at 297.
\textsuperscript{154} \textit{See supra} notes 78-79, & 120-21 and accompanying text.
\textsuperscript{155} 57 N.Y.2d at 114, 439 N.E.2d at 1243, 454 N.Y.S.2d at 299-300 (Jasen J., dissenting) (citing Hoffa v. United States, 385 U.S. 293, 310 (1966)).
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Abe A.}, 56 N.Y.2d at 297, 437 N.E.2d at 270, 452 N.Y.S.2d at 11 (citing \textit{In re Abe A.}, 81 A.D.2d 362, 371, 440 N.Y.S.2d 928, 933 (1st Dep't 1981)).
\textsuperscript{159} \textit{See supra} note 7.
Implied consent statutes in drunk driving situations are an example of law gone awry, of legislative good intent transformed into boondoggle. Constitutional decisions have defeated any possible usefulness of such statutes and they should be repealed, recognizing that public protection from drunk drivers deserves more, and constitutional protection due such drivers demands less. The decision in *Moselle* is a striking example of implied consent granting the drunk driver more rights than constitutionally enjoyed. Recognition of the fact that implied consent has outlived its usefulness has perhaps been stymied by two factors: (1) that the constitutional decisions rendering implied consent laws superfluous, if not obstructionist, came subsequent to the advent of those laws, and (2) that it just seemed too incredulous that something which sounded so good could be so bad.

The decision of the New York Court of Appeals in *Daniel* and *Wolter* is so novel and surprising that perhaps an unusual surmise is in order. That surmise is that perhaps the true impetus behind the *Moselle, Daniel, and Wolter* decisions is to throw implied consent back in the legislative lap. The court did so by rendering a judgment so surprising that it must call attention to the situation, and that at the same time will curtail litigation by setting forth a definitive solution. The solution decided upon was to foreclose the taking of blood without court order. Several observations support this surmise: First, the general overabundance of implied consent litigation as evidenced by these three cases coming before the court at the same time; second, the sua sponte application by the court of CPL 240.40 to the problem when none of the briefs of counsel nor the courts below perceived any such relevancy; lastly, the incongruity between this decision and the one two weeks earlier in *Abe A.*, which also dealt with the core issues.

That the matter is back in the legislative lap has recently become obvious. The problem is that the boondoggle of the past is

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160. E.g., see supra notes 138-46 and accompanying text.
161. A memorandum in support of proposed amendments was circulated among the New York State District Attorneys Association in January 1983. It summarized the proposed revisions in the law as follows:

Amends subdivision [sic] 1 of section 1194 of the Vehicle and traffic Law to add an additional basis for the administration of a chemical test of a motorist’s breath, blood, urine or saliva at the direction of a police officer. If the officer has reasonable grounds to believe the motorist to have been operating a motor vehicle in violation of section 1192 of the Vehicle and Traffic Law (driving while impaired or intoxicated) and as part of the same criminal transaction, to have committed a violation of certain sections of the Penal Law dealing with
apt to be repeated. The legislature again seeks to amend and fails to perceive that the real need is to repeal. Ever since Schmerber, the real privilege of implied consent legislation has not been the privilege to drive, but the privilege to refuse what one may be constitutionally compelled to do, to submit to a blood test. When the intrusion is slight, and done under medically safe procedures, and when the public interest is so substantial, the constitutional standard should apply.

An unperceived danger, however, lurks behind the court's decision in Daniel and Wolter. It is the danger of extending the historical snowball of implied consent to yet another statute, section 240.40 of the Criminal Procedure Law, and setting forth another boondoggle in full force. The evidence, however, is that the boondoggle may be well on its way. The proposed legislative remedy to the court's decision in Daniel and Wolter is to amend CPL 240.40 so that "[i]t shall not be construed to limit or otherwise affect the administration of chemical tests pursuant to subdivisions one and two of section 1194." The potential for difficulty is that the remedy is limited to chemical tests of the blood, urine or saliva under the implied consent statute, but the discovery statute is not so limited. It also provides, for example, for the taking of hair or other materials from the body. The decision in Daniel and Wolter then may be seen as authority in other situations. For example, if Daniel Murphy were being questioned in New York today for the strangulation death of his wife, and the same facts occurred in relation to the police obtaining his fingernail scrapings, the decision in Daniel and Wolter may be conclusive that the police were foreclosed from obtaining those fingernail scrapings without a court order. Daniel Murphy may get away with murder in New York, and the law has snowbal-

assault, reckless endangerment and various forms of homicide, a chemical test may be administered at the officer's direction in accordance with section 1194 of the Vehicle and Traffic Law and, as provided by subdivision 2 of that section, without court order and despite a refusal by the motorist to submit to the test.

The bill further provides that section 240.40 of the Criminal Procedure Law shall not be construed to limit or otherwise affect the administration of chemical tests pursuant to subdivisions one and two of section 1194.


162. See id.

163. Id.

164. N.Y. CRIM. PROC. LAW § 240.40(2)(b), (v) (McKinney 1982).
led from excluding evidence of an unintentional vehicular manslaughter to excluding evidence of an intentional murder.

Donna J. Arnold