

Traffic Safety Facts

Research Note



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Breath Test Refusals

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There were nearly 1.4 million DWI¹ arrests in 2005² in the United States. As part of the evidence-gathering process for an impaired driving investigation, a law enforcement officer typically requests a breath sample from the driver. All States have some form of an implied consent law, which provides that as part of accepting the agreement for receiving a license, a driver agrees to provide a breath, blood, or urine sample when properly requested. However, the National Highway Traffic Safety Administration has found that the percentage of people who refuse to provide breath samples when arrested for DWI varies considerably across States, and this creates a concern in the criminal prosecution of DWI cases.

This Research Note provides an overview of the DWI arrest process including blood alcohol concentration (BAC) testing, presents data on breath test refusal rates, and discusses one approach – the use of warrants and blood draws – that several States have implemented in an effort to reduce their refusal rates.

The DWI Arrest and BAC Testing Process

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

If the officer develops articulatable suspicion to pursue the investigation, the officer will typically request the driver to step out of the vehicle and perform a series of field sobriety tests. NHTSA strongly recommends the NHTSA/International Association of Chiefs of Police

(IACP) Standardized Field Sobriety Test (SFST), which consists of the Walk-and-Turn test, One-Leg-Stand test, and Horizontal Gaze Nystagmus test. The combined score of these tests indicates whether the driver is likely to be at or above the legal limit of .08 grams per deciliter BAC.

If the officer has probable cause to support an arrest decision, the officer will place the offender under arrest and read the Miranda Rights. At this point, the officer will request a BAC sample – most typically a breath sample but blood or urine samples could also be requested. The officer may take the offender to a booking location where the sample will be requested, or in many instances, the officer may obtain the sample at roadside in the patrol vehicle or in a BATmobile³ or similar setting, if an evidential breath test device is available in the field.

Not all suspects agree to submit to the BAC test. Under implied consent laws, a driver agrees, as part of the licensing agreement with the State, to provide a breath, blood, or urine sample when properly requested. Drivers have the right to refuse a lawful request by a law enforcement officer, though such a refusal may result in the suspension or revocation of the driver's license.

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

Breath Test Refusal Rates

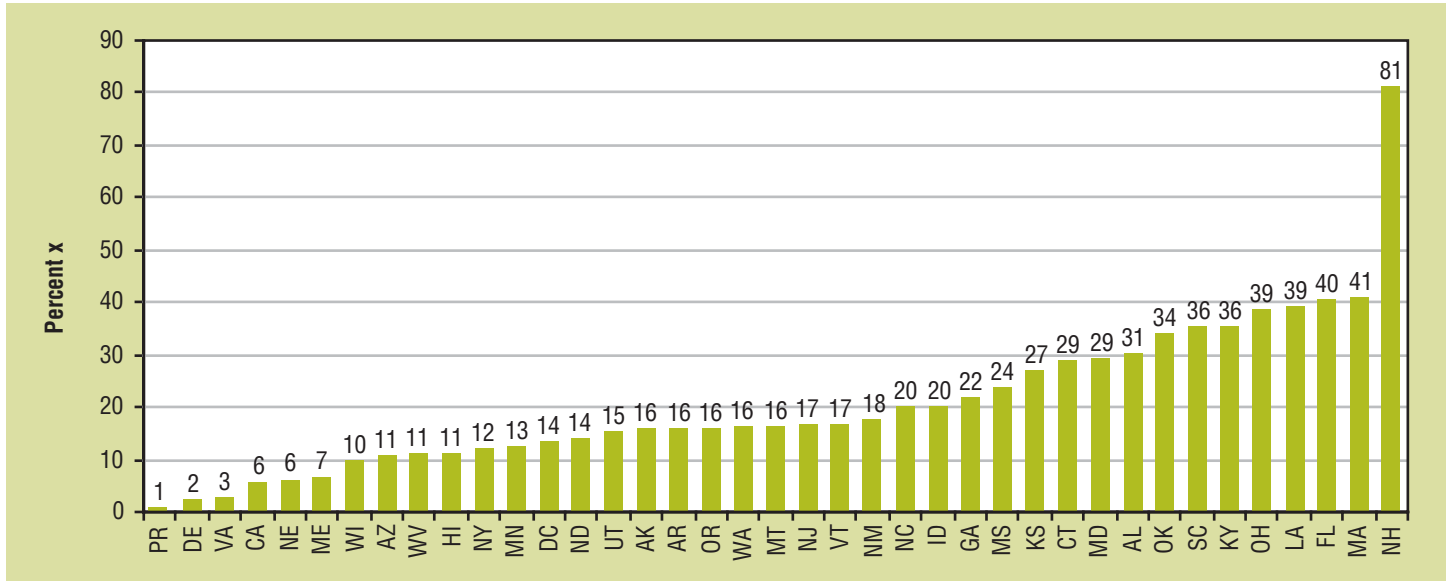
NHTSA contracted with the Mid-America Research Institute to collect recent State DWI refusal rate data. In 2006, Mid-America sought information from each State, the District of Columbia, and Puerto Rico regarding breath test refusal rates. Typically this data is obtained

from a State’s Department of Motor Vehicles, but some States will house the information in a court records agency, State laboratories involved in chemical testing, or another State entity involved with traffic safety. The results for 2005 are shown in Figure 1.

weighted mean of the rates based on State populations in 2005 was 20.9 percent.

Mid-America also contrasted breath test refusal rates for 2005 to rates from 2001⁴. The results, indicating both

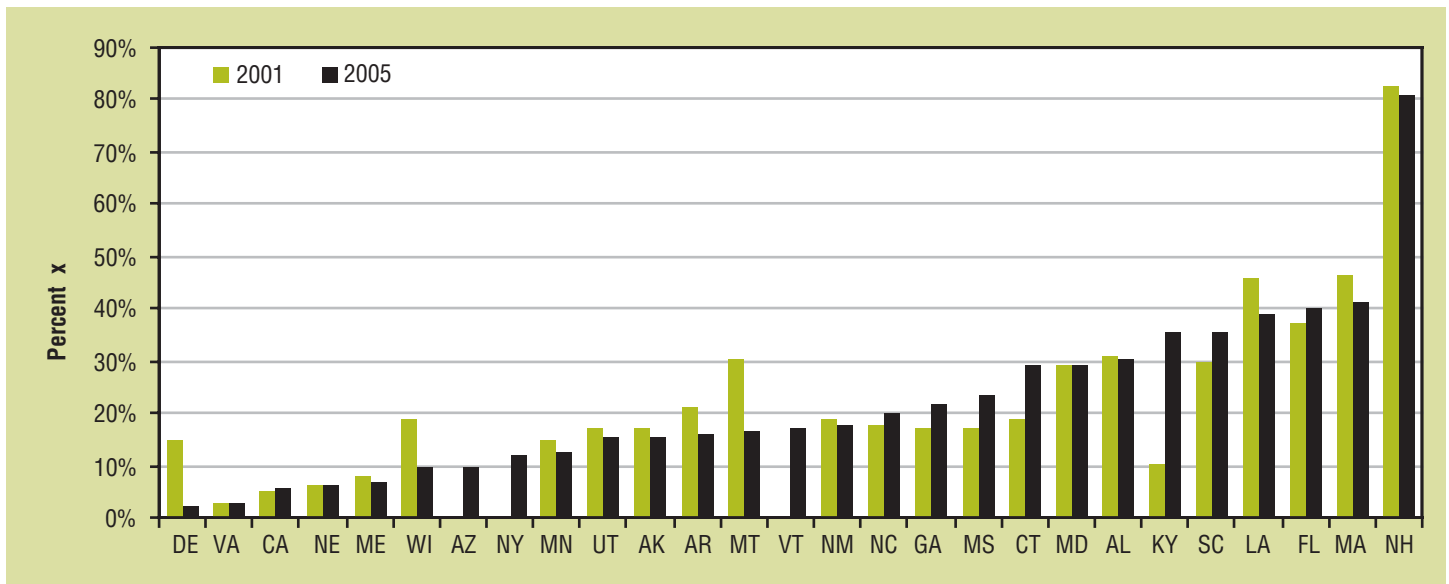
Figure 1. Breath Test Refusal Rates, 2005



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

2001 and 2005 data for States, are shown in Figure 2. Note that the results for these two years are not directly comparable because reporting methods may have changed in a State across time. Also, data was not received from each State for each time frame.

Figure 2. Breath Test Refusal Rates, 2001⁴ and 2005



Similarly, Mid-America compared NHTSA's earliest data on breath test refusal rates, from 1987,⁵ 2001 data, and the most 2005 recent data, as seen in Table 1. Again, reporting within States could have changed across years. However, the major finding is the relatively small change in the refusal rate in the Nation as a whole since 2001, and since 1987. The average rate for 2005 DWI arrests of 22 percent is 3 percentage points lower than for 2001 arrests, and 3 points higher than that the 1987 arrests. Table 1 provides basic statistics on rates from 1987, 2001, and 2005.

Table 1. Breath Test Refusal Rates, 1987,⁵ 2001,⁴ 2005

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

A Promising Strategy – Use of Warrants and Blood Draws

Many States have been concerned about breath test refusal rates, and have implemented procedures designed to lower the refusal rates. In Zwicker, Hedlund, and Northrup's 2005 report on refusals, they examined not only States' rates, but also DWI laws and sanctions. The report includes a discussion of possible reasons why rates are high in some States. The researchers conducted in-depth analyses in five States, and found a complex relationship of laws, procedures, and customs that influence rates, including differences in how first offenders respond to BAC requests versus how repeat offenders may respond.

One promising strategy that emerged is the use of warrants to obtain blood samples from drivers who refuse to provide breath samples. NHTSA has learned of at least six States using this approach in at least some local jurisdictions, and the Preusser Research Group (PRG) sought information on how well this process works. In a recently completed research project for NHTSA, the PRG examined these States and their use of warrants to obtain blood samples from drivers.⁶

The researchers conducted case studies of how Arizona, Oregon, Michigan, and Utah each use a warrant system to obtain blood samples from drivers. They obtained

additional information from California and Nevada, two States in which officers can obtain blood samples without warrants.

In each case study State, PRG conducted meetings and phone discussions with about 15 people, including officials in the State's Department of Public Safety or the Governor's Highway Safety Office, law enforcement officers, prosecutors, defense attorneys, and judges. Typically, the researchers began their discussions with representatives of the Highway Safety Office, and from there obtained contact information for individuals in the State's criminal justice system who were familiar with the breath test refusal issue, and also with the warrant process in their jurisdiction. These individuals provided information on policies and procedures, as well as their opinions on how well the warrant process is working. PRG's study did not include obtaining actual refusal data from each State; however, in some cases, the researchers noted officials' beliefs regarding changes in refusal rates. The researchers also conducted telephone interviews with key contacts in California and Nevada regarding their process for refusals.

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

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

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

policies for obtaining warrants and blood samples, and the results of the discussions with representatives from each State, is found in the full NHTSA report.⁷

Arizona

Jurisdictions in Arizona, including Phoenix, Peoria, and Scottsdale, began using warrants in some serious DUI⁸ cases in the mid-1990s. Some Arizona jurisdictions use warrants for all BAC test refusals, and most jurisdictions use warrants for at least some refusals.

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

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

An unusual feature of Arizona's approach is that law enforcement officers may be trained as phlebotomists – people trained in taking blood samples. Four community colleges across the State conduct this training, using a standard curriculum. The course, approximately one week, costs \$200 and includes 20 hours of classroom work and 100 blood draws. At this time, most Arizona law enforcement agencies have a phlebotomist on staff or can access one through a nearby agency.

The officer typically draws the blood at the police station – thus saving a trip to a medical facility. If a trained officer is not available, the driver may be taken to a medical facility or a qualified person may be called to the police station. A possible concern with having an officer draw the blood is that suspects could feel coerced if an

authority figure such as an officer is obtaining the sample. No representative in Arizona mentioned that this had been an issue; however, the study did not include interviews with drivers arrested for DUI.

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

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

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

With Arizona's use of officers as phlebotomists, much of the warrant and blood sample program costs are initial training costs – the cost of the training itself and the time that officers are in class. Officials estimated that about \$40,000 is authorized by Arizona's Governor's Office of Highway Safety for phlebotomy training. Blood kits cost about \$7 each and agencies each pay for their own; there are other supplies that an agency also needs to have available, costing approximately \$1,000. The blood samples are sent to law enforcement labs where the samples are tested at no additional charge.

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

Michigan

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

After arrest, the officer will take the driver to a location where a qualified medical practitioner, such as a physician, nurse, emergency medical technician, or phlebot-

omist is on duty; or a qualified person is called to the police station.

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

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

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

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

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

The primary costs of the warrant system are for blood draws, blood test kits, and blood sample analyses. There does not seem to be a consistent manner of paying

blood draw costs. Some hospitals bill drivers through their medical insurance; some bill the law enforcement agency for each draw (one agency quoted a cost of \$27 per draw). Law enforcement agencies that have a phlebotomist or other medical personnel at the agency cover the costs of these personnel. Law enforcement agencies pay for the blood test kits at about \$7 per kit, and the State police crime laboratory bills individual agencies for the costs of analyzing blood samples. Michigan offenders can be ordered to pay certain costs associated with their offenses. About one-third of Michigan's law enforcement agencies bill defendants for the costs of blood draws and analyses.

Those who were interviewed believe that the warrant system is fully accepted in their jurisdictions and noted that there have not been any challenges to the warrant process. The faxed warrant system was challenged and upheld. The judges, prosecutors, and law enforcement officers interviewed strongly supported the warrant system for BAC test refusals. Their universal reaction upon learning that most States do not use warrants was "Why not?"

Oregon

The use of warrants for blood samples in Oregon began more recently and is in effect in a few counties. There is no specific law that allows for forced blood draws, but Oregon's impaired driving law has been interpreted to allow for warrants and blood draws. The officer must first inform the suspect of the consequences of refusing or failing the test.

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

The samples are sent to the State lab for analysis, at an estimated cost of \$50 per test. According to officials interviewed, Oregon analyzes approximately 200 blood tests each year, compared to 50,000 to 60,000 breath tests, and BAC results are available within 30 days.

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

Utah

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

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

digital assistants to allow warrants to be completed via wireless communication.

Once a warrant is obtained, the officer must obtain approval from a supervisor. The supervisor contacts a qualified phlebotomist to draw the sample. As of June 2006, there were 53 active State Troopers in Utah who were trained phlebotomists, and there were plans to train more. Training is provided by the Utah School of Phlebotomy and is taught two days per week for two weeks, at a cost of \$250 per student. Civilian phlebotomists are also used when necessary. In fiscal year 2004, the Department of Public Safety spent approximately \$17,000 on blood draws in hospitals or by contract phlebotomists in five counties: Salt Lake, Utah, Davis, Weber and Toole counties. Salt Lake County alone spent approximately \$12,000.

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

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

California, Nevada, and North Carolina

These three States all allow blood draws for breath test refusals without a warrant. The researchers conducted phone interviews with knowledgeable individuals in California and Nevada. North Carolina's law was just recently enacted. We summarize the law here; however, officers were not contacted as part of this study.

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

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

than two hours away from the nearest law enforcement agency and evidential breath test instrument.

A North Carolina law became effective on December 1, 2006, and provides that any law enforcement officer who has reasonable grounds to believe that the driver has committed the implied-consent offense may obtain a chemical analysis of the person. Before any type of chemical analysis is administered, the driver is taken before a chemical analyst or a law enforcement officer who is authorized to administer chemical analysis of the breath, who informs the person orally and also give the person a notice in writing that reads: "You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver's license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws." The law further states that "Notwithstanding any other provision of law, when a blood or urine test is specified as the type of chemical analysis by law enforcement officer, a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample and obtain the urine sample, and no further authorization or approval is required."

Conclusions

As part of the evidence-gathering process for an impaired driving investigation, a law enforcement officer typically requests a breath sample from the driver. When a driver refuses to provide a voluntary breath sample, this piece of evidence is often unavailable to prosecutors. NHTSA data has consistently shown that States vary dramatically in terms of their refusal rates, ranging from about 2 percent to 81 percent in 2005. The average rate across the country is 22 percent.

In several States police officers request warrants to obtain samples. In general, the law enforcement officers, prosecutors, and judges interviewed for case studies were supportive of the use of warrants for blood draws, even when the use of a warrant required additional processing time and (for judges) late-night

calls. Many strongly believe that the driver's BAC is a valuable piece of evidence in court and can make the difference between a guilty plea and a trial. And BAC evidence is critical in the prosecution of DUI cases such as "high" BAC offenses (e.g., where there are enhanced sanctions for BACs of .15 or higher), multiple offenders, and cases involving crashes with serious injury or fatality.

The main disadvantage of the warrant system is the additional time it can add to the DWI arrest process. It can take two hours or more for the officer to complete the necessary forms, contact a judge, fax the forms, receive the warrant approval, transport the offender to the location of the blood draw, and wait for a phlebotomist obtain the sample. However, much of this time can be reduced if, as in Arizona and Utah, officers are trained as phlebotomists.

Other possible disadvantages include the rare but possible medical complications that can occur when taking a blood sample from someone. And not all judges support the use of warrants for impaired driving crimes.

Although not necessarily a disadvantage, there is a cost involved with obtaining blood samples from drivers. The cost is incurred either as phlebotomy training costs for law enforcement officers or paying for other qualified people to obtain the blood sample, including travel time. There is also the cost of the blood kits and the lab fees for analyzing the blood samples. This cost does not necessarily have to be borne by the jurisdiction but could be paid through offender fees.

In cases of breath test refusals, the use of warrants to obtain bloods samples appears to be a promising strategy for States to use in obtaining BAC evidence in DWI cases. NHTSA is continuing to examine this topic with research on the effect of refusals on DWI prosecution and whether the use of warrants can reduce refusals.

References

- ¹ Driving while impaired – used as a general term for various offenses of driving under the influence of alcohol or other substances.
- ² Federal Bureau of Investigation, Uniform Crime Report, 2005. www.fbi.gov, accessed November 29, 2006.
- ³ A BATmobile (breath alcohol testing mobile) is a mobile law enforcement vehicle designed as a self-contained booking station for DWI and other offenses. BATmobiles typically have breath-testing devices, communication technology (phone, fax), arrest and processing forms, holding facilities, and other equipment needed to test and temporarily detain DWI offenders.
- ⁴ The 2001 data was collected through a contract with Preusser Research Group. See Zwicker, T., Hedlund, J., & Northrup, V. (2005). *Breath Test Refusals in DWI Enforcement: An Interim Report*. DOT HS 809 876. Washington, DC: National Highway Traffic Safety Administration.
- ⁵ Jones, R., Joksch, H., & Wiliszowki, C. (1991). *Implied Consent Refusal Impact*. DOT HS 807 765. Washington, DC: National Highway Traffic Safety Administration.
- ⁶ Hedlund, J., and Beirness, D. (in press). *Use of Warrants for Breath Test Refusal: Case Studies*. Contract #DTNH22-02-351121, Task Order #6. Washington, DC: National Highway Traffic Safety Administration.
- ⁷ *Ibid.*
- ⁸ Driving under the influence of alcohol or drugs.



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