

NHTSA Technical Note
DOT HS-801 934

REPORT ON THE DEVELOPMENT OF PRELIMINARY BREATH TEST LAWS IN THE UNITED STATES



Prepared by:

U.S. DEPARTMENT OF TRANSPORTATION
National Highway Traffic Safety Administration
Traffic Safety Programs
Office of Driver and Pedestration Programs

June 1976

REPORT ON THE DEVELOPMENT
OF PRELIMINARY BREATH
TEST LAWS IN THE UNITED STATES



Prepared by:
Phil Dozier
National Highway Traffic Safety Administration
Traffic Safety Programs
Office of Driver and Pedestrian Programs
June 1976

Introduction to Preliminary Breath Test Laws

In most jurisdictions, for a law enforcement officer to require a motorist suspected of driving while under the influence of alcohol (DUI) to take an "Implied Consent Law" chemical test to determine his blood alcohol content (BAC), he must first place the suspected offender under arrest.¹ A preliminary breath test (PBT) law allows such a test prior to arresting the apprehended driver. The primary need for a PBT is to aid enforcement officers in ascertaining whether there exists sufficient evidence to arrest a person for DUI. There will always be individuals who pass routine psychomotor examination tests and still may be heavily influenced by alcohol. To make any real headway in managing the abusive drinker problem, PBT, in addition to reliance on subjective judgment, would strengthen both police and public confidence in DUI arrest decisions. The PBT has special value in disproving intoxication, although the apprehended driver showed outward manifestations of impairment at the time of the testing. This will avoid, in many instances, the arrest of a person who is not legally under the influence.²

The States of Florida, Indiana, Maine, Minnesota, Mississippi, Nebraska, New York, North Carolina, North Dakota, South Dakota, Vermont, and Virginia have laws which specifically provide for preliminary breath tests. (See Attachment A for a summary of the principal PBT law features.) The States of Maine, Nebraska, New York, North Dakota, and South Dakota have laws which are independent of their States' implied consent laws and can be triggered by an accident or traffic violation. The other States have laws which require the enforcement officer requesting the chemical breath test to have reasonable grounds or probable cause to believe the stopped driver was driving while impaired, under the influence or suspect him to be guilty of driving under the influence. Only Vermont's and Indiana's PBT laws are evidential in nature. However, the weakness in the latter two laws is that they only provide authority for the law enforcement to administer one chemical test to a suspected drinking driver; consequently, should a driver consent to a roadside PBT, he can not be compelled to submit to subsequent "in custody" chemical tests which, at the present time, are the only ones judicially recognized. Only Minnesota's PBT law constitutes grounds for use of the implied consent law on refusal or a .10 BAC. The States of Florida, Maine, Minnesota, New York, North Carolina, and Virginia do not impose either a fine penalty or license suspension on refusal to submit to a PBT. The States of Indiana, Mississippi, North Dakota, South Dakota, and Vermont allow for suspension or revocation of driver's

1 Driver Licensing Law Annotated, Section 6-205.1(a), P.271 (1973).

2 The need for PBT to investigate "cases in which the observable evidence is equivocal" was strongly recommended in a study of Alcohol Safety Action Project enforcement." Factors Influencing Arrests for Alcohol-Related Traffic Violations Contract No. DOT-HS-4-00837 (1974).

license upon a refusal to submit to a PBT, whereas a refusal in the State of Nebraska constitutes a criminal offense with a fine of \$50 to \$100.

There are currently eleven jurisdictions which possess implied consent laws which are similar in effect to the implied consent-PBT law of Vermont.³ While the legislative intent of the above laws was not to effectuate authority for the administering of roadside screening tests, the statutory language used in their enactment does, nevertheless, make such a practice legally permissible. The implied consent laws of these jurisdictions do not specify that consent is implied only in the event the person is arrested. However, all of these laws specifically require that an arrest precede the refusal to submit to the test if any sanctions are to be imposed. Since these eleven jurisdictions have implied consent laws which would not preclude the use of a PBT, then there presently exists twenty-three jurisdictions which possess, in one form or fashion, statutory authorization for the use of PBTs. Notwithstanding, adoption of specific PBT legislation is recommended.

The PBT law of the State of Nebraska best illustrates a law which is independent of implied consent. Its key provision provides:

"Any law enforcement officer who has been duly authorized to make arrests for violation of traffic laws of this State or ordinances of any city or village may require any such person to submit to a test of his breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his body, or has committed a moving traffic violation, or has been involved in a traffic accident."⁴ Refusal to submit to the test results in a separate criminal offense.

The provision may be too broad. While there is evidence that alcohol is involved in many highway crashes, there are many crashes in which it is not. The link between committing a moving violation and being under the influence is even more tenuous. A driver may commit a moving violation which will provide part of the reasonable grounds to believe, along with his physical condition, that he is under the influence. What is most important is the evidence of being under the influence, not the violation. Some authorities believe that a law such as Nebraska's may be vulnerable to constitutional attack.⁵

The PBT law of Minnesota is an example of an implied consent-PBT law. A PBT is required "When a police officer has reason to believe from the manner in which a driver is driving, operating, or actually controlling ... that such driver may be violating (the drunken driving law)."⁶

3 The eleven jurisdictions that do not specify that consent is implied only on arrest, are as follows:

Connecticut	Iowa	Pennsylvania	Utah
Hawaii	New Jersey	Rhode Island	District of Columbia
Idaho	Oklahoma	Tennessee	

4 Nebraska Rev. Stat., Section 39-722.03

5 See note 9, infra.

6 Minnesota Statutes 169.121

Evaluations of PBT use have been conducted in New York, North Dakota, and Minnesota. The results were very favorable in North Dakota and Minnesota, but equipment problems were experienced in New York. Surprisingly little judicial or attorney general constitutional and legal interpretation has occurred in the jurisdictions with PBT laws. Since Minnesota has had considerable PBT operational experience which has been evaluated and a State Supreme Court decision statutorily interpreting its combined PBT/ implied consent law, special emphasis is given its law in this position paper.

Minnesota PBT Operational Experience⁷

On April 4, 1973, thirteen Borg Warner J2 and J2A PBT devices were deployed in Hennepin County, Minnesota. Each Enforcement agency was free to establish its own policies regarding use of the PBT in various situations. Some agencies did not use the PBT in cases where it was obvious to the officer that the driver stopped was intoxicated. Through August of 1973, approximately 1200 PBT tests were administered. Statistics indicate that 48 percent of the drivers tested showed over .10 BAC, 33 percent showed between .05 and .10, and 19 percent showed .05 or under. The average BAC in arrests based on PBT use was .14 as compared to .18 for those arrests made during the same time period without using a PBT. An even greater difference would have appeared if PBTs had been used only when the officer was in doubt. A conventional psychomotor test was given in association with 478 PBT tests and the results of these tests showed that among 240 persons who received "fail" readings on the PBT, 62 percent had been rated "good" or "fair" on the physical performance tests.

The use of PBT tests in Hennepin County by departments which had at least one PBT available to them for the months of April through July 1973, also demonstrated an increase in the number of DUI arrests by 62 percent compared to the same period in 1972. Of those departments which did not employ the PBT test, DUI arrests increased only 23 percent for the comparable periods. It is important to note that had the participating departments been equipped with more PBTs the increase in DWI arrests would have likely been higher.

When requested to rate the physical characteristics and operation of the PBT device, the following enforcement responses were received:

- 1) Approximately eighty-three percent of the patrolmen believed the device to be neither too large or too small.
- 2) Ninety-one percent believed it to be neither too light or too heavy.
- 3) Eighty-four percent found the PBT easy to read.

7 Evaluation of Portable Breath Test Devices for Screening Suspected Drunken Drivers by Police in Hennepin County, Minnesota, Contract No. DOT-HS-048-1-064, June 1974.

- 4) Seventy-seven percent stated that the PBT is easy to operate and only nine percent said PBT operation was difficult.
- 5) Forty-nine percent felt the PBT was quick to operate, sixteen percent were neutral, and approximately thirty-five percent believed it was slow to operate.
- 6) Sixty-eight percent stated that the PBT simplified arrests, whereas only eleven percent felt that DWI arrests were complicated by the use of the PBT.
- 7) Eighty-five percent felt that use of the PBT can contribute greatly to traffic safety.

The reason given by the patrolmen for making stops in which a PBT was given fell into eight categories. The most common reason for making a stop was erratic driving, accounting for forty-seven percent of the traffic stops. This was followed by speeding and faulty equipment with thirteen and seven percent of the total, respectively. The miscellaneous category was indicated for twelve percent of the stops.

PBT Legal Interpretation

For any test to be administered under the Minnesota PBT law, a law enforcement officer must have reasonable grounds to believe the person have been driving or in actual physical control of a motor vehicle upon the public highways of the State while having alcohol in his body. In Minnesota's Supreme Court decision of State Department of Public Safety vs. Grovum, 209 N.W. 2d 788 (1972), the court interpreted the amending of Minnesota's implied consent law with the PBT provision "to enlarge the grounds upon which a peace officer may request a person to submit to chemical testing of his blood, breath, or urine." If the officer had reasonable and probable grounds to believe that a person was driving under the influence and one additional condition provided by the law existed (person had been placed under arrest for the offense, involved in a motor vehicle collision resulting in death, injury or property damage, refused to take the PBT, or had a PBT reading of .10 percent or greater) the implied consent test could be requested. The court even broadened the term "arrested person" or "person under arrest" to "include a person in a situation where he is not under arrest, but a peace officer has probable cause to believe"

Supportive of this position is a Florida Attorney General's Opinion 075-46, dated February 20, 1975. This opinion interpreted a similar "reason to believe" provision of that State's pre-arrest breath law to provide "law enforcement personnel with an additional tool to fill the void where the officer has more than mere suspicion,, yet does not have probable cause to arrest the person" and require him to take the implied consent test. The Florida Attorney General liked the term

"reasonable belief" to the term "reasonable indication to stop and frisk" in a Florida criminal code provision and referenced the U.S. Supreme Court decisions of Adms vs. Williams, 407 U.S. 143, (1972), and Terry vs. Ohio 392 U.S. 1. (1968).

In Terry the Court upheld a seizure of a pedestrian to allow a weapons search when the pedestrian's activities gave a patrolling policeman a reasonable suspicion that he was "casing" a shop for an armed robbery. The Court stated that "in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that intrusion." However, with regard to the reasonableness it is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen; for there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entail's." In Adams, the Court held that the occupant of a parked car could be subjected to an investigative seizure when the officer had a reasonable suspicion that the individual was armed and possessed narcotics.

PBT Constitutional Issues:

Clearly, the Constitutional legality of implementing a PBT statute must be considered in view of the "unreasonable search and seizure" protection of the Fourth Amendment, "self-incrimination privilege" of the Fifth Amendment to the United States Constitution.⁸

Search and Seizure

The Fourth Amendment limitations on alcohol screening procedures are of far greater consequence than those of the Fifth Amendment. The Fourth Amendment assures "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Evidence obtained through "unlawful search or seizure" by government officers is inadmissible in both Federal and State courts.

The Supreme Court has deemed the Fourth Amendment prohibition to be incorporated within the Fourteenth Amendment due process clause, thereby, extending the rule to State court proceedings. (Wolf vs. Coloradoc 69 S Ct 1369 (1949); Mapp vs. Ohio, 367 U.S. 643 (1961).)

In Davis vs. Mississippi, 37 U.S. LW. 4359, (1969), the Supreme Court held that the Fourth Amendment applies to the investigatory arrest stage of a prosecution. A preliminary breath test for alcohol is a "search" within the meaning of the Fourth Amendment. Eventhough a PBT statute may not provide for criminal consequences, but does provide for driving license revocation upon refusal to submit to the screening test, Fourth Amendment standards still apply.

⁸ See Hricko, Andrew R., "British Pre-Arrest Breath Tests-Constitutional in the United States? Traffic Digest and Review, December 1969, for an early exposition of the constitutional question.

Also, the fact that a license revocation for refusal to submit to one or more breath tests is based on "administrative authorization" rather than a statutory mandate," does not remove it from Fourth Amendment restrictions. Where basic rights are involved, the Supreme Court has traditionally looked to the substance rather than the form of a proceeding.

Traditionally, a search may be made under two qualified conditions: under a warrant issued to an enforcement officer who has demonstrated to a magistrate that he has "probable cause" to believe that a crime has been committed, or as an accompaniment to an arrest where there is also "probable cause" to believe a crime had been committed, but the obtaining of a warrant would be impracticable.

The Supreme Court, in Terry, lowered the evidential standards by upholding the conviction of a man who had been searched prior to arrest. The Terry decision limits the more liberal search procedure (stop and frisk) to those situations in which a police officer reasonably concluded that criminal activity may be afoot and that the persons with whom he was dealing may be armed and presently dangerous to either himself or the general public. However, the Court, in Adams, stated that "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. . . "a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

While the Terry and Adams cases reflect a more flexible policy by the U.S. Supreme Court toward search and seizure procedures, they do not assure that a PBT statute, requiring roadside breath tests for those drivers believed to have been driving under the influence, will meet Fourth Amendment standards. However, the application of a PBT statute, under "exigent circumstances," similar to Terry, would constitute a persuasive argument for changing the probable cause evidential requirement to protect the "public health and safety."

The variable probable cause concept of the Terry and Adams cases was applied to driving under the influence cases by a group of Denver College of Law professors, one of whom is a constitutional law expert, in a study conducted for the National Highway Traffic Safety Administration on "The Drinking Driver: An Interdisciplinary Approach to the Legal Management of a Social Problem."⁹ The idea of variable probable cause was described by the study as follows:

9 Contract No. DOT-HS-126-2-352 (1973).

"The greater the intrusion involved in a search, the more stringent are the standards that must be met. But the converse is also true: action not denominated as a 'full-blown' arrest or search can be constitutionally reasonable under the Fourth Amendment on less evidence of guilt than otherwise required."¹⁰

In other words, erratic driving and some physical signs of alcohol intoxication should provide sufficient probable cause to require a non-intrusive PBT.

Furthermore, searches without a warrant, and not otherwise consented to, or incident to a lawful arrest, may still be lawful if the prosecution can establish some compelling State interest to justify the search. The Supreme Court in Schmerber vs. California, 384 U.S. 787 pointed out that where it appears that crucial evidence might be lost or destroyed during the delay required to obtain a search warrant, a search without a warrant and over the protests of the accused, may still be lawful. In that case, the extraction of a blood sample from the accused was justified because the time required to obtain a warrant would allow dissipation of the alcohol in his bloodstream.

Self-Incrimination

The U.S. Constitution, Fifth Amendment, provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment prohibition is directly applicable to proceedings as well through the Fourteenth Amendment due process clause. (Malloy vs. Hogan, 378 U.S. 1 (1964)).

It was originally asserted that prohibition applied to all types of evidence; therefore a defendant could not be compelled to testify or to submit to any examination, nor produce any evidence, from which information could be obtained which might be used in evidence against him. However, modern authority holds that the prohibition applies only to testimonial compulsion. Today, an accused may be compelled to submit his body for the purpose of an evidential examination.

The United States Supreme Court in Schmerber held that the taking of a blood sample from an accused against his will did not violate his privilege of the Fifth Amendment. In that case, distinction was drawn between "testimonial" evidence and "physical" evidence. The latter category, to which the prohibition against self-incrimination is inapplicable, was deemed to include samples of body fluids.

10 Id at Part I, p. 26

Accordingly, it would be safe to assume that the admission into evidence of PBT results (physical evidence) would not be in violation of the Fifth Amendment.

Due Process

The Fourteenth Amendment states in part that "no person shall be deprived of his life, liberty, or property without due process of law." The same Amendment made it mandatory that the States grant due process of law.

With respect to the proposed PBT statute, there appears to be no due process problem involved so long as the PBT is administered in a reasonable manner by qualified personnel.

In Breithaupt vs. Abram, 352 U.S. 432 (1957), the Supreme Court held there was nothing inherently "brutal" or "offensive" in the taking of a blood sample from an unconscious motorist, and therefore the taking of the sample and its subsequent use as evidence did not constitute a violation of due process. The Court pointed out that due process is measured by the whole community sense of decency and fairness and not by the personal reaction of a sensitive person. The Court further noted that blood test procedures had become routine in our everyday life. In Schmerber, the Court also held there was no violation of due process of law.

The Supreme Court, at this juncture, would likely hold alcohol screening procedures to be within the confines of due process, so long as PBTs are administered by qualified personnel and in a manner not repugnant or offensive to a "sense of justice."

Health and Safety Searches

Warrantless searches of vehicles in inspection stops have been allowed for highway safety purposes to determine whether the driver is licensed and the vehicle is in proper mechanical condition. These stops have been allowed without any evidentiary justification.¹¹ Another limited exception to the "warrant" and "probable cause" requirements of the Fifth Amendment involves health and safety inspections of private residences or business premises. While the Supreme Court, in Camara vs. Municipal Court, 387, U.S. 523 (1967), held such inspections are subject to the Fourth Amendment limitations, it approved less stringent standards for the issuance of warrants than would be permissible in criminal cases. The Court has also intimated that Congress, in connection with supervising licensing programs (e.g., liquor sales), may have authority to authorize searches and seizures without a warrant if other standards of reasonableness are assured. (Colonnade vs. U.S. 397, U.S. 72 (1970)).

¹¹ E.g., United States vs. Turner, 442 F.2d 1146 (8th Cir. 1971). However, the Pennsylvania Supreme Court in Commonwealth vs. Swanger, 307, A.2d 875 (1973) probably held stops of individual cars for driver license inspections on less than probable cause unconstitutional.

The application of either of these Fourth Amendment exceptions to PBT laws is tangential, at best. However, they do indicate a judicial willingness to uphold Fourth Amendment exceptions that are public health and safety oriented.

Conclusion

PBT laws' which are helpful enforcement tools and would withstand constitutional attack should meet the following conditions:

- o The administering of a non-intrusive PBT which would not "shock the conscience" of the court or violate its "sense of justice."
- o Use of the PBT as objective aid to the traditional roadside psychomotor sobriety test which are customarily used prior to most DUI arrests.
- o The issuance of a search warrant would be impractical under situations in which a PBT is used.
- o Reasonable grounds to believe a driver had been driving under the influence, would key the PBT law.
- o The administration of a PBT as a non-evidential test could be followed by a second, evidential implied consent test, if justified.
- o While the operation of a motor vehicle fringes on the border of being a "right," it, nevertheless, is technically a privilege subject to the issuance of a license and certain restrictions. A positive PBT BAC can be used to trigger the implied consent law. Refusal to submit to the second, evidential implied consent test would be grounds for license suspension.
- o A PBT serves the purpose of benefiting the suspected drinking driver as well as enforcement. The suspect may not be inconvenienced by having to submit to a station house implied consent chemical test if the results are negative.
- o The use of a PBT expedites the immediate removal of dangerous drinking drivers off our nation's highways; thereby, protecting the general welfare and safety of the public.

U. S. Department of Transportation
 National Highway Traffic Safety Administration
 Office of Driver and Pedestrian Programs
 Driver Licensing and Adjudication Division
 Adjudication Branch
 Washington, D. C. 20590
 George D. Brandt and Phillip C. Dozier

COMPARISON OF PROVISIONS OF "PRELIMINARY TESTING" STATUTES

ATTACHMENT A

STATE	SECTION NO.	CRITERIA FOR USE	PENALTY PROVISION FOR REFUSAL	EVIDENCE USED FOR	TESTING	REMARKS
Florida	Florida Statutes 55322.261 (b)	Reason to believe person's ability to operate a motor vehicle is impaired by alcohol.	Nothing stated	No	Breath test	a. Officer must advise operator that he has a right to refuse breath test. b. Officer shall obtain the written consent of the motor vehicle operator.
Indiana	47-2003 e-h	Probable cause to believe that any person has committed the offense of DUI in officer's presence or has been involved in a motor vehicle accident not occurring in officer's presence.	Suspension of driver's license for one year.	Yes	Submit to a chemical test for intoxication	Indiana's statute is in essence, a pre-arrest implied consent law. The law is defective in that it only provides the law enforcement the authority to administer one chemical test. If a pre-arrest chemical test is administered, then no subsequent chemical test may be given for evidentiary purposes.
Maine	Me. Rev. Stats. Ann. 529-1312-10c	Involved in an Accident or Traffic Violation	Nothing stated	Nothing stated	Submit to breath test	

COMPARISON OF PROVISIONS OF "PRELIMINARY TESTING" STATUTES

STATE	SECTION NO.	CRITERIA FOR USE	PENALTY PROVISION FOR REFUSAL	EVIDENCE USED FOR	TESTING	REMARKS
Minnesota	Minn. Highway Traffic Regulation Act SS 169 121	Reason to believe	No penalty if person submits to a chemical test. License Revoked if person refuses both tests.	No	Submit to a breath test	The DUI offense and the PBT Provision are combined under SS 169.121. The PBT is used only for the purpose of guiding the officer in deciding whether an arrest should be made.
Mississippi	Miss. code Ann. 563-11-5	Reasonable grounds and probable cause to believe person driving motor vehicle while under the influence of alcohol.	Suspension of driver's license for a period of 90 days.	No	Submit to a breath test	The Implied consent and preliminary breath test provision are combined in the same statute. Notice as to penalty for refusal is required under both provisions. Under the implied consent provision, an arrest must precede request for chemical test.
Nebraska	Neb. Rev. Stat. SS 39-727.03	Reasonable grounds to believe 1) person has alcohol in his body or 2) committed a moving traffic violation or 3) involved in a traffic accident.	Placed under arrest for a misdemeanor - fine of \$50 - \$100	Nothing stated	Submit to a breath test	

COMPARISON OF PROVISIONS OF "PRELIMINARY TESTING" STATUTES

STATE	SECTION NO.	CRITERIA FOR USE	PENALTY PROVISION FOR REFUSAL	EVIDENCE USED FOR	TESTING	REMARKS
New York	N. Y. Veh. & T Law SS 1193-a, 1194 (McKinney Supp. (1973))	Involved in an accident or traffic violation	None	Nothing stated	Submit to a breath test	This law does not require that the breath test indicate consumption of alcohol within 3 hours of test as did the original PBT law. Implied consent law, S 1194 does not require prior arrest. Notice of penalty for refusal required under implied consent law.
North Carolina	S-2C-16.3 (1973)	Reasonable grounds to believe that a person was operating a vehicle while under the influence.	Nothing stated	Nothing stated	Chemical test	
North Dakota	N.D. code S.39-20-14 Supp. (1975)	Reason to believe such person committed a moving traffic violation.	Sufficient cause to revoke license	No	Chemical screening testing of breath	

COMPARISON OF PROVISIONS OF "PRELIMINARY TESTING" STATUTES

STATE	SECTION NO.	CRITERIA FOR USE	PENALTY PROVISION FOR REFUSAL	EVIDENCE	TESTING	REMARKS
				USED FOR		
South Dakota	SL 1973 Ch 195 Sec. 11	Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter (DUI)	Revocation of license for one year.	Nothing stated	Breath test	
Vermont	VT. Ann. Stat. tit. 23 1202, 1203, 1205 (Supp 1973)	Reasonable grounds to believe person was operating, attempting to operate or was in physical control of vehicle while under the influence.	Driver's license suspended for one year.	Yes	Breath test	Results of PBT may be used in both criminal and civil actions.
Virginia	VA. Code S 18.1-54.1 (1973 Cumulative Supp.)	Suspected to be guilty of DUI.	None	No	Submit to a breath test.	Officer must advise suspected person of his rights.

