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DON'T HOLD YOUR BREATH: AN ANALYSIS OF GEORGIA'S DUI IMPLIED CONSENT LAW*

Melissa Davies**

INTRODUCTION

Since the creation of motor vehicles, their operation by drivers under the influence of drugs and alcohol has plagued public safety.[1] To combat this problem, states individually criminalized such acts by making it illegal to drive a motor vehicle with a certain Blood Alcohol Concentration (BAC).[2] To measure BAC, an officer must collect a sample of the person's breath, blood, or urine.[3]

After years of difficulty with conducting BAC tests, Georgia lawmakers crafted the DUI implied consent notice or warning.[4] The

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1. Stephen K. Valle & Dennis Humphrey, *American Prisons as Alcohol and Drug Treatment Centers: A Twenty-Year Reflection, 1980 to 2000*, in ALCOHOL PROBLEMS IN THE UNITED STATES: TWENTY YEARS OF TREATMENT PERSPECTIVE 83, 86 (Thomas F. McGovern & William L. White eds., Routledge 2013) (2002); Robert L. DuPont & Corinne L. Shea, *The Public Safety Threat of Drugged Driving*, NAT'L ASS'N DRUG CT. PROS. 1, 4 (Aug. 2014), https://www.bexar.org/DocumentCenter/View/11700/The-Public-Safety-Threat-of-Drugged-Driving-PDF [https://perma.cc/JVD2-CQWP].

2. Birchfield v. North Dakota, 136 S. Ct. 2160, 2166 (2016) ("[A]ll states have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level."); GA. CODE ANN. § 40-6-391(a)(2) (2020). "Less safe . . . to drive" under paragraph (a)(2) of GA. CODE ANN. § 40-6-391 and "rendered incapable of driving safely" under subsection (b) of GA. CODE ANN. § 40-6-391 set the same standard of impairment necessary to establish that a driver was driving under the influence of alcohol or other intoxicating substance. See State v. Kachwalla, 561 S.E.2d 403, 405 (Ga. 2002).

3. *Field Sobriety Tests*, FINDLAW, https://dui.findlaw.com/dui-arrests/field-sobriety-tests.html [https://perma.cc/HJ5U-NN5Z] (Oct. 22, 2018). *See generally* NHTSA, DWI DETECTION AND STADARDIZED FIELD SOBRIETY TEST (SFST) INSTRUCTOR GUIDE REFRESHER (rev. Oct. 2015), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/sfst_ig_refresher_manual.pdf [https://perma.cc/8UCJ-SW9A] (describing other tests that officers use to determine people's sobriety).

4. GA. CODE ANN. § 40-5-67.1(b)(2) (2018) (original version at GA. CODE ANN. § 40-5-67.1 (1981), enacted by 1992 Ga. Laws 2564, § 6, at 2575–81), *invalidated in part by* Elliott v. State, 824 S.E.2d 265 (Ga. 2019); *Birchfield*, 136 S. Ct. at 2166 ("So every [s]tate also has long had what are termed 'implied consent laws.' These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the [s]tate's drunk-driving laws."); Olevik v. State, 806 S.E.2d 505, 509 (Ga. 2017). The law uses "implied consent notice," but it is interchangeable with "implied

notice provides that Georgia drivers agree to submit to BAC testing as a condition of driving on the public roads within the state and receiving a Georgia driver's license.[5] If an individual refuses a BAC test, the law calls for an automatic license suspension.[6]

Yet, since its creation, the law raises concerns about one's right against self-incrimination under Paragraph XVI of the Georgia Constitution.[7] Paragraph XVI provides that one has a right not to give self-incriminatory evidence after an arrest.[8] Defense attorneys argue that the law violates self-incrimination because one cannot be compelled to consent to a BAC test when simply driving on the road.[9]

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consent warning." GA. CODE ANN. § 40-5-67.1(b)(2) (2020). The title of the notice is called a warning, and the officer actually reads the notice. *Georgia House Bill 471*, GA. PUB. SAFETY TRAINING CTR., https://www.gpstc.org/wp-content/uploads/2019/04/2019ImpliedConsentWarning-PDF.pdf [https://perma.cc/L3H5-H2HJ].

5. GA. CODE ANN. § 40-5-55(a) (2020), *invalidated in part by* Cooper v. State, 587 S.E.2d 605 (Ga. 2003), overruled in part by Olevik v. State, 806 S.E.2d 505 (Ga. 2017); Kitchens v. State, 574 S.E.2d 451, 453 (Ga. Ct. App. 2002) ("[T]he purpose of the implied consent law is to notify drivers of their rights so that they can make informed decisions. Accordingly, [appellate courts] have suppressed the results of chemical tests where the driver was misinformed of his rights and where that misinformation may have affected his decision to consent."). The implied consent for suspects over the age of 21 reads:
"The State of Georgia has conditioned your privilege to drive upon the highways of this state upon your submission to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to blood or urine testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which test)?
§ 40-5-67.1(b)(2).

6. § 40-5-67.1(b)(2); § 40-5-55.

7. *See* Elliott v. State, 824 S.E.2d 265, 267 (Ga. 2019); Licata v. State, 826 S.E.2d 94, 96 (Ga. 2019); *Olevik*, 806 S.E.2d at 509; *see also* GA. CONST. art. I, § I, para. XVI ("No person shall be compelled to give testimony tending in any manner to be self-incriminating."). Typically, issues with self-incrimination *after arrest* remain heavily litigated, but the Georgia Constitution applies to all testimony at any point. *Id.*; *Olevik*, 806 S.E.2d at 509 ("after being arrested for a DUI offense").

8. GA. CONST. art. I, § I, para. XVI ("No person shall be compelled to give testimony tending in any manner to be self-incriminating."); *see, e.g.*, Eugene Volokh, Opinion, *Georgia's Conservative Supreme Court: Compelled Breathanalyzer Tests Violate State Privilege Against Self-Incrimination*, WASH. POST, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/16/georgias-conservative-supreme-court-compelled-breathanalyzer-tests-violate-state-privilege-against-self-incrimination/ [https://perma.cc/MV49-JAPX] (Oct. 16, 2017).

9. *See, e.g.*, *Olevik*, 806 S.E.2d at 509.

In two notable cases, *Olevik v. State* and *Elliott v. State*, the Georgia Supreme Court found parts of Georgia's DUI implied consent law unconstitutional.[10] In *Olevik* and *Elliott*, the Court reiterated that Paragraph XVI of the Georgia Constitution not only protects against compelled testimony but also compelled acts.[11] In *Olevik*, the court held, for the first time, that Georgia drivers do not have to submit to a breath test because "breathing deep lung air into a breathalyzer is a self-incriminating act."[12] In *Elliott*, the court adhered to its holding in *Olevik*, and held that refusing a breath test may not be used as evidence of one's guilt in court.[13] So, after the *Elliott* decision, the Georgia Legislature quickly changed the language of the implied consent notice by replacing "[y]our refusal to submit to the required testing . . . ." with "[y]our refusal to submit to blood or urine testing . . . ."[14] As a result, at the request of Georgia's Prosecuting Attorneys' Council, prosecutors should instruct local officers to read the current version of the implied consent warning, which could omit the reference to breath, and instead, request a blood or urine test.[15]

ANALYSIS

Generally, Georgia courts hold that under the totality of the circumstances, the warrantless extraction of blood does not violate self-incrimination under Paragraph XVI of the Georgia Constitution and the Fifth Amendment of the U.S. Constitution.[16] But if law

10. *Id.*; *Elliott*, 824 S.E.2d at 296.

11. *See* Olevik v. State, 806 S.E.2d 505, 515 (Ga. 2017); *Elliott*, 824 S.E.2d at 267. In *Olevik*, the defendant's name was Plevik, but the reporter spelled his name wrong, so his name in this case became forever known as "Olevik." *The New O'levik/Plevik DUI Case Simplified*, MICKEY G. ROBERTS ATT'Y AT L.(Oct. 26, 2017), https://mickeyroberts.com/the-new-olevikplevik-dui-case-simplified/ [https://perma.cc/3G2J-57LL] ("You may have seen or heard about the new Georgia Supreme Court decision last week Olevik v. State. The case involved a Defendant actually named 'Plevik.' The court documents incorrectly spelled Plevik with an 'O,' hence the case name 'Olevik.'").

12. *Olevik*, 806 S.E.2d at 509, 517.

13. *Elliott*, 824 S.E.2d at 267.

14. GA. CODE ANN. § 40-5-67.1(2) (2019).

15. *FYI:* Elliott v. State, PROSECUTING ATT'YS' COUNCIL OF GA. 1, 2, https://pacga.org/wp-content/uploads/2019/02/fyi_2_18_19_Elliott_v_State_revised-2_21_19.pdf [https://perma.cc/GY3E-EDW8] (last modified Feb. 21, 2019).

16. Williams v. State, 771 S.E.2d 373, 376 (Ga. 2015). Note that, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the

enforcement requests or forces an offender to act, courts would consider those acts as self-incriminating.[17] For instance, if a defendant is forced to place their foot in a footprint, such evidence would likely be inadmissible.[18] In Georgia, a breath test falls under this distinction because an offender is compelled by an officer to "breathe unnaturally" into a breathalyzer machine.[19]

On the other hand, if law enforcement does acts to the offender—such as taking blood for a test or removing a bullet from a wound—the constitutional protection of self-incrimination does not apply.[20] In other words, an officer can put his hand into a suspect's pocket, but the officer cannot force the suspect to reach into his own pocket.[21] This distinction also applies to requests for blood tests during DUI stops, which is why refusal to do a blood test may be admitted at trial under the implied consent law.[22]

A. Extracting Blood, Procuring Urine, and Giving Breath

In contrast to the Georgia Supreme Court's finding in *Olevik*, the United States Supreme Court held in *Birchfield v. North Dakota* that breath tests are not invasive because even "deep lung air" would eventually "be exhaled" without the test.[23] Yet, the Supreme Court held that the same reasoning does not apply with a blood test because a blood test, which requires piercing a suspect's skin, is a greater

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circumstances. Thus, to the extent that *Strong v. State* holds otherwise, it is hereby overruled." *Id.* (quoting Missouri v. McNeely, 569 U.S. 141, 156 (2013)).

17. Olevik v. State, 806 S.E.2d 505, 519 (Ga. 2017).

18. Evans v. State, 32 S.E. 659, 659 (Ga. 1899) (holding the evidence where the defendant was compelled to put his hand in a pocket as inadmissible).

19. *Olevik*, 806 S.E.2d at 518.

20. Creamer v. State, 192 S.E.2d 350, 352 (Ga. 1972) (holding the removal of a bullet from defendant did not violate his right against compelled self-incrimination).

21. *Id.*; Evans, 32 S.E. at 659.

22. Williams v. State, 771 S.E.2d 373, 376 (Ga. 2015); *Olevik*, 806 S.E.2d at 511 ("We ruled that the only exception to the warrant requirement at issue in *Williams* was the purported consent of the suspect, disapproving *Strong* to the extent it held that the natural dissipation of alcohol in blood categorically supports a finding of an exigent circumstance justifying a warrantless search." (citing *Williams*, 771 S.E.2d at 376)).

23. 136 S. Ct. 2160, 2177 (2016) ("Humans cannot hold their breath for more than a few minutes, and all the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test."); *Olevik*, 806 S.E.2d at 509, 517.

degree of intrusion.[24] So, as an available alternative to a blood test, the Supreme Court suggested doing a breath test instead.[25]

On the other hand, the Georgia Supreme Court does not consider the taking of urine as intrusive.[26] In *Olevik*, the Georgia Supreme Court cited *Birchfield*'s language to note that a breath test requires the "cooperation of the person being tested."[27] In interpreting this language from *Birchfield*, the Georgia Supreme Court in *Olevik* explained that requiring the person to cooperate in taking the breath test amounted to compelling the person to perform an act "that is incriminating in nature."[28] Accordingly, the Georgia Supreme Court found that a breath test does not capture or use "naturally exhaled breath"; therefore, breathing into a breathalyzer is an incriminating act.[29]

Next, Georgia courts hold that the neither the Georgia Constitution nor the U.S. Constitution affords any protection against self-incrimination when collecting an offender's urine.[30] The Georgia

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24. *Birchfield*, 136 S. Ct. at 2178 ("Blood tests are a different matter. They 'require piercing the skin' and extract a part of the subject's body." (first quoting Skinner v. Ry. Lab. Execs' Ass'n, 489 U.S. 602, 625 (1989); then citing Missouri v. McNeely, 569 U.S. 141, 148 (2013); and then citing *McNeely*, 569 U.S. at 174 (Roberts, C.J., concurring in part, dissenting in part)).

25. *Id.* at 2184 ("Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test.").

26. *Compare id.* (finding blood tests "significantly more intrusive"), *with* Elliott v. State, 824 S.E.2d 265, 284 (Ga. 2019) (citing Green v. State, 398 S.E.2d 360, 362 (Ga. 1990), *overruled in part by* Olevik v. State, 806 S.E.2d 505 (Ga. 2017)) (finding collection of urine not intrusive to violate Paragraph XVI of the Georgia Constitution), *and Olevik*, 806 S.E.2d at 518 (first citing *Green*, 398 S.E.2d at 362; and then citing Robinson v. State, 348 S.E.2d 662, 669 (Ga. Ct. App. 1986), *rev'd on other grounds*, 350 S.E.2d 464 (Ga. 1986)) (both cases finding collection of urine not coercive).

27. *Olevik*, 806 S.E.2d at 518 (quoting *Birchfield*, 136 S. Ct at 2168).

28. *Id.* at 518–19 ("Indeed, for the State to be able to test an individual's breath for alcohol content, it is *required* that the defendant *cooperate by performing an act*. . . . Compelling a defendant to perform an act that is incriminating in nature is precisely what Paragraph XVI prohibits.") (citations omitted).

29. *Id.* at 518. The court described how one submits to a breathalyzer test:

"Although a person generally expels breath from his body involuntarily and automatically, the State is not merely collecting breath expelled in a natural manner. For a breath test, deep lung breath is required. . . . Sustained strong blowing into a machine for several seconds requires a suspect to breathe unnaturally for the purpose of generating evidence against himself. Indeed, for the State to be able to test an individual's breath for alcohol content, it is required that the defendant cooperate by performing an act."

Id. (emphasis omitted) (citation omitted).

30. *Green*, 398 S.E.2d at 361. The collection of urine is a substance that is naturally excreted by the human body and does not violate self-incrimination. *Id.* at 362. *Elliott* cites *Green* with approval. *Elliott*, 824 S.E.2d at 284. However, *Elliott* and *Green* are both being re-considered in oral argument for *Awad v. State* in the September 2021 term. *See* Awad v. State, No. S21C0370, 2021 Ga. LEXIS 388, at *1 (Ga.

Supreme Court has found that because urine is "naturally" excreted by a human, the use of urine tests does not violate a defendant's right against self-incrimination.[31] Accordingly, under Georgia law, collecting urine would not be considered as something "being done" to someone; thus, the refusal of a urine test could likely be admitted as evidence.[32]

But arguably, Georgia courts could consider a urine test as a compelled act, for the same reason that a breath test is considered a compelled act.[33] In *Olevik*, the State of Georgia argued that a urine sample does not violate self-incrimination because urine is a naturally excreted substance by the human body.[34] Further, Georgia courts have held that urine samples are not in violation of self-incrimination because there is no evidence of "forcing" a defendant to produce urine.[35] But what if a defendant could not urinate at the moment? Then, would the officer force them to drink multiple cups of water until they could provide a sample? This dilemma remains difficult for prosecutors and defense attorneys to reconcile.

In contrast, the United States Supreme Court would likely find that urine tests are intrusive based on its finding that blood tests are intrusive self-incriminating acts.[36] Urine samples are undoubtedly "DNA samples" because offenders leave a biological "sample that can be preserved [in the government's possession] . . . ."[37] In *Olevik*, the

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argued Sept. 21, 2021).

31. *See Green*, 398 S.E.2d at 362.

32. *Id.*

33. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2178 (2016); Green v. State, 398 S.E.2d 360, 362 (Ga. 1990) ("The use of a substance naturally excreted by the human body does not violate a defendant's right against self-incrimination under the Georgia Constitution. Thus, the use of appellant's urine sample did not violate appellant's constitutionally-protected right against self-incrimination.").

34. *See* Olevik v. State, 806 S.E.2d 505, 511 (Ga. 2017) (citing *Green*, 398 S.E.2d at 361–62).

35. *See Green*, 398 S.E.2d at 362; *see also* Robinson v. State, 348 S.E.2d 662, 669 (Ga. Ct. App. 1986) (holding "procurement" of a defendant's urine does not violate the defendant's right to self-incrimination when there was no evidence that he was "forced" to produce the urine sample), *rev'd on other grounds*, 350 S.E.2d 464 (Ga. 1986). *Olevik* held that both *Green* and *Robinson* did not apply because the state was not "collecting breath expelled in a natural manner." *Olevik*, 806 S.E.2d at 518.

36. *See Birchfield*, 136 S. Ct. at 2177 ("[Breath tests] contrast sharply with the sample of cells collected by the swab . . . . Although the DNA obtained under the law . . . could lawfully be used only for identification purposes, ... A breath test, by contrast, results in a BAC reading on a machine, nothing more.") (citation omitted).

37. *Id.* at 2178.

Georgia Supreme Court did not address urine tests; rather, it relied on its eighteen-year-old precedent, which simply explained that urine is "naturally excreted."[38] Moreover, in *Elliott*, the Georgia Supreme Court only discussed breath tests and never even mentioned urine tests.[39]

In sum, the Georgia Supreme Court neglects to directly address blood or urine tests under the DUI implied consent law, which permits a refusal for either test to be admissible at trial.[40]

B. State by State Comparisons

Some states allow the evidence of refusals to be admissible at trial.[41] For instance, Wisconsin allows a refusal to be introduced as evidence when it is used for the purpose of showing the consciousness of guilt.[42] The Wisconsin Supreme Court holds that drivers have no constitutional right to refuse to take a blood, breath, or urine test.[43] The Wisconsin Supreme Court relies on the United States Supreme Court's holding in *South Dakota v. Neville*, where the United States Supreme Court held that admitting a defendant's refusal to submit to a blood test under South Dakota's DUI implied consent law did not violate his right against self-incrimination.[44] The Court found that the defendant's right to refuse a BAC test is "bestowed by the South Dakota Legislature," and this finding from *Neville* was key in interpreting the purpose of Wisconsin's law.[45]

In contrast, the Georgia Supreme Court has not found that a blood test violates an offender's right against self-incrimination, so as of the

38. *See Olevik*, 806 S.E.2d at 511 (citing *Green*, 398 S.E.2d at 361–62).

39. *See* Elliott v. State, 824 S.E.2d 265, 283 (Ga. 2019). The Georgia Supreme Court only referred to urine when stating that before its decision in *Olevik*, the court "referred repeatedly to the broader right afforded by Paragraph XVI compared to the right against compelled self-incrimination under the Fifth Amendment." *Id.* The Georgia Supreme Court then went on to cite a string of cases, including Green v. State, 398 S.E.2d 360, 362 (Ga. 1990), which held that the collection of urine—a substance naturally excreted by the human body—did not violate the right. *Olevik*, 806 S.E.2d at 283–84.

40. *See id.* at 295. *But see Birchfield*, 136 S. Ct. at 2178.

41. *See, e.g.*, State v. Lemberger, 893 N.W.2d 232, 234 (Wis. 2017).

42. *Id.*

43. *Id.* at 234–35 ("Lemberger had no constitutional or statutory right to refuse to take the breathalyzer test, and that the State could comment at trial on Lemberger's improper refusal to take the test.").

44. *Id.* at 238–39; South Dakota v. Neville, 459 U.S. 553, 554–59, 564–65 (1983).

45. *Neville*, 459 U.S. at 554–59, 564–65; *Lemberger*, 893 N.W.2d at 238–39.

publication of this Article, a refusal to take a blood test is admissible in Georgia.[46] Unlike Wisconsin courts, the Georgia Supreme Court in *Elliott* noted that their "decision does not turn on the meaning of the word 'coerced' as a textual matter . . . but, rather, on the meaning of the common-law right against self-incrimination."[47] Thus, the Georgia Supreme Court alters *Neville* and finds that *Neville*'s understanding of what constitutes "coercion" is not relevant to the question at hand.[48] As a result, the Georgia Supreme Court diminishes the Georgia legislature's purpose and power of enacting the implied consent law.[49]

On the other hand, Massachusetts does not allow evidence of BAC test refusals.[50] The Massachusetts statute originally allowed for the admissibility of refusal evidence, but the Massachusetts Supreme Court later held that such evidence was inadmissible.[51] After the Georgia Supreme Court found the refusals of breath tests to be inadmissible, Georgia's statute allows for the admissibility of the refusals of only blood and urine tests.[52] It is clear that states' DUI

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46. *See* Olevik v. State, 806 S.E.2d 505, 511 (Ga. 2017) ("Moreover, we explained, because the General Assembly created the right to refuse the test, the General Assembly's limitation of that right through the implied consent language was unobjectionable. *Klink's* holding rests in part on cases that are not good law. For the proposition that the Georgia Constitution does not protect citizens from compelled blood testing . . . .") (citation omitted).

47. Elliott v. State, 824 S.E.2d 265, 294–95 (Ga. 2019) ("But our decision does not turn on the meaning of the word 'coerced' as a textual matter, nor on 'the values behind the Fifth Amendment,' but, rather, on the meaning of the common-law right against self-incrimination when it was first enshrined into the Georgia Constitution in 1877 and then readopted in our current Constitution. *Neville*'s understanding of what constitutes 'coercion' thus is not relevant to the ultimate question before us here.").

48. *See id*.

49. *Id.*; *Neville*, 459 U.S. at 561 ("'[The] Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege.' This coercion requirement comes directly from the constitutional language directing that no person 'shall be compelled in any criminal case to be a witness against himself.'") (emphasis omitted) (quoting U.S. CONST. amend. V); *Id.* at 565 ("Respondent's right to refuse the blood-alcohol test, by contrast, is simply a matter of grace bestowed by the South Dakota Legislature.").

50. *See* Mackey v. Montrym, 443 U.S. 1, 18 (1979).

51. *See* Op. of the Justs. to the Senate, 591 N.E.2d 1073, 1077–78 (Mass. 1992) (holding that a Massachusetts statute, which allows the admission of the evidence of a refusal to take a breath test, is unconstitutional); *see also* MASS GEN. LAWS. ANN. ch. 90, § 24(1)(e) (West, Westlaw through Chapter 20 of the 2021 1st Annual Session) ("Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f) or in any proceedings provided for in section twenty-four . . . .").

52. GA. CODE ANN. § 40-5-67.1(b) (2020); *Elliott*, 824 S.E.2d at 284; Olevik v. State, 806 S.E.2d 505, 509 (Ga. 2017).

implied consent laws are not aligned, and often, state courts do not agree with their own states' statutes.[53]

And unlike Georgia, Massachusetts law calls for the suspension of one's driver's license if a driver refuses to take a breathalyzer test, regardless of whether that person is found intoxicated or not.[54] Massachusetts also notes that suspending the driver's licenses of those who refuse to take the test "substantially serves" the state's "interest in public safety."[55] Georgia law, however, only provides that one's license may be suspended if they refuse a chemical test and does not give way for other sanctions that could encourage cooperation from DUI suspects.[56]

CONCLUSION

Georgia lawmakers created the implied consent law to promote public safety on the roads and to encourage cooperation during DUI stops.[57] Yet, instead of cooperation, confusion remains. The holdings in *Elliott* and *Olevik* diminish the uniformity that the legislature sought to establish with the implied-consent law and continue to hinder prosecutors in obtaining any or enough evidence to prosecute DUI cases.[58] Interpretation and application of implied consent laws vary from state to state, but most states allow breath test refusals as evidence, which is in accordance with the U.S. Supreme Court's standards.[59]

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53. *See Elliott*, 824 S.E.2d at 284; *Mackey*, 443 U.S. at 18. *But see* State v. Lemberger, 893 N.W.2d 232, 238–39 (Wis. 2017).

54. ch. 90, § 24(1)(f)(1) (Westlaw); *Mackey*, 443 U.S. at 18.

55. *Mackey*, 443 U.S. at 18.

56. GA. CODE ANN. § 40-5-67.1(b)(1) (2020). "[G]eorgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year." *Id.*

57. *Id.* § 40-5-67.1(b)(2); Birchfield v. North Dakota, 136 S. Ct. 2160, 2166 (2016) ("[M]any drivers stopped on suspicion of drunk driving would not submit to [BAC] testing if given the option. So every [s]tate also has long has what are termed 'implied consent laws.'").

58. South Dakota v. Neville, 459 U.S. 553, 565 (1983) ("Respondent's right to refuse the blood-alcohol test, by contrast, is simply a matter of grace bestowed by the South Dakota Legislature.").

59. *See, e.g.*, *id.*; *Birchfield*, 136 S. Ct. at 2185 ("Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. . . . [A] warrant is not needed in this situation.").

Thus, to combat these concerns, the Georgia Legislature should amend its implied consent law by either creating harsher civil penalties for those refusing to take any chemical tests or amend Paragraph XVI of the Georgia Constitution to cover compelled acts, such as breath tests. Alternatively, the Georgia Supreme Court could revisit this issue and create a uniform application for the admissibility of refusals.

Notably, the Georgia Supreme Court will soon decide whether the state can submit evidence of a urine test refusal since the court recently heard oral arguments on this issue, and a decision is forthcoming.[60] Yet, given the complexity of Georgia's implied consent law, it is possible that not all the aforementioned issues will be fully resolved.

60. Awad v. State, No. S21C0370, 2021 Ga. LEXIS 388 (Ga. argued Sept. 21, 2021). The question before the Georgia Supreme Court is:
"Did the trial court err in concluding that the State was not permitted to introduce into evidence the defendant's refusal to submit a urine sample on the ground that admitting such evidence would violate his right against compelled self-incrimination provided by Article I, Section I, Paragraph XVI of the Georgia Constitution? *Compare* Elliott v. State, 305 Ga. 179, 223 (IV) (E) (824 SE2d 265) (2019) (Georgia's constitutional self-incrimination provision "precludes admission of evidence that a suspect refused to consent to a breath test"), *with* Green v. State, 260 Ga. 625, 627 (2) (398 SE2d 360) (1990) ("[T]he use of a substance naturally excreted by the human body does not violate a defendant's right against self-incrimination under the Georgia Constitution")."
Id. at *1.