

**BLURRED VISION:  
A SOBER RE-EXAMINATION OF RHODE ISLAND'S  
DRUNK DRIVING "CRISIS"**

*A REPORT PREPARED BY THE RHODE ISLAND AFFILIATE,  
AMERICAN CIVIL LIBERTIES UNION*

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## EXECUTIVE SUMMARY

Based largely on reports describing Rhode Island as having the worst ranking in the country when it comes to drunk-driving alcohol fatalities and refusals to take breathalyzer tests, public officials and others in the state have increasingly demanded swift legislative action to address the state's DUI problem. Most prominently on the table are bills that would criminalize sanctions for breathalyzer refusals and allow police to obtain warrants to forcibly extract bodily fluids from suspected drivers for chemical testing, and efforts to have the R.I. Supreme Court reconsider a court ruling banning the use of drunk driving roadblocks – all proposals that have potentially significant ramifications for civil liberties.

Is Rhode Island's drunk driving problem as bad as it has been made out to be? The answer is as simple as it is surprising: No.

An analysis by the Rhode Island ACLU has concluded the following:

- \* The particular statistic used to rate Rhode Island as the worst in terms of drunk driving fatalities is a very misleading one. In fact, for over twenty years, the state's alcohol fatality rate has been routinely *lower* than the national average.

- \* In addition, Rhode Island's *overall* fatality rate is much lower than the national average, and has been so for more than two decades. It is only because this rate is so low that the state's alcohol fatality percentage appears so high.

- \* Although Rhode Island's breathalyzer refusal rate appears to be high, this is not explainable by lenient penalties. Rhode Island's breathalyzer refusal penalties are typical of, or higher than, those in most other states. At the same time, the state's DUI penalties are also generally higher than those in most other states.

- \* Only eight states in the country treat breathalyzer refusal as a criminal offense. Rhode Island's civil penalties for refusal are not a "loophole" unique to the state.

- \* Contrary to popular belief, a driver cannot avoid a DUI arrest (or conviction) by refusing to take a breathalyzer test. In fact, the test isn't offered until after the DUI arrest has already taken place.

- \* Police who drop criminal DUI charges against drivers who have refused a breathalyzer test do so by choice, not because of prohibitions in the law.

- \* One of the biggest problems in terms of DUI enforcement does not appear to be the absence of strict laws, but instead a failure by some police departments to make drunk driving a priority. In that regard, DUI arrest rates in Rhode Island have been close to the lowest in the nation for more than a decade.

\* Despite the outcry over the General Assembly's failure to take action on drunk driving legislation in recent years, the total number of alcohol-related fatalities in Rhode Island in 2004 was the lowest it has been since 2000.

\* In general, states that, unlike Rhode Island, employ drunk driving roadblocks and authorize the forcible taking of blood samples from alleged drunk drivers, do not have lower alcohol fatality rates than states that prohibit those practices.

\* The raw data on refusal numbers is extremely murky. By publicly-available indicators, the state's refusal rate is much lower than has been portrayed.

\* Strategies to reduce drunk driving in the state need not sacrifice civil liberties in the process.

In short, there are many misconceptions about the drunk driving "crisis" in Rhode Island, brought about by a misunderstanding of some of the laws and police practices at issue, and by the unintentionally misleading use of some statistics regarding drunk driving in the state. This report is an attempt to correct those misconceptions.

The ACLU is hopeful that policy makers and others concerned about this issue will carefully examine the factual information gathered in this report. Although any drunk driving fatality is one too many, efforts to eradicate this problem should not be premised on misleading statistics or ungrounded expectations about the utility of punitive laws.

## I. INTRODUCTION

For some time, and particularly in the past year, Rhode Islanders have been bombarded with stories and statistics about the extraordinarily serious nature of drunk driving in the state as compared to other states. Year after year, the public has been told, the state tops the list of DUI hotspots based on federal reports and advocacy group ratings. We are also told about “loopholes” in the state’s drunk driving laws that allow drunk drivers to escape punishment, or at least to be treated much more leniently than they would be in other states. These stories predictably prompt concerned statements from local officials, and fresh calls for tough legislation to address the problem. Among the most prominent are proposals to criminalize sanctions for breathalyzer refusals, to authorize roadblocks for random alcohol checks, and to allow police to obtain warrants to forcibly extract bodily fluids from suspected drivers for chemical testing.

Unfortunately, legislative proposals like these have significant ramifications for civil liberties, including our basic freedoms against self-incrimination and unreasonable search and seizure. The R.I. ACLU therefore decided to more closely analyze the arguments being offered by proponents in calling for these sometimes draconian “solutions” to the problem of drunk driving in Rhode Island.

What we found surprised us. Without attempting to downplay the seriousness of drunk driving in Rhode Island – and every other state – it is imperative to note that our state’s drunk driving fatality rate simply is not as extreme as certain publicized surveys have made it out to be. In fact, statistics show that it has consistently been *below* the national average. Further, our state’s penalties for drunk driving violations are actually quite comparable to – and in at least some respects, stricter than – those found in other states.

Our goal in issuing this report is not to suggest that state officials should become complacent about the problem of drunk driving. Also not at issue are the heartfelt and sincere motivations of the many people, in both the public and private arena, who are promoting the calls for action that this report examines.

But our research does call into question many of the arguments being used to demand prompt and harsh legislative responses to the issue, as there are serious doubts about both their efficacy and need. We offer this analysis in the most positive sense – to promote a more constructive, knowledgeable and factually accurate debate on this important social issue.

## II. FATALITY RATES

*“Rhode Island has the deplorable distinction of being ranked first in the nation in the percentage of highway fatalities related to alcohol.”<sup>1</sup> – R.I. Attorney General Patrick Lynch*

*“[Rhode Island has] alcohol-related fatality trends which are some of the deadliest in the Nation.”<sup>2</sup> – Mothers Against Drunk Driving*

The quotes above and others like them have been ubiquitous this past year. In the same vein, a recent General Assembly news release noted that: “For four years, Rhode Island has led the nation in the percentage of its traffic fatalities that are linked to alcohol use,” and that in 2004, 50% of fatal traffic collisions here were alcohol-related, compared to 39% nationwide.<sup>3</sup> In November, a physician-based traffic safety group called End Needless Death on our Roadways reiterated these statistics and placed Rhode Island at the top of its “Fatal Fifteen” list, for having the highest proportion of alcohol-related fatal accidents in the nation in 2004.<sup>4</sup> Public officials have cited these figures time and again to show the need for strict legislative action.<sup>5</sup>

However, this particular statistic, while certainly striking as a rallying cry for supporters of new laws, is extremely misleading, and not terribly useful or relevant.

By examining the percentage of fatalities that are alcohol-related, this figure relies on an unrelated variable for comparison: the number of *non*-alcohol-related fatalities in the state. Why is this an ineffective and misleading way to measure a state’s drunk driving fatality problem? Perhaps the best way to explain why is to point out that Rhode Island’s rating would improve not only by reducing the number of alcohol-related fatalities, but also by *increasing* the number of overall (i.e., non-alcohol-related) fatalities. In other words, Rhode Island’s standing on these lists would not be so bad if more non-alcohol-related fatal accidents were taking place on our roads and highways!

Thus, the figures that MADD and others use to place Rhode Island at the bottom of the national list *do not really tell us how likely it is to have an alcohol-related fatality in Rhode Island compared to other states, but only how likely it is to have one as opposed to a non-alcohol-related fatality*. This is an interesting, but largely irrelevant, comparison, for it essentially penalizes states with low *overall* driving fatality rates.

And that is precisely the situation in Rhode Island. Although it has been mentioned only in passing in some news stories, Rhode Island drivers get in far fewer fatal accidents than the national average. In fact, the overall number of fatal accidents per resident in Rhode Island is exceptionally low, as is the number of accidents measured against the number of miles driven in the state.

In 2004, Rhode Island had the second fewest fatal accidents per 100k population of any state in the nation. But last year was not an anomaly. Combining the data for 2001 – 2003, for example, Rhode Island averaged the sixth lowest fatality rate per miles driven in the nation. It is *this* fact that makes Rhode Island’s alcohol-related fatalities stick out.<sup>6</sup>

The chart below, gleaned from National Highway Transportation Safety Administration (NHTSA) data, demonstrates the state’s low overall fatality rate versus the national average:

	Fatality Rate per 100K Population		Fatality Rate per 100M miles driven	
	RI	US	RI	US
2000	7.62	14.87	.96	1.53
2001	7.64	14.79	1.01	1.51
2002	7.86	14.93	1.03	1.51
2003	9.66	14.75	1.24	1.48
2004	7.68	14.52	Unavailable	1.46



As the chart shows, Rhode Island’s fatality rate per population has been, in many recent years, only about half the rate of the national average. The rate per miles driven has been one-third lower than the national average.

What does this mean? If Rhode Island drivers are involved in fewer overall fatal accidents than drivers in other states, the *percentage* of accidents related to alcohol could easily be elevated, even though the drunk driving problem is no more severe than anywhere else. Reduce the number of *non-alcohol related* accidents, and you’ll be left with an inflated alcohol fatality *percentage*.

Of course, even with a low overall fatality rate, Rhode Island could still have a comparatively high alcohol-related fatality occurrence. But that is not the case, as we see when NHTSA breaks down alcohol-related fatality rates per miles driven. As shown below, the picture these statistics paint of drunk driving fatalities in Rhode Island is much different than the one presented by the alcohol fatality percentage rate.<sup>7</sup>

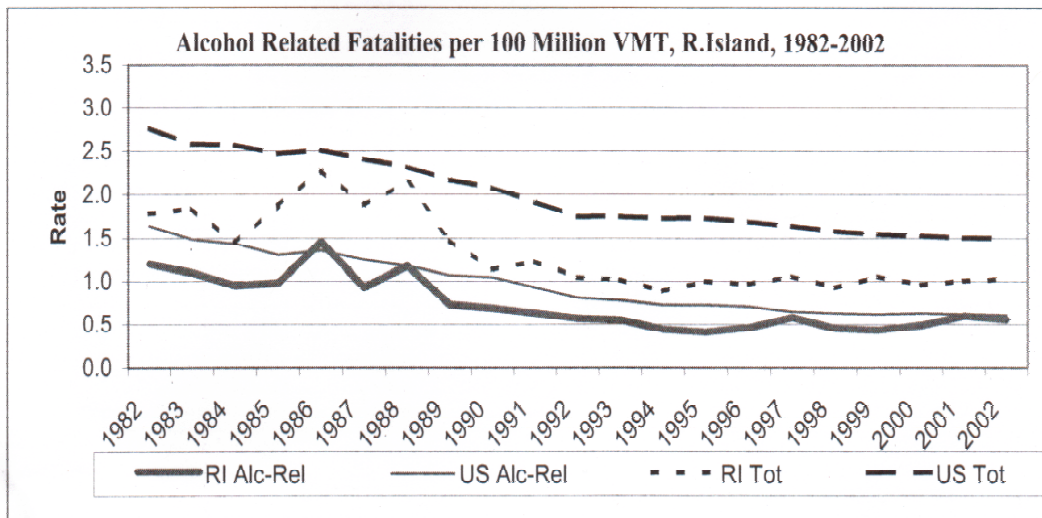
	<b>Fatal Alcohol-Related Crashes per 100M miles driven</b>	
	<b>RI</b>	<b>US</b>
2000	.49	.63
2001	.60	.62
2002	.56	.61
2003	.71	.59
2004	Unavailable	.59

Note that in three of the last four years for which the statistics are available, fatal alcohol-related crashes were actually *less likely* to occur in Rhode Island than in other states, based on miles driven. So a person driving in another state is actually *more likely* to be involved in a DUI

fatality than a person driving the same distance here. This helps demonstrate just how misleading are the oft-cited “percentage” figures that make Rhode Island roads sound so deadly.<sup>8</sup>

Although Rhode Island suffers the most from the use of a “percentage” comparison, other states with similarly low overall fatality rates also fare poorly on the “Fatal Fifteen” list. Of the fifteen states with the lowest overall fatal accidents per 100k population in 2004, six of them appear on the “Fatal Fifteen” list.<sup>9</sup>

Rhode Island’s below-average alcohol fatality figures are not just a recent happenstance. NHTSA has been collecting alcohol-related fatality data since 1982. In 2003, NHTSA published a study examining the rates of alcohol involvement in fatal crashes by state from 1982 to 2002. That study shows that Rhode Island’s overall fatality rate was lower than the national average *every* year between 1982 and 2002, and – even more to the point – its alcohol-related fatality rate exceeded the national average *only once* during those two decades.<sup>10</sup>



Although barely mentioned in the ongoing debate, it is further worth noting that in 2004, Rhode Island showed a 21% drop in alcohol related fatalities from the previous year, when the nation as a whole experienced only a 2% decrease in such fatal crashes.<sup>11</sup> Specifically, the state’s drunk driving fatalities dropped from 50 in 2003 to 42 in 2004. Admittedly, the significant

percentage decrease is partly explained by the fact that the number of alcohol-related fatalities in Rhode Island in 2003 was larger than it had been since 1997. At the same time, the 2004 figure marks the lowest number of alcohol-related fatalities in Rhode Island since 2000, when there were 41 fatal alcohol-related crashes on the state's roads. It is thus extraordinarily ironic to be hearing such an outcry in 2005 about the state's supposedly horrendous drunk driving rate.<sup>12</sup>

### III. THE LAW

*“Rhode Island is at the bottom of the list when it comes to our drunk-driving laws, and the result is that we have the absolute worst rate in the country for fatal, alcohol-related accidents.”*<sup>13</sup>

The above quote is representative of those made by many public officials and others in demanding stern legislative action. But as the previous section demonstrates, the logic underlying these sentiments is seriously flawed. Rhode Island does *not* have the worst rate in the country – or anywhere near the worst rate – for fatal alcohol-related accidents, so any connection between that rate and the nature of the state’s drunk driving laws is quite illusory. It is troubling to see important public policy decisions being pushed by repeated references to misleading statistics.

This, of course, is not to say that such legislative proposals should not be examined, but the examination has to take place in a broader context – and in recognition of the many other factors at work that need consideration.

National observers have noted that, after about a 15-year downward trend, the percentage of alcohol-related traffic deaths has appeared to reach a plateau, holding steady for a number of years now. This is so notwithstanding the adoption of tougher laws in many states. Consequently, some have suggested that after years of stepped-up enforcement and an increase in the social stigma associated with drunk driving, it is people with serious and chronic alcohol problems who may be mostly responsible for the alcohol-related fatalities on the road – that is, people for whom “tougher” laws are simply not going to serve as a deterrent.<sup>14</sup>

In any event, notwithstanding Rhode Island’s allegedly “lenient” drunk driving laws, its alcohol fatality rate has been, as the previous section documented, consistently below the national average. This throws into question the oft-expressed need for “stricter” laws.

But before even considering the enactment of potentially far-reaching legislative proposals, there is yet another major reason to question their efficacy or need. Rhode Island's "problem," to the extent there is one, may be easily explained by another statistic: that concerning arrests.

Although largely absent from the continuing public debate on this issue, the state's DUI arrest figures are much more aberrational than its alcohol fatality statistics: compared to the national rates, Rhode Island police make a strikingly small number of drunk driving arrests on a per capita basis. In 1991, 1994, and 1997, no state that provided data to the U.S. Department of Justice made fewer arrests in this category.<sup>15</sup> More recently, in 2002, Rhode Island had the third fewest per-capita DUI arrests of any state. In 2003 and 2004, only Delaware made fewer arrests per capita.<sup>16</sup>

There are a few possible explanations for this consistent and striking pattern, but a recent detailed *Providence Journal* news story highlights the most likely one: drunk driving arrests simply haven't been a priority for many police departments, especially in urban areas. For example, the *Journal's* five-year study of DUI arrests in Rhode Island shows that between 2000 and 2004, the most DUI arrests made in any year by Providence police was 37 – less than one arrest per week. In 2004, Providence police made a total of only 24 DUI arrests.<sup>17</sup>

The response to this from big city police departments is both predictable and understandable: they point out their need to attend to more important priorities, such as the violent crime that is found in large metropolitan areas. And, in support of this justification, the *Providence Journal* story notes that the three cities in Rhode Island making the fewest drunk driving arrests – Providence, Pawtucket and Central Falls – are also the cities with the highest violent crime rates according to FBI statistics.

Most important for purposes of this report, though, is another finding from the *Journal* article: accident records show that “alcohol-related traffic fatalities frequently take place in the same places where police enforcement is weakest.”

All the new laws one can imagine won’t change things if police do not utilize *current* laws and resources to make drunk driving a priority issue. Indeed, in light of the arrest statistics, it is more than reasonable to argue that the drunk driving problem is not a matter of too few (or too lenient) laws, but rather a problem of half-hearted enforcement.<sup>18</sup>

Some police departments complain about the paperwork and manpower involved in handling drunk driving cases. For example, Central Falls’ police chief explained in the newspaper article that incidents “where the driver refuses to take a breath test can take an hour and a half of an officer’s time. Where the driver submits to the test, it takes much longer.” To the extent these procedural hassles are a concern, the legislative solutions being offered will hardly affect that. Criminalizing refusals to take breathalyzer tests will lead to more paperwork, not less.

Similarly, random roadblocks – another proposed solution – are more time-intensive and less productive than other methods for catching drunk drivers, such as roving patrols. In short, given arrest rates consistently less than one-third of the national average over the last decade, one must question how proposals that require *more* police investment will solve the problem.

In sum, use of the “Fatal Fifteen” type-statistics by public officials to justify every high-profile legislative proposal on the table is deeply problematic. As we hope to have demonstrated, it is simply not true that Rhode Island has a substandard drunk driving fatality rate. And, as the next section will explain, even if one accepts those questionable statistics, the currently proposed legislative solutions are unlikely to “fix” the problem. Instead, implementation of these proposals will, in all likelihood, impact civil liberties much more than the drunk driving fatality rate.

## IV. THE LEGISLATIVE PROPOSALS

With all those caveats in mind, it is appropriate at this point to examine in more detail three of the most popular legislative proposals that have been offered. As has been noted, a general consensus – though emanating from a dubious use of statistics – has emerged that the state’s drunk driving laws are soft on drunk drivers. As we have explained, it is clear that the state’s comparative alcohol fatality rate cannot and should not serve as the impetus or justification for legislation.

Proponents of tougher laws nonetheless argue that while other states have effective deterrents and harsh penalties, Rhode Island has repeatedly rejected the like. The three most repeated calls for legislative reforms involve enhanced sanctions for breathalyzer refusals, roadblocks for random alcohol checks, and warrants that would allow police to forcibly obtain bodily fluids for chemical testing. This section briefly reviews each of those options.

### **A. Authorizing “warrants” that police could use to force drivers involved in serious accidents to give blood.**

For a number of years, legislation has been introduced to allow police officers to obtain a search warrant to forcibly take a blood sample from a suspected drunk driver involved in a serious accident if probable cause exists to believe that the driver was operating under the influence. Calls for this bill’s passage have echoed through the Statehouse halls with increasing urgency in recent years, and the bill has often passed in the Senate, but died in the House.

The Rhode Island ACLU has vigorously opposed this measure on a number of grounds. It is difficult to think of a more intrusive power than allowing the government to forcibly restrain a person in order to take bodily fluids from her with a needle. And although the U.S. Supreme Court has held – by deciding that the privilege against self-incrimination applies only to

testimonial, not physical, evidence – that the Fifth Amendment does not ban such conduct, it remains unclear whether Rhode Island’s *own* Constitution, with its independent protection against self-incrimination, would countenance such an extraordinary invasion of privacy. Indeed, it is a strange constitutional principle that bars the police from requiring you to answer questions about your drinking because your responses could be used against you, but that allows police to forcibly stick a needle in you and draw your blood for possible use as evidence against you.

Like the criminalization of breathalyzer refusals (discussed later), this proposal is less a preventive measure than a punitive one. As with refusals, police remain free to use – and routinely do use – other information in order to pursue DUI charges against persons involved in serious accidents. In fact, this particular legislation authorizes police to obtain a warrant for a blood sample *only if they already have probable cause* to believe that the person was driving under the influence.

Critics who say that Rhode Island is “different” from other states in this regard are partially correct, as Rhode Island is one of eleven states that do not give police this invasive power. But using proponents’ own alcohol-related-fatality statistics, it is worth noting that although Rhode Island has the highest percentage of alcohol-related fatalities nationally, every one of the ten states with the next highest percentage fatality rates have blood sample testing laws. In other words, except for Rhode Island, states *without* blood sample laws *do not* demonstrate high alcohol-related fatality rates.<sup>19</sup>

Nor is there any correlation if one analyzes the state data with the more meaningful “per miles driven” figures. Of the eleven states that don’t allow forcible blood testing, six are at or below the national average for the number of fatal alcohol-related accidents per miles driven, and



three of those states have among the fifteen lowest alcohol-related fatal accident rates in the nation.<sup>20</sup>

This should not come as a surprise – after all, it’s hard to believe that people’s drinking or driving habits would be affected by a law like this. Yet public officials have shown little hesitation in arguing that the absence of a law like this is responsible for the state’s “poor” drunk driving record.

While drunk driving certainly is a serious offense, the forcible testing proposed by this bill would be performed on people who remain presumptively innocent of any crime. From our perspective, it is precisely for serious offenses when we must be most vigilant about protecting basic rights, especially in terms of physically invading people’s bodies for evidence.

### **B. Revisiting drunk driving roadblocks**

In early 2005, the Attorney General urged Governor Carcieri to seek an advisory opinion from the RI Supreme Court to reverse a 1989 decision banning the use of so-called drunk driving roadblocks, a ban that also exists in nine other states. As with forcible blood testing, there does not appear to be any readily-identifiable correlation between the use of roadblocks and low alcohol fatality percentages. Of the small number of other states that do not use drunk driving roadblocks (now often euphemistically referred to as “sobriety checkpoints”), four of them have among the fifteen lowest alcohol fatality percentages in the country. Examining the alcohol-related fatal accident rates per miles driven, the outcome mirrors the statistics concerning states that reject forcible blood testing: of the ten states that don’t allow drunk driving roadblocks, six are at or below the national average for their number of alcohol-related fatal accidents, and three of them have among the fifteen lowest rates in the country.

Although the principle has been seriously eroded in the last few decades by a rightward-leaning U.S. Supreme Court, one of the most basic tenets of our system of justice is that police should not be able to stop or search someone without individualized suspicion. Drunk driving roadblocks turn this principle on its head, allowing police to stop and question thousands of innocent people in the hope of finding a guilty one. Making an exception to this principle because of the seriousness of drunk driving leads to a very slippery slope. After all, the drug problem in society is also considered serious by many people. Should we allow police to routinely stop and search pedestrians for drugs? Should police be authorized to periodically search homes for unlicensed guns in order to stem the violent crime problem?

Just as important from a public policy perspective, alternatives – most notably the use of roving patrols – exist to address the problem of drunk driving in a systematic and more effective way, and without infringing on fundamental privacy rights. Consider this: the Attorney General’s letter to the Governor touted a Tennessee campaign which set up 900 checkpoints and stopped 145,000 vehicles, all for a total of 773 DUI arrests (no indication is given on the number of convictions). In other words, the campaign led to less than one arrest per roadblock, and the detention, however brief, of more than 144,000 innocent people.

The massive police resources necessary for roadblock campaigns could be much better spent on highly-publicized roving patrols on the highways that focused on erratic driving and other behavior that might indicate an intoxicated driver. In addition to respecting individual rights, this approach would appear to be a more effective and efficient alternative. A major study cited in the Tennessee report made this very point: that for chronic drunk drivers – the ones that the public should be most concerned about – roadblocks are likely to be an ineffective tool, while roving patrols would be much more productive.

The Tennessee statistics regarding the effects of the checkpoints are troubling for another reason. The roadblocks – whose sole purpose was allegedly to find drunk drivers – somehow also led to more than 200 arrests for drug crimes. Roadblocks could easily become the next opportunity for racial profiling. Traffic stops statistics data for Rhode Island, now covering almost three years, have documented beyond dispute not only that minority drivers are stopped more often than whites, but – even worse – that they are searched much more often as well, even though they are less likely than whites to be found with contraband.<sup>21</sup> Thus, even if roadblock protocols ensure that drivers will be pulled over on a strictly random basis, police will have enormous discretion to decide which drivers deserve further scrutiny. It doesn't take too much cynicism to imagine police making the stops a little longer for young drivers or those who fit certain other profiles.

In sum, drunk driving roadblocks lead to the sacrifice of a fundamental civil liberty, and divert attention from more productive road safety techniques – particularly roving patrols – that are also more respectful of civil rights.

### **C. “Fixing” the Breathalyzer Refusal “Loophole”**

The most talked-about purported legislative failing in Rhode Island involves legal “loopholes” that allow a driver to “get off easy” by refusing to take a chemical test. It is worth examining this claim in more detail because careful scrutiny raises serious questions about it.

The proposal to criminalize breathalyzer refusals marks a not-insignificant step in whittling away at the notion underlying the privilege against self-incrimination. Admittedly, the self-incrimination concerns with a breathalyzer test refusal are not as egregious as those involved with forced blood testing. However, if legislation tightening the purported refusal “loophole” in the law ends up having little impact on the state's drunk driving fatality rate – and, based on the

analysis that follows, this appears likely – more intrusive measures are almost certain to be demanded in response. It is for this reason that we spend some time analyzing the issues surrounding this controversial, if less invasive, proposal.

As with the state’s drunk driving fatality rate, there are many misconceptions about Rhode Island’s breathalyzer law. For example, it is commonly believed that a person stopped for drunk driving can avoid criminal punishment by simply refusing a breath test. In addition, and related to that view, many proponents of tougher legislation suggest that Rhode Island’s breathalyzer refusal penalties – containing only civil sanctions such as fines and license suspensions – are much more lenient than laws in other states. Neither of these beliefs is accurate.

It is true that the breathalyzer refusal law itself contains only civil penalties, while drivers who take and fail the test risk a criminal conviction for drunk driving. However, a lot of misunderstanding appears to flow from this rudimentary rendition of the statutes.

### *1. A Comparison With Other States*

Police and others often mention the civil penalty “loophole” to explain why test refusal rates in Rhode Island are (according to published reports) consistently high. Between 1997 and 2001 that rate was listed by NHTSA as the highest in the nation. The reported refusal figure for 2001, the last year that nationally-gathered data are available, was 85% in Rhode Island, compared to a 25% national average.<sup>22</sup> Rep. J. Patrick O’Neill summed up the general consensus at a November press conference where he introduced legislation that would enhance penalties and criminalize second refusals: “Right now,” he said, “the refusal option is an easy choice, because the penalties are the same for a first-offense DUI charge and civil refusal charge, but you end up without a criminal record if you refuse.”<sup>23</sup>

So can Rhode Island really boost its compliance rate by making it a crime to refuse? Although one would never realize it from the hype about the laxity of Rhode Island's law, the fact is that, according to the National Highway Traffic Safety Administration, *only eight states* criminalize refusal. And, surprisingly, test compliance rates in these states were generally *not* significantly higher than those in the vast majority of remaining states where the offense is non-criminal.<sup>24</sup>

Apparently, Rhode Island's high refusal rate is not easily explained by the offense's non-criminal status, nor is its failure to criminalize atypical despite the contrary impression that has been etched in the public consciousness.

Is it possible, then, that the *civil* penalties Rhode Island law has for refusal – fines, suspensions and the like – are abnormally light in our state compared to the civil penalties that other states impose?

Once again, information from the National Highway Traffic Safety Administration reports that this is not the case. Rhode Island's refusal penalties are typical of, or higher than, those in most other states. Only twelve states fine a driver for the first refusal offense, and Rhode Island, with its \$200 - \$500 fine, is among that dozen.<sup>25</sup> A first refusal in Rhode Island also invokes a three-to-six month license suspension, which is very typical as well. And Rhode Island is one of the few states that makes community service part of the refusal penalty.<sup>26</sup>

If Rhode Island's refusal penalties are not unusually light, then another possibility is that the penalties for drunk driving here are unusually high – high enough to make test refusal the better option for drivers faced with the choice. This theory appears to have some validity and may explain, at least in part, the state's high refusal rate.

Rhode Island is one of 31 states whose DUI laws include harsher penalties for drivers with a documented “high BAC.”<sup>27</sup> In Rhode Island, the increased penalties for a first offender with a high BAC include a larger fine, more community service, and a longer allowable license suspension (3 to 18 months vs. 3 to 12 months.) Other states have enhancements that range from required treatment and education, to longer minimum suspensions, to bans on deferred judgments and plea bargaining, to mandatory prison time.

At an abstract comparative level, it appears that Rhode Island’s “high BAC” sanctions for first offenders are fairly typical. However, in discussing “high BAC,” it is important to note that states use anywhere from .15% to .2% BAC to trigger their high BAC sanctions. Rhode Island is one of only fifteen states that use .15%, the lowest trigger. And of these, four (Colorado, Illinois, Missouri and North Carolina) use the .15% limit only to require a treatment program. An additional three (Alaska, Oklahoma and Washington) offer restricted licenses, dismissal of DUI charges after pre-trial probation, or dismissal of DUI charges after treatment to soften the consequences of taking and failing a test. On the whole, then, a person in Rhode Island with a .15% to .19% BAC level faces greater penalties than the vast majority of drivers elsewhere.

The penalties escalate, of course, for repeat offenders. In Rhode Island, a second DUI conviction for a driver with a “high BAC” carries a \$1,000 fine, an automatic two-year license suspension, and a mandatory jail sentence of six months to one year. According to NHTSA data, these penalties are harsher than average: fewer than fifteen states allow two-year suspensions for second offenders in any situation, and not all of these states make them automatic.

So Rhode Island is one of very few states in which testing at a .15% BAC is appreciably deleterious, for repeat offenders and for first-time offenders as well. Drivers who know this might well be influenced to refuse the test. It is quite easy to understand why an attorney would

counsel a client not to take a breathalyzer. Uncertain whether a BAC breathalyzer test reading might place her client into the “high tier” category, an attorney is likely to urge the client to be safe rather than sorry.<sup>28</sup>

John MacDonald, the head of the R.I. Association of Criminal Defense Lawyers, recently made this point, noting that “because the DUI statute penalizes offenders on a graduated scale based on how high their blood-alcohol levels are, drivers may still prefer to refuse the test unless they know exactly what that number is. ‘The problem with Rhode Island law is that they want people to take a Breathalyzer, but then they penalize them depending on what their readings are. Rhode Island wants [to have] its cake and eat it too.’”<sup>29</sup>

In sum, a few things are clear. First, Rhode Island is far from unique – indeed, it is well within the mainstream – in failing to criminalize refusal. Second, Rhode Island’s refusal penalties, on the whole, are not more lenient than those in other states. Neither of these factors thus explains the high rates at which Rhode Island drivers refuse the chemical test. A more likely explanation, at least in part, is the relative *severity* of the state’s existing penalties for drunk driving. This can provide guidance as to whether particular new strategies are likely to work.

## 2. The Compatibility of DUI and Breathalyzer Refusal Charges

This leads us to the second misconception: that the refusal “loophole,” by authorizing only civil penalties, prevents police from charging large numbers of intoxicated motorists with DUI offenses. First, as has just been noted, it is a “loophole” that virtually all other states have as well. But, in any event, the fact is that it is not a loophole at all.

A typical statement from a *Providence Journal* story describing the “loophole” is the following: “Peter T. Brousseau, West Warwick’s police chief and president of the Rhode Island Police Chief’s Association, said some drivers were probably not charged with drunken driving

because a huge majority of them – 1,527 of them last year, according to the attorney general’s office – refused to take the breath test for alcohol.”<sup>30</sup>

Without directly saying so, comments like these suggest that a driver can avoid criminal DUI charges (and, consequently, DUI convictions) simply by refusing to take the test.<sup>31</sup> But this is not so. In fact, test results do not even form the basis for an arrest because police don’t seek to administer a breath test until *after* a driver has already been arrested on DUI charges! Most importantly, it must be emphasized that a person who refuses the test can still be criminally convicted of drunk driving.<sup>32</sup>

Consider the typical stop for a suspected drunk driver: it begins with “field sobriety” tests that an officer uses to assess coordination and mental status. If the driver fails these tests, the officer arrests her, advises her of her rights, and *only then* asks her to take a chemical test. So every person who refused the test – all 1,527 of them – had *already* been arrested for DUI.

What happens next? If a driver is cited for breathalyzer refusal, he or she must appear before the traffic court within days, where a judge can impose the administrative penalties of immediate license suspension, a fine, community service, and treatment. The police department can also go forward with the DUI charge. There’s nothing to stop a driver from being penalized for both refusal *and* drunk driving. To the contrary, some departments make it a policy to do both.<sup>33</sup> As will be noted later, NHTSA encourages police to gather additional evidence in breathalyzer refusal cases precisely in order to reduce the value to drivers of refusing to take the test.

So a driver clearly can’t escape a DUI arrest or conviction just by refusing to be tested.<sup>34</sup> References to drivers “avoiding criminal charges” by refusing the test are, however unintentionally, quite misleading. When state officials report that 2,330 people were arrested for



drunk driving in 2004, but 1,527 people refused the test, it is left unsaid that the latter number is a subset of the former.<sup>35</sup>

Of course, it remains the police department's decision whether to proceed with a DUI trial or be satisfied with an administrative refusal violation, which carries similar penalties. A department might have any number of reasons for not wanting to go forward with DUI charges, from lack of strong evidence of drunkenness, to an aversion to going to court without the concrete evidence provided by a breath test, to concern about tying up resources to take a case to trial. While it is true, as police officials point out, that a breathalyzer result may often be the cleanest and simplest evidence to present about a person's alleged state of intoxication, the failure to pursue DUI charges against drivers who refuse to take the test is a *choice* that police departments make, not one disallowed by the law.<sup>36</sup>

Ironically, criminalizing refusal will probably only make departments *more* likely to drop DUI charges. After all, they will already have a criminal conviction on the books. Such legislation could thus backfire if it is an attempt to increase the number of drunk driving convictions by reducing refusal rates. Figures from the few states that criminalize refusals support this, with compliance in those states no higher than elsewhere.

Refusal legislation's predominant purpose, then, is supposed to be to convince drivers to take the test. But drivers who face criminal prosecution if they take the test, and also if they refuse it, may still have no good reason to submit. Criminalizing refusal ultimately becomes mainly punitive, not an incentive to comply.

### 3. *The Validity of Breathalyzer Refusal Data*

There is one final matter on this subject worth briefly examining. The discussion in this section has been premised on the state's extremely high breathalyzer refusal rate, which – like

the state's allegedly high fatality rate – has been cited time and again as justification for stronger penalties. However, the question needs to be asked whether Rhode Island's refusal rate is actually as high as reported.

The most commonly quoted figure of 85% comes from a NHTSA report based on 2001 data. The figures from Rhode Island were similarly high for 1998-2000, according to NHTSA. Although the 85% figure was presumably obtained by NHTSA from local police sources, the ultimate computation of this statistic remains unclear. At the time of this report, the ACLU had been unable to obtain raw figures from the state regarding the prevalence of breathalyzer refusals. However, the figures that are presently publicly available actually point to a much lower percentage. It is further worth noting that public officials themselves have publicly given varied answers to this question.

For example, for 2004, news articles state that 2,330 people were arrested for drunk driving, and the Attorney General is cited as reporting that 1,527 refused the test. Assuming that everyone who refused the test had already been arrested, this amounts to a 66% refusal rate – still very high, but much less than the oft-cited 85% rate. But the figures get much murkier because the Attorney General has actually been quoted as giving vastly different numbers in this regard. Some examples of the contradictory numbers that have been bandied about in this debate are explained in detail in the endnote accompanying this paragraph. The most recent figures would lead to an even lower 57% refusal rate. Suffice it to say that there is enough confusion from official sources about these numbers that the validity of the highly-touted 85% refusal rate – or any rate approaching that level – is appropriately suspect.<sup>37</sup>

Public statistics from State Police annual reports also strongly suggest a much lower refusal rate. In 2003, the State Police reported 250 DUI arrests, with 180 “test given” and 70

“test refused.” This is a 28% refusal rate. Data from earlier state police annual reports show similar figures, and nothing even remotely approaching the 85% rate that is consistently cited for the state as a whole. It is difficult to understand why state police refusal rates would be so much lower than the rates of local police departments.

Without purporting to have the answer, we believe it is at least fair to raise legitimate questions about the veracity of Rhode Island’s reportedly high refusal rates. Until those figures are clarified, a moratorium should be called on complaining about Rhode Island’s inordinately high breathalyzer refusal rate.

## V. POOR GRADES?

“Top Ten” lists and “report cards” are always good headline-grabbers, but they often have the unfortunate effect of turning complex evaluations into one-word conclusions. That is hardly the way to promote and encourage thoughtful policy-making. Unfortunately, much of the pressure to pass DUI legislation has been precipitated by “ratings” and “report cards” that rank Rhode Island at the bottom of the “drunk driving” list.

The problems with the “Fatal Fifteen” list have already been addressed in some detail in the first section of this report, and will not be repeated here. The other most cited “report card” comes from Mothers Against Drunk Driving (MADD).<sup>38</sup> It is therefore worth taking a brief look at that report.

MADD, in its most recent “Rating the States” report, gave Rhode Island a “D,” as compared to the national grade of “C.” Why? Partly because the state lacks several “priority” measures, among them BAC warrants and a primary seatbelt law. But Rhode Island’s largest shortcoming, according to MADD, is its fatality rate: earning an “F,” in contrast to the nation’s “C -.”<sup>39</sup>

However, MADD bases its fatality grades on the *percentage* of alcohol-related fatalities, just as the “Fatal Fifteen” list does. We’ve already seen that in Rhode Island, where the overall fatality rate is uncommonly low, and the alcohol fatality rate also consistently remains below average, use of this percentage figure is very misleading. So MADD’s highly publicized “D” grade – and its more prominent “F” grade for our fatality rate – is based on a questionable representation of the scope of Rhode Island’s problem. Yet MADD’s methodology counts the fatal accident figures for 30% of a state’s grade, ensuring that Rhode Island’s percentage fatality rate is a significant factor in the state’s “D” grade. Thus, to the extent policy-makers wish to rely

on report cards like this one, a change in MADD's use of statistics to better reflect the true severity of the problem could likely place the state right in the middle of the pack.

Finally, and ironically, in light of the primary push being made to address the breathalyzer refusal "loophole" that allegedly exists in the state, it is particularly worth making note of one *favorable* criterion in the rating scheme that MADD says Rhode Island already meets: having "Penalties for Test Refusal Greater than Test Failure."

## VI. ALTERNATIVE SOLUTIONS

If Rhode Island is serious about reducing drunk driving and breathalyzer refusal rates, it can and should choose strategies that have proven successful in other states without sacrificing civil liberties. Rhode Island's strategies should also reflect the fact that its refusal penalties are actually typical, while its DUI penalties are already quite severe. In particular, Rhode Island lacks programs that offer benefits to drivers who take and fail the test.

For example, Connecticut drops first-time DUI charges for drivers who take the test and complete alcohol education *before* going to trial, an option that has successfully increased compliance rates for first-time offenders. Maryland has a successful "probation before judgment" program for first offenders, in which a criminal DUI conviction is erased after a year of probation and education. This makes test failure less drastic.<sup>40</sup> We are sure there are other similar approaches that states have taken that could serve as possible models.

In terms of breathalyzer refusals, there's always the time-honored strategy of presenting evidence that doesn't require confirmation from a machine in order to reduce the incentive for refusals. Note the following recommendation from NHTSA's 2005 report:

"Train and encourage officers to gather a broader set of evidence to support their DUI cases with the knowledge that the person could refuse the test. This includes getting more behavior indicators and following up the arrest with a more in-depth investigation. For example, officers could go to the locations where the person may have been drinking and interview bartenders and hosts of parties for information on how many drinks the person had and what they looked like when leaving. In addition, videotape the breath testing process to provide judges and prosecutors with supporting evidence of the person's behavior. Better evidence will mean that BAC test refusal provides no advantage to the defendant in court."<sup>41</sup>

Of course, it seems clear that some departments shy away from DUI charges precisely because they can be time-intensive arrests. But new laws will not address this problem any more than they can address the problem of minimal enforcement efforts by many departments.

Instead of grasping for legislative quick-fixes, policy makers must deal with the reality that drunk driving simply has not been a priority for many police departments. Unlike our fatality rates, our arrest rates are clearly abnormal as compared with other states. Providing the funding necessary for more patrols, or for police officers who are dedicated to handling drunk driving arrests, would better promote greater enforcement. In fact, it already has. As noted earlier, grant money provided the State Police for special patrols quickly and significantly elevated drunk driving arrests in Providence.<sup>42</sup>

There are many other approaches that police departments can use – from roving patrols to staked positions at strategic locations – to promote more, and more visible, arrest outcomes – if they are inclined to do so.

Finally, and perhaps most importantly, it is critical for the state to continue to examine the issue from non-punitive angles. Increased treatment availability, the use of social strategies that have been successful to curtail smoking, more public education, especially of younger people, and similar approaches all need to be promoted. Rhode Island officials already recognize this. For example, in examining “innovative state programs,” MADD’s last report card specifically cited for recognition a Rhode Island underage drinking prevention program for high school students. And just this past month, the Attorney General launched a new program in the schools, “Ask, Listen, Learn: Kids and Alcohol Don’t Mix,” which is designed to provide children and their parents with information and strategies to establish a dialogue about the dangers of underage drinking.<sup>43</sup> We are sure that there are other such programs that Rhode Island could investigate to help address the issue of drunk driving.

Like drug addiction, alcoholism is a disease that the passage of punitive laws cannot easily affect. Even a cursory look at the punitive drug laws in this state and country, and the

concomitant figures showing the large percentage of people incarcerated in our prisons for drug offenses, will lead to the realization that, when it comes to addiction, there is only so much that punitive laws can do. More attention should assuredly be spent on the availability and affordability of treatment for those in need of it. Yet discussion of dealing with the drunk driving problem from this extremely critical angle has been oddly missing from the debate. We are hopeful that it will be placed front and center, where it appropriately belongs.



## VII. CONCLUSION

There is one thing that's clear about Rhode Island's drunk driving "problem": it has, however unintentionally, been greatly exaggerated. Obviously, *any* drunk driving fatality is one too many, but efforts to eradicate this problem cannot be premised on misleading statistics or ungrounded expectations about the utility of punitive laws.

Rhode Island, in defiance of reputation, seems to have meaningfully dealt with drunk driving without turning to many of the measures that are most odious to privacy, due process, and other fundamental civil liberties that should never be suspended – not when circumstances are extreme, and certainly not when they're less egregious than they seem. We are hopeful that lawmakers will keep this in mind as they debate proposals on how best to further address this important issue.<sup>44</sup>

## ENDNOTES

<sup>1</sup> This quote is taken from an April 11, 2005 Attorney General news release, available at <<http://www.riag.ri.gov/public/pr.php?ID=436>>

<sup>2</sup> This quote is taken from MADD's 2002 *Rate the States* Report Card. The report card for Rhode Island is available at <[http://www.maddyouth.com/docs/rts2002/rts\\_section3.pdf](http://www.maddyouth.com/docs/rts2002/rts_section3.pdf)>

<sup>3</sup> "O'Neill Files Bill to Make Breath-Test Refusals a Crime," News Release, November 18, 2005. Available at <<http://www.rilin.state.ri.us/News/pr1.asp?prid=2689>>

<sup>4</sup> Available at <<http://www.endneedlessdeath.org/docs/2005%20Fatal%2015%20Release.pdf>>

<sup>5</sup> A non-exhaustive review of *Providence Journal* stories on drunk driving found ten articles in 2005 alone that have referred to statistics about Rhode Island's bottom ranking.

<sup>6</sup> These statistics and the ones that follow on the state's fatality rate are taken from the National Highway Traffic Safety Administration's *Traffic Safety Facts Annual Reports* for the years 2001 - 2004, available at <<http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/AvailInf.html>>

<sup>7</sup> A letter to the editor in the *Providence Journal* noted that a similar result is obtained if one examines the figures on a per population basis. "Deconstructing R.I.'s Drunk Driving 'Crisis,'" *Providence Journal*, December 12, 2005.

<sup>8</sup> The 2004 analysis is not yet available. However, the figures released to date show that the number of alcohol-related fatal accidents in Rhode Island declined in 2004, making a corresponding decline in the accident-to-driven miles ratio likely.

<sup>9</sup> The statistics are from NHTSA's State Traffic Safety Information for year 2004, available at <<http://www.nhtsa.dot.gov/stsi/index.cfm?Accessible=0>>. Two neighboring states that are on the "Fatal Fifteen" list – Massachusetts and Connecticut – also fit this profile. Their average 2001-2003 fatality rates for alcohol-related accidents per 100m miles driven were .41 and .46 respectively, while the national average was .61. Their average overall fatality rates, respectively, for that same period were .87 and 1, compared to a 1.38 national average.

<sup>10</sup> "State Alcohol Related Fatality Rates, 2002." Technical Report, December 2003, NHTSA, page 90. Available at <<http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/2003/809-673-color.pdf>>

<sup>11</sup> Rhode Island's reduction was probably even greater than 21%, as this figure, taken from NHTSA statistics, somewhat inexplicably appears to include alcohol-related fatalities involving intoxicated pedestrians or cyclists, not just drivers. The NHTSA 2004 figure for fatalities involving a .08+ BAC driver is 37, not 42, a 29% drop from 2003. Different news stories sometimes refer to one figure or the other. Compare, e.g., "R.I., Nation Have Decrease in Drunk Driving Deaths," *Providence Journal*, August 23, 2005 (citing Rhode Island's 37 fatalities) with "R.I.'s Spot on Drunk-Driving List a Concern," *Providence Journal*, November 29, 2005 (citing 42 fatalities). The figures within this NHTSA report show other variations as well. For example, one table lists RI as having 59 alcohol-related fatal crashes in 2003 and 42 in 2004, which would also be a 29% decrease. The same table lists in the .08+ BAC driver fatality category 54 fatalities for RI in 2003 and 41 in 2004, a 24% drop. (From Table 4 of NHTSA report, "Alcohol-Related Fatalities in 2004," available at <[http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809\\_904/809904.htm](http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809_904/809904.htm)>. The other slightly different numbers appear in Tables 7 and 8 of that document.) In any event, the variations are relatively slight and do not affect the analysis presented here or the specific point of this paragraph: Rhode Island's decline in alcohol fatalities in 2004 was one of the largest in the nation.

<sup>12</sup> As a further example that no good deed goes unpunished, a recent *Providence Journal* article cited Rhode Island as being at the bottom of yet another fatal accident list: leading the nation, as of 2003, in the percentage of fatal accidents in which *speed* was a factor. "Speed is Big Factor in State's Road Deaths," by Tony DePaul, *Providence Journal*, December 12, 2005. Once again, Rhode Island finds itself singled out for blame because its actual overall fatality rate is so low. In any event, even confining oneself to the use of the "percentage" methodology, the 2003

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rating, if accurate, can only be considered an anomaly. A 1983-2002 twenty-year analysis by NHTSA of the overall percent of speeding-related fatalities to total fatalities actually shows Rhode Island's rank over that period of time to be 27th in the country – right in the middle. See “Analysis of Speeding-Related Fatal Motor Vehicle Crashes,” Table 25, NHTSA, June 2005, available at <<http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/2005/809839.pdf>>

<sup>13</sup> Comments of Rep. J. Patrick O’Neill, “O’Neill Files Bill,” fn. 3.

<sup>14</sup> See, e.g., “Alcohol Related Deaths Hold Steady Despite Tougher Laws,” by Rick Popely, *Chicago Tribune*, reprinted in the *Providence Journal*, December 15, 2004.

<sup>15</sup> “DWI Offenders Under Correctional Supervision,” Table 3, U.S. Department of Justice, 1999, available at <<http://www.ojp.usdoj.gov/bjs/pub/ascii/dwiocs.txt>>

<sup>16</sup> Annual DUI arrest statistics are in the FBI’s yearly “Crime in the United States” reports, available at <<http://www.fbi.gov/ucr/ucr.htm>>

<sup>17</sup> “Big City Police Make Few DUI Arrests,” by Bruce Landis, *Providence Journal*, September 19, 2005.

<sup>18</sup> In fact, late last year, with the use of grant money to pay for overtime and extra patrols, the State Police began focusing on drunk driving in the capital city. As a result, Providence was suddenly leading the state with the most drunk-driving arrests since late November. “More Eyes on the Road,” by Amanda Milkovits, *Providence Journal*, December 31, 2005.

<sup>19</sup> Of course, for the reasons discussed in Section II, we do not believe this particular statistic is terribly relevant. However, since proponents have used the percentage methodology to justify the legislative proposals discussed in this report, we make use in passing of that methodology both here and in the following section on drunk driving roadblocks. In any event, as the text makes clear, the same results obtain when analyzed by “per miles driven” data.

<sup>20</sup> See fn. 6 for the source of this data. The figures are averaged for 2001-2003, the three most recent years of data available.

<sup>21</sup> The RI ACLU’s most recent report on this subject analyzes racial disparities in nine months of traffic stop data. The report can be found at <<http://www.riaclu.org/friendly/documents/Racialprofiling3rdqtrreportfinalpdf.pdf>>

<sup>22</sup> “Breath Test Refusals in DWI Enforcement,” page 7. NHTSA Report, August 2005. However, as discussed *infra*, there are serious questions as to the accuracy and validity of these refusal rates.

<sup>23</sup> “O’Neill Files Bill,” fn. 3.

<sup>24</sup> “Breath Test Refusals,” fn. 22.

<sup>25</sup> This and the comparative information that follows is from “Breath Test Refusals,” fn. 22, Appendix pp. 57 - 59. It should be noted that different sources (and occasionally the same source) sometimes provide conflicting data. The discrepancies may be attributable to differences in interpretation or the timeliness of the data. For example, MADD’s website cites 37 states as having “high BAC” laws, while the NHTSA report cites 31 states; MADD’s list appears to include more recent legislative enactments. See <<http://www.madd.org/Laws/law>>. Our report has generally relied on official NHTSA reports for the figures presented here. [See fns. 11 and 27 for other examples of differing data.]

<sup>26</sup> It is noteworthy that Mothers Against Drunk Driving (MADD) – a leading advocacy group on the issue – considers Rhode Island to be among the states that have “Penalties for Test Refusal Greater than Test Failure,” one of the criteria that they support.

<sup>27</sup> “BAC” refers to Blood Alcohol Concentration. See fn. 25 for an explanation of the figure.

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<sup>28</sup> This is not necessarily the case universally. A NHTSA report, not making the gradations this report has, found no statistically significant difference in refusal rates between states with high BAC laws and those that lack them. “Breath Test Refusals,” fn. 22, p. 7.

<sup>29</sup> “Defense Bar: Breath-Test Bill Won’t Close ‘Loophole,’” Tony Wright, *R.I. Lawyers Weekly*, December 5, 2005.

<sup>30</sup> “Big City Police,” fn. 17.

<sup>31</sup> Other comments from public officials – such as those of Rep. O’Neill, quoted in the preceding subsection of this report – are even more explicit in claiming that a criminal charge can be avoided by refusing a breath test.

<sup>32</sup> R.I.G.L. §31-27.2-2.1. It should be noted that another statute, §31.27.2-2.3, authorizes *pre-arrest* breath tests, which officers can use to decide whether to arrest a driver in the first place. However, pre-arrest test results are not admissible as evidence in court, and refusing the test doesn’t result in license suspension or the other penalties attached to refusing a post-arrest test. As a result, this method is rarely, if ever, used.

<sup>33</sup> See, e.g., “Breath Test Refusals Indicate Time for Change,” by Ryan Gainor, *Westerly Sun*, July 6, 2005 (noting that Westerly and Charlestown Police Departments double-charge all people who refuse the test).

<sup>34</sup> In fact, the R.I. Supreme Court has held that even a person who “passes” a breathalyzer test can still be convicted of drunk driving. *State v. DiCicco*, 707 A.2d 251 (R.I. 1998)

<sup>35</sup> The 1,527 number for refusals in 2004 comes from the news article cited in fn. 17. For questions about the accuracy of this number, see *infra*.

<sup>36</sup> In reality, introduction of breathalyzer evidence is not necessarily so clean or simple. Very specific procedures must be followed by police in collecting the samples, and defendants can raise a variety of objections to the validity of the results.

<sup>37</sup> The statistics cited by public officials regarding the number of breathalyzer refusals and DUI arrests in the state are sometimes contradictory and, on occasion, clearly erroneous. At least a few news stories report the Attorney General citing the 1,527 refusal figure in 2004 as referring to *state police cases alone*. See, e.g., “Bill Closes Drunk Driving Loophole,” by Bruce Landis, *Providence Journal*, June 20, 2005. This is clearly wrong. And while that article refers to a doubling of breathalyzer refusals between 2001 and 2004 – from 818 to 1,527 – a later story has the Attorney General claiming an increase in breathalyzer refusal trials from 1,017 cases to 1,342 cases between those same years. “Carceri, Lynch Back Drunk-Driving Legislation,” by Bruce Landis, *Providence Journal*, November 22, 2005. The 1,342 figure is the one presently cited by the Attorney General on his web site.

As for DUI arrests, a September 19, 2005 *Providence Journal* article cites the 2,330 figure quoted above. “Big City Police,” fn. 18. However, the same story has an accompanying chart, with data attributed to “Crime in Rhode Island, R.I. State Police; and Warwick Police,” that gives a state-wide DUI arrest figure of 1,972 arrests. The actual “Crime in Rhode Island” report from the FBI says there were 2,367 DUI arrests in 2004 (Table 69 of “Crime in the United States 2004” available at <<http://www.fbi.gov/ucr/ucr.htm>>). Using the FBI’s figure of 2,367 arrests and the AG’s most recent figure of 1,342 refusals, the refusal rate is 57%.

<sup>38</sup> Rhode Island also fares poorly in grading done by the Insurance Institute for Highway Safety, an advocacy group funded by auto insurers. But that grade is based solely on the presence or absence in a state of four particular laws or policies, including use of drunk driving roadblocks.

<sup>39</sup> 2002 *Rate the States* Report Card. See fn. 2 for the citation to the report card for Rhode Island.

<sup>40</sup> “Breath Test Refusals,” fn. 22, pp. 18-24.

<sup>41</sup> *Id.*, page 23.

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<sup>42</sup> See fn. 18.

<sup>43</sup> A news release about the program is available at <<http://www.riag.ri.gov/public/pr.php?ID=533>>

<sup>44</sup> This report was prepared by RI ACLU Program and Development Coordinator Amy Myrick.