AN ANALYSIS OF RECENT CHANGES IN KANSAS DRUNK DRIVING LAWS

by David J. Gottlieb*
and Steven R. Zinn**

For the past several years the problem of drunk driving has become of increasingly intense public concern. In response to this concern, the Kansas Legislature has passed major amendments to the drunk driving laws.[1] The most recent amendments[2] passed the legislature in 1985 in conjunction with changes in state liquor laws.[3] The 1985 amendments offer a consolidated package that toughens criminal penalties and limits the opportunity for certain defendants to receive diversion.[4] At the same time, the new laws expand the power of the police to act against persons suspected of drunk driving.[5] These expanded powers affect both the circumstances under which the police can order suspects to undergo tests and the kinds of tests that can be ordered. This Article examines the changes in police procedure required by the new drunk driving laws. The Article first provides a general description of the recent changes and then analyzes some of the constitutional and practical problems those changes raise.

A. Summary of the New Laws

The new drunk driving laws present several major revisions in police procedure. These revisions center on the statutory doctrine of implied consent. Under this doctrine, a person suspected of drunk driving is deemed to have consented to chemical testing for blood

---

* Professor of Law and Director, Kansas Defender Project. B.A. 1969, Oberlin College; J.D. 1974, Georgetown University.

** Adjunct Clinical Professor, Kansas Appellate Practice Clinic. B.A. 1977, Stanford University; J.D. 1982, University of Kansas.

[1] *See* Act of April 13, 1984, ch. 37, 1984 Kan. Sess. Laws 313 (codified as amended at K.S.A. §§ 8-254, 8-288, 8-1567); Act of April 21, 1983, ch. 37, 1983 Kan. Sess. Laws 285 (codified as amended at K.S.A. §§ 8-255, 8-285, 8-1001, 8-1005, 8-1567, 22-2908).

[2] *See* Act of May 9, 1985, ch. 50, 1985 Kan. Sess. Laws 340; Act of April 27, 1985, ch. 48, 1985 Kan. Sess. Laws 306.

[3] *See Hearing on S.B. 126-129 Before Senate Committee on Federal and State Affairs*, 1985 Sess. (Feb. 1, 1985); *Hearings Before House Committee on Federal and State Affairs*, 1985 Sess. (Feb. 26-28, 1985).

[4] *See* Act of April 27, 1985, ch. 48, 1985 Kan. Sess. Laws 306, Sec. 9, 11-12, 17 (codified as amended at K.S.A. §§ 8-1567, 12-4415, 12-4416, 22-2909).

[5] *See* Act of May 9, 1985, ch. 50, 1985 Kan. Sess. Laws 340 (codified as amended at §§ 8-1001, 8-1002, 8-1004, 8-1006 (Supp. 1985)).

alcohol content in exchange for exercising the privilege of driving.[6] Although that consent may be withdrawn, the penalty for doing so is suspension of the person's driver's license. The purpose of this scheme is to induce as many drivers as possible to submit to testing[7] and to relieve officers from the necessity of forcibly testing drivers who refuse consent.

One major change under the new laws is that consent is now implied even when a person suspected of drunk driving is not arrested. Under the old statute, consent to blood or breath tests was implied only if an officer arrested or otherwise took a suspect into custody.[8] Under the new statute, however, a motorist gives implied consent when an officer has reasonable grounds to believe that the person was operating the vehicle under the influence of alcohol or drugs and the person either is arrested or has been involved in a motor vehicle accident or collision resulting in property damage, personal injury or death.[9] This change eliminates the need for an actual arrest before requiring chemical tests, as long as probable cause[10] to arrest exists and an accident has occurred. Thus, police may now demand a test from an injured suspect who is being treated at a hospital but who has not yet been arrested.

A second significant change is the expansion of the types of tests permitted under implied consent. Prior to the 1985 amendments, consent was implied only for tests to determine blood alcohol content.[11] The new law permits tests to determine the "presence of al-

---

[6] K.S.A. § 8-1001(a) (Supp. 1985).

[7] *See* Comment, *The New Kansas Drunk Driving Law: A Closer Look*, 31 KAN. L. REV. 409, 410 (1983).

[8] K.S.A. § 8-1001(b) (1982) (repealed 1985).

[9] K.S.A. § 8-1001(b) (Supp. 1985).

[10] We recognize that the precise words of the statute require "reasonable grounds" to believe that an offense has occurred rather than "probable cause." However, the two terms have consistently been read as synonymous. Thus, in State v. Giddings, 216 Kan. 14, 531 P.2d 445 (1975), (syllabus of the court, ¶ 4) the court described K.S.A. § 22-2401(c), which requires probable cause to arrest, as permitting arrest when the officer "reasonably believes" the party has committed a felony. Similarly, in United States v. Watson, 423 U.S. 411, 418 (1975) the court described the common law rule permitting an officer to make a warrantless felony arrest as synonymous with a requirement of probable cause. *Id.* at 421. *See also* W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.5, at 141 ("At common law, a peace officer was authorized to arrest a person for a felony without first obtaining an arrest warrant whenever he had 'reasonable grounds to believe' that a felony had been committed and that the person to be arrested had committed it (i.e., *what now constitutes Fourth Amendment probable cause*)" (emphasis supplied)).

While there is little doubt that the legislature has produced a statute requiring probable cause, it is equally clear that they have done so in a confusing manner. The archaic term "reasonable grounds" is not nearly as well-known to lawyers or police as is "probable cause." Indeed the term "reasonable grounds" virtually invites confusion because of its semantic similarity with the lesser standard of "reasonable suspicion" required for a "stop and frisk." *See* K.S.A. § 22-2402. Accordingly, we urge the legislature to amend the statute to substitute the term "probable cause" in place of "reasonable grounds."

Finally, if for some reason we are incorrect in our analysis, and the legislature has intended to permit blood tests or some standard less than probable cause, the statute is clearly unconstitutional. There is no constitutional authority permitting the government to engage in a bodily intrusion such as a blood test on less than probable cause. *See* Schmerber v. California, 384 U.S. 757 (1966).

[11] K.S.A. § 8-1001(a) (1982) (repealed 1985).

cohol or drugs."[12] These tests can now include not only blood and breath tests but also tests of "urine or other bodily substance."[13] The statute contemplates that a police officer will first attempt to measure intoxication by requesting a breath or blood test. If an officer believes, however, that a driver is impaired by a drug not subject to detection by the blood or breath test, the officer may request a urine test.[14] The collection of the urine sample must be supervised by persons of the same sex as the person tested and must be conducted in a private setting.[15] Under the language of the new statute, tests of other bodily fluids, such as saliva, would also be permitted.

A third change to the implied consent statute has no counterpart in the old statute. The new statute requires that a series of warnings be given to a drunk driving suspect when tests are requested. The suspect is to be advised, both orally and in writing, that: (1) there is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to test will result in a six-month driver's license suspension; (3) such refusal may be used against him in any trial on a charge of driving under the influence; (4) if he decides to test, the results of the tests may be used in evidence; and (5) after completing the tests, he has a right to consult with an attorney and may secure additional testing on his own.[16]

A fourth major change is that the statute now explicitly states that police are not required to preserve samples of blood, breath or urine for purposes of independent testing by defendants.[17] Yet the new law allows, as did the prior law, a defendant to challenge the police test. It gives a person who has consented to testing a reasonable opportunity to have additional tests conducted by a physician of his own choice. If the police refuse to permit such additional testing, the results of the police testing cannot be admitted into evidence.[18]

In addition to these changes in police procedure, the new law provides for more severe treatment of drunk driving defendants. A mandatory ninety-day jail sentence is imposed upon a person convicted of driving under the influence if the violation was committed during the time the person's driver's license was suspended or revoked as the result of a previous conviction for driving under the influence.[19] The statute limits the possibility of diversion for certain defendants. If a defendant charged with DUI had a blood alcohol content of .20 percent or more or was involved in a motor vehicle accident resulting in personal injury or death, the new law does not

---

[12] K.S.A. § 8-1001(a) (Supp. 1985).
[13] *Id.*
[14] *Id.* § 8-1001(d).
[15] *Id.* A suspect may, however, waive this right to privacy.
[16] *Id.* § 8-1001(f).
[17] *Id.* § 8-1006.
[18] *Id.* § 8-1004.
[19] *Id.* § 8-262(4).

permit the defendant to enter a diversion agreement.[20] When diversion is otherwise permissible, a prosecuting attorney has the express authority to require license suspension or revocation as part of the diversion agreement.[21]

In addition to toughening penalties, the new law broadens the kinds of conduct that may be punished. Whereas the old statute did not directly address such conduct, the new statute extends the crime of driving under the influence to include *attempted* operation of a vehicle.[22] The new statute also criminalizes the act of driving with a blood alcohol content (BAC) of .10 percent or more.[23] Prior to the 1985 amendments, driving with such a BAC was mere prima facie evidence that a defendant was incapable of safely driving. Now, driving with a .10 percent or greater BAC is per se criminal.[24]

The law also modifies the driver's license suspension procedure used when a person refuses to take a requested test. Upon refusal, the officer administering the testing immediately notifies the person of the suspension. The officer then confiscates the person's driver's license and issues a fifteen-day temporary permit. The driver may request an administrative hearing from the division of vehicles. The scope of the hearing is limited to whether (a) reasonable grounds existed for requiring the test; (b) notice was given; (c) the test was refused; and (d) the person was arrested or involved in a motor vehicle accident or collision resulting in property damage, personal injury or death.[25] The minimum length of suspension is six months.

B. Analysis of the New Statute

1. Testing the Unarrested Suspect

The first significant change in the Kansas drunk driving law is the expansion of the implied consent doctrine to permit testing even when police have declined to arrest. Before this change the police could presume implied consent and request a blood test only if a driver was arrested or otherwise taken into custody for driving under the influence.[26] Pursuant to the 1985 amendment, consent is also implied when an officer has reasonable grounds to believe the person was attempting to operate a motor vehicle while under the influence and was involved in an accident resulting in property

---

[20] *Id.* § 22-2909(e); *see also* § 12-3315(b)(3)-(4) (municipal court diversion agreements).
[21] *Id.* § 22-2909(e).
[22] *Id.* § 8-1567(a).
[23] *Id.*
[24] *Id.* § 8-1567(a)(1).
[25] *Id.* § 8-1002.
[26] K.S.A. § 8-1001(a) (1982) (repealed 1985).

damage, personal injury or death.[27] Thus, officers can now demand a sample from an injured suspect being treated at a hospital without arresting him.

This change is, undoubtedly, the legislature's response to case law holding that blood alcohol tests taken from unarrested suspects should be suppressed. For example, in *State v. Bruner*[28] and *State v. Gordon*,[29] suspects were taken to a hospital for treatment of injuries, and were given blood alcohol tests prior to arrest. In both cases, the Kansas Supreme Court suppressed the results of the tests on the ground that the tests were searches neither authorized by the implied consent statute nor consented to by the suspects, and were therefore illegal.

The legislature's grant of statutory authority for the police to act in the absence of arrest raises a serious constitutional question: does the fourth amendment permit the police to take a blood test upon probable cause to arrest or search, when they neither have a warrant nor intend to arrest? Various state courts have disagreed on this issue.[30] To the extent Kansas courts have spoken, their language would appear to cast doubt on the new statute's constitutionality.[31]

The constitutional basis for permitting blood tests without a warrant is generally recognized as an outgrowth of the authority of police to search incident to arrest. If police have probable cause to believe a person has committed a crime, they may arrest. Incident to that arrest, they may, without a warrant or probable cause, search the person and the area in his immediate control.[32]

In *Schmerber v. California*,[33] the United States Supreme Court held that under certain circumstances, police may forcibly extract a blood sample from a defendant incident to an arrest for driving under the influence. The defendant argued that the warrantless search into the body could not be justified as a search incident to arrest. The Court recognized that a bodily intrusion, such as a blood test, represented a far greater affront to "human dignity" and privacy than the traditional search incident to arrest of a person for weapons and evidence. Therefore, the Court concluded that a bodily intrusion incident to arrest could not take place "on the mere chance that the desired evidence might be obtained"; rather, the state must show a "clear indication" that the evidence will be found by the test.[34] In *Schmerber*, the evidence of intoxication that established probable cause to arrest also suggested the relevance and

---

[27] K.S.A. § 8-1001(b) (Supp. 1985).
[28] 211 Kan. 596, 507 P.2d 233 (1973).
[29] 219 Kan. 643, 549 P.2d 886 (1976).
[30] *See infra* notes 37-42 and accompanying text.
[31] *See infra* notes 43-46 and accompanying text.
[32] *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).
[33] 384 U.S. 757 (1966).
[34] *Id.* at 770.

success of the blood test.

The Court then considered whether such tests could be conducted without a warrant. The Court recognized that the percentage of alcohol in the blood diminishes after drinking stops. Noting that the officer might therefore have concluded that he was confronted with an emergency that required the test to be taken before a warrant could be obtained, the Court found the test to be "an appropriate incident to petitioner's arrest."[35]

Schmerber serves as the authority for requiring warrantless and forcible blood alcohol tests for suspects properly arrested for drunk driving offenses. It also provides the justification for those states, like Kansas, that require a license forfeiture, rather than forcible testing, if a suspect refuses to submit to a test.[36]

A number of courts have limited *Schmerber* to its facts and have held that police may not compel a blood test absent a reasonably contemporaneous arrest.[37] For example, in *People v. Superior Court*,[38] a case decided shortly after *Schmerber*, the California Supreme Court upheld the trial court's suppression of evidence of a hospital blood sample taken from an unarrested defendant. The California court rejected the view that an arrest was a mere formality.[39] The court concluded that *Schmerber's* approval of the compulsory seizure of blood was clearly grounded on the premise that it is incident to a lawful arrest. This same conclusion has been reached in numerous other states,[40] and was reaffirmed only recently by the Ninth Circuit in *United States v. Harvey*.[41] In *Harvey*, a blood sample was taken from a hospitalized but unarrested suspect over her objection. The Ninth Circuit reversed the conviction, stating it was "constrained" by *Schmerber* in requiring that a valid formal arrest be made before taking a blood sample.[42]

To the extent Kansas cases have spoken on this issue, they have also noted the need for a valid arrest as a condition precedent to a blood test. In *State v. Bruner*,[43] the Kansas Supreme Court stated that "insofar as the constitution goes, a blood sample could have been taken from the defendant . . . even in the absence of consent—*if he had been arrested.*"[44] In *State v. Williams*,[45] the Kansas Court of Appeals found that the then-existing implied consent law, requiring an arrest precedent to a blood test, stated the constitutional minimum. The court, in a footnote, stated that "the consti-

---

[35] *Id.* at 771.
[36] *See, e.g.*, State v. Bruner, 211 Kan. 596, 604, 507 P.2d 233, 237-38 (1973).
[37] *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE § 5.4, at 341-45 (1978).
[38] 6 Cal. 3d 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972).
[39] *Id.* at 761, 493 P.2d at 447, 100 Cal. Rptr. at 283.
[40] *See, e.g.*, State v. Davis, 108 N.H. 45, 266 A.2d 873 (1967); Commonwealth v. Hlavsa, 266 Pa. Super. 602, 405 A.2d 1270 (1979).
[41] 701 F.2d 800 (9th Cir. 1983).
[42] *Id.* at 803-04.
[43] 211 Kan. 596, 507 P.2d 233 (1973).
[44] 211 Kan. at 603, 507 P.2d at 239 (emphasis in original).
[45] 4 Kan. App. 2d 651, 610 P.2d 111 (1980).

tution . . . requires a lawful arrest, absent a valid search warrant or voluntary consent, to justify the taking of a blood sample as an incident thereto."[46]

There is, on the other hand, support for the view that police have the authority to take a blood test upon probable cause, even if they do not make a formal arrest. While the United States Supreme Court has not addressed this exact issue, *Cupp v. Murphy*[47] seemingly favors the constitutionality of the new law. In *Cupp*, police took samples of fingernail scrapings from an unarrested homicide suspect. The samples contained traces of skin and blood cells which linked the suspect to the homicide. Although the police possessed probable cause to arrest, the suspect was released after the search and not formally arrested until a month later. In upholding the search the Court indicated that in the absence of a formal arrest, a full search incident to arrest might not be justified. Nevertheless, in the case the Court approved the "very limited search" necessary to preserve the "highly evanescent evidence" found under the suspect's fingernails.[48]

Cupp can be read as supporting the general proposition that when police have probable cause to arrest a suspect, they may search for evidence reasonably believed to be in the suspect's possession that might later be unavailable, even if they make no formal contemporaneous arrest.[49] Application of this principle to laws such as the new implied consent provision supports their constitutionality. The police have no authority to search unless they have probable cause to arrest. Moreover, in the blood test situation, the evidence of alcohol concentration will disappear unless the police are permitted to test. In fact, in reliance on *Cupp*, a majority of recent courts considering the issue have held that blood tests should be permitted upon probable cause, even if no arrest occurs.[50]

The better reasoned cases sustain the legality of the searches. The need for an immediate search is not affected in any degree by whether the police formally arrest. Because the percentage of alcohol in the body begins to diminish shortly after drinking stops, the police must act quickly or the evidence will dissipate. The police, therefore, face an emergency that is unaffected by whether the defendant is formally arrested. More significantly, the requirement of a formal arrest does not aid the defendant or protect his privacy. In fact, the arrest requirement forces the police officer, at the outset, to take an extremely intrusive step against the liberty of the suspect. Arrest eliminates the possibility of proceeding by summons or

---

[46] 4 Kan. App. 2d at 654 n.2, 610 P.2d at 114 n.2 (citing State v. Garner, 227 Kan. 566, 608 P.2d 1321 (1980)).

[47] 412 U.S. 291 (1973).

[48] *Id.* at 296.

[49] 2 W. LAFAVE, SEARCH AND SEIZURE § 5.4, at 341-44 (1978).

[50] *See, e.g.*, People v. Sutherland, 683 P.2d 1192 (Colo. 1984); State v. Libby, 453 A.2d 481 (Me. 1982); State v. Aguirre, 295 N.W.2d 79 (Minn. 1980); Van Order v. State, 600 P.2d 1056 (Wyo. 1979).

other means to bring the suspect into court.

Policy arguments in support of an arrest requirement are unconvincing. In *United States v. Harvey*, the court stated that an arrest requirement would

> help insure that the police do not arbitrarily violate an individual's privacy. Also, it will sharply delineate the moment at which the police officer determined he or she had probable cause to arrest . . . . Furthermore, the formal announcement of arrest triggers certain responsibilities for the arresting officer and gives rise to certain rights to the accused; for example, those rights delineated in a proper *Miranda* warning.[51]

A mandatory arrest will not insure against arbitrary police violation of individual privacy. With or without arrest, police may not demand a test unless they have probable cause. The request for a test will delineate the moment an officer believes he has probable cause just as distinctly as an invocation of a formal arrest. The fact that the police must, under the statute, inform the suspect of the consequences of refusing a test eliminates the argument that advantages or "rights" are somehow lost if the suspect is not arrested. In short, both the state and suspect should benefit by an implied consent statute triggered by probable cause rather than probable cause plus arrest. Nothing is gained by requiring a policeman who has probable cause to believe that a hospitalized suspect was driving while intoxicated to chant some order of arrest before requesting a blood sample.

2. Testing of Other Bodily Substances for Drugs

A second major change in the statute is the expansion of the testable substances and the means of testing permitted by police. Prior to the 1985 amendment, the police were authorized to demand consent only for tests of "breath or blood" to determine alcohol content.[52] The new law, in addition to these tests, permits tests of "urine or other bodily substance" for alcohol or "drugs."[53] The legislature included these additions following testimony at hearings indicating that numerous drugs other than alcohol can impair driving ability and consideration of studies showing that as many as one-half of the suspects arrested in certain states for driving while impaired had consumed sedative or hypnotic drugs.[54] The law contemplates that police officers will first attempt to measure intoxication by requesting a breath or blood test. If, however, an officer has reasonable grounds to believe that an impairment is caused by a drug not detectable by a breath or blood test, a urine test may be requested. The test must be supervised by persons of the same sex as

---

[51] 701 F.2d at 805 (9th Cir. 1983).
[52] K.S.A. § 8-1001(a) (1982) (repealed 1985).
[53] K.S.A. § 8-1001(a) (Supp. 1985).
[54] *Hearings Before House Committee on Federal and State Affairs*, Feb. 26, 1985 (testimony of Dr. Tim Rohrig, Kansas Bureau of Investigation).

the person being tested.[55] Presumably, tests of other bodily fluids, such as saliva, are also permitted. No warrant is required for collection of the sample.

The new section may present a constitutional issue. Under *Schmerber*, blood tests and other intrusions into the body are permissible without a warrant because the state can show a need for an immediate search—unless the police move quickly the percentage of alcohol in the suspect's blood will diminish.[56] If a urine sample is regarded as an intrusion into the body similar to a blood test, the state will need to show a similar justification for proceeding without a warrant.

A threshhold question is whether the collection of a urine sample should be regarded as an intrusion into the body, or whether, like fingerprinting, it is a "routine" search that generally can be conducted incident to an arrest. At present, the authorities are not consistent on this question. In *People v. Williams*[57] the Colorado Supreme Court concluded that a lawful custodial arrest does not alone justify the taking of a urine sample. The court found no difference in the degree of bodily intrusion surrounding a blood test and the compelled production of bodily fluids required in urinalysis. A contrary view is held by Professor LaFave, who believes urinalysis does not involve a bodily intrusion requiring any special requirement beyond a lawful arrest.[58]

The Kansas courts have not directly addressed the question. In a recent case, however, the Kansas Court of Appeals required that police obtain a warrant before taking evidence from the defendant's body. In *State v. Gammill*,[59] a sheriff plucked some 20-25 pubic hairs from an incarcerated defendant. In striking down the search, the court found the search a "needless indignity" and concluded:

> Neither can it be claimed that the warrantless search was necessary because of exigent circumstances. Pubic hairs may be expected to remain where they are for a considerable period of time—certainly long enough to obtain a valid warrant or court order.[60]

If a urine specimen is subject to the same rules as a blood test, a warrantless search will be constitutional only if urine specimens, like tests for alcohol, must be taken quickly before the suspected presence of the drug diminishes. The answer to that question is by no means as certain in urinalysis tests for drugs as it is for alcohol. Some drugs, marijuana for example, will remain in the body for days or longer.[61] Thus, an officer who believes a driver has used

---

[55] K.S.A. § 8-1001(d) (Supp. 1985).
[56] Schmerber v. California, 384 U.S. 757, 760-61 (1966).
[57] 192 Colo. 249, 557 P.2d 399 (1976).
[58] 2 W. LAFAVE, SEARCH AND SEIZURE § 5.3, at 323 (1978).
[59] 2 Kan. App. 2d 627, 585 P.2d 1074 (1978).
[60] *Id.* at 628, 585 P.2d at 1077.
[61] *See, e.g.*, McBay, Dubowski & Finkle, *Urine Testing for Marijuana Use*, 249 J.A.M.A. 881 (Feb. 18, 1983) (letter to the editor).

marijuana would arguably have little justification for proceeding before a warrant can be obtained. On the other hand, if an officer believes other drugs are involved, the justification may exist for immediately requiring a urine specimen to accurately ascertain the presence of those drugs. In any event, where the officer is uncertain of the intoxicating drug that the suspect has consumed, it would seem unrealistic to require the officer to first obtain a warrant before obtaining a urine specimen.

Beyond any constitutional questions, the testing of urine specimens raises serious practical difficulties which will be encountered when law enforcement officials attempt to determine the quantity and duration of a drug's presence in a suspect's urine. The new statute provides for "all qualitative and quantitative tests for alcohol and drugs."[62] While there are well-accepted and easily administered tests to determine the quantity of alcohol in the blood, similar tests to measure the quantity of drugs in urine are less well-established. Commonly used tests such as thin-layer chromatography merely determine whether a particular drug is present in the urine.[63] Similar problems surround tests to determine how long a drug has been in a suspect's body. Unlike alcohol, which is quickly metabolized, certain drugs, such as marijuana, will remain in the body for a prolonged period. Complex testing procedures requiring analysis of multiple specimens taken at different times are needed to determine the duration of a drug's presence in a suspect's system. At the present time it is questionable whether most police officers have the necessary training to conduct such tests.

Since the use of purely qualitative urinalysis testing will simply reveal whether a particular drug has been used at an undetermined time, serious evidentiary questions surround the use of such test results in a DUI prosecution. In prosecutions involving the use of marijuana, which may remain in a suspect's system for a prolonged period,[64] the prejudicial effect of such evidence arguably outweighs its probative value.[65] Yet even for drugs which metabolize rapidly after consumption, purely qualitative evidence, standing alone, will be of limited evidentiary value.

Even when the presence of a drug in a person's system can be

---

[62] K.S.A. § 8-1001(a) (Supp. 1985).

[63] Unless otherwise noted, all medical information discussed in this Article was obtained through telephone conversations on February 5, 1986, with Dr. Aryeh Hurwitz, Professor of Clinical Pharmacology at the University of Kansas Medical Center; Morris Fairman, Professor of Pharmacology and Toxicology at the University of Kansas; and Joyce Generali, Association Professor of Pharmacy Practice and Administrative Director of the Drug and Poison Information Center at the University of Kansas Medical Center.

[64] *See supra* note 61 and accompanying text. An additional problem may exist in the use of purely qualitative tests for the detection of marijuana and hashish in light of recent studies revealing that cannabinoids may be detected in individuals who have been only passively exposed to such substances. *See* Morland, Bugge, Skuterud, Steen, Wethe & Kjeldsen, *Cannabinoids in Blood and Urine after Passive Inhalation of* Cannabis *Smoke*, 30 J. FORENSIC SCI. 997 (1985).

[65] *See* K.S.A. 60-445; State v. Davis, 213 Kan. 54, 515 P.2d 802 (1973).

quantitatively measured, the legislature has failed to set forth any standards for determining what quantity of a particular drug is deemed to render a person incapable of driving safely.[66] This failure is likely due to the fact that there currently are no medically accepted standards for such a determination. Even if quantitative standards existed, a quantitative measurement of the presence of a drug may have little correlation to the degree of driving impairment. This is particularly true when therapeutic drugs are involved.[67] Many prescription and over-the-counter drugs, including frequently used products such as antihistamines, have sedative side effects. When such medication is used for a prolonged period, tolerance develops. Consequently, a high concentration of such a drug in a person's system may have little effect on that person's ability to drive safely.[68] Because there are no currently accepted standards for determining impairment caused by drugs other than alcohol, it may not be feasible for the legislature to delineate specific standards for determining when a driver is deemed incapable of driving safely. Yet without such standards, even quantitative evidence of the presence of a drug may be inadequate to establish persuasive evidence of impairment.

3. Warning the DUI Suspect

The 1985 amendments to the drunk driving laws require police officers to give a series of warnings prior to requesting a driver to submit to chemical tests. Officers must provide both oral and written notice that:

> (A) There is no right to consult with an attorney regarding whether to submit to testing; (B) refusal to submit to testing will result in six months' suspension of the person's driver's license; (C) refusal to submit to testing may be used against the person at any trial on a charge involving driving while under the influence of alcohol or drugs, or both; (D) the results of the testing may be used against the person at any trial on a charge involving driving while under the influence of alcohol or drugs, or both; and (E) after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from hospitals, medical laboratories and physicians.[69]

---

[66] K.S.A. § 8-1005(a)(3) (Supp. 1985) simply provides that:

> [i]f there was present in the defendant's bodily substance any narcotic, hypnotic, somnifacient, stimulating or other drug which has the capacity to render the defendant incapable of safety driving a vehicle, that fact may be considered to determine if the defendant was under the influence of drugs, or both alcohol and drugs, to a degree that renders the defendant incapable of driving safely.

[67] *Id.* § 8-1567(c).

[68] Under K.S.A. § 8-1567(b) (Supp. 1985), it is unlawful for any person who is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug to operate or attempt to operate a motor vehicle. Under subsection (c) of that statute, it is not a defense that the person is legally entitled to use the drug. Thus, it is seemingly illegal for an individual regularly using prescription medication with similar side effects to operate a motor vehicle.

[69] K.S.A. § 8-1001(f)(1).

Although these warnings should help some suspects better understand their rights, they become yet another obligation for an investigating officer and may create a new defense to DUI charges.

The new statutory warnings are, in essence, a codification of the Kansas Supreme Court's holding in *Standish v. Department of Revenue*.[70] In *Standish*, the court held that a DUI suspect has no fifth amendment right to consult with an attorney before deciding whether to submit to a blood alcohol test.[71] The fifth amendment privilege against self-incrimination protects an accused from being compelled to reveal testimonial or communicative evidence to the police. To protect that privilege a suspect must, upon request, be provided an attorney before being subjected to station house questioning. Blood and breath tests, being neither testimonial nor communicative, are not covered by the fifth amendment privilege.[72] Because there is no constitutional privilege to refuse a blood test, the court held that a driver has no right to consult with counsel in determining whether to submit to a test.[73]

While deciding against a right to consult with counsel, the *Standish* court recognized a problem faced by the arrested suspect. The DUI suspect had been informed of his *Miranda* rights at the time of the arrest. Under *Miranda*,[74] a suspect is told that he has a right to consult with an attorney before being subjected to custodial questioning by the police.[75] The *Standish* court found the DUI sus-

---

[70] 235 Kan. 900, 683 P.2d 1276 (1984).

[71] 235 Kan. at 904, 683 P.2d at 1281.

[72] Schmerber v. California, 384 U.S. 757, 765 (1966).

[73] 235 Kan. at 904, 683 P.2d at 1281. The following year, in State v. Bristor, 236 Kan. 313, 691 P.2d 1 (1984), the court addressed the right to counsel under the sixth amendment, which provides the accused with the right to counsel for all critical stages of the prosecution. The court found that the decision to submit to testing is not a critical stage of the "prosecution" for sixth amendment purposes because it is made before the filing of a complaint, when, in Kansas, adversary judicial proceedings are initiated and the right to counsel attaches. The court also found the decision to submit to a Blood Alcohol Test (BAT) is not a "critical stage" because the driver has already impliedly consented to testing and has no constitutional right to refuse testing.

[74] Miranda v. Arizona, 384 U.S. 436 (1966).

[75] *Id.* at 471. In Berkemer v. McCarty, 104 S. Ct. 3138 (1984), the United States Supreme Court held that *Miranda* warnings must be given prior to any custodial interrogation of a suspect arrested for a misdemeanor offense, such as driving under the influence of alcohol or drugs, as well as for felony offenses. An interesting question arises in light of the provision in the amendment to the Kansas drunk driving laws which permits testing of a suspect who is not formally arrested but has been involved in an accident involving property damage, personal injury or death. While the new statutory notice clearly must be given to such a person, it is less clear whether the *Miranda* warnings likewise must be given before the person is subjected to police interrogation. It would seem that when blood or urine tests are required, *Miranda* must be given. K.S.A. § 8-1001(c) (Supp. 1985) provides that blood tests may be administered only by qualified medical personnel. Under K.S.A. § 8-1001(d), privacy requirements attach to the administration of urinalysis examinations. Thus, such tests must necessarily be administered at a location away from the scene of the accident. Transporting a suspect to the testing location constitutes such a significant curtailment of the suspect's freedom of action that the suspect is in custody, even if not formally under arrest. While the mere administration of the test would not invoke *Miranda* because there is no interrogation, any question accompanying the testing, such as questions calculated to determine the nature or quantity of the alcohol or drugs consumed by the suspect, would bring *Miranda* into play. On the other hand, the adminis-

pect's refusal to submit to testing understandable in light of the confusion caused by giving *Miranda* without specifying the inapplicability of the right to counsel in determining whether to take a blood alcohol test.[76] To alleviate such confusion, the court stated that when giving *Miranda* warnings an officer "should also tell" an arrested suspect of the implied consent law and that there is no right to consult with counsel before deciding to take a test.[77] The court added that the officer "could well add" that the suspect's refusal to take the test may be used as evidence against the suspect in a subsequent DUI prosecution and will probably result in a suspension of his driving privileges.[78] Although the conditional nature of the language used in *Standish* did not clearly establish that the latter two warnings are mandatory, a year later in *State v. Bristor*,[79] the court construed *Standish* as affirmatively requiring that a person arrested for DUI be informed of the consequences of a refusal to submit to testing.[80]

Any remaining ambiguity about the mandatory nature of such warnings is removed by the statutory notice requirements contained in the 1985 amendments. Although the statute provides that the question of whether the statutory notice was given is one of only four issues that may be raised at an administrative license suspension hearing,[81] it is silent as to the consequences of a police officer's failure to give the warnings in a DUI prosecution. Such failure, however, will apparently render test results inadmissible in a DUI prosecution. This conclusion is largely premised on the mandatory language of the statute, which expressly provides that the notice "shall be given."[82] Inadmissibility of unwarned test results is the only practical way to insure that the warnings are actually given. A contrary result would make the new requirements virtually meaningless, for no purpose is served by requiring the notice if test results are admissible even if the warnings are not given.[83]

The new law provides that failure to understand the warnings because of intoxication or injury resulting from such intoxication does not constitute a defense in a DUI prosecution.[84] Nevertheless,

---

tration of a breath test at the scene of the accident would not require *Miranda* warnings before similar questioning can be conducted. Such questioning would fall far short of custodial interrogation, but would rather constitute mere roadside questioning, which does not require *Miranda* warnings. *See Berkemer*, 104 S. Ct. at 3144.

[76] 235 Kan. at 905, 683 P.2d at 1281-82.

[77] *Id.* at 904-05, 683 P.2d at 1281-82.

[78] *Id.* at 905, 683 P.2d at 1281.

[79] 236 Kan. 313, 691 P.2d 1 (1984).

[80] 236 Kan. at 319, 691 P.2d at 6.

[81] K.S.A. § 8-1002(d) (Supp. 1985).

[82] *Id.* § 8-1001(f)(1).

[83] The statutory amendments also provide that "[n]othing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant." K.S.A. § 8-1001(g) (Supp. 1985). Thus, failure to give the statutory notice will not render test results inadmissible if the test was conducted with a warrant.

[84] K.S.A. § 8-1001(f)(2) (Supp. 1985).

a suspect must be given both oral and written notice even if unconscious or intoxicated to the extent of being incapable of understanding the warnings.[85] A suspect's inability to comprehend the notice has no constitutional implications since, under *Schmerber*, a DUI suspect has no constitutional right to refuse a blood alcohol test.[86] Providing the statutory notice to a suspect who is incapable of understanding may be a hollow formality, but it is a requirement which nevertheless must be followed. The requirement that the notice be in writing will establish that it was in fact given to a suspect who was so intoxicated he cannot remember receiving the oral recitation.

The new statutory notice requirement includes one provision which was not mentioned in *Standish* and which the Kansas Court of Appeals had previously held not to be required.[87] The officer must now inform a suspect of the right to secure additional testing from an independent source.[88] This information is particularly important in light of the 1985 amendment to K.S.A. § 8-1006, which provides that test samples need not be preserved and furnished to a suspect for independent testing. Without the added warning, a suspect may be unaware of his rights, and thus lose any opportunity to independently challenge the result of the state's tests.

In summary, the new notice requirement imposes a more extensive obligation upon an investigating officer than previously required by the Kansas courts. Failure to give the notice, even to a suspect incapable of understanding it, should preclude the admissibility of the results of a test administered to the suspect. Despite the new obligations imposed upon law enforcement officers, the notice requirement serves the salutary purpose of clarifying any ambiguity concerning the right to counsel which may result from the *Miranda* warnings and provides a DUI suspect with the information necessary to make an informed decision whether to submit to testing.

4. Preserving the Evidence of the Test

Finally, the new drunk driving law explicitly states that samples of blood, breath or urine need not be preserved or furnished to the suspect for independent testing.[89] While preserving such samples for a defendant is probably neither technically infeasible nor unduly burdensome for law enforcement officers, the constitutionality of this provision, at least as to breath samples, finds support in a re-

---

[85] In State v. Garner, 227 Kan. 566, 608 P.2d 1321 (1980), the court held that the implied consent law applies even to an unconscious defendant who is incapable of making a knowing and intelligent response to a request for testing. Regardless of his condition, it is incumbent upon the suspect to make an express refusal.

[86] Schmerber v. California, 384 U.S. 757, 765-66 (1966). The Court concluded the suspect's fifth and sixth amendment rights had not been violated despite the suspect's adamant refusal, on counsel's advice, to submit to a blood test.

[87] City of Shawnee v. Gruss, 2 Kan. App. 2d 131, 576 P.2d 239 (1978), *petition for rev. denied*, 225 Kan. 843 (1978).

[88] K.S.A. § 8-1001(f)(1)(E) (Supp. 1985).

[89] *Id.* § 8-1006.

cent decision of the United States Supreme Court. In *California v. Trombetta*,[90] the Court reversed a lower court's ruling that due process requires law enforcement officials to preserve breath samples tested by a breath testing device for the use of the defendant.[91] The Court noted that it was the test results, not the actual breath sample, that is presented as evidence.[92] The significant questions surrounding such evidence are the accuracy of the testing device, which can be determined without preservation of the defendant's breath sample, and the propriety of the administration of the test, which can be challenged through cross-examination of the operator of the testing device.[93]

While *Trombetta* only addressed the absence of a requirement that breath samples be preserved, its rationale supports the conclusion that samples of blood, urine and other bodily fluids likewise need not be preserved. The Court in *Trombetta* noted that it would be technically feasible to preserve breath samples but nevertheless found that due process did not mandate such preservation.[94] Such reasoning would be applicable to any bodily substance which can be extracted and tested. Further, as with breath testing devices, defendants will be able to inquire into the accuracy of the type of testing system and the quality of the test administration.

Finally, the absence of a preservation requirement will not be prejudicial to a DUI suspect in light of the new requirement that an officer must notify a suspect of his right to obtain independent testing.[95] Such testing will enable a DUI suspect to gauge the accuracy of the test administered by the state. While under *Trombetta* notification of the right to obtain independent testing is not a constitutional prerequisite to the validity of the provision that samples not be preserved,[96] such notification adds weight to the fairness of that provision.

Conclusion

While the new Kansas drunk driving laws increase the ability of

---

[90] California v. Trombetta, 104 S. Ct. 2528 (1984).

[91] People v. Trombetta, 142 Cal. App. 3d 138, 190 Cal. Rptr. 319 (1983).

[92] California v. Trombetta, 104 S. Ct. at 2533.

[93] *Id.* at 2534. Prior to the decision in *Trombetta*, the Kansas Supreme Court had reached the same result, though on substantially different grounds, in State v. Young, 228 Kan. 355, 614 P.2d 441 (1980).

[94] California v. Trombetta, 104 S. Ct. at 2535. The Kansas court, conversely, relied upon evidence that breath samples are expanded in the testing process and are thus not readily preservable as a factor in its decision that failure to preserve such samples does not violate due process. *Young*, 228 Kan. at 361, 614 P.2d at 445-46.

[95] K.S.A. § 8-1004 (Supp. 1985). A DUI suspect also has the right to have a report of the testing results made available to him. *Id.* § 8-1001(h).

[96] *Cf.* California v. Trombetta, 104 S. Ct. at 2535 n.11 (no due process violation in failure to preserve breath samples in spite of no showing defendants were aware of right to independent testing under California law).

the police to gather information on both alcohol and drug intoxication, they also create significant constitutional and practical issues. The Kansas Supreme Court will surely be required to resolve whether the constitution permits the taking of a blood test upon probable cause when the police have declined to arrest the suspect. Similarly, the court will need to explore the consequences of a failure by the police to adequately warn suspects about the blood test. The expansion of testing from those measuring alcohol content to those determining the presence of drugs will require prosecutors and defense attorneys alike to examine unfamiliar scientific testing procedures. As the problem of driving while intoxicated has increased, so too has the range of legal issues confronting the criminal practitioner.