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Robert H. McManus

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COMMENT

FLORIDA'S "IMPLIED CONSENT" STATUTE: CHEMICAL TESTS FOR INTOXICATED DRIVERS

ROBERT H. MCMANUS*

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I. INTRODUCTION

In order to deal more effectively with the problem of driving while under the influence of intoxicating beverages, several states have enacted "implied consent" statutes which state that the act of driving constitutes an implied consent to submit to a chemical test to determine the blood alcohol level in the body.[1] Under these statutes a motorist who refuses to take the test may have his license suspended.

The Florida "implied consent" statute,[2] which goes into effect on July 1, 1968, provides that every person who accepts the privilege of driving within the state shall be deemed to have given his consent to an approved chemical test of his breath, urine, saliva or blood if he is arrested for driving while under the influence of intoxicating beverages. Paradoxically, even though the driver has "consented" to a chemical test, the statute

* Associate Editor, *University of Miami Law Review*; Student Instructor for Freshman Research and Writing.

1. CONN. GEN. STAT. ANN. § 14-227b (1964); IDAHO CODE § 49-352 (1955), *as amended*, ch. 362, § 3 (1963); KAN. STAT. ANN. § 8-1001 (1963); MINN. STAT. ANN. § 169.123 (Supp. 1967); NEB. REV. STAT. § 39-727.03 (1960); N.Y. VEHICLE & TRAFFIC LAW § 1194(1) (McKinney 1960); N.C. GEN. STAT. § 20-16.2 (1963); N.D. CENTURY CODE ANN. § 39-20-01 (1965); S.D. CODE § 44.0302-2 (Supp. 1960); UTAH CODE ANN. § 41-6-44.10 (1953); VT. STAT. ANN. tit. 23 § 1188 (1965); VA. CODE ANN. § 18.1-55 (Supp. 1960).

For general discussions on implied consent statutes and compulsory chemical testing *see* Weinstein, *Statute Compelling Submission to a Chemical Test for Intoxication*, 45 J. CRIM. L.C. & P.S. 541 (1955); Comment, *Virginia's Implied Consent Statute: A Survey and Appraisal*, 49 VA. L. REV. 386 (1963); Gunn, *Comment, Chemical Tests* and *Implied Consent*, 42 N.C.L. REV. 841 (1964); and Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing*, 44 MINN. L. REV. 673 (1960).

For a book that is mainly prosecutor oriented see R. DONIGAN, CHEMICAL TESTS AND THE LAW (2d ed. 1966). For a book on the side of the defense see R. ERWIN, DEFENSE OF DRUNK DRIVING CASES (1963):

2. FLA. STAT. § 322.262 (1967).

provides that he may refuse to submit. However, upon refusal, the privilege of operating a motor vehicle may be suspended provided that the driver has been told of the consequences and that a subsequent hearing is given to him. If one of the tests is taken the results may raise certain rebuttable presumptions as to whether the driver was under the influence of alcoholic beverages.

II. CONSTITUTIONAL ISSUES

A. *Theory*

In order to give a background to the provisions of the "implied consent" statute a brief sketch of the constitutional issues will be given. Arguments used to sustain and to attack the validity of the statute will be covered.

Two theories have been employed to sustain the constitutionality of "implied consent" statutes.[3] The first is the "right-privilege" theory under which driving an automobile is considered a privilege (rather than a right) and therefore subject to conditions the state may impose. In the case of the "implied consent" statute the privilege of driving is conditioned upon the driver waiving his constitutional right—assuming such a right exists—to refuse to submit to a chemical test whenever he is arrested for driving while intoxicated.

Since driving is constantly referred to in the statute as a "privilege," it would appear that the Florida "implied consent" statute is based upon the right-privilege theory.[4] Florida cases decided prior to the enactment of this statute also support this view.[5]

The second theory involves a due process analysis. According to this view, whether driving is labelled a right or a privilege makes no difference. Because of the social and economic importance of an automobile and its inherently dangerous nature, a statute which limits its use will be constitutional so long as it is a reasonable exercise of the state's police power and due process of law is not violated.[6] To satisfy the due process require-

3. *See* Weinstein, *supra* note 1, at 543-44 and 49 VA. L. REV. 386 at 388. *See also* Note, *Chemical Tests For Intoxication: A Legal, Medical, and Constitutional Survey*, 37 N.D.L. REV. 212, 252 (1961).

4. "The bill is based on the premise that driving is a privilege, not an absolute right." Statement by state Senator Eddie Gong, co-sponsor of the Implied Consent Law, in a letter to Professor Daniel E. Murray, July 7, 1967.

5. Smith v. Gainesville, 93 So.2d 105, 106 (Fla. 1965) ("a driver's license is a privilege, subject to proper regulations. It does not endow the holder thereof with an absolute property right in the use of a public highway"); Thornhill v. Kirkman, 62 So.2d 740, 742 (Fla. 1953) ("there is ample warrant for the legislature to treat a driver's license as a privilege").

6. As expressed by Judge Magruder in *Wall v. King*, 206 F.2d 878, 882 (1st Cir. 1953):

> [i]t is unimportant whether, for one purpose or another, a license to operate motor vehicles may properly be described as a mere personal privilege rather than a property right. We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in

ment, the statute must: (1) be aimed at a legitimate end, *i.e.*, the expulsion from the highways of intoxicated drivers, (2) be reasonably designed to accomplish these ends, and (3) seek to protect against a danger which warrants an infringement of an individual's liberty whenever he is reasonably believed to be driving while intoxicated.[7]

Implied consent statutes and the use of chemical tests have been traditionally subject to constitutional attacks on grounds that they violate: (1) the privilege against self-incrimination, (2) the protection against unreasonable search and seizure, and (3) due process of law. Despite these attacks, the statutes have been upheld by the various state supreme courts.[8] The United States Supreme Court, however, has never decided the constitutionality of such statutes.[9]

B. *Self-incrimination*

The most common attack upon statutes providing for the use of chemical tests is that they violate the privilege against self-incrimination.[10] Under the traditional and majority view the scope of the privilege is limited to "testimonial compulsions."[11] The Supreme Court of the United States, in the leading case of *Schmerber v. California,* accepted this view when in deciding the issue of whether withdrawal of blood and admission in evidence of the analysis violates an individual's privilege against self-incrimination it held that:

> [T]he privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the

pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law.

7. *See* Weinstein, *supra* note 1, at 545-47.

8. Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961); Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961); Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955). Prior to *Anderson,* the New York statute (the first implied consent statute enacted in the United States) although declared fundamentally sound was struck down on the constitutional grounds that it deprived motorists of due process by failing to require a hearing and because it failed to contain a provision limiting its application to cases where there had been lawful arrests. *See* Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954). These defects were overcome when the statute was amended.

The fact that a choice is available to the driver is one factor that has sustained the constitutionality of such statutes. *See* Walton v. City of Roanoke, 204 Va. 678, 133 S.E.2d 315 (1963).

9. In Breithaupt v. Abram, 352 U.S. 432, 435 n.2 (1957), Justice Clark commented upon the Kansas statute with apparent approval. In Schmerber v. California, 384 U.S. 757 (1966), the California implied consent statute had not been enacted. However, it seems only logical that if the Court in *Schmerber* found a compulsory blood test to be constitutional without a statute then a fortiori the Court would find chemical tests constitutional under a reasonable statute in which the individual has a choice of submission or refusal.

10. *E.g.*, People v. Duroncelay, 48 Cal. 2d. 766, 312 P.2d 690 (1957); State v. Durant, 188 A.2d 526 (Del. 1963).

11. For a history of the privilege see 8 J. WIGMORE, EVIDENCE § 2263 at 378 (McNaughton rev. 1961). As stated by Wigmore, the privilege "was directed at the employment of the legal process to extract from the person's own lips an admission of guilt . . . ."

> withdrawal of blood and use of the analysis in question . . . did not involve compulsion to these ends.[12]

Thus, compulsion which makes an accused the source of real or physical evidence such as fingerprints, photographs, measurements, and writing or speaking for identification purposes does not violate the fifth amendment privilege.[13] A strong minority view would extend the scope of the privilege to any evidence secured from the accused by compulsion.[14]

C. *Search and Seizure*

The argument is also made that chemical analysis introduced in evidence should be excluded as the product of an unconstitutional search and seizure.[15] In *Schmerber* the Court recognized that the blood test was clearly within the purview of the fourth amendment, but if conducted properly the test was not unreasonable per se.[16] Whether the test is admissible depends on the answers to two important questions: (1) were the

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12. Schmerber v. California, 384 U.S. 757, 761 (1966). The Court, however, did not limit the scope of the privilege to Wigmore's view of testimonial disclosures. "Our holding today, however, is not to be understood as adopting the Wigmore formulation." *Id.* at 763 n.7.

13. A case relied on heavily by the Court was Holt v. United States, 218 U.S. 245 (1910) where the accused, under protest, was compelled to put on a blouse. In rejecting the contention that modeling the blouse violated the accused's privilege against self-incrimination as "an extravagant extension of the 5th Amendment," Justice Holmes stated that "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof." *Id.* at 252-3.

14. See the dissenting opinions of Black, Douglas and Fortas in Schmerber v. California, 384 U.S. 757, 773. The underlying difference between the two views depends upon how one sees the purpose of the privilege against self-incrimination. The argument for making the distinction between testimonial and real evidence is that testimony might be subject to change under the influence of compulsion upon the accused, but real evidence such as fingerprints or bodily fluids would be the same whether taken with or without the consent of the accused. Such evidence manifests conduct which does not involve the veracity of the accused. Those who feel that the privilege should be given a broad scope argue that the purpose of the privilege is not just to guard against unreliable evidence but to protect the integrity of the individual and a narrow construction of the fifth amendment narrows the constitutional protection.

15. *Id.* at 766. In Breithaupt v. Abram, 352 U.S. 432, 434 (1957), the Supreme Court was faced with the same contention but rejected it because at that time the exclusionary rule did not apply to the states.

16. 384 U.S. at 757 (1966). "Such testing procedures plainly constitute searches of 'persons' and depend antecedently upon seizures of persons, within the meaning of the Amendment."

An interesting question is whether the "taking" of breath by the police with a breathalyzer comes within the scope of the Fourth amendment. In State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953), the court said that a compulsory breathalyzer test was not a search and seizure.

> We can see no legal difference in the right to a specimen of defendant's breath to be used as evidence in cases of drunk driving where the body of the person is neither invaded or assaulted and the right to search his person and premises and seizing such physical evidence as deemed necessary to procure a conviction of the crime for which he was arrested.

Id. at 102, 259 P.2d at 266.

police justified in requiring the driver to submit to a blood test, and (2) were the methods and procedures of the chemical test reasonable.[17]

First, the police must have a "clear indication"[18] that the motorist is intoxicated before a chemical test can be taken. Generally, a search warrant is required for the searches of dwellings and the Court felt that the same requirement should apply for "intrusions into the human body." However, there is an exception to the requirement in the case of an emergency or special circumstance such as where the evidence will be destroyed. Since alcohol in the blood stream is absorbed within a few hours, the attempt to secure it as evidence of the driver's intoxication does not necessitate a search warrant where the search is an appropriate incident to arrest.

Second, fourth amendment standards of reasonableness must be respected. The test used must be reasonable and be performed in a reasonable manner. For a blood test this means that the blood should be "taken by a physician in a hospital environment according to accepted medical practices."[19] It should also be remembered that the holding in *Schmerber* is limited to the facts of the particular case:

> That we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under *stringently limited conditions* in no way indicates that it permits more substantal intrusions, or intrusions under other conditions. (emphasis added)[20]

D. *Due Process*

The issue of whether the compulsory taking of a blood test constitutes a violation of the "due process" clause of the fourteenth amendment was settled in *Breithaupt v. Abram*,[21] where a blood test was taken while the defendant was unconscious. In distinguishing the earlier case of *Rochin v. California*[22] where the Court had found that the use of a stomach pump to extract capsules of morphine the defendant had swallowed was conduct that "shocks the conscience," the Court in *Briethaupt*

17. 384 U.S. 757, 768 (1966).

18. *Id.* at 770. Since the search involves intrusions into the body, a different standard of "reasonable cause" will probably be required by the Court. Although the difference may be one of semantics, clear indication is not synonymous with probable cause.

The "clear indication" requirement, however, does not mean that the police must be *convinced* that the driver is intoxicated. It is sufficient if they believe that he has consumed enough alcohol for his driving ability to have been impaired. Being under the "influence of alcohol" and being intoxicated do not refer to the same levels of drunkenness.

19. *Id.* at 771. The Court suggests that it would arrive at a different result if the test were made by other than medical personnel or in other than a medical environment, for example, if it were made by the police in the privacy of the station house.

20. *Id.* at 772.

21. 352 U.S. 432 (1957).

22. 342 U.S. 165 (1952).

said that there was nothing "offensive" or "brutal" in a blood test when done "under the protective eye of a physician."[23] Blood tests, the Court reasoned, have become routine in our everyday life. When administered by a physician it cannot be regarded as conduct that shocks the conscience.

In *Schmerber*, with *Breithaupt* as authority, the due process argument was rejected and the Court noted that "nothing in the circumstances of this case, or in supervening events persuades us" that this aspect of *Breithaupt* should be overruled.[24]

E. *Other Attacks*

The contention was made in *Schmerber* that the compulsory blood test was a denial of the petitioner's right to counsel. This claim was rejected in short order on the basis of the absence of the privilege against self-incrimination:

> Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented.[25]

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23. 352 U.S. at 435 (1957).
24. 384 U.S. 757, 760 (1966).
25. *Id.* at 766. This holding, however, is weakened somewhat by the Supreme Court's decisions in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), in which the Court held that the right to counsel applies to lineups in order to ensure that they are conducted fairly.

Should not the same protection of the right to counsel be given in administering blood tests? In *Wade*, the Court noted that precedent required it to:

> scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . [and] to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. United States v. Wade, 388 U.S. 218, 227 (1967) (emphasis added).

The Court distinguished a lineup from other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair and the like:

> We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

Id. at 227-28.

In regard to lineups themselves, the Court felt that they are "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." Thus, because of the great potential for prejudice to an accused, the Court believed that the presence of counsel would promote fairness in the lineup and a full hearing at trial on the issue of identification. *Id.* at 228.

A possible attack on "implied consent" statutes on the basis of an analogy to a coerced confession has also been made.[26]

Another attack upon the use of chemical tests is that they violate the physician-patient privilege. At common law the existence of privileged communication as between physician and patient was unknown.[27] Since the privilege is statutory, states, such as Florida, that have not enacted such statutes do not recognize the privilege.

The problem presented by the privilege in states where it is recognized is whether the physician who is requested by an officer to draw blood from the motorist-patient should be precluded from testifying on the grounds of a privileged relationship. Where such a test is not necessary for diagnosis the privilege will generally not apply since a confidential relationship does not exist.[28] A closer question is where the physician who is called to draw blood from the patient also gives emergency treatment.[29] Where the physician only withdraws blood usually no privilege will arise.[30]

With the physician-patient privilege in mind the best policy to insure the admissibility in evidence is to have the blood test taken by a physician other than the physician treating the motorist for injuries. The physician taking the blood specimen should avoid rendering any medical treatment at the time, as it would give rise to the privilege.

III. DETAILED PROVISIONS OF STATUTE[31]

A. *Suspension of License, Chemical Tests For Intoxication*[32]

(1)(a) *Any person who shall accept the privilege extended by the laws of this state of operating a motor vehicle within this state . . . .*

The first problem is to determine to whom the statute applies. Does it apply to a nonresident motorist? Does an unlicensed driver or a person whose license has been suspended "accept the privilege . . . of operating a motor vehicle within the state?" Section J of the statute states that a

26. *See* Comment, *Implied Consent to a Chemical Test For Intoxication: Doubts About Section 6-205 of the Uniform Vehicle Code*, 31 U. CHI. L. REV. 603 (1964).

27. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 101 (1954).

28. "It is manifestly clear from the reason upon which the privilege is based and from the decided cases that where no treatment is made or contemplated, there exists no relationship between the doctor and patient that will support the privilege." Ladd & Gibson, *The Medico-Legal Aspecs of the Blood Test to Determine Intoxication*, 24 IOWA L. REV. 191, 254 (1939).

29. *E.g.*, Schwartz v. Schneuriger, 269 Wis. 535, 69 N.W.2d 756 (1955) (confidential relationship not established).

30. Williams v. Hendrickson, 189 Kan. 673, 371 P.2d 188 (1962) (doctor who was not defendant's physician withdrew blood from defendant). The court held that no physician-patient relationship existed.

31. In this section the attempt will be made to interpret the "implied consent" statute on the basis of the wording and to predict some of the questions and problems which will probably arise under the statute.

32. Fla. Laws 1967, ch. 67-308, § 1, amending FLA. STAT. § 322 (1965).

". . . nonresident or any other person driving in a status exempt from the requirements of the driver's license law shall by his act of driving in such exempt status be deemed to have expressed his consent to the provisions of this section." This takes care of the nonresident motorist problem. An unlicensed driver, however, whether a Florida citizen or a citizen of another state, is not included in the category of persons who are exempt from obtaining a driver's license.[33]

The problem of the unlicensed driver is created because the Florida statute is based on the "right-privilege" theory. No doubt a court faced with this question will hold the statute applicable since it does not seem fair to apply the statute only to licensed drivers.[34] It would have been much easier, however, for the statute to simply read *anyone* who operates a motor vehicle within the state shall come within the statute.[35] In this way the unlicensed driver problem is avoided and the statute applies equally to all drivers, the statute being contingent only upon the act of driving within the state.

Another problem revolves around what is meant by "operating a motor vehicle within this state." No doubt the provision as to what is operating a motor vehicle will be interpreted liberally as is similar language in the long-arm nonresident motorist statute.[36]

The phrase "within the state" would appear to apply to both public and private roads.[37] However, elsewhere in the statute in referring to the unconscious driver the statute reads ". . . privilege to operate a motor vehicle upon the public highways of this state."[38]

33. *See* FLA. STAT. § 322.04 (1965). Generally persons exempt from obtaining a driver's license are governmental employees, persons driving farm equipment and nonresident licensed drivers.

34. *See* [1949-1950] FLA. ATT'Y GEN. BIENNIAL REP. 570, where is was stated that a man can be guilty of two charges at the same time such as operating a motor vehicle while intoxicated and also operating a motor vehicle without having first obtained a valid license.

35. *See, e.g.*, UNIFORM VEHICLE CODE art. I § 6-205.1.

36. FLA. STAT. § 48.171 (1967). *See* Hurte v. Lane, 166 F. Supp. 413 (N.D. Fla. 1958) where the nonresident defendant was operating an auto when he turned on the ignition and pressed the starter. "To make the actual movement of the wheels of the vehicle the test of 'operation' under these circumstances would be to give the statute such rigid limitation as to be unrealistic." *Id.* at 413.

37. *See* [1955-1956] FLA. ATT'Y GEN. BIENNIAL REP. 557. "While I am by no means certain, until a court of competent jurisdiction says otherwise, I am inclined to believe that the reckless driving statute, as well as the driving while intoxicated statute, embraces both on and off the public highways of the state." *Id.* at 558.

38. Fla. Laws 1967, ch. 67-308, § 1, amending FLA. STAT. § 322 (1965). *See* CONN. GEN. STAT. ANN. § 14-227(b) (1964), where it expressly states that the offense must occur on a public highway.

One question that comes to mind under a statute based on the privilege theory is whether it is a right or a privilege to drive an automobile on private property? Can a motorist drive his car solely on private property without a license? If he can do so without a license, how can a "privilege" statute apply to driving on private property?

In this connection see Green v. Pederson, 99 So.2d 292 (Fla. 1957), where the court in talking about a miniature trackless train owned by the appellee said that:

[I]f the train had never been and did not expect to go outside the bounds of the

. . . shall by so operating such vehicle be deemed to have given his consent to, submit to an approved chemical test . . . .

This is the "implied consent" part of the statute. Some statutes require that the driver's express consent be given.[39]

The talk of "implied consent" is fictitious. The real basis of the state to compel a motorist to take a chemical test is the state's police power, which must not violate requirements of due process. Originally, nonresident motorist long-arm statutes also were based on the theory of implied consent.[40] But the Supreme Court has shown that it considers the underlying basis to be the state's police power.[41]

The rationale for invoking the state's police power under the "implied consent" statute is that the interests of society outweigh the rights of the individual. The dangers imposed by the drinking driver to the vast number of persons using the highways are such that they warrant a slight infringement upon the liberty of the individual. Thus, under the statute the right of the many to use the highway without being endangered by intoxicated drivers outweighs the privilege of the individual driver to refuse to submit to a chemical test without fear of the sanctions contemplated by the statute.

To call driving a privilege which is granted by the state and then conditioning the grant merely clouds the issue. Whether a driving license is a right or a privilege is only a matter of labelling. Since the automobile plays such an important part in our social and economic lives, surely the opportunity to use it is "a liberty which under the fourteenth amendment cannot be denied or curtailed by a state without due process of law."[42] The constitutionality of conditioning the exercise of that right, privilege or liberty—whatever it is called—ought to be basically the same as the constitutionality of directly limiting that right, privilege or liberty under the state's police powers.

> appellee's premises the appellee could not reasonably be compelled to obtain a motor vehicle license and renew it annually . . . . [T]he fact that the veihcle occasionally traversed the public highways and streets on special occasions and, by inference, under special supervision, does not clearly bring it within the purview of the Motor Vehicle License Act.

Id. at 296.

See also FLA. STAT. § 320.01(1) (1965) "Motor vehicle" includes automobiles, motorcycles, motor trucks, and all other vehicles operated over the *public* highways and streets of this state . . . ." (emphasis added).

39. *See* CONN. GEN. STAT. ANN. § 14-227(b) (1964).

40. Hess v. Pawloski, 274 U.S. 352 (1927).

41. Olberding v. Illinois C. R.R., 346 U.S. 388 (1953).

> [T]here has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has impliedly consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all . . . . The defendant may protest to high heaven his unwillingness to be sued and it avails him not . . . .

Id. at 341.

42. Wall v. King, 206 F.2d 878, 882 (1st Cir. 1953), *cert. denied*, 346 U.S. 915 (1953).

. . . *of his breath, urine, or saliva for the purpose of determining the alcoholic content of his blood.*

The underlying purpose for using chemical tests is their scientific reliability.[43] They provide a sound basis for determining whether or not a motorist is intoxicated. Such evidence is superior to that based on observations and opinions by the police. Chemical tests take the guesswork out of judging whether the driver is under the influence or not. They also serve the double purpose of protecting the innocent as well as determining the guilty.

Common criteria for determining drunkenness is often unreliable. Without the use of chemical tests an investigating officer must make his decision concerning the motorist's condition on what he observes—how the driver handled the car, his general appearance and how he walked and talked. This decision is even more difficult since the officer does not know how the person is normally. Moreover, other conditions such as injury, illness, medicine, extreme fatigue, or shock from the accident may produce the appearance of being under the influence of intoxicating beverages.[44] Or the shock of the accident and the sight of a policeman may cause some inebriated people to sufficiently "sober up" so as to conceal their real condition, even though they were driving recklessly shortly before the accident.

It is to be noted that the conscious[45] driver does not "impliedly consent" to a *blood* test, even though the use of the test has been held to be constitutional. Generally, blood tests are believed to be the most reliable of the various tests.[46] However, in view of the sensitivities of many people over having a blood test taken,[47] it is desirable that the Florida statute relies on other forms of testing.[48] Since blood tests are valid under stringent conditions, a good policy might be to allow the conscious driver to take the blood test whenever he may desire it in order to clear himself

43. It does not follow, of course, that because a technique is scientifically reliable that it can always be used to obtain evidence since there may be constitutional limitations. For example, stomach pumps and hidden microphones produce reliable evidence but their reliability is immaterial if fundamental fairness or fourth amendment rights are violated.

44. For a work on chemical testing listing "pathological conditions having symptoms in common with those of alcoholic influence" see DONIGAN, *supra* note 1, at Appendix IV, 300-07.

45. In a subsequent provision, Fla. Laws 1967, ch. 67-308, § 1, amending FLA STAT. § 322 (1965), persons who are *unconscious* will be deemed to have "impliedly consented" to a blood test.

46. *See* Ladd and Gibson, *supra* note 28. For a discussion of the development of, and the scientific basis for, the breath-testing technique see People v. Kovacik, 205 Misc. 275, 282-90, 128 N.Y.S.2d 492, 499-506 (Ct. Spec. Sess. 1954).

47. "We note that the physical and psychological disturbance of the individual involved in obtaining a breath sample is apt to be significantly less than that involved in extracting a blood sample . . . ." Justice Traynor in People v. Sudduth, 65 Cal.2d 543, 545, 421 P.2d 401, 403, 55 Cal. Rptr. 393, 395 (1966).

48. Other problems such as whether a person has a right to choose his own physician to administer the blood test or must he "take" the physician chosen by the police are also avoided. *See* Breslin v. Hults, 20 App. Div. 2d 790, 248 N.Y.S.2d 70 (Sup. Ct. 1964).

in borderline cases. However, no doubt few people would be so willing. Section (2)(g) of the statute would seem to give the driver this opportunity:

(g) *Any person arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of alcoholic beverages may request the arresting officer to have a chemical test made of the arrested person's breath, blood, saliva, or urine for the purpose of determining the alcoholic content of such person's blood, and, if so requested, the arresting officer shall have the test performed.*

Under this section the driver is entitled to have a chemical test taken whenever he requests it. This takes care of the situation where police officers might inadvertently or arbitrarily prejudice the rights of the motorist by refusing to allow him to take a chemical test.[49]

Must a motorist be arrested before he is *entitled* to have a test taken under section (g)? From the wording of the section it would appear that arrest is a statutory prerequisite. However, in a Vermont case it was held that the evidence provided by a driver who consented to the taking of blood, without arrest, was admissible.[50] The court stated that,

> [T]o make an arrest a prerequisite to admission of even a voluntarily given blood test would require every driver suspected of being under the influence to be put under arrest in order to validate the very blood test that might establish that prosecution was unwarranted. The law is not so unreasonable as to deny him the right to avoid arrest by consenting to one of the statutory tests.[51]

. . . if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of alcoholic beverages. The test shall be incidental to a lawful arrest and . . . .

Before any of the three chemical tests can be performed an arrest must be made by the police officer. This is based on the general proposition that a search of a person following his arrest is proper. The arrest does not have to be for driving while intoxicated but can be for "any offense allegedly committed" while the person is driving under the influence of alcohol.

Other implied consent statutes have the same requirement that an arrest be made as a condition precedent to a test.[52] Some statutes require

49. *See* Evans v. Municipal Court, 24 Cal. Rptr. 633 (2d Dist. Ct. App. 1962). Whether the motorist has a right to choose which test he shall take will be discussed below.

50. State v. Auger, 124 Vt. 50, 196 A.2d 562 (1963).

51. *Id.* at 56, 196 A.2d at 566.

52. *See* CONN. GEN. STAT. ANN. § 14-227b (Supp. 1964) and N.Y. VEHICLE AND TRAFFIC LAW § 1194(1) (1960). New York's original implied consent statute did not require that the driver be placed under arrest. In Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954) the statute was declared unconstitutional on the ground that the police

that the test must be taken within two hours after the *time* of the arrest.[53] Florida, however, has no statutory provision for a time limit within which a chemical test must be made.

One problem that may arise is whether the officer has authority to arrest in a situation, for example, where he arrives at the scene after the accident has occurred. Since the offense of driving while under the influence is a misdemeanor[54] and an arrest for a misdemeanor can only be made when it is committed in the officer's presence,[55] it would appear that if the officer has not seen the motorist driving, he cannot make an arrest without first obtaining a search warrant.[56]

The argument on the side of the police for making a valid arrest would be: (1) an exception to the requirement of a search warrant is made when the evidence is apt to be destroyed, *i.e.*, alcohol disappears within the bloodstream; and, (2) a search can be made before an arrest if reasonable grounds for making an arrest exist at the time of the search and if the arrest is made within a reasonable time after the search. One writer, as a way to solve this difficulty, has proposed that the authority of the police be expanded to cover situations where there is reasonable grounds to believe the motorist is driving while under the influence of alcohol.[57]

. . . administered at the direction of a police officer having reasonable cause to believe such person was driving a motor vehicle within this state while under the influence of alcoholic beverages.

The major problem presented by this provision is whether the police officer or the motorist will make the choice as to which of the three tests will be administered. If the motorist can choose which test he prefers, must he be told of this choice?

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officers under the statute could deprive a driver of the constitutional rights of due process. The court stated that:

> [C]onferring upon police officers the right to make a request under the guise of authority concerning one's person without specific process and without lawful arrest clearly amounts to an unlawful infringement upon one's liberty.

Id. at 52-53, 127 N.Y.S.2d at 127.

53. *See* N.Y. VEHICLE & TRAFFIC LAW § 1192(1) (McKinney 1960) and VA. CODE ANN. § 18-75.1 (Supp. 1960).

54. Where the place of the imprisonment is not specified in the statute and there is no expression as to what class the offense is, or that the punishment is to be death or imprisonment in the state prison, then the offense is construed as a misdemeanor. Walden v. State, 50 Fla. 151, 39 So. 151 (1905); McDaniel v. Mayo, 79 So.2d 519 (Fla. 1955). The Florida Statute providing for punishment for drunk driving does not state where the imprisonment is to take place. *See* FLA. STAT. § 317.201 (1965).

55. FLA. STAT. § 901.15 (1965). An officer who arrives at the scene could arrest for manslaughter if he has reasonable grounds to believe the felony has been committed.

56. Relying on this basis, an unsuccessful attack was made in Combes v. Kelly, 2 Misc. 2d 491, 152 N.Y.S.2d 934, (Sup. Ct. 1956).

57. Weinstein, *supra* note 1, at 549-551. The Virginia statute has given this authority to its officers. VA. CODE ANN. § 19.1-100 (Supp. 1960).

From the wording of the statute it would seem that the motorist does not have a choice since the test is to be "administered at the direction of a police officer." Under the Kansas implied consent statute the argument was made unsuccessfully that a driver should be given his choice of *four* mentioned tests.[58] The court stated:

> We do not agree. In the first place, the statute says that the test shall be administered at the direction of the arresting officer. It is common knowledge that few areas in the state have the technical equipment and facilities to administer all the tests.[59]

To avoid any later attacks by the motorist and any disfavor with the courts it would probably be best, since three tests are listed by the statute, for the police to inform the driver that he has a choice, when available, of three tests. Such a policy would be evidence that the police acted reasonably.[60]

Under the statute the police must have "reasonable cause to believe" that the person is driving while intoxicated. Fourth amendment standards as to what constitutes probable cause are certainly relevant. However, it should be remembered that the Supreme Court in *Schmerber* stated that there must be a "clear indication" that the driver is under the influence.[61] This will probably mean that a higher standard than that of "reasonable cause" will be required.

Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of six months.

This apparently simple attempt to help the motorists gives rise to several problems.[62] First, what constitutes a failure to submit? For example, what about the situation where the motorist does not know whether he should consent or refuse to take the test? He tells the officer that he will take the test if his attorney advises him to, but the officer refuses to allow the motorist the opportunity to telephone his attorney. Has the motorist "refused" to take the test?

The New York Court of Appeals faced this question in a situation dealing with whether the motorist's license should be revoked for failure

58. Lee v. State, 87 Kan. 556, 358 P.2d 765 (1961).

59. *Id.* at 571, 358 P.2d at 769. *Accord,* Timm v. State, 110 N.W.2d 359 (N.D. 1961). *Contra,* Ringwood v. State, 8 Utah 2d 287, 333 P.2d 943 (1959). In *Ringwood* the court held that the arresting officer had not complied with the requirements of the statute when he confronted the accused with the choice of submitting to a blood test only, or of having his license revoked.

60. In talking about whether the withdrawal of blood was a violation of due process, the Supreme Court in *Schmerber* said:

> It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. 384 U.S. 757, 760 n.4 (1966).

61. *Id.* at 770.

62. *See* Annot., 88 A.L.R.2d 1064 (1963).

to submit to the test and stated that the "constitutional rights of petitioner were not invaded because of the refusal of his request for counsel."[63] In a concurring opinion Judge Van Voorhis stated that the motorist was "entitled if he could have done so promptly, to consult with his lawyer about the bearing which the test might have upon his possible conviction under the criminal charge."[64] However, such a right, he said, is limited to a criminal proceeding and does not apply to a proceeding concerned with the revocation of a license.[65]

Another condition which the motorist might impose is that a physician of his own choosing administer the test or be present. This usually has been held to constitute a refusal.[66]

A refusal must be distinguished from an inability to take a test. In *In re Scott*[67] the issue was whether there was substantial evidence to support the revocation of the petitioner's license on the ground that he "refused" to take a breathalyzer test. The petitioner had taken two other tests and apparently passed them. He testified that he had tried to blow into the balloon but that his false teeth kept getting in his way, that they "came down" and cut off his breath. The court said:

> [I]t must be remembered that refusal differs and may be distinguished from "inability," especially when the good faith of the petitioner does not seem to have been questioned. Indeed obedience in taking the coin and sobriety tests as directed could seem to negative any question of bad faith. The evidence, in our opinion, does not support the conclusion that petitioner refused to submit to such test....[68]

Second, must a motorist be told that he has a right to refuse to take the test under the statute? The statute reads that only upon a refusal to take the test must the driver be so informed of the consequences and it leaves up in the air whether he must be advised of his rights at the time the request for the test is made. The arguments that will be made for not informing the motorist of his rights are: (1) the driver has impliedly consented to take the test; and (2) the driver is presumed to know the law.[69]

Although the state can compel a driver to undergo chemical tests under certain circumstances, where the state has provided an alternative to such tests, it would seem that under the spirit of recent Supreme Court

63. Finocchairo v. Kelly, 11 N.Y.2d 58, 59, 181 N.E.2d 427, 428, 226 N.Y.S.2d 403 (1962), *cert. denied*, 370 U.S. 912 (1962).

64. *Id.* at 61, 181 N.E.2d at 429, 226 N.Y.S.2d at 405.

65. *Id.* at 62, 181 N.E.2d at 430, 226 N.Y.S.2d at 406.

66. Breslin v. Hults, 20 App. Div. 2d 790, 248 N.Y.S.2d 70 (Sup. Ct. 1964); Sowa v. Hults, 22 App. Div. 2d 730, 253 N.Y.S.2d 294 (Sup Ct. 1964).

67. 5 App. Div 2d 859, 171 N.Y.S.2d 210 (1958).

68. *Id.* at 859, 171 N.Y.S.2d at 211.

69. Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954).

decisions, such as *Miranda*, the driver should be told of his rights. If under the "implied consent" statute the motorist "impliedly" waives his privilege against self-incrimination, then to have an intelligent waiver, the motorist must *actually know* of his rights. If a motorist does not actually know of an alternative, then his rights under the statute are meaningless since most people in such a situation will submit to the authority of the police.

> [I]t is clear that everyone except possibly a hardened criminal or a very wise man would be under the feeling of some duress when any demand is made upon him by an officer of the law, especially if the officer is badged and armed. The feeling is natural and proper, and this court would not want it otherwise, for there must be respect for the authority of police officers.[70]

Unfortunately, this provision of the Florida statute does not mention anything about what information a motorist is to receive prior to the demand upon him to submit to the test.[71] Although the fact that the statute does not expressly require a warning probably does not violate due process,[72] hopefully the practice of the police will be to inform the motorist of his right of refusal and the effect of his refusal with respect to the possible suspension of his driver's license before they request that the driver submit to a test.[73]

Third, can evidence of a refusal to take the test be admitted into evidence or be commented upon at trial? The decisions on this point are not in full agreement.[74] In a recent decision by the District Court of Appeal, Fourth District, the petitioner was told he had a right not to take the breath analysis test.[75] He refused the test and this fact was brought out at the trial. Basing its opinion on a footnote in *Schmerber* which states that if the accused incriminates himself when faced with the prospect of taking a test, the testimony may be a by-product of compulsion

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70. *Id.* at 54, 127 N.Y.S.2d at 128 (1954).

71. A good argument could be made that this provision when read together with section (d) requires a warning. Section (d) lists the issues to be decided at a hearing for a driver's license:

> For the purpose of this section, the question of whether such person lawfully refused to take a chemical test as provided for by this law and the issues determinative shall be . . . (4) Whether . . . [the person] had been told that his driving privilege would be suspended if he refused to submit to such a test.

The argument would be that such a person could not "lawfully" refuse unless he had been told about the suspension. The "if" in sentence (4) should be interpreted to mean "upon the condition that" rather then "when" or "after." Thus the meaning of the sentence would be whether such person had been *told* that upon the condition that he refused to submit to such a test, that his driving privilege would be suspended.

72. Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955).

73. In People v. Ward, 307 N.Y. 73, 78, 120 N.E.2d 211, 214 (1954) the Court of Appeals said, "[I]t is undoubtedly the better practice for the police to notify the person of his rights . . . ."

74. *See* Annot., 87 A.L.R.2d 370 (1963).

75. Gay v. Orlando, 202 So.2d 896 (Fla. 4th Dist. 1967).

and therefore inadmissible,[76] the court held that evidence of the petitioner's refusal to submit to the breathalyzer test was a testimonial by-product that falls within the privilege of self-incrimination:

> In the case before us petitioner was confronted with a choice of either voluntarily submitting to the test or refusing and thereby making a self-incriminating statement. While the results of a properly administered breathalyzer test are not within the privilege, self-incriminating testimonial by-products are. . . .
>
> Thus we agree with petitioner that evidence of his refusal to take a breathalyzer test is inadmissible.[77]

Will a court reach the same result under the implied consent statute? Some statutes specifically provide that evidence shall not be admissible,[78] but most are silent on the matter. In a recent opinion by the California Supreme Court, which held that the prosecution's comment on the defendant's refusal to submit to a breathalyzer test was admissible, Justice Traynor stated:

> [T]he disparate results found in other jurisdictions may be ascribed to the presence of an underlying constitutional or statutory right to refuse to produce the physical evidence sought. States that recognize a right to refuse to take such tests exclude evidence of refusal. States that recognize no right to refuse allow testimony and comment on the refusal. (Footnotes omitted)[79]

(b) *Any such person who is incapable of refusal by reason of unconsciousness or other mental or physical condition shall be deemed not to have withdrawn his consent to any such test. Any such person whose consent is implied as hereinabove provided and who, during the period within which a test prescribed herein can be reasonably administered, or who being admitted to a hospital as a result of his involvement as a driver in a motor vehicle accident, is so incapacitated as to render impractical or impossible the administration of any of the aforesaid tests of breath, urine, or saliva, shall be deemed to have consented also to an approved blood test given as provided herein and shall be deemed not to have withdrawn his consent therefor. . . .*

This is a rather laborious way to say that the state may give a blood test to a person who is unconscious. It is a power the state already had before the enactment of the statute.[80] The fact that the statute talks of

76. 384 U.S. 757, 765 n.9 (1966).

77. Gay v. Orlando, 202 So.2d 896, 898 (Fla. 4th Dist. 1967).

78. *E.g.*, VA. CODE ANN. § 18.1-55 (Supp. 1960).

79. People v. Sudduth, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1967). Justice Traynor did note that in those states that recognize a right to refuse a chemical test there is not unanimous agreement on the exclusion of the evidence of a refusal. *See* State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958).

80. Breithaupt v. Abram, 352 U.S. 432 (1957). The Court in *Schmerber*, 384 U.S. 757,

consent not being withdrawn merely muddies the water further as the real basis of the state's power to give such a test is in its police powers, not in any consent being fictitiously "implied" or "not withdrawn." Since the withdrawal of blood from an unconscious person does not violate notions of due process, the state may properly administer a blood test under certain conditions. One of the main reasons for "implying consent" in advance, however, is to avoid the "consent" problem with particular emphasis on the motorist who is rendered insensible or unconscious from an accident. Most authorities, regardless of the deprivation of privacy, have held that where the motorist is unconscious, although in actuality he neither consents nor refuses, the evidence obtained from a test is admissible unless there is a statutory prohibition or a constitutional objection.[81]

Certain construction difficulties arise from the language of this section which will only provide defense attorneys grounds for attack. What constitutes "being incapable of refusal by reason of unconsciousness or other mental or physical condition?" For example, does a person who is conscious when he enters the hospital but after an hour or two becomes unconscious achieve this status?[82] Could not the person argue that a non-blood type test should have been taken when he was conscious?

When is the period during which a test can be *reasonably* administered? Some statutes require that the test be taken within two hours after the arrest.[83] Would a period longer than this be unreasonable? Since the reliability of blood tests decreases the longer the time for the test is delayed, there is always a reasonable time in which the test must be taken anyway.

What does it mean that the driver is "so incapacitated as to render impractical or impossible" the breath, urine or saliva tests? Would not the saliva test nearly always be practical?

The second sentence, because it is in the disjunctive, gives the impression that a blood test can be taken outside a hospital. However, sec-

760 n.4, in comparing the circumstances with *Breithaupt* effectively used a dissenting opinion by Justice Warren in *Breithaupt* in which he found no distinction between a blood test taken when a person is conscious and one taken when a person is unconscious: "[We] cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." Warren C.J., dissenting in Breithaupt v. Abram, 352 U.S. 432, 441 (1957).

81. Breithaupt v. Abram, 352 U.S. 432 (1957); People v. Haeussler, 41 Cal. 2d 252, 260 P.2d 8 (1953) (the test results were admitted in evidence and the California Supreme Court held that this procedure did not violate either the privilege against self-incrimination or the right to due process).

82. *See, e.g.*, State v. Ball, 179 A.2d 466 (1962) where the doctor said he found the motorist conscious at the scene of the accident and conscious at the hospital, although he would lapse into a deep sleep.

83. *See* N.Y. Vehicle & Traffic Law § 1194(1) (McKinney 1960); Va. Code Ann. § 18.1-55 (Supp. 1960).

tion (2)(b) states that "withdrawal of blood shall be performed only at a hospital, clinic, or other medical facility."[84]

Must an arrest be made in the case of an unconscious person before a test can be taken? The statute says nothing on this point. The requirement would seem somewhat formalistic since the motorist is unaware that he is being taken into the custody of the police. In a California case the requirement of arrest was met when the officer "mentally" placed the motorist under arrest for driving while under the influence of intoxicating beverages.[85]

A final question is must the blood test of the unconscious motorist be made at the request of a police officer or could it be made, for example, at the request of another driver who might want the results of the test for a personal injury case. Although the statute is silent on this matter, probably only a police officer can request the test since he is the only person named who can administer the test in the case of a conscious person.[86]

Although a driver's "implied consent" to a blood test is presumed not to be withdrawn under the statute because of unconsciousness,[87] it must be remembered that courts may arrive at various interpretations as to whether the requisite consent, implied or actual, has been given. For example, a Vermont court held that under its implied consent statute:

> Consent to the taking of any of the permitted tests is required to be real, for the respondent has the privilege of choice. Nowhere does the statute substitute an implication for an expressed consent to a test.[88]

A court might feel that the withdrawal of blood from an unconscious driver constitutes an unreasonable search and seizure.[89] The argument might be made that the driver's intoxicated condition rendered him in-

84. FLA. LAWS 1967, ch. 67-308, § 1, amending FLA. STAT. § 322 (1965). Query: Is an ambulance a medical facility? See also the Supreme Court's comment in *Schmerber*, 384 U.S. at 771: "Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices.

85. People v. Lane, 49 Cal. Rptr. 712 (Cal. 2d Dist. 1966).

86. Section (e) would also lend support to this. In dealing with the non-liability of a physician administering a blood test, it states that the physician is not liable if the test was proper and the physician was requested in writing by a peace officer to administer a blood test. From this it could be implied that only a police officer can make the request.

87. However, under the North Dakota implied consent statute, N.D. CENT. CODE § 39-20-01 (1965), "any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed to have withdrawn his consent . . . ."

88. State v. Ball, 123 Vt. 26, 30, 179 A.2d 466, 469 (1962). *But see* State v. Bock, 80 Idaho 296, 308, 328 P.2d 1065, 1072 (1958) where the court reasoned that "by operating a motor vehicle in this state the defendant is deemed to have given his consent to a chemical test." The only way he can withdraw that consent is to expressly refuse the test. Hence, under Idaho law if the person neither refuses nor consents expressly, the test may be made.

89. Lebel v. Swincicki, 354 Mich. 427, 440, 93 N.W.2d 281, 287 (1958) (not decided under an "implied consent" statute, however).

capable of legally "consenting" to a chemical test, since he was not in sufficient possession of his senses to know what he was doing.[90] A court may feel that in some cases where the motorist is unconscious, the police did not have "reasonable cause." For example, the police were not able to question the motorist, witnesses were not available, or an extended investigation was not made. Or finally a court may feel that the withdrawing of blood from an unconscious person may be especially undesirable since needed medical attention may be diverted and the law should not encourage such a diversion.[91]

Under the foregoing circumstances of this subsection, such tests, inclusive of said blood test, may be administered whether or not such person is told that his failure to submit to such blood test will result in the suspension of his privilege to operate a motor vehicle upon the public highways of this state.

This section seems somewhat absurd since an unconscious person can not refuse or be told anything. It merely reiterates the idea in section (a) that the motorist must refuse to take the test before he is told of his rights rather than be told of his right of refusal before the demand for the test is made.

A much fairer procedure would be to inform the unconscious person after he regains consciousness of his rights and at that time give him a choice between having the evidence used against him or of having his license suspended.[92]

The use of the phrase "public highways of this state" should be noted. This gives support to the argument that the statute was designed to cover only public roads, and not all roads within the state.

Sections (c), (d), (e) and (f) deal with matters of procedure concerning the suspension of the motorist's license upon his failure to take the test. The sections are generally self-explanatory and should present

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90. The argument which at first glance seems absurd has been made, but unsuccessfully, in Wells v. State, 239 Ind. 415, 158 N.E.2d 256 (1959), and in Jones v. State, 159 Tex. Crim. 29, 261 S.W.2d 161 (1953) where it was said:

> [A] person under the influence of intoxicating liquor, as defined by the penal code, need not be so intoxicated as to be incapable of entering into a valid agreement, and yet be sufficiently intoxicated to come within the statute . . . defining driving on a public highway while intoxicated.

Id. at 31, 261 S.W.2d at 162.

91. *See* Note, *Constitutional Law—Due Process of Law—Analysis of Blood Extracted Without Warrant From Unconscious Suspect is Admissible in Criminal Trial*, 79 HARV. L. REV. 677, 681 (1966). *See also* Giddons v. Cannon, 193 So.2d 453 (Fla. 2d Dist. 1967). Although the court in *Giddons* did not mention anything about medical attention being diverted, blood transfusions were begun on the unconscious motorist at 4:15 A.M. and at about 5:00 A.M. a blood sample was withdrawn for analysis. *Id.* at 454.

92. In State v. Tripp, 158 Me. 161, 180 A.2d 601 (1962) the court found a valid consent because the motorist consented to the test after he gained consciousness and after he was informed of his rights.

few difficulties. The problems involved will be concerned with the construction of the statute rather than with its validity.

Section (c) says that upon the motorist's refusal and a *sworn* statement by the officer that he had "reasonable cause to believe" that the motorist was under the influence, the motorist's privilege to operate a motor vehicle shall be suspended for six months. The suspension, however, is not automatic. Unless the person invokes his rights under section (d), the suspension is not effective until ten days after he has received notice of the suspension from the department of public safety.

In section (d) the motorist is given a right to a hearing. There can be no revocation of a license until the motorist has an opportunity to be heard. The department of public safety must immediately notify the motorist in writing of: (1) the suspension; (2) his right to petition for a hearing; and, (3) his right to be represented at the hearing by counsel. The petition for the hearing must be filed in "the court having trial jurisdiction of the criminal offense for which (the motorist) shall stand charged." It must be filed within ten days after the motorist has received notice of suspension. The court shall set a hearing within twenty days after the filing of the petition. At the hearing the following issues shall be decided:

(1) *Whether the arresting peace officer had reasonable cause to believe the person had been driving a motor vehicle in this state while under the influence of alcoholic beverage.*

Since the motorist has refused to take a chemical test, evidence of the motorist's intoxicated condition must be based on observations made by the police. These observations will usually be of the motorist's voice, speech, eyes, breath, and gait. Such evidence has been held to be sufficient to meet the "preliminary statutory requirement for the request by the arresting officer that a test for alcohol be taken by the driver . . . ."[93] It should also be remembered that the fact that a motorist may be acquitted of a criminal charge of driving while intoxicated does not preclude an administrative hearing revoking the motorist's license for refusing to submit to a chemical test.[94]

The remaining issues to be decided at the hearing are:

(2) *Whether the person was placed under lawful arrest?*

(3) *Whether he refused to submit to the test after being requested by a peace officer?*

93. Clancy v. Kelly, 7 App. Div. 2d 820, 822, 180 N.Y.S.2d 923, 924 (1958). *See also* Donlick v. Hults, 13 App. Div. 2d 879, 215 N.Y.S.2d 427 (1961).

94. Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N.W.2d 75 (1961) (acquittal of a criminal charge of driving under the influence of alcoholic beverages does not have any bearing upon a proceeding before the director). Combes v. Kelly, 2 Misc. 2d 491, 152 N.Y.S.2d 934 (Sup. Ct. 1956) (in the criminal trial the petitioner was presumed to be innocent and the hearing is a separate and distinct legal proceeding).

(4) *Whether, except for the person described in subparagraph* (b) *above, he had been told that his driving privilege would be suspended if he refused to submit to such test?*

Section (e) says that the filing of the motorist's petition shall delay the suspension of the license until the hearing, which must be held within 20 days of the filing. If the trial court does not hold the hearing within 20 days, the suspension shall not take place until the motorist has been granted a hearing. This provision avoids the problem of whether suspension may occur before the hearing.[95] If the motorist requests a continuance, however, then the suspension can occur before the hearing.

Section (f) says that if the suspension is sustained at the hearing then the motorist's driving privilege shall be immediately suspended and the driving license surrendered.

Section (g), stating that the motorist is entitled upon request to a test, has been previously covered.

(h) *Warning of the consent provision of this section shall be printed above the signature line on each new or renewed driver's license issued after the effective date of this act.*

(i) *By applying for a driver's license and by accepting and using a driver's license, the person holding the driver's license shall be deemed to have expressed his consent to the provisions of this section.*

These sections carry the fiction of "implied consent" to a ridiculous extreme. No conceivable good can come from them. Their only function will be to provide extra ammunition for defense attorneys to attack proceedings for suspension of drivers' licenses.

The question in section (h) is what will be the result if the section is not followed? For instance, will the "implied consent" statute apply if the department of public safety by mistake does not print the "consent provision" on the driver's license? What if it is printed, but it is illegible? What if it is printed below the line? What if the motorist upon receiving his license scratches the provision out? Many questions of this sort, which should never arise in the first place, can easily come to mind.

The same questions arise with section (i). Do the "consent provisions" apply to a person who does not apply for a license? How about the person who has his license suspended? Most likely a court when faced with these questions will say that even though sections (h) and (i) are not applicable because they have not been followed, the "implied consent" statute is still applicable through the operation of other sections of the statute.[96]

95. *See In re* Grimshaw, 7 Misc. 2d 218, 165 N.Y.S.2d 263 (Sup. Ct. 1957).

96. *E.g., subsection* (1)(a) of § 322.261: "Any person who shall accept the privilege . . .

If consent is what is desired in the licensing procedure, then it would be a simple matter to have the motorist consent in writing in order to obtain his driver's license.

(2) (a) *The test determining the weight of alcohol in the defendant's blood shall be administered at the direction of the arresting officer in accordance with rules and regulations which shall have been adopted by the department. Such rules and regulations shall have been adopted after public hearing, and shall specify precisely the test or tests which are approved by said department for reliability of result and facility and administration and shall provide an approved method of administration which shall be followed in all tests given under this section.*[97]

This section reinforces the idea that the police and not the motorist shall select the test to be administered. If the choice of the test can be made by the motorist, he could easily avoid the statute by choosing a test which was not approved of by the department.

Under this section, in order for the police to take advantage of the statute, a hearing will have to be held and rules and regulations will have to be adopted by the department of public safety afterward. Of course, the rules and regulations will have to be followed or defense attorneys will have a basis for further quibbling under the statute.

(b) *Only a physician, registered nurse, or duly licensed clinical laboratory technologist or clinical laboratory technician acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein. Such withdrawal of blood shall be performed only at a hospital, clinic, or other medical facility. This limiation shall not apply to the taking of breath, urine, or saliva specimens.*

This section is in harmony with the policy of *Schmerber* which stated that a blood test could be justified only under stringently limited conditions. Since a blood test requires a physical entry into the body, for health reasons and because of personal sensibilities, the test must be made by a qualified person in a medical atmosphere. The section is practical in that the taking of a blood test is not limited solely to a physician, but can be made by other qualified personnel.[98]

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shall by so operating such vehicle be deemed to have given his consent . . ." This would take care of the "consent provision" being absent on the driver's license.

97. Section (j) has been previously discussed.

98. Query: Can an intern, who is often in charge of emergency rooms in hospitals, withdraw blood under the statute? Is he a "physician" under the statute for the purpose of withdrawing blood. In People v. Stanton, 33 Misc. 2d 921, 228 N.Y.S.2d 858 (Erie County Ct. 1962) the court held that an intern is a "physician" for the purpose of the statute. In Murphy v. New York State Thruway Authority, 23 Misc. 2d 1078, 204 N.Y.S.2d 953 (Ct. Cl. 1960) an undertaker, at a state trooper's request, took a blood sample from the body of a deceased motorist. The evidence was held inadmissible.

(c) *The person tested may at his own expense have a physician, registered nurse, duly licensed clinical laboratory technologist or clinical laboratory technician or any other person of his own choosing administer a test, in addition to the one administered at the direction of a peace officer, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath, or urine. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of a peace officer.*

This section covers the situation where the motorist is under arrest. If the motorist is not arrested or is released, he, of course, always has the right to go to a doctor to have a chemical test taken. While under arrest, in order to make the right meaningful the motorist must be given a reasonable opportunity to contact a doctor.[99] This should usually mean no more than a phone call.

The main issue which arises is whether the motorist must be informed of his rights to an additional test. In facing this issue a New York court said:

> Defendant urges that the statute is unconstitutional by reason of the failure to provide a provision for notice to a defendant of his right to have a physician of his own choosing administer a a chemical test in addition to one by police. No authorities in support of this contention are submitted. This statute does not require that any notice be given a defendant as to this right. It would seem that it is sufficient to say that all persons are presumed to know the law and are therefore presumed to be so informed as to this right. They should acquaint themselves at least with those laws most likely to affect their usual activities. The point is without merit.[100]

Yet, if the motorist has this right to an additional test, why should it be kept under a blanket? If the right is important enough the motorist should be told about it. Under the Connecticut statute the motorist must be immediately informed of his right to have an additional chemical test performed.[101]

Another problem is what is meant by an "additional test?" For example, if a blood or urine specimen is obtained from the motorist does he have the right to obtain *part* of the specimen so as to obtain an additional, independent test, or must he have another blood or urine specimen

99. *See* CONN. GEN. STAT. ANN. § 14-227b (Supp. 1964), which says that the defendant shall have a "reasonable opportunity" to exercise his right to have an additional chemical test performed.

100. People v. Kovacik, 205 Misc. 275, 292, 128 N.Y.S.2d 492, 508-9 (Ct. Special Sess. of N.Y. City 1954).

101. *See* CONN. GEN. STAT. ANN. § 14-227b (1964).

taken from him by his own doctor? It is to the motorist's advantage to have an independent test made since a variance in the results of the two tests made of identical samples could always occur.[102] The Virginia statute attempts to solve this problem by requiring the physician withdrawing the blood to place the specimen in two separate containers. One container is delivered to the state and the other to the motorist, who can obtain a separate analysis if he so desires.

If "additional test" means, as it appears under the Florida statute, that another specimen must be obtained from the motorist, then the results of the two tests will be different since the "test" obtained by the motorist will have been performed at a later time. The state can claim that the "additional test" is unreliable since in the time between the two tests the alcohol has had a chance to oxidize and the motorist to "sober up."

Another question is whether the motorist can have an additional test taken of his saliva? The provision lists only blood, breath or urine and does not expressly exclude saliva. Perhaps the reason for omitting the saliva test is that it was feared that before the second test the motorist would rinse his mouth out so as to reduce the amount of alcohol.

The burden is upon the motorist to obtain a physician. The police under the statute are not obligated to obtain one. Furthermore, the police do not have to postpone their test until the motorist's physician arrives because the test afforded here is an additional test. If the motorist is given a reasonable opportunity to get his own physician but is unable to for one reason or another, then the motorist has failed in his burden and the original test is not made inadmissible.

(d) *Upon the request of the person tested, full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney.*

This section entitles the motorist to know the evidence which can be used against him at the trial. The burden, however, is on the motorist since he does not have to be informed that he has a right to the results of the test, and no doubt the courts will echo the refrain that the motorist is presumed to know the law.

But even if the motorist does know that he can obtain the results why should he be put to the trouble and expense of having to get the results himself? The statute does not even say from whom the motorist is to obtain the results. Is it the local police who have arrested him, the department of public safety, the state attorney's office, or the court in which he will be tried? In order to avoid red tape and to decide how he is going to plead, the motorist ought to be informed of the test results as

102. *See* Ladd & Gibson, *supra* note 28, at 194-8 and 207.

soon as they are available. If the test is a breath test taken at the scene of the accident, the motorist should be given the results, favorable or unfavorable, at that time so that he can decide whether he wants to have another test adminstered by his own doctor. If the test requires laboratory analysis, then the results should be *mailed* to the motorist when they are available. Such procedures are a minimum burden upon the state. In this respect the Connecticut statute is particularly exemplary. It states that a true copy of the report of the test result must be mailed to the motorist within twenty-four hours after the result is known in order for the evidence to be admissible.

(e) *No physician, registered nurse, or duly licensed clinical laboratory technologist or clinical laboratory technician shall incur any civil or criminal liability as a result of the proper administering of a blood test when requested in writing by a peace officer to administer such a test.*

This provision is salutary in that it ought to ensure the cooperation of the doctors and other qualified personnel administering the blood test. Otherwise, doctors would be apprehensive in performing the test for fear of possible suits for malpractice or the tort of assault. However, to be immune from liability, the test must be administered "properly." Thus, a physician might still be liable if he were negligent in administering the test. Since the withdrawal of blood is a fairly simple procedure medically, the likelihood of this contingency occurring is not very great.

The fact that the request is to be made in writing seems unnecessary. There seems to be no reason why an oral request should not be just as effective.[103] If the request is not in writing, does this mean that the physician may be liable? Or can the "request in writing" requirement be interpreted as a requirement imposed upon the police?

Another question left unanswered by this provision is whether the hospital can be sued for the acts of its physicians or other employees in making the blood test. If the purpose of the provision is to ensure the cooperation of physicians, then it is best carried out by making all persons who took part in the test, including the hospital, immune from liability. In this respect the New York statute is noteworthy:

> No physician, registered professional nurse or hospital employing such physician or registered professional nurse, and no other employer of such physician or registered professional nurse shall be sued or held liable for any act done or omitted in the course of withdrawing blood at the request of a police officer . . . ."[104]

The remedy for the motorist upon whom an improper blood test has been made should be in an action against the state.

103. N.Y. VEHICLE & TRAFFIC LAW § 1194(1) (McKinney 1960), says that a physician shall not be liable for the act of withdrawing blood done "at the request of a police officer."
104. *Id.*

(f) *If the test given under subsection* (1) *is a chemical test of urine, the person tested shall be given such privacy in the taking of the urine specimen as will insure the accuracy of the specimen and, at the same time, maintain the dignity of the individual involved.*

Since under the law the police must act reasonably and follow the requisites of due process, this provision does not appear to add anything new. Difficulty, of course will be encountered in ascertaining what is meant by *privacy* that will "insure the accuracy of the specimen and, at the same time, maintain the dignity of the individual involved." Such a concept requires a unique balancing test. For conduct that is extreme the answer will be obvious. Less than extreme conduct, however, will give interpretive problems as to what is meant by such privacy.

B. *Presumption of Intoxication, Testing Methods*[105]

(2)[106] *Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcoholic beverages when affected to the extent that his normal faculties were impaired, the results of any test administered in accordance with this act shall be admissable* [sic] *into evidence where otherwise admissable* [sic], *and the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:*

It should be noticed that the results of blood tests can be used in both criminal and civil proceedings. If the statutory standards of evidence are useful in driving while intoxicated cases, there seems to be no reason to limit their application to only this particular proceeding.[107]

An example of where test results were used in a civil action is a recent Florida case in the District Court of Appeal, Second District.[108] In an action for personal injuries sustained in a rear-end automobile collision the issue was whether the plaintiff was contributorily negligent in that he was intoxicated at the time of the accident. On appeal, the court in citing and following *Schmerber* held that the evidence was admissible.

When the statute states that the amount of alcohol at the "time alleged" should give rise to certain presumptions, it refers to the time of the

105. Fla. Laws 1967, ch. 67-308, § 2, amending FLA. STAT. § 322 (1965).

106. Section (1) is omitted since it merely reiterates FLA. STAT. § 317.201 (1965) making it punishable to drive under the influence of alcoholic beverages.

107. *See* Williams v. Hendrickson, 189 Kan. 673, 371 P.2d 188 (1962). A case, however, which limited the application of the tests because of the specific language of the chemical test statute was Hoffman v. State, 160 Neb. 375, 70 N.W.2d 314 (1955) where the statute was applicable only to driving while intoxicated, not motor vehicle homicide. *See generally* Donigan, *supra* note 1, at 27-9.

108. Giddens v. Cannon, 193 So.2d 453 (Fla. 2d Dist. 1967).

civil or criminal act. However, the test results will show the amount of alcohol present at the time when the test is made, which may be as much as two or three hours after the "acts alleged." In order to determine the percentage of alcohol present in a person's blood at the time of the accident, the process of extrapolation must be used. Since alcohol disappears from the blood stream at a known rate,[109] experts in their testimony can accurately estimate what the percentage of alcohol in the driver was at the time of the accident.

It is unfortunate that the term "other bodily substance" was used in enumerating the kinds of chemical tests which can be used since the enumeration in this provision is inconsistent with other provisions of the statute which lists breath, urine or *saliva* and blood in the case of an unconscious person.[110] The question then becomes whether tests of "other bodily substances" such as spinal fluid, or whatever else comes to the imagination, are permissible. Under a principle of statutory construction the answer would appear to be no. The rule of *ejusdem generis*[111] would construe the general term, "bodily substances," to be of the same kind as the specifically mentioned substances, namely blood, urine, breath or saliva.

(a) *If there was at that time 0.05 per cent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired.*

(b) *If there was at that time in excess of* 0.05 *per cent but less than* 0.10 *per cent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired.*

(c) *If there was at that time more than 0.10 per cent by weight of alcohol in the person's blood, it shall be prima facie evidence that his normal faculties were impaired.*

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109. Generally no more than .02 per cent an hour.

110. Fla. Laws 1967, ch. 67-308, § 1, amending FLA. STAT. § 322 (1965). However, see Fla. Laws 1967, ch. 67-308, § 2, amending FLA. STAT. § 322 (1965) where the term "other bodily substances" is also used.

111. "In the construction of laws, wills and other instruments the '*ejusdem generis* rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention." (citations omitted) BLACK'S LAW DICTIONARY 608 (4th ed. 1951).

The value of the presumptions is that they make it technically unnecessary for an expert witness to give interpretive testimony as to the consequences of various levels of alcohol in the blood.[112] The findings and knowledge of scientists and medical experts have been incorporated in the Florida statute in the form of legal presumptions.[113]

Where no statutory presumptions exist a qualified expert must explain to the jury the meaning of the different degrees of blood alcohol levels, their various effects on a motorist's faculties, and the interpretation of the results of the chemical tests.

Under the Florida Statute these presumptions are applicable to any type of civil or criminal proceeding[114] and their constitutional validity seems to be settled. The provision that a high blood alcohol content is to be taken as presumptive of intoxication has been upheld against the contention that it establishes an unconstitutional presumption of guilt.[115] The reason is that the alcoholic content of the blood has a strong, rational connection with the fact of intoxication.

The statutory presumptive level is not a single arbitrary line, with a person on one side being under the influence of intoxicating liquor and a person on the other side being sober. Rather, two limiting figures of blood alcohol concentration are established. There is a low level, 0.05 per cent, below which practically no one would be affected, and a second level, 0.10 per cent, considerably higher than the first, above which all drivers are under the influence. In between is a zone in which no presumption is created. In this zone some persons may be under the influence and others may not be. As the percentage increases toward 0.10 per cent a greater number will become under the influence. Thus the two levels protect a person who carries his liquor better than others. They also provide a safeguard against errors of interpretation.

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112. However, nothing in the statute prevents the introduction of expert interpretative testimony as would be necessary in the absence of the statute.

113. The stated presumption, that if at least 0.15 per cent of alcohol is present in the blood the subject is under the influence of intoxicating liquor for the purposes of operation of a motor vehicle, recognizes the universally accepted truth that such is physiologically the case with respect to every person, regardless of the extent of usual external manifestations, individual tolerance for alcohol or pre-existing individual physical conditions or idiosyncracies. . . . The experts testifying at the Senate hearing stated that in thousands of tests conducted over the years, no one has ever been found with that quantity of alcohol in his blood who was not so seriously impaired in his faculties, irrespective of external manifestations, that he should not operate a motor vehicle. Indeed, the scientific conclusion has now been reached that the level is attained when the percentage is only 0.10 and the revised Uniform Vehicle Code § 11-902 (b)(3) (1962) declares that the presumption shall come into operation at that figure.

State v. Johnson, 42 N.J. 146, 153, 199 A.2d 809, 822 (1964).

114. This is because of the broad language used in § 322.262 (2): "Upon the trial of any civil or criminal action . . . the results of any test . . . shall give rise to the following presumptions."

115. The leading case is State v. Childress, 78 Ariz. 1, 274 P.2d 333 (1954). *See* Annot., 46 A.L.R.2d 1176 (1956).

Many statutes, especially the early ones, established a presumptive level of intoxication at 0.15 per cent. Lately, however, as a result of new research, states have reduced the presumptive level for being under the influence from 0.15 per cent to 0.10 per cent, or have enacted statutes, such as Florida has, establishing the 0.10 per cent presumptive level.[116] Some writers still criticize the 0.10 per cent level as being too low.[117]

When the percentage of alcohol is sufficient to make it prima facie evidence that the motorist is under the influence of alcohol, the triers of fact are warranted in coming to the conclusion that the motorist is under the influence of alcohol. The presumption, however, is rebuttable, not conclusive. One way a presumption may be rebutted is where a variance is created by two different tests. For example, assume the first test taken by the police shows 0.11 per cent as a test result. Shortly thereafter the motorist has his own test taken, which shows a 0.08 per cent result. If the 0.08 test result is competent evidence, it would rebut the presumption of intoxication raised by the 0.11 per cent test. With no presumption arising the prosecution will have to base its case on the objective symptoms observed by the police. The final decision as to intoxication would be left to the jury.

(d) *Per cent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.*

This section needs no comment.

(e) *The foregoing provisions of this subsection shall not be contrued as limiting the introduction of any other competent evidence bearing upon the queston whether the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired.*

This section is generally self-explanatory. One issue that is raised is whether the evidence of the chemical test alone is sufficient or whether there must be corroborating evidence. The section does not expressly require that there be corroborating evidence. Some jurisdictions require corroborating evidence in addition to the results of the scientific tests.[118] Probably a Florida court would find that a chemical test alone, because it is given statutory approval and has the ability to raise presumptions, would be sufficient evidence. Other jurisdictions have held that the test results standing alone are sufficient to sustain a conviction.[119]

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116. *See* Donigan, *supra* note 1, at 22-3.

117. *See* Erwin, *supra* note 1, at 90-7 (Supplement) "Although most people will be under the influence at 0.10 per cent, some will not be under the influence until they reach .15 per cent, and that all persons having .15 per cent or more blood alcohol will be under the influence of alcohol." *Id.* at 88.

118. *E.g.*, Schwarz v. Schneuriger, 269 Wis. 535, 69 N.W.2d 756 (1955) (strong odor of intoxicants and eyewitness testimony as to manner of driving vehicle considered as corroborating evidence).

119. State v. Johnson, 42 N.J. 146, 199 A.2d 809 (1964).

(3) *Chemical analyses of the person's blood, urine, breath, or other bodily substance to be considered valid under the provisions of this section shall have been performed according to methods approved by the state board of health and by an individual possessing a valid permit issued by the state board of health for this purpose. The state board of health is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to issue permits which shall be subject to termination at the discretion of the state board of health.*

This provision provides the defendant with many grounds of attack in cases where the procedures of the state board of health are not followed or where an unqualified individual administers the test.

One procedure, which the board of health will have to follow in blood tests, is that alcohol should *not* be used as a sterilizer since it has been determined that such a sterilizer may invalidate the test results.[120] The Virginia statute specifically states that a sterilizer or cleanser "other than alcohol or other substance which might in any way affect the accuracy of the test" shall be used.[121]

IV. CONCLUSION[122]

Despite the many inconsistencies, ambiguities and interpretive difficulties created, the "implied consent" statute should be valuable in setting forth guidelines and directions for the police to follow.

The statute also seems to be preferable to the Supreme Court's holding in *Schmerber* since the motorist, unless he is unconscious, is given an alternative to undergoing a compulsory chemical test. Paradoxically, as a result of *Schmerber,* states without "implied consent" statutes can compel a motorist to undergo a chemical test, while in states with "implied consent" statutes the motorist has the option to refuse the test.

Although the statute is silent on the matter of whether the motorist must be informed of his various rights, hopefully it will be the practice

120. People v. Maxwell, 18 Misc. 2d 1004, 188 N.Y.S.2d 692 (Orange County Ct. 1959); People v. Douglas, 16 Misc. 2d 181, 183 N.Y.S.2d 945 (Jefferson County Ct. 1959). *But see* People v. Malone 14 N.Y.2d 8, 197 N.E.2d 189, 247 N.Y.S.2d 641, (Ct. App. 1964) where the doctor asked the nurse to furnish him with a non-alcoholic solution to sterilize the arm of the defendant. The doctor assumed the nurse did so since he was not conscious of an alcoholic odor when the solution was used by him. The court held the evidence sufficiently positive to allow the jury to find that a non-alcoholic preparation was used.

121. VA. CODE ANN. § 18.1-55 (1965).

122. Sections 3, 4, and 5 are omitted. Section 3 says that any person charged with drunk driving shall have the right to trial by jury.

Section 4 states that the provisions of the act are severable and if any part is found invalid then the validity of the rest of the act shall not be affected. The section involves constitutional problems of partial invalidity, *i.e.*, whether the remaining non-invalidated part can be saved as a workable statute.

Section 5 states that the act takes effect July 1, 1968.

of the police to do so. Perhaps the police could use *Schmerber* or "implied consent" cards as a checklist to inform the motorist that he has a right: (1) to refuse to take the test; (2) to the results of the test; and, (3) to have a physician of his own choice administer an additional test. In addition, the police should make a special effort to obtain a motorist's express consent to a test. In this regard it would be helpful, whenever feasible, for the police to obtain the motorist's signature acknowledging that he voluntarily consented to the test after being informed of his right to refuse. If this procedure can be followed, later disputes as to whether the motorist refused to take the test will be avoided. In this way the encroachments of the individual's liberty will not be coerced, and the prosecution will be in a superior position to protect the public from the hazards created by the intoxicated driver.