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## Legal By-Products of Chemical Testing for Intoxication

M. C. Slough\* and Paul E. Wilson\*\*

ONE AMONG MANY PROBLEMS of national moment is the intoxicated motorist. Legislators have long fumbled for remedies to halt a wave of senseless killing and mutilation that has resulted from an unhappy combination of ethyl alcohol and mechanical power. Convictions in court have been too difficult to halt a wave of senseless killing and mutilation that has reconstructed and effective legal control. Jurors themselves, have often been hesitant to convict because the sum total of objective evidence produced has not convinced them that the subjects they were judging had actually been drunk or intoxicated.

It is commonplace to write or to speak of the threat of the drunken driver, when in reality society should be more concerned with the problem of the drinking driver. Actually, one who is dead drunk or grossly intoxicated will be so depressed and anesthetized that he will barely be able to stagger to the steering wheel. Yet somewhere between sobriety and deep intoxication a driver can be "under the influence of alcohol," and in this critical area of perception loss, the use of liquor can significantly diminish his coordination and cloud his judgment. A motorist's driving ability can thus be impaired long before he reaches the extreme states referred to in common parlance as "intoxication" or "drunkenness."

To obviate unnecessary confusion over a choice of semantics, the National Conference on Street and Highway Safety, in cooperation with the National Conference of Commissioners on Uniform State Laws, prepared a model act which provides that it shall be unlawful and punishable for any person *under the influence of intoxicating liquor* to drive, or to be in actual physical control of, any vehicle.<sup>1</sup> By 1961, at least 46 states had likewise adopted that criterion.<sup>2</sup>

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<sup>1</sup> Uniform Vehicle Code § 11-902(a) (Emphasis added).

<sup>2</sup> Alaska Comp. Laws Ann. § 50-5-3 (Supp. 1958); Ariz. Rev. Stat. Ann.

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However, sheer adoption of such a provision does not eliminate the practical difficulties inherent in defining the ambiguous phrase "under the influence." An individual of literal complex will assert that one bottle of beer can exert sufficient influence, whereas a boastful and excessive imbibor will deny that anyone is under the influence so long as he is able to recognize the magic center line of the highway. Opinions at either extreme are absurd. Obviously the prosecutor need prove only that the subject's faculties were appreciably affected by strong drink, but without benefit of factual and concise scientific evidence, even this burden can evoke a keen sense of frustration.

A generation ago, the objective-symptom tests were the sum and substance of the prosecution's armory. The arrested person underwent an arduous series of motion and speech tests, which included simple balancing procedures, walking and turning, handwriting, touching the nose, picking up coins from the floor, and reciting stock tongue-twisters such as "Methodist Episcopal" and "Around the Rugged Rock the Ragged Rascal Ran." Because odor of breath was checked and relied upon, invariably the beer

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§ 28-692(a) (Supp. 1960); Ark. Stat. Ann. § 75-1027 (1957); Cal. Vehicle Code Ann. § 23101, 23102 (1960); Colo. Rev. Stat. Ann. § 13-4-30(1) (Supp. 1960); Conn. Gen. Stat. Ann. § 14-227 (1960); Del. Code Ann. tit. 21, § 4111(a) (Supp. 1960); Fla. Stat. § 317.20(1) (1955); Ga. Code Ann. §§ 68-1625(a) (1957); Hawaii Rev. Laws § 311-28 (1955); Idaho Code Ann. § 49-1102(a) (1957); Ill. Rev. Stat. ch. 95½, § 144(a) (1959); Ind. Ann. Stat. § 47-2001(b) (1952); Iowa Code § 321.209(2) (1958); Kan. Gen. Stat. Ann. § 8-254(2) (Supp. 1959); Ky. Rev. Stat. § 189.520(2) (1955); La. Rev. Stat. Ann. § 14.98 (Supp. 1959); Me. Rev. Stat. Ann. ch. 22, § 150 (Supp. 1959); Md. Ann. Code art. 66½, § 206(2) (1957); Mass. Ann. Laws ch. 90, § 24 (1959); Mich. Comp. Laws § 257.625 (Supp. 1956); Minn. Stat. § 169.121(1) (1957); Miss. Code Ann. § 8174 (1957); Mont. Rev. Codes Ann. § 32-2142(1) (1959); Neb. Rev. Stat. § 39-727 (Supp. 1959); Nev. Rev. Stat. § 484.050 (1959); N. H. Rev. Stat. Ann. § 262.19 (Supp. 1959); N. J. Stat. Ann. § 39:4-50 (1961); N. M. Stat. Ann. § 64-22-2(a) (Supp. 1961); N. C. Gen. Stat. § 20-138 (1943); N. D. Rev. Code § 39-08-01(1)(a) (1960); Ohio Rev. Code Ann. § 4511.19 (1958); Okla. Stat. tit. 47, § 93 (Supp. 1959); Ore. Rev. Stat. § 483.992(2) (1959); Pa. Stat. Ann. tit. 75, § 1037 (1960); R. I. Gen. Laws Ann. § 31-27-2(a) (Supp. 1960); S. C. Code § 46-343 (Supp. 1960); S. D. Code § 44.0302-1 (Supp. 1952); Tenn. Code Ann. § 59.1031 (1955); Utah Code Ann. § 41-66-44(a) (1960); Vt. Stat. tit. 23, § 1183 (1959); Va. Code Ann. § 18.1-54 (1960); W. Va. Code Ann. § 1721 (331) (Supp. 1959); Wis. Stat. § 343.31(b) (1958); Wyo. Comp. Stat. Ann. § 31-129(a) (1957). Washington uses the language "under the influence or affected by." Wash. Rev. Code § 46.56.010 (1952). Texas defines the prohibited condition as "intoxicated or under the influence." Tex. Pen. Code art. 802 (1961). Only two states use the term "intoxicated." See Mo. Ann. Stat. § 564.440 (1953) and N. Y. Vehicle and Traffic Law § 1192 (Supp. 1959) (superseded § 70(5), effective Oct. 1, 1960). The Alabama Code formerly employed the term "intoxicated" but that state has changed its criterion to "under the influence of intoxicating liquor." Ala. Code tit. 36 § 2 (1958).

drinker suffered more abuse than he deserved at the moment. Many offenders were acquitted or released because judges and juries were loath to premise convictions upon questionable objective symptoms and the equally questionable testimony of lay and police witnesses. On the other hand, diabetics suffering from insulin shock often failed these objective tests and were easy prey for the ill advised public protector.<sup>3</sup>

### I. Chemical Tests to Determine Blood-Alcohol Concentration

Early research was effected by Widmark in Sweden in the period between 1914 and 1932 on the problem of alcoholic impairment of drivers. His efforts were largely divided into two areas: the examination of drivers by subjecting them to certain psychosensory and psychomotor tests to demonstrate physical impairment, and the chemical testing of body materials to measure the alcohol level. Though the chemical test for alcohol had been known for some time, apparently Widmark was the first to suggest the use of the combination of these two tests to examine suspect drivers. By 1930, results of chemical tests were accepted as evidence in Swedish courts, and in 1934 a law was adopted in Sweden which made blood tests compulsory in criminal and in traffic cases.<sup>4</sup> Two years later, the German Minister of the In-

<sup>3</sup> Problems of the diabetic are illustrated in a recent opinion by the Supreme Court of Minnesota, *State v. Simonsen*, 252 Minn. 315, 89 N. W. 2d 910 (1958). Medical science recognizes more than sixty pathological conditions which may cause one or more of the symptoms produced by the excessive use of intoxicants. Even a skilled physician may encounter difficulty in arriving at an accurate diagnosis of alcoholic influence simply by observing the usual clinical symptoms.

<sup>4</sup> Laboratory experiments by a Swedish scientist, Widmark, were in large part accountable for this enactment. Widmark concluded that when blood-alcohol is 200 mg. % or more, individuals almost without exception are intoxicated. For an elaborate and scholarly discussion of the various methods of blood testing, see Ladd & Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 Iowa L. Rev. 191 (1939). The National Institute of Mental Health has lately announced two new leads in the treatment of alcoholism which should be of interest to those concerned with research in the area of blood-alcohol concentration. There is a substance known as tri-iodothyronine, a hormone derivative, which has been found, when given intravenously, to bring a person who is unconscious from the effects of alcohol, in an alcoholic stupor, very rapidly back to consciousness. Normal metabolism rate of alcohol in the blood is about 15 mg. per hundred cc.'s of blood per hour, but affected by the drug, the metabolism rate increases to approximately 30 to 32 mg. per hour. Subjects so treated are not only restored to consciousness, but are able to coordinate to the extent that they can walk a straight line. Odor of alcohol leaves the breath because the subject very likely has burned it up. The drug is contraindicated in coronary artery disease and in adrenal insufficiency. Research at Johns Hopkins has revealed that an increased dosage of thyroid extract given to rats will decrease alcohol consumption. Conversely, in the hypo-thyroid rat, consumption of alcohol will increase.

terior ordered blood tests in suspected inebriation cases. During that same year the National Safety Council officially recognized that a national problem existed and took action by establishing a special committee called the National Safety Council Committee on Tests for Intoxication.<sup>5</sup> Almost immediately after activation, the Committee saw fit to design a standard reporting form, which was in essence an attempt to formalize the use of tests for physical impairment and chemical tests for alcohol. Joining forces with the American Medical Association, the Committee was soon dedicated to the task of setting up standards for interpreting the meaning of blood alcohol levels. Both organizations lost little time before recommending adoption of chemical-test procedures in this country to assist law enforcement officers in interpreting and evaluating the usual symptoms resulting from excessive use of alcohol.<sup>6</sup>

Medical science has established with certainty that the percentage of alcohol absorbed into the blood and circulated through the body is closely correlated with the degree to which a person is under the influence of intoxicating liquor. And it is possible to predict accurately the percentage of alcohol in the brain (and hence, degree of "intoxication") by determining the percentage of alcohol contained in other body substances, namely, the blood, urine, saliva, or spinal fluid. Perhaps the preponderant amount of research has been conducted in terms of the percentage of alcohol in the blood, for the obvious reason that in other than the post-mortem state, blood is the most conveniently available body fluid closely in contact with the central nervous system upon which alcohol exercises its depressant effect.<sup>7</sup> Regardless

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<sup>5</sup> This committee now bears the title of Committee on Tests for Alcohol and Drugs. It continues to function as a national clearing house for all information relevant to its fact finding efforts.

<sup>6</sup> Report of Committee to Study Problems of Motor Vehicle Accidents of the American Medical Association, 119 A. M. A. J. 653 (1942).

<sup>7</sup> One might suspect that cerebrospinal fluid would furnish reliable evidence of alcoholic influence; however, the only spinal fluid that does is the cisternal spinal fluid obtained from the base of the brain. There is a decided delay in passage of alcohol down the spinal canal to the lumbar region where spinal fluid may be obtained with comparative safety. Actually, the best evidence of the extent of alcoholic influence would result from a direct measurement of the alcoholic content of nerve structures themselves, but for obvious reasons this cannot be effected in living persons. If the subject involved has been killed in a traffic accident, a coroner or medical examiner should have discretionary authority to order an appropriate post-mortem examination which might include a chemical test of body substances to determine what caused or contributed to the death. *Commonwealth v. Capalbo*, 308 Mass. 376, 32 N. E. 2d 225 (1941); *State v. Kelton*, 299 S. W. 2d 493 (Mo. 1957).

of the body substance tested, the result attained can readily be translated into terms of the percentage of alcohol in the blood.

### A. Ranges of Alcoholic Concentration

In 1938 the Committee on Tests for Intoxication recommended blood alcohol levels as an index of intoxication. At that time it was recognized, and still recognized, that a subject with a blood-alcohol concentration of 0.05 percent or less is not "under the influence of intoxicating liquor." With a concentration of 0.05 per cent to 0.15 per cent, many individuals will be "under the influence" and one evidencing a concentration of more than 0.15 per cent will invariably suffer impairment of driving ability. These ranges of alcoholic concentration, now accepted as an article of faith, have been incorporated into the Uniform Vehicle Code, which provides:

In any criminal prosecution for a violation of paragraph (a) of this section relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance shall give rise to the following presumptions:

1. If there was at that time 0.05 per cent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor;
2. If there was at that time in excess of 0.05 per cent, but less than 0.15 per cent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant;
3. If there was at that time 0.15 per cent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;
4. The foregoing provisions of paragraph (b) shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor.<sup>8</sup>

<sup>8</sup> Uniform Vehicle Code § 11-902(b). It is a matter of common knowledge that persons of the same sex, age, and weight may evidence a remarkable variability in their responses to intoxicating liquor. Furthermore, it is a

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Similar provisions have been incorporated into the motor vehicle codes of at least 17 states.<sup>9</sup> As might be expected, this legislative effort has been criticized readily, especially by prosecutors who have encountered difficulty in convicting defendants who register a blood-alcohol concentration in the middle range; juries in particular tend to require showing of a blood-alcohol concentration of 0.15 per cent before finding that the accused is under the influence. Viewed critically, these complaints are no doubt justifiable for the vast majority of persons do evidence marked impairment of driving ability, ergo judgment, when the blood-alcohol level reaches even 0.12 or 0.13 per cent.

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well-established fact that concentrations of blood-alcohol will be much lower among persons who have developed a tolerance to alcohol than among others, for in tolerant individuals absorption of alcohol is slower or elimination more rapid. Gradwohl, *Legal Medicine* 763 (1954). See text following note 22 *infra*.

<sup>9</sup> The following state statutes create presumptions substantially like those found in the Uniform Vehicle Code: Ariz. Rev. Stat. Ann. § 28-692(b) (1960); Colo. Rev. Stat. Ann. § 13-4-30(2) (Supp. 1960); Ga. Code Ann. § 68-1625(b) (1957); Hawaii Rev. Laws § 311-29 (1955); Idaho Code Ann. § 49-1102(b) (1957); Ill. Rev. Stat. ch. 95½, § 144(b) (1959); Ky. Rev. Stat. § 189.520(4) (1959); Mass. Gen. Laws Ann., ch. 90, § 24(1)(e) (Supp. 1961); Mont. Rev. Code Ann. § 32-2142(2) (Supp. 1959); Neb. Rev. Stat. § 39-727.01 (Supp. 1959); Nev. Rev. Stat. § 484.055 (Supp. 1959); N. J. Stat. Ann. § 39:4-50.1 (1961); S. C. Code § 46-344 (1952); S. D. Code § 44.0302-1 (Supp. 1952); Utah Code Ann. § 41-6-44 (Supp. 1959); Va. Code Ann. § 18-75.3 (Supp. 1958); Wash. Rev. Code § 46.56.010 (1952); Wyo. Comp. Stat. Ann. § 31-129(b) (1957).

Tenn. Code Ann. § 59.1033 (1955) contains only the presumption that one whose blood contains 0.15% or more alcohol is under the influence thereof. Another group of state laws uses the quantitative standards employed in the uniform code, but, within the framework of the statute, the result of the test constitutes prima facie evidence instead of creating a presumption: Del. Code. Ann. tit. 11, § 3507 (Supp. 1960); Ind. Stat. Ann. § 47-2003(2) (Supp. 1961); Md. Ann. Code art. 35, § 100(a) (Supp. 1959); Minn. Stat. § 169.121(2) (1957); N. H. Rev. Stat. Ann. § 262.20 (1955); N. Y. Vehicle & Traffic Law § 1192 (superseded § 70(5) effective Oct. 1, 1960); N. D. Rev. Code § 39-20-07 (1960); Ore. Rev. Stat. § 483.630(1)(5)(a) (1959); W. Va. Code Ann. § 1721 (331a) (Supp. 1959); Wis. Stat. § 325.235 (1958). Me. Rev. Stat. Ann. ch. 22, § 150 (Supp. 1959) differs only in that it provides that 0.07% or less alcohol in the blood shall be taken as prima facie evidence that the subject was not under the influence of intoxicants. Arkansas courts receive results of chemical analyses as evidence only, Ark. Stat. Ann. § 1031.1 (1957) giving such evidence neither prima facie nor presumptive effect. In Kan. Gen. Stat. Ann. § 8-1005 (Supp. 1959), the legislature has uniquely failed to recognize a doubtful area in which the chemical test should not be given presumptive effect. There, if the test shows under 0.15% alcohol, the subject is presumed not under the influence, while a presumption of influence arises with the presence of 0.15% or more of alcohol in the blood. Vt. Stat. § 1189 (Supp. 1959) differs from the Uniform Vehicle Code only in that there is a conclusive presumption of non-intoxication if the blood-alcohol content is 0.05% or less. Despite a lack of specific legislation in Ohio concerning the presumptive or prima facie effects of alcohol, it has been held proper for judges to refer to such levels in their instructions. *State v. Titak*, 75 Abs. 430, 144 N. E. 2d 255 (1955).

Evidently serious consideration should be given to a downward revision of the present formula, and greater emphasis should be placed upon corroborating factors inevitably brought to light in borderline cases. The National Safety Council Committee has more recently recommended that the lines of demarcation be amplified in the following manner: 0.00 per cent to 0.05 per cent, safe; 0.05 per cent to 0.10 per cent, *possibly* under the influence; 0.10 per cent to 0.15 per cent, *probably* under the influence.<sup>10</sup> Also important to regard is the fact that this report has recognized that chemical tests, important and valid as they are, should not constitute the sole basis for determining whether a person is under the influence of alcohol when other evidence is available.<sup>11</sup>

### B. Methods of Obtaining Specimens: A Comparison

The blood test is undeniably accurate, yet in the normal pattern of law enforcement it may not be practically feasible. The drawing of a blood sample, though not inherently dangerous, does involve an invasion of the person as well as the inconvenience incidental to making the necessary trip to a physician's office, clinic, or hospital. Furthermore, only a physician, nurse, or qualified medical technician should be permitted to draw blood, and the services of these trained individuals are not always readily available. Moreover, if there is an appreciable delay between the time of the accident or arrest and the time of drawing the blood sample, the percentage of blood-alcohol is likely to drop considerably.

Although one need not be a clinical expert to gather saliva, and only a small amount is necessary for testing purposes, one must reckon with a delay factor in terms of receiving the results of chemical analysis. As a rule, urine tests are satisfactory, but

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<sup>10</sup> Notice, however, that even the presumption that one is definitely under the influence of alcohol is rebuttable. During the years 1948-51, a research project was conducted at Michigan State University for the National Safety Council. Tests were run to evaluate the comparability and reliability of chemical tests generally to determine alcoholic influence. When concentration had reached or exceeded 0.15%, impairment of driving ability was noted in *every* case. In a majority of cases, impairment was evident at a figure appreciably below the 0.15% figure. See comment on this project in *People v. Miller*, 357 Mich. 400, 98 N. W. 2d 524, 526 (1959).

<sup>11</sup> It is highly important that police in making arrests for driving while under the influence follow a carefully established procedure designed to secure and record all relevant information procurable by observation and questioning. *McCormick*, Evidence § 176, at 377 (1954).



during the absorptive phase, concentration of alcohol in the secreted urine lags considerably behind blood-alcohol concentration, because excretion through the kidneys cannot occur until after the alcohol is absorbed into the blood, distributed through the aqueous parts of the body, and carried to the kidneys.<sup>12</sup> All factors considered, breath seems to be the most pragmatic substance from the standpoint of the average law enforcement agency's proficiency in obtaining potential blood-alcohol specimens.

In practical police work, breath analysis serves a useful purpose in providing easily obtainable specimens and a quick, reasonable test result to guide the officer. The concentration of alcohol in the exhaled (alveolar) breath reflects the alcoholic concentration of the blood circulated through the lungs. Approximately 2100 volume units of alveolar breath contain the same quantity of alcohol as does one volume unit of circulating blood. One fundamental principle which makes all breath tests possible is the basic gas law of Henry and Dalton, which for any given set of conditions defines the concentration of a volatile substance present as a vapor in an atmosphere at equilibrium with the liquid phase of the substance in solution. The conditions which determine this relationship are the nature of the solute and solvent, and the temperature, thus in the case of alcohol and blood, this relationship is ordinarily expressed as the ratio of the concentration of alcohol in the blood to that in the air at equilibrium with it—the coefficient of distribution.

Presently, there are several types of portable breath-testing units available, and if tests are properly conducted by experienced personnel, each type accurately measures the concentration of alcohol circulating in the blood. Breath has become a popular material for chemical analysis inasmuch as the sampling and analytical procedures are so simple that a trained police officer can make reliable analyses in most cases, and in addition, results are available when the officer most needs them, shortly after arrest.

All available units operate on essentially the same principle, that is, decolorization of a measured quantity of chemical by alcohol in the exhaled breath which has been trapped in a balloon.

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<sup>12</sup> Although saliva and urine are simple substances to collect, frequently during the emotional disturbance created by arrest or accident, the person will be quite unable to produce either type of fluid in quantity.

Among the perfected devices widely used are the drunkometer,<sup>13</sup> the intoximeter,<sup>14</sup> the alcometer,<sup>15</sup> and the breathalyzer;<sup>16</sup> except for scattered adverse criticism, results obtained through their use appear to be scientifically acceptable.<sup>17</sup>

### C. Judicial Acceptance of Breath Tests

With one outstanding exception,<sup>18</sup> appellate courts have unanimously approved the various tests outlined. Approval or

<sup>13</sup> This testing apparatus was developed by Doctor R. N. Harger, Professor of Biochemistry and Toxicology at the Indiana University School of Medicine. The test involves collecting a sample of expired breath in a balloon and titrating this breath into a reagent composed of potassium permanganate in sulfuric acid. Apparently, test validity is not influenced by acetone or breath odors. Doctor Harger is a noted authority in his field and has written extensively on matters pertaining to alcoholic intoxication. See, e.g., Harger, *Distribution of Absorbed Alcohol: Body Materials Which Yield Reliable Results*, 1 *J. Forensic Sciences* 27 (1956); *Some Practical Aspects of Chemical Tests for Intoxication*, 35 *J. Crim. L. C. & P. S.* 202 (1944).

<sup>14</sup> Developed and perfected by Doctor G. C. Forrester, this device follows the principles of the drunkometer, including the alcohol-carbon dioxide ratio. In final test procedures, magnesium perchlorate is used rather than the permanganate employed in the drunkometer. For use in court, the chemical unit must be prepared by a chemist or skilled technician so that he may testify concerning its original condition as well as to its change incidental to the test. Only a highly trained individual is qualified to conduct an analysis with the intoximeter whereas persons with little formal training may achieve competence in the operation of the drunkometer, alcometer, or breathalyzer.

<sup>15</sup> The alcometer utilizes iodine pentoxide as an oxidizing agent. Results are evaluated in terms of the dependability of the determination of iodine by means of the starch-iodine color measured photometrically. Developed by L. A. Greenberg and F. W. Keator of Yale University, this ingenious device is nearly foolproof. It is known as the most automatic of the breath testing devices. However, the unit does require a constant source of 110-volt alternating current and is both heavy and expensive. As a rule therefore, it must be used in police headquarters. For purposes of preserving adequate records, some police departments photograph the apparatus during testing situations, with the meter-reading showing the blood-alcohol percentage, the officer giving the test, the person being examined and the calendar all on one film.

<sup>16</sup> The breathalyzer, another photoelectric instrument, is a relatively new device and was invented by Captain R. F. Borkenstein of the Indiana State Police Department. A breath sample is passed through a solution of potassium dichromate and sulfuric acid which reacts with alcohol. As alcohol is absorbed, the solution, normally yellow, changes color; if there is no alcohol present, no color change occurs. The breathalyzer may be used on alternating current or on direct current from an automobile battery.

<sup>17</sup> Doctor Haggard and associates have published a criticism of the drunkometer, *The Alcohol of the Lung Air as an Index of Alcohol in the Blood*, 26 *J. Lab. Clin. Med.* 1527 (1941), to which Doctor Harger has replied, "Debunking" the Drunkometer, 40 *J. Crim. L. C. & P. S.* 497 (1949).

<sup>18</sup> In *People v. Morse*, 325 Mich. 270, 38 N. W. 2d 322 (1949), the Supreme Court of Michigan, by drawing an analogy to the ill-fated lie detector, found

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acceptance does not mean that courts have failed to recognize honest disagreement in scientific circles, but as a rule judicial opinions have considered reliability of the tests to be a matter affecting the weight of the evidence introduced, rather than its admissibility. In practice, test results are admitted whenever a qualified expert witness testifies that the particular test method employed is reliable and generally accepted as such by other experts in the discipline.<sup>19</sup>

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that testimony in the record failed to establish that the Harger drunkometer test had achieved general scientific recognition, and ruled that the admission into evidence of testimony concerning the drunkometer and the test results constituted reversible error. Two police officers with limited knowledge of chemistry and a young physician who had worked as a student assistant to Harger were called by the state as expert witnesses. The defendant, son of an eminent Detroit pathologist, produced five outstanding physicians as experts, one of whom (when referring to the drunkometer) stated that the "thing works like a slot machine." One of the other defense experts testified that most of the medical profession considered the method of testing unreliable. Undoubtedly the defense witnesses were reputable professional men but it was apparent that their personal contacts with the drunkometer were minimal and all based their testimony on articles written by authors critical of procedures employed in the drunkometer test. See Donigan, *Chemical Tests and the Law* 51 (1957).

In fairness to the Michigan opinion, it should be observed that the court did not say that the test method employed in any given case must be recognized and approved by *all* medical and scientific authorities. Obviously, it would be most impractical to insist that any scientific equipment of this nature must be accepted without exception or dissent.

The trial scene in *People v. Bobczyk*, 343 Ill. App. 504, 99 N. E. 2d 567 (1951), an action brought in the Municipal Court of Chicago, presents an interesting contrast. Defendant was charged with driving a motor vehicle while under the influence of intoxicating liquor. In his testimony, he admitted that before the collision he had consumed two glasses of beer, but he denied having had any other intoxicants through the course of the day. Daniel Dragel, Evidence Evaluator at the Chicago Crime Detection Laboratory, who operated the drunkometer in the case, testified that the test disclosed a 0.30% concentration of alcohol in the defendant's blood, and that in his opinion, the defendant was under the influence of alcohol at the time of arrest. Doctor Harger also testified for the prosecution as did Doctor Clarence Muehlberger, a widely known toxicologist. On the basis of this testimony, the defendant was convicted. And on appeal to the Appellate Court of Illinois, the conviction was affirmed. The question had never been presented to an Illinois court of review prior to this decision. The court, while rejecting the opinion in *People v. Morse*, *supra*, relied heavily upon a more recent Texas decision, *McKay v. State*, 155 Tex. Crim. 416, 235 S. W. 2d 173 (1950), which recognized the Harger drunkometer as scientifically acceptable. See also *People v. Garnier*, 20 Ill. App. 492, 156 N. E. 2d 613 (1959).

<sup>19</sup> "This court may recognize generally accepted scientific conclusions, even though there should be some who disagree with them. In all probability a scientist may be found who will disagree with practically every generally accepted scientific theory." *McKay v. State*, 155 Tex. Crim. 416, 419, 235 S. W. 2d 173, 174 (1950). The following cases are particularly applicable to the problem of expert testimony and the reliability of the various testing

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Although courts have recognized the accuracy of standard testing procedures and legislative enactments have lent credence to the conclusion that alcohol has a measurable psychophysical effect upon the human organism, one cannot overstress the necessity for supplying an adequate foundation before test results are offered in evidence.<sup>20</sup> Each facet of the testing situation should be thoroughly explained, including the methods employed and the manner in which the analysis was made.<sup>21</sup> When possible one should produce an expert witness who can attest not only to the scientific reliability of the chemical testing procedures followed but also vouch for their correct administration in the

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devices: *State v. Olivas*, 77 Ariz. 118, 267 P. 2d 893 (1954); *State v. Hunter*, 4 N. J. Super. 531, 68 A. 2d 274 (1949); *Toms v. State*, 95 Okla. Crim. 60, 239 P. 2d 812 (1952); *Jackson v. State*, 159 Tex. Crim. 228, 262 S. W. 2d 499 (1953); *Annot.*, 159 A. L. R. 209 (1945).

<sup>20</sup> In addition, one must be warned against complete reliance upon scientific evidence. Chemical symbols and arithmetical computations, though clinically infallible, may fall short of convincing a skeptical and unsympathetic jury, particularly in borderline cases. Objective proof of aberrational conduct is ordinarily easy to obtain and record. As a rule, police officers do not conduct haphazard searches for motorists who may be under the influence of alcohol. Before a motorist attracts the attention of an officer, he must have acted carelessly in some overt way, such as driving in a reckless manner, passing another car on a hill or around a curve, or weaving back and forth across the highway. And after being apprehended, the motorist may exhibit other characteristics suggestive of overindulgence in intoxicants. The officer normally checks the motorist's appearance, behavior, carriage and speech, and then proceeds to inquire as to when, where, and how much the subject has been drinking. Successful prosecution does not hinge upon a test-tube reaction alone, but rather upon the sum total of the officer's observations as substantiated by the results of the chemical test.

<sup>21</sup> Certified copies of official or unofficial reports concerning test analyses cannot qualify as adequate evidence to prove the authenticity, accuracy, or results of a chemical test performed to determine alcoholic influence. One cannot by-pass the need for testimony by qualified experts in the field, because a written laboratory report without more is hearsay and inadmissible as evidence. This does not mean that such records and reports do not serve a useful function, for they may be used for refreshing recollection, and when maintained in the usual course of business, are admissible to aid in proving elements of the case which do not involve expert conclusions and opinions. *Estes v. State*, 162 Tex. Crim. 122, 283 S. W. 2d 52 (1955). It is not absolutely necessary that the expert testifying have conducted every phase of the chemical analysis personally; if the analysis in question was conducted under his supervision and control, he is a proper party to testify concerning test results. *State v. Bailey*, 184 Kan. 704, 339 P. 2d 45 (1959). As a practical matter, in traffic courts, police courts, and generally in courts of the magistrate level, evidence is offered and received with a minimum of formality. Written laboratory reports are frequently accepted without further testimony or authentication, and since procedure is summary in nature and objections likely to be few, the practice continues. When these lower court convictions are appealed to courts of general jurisdiction, it is reasonable to assume that prosecuting authorities will be more alert to the need for accurate authentication and foundation testimony.

particular case being litigated. In order to qualify as an expert on all phases of the subject, one needs advanced training in chemistry and some basic training in physical medicine. Because of the nature of their training and practical experience, physicians, toxicologists, biochemists, and medical technologists usually are accepted as experts. Through limited training and experience, the ordinary police officer may learn to competently operate one or more of the breath-testing devices. Yet, obviously he cannot testify concerning the quality or strength of chemicals used or the chemical or mathematical formulas employed; nor can he interpret and analyze the numerical readings which indicate the existence of a given quantity of alcohol in the blood.<sup>22</sup>

Furthermore prosecutors must be warned against assuming that a given concentration of alcohol will produce substantially the same degree of intoxication in everyone, for individual tolerance and other subjective factors make this assumption false. An abstainer may perform subnormally when his blood-alcohol level reaches a threshold value of 0.02 to 0.04 per cent. However, as much as 0.08 to 0.09 per cent blood-alcohol concentration may be required to measurably impair the calm of a heavy drinker.<sup>23</sup>

It must also be recalled that test results reveal neither the amount of alcohol consumed nor the time when the drinking was done; but they do indicate the amount of alcohol remaining unburned in the blood at the time the specimen was obtained. Obviously the prosecutor is most directly concerned with the percentage of blood-alcohol present at the time of the incident in question. Although there may be an appreciable time lag between occurrence of the incident and the time of taking a specimen for analysis, there is ample authority upholding the admissibility of expert testimony estimating the percentage of blood-alcohol concentration present at the time of the event on the basis of the results of a test conducted subsequent to the event. Reliable estimates by expert witnesses may be made by a mathe-

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<sup>22</sup> *Alexander v. State*, 305 P. 2d 572 (Okla. Crim. App. 1956); *Hill v. State*, 158 Tex. Crim. 313, 256 S. W. 2d 93 (1953); *Omohundro v. County of Arlington*, 194 Va. 773, 75 S. E. 2d 496 (1953). As a rule, an individual who operates an intoximeter must be a qualified chemist or technician and will therefore be able to testify in court concerning the chemical phases of the test conducted. Qualifications for operation of the drunkometer, alcometer and breathalyzer are less exacting, and it is very likely that the operator himself will be unable to provide adequate information with respect to scientific principles involved in the testing situation.

<sup>23</sup> See note 8 *supra*.

matical process known as *extrapolation*. Given a known rate of elimination of blood-alcohol in the average person, an expert can reasonably estimate the percentage of blood-alcohol in the average person at the time of a certain event, based upon the quantity of alcohol in the blood as shown in the chemical test. An expert witness may present an acceptable estimate of the blood-alcohol concentration of a *particular* person if he is given definite facts from which he can determine the rate of elimination taking place in the individual's body.<sup>24</sup>

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<sup>24</sup> By taking two or more specimens from the individual during regularly spaced intervals, the expert can determine the rate of elimination in the individual on the particular occasion, and can further determine the blood-alcohol concentration in the same individual at the time of the event in question. Donigan, *Chemical Tests and the Law* 38 (1957); Newman, *Proof of Alcoholic Intoxication*, 34 Ky. L. J. 250 (1946). *Ray v. State*, 233 Ind. 495, 120 N. E. 2d 176 (1954), provides an example of the importance of valid expert opinion. The defendant had been charged with manslaughter following a fatal crash, and the drunkometer test revealed that one hour and forty-five minutes after the accident the percentage of alcohol in the defendant's blood was .139 per cent by weight. The prosecution posed a hypothetical question which, in substance, asked the expert witness, Doctor R. N. Harger, whether he could tell what the percentage of alcohol would have been at the time of the accident. Defendant's objection on the ground that the question called for a guess or broad conjecture was overruled. Doctor Harger then stated that the *minimum* alcoholic concentration an hour and forty-five minutes preceding testing would have been .165, although he explained that the percentage might have been higher because some persons are faster "burners" than others. The Supreme Court of Indiana ruled that the hypothetical question was proper in this instance and pointed out that the weight to be given the expert's testimony was for the jury to determine by considering his knowledge of the subject about which he testified.

In the following decisions, courts have approved admissibility of expert opinion concerning concentration of alcohol at the time of the incident, based upon results of delayed tests. *People v. Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8 (1953), *cert. denied*, 347 U. S. 931 (1954) (approximately 4 hours delay); *Nicholson v. City of Des Moines*, 246 Iowa 318, 67 N. W. 2d 533 (1954) (approximately 3½ hours delay); *State v. Stairs*, 143 Me. 245, 60 A. 2d 141 (1948) (approximately 4 hours delay). While alcohol concentration at the time of the event is usually higher than that prevailing at the time a sample is received, the converse may be true under extraordinary circumstances. If one should consume a considerable quantity of alcohol and become involved in an accident before the absorption phase is completed, a subsequent chemical test will likely show a blood-alcohol concentration *higher* than that existing at the time of the accident. See *Commonwealth v. Hartman*, 383 Pa. 461, 119 A. 2d 211 (1956). Attention is directed to the statutes of several states which limit admissibility of chemical-test evidence to those situations wherein specimens were taken within two hours of the event or within two hours of the time of arrest. For example, Minnesota provides that a court may admit evidence of the percentage of alcohol in a person's blood, if the test was taken voluntarily within two hours after commission of the offense. Minn. Stat. § 169.121 (1957). The statutes of Delaware, New York, Virginia, and Wisconsin contain similar provisions. For pertinent statutory citations, see note 2 *supra*.

## II. Constitutional and Statutory Restrictions

At this juncture, the great majority of courts will admit evidence of test results where, as is true in most cases, the subject voluntarily submits to testing. However, an arrested person's refusal to cooperate may raise further legal problems concerning the use of chemical tests: (a) the possibility that involuntary submission may constitute a violation of the privilege against self-incrimination; (b) that the taking of a body substance may amount to an unlawful search or seizure; (c) that the manner of taking the body substance could constitute a violation of due process; and (d) if a physician is involved, whether the time-worn physician-patient privilege applies when expert testimony is offered in court.

### A. Self-Incrimination

#### (1) *Scope of the Privilege*

A series of decisions handed down through the past century has determined that the Federal Bill of Rights, including the fifth amendment protection against self-incrimination, binds only the federal government.<sup>25</sup> In *Twining v. New Jersey*,<sup>26</sup> the Supreme Court of the United States held that the fourteenth amendment does not impose the self-incrimination restriction upon state action either under the privileges and immunities clause or as a requirement of fair trial under the due process clause of that amendment. The Court has more recently affirmed the due process part of this policy-making decision in *Adamson v. California*.<sup>27</sup> Nevertheless, a privilege against self-

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<sup>25</sup> *Feldman v. United States*, 322 U. S. 487 (1944); *Brown v. Walker*, 161 U. S. 591 (1896).

<sup>26</sup> 211 U. S. 78 (1908).

<sup>27</sup> 332 U. S. 46 (1947). In dissent, Mr. Justice Black, supported by Justices Murphy, Rutledge and Douglas, was of the opinion that the due process clause of the fourteenth amendment made all the guarantees of the Bill of Rights binding on the states. This, he believed, was the intention of the framers of the amendment, as indicated by the historical evidence. In a vigorous, well-documented attack on the Court's time-honored, natural law method of interpreting the fourteenth amendment, he contended that it was the intent of Congress, when passing that amendment, to guarantee the privileges of the Bill of Rights against abridgment by state action. *Id.* at 68-92. He also stated that the Court should give effect to that intent and cease to "roam at will in the limitless area of their own beliefs as to reasonableness." *Id.* at 92, quoting from *FPC v. Natural Gas Pipeline Co.*, 315 U. S. 575, 599, 601 n. 4 (1942). His proposals, though well phrased, were not

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incrimination does apply in every jurisdiction in the nation—in forty-eight states by constitution, and in the remaining two by statute. As the constitutions and statutes of the several states vary in terminology, so do the decisions interpreting the scope of the privileges provided for.

Historically, the privileges against self-incrimination has had little, if any, pertinency to the taking of body substances. As expressed in federal and state constitutions, the privilege provides a safeguard against being compelled to be a witness, being compelled to give oral testimony in court, and being compelled to produce in court (or in any formal governmental hearing) under judicial order, documents and other objects, the forced disclosure of which would amount to testimonial compulsion. In Dean Wigmore's words: "It is the employment of legal process to extract from the person's own lips an admission of his guilt."<sup>28</sup> The prohibition against compelling a man to be a witness against himself is a condemnation of the use of physical or moral compulsion to extract *communications* from him, and does not apply to the admissibility in evidence of his body substances.<sup>29</sup>

A clear majority of recent cases support the earlier decisions which applied the privilege only to testimonial compulsion.<sup>30</sup> However, the arena is not free from dissent. The Texas decisions are typical of the minority which adheres to a broader interpretation of the privilege. In *Apodaca v. State*,<sup>31</sup> the ac-

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new and have been specifically rejected in a long line of cases. See Notes, 33 Iowa L. Rev. 666 (1948); 46 Mich. L. Rev. 372 (1948); 58 Yale L. J. 268 (1949). The Court has very recently reiterated the long established doctrine that the fifth amendment privilege against self-incrimination is not applicable to the states. *Cohen v. Hurley*, 366 U. S. 117 (1961).

<sup>28</sup> 8 Wigmore, Evidence § 2263 (3d ed. 1940). See Note, Scientific Tests for Intoxication—a Constitutional Limitation, 39 Va. L. Rev. 215 (1953).

<sup>29</sup> *State v. Sturtevant*, 96 N. H. 99, 70 A. 2d 909 (1950); *State v. Gattion*, 60 Ohio App. 192, 20 N. E. 2d 265 (1938); *Inbau*, Self Incrimination 72 (1950); *McCormick*, Evidence § 126 (1954).

<sup>30</sup> *Holt v. United States*, 218 U. S. 245 (1910); *People v. Trujillo*, 32 Cal. 2d 105, 194 P. 2d 681 (1948); *People v. Conterno*, 170 Cal. App. 2d Supp. 817, 339 P. 2d 968 (1959); *Block v. People*, 125 Colo. 36, 240 P. 2d 512 (1951), *cert. denied*, 343 U. S. 978 (1952); *State v. Smith*, 47 Del. 334, 91 A. 2d 188 (1952); *Allredge v. State*, 239 Ind. 256, 156 N. E. 2d 888 (1959); *State v. Sturtevant*, 96 N. H. 99, 70 A. 2d 909 (1950); *State v. Titak*, 75 Ohio L. Abs. 430, 144 N. E. 2d 255 (1955); *State v. Cram*, 176 Ore. 577, 160 P. 2d 283 (1945); *Commonwealth v. Safis*, 122 Pa. Super. 333, 186 Atl. 177 (1936); *State v. Pierce*, 120 Vt. 373, 141 A. 2d 419 (1958). See 24 Minn. L. Rev. 444 (1940).

<sup>31</sup> 140 Tex. Crim. 593, 146 S. W. 2d 381 (1941).



cused had killed a pedestrian, and upon his arrest was required to furnish a urine specimen and perform a routine of muscular movements—the usual sudden turns, walking the line, and the finger-on-nose exhibition. In the opinion of the examiners, both sets of tests indicated alcoholic intoxication, but the appellate court ruled that compelling such action violated the privilege against self-incrimination.

Fifteen years later, in *Trammell v. State*,<sup>32</sup> the Texas Court of Criminal Appeals subscribed to the same strict principle announced in *Apodaca*, which required express consent of the accused before submission to a clinical-symptom test or chemical test of the breath or body fluids. In the *Trammell* case, the accused was injured in a traffic collision and while still in an unconscious state, was promptly transported to a hospital, where a specimen of blood was extracted from his arm. At the trial a toxicologist testified that the blood sample had been analyzed under his supervision. Over objection by the defense, the witness stated that the alcoholic concentration in the sample was 0.328 per cent. He further testified that no authority would disagree that such alcoholic concentration indicated definite intoxication. On appeal, the Texas Court of Criminal Appeals applied the self-incrimination privilege to this type of compelled conduct, thereby reversing the trial court's admission of the testimony, and proceeded to consider whether the defendant had waived the privilege. There was no testimony showing that the accused had consented to the taking of the blood sample, nor was there testimony that he did not assent or agree. The appellate court held that the state failed to prove that the specimen was taken with the consent of the accused, and thus the accused had not waived his privilege against self-incrimination. Consequently, the testimony of the toxicologist was inadmissible.<sup>33</sup>

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<sup>32</sup> 162 Tex. Crim. 543, 287 S. W. 2d 487 (1956): Annot., 25 A. L. R. 2d 1407 (1952).

<sup>33</sup> The Texas decision has been clarified in a later decision, *Sartain v. State*, 346 S. W. 2d 337 (Tex. Crim. 1961). Following arrest for driving while intoxicated, officers took the defendant to a physician's office where a blood sample was taken. The officers testified that the defendant had agreed and consented to take a blood test. Defendant admitted that the blood sample was taken from him but denied giving his consent and denied having been asked by the officers if he would take the test. Holding that a written consent was not necessary for the taking of a blood specimen, the Court of Criminal Appeals distinguished this case from *Trammell v. State*, noting that in the latter case, it was undisputed that no consent was given, the accused being unconscious, while in the case at bar the issue was clearly raised by the evidence. Judgment of conviction in trial court was affirmed.

Contrary, then, to the traditional scope of the privilege against self-incrimination is this second or broader view which extends the protection of the privilege to compelled conduct other than giving testimony and producing in court documents and other objects. Under this view, *passive submission* may be compelled but not *active cooperation*.<sup>34</sup> Thus the accused might be required to submit to finger-printing, a fluoroscopic examination or even a purging process,<sup>35</sup> but he could not be compelled to provide a sample of his handwriting or to aid in re-enacting the alleged crime. Unfortunately, the fine line distinguishing enforced activity does not lend itself to easy and immediate discernment, and it seems inevitable that the drawing of subtle if not useless distinctions will lead to indistinguishable conflicts among judicial opinions.<sup>36</sup>

The privilege against self-incrimination has been afforded its broadest interpretation by Justices Black and Douglas in recent concurring and dissenting opinions. They would extend the protection of the privilege even to passive submission. Neither Justice would draw a constitutional distinction between involuntary extraction of words, involuntary extraction of the contents of the stomach, and involuntary extraction of body fluids, when the evidence obtained is used to convict.<sup>37</sup> Mr. Justice Black has

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<sup>34</sup> For a complete discussion of pertinent authorities, see McCormick, Evidence § 126 (1954); Morgan, The Privilege Against Self Incrimination, 34 Minn. L. Rev. 1, 38 (1949).

<sup>35</sup> Nowhere in *Apodaca* was reference made to *Ash v. State*, 139 Tex. Crim. 420, 141 S. W. 2d 341 (1940), a case decided by the same court only one year previously. In *Ash v. State*, the defendant was convicted on a charge of receiving and concealing stolen property, which consisted of two diamond rings. When apprehended, the defendant was observed by the arresting officers to swallow objects, apparently metallic, which they believed to be the rings in question. He was taken to a hospital, subjected to fluoroscopic examination and enema against his will, and the stolen rings were thus recovered. Dismissing defendant's contentions that he had been denied due process of law and forced to incriminate himself, the reviewing court held: that the arrest and search were legal since possession of the rings and secreting them in the presence of the officers constituted a felony committed in their presence; that the fluoroscopic and purging process was conducted by experts; that there was no evidence of cruel or inhuman treatment; that the only force used was employed to combat the physical resistance of the defendant. In attempting to reconcile the two Texas decisions, one might point out that in *Ash* the court emphasized enforced passivity, while in *Apodaca*, emphasis was apparently upon enforced activity through being "compelled to do things." This same distinction between *passivity* and *activity* is clearly illustrated in *State v. Griffin*, 129 S. C. 200, 124 S. E. 81 (1924).

<sup>36</sup> Numerous cases pointing up the conflicting views and their application in varied fact situations are collected in Annot., 171 A. L. R. 1144 (1947).

<sup>37</sup> See the dissenting opinions of Justices Black and Douglas in *Breithaupt v. Abram*, 352 U. S. 432, 442 (1957).

said: "[A] person is compelled to be a witness against himself when . . . incriminating evidence is forcibly taken from him by a contrivance of modern science."<sup>38</sup> Mr. Justice Douglas agreed and stated that "words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent . . . [----] inadmissible because of the command of the Fifth Amendment."<sup>39</sup> Both Justices assert that a standard of due process for trial by the federal government should likewise be observed by state authorities and continually insist that inhibitions on governmental action inherent in the fifth amendment should be imposed upon the states through the fourteenth amendment.<sup>40</sup>

Dissenting in *Breithaupt v. Abram*,<sup>41</sup> they asserted without equivocation, that under our system of government, police cannot compel people to furnish evidence necessary to send them to prison. In the opinion of the dissenting Justices, if there is no affirmative consent it is all the same if (1) the victim states unequivocally that he objects, (2) resists violently, or (3) is unable to protest; in any event consent is lacking and that being the case distinctions are invalid.

Mr. Justice Douglas has noted that judges and lawyers often forget that the Anglo-American system of criminal law is designed to reduce police control and increase judicial control.<sup>42</sup> The Black-Douglas dissents constantly remind us of this very important principle and one cannot deny the import of their pleas for a rational consideration of individual rights. However, sometimes comparatively unimportant individual interests are unnecessarily overemphasized at the expense of legitimate governmental interests. Granted, there is an urgent need to provide protection against torture, both physical and mental; yet it appears far-fetched to insist that justice will perish simply because the accused is subject to a duty to respond to orderly governmental inquiry.<sup>43</sup> Actually, Mr. Justice Douglas has conceded that "an accused can be compelled to be present at trial, to stand, to sit,

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<sup>38</sup> *Rochin v. California*, 342 U. S. 165, 175 (1952) (Black, J., concurring).

<sup>39</sup> *Id.* at 179 (Douglas, J., concurring).

<sup>40</sup> See note 31 *supra*.

<sup>41</sup> 352 U. S. 432, 442 (1957) (Douglas, J., dissenting).

<sup>42</sup> Douglas, *The Means and the End*, 1959 Wash. U. L. Q. 103, 110.

<sup>43</sup> See the majority opinion written by Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 319 (1937).

to turn this way and that, and to try on a cap or a coat.”<sup>44</sup> Even he therefore sanctions a very low degree of compulsion. All legal writers and jurists agree that somewhere along the continuum compulsion becomes obnoxious; in Douglas’ opinion this occurs at a point short of outright physical coercion. The exact point at which this line must constitutionally be drawn has never been clearly defined nor agreed upon and very likely never will be.

## (2) “Consent” by Unconscious Persons

In many accident cases, the subject is actually unconscious at the time the test is given or the sample drawn and is therefore in no position to voice disapproval. Regardless of this obvious deprivation of privacy, most authorities have held that evidence of test results is admissible.<sup>45</sup> Moreover, the fact that a person has sufficient alcohol in his blood to make him an unsafe driver does not automatically render him incapable of “consenting” to a chemical test.<sup>46</sup> The general rule is that even if the accused is mentally incapable of perceiving or comprehending events and his surroundings, he is still legally capable of consent. Yet it is conceivable that extreme intoxication will point to lack of real consent and necessitate rejection of chemical-test evidence in those jurisdictions where express consent is a condition precedent to the admissibility of test results.<sup>47</sup> However, a majority of jurisdictions have admitted chemical-test evidence without proof of actual consent, barring objection on constitutional grounds.<sup>48</sup> Even in jurisdictions where consent is required,

<sup>44</sup> *Rochin v. California*, 342 U. S. 165, 179 (1952) (Douglas, J., concurring).

<sup>45</sup> *People v. Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8 (1953), *cert. denied*, 347 U. S. 931 (1954). While Mrs. Haeussler was unconscious, a hospital attendant withdrew five cubic centimeters of blood from her arm. Test results were admitted in evidence, the Supreme Court of California holding that this procedure did not violate either the privilege against self-incrimination or the right to due process. See also *Breithaupt v. Abram*, 352 U. S. 432 (1957); *Block v. People*, 125 Colo. 36, 240 P. 2d 512 (1951), *cert. denied*, 343 U. S. 978 (1952); *State v. Sturtevant*, 96 N. H. 99, 70 A. 2d 909 (1950).

<sup>46</sup> *Bowden v. State*, 95 Okla. Crim. 382, 246 P. 2d 427 (1952); *Jones v. State*, 159 Tex. Crim. 29, 261 S. W. 2d 161 (1953), *cert. denied*, 346 U. S. 830 (1953).

<sup>47</sup> In two states the case law requires express consent. *State v. Wardlaw*, 107 So. 2d 179 (Fla. 1958); *McCreary v. State*, 307 S. W. 2d 948 (Tex. Crim. App. 1957). Chemical-test legislation in Colorado, New Jersey, North Dakota, Oregon, and Virginia requires the person’s express consent. See relevant statutes cited note 2 *supra*. In Minnesota, admissibility of test results is dependent upon a voluntary submission. Minn. Stat. § 169.121 (1957). See *State v. McCarthy*, 104 N. W. 2d 673 (Minn. 1960).

<sup>48</sup> Where the subject is unconscious at the time the sample is drawn, in actuality he neither consents nor refuses. Without express statutory prohibition or objection raised on constitutional grounds, evidence of test results is generally admissible in such cases.

it is generally held that written consent is not necessary;<sup>49</sup> nor is it necessary to warn the accused, before he submits to a chemical test, that the results might be used against him in a subsequent criminal proceeding.<sup>50</sup>

## B. Unlawful Search and Seizure

Whether a search of private property or personal effects is reasonably necessary must be determined by the facts and circumstances of the individual case.<sup>51</sup> Normally, a search warrant must be obtained, but when the search is incident to a lawful arrest, failure to obtain a warrant does not necessarily make the search unreasonable.<sup>52</sup>

The fourth amendment prohibits unreasonable searches and seizures,<sup>53</sup> but until very recently (the *Wolf* case) the Supreme Court of the United States had consistently held that the amendment did not necessarily preclude the use in a criminal trial of evidence obtained by an unreasonable search or seizure.<sup>54</sup> Although the Court had held that such illegally obtained evidence

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<sup>49</sup> Written consent is required in Oregon by statute. Ore. Rev. Stat. § 483.630 (1955). In Texas, a confession statute requires that a confession obtained from an accused under arrest be in writing. However, the Texas courts have not extended this statutory requirement to the obtaining of specimens for chemical testing and oral consent is sufficient. *Tealer v. State*, 163 Tex. Crim. 629, 296 S. W. 2d 260 (1956); *Brown v. State*, 156 Tex. Crim. 144, 240 S. W. 2d 310 (1951).

<sup>50</sup> *State v. Duguid*, 50 Ariz. 276, 72 P. 2d 435 (1937); *People v. Hardin*, 138 Cal. App. 2d 169, 291 P. 2d 193 (1955).

<sup>51</sup> "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and the circumstances—the total atmosphere of the case." *Rabinowitz v. United States*, 339 U. S. 56, 66 (1950), *overruling* *Trupiano v. United States*, 334 U. S. 699 (1948). For an acute analysis of contemporary search and seizure problems, see, *Kamisar, Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure* (1961), Ill. Law Forum 78; *Kaplan, Search and Seizure: A No Man's Land in the Criminal Law*, 49 Calif. L. Rev. 474 (1961).

<sup>52</sup> *Weeks v. United States*, 232 U. S. 383 (1914) (dictum); *Machen, Law of Search and Seizure* 66 (1950); *cf. McDonald v. United States*, 335 U. S. 451 (1948); *Harris v. United States*, 331 U. S. 145 (1947); *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931).

<sup>53</sup> U. S. Const. amend. IV.

<sup>54</sup> *Wolf v. Colorado*, 338 U. S. 25 (1949). It should be observed that in *Wolf*, although the court held that the illegally obtained evidence need not be excluded, it also held that provisions of the fourth amendment were enforceable against unreasonable state action through the due process clause of the fourteenth amendment. The by-products of *Wolf* have been thoroughly analyzed in *Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 Minn. L. Rev. 1083 (1959).

was inadmissible in federal courts, the exclusionary rule did not apply to the states.<sup>55</sup> By 1960, time had set its face against the rationalization of *Wolf*, for in that year the Court in *Elkins v. United States*,<sup>56</sup> held that evidence obtained by state officers, which violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment, was inadmissible over the defendant's timely objection in a federal criminal prosecution. In that case, the Court overruled the well entrenched "silver platter" doctrine which in essence had allowed the admission in federal courts of evidence illegally obtained by state officers where there was no participation by federal agents. However, *Elkins* did not alter the power of state courts to admit or exclude evidence regardless of its source.

In *Mapp v. Ohio*,<sup>57</sup> decided in June 1961, the Court ruled that since the fourth amendment's right of privacy had been declared enforceable against the states through the due process clause of the fourteenth amendment, it was likewise enforceable against them by the same sanction of exclusion as is used against the federal government. By extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it thus became logically and constitutionally necessary that the exclusion doctrine, an essential part of the right to privacy, be made an essential ingredient of the rights afforded by *Wolf*.<sup>58</sup> Criticism of such a radical departure from

<sup>55</sup> *Weeks v. United States*, 232 U. S. 383 (1914). See Fed. R. Crim. P. 26.

<sup>56</sup> 364 U. S. 206 (1960).

<sup>57</sup> 6 L. Ed. 2d 1081 (1961). Defendant had been convicted of knowingly having had in her possession and under her control certain obscene literature and photographs in violation of Ohio law. The Supreme Court of Ohio in *State v. Mapp*, 170 Ohio 427, 166 N. E. 2d 387 (1960), ruled that her conviction was valid even though it was based primarily upon the introduction into evidence of articles unlawfully seized by police during an unlawful search of the defendant's home. On appeal the United States Supreme Court, by a 5-3 decision, reversed and held that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court. Mr. Justice Stewart entered a memorandum stating that he expressed no view as to the merits of the constitutional issue which the court had decided.

<sup>58</sup> Essential to the majority's argument against *Wolf* was the proposition that the *Weeks* rule of exclusion derived not from the supervisory power of the Court over the federal judiciary, but from Constitutional requirement. The exclusionary rule thus became an essential part of both the fourth and fourteenth amendments. In a sense it is regrettable that the Court, in overruling *Wolf*, did so in such broad terms, apparently applying the full body of federal search and seizure law to the states. It becomes difficult to realize that the many minor as well as major irrationalities in the law of search and seizure have suddenly achieved Constitutional dimen-

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precedent may well follow, and indeed, the effects of this landmark decision are far from apparent at this juncture. One fact is certain in the gathering haze, and that centers about the new importance of the searches and seizures question as it relates to methods employed in procuring samples for chemical testing.

The Supreme Court of the United States has not yet ruled on the reasonableness of an internal search of the body or its substances; nor has it adopted a fourth amendment standard for such searches.<sup>59</sup> And although lower federal courts and state courts have passed upon the problem on numerous occasions, one fact stands out—their opinions are not always in accord and their analogies are frequently strained.

### (1) *The Federal Decisions*

Although not directly related to the chemical-testing problem, a Ninth Circuit decision in *Blackford v. United States*,<sup>60</sup> inched close to a solution of the general problem of internal

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sion. In overruling *Wolf* the majority found support in the established doctrine that the admission in evidence of an involuntary confession renders a state conviction constitutionally invalid. As pointed out in the dissenting opinion of Mr. Justice Harlan, the analogy does not necessarily follow. The coerced confession rule does not exclude all statements illegally obtained, otherwise a statement procured during a period of illegal detention might well be classified as unlawfully seized evidence, illegally obtained, and be subject to exclusion on that basis. The Court has consistently refused to reverse state convictions resting upon the evidential use of such statements. It is possible that the Court in future decisions will recognize the virtues of federalism by applying exclusionary rules to the states only in cases of serious breach. Mr. Justice Black, in concurring with the majority result, did not subscribe to the view that the *Weeks* rule of exclusion derived from the fourth amendment. It was his premise that the end result could be achieved by bringing the fifth amendment to the aid of the fourth, recognizing a close relationship between the fourth and fifth amendments so explicitly outlined by the Court in *Boyd v. United States*, 116 U. S. 616 (1886). Concluding that the fourth amendment ban against unreasonable searches and seizures should be considered together with the fifth amendment ban against compelled self-incrimination, Mr. Justice Black found a constitutional basis emerging which not only justified but required the exclusionary rule. But regardless of the fourth-fifth coalition, the Court has consistently reiterated the doctrine that the fifth amendment privilege against self-incrimination is not applicable to the states. *Cohen v. Hurley*, 366 U. S. 117 (1961).

<sup>59</sup> For a comprehensive treatment of the historical implications of the fourth amendment, see Fraenkel, *Search and Seizure Developments in Federal Law Since 1948*, 41 Iowa L. Rev. 67 (1956); Trimble, *Search and Seizure Under the Fourth Amendment as Interpreted by the United States Supreme Court* (pts. 1-4), 41 Ky. L. J. 196, 388, 42 Ky. L. J. 197, 423 (1952-1954).

<sup>60</sup> 247 F. 2d 745 (9th Cir. 1957), *cert. denied*, 356 U. S. 914 (1958). See Note, 106 U. Pa. L. Rev. 1165 (1958).

bodily search. Blackford was stopped by customs officers at the international boundary line in California.<sup>61</sup> He was asked to remove his coat, whereupon numerous puncture marks were revealed in the veins of his arms. Further examination of his person disclosed that the defendant may have concealed a quantity of heroin in a body cavity. Thereafter he was taken to a hospital where, despite his denial of concealment and his resistance to search, qualified medical personnel removed the heroin. In a subsequent prosecution for illegal importation and concealment of heroin, the defendant's motion to suppress the evidence thus obtained was denied. The court of appeals affirmed the denial, holding that the search and seizure did not violate either the fourth or fifth amendment. But in arriving at its decision, the court specifically indicated that the fourteenth amendment did provide a bulwark against unreasonable searches and seizures of *persons* as well as *places*. The court applied the test of reasonableness to the conduct of the officers, noting that this was a stricter test than that applied to state proceedings under the due process clause of the fourteenth amendment.<sup>62</sup>

The fourteenth amendment draws no precise distinction between searches of property and searches of the person, but accepted values concerning the dignity of the human body compel a conclusion that some reasonable limit should be placed upon internal bodily searches. Those espousing an extreme point of view, dedicated to the idea that the human body is inviolate, as-

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<sup>61</sup> Search of persons, vehicles and vessels by customs inspectors is authorized by Rev. Stat. § 3061 (1875), 19 U. S. C. § 482 (1958); 49 Stat. 521 (1935), 19 U. S. C. § 1581 (1958); 46 Stat. 748 (1930), 19 U. S. C. § 1582 (1958).

<sup>62</sup> Although stating that the test of reasonableness was more stringent than that required by the fourteenth amendment, the court nonetheless relied on *Rochin v. California*, 342 U. S. 165 (1952) and *Breithaupt v. Abram*, 352 U. S. 432 (1957), fourteenth amendment cases, as furnishing the most practical guides. The court referred to several material factual differences which led it to conclude that *Rochin* was not dispositive of *Blackford*. *Rochin* was subjected to a series of abuses and violations of his rights, commencing with an unlawful entry into his home, continuing with the forcible attempt by officers to prevent him from swallowing capsules, and culminating in a brutal episode of stomach pumping. On the other hand, police officers made no attempt to force evacuation of the heroin from Blackford's rectum, and the actual physical examination was conducted by qualified medical personnel, under sanitary conditions, and with the use of medically approved procedures. Furthermore, the officers in *Rochin* had only a suspicion that the defendant had swallowed narcotic pills, but the officers in *Blackford* had almost incontrovertible proof that their subject possessed hidden narcotics. The court also took judicial notice of the fact that in the preceding two and one-half years, twenty per cent of the smuggling cases in the San Diego area had involved narcotics in body cavities.



sert that almost all internal searches are unreasonable.<sup>63</sup> Yet, this thesis appears undesirable in that a total prohibition of internal bodily searches would unnecessarily place valuable evidence beyond the reach of law enforcement officers. The *Blackford* decision indicated that there is nothing in the Bill of Rights which makes a body cavity a legally-protected sanctuary for carrying narcotics. Granted, the court decided only the precise issue before it and did not offer *carte blanche* authority to subject a human being to *any* type of physical examination, but the court did state that it considered pain and danger to be minimal factors in the instant situation, particularly since much of the pain resulted from the defendant's own resistance.

Several lower federal court cases subsequent to *Blackford* have followed it approvingly. In *King v. United States*,<sup>64</sup> the Fifth Circuit cited *Blackford* in upholding a similar search, noting the sterility which would follow efforts at law enforcement if searches of this type were to be prohibited. Similarly a federal district court has upheld as reasonable the search of a narcotics addict as he crossed the border from Mexico to the United States.<sup>65</sup> Following thorough search a drug container was extracted from the defendant's rectum by a physician under police direction, and judicial sentiment decreed that this method of search did not "shock the conscience" within the meaning of the phrase as used by the Supreme Court in *Rochin v. California*.<sup>66</sup>

<sup>63</sup> This seems to represent the viewpoint of Mr. Chief Justice Warren and Justices Black and Douglas who dissented in *Breithaupt v. Abram*, 352 U. S. 432, 440 (1957). Cf. *United States v. Townsend*, 151 F. Supp. 378 (D. D. C. 1957). In the *Townsend* case, defendant was charged with carnal knowledge of a girl under sixteen, and there was evidence that the complaining witness was menstruating at the time of the alleged offense. Informed that chemical tests would be run on his penis to determine the presence of blood, defendant offered physical resistance, but a police detective overcame this resistance by twisting the defendant's arms behind his back. Meanwhile a sergeant pulled down the defendant's trousers and swabbed his penis with patches of chemically treated cotton. In a well documented opinion Judge Youngdahl concluded that the defendant had been deprived of due process of law under the fifth amendment. Aside from the fact that evidence obtained in this case was of doubtful probative value, it must be noted that the defendant was taken to police headquarters in the middle of the night and denied the right to contact an attorney.

<sup>64</sup> 258 F. 2d 754 (5th Cir. 1958).

<sup>65</sup> Application of Woods, 154 F. Supp. 932 (N. D. Cal. 1957), *appeal denied*, 249 F. 2d 614 (9th Cir. 1957). Two recent federal decisions have cited *Blackford* with approval. *Witt v. United States*, 287 F. 2d 389 (9th Cir. 1961); *Murgia v. United States*, 285 F. 2d 14 (9th Cir. 1960). *Accord*, *United States v. Michel*, 158 F. Supp. 34 (S. D. Tex. 1957).

<sup>66</sup> 342 U. S. 165 (1952). More extensive comment regarding due process aspects of the *Rochin* decision follows at text accompanying notes 76-88 *infra*.

Where more radical search tactics have been employed, courts have not been hesitant about declining to apply the seal of reasonableness.<sup>67</sup>

*Blackford* and similar decisions may present a common-sense solution of the search and seizure problem relating to the seizure of *foreign substances* from body cavities, but they leave unanswered the question whether constitutional prohibitions should be extended to the forceful obtaining of *body substances*. Analogies may clarify some of the patent ambiguities but analogies fail to be convincing unless translated into practical terms. Dean Ladd and Professor Gibson have stated that the constitutional "provision against unlawful searches and seizures was designed to serve as a security to persons in their possessions and effects, to protect the individual from an invasion of his home without proper warrant . . . and to protect the individual from being searched personally for his possessions without reason or suspicion."<sup>68</sup> In essence this type of protection deals with things which a person might possess and with the privacy of his home rather than with his personal make-up or physical condition. Thus, they would advocate that a test of body substances or a physical examination should not come within the range of the constitutional restraint upon unlawful search and seizure. The argument is unassailable that history supports this contention, for the fourth amendment originally was designed to curb the nefarious practice of arbitrary government invasion of private homes. It is difficult to believe that the framers of the Constitution could have envisaged the uses to which biochemistry might be put in a twentieth century world, and there is strong reason to doubt that they would have included a search for body substances as such within the ambit of their prohibitory sanctions. If case law recognized and enforced this proposition, the search and seizure problem would not beg solution, but precedents relating to searches and seizures of body substances are few in number and rarely reveal unity of sentiment, let alone accuracy in research. For the moment we must consult state-court decisions for pertinent chemical-test cases, yet only the future will

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<sup>67</sup> Two district courts have held that the use of a stomach pump and an emetic to recover swallowed narcotics is unreasonable. *United States v. Willis*, 85 F. Supp. 745 (S. D. Cal. 1949); *In re Guzzardi*, 84 F. Supp. 294 (N. D. Tex. 1949).

<sup>68</sup> Ladd & Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 Iowa L. Rev. 191, 216 (1939).

determine the extent to which state tribunals may proceed in effectuating the right to freedom from arbitrary intrusions.

## (2) *The State Decisions*

The Supreme Court of California, in *People v. Duroncelay*,<sup>69</sup> ruled that the taking of a blood sample did not constitute an unlawful search and seizure. There was no evidence that the defendant had consented to the taking of the test; nor, on the other hand, was there evidence that he verbally protested against its being performed. There was evidence, however, that he drew his arm away when the nurse first attempted to insert the needle and that an ambulance driver then held his arm while the nurse extracted the blood. Affirming the trial court's ruling admitting the chemical-test results, the supreme court found that there was a lawful arrest in this instance and stated that the search was not unlawful merely because it preceded, rather than followed, the arrest.<sup>70</sup> A search may constitutionally be made either before or after arrest if reasonable grounds for making an arrest exist at the time of the search. It was not apparent exactly when the arrest had been made, but since the defendant was unconscious for a greater part of a forty-eight hour period, it would be assumed that the arrest took place after that time.

Some courts, however, have been more lenient with intoxicated offenders. Despite the fact that Iowa did not adhere to the rule excluding evidence obtained through an unreasonable search and seizure, the Supreme Court of Iowa has held evidence of a blood test inadmissible when blood was obtained from the body of an unconscious motorist, no arrest having been made or in-

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<sup>69</sup> 48 Cal. 2d 766, 312 P. 2d 690 (1957).

<sup>70</sup> Several years ago, the Supreme Court of Arizona, in *State v. Berg*, 76 Ariz. 96, 259 P. 2d 261 (1953), ruled that forcefully obtaining a breath specimen for chemical-testing purposes did not violate the searches and seizures provision of the Arizona Constitution. Following arrest for driving while under the influence of intoxicating liquor, the defendant refused to submit to a drunkometer test. Despite his strenuous objections, police officers strapped him to a chair, and while one held the defendant's head steady, another captured his breath by means of a rubber suction bulb and tube. Holding that this police action did not constitute an unlawful search and seizure, the appellate court observed that the defendant was not forced to exhale breath from his lungs inasmuch as he exhaled voluntarily and, in fact, of necessity to survive. The moment his breath passed his lips, it was no longer his to control but became part of the surrounding atmosphere. Thus the officers had the lawful right to capture his breath for use as evidence. Under the circumstances, this was a novel holding but not convincing as a precedent, particularly with reference to the factor of volition.

formation filed.<sup>71</sup> The defendant, painfully injured in an automobile collision, was transported to a nearby hospital for treatment. While he was on the operating table, a coroner from another county proceeded to draw blood from his arm, without requesting the consent of the defendant's wife, who was waiting in the hospital corridor. Here, then, was a situation where a volunteer, without legal warrant and without express or implied assent, drew blood from an unconscious person to insure the success of possible future prosecution. In rejecting expert testimony relative to chemical-test results, the majority did not rely on unreasonable search and seizure or lack of due process but was content to rest the decision upon its abhorrence of the coroner's insensate behavior.<sup>72</sup>

A recent Wisconsin case, *State v. Kroening*,<sup>73</sup> rejected chemical-test evidence on grounds of unreasonable search and seizure. Following an automobile accident, the defendant was admitted to a hospital where a blood sample was taken by a registered nurse with the consent of the attending physician, at the request and upon the direction of the district attorney. The blood sample was drawn while the defendant was unconscious or at the most semiconscious—hence taken without his real consent. He was not arrested on any charge until after the coroner's inquest nine days later. The state contended that the taking of the blood sample was not a search and seizure in the constitutional sense but merely a part of a physical examination; nevertheless, the court disagreed, holding that a search and seizure and a physical examination are not necessarily mutually exclusive.<sup>74</sup> The court recognized that a search and seizure incidental to a lawful arrest would not violate constitutional rights of the person searched, but it found that the lapse of time in this case between search and arrest was far too long to support a conclusion that this

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<sup>71</sup> *State v. Weltha*, 228 Iowa 519, 292 N. W. 148 (1940).

<sup>72</sup> In *Weltha* the court refused to overrule its prior decision in *State v. Tonn*, 195 Iowa 94, 191 N. W. 530 (1923), which held proper the admission of the analysis of blood taken from the defendant without his consent but at the time he was under arrest. Yet the court expressly stated that, if valid, the *Tonn* case was to be confined to its precise facts. In *State v. Sturtevant*, 96 N. H. 99, 70 A. 2d 909 (1950), the Supreme Court of New Hampshire noted that the view entertained in *Weltha* did not prevail in that state.

<sup>73</sup> 274 Wis. 266, 79 N. W. 2d 810 (1956). Note, 41 Marq. L. Rev. 93 (1957).

<sup>74</sup> "We do not understand that the constitutional provision in question forbids officers to go through one's pockets but permits them to go through his veins." 274 Wis. at 273, 79 N. W. 2d at 815.

search was an incident to the arrest. The court further observed that admitting evidence in violation of the defendant's rights under the state constitution constituted a denial of due process under Wisconsin law, and that violation by the state of its own constitution would inevitably deny the defendant due process within the meaning of the fourteenth amendments.<sup>75</sup>

It is apparent that the foregoing decisions have stressed two basic factors in determining whether a search and seizure would be unlawful under the circumstances: (1) time of search in relation to arrest; and (2) presence or absence of unreasonable, abusive physical force. If little or no force is employed and the

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<sup>75</sup> A later decision by the Supreme Court of Michigan in *Lebel v. Swincicki*, 354 Mich. 427, 93 N. W. 2d 281 (1958), deserves consideration. At the direction of a physician, blood was drawn from an unconscious motorist who was not under arrest at the time. Chemical-test evidence was admitted in the trial court, but the Supreme Court of Michigan held the evidence inadmissible as a violation of the Michigan Constitution prohibiting unreasonable search and seizure. The majority opinion stressed the fact that the blood sample was taken in violation of the defendant's right of security to his person and saw no distinction in principle between obtaining a blood sample from an unconscious person and taking such from a conscious person by force. Moreover, the court concluded that the majority opinion in *Breithaupt* had held that evidence against *Breithaupt* had been obtained in violation of the fourth amendment, and further observed that provisions of the Michigan Constitution were identical in substance with those of the fourth amendment. If the Michigan court's assumptions are correct, one would not be in a position to deny the validity of its final decision, but it is submitted that the majority opinion in *Breithaupt* did not hold that the evidence in that case was obtained in violation of rights protected by the fourth amendment; only by strained implication can one reach such a conclusion.

In *State v. Wolf*, 164 A. 2d 865 (Dela. 1960), the Supreme Court of Delaware has come to the defense of the unconscious motorist. Within two hours after accident, a blood sample was taken from subject offender by a qualified physician. The defendant had not been placed under arrest. Approximately two weeks later the defendant was arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor. Defendant filed a motion to suppress the results of the analysis of his blood sample on the ground that the taking was an illegal search and seizure in violation of the Delaware Constitution. The superior court thereupon certified the question to the supreme court of that state. The supreme court found for unlawful search and seizure, following *Weltha*, *Kroening*, and *Swincicki*, distinguishing *Duroncelay* on the ground that the blood sample in that case had been taken as an incident to lawful arrest. Nevertheless, the court did note that the instant situation could be cured by appropriate legislative action. By obtaining a license to drive, suggested the court, the applicant, by accepting, would be deemed to have given his consent to chemical analysis of body fluids. Implied consent legislation is discussed *infra*, in text accompanying notes 92-101.

The Supreme Court of Wisconsin in *Martell v. Clingman*, 11 Wis. 2d 296, 105 N. W. 2d 446 (1960), has lately rejected the defense of unreasonable search and seizure in the case of an unaware defendant. A motorist, while in semi-conscious condition and not under arrest, voluntarily urinated in a bottle held by the police, without realizing that the officers were intent on obtaining evidence as to alcoholic content. Held: search and seizure were not unreasonable under the circumstances.

search is conducted by qualified personnel at or near the time of arrest, it is likely that judicial disfavor and rebuff will be kept at a minimum. On the other hand, if the search and seizure are made without due regard to time of arrest and where elements of force are obvious, one might expect to cope with strong judicial resentment. Between these extremes of conduct, however, lies a twilight zone where predictions might well go awry, most notably in these times of constitutional uncertainty.

### C. Due Process

A third constitutional problem is whether the chemical-test procedure violates due process.<sup>76</sup> A leading analogous Supreme Court decision is *Rochin v. California*.<sup>77</sup> California police suspected Rochin of selling narcotics. They unlawfully broke into his room and were about to seize two capsules lying on a nightstand when Rochin thrust the capsules into his mouth. Rochin was then taken to a nearby hospital and strapped to a table while a physician forced a tube and emetic solution down his throat, causing him to disgorge the contents of his stomach. Tried and convicted on a charge of illegally possessing morphine, the capsules were admitted over his objection. A district court of appeal affirmed the conviction,<sup>78</sup> and the Supreme Court of California refused to grant a re-hearing.<sup>79</sup> On certiorari the Supreme Court of the United States reversed the conviction on grounds of violation of due process.<sup>80</sup> Mr. Justice Frankfurter, writing for the majority,<sup>81</sup> reasoned that the conviction rested on evidence

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<sup>76</sup> A tangential problem to that of the constitutionality of chemical testing to determine whether a person is under the influence of alcohol is whether due process requires a jury trial in a prosecution in municipal court for driving while under the influence of alcohol. The Supreme Court of Minnesota recently reversed a municipal court's denial of jury trial in such a case. *State v. Hoben*, 256 Minn. 436, 98 N. W. 2d 813 (1959). In *Hoben*, jury trial was decreed necessary because the court was of the opinion that prosecutions of traffic violations should receive uniform treatment throughout the state. But a prosecution for disorderly conduct under city ordinance was held properly tried by court without jury for the reason that it related to a matter of local concern. *State v. Mulally*, 257 Minn. 21, 99 N. W. 2d 895 (1959).

<sup>77</sup> 342 U. S. 165 (1952).

<sup>78</sup> *People v. Rochin*, 101 Cal. App. 2d 140, 225 P. 2d 1 (1950).

<sup>79</sup> *People v. Rochin*, 101 Cal. App. 2d 143, 225 P. 2d 913 (1951).

<sup>80</sup> *Rochin v. California*, 342 U. S. 165 (1952). See Notes, 50 Mich. L. Rev. 1367 (1952); 4 Stan. L. Rev. 591 (1952).

<sup>81</sup> Justices Black and Douglas concurred in the result but on different grounds. They considered the admission of the evidence a violation of the privilege against self-incrimination.

which was inadmissible because it was obtained by methods "too close to the rack and the screw . . ." <sup>82</sup> Relying upon the "coerced confession" cases, the majority drew no distinction between forced extractions from the mind and forced extractions from the body.

Following the *Rochin* decision, the due process argument was unsuccessfully invoked in numerous criminal cases involving the admissibility of chemical-test evidence.<sup>83</sup> Five years after *Rochin* the precise question was directed to the attention of the Supreme Court of the United States in the celebrated case of *Breithaupt v. Abram*.<sup>84</sup> Petitioner Breithaupt was seriously injured in an automobile accident in which three other persons were killed. He was taken to a hospital, and while he lay unconscious in the emergency room, the smell of liquor was detected on his breath. At the request of a state patrolman, a physician extracted a blood specimen to determine whether the petitioner was intoxicated, and evidence concerning alcoholic content of the specimen was subsequently admitted at the trial where he was convicted of involuntary manslaughter. No appeal was taken and a subsequent petition for a writ of habeas corpus was denied by the Supreme Court of New Mexico.<sup>85</sup> In a 6-3 decision, the Supreme Court of the United States affirmed the denial of the writ.<sup>86</sup> In substance, the Court held that the petitioner's conviction did not deny him the due process of law guaranteed by the fourteenth amendment.

Breithaupt attempted unsuccessfully to invoke the bar of *Rochin*, but the majority distinguished the case on the fact that there was nothing brutal or offensive in the taking of a blood sample when done under the protective eye of a physician. However, the Court did suggest that the indiscriminate taking of blood under different conditions or by persons not qualified to do so might be the kind of brutality proscribed by *Rochin*.

<sup>82</sup> 342 U. S. at 172.

<sup>83</sup> *State v. Berg*, 76 Ariz. 96, 259 P. 2d 261 (1953); *People v. Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8 (1953), cert. denied, 347 U. S. 931 (1954); *People v. Kiss*, 125 Cal. App. 2d 138, 269 P. 2d 924 (1954). In the last case cited, a California district court of appeal indicated that test results would be excluded only where the accused was so terrorized into submission that to admit evidence as such would be a mockery and a pretense of a trial.

<sup>84</sup> 352 U. S. 432, 71 Harv. L. Rev. 161 (1957), 42 Minn. L. Rev. 662 (1958), 35 Texas L. Rev. 813 (1957), 11 Vand. L. Rev. 196 (1957).

<sup>85</sup> *Breithaupt v. Abram*, 58 N. M. 385, 271 P. 2d 827 (1957).

<sup>86</sup> Mr. Chief Justice Warren and Justices Black and Douglas dissented. Mr. Justice Clark wrote the majority opinion.

In dissent, Mr. Justice Douglas observed that, as he understood the court's decision, there would be a violation of due process if blood had been withdrawn from the accused after a struggle with the police. "Under our system of government," he said, "police cannot compel people to furnish evidence necessary to send them to prison."<sup>87</sup> The weakness in his position is that it almost assumes that responsibility is one-sided and that the individual has only minimal obligations of citizenship. If no force whatsoever were countenanced, the law-abiding citizen would, in effect, be penalized unfairly; the obstreperous, vocative citizen would succeed in his mission to thwart the law at every turn.<sup>88</sup>

#### D. Physician-Patient Privilege

The common law recognized no privilege for confidential information imparted by a patient to a physician. In 1828, New York became the first state to depart from this rule when its legislature provided for a physician-patient privilege, and since that date a majority of American jurisdictions have enacted similar statutes.<sup>89</sup> Though the statutory provisions lack complete uni-

<sup>87</sup> 352 U. S. at 443. Dissenting in *Hannah v. Larche*, 363 U. S. 420, 506 (1960), Mr. Justice Douglas has more recently taken the "chameleon-like" due process decisions in *Rochin* and *Breithaupt* to task: "... one who tries to rationalize the cases on cold logic or reason fails. The answer turns on the personal predilections of the judge; and the louder the denial the more evident it is that emotion rather than reason dictates the answer. This is a serious price to pay for adopting a free-wheeling concept of due process, rather than confining it to the procedures and devices enumerated in the Constitution itself." Mr. Justice Black has been equally critical of the *Rochin*-type test. Concurring in *Mapp v. Ohio*, 6 L. Ed. 2d 1081, 1096 (1961), he stated: "As I understand the Court's opinion in this case, we again reject the confusing 'shock the conscience' standard of the *Wolf* and *Rochin* cases and, instead, set aside this state conviction in reliance upon the precise, intelligible and more predictable constitutional doctrine enunciated in the *Boyd* case." He likewise concurred in the reversal of the *Rochin* case, but on the ground that the fourteenth amendment made the fifth amendment's provision against self-incrimination applicable to the states, which was in essence the constitutional doctrine of *Boyd v. United States*, 116 U. S. 616 (1886).

<sup>88</sup> Forceful investigatory procedures were approved as reasonable in the following decisions: *Blackford v. United States*, 247 F. 2d 745 (9th Cir. 1957); *United States v. Michel*, 158 F. Supp. 34 (S. D. Tex. 1957); *Application of Woods*, 154 F. Supp. 932 (N. D. Cal. 1957).

<sup>89</sup> Statutes are compiled and quoted in 8 *Wigmore, Evidence* § 2380 n. 5 (3d ed. 1940). The American Law Institute Code of Evidence was originally drafted without reference to any privilege for medical secrets in court; however, last-minute pressure exerted by attorneys from jurisdictions which have enacted the privilege, caused the draftsmen of the Code to insert three sections establishing the physician-patient privilege. Similarly, at the 1950 meeting of the National Commissioners on Uniform State Laws,

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formity, generally they do provide that a licensed physician shall not, without the consent of his patient, divulge any information or any opinion with respect to knowledge acquired in attending the patient in a professional capacity.

The problem to be examined here is: If a physician draws a blood sample or any body fluid from the body of an inebriate, should the physician-patient privilege preclude the physician from testifying? Certainly, where there is no showing that the running of a chemical test is at all necessary to enable the physician to treat or to diagnose the person, the privilege should not apply.<sup>90</sup> In most cases the record will show affirmatively that the test was performed by the physician at the request of a public officer, and medical services so rendered are rarely, if ever, performed in an atmosphere of personal confidence. The privilege seeks its roots in a confidential relationship, and the bond between doctor and inebriate can scarcely be labeled confidential.

A closer question may arise when the physician who is called to act in a professional capacity discovers that the subject whom he is to attend needs emergency treatment. Even assuming that he gives such emergency treatment, this factor alone should not spell a confidential relationship which would bar use of the test results inasmuch as the chemical-testing situation is a matter entirely divorced from the treatment effort.<sup>91</sup>

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it was voted that the privilege should not be recognized. Nevertheless at the 1953 meeting, the Conference reversed its previous action and by a close vote decided to include the privilege. See Model Code of Evidence, Rules 220-23 (1942); Uniform Rules of Evidence, Rule 27 (1953). See generally McCormick, Evidence § 101 (1954); Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand? 52 Yale L. J. 607 (1943).

<sup>90</sup> Hanlon v. Woodhouse, 113 Colo. 504, 160 P. 2d 998 (1945); Lebel v. Swincicki, 354 Mich. 427, 93 N. W. 2d 281 (1958). "It is manifestly clear from the reasons 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, *supra* note 68, at 254.

<sup>91</sup> Richter v. Hoglund, 132 F. 2d 748 (7th Cir. 1943); State v. Townsend, 146 Kan. 982, 73 P. 2d 1124 (1937); People v. Barnes, 197 Misc. 477, 98 N. Y. S. 2d 481 (Sup. Ct. 1950); Schwartz v. Schneuriger, 269 Wis. 535, 69 N. W. 2d 756 (1955). Contrary to the general trend, the Supreme Court of Indiana has lately expanded the scope of the privilege while indicating that the statute in question should be strictly construed. Alder v. State, 239 Ind. 68, 154 N. E. 2d 716 (1958). A blood sample was drawn from the defendant while he was lying unconscious in a hospital, and the court placed considerable reliance upon a previous Indiana decision which had prohibited the testimony of an emergency-ward physician with respect to the "intoxicated condition" of a patient admitted for treatment. Chicago, S. B. & L. S. Ry. v. Walas, 192 Ind. 369, 135 N. E. 150 (1922).

### III. Implied Consent Statutes

Disturbed by the growing menace of the intoxicated driver, many conscientious persons have advocated enactment of legislation to make chemical tests compulsory. Others have urged that each driver should submit to chemical-testing procedures by signing a written waiver at the time he makes application for a license. In reality, neither proposal is practical. A compulsory chemical-test law would be doomed to failure in those jurisdictions where the judiciary has chosen to decree that the privilege against self-incrimination applies to a compulsory taking of physical evidence. And the second proposal would not apply to unlicensed drivers and nonresident motorists unless every state adopted such a provision and made the waiver broad enough to cover submission to tests in other states.

#### A. Nature of the Statutes

In 1953, New York arrived at a happy solution in enacting the first statute in this country requiring drivers to submit to a chemical test for intoxication.<sup>92</sup> Nationwide reaction has been generally favorable, and the Council of State Governments has recommended its adoption in principle by other states.<sup>93</sup>

The nucleus of the New York law declares that any person *operating* a motor vehicle in the state shall be deemed to have given his consent to a chemical test whenever the police suspect him of driving while intoxicated.<sup>94</sup> The *mere operation* of a motor vehicle within the state, whether by a person licensed or un-

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<sup>92</sup> N. Y. Laws 1953, ch. 854, N. Y. Vehicle & Traffic Law, § 71-a. For an illuminating comment concerning the New York law, see Weinstein, Statute Compelling Submission to a Chemical Test for Intoxication, 45 J. Crim. L., C. & P. S. 541 (1955).

<sup>93</sup> The Council of State Governments, Suggested State Legislation, Program for 1954, 38-39 (1953); The Council of State Governments, Suggested State Legislation, Program for 1955, 61-62 (1954). The legislatures of seven states have enacted laws similar in purpose and in content to the New York implied consent law. See Idaho Code Ann., § 49-353 (Supp. 1955); Kan. Gen. Stat. Ann., § 8-1001 (Supp. 1957); Neb. Rev. Stat. § 39-727.03 (Supp. 1959); N. D. Rev. Code § 39-20-01 (Supp. 1959); S. D. Code § 44.0302-2 (Supp. 1960); Utah Code Ann. § 41-6-44.10 (Supp. 1957); Vt. Stat. Ann. tit. 23, § 1188 (Supp. 1959). Provisions of the Kansas law are nearly identical to provisions suggested by the Council of State Governments in its 1954 report. The Kansas consent law drew favorable comment from the Supreme Court of the United States in *Breithaupt v. Abram*, 352 U. S. 432, 436 (1957).

<sup>94</sup> In 1954, the clause, "believe such person to have been driving" was amended to read, "suspect such person of driving." N. Y. Laws 1954, ch. 320, effective March 30, 1954, amending N. Y. Vehicle & Traffic Law, § 71-a(1).

licensed, resident or nonresident, constitutes consent to be tested. Implying consent in advance, through the mere operation of a motor vehicle, avoids the difficult consent problem, for even if the motorist is rendered insensible by consumption of intoxicants or is unconscious or dazed as a result of trauma or other mishap, he has consented in advance to submission to a chemical-test procedure prescribed by law. Without doubt some will assert that the test should not be administered if the subject involved is not capable of giving intelligent consent, but this reaction can only thwart the purpose of the statute. It seems quite obvious that the legislatures of the various states that have enacted consent statutes have intended that tests should be administered in all cases where refusals were not evident. This interpretation of the law in no way encourages violence, and judging from the opinion of the Supreme Court of the United States in the *Breithaupt* case, no overt violation of due process is contemplated. In short, the statutory provisions with respect to automatic consent serve their most useful function in those extreme situations where, because of injury or gross intoxication, actual consent is difficult, if not impossible, to obtain.

Paradoxically, however, the New York law also provides that, although the driver has constructively consented to submit to a chemical test, he may refuse to take the test despite his imputed promise to consent.<sup>95</sup> If he refuses to submit and therefore does not fulfill his implied agreement, he automatically forfeits the privilege of using the highways of the state. In effect, he loses his driver's license or nonresident operating privilege. This curious juxtaposition of mandatory consent with freedom of refusal provides further insurance against the unseemly struggles that are so likely to arise when police and citizen fail to appreciate the import of a common purpose.

## **B. Constitutionality of Consent Legislation**

In *Schutt v. MacDuff*,<sup>96</sup> the first case challenging the constitutionality of the New York statute, an action was brought to annul the revocation of petitioner's driver's license. The license was revoked by the Commissioner of Motor Vehicles for the alleged refusal of the petitioner to submit to a blood test as demanded by a police officer following an arrest for driving while intoxicated. Although it was found unconstitutional on other

<sup>95</sup> The privilege of refusal is common to all consent statutes.

<sup>96</sup> 205 Misc. 43, 127 N. Y. S. 2d 116 (Sup. Ct. 1954).

grounds, the validity of the statute was upheld against contentions that it violated the privilege against self-incrimination, the court holding that New York decisions have limited the effect of the state constitutional provision to protect only against testimonial compulsion.<sup>97</sup> The court also rejected petitioner's claim that the implied consent statute encroached upon the constitutional guarantee against unreasonable search and seizure, pointing to the fact that the petitioner, who was under legal arrest, could be searched for evidence of the crime for which he was arrested.<sup>98</sup> Without hesitation, the court rejected a claim that the statute operated to deprive the petitioner of equal protection of the laws guaranteed by the federal and state constitutions, stating that the law affected all persons similarly situated, that is, persons licensed to operate motor vehicles upon the highways of the state.

On the other hand, the court did hold that the statute violated due process, since it did not provide drivers with an opportunity to be heard on all questions of law and fact. Conscientious approval could not be given to a statute authorizing final revocation of a driver's license by loose and informal procedure which left every motorist in the state at the mercy of the commissioner and his assistants.<sup>99</sup> In effect, the court ruled that the statute, as written, provided for an arbitrary and summary infringement upon the qualified rights of a free people. It also held the statute unconstitutional in that it lacked a provision limiting its application to cases where there has been a lawful arrest.<sup>100</sup> Objections, as outlined, were met by legislative amend-

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<sup>97</sup> *Id.* at 122-23. The opinion indicated that the constitutional privilege would not bar the use of chemical-test results, even though body fluids were taken while defendant was in a confused or unconscious state.

<sup>98</sup> Until the interdict of *Mapp*, New York adhered to the rule that illegally-seized evidence was admissible. *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926).

<sup>99</sup> "Approval may not be given to a statutory provision authorizing the final revocation of a driver's license by loose and informal procedure, for if this were permitted, every automobile driver in the state would be at the mercy of the commissioner and his assistants without control in the legislative body from which the delegated authority was received." *State v. Moseng*, 254 Minn. 263, 270, 95 N. W. 2d 6, 12 (1959).

<sup>100</sup> Implied Consent Statutes have as a rule provided for lawful arrest. See e.g. *Idaho Code Ann.*, § 49-352 (Supp. 1955); *Kan. Gen. Stat. Ann.*, § 8-1001 (Supp. 1957); *Utah Code Ann.*, § 41-6-44.10 (Supp. 1957). If a person, having been placed under arrest, and having thereafter been requested to submit to a chemical test, refuses to submit to such test, the test shall not be given. In such event, license or permit to drive shall be revoked by a proper licensing authority.

ment permitting temporary suspension of a license without a hearing but requiring a hearing prior to final revocation, and further requiring that the subject be placed under arrest prior to being requested to submit to a chemical test.<sup>101</sup>

### C. Comment Upon Refusal to Submit to Chemical Testing

When a motorist refuses to submit to a chemical test, may the fact of refusal be admitted into evidence or be commented upon at the trial by the prosecution? The decisions are not in agreement. For example, Connecticut, Indiana, Iowa, Ohio, South Carolina, and Virginia have permitted comment, noting that there has been an increasing tendency among the courts of many jurisdictions to extend the scope of self-incrimination provisions to unwarranted lengths.<sup>102</sup> None of these cases involved interpreta-

<sup>101</sup> N. Y. Laws 1954, ch. 320, effective March 30, 1954, amending N. Y. Vehicle & Traffic Laws, § 71-a(1). Statutory provisions as amended were held not to violate due process on any theory. *Ballou v. Kelly*, 12 Misc. 2d 23, 176 N. Y. S. 2d 1005 (Sup. Ct. 1958). The fact that the statute does not require a warning by police to the effect that refusal to submit may result in revocation of one's driver's license does not violate due process. *Anderson v. MacDuff*, 208 Misc. 271, 143 N. Y. S. 2d 257 (Sup. Ct. 1955). On the other hand, the New York Court of Appeals has indicated that it is *better practice* for police to notify the motorist of his rights under the statute pertaining to refusal to submit. *People v. Ward*, 307 N. Y. 73, 120 N. E. 2d 211 (1954). A due process question, one almost certain to be raised, found practical solution in a recent decision by the Supreme Court of Kansas in *Lee v. State*, 187 Kan. 566, 358 P. 2d 765 (1961). Plaintiff had been arrested on a charge of driving while under the influence of intoxicating liquor. Refusing to submit to a blood test, a test was not made, whereupon plaintiff's driver's license was suspended for a period not exceeding 90 days. Subsequently a hearing was had on the question of the reasonableness of his failure to submit to testing procedures. He contended that he was diabetic and that he should have been given his choice of a breath, blood, urine, or saliva test as approved by Kansas law. After full hearing at which he offered no evidence with respect to the diabetic condition, suspension of license was sustained. Plaintiff then filed an action in district court to compel the Motor Vehicle Department to reinstate his license, alleging that a driver's consent to a chemical test of his breath, blood, urine, or saliva is not given in blank, thus insisting that consent relates to his choice of the four testing methods approved by statute. The supreme court ruled that it was common knowledge that few areas in the state possessed the technical equipment or facilities required to administer all tests. Further, there was nothing brutal or offensive about contemplated test procedures as they were effected under the protective eye of a physician or qualified technician. Since the law had given the driver the right of choice of statutory suspension of his license and had given him the right to a hearing on the question of the reasonableness of his failure to submit to the test, violation of due process was not evident.

<sup>102</sup> *People v. McGinnis*, 123 Cal. App. 2d 945, 267 P. 2d 458 (1953); *State v. Munroe*, 22 Conn. Sup. 321, 171 A. 2d 419 (1961); *Allredge v. State*, 239 Ind. 256, 156 N. E. 2d 888 (1959); *State v. Benson*, 230 Iowa 1168, 300 N. W. 275 (1941); *State v. Gattou*, 60 Ohio App. 192, 20 N. E. 2d 265 (1938); *State v. Smith*, 230 S. C. 154, 94 S. E. 2d 886 (1956); *Gardner v. Commonwealth*, 195 Va. 945, 81 S. E. 2d 614 (1954); Annot., 175 A. L. R. 234, 240 (1948).

tion of a statute granting an accused the right of refusal to submit to a chemical test. On the other hand, New York has held that evidence of the accused's refusal to submit is inadmissible.<sup>103</sup> Furthermore, statutes of several states specifically provide that evidence of refusal to submit to, or of failure to take, the test shall not be admissible.<sup>104</sup>

In *State v. Severson*,<sup>105</sup> the Supreme Court of North Dakota held that a statute<sup>106</sup> providing that the accused shall not be required to submit to a chemical test without his consent implied that evidence of the results of such test could not be admitted unless the accused consented to the test. An appellate division of the Supreme Court of New York has ruled that the New York courts have consistently held that under the self-incrimination laws the receipt of evidence in a criminal trial concerning a defendant's complete silence or refusal to answer is reversible error.<sup>107</sup> Thus, the fact that a defendant did what he had an absolute right to do could not be used to create an unfavorable inference against him. Similarly, a recent New Jersey decision has unequivocally stated that evidence of a motorist's refusal to take a drunkometer examination was inadmissible in harmony with the general philosophy adopted in New Jersey to protect rights of the defendant.<sup>108</sup>

The Supreme Court of Idaho has been just as emphatic in declaring that evidence of refusal to submit to a blood test was competent and admissible.<sup>109</sup> Like any other act or statement voluntarily made, it was competent for the jury to consider and weigh the fact of refusal with the other evidence, and to draw from it whatever inference as to guilt or innocence might be

<sup>103</sup> *People v. Stratton*, 286 App. Div. 323, 143 N. Y. S. 2d 362 (1955).

<sup>104</sup> E.g. Ga. Code Ann., § 68-1625 (Rev. 1957); Me. Rev. Stat. Ann. ch. 22, § 150 (Supp. 1957); Ore. Rev. Stat., § 483.630 (1955); Va. Code Ann., § 18-75.1 (Supp. 1958) (prohibits comment also); Wash. Rev. Code, § 46.56.010 (1951). Some states have held such evidence inadmissible on the basis of ordinances, *State v. Simonsen*, 252 Minn. 315, 89 N. W. 2d 910 (1958), analogous statutes, *Jordan v. State*, 163 Tex. Crim. 287, 290 S. W. 2d 666 (1956), or statutes merely prohibiting comment, *State v. McCarthy*, 104 N. W. 2d 673 (Minn. 1960); *Duckworth v. State*, 309 P. 2d 1103 (Okla. Crim. App. 1957).

<sup>105</sup> 75 N. W. 2d 316 (N. D. 1956). The North Dakota court cited no supporting authority.

<sup>106</sup> N. D. Rev. Code § 39-0801 (Supp. 1957). See comment on consent requirements in text at notes 45-49 *supra*.

<sup>107</sup> *People v. Stratton*, 286 App. Div. 323, 143 N. Y. S. 2d 362 (1955).

<sup>108</sup> *State v. Ingram*, 67 N. J. Super. 21, 169 A. 2d 860 (1961).

<sup>109</sup> *State v. Bock*, 80 Idaho 296, 328 P. 2d 1065 (1958).

justified under the circumstances. Comparing the North Dakota and Idaho statutes, the court pointed out that under Idaho law, by operating a motor vehicle within the state, the defendant is deemed to have given his consent to a chemical test.<sup>110</sup> The court also took notice of an Idaho statute which prohibited comment when a defendant in a criminal action neglected or refused to testify, but held that statute inapplicable in the instant case, because it applied to a defendant only as a witness and guarded against testimonial compulsion, not against the admissibility of real evidence.<sup>111</sup>

Modern legislation has granted the arrested motorist the luxury of refusal, yet it does not necessarily follow that comment upon refusal will work undue hardship when the motorist stands accused at trial. Should it be admitted that the privilege of refusal stems from an honest legislative effort to eliminate unreasonable force in terms of police action, the accused has received his share of benefits when he is afforded the right of refusal. In the interest of peace and order, the state has surrendered evidence of significant value, and beneficence at the expense of effective law enforcement should not be compounded by denying the state the privilege of comment.

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<sup>110</sup> Idaho Code Ann., § 49-353 (Supp. 1955).

<sup>111</sup> Idaho Code Ann., § 19-3003 (1947).