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CONSTITUTIONALITY OF COMPULSORY CHEMICAL TESTS TO DETERMINE INTOXICATION

V. B. GOFF

The demand for accurate, scientific methods to determine contested facts in a criminal case must be balanced against the necessity to safeguard constitutional rights. The conflict is not a novel one. Past struggles concerned the admissibility into evidence of finger-prints, firearms identification, the results of medical examinations of accused persons, and radar speedometer tests, all of which have become relatively commonplace in criminal proceedings. Now the problem focuses upon the admissibility of compulsory chemical tests to determine alcoholic intoxication. There is a further complication in the case of compulsory blood tests due to the invasion of the body which occurs when the skin is pierced or a body fluid or other substance extracted.

Strong policy factors urge the acceptance of this scientific evidence. Traffic deaths and injuries in which consumption of alcohol was a factor have increased at an alarming rate.[1] Stricter enforcement of the statutes which prohibit the operation of a motor vehicle while under the influence of alcohol is sought and the need for an accurate method for determining alcoholic intoxication is especially acute. This latter observation is strengthened by the fact that opinion evidence based upon the accused's speech, walk, demeanor, odor of breath, and other available observations concerning muscular incoordination are not completely reliable, especially in the border-line cases.

The reliability of chemical tests as a standard for the determination of acoholic intoxication is acknowledged by most medical experts today.[2] Forty-seven states have given legislative or judicial approval to the use of chemical tests in the determination of intoxication.[3] Of course, reliability is affected by the methods employed, but assuming that the test is properly administered and the evidence identified and preserved, the objection to its accuracy would probably vanish. Furthermore, the test results do not create irrebuttable presumptions of intoxication, but provide instead only another factor for resolving the issue.[4] The absence of

[1] "National Safety Council, Accident Facts, 1956" pp. 43–71 points out that in 1955 there were 38,000 deaths and 1,350,000 injuries in the United States, an increase of 8% and 11%, respectively, since 1954. According to reports from twenty states, in twenty-six of 100 fatal motor vehicle accidents a driver or a pedestrian had been drinking intoxicants. Similarly, in a Delaware study of 97 fatal accidents, 56 of 138 drivers involved had been drinking to some extent. (40.6%).

[2] 1 Journal of Forensic Sciences 27–59 (1956).

[3] See Breithaupt v. Abram, 352 U.S. 432, 436 (1957), footnote 3 which lists states which have given statutory or judicial authority for the use of chemical tests to determine alcoholic intoxication.

[4] Those states which have adopted statutes have patterned their legislation after §11-902 of the Uniform Vehicle Code (1956) which creates the following presumptions:

"b . . .

1. If there was at that time 0.05 percent 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 percent but less than 0.15 percent 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;

physical harm in properly administered tests and the fact that the taking of body fluid specimens has become commonplace medical procedure, are frequently urged as further reasons for the admission of the compulsory chemical test results.

Those who oppose the admission of chemical test evidence of intoxication, question the constitutionality of the test procedure when conducted without the consent of the accused. The contentions have been made that to extract a specimen of blood, urine, or saliva, or to conduct a breath test without consent violates the privilege against self-incrimination, constitutes an unlawful search and seizure, and violates due process of law.

SELF-INCRIMINATION

The most common objection to the admissibility of the results of compulsory chemical tests is that the privilege against self-incrimination provided by the state constitution has been violated.[5] The Fifth Amendment to the United States Constitution, which guarantees this privilege, does not apply directly to the individual states, nor are its provisions made applicable indirectly through the Fourteenth Amendment.[6] Consequently, the states themselves have determined the circumstances under which the self-incrimination privilege can be claimed.

Although the argument is frequently made that compulsory submission to a blood, urine, saliva or breath test forces an accused to supply evidence to be used in his own prosecution in violation of the privilege, the great majority of courts have refused to accept this contention and have concluded that historically the scope of the privilege has been limited to testimonial compulsion.[7] The privilege against self-incrimination, it is asserted, was the culmination of a reaction against inquisitions instituted by the Ecclesiastical Courts and by the Court of the Star Chamber under the Stuart reigns for prosecution of heresy and sedition. The resulting privilege was incorporated into the common law in the 17th century. The conclusion is drawn that the privilege was traditionally limited to the use of legal process to obtain an admission of guilt from the witness's own lips.[8]

The separate origin and development of the rule excluding coerced confessions suggest that the confession rule should have no effect on the privilege against self-incrimination, but such has not been the case. There is a tendency to merge the two concepts, thereby making the privilege applicable to evidence secured outside the courtroom if obtained under compulsion.[9] Even under this view of the self-incrimination privilege the chemical tests would not seem to be objectionable, for the rule excluding coerced confessions is predicated upon the unreliability of the evidence so obtained. Physical evidence is not altered by the amount of compulsion employed. The percentage of alcohol in the blood-stream is unaffected by the accused's state of mind.

Only a small minority of courts refuse to contain the self-incrimination privilege within its historical bounds.[10] No distinction is drawn by the "Texas view" between oral and physical evidence and, therefore, any evidence, including the results of chemical tests, is inadmissible when obtained

3. If there was at that time 0.15 percent 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."

[5] All but two states have constitutional provisions guaranteeing the privilege against self-incrimination, and in the two exceptions, Iowa and New Jersey, the privilege is protected by statute. IOWA CODE ANN. tit. 31 §622.14 (1946); N. J. STAT. ANN. 2:97-7 (1937).

[6] Adamson v. California, 332 U.S. 46 (1946) reaffirming Twining v. New Jersey, 211 U.S. 78 (1908) and Palko v. Connecticut, 302 U.S. 319 (1937).

[7] See cases cited in Annot., 164 A.L.R. 967 (1946); 25 A.L.R. 2d 1407 (1952). Also, American Law Institute, MODEL CODE OF EVIDENCE, Rule 205.

[8] 8 WIGMORE, EVIDENCE §§2250, 2263–65 (3d ed. 1940); INBAU, SELF-INCRIMINATION, WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? (1950). Mr. Justice Holmes observed in Holt v. United States, 218 U.S. 245, 252 (1910), "But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

[9] Mr. Justice Frankfurter said, "To attempt in this case to distinguish between what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Uses of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true." Rochin v. California, 342 U.S. 165, 173 (1952). See also Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 11 (1956).

[10] Apodaca v. State, 140 Tex. Crim. 593, 146 S.W. 2d 381 (1941). Comments criticizing this case are found in 15 Cincinnati L. Rev. 344 (1941); 19 Texas L. Rev. 463 (1941); 26 Wash. L. Rev. 435 (1941).

without consent.[11] Although other courts have not accepted the testimonial-real evidence distinction adopted by the majority, few would embrace the Texas view on self-incrimination and reject results of chemical tests obtained through compulsion.[12]

The related question of admissibility of comment on the refusal to submit to a chemical test also has been argued. Those courts which find no violation of the self-incrimination privilege where a compulsory chemical test has been given would certainly find no violation of the privilege where comment on the refusal to submit was made.[13] One jurisdiction has admitted evidence of refusal to submit to a chemical test even though holding that evidence of a compulsory test violates the self-incrimination privilege. The rationale adopted to allow such comment is that the evidence indicates the accused's conduct, demeanor, and also his attitude toward the crime, all of which suggest a consciousness of guilt.[14]

Some state statutes which authorize the use of test results specifically prohibit comment upon the failure to submit to the test.[15] Whenever the statute prohibits compulsory tests or makes absolute the right of refusal,[16] the courts have reasoned that the legislature also intended to exclude evidence of the refusal to submit.[17]

In summary, if the self-incrimination privilege is interpreted from an historical point of view, there can be no objection to the evidence obtained by means of a compulsory chemical test. The purpose of the privilege is to protect against the extraction of evidence from the accused's lips and to safeguard his right to remain silent at his trial. To extend the coverage of this privilege to physical evidence obtained through compulsion is to lump with the self-incrimination privilege the principles of the rule against coerced confessions and due process concepts which results in an unnecessary extension of the privilege.

Illegal Search and Seizure

A second contention frequently made is that a compulsory chemical test constitutes an illegal search and seizure and that the evidence so obtained should be suppressed on timely motion in any jurisdiction which follows the exclusionary rule respecting illegally obtained evidence.[18] Since the exclusionary rule, which is followed in the federal courts, is not binding upon the states, they

[11] The "Texas view" has been modified considerably. Application of paraffin to a suspect's fingers to determine the presence of nitrates was held not to violate the privilege in Henson v. State, 159 Tex. Crim. 647, 266 S.W. 2d 864 (1953). Scrapings taken from an accused's fingernails were held admissible, Coleman v. State, 151 Tex. Crim. 582, 209 S.W. 2d 925 (1948). However, the court recently affirmed its original position on compulsory chemical tests by refusing to admit this evidence where the state failed to prove consent. Trammel v. State, 163 Tex. Crim. 543, 287 S.W. 2d 487 (1956).

[12] Those states which might follow the Texas view are as follows: Arkansas, Bethel v. State, 178 Ark. 277, 10 S.W. 2d 370 (1928), which rejected evidence of an examination for venereal disease, but was modified to a degree by Shannon v. State, 200 Ark. 658, 182 S.W. 2d 384 (1944) which admitted fingerprints; Michigan, People v. Corder, 244 Mich. 274, 221 N.W. 309 (1928) which rejected evidence of an examination for venereal disease, but was weakened by People v. Placido, 310 Mich. 404, 17 N.W. 2d 230 (1945) which indicated a preference for the Wigmore rule; Missouri, State v. Newcomb, 220 Mo. 54, 119 S.W. 405 (1909), which rejected evidence of an examination for venereal disease. On the other hand, Oklahoma recently adopted the majority view in Alexander v. State, 305 P. 2d 572, (Okla. Crim. 1956) after an earlier indication of a contrary policy in Turvey v. State, 95 Okla. Crim. 418, 247 P. 2d 304 (1952). In the Alexander case the court found that submission to the breath test was not voluntary and adopted the Wigmore View since they found no substantial difference between fingerprints and a breath sample. Furthermore, the court enunciated the policy that a "fetish" should not be made of the self-incrimination provision "to protect enemies of society." In Wisconsin, Green Lake County v. Domes, 247 Wis. 90, 18 N.W. 2d 348 (1945), held that the results of a general physical examination did not violate the privilege, and City of Barron v. Covey, 271 Wis. 10, 72 N.W. 2d 387 (1955), held that the lower court erroneously refused to permit comment on the accused's failure to submit to the test. Recently, the court in State v. Kroening, 274 Wis. 266, 79 N.W. 2d 810 (1956), held specifically that a blood test did not violate the privilege, even though the court acknowledged that this right extended beyond mere oral statements.

[13] State v. Gatton, 60 Ohio App. 192, 20 N.E. 2d 265 (1938); People v. McGinnis, 123 Cal. App. 2d 945, 267 P. 2d 458 (1953); City of Barron v. Covey, 271 Wis. 10, 72 N.W. 2d 387 (1955); State v. Smith 230 S.C. 164, 94 S.E. 2d 886 (1956). Comment on refusal to submit is now prohibited by statute in Virginia, Va. Code Ann. §§18-75.1 (Cum. Supp. 1956) nullifying, in effect, Gardner v. Commonwealth, 195 Va. 945, 81 S.E. 2d 614 (1954).

[14] State v. Benson, 230 Iowa 1168, 300 N.W. 275 (1941).

[15] Colo. Rev. Stat. §13-4-30 (Cum. Supp. 1955); Ga. Code Ann. §68-1625 (Cum. Supp. 1955); Me. Rev. Stat. c. 22 §150 (Cum. Supp. 1957); Neb. Rev. Stat. §39-727.01 (1943); Ore. Comp. Laws Ann. §483.630 (1955); Va. Code Ann. §18-75.1—75.3 (Cum. Supp. 1956); Wash Rev. Code §46.56.010 (1951).

[16] Colo. Rev. Stat. §13-4-30 (Cum. Supp. 1955); Ky. Rev. Stat. Ann. §189.520 (1956); N.J. Stat. Ann. §39:4-50.1 (Supp. 1951); Va. Code Ann. §§18-75.1—75.3 (Cum. Supp. 1956); Wash. Rev. Code §46.56.010 (1951). Idaho, Kansas, New York, and Utah have enacted implied consent statutes which grant the right to refuse. (See infra note 45).

[17] People v. Stratton, 286 App. Div. 323, 143 N.Y.S. 2d 362 (1955); State v. Severson, 75 N.W. 2d 316, (N.D. 1956); Duckworth v. State, 309 P. 2d 1103 (Okla. Crim. 1957).

[18] Weeks v. United States, 232 U.S. 382 (1914).

are left free to determine the status in their own courts of illegally seized evidence.[19] In a majority of jurisdictions the exclusionary rule is not applied,[20] although there is some indication of a movement to extend the adoption of the rule either by statute or decision.[21] The exclusionary rule has not been highly regarded by many authorities;[22] they feel that its net effect is to reduce the amount of reliable evidence in situations where the demand for truth outweighs personal inconvenience, short of violence to the person or the related problem of untrustworthy confessions. The basis for the rule, of course, is to protect individual interests from invasions of privacy without lawful warrants and to discourage overzealous police activity by rejecting the evidence thus obtained, regardless of its reliability.[23]

The provision which prohibits unlawful search and seizure creates problems primarily in those jurisdictions which have adopted the exclusionary rule.[24] The questions posed are 1) whether the withdrawal of body fluids without a warrant is an unlawful search and seizure; 2) whether the search is made incident to a lawful arrest; and 3) whether the search is reasonable.

When the exclusionary rule courts have been confronted with the problem of whether submission to a compulsory chemical test is a search and seizure, they have uniformly held that it is and have passed on to the more difficult problems of the reasonableness of the search and whether the search was made incident to a lawful arrest.[25] One court, while recently seeking to determine whether the taking of a blood specimen was incidental to the arrest, recognized that the withdrawal of the blood might be reasonable if the suspect were under lawful arrest, but concluded that a nine day interval between the seizure and the subsequent arrest itself was not a search made incident to the arrest.[26] The court indicated that even though the arrest does not necessarily have to precede the search, the two events must approximate each other in terms of time.[27]

In contrast with this view, however, is that of another jurisdiction to the effect that even though the taking of a blood specimen precedes the arrest, if reasonable grounds existed for an arrest when the specimen was obtained, then the seizure was lawful as an incident to the arrest.[28] This rule was laid down in a case in which blood was removed from a semi-conscious suspect who indicated a lack of consent by withdrawing his arm when approached with a needle. Since that jurisdiction (California) had recently adopted the federal exclusionary rule, the issue of an illegal search was raised.[29] The court found that on the basis of the

[19] Wolf v. Colorado, 338 U.S. 25 (1949).

[20] Wolf v. Colorado, 338 U.S. 25 (1949) contains an appendix listing those states which do and do not apply the *Weeks* doctrine.

[21] MD. ANN. CODE GEN. LAWS art. 35 §§5, 5a (Cum. Supp. 1956); N.C. GEN. STAT. §15-27 (Michie 1953); TEX. CODE OF CRIM. PRO. tit. 8. art. 727a (Vernon Cum. Supp 1957). People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 (1955); Rickards v. State, 45 Dela. 573, 77 A. 2d 199 (1950).

[22] 8 WIGMORE, EVIDENCE §2184 (3d ed. 1940); Harno, *Evidence Obtained By Illegal Search and Seizure*, 19 Ill. L. Rev. 303 (1925); Waite, *Police Regulations By Rules of Evidence*, 42 Mich. L. Rev. 679 (1944).

[23] "We have been compelled to reach that conclusion [evidence obtained by illegal search and seizure is inadmissible] because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." People v. Cahan 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955).

[24] The evidence of the test results was admitted in the following jurisdictions even though illegally seized: State v. Alexander, 7 N.J. 585, 83 A. 2d 909 (1950) dictum; Davis v. State, 189 Md. 640, 57 A. 2d 289 (1948).

[25] People v. Duroncelay, 48 Cal. 2d 766, 312 P. 2d 690 (1957); State v. Kroening, 274 Wis. 266, 79 N.W. 2d 810 (1956), *modified*, 80 N.W. 2d 816 (1957).

[26] The accused was taken to a hospital where a blood sample was withdrawn without his consent on the basis of the detection of alcohol on his breath and the fact that the accident occurred in the opposite lane of travel. Nine days after the accident and the chemical test the accused was placed under formal arrest. The issue before the court was whether a search could be made incident to an arrest and, if so, whether the nine day lapse satisfied the "incident" requirement. The test results were held inadmissible and in reaching the decision the court expressed doubt as to whether probable cause for arrest existed due to the lack of evidence indicating intoxication. State v. Kroening, 274 Wis. 266, 79 N.W. 2d 810 (1956) *modified*, 80 N.W. 2d 816 (1957) where remarks concerning due process were withdrawn since the issue had not been argued in the briefs or before the court.

[27] "While the attorney general correctly says that a search and seizure which is incidental to a lawful arrest does not violate the constitutional rights of the person searched, the lapse of time between the search and arrest is important and in some cases, as this, vital in determining whether the search is incident to the arrest. In Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923) an arrest on the day following the search came too late for such incidental connection . . ." State v. Kroening, supra note 26 at 79 N.W. 2d 815.

[28] People v. Duroncelay, 48 Cal. 2d 766, 312 P. 2d 690 (1957); see also the same case in the intermediate appellate court at 303 P. 2d 617 (Cal. Dist. Ct. App. 1956).

[29] People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 (1955).

evidence[30] there was reasonable cause to believe that the accused had committed a felony and, therefore, a search could be made even though it preceded the arrest.[31]

A flexible standard of what constitutes an incident to a lawful arrest permits a test to be made a reasonable time before the actual arrest has taken place and thereby assures the evidentiary value of the test. The time element may be vital from the standpoint of accuracy as well as statutory requirements respecting the time in which the test must be administered.[32] Since reasonable cause for making an arrest is a prerequisite to the lawfulness of the seizure of the body fluid or substance to be tested, the dangers of indiscriminate testing and exclusive reliance on test results to determine the existence of a violation would be avoided.

The requirement of reasonable cause to believe that a crime has been committed before an arrest can be made, thus permitting a search to be conducted, may create additional problems in a jurisdiction following the exclusionary rule. Frequently, it is difficult to gather evidence of the suspect's intoxication since the only available evidence of intoxication may be the occurrence of the accident and the odor of alcohol on the driver's breath, evidence which some courts would find insufficient for making an arrest.[33] The law enforcement officers, in recognition of the requirements exacted by the exclusionary rule, as well as the reasonable cause standards of arrest, will be quick to make an arrest on grounds other than driving while under the influence of alcohol, even though such grounds be relatively minor.[34] This presumably affords the right to make a search and thus seize a sample of blood, urine, breath, or saliva to support the more serious charge. This practice, of course, tends to weaken the policy sought to be enforced by the exclusionary rule.

[30] An eyewitness testified that the car was going fast and that the brake lights failed to illuminate when the car passed through a boulevard stop sign, struck a warning sign, and rammed into the bank of a ditch. There were no tire skid marks to be found. Beer cans were discovered in the back seat and one passenger was clutching a beer can in one hand and a wine bottle in the other when found. All occupants had the odor of alcohol on their breaths and the accused, after being taken to the hospital, regurgitated matter of a strong alcoholic odor whereupon the blood test was administered. People v. Duroncelay, 48 Cal. 2d 766, 312 P. 2d 690 (1957).

[31] "There is no claim that defendant was not arrested within a reasonable time or that the arrest was not made on the basis of the facts known to the officer who investigated the accident, and we must presume a lawful arrest in the absence of a showing to the contrary." Id. at 693. In State v. Berg, 76 Ariz. 96, 259 P. 2d 261 (1953) there were no indications of the grounds for arrest in the stipulation of facts, but the court concluded that the grounds for arrest must have been reasonable.

[32] N.Y. VEHICLE AND TRAFFIC LAW §70 (5); VA. CODE §18-75.1 imposes a two hour time limit within which the test must be made, measured from the time of arrest. DEL CODE ANN. tit. 11 §3507 (Supp. 1956); WIS. STAT. §325.235 (1955) impose a two hour time limit within which the test must be made, measured from the event itself.

[33] In State v. Kroening, 274 Wis. 266, 79 N.W. 2d 810 (1956) the court indicated that evidence of the accident and the odor of alcohol on the driver's breath would be insufficient grounds for making an arrest.

DUE PROCESS

Since the decision of the United States Supreme Court in *Rochin v. California*,[35] the constitutional argument of denial of due process has been bolstered and is made available to an accused who has been compelled to submit to a chemical test. The issue of the reasonableness of the search and seizure is an issue of due process, the point being that in states not following the exclusionary rule it is necessary to employ the Fourteenth Amendment, or its equivalent in the state constitution, to exclude such evidence. In the *Rochin* case a physical struggle occurred and the accused's stomach was pumped against his will in order to obtain narcotic capsules that he had swallowed.[36] The Supreme Court declared the law enforcement conduct to be a violation of due process of law and reversed the conviction. The stomach pumping incident was considered to be "shocking" and "offensive."[37]

The multiplicity of policy factors which compose the elements of due process resulted in the adop-

[34] In Alexander v. State, 305 P. 2d 572 (Okla. Crim. 1956), arrest was for an unauthorized left hand turn after which the accused was taken to the police station and given various tests including a breath test. In Fletcher v. State, 298 S.W. 2d 581 (Tex. Crim. 1957) the accused was arrested while sitting in his parked auto for being drunk in a public place.

[35] 342 U.S. 165 (1952).

[36] Rochin, who was thought to be dealing in narcotics, swallowed two capsules when seized without warrant by police officers in his own home. After they had failed to extract the capsules by "jumping on" Rochin and attempting to pry his mouth open, he was handcuffed and taken to an hospital where an emetic solution was forced through a tube into his stomach, whereupon he gave up the capsules later found to contain morphine.

[37] "... We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience ... this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities ... convictions cannot be brought about by methods that offend a 'sense of justice' ..." *Id.* at 172, 173.

tion of a test by the Supreme Court that was necessarily ill-defined. The Court could only outline the general consideration that conduct offensive to the community sense of justice constituted a violation of due process. The application of the test in future cases would depend upon the particular facts involved in each one of them.

After the *Rochin* decision, the question of whether a compulsory chemical test constituted conduct proscribed by that case was debated in the state courts. The trend of the decisions has been to limit the application of this doctrine to brutal and shocking conduct, not found to exist where chemical tests were administered by qualified persons.[38] In support of the blood test specifically, and of the chemical tests generally, the state courts have pointed to the lack of danger and the frequent use of blood specimens for such purposes as marriage licenses, pre-induction military physicals, normal medical care, and admission to universities. Furthermore, policy factors favored the admissibility of the evidence, since statistics clearly show that alcohol is a major factor in traffic deaths.[39]

Recently, the United States Supreme Court itself was confronted in *Breithaupt v. Abram*[40] with this issue of whether the compulsory chemical test violated due process as formulated in the *Rochin* case. In the *Breithaupt* case a blood sample was taken from an unconscious motorist without his consent and the results of a chemical test for alcoholic intoxication were admitted into evidence. The majority opinion characterized the *Rochin* case just as did the state courts, emphasizing the fact that brutality measured by the community sense of justice was involved and not that of any particular individual.[41] Although due process was not considered violated by the extraction of a blood sample without consent, the Court indicated that if tests should be made indiscriminately or conducted by unqualified personnel, then there may be a basis for the application of the *Rochin* doctrine.[42]

The dissenting opinions in the *Breithaupt* case noted the similarities between this case and the *Rochin* case by pointing out the invasion of the person's body, the public interests which are involved, and the lack of dangerous after-effects. They concluded that the two cases could be distinguished by the majority only on the grounds of physical resistance and personal reaction against the stomach pump in the *Rochin* case, criteria which the dissenters considered unsubstantial.[43] This serves to emphasize the great difficulty encountered in the attempt to formulate standards of due process by which to judge conduct.

While there may be truth in the dissent's comment that the test adopted by the majority places the due process concept on "shifting sands," it seems appropriate that there be flexibility here. When weighing policy factors, it is quite probable that a different result will be obtained not only as the facts change, but as the social values of the community change with time.[44] The validity under due process considerations, for example, of a compulsory chemical test which is made after a skirmish with the police, or a urine sample secured from either a conscious or unconscious narcotic suspect by compulsory catheter, remains open.

[38] State v. Berg. 76 Ariz. 96, 259 P. 2d 261 (1953), where the conscious suspect was placed in restraining straps while his head was being held in order to obtain a breath specimen. The court attempted to distinguish between a natural product of the body which was utilized and elements of the body that require breaking the skin for example. To attempt to distinguish between the two in this manner is to rely solely on the nature of the invasion, excluding the additional factors of force and commonness of the experience used to obtain the sample. People v. Haeussler, 41 Cal. 2d 252, 260 P. 2d 8 (1953) accused was unconscious; McClanahan v. State, 232 Ind. 248, 112 N.E. 2d 575 (1953); note also the modified opinion in State v. Kroening, 80 N.W. 2d 816 (1957) withdrawing remarks concerning due process since the issue was not fully argued on review.

[39] See note 1 supra.

[40] The violation occurred in New Mexico, a state that does not follow the *Weeks* doctrine of excluding illegally seized evidence, when the accused was involved in a collision killing three occupants of the second car. A pint bottle of whiskey almost empty was found in the car of the petitioner and the odor of alcohol was detected on his breath. Breithaupt did not appeal his conviction, relying instead on a writ of habeaus corpus to the New Mexico Supreme Court which had denied the writ. The United States Supreme Court granted *certiorari* and affirmed the judgment, three Justices dissenting. Breithaupt v. Abram, 352 U.S. 432 (1957).

[41] "... due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by the whole community sense of 'decency and fairness" that has been woven by common experience into the fabric of acceptable conduct." *Id.* at 436.

[42] *Id.* at 438.

[43] "Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reactions is to build on shifting sands." Id. at 442.

[44] "In the common-law process, decided cases become fixed points from which boundaries are drawn and contours filled in. That is the process that has been used from the outset in giving meaning to the due process clause." Schaefer, *Federalism and State Criminal Procedure,* op. cit. supra.

There are basic factors, however, to be taken into account when determining whether conduct offends the community sense of justice. These are the brutality of the conduct of the law enforcement officers, the community reaction to the particular type of invasion as determined by the court, and the public interests involved. For present purposes it is sufficient to state by way of summary that a compulsory blood test made by qualified personnel in the proper manner without violence to determine whether the suspect was driving while under the influence of alcohol is not a violation of due process of law.

Implied Consent Statutes

Prompted by the public policies already mentioned, as well as the effort to obtain evidence of the chemical test and still avoid the problems caused by belligerent or unconscious suspects, some states have enacted implied consent statutes as a remedial device.[45] The rationale of the legislation is that use of the highways is a privilege that is subject to reasonable conditions which the state may impose in the interests of public safety and welfare. The states have traditionally enforced these requirements through the media of license, fine, and imprisonment. Consequently, it is contended that it is reasonable for a state to enact a statute which provides that every motorist who operates a vehicle upon the public highways gives his consent to submit to a chemical test should he be arrested for driving while under the influence of alcohol. Further, the statute provides that even though he has consented to the test, he also may refuse to submit, but if he does refuse, the privilege of using the public highways in that state is forfeited, provided, however, that a subsequent hearing held by the licensing agency discloses an unreasonable refusal to submit to the test.

The statute which implies consent to submit to a chemical test has raised a number of constitutional arguments, chief among which are the alleged violation of the self-incrimination privilege, the violation of provisions which afford protection against unlawful search and seizure, and the denial of due process. The arguments are essentially those described heretofore and the cases dealing with the question have found no compulsion even where the driver was warned that his license might be revoked should he fail to submit to the test.[46] Another case held that where the accused failed to submit to the test and was acquitted of the charge of drunken driving, the hearing official still had the power granted under the statute to revoke the driver's license, since this was a separate proceeding from the criminal charge.[47] Another constitutional argument raised has been that of denial of equal protection of the laws on grounds that the statute does not apply with equal force to unlicensed drivers. This contention was summarily dismissed by one court.[48]

These implied consent statutes are analogous to the statutes dealing with jurisdiction over nonresident motorists, which also rely on the concept of implied consent through operation of a vehicle on a public road.[49] There are substantial differences, however. The nonresident motorist statute does not involve a physical invasion of the person. Neither does it involve problems of self-incrimination and unlawful search and seizure, nor does it provide for an option to refuse, which gives rise to an alternate punishment.

Although the hearing itself has been unsuccessfully challenged as a criminal action without a judge and jury, and without protection of the self-incrimination privilege and rules of evidence,[50] no one has questioned the licensing agency's right and power to conduct a hearing to determine the reasonableness of the suspect's refusal to submit to the test. The courts have held that the hearing is not a criminal trial, but merely an administrative function to determine whether the privileges granted by the state should be revoked. It is apparently conceded that the delegation of power to entertain the hearing is proper and that the standards of reasonableness are adequately defined.[51]

The implied consent statute has not as yet been thoroughly tested by the courts. It is not certain that the consent obtained would be suffi-

[45] Idaho Code §49-352 (1957); Kan. Gen. Stat. §8-1001—07 (Supp. 1955); N.Y. Vehicle and Traffic §71.a; Utah Code Ann. §41-6-44.10 (Supp. 1957).

[46] People v. Ward, 307 N.Y. 73, 120 N.E. 2d 211 (1954); People v. Davidson, 5 Misc. 2d 699, 152 N.Y.S. 2d 762 (Sup. Ct. 1956) reversed on other grounds.

[47] Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S. 2d 257 (Sup. Ct. 1955); Combes v. Kelly, 2 Misc. 2d 491, 152 N.Y.S. 2d 934 (Sup. Ct. 1956).

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

[49] Hess v. Pawloski, 274 U.S. 352 (1927).

[50] Schutt v. MacDuff supra note 48.

[51] See Jaffe, *An Essay on Delegation of Legislative Power*, 47 Col. L. Rev. 359, 561 (1947), especially at 581 et seq.