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THE ADMISSION OF CHEMICAL TEST REFUSALS AFTER STATE v. NEVILLE: DRUNK DRIVERS CANNOT TAKE THE FIFTH

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I. INTRODUCTION

Nearly fifteen years ago, Justice Clark commented upon the tragedies created by drunk drivers when he stated, "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."[1] Unfortunately, the astounding battlefield figures are dwarfed by the more astounding figures now being heard from the nation's highways. For example, during the war in Viet Nam, 45,000 American soldiers were killed by the enemy,[2] but during the same period, 274,000 Americans were killed on highways as a direct

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1. Breithaupt v. Abram, 352 U.S. 432, 439 (1957).

2. *Oversight into the Administration of State and Local Court Adjudication of Driving While Intoxicated: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 93 (1982) (statement of Dr. Alasdair Conn, Medical Director, Maryland Institute for Emergency Medical Systems, Baltimore, Md.) [hereinafter cited as *Senate DWI Hearings*].

result of alcohol intoxication.[3] More than 26,000 persons died in 1980, and more than 750,000 were injured as a result of collisions in which one or more of the participants had been drinking.[4] In addition to the loss of lives, drunk drivers are responsible for more than five billion dollars in damages each year.[5]

Paradoxically, it is often more difficult to prosecute a driving while intoxicated (DWI) case than it is to prosecute other crimes.[6] For example, jurors more readily identify with a DWI defendant than they do with defendants accused of violent crimes.[7] Most jurors, if not their friends and relatives, have engaged in the prohibited conduct themselves.[8] Additionally, police officers are often discouraged from making DWI arrests because it takes as long as four hours for an officer to process a DWI arrestee.[9] Thus, the crime of driving while intoxicated is steadily increasing across the country.[10]

There have been numerous attempts by various legislative groups to keep drunk drivers off the roads and to convict them when apprehended.[11] All states, for example, have enacted implied consent laws requiring a suspected drunk driver to submit to chemical testing of his blood, breath, or urine to determine his blood alcohol level.[12] The result of such tests are then admissible at

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3. *Id.*

4. *Id.* at 14 (statement of Rep. Michael Barnes, Md.).

5. Lauter, *The Drunk Driving Blitz,* 4 NAT'L L.J., Mar. 22, 1982, at 1, col. 1. *See also* 1 MADD (Mothers Against Drunk Drivers), Hous. Area Chapter Newsletter, 1st quarter, 1982, at 1. The Houston Chapter of Mothers Against Drunk Driving reported the following: Drunk driving is "a crime that kills more than homicides, that injures more people more seriously than assaults with deadly weapons, that does more property damage than all forgers, burglars and robbers all added together." *Id.*

6. *See* Haddon & Blumenthal, *Forward* to H. ROSS, DETERRING THE DRINKING DRIVER at xviii (1981) (prosecution of drunk drivers "is riddled with escape hatches of bewildering ingeniousness, variety, and effectiveness").

7. *See id.* at xiii (public is reluctant to punish the drunk driver because it may view a drunk driver and think " '[t]here but for the grace of God go I' ").

8. *See* Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal,* 20 AM. CRIM. L. REV. 31, 32 n.7 (1982) ("When the testifying defendant is a respectable citizen, juries are often reluctant to convict.").

9. *See Senate DWI Hearings, supra* note 2, at 50 (statement of Diane Steed, Deputy Administrator, National Highway Traffic Safety Administration, U.S. Department of Transportation).

10. *See Senate DWI Hearings, supra* note 2, at 71 (testimony of Lt. Col. Johnny G. Lough, Chief, Maryland State Police, Pikesville, Md.).

11. *E.g.,* N.D. CENT. CODE § 39-20-01 (1980); OHIO REV. CODE ANN. § 4511.19.1 (Page Supp. 1979). California, for example, in 1981, passed a law that made a defendant's refusal admissible in evidence in driving-while-intoxicated (DWI) cases. *See* CAL. VEH. CODE § 13353 (West 1981). In 1982 California reported 100 fewer alcohol related deaths than in 1981. 4 NAT'L L.J. Mar. 22, 1982, at 22, col. 2.

12. *See* Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent,* 58 TEX. L. REV. 935, 935 n.4 (1980). "Blood alcohol" is a term used to describe the amount of alcohol in a person's bloodstream expressed as a percentage by weight. 1 R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 15.04 (3d ed. 1980). Most states presume legal intoxication when a person registers a 0.10% blood alcohol content. *See* Crothers, *The Constitutional Dimension of Discovery in DWI Cases,* 59 N.D.L. REV. 369, 371 n.9 (1983) (indicates the blood alcohol content that each state requires to give rise to legal intoxication). A person could register a blood alcohol content of 0.10% if he

trial.[13] Some states have statutes that permit the prosecution to introduce into evidence a defendant's refusal to submit to testing.[14] The admission of a defendant's refusal appears justified because jurors are most aware of the existence of chemical testing and may refuse to convict when such evidence is not made available by the prosecution. If the prosecution is permitted to explain the absence of test results, jurors would be less likely to acquit on the irrational basis that the prosecution has produced no "scientific" evidence for conviction.[15] Statutes that permit admission of a defendant's refusal have faced numerous constitutional and statutory challenges in recent years, with varying results.[16] To resolve the disagreement and to determine whether a defendant's refusal is protected by the fifth[17] or fourteenth amendment,[18] the United States Supreme Court granted certiorari in *South Dakota v. Neville.*[19]

The facts of *Neville* present a typical DWI case. The defendant, Mason Henry Neville, was stopped by city police after he failed to observe a stop sign.[20] According to the officers, Neville had an odor of alcohol on his breath, he fell against his car when attempting to get out, and he informed the officers that he had no driver's license because it had been revoked after a previous DWI conviction.[21] When Neville was unable to perform simple field sobriety tests,[22] the officer making the stop placed Neville under arrest and read

consumed either 42 ounces of beer with a 5% alcohol content by volume or 4.9 ounces of 86-proof liquor within a one-hour period of time. 1 R. ERWIN, *supra,* § 15.01.

13. *See, e.g.,* N.D. CENT. CODE § 39-20-07 (5) (1980). *See generally* Note, *supra* note 12, at 944-45 (admission of test at trial establishes a presumption of guilt).

14. The following statutes for example, permit the defendant's refusal to submit to testing to be admitted as evidence: ALA. CODE § 32-5A-194 (c) (Supp. 1980); ARIZ. REV. STAT. ANN. § 28-692 (h) (Supp. 1982-1983); DEL. CODE ANN. tit. 21, § 2749 (1974); N.D. CENT. CODE § 39-20-08 (1980). The following statutes, for example, prohibit the use of the refusal as evidence: COLO. REV. STAT. § 42-4-1202 (3) (h) (1973); MASS. GEN. LAWS ANN. ch. 90, § 24 (i) (e) (West 1978).

15. *See* Cohen, *The Case for Admitting Evidence of Refusal to Take a Breath Test,* 6 TEX. TECH L. REV. 927, 945 (1975).

16. The following cases are examples of state court decisions that allowed admission of the refusal into evidence: Hill v. State, 366 So. 2d 318, 321 (Ala. 1979); Campbell v. Superior Court, 106 Ariz. 542, ____, 479 P.2d 685, 692 (1971); State v. Lynch, 274 A.2d 443, 444 (Del. Super. Ct. 1971); People v. Taylor, 73 Mich. App. 139, ____, 250 N.W.2d 570, 572 (Ct. App. 1977); State v. Tabisz, 129 N.J. Super. 80, ____, 322 A.2d 453, 454 (Super. Ct. App. Div. 1974). The following cases are examples of state court decisions that did not allow admission of such evidence: State v. Anonymous, 6 Conn. Cir. Ct. 470, ____, 276 A.2d 452, 455-56 (Cir. Ct. 1971); People v. Boyd, 17 Ill. App. 3d 879, 883, 309 N.E.2d 29, 32 (App. Ct. 1974); Davis v. State, 8 Md. App. 327, ____, 259 A.2d 567, 569 (Ct. Spec. App. 1967); State v. Andrews, 297 Minn. 260, ____, 212 N.W.2d 863, 864, *cert. denied,* 419 U.S. 881 (1973); Dudley v. State, 548 S.W.2d 706, 707 (Tex. Crim. App. 1977).

17. *See* U.S. CONST. amend. V ("No person shall be . . . compelled, in any criminal case, to be a witness against himself. . . .").

18. *See* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty or property, without due process of law . . . .").

19. 312 N.W.2d 723 (S.D. 1981), *cert. granted,* 102 S. Ct. 2232, 2232 (1982).

20. South Dakota v. Neville, 103 S. Ct. 916, 918 (1983).

21. *Id.*

22. *Id.* The officers asked the defendant to touch his finger to his nose and to walk a straight line, neither of which he was able to accomplish. *Id.*

him his *Miranda* warnings.[23] The officer also asked Neville to submit to a chemical test to determine his blood alcohol level in accordance with South Dakota statutory procedure.[24] Neville refused, stating, "I'm too drunk, I won't pass the test."[25] The trial court suppressed evidence of Neville's refusal, even though a recent statutory amendment expressly permitted such evidence to be presented to a jury.[26] The South Dakota Supreme Court affirmed, stating that Neville's refusal was "testimonial" and thus protected by the fifth amendment to the United States Constitution[27] and its South Dakota counterpart.[28] The court also concluded in dicta that to admit evidence of Neville's refusal would be contrary to express state statutory language that appears to grant all DWI suspects the "right" to refuse testing.[29]

The United States Supreme Court rejected the South Dakota court's constitutional analysis, holding instead that the fifth amendment did not bar admission of the defendant's refusal

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23. *Id.* The officer read the *Miranda* warnings from a printed card. *Id.* The police officer in *Neville* stated the following:

> You have the right to remain silent. You don't have to talk to me unless you want to do so. If you want to talk to me I must advise you whatever you say can and will be used as evidence against you in court. You have the right to confer with a lawyer, and to have a lawyer present with you while you're being questioned. If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you. Knowing these rights, do you want to talk to me without having a lawyer present? You may stop talking to me at any time. You may also demand a lawyer at any time.

Id. at 918 n.1. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

24. 103 S. Ct. at 918-19. *See* S.D. CODIFIED LAWS ANN. § 32-23-10 (1976). Section 32-23-10 provides as follows:

> Any person who operates any vehicle in this state shall be deemed to have given his consent to a chemical analysis of his blood, urine, breath or other bodily substance for the purpose of determining the amount of alcohol in his blood . . . .
>
> Such person shall be requested by said law enforcement officer to submit to such analysis and shall be advised by said officer of his right to refuse to submit to such analysis and . . . in the event of such refusal with respect to the revocation of such person's driving license.

Id.

25. 103 S. Ct. at 918.

26. *Id.* at 919. *See* S.D. CODIFIED LAWS ANN. § 32-23-10.1 (Supp. 1982). Section 32-23-10.1 provides as follows:

> If a person refuses to submit to chemical analysis of his blood, urine, breath or other bodily substance, as provided in § 32-23-10, and that person subsequently stands trial for driving while under the influence of alcohol or drugs . . . such refusal may be admissible into evidence at the trial . . . .

Id.

27. *See* U.S. CONST. amend. V.

28. South Dakota v. Neville, 312 N.W.2d 723, 727 (S.D. 1981), *rev'd*, 103 S. Ct. 916 (1983). *See* S.D. CONST. art. VI, § 9 ("No person shall be compelled in any criminal case to give evidence against himself. . . .").

29. 312 N.W.2d at 724-25. *See* S.D. CODIFIED LAWS ANN. § 32-23-10 (1976).

because the refusal was not "coerced" within the meaning of the fifth amendment.[30] Nor did the Court find it fundamentally unfair under the fourteenth amendment[31] to admit the refusal,[32] although the arresting officer failed to warn the defendant about all the statutory consequences of his refusal.[33]

The purpose of this Article is to analyze a defendant's refusal to submit to chemical testing. The analysis is comprised of two major issues. The first issue is whether a defendant has any state created or absolute "right" to refuse testing, when, under state law, he has impliedly agreed to take such a test by using the state's highways. Although this issue was not presented to the Supreme Court in *Neville,* an analysis of implied consent statutes will provide a clearer understanding of the confusion that reigned in lower court opinions prior to this decision. Also, state courts could attempt to distinguish *Neville* by recognizing a state statutory right to refuse testing based upon a misreading of the implied consent statutes. Thus, a discussion of this issue is important to understand both the *Neville* decision and any future state court action.

The second issue is whether any fifth or fourteenth amendment questions remain unanswered after *Neville* and *Schmerber v. California.*[34] The analysis of this issue will focus on the "compulsive" and "testimonial" aspects of the fifth amendment and will consider whether the Court has abandoned, limited, or merely distinguished the *Doyle v. Ohio*[35] due process limitation on using a defendant's post-arrest silence as evidence.[36]

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30. 103 S. Ct. at 923. The majority of the Court refused to find that a violation of the South Dakota fifth amendment counterpart constituted an independent and adequate state ground for the decision that precluded federal review. *Id.* at 919 n.5. The Court discussed the issue of an adequate state ground because of the following language in the lower court's holding: "Since the Fifth Amendment of the U.S. Constitution is broad enough to exclude this evidence, there is no need to draw a distinction at this time between S.D. Const. art. VI, § 9 and the Fifth Amendment of the U.S. Constitution." *Id.* (quoting *Neville,* 312 N.W.2d at 726 n.*). In reviewing this language, Justice Stevens in his dissent emphasized that the state constitutional basis for the holding was sufficient to decide the case without consideration of the federal constitutional issue. 103 U.S. at 924 (Stevens, J., dissenting). The majority, however, deemed the South Dakota Supreme Court's language to be identical to the Delaware court's language in *Delaware v. Prouse. Id.* at 919 n.5. *See* Delaware v. Prouse, 440 U.S. 648 (1979). The Delaware Supreme Court in *Prouse* found a fourth amendment violation and summarily concluded that there was also a state constitutional violation. *Id.* at 651-53. In *Neville* the Supreme Court recognized the state ground for decision to be potentially adequate but not sufficiently independent to preclude federal review. 103 S. Ct. at 919 n.5.

31. *See* U.S. CONST. amend. XIV, § 1.

32. 103 S. Ct. at 923. The Court distinguished *Neville* from *Doyle v. Ohio. Id. See* Doyle v. Ohio, 426 U.S. 610 (1976). In *Doyle* the Supreme Court held that the due process clause of the fourteenth amendment forbids the use of a defendant's post-*Miranda* warning silence to impeach the defendant's testimony. *Id.* at 618.

33. 103 S. Ct. at 918. The officers warned the defendant that he could lose his driver's license if he refused to submit to the test. *Id.* The officers failed to inform him that the test results or the fact of refusal could be used against him at trial. *Id.* at 923.

34. *See* Schmerber v. California, 384 U.S. 757 (1966). For a discussion of *Schmerber v. California,* see *infra* text accompanying notes 74-79.

35. *See* Doyle v. Ohio, 426 U.S. 610 (1976).

36. *Id.* at 618.

II. THE IMPLIED CONSENT LAWS AND THE PHYSICAL COERCION DOCTRINE: A BALANCING OF INTERESTS

All states require motorists who drink to submit to chemical testing of their blood alcohol levels under the legal theory of implied consent.[37] The implied consent statutes, however, also contain language recognizing a defendant's "right" to refuse testing.[38] In attempting to resolve this apparent contradiction, some state courts, such as the South Dakota Supreme Court in *Neville*,[39] have held that the "right" to refuse is paramount to a defendant's duty to submit to testing.[40] Courts reaching this conclusion seldom base their analysis on actual legislative intent.[41] Instead, they argue that it would be fundamentally unjust for a legislature to create a right to refuse and then punish the exercise of that right by permitting a jury to speculate on a defendant's possibly self-incriminating motives for refusal.[42] In sum, such courts determine legislative intent by reference to general fifth amendment policies.

The fact that a legislature qualifies a "right" to refuse by allowing a jury to hear such evidence, however, is a strong indication that the "right" was not absolute in the first place. Clearly, a legislature has the authority to grant to a defendant less than an absolute right to refuse testing.[43] But it appears contradictory in reason, if not in purpose, to require a defendant to submit to testing, recognize that he has a "right" to refuse should he so desire, and then punish the exercise of that "right" by letting

37. *See* Note, *supra* note 12, at 936 n.4 (complete listing of implied consent statutes).

38. *See, e.g.,* OR. REV. STAT. § 487.805 (2) (1981). Section 487.805 (2) provides in part as follows: "No chemical test of the person's breath shall be given . . . if the person refuses the request of a police officer to submit to the chemical test . . . ." *Id. See also* S.D. CODIFIED LAWS ANN. § 32-23-10 (1976). The South Dakota statute is worded in terms of the defendant's "right" to refuse testing. *See id.* For the text of this provision, see *supra* note 24.

39. *Neville,* 312 N.W.2d at 726.

40. *See, e.g.,* Duckworth v. State, 309 P.2d 1103, 1106 (Okla. Crim. App. 1957). *But see* State v. Newton, 291 Or. 788, ____, ____, 636 P.2d 393, 401, 409 (1981) (test results were admissible even though consent was coerced by fear of adverse consequences).

41. *See, e.g.,* Duckworth v. State, 309 P.2d at 1105 (court failed to consider legislative intent).

42. *See, e.g., id.* The *Duckworth* court stated that it would be inconsistent for the state to inform the defendant of his right to refuse testing and then to use his refusal as evidence against him. *Id. See also* State v. Neville, 312 N.W.2d at 724. The South Dakota Supreme Court in *Neville* offered the following explanation for finding the right to refuse paramount to the duty to submit to testing:

> Certainly it is unfair to create by statute a right not to submit to a chemical test and to allow the accused to exercise that right and then in open court before a jury to permit testimony concerning refusal which can all too easily work in the minds of the jury members to the prejudice of the defendant.

Id. (quoting State v. Oswald, 90 S.D. 342, 346, 241 N.W.2d 566, 569 (1976)).

43. *See, e.g.,* State v. Brean, 136 Vt. 147, 152, 385 A.2d 1085, 1088 (1978) (the right to refuse testing is a matter of legislative grace or privilege).

a jury hear evidence of his refusal.

A court has the duty to attempt to reconcile conflicting portions of related statutes to give all provisions maximum effect.[44] Thus, a court could reconcile chemical testing provisions by nullifying the provision that allows admission of the refusal. This interpretation would suggest that the defendant's duty to submit to testing is optional. Courts, however, may refuse to give effect to one portion of conflicting legislation only after considering all possible interpretations.[45]

In attempting to reconcile the rights and duties defined by state chemical testing laws, courts should look to the legal and historical context in which these laws were passed.[46] The theory of implied consent was developed in *Hess v. Pawloski.*[47] In *Hess* a resident plaintiff brought a civil suit against an out-of-state defendant because of an automobile accident in the forum state.[48] In evaluating jurisdiction over the defendant, the Supreme Court made a significant departure from its previous strict position of "territoriality,"[49] which had shackled in personam jurisdiction since *Pennoyer v. Neff,*[50] and dispensed with the requirement that a nonresident defendant must be found within the forum state before he could be sued.[51] The Court reasoned that because the state had the right to prohibit a nonresident motorist from using its highways, the state could condition the use of its highways by finding that the nonresident motorist had impliedly consented to being sued within the jurisdiction.[52]

In the wake of *Hess,* states soon recognized that they had the analogous power to prohibit drinking drivers from using their highways.[53] State legislatures reasoned that they could condition the use of their highways upon a driver's implied consent to take a

44. *See, e.g.,* Paice v. Maryland Racing Comm'n, 539 F. Supp. 458, 463 (D. Md. 1982); Stoner v. Young, 533 F. Supp. 561, 566 (S.D. Mich. 1980).

45. *See* Hughes Air Corp. v. Public Utils. Comm'n, 644 F.2d 1334, 1338 (9th Cir. 1981).

46. *See, e.g.,* Hess v. Pawloski, 274 U.S. 352, 356 (1927).

47. 274 U.S. 352, 356 (1927). *See generally* Note, *supra* note 12, at 937-41 (development of implied consent laws).

48. 274 U.S. at 353.

49. *Id.*

50. *See* Pennoyer v. Neff, 95 U.S. 714 (1877). In *Pennoyer* the Court held that notice sent outside a state to a nonresident is insufficient to give the forum state jurisdiction in an action against a nonresident personally for a money judgment. *Id.* at 734-36. The Court in *Hess* considered a state's interest in promoting the welfare of its citizens. 274 U.S. at 356. The *Hess* Court declared that when a nonresident uses the highways the finding of his implied consent to service is equivalent to the appointment of a registrar as an agent on whom process may be served. *Id.* at 357.

51. *Hess,* 274 U.S. at 356-57.

52. *Id.* For an analysis of the development and validity of the implied consent laws following *Hess,* see Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends,* 5 U.C.L.A. L. REV. 198, 200-11 (1958).

53. *See* State v. Newton, 291 Or. 788, ____, 636 P.2d 393, 397-401 (1981).

chemical blood alcohol test in much the same way that a state could condition an out-of-state driver's right to use its highways upon a driver giving his implied consent to being sued in the forum state.[54] This theory of a driver's inferred acquiescence to chemical testing was upheld by the Supreme Court against a fourteenth amendment challenge in *Breithaupt v. Abrams*[55] and against fourth, fifth, and fourteenth amendment challenges in *Schmerber v. California.*[56]

Despite the legal validity of the implied consent theory, courts had to determine whether a defendant could be physically compelled to submit to testing.[57]Many commentators feared that due process might bar the forcible extraction of any bodily substance for testing purposes, no matter how inoffensive the process,[58] a fear that was borne out by the Supreme Court's decision in *Rochin v. California.*[59] In *Rochin*[60] the Supreme Court held that a police officer who compelled a suspect to disgorge evidence of a crime violated the fourteenth amendment.[61]

In 1953 the New York Legislature enacted its prototype implied consent statute for intoxicated motorists, which authorized the use of threatened adverse consequences to overcome a defendant's refusal to submit to chemical testing.[62] One of the

54. *See, e.g.,* Shutt v. MacDuff, 205 Misc. 43, 47-48, 127 N.Y.S.2d 116, 122-23 (Sup. Ct. 1954). *See generally* Note, *supra* note 12, at 937-56 (constitutional issues in the development of implied consent and the reasons for state adoption of implied consent statutes).

55. 352 U.S. 432, 433-40 (1957). In *Breithaupt* the Court held that the taking of blood from an unconscious driver, who had been in an accident and who emitted an odor of alcohol, did not violate the driver's right to due process. Breithaupt v. Abrams, 352 U.S. 432, 433-40 (1957).

56. 384 U.S. 757, 772 (1966). *Schmerber* made it clear that there was no right of a driver to withhold consent for testing of his bodily fluids for determination of his blood alcohol level under any constitutional theory. Schmerber v. California, 384 U.S. 757, 772 (1966). *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."); U.S. CONST. amend. V ("No person shall be . . . compelled, in any criminal case, to be a witness against himself . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."). The only limitation that *Schmerber* imposed was that the blood alcohol test must be performed in a reasonable manner. 384 U.S. at 771.

57. *See, e.g., Schmerber,* 384 U.S. at 765.

58. *See, e.g.,* Ruffin, *Intoxication Tests and the Bill of Rights: A New Look,* 2 CAL. W.L. REV. 1, 38 (1966).

59. 342 U.S. 165 (1952).

60. Rochin v. California, 342 U.S. 165, 172 (1952). In *Rochin* the Supreme Court held that the police officer's conduct violated the due process clause of the fourteenth amendment because forcing a defendant to swallow an emetic is "conduct that shocks the conscience." *Id.*

61. *Id.* The officer forced the defendant to swallow an emetic in order to cause him to regurgitate the contents of his stomach. *Id.* at 166.

62. *See* N.Y. VEH. & TRAF. LAW § 71-a (McKinney 1959). In 1970 the New York Legislature repealed § 71-a. *See* N.Y. VEH. & TRAF. LAW § 2014 (McKinney 1970). Section 1194(1) of the New York Traffic and Vehicle Law provides, as did its predecessor § 71-a, that when a driver refuses to submit to a chemical test, the state will revoke his license or permit to drive. *See id.* § 1194(1). The new statute provides, however, that revocation is lawful only if the state warned the driver of this consequence before he refused. *Id. See also* Comment,*Constitutional Law — Validity of New York Statute Setting Out Motorists' Implied Consent to Chemical Tests for Intoxication,* 51 MICH. L. REV. 1195, 1195-1202 (1955) (analyzes constitutional problems surrounding the extraction of bodily fluids from persons by compulsion).

adverse consequences that flowed from a refusal was the suspension of the defendant's driver's license.[63] In *Breithaupt* the Court viewed this suspension as a mild form of nonphysical compulsion not offensive to *Rochin*.[64] The New York Legislature also used language in the implied consent statute that implied a defendant's "right" to refuse testing.[65] In light of *Rochin* and the nonphysical form of compulsion contained in the statute,[66] this "right" clearly meant a recognition of a defendant's physical ability to refuse, rather than any innate statutory privilege to refuse.[67]

Thus, although there might appear to be a contradiction between requiring a defendant to submit to chemical testing and granting him a "right" not to submit, that dichotomy can be resolved by recognizing the origins of the implied consent laws and the fourteenth amendment constraints on testing procedures. Under these circumstances a statutory "right" to refuse testing should be interpreted as legislative recognition of a physical ability rather than as a legislative privilege. It is possible, however, that state courts may choose to view this issue differently. State courts and legislatures may always grant more rights to an accused than the federal constitution requires.[68] Should a state court choose to find an absolute statutory "right," the court would misinterpret legislative intent. Nor can such a position be supported by fifth amendment policies, which were previously regarded as being

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63. *See* N.Y. VEH. & TRAF. LAW § 71-a (McKinney 1959).

64. 352 U.S. at 435-38.

65. *See* N.Y. VEH. & TRAF. LAW § 71-a (McKinney 1959). Section 71-a states in part as follows: If a "person refuses to submit to such chemical test [for analysis of his breath, blood, urine, or saliva] the test shall not be given but the commissioner shall revoke his license or permit to drive and any nonresident operating privilege." *Id.*

66. *See id.*

67. If a legislature intended to grant a defendant an absolute "right" to refuse testing, rather than the right to refuse to be physically coerced, then retributive license suspensions would also violate that absolute "right." License suspensions, however, have been held to be clearly legitimate sanctions under these circumstances. *See* Mackey v. Montrym, 443 U.S. 1, 19 (1979).

The distinction between prohibited physical coercion and the legal right to do an act was explained by a dissenting state supreme court justice in *State v. Jackson*. State v. Jackson, ___ Mont. ___, ___, 637 P.2d 1, 9 (1981) (Haswell, C.J., dissenting). In *Jackson* Chief Justice Haswell described the difference:

> This type of statute provides for mandatory consent with a freedom of refusal to prevent unseemly struggles that are likely to arise when police and citizens fail to appreciate the import of a common purpose. An act of this type does not contemplate a *per se* right of refusal, but rather an acquiescence in refusal in the posture of avoiding violent conflict.

Id. (Haswell, C.J., dissenting). Courts and commentators have favorably considered Chief Justice Haswell's analysis. *See* Bush v. Bright, 264 Cal. App. 2d 788, ___, 71 Cal. Rptr. 123, 125 (Ct. App. 1968); Hunvald & Zimring, *Whatever Happened to Implied Consent? A Sounding*, 33 MO. L. REV. 323, 323-24 (1968); Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHN'S L. REV. 39, 49 (1978).

68. *See* Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 81 (1980); Delaware v. Prouse, 440 U.S. 648, 652 (1979).

foremost in the legislatures' mind when creating this "right."[69] It is therefore necessary to examine the fifth amendment policy arguments considered and rejected by the Supreme Court in *Neville.*

III. NARROWING THE SCOPE OF THE FIFTH AMENDMENT: LESSER FORMS OF COMPULSION AND TESTIMONIAL COMMUNICATION

A. COERCION AND THE PRIVILEGE: TO TALK, BALK, OR LIE

The fifth amendment privilege against self-incrimination provides that "[n]o person . . . shall be compelled, in any criminal case, to be a witness against himself."[70] The primary requirements of the amendment's protection can be found in the word "compelled" and the phrase "to be a witness against himself."[71] A broad interpretation of these expressions would prohibit the state from using a defendant's fingerprints as evidence against him because the taking of the prints were, in a sense, against the defendant's will.[72] A more reasonable interpretation would protect a defendant's statements that are truly the product of psychological or physical coercion.[73]

The extent to which a defendant must provide the prosecution with potentially incriminating evidence revealing his blood alcohol level was addressed by the Court in *Schmerber.*[74] In *Schmerber* the Court made it clear that a state could force a defendant to submit to a blood alcohol test without violating the defendant's fifth amendment right against self-incrimination.[75] Presumably, the procedure must comply with the due process standards announced in *Rochin.*[76] An issue left undecided, however, was whether the fifth

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69. *See Neville*, 312 N.W.2d at 725.

70. U.S. CONST. amend. V.

71. *See* Arenella, *supra* note 8, at 36.

72. *Cf.* United States v. Wolfish, 525 F.2d 457, 461 (2d Cir. 1975) (no fifth amendment violation occurred when an expert testified that the defendant attempted to hide his guilt in a handwriting exemplar).

73. *See* 8 J. WIGMORE, EVIDENCE § 2250 (McNaughten rev. ed. 1961).

74. Schmerber v. California, 384 U.S. 757, 760-65 (1966).

75. *Id.* at 765. The Court concluded that a defendant had no right to protect "real and physical evidence" such as a blood sample, as opposed to "testimonial" evidence, such as oral statements. *Id.* at 764. The Court also rejected a fourth and fourteenth amendment challenge to the involuntary taking of a defendant's blood sample. *Id.* at 772. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."); U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty or property without due process of law . . . .").

76. *See* Rochin v. California, 342 U.S. 165, 172 (1952). In *Rochin* the Supreme Court stated that

amendment would protect a defendant if the state attempted to show that he testimonially incriminated himself when told he was to be tested.[77] The Court provided no standard to resolve, for example, whether a state may introduce into evidence a refusal to submit to chemical testing if that refusal consisted of a defendant's head shake or a statement that he would not cooperate.[78] In an ambiguous footnote, the Court in *Schmerber* explained the dilemma as follows:

> If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any *testimonial* products of administering the test — products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the "search," and nothing we say today should be taken as establishing the permissibility of compulsion in that case.[79]

In contrast to the ambiguity of the Court's footnote in *Schmerber,* the Supreme Court in *Neville* stated that a defendant's refusal to submit to chemical testing was not "compelled" under the fifth amendment and thus not protected, even if it incidentally involves a defendant's communication of his guilt.[80] It is undeniable, however, that a defendant, when asked to submit to chemical testing, will be placed in a difficult position. If he submits, scientific measurements may show him to be guilty. If he refuses, his refusal may be taken as evidence of his guilt by a jury. Thus, in one sense, *Neville* allows a state to place a defendant in a position that compels him to choose a lesser form of incrimination. This is similar to the "trilemma" noted by courts[81] and commentators[82] in

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the prohibited procedure was conduct that "shocks the conscience." *Id.*

77. *See* 384 U.S. at 765. In *Schmerber* the defendant failed to object to the admission of his refusal as evidence. *Id.* at 765 n.9.

78. *See id.* at 765. The Court stated that because the defendant was unconscious when the test was administered "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused was involved." *Id.*

79. *Id.* at 765 n.9.

80. *Neville,* 103 S. Ct. at 923.

81. *See, e.g., id.* at 922. The *Neville* Court discussed the classic example of cruel "trilemma," when the State tells a defendant at trial to testify. The defendant has three choices: he could incriminate himself and risk conviction, testify falsely and risk perjury, or decline to testify and risk contempt. *Id.*

82. *See* Westen & Mandell, *To Talk, to Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response,"* 19 AM. CRIM. L. REV. 521, 523-27 (1982).

which the state forcibly places a defendant in a situation of either "talking, balking or lying." The fifth amendment under such circumstances, however, would be meaningless if a defendant did not have the right to remain silent.[83]

In rejecting the implied "trilemma" analysis as it applies to the facts in *Neville,* the Court recognized a fundamental limitation: fifth amendment policies only protect against incriminating results that flow from constitutionally protected choices.[84] Unlike situations in which a defendant has a constitutional right to remain silent at trial and thus not incriminate himself,[85] a defendant is lawfully required to submit to chemical testing and is not protected by the Constitution when he refuses.[86] The Court thus distinguished *Neville* from cases such as *Griffin v. California,*[87] in which a prosecutor violated a defendant's fifth amendment right to remain silent at trial by impermissibly commenting upon that right to a jury,[88] and found this line of cases inappropriate.

The Court's view in this regard is persuasive. In commenting upon the coercion aspect of the fifth amendment, the Court in *Miranda v. Arizona*[89] stated the following: "Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own labors, rather than by the cruel expedient of compelling it from his own mouth."[90] Originally, the coercion aspect of the amendment barred admission of statements that were coerced from a defendant, either by physical or psychological means, because the statements would probably be false and unreliable.[91] The better and more modern view is, however, that coerced confessions are excluded from evidence primarily to protect the defendant's fifth amendment right against self-incrimination, regardless of the truth or falsity of the confession.[92]

The Court in *Neville* did not find any physically coercive

83. *See* Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense,* 66 CALIF. L. REV. 935, 939-59 (1978).

84. 103 S. Ct. at 923.

85. *See* Miranda v. Arizona, 384 U.S. 436, 458-65 (1966).

86. *See Schmerber,* 384 U.S. at 765.

87. *Neville,* 103 S. Ct. at 921 n.10. *See* Griffin v. California, 380 U.S. 609 (1965). In *Neville* the Supreme Court held that "[u]nlike the defendant's situation in *Griffin,* a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test. The specific rule of *Griffin* is thus inapplicable." *Neville,* 103 S. Ct. at 921 n.10.

88. *Griffin,* 380 U.S. at 615.

89. 384 U.S. 436 (1966).

90. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

91. *See id.* at 465-66; Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (Supreme Court feared that self-incriminating statements would be elicited by "inhumane treatment and abuses").

92. *See* Butler v. State, 493 S.W.2d 190, 197 n.5 (Tex. Crim. App. 1973).

element present in the administration of a chemical test.[93] The Court recognized that the blood alcohol test was "safe, painless and commonplace."[94] Moreover, the procedures are considerably less intrusive than those used to obtain the contents of a defendant's stomach in *Rochin*[95] and are not calculated to force a person into confessing his guilt rather than enduring a painful alternative.[96] Although it could be argued that there are persons for whom a blood test would be dangerous, such as hemophiliacs, statutes generally offer a defendant a choice of tests to avoid this unlikely problem.[97] The same rationale would apply when the state undertakes to obtain a breath test. The equipment is generally reliable,[98] and operators must be trained.[99] The defendant need only avoid physical resistance and engage in normal bodily functions.[100] These procedures are distinguishable from the practice of a corrupt or lazy police officer who beats a confession out of a defendant. In addition, when the state offers to test the defendant's blood alcohol content, it does not seek to coerce the defendant, psychologically or physically, into refusing so that it can use his refusal against him at trial.[101] The value of a refusal to the state is far less than that of a positive and substantial blood alcohol test result.

Although not noted by the Court in *Neville,* this same reasoning has been applied by several courts in cases involving a defendant's refusal to furnish other types of physical evidence not protected by the Constitution, such as handwriting,[102] voice identification exemplars,[103] and attendance at a lineup.[104] When a defendant is clearly put to a choice between incriminating himself by supplying such a sample or incriminating himself by refusing to comply, courts have held refusals admissible, despite fifth

93. 103 S. Ct. at 923.
94. *Id.*
95. *See Rochin,* 342 U.S. at 166-67.
96. *See Schmerber,* 384 U.S. at 765 n.9.
97. *See, e.g.,* S.D. CODIFIED LAWS ANN. § 32-23-10 (1976) (defendant may consent to analysis of his blood, urine, breath, or other bodily substance).
98. *See* L. TAYLOR, DRUNK DRIVING DEFENSE § 5.6 (1981).
99. *See id.* § 5.7.1.
100. *See id.*
101. *See Neville,* 103 S. Ct. at 923; People v. Ellis, 65 Cal. 2d 529, ____, 421 P.2d 393, 397, 55 Cal. Rptr. 385, 389 (1966).
102. *See* United States v. Wolfish, 525 F.2d 457, 461 (2d Cir. 1975), *cert. denied,* 423 U.S. 1059 (1976); United States v. Nix, 465 F.2d 90, 93 (5th Cir.), *cert. denied,* 409 U.S. 1119 (1972).
103. *See* United States v. Wolfish, 525 F.2d at 461; Higgins v. Wainwright, 424 F.2d 177, 178 (5th Cir. 1970).
104. *See* United States v. Wade, 388 U.S. 218, 221-23 (1967). *See generally* 8 J. WIGMORE, *supra* note 73, § 2265 (lists various categories of physical evidence the state may obtain from a defendant without violating his constitutional rights).

amendment claims.[105] Permitting a jury to hear of a defendant's refusal to provide all types of physical evidence, which he has no constitutional right to withhold, including a sample of his blood, breath, or urine, sets one unified and clear standard under the fifth amendment.

As recognized by the Court, a defendant might prefer to avoid a situation in which his guilt was determined by a scientific method.[106] Often, a decision to take or refuse a chemical test will be made without prior consultation with an attorney, and it will not be easy or pleasant, especially when the defendant's reasoning faculties have been blurred by alcohol. Nonetheless, the Court has made it clear that the fifth amendment protects against state coercion only when the defendant has lawful and constitutional choices to make.[107]

B. THE TESTIMONIAL ASPECT OF THE PRIVILEGE

Both courts and commentators, in considering the constitutional issues involved in *Neville,* have focused on whether a defendant's refusal constitutes "testimonial" communication[108] as defined in *Schmerber.*[109] In *Schmerber* the defendant, who was unconscious while an incriminatory blood sample was taken, argued that the state was barred from obtaining evidence of his guilt that required him to participate, even minimally.[110] The Supreme Court, however, refused to take such a broad view of the scope of the privilege.[111] Instead, Justice Brennan, speaking for the majority, held that only "testimonial" evidence is protected, whereas "real" or "physical" evidence, such as a blood sample, is

105. *See* United States v. Wade, 388 U.S. at 221-23; United States v. Nix, 465 F.2d at 94; Higgins v. Wainwright, 424 F.2d at 178.

106. 103 S. Ct. at 923.

107. *Id.*

108. *See, e.g.*, State v. Andrews, 297 Minn. 260, ____, 212 N.W.2d 863, 864-65 (1973), *cert. denied,* 419 U.S. 881 (1974); Arenella, *supra* note 8, at 36-48.

109. *See Schmerber,* 384 U.S. at 761. In a footnote the *Schmerber* Court discussed the terms "testimonial" and "communicative." *Id.* at 761 n.5. The Court stated the following:

> Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a "testimonial" or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.

Id.

110. *Id.* at 758-59.

111. *Id.* at 764.

not.[112] Left undecided, however, was the extent to which the fifth amendment would protect a defendant if the prosecution attempted to show that the defendant incriminated himself when told he was to be tested.[113] In other words, the Court in *Schmerber* did not indicate whether it would consider a refusal to be "testimonial," or whether it would find admissible a statement similar to Neville's — "I'm too drunk, I won't pass the test" — regardless of the admissibility of the test results.

Based upon frequent references in *Schmerber* to other examples of assertive conduct and upon the cryptic footnote number nine,[114] the South Dakota Supreme Court in *Neville* concluded that a refusal to submit to chemical testing is not only compelled, but is also a "tacit or overt expression and communication of a defendant's thoughts."[115] Therefore, the court held that such evidence is "testimonial" as that term was defined in *Schmerber*.[116]

The Supreme Court rejected this analysis, suggesting[117] that it found more persuasive the explanation by Justice Traynor in *People v. Ellis*.[118] Justice Traynor likened evidence of the refusal to that of flight, escape, or intentional destruction of incriminating evidence.[119] He stated that "by acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind."[120] Such acts have been described by courts as admissions by conduct rather than as testimonial statements.[121]

Although strained to some degree, Traynor's analogy is helpful. The alcohol in a person's blood stream metabolizes at the approximate rate of 0.02% per hour.[122] When a defendant refuses to take a breath, blood, or urine test, he intentionally destroys evidence through his metabolic process. Permitting the refusal into evidence under these circumstances might be analogous to allowing

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112. *Id.*
113. *Id.* at 765 n.9.
114. *See id.* at 761, 764, 765 n.9.
115. *Neville,* 312 N.W.2d at 726.
116. *Id.*
117. *Neville,* 103 S. Ct. at 921. The Court falls short of basing its opinion upon a finding that Neville's refusal was not a testimonial act because determination of that issue was unnecessary once the Court failed to find that the refusal was compelled. *Id.* at 923.
118. 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
119. People v. Ellis, 65 Cal. 2d 529, ____, 421 P.2d 393, 397, 55 Cal. Rptr. 385, 389 (1966). In a companion case, *People v. Sudduth,* the California Supreme Court used the *Ellis* rationale to allow the admission of a refusal to take a breath test. People v. Sudduth, 65 Cal. 2d 543, ____, 421 P.2d 401, 403, 55 Cal. Rptr. 393, 395 (1966).
120. People v. Ellis, 65 Cal. 2d at ____, 421 P.2d at 397-98, 55 Cal. Rptr. at 389-90.
121. *See, e.g.,* Newhouse v. Misterly, 415 F.2d 514, 517-18 (9th Cir. 1969); Commonwealth v. Robinson, 229 Pa. Super. 131, ____, 324 A.2d 441, 449-51 (Super. Ct. 1974).
122. *See* A. CEDERBAUMS, SCIENTIFIC AND EXPERT EVIDENCE IN CRIMINAL ADVOCACY 436 (1975).

the prosecution to show that a defendant, when confronted with a warrant to search his premises for contraband, swallowed narcotics to avoid detection in the hope that his body would metabolize the incriminating evidence.[123]

State courts could, however, substantially erode this theory by finding an absolute statutory right to refuse testing. If a defendant is given a lawful state created choice under such circumstances, a jury might interpret a defendant's failure to explain his refusal as evidence of his guilt, which would undermine his right to remain silent.[124] It is possible that the Court wished to avoid this dilemma and thus declined to base its decision on the theory that a refusal was not "testimonial."[125]

The Court was not required to reach the "testimonial" issue once it found that the refusal was not "coerced" within the meaning of the fifth amendment.[126] For example, a spontaneous, uncoerced utterance by a defendant in custody is not protected by the fifth amendment, even if it is incriminating and "testimonial."[127] By refusing to find coercion, the Court avoided the quagmire of determining whether a nod of a defendant's head is testimonially distinguishable from an affirmative "no,"[128] and thus any response by a defendant in refusing the test may come into evidence, including the damaging statement, "I'm too drunk, I

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123. *Cf. Rochin,* 342 U.S. at 166 (Supreme Court reversed a conviction for possession of morphine because after the defendant had swallowed morphine capsules in an attempt to avoid detection, police officers ordered a doctor to force an emetic solution into his stomach against his will).

Another purpose of admitting into evidence a defendant's refusal to submit to testing is to avoid the confusion, misrepresentation, and prejudice to the State that would result from its failure to explain to a jury the absence of test results. *See, e.g.,* State v. Andrews, 297 Minn. 260, ____, 212 N.W.2d 863, 867 (Peterson, J., dissenting), *cert. denied,* 419 U.S. 881 (1973). The dissent offered the following explanation for allowing admission of the refusal:

> The concept of the implied-consent law had by 1971 been more widely accepted than at the time of its first enactment, with increased public awareness of its routine use. This being so, the legislature [in repealing a statutory provision making evidence of refusal inadmissible] could well have intended to avoid a jury's speculating that a chemical test had been given to the defendant but that the absence of any evidence concerning the result indicated that the results were negative.

297 Minn. at ____, 212 N.W.2d at 867 (Peterson, J., dissenting).

It is a general principle of evidence that either party may explain the absence of evidence that jurors normally expect to be present. *See* Schumacher v. United States, 216 F.2d 780, 787-88 (8th Cir. 1954), *cert. denied,* 348 U.S. 951 (1955). Jurors are universally aware of the availability of chemical tests to determine intoxication and can hardly escape inferring either that a test was not offered or that its results were favorable to the defendant if no test results were presented by the State. The doubt created by the unexplained absence of test results is often, by itself, enough to insure an acquittal. *See* Cohen, *supra* note 15, at 935.

124. *See Neville,* 312 N.W.2d at 724-25; Dudley v. State, 548 S.W.2d 706, 707-08 (Tex. Crim. App. 1977).

125. *Neville,* 103 S. Ct. at 922 n.12.

126. *Id.* at 923.

127. Rhode Island v. Innis, 446 U.S. 291, 302-03 (1980).

128. *See Schmerber,* 384 U.S. at 761 n.5.

won't pass the test."

IV. DOYLE v. OHIO AND THE CONSTRAINTS OF DUE PROCESS

Finally, the *Neville* Court considered and rejected the due process argument[129] under *Doyle v. Ohio*[130] that was obliquely raised in the lower court opinion[131] and mentioned only in passing by respondent Neville in his brief.[132] In *Doyle* the Supreme Court found that a prosecutor had violated a defendant's fourteenth amendment rights when he used the defendant's post-*Miranda* warning silence to impeach him at trial.[133] The *Neville* Court recognized that Neville could have similarly argued that his due process rights were violated by the arresting officer's failure to warn him that his refusal could be used against him at trial, despite the statutory requirement that such a warning be given at the time the test was offered.[134]

The Court recognized this argument, however, merely to dismiss it from consideration.[135] The Court pointed out that the police specifically told Doyle that his silence was sacrosanct and that no adverse consequences would flow from that silence.[136] In contrast, the police informed Neville that his license would be suspended if he refused the test,[137] thus belying the assumption that his choice was a "safe harbor," free from attendant penalties.[138] Failure to warn Neville that his refusal could itself be admitted at trial, therefore, was not a fundamentally unfair procedure in violation of the fourteenth amendment.[139]

The Court seems to be on solid ground in such a holding,

129. *Neville*, 103 S. Ct. at 923-24. The Court considered whether the admission of the defendant's refusal as evidence violated the defendant's right to due process because police officers did not fully warn him of the consequences of refusal. *Id.*

130. 426 U.S. 610 (1976).

131. *Neville*, 312 N.W.2d at 728. The South Dakota Supreme Court cited *Doyle* solely for the proposition that the State may not use a defendant's post-arrest silence for any purpose during its case-in-chief. *Id. See* Doyle v. Ohio, 426 U.S. 610, 619-20 (1976).

132. Brief for Respondent at 11, 13, South Dakota v. Neville, 103 S. Ct. 916 (1983). Respondent Neville, in his brief to the Supreme Court, cited *Doyle* for the proposition that a prosecutor may not impeach a defendant by commenting on the defendant's post-*Miranda* warning silence. Brief at 13. Neville did not raise the issue addressed by the Court in *Neville* of whether the state's failure to warn the defendant that his refusal to submit to a blood alcohol test would be used against him at trial violated due process. *Id.*

133. *Doyle*, 426 U.S. at 619-20.

134. *Neville*, 103 S. Ct. at 923-24. *See* S.D. CODIFIED LAWS ANN. § 32-23-10 (1976).

135. 103 S. Ct. at 923-24.

136. *Id.* at 924. *See Doyle*, 426 U.S. at 618.

137. 103 S. Ct. at 924.

138. *Id.* The Court stated that "the warning that he could lose his driver's license made it clear that refusing the test was not a 'safe harbor,' free of adverse consequences." *Id.*

139. *Id.*

although it was not technically necessary for it to consider the issue. *Doyle* is only one in a series of cases in which the Supreme Court has found a due process violation when the prosecution attempted to use a defendant's silence to impeach him after he had been specifically told that his silence could not be used against him.[140] Cases that limit the defendant's right to remain silent, however, indicate that due process will not protect a defendant's silence at any stage of the proceedings if he has not been so assured.[141] Thus, had the arresting officer failed to warn Neville that any adverse consequences would result from his refusal, due process and a "sense of justice"[142] might have dictated a different result.

V. CONCLUSION

The Supreme Court's decision in *Neville* is well-reasoned, legally supportable, and publicly palatable. It comes at a time when society is becoming increasingly concerned about the devastation caused by drunk drivers and at a time when the country is calling for solutions. By what appears to be a definitive disposal of all constitutional challenges to the admittance of a defendant's refusal at trial, the Court has laid to rest the conflicting and often erroneously decided state court decisions on the issue and has provided law enforcement with an additional tool to prosecute successfully DWI cases. Although the Court's resolution of the due process challenge might be controversial because it extends the rationale of *Doyle* to a situation in which the defendant was not warned about the exact consequences that resulted, it is nonetheless consistent with prior case law and is a legally defensible extension.

Although it is likely that Justice Stevens was in error in finding an adequate and independent state ground for decision that would have precluded federal review,[143] his conclusion that the Court was deciding a federal issue unnecessarily may have some merit: some state courts, after reviewing *Neville,* may choose to recognize a state

140. *See, e.g.,* United States v. Hale, 422 U.S. 171, 180 (1975) (admission of evidence of silence at the time of the arrest has a significant potential for prejudice); Johnson v. United States, 318 U.S. 189, 196-99 (1943) (due process prohibits a prosecutor from commenting upon a defendant's refusal to answer certain questions during cross-examination as a result of court bestowed immunity even though the immunity was improperly granted).

141. *See, e.g.,* Fletcher v. Weir, 455 U.S. 603, 607 (1982) (State properly impeached the defendant by commenting on the defendant's silence at time of arrest because his silence was not preceded by *Miranda* warnings); Jenkins v. Anderson, 447 U.S. 231, 238-40 (1980) (State properly impeached the defendant by commenting on his failure to report the crime with which he was charged and to give an explanation of his actions).

142. *See Rochin,* 342 U.S. at 173.

143. *See Neville,* 103 S. Ct. at 924 (Stevens, J., dissenting). The majority stated that there was an adequate but not an independent state ground for the state court decision. *Id.* at 919 n.5.

statutory right to refuse testing that is free from constitutional considerations, thus rendering the Court's decision impotent. It would be unfortunate, however, if state courts recognized such a right because the only support for such recognition is a fifth amendment argument, which the Court has found inapplicable. The Court has nonetheless rendered a significant decision concerning the coercion aspect of the fifth amendment and one whose ultimate ramifications in other constitutional contexts have yet to be determined.