ALASKA'S CRIMINALIZATION OF REFUSAL TO TAKE A BREATH TEST: IS IT A PERMISSIBLE WARRANTLESS SEARCH UNDER THE FOURTH AMENDMENT?

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I. INTRODUCTION

As illustrated by the increase in alcohol-related traffic fatalities during 1986,[1] immoderate alcohol consumption and driving a motor vehicle do not mix.[2] States have taken different approaches in attempting to facilitate the prosecution of those who engage in this antisocial behavior. One approach common to all states has been to seek

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1. After declining steadily from a 1982 high of 25,166, the number of alcohol-related traffic fatalities jumped back up by more than 1600 to a 1986 total of 23,987. A related statistic reports 1,793,300 drunk-driving arrests for 1986, a 39% increase over the level in 1977. Press, *The Menace on the Roads,* NEWSWEEK, Dec. 21, 1987, at 42.

2. In a recent dissenting opinion, Chief Justice Peterson of the Oregon Supreme Court noted the following statistics regarding the results of intoxicated drivers:

> Nationally:
> ** Approximately 50 percent of all traffic fatalities occur in alcohol-related crashes. This means that more than 20,000 lives are lost each year in alcohol-related crashes.
> ** About 560,000 people are injured each year in alcohol-related crashes, 43,000 of them seriously.
> ** More than half of alcohol-related fatalities occur in single-vehicle crashes.
> ** About two-thirds of all people killed in alcohol-involved crashes are drivers or pedestrians who had been drinking, while one-third are innocent victims: drivers or non-occupants (primarily pedestrians and pedalcyclists) and passengers in either vehicle.
> ** The proportion of alcohol-related fatal crashes is about three times greater at night than during the day. Between midnight and 4 a.m., about 80 percent of drivers killed have been drinking.

ways to induce those suspected of drunk driving to submit to a chemical test for alcohol intoxication. Most seek to compel the test by suspending the driving privileges of those suspects who refuse.[3] Two states, Alaska and Nebraska, have taken a different approach. Both have made it a separate misdemeanor crime to refuse to submit to a chemical test when lawfully under arrest for driving while intoxicated,[4] with penalties identical to an intoxicated driving charge.[5]

Alaska's "Refusal to Submit to Chemical Test"[6] and the nearly identical provisions of the Anchorage Municipal Code[7] were under challenge in the case of *Burnett v. Municipality of Anchorage.*[8] In *Burnett,* two individuals, Peter Burnett and Daniel C. Ryan, were convicted under Anchorage's refusal ordinance, and one individual, Raymond Roop, was convicted under the state statute.[9] In petitions

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Nelson v. Lane County, 304 Or. 97, 116-17, 743 P.2d 692, 702-03 (1986) (citing data compiled by the NHTSA/National Center for Statistics and Analysis (Aug. 1986)).

3. *See* Bruns, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent,* 58 TEX. L. REV. 935, 935-36 & n.4 (1980) [hereinafter Bruns]; Note, *The Theory and Practice of Implied Consent in Colorado,* 47 U. COLO. L. REV. 723, 725 & n.9 (1976) [hereinafter Note, *Implied Consent*]; Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept,* 53 ST. JOHN'S L. REV. 39, 39 n.3 (1978) [hereinafter Lerblance].

4. ALASKA STAT. § 28.35.032(a) (1987); NEB. REV. STAT. § 39-669.08 (1984 & Supp. 1987).

5. ALASKA STAT. §§ 28.35.032(g), .030(c) (1987) (A refusal to submit to chemical testing results in the denial or revocation of the driver's license; refusal may also be used against an individual in both criminal and civil proceedings; a conviction carries a minimum sentence of 72 hours' imprisonment and a $250 fine for the first conviction; subsequent convictions carry a minimum sentence of 20 days' imprisonment and a $500 fine; and penalties increase for each subsequent conviction.); NEB. REV. STAT. §§ 39-669.08 (1984 & Supp. 1987), 28-106 (1985) (A person who refuses to submit to a preliminary breath test shall be placed under arrest and is guilty of a Class V misdemeanor, which carries a maximum fine of $100 but no imprisonment; once arrested, a person who refuses to consent to chemical testing, if subsequently convicted of the crime and if the individual has no previous convictions for refusal, shall be guilty of a Class W misdemeanor, carrying a mandatory seven-day prison term and a $200 fine; in addition, the person's driver's license will be revoked for six months. The penalties increase for each subsequent conviction.).

6. ALASKA STAT. § 28.35.032 (1987) [hereinafter "refusal statute"].

7. ANCHORAGE, ALASKA, MUNICIPAL CODE § 9.28.022 (1983).

8. 806 F.2d 1447 (9th Cir. 1986).

9. *Id.* at 1449. Burnett and Roop were both unsuccessful in appealing their convictions. *See* Burnett v. Municipality of Anchorage, 678 P.2d 1364 (Alaska Ct. App. 1984), *petition for hearing denied,* No. S-439 (Alaska June 7, 1984), *cert. denied,* 469 U.S. 859 (1984); Roop v. State of Alaska, No. A-375 (Alaska Ct. App. Sept. 19, 1984), *petition for hearing denied,* No. S-668 (Alaska Nov. 14, 1984), *cert. denied,* 471 U.S. 1016 (1985). Ryan did not appeal his conviction. *See* Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir. 1986) (The court found that Ryan was excused from not exhausting his state remedies "on the basis that further resort to state forums would have been futile."). Burnett, Roop, and Ryan subsequently and

for post-conviction relief, these defendants asserted that requiring submission to a breath test could be justified neither as a search incident to arrest, nor as a consensual search. The United States District Court for the District of Alaska denied relief, reasoning that Alaska's requirement that arrestees submit to breath tests was valid both as a search incident to arrest and as a consent search.[10] The Ninth Circuit, in an opinion by Judge J. Blaine Anderson, affirmed the district court's holding that the requirement to take a breath test was valid as a search incident to arrest, but it neither relied on nor discussed the district court's consent search rationale.[11]

Part II will briefly recount the factual context of the case. Part III will trace the district court's and the Ninth Circuit's reasoning in finding the requirement supportable as a search incident to arrest and will conclude that the court was incorrect. Based on a correct reading of *Schmerber v. California,*[12] this article will show that, to be valid, chemical test searches must be justified by "exigent circumstances." Part IV will assess the district court's finding that chemical tests are sustainable as consent searches and will conclude that, because of the coercive and involuntary nature of the tests, this holding was wrongly decided. Part V will conclude that (1) in the absence of actual consent, only the presence of exigent circumstances can sustain breath tests as warrantless searches, and (2) actual consent cannot be implied by statute.

II. THE FACTS OF *BURNETT V. MUNICIPALITY OF ANCHORAGE*

Peter Burnett and Daniel Ryan were arrested on separate occasions by Anchorage police officers for driving while intoxicated.[13] Raymond Roop was arrested for the same offense by an Alaska state trooper.[14] The three arrests occurred during 1983 and 1984. All three arrestees were advised of the relevant implied consent law applicable to each of them[15] and the penalties for refusing to submit to the breath

separately sought federal habeas relief pursuant to 28 U.S.C. § 2254 (1982). *See* Burnett v. Municipality of Anchorage, 634 F. Supp. 1029 (D. Alaska), *aff'd,* 806 F.2d 1447 (9th Cir. 1986). These latter two federal court decisions are the focus of this article.

10. 634 F. Supp. at 1034-38.

11. 806 F.2d at 1451. The defendants chose not to seek review in the United States Supreme Court. Letter from Jim Wolf, Anchorage Deputy Municipal Prosecutor, to D. Bernard Zaleha (Aug. 14, 1987) (on file with *Alaska Law Review*).

12. 384 U.S. 757 (1966).

13. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029, 1031 (D. Alaska), *aff'd,* 806 F.2d 1447 (9th Cir. 1986).

14. *Id.*

15. ALASKA STAT. § 28.35.031(a) (1987) provides as follows:

> A person who operates or drives a motor vehicle in this state . . . shall be considered to have given consent to a chemical test or tests of the person's

test.[16] All three were asked to take the breathalyzer test, which they peacefully refused.[17] They were charged under the respective provisions with both driving while intoxicated ("DWI") and refusal. The three defendants argued unsuccessfully in pre-trial motions to dismiss that the refusal statutes violated their fourth and fourteenth amendment rights under the United States Constitution.[18]

> breath for the purpose of determining the alcoholic content of the person's blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle . . . while intoxicated.

ANCHORAGE, ALASKA, MUNICIPAL CODE § 9.28.021(A) (1983) mirrors this provision with similar language:

> A person who operates, drives [or is in actual physical control] of a motor vehicle [within the municipality] . . . shall be considered to have given consent to a chemical test or tests of [his or her] breath for the purpose of determining the alcoholic content of [his or her] blood or breath if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating, driving [or is in actual physical control] of a motor vehicle . . . .

(language differences in brackets).

16. "Refusal to submit to a chemical test of breath authorized by ALASKA STAT. § 28.35.031(a) is a Class A misdemeanor." ALASKA STAT. § 28.35.032(f) (1987). ALASKA STAT. § 28.35.032(g) further provides that:

> [u]pon conviction of a person under this section, the court shall impose a minimum sentence of imprisonment of not less than 72 consecutive hours and a fine of not less than $250 if the person has not been previously convicted in this or another jurisdiction of driving while intoxicated . . . or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 20 consecutive days and a fine of not less than $500 if, within the preceding 10 years, the person has been previously convicted once in this or another jurisdiction of driving while intoxicated . . . or refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. Upon conviction under this section the court shall impose a minimum sentence of imprisonment of not less than 30 consecutive days and a fine of not less than $1,000 if, within the previous 10 years, the person has been previously convicted in this or another jurisdiction of more than one of the following offenses: (1) driving while intoxicated . . . ; (2) refusal to submit to a chemical test under this section or another law or ordinance with substantially similar elements. The execution of sentence may not be suspended nor may probation be granted except on condition that the minimum imprisonment provided in this section is served. Imposition of sentence may not be suspended . . . . The sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the committed person.

The same penalties are provided by ANCHORAGE, ALASKA, MUNICIPAL CODE § 9.28.022(D) (1983).

17. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029, 1031 (D. Alaska), *aff'd*, 806 F.2d 1447 (9th Cir. 1986).

18. *Id.* at 1032.

Burnett and Roop then pleaded no contest to the refusal charges, but they reserved their right to appeal their convictions under an Alaska procedure.[19] The prosecutors dropped their DWI charges, and both defendants were fined.[20] Burnett was given the usual first-time sentence of thirty days in jail, with twenty-seven days suspended. Roop was sentenced to sixty days in jail, with fifty-two days suspended.[21] Ryan went to trial and was acquitted of the DWI charge but was convicted of refusal and sentenced to 180 days in jail with 140 days suspended.[22]

All three defendants appealed their convictions, again arguing fourth and fourteenth amendment violations.[23] Burnett's and Roop's convictions were affirmed by the Alaska Court of Appeals.[24] Both Burnett and Roop then sought and were denied review by the Alaska and United States Supreme Courts.[25] The Alaska Superior Court rejected Ryan's constitutional arguments,[26] and he sought no further state court relief. Burnett, Ryan, and Roop, their convictions stayed, then filed post-conviction proceedings in federal court.[27] All three cases were consolidated for the court's consideration.[28]

III. SEARCH INCIDENT TO ARREST OR EXIGENT CIRCUMSTANCES

As a practical matter, the petitioners in this case objected to the fact that their refusals to submit to a chemical test were met with criminal sanctions instead of the usual administrative license suspensions applied in all but one of the other forty-nine states.[29] One legal

19. *Id.*

20. *Id.*

21. *Id.* While within the range of a first-offender sentence, the eight days to serve indicates that the judge found some aggravating circumstances, which usually involves the presence of poor driving behavior, an accident, or a high breath alcohol. The latter, of course, could not have been the basis here.

22. *Id.* This sentence probably indicates that this was at least Ryan's third conviction for DWI or refusal within ten years, explaining at least in part why he elected to go to trial. *See* ALASKA STAT. § 28.35.032(g) (1987) quoted *supra* note 16.

23. *See supra* note 9.

24. *Id.*

25. *Id.*

26. Burnett v. Municipality of Anchorage, 634 F. Supp. 1029, 1032 (D. Alaska), *aff'd,* 806 F.2d 1447 (9th Cir. 1986).

27. *Id.*

28. *Id.*

29. *See* Brief for Appellant at 11-12, Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986) [hereinafter Appellant's Brief] ("Appellants insist that the Fourth Amendment includes 'the right of people to be secure in their persons . . . against unreasonable searches and seizures . . .' and that imposing criminal sanctions for withdrawing consent to a warrantless search has a constitutionally impermissible chilling effect on the exercise of that right."). *See also supra* notes 3-5 and accompanying text.

argument they advanced to defeat this outcome was that requiring a breath test was not a valid search incident to arrest. This argument must be evaluated against the Supreme Court cases of *Schmerber v. California*[30] and *South Dakota v. Neville.*[31]

A. *Schmerber v. California*

In *Schmerber,* the defendant had been involved in an automobile accident and was taken to a hospital. A police officer requested that he submit to a breathalyzer test[32] or a blood-alcohol test, and the defendant refused both tests.[33] Despite the refusal, the officer directed a physician to withdraw a sample of blood from the defendant, which was then seized and tested for alcohol content. The test results were used against him at trial, and he was convicted of driving under the influence of alcohol. Contending that the blood-alcohol evidence used against him was the product of an unreasonable search and seizure violative of the fourth amendment of the United States Constitution, the defendant sought reversal in the Appellate Department of the California Superior Court. The appellate department affirmed the convictions, and, after further review was denied within California, the United States Supreme Court granted review.[34]

The Supreme Court, per Justice Brennan, framed the issue as whether, given these particularized facts, the blood could be drawn without first procuring a search warrant.[35] The Court began its discussion by distinguishing between searches permitted as an incident of a lawful arrest and searches beyond the body's surface. The Court noted that, in order to protect police officers from concealed weapons and prevent the destruction of evidence within an arrestee's control, police are allowed to search arrestees as an incident of their arrest, regardless of the likelihood of finding either weapons or evidence.[36] The Court, however, found that "human dignity and privacy" interests prevented the extension of the so-called search-incident rationale to searches beyond the body's surface.[37] Warrantless body searches could not be sustained on the "mere chance that desired evidence might be obtained" but must be based on "a clear indication that in fact such evidence will be found."[38]

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30. 384 U.S. 757 (1966).
31. 459 U.S. 553 (1983).
32. 384 U.S. at 765 n.9.
33. *Id.* at 759, 765 n.9.
34. *Id.* at 758-59.
35. *Id.* at 770.
36. *Id.* at 769.
37. *Id.* at 770.
38. *Id.*

Even applying this more rigorous test, however, the Court found several factors present which upheld the warrantless search in this case. First, the probable cause necessary for the underlying arrest for drunk driving also established the relevance and likely success of finding evidence by testing the defendant's blood. Second, the officer might have reasonably believed, given the immediate onset of physiological elimination of alcohol from the blood stream, that he was confronted with an emergency situation whereby the imminent destruction of evidence was threatened. Third, the method of testing the blood-alcohol level was a reasonable one. Finally, minimal blood was extracted through a process involving "virtually no risk, trauma, or pain."[39] The Court, therefore, held that, given the special facts of that case, the attempt to secure evidence of blood-alcohol content was "an appropriate incident to defendant's arrest."[40]

B. *South Dakota v. Neville*

In *South Dakota v. Neville,*[41] police officers stopped the defendant's car after observing the defendant's failure to stop at a stop sign. When the defendant got out of his car, he staggered and fell against the car for support; the officers also detected alcohol on the defendant's breath. The defendant informed the officers that he did not have his license because it had been revoked after a previous DWI conviction. The defendant then failed two field sobriety tests.

The defendant was arrested for DWI and then was asked to submit to a breath test, both at the scene of the arrest and later at the police station.[42] Though warned that he could lose his license if he refused, he refused the test on three separate occasions. The defendant sought to suppress all evidence of his refusals, even though South Dakota law provides that a refusal may be admitted at trial. The state circuit court suppressed the evidence and the state supreme court affirmed, finding that allowing the evidence of refusal to be admitted violated the defendant's federal and state privilege against self-incrimination.[43] The state's high court reasoned that, by forcing the defendant to choose between submitting to the examination or having his refusal admitted against him at trial, the state had compelled an incriminating communication.[44] The United States Supreme Court granted review.[45]

39. *Id.* at 771.
40. *Id.* at 770-71.
41. 459 U.S. 553 (1983).
42. *Id.* at 555-56.
43. State v. Neville, 312 N.W.2d 723 (S.D. 1981), *rev'd,* 374 N.W.2d 128 (S.D. 1985) (applying South Dakota v. Neville, 459 U.S. 553 (1983)).
44. *Id.* at 726.
45. 459 U.S. at 558.

The Supreme Court, per Justice O'Connor, began its analysis in *Neville* by interpreting *Schmerber* as allowing "a State to force a person suspected of driving while intoxicated to submit to a blood-alcohol test."[46] South Dakota, however, had chosen not to force submission to a test but, rather, to penalize refusal to submit through license revocation and admission of the refusal into evidence at trial. The Court reasoned that, because "the State could legitimately compel the suspect, against his will, to accede to the test," the state had the option of offering the arrestee a choice between taking the test or having a refusal admitted in evidence against him to the trier of fact.[47] Thus, "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."[48]

C. The *Burnett* Court's Application of *Schmerber* and *Neville*

In the *Burnett* case, petitioners sought to distinguish the involuntary blood test upheld in *Schmerber* by arguing that the breath test at issue requires the cooperation of the defendant[49] and, therefore, requires a warrant before it can lawfully be administered.[50] The district court distilled petitioners' argument on this point down to the following: (1) because the breath test requires cooperation from a suspect (to provide the breath needed to activate the breathalyzer), such a search cannot be considered as a mere incident to arrest but must instead be considered a consent search; (2) such consent is lacking when a suspect refuses the test; (3) because the Alaska legislature has prohibited the administration of a chemical test if the suspect refuses, a breath test is not a search incident to arrest.[51] The district court conceded that petitioners' argument was "novel, subtle, and superficially forceful," but concluded that it was without supporting authority.[52]

In rejecting petitioners' argument, the district court relied on several factors. First, a breath test is even less intrusive than the blood

46. *Id.* at 559.

47. *Id.* at 563.

48. *Id.* at 564. For a more thorough discussion of *Neville,* see Crump, *The Admission of Chemical Test Refusals After State v. Neville: Drunk Drivers Cannot Take the Fifth,* 59 N.D.L. REV. 349 (1983).

49. The parties stipulated that the cooperation of a suspect is necessary for an accurate breath test result. 634 F. Supp. at 1036 n.5.

50. Appellant's Brief, *supra* note 29, at 9.

51. 634 F. Supp. at 1036. In an apt description, the Municipality noted that, in essence, defendants' argument seeks to imply from the accepted legal principle that consent may make legitimate an otherwise illegal search the proposition that lack of consent will make illegitimate an otherwise permissible search. Brief for Appellee at 7, Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986) [hereinafter Appellee's Brief].

52. 634 F. Supp. at 1036.

samples at issue in *Schmerber* and, therefore, deserving of even less protection.[53] Second, because under *Neville* a driver lawfully arrested for DWI has no constitutional right to refuse to submit to a breath test,[54] a chemical test could constitutionally—if not physically—be administered against the suspect's will. Thus, the fact that a driver refuses to submit to the test does not create a constitutional distinction sufficient to remove the search from the lawful scope of a search incident to arrest.[55]

The district court concluded its opinion as follows:

> Nothing in the Alaska statutes here at issue deprives [petitioners of their right to be free of unreasonable searches], or otherwise burdens it. A motorist who has been stopped for driving while intoxicated and who wishes to vindicate himself has two choices under the law. He may take the test as the state prefers him to do. If he does, and the evidence is favorable to him, he will gain his prompt release with no charge being made for drunk driving.[56] If the evidence is unfavorable, he may challenge the government's use of that evidence by attacking the validity of the arrest. If he does not take the test, he can still challenge the evidence of his refusal by once again attacking the validity of the arrest. Either way, he remains fully capable of asserting the only fourth amendment right he possesses: the right to avoid arrest on less than probable cause.[57]

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53. *Id.* at 1037.

54. *Id.* The district court apparently found persuasive on this point the following language in a concurring opinion by Judge Singleton of the Alaska Court of Appeals (which hears appeals only in criminal cases):

> [Defendant's] argument confuses a legal concept, "consent," with a factual concept, "cooperation" or "assent." The two are substantially different. Consent in the constitutional sense is only required where the defendant has a legal right to refuse. As we have seen, a legally arrested defendant has no constitutional right to refuse a breathalyzer examination. True, he may fail to cooperate or give his assent to a breath test as a matter of fact, but failure to cooperate does not create a legal right where it would otherwise not exist .... [A] drunk driver's failure to cooperate in furnishing a breath sample does not give him a legal right to withhold breathalyzer evidence.

McCracken v. State, 685 P.2d 1275, 1280 (Alaska Ct. App. 1984) (Singleton, J., concurring), *quoted in* 634 F. Supp. at 1038 n.7. Apparently, Judge Anderson also found this reasoning persuasive, as he adopted the rationale almost verbatim as part of his opinion when the *Burnett* case was before the Ninth Circuit on appeal. *See* 806 F.2d at 1450.

55. 634 F. Supp. at 1037.

56. This is not necessarily so. The Anchorage, Alaska, Municipal Prosecutor's Office has occasionally prosecuted DWI suspects who had registered 0.0% breath alcohol, believing it had sufficient evidence to prove intoxication from a substance other than alcohol. To the extent that this faulty hypothesis provided a basis for the district court's holding, its holding and that of the Ninth Circuit, which contains identical language, *see* 806 F.2d at 1451, is proportionally tainted.

57. 634 F. Supp. at 1040-41 (citation omitted). This whole quote is replicated in the Ninth Circuit's opinion. *See* 806 F.2d at 1451. Certainly, neither court means to imply in the last sentence that the defendants lacked a constitutional right to be free of

The Ninth Circuit affirmed the district court's holding that Alaska's breath test requirement was a reasonable search incident to arrest, resting its decision primarily on *Schmerber.*[58] Judge Anderson interpreted *Schmerber* as setting up a three-part test of whether a chemical test is constitutionally valid: (1) there must be a "clear indication" that the evidence will in fact be found; (2) the test chosen to measure defendant's blood-alcohol level must be a reasonable one; (3) the test must be performed in a reasonable manner.[59] Judge Anderson noted as well that the *Schmerber* Court also accepted the fact that obtaining evidence of blood-alcohol level presents an emergency situation not allowing time to obtain a warrant.[60] Finding that all three tests were met in the present situation, and apparently assuming, though not expressly finding, that an emergency existed which prevented the officers from getting a search warrant, Judge Anderson ruled that "the breathalyzer examination in question is an appropriate and reasonable search incident to arrest which appellants have no constitutional right to refuse."[61]

D. Issues Not Addressed in *Burnett*

The *Schmerber* Court, in summarizing that case, concluded that a blood test of a suspect under arrest for drunk driving was "an appropriate incident to [his] arrest."[62] Given this language, it is perhaps understandable that both the district court[63] and the Ninth Circuit[64] also characterized the breath test at issue in *Burnett* as a "search incident to arrest." However, exceptions permitting warrantless searches under the fourth amendment have evolved further since *Schmerber.* Among the distinct exceptions to the usual rule that a warrant is required are "searches incident to arrest" and searches justified by "exigent circumstances." While *Schmerber* intermixed both rationales, at least linguistically, it may be that *Schmerber* is more properly characterized as an "exigent circumstances," rather than a "search incident," case. In order to evaluate this possibility, the fourth amendment case law subsequent to *Schmerber* must be analyzed.

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unreasonable searches; rather, they intend merely that the breath test at issue was reasonable.

58. 806 F.2d at 1449-50. *See supra* notes 32-40 and accompanying text.
59. 806 F.2d at 1449.
60. *Id.* at 1449-50.
61. *Id.* at 1450.
62. 384 U.S. at 771; *see supra* Part IIIA pp. 268-69.
63. 634 F. Supp. at 1037.
64. 806 F.2d at 1450.

1. *Search Incident to Arrest.* Prior to 1969, it was generally assumed that the police could search without a warrant the entire premises where a person was arrested.[65] In *Chimel v. California,*[66] however, the United States Supreme Court restricted the area that could be searched without a warrant. In *Chimel,* police went to the home of a person suspected of robbing a coin shop. The police had an arrest warrant, but no search warrant. The police arrested the suspect and then conducted a full search of the three-bedroom home, finding some of the stolen coins. In analyzing the case, the Court acknowledged the police's right to search the area within the arrestee's immediate control but concluded that an area outside of the arrestee's control could not be searched without a warrant. The Court reasoned that an arresting officer may properly search the person for any weapons he or she may use to resist arrest and injure the officer. In addition, the officer may search for and seize any evidence on the arrestee's person or within his or her reach "in order to prevent its concealment or destruction."[67] The Court found ample justification "for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[68] Because the search in *Chimel* did not meet this test, the Court invalidated the search.

In *United States v. Chadwick,*[69] the Supreme Court further clarified its position that a warrantless search may not be validated as one incident to arrest if conducted "remote in time or place from the arrest."[70] Thus, a search of a footlocker which contained marijuana was not considered a search incident to arrest when it had not been opened until more than an hour after the arrest and after the suspected smugglers were safely incarcerated.

If the logic of *Chimel* were given broad application, all warrantless searches incident to arrest would have to be supported by facts indicating the presence of either weapons or destructible evidence. At least as to searches of the person, however, the Court has refused to

65. *See, e.g.,* United States v. Rabinowitz, 339 U.S. 56 (1950), *rev'd,* 395 U.S. 752 (1969) (The court held that a search is reasonable if the search is incident to a valid arrest, if the place searched was a business room open to the public, and if the room was small and under the complete and immediate control of the arrestee.).

66. 395 U.S. 752 (1969).

67. *Id.* at 763.

68. *Id.*

69. 433 U.S. 1 (1977).

70. *Id.* at 15 (quoting Preston v. United States., 376 U.S. 364, 367 (1964)); *see also* Vale v. Louisiana, 399 U.S. 30, 33 (1970) (Because "a search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest,' " the search of arrestee's home after being arrested outside his home could not be sustained as a search incident to arrest.).

give *Chimel* such a broad reading. In *United States v. Robinson,*[71] the defendant was arrested for driving with a revoked license. After placing him under arrest, the officer had Robinson get out of the car and conducted a general frisk. The officer felt a soft, crumpled cigarette package in Robinson's pocket and discovered capsules of heroin in the package. The cigarette package was unlikely to contain either weapons or evidence of Robinson's driving without a license. The Court, nonetheless, upheld the search as one incident to arrest, reasoning that the "authority to search [a] person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[72] Because it is the fact of a lawful arrest which establishes the authority to search, the Court concluded that no additional justification for a "full search" of the person is required under the fourth amendment.[73]

More recently, the Supreme Court has also limited the application of the *Chimel* rule of "immediate control" when applied to searches of automobiles after a lawful stop. In *New York v. Belton,*[74] a car in which the defendant and several others were riding was stopped for speeding. After the officer smelled marijuana and saw an envelope he suspected contained marijuana, he ordered all of the occupants out of the car and arrested them for unlawful possession. After moving them some distance from the car, he searched the zippered pocket of Belton's jacket which was on the back seat of the car and found cocaine.

In upholding the search, the Supreme Court acknowledged that, in a given case, the entirety of a car's passenger compartment may not be within an arrestee's immediate control. However, reasoning that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m],' "[75] the Court opted for a bright line approach in holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile . . . [and] any containers found within the passenger compartment."[76] By the time the jacket was actually searched, Belton

71. 414 U.S. 218 (1973).
72. *Id.* at 235.
73. *Id.*
74. 453 U.S. 454 (1981).
75. *Id.* at 460 (quoting Chimel v. California, 395 U.S. at 763).
76. *Id.* (footnotes omitted).

had been arrested and secured some distance from the car. The jacket was, therefore, no longer in his immediate control. The Court, however, attached no significance to this fact and instead concluded that because "[t]he jacket was located inside the passenger compartment of the car in which [Belton] had been a passenger just before he was arrested . . . [it] was within the area which we have concluded was 'within the arrestee's immediate control' within the meaning of *Chimel.*"[77]

In summary, the post-*Chimel* cases establish that the "immediate control" test affords the most protection to the surroundings of suspects in their own home. Searches other than those of the person must not be remote in time or place from the arrest. Full searches of the person are presumed to be the valid incident of a lawful arrest, however, and searches of the passenger compartment of a car and any containers therein are *per se* permissible, regardless of whether the arrestee remains in actual control of the searched area at the time of the search.

2. *Exigent Circumstances Search.* In *Vale v. Louisiana,*[78] the Court suggested that a warrantless search might be permitted if the goods ultimately seized had been "in the process of destruction," even if the search was not incident to arrest. In *Vale,* police arrested appellant outside his residence after observing what they believed to be a narcotics deal. Although the police had two warrants for Vale's arrest, they did not have a search warrant for appellant's residence. A search of the unoccupied home disclosed narcotics, which were seized. While holding that the search violated appellant's fourth amendment rights, the Court listed several circumstances which would have justified the search, including the possibility that the goods were in the process of being destroyed. The Court concluded, however, that the mere possibility that accomplices might destroy evidence in the near future did not meet the "process of destruction" test, and the search of a house there at issue was invalidated.

The "process of destruction" test was met, however, in *Cupp v. Murphy.*[79] There, Murphy had voluntarily appeared at the police station for questioning in regard to the strangulation murder of his wife. During questioning, the police noticed what appeared to be blood on Murphy's finger. When the police asked if they could take a sample of scrapings from his fingernails, he refused. After refusing, Murphy put his hands behind his back and then in his pockets and seemed to be rubbing his nails against his coins or keys. At that point, the police

77. *Id.* at 462.
78. 399 U.S. 30, 35 (1970).
79. 412 U.S. 291 (1973).

took the fingernail scrapings against Murphy's will but without placing him under arrest. The scrapings contained traces of skin and fabric from the victim's nightgown.

In resolving the case, the Court noted that the search could not be upheld as a "search incident to arrest" because no arrest had occurred, even though the Court believed the police had had probable cause to arrest before they took the scrapings. Nonetheless, the Court concluded that, even though a full-scale search such as one permitted incident to arrest was unavailable, the "very limited search" involved in taking fingernail scrapings was justified by the need "to preserve the highly evanescent evidence they found under his fingernails."[80]

Other cases following *Vale* have found exigent circumstances upholding warrantless searches in settings other than the imminent destruction of evidence. In *United States v. Doyle,*[81] the United States Court of Appeals for the Fifth Circuit upheld the search of a suspected narcotics dealer's garage when the search was based on reliable information that the evidence would have been moved before a warrant could have been obtained. And in *People v. Sirhan,*[82] the California Supreme Court upheld a warrantless search of Sirhan Sirhan's house after the shooting of Robert Kennedy based on "mere possibility" that the house may have contained evidence of a conspiracy to assassinate prominent political leaders.

In summary, for a warrantless search to be sustained based on exigent circumstances, there must be probable cause to believe that the place searched will contain the desired evidence, and there must be exigent circumstances which excuse obtaining a warrant, such as the imminent destruction or loss of evidence.[83] In contrast, a "search incident to arrest" requires probable cause for the arrest, but not probable cause to believe that the person or place searched will yield evidence. Police have an automatic right to search on the mere possibility weapons or evidence will be found. In addition, a "search incident to arrest" does not require exigent circumstances, although in a given instance, such circumstances may be present.

3. Burnett *Analyzed.* In order to analyze the *Burnett* court's characterization of breath tests as searches incident to arrest, it is helpful to outline the manner in which drunk-driving suspects are

80. *Id.* at 296.

81. 456 F.2d 1246 (5th Cir. 1972).

82. 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972), *cert. denied,* 410 U.S. 947 (1973), *rev'd,* 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

83. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.5(e) (1985).

processed in Anchorage.[84] In Anchorage, the initial traffic stop is based either on driving behavior indicating intoxication or, more typically, a violation of some other traffic regulation such as speeding or expired tags.[85] The officer will conduct field sobriety tests such as requiring the suspect to walk a straight line and touch his or her nose. If the suspect fails these tests, he or she is placed under arrest and transported to the police station.[86]

After an arrestee is taken to the downtown testing area, he or she is asked to provide a breath sample for the Intoximeter 3000.[87] It is the refusal of this test which is a misdemeanor crime under Alaska's statute.[88] The arrestee must be watched constantly for a twenty-minute period before being allowed to take the test to assure that the arrestee does not smoke any tobacco products, as smoking within the twenty-minute period preceding the test invalidates the test results.[89] If an arrestee is inadvertently allowed to smoke during the twenty-minute period, the waiting period must begin anew.[90]

One possible objection to the *Burnett* court's characterization of the breath tests conducted downtown as "searches incident to arrest"

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84. This information is based on the author's experience as a prosecution intern where he read hundreds of police reports of drunk-driving arrests and on information supplied during prosecution intern training.

85. *Id.*

86. While the author was in Anchorage, the Anchorage Police sometimes used the results of a portable breathalyzer to establish probable cause for arrest. The portable breathalyzer is less accurate than the Intoximeter 3000 used at the police station. If the suspect's performance on the field sobriety tests did not establish probable cause for arrest and the officer still believed that the suspect was intoxicated, the officer could request that the suspect blow into a portable breathalyzer. Refusal to provide a breath sample for the portable breathalyzer constitutes a traffic infraction punishable by a fine of up to $300. ALASKA STAT. § 28.35.031(b) & (e) (1987). If the breath alcohol that was detected by the portable breathalyzer was above a certain level, probable cause was established, and the suspect could then be arrested and transported to the police station. This manner of utilizing portable breathalyzers was invalidated in Leslie v. State, 711 P.2d 575 (Alaska Ct. App. 1986). In *Leslie,* the Alaska Court of Appeals held that requiring a suspect to submit to the portable breathalyzer test could be permitted only if the officer already has probable cause to arrest the suspect for driving while intoxicated. *Id.* at 577. Because the results from the portable breathalyzer tests can no longer be used to supply probable cause for arrest, the Anchorage Police no longer use the portable breathalyzers. Telephone interview with Assistant Municipal Prosecutor John McConnaughy, III (Sept. 21, 1988).

87. According to information supplied during prosecution intern training, the Intoximeter 3000 is a state-of-the-art testing machine superior to the older "Breathalyzer" series. It is considerably more accurate than the portable breathalyzers used in the field. *See* ALASKA ADMIN. CODE tit. 7, §§ 30.005, .010 (Oct. 1985).

88. ALASKA STAT. § 28.35.032 (1987).

89. ALASKA ADMIN. CODE tit. 7, § 30.020(1) (Oct. 1985).

90. *Id.*

is that the search is remote in time and place from the place of arrest, seemingly in violation of the holdings of *Chadwick* and *Vale.*[91] However, neither of those cases involved searches of one's person. Because the site of the defendant and the site of the search are one and the same when applied to breath tests, the fact that the test is not performed at the scene of the arrest should not matter. This outcome is buttressed by the holding in *United States v. Edwards*[92] that personal effects found on an arrestee at the scene of the arrest may later be searched without warrant at the place of detention, regardless of elapsed time.

One argument that the downtown breath tests are valid "searches incident to arrest" is that they are simply part of a "full search" of the person justified by a lawful arrest within the meaning of *Robinson.* This argument, however, contradicts the express holding of *Schmerber* that, because of "human dignity and privacy" interests, searches beyond the body's surface cannot be upheld merely as incident to lawful arrest.[93] The *Schmerber* Court's heightened solicitousness towards "human dignity" where inner body searches are involved is consistent with the Supreme Court's holding in *Rochin v. California*[94] that a conviction for selling narcotics obtained by using evidence retrieved through forced stomach pumping violated due process. It is this express removal by the *Schmerber* Court of chemical tests from the gamut of searches normally covered as incident to arrest that most clearly takes chemical tests from the "search incident" category.

In language very reminiscent of the "exigent circumstances" rationale, the *Schmerber* Court instead relied on the probable cause present in that case to sustain the arrest as providing the probable cause necessary to show that evidence of intoxication would be found through the blood test.[95] Finding that the pending loss of evidence

91. *See supra* notes 69-70, 78 and accompanying text.

92. 415 U.S. 800, 807 (1974) (The court admitted Edward's clothing into evidence even though not taken from him until the morning following his late-night arrest, stating "once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.").

93. 384 U.S. at 769-70; *see supra* notes 32-38 and accompanying text.

94. 342 U.S. 165, 173 (1952) ("It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.").

95. 384 U.S. at 770.

presented an emergency and that the test method was reasonable and non-offensive, the *Schmerber* Court upheld the blood test.[96]

In *Burnett,* the United States Court of Appeals for the Ninth Circuit also concluded that the officers had probable cause to believe that petitioners were under the influence of alcohol and, thus, had probable cause to believe that a breath test would indicate that petitioners had consumed significant quantities of alcohol.[97] However, the Ninth Circuit made no express finding that an emergency was present in the *Burnett* case,[98] but merely concluded that the breath tests met the "reasonableness" requirements of *Schmerber* and were, therefore, properly characterized as "searches incident to arrest."[99] A close reading of *Schmerber* shows this characterization by both the Ninth Circuit and the district court[100] to be mistaken.[101] Instead, the breath tests at issue in *Burnett* are properly understood to have been searches which could only be justified by "exigent circumstances."

As a practical matter, probable cause sufficient to sustain an arrest for drunk driving will in most cases also provide sufficient probable cause to believe a breath test will show evidence of intoxication, as is required by the first prong of the "exigent circumstances" rationale. However, to be valid under this rationale, there must be an "exigent circumstance" as well. In the breath test context, this "exigent

96. *Id.* at 770-71.

97. 806 F.2d at 1450.

98. In the portion of the opinion immediately preceding the application of *Schmerber* to the facts of *Burnett,* Judge Anderson quotes the portion of *Schmerber* describing the rapid loss of alcohol from the blood stream. 806 F.2d at 1449-50. Judge Anderson may have intended the reader to infer from this quote that a similar emergency existed in the facts of *Burnett.*

99. *Id.* at 1450.

100. 634 F. Supp. at 1037.

101. The Ninth Circuit's confusion on this matter is explained by its failure to accurately interpret *Schmerber.* Judge Anderson began by interpreting *Schmerber* as allowing a compelled blood test "where there [is] probable cause to arrest [a suspect] for driving under the influence of intoxicating liquor." 806 F.2d at 1449. Judge Anderson further interpreted *Schmerber* as setting up a three-part test: "First, there must be a 'clear indication' that in fact the desired evidence will be found. Second, the test chosen to measure defendant's blood alcohol level must be a reasonable one. Third, the test chosen must be performed in a reasonable manner." *Id.* Significantly, Judge Anderson neglected to include the requirement for an exigent circumstance, or, in the words of *Schmerber,* an "emergency." The first prong of Judge Anderson's interpretation should have alerted him that he was not dealing with a "search incident to arrest" as currently understood, seeing it is the fact of arrest, not any "clear indication" that evidence will be found, which justifies such searches. However, this nuance eluded him, and he missed an opportunity to clarify for future litigants that *Schmerber* is properly understood as an "exigent circumstances" case.

circumstance" will most likely be supplied by a threatened loss of evidence of intoxication over time. This requirement for an "exigent circumstance" constitutes a weak link in the Ninth Circuit's holding, even if the court impliedly found that an emergency existed.[102]

In Anchorage, there is a magistrate on duty twenty-four hours per day, 365 days per year. Given the United States Supreme Court's approval of telephonic search warrants,[103] it is likely that Anchorage police officers could obtain a warrant during the twenty-minute period described above without delaying the procurement of the test results. Depending on the telephonic availability of magistrates elsewhere in Alaska, this may be true state-wide. Obtaining a warrant would divert officers and magistrates from other tasks, and both would likely resent the requirement. However, inconvenience does not excuse non-compliance with fourth amendment requirements. Thus, in Anchorage, and perhaps all of Alaska, it may be difficult to justify not getting a warrant based on "impossibility" or an emergency prospect of loss of evidence.

The court in *Burnett* was not made aware of the twenty-minute waiting period, perhaps because defense counsel was unaware of actual practice. This factual reality, however, does provide the clearest basis for distinguishing Burnett's, Roop's, and Ryan's circumstances from those at issue in *Schmerber.* Fear of loss of evidence was the primary factor animating the Supreme Court's decision in that case. The other factors relied upon in *Schmerber*—likelihood of success and reasonableness of method—merely provided the rationale for permitting a warrantless search in such "emergency" circumstances.

In summary, both the district court and the Ninth Circuit inaccurately believed they were dealing with a "search incident to arrest" when they were considering breath tests. Because they labored under this premise, both courts neglected to make the proper inquiry: Was there an "exigent circumstance" which excused obtaining a search warrant? To the extent that further fact finding would have shown such a circumstance did not exist, the *Burnett* case must be considered to have been wrongly decided under current case law.

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102. *See supra* note 98 and accompanying text.

103. *See, e.g.,* United States v. Montoya de Hernandez, 473 U.S. 531, 557-58 (1985) ("[T]he Government's interest in proceeding expeditiously could have been achieved by obtaining a telephonic search warrant . . . ."); Steagald v. United States, 451 U.S. 204, 222 (1981) ("[I]f a magistrate is not nearby, a telephonic search warrant can usually be obtained.").

E. Implications of Breath Tests as "Exigent Circumstances" Searches

When breath tests become properly understood as searches justified by exigent circumstances, state power to enforce drunk driving laws may actually be enhanced. Perhaps even the faint scent of alcohol on the breath of a driver would provide an officer with probable cause to believe that a breath test would provide "highly evanescent evidence" of a crime, even though such a scent is probably insufficient probable cause for a sustainable arrest. And because absence of probable cause to arrest would prevent lengthy detention to obtain a search warrant, perhaps an exigent circumstance excusing the search warrant requirement exists, thereby permitting a warrantless search in the field to obtain the "evanescent evidence."

Interpreting *Schmerber* as allowing chemical tests only after arrest may unnecessarily restrict the enforcement options available to the states. If facts such as those hypothesized above can meet both prongs of the test, law enforcement options could be enhanced.

F. Possibilities for the Future

Under current Supreme Court precedent, a warrantless breath test should be deemed a search requiring some exigent circumstance to be valid. However, were this issue to come before the Supreme Court, the Court could take the opportunity simply to create an irrebuttable presumption that where there is probable cause to believe a chemical test will produce evidence of drunk driving, there is also an exigent "emergency" threat of lost evidence sustaining the test. Because it is "generally, even if not inevitably,"[104] true that a threatened loss of evidence may exist, the Court would be merely extending to a new factual setting its approach in *Belton,* where it decided simply to presume that the entire passenger compartment of a car was within an occupant's "immediate control" within the meaning of *Chimel.*[105] Given the widespread concern within society about drunk-driving, such a result would not be surprising.

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104. New York v. Belton, 453 U.S. 454, 460 (1981) (discussed *supra* at notes 73-76). In creating the *per se* rule that the passenger compartment of a car may be searched as an incident to an arrest, the *Belton* court reasoned that "articles inside the relatively narrow compass of the passenger compartment of the automobile are in fact *generally, even if not inevitably,* within the 'area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' " *Id.* (emphasis added) (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

105. *See supra* notes 73-76 and accompanying text.

IV. BREATH TESTS AS CONSENT SEARCHES

Petitioners' primary argument throughout the various levels of judicial review was that because the breath test requirement could not be justified as a search incident to arrest, it could only be justified based on consent, and that, here, no consent had been given.[106] The theory of consent searches is that an otherwise impermissible search is legitimated if the suspect gives legally sufficient consent.[107] The petitioners' argument that consent was lacking and the district court's holding that consent was supplied by the "implied consent" statute must be evaluated in light of the Supreme Court's precedents developing the consent search rationale.

A. Consent Searches and the Supreme Court

The Supreme Court's leading case in this area is *Schneckloth v. Bustamonte.*[108] Bustamonte was a passenger in a car which was stopped for a traffic violation. Another passenger consented to a search of the car and stolen checks were found which were used as evidence to convict Bustamonte of unlawful possession of checks.

The Court upheld the validity of the consent. In so doing, the Court reasoned that two competing concerns, the police's need for consent searches and the need to assure absence of coercion, are fairly accommodated by determining the "voluntariness" of the consent.[109] Noting that it is the state's burden to establish that a given consent was "freely and voluntarily given,"[110] the Court set forth the vague test that voluntariness of consent is determined by "examining all the surrounding circumstances to determine if in fact the consent was coerced."[111] The guiding principle is to be whether the consent is "the product of an essentially free and unconstrained choice by its maker"

106. As has been suggested, the better argument may have been that no exigent circumstance was present to justify a non-consensual warrantless search. *See supra* Part III pp. 267-81.

107. W. LAFAVE & J. ISRAEL, *supra* note 82, at § 3.10(a); *see also* Christianson v. State, 734 P.2d 1027 (Alaska Ct. App. 1987) (evidence of stolen parts seized from truck during search properly admitted against defendant where truck driver gave valid consent to search).

108. 412 U.S. 218 (1973).

109. *Id.* at 227.

110. *Id.* at 222 (quoting Bumper v. North Carolina, 391 U.S. 543, 548 (1968), which invalidated consent given by a defendant's grandmother to police officers who claimed to have a search warrant). In announcing the "free and voluntary" test for consent searches, the *Schneckloth* Court acknowledged that it was setting up a test less demanding than the "knowing and intelligent waiver" test required for the valid waiver of trial rights. *Id.* at 235-38.

111. *Id.* at 229.

or whether "his will has been overborne and his capacity for self-determination critically impaired."[112] Expressly rejecting a rule that prosecutors must prove that a suspect "affirmatively knew of his right to refuse" consent,[113] the *Schneckloth* Court found legally valid consent had been given.[114]

In *United States v. Mendenhall,*[115] the Court clarified that it is the subjective mental state of the suspect which determines whether consent to a search is "in fact voluntary."[116] There, Drug Enforcement Administration ("DEA") agents approached the respondent and asked to see her identification and airline ticket. Finding a discrepancy between the names found therein, the agents requested that the respondent accompany them to the DEA airport office. Once there, the agents asked the respondent for permission to search her handbag and person. The respondent replied, "Go ahead." Thereafter, a female police officer arrived, and again respondent gave her consent to these searches. The officer then informed the respondent that she would have to remove her clothes for the search. Although the respondent replied that she had a plane to catch, she was assured by the officer that if no drugs were found there would be no problems. The respondent then removed her clothing without further comment, and heroin was found during the search.[117] The respondent argued on appeal that the consent was not voluntary but, rather, coerced. Noting that the officers had told her she could refuse consent, the Court concluded she had in fact consented and that her consent was in fact voluntary.

Examples of the Court's finding valid consent lacking include consent based on a false claim by the police that they already had a search warrant,[118] and truthful statements by the police that they have a search warrant which in fact turns out to be invalid.[119]

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112. *Id.* at 225-26.

113. *Id.* at 229-30.

114. The *Schneckloth* Court, there dealing with an out-of-custody search, left open the possibility that a more rigorous test might apply in an in-custody setting. *Id.* at 240 n.29. This possibility was foreclosed in United States v. Watson, 423 U.S. 411 (1985). There, after the defendant was arrested, police asked whether they could search his car without advising him that he could refuse permission. The defendant granted his permission. The Court concluded that the mere fact that an in-custody consenting party is not told of his or her right to refuse consent does not invalidate a search where the consent given nonetheless seems voluntary.

115. 446 U.S. 544 (1980).

116. *Id.* at 557.

117. *Id.* at 549.

118. Bumper v. North Carolina, 391 U.S. 543 (1968).

119. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

The Court's cases interpreting consent searches have all involved some communication at the time of the search, either verbal[120] or non-verbal,[121] purportedly consenting to a search. The issue has been whether the communication was in fact voluntary,[122] or in some way coerced.[123]

B. Consent Holding in *Burnett*

In the district court opinion in *Burnett,* Judge Holland suggests that Alaska's breath test requirement is also sustainable as a valid consent search. Specifically, the judge states the following:

> The Alaska legislature and the Anchorage assembly have . . . determined [through their implied consent laws] that once a driver undertakes to operate a car within the state or city, he has consented to the taking of a breath sample. Having given his consent by operating a car on the state or city highways, a driver may not legally recant or withdraw such consent after being lawfully arrested for driving while intoxicated. Of course, the driver may choose not to cooperate in the providing of the breath sample . . . but just as that lack of cooperation was no bar to a finding that a driver has no constitutional right to refuse the test, it ought not be seen as a lack of consent in the legal sense, for that consent has already been given.[124]

The opinion, then, does a curious, immediate about-face. Having just concluded that valid, non-withdrawable consent has been given by drivers on Alaska's roads, Judge Holland asserts in the next two paragraphs that petitioners' reliance on *Schneckloth* is misplaced, because a "driver stopped on probable cause for driving while intoxicated has no consent to withhold . . . for . . . purposes of . . . fourth amendment analysis."[125] Thus, in the same rhetorical breath, Judge Holland asserts that the breath test requirement is valid both because consent has been given and because no consent can be given.

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120. *See* United States v. Watson, 423 U.S. 411 (1985); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968); *supra* notes 108-14 and accompanying text.

121. *See* United States v. Mendenhall, 446 U.S. 544, 549, 559 (1980); *supra* notes 115-17 and accompanying text.

122. *See supra* notes 115-16 and accompanying text.

123. Bumper v. North Carolina, 391 U.S. 543, 550 (1968) ("Where there is coercion there cannot be consent."); *see generally* W. LAFAVE & J. ISRAEL, *supra* note 83, at § 3.10.

124. 634 F. Supp. at 1038. Why consent cannot later be withdrawn is not explained and is contrary to the original theory of implied consent. *See infra* note 134. It seems that in some manner the judge is applying a specific performance or other contract theory in the realm of criminal law.

125. 634 F. Supp. at 1038.

Exactly what proposition is being argued for here is not clear. Perhaps Judge Holland is arguing that the state can, through its implied consent law, create a statutory substitute which somehow meets the "voluntariness" requirements of *Schneckloth.* This would be a radical expansion of the manner in which the state can meet its burden of proving free and voluntary consent. However, if this is the proposition, Judge Holland should have said *Schneckloth* applies but the constitutional test has been met, not that *Schneckloth* does not apply because a DWI suspect has no consent to withhold. Judge Holland provides no explanation of how implied consent supplied by an implied consent statute can meet the *Schneckloth* "voluntariness" test.

The Ninth Circuit did not affirm, reverse, or discuss Judge Holland's proposition that the breath test requirement was sustainable as a consent search. Instead, the court sustained the requirement solely on the "search incident to arrest" rationale.[126] However, because blood and breath tests cannot be sustained as searches incident to arrest and probably cannot be sustained as exigent circumstance searches,[127] Judge Holland's implied consent rationale is important to the sustainability of these tests as warrantless searches.

Judge Holland's implied consent rationale is also of interest because it could be used in settings other than blood and breath tests of suspected drunk drivers. For example, the Alaska Legislature might disregard the fact that the Ninth Circuit affirmed the district court on a basis other than Judge Holland's "implied consent" rationale and erroneously conclude that the Ninth Circuit has approved its use of implied consent in the custodial arrest setting. Feeling thus validated, the Alaska Legislature may seek to extend its use of implied consent to other areas. The Supreme Court has left open the possibility that a state could require all individuals to carry state approved identification when traveling outside one's home[128] and that a state could require all

126. *See supra* Part III pp. 267-81.

127. *Id.*

128. In Kolender v. Lawson, 461 U.S. 352 (1983), the Court struck down as unconstitutionally vague a California statute which had been interpreted in state courts as requiring an individual to present "credible and reliable" identification to a police officer who requests it. While acknowledging that the requirement implicates the constitutional right of free movement, the Court simply concluded that the notion of "credible and reliable" identification was too vague to allow individuals to know what they must do to meet the standard. *Id.* at 358-61. Of course, one way a state could clarify the matter would be to require all individuals to carry identification of a prescribed form, which in turn would be defined as meeting the requirement of presenting peace officers with "credible and reliable" information. Were a state to do this, the Court would then be forced to confront some of the issues it ducked in *Kolender. See id.* at n.10.

motorists to stop at fixed checkpoints for sobriety checks.[129] Alaska could attempt to implement such identification and checkpoint schemes and, as added inducements to compliance, include in its statutory scheme a presumption that anyone in public places in Alaska has impliedly consented to a test of his breath alcohol[130] and that anyone driving in Alaska has impliedly consented to a search of his breath at fixed checkpoints. Refusal could involve loss of identification or driver's license or perhaps, as in *Burnett,* criminal sanctions. While it is beyond the scope of this article to explore the other constitutional issues that such a scheme might involve, such as the right to privacy and the right to travel, it is worthwhile to explore further whether Judge Holland's use of statutorily implied consent can be valid even within the factual context of *Burnett.*

C. Challenges to *Burnett*'s Consent Holding

As noted above, the United States Supreme Court cases interpreting consent searches have all involved some communication purportedly consenting to a search. The issue has been whether the communication was in fact voluntary or in some way coerced.[131] It is perhaps instructive that when the Supreme Court has had the opportunity to determine whether chemical tests could be justified as consent searches, it ducked the issue, preferring instead to uphold them on other grounds.[132] This is probably because chemical tests as currently conducted in most states do not easily fit within the analytical framework of consent searches as currently understood. Each of these problems will now be explored.

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129. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court upheld brief stops at fixed checkpoints to check for the possible transportation of illegal aliens. The Court simply weighed the public interest in illegal alien interdiction against the individual's fourth amendment interests and concluded that the public interest there involved was greater. *Id.* at 557. In Delaware v. Prouse, 440 U.S. 648 (1979), the Court held that random traffic stops to check registration and driver's license status were impermissible seizures under the fourth amendment, but it noted in dicta that "[q]uestioning of all on-coming traffic at roadblock-type stops [was] one possible alternative." *Id.* at 663.

While illegal aliens arguably may burden the nation's economic health, and unregistered vehicles and unlicensed drivers may pose some degree of safety problems, it is unlikely that they cause as great a burden on society as the deaths caused by drunk drivers. It would thus seem that society's interest in sobriety checkpoints is even greater than the interests at issue in *Martinez-Fuerte* and *Prouse.*

130. Such a requirement could assist in the prosecution of such crimes as "possession of a firearm while intoxicated" and "public drunkenness."

131. *See supra* notes 120-23 and accompanying text.

132. *See supra* Parts IIIA and IIIB pp. 268-70.

1. *If No Consent to Withhold, Then Not a Consent Search.* The underlying premise of consent searches is that the person searched has consent to withhold. If the search can be sustained on other grounds, such as search incident to arrest or exigent circumstances, no consent is necessary. Assuming, for the sake of discussion, that breath tests cannot be sustained on some other rationale, but only as a consent search, the crucial inquiry becomes when and if voluntary consent is given. In the breath test context, there are only three possible times that consent could be given: (1) at the time one's driver's license is issued; (2) each time one chooses by one's actions to drive on public roads; or (3) at the time an officer requests submission to the test.

All of the Supreme Court cases on point have involved some request by a person of authority to allow the search at or near the time of the search followed by the granting of permission. If one implies from these cases that there must be an individualized request to search in each case followed by an opportunity to refuse, then licensure or driving could not provide valid consent, because no request has yet been made. Thus, the argument goes, an officer must obtain the driver's consent, not just his or her cooperation, at or near the time the officer desires to obtain evidence of breath alcohol.

In Alaska, however, the refusal to cooperate in a breath test constitutes a crime. Thus, in Judge Holland's words, an individual asked to take a breath test has "no consent to withhold" in the legal sense of the term.[133] If at the time of the request there is no consent to withhold and if the time of request is the only time consent can be obtained, then this circumstance does not fall within the factual predicate for a consent search and could not be validated based on "consent search" rationale.[134]

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133. *See supra* note 125 and accompanying text.

134. Alaska's approach to implied consent departs from the original theory of implied consent. The original theory behind implied-consent statutes presumes a right on the part of the requestee to refuse the test. Implied-consent statutes were passed in response to the Supreme Court's holding in *Rochin v. California,* 342 U.S. 165 (1952), disallowing evidence of concealed narcotics through forced stomach pumping. *See* Bruns, *supra* note 3, at 938-44. To avoid the constitutional problems presented by *Rochin* in searching beyond the body's surface, states began to pass during the 1950's their implied-consent statutes imposing the civil penalty of license revocation for refusal to submit to a chemical test. As articulated by one commentator, these "statutes were predicated upon the theoretical proposition that in return for the 'privilege' of driving upon the highways of the state, the driver had impliedly 'consented' to take a chemical sobriety test if properly requested to do so by an officer of the state. If a person refused to take a test, he in effect withdrew the consent upon which his right to drive was conditioned, and the state was thereby entitled to revoke the conditional privilege of driving." *See* Note, *Implied Consent, supra,* note 3, at 724-25. Stated another way, the requestee voluntarily chooses to void an agreement between himself and the state, thereby avoiding the test but losing the right to drive which the agreement had allowed. Thus, under the original implied consent theory, the requestee

2. *Can Implied Consent Searches Be "In Fact Voluntary?"* It would be difficult to argue that an out-of-state motorist crossing into Alaska for the first time, who, under Alaska law has impliedly consented to the breath-test requirement, in fact has the subjective mental state of voluntary consent required by the fourth amendment. In the absence of actual knowledge of Alaska law, ascribing voluntary consent to these drivers can be achieved only through a legal fiction, statutory or otherwise, that the driver impliedly has consented to the search by driving on the roads of Alaska. This, of course, is Judge Holland's precise argument. However, legal fictions are just that. They have nothing to do with what "in fact" is. If the requirement of *United States v. Mendenhall,* that consent must be "in fact voluntary," is to be given full force, then legal fictions are irrelevant. Thus, under current precedent, out-of-state drivers unaware of Alaska law must provide consent at the time they are requested to take a breath test. If they refuse, consent cannot be implied by statute. However, given the Supreme Court's recent affection for legal fictions,[135] it may adopt a new one in this situation were the matter to reach it.

If one accepts the Supreme Court's precedents as permitting consent for a search to be given remote in time and place from where a search eventually takes place and one assumes along with Judge Holland that consent cannot be revoked once given,[136] then the "in fact voluntary" test may arguably be met as to in-state driver licensees. This would be based on a presumption that knowledge of the implied consent statute obtained at the time of licensure provides actual consent for the breath test once requested. One might further presume, based on the knowledge of the implied consent statute obtained at the time of licensure, that each time the licensee drives upon the roads of Alaska, he or she voluntarily consents anew to a breath test. Such logic might further hold that a driver is in a continual state of "consenting" whenever driving, thereby taking the time of consent right up to the time of request, and thereby avoiding any remoteness in time or place problems.

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could refuse the test without fear of criminal sanction and subject only to a "civil sanction" or the loss of valuable agreement, depending on which theoretical construct is used.

135. *See* New York v. Belton, 453 U.S. 454, 462 (1981) (holding that a search of a zipped jacket pocket was valid as a search incident to lawful arrest because the jacket was "within the arrestee's immediate control," despite the fact that the jacket was located inside the car and that the arrestee was not within the reach of the vehicle); *see also supra* notes 74-77, 104 and accompanying text.

136. *See supra* note 124 and accompanying text.

However, the Supreme Court has determined that the presence of "coercion" also undermines any finding of voluntariness.[137] Under Alaska's statutory scheme, one who refuses a chemical test must be told that a refusal is a misdemeanor crime. Being threatened with possible jail and fines for not "consenting" would seem to be the ultimate in coercion, such that submission to a chemical test after such a request could not, as a matter of constitutional law, be considered "voluntary." Nor would a statute declaring the submission to the test to be consensual of itself make the submission voluntary "in fact." Submission to the test would remain the improper product of coercion and, thus, could not be a valid consent search.

Even at the licensing stage, absence of coercion is doubtful under the implied consent scheme, both in Alaska and in other jurisdictions. In *Garrity v. New Jersey,*[138] the Supreme Court considered a similar situation in the context of confession. There, the Court reversed a conviction that was based on incriminating statements made under the threat that the defendant's silence would result in the loss of his state employment. The Court reasoned that: "[t]he option to lose [one's] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice . . . . [It] is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice . . . .' "[139] Furthermore, the Court stated that "[w]here the choice is 'between the rock and the whirlpool,' " duress is inherent in deciding to "waive" one or the other. "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."[140] Many people are dependent on their cars for their livelihood.[141] Any

137. *See supra* notes 110-11 and accompanying text; *see also* Poulin, *Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination,* 52 GEO. WASH. L. REV. 191, 206-09, 218-22 (1984).

138. 385 U.S. 493 (1967).

139. *Id.* at 497-98 (quoting Miranda v. Arizona, 384 U.S. 436, 464-65 (1966)).

140. Union Pacific Railroad v. Public Service Comm'n, 248 U.S. 67, 70 (1918).

141. In Delaware v. Prouse, 440 U.S. 648 (1979), the Supreme Court noted the following in the context of random traffic stops:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, work place, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in . . . other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Id. at 662-63. In Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954), a New York court noted that

> [t]o many persons, the right to own a motor vehicle and the right to possess a license to drive the same are among the most cherished rights of a citizen

demand that an individual give up his right to be free from unreasonable searches in return for the privilege to drive can only be considered coercive, regardless of the theoretical justification underlying the original implied consent theory.[142] This would be true of the threat of revocation used in most states and would be especially true in Alaska's scheme of threatened criminal sanctions. Thus, whatever consent is obtained through these threatened sanctions is the product of coercion. Such consent cannot be deemed "voluntary" in the constitutional sense, and cannot be used to sustain warrantless chemical tests as consent searches.

3. *Unconstitutional Conditions.* If breath tests are to be justified as consent searches, then the states must be seen as attempting to require individuals to consent to an otherwise impermissible search in order to receive the valuable privilege of driving. This attempt runs up against the argument that the states are seeking to condition a privilege on the relinquishment of a constitutional right,[143] an argument made unsuccessfully by the petitioners in *Burnett.*[144] Both the district court[145] and the Ninth Circuit[146] rejected this argument based on the conclusion that the breath test requirement was supportable as a search incident to arrest, and, therefore, no burden on a constitutional right was involved. However, if Judge Holland wanted to justify the breath-test requirement as a valid consent search, he would have had to address the unconstitutional conditions doctrine, which he did not.

At least one other court has rejected such an "implied consent" rationale in a similar context. In *United States v. Lopez,*[147] the government argued that airline passengers impliedly consent to boarding

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> in this free country. The very livelihood of many, such as chauffeurs, truckers, farmers, etc., and the very welfare of their families depend upon their right to use the highways. In fact, it is clear that one's inalienable right to "liberty and the pursuit of happiness" is curtailed if he may be unreasonably kept off the highways maintained at his expense . . . . [O]ne court has . . . gone so far as to say that "the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law."

Id. at 127 (quoting Wall v. King, 206 F.2d 878, 882 (1st Cir.), *cert. denied,* 346 U.S. 915 (1953)).

142. *See supra* note 134.

143. Frost and Frost Trucking Co. v. Railroad Comm'n of Cal., 271 U.S. 583, 593-94 (1926) ("state . . . may not impose conditions which require the relinquishment of constitutional rights").

144. Appellant's Brief, *supra* note 29, at 13-15.

145. 634 F. Supp. at 1039.

146. 806 F.2d at 1450.

147. 328 F. Supp. 1077 (E.D.N.Y. 1971).

searches. Noting that the government was insisting that individuals must voluntarily relinquish their fourth amendment rights in order to enjoy the constitutional right of travel, the court concluded that "implied consent under such circumstances would be inherently coercive" and therefore invalid.[148]

D. Final Thoughts on Breath Tests as Consent Searches

Judge Holland's attempt to fit chemical tests within the consent search framework is built on a shaky foundation of "if's." If there can be consent without a right of refusal, if consent can be given remote in time and place prior to the search, if such consent cannot be revoked, if statutorily implied consent can equal actual consent, if consent obtained through threat of imprisonment or license revocation is free of coercion and voluntary, and if requiring consent for a bodily search in return for the right to drive is not a burden on fourth amendment rights, then a breath test can be a consent search. This is carrying legal fiction further than is merited. Professor Lerblance aptly summarizes the problem as follows:

> To say that implied-consent statutes are not based upon constitutional notions of voluntary consent is not to say that these statutes are unconstitutional. Rather, it is to suggest that the statutes are erroneously labeled and expound a faulty concept. If the state can with impunity label coercion "consent," surely the idea suffers as a normative guide in other contexts as well. This false labeling is not only an affront to the concept of consent, but also damages the integrity of the law as a mechanism for justice. Legal fictions are not uncommon in the law, but they are generally spawned of necessity. In the instant case there is neither necessity nor justification. There is no imperative to clothe this statutory mechanism in the legal fiction of consent. Implied-consent statutes may be desirable, even necessary, but the label and express premise—implied consent—is optional.[149]

V. CONCLUSION

The fourth amendment requires that searches must be reasonable in order to be constitutional. In turn, a reasonable search usually requires a warrant. For a search to be warrantless, it must be either a consensual or a non-consensual search within one of the specific exceptions to the warrant requirement. The requirement in all states that drivers submit to a chemical test when under arrest for suspicion of intoxicated driving, the refusal of which is penalized either with criminal sanctions or license revocation, may be sustained in a given case, but not as searches incident to arrest as the *Burnett* court, some

148. *Id.* at 1093.
149. Lerblance, *supra* note 3, at 64.

commentators,[150] and the implied consent statutes have assumed. Instead, there must be an exigent circumstance excusing the procurement of a warrant. Realizing that chemical tests may be given without a warrant only if there is an exigent circumstance may restrict warrantless chemical tests beyond what is current practice. Finally, because chemical tests cannot be voluntary in fact and free of coercion, implied consent statutes cannot sustain these tests as consent searches. Because the implied consent concept is not valid even within the context of chemical tests, society need not fear that the implied consent approach will be expanded beyond its current coverage of suspects under arrest based on probable cause.

150. *See id.* at 46 n.21; Note, *Implied Consent, supra* note 3, at 760.