North Dakota Law Review

Volume 67 | Number 1 Article 4

1991

Right to Counsel - Automobiles Intoxilyzer Tests Held Admissible Even If Qualified Right to Counsel Was Denied

Lawrence E. King

RIGHT TO COUNSEL—AUTOMOBILES: INTOXILYZER TESTS HELD ADMISSIBLE EVEN IF "QUALIFIED RIGHT" TO COUNSEL WAS DENIED

On January 1, 1989, Sheriff Duane Snider of the Morton County Sheriff's Department observed Julie Fasching driving erratically and proceeded to stop her vehicle.[1] While speaking with Fasching after the vehicle had been stopped, Sheriff Snider concluded from his observations that Fasching had been drinking alcohol.[2] At this point, Sheriff Snider requested that Fasching perform field sobriety tests in the patrol car.[3] Debra Holter, a passenger in Fasching's vehicle, identified herself as an attorney and expressed her desire to be with Fasching in the patrol car during these tests.[4] Holter's request was denied.[5] Upon completion of the field sobriety tests, Fasching was arrested and taken to the Mandan Law Enforcement Center, whereupon an intoxilyzer test was administered with the results being in excess of the statutory limit.[6]

Fasching and Holter testified at the administrative hearing that their requests to consult with each other prior to the administration of the intoxilyzer test were denied.[7] Sheriff Snider testified that Fasching consented to the intoxilyzer test after having been informed of her right to consult with an attorney.[8] The decision of the administrative hearing concluded that Fasching was allowed to consult with her attorney.[9] The hearing officer at the adminis-

---

1. Fasching v. Backes, 452 N.W.2d 324 (N.D. 1990). Sheriff Snider testified at the administrative hearing that he followed Fasching's vehicle eastbound on Interstate 94 from exit 31 to exit 32. Transcript of admin. hearing at 3-4, appendix of appeal, Fasching v. Backes, 452 N.W.2d 324 (N.D. 1990).

2. Fasching v. Backes, 452 N.W.2d 324 (N.D. 1990).

3. *Id.* The sobriety tests included the alphabet recital, the numerical countdown, and the horizontal gaze nystagmus. Transcript of admin. hearing at 11, appendix of appeal, Fasching v. Backes, 452 N.W.2d 324 (N.D. 1990). Sheriff Snider testified that Fasching's performance of these tests indicated the possibility of being under the influence of alcohol. *Id.* at 9-10.

4. *Fasching*, 452 N.W.2d at 324.

5. *Id.*

6. *Id.* North Dakota sets the limit for blood alcohol concentration at one-hundredth of one percent. N.D. CENT. CODE § 39-08-01(1)(a) (Supp. 1989). Fasching was administered a temporary drivers license, and she filed for an administrative hearing. *Fasching*, 452 N.W.2d at 324-25.

7. *Id.* at 325. Fasching argued that her arrest was illegal, and therefore all evidence should be suppressed. *Id.*

8. *Id.*

9. *Id.* The commissioner stated, "*I believe that*, or I know from the testimony that Ms. Fasching was allowed advice from her attorney on the test, but that it was not used, according to the testimony, and she was more concerned if the attorney was okay" (emphasis added). Transcript of admin. hearing at 31, appendix of appeal, Fasching v. Backes, 452 N.W.2d 324 (N.D. 1990).

trative hearing suspended Fasching's driving privileges for 364 days.[10] However, the district court stated,

> "[t]he record of the administrative hearing, including Ms. Holter's deposition, is quite clear that Ms. Fasching asked the officers several times to see or talk to Ms. Holter. . . . Ms. Holter repeatedly asked the then present officers for the opportunity to actually talk with and consult with Ms. Fasching. . . . Each request by Ms. Holter and Ms. Fasching was denied or put off."[11]

The district court for the County of Morton reversed the suspension and reinstated Fasching's driving privileges.[12] The North Dakota Supreme Court reversed the district court and *held* that the results of a properly administered intoxilyzer test were admissible as evidence at a civil administrative hearing, despite the possible violation of the motorist's right to counsel.[13] *Fasching v. Backes*, 452 N.W.2d 324 (N.D. 1990).

In *Miranda v. Arizona*,[14] the United States Supreme Court interpreted the fifth amendment protection against self incrimination to include the right to counsel when an individual is in an interrogation situation.[15] *Miranda* also stated that evidence obtained as a result of an interrogation in which this protection was denied could not be used.[16] Application of *Miranda* depends upon what constitutes an interrogation setting and whether the administration of an intoxilyzer test falls within this definition, thereby invoking the protection of the fifth amendment.[17] However, in *Schmerber v. California*,[18] which the Supreme Court decided one week after *Miranda*, it was held that the privilege against self-incrimination only protects the accused from the

10. Transcript of admin. hearing at 31, appendix of appeal, Fasching v. Backes, 452 N.W.2d 324 (N.D. 1990).

11. Fasching v. Backes, No. 15700 at 2 (D. N.D. Aug. 30, 1989) (order reversing commissioner's decision).

12. *Id.* at 11. The district court relied on the violation of North Dakota Century Code section 29-05-20 in overturning the commissioner's decision. *Id.* at 10-11.

13. Fasching v. Backes, 452 N.W.2d 324, 326 (N.D. 1990).

14. 384 U.S. 436 (1966).

15. Miranda v. Arizona, 384 U.S. 436, 470-71 (1966). The court reasoned that the need for counsel does not exist only prior to questioning but is needed during questioning to guarantee trustworthiness and noncoercion. *Id.* The fifth amendment specifically states that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

16. *Miranda*, 384 U.S. at 479.

17. *See generally Miranda*, 384 U.S. at 469 (the interrogation setting is where the right to counsel is indispensable).

18. 384 U.S. 757 (1966). *Schmerber* dealt with the taking of a blood sample, without consent, to determine blood alcohol content. *Id.* The court allowed the evidence and affirmed the conviction. *Id.* at 772.

state's using evidence of a testimonial or communicative nature.[19] The holding in *Schmerber*, in essence, eliminates the question of whether an accused is denied the fifth amendment right to counsel in relation to intoxilyzer tests because the amendment only protects against use of testimonial evidence, which does not include blood and intoxilyzer tests.[20]

The sixth amendment provides for the assistance of counsel to the accused in all criminal prosecutions.[21] The United States Supreme Court, in *Powell v. Alabama*,[22] acknowledged that there are "critical" periods prior to trial that may require the right to counsel.[23] This "critical stage" doctrine was elaborated in *United States v. Wade*,[24] wherein the Court stated that it must, in each particular situation, "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[25]

The Court went on to say that situations such as "fingerprints, blood sample, clothing, hair, and the like" fail to qualify as critical stages because technical and scientific cross examination at trial is sufficient to protect the defendant's rights.[26] Presumably an intoxilyzer test would fall short of the Court's view of what constitutes a critical stage.[27] However, regardless of when courts are willing to declare a stage critical, the sixth amendment still applies to criminal proceedings, and "a majority of the courts draw a distinction between the criminal nature of the DWI proceeding and the apparently civil nature of the implied consent proceeding."[28]

---

19. Schmerber v. California, 384 U.S. 757, 761 (1966). In *State v. Fasching*, the North Dakota Supreme Court cited *Schmerber* as support for its conclusion that non-testimonial evidence can be obtained and admitted without concern for fifth amendment privileges. State v. Fasching, 453 N.W.2d 761, 763 (N.D. 1990).

20. *See* State v. Fasching, 453 N.W.2d 761, 764-65 (N.D. 1990). The court held that blood test results were admissible and refused to even consider Fasching's argument that she was denied her right to counsel. *Id.* at 765.

21. U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence." *Id.*

22. 287 U.S. 45 (1932).

23. Powell v. Alabama, 287 U.S. 45, 57 (1932).

24. 388 U.S. 218 (1967).

25. United States v. Wade, 388 U.S. 218, 227 (1967).

26. *Id.* at 227-28. For a critical analysis of this position, see Note, *To Submit or Not to Submit—Where is My Attorney? The Right to Counsel Before Submission to Chemical Testing in a DWI Proceeding*, 63 NEB. L. REV. 373, 382 (1984) (the critical decision about whether to submit has such an impact on the outcome that the effects of that choice are "critical") [hereinafter Note, *To Submit or Not to Submit*].

27. *See generally* United States v. Wade, 388 U.S. at 227 (preparatory scientific analysis, which an intoxilyzer test is, is not critical stage requiring protection).

28. Note, *To Submit or Not to Submit*, *supra* note 26, at 379. The North Dakota Supreme Court accepted the general proposition that constitutional protections afforded criminal defendants are not applicable to civil proceedings. *See* Holen v. Hjelle, 396

In addition to the possible application of constitutional right to counsel, several states have passed statutes granting individuals the right to counsel.[29] North Dakota has passed such a statute,[30] which the North Dakota Supreme Court interpreted in *Kuntz v. State Highway Commissioner*.[31] In *Kuntz*, the court held that a person arrested has a "qualified" right to an attorney and must be given a reasonable opportunity to consult with counsel prior to taking an intoxilyzer test.[32]

The North Dakota Legislature has clearly chosen to take a tough public stance on driving under the influence (DUI) by passing section 29-06-15 of the North Dakota Century Code.[33] This statute allows for the arrest, without a warrant, of a person reasonably suspected of drinking and driving.[34] In enacting this statute the legislature apparently has recognized the immediacy of the arrest situation which calls for more police discretion.[35] The Supreme Court also noted some of the emergency characteristics that an arrest for DUI might involve, such as the destruction of

---

N.W.2d 290, 294 (N.D. 1986) (discusses whether, at the time of collection of the evidence, there is really a distinction between the civil license suspension proceedings and the criminal DWI action since the decision of which of these to pursue has not yet been made). *But see* Note, *To Submit or Not to Submit, supra* note 26, at 379 (discusses the reasons why a majority of courts have recognized a distinction). In addition, language in *Kuntz v. State Highway Commissioner* appears to question the distinction by stating, "The civil and criminal consequences are so intermingled that they are not perceptibly different to a lay person." Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 289 (N.D. 1987).

29. *See, e.g.*, MINN. STAT. § 481.10 (Supp. 1989); MO. ANN. STAT. § 544.170 (Vernon 1990); N.C. GEN. STAT. § 20-16.2(a) (1989); VT. STAT. ANN. tit. 23, § 1202(c) (1989) (these statutes place some reasonableness limit on this right to counsel, such as, "as soon as practicable" or "at all reasonable hours").

30. N.D. Cent. Code § 29-05-20 (1989). The text of North Dakota's right to counsel statute is as follows:

> The accused in all cases must be taken before a magistrate without unnecessary delay, and any attorney at law entitled to practice in the courts of record of this state, at his request, may visit such person after his arrest.

Id.

31. 405 N.W.2d 285, 287 (N.D. 1987). The motorist in *Kuntz* refused to take the test and had his license revoked. *Id.* The district court upheld the revocation but the supreme court reversed, holding that the motorist's right to counsel under North Dakota Century Code section 29-05-20 had been violated. *Id.*

32. Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 290 (N.D. 1987). The court stated that the right to counsel is a qualified right because it cannot be used merely to interfere with the police officer's administration of the test. *Id.*

33. N.D. Cent. Code § 29-06-15(1)(f) (Supp. 1989). The text of this statute provides in pertinent part:

> 1. A law enforcement officer without a warrant, may arrest a person:
> * * *
> f. On a charge, made upon reasonable cause of driving or being in actual physical control of a vehicle while under the influence of alcoholic beverages.

Id.

34. *Id.*

35. *See generally* 1969 N.D. LAWS ch 91, § 4 (amending the section which allows warrantless searches to include driving while intoxicated).

evidence, and on this basis held in *Schmerber* that the tests were proper.[36]

Difficulties arise when the right to counsel conflicts with implied consent laws.[37] To deal with the increasing risks and dangers presented by drunken drivers, every state has passed implied consent laws.[38] These laws provide that upon receiving driving privileges, each motorist "consents" to submit to alcohol testing, and that refusal to submit to testing can result in the suspension or revocation of driving privileges.[39] Attacks on the constitutionality of implied consent statutes have generally failed.[40] The North Dakota implied consent statute was passed in 1959,[41] and it has since been interpreted by the North Dakota Supreme Court on many occasions.[42] A chronological examination of the changing interpretation of this statute will help to clarify the court's present position.[43]

In 1974, the North Dakota Supreme Court decided *Agnew v. Hjelle*.[44] In *Agnew*, the motorist was arrested and, upon request, was allowed to call his attorney.[45] The attorney, however, was also the city prosecutor and informed Agnew he could not advise or represent him.[46] Agnew alleged that as a result of not speaking with an attorney, he was confused about his *Miranda* rights and the ramifications of refusing to submit to testing.[47]

Agnew contends that, without the advice of counsel, his deci-

---

36. Schmerber v. California, 384 U.S. 757, 770-71 (1966). The court voiced its concern that the evidence of the blood alcohol content would be lost, and on this basis upheld the admissibility of the evidence. *Id.*

37. *See Implied Consent Statutes: What is Refusal?*, 9 AM.J. TRIAL ADVOC. 423, 431 (1986) (difficulty is dealt with by applying a reasonableness test; if the exercise of the right to counsel unreasonably interferes with the testing, then the defendant can be required to submit to testing) [hereinafter *Implied Consent Statutes: What is Refusal?*].

38. *See, e.g.*, ALASKA STAT. § 28.35.031-.032 (1990); ARIZ. REV. STAT. ANN. § 28-691 (Supp. 1990); CAL. VEH. CODE § 13353(a) (West 1991); COLO. REV. STAT. § 42-4-1202(3)(a) (1984 & Supp. 1990); MINN. STAT. ANN. § 169.123(2) (West 1990).

39. *Implied Consent Statute: What is Refusal?*, *supra* note 37, at 425. North Dakota's implied consent statute provides for revocation of driving privileges for up to three years. N.D. CENT. CODE § 39-20-01 (1987).

40. *Implied consent statutes: What is refusal?*, *supra* note 37, at 425-27. These attacks have ranged from due process and self-incrimination attacks to allegations that the statutes are ex post facto laws and bills of attainder. *Id.*

41. 1959 N.D. LAWS ch. 286, § 1.

42. *See, e.g.*, Kuntz v. State Highway Comm'r, 405 N.W.2d 285 (N.D. 1987); Holte v. North Dakota State Highway Comm'r, 436 N.W.2d 250 (N.D. 1989).

43. *See, e.g.*, *Kuntz*, 405 N.W.2d at 285; *Holte*, 436 N.W.2d at 250; Bickler v. North Dakota State Highway Comm'r, 423 N.W.2d 146 (N.D. 1988) (these cases demonstrate the development of the court's view).

44. 216 N.W.2d 291 (N.D. 1974).

45. Agnew v. Hjelle, 216 N.W.2d 291, 293 (N.D. 1974).

46. *Id.*

47. *Id.* at 296. The court noted that "[t]he so called 'confusion doctrine' has been asserted with success under limited circumstances in California." *Id.* at 297.

sion to refuse testing was not knowledgeable and therefore should not be considered a refusal at all under North Dakota Century Code section 39-20-01.[48] The supreme court did not find support in the record for the contention that Agnew was so confused that his response was not a refusal under the implied consent law.[49]

In 1987, the North Dakota Supreme Court decided *Kuntz v. State Highway Commissioner*,[50] holding that there was a statutorily created "qualified" right to counsel, and that if this right was denied, failure to take an alcohol test could not be considered a refusal.[51] In *Kuntz*, the court stated its approval of the rationale expressed by the Minnesota Supreme Court,[52] which held that a motorist is entitled to consult with counsel prior to rendering a decision about whether to submit to chemical tests.[53]

In *Prideaux v. State Dep't of Public Safety*,[54] the Minnesota Supreme Court attacked the rationale of not applying constitutional protections to these administrative hearings simply because of the "civil" label which is attached to them.[55] The court expressed three main reasons why this label should not be controlling.[56] First, the court was concerned with the fact that the civil proceeding is so intertwined with the criminal proceeding that the evidence can be used for both.[57] Second, the court saw very little

48. *Id.* at 296. The arresting officers testified that they attempted to explain the process but Agnew continued to refuse. *Id.* at 297.

49. *Id.* at 298. The court appears to have rejected this doctrine, stating: "[e]ven if we were to recognize the existence in this state of such a doctrine, which we do not . . . ." *Id.*

50. 405 N.W.2d 285 (N.D. 1987).

51. Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 285-86 (N.D. 1987). The court in *Kuntz* stated, "[w]e do not exclude any evidence, but we hold that the evidence of failure to take a test under these circumstances is not a 'refusal.'" *Id.* at 286 n.1. *Kuntz* was decided by a three person majority consisting of Justice Meschke, Justice Gierke, and Justice Levine. *Id.* at 290.

52. *See, e.g.*, Prideaux v. State Dep't of Public Safety, 310 Minn. 405, 247 N.W.2d 385 (1976). *But see* Nyflot v. Commission of Public Safety, 369 N.W.2d 512 (Minn. 1985) (interpreted the Minnesota implied consent statute as amended in 1984). The amendment took away the right to counsel prior to testing. *Nyflot*, 369 N.W.2d at 515.

53. Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 287 (N.D. 1987).

54. 310 Minn. 405, 247 N.W.2d 385 (1976). In 1984, Minnesota amended its statute to take away the limited right to counsel which was recognized in *Prideaux*. MINN. STAT. ANN. § 169.123 (West 1986). The Minnesota Supreme Court agreed that these amendments were meant to remove the right which was recognized in *Prideaux*. Nyflot v. Comm'r of Public Safety, 369 N.W.2d 512, 515 (Minn. 1985). However, the reasoning in *Prideaux* is still valid in North Dakota because the North Dakota legislature has not amended its statutes as did Minnesota. N.D. CENT. CODE § 29-05-20 (1974).

Prior to publication of this article, the Minnesota Supreme Court declared section 169.123 unconstitutional and distinguished the *Nyflot* case. Friedman v. Commissioner of Public Safety, 1991 WL 94424 (Minn.) (decided June 7, 1991). Therefore, Minnesota has reacknowledged the qualified right to counsel that was recognized in the *Prideaux* case.

55. Prideaux v. State Dep't of Public Safety, 310 Minn. 405, __, 247 N.W.2d 385, 388 (1976).

56. *Id.* at __, 247 N.W.2d at 388-89.

57. *Id.* at __, 247 N.W.2d at 388-89. Presumably this point is irrelevant in North Dakota since the evidence is not testimonial, and therefore it cannot be suppressed in

difference in severity between the license suspension and some of the normal criminal sanctions.[58] Third, the court cited *United States v. Wade*[59] and argued that the proceeding fell within the definition of a critical stage and, therefore, in order to protect the defendant's right to a fair proceeding, constitutional protections must apply.[60]

The *Kuntz* majority also questioned the validity of the distinction between civil and criminal proceedings, stating that "the civil and criminal consequences are so intermingled that they are not perceptibly different to a lay person."[61] The motorist in *Kuntz* refused to submit to an intoxilyzer test and the commissioner revoked his driver's license for two years, but the supreme court reversed because the right to counsel was denied.[62] The court later interpreted this qualified right to counsel to require an "out-of-earshot" consultation with counsel provided that there was no substantial interference in the testing procedure, thereby affirming *Kuntz* yet applying useful boundaries.[63] The North Dakota Supreme Court then decided *Holte v. North Dakota State Highway Commissioner*,[64] in which the court distinguished the *Kuntz* decision by stating that it addressed the narrow issue of what constitutes a refusal under North Dakota Century Code section 39-20-01.[65] In *Holte*, after requests to consult with counsel were denied, the motorist submitted to an intoxilyzer test.[66] The question the court examined was whether to exclude the evidence of the test results.[67] The court cited *Westendorf v. Iowa Depart-*

---

either civil or criminal proceedings. *See* State v. Fasching, 453 N.W.2d 761, 763-64 (N.D. 1990) (holding that only communication may be suppressed and not physical performance of tests).

58. *Prideaux*, 310 Minn. at __, 247 N.W.2d at 389. The court stated that revocation of a driver's license which is a "prerequisite to earning a livelihood" is as much or more of a penalty than some criminal sanctions. *Id.* at __, 247 N.W.2d at 389.

59. 388 U.S. 218 (1967).

60. *Prideaux*, 310 Minn at __, 247 N.W.2d at 389.

61. *See* Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 289 (N.D. 1987) (the results of the intoxilyzer test are admissible in both the civil and criminal proceedings brought against a driver).

62. *Id.* at 287, 290.

63. *See* Bickler v. North Dakota State Highway Comm'r, 423 N.W.2d 146, 147-48 (N.D. 1988) (law enforcement officials were required to establish that an opportunity for private consultation had been provided).

64. 436 N.W.2d 250 (N.D. 1989).

65. Holte v. North Dakota State Highway Comm'r, 436 N.W.2d 250, 251 (N.D. 1989). The relevant part of North Dakota Century Code section 39-20-01 is as follows:

> . . . the law enforcement officer shall also inform the person charged that refusal of the person to submit to the test determined appropriate will result in a revocation for up to three years of the person's driving privileges.

N.D. CENT. CODE § 39-20-01 (Supp. 1989).

66. *Holte*, 436 N.W.2d at 251.

67. *Id.* The *Holte* decision was decided by a three person majority consisting of Chief

ment of Transportation[68] in support of its decision refusing to extend the exclusionary rule to civil proceedings.[69] The rationale of the *Westendorf* court was that the benefit of the evidence at the hearing outweighed the deterrent effect on police conduct that the exclusionary rule is supposed to create.[70] The *Holte* court listed four reasons for adopting the *Westendorf* rationale: 1) the need for reliable evidence; 2) the legislature's concern that the courts accept evidence of fairly administered tests; 3) case law precedence requiring affirmative refusal to withdraw the implied consent; and 4) the proper role of the administrative hearings in protecting the public.[71] Deciding that the exclusionary rule did not apply to civil proceedings, the court held the evidence admissible and reinstated the administrative decision.[72]

In *Mapp v. Ohio*,[73] the Supreme Court extended the exclusionary rule to state courts.[74] The North Dakota Supreme Court has applied the exclusionary rule to criminal cases.[75] The North Dakota Supreme Court, in *State v. Phelps*, stated that the purpose of the rule is to protect against "unwarranted intrusions" and to uphold "judicial integrity."[76] Although the exclusionary rule's acceptance is clear, there are critics who suggest examining alternatives to the extreme position of total exclusion of the evidence.[77]

Approximately one month after *Holte*, the North Dakota Supreme Court decided the case of *Evans v. Backes*.[78] In *Evans*, the court found that the commissioner at the administrative hear-

---

Justice Erickstad, Justice Vande Walle, and Justice Gierke. *Id.* at 252. See *supra* note 51 for a comparison of the justices who were in the majority in the *Kuntz* decision.

68. 400 N.W.2d 553 (Iowa 1987).

69. *Holte*, 436 N.W.2d at 252. The exclusionary rule, as announced in *Weeks v. United States*, called for the exclusion of the evidence which was obtained through improper means, such as illegal searches and seizures. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (permitting the use of the evidence which was obtained illegally was prejudicial error). This doctrine was implemented to deter law enforcement officials from trying to obtain evidence in violation of constitutional protections. *Id.* at 390, 392.

70. Westendorf v. Iowa Dep't of Transp., 400 N.W.2d 553, 557 (Iowa 1987).

71. *See* Holte v. North Dakota State Highway Comm'r, 436 N.W.2d 250, 252 (N.D. 1989) (*Holte* adoption of the *Westendorf* rationale).

72. *Id.* The dissent in *Holte* noted that, due to a plea agreement, the motorist's license was suspended for 364 days, thus making the case moot. *Id.* at 254. The majority did not address this issue. *Id.*

73. 367 U.S. 643 (1961).

74. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

75. State v. Phelps, 297 N.W.2d 769, 773 (N.D. 1980). Phelps dealt with criminal charges of burglary and arson. *Id.* at 771. The North Dakota Supreme Court stated, "we agree with the rationale of the Iowa Supreme Court in refusing to extend the exclusionary rule to civil proceedings. . . ." Holte v. North Dakota State Highway Comm'r, 436 N.W.2d 250, 252 (N.D. 1989).

76. *Phelps*, 297 N.W.2d at 774.

77. 62 JUDICATURE 351, 352 (1979). The author argues that, "[t]he illogical penalty of total exclusion of evidence is damaging to the cause of justice." *Id.* at 356.

78. 437 N.W.2d 848 (N.D. 1989).

ing had failed to make a factual determination as to whether the motorist was denied his right to counsel and, therefore, remanded the case.[79] The court stated that the determination of whether he was denied his right to counsel was critical because if he was, then his refusal to take the test was not a refusal under North Dakota Century Code section 39-20-01.[80] The supreme court in *Evans* reaffirmed the *Kuntz* decision as to what constitutes a refusal under this statute.[81] The *Evans* decision appears to address the question of whether the right to counsel does apply to DUI proceedings and answers this question affirmatively: even in the light of *Holte*, there is still a right to counsel.[82]

The central point of law examined in *Fasching v. Backes*[83] is whether a motorist has a right to consult counsel prior to taking an intoxilyzer test, and if this right exists, then the ramifications of its denial.[84] The court in *Fasching* followed *Holte*, holding that the exclusionary rule does not apply to civil administrative hearings.[85] Therefore, the results of the intoxilyzer tests were admissible and the suspension was upheld.[86] Because the intoxilyzer test was "fairly administered" and "properly admitted," the court declined to address the question of whether Fasching was denied counsel.[87]

The *Fasching* court reiterated and adopted the rationale of the Iowa Supreme Court, which held that the benefits of using the results of the intoxilyzer test outweigh the possibility of the exclusionary rule deterring future unlawful conduct by law enforcement officials.[88] The court also stated in dicta that the district court misinterpreted North Dakota Century Code section 29-05-20 when it read the statute to not only allow for the right of the accused to seek counsel but to include the right of counsel to see the accused.[89] While the court admitted it was possible to grammatically construe the statute to extend the right to both parties, the court stated that that reading was inconsistent with prece-

79. Evans v. Backes, 437 N.W.2d 848, 849 (N.D. 1989).

80. *Id.* at 850. See *supra* note 65 for the text of the relevant portions of the North Dakota Century Code section 39-20-01.

81. Evans v. Backes, 437 N.W.2d 848, 850 (N.D. 1989).

82. *Id.* at 851.

83. 452 N.W.2d 324 (N.D. 1990).

84. Fasching v. Backes, 452 N.W.2d 324, 325 (N.D. 1990).

85. *Id.*

86. *Id.* at 326.

87. *Id.* *But cf.* Evans v. Backes, 437 N.W.2d 848, 851 (N.D. 1989) (remanded for a determination of the critical issue of whether the motorist was denied his right to counsel).

88. *Fasching*, 452 N.W.2d at 325.

89. *Id.* at 326. The court clearly indicates that section 29-05-20 of the North Dakota Century Code only gives the client the right to seek counsel and does not give the attorney the right to seek the client. *Id.*

dent.[90] The court then reversed the district court and affirmed the commissioner's decision.[91]

Justice Levine dissented, arguing that the decision severely limits both *Kuntz* and *Bickler v. North Dakota State Highway Commissioner*,[92] by denying the accused a reasonable opportunity to seek counsel.[93] The dissent urged that the exclusionary rule be applied to civil proceedings, citing several cases in support of this contention.[94] In addition, the dissent urged that section 39-20-07(5) of the North Dakota Century Code allows the evidence to be admitted only when "the sample was properly obtained and the test was fairly administered."[95] Justice Levine raised the question of how a test can be classified as either "fairly administered" or "properly obtained" when it was taken in violation of the motorist's right to counsel.[96] The dissent's concern is that the integrity and fairness of the proceeding cannot be maintained without the use of the exclusionary rule because the motorist is no longer protected: "the stench of impropriety and unfairness is rank."[97]

The *Fasching* decision legitimized the *Holte* decision, which Justice Meschke had alleged was only an advisory opinion because when it was decided the facts left the issue moot.[98] *Fasching* sends a mixed signal to the citizens of North Dakota. On the one hand it stands for the premise that the exclusionary rule does not apply to civil proceedings, thereby allowing the results of any chemical tests taken to be admitted.[99] On the other hand, the *Evans* decision, decided after *Holte*, reaffirmed *Kuntz* and held that the determination of whether the motorist was denied his right to counsel was critical.[100] It is unclear why this determination is

90. *Id.* The court's statement that North Dakota Century Code section 29-05-20 was meant to give a client the right to seek counsel but not the right of counsel to seek the client appears to be dicta because, immediately before making that statement, the court said, "[w]hile not being relevant in this case. . . ." *Fasching*, 452 N.W.2d at 326.

91. *Id.*

92. 423 N.W.2d 146 (N.D. 1988).

93. *Fasching*, 452 N.W.2d at 326.

94. *Id.* In support of its position, the dissent cites the following cases in which the exclusionary rule was held to apply to civil proceedings: Whisenhunt v. Dep't of Public Safety, 746 P.2d 1298 (Alaska 1987); Prideaux v. State Dep't of Public Safety, 310 Minn. 405, 247 N.W.2d 385 (1976); Gooch v. Spradling, 523 S.W.2d 861 (Mo.Ct.App. 1975); Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, 245 S.E.2d 518 (1978).

95. Fasching v. Backes, 452 N.W.2d 324, 326 (N.D. 1990).

96. *Id.* According to Justice Levine, the majority fails to explain its rationale and merely states that "there is no evidence to suggest that Fasching's intoxilyzer test was improperly administered." *Id.* at 325-26. The majority does not address the question of whether it was "properly obtained." *Id.* at 326.

97. *Fasching*, 452 N.W.2d at 326 (Levine, J., dissenting).

98. Holte v. North Dakota State Highway Comm'r, 436 N.W.2d 250, 254 (N.D. 1989).

99. Fasching v. Backes, 452 N.W.2d 324, 326 (N.D. 1990).

100. Evans v. Backes, 437 N.W.2d 848, 850 (N.D. 1989).

important because, regardless of the determination, the evidence will be admitted.[101] The result of these cases is to emphasize whether the tests are refused.[102] If the tests are taken, then *Fasching* and *Holte* control and the evidence is admissible regardless of whether the motorist's right to counsel was denied.[103] However, under *Kuntz*, if the motorist is denied counsel and then refuses to take the tests, this does not constitute a refusal under section 39-20-01 of the North Dakota Century Code, and the suspension will not be upheld.[104] It is apparently clear that a majority of the court has determined that motorists, upon arrest and prior to submitting to chemical testing, have a qualified right to counsel.[105] It is also clear that a different majority interprets the exclusionary rule to be inapplicable to civil proceedings.[106]

The North Dakota courts have struggled for a long time with the issue of when there is a right to counsel and what the ramifications are of denying this right.[107] In light of *Fasching* and *Kuntz*, the legislature needs to address this dilemma.[108] An examination of how other jurisdictions have dealt with this problem may help achieve a workable solution.[109] One possible solution to this problem was stated quite clearly by the Honorable Judge Schneider: "Perhaps California's statutory solution is the better route, providing for a pecuniary penalty for a violation of the consultation statute, thus perhaps eliminating the policy for having a civil exclusionary rule. But that requires legislation. In the interim, this exclusionary rule applies."[110] California's approach appears to deter unlawful police conduct by imposing a penalty while still allowing for the use of reliable evidence.[111] This would be an

101. *Fasching*, 452 N.W.2d at 326.

102. *See generally* Fasching v. Backes, 452 N.W.2d 324 (N.D. 1990); Holte v. North Dakota State Highway Comm'r, 436 N.W.2d 250 (N.D. 1989); Evans v. Backes, 437 N.W.2d 848 (N.D. 1989); Kuntz v. State Highway Comm'r, 405 N.W.2d 285 (N.D. 1987) (motorists who are denied the right to counsel are protected if they refuse the test, but are not protected if they have submitted to testing).

103. Fasching v. Backes, 452 N.W.2d 324 (N.D. 1990); Holte v. North Dakota State Highway Comm'r, 436 N.W.2d 250 (N.D. 1989).

104. Kuntz v. State Highway Comm'r, 405 N.W.2d 285, 288 (N.D. 1987).

105. *See id.* (three justice majority).

106. *See Holte*, 436 N.W.2d at 252 (three justice majority).

107. *See, e.g.*, *Kuntz*, 405 N.W.2d at 285; *Holte*, 436 N.W.2d at 250; *Fasching*, 452 N.W.2d at 324 (these cases demonstrate the court's difficulty in this area).

108. *See generally Kuntz*, 405 N.W.2d at 285; *Fasching*, 452 N.W.2d at 324 (demonstrating the need for the legislature to clarify the situation).

109. *See generally* Fasching v. Backes, No. 15700 at 10 (D. N.D. Aug. 30, 1989) (Judge Schneider examined reasonable alternatives).

110. Fasching v. Backes, No. 15700 at 11 (D. N.D. Aug. 30, 1989) (order reversing commissioner's decision).

111. *See generally* Fasching v. Backes, No. 15700 at 10 (D. N.D. Aug. 30, 1989) (suggesting California's approach as a reasonable alternative to the exclusionary rule deters misconduct).

effective approach because it balances the public welfare and the need for safe highways with the right of the individual to receive fair procedural safeguards.[112]

It seems apparent that an alternative approach is needed.[113] The key is for the legislators and judges to examine new concepts and approaches that will accurately reflect the needs of a modern society rather than to cling to old rules and court manifested concoctions that have clearly outdated their usefulness.[114] California's approach articulated by Judge Schneider appears to be the most sensible approach.[115]

Lawrence E. King

112. *See generally id.* (citing the California section which penalizes police misconduct but still protects highways by not allowing the evidence to be excluded).

113. *See generally* 62 JUDICATURE 351, 352 (1979) (the author criticizes the exclusionary rule).

114. *Id.*

115. *See generally id.* at 355-56 (the author is critical of distorting old doctrines rather than creating new ones).