Chemical Tests for Intoxication: A Legal, Medical and Constitutional Survey

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NOTES

CHEMICAL TESTS FOR INTOXICATION: A LEGAL, MEDICAL, AND CONSTITUTIONAL SURVEY

"Noah was the first tiller of the soil. He planted a vineyard; and he drank of the wine, and became drunk . . ." Genesis 9:20-21.

I. INTRODUCTION

With the current emphasis being placed on highway safety it might seem superfluous to recite traffic accident statistics. However, these statistics form the very basis of the problem with which we are here concerned. It is interesting, and somewhat appalling, to review briefly the accident situation in the State of North Dakota.

In 1959, the State Registrar of Motor Vehicles licensed 341,098[1] motor vehicles and 326,951[2] vehicle operators. In the same period, these and other operators were involved in 14,687 reported accidents resulting in one hundred and sixty deaths and 2,940 injuries.[3] These same accidents cost the people of North Dakota some 23.6 million dollars.[4]

In the study we are concerned with a particular aspect of this grisly problem: *Twenty-six per cent of the drivers involved in fatal accidents in North Dakota, in 1959, had been drinking.*[5] Also during 1959, eighteen hundred and twenty three[6] drivers licenses were either suspended or revoked for operation of a vehicle while under the influence of intoxicating liquor and five hundred ninety-five[7] convictions for the same offense were had without suspension or revocation. In addition to this, 2,456 drivers were convicted of carrying open bottles or containers of intoxicating liquor in their automobiles.[8] As this is being written, North Dakota's traffic fatality rate is twice that of one year ago. Thus the problem has been stated and we now enter our consideration of a hopeful solution — *Chemical Testing For Intoxication.*

A. PAST CONSIDERATIONS

To date, no tests are available to law enforcement personnel

1. Rep't of Safety Responsibility Division, N.D. State Highway Dep't, *Traffic Accident Facts and Statistical Rep't* 4 (1959).
2. *Id.* at 15
3. *Id.* at 6.
4. *Ibid.*
5. *Id.* at 2.
6. *Id.* at 13.
7. *Id.* at 14.
8. *Ibid.*

which allow a measure of the physiologic response one experiences after partaking of, and assimilating an amount of alcoholic beverages.[9] Prior to the introduction of chemical tests to determine intoxicaton, authorities were forced to resort to haphazard methods of ascertaining whether an individual might be under the influence of intoxicants. Suspects were subjected to a myriad of physical and mental gymnastics. The observations and subsequent testimony of those witnesses present at the time of the arrest of a suspect was often the only information available to the courts. Most of those observations consisted of detection of the odor of alcohol on the breath, facial coloring, eye coloring, articulation, condition of clothing, attitude of the suspect to the arresting officer, balance, ability to walk or turn normally, ability to pick up small objects from the floor and ability to touch the index finger to the nose.

Due to the severe penalties imposed upon drunken drivers these methods were not deemed adequate. One major work on chemical testing lists many pathological conditions having symtoms approximating those of alcoholic influence.[10] Any of these conditions with their accompanying physical impairments could give an untrained observer the impression that the subject had been under the influence of intoxicants.

Long before the advent of the automobile and the drunken driver, the courts were forced to approximate the physiological response to a given amount of alcohol taken into the body, and the problem remains. The court, in *Elkin v. Buschner*,[11] an 1888 Pennsylvania decision, stated:

> "There are degrees of intoxication or drunkeness, as everyone knows. A man is said to be dead drunk when he is perfectly unconscious, powerless. He is said to be stupidly drunk when a kind of stupor comes over him. He is said to be staggering drunk when he staggers in walking. He is said to be foolishly drunk when he acts the fool."[12]

As the death toll on the highways increased, the state legislatures felt obliged to enact legislation prohibiting the use of the highways to intoxicated individauls. However, the problem of interpretation soon arose. Intoxication, within the purview of the statutes, has been variously defined by the courts in the following manner: "an appreciable interference with the exercise [by the driver] of ordi-

9. Gonzales, Vance, Helpern and Umberger, *Legal Medicine, Pathology and Toxicology*, at 1083 (2d ed. 1954) [hereinafter cited as *Legal Medicine*].
10. Donigan, *Chemical Tests and the Law*, at 3-12 (Supp. 1959).
11. 1 Mona. 359, 16 Atl. 102 (Pa. 1888).
12. *Id.* at 103.

nary care.";[13] "[when] passions are visibly excited or . . . judgment impaired by the liquor";[14] [when the driver] had appreciably lost normal control of his body and mental facilities."[15]

In order to eliminate the resulting confusion from many definitions the National Committee on Uniform Traffic Laws and Ordinances incorporated in the Uniform Vehicle Code the following provision: "it is unlawful and punishable . . . for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of a vehicle within this State".[16] By 1959, forty-two state legislatures and the District of Columbia had enacted the model provision into law.[17] Of the remaining states, four use the term "intoxicated".[18] Texas and Nevada legislation includes the language "intoxicated or under the influence",[19] and the Washington Code provides "under the influence or affected by".[20] Lastly, the Maine Revised Statutes state "intoxicated or at all under the influence".[21]

An Arizona case appears to be the first reported decision affirming the use of chemical tests to determine intoxication.[22] Since that time court decisions have varied as to the competence of chemical testing, although there now seems to be rather general agreement as to the admissibility and validity of chemical test results.

The problem confronting those who advocate the general accept-

13. Steinkrause v. Eckstein, 170 Wis. 487, 175 N.W. 988, 990 (1920).
14. State v. Wheelock, 218 Iowa 178, 254 N.W. 313, 318 (1934).
15. Shanahan v. State, 162 Neb. 676, 77 N.W.2d 234, 237 (1956).
16. Uniform Vehicle Code § 11-902 (a) (1956).
17. Alaska Comp. Laws Ann. § 50-5-3 (Cum. Supp. 1958); Ariz. Rev. Stat. Ann. § 28-692 (a) (1956); Ark. Stat. Ann. § 75-1027 (1957); Cal. Veh. Code § 23102 (1959); Colo. Rev. Stat. Ann. § 13-4-30 (1) (Cum. Supp. 1957); Conn. Gen. Stat. § 14-227 (1958); Del. Code Ann. tit. 21, § 4111 (a) (Cum. P.P. 1960); Fla. Stat. § 317.20 (1959); Ga. Code Ann. § 68-1625 (a) (1957); Hawaii Rev. Laws § 311-28 (1955); Idaho Code Ann. § 49-329 (2) (1957); Ill. Rev. Stat. ch. 95½ § 144 (a) (1958); Ind. Ann. Stat. § 47-2001 (b) (1952); Iowa Code Ann. § 321.209 (2) (1949); Kan. Gen. Stat. Ann. § 8-254 (2) (Cum. Supp. 1959); Ky. Rev. Stat. § 189.520 (2) (1960); Md. Ann. Code art. 66½ § 206 (1957); Mass. Gen. Laws Ann. ch. 90 § 24 (1) (a) (1958); Mich. Comp. Laws § 257.625 (a) (Supp. 1952); Minn. Stat. Ann. § 169.121 (1) (a) (1960); Miss. Code Ann. § 8174 (a) (1942); Mont. Rev. Codes Ann. § 32-2124 (1) (a) (Cum. Supp. 1959); Neb. Rev. Stat. § 39-727 (1960); N.H. Rev. Stat. Ann. § 262.19 (1955); N.J. Rev. Stat. § 39:4-50 (Supp. 1959); N.M. Stat. Ann. § 64-22-2 (a) (1953); N.C. Gen. Stat. § 20-138 (1953); N.D. Cent. Code 39-08-01 (2) (1960); Ohio Rev. Code Ann. § 4511.19 (1954); Okla. Stat. tit. 47, § 93 (Supp. 1959); Ore. Rev. Stat. § 483.992 (2) (a) (1959); Pa. Stat. Ann. tit. 75 § 1037 (1959); R.I. Gen. Laws Ann. § 31-27-2 (a) (Supp. 1960); S.C. Code § 46-343 (Cum. Supp. 1960); S.D. Code § 44.0302-1 (Supp. 1960); Tenn. Code Ann 59.1031 (1956); Utah Code Ann. § 41-6-44 (Supp. 1959); Vt. stat. tit. 23, § 1183 (1959); Va. Code Ann. § 18.1-54 (1950); W. Va. Code Ann. § 1721 (331) (a) (1955); Wash. Rev. Code § 46.56.010 (Cum. Supp. 1959); Wis. Stat. Ann § 343.31 (1) (b) (1958); Wyo. Stat. § 31-129 (a) (1957). The La. Rev. Stat. § 14:98 (Cum. P.P. 1958) resembles the above quotations in stating "when intoxicated".
18. Ala. Code tit. 36 § 2 (Supp. 1955); Mo. Rev. Stat. § 564.440 (1949); and N.Y. Vehicle and Traffic Law § 1192 (Supp. 1959).
19. Nev. Rev. Stat. § 484.050 (1) (1959); Tex. Pen. Code, art. 802 (1959).
20. Wash. Rev. Code § 46.56.010 (Cum. Supp 1959).
21. Me. Rev. Stat., ch. 22 § 150 (Cum. Supp. 1959).
22. State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937).

ance of chemical testing was stated in a recent Michigan decision[23] in the following manner:

> "The evidentiary situation in this area of the law presents an odd combination of faith and skepticism. Courts will freely admit as evidence of intoxication the testimony of untrained observers that a defendant had difficulty with his speech or walking. [citation ommitted] At the same time some courts will adamantly set their faces against the testimony of a scientific test because the results may be jeopardized by an abnormality of the individual, or the use of faulty techniques or unclean instruments in making the test."[24]

The view that chemical tests should be fully accepted is embodied in an opinion rendered in the case of *Toms v. State*[25] which states the following:

> "[W]e should favor the adoption of scientific methods for crime detection, where the demonstrated accuracy and reliability has become established and recognized. Justice is truth in action, and any instrumentality which aids justice in ascertainment of truth, should be embraced without delay. . . . We believe, in the light of the foregoing, chemical tests by experts of body fluids as blood, urine, breath, spinal fluid, saliva, etc., under varying conditions have been approved as having gained that scientific recognition of infallibility as to be admissible in evidence."[26]

The following skepticism was registered concerning scientific tests in the case of *Frye v. United States*:[27]

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stage is difficult to define. Some-where in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[28]

Rabinowitch, in challenging the scientific basis of chemical testing asserts that the concentration of blood alcohol and brain alcohol may not parallel each other because of variation in absorption, distribution in the body, consumption and elimination through the kidneys, lungs and pores.[29] However it has been held that proof of

23. People v. Miller, 357 Mich. 400, 98 N.W.2d 524 (1959).
24. *Id.* at 527.
25. 95 Okla. Crim. 60, 239 P.2d 812 (1952).
26. *Id.* at 821.
27. 293 Fed. 1013 (D.C. Cir. 1923).
28. *Id.* at 1014.
29. Rabinowitch, *Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication*, 26 Can. B. Rev. 1437 (1948). Dr. Rabinowitch, O.B.E., D.Sc., M.D., C.M., F.R.C.P.(C), F.A.C.P., is Associate Professor of Medicine and Lecturer in Medical Jurisprudence and

the alcohol content of a sample of blood is admissible, nothwithstanding the difference in individuals tolerance to alcohol.[30]

Scientific opinion varies from indicating that the test is "accurate in only 40% of the cases,[31] to indicating that the test is "reasonably accurate"[32] or "affords a safe basis of determining intoxication where the alcoholic basis is in the higher levels".[33] This lack of unanimity affords a strong basis for critics of chemical testing.

In October 1957, at the annual meeting of the Committee on Test for Intoxcation of the National Safety Council, the Uniform Chemical Test for Intoxication Act was approved. This committee, consisting of scientists, doctors, judges, lawyers and law enforcement officers further recommended that the Act be adopted by the various state legislatures.

A portion of the Act is concerned with degrees of alcoholic intoxication. This has been the subject of discussion and debate for many years. It was finally decided that the degrees of alcoholic intoxication would be 'presumed' as follows: (a) 0.5% or less — "not under the influence of intoxicating liquor" (b) 0.5% to 0.15% — "[no] presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant" (c) over 0.15% — "presumed that the defendant was under the influence of intoxicating liquor".[34]

The following excerpt reflects the opinion of many now calling for a downward revision of the presumed percentages:

> "The Uniform Act has required a rather high percentage of alcohol in the blood to create prima facie evidence of intoxication. The concentration of 15 hundreths of one per cent is much higher than many scientists consider required to place any person under the influence of alcohol with judgment impaired, and control of faculties lost. The Uniform Act has taken this percentage because it exists in all present American legislation and because it eliminates any conceivable question of tolerance of different individuals. The figure of 12 hundreths of one percent would more nearly accord with modern scientific opinion."[35]

Toxicology at McGill University, Montreal; Director, Institute for Special Research and Cell Metabolism, The Montreal General Hospital.

30. Kuroske v. Aetna Life Ins. Co., 234 Wis. 394, 291 N.W. 384 (1940).

31. Gardner, *Breath Tests for Alcohol: A Sampling Study of Mechanical Evidence*, 31 Texas Law Rev. 289, 300 (1952).

32. LeTourneau, *Chemical Tests in Alcoholic Intoxication*, 28 Can. B. Rev. 858, 866, (1950).

33. Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 Iowa L. Rev. 191, 267 (1939).

34. Uniform Chemical Test for Intoxication Act § 7.

35. 9 U.L.A., at 42 (Cum. Supp. 1960).

This legislation has been adopted by the legislatures of nearly one-third of the states,[36] and while many consider it inadequate for controlling those whose intoxication ranges between 0.05 per cent and 0.15 per cent, it is an effective measure of the more serious cases and will further suffice until downward revision can be made.

The Committee on Medicolegal Problems of the American Medical Association reports that chemical tests for alcohol concentration have been in use for nearly 100 years. They further report that their use to determine intoxication has been employed for over 50 years.[37]

In 1914, Widmark, a Swedish scientist proposed that chemistry aid in diagnosing inebriation. Chemical tests were accepted in evidence in 1930 in Sweden and in 1934 a law was passed making the tests compulsory.[38] In 1936, upon order of the German Interior Ministry, the Widmark method of blood analysis were ordered in connection with traffic accident cases.[39]

Today chemical tests for intoxcation have been accepted in Australia, Belgium, Canada, Czeckoslovakia, Denmark, Finland, Germany, Greece, Iceland, Japan, Holland, Norway, Sweden, Switzerland and the United States.[40] In an effort to increase the use of chemical tests and induce legislation allowing chemical testing in the United States, the following organizations have recommended their use: The American Medical Association, National Safety Council, International Association of Chiefs of Police, American Bar

36. Sixteen states have nearly approximated the provisions of the Uniform Vehicle Code: Ariz. Rev. Stat. Ann. § 28-692 (b) (1956); Colo. Rev. Stat. Ann. § 13-4-30 (2) (Cum. Supp. 1957); Ga. Code Ann. § 68-1625 (b) (1957); Hawaii Rev. Laws § 311-29 (1955); Idaho Code Ann. § 49-1102 (b) (1957); Ill. Rev. Stat. § 144 (b) (1958); Ky. Rev. Stat. § 189.520 (4) (1960); Mont. Rev. Codes Ann. § 32-2142 (2) (Cum. Supp. 1959); Neb. Rev. Stat. § 39-727.01 (1960); Nev. Rev. Stat. § 484.055 (1) (1959); S.C. Code § 46-344 (1952); S.D. Code § 44.0302-1 (Supp. 1960); Utah Code Ann. § 41-6-44 (Supp. 1959); Wyo. Comp. Stat. Ann. § 31-129 (b) (1957).

In the following statutes the test result constitutes prima facie evidence rather than a presumption: Del. Code Ann. tit. 11, § 3507 (Cum. P.P. 1960); Ind. Ann. Stat. § 47-2003 (2) (Cum. Supp. 1960); Md. Ann. Code art. 35, § 100 (a) (3) (Supp .1959); Minn. Stat. Ann. § 169.121(2) (1960); N.H. Rev. Stat. Ann. § 262:20 (1955); N.Y. Vehicle & Traffic Law § 1192 (1960); Ore. Rev. Stat. § 483.630 (5) (1959); W. Va. Code Ann. § 1721(331a) (Cum. Supp. 1960); Wis. Stat. § 325.235 (1) (1958). The Me. Rev. Stat. ch. 22, § 150 (Cum. Supp. 1959) raises the lower presumptive level from 0.05 per cent to 0.07 per cent and differs only in that respect.

Other statutes differ variously. Ark. Stat. Ann. § 75-1031.1 (1957) gives chemical test evidence neither prima facie nor presumptive effect. Kan. Gen. State Ann. § 8-1005 (Supp. 1959) state that any percentage of alcohol concentration under 0.15, a person is presumed to be not under the influence. On the other hand Tenn. Code Ann. § 59.1033 (1955) presumes that only after the alcohol content reaches 0.15 per cent is one presumed under the influence. Vt. Stat. § 1189 (Supp. 1959) states conclusively that one is not intoxicated if alcohol concentration is 0.05 per cent or less.

37. Committee on Medicologal Problems, American Medical Association, *Chemical Tests For Intoxication Manual* 4 (1959).

38. See Slough and Wilson, *Chemical Testing For Intoxication*, 44 Minn. L. Rev. 673, 675 (1960).

39. See 107 J. Am. Med. Ass'n 2145 (1936).

40. See Slough and Wilson, *supra* note 37, at 5.

Association, American Association of Motor Vehicle Administrators, The National Committee on Uniform Traffic Laws and Ordinances, The Presidents Highway Safety Conference, American Automobile Association, the Federal Bureau of Investigation and the Licensed Beverage Industries.[41]

B. THE BODY'S PHYSIOLOGICAL RESPONSE TO ALCOHOL

In order to establish a sound basis for our consideration of chemical testing it is necessary to investigate the chemical reaction of the body to alcohol. Very shortly after the ingestion of alcohol into the stomach, usually 2 to 10 minutes later, it begins appearing in the blood stream. It's passage is from the stomach, then to the intestine and through the intestinal wall and directly into the bloodstream. If the drinker imbibes of a sufficient amount it cannot be eliminated quickly enough by the body and there is a consequent piling up of alcohol in the bloodstream. The blood stream carries the excess alcohol to all parts of the body. Drunkeness results when the nerve cells receive this alcohol as it interferes with the passage of regular nerve impulses.[42] Thus, due to this distribution, chemical testing is made possible as the alcohol is distributed equally to the brain, liver, kidneys, muscles and every part of the body which contains water.[43] Therefore, with the passage of nerve impulses impaired, one experiences a lessening of normal reaction time, blurred vision, the traditional feeling of well-being and the subsequent care-free attitude toward the complex problems of modern highway travel.

II. CHEMICAL TESTS

A. THE BLOOD TEST

The blood test is considered the most reliable method of determining the amount of alcohol in one's body. Certain procedures should be strictly followed by all persons involved in taking or processing the sample. Initially, the subject should be notified that he does not have to consent to the test if he does not desire to do so. It should be further stated that a refusal to do so will result in the loss of his driving privileges for a period of six months. Upon receiving the necessary consent, the subject's arm should be cleaned

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41. *Id.* at 4.
42. *Legal Medicine, supra* note 9, at 1094.
43. See People v. Kovacik, 205 Misc. 275, 128 N.Y.S.2d 492, 501 (Ct. Spec. Sess. 1954).

with a non-alcohol solution. The use of alcohol as a cleansing agent may adulterate the test and result in either an unfairly high reading or refusal of the court to allow its admission into evidence. The syringe used in the withdrawal should be thoroughly cleansed in pure distilled water as should all glassware and instruments used in the course of the test. After the sample is withdrawn from the subject it should be placed in a sterile container, sealed, and properly labelled with the subject's name and any other pertinent medical information. If the sample is to be stored pending delivery to a laboratory it should be refrigerated. Upon delivery of the specimen to the laboratory, it should be properly marked and a receipt given the delivering officer.

The test is conducted in the following manner: 20 cubic centimeters of saturated picric acid solution are introduced into a distilling flask, one cubic centimeter of the sample to be analyzed added along with a few chips of porcelain to prevent lumping. The distilling flask is connected to a glass condenser which is so made that the condenser fits into the distilling glass like a ground glass stopper into a bottle. Ten cubic centimeters of standard dichromate solution (2.188 g. of potassium dichromate made up to 1000 c.c. with distilled water) equivalent to 0.5 mg. of alcohol is added to the receiving flask. About 10 c.c. of distillate is obtained, 20 c.c. of sulphuric acid is added and the mixture is allowed to stand for about 10 minutes. A titration solution containing ferrous sulphate, sulphuric acid and a small amount of mthyl orange is added from a burrette with constant stirring until the distillate shows an excess of the methyl orange. The cubic centimeters of the ferrous sulphate solution is noted. A blank titration is done on exactly 10 c.c. of the standard bichromate solution with sulphuric acid added and this result is also noted. The calculation: 10 times the distillate titration in cubic centimeters is divided by the blank titration and the result subtracted from 10; the figure obtained multiplied by 50 gives the mg. percent of alcohol. The composition of the titration solution is as follows: Three stock solutions are prepared, (a) ferrous sulfate crystals, 50 mg. dissolved in about 150 c.c. of water, 30 c.c. of sulphuric acid added and the volume made to 250 c.c.; (b) sulfuric acid 50% by volume, and (c) 0.1% methyl orange in 0.1% sodium hydrate solution; mixed before using in these proportions — (a) 60 c.c. (b) 40 c.c. and (c) 2 c.c.

The distillation, oxidation and titration are repeated on a second 1 c.c. sample of the specimen. The calculated results should check

within 5 mg. % for lower values and 10 mg. % for higher values. Otherwise a third test should be made.[44]

Notes taken during the analysis and calculations of the alcohol content should be preserved. The container and what is left of the specimen may be returned to the officer and a receipt obtained, or it may be kept under lock and key in the laboratory by the analyst until the trial, and personally delivered to the prosecuting attorney.

Other methods used in analyzing blood specimens for alcohol include Heise's test,[45] the Widmark method[46] and the Nicloux method,[47] any of which gives accurate reading of the amount of blood alcohol present in the suspect's body.

B. THE SALIVA, URINE AND CEREBRO-SPINAL FLUID TESTS

The chemical test to determine the alcoholic content of urine operates on the scientific presumption that the alcoholic content of the urine is an accurate measure of the alcoholic content of the blood.

A definite asset in the use of the urinalysis is that it may be administered by anyone without extensive training or scientific background. It is only necessary that the container in which the sample is taken be free from contamination and that the specimen be properly sealed and transported to the laboratory. Upon arrival at the laboratory the specimen is distilled over a specific amount of potassium dichromate. The alcohol, if any is present in the specimen, reacts with the chemical. Upon completion of this process the amount of potassium dichromate used is measured, which should reflect the amount of alcohol present in the specimen.[48]

44. Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 Iowa L. Rev. 191 (1939). While various methods are available for blood analysis, the quoted method is the one used in the University of Iowa Hospital. 24 Iowa L. Rev. 210, 211.

45. "After distillation of the urine or blood, diluted with a picric-tartaric solution to prevent frothing, the alcohol in a portion of the distillate is oxydized with potassium dichromate and sulphuric acid. This changes the color in the solution from yellow to blue. The percentage of alcohol is obtained by matching the resulting color with the color-standard tubes prepared from known concentrations of alcohol. This test is used extensively in this country". *Id.* at 211.

46. Two to four drops of blood are drawn from the ear lobe or finger tip, after skin puncture, with specially prepared glass tubes. These tubes are weighed, the blood discharged into a glass spoon attachment to a glass stoppered flask containing a measured amount of a bichromate-sulphuric acid mixture, the emptied blood container again weighed to obtain the amount of blood by difference. The flask and the blank control are placed in an oven at 70° centigarde. The water and alcohol vapor are absorbed by the oxidyzing mixture, the blood sample being completely dried. The unchanged bichromate is estimated idometrically, the difference between the values of the control and the blood sample flask being equivalent to the alcohol in the sample. The Widmark method is used especially in Germany and the Scandinavian countries and Denmark. *Id.* at 211, 212.

47. This method calls for a distillation of the blood or urine diluted with a picric acid solution, bichromate oxidation, the addition of an excess measured amount of a standard ferrous sulphate solution which reduces the unused bichromate; the latter is estimated by titration with standard potassium permanganate. The Nicloux method is used principally in France, Switzerland and Belgium. *Id.* at 212.

48. See Note, 29 Conn. B.J. 147, 152, 153 (1955).

Care should be exercised in some areas of the urinalysis. First of all a diabetic should be specially checked to ascertain whether the urine contains acetone. Acetone reacts somewhat like alcohol and will cause an unfairly high reading if undetected. Another area where an unfair reading may occur is concerned with the time at when the sample is taken. Alcohol accumulates in varying amounts in the bladder depending upon the time of consumption or the amount consumed. Thus, a urinalysis administered a short time after consumption would indicate a very low quantity of alcohol, if any.

The saliva test merits some consideration but for obvious reasons it may be impractical in some instances. Often the mental anxiety experienced by one apprehended for driving will cause the suspect's mouth to become dry, making the sampling impossible. Great caution must be exercised in the saliva test to insure that mouth alcohol is not present due to recent drinking or regurgitation. The officer taking the sample should wait at least 15 minutes after apprehension of the suspect to insure that all mouth alcohol is washed away.

Chemical testing for the alcohol content of cerebro spinal fluid has and may be used. However, its use should probably be restricted to autopsies as surgical conditions are necessary when the spinal puncture is made. There are dangers inherent in this approach and most suspects would be wary of this method of sampling.

C. BREATH TESTS

Four scientific devices have been developed to measure the alcohol content of breathed air. They include the Drunkometer,[49] the Alcometer,[50] the Breathalyzer[51] and the Intoximeter.[52] These de-

49. Developed by Dr. R. N. Harger, Professor of Biochemistry and Toxicology at the School of Medicine, Indiana University. Doctor Harger has written extensively on this subject and is a noted authority on the subject of chemical testing.

50. Developed by L. A. Greenburg and F. W. Keator of Yale University, "In the Alcometer test . . . the subject is required to blow into a collection chamber which samples a fixed (30 c.c.) measure of expired air. The sample is held in the tube at a constant temperature in order to avoid condensation of moisture. The sample of air is then blown into a reaction chamber which contains iodine pentoxide as an oxydizing agent. When alcohol reduces the pentoxide, this causes free iodine to be liberated. All of the iodine thus released is then bubbled through a fortified solution of starch and potassium iodide contained in the colormeter test tube. A blue color is here produced, the intensity of which is proportional to the amount of free iodine present: the more iodine present, the darker the blue will appear. This is measured by means of a photo-electric cell. As the intensity of the blue changes, it is recorded on the Alcometer scale, calibrated in per cent of alcohol in the suspect's blood. This test avoids any assumption as does the Drunkometer concerning the relationship between blood alcohol and alcohol in the lung air." 29 Conn. B.J. 147, 154 (1955).

51. The Breathalyzer is a self-contained device, weighing approximately eighteen pounds. It is contained in an aluminum carrying case which measures 9 inches by 10 inches by 9 inches. The device is electrically operated either from 110 volt, 60 cycle circuits or on a six or twelve volt storage battery.

For it's operation the subject blows into a mouthpiece. A piston device settles to a predetermined position and is held in that position by a magnet. In this way 52 c.c. of breath air is held in the cylinder. The operator then allows the trapped air to filter into an

vices are commercially manufactured and may be purchased by any law enforcement agency.

In speaking of the practical application of the Breathalyzer, Borkenstein and Somth point out some obvious advantages of the various breath testing devices:[53]

> "The stability of the instrument and the close control possible in the measurement have assisted in its wide acceptance in the United States, Switzerland, England, Sweden and Australia. With this instrument as with other breath testng devices, the concentration of alcohol in the blood of a driver suspected of being 'under the influence' can be determined quickly. When this concentration is high it becomes part of the evidence in the case. When the concentration is low (below 0.05%), the driver can be relieved of suspicion. Moreover, the test will always be valuable protection for the person who is ill, and whose intoxicated behaviour is not attributable to alcohol."[54]

These devices measure the amount of alcohol in the alveolar air.[55] It is claimed that the alcohol in the blood will pass into the alveolar air and reach a state of equilibrium so that the ratio of alcohol in the blood to the alveolar air will be constant.[56]

It will be sufficient, for our purposes, to investigate the scientific principle of but one of these instruments: the Harger Drunkometer.[57] For its operation, a sampe of the suspects breath is blown into a previously unused balloon. This balloon is then attached to

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alcohol sensitive solution (3 millilitres of 0.025 per cent potassium dichromate in 50% sulphuric acid). The solution absorbs the alcohol from the breath and oxidyzes it according to a definite chemical relationship. As this reaction progresses, the yellow color of the solution fades in proportion to the amount of alcohol oxidized. The operator then records the decrease in yellow color that occurs in the oxidized solution. The actual measurement is done by a series of light filters and photo-electric cells. The degree of color change is measured on a dial calibrated in per cent of alcohol in the blood. This instrument is not appreciably affected by variance in temperature (plus or minus 10°) nor in lapse in time of reading. Other chemicals (wood alcohol, ether or pareldehyde) which would appreciably affect the reading are not usually found on the average individual. Smith & Lucas, *Breath Tests For Alcohol*, reprinted from The Criminal Law Quarterly, Volume 1, Number 1, pp. 26-30.

52. Developed by Dr. G. C. Forrester, It's scientific principle is nearly the same as that of the Drunkometer except that it substitutes Magnesium Perchlorate instead of Potassium Permanganate solution used in the Drunkometer. Two models, the Photo-electric and an small portable are available.

53. See Pamphlet, *The Breathalyzer and It's Application*, by R. F. Borkenstein, B.A., Chairman, Department of Police Administration, Indiana University, and H. W. Smith, Ph.D., Assistant Professor of Pharmacology, University of Toronto; Director, Attorney General's Laboratory, Toronto, Ontario.

54. *Id.* at 5.

55. Alveolar air is that air drawn from deep in the lungs where it comes in contact with the small blood vessels.

56. For a criticism of the various chemical tests, see generally Rabinowitch, *Medicolegal Aspects of Chemical Tests of Intoxication*, 39 J. Crim. L., C.&P.S. 225 *passim* (1948), to which Drs. Harger and Meuhlberger reply in *Medicolegal Aspects of Chemical Tests For Intoxication-Comments on Dr. I. M. Rabinowitch's Paper*, 39 J. Crim. L., C.&S.P. 402 *passim* (1948).

57. For a thoroughly complete and illuminating discussion of the Harger Drunkometer, see People v. Kovacik, 205 Misc. 275, 128 N.Y.S.2d 492 (Ct. Spec. Sess. 1954).

a glass inlet tube which allows the breath to pass into a reagent containing a solution of potassium permanganate at 1/20th its normal strength, 56% sulphuric acid and 46% distilled water, by weight.

The solution in this reagent is purple in color and the reagent is situated between two sealed comparison tubes containing different colored solutions. As the breath sample passes through the reagent the sulphuric acid catches the alcohol and causes a color change in the solution. The end point of this color change is reached when 0.169 milligrams of alcohol pass through the solution and cause the purple solution to attain a shade between the colors in the two comparison tubes.

The amount of breath needed to attain this 0.169 milligrams of alcohol always varies according to the amount of alcohol in the blood and the breath. The portion of breath needed to reach the end point color is then passed into a partitioned container called a Gasometer and displaces water in the upper portion of the tube to a lower, calibrated portion. The more intoxicated a person, the more rapidly the alcohol is caught and therefore a smaller portion of air reaches the Gasometer. Through the use of a formula which equates centimeters of expired breath to a centimeter of alcohol concentration in the blood, one can determine the ratio of alcohol in the breath to that of alcohol in the blood.

A second test is taken whereby the breath is passed through a tube containing magnesium perchlorate which removes the breath moisture. It passes then through a tube containing a substances of fused potassium hydroxide on particles of asbestos which catches all carbon dioxide in the breath. When the reaction tube removes 0.169 milligrams of alcohol the second tube containing the asbestos is removed and re-weighed. On the basis of a formula stating that 3200 centimeters of ordinary expired breath or 2100 cubic centimeters of deep lung breath contain 190 milligrams of carbon dioxide, the amount of breath used is determined.

Through the use of the two tests a definite amount of alcohol is measured and the amount of breath necessary to furnish this alcohol is also measured. From these amounts one may calculate the percent of alcohol in the blood.

With the exception of one notable decision,[58] the scientific relia-

58. People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949) (wherein the Michigan Supreme Court accepted the testimony of five physicians as expert witnesses for the defense) pointed out that the basis of defendant's expert testimony was that "most of the medical profession considered the method of testing unreliable . . . based on articles written by authors critical of procedures employed in the drunkometer test"; see Slough & Wilson, *Chemical Testing For Intoxication*, 44 Minn. L. Rev. 673, 680 n. 18 (1960).

bility of the various breath testing devices has been generally accepted by the courts.[59] However, the courts will not take judicial notice of the reliability of such tests;[60] thus the prosecution must call an expert witness qualified to testify as to the scientific reliability of the device.[61] If said witness was not the operator, it is also necessary that the person actually taking the test be able to prove his qualifications in properly administering the test.[62]

Testimony offered in establishing the reliability of the device goes to the weight of the results given rather than to their admissibility.[63] Therefore, it is incumbent upon prosecutors and law enforcement personnel to become especially well acquainted with their technical ramifications and the scientific theories necessary to their development and use.

Some jurisdictions require corroborating evidence in addition to the results of the scientific tests. A Wisconsin case held that the odor of alcohol on the drivers breath and his manner of driving, witnessed by the officer, constituted sufficient corroborating evidence.[64]

The fact that chemical test results are admissible in the courts as valid evidence can hardly be disputed. Therefore, implementing legislation is generally not necessary, it being only incumbent to abide strictly by the rules of evidence. Statutory interpretation has at least required strict conformity with the statute in some jurisdictions, while others may generally be considered permissive in nature.[65] Chemical test legislation, in the main, requires that the prosecution prove the scientific reliability of the device. North Dakota's Implied Consent Statute recognizes the scientific basis of the

59. State v. Olivas, 77 Ariz. 118, 267 P.2d 893 (1954); State v. Berg, 76 Ariz. 93, 259 P.2d 261 (1953); People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567 (1951); Willennar v. State, 228 Ind. 248, 91 N.E.2d 178 (1950); People v. Coppock, 206 Misc. 89, 133 N.Y.S.2d 174 (Ct. Spec. Sess. 1954); People v. Spears, 201 Misc. 666, 114 N.Y.S.2d 869 (1952); Lombness v. State, 243 P.2d 389, (Okla. Crim. 1952); Toms v. State, 239 P.2d 812 (Okla. Crim. 1952); Guenther v. State, 153 Tex. Crim. 519, 221 S.W.2d 780 (1949); Omohundro v. Arlington County, 194 Va. 773, 75 S.E.2d 496 (1953).

60. State v. Williams, 245 Iowa 401, 62 N.W.2d 241 (1954); Fortune v. State, 197 Tenn. 691, 277 S.W.2d 381 (1955); People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949). *Contra,* Natwick v. Moyer, 177 Ore. 486, 163 P.2d 936 (1945), holding that the test is scientifically established; see Stacy v. State, 228 Ark. 260, 306 S.W.2d 852 (1957); State v. Libby, 153 Me. 1, 133 A.2d 877 (1957); State v. Moore, 245 N.C. 158, 95 S.E.2d 548 (1956); State v. McQuilkin, 113 Utah 268, 193 P.2d 433 (1948).

61. North Dakota's implied consent law recognizes "the results of the Harger Drunkometer or other similar devices" when received in evidence. N.D. Cent. Code § 39-20-07(5) (1960).

62. See Fortune v. State, 197 Tenn. 691, 277 S.W.2d 381, 384 (1955) (wherein the qualifications of the operator are distinguished from that of an expert witness).

63. State v. Olixas, 77 Ariz. 118, 267 P.2d 893 (1954); *accord,* McKay v. State, 155 Tex. Crim. 416, 253 S.W.2d 173 (1951).

64. Schwartz v. Schneuringer, 269 Wis. 535, 69 N.W.2d 756, 760 (1955).

65. State v. Resler, 262 Wis. 285, 55 N.W.2d 35 (1952); *accord,* Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (1954); Ringwood v. State, 8 Utah 2d 287, 333 P.2d 943 (1959).

Harger Drunkometer "and other similar devices".[66] Here the operator need only prove that the test was "fairly administered".

Generally, the admissibility of evidence of the results of breath testing devices lies within the dscretion of the trial judge.[67] In admitting expert testimony, the court must determine that experts have some special, as well as practical, knowledge of the subject upon which he is testifying. The court does not rule upon the trustworthiness of his testimony as this is left to the jury.[68] These results should not be considered as conclusive but should be considered with other circumstances of the case by the jury.[69]

III. EVIDENTIARY CONSIDERATIONS

A. CUSTODY AND PRESERVATION

In any prosecution involving chemical testing it is incumbent upon the party relying upon the evidence of such test to prove the identity, preservation, and proper custody of the samples taken. This proof constitutes the "chain of evidence". An Iowa court,[70] describing this process held that "it is necessary to establish a complete chain of evidence, tracing the possession of the exhibit from the defendant to the first custodian, and . . . if one link in the chain is entirely missing, the exhibit cannot be introduced."[71] Generally, it must be proved that the sample was taken from the defendant, that the sample was properly preserved, and that it was correctly labeled and identified.[72] Where necessary, it must be shown that the sample was properly transported and delivered and finally that the sample taken is the sample being introduced in court.[73]

The identity of the person from whom the sample was taken is provable by direct testimony. It is most desirable to have the testimony of the person actually taking the test, however, a Texas court[74] held a blood specimen properly identified where a police officer testified as to his presence at the time of the sampling, notwithstanding the failure of the doctor to testify.

66. See statute cited at note 61 *supra*.
67. Fortune v. State, 197 Tenn. 691, 277 S.W.2d 381 (1955).
68. *Accord*, Moon v. State, 146 Tenn. 319, 242 S.W. 39 (1922).
69. See Sheperd v. State, 300 Pac. 421 (Okla. Crim. 1931).
70. Joyner v. Unterbach, 196 Iowa 1040, 195 N.W. 594 (1923).
71. *Id.* at 595.
72. Piester v. State, 161 Tex. Crim. 436, 277 S.W.2d 723 (1955); see State v. Brezina, 45 N.J. Super. 596, 133 A.2d 366 (1957), where the court held that test results were inadmissible because prosecution failed to show that chemicals were properly compounded and in good condition.
73. Abego v. State, 157 Tex. Cim. 264, 248 S.W.2d 490 (1952); see McAlliste v. State, 159 Tex. Crim. 57, 261 S.W.2d 332 (1953); Gilderbloom v. State, 160 Tex. Crim. 471, 272 S.W.2d 106 (1954).
74. Mora v. State, 159 Tex. Crim. 321, 263 S.W.2d 787 (1954).

In considering whether the specimen has been adequately preserved and has remained in the proper custody, two factors arose: (1) was the specimen properly secured to prevent tampering or contamination and (2) was the packaging or container sufficient in view of the necessity to prevent tampering or contamination? The testimony on this subject should include the type of container employed,[75] the safekeeping of the sample,[76] and whether anyone had an opportunity to tamper with, or disturb the sample.[77]

It has been held that the prosecution's failure to provide evidence of proper custody may be obviated by the direct testimony of an individual who will state that he recognizes the sample because of distinguishing characteristics or marks previously observed. However, this does not imply that the specimen is in the same condition when identified as when first observed.[78]

The necessity of proper labeling of chemical test specimens is obvious. Each sample, after being placed in a sealed container, should be marked so that it is completely distinguishable from other samples in possession. The inability to positively identify a sample in the courtroom is usually considered a fatal break in the chain of evidence.[79] A Virginia decision[80] held that where evidence failed to show that blood sample taken from defendant was properly labelled and that only evidence was to the effect that blood from accused was analyzed the day following the taking, that the proof was insufficient to show beyond a reasonable doubt that the sample analyzed was the sample extracted from the defendant.

A majorty of the law enforcement agencies are faced with the problem of transporting a specimen from the place where the sample was taken to the laboratory for analysis. The utmost care must be exercised to insure that the transportation of the specimen constitutes a continuous transaction. The courts demand that persons handling the specimen be able to show, in direct testimony, that the sample remained secure from tampering, contamination and confusion with other samples. An Iowa case held that where a blood sample taken from defendant was properly mailed and addressed

75. State v. Thompson, 132 Mo. 301, 34 S.W. 31 (1896).
76. Piester v. State, *supra* note 72.
77. People v. Bowers, 2 Cal.Unrep. 878, 18 Pac. 660, 666 (1888). It was held, by way of dicta, in Hershiser v. Chicago, B. Q. Ry., 102 Neb. 820, 170 N.W. 177 (1918), that identity is sufficiently shown where probability of tampering is negatived, is best shown by proving that the specimen was untouched except by the expert who made the analysis, but may be proved in spite of the possibility of the substitution of another specimen. See also People v. Herman, 8 Misc.2d 991, 166 N.Y.S.2d 131 (1957).
78. State v. Shawley, 334 Mo. 352, 67 S.W.2d 74 (1933).
79. American Mutual Liability Ins. Co. v. Industrial Accident Com., 78 Cal.App.2d 493. 178 P.2d 40 (1947).
80. Newton v. Richmond, 198 Va. 869, 96 S.E.2d 775 (1957).

to the State Hygenic Laboratory it would be presumed that it was properly delivered.[81] However, a District of Columbia decision held that where the witness testified as to taking the specimen, labelling it and delivering it to a laboratory for analysis and the subsequent testimony of the expert witness making the analysis and his identification of the sample without identification by the deliveror constituted a missing link in the chain of evidence.[82]

An excellent Iowa decision, *State v. Werling*,[83] shows what would be the correct method of handling a blood specimen. Here, in a drunk driving prosecution, a physician testified as to taking a specimen from defendant's body and giving it to a police officer, X; X testified that the physician took the sample in his presence, put it in a sealed container, labeled the container with defendant's name and gave him the container. X further testified that he kept the specimen overnight and gave it to another policeman, Y, the following day. Y then testified that he had received the specimen from X, that he delivered the specimen to a specific hospital where he gave it to a medical technician, Z. Z testified that she received the specimen from policeman Y, opened it and delivered it to a Doctor. Z then testified that she proceeded to make the analysis under the Doctor's supervision.

The question of the necessity of producing the specimen in court arises at this point. There is a strong inference that the specimen, or at least part of it, properly packaged and labeled should be produced in court as absolute proof of security.[84] However, where the specimen has been completely destroyed as a result of normal laboratory procedures it has been held that absolute production is not necessary.[85] Generally, failure to produce the specimen, if not fatal to the test, raises a strong presumption that the evidence is insufficient.[86]

B. THE PHYSICIAN-PATIENT PRIVILEGE

It is not infrequent that a person charged with intoxication under the terms of the various statutes has availed himself or has been committed to medical care. This most often occurs in the case of automobile accidents where defendant is subsequently involved in civil or criminal litigation resulting from the mishap.

Naturally, where defendant has received medical aid, most plain-

81. State v. Weltha, 228 Iowa 519, 292 N.W. 148 (1940).
82. Novak v. District of Columbia, *supra* note 82.
83. 234 Iowa 1109, 13 N.W.2d 318 (1944).
84. See Novak v. District of Columbia, *supra* note 82.
85. State v. Romo, 6 Ariz. 174, 185 P.2d 757 (1947).
86. See Nichols v. McCoy, 106 Cal. App. 2d 661, 235 P.2d 412 (1951).

tiffs and prosecutors will attempt to introduce the doctor's testimony as to defendant's condition. The natural reaction to these attempts is defendant's claim that such testimony violates the physician-patient privilege accorded by statute in many jurisdictions. North Dakota, not unlike many other jurisdictions has enacted such a statute:

> "A physician or surgeon, without the consent of his patient, cannot be examined as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."[87]

At common law the existence of privileged communication as between physician and patient was unknown.[88] It follows that states not having enacted such statutes do not recognize the privilege.[89]

In *Perry* v. *Hannagan*,[90] a Michigan decision, in which defendant's doctor testified as to the odor of alcohol on defendant's breath, the court held that the doctor was treating the patient for cuts and bruises and not for intoxication and could therefore testify as to what he had observed apart from the treatment of the injuries. On the other hand, the Nebraska Supreme Court, in the case of *Freeburg* v. *State*,[91] cited as controlling an opinion rendered in the case of *Smart* v. *Kansas City*,[92] a Missouri decision:

> "We have distinctly held in such a case that the communication to the physician's sense of sight is within the statute, and as much as if it had been oral and reached his ear. . . . The meaning of this section is not veiled in doubt. It disqualifies the physicians and surgeons from testifying to any information acquired by them while attending their patients in a professional capacity."[93]

Thus within the purview of the Missouri decision, any observations made by a physician during treatment of his patient for any cause, falls within the terms of the statute.

A recent Indiana decision announced that a statute necessitated the exclusion of evidence of the result of a blood test where the accused's physician had treated the defendant for injuries received.[94]

In view of the uncertainties of the decisions in many of the jurisdictions it seems the best policy to insure that the specimen taken at the time of the analysis be taken by a technician other than the

87. N.D. Cent. Code § 31-01-06 (3) (1960).
88. *In re* Albert Lindley Lee Memorial Hospital, 115 F.Supp. 643, 645 (N.D.N.Y. 1953), *aff'd*, 209 F.2d 122 (2d Cir. 1953).
89. Dyer v. State, 241 Ala. 679, 4 So.2d 311, 313 (1941).
90. 257 Mich. 120, 241 N.W. 232 (1932).
91. 92 Neb. 346, 138 N.W. 143 (1912).
92. 208 Mo. 162, 105 S.W. 709 (1907).
93. Freeburg v. State, *supra* note 91, at 144.
94. Adel v. State, 154 N.E.2d 716 (Ind. 1958).

physician or surgeon treating the subject for injuries. This would of necessity preclude the privilege from arising at the time of the prosecution.

C. ADMISSIBILITY OF OTHER EVIDENCE

Often memoranda, business, and official records are used to refresh a witness's memory or are referred to for data needed in the prosecution of a case wherein the testing of a chemical specimen is being considered.

It has been held that where a memorandum is used as the basis for a witness's testimony, the memorandum is only secondary evidence of the fact for which it speaks, the primary evidence being the witness's own knowledge.[95] It then follows that where a witness had no prior knowledge, a memorandum on the subject is inadmissible in evidence. Thus, the identity of a person from whom a blood sample has been taken can only be proved positively by the person actually taking the test.[96]

Hospital or laboratory business records may sometimes form the basis for a witness's testimony. The common law rule[97] was that these records were generally inadmissible unless testimony from the person subscribing the data was available. However, THE UNIFORM BUSINESS RECORDS AS EVIDENCE ACT has been adopted in North Dakota which reads:

> "A record of an act, condition, or event shall be competent evidence, in so far as relevant, if:
> 1. The custodian or other qualified witness testifies to its identity and the mode of its preparation;
> 2. It was made in the regular course of business, at or near the time of the act, condition or event; and
> 3. The sources of information and the method and time of preparation, in the opinion of the court, were such as to justify its admission.
>
> For the purpose of this section, the term "business" shall include every kind of business, profession, whether carried on for profit or not."[98]

A North Dakota case, *State* v. *Ramstad*,[99] held that this statute is not restricted to civil suits but is equally applicable in criminal

95. Dr. R. D. Eaton Chemical Co. v. Doherty, 31 N.D. 175, 153 N.W. 966 (1915); see Weigel v. Powers Elevator Co., 49 N.D. 869, 194 N.W. 113 (1923).
96. Natwick v. Moyer, 177 Ore. 486, 163 P.2d 936 (1945).
97. This rule includes the 'shopbook rule' which admits only the account books of a party to a cause or proceeding, and the 'regular entries' rule by which entries or memoranda made by third parties in the regular course of business are admissible in evidence. 5 Wigmore, Evidence § 1518 (3d ed. 1940).
98. N.D. Cent. Code § 31-08-01 (1960).
99. 87 N.W.2d 736 (N.D. 1958).

actions. With the aid of this liberally construed statute the courts have little difficulty in admitting fully, any amount of business records available which are pertinent to the cause.[100]

Public documents, official records and writings are considered in a different light than ordinary business records and memoranda. Where there is a duty to record official doings, the record thus kept is admissible in evidence.[101] The North Dakota statute on this subject reads as follows:

> "Entries in public or other official books or records made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein."[102]

It is obvious from the foregoing material that the most meticulous attention be given to the details involved in presenting evidentiary material as the rules of evidence related to chemical testing are often diverse and complicated.

IV. QUALIFICATIONS NECESSARY TO ADMINISTER THE TESTS

The North Dakota Code specifically states which individuals are qualified to withdraw blood in chemical tests for intoxication. The statute provides:

> "Only a physician, or a qualified technician, chemist or registered nurse acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of breath, saliva or urine specimens . . . ."[103]

Each type of chemical test for intoxication has involved peculiarities. It is obvious that the policeman-operator need not have the qualifications of the college trained chemist who interprets the test. The policeman must however be qualified to fairly administer

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100. See Northwestern Improvement Co. v. Norris, 74 N.W.2d 497 (N.D. 1955), and Northern Pac. Ry. v. Advance Realty Co., 78 N.W.2d 705, 712 (N.D. 1956), where it was held that the admission or exclusion of records under the statute should not be reversed in the absence of manifest abuse of discretion and that the statute should be liberally construed.

101. See Smith v. Mott, 100 So.2d 173 (Fla. 1958), where it was held that a medical examiner's report was admissible under public record exception to hearsay rule. See also 8 Wigmore, Evidence § 1639 (3d ed. 1940).

102. N.D. Cent. Code § 31-09-08 (1960). See generally Title 31-09, of the N.D. Cent. Code for statutory material concerning other types of public documents or writings.

103. N.D. Cent. Code § 39-20-02 (1960). Other implied consent statutes distinguish as to who may withdraw a blood specimen in the following manner: Idaho (physician or registered nurse); Kansas (physician or qualified medical technician); New York (physician only); South Dakota (physician, laboratory technician, medical technician, or medical technologist); Utah (physician or laboratory technician); Vermont (physician only); Nebraska (physician, registered nurse, or registered laboratory technician).

and completely conduct the examination of any suspect brought before him.[104]

It is necessary that the qualification of the test operator be presented prior to the introduction of his findings. The acceptance of an operator's credentials, or reliability lies largely within the discretion of the trial court.[105] It is extremely important that a person operating one of the chemical testing devices be trained in the fundamentals of the machine. It is not necessary that he understand the scientific principles behind the device, but he should be able to clearly outline the methods and procedures used in making the test.

Every police unit using the chemical testing devices should have the services of a qualified chemist or laboratory technician to interpret the results of chemical tests. This expert will be able to competently testify as to the scientific basis, methods and results of the test and tie in the testimony of the operator.

Illustrative of the aforementioned principles are the following cases. In *State* v. *Gagnon*,[106] a police operator administered the test and subsequently testified as to the details of the test and as to the numerical result received, which was stated as "0.21". His testimony as to his qualifications was that he was a high school graduate with no chemistry background and no laboratory training in evaluating the tests. His testimony was followed by that of a pathologist and research specialist who testified as to the qualifications of the operator, the scientific reliability of the drunkometer, the proper methods of taking the test and his interpretaton of the operator's reading of "0.21". In upholding the defendant's conviction the court held that the operator "testified only as to his observation of the physical condition of the defendant and as to the number of the reading which he obtained from the 'Drunkometer' test. He did not, as an expert or layman, undertake to interpret or analyze what the reading '0.21' meant, nor express any opinion in that respect."

In a similar case, *State* v. *Gregoire*,[107] in which an "Alcometer test" was administered by a police captain, the court held that the officer's lack of training precluded his giving testimony. It was shown at the trial that, in 1949, during a two week course in police training he had received three hours of instruction in how to operate the device. His testimony showed that he had also described the steps used in administering the test. As in the *Gagnon* case, the

104. Alexander v. State, 305 P.2d 572 (Okla. Crim. 1956).
105. Omohundro v. Arlington County, 194 Va. 773, 75 S.E.2d 496 (1953).
106. 151 Me. 501, 121 A.2d 345 (1956).
107. 148 A.2d 751 (R.I., 1959).

operator's testimony was supported by an expert witness who testified as to the scientific reliability of the device, and that the "Alcometer" had been designed to permit it's operation by a person of ordinary intelligence.

The court here strictly construed the qualifications necessary to operate the Alcometer and in citing Wigmore stated:

> "The general rule is that scientific tests, in order to be admissible as evidence, must have been conducted by one who is expert in the particular branch of science concerned."[108]

The court here recognized that the question of whether a witness is qualified to testify as an expert is within the sound judicial discretion of the trial court and subsequently held that the trial judge abused that discretion in allowing the operator's testimony.

V. CONSTITUTIONAL ISSUES

The demand for accurate, scientific methods of testing to determine definite evidence of intoxication must be balanced on the judicial scale against the necessity of safeguarding the individual's constitutional rights. The problem arises on the question of admissibility of compulsory chemical test results, and is further complicated in the case of blood tests due to the invasion of the body which occurs when the skin is pierced or a body fluid is extracted. In a recent decision of the Supreme Court,[1] Mr. Justice Clark considered the conflict of interests involved in his delivery of the majority opinion:

> "As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test . . . must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road."[2]

The great majority of courts will admit evidence of chemical tests where the person has voluntarily submitted to the testing. However, further legal problems arise when the test procedure is conducted without the consent of the accused. The apprehended person usually contends that to extract a specimen of blood, urine, or saliva, or to conduct a breath test without consent constitutes an unlawful search and seizure, violates his privilege against self-incrimination, and violates his right of due process of law.

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108. *Id.* at 752.

1. Breithaupt v. Abram, 352 U.S. 432 (1957).
2. *Id.* at 439.

A. SEARCH AND SEIZURE

"The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ."[3]

These words, which are included in the Fourth Amendment of the United States Constitution,[4] form the basis for the privilege against arbitrary intrusion by officialdom of one's security and privacy.[5] All states have constitutional or statutory provisions covering searches and seizures which in intent are substantially the same as those found in the Fourth Amendment.[6] These provisions do not establish a prohibition against *all* searches and seizures but only against *unreasonable* searches and seizures. Under the federal constitution and those of the states, search under a valid warrant is reasonable, and conversely search under an invalid warrant is unreasonable.[7] Even without a warrant there may be special circumstances which make a search and seizure reasonable.[8] The right to search without a warrant, when incident to a lawful arrest, is reasonable[9] when based upon the necessity of the situation. It is granted to protect the arresting officer from violence, to prevent the escape of the arrestee, and to *prevent destruction of evidence of the crime.*[10] Whether the search of the person or his effects is reasonable obviously must be determined by the facts and circumstances of the individual case.[11]

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3. U.S. Const. amend. IV.

4. The entire fourth amendment reads: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. See McDonald v. United States, 335 U.S. 451 (1948) where Mr. Justice Douglas declared that the fourth amendment guarantee of protection against unreasonable searches and seizures "marks the right of privacy as one of the unique values of our civilization . . ." 335 U.S. at 453.

6. *E. g.*, N.D. Const. art. 1, § 18. The North Dakota provision against unreasonable searches and seizures follows the federal provision verbatim.

7. Trupiano v. United States, 334 U.S. 699 (1948). "It is a cardinal rule . . . in seizing goods and articles (that) law enforcement agents must secure and use search warrants wherever reasonably practicable." 334 U.S. at 705. (Murphy, J.).

8. "The critical points in each case where a search without a warrant . . . is to be justified are (1) whether the information of the searching officer was sufficient to justify a reasonable person in believing that he had probable cause to search and (2) whether the facts tending to show probable cause were actually known to the searching officer and relied on by him in entering upon the search." MACHEN, LAW OF SEARCH AND SEIZURE 50 (1950).

9. People v. Duroncelay, 48 Cal.2d 766, 312 P.2d 690 (1957). "Where there are reasonable grounds for an arrest, a reasonable search of a person . . . to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest." 312 P.2d at 693; *accord,* People v. Knox, 178 Cal.App.2d 502, 3 Cal.Rptr. 70 (1960); People v. Caruso, 339 Ill. 258, 171 N.E. 128 (1930).

10. See Agnello v. United States, 269 U.S. 20 (1925).

11. "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances — the total atmosphere of the case." Rabinowitz v. United States, 339 U.S. 56, 66 (1950).

But even if it is determined that the evidence was obtained as a result of an illegal search and seizure, the courts, depending upon the state of the law which exists in a particular jurisdiction, may still admit such evidence. The season for this curious anamaly is found in a rule of evidence which considers the means of obtaining such evidence a collateral matter that does not effect its admissibility. Another, however, excludes such evidence and is called the federal exclusionary rule. Therefore, whether the courts will admit illegally obtained evidence necessarily depends upon the present status of these two opposing views in the various jurisdictions. Hence, before a discussion of search and seizure may be adequately presented, a sufficient understanding of these rules is considered essential.

(1) *The Federal Exclusionary Rule.* At common law, the admissibility of evidence is not affected by the illegal means in which it is obtained.[12] Thus, under the common law rule of non-exclusion, evidence obtained as a result of an unreasonable search is admissible in a criminal trial,[13] notwithstanding the constitutional prohibitions against such searches. Until the Supreme Court of the United States departed from the rule in one of its decisions in 1914,[14] the non-exclusionary rule had been firmly established and adhered to.

Then, in the celebrated case of *Weeks* v. *United States*,[15] the Supreme Court held that evidence illegally seized by federal officials in violation of the Fourth Amendment was inadmissible in a federal criminal prosecution.[16] Following the *Weeks* case, the federal exclusionary rule was very strictly enforced and its influence soon spread to many of the states which adopted similar rules.[17] The federal courts have justified their stand for the most part on the ground that the courts cannot in one breath enforce the constitution and in the next participate in illegal practices by receiving

12. 8 WIGMORE, EVIDENCE §§ 2183, 2184a (3d ed. 1940).

13. State v. Griswold, 67 Conn. 290, 34 Atl. 1046 (1896); State v. Bond, 12 Idaho 424, 86 Pac. 43 (1906); Ciano v. State, 105 Ohio St. 229, 137 N.E. 11 (1922).

14. Weeks v. United States, 232 U.S. 383 (1914).

15. 232 U.S. 383 (1914).

16. The Weeks rule is codified in Fed. R. Crim. P. 41(e). See generally MACHEN, THE LAW OF SEARCH AND SEIZURE c. IV (1950).

17. 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940). See appendix to Elkins v. United States, 364 U.S. 206 (1960), where the Court lists 26 states as adopting the exclusionary rule: Alabama, Alaska, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and Wyoming.

From this it seems that the tide has turned in favor of the rule of exclusion. This is the view taken by the Court in Elkins, *supra*, where it was stated that "the movement towards the rule of exclusion has been halting but seemingly inexorable . . . ." 364 U.S. at 214.

the fruits of unconstitutional searches and seizures.[18] On a more practical basis, the courts have reasoned that it is the only realistic method of avoiding persistent violations of the Fourth and Fifth Amendments by law enforcement officers.[19]

But another question arose in *Weeks*, concerning the applicability of the exclusionary rule in state courts, when the Court declared that the Fourth Amendment did not bind state officers.[20] The Court's answer came in 1949 in *Wolf* v. *Colorado*,[21] holding that although the sanction of an exclusionary rule was not required of the states by the federal constitution, nevertheless "the security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is . . . implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[22] Despite the holding in the *Wolf* case, however, the practice remained until recently of admitting illegally seized evidence in a *federal* trial, obtained by a *state* officer, without any federal participation, by having it handed over on a "silver platter"[23] to federal authorities.[24] Since *Wolf* the status of the 'silver platter' doctrine remained uncertain,[25] although one of the lower federal courts held that the *Weeks* and *Wolf* decisions, considered together, make *all* unlawfully seized evidence excludable, regardless of federal participation.[26] Then, in the recent deci-

18. Weeks v. United States, 232 U.S. 383 (1914). "The duty of giving to it (fourth amendment) force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." 232 U.S. at 392. In Olmstead v. United States, 277 U.S. 438 (1928), Mr. Justice Holmes' dissenting opinion declares that the "govenment should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained . . . . I think it a less evil some criminals should escape than that the government should play an ignoble part." 277 U.S. at 470.

19. Elkins v. United States, 364 U.S. 206 (1960); *accord*, Caroll v. United States, 267 U.S. 132 (1925); United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945) (The exclusionary rule is the "only practical way of enforcing the constitutional privilege . . . .") 153 F.2d at 499 (Hand, J.); Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940) *passim*.

20. Some of the articles used as evidence against Weeks had been unlawfully seized by local police officers acting on their own behalf. The Court held that the admission of this evidence was not error for the reason that "the Fourth Amendment is not directed to individual misconduct of such officials." Its limitations reach the Federal government and its agencies." 232 U.S. at 398.

21. 338 U.S. 25 (1949).

22. *Id.* at 27-28.

23. The 'silver platter' label was first coined in Lustig v. United States, 338 U.S. 74, 79 (1949).

24. Lustig v. United States, *supra* note 23; Burdeau v. McDowell, 256 U.S. 465 (1921); Graham v. United States, 257 F.2d 724 (6th Cir. 1958); Grimes v. United States, 234 F.2d 571 (5th Cir. 1956).

But, where a state officer conducts a search on behalf of or in co-operation with federal officers, the evidence is inadmissible in a federal court. Gambino v. United States, 275 U.S. 310 (1927) (aiding in federal law enforcement); Byars v. United States, 273 U.S. 28 (1927) (participation of federal officers in illegal search by state officers); Sutherland v. United States, 92 F.2d 305 (4th Cir. 1937) (pursuant to a plan of co-operation between federal and state agencies).

25. Benanti v. United States, 355 U.S. 96, 102 n. 10 (1957).

26. Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958).

sion of *Elkins* v. *United States*,[27] the doctrine was specifically denied where the Court, Mr. Justice Stewart speaking for a majority of five,[28] held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial."[29]

Under the new exclusionary rule the test of inadmissibility now seems to be that any act of a state official which, if committed by a federal official, would violate a person's right under the Fourth Amendment is also in violation of the due process clause of the Fourteenth Amendment. Apart from the relationship of the Fourth and Fourteenth Amendments and the tests under each, the real problem involved is the extent to which the Court's supervisory power over the lower federal courts[30] should be used in criminal prosecutions. It could be used not only to enforce the conduct of federal officials[31] but also to deter unconstitutional conduct of state officials as well, thereby keeping the federal courts from participating in such lawlessness.[32] The desire to keep the courts free of lawlessness would therefore seem to support a rule excluding evidence obtained in violations of state law as well as federal law.

It is submitted that in states which admit all evidence without regard to how it was obtained as does North Dakota,[33] the deterrent effect of the *Elkins* rule will have some influence upon a state official's conduct. Under the "silver platter" doctrine, whenever state officials seized evidence with a view to federal prosecution, it was excluded in the federal courts.[34] In other instances, when a state official was seeking evidence for use in a state prosecution, its possible inadmissibility in a federal court would not affect him. Nevertheless, the realization that evidence may turn out to be relevant to a federal prosecution, but be inadmissible there if illegally obtained, should certainly have some influence on a state official's conduct; and, as the Court stated in *Elkins*, the old rule "implicitly invites

27. 364 U.S. 206 (1960).
28. Mr. Justice Frankfurter delivered the dissent in which Justices Clark, Harlan, and Whittaker joined.
29. Elkins v. United States, *supra* note 27, at 223; *accord*, Rios v. United States, 364 U.S. 253 (1960).
30. See McNabb v. United States, 318 U.S. 332 (1943).
31. See Rea v. United States, 350 U.S. 214 (1956) (5-4 decision) (The Court enjoined a federal officer, who had seized evidence illegally, from producing such evidence in a state court — the 'silver platter' in reverse.)
32. See McNabb v. United States, 318, U.S. 332 (1943); Olmstead v. United States, 277 U.S. 438, 469, 471 (1928) (dissenting opinions of Holmes and Brandeis, JJ.)
33. State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925); *accord*, State v. Lacy, 55 N.D. 83, 212 N.W. 442 (1927).
34. See Gambino v. United States, 275 U.S. 310 (1927).

federal officers to withdraw from . . . association (and cooperation with state officers) and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom."[35] One practical difficulty that will surely arise is that state officers may uncover evidence in an unconstitutional search that is relevant to a federal violation, thereby thwarting the federal agency's opportunity to use the evidence in conducting an effective prosecution. It is for this very reason alone, it seems, that it will be necessary for the federal government to prevail upon state officials not to make unconstitutional searches and seizures. Thus, the new rule may have an indirect if not a direct influence on state officials.

In view of the foregoing discussion of the rationale of the rule and the reasons for its adoption on the federal level and in twenty-six other jurisdictions, it is difficult to square North Dakota's present stand on the side of the non-exclusionary states.[36] The North Dakota Constitution provides for the person to be "secure from unreasonable searches and seizures."[37] Furthermore, the basis for the rule is to protect individual interests from invasions of privacy without lawful warrants and to discourage overzealous police activity by rejecting the evidence thus obtained, regardless of its reliability.[38] Any other concept must support the proposition that our constitutional prohibition against unreasonable searches and seizures is being flouted and that our courts are being used to dignify evidence obtained by such searches.[39] Therefore, it is urged that, in North Dakota at least, this proposition be avoided by simply adopting a similar form of the federal exclusionary rule.

(2). *The Internal Search Problem at the Federal Level.* When the courts are confronted with the problem of whether submission of the body to a compulsory chemical-test is a search and seizure, they generally concede that it is, and have passed on to the more difficult problems of whether the search was unreasonable and whether it was made under the aegis of a lawful arrest.[40] Though

35. 364 U.S. at 221-22.
36. See note 17 *supra*.
37. N.D. Const. art. 1, § 18.
38. "We have been compelled to reach that conclusion, *viz.*, evidence obtained by illegal search and seizure is inadmissible, because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under he old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 911 (1955).
39. In adopting the exclusionary rule, the California court recognized the need to protect both the "rights guaranteed by the constitutional provisions and the interests of society in the suppression of crime." People v. Cahan, *supra* note 38, at 915.
40. Application of Woods, 154 F. Supp. 932 (N.D. Cal. 1957). *appeal denied* 249 F.2d 614 (9th Cir. 1957); United States v. Michel, 158 F. Supp. 34 (S.D. Tex. 1957); United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949); *In re* Guzzardi, 84 F. Supp. 294 (N.D. Tex. 1949); *cf.* United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957).

the Supreme Court of the United States has not yet ruled on the reasonableness of an internal search of the body or its substances,[41] a Ninth Circuit decision, in *Blackford* v. *United States*,[42] suggested a solution to the general problem of internal bodily search. In crossing from Mexico into the United States at the California border, Blackford was stopped by the customs officials[43] and was asked to remove his coat. Numerous puncture marks were revealed in his arms and further examination of his person found that he may have concealed a quantity of narcotics in a body cavity. Thereafter he was taken to a hospital where, despite his denial of concealment and his resistance to search, a qualified doctor withdrew a rubber fingerstall containing heroin. Blackford's resistance was so great that it was necessary to apply force in order to hold him in the appropriate position. Moreover, because of the struggle, the doctor was unable to reach the package manually, but was required to utilize an anoscope and forceps in order to remove the object. In a subsequent prosecution for illegal importation and concealment of heroin, the court held that the search and seizure did not violate either the Fourth or Fifth Amendments. The court applied the test of reasonableness to the conduct of the officers and their search, noting that the use of a medically approved procedure administered by a qualified physician, with force applied only after the defendant demonstrated his refusal to cooperate for his own "safety and protection", was reasonable conduct.

In arriving at the standards to be met for permitting this internal search of the body, the court pointed out that it was well established that a search incident to a valid arrest is not invalid, so long as the arresting officer has "probable cause for believing that the suspect has or is committing a felony."[44] The court further noted that although the arrest may be valid, the scope and method of search which follows is circumscribed by the standards of reasonableness implicit in the due process clause.[45] This view recognizes the proposition that although there are accepted values regarding the dignity of the human body, it should not be held inviolate, but that some reasonable limit should be placed upon internal bodily searches.[46] Conversely, to advocate a total prohibition of internal

41. See 50 J. Crim. L., C.&P.S. 144, 145 n. 15 (1959).
42. 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); see Note, 106 U. Pa. L. Rev. 1165 (1958).
43. The search of persons, vehicles, and vessels by customs inspectors is authorized by Rev. Stat. § 3061 (1875), 19 U.S.C. § 482 (1958); 49 Stat. 521 (1935), 19 U.S.C. § 1581 (1958); 46 Stat. 748 (1930), 19 U.S.C. § 1582 (1958).
44. 247 F.2d at 749.
45. The due process standards are discussed at text accompanying notes 112-20 *infra*.
46. Breithaupt v. Abram, 352 U.S. 432 (1957).

bodily searches would be to place valuable evidence out of reach of the law and would see the law enforcement procedures grind to halt. Thus, the *Blackford* decision does not subject a human being to *any* type of physical examination, but does indicate that pain and danger are to be considered minimal, especially when caused by the defendant's own conduct.

The court compared and contrasted *Rochin* v. *California*[47] and *Breithaupt* v. *Abram*,[48] due process cases, as guides for determining the test of reasonableness. In the *Rochin* case, officers broke into the defendant's room and saw him swallow what appeared to have been two capsules believed by them to contain narcotics. They struggled to open his mouth to remove the capsules but were unable to do so. He was then taken to a hospital where his stomach was pumped by the use of an emetic and the capsules were recovered. The defendant's conviction was reversed by the Supreme Court as being violative of the due process clause of the Fourteenth Amendment. The Court said:

> "This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth . . . the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw. . . ."[49]

The *Breithaupt* case, on the other hand, upheld the use of approved medical techniques as a protective measure, and as a means of obtaining evidence. There the defendant was subjected to a blood test, while he was unconscious, for the purpose of determining the percentage of alcohol in his blood. Thereafter he was convicted of involuntary manslaughter, and the results of the blood test were used as evidence of his intoxication. As against the contention that the extraction of blood was so brutal and offensive that it 'shocked the conscience,' and thereby falling within the Rochin doctrine, the Court declared, through Mr. Justice Clark:[50]

> "Basically the distinction rests on the fact that there is noth- 'brutal' or 'offensive' in the taking of a sample of blood when done . . . under the protective eye of a physician."[51]

In arriving at its decision the Court considered the social problem to be solved, and reasoned that:

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47. 342 U.S. 165 (1952).
48. 352 U.S. 432 (1957).
49. 342 U.S. at 172; *cf.* United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957) (police officer twisted defendant's arms behind his back while another officer forcefully obtained a specimen).
50. Mr. Chief Justice Warren and Justices Black and Douglas dissented.
51. 352 U.S. at 435.

". . . [S]ince our criminal law is . . . justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions."[52]

From these two cases, the *Blackford* decision distinguished the ruling of *Rochin* and said that the *Breithaupt* decision was indicative of the true state of the law.[53] To extract narcotics from a suspected smuggler's rectum by means of recognized medical practices[54] and to extract blood from a suspected drunken driver who is unable to resist,[55] therefore, does not violate the constitutional prohibition against unreasonable searches and seizures.[56] Moreover, it is interesting to note the highly practical approach that the courts take to the overall problem.[57] It is submitted that the gravity of the social problem presented by drunken driving warrants a 'medical' invasion of the body in the 'scientific determination of intoxication.' Indeed, as one court stated,[58] it should not be forgotten that "a test of this kind may serve to exonerate, as well as to convict."[59]

(3) *The Internal Search Problem at the State Level.* Although precedents relating to searches and seizures of body substances at the federal level are few in number, the chemical-test cases of the states are impressive, both in number and in inconsistency. This lack of unity among the states is due largely to a failure on the part of law enforcement agencies to promulgate standard operating procedures for arresting, searching, and seizing evidence of the violators.[60] Moreover, the fact that the federal exclusionary rule is followed in only one-half of the states also contributes to the disunity.[61] Nevertheless, in determining whether a search and seizure

52. *Id.* at 439-40.

53. 247 F.2d at 752; *accord*, King v. United States, 258 F.2d 754, 755 (5th Cir. 1958) (rectal probe: noting the "sterility which would follow efforts at law enforcement," if they were not allowed such searches); Application of Woods, 154 F. Supp. 932 (N.D. Cal. 1957) (rectal probe), *appeal denied*, 249 F.2d 614 (9th Cir. 1957); United States v. Michel 158, F. Supp. 34 (S.D. Tex. 1957).

It seems, however, that there is a remarkable difference between a forced bowel movement and a forced regurgitation. This, because two other district courts have ruled that the use of a stomach pump and an emetic to recover narcotics is unreasonable. United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949); *In re* Guzzardi, 84 F. Supp. 294 (N.D. Tex. 1949).

54. Blackford v. United States, *supra* note 53.

55. Breithaup v. Abram, 352 U.S. 432 (1957).

56. *Cf.* United States v. Willis 85 F. Supp. 745 (S.D. Cal. 1949) (stomach pump); *In re* Guzzardi, 84 F. Supp. 294 (N.D. Tex. 1949) (stomach pump).

57. See Breithaupt v. Abram, 352 U.S. 432 (1957); King v. United States, 258 F.2d 754 (5th Cir. 1958).

58. People v. Duroncelay, 48 Cal.2d 766, 312 P.2d 690 (1957).

59. *Id.* at 694.

60. See *e. g.*, MACHEN, THE LAW OF SEARCH AND SEIZURE, c. IV *passim* (1950).

61. See text accompanying notes 30-39 *supra*.

of a human being would be unlawful, the state decisions do stress certain fundamental factors of conduct. A consideration of these factors will be discussed in the following pertinent chemical-test cases.

In 1953, the Supreme Court of Arizona ruled that obtaining a specimen of breath for chemical-testing purposes did not constitute a violation of the search and seizure provision of the state constitution.[62] The defendant, after his arrest for driving while under the influence of intoxicating liquor, had protested against and objected to being given a breath test. Despite this, the police officers strapped him to a chair in the police station, and while one officer held his head steady, the other, as the defendant, of necessity exhaled, captured his breath by means of a rubber suction bulb and tube held up in front of his mouth and nose, and passed it through a drunkometer for analysis. Holding that this conduct on the part of the officers did not constitute an unlawful search and seizure, the court pointed out that the defendant ". . . was not forced to exhale breath from his lungs, (since) he exhaled it voluntarily. . . . The moment his breath passed his lips it was no longer his to control but became a part of the surrounding atmosphere which was equally free for use by anyone present. . . ."[63] Thus, the officers had the lawful right to capture the breath after it left the defendant's body for use as evidence. Although the reasoning of the Arizona court is quite unique, it is submitted that this decision is a very tenuous one, and at most, a remarkable attempt on the part of the court to make the end justify the means.

Another court, which followed the non-exclusionary rule, considered the obtaining of chemical test evidence from the standpoint of due process with relation to an alleged illegal search and seizure.[64] The defendant, a woman driver, had been involved in a collision with another vehicle, an occupant of which had been killed as a result. The defendant also had been seriously injured and it was found at the hospital that a blood transfusion was necessary in order to save her life. An attending physician extracted a specimen of blood from her to determine what type of blood was needed for the transfusion, and a small amount left over from this was analyzed for blood alcohol concentration. Evidence of the result of this

62. State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953).
63. *Id.* at 265.
64. People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953). Attention is directed to the subsequent departure of California from the non-exclusionary rule at notes 38-39 *supra*.
It is necessary for the non-exclusionary rule states to consider illegally obtained evidence under the due process standards. Thus the test becomes one of reasonableness of conduct.

test was used in obtaining her conviction for manslaughter in driving while under the influence of intoxicating liquor. On appeal, the defendant contended that any taking of evidence, by force, from the person without consent violates due process of law, and that the force used here consisted of puncturing the skin with a needle to withdraw blood. In affirming the conviction, the Supreme Court of California declared that:

> "The taking of a blood test, when accomplished in a medically approved manner, does not smack of brutality. In recent years, millions of young men have been subjected to such tests as an incident to induction into military service. . . . Here, the only unauthorized action . . . was to remove one additional cubic centimeter of blood after the hypodermic needle already had been inserted. Certainly, this conduct cannot be characterized as shocking to the conscience. . . ."[65]

Other courts, however, are inclined to hold the human body inviolate and will not sanction a medical invasion. Although Iowa does not follow the federal exclusionary rule, the Supreme Court of Iowa has held evidence of a blood test inadmissible when obtained from an unconscious defendant by a 'volunteer,' no arrest having been made or crime charged.[66] The defendant, while driving in an intoxicated condition, collided with another vehicle killing three occupants of the other car. The defendant was rendered unconscious as a result of the collision and was transported to a hospital for treatment. While he was still unconscious, a coroner from another county, who was a doctor, proceeded to draw blood from his arm, without requesting the consent of the defendant's wife who was waiting in a corridor. After having been informed of the result some days later, the coroner caused the defendant to be arrested and charged with homicide. In reversing his conviction on appeal, the court said:

> ". . . We have here then a situation where a volunteer, without legal warrant and without express or implied assent, intrudes himself into an operating room and takes from an unconscious patient a blood sample to be used to make or sustain possible future criminal prosecution. We cannot bring ourselves to approve such a course. . . ."[67]

Instead of relying on unreasonable search and seizure or some other valid legal foundation, the court's reversal seems to stem from an abhorrence of an alien coroner.[68]

65. *Id.* at 12-13; *accord,* State v. Pierce, 141 A.2d 419 (1958); People v. Duroncelay, 48 Cal.2d 766, 312 P.2d 690 (1957).

66. State v. Weltha, 228 Iowa 519, 292 N.W. 148 (1940).

67. *Id.* at 149.

68. Prior decisions in Iowa show little unity of sentiment on this point. In State v. Height, 117 Iowa 650, 91 N.W. 935 (1902), it was held that a physical examination to

The recent decision of the Supreme Court of Michigan, *Lebel* v. *Swincicki*,[69] deserves attention at this point. The defendant was transported to a hospital after a motor vehicle collision in which several persons were fatally injured. There, while unconscious and not under arrest, a sample of his blood was taken by a nurse who testified that she did so at the direction of a physician. The chemical-test evidence was admitted at the trial court over the defendant's objection, but the Supreme Court of Michigan held the evidence inadmissible as a violation of the provision of the Michigan Constitution prohibiting unreasonable searches and seizures. The court declared:

> ". . . . That the blood sample was taken . . . in violation of defendant's right of security of his person is apparent. He was unconscious at the time but that fact did not permit others to invade his personal rights. We see no difference . . . between obtaining a blood sample under the circumstances here involved and taking it from a conscious person by force."[70]

Although the court excluded the chemical-test evidence, it ruled that the conclusiveness of other evidence, *i. e.*, defendant's admission of having had 'probably four bottles of beer,' the smell of alcohol, *etc.*, did not warrant a reversal.

Illustrative of the principle that a search and seizure is reasonable when the accused expressly and willingly consents, is a Wisconsin decision involving a urine test.[71] The defendant caused a collision as a result of which an occupant of his car was killed. At the hospital, the defendant willingly consented to give a specimen of his urine for chemical analysis of its alcoholic content at the request of a doctor sent there by the police. At his trial, the defendant objected to the introduction of any chemical-test evidence on the ground that it constituted illegal search and seizure. On appeal, the overruling of this objection was upheld, the court stating:

> "Defendant also contends that the procurement . . . of the evidence . . . constituted an unreasonable search and seizure. We see no merit in this contention. The record shows that the defendant knew the purpose for which the sample was intended to be used, and voluntarily submitted to the tests."[72]

The time element is another vital factor that must be considered

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determine traces of a venereal disease was an unlawful search and seizure. In State v. Tonn, 195 Iowa 94, 191 N.W. 530 (1923), the court held that evidence obtained as a result of unlawful search and seizure was admissible, despite federal decisions to the contrary.

69. 354 Mich. 427, 93 N.W.2d 281 (1958).

70. *Id.* at 286.

71. State v. Resler, 262 Wis. 285, 55 N.W.2d 35 (1952).

72. *Id.* at 38. The court found it necessary, however, to reverse the conviction because the specimen was not taken for analysis within two hours of arrest as required by statute.

by the courts when the tests are made without a search warrant and without the accused's consent, or when made before the actual arrest. A recent Wisconsin case, *State* v. *Kroening*,[73] while seeking to determine whether the taking of a blood specimen was incident to the arrest, recognized that the withdrawal of the blood might be reasonable if the suspect were under lawful arrest, but concluded that a nine day interval between the seizure and the subsequent arrest was not a search made incident to the arrest.[74] One of the contentions of the state was that the taking of the blood was not a search and seizure but merely a physical examination; however, the court disagreed, holding that a search and seizure and a physical examination are not necessarily mutually exclusive.[75] In discussing the time element with the 'probable cause' and the 'incident to arrest' requirements, the court said:

> "The statement of facts . . . hardly warrants the assumption that there was probable cause to arrest Kroening without warrant, but we . . . observe that he was not arrested until nine days after the accident. . . . (I)t would seem most likely that it was the result of the blood analysis rather than anything else which supplied the probable cause. . . ."[76]

In contrast with this view, however, is that of the California court in the recent decision of *People* v. *Duroncelay*,[77] to the effect that even though the taking of a blood specimen *precedes* the arrest, if reasonable grounds existed for an arrest when the specimen was obtained, then the seizure was lawful as an incident to the arrest. Evidence showed that the defendant had not consented to the taking of the specimen, indeed, it showed that he had drawn his arm away when a registered nurse attempted to insert the needle and that an ambulance driver then held his arm while the nurse extracted the blood. The specimen was taken at the request of the investigating officer who had detected an odor of alcohol in the car and had noticed beer cans on the floor. In affirming the trial court's ruling admitting the chemical-test results, the court declared:

> "It is obvious from the evidence that, before the blood

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

74. The defendant was involved in a traffic collision as a result of which four persons were killed. Shortly after, the defendant was taken to a hospital where a blood sample was withdrawn without his consent on the basis of the detection of alcohol on his breath, and the fact that the accident occurred in the opposite lane of travel. Nine days after the accident and the chemical test, the defendant was placed under formal arrest. The test results were held inadmissible and in reaching the decision the court expressed doubt as to whether probable cause for arrest existed.

75. "We do not understand that the constitutional provision in question forbids officers to go through one's pockets but permits them to go through his veins." 79 N.W.2d at 815.

76. *Id.* at 815.

77. 48 Cal.2d 766, 312 P.2d 690 (1957).

> sample was taken at the request of the highway patrolman, there was reasonable cause to believe that defendant had committed the felony of which he was convicted, and he could have been lawfully arrested at that time. Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest."[78]

Thus, a search may constitutionally be made either before or after arrest if reasonable grounds for making an arrest exists at the time of the search. This rule not only assures the evidentiary value of the chemical test from the standpoint of accuracy, but also allows law enforcement officers to more easily comply with statutory requirements respecting the time in which the test must be taken.[79]

In summarizing the above decisions, it can generally be said that the courts consider two basic factors as being vital in determining whether a search and seizure is unreasonable: (1) conduct; and (2) time. Where little force is used and the specimen is obtained in a medically approved manner at or near the time of arrest, it seems that law enforcement officers would have very little difficulty in "discovering wrongdoers and bringing them to book."[80] On the other hand, where excessive or indiscriminate force is employed in obtaining the specimen and without regard to the time of the actual arrest, it appears that the law enforcement procedures would more likely grind to a halt.

B. SELF-INCRIMINATION

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[81]

The above words, which are contained in the Fifth Amendment to the United States Constitution,[82] form the basis for the privilege against self-incrimination. And, although it is well settled that the Fifth Amendment privilege is binding only upon the Federal government,[83] similar provisions exist in all of the states. It has also

78. *Id.* at 693; *accord,* People v. Knox, 178 Cal. App. 2d 502, 3 Cal.Rptr. 70 (1960) (awaiting the return of the analysis before making the arrest was proper).

79. See N.Y. Vehicle & Traffic Law § 1192(1); Va. Code Ann. § 18-75.1 (Supp. 1958), which impose two hours time limits within which the test must be made, measured *from the time of the arrest. But see* Del. Code Ann. tit. 11, § 3507 (Supp. 1956); Wis. Stat. § 325.235 (1955), which impose a two hour time limit within which the test must be made, measured *from the time of the event.*

It is interesting to note that North Dakota has no statutory provision for a time limit within which a chemical test must be made. See statutory comparison cited in Appedix I.

80. Rochin v. California, 342 U.S. 165, 174 (1952).

81. U.S. Const. amend. V.

82. North Dakota also recognizes the privilege in statutory form. N.D. Cent. Code § 31-01-09 (1960).

All of the states have recognized the privilege, and the provisions of the state constitutions are found in 8 WIGMORE, EVIDENCE § 2252 n. 3 (3d ed. 1940).

83. Feldman v. United States, 322 U.S. 487 (1943).

been ruled by the Supreme Court that the privilege against self-incrimination, as embodied in the Fifth Amendment is not made applicable to the states by virtue of the Fourteenth Amendment.[84] However, proponents of this latter concept have gained momentum as is evidenced in a later decision of the Supreme Court, where the minority, favoring recognition of the privilege as being inherent in due process, has jumped from one to four justices.[85] A decision that the Fourteenth Amendment requires state recognition of a privilege against self-incrimination would permit the Supreme Court to control state activities dealing with the privilege. The concomitant potentialities of such a federal power, of course, would become ominous.

Whenever the results of chemical tests to determine intoxication are offered in evidence, it is a common contention that the privilege against self-incrimination provided by the various state constitutions has been violated. Since the constitutional and statutory provisions of the several states vary in form and terminology, it is understandable that the states themselves have determined the circumstances under which the privilege can be claimed. The contention most frequently made is that submission to a blood, breath, urine, or saliva test forces an accused to supply evidence to be used in his own prosecution, but the great majority of courts have refused to accept this argument and have concluded that historically the scope of the privilege has been limited to testimonial compulsion.[86] Stated more succinctly by Dean Wigmore, the privilege provides a safeguard against "the employment of legal process to *extract from the person's own lips an admission of his guilt.*[87] Thus, the majority view of the privilege relates to the prohibition of the use of physical or moral compulsion to extract *communications* from the accused, and does not apply to the admissibility in evidence of his body substances.[88] In a recent Oklahoma decision, *Alexander* v. *State,*[89] the

84. Twining v. New Jersey, 211 U.S. 78 (1908).

85. Adamson v. California, 332 U.S. 46 (1947). See also Kauper, *Supreme Court: Trends in Constitutional Interpretation,* 24 F.R.D. 155, 167-68 (1960).

86. Holt v. United States, 218 U.S. 245 (1910); People v. Duroncelay, 48 Cal.2d 766, 312 P.2d 690 (1957); People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681 (1948); Block v. People, 235 Colo. 36, 240 P.2d 512 (1951), *cert. denied,* 343 U.S. 978 (1952); Alldredge v. State, 156 N.E.2d 888 (Ind. 1959); State v. Sturtevant, 96 N.H. 99, 70 A.2d 909 (1950); State v. Gatton, 60 Ohio App. 192, 20 N.E.2d 265 (1938); Alexander v. State, 305 P.2d 572 (Okla.Crim. 1956); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945); Commonwealth v. Safis, 122 Pa.Super. 333, 186 Atl. 177 (1936); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956); State v. Pierce, 120 Vt. 383, 141 A.2d 419 (1958).

87. 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940).

88. Holt v. United States, 218 U.S. 245 (1910), where the Court, speaking through Mr. Justice Holmes, lays out the line of demarcation more clearly: "But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to exort communication from him, not an exclusion of his body as evidence when it may be material." 218 U.S. at 252-53.

89. 305 P.2d 572 (Okla. Crim. 1956).

court discussed the reason for the rule that distinguishes between 'oral' and 'physical' evidence, and said:

> "From the textbooks and cases the distinction between evidence elicited from the lips of an accused or by writings made is this. That where such evidence is given either in fear of punishment or in hope of escaping punishment, it is not received as evidence because experience shows that the accused is liable to be influenced by these motives, and such evidence cannot be relied on as guides to truth. But . . . this objection will not apply to evidence of the nature complained of (blood test) . . . because no hopes or fears of the accused could change one iota the physical facts."[90]

Thus, the purpose of the privilege, as adopted by the great weight of authority, is to protect against the extraction of evidence from the accused's lips and to safeguard his right to remain silent at his trial. Any other compelled conduct or its products, however unlawful or inadmissible on other grounds, is not within the protection of this privilege.[91]

Only a small minority of courts tend to extend the privilege to physical evidence secured outside the courtroom if obtained under compulsion.[92] Under this view of the privilege it seems that the results of the chemical tests would still be admitted, for the rule excluding coerced confessions is predicated upon the unreliability of the evidence so obtained. As was pointed out so clearly in the *Alexander* case, *supra*, physical evidence is not altered 'one iota' by the amount of compulsion used.[93]

(1) *The 'Consent' Question.* Some courts, instead of adhering to the rule that the self-incrimination privilege is applicable only to testimonial compulsion, evade it by finding lack of compulsion, or waiver of the privilege through express or implied consent.[94] Of

90. *Id.* at 577-78.

91. See UNIFORM RULES OF EVIDENCE 23(3), 25(b) 25(c).

92. Trammell v. State, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956); Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1941); *cf.* Bethel v. State, 178 Ark. 277, 10 S.W.2d 370 (1938); People v. Corder, 244 Mich. 274, 221 N.W. 309 (1928); State v. Newcomb, 220 Mo. 54, 119 S.W. 405 (1909).

93. The court further added that a "fetish" should not be made of the self-incrimination privilege "to protect enemies of society, and the drunken driver seems to be percisely that." 305 P.2d at 585.

94. Spittler v. State, 221 Ind. 107, 46 N.E.2d 591 (1943) (volunteered to test in order to exonerate); State v. Sampson, 248 Iowa 458, 79 N.W.2d 210 (1959) (expressly consented); State v. Small, 233 Iowa 1280, 11 N.W.2d 377 (1943) (absence of 'duress'); State v. Daugherty, 320 S.W.2d 586 (Mo. 1959) (written permission signed nine hours after obtaining specimen).

Some courts in jurisdictions that have established the general rule as precedence, *i. e.*, limitation to testimonial compulsion, decide instead upon waiver of the privilege by reason of consent of the accused. State v. Haley, 132 Mont. 366, 318 P.2d 1084 (1957); Bowden v. State, 95 Okla. Crim. 382, 246 P.2d 427 (1952).

The courts in those states that have adopted the so-called 'implied consent' statutes may decide on the basis of waiver, since the accused has already impliedly consented in advance hereby waiving his privilege against self-incrimination. See text accompanying notes 141-44 *infra*.

course, in those jurisdictions where express or implied consent is a condition precedent to the admissibility of test results, very little difficulty should arise regarding the self-incrimination privilege.[95] Other courts have held that submission to a chemical test was voluntary and the privilege waived because, in the absence of any compulsion, there was no protest or objection by the accused to the taking of the specimen.[96] Even in those jurisdictions where express consent is required, it is generally held that written consent is not necessary;[97] nor is it necessary to warn the accused, before submitting to the chemical test, that the results may be used against him.[98] In considering the foregoing aspects of consent, however, the courts avoid, for the moment, the necessity of taking a stand on whether the privilege is limited only to testimonial compulsion, or whether it should be extended to the obtaining of physical evidence as held by the minority.

A very interesting question arises regarding the privilege against self-incrimination when specimens are obtained for determining intoxication from a person who is unable to give his consent. In many accident cases, the person is actually unconscious or very badly injured at the time the sample is taken and is therefore in no position to voice his approval, or disapproval. Despite this obvious invasion of privacy, most authorities have held that evidence so obtained is admissible.[99] Also, it is no defense to a charge of driving

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95. In two states the case law requires express consent. State v. Wardlaw, 107 So.2d 179 (Fla. 1958); McCreary v. State, 307 S.W.2d 948 (Tex. Crim. 1957). For chemical test legislation see Colo. Rev. Stat. Ann. § 13-4-30(1) (Supp. 1957); N.J. Rev. Stat. § 39:4-50 (Supp. 1959); Ore. Rev. Stat. § 483.992(2) (1959); and Va. Code Ann. § 18-75 (Supp. 1959), which requires the accused's express consent. (Oregon requires *written* consent). This means that chemical test results obtained from unconscious persons, from critically injured persons, or from the highly intoxicated person, who would be incapable of giving consent, would be held inadmissible.

Attention is directed to the implied consent laws enacted in the following states which reason that an individual has impliedly consented in advance to submit to a chemical test as a condition of the state's granting use of its highways: Idaho, Kansas, Nebraska, New York, North Dakota, South Dakota, Utah, and Vermont. See applicable statutes cited note 121 *infra*.

96. State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937); Touchton v. State, 154 Fla. 547, 18 So.2d 752 (1944); State v. Koenig, 240 Iowa 592, 36 N.W.2d 765 (1949); People v. Coppock, 206 Misc. 89, 133 N.Y.S.2d 174 (1954); Logan v. State, 269 P.2d 380 (Okla. Crim. 1954).

97. Texas leads in cases on this point because it has a confession statute which requires that a confession be obtained from an accused in writing, after his arrest. But the Court of Criminal Appeals has refused to extend this requirement to the obtaining of chemical test specimens. Tealer v. State, 163 Tex. Crim. 629, 296 S.W.2d 260 (1956).

98. State v. Duguid, 50 Ariz, 176, 72 P.2d 435 (1937); People v. Hardin, 138 Cal. App. 2d 169, 291 P.2d 193 (1955); State v. Libby, 153 Me. 1, 133 A.2d 877 (1957); State v. Titak, 144 N.E.2d 255 (Ohio App. 1955).

It is probably the better practice, however, for the arresting officer to notify the accused of his rights. See People v. Ward, 307 N.Y. 73, 120 N.E.2d 211 (1954) (requesting to submit to chemical test under provisions of implied consent statute).

99. Breithaupt v. Abram, 352 U.S. 432 (1957); People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953); Block v. People, 125 Colo. 36, 240 P.2d 512 (1952); State v. Pierce, 120 Vt. 373, 141 A.2d 419 (1958).

North Dakota takes the opposite view, however, by expressly providing in statutory form

while intoxicated for an accused to contend that if he was under the influence of intoxicants then he was also mentally incapable of waiving his constitutional rights and therefore the alleged consent was invalid.[100] The general rule is that if the accused is capable of comprehending events and his surroundings, then he is capable of legally consenting to submit to the proffered tests.[101] Again, however, in those jurisdictions requiring express censent as a condition precedent to the admissibility of test results,[102] it is conceivable that extreme intoxication as a defense may be a valid argument which would render the chemical-test evidence inadmissible.[103]

(2) *Admissibility of Testimony of Refusal to Submit to Chemical Testing.* In many instances the accused actually refuses to submit to a chemical test, which necessarily begs the question whether the fact of his refusal may be admitted into evidence or be commented upon at the trial. Although the decisions on this point are not in full agreement, many of the courts reason that if the privilege against self-incrimination is not applicable to the obtaining of chemical-test evidence, then such an objection to the admissibility of refusal to submit to the test is without merit.[104] But even if the privilege were applicable to chemical-test evidence, the majority of the courts allowing comment on the refusal adopt the rationale that to admit such evidence indicates the accused's conduct, demeanor, and attitude toward the crime, all of which suggests a consciousness of guilt.[105] On the other hand, some courts have held that evidence

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that when a person is unconscious, or otherwise incapable of refusal, his implied consent to submit is withdawn. N.D. Cent. Code § 39-20-03 (1960). See text accompanying notes 126-29 *infa.*

100. State v. Sampson, 248 Iowa 458, 79 N.W.2d 210 (1956) (while unde medication with narcotic and had 0.186% blood alcohol concentration); Bowden v. State, 95 Okla. Crim. 382, 246 P.2d 427 (1952) (express consent given for test that showed 0.150%); Jones v. State, 159 Tex. Crim. 29, 261 S.W.2d 161 (1953) (gave written consent to test which showed 0.275%), *cert. denied,* 346 U.S. 830 (1953). *Contra,* State v. Anderson, 247 Minn. 469, 78 N.W.2d 320 (1956), where the court held that the injured defendant, while under medication and with 0.310% blood alcohol concentration, was in too much of a stupor to make a valid confession that he was the driver of the death car.

101. People v. Quarles, 123 Cal. App. 2d 1, 266 P.2d 68 (1954); Ray v. State, 233 Ind. 495, 120 N.E.2d 176 (1954); Commonwealth v. Mummert, 183 Pa. Super. 638, 133 A.2d 301 (1957).

102. See note 95 *upra.*

103. See State v. Anderson, 247 Minn. 469, 78 N.W.2d 320 (1956). In Minnesota, admissibility of test results is dependent upon a voluntary submission. Minn. Stat. § 169.121 (1957).

104. See State v. Gratton, 60 Ohio App. 192, 20 N.E.2d 265 (1938); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956); City of Barron v. Covey, 271 Wis. 10, 72 N.W.2d 387 (1955).

105. "It is proper to show the defendant's conduct, demeanor, and statements (not merely self-serving), whether oral or written, his attitude and relations toward the crime, if there was one. These are circumstances that may be shown. Their weight is for the jury to determine. The fact that defendant declined to submit to a blood test is such a circumstance. It may be shown. The jury may consider it. The evidence was admissible." State v. Benson, 230 Iowa 1168, 300 N.W. 275, 277 (1941); *accord,* State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956).

of the accused's refusal to submit is inadmissible[106] on the basis of statutes or ordinances granting the accused the right to refusal.[107]

Other courts admit evidence of such refusals when the defendant himself or his counsel opens the door or fails to object.[108] North Dakota has expressly adopted this latter view into its so-called 'implied consent' law where it provides that "proof of refusal shall be admissible . . . *provided* the person shall first have testified. . . ."[109] Recently however, the Supreme Court of Idaho held that, although its implied consent statute grants the right to refuse to submit to chemical tests, the evidence of such refusal, nevertheless, is competent and admissible.[110] Such evidence was like any other act or statement voluntarily made by the defendant and was competent for the jury to consider and weigh, and to draw from it whatever inference as to guilt or innocence that might be justified under the circumstances. The court compared the North Dakota and Idaho statutes pointing out that in Idaho, "by operating a motor vehicle . . . the defendant is 'deemed to have given his consent to a chemical test.' "[111]

In summary, it would seem that comment upon refusal to submit to a chemical test would not work any real undue hardship on the accused at his trial. Such evidence, when considered from the standpoint that it is analogous to any other act or statement volun-

106. People v. Knutson, 17 Ill. App. 2d 251, 149 N.E.2d 461 (1958); State v. Severson, 75 N.W.2d 316 (N.D. 1956); People v. Stratton, 286 App. Div. 323, 143 N.Y.S.2d 362 (1955). *Contra.* State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958).

107. Some state statutes authorizing the use of test results specifically prohibit comment upon the failure to submit to the test. *E. g.,* Colo. Rev. Sat. §13-4-30 (Cum. Supp. 1955); Ga. Code Ann. § 68-1625 (Rev. 1957); Ore. Comp. Laws Ann. § 483.630 (1955); Va. Code Ann. § 18-75.1-75.3 (Supp. 1958); Wash. Rev. Code § 46.56.010 (1951). Some state decisions holding the evidence inadmissible on the basis of ordinances are: State v. Simonson, 252 Minn, 315, 89 N.W.2d 910 (1959); Duckworth v. State, 309 P.2d 1103 (Okla. Crim 1957); Jordan v. State, 290 S.W.2d 666 (Tex. Crim. 1056).

Under North Dakota's implied consent law, the accused's refusal is admissible provided he has first testified in the action. N.D. Cent. Code § 39-20-08 (1960). See text accompanying notes 130-37 *infra.*

103. Barnhart v. State, 302 P.2d 793 (Okla. Crim. 1956), where the court stated that "when he (defendant) took the stand in his own behalf and opened up the matter of the kind of tests to which he may have been subjected, he thereby waived the privilege and all other relevant facts became pertinent and were admissible either on cross-examination or on rebuttal. . . ." 302 P.2d at 796; *accord,* Hopkins v. State, 282 S.W.2d 232 (Tex. Crim. 1955) (defendant forfeited right to object when he pursued the matter on cross-examination); Hartman v. State, 280 S.W.2d 739 (Tex. Crim. 1955) (failed to object). See also State v. Tryon, 145 Conn. 304, 142 A.2d 54 (1958), in which refusal was held admissible for purpose of showing state of intoxication because the defendant, upon being requested to submit to breath test, said she would not blow up the balloon but would blow the officer's head off.

109. N.D. Cent. Code § 39-20-08 (1960). This provision seems to be an adoption of the decision in State v. Severson, 75 N.W.2d 316 (N.D. 1956), which held that where the accused had not yet testified, and where his refusal under statute was absolute, such refusal could not be commented upon.

110. State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958).

111. *Id.* at 1072. See Idaho Code Ann. § 49-353 (Supp. 1955).

Of course, this is precisely the language used in North Dakota's recently enacted implied consent law. N.D. Cent. Code § 39-20-01. Therefore, there should no longer be any obstacle to admitting evidence of an accused's refusal in North Dakota courts.

tarily made, necessarily demands that it be admitted so that the jury may consider and weigh *all* of the facts. To suggest that the state should be denied the privilege of comment is yet another way of making it difficult for effective law enforcement. Moreover, if the privilege of refusal is granted to the arrested motorist in order to be protected from overzealous police officers, it seems that he has taken advantage of all the rights that are really necessary. Therefore, it is submitted that allowing testimony of mere refusal to submit to a chemical test into evidence is not unduly prejudicial and it does not affect the value of the privilege of refusal in any appreciable degree.

C. DUE PROCESS

A third constitutional problem arises when an accused contends that the chemical-test procedure violates his rights of due process of law. It is not uncommon to find this defense coupled with that of unreasonable search and seizure and the privilege against self-incrimination.[112] The most common due process objection, based on the decision of *Rochin* v. *California*,[113] arises when physical force that offends a 'sense of justice,' or 'shocks the conscience,' is employed to extract the specimen necessary for an alcoholic analysis. Thus, it is the reasonableness of the search and seizure that is the issue of due process, the point being that in the non-exclusionary rule states[114] it is necessary to employ the Fourteenth Amendment, or the state equivalent, to exclude such evidence.[115] The trend of the decisions has been to limit the application of this doctrine to 'brutal' or 'offensive' conduct,[116] which is not found to exist when the chemical tests are administered by qualified persons in an approved manner.[117] In the recent decision of *Breithaupt* v. *Abram*,[118] the Supreme Court was called upon to distinguish the *Rochin* rule and its applicability to compulsory chemical tests.[119] The Court emphasized the fact that brutality measured by the community sense of justice was involved and not that of any praticular individual. Although due process of law was not considered violated by the extraction of a blood sample without consent, the Court pointed out that if the test should be made indiscriminately or conducted by un-

112. See note 64 and accompanying text *supra*.
113. 342 U.S. 165 (1952).
114. See list of non-exclusionary states cited at note 17 *supra*.
115. State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953); People v. Kiss, 125 Cal. App. 2d 138, 269 P.2d 924 (1954).
116. Rochin v. California, 342 U.S. 165 (1952).
117. "Basically . . . there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done . . . under the protective eye of a physician." Breithaupt v. Abram, 352 U.S. 432, 435 (1957).
118. *Ibid.*
119. For other aspects, see text accompanying notes 47-59 *supra*.

qualified personnel, then there may be a basis for the application of *Rochin*. In similar state criminal cases involving the admissibility of chemical-test evidence, the due process argument has also been generally unsuccessful.[120] Thus, it is sufficient to state by way of summary that a chemical test made by qualified persons, in the approved manner, without offensive conduct to determine whether the accused was driving while under the influence of alcohol is not a violation of due process of law.

VI. A PRACTICAL SOLUTION AND COMPROMISE: THE 'IMPLIED CONSENT' STATUTES

A. SCOPE

Prompted by the growing menace of the intoxicated driver, as well as the numerous constitutional and evidentiary questions involved in obtaining chemical test evidence already mentioned, some states have arrived at a commendable solution by enacting so-called implied consent statutes.[121] The rationale upon which an implied consent statute rests is that use of the highways is a privilege,[122] rather than a right, that is subject to reasonable conditions which the state may impose in the interests of the public safety and welfare. In enforcing these interests, the states have imposed the familiar means of license, fine and imprisonment. Consequently, the states conclude that it is reasonable to enact a statute which provides that every motorist who operates a motor vehicle upon the highways impliedly consents in advance[123] to submit to a chemical test of his blood, breath, urine, or saliva, should he be arrested for driving while intoxicated. Paradoxically, the statutes also provide that even though he has consented to the test, he may also refuse to submit, but if he does refuse, the privilege of using the highways

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120. State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953); People v. Duroncelay, 48 Colo.2d 766, 312 P.2d 690 (1957); State v. Alexander, 7 N.J. 585, 83 A.2d 441 (1951); Alexander v. State, 305 P.2d 572 (Okla. Crim. 1956).

121. Idaho Code Ann. § 49-352 (Supp. 1955); Kan. Gen. Stat. Ann. § 8-1001 (Supp. 1959); Neb. Rev. Stat. § 39.727.03 (1960); N.Y. Vehicle & Traffic Law § 1149 (1960); N.D. Cent. Code § 39-20-01 (1960); S.D. Code § 44.0302-2 (Supp. 1960); Utah Code Ann. § 41-6-44.10 (Supp. 1957); Vt. Stat. Ann. § 1188 (1959).

122. The great majority of the states, North Dakota included, regard the use of the highways as a privilege. N.D. Cent. Code § 39-06-01 states that "any person licensed as an operator hereunder may exercise the *privilege thereby granted* . . ." (emphasis added).

123. The premise upon which the implied consent is based is not unique, for it is analogous to the statutes dealing with jurisdiction over non-resident motorists. The non-resident service statutes state that a non-resident motorist impliedly consents to service on the state highway commissioner as his agent for any action arising from any accident incurred while he was in the state. These statutes have been upheld as constitutionally sound. Hess v. Pawloski, 274 U.S. 352 (1927). The North Dakota Non-Resident Motor Vehicle Act, N.D. Cent. Code § 39-01-11, employs this identical premise and was upheld in Austinson v. Kilpatrick, 82 N.W.2d 388 (N.D. 1957).

is forfeited, provided, however, that a subsequent hearing held by the licensing agency determines that there was an unreasonable refusal to submit to the test. This is essentially the nucleous of a similar implied consent statute enacted by the North Dakota legislature in 1959,[124] and contains almost identical provisions to those provided in the Uniform Chemical Test For Intoxication Act.[125] Despite the apparent similarity of our own implied consent statute to the Uniform Act and to the other states, there are, however, some conspicuous variations which deserve special consideration.

A unique, though unfortunate, feature of North Dakota's implied consent law provides that "any person who is dead, unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed to have withdrawn the consent. . . ."[126] Although only one other implied consent state has expressly provided for a section on those incapable of refusing to submit to a chemical test, it has at least conformed to the Uniform Act by providing that such persons are "deemed *not* to have withdrawn the consent. . . ."[127] Indeed, one of the main reasons for implying consent in advance is to avoid the thorny consent problem *entirely* with particular emphasis on the motorist who is rendered insensible from intoxicants or is unconscious or dazed from an accident. Thus, the anomolous provision in our present statute accomplishes only half the purpose for which it was intended, since the accused must be in some nebulous stage of alertness before the request to submit can be made. Secondly, it seems obvious that the other state legislatures that have enacted consent statutes intended that the chemical tests should be obtained in all cases where refusals were not had.[128] Therefore, it is submitted that this inconsistent provision in our implied consent law can only thwart the intended purpose of the statute, for automatic consent serves its most useful function in such extreme situ-

124. N.D. Cent. Code § 39-20-01 (1960).

125. The Uniform Laws Annotated lists North Dakota as being the only state which has adopted the Act. The Uniform Act was approved by the Conference of Commissioners on Uniform State Laws, and the American Bar Association in 1959, 9 U.L.A. (P.P. 1960 § 3).

126. N.D. Cent. Code § 39-20-03 (1960). *Contra*, UNIFORM CHEMICAL TEST FOR INTOXICATION ACT § 3, which expressly provides that regardless of incapacity of the accused, he shall be deemed *not* to have withdrawn his consent.

127. Neb. Rev. Sat. § 39-727.05 (1960).

128. State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958), reasoning that "by operating a motor vehicle in this state the defendant is 'deemed to have given his consent to a chemical test.' The only way he can withdraw that consent is to expressly refuse to test. So under our law if he neither refuses nor consents, expressly, the test may be made." 328 P.2d at 1073; see State v. Pierce, 120 Vt. 373, 141 A.2d 419 (1958); *cf.* Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116, 123 (1954) (dictum) (". . . the constitutional privilege would not bar the use in the prosecution of a defendant of the results of a . . . test even though taken while he was so drunk as to be confused or unconscious or otherwise in such a condition it may not be said that he voluntarily consented thereto. . . .").

ations as gross intoxication or serious injury where consent is nearly always impossible to obtain.[129]

Another singular modification in our implied consent law which deserves special attention involves the admission into evidence of the accused's refusal to submit to chemical testing.[130] The applicable provision provides that ". . . proof of refusal shall be admissible . . . *provided the person shall first have testified in the action.*"[131] The 'testify-first' clause as a condition precedent to the admissibility of this type of evidence obviously appears to be a reasonable reproduction into statutory form of the ruling laid down in *State* v. *Severson*[132] In this case, the Supreme Court of North Dakota reasoned that a statute providing that an accused shall not be required to submit to a chemical test without his consent[133] necessarily implies that the results of such a test may not be received in evidence unless he consented to the test. From this premise the court held that 'where the defendant has not testified' is also to be implied that his refusal may not be admitted in evidence against him.[134] Further, the fact that the defendant did what he had an absolute right to do by statute, "without being subjected to the liability that his exercise of the right may be used against him,"[135] was considered by the court to be in harmony with 'the spirit of the criminal law.' Since the reasoning employed in *Severson* stemmed from a former statute providing that no test shall be obtained without the accused's consent, the question is now raised whether the conclusion reached by the court is still valid in view of our present statute which provides that a motorist impliedly consents *in advance* to submit to a chemical test. We think not. Since there is no longer a valid reason for a 'testify-first' clause as a condition precedent to the admissibility into evidence of an accused's refusal to submit to a chemical test, such evidence should now be

129. Cases cited note 128 *supra;* see Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing,* 44 Minn. L. Rev. 673, 689 n. 51 (1960); Note, 17 Wash. & Lee L. Rev. 288, 306 (1960) (". . . a logical extension . . .").

130. See authorities cited at notes 104-11 *supra* and accompanying text.

131. N.D. Cent. Code § 29-20-08 (1960) (emphasis added). The italicized clause is omitted from the same section in the UNIFORM ACT (see Appedix I), thereby making the admission into evidence of the refusal unconditional.

132. 75 N.W.2d 316 (N.D. 1956).

133. N.D. Rev. Code § 39-0801 (Supp. 1957) (amended by N.D. Sess. Laws 1959, ch. 286), as amended, N.D. Cent. Code § 39-08-01 (1960).

134. 75 N.W.2d at 318 (no supporting authority cited).

135. *Id.* at 318. The court also relied on another statute which provides that "in the trial of a criminal action . . . the defendant, at his own request and not otherwise, shall be deemed a competent witness but his neglect or refusal to testify shall not create or raise any presumption of guilt against him. Nor shall such neglect or refusal be referred to . . . ." N.D. Cent. Code § 29-21-11. It is submitted that the court's reliance thereon as substantiating their holding was not valid, since the statute is applicable to the defendant *only as a witness.* Moreover, the statute should guard against testimonial compulsion, not against physical evidence.

freely admissible. Such evidence should be looked upon like any other act or statement voluntarily made and is competent for the jury to consider and weigh with all the other evidence involved. This point of view is buttressed by a recent decision of the Supreme Court of Idaho — an implied consent state — which held that evidence of refusal to submit to a blood test was competent and admissible.[136] It should be noted that the court compared the North Dakota and Idaho statutes and pointed out that under Idaho law a motorist is deemed to have given his consent to a chemical test *in advance*.[137] Thus, although the implied consent laws grant the accused the privilege of refusal, it does not necessarily mean that comment upon this refusal at trial will be unduly prejudicial to his cause. Indeed, if the accused's refusal is reasonable under the circumstances, there would seem to be no reason why he could not successfully rebut any prejudicial presumptions raised against him as a result of such comment at the trial, by simply taking the stand and explaining the reasons for his refusal.

Another noticeable departure from the Uniform Act and the other implied consent statutes is the North Dakota provision which expressly recognizes the use of the Harger Drunkometer[138] as follows: "The results of a test given by means of the Harger Drunkometer or other similar device approved by the American Medical Association and the National Safety Council shall be received in evidence when it is shown that the test was fairly administered."[139] This statutory recognition of the scientific basis and reliability of the various breath testing devices is a definite improvement and will preclude the types of unfortunate decisions rendered in Michigan where it was held that the Harger Drunkometer was not scientifically reliable.[140] Whether this provision would eliminate the necessity of an expert witness' testimony concerning the reliability of the various devices remains in doubt. None of the devices have been given complete judicial recognition, but the time of total acceptance seems near. Until the attainment of such recognition, the constitutional and evidentiary aspects of this unique provision must await judicial interpretation. Despite the roadblocks facing this provision, the elimination of costly and complex scientific testimony would definitely improve upon the criminal prosecutions of drunken drivers.

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136. State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958).
137. Idaho Code Ann. § 49-352 (Supp. 1955).
138. See discussion on the Harger Dunkometer and other similar chemical testing devices at text accompanying notes 49-52 *supra*.
139. N.D. Cent. Code § 39-20-07(5) (1960).
140. People v. Morse, 325 Mich. 270, 38 N.W.2d 322 (1949).

B. CONSTITUTIONAL CONSIDERATIONS

The arguments raised in challenging the constitutionality of the implied consent statutes are essentially those described before, chief among which involve the privilege against self-incrimination, the protection from unreasonable search and seizure, and the right of due process of law. Since North Dakota's implied consent statute was only recently enacted, it has not as yet been tested on the grounds of these constitutional arguments. The statute, however, should not encounter any constitutional problems when finally tested by our courts, for similar implied consent laws in other jurisdictions have been upheld when confronted with these identical arguments.

Perhaps the most frequent argument raised against this particular type of statute is that it violates the privilege against self-incrimination. But this should not present any difficulty for one or two good reasons: (1) because blood is physical evidence as contrasted to the testimonial-physical evidence distinction; or (2) because of a waiver of the privilege by reason of the advanced consent. As already mentioned, the overwhelming weight of authority differentiates between testimonial and physical evidence which renders the privilege not applicable to blood test results as they are considered physical evidence.[141] However, if this distinction were not accepted by our courts,[142] then the doctrine of waiver would effectively rebut the objection. Under an implied statute, an accused may either waive his privilege against self-incrimination by submitting to the blood test, or lose his privilege to use the highways by refusing to submit.[143] Because of the pressing need for increased highway safety it is within the valid exercise of the legislative power to so condition the privilege to use the highways in such a manner and to put such a choice to motorists.[144] Hence, the statute has not

141. Holt v. United States, 218 U.S. 245 (1910); State v. Bock, 80 Idaho 296, 328 P.2d 1065 (1958); *cf.* State v.Pauley, 49 N.D. 488, 192 N.W. 91 (1922) (dictum). See 3 WHARTON'S CRIMINAL EVIDENCE § 720 (12th ed. 1955); 8 WIGMORE, EVIDENCE §§ 2263-65 (3d ed. 1940).

142. It seems likely that they do, however, for in State v. Pauley, 49 N.D. 488, 192 N.W. 91 (1922), the court, by way of dictum, referred to 8 WIGMORE § 2263 (3d ed. 1940) in employing the testimonial-physical evidence distinction to its decision. The court pointed out that ". . . concerning the constitutional provision compelling one to be a witness against himself . . . 'it is not merely compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion.*'" 129 N.W. at 92. (emphasis added).

143. "It is clear that the statute does not infringe upon any constitutional guarantee against self-incrimination . . . . (since) 'the accused is given the choice of waiving his right against self-incrimination . . . or losing the privilege to continue driving on our highways.'" Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116, 122 (1954), *rev'd on other grounds; accord,* Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (1955); Ballou v. Kelly, 12 Misc.2d 25, 176 N.Y.S.2d 1005 (1958).

144. "Bearing in mind the purpose of the statute and that highway safety is a matter of great concern to the public, it may not be held that it is unreasonable or beyond legisla-

abridged the North Dakota motorist's privilege against self-incrimination, and when he submits to the proffered test he will have no valid grounds on this objection.

The constitutional objection of unreasonable search and seizure will have little or no effect upon the taking of tests under the provisions of the North Dakota consent law. This, because the statute provides that a motorist shall be requested to submit to a chemical test ". . . only after placing such person . . . under arrest and informing him that he is or will be charged with the offense of driving . . . while under the influence of intoxicating liquor."[145] Since it is a well-known and general proposition that a search and seizure of one's person following his lawful arrest is not violative of any law, the motorist who fails within the limits of this provision, may legally be searched for evidence of the crime for which he was arrested by means of a chemical test.[146] Moreover, the statute simply avoids any possible unreasonable search and seizure, because it is premised upon the constructive consent of the motorist to submit to the test when demanded. Further, the motorist is expressly given the right to exercise his option of refusal. But even if the procedure set forth in this provision were not complied with by the law enforcement officers of this state, the objection on the grounds that the evidence obtained by such unlawful means constituted an unreasonable search and seizure, would still be unavailing. This, because North Dakota and twenty-four other states reject the federal exclusionary rule[147] and hold that the admissibility of evidence is not affected by the illegal means in which it is obtained.[148] Because of this abject failure to ensure compliance with constitutional and statutory rights and because the courts are required to participate in, or in effect condone, such unlawful conduct, it is urged that the courts of this state adopt the exclusionary rule in order to secure the protection of both the guaranteed rights and "the interests of society in the suppression of crime."[149] Under the aegis of either rule, how-

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tive power to put such a choice to a motorist who is accused upon reasonable grounds of driving while intoxicated." Schutt v. MacDuff, *supra* note 143, at 122-23; see 2 WHARTON'S CRIMINAL EVIDENCE § 663 (12th ed. 1955).

145. N.D. Cent. Code § 39-20-01 (1960). The UNIFORM ACT and the implied consent statutes in the other seven jurisdictions also provided for an arrest as a condition precedent to such request.

146. Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (1954).

147. See note 17 *supra*, which contains a breakdown of the states into groups of exclusionary or non-exclusionary jurisdictions.

148. State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925). See also text accompanying notes 12-39 *supra*.

149. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 915 (1955).

In State v. Wolf, 164 A.2d 865 (Del. 1960), the court pointed out how the exclusionary rule and an implied consent law are compatible to each other. Delaware does not yet have an implied consent law, but adopts the federal exclusionary rule — the reverse of

ever, the unreasonable search and seizure objection will offer little resistance and will be the least effective of the constitutional arguments in this state.

The usual due process objection would also seem unavailing since, by the very terms of the implied consent statute, no force is authorized in any degree. This is because no test is to be given if the accused refuses to submit, but his license to drive shall be revoked if such refusal was unreasonable.[150] Of course, when the accused submits there is still no violation of due process if, as declared in *Breithaupt* v. *Abram*,[151] the test is performed by qualified personnel[152] in the proper manner and without violence.

A violation of due process was successfully challenged under the original New York statute,[153] in *Schutt* v. *MacDuff*.[154] The court held the statute to be constitutionally sound except for two failures — it did not provide for a lawful arrest by a police officer and failed to afford the driver an opportunity to have a hearing.[155] These objections have since been met by legislative amendment and the statute, as amended,[156] is now held not to violate due process on any theory.[157] Consequently, under the North Dakota statute, this objection should certainly not prove troublesome for the objections as outlined are included in its provisions.[158]

North Dakota's state of the law. The defendant, Wolf, was acquitted of the conviction of driving while intoxicated because the specimen of blood was obtained while he was unconscious, thereby rendering the results of the test into evidence as inadmissible. In holding their decision as unfortunate, the court, nevertheless, pointed out that this could be obviated in the future since:

> ". . . the State is not helpless to remedy this situation. We can see no reason why the State in the exercise of its police power in licensing drivers . . . cannot, by statute, impose as a condition to obtaining such a license that, by his acceptance of a license to drive, the applicant shall be deemed to have given his consent to submit to chemical analysis. . . ." 164 A.2d at 868.

150. N.D. Cent. Code § 39-20-04 (1960) provides: "If a person under arrest refuses to submit . . . none shall be given, but the state highway commissioner, upon receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving . . . while under the influence . . . shall revoke his license . . . ."

151. 352 U.S. 432 (1957).

152. N.D. Cent. Code § 39-20-02 (1960) provides for ". . . a physician or a qualified technician, chemist or registered nurse . . . ."

This type of statute does not infringe upon an individual's rights or impair his individual liberty any more than does a statute which requires a pre-marital blood test before a marriage license application may be filed. N.D. Cent. Code § 14-03-12 (1960) provides for pre-marital syphilis tests.

153. N.Y. Vehicle & Traffic Law § 71-a (1953).

154. 205 Misc. 43, 127 N.Y.S.2d 116 (1954).

155. "Conscientious approval may not be given to a statute authorizing the final revocation of a drivers' license by loose and informal procedure, for thereby 'every automobile driver in the State will be at the mercy of the commissioner and his assistants.' " *Id.* at 127. (citations omitted).

156. N.Y. Vehicle & Traffic Law § 1194(1).

157. Ballou v. Kelly, 12 Misc.2d 25, 176 N.Y.S.2d 1005 (Sup. Ct. 1958).

158. The test may be administered at the direction of a law enforcement officer *only after* placing the accused under arrest and informing him of the charge. N.D. Cent. Code § 39-20-01 (1960).

An administrative hearing is granted by the State Highway Commissioner upon his receiving a written request from the person who has had his license revoked. N.D. Cent.

Other cases have found no coercion even where the accused was warned that his license might be revoked should he fail to submit to the test.[159] Further, the fact that the statute does not expressly require a warning by the police that the accused's refusal may result in the revocation of his license does not violate due process of law.[160] However, the New York Court of Appeals has stated that "it is undoubtedly the *better practice* for the police to notify the person of his rights. . . ."[161] It also seems necessary, in properly notifying the accused of his rights, to inform him of the alternative choices of tests provided for in the statute, to which he may comply by simply selecting the one which is the least burdensome or offensive to him.[162] This point of view is buttressed by the recent decision in *Ringwood* v. *State*,[163] where the court held that the arresting officer had not complied with the requirements of the statute when he confronted the accused with the choice of submitting to a blood test *only*, or of having his license revoked.[164] Another case held that where the accused was acquitted of the drunken driving charge, the licensing agency still had the power to revoke his driver's license in the administrative hearing, since this was a separate proceeding from the criminal charge.[165] It is conceivable that many other problems will arise in the everyday application of this statute by the law enforcement officers, and it is adamantly suggested that the various law enforcement agencies establish standard procedures and techniques compatible with its provisions in

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Code § 39-20-05 (1960). Further, if the revocation is sustained, such person may appeal to the district court for a rehearing of the matter thereby providing judicial review of the administrative agency's determination. N.D. Cent. Code § 39-20-06 (1960).

159. People v. Davidson, 5 Misc.2d 699, 152 N.Y.S.2d 762 (Sup. Ct. 1956), *rev'd on other grounds*, stating that "the trooper's advice was proper, it was a gratuitous offering of information as to the provisions of the statute, which the defendant was not required to accept . . . ." 152 N.Y.S.2d at 764.

160. Anderson v. MacDuff, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955).

161. People v. Ward, 307 N.Y. 73, 120 N.E.2d 211, 214 (1954) (emphasis added). The basic premise upon which the court relied fo rthis procedural *caveat* was that the line between consent and coercion is difficult to determine whenever the request is made by a policeman, as such.

162. N.D. Cent. Code §39-20-01 (1960) provides that "any person who operates a motor vehicle . . . shall be deemed to have given consent . . . to a chemical test of his blood, breath, saliva, or urine . . . ." (emphasis added).

163. 8 Utah 2d 287, 333 P.2d 943 (1959).

164. "The statute is . . . so designed advisedly with the thought in mind that under some circumstances it might be impractical, or even dangerous, if it were mandatory that all persons so arrested give a test of a particular substance." *Id.* at 944.

The applicable provision in the Utah implied consent law provides for the accused to submit to a chemical test of his ". . . breath, blood, *or* urine . . . ." Utah Code Ann. § 41-6-44.10 (Supp. 1957) (emphasis added). Note the similar connective of the disjuncture "or" in the North Dakota provision cited in note 162 *supra*.

The Nebraska implied consent statute has provided a unique provision in that it expressly provides that "the person so arrested . . . may choose whether the test so required shall be a chemical test of his blood or urine." Neb. Rev. Stat. § 39-727.04 (1960).

165. Anderson v. MacDuff, 208 Misc. 143 N.Y.S.2d 257 (Sup. Ct. 1955); *accord*, Combes v. Kelly, 2 Misc.2d 491, 152 N.Y.S.2d 934 (Sup. St. 1956).

order to ensure more successful prosecutions in the courts of North Dakota

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From the foregoing discussion, it is our considered opinion that North Dakota has taken a very commendable step in the direction of clearing its highways of the menace of drunken driving. Through the adoption of a statute which implies consent to submit to a chemical test, the conviction rate should increase and the accident-due-to-alcohol rate should decrease. For those who drive after taking 'one more for the road,' many will find that it will no longer be too difficult to prove beyond a reasonable doubt that they were, in fact as well as law, inebriated. This, because the statute provides for the obtaining of definite evidence as to the state of intoxication in advance — unhindered by the usual obstacles of belligerent motorists and frustrating public policy. More specifically, the statute provides for the elimination of guesswork from the prosecution of driving while under the influence of intoxicating liquor cases; it protects innocent victims, for the tests may exonerate as well as convict; and, most significantly, it helps eliminate the drunk driver — Public Enemy No. 1 — from North Dakota's streets and highways.

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GROUND WATER: WHAT IS THE LAW IN NORTH DAKOTA?

I. INTRODUCTION

Most of the seventeen states west of a line drawn from North Dakota to Texas have had or are having problems dealing with groundwater law. This becomes increasingly significant now because of the increasing shortage of water faced by these states.[1] The question usually presented is whether a legislature can validly change the law on the subject because in so doing they might be depriving some of their citizens of vested rights. This question brings forth the question of what is a vested right. This situation is further complicated in North Dakota because of two apparently conflicting statutes. Statute 47-01-13 declares the overlying land-

1. See Hutchins, *Trends in the Statutory Law of Ground Water in the Western States*, 34 Texas L. Rev. 157, 182 (1955).