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The Need for Presumptive Evidence

The blood alcohol test was developed in the interests of public safety for the purpose of facilitating the prosecution of drunk-drivers. Because intoxication is a transient condition and is a matter of degree, rather than an absolute state, the prosecution of this offense generally has been very difficult. The available evidence rarely amounts to more than that given by witnesses who are willing to testify to their opinion of the defendant's condition. It is a patent fact that eyewitness accounts are frequently inaccurate, and a clever defense counselor is often able to impeach a witness who is not positive of everything he saw

Defendant testimony which admits to "having a couple of beers," but denies being unduly influenced by the alcohol presents the state with an often insurmountable problem of proof. Likewise, in the case of a collision where one of the drivers is cited for drunken driving, the prosecutor may not have the evidence to suitably counter a defense claim that the appearance of intoxication was actually a manifestation of shock resulting from the accident. Conclusive and reliable proof is seldom had in these cases. This is perhaps the primary reason for the development of the several chemical tests by which the level of intoxication may be determined.

The Physiological Basis

Because of differences in absorbtion and elimination rates, persons react differently to equal quantities of alcohol. Once the alcohol has been absorbed into the blood stream and has reached the brain, however, all persons react substantially the same to a like amount of alcohol in the blood. Quantitative analysis of the brain itself represents the ideal test of intoxication, but, since this is not possible, the blood analysis test offers a highly accurate alternative.[1]

Chemical tests based upon an alcoholic analysis of various body substances such as urine, spinal fluid, saliva and respired air[2] are frequently used, but because of the relatively indirect relationship between these substances and the brain, the results cannot so precisely depict the actual degree of inebriation as can the blood alcohol test.[3]

The distinction between the blood test and other common chemical tests

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[1] For a general discussion, see 14 MD. L. REV. 111 (1954).

[2] Devices which analyze respired air (*e.g.*, the Drunkometer, Alcometer, and Intoximeter units) are in widespread usage by progressive police departments. This popularity is attributed to the inherent practical advantages of the breath analysis test: (1) the examination need not be administered by a doctor (unlike the blood test), (2) a minimum of training is required in the use of the machines; (3) the machines are portable and may be carried in patrol cars; (4) the test offers little possibility of embarrassment (unlike the urinalysis examination), and (5) the results of the test are quickly ascertainable, since a laboratory analysis need not be made.

is not limited only to the accuracy of the results. In the former, the collection of the required body substance involves a technical "invasion of the body" which may, or may not, be privileged by consent. The collection of urine and breath samples, however, may be accomplished without this "invasion," since these substances are externally accessible. This distinction will be more fully treated in subsequent discussion.

Prima Facie Evidence of Intoxication

When research and experience established that alcoholic analysis of the blood offered an accurate and consistent means of measuring the effects of liquor upon the person, a new and unique tool was placed at the disposal of the police and the courts. Arbitrary limits were set to simplify the evaluation of the tests and have evolved to the generally accepted scale which is here presented:[4]

> Under .05% alcohol (by weight)—average person is not influenced.
> .05% to .15% alcohol (by weight)—questionable.
> .15% and over alcohol (by weight)—average person is influenced.

Upon recommendation of the National Safety Council, approximately one-third of the states[5] have passed statutes which not only provide for the reception of evidence obtained through blood alcohol tests, but designate the results as being prima facie evidence[6] of the degree of alcoholic influence. This provision results in a much more efficient trial, although, with the exception of availability of evidence, the end result is the same as in other states which require an expert witness to establish the degree of influence. The jury need not consider opinion evidence; the legislators have already done that for them. When the laboratory analyst testifies to the alcoholic content in the blood, the level of intoxication is automatically set and the burden of showing non-influence is placed upon the defendant.

Admissibility of Evidence

In its efforts to keep pace with a changing society, the law is forced to advance more slowly and carefully in its new procedures. Nearly every modification in substance or procedure which affects personal rights and privileges must, at some time, stand the test of Constitutional inquiry Admissibility of body fluid analyses have been no different; their legality

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[3] Possible error in urinalyses may result from the case where a person who is sober, but who had recently been drinking, is examined. A high concentration of alcohol in the urine does not necessarily indicate *present* intoxication.

The breath tests, although not subject to as severe criticism in this respect, may be invalidated by a claim that the defendant "belched" into the collecting device, thus causing a relatively highly concentrated volume of stomach gas to be intermixed with the less concentrated respired air from the lungs.

[4] C. W. Muehlberger, *Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication,* 39 J. CRIM. L. & CRIM. 411 (1948).

[5] 37 MASS. L. Q. (4) 10, 16 (1952).

[6] For examples, see N.Y. VEHICLE AND TRAFFIC LAWS § 70(5), WIS. STAT. § 53.13(2) (1951).

has been questioned on grounds of alleged violations of Constitutional guarantees.

Objection via Self-incrimination

The most notable challenge to the new evidence has come up under the problem of self-incrimination.[7] The claim that, compelling an accused person to offer evidence against himself conflicts with his basic rights is not a new issue in the history of law.[8]

As a result of careful study on the development of the privilege, Wigmore observes that the purpose of the rule was to guard against the possibility of untrustworthy evidence and that it applied only to verbal and written testimony which was elicited through compulsion.[9] Justice Holmes stated in his opinion in *Holt v. U.S.*,[10] that the privilege only protects the individual against physically or morally compelled testimony and does not provide for the exclusion of a person's body as evidence when it is material to the case. "Evidence of this nature," he continued, "is admissible whether voluntary or not, if material."

The decisions have generally been in accord with this view. Hence, in numerous cases, damaging evidence was required from the defendant over objection that this was compulsory self-incrimination. In landmark decisions, fingerprints[11] and photographs[12] taken without consent have been admitted in evidence, persons have been required to exhibit themselves before the court,[13] to display tattoos[14] and other special marks, and in some cases the defendants have been required to perform certain acts such as trying on clothing to see if it fits[15] or to demonstrate their voice characteristics.[16] In at least one case of alleged drunkenness, the defendant was ordered to submt to a medical examination, and the resulting evidence was used against him at the trial.[17] In many cases, the defendant has been required to submit to other physical examinations.[18]

Because the privilege against self-incrimination may be waived, little difficulty has been encountered in adjudging those cases where consent of

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[7] The U.S. Constitution, Fifth Amendment, reads in part that "No person shall be compelled in any criminal case to be a witness against himself " State constitutions have similar provisions.

[8] Fred E. Inbau, *Self-Incrimination*, 28 J. CRIM. L. & CRIM. 261 (1937).

[9] 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940).

[10] Holt v. U.S., 218 U.S. 245 (1910).

[11] People v. Jones, 112 Cal.App. 68, 296 Pac. 317 (1931), People v. Sallow, 100 Misc. 447, 165 N.Y.S. 915 (1917). Also see annotation in 83 A.L.R. 127.

[12] Shaffer v. U.S., 24 D.C.App. 417 (1904), cert. den., 196 U.S. 639 (1905). A sound movie was used in People v. Hayes, 21 Cal.App. 320, 71 P.2d 321 (1937).

[13] People v. Oliveria, 127 Cal. 376, 59 Pac. 772 (1899), People v. Goldenson, 76 Cal. 328, 19 Pac. 161 (1888). Also see annotation in 171 A.L.R. 127.

[14] State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530 (1879).

[15] See note 10 *supra*; see also annotation in 18 A.L.R.2d 796.

[16] See annotation in 16 A.L.R.2d 1322.

[17] Green Lake County v. Domes, 247 Wis. 90, 18 N.W.2d 348 (1945).

[18] See annotations in 164 A.L.R. 967 and 25 A.L.R.2d 1407.

the defendant may be demonstrated.[19] Even where the defendant submitted to a test because he thought it was required by law, the court found his consent waived the claim of compelled self-incrimination.[20] This waiver has been astutely extended to cover those cases where the defendant was unconscious and could not object to the gathering of specimens; the courts have consistently ruled that this evidence was not compelled.[21]

A departure from this rule appears in the disputed case of *Apodaca v. State*,[22] a 1940 Texas decision, where a compulsory urinalysis was held to be a violation of the defendant's guarantee against self-incrimination.

The cases indicate that the view taken by Holmes and Wigmore, *supra*, represents the prevailing attitude of the courts in regard to requiring a defendant to perform acts which may tend to incriminate him. When it comes to the matter of required submission to certain tests, however, the courts which have sat in judgment on the issue of self-incrimination have displayed a singular disinclination to decisively hold that this guarantee does not, and cannot, apply to *any* cases except where testimonial compulsion is present.

Objection via Unreasonable Search and Seizure

Although the issue of self-incrimination has been the standard constitutional defense in cases involving admissibility of blood test evidence, the claim of unreasonable search and seizure[23] has also been offered in defense. It seems to be a fixed rule of law, however, that a citizen who is under arrest may have his person and immediate surroundings searched, and pertinent evidence seized by the arresting officer. This would apply directly to compulsory body fluid analyses, since the investigation of drunkenness is invariably preceded by an arrest. The Fourth Amendment, then, seems to offer no protection to the defendant in cases where he is under arrest.[24] Even in the event that the defendant was not under arrest at the time of the test, the resulting evidence would be admissible in many states notwithstanding the fact that it was obtained in violation of the Fourth Amendment.[25]

Objection via Due Process

The present stand taken by the state courts indicates that if a valid

[19] People v. Frederick, 109 Cal.App.2d 897, 241 P.2d 1039 (1952).

[20] State v. Werling, 234 Iowa 1109, 13 N.W.2d 318 (1944).

[21] People v. Tucker, 88 Cal.App.2d 333, 198 P.2d 941 (1948). In State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945), the evidence was held admissible in spite of an Oregon statute which excludes blood alcohol tests if forcibly obtained.

[22] Apodaca v. State, 140 Tex. Cr. 593, 146 S.W.2d 381 (1940).

[23] U.S. Constitution, Fourth Amendment, which protects the " persons, houses, papers and effects against unreasonable searches and seizures . . " State contitutions have similar provisions.

[24] *Contra*: U.S. v. Willis, 85 F.Supp. 745 (1949), in which a "stomach pump" was used over protest in searching for narcotics that had been swallowed by the defendant. The court held that this was an unreasonable search and seizure, even though an arrest preceded the search.

[25] 20 AM. JUR., Evidence, § 394.

objection to the admission of compulsory blood tests is to be raised, it must be predicated upon alleged violation of the Fourteenth Amendment.[26] If the facts of the case are such that the court concludes the defendant was subjected to treatment which "shocks the conscience" and "offends the decencies of civilized conduct," the evidence may be excluded. This was the phraseology used by the United States Supreme Court in the much-cited *Rochin*[27] case decided in 1951, wherein the actions of state officers in securing evidence were held sufficiently outrageous to constitute a denial of due process under the Fourteenth Amendment.[28]

Although the *Rochin* case is distinguishable in that a "stomach pump" was used, the reasoning of the Court in reaching their decision may be influential in trials involving compulsory blood alcohol tests. If this case stands for condemnation of *compulsory invasion of the interior of the body* solely to secure evidence against the defendant, then, where there is no consent,[29] blood tests are clearly inadmissible. This is apparently the interpretation placed on the *Rochin* case by the California District Court of Appeals in reversing a conviction of manslaughter and drunk-driving.[30] In this case, a sample of blood was collected from the defendant while she was unconscious as a result of an auto accident. The sample was taken to determine the blood type required for a transfusion, but one portion was subsequently tested for alcoholic content and the results used against the defendant in the trial. The California Supreme Court, in reversing judgment of the District Court in the same case,[31] held that due process was not violated. Their interpretation of the *Rochin* case was that " brutal or shocking force exerted to acquire evidence renders void a conviction based wholly or in part upon the use of such evidence." Evidently, the Court decided such conduct was absent in this case.

This leaves some doubt as to where the line should be drawn by the courts in their application of the *Rochin* doctrine. Where the defendant vainly objects to the test, but offers no physical resistance, it can scarcely be said that the officers are "brutal and shocking" in their actions.[32] But

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[26] U.S. Constitution, Fourteenth Amendment, which provides that no State shall " deprive any person of life, liberty, or property, without due process of law " There is no doubt that this Amendment, unlike the Fourth and Fifth, requires compliance by all state governments.

[27] Rochin v. California, 342 U.S. 165 (1951), the circumstances of which were similar to the *Willis* case, *supra* note 24. The defendant was forced to submit to a "stomach pump" and the evidence obtained thereby was admitted against him in court.

[28] In concurring opinions, Black and Douglas, JJ., stated that the Fifth Amendment was violated, not the Fourteenth.

[29] In People v. Frederick, *supra* note 19, a case decided after the *Rochin* decision, the Court held there was no denial of due process where the jury found consent had been given to the blood test.

[30] People v. Haeussler, 248 P.2d 434 (Cal.App. 1952).

[31] People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953).

[32] People v. Walton, docket no....., a case now before the U.S. Supreme Court, is likely to settle this particular question. Walton contends that police violated the Fourteenth Amendment when they rolled up his sleeve and had a technician take a blood sample over his protest.

the courts may view the case differently where the defendant physically resists and is overcome by the force and violence of superior numbers. To draw the line between these cases would be to place a premium upon resistance.

By establishing the *degree of risk* as the basic issue, the courts will encounter difficulties in more than one case. Surely a man could not lawfully be forced to submit to a delicate operation in order that a bullet lodged near his heart might be extracted and used as evidence against him. Where would the line be drawn between this extreme and the relatively slight risk involved in a blood test?

In balancing the scales of justice, the protection of individual civil liberties can be lessened with justification only if it can be demonstrated that the protection of society in the aggregate will be substantially increased. Perhaps the courts, in balancing the two, will find that compulsory invasion of the body represents the most equitable place to draw the illusive and intangible line between proper and improper conduct. Were this line drawn at the skin, the urine and breath tests[33] would be made compulsory,[34] as well as the taking of fingerprints, performance of special acts, and other compulsory examinations. Resistance could be met with force, but only that amount of force necessary to overcome the resistance. Compelled blood analyses would be a denial of due process, but leeway could be provided by ruling that silence could not operate as a protest and that only examinations over protest could be designated as compulsory Where the defendant consents to a test to determine his blood type, but expressly objects to a portion of the sample being used for alcoholic analysis, his demand must be followed, else every injured defendant be subjected to an unnecessary pre-transfusion test merely to provide the investigators with evidence of intoxication.

Admittedly, this is rather narrow construction of so broad a safeguard as the Fourteenth Amendment. There are those who claim that "due process," by its very nature, can never be precisely construed, and that it is error to attempt to predict the path that will be taken by the courts who wield ths highly flexible tool. Granting that due process is, and should be, a subjective test, nevertheless, the increasing problem of drunk-driving and the proportionately increasing use of alcoholic testing devices by the police require that the law be constantly re-examined and appraised. Only in this way may it be determined what the law requires of the individual, and whether the existing law properly maintains the balance of equity and justice.

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[33] Because of its advantages, the breath test is preferred. (*E.g.*, there is little chance of embarrassment.)

[34] People v. Kiss, 125 Cal.App.2d 138, 269 P.2d 942 (1954), a recent California decision, indicates at least partial acceptance of this theory. Though there was evidence that the defendant was required to submit to an Intoxmeter test through either supposed or real fear of violence, the test results were admitted in evidence against him. The appellate court affirmed the conviction, pointing out that this was not the only evidence of his drunkenness.