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NOTES

REMOVAL OF INTOXICATED DRIVERS FROM MISSOURI ROADS: A SUGGESTED APPROACH

Persons whose driving ability is impaired by use of alcohol are involved in an appalling number of traffic accidents.¹ From this fact it appears conclusive that existing laws have been ineffective in removing drinking drivers from the roads. In Missouri there are two principal reasons for this ineffectiveness. First, it is extremely difficult to obtain and get before the jury convincing evidence of intoxication in any case in which the driver is not extremely or insensibly drunk. Second, driving while intoxicated is a felony,² the severity of the punishment for which serves to deter prosecutors from indicting and juries from convicting, especially since one may be convicted if his operation of an automobile is impaired in any manner. This note will examine the problem in the perspective of prevailing evidentiary and constitutional limitations, with particular regard to the Missouri situation. A positive approach toward solution of the problem will then be suggested.

I. EVIDENCE PROBLEMS IN DRINKING DRIVER CASES

There are scientifically accurate methods now recognized and in use by which the degree of intoxication can be determined by chemically testing body fluids.³ However, unless the results of such tests can be admitted into evidence, there is little hope of utilizing them to convict any driver who is not decidedly drunk. Since one may appear

1. Campbell, *Courts and Prosecutors Are the Weak Link in Preventing Drunken Driving*, 46 A.B.A.J. 43 (1960). The article gathers data from numerous sources to support its contention that alcohol causes more accidents than is generally conceded. "The largest single factor in our present motorcar death and injury problem is the drinking driver." *Id.* at 45. That such a statement correctly describes local problems is supported by a statement of Mr. Raymond I. Harris, Coroner of St. Louis County, that 54 of the 83 fatal accidents occurring in St. Louis County during 1958 involved drinking drivers. *St. Louis Globe-Democrat*, Nov. 6, 1959, p. 12, col. 1 (quoted in editorial).

2. Mo. Rev. Stat. § 564.460 (1949).

3. These body fluids are blood, breath, urine, saliva and spinal fluid. See Muehlberger, *Alcohol and Traffic Accidents*, a pamphlet distributed by the Northwestern University Traffic Institute, at 9. See also 25 U. Kan. City L. Rev. 36 (1956).

to be sober and yet be incapable of driving a car safely,⁴ some way must be found to use these tests effectively to remove drinking drivers from the roads. In examining cases involving chemical testing, it is essential that various factual differences be noted, for upon these differences the question of admissibility often turns. Cases may arise where defendant (1) consents to the test, (2) is coerced into submitting to the test, (3) is incapable of consenting to the test, or (4) refuses the test and none is given. Problems which commonly arise in each of these situations will be discussed.

1. *Defendant Consents to the Test.*

Generally, results of chemical tests for intoxication are admissible if the defendant has consented.⁵ Problems can arise, however, if the prosecution fails to show general scientific acceptance of the test⁶ or that the person testifying to the results of the test is sufficiently well-trained to qualify as an expert.⁷ Similarly, the chain of custody of the sample may not be shown or there may be questions about whether the sample has been allowed to become contaminated.⁸ It has been

4. "Two 12 oz. bottles of 3.2% beer or 2 oz. of 100 proof whiskey consumed within one hour will put the average moderate drinker in the zone of impaired driving ability . . . [He] is a potential menace on the highway." Campbell, *supra* note 1, at 45. This article criticizes the widespread practice of not charging as drunk any person whose blood has less than a 0.15% alcoholic content by weight. The percentage is the one used in the Model Chemical Test Law as the minimum for a presumption of intoxication, and was set high enough to be unassailable.

5. See, e.g., *Spitler v. State*, 221 Ind. 107, 46 N.E.2d 591 (1943); *State v. Morkrid*, 286 N.W. 412 (Iowa 1939); *City of Columbus v. Thompson*, 55 Ohio App. 302, 89 N.E.2d 604 (1949); *Marshall v. State*, 159 Tex. Crim. 268, 262 S.W.2d 491 (1953); *State v. McMurray*, 47 Wash. 2d 128, 286 P.2d 684 (1955).

6. Blood and urine tests for intoxication have long been generally conceded to be valid. See Ladd & Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 Iowa L. Rev. 191, 267 (1939). Other tests questioned by some authorities may yet be admissible. The divergent view may be held to affect the weight and not the admissibility of the evidence. See, e.g., *McKay v. State*, 155 Tex. Crim. 416, 235 S.W.2d 173 (1950).

7. E.g., *State v. Williams*, 245 Iowa 401, 62 N.W.2d 241 (1954); *Fortune v. State*, 197 Tenn. 691, 277 S.W.2d 381 (1955). A lay witness is qualified to testify to usual signs of intoxications, such as staggering, incoherent speech, etc. A possible problem may arise, however, since such symptoms may be produced by an overdose or lack of insulin, if the individual is a diabetic, or by inhaling carbon monoxide fumes, a blow on the head, kidney trouble, nerve disorders, overdoses of barbiturates or other drugs, or many other causes. See Muehlberger, *op. cit. supra* note 3, at 3. See also *People v. Bobczyk*, 343 Ill. App. 504, 99 N.E.2d 567 (1951), for a lengthy discussion of the problem of detecting intoxication without a chemical test.

8. Suggestions for overcoming these problems may be found in Ladd & Gibson, *supra* note 6, at 262. Evidence has been held inadmissible when proper handling has not been shown. E.g., *Riddle v. State*, 288 P.2d 761 (Okla. Crim. 1955); *Rodgers v. Commonwealth*, 197 Va. 527, 90 S.E.2d 257 (1955).

contended that the taking of a fluid sample violates the privilege against self-incrimination even when the defendant has consented, but this argument commonly has been rejected.⁹ If the sample is procured by a doctor, there exists the possibility of invasion of the physician-patient privilege.¹⁰ Finally, as with any evidence problem, there may be instances in which the hearsay rule is violated or the proper foundation is not laid.¹¹ Careful preparation can usually avoid such occurrences; hence this aspect will not be further discussed.

Because of the widely acknowledged scientific accuracy of many of the tests,¹² it is believed that there will be an increasing tendency to adopt a rationale that will lead to freer admissibility in "consent" cases. Some courts have found "consent" in situations in which the average laymen would say none was present. Thus, in *State v. Small*,¹³ defendant was held to have consented to a test when he allowed it only after being told by the examining physician that unless he permitted the taking of a blood sample, the physician would testify that defendant was drunk. Courts have found little difficulty in holding that a person may be too drunk to drive and yet be quite capable of consenting to a test.¹⁴ Still another approach is the rule that failure to object amounts to consent,¹⁵ which rule shifts to the defendant the burden of proving lack of consent.

It should be noted that in cases where consent is disputed, regardless of who has the burden of proof, there is a probability that the jury will get the results of the test before it, inasmuch as the question of consent itself is for the jury.¹⁶ Thus if there is conflicting evidence, the most for which defendant may hope is a limiting instruction that the results must be disregarded if the jury should find no consent. This approach parallels the rule for coerced confessions followed in many states.¹⁷

9. See cases cited in note 5 supra. However, not all courts require consent. *State v. Berg*, 70 Ariz. 96, 259 P.2d 261 (1953); *People v. Kiss*, 125 Cal. App. 2d 138, 269 P.2d 924 (1954).

10. See, e.g., *Alder v. State*, 154 N.E.2d 716 (Ind. 1958) (blood sample procured from unconscious defendant held inadmissible). Cf. *Clapp v. State*, 73 Okla. Crim. 260, 120 P.2d 381 (1941) (defendant held to have waived privilege). See cases cited in note 41 infra which admit evidence over objection that doctor-patient privilege was violated.

11. E.g., *State v. Gagnon*, 151 Me. 501, 121 A.2d 345 (1956) (held hearsay for a doctor to testify to results of blood test when he took no part in the analysis).

12. See note 3 supra.

13. 233 Iowa 1280, 11 N.W.2d 377 (1943).

14. See, e.g., *Bowden v. State*, 246 P.2d 427 (Okla. Crim. 1952); *Jones v. State*, 159 Tex. Crim. 29, 261 S.W.2d 161 (1953).

15. *Touchton v. State*, 154 Fla. 547, 18 So. 2d 752 (1944); *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949).

16. *State v. Daugherty*, 320 S.W.2d 586 (Mo. 1959).

17. See generally McCormick, *Evidence* § 111 (1954).

2. *Defendant is Coerced Into Submitting to the Test.*

Coercing defendant into submitting to a test also may be analogized to the coerced confession situation. In many cases, counsel have tried to invoke the rules relating to coerced confessions and the closely related rules protecting against self-incrimination.¹⁸ Often, both considerations are treated under the general category of self-incrimination, and roughly speaking, courts have followed the same divergent rules in dealing with chemical tests which they apply generally to all problems of self-incrimination.¹⁹

The Missouri rule, as stated in *State v. Newcomb*,²⁰ is that admission of any evidence obtained through coercion of the defendant violates his right against self-incrimination. In the *Newcomb* case, defendant had been compelled to submit to a medical examination to determine if he had a venereal disease. In 1959 the Supreme Court of Missouri, faced with a blood test case, was able to avoid ruling on whether a coerced test violated the self-incrimination privilege, since defendant did not ask for a jury instruction on voluntariness.²¹ The court did, however, cite *Newcomb* with no apparent disapproval.²² Therefore, it appears that the Missouri courts would treat a coerced chemical test in the same way in which they treat a coerced confession.

Another view of self-incrimination is found in Texas decisions, which have treated the compelling of an "affirmative act" as a violation of the privilege against self-incrimination. In *Apodaca v. State*,²³ the conviction was reversed because the defendant was required to give a urine specimen; as compulsion of an affirmative act, this was held to violate his privilege. Although the "affirmative act doctrine" would seem to permit admission of test results obtained without active participation of the defendant, a recent Texas case indicates that chemical test results, whether obtained from an active or passive defendant, are always inadmissible if the defendant has not consented.²⁴ Obviously this greatly limits the "affirmative act doctrine" regardless of how much latitude the court is allowed in which to make its own characterization of a given act as active or passive.

Many recent cases have refused to analogize the chemical test problem to that of coerced confessions. These cases adopt the approach of

18. E.g., *Block v. People*, 125 Colo. 36, 240 P.2d 512 (1951); *State v. Alexander*, 7 N.J. 585, 83 A.2d 441 (1951); *State v. Cram*, 176 Ore. 577, 160 P.2d 283 (1945).

19. Discussion of the three major views of self-incrimination generally may be found in 8 Wigmore, *Evidence* §§ 2263-66 (3d ed. 1940).

20. 220 Mo. 54, 119 S.W. 405 (1909).

21. *State v. Daugherty*, 320 S.W.2d 586 (Mo. 1959).

22. *Id.* at 589.

23. 140 Tex. Crim. 593, 146 S.W.2d 381 (1940).

24. *Trammell v. State*, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956).

Wigmore,²⁵ that a compelled chemical test, unlike a compelled oral statement, will be reliable since no amount of coercion can alter a physical fact. Courts following the Wigmore view limit the privilege against self-incrimination to testimonial utterances.²⁶ Thus, in *State v. Alexander*,²⁷ the defendant was constrained to give a breath sample by the forceful and compelling manner of the police officers. In admitting the evidence, the Oklahoma court held that constitutional protection against self-incrimination did not "justify the enlargement of [the] clause to cover 'real' or 'physical' evidence."²⁸

Coercion of itself is distasteful and there have been judicial attempts to curtail it, based upon due process. All cases involving use of physical coercion should be tested against the frequently cited case of *Rochin v. California*.²⁹ There the Supreme Court of the United States indicated that it is a denial of due process for a state to admit evidence obtained as a result of shockingly brutal police conduct. In the specific area of chemical testing, however, the Supreme Court has ruled that a blood sample obtained in the normal manner from an unconscious defendant is not tantamount to brutality, and evidence regarding the sample is admissible.³⁰ Therefore, exclusion of the results of a coerced chemical test as violative of due process would necessitate a showing that the sample was obtained in a way which "shocks the conscience."³¹ There are several cases which indicate a considerable degree of force may be employed without making the test results inadmissible. In *State v. Berg*,³² police officers strapped the arms of the defendant behind him and managed to obtain a breath sample. The Arizona court upheld the conviction, saying that a person must submit to a chemical test for intoxication, and if the individual refuses, necessary force may be used to subdue him.

25. 8 Wigmore, Evidence § 2263 (3d ed. 1940).

26. See, e.g., cases cited note 18 supra.

27. 305 P.2d 572 (Okla. Crim. 1956).

28. Id. at 584.

29. 342 U.S. 165 (1952). This decision provoked an abundance of law review comment. See, e.g., 40 Calif. L. Rev. 311 (1952); 21 Fordham L. Rev. 287 (1952); 66 Harv. L. Rev. 122 (1952); 50 Mich. L. Rev. 1367 (1952); 1952 Wash. U.L.Q. 471.

30. *Breithaupt v. Abram*, 352 U.S. 432 (1957). Three justices dissented in the *Breithaupt* case. These justices felt that the *Rochin* case had been decided not because of the use of force by police, but because it was a denial of due process to invade the body of a man to obtain evidence to use against him. This case also caused much comment, e.g., 71 Harv. L. Rev. 161 (1957); 1957 U. Ill. L.F. 315; 26 U. Kan. City L. Rev. 55 (1957), but the decision leaves little doubt that in the area of chemical testing, only brutality "shocks the conscience."

31. *Rochin v. California*, 342 U.S. 165, 172 (1952).

32. 76 Ariz. 96, 259 P.2d 261 (1953).

3. *Defendant Is Incapable of Giving Consent.*

Even if the Wigmore approach to self-incrimination is adopted, and there are no due process objections, admissibility is not assured. Obtaining a sample of defendant's bodily fluids for subjection to a chemical test may constitute an unreasonable search.³³ If the search is held unreasonable, the test result would be inadmissible, all questions of self-incrimination aside, in states such as Missouri which follow the exclusionary rule barring evidence obtained by unreasonable search and seizure.

On the other hand, courts which adopt the Wigmore approach to self-incrimination and also admit illegally obtained evidence will almost certainly admit chemical tests obtained from subjects incapable of giving their consent. For example, in *Block v. People*,³⁴ the Colorado court admitted into evidence a blood sample obtained from an unconscious person. It should be noted that since the legality of the search was immaterial to the Colorado court, it did not have to pass on whether such a blood test was illegal or not. Wisconsin, a jurisdiction with the exclusionary rule, has held, in a case factually similar to the *Block* case,³⁵ that taking the blood was an unreasonable search and seizure and that the evidence of the test results should therefore be excluded.

From this it might appear that taking blood from an unconscious person is an unreasonable search and seizure, and that the only question is whether the jurisdiction concerned adopts the exclusionary

33. In *State v. Cram*, 176 Ore. 577, 160 P.2d 283 (1945), evidence was admitted under the Wigmore self-incrimination view, but it was pointed out in the concurring opinion that had the argument been made that the evidence was obtained by an illegal search, the result might have been different. Many states refuse to admit evidence obtained by unreasonable searches and seizures. See Annot., 50 A.L.R.2d 531 (1956).

34. 125 Colo. 36, 240 P.2d 512 (1951). For similar holdings in similar fact situations see *People v. Haeussler*, 41 Cal. 2d 252, 260 P.2d 8 (1953); *State v. Ayres*, 70 Idaho 18, 211 P.2d 142 (1949); *Breithaupt v. Abram*, 58 N.M. 385, 271 P.2d 827 (1954); *State v. Cash*, 219 N.C. 818, 15 S.E.2d 277 (1941); *Commonwealth v. Statti*, 166 Pa. Super. 577, 73 A.2d 688 (1950). Except for Idaho, all the jurisdictions named above normally admit illegally obtained evidence. The result in the Idaho case can be explained on the basis of the peculiar fact situation present—the test results showed that the defendant was *not* intoxicated. Cf. *State v. Sturtevant*, 96 N.H. 99, 70 A.2d 909 (1950); *State v. Alexander*, 7 N.J. 585, 83 A.2d 441 (1950).

35. *State v. Kroening*, 274 Wis. 266, 79 N.W.2d 810 (1956). The holding is particularly significant since Wisconsin adopts Wigmore's view of self-incrimination. *City of Barron v. Covey*, 271 Wis. 10, 72 N.W.2d 387 (1955); *Green Lake County v. Domes*, 247 Wis. 90, 18 N.W.2d 348 (1945) (evidence of intoxication obtained by a forced medical examination held admissible. No chemical tests were involved).

rule. A recent California case,³⁶ however, shows that such a conclusion is not necessarily compelled. California only recently adopted the exclusionary rule³⁷ but subsequently has admitted evidence of a blood sample obtained from a defendant who was semi-conscious. The basis for the decision appears to be that taking a blood sample from a non-consenting person by non-brutal means does not constitute an unreasonable search and seizure because it is *not* unreasonable. The significance of the case is enhanced because the defendant had not been arrested when the sample was taken, so the search was not incidental to arrest. The court, in answering defendant's argument on this point, stated that when there are reasonable grounds for arrest, the search is not unlawful merely because it precedes rather than follows the arrest.³⁸ It is submitted that in spite of this decision, whether or not the defendant was arrested upon reasonable grounds prior to the search, may well be determinative of the issue of the legality of the test.³⁹

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

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

38. 48 Cal. 2d at 771, 312 P.2d at 693.

39. The court in the *Duroncelay* case cited three earlier California decisions to support the contention that a search is not unlawful merely because it precedes rather than follows the arrest. *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955); *People v. Boyles*, 45 Cal. 2d 652, 290 P.2d 535 (1955); *People v. Simon*, 45 Cal. 2d 645, 290 P.2d 531 (1955). The *Simon* case contains the most extensive discussion of the problem, and concludes that search prior to arrest is consistent with the view of the Supreme Court of the United States in *United States v. Rabinowitz*, 339 U.S. 56 (1950). Whether such a conclusion is sound is dubious. In the *Rabinowitz* case, the court made this statement: "[N]o one questions the right, without a search warrant, to search the person *after* a valid arrest." 339 U.S. at 60. (Emphasis added.) The court continued by pointing out that the validity of a search is dependent initially upon a valid arrest. The view of the California court can be justified only because a search before arrest is not permitted unless valid grounds for arrest existed prior to the search. In the *Simon* case, the court said "if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested." 45 Cal. 2d at 648, 290 P.2d at 533. In view of the stigma attaching to a person with an arrest record, it cannot be denied that a person who could be legally arrested would be well advised to submit to a search if it would avoid an arrest. If reasonable grounds for arrest exist, it would seem an exaltation of form over substance if in a given fact situation, evidence obtained would be either admitted or not admitted depending upon whether or not the officer uttered the words, "You are under arrest." In spite of this, it is felt that most courts would adhere to the more traditional approach, and admit evidence from searches only if made after valid arrests. For a discussion of the historical background of search incident to arrest, see *Way*, *Increasing Scope of Search Incidental to Arrest*, 1959 Wash. U.L.Q. 261-62. Since driving while intoxicated is a felony in Missouri, there is no chance for a

When a sample is taken from an unconscious person by a doctor, at least one case has held that permitting the doctor to testify about taking the sample violates the physician-patient privilege,⁴⁰ but there is contrary authority.⁴¹

4. *Defendant Refuses the Test and None is Given.*

In this area an attempt often is made to analogize refusal to take a chemical test to refusal to take the witness stand in a criminal case. Most jurisdictions do not permit comment on the accused's failure to testify.⁴² It is argued that comment on failure to take a chemical test should not be permitted because a person has a constitutional right to refuse a test, and to permit testimony that defendant refused the test would discourage the exercise of this constitutional right. Several factors make this analogy incorrect. First, under the Wigmore doctrine of self-incrimination, which views the results of a chemical test as non-testimonial, nothing concerning the test could be held to violate the privilege. In contrast, compelling the accused to take the stand and testify does violate the privilege. Permitting comment on a refusal to take the test therefore does not in any way violate the privilege, while permitting comment on a refusal to take the stand does. Secondly, the accused is protected from comment on his failure to take the stand by specific statutes.⁴³ Absent a statute prohibiting comment on failure to take a test, comment should be permitted. It should be noted that many writers⁴⁴ feel that comment should be permitted regarding failure to testify. Such a view certainly would oppose extension without a statute of a doctrine thought to be unsound to the area of chemical testing where it has no proper application.⁴⁵

drunk driving arrest to be illegal, provided the arresting officer had reasonable grounds for believing the arrested person was operating an automobile while under the influence of alcohol.

40. *Alder v. State*, 154 N.E.2d 716 (Ind. 1958).

41. *Hanlon v. Woodhouse*, 113 Colo. 504, 160 P.2d 998 (1945); *People v. Barnes*, 197 Misc. 477, 98 N.Y.S.2d 481 (County Ct. 1950); *Schwartz v. Schneuringer*, 269 Wis. 535, 69 N.W.2d 756 (1955). Cf. *Block v. People*, 125 Colo. 36, 240 P.2d 512 (1952) (statute defining physician-patient privilege held not to apply to nurses or medical technicians). It is submitted that the physician-patient privilege should be applied only when the sample was used in treatment of the patient.

42. The various statutes prohibiting comment are set out at 2 Wigmore, *Evidence* § 488 (3d ed. 1940).

43. *Ibid.*

44. See, e.g., *McCormick*, *Evidence* § 132 (1954); *Vanderbilt*, *Minimum Standards of Judicial Administration* 381 (1949). For a discussion of the policy factors behind permitting comment, see *State v. Baker*, 115 Vt. 94, 53 A.2d 53 (1947) (upholding state statute permitting comment).

45. See, e.g., Wigmore's discussion at 8 Wigmore, *Evidence* § 2265 (3d ed. 1940).

The cases that have dealt with the problem raised when comment is made on refusal to submit to a test are not in agreement.⁴⁶ At least one holding⁴⁷ that comment could not be made is distinguishable since the state had a statute forbidding chemical tests without the defendant's consent. If the state is one which permits comment on refusal of an accused to testify, the likelihood is that comment on refusal to take a chemical test would be permitted. Such a result was obtained in a recent California case,⁴⁸ although the basis of the decision was that a chemical test is not within the purview of the privilege against self-incrimination.

Summary of Evidentiary Problems Regarding Chemical Testing.

It is apparent that before chemical intoxication test results will be generally admissible, a number of formidable legal hurdles must be cleared. Whether or not test results will be admitted in a given case will depend of course upon the facts of the case and the law of the jurisdiction. Generally, problems may be expected to arise in the areas of self-incrimination, unreasonable search and seizure and due process. These by no means are the only potential bars to admissibility, but certainly the most serious.⁴⁹

With regard to Missouri law in particular, at least two, and possibly all three, of the major problems stand in the way of admissibility. Missouri's definition of self-incrimination is as broad as that of any state,⁵⁰ and the rule excluding illegally obtained evidence is in force.⁵¹ If obtaining the sample involves use of any brutality, there undoubtedly would be no hesitancy to draw upon the *Rochin* case as authority for refusing admission to test results, should other reasons to exclude not be present. Missouri has held that chemical test results cannot be admitted unless consent is shown,⁵² and it appears that

46. Permitting comment: *State v. Benson*, 230 Iowa 1168, 300 N.W. 275 (1941); *State v. Nutt*, 78 Ohio App. 336, 65 N.E.2d 675 (1946); *State v. Gatton*, 60 Ohio App. 192, 20 N.E.2d 265 (1938); *State v. Smith*, 230 S.C. 164, 94 S.E.2d 886 (1956); *Gardner v. Commonwealth*, 195 Va. 945, 81 S.E.2d 614 (1954); *City of Barron v. Covey*, 271 Wis. 10, 72 N.W.2d 387 (1955). Not permitting comment: *People v. Stratton*, 286 App. Div. 323, 143 N.Y.S.2d 362 (1955); *State v. Severson*, 75 N.W.2d 316 (N.D. 1956); *Bumpass v. State*, 160 Tex. Crim. 423, 271 S.W.2d 953 (1954).

47. *State v. Severson*, 75 N.W.2d 316 (N.D. 1956). The statute which prohibited chemical tests without defendant's consent is N.D. Rev. Code § 39-0801 (Supp. 1957).

48. *People v. Conterno*, 170 Cal. App. 2d 817, 339 P.2d 968 (1959).

49. See notes 6, 7, 8, 10 and 11 *supra*, and accompanying text.

50. *State v. Newcomb*, 220 Mo. 54, 119 S.W. 405 (1909); *State v. Horton*, 247 Mo. 657, 153 S.W. 1051 (1913).

51. *State v. Owens*, 302 Mo. 348, 259 S.W. 100 (1924).

52. *State v. Daugherty*, 320 S.W.2d 586 (Mo. 1959).

evidence of a refusal to take a test also would be inadmissible.⁵³ At present, the only clear way to get chemical test results admitted is for the prosecution to prove that the defendant consented to the test. In such a situation it is obvious that chemical testing is practically without value in Missouri, serving neither to secure convictions nor to deter drinking drivers from use of the roads.

II. THE PROBLEM OF SEVERE SANCTION—"DRIVING WHILE INTOXICATED IS A FELONY"

Unless the punishment can be tailored to fit the crime, no useful purpose is to be served by making chemical test results more freely admissible. The fact that driving while intoxicated carries full felony sanctions in Missouri means that rarely will any but the most aggravated cases of drunken driving be punished. For although the "driver who drinks but is not drunk" is a definite danger to the public,⁵⁴ prosecutors and jurors are understandably reluctant to make felons of such persons. As a result, usually no punishment at all is meted out. Chemical test results would be useful chiefly in the "drinking but not drunk" cases,⁵⁵ but it is apparent that making the results generally admissible would be of little or no practical consequence, inasmuch as it still would be unlikely under the present felony statute that such cases would even be prosecuted. Moreover, even if the cases were prosecuted, juries could choose to ignore scientifically irrefutable fact in order to prevent sending fellow citizens to the penitentiary.

One obvious solution would be to lessen the statutory penalty. Realistically, however, this possibility is a very remote one since the average legislator undoubtedly would prefer to avoid having to justify to his constituents why he favored reducing the penalty for "drunken driving."

III. A MODIFIED "IMPLIED CONSENT" STATUTE AS A SUGGESTED SOLUTION

An "implied consent" statute seeks to avoid all the evidence problems which may be raised in the area of chemical tests for intoxication by providing that a driver by his use of the roads is deemed to have

53. This would follow from the Missouri view that one has a constitutional right not to be tested. Texas, with a view of self-incrimination quite similar to Missouri's has decided that it is improper to admit evidence on defendant's refusal to take an intoxication test. *Bumpass v. State*, 160 Tex. Crim. 423, 271 S.W.2d 953 (1954).

54. See note 4 supra.

55. A layman is qualified to testify to the signs of obvious drunkenness. But one who is not outwardly intoxicated cannot be shown to be affected by alcohol without scientific proof.

consented to chemical testing.⁵⁶ Implicit in such a law is the principle that a person can be required in advance to waive any constitutional privilege, such as that against self-incrimination, in return for the privilege of using the public roads. The ultimate determination of constitutionality naturally is dependent upon whether the courts decide that the public interest in safer roads outweighs the private interest of retaining privilege to refuse a chemical test.

Courts have been confronted with this same basic determination in ruling on "hit-and-run" statutes.⁵⁷ Such a statute provides that if a driver is involved in an accident in which there is property damage or personal injury, he must report the accident to the authorities. In the first cases arising under these laws it was argued that drivers were being forced to give self-incriminatory evidence in violation of their constitutional rights. When presented with this argument, the New York court held that even if the privilege against self-incrimination were involved, one could be required to waive it.⁵⁸ Use of the highways is a privilege which may be withheld altogether by the legislature; hence it is subject to reasonable regulation.

In the Missouri case of *Ex Parte Kneedler*,⁵⁹ it was held that despite the possible presence of a self-incrimination problem, Missouri's hit-and-run statute was a reasonable exercise of the police power of the state. It is therefore submitted that the Missouri courts would sustain in like fashion the validity of an implied consent statute in the area of chemical testing for intoxicated drivers.

However, an implied consent statute would not solve Missouri's problem unless modified so as to limit its sanctions solely to suspen-

56. "Implied consent statutes" are in force in Idaho, Kansas, New York, Utah and Puerto Rico. Idaho Code Ann. § 49-352 (1957); Kan. Gen. Stat. Ann. § 8-1001 (Supp. 1957); N.Y. Vehicle and Traffic Law § 70-a (1958); P.R. Laws Ann. tit. 9, § 183(3)-(8) (Supp. 1958); Utah Code Ann. § 41-6-44.10 (Supp. 1959).

The New York "implied consent" statute approving the waiver theory was upheld in *People v. Kovacik*, 205 Misc. 275, 128 N.Y.S.2d 292 (Spec. Sess. 1954); *Anderson v. McDuff*, 208 Misc. 271, 143 N.Y.S.2d 257 (Sup. Ct. 1955); *Schutt v. McDuff*, 205 Misc. 43, 127 N.Y.S.2d 116 (Supp. Ct. 1954) (former statute held invalid on other grounds).

See Weinstein, *Statute Compelling Submission to a Chemical Test for Intoxication*, 45 J. Crim. L.C. & P.S., 541 (1955) for an illuminating discussion of the statute. Professor Weinstein was assistant counsel for the committee that drafted the New York statute. See also the Interim Report of the New York Joint Legislative Committee on Motor Vehicle Problems, *Chemical Tests for Intoxication*, Legislative Documents (1953).

Use of the waiver theory to compel chemical testing was originally suggested in *Mamet, Constitutionality of Chemical Tests to Determine Alcoholic Intoxication*, 36 J. Crim. L.C. & P.S. 132 (1945).

57. The Missouri hit-and-run statute is Mo. Rev. Stat. § 564.450 (1949).

58. *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913).

59. 243 Mo. 632, 147 S.W. 983 (1912).

sion of the driving privilege, otherwise the severe-sanction dilemma of the felony statute would thwart effective enforcement. All evidence obtained by means of the new statute should therefore be made inadmissible in other criminal proceedings. In this manner no one would be sent to the penitentiary because of inability to assert any of his constitutional rights. Necessary flexibility can be attained by graduating the period of license suspension according to the degree of intoxication.⁶⁰

The following is submitted as a suggested framework or basic outline for an implied consent statute in Missouri:

Section 1. Any person who operates a motor vehicle in this state thereby consents to the giving and taking of any fluid or fluids of his body, as illustrated by but not limited to blood, breath, urine and saliva, if such fluid can be subjected to an analysis which can determine the concentration of alcohol in the blood of a person.

Section 2. The director of the division of health shall prepare and keep current a list of body fluids that can be subjected to analysis to determine the concentration of alcohol in the blood of a person for purposes of this act.

Section 3. Until a list of body fluids is prepared under section 2 of this act, samples of blood, breath, urine and saliva may be taken and analyzed.

Section 4. Whenever the director of the division of health recognizes a certain body fluid to be susceptible to analysis to determine the concentration of alcohol in the blood, he shall:

- (a) Establish a procedure for taking samples of the fluid.
- (b) Establish qualifications for persons who may procure samples of the fluid.
- (c) Establish qualifications for persons who may analyze the fluid.

Section 5. Until procedures for procuring body fluid samples and qualifications for persons who may take the samples and conduct the analysis are established under section 4 of this act, any person is qualified to take a sample of urine, breath or saliva, provided that the sample or samples are taken under circumstances that assure lack of contamination. Only a person qualified by training and experience, as illustrated by but not limited to a doctor or medical technician, is permitted to take a blood sample, until other persons are qualified under section 4 of this

60. Percentages of alcohol used in the statute are based upon those in the Model Chemical Test Law which presumes defendant not to be under the influence of alcohol if his blood had less than a 0.05% alcoholic content by weight. If the percentage figure is between 0.05 and 0.15 there is no presumption either for or against intoxication, but such fact may be considered with other competent evidence. One authority has stated "the vast majority of persons show measurable deterioration when the blood alcohol is 0.05 per cent or over." Campbell, *supra* note 1, at 45.

act. Until the director of the division of health shall establish qualifications for persons who may analyze samples of body fluids to determine alcoholic content under section 4 of this act, such analysis may be made by any qualified person, as illustrated by but not limited to chemists, physicians and laboratory technicians.

Section 6. No person shall be required under this act to furnish a body fluid sample unless he shall first have been arrested by a law enforcement officer having reason to believe that the person has been operating a motor vehicle while his operating ability was impaired because of the influence of alcohol.

Section 7. If an arrested person refuses to furnish a body fluid sample upon request of a law enforcement officer, the arrested person has revoked his consent and no sample shall be taken. The arresting officer shall sign and file with the director of revenue a sworn report stating that he had reason to believe the person was operating a motor vehicle while his driving ability was impaired because of the influence of alcohol and that the person failed to furnish the body fluid sample when lawfully requested. Upon receipt of such report, the director of revenue immediately shall suspend the arrested person's driving privilege for a period of nine months.

Section 8. If the arrested person does not refuse to furnish a body fluid sample, the sample shall be analyzed in a manner authorized by this act. The person supervising or conducting the analysis shall sign and file with the director of revenue a sworn report of his findings as to the alcoholic content of the fluid and the arresting officer shall sign and file with the director of revenue a sworn report stating that he had reason to believe that the arrested person was operating a motor vehicle while his driving ability was impaired because of the influence of alcohol.

Section 9. If the reports prepared under section 8 of this act show that the concentration of alcohol in an arrested person's blood exceeded 0.05% by weight, but was less than 0.10% by weight, the director of revenue immediately shall suspend the arrested person's driving privilege for a period of three months.

Section 10. If the reports prepared under section 8 of this act show that the concentration of alcohol in an arrested person's blood exceeded 0.10% by weight, but was less than 0.15% by weight, the director of revenue immediately shall suspend the arrested person's driving privilege for a period of six months.

Section 11. If the reports prepared under section 8 of this act show that the concentration of alcohol in an arrested person's blood exceeded 0.15% by weight, the director of revenue immediately shall suspend the arrested person's driving privilege for a period of nine months.

Section 12. Whether or not an arrested person refuses to furnish a body fluid sample or samples, neither the fact of refusal nor the results of the analysis of the sample or samples shall be admitted into evidence or used against the interests of the arrested person in any criminal proceeding in this state, independently of this act.

It should be noted that this proposed outline for an implied consent statute is incomplete to the extent that it fails to include procedures for administrative review and appeal. There should be a provision for such procedures, with a further provision that the license be suspended pending review or appeal. Another desirable feature would be a prior-offense point system provision in order to bar repeated violators from the road permanently.