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Survey and Background of State Statutes Concerning Chemical Tests for Intoxication

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SURVEY AND BACKGROUND OF STATE STATUTES CONCERNING CHEMICAL TESTS FOR INTOXICATION

With the great influx of automobiles on the nation's highways in recent years, effective enforcement of traffic laws has become a major problem in each state. In all states it is a violation of the law to drive while "intoxicated" or "while under the influence" of alcohol.[1] Before the advent of scientific tests to determine intoxication, prosecutors had to rely primarily on testimony as to the defendant's breath, abnormal speech, flushed face, co-ordination, and other such symptoms. By these methods, however, it was difficult to prove intoxication, since there is no single symptom produced by alcohol which cannot be caused by some other factor or condition.[2] This difficulty has now been greatly alleviated by the use of chemical tests for determining alcoholic intoxication.

Medical and other scientific authorities are in general agreement that the amount of alcohol present in a person's blood can be accurately determined by chemical analysis of that person's body specimen.[3] The amount of alcohol present in the blood indicates the degree of intoxication.

State and local police forces in forty-five states have employed these tests, recognizing their value in law enforcement.[4] However, the use of these tests and their results have not been without challenge, one of the chief objections raised in the series of cases on the subject has involved the privilege against self-incrimination.[5] Only the self-incrimination privilege contained in state constitutions and statutes[6] restrict state action, since the privilege guaranteed by the Fifth Amendment of the Federal Constitution is not applicable to the state governments.[7] Although the accused is protected against being compelled to incriminate himself in all states, this privilege prevents only the "employment of legal process to extract from a person's lips an admission of guilt."[8] Thus the privilege applies to testimonial utterances and not to physical evidentiary facts which may be obtained from the defendant even by compulsion.[9] Although a few early cases[10]

[1] See e.g. N. Y. VEHICLE & TRAFFIC LAW §70-5 (McKinney 1952) "intoxicated"; ILL. REV. STAT. 95½ §144 (1953), OHIO REV. CODE §4511.19 (1953) "under the influence".

[2] Slot, *The Medico-Legal Aspects of Drunkeness*, 3 MED. L. & CRIM. R. 282 (1935); Selesnick, *Alcoholic Intoxication. Its Diagnosis and Medico-Legal Implications*, 110 J.A.M.A. 775 (1938).

[3] Newman, *Proof of Alcoholic Intoxication*, 34 KY. L. J. 250 (1946). Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 IOWA L. REV. 191 (1939); Newman and Fletcher, *The Effect of Alcohol on Driving Skill*, 115 J.A.M.A. 1600 (1940).

[4] Report of the Committee on Tests for Intoxication, National Safety Council, 1953.

[5] See DONIGAN, CHEMICAL TEST CASE LAW (1950).

[6] Iowa and New Jersey have statutory provisions.

[7] Twining v. New Jersey, 211 U.S. 78 (1908).

[8] 8 WIGMORE, EVIDENCE, §2275 (3d ed. 1940).

[9] INBAU, SELF-INCRIMINATION, (1950). UNIFORM RULES OF EVIDENCE, Rule 25 (c) provides, "no person has the privilege to refuse to furnish or

indicated that the issue of compulsion would determine the admissibility of chemical tests, the vast majority of the more recent decisions adhere to the historical interpretation of the privilege as embracing only compulsory testimonial utterances.[11] The recent case of *State v. Berg*[12] exemplifies this interpretation. Police officers held the defendant in a position which allowed his breath to be captured for chemical analysis. Although compulsion was used, the court held that the privilege against self-incrimination prohibits only testimonial compulsion.

The admissibility of chemical tests into evidence has also been challenged as constituting unreasonable search and seizure. State action in this area is not governed by the Federal Constitutional provision, but rather by the provision in the particular state constitution.[13] The protection granted was designed to prevent searches of homes without warrants issued upon reasonable grounds, and to protect against searches of the person without legal justification. The test is one of reasonableness. In all jurisdictions, a search and seizure incidental to an arrest is considered reasonable, hence otherwise unobjectionable bodily specimens obtained in that manner are admissible. A minority of states follow the Federal rule as announced in *Weeks v. U.S.*[14] that otherwise competent evidence must be excluded if such evidence is unlawfully obtained. However, most state courts hold that the illegality of a seizure does not affect its admissibility.[15] Nevertheless under both views, if the subject is under arrest at the time the specimen is obtained there can be no valid claim as to unreasonable search and seizure.

Although state action is not in any way limited by provisions in the Federal Constitution regarding "self-incrimination" or "search and seizure", it is not totally exempt from Federal control. Extreme action in obtaining the specimen may violate the Due Process clause of the Fourteenth Amendment. In *Rochin v. California*,[16] physical evidence obtained by "methods that offend a sense of justice"[17] was held violative of due process. After Rochin had been surprised by officers entering his bedroom, he attempted to destroy narcotic evidence by swallowing two capsules containing morphine. The officers recovered the two capsules by compelling Rochin to submit to the ordeal of a stomach pump. Although the shocking method which was employed may partially account for the Supreme Court's decision, it is possible that a state conviction for drunken driving would also be reversed if the defendant resisted attempts to obtain a specimen, so that the officers had to use brutal force or means highly uncomfortable or dangerous to the defendant.[18] The facts of the *Berg* case—the forcible capture of a breath specimen—were distinguished by the Arizona Supreme Court from the *Rochin* doctrine on the ground that the methods used were neither brutal nor highly dangerous.

Once the specimen is lawfully obtained and analyzed, the admission of the results depends on the satisfaction of certain rules of evidence. Initially the test must be shown to be reliable.[19] The fact that there is lack of unanimity in the medical profession as to whether intoxication can be determined by the test merely affects

permit the taking of samples of body fluids or substances for analysis."

[10] State v. Benson, 230 Iowa 1168, 300 N.W. 275 (1941) (dicta); Booker v. City of Cincinnati, 5 Ohio Op. 433 (1936) (dicta); Apodaca v. State, 140 Tex. Cr. R. 593, 146 S.W. 2d 381 (1940).

[11] See note 5 *supra*.

[12] 76 Ariz. 96, 259 P.2d 261 (1953).

[13] Wolf v. Colorado, 338 U.S. 25 (1949).

[14] 232 U.S. 383 (1914).

[15] Ala., Ariz., Ark., Calif., Colo., Conn., Ga., Kan., La., Me., Mass., Minn., Neb., Nev., N. H., N. J., N. M., N. Y., N. C., N. D., Ohio, Ore., Pa., S. C., Texas, Utah, Vt., Va.

[16] 342 U.S. 168 (1952).

[17] *Id.* at 173.

[18] People v. Walton docket no. 402, a case presently before the U. S. Supreme Court is somewhat analogous. The defendant contends that a technician drew a blood sample over his objections. However, the defendent did not offer physical resistance.

[19] People v. Morse, 325 Mich. 203, 38 N.W.2d 322 (1949) (evidence from breath test excluded because there was no testimony as to the reliability of the test).

the weight of the evidence, but does not destroy its admissibility.[20] Furthermore, the specimen must be shown to have been processed with proper chemical instruments[21] and by qualified personnel.[22] The specimen in issue must also be identified as the defendant's by a chain of proof demonstrating that the specimen taken from the defendant was the specimen analyzed.[23] When the specimen passes through a great number of hands, it is not unreasonable for a jury to entertain some doubts as to whether its integrity as a sample had been preserved.[24] When the results have been obtained by chemical analysis a standard is required for correct evaluation by the trier of fact since the test result is in terms of the percent of alcohol to weight of blood. Unless there is a statute setting the standards, expert testimony must establish that fact in each case in which scientific evidence of intoxication is used.

Survey of State Statutes

The standard generally accepted is identical to that embodied in the 1952 Uniform Vehicle Code[25] which reads:

(a) It is unlawful and punishable as provided in paragraph (d) of this section for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state.

(b) In any criminal prosecution for a violation of paragraph (a) of this section relating to driving a vehicle under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:

1. If there was at the time 0.05 or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor;

2. If there was at the time in excess of 0.05 but less than 0.15 percent by weight of alcohol in the defendant's blood, such fact shall not give rise to any 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;

3. If there was at the time 0.15 or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;

4. The foregoing provisions of paragraph (b) shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor.[26]

It is evident that the primary purpose of this proposed act is to establish standards and thus eliminate the requirement of expert testimony. The provisions of the Uniform Vehicle code are embodied, without substantial addition or deviation in the codes of Arizona, Idaho, Indiana, New Hampshire, South Carolina,

[20] People v. Bobczyk, 343 Ill. App. 504, 99 N.E.2d 567 (1951); Mckay v. State, 155 Tex.Cr.R. 370, 235 S.W.2d 173 (1951).

[21] In State v. Hunter, 4 N. J. Super. 531, 68 A.2d 274 (1949) (breath test evidence was excluded upon a showing that an accurate chemical scale was not used).

[22] Hill v. State, 158 Tex.Cr.R. 313, 256 S.W.2d 93 (1953) (breath test evidence excluded upon a showing that the police officer could not give the mathematical result of the test from his own calculations, and was allowed to run test without expert supervision.)

[23] Evidence of urine test improperly admitted without sufficient identification in Novak v. District of Columbia, 160 F.2d 588 (D.C. Cir. 1947); Evidence was admitted with sufficient identification in Burleson v. State, 159 Tex.Cr.R. 112, 261 S.W.2d 726 (1953); McAllister v. State, 159 Tex.Cr. R. 57, 261 S.W.2d 332 (1953).

[24] Kuroske v. Aetna Life Ins. Co., 234 Wisc. 394, 404, 291 N.W. 384, 388 (1940).

[25] National Safety Council, UNIFORM VEHICLE CODE, Act V. §54 (1952).

[26] The subsections dealing with narcotics and penalties are excluded. No attempt will be made to compare penalty provisions of this act and state statutes, or among the various state statutes.

South Dakota, and Utah.[27] The statutes of Oregon,[28] and Virginia[29] make no mention of standards at all. These standards, therefore must be determined according to the rules of evidence which require that a proper foundation be laid by expert testimony. Maine's statute[30] varies from the usual standard in that it raises a presumption of sobriety when there is evidence of 7/100 percent or less by weight of alcohol in a person's blood. The range where there is no presumption either for or against intoxication is consequently narrowed between 7/100 to 15/100. On the other hand the Tennessee statute[31] adopts the Code's presumption for intoxication, but omits any standard to create a presumption against intoxication or a range where no presumption is created.[32]

The proposed Code does not purport to answer various other procedural questions encountered in the use of chemical tests, some of the more important of which are as follows: How may the motorist's compliance with the officer's request for a specimen be obtained? Can the motorist refuse to submit to a test? May such a refusal be offered into evidence? Who should obtain the specimen? Which types of tests are reliable? Can the motorist demand a test as a matter of right? If he can, who should pay for the costs incurred? The law enforcement agencies of the states which adopt only the provisions of the Code therefore must make their own determination of these questions without the aid of statutory guidance.

The statutes of Arizona, Indiana, Tennessee and Wisconsin[33] do not indicate how a specimen is to be obtained, hence the issue of whether reasonable force would be permissible is left for judicial determination. The question of how to obtain a specimen of the defendant's breath is answered in Arizona by the *Berg* case, where reasonable force without brutality was condoned. There are indications that this would also be permitted in Indiana.[34] However, statutes in Georgia, Kentucky, New Jersey, New York, North Dakota, Virginia and Washington[35] specifically require that the subject consent to the test. But only the Kentucky statute provides that the motorist's refusal to consent can be admitted into evidence,[36] which may or may not be an impelling reason for the motorist to submit to a chemical test. The statutes of Maine, Nebraska and Oregon,[37] while not stating specifically that the motorist can refuse to give specimen, state as much by implication through provisions which prohibit the introduction of the refusal into evidence.[38] Com-

[27] ARIZ. CODE ANN. §66-156 (Supp. 1951); IDAHO CODE §49-520.2 (1948); IND. STAT. ANN. §47-2003 (1952); N.H. Session Laws c. 204 (1949); S. C. CODE §46-344 (1952); S. D. Session Laws c. 42 (1949); UTAH CODE ANN. §41-6-44. (1953).

[28] ORE. REV. STAT. §483.630 (1953).

[29] VA. CODE §18-75.1 (Supp. 1954).

[30] ME. REV. STAT. c. 19 §121 (1944).

[31] Tenn. Public Acts c. 202 (1953).

[32] The practical consequences of this type of a provision is to require the defendant to use expert testimony in order to establish any presumption against intoxication, while the prosecution can dispense with expert testimony to establish a presumption for intoxication.

[33] Ariz. *supra* note 27; Ind. *supra* note 27; Tenn. *supra* note 31; WISC. STAT. §85.13 (1951).

[34] Ind. Op. Atty. Gen. 1949, p. 210; "There is no legal impediment which would prevent the use by the State Police of any reasonable force or compulsion in making an accused person take such a test. I think the use of force or compulsion to require the taking of the drunkometer test, falls into the same category as the slight and reasonable physical force which is used sometimes in taking fingerprints or in making physical examination of accused persons."

[35] GA. CODE ANN. §68-1625 (Supp. 1954); KY. REV. STAT. §189.520 (Supp. 1954); N. J. STAT. ANN. §39: 4-50.1 (Supp. 1953); N. Y. VEHICLE & TRAFFIC LAW §70-5, 71-a (McKinney 1952); N. D. REV. CODE §39-0801 (Supp. 1953); Va. *supra* note 29; WASH. REV. CODE §46.56.010 (1951).

[36] See note 35 *supra*. Section (6) of the Kentucky statute provides, "No person may be compelled to submit to any test specified in subsection (4) of this section, but his refusal to submit to such test may be commented upon by the prosecution in the trial against any person charged with operating any vehicle under the influence of alcohol."

[37] Me. *supra* note 30; NEB. REV. STAT. §727.01 and 727.02; Ore. *supra* note 28.

[38] In the absence of such provisions comment

ment on a motorist's refusal is also prohibited in Georgia, Virginia and Washington.[39] Only the New York statute provides sanctions operating to gain consent, without resorting to compulsion.

The New York statute[40] rests upon a concept enunciated in *People v. Rosenheimer*,[41] that in "operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and in case of a privilege the legislature may prescribe on what conditions it shall be exercised."[42] The legislature in New York imposed such a condition on the privilege of operating a motor vehicle in New York—in other words, any person so doing is deemed to have consented in advance to a chemical test. The statute provides that if the motorist refuses to take the test when requested to by an arresting officer, the officer by making a sworn statement to the Commissioner can cause the motorist's license to be suspended. Revocation of the license may occur after a hearing, or when the motorist fails to make a timely demand for a hearing during the suspension.[43] This type of aid to law enforcement agencies is certainly desirable and therefore it would not be unreasonable to predict that this statute will be a model for future statutes in other states.[44]

The Uniform Vehicle Code does not attempt to enumerate the tests which are reliable to establish the amount of alcohol in a person's blood. This also has been overlooked in all but two state statutes on the subject. The North Dakota statute,[45] provides that the "Drunkometer" or other similar devices approved by the American Medical Association and the National Safety Council can be used for breath analysis. The statute does not further specify particular tests for other body specimens. In the Nebraska statute[46] it is provided that in order to be considered valid, chemical tests will have to be performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by the Department for that purpose. The Department is thereby authorized to set valid and reliable methods of analyzing breath, blood, spinal fluid, and urine.

The Nebraska law also provides a method of determining who should perform these chemical tests by requiring an operator to be certified by the Department of Health. The New York law does not state who should perform the analysis of a body specimen, but declares that the obtaining of a blood specimen must be done by a physician.[47] But samples of breath, urine, or saliva can be obtained by persons other than physicians. The Georgia statute[48] is similar to both in some respects. It provides that the Director of Public Safety shall designate one or more physicians for each county to perform blood tests upon arrested subjects if and when they demand a chemical test. However, if the subject does not demand a test, but merely consents to take one, he may be given any test and a blood specimen need not be withdrawn by a physician.

The Georgia law gives the subject a right to demand a blood test, and it is mandatory upon the arresting officer to provide it, if possible. The Virginia[49] statute is somewhat similar to

would be allowed, since the chemical tests are not a violation of the privilege against self-incrimination.

[39] See note 35 *supra*.

[40] See note 35 *supra*.

[41] 209 N. Y. 115, 102 N.E. 530 (1913).

[42] *Id.* at 121, 102 N.E. at 532.

[43] The original New York law provided for automatic revocation of license when the motorist refused to take the test. N. Y. Reg. Sess. c. 854 (1953). However, this was held invalid by the New York court in Schutt v. Macduff, 205 Misc. 43, 127 N.Y.S.2d 116 (1954). The present law cures the objections raised to the original act by providing for a hearing before revocation.

[44] Puerto Rico has adopted legislation patterned after the New York law. Puerto Rico Laws, 1954, No. 95, Puerto Rico Law of Automobile Transit Act 13 §§3-7; In Feb. 1955 the Indiana House adopted an amendment to provide for a suspension of license for one year if the motorist refused to take a drunkometer test after arrest.

[45] See note 35 *supra*.

[46] See note 36 *supra*.

[47] See note 35 *supra*.

[48] See note 35 *supra*.

[49] See note 29 *supra*.

this provision except that the choice of tests is not limited to the blood test, and the test is not mandatory upon the arresting officer, although it does impose a duty on him to render full assistance to obtain such a determination. There is a monetary consideration involved in the Georgia law since an individual demanding a blood test has to pay the expense of the test, although the statute limits his liability to ten dollars. In New York and presumably the other states, the costs are borne by the local governmental agencies.[50]

The statutes of New York and Wisconsin[51] require that chemical tests must be given within two hours of arrest. The purpose of this provision is evidently to insure that the test will be given soon enough after the violation so that specimen samples will be obtained before the alcohol in the body is dissipated. The provision is well adapted to situations where the violation and arrest occur in a short time interval. However in accident cases where a more serious charge may be brought such as negligent homicide, arrest may be delayed in order to evaluate the feasibility of such a charge in view of the evidence. In such an instance if the subject submits to a test after the accident but not within two hours of any subsequent arrest, the test results will not be admitted into evidence. The Wisconsin case of *State v. Resler*,[52] is an illustration. There the defendant caused his automobile to overturn, killing a passenger. About one hour after this accident he voluntarily submitted to a urinalysis. It was not until fourteen hours later that he was arrested for negligent homicide. His conviction was reversed by the Wisconsin Supreme Court since the procedure was contrary to the time provision contained in the statute. It is submitted that the statutes should recognize that chemical tests are used primarily to determine the individual's condition at the time of the alleged violation of the law, and the time of the arrest should be immaterial when the subject consents. The New York law has not yet been confronted with any similar case.

The Oregon statute[53] has an innovation which should be noted—it applies only to counties with more than 200,000 population. This statute does not prevent other counties from using chemical tests,[54] but has the anomalous effect of giving individuals in the more populous counties a statutory right to refuse to take the tests. Moreover, since the statute does not apply to the less populous counties the administration of chemical tests is governed by common law principles which allow reasonable force to procure a specimen.

Conclusion

The states have not only authority, but a duty to protect the health, safety, and morals of their citizens. It cannot be denied that deaths and property damage caused by automobile accidents are now at a peak. How much of this misfortune is caused by alcohol cannot be accurately determined. However, at least a significant part of this problem can be avoided by wider application of chemical tests for intoxication. There need be no fear that the guilt or innocence of a defendant will be decided by chemical analysis rather than by the trier of fact. The presumptions created by chemical tests are, in law, not conclusive but are rebuttable; their accuracy is widely attested to by the medical profession and other scientists. The wise prosecutor would not attempt to rely on the test result alone, but would supplement his case with collateral evidence of intoxication. In this regard the Wisconsin statute[55] provides that the test alone will not sustain a conviction. The other states adopt the view of the Vehicle Code that the use of the test does nor bar other competent evidence for or against intoxication.

[50] See 9 Op. State Compt. File No. 6392 (1953) and 9 Op. State Compt. File No. 6381 (1953) of New York.

[51] N. Y. *supra* note 35, Wisc. *supra* note 33.

[52] 262 Wisc. 285, 55 N.W.2d 35 (1952); [1953] Wisc. L. Rev. 560.

[53] See note 28 *supra*.

[54] Ore. Op. Atty. Gen. p. 210 1942–44.

[55] See note 33 *supra*. The presumption for intoxication "... shall not without corroborating physical evidence thereof, be sufficient upon which to find the defendant guilty of being under the influence of intoxicants."