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THE INTENSIVE SEARCH OF A SUSPECT'S BODY AND CLOTHING*

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Some of the data forming the basis for this article will appear in a forthcoming A. B. F. book entitled *The Detection of Crime*.

Following the arrest of a criminal suspect the police often find it desirable, and sometimes necessary, to make an intensive search of the suspect's person. Searches of this kind are conducted without a warrant under the general rule that permits the search of a suspect as incident to his lawful arrest. Courts have long recognized the need for police to search an arrested person as a protective measure, both to save the officer from harm and to recover incriminating evidence before it is disposed of by the suspect.¹

Legislatures have been virtually silent in regulating searches made incident to a valid arrest. Appellate courts on the other hand, through their interpretations of the Fourth Amendment's prohibition against unreasonable searches, have established a sizable body of law governing the permissible scope and intensiveness of the incidental search.

This discussion of the problems created by intensive body searches begins with the premise that a valid arrest has been made and that some form of search is permissible. The question to be considered is whether the scope or methods of search are reasonable or unreasonable police intrusions. The question arises particularly in regard to three searching techniques that are often humiliating or painful for the suspect and degrading for the police. The first technique can be identified as "strip searching," whereby a suspect is disrobed so that his clothes and body can be examined for weapons or evidence of crime. The second technique is the intensive search for evidence suspected

of being secreted in a body cavity, such as the suspect's mouth, stomach and internal tract, rectum, or vagina. The third consists of taking or capturing a specimen of the suspect's blood, urine, or breath for chemical analysis to determine whether he is under the influence of alcohol or drugs. References to police practices are based, in large part, on data from the American Bar Foundation's study of criminal justice administration² and from interviews with officials of the Chicago Police Department.

STRIP SEARCHING

When a male suspect is arrested he is frisked,³ but normally he is not required to remove his clothes. Exceptions to this practice exist when the arrest is made for an offense involving the theft or possession of small items and there is reason to believe the items are concealed in the suspect's clothes. Thus, jewelry, narcotics, and gambling slips are often found in the lining of wearing apparel and in shoes. On some occasions clothing is removed so that it can be subjected to chemical analysis. The legality of removing the clothes of a suspect in these circumstances has seldom been

² Pilot Project Report, *The Administration of Criminal Justice in the United States (1958)*, 7 Vols. (unpublished). The pilot study was done in Michigan, Kansas, and Wisconsin in 1956-57.

³ While a frisk normally amounts to the officer running his hands over the suspect's clothes to detect a weapon, it could be more intensive, as in the following description: "The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin area about the testicles, and entire surface of the legs down to the feet. The pat and feel method may be employed when the arrest is made outdoors and disrobing is not feasible." Priar & Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L., C & P.S. 481 (1954).

*The opinions and conclusions expressed by the authors are their own and do not necessarily reflect the views of the American Bar Foundation.

¹ The clearest statement of this rule appears in *United States v. Rabinowitz*, 339 U.S. 58 (1950).

placed in issue on appeal; when it has, the searches have been upheld.⁴

More ticklish problems arise in connection with the search of female prisoners. Departmental orders usually prohibit policemen from searching a woman placed under arrest, except for searches of her handbag or a coat carried on her arm. These regulations are prompted in large part by a desire to avoid accusations, or the threat of accusations, of abuse. However, thorough searches are made by police matrons at places where female prisoners are detained. The legal problem arises in regard to such searches.

It is difficult to make generalizations about procedures for searching women prisoners. Interviews with officials gave some indication of the practices employed. In Chicago, for example, women arrestees—about 20,000 annually—are initially detained at central police headquarters. Prior to arrival at this detention facility, the arresting officers, since they cannot make a search for weapons, protect themselves against the risk of attack by handcuffing women thought to be dangerous and transporting them in a vehicle that has a protective screen between the driver and the suspect. Policewomen are sometimes used to search women at the scene of an arrest, but this is unusual because policewomen are ordinarily not immediately available. However, when a raid is planned against an organized crime operation such as a narcotics ring, policewomen often accompany the raiding party for the express purpose of making a thorough search of female suspects involved in the unlawful enterprise.

When a search of women prisoners is conducted at headquarters, the women are first asked to place their personal items on a table so they can be inventoried and placed in safekeeping. About 90 per cent of the prisoners are then asked to remove their clothes so that they can be examined for weapons or contraband. Following this, the prisoners are asked to assume a squatting position, which presumably has the effect of dislodging any items secreted in the vagina.

According to the experience of the Chicago police matrons, most of the women prisoners have criminal records and many have been arrested for crimes of violence. This explains the high incidence of body searches. Strip searches are less frequently used for male prisoners. Such searches are consid-

ered by the police to be less regularly necessary because "field" searches serve to uncover weapons—the police's main concern—and because men rarely secrete weapons beyond putting them in their pockets or belts.

The primary objective of the strip search appears in practice to be to safeguard the property and physical well-being of those in custody, rather than to uncover evidence of crime. All manner of objects capable of inflicting harm are seized in routine strip searches. The undergarments of female prisoners, in particular, are frequent hiding places for knives, fingernail files, straight razors, and small firearms. The police are aware that a self-inflicted injury, suicide attempt, or injury to another prisoner through the use of such weapons is apt to result in civil liability for the police or, in any event, disciplinary action by the department for failure to take adequate protective measures. For this reason any items capable of conversion into dangerous instruments, such as the glass in a watch or spectacles, are taken from the prisoner during the initial detention period. (Requiring the removal of female attire is also a means of coping with the problem created by female impersonators or transvestites.)

While it is of secondary concern, evidence of crime is frequently uncovered by the strip search. Contraband, such as narcotics or gambling slips, are from time to time exposed and seized. Even the squatting exercise will occasionally produce the aforementioned items, according to the police matrons of the Chicago Police Department.

The lawfulness of these searching practices is not apt to be challenged because the items seized are rarely used as a basis for prosecution. Weapons and contraband are simply confiscated. Discovery of a large quantity of narcotics, however, may support a "possession" or "sale" charge. In such event, the introduction of the evidence could be challenged on two grounds: first, that the strip search was an excessive intrusion on the body of the suspect (and therefore unreasonable) and, second, that the search was exploratory in that police were seeking evidence of any crime rather than preventing destruction of evidence related to the crime for which the arrest was made.⁵

⁵ The need for a relationship between the evidence searched for and the reason for the arrest appears in cases where officers make an incidental search pursuant to a traffic arrest. In *Taglavore v. U.S.*, 291 F.2d 291 F.2d 262 (9th Cir. 1961), for example, a narcotics suspect was arrested on a traffic warrant. Upon being approached by the police, he deposited something in his

⁴ *Robinson v. U.S.* 283 F.2d 508 (D.C. Cir. 1960); *People v. Fiorito*, 19 Ill. 2d 246, 166 N.E.2d 606 (1960).

These issues have not been conclusively decided by the courts. Persuasive arguments can be made in both directions. In the last analysis, whether the strip searching is excessive or reasonable requires a choice between the plain utility for the purposes mentioned and the equally plain offensive intrusion they entail.

Whether the search was exploratory is a more complex problem. If the strip search is a routine matter, it is an indication that the police are motivated by a desire to protect the lives and property of prisoners and not to explore for evidence to support another, more serious charge than that for which the suspect was arrested.⁶ Paradoxically, the routine use of strip searches, which has a non-prosecutorial objective, is more compatible with "reasonableness of search" limitations than selective strip searching practices.⁷ In the occasional situation where a quantity of narcotics turns up in the course of a routine search, it could be said that the discovery was a fortuity and the evidence admissible under the general rule that permits the seizure of contraband when it is accidentally discovered.⁸

Reasoning of this sort, however, may find no favor in the courts, especially if the cases that bring strip searching to their attention are extreme situations demonstrating obvious abuse. An example appears in *Lucero v. Donovan*,⁹ a suit under the Federal Civil Rights Act stemming

mouth. One officer "applied pressure to the suspect's throat" and saw what appeared to be cigarette paper in his mouth. A second officer arrived and the suspect was thrown to the ground. While one officer "sat on his stomach [the other officer] . . . continued to choke him until his mouth opened" and a marijuana cigarette removed. The evidence was held inadmissible because the traffic arrest was a subterfuge for conducting an incidental search for narcotics, which was obviously unrelated to the traffic violation. See also *People v. Watkins*, 191. 2d 11, 153 N.E. 2d 253 (1960), *Agnello v. U.S.*, 269 U.S. 20, 30 (1925) and *People v. Cona*, 180 Mich. 641, 147 N.W. 525 (1914).

⁶ Searches that can be characterized as "exploratory" or as "fishing expeditions" are prohibited. *U.S. v. Lefkowitz*, 285 U.S. 452 (1932).

⁷ There is ample indication that when the searching activity is motivated by a desire to enforce civil regulations, like health and building inspections, and not to build a criminal case, the search will be upheld. *Frank v. Maryland*, 359 U.S. 360 (1959), and *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960).

⁸ *U.S. v. Charles*, 8 F.2d 302 (N.D. Cal. 1925) where it is stated that, in the absence of a search that is a mere pretext, the seizure of contraband is not only legal but also mandatory when it is in "plain view" during a search for another item. See also *Abel v. U.S.*, 362 U.S. 217 (1960) and *Harris v. U.S.*, 331 U.S. 145 (1947).

⁹ 354 F.2d 16 (9th Cir. 1965).

from an unlawful arrest and search, including abusive treatment at the police station. The plaintiff, a female, was detained on a narcotics charge and instructed by a police matron to remove her clothes, to squat, lean forward, and pull her own buttocks apart for a visual check for narcotics. She refused. Two policemen were then summoned to hold the prisoner down while the matron removed her clothes. The plaintiff alleged further that the male officers made deprecating remarks about her nude body as she lay weeping on the floor. No contraband was found and no criminal charges were filed. (The district court's directed verdict for the defendant officers was reversed on appeal and the case remanded for jury consideration.)

It would not take many episodes such as this to persuade the courts in favor of unqualified prohibitions against strip searching, regardless of purpose. No doubt, the courts would be inclined to suppose that the cases typically coming before them were those typically occurring in the police station. Possibly, the courts would consider it beyond the purview of their responsibility to consider the consequences of a prohibition on body searches upon the safety of jail inmates. Possibly, too, the end result of such a rule would be that the police as a general rule would conduct searches but then drop charges. It is not clear how this would advance the objectives of the search and seizure limitations.

RETRIEVING OBJECTS FROM BODY CAVITIES

The body cavity most frequently used to hide or destroy evidence is the mouth. In the situation when the police approach a suspect either to arrest or to question him, the suspect caught with contraband puts it in his mouth. In these circumstances the police usually act fast. If these small items are to be retrieved before they are swallowed, there is no alternative to physical force, usually choking.

Guidelines for determining the lawfulness of choking a suspect are not easily stated, and the courts have faced the problem with irresolution. On the one hand, courts are sensitive to choking episodes. The view has been taken, for example, that the question "is not how hard the officers may choke a suspect but whether he may choke him at all."¹⁰ On the other hand, emphasis is

¹⁰ *People v. Martinez*, 130 Cal. App. 2d 54, 56, 278 P.2d 26, 27 (1955). The police, suspecting the defendant of carrying narcotics, followed him; when they

sometimes placed on the proposition that "suspects have no constitutional right to destroy or dispose of evidence" despite what are obviously extreme measures to retrieve the evidence.¹¹

The difficulty of balancing these divergent attitudes is reflected in the way courts have strained in rationalizing their decisions. For example, when an officer "placed his hand on the defendant's throat and with his thumb pushed sideways" the court found the officer's conduct "entirely reasonable to prevent . . . the defendant . . . from disposing of evidence".¹² In further support of this position the court agreed with the trial judge's determination that there was, in fact, no choking because the suspect "was able to breathe, did not gasp for breath or cry out in pain, and his face did not turn color".¹³ Another rationalization used to support the choking of an arrestee is that police officers, when confronted with the possibility of the destruction of evidence in the suspect's mouth, are indulging in a "natural reaction" in order to preserve incriminating evidence.¹⁴

Although not frequently expressed, a final reason for granting some leeway to the police in preventing the suspect from swallowing evidence is that, once swallowed, the evidence, if soluble, is lost for all practical purposes. Retrieving some items from the stomach or intestinal tract before they decompose means resort to the forcible introduction of emetics or laxatives. The judicial choice, then, is in practical terms, one between oral emetics and intestinal ones, or else nullification of any effective police measures to prevent digestion of the evidence.

The courts are significantly more restrictive in

approached his car he put something in his mouth. One of the officers placed a "choke hold" on the defendant's neck, and they fell to the ground where Martinez spit out a package of narcotics. The court rejected the evidence because it was obtained by methods both brutal and shocking.

¹¹ *People v. Brinson*, 12 Cal. Rep. 625 (1962).

¹² *People v. Sanchez*, 11 Cal. Rep. 406, 411 (1961).

¹³ *Id.* at 409, and also cases cited therein at 411.

¹⁴ *Commonwealth v. Tunstall*, 78 Pa. Super. 359, 115 A.2d 914, 916 (1955). Police observed the suspect sitting in his car. When they approached he put something in his mouth. One of the officers put his arm around the defendant's neck and used force to take some slips of paper from his mouth. The papers were policy (gambling) slips. In allowing the evidence the Court concluded that it ". . . was not obtained as the result of any procedure which shocks the conscience or violates appellant's fundamental constitutional rights. The conduct of the police officer was the natural reaction to appellant's attempt to destroy incriminating evidence."

their approach to the, forcible introduction of emetics than they are with choking to obtain contraband. This attitude, too, has its paradoxes. In practice, use of emetics involves less force than choking. The police normally attempt to get the suspect's consent to taking an emetic by pointing out, for example, that the toxic effect of the contraband, usually narcotics, will cause serious injury or death unless immediately regurgitated.¹⁵ However, forcible administration of emetics is resorted to in narcotics cases because the contraband is soluble and thus easily lost in the digestive tract. Alternatively, the practice is to maintain surveillance over the suspect so that an insoluble object, such as a piece of jewelry, can be obtained after a natural bowel movement. Whatever invasions of privacy such surveillance involves, the practice is highly desirable from the standpoint of insuring the admissibility of the evidence obtained.

Forcibly administering either emetics or laxatives calls for harsh measures. An example appears in *Willis v. U.S.*¹⁶—one of the first notable decisions on the subject. The suspect swallowed a packet of narcotics. He was arrested, handcuffed, and taken to a hospital. There his arms and legs were strapped to a table, his jaws forced open, cotton pads forced between his teeth, and his nostrils stopped up to keep his mouth open so a tube could be forced down his throat and an emetic introduced. He vomited up a packet of narcotics. In rejecting the evidence thus obtained as an unreasonable search and seizure under the Fourth Amendment, the court, in a rather extreme

¹⁵ In *United States v. Michel*, 158 F. Supp. 34 (S.D. Tex. 1957) two narcotics suspects were picked up at the Mexican border and admitted that they had swallowed rubber containers of narcotics. A doctor explained the hazards of these containers rupturing. Both agreed to a dose of castor oil. Later one agreed to a dose of epsom salts, whereupon he vomited up the narcotics. The other, while handcuffed to a stationary object in the room from twenty minutes to one hour (despite the frequent need to visit the rest room), agreed to taking epsom salts. Later he passed the narcotics through his alimentary canal. The search was upheld.

The situation may arise where a suspect consents to an emetic, enema, or laxative because of false or misleading statements regarding the danger of the item swallowed. In this event courts may regard the admonitions as fraudulent inducements that vitiate consent, as they have done where consent was induced by the production of a fictitious warrant, *Gatewood v. United States*, 209 F.2d 789 (D.C. Cir. 1953), or when the officer, in order to gain access to a still, falsely told the suspect, "the boss sent me down to fix the still". *United States v. Reckis*, 119 F. Supp. 687, 689 (D. Mass. 1954).

¹⁶ *U.S. v. Willis*, 85 F. Supp. 745 (S.D. Cal. 1949).

analogy, reasoned that "... if the stomach pump can be justified, then the opening of one's person by the surgeon's knife can be justified. . . . [I]f a search such as was made in the instant case may be approved, would it not likewise follow that if the narcotics, after being swallowed, had passed into the blood stream, some officers might feel it incumbent upon them to drain the defendant of part of his life blood in an effort to discover the hidden narcotics?" This case is similar to *Rochin v. California*, with its oft-quoted language that such tactics were so brutal and offensive as to "shock the conscience" of the court.¹⁷

"Shocking the conscience" may be an adequate guideline in searches in cases such as *Willis* and *Rochin* but it provides little guidance for the wide range of searches of lesser vigor.¹⁸ The forcible probing of a suspect's rectum, for example, apparently does not engender nearly the shock or qualms of conscience that are aroused from the police tampering with a suspect's stomach. In what is almost exclusively a narcotics traffic problem, the rectal probe is initiated when a narcotics suspect is examined for a telltale greasy substance around his anus or by the use of X-ray or fluoroscope to detect the presence of foreign objects in the large intestine.

The case most clearly establishing the lawfulness of a forcible rectal probe in these circumstances is

¹⁷ *Rochin v. California*, 342 U.S. 165 (1952). Three deputy sheriffs "having some information that Rochin was selling narcotics" unlawfully broke into his house. Rochin was seated on the bed only partially dressed. The officers were about to seize two capsules lying on the bedside table when Rochin thrust the capsules into his mouth. One of the officers grabbed Rochin's throat in an effort to keep him from swallowing—to no avail. He was handcuffed, rushed to the nearby hospital, and strapped to a table while a physician forced an emetic solution through a tube into his stomach. This "stomach pumping" procedure produced the capsules which were shown to contain narcotics and which were admitted as the chief evidence against Rochin in a prosecution for possession of narcotics contrary to the California Health and Safety Code. The Supreme Court granted certiorari on the grounds that a serious question was raised as to the due process limitations in a state criminal proceeding.

Justice Frankfurter's majority opinion held that the police methods employed in securing the evidence against Rochin "did more than merely offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. Rather the consummation of the search was so brutal as to approach the techniques of the 'rack and screw.' The conviction was brought about by a method which 'shocks the conscience' and 'offends a sense of justice.'"

¹⁸ Bachelder, *Use of Stomach Pump as Unreasonable Search and Seizure*, 41 J. CRIM. L., C. & P. S. 189, 191 (1950-1951).

Blackford v. United States.¹⁹ Here the suspect was stopped at an international boundary line in California by customs officers and asked to remove his coat.²⁰ Numerous puncture marks were revealed in the veins of his arms. Inspectors then directed the defendant to remove his clothes entirely, whereupon they noticed a large quantity of greasy substance around his anus; the defendant admitted that he had heroin concealed there. He was taken to the U. S. Naval Hospital where he then denied the concealment and resisted a rectal probe. The heroin was forcibly removed by medical personnel. The search was upheld as similar searches have been where there was a valid arrest and where there is clear evidence that contraband is present in a body cavity.²¹

Several considerations may help explain why the courts are less offended by a rectal probe or enema than by stomach pumping or the administration of an emetic. As to the element of pain that may be involved, the courts weigh this aspect of a cavity search against the overall conduct of the suspect. While characterizing a rectal probe as a "disgusting sequence",²² courts have no great difficulty, apparently, attributing the necessity for it to the defendant's choice of an equally disgusting repository in the first place. Conventional morality may thus supply the formally missing premise of distinction. This attitude appears to extend also to the suspect who resists a rectal probe, causing some degree of pain and the possibility of physical injury. The courts are not willing to place a premium on the suspect's violent resistance, especially if he is in all other respects treated

¹⁹ 247 F.2d 745 (9th Cir. 1957). See also Note, *Evidence Forcibly Removed from Body Cavity Admissible in Federal Court*, 58 COLUM. L. REV. 565 (1958).

²⁰ Note, 106 U. PA. L. REV. 1165 (1958); *Blackford v. U.S.*, 247 F. 2d 745 (9th Cir. 1957). Law enforcement problems of this sort occur most frequently in areas noted for narcotics smuggling, such as the Mexican border where it is estimated that 20% of the narcotics smuggled in are hidden in body cavities.

²¹ Application of Woods, 154 F. Supp. 932 (N.D. Cal. 1956); *In re Guzzardi*, 84 F. Supp. 294 (N.D. Tex. 1949); *Murgia v. U.S.*, 285 F.2d 14 (9th Cir. 1960) *Ng Pu Yu v. U. S.*, 352 F.2d 626 (9th Cir. 1965); *King v. U.S.*, 348 F.2d 814 (9th Cir. 1965).

See, however, Note, 106 U. PA. L. REV. 1165 (1958), where it is suggested that a search warrant should issue before an internal bodily search is made even though it is performed in connection with a lawful arrest. It would insure that the procedure would be performed in a clinical fashion by authorized personnel and it would lessen the possibility of abuse by over-enthusiastic officers.

²² *Blackford v. U.S.*, 247 F.2d 745, 754 (9th Cir. 1957) (concurring opinion).

civily. Pain in such circumstances indeed has been termed "self-inflicted".²³ In further support of this position, the courts point out that a rectal probe "is an uncomplicated and non-hazardous procedure";²⁴ with regard to the administration of an enema, courts have indicated that it is "a very normal and natural thing to do".²⁵

Emphasis has been placed, moreover, on the fact that the contraband in the body cavity may cause serious injury to the suspect unless promptly removed. Testimony by medical experts as to the likelihood of this eventuality has been used to substantiate the use of force. A final point of emphasis is the court's willingness to analogize a cavity probe to forcing a suspect "with narcotics in a clenched fist to open his hand"²⁶ or cutting the stitches of the suspect's clothing to recover contraband contained therein.²⁷

The considerations emphasized in justifying rectal probes were, in the recent case of *Blefare v. United States*,²⁸ applied to induced vomiting, demonstrating that there is, or should be, no sound basis for the difference in the judicial attitude toward choking, probing, or administering an

enema, on the one hand, and administering an emetic on the other. The distinction between the *Rochin* and the *Blefare* cases lies in the total police conduct in handling the suspects. This includes the time and place of the initial apprehension and the basis for probable cause not only to arrest but also to believe the contraband was in the suspect's stomach.

Upon superficial reading, the ruling in *Rochin* seems to be that the procedures necessary to pump a stomach by force are sufficiently repugnant to violate *per se* the Fourth or Fourteenth Amendments. Such a reading, however, may be naive because of other aggravating factors attending the *Rochin* search. Thus, the court referred to the unlawful entry into *Rochin's* dwelling and the forceful methods employed to prevent him from swallowing the item only suspected to have been narcotics. Had the suspect been arrested legitimately and had there been adequate proof that he in fact swallowed narcotics, as in the rectal probe cases,²⁹ the courts, as in *Blefare*, will give greater weight to the proposition that the Constitution in no way gives a suspect the right to use his body as a sanctuary for contraband.

²³ *Id.* at 752. Also, Application of Woods, 154 F. Supp. 932 (N.D. Cal. 1957). The court held in a situation involving a rectal probe that the *Rochin* test was not controlling. "If judicial sensitivity is to be aroused in the instant case, the source of shock lies not in the efforts of the law enforcement officers, but rather with the deranged conduct of petitioner".

²⁴ *Blackford v. U.S.*, 247 F.2d 745, 752 (9th Cir. 1957).

²⁵ *Ash v. State*, 139 Tex. Crim. 420, 422, 141 S.W. 2d 341, 343 (1940).

²⁶ *Blackford v. U.S.*, 247 F.2d 745, 754 and 753 (9th Cir. 1957) (concurring opinion).

²⁷ *Ash v. State*, 139 Tex. Crim. 420, 422, 141 S.W. 2d 341, 343 (1940). The police apprehended the defendant attempting to pawn some stolen rings and observed him put something in his mouth and swallow. Over the defendant's objections, the Court admitted the evidence which had been obtained by an enema-induced bowel movement. In its opinion the Court said, "If the rings had remained in defendant's mouth they [the police] would have had as much right to search his mouth and secure the rings as if they were in his pockets." He swallowed them "... which warranted them in continuing their search." On rehearing, the same Court asked: "Could it be said that if a thief has stolen property, sewed it up in his pocket, or in the lining of his coat, that the officers would have no right to cut the stitches or even to injure his clothing for purposes of legal search?"

²⁸ 362 F.2d 870 (9th Cir. 1966). Two men, suspected of smuggling narcotics across the border, were lawfully arrested; additional evidence indicated that they probably had swallowed the contraband. With the assistance of police, a doctor forcibly introduced an emetic. The packets of narcotics were vomited up. The court held this search to be reasonable and therefore lawful.

OBTAINING BODY FLUID OR BREATH FOR ANALYSIS IN DRUNK DRIVING CASES

Forty states have chemical test laws, providing that fifteen hundredths of 1: per cent (0.15 per cent) of alcohol in the blood of a suspect is *prima facie* evidence of his intoxication.³⁰ The extent to which the police use force in extracting the blood or capturing the breath of drunk-driving suspects for chemical analysis is not clear, although there is some indication that seldom is there a resort to

²⁹ In *Blackford*, *supra*, note 22, the suspect told the officers he had deposited narcotics in his rectum. Furthermore, the officer noticed a greasy substance around his anus. In *Ash*, *supra* note 25, the presence of the ring in the suspect's lower intestinal tract was made unmistakably clear by an X-ray. In *U.S. v. Michel*, 158 F. Supp. 34 (S.D. Tex 1957), a fluoroscope revealed the foreign object in the suspect's intestine.

³⁰ The 1962 version of the Uniform Vehicle Code, published by the National Committee on Uniform Traffic Laws and Ordinances, provides that 0.10% of alcohol in the blood establishes a *prima facie* case, but only three states, Vermont, North Dakota, and North Carolina, have adopted this change. Committee on Alcohol and Drugs, National Safety Council, *Uses of Chemical Tests for Intoxication*, 1964. Breath analysis is accomplished by the use of the Harger Drunkometer, the Breathalyzer, the Alcometer, or the Intoximeter. See DONIGAN, CHEMICAL TESTS AND THE LAW 91-98 (2d ed. 1966).

force.³¹ Some states, such as Michigan, prohibit the use of physical force as a means of obtaining body fluid or breath, by providing that blood alcohol tests must be submitted to voluntarily and in writing.³²

Several states have adopted "implied consent" laws as a means of inducing drunk-driving suspects to submit to blood alcohol tests. The principle underlying this type of law is that, as a condition to the privilege of using the state highways, the driver is deemed to have given his consent to a chemical test following a valid arrest for drunk driving; should the arrestee refuse the test, his operator's license will be automatically suspended.³³ These provisions are designed to obviate the need for physical force by providing other inducements. Whether they adequately serve this function is not altogether clear.

There is some evidence that implied consent laws have not provided sufficient inducement, as exemplified by a large number of refusals occurring in large cities in states that have such laws.³⁴ On the other hand, some states, after adoption of

³¹ The National Safety Council reports that the percentage of drunk-driving arrestees refusing to submit to a blood alcohol test runs as high as 92% in Cleveland, 80% in Mobile, and 73% in Baltimore. Committee on Alcohol and Drugs, National Safety Council, *Uses of Chemical Tests for Intoxication*, 1964.

³² MICH. STAT. ANN. § 9.2325 (1960). The authorities seem to be in agreement that consent is valid even though the person giving it may be under the influence of intoxicating liquor. *Halloway v. State*, 146 Tex. Crim. 353, 173 S.W.2d 258 (1943); *Guenther v. State*, 153 Tex. Crim. 519, 221 S.W.2d 780 (1949); *Bowden v. State*, 95 Okla. 221, 246 P.2d 427 (1952); *People v. Quarles*, 123 Cal. App. 2d 1, 266 P.2d 68 (1954); *Ray v. State*, 233 Ind. 495, 120 N.E.2d 176 (1965). "The solution to this perplexity rests in the fact that a person under the influence of intoxicating liquor, as defined by the penal code, need not be so intoxicated as to be incapable of entering into a valid agreement, and yet be sufficiently intoxicated to come within the statute. . . ." *Jones v. State*, 159 Tex. Crim. R. 29, 261 S.W.2d 161 (1953), *cert. denied*, 346 U.S. 830 (1953). "A motorist may be mentally or physically unfit to operate a motor vehicle due to the excessive consumption of alcoholic beverages and yet his ability to comprehend his surroundings and what goes on will be sufficient in the eyes of the law to permit his valid consent to a chemical test of his breath or body fluids." *DONIGAN, CHEMICAL TESTS* 145 (1st. ed. 1957).

³³ See, UNIFORM VEHICLE CODE, §6-205.1. States adopting this code in substance are: Connecticut, Idaho, Iowa, Kansas, Minnesota, Missouri, Nebraska, New York, North Carolina, North Dakota, Oregon, South Dakota, Utah, Vermont, and Virginia.

³⁴ In Minneapolis, Minnesota, in 1964, 1251 tests were offered and 537 were refused. In Wichita, Kansas, 786 tests were offered and 194 refused. In Kansas City, Missouri, 2827 tests were offered and 1692 refused. Committee on Alcohol and Drugs, National Safety Council, *Use of Chemical Tests for Intoxication*, 1964.

implied consent laws, have estimated that submissions to blood alcohol tests have substantially increased. A statement by James P. Hayes, Deputy Commissioner of the Department of Public Safety for the State of Iowa, is typical: "We have no exact figures on the number of refusals to take chemical tests before the statute was passed; however, our best estimation and reports from the field indicate that there were many more refusals before the law was enacted". The state of New York, which was the first to adopt an implied consent statute, reports that overall refusals for both state and municipal enforcement agencies average only about 20 per cent. A comparison of New York figures with those of states that have not adopted an implied consent law is strong support in favor of the legislation.

When force is used, however, the question of its legality turns on whether it is unreasonable under the Fourth Amendment.³⁵ Standards for reasonableness are construed in light of traditional procedures of search incident to arrest. Analogies, for example, have been drawn between taking blood samples and the taking of fingerprints or the removal of objects from the pockets of a person under arrest.³⁶ In any event a valid arrest is a necessary prerequisite.³⁷

³⁸ The United States Supreme Court has upheld the taking of blood from an unconscious drunk-driving suspect³⁸ and, more recently, from a suspect over his clear objection on advice of counsel.³⁹ The fact that actual physical force is used is clear from decisions upholding the police actions, which obviously involve something more than the simple insertion of a hypodermic needle,⁴⁰ or simply

³⁵ The Supreme Court has recently held that taking a blood sample is not testimonial compulsion that is prohibited by the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757 (1966).

³⁶ *Davis v. State*, 189 Md. 640, 57A.2d 289 (1948). The "search of the pockets" parallel was used by the California Supreme Court when it concluded that search of the blood for evidence of intoxication is analogous to a search of a man's pockets incident to his arrest and that if a search of the pockets would be valid so would extraction of blood for intoxication tests. *People v. Duroncelay*, 48 Cal. 2d 766, 312 P.2d 690 (1957).

³⁷ *State v. Kroening*, 74 Wis. 266, 79 N.W.2d 810 (1956).

³⁸ *Breithaupt v. Abrams*, 352 U.S. 432 (1957).

³⁹ *Schmerber v. California*, 384 U.S. 757 (1966).

⁴⁰ The extraction technique was deemed reasonable, for example, when the suspect "drew his arm away when the nurse first attempted to insert the needle and . . . the ambulance driver held his arm while the nurse extracted the blood. . . ." *People v. Duroncelay*, 48 Cal. 2d 766, 769, 312 P. 2d 690, 692 (1957).

holding a suspect's head to capture his breath.⁴¹ Decisions permitting the use of force are bolstered by the argument, sometimes made explicit⁴² but more often implicit, that law enforcement agencies must be given the power to cope with the ever increasing death and injury toll on the highways, much of which is due to drivers under the influence of alcohol.⁴³

The recent Supreme Court case of *Schmerber v. California*⁴⁴ holds that states may impose reasonable forms of compulsion upon drivers lawfully arrested for drunk driving. But in light of the language used in *Schmerber*, it cannot be categorically stated that physical force is permissible in all situations. Police actions may run afoul of the admonition that, while the court would permit "minor intrusions into an individual's body under stringently limited conditions",⁴⁵ more substantial intrusions or intrusions under other conditions may not be permitted. It hardly need be said that this language falls short of the precision required for an adequate administrative directive to the police.

The power of the police to use force in capturing

⁴¹ *State v. Berg*, 76 Ariz. 96, 259 P.2d 261 (1953). The court held, *inter alia*, that defendant's person had not been violated. Said the court: "He was not forced to exhale breath from his lungs. He exhaled it voluntarily and in fact of necessity in order to survive. The moment his breath passed his lips it was no longer his to control but became part of the surrounding atmosphere which was equally free for use by anyone present within the orbit of its immediate circulation." The court indicated the result may have been different had the officers forced the suspect to exhale. See also *People v. Kiss*, 125 Cal. App. 2d 138, 269 P.2d 924 (1954), where there was conflicting evidence that the police officer struck the suspect in the stomach and that he took the test because of fear of further punishment. The Court allowed the evidence "conceding that violence was applied" because the results of the test would be excluded only where the accused "is by threats and punishment so terrorized into submission that to admit it would be a mockery and a pretence of a trial".

⁴² *Breithaupt v. Abrams*, 35 U.S. 432, 436 (1957).

⁴³ It has been estimated that as many as half of the almost 50,000 fatal vehicle accidents involve drivers who have been drinking alcoholic beverages. *Alcohol Involvement in Traffic Accidents, Accident Facts*, 1965 Annual Statistical Report of the National Safety Council.

⁴⁴ Note 39, *supra*.

⁴⁵ These conditions include extractions involving "no risk, trauma, or pain," and where "fear, concern for health, or religious scruple" are not present. *Schmerber v. California*, 384 U.S. 757, 771 (1966). The Court also indicated that the taking of blood may not be lawful if "The police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force".

body fluid also has practical limitations. Blood must be taken in accordance with clinical procedures, which means that a doctor or medical technician must perform the task. Finding a doctor willing to take blood over the suspect's objection may be an obstacle formidable enough to discourage the police from using blood alcohol tests. The advice given doctors by the legal department of the American Medical Association is not to engage in any act of medical practice, including the taking of blood, without the patient's consent. The point of primary concern to doctors is that the police directive to take blood or probe a cavity may not be based on adequate probable cause, hence resulting in civil liability for the doctor.⁴⁶ One state has legislation granting doctors immunity from civil liability for taking blood upon request by a police officer.⁴⁷

The use of physical force in the administration of blood alcohol tests would present a lesser problem if there were wider use of the so-called implied consent approach. The apparent reluctance to adopt the approach can be attributed to two factors. First, it is a relatively new concept.⁴⁸ Second, some states have imposed so many administrative restrictions and limitations upon the conduct of chemical tests called for in the standard implied consent law that the police hesitate to apply them.⁴⁹ It is in these states that the results of this law have been disappointing.

These problems can and should be overcome. The adoption of implied consent laws should in-

⁴⁶ This position of the American Medical Association was stated by Mr. Richard P. Bergan, Director of Legal Research, Law Division, the American Medical Association, in an interview with the authors.

⁴⁷ N.Y. VEHICLE AND TRAFFIC LAW, §1194 *id.*

⁴⁸ The term "consent" seems out of place in that the traditional concept of the term, generally applicable to search and seizure situations, requires that there be no coercion and that the consent must be "freely given." *Amos v. U.S.*, 255 U.S. 313, (1921); *Judd v. U.S.*, 190 F.2d 649, (D.C. Cir. 1951); *Ray v. U.S.*, 84 F.2d 654 (5th Cir. 1936); *Holt v. State*, 17 Wis. 2d 465, 117 N.W.2d 626 (1962). The threat of suspension of an operator's license, no matter how construed, smacks of coercion.

⁴⁹ For example, in Vermont a chemical test cannot be given to an unconscious suspect. The suspect must be given the opportunity to refuse to take the test and also be given an option as to which of three forms of testing he would prefer. In any test a sample must be provided to the suspect for analysis by his own physician if he so desires. See, T.23 §1188-1194, VERMONT ANN. STAT.

Some states have weakened their implied consent laws in other ways. For example, North Carolina has no provision for the automatic suspension of operator's licenses, but a refusal to take the test will be admitted as evidence in court. N.C. GEN. STAT. §20-16.2 (1965).

clude strict enforcement of suspension of operator's licenses and provision for greater use of the suspect's breath as a means of measuring the amount of alcohol in his blood. This would eliminate many of the problems raised by the blood-alcohol approach. Finally, the states should draft implied

consent laws that are free of the numerous restriction and limitations which now render them ineffective as a law enforcement tool. In short, the states would be wise to adopt a law closely related to the implied consent provision of the Uniform Vehicle Code.