

1955

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### Recommended Citation

Jack B. Weinstein, Statute Compelling Submission to a Chemical Test for Intoxication, 45 J. Crim. L. Criminology & Police Sci. 541 (1954-1955)

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## STATUTE COMPELLING SUBMISSION TO A CHEMICAL TEST FOR INTOXICATION

JACK B. WEINSTEIN

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In 1953 New York State enacted the first statute in this country requiring drivers to submit to a chemical test for intoxication.<sup>1</sup> Reaction both within and without the state has been generally favorable and, indeed, the Council of State Governments has used it as a model, recommending its adoption by other states.<sup>2</sup> On the basis of a year's experience with the law in the courts and in the field, New York has recently approved a number of amendments.<sup>3</sup> As a result, there is now available to any state willing to adopt it a powerful weapon against the intoxicated driver.<sup>4</sup> It is the purpose of this paper to explain some of the statute's merits and defects.<sup>5</sup>

### I. STATUTE

1. Any person who operates a motor vehicle or motor cycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition and in accordance with the rules and regulations established by the police force of which he is a member. If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical

<sup>1</sup> New York Laws 1953, ch. 854, NEW YORK VEHICLE AND TRAFFIC LAW, §71-a.

<sup>2</sup> THE COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, PROGRAM FOR 1954, 38-39 (1953); THE COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, PROGRAM FOR 1955, 61-62 (1954).

<sup>3</sup> New York Laws 1954, ch. 320.

<sup>4</sup> Within a month after the law became effective in 1953, the New York Automobile Club sent questionnaires to forty-six police departments in the state. Thirty-three responded. Of these eight had used the test before enactment of the statute, eighteen had started or planned to start the tests after enactment, seven were considering using them and one had decided not to use them. NEW YORK MOTORIST, Sept. 1953, p. 2, col. 1.

<sup>5</sup> It will be assumed that chemical tests for intoxication have considerable evidentiary value. "Intoxicated" rather than the more desirable "under the influence" will be used to conform to New York's law. For a selected Bibliography on the subjects see NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON MOTOR VEHICLE PROBLEMS, CHEMICAL TESTS FOR INTOXICATION, 39-40 [N. Y. Leg. Doc. (1953) No. 25, pp. 39-40]. In addition to the continued flow of periodical comments, see generally the authoritative study by TURNER ET AL., "EVALUATING CHEMICAL TESTS FOR INTOXICATION" (Committee on Tests for Intoxication, National Safety Council, Chicago, 1952) and PROCEEDINGS OF THE SECOND INTERNAL CONFERENCE ON ALCOHOL AND ROAD TRAFFIC, which will be published shortly.

test the test shall not be given but the commissioner shall revoke his license or permit to drive and any nonresident operating privilege; provided, however, the commissioner shall grant such person an opportunity to be heard but a license, permit or nonresident operating privilege may, upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition and that said person had refused to submit to such test, be temporarily suspended without notice pending the determination upon any such hearing. The provisions of subdivisions five and six of section seventy-one of this law shall be applicable to revocations under this section.

2. Upon the request of the person who was tested, the results of such test shall be made available to him.

3. Only a physician acting at the request of a police office can withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen.

4. The person rested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.<sup>6</sup>

<sup>6</sup> The 1954 amendments are discussed in detail below. They made the following changes: substitution of "believe such person to have been driving . . ." for "suspect such person of driving . . ."; addition of the language "and in accordance with the rules and regulations established by the police force of which he is a member" after "intoxicated condition" and of "having been placed under arrest and having thereafter been requested to submit to such chemical test" after "such person"; addition of the limitation from "provided" to "section" at the end of subsection 1; and deletion of the words "duly licensed" which formerly appeared before "physician" in subsection 3.

The Council of State Governments has, in its Suggested State Legislation for 1955, used the New York statute as a model but it has made a number of changes which will be discussed in the footnotes below. The text of the Council's bill is set out in its 1954 report, op. cit., supra, note 2 at pages 61-62. It reads as follows:

*Section 1.* Any person who operates a motor vehicle upon a public highway in this state shall be deemed to have given his consent to submit to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood whenever he shall be arrested or otherwise taken into custody for any offense involving operating a motor vehicle under the influence of intoxicating liquor and the arresting officer has reasonable grounds to believe that prior to his arrest the person was driving under the influence of intoxicating liquor. The test shall be administered at the direction of the arresting officer in accordance with rules and regulations which shall have been adopted by the [driver licensing authority]. If the person so arrested refuses a request to submit to the test, it shall not be given and the arresting officer shall make to the [driver licensing authority] a sworn report of the refusal, stating that prior to the arrest he had reasonable grounds to believe that the person was driving under the influence of intoxicating liquor. Upon receipt of the report, the [driver licensing authority] shall suspend for a period not exceeding [ninety] days the person's license or permit to drive or non-resident operating privilege and, after granting the person an opportunity to be heard on the issue of the reasonableness of his failure to submit to the test, the [driver licensing authority] shall revoke the person's license or permit to drive or non-resident operating privilege.

*Section 2.* Upon the request of any person submitting to a chemical test under this act, a report of the test shall be delivered to him.

*Section 3.* Only a physician or qualified medical technician acting at the request of the arresting officer can withdraw any blood of any person submitting to a chemical test under this act.

*Section 4.* Without limiting or affecting the provisions of sections 1-3 hereof, the person tested

## II. THEORY

The nucleus of the law is in subdivision 1 which declares that any person operating a motor vehicle in the state shall be deemed to have given his consent to a chemical test whenever the police believe him to have been driving while intoxicated. In an apparent paradox, it then provides that, although the driver has constructively consented to take the test, when the chips are down and he is actually apprehended he may renege on his imputed promise and refuse. Such a refusal is costly for it will result in the loss of his driver's license or nonresident operating privilege.

This seeming anomaly of free choice coupled with mandatory consent has a good deal of practical merit. On the one hand, freedom to refuse to take the test completely avoids the need to use physical force on the suspect; it prevents the unseemly struggle likely to arise when an intoxicated driver refuses to do what the police insist he is bound to do.<sup>7</sup> On the other hand, implied consent in advance, through the mere operation of a motor vehicle, avoids the difficult problem that might otherwise arise of the need for explicit consent from a heavily intoxicated person or one dazed—or indeed unconscious—from a crash.<sup>8</sup>

It is not these sound practical reasons, however, but the apparent theoretical advantage of this juxtaposition of mandatory consent with a free choice that has received primary attention and approval.<sup>9</sup> This device avoids, so the theory goes, any question about the driver's constitutional right to refuse to take the test. In the words of New York State's Joint Legislative Committee on Motor Vehicle Problems

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shall have a reasonable opportunity to have an additional chemical test by a physician of his own choosing.

Section 5. [Insert effective date.]

Puerto Rico has adopted a chemical test law patterned upon New York's legislation.

Puerto Rico has adopted a chemical test law patterned upon New York's legislation. Puerto Rico Laws, 1954, No. 95, Puerto Rico Law of Automobile Transit Act 13 §§3-7.

<sup>7</sup> If the stomach pumping case, *Rochin v. California*, 342 U. S. 165 (1952) stands, as it appears to, for the proposition that it is brutal rather than refined coercion, that it is obnoxious to due process, then it becomes vital to avoid this struggle. Cf., e.g., Falknor, *Evidence*, 1953 ANNUAL SURVEY OF AMERICAN LAW 755, 762-765. The statute side-steps the danger inherent in *Rochin* of "putting a premium on resistance rather than cooperation" pointed out by RAUSENBUSH in his Note, *Constitutionality in Wisconsin of Compulsory Scientific Tests for Intoxication*, [1953] WIS. L. REV. 351, 359. Cf. *United States v. Nesmith*, 121F.Supp. 758,762 (D.C.D.C., 1954).

<sup>8</sup> E.g., LADD & GIBSON, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 IOWA L. REV. 191, 241-243 (1939); Note, *Use of Chemical Tests to Determine Intoxication—Self-incrimination*, 30 N. C. L. REV. 302, 308-309 (1952); WEINSTEIN, *Some Thoughts on Legislation, Alcohol and Drivers in the United States*, text and footnotes 22-25, 28, PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE ON ALCOHOL AND ROAD TRAFFIC, *op. cit. supra* note 5; but cf. *Olberding v. Illinois Central R. Co.*, 346 U. S. 338, 341 (1953).

<sup>9</sup> E.g., THE COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 2; Note, *Validity of New York Statute Selling out Motorists' Implied Consent to Chemical Tests for Intoxication*, 51 Mich. 1195 (1953). For a discussion antedating New York's statute which approved this approach but evidently did not consider the refinement of permitting the driver to exercise his future freedom not to drive both when he applied for his license and when he was picked up by the police, see, e.g., MAMET, *Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication*, 36 J. CRIM. L. & CRIMINOL. 132 (1945).

which developed the legislation, "the accused is given the choice of waiving his [constitutional] right . . . —assuming such a right exists—or losing the privilege to continue driving on our highways.<sup>10</sup> In short, the rationale is that we avoid all constitutional issues by calling the opportunity to drive on our roads a "privilege" instead of a "right," and then conditioning the grant of this privilege upon the renouncing of any constitutional right to resist taking the test.

It seems particularly surprising to find the Committee attempting to avoid constitutional questions through euphemistic juggling of the words "right" and "privilege" since it had already summarized in detail the possible constitutional objection to making the test mandatory—i.e., self-incrimination, unreasonable search and seizure, and lack of due process—and found them untenable.<sup>11</sup> Its approach raises two puzzling queries: First, if there is no legal objection to forcing a man to submit to the test—providing no violence is used<sup>12</sup>—why is a statute necessary at all? Second, if a statute is desirable, why justify it by talk of conditions and privileges? The answer to the first question lies partly in the difference between what a state *may* constitutionally do in the exercise of its police powers and what it *does* do and partly in the desirability of detailed protections against police abuse that can be more effectively worked out in the legislature than in the courts.<sup>13</sup> The answer to the second lies primarily in the need to obtain the votes of some legislators who, like many experts in the field of chemical tests, were not as convinced as the Committee of the soundness of its legal arguments.<sup>14</sup> This waiver formula had been approved by the courts in the

<sup>10</sup> NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON MOTOR VEHICLE PROBLEMS, *op. cit.* *supra* note 5, at 26.

<sup>11</sup> *Id.* at 19–23. Compare subsection 3 of the statute with the following Comment to Rule 25 of the Uniform Rules of Evidence: "Resistance to the forcible extraction of body fluids is not justified on the grounds of privilege against self-incrimination, but may be warranted on the ground of violation of the right of personal immunity, if proper safeguards, such as supervision by a physician, are not provided."

<sup>12</sup> *Supra* note 7.

<sup>13</sup> For a discussion of judicial self-abnegation in this area see WEINSTEIN, *op. cit.*, *supra* note 8, text and footnotes 37–38.

<sup>14</sup> "Because of the increasing interest and demand for making the taking of chemical tests compulsory, the following resolution was unanimously passed [by the Committee on Tests for Intoxication of the National Safety Council]:

"RESOLVED, that the Committee on Tests for Intoxication of the National Safety Council go on record as recommending to the various state legislatures that their drivers' license act be amended to provide that, as a condition precedent to a driver's license being issued by the state, an applicant for such a license shall be required to agree to take a chemical test in any case in which he is suspected of driving under the influence of intoxicating liquor and that refusal on his part in such case to submit to the taking of a specimen of his blood, urine, saliva or breath for chemical analysis to determine alcoholic influence shall be ground for automatic mandatory revocation of his license;

"BE IT FURTHER RESOLVED, that the above provision be incorporated in Act II of the Uniform Vehicle Code.

"The legal people on the committee were well agreed that the courts throughout the country would not uphold a chemical test statute making tests compulsory, but felt that since the courts have always held that driving is a privilege and not a right, they would uphold a provision such as the one suggested in the resolution because it is a condition governing the privilege of driving. We are notifying the National Committee on Uniform Laws and Ordinances of this committee action." TEST TASK, Nov. 1952, p. 2.

"hit and run" reporting statutes and in the "nonresident" service statutes, and it was available to soothe fears of invalidity.<sup>15</sup> That it would help serve this same function in the courts was shown in *Schutt v. MacDuff*, the first case challenging the statute, for Judge Eager of New York State's Supreme Court found that "The theory behind the statute is fundamentally sound. . . ."<sup>16</sup>

Despite this approval, there is a good deal of doubt about whether any bona fide constitutional problem is really solved by an indirect approach using a theory of conditions.<sup>17</sup> The constitutional test for conditioning the exercise of a right or privilege—call it what you will—ought to be basically the same as the constitutional test for directly limiting the exercise of that right or privilege under the state's police powers. Where there is a threat to general safety, the state may act even at the cost of impinging on the liberties of individuals. But the action must relate directly to the danger threatened and the threat must be weighed against the right affected. The added consideration given to the individual may not be as great in the case of conditions as in the case of threatened imprisonment, but only because the nature of the compulsion is not as harsh. Certainly, however, in our modern society, a threat to deprive a person of the opportunity to drive constitutes a powerful sanction.

Thus, like all other legislation based on police powers of the state, this statute raises a number of basic questions: First, whether maintaining the safety of the highways is directly connected and germane to the exclusion from those highways of intoxicated drivers. As to this, the answer is clearly Yes. Second, whether the statute aids appreciably in controlling these drivers. The experience in New York indicates that it does.<sup>18</sup> What is not conceded by all is the answer to the third, and final, question: Whether the menace of the intoxicated driver in any state is great enough to warrant an incursion of the liberty of all drivers by requiring them to agree in advance to submit to a chemical test whenever requested by the police to do so.

<sup>15</sup> See, e.g., NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON MOTOR VEHICLE PROBLEMS *op. cit. supra* note 5 at 25-26; MAMET, *op. cit. supra* note 9, at 143-145; but *cf.* *Olberding v. Illinois Central R. Co.*, *supra* note 8, 346 U. S. 338, 341 (1953).

<sup>16</sup> 205 Misc. 43, 127 N. Y. S. 2d 116, 122 (Sup. Ct., Orange County 1954). As appears below, he declared the statute unconstitutional because it failed to require a hearing and it was amended to meet his objection.

<sup>17</sup> See, e.g., *Wall v. King*, 206 F., 2d 878, 882 (C.A. 1st. 1953), *Cest. den.*, 346 U.S. 915; *Parker v. Lester*, 112 F. Supp. 433 (1953); see also HALE, *FREEDOM THROUGH LAW* (1952) p. 301; DAVIS, *The Requirements of Opportunity to be Heard in the Administrative Process*, 51 YALE 1093, 1118-1125 (1942); WEINSTEIN, *op. cit. supra* note 8, text and footnotes 30-32; BEST, Note, *Civil Liberties and Chemical Tests For Intoxication*, 17 ALBANY L. REV. 258, 265 (1953); Johnston, *The Administrative Hearing for the Suspension of a Driver's License*, 30 N.L.L.Rev. 27 (1951), but *cf.* e.g., *Bailey v. Richardson*, 182 F. ed 46, 61 (C.A.D.C. 1950, affirmed by an equally divided court, 341 U.S. 918 (1951)).

<sup>18</sup> NEW YORK TIMES, July 14, 1954, p. 1, col. 3.

The Commissioner of Motor Vehicles reports: "So far this year [since the effective date of the statute, March 30, 1954], 17 driver licenses have been revoked under the new law covering chemical tests for intoxication in cases where drivers charged with intoxicated driving have declined to submit to the test.

"In addition, 2,028 licenses have been revoked following drunk driving convictions, compared with 1,324 in the same seven months last year." BUREAU OF MOTOR VEHICLES RELEASE, No. 149A, August 24, 1954.

I must confess to some difficulty in understanding why requiring these tests impairs the individual's integrity and liberties more than the requirement that he take an eye examination before driving or that he be fingerprinted if he is booked for a motor vehicle homicide. But those with finer sensibilities about civil liberties do feel that compelling submission to a test for intoxication constitutes a significant diminution in freedom and as to this each legislator must search his own soul.<sup>19</sup> Any answer to this perplexing inquiry depends not only on the value placed on the individual's freedom to refuse to be tested but upon a survey of the actual danger of drunken drivers in the state which has the legislation before it. Although published data generally available are not very enlightening,<sup>20</sup> the courts appear to be conditioned to support any reasonable legislative finding about the dangers of drinking. For example, in passing upon the 1953 version of the statute in *Schutt v. MacDuff*, Justice Eager noted:<sup>21</sup>

There has been a long-felt need for further legislation to clear the highways from the menace of the intoxicated driver. A mounting toll yearly in injured and dead has been his responsibility. The seriousness of the problem is well known. . . . Thus, any statute tending to assist in the marshalling of definite evidence as to state of intoxication of an accused is a step in the right direction.

The recent case of *Wall v. King*,<sup>22</sup> decided by the United States Court of Appeals for the First Circuit, while it did not deal with tests for intoxication, throws considerable light on the powers of the states when dealing with drivers suspected of being intoxicated. Plaintiff sought damages in the federal district court under the

<sup>19</sup> For an eloquent plea for protection of the individual's integrity and his right to resist the tests, see Raushenbush, *op. cit. supra* note 7, at 367-370; see also report of the position taken by the New York Automobile Association, N. Y. TIMES, Sept. 11, 1953, p. 19 col. 4, Oct. 21, 1954, p. 32 col. 1; cf. concurring opinions of Justices Black and Douglas, *Rochin v. California*, *supra* note 7, 342 U. S. 165, 175, 179 (1952).

<sup>20</sup> The best available data indicates that in 21 states 18 out of 100 drivers involved in fatal accidents had been drinking; reports from 21 states showed 26 out of 100 adult pedestrians involved in fatal accidents had been drinking. National Safety Council, ACCIDENT FACTS (1953 ed.), p. 53. New York State reports indicate that drunken drivers figured in only seven and intoxicated pedestrians in 12 out of 617 fatal accidents in the first half of 1953. Bureau of Motor Vehicles Release, No. 137A, September 4, 1953. Yet the Governor in his message to the legislature urging enactment of amendments said, "The records of the Bureau of Motor Vehicles for the year 1952 show that whenever the conditions of drivers could be ascertained, more than one out of every three fatal accidents involved a drinking driver." McKinney's 1954 Sessions Laws of New York 1341 (1954). In Baltimore where extensive post mortems are conducted the conclusion was that "nearly one half of vehicular accidents" are a result of drinking. State of Maryland, Thirteenth Annual Report of the Department of Post Mortem Examiners 8, 25 (1951), see also PLYMAT, *Relation of Alcohol to Highway Accidents* [Preferred Risk Mutual Insurance Co., Des Moines, Iowa (1953)] *passim*. The absurdity of much of the statistical material available is pointed up in Mark Keller's review of the report of the Copenhagen Police on the World's City Traffic in which he points out "It is conceivable that there may be twice as many intoxicated drivers in Helsinki as in Santiago, or three times as many in Hamburg as in Los Angeles. But there are not 100 times as many in Helsinki or 40 times as many in Los Angeles as in New York, nor 580 times as many in Hamburg or 250 times as many in Copenhagen as in Marseilles." 15 QUARTERLY JOURNAL OF STUDIES ON ALCOHOL 164, 166 (1954).

<sup>21</sup> *Supra*, note 16, 127 N. Y. S. 2d at 121; see also *People v. Kovacic*, 205 Misc. 275, 128 N. Y. S. 2d 492, 499 (Special Sessions, N. Y. County 1954).

<sup>22</sup> *Supra* Note 17, 206 F. 2d 878 (C.A. 1st 1953), Cert. den. 346 U. S. 915.

Civil Rights Law from the Registrar of Massachusetts who, it was alleged, deprived him of liberty without due process of law in suspending his driver's license without a hearing. The Registrar had acted after he had received a report that plaintiff "operated a motor vehicle after drinking intoxicating liquor . . . in Cambridge."<sup>23</sup> A hearing was not necessary at the administrative level, the court held, since it was possible to obtain one on review by the Massachusetts Courts. Significant is its language and reasoning. Chief Judge Magruder refused to place the decision on any purported distinction between privilege and right, declaring:<sup>24</sup>

. . . it is unimportant whether, for one purpose or another, a license to operate motor vehicles may properly be described as a mere personal privilege rather than a property right. We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a "liberty" which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law.

Basic to the Court's decision was its recognition of the need for police restrictions on the liberty to use the highways. The state might, the court stated, rule off its roads any driver who drives a car "after taking a drink."<sup>25</sup>

Thus, on the basis of principle and the decisions, it seems clear that where the legislature has found that intoxicated drivers are a serious menace; that their elimination requires that they submit to chemical tests; and that these tests can be administered so as to interfere to a minimal degree with personal dignity and liberty, it may condition the use of its highways on submission to the tests. New York has studied the problem in the light of the basic constitutional issues and has decided that the needs of the State warrant the slight incursion into the right of the individual that occurs when a specimen is taken by compulsion. Whether or not other states considering the adoption of this legislation reach the same conclusion, they ought not avoid posing the question directly; they ought not mask it by talk of privileges and conditions. Obviously, if the decision is made to compel submission, the legislature should provide as many safeguards against abuse as possible. Most of the statute adopted by New York consists of such safeguards.

### III. DETAILED PROVISIONS

*Any person who operates a motor vehicle or motor cycle in this state shall be deemed to have given his consent*

The mere operation of a motor vehicle within the state, whether by a person licensed or unlicensed, resident or nonresident, constitutes consent to be tested. Instead of constructive consent it has been suggested that each driver sign a written waiver at the time he makes application for a license.<sup>26</sup> However, unless every state adopted such a provision and made the waiver broad enough to cover submission to tests in other states, some nonresident drivers would be exempt. This is undesirable. Another factor considered in rejecting this suggestion is that New York licenses its

<sup>23</sup> *Id.* at 880.

<sup>24</sup> *Id.* at 882.

<sup>25</sup> *Id.* at 884.

<sup>26</sup> E.g., *supra* note 14.



drivers for a three-year period so that the statute would not have applied to all drivers until at least three years from the date of enactment.

*to a chemical test of his breath, blood, urine or saliva for the purpose of determining the alcoholic content of his blood*

The ultimate purpose of the test is, of course, not to determine alcoholic content of the blood but rather to decide if there has been appreciable impairment of driving ability because of that alcohol. However, breath, urine and saliva results are usually equated to blood percentages which are in turn correlated to physiological reactions. Moreover, the statutes providing for the use in evidence of chemical tests results speak in terms of percentage of alcohol in the blood.<sup>27</sup>

*provided that such test is administered at the direction of a police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition*

Only a police officer may require a driver to submit. Another motorist involved in an accident with a person believed to have been drinking has no such power.

Undoubtedly there will be litigation attempting to fix the metes and bounds of "reasonable grounds to believe." It was the intention of the draftsmen that the police be given the broadest possible discretion in making this decision. Thus, in outlining the procedure to be used, the Committee in its report stated that "When a police officer apprehends a person *who he assumes* is driving while under the influence,"<sup>28</sup> he may demand submission. This broad discretion is particularly important since an on-the-spot decision will often be required. In a case where the suspect is unconscious or dazed, the police officer will not be able to question him and often witnesses will not be available. No extended investigation is possible because, unless the test is given within a short time after apprehension, its reliability is greatly reduced.

No change in legislative policy is reflected in the 1954 amendment substituting the word "believe" for the word "suspect."<sup>29</sup> The opinion in *Schutt v. MacDuff* declared that "it would be lawful for an officer to stop a motor vehicle driver upon the highway if the officer has reasonable grounds to believe the driver is intoxicated"<sup>30</sup> and, even though the court made no reference to the difference between its language and that of the statute, the legislature thought it wiser to use the court's rather than its own phrasing.

*and in accordance with the rules and regulations established by the police force of which he is a member.*

This clause was designed to make clear that the police and not the driver are to decide the type of test to be given.<sup>31</sup> It was added by the 1954 legislature although an opinion by the Legal Counsel to the Tax Department had already determined that

<sup>27</sup> E.g., UNIFORM VEHICLE CODE, ACT V, § 54(b); NEW YORK VEHICLE AND TRAFFIC LAW, § 70(5).

<sup>28</sup> Emphasis supplied. NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON MOTOR VEHICLE PROBLEMS, *op. cit.* *supra* note 5, at 35.

<sup>29</sup> Senator Halpern who was Chairman of the Joint Legislative Committee on Motor Vehicle Problems and who sponsored the legislation, emphasized this in his memorandum to the Governor explaining the bill. He wrote: "This change from 'suspect' to 'believe' is negligible, if there is . . . a distinction at all, and the change will not have any appreciable effect on enforcement of the law."

<sup>30</sup> *Supra*, note 16, 127 N. Y. S. 2d at 126.

<sup>31</sup> Memorandum of Senator Halpern, *supra* note 29.

this was the case under the law as originally enacted.<sup>32</sup> This was clearly in accord with the intention of the draftsmen who stated, "The decision as to which test ought to be used should be left entirely to the authorities charged with administering it."<sup>33</sup> The Committee then outlined the various factors, such as cost, reliability and convenience, that would be considered by local authorities in determining the type or types of tests to be used within their jurisdiction. If this determination could be made by the motorist, he could circumvent the law by merely selecting a test which the police were not equipped to give.

The language used by the legislature is unfortunate. It would have been far better had it merely provided, in so many words, that the police shall determine the type of test. As a result of the phrasing used, a police department wishing to take advantage of the law will need to adopt a set of detailed regulations to guide its members.<sup>34</sup> While well considered routine procedures are highly desirable, the presence of this language in the statute will undoubtedly provide defense attorneys with the basis for much quibbling as to whether the rules were followed in precise detail. So long as there has been no abuse by the police of its powers, such arguments ought not to be given much weight.

*If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the commissioner shall revoke his license or permit to drive and any nonresident operating privilege;*

The requirement that the suspect be placed under arrest before being compelled to submit was added in 1954. This addition was the result of a suggestion by Judge Eager in *Schutt v. MacDuff* who felt that without this requirement the police might abuse law-abiding citizens. He said:<sup>35</sup>

... conferring upon police officers the right to make a request under the guise of authority concerning one's person without specific process and without lawful arrest clearly amounts to an unlawful infringement upon one's liberty.

To avoid this infirmity he suggested, among other things, that the statute be "written to provide for the demanding of the submission to a test only after a driver had been duly arrested. . . ."<sup>36</sup>

Practical difficulties may be created because an arrest must precede a demand. In most states, an officer needs a warrant to arrest for a misdemeanor which was

<sup>32</sup> The question was raised in BULLETIN OF THE WESTCHESTER COUNTY MAGISTRATES ASSOCIATION, July-August, 1953, p. 1. The opinion of the Counsel to the Commissioner of Motor Vehicles was summarized in STATE OF NEW YORK POLICE BUREAU NEWS, No. 10, October, 1953, p. 1.

<sup>33</sup> JOINT LEGISLATIVE COMMITTEE ON MOTOR VEHICLE PROBLEMS, *op. cit. supra* note 5, at 33.

<sup>34</sup> Excellent model regulations had been adopted, among other groups, by the New York City and New York State Police. The bill of the Council of State Governments grants power to adopt these regulations to the "state driver licensing authority" rather than to the local police. *Supra*, note 6. This may result in more workable sets of rules. In light of the legislative history of this provision in New York, the state authority's regulations ought to explicitly provide that the police and not the suspect are to decide upon the type of test.

<sup>35</sup> *Supra*, note 16, 127 N. Y. S. 2d at 127.

<sup>36</sup> *Id.* at 126.

not committed in his presence.<sup>37</sup> Driving while intoxicated is only a misdemeanor<sup>38</sup> and it cannot be seriously argued that a legislature intends to broaden the police power to arrest by merely enacting the compulsory test statute. In New York there is no serious problem because in cases involving an accident, the crime of operating a motor vehicle while in an intoxicated condition is, for purposes of arrest, treated as if it were a felony by subdivision 5-c of section 70 of the Vehicle and Traffic Law. Thus, the impact of this requirement on three categories of suspects needs to be considered: (1) those who have no capacity to object because they are heavily intoxicated, dazed or unconscious; (2) those capable of objecting who (a) were observed by the police while they were driving, and (b) were not so observed.

No real problem arises as to a suspect in the first category. The requirement of arrest is a condition precedent to revocation of the license for refusal; it has no significance where the suspect is not capable of refusing. Nor can it be claimed that the taking of a specimen without an arrest constitutes an illegal search and seizure the fruits of which may not be used in evidence. In the majority of states, including New York, the evidence is admissible whether or not it was seized in the course of an unauthorized search.<sup>39</sup> Whether, in other states, an unconscious person will have to be arrested before being tested may depend upon whether the state requires an arrest before a search of the person.<sup>40</sup>

In New York and those states which have equivalent arrest statutes there is also no problem where the officer has himself observed the violation. He has clear authority to immediately place the suspect under arrest before demanding that he submit to the test.

The third category presents difficulties. In many cases the officer will be called to the scene of an accident which he has not observed. The information that one of the persons at the scene was driving may come from a bystander or it may be based on inference of the police officer. If the suspected driver refuses to submit, the officer will have to obtain a warrant and arrest him before he can threaten him with loss of his license. Two dangers should be faced. First, if there is any appreciable delay in obtaining the warrant, the suspect's alcoholic content may have dropped considerably. While it is possible to predict the rate of this decline with fair accuracy, the time lag does make the test results less reliable. Second, and more important, if the suspect has refused to accompany the officer, he may claim that he did his drinking

<sup>37</sup> E.g., NEW YORK CODE OF CRIMINAL PROCEDURE, § 177. The distinction is between felonies and misdemeanors. The officer can arrest for a felony without a warrant even though he did not observe its commission. See also, e.g., DONIGAN, *Laws of Arrest and Use of Police Complaints in Accident Cases*, JUDGES AND PROSECUTOR IN TRAFFIC COURT 109, 110-111 (1951); PUTTKAMMER, *ADMINISTRATION OF CRIMINAL LAW*, 63-64 (1953); PROSSER, *TORTS*, 162-163 (1941).

<sup>38</sup> NEW YORK VEHICLE AND TRAFFIC LAW, § 70(5). Indicative of the absurdities of some of our arrest laws is the fact that in New York the act of driving while intoxicated after a previous conviction for the same offense is a felony. We need only consider misdemeanors for even if he should be aware of the suspect's past pецadillos, the officer might well hesitate to arrest without a warrant since, under the statute, he must assure himself that "a felony has in fact been committed," i.e., that this suspect was actually driving and was actually intoxicated.

<sup>39</sup> *People v. Richter's Jewelers, Inc.* 291 N. Y. 161 (1943); see *Wolf v. Colorado*, 338 U. S. 25, 33-38, (1949).

<sup>40</sup> E.g., PERKINS, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 617-618, 622, 648-649 (1949); Note, *Chemical Tests for Intoxication in Tennessee*, 20 TENN. L. REV. 178, 188-189 (1954); see also LADD and GIBSON, *op. cit. supra* note 8, at 216-218.

after he stopped driving. While there are limits to how fast you can drive up your alcoholic content, this claim, if substantiated, will make any subsequent test practically worthless.

One way of circumventing this difficulty is for the police to arrest the suspect for another crime. The driver may be committing a crime merely by being intoxicated in a public place.<sup>41</sup> The officer having observed this delict may make an arrest. Since the statute merely requires an arrest—not an arrest for driving while intoxicated—a demand to submit can then follow. While this approach meets the technical demands of the statute, it is a subterfuge that ought not to be encouraged. If the arrest provision is retained, the legislature should expand police authority to arrest to cover cases where there is a reasonable ground to believe that the suspect has been driving while intoxicated.

In view of the difficulties which may arise, ought the requirement of arrest be retained? If police authority to arrest is expanded, the answer is probably yes. There is a possibility of slight benefit to the suspect in that the police officer may fear criminal or civil prosecution for unlawful arrest, and therefore he may be deterred from taking action unless he has some reasonable basis for concluding that the driver was intoxicated.<sup>42</sup> Perhaps a more effective deterrent will be his fear of looking foolish if his suspicions are unfounded and he has formally arrested and booked the suspect. In those states where an arrest must precede a search of the person, an arrest may well be required to forestall a claim of illegal search and seizure.<sup>43</sup>

*provided, however, the commissioner shall grant such person an opportunity to be heard*

Added in 1954 was this statutory requirement of a hearing. It will cover the issues of whether a police officer had a reasonable ground to suspect the driver of driving while intoxicated and whether he did in fact refuse.<sup>44</sup> There is no question of the fair-

<sup>41</sup> E.g., NEW YORK PENAL LAW § 1221 ("Any person intoxicated in a public place may be arrested without warrant while so intoxicated, and be taken before a magistrate having jurisdiction for examination on a charge of public intoxication."); see DONIGAN, *op. cit. supra* note 37 at 112; cf. *People v. City of Hornell*, 256 App. Div. 113, *affd.*, 282 N. Y. 555 (1939).

The Council of State Government's statute requires that the arrest be for an "offense involving operating a motor vehicle under the influence of intoxicating liquor. . . ." *Supra*, note 6. The counsel to the New York STATE TAX Commission, the state's driver licensing authority, has taken the position that this is the interpretation which ought to be given to New York's statute. Letter from Counsel to police officials dated April 19, 1954.

<sup>42</sup> But *cf.*, e.g., *Wolf v. Colorado*, *supra* note 39, 338 U. S. 25, 42-44 (dissenting opinion). It might be argued that there would be an action for assault if—even without an arrest—the officer compelled submission to the test when there was no basis for suspecting a violation. Cf. 1941 Report of New York Attorney General 143. But this remedy is even more problematical than that for false arrest.

<sup>43</sup> See, e.g., *supra* note 39; RAUSHENBUSH, *op. cit., supra* note 7, at 356; cf. *United States v. Rabinowitz*, 339 U. S. 56, 60, 72 (1949). The Search of Accused Persons and the Examination of Premises Related to Crime, NEW YORK LAW JOURNAL, July 6, 1954, p. 4, July 7, p. 4, col. 2, July 8, p. 4, col. 1.

<sup>44</sup> Message of the Governor, *op. cit. supra* note 19, at 1341. As noted below, it may be that the defendant will also be able to raise the question of whether the driver was notified that his license would be revoked if he refused to submit to the test. So far as revocations are concerned, however, it is unlikely that this will be a real issue. Since the police will want the suspect to submit, they will undoubtedly try to overcome his initial reluctance with the threat of a loss of license.

The Council of State Government's bill reads as follows: "an opportunity to be heard on the issue of the reasonableness of his failure to submit to the test." *Supra*, note 6. While there are advantages to the greater discretion afforded by this broader language, it may well lead to undesirable pressures upon the driver licensing authority which New York sought to avoid.

ness of this provision. No requirement of a hearing was provided in the original bill because the draftsmen assumed that a hearing would be granted by the Commissioner as a matter of his own discretion.<sup>45</sup> Nevertheless, the Commissioner took the legally tenable position that such hearings were unnecessary at the administrative level.<sup>46</sup> The *Schutt* case held that an administrative hearing was, in New York, an essential incident of due process. Noting that this failure to grant a hearing was his main objection to the statute, Supreme Court Justice Eager said:<sup>47</sup>

If it were written to provide for . . . action by the Commissioner on the sworn report of the officer making the demand, with a further provision whereby the driver could have a hearing, if demanded, with temporary suspension of license in the meantime, and with revocation to follow in the absence of the due demand for a hearing or upon due proof on a hearing, this court would, without hesitation, approve the statute.

The judge evidently felt that the scope of a New York court's review of an administrative order revoking a license failed to satisfy the requirements of due process. To avoid the delay in enforcement of its drive against drinking drivers that an appeal would entail, the governor recommended an amendment to provide for a hearing and the judge's decision was not challenged.<sup>48</sup> Sound administrative practice as well as maximum protection to the driver would seem to require that the hearing be given by the administrator. However, *Wall v. King* held that there was no constitutional requirement of an administrative hearing so long as the courts of the state were empowered to grant the equivalent of an original hearing.<sup>49</sup> Depending upon the nature of their review of administrative proceedings, other states are free to choose the *Schutt* or the *Wall* approach.

*but a license, permit or nonresident operating privilege may, upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition and that said person had refused to submit to such test, be temporarily suspended without notice pending the determination upon any such hearing.*

This provision permits the Motor Vehicle Commissioner to suspend the driver's license as soon as he receives notification from the police that a driver has refused to take the test. It is desirable that this suspension take place at once so that the law will have its maximum deterrent effect. *Wall v. King* held that this practice did not constitute a violation of due process. The court declared:<sup>50</sup>

We have no doubt that these provisions of law are reasonable regulations in the interest of safeguarding lives and property from highway accidents. The incidental hardship upon an individual

<sup>45</sup> Letter citing authority from Associate Counsel Joint Legislative Committee on Motor Vehicle Problems to Office of Governor's Counsel, April 16, 1953. Letter from Associate Counsel Joint Legislative Committee on Motor Vehicle Problems to Counsel to the Commissioner of Motor Vehicles dated August 31, 1953.

<sup>46</sup> In *Schutt v. MacDuff* the Commissioner argued that the driver need not receive his hearing at the administrative level since he could obtain one when the Commissioner's decision was reviewed in an Article 78 proceeding in the nature of mandamus. Respondent's Brief, pp. 23-27.

<sup>47</sup> *Supra*, note 16, 127 N. Y. S. 2d, at 126.

<sup>48</sup> Message of Governor, *op. cit. supra* note 20, at 1342.

<sup>49</sup> *Supra*, note 22.

<sup>50</sup> *Supra*, note 22, 206 F. 2d, at 883.

motorist, in having his license suspended pending investigation and review, must be borne in deference to the greater public interest served by the statutory restriction. It is well-settled that the concept of due process of law does not necessarily require the granting of a hearing prior to the taking of official action in the exercise of police power.

The procedure provided in the statute accords with the general practice in New York under which "a license or certificate of registration may . . . be temporarily suspended without notice pending any prosecution, investigation, or hearing."<sup>51</sup>

The requirement of a sworn report by the police officer was included at the suggestion of Judge Eager in the *Schutt* case.<sup>52</sup> A written report may provide some slight additional protection to the driver, but it is doubtful whether the oath adds anything.

*The provisions of subdivisions five and six of section seventy-one of this law shall be applicable to revocations under this section.*

Subdivisions 5 and 6 of Section 71 of New York's Vehicle and Traffic Law are applicable to revocations generally. Under them a driver whose license has been revoked because of a statute's mandate is unable to obtain a new license for at least six months. These provisions also provide in general terms for such matters as attendance of witnesses and appeals. In so far as possible, it is desirable to integrate the revocation proceeding under this statute with revocation proceedings generally.

*2. Upon the request of the person who was tested, the results of such test shall be made available to him.*

The person tested ought to be given the results of the test, whether favorable or unfavorable, as soon as they are available so that he can decide whether to plead guilty or to contest the charges. If one of the breath tests which give almost immediate results is used, the motorist ought to be informed at once so that he will be in a position to decide whether he wants a test by his own physician, an option that is given to him in another section of the statute.

*3. Only a physician acting at the request of a police officer can withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of urine, saliva or breath specimen.*

Since a blood test requires a physical entry into the suspect's body, the protection of his health and sensibilities require that such specimen be obtained only by a person who can be accepted by the defendant as qualified. As originally enacted, the bill required that the physician be "duly licensed." This requirement was found to be burdensome because unlicensed but fully competent internes and residents are often in charge of emergency rooms in hospitals. They should be permitted to withdraw blood. It was suggested that the provision be broadened to include laboratory technicians who often take blood specimens in the course of normal hospital routine.<sup>53</sup> However, such tests are usually taken only under the direction and at the request of a physician, and there appears to be no real need to further relax this provision.

Some of the police forces in local communities have experienced difficulty in ob-

<sup>51</sup> NEW YORK VEHICLE AND TRAFFIC LAW, §71(3); see also UNIFORM VEHICLE CODE, Act II, §30(a). The bill of the Council of State Governments, places a limit of ninety days on the suspension. *Supra*, note 6. Should there be a possibility of administrative abuse in the state considering this legislation, the Council's draft is preferable.

<sup>52</sup> *Supra*, note 16, 127 N. Y. S. 2d, at 126.

<sup>53</sup> This suggestion was followed by the Council of State Governments. *Supra*, note 6.

taining cooperation of local physicians who have expressed some fear that their malpractice insurance policies would not protect them against possible suits by persons they tested. This fear appears to be unfounded. The Legal Department of the Association of Casualty and Surety Companies has given it as its opinion that<sup>54</sup>

There is no problem, at least insofar as the standard policy is concerned which is used by all the National Bureau companies. The standard policy is very broad in scope, covering injuries arising out of malpractice, error or mistake in rendering or failing to render professional services in the practice of the insured's profession. The coverage, therefore, is not restricted to any patient-physician relationship. Therefore, under such a policy, taking blood tests, in connection with the chemical test law concerning driving while intoxicated, would be covered under the policy. As I understand it, almost all companies writing such policies in New York use the standard form. There may, however, be some mutual companies that issue a more restricted form covering physicians only for services rendered where there is a patient-physician relationship.

To repeat, any physician that has the standard form should have no concern about being covered.

Some doctors, however, have remained unconvinced. Conceding that there is naught to fear under the tort of malpractice, they raise the spectre of a suit for the tort of assault. Armed by a widely circulated opinion of Counsel to the New York State Medical Society that the driver must consent to the test or "the physician will most probably subject himself to a civil action for assault," doctors are in some cases refusing to cooperate with the police.<sup>55</sup> This opinion, after noting that the statute provides that the driver is deemed to have consented to the test, declares "But the Statute in the very same paragraph, namely, Subdivision 1 of 71-a provides 'if such person *refuses* to submit to such chemical test, the test *shall not* be given. . . .' Here then is explicit language banning the test in the absence of consent."<sup>56</sup> This is curious reasoning indeed. The statute is designed so that an affirmative refusal is needed to overcome an original implied consent and this is interpreted to mean that affirmative consent is needed to ratify the original consent. Applying this same logic to what is probably a working rule of doctors that every person is assumed to be healthy and unless he proves to be diseased he shall not be operated upon, surgeons would forthwith operate upon anyone who could not establish that he was healthy.

The medical profession was particularly concerned about the ability of an intoxicated person to consent.<sup>57</sup> Here again, once it is realized that the driver does not need explicitly to agree to take the test but that he has only an option to refuse, it is apparent that there is no problem. If the driver does not refuse to take the test, it ought to be given. If he refuses, it ought not be given. There is, of course, the possibility that he will be so drunk as not to be legally capable of exercising his option to refuse, but that problem need not concern the doctor, and he ought not give the test whenever there is a refusal. The irony of the confusion engendered by this opinion is that it completely ignores the report of New York's Joint Legislative Committee on Motor Vehicle Problems, which makes it quite clear that the bill was specifically

<sup>54</sup> Letter from Director Traffic Safety Division, Association of Casualty and Surety Companies to the author dated June 2, 1954.

<sup>55</sup> Bulletin of the Medical Society of the County of Erie and the Buffalo Academy of Medicine, July, 1954, p. 11.

<sup>56</sup> *Id.* at p. 12.

<sup>57</sup> Emphasis in original. *Id.* at p. 11.

designed to avoid the possibility of any claim of assault.<sup>58</sup> If the statute is complied with, there is no need to fear an action for assault.<sup>59</sup>

4. *The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.*

The requirement that the person tested be permitted to have a physician of his own choosing administer the test as a check on the police test was added to the bill after it was submitted by the Committee on Motor Vehicle Problems in 1953. Some members of the legislature feared that the police might, knowingly or unknowingly, make a mistake in giving the test and then incarcerate the defendant so that he would be unable to have the results checked by his own physician. This provision will apply only where the suspect is actually held in custody after the test has been given.<sup>60</sup> In such cases the suspect must be granted an opportunity to phone a physician. The burden here will be on the suspect just as it is his responsibility to obtain an attorney when given the opportunity to do so by the police. No obligation is placed upon the police force to actually obtain a private physician nor do the police have to forego their test pending the arrival of the accused's doctor. If an independent physician is not willing to give the test, the police results may still be used.

#### IV. INFORMING THE SUSPECT OF HIS RIGHTS

One problem which cuts across the entire statute warrants separate treatment. When a driver is apprehended by the police must they inform him of the various protections available to him, namely, (1) his right to refuse to take the test at all if he is willing to lose his license; (2) his right to the results of the test; and (3) his right to have a physician of his own choosing administer a test in addition to the one administered under the direction of the police?

The statute itself is silent on the question of notice. Apparently, however, it was the intention of the draftsmen that the suspect be fully informed. The report of the Joint Legislative Committee on Motor Vehicle Problems declares that the "attitude of keeping accused persons from knowing their rights in the hope that they will fail to insist upon them is one that does not appeal to your Committee."<sup>61</sup>

<sup>58</sup> New York State Joint Legislative Committee on Motor Vehicle Problems, *op. cit. supra*, note 5, at 25.

<sup>59</sup> See text at note 72, *infra*. Despite this, the damage to proper police-doctor cooperation has been done, and it is possible that the only way to fully assuage the fear of the doctors is to enact clarifying legislation. They have suggested adding, "Such physician shall not be liable for damages, in any civil suit, for withdrawing such blood, except for negligence in the performance of such withdrawal." Bulletin of the Medical Society of the County of Erie and the Buffalo Academy of Medicine, July, 1954, *op. cit. supra*, note 55, at 11.

<sup>60</sup> The letter dated March 26, 1953, from the Associate Counsel of Joint Legislative Committee on Motor Vehicle Problems to the Office of the Counsel to the Governor read in part as follows: "subdivision 4 has been added to the bill. It gives the person tested the right to have a physician of his own choosing give him a test, in addition to the one administered under the direction of the police officer. This provision will be used only when the person is arrested. If he is released he would, of course, have the right to go to his own doctor in any event."

<sup>61</sup> New York State Joint Legislative Committee on Motor Vehicle Problems, *op. cit. supra* note 5, at 17.



The point has already been raised in at least two cases—one decided by the Court of Special Sessions, a trial court, and one by the Court of Appeals, New York's highest appellate court. In both cases the suspect submitted to the test and then sought to have its result excluded from evidence. In *People v. Kovacick*,<sup>62</sup> the lower court decision, the defendant claimed the statute was unconstitutional because it failed to require the police to inform him of his right to have his own physician administer a test in addition to the one given by the police. No authority in support of this contention was submitted. The court rejected defendant's claim as "without merit" because "It would seem that it is sufficient to say that all persons are presumed to know the law and are therefore presumed to be so informed as to this right."<sup>63</sup> It agreed with defendant that "The statute does not require that any notice be given a defendant as to this right [to refuse the test]."

The Court of Appeals obviously found the question a more intriguing one than did the Court of Special Sessions but it neatly side-stepped it in *People v. Ward*.<sup>64</sup> The statute, it held, was inapplicable to the case before it. Implicit, however, in its language is a clear warning to the police that they will be well advised to give suspects full notification of their rights.

In the *Ward* case the defendant was observed driving his truck erratically by the police who followed and stopped him. According to the defendant's own testimony, gentle inquiry was made as to whether he would submit to the test and he unhesitatingly consented. The result showed an alcoholic content high enough to convict him. On appeal he contended that this evidence should not have been used since he had not been apprised of the provisions of the statute permitting him (1) to refuse to take the test and (2) to insist upon an additional test by his own physician.

The statute, said the court, "has no application where, as here, the defendant voluntarily submitted to the test and there is no claim or hint of coercion."<sup>65</sup> This conclusion was based upon its review of the legislative history and the determination that<sup>66</sup>

This new section was directed at the problem of compelling submission to the test; it was concerned, not with those who consented to take the test, but with those who were required to submit.

Judge Fuld, writing for the court, found no real need for the protections provided by the statute in the case of a volunteer. He noted that<sup>67</sup>

<sup>62</sup> *Supra*, note 21, 128 N. Y. Supp. 2d 492.

After the *Kovacick* decision, three judges of this same court sitting *en banc* rejected a defendant's contention that the test results could not be admitted in evidence where a driver had not been advised of his rights under the statute. In an unsatisfactory opinion the court, *per curiam*, declared that *People v. Ward* "unanimously upheld the principle that in the absence of any proof of coercion or compulsion, the defendant was bound by the test." *People v. Coppock*, 133 N.Y.S. 2d 174, 178 (Special Sessions, N. Y. County 1954). As the remaining text of this paper points out, this is an exaggeration of the holding in the *Ward* case.

<sup>63</sup> *Supra*, Note 21, 128 N.Y. Supp. 2d. at p. 509.

<sup>64</sup> 307 N. Y. 73 (1954).

<sup>65</sup> *Id.* at 76.

<sup>66</sup> *Id.* at 77.

<sup>67</sup> Citations omitted. *Id.* at 77-78. If a suspect had not been drinking, he might well object to arrest before the test since a low test result might save him the embarrassment and annoyance of being booked.

In point of fact, it is difficult to perceive any necessity for the protections embodied in section 71-a where the driver freely volunteers to take the test and have his blood analyzed . . . and in any event, there was ample reason and precedent for a statutory scheme distinguishing between the evidentiary effect of a voluntary and an involuntary submission. In the field of confessions, for instance, the distinction between the admissible and the inadmissible is in a large measure written in terms of the difference between the voluntary and the involuntary. And where evidence seized without a warrant is inadmissible, it is accepted that a "warrantless search-and-seizure with *consent* of the party defendant is not within the rule."

The opinion clearly raises—although leaving unanswered—the problem of what constitutes consent and what coercion. For example, it noted<sup>68</sup>

We recognize, of course, that the line between consent and coercion is hard to draw whenever a policeman makes a request, however gentlemanly, upon one who, having drunk to excess, has become inebriated. And compare the content of the term "voluntary" in search and seizure cases, with that in confession cases.

Citation of the search and seizure cases is particularly interesting since in those cases courts which exclude illegally obtained evidence are quick to find coercion.

In any future case, the attorney for the defendant, with this opinion before him, can quite easily circumvent it and lay a foundation for a claim of coercion. He will undoubtedly argue, first, that there was coercion implicit in the police request and, second, that the statute itself is coercive. As Judge Eager noted in his opinion in *Schull v. MacDuff*, "Everyone except possibly a hardened criminal or a very wise man would be under the feeling of some duress when any demand is made upon him by an officer of the law, especially if that officer is badged and armed. The feeling is natural and proper, and this court would not want it otherwise, for there must be respect for the authority of police officers."<sup>69</sup> In the *Ward* case, the attorney for defendant failed to argue that there was any coercion on the part of the police officer. In fact, the testimony of the defendant clearly implied that there was none. He would have found it difficult to argue that the statute itself is inherently coercive since he had taken the position that the defendant was unaware of its existence.<sup>70</sup>

Assuming that the courts find that the police have an obligation to inform the driver, what will be the result of their failure to perform? The problem will arise only when the test has been given because, if the defendant gives signs of refusing, the police will certainly threaten him with loss of license.<sup>71</sup> Possibly the driver will have a cause of action for assault on the theory that because the statute was not complied with it constitutes no justification.<sup>72</sup> Practically, a defendant's gambit will be to

<sup>68</sup> Citations omitted. *Id.* at 78.

<sup>69</sup> *Schull v. MacDuff*, *supra*, note 16, 127 N. Y. S. 2d 116, 127.

<sup>70</sup> But *cf.* *People v. Kovacic*, *supra* note 21, 128 N. Y. S. 2d 492, 508: "The defendant testified (p. 338, minutes);

"Q. When you were driven downtown and you came to the precinct at 54th Street, did they ask you to take a test? A. They didn't ask me. The detective just told me—asked me if I want to take a test, yes. But he explained immediately that if I don't take the test that I will lose my license at that moment. So therefore I decided to take the test because I need the car badly."

"This could hardly be construed as duress. The detective merely stated that which is contained in the statute . . ."

<sup>71</sup> *Supra* notes 44, 70.

<sup>72</sup> *Supra* note 42, text at note 59.

object to the introduction of the results because they were illegally obtained. Here he will run squarely into the rule in the majority of states—including New York—which will not bar evidence even though it is illegally garnered.<sup>73</sup> There is no need to here debate the broader issue of whether rules of evidence ought to be generally used as a weapon to discipline the police. The legislature's special—almost doting—concern to protect the driver under this statute warrants the exclusion of test results obtained without informing a defendant of his rights under the statute. We must assume that, at least in some cases, without the statute the evidence would not have been obtained<sup>74</sup> and it seems reasonable then that the police not distort it to obtain its benefits. It would be possible to take the position that the evidence ought not to be excluded where the police could prove that the statute had no effect in producing submission but the difficulties of proof argue in favor of a rule of exclusion in all cases.

While the question is still open and it would be difficult to predict how the Court of Appeals will decide the question when it is actually posed, as a rule of practice, the police ought to assume that it will be decided against them. The fact that this court went out of its way to warn the police that it is "the better practice . . . to notify the person of his rights . . . whenever there may be a charge of coercion,"<sup>75</sup> is particularly significant. Both as a matter of fairness and of wisdom the police would be well advised to take advantage of the hint and period of grace granted them by the Court of Appeals.<sup>76</sup> They should develop a set of regulations under which the suspect is informed of all the options presented to him by the legislature.

#### CONCLUSION

New York's statute requiring submission of drivers suspected of driving while intoxicated to submit to a chemical test for intoxication provides a sound model for other states. Before it is adopted, however, the legislature ought to seriously consider whether it is needed. If a decision to enact it is reached, there are a number of detailed changes in the statute which might profitably be made. Whatever other textual changes are decided upon, the legislature ought to explicitly meet the problem of whether the police must inform the accused of the protections provided for him.

<sup>73</sup> *Supra* note 38.

<sup>74</sup> *Supra* note 70.

<sup>75</sup> *People v. Ward*, *supra*, note 64, 307 N. Y. at p. 78.

<sup>76</sup> There seems little doubt but that the majority will do so. The New York Automobile Club Survey reported:

"The replies also showed that all of the police departments intend to hew closely to a provision of the law stipulating that 'the person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.'

"Asked by the Club whether it will also be 'your policy to inform the person of his right to have a physician of his own choosing,' only one official replied in the negative. This was H. L. Wood, Detective Sergeant and Acting Chief of Police of Tarrytown.

"He elaborated the view that the law does not require that the motorist be informed of this right, that he is presumed to be aware of it and that it is up to him to make the request.

"He observed that in a small town it is not always possible to reach another doctor, let alone the police physician.

"In connection with the same point, 24 police officials replied that they would supply suspected drivers with the names of available physicians to make additional tests and four said they would not." *NEW YORK MOTORIST*, *Op. cit.*, *supra* note 4.