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CONSTITUTIONALITY OF COMPULSORY CHEMICAL TESTS TO DETERMINE ALCOHOLIC INTOXICATION

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(In a previous issue of this Journal (September-October, 1944) appeared a timely article by Dr. Harger on the subject of chemical tests for intoxication. In the article the tests were described and values noted with particular reference to the problem of the drinking driver and pedestrian. Now, in the following article, Mr. Mamet discusses constitutional issues involved in the use of chemical tests and suggests means by which such tests can be taken *without the consent* of the person involved. The author, a senior law student in Northwestern University Law School, is Editor-in-Chief of the Illinois Law Review.—EDITOR.)

Alcoholic intoxication is a serious factor contributing to traffic accidents. Although there are no completely accurate statistics available[1] regarding the relationship of alcohol to automobile accidents, records indicate that alcohol plays a major role in traffic safety problems.[2] As yet, legislation, court procedure, and public opinion have not been developed sufficiently so as to enable traffic and safety officers to adequately cope with the situation.

It is, of course, unlawful in all states to drive a vehicle while "intoxicated"[3] or "under the influence"[4] of alcohol. However, definitions and interpretations of these terms are so inadequate in many states, that generally it is difficult to obtain a conviction unless a person is obviously inebriated to a high degree.

Inadequacy of the Customary Methods

In most communities general observations by police officers and witnesses to an accident or traffic violation constitute the only attempt at diagnosis. In a number of other localities the police supplement their "general observations" with a "special examination" which consists primarily of alleged neurological tests designed to determine the muscular coordination of the arrested person. A police surgeon or other physician may also

* The author is indebted to Professor Fred E. Inbau of the Northwestern University School of Law for his valuable comments and the suggestion of the approach taken in this writing.

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[1] The unavailability of accurate information is due to the fact that records, when compiled, are obtainable, for the most part, from accident reports. The accuracy of these reports is dependent upon the system the reporter uses in summarizing the information and the care taken by the reporter in noting his observations. Often the system utilized and the care given are not adequate.

[2] See the 1937 to 1941 Reports of the Committee on Tests for Intoxication of the National Safety Council, hereafter cited as Committee Report. See also, address delivered by Donald S. Berry of the National Safety Council, *Alcohol and Traffic*, July 25, 1944.

[3] Term used in six states.

[4] Term used in forty-two states. No attempt will be made to attach any particular significance to these terms or to differentiate between them.

be called upon in certain instances to conduct a clinical examination for the chief purpose of distinguishing general illness from intoxication. Thus, whether or not one is intoxicated is usually determined by noting his ability to walk and stand, his speech, the odor of his breath, the color of his face, the tremor of his hands, the condition of his eyes, and any unusual acts which deviate from the accepted norm.

Obviously, such tests cannot be used as an accurate index of intoxication; the reliability of them can be seriously challenged.[5] For one thing, how many of the physical factors allegedly indicating impairment due to alcohol must be present? Again, to what extent must they exist? Then, too, even assuming that all the physical factors manifest alcoholic influence, the effect observed or sensed may originate from another cause.[6]

The state is, therefore, confronted with the arduous task of proving that the impairment in driving was due to alcohol. In most instances, the methods are, of necessity, haphazard. The result is correspondingly seen in the enforcement of "drunken driving" legislation. Inadequacy also exists in the protection of the driver of the vehicle; the customary tests may appear to denote alcoholic influence and the defendant, although free from culpability, may be unable to exonerate himself.

Chemical Testing

This situation need not exist. A scientific method for determining intoxication has been formulated.[7] Chemical tests can now be utilized to ascertain the presence and amount of alcohol in the body fluids or breath of the arrested driver. These tests indicate the percentage of alcohol in the body substance

[5] See People v. Evans, 209 Ill. App. 75; 7 N.E. (2d) 912 (1937) for an example of the type of testimony used in obtaining a conviction for driving a motor vehicle on the highways while under the influence of intoxicating liquors. The doctor testified that "the first thing he noticed was a very strong smell, or odor, of some kind of a stimulant on the defendant's breath . . . . I had a conversation with him, and he did not look exactly right for a sober man. The expression of his eyes, his actions and so on . . . . His eyes, more or less, squint up and there is a peculiar glint in them. I don't know how to describe it, but this is so. His eyes showed he had had some booze."

[6] See, Harger, Some Practical Aspects of Chemical Tests for Intoxication (1944) 35 J. of Cr. L. & Crim. 202-4 for an excellent discussion of this point.

[7] For discussion of the chemical aspects of the tests *see*: Harger, *op. cit. supra* note 6; Ladd and Gibson, The Medico-legal Aspects of the Blood Test to Determine Intoxication (1939) 24 Iowa Law Review 191, 193-215: Southgate and Carter, Excretion of Alcohol in the Urine as a Guide to Alcoholic Intoxication (1926) 1 Brit. Med. Jour. 463; Holcomb, Alcohol in Relation to Traffic Accidents (1938) 111 J. of Am. Med. Ass'n. 1076; Heise, The Specificity of the Test for Alcohol in Body Fluids (1934) 4 Am. J. Clin. Path. 182, and by the same author, Alcohol and Automobile Accidents (1934) 103 Am. Med. Assn. Jour. 739; Heise and Halporn, Medico-legal Aspects of Drunkenness (1932) 36 Pa. Med. Jour. 190. See also, *Committee Reports*: 1937, p. 14; 1938, pgs. 14-18 (comparison of tests), pgs. 36-39 (bibliography); 1939, pgs. 22-23 (bibliography); 1940, pgs. 33-35 (bibliography).

analyzed and from this percentage the extent or state of inebriation at the time the test is administered can be calculated. Whether the substance analyzed be blood, urine, or breath, the result attained is expressed in terms of the percentage of alcohol in the blood.

The factor determining a person's intoxication, or the degree of intoxication, at any given time is not the amount of alcohol consumed or the "drinking capacity" of the person tested. It is the amount of alcohol actually absorbed into the blood and thereby conveyed to the brain. Experiments have proved that certainly insofar as automobile driving is concerned, any person with a blood alcohol concentration of .15% is intoxicated and incompetent to drive safely; that many, but not all, persons having a blood alcohol concentration ranging from .05% to .15% are intoxicated and incompetent to drive safely;[8] and that practically all persons with a blood alcohol concentration of .05% or less are sober and unaffected to the extent of impairing their driving ability.[9] Thus, in one category the non-drinking or temperate driver can be vindicated. In another, tolerance, *i.e.*, the particular capacity of an individual can be considered. In a third, alcoholic influence can be determined regardless of unusual tolerance.

The information furnished by this process is unaffected by the various factors which may influence the reliability of the other methods of obtaining evidence. Chemical tests and the interpretation of them are accurate and have been generally accepted by the medical profession.[10] The value of the tests in furnishing evidence to determine intoxication and deter

[8] The number dependent, of course, upon the approach to the greater limit of .15%.

[9] "1. If there was . . . five-hundredths per cent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor;

"2. If there was . . . in excess of five-hundredths per cent but less than fifteen-hundredths per cent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant;

"3. If there was . . . fifteen-hundredths per cent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;

"4. The foregoing provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor." These provisions were adopted as a revision of § 54, Act V, Uniform Vehicle Code, at a meeting of the Committee on Uniform Traffic Laws and Ordinances, Nat'l Conference on Street and Highway Safety, Oct. 12, 1944. No attempt will be made to discuss the above provisions relating to "presumptions".

[10] The American Medical Ass'n has accepted these tests as reliable indices of the degree of intoxication. *See*, 1944 Report of the Committee to Study Problems of Motor Vehicle Accidents, Am. Med. Ass'n. See also note 7 *supra*.

"drunken driving" has been realized by those communities utilizing them.[11]

Compulsory Aspect

Four states have legislation encompassing the use of evidence obtained through chemical tests.[12] These laws deal only with the use and weight of the evidence when chemical tests have been made of body fluids or of the breath of suspected drivers.[13] As yet, no legislation has been passed which provides for the *compulsory* taking of specimens. However, a bill has been prepared for presentation to the United States Congress, which, if passed, will require motorists in the District of Columbia,[14] charged with operating a vehicle while under the influence of any intoxicating liquor, to submit to a chemical test to determine intoxication.[15]

Insofar as the chemical test results are concerned, it is immaterial whether or not the test is made with the subject's consent or by compulsion — the accuracy of the results is, of course, unaffected. However, the average person accused of being under the influence of alcohol will not, if he has been drinking, submit to a test when he knows he is not required to do so. Moreover, if the test is voluntary, and consent is necessary, how and to whom must this permission be given? Who will determine this, the judge or jury? Can an intoxicated person consent?[16] Although as yet these queries have not been raised in any case, there is no doubt that as the tests become used more widely the issue of "consent" will appear as a valuable defense mechanism. Therefore, if chemical tests for alcoholic intoxication are to be employed to maximum advantage, their use should not be dependent upon the arrested driver's consent.

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[11] See the latest Committee Report.

[12] *Indiana*, Burns Rev. Stat. Ann., 1940, § 47-2003 (a); *Maine* Rev. Stat., 1939, c. 29, § 88 as amended; Thompson, Laws of *New York*, Vehicle and Traffic Law, 1942 Supp., § 70 (5); *Oregon* Com. Laws Ann., 1943 Supp., c. 8, § 115-318 a (enabling act which provides for use of evidence obtained through chemical tests which are made in counties having a population of 200,000 or more.)

[13] *Ibid.*

[14] "(e) Any person arrested in the District of Columbia on any charge of operating a vehicle while under the influence of any intoxicating liquor may be taken before one of the examiners . . . and such examiner is authorized to examine such person for evidence of being under the influence of intoxicating liquor. As a part of this examination, the examiner may take a specimen or specimens of such person's blood, urine, and breath or any of them."

[15] Wide publicity of such legislation will have a marked prophylactic effect on those who drink and drive. The enforcement of the statutes and the prosecution of violators will be expedited and scientific evidence will be accessible.

[16] For a discussion of the issue of consent see, Ladd and Gibson, *op. cit. supra* note 7 at 241-251.

Constitutional Issue

In many respects, the administration of chemical tests does not present legal problems different from those attending the employment of the usual methods of examinations used by officers. However, since the very nature of chemical tests requires what may be termed an invasion of bodily security, *i.e.,* the extraction or use of body fluids or breath, the constitutional privilege against *self-incrimination* naturally appears appropriate to defense attorneys as the basis for objections to the admissibility of such test results.[17] Can an accused person be compelled to submit to an examination of this nature?

The reported cases dealing with the privilege in relation to compulsory tests of the type proposed are not numerous. In fact, the majority of them are enlightening only as to the admissibility of such evidence and are not helpful in analyzing the issue of self-incrimination. The courts find no difficulty in admitting into evidence the results of tests voluntarily given. One of the best discussions as to the value of the tests and the admissibility of them is found in a civil case,[18] where the court states, in allowing the introduction of the evidence, that "It appears to be the consensus of the medical profession that when the blood alcohol concentrate of the driver of an automobile is 0.15% (by weight) such fact is conclusive evidence that the driver is under the influence of alcohol."[19] Similar expositions are found in criminal cases in Iowa,[20] North Carolina,[21] and Massachusetts.[22] In all these cases the issue of compulsion was not involved.

Most courts which have considered the compulsory aspect of the test have held that the test was administered voluntarily—that the defendant had consented. The first important case dealing with this point was *State v. Duguid.*[23] There the evidence introduced at the trial indicated that the urine specimen

[17] All states except Iowa and New Jersey have adopted the privilege against self-incrimination by constitution and these two states have incorporated it into their statutes.

[18] Lawrence v. City of Los Angeles, 53 Calif. App. (2d) 6, 127 P. (2d) 931 (1942).

[19] A reproduction of a graphic illustration which appeared in the 1940 Report of the Committee on Tests for Intoxication showing the relationship between alcohol in the blood and the degree of intoxication is found in the opinion. See also, Kuroske v. Aetna Life Ins. Co., 234 Wis. 394, 291 N.W. 384 (1940) and Richter v. Hoglund, 132 F. (2d) 748 (C.C.A. 5th, 1943). In both of these civil cases the court admitted blood tests to determine intoxication. The only privilege the courts discuss is the physician-patient one. See also, Bednarika v. Bednarika, 18 N. J. Misc. 633, 16 A. (2d) 80 (1940).

[20] State v. Morkid, 286 N.W. 412 (Iowa, 1939). The court recognized the value of the blood test and admitted it into evidence. Compulsion was not involved.

[21] State v. Cash, 219 N. Car. 818, 15 S. E. (2d) 277 (1941).

[22] Commonwealth v. Capalbo, 308 Mass. 376, 32 N. E. (2d) 225 (1941).

[23] 53 Ariz. 276, 72 P. (2d) 435 (1941).

was given upon request. The court held that there had been no compulsion and hence the testimony of the doctor analyzing the results of the test was admissible. Consent to the test had been given by *failure to resist.* Thus, the exclusionary rule of the privilege against self-incrimination was eliminated. The same result was attained in an Indiana case[24] where the court held that the accused had voluntarily submitted to the test and he thereby *waived* the privilege. Similarly, the Florida court[25] recently allowed the admission of a blood test where no compulsion was shown.

In *State v. Gatton,*[26] the refusal of the defendant to submit to a blood test to determine intoxication was allowed to be shown at the trial and the prosecutor was permitted to comment upon this point in his argument to the jury. The court in upholding the conviction stated: "We are unable to observe any merit in the defendant's claim that the introduction of such evidence violated his constitutional rights, and we believe, and hold, that the constitutional inhibition against self-incrimination relates only to disclosures by utterance. No such disclosure was required of the defendant in the instant case."[27] Thus, the court appears to doubt that the privilege exists under such circumstances. Despite the broad language of the case it is conjectural whether the same result would have been attained if the defendant had been compelled to submit to the test.

Although it is apparent that most courts require that consent be given, a few cases have upheld the tests where the person did not submit to them on a purely voluntary basis. In *State v. Small,*[28] the court found consent where the defendant, after being arrested, was taken to jail and subjected to a blood test. The defendant agreed to take the test only after the doctor told him that he was convinced that the defendant was intoxicated and would so testify; that a blood test would either confirm or disprove the doctor's testimony.[29] An even more promising attitude is noted in the latest exposition on this point in Iowa.[30] The admission of a blood test was affirmed over the objection

[24] Spitler v. State, 221 Ind. 107, 46 N. E. (2d) 591 (1943).

[25] Touchton v. State, 154 Fla. 547, 18 So. (2d) 752 (1944).

[26] 60 Ohio App. 192, 20 N.E. (2d) 265 (1938).

[27] See in this connection, State v. Benson, 230 Iowa 1168, 300 N.W. 275 (1941) where the court allowed the admission of the testimony of the sheriff which showed the refusal of the defendant to submit to a blood test, holding that this was a circumstance to be considered by the jury.

[28] 233 Iowa 1144, 11 N.W. (2d) 377 (1943).

[29] See the first Iowa case State v. Morkid, *supra* note 20.

[30] State v. Werling,— Iowa—, 13 N.W. (2d) 318 (1944). For the Iowa cases up to 1942 see Ladd, Recent Legal Developments on Blood Tests to Determine Intoxication (mimeograph material issued by the Committee on Tests for Intoxication, Nat'l Safety Council, May 5, 1942).

of the defendant who claimed that he submitted to the test because "he thought the law required him to." The court found no duress present.

The most recent exposition on the admissibility of compulsory chemical tests has been tendered by the Supreme Court of Oregon. The court, in the case of *State v. Cram*,[30a] offers a discussion of the cases involving chemical tests and the issue of self-incrimination. The defendant was convicted of manslaughter while engaged in driving a vehicle "while under the influence of intoxicating liquor." The automobile which the defendant was driving capsized, rendering him unconscious, a condition in which he remained for approximately forty-eight hours. During this state of unconsciousness, a doctor, at the request of the police, extracted a sample of blood. This blood was later analyzed for the purpose of determining its alcoholic content and the results of this analysis were admitted into evidence over the defendant's plea of self incrimination. The majority opinion, after illustrating that the privilege applies only to "testimonial compulsions," held that the "defendant was not deprived of any of his constitutional rights by the admission of the testimony. . . . He was not compelled to testify against himself. Evidence of the result of the analysis of the blood sample was not his testimony. . . . The blood sample was obtained without the use of any process against him as a witness. He was not required to establish the authenticity, identity or origin of the blood, those facts were proved by other witnesses." The opinion compares the admissibility of fingerprints procured under compulsion and various acts a defendant might be required to do with that of the evidence under attack.

If the opinion were confined to the above statements, its value would be greatly enhanced. However, the strong *dicta* and the manner in which other cases are distinguished are misleading and detract from its effectiveness. For example, as the defendant "was not compelled to do anything" (evidently because he was unconscious) the court finds it unnecessary to consider how far a court can go in requiring one to submit to a blood test.[30b] "Here the blood has already been extracted; *defendant is not being called upon to submit to an examination.*" (Italics supplied.) Thus, the court emphasizes that they are not being called upon to decide whether the accused may be forced to submit to such a test and apparently the decision can only be used as precedent in situations wherein blood is taken from an *unconscious person.* Moreover, the majority believes that the compulsory aspect of the test is intricately con-

[30a] ——Ore.——, 160 P. (2d) 283 (reported Aug. 17, 1945).

[30b] This analysis was used to distinguish the Apodaca case, *infra* note 31.

nected with the constitutional provision against "illegal search and seizure"[30c] and the admissibility of evidence illegally obtained. Although these issues were not urged by the defense, the majority joins with the concurring opinion in a rather involved, complicated and misleading analysis of these points.[30d] It appears, therefore, that had these defenses been raised the results of the blood test would have been held to be inadmissible.

Although the *Cram* case is valuable in support of the view that the privilege against self-incrimination does not prevent the taking of chemical tests to determine intoxication, the extent of the value of the opinion is conjectural. The *dicta* and side issues portrayed unfortunately hamper its utility and affect its vitality.

The Texas case of *Apodaca v. State*[31] was the first one holding inadmissible the results of a chemical test to determine alcoholic intoxication. The defendant was forced to submit to a urine test. The compulsion element was clear. Two tests were taken, the results of the first one being destroyed by the defendant. The second specimen was given because he was "ordered" to do so. The court gave its interpretation of the historical origin of the privilege and believed that as long as any compulsion was present the prohibition against self-incrimination was violated. The Texas courts, however, apparently admit the chemical tests if consent is definitely given.[32]

From the above summary discussion it appears clear that the courts recognize the value of chemical tests and will admit them. The only legal barrier that exists is that of allowing the results of *compulsory* tests to be introduced into evidence. The *Apodaca*[33] dilemma of self-incrimination in Texas is definitely an obstacle[34] to the effective development and administration

[30c] Thus, the court becomes involved in the problems discussed in note 34 *infra*.

[30d] The dissenting justice believes the case falls within the same category as those wherein force is exerted to obtain the blood tests. He finds self-incrimination and appears to agree with the rest of the court that the evidence was illegally obtained and that there was an "illegal search and seizure."

[31] 140 Tex. Cr. App. 593, 146 S. W. (2d) 381 (1940).

[32] See Halloway v. State, 146 Tex. Cr. App. 353, 175 S. W. (2d) 258 (1943) where the Apodaca case is distinguished because consent was given (urine test). See also, Millican v. State, 143 Tex. Cr. App. 115, 157 S.W. (2d) 357 (1942) where the court, in admitting the results of chemical tests, speaks of "observations".

[33] *Supra* note 31.

[34] The case of State v. Weltha, 228 Iowa 519, 292 N.W. 148 (1940) presented what the court thought was another constitutional restriction against compulsory chemical tests. In that case the trial court's ruling was reversed because of what the court claimed was an erroneous admission into evidence of the results of a blood test taken from an unconscious person not under arrest at the time. The court stated: "We have here a situation where a volunteer, without express or implied assent, intrudes himself into an operating room and takes from an uncon-

of a proper formula for cleansing highways of the prodigious hazard of alcoholic driving. The decisions that justify the result reached because there was no compulsion are to a lesser degree impeding the efficient administration of "drunken driving" legislation. This is also true of the opinions of several state attorney generals[35] to the effect that the tests are violative of the privilege against self-incrimination.

Although some of the details concerning the English and early American history of the privilege are obscure, it is perfectly clear that the primary purpose of the privilege was to put an end to the practice of employing legal process *to extract from a person's lips an admission of his guilt.*[36] It was not designed to afford protection from compulsory physical examinations conducted for the purpose of establishing identity or for ascertaining certain facts of a physical nature indicative of the guilt

scious patient a blood sample to be used to make or sustain possible future criminal prosecution. We cannot bring ourselves to approve such a course; we find no authority which requires us to do so". Thus, the court spoke as if there were an illegal search and seizure. Even assuming there was basis for such reasoning, the court did not have to discuss this point. The decision could simply have been put upon the ground, which the court discusses, that the evidence was carelessly handled and not properly traced up until the time it reached the expert for analysis.

Actually, search and seizure was not involved. The one who obtained the evidence was a private volunteer — not an officer of the law. How then could the search and seizure clause apply? The attempt to extend the search and seizure clauses of the states to the situation under discussion is untenable. This safeguard was designed to protect people's homes and persons from being invaded without legitimate search warrants. This provision was never designed to extend beyond the privacy of the home and the *possessions* of an individual. It does not prohibit a chemical disclosure and is not applicable to compulsory tests to determine intoxication. *See*: Olmstead v. United States, 277 U. S. 438, 465 (1928); People v. Defore, 242 N. Y. 13, 150 N.E. 585 (1926), *cert. denied,* Defore v. People of the State of New York, 270 U. S. 657 (1926); Ladd and Gibson, *op. cit. supra* note 7 at 215-218.

[35] See the 1940 Committee Report, pgs. 21-22 for a brief discussion of some of the opinions.

[36] For a detailed discussion of the history of the privilege see, Inbau, Self Incrimination—What Can an Accused Person be Compelled to Do? (1937) 28 J. of Cr. L. & Crim. 261. See also, 8 Wigmore, Evidence (3rd ed., 1940) § 2263: "Looking back at the history of the privilege and the spirit by which its establishment came about, the object of the protection seems clear. It is the employment of legal process to *extract from a person's own lips* an admission of his guilt, which will thus take the place of other evidence.

"Such too, is the inference from the policy of the privilege as a defensible institution (*ante* § 2251); that is to say, it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by forces of law.

"Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence . . . .

"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsions."

or innocence of the accused person.[37] Moreover, the general policy justifying the existence of the privilege at the present time is to deter law enforcement officers "from a lazy and pernicious reliance upon the accused's *confession*" and "to stimulate the prosecution to a full and fair search for evidence procurable by its own exertions."[38]

There are many appellate court decisions to the effect that an accused person may be compelled to submit to an examination of his body for scars, marks, and wounds, and to the taking of his fingerprints or his photograph; to place his foot in a print at the scene of a crime for comparison purposes; to change his wearing apparel or enact a crime for purposes of identification.[39] One court, in a case which involved a problem similar to that regarding compulsory examinations for intoxication, held that an accused person's privilege against self-incrimination was not violated by his being forced to discharge from his mouth some morphine which he had concealed there when arrested for its unlawful possession.[40]

The analogy between these various types of compulsory evidence and the taking of a specimen of breath, blood, or urine seems basically valid in support of the view that such a procedure does not violate the privilege against self-incrimination.[41] Certainly no other conclusion is acceptable under a proper historical interpretation of the privilege.[42]

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[37] See, Holmes, J. in Holt v. United States, 218 U. S. 245 (1910): ". . . the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion not to extort communications from him, not an exclusion of his body as evidence when it may be material."

[38] Wigmore, *op. cit. supra* note 36 at § 2263.

[39] For a complete discussion of the cases involving the privilege see, Inbau, *op. cit. supra* note 36. See also, Ladd and Gibson, *op. cit. supra* note 7 at 232-241.

[40] United States v. Ong Siu Hong, 36 Phil. Is. 735 (1917). See also, State v. McLaughlin, 138 La. 958, 70 So. 925 (1916) (court held that scrapings underneath the fingernails of an accused may be removed for analysis without violating the privilege).

[41] See the very recent case of Green Lake County v. Domes, —— Wis. ——, 18 N.W. (2d) 348 (1945) where the defendant upon being charged with violating a county ordinance by operating an automobile while under the influence of liquor was *compelled* to take a *physical* examination. The court held that the admission into evidence of the testimony of the doctor relating to the physical examination was proper. It stated that even though the defendant was compelled to do this there was no violation of the privilege, following the views of Holmes, Wigmore and Inbau. That is, the privilege extends only to oral communincations. See also, McFarland v. United States, —— F. (2d) —— (App. D. C., July 2, 1945) where the defendant was forced under *military order* to submit to an examination for the purpose of discovering the deceased's blood on his body.

[42] "In so far as the privilege against self-incrimination is concerned there seems to be no limit to the extent an accused person must tolerate an invasion of his bodily security. There may be and are, of course, other considerations which will impel a court to define certain limitations. Nevertheless, there is no justification for invoking the privilege against self-incrimination for this purpose. Other and more appropriate legal principles are available." Inbau, *op. cit. supra* note 36.

Legislative Intervention

However unsound the application of the privilege against self-incrimination may be to the situation under discussion, the supposition appears to be firmly entrenched by the *dicta* of most courts that have been confronted with the problem of the admissibility of chemical tests. It would be wishful thinking to expect a general enlightened viewpoint in the near future. However, this barrier is not insurmountable. The constitutionality of compulsory chemical tests can be upheld even though the issue of self-incrimination is uppermost in the minds of the courts. That is, let it be assumed that ordinarily it is a violation of the privilege to compel one to submit to a chemical test to determine intoxication—that the privilege exists in such a situation. Yet, the legislature can by an enactment remove all doubt as to the legality of such tests and overcome the alleged existence of the privilege. The theory is simple.

One can not dispute the fact that it is within the police power of a state to regulate the use of highways for the protection of the public.[43] When the automobile first came into use, the cases vehemently discussed whether the exercise of the use of the highways by individuals was conditioned upon a mere privilege which could be denied completely[44] or whether it was a right which could not be absolutely taken away.[45]

Viewing the use of the highways as a privilege it is said that the legislature can exclude automobiles from the highways entirely. If they can deny the privilege they can provide for the conditions under which it can be exercised, or as the theory is commonly denoted: "the greater includes the lesser." If a condition be that one must submit to a chemical test, one in accepting the grant of using the highways waives a personal constitutional privilege. That is, the power to prohibit includes the power to impose conditions of use. If one uses the highways, he assumes the conditions attached to the use. Thus, he can be deemed to have waived his privilege against self-incrimination, if such a privilege did exist — there being no doubt that the privilege can be waived.[46]

[43] See, 1-2 Cyclopedia of Automobile Law (9th ed., 1932) p. 188, note 15 and (1945 Supp.) p. 4.

[44] For example, see: State v. Cox, 91 N.H. 137, 16 A. (2d) 508 (1940); Goldberg v. Davenport, 211 Iowa 612, 232 N.W. 477 (1930).

[45] Similarly see, Chicago Motor Coach Co. v. City of Chicago, 337 Ill. 200, 169 N.E. 22 (1929); Florida Motor Lines v. Ward, 120 Fla. 1105, 137 So. 163 (1931).

[46] Sawyer v. United States, 202 U. S. 150 (1906); Powers v. United States, 223 U. S. 303 (1912); Ingram v. United States, 5 F. (2d) 940 (C.C.A. 8th, 1925); United States v. Wetmore, 218 Fed. 227 (W.D. Pa. 1914); People v. Johnston, 228 N.Y. 332, 127 N.E. 186 (1920). See also, 8 Wigmore, Evidence (3rd ed., 1940) § 2275, p. 435 when in referring to self-incrimination he states: "It has never been doubted that the privilege like all privileges . . . is in itself waivable."

The New York case of *People v. Rosenheimer*[47] was one of the earliest expressions of the waiver of the privilege against self-incrimination effectuated through the use of the automobile. The defendant was indicted for violating a typical "hit and run" statute which was being passed in all parts of the country at that time. The act made it a felony for any one to knowingly leave the site of an accident without stopping and disclosing his name, address, and operator's license number. The defendant attacked the constitutionality of the statute on the ground that it violated a portion of the state constitution which provided that no person shall "be compelled in any criminal case to be a witness against himself" — the usual self-incrimination provision. The court in applying the above enunciated theory found no difficulty in holding that the defendant by use of the highways had waived his privilege against self-incrimination. It saw no "violation of public policy or of the principles of personal liberty to enact that, as a condition of operating such a machine one must waive his constitutional privilege."

Although the court refused to state whether or not the information required impaired the constitutional privilege, it emphasized that the particular theory used in upholding the legislation did not involve the consideration of the degrees of self-incrimination. That is, no matter how self-incriminatory the matter may be, the privilege is capable of being waived by the application of the principle that the "greater includes the lesser."[48]

Similarly in California[49] and in New Hampshire[50] "hit and run" statutes have been upheld. The reasoning in these cases is just as forceful as that found in the *Rosenheimer* case. The courts speak in phrases of "privilege and not a right," "complete denial of use of highways," "imposition of conditions," and "waiver." Financial responsibility laws[51] and the closing

[47] 209 N.Y. 115, 102 N.E. 530 (1913).

[48] The lone dissenting judge could not accept the fact that a waiver could be effected in this manner. He thought the statute was an infringement upon the rights of individuals prohibited by the constitution. His reasoning has not been borne out by the later cases nor does it find support in the earlier ones.

[49] People v. Fodera, 33 Calif. App. 8, 164 Pac. 22 (1917); People v. Diller, 24 Calif. App. 799, 142 Pac. 797 (1914).

[50] State v. Corron, 73 N.H. 434, 62 Atl. 1044 (1905); State v. Sterrin, 78 N.H. 220, 98 Atl. 482 (1916).

[51] In re Opinion of the Justices, 81 N.H. 566, 129 Atl. 117 (1925); In re Opinion of the Justices, 251 Mass. 569, 147 N.E. 681 (1925) ("The power to license imports the further power to withhold such license except upon compliance with prescribed conditions. The power to regulate, even to the extent of prohibition of motor vehicles from public ways, includes the lesser power to grant the right to use public highways only upon observance of prescribed conditions precedent."); Heart v. Fletcher, 53 N.Y.S. (2d) 369 (1945).

of certain streets to traffic[52] have been upheld upon the same basis.

The doctrine of "privilege"[53] and the accompanying "waiver" based on the power to exclude entirely can perhaps be challenged by those adhering to the view that, although the use of automobiles can be regulated they cannot be kept off the highways entirely, or viewed realistically, no attempt will be made to prohibit them. Thus, the need for a second avenue of analysis.

If another approach is followed, "waiver" need not be discussed, and it can be assumed that one has a "right" rather than a "privilege" to use of the highways. The case of *Ex Parte Kneedler*[54] illustrates this view. There, the constitutionality of a statute was involved which contained provisions identical with those discussed in the *Rosenheimer* case; the same issue was raised — self-incrimination.[55] Although the court used the terms "privilege" and "right" interchangeably, it is apparent that it believed that the use of automobiles could not be absolutely prohibited from the highways. The decision does not express the doctrine of waiver, but merely holds that the statute is a simple police regulation applied to a "fit subject." It argues that as a person operating a motor vehicle has not an "unrestricted right" in exercising the "privilege" granted by the legislature, he "must take it subject to all proper restriction."

[52] See Commonwealth v. Kingsbury, 199 Mass. 542, 85 N.E. 848 (1908).

[53] See United States v. Mulligan, 268 Fed. 893 (N.D.N.Y. 1920) for an excellent discussion of this theory. See also, Wilson v. United States. 221 U. S. 361, 380-81 (1911). This theory has also been applied in cases involving the displaying of license plates: People v. Schneider, 139 Mich. 673, 103 N.W. 172 (1905) ("It is merely a justifiable exercise of the police power in the interest of the safety of the travelling public."); People v. Scholplen, 137 N.Y.S. 675 (1912). It was also found applicable in those cases which dealt with the requirement that trucks be weighed: Commonwealth v. Abell, 275 Ky. 802, 122 S.W. 757 (1938) and in numerous situations not relating to highway regulation: see the quotation from the Kneedler case, *infra*, note 55.

[54] 243 Mo. 632, 147 S.W. 983 (1912) (*Habeas Corpus* proceeding—the petitioner being held on a *capias* issued on an information under the statute.)

[55] The court offers a fine discussion of other fields which are regulated: ". . . If this objection to the statute is valid, it may as well be urged against the other provisions, which require the owner and chauffeur to register their names and number, and to display the number of the vehicle in a conspicuous place thereon, thus giving evidence of identity, which is the obvious purpose of the provisions . . . We have several statutes which require persons to give information which would tend to support possible subsequent charges, if introduced into evidence. Persons in charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book, wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation . . . ."

The decision, in itself, is not decisive of the point under discussion, for the tenor of it is that actually the information required by the statute was not self-incriminating. Confusion is added by the alternative use of the terms "privilege" and "right." However, later cases have clarified the views expressed.[56]

In *People v. Thompson*,[57] the court, under similar facts, held that the ". . . use of automobiles on public highways is subject to regulation under the police power. . . . And, under the police power, if public welfare or public safety requires regulation of the use of such property, the otherwise private right of unrestricted use must yield to public exigency."[58] Thus, the proposition is that although one has a right to use the highways, if the rights of the individual citizen conflict with the paramount rights of the public at large, then the rights of one must yield to those of many. That is, a police regulation is not rendered invalid by the fact that it may incidentally affect some privileges or even some rights guaranteed by the constitution.[59] The doctrine of waiver is not involved. The situation is a typical one of the balancing of the interest of an individual against that of the community in general. The right to use the highways must be exercised in the mode consistent with the rights of others to protection. It is within the purview of the states' police power to effectuate a balance of these interests even though in so doing one may be compelled to give information against himself. By the application of this theory, the issue of self-incrimination can be conveniently disposed of by simply recognizing the superior power of the sovereign.

[56] For additional cases dealing with highway regulation *see*: Woods v. State, 15 Ala. App. 251, 73 So. 129 (1916); Ule v. State, 208 Ind. 255, 194 N.E. 140 (1935); *In re* Jones, 130 Fla. 667, 178 So. 424 (1938); Scott v. State, 90 Tex. Cr. App. 100, 233 S.W. 1097 (1921); State v. Masters, 106 W. Va. 46, 144 S.E. 718 (1928). *Contra*: People v. Hoogy, 277 Mich. 578, 269 N.W. 605 (1936). No attempt was made to uphold the legislation on the ground suggested in this writing. The court did not take notice of the earlier Michigan case, People v. Thompson, *infra* note 57. Similarly see, Rembrandt v. City of Chicago, 28 Ohio App. 4, 161 N.E. 364 (1927) where a statute required a *full* report to be made in case of an automobile accident. Held: self-incrimination. Again, the "waiver" or "reasonable regulation" aspects were not discussed.

[57] 259 Mich. 109, 242 N.W. 857 (1932). See also, Surtman *et al.* v. Sect. of State, 309 Mich. 270, 15 N.W. (2d) 471 (1944) holding that the amendment to the Motor Vehicle Financial Responsibility Act, requiring motorists other than operators of vehicles owned by the public to file with the Secretary of State reports of accidents is not unconstitutional as violating the self-incrimination privilege. It merely cites the Thompson case as controlling.

[58] The court also accepted the "privilege and complete exclusion" theory, thus using two grounds for supporting its holding. See also, in this connection, State v. Razey, 129 Kan. 328, 282 Pac. 755 (1929); State v. Masters, 106 W. Va. 46, 144 S.E. 718 (1928).

[59] *See*: Reitz v. Mealey, 314 U. S. 33, 36 (1941); Haque v. C.I.O., 307 U. S. 496 (1939); State v. Gibbes, 171 S. Car. 209, 172 S.E. 130 (1933); People v. Alterie, 356 Ill. 307, 190 N.E. 305 (1934); Schneider v. State, 308 U. S. 147 (1939).

It is not necessary to discuss the variations in the degrees of self-incrimination. Once it has been determined that the highways are a fit subject for regulation, and the regulation is reasonable, the amount of infringement upon a person's constitutional privilege is immaterial[60]— and this is so whether the use of highways be called a "privilege" or a "restricted right"; whether or not automobiles can be excluded from the highways completely.[61]

The propositions discussed above are not novel nor is their use limited to situations where the issue of self-incrimination is raised.[62] The "non-resident" motorist statutes are a classic example. Service of process upon the secretary of state or a fictitious agent is not in keeping with the traditional view of due process. Yet, these statutes are upheld under the policy underlying the *Kneedler* and *Rosenheimer* cases: the need for reasonable regulation.[63] The result is the same whether the theory is articulated in terms of waiver or merely by recognizing the police power of the state.[64]

It is to be noted that compulsory tests do not present a question which goes beyond the sphere of the state. There is no federal constitutional issue involved. Although the fifth amendment of the federal constitution contains a provision regarding self-incrimination, it has no application to infringement by the states. The fifth amendment prohibits certain action by the federal government alone. It has definitely been held that self-incrimination clause of the amendment is not included within the fourteenth.[65] Therefore, it is only the self-incrimination provisions of the state constitutions and statutes that are appli-

[60] See State v. Mayo, 106 Me. 62, 75 Atl. 295 (1909) where it is stated that no constitutional guarantee is violated by such an exercise of the police power. See also, Reitz v. Mealey, *supra* note 59 and the discussion in the Rosenheimer case, *supra* note 47.

[61] See the quotation from the Kneedler case, *supra* note 55 and the cases cited *supra* note 53.

[62] Merchant's and Planter's Bank v. Bugman *et al.*, 160 S. Car. 362, 91 S.E. 332 (1917) (Lien on automobile when any personal injury or property damage occurred. Held not violative of due process.); State v. Phillips, 107 Me. 249, 78 Atl. 283 (1910) (Prohibited automobiles from passing over certain streets. Held no denial of equal protection of law or of enjoying life, liberty etc.).

[63] See Jones v. Paxton, 27 F. (2d) 364 (D.C. Minn. 1928); Grave v. Rogers, 158 Md. 685, 149 Atl. 547 (1930); Shushereba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931); Smith v. Haughton, 206 N. Car. 587, 174 S.E. 506 (1934); State *ex rel* Cronkhite v. Belden, 193 Wis. 145, 211 N.W. 916 (1927); Pizzulti v. Wichter, 103 N.J. 130, 134 Atl. 727 (1926). See also, Scott, Jurisdiction over Nonresident Motorists (1926) 39 Harv. L. Rev. 563; Barry, Jurisdiction over Non-Residents (1927) 13 Va. L. Rev. 175.

[64] See Hess v. Pawloski, 274 U. S. 252 (1927); Kane v. New Jersey, 242 U. S. 160 (1916).

[65] Twining v. New Jersey, 211 U.S. 79 (1908). See also, Ladd and Gibson, *op. cit. supra* note 7 at 218-25.

cable. The due process clause of the fourteenth amendment is in no wise relevant.[66]

Thus, where the courts might fail or be reluctant to admit into evidence the results of chemical tests obtained under compulsion, the legislature, by the exercise of its police power, may overcome the hesitation and remove all doubts as to the legality of such evidence. The theory upholding such legislation need not be stated in the acts themselves. However, in order to dispel any future controversies the legislation might provide that one in applying for his driver's license must consent to the taking of these tests. The application might state that the applicant accepts the license subject to the conditions imposed by the legislature.

It militates against reality to believe that the privilege against incriminating oneself is applicable in compulsory tests to determine intoxication. But, as has been indicated, the privilege is thought to exist and there is little possibility that it will disappear from the minds of the courts. The need for legislation embodying provisions relating to the compulsory taking of chemical tests is evident. The manner in which this legislation can be upheld is equally patent. One need not search too long for authorities to substantiate its validity, nor is any drastic manipulation of legal principles necessary.

[66] Nor is it necessary to discuss the doctrine of "unconstitutional conditions" for, in the main, this doctrine is found in situations wherein the regulations imposed by the state are of direct concern to the federal government—where a federal constitutional provision is violated. For examples of these conditions, *see*: Merrill, Unconstitutional Conditions (1929) 77 Pa. L. Rev. 879; Oppenheim, Unconstitutional Conditions and State Powers (1928) 26 Mich. L. Rev. 176; Hale, Unconstitutional Conditions and Constitutional Rights (1935) 35 Col. L. Rev. 321; Comment (1945) 39 Ill. L. Rev. 244.