

# Sound Motion Pictures as Evidence of Intoxication in Drunken Driving Prosecutions Constitutional Standards

James R. Sweeny

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

James R. Sweeny, *Sound Motion Pictures as Evidence of Intoxication in Drunken Driving Prosecutions Constitutional Standards*, 52 Cornell L. Rev. 323 (1967)  
Available at: <http://scholarship.law.cornell.edu/clr/vol52/iss2/9>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

application of the hearsay rule. The mere reading from a medical treatise to a jury, or the submission of an excerpt from such a treatise to the trial judge, is a clear case where the rule against the admission of hearsay should operate to exclude the evidence. Such is the result under the general rule followed by all states except Alabama.

Where the medical treatise is introduced in a workmen's compensation proceeding in conjunction with expert opinion evidence, there is little justification for refusal to permit consideration of the evidence. Certainly under the California rule and probably under the majority rule (New York's "residuum" rule) a compensation award can be based upon a treatise corroborated by expert opinion evidence.

Even in a court trial where expert opinion evidence is presented in conjunction with the reading of a medical treatise, a strong case can be made for permitting the reading. This position has been adopted by only a few states, but it is worthy of much wider recognition. It is questionable whether reading from medical texts in a workmen's compensation proceeding without an expert witness available should be permitted, at least where, as under the California rule, any kind of hearsay evidence may be the sole basis of the award. Under the residuum rule, corroborating, expert opinion evidence would be unnecessary only if there were other legal evidence which could provide some support for the decision. The difference between these two kinds of rules is in the amount of faith placed in the expertise of the commissioners. Since their expertise does not make them medical experts, the majority (residuum) rule may be the better view.

*Donald G. Cherry*

#### **SOUND MOTION PICTURES AS EVIDENCE OF INTOXICATION IN DRUNKEN DRIVING PROSECUTIONS: CONSTITUTIONAL STANDARDS**

Since 1950 the number of Americans killed in motor vehicle accidents has increased steadily and is now almost 50,000 per year.<sup>1</sup> While exact statistics are impossible to obtain, it has been estimated that between one-third and one-half of the drivers involved in fatal accidents had been drinking.<sup>2</sup> In response to this obvious alcoholic menace many states have instituted "get-tough" law-enforcement techniques. While these programs, and the accompanying publicity, may have convinced some potentially-dangerous individuals not to drive, they do not assure that an apprehended driver, if intoxicated, will eventually be convicted.

<sup>1</sup> Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 576 (1966).

<sup>2</sup> Johnson, "Blood Test Results—Their Admissibility To Show a Decedent's Intoxication," 38 Ind. L.J. 603 n.1 (1963); Kozelka, "Scientific Tests for Alcohol Intoxication," in Institute on Scientific and Laboratory Methods of Judicial Proof, p. III-1 (Univ. of Wisc. 1951); Note, 49 Va. L. Rev. 386 n.1 (1963).

### *The Problem of Obtaining Convictions Without Chemical Tests*

Without chemical evidence of a defendant's state of intoxication, a prosecutor must rely heavily upon the arresting officer's testimony to obtain a conviction. The officer will probably describe the physical appearance of the defendant—the odor of his breath, the condition of his pupils, his ability to speak and walk, and his general behavior.<sup>3</sup> These criteria, however, are quite unreliable. Breath odor<sup>4</sup> and other incriminating characteristics may result from causes far removed from over-indulgence in alcohol.<sup>5</sup> In fact, from the symptoms above a physician, as an expert witness, could not swear that an individual defendant had consumed any alcohol at all.<sup>6</sup>

Faced with the necessity of obtaining convictions if their increased enforcement efforts are to have any deterrent or punitive<sup>7</sup> effect, the states have turned to scientific and pseudo-scientific testing techniques to furnish the needed evidence of intoxication.

### *The Problems Raised by Chemical Testing*

Virtually every state now sanctions the use of chemical tests for the purpose of establishing a defendant's state of intoxication.<sup>8</sup> These statutes and decisions

<sup>3</sup> This list contains the usual symptoms of intoxication. Kozelka, *supra* note 2, at III-1. See *State v. Paschal*, 253 N.C. 795, 796, 117 S.E.2d 749, 749-50 (1961), where the state's evidence, consisting solely of the arresting officer's testimony, was as follows:

The officer stopped defendant on account of the manner (described in detail) in which defendant was operating his car. Defendant, when he walked out in front of the patrol car, "weaved and wobbled." His speech was "slurred" and the odor of alcohol was upon his breath. In defendant's car, there was a six-pack carton of Budweiser Beer, containing four full bottles and one empty bottle, and also a partially filled bottle (containing thirteen ounces) of vodka.

<sup>4</sup> Breath odor is in no way proportional to the amount of alcohol actually consumed, being principally a function of the flavoring matter of the liquor. Harger, "Some Practical Aspects of Chemical Tests for Intoxication," in *Institute on Scientific and Laboratory Methods of Judicial Proof*, p. III-16 (Univ. of Wisc. 1951).

<sup>5</sup> Among the other possible causes are epilepsy, concussion, heart attack, diabetes, overdose of insulin, and the use of drugs such as barbituates and tranquilizers. Borkenstein & Smith, "The Breathalyzer and Its Applications," 2 *Med. Sci. & Law* 13, 21 (1961). To make the proof of intoxication more difficult, it appears that many defendants are able to find witnesses, sometimes from the local tavern, to testify that the accused certainly had not seemed intoxicated to them, although this is not always the best defense. See Erwin, "Defense of Persons Accused of Driving While Under the Influence of Alcohol," 11 *Prac. Law.* 73, 78 (No. 1, 1965).

<sup>6</sup> Harger, *supra* note 4, at III-16. See Erwin, *supra* note 5, at 80-83.

<sup>7</sup> See *id.* at 74 where the author states that "a single drunken-driving conviction in the State of California would cost the convicted person about \$1,000 over a three-year period in additional auto insurance premiums, if he carries ordinary coverage on two automobiles." Of course this is in addition to the very heavy fine often imposed.

<sup>8</sup> *Breithaupt v. Abram*, 352 U.S. 432, 436-37 n.3 (1957); Richardson, "Scientific Evidence in the Law," 44 *Ky. L.J.* 277, 280 (1956). There are apparently two theories under which a state may authorize the use of these tests. The first is the "implied consent" or "right-privilege" theory. See Comment, 49 *Va. L. Rev.* 386, 388 (1963) and cases collected therein. Under this theory the use of the state's highways is viewed as a privilege rather than a right. Since the state has the power to exclude a motorist from its highways, it also has the power to extend that privilege to him upon the condition that he "consent" to chemical tests when required. Under the second theory a state may, through its police power, curtail the individual's freedom to drive his auto providing it does so without denying him the due process of law guaranteed by the fourteenth amendment. Although there have been constitutional objections to such statutes, they have always been found constitutional. See *State v. Johnson*, — *Iowa* —, —, 135 *N.W.2d* 518, 525 (1965); Comment, 49 *Va. L. Rev.* 386, 388-89 (1963).

show great diversity in dealing with the fundamental problem<sup>9</sup> in spite of the existence of the Uniform Vehicle Code.<sup>10</sup>

Chemical testing techniques do not assure conviction, however, even though their results may clearly indicate that the defendant was intoxicated. There are three basic types of chemical tests: breath, urine, and blood.<sup>11</sup> Liquor's intoxicating effect is produced by alcohol present in an individual's brain, and the degree of the effect is directly proportional to the concentration of alcohol present there.<sup>12</sup> Precise measurement of the concentration of alcohol in the blood of the brain is not feasible; instead, the amount of alcohol in the brain can only be estimated by measuring parameters capable of furnishing a more-or-less reliable indication of that concentration.

Since alcohol is carried to the brain by the blood, it would seem that the most reliable estimate of the brain alcohol could be made by measuring the alcohol content of the blood. This is one of the most frequently employed tests<sup>13</sup> and is likely to become even more popular as a result of the recent Supreme Court decision in *Schmerber v. California*.<sup>14</sup> However, there is reason to believe that during the first hour after drinking, the concentration of alcohol in the blood taken from the arm is not necessarily a reliable estimate of the concentration of alcohol in the brain.<sup>15</sup>

Another parameter often measured is the concentration of alcohol in the lung air, through the use of a "Breathalyzer" or "Drunkometer."<sup>16</sup> In this way the concentration of alcohol in the blood in the lungs is indirectly measured. The parameter measured here is one step further removed from that which actually produces intoxication; the test first assumes that the alcoholic concentration of the breath is a reliable indication of that in the lungs, and then that the concentration in the blood in the lungs is a reliable indicator of that in the brain. Results of such tests can also be unreliable in certain circumstances, particularly if any alcohol remains in the defendant's mouth,<sup>17</sup> or if the operator fails to purge the machine of any residual alcohol vapor at the beginning of the test.<sup>18</sup>

Finally, the alcoholic concentration in the brain may be estimated by measur-

<sup>9</sup> For compilations of the state statutory citations and some of the features of each, see Comments, 31 Temp. L.Q. 372, 374 n.11 (1958); 31 U. Chi. L. Rev. 603, 604 (1964); 18 Wash. & Lee L. Rev. 370, 377-78 (1961).

<sup>10</sup> Uniform Vehicle Code § 6-205 provides for implicit consent to a blood test by those arrested for drunken driving and for the revocation of the driving licenses of those who expressly refuse to consent. This code has the support of the National Safety Council, and was introduced in 24 state legislatures in 1963. Comment, 31 U. Chi. L. Rev. 603, 605 (1964).

<sup>11</sup> See generally Kozelka, supra note 2; Erwin, supra note 5.

<sup>12</sup> Harger, supra note 4, at III-17.

<sup>13</sup> See *Breithaupt v. Abram*, supra note 8, at 436-37 n.3, where it is stated that 23 states sanction the use of a blood test by statute, while other states have allowed blood tests with court approval without statutory authority.

<sup>14</sup> 384 U.S. 757 (1966). This case held that blood test results are admissible at trial even when the sample was taken without the defendant's approval.

<sup>15</sup> Borkenstein & Smith, supra note 5, at 20. This first hour is the stage of "active absorption." It is estimated that the concentration of alcohol reaches a maximum between one-half hour and one hour after drinking. Kozelka, supra note 2, at III-3.

<sup>16</sup> Breath tests are used by police in 38 states and 12 foreign countries. Comment, 31 Temp. L.Q. 372, 373 (1958). But cf. Johnson, "The Breathalyzer and Its Applications—A Critique," 2 Med. Sci. & Law 23 (1961).

<sup>17</sup> Borkenstein & Smith, supra note 5, at 20.

<sup>18</sup> Johnson, supra note 16. One case has refused to admit evidence of the results of using such a device as inherently unreliable without a showing of any specific defect in the machine. *People v. Morse*, 325 Mich. 270, 38 N.W.2d 322 (1949).

ing that present in the defendant's urine. When this test is used, the results must be modified by a correction factor before they are even a good indication of blood alcohol.<sup>19</sup>

Even if he is forced to concede that the testing equipment used furnishes a reliable estimate of alcohol in the brain, a defense attorney may still be able, at trial, to weaken or destroy the effectiveness of the evidence produced by this equipment. The state must show that the results offered as evidence actually came from a specimen or test of the defendant, and that the person who conducted the tests was competent.<sup>20</sup> Perhaps the most troublesome burden on the state is that of showing an "uninterrupted chain of identification" from the time a sample is taken until it is tested.<sup>21</sup>

A defense attorney may also contend that, despite test results which would indicate an average man was incapable of operating a motor vehicle, his client, as an individual, was not intoxicated.<sup>22</sup> Medical researches have conducted controlled experiments to determine the concentration of alcohol which will produce a noticeable impairment of a drinker's ability to drive. They have recommended that three general categories of degree of impairment be established.<sup>23</sup> Some states have followed these recommendations, creating statutory rebuttable presumptions of sobriety or intoxication depending upon the range in which a defendant's blood alcohol is found to lie.<sup>24</sup> These ranges are expressly designed to meet the objection that one person may have a greater capacity to absorb alcohol without displaying noticeable effects than another.<sup>25</sup>

<sup>19</sup> Kozelka, *supra* note 2, at III-10.

<sup>20</sup> DeWitt, "Some Legal Problems in 'Driving Under the Influence' Cases," in *Institute on Scientific and Laboratory Methods of Judicial Proof*, p. III-34 (Univ. of Wisc. 1951).

<sup>21</sup> In the opinion of the Assistant Attorney General of one state this stringent requirement has been the source of the failure in his state to introduce the results of such tests even though they are admissible. Evans, "Admissibility of Blood Analysis Data on Question of Intoxication," 14 S.C.L.Q. 395 (1962). In the case of *People v. Lesinski*, 10 Misc. 2d 254, 171 N.Y.S.2d 339 (Sup. Ct. Erie County 1958), a patrolman took a urine sample home with him when he went off duty at 1:00 a.m. He placed it on his dresser and went to sleep. The next day at noon he delivered it to the police chemist. It was held that the chain of evidence had been broken because of the time lapse while the sample was on the dresser, and the defendant was acquitted. *Id.* at 256, 171 N.Y.S.2d at 341. For similar results in other courts, see *Novak v. District of Columbia*, 160 F.2d 588 (D.C. Cir. 1947); *Greenwood v. United States*, 97 F. Supp. 996 (D. Ky. 1951); *Jones v. Forrest City*, 388 S.W.2d 386 (Ark. 1965); *Rodgers v. Commonwealth*, 197 Va. 527, 90 S.E.2d 257 (1955). See also Note, 110 U. Pa. L. Rev. 895 (1962).

<sup>22</sup> See *Kuroske v. Aetna Life Ins. Co.*, 234 Wisc. 394, 402, 291 N.W. 384, 387-88 (1940).

<sup>23</sup> The American Medical Association's Committee on Street and Highway Accidents and the National Safety Council's Committee on Tests for Driver Intoxication have approved these classifications. The first zone has as its limit an alcohol content of 0.05%. This is equivalent to 2 oz. of 100 proof whiskey or 2 bottles of beer in a person weighing 150 pounds. It was recommended that a blood alcohol in this zone shall be taken to be prima facie evidence that the driver was "not under the influence" of alcohol. The second zone's limit is 0.15%. This represents 6 oz. of 100 proof whiskey or 6 bottles of beer in a person weighing 150 pounds. In this zone, the evidence of blood alcohol should be considered relevant, but not prima facie evidence that the driver was "under the influence" of alcohol. The third zone includes blood alcohol above .15%. It was recommended that a blood alcohol in this zone should be taken as prima facie evidence that the driver was "under the influence" of alcohol. Harger, *supra* note 4, at III-20.

<sup>24</sup> E.g., Ark. Stat. Ann. § 75-1031.1 (Supp. 1965). The effect of such a statute is that if a defendant displays a concentration in the first range there is a rebuttable presumption that he is not intoxicated; if in the second range there is no presumption but the results of the tests are admissible; if in the third range, there is a rebuttable presumption that the defendant is intoxicated.

<sup>25</sup> Kozelka, *supra* note 2, at III-6:

Frequently, however, no such presumptions are made. Instead the results of the tests are introduced, and the state must then furnish an expert witness to testify that a person displaying that concentration of alcohol in his blood would be intoxicated.<sup>26</sup>

Adoption of the presumptions by statute seems to be a rational approach to the problem. These presumptions are based upon scientifically controlled experiments rather than upon the opinion of only one expert witness. In addition to saving the expense of an expert witness in each case,<sup>27</sup> this procedure might reduce the volume of litigation, for there seems to be less motivation for prosecuting or defending a case in which the defendant falls clearly within a classification for which a presumption has been established.

### *Sound Motion Pictures as Evidence*

Police in several states now take sound motion pictures of a driver who is brought to the police station under a charge of driving while intoxicated.<sup>28</sup> Originally, the purpose of these movies seems to have been to encourage guilty pleas by illustrating to the driver and his attorney the driver's appearance and demeanor when arrested.<sup>29</sup> However, in *Lanford v. People*,<sup>30</sup> they were presented as evidence at trial.

In *Lanford*, the defendant was taken to police headquarters after being arrested for driving under the influence of alcohol. The sound movies were taken there without first obtaining the defendant's consent. His speech, as reproduced on the movie's sound track, was noticeably slurred. The movies were admitted over the defendant's objections that the Constitution prohibited the introduction of such evidence,<sup>31</sup> and he was convicted.

It is possible, formalistically, to separate a sound motion picture into its visual and auditory component parts. Courts reason that if each of the components is found acceptable as evidence, the whole must also be admissible. With the visual component, another division is made. The continual visual image is divided into a series of still ones, the reasoning being that a motion picture is analogous to a series of still photos taken at close time intervals.<sup>32</sup> Thus, the

---

It is a matter of common knowledge that the person accustomed to the use of alcohol can drink more and show fewer symptoms of toxicity than a person not so accustomed . . . . The habituated individual acquires an increased ability to compensate psychically and functionally for the effects of the intoxicant.

The absorption rate of alcohol into the bloodstream depends upon whether it is taken "straight" or with food, the rate being slower with food. *Id.* at III-3. Regardless, in all cases, intoxication is reached when the alcohol content of the brain reaches 0.25%. *Id.* at III-7.

<sup>26</sup> See, e.g., *Kuroske v. Aetna Life Ins. Co.*, supra note 22.

<sup>27</sup> Harger, supra note 4, at III-24.

<sup>28</sup> Erwin, supra note 5, at 89.

<sup>29</sup> *Id.* The author quotes a California district attorney:

"We found that, by taking motion pictures, we could readily get pleas of guilty from a lot of young men who were not used to drinking. The motion pictures amply demonstrated the intoxication of the drivers, and upon being shown the motion pictures, or after having their attorneys look at the motion pictures, it was easy to get them to plead guilty."

<sup>30</sup> — Colo. —, 409 P.2d 829 (1966), 41 *Notre Dame Law.* 1009 (1966). See also, *Housewright v. State*, 154 *Tex. Crim.* 101, 225 S.W.2d 417 (1949).

<sup>31</sup> The defendant contended that his constitutional right against self-incrimination had been violated. For a discussion of this issue, see text accompanying notes 48-96 *infra*.

<sup>32</sup> *Commonwealth v. Roller*, 100 Pa. Super. 125, 127-28 (1930); *Houts, Photographic Misrepresentation* §§ 20.01-20.02, at 20-1 (1964); Note, 22 *Ga. B.J.* 92, 94 (1959).

rules relating to the admission of motion pictures are basically the same as those pertaining to still photos.<sup>33</sup> A proper foundation must be laid by establishing identification and accuracy.<sup>34</sup> Since motion pictures, unlike still photos, are able to illustrate speed,<sup>35</sup> it must also be established that the movies accurately represent this quality.<sup>36</sup>

The sound track of a motion picture should be treated as analogous to the reproduction of sound by other recording devices. An independent foundation relating to the sound reproduction qualities of the equipment would seem necessary.<sup>37</sup>

Like a photograph or a sound recording, a sound motion picture may only be used in conjunction with a witness's testimony,<sup>38</sup> and it is because of this that the "component" approach may be unrealistic. Since a movie is only a witness's "pictured expression of the data observed by him and therein communicated to the tribunal more accurately than by words,"<sup>39</sup> it is necessary only for him to state that the movie accurately represents the impressions he received in witnessing the event in question.<sup>40</sup> Yet a jury may give more weight to the evidence presented by mechanical reproduction devices, and especially movies, than it would to ordinary verbal testimony.<sup>41</sup> The procedure of setting up the projection equipment and darkening the courtroom<sup>42</sup> draws more attention to the film than would be accorded normal testimony or the introduction of either still photos or sound recordings. To this extent the whole is greater than the sum of its parts and may overshadow equally strong testimony offered by the defense in rebuttal.

This effect may have been recognized by appellate courts, although no motion picture has ever been rejected simply because it was one.<sup>43</sup> Broader discretion

<sup>33</sup> Houts, *supra* note 32.

<sup>34</sup> *Id.* § 25.01, at 25-1-25-2; see 3 Wigmore, *Evidence* § 792 (3d ed. 1940). For a detailed discussion of the foundation problem, see Paradis, "The Celluloid Witness," 37 U. Colo. L. Rev. 235 (1965).

<sup>35</sup> Houts, *supra* note 32, § 20.03, at 20-3. The author states that the apparent speed of moving subjects toward and away from the camera can be doubled or halved depending entirely upon the lens which is used in the camera. See *id.* at 20-4-20-11 for illustrations of this distortion. In personal-injury litigation, in which motion pictures are most often used, the quantum of speed may not be essential. Paradis, *supra* note 34, at 243-45. But distortion in the speed of movement of one allegedly intoxicated could obviously be prejudicial to him.

<sup>36</sup> *Pacific Mut. Life Ins. Co. v. Marks*, 230 Ala. 417, 420, 161 So. 543, 545 (1935), criticized in Paradis, *supra* note 34, at 243. See Houts, *supra* note 32, § 20.03, at 20-12; Scott, *Photographic Evidence* § 624, at 510 (1942).

<sup>37</sup> Before dictaphone evidence could be introduced in *Steve M. Solomon, Jr., Inc. v. Edgar*, 92 Ga. App. 207, 88 S.E.2d 167 (1955), the court demanded this foundation:

- (1) It must be shown that the mechanical transcription device was capable of taking testimony.
- (2) It must be shown that the operator of the device was competent to operate the device.
- (3) The authenticity and correctness of the recording must be established.
- (4) It must be shown that changes, additions, or deletions have not been made.
- (5) The manner of the preservation of the record must be shown.
- (6) Speakers must be identified.

*Id.* at 211-12, 88 S.E.2d at 171. See also Roper, "Sound Recording Devices Used as Evidence," 9 Clev.-Mar. L. Rev. 523, 526 (1960); Note, 18 Okla. L. Rev. 87, 88 (1965).

<sup>38</sup> *State v. Palmer*, 227 La. 691, 716, 80 So. 2d 374, 383 (1955); Houts, *supra* note 32, § 30.02, at 30-7; 3 Wigmore, *supra* note 34, § 792, at 178; Note, 22 Ga. B.J. 92, 94 (1958).

<sup>39</sup> 3 Wigmore, *supra* note 34, § 792, at 178.

<sup>40</sup> *McCormick*, *Evidence* § 181, at 387 (1954); 3 Wigmore, *supra* note 34, § 792, at 185; Paradis, *supra* note 34, at 238.

<sup>41</sup> See 3 Wigmore, *supra* note 34, § 798(a), at 203.

<sup>42</sup> *McCormick*, *supra* note 40, at 389.

<sup>43</sup> Paradis, *supra* note 34, at 235.

may be allowed the trial court when ruling upon the admissibility of motion pictures rather than upon other evidence.<sup>44</sup>

Although mechanical reproduction devices have been praised for their ability to present clearly the testimony of a witness,<sup>45</sup> at least one court was worried by the impact such "clarity" may have had on the jury.<sup>46</sup> Using the trial judge's discretion may be the only practical way in which this impact can be controlled in each trial as it unfolds. He is clearly in the best position to evaluate it.

Even if a movie such as the one in *Lanford* is admitted, all of the physical aberrations which an allegedly intoxicated defendant may exhibit can well be due to some cause other than intoxication.<sup>47</sup> A moving picture should not be admitted if its use is so dramatic that it effectively deprives the defendant of any ability to rebut.

### *Constitutional Issues*

*Self-Incrimination.* In *Lanford v. People*,<sup>48</sup> defendant was removed to police headquarters where sound motion pictures were taken of him without his consent.<sup>49</sup> The results, introduced as evidence at his trial over his objections, showed him refusing, in a slurred voice,<sup>50</sup> to undergo sobriety tests<sup>51</sup> which the police suggested. Defendant was convicted. On appeal, he contended that the "introduction of the motion picture violated [his] . . . constitutional right against self-incrimination because it showed him refusing to submit to sobriety tests."<sup>52</sup> The Supreme Court of Colorado held the motion picture admissible for the

<sup>44</sup> McCormick, supra note 40, at 389. See also *State v. Zobel*, — Iowa —, —, 134 N.W.2d 101, 111 (1965); Scott, supra note 36, § 625, at 512-13; Note, 22 Ga. B.J. 92, 94 (1960); Annot., 83 A.L.R. 1315, 1317 (1933). This may be a very broad discretion. Of about 120 appellate decisions found by one author dealing with motion pictures, "fewer than half a dozen reverse the trial judge for an abuse of discretion." Paradis, supra note 34, at 245.

<sup>45</sup> *Housewright v. State*, 154 Tex. Crim. 101, 103, 225 S.W.2d 417, 418 (1949); *Cady v. Department of Labor & Industries*, 23 Wash. 2d 851, 863, 162 P.2d 813, 818 (1945); Roper, supra note 37, at 525.

<sup>46</sup> This court stated:

Such photographs would be likely to impress a jury to such an extent as virtually to preclude the possibility of an acquittal, however otherwise reasonably justified, because the vividness of their appeal to the eye might well give them greater significance than that to which their evidential value really entitled them.

*Commonwealth v. Johnson*, 368 Pa. 139, 145-46, 81 A.2d 569, 572 (1951). There was also an element of coercion of the defendant in this case, and it may have been decided upon this narrow ground. However, courts have allowed as evidence motion pictures showing a defendant signing his confession. *People v. Hayes*, 21 Cal. App. 2d 320, 71 P.2d 321 (1937); *Commonwealth v. Roller*, 100 Pa. Super. 125 (1930).

<sup>47</sup> See note 5 supra.

<sup>48</sup> — Colo. —, 409 P.2d 829 (1966).

<sup>49</sup> The opinion in *Lanford* states: "There is evidence in the record that the defendant was not cooperative when the film was being taken and refused to take designated coordination tests." *Lanford v. State*, — Colo. —, —, 409 P.2d 829, 830 (1966). Whether defendant actually refused to be the subject of the film, or whether he merely did not consent, is not clear. This distinction may now be constitutionally unimportant. See *Breithaupt v. Abram*, 352 U.S. 432, 441 (1957) (Warren, C. J., dissenting), quoted with approval in *Schmerber v. California*, 384 U.S. 757, 760 n.4 (1966).

<sup>50</sup> Apparently the most damaging evidence presented in the film was the quality of the defendant's speech in responding to police requests. *Lanford v. People*, supra note 49, at —, 409 P.2d at 830.

<sup>51</sup> The tests which defendant refused to take were "coordination" tests, and evidently not chemical ones. *Id.* at —, 409 P.2d at 830.

<sup>52</sup> *Ibid.*

limited purpose of depicting defendant's physical characteristics at the time of his arrest.<sup>53</sup>

In effect the defendant incorporated two constitutional objections into his single assignment of error. The first, discussed here, relates to the fact that his own words and image, recreated by a motion picture, were used as damaging evidence against him, resulting in a violation of his "constitutional"<sup>54</sup> right against self-incrimination.<sup>55</sup>

The scope of a defendant's privilege against self-incrimination, until recently, depended upon whether he was being prosecuted under state or federal law. Until 1964 protection against self-incrimination in state prosecutions was determined solely under that state's constitution.<sup>56</sup> *Twining v. New Jersey*<sup>57</sup> limited use of the fifth amendment of the United States Constitution to federal prosecutions.<sup>58</sup> But in *Malloy v. Hogan*<sup>59</sup> the Supreme Court abruptly<sup>60</sup> "succeeded"<sup>61</sup> *Twining*, deciding that in state prosecutions a defendant is guaranteed, through the fourteenth amendment, the fifth amendment's privilege against self-incrimination.<sup>62</sup>

Despite the fact that they evolved separately under differing state constitutions and under the United States Constitution, decisions in the area of Lanford's first constitutional objection were remarkably uniform. There seemed little doubt, until *Schmerber v. California*,<sup>63</sup> that the privilege against self-incrimination would not bar the use of movies showing a defendant's behavior at the time of his arrest.

"*Testimonial Compulsion*" or "*Body Evidence*"? In the early case of *Holt*

<sup>53</sup> Id. at —, 409 P.2d at 332.

<sup>54</sup> At no point in its opinion does the Colorado court indicate whether the "constitutional" questions were resolved under the Colorado or United States Constitution, or both.

<sup>55</sup> The second objection was that the film showed him objecting to performing certain sobriety tests. See text accompanying notes 89-96 *infra*.

<sup>56</sup> Every state but Iowa and New Jersey has a constitutional guarantee against self-incrimination. In Iowa the privilege has been read into the state's due process clause, and in New Jersey it has been adopted by statute. Note, 78 Harv. L. Rev. 426, 427 (1964). The language of the federal fifth amendment appears verbatim in 16 state constitutions (including California, Michigan, New York, and Ohio); it appears virtually verbatim in 14 others; there is "different language coming to the same thing" in 11 other state constitutions. 8 Wigmore, Evidence § 2552, at 319 (McNaughton rev. 1961). See *Schmerber v. California*, 384 U.S. 757, 761-62 n.6 (1966), where the Court refused to distinguish between "many state constitutions, including those of most of the original Colonies" which "phrase the privilege in terms of compelling a person to give 'evidence' against himself," and the fifth amendment's use of the word "witness."

<sup>57</sup> 211 U.S. 78 (1908).

<sup>58</sup> *Twining v. New Jersey*, 211 U.S. 78, 91 (1908). See also *Breithaupt v. Abram*, 352 U.S. 432, 434 (1957); *Hunt v. State*, 248 Ala. 217, 222, 27 So. 2d 186, 191 (1946).

<sup>59</sup> 378 U.S. 1 (1964).

<sup>60</sup> The court had affirmed *Twining* as recently as 1961. *Cohen v. Hurley*, 366 U.S. 117, 128 (1961).

<sup>61</sup> *Schmerber v. California*, *supra* note 56, at 760-61:

But [*Twining*] . . . holding that the protections of the Fourteenth Amendment do not embrace this Fifth Amendment privilege, has been succeeded by *Malloy v. Hogan* . . . . We there held that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."

<sup>62</sup> *Malloy v. Hogan*, 378 U.S. 1, 3 (1964). See *State v. Johnson*, — Iowa, —, —, 135 N.W.2d 518, 521 (1965). On incorporation generally, see Cushman, "Incorporation: Due Process and the Bill of Rights," 51 Cornell L.Q. 467 (1966).

<sup>63</sup> 384 U.S. 757 (1966).

*v. United States*,<sup>64</sup> defendant claimed his federal constitutional privilege against self-incrimination had been violated when he was forced to try on a blouse in front of the jury. The Supreme Court, speaking through Justice Holmes, said:

Another objection is based upon an extravagant extension of the Fifth Amendment. . . . But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.<sup>65</sup>

The Court thus distinguished "testimonial compulsion" from "body evidence," holding that the privilege against self-incrimination applies only to the former.<sup>66</sup> Although "not models of clarity and precision,"<sup>67</sup> the phrases furnished precedent for numerous subsequent cases. In both state<sup>68</sup> and federal prosecutions, "body evidence" has been held to include psychiatric examinations,<sup>69</sup> samples of handwriting,<sup>70</sup> voice recordings,<sup>71</sup> chemical tests of body specimens,<sup>72</sup> fingerprints,<sup>73</sup> and other samples of a defendant's body.<sup>74</sup>

*The Distinction Under Schmerber.* *Schmerber* dealt with the admissibility of blood test results where the sample had been removed from the defendant's body against his wishes. The majority<sup>75</sup> did not doubt that "in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled

<sup>64</sup> 218 U.S. 245 (1910).

<sup>65</sup> *Holt v. United States*, 218 U.S. 245, 252 (1910).

<sup>66</sup> The majority of writers seem to have accepted this holding as historically correct, although the "history" and development of the protections now incorporated in the fifth amendment seem to depend, to some extent, upon the proposition the particular writer espouses. Compare, Fink, "The Privilege Against Self-Incrimination—A Critical Reappraisal," 13 *W. Res. L. Rev.* 722, 723 (1962); 8 *Wigmore*, supra note 56, § 2263, at 378. Chief Justice Warren, writing for the majority in *Miranda v. Arizona*, 384 U.S. 436, 458-59 (1966), traces the protection from "ancient times" through the trial of John Lilburn and into our Bill of Rights. Comment, 31 *Temp. L.Q.* 372, 383 (1958), criticizes *Wigmore* for failing to trace the privilege to its origins in Jewish law.

<sup>67</sup> *Schmerber v. California*, 384 U.S. 757, 774 (1966) (dissenting opinion of Black, J., Douglas, J., concurring).

<sup>68</sup> See Comment, 31 *Temp. L.Q.* 372, 386-87 n.72 (1958), for a tabulation of state cases. But cf. *Spencer v. State*, 404 P.2d 46 (Okla. Crim. App. 1965); *Smith v. State*, 247 Ala. 354, 358, 24 So. 2d 546, 549 (1946).

<sup>69</sup> *Kaufman v. United States*, 350 F.2d 408, 415 (8th Cir. 1965); *Hunt v. State*, 248 Ala. 217, 224, 27 So. 2d 186, 193 (1946); *Commonwealth v. Musto*, 348 Pa. 300, 306, 35 A.2d 307, 311 (1944). But cf. *State v. Olson*, — Minn. —, 143 N.W.2d 69 (1966).

<sup>70</sup> *Bryant v. United States*, 244 F.2d 411 (5th Cir. 1957).

<sup>71</sup> *Burgman v. United States*, 188 F.2d 637, 639 (D.C. Cir.), cert. denied, 342 U.S. 838 (1951); *Gillars v. United States*, 182 F.2d 962, 973 (D.C. Cir. 1950).

<sup>72</sup> *People v. Haussler*, 41 Cal. 2d 252, 257, 260 P.2d 8, 11 (1953); *Block v. People*, 125 Colo. 36, 42-44, 240 P.2d 512, 516 (1951), cert. denied, 343 U.S. 978 (1952); *State v. Alexander*, 7 N.J. 585, 591, 83 A.2d 441, 446 (1951), cert. denied, 343 U.S. 908 (1952); *State v. Paschal*, 253 N.C. 795, 797, 117 S.E.2d 749, 751 (1961); *State v. Gattton*, 60 Ohio App. 192, 196, 20 N.E.2d 265, 266 (1938).

<sup>73</sup> *State v. Swallow*, 100 Misc. 447, 455, 165 N.Y. Supp. 915, 919 (Ct. Gen. Sessions of Peace, N.Y. County 1917); *Commonwealth v. Statti*, 166 Pa. Super. 577, 583, 73 A.2d 688, 691 (1950).

<sup>74</sup> *People v. Caritativo*, 46 Cal. 2d 68, 73, 292 P.2d 513, 515 (1956); *Commonwealth v. Musto*, 348 Pa. 300, 35 A.2d 307 (1944). See 8 *Wigmore*, supra note 56, § 2265, at 387 for an extensive tabulation of situations in which the "body evidence" rule has been followed.

<sup>75</sup> The "opinion of the court" represents that of Justice Brennan, who was its author, and Justices Clark and White. Justices Harlan and Stewart concurred, but "would go no further" than holding that taking of the blood tests "involved no testimonial compulsion." Chief Justice Warren, Justices Black and Douglas, and Justice Fortas dissented in three separate opinions.

him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense,<sup>76</sup> but phrased the crucial constitutional question as whether this resulted in petitioner's being "compelled 'to be a witness against himself.'"<sup>77</sup> They ruled that the "scope of the privilege" does not coincide "with the complex of values it helps to protect,"<sup>78</sup> but rather, reaches only defendant's right "to remain silent unless he chooses to speak in the unfettered exercise of his will."<sup>79</sup> Thus, the protections of the privilege include an "accused's communications, whatever form they might take," but not "real or physical evidence."<sup>80</sup> Thus they recognized Holmes' dichotomy, but they were careful to add that "we are not to be understood to agree with past applications in all instances."<sup>81</sup> The Court carefully pointed out that lie detector tests are actually directed at obtaining "testimonial" evidence, even though no vocal communications<sup>82</sup> are involved.<sup>83</sup>

What then of a defendant's voice and likeness depicted, as in *Lanford*, in motion pictures? His voice—his verbal utterances—are clearly being used as evidence against him. However, it is not the words he utters which are incriminating, and they alone are the product of his free will. Instead, it is only the manner in which the product of his thought is formed, albeit imperfectly, which is responsible for his incrimination. These verbal traces, in spite of being the form in which his free will is often expressed, themselves represent no interchange. Instead they are "real or physical evidence" with which "the scope of the privilege" does not "coincide."

*Admissibility of Refusal To Submit to Sobriety Test.* The defendant in *Lanford* complained that his privilege against self-incrimination was violated by the admission at his trial of portions of the film in which he was heard refusing to submit to sobriety tests.<sup>84</sup> The Colorado court ruled that upon request he would have been entitled to have the judge caution the jury that the film was offered only to illustrate the defendant's general demeanor;<sup>85</sup> apparently they were not to consider his refusal to submit to the tests as evidence of guilt.

*Schmerber v. California*<sup>86</sup> has resolved the states' split on the question of whether a blood test may constitutionally be taken against a suspect's wishes<sup>87</sup>

<sup>76</sup> *Schmerber v. California*, 384 U.S. 757, 761 (1966).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Id.* at 762.

<sup>79</sup> *Id.* at 763, quoting *Miranda v. Arizona*, 384 U.S. 436 (1966). Justices Black and Douglas could "find nothing whatever in the majority opinion in that case which either directly or indirectly supports the holding in this case." *Schmerber v. California*, *supra* note 76, at 777 (dissenting opinion).

<sup>80</sup> *Schmerber v. California*, *supra* note 76 at 763-64.

<sup>81</sup> *Id.* at 764.

<sup>82</sup> Wigmore was convinced that historically the privilege was "limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would then take the place of other evidence." 8 Wigmore, *supra* note 56, § 2263, at 378. The "majority" in *Schmerber*, after quoting the passage above, was careful to add that it was not adopting the Wigmore formulation. *Schmerber v. California*, 384 U.S. 757, 763 n.7 (1966). The dissenting opinion of Justice Black with Justice Douglas concurring also rejects the notion that the privilege is limited solely to vocal utterances. *Id.* at 774-75 (dissenting opinion).

<sup>83</sup> *Schmerber v. California*, *supra* note 82, at 764.

<sup>84</sup> *Lanford v. State*, — Colo. —, —, 409 P.2d 829, 830 (1966).

<sup>85</sup> *Id.* at —, 409 P.2d at 832.

<sup>86</sup> 384 U.S. 757 (1966).

<sup>87</sup> May be taken without consent: *Block v. People*, 125 Colo. 36, 42-44, 240 P.2d 512, 516 (1951), cert. denied, 343 U.S. 978 (1952); *State v. Johnson*, — Iowa —, —,

and has established that sobriety tests, as long as an unspecified quantum and type of force is not exceeded,<sup>88</sup> may be performed upon an unwilling subject. That case may also have decided whether or not a refusal by the suspect to undergo a requested sobriety test may be offered as evidence at trial.

At first blush, it would seem to be valid to argue that if there is no constitutional right, under ordinary circumstances, to refuse a proposed sobriety test,<sup>89</sup> there should be no constitutional right to have evidence of a refusal excluded at trial. The decisions in *Griffin v. California*<sup>90</sup> and *Miranda v. Arizona*<sup>91</sup> seem to make this argument more compelling. In *Griffin*, the Supreme Court held that if a defendant refuses on the basis of the fifth amendment to testify during his trial, the prosecutor may not argue that such a refusal is indicative of the defendant's guilt.<sup>92</sup> In *Miranda*, the Court found that if a defendant exercises his fifth amendment privilege to decline to answer questions while "under police custodial interrogation," the prosecutor may not introduce evidence to that effect at trial.<sup>93</sup>

However, the Court in *Schmerber* indicated, by dictum,<sup>94</sup> that it will not

135 N.W.2d 518, 524 (1965) (dictum); *State v. Paschal*, 253 N.C. 795, 797, 117 S.E.2d 749, 751 (1961) (dictum). May not be taken: *Booker v. City of Cincinnati*, 22 Ohio L. Abs. 286, 288 (C.P. 1936). Some states had avoided the issue by giving a suspect, by statute, the right to refuse to undergo a test, but providing for automatic suspension of his driving "privileges" if he exercised that right. See, e.g., N.Y. Vehicle and Traffic Law § 1194(1); Va. Code Ann. § 18.1-55.1 (Supp. 1966). For complete list of state statutes in this area, see Comment, 18 Wash. & Lee L. Rev. 370, 377-78 (1961).

<sup>88</sup> This requirement follows under the due process clause and the fourth amendment's proscription of unreasonable searches and seizures. There must, of course, be some compulsion against a suspect to incriminate himself before the fifth amendment protections are available. But when it is the quantum or type of force which is attacked, the fourteenth and fourth (which has been made applicable to the states through the fourteenth) amendments are the traditional approaches. See *Rochin v. California*, 342 U.S. 165 (1952), where pumping a suspect's stomach without his consent to obtain evidence involved police methods so brutal as to violate defendant's right to due process of law. There the Court said:

[T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

*Id.* at 172.

On the other hand, in *Breithaupt v. Abram*, 352 U.S. 432 (1957), the Court decided that removal of a blood sample from an unconscious suspect by a qualified doctor in a hospital did not involve such brutality.

It was against this background that *Schmerber* was decided, and over conflicting precedents that the split in the Court developed.

No force or invasion of a suspect's body is ordinarily present when movies are taken. On the other hand, if a suspect is forcibly removed to the scene of his alleged crime, and is there forced to re-enact the crime, compulsion like that in *Rochin* may be involved, and the evidence excluded. See *Bates v. State*, 40 Ala. App. 549, 117 So. 2d 258 (1959); *Commonwealth v. Johnson*, 368 Pa. 139, 81 A.2d 569 (1951).

<sup>89</sup> The majority indicated that there may be circumstances when a suspect's request to be excused from chemical testing must be obeyed by police. Evidentially, if for reasons of "fear, concern for health, or religious scruple," a suspect prefers not to have a blood test taken, he may request that a breath test (see text accompanying notes 16-19 supra) may be taken instead. *Schmerber v. California*, 384 U.S. 757, 771 (1966).

<sup>90</sup> 380 U.S. 609 (1965).

<sup>91</sup> 384 U.S. 436 (1966).

<sup>92</sup> *Griffin v. California*, 380 U.S. 609, 615 (1965).

<sup>93</sup> *Miranda v. Arizona*, 384 U.S. 436, 444-91 (1966).

<sup>94</sup> The petitioner in *Schmerber* had also refused a request that he undergo a breath

accept the converse of these theorems—that if there is no constitutional right to refuse, there is no constitutional right to have the evidence of that refusal excluded.<sup>95</sup> The Court reasoned that even if the evidence produced by a certain test is “physical or real,” evidence of a defendant’s refusal to take that test may be “testimonial” and therefore protected by the fifth amendment. Logically, this argument seems to be without fault. But it is likely to place policemen in yet another difficult situation. They may compel a suspect to submit to a sobriety test, but if he refuses and is somehow able to prevent the testing, the police may not be able to tell the jury of that fact. Thus, the police are encouraged to use some degree of force upon the defendant, the very antithesis of the *Miranda* decision.<sup>96</sup>

In *Lanford* the sounds which the jury heard were acceptable, so long as they were taken only as sounds. But when they rise to the stature of words, as when defendant refused to submit to a sobriety test, they become inadmissible. The trial judge’s ruling that the jury may hear the sound portion of film, if accompanied by an instruction to hear only the way in which the words were spoken, and not what they said, appears logically infallible, even in the light of the most recent Supreme Court decisions. But it is unlikely that such an instruction could really be effective; the judge’s comment may only further impress a jury with the defendant’s refusal to submit to the tests. This is another unfortunate result of a logically sound decision.

#### CONCLUSION

Police and prosecutors in another attempt to secure more convictions in drunken driving cases have begun to take sound motion pictures of drivers brought to the police station. The arresting officer’s testimony of a suspect’s behavior may be rebutted, and scientific testing of a suspect’s urine, blood, or breath, even when obtainable and admissible as evidence, is not infallible. These difficulties may be partially circumvented by offering a movie as evidence. By analogizing sound movies to still photographs and sound recordings, rules relating to their admissibility have been established. However, such an approach seemingly ignores the inordinately great impression a sound movie may make in relation to other testimony.

The Supreme Court of Colorado has decided that sound motion pictures of one allegedly under the influence of alcohol taken at a police station without his consent are admissible when he is later brought to trial. If the sound reveals him refusing to submit to a sobriety test the film may still be admitted, but only to reveal his general demeanor.

Introduction of a movie of a defendant probably does not violate his federal constitutional privilege against self-incrimination, now made applicable to the states, merely because his likeness is reproduced or his voice heard. *Schmerber v. California* has reaffirmed, although in a limited sense, the distinction between

---

test, and evidence of that refusal was allowed at trial. However, he did not object at trial to the introduction of the evidence, and therefore had no standing to argue the question before the Supreme Court. *Schmerber v. California*, supra note 89, 765 n.9.

<sup>95</sup> *Ibid.* It should be noted that saying “there is a constitutional right to refuse” is merely a shorthand method of expressing the fact that there is a constitutional right to have the evidence excluded at trial following a timely refusal.

<sup>96</sup> See *Miranda v. Arizona*, supra note 93, at 445-58.