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NONCONSENSUAL BLOOD DRAWS AND DUAL LOYALTY: WHEN BODILY INTEGRITY CONFLICTS WITH THE PUBLIC HEALTH

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Alcohol-impaired driving is among of the leading preventable causes of premature death in the United States and constitutes a grave public health concern.¹ In 2009, the National Highway Traffic Safety Administration (NHTSA) recorded 10,839 fatalities involving drivers with blood alcohol levels above 0.08 g/dL.² NHTSA analysis placed the economic cost of drunk driving, as of 2000, at \$114.4 billion annually, including \$71.6 billion paid by innocent third parties;³ in other words, by conservative estimates, alcohol-impaired driving costs society between sixteen and thirty cents for every mile driven under the influence.⁴ In order to combat alcohol-impaired driving, state and local governments have in recent years embraced a wide range of measures to apprehend offenders and remove them from the roads. These include sobriety checkpoints,⁵ stiffer penalties such as mandatory jail time,⁶ breath alcohol ignition locks,⁷ and the use of portable breathalyzers and

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1. See, e.g., Christina Lindgren, Editorial, *Drop The Scare Tactics: To Reduce Impaired Driving Fatalities, Treat Young People With Respect*, BALT. SUN, Dec. 1, 2011, at 23A (reporting that in 2009, more than 10,000 people died as a result of impaired driving).

2. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUB. NO. DOT HS 811 385, TRAFFIC SAFETY FACTS: 2009 DATA 1 (2010), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811385.PDF>.

3. *Impaired Driving in the United States*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., http://www.nhtsa.gov/people/injury/alcohol/impaired_driving_pg2/US.htm (last visited Mar. 21, 2013).

4. Steven D. Levitt & Jack Porter, *How Dangerous Are Drinking Drivers?*, 109 J. POL. ECON., 1198, 1201 (2001).

5. See Randy W. Elder et al., *Effectiveness of Sobriety Checkpoints for Reducing Alcohol-Involved Crashes*, 3 TRAFFIC INJ. PREVENTION 266, 266 (2002) (noting that sobriety checkpoints have become popular law enforcement tools to curb drunk driving).

6. See Alexander C. Wagenaar et al., *General Deterrence Effects of U.S. Statutory DUI Fine and Jail Penalties: Long-term Follow-up in 32 States*, 39 ACCIDENT ANALYSIS & PREVENTION 982, 982 (2007) (noting that eighteen states enacted statutes imposing mandatory jail sentences for first time DUI offenders from 1976 to 2002).

blood draws in the field to determine the blood alcohol content of drivers suspected of intoxication.⁸ Yet since their introduction by Lieutenant Robert Borkenstein of the Indiana State Police in the 1950s, breath-based assessments of intoxication have been frequently challenged in court on the grounds of accuracy, leading law enforcement to prefer direct blood sampling.⁹

When suspects voluntarily agree to blood draws, this approach is not legally problematic.¹⁰ Increasingly, however, states are permitting law enforcement officers to draw blood forcibly from suspects and to seek the assistance of health care providers in the involuntary phlebotomy process.¹¹ Nonconsensual blood draws from competent individuals raise a series of challenging ethical questions regarding both unwanted medical interventions and the role of health professionals:¹² Do such blood draws violate fundamental human and Constitutional rights to bodily integrity? Are physicians and other health care providers bound to participate in forced blood draws as part of their professional duty to serve the public welfare? Or are these providers forbidden to participate as part of their professional obligation to respect patient autonomy and to do no harm? This article surveys current federal and state law on the subject and then explores the ethical and legal issues that are likely to confront physicians at this nexus of patient care and law enforcement.

I. CURRENT LAW AND PRACTICE

On August 14, 2004, Marc Martel, an emergency room physician at Hennepin County Medical Center in Minneapolis, Minnesota, was ordered by police to

7. See C. Willis et al., *Alcohol Ignition Interlock Programmes for Reducing Drink Driving Recidivism*, COCHRANE DATABASE SYSTEMATIC REV., Oct. 18, 2004, at 2 (noting that alcohol ignition interlocks are used in combating drinking and driving).

8. See Joseph T. Hallinan, *Test Questions: In Fight to Stop Drunk Driving, Police Draw Blood*, WALL ST. J., Mar. 23, 2004, at A1 (noting that police routinely request breath tests of drivers suspected of drinking and driving and in many states also conduct forcible blood draws on suspects as well).

9. See, e.g., Jay Romano, *Drunken Driving Statutes Criticized*, N.Y. TIMES (Mar 11, 1990), <http://www.nytimes.com/1990/03/11/nyregion/drunken-driving-statutes-criticized.html?pagewanted=all&src=pm> (noting one challenge in the New Jersey Supreme Court to the legality of law enforcement using breathalyzers to obtain convictions for DUI offenses as well as discussing the potential for error in administering such tests).

10. See *People v. Ward*, 120 N.E.2d 211, 213 (1954) (noting that since the defendant voluntarily submitted to the test it was unnecessary to address the question whether a suspect must be given notice of his right to refuse to take a test to establish alcoholic content); *Breithaupt v. Abram*, 352 U.S. 432, 441 (1957) (Warren, C.J., dissenting) (noting that a person who consents to a blood draws waives due process objections).

11. See Hallinan, *supra* note 8 (showing that laws in at least eight states allow police to draw blood by force and noting a common trend of police taking suspects who fail sobriety test to a medical facility to have their blood drawn).

12. *Id.* (noting that forcible blood draws on suspects raise questions on the amount of force that law enforcement may take in obtaining samples as well as the ethical dilemmas that medical professionals face in being forced to conduct blood draws on patients).

collect blood from a homicide suspect, Erik Lamont Lindsey, in order to determine his degree of intoxication.¹³ When Dr. Martel refused, expressing concerns about a hospital policy that prohibited performing “intrusive procedures” on unwilling patients, police had Hennepin County District Judge Diana Eagon phone the emergency room and order Dr. Martel to draw Lindsey’s blood.¹⁴ Minnesota state law permits such involuntary blood draws with a warrant, but does not address the question of whether health professionals can be commandeered for the phlebotomy process.¹⁵ Dr. Martel continued to refuse and was arrested for obstructing a homicide investigation.¹⁶ However, local prosecutors eventually declined to pursue charges against the physician.¹⁷ In another case, an emergency room resident physician at Martin Luther King Jr.-Drew Medical Center in Los Angeles, William Watkins, was handcuffed and detained in 1988 for refusing to draw blood from an unwilling hit-and-run suspect.¹⁸ A Compton police officer reportedly told the physician, “You draw the blood or go to jail,” although the hospital had earlier received clarification from the Deputy County Counsel stating that “if an arrestee expressly refuses to submit to testing, hospital personnel may not force the arrestee to submit to the testing.”¹⁹ In 2009, charge nurse Lisa Hofstra of Advocate Illinois Masonic Center sued the city of Chicago after a police officer handcuffed her for refusing to draw blood from a DWI suspect who had not yet been admitted to the hospital.²⁰ While the arrest of medical providers for refusing nonconsensual blood draws remains a rare event, conflicts between clinicians and law enforcement will continue to arise in circumstances where either providers are uncertain of their legal duties or where their legal duties conflict with perceived ethical obligations to their patients.²¹

13. See Associated Press, *Doctor Not Charged in Refusal to Draw Blood*, Saint Paul Pioneer Press, Aug. 18, 2004, at B9 (describing the event that led to the arrest of Dr. Marc Martel).

14. *Id.*

15. See *Minnesota v. Shriner*, 751 N.W.2d 538, 549–50 (Minn. 2008) (holding that Minnesota police officers may conduct a warrantless, forcible blood draw on a suspect arrested for drinking and driving as long as officers have probable cause to believe that a suspect committed criminal vehicular homicide or operation, but omitting whether medical professionals can be compelled to conduct such blood draws).

16. Associated Press, *supra* note 13.

17. *Id.*

18. Claire Spiegel & Patt Morrison, *Doctor Held As He Balks at Taking Blood Of Suspect*, L.A. TIMES, June 29, 1988, § 2 (Metro), at 3.

19. *Id.*

20. Frank Main, *Nurse Arrested on the Job Sues Police*, CHI. SUN-TIMES, Sept. 22, 2009, at 2.

21. See Hallinan, *supra* note 8 (noting that some doctors believe that performing blood draws on suspects without patient consent violates the Hippocratic Oath while other doctors feel reporting alcohol levels may violate the Health Insurance Portability and Accountability Act, which prohibits the unauthorized disclosure of patients’ records).

A. *Blood Draws Under Federal Law and the U. S. Constitution*

Federal law grants state and local jurisdictions significant latitude in developing policies on nonconsensual blood draws.²² In the modern era, the United States Supreme Court has generally adopted a restrictive view of forensic techniques that involve nonconsensual invasions of a criminal suspect's body.²³ A series of cases dating to the 1950s have addressed a wide assortment of law enforcement efforts to extract evidence from the body of an unwilling suspect.²⁴ In the 1960s, most notably in *Schmerber v. California*, the Supreme Court attempted to articulate a clear doctrine in this area that established a balancing act between the nature of the incursion and the value of the evidence.²⁵ During the ensuing five decades, a patchwork of decisions emanating from both the Supreme Court and the circuit courts has tended to favor strict limits upon such incursions, with involuntary blood draws being an exception to the general trend.²⁶

The seminal case in the field of involuntary invasions of bodily integrity is *Rochin v. California*.²⁷ On July 1, 1949, responding to a tip that a man named Antonio Rochin was dealing in narcotics, the Los Angeles police entered Rochin's home without a warrant, where they found the suspect seated upon his bed.²⁸ On a night stand alongside the bed, "the deputies spied two capsules;" Rochin "seized the capsules and put them in his mouth."²⁹ During the ensuing struggle, three

22. See Michael A. Correll, *Is There a Doctor in the (Station) House?: Reassessing the Constitutionality of Compelled DWI Blood Draws Forty-Five Years After Schmerber*, 113 W. VA. L. REV., 381, 400–01 (2011) (noting that the Supreme Court's "pro-search jurisprudence" on forcible blood draws has resulted in many states adopting a variety of statutory responses to limit their use by law enforcement).

23. See, e.g., *Schmerber v. California*, 384 U.S. 757, 771 (1966) (finding in that case that a forcible blood draw performed on a DWI suspect was reasonable because it was performed by a physician under accepted medical standards).

24. See Michael G. Rogers, *Bodily Intrusion in Search of Evidence: A Study in Fourth Amendment Decision-making*, 62 IND. L.J. 1181, 1183–84 (1987) (discussing *Rochin v. California*, 342 U.S. 165 (1952), a case in which the Supreme Court overturned the defendant's conviction on the ground that officers illegally obtained evidence by extracting contents from the defendant's stomach); see also *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Schmerber*, 384 U.S. 757 (analyzing the constitutionality of blood draw under the fourth amendment of a conscious suspect).

25. See *Schmerber*, 384 U.S. at 770–71 (establishing that an officer could reasonably believe that obtaining a warrant in order to draw a suspect's blood could result in a delay that would destroy necessary evidence).

26. See Edward D. Tolley & N.E.H. Hull, *Court Ordered Surgery to Retrieve Evidence in Georgia in Light of the United States Supreme Court Decision in Winston v. Lee*, 37 MERCER L. REV. 1005, 1006, 1008–09 (1986) (discussing how many courts have held that any state ordered surgical procedure on a suspect is a *per se* intrusion, but that most courts tend to uphold simple, *Schmerber*-like procedures, such as taking blood samples from suspects).

27. 342 U.S. 165 (1952).

28. *Id.* at 166.

29. *Id.*

officers jumped upon the suspect in an effort to extract the capsules.³⁰ When that effort failed, Rochin was handcuffed and transported to a local hospital.³¹ According to Justice Frankfurter's subsequent description of the facts: "At the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine."³² As a result of this forced extraction, Rochin was convicted of a California state statute prohibiting the possession of morphine without a prescription.³³ He challenged his conviction on the grounds that the extraction of evidence constituted an unreasonable search and/or seizure that violated the due process clause of the Fourteenth Amendment through its application of the Fourth Amendment to the states,³⁴ leading to one of the strongest verdicts in favor of bodily integrity in the Court's history to that time.³⁵

The Supreme Court ruled unanimously that forced stomach pumping to retrieve illegal drugs violated the Due Process Clause of the Fourteenth Amendment.³⁶ Writing for the Court, Justice Felix Frankfurter noted that such conduct "shocked the conscience."³⁷ He quoted two dissenting judges from the California Supreme Court for the proposition that "a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse."³⁸ In principle, *Rochin* seemed to open the door to a constitutional ban on the forcible extraction of blood.³⁹

In the wake of the *Rochin* ruling, it was only a matter of time before a criminal defendant challenged a forcible blood draw on Fourteenth Amendment grounds. The Court managed to sidestep the larger issue of involuntary extractions in the 1957 case of *Breithaupt v. Abram*, ruling six to three in that blood drawn from an unconscious suspect after a traffic fatality was admissible as evidence.⁴⁰

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (discussing the decision of a California Superior Court to convict Rochin of violating California law and sentence Rochin to sixty days in jail).

34. Brief for the Petitioner, *Rochin*, 342 U.S. 165 (No. 83).

35. See Rogers, *supra* note 24, at 1184 (discussing *Rochin* as both a Fifth Amendment decision prohibiting the police from extracting evidence from a suspect's body, as well as a Fourth Amendment decision denouncing certain police behavior).

36. *Rochin*, 342 U.S. at 174.

37. *Id.* at 172 (elaborating that the manner in which police officers obtained the evidence does "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically.").

38. *Id.* at 167.

39. See Rogers, *supra* note 24, at 1184 ("*Rochin* draws a clear analogy between forcible extraction of evidence from the body and coerced confession.").

40. 352 U.S. 432, 433–35, 440 (1957)

However, the Court left the determination of the constitutionality of forcible extractions from *conscious* defendants to a future case.⁴¹ Yet *Breithaupt* did lay the groundwork for extending the law enforcement prerogative to conscious but unwilling suspects.⁴² Justice Tom Clark, writing for the majority, noted the widespread use of blood testing in other areas of the law—from paternity testing to the use of ABO blood-typing in narrowing down suspect pools in criminal cases (in a manner that foreshadowed the later use of DNA evidence).⁴³ Of note, Justices Warren, Black and Douglas dissented.⁴⁴

The court finally confronted the issue of forcible blood draws from conscious suspects directly in *Schmerber v. California* (1966).⁴⁵ Writing for the Court, Justice William Brennan noted that the seizure of elements of the human body was a subject that the federal courts had rarely dealt with in the past, and that therefore he was able to write upon “a clean slate.”⁴⁶ What resulted was an opinion that implicitly created a balancing test for such forcible incursions.⁴⁷ Brennan noted that courts had previously upheld a wide swath of marginally intrusive interventions.⁴⁸ According to these earlier rulings, the Constitution offers no protection against “compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, . . . to assume a stance, to walk, or to make a particular gesture.”⁴⁹ He also emphasized the significant value of blood draws to law enforcement authorities, observing that the “[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol.”⁵⁰ Finally, Brennan relied upon the widespread use of the practice at the time: “Such tests are a commonplace in these days of periodic physical examination, and experience with them teaches that the quantity of blood extracted is minimal, and that, for most people, the procedure involves virtually no risk, trauma, or pain.”⁵¹ One authority on the case, Illinois attorney Jay Gitles, has observed that, “In *Schmerber*, the Court balanced the

41. See *id.* at 435 (noting that the case dealt with a blood draw of an unconscious driver).

42. *Id.* at 438 (noting that a blood draw under different conditions or on individuals deemed incompetent may be objectionable).

43. *Id.* at 436, 438 n.4.

44. *Id.* at 440 (stating that the facts in *Rochin* were comparable to *Breithaupt* and therefore the Court should find the same result).

45. See *Schmerber v. California*, 384 U.S. 757, 758–59 (1966) (deciding whether the petitioner was denied due process when the arresting officer directed a physician to obtain a blood sample despite the petitioner’s refusal).

46. *Id.* at 767–68.

47. See Jay A. Gitles, *Fourth Amendment – Reasonableness Of Surgical Intrusions*, 76 J. CRIM. L. & CRIMINOLOGY 972, 972 (1985) (noting that the *Schmerber* Court adopted a balancing test that weighs a defendant’s right of personal privacy and bodily integrity against the state’s interest in collecting evidence in determining the reasonableness of police conduct).

48. *Schmerber*, 384 U.S. at 763–64.

49. *Id.* at 764.

50. *Id.* at 771.

51. *Id.*

procedure's threat to the suspect's safety and health and the intrusiveness upon the suspect's dignitary interest in personal privacy and bodily integrity against the community's evidentiary interest in more fairly and accurately determining guilt or innocence."⁵²

Brennan's ruling only applied to blood draws by medical personnel.⁵³ He declined to address the question of whether such blood draws would pass constitutional muster if the police themselves drew blood at the stationhouse, nor did he confront the question of whether medical professionals could be required to extract blood.⁵⁴ Yet as a result of *Schmerber v. California*, the practice of warrantless blood draws after DWI stops became policy in many jurisdictions.⁵⁵

Several decisions in the post-*Schmerber* era do suggest a window for narrowing the powers on law enforcement in the future. Notably, in *Winston v. Lee*, Virginia prosecutors sought court-ordered surgery to remove a bullet from the chest of a robbery suspect, Rudolf Lee, who had allegedly been wounded at the crime scene.⁵⁶ The state hoped to use ballistic evidence to connect the defendant directly to the victim's gun.⁵⁷ After a federal district court enjoined a state court judge's order for the surgery, the Supreme Court intervened.⁵⁸ Justice Brennan wrote for the Court once again and flushed out the balancing test he had hinted at in *Schmerber*.⁵⁹ According to Brennan, "the reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure."⁶⁰ Ultimately, the Court decided that the surgery sought by Virginia prosecutors did not pass the balancing test.⁶¹ Brennan observed that "the intrusion on respondent's privacy interests and bodily integrity can only be characterized as severe. Surgery without the patient's consent, performed under a general anesthetic to search for evidence of a crime, involves a virtually total

52. See Gitle, *supra* note 47, at 979.

53. See *Schmerber*, 384 U.S. at 771–72 (limiting the Court's ruling to the validity of blood draws conducted by medical professionals and noting that blood draws performed by non-medical professionals or in non-medical environments present different concerns on suspects' rights).

54. *Id.* at 772.

55. See *Carleton v. Superior Court*, 170 Cal. App. 3d 1182, 1185 (Ct. App. 1985) (finding that a warrant is not needed for a blood draw following a felony drunk driving arrest); see also *Ellis v. Cotton*, 2008 WL 4182359, at *6–9 (N.D. Tex. Sept. 9, 2008) (finding the case to be "remarkably similar to *Schmerber*," and finding that the police officer's forcible extraction of blood did not violate the Plaintiff's constitutional rights).

56. 470 U.S. 753, 756 (1985).

57. *Id.* at 755.

58. *Id.* at 757–58. Following the District Court for the Eastern District of Virginia's decision to enjoin the surgery, the Fourth Circuit affirmed and the Supreme Court granted certiorari to determine whether the state could force a suspect to undergo surgery in their efforts to gather evidence for a crime. *Id.*

59. *Id.* at 763; see also *supra* note 47 and accompanying text.

60. *Winston*, 470 U.S. at 760.

61. *Id.* at 766.

divestment of the patient's ordinary control over surgical probing beneath his skin."⁶² He also took note of the "uncertainty about the medical risks" involving in such a procedure, which he saw as a factor distinguishing it from the earlier blood draw cases.⁶³ In the decades since *Winston*, lower courts have been divided in their verdicts when applying the balancing test to forced surgeries.⁶⁴

In *Schmerber*, Brennan held out the possibility that the Constitution might require an exception for those suspects who objected to blood draws out of "concern for health, or religious scruple."⁶⁵ In theory, particularly after the limits outlined in *Winston*, an individual defendant might be able to establish that the unique aspects of his circumstances render an involuntary blood draw upon his person more like the intrusion in *Winston* than that in *Schmerber*.⁶⁶ To date, however, no defendant has successfully done so. As a result, the most significant impact of the *Schmerber* decision was to establish a legal floor that enabled state and local authorities to generate their own guidelines for forcible blood draws.⁶⁷ Needless to say, the results vary strikingly by jurisdiction, often shaped by state constitutional requirement that may prove more stringent than those mandated by the federal courts.⁶⁸

In 2013, the Supreme Court revisited the issue warrantless blood draws in *Missouri v. McNeely*.⁶⁹ The case arose after Missouri police stopped driver Tyler G. McNeely for allegedly speeding and crossing the yellow line.⁷⁰ McNeely refused both a breath analysis and a blood test to measure his blood alcohol content

62. *Id.* at 754.

63. *Id.* at 764 (noting the uncertainty in the nature of the surgery in that one surgeon believed that it would take approximately fifteen to twenty minutes while another surgeon predicted that it could last up to two and half hours).

64. See Gitle, *supra* note 47, at 979–80 (noting that, unlike the *Winston* Court, several lower courts have permitted court-ordered surgery to gather evidence for criminal prosecutions).

65. *Schmerber v. California*, 384 U.S. 757, 765 n.9, 771 (1966).

66. See *Winston*, 470 U.S. at 766 (finding in that case that the substantial intrusion of a protected interest, the medical risks involved, and the intrusion on the suspect's privacy that would be caused by surgery, did not outweigh the state's interest in gathering evidence).

67. See Correll, *supra* note 22, at 395, 401 (noting that states have generally responded to *Schmerber* in one of four ways: allowing law enforcement to conduct forcible non-consensual blood draws, adopting a right to refuse policy for drivers, permitting blood draws in severe circumstances, or allowing police to notify suspects that force will be used unless they voluntarily submit a blood sample).

68. See Willard Bergman, Jr., *Driving While Under the Influence of Alcohol: A Model Implied Consent Statute*, 12 WM. & MARY L. REV 654, 656 (1971) (noting that states used their police powers to pass varying implied consent statutes authorizing chemical test to determine alcoholic content over a concern of a growing drunk driving problem); see also Correll, *supra* note 22, at 401–02 (noting that states addressed differently the *Schmerber* use of force test by statute for example Florida permits blood draws by a specified group of medical professionals, while Maryland permits blood draws by a "qualified medical person" without enumerating specific professions).

69. 133 S. Ct. 1552, 1556 (2013).

70. *Id.*

(BAC).⁷¹ Relying on the “exigent circumstances” justification of *Schmerber*,⁷² the police transported McNeely to a local hospital and had a lab technician draw his blood without his consent.⁷³ Both the trial court and the Missouri State Supreme Court ruled the result of the test inadmissible as violations of the Fourth Amendment, arguing that routine DWI stops did not qualify as emergencies, and the state appealed.⁷⁴ A fragmented United States Supreme Court, per Justice Sonia Sotomayor, upheld the Missouri Supreme Court’s conclusion.⁷⁵

Sotomayor did not reject *Schmerber*.⁷⁶ Rather, she analyzed the facts of *McNeely* in the context of *Schmerber*, ultimately rejecting the State of Missouri’s claim that such blood draws in DWI cases were *per se* admissible evidence because, as the state viewed the matter, the dissipation of alcohol from the blood stream inherently posed an “exigent circumstance.”⁷⁷ Instead, Justice Sotomayor’s majority opinion, evaluating the need for warrantless action under a “totality of circumstances” standard,⁷⁸ found that routine DWI stops did *not* qualify as exigent events.⁷⁹ According to Sotomayor: “The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a ‘now or never’ situation . . . because BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner.”⁸⁰ However, Sotomayor allowed that under certain circumstances, a particular case might trigger an exigent circumstances exception.⁸¹ What proved most striking about Sotomayor’s opinion was a second justification she offered for requiring warrants in routine stops, namely that “because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to

71. *Id.* at 1556–57.

72. *See Schmerber v. California*, 384 U.S. 757, 770–71 (1966) (discussing the circumstances of the case and concluding that such circumstances justified the officer’s choice to secure the evidence absent a warrant).

73. *McNeely*, 133 S. Ct. at 1557.

74. *Id.* (discussing the trial court and the Missouri Supreme Court’s findings).

75. *Id.* at 1556.

76. *See id.* at 1563 (noting that the basis for the finding in *Schmerber*, the dissipation of alcohol in the blood, may support a finding of exigency in some cases, but it is not a categorical exception).

77. *Id.* at 1561, 1563.

78. *Id.* at 1563.

79. *See id.* at 1568 (describing the relevant factors for a “routine DWI” to qualify as an exigent event).

80. *Id.* at 1561.

81. *See id.* at 1568 (finding that some cases will still arise where a warrantless blood test will be justified).

obtain a warrant.”⁸² Yet in some states, where law enforcement officers are trained to draw blood in the field, such transportation no longer proves necessary.⁸³

B. Blood Draws Under State Laws

New York enacted an “implied consent” statute in 1953, which deemed that the act of driving itself indicated that a driver had consented to chemical testing for intoxication.⁸⁴ All forty-nine other states and the District of Columbia have since adopted similar statutes.⁸⁵ However, in some jurisdictions, authorities will attempt to obtain a suspect’s blood by force, while in others, the driver will simply face a penalty for refusal, such as automatic forfeiture of a driver’s license and/or a stiff fine.⁸⁶ States also differ on whether a bench warrant is required—although states that now permit warrantless draws will presumably narrow or eliminate such exception in light of *McNeely*⁸⁷—and upon whether the blood may be drawn by the police themselves or whether medical personnel must conduct the extraction.⁸⁸ In 1995, Arizona became the first state to authorize law enforcement officers to draw blood on their own.⁸⁹ The Phoenix Police Department now has one hundred twenty officers trained in the practice and conducts up to five hundred tests per month.⁹⁰ Some police departments in Idaho,⁹¹ Texas⁹² and Utah⁹³ also have officers who are authorized to conduct on-site phlebotomy.

Table I below describes the various nuances of state statutes regarding blood draws for law-enforcement purposes. It is also worth noting that at least two states,

82. *Id.* at 1561.

83. See *The Dangers of Phlebotomists: Why We All Should Be Frightened About Police “Phlebotomists”*, KATHLEEN N. CAREY LAW OFFICES, PLC, <http://www.azduiatty.com/the-dangers-of-phlebotomists.htm> (last visited Nov. 1, 2013) (discussing the increase in officers taking blood samples from DUI suspects in the field).

84. NY VEH. & TRAF. LAW § 71-a (1953).

85. See Hallinan, *supra* note 8.

86. See AMY BERNING ET AL., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., RES. NOTE NO. 810871, TRAFFIC SAFETY FACTS: BREATH TEST REFUSALS 1, 6 (2007), available at <http://ntl.bts.gov/lib/30000/30100/30142/810871.pdf>.

87. *McNeely*, 133 S. Ct. at 1568.

88. See Correll, *supra* note 22, at 401–02 (noting that, while New York requires an arresting officer to obtain a bench warrant or court order, California only allows certified technicians to conduct blood draws under specific circumstances).

89. See *Officers’ New Tool Against D.W.I.: Syringe*, N.Y. TIMES, Sept. 14, 2009, at A11.

90. *Id.* (discussing the use of blood draws by the Phoenix Police Department as well as other police departments around the country).

91. Rebecca Boone, *DWI Project Drawing Blood*, FORT WAYNE J. GAZETTE, Sept. 14 2009, at 8A.

92. See *id.* (noting that a select group of Texas officers have received training to complete blood draws on suspected drunken drivers).

93. See BERNING ET AL., *supra* note 86, at 6 (noting that as of 2006, there were fifty-three police officers in Utah trained to perform blood draws and that the state planned to train more).

Hawaii⁹⁴ and Idaho,⁹⁵ have statutes that overtly compel health care providers to perform blood draws when instructed to do so by law enforcement. In contrast, South Dakota law explicitly guarantees medical providers the right to refuse such a request.⁹⁶ The impact of *McNeely* is unclear, as states may either impose a warrant requirement universally or might choose to delineate narrower, exigent circumstances under which a warrant would not be required.⁹⁷

TABLE 1: STATE LAWS REGARDING BLOOD DRAWS
FOR LAW ENFORCEMENT PURPOSES

State	Authorizes Force	Warrant Required?	Who May Perform	Additional Restrictions
AL ⁹⁸	NO	NO (for unconscious drivers)	No restrictions (for unconscious drivers)	Consent to draw blood on unconscious driver is presumed
AK ⁹⁹	YES	NO	No restrictions	Only applies when a preceding motor vehicle incident has resulted in “physical injury to another person.”
AR ¹⁰⁰	NO	Not applicable	Not applicable	Not applicable

94. HAW. REV. STAT. ANN. § 291E (LexisNexis 2010 & Supp. 2011).

95. IDAHO CODE ANN. § 18-8002-03 (2004 & Supp. 2012); *see also* *Idaho v. Diaz*, 160 P.3d 739, 743 (Idaho 2007) (“A plain reading of Idaho Code § 18-8002(6) shows that an officer may always request hospital personnel to draw a suspect’s blood upon suspicion for DUI but may only compel a blood draw under certain circumstances.”).

96. S.D. CODIFIED LAWS § 32-23-14 (2011).

97. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1568 (2013) (discussing the relevant factors in determining whether exigent circumstances existed, justifying a warrantless search, but clarifying that a broad interpretation to include all DWI cases is insufficient for a warrantless seizure of blood evidence).

98. ALA. CODE §§ 32-5-192, 32-5A-194(a)(2), 32-5-200 (LexisNexis 2010).

99. ALASKA STAT. § 28.35.035 (2010). *But see* *Bass v. Mun. of Anchorage*, 692 P.2d. 961, 965 (Alaska Ct. App. 1984) (noting that the section should be read narrowly because the legislature did not want to give police the power to forcibly take blood tests).

100. ARIZ. REV. STAT. ANN. § 28-1321(D) (Supp. 2011) (noting that a test shall not be given if refused unless pursuant to a search warrant); *see also Carrillo v. Houser*, 232 P.3d 1245, 1245 (Ariz. 2010) (holding that Arizona’s implied consent statute typically forbids police from giving a test in the absence of a warrant unless the arrestee agrees to it); U.S. DEPT. OF TRANSPORTATION, REFUSAL OF INTOXICATION TESTING: A REPORT TO CONGRESS 12 (2008) *available at* <http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811098.pdf>.

AZ ¹⁰¹	YES	YES	Medical personnel only, unless driver consent	
CA ¹⁰²	YES	NO	No Restrictions	Unless officer suspects other intoxicants, driver may consent to breath test instead
CO ¹⁰³	YES	NO	Medical personnel only	Limited to cases of negligent vehicular homicide
CT ¹⁰⁴	UNCLEAR	NO	Medical personnel only	Section 227b of statute requires driver consent; however, section 227c seems to permit draws in absence of consent for probable causes if serious injury or death has occurred. Author could find no causes in which force was actually use
DE ¹⁰⁵	YES	NO	Medical personnel only	
FL ¹⁰⁶	YES	NO	No restrictions	Only applies when a preceding motor vehicle incident has resulted in

101. ARK. CODE ANN. § 5-65-205(a)(1) (Supp. 2011).

102. CAL. VEH. CODE § 23612 (West Supp. 2012).

103. COLO. REV. STAT. § 42-4-1301.1(3) (West 2012) (noting that physical force is allowed only when a law enforcement officer “has probable cause to believe that the person has committed criminally negligent homicide”).

104. CONN. GEN. STAT. §§ 14-227b, 227c (West Supp. 2012).

105. DEL. CODE ANN. tit. 21, §§ 2740, 2741, 2746 (2005).

				“serious bodily injury.”
GA ¹⁰⁷	NO	Not applicable	Not applicable	
HI ¹⁰⁸	YES	NO	Medical personnel only	Possible breath test option in cases where no injury occurs
ID ¹⁰⁹	YES	NO	Medical personnel or officers with specialized training.	
IL ¹¹⁰	YES	NO	Medical personnel only	Only applies in cases of death or injury
IN ¹¹¹	YES	NO	Medical personnel only	
IA ¹¹²	YES	YES	Medical personnel only	Only applies in cases of death or injury likely to cause death
KS ¹¹³	YES	YES	No restrictions	Applies when driver “was operating or attempting to operate a vehicle and such vehicle has been involved in an accident or collision resulting in serious injury or death of a

106. FLA. STAT. ANN. § 316.1933 (West 2006).

107. GA. CODE ANN. § 40-5-67.1(d) (2011).

108. HAW. REV. STAT. ANN. §§ 291E-12, 21 (LexisNexis 2010 & Supp. 2011).

109. IDAHO CODE ANN. §§ 18-8002, -8003 (Supp. 2012); *see also* State v. Diaz, 160 P.3d 739, 741 (Idaho 2007) (discussing the Idaho Code and how implied consent allows for “testing a suspect’s blood”).

110. 625 ILL. COMP. STAT. ANN. 5/11-501.2 (West 2008); *see also* Yanchin v. Libertyville, 803 F. Supp. 2d 844, 853 (N.D. Ill. 2011).

111. IND. CODE ANN. § 9-30-6-6 (LexisNexis 2010).

112. IOWA CODE ANN. §§ 321J.10A–11 (West 2005 & Supp. 2012).

				person and the operator could be cited for any traffic offense
KY ¹¹⁴	YES	YES	Medical personnel only	Applies when a person is killed or suffers serious injury
LA ¹¹⁵	YES	NO	No restrictions	Two prior incidents of refusal required
ME ¹¹⁶	YES	NO	Driver may request medical personnel, if available	Only applies if officer believes “death has occurred or will occur as a result of an accident.”
MD ¹¹⁷	YES	NO	Medical personnel only	Only applies in cases of death or life threatening injury
MA ¹¹⁸	NO	Not applicable	Not applicable	
MI ¹¹⁹	YES	YES	Medical personnel only	
MN ¹²⁰	YES	NO	Medical personnel only	Only applies in cases of death, injury, or property damage

113. KAN. STAT. ANN. § 8-1001 (2001).

114. KY. REV. STAT. ANN. § 189A.105(2)(b) (West 2006 & Supp. 2011).

115. LA. REV. STAT. ANN. §14:98.2 (2012); *see also* State v. Dayton, 445 So.2d 76 (La. Ct. App. 1984) (including “chemical blood analysis” in a discussion of “chemical tests,” which is the term used in the relevant statute).

116. ME. REV. STAT. ANN. tit. 29-A, §§ 2521, 2522, 2524 (1996 & Supp. 2011).

117. MD. CODE ANN. TRANSP. § 16-205.1 (LexisNexis Supp. 2011).

118. MASS. GEN. LAWS ANN. ch. 90, § 24 (West Supp. 2012).

119. MICH. COMP. LAWS ANN. § 257.625a(6)(b), .625d (West Supp. 2012); *see also* AMY BERNING ET AL., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., REP. NO. DOT HS 811098, REFUSAL OF INTOXICATION TESTING: A REPORT TO CONGRESS 13 (2008) (noting that in most Michigan counties prosecutors have adopted policies requiring police officers to receive warrants before submitting drivers to a blood test).

MS ¹²¹	NO	Not applicable	Not applicable	
MO ¹²²	YES	YES—but struck down in <i>Missouri v. McNeely</i> (2013) ¹²³	Medical personnel only	
MT ¹²⁴	YES	YES	No restrictions	Only in cases with prior conviction for DWI related offense
NE ¹²⁵	NO	Not applicable	Not applicable	
NV ¹²⁶	YES	NO	No restrictions	Only applies if the officer has “reasonable grounds to believe” that the driver caused death or serious harm to another while driving drunk or has been convicted within the previous seven years of a similar violation
NH ¹²⁷	YES	NO	Medical personnel only	Only applies in cases of death or

120. MINN. STAT. ANN. § 169A.51 (West Supp. 2012); *see also* *Minnesota v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008); *supra* note 15 and accompanying text.

121. MISS. CODE ANN § 63-11-30 (2004 & Supp. 2011).

122. MO. REV. STAT. §§ 577.029, .041 (West 2011); *see also* *State v. Smith*, 134 S.W.3d 35, 40 (Mo. Ct. App. 2003) (holding that law enforcement officers can proceed with a blood draw after a defendant has refused as long as officers obtain a warrant).

123. *Missouri v. McNeely*, 133 S. Ct. 1552, 1568 (2013) (holding that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case involving a drunk-driving investigation).

124. MONT. CODE ANN. § 61-8-402 (2011).

125. NEB. REV. STAT. §§ 60-6, 197, 197.03 (Supp. 2011).

126. NEV. REV. STAT. ANN. § 484C.160 (2010); *see also* *BERNING ET AL.*, *supra* note 119, at 15 (noting that Nevada’s law does not require police officers to obtain a warrant before conducting forcible blood draws on drivers who refuse to take a breath test).

				serious injury
NJ ¹²⁸	UNCLEAR	NO	Medical personnel only	Despite seemingly clear state statute prohibiting involuntary blood draws, some state courts have upheld such draws on implied consent grounds
NM ¹²⁹	YES	YES	Medical personnel only	
NY ¹³⁰	YES	YES	No restrictions	Only applies in cases of death or serious injury
NC ¹³¹	YES	NO	“[A] physician, registered nurse, emergency medical technician, or other qualified person.”	
ND ¹³²	NO	Not applicable	NA	
OH ¹³³	YES	NO	“Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a	

127. N.H. REV. STAT. ANN. § 265-A:5, A:16 (LexisNexis 2011).

128. N.J. STAT. ANN. § 39:4-50.2(e) (West Supp. 2012) (stating the forcible taking of chemical tests is not permitted); *see also* State v. Ravotto, 777 A.2d 301, 305 (N.J. 2001) (ruling that implied consent exists “when the test is itself [is] not performed forcibly or against physical resistance”).

129. N.M. STAT. ANN. §§ 66-8-103, 111 (LexisNexis 2009).

130. N.Y. VEH. & TRAF. LAW § 1194 (McKinney 2011).

131. N.C. GEN. STAT. ANN. §§ 20-16.2, -139.1 (2011); *see also* State v. Fletcher, 688 S.E.2d 94, 98 (N.C. Ct. App. 2010) (noting that North Carolina law allows police officers to obtain forced blood tests without a search warrant as long as an officer has “probable cause” and a “reasonable belief that a delay in testing would result in dissipation of the person’s blood alcohol content”).

132. N.D. CENT. CODE § 39-08-01 (Supp. 2011).

133. OHIO REV. CODE ANN. § 4511.191 (LexisNexis 2008 & Supp. 2012).

			qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma.”	
OK ¹³⁴	NO	Not applicable	Not applicable	
OR ¹³⁵	YES	Varies by county	Medical personnel only	
PA ¹³⁶	NO	Not applicable	Not applicable	
RI ¹³⁷	NO	Not applicable	Not applicable	
SC ¹³⁸	NO	Not applicable	Not applicable	
SD ¹³⁹	NO	Not applicable	Not applicable	Also creates complete shield for physicians: “No person

134. OKLA. STAT. ANN. tit. 47, § 11-902 (West 2007 & Supp. 2012).

135. OR. REV. STAT. §§ 813.100, .160(2) (2011); *see also* BERNING ET AL., *supra* note 119, at 14 (“The use of warrants for blood samples in Oregon began more recently and is in effect in a few counties. There is not a specific law that allows for forced blood draws, but Oregon’s impaired driving law has been interpreted to allow for warrants and blood draws. The officer must first inform the suspect of the consequences of refusing or failing the test.”).

136. 75 PA. CONS. STAT. ANN. § 1547(b) (West Supp. 2012).

137. R.I. GEN. LAWS § 31-27-2.1(b) (Supp. 2011).

138. S.C. CODE ANN. §§ 56-6-2951(A) (Supp. 2011).

139. S.D. CODIFIED LAWS § 32-23-14 (2011).

				authorized to withdraw blood under this section may be required or forced to withdraw blood for the purposes outlined in this chapter, unless required pursuant to a written agreement.”
TN ¹⁴⁰	YES	NO	Medical personnel only	Only applies if accident causes serious injury or death, if driver has two prior convictions, or if children are in vehicle
TX ¹⁴¹	YES	NO	No restrictions	“[A]llows for blood draws to be conducted when a preceding motor vehicle incident has resulted in death or serious injury or has been convicted of certain crimes in the past.”
UT ¹⁴²	YES	NO	No restrictions	

140. TENN. CODE ANN. § 55-10-406 (2008 & Supp. 2011).

141. TEX. TRANSP. CODE ANN. § 724.012(b) (West 2011 & Supp. 2010); *see also* Beeman v. State, 86 S.W.3d. 613, 615 (Tex. Crim. App. 2002) (explaining that “the implied consent statute requires the State to take an arrested suspect’s blood, over his refusal, when there is an accident and someone is injured”).

142. UTAH CODE ANN. § 41-6a-520 (LexisNexis 2010); *see also* BERNING ET AL., *supra* note 119, at 14 (noting that since 2006 Utah has required police officers to obtain warrants for blood draws for breath test refusals and that the state’s procedure is based not on a statute but on “case law whereby a police officer swears an affidavit before a justice and can be granted a warrant to obtain a blood sample”).

VT ¹⁴³	YES	YES	Medical personnel only	Only in cases of serious injury or death
VA ¹⁴⁴	YES	NO	No restrictions	
WA ¹⁴⁵	YES	YES	No restrictions	
WV ¹⁴⁶	NO	Not applicable	Not applicable	
WI ¹⁴⁷	YES	NO	doctor, nurse, medical technologist, physician assistant or person acting under the direction of a physician	
WY ¹⁴⁸	YES	YES (unless serious death or injury occur)	Trained officers or medical personnel	Warrantless draws permitted in cases of serious death or injury

While state laws differ considerably, the overall trend in recent years has been toward the expansion of forcible testing.¹⁴⁹ “No refusal” weekends have become frequent occurrences in Texas, where 212 communities—including Houston, Austin and Fort Worth—participate.¹⁵⁰ These blanket compulsory testing periods

143. VT. STAT. ANN. tit. 23, §§ 1202(f), 1203(b) (2007 & Supp. 2011).

144. VA. CODE ANN. § 18.2-268.2 (2009).

145. WASH. REV. CODE ANN. § 46.20.308(3) (West 2013); *see also* Seattle v. St. John 215 P.3d 194, 197 (Wash. 2009) (discussing how, despite Washington’s implied consent statute, an officer may obtain a blood alcohol test if they obtain a warrant).

146. W. VA. CODE ANN. § 17C-5-7 (LexisNexis 2009).

147. WIS. STAT. ANN. § 343.305 (West 2010); *see also* State v. Krajewski, 648 N.W.2d 385, 398–99 (Wis. 2002) (reasoning that the “rapid dissipation of alcohol in the bloodstream creates an exigency that justifies a nonconsensual test of the blood” for persons arrested for drunk driving as long as the test is administered pursuant to certain factors).

148. WYO. STAT. ANN. §§ 31-6-102(d), -105(b) (2011).

149. *See* Hallinan, *supra* note 8 (noting that at least eight states have enacted statutes permitting police officers to use reasonable force to obtain blood samples from drivers in DUI cases).

150 *See* Allison Harris, *Austin Police, Various Agencies to Enforce No-Refusal Weekend*, DAILY TEXAN (July 4, 2011), <http://www.dailytexanonline.com/news/2011/07/04/austin-police-various-agencies-enforce-no-refusal-weekend> (discussing the number of law enforcement agencies in Texas that have adopted a “no refusal” weekend policy to reduce drinking and driving); Stephanie Lucero, *North Texas No Refusal Weekend Starts Friday Night*, CBS (Dec. 28, 2012),

have spread to localities in at least seven other states,¹⁵¹ among which are the cities of Columbus, Ohio,¹⁵² and Jefferson Parish, Louisiana.¹⁵³ Eight states have adopted or expanded forcible blood draws in the last ten years, while other states, such as Colorado, have seriously considered legislation.¹⁵⁴ Increasingly, these laws create ethical and legal challenges for hospitals and clinicians.¹⁵⁵ Not the least of these dilemmas is the difficulty of determining the accurate rule in a particular jurisdiction, as police departments and prosecutors have often engaged in aggressive interpretations of state laws to conduct nonconsensual tests in states, such as Illinois, where a plain reading of the statute would have led a reasonable person to conclude that such tests were prohibited.¹⁵⁶ While the state policies outlined above offer a considered assessment of current law, the complexity of the statutes and potential for aggressive interpretation raise the possibility that physicians in nearly any jurisdiction might be asked to conduct forcible phlebotomy.

<http://dfw.cbslocal.com/2012/12/28/north-texas-no-refusal-weekend-starts-friday-night/> (reporting deputies will patrol for suspected drunk driving during the New Years holiday); Brian Rogers, *Prosecutors Tout Success of No-Refusal Weekend*, HOUSTON CHRON. (Jan. 3, 2012), <http://www.chron.com/news/houston-texas/article/Prosecutors-tout-success-of-no-refusal-weekend-2439541.php> (reporting the No Refusal program had been in effect in Harris County and Montgomery County nearly every weekend in 2011).

151. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *No-Refusal Initiative Facts*, <http://www.nhtsa.gov/no-refusal/> (last visited Apr. 17, 2013) (reporting that numerous states including Arizona, Florida, Idaho, Illinois, Kansas, Louisiana, Missouri, Texas, and Utah have implemented No Refusal initiatives).

152. See Kathy L. Gray, *Holiday DUI Suspects Risk Forced Blood Test; Court's OK Likely if Breath Exam Is Refused*, COLUMBUS DISPATCH, July 3, 2008, at 3B (discussing how Columbus police instituted a "no-refusal weekend" during which drivers refusing to take breath tests were compelled to take blood tests).

153. See Melinda Morris, *DWI Suspects Will Face Forced Blood Tests Judges Will be Ready on Holiday Weekend*, NEWSROOM, May 13, 2010, available at 2010 WLNR 9860143 (discussing how the Jefferson Parish district attorney's office arranged for judges to be available over Memorial Day weekend to sign search warrants giving officers the authority to conduct blood tests on DWI suspects).

154. See Hallinan, *supra* note 8 (reporting that Alaska, Arizona, Iowa, Florida, Indiana, Michigan, Nevada, and Texas all recently passed statutes permitting police to use reasonable force to obtain blood samples); see also Rebecca Boyle, *Under Bill, Drunk Drivers Would Have to Take Alcohol Test*, GREELEY TRIB. (Mar. 22, 2007), <http://www.greeleytribune.com/article/20070322/NEWS/103210101> (reporting a proposed bill in Colorado where suspected drunk drivers, who are given the option of a breathalyzer or blood test, will be required to take a test even if the requested option is not available).

155. See, e.g., E. John Wherry, Jr., *DWI Blood Alcohol Testing: Responding to a Proposal Compelling Medical Personnel to Withdraw Blood*, 18 SETON HALL LEGIS. J. 655, 657, 670-71 (1994) (commenting that laws requiring medical personnel to draw blood for law enforcement purposes violate physician-patient privilege as well as a health provider's ethical duty to care for the health of patients).

156. See *People v. Farris*, 968 N.E.2d 191, 197 (Ill. Ct. App. 2012) (interpreting Illinois's statute to prohibit law enforcement officials from using force to obtain a blood sample of a DWI suspect).

II. ETHICAL IMPLICATIONS

The dominant approach to western medical ethics since the 1970s is one that favors patient autonomy and privileges the right of the competent patient to make his own medical decisions.¹⁵⁷ Among the most fundamental aspects of this right is the authority to turn down unwanted medical interventions.¹⁵⁸ Western medical ethicists and courts have largely reached a consensus that an adult with capacity may reject even life saving measures—guaranteeing, for example, Jehovah’s Witnesses the right to refuse blood transfusions and Christian Scientists the right to refuse antibiotics.¹⁵⁹ Physicians who forcibly provide such care over a patient’s objections will risk civil liability and may be guilty of battery.¹⁶⁰ At the same time, government and professional authorities have long accepted that medical providers, as licensees of the state and possessors of a state-sanctioned monopoly in the healing arts, have dual loyalties: in addition to having an ethical duty to individual patients, providers also have an ethical obligation to serve the public at large that may trump the duty to patients under limited circumstances.¹⁶¹ As a result, physicians may be compelled to report a wide variety of public health hazards, ranging from communicable diseases to gunshot wounds.¹⁶² Physicians may also be compelled to violate doctor-patient confidentiality in instances of suspected

157. See Cathy J. Jones, *Autonomy and Informed Consent in Medical Decisionmaking: Toward a New Self-Fulfilling Prophecy*, 47 WASH. & LEE L. REV. 379, 391–97 (1990) (describing the evolution of the patient’s right to informed consent and to self-determination).

158. See, e.g., George J. Annas & Joan E. Densberger, *Competence to Refuse Medical Treatment: Autonomy vs. Paternalism*, 15 U. TOL. L. REV. 561, 565–69 (1984) (describing the right of competent adults to refuse medical treatment).

159. See generally Sarah Woolley, *Jehovah’s Witnesses in the Emergency Department: What Are Their Rights?*, 22 EMERGENCY MED. J. 869, 870 (2005) (explaining that the law unequivocally protects the Jehovah’s Witness patient’s right to refuse medical treatment, even when physicians believe the reasons are irrational and the patient will die in the absence of treatment); Larry May, *Challenging Medical Authority: The Refusal of Treatment by Christian Scientists*, HASTINGS CENTER REP., Jan.–Feb. 1995, at 15, 15–17 (explaining that Christian Scientists refuse all medical treatment and turn to prayer to battle health issues).

160. See, e.g., *Malette v. Shulman*, [1990] O.R. 2d. 417 (Can. Ont.) (holding a physician liable for negligence, assault, and battery for performing a blood transfusion on a Jehovah’s Witness patient who carried a card in her wallet identifying her as a Jehovah’s Witness and requesting that no blood transfusion be given to her); *Schloendorff v. Soc’y of the N.Y. Hosp.*, 105 N.E. 92, 93–94 (N.Y. 1914) (noting that a surgeon who operates on a patient without the patient’s consent commits an assault).

161. See Christopher J. Lockey & Phillip Resnick, *Physicians’ Duty to Prevent Harm to Nonpatients*, 36 J. AM. ACAD. PSYCHIATRY & L. 580, 581 (2008).

162. See Jeffrey T. Berger et al., *Reporting by Physicians of Impaired Drivers and Potentially Impaired Drivers*, 15 J. GEN. INTERN. MED. 667, 669 (2000) (explaining that compulsory reporting of conditions that impact public safety is an exception to patient-physician confidentiality); see generally MD. CODE REGS. 10.06.01.03 (2011) (requiring health care providers to report certain diseases and conditions); MD. CODE ANN., HEALTH-GEN. § 20-703 (LexisNexis 2009) (requiring health care practitioners to report gunshot injuries).

child abuse, future violent crimes or the impaired practice of medicine.¹⁶³ In fact, some jurisdictions even require physicians to report impaired driving to state authorities.¹⁶⁴ Forcible blood draws of suspected drunk drivers place the duty to patient autonomy and the duty to protect the public in direct conflict.¹⁶⁵

Blood draws are not entirely benign interventions.¹⁶⁶ While for the vast majority of suspects, the only side effect of the procedure is minor pain and bruising, a small subset of individuals may suffer more significant detriment.¹⁶⁷ Some individuals have compelling medical reasons for refusing blood draws, such as hemophilia or ongoing anticoagulant therapy.¹⁶⁸ Others may have religious objections to removing blood, especially when the blood draw is not intended to serve a life-saving or other medical purpose¹⁶⁹ Some state statutes do shield these minorities, but providers and law enforcement will likely face considerable

163. See Frank T. Saulsbury & Robert E. Campbell, *Evaluation of Child Abuse Reporting by Physicians*, 139 AM. J. DISEASES CHILDREN 393, 394 (1985) (reporting that in one study surveying physicians the majority of physicians claimed to report almost all sexual abuse cases to authorities); see also COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CEJA REP. A-I-91, REPORTING IMPAIRED, INCOMPETENT OR UNETHICAL COLLEAGUES 1, 2 (1992) (noting that for centuries medical ethical standards have required physicians to report inappropriate conduct by colleagues); Elisia Klinka, *It's Been a Privilege: Advising Patients of the Tarasoff Duty and its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 FORDHAM L. REV. 863, 883 (2009) (establishing that most states have enacted laws requiring psychotherapists to report confidential patient communication if it would prevent harm to possible victims of the patient).

164. See Berger et al., *supra* note 162, at 669 (noting that a few states have enacted laws requiring physicians to disclose whether patients have certain health conditions such as epilepsy or dementia that could impair driving abilities).

165. See Robert R. Wilk, *Compelling Medical Personnel to Draw Blood Samples From DWI Suspects*, 17 SETON HALL LEGIS. J. 329, 355 (1993) (commenting that forcible blood draws for DWI cases evoke concerns of violating patient rights and arguing that the need to protect potential victims of a drunk driver overrides this concern).

166. See, e.g., *State v. McNabb*, No. 36552, slip op. at 2 (Idaho Ct. App. Aug. 26, 2010) (describing how officers restrained the defendant by holding him down on the hospital floor while medical personnel drew his blood after he refused to submit to a sobriety test).

167. See WORLD HEALTH ORG., WHO GUIDELINES ON DRAWING BLOOD: BEST PRACTICES IN PHLEBOTOMY 3–4 (2010) (noting that the risks of blood draws include loss of consciousness, seizures, anxiety, fainting, and exposure to bloodborne pathogens including hepatitis).

168. See Hallinan, *supra* note 8 (noting that blood draws can be dangerous for people with certain medical conditions including hemophilia); *What is Hemophilia?*, NAT'L HEART, LUNG, & BLOOD INST. (July 1, 2011), <http://www.nhlbi.nih.gov/health/health-topics/topics/hemophilia/> (explaining that hemophilia is an inherited disease that can cause uncontrollable, life-threatening bleeding); Amir K. Jaffer et al., *When Patients On Warfarin Need Surgery*, 70 CLEV. CLINIC J. MED. 973, 973 (2003) (explaining that patients on Warfarin, a popular anticoagulation therapy drug that thins the blood to prevent blood clots, have a high risk of bleeding).

169. See Leah Perry, *Religious Beliefs & Phlebotomy*, OPPOSING VIEWS, <http://people.opposingviews.com/religious-beliefs-phlebotomy-4582.html> (last visited Nov. 1, 2013) (discussing the strong objections to phlebotomy, even in life-saving circumstances, that certain religious groups hold).

challenges in determining who qualifies.¹⁷⁰ Once these exemptions become well known, many DWI suspect will likely claim religious or medical exemptions—at least until the alcohol dissipates from their bloodstreams. Another subset of individuals suffers from a deep fear of needles, trypanophobia, and may find the intervention psychologically traumatic.¹⁷¹ Hamilton reports that up to ten percent of Americans may suffer some degree of this disorder, and even reports cases of fatal reactions secondary to a vaso-vagal reflex after injection.¹⁷² Moreover, all blood draws pose at least some additional risk of infection.¹⁷³ In a well publicized 2007 case, thirty-one-year-old test pilot James Green of Arizona sued Pima County and its Sheriff's Department after a forced blood draw allegedly left him with an infection for months that did not respond to antibiotics.¹⁷⁴ Yet the very risks involved in forced blood draws might arguably justify physician involvement. Since some states now allow police to draw blood without medical personnel,¹⁷⁵ which might result in even greater risk,¹⁷⁶ providers who refuse to participate—at least in those jurisdictions—do not ultimately change the outcome for suspects and may actually expose them to increased dangers. Of course, such reasoning might be used to justify physician involvement in a broad swath of questionably ethical police activity, including enhanced interrogation methods.¹⁷⁷

Suspects transported to hospitals solely for the purposes of forced blood draws may not be patients in the traditional sense; and some advocates of forced blood draws might argue that they are not patients at all.¹⁷⁸ Yet professional

170. See, e.g., NEV. REV. STAT. ANN. § 484C.160 (LexisNexis 2012) (exempting hemophiliacs and drivers with heart conditions requiring the use of anticoagulants from forcible blood draws, but also providing that such drivers must take a breath or urine test).

171. See James G. Hamilton, *Needle Phobia: A Neglected Diagnosis*, 41 J. FAM. PRAC. 169, 169 (1995) (noting the various health symptoms that individuals with needle phobia experience when exposed to needles).

172. *Id.*

173. See WORLD HEALTH ORG., *supra* note 168, at 3 (suggesting that blood draws have the potential to expose individuals to infection and other possible injuries).

174. Erica Meltzer, *Blood Draws by Officers in DUI Stops Questioned*, ARIZ. DAILY STAR, Oct. 14, 2007, at A1.

175. See Hallinan, *supra* note 8.

176. See Wherry, *supra* note 155, at 667–68 (noting that blood-borne pathogens such as the HIV virus can be transmitted during the blood drawing process); WORLD HEALTH ORG., *supra* note 168, at 3 (explaining best phlebotomy practices to lower the risks of blood draws, including infection and loss of consciousness); Meltzer, *supra* note 175 (reporting that a blood draw performed in a squad car by an officer took two tries and resulted in swelling and a persistent infection).

177. See Steven P. Cohen, Letter to the Editor, *Doctors and Interrogation*, 353 NEW ENG. J. MED. 1633–34 (2005) (citing humanitarian reasons as possible justification for participation in interrogation).

178. Compare Wilk, *supra* note 165, at 330–33 (stating that, although most members of the medical community “overextend themselves to assist police officers,” some medical personnel “openly seek to thwart” officers’ efforts to obtain a blood sample without patient consent), with *State v. Johnston*, 305 S.W.3d 746, 757 (Tex. Ct. App. 2009) (describing DWI suspects as “patients,” language which could be interpreted as reflecting the testifying expert, a physician, and

organizations of health care providers have none-the-less consistently found that the absence of a traditional provider-patient relationship does not free a provider to become an agent of law enforcement without limitation. For example, the American Medical Association and American Psychiatric Association have determined that participation in executions violates the ethical duties of physicians.¹⁷⁹ A consensus is slowly emerging that the forcible medication of psychiatric patients to render them fit for capital punishments, while legal, is also impermissible.¹⁸⁰ Although the stakes are clearly lower in forced blood draw cases than in capital trials, society also has many other options available to reduce intoxicated driving that do not entail commandeering health professionals. These range from increasing the penalties for refusing to consent¹⁸¹ to requiring breath alcohol ignition locks in vehicles.¹⁸² Relying upon health workers may be easier and cheaper, as compared with training a separate body of professionals to engage in such blood draws, but that alone is not a satisfactory justification.¹⁸³ Unfortunately, the leading professional organizations have as yet not taken a firm stance on the practice or outlined guidelines for participation by their members.¹⁸⁴ Needless to say, such guidance is long overdue.

Since the individual provider in the field will likely have little power to resist police demands for forced testing—and may even be uncertain as to the governing law—hospitals should clarify their positions on the practice in advance and should

the court's reluctance to affirmatively label a DWI suspect brought in to the hospital for a blood draw as a patient).

179. AM. MED. ASS'N., AMA POLICY E-2.06, CAPITAL PUNISHMENT 1 (1994) (barring physician participation in an execution because such participation would directly conflict with a physician's duty to preserve life when possible); AM. PSYCHOLOGICAL ASS'N, REPORT OF THE TASK FORCE ON MENTAL DISABILITY AND THE DEATH PENALTY (2005).

180. See Ebrahim J. Kermani et al., *Psychiatry and the Death Penalty: The Landmark Supreme Court Cases and Their Ethical Implications for the Profession*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 95, 97–98 (1994) (analyzing the ethical dilemmas that result from psychiatrists medicating patients to make them competent for execution as it directly violates their professional obligation of beneficence and nonmaleficence toward patients).

181. See, e.g., Michelle Dynes, *Refusing Sobriety Test May Become a Crime*, WYO. TRIB.-EAGLE, Jan. 5, 2011, at A2 (reporting that the Wyoming legislature considered making a DWI's suspect's refusal of a breathalyzer tests a misdemeanor punishable by a \$750 fine).

182. See generally KAREN SPRATTLER, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PUB. NO. DOT HS 811246, IGNITION INTERLOCKS – WHAT YOU NEED TO KNOW: A TOOLKIT FOR POLICYMAKERS, HIGHWAY SAFETY PROFESSIONALS, AND ADVOCATES 5–6 (2009); see also *DUI/DWI Laws*, INSURANCE INST. FOR HIGHWAY SAFETY (Apr. 2013), <http://www.iihs.org/laws/dui.aspx> (listing state laws regarding mandatory ignition interlocks for repeat offenses).

183. See, e.g., *2013 Phlebotomy Technician Program*, ARIZ. MED. TRAINING INST. (2013), <http://arizonamedicaltraininginstitute.com/programs/phlebotomy/> (providing a course description available in Arizona for phlebotomy training, including required hours spent in training and associated costs with the course).

184. See generally, e.g. AM. PHLEBOTOMY ASS'N (Sep. 17, 2013), <http://www.apa2.com/> (containing a great deal of information regarding this professional organization related to phlebotomy, but providing no guidance with regards to the field officer participation).

notify all emergency providers. Hospitals may even be able to negotiate with local authorities to establish guidelines for participation that meet the needs of law enforcement without damaging the perceived ethical duties of clinicians. Earlier this year, for example, Memorial Hospital of Converse County, Wyoming, did precisely that: after initially refusing involvement with any forcible blood draws, citing ethical and liability concerns, the hospital worked out an arrangement with local police to conduct the involuntary tests off-site, under color of a judicial warrant, an approach that apparently satisfied their providers' objections.¹⁸⁵

While individual providers will likely differ regarding whether and when participation in forcible blood draws is ethical, in the absence of clear guidance from professional organizations, three minimum standards seem necessary to justify any healthcare institution participating in such procedures. First, forced blood draws should be completely sequestered from the practice of medical care. The medical providers designated to take part in the forced blood draw should play no other role in the care of the suspect, as the risk is too great that the blurring of roles will compromise the greater medical care of the patient.¹⁸⁶ So, for example, if a patient is injured in a motor vehicle accident, the physicians and nurses attending to his injuries must not be the same individuals who draw blood for police. Should care givers need to draw blood for therapeutic reasons, this blood ought not also be used for law enforcement purposes—and the patient should be advised which interventions are being conducted on his behalf and which are being conducted to serve the interests of the public. Second, institutions should require assurances that involuntary blood samples are used solely for the determination of intoxication. While the police may have a legitimate reason for using blood samples for other law enforcement purposes—such as storing them for future DNA checks against crime scenes¹⁸⁷—physicians ought not risk being complicit in such projects, particularly as these extraneous uses raise significant risks to a subject's privacy.¹⁸⁸ Ideally, a sensible policy will require that all blood samples either be returned to the hospital after testing is completed, or that the hospital be provided with written confirmation of their destruction. Finally, individual providers should be guaranteed the right to opt out of the intervention as long as they make a good faith effort to find another provider who can participate. Such conscience clauses have

185. See Collin McRann, *MHCC Reverses Its Policy on Involuntary DUI Blood Draws*, DOUGLAS BUDGET (Wyoming) (Sept. 28, 2011), www.douglas-budget.com/news/article_51f67596-e9ee-11e0-b3fb-0001cc4c03286.html.

186. See Wherry, *supra* note 155, at 667–80 (highlighting the ethical and legal dilemmas physicians face in conducting forcible blood draws on patients).

187. See George J. Annas, *Privacy Rules for DNA Databanks: Protecting Coded "Future Diaries"*, 270 JAMA 2346, 2347 (1993) (noting that law enforcement officials want to create DNA fingerprinting banks to identify perpetrators).

188. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 491 (Cal. 1990) (examining the argument that depriving a patient of the power to control what happens to their tissues would be an invasion of the patient's privacy and dignity).

for many years shielded physicians from participation in certain reproductive and end-of-life interventions they find objectionable¹⁸⁹—even in circumstances where the result is that a patient’s medical needs go unmet.¹⁹⁰ It would prove ironic if physicians could not opt out of interventions that have the potential to harm the patient on similar grounds of conscience. Occasionally, such conscience objections may prevent any blood draw from taking place—if, for instance, no willing provider can be found—but, in the absence of any evidence that such occurrences will be widespread, the risk of a few missed blood draws seems less grave than the damage to be done by forcing reluctant providers to draw blood from patients under the threat of criminal sanction.¹⁹¹

While using the public roads may entail consent to forcible blood testing,¹⁹² joining the health care professions does not necessarily entail consent to perform such blood draws.¹⁹³ The act of inflicting unwanted medical care on a competent adult—a violent intrusion that contrasts strikingly with the general norms of the healing trades—is likely to prove disturbing and objectionable to many professional caregivers.¹⁹⁴ At a minimum, providers and their employers should educate themselves on their specific duties and should reach out to local law enforcement authorities to clarify in advance potential matters of disagreement. Advance planning may not entirely eliminate the possibility of conflict, but such a negotiated approach has at least the potential to mitigate friction between providers and public authorities. After all, the ethical and legal issues surrounding forcible blood draws by physicians and hospital employees are far too important to be resolved ad hoc in emergency rooms as difficult cases arise.

189. JODY FEDER, CONGR. RESEARCH SERV., RS21428, *THE HISTORY AND EFFECT OF ABORTION CONSCIENCE LAWS* 1, 1 (2005) (discussing the conscience clause laws and how they are sued to resolve the problem with physicians providing care that they believe is against their religious beliefs).

190. Cf. Rachel Benson Gold, *Conscience Makes a Comeback In the Age of Managed Care*, GUTTMACHER REP. ON PUB. POL’Y, Feb. 1998, at 1, 1 (arguing the conscience clauses effectively allow entities to opt out of paying for any health care service by claiming “conscience”).

191. See Wherry, *supra* note 155, at 677–80 (arguing that there would be immense harm to the medical profession if physicians were compelled to violate fundamental ethical principles of their profession).

192. See Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. SAFETY RES. 77, 79 (2009) (noting that states have passed implied-consent laws providing that drivers in becoming licensed have implicitly given consent to chemical tests by law enforcement).

193. See Wherry, *supra* note 155, at 677–78 (arguing that physicians are ethically prohibited from forcibly drawing blood on patients).

194. See *id.*