NOTES

VERMONT'S BLOOD ALCOHOL TEST: ILLEGAL SEARCH AND SEIZURE?

INTRODUCTION

The drunken driver has been the single greatest cause of deaths on the nation's highways in recent years.[1] Concern with this menace has prompted the United States Supreme Court to say: "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."[2] In Vermont,[3] as in all the fifty states,[4] an effort is made to deter drunken driving through the use of statutes which make it unlawful to drive while intoxicated [hereinafter D.W.I.]. Effective enforcement of these statutes is attempted by means of statutory provisions enabling a police officer, having reasonable grounds to believe that a driver is intoxicated, to request that driver to submit to a blood or breathylyzer test [hereinafter blood alcohol test]—a test that will measure the degree of alcohol in the driver's body.[5]

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1. HOUSE COMM. ON PUBLIC WORKS, 90TH CONG., 2D SESS., ALCOHOL AND HIGHWAY SAFETY REPORT 14 (Comm. Print 1968). This study indicated that upwards of 50% of the fatal auto crashes in the country involve drivers with high concentrations of alcohol in their blood streams.

2. Breithaupt v. Abram, 352 U.S. 432, 439 (1957). The taking of a blood alcohol sample from an unconscious driver was upheld against a claim that such a taking was in violation of due process.

3. VT. STAT. ANN. tit. 23, §§ 1201-1210 (Cum. Supp. 1976).

4. *See, e.g.*, CAL. VEH. CODE § 13353 (1971); N.Y. VEH. & TRAF. LAW § 1192 (McKinney Cum. Supp. 1976-1977).

5. Tests work in conjunction with statutory provisions that determine the blood alcohol percentage beyond which a driver is presumed to be intoxicated. *See, e.g.*, VT. STAT. ANN. tit. 23, § 1204 (Cum. Supp. 1976). Above .10 per cent by weight of alcohol—one drop of alcohol for every 1000 drops of blood—will give rise to a presumption of D.W.I.

The following table indicates what the per cent of alcohol would be with one ounce of alcohol according to various body weights.

BODY WEIGHT	BAC per drink	BODY WEIGHT	BAC per drink
100	.032	180	.018
120	.026	200	.016
140	.024	220	.014
160	.020	260	.011

The taking of these tests has been held by the United States Supreme Court, in *Schmerber v. California,*[6] to constitute a search within the meaning of the fourth amendment. Therefore, the entire body of fourth amendment search and seizure law attaches to the administration of blood alcohol tests.[7] However, because the spontaneous nature of a blood alcohol search renders it impractical to obtain a search warrant as the fourth amendment requires, most blood alcohol tests in Vermont and elsewhere are conducted without search warrants.[8] Such warrantless searches, conducted outside of the judicial process without prior approval by judge or magistrate, are unreasonable under the fourth amendment, subject to a few well-established exceptions.[9] Therefore, blood alcohol searches must satisfy one of the exceptions to the warrant requirement to be consistent with the fourth amendment. The exceptions to the warrant requirement can be classified into three categories: the consent exception, the search incident to an arrest exception, and the exigent circumstances exception. Forty-nine states require that blood alcohol searches be conducted incident to an arrest in an attempt to conform their statutes to fourth amendment standards.[10] Vermont has the only statute which does not have an arrest requirement.[11]

The purpose of this note is to examine the Vermont D.W.I. statute in order to determine whether the lack of an arrest requirement is fatal to the constitutionality of Vermont's blood alcohol

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To compute Blood Alcohol Content (BAC), multiply the number opposite applicable body weight by the number of drinks consumed. Table reproduced from Project Crash, Officers' Manual on the Detection, Apprehension and Processing of Persons Impaired by Alcohol 54 (revision no. 4) (manual distributed by Project Crash to Vermont police officers).

6. 384 U.S. 757, 767 (1966).

7. This note will not deal with the probable cause requirement of the fourth amendment because the Vermont D.W.I. statute clearly satisfies that requirement in providing that a police officer must have reasonable grounds to belive the driver is intoxicated before requesting a test. Reasonable grounds have been held to be the functional equivalent of probable cause. Brinegar v. United States, 338 U.S. 160, 175 (1949).

8. Telephone interview with Stephen W. Webster, Orange County State's Attorney (Dec. 7, 1976).

9. Katz v. United States, 389 U.S. 347, 357 & nn. 18 & 19 (1967).

10. *See generally* text accompanying notes 51-67 *infra.* Some states require the emergency doctrine and an arrest to justify a warrantless blood alcohol search.

11. Vermont repealed its former statute which had an arrest requirement in 1973. 1959 Vt. Acts, No. 212, § 1, VT. STAT. ANN. tit. 23, § 1188 (current version at VT. STAT. ANN. tit. 23, § 1202 (Cum. Supp. 1976)).

searches according to current United States Supreme Court interpretation of the fourth amendment. The focus of the note will be an analysis of whether Vermont's warrantless blood alcohol searches can be sustained under any of the exceptions to the warrant requirement. It will first explore the applicability of the consent exception to warrantless blood alcohol searches, and conclude that Vermont's statutory requirements for the obtaining of a consent do not comply with the voluntariness standards of fourth amendment doctrine.[12] Secondly, the note will examine *Schmerber v. California,*[13] which is the United States Supreme Court decision that has been interpreted by many state[14] and federal courts[15] to require that warrantless blood alcohol searches be conducted incident to a lawful arrest, rather than pursuant to one of the other exceptions, in order to satisfy the fourth amendment.[16] Determining that an arrest is not a prerequisite to a valid blood alcohol search, the note will conclude that Vermont's statute can survive under the exigent circumstances exception. In order to lay the groundwork for analysis, the note will begin with an explanation of the statute.

I. VERMONT'S D.W.I. STATUTE

Vermont's D.W.I. statute is similar to the statutes of the other states in that it is designed in part to encourage driver submission to blood alcohol tests.[17] The scientific evidence of intoxication obtained from blood alcohol tests is considered more reliable evidence than the uncertain opinion of a police officer derived solely from his

12. *See generally* text accompanying notes 39-50 *infra.*

13. 384 U.S. 757 (1966).

14. *See, e.g.,* Layland v. State, 535 P.2d 1043 (Alaska 1975); State v. Davis, 108 N.H. 25, 226 A.2d 873 (1967); State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App. N.M. 1975) *cert. denied,* 87 N.M. 450, 535 P.2d 657 (1975); Commonwealth v. Murray, 441 Pa. 22, 271 A.2d 500 (1970); State v. Spry, 87 S.D. 318, 207 N.W.2d 504, 509 (1973); State v. Wetherell, 82 Wash.2d 865, 514 P.2d 1069 (1973). *Contra,* State v. Mitchell, 245 So.2d 618 (Fla. 1971); State v. McMaster, 118 N.J. Super. 476, 288 A.2d 583, 585 (Super. Ct. App. Div. 1972).

15. *See, e.g.,* Holland v. Parker, 354 F. Supp. 196 (D.S.D. 1973) (holding the South Dakota D.W.I. statute unconstitutional on the grounds that it did not have an arrest requirement).

16. *See* text accompanying notes 57-67 *infra.*

17. "A principle purpose of the statute, also, is to encourage the availability of scientific evidence to determine the presence or absence of alcoholic influence in a person's body fluids. . . ." State v. Mastaler, 130 Vt. 44, 47, 285 A.2d 776, 778 (1971).

observations of external symptoms of intoxication.[18] The first step in the state's attempt to insure that drivers submit to a test is provided by a statutory provision—title 23, section 1202 of the Vermont Statutes Annotated.[19] This statute provides that by accepting the privilege of driving on the public roads of Vermont, a driver is deemed to have given his consent to the taking of a sample of his breath or blood whenever requested to do so by a police officer having reasonable grounds to believe that the driver is under the influence of alcohol.[20] The implied consent operates to permit the taking of a blood alcohol sample only from an unconscious driver. For conscious drivers an additional statutory section is applicable. In order to avoid the police procedure of compelling a driver to submit to a test against his will, and the constitutional problem

18. Comment, *The Drinking Driver: An Approach to Solving a Problem of Underestimated Severity*, 14 VILL. L. REV. 97 (1968). Before the use of blood alcohol tests there was a problem of convicting drivers of D.W.I. due to the inability to prove beyond a reasonable doubt that the driver was intoxicated.

19. VT. STAT. ANN. tit. 23, § 1202 (Cum. Supp. 1976). The statute states in full:

> Any person who operates, attempts to operate or is in actual physical control of any vehicle on a highway in this state is deemed to have given his consent to the taking of a sample of his breath for the purpose of determining the alcoholic or drug content of his blood. If breath testing equipment is not reasonably available or if the person is unable to give a sufficient sample of his breath for testing, he is deemed to have given his consent to the taking of a sample of his blood for the same purposes. If in the officer's opinion a person is incapable of decision or unconscious or dead, it is deemed that his consent is given and a sample of his blood shall be taken. A sample of his breath or blood shall be taken whenever a state police officer, chief of police, or a police officer employed full-time by a town, city or incorporated village or sheriff has reasonable grounds to believe that the person was operating, attempting to operate or was in actual physical control of any vehicle while under the influence of intoxicating liquor or drugs, or both.

20. The constitutionality of implied consent legislation was first considered by the United States Supreme Court in Hess v. Pawloski, 274 U.S. 352, 356 (1927). The Court upheld the validity of a Massachusetts statute which provided that nonresident motorists impliedly consent to the appointment of a state agent for service of process by accepting the privilege of driving on the state's highways. The Court reasoned that the dangerous nature of a motor vehicle justified the impositon of certain conditions on the driver as a prerequisite to the exercise of the privilege of driving in the state. This rationale was applied to the blood alcohol implied consent legislation in Breithaupt v. Abram, 352 U.S. 432, 435 n.2 (1957). In *Breithaupt*, the Supreme Court approved, in dictum, the implied consent statute of Kansas. Since the *Breithaupt* opinion, almost every state has passed implied consent statutes for blood alcohol tests. The state and federal courts have looked favorably on these statutes, consistently rejecting constitutional challenges. *See* Lee v. State, 187 Kan. 566, 358 P.2d 765 (1961); Blydenburg v. David, 413 S.W.2d 284 (Mo. 1967).

created by extracting evidence by force,[21] title 23, section 1205 of the Vermont Statutes Annotated[22] provides that a driver may refuse to submit to a test. Pursuant to the terms of section 1205, the police officer requesting the test will apprise the driver of his right to refuse the test.[23] No test will be administered without the driver's express consent.

However, a refusal to a blood alcohol test is not without consequences. While the express consent requirement of section 1205 prevents a police officer from forcibly taking a blood sample, the statute formulates an alternative method of encouraging drivers to submit to a test. Section 1205 provides that in refusing the test a driver subjects himself to possible revocation of his license for one year.[24]

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21. *See* Rochin v. California, 342 U.S. 165 (1952).

22. VT. STAT. ANN. tit. 23, § 1205(a) (Cum. Supp. 1976). The statute states in full:

> If the person refuses to submit to a chemical test, it shall not be given but such refusal may be introduced as evidence in a criminal proceeding. If the person is charged with a violation of the vehicle laws, the court at the arraignment or as soon thereafter as is practicable shall hold a summary hearing, and take evidence relating to the reasonableness of the officer's belief that the respondent was operating, attempting to operate or in actual physical control of a vehicle on a highway while under the influence of intoxicating liquor or other drugs, or both. Upon a finding by the court that the officer had reasonable grounds to believe that the respondent was so operating, attempting to operate, or in actual physical control of a motor vehicle on a highway, the person's operator's license or nonresident operating privilege or the privilege of an unlicensed operator to operate a vehicle shall be suspended for a period of one year, and the person shall deliver his operator's license, if any, to the court, and the court shall forward it forthwith to the commissioner of motor vehicles. For any person who has complied with the provisions of subsection (b) of this section, the one-year period of suspension shall be reduced by the commissioner of motor vehicles to six months and the person's license shall thereupon be reinstated.

23. Police officers advise the driver in accordance with the D.W.I. field processing form that is compiled by the state's attorney in each county.

24. The constitutionality of penalizing the driver for exercising his right to refuse has been considered by many state courts and has been consistently upheld. In Quoyeser v. Department of Pub. Safety, 325 So.2d 327, 329-30 (La. Ct. of App. 1975), the court held that refusal sanctions are not violative of due process, reasoning that the right to drive is a privilege rather than a property right. The court found that there is a compelling state interest in safety on the highways and determined that interest to be superior to the individual's right to use the highways. In *In re* McCain, 84 N.M. 657, 661, 506 P.2d 1204, 1208 (1973), the New Mexico Supreme Court upheld the state's statutory refusal sanctions against an allegation that they were violative of equal protection. The court determined that, "It is perfectly reasonable to make a separate classification for those who refuse to submit to the test, and it is not unreasonable that harsher treatment might be given those who refuse to submit." *Id.*

The license will be suspended if at a subsequent administrative hearing[25] it is found that the police officer had reasonable grounds to believe the driver was under the influence of alcohol.[26] The specific information on the sanctions for refusal of a test given by police officers to drivers suspected of intoxication varies slightly from county to county. To illustrate an example of the advice given, in Orange County a driver is advised that if he refuses to submit to the test he "will almost certainly lose his license," at the refusal hearing.[27] Thus, the effect of the express consent requirement of section 1205 is to offer the driver a choice of taking the test or risking loss of his license at a refusal hearing—a hearing which has been estimated to result in loss of license, at least in one county, ninety-six percent of the time.[28]

When a blood alcohol test is administered in Vermont, therefore, the driver has both impliedly and expressly consented to submit to the search. The question to be considered in the next section is whether this two-tier consent meets the requirements of the consent exception. In the alternative, if the consent exception is not an appropriate justification, can the validity of Vermont's blood alcohol searches be upheld under any of the other exceptions to the warrant requirement?

II. The Consent Exception

The consensual search exception provides that if a suspect

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at 1208. *See generally* Comment, *Administrative Law—Kentucky's "Implied Consent" Statute—Revocation of Motor Vehicle Operator's License for Refusal to Take Blood Alcohol Test*, 59 Ky. L. J. 536 (1970).

25. State v. Dellveneri, 128 Vt. 85, 258 A.2d 834 (1969). The summary district court hearing is not a criminal proceeding. It is an administrative proceeding for the determination of a civil matter. This factor has been significant, for example, in the determination that *Miranda* warnings are not a prerequisite to the administration of a blood alcohol test. State v. Bassett, 128 Vt. 453, 266 A.2d 438 (1970).

26. The only relevant issue for the court to decide at the summary hearing is whether the officer had reasonable grounds to believe that the driver was under the influence of alcohol. *See* State v. Mastaler, 130 Vt. at 50, 285 A.2d at 781. Independent evidence such as a passenger's belief that the driver was not intoxicated will not be considered. McGarry v. Costello, 128 Vt. 234, 239, 260 A.2d 402, 405 (1969).

27. Field Processing Form D.P.S. No. 245 (1975).

28. Telephone interview with John A. Rocray, Windham County State's Attorney (Dec. 27, 1976).

freely and voluntarily consents to a search of his property or person, he cannot later have evidence found in the search suppressed on the basis that it was obtained without a search warrant.[29] The most extensive judicial exposition of the consent doctrine was developed by the United Supreme Court in *Schneckloth v. Bustamonte.*[30] In that case an automobile was stopped by a policeman for a routine check. When the driver could not produce a license, the officer asked permission to search the car. Consent to search was given and the search was made though the officer did not have a search warrant. The uncontradicted evidence at trial was that prior to the search no one was threatened with arrest and the situation was very "congenial."[31] In upholding the warrantless search on the basis of the driver's voluntary consent, the Court set out a strict standard of voluntariness.[32] Justice Stewart, writing for the majority, determined that a consent to a search cannot be accepted at face value as voluntary because of the potential for a suspect to be intimidated by the officer's express or implied assertion of authority.[33] Employing language used in the voluntariness test for confessions,[34] Stewart said that voluntariness of a consent is a question of fact to be drawn from all of the facts and circumstances surrounding the encounter between the police officer and the individual.[35] The ultimate consideration, he said, is that the consent must be the product of a "free and unconstrained choice by its maker."[36] The attitudes and actions of the investigating officer are among the circumstances to be scrutinized. If the officer used coercive tactics, no matter how subtle, the consent will not be valid under *Bustamonte.*[37] For example, the use of force or threats, even if only implied, such as with psychological intimidation, will invalidate the consent. In conjunction with the details of the officer's actions, the *Bustamonte* test requires an inquiry into the vulnerability of the suspect to coercion. Factors such

29. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

30. *Id.*

31. *Id.* at 221.

32. *Id.* at 248-49.

33. *Id.* at 229.

34. Miranda v. Arizona, 384 U.S. 436, 508 (1966) (Harlan, J., dissenting); Culombe v. Connecticut, 367 U.S. 568, 604-05 (1961); Fikes v. Alabama, 352 U.S. 191, 197-98 (1957).

35. 412 U.S. at 227.

36. *Id.* at 225 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

37. *Id.* at 225, 228.

as the suspect's intelligence and his overall ability to comprehend the situation must be considered in evaluating the voluntariness of the consent.[38]

A. *Express Consent*

Applying the *Bustamonte* test to the express consent requirement of Vermont's statute requires a finding that the statute is not conducive to a voluntary consent. Although the express consent provision of the statute mandates that no test be given if the driver refuses to take the test, the consequence of refusal is possible loss of license.[39] A consent that is encouraged by statutory sanctions for refusal is not consistent with the *Bustamonte* requirement that a consent must be the result of the unconstrained choice of the suspect. The Vermont statute, by design, provides a disincentive to refusal. Not only are there sanctions for refusal, but the driver who refuses to submit to a test is subject to a stiffer penalty (one year reducible to six months if the driver completes a rehabilitation program)[40] than a driver who takes the test and is found to be over the legal limit (one year reducible to three months if the driver completes a rehabilitation program).[41] In addition, the advice given to the driver by the officer in some counties—that "you will almost certainly lose your license" for refusal[42]—furthers the statutory coercion. Informing a driver that he will almost certainly lose his license is virtually indistinguishable from using a threat to force the driver to consent, the latter being expressly prohibited by *Bustamonte.*

Furthermore, *Bustamonte* provides that a prosecutor has the burden of proving that the consent was voluntarily given when he seeks to rely upon express consent to justify the lawfulness of a search.[43] There is no provision in the Vermont statute for any show-

38. *Id.* at 226-28.

39. *See* text accompanying notes 21-28 *supra.*

40. VT. STAT. ANN. tit. 23, § 1205 (Cum. Supp. 1976).

41. VT. STAT. ANN. tit. 23, § 1206(a) (Cum. Supp. 1976).

42. *See* note 27 *supra.*

43. 412 U.S. at 248. "We hold only that when . . . the State attempts to justify a search on the basis of his [the driver's] consent, the Fourth and Fourteenth Amendment require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."

ing by the state that the consent to a test was voluntary.[44] Though the statute requires an express consent, the function of that consent—to prevent the forcible taking of a blood alcohol sample—is unrelated to the fourth amendment warrant requirement exceptions. Prosecutors in Vermont offer the results of blood alcohol tests in evidence as a matter of course without having to demonstrate that the consent was volunarily obtained.[45] If such a showing were required many blood alcohol test consents would likely be invalidated, for example, in cases where a driver is too intoxicated to understand the significance of the consent.

In summary, the express consent attained under a statute such as section 1205, which requires express consent but threatens license suspension for refusal, is not a voluntary consent for fourth amendment purposes.

B. *Implied Consent*

The implied consent to submit to a test, which a driver is deemed to have given by driving on Vermont's roads, is similarly not voluntary under *Bustamonte* standards. First, an implied consent is not necessarily a knowing consent. The mere fact that implied consent is in the statute does not mean that the driver has actual knowledge of it. This is especially true of an out-of-state driver whose consent is implied when he drives into the state of Vermont, though he is hardly likely to have actual knowledge of the statute even if his own state has an implied consent statute. The implied consent to a search, therfore, cannot be considered freely and knowingly given, as *Bustamonte* requires, when drivers are not aware that they have consented to it. Secondly, even if a driver is aware that if he chooses to drive in Vermont his consent to a blood alcohol test will be implied, the alternative of not driving in the state would work a considerable hardship on a driver. Faced with the choice of giving up the right to drive in the state or impliedly consenting to be searched, a driver may well choose the latter because he needs

44. *See* State v. Auger, 124 Vt. 50, 55, 196 A.2d 562, 565-66 (1963). The court indicated that the only ground for voiding a consent is a showing by the defendant that the consent was obtained through fraud or misrepresentation.

45. Telephone interview with John A. Rocrary, Windham County State's Attorney (Dec. 27, 1976).

to drive in order to procure such fundamentals as food and social services. If a driver chooses to impliedly consent out of necessity, the open and voluntary fashion of consent that *Bustamonte* demands is not fulfilled.[46]

A recent federal court decision, *United States v. Albarado,*[47] concerning the constitutionality of conditioning airline travel on the passenger's consent to be searched, is supportive of this conclusion. Though the court indicated that a limited search of a passenger prior to entering a plane is a justifiable invasion of privacy in light of the great threat to the traveling public that is at stake, it made clear that it did not predicate its decision on the basis of the passenger's voluntary consent to be searched.[48] The court found that there was an element of involuntariness in the search that was inconsistent with the requirements of *Bustamonte,* even though there were signs warning passengers in line that they may be searched and presumably the passengers had knowledge that they could have avoided search by leaving the line.[49] "To make one choose between flying to one's destination and exercising one's constitutional right [to be free from unreasonable searches]," said the court, "appears to us,. . . in many situations a form of coercion, however subtle."[50] The conditioning of the use of Vermont's public highways on the driver's consent to be searched has the same coercive elements ap-

46. While the United States Supreme Court has never considered whether implied consent is sufficient for fourth amendment purposes, it has decided that it is sufficient for due process purposes. In Hess v. Pawloski, 274 U.S. 352 (1927), the Supreme Court upheld a state statute which provided that nonresident motorists impliedly consent to the appointment of a state agent for service of process by accepting the privilege of driving on the state's highways. Under *Hess,* a state does not violate due process by forcing drivers using the state's roads to be served with process in the state. However, the standards of consent necessary for waiver of a procedural due process right are not as strict as those required for waiver of a substantive fourth amendment right. In determining that due process standards were not infringed by implied consent, the Court did not equate implied consent with voluntary consent. Rather the Court justified the implied consent statute on the basis that a driver has, by using its roads, established sufficient contact with the state to have his consent implied. Therefore, *Hess* cannot be used to support the voluntariness of an implied consent for fourth amendment purposes.

47. 495 F.2d 799 (2d Cir. 1974).

48. *Id.* at 806.

49. *Id.* at 806-07.

50. *Id. Accord,* United States v. Edwards, 498 F.2d 496 (2d Cir. 1974); United States v. Bryant, 406 F. Supp. 635 (E.D. Mich. 1975). *But see* United States v. Canada, 527 F.2d 1374 (9th Cir. 1975).

pearing in *Albarado*. The choice is the same in each case—consent or do not drive (or fly). The implied consent under Vermont's statute is no more voluntary than the express consent. The consent doctrine, therefore, is not a valid justification for Vermont's warrantless blood alcohol searches.

III. The Search Incident To An Arrest Exception

The arrest exception, another well-established exception, has been considered by many state courts to be mandatory for blood alcohol searches. This exception was first articulated in dicta in the 1914 Supreme Court case, *Weeks v. United States*.[51] In *Weeks*, the suspect's home was searched without a search warrant, after he had been arrested at his place of business. Striking down the warrantless search as unreasonable, the Court suggested that a warrantless search might have been made of the suspect's person after he had been placed under a lawful arrest.[52] This dicta earned the dignity of a holding in *United States v. Rabinowitz*,[53] where it was expanded to allow warrantless searches incident to an arrest not only of the suspect's person, but also of the property within his control.

The fullest and most recent Supreme Court decision concerning the search incident to an arrest exception is found in *Chimel v. California*.[54] In *Chimel*, where the defendant's house was searched as an incident to his arrest, the Court held that the search of a house goes beyond the permissible limits of the exception. However, the Court found it reasonable to search the person arrested and the immediate area around him in order to remove any weapons that the suspect might use to resist arrest or to escape and to prevent the concealment or destruction of evidence within the suspect's control.[55] The Court reasoned that the officer's safety might be endan-

51. 232 U.S. 383 (1914) (where the Court held that evidence obtained through an illegal search was barred in a federal prosecution).

52. *Id.* at 392.

53. 339 U.S. 56 (1950) (where a search of the suspect's one-room office, including his desk, safe and filing cabinets, was held a reasonable search incident to his arrest).

54. 395 U.S. 752 (1969).

55. *Id.* at 763.

gered and the arrest itself frustrated if the officer were not allowed a limited search.[56]

It is evident that the arrest exception cannot be applied to a warrantless blood alcohol search conducted pursuant to Vermont's statute which contains no arrest requirement. However, because many courts have interpreted the United States Supreme Court decision in *Schmerber v. California* to stand for the proposition that an arrest is a fourth amendment prerequisite to a valid search,[58] it is necessary to determine whether the absence of an arrest requirement renders the Vermont statute unconstitutional.

In *Schmerber*, a police officer arrived at the scene of an auto accident shortly after it had occurred and noticed that the injured driver had alcohol on his breath and that his eyes were glassy. Upon observing the same symptoms at the hospital to which the driver was taken, the officer placed the driver under arrest and directed the attending physician to take a blood alcohol sample. This was done without a search warrant and over the objection of the driver. In attempting to suppress the evidence obtained from the blood alcohol test, the driver contended at his trial for the criminal offense of D.W.I. that the withdrawal of blood without his consent and without a search warrant violated his fourth amendment rights.[59]

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56. *Id.* In defining the scope of a search allowable when incident to an arrest, the Court said that the area into which an arrestee might reach in order to grab a weapon or evidentiary item may be searched.

57. 384 U.S. 757 (1966).

58. *See* notes 14 & 15 *supra.*

59. 384 U.S. at 766. The driver also contended unsuccessfully:

1) that his rights against self-incrimination were violated when the state forced him to submit to a blood test. The Court held that the right against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends." *Id.* at 761. *See generally* Karabian, *California's Implied Consent Statute: An Examination and Evaluation*, 1 LOY. L.A.L. REV. 23 (1968);

2) that his sixth amendment right to consult with counsel was violated. The Court held that the right to counsel did not attach to the decision as to whether to submit to a blood alcohol search, *id.* at 765-66. The Vermont Supreme Court recently held in State v. Welch, No. 73-76 (Vt. Sup. Ct. June 7, 1977), that a D.W.I. suspect has a limited right to advice of counsel. This right is available, the court determined, if the suspect requests the aid of counsel and if such advice can be procured within a reasonable time so as not to affect the blood alcohol test results. *Id.* at 7.

The Supreme Court held that a blood sample may be taken from a driver who has been lawfully arrested, without his consent or a search warrant, provided there is probable cause to believe the driver is intoxicated.[60]

Many of the state courts[61] that have construed the *Schmerber* holding to require an arrest have reacted to language in the *Schmerber* opinion in which the Court concluded "that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest."[62] There is support in *Schmerber,* however, for the proposition that the arrest was a nonessential ingredient of the opinion included merely because the driver had in fact been arrested. This proposition is documented by the Court's analysis of two exceptions to the warrant requirement in which it rejected the application of the arrest exception and upheld the search on the basis of the exigent circumstances exception. (The exigent circumstances exception will be discussed in the next section).

The Court recognized that the search incident to an arrest exception had traditionally given the police an unrestricted right to search a person subsequent to a lawful arrest.[63] However, after considering the justification for the exception which it had previously

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Though the *Welch* decision did not make mention of a statutory change in Vermont's D.W.I. statute, Vt. Act No. 96 (May 5, 1977), *amending* Vt. Stat. Ann. tit. 23, § 1202 (Cum. Supp. 1976), the decision may well have been affected by that statutory amendment which was enacted about a month before the decision was handed down. The following paragraph will be added to section 1202 pursuant to the amendment:

> (b) A person who is requested by a law enforcement officer to submit to a chemical test under this section shall have the right to consult an attorney prior to deciding whether or not to submit to the chemical test. The person must decide within a reasonable time, but no later than thirty minutes from the time of the initial attempt to contact the attorney whether or not to submit to the chemical test. . . .

See generally Note, *Miranda's Applicability to the Breathylyzer and Blood Test,* 7 WAKE FOREST L. REV. 313 (1971); and

3) that the forced taking of a blood alcohol sample is violative of the right to due process of law as guaranteed by the fourteenth amendment, 384 U.S. at 759-60. The Court rejected this claim relying on Breithaupt v. Abram, 352 U.S. 432 (1957).

60. 384 U.S. at 768-72. Probable cause was satisfied according to the Court by the officer's observation that the driver had alcohol on his breath and bloodshot eyes.

61. *See, e.g.,* notes 65 & 66 *infra.*

62. 384 U.S. at 771.

63. *Id.* at 769.

outlined in *Chimel*—to avoid the danger of concealed weapons and the destruction of evidence in the direct control of the accused—the Supreme Court found the arrest exception to have little applicability to blood alcohol searches.[64] The evidence sought in blood tests, the Court reasoned, involves an intrusion beyond the body's surface, where the person searched has no control over its destruction as he would over weapons or other contraband. Moreover, the Court determined, no danger is presented to the police officer by the evidence of alcohol which is sought. Thus, the *Schmerber* Court emphasized a restriction of the arrest exception which limits it to searches where the evidence is in the control of the suspect. Perhaps courts such as the California Supreme Court[65] and the Kansas Supreme Court,[66] which have held an arrest to be mandated by *Schmerber*, have done so out of a cautious respect for *Schmerber*. In so doing they have rendered their statutes at least consistent with the language of *Schmerber*, making certain that they would avoid future fourth amendment attacks. However, the reliance of the Court in *Schmerber* on a second exception, the exigent circumstances exception,[67] makes it apparent that these courts went further than was necessary in interpreting *Schmerber*.

IV. The Exigent Circumstances Exception

The exigent circumstances exception, sometimes referred to as the emergency doctrine, was first announced in *Carroll v. United States*,[68] a 1925 Supreme Court case allowing a warrantless search of an automobile which the police had probable cause to believe was illegally transporting liquor. The Court determined that where a fast-developing situation precludes resort to a magistrate and where the evidence sought is highly mobile, such that it may disappear if a warrant must be obtained, a warrantless search is justified provided the officer has probable cause to believe that contraband will be found.[69] The exigent circumstances exception has since been expanded beyond a test of the mobility of the evidence to include a

64. *Id.* at 769-70.

65. People v. Superior Court of Kern County, 6 Cal. 3d 757, 761-63, 493 P.2d 1145, 1147-49, 100 Cal. Rptr. 281, 283-85 (1972).

66. State v. Brunner, 211 Kan. 596, 602-03, 507 P.2d 233, 238 (1973).

67. 384 U.S. at 770-71.

68. 267 U.S. 132 (1925).

69. *Id.* at 158-59.

general class of exceptional circumstances in which removal or destruction of evidence is highly likely.[70]

In discussing the applicability of the emergency doctrine to blood alcohol searches, the *Schmerber* Court indicated that the officer was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of the evidence.[71] Taking judicial notice of the fact that the percentage of alcohol begins to diminish shortly after the last drink is taken,[72] the Court found the officer justified in withdrawing a blood sample without first getting a warrant.[73] This application of the emergency doctrine to blood alcohol searches is well founded. In *Carroll,* where the doctrine originated, it was held that evidence in an automobile was likely enough to disappear, due to the automobile's mobility, to merit an immediate search without a warrant or an arrest. That the evidence will disappear when the search is for alcohol, if time is taken to procure a warrant, is more than a likelihood. Scientific studies have shown it to be a certainty.[74]

Notwithstanding this reasoning, there are three recurring arguments that have been made by the courts which have held that a warrantless blood alcohol search cannot be justified by the emergency doctrine when conducted independent of an arrest.[75] The first

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70. *See* Chapman v. United States, 365 U.S. 610, 615 (1961); McDonald v. United States, 335 U.S. 451, 454 (1948).

71. 384 U.S. at 770.

72. Every person regardless of body weight loses alcohol from the blood at a constant rate of .015 every hour. *See* Officer's Manual on the Detection, Apprehension and Processing of Person's Impaired by Alcohol, *supra* note 5.

73. 384 U.S. at 770-71.

74. *See* note 72 *supra.*

75. There is a fourth argument which will not be addressed in the text of this note. *See* State v. Brunner, 211 Kan. at 602-03, 507 P.2d at 238 (1973); State v. Richerson, 87 N.M. at 441, 535 P.2d at 644, 646 (1975). These courts relied on the dicta in United States v. Dionisio, 410 U.S. 1 (1973), a Supreme Court case decided shortly after *Schmerber,* which suggests that *Schmerber* does not eliminate the need for the arrest exception even when there are exigent circumstances present. Rather, *Dionisio* indicates that two exceptions are used in conjunction with each other to justify the warrantless search in *Schmerber. Schmerber,* the *Dionisio* Court said, stands for the proposition that the obtaining of physical evidence involves a potential fourth amendment violation on two levels—the seizure necessary to bring the person in contact with governmental agents, and the subsequent search for and seizure of evidence. The *Dionisio* interpretation of *Schmerber* proceeds: "In *Schmerber,* we found the initial seizure justified as a lawful arrest, and the subsequent seizure of a blood sample from his body reasonable in light of the exigent circumstances." *Id.* at 8-9.

of these arguments was articulated by the Alaska Supreme Court.[76] In holding that the exigent circumstances exception does not justify a blood alcohol search unless the driver has been placed under arrest, the court cited with approval a law review note[77] which argued that the arrest requirement will serve as a virtual substitute for the search warrant in that it deters arbitrary searches by the police.[78] The function of a search warrant is to interpose the independent determination of probable cause by a magistrate prior to the search. However, because the encounter between the police officer and the D.W.I. suspect is not premeditated, and the suspect is highly mobile, it is impractical for a police officer to obtain a search warrant prior to search. Similarly, obtaining an arrest warrant prior to search is impractical. The incorporation of warrantless arrests into the criminal procedure statutes of most states, it is argued, helps to solve this problem.[79] First, a warrantless arrest allows the officer the flexibility to take the suspect into custody and in so doing to eliminate the possibility of the suspect fleeing. Second, it requires the officer to bring the suspect before a magistrate as soon as possible after the arrest thus accomplishing the same objective as the search warrant. Whether the search arises in the context of a search warrant or a warrantless arrest, no search is conducted unless the magistrate finds the requisite probable cause to search or to arrest.[80] Moreover, the arrest requirement reduces the officer's decision to search into a commitment by the officer to stand by that decision. He cannot avoid the magistrate, as he could without an arrest, by awaiting the results of the test and then dropping the charges if the test results absolve the driver.

This argument might have validity in a jurisdiction that was able to offer contemporaneous hearings. However, as is evidenced by the modern trend of arrest procedure, it is recognized that in practice there is an inevitable time delay between the arrest and the

76. Layland v. State, 535 P.2d 1043 (Alaska 1975).

77. Note, *Arrest Requirement For Administering Blood Tests*, 1971 DUKE L.J. 601.

78. *Id.* at 613-17. *See* Note, *Destruction of Evidence—A Rationale for Blood Tests Without an Arrest?*, 18 STAN. L. REV. 243, 252-53 (1965).

79. 1971 DUKE L.J., *supra* note 77, at 613-17.

80. *Id.* at 614. The author of the note concedes that in a minority of cases it will not be practical to get a magistrate before the search due to distance or the lateness of the hour. In these cases, the hearing will be held shortly after the search or in the morning.

hearing before the magistrate.[81] The modern trend of arrest procedure, as illustrated by the Model Penal Code of Pre-Arraignment Procedure[82] as well as the Vermont,[83] New York[84] and California penal codes,[85] is to dispense with the requirement of an immediate probable cause hearing after a warrantless arrest. These statutes were enacted to eliminate the pretrial detention which would otherwise be the result of the delay.[86] While the blood alcohol search is made immediately, the police officer is required to order the suspect to appear in court at a later date and then release him. In Vermont the time lapse between the arrest and the hearing is approximately three weeks, subject to slight variation from county to county.[87] Thus if a driver were arrested for D.W.I., the police officer would administer the test and would then be required to issue a citation ordering the driver to appear at a later date before a magistrate for a determination that there was probable cause to search. Therefore, in the context of Vermont criminal procedure and the modern trend, the benefit of a warrantless arrest is illusory because there is no contemporaneous hearing before the magistrate. In fact, under present police procedure in Vermont the probable cause hearing will not take place at all in many districts if the test results do not provide the requisite blood alcohol content.[88] In that event the state's attorney will dismiss the charges.[89] The impact of this is that an officer may conduct an unjustified blood alcohol search while never confronting the magistrate whose independent judgment was to have

81. The drafters of the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE have acknowledged this time delay, characterizing it as "costly both in monetary and human terms." *See* note following MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.2 (Proposed Official Draft, Apr. 15, 1975).

82. *Id.* § 120.2(2).

83. VT. R. CRIM. PROC. 3(b).

84. N.Y. CRIM. PROC. LAW § 140.20(2) (McKinney 1971).

85. CAL. PENAL CODE § 853.6(a) (West Cum. Supp. 1975).

86. The United States Supreme Court has held that the essential objective should be to eliminate pretrial detention and that if that is accomplished then an immediate judicial determination of probable cause following an arrest is not necessary. Gerstein v. Pugh, 420 U.S. 103 (1975).

87. In Windham County, for example, the driver is issued a citation demanding that he appear in court on the third Monday after the arrest. Telephone interview with John A. Rocray, Windham County State's Attorney (Dec. 27, 1976).

88. Telephone interview with Stephen W. Webster, Orange County State's Attorney (Dec. 10, 1976).

89. *Id.*

had the effect of deterring such searches. In sum, the requirement of an arrest only makes sense in the context of an immediate hearing before a magistrate.

However, the Vermont procedure is not without the safeguards against irresponsible police behavior. First, the state's attorney will function as a deterrent against unreasonable searches. With each test that a police officer administers, he is required to complete a D.W.I. field processing form which includes the observations that led him to believe the driver was intoxicated[90] and to swear out an affadavit stating his grounds for probable cause. These forms and a copy of the test results are forwarded to the state's attorney.[91] On the basis of this inspection of the forms, which serves as a review of the officer's conduct, the state's attorney will decide whether to proceed with the prosecution.[92] In addition, the sergeant in some police precincts reviews the field processing forms and the test results from each test given[93] and is in a position to discipline an officer who uses his right to search irresponsibly. Finally, a driver who belives that his fourth amendment rights have been violated by an officer may file a civil action against the police officer for monetary damages.[94]

A second argument that has been cited in support of the proposition that the emergency doctrine cannot function independently of an arrest to justify blood alcohol searches is found in a California Supreme Court decision. In *People v. Superior Court of Kern County*,[95] the court determined that a search can be conducted independently of an arrest only when there is an emergency which not only deprives the officer of time to obtain a warrant, but also makes

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90. *Id.*

91. Among the factors that the officer is required to document are: a scent of alcohol on the breath, slurred speech, erratic driving, blood-shot eyes, and presence of alcoholic beverages in the automobile. *See* Officer's Manual on the Detection, Apprehension and Processing of Persons Impaired by Alcohol, *supra* note 5, at 21-23.

92. If the test results indicate a level of intoxication of above .05 but below the legal limit of .10 the driver may be charged with careless and negligent driving. *See* note 88 *supra.*

93. Telephone interview with Sergeant Irwin W. Miranville, Coordinator of Enforcement—Project Crash (Dec. 27, 1976).

94. Under federal law an action may be brought pursuant to 42 U.S.C. § 1983 (1970). Alternatively, an action may be brought in state court against the state as per VT. STAT. ANN. tit. 12, § 5601 (1973).

95. 6 Cal. 3d. 757, 493 P.2d 1145, 100 Cal. Rptr. 281 (1972).

it impractical for the officer to arrest the suspect before searching.[96] *Schmerber* recognizes, said the *Kern* court, that once a suspect is arrested, the rapid dissipation of alcohol justifies the failure to obtain a search warrant. However, the *Kern* court saw no emergency created by the disappearing evidence that would render the arrest impractical to facilitate because the driver is not fleeing or otherwise unavailable.[97]

This argument is unsubstantiated by *Carroll v. United States,*[98] the United States Supreme Court decision in which the emergency doctrine originated. In that case the police engaged in a warrantless search of an automobile without first arresting the occupants of the car. The *Carroll* Court found the circumstances to be exigent in that if the police had to take time out to obtain a warrant the automobile could be moved and the contraband could be destroyed.[99] Whether these same circumstances prevented an arrest was not one of the Court's considerations. In fact the Court held that: "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."[100]

Although *Carroll* lends support for the reasonableness of a warrantless blood alcohol search justified solely by the emergency doctrine, still a third argument has been articulated in support of the need for an arrest. The Alaska Supreme Court[101] has distinguished the use of the emergency doctrine for vehicle searches as in *Carroll,* from the use of the doctrine for blood alcohol searches. Holding an arrest to be constitutionally required for blood alcohol searches, the court rejected the applicability of the emergency doctrine to such searches made without an arrest.[102] Most of the United States Supreme Court decisions that have upheld searches conducted pursuant to the emergency doctrine, said the Alaska court, have dealt

96. *Id.* at 765 n. 7, 493 P.2d at 1150 n.7, 100 Cal. Rptr. at 286 n.7.
97. *Id.*
98. 267 U.S. 132 (1925).
99. *Id.* at 153.
100. *Id.* at 158-59.
101. Layland v. State, 535 P.2d 1043 (Alaska 1975).
102. *Id.* at 1049-50.

with searches of moving vehicles and not bodily searches.[103] The Alaska court refused to extend the emergency doctrine to bodily searches made independent of an arrest. They interpreted the rationale for the use of the emergency doctrine in *Schmerber* as: "to excuse the failure to obtain a search warrant after the subject's arrest and before the blood sample was taken."[104] Thus the Alaska court believed that both an arrest and exigent circumstances were necessary to justify warrantless blood alcohol searches.

Although the Alaska case was decided in 1975, the court neglected to consider a 1973 United States Supreme Court decision which helps to eliminate the confusion on the sufficiency of the emergency doctrine independent of an arrest as an exception to justify warrantless bodily searches. In this case, *Cupp v. Murphy*,[105] the defendant was suspected of strangling his wife and was asked to come to the police station for questioning. When an officer noticed a spot under the suspect's fingernails and suspected it was dried blood, he requested Murphy's consent to submit to a fingernail scraping. Under protest, the scraping was taken and proved incriminating to the defendant. At his trial the defendant claimed that the search was unreasonable in that the officers did not have a search warrant and they did not arrest him before making the search. The Court held the search to be constitutionally permissible.[106] Using the evanescent nature of the fingernail evidence as a justification, the Court held that even in the absence of an arrest, a limited search could be made to prevent the evidence from disappearing. The disappearance of evidence was likely, they found, be-

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103. *Id.*

104. *Id.*

105. 412 U.S. 291 (1973).

106. *Id.* at 296. This decision may have been motivated in part by the fact that the arrest may frustrate law enforcement when technical statutory arrest requirements cannot be met. An example of this is the requirement that to arrest for a misdemeanor an officer must observe it being committed, which is the case in Vermont (VT. R. CRIM. PROC. 3(a)) and in many other states. If an officer comes upon the scene of an accident that he has not observed for example, his hands are tied because he cannot comply with the statutory prerequisite that he make a lawful arrest. *See, e.g.*, Holland v. Parker, 354 F. Supp. at 198-200. A similar result occurs when the officer comes upon a D.W.I. suspect outside his jurisdiction. Since he cannot make a lawful arrest under such circumstances, he cannot trigger the implied consent law. *See* Irwin v. State, Dept. of Motor Vehicles, 10 Wash. App. 369, 517 P.2d 619 (1974) (where arrest is out of officer's jurisdiction it will invalidate D.W.I. implied consent and refusal sanctions).

cause the defendant was motivated to destroy it at his first opportunity.[107]

The *Cupp* search might be distingusihed from a blood alcohol search in that *Cupp* involved a fingernail search for murder evidence which the defendant himself could destroy if given the chance, while blood alcohol searches involve a search for evidence of intoxication over which the suspect has no control. However, though the lack of control over the evidence was the basis for the Court's rejection of the application of the arrest exception in *Schmerber,*[108] the Court found the emergency doctrine applicable in spite of the suspect's powerless position over the disappearance of the alcohol.[109] In addition, there is language in *Cupp* which indicates that its holding applies equally as well to blood alcohol searches. This is found in the Court's determination that a limited search may be made under the emergency doctrine to preserve highly evanescent evidence. The Court made reference to *Schmerber* as an example of a case that dealt with the type of evidence that is highly likely to disappear.[110] Furthermore, at least one state supreme court, the Illinois court in *People v. Todd,*[111] recognized *Cupp* as authority for justifying warrantless blood alcohol tests, that are not incident to an arrest, by the emergency doctrine. Though the Illinois court was bound by the state's statutory arrest requirement, it indicated that constitutionally the absence of a formal arrest may not taint a limited search, given probable cause and evidence that may dissipate.[112]

Thus the holding in *Cupp* appears to be adaptable to a blood alcohol search conducted pursuant to Vermont's statutory requirements. *Cupp* allows a limited search for evidence that is likely to disappear provided the officer has probable cause to believe the suspect will have such evidence on his person. A full *Chimel* search (of the immediate area around the suspect) would not be permissi-

107. 412 U.S. at 296. In support of this finding, the Court referred to the officer's testimony that the defendant was rubbing his fingernails against his keys which were in his pocket.

108. *See* text accompanying notes 62-65 *supra.*

109. *See* text accompanying notes 71-74 *supra.*

110. 412 U.S. at 296.

111. 59 Ill.2d 534, 544, 322 N.E.2d 447, 453 (1975).

112. *Id.*

ble under *Cupp* without an arrest or a warrant.[113] The search permitted by the Vermont statute is similarly a limited search for evanescent evidence. A search of the suspect's car or other property in conjunction with the alcohol search would not be within a Vermont police officer's rights under the D.W.I. statute. Similarly, the probable cause requirement of *Cupp* is satisfied by section 1202 of title 23[114] of Vermont's statute, which provides that the officer must have reasonable grounds to believe the driver is intoxicated before requesting permission to search. Reasonable grounds have been held by the United States Supreme Court in *Brinegar v. United States*[115] to be the functional equivalent of probable cause. It is important to remember, however, that because, as indicated earlier in this note, the consent doctrine is inapplicable[116] and it is the emergency doctrine which justifies Vermont's warrantless blood alcohol searches, it will be the affirmative duty of the state to show that the officer had probable cause to search the driver notwithstanding the driver's consent to be searched.

CONCLUSION

Vermont's implied consent statute is triggered when a driver furnishes a Vermont police officer with reasonable grounds to believe that he is driving while intoxicated. Despite this statutory implied consent to take a blood alcohol test, and the express consent of the driver to take a test which the police officer must obtain, a warrantless blood alcohol search conducted pursuant to Vermont's statute does not qualify for the consent exception. The statutory sanction of loss of license which a driver may face for refusal to submit to a blood alcohol test precludes the search from fulfilling the voluntariness requirement of the consent exception. Similarly,

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113. 412 U.S. at 296.

113.1 The Vermont Supreme Court's recent decision in State v. Welch, No. 73-76 (Vt. Sup. Ct. June 7, 1977) indicates the court's recognition of the evanescent nature of blood alcohol test evidence. In providing for the first time, that there is a limited right to advice of counsel before submitting to a blood alcohol test, the court was careful to limit that right to circumstances in which the advice could be obtained within a reasonable time such that the blood alcohol content would not diminish.

114. VT. STAT. ANN. tit. 23, § 1202 (Cum. Supp. 1976).

115. *See* note 7 *supra*.

116. *See* text accompanying notes 39-50 *supra*.

the omission of an arrest requirement in the statute means that the search incident to an arrest exception cannot be utilized to justify the search. Therefore, if Vermont's statute is to comply with the fourth amendment, it must fall within another exception to the warrant requirement.

The Supreme Court has taken an expansive view of the exigent circumstances exception in *Cupp v. Murphy*. Thus, while the legality of Vermont's warrantless blood alcohol searches was uncertain under *Schmerber*, the exigent circumstances exception as outlined in *Cupp* indicates that Vermont's statute will fare better under that exception. After *Cupp*, a warrantless search that is not incident to an arrest may still satisfy the exigent circumstances exception where the search is for evidence that is subject to dissipation. There was no factor preventing the officers in *Cupp* from making an arrest prior to conducting the fingernail search. The Court nonetheless found that the existence of probable cause to arrest validated the warrantless search without the actual interposition of an arrest. The application of *Cupp* to blood alcohol searches is reasonable because alcohol dissipates from the blood at the rate of .015 per hour which is clearly an exigent circumstance justifying an immediate search of the driver.

Richard A. Goldberg