Drunk Drivers and Vampire Cops: The “Gold Standard”

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I. INTRODUCTION

A driver is pulled over for erratic driving. An officer suspects the driver of drinking and, after he refuses a breathalyzer, the officer asks the driver to step out of the vehicle and to place his arm on the hood of the car. The officer then proceeds to draw the driver’s blood. This is exactly what happens under a new federal pilot program implemented by the National Highway Traffic Safety Administration (NHTSA) in 2009. The NHTSA developed this program “to determine if drawing blood by law-enforcement officers can be an effective tool against drunken drivers and aid in their prosecution.” Under this program, officers from selected states will receive training on drawing blood from persons suspected of impaired driving. NHTSA has collected data that shows blood tests measure blood

1. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., No. DOT HS 810 704, PILOT TEST OF NEW ROADSIDE SURVEY METHODOLOGY FOR IMPAIRED DRIVING 10 (2009) (stating that blood samples are the “gold standard” for impaired driving testing).
2. Candidate for Juris Doctor, New England Law | Boston, 2011; B.S. in Media Studies-Journalism, Radford University, 2008. I would like to thank the Journal staff, my professors, and my ECNE for their guidance and assistance in the completion of this Note. I would also like to give a special thanks to my wonderful parents and Ryan whose encouragement, love, and support have helped me reach my goals and dreams.
3. See Kelsey P. Black, Note, Undue Protection Versus Undue Punishment: Examining the Drinking and Driving Problem Across the United States, 40 SUFFOLK U. L. REV. 463, 463-64 (2007) (discussing the impaired driving problem). The severity of the impaired driving problem has prompted the NHTSA and various other groups to conduct research and implement new programs and laws to decrease impaired driving and accompanying fatalities. Id. Regardless, “intoxicated drivers still cause a disturbingly high number of deaths.” Id.
5. Id. Although no information is available on exact training procedures, officers will be trained “under the same program as other phlebotomists in their state, but under a highly compressed schedule.” Id.
alcohol more accurately than breath tests. However, concerns have been raised over the constitutionality, credibility, safety, and feasibility of this new practice. Further, there are neither cases nor scholarly articles which discuss how this program will be impacted by the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts.* The Court held that certificates of forensic analysis were "testimonial", and, therefore, under the Sixth Amendment, a certificate cannot be used unless the expert who prepared it testifies.

Accordingly, this Note will analyze the problematic results of the pilot program and conclude that an alternative solution is better suited to reduce incidents of impaired driving. Although impaired driving has been, and remains, a serious problem in the United States, this Note will argue that the detrimental consequences of officer phlebotomists will outweigh any benefit the program will have on reducing impaired driving because of the questionable constitutionality of the program's practices, as well as the public policy concerns it raises. Part II will discuss impaired driving law-enforcement procedures and the evolution of blood tests in that setting, along with an explanation of the laws that govern these procedures. Part III will detail and compare the program's experience in several states. Part IV will analyze the concerns stemming from the program, including questions of constitutionality, risk, safety, and credibility. Furthermore, Part IV will also examine the ways in which the program implicates concerns under the recent decision in *Melendez-Diaz.* Lastly, Part V will conclude that the detrimental consequences stemming from the program far outweigh the effects it will have in deterring persons from driving under the influence of alcohol.

II. IMPAIRED DRIVING LAWS AND BLOOD TESTING PROCEDURES

A. Impaired Driving Laws

Every state has laws prohibiting driving while under the influence of alcohol. The government in every state must prove beyond a reasonable

6. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., supra note 1 (explaining blood samples are "the form of analysis which has been most established").
7. See infra Part IV.
9. Id. at 2532.
10. Dennis R. Cook, Comment, Ouch! Blood Search Warrants After Beeman v. State: An End-Run Around the Texas Legislature Resulting in Judicially Sanctioned Batteries, 42 TEX. TECH L. REV. 91, 92 (2009) ("In 2007, approximately 12,998 people were killed in alcohol-impaired traffic accidents across the nation. Alcohol was a factor in 31.7% of all traffic fatalities that occurred that year." (footnotes omitted)).
doubt that a driver met the statutory definition for “impairment.” There are a variety of other laws that further govern impaired driving including illegal per se laws and implied consent laws.

"[A]ll States have passed ‘illegal per se’ laws that make it a crime to operate a motor vehicle with a BAC concentration at or above .08 g/dL." These laws only require the blood alcohol content (BAC) test result as sufficient evidence for conviction. By reducing the evidentiary burden, the per se laws assist states “in the prosecution of DUI offenders.” The state must still prove the other elements of the crime beyond a reasonable doubt; “[t]he main issues at trial, therefore, will usually be the accuracy of the test result and the manner in which the test was administered.”

Implied consent laws “provide that in return for the privilege of driving, each motorist is assumed to have given his consent to a blood-alcohol test.” In all states, implied consent laws have mandatory requirements that drivers provide BAC evidence when requested.

The criminal and administrative penalties for refusing to submit to a chemical test vary by state. Usually refusal to submit to a chemical test results in revocation of the individual’s driver’s license. An officer is required to inform the driver of the direct consequences of the refusal and that the refusal may be introduced as evidence in court.

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13. Id.
14. Id. at 2-3.
15. Id. at 2.
17. Id. at 31.
21. Kwasnoski et al., supra note 15, § 3-4a, at 99. “A refusal occurs when a driver exhibits conduct that would justify a reasonable person in the officer’s position to believe that the driver is unwilling to submit to the testing procedures.” Id. at 113 (detailing the procedure).
22. Id. at 99.
Forty-one states have passed “administrative license revocation” programs that suspend a suspect’s license immediately if his or her BAC is above a certain level. The administrative license revocation proceedings may also be used under the implied consent laws as a remedial measure “designed to remove irresponsible drivers from the roadways.” Implied consent laws can be a “powerful weapon” against impaired driving; although, statistics show they have not been a deterrent. This has led to the idea of officer phlebotomists, who can both lower refusal rates with the use of a warrant and reduce long delays by drawing blood themselves.

B. Procedures for Blood Tests

Once an officer has probable cause to believe that a driver is impaired, the officer will arrest the driver and request a BAC sample, which is often refused. After a driver who is arrested for impaired driving refuses a breath sample and is apprised of the state’s implied consent laws, an officer requests a warrant using standard procedures. If a warrant is granted, the driver is then required to provide a blood sample. Sometimes, the driver is then taken to a facility where a qualified medical practitioner, such as a physician, emergency medical technician, nurse, or phlebotomist, is called to the police station to draw the sample. Warrants for drawing blood have simultaneously reduced breath test refusals and increased the proportion of impaired driving cases with BAC evidence. The results have been “more guilty pleas, fewer trials, and more convictions.”

23. REPORT, supra note 11, at 3.
24. KWASNOSKI ET AL., supra note 16, § 3-8, at 125.
27. REPORT, supra note 11, at 4. To determine probable cause an officer will: (1) simultaneously converse with the driver about the amount of alcohol the driver consumed while observing cues of alcohol use; and (2) perform field sobriety tests. Id. at 3-4 (discussing DWI arrest and BAC testing processes).
28. CASE STUDIES, supra note 19, at 36.
29. Id.
30. KWASNOSKI ET AL., supra note 15, § 2-8, at 82. In accident cases, hospitals draw blood as part of routine procedure; however, the availability of the results varies among states. See id. (explaining the traditional process of impaired driving blood draws). Some states consider the blood alcohol content test results procured at the direction of a physician as confidential, while others find physician-patient privilege inapplicable. Id.
31. Id.
32. Id.
Many judges and prosecutors consider BAC as valuable evidence of drunk driving; without it the evidence supporting the impaired driving charge “is limited to an officer’s observations of the driver’s behavior on the road, visible signs of intoxication, and the driver’s scores on the Standardized Field Sobriety Tests (SFST).” Jurors commonly rely on the chemical test because “[t]here is no question that a chemical test provides the most reliably probative evidence of the influence or non-influence of alcohol on a driver.” Therefore, it is more difficult to obtain a conviction without the test.

There are many advantages of using blood evidence: it has a strong evidentiary value; it tests for both drugs and alcohol; it can be retested and saved; it appeals to the jury (labeled the “CSI Effect”); it results in less court time; and it results in more pleas as opposed to litigation. However, there are also various disadvantages to blood evidence, including: difficulties obtaining the sample; high costs; officers being off the road for an extended period of time; lost hours waiting for blood to be drawn; and officers becoming frustrated and losing interest in DUI/DWI enforcement. Despite the debate, refusal rates remain high. As a result, the NHTSA has developed the Officer Phlebotomy Refusal Grant Program.

III. “VAMPIRE COPS” AND THEIR EXPERIENCE IN THE STATES

Before the pilot program, Arizona was “the only state in the nation that [had] a statewide program training law enforcement officers to conduct

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33. CASE STUDIES, supra note 19, at 1.
34. KWASNOSKI ET AL., supra note 16, § 2-7, at 81.
35. CASE STUDIES, supra note 19, at 1.
37. Id. (relating that costs to obtain a blood sample at a hospital range from $50-200 per procedure and contracted phlebotomists cost $35-50 per procedure or per hour).
38. REPORT, supra note 11, at 5 (averaging 22.4% and as high as 81% in one state); see also Cafaro, supra note 25, at 110 (documenting refusal rates).
39. JANICE K. BREWER ET AL., ARIZ. GOVERNOR’S OFFICE OF HIGHWAY SAFETY, ANNUAL PERFORMANCE REPORT: FEDERAL FISCAL YEAR 2009, 14 (2009), available at http://www.azgohs.gov/about-gohs/fy2009annualreport.pdf; see also Associated Press, supra note 4 (“For the approximately 5 percent [sic] who refuse, the officer obtains a search warrant from an on-call judge and the suspect can be restrained if needed to obtain a sample . . . .”).
40. Officer phlebotomists have been labeled “Vampire Cops” by some groups. STOP VAMPIRE COPS BLOG (Nov. 3, 2009), http://stopvampiricops.wordpress.com/.
blood draws." In 1995, the Arizona Department of Public Safety (DPS) created the Law Enforcement Phlebotomy Program "in order to more effectively gather evidence and prosecute the DUI offender." Along with the program, DPS implemented a tele-fax search warrant system in which officers can contact judges by fax after-hours. The tele-fax warrant decreases the time spent on obtaining a warrant to approximately thirty minutes. Under this program, officers have significant "new tools to combat DUI as the number of impaired driving arrests and prosecutions rise."

In Arizona, more than fifty different police agencies staff "at least one trained Law Enforcement Phlebotomist," and some agencies have transitioned to blood testing only. In Arizona, officers participate in the Law Enforcement Phlebotomy Program by receiving training on drawing blood and "must complete one hundred successful blood draws to become qualified phlebotomists." The officers receive annual training and performance reviews under the program. Additionally, a phlebotomy coordinator is employed to oversee training and the program itself.

Modeled after the program in Arizona and funded by the NHTSA grant, officers in both Texas and Idaho are being trained to conduct blood draws on drivers who do not consent to breath tests. Shortly after the media reported on the pilot program, Texas and Idaho received different reactions. In Austin, Texas, City Council members "approved a resolution saying it is their 'clear will' that police officers not personally collect blood from people suspected of driving while intoxicated." In November 2009, the

42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
48. Id. (explaining that officers must comply with a standard manual that details the program's protocol).
49. Id.
50. Press Release, Bill Augsburger, Chief of Police, Nampa Police Dep't, Nampa Police Phlebotomy (Sept. 7, 2009), available at http://www.nampapolice.org/nampapolice/pressreleases.php; see also ARIZ. GOVERNOR'S OFFICE OF HIGHWAY SAFETY, ANNUAL PERFORMANCE REPORT, FEDERAL FISCAL YEAR 2009, at 25 (2009) (describing the assistance of Arizona in "the NHTSA Officer Phlebotomy Refusal Grant by helping with program set up and training in Idaho and Texas").
51. Tony Plohetski, Council Members' 'Clear Will' is that Officers Not Collect Blood,
Houston Police Department (HPD) delayed training for the officers citing vaccination requirements for the delay.\textsuperscript{52} The \textit{Examiner} reported that “HPD headquarters was still hoping to avoid any criticism by playing dumb” and that “[a] spokesman said he could not confirm the program was anything more than an idea. . . . However, officers familiar with this program say the policy is in place, the training is scheduled, and the funding is ready to be spent.”\textsuperscript{53} In June 2010, the \textit{Examiner} reported that Mayor Annise Parker had halted the program after the federal money was spent to train some of the officers.\textsuperscript{54} Not only did the officers get the vaccinations necessary for becoming phlebotomists, but they also had an opportunity to practice drawing blood by sticking state prison inmates with needles.\textsuperscript{55} It was reported that about fifty inmates were stuck with needles by HPD officers; however, they were all having blood testing done anyway.\textsuperscript{56} The \textit{Examiner} also reported that “[t]he prison testing component was kept quiet,” and it is possible that Mayor Parker was unaware of the prison testing when she decided to halt the program.\textsuperscript{57} Instead of officers performing the blood draw, a new program is being considered that would have certified firefighters/paramedics take the sample.\textsuperscript{58}

Idaho’s Nampa Police Department (NPD), on the other hand, immediately issued a press release explaining that it:

[W]ould like to get the word out that if you drive while impaired, you will not be given the ability to refuse evidentiary tests. If an impaired driver refuses an offered test, an involuntary blood draw will be conducted. The inability to refuse evidentiary tests furthers the Nampa Police Department’s commitment to making our highways safer, removing the impaired drivers from the roadways, and working ‘Towards Zero Deaths.’\textsuperscript{59}


\textsuperscript{53} Id.

\textsuperscript{54} Id.

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Press Release, Matthew Pavelek, Sergeant, Nampa Police Dep’t, (Sept. 7, 2009)
NPD claims the new pilot program has proven to be both cost-effective (saving $300 per blood draw) and more accurate (as hospital waits are avoided; thus, providing more accurate blood-alcohol readings).

Even hospital officials support the Idaho program, as staff has more time to focus on their patients’ needs.

In both states, officers who have been briefed on the program have been informed that many cases will not require a search warrant, enabling them to draw blood without court oversight. Initially both states eased concerns caused by the backlash by not conducting blood draws in the field. Texas went as far as planning to video record the whole process; however, this was never tested before the program was halted. As for the Idaho program, it could change over time to model Arizona’s field blood draws.

Training occurs at local colleges and is funded by the NHTSA grant program. As of September 2009, five Nampa officers had been certified to perform blood draws, and five others had completed the required training. Officers are required to take fourteen hours of classroom lecture, are given standard phlebotomy text and photocopies of literature on venipuncture, are required to do a minimum of fifty veni-puncture draws, and receive certification upon completion of the program.

For obvious reasons the experience in Texas was unsuccessful; however, Idaho hopes their experience will prove to be as successful as Arizona’s, whose refusal rates have dropped from 16.9% to 8.56% from 1996 to 2007. Further, Arizona believes its program saves the state a considerable amount of resources and time, and “deliver[s] a sense of community and

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61. Id.

62. Dean, supra note 52 (explaining Texas law allows “mandatory blood draw[s]” for felony cases and a new state law allows them for car crashes resulting in slight injuries); see NAMPA POLICE DEP’T, supra note 59.

63. See Dean, supra note 52; Nance, supra note 60.

64. Dean, supra note 52 (explaining that in Texas suspects will be taken to a facility already set up for breathalyzer testing and a camera will record the whole process); see Nance, supra note 60 (in Idaho blood draws are done in a special phlebotomy room).

65. Nance, supra note 60.

66. Id. (explaining that the Boise Police Department has also put five officers through the training. Sgt. Matthew Pavelek said the National Highway Association is doing “studies to see how it affects drunk-driving behavior before and after the blood draws”).


68. Workshop-Phlebotomy, supra note 41.
teamwork to the many agencies involved in the program.”

IV. CONCERNS

Many concerns are raised under the new pilot program. These concerns are brought to light by the leading Supreme Court case, Schmerber v. California,70 which is the authority governing blood draws. In Schmerber, the petitioner was being treated for injuries sustained in a car accident when he was arrested at the hospital.71 Following the request of an officer, a blood sample was drawn from the petitioner by a physician in the hospital.72 The resulting BAC revealed that the petitioner was driving under the influence of alcohol.73 The petitioner objected to the evidence being admitted at trial, contending that the circumstances of the withdrawal were unconstitutional under the Fourth, Fifth, and Sixth Amendments.74 Nonetheless, the Supreme Court ultimately held that the warrantless blood draw was justified in this case because: (1) the officer had probable cause to believe that the defendant was involved in an alcohol-related offense; (2) the officer had reason to believe the blood sample would produce evidence of the defendant’s level of intoxication when the crime was committed; (3) the officer reasonably believed that, under the circumstances, the delay caused by obtaining a warrant threatened to destroy the evidence; and (4) the blood draw was performed in a reasonable manner.75

With regard to the Fourth Amendment claim, the Court held that a warrant was not required to perform a blood test on a suspected drunk driver when the search was incident to the driver’s arrest.76 This is because “the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.”77

Further, the Court was satisfied with the test chosen to measure the petitioner’s BAC because such tests are highly effective, commonplace, extract a minimal quantity of blood, and generally the procedure involves little risk, trauma, or pain.78 In addition, the petitioner was “not one of the few who on the grounds of fear, concern for health, or religious scruple

69. Id. (stating that private phlebotomists charge between $30-40 per blood draw and DUI offenses increased to 35,000, creating a substantial cost savings. Also, the cost of the class to train officers is under $250).
71. Id. at 758.
72. Id.
73. Id. at 759.
74. Id.
75. Id. at 770-72.
76. Id. at 770-71.
77. Id. at 770.
78. Id. at 771.
might prefer some other means of testing, such as the ‘breathalyzer’ test petitioner refused.”

Lastly, the Court decided that the test was performed in a “reasonable manner,” as the blood was “taken by a physician in a hospital environment according to accepted medical practices.” However, the Court did state:

We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of a stationhouse. To tolerate such searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

The Court was also clear that its holding was limited to “the State’s minor intrusions into an individual’s body under stringently limited conditions [and] in no way indicates that it permits more substantial intrusions.”

In Schmerber, the Court noted that blood draws must be performed in a reasonable manner, and it is under this requirement that such concerns are raised, creating the suspicion that the pilot program may be unconstitutional. Although questions arise as to warrantless blood draws, the focus of this analysis is on the unreasonableness of the blood draw itself and of the program.

A. Schmerber’s Interpretation in Various States

The discussions in the following cases do not seem to answer the deep constitutional questions that follow from this program, but instead only focus on the statutory language. Of the states that use officer phlebotomists under the program, only Arizona and Texas have ruled on the matter.

In 2005, the Arizona Court of Appeals noted that an officer phlebotomist is a “qualified person” under the applicable statute and upheld the blood draw. The court agreed with the lower court’s finding that “the seizure [was] reasonable because the procedure [the officer] used resulted in only a

79. Id. The issue of whether such wishes should have been respected was not addressed. Id.
80. Id.
81. Id. at 771-72.
82. Id. at 772.
83. Id. at 771-72.
84. It would seem to follow that every time an officer pulls someone over for impaired driving it could be interpreted as an emergency situation or search incident to arrest, “in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.” See id. at 770.
‘slightly higher’ risk of complications ‘in a field setting’ than those [in] a clinical setting."\(^{86}\) As for the program itself, the Arizona Court of Appeals, in a different case, decided that the fundamental question was not whether the blood draw program as a whole was reasonable, but “whether the means and procedures employed in taking [a suspect’s] blood respected relevant Fourth Amendment standards of reasonableness."\(^{87}\) The court found the procedure employed by the Arizona program reasonable under \textit{Schmerber} and the Fourth Amendment.\(^{88}\) The Arizona cases broadly read into the \textit{Schmerber} decision, avoiding underlying constitutional concerns.

Texas, on the other hand, found blood draws performed by officer phlebotomists unreasonable and, therefore, unconstitutional under the Fourth Amendment.\(^{89}\) The court did not find the location unreasonable, but focused its analysis on the unjustified risk of medical harm.\(^{90}\) The level of unreasonableness in both issues thereby constitutes the program as effectively unreasonable under the \textit{Schmerber} standards.

B. Blood Draws Under the Program are Unreasonable

1. Accepted medical practices and location

The \textit{Schmerber} court held that the blood draw taken in the hospital environment and according to accepted medical practices was reasonable.\(^{91}\) An officer drawing blood on the side of the road or in the back of a vehicle is significantly different from the blood draw permitted in \textit{Schmerber}. Although the Court in \textit{Schmerber} limited its decision to the specific facts of the case, “most cases interpreting \textit{Schmerber} [have] not read it so narrowly as to restrict the location of a blood draw to a hospital or clinic only."\(^{92}\)

The Arizona trial court in \textit{Noceo} found that the DPS phlebotomy program itself and the program manual "lacked appropriate medical oversight" at the time it was created;\(^{93}\) however, the appeals court found

\(^{86}\) Id.
\(^{87}\) \textit{Id.} at 1040 ("[A] roadside blood draw performed in a reasonable manner by an officer who has demonstrated competency through training or experience [does] not run afoul of . . . the Constitution.").
\(^{88}\) \textit{Id.} at 1040 ("[A] roadside blood draw performed in a reasonable manner by an officer who has demonstrated competency through training or experience [does] not run afoul of . . . the Constitution.").
\(^{90}\) \textit{Id.} at 759-60.
\(^{91}\) \textit{Schmerber}, 384 U.S. at 771-72. The Court noted that it was “not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment.” \textit{Id}.
\(^{92}\) \textit{Johnston}, 305 S.W.3d at 759 ("Draws taken in jails and sheriff’s offices have been upheld as reasonable.").
\(^{93}\) \textit{Noceo}, 221 P.3d at 1039 (internal quotation marks omitted).
that because the former director of the program and author of the manual had previous medical experience in the military, and the first director of the program was a medical doctor, there was no evidence that it lacked medical oversight at its creation.\footnote{Id. at 1040 n.4. Noceo’s expert testified that generally “the phlebotomy program consist[ed] of people who [were] totally incompetent . . . and [do not] follow[] protocol” Id. (internal quotation marks omitted). However, Noceo’s expert acknowledged that there was no evidence that there was a failure to follow protocol in Noceo’s case. Id.} Basing the constitutionality of the program on the former director’s testimony regarding his nursing background hardly seems like the type of evidence required to overcome valid constitutional concerns.\footnote{Id.}

Presently, Texas and Idaho do not perform field blood draws,\footnote{Dean, supra note 55; Nance, supra note 60.} perhaps due to the backlash the program has received. However, once officers begin drawing blood in the field, questions may arise as to whether \textit{Schmerber} should be interpreted to limit blood draws to a hospital environment. For instance, the NHTSA has given Arizona a “$201,343 grant running from September 2008 through September 2011,” to do phlebotomy demonstrations in Idaho and Texas.\footnote{BREWER ET AL., supra note 39.} This means that these officers and departments are being trained according to the standards and practices set out in Arizona, including on-site field draws and possible use of force. If field draws are eventually implemented, sanitation concerns will arise. A hospital environment follows strict sanitation guidelines and protocol—something that a dimly-lit street corner next to a police car may be lacking. Although Arizona courts have found these field situations to create “only a ‘slightly higher’ risk of complications,”\footnote{State v. May, 112 P.3d 39, 42 (Ariz. Ct. App. 2005).} it is arguable whether this language is masking the unreasonable nature of the location of the tests.

In addition to the medical concerns raised by on-site blood draws, there are also concerns about the conditions surrounding the field draws that could damage or contaminate the blood sample itself. “The basic foundation of the reliability of the test result lies in the collection of the specimen. If the specimen is not collected properly, the entire result may be compromised.”\footnote{Lawrence E. Wines, \textit{DUI Scientific Evidence, Scientific-Medico-Legal Defenses, and Practice Tips: What DUI Lawyers Need to Know}, in \textit{UNDERSTANDING DUI SCIENTIFIC EVIDENCE} 45, 61 (2007).} “Chain of custody documentation must be maintained at all times, and . . . remain intact.”\footnote{Id. app. at 182.} Under this program, serious issues arise when dealing with chain of custody concerns. First, “the specimen must be secure, in a locked container, to limit access and protect the specimen from...
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If an officer is having problems detaining the driver or if force is necessary to obtain a blood sample, then the specimen could be compromised.

Second, the specimen should be refrigerated as soon as possible after collection; keeping the specimen in a car trunk or in an otherwise un-refrigerated area should be discouraged. In a situation where an officer is taking on the dual role of medical personnel and law enforcer, a blood sample could easily be placed in the trunk for secure keeping or placed there in a rush and left un-refrigerated during further booking. This compromises the blood test's results, something that is less likely to occur if medical personnel administered the blood draw or if a breathalyzer was given instead.

Third, expiration dates are contained on all blood draw tubes, and, “[a]lthough many preservatives . . . are fairly stable, the vacuum in the tube can be lost under rough handling or over time.” If complications arise, calling for the need of force during the arrest, the blood sample could be handled in a way that tampers with its results and preservatives.

Fourth, “[p]roper mixing of the preservative into the blood upon collection is vital” and, “[w]ithout proper mixing, the granular/powdered additives may remain at the bottom of the tube, and not adequately mix into the entire blood sample.” As such, if an officer encounters a situation that requires his attention, and the tube is not properly mixed, the sample will be contaminated. The intended benefits of the program are fraught with opportunities that may destruct the evidence entirely, completely undermining the goals of the program. This could be prevented by drawing blood in a medical environment.

2. Qualified persons

From the language in Schmerber it would appear that police officers are not included in any category of approved persons able to take blood. Although stated in dicta, the Court did question whether a draw done by a police officer in a stationhouse would be reasonable; suggesting the practice might not be constitutional.

When Arizona implemented its program, the first officers trained as phlebotomists were certified paramedics—but this is certainly not the case now. It may be that the initial idea was founded on constitutional

101. Id. app. at 184.
102. Id.
103. Id. at 100.
104. Id. app. at 185.
concerns, recognizing that the officers needed more training and experience to be considered qualified. Some phlebotomists (certified paramedics, hospital workers, and contract phlebotomists) were hesitant to draw blood on uncooperative suspects due to "unfounded legal concerns," such as when and how much force was needed, whether they had to respect a suspect's wishes if they refused to give a sample, and how much risk of liability was applicable to them. This does not mean that simply because hospital workers or contract phlebotomists were concerned over legal, ethical, or practical considerations that an officer must now take on the dual role of law enforcement and medical staff.

Further, officer phlebotomists must draw a minimum of nine blood samples every ninety days and are expected to respond to requests for blood draws; failure to do so could result in their removal from the program. This raises further concerns because officers may feel pressure to reach the requisite number of draws to prevent their removal from the program and could result in officers drawing blood unnecessarily.

Drivers may not feel comfortable having a medical procedure performed on them by someone who has only completed one week of training and is not considered certified, but rather only competent. Concerns over the lack of training or experience are not unfounded. As previously outlined, the integrity of the forensic sample may be questioned due to improperly collected or preserved samples. Furthermore, there are many procedures that must be followed both when sterilizing a site for a blood draw and when taking it thereafter; if these are not strictly followed the sample's accuracy will be questioned.

There are serious health and safety concerns for both the driver and the officer conducting the test. A driver may want to request a less invasive method if fearful of blood draws or if a medical condition exists that restricts the procedure. Further, with diseases such as Hepatitis B and C

107. See id. at 123.
110. See Wines, supra note 99.
112. See Erica S. Ayala et al., Treatments for Blood-Injury-Injection Phobia: A Critical Review of Current Evidence, 43 J. OF PSYCHIATRIC RES. 15, 1235-36 (2009). Blood-injury-injection phobia can result in blood pressure drops which can culminate in fainting. Id. at 1236. Questions arise as to whether officers are educated on these medical conditions and
and HIV prevalent throughout the United States, a possibility, however small, remains that an officer or arrestee can be infected.\textsuperscript{113}

There is no reason that a less invasive procedure, such as the standard breathalyzer, could not be given when such tests are reliable, common, and easily available.\textsuperscript{114} Further, if officers are only focused on gathering evidence, the safety of the driver may be at risk. Thus, a clinical setting is the ideal environment for dealing with medical procedures and would decrease the risk of injury to all parties involved.

In \textit{State v. May}, a defendant charged with drunk driving challenged the reasonableness of his blood draw because the officer required him to stand during the procedure.\textsuperscript{115} At trial, an expert testified that the officer breached the standard of care because the standing driver could “pass out or faint, move his arm and cause the needle to fall out, and possibly cause nerve damage.”\textsuperscript{116} Despite this testimony, the blood draw was found to be reasonable.\textsuperscript{117} Moreover, in \textit{Noceo}, the blood draw was found to be reasonable despite poor lighting, unsanitary conditions, and being in violation of protocol.\textsuperscript{118} These conditions were found to be not “optimal”; however the court noted, not so unreasonable as to offend the Constitution.\textsuperscript{119} These are serious safety concerns that must be addressed and any disregard for such concerns should not be condoned by any court.

3. Force and coercion

Even if the procedures are found to be reasonable and the officers are considered qualified medical personnel for the purpose of drawing blood, this program nonetheless overlooks the setting of the draw itself—in the field. This process of an officer drawing one’s blood is less than ideal for many people, which could lead to resistance by the suspect, requiring the need for use of force by the officer. It is difficult for both police officers and courts to determine the force necessary to overcome resistance and phobias and whether they are adequately trained to handle their responses. \textit{See id.}

\textsuperscript{113} \textit{See Nat’l Ctr. for Infectious Diseases, Dep’t of Health and Human Servs., Exposure to Blood: What Healthcare Personnel Need to Know} I (2003), available at http://www.cdc.gov/ncidod/dhqp/pdf/bbp/Exp_to_Blood.pdf. Officers under this program are at risk of exposure to Hepatitis B and C, and human immunodeficiency virus (HIV). \textit{Id.} “Exposures occur through needlesticks or cuts from other sharp instruments contaminated with an infected patient’s blood.” \textit{Id.}

\textsuperscript{114} \textit{See Skinner v. Ry. Labor Execs.’ Ass’n}, 489 U.S. 602, 625 (1989) (“Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment.”).


\textsuperscript{116} \textit{Id.} at 42.

\textsuperscript{117} \textit{Id.}


\textsuperscript{119} \textit{Id.}
obtain a sample.\footnote{Robert Brooks Beauchamp, Note, "Shed Thou No Blood": The Forcible Removal of Blood Samples from Drunk Driving Suspects, 60 S. CAL. L. REV. 1115, 1129-30 (1987).} This particular concern pre-dated the pilot program’s existence, highlighting the struggle that awaits courts in the future. Further, an impaired driving arrest generally involves a police-suspect interaction quite different from others, as “[t]he accused drunk driver is often surprised, confused, disoriented, and almost invariably, to a greater or lesser degree, intoxicated.”\footnote{Id. at 1133.} Therefore, under these unique circumstances, officers are equipped with needles for the purpose of obtaining evidence to be used against a defendant in court—a practice that is potentially unconstitutional.

There are two competing agendas here: the officer’s interest in obtaining an arrest and blood evidence, and the individual’s interest in privacy and freedom from bodily intrusions. “Common sense dictates that this combination of factors is a recipe for violence and danger to all concerned.”\footnote{Id.} Force under such circumstances will most likely be difficult to control:

All other things being equal, the force required to restrain an accused to the degree necessary to allow a needle to be inserted into a vein for the removal of a blood sample is much greater than the force required to restrain an accused to the extent necessary to effect an arrest by placing handcuffs on the wrists. There can be no doubt that the episodes occurring between the resistive drunk and the police officer attempting to secure a blood sample by means of “reasonable force” are likely to be dangerous, unpleasant, undignified, and undesirable from the standpoint of all concerned.\footnote{Id.}

Trained medical professionals are “honor-bound to obey patients’ treatment wishes and protect their privacy” while officers are not.\footnote{Joseph T. Hallinan, In Fight to Stop Drunk Driving, Police Draw Blood, WALL ST. J., Mar. 23, 2004, at A1.} The Hippocratic Oath requires doctors to put the needs of the patient first, including the patient’s privacy and their decision to refuse medical procedures.\footnote{Id.} Officers are not bound by a similar oath.

This could lead to lawsuits against the police department. Having to spend time, energy, and money involved in such litigation will take officers off the road and lead to confusion over the proper practices and constitutionality of such a program. There is no question that the police department will receive more complaints over improper blood draws, procedures, and uses of force.

\begin{itemize}
\item \footnote{Robert Brooks Beauchamp, Note, "Shed Thou No Blood": The Forcible Removal of Blood Samples from Drunk Driving Suspects, 60 S. CAL. L. REV. 1115, 1129-30 (1987).}
\item \footnote{Id. at 1133.}
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\item \footnote{Joseph T. Hallinan, In Fight to Stop Drunk Driving, Police Draw Blood, WALL ST. J., Mar. 23, 2004, at A1.}
\item \footnote{Id.}
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4. Intrusion versus the interest in fair and accurate determination of guilt

Convictions are dependent on the collection of evidence, but how far will states go to get the BAC results? The collection of evidence is complicated by two factors: (1) the best evidence of intoxication is harbored within the body of the suspect; and (2) evidence of blood alcohol dissipates over time... Paired with the high refusal rates discovered through NHTSA research, these evidence issues lead to the implementation of highly invasive and unconstitutional programs. The state has a great interest in preventing drunk driving and any resulting accidents; however, balancing this interest with the individual's interest in privacy, dignity, and personal autonomy leads to the conclusion that the individual should be able to refuse an intrusion beneath the surface of the skin administered by an arresting officer.

States should further their own interests in highway safety and the individual's interest in minimal intrusions by favoring a less invasive procedure. For instance, a breath sample is far less intrusive than a blood test. A person's blood reveals personal details that an individual may not want revealed like: diseases, other medical conditions, and genetic content. Many people fear that once their blood is taken, it will be analyzed for more than alcohol content, and the record of the results will be kept indefinitely. The fear that the results will be viewed, shared, and stored by the police or government is an additional concern for personal privacy.

Coercion concerns also arise when an officer employs the dual role as phlebotomist and arresting officer. If a warrant exception is available, there will be no court oversight approving the blood draw. Coupled with the lack of medical oversight, the full process will be governed solely by law enforcement personnel, whose primary goal is to gather the necessary evidence used for conviction. Even if the arresting officer is not doing the

126. Beauchamp, supra note 120, at 1116.
127. Id.
128. Id.
129. See id. at 1135.
130. See Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 647 (1989) (Marshall, J., dissenting) (“Technological advances have made it possible to uncover, through analysis of chemical compounds in these fluids, not only drug or alcohol use, but also medical disorders such as epilepsy, diabetes, and clinical depression.”).
131. Cook, supra note 10, at 115 (citing Elizabeth D. De Armond, A Dearth of Remedies, 113 PENN. ST. L. REV. 1, 24-25 (2008)).
132. Id. See also Workshop-Deterrence, supra note 36 (stating advantages to blood draws include its ability to be retested and saved) (PowerPoint presentation).
actual blood draw, but rather his partner is, it is clear that they will have the same goals and motives in mind.\textsuperscript{133}

Suspects may feel overcome by the power dynamic because "[t]here is a potential for a tremendous level of fear and anxiety to be thrust upon the law-abiding motorist who is forced by a peace officer to submit to a blood search warrant."\textsuperscript{134} Pairing this with the coercion and force used by an officer to obtain a blood sample, this procedure could be seen as unconstitutional.\textsuperscript{135}

C. How Blood Draws Implicate Melendez-Diaz

In order to get an out-of-court statement introduced at trial it must fit within both a hearsay exception and the Confrontation Clause of the Sixth Amendment.\textsuperscript{136} In \textit{Crawford v. Washington}, the Supreme Court held that an out-of-court statement by a witness that is testimonial in nature is barred under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.\textsuperscript{137}

The key to the \textit{Crawford} analysis is determining which statements are testimonial.\textsuperscript{138} The Supreme Court in \textit{Melendez-Diaz} held that forensic analyst certificates "were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment."\textsuperscript{139} Absent a showing that the defendant had a prior opportunity to cross-examine the analyst and a showing that the analyst was unavailable to testify, the petitioner is entitled to confront the analyst at trial.\textsuperscript{140} To be considered testimonial, the certificates do not have to directly accuse the defendant of a crime; rather,

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  \item \textsuperscript{133} Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (2009) ("A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.").
  \item \textsuperscript{134} Cook, supra note 10 (citing Elizabeth F. Rubin, Comment, \textit{Trying to Be Reasonable About Drunk Driving: Individualized Suspicion and the Fourth Amendment}, 62 U. Cin. L. Rev. 1105, 1125 (1994)).
  \item \textsuperscript{135} Blackburn v. Alabama, 361 U.S. 199, 206 (1960) ("[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.").
  \item \textsuperscript{136} Crawford v. Washington, 541 U.S. 36, 51 (2004) ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").
  \item \textsuperscript{137} Id. at 68-69 (abrogating its decision in \textit{Ohio v. Roberts}, 448 U.S. 56, 66 (1980), that focused on the reliability of the statement).
  \item \textsuperscript{138} See id. at 51. In \textit{Crawford}, the Court defines testimony as "typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (internal quotation marks omitted).
  \item \textsuperscript{139} Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009).
  \item \textsuperscript{140} Id. (emphasis added) (quoting Crawford, 541 U.S. at 54).
\end{itemize}
it is sufficient that the certificates provide adverse evidence against the defendant.\textsuperscript{141}

In impaired driving cases, there are a variety of documents that create confrontation issues under \textit{Melendez-Diaz}, including records of "breathalyzer equipment calibration or maintenance, and . . . breathalyzer test results."\textsuperscript{142} Under \textit{Melendez-Diaz}, breathalyzer results are "clearly testimonial."\textsuperscript{143} Therefore, blood test results should be as well. Just as the defendant has a right to challenge the accuracy of a breathalyzer, he or she should be able to do the same for a blood test. In the dicta of \textit{Melendez-Diaz}, Justice Scalia explained that "breathalyzer results are grouped among those forensic tests that may not be capable of repetition, but that nevertheless require confrontation."\textsuperscript{144}

In the context of the pilot program, various jurisdictions require testimony from the officer who performed the BAC test. "In Virginia, a judge . . . dismissed [an impaired-driving] case where the evidence of intoxication was based only on [the] breath certificate without the testimony of the officer who performed the test."\textsuperscript{145} In a Massachusetts case, \textit{Commonwealth v. Parmenter}, the trial court applied \textit{Melendez-Diaz} to a blood sample analysis in an impaired-driving case.\textsuperscript{146} The defense asked the judge to exclude the blood sample analysis unless the state produced the individual who conducted the test and the defense had an opportunity to confront that witness.\textsuperscript{147} Judge Noonan agreed, stating that "the defendant has a right to challenge the accuracy of a blood test result to be used against him and that can be done only through the testimonial evidence of the person drawing . . . said blood."\textsuperscript{148}

The defense attorney in \textit{Parmenter} believed that there was a clear \textit{Melendez-Diaz} issue as "[h]ospitals collect blood samples in a host of different ways, and their methods seldom comply with the rigorous standards used by the Massachusetts State Police’s Office of Alcohol

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\item 141. \textit{Id.} at 2533-34.
\item 143. \textit{Id.}
\item 144. \textit{Id.} (citing \textit{Melendez-Diaz}, 129 S. Ct. at 2532 n.1)
\item 145. \textit{Id.} at 33 (citation omitted).
\item 147. \textit{Id.}
\item 148. \textit{Id.} “The Middlesex District Attorney’s Office has filed an interlocutory appeal with the SJC, asking it to overturn the Judge and allow the blood sample analysis to be used at trial.” \textit{Inside Information}, \textit{MASS. CHIEFS OF POLICE ASS’N}, Jan. 2010, at 7, \textit{available at} \url{http://www.masschiefs.org/documents/January%202010%20Newsletter.pdf}.
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Testing, yet the results can be used to help establish guilt at trial.\textsuperscript{149} In light of the many factors that can alter an alcohol reading, "the defendant should have the right to cross-examine the individual who drew the blood and tested the blood."\textsuperscript{150} Moreover, under the pilot program, substantially more questions and factors will arise as to whether officers are following proper procedures. Further, because of the officer-phlebotomist's dual role, requiring officers to be cross-examined can lead to a conflict of interest and other ethical or evidentiary issues, as the need and importance of blood evidence is so great.

\textit{Melendez-Diaz} has left courts across the country in a state of confusion as the admissibility of once "familiar modes of proof are called into question."\textsuperscript{151} Under the holding, if an officer-phlebotomist does not appear at trial to testify to the blood draw, the evidence will be suppressed and the charges could be dropped.\textsuperscript{152} This means officer-phlebotomists must attend trials and testify, resulting in less time on the road for the officer, loss of money intended to be "saved" under the program, and the frustration of both the judicial system and law enforcement. In filling both the law enforcement and medical personnel role, officers might have to testify at multiple trials a day and travel to courts throughout the state. The "saving time" argument of using officer-phlebotomists instead of bringing suspected impaired drivers to medical facilities is weakened by evidence such as this that shows how time consuming this process can be as well. Further, it seems likely that defense attorneys will challenge the validity of blood draws performed by an officer with a potentially questionable agenda.\textsuperscript{153}

In a footnote, Justice Scalia made it clear that the Court was not holding that "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case."\textsuperscript{154} Despite this footnote, it could mean that the head of the phlebotomy training or an officer in

\begin{itemize}
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.} (internal quotation marks omitted).
\item \textsuperscript{151} Christina Miller & Michael D. Ricciuti, \textit{Crawford Comes to the Lab: Melendez-Diaz and the Scope of the Confrontation Clause}, 53 Bos. B. J. 13, 13 (2009).
\item \textsuperscript{152} \textit{Melendez-Diaz v. Massachusetts}, 129 S. Ct. 2527, 2550 (2009) (Kennedy, J., dissenting) ("Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision . . . If for any reason the analyst cannot make it to the courthouse in time . . . [t]he result, in many cases, will be that the prosecution cannot meet its burden of proof, and the guilty defendant goes free on a technicality that, because it results in an acquittal, cannot be reviewed on appeal.").
\item \textsuperscript{153} \textit{Id.} at 2537 (majority opinion) ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.").
\item \textsuperscript{154} \textit{Id.} at 2532 n.1 (suggesting that if one is so attenuated from testing the sample or calibrating the machines he or she would not have to testify).
\end{itemize}
charge would have to testify as well, particularly if the blood draw is questioned under Schmerber. Moreover, if one officer takes the blood while another watches, the “testimonial evidence as to chain of custody must be live, and those statutes to the contrary are, as in the case of the DUI breath test affidavits, invalid.”\textsuperscript{155} Therefore, the watching officer would not be able to avoid appearing in court by signing an affidavit; his presence would be necessary. Only time will tell how these questions will be addressed and answered by the Supreme Court, and it seems serious complications await.

Due to these unanswered questions and concerns with both Melendez-
Diaz and the program, continuing to use the familiar breathalyzer tests and results will alleviate much of this uncertainty. In most states, “the results of a breathalyzer test requires [sic] expert testimony on the administration of the test, calibration of the machine, and compliance with the periodic testing requirements.”\textsuperscript{156} These requirements are generally satisfied by the testimony of a trained police officer that the procedures laid out in the applicable statutes were followed and satisfied. Due to this, the officer will probably be the only one needed to testify as to the results.\textsuperscript{157} Officer phlebotomists, on the other hand, must send the blood sample to a chemist, whose presence in court is now necessary under Melendez-Diaz.\textsuperscript{158}

Although this still keeps officers off the roads, the cost of blood analysis after the draw and the fact that the analyst will also have to testify further shows that the breathalyzer test should be favored. Breathalyzer results are much easier to prove and this keeps the complications and concerns surrounding officer–phlebotomist blood draws out of the courtroom.

V. CONCLUSION

Although the pilot program's ultimate goal is important, this program puts too much power into the hands of law enforcement while ignoring the substantial concerns over a driver's privacy interests. This program can be seen as one used purely for purposes of convenience while masked behind

\textsuperscript{155} Yermish, \textit{supra} note 142, at 32 (citing various cases and statutes that applied Crawford).


\textsuperscript{157} It is important to note that the technician/calibrator/maintenance worker of the breathalyzer machine may be called; however, it seems unlikely that this would take place each time. Further, it is important that the officer operate the breath test machine and not another police officer, as they would also have to be called as a witness. \textit{See generally} Grant v. Commonwealth, 682 S.E.2d 84, 89 (Va. Ct. App. 2009) (requiring the administrator of the breath test, who was not the arresting officer, to testify).

\textsuperscript{158} Kenney & Farris, \textit{supra} note 156, at 9.
a cost-effective and safety-first façade. The larger question is whether the program and its implications will actually deter refusals and impaired driving, and how far each state will go in order to alleviate this nationwide problem. It seems, at least under this program, states are willing to go beyond constitutionally accepted means to justify an end that can be achieved using a less-restrictive alternative. Although there is a consensus about the negative role that refusals have on the effectiveness of preventing impaired driving, “it is less clear whether refusal rates diminish enforcement efficiency and deterrence sufficiently to impact crash rates”,159 the exact underpinnings upon which the NHTSA founded this program.

If blood draws are the wave of the future, a warrant should undoubtedly be required, not to mention a restriction on the amount of force an officer can use to extract the blood. Destruction of evidence concerns could be dealt with by utilizing the tele-fax warrant system seen in various jurisdictions.160 Blood draws should also only be used in felony-impaired-driving cases where chemical evidence is deemed to be more compelling.161 There are efficient and less intrusive alternatives for “regular” impaired driving cases, such as the breathalyzer. Further, these alternatives lessen the confusion over the impact of Melendez-Diaz in the courtroom. Such less-intrusive methods should be explored, as this pilot program has serious constitutional concerns and highlights poor public policy—and for that, should not go forward.


160. See, e.g., Workshop-Phlebotomy, supra note 41 (explaining the tele-fax system in Arizona).

161. Beauchamp, supra note 120, at 1141.