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# Notes: Criminal Law — Evidence — Evidence of Refusal to Submit to Chemical Breath Test for Alcohol Admissible Only When Relevant to Matters Other Than Defendant's Innocence or Guilt. *Krauss v. State*, 322 Md. 376, 587 A.2d 1102 (1991)

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# NOTES

CRIMINAL LAW - EVIDENCE - EVIDENCE OF REFUSAL TO SUBMIT TO CHEMICAL BREATH TEST FOR ALCOHOL ADMISSIBLE ONLY WHEN RELEVANT TO MATTERS OTHER THAN DEFENDANT'S INNOCENCE OR GUILT. *Krauss v. State*, 322 Md. 376, 587 A.2d 1102 (1991).

More than 22,000 Americans, including over 200 Marylanders, die every year in alcohol-related automobile accidents.<sup>1</sup> Maryland's legislature has acted to stem this carnage by "enacting a series of measures to rid our highways of the drunk driv[ing] menace."<sup>2</sup> Chemical breath analyses<sup>3</sup> are one measure that the legislature has sanctioned to detect those suspected of driving under the influence of alcohol<sup>4</sup> or driving while intoxicated.<sup>5</sup>

In *Krauss v. State*,<sup>6</sup> the Court of Appeals of Maryland held in a four-to-three decision<sup>7</sup> that evidence of a defendant's refusal to submit to breath testing for alcohol is inadmissible when offered to prove guilt.<sup>8</sup> The court concluded that evidence of refusal is properly admissible only when relevant to a "collateral" matter, such as a claim by the defendant that he was not afforded the opportunity to take a breath test or that the arresting officer failed to comply with the statutory provisions regarding administration of the test.<sup>9</sup> In thus

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1. NAT'L SAFETY COUNCIL, ACCIDENT FACTS 56 (1992). The National Safety Council reports that "[a]bout 50 percent of all traffic fatalities in 1990 involved an intoxicated or alcohol-impaired driver or non-occupant," resulting in 22,083 fatalities. *Id.* "The estimated cost of all alcohol-related motor-vehicle accidents in 1991 was about \$22.2 billion." *Id.* Alcohol related accidents claimed 230 Marylanders in 1991. Maryland State Police, Dep't of Public Safety and Correctional Services, News Release (Jan. 28, 1992).
  2. *Willis v. State*, 302 Md. 363, 370, 488 A.2d 171, 175 (1985); *see also* MD. CODE ANN., TRANSP. §§ 16-205 to -205.2 (1992), and MD. CODE ANN., CTS. & JUD. PROC. §§ 10-302 to -309 (1992).
  3. Chemical breath tests are performed on a Breathalyzer unit. Both the Breathalyzer device and its operator are subject to rigorous standards set by the state toxicologist. *See* MD. CODE ANN., CTS. & JUD. PROC. §§ 10-302 to -309 (1992).
  4. *See id.* § 10-307(d) (1989 & Supp. 1992).
  5. *See id.* § 10-307(e) (1989 & Supp. 1992).
  6. 322 Md. 376, 587 A.2d 1102 (1991).
  7. The majority opinion, authored by Judge Orth, was joined by Judges Eldridge, Rodowsky, and Thieme. *Krauss v. State*, 322 Md. 376, 377, 587 A.2d 1102 (1991). The dissent consisted of Judge McAuliffe, joined by Judges Chasanow and Smith. *Id.* at 390, 587 A.2d at 1109.
  8. *Id.* at 388, 587 A.2d at 1107-08.
  9. *Id.* at 386-87, 587 A.2d at 1107.

deferring to the legislative mandate, the court declined to embrace the national trend towards liberalization of laws governing admissibility of evidence of refusal<sup>10</sup> by adopting an approach that greatly restricts the admissibility of such evidence.

Frank Leroy Krauss's troubles began when he allegedly ran another motorist off the road.<sup>11</sup> Krauss became involved in an altercation with the other motorist, and then fled on foot from the scene.<sup>12</sup> Krauss was later apprehended by police who "detected the odor of alcohol emanating from [him]."<sup>13</sup> Krauss was placed under arrest and advised of his rights to have a chemical breath test for alcohol, which he refused.<sup>14</sup>

Krauss was tried by jury and convicted of driving under the influence of alcohol in the Circuit Court for Cecil County.<sup>15</sup> Rejecting a motion to exclude the evidence of Krauss's breath test refusal, the trial judge allowed the jury to hear the evidence, but instructed them that the "refusal could not in any way be used against [Krauss] as evidence of his guilt."<sup>16</sup> Krauss appealed to the court of special appeals, which affirmed the judgment of the trial court.<sup>17</sup> The Court of Appeals of Maryland vacated the judgment of the court of special appeals, remanding the case to the circuit court for retrial.<sup>18</sup>

The issue before the court of appeals was whether the trial judge erred in admitting evidence of Krauss's refusal to submit to a chemical breath test.<sup>19</sup> To resolve the issue, the court was forced to mesh two seemingly inconsistent provisions of section 10-309(a) of the Courts and Judicial Proceedings Article into a coherent and cogent declaration of the law.

The court noted in its analysis that, prior to July 1, 1986, Courts and Judicial Proceedings section 10-309(a) provided that no inference or presumption of guilt or innocence could be drawn from refusal

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10. See *infra* note 26 and accompanying text.

11. *Krauss v. State*, 82 Md. App. 1, 2, 569 A.2d 1284, 1285 (1991).

12. *Id.* at 2, 569 A.2d at 1285.

13. *Id.* at 3, 569 A.2d at 1285. Krauss had allegedly been drinking at a party on the evening of September 3, 1988. *Id.* at 2-3, 569 A.2d at 1284-85.

14. *Id.* at 3, 569 A.2d at 1285.

15. *Id.* at 2, 569 A.2d at 1284.

16. *Id.* at 7, 569 A.2d at 1287. The trial judge refused Krauss's proposed jury instruction which read:

The only reason you have been permitted to hear evidence concerning whether Defendant did not take a breath or blood test is in determining whether the police followed the proper procedures upon detaining and/or arresting Defendant for the offenses of driving under the influence of alcohol and/or driving while intoxicated.

*Id.* at 7, 569 A.2d at 1287.

17. *Id.* at 9, 569 A.2d at 1287.

18. *Krauss v. State*, 322 Md. 376, 390, 587 A.2d 1102, 1109 (1991).

19. *Id.* at 382, 587 A.2d at 1105.

to submit to a breath test, and evidence of refusal was *not* admissible at trial.<sup>20</sup> In 1986, the section was revised, making evidence of refusal admissible, but retaining the provision prohibiting presumptions or inferences.<sup>21</sup> Krauss argued, and the court agreed, that the statutory provision prohibiting inferences or presumptions of guilt or innocence could be harmonized with the provision making evidence of refusal admissible at trial.<sup>22</sup>

The court of appeals noted that the 1986 revision was originally intended both to eliminate the prohibition on presumptions and inferences and to *allow* for the admission of evidence of refusal, but that amendments during the bill's passage abolished the attempt to eliminate the bar on presumptions and inferences.<sup>23</sup> In light of the conflict between the original draft and the enacted version of the bill, the court turned to recognized principles of statutory interpretation to ascertain legislative intent.<sup>24</sup> The court found that the legislature clearly "recognized that the mere fact of refusal to take the Breathalyzer test was collateral to the issue of [guilt,] . . . [b]ut . . . may be material and relevant to collateral matters."<sup>25</sup>

The court then shifted its focus to an examination of the evidentiary requirements for admissibility. To be admissible, evidence must be material to the issue for which it is offered,<sup>26</sup> and probative of the proposition towards which it is directed.<sup>27</sup> Evidence that is not material or probative is irrelevant and not admissible.<sup>28</sup>

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20. *Id.* at 386, 587 A.2d at 1106. For the text of the pre-1986 version of § 10-309, see *infra* note 58.

21. *Id.* at 386, 587 A.2d at 1107. For the text of § 10-309 as amended in 1986, see *infra* note 70. As noted by the *Krauss* court, see *id.* at 378 n.1, 587 A.2d at 1103 n.1, § 10-309 was subsequently amended in 1989, see 1989 Md. Laws 2353, and again in 1990, see 1990 Md. Laws 1714. The subsequent amendments had no bearing on the court's decision in *Krauss*, and are not considered in this casenote.

22. *Id.* at 383-86, 587 A.2d at 1105-06. Counsel for Krauss argued that although refusal evidence was made admissible, the inference or presumption clause was left in the statute "to give the State an opportunity, and certainly correctly, to rebut any allegations that the trooper did anything other than that which is provided by statute." *Id.* at 383, 587 A.2d at 1105.

23. *Id.* at 386, 587 A.2d at 1107. See Senate Judicial Proceedings Committee, *Summary of Committee Report: Senate Bill 85 1-2* (1986).

24. *Krauss v. State*, 322 Md. 376, 386, 587 A.2d 1102, 1107 (1991).

25. *Id.* at 386-87, 587 A.2d at 1107.

26. As noted by the *Krauss* court, "[m]ateriality looks to the relation between the propositions for which the evidence is offered and the issues in the case." *Id.* at 387, 587 A.2d at 1107 (citing MCCORMICK ON EVIDENCE § 185, at 541 (Edward W. Cleary ed., 3d ed. 1984)).

27. Probative value is "the tendency of evidence to establish the proposition that it is offered to prove." *Id.* (citing MCCORMICK ON EVIDENCE § 185, at 544 (Edward W. Cleary ed., 3d ed. 1984)).

28. *Krauss v. State*, 322 Md. 376, 387-88, 587 A.2d 1102, 1107-08 (1991).

Relating evidentiary considerations to the facts before it, the court emphasized that because Krauss was contesting neither the fact of his having refused a breath test nor the actions of the police in arresting him, there was no collateral matter in question.<sup>29</sup> Consequently, the evidence of refusal was immaterial, bearing "no proper relation to the . . . guilt of the accused,"<sup>30</sup> and irrelevant, having "no proper probative value to establish the guilt of the accused."<sup>31</sup> The court thus held that the trial judge abused his discretion in admitting the evidence.<sup>32</sup> The court further held that the admission of the evidence of refusal constituted prejudicial error, as they could not declare beyond a reasonable doubt that the admission had not influenced the verdict of the jury.<sup>33</sup>

Determining the admissibility of evidence of refusal involves consideration of constitutional, statutory, and evidentiary issues.<sup>34</sup> The constitutional issues focus on the Fifth Amendment's protection against self-incrimination.<sup>35</sup>

In *Schmerber v. California*,<sup>36</sup> the United States Supreme Court held that a state could compel the withdrawal of blood for alcohol analysis<sup>37</sup> and introduce the results of such analysis into evidence.<sup>38</sup> The Court explained that the Fifth Amendment protects an accused against the compulsion of testifying against himself or herself<sup>39</sup> or otherwise providing the State with testimonial or communicative

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29. *Id.* at 388, 587 A.2d at 1107. The court indicated that "there appeared no sound reason for the State to introduce evidence of the refusal except to influence the jury towards a verdict of guilty." *Id.* at 388, 587 A.2d at 1107-08.

30. *Id.* at 388, 587 A.2d at 1108.

31. *Id.*

32. *Id.*

33. *Id.* at 389, 587 A.2d at 1108. In dicta, the court noted that it did not believe that the judge's jury instruction regarding Krauss's refusal served to "disassociate, in the minds of the jurors, the refusal to take the test from the question of Krauss's guilt or innocence of the charges." *Id.* at 389-90, 587 A.2d at 1108.

34. 1 DONALD H. NICHOLS, *DRINKING/DRIVING LITIGATION* § 12:02 (1988).

35. U.S. CONST. amend. V.

36. 384 U.S. 757 (1966).

37. *Id.* at 771-72. The Court held that under the circumstances of the case, compelling the defendant to provide a blood sample for alcohol analysis did not constitute an unlawful search and seizure violative of the Fourth and Fourteenth Amendments. Factors which the court considered were that police had probable cause to make an arrest for driving while intoxicated, the method chosen for determining blood alcohol content was reasonable and effective, and the consequences of delay in taking a blood sample left no time to secure a warrant. *Id.* at 766-72.

38. *Id.* at 760-65.

39. *Id.* at 761.

evidence.<sup>40</sup> The Fifth Amendment protection does not, however, require the exclusion of the "body as evidence when it may be material."<sup>41</sup> As a result, "compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate [the Fifth Amendment]."<sup>42</sup> Compulsory blood withdrawal, though potentially incriminating, demands neither a defendant's testimonial nor communicative faculties, and therefore is not proscribed by the Fifth Amendment.

While holding that the state could compel a defendant to undergo a chemical test for alcohol, *Schmerber* left unanswered the "question of whether evidence of refusal violate[s] the privilege against self-incrimination."<sup>43</sup> The Court addressed this question in 1983, in *South Dakota v. Neville*.<sup>44</sup> At issue in *Neville* was the constitutionality of a South Dakota statute allowing suspects to refuse testing to avoid confrontations with police, but permitting evidence of refusal to be used against the defendant at trial. The Court emphasized that Fifth Amendment protections are not triggered in such situations, because the State does not compel or coerce suspects to *refuse* to submit to testing.<sup>45</sup> The Court further reasoned that, whereas *Schmerber* grants the State a legitimate right to compel a test for alcohol,<sup>46</sup> it is "no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice."<sup>47</sup>

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40. *Id.*

41. *Holt v. United States*, 218 U.S. 245, 253 (1910).

42. *Schmerber*, 384 U.S. at 764.

43. *South Dakota v. Neville*, 459 U.S. 553, 560 (1983) (citing *Schmerber v. California*, 384 U.S. 757, 765 n.9 (1966)). In *Schmerber*, a physician was directed by a police officer to withdraw *Schmerber's* blood for alcohol screening following an accident. *Schmerber*, 384 U.S. at 758. The *Schmerber* holding was limited to a finding that it was constitutional for the state to compel a suspect to undergo testing and utilize the results at trial. *Id.* at 760-65.

The case makes note, however, that *Schmerber* was requested to take a breath test, which he refused. *Id.* at 765 n.9. Evidence of *Schmerber's* refusal to submit to a breath test was introduced at trial without objection. *Id.* On appeal to the Supreme Court, *Schmerber* contended that the admission of such evidence constituted grounds for reversal of his conviction. *Id.* The Court felt "general Fifth Amendment principles" would govern the admissibility of evidence of refusal, but declined to comment further as they felt that his contention was foreclosed due to the lack of a timely objection. *Id.*

44. 459 U.S. 553 (1983).

45. *Id.* at 562-63.

46. *Schmerber v. California*, 384 U.S. 757 (1966).

47. *South Dakota v. Neville*, 459 U.S. 553, 563 (1983). The Court also determined that it was not "fundamentally unfair" to use the respondent's refusal as evidence of guilt, even though he was "not specifically warned that his refusal could be used against him at trial." *Id.* at 565. In dicta, however, the Court suggested that since the state encourages suspects to submit to testing, it is in the state's best interest to fully warn suspects of the consequences of refusal. *Id.* at 566 n.17.

A majority of states have enacted statutes, some established as a result of *Neville*,<sup>48</sup> expressly permitting evidence of refusal to be adduced at trial.<sup>49</sup> Only a small minority of states bar the introduction of evidence of refusal.<sup>50</sup> Those states that do bar such evidence do

48. See 1 NICHOLS, *supra* note 34, § 21:03.

49. Jurisdictions that have enacted statutes permitting admission of evidence of refusal include the following: Alabama (Ala. Code § 32-5A-194(c) (1989)); Alaska (Alaska Stat. § 28.35.032(e) (Supp. 1992)); Arizona (Ariz. Rev. Stat. Ann. § 28-692(I) (Supp. 1992)); California (Cal. Veh. Code § 23157(a)(4) (West Supp. 1993)); Colorado (Colo. Rev. Stat. Ann. § 42-4-1202(3)(e) (West 1990)); Connecticut (Conn. Gen. Stat. Ann. § 14-227a(f) (West Supp. 1992)); Delaware (Del. Code Ann. tit. 21, § 2749 (1985)); Florida (Fla. Stat. Ann. § 316.1932(1)(a) (West Supp. 1993)); Georgia (Ga. Code Ann. § 40-6-392(d) (Supp. 1992)); Illinois (Ill. Ann. Stat. ch. 95-1/2, para. 11-501.2(c) & 11-501.6(f) (Smith-Hurd Supp. 1992)); Indiana (Ind. Code Ann. § 9-30-6-3(b) (Burns 1991)); Iowa (Iowa Code Ann. § 321J.16 (West Supp. 1991)); Kansas (Kan. Stat. Ann. § 8-1001(f)(1) (1991)); Louisiana (La. Rev. Stat. Ann. § 32:666A(3) (West 1993)); Maine (Me. Rev. Stat. Ann. tit. 29, § 1312(8) (West Supp. 1992)); Minnesota (Minn. Stat. Ann. § 169.121, subd. 2(b) (West Supp. 1993)); Mississippi (Miss. Code Ann. § 63-11-41 (1989)); Missouri (Mo. Ann. Stat. § 577.041 (Vernon Supp. 1992)); Montana (Mont. Code Ann. § 61-8-404(2) (1991)); Nebraska (Neb. Rev. Stat. § 39-669.08(10) (Supp. 1992)); Nevada (Nev. Rev. Stat. Ann. § 484.389 (Michie 1990)); New Hampshire (N.H. Rev. Stat. Ann. § 265:88-a (Supp. 1992)); New York (N.Y. Veh. & Traf. Law § 1194(2)(f) (McKinney Supp. 1993)); North Carolina (N.C. Gen. Stat. § 20-16.2(a)(3) (1989)); North Dakota (N.D. Cent. Code § 39-20-08 (1987)); Oklahoma (Okla. Stat. Ann. tit. 47, § 756 (West 1988)); Oregon (Or. Rev. Stat. § 813.310 (1991)); Pennsylvania (75 Pa. Cons. Stat. Ann. § 1547(e) (Supp. 1992)); South Dakota (S.D. Codified Laws Ann. § 19-13-28.1 (1987)); Texas (Tex. Rev. Civ. Stat. Ann. art. 67011-5, § 3(g) (West Supp. 1993)); Utah (Utah Code Ann. § 41-6-44.10(8) (Supp. 1992)); Vermont (Vt. Stat. Ann. tit. 23, § 1202(b) (Supp. 1992)); Washington (Wash. Rev. Code Ann. § 46.61.517 (West Supp. 1993)); Wyoming (Wyo. Stat. § 31-6-105(f) (1989)).

50. States prohibiting admission of evidence of refusal include Hawaii, Virginia, and Massachusetts. The Hawaii statute provides as follows:

If a legally arrested person refuses to submit to a test of the person's breath or blood, evidence of refusal shall be admissible only in a hearing under part XIV of this chapter [relating to administrative revocation of licenses] and shall not be admissible in any other action or proceeding, whether civil or criminal.

HAW. REV. STAT. § 286-159 (Supp. 1992).

Massachusetts law provides that

[w]hen there is no evidence presented at a civil or criminal proceeding of the percentage, by weight, of alcohol in the defendant's blood, the presiding judge at a trial before a jury shall include in his instructions to the jury a statement of an arresting officer's responsibilities upon arrest of a person suspected to be operating a motor vehicle under the influence of alcohol and a statement that a blood alcohol test may only be administered with a person's consent; that a person has a legal right to take or not take such a test; that there may be a number of reasons why a person would not take such a test; that

so judicially on the ground that it lacks evidentiary value,<sup>51</sup> or by means of a statute expressly prohibiting admission.<sup>52</sup>

The State of Michigan is among the minority of states that bar admission of evidence of refusal. In *People v. Duke*,<sup>53</sup> a Michigan court faced with the challenge of interpreting a statute allowing for the admission of evidence of refusal but forbidding the fact-finder from using refusal as evidence of guilt<sup>54</sup> held that such evidence was inadmissible because it was too prejudicial.

there may be a number of reasons why such a test was not administered; that there shall be no speculation as to the reason for the absence of a test and no inference can be drawn from the fact that there was no evidence of a blood alcohol test; and that a finding of guilty or not guilty must be based solely on the evidence that was presented in the case.

MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West Supp. 1993). But see *Commonwealth v. Conroy*, 485 N.E.2d 180 (Mass. 1985), wherein the combination of a trooper testifying that the defendant had been provided with an opportunity to take a breathalyzer test, followed by an absence of discussion concerning the results or reasons why a test could not be performed, led inferentially to the conclusion that the defendant had refused a test. *Id.* at 182. Distinguishing between direct evidence (e.g., the prosecutor asking the trooper whether the defendant refused testing) and indirect evidence (e.g., the trooper's brief mention that a test was offered, followed by no further discussion of testing), the court held that although the evidence should have been excluded, it did not constitute reversible error. *Id.* at 182-83. The court noted that it was not opening the door for prosecutors to circumvent the statute in the future because its conclusion was based on the inadvertency of the trooper's statement, the fact that it was not made as part of a tactical maneuver, and the weight of the Commonwealth's evidence. *Id.* at 183.

Virginia law provides as follows:

The failure of an accused to permit a blood or breath sample to be taken to determine the alcohol or drug content of his blood is not evidence and shall not be subject to comment by the Commonwealth at the trial of the case, except in rebuttal; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal.

VA. CODE ANN. § 18.2-268.10 (Michie Supp. 1992).

51. See discussion of *People v. Duke*, *infra* notes 53-56 and accompanying text.

52. See MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West Supp. 1992), discussed *supra* note 50.

53. 357 N.W.2d 775 (Mich. Ct. App. 1984).

54. *Id.* at 777. Michigan's statute read:

(8) If a jury instruction regarding a defendant's refusal to submit to a chemical test under this section is requested by the prosecution or the defendant, the jury instruction shall be given as follows:

'Evidence was admitted in this case which, if believed by the jury, could prove that the defendant had exercised his or her right to refuse a chemical test. You are instructed that such a refusal is within the statutory rights of the defendant and is not evidence of his guilt. You are not to consider such a refusal in determining the guilt or innocence

Acknowledging that other states have determined evidence of refusal to be probative, the *Duke* court nonetheless concluded that Michigan's statute forbade introduction of evidence of refusal to "prove the elements of the crime."<sup>55</sup> Rather, the introduction of such evidence would be limited to rebuttal, and then only when the defense "opens the door" to the issue by questioning the police officer's competency or credibility.<sup>56</sup>

Admission of evidence of breath test refusal has long been prohibited by statute in Maryland.<sup>57</sup> Prior to amendment in 1986, section 10-309 of the Courts and Judicial Proceedings Article provided that "[t]he fact of refusal to submit [to a chemical breath test for alcohol] is *not* admissible in evidence at the trial."<sup>58</sup> The statute

of the defendant.'

MICH. COMP. LAWS ANN. § 257.625a(8) (West Supp. 1983).

This code section has since been amended. Effective January 1, 1993, the section relevant to evidence of refusal reads:

(10) A person's refusal to submit to a chemical test as provided in subsection (6) shall be admissible in a criminal prosecution for a crime described in section 625c(1) only for the purpose of showing that a test was offered to the defendant, but not as evidence in determining innocence or guilt of the defendant. The jury shall be instructed accordingly.

MICH. COMP. LAWS ANN. § 257.625a(10) (West Supp. 1992).

55. *People v. Duke*, 357 N.W.2d 775, 777 (Mich. Ct. App. 1984).

56. *Id.* at 777-78. The court held that

[t]he most obvious examples of circumstances where such evidence could be admitted are:

- a. Where the defendant denies being given an opportunity to take a breathalyzer test,
- b. Where the defendant claims that he took the test and the results were exculpatory,
- c. Where the defendant challenges the competency of any of the testing done by the officer, or
- d. When the defendant challenges the credibility of the officer.

*Id.*

57. Courts and Judicial Proceedings § 10-309 which prohibits the admission of evidence of refusal and bars presumptions or inferences arising from refusal, was enacted in 1973 and became effective on January 1, 1974. See 1973 Md. Spec. Sess. Laws 313-14, 431 (effective Jan. 1, 1974). Article 35, § 100 of the Annotated Code of Maryland (1957), the predecessor to § 10-309, was enacted in 1959. See 1959 Md. Laws 1187-89 (effective June 1, 1959).

58. MD. CODE ANN., CTS. & JUD. PROC. § 10-309 (1984) (emphasis added) (effective July 1, 1982) (current version at MD. CODE ANN., CTS. & JUD. PROC. § 10-309 (Supp. 1993)). The 1984 version of the statute provided in full as follows: [Chemical tests for intoxication] — Refusal to submit to test.

(a) *Test not compulsory.* — Except as provided in § 16-205.1(c) of the Transportation Article, a person may not be compelled to submit to a chemical analysis provided for in this subtitle. Evidence of chemical analysis is not admissible in a prosecution for a violation of § 21-902 of the Transportation Article if obtained contrary to its

further provided that "[n]o inference or presumption concerning either guilt or innocence arises because of [the defendant's] refusal to submit."<sup>59</sup>

Shortly after the Supreme Court's decision in *South Dakota v. Neville*, Maryland legislators proposed amending state law to allow for the admission of evidence of refusal.<sup>60</sup> Two bills introduced in the Maryland Senate in 1983 were intended to amend section 10-309 to allow for the admission of evidence of refusal.<sup>61</sup> Despite vigorous support from the law enforcement community<sup>62</sup> and favorable Senate treatment, neither bill was enacted. Similar efforts by the legislature in 1984<sup>63</sup> and 1985<sup>64</sup> also failed, but the measure permitting introduction of evidence of refusal finally passed in 1986.<sup>65</sup> Notwithstanding the statutory amendment of the code, however, the court of appeals' ruling in *Krauss* leaves Maryland among the minority of states that restrict the admissibility of evidence of refusal.

Forced to reconcile two seemingly inconsistent statutory provisions, the court of appeals sought to balance the legislative directive with the principles governing admissibility of evidence.<sup>66</sup> In so doing, the court noted that the goal of statutory interpretation is to realize "a reading of the words employed which is consistent with ordinary language use and expresses a rule which [the court] believe[s] the legislature intended to enact."<sup>67</sup> As a starting point, therefore, the *Krauss* court examined the legislative history of Senate Bill 85, the passage of which amended section 10-309 in 1986. Although initially intended to eliminate restrictions on presumptions or inferences aris-

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provisions. No inference or presumption concerning either guilt or innocence arises because of refusal to submit. The fact of refusal to submit is *not* admissible in evidence at the trial.

*Id.* (second emphasis added).

59. *Id.*

60. See SENATE JUDICIAL PROCEEDINGS COMMITTEE, COMMITTEE REPORT SYSTEM OF 1983, at Parts I-III (1983).

61. See S. 872, Reg. Sess. (1983); S. 847, Reg. Sess. (1983). Senate Bill 872 sought to make the fact of refusal admissible, but retained the bar on inferences and presumptions arising from refusal. As originally drafted, S. 847 also sought to make the fact of refusal admissible while retaining the bar on inferences and presumptions. An amendment to S. 847, however, deleted the provision prohibiting inferences or presumptions arising from a person's refusal to submit to a breath test.

62. See *infra* notes 77-79 and accompanying text.

63. See *infra* notes 83-87 and accompanying text.

64. See *infra* notes 88-90 and accompanying text.

65. See *infra* notes 91-98 and accompanying text.

66. See *Krauss v. State*, 322 Md. 376, 385-88, 587 A.2d 1102, 1106-08 (1991).

67. JIM EVANS, STATUTORY INTERPRETATION 59 (1988). See also *In re Demetrius*, 321 Md. 468, 473-77, 583 A.2d 258, 261-62 (1991), in which the court discussed the methodology it follows in divining legislative intent.

ing from refusal to submit to a chemical breath test,<sup>68</sup> Senate Bill 85 was amended prior to enactment, resulting in conflicting statutory language. In its final form, the bill expressly allowed for the admission of evidence of refusal,<sup>69</sup> but took the "teeth" from such evidence by directing that "[n]o inference or presumption concerning either guilt or innocence arises because of refusal to submit."<sup>70</sup>

Analysis of the history of the breath test admissibility reform efforts sheds light on the impetus underlying the amendment of Senate Bill 85 and its companion, House Bill 757. Shortly after the Supreme Court's 1983 decision in *South Dakota v. Neville*,<sup>71</sup> Senate Bill 847 was introduced in the Maryland Legislature.<sup>72</sup> Interestingly, when first introduced, Senate Bill 847 merely deleted the word "not" from Courts and Judicial Proceedings section 10-309.<sup>73</sup> Thus the statute, the purpose of which was to "provide that the fact of refusal to submit to a chemical analysis is admissible in evidence at a trial,"<sup>74</sup> was to read "[t]he fact of refusal is admissible," while the restriction on presumptions and inferences was to remain.<sup>75</sup> This appears to indicate that, at least initially, the drafters did not view the retention of the restriction on presumptions and inferences as an impediment to the introduction of evidence of refusal. Apparently having noticed

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68. SENATE JUDICIAL PROCEEDINGS COMMITTEE, SUMMARY OF COMMITTEE REPORT: SENATE BILL 85 at 1 (1986). This report provides in pertinent part: "Changes Made By The Bill: This bill eliminates the provision of current law that no inference or presumption arises because of refusal to submit to a chemical analysis, and makes the fact of refusal to submit admissible in evidence at the trial." *Id.*

69. MD. CODE ANN., CTS. & JUD. PROC. § 10-309(a) (Supp. 1986) provided that "[t]he fact of refusal to submit is admissible in evidence at the trial."

70. MD. CODE ANN., CTS. & JUD. PROC. § 10-309 (1989) (effective July 1, 1986) (current version at MD. CODE ANN., CTS. & JUD. PROC. § 10-309 (Supp. 1993)). The 1986 version of the statute provided in full as follows:

[Chemical tests for intoxication] — Refusal to submit to test.

(a) *Test not compulsory.* — Except as provided in § 16-205.1(c) of the Transportation Article, a person may not be compelled to submit to a chemical analysis provided for in this subtitle. Evidence of chemical analysis is not admissible in a prosecution for a violation of § 21-902 of the Transportation Article if obtained contrary to its provisions. *No inference or presumption concerning either guilt or innocence arises because of refusal to submit. The fact of refusal to submit is admissible in evidence at the trial.*

*Id.* (second emphasis added).

71. 459 U.S. 553 (1983).

72. S. 847, Reg. Sess. (1983).

73. *Id.*

74. *Id.*

75. S. 847, Reg. Sess. (1983) (version of bill as drafted on Feb. 21, 1983) (emphasis added).

the possibility of evidentiary problems, Senate Bill 847 was amended by the Senate Judicial Proceedings Committee to delete the restriction on presumptions and inferences.<sup>76</sup>

The bill was supported by the Maryland State Police<sup>77</sup> and the Maryland Chiefs of Police Association,<sup>78</sup> which felt that "enactment of this legislation would be in the public interest in that it would assist in efforts to rid our highways of drunken drivers."<sup>79</sup> Although the bill received a favorable vote in the Senate, it was killed upon reaching the House of Delegates.<sup>80</sup>

The key factor to consider regarding Senate Bill 847 was the amendment added by the Senate Judicial Proceedings Committee. This suggests that the legislature was expressly aware of the potential conflict between the admissibility provision and the presumption and inference provision of section 10-309.<sup>81</sup> Curiously, despite the 1983 amendment and a proposal from the Maryland State's Attorneys' Association to the contrary,<sup>82</sup> when the bill was re-introduced in 1984 as Senate Bill 474, the restriction on presumptions and inferences was left in place.<sup>83</sup> As with Senate Bill 847, Senate Bill 474 was intended to "provide that a person's refusal to submit to a chemical test for intoxication [could] be introduced into evidence";<sup>84</sup> the goal

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76. S. 847, Reg. Sess. (1983) (as amended by the Senate Judicial Proceedings Committee). See also SENATE JUDICIAL PROCEEDINGS COMMITTEE, SUMMARY OF COMMITTEE REPORT: SENATE BILL 847, Part I, at 1 (1983) ("As amended, the bill also strikes the provision of the present law that no inference of guilt or innocence can be drawn from the fact of refusal to submit.").

The Senate Judicial Proceedings Committee, by a vote of eight to zero, gave S. 847, as amended, a favorable recommendation on March 21, 1983. The bill then passed on third reader in the Senate on March 28, 1983, by a vote of 43 to 0.

77. See Letter from Colonel William T. Travers, Superintendent, Maryland State Police, to Senator Thomas V. "Mike" Miller, Jr., Chairman, Senate Judicial Proceedings Committee (Mar. 18, 1983), *microformed on S. 847 Legislative History File* (1983).

78. See Letter from H. Edgar Lentz, Chairman, Joint Legislative Committee, Maryland Chiefs of Police Association, to Senator Thomas V. "Mike" Miller, Jr., Chairman, Senate Judicial Proceedings Committee (Mar. 15, 1983), *microformed on S. 847 Legislative History File* (1983).

79. *Id.*

80. See House Judiciary Committee Vote Tally, S. 847 (Apr. 7, 1983) (unfavorable motion for S. 847). House Bill 391, 1983 Sess. of Maryland Legislature, was intended to make the fact of refusal admissible. The bill received an unfavorable vote in the House Judiciary Committee on March 22, 1984.

81. See *supra* notes 71-76 and accompanying text.

82. Maryland State's Attorneys' Association Proposed Bill #14 (proposing amendment to Courts and Judicial Proceedings § 10-309(a)), *microformed on S. 474 Legislative History File* (1984).

83. S. 474, Reg. Sess. (1984).

84. SENATE JUDICIAL PROCEEDINGS COMMITTEE, SUMMARY OF COMMITTEE REPORT: SENATE BILL 474 at 1 (1984).

was "to lower the number of people refusing to take the test."<sup>85</sup> Although Senate Bill 474 received a favorable vote from the Senate,<sup>86</sup> it too was rejected by the House.<sup>87</sup>

In 1985, Senate Bill 54 and companion House Bill 660, both of which set out to make evidence of refusal admissible and eliminate the restriction on presumptions and inferences, were introduced.<sup>88</sup> Despite support from the Maryland State Police, Baltimore County Police, Mothers Against Drunk Driving, Maryland State's Attorneys' Association, and Judge Charles E. Moylan, Jr. of the Court of Special Appeals of Maryland,<sup>89</sup> the companion bills failed in the House,<sup>90</sup> seemingly cementing the House bias against this type of legislation.

In 1986, similar legislation was introduced for the fourth consecutive year, in the form of Senate Bill 85 and companion House Bill 757.<sup>91</sup> At the outset, both bills provided that evidence of refusal was to be admissible, and that the restriction on presumptions or inferences was to be eliminated.<sup>92</sup> On February 27, Senate Bill 85 passed the Senate on third reader by a vote of forty to one.<sup>93</sup>

Interestingly, although many agencies ardently supported this legislation,<sup>94</sup> the Bar Association of Baltimore City strongly opposed

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85. *Id.*

86. Senate Bill 474 passed on third reader in the Senate on March 29, 1984, by a vote of 42 to 2, with three members not voting.

87. Senate Bill 474 was rejected by the House Judiciary Committee on April 3, 1984. Four similar bills were introduced in the House in 1984. House Bill 1115, which provided that evidence of refusal was to be admissible, was withdrawn due to a drafting error. See Letter from Joseph Lutz, Delegate, Harford County, to Joseph Owens, Chairman, House Judiciary Committee (Mar. 15, 1984), *microformed on* H.D. 1115 Legislative History File (1984).

House Bill 638, which was intended to repeal the restrictions on presumptions and inferences and make the fact of refusal admissible, received an unfavorable vote in the House Judiciary Committee on March 22, 1984. House Bills 192 and 391, both intended to make the fact of refusal admissible, were also rejected by the House Judiciary Committee on March 22, 1984.

88. See S. 54, Reg. Sess. (1985); H.D. 660, Reg. Sess. (1985).

89. See List of Proponents and Transcript of Public Hearing Held on Feb. 19, 1985 Before the House Judiciary Committee, *microformed on* H.D. 660 Legislative History File (1985). As noted in the transcript of the hearing, Judge Moylan indicated that the law barring introduction of evidence of refusal was based on an assumption that such a bar was required by the Constitution, but that the Supreme Court's decision in *Neville* proved this assumption invalid.

*Id.*

90. See House Judiciary Committee Vote Tally, H.D. 660 (Mar. 22, 1985).

91. See S. 85, Reg. Sess. (1986); H.D. 757, Reg. Sess. (1986).

92. See S. 85, Reg. Sess. (1986); H.D. 757, Reg. Sess. (1986).

93. Maryland State Senate, S. 85, 3rd Reading (Feb. 27, 1986). Forty members voted in favor of the bill, six members did not vote, and only one member, Senator Winegrad, voted against the bill. *Id.*

94. Representatives from the Maryland State Police, Baltimore County Police,

the passage of the bill. In a letter dated March 12, 1986, the president of the city bar association wrote to the chairman of the House Judiciary Committee, stating that the association opposed the bill because it "would allow an adverse inference to be drawn from the refusal of a criminal defendant to submit to a chemical test for alcohol and would allow for the admission of such refusal into evidence at trial,"<sup>95</sup> thus having a "chilling effect on the exercise of the right against self-incrimination."<sup>96</sup> The letter further suggested that "the bill may be unconstitutional."<sup>97</sup>

Shortly after the date of this letter, the House Judicial Proceedings Committee amended Senate Bill 85 and House Bill 757, reincorporating the restriction on presumptions and inferences.<sup>98</sup> Senate Bill 85, as amended, then passed in the House by a vote of ninety to twenty-eight, and in the Senate by a vote of forty-two to zero.

The tortured history of proposals, amendments, Senate successes, and House failures seems to indicate a House bias against this type of legislative reform. Furthermore, recognizing that the legislature had, in 1983, apparently detected an inconsistency caused by changing the admissibility clause but retaining the restriction on presumptions or inferences,<sup>99</sup> it is possible that the House Judiciary Committee's amendment was intended to be ambiguous. Despite the ambiguity, the *Krauss* decision was not unprecedented, however, as a similar outcome could have been predicted by analyzing three indicators. First, the decision directly accords with the 1984 decision of the Court of Appeals of Michigan in *People v. Duke*.<sup>100</sup> In *Duke*, the

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Maryland State's Attorneys' Association, and Mothers Against Drunk Driving appeared in favor of S. 85 at the hearing on February 13, 1986. See Senate of Maryland, Judicial Proceedings Committee, Speakers and Appearances, S. 85, Chemical Test for Alcohol—Refusal—Admissibility (Feb. 13, 1986).

The same agencies were represented at the hearing for House Bill 757, held on February 25, 1986. See House of Delegates, House Judiciary Committee, Speakers and Appearances, H.D. 757, Chemical Test for Alcohol—Refusal—Admissibility (Feb. 25, 1986).

95. Letter from James S. Maffitt, Esq., President, The Bar Association of Baltimore City, to Joseph E. Owens, Chairman, House Judiciary Committee (Mar. 12, 1986), *microformed on* S. 85 Legislative History File (1986).

96. *Id.*

97. *Id.* Several months later, Attorney General Stephen Sachs wrote Governor Harry Hughes that "[b]ecause the Supreme Court has upheld legislation even more far-reaching than Senate Bill 85/House Bill 757, we cannot say that this legislation is unconstitutional." Letter from Maryland Attorney General Stephen Sachs to Governor Harry Hughes, at 1 (May 16, 1986) *microformed on* S. 85 Legislative History File (1986).

98. See House Judiciary Committee, Amendments to House Bill No. 757 (First Reading File Bill) (Adopted by the House on Mar. 19, 1986); House Judiciary Committee, Amendments to Senate Bill No. 85 (Third Reading File Bill).

99. See *supra* notes 72-76 and accompanying text.

100. 357 N.W.2d 775 (Mich. Ct. App. 1984).

court construed the analogous Michigan statute, which permitted the admission of evidence of refusal, but forbade the fact-finder from using refusal as evidence of guilt.<sup>101</sup> The court concluded that, under that state's statute, "evidence of the refusal may not be admitted to prove the elements of the crime."<sup>102</sup> The *Krauss* court did not mention *Duke* in its opinion, but certainly knew of its existence, as it was prominently mentioned in Krauss' appellate brief.<sup>103</sup>

Second, Attorney General Stephen Sachs, in a letter to then-Governor Harry Hughes, addressed the constitutionality and legal sufficiency of Senate Bill 85 and companion House Bill 757.<sup>104</sup> Although Attorney General Sachs said that, in light of *Neville*, the legislation could not be said to be unconstitutional,<sup>105</sup> he stated that "it seems difficult to imagine how such evidence could be relevant in a case except as an inference of guilt."<sup>106</sup> Furthermore, the Attorney General added that "retention in the law of the restriction on the inference that arises from the refusal to take the test appears to be at odds with the purpose of this legislation in making the evidence admissible."<sup>107</sup>

Third, three years prior to *Krauss*, in *Nast v. Lockett*,<sup>108</sup> the court of appeals held that evidence of refusal is admissible in civil cases, where section 10-309 does not apply.<sup>109</sup> The court stated in

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101. *Id.* at 776-77. The court of appeals outlined the relevant legislative history as follows:

Prior to 1967, MCL 257.625a; MSA 9.2325(1) provided:

(4) The person charged shall be advised of his right to refuse to take any test provided for in this act and the refusal on the part of any person to submit to any such test shall not be admissible in any criminal prosecution relating to driving a vehicle while under the influence of intoxicating liquor.

That section was amended by 1967 PA 153 to read:

(4) The person charged shall be advised that his refusal to take a test as herein provided shall result in the suspension or revocation of his operator's or chauffeur's license or his operating privilege.

*Id.* at 776 (quoting MICH. COMP. LAWS § 257.625a). The statute has since been extensively revised. See MICH. COMP. LAWS ANN. § 257.625a (West Supp. 1993).

102. *Id.* at 777. The court indicated that the statute permits introduction of evidence of refusal in order to rebut a defense founded on improper administration of the test. *Id.* at 777-78.

103. Brief for Petitioner at 15-17, *Krauss v. State*, 322 Md. 376, 587 A.2d 1102 (1991) (No. 42).

104. Sachs, *supra* note 97.

105. *Id.* at 1.

106. *Id.* at 1-2.

107. *Id.* at 2.

108. 312 Md. 343, 539 A.2d 1113 (1988).

109. *Id.* at 369, 539 A.2d at 1126. Although the central holding of *Nast*, regarding the standard applicable to the award of punitive damages in non-intentional

*Nast* that refusal "tends to show a person's state of mind,"<sup>110</sup> which, though not rising to the level of a presumption, "enables a *reasonable inference* that the person was aware that he was not sober . . . [and] tends to show that he was reluctant to have evidence pertaining to the actual extent of his impairment ascertained."<sup>111</sup>

In light of the court's recognition that, in civil cases, evidence of refusal gives rise to a "reasonable inference" that the defendant believed himself not to be sober, it would not be unreasonable to presume that the fact finder would draw the same inference in the criminal setting. This factor, in conjunction with the express words of section 10-309, weighs against admitting evidence of refusal.<sup>112</sup>

Forced to balance the conflicting statutory provisions, the court of appeals in *Krauss* was, in reality, balancing conflicting legislative agendas. Perhaps realizing this conflict, the court interpreted the law in a manner that maintains the status quo, thereby burdening the legislature with the responsibility of effecting any desired change.

Despite the decision's failure to reflect the twin goals of the statute's drafters, i.e., both allowing evidence of refusal to be admissible and concomitantly "permitting" whatever inferences or presumptions that arise therefrom to play a role in the verdict, *Krauss* nonetheless serves to clarify the operation of the statute. The decision essentially maintains the status quo, in that evidence of refusal continues to be excluded under most circumstances.

The decision will still likely have some impact upon several phases of the justice system. Prior to conducting breath tests, police officers in Maryland are required to read suspected drunk drivers a

tort cases, has been overruled, see *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460, 601 A.2d 633, 652 (1992), the proposition for which *Nast* is cited herein is still valid.

110. 312 Md. at 369, 539 A.2d at 1126.

111. *Id.* In the first edition of his treatise, *Maryland Evidence Handbook*, Judge Joseph Murphy wrote, "My favorite piece of legislation is found in C.J. 10-309." JOSEPH F. MURPHY, *MARYLAND EVIDENCE HANDBOOK* § 520, at 204 (1st ed. 1989). Judge Murphy added:

At one time the refusal to submit to such a test was inadmissible. . . . Nobody can take issue with the legislature's right to change the law, but if "*No inference concerning either guilt or innocence arises*," how come "the fact of refusal" is admissible?

The quick answer seems to be that the jury should know that the defendant was not denied the opportunity to prove his innocence by taking the test. Is it realistic to assume, however, that the jurors will avoid drawing the conclusion discussed by Judge Orth in *Nast*?

*Id.*

112. Judge Murphy begged the question when he asked, "Is it realistic to assume . . . that jurors will avoid drawing the conclusion discussed by Judge Orth in *Nast*?" MURPHY, *supra* note 111, § 520, at 204.

form delineating their rights.<sup>113</sup> This "advice of rights" provides that "[t]he results of such test or a refusal of such test may be admissible as evidence in any criminal prosecution."<sup>114</sup> Based upon the *Krauss* holding, this warning may be subject to attack since it arguably misleads suspects into believing that the state, regardless of whether any collateral matters are at issue, may introduce evidence of breath test refusal.

As the public becomes more aware that evidence of refusal is unlikely to be introduced, the number of persons submitting to testing will probably decrease. However, the drunk driving suspect who refuses to submit to testing may still be convicted, since a "chemical

113. MD. CODE ANN., TRANSP. § 16-205.1 (1992 & Supp. 1993) serves as the statutory basis for this requirement.

114. Maryland Advice of Rights Form. The Advice of Rights provides in pertinent part:

**YOUR DRIVER'S LICENSE / PRIVILEGE WILL BE SUSPENDED**

By law, any person who drives or attempts to drive a motor vehicle on a highway or on any private property that is used by the public in general in this State is deemed to have consented with certain limitations, to take a test of breath or a test of blood to determine the alcohol concentration of the person's breath or blood, or a blood test to determine drug or controlled dangerous substance content.

You are hereby advised that you have been stopped or detained and that reasonable grounds exist to believe that you have been driving or attempting to drive a motor vehicle while intoxicated, while under the influence of alcohol . . . .

Under Maryland law, the test to be administered, at no cost to you, shall be the test of breath . . . .

The results of such test or a refusal of such test may be admissible as evidence in any criminal prosecution.

You have the right to refuse to submit to the test. Your refusal shall result in an administrative suspension of your Maryland driver's license or your driving privilege if you are a non-resident. The suspension by the Motor Vehicle Administration shall be 45 days for a first offense and 90 days for a second or subsequent offense . . . .

. . . .  
If you refuse the test or submit to a test which indicates an alcohol concentration of 0.10 or more, the Motor Vehicle Administration shall be notified, your Maryland driver's license shall be confiscated, an Order of Suspension issued, and a temporary license issued which allows you to continue driving for 45 days or until a hearing is completed, whichever occurs first.

. . . .  
I have read or have been read the Advice of Rights for a test and have been advised of administrative sanctions that shall be imposed for refusal to take a test or for a test result indicating an alcohol concentration of 0.10 or more. I understand that this requested test is in addition to any preliminary tests that were taken.

Having been so advised, do you now agree to submit to a test? (This is not an admission of guilt).

analysis is not a prerequisite to a conviction.<sup>115</sup> Evidence such as demeanor, witness observations, and odor of alcohol can support a finding that a defendant was intoxicated.<sup>116</sup> Moreover, those who refuse testing will face the administrative penalties of refusal, including the threat of license suspension.<sup>117</sup>

In the wake of *Krauss*, defense attorneys will be forced to perform a balancing test before asserting defenses challenging collateral matters.<sup>118</sup> More often than not, the defense attorney will stipulate that the police officer followed proper procedure in conducting the traffic stop and subsequent drunk driving investigation, for doing otherwise will open the door to the introduction of evidence that the defendant refused a breath test.

In *Krauss v. State*, the Court of Appeals of Maryland has communicated its interpretation of section 10-309(a) of the Courts and Judicial Proceedings Article. The court reached a logical conclusion in analyzing an internally inconsistent statute. Nevertheless, the decision places Maryland among the minority of jurisdictions which greatly limit the admissibility of evidence of refusal to submit to breath testing.

*Howard S. Cohen*

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115. *State v. Werkheiser*, 299 Md. 529, 539-40, 474 A.2d 898, 904 (1984).

116. *Major v. State*, 31 Md. App. 590, 358 A.2d 609 (1976).

117. See MD. CODE ANN., TRANSP. § 16-205.1 (1992 & Supp. 1993).

118. Examples of such challenges include claims that no opportunity was afforded the defendant to take a breath test, that the defendant actually took the test and the results were exculpatory, or questioning the credibility or competency of the police officer. *People v. Duke*, 357 N.W.2d 775, 777-78 (Mich. Ct. App. 1984). See also Jay M. Zitter, Annotation, *Admissibility In Criminal Case of Evidence That Accused Refused To Take Test Of Intoxication*, 26 A.L.R.4th 1112, 1119-22 (1983).