

NALLINE AS AN AID IN THE DETECTION AND CONTROL
OF USERS OF NARCOTICS

I

THE HISTORY OF THE NALLINE TEST

Narcotics addiction is a serious social problem. Besides the degrading effect on the user, narcotics addiction is also associated with the petty crimes needed to support the habit and with organized criminal groups which make a business out of illegal traffic in narcotics. There is much conjecture as to the relation between crime and narcotics, but it is generally accepted that the crimes related to addiction, including the occasionally violent crimes, are committed in order to get money to buy drugs and are not the direct result of any physiological action of drugs.¹ Therefore, one approach to the problem of narcotics and crime is to discover who are the users of narcotics and then to employ a suitable means of assuring that these persons will cease to use narcotics.

In California it is a felony to possess narcotics without the prescription of a licensed physician, dentist, chiroprapist or veterinarian.² Furthermore, in California it is a misdemeanor punishable by a term of 90 days to 1 year in the county jail to use narcotics or to be addicted to the use of narcotics.³ In order to enforce our laws, there must be positive means of proving use or addiction. Nalline has supplied these means.

Nalline (N-allylnormorphine, nalorphine) is an antagonist to morphine, methadone, and all related compounds.⁴ Nalline has three distinct uses: "(1) the prevention and treatment of respiratory depression in the newborn, (2) the treatment of poisoning with narcotics, (3) the diagnosis of physical dependence (active addiction) on narcotic drugs."⁵ Isbell and Fraser, working at the United States Public Health Service in Lexington, Kentucky, between 1950 and 1952, showed that a subcutaneous injection of Nalline will precipitate symptoms of abstinence in addicted persons, but this effect would not occur when administered to a non-user or a former addict, who will actually appear addicted.⁶

Until 1950, in the narcotics field Nalline was used exclusively to treat narcotics poisoning. Since that time procedures have been developed for the employment of Nalline as a safe and reliable diagnosis of the presence of narcotics. Dr. J. Y. Terry of the Santa Rita Rehabilitation Center in California is responsible for the test

¹ MAURER & VOGEL, NARCOTICS AND NARCOTIC ADDICTION 211 (1954).

² CAL. HEALTH & SAFETY CODE § 11500.

³ CAL. HEALTH & SAFETY CODE § 11721.

⁴ "Nalline" is the trade name for N-allylnormorphine. Those substances upon which Nalline is effective are: morphine, methadone: 154 A.M.A.J. 414 (1954); opium: CECIL & LOEB, MEDICINE 1637 (1959); heroin, Dilaudid, Dromoran; Roth, *Poisonings*, in THE MEDICAL CLINICS OF NORTH AMERICA 203 (1954); dihydromorphine, methorphan: Fraser, *Human Pharmacology and Clinical Uses of Nalorphine*, in THE MEDICAL CLINICS OF NORTH AMERICA 393 (1957).

Nalline will not produce an effect on persons using cocaine, marijuana, barbiturates. As to the latter, see Roth, *supra* at 203. There is doubt as to the value of Nalline in the detection of the presence of meperidine (Demerol), 154 A.M.A.J. 414 (1954). *But see* Fraser, *supra* at 399.

⁵ Terry & Baumoeller, *Nalline: An Aid in Detecting Narcotic Users*, 85 CAL. MEDICINE 299 (1956).

⁶ Fraser, *supra* note 4, at 393.

which is used in California to a far greater extent than any other test.⁷ Following a physical examination of the patient, the pupils of the patient's eyes are measured with a pupilometer, which is a one- by three-inch card which contains a series of solid black dots varying in diameter from one to five millimeters. Nalline is administered subcutaneously⁸ in a dose of three milligrams. Thirty minutes later the diameter of the pupils is again measured. If the person tested has not been using opiates, the diameter is reduced from its normal size by an amount between 0.5 millimeters and 2 millimeters. In a person who has been using opiates occasionally but who is not addicted, the pupils will remain unchanged in size. In a person who is addicted, the diameter of the pupils will increase from 0.5 to 2 millimeters, the amount of increase depending upon the degree of addiction. Associated with this pupillary dilation is the development of withdrawal symptoms: gooseflesh, yawning, nausea and vomiting.⁹ Dr. Terry advises that the withdrawal symptoms in addition to pupillary dilation need not be relied upon and ought to be avoided if possible by administration of small amounts of morphine sulfate or dilaudid where necessary to avoid discomfort and to return the patient to his prior condition. Dr. Terry has found that the pupillary response is an accurate, sufficient and sensitive index of addiction, or of the absence or the occasional use of narcotics up to 15 days prior to the test.¹⁰

The technique used by Dr. Terry is not of universal application.¹¹ This is due probably to the surroundings in which the drug was originally used in Lexington, Kentucky. It was used there solely upon heavily addicted persons and in amounts greater than 3 milligrams. In fact, the American Medical Association in 1954 described a test in which 16 milligrams are administered in an hour, in doses of 3 milligrams, 5 milligrams, and 8 milligrams spaced evenly over that time.¹² When it is realized that 10 to 20 milligrams is the prescribed antidote treatment for serious narcotic poisoning,¹³ it can be reasonably expected that 16 milligrams administered solely for testing purposes will have undesirable side effects, especially upon heavily addicted persons. Yet the AMA advocates producing the side effects of perspiration, nausea, defecation, etc., as a means of testing for the presence of the drug, but warns that "the use of Nalline is not an innocuous procedure since too large a dose will produce symptoms severe enough to endanger the lives of persons strongly addicted to . . . drugs."¹⁴

Understandably, therefore, there is much confusion as to the safety of using Nalline for testing purposes. This led the *Ad Hoc* Advisory Committee on Procedure for the Nalorphine Tests of the California Department of Public Health to take an admittedly "very cautious approach" as recently as 1958 in its *Recom-*

⁷ As of October 1959 Nalline programs were established in the counties of Alameda, Santa Clara, Orange, Fresno, San Francisco, San Bernardino, Ventura, Bakersfield, Sacramento; in the cities of Pasadena, Stockton and Long Beach, and Saint Louis, Missouri; and in the Bureau of Narcotics Control of the State of Illinois. Paper Presented by Lt. Brown, Oakland Police Department, Joint Meeting of the Northern-Central California Narcotics Officers' Association With Southern California Narcotics Officers, Oct. 29, 1959.

⁸ A subcutaneous injection is an injection given immediately under the skin.

⁹ Terry & Braumoeller, *supra* note 5, at 299.

¹⁰ *Id.* at 300. In some quarters it is felt that pupillary reaction is not enough. See note 16 *infra*.

¹¹ 154 A.M.A.J. 414 (1954). CECIL & LOEB, *op. cit. supra* note 4, at 1786. CAL. DEP'T OF PUBLIC HEALTH, RECOMMENDED PROCEDURE FOR THE NALORPHINE TEST (1958).

¹² 154 A.M.A.J. 414 (1954).

¹³ Roth, *supra* note 4, at 220.

¹⁴ 154 A.M.A.J. 414 (1954).

*mended Procedure for the Nalorphine Test, A Guide to Physicians.*¹⁵ Although Dr. Terry is a member of the committee, his procedure was not the procedure advised by the committee in its *Guide to Physicians*. The committee advised a 3-milligram injection but for a positive result demanded the presence of four symptoms. The committee set up two groups of symptoms and required any two symptoms in each group to appear within 20 minutes before interpreting the test as positive.¹⁶ Pupillary dilation is only one of the possible signs.

Group 1

1. Profuse sweating
2. Repetitive, uncontrollable yawning
3. Lacrimation (tearing eyes)
4. Rhinorrhea (running nose)

Group 2

5. Marked increase in respiratory rate
6. Increase in pupillary diameter of 2 mm. or more
7. Gooseflesh (pilomotor activity)
8. Restlessness, manifested by turning from side to side, curling into the fetal posture, covering up with blankets
9. Twitching of muscles
10. Gagging, retching, and vomiting
11. Defecation
12. Elevation of 15 mm. of mercury or more in systolic blood pressure

According to Dr. Terry the observation of gross withdrawal symptoms as the committee recommends is not dependable. He asserts that to some degree the patient can control some of the withdrawal symptoms.¹⁷ Furthermore, it should be noted that the degree of addiction will affect the degree of reaction to the Nalline test; therefore, by insisting upon four marked symptoms, it is conceivable that many moderate users or those who have abstained for a short time prior to the test will not strongly show four symptoms. On the other hand, Dr. Terry reports that patients who are occasionally using an opiate will have a positive pupillary reaction in a majority of cases and that only a small proportion of cases will be missed.¹⁸

The California Department of Public Health has added additional precautions, which if insisted upon would for practical reasons greatly restrict the use of Nalline. For instance, the department advises a hospital setting with a constant room temperature of between 70 to 75 degrees. It also advises the presence of numerous resuscitation equipment and resuscitative medications. In 1958 the Oakland Police Department reported that in the 2 years in which it had been administering Nalline more than 4,000 tests had been given and in none of these tests were there any complications other than the "goose flesh" or minor nausea experienced by the heavily addicted subject; in those cases prompt relief was obtained by the administration of morphine sulfate as an antidote.¹⁹ Dr. Terry has found no need to resort to the resuscitative techniques of the California Public Health Department and uses these facts as support for his statement that a dose of 3 milligrams of Nalline is safe for both the non-addict and the addict.

The Office of the District Attorney of Alameda County offers evidence of the Terry technique's reliability. The office reports that by November 1958 charges against approximately 320 persons had been filed under the Health and Safety Code in reliance substantially on the Nalline test. Of those cases, all but about 30 pleaded guilty after being informed of the positive reaction to the test, and of the

¹⁵ CAL. DEP'T OF PUBLIC HEALTH, RECOMMENDED PROCEDURE FOR THE NALORPHINE TEST 4 (1958).

¹⁶ *Id.* at 6.

¹⁷ Terry & Braumoeller, *supra* note 5, at 300.

¹⁸ *Ibid.*

¹⁹ OAKLAND, CAL. POLICE DEP'T, NARCOTICS ADDICTION AND NALLINE 6 (1958).

30 who maintained their innocence only five were found not guilty, four by a jury and one by a judge sitting alone.²⁰

Dr. Terry is able to increase his safety precautions should the preliminary physical examination suggest the necessity of such measures. The equipment used by the Oakland Police Department is a converted dental chair with a single stationary light and an arm and wrist support for the doctor.²¹ This technique is acknowledged by the *ad hoc* advisory committee as a "modified form of the nalorphine test."²² The *ad hoc* advisory committee, in admitting its "very conservative approach," states that, "As more experience is gained with the use of these drugs, it is likely that modifications of the present guide will be appropriate."²³

II

USES OF THE NALLINE TEST

In California, the Health and Safety Code²⁴ makes it unlawful for anyone to use, be under the influence of, or be addicted to the use of narcotics, except when administered by or under the direction of a licensed physician. Violation is a misdemeanor involving an act or a condition. The Nalline test is used to prove this act or condition. In the only appellate case involving the Nalline test, *People v. Williams*,²⁵ the defendants' convictions were based upon the Nalline test, a history of prior use, and the needle marks which were observed on their arms. Thus far no reported decision has relied on the Nalline test alone to affirm a conviction.

Another crime involving narcotics is outlined in the California Health and Safety Code section 11500, which makes it a felony to possess narcotics except upon prescription of a licensed physician.²⁶ The Nalline test has not as yet been used to prove possession. The Nalline test may conceivably be employed to prove that one has possession of a narcotic in his system. In practice, however, the statute has been interpreted to mean physically, or constructively, *on* the defendant's person²⁷ or constructive possession by an agent,²⁸ not possession *within* the person. Since knowledge of the narcotic character of the substance is an essential element of the crime of unlawful possession of narcotics,²⁹ the Nalline test might be employed to refute the defendant's allegation that he was ignorant of the character of the substance found in his possession.

The Nalline test is also widely used in connection with probation and parole. In 1957 the California Legislature added section 11722 to the Health and Safety Code:

(a) Whenever any court in this State grants probation to a person who the court has reason to believe is or has been a user of narcotics, the court may require as a condition to probation that the probationer submit to periodic tests by a city or county health officer, or by a physician and surgeon appointed by the city or county health officer

²⁰ OFFICE OF THE DISTRICT ATTORNEY OF ALAMEDA COUNTY, THE NALLINE TEST AND ITS USE IN THE CITY OF OAKLAND (1958).

²¹ OAKLAND, CAL. POLICE DEP'T, NARCOTICS ADDICTION AND NALLINE 6 (1958).

²² CAL. DEP'T OF PUBLIC HEALTH, RECOMMENDED PROCEDURE FOR THE NALORPHINE TEST 4 (1958).

²³ *Ibid.*

²⁴ CAL. HEALTH & SAFETY CODE § 11721.

²⁵ *People v. Williams*, 164 Cal. App. 2d 858, 331 P.2d 251 (App. Dep't 1958).

²⁶ CAL. HEALTH & SAFETY CODE § 11500.

²⁷ *People v. Walker*, 121 Cal. 2d 173, 262 P.2d 640 (1953).

²⁸ *People v. White*, 50 Cal. 2d 428, 325 P.2d 985 (1958).

²⁹ *People v. Hancock*, 156 Cal. App. 2d 305, 319 P.2d 731 (1957).

with the approval of the State Division of Narcotic Enforcement, to determine, by means of the use of synthetic opiate antinarcotics in action whether the probationer is a narcotic addict. . . . [The physician] shall report the results to the probation officer.³⁰

Subsection (b) of section 11722 makes the same provision for parolees. In the *Williams* case³¹ the court stated it had received uncontroverted evidence that the legislature had the Nalline test in mind when it enacted section 11722.

The Alameda County Probation Department has observed dramatic results in its experience with the use of Nalline. Most impressive is the steady reduction in percentage of positive reactions to the Nalline test.

During the first three months of the testing program, as a result of having given 61 tests to probationers, some 31 per cent showed a positive reaction. In contrast, those who reacted positively to some 538 tests given during the first quarter of 1959 amounted to only four per cent.³²

A possible conclusion to be drawn from this is that probationers have been made aware of the effectiveness of the Nalline test and are managing to abstain or to take only as much narcotics as will permit a negative test result. The Oakland Police Department finds the results confirmed by a decline in the types of crimes frequently committed by addicts in order to support a narcotics habit.³³ The user who knows his freedom depends upon abstinence will make a greater effort to abstain if he knows that his nonabstention will be detected.

III

ADMISSIBILITY IN EVIDENCE OF THE NALLINE TEST

The rule for the admissibility in evidence of a scientific test has been formulated as requiring general acceptance by the medical profession or general scientific recognition of the results as accurate.³⁴ The test must be sufficiently established to have gained general acceptance in the particular field in which it belongs.³⁵

In *People v. Williams*, one of the chief witnesses for the State was Dr. Terry, who had administered the Nalline test to the defendants. The doctor and two other experts called by the State expressed the opinion that the medical profession had generally accepted the use of Nalline as a reliable means of detecting the presence

³⁰ CAL. HEALTH & SAFETY CODE § 11722(a). Under the provisions of CAL. GOV'T CODE § 15002.5 the "Division of Narcotic Enforcement" was changed to the "Bureau of Narcotic Enforcement."

³¹ *People v. Williams*, 164 Cal. App. 2d, 858, 331 P. 2d 251 (App. Dep't 1958).

³² ALAMEDA COUNTY PROBATION DEP'T, NALLINE AS AN AID IN PROBATIONARY SUPERVISION OF NARCOTIC OFFENDERS, THREE YEARS' RETROSPECT 1 (1959). It is safe to say that all statisticians will admit a relation, if not a cause and effect relation.

³³ OAKLAND, CAL. POLICE DEP'T, NARCOTICS ADDICTION AND NALLINE 2 (1958):

Offense	1955	1958	Percentage Change
Burglary	3094	2694	-13
Robbery	731	577	-21
Auto-Burglary	1062	561	-47
Auto-Clout	877	671	-23
Prostitution	268	201	-25

Here again statisticians admit a relation, if not a cause and effect relation.

³⁴ *People v. Wochnick*, 98 Cal. App. 2d 124, 219 P.2d 70 (1950); *People v. Morse*, 325 Mich. 270, 38 N.W.2d 322 (1949).

³⁵ *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).

of an opiate in a person's system, and concluded that they personally accepted it as such. On cross-examination, however, each of the State's experts admitted to the effect that "the medical profession generally is unfamiliar with the use of Nalline and therefore it cannot be truthfully said that the Nalline test has met with general acceptance of the medical profession as a whole, general acceptance being at present limited to those few in a specialized field who deal with the narcotic problem."³⁶ The court went on to say, however, "Should this fact render the testimony inadmissible? We believe not. All of the medical testimony points to the reliability of the test. It has been generally accepted by those who would be familiar with its use. In this age of specialization more should not be required."³⁷ This language amounts to a liberalization of judicial attitudes toward the admissibility of scientific evidence.³⁸ The previous more restrictive rule has been subject to some criticism as being unrealistic,³⁹ and was based chiefly on cases involving the use of the systolic blood pressure deception test as a lie detector test.

Witkin, citing the *Williams* case, states the rule, "The admissibility of a scientific test depends upon its acceptance in the field of learning in which it is in use."⁴⁰ Therefore, reading this rule in the light of prior decisions, a scientific test such as the Nalline test is admissible if accepted by persons who specialize in diagnosing the presence of narcotics and does not necessarily have to be accepted by physicians in general. At this point it will be recalled that the *ad hoc* advisory committee of the California Department of Public Health, though not recommending the Terry version of the Nalline test for physicians in general, did acknowledge this version of the test as a modification of the recommended procedure.⁴¹ It should be kept in mind that the committee's recommended procedure is probably designed to guarantee that any doctor may administer the test without fear of civil or criminal liability.⁴²

The typical criticism of "lie-detector" machines was stated in *People v. Aragon*:⁴³ "It is general knowledge among those familiar with lie detector machines that the results are greatly dependent upon the training, experience and skill of the operators and that the results vary with different types of subjects." This criticism is not applicable to the Nalline test, for although the person giving the test must be skilled, the result is the physical reaction of the patient, not an interpretation of the working of a machine which records a physical reaction. Some of the critics of drunkometer tests say that although that machine may detect alcohol in the system of the accused, it does not measure his ability to drive. This criticism

³⁶ *People v. Williams*, 164 Cal. App. 2d 858, 862, 331 P.2d 251 (App. Dep't 1958).

³⁷ *Ibid.*

³⁸ For examples of the more restrictive judicial approach, see cases cited notes 34, 35 *supra*.

³⁹ Conrad, *The Admissibility of the Nalline Test As Evidence of the Presence of Narcotics*, 50 J. CRIM. L., C & P.S. 187, 190 (1959), states, "[The *Frye* case] has placed a judicial straight jacket on the field of scientific evidence, is very unrealistic in view of modern developments, and fails to recognize the vast specialization which is a part of our modern society."

⁴⁰ WITKIN, CALIFORNIA EVIDENCE § 325 (Supp. 1959).

⁴¹ CAL. DEP'T OF PUBLIC HEALTH, RECOMMENDED PROCEDURE FOR THE NALORPHINE TEST 4 (1958).

⁴² Chief Parker of the Los Angeles Police has adopted the position that Nalline will not be used in Los Angeles, and he seems to be under the impression that the procedure recommended by the *ad hoc* advisory committee has the effect of law. Address by Chief Parker, Los Angeles Police Officers' Association, April 15, 1959. This impression is erroneous, for the pamphlet is obviously not law; it recognizes the test which Chief Parker condemns as being inconsistent with the law. Further research on the effectiveness, safety and relevant law should be given to the Nalline test by the Los Angeles Department of Police.

⁴³ 154 Cal. App. 2d 646, 658, 316 P.2d 370, 378 (1957).

does not apply to the Nalline test, for the statute proscribes the very presence of narcotics within the system of the accused, which is precisely what the Nalline test measures.

The court in the *Williams* case put great emphasis on the fact that the legislature passed a statute, Health and Safety Code section 11722, with reference to the Nalline test.⁴⁴ "This enactment must be accepted as a legislative mandate that the Nalline test has probative values."⁴⁵ This statement was made even though that Code section was not involved in the case in order to support the admissibility of the Nalline test. More recently, in 1959, the legislature added sections 11728, 11729 and 11730 to the Health and Safety Code, directing the California Department of Justice to promote and sponsor the use of narcotic tests by agencies of local government. The department is authorized to cooperate in the establishment of facilities for, and the training of, personnel to conduct testing procedures pursuant to section 11722. The legislature also added section 11723 to the Health and Safety Code, which provides for the administration of a test to discover the use of narcotics in a person who has been arrested for a criminal offense and is suspected of being an addict. Because the *Williams* case was decided before these latest Code sections, it may be said that the legislature has sanctioned by implication the approbation in *Williams* of Dr. Terry's version of the Nalline test as having probative value and as being a proper test for Health and Safety Code section 11721 as well as section 11722.

The exact meaning of Health and Safety Code section 11723 is not entirely clear. There are obvious defects in the drafting of the statute. Section 11723 reads:

In any case in which a person has been arrested for a criminal offense and is suspected of being a narcotics addict, a law enforcement officer having custody of such person may, with written consent of such person, request the city or county health officer, or physician appointed by such health officer pursuant to section 11722, to administer to the arrested person a test to determine, by means of use of a synthetic opiate anti-narcotic in action, whether the arrested person is a narcotic addict, and such health officer or physician may administer such test to such arrested person.

It is to be noted that the statute requires written consent for the administration of the Nalline test. An important question to be determined is whether the word "only" is to be read into the statute. It is probably safe to assume that the statute is not primarily intended to provide a tort remedy for suspected addicts. Originally the authors of the statute appear to have intended that the legislature give specific statutory authorization for the employment of the Nalline test in situations involving arrests in addition to the existing authorization of use in probation and parole. In the legislative committee, however, it was erroneously assumed that a compulsory Nalline test would violate the privilege against self-incrimination. Consequently the result was to give statutory authorization for use of the Nalline test only when conducted on a voluntary basis.⁴⁶

Although that may have been the result intended by the legislature, the practical result is nevertheless still in doubt. One possible conclusion is that the legislature has codified the result of the *Williams* case and has assured the admissibility in evidence of a properly conducted Nalline test. On the other hand, it may be interpreted to mean that the legislature has additionally made inadmissible in

⁴⁴ *People v. Williams*, 164 Cal. App. 2d 858, 862, 331 P.2d 251 (App. Dep't 1958).

⁴⁵ *Ibid.*

⁴⁶ Los Angeles Times, June 4, 1959, p. 3, col. 8.

evidence all Nalline tests given without written consent. Under the latter interpretation a Nalline test conducted without written consent might be considered an unlawful search and seizure and therefore inadmissible in California under *People v. Cahan*.⁴⁷ It should be noted, however, that it does not always follow that scientific evidence is inadmissible if obtained without the defendant's consent.

An additional problem is presented by the fact that the statute states that a Nalline test may be given to persons suspected of being addicted to narcotics, but fails to recognize that there is a physiological difference between an addict and a user of narcotics. Both the *condition* of addiction and the *act* of using narcotics are crimes, yet the literal reading of the statute sanctions the Nalline test only upon the suspected addict and not upon the user. This is an unreasonable interpretation because both of these crimes are treated alike under section 11721. Written consent is a strict requirement and is not often employed; such a condition to the exercise of the statutory grant of authority would not have been imposed without intending somehow to protect the individual. Improper drafting has created the anomalous result that only certain individuals will be protected while others who are similarly situated will not be affected.

There is still another serious problem in section 11723. The statute by its terms comes into play only where (1) a person has been arrested for a criminal offense *and* (2) is suspected of being a narcotics addict. It is not clear whether the phrase "arrested for a criminal offense" includes within its meaning the offenses of addiction to narcotics and the use of narcotics. The statute may be construed to apply only when the arrest is for an offense not involving narcotics. If the statute applied to *all* crimes including those involving narcotics, the second condition of section 11723 would be redundant in narcotics addiction cases, since a person who is arrested for addiction to narcotics is obviously suspected of being a narcotics addict. The statute, then, may be intended merely to insure that police may use a rather novel scientific test upon a consenting subject to detect the commission of a crime other than the one for which he was arrested. It is perhaps a lawful incident of the arrest of a person suspected of addiction to narcotics to determine the presence of narcotics in that person's system. If the use of Nalline on a person arrested for use or addiction is a lawful incident to the arrest, then a requirement of written consent may be an unnecessary burden on the State in such cases, whereas it would be a justifiable burden if the arrest were for a crime unrelated to the use of narcotics. Therefore, the courts may very well find that the statute is inapplicable not only when the crime for which the arrest is made is addiction but even when it is use of narcotics.

Since the effect of section 11723 on the admissibility of a Nalline test is not clear, and in any case many constitutional problems will remain, it is germane to discuss the law as it existed prior to the enactment of the section. Assuming the absence of bona fide consent, the admissibility of the Nalline test may be subject to attack on various constitutional grounds. First of all, it must be established whether the administering of the Nalline test in a medically approved manner would be such as to constitute brutality or to shock the conscience of the court and therefore be a denial of due process, as was the pumping of the defendant's stomach to produce narcotics in *Rochin v. California*.⁴⁸ In *Breithaupt v. Abram*,⁴⁹

⁴⁷ 44 Cal. 2d 434, 282 P.2d 905 (1955).

⁴⁸ 342 U.S. 165 (1951).

⁴⁹ 352 U.S. 432 (1956).

the extraction of blood from an unconscious defendant by a skilled technician was held not to shock the conscience, and the evidence obtained was held admissible over due process objections. The Nalline test must be regarded as more akin to the latter case than the former. Some authorities place great weight upon the fact that a needle is used for both blood tests and Nalline tests. They state that in a blood test, it is used to extract a substance from the body, and that this is the same in principle as using a needle to inject a substance into a human body.⁵⁰ However, it is possible that a court may not be content with this analogy, for the significant aspect of the Nalline test is the mild chemical reaction which occurs thirty minutes after the withdrawal of the needle, whereas the blood test involves no corresponding reactions. It must be demonstrated to the court that the results of an injection of 3 milligrams of Nalline are not harmful to the defendant when properly administered by a trained technician and that such a test cannot be labeled "brutal." In fact, as the test is now administered, one of the purposes of administering morphine sulfate to patients who may experience the discomfort of mild withdrawal symptoms is to guarantee that the Nalline test is in no way brutal. The procedure outlined by the California Department of Public Health, which measures by withdrawal symptoms other than pupillary dilation, comes closer to the conduct proscribed by standards of due process. It is of course possible to envision circumstances under which the test may be given in a violent manner, but the same may be said of a blood test. The Nalline test should satisfy due process requirements under ordinary circumstances.

It should be pointed out that thus far the Nalline test has been given in California only after lawful arrest and with freely given written consent; therefore the test has not presented the issue of an unlawful search and seizure so as to be inadmissible under *People v. Cahan*.⁵¹ However, even after a lawful arrest, issues will arise if consent was not given or was not given freely and with full knowledge of all necessary facts. If the written consent requirement of section 11723 does not apply to arrests made for addiction to narcotics or the use of narcotics, the problems which may arise at this point include whether it was a reasonable search, whether consent is necessary, whether consent was freely given, whether this is self-incriminatory, and the effect of a refusal to take the test.

A "search" for these purposes is defined as the examination of a man's person with a view to the discovery of some evidence of his guilt to be used against him in a criminal prosecution.⁵² The reasonableness of such a search involves the questions discussed above in connection with *Rochin*, and each case would be decided on its own facts. A forced Nalline test may not be admissible although given subsequent to a lawful arrest, just as a blood test in which the defendant's arm was broken may not be admissible.

Section 11723 requires written consent for a Nalline test in some cases. It does not state that the failure to obtain written consent will result in inadmissibility. The lack of written consent does not mean that a Nalline test is automatically involuntary; in any case prior decisions indicate that consent may not be an essential part of admissibility. There are no reported cases on the necessity of consent to a Nalline test. In *People v. Duroncelay*,⁵³ the defendant in a drunk-driving

⁵⁰ Conrad, *The Admissibility of the Nalline Test As Evidence of Narcotics*, 50 J. CRIM. L., C. & P.S. 190 (1959).

⁵¹ 44 Cal. 2d 434, 282 P.2d 905 (1955).

⁵² *Camden County Beverage Co. v Blair*, 46 F.2d 648 (D.N.J. 1930).

⁵³ 48 Cal. 2d 766, 312 P.2d 690 (1957).

case was taken to a hospital and was asked to take a blood test. The defendant made no reply and withdrew his arm, whereupon his arm was held and a sample of his blood was extracted. The California Supreme Court found that there was no consent to the blood test. The court relied on the *Breithaupt* case for its holding that this did not violate due process, and then went on to decide that this was "reasonable" under the *Cahan* case and hence admissible in evidence. The court held that where there are reasonable grounds for an arrest, a reasonable search of a person may be conducted, and that this blood test met the standard of reasonableness even without the defendant's consent. The court also said that it makes no difference whether the arrest was made before or after the blood test.

If one may analogize a Nalline test to a blood test, it is possible that where there are reasonable grounds for an arrest for a violation of Health and Safety Code section 11721, a Nalline test may be administered in a reasonable manner with or without the defendant's consent. The results would be admissible in evidence without violating section 11723, either because the consent provisions of that section do not apply where the arrest is for use of or addiction to narcotics, or because the consent provisions, though applicable, do not require inadmissibility as the penalty for failure to obtain consent. This would hold true in cases where the defendant was unconscious as in the *Breithaupt* case and in *People v. Haessler*,⁵⁴ or conscious as in the *Duroncelay* case, even though the arrest was subsequent to the Nalline test.

A municipal court in San Francisco was seemingly impressed by the fact that a Nalline test is not as every-day an occurrence as a blood test. That court rejected two Nalline tests on the grounds that written consent in one case came subsequent to a refusal to take the test, and that the defendant was not apprised of his rights in the second case.⁵⁵ If consent is essential to the admission in evidence of the Nalline test, each case must then be decided upon its own facts in determining whether or not consent was freely given. As in cases of confessions, the legality of the defendant's detention, the use of threats, and other forms of coercion are all factors to be considered in determining whether a defendant freely gave consent with knowledge of all necessary facts. In order to avoid questions of force or duress, the Nalline test has not been given in California without the signing of an "Authorization and Release Form."⁵⁶

Cases may arise where a doctor administers Nalline to an unconscious patient either as an antidote for narcotic poisoning or as a test to determine the necessary treatment. In such a case there would be an "implied consent," and the doctor would be able to proceed without actual consent in order to avert death or serious bodily harm.⁵⁷ Furthermore, for the doctor to testify to the results in court would not violate a physician-patient privilege because the privilege statute is limited to a "civil action" and does not apply in criminal cases.⁵⁸ As section 11723 is now worded, it is not clear whether evidence of this character would be admissible, because in addition to the lack of written consent, there is no arrest, and the statute may be interpreted as implying that there must be an arrest before Nalline may be used. Furthermore this test would not have been conducted by the proper health officer or made with his authority.

⁵⁴ 41 Cal. 2d 252, 260 P.2d 8 (1953).

⁵⁵ San Francisco Chronicle, Dec. 24, 1959, p. 31, col. 3.

⁵⁶ OFFICE OF THE DISTRICT ATTORNEY OF ALAMEDA COUNTY, THE NALLINE TEST AND ITS USE IN THE CITY OF OAKLAND (1958).

⁵⁷ PROSSER, TORTS 84 (1955).

⁵⁸ CAL. CODE CIV. PROC. § 1881(4).

Another objection to a Nalline test given subsequent to a valid arrest but without consent to the test may be that it is self-incriminatory. In *People v. Haussler*⁵⁹ the court admitted the results of a blood test administered to an unconscious subject over objections that this evidence was self-incriminatory. The court held that the privilege against self-incrimination pertains only to evidence obtained by testimonial compulsion. "Evidence is not obtained by testimonial compulsion where it consists of a test of blood taken from an accused. It is not a communication from the accused but real evidence of the ultimate fact in issue—the defendant's physical condition."⁶⁰ The court, therefore, distinguishes a compulsory physical examination from the compelling of a defendant to testify against himself by employing legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence. Analogizing the Nalline test to the blood test, it may seem that the Nalline test would also not involve testimonial compulsion and would not be subject to the defense of self-incrimination. It may also be seen that a Nalline test should not be inadmissible due to the failure to warn the defendant that it may be used against him, unless consent is held to be necessary to admissibility, in which event such knowledge may be an element of a voluntary consent.

Another problem to be considered at this point is the effect of a refusal to submit to a Nalline test. In *People v. McGinnis*⁶¹ an appellate court held that when a person has been arrested for drunken driving, his refusal to submit to an intoximeter test is conduct that tends to show a consciousness of guilt and is admissible in evidence against him.⁶² Therefore, assuming that the defendant is properly apprised of the character and significance of the Nalline test, and assuming that the privilege against self-incrimination is not applicable, the fact of a refusal to take the test should be admissible in evidence in California.⁶³

IV

DEFENSES BASED ON QUESTIONS OF THE RELIABILITY OF THE NALLINE TEST

The Office of the District Attorney of Alameda County has prepared an information circular, which it supplies on request, outlining the *Possible Defenses Used in Court* against the Nalline test, as a possible aid to prosecuting attorneys elsewhere.⁶⁴ The first defense is that the test is still in the experimental stages and is not yet an established or conclusive test for the detection of narcotics addiction. The Alameda District Attorney advises meeting this argument with the *Williams* case,⁶⁵ which rejected the need for general medical acceptance. The Office also suggests reliance upon the interpretation in the *Williams* case of Health and Safety Code section 11722 as constituting deliberate legislative recognition of the Nalline

⁵⁹ 41 Cal. 2d 252, 260 P.2d 8 (1953).

⁶⁰ *Id.* at 257, 260 P.2d at 11.

⁶¹ 123 Cal. App. 2d 945, 267 P.2d 458 (App. Dep't 1953).

⁶² A case note in 42 CALIF. L. REV. 697 (1954) points out the court's confusing language, that the defendant may have the "right to refuse" to take the test, which is inconsistent with its holding and which suggests that such a test would be self-incriminating, is in conflict with the *Haussler* case.

⁶³ A final constitutional argument is that because the Nalline test does not detect all forms of narcotics and not all users will have a positive result, those who are detected by the test are denied equal protection of the laws. This argument is answered by *Williamson v. Lee Optical Co.* 348 U.S. 83 (1955), an economic equal-protection case which settled a similar question by allowing the State to attack problems one at a time.

⁶⁴ OFFICE OF THE DISTRICT ATTORNEY OF ALAMEDA COUNTY, THE NALLINE TEST AND ITS USE IN THE CITY OF OAKLAND (1958).

⁶⁵ *People v. Williams*, 164 Cal. App. 2d 858, 331 P.2d 251 (App. Dep't 1958).

test. The Office also recommends mentioning the fact that some of the foremost authorities on narcotics addiction have done work in this field, including Doctors Terry, Ibsell and Vogel.

The second defense which is often raised is that the effect of light on the eyes will tend to dilate or constrict the pupils in such fashion as to make the result of the Nalline injection inconclusive. The Office offsets this argument with evidence showing that the testing room is set up so as to shut out outside lights and that the only light is a one hundred watt bulb permanently attached in front of and above the chair in which the patient is seated. The distance of the light is constant and any effect on the eye will appear when both readings are taken and will therefore make no difference.

The third defense is that there is a possible mechanical error in the use of a pupilometer by virtue of the shaking of the doctor's hands or his own margin of error in reading the comparison between the patient's eyes and the reading on the pupilometer. The Office has countered this argument with the fact that the doctor's arm rests in a movable, swinging, metal armrest which is attached to the patient's chair. The Office also has the officer assisting the doctor make an independent reading. However, it would probably be even more satisfactory to discard the pupilometer and to replace it with a device described to this writer by personnel at the University of California School of Optometry. This device consists of a pair of spectacles which would magnify the size of the patient's eye for the doctor's observation. On the front of the spectacles is a numbered gauge. The doctor would take his first reading from the gauge, inject the Nalline and wait 30 minutes for the pupil to react properly, and then, using the same spectacles, take the second reading. The possibility for error would be reduced by the fact that the doctor would be dealing with larger units than offered by the unmagnified eye. The California Department of Public Health recommends a photographic reading;⁶⁶ however, this would involve expense and wasted time should the pictures not print properly.

The fourth defense offered is that outside influences on a person's nervous system, such as fear and anxiety, can cause a dilation of the pupils. The Office answers this by pointing out that the doctor first checks the patient, recording his heartbeat and pulse rate and checking the reaction of the patient's pupils with a flashlight for a normal reflex. The Office asserts that if anything unnatural were present, it would be ascertainable before the first reading is made, and there is little reason to believe that the patient will be any more frightened at the end of the 30-minute period than before it.

The fifth defense is that the difference between the readings of pupil diameters is very small, perhaps from a measurement of 4 millimeters before the injection to one of only 4.5 millimeters after the injection. However, the Office points out that since the nonuser's pupils will constrict, the difference between what the reading is and what it should be is quite considerable. The Office also points out that although the diameter measurement seems small, comparing the over-all area is at times like comparing a quarter of a dollar to a nickel. Here also these objections would be countered by the use of magnifying spectacles that would increase the size of the units with which the doctor was working and decrease mistakes caused by working with small units.

CONCLUSION

The Nalline test is an effective method of dealing with users of narcotics. It is

⁶⁶ CAL. DEPT OF PUBLIC HEALTH, RECOMMENDED PROCEDURE FOR THE NALORPHINE TEST 12 (1958).

an aid in the conviction of these persons and a means of controlling them after they have been released. The Oakland Police Department indicates that the reduced consumption of narcotics by the addict has in turn been accompanied by a reduced crime rate. The Nalline test has received an impetus from the sanction given by the legislature in Health and Safety Code section 11728 to synthetic opiate anti-narcotic tests to determine the presence of narcotics, encouraging statewide use of such tests.

However, before the Nalline test can be utilized in some parts of the State, it will probably be necessary for the State Department of Public Health to take notice of the work which has already been done and to recognize the safety and reliability of Dr. Terry's technique of administering the test. The department should then establish this technique as the uniform minimum standard. This minimum standard would serve the purpose of safety to the patient and would leave no area of doubt for the courts as to the standards for admissibility in evidence of a Nalline test. The establishment of mandatory standards would also serve the purpose of regulating law enforcement agencies and preventing the use of methods that might encroach upon civil liberties and cause a court to declare the Nalline test inadmissible. The *Williams* case, if followed, will serve to further the admissibility of other valid and valuable forms of scientific evidence.

Health and Safety Code section 11723, which apparently was intended to codify the *Williams* case, is poorly drafted and allows various constructions. One of its possible purposes is the protection of individuals by requiring written consent before a test can be made. This is not an insurmountable burden on law enforcement officials, for even before the passage of that statute they encountered little difficulty in obtaining voluntary written consent. However, it is not difficult to imagine that there may be occasions when law enforcement officers will overlook the technicality of obtaining written consent for what otherwise may be a voluntary test. It does not automatically follow from section 11723 that the test will be inadmissible. One of the failings of the statute is that neither a purpose for its provisions nor a sanction for a failure to follow them is presented. There also is doubt as to whether the statute is intended to apply when addiction to narcotics or use of narcotics is the crime for which the individual was arrested. A legislative reassessment is in order for section 11723, and technical changes should be made to clarify the statute and prevent the evasion which it invites.

Aside from the problems raised by section 11723, the admissibility in evidence of a Nalline test may be established by analogizing a Nalline test to a blood test. The blood test is constitutionally permissible, and the Nalline test is comparatively superior, since it measures precisely what is proscribed by law and no further conclusions need be drawn as in the case of other scientific tests. A Nalline test, if reasonably performed, would not shock the conscience of the court. Until section 11723 is clarified it may be argued that the results of a Nalline test are admissible in evidence whether or not there was express written or oral consent, provided the test was not performed forcibly. The evidence obtained is not self-incriminatory because it does not involve testimonial compulsion. If the accused was properly informed of the significance of a Nalline test, the fact that he refused to take the test may in California be the subject of comment at a trial.⁶⁷

Stewart Weinberg*

⁶⁷ CAL. PEN. CODE § 1093 subdiv. 6.

* Member, Third-Year Class.