Police Warning in Drunk Driver Tests

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Prompted by shocking reports of police interrogation procedures, and desirous of maintaining a just balance between the rights of the state and the individual, the United States Supreme Court, in *Miranda v. Arizona*, found it necessary to restate the restraints which society must observe in accordance with the Federal Constitution in cases of criminal prosecutions of its citizens.

*Miranda* requires that any communications obtained in violation of its mandate may not be used in evidence at the trial. It limits the application of its warning to "in-custody interrogation," but goes no further in delineating its precepts. The United States Supreme Court has not as yet clearly discriminated between those cases in which *Miranda* applies and those in which it does not. Of course, the rule is not expressly limited to the type of heinous crimes involved in the *Miranda* series of cases, but the Court's decision furnishes no illustrations of the type of cases which do not fall within the rule.2

Recently, the Supreme Court specifically declined to consider the applicability of *Miranda* to motor vehicle cases in general.3 The various state courts are now being called upon to decide the extent of its application and, in particular, whether the *Miranda* mandate controls in misdemeanor proceedings.4 This article examines (1) the present status of *Miranda* in relation to drinking driver traffic offenses as interpreted by

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1 *Miranda v. State of Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). At 444-45 the Court ruled that "...the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.... Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."


the various courts, and (2) the necessity of extending the rule to these offenses.

Rochin to Schmerber

As the number of people slaughtered on the highways escalates annually, states continue to stiffen the penalties for "driving while under the influence," in hopes of reducing the holocaust caused partly by drivers who imbibe too freely. Effective enforcement of the law requires proof of the intoxication at the point of arrest because of alcohol's dissipating character. Motion pictures are often employed as the accused is placed through a performance test requiring him to write his name and address, pick up coins on the floor, and to close his eyes and touch his hand to his nose. Likewise, blood and urine analyses are often taken. The breathalyzer test is the most sophisticated and commonly employed apparatus for measuring the level of intoxication. The problems arise when Miranda warnings are not given prior to obtaining the incriminating evidence.

The history of the modern legal fate of the drinking driver begins with the case of Rochin v. California (oddly enough a narcotics case). At the request of the police the accused was stomach pumped to determine if he had swallowed any narcotic capsules. Ruling that it was "conduct that shocks the conscience," Mr. Justice Frankfurter said that the coerced confession must be excluded because it offended the community's sense of fair play and decency. The Court held that the defendant had been denied his due process of law but did not find that the police conduct led to his self-incrimination. Nevertheless, Mr. Justice Frankfurter, comparing real and testimonial evidence, concluded that there was no difference between a coerced confession and a forced pumping of the stomach. This distinction was (in later cases) to be elaborated upon by the Court.

In Breithaupt v. Abram, petitioner was convicted of manslaughter after causing an accident while driving a motor vehicle under the influence of intoxicating liquor. While he was unconscious, a physician took a blood sample. Breithaupt instituted a petition for habeas corpus on the ground that the admission into evidence of the blood sample analysis was a violation of the due process clause of the Fourteenth Amendment. The United States Supreme Court held that taking of blood did not violate defendant's right to due process because the taking of the sample did

7 Id. at 172.
8 Id. at 173.
9 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).
not offend the "sense of justice" of which it spoke in *Rochin*. Believing that there is nothing basically offensive in taking blood samples, the Court disregarded Frankfurter's relationship between coerced confessions and coerced physical evidence. The United States Supreme Court, citing *Twining v. State of New Jersey* and *Wolf v. Colorado*, summarily rejected petitioner's claims of violation of the Fifth Amendment privilege against self-incrimination caused by the admission into evidence of the analysis report and an unlawful search and seizure, violative of the Fourth and Fourteenth Amendments.

It is important to note that *Miranda* was decided before *Schmerber v. State of California* but in the same terms of court. Schmerber's car had been in an accident, and he was taken to a hospital for treatment. He was arrested and while still conscious (unlike *Breithaupt*), a sample of his blood was taken. The sample indicated intoxication and was admitted in evidence over defendant's objection. He contended that the withdrawal of the blood and the admission of the analysis in evidence denied him his due process of law, was an illegal search and seizure, deprived him of a right to counsel, and violated his right against self-incrimination. Mr. Justice Brennan, writing for the majority, rejected each of his claims.

The Court rejected the due process of law argument for the same reason that it later rejected Breithaupt's. The withdrawal did not offend "that 'sense of justice' of which we spoke in *Rochin v. California.*" The search and seizure claim was rejected because the search of his body was reasonable and incident to a lawful arrest supported by probable cause.

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11 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908), held that the protection of the Fourteenth Amendment did not embrace the Fifth Amendment privilege.
12 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), held that in a prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the admission of relevant evidence even though obtained by an unreasonable search and seizure. Note, however, that before Schmerber was decided, Twining and Wolf were supplanted by *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), holding that the Fourteenth Amendment secured against state invasion the same privilege that the Fifth Amendment guaranteed against federal infringement, i.e., the right to be free from self-incrimination; and *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), holding that the exclusionary rule of federal prosecutions must also be applied in state courts.
15 *Id.* Generally a policeman is required to obtain an arrest warrant when the misdemeanor does not occur in his presence. The Court dismissed the need for a warrant under these facts because the officer might reasonably have believed that he was confronted with an emergency, where the delay necessary to obtain a warrant would threaten the destruction of the evidence by a diminution in the percentage of alcohol in the blood, which begins shortly after drinking stops. State of New Jersey v. Swiderski, 94 N.J. Super. 14, 225 A. 2d 728 (1967); Also see, State v. Harbatuk, 95 N.J. Super. 54, 229 A. 2d 820 (1967); State v. Tolbert, 100 N.J. Super. 350, 241 A. 2d 865 (1968); But see, State v. Haud, 101 N.J. Super. 43, 242 A. 2d 888 (1968).
Petitioner also claimed that since he was compelled to submit to the test, though he objected on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. The Court ruled that since petitioner was not entitled to assert the privilege under California law, he had no greater right because counsel erroneously advised him that he could assert it. "His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate." 16 The Court did, however, indicate that no issue was presented of counsel's ability to assist petitioner in respect to any rights he did possess. It cannot be suggested that had petitioner requested counsel he might be refused, 17 but the Court avoided the question of whether he must be advised of his right to an attorney. 18

The most controversial aspect of Schmerber concerns Fifth Amendment rights. The Court held that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and the use of the analysis in question in this case did not involve compulsion to these ends." 19 Compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate the privilege. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds. 20 Thus a questionable distinction was firmly established. Compulsion which produces real or physical evidence does not violate the privilege, while the same compulsion which elicits communications or testimony is forbidden.

Aftermath of Schmerber

Four dissenting justices disagreed with this distinction without a difference and wrote separate opinions. Justice Black's dissent presented the interesting view that the sole purpose of the test is to obtain "testimony" from some person (the technician who analyzes the blood sample) to prove that the petitioner had alcohol in his blood, and is "communicative" in that it supplied information to enable a witness to communicate to the court that the petitioner was drunk. Justice Black criticizes the Court's narrow interpretation of the Fifth Amendment and indicates that Miranda requires a broad and liberal construction of the privilege rather than the limited view adopted in this case. 21

16 Schmerber v. California, supra note 13 at 766.
18 Schmerber v. California, supra note 13 at 766.
19 Ibid. at 761.
20 Id.
21 Id. at 773-78.
Although the margin was slim, the Court's rule has been reflected in a majority of the state court drunk driving convictions despite the failure to give the *Miranda* warnings. As illustrated in the following cases, *Schmerber* has usually proven sufficient to rebuff any claim that the accused was denied his constitutional rights.

In *City of Piqua v. Hinger*, the defendant was arrested in the City of Piqua, Ohio, in 1967. He was taken to a police station, questioned, given a performance test recorded on film and a breathalyzer test, then advised of his constitutional rights, and finally charged with operating a motor vehicle while under the influence of intoxicating liquor (a misdemeanor in Ohio). At defendant's trial in Piqua Municipal Court these films were admitted into evidence and exhibited to the jury over the objection of defendant's counsel that they were obtained in violation of defendant's constitutional rights under *Miranda*. The defendant was convicted of the offense.

While Hinger was convicted in the municipal court, a similar Ohio case was being decided on appeal. *City of Columbus v. Hayes*, in a *per curiam* decision, ruled that "since the punishment for the offense charged is not now such as to bring this case within the constitutional limitations on custodial interrogation" no Miranda warnings are required and the conviction was confirmed.

Hinger, in the meantime, appealed his conviction and the Court of Appeals for Miami County reversed the judgment of conviction on the ground that evidence of the physical tests performed should have been suppressed on the theory of *Miranda*. Judge Kerns and a unanimous court criticized the *Hayes* opinion for not stating a reason for its conclusion, as follows:

... we have encountered some difficulty in recognizing why constitutional rights are any less sacred in misdemeanor cases than in felony cases. ...

The distinction between misdemeanors and felonies is found in the penalty provisions of the criminal law, and this distinction, which is based entirely upon the place of possible confinement, has little or nothing to do with the actual trial of a criminal case. How then could this distinction affect the basic question of fairness which is an inherent quality of every constitutional safeguard?

... The onerous prospect of confinement in the county jail rather than the state penitentiary is hardly an adequate substitute for a fair trial and, as a practical matter, it is well known that the

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23 Ibid. The punishment for driving while intoxicated is governed by Ohio Rev. Code §§ 4511.19 and 4511.99(B) (Page's 1965 ed., with 1966 suppl.). The penalty includes a fine of up to $500 and imprisonment of not less than three days nor more than six months.
25 9 Ohio App. 2d 38, 222 N.E. 2d 829 (1967).
26 Ibid.
actual punishment for many felonies is less harsh and severe than the penalties which may be inflicted in some misdemeanor cases.\textsuperscript{27}

Judge Kern's seemingly logical decision was soon reversed when the Ohio Supreme Court settled the conflict.\textsuperscript{28} The Court indicated that the issue to be decided was whether the ruling in \textit{Miranda} is applicable in misdemeanor cases. Ruling that the evidence was real or physical and of the kind designated in \textit{Schmerber} as unprotected by the Constitution, the evidence was held to be constitutionally admissible irrespective of whether the warnings required by \textit{Miranda} are given. Thus the Court never decided the basic issue of the case.

In \textit{Gottschalk v. Sueppel}\textsuperscript{29} the accused contended that he had a constitutional right to consult with counsel before consenting to or refusing a chemical test. The court rejected his contention, holding that these rights do not apply to an administrative proceeding resulting in a license revocation.

In \textit{People v. Letterio},\textsuperscript{30} a New York court ruled that there is no mandate requiring the court hearing a traffic case to advise the defendant of his right to counsel. Justice Scileppi reasoned that,

\begin{quote}
...some may say that the right to counsel extends to all crimes, we say that neither our State nor the Federal Constitution requires (sic) the court having jurisdiction of a petty offense like a traffic infraction, so to advise defendant.

...New York has long deemed traffic infractions as a form of misconduct distinguishable from more serious breaches of the law.\textsuperscript{31}
\end{quote}

\textsuperscript{27} City of Piqua v. Hinger, supra note 22 at 112; also see, City of Toledo v. Frazer, 10 Ohio App. 2d 51, 226 N.E. 2d 777 (1967), where the court held that until a mandate comes from the Supreme Court of the United States it was not mandatory under the Ohio Constitution to furnish counsel at public expense to indigent defendants charged with a misdemeanor.

\textsuperscript{28} City of Piqua v. Hinger, 15 Ohio St. 2d 110, 238 N.E. 2d 766 (1968).

\textsuperscript{29} 258 Ia. 1173, 140 N.W. 2d 866 (1966).


\textsuperscript{31} People v. Letterio, 16 N.Y. 2d 307, 266 N.Y.S. 2d 368 at 311-12 (1965); Solomon, This New Fetish for Indigency: Justice and Poverty in an Affluent Society, 66 Col. L. R. 248, n. 77 (1966). “In its recent ruling that persons charged with traffic violations in N.Y.C. need not be advised of their right to counsel, the New York Court of Appeals estimated that the New York Criminal Court handled about 2,000,000 traffic offense cases annually. The majority opinion, by Judge Scileppi, noted that “assigning counsel to but 1 per cent of these cases could require the services of nearly half the attorneys registered in the state.” See, People v. Letterio, No. 275, N.Y. Ct, App. Dec. 30, 1965, p. 4. New York's highest court seems to be saying that the “constitutional” rights of traffic offenders will be legitimated or denied on grounds of economy or practicality, rather than on grounds of theory or principle.”
WARNING IN DRUNK DRIVING TESTS

Chief Justice Desmond, finding it difficult to fathom the court's distinction between traffic offenses and crimes, dissented by distinguishing People v. Witenski, where it was held that the defendant's constitutional rights were violated by the failure to notify him of his right to assignment of counsel even though the amount involved in the alleged theft was no more than $2.00 and the imprisonment ordered was for a few days only. Viewing the distinction as unfounded, the Chief Justice condemned the majority for:

... holding that this constitutional right somehow disappeared in the present cases simply because the legislature chose to label these wrongdoings as "traffic infractions" rather than "crimes," and even though the penalties here imposed are far greater than in Witenski....

The wording of the Bill of Rights does not distinguish between a felony and a misdemeanor. The purpose of the guaranty is to give assurance against deprivation (regardless of length) of life or liberty, a result clearly overlooked in the above case.

The New Jersey courts, in accord with the majority, have held that the breathalyzer "is a search of the person and therefore subject only to the question of reasonableness," in State v. Kenderski, and that the Miranda warnings are not applicable to prosecutions under the Motor Vehicle Act.

Recently, in State v. Gillespie, the court again hid behind the Schmerber shield but pointed out that: "the issue is close and weighty. If we can avoid deciding it here, the Supreme Court not having spoken, we should. We have decided to take no definite position on the point. ..." The opinion seemed motivated by practical considerations which favor avoiding Miranda in drunk driving cases, especially the frequency of such prosecutions and the difficulties of mobilizing counsel quickly for those arrestees unable to afford such protection.

A New York District Court held the test results admissible despite the lack of warnings, by distinguishing between jus and lex. Noting that

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33 People v. Letterio, supra note 30, at 315. The penalty in this case included a fine of $1,030 or 135 days imprisonment: see, People v. Bliss, 53 Misc. 2d 472, 278 N.Y.S. 2d 732 (1967), where Judge Serra ruled that, traffic infractions are treated as misdemeanors for determination of jurisdiction, procedure, and manner of arrest only. "... Unless traditional rules as to coercion have been violated so as to render a confession involuntary as determined by a hearing held under statute, admissions or confessions are admissible in traffic infraction cases. ... This is a part of the substantive law of evidence and not a mere procedural facet."
37 Id. at 244.
“right is the liberty to do or refrain from doing anything,” and that “law determines and binds,” the court continued that “In a lawful society, man willingly, when others are likewise willing, lays down his rights to all things and acclimates himself to so much liberty or right as he would allow other men. If it be otherwise, the result would be disastrous.” 38 Certainly these are comforting words to one who is denied his basic rights.

These few cases exemplify the reasoning given by the courts holding the Miranda warnings an unnecessary privilege for the drunk driver. Disregarding the “real” or “communicative” test, the fact that traffic violations are misdemeanors, and the impracticality of obtaining counsel for the accused, a few courts have found it impossible to disregard the basic rights of the intoxicated driver. These courts have suppressed the results of a breathalyzer test where the defendant was not adequately warned of his rights. An unusual decision supporting this position came from a New York court. In a decision ripe with legalistic prose, Judge Raymond L. Wilkes posed the question: “Is it better to have ‘advised’ and wonder, than never to have ‘advised’ at all?” 39 He answered with an implied “affirmative” and then suppressed the results of a performance test given in the absence of the Miranda warnings. The Schmerber test was neatly disposed of by citing the United States Supreme Court:

... To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege “is as broad as the mischief against which it seeks to guard.” 40

He then suggested that a performance test elicits such physiological responses.

Support for his opinion was also found in United States v. Wade, 41 decided one year after Schmerber, in which Justice Fortas wrote: “To permit Schmerber to apply in any respect beyond its holding is in my opinion indefensible.” 42 Judge Wilkes continued, by stating:

The Performance Tests to which this defendant was subjected without having been advised of his right to counsel ... were remorselessly related to the condition of his sobriety, and hence, to the questions of his guilt or innocence. These tests went to the very

40 Id. at 680, citing Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S. Ct. 195, 198 (1892).
42 Id,
Judge Wilkes found that the defendant communicated his guilt by participating in the test. The Miranda warnings were found to be "apposite." 44

People v. Sweeney 45 distinguished Schmerber and ruled that the incriminating evidence must be suppressed. California statutes permit the police to take a test despite defendant's refusal, 46 while in New York, if the defendant chooses not to take the test, no test is administered. Since the defendant could choose whether or not to submit to the test and had a right to have his own physician administer the test he was denied his Sixth Amendment right by being refused a call to his attorney.

There are very few state cases supporting the proposition that a drunk driver deserves the same protection as a hardened criminal. There is even less federal authority for this position. In the recent case of United States v. Green, 47 the court boldly attacked the majority who follow Schmerber by ruling that:

The distinctions between compulsions of a communicative nature which are protected and those which produce only "identifying physical characteristics" or become the source of "real or physical evidence," which are not protected by the Fifth Amendment are nebulous.48

The Supreme Court seems to be waiting for the lower court decisions to jell before it attempts to refine its Miranda mandate. The Court's recent decision in United States v. Wade 49 tends to indirectly affirm the Schmerber holding. Speaking for the majority, Mr. Justice Brennan said that the preparatory stage of scientifically analyzing the accused's fingerprints or blood sample is not a critical stage requiring the right to the presence of counsel. "... (these) are not critical stages since there is minimal risk that his counsel's absence at such stages might

43 People v. McLaren, supra note 39 at 995.
44 People v. McLaren, supra note 39 at 996; but see People v. Gursey, 22 N.Y. 2d 224, 239 N.E. 2d 351 (1968) where court held that where a defendant wishes to telephone his lawyer there is no danger of delay in administering a drunkometer test which would justify refusing request, but a defendant does not have an absolute right to refuse the test until his lawyer reaches the scene if he cannot be reached promptly.
47 282 F. Supp. 373, 374 (S.D. Ind. 1968).
48 Ibid.
49 U.S. v. Wade, supra note 41.
derogate from his right to a fair trial." 50 It seems that the Court is disregarding the reason for the Miranda decision: "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on. . . ." 51 Despite the alleged accuracy of a drunkometer an attorney would be an overseer of the procedure rather than a menace to law enforcement. He would protect the right of his client to a meaningful defense. After all, isn't that the purpose of providing the Miranda warnings?

The Fortas dissent in Heller v. Connecticut 52 presented the pragmatic approach:

... Petitioner's lawyer, had petitioner's request to call him been granted, might have performed an important function, which was not capable of performance five or six hours later. He might have insisted upon medical or chemical tests; he might have summoned a private physician. At the very least, he could have informed the arrested person's family and friends that the accused had not disappeared without a trace, but was held, safely, if unhappily, in jail. 53

Forty-five states have "implied consent" statutes. Each statute is based upon the theory that there is no natural or unrestrained right to operate a motor vehicle. It is a "privilege" which is subject to reasonable regulation under the police power of the state. 54 Since the statutes in most states vary 55 it is unlikely that an interstate traveler understands his rights under the statute. For that matter, it is unlikely that a driver in his own state will understand his rights and liabilities under the law. An attorney is indispensable in advising the accused of his responsibilities in regard to the statute. In State v. Mobley 56 a police officer told the defendant that his refusal to take a test would be used as an assumption of guilt in court. Had an attorney been present he could have advised the accused that the North Carolina statute had no such provision. 57 Likewise, an attorney could advise the accused whether or not to take the test. More importantly, an attorney could act as an outside

50 Ibid.; see, People v. Mulack, 40 Ill. 2d 429, 240 N.E. 2d 429 (1968), where court held that the time of visual testing of person arrested for drunken driving and of breath analysis was not a critical stage of the proceedings and a person arrested was not entitled to Miranda warnings.

51 Miranda v. Arizona, supra note 1, at 448.

52 Heller v. Connecticut, supra note 3, cert. denied.

53 Ibid.

54 For cases upholding the constitutionality of such statutes, see 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 127 (1963); 60 C.J.S. Motor Vehicles, § 146 (1949). Also see, State v. Hanusiak, 4 Conn. Cir. 54, 225 A. 2d 208 (1966); Bean v. Strelecki, 101 N.J. Super. 310, 244 A. 2d 316 (1968).

55 Erwin, op. cit. supra note 5.


observer clarifying any discrepancies between the facts observed and those adduced in court.

**Conclusion**

A person accused of driving while intoxicated is more likely to be an ordinary citizen than a hardened criminal. A few of the "boys" decide to get together and celebrate, or a young college student sets out to prove his virility. Naturally, this does not reduce the seriousness of the offense. The inebriated driver causes an excessive loss of life annually and the process of his apprehension creates the need for a fair, enforceable, and accurate system of detection. But should society's interest in promoting highway safety be superior to the protection of individual rights? Death is final, whether premeditated or caused by a drunken driver. Why should the former class be accorded superior rights over the latter?

Those who seek to categorize the law will relish knowing that a definite majority trend exists. These decisions refuse to extend *Miranda* beyond its clear limits until the Supreme Court furnishes further guidelines. *Schmerber* remains as authority for the position that the character of a defendant's blood relates to his corporeal features and does not involve any testimonial compulsion prohibited by the Bill of Rights.

Whether or not the trend will change is questionable. *Miranda* should not be employed to thwart law enforcement, but it should extend to those who need its protection. When a misdemeanor requires in-custody interrogation the unassisted layman is placed in a disadvantageous position as the legal process begins. The warning principles of *Miranda* must be applied reasonably and with common sense in order to achieve the protection demanded by our system of jurisprudence.