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Massachusetts Law on the Inadmissibility of Evidence of a Suspect's Refusal to Test in Drunk Driving Cases: A Self-Defeating Approach

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MASSACHUSETTS LAW ON THE INADMISSIBILITY OF EVIDENCE OF A SUSPECT'S REFUSAL TO TEST IN DRUNK DRIVING CASES: A SELF-DEFEATING APPROACH?

I. HISTORY OF THE DEMAND FOR REFUSAL EVIDENCE

A state's interest in preserving the safety of its public roadways is perhaps its most fundamental.[1] As "the slaughter on the highways of this Nation exceeds the death toll of all our wars,"[2] states continue to recognize their "compelling interest in highway safety."[3] While the problem is not new, the public's awareness and frustration about the crime of operating a motor vehicle while under the influence of an intoxicating substance (OUI), are increasing steadily.

States responded to the public outcry for tougher enforcement through various legislative approaches. All states enacted implied consent laws.[4] Such laws require a suspected drunk driver to submit to the chemical testing of his breath, blood, or urine, in order to determine his or her blood alcohol level.[5] Some states attempted to enforce this chemical testing by imposing a penalty upon a suspect who refuses to submit.[6] For instance, most states suspend a suspect's driving privileges if he or she refuses chemical testing.[7] Other states, such as Alaska and Nebraska, enacted legislation which makes the act of refusal itself a crime.[8] Finally, a majority of the states and the

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[1] Mackey v. Montrym, 443 U.S. 1, 17, 19 (1979); Dixon v. Love, 431 U.S. 105, 114-15 (1977). *See also* South Dakota v. Neville, 459 U.S. 553, 558 (1983) ("The carnage caused by drunk drivers is well documented and needs no detailed recitation here").

[2] Perez v. Campbell, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring) (footnote omitted).

[3] *Mackey*, 443 U.S. at 19.

[4] Susan Waite Crump, *The Admission of Chemical Test Refusals After* State v. Neville: *Drunk Drivers Cannot Take The Fifth*, 59 N.D. L. REV. 349, 350 (1983).

[5] *Id.* "Blood alcohol content" refers to the amount of alcohol in a person's bloodstream, described as percentage by weight. *Id.* at 350 n.12 (citation omitted).

[6] *Id.*

[7] Crump, *supra* at 350.

[8] D. Bernard Zaleha, *Alaska's Criminalization of Refusal To Take A Breath Test: Is It A Permissible Warrantless Search Under The Fourth Amendment*, 5 ALASKA L. REV. 263, 264 (1988). *See* ALASKA STAT. §§ 28.35.032(G), .030(c) (1987) (Refusal to submit to chemical testing results in denial or revocation of driver's license; refusal may also be used against individual in both criminal and civil proceedings; conviction carries a minimum sentence of 72 hours' imprisonment and $250 fine for first conviction; subsequent

federal courts admit the evidence of refusal during the suspect's criminal trial.[9] While these jurisdictions allow such refusals into evidence, a minority of jurisdictions, including Massachusetts, stringently prohibit the introduction of the refusal evidence on the grounds that it violates a defendant's freedom from self-accusation.[10]

The Massachusetts Supreme Judicial Court has consistently expanded the protections granted under the Federal Constitution in the Massachusetts Declaration of Rights. In the context of OUI, the Supreme Judicial Court recently afforded a criminal defendant even broader protections in *Commonwealth v. Zevitas*.[11] Not only will the Court prohibit introduction of the refusal evidence, but now the Court forbids even the mere mention of such a test vis-à-vis jury instructions.[12] In today's multi-media society, however, jurors are aware of the procedures inherent in an OUI stop. The concept and reputation of chemical and field sobriety tests incident to the arrest of a suspected drunk driver are common knowledge. Thus, the jury may reasonably infer that the absence of chemical test evidence at trial is due to the

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convictions carry minimum sentence of 20 days' imprisonment and $500 fine; penalties increase for each subsequent conviction.); NEB. REV. STAT. §§ 39-669.08 (1984 & Supp. 1987), 28-106 (1985) (Person who refuses to submit to preliminary breath test placed under arrest and guilty of Class V misdemeanor, which carries maximum fine of $100 but no imprisonment; once arrested, person who refuses to consent to chemical testing, if subsequently convicted and if individual has no previous convictions for refusal, shall be guilty of Class W misdemeanor, carrying mandatory seven-day prison term and $200 fine; in addition, driver's license revoked for six months. Penalties increase for each subsequent conviction).

[9] Majority of jurisdictions held that privilege against self-incrimination does not prohibit admission of evidence of defendant's refusal to take breathalyzer test. *See* Allen v. State, 330 S.E.2d 588 (Ga. 1985); State v. Courmier, 499 A.2d 986 (N.H. 1985); State v. Gardner, 629 P.2d 412 (Or. App. 1981); State v. Vietor, 261 N.W.2d 828 (Iowa 1978); People v. Thomas, 385 N.E.2d 586 (N.Y. 1978), *appeal dismissed*, 444 U.S. 891 (1979); State v. Neisbitt, 735 P.2d 337 (Okla. Crim. App. 1978); State v. Brean, 385 A.2d 1085 (Vt. 1978); State v. Meints, 202 N.W.2d 202 (Neb. 1972); People v. Sudduth, 421 P.2d 401 (Cal. 1966), *cert. denied*, 389 U.S. 850 (1967) (refusal to furnish breath sample for breathalyzer constitutionally admissible under Federal Constitution). *See also* Annotation, *Admissibility in Criminal Case of Evidence That Accused Refused to Take Test of Intoxication*, 26 A.L.R.4th 1112, 1138-139, 1144-145 (1983 & Supp. 1992).

[10] *See, e.g.*, Opinion of the Justices, 591 N.E.2d 1073 (Mass. 1992); State v. Anonymous, 276 A.2d 452 (Conn. Cir. Ct. 1971); State v. Munroe, 171 A.2d 419 (Conn. 1961); Hovious v. Riley, 403 S.W.2d 17 (Ky. Ct. App. 1966); State v. Andrews, 212 N.W.2d 863 (Minn. 1973), *cert. denied*, 419 U.S. 881 (1974); People v. Rodriguez, 80 Misc. 2d 1060 (N.Y. Sup. Ct. 1975); State v. Adams, 247 S.E.2d 475 (W. Va. 1978).

[11] 639 N.E.2d 1036 (Mass. 1994).

[12] *Id.*

fact that the defendant refused to submit to such a test. This article discusses the failures and incongruity of the *Zevitas* decision.

II. THE TESTIMONIAL–REAL EVIDENCE DISTINCTION

The Fifth Amendment to the United States Constitution affords a criminal defendant the privilege against self-incrimination.[13] State and federal courts have interpreted this protection as prohibiting the compelled extraction of testimonial evidence from an accused.[14] Testimonial evidence reflects the knowledge, understanding, or thoughts of a witness.[15] The courts distinguish testimonial evidence from physical evidence, such as blood, saliva, and voice exemplars, which is not protected under the Fifth Amendment.[16] In the context of OUI, most courts that have applied Fifth Amendment principles to a suspect's refusal to submit to a chemical test have found no violation of the privilege against self-incrimination, reasoning that refusal is a "physical act rather than a communication."[17]

In *South Dakota v. Neville*,[18] the United States Supreme Court examined whether introducing evidence that the defendant refused to submit to a blood-alcohol test was proper in light of the Fifth Amendment protection against self-incrimination.[19] In *Neville*, police officers stopped the defendant after he failed to obey a stop sign.[20] The police officers observed the defendant stagger and fall against his motor vehicle, and smelled alcohol on

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[13] The Fifth Amendment to the United States Constitution states: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

[14] Doe v. United States, 487 U.S. 201, 207 (1988); Fisher v. United States, 425 U.S. 391, 408 (1976).

[15] Commonwealth v. Buckley, 571 N.E.2d 609, 613 (Mass. 1991); Commonwealth v. Doe, 544 N.E.2d 860, 862 (Mass. 1989).

[16] Schmerber v. California, 384 U.S. 757, 765 (1966).

[17] South Dakota v. Neville, 459 U.S. 551, 560-61 (1983) (citations omitted). *See* State v. Rollyson, 486 N.E.2d 838 (Ohio App. 1984) (defendant's refusal to submit to breathalyzer or urine test on advice of her attorney, and corresponding statement to effect that if she took test, "it would prove her guilty," held admissible because not protected by privilege against self-incrimination under *Neville*); State v. Gardner, 629 P.2d 412, 416 (Or. Ct. App. 1981) ("Because a person's breath constitutes real or physical evidence rather than testimonial or communicative evidence, a person under arrest has no constitutional right to refuse to take a breath test. . . . [and thus] a defendant's refusal to take a sobriety test in the form of a blood or breath test does not violate his or her right against self-incrimination").

[18] 459 U.S. 534 (1983).

[19] *Id.* at 564.

[20] *Id.* at 554.

his breath.[21] After the police officers administered a field-sobriety test, which the defendant failed, they placed him under arrest.[22] The arresting police officers then asked the defendant to submit to a blood-alcohol test, warning him that he could lose his license upon refusal.[23] The defendant refused the police officers' thrice-issued requests to submit to the chemical testing, stating, "I'm too drunk, I won't pass the test."[24]

The South Dakota Supreme Court prohibited the introduction of the defendant's refusal.[25] That Court reasoned that the defendant's refusal was a "communicative act involving [his] testimonial capacities and that the State compelled this communication by forcing [the defendant] 'to choose between submitting to a perhaps unpleasant examination and producing testimonial evidence against himself.'"[26] The United States Supreme Court, however, reversed the lower court, holding that "refusal" evidence does not offend the right against self-incrimination.[27]

The Fifth Amendment right against self-incrimination, applicable to the States through the Fourteenth Amendment, bars the State from compelling communications or testimony from an accused.[28] The *Neville* Court noted that many courts have decided that a refusal to submit to chemical testing is a physical act and not a communication.[29] As such, evidence of refusal to submit does not violate the privilege against self-incrimination.[30]

The Supreme Court explained in *Neville* that "the distinction between real or physical evidence . . . and communications or testimony . . . is not readily drawn in many cases."[31] As such, the Court opted to rest its decision upon the fact that "no impermissible coercion is involved when the sus-

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[21] *Id.* at 554-55.

[22] *Neville*, 459 U.S. at 555.

[23] *Id.*

[24] *Neville*, 459 U.S. at 555.

[25] *Id.* at 556; State v. Neville, 312 N.W.2d 723 (S.D. 1981).

[26] *Neville*, 459 U.S. at 557-58.

[27] *Id.* at 554.

[28] *Neville*, 459 U.S. at 559.

[29] *Id.* at 560.

[30] *Id.* at 560-61. *See* People v. Sudduth, 421 P.2d 401 (Cal. 1966), *cert. denied*, 389 U.S. 850 (1967) (refusing to take potentially incriminating test similar to other circumstantial evidence of consciousness of guilt).

[31] *Neville*, 459 U.S. at 561.

pect refuses to submit to take the test, regardless of the form of refusal."[32] The Court decided that the State did not compel the defendant to refuse the test as it had presented the defendant with the choice of submission or refusal.[33]

In ruling that evidence of a suspect's refusal to submit to testing may be introduced at trial, the Court further noted that under *Schmerber*, a suspect may be compelled to submit to chemical testing.[34] While *Schmerber* clearly permits a State to "force" a person suspected of drunk driving to submit to chemical testing, South Dakota has declined to conduct testing against the suspect's will.[35] Instead, the South Dakota statute permits a suspect to refuse, and requires police officers to inform the suspect of his or her right to refuse, so as to "avoid violent confrontations."[36] According to the Supreme Court, "the action becomes no *less* legitimate when the State offers a second option of refusing the test with the attendant penalties for making that choice."[37] Thus, *South Dakota v. Neville* and its progeny hold that a refusal to take a blood alcohol test, in response to a police officer's lawful request, is not an act coerced by the police officer, and thus is not afforded the privilege against self-incrimination.[38]

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[32] *Id.* at 562. The Court noted that it "has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Id.*, (quoting Fisher v. United States, 425 U.S. 391, 397 (1976)).

[33] *Neville*, 459 U.S. at 562. The Court further noted that the State does not offer any real compulsion to either submit or refuse to chemical testing, as "[t]he simple blood-alcohol test is so safe, painless, and commonplace." *Id.* at 563.

[34] *Id.* at 559 (citing Schmerber v. California, 384 U.S. at 765). In *Schmerber*, the Supreme Court determined that blood samples forcibly taken from a defendant suspected of drunk driving, by a physician at a police officer's direction, was not violative of the Fifth Amendment, as "[n]ot even a shadow of testimonial compulsion or enforced communication by the accused was involved either in the extraction or in the chemical analysis." *Id.*

[35] *Neville*, 459 U.S. at 559.

[36] *Id.* at 559-60.

[37] *Id.* at 563 (emphasis in original).

[38] Evidence of a defendant's refusal to submit to chemical testing is admissible in a majority of jurisdictions, where statutes expressly provide for their introduction. Jay M. Zitter, Annotation, *Admissibility In Criminal Case of Evidence That Accused Refused To Take Test of Intoxication*, 26 A.L.R. 4th 1112, 1123 (1983 & Supp. 1994). *See, e.g.*, Gibson v. Troy, 481 So. 2d 463 (Ala. Crim. App. 1985); Longlet v. State, 776 P.2d 339 (Alaska Ct. App. 1989); State v. Thornton, 837 P.2d 1184 (Ariz. Ct. App. 1992); State v. Castillo, 528 So. 2d 1221 (Fla. Dist. Ct. App. 1988); Keenan v. State, 436 S.E.2d 475 (Ga. 1993); People v. Thomas, 558 N.E.2d 656 (Ill. App. Ct. 1990); State v. Hennessey, 405 N.W.2d 846 (Iowa 1987); State v. Adee, 740 P.2d 611 (Kan. 1987); State v. Washing-

In contrast, Massachusetts courts bar the admission of a defendant's refusal to submit to chemical testing on the ground that it violates the privilege against self-incrimination, as protected by Article Twelve of the Massachusetts Declaration of Rights.[39] The courts note, however, that such refusal does not violate any principle of the United States Constitution.[40]

In *Opinion of the Justices to the Senate*,[41] the Justices of the Massachusetts Supreme Judicial Court held that proposed legislation, which allowed admitting evidence of a suspect's refusal to submit to a breathalyzer test, would have the effect of compelling the accused to provide testimonial evidence in violation of Article Twelve.[42] The Justices expressed their fear that, "[i]n the ordinary case a prosecutor would seek to introduce refusal evidence to show, and would argue if permitted, that a defendant's refusal is the equivalent of his statement, 'I have had so much to drink that I know or at least suspect that I am unable to pass the test.'"[43] Used for such a purpose, the Justices concluded that refusal evidence constitutes evidence of an accused's thought process and is therefore testimonial in nature.[44]

While the Justices opined that evidence of the refusal to submit to chemical testing is testimonial under Article Twelve, they held ten years earlier that the *results* of these chemical tests are not testimonial.[45] In *Brennan*, the Massachusetts Supreme Judicial Court concluded that since Article Twelve of the Declaration of Rights only applies to testimony or communications, neither a breathalyzer nor field-sobriety test is "communicative to

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ton, 498 So. 2d 136 (La. Ct. App. 1986); State v. Berge, 464 N.W.2d 595 (Minn. Ct. App. 1991); Ricks v. State, 611 So. 2d 212 (Miss. 1992); Helena v. Barrett, 798 P.2d 544 (Mont. 1990); People v. Bratcher, 560 N.Y.S.2d 516 (1990); West Fargo v. Maring, 458 N.W.2d 318 (N.D. 1990); Harris v. State, 773 P.2d 1273 (Okla. Crim. App. 1989); State v. Fish, 852 P.2d 838 (Or. 1993); Commonwealth v. McConnell, 591 A.2d 288 (Pa. Super. Ct. 1991); State v. Long, 778 P.2d 1027 (Wash. 1989).

[39] Commonwealth v. Lydon, 597 N.E.2d 36, 39-40 (Mass. 1992) (evidence that defendant refused to allow police to swab his hands to test for evidence that he had recently fired a gun violated privilege against self-incrimination under Article Twelve). Article Twelve of the Massachusetts Declaration of Rights provides that no person shall "be compelled" to accuse or to furnish evidence against oneself. *Id.* at 39.

[40] Opinion of the Justices to the Senate, 591 N.E.2d 1073, 1078 (Mass. 1992). *See* Commonwealth v. Lydon, 597 N.E.2d at 40.

[41] 591 N.E.2d 1073 (Mass. 1992).

[42] *Id.* at 1076.

[43] *Id.* at 1077 (quoting Williford v. State, 653 P.2d 339, 342-43 (Alaska Ct. App. 1982)).

[44] *Id.* at 1077.

[45] Commonwealth v. Brennan, 438 N.E.2d 60 (Mass. 1982).

the extent necessary to evoke the privilege."[46] In *Brennan*, the defendant contended that Article Twelve encompassed real or physical evidence as well as testimonial.[47] The Supreme Judicial Court declined to take such an expansive view for two reasons.[48]

First, the Court noted that "[a] purely literal construction of art[icle] 12 would forbid the compelled production of any evidence furnished by the defendant."[49] The Justices expressed doubt that the framers of the State Constitution intended Article Twelve to prohibit such common methods of identification as fingerprints, photographs, and line-ups.[50] Second,

> [e]ven a cursory review of the history of the privilege leaves little doubt that the privilege was directed toward the forced extraction of confessions and admissions from the lips of the accused. This suggests that the framers of our Declaration of Rights did not contemplate that art[icle] 12 apply to real or physical evidence, the production of which would have no inherently communicative value.[51]

Thus, Article Twelve does not extend its privilege against self-incrimination to non-communicative evidence.[52]

Finally, the Massachusetts Supreme Judicial Court in a recent decision, *Commonwealth v. McGrail*,[53] expanded the rubric of communicative evidence to include evidence of a suspect's refusal to submit to a field sobriety test.[54] The Court noted, however, that Article Twelve does not protect the results of field sobriety tests as the tests are mere dexterity tests, and are "based on the subject's loss of coordination, rather than his subjective knowledge of the crime."[55] While the results of the field sobriety test are admissible, the evidence of the refusal to submit to the testing is not permitted, as it constitutes testimonial evidence concerning the defendant's belief in his or her level of intoxication.[56]

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[46] *Id.* at 67.

[47] *Id.* at 65.

[48] *Id.*

[49] *Brennan*, 438 N.E.2d at 65.

[50] *Id.*

[51] *Id.* at 66.

[52] *Id.*

[53] 647 N.E.2d 712 (Mass. 1995).

[54] *Id.*

[55] *Id.* at 714 n.7.

[56] *Id.*

The Justices recognized that evidence of a suspect's refusal to submit to a breathalyzer test, and refusal to take a field sobriety test differ only slightly.[57] Moreover, the Court found present the same level of compulsion attached to the request to submit to a field sobriety test as exists with chemical tests.[58] Therefore, the Justices concluded that admitting evidence of a suspect's refusal to take a field sobriety test violates the defendant's Article Twelve privilege against self-incrimination.[59]

III. *COMMONWEALTH V. ZEVITAS*: MERE MENTION OF THE DEFENDANT'S RIGHT TO REFUSE CHEMICAL TESTING CONSTITUTES REVERSIBLE ERROR

On July 12, 1990, at approximately 11:15 P.M., Edward Allaire was operating an automobile in the right lane of the Massachusetts Turnpike, approaching the Allston-Brighton toll booths, when his car suddenly became inoperable.[60] Mr. Allaire activated the car's hazard lights, and approached the rear of the vehicle, accompanied by one of the two passengers, in order to push the vehicle to the toll-gate ramp.[61] As Mr. Allaire and one of the passengers were pushing the vehicle, the second passenger steered the vehicle toward the edge of the road.[62]

At this time, the defendant was also traveling in a westerly direction on the turnpike at a speed of forty five to fifty miles per hour.[63] The defendant struck the rear of the troubled vehicle and killed Mr. Allaire, who was positioned at the left rear of the car.[64] At the scene of the accident, the defendant said repeatedly that he "didn't see [Allaire's car]."[65]

During the trial, three state troopers, who observed the defendant at the scene of the accident, testified that the defendant's breath smelled strongly of alcohol, "his eyes were bloodshot and glassy, he was unsteady on his feet and his speech was slurred."[66] Since the defendant did not submit to chemi-

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[57] *McGrail*, 647 N.E.2d at 715.

[58] *Id.*

[59] *Id.*

[60] 639 N.E.2d 1076 (Mass. 1994).

[61] *Id.* at 1077.

[62] *Id.*

[63] *Zevitas*, 639 N.E.2d at 1077.

[64] *Id.*

[65] *Id.*

[66] *Id.*

cal testing,[67] the trial judge instructed the jury, over the defendant's objection, in pertinent part:

> In this case, no evidence has been offered about any breath test or blood test. I remind you that such a test may be administered only with a person's consent and that a person has a legal right either to take or not to take such a test. In any particular situation, there may be a number of reasons why a person would not take such a test; and there may be a number of reasons why such a test was not administered by the police. *You are not to speculate about why there is no evidence of such a test in this case. You are not to draw any inference favorable or unfavorable to either the defendant or the Commonwealth because there is no such evidence.* You are to decide whether the defendant is guilty or not guilty based solely on the evidence that has been presented to you in this particular case.[68]

These instructions were based on those mandated by the Massachusetts OUI statute.[69]

The Supreme Judicial Court held that the jury instruction, as formulated by chapter 90, section 4(1)(e) of the Massachusetts General Laws was unconstitutional, as it had the effect of presenting evidence that a defendant had refused to submit to a breath or blood test.[70] The Justices reasoned that the trial "judge told the jury, by strong implication at least, that the defendant's blood alcohol level had not been tested, and that the reason no test

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[67] *Zevitas*, 639 N.E.2d at 1077.

[68] *Id.* at 1078-79 (emphasis added).

[69] MASS. GEN. L. ch. 90, § 24(1)(e) (1994) provides in pertinent part:

> Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding, but shall be admissible in any action by the registrar under paragraph (f). When 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 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.

[70] *Zevitas*, 639 N.E.2d at 1079.

was conducted was that the defendant refused to submit to such a procedure."[71] Further, in response to the Commonwealth's urging that the instruction stressed non-speculation, the Supreme Judicial Court noted that it

> [is] confronted with an erroneous instruction, although legislatively mandated and . . .cannot fairly conclude that the judge's admonition against speculation and inferences based on the information he had given the jury dissuaded the jury from concluding that the defendant had refused to submit to a blood alcohol test and using that evidence against him in violation of his art[icle] 12 rights.[72]

Thus, the Court held that the trial judge's issuance of the jury instructions, although legislatively mandated, constituted reversible error requiring a new trial.[73]

IV. THE HOLDING IN *ZEVITAS* MAY INADVERTENTLY UNDERMINE ITS OWN GOALS

The Massachusetts legislature promulgated the OUI statute[74] in an effort to protect the public from drunk drivers.[75] A defendant has no right, either statutory or constitutional, to take a breathalyzer test.[76] Rather,

> [w]hoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which the public has access as invitees or licensees, *shall be deemed to have consented to submit to a chemical test or analysis of his breath*

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[71] *Id.*

[72] *Id.* The Justices elaborated that "[w]here the prejudicial remarks fall from the judge himself, the effect on the jury is likely to be more damaging [than the erroneous admission of testimony] . . . ." *Id.*, quoting Commonwealth v. Goulet, 372 N.E.2d 1288, 1295 (Mass. 1978).

[73] *Id.* at 1079. In Commonwealth v. McGrail, 647 N.E.2d 712 (Mass. 1995), the Court upheld its conclusion that the mandated instruction increased the likelihood that a jury might "draw the impermissible inference that the defendant refused to take both [chemical and field sobriety] types of tests because he was too intoxicated to pass either test." McGrail, 647 N.E.2d at 716. The *McGrail* Court, however, failed to rule on the retroactivity of *Zevitas* as the issue was not preserved, and as it did not affect the outcome of the case at bar. *Id.*

[74] MASS. GEN. L. ch. 90, § 24.

[75] Commonwealth v. Connolly, 474 N.E.2d 1106, 1109 (Mass. 1985); Petras v. Storm, 465 N.E.2d 283, 285-86 (Mass. App. Ct. 1984), *appeal denied*, 469 N.E.2d 830 (Mass. 1984).

[76] Commonwealth v. Mencoboni, 552 N.E.2d 589, 590 (Mass. App. Ct. 1990); Commonwealth v. Alano, 448 N.E.2d 1122 (Mass. 1983).

> *or blood* in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. . . .[77]

This statutorily imposed implied consent, however, is qualified: under present law, a defendant may refuse to undergo such a test, but will lose his license to operate a motor vehicle for one hundred twenty days.[78] Thus, the statute provides the defendant the alternative of submitting to or refusing a chemical test.

The Massachusetts Declaration of Rights provides more protection, under Article Twelve, than does the Fifth Amendment to the United States Constitution because it not only protects a person from being "compelled to be a witness against himself,"[79] but it also provides that no person can be compelled to "furnish evidence against himself."[80] In *Emery's Case*[81] the Supreme Judicial Court stated that

> it is a reasonable construction to hold that it protects a person from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him.[82]

Further, the Justices have explained the policy behind the Article Twelve privilege:

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[77] MASS. GEN. L. ch. 90, § 24(1)(f) (emphasis added).

[78] *Id.*

[79] U.S. CONST. amend. V; MASS. CONST. art. 12.

[80] Opinion of the Justices, 591 N.E.2d at 1076 n.5. Article 12 of the Declaration of Rights of the Massachusetts Constitution provides:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; *or be compelled to accuse, or furnish evidence against himself.* And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous offense, excepting for the government of the army and navy, without trial by jury (emphasis added).

[81] 9 Am. Rep. 22 (Mass. 1871).

[82] *Id.* at 23.

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'[83]

Thus, the Massachusetts Declaration of Rights offers a criminal defendant more protections than does the Fifth Amendment.[84]

Article Twelve, however, prohibits "any comment by the judge which can be fairly understood as permitting the jury to draw an inference adverse to the defendant from the fact of his failure to testify."[85] Given the special weight of the defendant's refusal to submit to chemical testing to the fact-finder, the defendant, in essence, must choose whether to testify at trial or whether to submit to chemical testing.[86] This results because:

> [t]o the jury, the defendant's silence at trial, even without comment by a prosecutor and even with an instruction from the court, may appear to be part of a continuing cover-up. The defendant's failure to rebut the evidence of his refusal to submit to a BAC test creates an adverse inference of guilt. Thus, the statutory scheme yields the final 'evidence' furnished by the defendant to secure his own conviction.

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[83] Attorney General v. Colleton, 444 N.E.2d 915, 917 (Mass. 1982) (citations omitted).

[84] The United States Supreme Court, however, has stated that there is no significant difference in privilege between the Fifth Amendment use of the word "witness" and certain state constitutions' provisions for furnishing evidence:

> [A]s the manifest purpose of the constitutional provisions, both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction . . . [of the constitutional provisions] however differently worded, would have as far as possible the same interpretation. . . .

Schmerber v. California, 384 U.S. at 761-62 n.6 (citations omitted).

[85] Commonwealth v. Pope, 406 Mass. 561, 589 (Mass. 1990). *See* Commonwealth v. Goulet, 372 N.E.2d 1288, 1294 (Mass. 1978); Brown v. Commonwealth, 140 N.E.2d 461, 464-65 (Mass. 1957).

[86] State v. Cormier, 499 A.2d 986, 994 (N.H. 1985) (Douglas, J. dissenting).

> Carried to its logical end result, this previously suspect degree of compulsion to testify becomes constitutionally impermissible.[87]

The Supreme Judicial Court opined that contrary to the view taken in *Neville*, refusal evidence is compelled evidence because "the threat of adverse testimonial evidence [is] . . . a coercive tool to compel submission to a breathalyzer test. The accused is thus placed in a 'Catch-22' situation: take the test and perhaps produce potentially incriminating real evidence; refuse and have adverse testimonial evidence used against him at trial."[88]

The New Hampshire Constitution, which adopted the wording of Article Twelve of the Massachusetts Declaration of Rights, prohibits a person from "furnishing evidence" against himself.[89] In contrast to the Massachusetts approach, however, the Supreme Court of New Hampshire held that refusal to submit to testing is not compelled for two reasons.[90] "First, it is clear that a defendant's testimonial response prompted by the imposition of State power upon him does not, without more, amount to compelled self-incrimination. If it did, the requirements of *Miranda v. Arizona*[91] could not in principle be confined to interrogations, and any statement following State intrusion would be inadmissible unless preceded by the warnings and waiver that *Miranda* requires."[92] Second,

> there is nothing about the characteristics of chemical tests for blood alcohol that can be said to force a defendant to choose the so-called refusal option. The State does not, and could not, employ unreasonable means of physical coercion to induce a defendant's consent or to take the sample against a defendant's will.[93]

Thus, the inducement provided by the State works in quite the opposite direction; the civil penalty for refusal is an inducement to submit to the test, not to refuse it."[94]

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[87] *Id.* at 995.

[88] Opinion of the Justices, 591 N.E.2d at 1078.

[89] N.H. CONST. pt. 1, art. 15.

[90] State v. Cormier, 499 A.2d at 988.

[91] 384 U.S. 436 (1966).

[92] State v. Cormier, 499 A.2d at 990.

[93] *Id.* *See* Rochin v. California, 342 U.S. 165 (1952) (Due process prohibiting the use of brutal means to require test or obtain sample).

[94] State v. Cormier, 499 A.2d at 990.

V. CONCLUSION

Prior to *Commonwealth v. Zevitas*, jury instructions mandated by the OUI statute attempted to balance the jurors' collective and common knowledge with the defendant's Article Twelve protections. Trial judges attempted to forbid the creeping of extrinsic evidence into the jury room by instructing the jury not to speculate about the absence of chemical evidence. With the removal of such an instruction, a criminal defendant now risks being convicted on the basis of his de facto refusal to submit to chemical testing. This is not a case where the judge attempts to "unring the bell" of improperly admitted evidence. Instead, the instruction mandated by the Massachusetts OUI statute acknowledges the sophistication of the average juror in drunk driving procedure, and requires that verdicts be based on the evidence produced at trial. Therefore, the Massachusetts Supreme Judicial Court has undermining its own goals by stripping the criminal defendant of his or her rights in OUI cases.

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