Criminal Law

Coming to a Roadside Near You: The Textalyzer

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Distracted driving has become problematic to say the least. Indeed, "Americans confess in surveys that they are still texting while driving, as well as using Facebook and Snapchat and taking selfies."[1]

One question for the legal profession is whether law enforcement's appetite for evidence relating to arrests and ticketing for unlawful texting and driving while intoxicated (DWI) should subject our mobile phones to seizure and search. An additional question is the scope of the implied consent laws, traditionally used throughout the United States and regularly invoked in roadside stops for drunk driving to compel the taking of breath samples from drivers.

Birchfield: Breath Samples Are a Reasonable Search for DWI

The Supreme Court recently determined in *Birchfield v. North Dakota*[2] that the collection of breath samples collected as a search incident to an arrest is a reasonable intrusion of personal liberty when compared with the government's interest in ameliorating, preventing and addressing DWI crimes.

Often, it is the constable's predictable observation of bloodshot and glassy eyes, slurred speech and unsteadiness on one's feet that results in an arrest for driving while intoxicated. Unhappily for many, such symptoms are often consistent with many forms of entirely innocent behavior, especially after a driver has been in a car accident.

The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Prior to *Birchfield*, the Supreme Court noted that "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."[3]

The Supreme Court has approved compulsory blood tests for a variety of law enforcement purposes.[4] In New York, complied consent laws impose mandatory one-year license revocation for any driver who refuse to "voluntarily" provide a sample of breath or blood when requested to do so by a police officer when probable cause exists to believe the driver have been driving under the influence.

Presumptive Intoxication to Per Se Illegality

Alcohol intoxication was not always proved in court by the collection of a sample of a fellow or gal's breath. The Supreme Court in *Birchfield* noted that in 1939, Indiana enacted the first law that defined *presumptive* intoxication at a .15% Blood Alcohol Concentration (BAC). The fact that a criminal presumption could be rebutted only by a persuasive and affirmative showing of innocence by the driver was quite a revolutionary legal concept. It certainly brought "science" more squarely into the DWI picture.

Evidently not satisfied with the .15% BAC standard, states moved away from the presumption and moved toward *per se* illegality with a Blood Alcohol Concentration reading of .10% or above. This, of course, was a sea change and a point of concern at the corner pub. Subsequently, of course, the legal BAC limit has been lowered to .08 and, alarmingly for some, is aggressively trending downward.

The Supreme Court noted that "[t]he most common and economical method of calculating BAC is by means of a machine that measures the amount of alcohol in a person's breath."[5] Although it may sound comical now, one such early device for analyzing breath was the "Drunkometer." Destined to be replaced by the more commonly known "Breathalyzer," itself to be replaced with the "Intoxilyzer," law enforcement's advancement in technology was based upon the principle evinced by the Drunkometer, that one's blood alcohol content could accurately be reflected by a breath sample.

The biggest problem with the use of these machines for law enforcement was that the cooperation (voluntary breath sample) of the driver was required.

Implied Consent: The Rule of the Road

Implied consent became the rule of the road. In 1953, New York was one of the first states to provide that "cooperation with BAC testing was a condition of the privilege of driving on state roads and that the privilege would be rescinded if a suspected drunk driver refused to honor that condition."[6] Eventually, every state in the union fell in line and strengthened its drunk-driving and implied consent laws, frequently under threat of the federal government's retaliatory withholding, from any given non-compliant state, all fed-

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eral highway money, making national uniformity a near certainty given the catastrophic consequences of the loss of such monies.[7]

And so it was that the success of implied consent laws gave rise to a coercive form of voluntary breath and blood sampling, given the loss of license consequences. The government now had a new ability to regularly test the blood alcohol concentration of suspected drunk drivers. Drunk driving laws had evolved and now prohibited a certain chemical status. The government was no longer constrained to arrest only for actual impaired ability to drive but it could arrest a man even had he just won the Daytona 500 if the percentage of alcohol in his blood was a wee too high. A calculation of blood alcohol concentration was divined remarkably not from a blood test, but from a good old deep lungful of potentially incriminating air—voluntarily produced, of course.

Enter the Textalyzer for Cell Phone Searches

Remember that the Fourth Amendment protects against *unreasonable* searches. Not long ago, in *Riley v. California*, the Supreme Court recognized that, "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."[8] "Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy."[9] The Supreme Court went as far as to say that "modern cell phones ... are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[10]

Ought one to be deemed to have impliedly consented to the search of such an "important feature" merely by driving one's auto down the boulevard?

Indicating that the Fourth Amendment may be changing with the "digital age," Justice Sotomayor "would…consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power."[11]

In April 2016, the American Bar Association Journal published an article observing that "(s)ome say distracted driving by those who are texting behind the wheel is every bit as dangerous as drunken driving."[12] Most reasonable people presumably would agree that this is a legitimate law enforcement issue.

New York is considering proposed legislation known as the Textalyzer Law.[13] "On a summer morning near Chappaqua, New York, in 2011, Evan Lieberman, 19, was carpooling with co-workers when the driver collided with another vehicle. Five occupants between the two cars were sent to the hospital. After 32 days of intensive care and multiple surgeries, the teenager died." The proposed legislation known as «Evan's Law, was spearheaded by Evan's father. His family blamed an allegedly distracted [texting] driver."[14] Proposed technology, called the "Textalyzer," is being developed to prove distracted driving.

As technology advances, from phone-equipped watches to voice-activated bluetooth systems, privacy fears abound. Language is selected "to alleviate privacy concerns…emphasiz[ing] that the [T]extalyzer will only look at phone usage, not its content."[15]

Do not fret as Big Brother is not quite yet "real time" watching New York drivers. "Like breath-test laws, the bill uses implied consent, which is given by anyone merely driving on the roads of New York whether or not in possession of a New York driver's license, to justify the search of the phone."[16] "It would work like this: An officer arriving at the scene of a crash could ask for the phones of any drivers involved and use the Textalyzer to tap into the operating system to check for recent activity."[17]

As with refusing a breath test, "drivers who refuse to hand over their phones risk their license or driving privileges, which 'shall be immediately suspended and subsequently revoked,' says the draft legislation."[18]

Red light cameras, speed cameras and the Breathalyzer make the "privilege" of driving on the road nothing if not increasingly intrusive. Surely phone, financial, texting, photo, email, web browsing and other data ought to be more sacrosanct and preciously safeguarded against law enforcement intrusion than the single lungful of breath.

Is there no personal liberty or right to privacy which ought not to be sacrificed in the name of public safety and law enforcement? Let us all hope for the speedy arrival of the accident-proof driverless car. It might help solve the drunk driving problem and, perhaps, resurrect the corner pub.

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1. Matt Richtel, *Texting and Driving? Watch Out for the Textalyzer*, NY Times (April 27, 2016) http://nyti.ms/1qSJ3sQ.
2. 136 S.Ct. 1535 (2016).
3. *Riley v. California*, 134 S.Ct. 2473, 2494 (2014).
4. *See, e.g.*, *Schmerber v. California*, 384 U.S. 757 (1966).
5. *Birchfield*, 136 S.Ct. at 2167.
6. *Id.*
7. 106 H.R. 5394, § 351 (2000).
8. *Riley*,134 S Ct at 2488-89.
9. *Id.* (citing Kerr, Foreword: *Accounting for Technological Change*, 36 Harv. J. L. & Pub. Pol'y 403, 404-405 (2013)).
10. *Id.* at 2484.
11. *United States v Jones*, 132 S.Ct. 945, 956 (2012) (Sotomayor, J., concurring) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).
12. Martha Neil, *Lawmakers mull 'textalyzer' bill that would let cops test cellphones to ID distracted drivers*, ABA Journal (April 12, 2016) https://goo.gl/xK71nJ.
13. Jason Tashea, *New York considers 'textalyzer' bill to allow police to see if drivers were texting behind the wheel*, ABA Journal (October 1, 2016).
14. Neil, *supra* note 12.
15. *Id.*
16. Tashea, supra note 13.
17. Matt Richtel, *Texting and Driving? Watch Out for the Textalyzer*, NY Times (April 27, 2016) http://nyti.ms/1qSJ3sQ.
18. Tashea, *supra* note 13.