

# Drunk Driving, Implied Consent, and Self-Incrimination

Kehinde A. Ogundipe, MD, and Kenneth J. Weiss, MD

The effects of drunk driving are a significant risk to public health and safety. Accordingly, the federal government and the states have enacted laws that permit law enforcement to identify offenders and to apply various levels of sanctions. There is no constitutional requirement that evidence of drunkenness be permitted in defense of criminal behavior. In practice, citizens who undertake to operate motor vehicles under the influence of alcohol are considered reckless *per se* and have no right to obstruct law enforcement in determining their condition. Indeed, refusal of roadside sobriety tests, including the Breathalyzer, may be considered a separate offense. The issuing of *Miranda*-type warnings by police officers has been ruled on recently in New Jersey. In a superior court appellate decision, *State v. Spell*, the court outlined the necessary procedures, concluding that, although motorists have no right to refuse testing, police officers have an obligation to issue sufficient warnings before the motorist decides how to proceed. In the *Spell* matter, the defendant incriminated himself by refusing the testing, even though he was acquitted on the drunk-driving charge. The authors discuss the role of expert testimony in these matters.

**J Am Acad Psychiatry Law 37:386–91, 2009**

Driving while intoxicated (DWI; often DUI, driving under the influence, or OWI, operating a motor vehicle while intoxicated) is unlawful in all jurisdictions. This prohibition applies to alcohol, with a blood alcohol concentration (BAC) of 0.08 percent taken as the standard for determining intoxication, and to drugs. In either case, motorists are subject to field sobriety tests (FSTs; for example, walking a line, reciting the alphabet) that provide the police with quasi-objective information on the motorist's condition. That a person is under the influence is never a defense to a crime or motor-vehicle infraction involving reckless behavior. The state laws vary as to the admissibility of evidence of intoxication in crimes involving higher levels or intent, such as knowing and purposeful behavior,<sup>1</sup> although there is no constitutional mandate that states have such laws.<sup>2</sup>

Many motorists believe that, by refusing FSTs, especially the Breathalyzer (or its equivalent; for example, Alcotest), they can avoid detection. They are then surprised to learn that it is also against the law to

refuse the tests. All states have an implied-consent law, whereby operating a motor vehicle obligates the motorist to comply with FSTs.<sup>3</sup> These laws have been found constitutionally sound.<sup>3</sup> In practice, there are parallel requirements between motorists and police officers: the motorist must submit to FSTs or possibly face criminal or civil penalties, and the officer must apprise the motorist of the consequences of refusal. An interesting permutation of this scenario is that in some jurisdictions the motorist can be acquitted of the DWI offense and convicted of the refusal (they are separate offenses), often with significant consequences (usually license suspension). The purpose of this article is to provide background on how these laws work in practice and to suggest applications of psychiatry, in the event that the defendant's state of mind is at issue.

## Legal Basis of Field Sobriety Tests

All jurisdictions are required, at minimum, to protect citizens from intoxicated drivers by way of guidelines promulgated by the United States Department of Transportation, National Highway Traffic Safety Administration,<sup>4–6</sup> which supports state-administered programs under alcohol-impaired driving countermeasures. Drivers have an obligation to comply with these laws and to submit to breath alcohol (BrAC) tests and other roadside or in-custody exam-

Dr. Ogundipe is Chief Resident, Department of Psychiatry, Drexel University College of Medicine, Philadelphia, PA. Dr. Weiss is Adjunct Clinical Professor of Psychiatry, UMDNJ-Robert Wood Johnson Medical School, and Clinical Fellow in Psychiatry and Associate Director, Forensic Psychiatry Fellowship Program, University of Pennsylvania Health System, Philadelphia, PA. Address correspondence to: Kehinde A. Ogundipe, MD, Drexel University College of Medicine, Department of Outpatient Psychiatry, 1427 Vine Street, 8th Floor, Philadelphia, PA 19102. E-mail: kehinde.ogundipe@drexelmed.edu

inations (for example, a blood alcohol concentration [BAC] test). This obligation derives from the implied consent doctrine, defined as follows:

This type of law provides that a person gives implied consent to submit to a test for either an alcohol or drug content in his/her body if he/she is arrested or otherwise detained for a DWI offense. If the person refuses to submit to such a test, the law usually provides that his/her driving privileges will be either suspended or revoked. The results obtained from such a test are usually admissible into evidence at a DWI trial [Ref. 5, p ii].

Because implied consent may not be self-evident to motorists, police encounter a variety of responses from sober and intoxicated drivers, ranging from cheerful consent to belligerent refusal, to ambiguous hesitancy. Accordingly, drivers stopped by police are issued a set of warnings pertaining to the consequences of refusal.

### Zero Tolerance

Under pressure from Mothers Against Drunk Driving (MADD)<sup>7</sup> and state prosecutors to reduce further the risk of drunk driving, some states have undertaken a less tolerant approach to FST or BAC refusals. For example, in December 2008, the city of Austin, Texas initiated a no-refusal weekend, during which motorists who refused testing would be subject to a search warrant and forced phlebotomy.<sup>8</sup> During a nine-hour period, seven persons were arrested and taken to the Jefferson County jail, where involuntary testing was ordered for one.<sup>9</sup> Then on New Year's Eve, Austin police caught 24 drunken drivers; 12 complied with breath or blood testing, whereas 12 were court ordered to a phlebotomy station in the county jail.<sup>10</sup> In South Carolina as of 2009, there are enhanced license suspensions and a new provision that police need only read *Miranda* warnings once.<sup>11</sup>

### Are Refusal Warnings on the Roadside Comprehensible?

Sober and intoxicated drivers are susceptible to a range of reactions under the stress of a traffic stop. While the average citizen is likely to be compliant, some try to second guess the police by reasoning that if they refuse FSTs they will escape detection. Such individuals may find, to their dismay, that they can be prosecuted without chemical tests and that, as noted, refusal alone will have negative consequences.

We have reproduced in the Appendix an example of a statement that police in New Jersey are required to read in its entirety to drivers. We are impressed by its length, complexity, and use of difficult words such as ambiguous, conditional and unconditionally. Under the stressful conditions of a DWI arrest, the phrase "You have no legal right. . ." could easily be misconstrued as the more familiar *Miranda* phrase "You have the right. . ." Clearly, it is a cumbersome procedure, but one that has been mandated by law. In the following example, we see the interplay between efficient law enforcement and an arguably citizen-friendly procedural protection that inhibits efficient policing.

### State of New Jersey v. Spell

This police procedure has become a lightning rod for litigation. In 2004, Ernest Spell rear-ended another vehicle at 3:00 a.m. on a major New Jersey highway.<sup>12</sup> The state trooper who responded noted indicia of intoxication: the odor of alcohol, flushed face, and bloodshot eyes. He conducted FSTs, such as horizontal gaze, alphabet, heel to toe, and one-legged standing. Mr. Spell performed poorly and was arrested for DWI. The defendant received *Miranda* warnings and then told the trooper that he had had four beers between 8 and 11 p.m. the evening before. The reason he was on the road was that he had just received a call that his best friend's father had died. With respect to the FSTs, he attributed any flaws in performance to the effects of the crash and of airbag impact and residue. According to trial testimony, at the State Police barracks, the trooper asked Mr. Spell to give a breath sample. Although the trooper said the defendant refused, Mr. Spell said that he had difficulty breathing and that he wanted to take the test, but needed to feel better first. An hour later, Mr. Spell requested the test, but the trooper declined because of the prior refusal.

Mr. Spell was convicted in municipal court of DWI, careless driving, and refusal of the breath test. The judge found that the defendant's alleged breathing problem was not credible, but rather, a convenient way to avoid a Breathalyzer test. Taking the trooper's testimony as credible, that the defendant had flat-out refused, the court, relying on case law, stated: "It has been held that anything short of an unqualified, unequivocal assent to take the Breathalyzer test constitutes a refusal" (Ref. 1212, p 6). The

judge also stated that a defendant, after refusing, has no right to request testing. Upon review, a Law Division judge affirmed the conviction for refusal but not the DWI and careless driving convictions. Noting the impractical nature of a deferred breath test, the judge stated:

I find that he was given proper notice, that he did refuse after receiving proper notice. And that coming back an hour later and saying, well, now I'd like to take it, is meaningless to this Court. What would we start to do once a person refuses? Draw a line at an hour, an hour and 15 minutes? Well, then it could be, I'll come back tomorrow morning and take the test. And everyone knows that the test—the importance of the test is having a Breathalyzer test within a reasonable period of time after you've imbibed the alcohol. I don't think the law permits anyone, under the pertinent law, to refuse and then come back an hour later. . . . [Ref. 12, p 7].

It was not disputed that the trooper had read Mr. Spell the rights statement contained within the first 11 items in the document shown in the Appendix. The trooper admitted that he had neglected to read the additional material (items 15 and 16), which was to have been triggered by an apparent refusal.

### Ambiguity Defined?

Relying on a 1999 case, *State v. Widmaier*,<sup>13</sup> the court in *Spell* affirmed the importance of an officer's apprising the motorist of limited rights:

This is because anything substantially short of an unconditional, unequivocal assent to an officer's request would undermine law enforcement's ability to remove intoxicated drivers from the roadways and impede their ability to conduct the test in a timely manner to ensure that the results are meaningful [Ref. 12, pp 10–11, and Ref. 13, p 497].

Explaining further, the *Widmaier* decision noted that breath samples, being “a nontestimonial form of evidence,” did not imply a Fifth Amendment right to consult with counsel or have one present during the test. Moreover, a one-hour delay in consent to take a breath test violated the implied consent law (Ref. 12, pp 487–8). Looking at the question of the driver's intent was not pertinent to the question of refusal, the *Spell* court said, citing *Widmaier*:

We emphasize that a defendant's subjective intent is irrelevant in determining whether the defendant's responses to the officer constitute a refusal to take the test. A suspect's conditional or ambiguous response to a police officer's final demand to submit to the Breathalyzer test constitutes a violation of the refusal statute whether or not the suspect intended to refuse to take the test [Ref. 12, p 498].

This court acknowledged that the phrase “Your prior response, silence, or lack of response, is unaccept-

able” (Appendix, Item 15) was “difficult to understand.” The language was not corrected in the 2004 (current) version.

What constitutes an equivocal or unequivocal refusal? The *Spell* court noted an earlier case, *State v. Duffy*,<sup>14</sup> where the motorist claimed to be sick and unable to take the breath test. After two more requests by the officer, the motorist replied he would but “it's under duress.” The officer arrested him but made no further attempt to give him the test. Duffy was convicted of refusal, but won his appeal because the officer had failed to apprise him of the consequences of refusal. Distinguishing these facts, the *Spell* court noted that there was no ambiguity in Spell's refusal. Therefore, the officer had no duty to read the additional language as instructed in Appendix, Item 13.

Mr. Spell's refusal conviction was affirmed, but the three-judge appellate court in *Spell* was unsettled by the leeway in a defendant's claiming his or her answer to the arresting officer was ambiguous. That is, the officer may perceive an unequivocal refusal, and the defendant may later claim otherwise. To add uniformity to the procedure and to close this potential litigation loophole, the court held prospectively that “officers must read the additional paragraph [Appendix, Item 15] whenever the defendant refuses to immediately take the Breathalyzer exam upon request” (Ref. 12, p 17).

This *dictum* created discomfort within the New Jersey Attorney General's Office, which sent Assistant Attorney General Moczula to complain to the state's Supreme Court on October 20, 2008.<sup>15</sup> His legal point was that the appellate court had no business usurping the role of the legislature, although the underlying concern was that the court had placed a new burden on police. Attorneys for Mr. Spell and the criminal defense bar did not dispute the appellate court's lack of authority, but suggested that the Supreme Court uphold the ruling: “I can see no reason why the second paragraph cannot be read” (Ref. 15, p 6). Shortly after the New Jersey Supreme Court heard these arguments, it issued an opinion affirming Mr. Spell's conviction but vacating the appellate court's mandate that the additional paragraph be read to every driver who refuses a Breathalyzer, calling it “unnecessary.”<sup>16</sup> The court referred the matter to the Chief Administrator of the Motor Vehicle Commission for consideration.

## Discussion

### What About State of Mind?

Taking the example of New Jersey's procedures as typifying legislative attempts to reduce drunk driving, it appears that motorists have few rights when they are stopped by police. Driving under the influence is unlawful and intoxication cannot be used as a defense. The case law indicates that drivers have pleaded difficulties such as breathing problems and illness in attempts to delay a breath test. Because of the implied-consent laws in all jurisdictions, there is no right to delay the test, let alone to refuse it. Motorists are informed that there is no right to counsel and that any response other than a clear affirmative can be taken as a refusal.

Once the unlawful act of refusal has occurred, it cannot be cured by a subsequent change of mind. For example, New Jersey has taken a bright-line approach, wherein any refusal is final.<sup>17</sup> After all, in no other instance can a person reverse a criminal act by merely agreeing. Under New York's statutes, the test must take place within two hours of arrest, or longer if there is no coercion.<sup>18</sup> If appealed, the state must prove by clear and convincing evidence that the procedures were followed correctly. A driver also has a difficult time claiming illegal search and seizure, with the advent of sobriety checkpoints and aggressive enforcement campaigns.<sup>6-9</sup> In another recently decided New Jersey Supreme Court case,<sup>19</sup> a driver's 17-year-old daughter informed police that he was driving while intoxicated. He was arrested, later arguing that the police had no right to stop him, since there were no obvious driving problems and there was no way for the police to know the accuracy of his daughter's claim. Ultimately the court decided that such a call was credible and that he had no right to suppress the evidence against him.

### A Role for Expert Testimony?

As noted, there may be some cognitive dissonance among motorists who hear the *Miranda*-type warnings in a drunk-driving situation, particularly when the officer says the driver does not have a right to refuse or to have an attorney present. It is possible that such a defendant who refuses the FST would invoke the confusion doctrine<sup>20</sup>, which is equivalent to an honest mistake—not that the driver was too drunk to make a decision. In New Jersey, for example, the burden of proof would fall on the defendant

to establish confusion, although it is not clear that mental confusion in the psychiatric sense would be required. What about the driver with mental illness, say, panic disorder, Asperger's disorder, or PTSD, who is driving erratically and is stopped by police? Flustered and not understanding the meaning of the statement of refusal consequences, could the driver later pursue a psychiatric defense to a refusal conviction?

A Maryland case sheds light on this possibility.<sup>21,22</sup> The appellant, Ms. White asked a police officer for directions late in the evening of July 17, 1999. The officer observed her slurred speech and watery eyes and the odor of alcohol on her breath. She admitted having had one drink of vodka. The FSTs showed nystagmus and lack of smooth pursuit, admittedly nonspecific signs, according to the officer, and ambiguously performed tests of coordination; the BrAC was 0.05. There was a full bottle of whiskey in the car. After arrest, Ms. White was boisterous and uncooperative. Later, she tried to hang herself. At trial, she explained that she suffered from depression and PTSD, had been off medications, got lost, and went into a panic when the officer began to test her. The defendant attempted to proffer psychiatric testimony to the effect that her behavior was explainable on the basis of her known psychiatric disorders, but the testimony was excluded because there was no specific intent charged and there was no psychiatric defense to the underlying offense. Ms. White was convicted of driving under the influence of alcohol, a lesser offense than driving while intoxicated. She was not jailed pending appeal. The Maryland appeals court was sympathetic to the idea that the jury might find it helpful to hear from a medical expert about the defendant's postarrest behavior, as it had been used as inferential evidence of intoxication. Thus, the admission of the doctor's testimony would be neither a defense to the drunk-driving charge itself nor an attack on criminal responsibility; rather, it would be an explanation of how certain erratic behaviors can be misconstrued as intoxication.

We draw two main inferences from the *Spell* decision and Ms. White's situation. First, it appears that legal challenges to breath-test refusal are mainly about police procedure—that is, whether the driver received adequate information. The question of capacity to understand the information seems less fruitful because the implied consent doctrine is in effect, the presence of intoxication tends to contaminate

any claims of mental incapacity, and the confusion doctrine would not be likely to require expert testimony. Second, we infer from Ms. White's situation that courts will entertain reasonable explanations for unusual behavior, so long as there is no expectation of total exculpation. Thus, while the use of psychiatry in drunk-driving cases may be sparse, practitioners are alerted to potential applications. In the meantime, public and regulatory sentiment has clearly swung away from any suggestion that a drunken driver is less than fully culpable.

### Appendix: Example of Roadside Warnings

NEW JERSEY MOTOR VEHICLE COMMISSION STANDARD STATEMENT FOR OPERATORS OF A MOTOR VEHICLE—*N.J.S.A.* 39:4-50.2(e) (Revised and effective, April 26, 2004)

THE ARRESTING OFFICER MUST READ THE FOLLOWING TO THE DEFENDANT: FULL TEXT OF STANDARD STATEMENT FOLLOWS:

1. You have been arrested for operating a motor vehicle while under the influence of intoxicating liquor or drugs, or with a blood alcohol concentration at, or above, that permitted by law.
2. The law requires you to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood.
3. A record of the taking of the samples, including the date, time, and results, will be made. Upon your request, a copy of that record will be made available to you.
4. Any warnings previously given to you concerning your right to remain silent, and your right to consult with an attorney, do not apply to the taking of breath samples, and do not give you the right to refuse to give, or to delay giving, samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. You have no legal right to have an attorney, physician, or anyone else present, for the purpose of taking the breath samples.
5. After you have provided samples of your breath for chemical testing, at your own expense, you have the right to have a person or physician of your own selection, take independent samples and conduct independent chemical tests of your breath, urine, or blood.
6. If you refuse to provide samples of your breath you will be issued a separate summons for this refusal.
7. Any response from you that is ambiguous or conditional, in any respect, to your giving consent to the taking of breath samples will be treated as a refusal to submit to breath testing.
8. According to law, if a court of law finds you guilty of refusing to submit to chemical tests of your breath, then your license to operate a motor vehicle will be revoked, by the court, for a period of no less than seven months, but no more than 20 years. The Court will also fine you a sum of no less than \$300, and no more than \$2,000 for your refusal conviction.
9. Any license suspension or revocation for a refusal conviction may be independent of any license suspension or revocation imposed for any related offense.

10. If you are convicted of refusing to submit to chemical tests of your breath, you will be referred, by the Court, to an Intoxicated Driver Resource Center, and you will be required to satisfy the requirements of that Center in the same manner as if you had been convicted of a violation of *N.J.S.A.* 39:4-50, or you will be subject to penalties for your failure to do so.

11. I repeat, you are required by law to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Now, will you submit the samples of your breath?

12. (ADDITIONAL INSTRUCTIONS FOR POLICE OFFICER)

13. IF THE PERSON: REMAINS SILENT; OR STATES, OR OTHERWISE INDICATES, THAT HE/SHE REFUSES TO ANSWER ON THE GROUNDS THAT HE/SHE HAS A RIGHT TO REMAIN SILENT, OR WISHES TO CONSULT AN ATTORNEY, PHYSICIAN, OR ANY OTHER PERSON; OR IF THE RESPONSE IS AMBIGUOUS OR CONDITIONAL, IN ANY RESPECT WHATSOEVER, THEN THE POLICE OFFICER SHALL READ THE FOLLOWING ADDITIONAL STATEMENT:

14. FULL TEXT OF ADDITIONAL STATEMENT FOLLOWS:

15. I previously informed you that the warnings given to you concerning your right to remain silent and your right to consult with an attorney, do not apply to the taking of breath samples and do not give you a right to refuse to give, or to delay giving, samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Your prior response, silence, or lack of response, is unacceptable. If you do not agree, unconditionally, to provide breath samples now, then you will be issued a separate summons charging you with refusing to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood.

16. Once again, I ask you, will you submit to giving samples of your breath?

### References

1. Weiss KJ: "Wet" and wild: PCP and criminal responsibility. *J Psychiatry Law* 32:361–84, 2004
2. *Montana v. Egelhoff*, 518 U.S. 37 (1996)
3. Jacobs DP: Implied consent laws: some unsettled constitutional questions. *Rutgers L J* 12:99–116, 1980
4. National Highway Traffic Safety Administration: Highway Safety. Title 23, United States Code, Chapter 4 and Related Highway Safety Provisions Administered by the National Highway Traffic Safety Administration. U.S. Department of Transportation, National Highway Traffic Safety Administration, Office of the Chief Counsel. Washington, DC: U.S. Department of Transportation, May 2006. Section 410: Alcohol-Impaired Driving Countermeasures
5. National Highway Traffic Safety Administration: Motor Vehicle Safety. Title 49, United States Code, Chapter 301 and Related Uncodified Provisions Administered by the National Highway Traffic Safety Administration. Washington, DC: U.S. Department of Transportation, May 2008
6. National Highway Traffic Safety Administration: Digest of Impaired Driving and Selected Beverage Control Laws (ed 24). Washington, DC: U.S. Department of Transportation, August 2007, DOT HS 810 827. Available at [www.nhtsa.gov](http://www.nhtsa.gov). Accessed December 14, 2008

7. Mothers Against Drunk Driving: Support greater sanctions for BAC test refusal. Available at <http://www.madd.org/Professionals/Law-Enforcement.aspx>. Accessed December 14, 2008
8. Austin police announce 'no refusal weekend.' Available at <http://Austin-texasdwi.blogspot.com/2008/12/austin-police-announce-no-refusal.html>. Accessed December 12, 2008
9. DPS books seven during 'no refusal' night. Available at <http://www.kfdm.com/news/night-29174-seven-stops.html>. Accessed December 14, 2008
10. Austin police record 24 DWI arrests on New Year's Eve. Reported on January 18, 2009 and available at <http://austin-texasdwi.blogspot.com/2009/01/austin-police-record-24-dwi-offenses-on.html>. Accessed February 9, 2009
11. News Channel 7: Tough DUI law next year. [http://www.wspa.com/spa/news/local/article/tough\\_dui\\_law\\_next\\_year/12096/](http://www.wspa.com/spa/news/local/article/tough_dui_law_next_year/12096/). Accessed December 12, 2008
12. State v. Spell, 928 A.2d 921 (N.J. Super. Ct. App. Div. 2007). Available at: [http://www.judiciary.state.nj.us/webcast/opinions/ob\\_A\\_99\\_07.pdf](http://www.judiciary.state.nj.us/webcast/opinions/ob_A_99_07.pdf). Accessed December 14, 2008
13. State v. Widmaier, 724 A.2d 241 (N.J. 1999)
14. State v. Duffy, 792 A.2d 555 (N.J. Super. Ct. App. Div. 2002)
15. Booth M: Court mulls *Miranda*-type warnings for drivers who refuse breath tests. New Jersey L J October 27, 2008, pp 1, 6
16. State v. Spell 959 A.2d 1209 (N.J. 2008). Available at: <http://lawlibrary.rutgers.edu/decisions/supreme/a-99-07.opn.html>. Accessed on December 24, 2008
17. State v. Bernhardt, 584 A.2d 854 (N.J. Super. Ct. App. Div. 1991)
18. People v. Morris, 8 Misc. 3d 360 (N.Y. Crim. Ct. 2005)
19. State v. Amelio 2007 WL 5861370 (N.J. Super. Ct. App. Div. 2007). Available at: [http://www.judiciary.state.nj.us/webcast/opinions/ob\\_A\\_92\\_07.pdf](http://www.judiciary.state.nj.us/webcast/opinions/ob_A_92_07.pdf). Accessed December 24, 2008
20. State v. Leavitt, 527 A.2d 403 (N.J. 1987)
21. White v. State, 790 A.2d 754 (Md. Ct. Spec. App. 2002)
22. Stamm LR: I may be crazy, but I ain't drunk: the psychiatric defense to drunk driving. The Champion, July 2002, pp 44-9