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Constitutional Law -- Miranda v. Arizona and the Fourth Amendment

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least recognized that such an ambit exists, and that the "one man, one vote" principle should not venture outside of it lest the theoretical tail end up wagging the functional dog.

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Constitutional Law—Miranda v. Arizona and the Fourth Amendment

An interesting new dimension of *Miranda v. Arizona*[1] was presented in two recent cases, *State v. Forney*[2] and *State v. McCarty*.[3] The defendants in these cases argued for application of *Miranda's* requirements[4] concerning confessions to those rights guaranteed by the fourth amendment.[5] Despite the judiciary's contemporary tendency to emphasize the necessity of protecting the individual's constitutional rights, neither court would apply the *Miranda* test because *Miranda* dealt specifically with only the fifth and sixth amendments.

In *Forney* the defendant willingly went to the police station to answer questions after being apprehended in his car as a suspect for burglary. When the defendant was asked by an officer at the station if the officer could look in his car, the defendant agreed. Later, in testimony, the defendant described the situation: "Ah Well, they asked me if I was—they could search my car, and I said, 'Yeah, go ahead.' I couldn't stop them."[6] As a result of the search, a bag

[1] 384 U.S. 436 (1966).
[2] 150 N.W.2d 915 (Neb. 1967).
[3] 427 P.2d 616 (Ore. 1967).
[4] As for procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence . . . the following measures are required. 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 defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. 384 U.S. at 444.
[5] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, 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.
U.S. CONST. amend. IV. See Camara v. Municipal Court, 385 U.S. 523. (1967).
[6] 150 N.W.2d 915, 917 (Neb. 1967).

and loaded revolver were found and these articles were held to be admissible evidence by the Supreme Court of Nebraska.[7]

In *McCarty* the defendant and a companion were apprehended as suspects for robbery. After being taken to the police station, the defendant signed a written consent to a search of the living quarters over the tavern where he had been apprehended. This search yielded evidence which was significant in the defendant's conviction of robbery.[8]

The defendants in *Forney* and *McCarty* were asked to waive their constitutional rights under the fourth amendment. Explanation of their rights was not offered nor was counsel suggested or offered to help them. For all practical purposes, the defendants waived rights of which they were not clearly aware; and the abandonment of these rights resulted in evidence detrimental to their cases. It is in this context that the defendants argued that a valid consent-search should be subject to the same or similar requirements established in *Miranda* for confessions.[9]

In both *McCarty* and *Forney* the defendants' arguments were rejected by the state supreme courts for substantially the same reasons. The court in *McCarty* said:

> *Miranda* deals only with the compulsory self-incrimination barred by the Fifth Amendment, not with the unreasonable search and seizure proscribed by the Fourth Amendment. There is an obvious distinction between the purposes to be served by these two historic sections of the Bill of Rights. The Fifth Amendment prohibits the odious practice of compelling a man to convict himself; the Fourth guards the sanctity of his home and possessions as those terms have been judicially interpreted. An indispensable element of compulsory self-incrimination is some degree of compulsion. The essential component of an unreasonable search and seizure is some sort of unreasonableness.[10]

An attempt to separate completely the purposes of the fourth and fifth amendments is also found in *Forney* when the court states that

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[7] *Id.* at 916-18.

[8] 427 P.2d 616, 619 (Ore. 1967).

[9] Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the persons of the accused for weapons or for the fruits of or implements used to commit the crime.
Preston v. United States, 376 U.S. 364, 367 (1964).

[10] 427 P.2d 616, 619-20 (Ore. 1967).

Miranda in that jurisdiction will pertain "only to the issue tried therein, and will not be extended by analogy to cover the Fourth Amendment . . . ."[11]

Whatever may have been the limited intention of the framers of the fourth and fifth amendments, case history illustrates that the scope of the two amendments has been undeniably expanded.[12] The Supreme Court has emphasized that "the Fourth and Fifth Amendments run almost into each other,"[13] that they are "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy,"[14] and that the "values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect."[15] Any other view which attempts to separate the two amendments in regard to limited and outdated objectives seems wholly anachronistic and tends to destroy the vitality of the Constitution.

The court in *McCarty* emphasized that the key word in the fifth amendment is "compulsion" while the crucial word in the fourth is "unreasonableness." The court, however, apparently overlooked the Supreme Court's holding in *Boyd v. United States* that the two amendments "throw great light on each other."[16] In that case the Court recognized that the search and seizure of evidence within an accused's possession might well violate the self-incrimination clause of the fifth amendment. If the possibility of self-incrimination is

[11] 150 N.W.2d 915, 917 (Neb. 1967). The court added:

> The trial court sustained the motion to suppress on the theory that in order for a consent to be voluntary it was necessary that the defendant be first advised that he need not submit to a search, and that if he does consent, the fruits of the search may be used as evidence against him. To reach this result the trial court held that *Miranda v. Arizona*, 384 U.S. 436, which involved the Fifth and Sixth Amendments to the Constitution of the United States, by analogy was applicable to search and seizure under the Fourth Amendment to the Constitution of the United States.

Id. at 917.

[12] See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 55 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL STUDIES 211, 261-88 (1937). See also Miranda v. Arizona, 384 U.S. 436 (1966); Murphy Waterfront Comm'n, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Quinn v. United States, 349 U.S. 155 (1955); McCarthy v. Arndstein, 266 U.S. 34 (1924); Counselman v. Hitchcock, 142 U.S. 547 (1892).

[13] Boyd v. United States, 116 U.S. 616, 630 (1886).

[14] Feldman v. United States, 322 U.S. 487, 489-90 (1944).

[15] Schmerber v. California, 384 U.S. 757, 767 (1966).

[16] 116 U.S. 616, 633 (1886).

present, said the Court, then the search itself is unreasonable.[17] Thus, compulsion and unreasonableness can rarely, if ever, be separated.

As can be seen from *Boyd* and other cited cases, the fourth and fifth amendments protect inter-related zones of privacy.[18] Both *Forney* and *McCarty* appear to be relying on an insecure basis in maintaining that the fourth amendment applies only to the security of one's possessions and does not overlap the area of privacy guaranteed by the fifth. Not only is the fifth amendment incorporated into the fourth by the provision that people are to be "secure in their persons," but the protection offered by the fourth is also incorporated into the fifth.[19] A consent-search necessarily includes a degree of communication or testimony. One who consents to a search is, for all practical purposes, saying either "Yes, I am guilty" or "No, I am not guilty."[20] The only remaining alternative is that the individual's consent is the product of hope or fear, both of which have been held to be invalid consents under the two amendments.[21]

Thus, it seems unsatisfactory to deny application of the *Miranda* test for the reason that the fourth and fifth amendments have separate purposes.[22] Indeed, the two amendments have been insepa-

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[17] *See* 1967 DUKE L.J. 366.

[18] See the dissenting opinion of Douglas, J. in Schmerber v. California, 384 U.S. 757, 778-79 (1966), where he says:

> The Fifth Amendment marks 'a zone of privacy' which the Government may not force a person to surrender . . . . Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be secure "in their persons."

[19] *See* Miranda v. Arizona, 384 U.S. 436, 459-60 (1966) where the Court says that "the privilege [against self-incrimination] was elevated to constitutional status and has always been 'as broad as the mischief against which it seeks to guard.'" See also Mapp v. Ohio, 367 U.S. 643 (1961).

[20] *See* 67 COLUM. L. REV. 130, 135 n.29 (1967). Also see Miranda v. Arizona, 384 U.S. 436, 477 (1966) in which the Court says that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'"

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> There is no doubt but that the defendant was influenced by his situation, and, when all the surrounding circumstances are considered in their true relations, not only is the claim that the consent was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both operating on the mind.

United States v. Baldocci, 42 F.2d 567, 568 (9th Cir. 1930). *See also* Quinn v. United States, 349 U.S. 155 (1955) and Johnson v. United States, 333 U.S. 10 (1948).

[22] *See* Gouled v. United States, 255 U.S. 298, 304 (1921):

> The effect of the decisions cited [Boyd v. United States, 116 U.S. 616 (1886), Weeks v. United States, 245 U.S. 618 (1914), and Silver-

rably woven together both by their own language and by the Supreme Court's interpretations. To separate them is to enter upon an absurdity not unlike trying to separate the concept of freedom into life without liberty, or liberty without the pursuit of happiness.

Regardless of their views toward the fourth and fifth amendments, the courts in *Forney* and *McCarty* expressed one more reason why they would not apply *Miranda* to the fourth amendment. In the words of the Nebraska Supreme Court, "So far as I have been able to determine, the United States Supreme Court has not applied the *Miranda* test to searches and seizures. Until it does so, if it ever does, we should not further shackle law enforcement."[23] This belief is reiterated in *McCarty*.[24] The courts' reasoning, however, flies in the face of *Miranda* itself. Searching for precedent to justify a decision cannot by any means insure justice. In *Miranda*, the Supreme Court emphasized the fact that "our contemplation cannot be only of what has been but of what may be,"[25] and it encouraged courts to find new solutions to guarantee justice.[26]

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thorne Lumber Co. v. United States, 251 U.S. 385 (1920) concerning the Fourth and Fifth Amendments] is: that such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty, and private property;" that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and is imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right, to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers.

[23] State v. Forney, 150 N.W.2d 915, 917-18 (Neb. 1967). *But see* Berger v. New York, 388 U.S. 41, 62-63 (1967) where the Court said:

In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While 'the requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement,' . . . it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded.

[24] 427 P.2d 616, 619 (Ore. 1967).

[25] 384 U.S. 436, 443 (1966). The Supreme Court went on to say:

Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be loss in reality.

[26] Our decision in no way creates a constitutional straightjacket

Moreover, although the two state courts were reluctant to apply the *Miranda* test to searches and seizures, a lower federal court did not hesitate to apply requirements similar to those of the *Miranda* test to guarantee the rights secured by the fourth amendment. In *United States v. Blalock*,[27] three F.B.I. agents encountered the defendant in a hotel lobby. The defendant, who was suspected of robbing a bank, was frisked by the agents after they had identified themselves. Although they had no warrant, they accompanied the defendant to his room. The defendant denied any knowledge of the crime, but the entire party entered his room. When asked if he would consent to a search of his room, the defendant replied that he would not object. As a result of this consent-search, money from the robbery was found and used as evidence at the defendant's trial.[28] In a well-reasoned opinion citing numerous other decisions, the district court said that "rights given by the Constitution are too fundamental and too precious for waiver lightly to be found."[29] An effective waiver is present "only where there is 'an intentional relinquishment or abandonment of a known right or privilege.' "[30] The district court maintained that where the government relies on consent to validate a warrantless search, the consent must not only be voluntary but also intelligent[31] or knowing.[32] It, therefore, held that a defendant who is not warned of his fourth amendment rights cannot be said to have abandoned them.[33] In conclusion, the district court emphasized that the requirements for waiver are the same for both the fourth and fifth amendments:

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which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[27] 255 F. Supp. 268 (E.D. Pa. 1966).

[28] *Id.* at 268-269.

[29] *Id.* at 269. See also Pennsylvania *ex rel.* Whiting v. Cavell, 244 F. Supp. 560, 567 (M.D. Pa. 1965).

[30] United States v. Blalock, 255 F. Supp. 268, 269 (E.D. Pa. 1966). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938).

[31] Obviously, the requirement of an 'intelligent' consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a 'known right.' 255 F. Supp. 268, 269 (E.D. Pa. 1966). *See* United States *ex rel.* Mancini v. Rundle, 337 F.2d 268 (3d Cir. 1964); Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963); Channel v. United States, 285 F.2d 217 (9th Cir. 1960).

[32] United States v. Blalock, 255 F. Supp. 268, 269 (E.D. Pa. 1966).

[33] *See also* United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966).

> The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd . . . . To require law enforcement agents to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden, nor would it unduly or unnecessarily impede criminal investigation.[34]

Not only is the reasoning behind the decisions questionable in *Forney* and *McCarty*, but justice itself demands that a *Miranda*-type test or an objective standard be applied to guarantee the rights secured by the fourth amendment. A warning—similar to the one imposed by *Miranda*—has been suggested by a student for dealing with warrantless searches:

> You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things which I couldn't even if I could get a search warrant. You have a right to a lawyer before you decide, and if you can't afford a lawyer we will get you one and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information, you will need a lawyer to help you before you tell me I can search.[35]

This type of warning serves several important purposes. In the first place, it informs the individual of his rights. The ignorant and the well-informed are brought to a less unequal position, especially when one knows he may have an attorney present.[36] Authorities are less able to exploit the deprived or ill-equipped. Moreover, the warning impresses the consequences of his decision upon the individual and makes him more reluctant to abandon his constitu-

[34] 255 F. Supp. 268, 269-70 (E.D. Pa. 1966).
[35] 67 COLUM. L. REV. 130, 158 (1967).
[36] Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal.
Griffin v. Illinois, 351 U.S. 12, 16 (1956). *See also* Douglas v. California, 372 U.S. 353 (1963).

tional rights. Such an objective standard is held in high regard by the Supreme Court, as indicated by *Miranda*.[37] Finally, because of the warning's content and its likely effect upon the individual, the warning requirement would encourage authorities to seek the judicially preferred search warrant.[38] The skeptical practice of conducting a warrantless search in reliance upon the individual's uninformed consent would grow increasingly rare.

It seems fair to say that if courts adopt the *Forney-McCarty* position, justice will suffer because fourth amendment rights will be protected by subjective good faith alone. And, as the Supreme Court said in *Beck v. Ohio*:

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.[39]

D. S. DUNKLE

Constitutional Law—Racial Discrimination—Expansion of State Action

Since the *Civil Rights Cases*[1] the Supreme Court has held that the fourteenth amendment prohibits "state action" and not purely private action. Subsequent decisions have greatly expanded the reach of "state action." Indeed the expansion has been so great that commentators have suggested that the search for "state action" is a "misleading search,"[2] that some sort of state action can always be found, and that the Supreme Court should be using a different mode of analysis.[3]

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[37] 384 U.S. 436, 468-69 (1966).

[38] *See* United States v. Ventresca, 380 U.S. 102 (1956); Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 362 U.S. 257 (1960); Brinegar v. United States, 338 U.S. 160 (1949); Johnson v. United States, 333 U.S. 10 (1948); United States v. Lefkowitz, 285 U.S. 452 (1932).

[39] 379 U.S. 89, 97 (1964).

[1] 109 U.S. 3 (1883).

[2] *See* Horwitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

[3] St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *Twilight of State Action*, 41 TEX. L. REV. 347 (1963). Williams suggests that the test should be whether the private group has so moved into the area of public concern that the public's interest in eliminating the particular