Constitutional Law -- Compulsory Blood Tests -- Self-Incrimination

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school boards. Simultaneously, the decisions have increased the pressure on school boards to eliminate racially motivated faculty assignment, and to base employment decisions on objective nondiscriminatory standards. Most important though, the court of appeals has again moved closer to making the mandate of *Brown v. Board of Educ.*—now more than twelve years in existence—a reality.

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Constitutional Law—Compulsory Blood Tests—Self-Incrimination

Recent decisions of the Supreme Court of the United States involving the rights of the accused in state criminal proceedings have attracted the attention of state law enforcement officials who, undoubtedly, are concerned with the present Court's concept of the scope of the fourth, fifth and sixth amendments. *Schmerber v. California,*[1] unlike most recent decisions, restricts the scope of the fifth amendment and affords state police with a clear guideline.

Petitioner was convicted in Los Angeles municipal court of the criminal offense of driving an automobile while under the influence of alcohol. He was arrested at a hospital where he was receiving treatment for injuries received in an accident involving the automobile that he had been driving. At the direction of a police officer, a blood sample was taken from petitioner at the hospital and an analysis of this sample indicated by weight of alcohol in his blood that the petitioner was intoxicated at the time of the accident.[2] Petitioner objected to use of this test as evidence on the grounds that the blood was withdrawn dispite his refusal on advice of counsel to consent to it.

He contended that the admission of the test as evidence denied him due process of law under the fourteenth amendment of the Constitution as well as his specific rights under the fourth, fifth and sixth amendments as incorporated in the fourteenth amendment. The California court rejected these contentions and affirmed the conviction. The Supreme Court, in an opinion by Mr. Justice Brennan, held that the blood test, even though compulsary, did not vio-

[1] 384 U.S. 757 (1966).

[2] Concerning the reliability of blood tests as evidence of intoxication see Ladd & Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication,* 24 IOWA L. REV. 191 (1939) [hereinafter cited as Ladd & Gibson].

late the petitioner's constitutional rights. This note will restrict itself to the Court's application of the fifth amendment's self-incrimination clause to compulsary blood tests.

Schmerber represents the resolution, at least temporarily, of a legal and scholarly disagreement over the nature and scope of the privilege against self-incrimination. Several writers and courts have interpreted and applied the privilege narrowly with reference to its historical origins, while others have asserted that the privilege in the fifth amendment, together with the fourth and sixth amendments, is a broad principle of civil liberty designed to protect the citizen from intrusions upon his personality and body by the government.

According to one writer, the significant historical fact in judging the privilege today is that it originally dealt only with testimonial communications compelled from the accused in court; in other words, the privilege was first directed at the inquisitorial system. Compulsion alone was not the basis of the privilege but testimonial compulsion—each idea being essential to the other.[3] This historical emphasis on compelled oral testimony, as distinguished from compelled real or physical evidence, becomes the main reason for the Court's opinion in *Schmerber*. It is generally recognized that the privilege evolved from the abuse of the ex officio oath by the Star Chamber in England during the first half of the seventeenth century. By that time, the inquisitorial oath was a well established rule of cannon law in ecclesiastical courts; the accused, subsequent to proper presentment with charges of heresy or sedition was required to take an oath that he would answer all questions truthfully. The original objection to the oath resulted from one particular procedure by which the oath was put into operation: the ex officio charging of the accused by the court itself rather than by indictment based on probable cause. The over zealous Star Chamber found the oath a powerful tool in dealing with heresy and sedition cases; it frequently used the technique of "fishing out" evidence of some crime upon which to base the conviction of some unpopular political or religious figure.[4] The end of the Star Chamber and the oath itself was pre-

[3] *Id.* at 226-27.

[4] 8 WIGMORE, EVIDENCE § 2250 (McNaughton Rev. 1961) [hereinafter cited as WIGMORE]. This treatise gives a detailed and extensively documented history of the development of the privilege against self-incrimination and an equally extensive treatment of the ex officio oath.

cipitated by the famous Lilburn trial.[5] Lilburn, charged with printing seditious and heretical literature, refused to take the oath before the Star Chamber on the grounds that he was improperly indicted—he did not question the legality of the oath. Lilburn's resulting conviction for contempt served to aggravate the growing reaction to the abuses of the Star Chamber and, in 1641, by an act of Parliament, the Star Chamber was abolished and the ex officio oath was forbidden in any church trial involving a penal charge.[6]

The second stage of the development of the privilege against self-incrimination involved its emergence in common law courts. The privilege did not appear as a rule of law until the 1700's. In spite of the fact that there was no judicial abuse of the inquisatorial oath in common law courts that paralleled the abuse by the Star Chamber,[7] the Lilburn trial had great impact and it began to be claimed by defendants and conceded by courts that no man was bound to incriminate himself on any criminal charge in any court. Eventually the privilege was applied to any witness,[8] whether or not he was a defendant in a criminal trial.

The American courts knew of the privilege because their lawyers went to English inns of court to study law,[9] but it is possible that support for the privilege developed, in part, due to the colonies' own experience with the Courts of Governor and Council which applied the strict English trade laws. This fact indicates that the privilege may have been given constitutional status to check executive rather than judicial abuse of the inquisitorial power and leads one writer to conclude that "the privilege did not acquire constitutional status because it was deemed a palladium of individual liberty; it has come to be deemed a palladium of individual liberty because it has acquired constitutional status."[10]

In any event, whatever the origin or policy behind the privilege

[5] Lilburn's Trial, 3 How. St. Tr. 1315 (1645).

[6] 8 WIGMORE § 2250, at 282-83.

[7] Wigmore writes that the jury trial came to be used because "wager of law" was more or less a privilege to the defendant. The use of the inquisitorial oath would have impaired the value of the jury trial since the defendant would have an opportunity to free himself by his own testimony. For this reason the oath was not used before the jury but it was used in all other proceedings. *Id.* at 285-86.

[8] *Id.* at 286-90.

[9] *Id.* at 294.

[10] MAYER, SHALL WE AMEND THE FIFTH AMENDMENT 182 (1959). Wigmore takes the position that the framers intended that the fifth amendment protect the citizen from executive abuse. 8 WIGMORE § 2250, at 295.

in colonial America, the nineteenth century courts interpreted the fifth amendment as a fundamental individual right.[11] The privilege has been extended to situations other than testimony compelled from the accused at trial, and it is this fact that has led courts into difficulty and controversy in trying to establish the policy behind the privilege as well as the scope of its application to various fact situations. As a general rule, the decisions which have extended the privilege to other than the forced testimony of the accused at trial have set their reasons in broad terms of freedom and civil liberty in an obvious effort to afford later courts latitude in dealing with different fact situations.

Several examples will illustrate this point. *Counselman v. Hitchcock* held that the fifth amendment was applicable to all witnesses at grand jury investigations and stated, "The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."[12] In *Boyd v. United States,*[13] the Supreme Court held that a man cannot be compelled to produce private papers in a civil action involving penalty or forfeiture. Although recognizing that compelling production of private papers is less objectionable than other practices, the Court argued:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from the legal modes and procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.[14]

Bram v. United States,[15] in holding a confession involuntary, stated that both the fourth and fifth amendments contemplated principles of humanity and civil liberty. More recently, in a case involving in-custody confessions to the police, Mr. Chief Justice Warren, speaking for the Court in holding the confessions involuntary and therefore inadmissable, pointed out that the history of the privilege against self-incrimination is one of a constant groping for the proper

[11] MAYER, SHALL WE AMEND THE FIFTH AMENDMENT 182 (1959).
[12] 142 U.S. 547, 562 (1892).
[13] 116 U.S. 616 (1886).
[14] *Id.* at 635.
[15] 168 U.S. 532, 544 (1897).

scope of governmental power.[16] The privilege is founded on a complex of values and all "these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens," and furthermore, "justice demands that a government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[17] The cases above, while not directly related to the testimonial-real evidence distinction raised in *Schmerber,* give some indication that the Supreme Court has not limited itself to the historical origins of the privilege when applying the fifth amendment.

Cases of this sort have not gone without criticism. The chief criticism is that the courts have gone to great length in extolling the general merits of the fifth amendment but generally have failed to analyze it carefully to determine whether the application given to it honestly fits the original purpose of the privilege. By covering up the factual issue with general discussions of the broad principles, the privilege has been extended improperly.[18] Wigmore, who was undoubtably the foremost proponent of the position ultimately taken by the Court in *Schmerber*—that the fifth amendment does not extend to compelled physical evidence but only to evidence of a communicative or testimonial nature—asserts that the policy behind the privilege is often completely overlooked, a fact which has resulted in the broad civil liberty concept of the fifth amendment. According to Wigmore, this conception is completely unwarranted by the historical development of or the policy behind the privilege.[19]

Wigmore's position is that the policy behind the privilege is the protection of the accused against being forced to reveal private thoughts or beliefs, a protection not afforded in Star Chamber heresy and sedition trials. This protection is accomplished best by allowing the accused to remain silent at trial.[20] Support for this

[16] Miranda v. Arizona, 384 U.S. 436, 460 (1966).
[17] *Id.* at 460.
[18] Ladd & Gibson 225, 238.
[19] 8 WIGMORE §§ 2263-64.
[20] *Id.* § 2263. For an examination of many writers' views on the policy behind the privilege see *Id.* at § 2251 n.2. Reasons frequently given for the existence of the privilege are: (1) It protects the innocent from convicting himself by a bad performance on the witness stand, (2) it avoids burdening the courts with false testimony, (3) it incourages third party witnesses by removing the fear of self-incrimination, (4) it recognizes the practical limits

position can be found in numerous state cases,[21] and in *Holt v. United States,*[22] where it was held that requiring the defendant to try on a blouse for the purpose of identification did not violate his fifth amendment rights. Mr. Justice Holmes called the objection to the evidence "an extravagant extension of the fifth amendment"[23] and held that the privilege only applied to extortion of a communication from the accused through physical or moral compulsion. This approach rejects any analogy between coerced confessions and coerced physical evidence. One writer, in a discussion of the admissibility of blood tests, goes a step farther and states that it is historically inaccurate to apply the privilege to coerced confessions. Coerced confessions are inadmissable because they are unreliable. Being completely reliable, blood tests should be admitted as evidence, regardless of how they are obtained.[24] The argument that the fifth amendment is not applicable to pretrial coerced confessions is not in line with the present case law on the subject,[25] but the statement that the unreliability of coerced testimony is the real policy behind the privilege has been frequently asserted.[26] However in *Rochin v. California,*[27] Mr. Justice Frankfurter said that coerced confessions are excluded because they offend the community's sense of fair play and decency. In that case, the petitioner was arrested and forced to submit to having his stomach pumped to see if it contained narcotic capsules. While this case was decided on the basis of the defendant's right to due process under the fourteenth amendment rather than upon his privilege against self-incrimination, Justice Frankfurter appears to have had the privilege in mind. He referred to the distinction between real and testimonial evidence and concluded that there was no difference between a coerced confession and a forced pumping of the stomach.[28]

of governmental power, (5) it is justified by history, (6) it prevents Star Chamber tactics, (7) it preserves respect for the legal process, (8) it incourages the prosecutor to conduct a thorough investigation, (9) it frustrates bad laws, especially in the area of beliefs, (10) it protects the defendant from fishing by the state, (11) it prevents cruel and inhuman treatment, and (12) it creates a fair state-individual balance. *Id.* § 2251, at 310-15.

[21] See Annot., 25 A.L.R.2d 1407 (1952); 8 WIGMORE § 2265 n.6.
[22] 218 U.S. 245 (1910).
[23] *Id.* at 252.
[24] Ladd & Gibson 228.
[25] Miranda v. Arizona, 384 U.S. 436 (1966).
[26] 8 WIGMORE § 2251, at 310-15.
[27] 342 U.S. 165 (1952).
[28] *Id.* at 173; see United States v. Townsend, 151 F. Supp. 378 (D.D.C.

This case may have set a different stage for *Schmerber* had it not been sharply limited by the Court's decision in *Breithaupt v. Abram*.[29] In *Breithaupt*, the Court was confronted with a factual situation similar to the one in *Schmerber* (the petitioner was unconscious when a blood sample was taken), but at that time the fifth amendment was not applicable to the states.[30] The Court held that taking the blood sample did not violate the defendant's right to due process and distinguished the case from *Rochin*. According to the Court, *Rochin* held that the conduct of the police shocked the conscience and implied that it was not the pumping of the stomach but the totality of the official conduct that violated due process.[31] It is clear that the Court in *Breithaupt* gave little consideration to Frankfurter's rejection of the distinction between coerced confessions and coerced physical evidence. Mr. Justice Clark reasoned that there is nothing basically brutal or offensive in taking blood samples without the consent of the accused since these tests are used as a matter of routine in America.[32] In his dissenting opinion, Chief Justice Warren asserted that there is no distinction between blood tests and stomach pumping and that the Court made *Rochin* stand for no more than the personal reaction of this Court to particular police methods.[33]

In *Schmerber*, the Court was faced for the first time with the issue of whether a blood test violated the defendant's privilege against self-incrimination. *Malloy v. Hogan*[34] held that the fifth amendment applies to state criminal proceedings. The Court in *Schmerber* concluded that the facts in the case were in no way dis-

1957) (blood specimen forceably taken from defendant's penis) which said that *Rochin* casts doubt on the real-testimonial evidence distinction and said that *Rochin's* reasoning was applicable to the fifth amendment. *But see* Blackford v. United States, 247 F.2d 745 (9th Cir. 1957) (narcotics container forceably removed from defendant's rectum). The court adhered strictly to the distinction.

[29] 352 U.S. 432 (1957); 37 B.U.L. REV. 360; LA. L. REV. 840; 36 N.C.L. REV. 76; 11 VAND. L. REV. 196.

[30] Twining v. New Jersey, 211 U.S. 78 (1908).

[31] Breithaupt v. Abram, 352 U.S. 432, 438 (1957).

[32] *Id.* at 435-36. The Court noted that modern community living standards require modern crime techniques.

[33] *Id.* at 435-46. Warren also argued that the Court's opinion implies that a different result would obtain if defendant had resisted more vigorously. This would put a premium on lack of cooperation.

[34] 378 U.S. 1 (1964). Mr. Justice Brennan, who wrote this opinion, spoke in terms of broad civil liberty concepts in applying the fifth amendment. This opinion should be compared to his language in *Schmerber*.

tinguishable from those in *Breithaupt* as far as due process was concerned.[35] Recognizing, however, that the self-incrimination issue was unsettled, Mr. Justice Brennan stated:

> We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to those ends.[36]

The Court rejected the position that "the scope of the privilege coincided with the complex of values it helps to protect."[37] Admitting that the privilege requires the state to produce evidence by its own independent labors and that the state must respect the inviolability of the human personality, the Court said that *Miranda v. Arizona*[38] implicitly recognizes that the fifth amendment has never been given the full scope which the values it helps protect suggest, and concluded that history and a long line of state and lower federal courts have consistently limited the privilege's protection to situations where the state seeks to submerge those values by the simple expedient of forcing evidence from the defendant's own mouth.[39]

As precedent for the view that the privilege does not apply to physical evidence, the Court cited *Holt v. United States*.[40] The rule was explained as follows:[41] the privilege does exclude compelled evidence of testimonial or communicative nature, written or oral; but it does not exclude compelled evidence that is physical or real; *e.g.*, compelling defendant to give writing or voice samples, to give fingerprints, or to stand in court.[42] However, it was admitted that the distinction cannot always be drawn as in the case of the use of a lie detector which according to the Court calls to mind the spirit of

[35] 384 U.S. at 760.
[36] *Ibid.*
[37] *Id.* at 762.
[38] 384 U.S. 436 (1966).
[39] 384 U.S. at 763.
[40] *Ibid.*
[41] *Id.* at 764.
[42] For discussions of the several views on what the privilege excludes see 8 WIGMORE § 2263; Danforth, *Death Knell for the Pretrial Mental Examination*, 19 RUTGERS L. REV. 489, 492 n.16 (1965); Inbau, *Self Incrimination—What an Accused Person Can Be Compelled to Do*, 28 J. CRIM. L., C. & P.S. 261 (1937); Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485 (1956-57); 44 KY. L.J. 353 (1955-56).

the fifth amendment.[43] In fact, the Court cautioned that its holding should not be understood as accepting the Wigmore rule,[44] but it appears that, for practical purposes, the Court has done just that. At least it is clear that the Court does accept tacitly the Wigmore position that the policy behind the privilege is not the broad principle of civil liberty as conceived in prior cases.

Mr. Justice Black, in his dissent, specifically took issue with the testimonial-physical evidence distinction and stated that there was no precedent for this choice of words in past decisions of the Court but only the scholarly precedent of Wigmore in his treatise on evidence.[45] In his view, the Court strayed away from the guidelines laid down in *Boyd*.[46] Justice Black argued, "It is a strange hierarchy of values that allows the state to extract a human being's blood to convict him of a crime because of the blood's contents but proscribes production of lifeless papers (a reference to *Boyd*)."[47] The Court has simply failed to give the fifth amendment the liberal construction called for in cases like *Boyd, Counselman* and *Miranda,* and instead, has given it an unwarranted technical construction.[48] The decision, according to Justice Black, provides the Court with a handy instrument for further narrowing of the fifth amendment and other basic rights.[49]

Perhaps the Court considered the interest of society in promoting highway safety as superior to any interest of the individual in the inviolability of his body. This was the position taken in *Breithaupt.* Yet, the Court failed to discuss specifically any policy considerations of this nature and rested its decision of the fifth amendment issue on the evidentiary distinction made by Wigmore in his analysis of the history of the privilege against self-incrimination. Few legal principles are of much value if kept static; this seems particularly true of constitutional rights. Whether the framers in-

[43] Schmerber v. California, 384 U.S. 757, 764 (1966).
[44] *Id.* at 763 n.7.
[45] *Id.* at 772.
[46] *Id.* at 776-77.
[47] *Id.* at 775.
[48] *Id.* at 776-77. Justice Black rejects the Court's interpretation of *Miranda.* His position is that *Miranda* requires a broad and liberal construction of the privilege.
[49] *Id.* at 778. Mr. Justice Douglas, in his dissent, *Id.* at 778, adheres to his dissent and Chief Justice Warren's dissent in *Breithaupt,* but also asserts that *Schmerber* involves the right of privacy which was held to exist within the Bill of Rights in Griswold v. Connecticut, 381 U.S. 479 (1965).

tended that the fifth amendment be applied strictly in line with its historical origins or that it be considered a broad principle designed to take care of unforeseeable judicial abuses is a question that is particularly pertinent to the use of compulsary blood tests. Although blood tests may not be very objectionable in themselves, it is possible that other medical and scientific tests will be developed which might not be as unobjectionable as blood tests. For this reason, it is regrettable that the Court has failed to support its decision with appropriate considerations of the policy and scope of the privilege.

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Constitutional Law—Prejudicial Publicity in Criminal Proceedings

The free press-fair trial controversy has occasioned much public discussion on how best to accommodate the conflicting guaranties of the first and sixth amendments in the law enforcement process without making the latter unworkable. In *Sheppard v. Maxwell*,[1] the United States Supreme Court faced the problem squarely for the ninth time in fifteen years, clarifying again the constitutional requirement of jury impartiality, and encouraging for the first time a more vigorous use of existing procedural devices to protect the individual from prejudicial publicity. The murder of Dr. Sheppard's wife "captivated the attention of the news media in an unprecedented manner."[2] Much of the damaging publicity, both before and during the trial, was the result of leaks to the press by the police, county officials and the district attorney's office. The press aired much of the evidence, some of it "doctored," and some of it never admitted at the trial; publicized petitioner's refusal to take a lie detector test; criticized the "protective ring" thrown up by his family; and, when the police investigation appeared to be uncovering too little, campaigned for an inquest and his eventual arrest. The three-day televised inquest was held in a gymnasium, where the coroner received "cheers, hugs and kisses from ladies" in the audience when he forcibly ejected the petitioner's chief counsel. At the trial itself, held two weeks before both the judge and the prosecutor were up for election, newsmen crowded into the court-

[1] 384 U.S. 333 (1966).

[2] Sheppard v. Maxwell, 231 F. Supp. 37, 40 (S.D. Ohio 1964), *rev'd*, 346 F.2d 707 (6th Cir. 1965).