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Constitutional Law - Due Process - Blood Test

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the factors favoring such treatment are not prevalent, and there are weighty factors against it.[44] But the growing line of tax jurisprudence represented by the instant case provides considerable precedent for freedom of review if inarticulated considerations should call for it.

Frederick W. Ellis

CONSTITUTIONAL LAW — DUE PROCESS — BLOOD TEST

The truck petitioner was driving collided with an automobile on a New Mexico highway. Three occupants of the automobile were killed and petitioner was seriously injured. He was taken to a hospital where a physician removed a sample of his blood at the request of a state patrolman. The blood sample was taken with a hypodermic needle while petitioner was unconscious. Over his objection, evidence of this blood test, showing that petitioner was under the influence of alcohol, was introduced at his trial. After his conviction of involuntary manslaughter, the Supreme Court of New Mexico denied a writ of habeas corpus. On certiorari, the Supreme Court of the United States *held*, affirmed. Petitioner's conviction, based on the result of the involuntary blood test, did not deprive him of his liberty without that due process of law guaranteed him by the Fourteenth Amendment to the Constitution.[1] *Breithaupt v. Abram*, 77 Sup. Ct. 408 (1957).

It has long been settled that the due process provision of the Fourteenth Amendment does not incorporate the Federal Bill of Rights[2] as restrictions upon the powers of the states.[3] On the

ence of the Social Security Administrator was factual, although involving broad statutory terms.

44. Many administrative agencies clearly possess delegated legislative authority, whereas Congress, in creating the "clearly erroneous" rule, apparently intended that the Tax Court should not have such authority. The expertise argument (favoring non-substitution on highly technical questions), while often present in tax matters, is more clearly and consistently present in reviewing the findings of such agencies as the ICC, FCC, and SEC. The strong precedent of such cases as O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951) (statutory construction of ultimate fact inferences considered fact and subject to substantial evidence rule) would discourage any large scale law classification under the substantial evidence rule.

1. U.S. CONST. amend. XIV, § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. U.S. CONST. amend. I-VIII.

3. See concurring opinion of Mr. Justice Frankfurter in Adamson v. California, 332 U.S. 46, 59 (1947).

contrary, as expressed by Mr. Justice Cardozo, due process of law is a constitutional guarantee only of those personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[4] or are "implicit in the concept of ordered liberty."[5] The Supreme Court has applied this test to the protections embodied in the Fourth[6] and Fifth[7] Amendments and held that these amendments as such do not apply to the states, but that some of the protections included in them are so basic that they are embraced within the due process provision of the Fourteenth Amendment.[8] Thus, if use of the involuntary blood test by the State of New Mexico in the instant case violated petitioner's rights under the Federal Constitution, the violation was of the Fourteenth Amendment itself. The guarantee of "due process of law" set forth in this amendment is difficult to define. On one occasion the Court said that the principle precludes defining more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."[9] In two relatively recent cases the Supreme Court in applying this test reached opposite conclusions. In *Adamson v. California*[10] the Court held that comment by the state upon the accused's failure to testify did not violate the due process provision of the Fourteenth Amendment. On the other hand, in *Rochin v. California*[11] the Court found that the forcible use of a stomach pump to obtain morphine capsules from the accused was conduct "bound to offend even hardened sensibilities"[12] and was violative of due process.

In the instant case the majority of the Court found that

4. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
5. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
6. U.S. CONST. amend. IV: "The 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."
7. U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
8. Wolf v. Colorado, 338 U.S. 25 (1949); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908).
9. Rochin v. California, 342 U.S. 165, 173 (1952).
10. 332 U.S. 46 (1947).
11. 342 U.S. 165 (1952).
12. *Id.* at 172.

there is nothing brutal or offensive in taking blood when it is done under the protective eye of a physician.[13] On this ground the majority distinguished the *Rochin* case. However, as Mr. Chief Justice Warren pointed out in his dissenting opinion, in both cases the operation was performed by a doctor in a hospital. The only basic difference is that Rochin was conscious and able to protest and Breithaupt was unconscious and unable to protest. Would the result in the *Rochin* case have been different if Rochin had been given a sedative before having his stomach pumped? Certainly, elimination of the need for force could not alter the fact that the privacy of his body was invaded without his consent in order to secure evidence upon which he was convicted. It is true that the use of force is unquestionably an aggravating element. However, the presence or absence of violence should not be the determinative factor in deciding whether a conviction has been brought about by methods which "offend a sense of justice." Rather, it seems that any conviction based upon evidence obtained from the person of the accused without his knowledge or consent should be set aside. This is equally true whether the evidence is in the form of capsules from his stomach or blood from his veins. Perhaps, as the Chief Justice's dissent indicated, the Court was motivated by a desire to help curb the alarming death rate on the American highways. Prevention of highway deaths, like the effort to apprehend dangerous criminals, is of course laudable. But the civil liberties limited in this case were not designed for efficiency and should not be set aside for convenience.

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LABOR LAW — RIGHT TO STRIKE DURING REOPENING NEGOTIATIONS WHILE CONTRACT IS STILL IN EFFECT

A collective bargaining agreement between the company and the union was to remain in effect until October 23, 1951, and thereafter until cancelled in the manner prescribed by the contract. The party desiring cancellation was first required to give a sixty-day notice of desire to amend the contract. Then, if no agreement on proposed amendments was reached during this first sixty-day period, either party could cancel the contract by giving a second sixty-day notice. Sixty days prior to October 23, 1951, the union gave notification of desire to *modify* the agree-

13. Breithhaupt v. Abram, 77 Sup. Ct. 408, 410 (1957).