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# Constitutional Criminal Justice - Blood Tests - Due Process

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servitude of article 665 and, therefore, can only receive the previous year's assessment value as compensation.

A repeal of the levee servitude under article 665 would not hurt Louisiana. Any land needed for the purpose could readily be obtained through expropriation and the added cost will not be so great as to overshadow the good that this change would bring about. The flood control program is for the benefit of all the state and all taxpayers should share the burden. The cost of other public works is distributed in an equitable manner and flood control should be no exception.

*John W. Jewell*

## CONSTITUTIONAL CRIMINAL JUSTICE—BLOOD TESTS—DUE PROCESS

The automobile petitioner was driving skidded and struck a tree. Suspecting that he had been drinking, police arrested him at a hospital where he was being treated. A sample of Schmerber's blood drawn by a physician over his objection was used as evidence to convict him of driving while under the influence of intoxicating liquor. The United States Supreme Court affirmed, *held*,[1] the privilege against self-incrimination protects an accused only from being compelled to testify against himself or from otherwise providing the state with evidence of a testimonial or communicative nature. The taking of blood was justified and under reasonable conditions, therefore petitioner's

1. Decision was 5-4 with Chief Justice Warren, Justices Black, Douglas, and Fortas dissenting. The Chief Justice assigned his reasoning in Breithaupt v. Abram, 352 U.S. 432 (1957) as the basis for his present dissent; Justices Douglas and Fortas also cited Warren's *Breithaupt* dissent. *Breithaupt* involved a conviction of involuntary manslaughter on evidence of intoxication supplied by a blood sample taken from the accused while he was unconscious by a physician under medically proper conditions. Justice Douglas felt that the true issue was the right of privacy recognized in Griswold v. Connecticut, 381 U.S. 479 (1965) and that the right coincided with the fourth amendment right of persons to be secure "in their persons." He felt that there was a clear invasion of personal dignity and privacy in the case at hand (*cf.* State v. Findlay, 145 N.W.2d 650 (Iowa 1966), where the Iowa Supreme Court held that the taking of a blood sample from an unconscious defendant was not an unreasonable invasion of privacy and that in view of bodily assimilation of alcohol an emergency existed justifying taking the sample though defendant was not under arrest, and that the procedure did not constitute brutality or deprive defendant of due process of law; it was another automobile case). Justice Fortas felt that the states have no right to commit violence upon a person, or to make use of the results of such violence, and that the extraction of blood, over protest, was an act of violence.

right to be free from unreasonable searches and seizures was not violated. *Schmerber v. California*, 384 U.S. 757 (1966).

The instant case raises three constitutional questions: (1) Is it violative of due process to admit in evidence testimony based on the chemical analysis of a blood test obtained over an accused's objection?[2] (2) Does such procedure contravene the privilege against compelled self-incrimination?[3] (3) Is it an unreasonable search and seizure?[4]

*The Due Process Claim*

In addition to using the due process clause of the fourteenth amendment to apply sections of the Bill of Rights to the states, the Court has used the clause of its own force without reference to specific articles of the Bill of Rights, to declare unconscionable activities unconstitutional. Under this latter approach, the Court attempted to define fundamental rights in cases of intrusion into the human body for evidence in *Rochin v. California*,[5] where Justice Frankfurter stated that convictions would not be sustained if secured by methods that "shock the conscience."[6]

In the instant case the Court summarily rejected Schmerber's due process challenge by reaffirming *Breithaupt v. Abram*,[7]

2. U.S. CONST. amend. XIV, § 1: "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 . . . ."

3. U.S. CONST. amend. V: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

4. 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."

5. 342 U.S. 165 (1952). In *Rochin* three deputy sheriffs entered the defendant's home without a search warrant and forced open the door to his room. Inside they found Rochin sitting partly dressed on the side of the bed, upon which his wife was lying. Rochin immediately seized two capsules which were on a night stand nearby and attempted to swallow them. The deputies struggled with him in an attempt to prevent his swallowing of them but failed. Rochin was then handcuffed and taken to a hospital where an emetic solution was forced through a tube into his stomach against his will, causing him to regurgitate the capsules. The capsules were found to contain morphine and were used to convict him of possession of morphine, a misdemeanor.

6. *Id.* at 172.

7. 352 U.S. 432 (1957) (affirming a conviction of involuntary manslaughter). Decision was 6-3 with Warren, Black, and Douglas dissenting. The Chief Justice felt that the case was indistinguishable in principle from Rochin v. California, 342 U.S. 165 (1952). Justices Black and Douglas felt that the concept of due process should not be limited to a prohibition of force and violence against an accused, but equally prohibits the violation by the police of the sanctity of the body of an unconscious man. They also felt that the accused had

where, as in the present case, the extraction of blood was made in a medically acceptable environment by a physician. The only distinction was that Breithaupt was unconscious at the time and had no opportunity to object.[8] The majority felt that under such circumstances the taking was not offensive, did not "shock the conscience" nor offend "a sense of justice"[9] even though the accused objected.

In *Breithaupt* the petitioner had invoked *Rochin*, which invalidated a state conviction based on evidence of morphine capsules extracted by force from the accused's stomach. The majority, however, distinguished the case and cited the absence of offensive conduct in *Breithaupt*. It also noted the commonplace nature of blood tests and the fact that most states admit the results of such tests in evidence.[10] The majority of state and federal courts have adopted an unduly strict construction of *Rochin* and will not invalidate the proceedings unless there has been shocking force and almost flagrant abuse of the person.[11]

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been made to furnish evidence against himself and that any form of compulsion to these ends was improper.

8. See dissenting opinions of Justices Warren and Douglas in Breithaupt v. Abram, 352 U.S. 432 (1957), which imply that had petitioner been conscious and objected to the proceedings the Court would have reversed his conviction and held the procedure invalid. "This implies that a different result might follow if petitioner had been conscious and had voiced his objection. I reject the distinction." Warren, dissenting opinion, *id.* at 441. "As I understand today's decision there would be a violation of due process if the blood had been withdrawn from the accused after a struggle with the police." Douglas, dissenting, *id.* at 443.

9. Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).

10. 352 U.S. 432, 436-37 (1957) (majority opinion, Clark, J.). Justice Clark cites 47 states using chemical tests (Louisiana not included) to aid in determination of intoxication in cases involving charges of driving while intoxicated; 23 sanctioning the practice by statute and the others by court approval. In footnote 3 Justice Clark offers the proposition that: "The fact that so many States make use of the tests negatives the suggestion that there is anything offensive about them." *Id.* at 437. See for excellent discussion of the advantages of a compulsory test statute — problems of proof and reliable methods of establishing fact, Rosenberg, *Compulsory Intoxication Tests: A Suggestion for Massachusetts*, 50 MASS. L.Q. 145 (1965): "And while federal standards relative to self-incrimination must now be applied as a *minimum* the states will be perfectly free to interpret their own constitutional provisions in a manner which would not allow compulsory blood tests even if the federal standard permits them." *Id.* at 153. See also Note, 18 WYO. L.J. 252 (1964) (implied consent statutes); Lynch, *Blood Tests in Motor Vehicle Prosecutions*, 32 N.Z.L.J. 184 (1956) (possible ethical objections by medical profession to compulsory statutes); *Should There Be a Statute Authorizing Chemical Tests for Determining Intoxication of Drivers? Yes No*, 39 MICH. STATE B.J. 20 (1960) (pro-con discussion).

11. People v. Dawson, 127 Cal. App. 2d 375, 273 P.2d 938 (1954) (arresting officer placed a neckhold on accused and forced him to relinquish a packet of narcotics from his mouth); State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1955) (accused was strapped in a chair and his head involuntarily held so that his breath could be obtained for a drunkometer test); People v. Duroneclay, 146

These cases reason that it was the whole chain of events that shocked the conscience in *Rochin*, beginning with the illegal invasion of Rochin's home and the struggle to free the capsules from his mouth, and not just the lack of consent or the use of the stomach pump.[12]

*The Fifth Amendment Claim*

Petitioner's second challenge was that the admission of blood test results was violative of the privilege against self-incrimination.[13] In the pre-*Malloy v. Hogan*[14] cases the issue was the presence or absence of force and brutality—the due process approach. With *Malloy* applying the fifth amendment to the states, however, is no longer left to individual determination of the scope of the privilege and the crucial factor is whether the form of disclosure involved falls within the fifth amendment privilege.[15]

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Cal. App. 2d 96, 303 P. 2d 617 (1956) (arm of accused held in an attempt to secure a blood sample because he had previously withdrawn it). All of these cases held no violation of due process. *But cf.* People v. Martinez, 130 Cal. App. 2d 54, 278 P.2d 938 (1954) (police wrestled with accused and forced him to surrender package of narcotics from his mouth, held violation of due process). See the recent case of Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (government agents held suspect's arms and head while a doctor inserted a tube through his nose and into his stomach; saline solution allowed to gravitate into stomach causing two packets of heroin to be expelled from suspect's stomach; held not an unreasonable search and seizure). See also cases cited where federal courts have upheld searches where evidence was extracted from anus of arrested person and used in evidence against him. *Id.* at 874-75; where emetics have been employed to retrieve narcotics which had been swallowed, *id.* at 875.

12. See especially Blefare v. United States, 362 F.2d 870 (9th Cir. 1966), where the majority distinguished *Rochin* on this very ground. A concurring opinion stressed the fact that the methods used and the conduct pursued in *Rochin* were not the methods used or conduct pursued in the instant case. A strong dissent argued that the case was similar to *Rochin*. The majority thought the case more comparable to *Breithaupt* than *Rochin*.

13. All states except Iowa and New Jersey incorporate this guarantee by means of constitutional provision. These two states guarantee the privilege by statute. 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940). The pertinent Louisiana provision is La. CONST. art. I, § 11, providing, principally: "No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution . . . ." See generally Inbau, *Should We Abolish the Constitutional Privilege Against Self-Incrimination*, 45 J. CRIM. L., C. & P.S. 180 (1954); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 79 MICH. L. REV. 1 (1930).

14. 378 U.S. 1 (1964), reversing Twining v. New Jersey, 211 U.S. 78 (1908); Brown v. Walker, 161 U.S. 591 (1896).

15. Justice Brennan, speaking for the majority, noted that a prerequisite to consideration of the search and seizure claim was the assumption that the form of disclosure involved did not fall within the protection of the fifth amendment; otherwise the disclosure could not legally be subject to a search and seizure. The self-incrimination claim was also crucial to Schmerber's limited right to counsel claim. Schmerber had refused to consent on the advice of counsel and claimed that failure to honor this advice denied him of his sixth amendment right. This claim was summarily rejected on the ground that since

Prior to the instant case the majority of federal and state courts held that compulsory submission to blood, urine, saliva, or breath tests did not force an accused to supply evidence against himself and that historically the privilege has been limited to compulsion to obtain testimony.[16] The Supreme Court first adopted its restrictive view in *Holt v. United States*,[17] where Justice Holmes explained that:

> "[T]he prohibition of compelling a criminal to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort *communications* from him, not an exclusion of his body as evidence when it may be material." (Emphasis added.)[18]

The federal standard, therefore, established a distinction between testimonial and demonstrative, or real evidence.

The majority reaffirmed this basic distinction and held that the privilege protected Schmerber to the extent that he could

Schmerber was not entitled to assert the privilege he was not given a greater right because his attorney erroneously advised him that he could assert it.

16. "Looking back at the history of the privilege and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process *to extract from the person's own lips* an admission of guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical Court, as opposed through two centuries — the inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow-objectors, that he ought to be convicted by other evidence and not by his own forced confession under oath . . . .

". . . In other words, it is not any and every compulsion that is the kernel of the privilege in history and in the constitutional definitions, but *testimonial compulsion.* The one idea is as essential as the other.

"The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure *sought by legal process against him as a witness.*" 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940), cases cited *id.* § 2265; cases also cited in Schmerber v. California, 384 U.S. 757, 764, n.8 (1966); *cf.* United States v. Nesmith, 121 F. Supp. 758 (D.D.C. 1954), holding specifically that a urine specimen does not come within the ambit of the privilege. Cases collected in Annot., 164 A.L.R. 967 (1946), supplemented by Annot., 25 A.L.R.2d 1407 (1952).

17. 218 U.S. 245 (1910).

18. *Id.* at 252-53. In *Holt*, the defendant had been convicted of murder and sentenced to life imprisonment. One of the errors assigned was that the accused had been compelled to try on a blouse which the authorities claimed belonged to him. A witness for the prosecution testified that he had seen the accused put on the blouse and that it fitted him. Held, affirmed. Defendant had not been compelled to serve as a witness against himself by the Court's requiring him to try on the blouse. Justice Holmes referred to the possible inclusion of physical evidence within the scope of the privilege as an "extravagant extension of the Fifth Amendment." *Ibid.* The Supreme Court of Colorado elaborated somewhat on this language from *Holt* in Vigil v. People, 134 Colo. 126, 300 P.2d 545 (1956) by stating that: "Our Constitution (Colorado) protects one against an admission of guilt coming from his own lips under compulsion and against the will of the accused, and has no relation whatever to *real as distinguished from testimonial evidence.*" (Emphasis added.)

not be compelled to testify against himself, or to otherwise furnish evidence of a testimonial or communicative nature, but that it did not extend to a non-communicative blood test. Justice Brennan cited *Miranda v. Arizona*[19] for the proposition that the privilege has never been given the full scope suggested by the values it helps to protect. Although it is clear that the scope of the privilege could include the accused's communications, whatever form they might take, both federal and state courts have held that the protection of the privilege does not embrace compulsion to submit to photographing, measurements, fingerprinting, to write or to speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.[20]

In his dissent, Justice Black rejected the majority's use of the terms "testimonial" and "communicative" to restrict the privilege. He pointed out that the latest edition of Professor Wigmore's treatise translates "testimonial" to mean "communicative"[21] and contended that these terms were "not models of clarity and precision"[22] that could be properly used in defining the ambit of the privilege. He claimed that the purpose of the blood test was to obtain "testimony" in that it supplied information to ultimately enable a witness to "communicate" to the court the fact of intoxication. Justice Black found the majority's approval of *Boyd v. United States*[23] inconsistent with its strict construction in the present case and commented:

> "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 content but proscribes compelled production of his lifeless papers. . . . In such a situation blood . . . is not oral testimony given by an accused but it can certainly 'communicate' to a court and jury the fact of guilt."[24]

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19. 384 U.S. 436 (1966).
20. See note 16 *supra*.
21. 8 WIGMORE, EVIDENCE 378 § 2263 (McNaughton rev. ed. 1961).
22. 384 U.S. 757 (1966) (dissenting opinion).
23. 116 U.S. 616 (1886). It was said there that: "A close and literal construction (of constitutional provisions for the security of persons and property) deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against the stealthy encroachments thereon." *Id.* at 635.
24. 384 U.S. 757 (1966) (dissenting opinion).

He found the majority's reference to *Miranda* inept and a poor support for its holding, and asserted that the interpretive constitutional philosophy there was in harmony with *Boyd* and should have been applied in the present case. It is submitted that Justice Black disregarded *Holt* and its distinction between testimonial and real or demonstrative evidence, and that *Holt* controls. Justice Black's argument against the majority's terminology is answered by an analysis of the distinction between testimonial or communicative evidence and non-communicative or nontestimonial evidence. If the evidence depends upon the testimony of one other than the accused to convey ideas or information it is not *itself* communicative or testimonial. On the other hand, if the evidence *itself* conveys information or ideas it is communicative or testimonial. Justice Black argues that the source of the act should control, whereas the majority considers the nature of the product of the act and not the source.

*The Fourth Amendment Claim*

In considering Schmerber's search and seizure claim, Justice Brennan, speaking for the majority, noted that a similar challenge had been urged in *Breithaupt*,[25] but had been summarily dismissed because of *Wolf v. Colorado*,[26] which held that evidence obtained from an illegal search and seizure could be admitted in state prosecutions. Since *Mapp v. Ohio* had overruled Wolf, the issue of the constitutionality of the compulsory blood test was squarely presented. The questions to be answered were (1) whether the police were justified in requiring petitioner to submit to the test, and (2) whether the means employed in the taking of the blood were proper.

Although the majority recognized that more justification for intrusions into the human body must exist than the mere chance of obtaining desired evidence, they concluded that the procedure here in question was justified because the police officer might reasonably have believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened "the destruction of evidence."[27] The emergency resulted from the fact that the percentage of alcohol in the blood diminishes shortly after drinking stops. The securing of evi-

25. 352 U.S. 432 (1957).
26. 338 U.S. 25 (1949).
27. Preston v. United States, 376 U.S. 364, 367 (1964).

dence of blood-alcohol content was as an appropriate incident to the arrest.

The Court answered the second question by restating its reasoning in *Breithaupt* that such a blood test was commonplace and that it had been administered under reasonable conditions by competent personnel. Although it was concluded that there had been no violation of the fourth amendment right, Justice Brennan emphasized that the decision had only been reached on the facts of the present record, and,

> "That we today hold that the Constitution does not forbid the States *minor intrusions* into an individual's body *under stringently* limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."[28] (Emphasis added.)

*Observations*

It is submitted that the majority's traditional approach to the self-incrimination challenge was sound. Underlying consideration was given to the history and policy of the privilege, and *Holt*[29] supports the view that only compelled personal "communications" of a self-incriminating nature are protected. Justice Black's attack on the majority's terminology was answered by Justice Brennan's explanation that were the words used consistently as Justice Black suggested, all evidence received in court would be of a "testimonial" or "communicative" nature. He suggested that the fifth amendment does not relate to all acts, but only those that are communicative. Non-communicative acts, even though compelled to elicit the testimony of others, are not protected. *Boyd*[30] was cited as an example of what the Court considered a communicative act (the writing of personal letters or other private papers). The Court suggested that participation in a lie detector test might also be so categorized. In his concluding remarks, Justice Brennan explained:

> "The petitioner's testimonial capacities were in no way implicated; indeed, his *participation*, except as a donor, *was irrelevant to the results of the test*, which depend on chemical analysis . . . alone. Since the blood test evidence . . . was neither petitioner's testimony nor evidence relating to some

28. 384 U.S. 757, 772 (1966).
29. 218 U.S. 245 (1910).
30. 116 U.S. 616 (1886).

communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."[31] (Emphasis added.)

This language denotes a supplemental distinction between "passive" and "active" participation by the accused, passive participation being outside the protection of the privilege. A similar distinction was employed by a minority of states as an approach to their self-incrimination problems before *Malloy*,[32] but that distinction was between "forced passivity" and "forced activity" and should be distinguished from the Supreme Court's present classification. Forced activity meant compelled cooperation by the accused in the acquisition of evidence (breath for a breath test, putting finger to nose for a sobriety test), whereas forced passivity was taken to mean compelled submission supposedly without the need for cooperation of the accused (blood test). This approach produced an absurd result in that one could not be compelled to submit to a breath test, but could be compelled to submit to a blood test.[33] In the present case the Court implied that active participation was that which tended to produce evidence *itself* communicative; passive participation related to acts productive of evidence *itself* non-communicative.[34] Professor Wigmore has stated that only statements coming from a "person's own lips" are protected and that all acts are excluded from the privilege. Justice Black suggested that acts productive of physical evidence upon which others might testify should be protected. The majority compromised by concluding that only acts productive of communicative evidence would be protected.

It is submitted that this supplemental distinction is a valid and desirable accessory to proper application of the testimonial

31. 384 U.S. 757, 765 (1966).

32. 378 U.S. 1 (1964).

33. See Note, 44 KY. L.J. 353 (1956); Comment, 1 VAND. L. REV. 243 (1948); *cf.* Gouled v. United States, 255 U.S. 298 (1921); MCCORMICK, EVIDENCE 265, § 126 (1954).

34. *Cf.* Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 39 (1949): "Whenever the evidence is confined to *descriptions of involuntary reactions* of the accused *or to qualities of his body substances beyond his power* of control, its admissibility is clearly justified by the more liberal interpretation of the constitutional provision. Where, however, he is compelled *to do acts* which *he can use as a means of conveying ideas*, the reception of evidence of his conduct raises serious questions as to the extent to which practical considerations affecting efficient enforcement of the law under modern conditions may be safely permitted to limit the right of privacy and personal liberty." (Emphasis added.) *Cf.* Apodaca v. State, 140 Tex. Crim. Rptr. 593, 146 S.W.2d 381 (1941).

versus demonstrative or real evidence distinction. The present test as to exclusion of compelled physical evidence on self-incrimination grounds is apparently whether the person's act produces evidence itself communicative, *i.e.*, capable of conveying ideas within the person's power or control. *Schmerber* concluded that the act of compelled submission to a blood test did not produce evidence capable of conveying subjective ideas, but rather related to objective non-testimonial qualities of body substances. Although the majority did regard the evidence as an "incriminating product of compulsion," it felt that the privilege should not be extended to include this type of disclosure. Construing the privilege to include all physical evidence has been meaningfully described as a lumping together of the privilege against self-incrimination with "the principles of the rule against coerced confessions and due process concepts which results in an unnecessary extension of the privilege."[35] Although such an extension might possibly be justified as serving the policies of the privilege, it would be an undesirable impediment to law enforcement. Such minor intrusions are outweighed by the benefits received by society.

By means of its search and seizure analysis, it is suggested that the Court strikes a correct constitutional balance between the demands of society for scientific investigation methods and the rights of the individual. The Court, for the first time, provides specific guidelines for the application of the *Rochin* rule which were heretofore only broadly stated. Its search and seizure standard suggests that bodily invasions will be held valid only when: (1) the attempt to secure evidence is an appropriate incident to arrest, *i.e.*, that special circumstances must be present to remove the necessity of a warrant before proceeding with the test; (2) the intrusion is minor; (3) the extraction is by a physician in a hospital environment according to accepted medical practices; (4) the quantity of blood extracted is small; and (5) the method utilized involves minimal risk of infection, pain, or trauma. The Court's basic due process standard, that convictions may not be secured by methods that are brutal or shocking, has eliminated the need for affirmative con-

35. Comment, 49 J. CRIM. L., C. & P.S. 58, 60 (1958). As early as the decision in *Rochin*, Black and Douglas favored enlargement of the privilege to include this form of disclosure. They advocated extension of the privilege to "capsules taken from his stomach, blood taken from his veins . . . . provided they are taken from him without his consent." Douglas, J., concurring, 342 U.S. 165, 179 (1952). See also Douglas' dissent in Breithaupt, 352 U.S. 432, 442 (1957).

sent and there is no apparent objection to the tests when there is implied consent or protest without physical resistance. But how much must an accused resist and how much force can be exercised to compel him to submit before the procedure becomes unreasonable? *Rochin* represents one extreme of the problem — the case where there is resistance by the accused and brutal and shocking conduct is employed to compel submission. *Breithaupt* and the present case present the opposite extreme — the case where there is no resistance by the suspect or accused.

Although the laws of most states are seemingly precise in stating that reasonable force may be used in the execution of search warrants,[36] the gap between use of no force and the use of shocking force presents a nebulous middle zone.[37] The states have reached varied and conflicting results and the tendency is to require brutal force before vitiating the proceedings.[38] The best that can be said for these decisions is that they are inconsistent. For a state to authorize use of whatever force and means are necessary to compel submission, *i.e.*, to say that whatever amount of force is needed is reasonable, seems too broad a grant of power. It is generally viewed as such, with most of the states expressly stating that it is not the test.[39] Yet little is really done to establish a satisfactory standard other than to suggest that resolution of the problem is necessarily an ad hoc factual determination of reasonableness. It is felt that

36. See, *e.g.*, LA. R.S. 15:164 (1950), which makes a cross reference to 15:220 in authorizing the means and force permitted in the execution of a search warrant. R.S. 15:220 provides, in pertinent part: "The person making a lawful arrest may use reasonable force to effect the arrest and detention, and also to overcome any resistance or threatened resistance of the person being arrested or detained." Comment (b) to 15:220 states that a requirement of reasonableness would preclude the use of clearly inappropriate force and states that to impose a test of actual necessity upon the person arresting would not be just nor sound policy.

37. Justice Brennan noted that the Court was dealing with a novel aspect of search and seizure — that of intrusions into the human body — therefore former limitations as to permissible scope and procedure as well as kinds of property subject to search and seizure were no longer helpful, the traditional problems having dealt with intrusions into property relationships or private papers. "Because we are dealing with intrusions into the human body . . . we write on a clean slate." 384 U.S. 757 (1966) (majority opinion).

38. See note 11 *supra*.

39. It is submitted that there should be a distinction between the amount of force which is permissible in making a detention or arrest and the amount of force which is permissible in executing a search warrant involving a bodily intrusion. In the latter case some degree of force short of shocking conduct should not be permitted. Most commentators recognize the outer limits of the problem, but it seems a zone of great doubt as to permissible, or reasonable force in this new area of search and seizure where the Supreme Court now writes on a clean slate.

there is some degree of force short of brutality which should render the procedure unreasonable and therefore violative of due process. The present criterion protects the individual only from the more shocking police methods and encourages the well-informed suspect to resist with great tenacity in hopes of prompting brutal force to compel submission. It is to this area, therefore, that we must look to the Court for further clarification.

*Larry P. Boudreaux*

CRIMINAL LAW — CULPABILITY OF THE CHRONIC ALCOHOLIC

> *"The following persons are and shall be guilty of vagrancy: (1) Habitual drunkards; . . . Whoever commits the crimes of vagrancy shall be fined not more than two hundred dollars, or imprisoned for not more than nine months, or both."*[1]
>
> *"Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public: . . . (3) Appearing in an intoxicated condition . . . . Whoever commits the crime of disturbing the peace shall be fined not more than one hundred dollars, or imprisoned for not more than ninety days, or both."*[2]

Three recent decisions have cast doubt on the constitutionality of condemning as a criminal the chronic alcoholic who violates laws analogous to the Louisiana statutes set out above.[3] In *Robinson v. California*,[4] the Supreme Court held that a statute imprisoning a narcotics addict who had not been guilty of irregular behavior inflicts cruel and unusual punishment in violation of the eighth amendment as made applicable to the states through the due process clause of the fourteenth amendment.[5]

1. LA. R.S. 14:107 (1950), *as amended*, La. Acts 1952, No. 434, § 1.
2. LA. R.S. 14:103 (1950), *as amended*, La. Acts 1960, No. 70, § 1, La. Acts 1963, No. 93, § 1.
3. Most state laws dealing with vagrancy and public drunkenness are similar and find their origin in early English models. For extensive discussion see Dubin & Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); PERKINS, CRIMINAL LAW § 3, at 777 (1957).
4. 370 U.S. 660 (1962).
5. CALIF. HEALTH AND SAFETY CODE § 11721 provided: "No person shall use, or be under the influence of, *or be addicted to the use of narcotics*, excepting