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After an automobile accident, a state highway patrolman directed a physician to take blood from the arm of the unconscious driver for use in an alcoholic content test. The smell of alcohol on the driver's breath and an almost empty liquor bottle found in the car had indicated that the driver had been drinking. The result of the blood analysis was used to secure his conviction for involuntary manslaughter in a New Mexico court. No appeal was taken. A subsequent application for a writ of habeas corpus was denied. On certiorari, the United States Supreme Court, by a 6-3 decision, affirmed on the grounds (1) that the right against admission of illegally obtained evidence under the fourth and fifth amendments to the United States Constitution is not enforceable against the states as a generative principle of the Bill of Rights, and (2) that the due process clause of the fourteenth amendment was not violated inasmuch as the taking of blood without the petitioner's consent was not conduct sufficiently offensive or brutal as to deprive him of fundamental constitutional guarantees. In two dissenting opinions, it was objected that such an act was shocking to the conscience and hence unlawful. *Breithaupt v. Abram*, 77 Sup. Ct. 408, 412, 413 (1957).

The first ten amendments to the Federal Constitution have never been held to be restrictions upon the states.[1] Nor has it been held that the specific enumeration of a right among the Bill of Rights is alone sufficient to make that guarantee applicable against the states under the due process clause of the fourteenth amendment.[2] Rather, this clause encompasses only those rights which, regardless of whether they are explicitly mentioned in the Bill of Rights, are found through a long history of judicial inclusion and exclusion[3] to be fundamental to a free society.[4]

Among the restrictions thus excluded from the meaning of the due process clause is the fifth amendment guarantee against compulsory self-incrimination in a criminal proceeding.[5] In federal prosecutions illegally obtained evidence is inadmissable under the interpretations given the fourth and fifth amendments.[6] The states, however, are free to act as they choose in this regard, and the admissibility of evidence obtained by unreasonable search and seizure is a matter to be determined in each state by its own law.[7]

If, on the one hand, a state forbids admission of illegally obtained evidence, its use violates the state's law and hence might be

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[1] Barron v. Baltimore, 10 U. S. (7 Pet.) 464 (1833).
[2] Palko v. Connecticut, 302 U. S. 319 (1937); Brown v. Mississippi, 297 U. S. 278 (1936); Twining v. New Jersey, 211 U. S. 78 (1908); Hurtado v. California, 110 U. S. 516 (1884).
[3] Davidson v. New Orleans, 96 U. S. 104 (1877).
[4] Hebert v. Louisiana, 272 U. S. 312 (1926); Holden v. Hardy, 169 U. S. 366 (1898); Pennoyer v. Neff, 95 U. S. 714 (1877).
[5] Twining v. New Jersey, 211 U. S. 78 (1908) (leading case); Adamson v. California, 332 U. S. 46 (1947); Palko v. Connecticut, 302 U. S. 319 (1937).
[6] Weeks v. United States, 232 U. S. 383 (1914).
[7] Wolf v. Colorado, 338 U. S. 25, 38, Appendix, Table I (1949).

considered a violation of due process. Thus the Wisconsin Supreme Court recently held that the taking of blood for an alcoholic content test while a person was unconscious after an accident, and the subsequent use of the test results against him in a trial for negligent homicide, was, in this manner, unconstitutional both under the state constitution[8] and the fourteenth amendment due process clause.[9]

A state may, on the other hand, follow one of two other possible policies. It may, like Colorado,[10] permit the admission of such evidence under its law,[11] or it may mix its policy by only partially allowing the use of illegally obtained evidence.[12] In a state where the first course prevails, and sometimes in a state of the second type, the defendant in a criminal proceeding has no recourse to the Federal Constitution to secure the exclusion of this sort of evidence unless it can be shown that some part of the state's action has run counter to one or more of the fundamental rights brought under the due process clause by judicial interpretation.[13]

The New Mexico court has interpreted that state's constitutional provisions as allowing the admission of illegally obtained evidence.[14] The United States Supreme Court in the *Breithaupt* case [15] (1911).
followed the well-established rules just mentioned in holding that under these circumstances no error was present in the use of the evidence.

However, it is also established that any prejudicial act by government which is of such a nature as to shock the community's sense of fairness is outside due process of law,[15] and whether such an act had been perpetrated was the primary issue in the *Breithaupt* case. Personal sensibilities are not the criteria for this test unless they are generally shared by the population. In the Court's opinion, due process is an evolutionary concept changing as the people's practices and thinking change.[16] In each case, however, the

[8] Wis. Const. art. 1, § 8 (1870).
[9] Wisconsin v. Kroenig, 274 Wis. 266, 79 N. W.2d 810 (1956).
[10] Massantonio v. People, 77 Colo. 392, 236 Pac. 1019 (1925).
[11] Wolf v. Colorado, 338 U. S. 25, 35, Appendix, Table E (1949).
[12] See, e. g., Salsburg v. Maryland, 346 U. S. 545 (1954).
[13] *Ibid.* See note 3 *supra*.
[14] State v. Dillon, 34 N. M. 366, 281 Pac. 474 (1929), construing N. M. Const. art. 2, § § 7, 10,
[15] Rochin v. California, 342 U. S. 165 (1952); Brown v. Mississippi, 297 U. S. 278 (1936).
[16] "[D]ue process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by the whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct." 77 Sup. Ct. at 410.

private right involved must be weighed against the interest of government in performing its functions.[17]

This point of view is to be distinguished from earlier positions taken by the Court. Although the due process clause has long been taken to include a largely undefined body of basic rights,[18] the establishment of a sociological test for inclusion and exclusion is philosophically opposed to those conceptions of the law which hold that law is to be immutable except as it is changed by legislative action and that rights are to be secure against shifts in majority opinion. *Breithaupt* represents the "modern" trend. The "traditional" view was perhaps best expressed by the late Justice Sutherland when he cautioned that although the law is inclusive of all new situations to which it applies, it must not be taken to mean something which it did not mean when written.[19] The "modern" position considers the major premises of the law as evolutionary.[20] The "traditional" legal philosophy holds that only the factual situations, the minor premises, may evolve without the action of the properly constituted legislative organs. Whether this conflict involves a difference of opinion as to the outcome of the *Breithaupt* case under the two conceptions of the law is, of course, speculative. It is quite possible to reach the same conclusion through different lines of reasoning.

The Court in the principal case, however, relied upon the discovery of criteria by induction, which is—under the Court's present doctrine—the only avenue of approach open. It is significant that the Court, speaking through Mr. Justice Frankfurter, placed much emphasis upon the extent of blood sampling in the United States both in general medical practice and under the laws requiring blood tests prior to marriage.[21] The Court also appeared to stress the degree of the subject's physical exertion in opposing the violation of his body as a test of considerable importance,[22] probably with the view that this is relevant to the manner by which the general community would react to bloodtaking. In a prior case in which the man had struggled violently to avoid stomach-pumping, the Court held that the public conscience had been offended.[23] On the other factual extreme, a California case held that no offensive act occurred where blood was taken from a driver's arm while he was unconscious after an automobile accident.[24] However, in the last

[17] 77 Sup. Ct. at 412.

[18] Twining v. New Jersey, 211 U. S. 78 (1908); Brown v. New Jersey, 175 U. S. 176 (1899).

[19] "[T]he meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise. . . ." West Coast Hotel Co. v. Parrish, 300 U. S. 379, 402 (1937) (dissent).

[20] See, e. g., Brown v. Board of Educ., 347 U. S. 483 (1954).

[21] "The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance." 77 Sup. Ct. at 410.

[22] "[T]he absence of conscious consent, *without more*, does not necessarily render the taking a violation of a constitutional right." 77 Sup. Ct. at 410 (emphasis supplied). See also the interpretation of the Court's opinion given in the dissenting opinion of Chief Justice Warren, who said: "The Court's opinion suggests that an invasion is 'brutal' or 'offensive' only if the police use force to overcome a suspect's resistance." *Id.* at 413.

[23] Rochin v. California, 342 U. S. 165 (1952).

[24] People v. Haeussler, 41 Cal. 2d 252, 260 P.2d 8 (1953).

mentioned case, the blood sample was also needed for typing in order that the injured driver might receive a transfusion. The *Breithaupt* case lay between these two cases in terms of the violence done, and in none of the blood-taking cases mentioned here was a struggle present. It will be interesting to see what the Court will decide if ever a case arises pertaining to a state's right to use evidence obtained by a hypodermic withdrawal of blood from a conscious and strongly resisting defendant.

An additional constitutional issue involved in these cases seems now to be settled. The statutory provision that a high blood alcohol content is to be taken as presumptive of intoxication has been upheld against the contention that it established an unconstitutional presumption of guilt.[25] Unquestionably, the alcoholic content of blood has a strong, rational connection with the fact of intoxication.

Several criticisms of *Breithaupt* might be offered. Primarily it must be recognized that the view, discussed above, that the content of liberties is to shift with the changing feelings of the people is, in itself, inconsistent with the Rule of Law, and therefore inconsistent with perhaps the most fundamental concept of a free society. Each man's protection against the misuse of power should not depend upon the vicissitudes of his neighbors' opinions. If there is to be an evolution of the law it is better that the rights of the people should always be broadly construed and the powers of government narrowly confined. The "public interest" to enforce a particular law should never be held to outweigh the interest which the people have at stake in the protection of private rights if substantial methods of law enforcement exist in the alternative. The states are not so destitute of means to enforce traffic laws that they must puncture the unwilling bodies of their citizens. In the instant case, for example, other evidence was present, including a near-empty liquor bottle and the smell of alcohol on the driver's breath. The state may well have been able to obtain testimony by persons who had witnessed his drinking. It can hardly be said that there is a paucity of alternative proofs in cases involving overt acts which may be seen by others and which often give rise to abundant circumstantial evidence.

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[25] State v. Childress, 78 Ariz. 1, 274 P.2d 333 (1954).