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Blood Tests and the Bill of Rights--Breithaupt Revisited

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BLOOD TESTS AND THE BILL OF RIGHTS— *BREITHAUPT* REVISITED

Petitioner, in *Breithaupt v. Abram*,[1] was involved in a traffic accident in which several persons were killed. A near-empty whiskey bottle was found in the glove compartment of his pickup. While he lay unconscious in a hospital emergency room, liquor was smelled on his breath. At a state patrolman's request, the attending physician withdrew a sample of petitioner's blood with a hypodermic needle. Subsequent laboratory analysis indicated that the blood contained .17 per cent alcohol. At his trial for involuntary manslaughter, the results of the blood test were admitted as evidence that he had been driving while under the influence of alcohol.

On appeal petitioner claimed that a three-fold violation of his constitutional rights had occurred. Relying on the proposition that the "generative principles" of the Bill of Rights should extend the protections of the fourth and fifth amendments to his case through the due process clause of the fourteenth amendment,[2] he claimed a violation of the fourth amendment in that the taking of the sample constituted an unreasonable search and seizure, and a violation of the fifth amendment, in that the admission of the test results into evidence compelled him to be a witness against himself.[3] He also claimed that the conduct of the state officers constituted a violation of the fourteenth amendment's guarantee of due process.[4]

The court did not feel it necessary to consider his first two contentions since it was then established law that the fifth amendment was not applicable to the states,[5] and that the states were free to reject, as had been done here, the exclusionary rule that prohibited the admission in a criminal proceeding of any evidence obtained in violation of defendant's constitutional right to be free from unreasonable search and seizure.[6] However, the court did note that petitioner would have an argument were the rule applicable.[7]

Thus, the case was decided solely upon a consideration of petitioner's third contention: that the conduct of the state officers was "shocking" and offended a "sense of justice" and therefore was in itself a violation of due process.[8] He relied upon *Rochin v. California*,[9] in which the Supreme Court found such a violation when state officers forcibly employed a stomach pump to extract evidence. However, the Court could find nothing comparable to the facts in *Rochin*.[10] It considered the invasion to be slight since blood tests were by them routine. It then set the right of the individual that his person be held inviolable against the interests of the community in scientific determination of intoxication. Citing the deterrent effect of public appreciation of the conclusiveness of such tests, the

[1] 352 U.S. 432 (1957).

[2] *Id.* at 434.

[3] *Ibid.*

[4] *Id.* at 435.

[5] Palko v. Connecticut, 312 U.S. 319 (1937).

[6] Wolf v. Colorado, 338 U.S. 25 (1949). This case stated that the fourth amendment was binding upon the states, but held that the exclusionary rule was not.

[7] 352 U.S. at 434.

[8] *Id.* at 435.

[9] 342 U.S. 165 (1952).

[10] 352 U.S. at 435.

Court concluded that the individual's rights were far outweighed by the interests of the community.[11]

Although the issue was then thought to be settled, in the eight years since *Breithaupt* the Supreme Court has established precedents which would require a very different approach to the problem were a similar fact situation to come before it today. It is the purpose of this note to consider whether this new approach would necessarily require a different result.

Under the Fourth Amendment

In *Mapp v. Ohio*[12] the Supreme Court held that evidence obtained through an unreasonable search and seizure is inadmissible in state as well as federal courts. This holding invalidates the Court's basis for dismissal of petitioner's first contention in *Breithaupt*, and focuses attention on its comment that the decision might be otherwise were the exclusionary rule applicable.

The effect of *Mapp* upon the criminal law enforcement system of the individual states was left in doubt, since the Court did not discuss the question of what kinds of searches and seizures would be considered "unreasonable."[13] The issue was clarified somewhat by *Ker v. California*,[14] where the Court decided that *Mapp* did not wholly obliterate state search and seizure laws,[15] nor establish the standard of reasonableness.[16] The Court, while emphasizing that state standards must be consistent with constitutional guarantees, recognized that the circumstances facing state courts were as varied as the investigative and enforcement techniques employed by their law enforcement agencies.[17]

In *Ker*, state officers had probable cause to believe defendant had committed, and was committing, a felony[18] and that the evidence would be destroyed if they delayed in acting.[19] Failing to give the notice of authority and purpose required by statute,[20] the officers broke into his apartment and arrested him. A search at the time uncovered the evidence used for conviction.[21] If this method of entry was unreasonable, *Mapp* would prevent admission of the evidence since the subsequent arrest and search would be unlawful. The court reasoned that the "exigent circumstances"[22] justified the failure to comply with the statute.[23]

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[11] *Id.* at 439-40.

[12] 367 U.S. 643 (1961).

[13] Note, *Aftermath of Mapp v. Ohio*, 29 BROOKLYN L. REV. 98 (1962).

[14] 374 U.S. 23 (1963).

[15] *Id.* at 31.

[16] *Id.* at 32; see also Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319 (1962).

[17] 374 U.S. 23, 34 (1963).

[18] *Id.* at 35. "Every person . . . who possesses any marijuana . . . shall be punished by imprisonment in the state prison for not less than one year and no more than ten years . . ." CAL. HEALTH & SAFETY CODE § 11530.

[19] *Id.* at 42.

[20] "To make an arrest . . . a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." CAL. PEN. CODE § 844.

[21] 374 U.S. 23, 35-36 (1963).

[22] *Id.* at 41 (felony being committed and destruction of evidence imminent.)

[23] The dissent argued that federal standards of reasonableness were indeed broken

In *Breithaupt*, though there was no warrant or arrest, the officers undoubtedly had probable cause to believe that petitioner had been driving his vehicle while intoxicated.[24] There also was no question that destruction of the evidence was imminent.[25] These circumstances are similar to those of *Ker*, where constitutional standards of reasonableness were not exceeded.[26]

Recently two courts faced fact situations nearly identical to those involved in *Breithaupt* and came to different conclusions as to the reasonableness of the blood test. A California court in *People v. Huber*[27] held that where investigating officers had reason to believe that the driver was intoxicated and had caused the accident, and where there was no other means available to prevent destruction of evidence of the alcohol content of the blood of an unconscious driver, there were exceptional circumstances which justified taking a blood sample without a warrant, arrest, or consent by the driver.[28] This analysis follows that of the Supreme Court in *Ker*. As in *Breithaupt*, the court appreciated "the imperative public interest involved."[29]

On the other hand, a New York court in *People v. Young*[30] found the taking of the sample unreasonable,[31] dismissing *Breithaupt* as of no consequence, and saying: "if the Breithaupt facts were today to be represented to the Supreme Court, we think it reasonable to anticipate, in the light of *Mapp v. Ohio*, that the court would condemn the police action here as an illegal search and seizure violative of the Fourth Amendment."[32] The court completely ignored the reasoning of *Ker* that the particular circumstances of the case and any "exigent circumstances" are important in determining the reasonableness of the action in question.[33] In the light of *Ker*, it is difficult to justify the prophecy of the New York court in *Young*.

Therefore, even in light of *Mapp*, a consideration of petitioner's search and seizure argument should not change the *Breithaupt* result. The treatment of the argument in *Huber*[34] reinforces this conclusion. *Ker* allows local courts considerable latitude, and even implies that the due process standards of *Breithaupt* and *Rochin* may very well receive indirect recognition through an appreciation of the importance of "exigent circumstances" in cases of this nature.[35]

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and that the court's decision could rest only upon "an almost automatic assumption that the suspect . . . will attempt to destroy whatever possible incriminating evidence he may have." *Id.* at 56.

[24] There was a whiskey bottle in the glove compartment of petitioner's car and liquor on his breath.

[25] The amount of alcohol in the bloodstream diminishes with time, destroying the incriminating evidence. This removes one of the principal objections of the *Ker* dissent.

[26] 374 U.S. 23, 40-41 (1963). *Accord*, Chapman v. United States, 365 U.S. 610 (1961), allowing search without a warrant and not incident to arrest under emergency circumstances indicating that suspects are about to remove evidence.

[27] 232 Cal. App. 2d 663, 43 Cal. Rptr. 65 (1965).

[28] *Id.* at 670, 43 Cal. Rptr. at 70.

[29] *Id.* at 668, 43 Cal. Rptr. at 69.

[30] 42 Misc. 2d 540, 248 N.Y.S.2d 287 (Westchester Co. Ct. 1964).

[31] The court maintained that where no warrant has been employed and accused is not yet under arrest, search and seizure is unreasonable.

[32] 42 Misc. 2d at 550, 248 N.Y.S.2d at 297.

[33] 374 U.S. 23, 32-33 (1963).

[34] 232 Cal. App. 2d at 670, 43 Cal. Rptr. at 71.

[35] 374 U.S. 23, 34 (1963).

Under the Fifth Amendment

The Supreme Court in *Malloy v. Hogan*[36] extended the fifth-amendment privilege against self-incrimination to the states through the due process clause of the fourteenth amendment. This extension invalidates the basis for the Court's refusal to consider petitioner's second contention. There is, however, considerable doubt whether this privilege would aid the petitioner.

The privilege against self-incrimination originated in reaction to the practice of early English courts of compelling defendants to give testimony as to their guilt.[37] It was originally limited to testimonial compulsion,[38] and the majority of the cases have retained this limitation,[39] although two other views have achieved some recognition. One view would admit evidence gathered through passive assistance of the accused but would reject it if the accused was compelled actively to participate.[40] Even if this approach were followed, the blood test would be admissible since petitioner's participation was merely passive. The second view, of recent origin, was adopted by Justices Black and Douglas in *Breithaupt*[41] and *Rochin*.[42] It holds that the use of any compulsion upon the accused brings the evidence so obtained within the privilege.[43] In *Huber*, the court dismissed without discussion defendant's contention that this right was violated,[44] while the court in *Young* came to the same conclusion[45] after careful consideration of the views of Black and Douglas. Since there is no indication that their views have gained majority status in the Supreme Court, the application of the fifth amendment to the states does not aid petitioner.

Under the Sixth Amendment

Breithaupt made no claim of a violation of the right to counsel guaranteed him by the sixth amendment.[46] *Gideon v. Wainwright*[47] first applied the right to representation by counsel at trial to the states through the due process clause. *Gideon* alone does not provide a reason to reconsider *Breithaupt*, since the dis-

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[36] 378 U.S. 1 (1964).

[37] McCORMICK, EVIDENCE § 120 (1954).

[38] *Ibid.*

[39] United States v. Nesmith, 121 F. Supp. 758 (D.D.C. 1954); People v. Lewis, 152 Cal. App. 2d 824, 313 P.2d 972 (1957); People v. Conterno, 170 Cal. App. 2d Supp. 817, 339 P.2d 968 (App. Dep't Super. Ct., Los Angeles, 1959); State v. Smith, 91 A.2d 188 (Del. Super. Ct. 1952); State v. Wise, 19 N.J. 59, 115 A.2d 62 (1955); Commonwealth v. Tanchyn, 200 Pa. Super. 148, 188 A.2d 824 (1963); Walton v. Roanoke, 204 Va. 678, 133 S.E.2d 315 (1963); 8 WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1961). *Contra*, Cox v. State, 395 P.2d 954 (Okla. Crim. 1964); Owens v. State, 164 Tex. Crim. 613, 301 S.W.2d 653 (1957).

[40] McCORMICK, EVIDENCE § 126 (1954).

[41] 352 U.S. 432, 443-44 (1957) (dissent).

[42] 342 U.S. 165, 174, 177 (1952) (concurring opinion).

[43] See McCORMICK, EVIDENCE § 126 (1954).

[44] 232 Cal. App. 2d 663, 672, 43 Cal. Rptr. 65, 70 (1965).

[45] 42 Misc. at 551-52, 248 N.Y.S.2d at 298.

[46] This point also was not raised in *Huber* or *Young*.

[47] 372 U.S. 335 (1963).

puted blood test took place prior to the trial. However, *Escobedo v. Illinois*,[48] which held that the right to counsel may accrue at the time of police interrogation, raises the question of whether it would apply to *Breithaupt*. There, the Supreme Court held that once an investigation focuses upon a particular suspect who is in custody, and the police begin a process of interrogation designed to elicit incriminating statements, if the suspect requests and is denied assistance of counsel and is not warned of his constitutional right to remain silent, he has been denied his constitutional right to counsel and no statement elicited from him may be used as evidence against him.[49] A waiver of this right is possible only if done knowingly and intelligently.[50] In order to determine when this critical stage has been reached, the nature of the particular proceeding and the circumstances of the case must be considered.[51]

It is apparent that *Escobedo* does not apply to the particular fact situation of *Breithaupt*. As the Court in *Escobedo* makes clear,[52] the purpose of allowing a prisoner to see his attorney at the time of interrogation is to assure that he is effectively advised of his rights—in that case, the right to remain silent—so that he can intelligently decide whether to waive them. He is prejudiced by denial of his right to counsel only if he "waives" his rights without being fully advised. In *Breithaupt*, petitioner, being unconscious, neither gave nor withheld his consent to the blood test. Therefore, since he did not "waive" his rights, the denial of petitioner's right to counsel, if there were such a denial, did not prejudice him.[53]

Conclusion

Although a "revisiting" of *Breithaupt* would involve radically different precedent and problems, the decision of the Supreme Court should not change. In addition to the factors previously mentioned, practical considerations make an extension of the privileges of the fourth, fifth, and sixth amendments to *Breithaupt* unwise. The increasing slaughter on the nation's highways, as well as the increase in crime in general, may be prevented best through the use of modern criminal investigative techniques. These techniques would be severely hampered by an interpretation of what constitutes an unreasonable search and seizure that allows the guilty to go unpunished. It is within the authority of Congress and state legislatures to create alternate methods of deterring police misconduct in this area. An application of the fifth amendment as called for by petitioner could easily lead to the extension of the privilege against self-incrimination to other modern police investigative procedures, such as fingerprinting and photo identification. An extension of the *Escobedo* doctrine to *Breithaupt* would seriously impede routine police investigative methods. As the criminal element of our society grows more

[48] 378 U.S. 478 (1964).

[49] *Id.* at 490-91.

[50] *Id.* at 490 n.14.

[51] *Id.* at 488.

[52] *Ibid.*

[53] The question of whether *Escobedo* applies to blood-test cases in which the suspect was conscious when the blood sample was taken is beyond the scope of this note. An indication that it would not apply will be found in People v. Bellah, 237 A.C.A. 129, 46 Cal. Rptr. 598 (1965).

resourceful, so must our law enforcement agencies, if the public is to be protected. This problem was appreciated by the court in *Breithaupt* and a sound decision resulted. Such policy considerations provide perhaps the best argument for allowing that decision to remain unchanged.[54]

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[54] Implied-consent statutes raise problems beyond the scope of this note. For an able discussion, see Comment, *Chemical Tests and Implied Consent*, 42 N.C.L. REV. 841 (1964).

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