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JUDICIAL REACTION TO EVIDENCE OBTAINED BY HARSH AND UNUSUAL MEANS

GENE HAISLIP

I.

Introduction

The question with which this paper will be concerned is the nature of the judicial reaction to the new potentialities which science holds for the further extension of the "eye and finger" of the government, particularly as regards their scrutiny of the person accused of a crime. More specifically we shall consider what presently is and what probably will be the court's answer to the accused's plea for the sanctity of his person from the probing instrumentalities of a police authority newly awakened to the fact finding advantages which modern technology can offer.

No adequate means presently exist with which to protect an individual helplessly in the clutches of a police power determined to wring from him the facts which it desires to know or to have believed. But whereas such a procedure cannot result in a condemnation, the accused may seek his succor in the court in which he is tried. This power of the court was clearly recognized in the case of *Weeks* v. *United States*[1]. In this case the Supreme Court refused to entertain certain incriminating facts which were obtained from the accused by what the court considered to be illegal means. In effect the court has, by this ruling and its subsequent ramifications, established its authority over the exercise of police power to the extent of determining what uses of the power can be fruitful in producing legally competent evidence which will be received at trial. It therefore becomes crucial for the exercise of police power to determine whether or not any given method of collecting evidence is illegal. As a consequence such a determination can

[1] 232 U.S. 383 (1913).

also be decisive of the degree of efficiency with which the criminal law will be administered.

The principal legal concepts which are of most relevance to the issue with which we will be concerned are those expressed in the Fourth and Fifth Amendments of the Federal Constitution:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.[2] . . . nor shall [any person] be compelled in any criminal case, to be witness against himself.[3]

It is by application of these principles, together with their state counterparts and more indirectly the Fourteenth Amendment, that the problem of science and the suspect will be decided.

The following analysis purports to be only a cursory examination of the subject and its possible implications. The emphasis will be placed on the federal and Supreme Court decisions for the reason that (1) the Supreme Court has announced in the recent case of *Mapp* v. *Ohio*[4] that all illegally obtained evidence will be inadmissible in any court in the United States, (2) the relevant provisions of the Constitution are to be found in duplicate in most of the states, (3) it is established that the Fourth Amendment applies to the states by means of the "due process" clause of the Fourteenth Amendment[5] and (4) there is strong evidence that the states will either follow the lead of the Supreme Court in this field or that they will be forced to do so by application of the Fourteenth Amendment.

One further note of caution, before proceeding, is that one cannot yet pretend to draw any conclusions as to what the general law governing the subject matter presently is. First of all there are not enough decided cases to support such a conclusion and secondly it would require a dubious supposition

[2] U.S. CONST. amend. IV.

[3] U.S. CONST. amend. V.

[4] 367 U.S. 643 (1961).

[5] Wolf v. Colorado, 338 U.S. 25 (1949).

as to the relationship of the federal and state precedents. This then is intended to be only an analysis of the judicial reaction to the problem. The important element is that the advent of new circumstances has necessitated a re-examination and a further definition of the two greatest procedural protections of the individual.

II.

Background

The ancient law governing the extent to which the individual's person could be scrutinized is well settled. The conventional limitations on the application of the Fifth Amendment are stated in the case of *Holt* v. *United States* in which the court said:

> The prohibition of compelling a man in a criminal court to be 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.[6]

It has therefore followed that evidence obtained by a compulsory examination of the accused does not violate the provisions of the Fifth Amendment.

In a similar manner the Fourth Amendment prohibition against illegal search and seizure has always been held not to apply in cases where there has been a valid arrest. The court held in the case of *United States* v. *Rabinowitz*:

> The right to search the person incident to an arrest has been recognized in this country and in England. Where one had been placed in the custody of the law by valid action of officers it was not unreasonable to search him.[7]

This exception to the general rule has been to some degree eroded by time and circumstance and the problems with which we shall deal. It is now recognized that there may be exceptions

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[6] 218 U.S. 245, 246 (1910); see also, United States v. McFarland, 150 F.2d 593 (D. C. Cir. 1945).

[7] 339 U.S. 56, 57 (1950); see also, Weeks v. United States, *supra* note 1; Jones v. United States, 357 U.S. 493 (1958).

to the exception and the now prevailing attitude of the courts is better expressed by the court in *Charles* v. *United States*:

> . . . Once the body of the accused is validly subjected to the physical dominion of the law, inspection of his person, regardless of purpose, cannot be deemed unlawful . . . unless they violate the dictates of reason either because of their number or their manner of perpetration.[8]

The question which is not answered by this general rule is what kind of examination will be deemed reasonable and what kinds not. The previously unknown use of scientific methods of investigation and the high esteem in which the public holds its proofs have made this decision one of considerable judicial difficulty and importance, not so much in the light of present usage but in regard to future possibilities. The question then may be concretely stated as this—assuming a valid arrest, what is the judicial criterion for an acceptable scientific examination of the person?

In the case of *United States* v. *Willis*[9] the defendant was validly arrested by federal officers upon grounds of reasonable suspicion of having carried and consumed narcotics. The defendant was then forcibly strapped to a table and his stomach was pumped by a qualified physican. A quantity of dope was recovered and subsequently used in evidence. On appeal, the court tiraded to some length as to the injustice and brutality of this examination:

> It is rather difficult to reason one into the conclusion that the sacred person may be so violated, over the protests of that person, as to take from the stomach without consent and without warrant.
>
> We may venture a little further into the realm of conjecture . . . if a search such as was made in the instant case may be approved, would it not likewise follow that if the narcotics after being swallowed had passed from the stomach to the blood stream, some officers might feel it incumbent upon them to drain the defendant of part of his life's blood in an effort to discover the hidden evidence.[10]

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[8] 278 F.2d 386, 389 (9th Cir. 1960).

[9] 85 F. Supp. 745 (S.D. Calif. 1949).

[10] *Id.* at 748.

This latter paragraph will seem particularly ludicrous in the light of more recent Supreme Court decisions although it would seem that there is something generally nauseating to judges about stomach pumping.

In the case of *Rochin* v. *California*[11] the police entered the defendant's house without a warrant and came upon him in his bedroom whereupon they preceived on a night stand a number of capsules which they reasonably believed to be narcotics. The defendant grabbed these capsules and put them in his mouth. A struggle ensued in which the police attempted unsuccessfully to recover the capsules. When it was apparent that they had failed they arrested the defendant and rushed him to a hospital where his stomach was pumped against his will and a quantity of narcotics was thereby recovered. The defendant was convicted largely on the strength of this evidence. The case came before the Supreme Court on the charge that the petitioner had been deprived of due process of law. The court held:

> . . . This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of the government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.[12]

The question arises as to exactly what the court's objection was to this line of procedure. It is obvious from the case of *Wolf* v. *Colorado*[13] that mere illegal search and seizure on the part of the state was not, at the time of the *Rochin* case, a sufficient ground for setting aside a conviction.

It seems to be well established that had the officers come upon the defendant with reasonable grounds of suspicion that they would have been justified in their attempt to retrieve the capsules from the defendant's mouth. Such was the set of facts in the case of *Espinoza* v. *United States*[14] in which the court

[11] 342 U.S. 165 (1952).

[12] *Id.* at 209.

[13] *Supra* note 5.

[14] 278 F.2d 802 (5th Cir. 1960).

upheld this action on the part of federal officers. The question then arises as to whether the officers would have been justified in pumping the accused's stomach had they failed to recover the capsules from his mouth. Under the lower court precedent of *United States* v. *Willis*[15] they would not. Although in the *Rochin* case[16] the Supreme Court objected to the "whole line of procedure" on the part of the state officers, it is fairly clear in the dicta that the major objection was not to the illegal entry and search without a warrant but rather to the subsequent stomach pumping.

III.

Present Criterion

Some five years later the case of *Breithaupt* v. *Abram*[17] came before the Supreme Court. In that case the defendant was involved in an automobile accident and while in a state of unconsciousness following the accident, police officers took from him a blood sample to use as evidence in convicting him of a manslaughter charge. The defendant objected to this unwarranted taking of his blood without his consent and cited the *Rochin* case as supporting precedent. The court however distinguished the two cases on the following grounds:

> Basically the distinction [between the Rochin and Breithaupt cases] rests on the fact that there is nothing "brutal" and "offensive" in the taking of a sample of blood when done, . . . under the protective eye of a physician.[18]

The court also made much over the fact that some 44 states use blood testing as a means of determining intoxication and that the accuracy of the test is well recognized in medical circles. The case therefore evolves a threefold criterion on which to validate such probings: (1) that no "brutal" or "offensive" means be employed in the examination, and (2) that the examination be administered by trained personnel, and (3) that the results of the examination have a high degree of certainty.

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[15] *Supra* note 9.

[16] *Supra* note 11.

[17] 352 U.S. 43 (1957).

[18] *Id.* at 410.

The earlier case of *Leyra* v. *Denno*[19] reflects also the same attitude on the part of the Supreme Court. Although the case is not formally classified as one dealing with the validation of a scientific examination of the person, it nevertheless reflects a common element. Here the accused was validly arrested as a murder suspect in the slaying of his parents. While under police custody he was examined and questioned for some hours by a psychiatrist. At the end of the examination the defendant had confessed to the murders. With sweeping statements of disapproval the court reversed the case on the grounds that the confession was coerced. So little faith did the court have in the examination that it seems never to have occurred to it that, at least from the psychiatrist's point of view, he had considered himself to be conducting a reliable and scientific examination. It is however widely known that the present value of such findings are in great dispute and laymen in general do not have as much confidence in this type of examination as they do in a chemical analysis. For this reason the proceedings, although conducted by an expert and seemingly neither brutal nor offensive, failed completely to meet the requirement that the results of an examination have a high degree of certainty.

An analysis of the later decisions shows that the courts have more or less consciously applied this threefold criterion. In the case of *United States* v. *Townsend*[20] the defendant was arrested on a charge of rape and was taken to the police station where a number of officers forcibly removed his trousers and swabbed his penis with cotton, thereby obtaining evidence of blood stains which they sought to use at trial. The court, in condemning the examination, cited the fact that, "the police failed to make any tests which might have established the source or nature of the blood . . . " The court then stated:

> . . . the swabbing of the penis by law enforcement officers is by no means standard operating procedure . . . The use of force to compel an individual to submit to such an invasion of his privacy is certainly conduct which shocks the conscience . . . [21]

[19] 347 U.S. 556 (1954).

[20] 151 F.Supp. 378 (D.C. Cir. 1957).

[21] *Id.* at 387.

These criticisms point out that the examination in question failed to qualify for validation in at least two particulars: (1) the results of the examination did not have a high degree of certainty, and (2) the examination was not administered by trained personnel.

In the case of *Blackford* v. *United States*[22] the defendant was reasonably suspected of concealing narcotics in his rectum and over his protest he was forcibly undressed and held while a doctor probed the rectum and recovered the narcotics. Of this the court said:

> The precise knowledge of what and how much was where, the use of only slight force, the handling of the examination by qualified doctors, with the use of scientific procedures, and under sanitary conditions, all militate against finding this search and seizure to be unreasonable.[23]

The court, in essence, pointed out the compliance of the examination with each aspect of the necessary criterion. The case of *Murgia* v. *United States*[24] involved a more or less identical situation and was likewise validated by the court.

Thus far it would appear that the controversy over such scientific invasions of the person has dissipated and settled into a set of workable judicial rules. In regard to two of the aspects of the threefold criterion, *i.e.* the requirement of reliable results and the use of scientific methods and personnel, this picture of judicial unity would seem to be an accurate representation. But it is when we come to the third requirement, that of the absence of the use of "brutal and offensive" means, that one clearly sees the disunity and misunderstanding which exist among the judiciary. In fact the dicta of the various cases show that the courts and justices are acting from antithetical philosophies.

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[22] 247 F.2d 745 (9th Cir. 1957).

[23] *Id.* at 753.

[24] 285 F.2d 14 (9th Cir. 1960).

IV.

The "Brutal" or "Offensive" Test

The obvious difficulties entailed in a uniform application and understanding of so vague a requirement that an examination be conducted without "brutal" or "offensive" means arise from the fact that whether or not a procedure is "brutal" or "offensive" is a matter of subjective sentiment. In the dissenting opinion of the *Breithaupt*[25] case, Justices Warren, Douglas and Black were of the view that, "Only personal reaction to the stomach pump and the blood test can distinguish . . . " the case from the *Rochin* decision. Yet the body of the court insisted that in so ruling in the *Breithaupt* case that it was not overruling the *Rochin* decision. But in view of the fact that the stomach pumping in the *Rochin* case was administered by a qualified physician and that the results of this type of examination are highly conclusive it would appear that the only valid distinction between the two cases rests on the fact that the court considered the forced stomach pumping in *Rochin* to be "brutal" and "offensive" as compared with the nicety of taking blood from an unconscious suspect. It is worthy of note that the court in the previously cited case of *United States* v. *Willis*[26] considered that, "to drain the defendant of part of his life's blood . . . " was a great deal more heinous than pumping his stomach.

What therefore is "brutal" or "offensive" conduct in problems of this nature? One cannot escape the impression from a reading of the *Rochin* case that the court had before it the conjured image of a lone and helpless man strong-armed and bullied into regurgitating his stomach's contents, a repulsive show of brute police power. What would have been the conjured image had Rochin been requested to submit to the stomach pumping and upon his refusal had been ordered to submit to the examination whereby he calmly reclined on the table and resigned himself to the methodical procedures of the attending physician? Would this too have been brutal and offensive? To quote from the previously cited case of *Murgia* v. *United States*:

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[25] *Supra* note 17.

[26] *Supra* note 9.

> At the hospital Agent Scott asked Murgia to remove his trousers and Murgia declined to do so, upon which Agent Scott said, "Bend over and remove your trousers". Murgia thereupon complied. Dr. Milligan then probed the rectum with his finger and withdrew the red balloon which contained the heroin. Thus no question arises herein under the "brutal and offensive treatment" doctrine re-emphasized recently by the Supreme Court.[27]

From this statement it is clear that the court saw no problem of "brutal" and "offensive" treatment because of the fact that no physical force was necessary to subdue the accused. The same conclusion was reached by the court in *Blackford* v. *United States*[28] because of the necessity of using "only slight force" to subdue the defendant. In the *Breithaupt* case of course no force was necessary since the defendant was unconscious.

Must we therefore conclude that the applicability of the "brutal and offensive treatment" doctrine depends on the degree of force necessary to be exerted in order to suppress the defendant's will? This would certainly appear to be a most injudicious rule. To quote again from the case of *United States* v. *Townsend* in which the defendant's penis was forcibly swabbed:

> . . . For basically, what is "offensive" herein is that the suspect was compelled by police authorities to submit to the test involved. To say otherwise is to say that hardened criminals willing to risk struggle with the police could successfully overcome the right of law enforcement officers to obtain evidence while less aggressive suspects . . . could be compelled to submit to the identical tests.[29]

Obviously the court did not see or could not believe the logical implications of the earlier Supreme Court decisions. The holding in the case is therefore identical with the dicta found in the dissenting opinion of the *Breithaupt* case:

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[27] *Supra* note 24 at 16.

[28] *Supra* note 22.

[29] *Supra* note 20 at 388.

> I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest . . . [30]

The only other explanation of the *Rochin* and *Breithaupt* decisions would be that the court did not mean to equate "brutal and offensive treatment" with the quantum of force necessary to subdue the defendant but rather with the pumping of stomachs as distinguished from the taking of blood regardless of the force involved. We must then ask the question: Is the momentary taste of vomit so much worse than the prick of a needle or the probing of the rectum that it should mean the difference between freedom and confinement or the establishment of guilt and innocence? When measured in terms of such weighty matters the differences between these types of examinations would clearly seem to be negligible.

At this point in our exposition it is clear that the misunderstanding and confusion which exist among the judiciary goes to the very heart of the matter. It is not to be expected that the courts will continue long in their handling of these matters before the unjust implications of the cases as they now stand will have to be dealt with one way or another. Nor can they long afford to continue in this state of confusion if police abuses are to be corrected. To quote Justice Clark:

> . . . Unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions.[31]

The ultimate issue with which the courts will be faced is whether or not a validly arrested person may be required to submit to any scientific examination and if so then how will the line be drawn as to what kinds of scientific examinations may be given. We may assume that if it be decided that an accused may be given certain kinds of examinations without his consent then the present absurdity will be dispensed with. It will make no difference how much force will have to be used to give the accused the examination. We may also assume that if certain

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[30] *Supra* note 17 at 413.
[31] Irvine v. People of California, 347 U.S. 128, 138 (1954).

examinations may be given without the accused's consent that their validity will still be subject to the two generally accepted requirements, that their results have a high degree of certainty and that they be conducted by qualified personnel.

V.

Antithetical Points of View

Thus far we have two basically contradictory points of view represented by the *Rochin* and *Breithaupt* cases. One of these two cases will become the basis for the future rulings while the other will become a useless precedent either in fact, by being distinguished to death, or by actual repudiation. The antithetical points of view regarding the scientific scrutinizing of the person are well reflected and stated in the two cases. From the concurring opinion of Justice Black in the *Rochin* case we have the following statement:

> I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by the contrivance of modern science.[32]

Here science is viewed as not belonging in the realm of criminal prosecution or at least not in this phase of it. For a forceful statement of the other view we have but to turn to the dicta of the *Breithaupt* case:

> Modern community living requires modern scientific methods of crime detection lest the public go unprotected . . .
>
> As against the right of the individual that his person be held inviolable . . . must be set the interests of society . . . And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses.[33]

Now therefore we have the broadest questions of human concern before us: How to make a beneficial use of power. As the wheels of science continue to grind out new and more powerful devices in every area they unfortunately do not grind

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[32] *Supra* note 11 at 211.

[33] *Supra* note 17 at 413.

out mandates or even formulas for their proper use. These problems are only now beginning to lap against the ancient precepts of the law. It is therefore natural that they produce temporary confusion and uncertainty. The scientific procedures involved in the cases with which we have dealt represent only the infancy of this field of application. It may be reasonably anticipated that in time advances in the field of medicine, psychology, chemistry and neurology will be able to produce reliable and objective lie detector tests, truth serums and the like. For this reason and for the reason of the present confusion on the subject it is perhaps worth while to consider the merits of the conflicting points of view.

As already indicated the principal objection to the giving of a compulsory scientific examination has been that it violates the privilege against self-incrimination embodied in the Fifth Amendment. This line of thought is represented in the Supreme Court by Justices Black, Douglas and Warren, although in a continuous line of decisions the court has held that the amendment applies only to verbal communications.[34] Even so the fact remains that the reason for making such a distinction is a flimsy one at best and one which, given the right court, might be easily torn away. The basic mandate of the Fifth Amendment as these Justices have grasped, is that the defendant's will be not bent against his own cause, or stated another way, that the defendant is not a source from which evidence may be obtained without his cooperation. There can be no real distinction between forcing words from the accused's mouth and forcing blood from his veins unless it be for reasons which go behind the Fifth Amendment. It can be safely assumed however, that the Fifth Amendment was drafted with verbal communications in mind for the reason that the framers of the amendment did not at that time imagine that there could by any other means of self-incrimination. Therefore if the Fifth Amendment is to be applied to the kind of probings under consideration, it can only be applied by means of judicial interpretation. This would require going behind the amendment in search of the intent of its framers and the nature of the evils which they sought to thereby remedy.

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[34] Other than the cases already cited is the closely related case of United States v. Iacullo, 226 F.2d 788 (7th Cir. 1955) in which the compulsory taking of fingerprints after a valid arrest was held not to violate the Fifth Amendment.

VI.

The Fifth Amendment Objection

We may begin this inquiry by first seeking the origin of the Fifth Amendment and thereby exposing the causes which gave rise to it. According to Professor Wigmore's concise and well documented account of the origin of the Fifth Amendment[35] the objection to compulsory self-incrimination first arose because of the abusive ecclesiastic ex officio proceedings by the Court of Star Chamber. The ex officio proceeding provided that an accused could only be made to answer after he had been duly charged by a number of witnesses or had become publicly notorious. The abuses of the Star Chamber were of two kinds, the first of which according to Professor Wigmore was that in practice the Court of Star Chamber dropped the requirement that the defendant could not be compelled to answer until some evidence or witnesses were first produced. In so doing, they used the compulsion merely as a means to explore at will and at random into the life of whomever it so pleased them to choose as a victim, "in the speculation of finding something chargeable".[36] The second abuse was adopted directly from the ecclesiastical inquisition and consisted in torturing the accused into answering.[37] Needless to say this frequently resulted in obtaining the desired results regardless of the truth.[38] By 1641 the English Parliament became so disgusted with the Star Chamber that it was abolished and with it, according to Bentham, "every distinguishable feature of a system of procedure directed at such ends".[39] This statute and its subsequent development at law resulted in the prohibition of the Fifth Amendment.

The historical basis on which the Fifth Amendment is therefore predicated is to be found in two major objections:

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[35] 8 WIGMORE, EVIDENCE § 2250 (3rd ed. 1940).

[36] *Ibid.*

[37] Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 1, 5 (1930).

[38] A clear indication of this is to be found in Bacon's notes to wit: "Upon these interrogatories, Peacham was examined before torture, between torture, and after torture; nothing could be drawn from him, he still persisted in his obstinate and inexcusable denials and former answers." Corwin, *Ibid.*

[39] 8 WIGMORE, EVIDENCE § 2250 (3rd ed. 1940), quoting from Bentham's Rationale of Judicial Evidence (at p. 283).

(1) the wanton arrest, imprisonment and examination of persons without well-founded suspicion or charges and (2) the unreliability of the evidence and admissions obtained by coercing the accused. The former objection is tied to the general axiom of Anglo-American law that the individual is above the reproach of the law until there is just reason to suspect his guilt. This objection is presently met by the law of warrants and arrests and does not concern the problem at hand. The latter objection is tied to the general axiom that it is better that the guilty go free than that the innocent should suffer, or more exactly that it is better to make law enforcement more difficult than that innocent persons should suffer conviction because of forced and fabricated admissions obtained by over-zealous prosecutors. This latter objection is met almost exclusively by the application of the Fifth Amendment and to this end it continues to be of great value.

Returning to the question of whether or not the Fifth Amendment should be applied to the scientific probings of an accused we see that the protection which the Fifth Amendment was created to afford is not violated by such examinations for the reason that the validity of the evidence so obtained may be objectively appraised. Whereas over-zealous prosecutors could by means of force "persuade" an accused that he was drunk (for example), they cannot persuade his blood to register a certain percentage of alcohol. The element of unreliability is not present in the evidence so obtained, provided, however, that the courts continue to adhere to the requirements of testing which are presently agreed upon.

VII.

The Necessity of Further Rules and Some Tentative Suggestions

It is probable also that the Fifth Amendment was created not only to do away with unreliable aspects of the evidence obtained by coercion but also with the brutality of the methods which it might become necessary to use on a stubborn suspect, *i.e.* torture. This fact is no doubt responsible for the "brutal and offensive" doctrine which the court has announced. In order to meet this objection without ending up in the present logical absurdity already mentioned *i.e.* that the more uncooperative suspects may avoid the tests by putting up enough of

a struggle, it will be necessary to formulate additional rules. The newly enacted Virginia statute[40] regarding the taking of blood from drunken driving suspects provides an admirable means to solve this dilemma. The coercing incentive for taking the test is completely uniform and neither brutal or offensive.[41] A reasonable solution to the problem at hand would be to inform the suspect that if he refuses to submit to the examination that such refusal will raise a rebuttable presumption of his guilt. The suspect may then make his election.

Now it is necessary to return to the possible "brutality" of the examination itself. It is certainly not to be supposed that the ideals of Anglo-American law could ever tolerate the forcing of a major operation on an individual solely for the sake of obtaining evidence. For this reason it will be necessary to draw limits on the possible kinds of examinations which an accused may be subjected to. It would seem that a workable and otherwise sensible rule would be to require that the accused choose between raising a rebuttable presumption of guilt against himself or submit to any such examination as a reasonable man, under valid arrest with nothing to hide, would consent to in order to clear himself of the charges involved—short of any examination which would result in a permanent injury or prolonged suffering. This latter clause would take into account any unique or unusual condition or phobia of the particular individual. Such a rule would answer all objections which were sought to be cured by the Fifth Amendment and at the same time satisfy the final requirements of the Fourth Amendment in this field that a search of the person must be reasonable.[42] If it be added to the rule that the evidence so obtained be open to use by the defendant then all of the benefits of this new field of evidence of which the court spoke in the *Breithaupt* case are preserved not only for the protection of society but as well for the individual.

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[40] VA. CODE ANN. § 18.1-55-59 (1950) (Repl. Vol. 1960, Supp. 1962).

[41] Reference here is made to the suspension of driver's license under VA. CODE ANN. § 18.1-55 (1950) (Repl. Vol. 1960, Supp. 1962) for failure to submit to blood testing.

[42] Blackford v. United States, *supra* note 22 at 749; Charles v. United States, *supra* note 8 at 389.

VIII.

Last Objections Answered

There remains but one further vocalized reason for which it is claimed the Fifth Amendment exists and although not found in the formative history of the amendment it may be argued that it exists nevertheless in the minds of some of the judiciary. To quote the statement of Justice Frankfurter from the *Rochin* case:

> Use of involuntary verbal confessions in . . . criminal trials is constitutionally obnoxious not only because of their unreliability. Coerced confessions offend the community's sense of fair play . . .[43]

Unless the allusion to "fair play" be in reference to the matters which have already been dealt and dispensed with, *e.g.* in the use of torture, then the statement can only mean that it should be one of the rules of law enforcement that guilty persons be given a fair chance to escape the penalties of their crimes. This would ignore the basic principle that the criminal law is construed so as to protect those of the class of accused persons who may be innocent. In essence, the law recognizes that not all of the persons accused of crimes will be guilty of these crimes and therefore, in the interest of protecting such innocent persons from conviction, those means of gathering evidence which are unreliable should be prohibited. Furthermore all means of gathering evidence which are inhumane should be prohibited for the protection of both guilty and innocent suspects. So analyzed, the basis of the criminal law is only to protect guilty suspects from inhumane treatment even though in the interest of innocent suspects, further protections are granted to the class of suspects as a whole. Therefore when the element of uncertainty as to the evidence obtained is absent and when the element of inhumane means of obtaining such evidence is absent, then the prohibition should be absent since it serves no longer to protect the innocent from conviction or to protect either class from cruel treatment. To pump any further concept of "fair play" into the prohibition would be to radically alter

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[43] *Supra* note 11 at 210.

the basis of the criminal law and serve only the interests of the guilty and was therefore probably not the intention of the author of the above quoted statement.

IX.

Concluding Remarks

The twentieth century has seen the growing refinement and application of the scientific method sometimes with horror although most frequently with delight. The new powers which have thereby come into being whether for massive destruction or for fact finding offer great problems in the field of social application. These problems have been viewed with foreboding in many quarters and are reflected generally in contemporary letters. The writings of Aldous Huxley, George Orwell and Arthur Koestler, to mention but a few, have with dexterity portrayed the scientific machinery of the police state crushing out the resistance of the accused individual. The present judicial hesitations to recognize a police power armed with science are but echoes of this single line of foreboding based especially on the fear of usage as manifest in the modern totalitarian state. Surely it is true that the days of the individual's integrity are numbered when a set of facts such as existed in the *Rochin* case go uncorrected. But the principal objection there was due to an error of another kind which the court has since corrected in the *Mapp* case. In conclusion it is demonstrated that all historical and contemporary objections to the use of the scientific scrutiny of the accused may be answered and yet the benefits of the method preserved. If the courts continue to require that such examinations be conducted by trained personnel and that their results carry a high degree of certainty and if the legislatures further provide for a uniform and humane means of coercing suspects, then it would seem that any scientific probing for evidence reasonably commensurate with the value of the evidence sought, will not violate the principles and purposes of the Constitution. A power is no better or worse than the persons or institutions which supervise its employment.