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ROCHIN AND BREITHAUPT IN CONTEXT*

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PRELIMINARY CONSIDERATIONS

Modern scientific methods of fact-finding present evidentiary problems of admissibility which are grounded in reliability of the process, validity of the technique employed and desired policy objectives. In the final analysis, these three facets of the problem are all indivisibly interrelated since, in order to determine acceptable policy, scientific process and application of that process must inevitably be considered in the light of the concept of due process even though due process as such may not be posed affirmatively in any particular decision.[1] Moreover, it must be recognized that these factors will be present in varying degrees of intensity, dependent upon the facts and circumstances of a given situation.

As to reliability of a scientific process, test or experiment, the proposition here advanced is that if the particular process, such as a lie detector test or a test to determine intoxication, is so unreliable as to have little or no probative value, the admission on behalf of the state of the results thereof in a criminal prosecution would violate due process; the same material could likewise be excluded by invoking the rule of immateriality. On the other hand, if the results of such tests are of probative value and favorable to the defendant, exclusion would violate due process; even though the reviewing court could confine its consideration to rules of evidence and find prejudicial error on the part of the trial court in excluding evidence material to the issues.[2]

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* The problems of self-incrimination and due process of law raised herein are discussed in greater detail in the author's book *Modern Scientific Evidence.*

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1. Rules of evidence may, in certain instances, be rightly condemned as rigid and arbitrary, but, nevertheless, they represent policy concepts where questions of admissibility are presented, since the balancing of conflicting interests through the admission-exclusion process is calculated to control the outcome of decisions properly. As to the statement that the procedure always involves due process of law, if material and competent matter is excluded, or prejudicial matter is admitted in evidence, the broad catch-all concept of due process could be invoked if another existing rule or doctrine were not available. That is to say, if the fourth and fifth amendments to the federal constitution were non-existent, an enlightened, policy-conscious court would exclude evidence which it judicially conceived to have been wrongfully obtained, or viewed as self-incriminating, under the due process clause of the fourteenth amendment.

2. We are not directly concerned in this article with judicial standards for determining reliability of a particular process as a criterion for admissibility. However, it is quite clear that the widely cited test of "general scientific acceptance" laid down in Frye v. United States, 293 Fed. 1013 (D.C. Cir.

As to the validity of the technique employed, this phase of the problem can be viewed as being double-barrelled in nature. That is, "validity" may refer to the scientific validity of the technique utilized in conducting a test and may be assessed by looking to the qualifications of the expert and the observance of proper control procedures by such expert.[3] On the other hand, the reference may be to the constitutional validity of the technique employed, which can be judged in regard to the person subjected to the test and the manner in which his participation is secured.[4] This participation may be voluntary or involuntary, and it is the purpose of this article to investigate the issues raised thereby, in the light of society's objectives under existing rules of evidence and relevant constitutional safeguards.

THE *Rochin* CASE

An admirable vehicle for posing the problem on admissibility of factual evidence, secured by the proper or improper use of modern fact finding techniques, is found in the much discussed *Rochin* case.[5] On the facts, this case presents a summary and effective means of securing incriminating evidence against a recalcitrant suspect. How-

1923), is properly the basis for according judicial notice to a scientific device or procedure; and that, as stated by Wigmore, "all that should be required as a condition (to admissibility) is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has a reasonable measure of precision in its indications." 3 WIGMORE, EVIDENCE § 990 (2d ed. 1923). McCormick rejects the "general scientific acceptance" test as criterion for admissibility in supporting acceptance by "a substantial body of scientific opinion" as a standard for admissibility. MCCORMICK, EVIDENCE § 174 (1954).

3. Conceivably, the skill and training of an expert who has basic qualifications may govern the issues of weight and conclusiveness rather than that of admissibility, and the same is true with respect to control procedures employed in some instances. For instance, in State v. Damoorgian, 53 N.J. Super. 108, 146 A.2d 550 (1959), the defendant argued that results of an intoxication test were not admissible against him since three essential elements of the test were not shown to have been complied with. The reviewing court, in holding the results admissible, stated that it had no particular argument with cases so holding, but went on to observe that whether these three essential elements have been complied with *fully* goes to weight, not admissibility. The court was also of the opinion that it is not necessary for the operator of a drunkometer or the person who prepares the chemical compounds to be a college graduate with a B.S. in chemistry, since one can acquire the required skills through training and experience.

4. In People v. Heirens, 122 N.E.2d 231, 4 Ill.2d 131 (1954), it was contended, and not seriously controverted, that the police unlawfully searched the defendant's living quarters and seized stolen property found there; that he was subjected to prolonged and continuous questioning; that, while in the hospital recovering from a serious beating he suffered in the process of resisting arrest, he was compelled to submit to lie detector tests; and that he was also given injections of sodium pentothol without his consent. This is an extreme case on the facts but it will illustrate the problem presented by the misuse of modern fact-finding techniques.

5. Rochin v. California, 342 U.S. 165 (1952).

ever, the evidentiary and constitutional issues thereby created cannot be disposed of in so cursory a manner.

In the *Rochin* case, three deputy sheriffs, "having some information that the defendant was selling narcotics," entered his home early one morning without a search warrant and proceeded to a bedroom on the second floor where they forced open the door. Rochin, only partially dressed, was seated on the side of the bed. Almost immediately he seized two capsules from a night stand beside the bed and swallowed them. He was handcuffed and rushed to a hospital where, at the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach. This "stomach pumping" produced the capsules which were shown to contain morphine, and which constituted the chief evidence against the defendant in a prosecution that resulted in his conviction on the charge of possessing "a preparation of morphine" in violation of the California Health and Safety Code. The United States Supreme Court granted certiorari on the ground that a serious question was raised as to the limitations which the due process clause of the fourteenth amendment imposes on the conduct of criminal proceedings by the states.[6]

In the majority opinion, delivered by Mr. Justice Frankfurter, it was held that the police methods employed in securing incriminating evidence against the petitioner did more than merely offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. Rather, as seen by the majority, the conduct displayed toward the petitioner was so brutal as to approach the techniques of the rack and the screw; and hence, the conviction was reversed as offensive to the due process clause, a constitutional guarantee "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Mr. Justice Black, in a concurring opinion, would have reversed on other grounds. He stated that: "What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application 'shocks the conscience,' offends a 'sense of justice' or runs counter to the decencies of civilized conduct." Justice Black's chief

6. Rochin was tried before a California superior court, sitting without a jury. The U.S. Supreme Court granted certiorari from affirmance by the state district court of appeals, People v. Rochin, 101 Cal. App. 2d 140, 225 P.2d 1 (1951), and denial of review by the state supreme court, 101 Cal. App. 2d 143, 225 P.2d 913, (1951). Two justices dissented from this view stating in part: "Had the evidence forced from the defendant's lips consisted of an oral confession that he illegally possessed a drug . . . he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this state are permitted to base a conviction upon it. I find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse." 225 P.2d at 917-18.

objection to the majority decision was that it set a nebulous, evanescent standard which could be used to destroy the Bill of Rights and individual liberty. The Justice was further of the opinion that a person is compelled to be a witness against himself not only when he is compelled to testify orally, but also when, as in the instant case, incriminating evidence is forcibly taken from him by a contrivance of modern science.[7] Likewise, Mr. Justice Douglas in concurring in the result, *i.e.*, reversal, but not the reasons therefor, expressed the view that words taken from the lips, capsules taken from the stomach, or blood taken from the veins are all inadmissible provided they are taken without the subject's consent, since such procedures contravene the fifth amendment.[8]

In summary, the majority concluded that due process of law cannot be frozen at some fixed stage of time or thought; that due process of law cannot be heedless of the means by which otherwise relevant and credible evidence is obtained; that due process of law as a historic and generative principle precludes convictions that are brought about by methods which "offend a sense of justice"; and that, admittedly, hypothetical situations can be conjured up, shading imperceptibly from the circumstances of the instant case and by gradations producing practical differences despite seemingly logical extensions.

It is true that to define a term or concept restricts it, and restriction may destroy its utility. On the other hand, this expressed accordion-like philosophy prohibits the application of known standards, and, while we must avoid the danger of requiring courts to function as inaminate machines, there would be equal danger in allowing judges to run at large in the constitutional adjudication process. From the opinion, one receives the distinct impression that the Court was acutely aware of the tightrope it was walking, and one of the gradations of which it spoke was provided by the *Breithaupt* case. That the Court, in *Rochin*, anticipated necessary action in this area in the near future is apparent from its words:

> In deciding this case we do not heedlessly bring into question decisions in many states dealing with essentially different, even if related, prob-

7. This is, of course an expression of the minority view on what constitutes self-incrimination. See MCCORMICK, EVIDENCE § 126 (1954); 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940). Wigmore does not limit the constitutional privilege against self-incrimination to testimonial utterances. The protection to the individual is "from any disclosure sought by legal process against him as a witness." Hence, he includes within the orbit of the privilege "the production of documents or chattels by a person (whether ordinary or party-witness) in response to a subpoena."

8. There is much to be said for Justice Douglas' argument that it is unjust to free the state courts from the command of the fifth amendment and then nullify a definite rule of evidence by excoriating them for flouting "the decencies of civilized conduct" when they admit the evidence.

> lems. We therefore put to one side cases which have arisen in the state courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record.[9]

Thus, the stage was set for *Breithaupt,* and cases of a similar nature, in which the Court would be required to examine methods employed to secure incriminating evidence from the subject in the light of the vague contours of the due process clause.

THE *Breithaupt* CASE

In *Breithaupt,* the petitioner was the driver of a pickup truck which collided with a passenger car, killing three occupants of that vehicle.[10] He was taken to a hospital and while lying unconscious in an emergency room the smell of liquor was detected on his breath. At the request of a highway patrolman, who had discovered an almost empty bottle of whiskey in the wrecked truck, an interne withdrew a sample of about 20 cubic centimeters of the petitioner's blood by use of a hypodermic needle. This sample was given to the patrolman and subsequent laboratory analysis revealed the blood contained .17 per cent alcohol by weight. Testimony regarding the blood test and its result was admitted into evidence at trial over the petitioner's objection, along with expert opinion to the effect that a person with .17 per cent alcohol in his blood is under the influence of intoxicating liquor.[11] The petitioner was convicted and sentenced for involuntary manslaughter. He did not appeal the conviction, but subsequently sought release from imprisonment by petition for a writ of habeas corpus to the Supreme Court of New Mexico.[12] The court, after argument,

9. 342 U.S. at 174.

10. Breithaupt v. Abram, 352 U.S. 432 (1957).

11. The National Safety Council and the American Medical Association have made certain findings and recommendations which have been incorporated into statutes in many states. They are in brief: (1) Less than 0.05% alcohol in the blood of a subject leads to a presumption of non-intoxication. (2) Where there is 0.15% or more alcohol in the blood there is a presumption of intoxication. (3) Where there is between .05% and .15% alcohol in the blood, no presumption arises but the evidence is receivable as bearing on the issue of intoxication. The foregoing figures are footnoted pictorially in Lawrence v. City of Los Angeles, 53 Cal. App. 2d 6, 127 P.2d 931 (1942). They are also, referred to in Toms v. State, 239 P.2d 812 (Okla. 1952). See an authoritative article, Newman, *Proof of Alcoholic Intoxication,* 34 KY. L.J. 250 (1946).

12. Petitioner sought and was denied a writ of habeas corpus from the District Court for Santa Fe County, New Mexico, on March 7, 1952. *Affirmed,* Breithaupt v. Abram, 58 N.M. 385, 271 P.2d 827 (1954). The Supreme Court of New Mexico was of the opinion that the issue of denial of due process of law could properly be raised by writ of habeas corpus after the time for an appeal had expired, but held that the admission, in an involuntary manslaughter prosecution, of evidence based on the results of a blood test made of a blood

denied the writ, whereupon, the Supreme Court of the United States granted certiorari to determine whether the requirements of the due process clause, as it concerns state criminal proceedings, necessitated the invalidation of the conviction.[13]

The Court began by observing:

> It has been clear since Weeks v. United States, 232 U.S. 383 . . . that evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions. There is argument on behalf of petitioner that the evidence used here, the result of the blood test, was obtained in violation of the Due Process Clause of the Fourteenth Amendment in that the taking was the result of an unreasonable search and seizure violative of the Fourth Amendment. Likewise, he argues that by way of the Fourteenth Amendment there has been a violation of the Fifth Amendment in that introduction of the test result compelled him to be a witness against himself. Petitioner relies 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. But Wolf v. Colorado . . . answers this contention in the negative.[14]

Next, the Court came to the heart of the real issue presented by stating, "the petitioner's remaining and primary assault on his conviction is not so easily unhorsed." This primary assault was the argument that the conduct of the state officers in taking Breithaupt's blood without his consent offended that "sense of justice" of which the Court spoke in *Rochin*. But, the Supreme Court rejected this final and basic contention of the petitioner, seeing as the real distinction from *Rochin* the fact that there is nothing brutal or offensive, so as to not comport with traditional ideas of fair play and decency, in taking blood from an unconscious person when done, as in this case, under the protective eye of a physician; and "the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right."[15]

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sample taken from the accused while he was unconscious was not a denial of due process, since the rule against compulsory or involuntary testimony from a defendant does not apply to real evidence so secured.

13. Breithaupt v. Abram, 351 U.S. 906 (1956).

14. 352 U.S. at 434. The reference of the Court to the *Wolf* decision is to this reasoning: "The notion that 'the due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration." Wolf v. Colorado, 338 U.S. 25, 26 (1949). In support of the New Mexico Supreme Court decision, it should be noted that that state has rejected, as it may, the exclusionary rule set forth in *Weeks*. State v. Dillon, 34 N.M. 366, 281 Pac. 474 (1929). (1929).

15. 352 U.S. at 435-36. See also nn.2,3 on those pages. Carrying on a step beyond statutes which make Secretaries of State process agents for service on non-resident motorists, it is arguable that a driver on the highways, in obedience to state policy, would consent to have a blood test made as a part

To buttress the view that the taking of blood from an unconscious person is not such "conduct that shocks the conscience," the majority opinion stated that this standard refers not to the conscience of a sensitive person, but rather to the sense of decency and fairness of the whole community, and does not condone blood taking under indiscriminate conditions which would be within the "brutality" of the *Rochin* case. To bolster its position the majority pointed out that blood tests are routine procedure upon entering the army, making application for marriage licenses, entering college, and for blood donors and the like, concluding that a blood test taken by a skilled technician is not such a method of obtaining evidence as to constitute a violation of due process within *Rochin*.

The dissent, written by Mr. Chief Justice Warren and joined in by Justices Black and Douglas, expressed the view that the decision expunges all meaning and validity from *Rochin* and causes it to stand for no more than personal revulsion against particular police methods. The dissent sees *Rochin* and *Breithaupt* as basically the same on the facts, with public interest, that is the interest in forestalling dope peddling and slaughter on the highways, equally present in both instances. Then, the dissent observes that the majority opinion fails to distinguish between the two essential parts of the problem: (1) the nature of the invasion of the person; and (2) the expression of the victim's will. According to the dissenting Justices, if there is no affirmative consent it is all the same if (1) the victim states unequivocally that he objects, (2) resists violently, or (3) is unable to protest; in any event consent is lacking and any distinction is invalid.

DISTINGUISHING *Rochin* AND *Breithaupt*

The facts of *Rochin* and *Breithaupt* have been set out in detail because of significant analogies that may be drawn and due to the fact that they are undeniably landmark cases in the restricted area of scientific evidence which they encompass. The similarity of the material facts in these two cases are patent. They are:

1. Evidence was secured from the bodies of suspects by means of technical processes or devices.
2. In both instances the methods were common, medically accepted techniques.

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of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from the use of dubious lay testimony on his state of sobriety. However, this fictional consent would be the crux of such assumption. And, of the forty-seven states authorizing chemical tests to determine intoxication in traffic accidents, none sanction involuntary tests, as such, though there are sanctions for refusal, such as suspension of driver's license or comment on trial by the prosecutor.

3. Consent for the taking was lacking in both situations.
4. The evidence secured by scientific procedure was in each case materially significant in securing convictions on serious felony counts.
5. Policy considerations were present in each case since the alleged infractions and police methods were weighted with public interest.

The notable points of dissimilarity are:

1. In *Rochin* the accused violently resisted the taking of evidence, while in *Breithaupt* he was unconscious and unable to resist.
2. In *Rochin* a foreign, contraband substance was removed from the body of the accused, while in *Breithaupt* the accused's own blood was taken. This distinction was not considered by the court.
3. Rochin was taken forcibly from his own bedroom, apparently without a warrant whereas Breithaupt was taken from a public highway by ambulance to a hospital. However, this is not a factor which was of any apparent consequence in the decisions.

From the above analysis, it is apparent that there was an invasion of the person without consent in both cases. Moreover, if the taking of blood by means of a hypodermic needle is a medically accepted procedure, it is equally true that the use of a stomach pump is a common and medically accepted means of making tests, relieving distress and saving lives. Thus it is inescapably clear that the majority opinions in *Rochin* and *Breithaupt* use physical resistance and consequent application of force as the real point of differentiation, and the discussion on the salutary results of blood tests is engaged in only for its buttressing effect.

If, as must be conceded, brutality of method is the controlling factor in the cases, then *Rochin* and *Breithaupt* can be distinguished and reconciled, not by referring to any set standard but only by viewing the limits of permissible investigative techniques as a matter of degree to be determined in individual cases. But, if overzealous action of police officers is used as the criterion for determining if due process has been violated in such cases, does this not obscure that which should be the real issue, namely, violation of security of the person without consent? To place a premium on the ability of a suspect to resist permits the state to make fortune out of misfortune where one is unable to resist. Had the officers knocked Breithaupt unconscious and had a blood sample taken, the case would have been within *Rochin,* according to the implications of *Breithaupt.* However, is it not fundamentally the same if you find a man unconscious, give him a

pill to put him to sleep, or blackjack him into insensibility? In any of these situations, consent to invasion of his person is lacking and use of evidence so obtained should be barred under rule of evidence or constitutional right.[16]

State Decisions Compared

It is of practical interest to note how some of the states have treated the admissibility of involuntary test results; and the intriguing two fact situations of Texas cases invite comparison with *Rochin* and *Breithaupt*. In the first of these, *Ash v. State*,[17] the defendant was convicted on a charge of receiving and concealing stolen property, which consisted of two diamond rings. When apprehended, the defendant was observed by the arresting officers to swallow objects, apparently metallic, which they believed to be the rings in question. He was taken forcibly to a hospital and by means of a fluoroscope the rings were located in the lower part of his intestines. Next, the defendant was subjected to an enema, against his will, which resulted in elimination and recovery of the stolen rings. The defendant appealed on the grounds that he had been denied due process of law and forced to incriminate himself. The reviewing court dismissed these arguments by stating that the arrest and search were legal since possession of the rings and secreting them in the presence of the officers constituted a felony committed in their presence; that the fluoroscopic and purging processes were conducted by experts; that there was no evidence of cruel or inhuman methods to recover the rings; that the enema was a natural and normal way to recover stolen property secreted in an unusual manner and that the only force used was to combat the physical resistance of the defendant.

In the other Texas case involving the issue of "consent," *Apodaca v. State*,[18] the defendant was convicted of manslaughter through operation of a motor vehicle while intoxicated. Upon appeal, the defendant complained that he had been compelled to furnish a specimen of urine for analysis of alcoholic content, make right turns, touch his finger to his nose and walk a straight line, such constituting self-incrimination in that he was required to give evidence against himself.

16. Perhaps three out of four states which have considered the problem have held that the result of a blood test taken from an unconscious person is admissible in evidence. People v. Duroncelay, 146 Cal. App. 2d 96, 303 P.2d 617 (1956); Block v. People, 125 Colo. 36, 240 P.2d 512 (1951); State v. Ayres, 70 Idaho 18, 211 P.2d 142 (1949); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945). See also State v. Sturtevant, 96 N.H. 99, 70 A.2d 909 (1950); *cf.* United States v. Williamson, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954). But see State v. Weltha, 228 Iowa 519, 292 N.W. 148 (1950); State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956).

17. Ash v. State, 139 Tex. Crim. 420, 141 S.W.2d 341 (1940).

18. Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1940).

The reviewing court was of the expressed opinion that the essence of the privilege against self-incrimination is "compulsion"; that the defendant, compelled to do the things required of him by the officers, had been forced to give evidence against himself; and that, hence, the privilege against self-incrimination was violated.[19]

One writer, in commenting on this decision, observes that nowhere in the opinion was reference made to the *Ash* case decided by the same court only one year previously, and that in so far as the self-incrimination privilege is concerned there is no distinction between the compulsory removal of a ring from the intestines and the compulsory procurement of a specimen of urine.[20] In the abstract, this observation is doubtlessly true both as to constitutional as well as aesthetic considerations. But this able critic ignores the fact that in *Ash* the court emphasized enforced *passivity,* while in *Apodaca* emphasis was definitely on enforced *activity* through being "compelled to do things." It was this compulsion to act which permitted the court to find self-incrimination under the Texas rule. This is not to say that this minority view on what constitutes self-incrimination is sound, but to demonstrate that the Texas court could reach this decision logically enough without attempting to distinguish *Apodaca* from *Ash.*

In the Texas cases and the federal decisions by way of comparison, we have use of an emetic as contrasted with an enema, and involuntary blood taking as contrasted with compulsion to provide a specimen of urine and do other affirmative acts. Perhaps the Texas judges had stronger stomachs in endorsing the use of an enema than did the majority of the Supreme Court in decrying the use of an emetic, despite the fact that Justice Douglas, in a contempt of court case, stated that judges are supposed to be men of fortitude, able to thrive in a hardy climate.[21] Be that as it may, *Ash* and *Rochin* can be distinguished on one significant point. In the latter the emetic was used solely to secure incriminating evidence, while in the former the enema had as an additional objective the recovery of valuable stolen property. So, perhaps the end justified the means on the basis of expediency if nothing else. As for the results in *Apodaca* and *Breithaupt,* the Supreme Court, in view of the rule it follows, would not have found a violation of the constitutional privilege, as did the Texas court, and it is logical to assume that it would not have found a violation of due

19. It is the general rule that the privilege against self-incrimination protects against testimonial compulsion either before or at trial, through speech or the equivalent of speech. MCCORMICK, EVIDENCE, § 126 (1954); 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940). But some jurisdictions in interpreting the privilege draw a distinction between enforced passivity and enforced activity on the part of the accused. This doctrine is well illustrated by State v. Griffin, 129 S.C. 200, 124 S.E. 81 (1924).

20. INBAU, SELF-INCRIMINATION 73 (1950).

21. Craig v. Harney, 331 U.S. 367 (1947).

process, on the ground that the compulsion employed was not such as to "shock the conscience and approach the rack and the screw."

A sensationally publicized state decision involving, among other things, illegal search and seizure, involuntary narcoanalysis and forced polygraph examinations is worthy of discussion in connection with *Breithaupt* and *Rochin*.[22] In this case, William Heirens, a college student seventeen years of age, pleaded guilty to three murder indictments and twenty-six additional indictments charging various robberies, burglaries and assaults. He was sentenced to the penitentiary for life on each of the murder indictments, the sentences to run consecutively, and the statutory penalties on the other indictments were imposed to run concurrently with each other, but consecutively to the sentences on the murder indictments. Approximately six years later Heirens filed a petition under the Post-Conviction Hearing Act of Illinois, alleging that his constitutional rights had been violated in a number of respects. The State filed an answer, a hearing was held after which judgment was entered denying the petition; thereupon Heirens sought and was granted a review on writ of error to the Supreme Court of Illinois.

The decision, which affirms the action of the trial court in both instances, reveals investigative procedures as bizarre as the facts of the petitioner's numerous crimes. It was contended and not seriously controverted: that the police forcibly entered and unlawfully searched Heirens' living quarters and seized stolen property found therein; that he was subjected to prolonged and continuous questioning by law enforcement officers; that, while he was confined in a hospital as the result of a serious beating when he resisted arrest, he was injected against his consent with sodium pentothol by doctors who were then able to obtain admissions and confessions from him; that he was compelled to submit to lie-detector tests; that adverse newspaper publicity would have prevented him from having a fair and impartial trial; that he was subjected to insistent urging of counsel and his parents to plead guilty; that his attorneys, instead of giving him their undivided allegiance, conceived it their duty to avoid any action which might result in his return to society; and that his pleas of guilty were not products of free and voluntary choice but were induced or compelled by the illegally obtained evidence, the disclosures while under

22. People v. Heirens, 122 N.E.2d 231 (1954), *cert. denied*, 349 U.S. 947 (1955). This case is discussed in Despres, *Legal Aspects of Drug-Induced Statements*, 14 U. CHI. L. REV. 601 (1947); and in Muehlberger, *Interrogation under Drug Influence*, 42 J. CRIM. L., C. & P.S. 513, 526 (1951). The psychiatric report is reproduced in 38 J. CRIM. L., C. & P.S. 311 (1947). See Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315 (1953) on the constitutional aspects of involuntary narcoanalysis and lie detector tests.

the influence of drugs,[23] the improbability of a fair trial in view of adverse newspaper publicity and the extreme pressure exerted by his parents and counsel.

In the face of this impressive list of alleged grievances, the reviewing court conceded that the search of the defendant's living quarters without a warrant, incessant and prolonged questioning of the defendant while he was confined to a hospital bed, and the unauthorized use of the truth serum and lie-detector were flagrant violations of his rights; but the court stated that the pleas of guilty were not made until more than a month after the occurrence of the acts complained of by the petitioner; that the petitioner must be deemed to have been aware, through his counsel, that any evidence obtained by unlawful means could not be used against him; and that it was clear that the antecedent conduct of the police and the state's attorney, however much it was to be condemned, had no substantial connection with the pleas of guilty.[24]

Passing from the conduct of the investigating officers to that which may, in part at least, explain the defendant's conduct: There was evidence that Heirens was a "disassociated psychotic schizophrenic"—a mental disease described by testimony of the experts as characterized by splitting of the personality, in which very frequently one aspect of the personality may not be aware of the other and may not be in communication with the other. From this evidence, the reviewing court further conceded that the defendant's conduct, including his involuntary disclosures under the drug, may have indicated that the defendant was not legally sane, but stated that the mere fact

23. Heirens in effect confessed to the crimes while under the influence of the "truth serum." He revealed the facts of the crimes in detail and attributed their commission to an obstreperous friend named "George." "George" compelled Heirens to locate suitable places to burglarize and carried out the crimes over Heirens' strong protest. When Heirens was asked to describe "George," he gave an accurate description of himself. In the lie detector test Heirens was uncooperative and merely repeated the questions asked him by the examiner.

24. When a confession has once been obtained, whether by force, threats, exhaustive questioning, or involuntary narcoanalysis, the road is paved for easy access to another in the future. The situation is explained in this manner by Justice Jackson: "After an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantage of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after these conditions have been removed." United States v. Bayer, 331 U.S. 532, 540 (1947). This was a federal prosecution for accepting a bribe. The defendant army officer confessed while illegally detained. Six months later, while no longer imprisoned but merely restricted to his base he made a second confession. The Supreme Court held that the trial court did not err in holding the second confession voluntary and admissible.

that competent counsel did not advise their client to defend on such ground did not show inadequate representation amounting to a denial of due process. So, in this one last respect, the decision becomes as bizarre as the facts in the case and the official investigating of those facts.

One cannot but wonder why the Supreme Court denied certiorari in view of *Rochin*. In any event, the *Heirens* case demonstrates how insidious and devastatingly inquisitorial involuntary narcoanalysis is, or can become, in laying bare the mind of a subject, as by a figurative scalpel, thus causing him to reveal his innermost thoughts, hopes and secrets.[25] Involuntary narcoanalysis is, as to the examiner, unprofessional and, as to the subject, a type of tyrannical oppression which ignores all concepts of human diguity and ruthlessly invades the security and privacy of the person in violation of due process of law, and results in violation of the privilege against self-incrimination if participation in crime is revealed.[26]

Chemical tests to determine intoxication constitute an area of scientific investigation in which the opportunities for official abuse of personal rights are legion, because of the usual absence of "consent" to take the test. And, since the lack of consent to submit to an intoxication test cannot be projected as a defense on the basis of self-incrimination as a general rule,[27] the sole valid objection, if any, is

25. Heirens was responsive under the drug, but sodium pentothol, and related drugs, is not a truth serum and subjects so interviewed will not always tell the truth. See Dession, Freedman, Donnelly, & Redlich, *Drug-Induced Revelation and Criminal Investigation,* 62 YALE L.J. 315, 335 (1953), where it is stated that if a state court admitted a confession made under narcoanalysis, the Supreme Court would assuredly reverse a conviction as violative of due process. Of course, Heirens pleaded guilty once the "cat was out of the bag" due to involuntary narcoanalysis, so it was not necessary to use the tainted confession.

26. Despres, *Legal Aspects of Drug-Induced Statements,* 14 U. CHI. L. REV. 601, 605 (1947); Matthews, *Narcoanalysis for Criminal Interrogation,* THE JOURNAL-LANCET (n.s.) 283 (1950). Herein, techniques and results are described by Dr. Matthews. See also People v. Esposito, 287 N.Y. 389, 39 N.E.2d 925 (1942). Here, in one of the rare reported decisions involving narcoanalysis, the New York Court of Appeals approved the use of the "truth drugs" metrazel and sodium amytal in a court-ordered psychiatric examination, where the defense of insanity was interposed in a prosecution for murder. The court rejected the defense's objection that testimony based on the drug induced interview violated the defendant's privilege against self-incrimination. This ruling is in harmony with the view that one cannot, in reason, set up a particular defense, and then make his own rules for determining its validity. This and similar objections, can be disposed of by holding them inapplicable to proceedings to determine mental responsibility, not guilt or innocence.

27. It is clear that in cases of involuntary tests for intoxication the defendant does not provide testimonial utterances against himself, but, rather, he furnishes real evidence against himself and under compulsion. State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945), is a decision vigorously upholding involuntary blood tests to determine intoxication. However, it is accompanied by an equally vigorous dissent which states in part: "Will the injection of 'truth

to be found in the guaranty of due process, if merited by the facts. While it may be argued that consent is vitiated, in given cases, by force or duress, psychological coercion, intoxication, or unconsciousness it should be noted that there are few reported decisions in which actual force was used to secure body fluid samples. But, in one case it was stipulated that police officers forcibly placed restraining straps on the defendant and that his head was forcibly held steady during the taking of a breath specimen.[28] The issue presented was whether, under these circumstances, the result of the drunkometer test, which revealed a blood alcohol concentration of .24 per cent by weight was admissible against the defendant. The reviewing court used an ingenious and convenient method of reasoning in order to uphold the trial court in admitting the evidence.

The court stated that the stipulated facts did not disclose if breath was forced from the defendant's lungs in some brutal manner or if it was forced to be retained in the lungs and permitted to escape only through some device clamped over the month or nostrils of the defendant, or in some other inhuman or unlawful manner by the use of force. In the absence of such stipulation the court assumed that the obnoxious situation first described did not exist. The court then observed that Arizona is committed to the rule that evidence secured in violation of the fourth amendment does not preclude its admissibility. Next, the court inquired whether forcibly taking a breath specimen from a defendant for the purpose of a drunkometer test violates article 2, section 10 of the Arizona constitution which provides that "no person shall be compelled in any criminal case to give evidence against himself . . . ." Strange as it may seem, the court said the answer to its inquiry must be in the negative if the force is not used in capturing the exhaled breath until *after* it leaves the body.[29]

The court's final inquiry was in regard to illegal search and seizure,

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serums,' or spinal punctures, or 'lie detectors' be the next step. I recognize that law is a progressive science but 'progress' should not be accomplished by an invasion of rights guaranteed under the constitution." 160 P.2d at 294.

28. State v. Berg, 76 Ariz. 96, 259 P.2d 261 (1953). State v. Cash, 219 N.C. 818, 15 S.E.2d 277 (1941), and Touchton v. State, 154 Fla. 547, 18 So. 2d 752 (1944), did not involve actual force or duress but contain dicta frowning on such tactics. See also People v. Tucker, 88 Cal. App. 2d 333, 198 P.2d 941 (1948). No hard and fast rule for duress or coercion that violates due process can be laid down. Each case must go on its own merits. Vermont cases illustrate the problem. In State v. Slamon, 73 Vt. 212, 50 Atl. 1097 (1901), taking blood involuntarily was held to be a violation of constitutional rights. This rule was reversed in State v. Stacy, 104 Vt. 379, 160 Atl. 257 (1932). Then in State v. Pierce, 120 Vt. 373, 141 A.2d 419 (1959), the court said that the broad rule of *Stacy* might have to be curtailed in future cases involving violence and brutal conduct by policy officers.

29. In substantiation of this distinction, the court cited Holt v. United States, 218 U.S. 245 (1910), and 8 WIGMORE, EVIDENCE, § 2250 (3d ed. 1940) to the effect that the privilege against self-incrimination applies to testimonial compulsion extracted from the person's own lips.

and here the court applied its novel reasoning. That is, the defendant exhaled voluntarily in order to survive. The moment his breath passed his lips it was no longer his to control, but became a part of the surrounding atmosphere which was equally free for use by anyone present within the orbit of its immediate circulation; the officers making the arrest had the right of capture after it left his body. The court went on to say that there was no invasion of the defendant's person, and that so long as the officers limited their operation to the capture of his breath after it left his body, by means which interferred only slightly and temporarily with his freedom of action, he had no legal right to obstruct their efforts. The court, it will be noted, gave little or no attention to the fact that the defendant's breath was so readily available for capture solely by reason of his complete and forcible immobilization, as if in a strait jacket. Surely such police procedure is plainly an illegal act, constituting an assault and battery upon the person of the defendant, and evidence secured thereby violates due process of law.

Invasion of Privacy

It has been demonstrated that scientific methods of criminal investigation provide great temptation for overzealous officers to make unwarranted invasions of privacy and of the person in securing incriminating evidence. Further, the suspect, if protection against self-incrimination or illegal search and seizure is not available, may be forced to rely on violation of due process of law. Unfortunately, his person, privacy or property can be invaded with impunity under the due process clause to a disturbing degree so long as official conduct is not so outrageous as to shock the conscience.

To illustrate the above observation, another case involving a quite different scientific method of investigation is revealing with regard to the implications of *Rochin* and *Breithaupt*. In the case referred to the state's conviction of the defendant for bookmaking rested upon evidence obtained by officers through a series of intrusions on privacy by methods described as "obnoxious" and "almost incredible" by the reviewing court.[30] The police strongly suspected the petitioner of illegal bookmaking but were without proof of it. In order to secure this proof, an officer arranged to have a locksmith go to the home of the petitioner when he and his wife were absent and make a copy of the door key. Two days later, again in the absence of the occupants, officers and a technician made entry into the home by the use of this key and installed a concealed microphone in the hall. A hole was bored in the roof of the house and wires were strung to transmit to a nearby

30. Irvine v. California, 347 U.S. 128 (1954).

garage whatever sounds or conversation the microphone might pick up. Officers were stationed in the garage to listen. A few days later police officers again made a surreptitious entry and moved the microphone, this time hiding it in the bedroom. Twenty days later, they again made secret entry and placed the device in a closet, where it remained until the purpose of enabling the officers to overhear incriminating statements was accomplished.

By a five to four decision of the Supreme Court, the petitioner's attack on his conviction on the ground of violation of due process failed. The facts were held to be outside the situation in *Rochin* and within the purview of the *Wolf* case.[31] Mr. Justice Jackson spoke as follows for the majority:

> However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person but rather a trespass to property, plus eavesdropping.[32]

Regardless of whether *Breithaupt* is regarded as a refinement or as a dilution of *Rochin,* it is not to be denied, that *Irvine* is a retreat from the broader implications of *Wolf* wherein it was stated:

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic in a free society . . . .
>
> Accordingly we have no hesitation in saying that were a State affirmatively to sanction such police intrusion into privacy it would run counter to the guaranty of the Fourteenth Amendment.[33]

The concealed microphone does the job of the wire-tap and more, since the privacy of one's home and family relations are laid bare to public officials under facts as in *Irvine.* Yet, as to the wire tap, Justice Brandeis, in his dissenting opinion, in the *Olmstead* case stated: "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."[34]

POLICY CONSIDERATIONS

From the discussion of the foregoing cases, it is apparent that the issue of admissibility presented by illegally obtained evidence is steeped in policy. The problem resolves itself into a clash between

31. Wolf v. Colorado, 338 U.S. 25 (1949), holding that, in a prosecution in a state court for a state crime, the due process clause of the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

32. 347 U.S. at 133.

33. 338 U.S. at 27-28.

34. Olmstead v. United States, 277 U.S. 438, 476 (1928), upholding by a five to four decision the admissibility of evidence secured by wire-tapping in a prosecution in Federal court for conspiracy to violate the Prohibition Act. This decision led to enactment of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605 (1958), prohibiting the interception of radio and telephone conversations.

public and private interests, and while the public interest must be protected, it is equally true that the average defendant in a criminal prosecution often needs protection from the almost unlimited investigative resources of the state, in its utilization of scientific fact-finding techniques.

This clash of strong interests has, as is to be expected, led to a divergence of judicial thought. In support of the traditional view which resolves the conflict in favor of admissibility, Justice Cardozo has expressed his views as follows:

> No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams case strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the courts that the change has come to pass.[35]

In another case, Justice Wheeler adhered to the same view with even stronger language.

> When evidence tending to prove guilt is before a court, the public interest requires that it be admitted. It ought not to be excluded upon the theory that individual rights under these constitutional guaranties are above the right of the community to protection from crime. The complexities and conveniences of modern life make increasingly difficult the detection of crime. The burden ought not to be added to by giving to our constitutional guaranties a construction at variance with that which has prevailed for over a century at least. The cases in which in recent years some of the courts have either excluded this class of evidence or ordered articles taken from the accused returned to him have been in prosecutions for violations of the laws against policy, gambling, fraud, and intoxicating liquors. The next case may be one of murder, and the prosecutor be compelled by the ruling of the court to return to the accused the certain evidence of his guilt and the accused go free—his constitutional rights against search protected above the right of society against his crime . . . .
>
> . . .
>
> If the question recurs, where is the accused's remedy? The answer must be by a civil action, the only form of remedy known for the protection of an individual against a trespass. It may be that the officer would be guilty of a contempt. If violations of these constitutional rights shall multiply, undoubtedly the General Assembly can provide for a penalty for subsequent violations. A penalty upon an officer for an illegal search made without reasonable ground would furnish adequate protection against such a public wrong.[36]

35. People v. Defore, 242 N.Y. 13, 150 N.E. 585, 589 (1926). Admitting incriminating evidence though secured by arresting officers through commission of a trespass in search of premises without a warrant.

36. State v. Reynolds, 101 Conn. 224, 225, 125 A.2d 636, 639-40 (1924).

The contrary, and more logical view, favoring the rule of exclusion has been commented on thusly by Judge Learned Hand:

> As we understand it, the reason for the exclusion of evidence competent as such, which has been unlawfully acquired, is that exclusion is the only practical way of enforcing the constitutional privilege. In earlier times the action of trespass against the offending official may have been protection enough; but that is true no longer. Only in case the prosecution, which itself controls the seizing officials, knows that it cannot profit by their wrong, will that wrong be repressed.[37]

Justice Vinson took a similar view in a decision involving these conflicting views in writing:

> The rights given by the IVth Amendment are sometimes quite distinct from the determination of whether the defendant was driving under the influence of liquor. The two problems must be considered together, however, in effectuating either the protection of the Constitution, or the punishment of the guilty. When two interests conflict, one must prevail. To us the interest of privacy safeguarded by the Amendment is more important than punishing all those guilty of misdemeanors. Happy would be the result if both interests could be completely protected. If this declaration is admissible and justice meted out on the issue of drunken driving, where is the defendant's remedy for the inexcusable entry into his home? The casuist answers—a civil action against the officers. That remedy has been found wanting. . . . A simple effective way to assist in the realization of the security guaranteed by the IVth Amendment, in this type of case, is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home.[38]

To admit unlawfully obtained evidence against an accused is to emasculate constitutional rights in many cases, and sanction law enforcement by illegal means in all such cases.[39] And to say that he has a remedy through a trespassory action is to turn one's back on practicality. If by "remedy" is meant a positive deterrent to unlawful search and seizure, then the remedy is illusory in effect. A wronged

37. United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945).

38. Nusslein v. District of Columbia, 115 F.2d 690, 695 (D.C. Cir. 1940). In substantiation of its statement that a civil action against officers has been found wanting, the court cited Snyder v. United States, 285 Fed. 1, 3 (4th Cir. 1922). The court said: "We have been able to find among the reported federal cases only one action for damages against an officer for an alleged unreasonable search. Hunt v. Evans, 56 App. D.C. 97, 10 F.2d 892. There was no recovery since the court held that the search warrant was good on its face and the plaintiff invited the search. The number of cases in which the courts have said that there was an unreasonable search and seizure negatives any contention that actions for damages are not brought because the IV Amendment is never infringed." 115 F.2d at 695 n.15.

39. As one able critic has observed the trend toward admission of illegally obtained evidence is disappointing to one who feels that the Supreme Court's control of lawless enforcement of the law by state officers has been a civilizing influence. MCCORMICK, EVIDENCE §§ 138-41 (1954). Dean McCormick notes conflicting policy as demonstrated by state and federal decisions and hopefully observes that the tide seems to be turning against the traditional view which admits evidence secured by unreasonable search and seizure.

party may do no more than vindicate his rights by a verdict for nominal damages only, since rarely would compensatory damages be an element in the action. As for punitive damages, a case could rarely be made out since the trespassing officer in determined pursuit of crime will not generally entertain malice for the victim of an unlawful search. As for due process, we have seen that its protection cannot be invoked successfully unless (1) there is affirmative sanction by the state of "incursions into privacy" of the individual, (2) or in case of an involuntary verbal confession, (3) or in a situation where evidence is secured through a process of force which is "brutal and offensive to human dignity."

The employment of modern scientific processes to establish the guilt or innocence of an accused person is worthy of commendation. However, when scientific devices are used to invade the privacy of one's person or home without consent, with admissibility or inadmissibility of the evidence thereby secured turning on the extent of brutality employed, constitutional rights become ephemeral in substance due to indeterminate standards for regulation of investigative methods. Certainly, the methods can be morally reprehensible and the results viciously incriminating in many instances. We can only speculate as to the future when narcoanalysis and lie detectors become more reliable and "scientifically acceptable." Even now the bare threat of their use may lead to involuntary confessions which do not reflect "undue influence." However, if scientific acceptance becomes a reality, will the judiciary permit search of an accused's mind by means of a lie detector or narcoanalysis, if the subject, for example, submits to an examination through trickery or deception without employment of methods which are "so brutal as to shock the conscience?" Demonstrably, the answer, in the final analysis depends on a balancing of values in relation to individual and public interests. Currently, the Supreme Court, in view of *Rochin, Breithaupt* and *Irvine,* is committed to finding the answer in the extent to which brutality was employed in the acquisition of incriminating evidence.

Viewed in the abstract, this middle of the road rule of policy for interpreting and applying due process has some merit. But in practice the countenancing of "little misconduct" and condemnation of "big misconduct" is unsound since the necessary evidence is secured in either instance. Moreover, the misconduct employed in criminal investigation, if used at all, will usually be regulated by what the authorities feel is necessary to secure the end result. Our three principal Supreme Court cases stand as witnesses for this statement.

Next, and finally, this middle of the road policy assumes that the state and the accused deal at arm's length. Perhaps there was a time

when this was true, and perhaps the accomplished criminal even held the advantage over state enforcement agencies. But in this day of modern scientific investigation the scale may well be weighted in favor of the state, especially as to the average person accused of crime.[40] The state has almost unlimited resources for investigation and laboratory tests of its findings, which are presented in a highly partisan and adversary proceeding. How often, on the other hand, can the average defendant hire investigators to uncover the facts, undergo the costs of adequate pre-trial discovery, or pay for adequate expert opinion? Crime detection is admittedly difficult and society rightly uses all available scientific fact-finding methods in criminal investigation and prosecution. But, while it has steadily strengthened the prosecutor's office, society has done little or nothing to make its scientific aids available to accused persons, and very little more in the way of providing adequate counsel.[41] Governmental responsibility for the conduct of trials should extend to fact-finding on behalf of defendants as well as the state, with court appointed experts available to both parties, if true facts are to be revealed and constitutional rights preserved.[42] It may be that adversary presentation of conflicting factual situations will eventually reach the truth in the majority of cases, but meanwhile the tools of scientific investigation are consistently used to invade the privacy of the person and home and the accused finds himself virtually without redress unless the acts are so carried out as to shock the conscience of the community.[43]

40. "A great many innocent persons have their privacy invaded or their liberty curtailed in the course of police investigation. Constitutional and legal rights of persons who have committed crimes are often ignored by the police." George, *Scientific Investigation and Defendants' Rights*, 57 MICH. L. REV. 37 (1958). Of course, it may be argued that there is another side to the coin; that clever criminals are quick to adopt scientific methods in the planning and execution of crimes.

41. Mars, *The Problem of the Indigent Accused*, 45 A.B.A.J. 272 (1959).

42. "The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed thoughts, beliefs and emotions. 'That places the liberty of every man in the hands of every petty officer was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?" Brandeis, J., in Olmstead v. United States, 277 U.S. 438, 474 (1928).

43. "More subtle in method than the third degree and correspondingly more difficult to restrict without impairing the efficacy of police activity is the practice of subjecting suspects to unpleasant scientific investigations prior to a judicial determination of guilt. The zeal of the police, coupled with popular superstition as to the infallibility of science makes it questionable whether the law's protection of the individual's interests has kept pace with discovery of methods for their violation." Barish, *Scientific Proof and the Constitution*, 31 TEMP. L. Q. 372 (1952).