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# Constitutional Law—Constitutionality of Blood Test Performed over Objection of Intoxicated Driver: *Schmerber v. California*, 384 U.S. 757 (1966)

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CONSTITUTIONAL LAW—CONSTITUTIONALITY OF BLOOD TEST PERFORMED OVER OBJECTION OF INTOXICATED DRIVER—*Schmerber v. California*, 384 U.S. 757 (1966).

## I. INTRODUCTION

In June of 1966, the Supreme Court of the United States handed down the decision in the case of *Schmerber v. California*.[1] The case involved a criminal conviction for driving an automobile while under the influence of intoxicating liquor.[2] While at the hospital undergoing treatment for injuries resulting from the accident, defendant was arrested by a police officer, and under the direction of the officer, a physician at the hospital drew a blood sample from the body of the defendant. The result of the blood analysis, which indicated that the petitioner was intoxicated, was admitted in evidence at the trial over the objection of the petitioner.

The petitioner objected to the admission of the blood test on the following grounds: first, that he was denied due process of law under the fourteenth amendment to the Constitution of the United States;[3] second, that his fifth amendment privilege against self-incrimination had been violated; third, that his fourth amendment right not to be subjected to unreasonable searches and seizures had been violated; and fourth, that his right to counsel under the sixth amendment had, in effect, been ignored. The petitioner alleged that these rights, the latter three made applicable to the states through the due process clause of the fourteenth amendment,[4] had been violated after his refusal, on the advice of counsel, to give his consent to the blood test.

Not since 1956 in *Breithaupt v. Abrams*[5] had the Supreme

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1 384 U.S. 757 (1966).

2 CAL. VEHICLE CODE § 23102(a) (West 1960). "It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway."

3 The fourteenth amendment in applicable part provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

4 As to the fifth amendment privilege against self-incrimination made applicable to the states see Malloy v. Hogan, 378 U.S. 1 (1964); as to the fourth amendment right not to be subject to unreasonable searches and seizures see Mapp v. Ohio, 367 U.S. 643 (1961); as to the sixth amendment right to counsel see Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966).

5 352 U.S. 432 (1957). Petitioner was unconscious when the blood test was taken.

Court decided the constitutionality of the blood test, or the admissibility of the results of such a test into evidence.

## II. THE DUE PROCESS CLAIM

In *Breithaupt* the facts, with the exception of the defendant's lack of consciousness, and the issues before the Court were essentially the same as those presented in *Schmerber*. The Court in *Breithaupt*, since the exclusionary rule had not been adopted by New Mexico, disposed of petitioner's contentions, with the exception of his due process of law argument under the fourteenth amendment, on the basis of two prior decisions.[6] Petitioner in *Breithaupt* tried, also unsuccessfully, to fit his fourteenth amendment due process claim under the rule set forth in *Rochin v. California*.[7]

In *Rochin* the Court had said that such acts by agents of the government in an effort to obtain evidence were bound to offend even hardened sensibilities; that such conduct "shocked the conscience" and was so "brutal" and "offensive" that it did not comport with traditional ideas of fair play and decency.[8] The *Breithaupt* Court refused to hold that the case came under the rule enunciated in *Rochin*, stating that an involuntary blood test did not violate due process of law under the fourteenth amendment. The Court in *Breithaupt* said that the test, administered by a physician, was not such "conduct that shocks the conscience," and that such a method of obtaining evidence did not offend a "sense of justice."[9]

Chief Justice Warren, dissenting in the same case,[10] stated that the problem was one of two component parts, the character of the bodily invasion and the expression of the victim's will. After discussing the similarities of the facts in *Rochin* and *Breithaupt*, he stated that the distinction between the two cases was merely the

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[6] Wolf v. Colorado, 338 U.S. 25 (1949). *Wolf* disposed of petitioner's fourth amendment claim. Twining v. New Jersey, 211 U.S. 78 (1908). *Twining* disposed of petitioner's fifth amendment claim.

[7] 342 U.S. 165 (1952). In *Rochin* the police, having "some information" that petitioner was selling drugs, entered petitioner's bedroom; petitioner put two capsules in his mouth, a struggle followed but the police failed to retrieve the capsules so they took petitioner to a hospital where a stomach pump administered by a doctor produced the capsules. The same set of facts today would assuredly be held to violate the fourth amendment as well, thereby giving the Court the opportunity to avoid the due process of law question under the fourteenth amendment.

[8] Rochin v. California, 342 U.S. 165, 172-74 (1952).

[9] Breithaupt v. Abram, 352 U.S. 432, 437-38 (1957).

[10] *Id.* at 440.

arbitrary one of personal reaction to a stomach pump rather than a blood test. In *Schmerber* the Court disposed of petitioner's fourteenth amendment due process of law claim on the basis of their holding in *Breithaupt*, stating that nothing existed in the former to persuade them to overrule that part of *Breithaupt*.[11] Yet the *Schmerber* Court, by using the "offend a sense of justice" test and thus impliedly the "shock the conscience" test, has re-affirmed a viewpoint espoused by earlier court decisions[12] without meeting head on the contention of Chief Justice Warren in his dissenting opinion in *Breithaupt*:

> [D]ue process means at least that law enforcement officers in their efforts to obtain evidence from persons suspected of a crime must stop short of bruising the body, breaking the skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.[13]

## III. THE FIFTH AMENDMENT CLAIM

Justice Brennan, author of the majority opinion[14] in *Schmerber v. California*, began his discussion of the fifth amendment (after giving procedural background on that particular issue) by citing *Miranda v. Arizona*, a case decided by the Court one week before *Schmerber*. The passage from *Miranda* follows:

> All of these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[15]

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11 The majority in *Schmerber*, 384 U.S. 757, 760 n.4 (1966), adopted part of the viewpoint of Chief Justice Warren in his dissenting opinion in *Breithaupt*; in effect the majority said that no reason existed to distinguish between force, as in *Schmerber*, and stealth, as in *Breithaupt*.

12 Wolf v. Colorado, 338 U.S. 25, 27 (1949).

13 Breithaupt v. Abram, 352 U.S. 432, 442 (1957). In *Schmerber* all of the dissenting justices support this view.

14 It should be noted that while the decision in Schmerber v. California, 384 U.S. 757 (1966), was 5-4, two of the Justices, Harlan and Stewart, in a short concurring opinion, said that while they agreed with the Court that the taking of a blood test involved no testimonial compulsion, they thought that the Court should go further and hold that "apart from this consideration the case in no way implicates the fifth amendment." *Id.* at 772.

15 384 U.S. 436, 460 (1966).

The Court then goes on to concede two points: one, that a blood test fails to "respect the inviolability of the human personality"[16] and two, since the state is able to rely on evidence forced from an accused it violates the standard that the state must obtain evidence "by its own independent labors."[17] The Court continues by stating that according to history and legal precedent the privilege has never been given the full scope of the values it helps to protect and is limited to such situations,

> in which the State seeks to submerge these values by obtaining the evidence against an accused through "the cruel, simple expedient of compelling it from his own mouth. . . ." In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."[18]

Thus it appears that the fifth amendment privilege is limited, at least in most circumstances, to words from the mouth and it appears that at this point in the decision the Court is adopting the viewpoint of Professor Wigmore as announced in his voluminous writings; in fact, Professor Wigmore has used similar words to express his position.[19] The Court, however, expressly stated that *Schmerber* was not to be taken as an adoption of Wigmore's viewpoint.[20] In addition to this specific statement the Court went on to say that "the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications. . . .[21]

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16 Schmerber v. California, 384 U.S. 757, 762 (1966).

17 *Ibid.*

18 Schmerber v. California, 384 U.S. 757, 763 (1966), and quoting in part from Miranda v. Arizona, 384 U.S. 436, 460 (1966). *Accord*, Holt v. United States, 218 U.S. 245, 252-53 (1910), which the Court in *Schmerber* cited as the leading case in this area. In *Holt* petitioner had been convicted of first degree murder and objected to the admission into evidence by an attesting witness that a blouse which petitioner had been required to try on fitted him. Justice Holmes called it an extension of the fifth amendment and said that the "objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

19 8 WIGMORE, EVIDENCE § 2263 (McNaughton rev. 1961). "It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence."

20 Schmerber v. California, 384 U.S. 757, 763 n.7 (1966).

21 Schmerber v. California, 384 U.S. 757, 763-64 (1966). The Court relies on Boyd v. United States, 116 U.S. 616 (1886) for its position. *Boyd* protected papers that the petitioner was ordered to produce under a subpoena. *Boyd* will be discussed in more detail later in this section. On the other hand, as the Court in *Schmerber* states, both state and

The Court in *Schmerber* distinguishes, at least for the purposes of this case, between evidence that is "communication" or "testimony"—these the privilege protects—and evidence, not protected by the privilege, that makes the accused the source of "real or physical evidence."[22]

The Court is evidently using the word "testimony" in the same sense that it was used by Wigmore,[23] and as to what are "communications" the Court has the example of *Boyd*.[24] However, at least three members of the majority envision the privilege as meaning something more than, or different from, Wigmore or *Boyd*, for the Court goes on to state that to use a lie detector to establish guilt or innocence on the basis of physiological responses, whether such responses are willed or not, is contrary to the spirit and history of the fifth amendment.[25]

Finally, the Court concludes that the petitioner's testimonial capacities or communications were in no way implicated because the petitioner was merely a donor, thus suggesting that a legal distinction exists between the cases where an accused actively participates while evidence is compelled from him, and the cases where the accused is only passively involved as the evidence is forced from him.

### B. Where Has Schmerber Taken Us

To start, several concepts have been used in an effort to determine the meaning and scope of the fifth amendment privilege against self-incrimination. This article will start with the one mentioned specifically in *Schmerber*, that is, the position taken by Professor Wigmore, which has been called the "traditional view,"[26] and will then continue with other views implicit in the language of the Court in *Schmerber*. Professor Wigmore stated in effect that the history and spirit of the struggle by which the privilege was estab-

federal courts have usually held that the privilege does not protect against compulsion in finger printing, photography, or measurements, to write or speak for identification, or to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. *Contra*, as to alcoholic testing (urine and blood movements), Apodaca v. State, 140 Tex. Crim. 593, 146 S.W.2d 381 (1941); Trammell v. State, 162 Tex. Crim. 543, 287 S.W.2d 487 (1956); Annot., 25 A.L.R.2d 1407 (1952).

22 Schmerber v. California, 384 U.S. 757, 764 (1966).

23 See note 19, *supra*.

24 See note 21, *supra*.

25 Schmerber v. California, 384 U.S. 757, 764 (1966).

26 Slough and Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing*, 44 Minn. L. Rev. 673, 686 (1960).

lished led to the conclusion that the object of the protection is to prevent the employment of the legal process to extract from the accused's own mouth an admission of guilt, which will thus take the place of other evidence.[27] He goes on to say that it is not *every* compulsion that violates the privilege, but only *testimonial compulsion.* Thus, under Professor Wigmore's view, testimony without compulsion is not privileged and compulsion which is not directed at extracting evidence from an accused's mouth is not within the scope of the fifth amendment. The difficulty, in the Wigmore view, is primarily with the word "compulsion."[28]

As stated before, the Court apparently adopts the Wigmore viewpoint, but the Court denies this, and the denial is supported in fact[29] by their sustaining of the rule in *Boyd v. United States.*[30]

The so called Boyd Doctrine is the second approach to the fifth amendment privilege, and is sought to be utilized in the dissent of Mr. Justice Black. The Court in *Boyd* started its discussion with what it considered the landmark case of *Entick v. Carrington.*[31] The action in *Entick* was for entering the plaintiff's dwelling house and searching and examining his papers. That the *Entick* rationale was based upon property concepts cannot be doubted;[32] however, this is consistent with *Schmerber.*[33] Mr. Justice Bradley, author of the majority opinion, went on to say that:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, *where that right has never been forfeited by his conviction of some public offense,*—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his

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27 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940).

28 Miranda v. Arizona, 484 U.S. 436 (1966). Any attempt at defining the word "compulsion" is beyond the scope of this article.

29 Schmerber v. California, 384 U.S. 757, 775 (1966). Justice Black, dissenting, says that as long as *Boyd* stands Wigmore has not been adopted in full, and the majority in *Schmerber* concede that *Boyd* still stands.

30 116 U.S. 616 (1886).

31 [1765] 2 K.B. 275. See 54 GEO. L. J. 593 (1966).

32 20 U. CHI. L. REV. 319 (1953). A comprehensive article that discusses the rationale of Gouled v. United States, 255 U.S. 298 (1921), a decision which was based on *Boyd.*

33 Blood must surely be considered the property of the person in whom it flows; it may be sold, donated, or, if one so chooses, wasted. However, the accused, in most cases, is more interested in not having the test taken then he is in the possibility of losing his blood.

> private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the *Fourth and Fifth Amendments run almost into each other.* . . . It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for the security of the person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.*[34]

The above quotation is the basis of what has been called the Boyd Doctrine, a doctrine that has been both inundated with praise and soundly condemned.[35]

Turning to Justice Black's dissenting opinion in *Schmerber* one finds that: one, the Court having re-affirmed *Boyd* has held that a person's papers cannot be used to incriminate him but his blood may be used to incriminate him—"a strange hierarchy of values"; two, that though blood is not "oral testimony," that is, blood is not evidence extracted from one's mouth, it "communicates" most effectively to a jury; three, that the frailty of the distinction between the blood test and a lie detector test points up what Justice Black considers the basic error in the Court's holding in *Schmerber*,

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[34] Boyd v. United States, 116 U.S. 616, 630, 635 (1886). (Emphasis added.) In *Boyd* thirty-five pieces of plate glass were seized from the petitioners by the collector and forfeited to the United States under an appropriation statute. The change was that the goods were imported into the United States, subject to payment duties, and that the owners or agents of the merchandise committed the alleged fraud. At the trial it became important to establish the value of the plate glass, and to do this the district judge, acting under the same statute, required the petitioners to produce the invoice of the twenty-nine cases. The petitioners obeyed, but objected to the validity and constitutionality of the law on the ground that so far as it compelled production of evidence to be used against the claimants was unconstitutional and void.

Under the statute the effect of not producing the invoice, or the allegations stated in the motion, was that the failure or refusal was to be taken as a confession unless explained to the satisfaction of the court. If produced, then the result, as was the situation in *Boyd*, might be admitted into evidence. The Court said that the alternatives were tantamount to compelling their production.

[35] Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) "a case that will be remembered as long as civil liberty lives in the United States"; Harris v. United States, 331 U.S. 145, 160 (1947) (Frankfurter, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 662-63 (1961) (Black, J., concurring). But see 8 WIGMORE, EVIDENCE § 2264 (3d ed. 1940).

that is, its failure to follow the doctrine set out in *Boyd*.[36]

Arguments as to whether or not *Boyd* should have been followed will now turn upon words and phrases such as "testimony," "communications," and "liberal" as contrasted with a "close and literal" construction of the Bill of Rights. It would seem that the Court in *Schmerber* was faced with an excellent opportunity to expound, elaborate, constrict, or nullify the rationale of *Boyd*; however, the Court chose not to do so.

A third approach to the fifth amendment privilege is that which Professor McCormick designates as a line drawn "between enforced passivity on the part of the accused and enforced activity on his part."[37] Professor McCormick gives several citations which

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[36] In addition to *Boyd*, see Gouled v. United States, 255 U.S. 298 (1921). Petitioner Gouled and two others were charged with conspiracy to defraud the United States. The case involved two separate and questionable acts: one, a private in the Army attached to the intelligence department, and an acquaintance of Gouled, under orders, went to Gouled's office on a friendly visit and seized and carried away several documents, one of which was of "evidentiary value" only, and this act was held to violate the fourth amendment; two, the admission into evidence of such paper against the same person, on the basis of *Boyd*, was held to be a violation of the fifth amendment. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., concurring). Lopez v. United States, 373 U.S. 427, 454-58 (1962) (Brennan J., dissenting). The facts in *Lopez* were as follows: a governmental agent suspected that the petitioner was avoiding paying an excise tax on entertainment that petitioner was providing in his club. The agent went to the club, talked to the petitioner about the matter, and was offered a bribe by the petitioner. After reporting the incident to his superiors, the agent went back again, this time with a minifon, in an attempt to record essentially the same thing that had transpired between the agent and petitioner on the previous occasion. The evidence was obtained on the minifon and such was used to convict petitioner of attempted bribery. Justice Brennan said in effect that the Court in *Boyd* had rejected a narrow, literal conception of "search and seizure" and instead had read the fourth and fifth amendments together, creating a broad right to inviolate personalty. He went on to say that the authority of the *Boyd* decision had never been impeached. Its basic principle, that the fourth and fifth amendment interact to create a comprehensive right of privacy, of individual freedom, had been repeatedly approved by the Court. "*Boyd* stated that, when the object of a search is violative of the fifth amendment, the search is unreasonable within the meaning of the fourth amendment. . . . However, when the articles in which the defendant has a proprietary interest are seized and used as evidence, the accused is, in effect, being compelled to be a witness against himself. . . . Certainly, in view of the premise under which the Boyd Court was operating, it would be incongruous to limit the application of the rule to private papers." 34 FORDHAM L. REV. 746, 748 (1966).

[37] MCCORMICK, EVIDENCE § 126 (1954).

have supported this position, but as he says, "it seems to have no basis in history, practicality or justice."[38] For, as McCormick points out, under this viewpoint fingerprints and blood tests would be permissible, while the taking of a handwriting specimen or the reenactment of a crime are "activities" which would be prohibited by the fifth amendment. If any rule is in search of a reason it must surely be the distinction between "enforced passivity" and "enforced activity."

Yet some acceptance of this rule is indicated in *Schmerber*. The Court in the concluding paragraph of its discussion of the fifth amendment says: "Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone."[39] This passage, in reference to the blood test, follows the paragraph in which the Court speaks of a lie detector as contrary to the spirit and history of the fifth amendment. The Court distinguishes the lie detector test from the blood test, not on the basis of the comparative reliability of the two tests, but because in the lie detector situation guilt or innocence will be determined by physiological responses, whether such responses are willed or not. Evidently the distinction is based on the theory that the nervous system reacts to the question, taking an active part in the testing, and consequently it is enforced activity on the part of the accused—thus testimony. When the guilt, or at least the evidence, is riding, so to speak, on the bloodstream, it is neither testimony nor communication because the accused is a donor; when the guilt—or evidence—is riding on the nervous system and is, in effect, thrown out of the system by the accused as he reacts to the test, he is no longer a donor but he has by his reaction become an active participant.

The distinction between the lie detector and the blood test is most unsatisfactory. Certainly an accused has no power to control the results of the test, but is this a valid inquiry for the purpose of distinguishing a blood test from a lie detector test? Justice Black in his dissent asks: "How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of "testimony" taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony?"[40]

The final approach to the fifth amendment to be discussed is

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[38] *Id.* at 265.

[39] Schmerber v. California, 384 U.S. 757, 765 (1966).

[40] *Id.* at 778.

that which has been called the Black-Douglas view.[41] Both Justice Black and Justice Douglas have said, though somewhat differently, that words taken from the mouth, capsules from the stomach, blood from the veins, or incriminating evidence taken from the accused by a device of modern science, without consent, is proscribed by the command of the fifth amendment.[42] "They would extend the protection of the privilege even to passive submission."[43] Thus, the police cannot compel an accused to give them the evidence necessary to put them in jail.[44] Finally, "all legal writers and jurists agree that somewhere along the continuum compulsion becomes obnoxious; in Douglas' view this occurs at a point short of outright physical coercion."[45]

It seems the trouble with this view is that "society must suffer, regardless of the cost and regardless of the extent of compulsion" and this approach, for the sake of policing the police may be more than society is willing to accept.[46] In addition, its foundation in legal history and precedent is limited.

The Supreme Court in *Schmerber* has done little to clear up the fifth amendment privilege against self-incrimination, and perhaps they are not likely to do so. It seems, however, that the rule in *Boyd*, although after *Schmerber* more than ever relegated to the position of a lofty principle lacking in practicality, should be urged by the minority. In this age of more than one "contrivance of modern science,"[47] the notions of privacy on which the Boyd Doctrine is based[48] become ever more important. Professor Wigmore has said that the privilege exists mainly to stimulate the prosecution to a full and fair search of the evidence and to deter them

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41 Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing*, 44 MINN. L. REV. 673 (1960).

42 Rochin v. California, 342 U.S. 165, 175, 179 (1952) (Black, J., & Douglas, J., concurring).

43 See note 41, *supra.*

44 Breithaupt v. Abram, 352 U.S. 432, 442 (1957) (Douglas, J., dissenting).

45 *Supra* note 41 at 689.

46 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940). "If the privilege creates inviolability not only for his physical control over his own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles . . . ."

47 Gouled v. United States, 255 U.S. 298 (1921). 20 U. CHI. L. REV. 319 (1953).

48 Rochin v. California, 342 U.S. 165, 175 (1952) (Black, J., concurring).

from relying on the accused's testimony extracted by force of law,[49] and if one traces the historical development back to the time of John Lilburn,[50] this may be accurate. However, since 1886, in *Boyd*, the Supreme Court of the United States has recognized a privacy element in the privilege and this element has been approved and seemingly affirmed as recently as June of 1966.[51] The Court in *Miranda* said in part and quoted[52] in part the following passage:

> Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightly to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy."[53]

## IV. THE FOURTH AMENDMENT CLAIM

No mention of the fourth amendment prohibition against unreasonable searches and seizures is present in the dissenting opinions in *Schmerber*. The reason is quite obvious, for once the Court had decided that the blood test was not "testimony" or "communications" it had by-passed the *Boyd* ruling, and of course none of the other approaches to the fifth amendment discussed are applicable to the fourth amendment. Much of the discussion concerning the Boyd Doctrine in part three of this article is also applicable as to the fourth amendment. To avoid redundancy it will not be repeated in this part of the article; however, that *Boyd* is applicable to the fourth amendment cannot be doubted. It was, in fact, a main basis of the decision of *Boyd*, regardless of the need for such basis at the time of the decision.[54] Little else is to be said as to the fourth amendment rationale in *Schmerber*.

Consequently, only two questions need be discussed—whether

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[49] 8 WIGMORE, EVIDENCE § 2265 (3d ed. 1940).

[50] 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940). Reporting on John Lilburn's trial Wigmore says, in effect, that Lilburn did not object to answering questions about the charges laid to him, but only when the Star Chamber started asking questions about things that he had not been charged with did he object. But see Miranda v. Arizona, 384 U.S. 436, 459 (1966), quoting from HALLER & DAVIES, THE LEVELLER TRACTS 1647-53, 454 (1944).

[51] Miranda v. Arizona, 384 U.S. 436 (1966).

[52] United States v. Grunewald, 233 F.2d 566, 579, 581-82, *rev'd* 353 U.S. 391 (1957).

[53] Miranda v. Arizona, 384 U.S. 436, 460 (1966).

[54] Ker v. California, 374 U.S. 23, 30 (1963).

the police were justified in requiring the petitioner to submit to a blood test, and whether the means and procedures respected standards of reasonableness.[55] The Court states that probable cause existed, and, on the facts of this case, that conclusion is not to be disputed. Next the Court says that there is no unrestricted right to go beyond the exterior of the body to search for and seize the evidence or fruit of the crime; that "human dignity and privacy . . . forbid any such intrusions on the mere chance that desired evidence might be obtained."[56] To this statement the Court adds that in the absence of a "clear indication" that such evidence will be found, the law officers must bear the risk that the evidence will disappear unless an immediate search takes place. The meaning of this is somewhat difficult to ascertain, unless the "clear indication" is only another term for probable cause. Perhaps, however, the Court requires, in the situation where the intrusion extends beyond the body's surface, that there be something more than probable cause; this would seem to indicate that the authority for a search and seizure is, in theory, a somewhat slippery element. In other words, the arresting officer has probable cause, and in addition he thinks he may have a clear indication that if he is able to get a blood test immediately he will be able to find the desired evidence; he is able to get the accused to a hospital as quickly as is possible, but the evidence is found to be lacking. In this situation his authority has evidently slipped away from him and he must bear the burden of his risk.[57] An additional problem is the Court's

[55] Ker v. California, 374 U.S. 23, 44 (1963) (Harlan, J., concurring), states that until *Ker* the standard for the states in the search and seizure area was the "more flexible concept of 'fundamental' fairness, or rights 'basic to a free society' embraced in the Due Process Clause of the Fourteenth Amendment," rather than the federal requirement of reasonableness. See also Ruffin, *Intoxication Tests and the Bill of Rights: A New Look*, 2 CALIF. WEST. L. REV. 1, 9 (1966).

[56] Schmerber v. California, 384 U.S. 757, 769-70 (1966).

[57] Harris v. United States, 331 U.S. 145 (1947) (Frankfurter, J., dissenting). "Search requires authority; authority to search is gained by what may be found during search without authority. By this reasoning every illegal search and seizure may be validated if the police find evidence of crime. The result can hardly be to discourage police violation of the constitutional protection." *Id.* at 167.

Although, in the blood test situation, the accused has the protection of the probable cause requirement, the Court is evidently requiring more than probable cause before a blood sample may be taken and as to this "clear indication" Frankfurter's reasoning is appropriate. It must be admitted that the problem exists a good deal more in theory than in practicality, for the Court itself goes on to say that if probable cause exists it is unlikely that a blood test will not be relevant and the test unsuccessful. The use of the language will probably have the effect, once probable cause is established, of encouraging the

use of the words "desired evidence," for no indication is given as to whether the "desired evidence" is a sufficient percentage of alcohol in the blood to aid in conviction, or only a percentage of alcohol in the blood sufficient to indicate that the accused was in fact drinking alcoholic beverages.

The next question presented and answered by the Court is whether it is reasonable for an officer to draw inferences of probable cause and the relevance of a blood test without going before a magistrate, since search warrants are usually required for a dwelling, absent an emergency, and no less is to be expected in a situation where the body is concerned. The Court disposes of the question on the basis of the "destruction of evidence" test.[58] The rule is explained in *Preston* as follows:

> The rule allowing contemporaneous searches is justified, for example by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control.[59]

It is doubtful that in a situation where a blood test is relevant a magistrate will ever be necessary for the issuance of a warrant; if the situation did arise it would be rare. The Court then concludes by saying that the test is an everyday occurrence, and that it was performed, in this case, in a reasonable manner.[60]

## V. THE RIGHT TO COUNSEL CLAIM

The right to counsel now arises at what is called the "custodial interrogation"[61] stage of the proceedings. The right to counsel at

policeman to have the blood test taken as quickly as possible, even in a situation where it might be practical and appropriate to go before a magistrate before the blood test is taken. Such situations, admittedly, would be rare.

58 Preston v. United States, 376 U.S. 364 (1964).

59 *Id.* at 367.

60 Breithaupt v. Abram, 352 U.S. 432 (1957). Since the fourth amendment is now applicable to the states, the due process claim under the fourteenth amendment in this area may well be a dead end. In addition, the problems created by blood tests in the automobile drinking situation, may perhaps be avoided by the state legislatures enacting into law a bill that makes the test itself the subject of the crime; that is, a refusal to take the test vountarily would be an interference with the duties of a police officer.

61 Miranda v. Arizona, 384 U.S. 436, 444 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964). *Escobedo* spoke of the right to counsel arising at the time the investigation had focused on the accused. Other factors were considered in *Escobedo*, but these become irrelevant under the explan-

the custodial stage protects the fifth amendment privilege;[62] however, since a blood test is not within the scope of the fifth amendment, nothing exists with regard to the test, in most situations, for counsel to protect. As a result, counsel may be sought for other reasons, that is, the accused still has his right to counsel at the custodial stage, but as to the taking of the blood test, absent religious beliefs or physical fears, the presence or absence of counsel is in most situations irrelevant.

## VI. CONCLUSION

The due process of law argument under the fourteenth amendment is now solidly predicated on the *Breithaupt* ruling and *Schmerber* re-emphasizes that a blood test does not fit under the ruling of *Rochin*. Apparently, though the Court failed to answer the question directly, the contention of Chief Justice Warren and Justice Fortas, that due process in the search for evidence requires that the government stop short of violence upon the person of the accused, has been put aside permanently.

As to the fifth amendment privilege against self-incrimination the Court has held that blood taken from the accused is not self-incriminatory. The Boyd Doctrine, stating that the fourth and fifth amendments run almost into each other, and that the Bill of Rights must be liberally construed, has been placed back upon the shelf subject to being brought down again at a later date.

In regard to the fourth amendment prohibition of unreasonable searches and seizures it only need be said that *Boyd*, resting in part on the fifth amendment is not applicable since neither "testimony" nor "communication" is present. Probable cause must exist, the blood test must be relevant, the officer must be faced with an emergency, and the methods employed must be reasonable.

The sixth amendment right to counsel, resting on the existence of the fifth amendment privilege, is, as far as the actual blood test is concerned, irrelevant and probably does not apply.[63]

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ation by the Court in *Miranda*, which said: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, *supra*. If the blood test had been held to come under the fifth amendment privilege, petitioner's right to counsel would assuredly arise before the test was taken.

62 Miranda v. Arizona, 384 U.S. 436, 469 (1966).

63 For a different conclusion to this particular problem see, Ruffin, *Intoxication Tests and the Bill of Rights: A New Look*, 2 CALIF. WEST. L. REV. 1 (1966).

In reading and analyzing *Schmerber* one should not overlook two passages. The first is that of Justice Clark writing the opinion for the Court in *Breithaupt v. Abram*, where he states:

> Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on the highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. . . . As against the right of the individual that his person be held inviolable . . . must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road.[64]

The second is from Niebuhr, *The Children of Light and the Children of Darkness*: "[A]ny definition of a proper balance between freedom and order must always be at least slightly colored by the exigencies of the moment which may make the peril of the one seem greater and the security of the other therefore preferable."[65]

*Kevin P. Colleran, '68*

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[64] Breithaupt v. Abram, 352 U.S. 432, 439 (1957).

[65] NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS, 78 (Charles Scribner's Sons, 1944).