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Constitutional Law--Bodily Intrusions as Violations of Constitutional Rights

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the proposition involved—to hold the principal liable—it seems unfortunate that it takes on different technical names in its varying contexts. As Mechem states, “it seems unfortunate that so much time has been spent and so much heat generated over scarcely more than a difference in terminology. . . . [as] few practical consequences will result from the choice of one formula rather than the other.”³⁸ One can be certain, though, that the debate will continue, and, despite consistently holding the defendant liable, that the courts will continue, in cases bearing similar facts to the principal case, to justify and base their decisions on different and inconsistent terminology.

Robert Brand Stone

**Constitutional Law—Bodily Intrusions as Violations
of Constitutional Rights**

D attempted to smuggle packets of heroin into the United States by swallowing the packets and carrying them into this country in his stomach. United States Customs Agents, who were advised that *D* had told the Royal Canadian Mounted Police he was using this method of smuggling, took *D* to a physician's office twelve miles from the United States - Mexico border to be examined. Following a rectal probe which proved negative, *D* was given a saline solution to drink to produce vomiting. *D* sipped it without objection, and was observed throwing up an object and reswallowing it. The doctor then suggested use of a tube procedure to recover the object, to which *D* did not consent. Following *D*'s refusal, two agents held his arms, one his head, and the tube procedure, in which the tube goes through the nose to the stomach and saline solution is then passed through the tube to produce vomiting, was used. It resulted in *D* expelling two capsules of heroin. *D* was convicted of smuggling narcotics into the United States and appealed. *Held*, affirmed. It was not a violation of *D*'s constitutional rights to have this tube procedure, sometimes termed “stomach pumping,” used to procure the evidence. *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966).

³⁸ MECHEN, AGENCY § 90 (4th ed. 1952).

The principal case raises some interesting questions as to the extent to which a physical examination, including intrusions into the body cavity of an individual, will be permitted in the prosecution's quest for incriminating evidence. Although the court allowed evidence to be procured through the use of a stomach pump, there is authority that such a search is, under certain conditions, unconstitutional.

The constitutional provision relating to searches and seizures is found in the fourth amendment,¹ which provides that "the right of the people to be secure . . . against unreasonable searches and seizures shall not be violated" While the amendment is quite explicit in providing constitutional guarantees against unreasonable searches and seizures, responsibility to determine how it is to be applied lies with the judiciary. The United States Supreme Court has held that this guaranty should be given a liberal construction, in favor of the individual.² It has also held that there can be no fixed formula for making the determination of what constitutes an unreasonable search and seizure, but that it must be resolved according to the facts of each case.³

In the leading case of *Rochin v. California*,⁴ the United States Supreme Court considered the constitutionality of the use of a "stomach pump" by state law enforcement officers to extract evidence from within the body of an individual. Here the officers forced their way into Rochin's home, saw him swallow two capsules, and took him to a hospital where they had a doctor forcibly pump his stomach and secure heroin capsules he had swallowed. The Supreme Court reversed a conviction based upon the use of these capsules as evidence, stating that the methods used violated the due process clause of the fourteenth amendment. The Court referred to the proceedings by which the conviction was obtained as "conduct that shocks the conscience" and stated that these are methods "too close to the rack and the screw"

As explained above, the *Rochin* case involved state action and the Court consequently based its decision upon the due process

¹ U.S. CONST. amend. IV.

² *Grau v. United States*, 287 U.S. 124 (1932).

³ *United States v. Rabinowitz*, 339 U.S. 58 (1950).

⁴ 342 U.S. 165 (1952).

clause of the fourteenth amendment.⁵ If federal officers had been involved the decision might have turned on the fourth amendment's prohibition against unreasonable searches and seizures, and, if the actions had been deemed unreasonable, the conviction would have been reversed on that basis. In a somewhat similar situation involving federal officers, where a defendant's stomach was pumped in order to recover capsules of heroin, it was held by a United States District Court⁶ that "the search . . . was an unreasonable one within the meaning of the Fourth Amendment."

Other cases have held that certain types of bodily intrusions are not unconstitutional. One of these involves securing evidence by compulsory administration of blood tests to individuals suspected of being intoxicated. After the blood samples are taken they are analyzed for alcoholic content and the analysis used in evidence against the accused. In *Breithaupt v. Abram*,⁷ a leading case on this question, the Supreme Court held that the taking of a blood sample by a physician from an unconscious defendant did not deprive him of due process of law in violation of the fourteenth amendment. Here again, state action was involved and the unreasonable search and seizure clause of the fourth amendment was not specifically employed. The Court distinguished the facts in *Breithaupt* from those in *Rochin* and concluded "that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience,'⁸ . . . nor such a method of obtaining evidence that it offends a 'sense of justice . . .'"

At the time of the *Breithaupt* decision the fourth amendment had not been applied to the states. However, four years subsequent to that decision, in *Mapp v. Ohio*¹⁰ the Court held that the fourth amendment's provision against unreasonable search and seizure applies to state actions. Then, in *Schmerber v. California*,¹¹ the Court held that the taking of a blood sample over the objections of a conscious individual, was no violation of the defendant's constitutional rights. In this case, which again involved state action,

⁵ U.S. CONST. amend. XIV, §1, states "No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law" (emphasis added).

⁶ *United States v. Willis*, 85 F. Supp. 745 (S.D. Cal. 1949).

⁷ 352 U.S. 432 (1957).

⁸ *Rochin v. California*, 342 U.S. 165, 172 (1952).

⁹ *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁰ 367 U.S. 643 (1961).

¹¹ 388 S.Ct. 1966 (1966).

the Court discussed at length the constitutional safeguards against unreasonable searches and seizures as embodied in the fourth amendment, and which, since *Mapp*, apply to the states through the due process clause of the fourteenth amendment. The Court pointed out that although "the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions. . ." such a holding "in no way indicates that it permits more substantial intrusions. . . ."

In *Schmerber*, the Court also considered the question of whether the fifth amendment's provision protecting an individual from being "compelled . . . to be a witness against himself," which also is applied to the states through the due process clause of the fourteenth amendment,¹² applied to intrusions into the body to obtain evidence. The Court held "that the privilege protects the accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature and that the withdrawal of blood . . . did not involve compulsion to these ends." Mr. Justice Douglas and Mr. Justice Black based dissenting opinions in *Schmerber* upon their belief that the fifth amendment should extend to prohibit bodily intrusions, made without consent, to obtain evidence. But this case clearly distinguishes between compelled communications or testimony which the fifth amendment bars, and the compelling of a suspect to be "the source of 'real or physical evidence'" which does not violate the fifth amendment's provisions.

Of the cases discussed above, only those which, like the principal case, involved use of a stomach pump, were reversed due to a violation of constitutional rights. In the principal case, however, we find a lower federal court upholding the use of a stomach pump to extract evidence from within a person's stomach. Upon what can such a decision be based?

The instant court distinguished *Rochin* on the fact that the action taken was incident to a border search. As was said in a recent federal case, "This being a border search, special rules are applicable."¹³ Federal courts have approved the use of emetics to retrieve narcotics which have been swallowed when such use is

¹² *Malloy v. Hogan*, 379 U.S. 1 (1964).

¹³ *King v. United States*, 348 F.2d 814, 817 (9th Cir. 1965).

incident to a border search,¹⁴ and of anal examinations to retrieve narcotics being smuggled into the United States.¹⁵

The principal case in a sense establishes an exception to decisions which have held that the use of a stomach pump to extract evidence will not be allowed. In contrast to *Rochin* where the Court said it would shock the conscious to allow such methods, here the Court stated that "it would shock the conscience . . . if these officers . . . were frustrated in the recovery and use of this evidence." It could be argued, however, that there is no exception, for this case may also be regarded as an example of the often-stated rule that whether a search is reasonable, and therefore whether constitutional rights are violated, is to be determined by the court after looking at all the facts and circumstances of each case.¹⁶ In the principal case, even though a stomach pump was forcibly used to extract evidence from within the body cavity of the defendant, the trial court's findings that this was a reasonable search was, in light of the facts and circumstances, affirmed.

From the discussion above, the following conclusions may be drawn as to whether bodily intrusions used to obtain evidence will be considered violations of constitutionally protected individual rights:

- (1) The fourth amendment provision protecting against unreasonable searches and seizures may be invoked directly, if the court determines from all facts and circumstances of the case that this provision is violated, when federal action is involved;
- (2) That same provision may be invoked indirectly, through the due process clause of the fourteenth amendment, to protect against state action if the court, again looking at all the facts and circumstances of the case, deems the action taken to be a violation; and,
- (3) The fifth amendment's protection against self-incrimination does not apply to such intrusions, regardless of whether the action is state or federal.

Robert Bruce King

¹⁴ *Barrera v. United States*, 276 F.2d 654 (5th Cir. 1960).

¹⁵ *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), cert. denied 358 U.S. 914 (1958).

¹⁶ *United States v. Rabinowitz*, 339 U.S. 56 (1950).