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Criminal Procedure--Self-Incrimination--Scientific Tests of Body Substances as Evidence

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the state's power to search and seize under valid search warrants. This would be a change in the law, at least on the federal level.

It is believed that such a solution reaches a workable balance between the right of organized society to protect itself and the inherent rights of individuals so dear to a freedom-loving people.

TOM SOYARS

CRIMINAL PROCEDURE—SELF-INCRIMINATION—SCIENTIFIC TESTS OF BODY SUBSTANCES AS EVIDENCE¹

The Fifth Amendment to the Constitution of the United States provides that no person accused of crime shall be compelled to be a witness against himself. Most of the states,² in somewhat varying language within their constitutions,³ also provide such protection against self-incrimination.⁴ In recent years the courts throughout the United States have had to face the problem of whether this privilege against self-incrimination extends beyond the historic concept of testimonial compulsion and the compulsory production of papers in open court⁵ to cover non-testimonial, physical evidence of crime. The specific types of non-testimonial, physical evidence selected for treatment herein⁶ are the scientific tests of body substances, such as blood, urine and stomach contents. Since the very nature of these tests requires an invasion of the bodily security (extraction of body fluids), the privilege against self-incrimination usually appears appropriate to defense attorneys as the basis for an objection to the use of such tests.⁷ The purpose of this note, therefore, will be to consider whether the use of evidence obtained by such procedure is prohibited by the privilege against self-incrimination.

¹ The validity and accuracy of such tests are not within the scope of this paper. See Gibson and Ladd, *Legal-Medical Aspects of Blood Tests To Determine Intoxication*, 29 VA. L. REV. 749 (1943).

² New Jersey and Iowa have no constitutional provisions pertaining to self-incrimination, but they do have statutory provisions which cover the "privilege". See 8 WIGMORE, EVIDENCE sec. 2252, p. 320 (3d ed. 1940).

³ Typical of such language variation is Kentucky's Constitution which states, "In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself. . . ." CONSTITUTION OF KENTUCKY, Sec. 11 (1893).

⁴ Wigmore points out that the varying language is of no significance since all the phrases had a common conception in the common law. 8 WIGMORE, EVIDENCE 362 (3d ed. 1940).

⁵ 8 WIGMORE, EVIDENCE 363 (3d ed. 1940).

⁶ Other types of non-testimonial evidence will not be discussed, except as they incidentally involve body substance tests.

⁷ Mamet, *Constitutionality of Compulsory Chemical Tests To Determine Alcoholic Intoxication*, 36 J. OF CRIM. LAW AND CRIMINOLOGY 132 (1945-46).

It is believed that this purpose can best be accomplished by an analysis based on three divergent views⁸ as to the scope of the privilege. The first view, based upon the historical approach, would limit the privilege to oral testimony and the compulsory production of documents in court by judicial process. The second theory, which a few jurisdictions have accepted, is that any evidence secured by compulsion from the accused is within the protection against self-incrimination. The third view, which attempts a compromise between the two other views, would draw a line between enforced *passivity* and enforced *activity* on the part of the accused in the securing of evidence from him.

1. STRICT VIEW DERIVED FROM THE HISTORICAL APPROACH TO THE PROBLEM

Dean Wigmore, the foremost exponent of strict adherence to the historic development of the privilege against self-incrimination, in his discussion of the scope of the privilege, states,

Looking back at the history of the privilege and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical Court, as opposed through two centuries,—the inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn⁹ and his fellow-objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath.

. . . In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion*. The one idea is as essential as the other.

The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure *sought by legal process against him* as a witness.¹⁰

It is evident from the foregoing quotation that Wigmore's interpretation of the historical approach¹¹ to the protection against self-incrimi-

⁸ McCORMICK, EVIDENCE sec. 126, p. 263 (1954). Inferences of such divergent views appear in: *State v. Cram*, 176 Ore. 577, 160 P. 2d 283 (1945), and *Green Lake County v. Domes*, 247 Wis. 90, 18 N.W. 2d 348 (1945).

⁹ Lilburn's Trial, 3 How. St. Tr. 1315 (1638).

¹⁰ *Supra* note 4.

¹¹ For other discussions of the history of the "privilege" which agree with Wigmore's interpretation see: 1 GREENLEAF, EVIDENCE sec. 469 e (16th ed. 1899); Inbau, *Self Incrimination—What Can An Accused Person Be Compelled To Do?*, 28 J. OF CRIM. LAW AND CRIMINOLOGY 261, 263 (1937-38).

nation would extend this protection no further than testimonial compulsion (oral or written).¹² Hence, this view would allow no other compelled conduct or its products, however unlawful or inadmissible on other grounds, to be within the protection of this privilege.¹³ The historical approach to self-incrimination, as enunciated by Wigmore, has rather wide acceptances in modern cases¹⁴ and authorities.¹⁵ Many of the early cases avoid the issue of the constitutionality of these chemical tests by finding that the accused waived his rights to the protection against self-incrimination.¹⁶ However, in recent years the courts have shown a disinclination to rest the decision on waiver, where it is apparent the accused was compelled to submit to the tests.¹⁷

One of the more recent cases to adopt the view that the primary purpose of the privilege is to protect an accused from compulsory testimonial utterances is *People v. One 1941 Mercury Sedan*.¹⁸ In that decision the accused was compelled by bodily force to submit to a stomach pump for the purpose of extracting swallowed capsules of narcotics. The California Court, in allowing such evidence to be used against the defendant, said,

In line with the weight of authority it is our opinion that the privilege against self-incrimination does not preclude the introduction of physical disclosures the defendant is forced to make, or the results of tests to which he has involuntarily submitted. It is our view that the privilege only protects the individual from any forced disclosures by him, whether oral or written. It is limited to the protection against testimonial compulsion. The privilege protects the accused from the process of extracting from his own lips against his will an admission of guilt, but it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material. . . .¹⁹

¹² Mamet, *op. cit. supra* note 7 at 140.

¹³ McCORMICK, *op. cit. supra* note 8, at 264.

¹⁴ 25 A.L.R. 2d 1407.

¹⁵ Mamet, *op. cit. supra* note 7.

¹⁶ *State v. Duguid*, 50 Ariz. 276, 72 P. 2d 435 (1941); *Novak v. District of Columbia*, 49 A. 2d 752 (1946); *Touchton v. State*, 154 Fla. 547, 18 So. 2d 752 (1944); *State v. Werling*, 234 Iowa 1109, 13 N.W. 2d 318 (1944); *Gentry v. Commonwealth*, 215 Ky. 728, 286 S.W. 1041 (1926); *State v. Alexander*, 7 N.J. 585, 83 A. 2d 441 (1951).

¹⁷ The following cases found no waiver: *Rochin v. California*, 342 U.S. 165, 25 A.L.R. 2d 1396 (1952); *Holt v. U.S.*, 218 U.S. 245 (1910); *United States v. Willis* 85 F. Supp. 745 (1949); *People v. One 1941 Mercury Sedan*, 74 Cal. App. 199, 168 P. 2d 443 (1946); *Apodaca v. State*, 140 Tex. Cr. 593, 146 S.W. 2d 381 (1941); *Green Lake County v. Domes*, 247 Wis. 90, 18 N.W. 2d 348 (1945).

¹⁸ 74 Cal. App. 199, 168 P. 2d 443 (1946).

¹⁹ *Id.*, 168 P. 2d at 451. It should be noted that in a similar case in 1952 the United States Supreme Court reversed a conviction because excessive force (stomach pump) had been used in violation of the "due process" clause of the Fourteenth Amendment to the United States Constitution.

It is apparent that a court following this view would not apply the privilege to any type of physical evidence (blood or urine tests) no matter how the evidence is acquired. The weight of authority²⁰ in the United States today, supports the historic view as presented in *People v. One 1941 Mercury Sedan*.²¹

The American Law Institute Model Code of Evidence definitely accepts the view that the taking of body fluids is not within the privilege against self-incrimination when it states:

No person has a privilege . . . to refuse
(b) to furnish or to permit the taking of samples of body fluids
or substances for analysis.²²

This rule would leave no doubt in the mind of future courts that blood tests, urine tests, stomach pumps and any other chemical tests of body substance should not be excluded on the basis of self-incrimination, since these tests are not in the nature of *testimonial compulsion* as defined by history, for as has been pointed out, "What is obtained from the accused by such action is not testimony about his body but his body itself. . . ."²³

II—VIEW THAT NO EVIDENCE SECURED BY COMPULSION IS ADMISSIBLE

A second theory to which a few jurisdictions have adhered is that *any* evidence secured from the accused by means of compulsion is within the prohibition against self-incrimination.²⁴ It is clear that *compulsion* is made the keynote of the privilege in this instance.²⁵ Therefore, any type of evidence closely connected with the accused's body such as blood, urine, stomach contents, etc., and which is taken by force would be within the "prohibition". This approach erroneously places its emphasis on compulsion rather than upon the testimonial aspect of the protection against self-incrimination. Under such an interpretation, the logical consequences would be disastrous to law enforcement for it is easily seen that such an analysis would necessarily include such evidence as: fingerprints, photographs, "line-ups," meas-

²⁰ *Holt v. United States*, 218 U.S. 245 (1910); *United States v. Ong Siu Hong* 36 Phil. Is. 735 (1917); *State v. Berg*, 76 Ariz. 96, 259 P. 2d 261 (1953); *State v. Graham*, 116 La. 779, 41 So. 90 (1906); *City of Columbus v. Thompson*, 55 Ohio L. Absc. 302, 89 N.E. 2d 604 (1949); *State v. Gatton*, 60 Ohio App. 192, 20 N.E. 2d 265 (1938); *Green Lake County v. Domes*, 247 Wis. 90, 18 N.W. 2d 348 (1945).

²¹ *Supra* note 18.

²² A.L.I. MODEL CODE OF EVIDENCE, Rule 205 (1942). The comment to this rule makes it clear that it leaves open the question whether any other rule of law protects an accused from chemical tests of body substance.

²³ 8 WIGMORE, EVIDENCE sec. 2265, p. 375 (3d ed. 1940).

²⁴ *Supra* note 8. ²⁵ 16 C.J. 566, 28 R.C.L. 434.

urements, and compelled attendance in court. This interpretation fails to consider that two elements, instead of one, are necessary to the privilege, *i.e.*, compulsion plus testimony. Certainly any reasonable interpretation of this view would incorporate a concept of evidence which goes beyond the limits of *testimony*.

Very few modern decisions can be found which, upon their facts,²⁶ promulgate this extreme view. Two older decisions which indicate an acceptance of the *compulsion* view are *State v. Height*²⁷ and *State v. Newcomb*²⁸ which hold that the authorities cannot compel an accused to submit to an examination for a venereal disease (rape cases). Such decisions go to lengthy ends to show the evils of the use of *force* but they fail to comprehend the full meaning of the privilege.

III—VIEW WHICH MAKES A DISTINCTION BETWEEN ACTIVE AND PASSIVE CONDUCT ON THE PART OF THE ACCUSED

The third approach to self-incrimination attempts a compromise between the two previous views on self-incrimination.²⁹ This approach would distinguish those situations where the accused is compelled to *passively* submit to tests and examinations from those situations in which the accused is compelled to *actively* cooperate in the accomplishment of the chemical analysis of the body substances. Such a view can draw upon no precedents from history but it does have moderate support³⁰ in certain instances where the courts feel compelled to limit to some extent the lengths to which the police may go in order to obtain evidence from the accused. This theory makes an effort to balance the interests of the individual against the interests of society in having scientific methods of producing evidence. One authority indicates his general acceptance of this concept when he states,

Whenever the evidence is confined . . . to qualities of his body substances beyond his power of control, its admissibility is clearly justified by the more liberal interpretation of the Constitutional provision. Where, however, he is compelled to do acts which he can use as a means of conveying ideas, the reception of evidence

²⁶ A Texas case in 1941 indicated an acceptance of the "compulsion view", but its facts make such an acceptance mere *dictum*. See *Apodaca v. State*, 140 Tex. Cr. 593, 146 S.W. 2d 381 (1941).

²⁷ 117 Iowa 650, 91 N.W. 935 (1902).

²⁸ 220 Mo. 54, 119 S.W. 405 (1909).

²⁹ *Supra* note 8.

³⁰ *Allen v. State*, 183 Md. 603, 39 A. 2d 820 (1944); *State v. Cram*, 176 Ore. 577, 160 P. 2d 283, 164 A.L.R. 952 (1945); *Apodaca v. State*, 140 Tex. Cr. 593, 146 S.W. 2d 381 (1941); *Green Lake County v. Domes*, 247 Wis. 90, 18 N.W. 2d 348 (1945). (The court indicated that a line did exist where it would be improper to compel the accused to give physical evidence, but the court failed to draw such a distinction); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 39 (1949).

of his conduct raises serious questions as to the extent to which practical considerations affecting efficient enforcement of the law under modern conditions may be safely permitted to limit the right of privacy and personal liberty.³¹

The most prominent decision supporting the active-passive differentiation concept is *Apodaca v. State*.³² In this case the accused was forced to undergo certain tests for intoxication which included walking, finger-on-nose, and a urinalysis. The court, quoting Ruling Case Law,³³ based its decision on the belief that "the constitutional inhibition is directed not merely to the giving of oral testimony, but embraces as well the furnishing of evidence by other means than by word of mouth, the divulging, in short, of any fact which the accused has a right to hold secret."³⁴ This decision is limited in the sense that it does not indicate the type of evidence which would be allowed. However, the inference in the case is that the evidence was inadmissible because "he was compelled to *do* the things required of him"³⁵ and had he only been compelled to submit to these tests, a different result would have been reached. A second significant case³⁶ which, upon its facts, supports this third approach to self-incrimination is *State v. Cram*.³⁷ The court held admissible as evidence the results of a blood-test for intoxication which was taken from the accused while he was unconscious. It is obvious that the accused in this instance was not compelled to *act* and hence this decision reached the proper result under the passive concept of the third approach to the privilege.

It is apparent that those who advocate the distinction between the active and passive conduct of the accused believe that the key to self-incrimination is compulsion upon the individual to actively cooperate in an effort to incriminate himself. Again (as in View Two), it is evident that a logical extension of this rule must necessarily bar such evidence as walking a chalk line or standing in court for identification, for in each of these the defendant is called upon to act. A close analysis of this compromise approach to self-incrimination shows two inherent weaknesses. (1) There are factual situations where it would be difficult to analyze the conduct of the accused as to active or passive behavior. Such instances could involve urinalysis, lie detectors, drunk-o-meters and truth serums. (2) If the active-passive line is

³¹ MORGAN, *op. cit. supra* note 30, at 39.

³² 140 Tex. Cr. 593, 146 S.W. 2d 381 (1941).

³³ 28 RULING CASE LAW 434.

³⁴ *Supra* note 32, at 146 S.W. 2d 382.

³⁵ *Ibid.*

³⁶ The same results would have been reached if this case had been decided under the "historic view". In fact the court did rest its decision on both the historic and active-passive views.

³⁷ 176 Ore. 577, 160 P. 2d 283, 164 A.L.R. 952 (1954).

strictly drawn, absurd conclusions may be reached. For instance, the problem of admissibility would be decided differently in blood tests (passive) and urine tests (active) when there is no substantive basis for distinguishing the two tests. Another absurd result would be the fact that a man could be subjected to catheterization but he could not be forced to urinate into a bottle.

It cannot be denied that the active-passive criterion is helpful in some instances but this writer believes that a more reasonable result can be reached under the historical approach. In many instances these two approaches will reach the same result³⁸ and will only diverge when the active-passive distinction goes beyond its historical precedent in the common law. Although helpful in some instances, the overall result of this view is to cloud the issue.

IV—CONCLUSION

The writer, as a result of the above analysis of the three divergent approaches to self-incrimination as it involves body substances, is forced to the conclusion that the *historical* approach to self-incrimination is the sounder of the three views. This conclusion is based upon two reasons, i.e., the *historical* background of the privilege, and what is thought to be sound *public policy* of today.³⁹ The remainder of this note, therefore, will be concerned with the considerations of these two reasons.

It is clear that an analysis of the *historical* development of the protection of the accused from self-incrimination shows that such a privilege arose essentially to protect a person from testimonial compulsion, i.e., the extraction of evidence from his lips.⁴⁰ This unique privilege owes its beginning to the misuses of the inquisitional oath, both in the ecclesiastical courts and in the Star Chamber.⁴¹ By 1620 Coke and the nonconformists had established that such oaths were unlawful in the ecclesiastical courts without formal accusation.⁴² However, it was Lilburn's Case and its aftermath which persuaded the courts that an accused could not be compelled to disclose his guilt.⁴³ From this background the colonists incorporated provisions against

³⁸ *People v. One 1941 Mercury Sedan*, *Supra* note 18; *State v. Cram*, *Supra* note 37.

³⁹ For a full discussion of the policy behind the "privilege" see, WISCONSIN BRANCH, AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY; REPORT OF THE COMMITTEE ON TRIAL PROCEDURE (1910).

⁴⁰ 8 WIGMORE, EVIDENCE, 863 (3d Ed. 1940).

⁴¹ McCORMICK, EVIDENCE, 254 (1954); 8 WIGMORE, EVIDENCE 217 *et seq.*, 363 (3d ed. 1940).

⁴² McCORMICK, *op. cit. supra* at 254; WIGMORE, *op. cit. supra* at 288.

⁴³ McCORMICK, *op. cit. supra* at 254; WIGMORE, *op. it. supra* at 291.

self-incrimination into their state constitutions in order to protect themselves against testifying to incriminating facts. Therefore, it can be seen that if such phrases as "witnessing against oneself" are viewed within their historic evolution and the spirit which brought them about, there can be little doubt that chemical tests involving body substances are not within their meaning. As has been pointed out, such evidence is not *testimony about the body*, but is the body itself.⁴⁴

The second basis for urging an acceptance of the historical interpretation of the privilege as against the other two approaches is founded upon *public policy*. There are several policy reasons which give full support to the Wigmore view.

First. The historical approach, unlike the other two concepts, has no factual exceptions which tend to nullify the effectiveness of the theory. As has been pointed out (*supra*) the passive-active criterion will result in absurd results and distinctions and, like the *compulsion* approach, a logical extension of this view would bar the most in-offensive evidence such as fingerprints.

Second. The privilege should be kept within the strictest limit possible,⁴⁵ since there can be no doubt that the privilege is often a refuge for criminals. To extend it beyond the necessary area (*i.e.*, oral and written testimony) needed to protect the innocent from an inquisitorial method of investigation would be to dangerously hamper society in the apprehension of criminals. It is felt that there is no inherent danger to the accused for him to be subjected to an objective scientific test of his body substance as there would be in case of oral compulsion.

Third. The importance of using chemical tests to minimize crime (such as drunken driving) outweighs relatively slight invasions of body security. A recent article points out these conflicting interests:⁴⁶

The interests involved . . . are, on the one hand, the personal interest of the accused in preserving his bodily integrity and the social interest in framers of criminal procedure, and, on the other hand, the interest of society in minimizing crime . . . and in reducing the number of deaths widely presumed to be caused by drinking drivers. . . . That in many cases the courts have tipped the scales on the side of admissibility of such evidence, when taken without consent and with some force, indicates the apparent belief that the invasion of bodily integrity is relatively slight and the interest of society relatively large.

It is evident that an extension of the privilege against self-incrimination into the fields of physical evidence would be a great hindrance

⁴⁴ WIGMORE, *op. cit. supra* at 375.

⁴⁵ *Id.* at 318.

⁴⁶ 4 J. OF PUBLIC LAW 202, 206 (Spring-1945).

to reasonable law enforcement. The accused is forced to do many other things while under arrest (appear in court, finger-print, line-ups, etc.), hence it is submitted that no distinction should be drawn so as to bar chemical tests from use as evidence. The prohibition of any of these would render crime detection almost impossible.

Fourth. The privilege exists partly in order to stimulate the prosecution to a full and fair search for evidence procurable by its own exertions rather than a reliance upon oral testimony extracted from those accused of crime. It is evident that scientific tests of body substances do not violate this purpose, since such tests do not rely upon the testimony of the accused but rather upon objective physical, non-testimonial substances.

Fifth. For those who fear that such an approach (described herein as the historic view) leaves the door open for unreasonable police tactics, it is suggested that the following remedies are available for the protection of the accused:

(a) A civil suit for battery may be available against an officer who abuses a person while under arrest.⁴⁷

(b) There is authority for the position that evidence obtained by chemical tests may be barred as evidence obtained by "Illegal Search and Seizure."⁴⁸

(c) Excessive force in such tests may violate the "Due Process Clause" of the Fourteenth Amendment of the United States Constitution.⁴⁹

Therefore, based upon history and policy, it is concluded that the correct interpretation of the privilege against self-incrimination does not protect an accused from being compelled to engage in scientific tests of his body substances for the purpose of securing evidence to be used in his criminal prosecution.

LUTHER HOUSE

CONTRACTS—ACCEPTANCE OF AN OFFER—WHEN AN ACCEPTANCE BY MAIL TAKES EFFECT

The law of contracts with regard to the need for communication of the acceptance of an offer by mail was settled in England in 1818 by the case of *Adams v. Lindsell*.¹ Through a process of historical evolution, this case and its related cases established the doctrine that

⁴⁷ Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (April 1955).

⁴⁸ *State v. Weltha*, 228 Iowa 519, 292 N.W. 148 (1940).

⁴⁹ *Rochin v. California*, 342 U.S. 165, 25 A.L.R. 2d 1396 (1952).

¹ 1 *Barnewall & Alderson* 681, 106 Eng. Rep. 250 (K.B. 1818).