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Protection Against Illegal Meansof Obtaining Evidence

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NOTE

PROTECTION AGAINST ILLEGAL MEANS OF OBTAINING EVIDENCE

The determination of the extent of the protection which will be accorded to one accused of crime, as against the efforts of law enforcement officials to obtain evidence of his guilt directly from him, requires a balancing of the need for restraints on the overzealousness of police officers dealing with those merely suspected of crime as against the necessities of obtaining evidence to convict criminals. The flagrant barbarities practiced against accused offenders in past centuries led to the erection of civil rights guarantees against such abuses, two of these being the privilege against self-incrimination and the rule holding coerced confessions inadmissible.[1] Professor Wigmore points out that these rules are different in scope and origin, but that courts have often confused them. "So far as concerns *principle,* the two doctrines have not the same boundaries; i.e. the privilege covers only statements made in court under process as a witness; the confession rule covers statements made out of court, but may, also overlapping, cover statements made in court."[2] The aim of these two rules is to exclude from evidence *testimonial* utterances given unwillingly by the witness or the accused under force of legal process or as a result of physical torture; but the advent of science into the field of criminal investigation has led to attempts to extend the prohibitions to almost every kind of effort to obtain incriminating evidence from the accused's mind, body, and possessions. Consequently, there exists a danger of extending the protection so far that legitimate efforts of the prosecution may be impaired. But ingenious police officers continue to employ new devices on accused persons, and the courts must decide whether they go beyond the bounds of due process of law, and whether the accused is protected from their use by the rule against coerced confessions or the privilege against self-incrimination.

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[1]The modern rule against coerced confessions was not given a full and clear expression until Warickshall's case in 1783. 3 Wigmore, Evidence (3d ed. 1940) 238. The privilege against self-incrimination, however, was crystallized almost a century and a half earlier in the trial of John Lilburn in 1637. 8 Wigmore, Evidence (3d ed. 1940) 298. This latter privilege was developed as a weapon against the inquisitorial methods of the Court of Star Chamber and the ecclesiastical courts.

[2]8 Wigmore, Evidence (3d ed. 1940) 387.

These issues were recently presented to the Supreme Court of the United States in *Rochin v. California*.[3] Three deputy sheriffs of Los Angeles County had entered the bedroom of one Antonio Rochin, whom they suspected of illegally possessing narcotics. Two capsules, which were wrapped in cellophane, were seen by the deputies on a small table inside the room, but before the deputies could seize the capsules, Rochin had placed them in his mouth and swallowed them. Rochin was then handcuffed and taken to a local hospital where a physician strapped him to a table in the operating room, placed a pail beside him, and forcibly injected a tube down the unwilling victim's throat, through which an emetic solution was released into his stomach. Rochin vomited, and the cellophane-wrapped capsules, which were found to contain morphine, floated in the pail. This evidence was used to convict Rochin in the California court.[4] An appeal was taken to the Supreme Court of the United States, where the conviction was reversed on the ground that the taking of the capsules from the defendant's stomach deprived him of due process of law guaranteed by the Fourteenth Amendment.[5] In the view of the Court the conduct of the officers was brutal, shocking to the conscience, and offensive to the community's sense of fair play and decency.[6]

Applicability of the Federal Bill of Rights to State Criminal Proceedings

Differing in their reasoning from a majority of the Court, Justices Black[7] and Douglas [8] announced in concurring opinions that they would have reversed the conviction on the ground that the defendant was protected by the privilege against self-incrimination contained in the Fifth Amendment[9] from having his stomach pumped to obtain evidence against him. To reach this result, these Justices would have the Fifth Amendment privileges apply to the states through the Four-

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[3]72 S. Ct. 205, 96 L. ed. 154 (1952).

[4]The conviction was affirmed in People v. Rochin, 101 Cal. App. (2d) 140, 225 P. (2d) 1 (1950), noted in (1951) 25 Tulane L. Rev. 410. This case was in accord with an earlier case upholding the use of evidence obtained by the use of a stomach pump. People v. One 1941 Mercury Sedan, 74 Cal. App. (2d) 199, 168 P. (2d) 443 (1946).

[5]U. S. Const. Amend. XIV.

[6]Rochin v. California, 72 S. Ct. 205, 96 L. ed. 154 (1952).

[7]See Rochin v. California, 72 S. Ct. 205, 211, 96 L. ed. 154, 160 (1952).

[8]See Rochin v. California, 72 S. Ct. 205, 212, 96 L. ed. 154, 161 (1952). All other Justices concurred with the reasoning of Justice Frankfurter, with the exception of Justice Minton, who took no part in the decision.

[9]U. S. Const. Amend. V.

teenth Amendment. They reaffirmed the view taken in a dissent in *Adamson v. California,*[10] wherein Justice Black, joined by Justice Douglas, urged that the scope of the Due Process Clause of the Fourteenth Amendment included, and was limited to, the specific provisions of the first eight amendments to the Constitution. The impact of this view, when applied to the facts of the *Rochin* case, is twofold.

First, it would repudiate repeated pronouncements by the Court that the Due process Clause includes only those provisions of the Bill of Rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[11] or are "implicit in the concept of ordered liberty."[12] Those provisions of the first eight amendments which have been held to be "fundamental" are: Freedom of religion,[13] speech, [14] press,[15] and assembly;[16] and freedom from illegal searches and seizures.[17] In certain cases the right to assistance of counsel is considered essential to due process.[18] Among those provisions which are not so "fundamental" as to be essential to due process are:

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[10]332 U. S. 46, 68, 67 S. Ct. 1672, 1684, 91 L. ed. 1903, 1917 (1947). Apparently favoring a close, literal interpretation of constitutional provisions, Justice Black disapproved of any such nebulous formula as the "fundamental" standard used by the majority in the Adamson case. It was his belief that the framers of the Fourteenth Amendment intended to incorporate the Bill of Rights in its entirety. For a thorough discussion of the Amendment's history, see Justice Black's Appendix: 332 U. S. 46 at 92, 67 S. Ct. 1672 at 1696, 91 L. ed. 1903 at 1930 (1947). Justice Murphy, joined by Justice Rutledge, dissented seperately. 332 U. S. 46, 123, 67 S. Ct. 1672, 1683, 91 L. ed 1903, 1946 (1947). These two Justices agreed with Justice Black that the Due Process Clause of the Fourteenth Amendment included the Bill of Rights, but they did not believe that the Fourteenth Amendment is necessarily limited to the provisions of the first eight amendments.

[11]Snyder v. Massachusetts, 291 U. S. 97, 105, 54 S. Ct. 330, 332, 78 L. ed. 674, 677 (1934).

[12]Palko v. Connecticut, 302 U. S. 319, 325, 58 S. Ct. 149, 152, 82 L. ed. 288, 292 (1937).

[13]Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. ed. 1213 (1940).

[14]De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. ed. 278 (1937); Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. ed. 1138 (1925).

[15]Grosjean v. American Press Co., Inc., 297 U. S. 233, 56 S. Ct. 44, 80 L. ed. 660 (1936).

[16]De Jonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255, 81 L. ed. 278 (1937).

[17]Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. ed. 1782 (1949), noted in (1950) 7 Wash. & Lee L. Rev. 51.

[18]Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. ed. 158 (1932) held that a state denied due process to a defendant in a rape prosecution by refusing to furnish counsel for his defense when the punishment could be death if he was convicted. Cf. Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. ed. 1595 (1942), where the Court held assistance of counsel not to be "fundamental" in a prosecution for robbery where the punishment was limited to imprisonment.

The right to bear arms,[19] to indictment by grand jury,[20] to jury trial in criminal cases,[21] the freedom from twice being placed in jeopardy for the same offense,[22] and the privilege against self-incrimination.[23]

The Court stated in *Twining v. New Jersey*[24] that the privilege against self-incrimination was not "fundamental," because, historically, it was not a part of the *law of the land* in England, and thus not within the traditional definition of due process of law. The Court further maintained that the privilege was not essential to affording an accused (1) reasonable notice of the crime with which he was charged and (2) a fair opportunity to be heard, the two tests repeatedly used by the Court in procedural due process controversies. Reaffirming the *Twining* case in *Adamson v. California,* the Court maintained that for a state to deny an accused the privilege against self-incrimination "is not necessarily a breach of a state's obligations to give a fair trial."[25]

Secondly, to invoke the privilege against self-incrimination in the *Rochin* case, Justices Black and Douglas would repudiate the well established rule that the one claiming the privilege is only protected against *testimonial* compulsion. This is the rule in a majority of states[26] and in the federal courts.[27] Under this interpretation of the privilege, a defendant in a criminal case may be forced to reveal to the jury the scars on his body.[28] He may be made to grow a beard,[29] to place his

[19]Presser v. Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. ed. 615 (1886).

[20]Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 28 L. ed. 232 (1884).

[21]Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. ed. 597 (1900).

[22]Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937).

[23]Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903 (1947); Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908). Cf. State v. Height, 117 Iowa 650, 91 N. W. 935 (1902), where an Iowa court held that the privilege was an integral part of the due process clause of the Iowa Constitution, although the constitution had no specific privilege against self-incrimination provision.

[24]211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908).

[25]332 U. S. 46, 54, 67 S. Ct. 1672, 1677, 91 L. ed. 1903, 1910 (1947).

[26]State v. Sturtevant, 96 N. H. 99, 70 A. (2d) 909 at 911 (1950); 8 Wigmore, Evidence (3d ed. 1940) §2263. Compare the dissenting opinion of Chief Justice Belt in State v. Cram, 176 Ore. 577, 160 P. (2d) 283, 292 (1945).

[27]In Holt v. United States, 218 U. S. 245, 252, 31 S. Ct. 2, 6, 54 L. ed. 1021, 1030 (1910), Justice Holmes stated that the privilege against self-incrimination is a "prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

[28] State v. Oschoa, 49 Nev. 194, 242 Pac. 582 (1926), noted in (1926) 24 Mich. L. Rev. 617. For an exhaustive discussion see Inbau, Self-Incrimination—What can an Accused Be Compelled to Do? (1938) 28 J. Crim. L. 261.

[29]Ross v. State, 204 Ind. 281, 182 N. E. 865 (1932).

shoes in tracks,[30] and to try on an article of clothing.[31] Had the Supreme Court followed the view of Justices Black and Douglas and decided in the *Rochin* case that the defendant's privilege against self-incrimination had been violated, all this authority, both state and federal, would have been repudiated, for the taking of capsules from the defendant's stomach was not an extraction of *testimony*.

The Ratio Decidendi of the Rochin Case

A majority of the Court, however, refused to overrule the principle that only those provisions of the Bill of Rights which are "fundamental" apply to the states through the Fourteenth Amendment. Furthermore, the Court was unwilling to overrule *Adamson v. California*[32] and *Twining v. New Jersey*[33] which held that the privilege against self-incrimination was not such a "fundamental" provision. Since the Court decided the case on grounds other than the privilege against self-incrimination, it was not concerned with the problem of whether the scope of the privilege extends beyond testimonial compulsion. The due process objection found by a majority of the Justices was that the pumping of an accused's stomach was brutal conduct akin to obtaining evidence by torture. The Court found "that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience ... [and is] too close to the rack and the screw to permit of constitutional differentiation."[34] Justice Frankfurter compared this case to *Brown v. Mississippi*,[35] where the Court held that state officials

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[30]People v. Van Wormer, 175 N. Y. 188, 67 N. E. 299 (1903).

[31]Benson v. State, 69 S. W. 165 (Tex. Crim. 1902). Cf. Allen v. State, 183 Md. 603, 39 A. (2d) 820 (1944), where the court limits the scope of the privilege to "testimonial compulsion," but refuses to allow a defendant to be compelled to try on a hat at the trial, on the ground that such an act would constitute "testimony" within the meaning of the privilege.

[32]332 U. S. 46, 67 S. Ct. 1672, 91 L. ed. 1903 (1947).

[33]211 U. S. 78, 29 S. Ct. 14, 53 L. ed. 97 (1908).

[34]Rochin v. California, 72 S. Ct. 205, 209, 96 L. ed. 154, 159 (1952).

[35]297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682 (1936). The protection of the Due Process Clause extends beyond torture and includes conduct which places an accused in apprehension, although no violence actually occurs. Malinski v. New York, 324 U. S. 401, 65 S. Ct. 781, 89 L. ed. 1029 (1945). The use of "third degree" methods also comes within the scope of the Fourteenth Amendment. Ashcraft v. Tennessee, 322 U. S. 143, 64 S. Ct. 921, 88 L. ed. 1192 (1944). For a further discussion of Supreme Court decisions dealing with coerced confessions, see Note (1948) 5 Wash. & Lee L. Rev. 243.

deprived a defendant of due process of law by extracting a verbal confession of guilt from him by torture.

> "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.
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> "To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency."[36]

The *Rochin* case, however, differs from the ordinary case of coerced confessions in that the morphine capsules were willfully concealed by the accused in the presence of the arresting officers. It could be argued that whatever "torture" was inflicted upon the defendant was caused by his own act of concealing the evidence and in resisting the officers' attempts to retrieve it, for no allegations of force were pointed out by the Court other than that application of force necessary to compel the insertion of the tube into the defendant's stomach. The Supreme Court of Texas recognized this distinction when a similar problem was presented in *Ash v. State*.[37] In that case the defendant was suspected of having possession of stolen jewelry. When the police officers entered his room, he, like Rochin, swallowed the incriminating evidence. At a hospital, metal objects were located in defendant's stomach by use of a fluoroscope. At the local jail, the defendant was kept under watch for several hours, but he refused to allow his bowels to move. As a result, the defendant was returned to a hospital and was forcibly given an enema, after which the officers retrieved two rings, which were part of the missing jewelry. The reviewing court sustained the admission of the rings in evidence and, in so doing, drew some persuasive analogies, all of which seem equally applicable to the *Rochin* case. Justice Beauchamp posed this question:

> "Could it be said that if a thief has stolen property, sewed it up in his pocket, or in the lining of his coat, that the officers would have no right to cut the stitches or even to injure his clothing for the purpose of securing the valuables belonging to another . . . ?"[38]

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[36]Rochin v. California, 72 S. Ct. 205, 210, 96 L. ed. 154, 159 (1952).
[37]139 Tex. Crim. 420, 141 S. W. (2d) 341 (1940).
[38]Ash v. State, 139 Tex. Crim. 420, 141 S. W. (2d) 341, 343 (1940).

A second analogy was suggested by Justice Graves in ruling on a motion for a rehearing:

> "Had appellant merely held these rings in his hand and refused to open it so that they might be recovered, we think the officers would have been justified in either waiting in patience until appellant saw fit to open his hand, or in forcibly opening the hand and recovering the property. So in this instance after ascertaining the presence of these rings in appellant's body, they could either patiently wait until these rings passed through appellant's body in a natural way, or they could assist nature by means of an enema in recovering this stolen property."[39]

Clearly, the decision in *Ash v. State* would have been reversed had it been decided by the Supreme Court, since the same type of "brutality" was involved that the Court condemned in the *Rochin* case. However, the Texas court looked upon the "brutality" in a different light. There, it was said that the defendant's "possession of the rings and secreting them in the presence of the officers ... gave them a *legal right* to arrest him and *search his person.*"[40] Had the defendant run with the rings to avoid arrest, the officers would have been justified in using whatever force was necessary to prevent his escape.[41] Little logic can be found for holding that an accused is immune from force when he accomplishes the same result in a more subtle, though no less effective manner.

Nevertheless, the *Rochin* decision is not without justification. It is true that the facts of these two cases are distinguishable from the indiscriminate use of the stomach pump or the enema as methods for searching all persons suspected of crime, yet the condoning of a limited use of these devices could lead to their employment by unscrupulous police officials outside the realm of reasonable law enforcement to thwart crafty felons who would use the viscera as a storehouse for evidences of crime. There can be no doubt in the present case that Rochin was guilty. It is undisputed that the capsules he swallowed contained morphine. The result of the Court's decision is to leave unconvicted a man admittedly guilty of crime. But civil rights provisions, to be effective must apply equally to all persons. Therefore, the primary consideration of the court in defining due process of law must be to protect *all of the innocent* rather than to convict *all of the guilty.*

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[39]Ash v. State, 139 Tex. Crim. 420, 141 S. W. (2d) 341, 344 (1940).
[40]Ash v. State, 139 Tex. Crim. 420, 141 S. W. (2d) 341, 343 (1940) [italics supplied].
[41]Miller, Criminal Law (1934) 257.

Sanctions Applied to Deter Future Violations of Civil Rights

The Court does not uniformly apply the same sanctions in all cases where police officers have deprived an accused of due process of law. It would seem that the most effective means of providing redress for the wrong committed, while at the same time deterring similar conduct by police in the future, would be to hold the evidence obtained in violation of the Fourteenth Amendment to be inadmissible in any prosecution of the accused. In the federal courts and in a minority of states illegally obtained evidence is not admissible, but in a majority of the states the rule is contrary.[42] Thus, in the *Rochin* case the California court had found that the deputy sheriffs had violated state law in obtaining the capsules from Rochin, but under the practice in

[42]Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652 (1914) held evidence obtained by federal officers in violation of the unreasonable searches and seizures provision of the Fourth Amendment to be inadmissible. If the unreasonable search is made by a private individual the evidence is admissible in federal courts. Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. ed. 1048, 13 A. L. R. 1159 (1921). States which adopt the Weeks rule have followed this distinction. Kendall v. Commonwealth, 202 Ky. 169, 259 S. W. 71 (1924). Moreover, the Weeks rule applies only to criminal prosecutions and not to civil actions. Walker v. Penner, 190 Ore. 542, 227 P. (2d) 316 at 318 (1951). In McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. ed. 819 (1943), the Court held evidence inadmissible which was obtained at a time when the accused was being held in violation of statute. Thus, in the federal courts today, evidence is inadmissible if obtained by federal officers while violating either a federal statute or the unreasonable searches and seizures provision of the Fourth Amendment. Thirty-one states have rejected the rule of the Weeks case, while sixteen states have followed it. Rhode Island is the only state which has not directly passed on the question.

For an exhaustive survey of the impact of the Weeks case on state decisions, see Appendix to Justice Frankfurter's opinion in Wolf v. Colorado, 338 U. S. 25 at 33, 69 S. Ct. 1359 at 1364, 93 L. ed. 1782 at 1788 (1949). Note, however, that in Table I Justice Frankfurter inadvertently lists Iowa as a state which adheres to the Weeks rule, when in fact the Iowa courts have repeatedly rejected the rule. State v. Nelson, 231 Iowa 177, 300 N. W. 685 (1941); State v. Rowley, 197 Iowa 977, 195 N. W. 881 (1923). The Justice failed to note that the case which he correctly cites in Table B as adhering to the Weeks doctrine [State v. Sheridan, 121 Iowa 164, 96 N. W. 730 (1903)] was squarely overruled by the Iowa Supreme Court in State v. Tonn, 195 Iowa 94, 191 N. W. 530, 536 (1923), where the court states: "Notwithstanding our previous holdings, and notwithstanding the rule recognized by the Supreme Court of the United States, we are disposed to and do hold that the objection to this evidence when offered in behalf of the state, on the ground that it was obtained by an unlawful search, was not well taken, and that the court did not err in overruling said objection."

For a more extensive discussion of the subject of illegally obtained evidence, see Lyons, Utilization of Rules of Evidence in Federal Courts To Supervise Conduct of Federal Law Enforcement Officers (1950) 7 Wash. & Lee L. Rev. 1. For a discussion of searches without a warrant under the Fourth Amendment, see Notes (1950) 7 Wash. & Lee L. Rev. 184, (1948) 5 Wash. & Lee L. Rev. 93.

that state the evidence thus secured was nevertheless admissible.[43] However, when the Supreme Court decided that the conduct of the officers was in violation of the Due Process Clause, it held the evidence inadmissible, undoubtedly assuming that this ruling would help to deter police officers from using such means in the future.

In contrast, the Court held in *Wolf v. Colorado*[44] that the provision against unreasonable searches and seizures of the Fourth Amendment was so "fundamental" as to apply against the states through the Due Process Clause of the Fourteenth Amendment, but the Court ruled that due process was satisfied if the state provided sanctions against officers who made the illegal search or seizure; thus, the federal rule making the illegally obtained evidence inadmissible was not imposed upon the states.

In both the *Rochin* case and *Brown v. Mississippi*[45] the due process objection resulted in a holding that the evidence illegally obtained was inadmissible, whereas in *Wolf v. Colorado* the fact that the evidence was seized without a warrant had no effect on its admissibility. The result of the *Brown* decision might be reconciled with the rule of the *Wolf* case on the reasoning that the coerced confession in the former case was unreliable, because the defendant may have falsely admitted guilt to avoid further torture, while no such unreliability exists where the evidence is "real" rather than "verbal."[46] However, this explanation of the decisions breaks down in the *Rochin* case, where the Court held "real" evidence inadmissible. The probative value of the capsules in the *Rochin* case and of the evidence secured without a warrant in *Wolf v. Colorado* is equally unimpaired by the illegality of the seizures; nevertheless, one is admissible, the other not, under the Due Process Clause. Possibly the Court recognized after the *Wolf* decision that the sanction of inadmissibility is far more effective to deter police officials from illegal practices which invade civil rights than is the theoretical liability of police officers to criminal

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[43]People v. Rochin, 101 Cal. App. (2d) 140, 225 P. (2d) 1 at 3 (1950).

[44]338 U. S. 25, 69 S. Ct. 1356, 93 L. ed. 1782 (1949), noted in (1950) 7 Wash. & Lee L. Rev. 51.

[45]297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682 (1936).

[46]The Brown case gives constitutional support to the common law rule excluding involuntary confessions. The reason assigned for holding these confessions inadmissible is that the confessions may be false. 3 Wigmore, Evidence (3d ed. 1940) 250. But Justice Frankfurter says that coerced confessions are not excluded solely on this ground, but also because they "offend the community's sense of fair play and decency." Rochin v. California, 72 S. Ct. 205, 210, 96 L. ed. 154, 159 (1952).

prosecution or civil action.[47] On the other hand, the Court may not have withdrawn from its position in the *Wolf* case. The *Rochin* decision may be a manifestation of a belief among the Justices that a more stringent sanction should be imposed in situations where the objectionable conduct violates the *person* of the accused than is invoked where only the sanctity of the home is invaded. However, some of the language used by the Court indicates that the sanction of inadmissibility may not apply to all violations of the *person,* but only to those which shock the conscience and "afford brutality the cloak of law."[48]

None of these distinctions is very convincing. The Supreme Court, as final arbiter of personal liberties, should have a conscience no less sensitive than the Constitution itself. Therefore, all types of conduct which deprive persons of due process of law should shock the conscience of the Court, and ought to be worth preventing. If holding evidence inadmissible will best accomplish this result, little reason can be discerned for not applying this sanction uniformly to all violations.

Impact of the Rochin Case on the Use of Other Scientific Devices

By holding unconstitutional the obtaining of evidence from a a person's stomach, the Court has cast some doubts upon the admissibility of evidence obtained from other parts of the body. The analysis of human blood has been used increasingly by the courts to settle questions of fact ranging from the determination of non-paternity[49] to the establishment of a murderer's identity. For example,

[47]Cf. People v. De Fore, 242 N. Y. 13, 150 N. E. 585 at 587 (1926). Chief Judge Cardozo maintained that criminal prosecution, civil liability, and administrative discipline are sufficient sanctions to prevent the illegal seizure of evidence without resort to the Weeks doctrine. He admits that to satisfy the victim of the illegal search completely the evidence should be rendered inadmissible against him, but a balance of this factor against the public interest in convicting criminals and the possibility that one bungling policeman might spoil an entire prosecution by one inopportune search dictates that the evidence be admissible despite the illegality of its seizure. But see Note (1934) 43 Yale L. J. 847 for an analysis of cases showing the ineffectiveness of liability of police officers to civil action by the victim of the illegal search.

[48] Rochin v. California, 72 S. Ct. 205, 210, 96 L. ed. 154, 159 (1952).

[49]Jordan v. Mace, 69 A. (2d) 670 (Me. 1949), noted in (1950) 7 Wash. & Lee L. Rev. 208. Cf. Bednarik v. Bednarik, 18 N. J. Misc. 633, 16 A. (2d) 80 (1940), where the court held a statute unconstitutional which authorized the court to compel parties to submit to blood tests in paternity cases. The reason assigned by the court was that the statute invaded a person's right to privacy. Overruled in Cortese v. Cortese, 10 N. J. Super. 152, 76 A. (2d) 717 (1950).

in the recent case of *State v. Alexander*,[50] a defendant accused of murder voluntarily gave a sample of his blood to health officers to determine whether he was infected with a venereal disease. Without his consent, the health officers submitted an unused portion of the defendant's blood to the police, who compared it with blood found at the scene of the crime, and used the result of the test as evidence to prove his guilt. On appeal, the admission of this evidence was upheld by the Supreme Court of New Jersey, but all authorities are not in accord with this view. Aside from the problem of the reliability of blood grouping tests,[51] probably all courts would hold such evidence admissible if the defendant freely consented to the taking of his blood for the purpose of the test. Some courts will rationalize the finding of a waiver of any objection to admissibility from the failure of the defendant to object at the time the blood was taken.[52] Others have gone so far as to admit evidence of blood taken from an unconscious person, where no consent, express or implied, could be had.[53] However, no cases have been found which go so far as to allow police forcibly to compel a defendant to give his blood for analysis. The Model Code of Evidence states that the privilege against self-incrimination is not a bar to compulsory blood testing, but reserves comment on whether there is some other ground for inadmissibility.[54]

The *Rochin* case may have an impact on these problems. Analytically there would seem to be no valid basis for differentiating between getting evidence from the veins and getting it from the stomach. Nevertheless, it is stated in the *Rochin* decision:

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[50]7 N. J. 585, 83 A. (2d) 441 (1951).

[51]The reluctance of courts to accept the results of blood grouping tests as conclusive is graphically shown by Berry v. Chaplin, 74 Cal. App. (2d) 652, 169 P. (2d) 442 (1946), noted in (1947) 4 Wash. & Lee Rev. 199, and State v. Damm, 62 S. D. 123, 252 N. W. 7 (1933). For a discussion of this problem, see Boyd, Protecting the Evidentiary Value of Blood Group Determinations (1943) 16 So. Calif. L. Rev. 193; Britt, Blood-Grouping Tests and the Law: The Problem of "Cultural Lag" (1937) 21 Minn. L. Rev. 671; Note (1952) 5 Fla. L. Rev. 5 at 17. The Rochin decision would in no way affect this problem, for there the Court was not concerned with the probative value of the evidence, but rather with whether the method used to obtain the evidence violated some private right of the defendant's.

[52]State v. Duguid, 50 Ariz. 276, 72 P. (2d) 435 (1937). Cf. Davis v. State, 189 Md. 640, 57 A. (2d) 289 (1948).

[53]State v. Cram, 176 Ore. 577, 160 P. (2d) 283 (1945). This case deals with blood tests to show intoxication rather than with blood grouping tests. Although the two types of tests differ from the standpoint of laboratory analysis, the blood is obtained in the same manner regardless of the method of analysis later to be performed upon it, and the problem of whether the blood was legally obtained remains the same.

[54]Model Code of Evidence (1942) Rule 205 (b).

"In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. 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."[55]

The Court would probably exclude from the principle of the *Rochin* case state statutes and decisions authorizing compulsory blood tests to determine non-paternity and to prevent the spread of venereal disease. The public interest of the state in the parent-child relationship and in the health of its citizens would seem to outweigh considerations of individual privacy. Futhermore, the results of blood tests in these situations are not used in evidence in a criminal trial against the one whose blood was tested.

Blood samples obtained with the express consent of the donor should also be exempted from the rule of the *Rochin* case, because no "brutality" would be involved. The words of Justice Frankfurter, excluding from the scope of the *Rochin* doctrine state court decisions involving certain scientific devices, may not mean that there is no due process objection to decisions which have found a waiver from the lack of affirmative resistance to the taking of blood. Where the defendant submits to the test because of a real or imagined fear of violence if he refuses, the constitutional objection would seem to remain. Moreover, it is doubtful that the Court would sanction the taking of blood from an unconscious defendant. True, no "brutality" would be involved here, yet consciousness would seem to be a poor standard upon which to determine constitutional rights.

Justice Frankfurter may have had in mind other scientific devices than blood tests for bringing criminals to book. In *United States v. Kelly* the forcible fingerprinting of persons accused of crime was held not to violate constitutional or common law rights of the accused.[56]

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[55]72 S. Ct. 205, 210, 96 L. ed. 154, 159 (1952).

[56]55 F. (2d) 67 (C. C. A. 2d, 1932). The Kelly case allowed forcible fingerprinting even in the absence of statute. Accord: Shannon v. State, 207 Ark. 658, 182 S. W. (2d) 384 (1944); Bartletta v. McFeeley, 107 N. J. Eq. 141, 152 Atl. 17 (1930). Contra: People v. Hevern, 127 Misc. 141, 215 N. Y. Supp. 412 (1926). But more reluctance has been shown by the courts to authorize compulsory blood grouping tests in the absence of statute. See the concurring opinion of Justice Brand in State v. Cram, 176 Ore. 577, 160 P. (2d) 283 at 291 (1945), and cases collected in Note (1946) 163 A. L. R. 939 at 944.

Fingerprinting requires no extraction of evidence from *within* the defendant's body, although it is conceivable that a great measure of "brutality" might be necessary to compel the submission of a recalcitrant defendant. The use of force might be justified on the ground that fingerprinting is primarily a method of identification, rather than a means of obtaining evidence against the accused. Thus, it would seem that a defendant may be forcibly fingerprinted just as he may be forced to enter a courtroom to be identified by a witness.[57] There is greater justification for upholding compulsory fingerprinting than compulsory blood tests as an identifying device. Fingerprints single out individuals conclusively. No two persons have the same fingerprints. On the other hand, many people have the same blood type, and blood-grouping tests merely identify a person as a member of one of a few groups.

Various tests of intoxication have been employed by law enforcement officials to ferret out the drunken drivers on the highways. The least technical of these tests is to require the person alleged to be intoxicated to perform certain physical acts to demonstrate his sobriety, such as walking a chalk line, reciting difficult word combinations and placing his finger to his nose.[58] Samples of blood or urine can be analyzed to determine the percentage of alcohol present, or the accused may be required to inflate a balloon to procure a sample of his breath for analysis in a device called the Harger Drunk-O-Meter. [59]

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[57]Commonwealth v. Di Stasio, 294 Mass. 273, 1 N. E. (2d) 189 at 195 (1936); State v. De Cesare, 68 R. I. 32, 26 A. (2d) 237 (1942); 8 Wigmore, Evidence (3d ed. 1940) 374.

For a discussion of the further problem of whether photographs and fingerprints may be retrieved from police files under certain circumstances, see Note (1933) 83 A. L. R. 127 at 129.

[58]In Schmidt v. District Attorney of Monroe County, 255 App. Div. 353, 8 N. Y. S. (2d) 787 (1938) the evidence was held to have been properly admitted. These simple tests, when administered by trained police officers or medical examiners, can be of great value to determine the effect of alcohol on the person allegd to be intoxicated, which is a fact as important to ascertain as the quantity of alcohol in the blood. Newman, Proof of Alcoholic Intoxication (1946) 34 Ky. L. J. 250. But some judicial opposition to admitting this evidence has been encountered. In Apodaca v. State, 140 Tex Crim. 593, 146 S. W. (2d) 381 (1940), noted in (1941) 3 Wash. & Lee L. Rev. 122, the Texas court held that the introduction of these tests of intoxication violated the defendant's privilege against self-incrimination, which is a misconception of the true limits of the scope of the privilege. However, in Texas, police officers may testify as to the behavior of the defendant, so long as such conduct was not induced by the officers. Millican v. State, 143 Tex. Crim. 115, 157 S. W. (2d) 357 (1941). And motion pictures of the defendant's unsolicited behavior is also admissible. Housewright v. State, 225 S. W. (2d) 417 (Tex. Crim. 1949).

[59]In addition to the problem of whether an accused may be forced to submit to these tests, some doubts exist as to the probative value of an analysis of the

In ruling on the admissibility of these tests for determining intoxication, the courts follow the same pattern as in the cases dealing with the evidence of blood grouping tests offered to convict a defendant of crime. No cases have been found dealing with situations where a defendant has been subjected to the intoxication tests by use of physical force.[60] It would seem that such a situation would fall within the rule of the *Rochin* case, and the evidence would be inadmissible because obtained by depriving the accused of due process of law. Courts sometimes require consent to the test to render the results admissible,[61] but in cases where the defendant was unconscious when the blood or urine was taken from his body some courts have dispensed with the requirement of consent and held the results of the tests admissible.[62]

Although the Court in the *Rochin* case is careful to avoid expressing an opinion as to the effect of the decision on the use of these various scientific devices to obtain incriminatory evidence from an accused, the decision cannot logically apply to stomach pumps without also applying to some other methods of detection. In theory, obtaining evidence from a man's stomach would seem indistinguishable from obtaining evidence from his veins, his bladder, or his lungs. Yet

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alcohol content of the breath. In People v. Morse, 325 Mich. 270, 38 N. W. (2d) 322 (1949) the court held the results of an analysis made of the defendant's breath with the Harger Drunk-O-Meter to be unreliable. Evidence obtained by this device was held admissible in People v. Bobczyk, 99 N. E. (2d) 567 (Ill. App. 1951) and in McKay v. State, 235 S. W. (2d) 173 (Tex. Crim. 1950). The reliability of blood and urine tests as evidence of intoxication is now generally conceded. Ladd and Gibson, Legal-Medical Aspects of Blood Tests To Determine Intoxication (1943) 29 Va. L. Rev. 749 at 770; Note (1952) 5 Fla. L. Rev. 5 at 12.

[60]But some courts have allowed police to testify at the trial that a defendant refused to submit to scientific tests of his body fluids for the purpose of ascertaining whether he was intoxicated. State v. Benson, 230 Iowa 1168, 300 N. W. 275 (1941); State v. Gatton, 60 Ohio App. 192, 20 N. E. (2d) 265 (1938). The refusal to submit to a test is a strong circumstance from which intoxication may be inferred by the jury. Therefore, when evidence of the defendant's refusal is admitted, the prosecution has a method of proof almost as persausive as the result of the test itself. This rule prevents a possible means to escaping the fetters placed on police action by the Rochin decision; it offers a method of obtaining a conviction, while obviating the due process objection which might be raised if the officers sought to extract the defendant's blood over his objection by the use of physical force.

[61]State v. Duguid, 50 Ariz. 276, 72 P. (2d) 435 (1937). In People v. Corder, 244 Mich. 274, 221 N. W. 309 (1928), the result of a physical examination was held inadmissible in a murder trial where the defendant only consented to the examination to determine the presence of venereal disease. Cf. State v. Cash, 219 N. C. 818, 15 S. E. (2d) 277 (1941), noted in (1941) 3 Wash. & Lee L. Rev. 122 where it was held that no consent was necessary.

[62]People v. Tucker, 105 Cal. App. (2d) 333, 198 P. (2d) 941 (1948); State v. Ayers, 70 Idaho 18, 211 P. (2d) 142 (1949); Bovey v. State, 197 Misc. 302, 93 N. Y. S. (2d) 560 (1949); State v. Cram, 176 Ore. 577, 160 P. (2d) 283 (1945).

there is no assurance that the Court would adopt this logic in ascertaining the scope of the Due Process Clause in these situations; for, in the words of the Court, "the Constitution is 'intended to preserve practical and substantial rights, not to maintain theories'."[63]

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[63]Rochin v. California, 72 S. Ct. 205, 210, 96 L. ed. 154, 160 (1952). The Court cites Davis v. Mills, 194 U. S. 451, 457, 24 S. Ct. 692, 695, 48 L. ed. 1067, 1072 (1904).