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Case Comments

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CONSTITUTIONAL LAW—IS THE VIOLENCE USED IN OBTAINING CONFESSIONS AND EVIDENCE THE TRUE TEST OF DUE PROCESS?—Many students of constitutional law believe that the Second through the Eighth Amendments to the Federal Constitution should apply to the states. Included in this group were four justices of the Supreme Court of the United States in the case of *Adamson v. People of California.*[1] Justice Frankfurter, who wrote the majority opinion in that case, said that to apply these would require more than one-half the states which now have a substitute for indictment by grand jury to use the grand jury, and would require all states to furnish a jury of twelve for every case involving a claim of over twenty dollars. An enormous and unjustified burden would thereby be placed upon the states.

It has been held that the due process clause of the Fourteenth Amendment does not include: indictments by grand jury [2]; trial by jury in civil and criminal cases [3]; the right against self-incrimination [4]; protection against double jeopardy [5]; the right of suppression of evidence obtained by an unreasonable search and seizure.[6]

The court used the due process clause to prevent convictions based upon evidence of confessions obtained by force, coercion, or brutality. In *Brown v. Mississippi,*[7] the court said, "the rack and torture chamber may not be substituted for the witness stand."

It consequently appeared that the court was punishing flagrant abuses of self-incrimination by simply calling upon the due process clause. Lawyers then seemed to believe that the test was one of real versus oral evidence. They believed that a state *could* permit the use of any evidence forcibly taken from the accused or from his premises, but that coerced confessions were prohibited.

Some of the misapprehensions were alleviated by the case of *Rochin v. People of California* [8] decided January 2, 1952. The

[1] 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947).

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

[3] Walker v. Sauvienet, 92 U. S. 90, 23 L. Ed. 628 (1875). Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597 (1900).

[4] Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97, Adamson v. People of California. Loc. Cit.

[5] Polko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937).

[6] Wolf v. People of Colorado, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

[7] Brown et al. v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1932); Watts v. State of Indiana, 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1947); Turner v. Commonwealth of Pennsylvania, 338 U. S. 62, 69 S. Ct. 1352, 93 L. Ed. 1810 (1949); Harris v. State of South Carolina, 338 U. S. 68, 69 S. Ct. 1354, 93 L. Ed. 1815 (1949).

[8] 72 S. Ct. (1952).

Court, speaking through Mr. Justice Frankfurter in whose opinion five other justices concurred, set aside a conviction based in a large part upon evidence forcibly taken from the accused on the grounds that "it would be improper to legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record." The record read, in part, as follows:

> Having some information that (Rochin) was selling narcotics, three deputy sheriffs of the County of Los Angeles . . . made for a two-story building house in which Rochin lived . . . Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found the petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed the deputies spied two capsules. When asked "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him," and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of the officers a doctor forced *invito* an emetic solution into Rochin's stomach by means of a tube. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

At the trial for "possessing a preparation of morphine" the chief evidence to convict the defendant was the tablets. The facts relating to the illegal taking were brought to the attention of the California courts on appeal,[9] and the issue of constitutionality was raised in the trial courts and appellate courts.

The conviction was reversed by the Supreme Court of the United States on the constitutional ground that there had been a denial of "due process of law."

The court let it be known that exclusions of illegally obtained evidence necessitated by the requirements of due process are not to be limited to oral evidence. "To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions." It went on to say that coerced confessions are inadmissible even though they may be independently established as true. "Coerced confessions offend the community's sense of fair play and decency." The court then states that the same is true here; the *brutal conduct* is what offends the sense of fair play and decency. "Nothing could be more calculated to discredit law and thereby to brutalize the temper of society."

The test laid down by the court in the opinion of this writer is one of violence. Where the courts of the state legalize brutal

[9] 101 Cal. app. 2d. 140, 225 P. 2d 1. 101 Cal. app. 2d. 143, 225 P. 2d. 913.

force offensive to human dignity in securing evidence from a suspect it will be held there was a denial of "due process of law."

Now that the test has been laid down, how will it be applied? That too, is pointed to in the decision and commented upon by Justice Black in his concurring opinion. "The concept of due process of law is not final and fixed." The Court will exercise it judgment "upon interests of society pushing in opposite directions." Due process is a continually changing concept of society to be exercised by the court's interpretation, "mindful of reconciling the needs both of continuity and of change in any progressive society."

Since "due process of law" has been said to depend on the prevailing concept of what is fair play and since the judicial exercise of judgment cannot be frozen at one fixed stage of time, there can be no accurate prediction of its future course.

The court has devised a constitutional tool whereby it can temper the power of the state courts in their interpretation of the state constitutional provisions which are the equivalent of the second through the eighth amendments of the Federal Constitution. To say that the decision affects only the state courts' interpretation of self-incrimination provisions is to "mimick an ostrich." It may be inferred from this decision that an illegal search and seizure carried out in a violent manner and sanctioned by the court of the state through admission of the evidence so obtained with knowledge of the manner in which it was obtained would constitute a denial of due process.

In the recent Colorado case of *Kallnback v. The People* [10] the Supreme Court of Colorado affirmed a conviction where specimens for a blood alcohol test were taken from the defendant without objection. Mr. Justice Holland based part of his dissent upon the contention that there had been a violation of the state constitutional provision against self-incrimination [11] because the person had not been informed that the evidence taken might be used against him. He refused to recognize the difference between testimonial and real evidence when constitutional safeguards were involved.

It is the state's prerogative to interpret its provisions against self-incrimination. Such will not be the subject of review by the Supreme Court of the United States unless the state court's admission of evidence amounts to a denial of due process of law.

Mr. Justice Moore dissented and wrote a very brief opinion saying that for reasons discussed in *Rochin v. California* . . . it was his opinion that the admission of this evidence (blood test) was reversible error.

It would have been enlightening if the Justice had presented his analysis of the legal and factual similarities of the two situations. Until this writer has been enlightened he will believe that under the Rochin case the test was that the due process

[10] 1951-52 CBA Adv. Sheet, p. 183, February 9, 1952.
[11] Sec. 18, Article 11.

clause denies the courts the right to sanction violence and brutality by the admission of evidence obtained by such methods. In the Kallnback case the defendant submitted without objection to the taking of the blood. It was taken by a physician licensed to practice in the state and at a hospital.

For theoretical purposes the Rochin case did not extend the court's authority. It simply applied the existing right to a new factual situation. The case was strong on its facts and it was easy to say that if a state cannot use force to make the accused emit thoughts from his mouth it cannot use force to make the accused emit capsules from his stomach. For practical purposes the case adds to the scope of due process of law as formerly applied. It gave a definition of its scope which may result in the United States Supreme Court's control over the state's application of certain fundamental freedoms. The test set out will allow the states great freedom, but when the state courts realize that the exercise of such freedom is subject to review and scrutiny they are likely to use that freedom more wisely.

It is the writer's opinion that all blood sample cases are not overruled by the principal case. Only those where blood is taken over the express objections of the accused are overruled. The objector need not resort to physical force because to do so would bring forth the very violence the Rochin case seeks to prevent. Cases such as *State v. Cram*,[12] where the person was unconscious at the time of the taking of the blood and therefore could not object are questionable. At this date under the Rochin case it is the writer's opinion that the cases are good law. However, the court might adopt the minority view of *State v. Cram* and hold that the taking of blood from an unconscious person is more obnoxious (brutal) than if obtained through compulsion.

Another probable effect of this case will be that the advocates of incorporating the entire first eight amendments within the due process clause and of applying them directly to the states will find that this case provides a means of alleviating the cause without creating undue burdens upon the states.

In the case of *Gallegos v. State of Nebraska*,[13] the United States Supreme Court said, "So far as due process affects admissions before trial of the defendant, the accepted test is their voluntariness," citing *Brown v. State of Mississippi* [14] as one of the authorities for the statement. The question arises then whether the test is one of voluntariness or one of violence. The answer seems clear from the facts of the case and the conclusion of the court that violence or the lack of it was the test of the voluntary nature of the admissions and plea. The only question before the court was,

> Are confessions and a plea obtained from a prisoner during a period of twenty-five days of illegal deten-

[12] 176 Ore. 577, 160 P. 2d. 283, 164 A.L.R. 952.
[13] 72 S. Ct. 141 (1951).
[14] *See*, supra, note 7.

> tion by federal and state officers before being brought before a magistrate and before counsel is appointed to assist the prisoner admissible in evidence?

The court answered the question in the affirmative, holding that the admission of such testimony was not a denial of due process of law. The court checked the testimony very closely to determine whether or not violence had been committed upon the defendant. They found as a matter of fact that no violence was used to obtain the confessions and plea and that the mere illegal detention was not enough to invalidate the proceedings in which the confessions were admitted into evidence. The fact that the defendant was charged with murder did not alter the ruling because there was no abuse or the threat of it.

It can be seen that while the court announced the test as being one of voluntariness, the evidence obtained from the defendant was held not to have been involuntarily given because of the lack of violence. This writer concludes that the true test must be whether or not the facts show that at the time the evidence was obtained from the defendant he was subjected to violence or the immediate threat of it.

GEORGE HOLLY.

CONSTITUTIONAL LAW—USE IN STATE COURTS OF EVIDENCE OBTAINED BY UNLAWFUL SEARCH AND SEIZURE.—Having read the comment on *Rochin v. People of California* you may think there should be a way around the entire difficulty. While we offer no hope of an easy solution we think a near approach was made in the case of *Stefanelli v. Minard,*[1] which is the subject of this comment.

Not long ago someone suggested in a note in Case and Comment that evidence obtained by unlawful search and seizure might be kept out of state courts by petitioning a federal district court to enjoin its use under authority of the Civil Rights Act, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.[2]

We thought this a rather brilliant suggestion, as did Stefanelli and Malanga, who were about to be convicted of bookmaking with the air of certain incriminating property which the State of

[1] Stefanelli v. Minard, 72 S. Ct. 118.

[2] R.S. § 1979, 8 U.S.C. § 43, 8 U.S.C.A. § 43..
Jurisdiction Is Founded On 28 U.S.C. § 1343(3), 28 U.S.C.A. § 1343(3).

New Jersey had admittedly obtained through unlawful search and seizure. These worthies petitioned the Federal District Court in equity for suppression of this evidence, maintaining that an injunction was a proper redress within Sec. 1979 (supra).

The petition was dismissed, the Court of Appeals affirmed, and the Supreme Court granted certiorari. That court, Justice Frankfurter delivering the opinion, assaulted the question as follows:

> This act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning . . . however, the Court's lodestar of adjudication has been that the statute "should be construed so as to respect the proper balance between the States and the federal government in law enforcement." . . . Discretionary refusal to exercise equitable power under the Act to interfere with State criminal prosecution is one of the devices we have sanctioned for preserving this balance.

The court notes that it is not deciding whether or not the complaint stated a cause of action under Sec. 1979, for even if the action was perfectly good, "to sustain the claim would disregard the power of courts of equity to exercise discretion when, as a matter of equity jurisdiction, the balance is against the wisdom of using their power." The Court carefully refrains from indicating what its decision would be had the district court taken jurisdiction. While the Constitutional validity of the action is still an open question, however, the frame of mind of the Supreme Court in the matter is not. The opinion states on page 121 that courts of equity should refuse to interfere with or embarrass threatened proceedings in state courts "save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . No such irreparable injury, clear and imminent, is threatened here. At worst, the evidence . . . may provide the basis for conviction of the petitioners."

In the inevitable Horrible Consequences section of the opinion Mr. Justice Frankfurter adds his final filip:

> If we were to sanction this interview . . . Every question of procedural due process of law . . . would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this court . . . (citing examples) . . . To suggest these difficulties is to recognize their solution.

Mr. Justice Douglas dissented briefly on the ground of his dissent in *Wolf v. Colorado*. We think this settles the question.

WALLACE L. VANDER JAGT.