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CONSTITUTIONAL LAW-EVIDENCE-USE OF ILLEGALLY OBTAINED EVIDENCE AND DUE PROCESS OF LAW

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CONSTITUTIONAL LAW—EVIDENCE—USE OF ILLEGALLY OBTAINED EVIDENCE AND DUE PROCESS OF LAW—It is fundamental, even in a federal system, that a state be free to regulate the procedure of its courts in accordance with its own conceptions of proper policy, subject only to constitutional limitations safeguarding individuals from arbitrary action by the state.[1] In the United States this constitutional protection is two-fold—both state and federal constitutions acting as limitations on state action. As a result, a problem arises as to what extent the federal courts can, in the enforcement of federal constitutional limitations, override state criminal procedures and the policies underlying them. It is clear that the states have, by virtue of the due process clause of the Fourteenth Amendment,[2] subjected their administration of justice to federal scrutiny; but the question remains whether this scrutiny is limited to a superficial[3] inquiry as to the existence and observance of adequate minimum procedural safeguards (as established by prevailing Anglo-American mores), or whether it involves a deeper and more philosophical inquiry into the underlying moral conduct and juridical policies of the state; or translated into more rudimentary terms, whether the state's conduct is to be judged in terms of deviation from established standards of society or in terms of deviation from standards deemed to be ultimately desirable. The choice is essentially one as to the proper judicial role: policeman or philosopher?

This problem has recently been brought to the forefront by the rulings of the Supreme Court in cases involving the use of illegally obtained evidence to obtain convictions in state criminal proceedings. Two cases (partly fictional for purposes of contrast, but with real life

[1] Brown v. Mississippi, 297 U.S. 278 at 285, 56 S.Ct. 461 (1936) and cases cited therein.

[2] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST., Amend. XIV.

[3] Used in a descriptive, rather than derogatory, sense.

counterparts) may be used to illustrate the present confusion created in this arena. A state statute makes it a crime to possess morphine. Police officers, suspecting defendant of violation of the statute, forcibly enter his home without a search warrant and find a supply of capsules containing the illegal drug. The Supreme Court is apparently committed to the doctrine that the capsules, though illegally obtained, are admissible in evidence in the state courts.[4] However, the plot thickens. Before the officers can seize the capsules, the defendant swallows them, whereupon he is seized and compelled to swallow a solution causing the capsules to be coughed up. *Rochin v. California*[5] indicates that the capsules, when so obtained, may not constitutionally be used as evidence against the defendant, despite their obvious probative value. Such divergent results, whether or not morally justifiable, indicate that the Court has transgressed the bounds of the superficial inquiry and donned the robe of the philosopher. In a society which still regards punishment of the wrongdoer according to his legal wrong, rather than according to his equitable position (either at the time of the crime[6] or the time of the trial[7]),[8] as the primary objective of the criminal law, and which consequently regards the accurate ascertainment of the truth rather than the protection of the individual from the state as the principal aim of criminal trial procedure,[9] the Court has prescribed a rule of evidence based solely on equitable grounds[10] as a

[4] Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949); holding reaffirmed in Steffanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118 (1951).

[5] 342 U.S. 165, 72 S.Ct. 205 (1952).

[6] E.g., the method by which the victim of a robbery acquired the property stolen from him does not affect the thief's liability, nor does the fact that the thief was poor and starving and the person robbed a man of means alleviate the penalty; likewise, the law makes no distinction between the mercy killing and the ordinary murder, or between the forgery to collect a debt and the common forgery.

[7] E.g., the fact that the thief voluntarily returned the stolen property or that the property was in turn stolen from him before he had an opportunity to enjoy it does not remove or reduce his criminal liability; neither does the fact that he has suffered, either at the hands of the victim or of the police, prior to the trial serve to alter his liability.

[8] The equitable position of the wrongdoer may well be taken into consideration by the jury in arriving at their verdict, however. Also, the law does make some distinction in severity of punishment based on certain equitable determination, such as intent of the wrongdoer and his criminal propensities.

[9] Since the fact of the wrong is the basis of punishment, the object of the trial must be the accurate ascertainment of this fact. However, the present federal rules of evidence seem to evidence a trend in Anglo-American jurisprudence toward the imposition of equitable standards. See POUND, JUSTICE ACCORDING TO LAW 22 (1951).

[10] Since there could be no question as to the reliability of the capsules obtained from the defendant's stomach to prove his guilt, the evidence must have been excluded because of the inequitable method by which it was obtained by the police. Apparently the Court feels that such a procedure is much more unfair than the obtaining of evidence by an illegal search or seizure.

constitutional principle. It has superimposed its own conceptions of proper policy on the state. The question is: has the Court properly construed its function in this respect?

I

The Supreme Court's Approach

Analytically, the Court is both director and actor; the role it casts for itself is the one it plays; its interpretation of the role is the one that will govern the performance. Any critical evaluation of this interpretation must therefore start with a diagnosis of the characterization which the Court itself has given to the part. Such a diagnosis must be subject to an inherent limitation on the critic: what is basically an inquiry into a subjective, sometimes even subconscious, state of the actor can be based only on his objective pronouncements and actions.

A. *The Confession Cases.* The Supreme Court's initial inroads into the domain of state evidentiary rules involved the use of coerced confessions in criminal trials. As a general rule, confessions are admissible as evidence if, and only if, voluntarily given.[11] Although this test has sometimes been defended as a protection against self-incrimination,[12] the traditional explanation has remained that confessions extracted by torture, either physical or psychological, are intrinsically untrustworthy[13] (an application of the general principle that duress removes any assumption of validity, and perhaps even substitutes an assumption of invalidity in place of it). This exclusionary rule of evidence has become established in Anglo-American jurisprudence as an essential ingredient of a fair trial, embodied in the concept of due process of law.

Brown v. Mississippi[14] provided an easy initial foothold in the constitutional enforcement of this requirement. A state court had convicted three Negroes of murder solely on the basis of confessions obtained from each of them after severe physical torture. A unanimous Court ruled that the use of such unreliable evidence to convict constituted "a clear denial of due process,"[15] analogizing the case to one

[11] 3 WIGMORE, EVIDENCE, 3d ed., §§822-826 (1940).

[12] Bram v. United States, 168 U.S. 532 at 542, 18 S.Ct. 183 (1897); cf. 3 WIGMORE, EVIDENCE, 3d ed., §823c (1940).

[13] 3 WIGMORE, EVIDENCE, 3d ed., §822 (1940); Wilson v. United States, 162 U.S. 613 at 623, 16 S.Ct. 895 (1896).

[14] 297 U.S. 278, 56 S.Ct. 461 (1936).

[15] Id. at 286, characterizing the trial as "a mere pretense."

where the state knowingly uses perjured testimony (which had previously been held to violate the constitutional mandate[16]). A few years later this beachhead was expanded to include confessions obtained from defendants under mental duress.[17] With this settled, the only question that remained was whether the Court should lay down a rule of law that all confessions obtained under various specified conditions were inherently unreliable or merely make an independent fact determination, either on the undisputed or on all the facts, that the particular confession was coerced and thus presumptively[18] unreliable. Each prevailing majority has professed to be making an independent determination on the undisputed facts as measured against constitutional standards,[19] but dissenters have accused their brethren of reweighing conflicting evidence on which a finding or verdict in the trial court was based.[20] Certainly the standards of conduct or rules of law formulated by various majorities may well be a thin disguise for a conclusion arrived at through a subjective evaluation of all of the evidence.

The rule of evidence excluding involuntary or coerced confessions may well serve a function in addition to assuring a fair trial; it may serve as a means of disciplining police officers by denying them the fruits of their illegal activity. The philosophy is that the motive to coerce confessions will be removed if such confessions can not be used to prove guilt. However, this rationale must be based on the assumption that the confession will not materially aid the police in obtaining other evidence of the defendant's guilt, an assumption which may well be questioned. This additional function of the exclusionary rules becomes important only when it is used as an independent basis for denying the admissibility of confessions. Two such applications are possible: (1) where the coerced confession is substantiated by other evidence, and (2) where the confession, though voluntary, is obtained while the police are engaged in an illegal activity. The wisdom of using such a policy to support a rule of evidence[21] is debatable, but

[16] Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935).

[17] Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472 (1940).

[18] This presumption may be either conclusive or rebuttable, depending on the jurisdiction.

[19] Ashcraft v. Tennessee, 322 U.S. 143 at 153-155, 64 S.Ct. 921 (1944); Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781 (1945); Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347 (1949); Stroble v. California, 343 U.S. 181, 72 S.Ct. 591 (1952).

[20] Ashcraft v. Tennessee, supra note 19 at 156; Malinski v. New York, supra note 19 at 434; Watts v. Indiana, supra note 19 at 57.

[21] It may be noted that the rule of evidence supports the policy of disciplining police officers as well as the policy supports the rule of evidence.

each state is free to do so if it wishes; the enforcement by the Supreme Court of such a policy as a constitutional requirement, however, would seem very questionable.[22] Thus, although the Court in the exercise of its supervisory power over the lower federal courts has established a rule of evidence requiring the exclusion of confessions received during a detention illegal because of unnecessary delay in arraignment regardless of their voluntary or involuntary character,[23] it has refused to enforce this rule on the states through the due process clause.[24] Whether this practice will be followed as to the admissibility of coerced confessions where their truthfulness is substantially confirmed by other evidence appears doubtful however.[25]

B. *The Illegal Search and Seizure Cases.* In the federal courts, evidence obtained by federal officers in violation of the Fourth Amendment[26] is inadmissible against a party having standing to raise the the objection, provided a timely motion is made for its exclusion.[27] The question remains open, however, as to whether this result is dictated by the Constitution or is merely a rule of evidence imposed by the Supreme Court in the exercise of its supervisory control over the federal judicial system. On the one hand it can be argued that the protection of the Fourth Amendment is essentially destroyed if the fruits of its violation are to be used to convict; that to so read it is to ignore realities and make the command a whisper; that therefore the amendment by implication requires the exclusion of evidence so obtained. In the rebuttal it may be said that there is no suggestion of such a sanction in the words of the amendment; that such a rule was

[22] See infra part III of this comment.

[23] McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943).

[24] Gallegos v. Nebraska, 342 U.S. 55, 72 S.Ct. 141 (1951).

[25] While the point has never been precisely ruled upon, the opinion in Rochin v. California, 342 U.S. 165 at 173-174, indicates that the admission of substantiated confessions would be regarded as a violation of due process. Apparently this conclusion must be derived by implication from the statements of various minority justices (e.g., Justice Jackson's separate opinion in Watts v. Indiana, 338 U.S. 49 at 60, and the two companion cases decided at the same time) to the effect that there was evidence substantiating the confessions ruled on. The problem is discussed in 1 BAYLOR L. REV. 171 (1948). Dictum in Stroble v. California, 343 U.S. 181, is also to the effect that substantiated confessions are inadmissible.

[26] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST., Amend. IV.

[27] Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914). The motion is considered timely if it is made at the first opportunity, whether this be before the trial, Weeks v. United States, supra, or at the time the evidence is introduced, Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261 (1921). Where the facts as to the illegal seizure are not in dispute, a motion at the trial is apparently timely enough even though there was prior opportunity, Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4 (1926).

unknown at common law; and that therefore the exclusion can be only justified as a rule of evidence designed to further the basic policy of preventing violations of the constitutional prohibition. Since the nine men on the bench have never been called upon directly to decide the point, which is not entirely an academic one,[28] circumstantial evidence must be examined to determine its probable resolution. The reasoning of the Court and the expression of opinions in dictum in relation to the problem have utilized both approaches at various times,[29] although the rule of evidence designation appears to be currently favored.[30] One other scrap of evidence is the non-application of the exclusionary rule to evidence obtained solely by state officers by an illegal search and seizure and subsequently turned over to federal authorities.[31] The rationale given for this exception is that the Fourth Amendment applies only to the federal government and its officers; consequently, an exclusionary rule based on the Fourth Amendment can have no application to evidence procured by state officials. If the exclusion of the evidence is a rule dictated by the Constitution, this reasoning, while valid on its face, ignores the reasoning supporting the exclusionary rule, i.e., that the Fourth Amendment can have no real meaning if evidence obtained by such means is admissible in the federal courts.[32] On the other hand, if the exclusion is purely a procedural rule, the exception to it, while making rather an arbitrary distinction, can be justified if the underlying policy to be served is merely one of disciplining or frustrating violations of the Fourth Amendment and not also of excluding the evidence because of the illegal method by which it

[28] The resolution of this point is determinative of Congress's power to change the exclusionary rule, and also of the applicability of the rule to the states even if it is assumed that the Fourth Amendment is incorporated in the Fourteenth Amendment due process clause.

[29] Constitutional requirement: Weeks v. United States, 232 U.S. 383; implication from statement in Olmstead v. United States, 277 U.S. 438 at 468, 48 S.Ct. 564 (1928) that the Supreme Court has no power, without the sanction of congressional enactment, "to exclude evidence, the admission of which is not unconstitutional, because unethically secured"; implication from failure of Court in McNabb v. United States, 318 U.S. 332 at 341, to include the Weeks rule in the list of evidentiary rules formulated by the Court in its supervisory capacity; also see cases listed in McNabb v. United States, supra at 339. Rule of evidence: see note 30 infra.

[30] Justice Black: Wolf v. Colorado, 338 U.S. 25 at 39-40; United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950). By implication: Wolf v. Colorado, supra at 28.

[31] Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574 (1921).

[32] If the Fourth Amendment requires the federal exclusionary rule as a prohibition on the federal courts of the use of evidence obtained by means of an illegal search and seizure, then the fact that the illegal search and seizure was conducted by other than federal officers can have no significance, particularly since the state's action in so obtaining evidence is also unconstitutional, see note 34 infra. If the rule is a constitutional one, it is the use by the federal courts, not the obtaining by federal officers, that is important.

was obtained. Therefore, an examination of the circumstantial evidence would seem to indicate that the federal exclusionary rule is regarded as essentially a procedural, rather than a constitutional, requirement.

In line with this analysis, it is not surprising that a divided Court, in the case of *Wolf v. Colorado*,[33] held that the federal exclusionary rule is not binding on the states, even though the due process clause of the Fourteenth Amendment prohibits unreasonable searches and seizures by the states.[34] The majority of the Court was impressed with the possible probative value of such evidence, the existence of other remedies to punish the abuse, the failure of the states to accept the exclusionary rule as a remedy necessary to protect the right, and the less compelling need to stand guard against misconduct by the state police, who, it was thought, are more sensitive to public opinion than are federal officers. The dissent[35] was concerned mainly with the inadequacy of the alternative remedies available and the irony of allowing the state to enjoy the ill-gotten fruits of a forbidden tree. It should be noted that the minority view has to make two basic assumptions: (1) the federal exclusionary rule is dictated by the Fourth Amendment, and (2) the due process clause incorporates the Fourth Amendment;[36] the majority view, on the other hand, follows if either of these premises is defeated. The result: not only was the Court split, but the majority of the Court was also split[37]—a majority in flesh, but not in spirit.

C. *The Rochin Case.* The case of *Rochin v. California*[38] is the Court's latest invasion into the realm of state evidentiary rules. The result was a reversal of a conviction gained through the abusive use of a stomach pump as a violation of due process requirements, although most states would probably not have required an exclusion of the evidence as an original proposition.[39] Oddly enough, all of the justices reached the same result, although not on the same grounds. A ma-

[33] 338 U.S. 25, 69 S.Ct. 1359 (1949).

[34] Id. at 28.

[35] Justices Douglas, Murphy, and Rutledge, id. at 40. See 58 YALE L.J. 144 (1949) on question of adequacy of alternative remedies.

[36] It is obvious that the exclusionary rule cannot be required of the states by the Constitution unless it is required of the federal government by the Constitution. Since the Fourth Amendment is the constitutional grounds used to support the federal rule, it must mean that the requirements of this amendment are made applicable to the states through the Fourteenth Amendment if the rule is required of the states.

[37] Justice Black was split from the rest of the majority. However, this still left a majority of the Court supporting Justice Frankfurter's opinion.

[38] 342 U.S. 165, 72 S.Ct. 205 (1951).

[39] See Douglas' opinion, id. at 177-178.

jority of the Court thought that the confession cases, citing the *Brown* case, were controlling. These cases were interpreted as excluding the evidence not only because of its unreliability, but also because the method of obtaining the evidence offends "the community's sense of fair play and decency."[40] The conclusion is that "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."[41] The *Wolf* case, which would seem to be a closer analogy, is completely ignored.[42] Instead, stress is placed on the fact that force was used to compel the defendant to surrender the evidence rather than on the fact that the evidence was obtained illegally. The concurring minority,[43] on the other hand, completely rejects this approach, but arrives at the same result by arguing that the privilege against self-incrimination has been violated and that this privilege is an inherent part of the Fourteenth Amendment. Both of these contentions are clearly against the great weight of authority.[44] Thus the Court stands at present.

D. *Summary.* Three basic principles may be drawn from the above cases. (1) The confession cases basically indicate that the concept of due process of law requires the exclusion of unreliable evidence in order to insure a fair trial. (2) Taken in conjunction with the *Rochin* case, they also indicate that the element of compulsion alone, aside from its effect on reliability, is sufficient to prohibit the use of evidence so obtained.[45] (3) However, mere illegal detention or illegal search and seizure, absent any compulsion, is not sufficient to invoke the due process clause exclusionary requirement.

[40] Id. at 173.

[41] Ibid.

[42] The only possible reference to the Wolf case is the statement: "We therefore put to one side cases which have arisen in State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book." Obviously this is a far-fetched reference at best. Id. at 174.

[43] Justices Black and Douglas, id. at 174 and 177.

[44] Scope of privilege: 8 WIGMORE, EVIDENCE, 3d ed., §§2263-2265 (1940); Inbau, "Self-Incrimination—What Can An Accused Person Be Compelled To Do?" 28 J. CRIM. L. 261 (1937); Morgan, "The Law of Evidence 1941-1945," 9 HARV. L. REV. 481 at 519-523 (1946). Non-incorporation into Fourteenth Amendment: Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672 (1947).

[45] The fingerprint and physical examination of the defendant cases may require this proposition to be limited to the removal of something from the body or mind (i.e., internal removal) of the defendant by force. However, if more than reasonable force is used by the police to obtain the defendant's fingerprints, etc., the Rochin rule might be held applicable.

These three principles do not represent a consistent approach to the Court's role under the due process clause however. The policing of state procedural safeguards to insure the exclusion of unreliable evidence at the trial is markedly different from the chastisement of the state for its failure to punish police misconduct by the exclusion of reliable and relevant evidence. The former requires merely that the state's procedural rules conform to established legal standards;[46] the latter requires that the state's rules of procedure meet ethical standards of fair play as well.[47] This conflict might well be titled "legal justice v. equitable justice: rules of evidence and the judicial conscience."[48]

This same conflict is also manifested in other divisions of the Court. Thus the splitting of the Justices in the confession cases over whether a factual finding of coercion raising a presumption of unreliability is required to reverse a state conviction, or only a finding of circumstances which as a matter of constitutional law render the confession inherently unreliable, is a reflection of the same basic conflict as to the scope of the Court's reviewing powers under the due process clause.[49] The division in the *Wolf* case is but another example.[50] This suggests that one of the basic causes of the inconsistent approach of the Court to the various problems is that there are nine actors and only one role to play.

As a result of this casting problem, the opinion of the Court in any particular case must be read in the light of the particular Justice's interpretation of the character of due process of law. Justices Black and Douglas, as strong exponents of individual civil rights, favor an interpretation of the Constitution which requires the exclusion of evidence obtained by police misconduct. The Fifth Amendment prohibition against self-incrimination is their basic focal point,[51] but the

[46] As pointed out earlier, the use of such unreliable evidence as coerced confessions, etc., is clearly against all modern standards of civilized justice.

[47] See note 10 supra. Also see Rochin v. California, 342 U.S. 165 at 173.

[48] See POUND, JUSTICE ACCORDING TO LAW, c. 9 (1951), for distinction between a legal and equitable justice. Basically the distinction revolves around whether each person should be punished for his own wrongs without regard to the equities in his favor or whether a balance should be struck between the parties on their relative equities.

[49] If the Court makes a factual finding of coercion, then the evidence is required to be excluded because of the violation of accepted reliability standards. On the other hand, if a rule of law is laid down that confessions obtained under certain circumstances are required to be excluded because unreliable as a matter of law (rather than fact), then the Court is enforcing a policy determination on the states.

[50] If the federal exclusionary rule of evidence had been imposed on the states, the Court would have been imposing its own conceptions of policy on the states, since the federal rule is based on purely policy grounds. However, the approach of the majority indicated that it was applying the "established legal standard" test, since it made a finding of fact that the federal rule was not generally accepted by civilized legal systems.

[51] See opinions in Rochin v. California, 342 U.S. 165 at 174 and 177.

unreasonable search and seizure clause of the Fourth Amendment is also utilized.[52] These exclusionary rules are then enforced against the states by interpreting the Fourteenth Amendment as a short-hand codification of the entire first eight amendments.[53] They are definitely opposed to the use of the due process clause to formulate ethereal concepts of fundamental justice enforceable against the states.[54] Justices Murphy and Rutledge may also be classified with this school of thought for present purposes.[55] All of the remaining Justices are opposed to this interpretation of the Fourteenth Amendment. Justice Frankfurter, while also an exponent of individual civil rights, takes a diametrically opposite position from Justices Black and Douglas. His position is that the due process clause is entirely divorced from the first eight amendments, but that it requires the observance by the states of "fundamental concepts of fairness and justice."[56] With this flexible concept to work with, his position in any particular case depends upon his subjective balancing of the equities of the situation within the bounds of accepted notions of justice,[57] as evidenced by the fact that he wrote the majority opinion in both the *Wolf* and the *Rochin* cases. Chief Justice Stone also adopted essentially this position, with the qualification that the state's determination of the basic policy question by a balancing of the equities was to be given effect unless it was completely contrary to any reasonable concept of fairness.[58] Consequently, under Stone's approach the states would be required to exclude only unreliable or irrelevant evidence. Justice Reed and former Justice

[52] See Justice Douglas' opinion in Wolf v. Colorado, 338 U.S. 25 at 40. But cf. Justice Black's opinion in same case, id. at 39.

[53] See Adamson v. California, 332 U.S. 46 at 68. For a criticism of this position, see Fairman and Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 STAN. L. REV. 5 (1949); Kauper, "The First Ten Amendments," 37 A.B.A.J. 717 at 780 (1951).

[54] See dissents in Adamson v. California, 332 U.S. 46 at 68; Rochin v. California, 342 U.S. 165 at 174.

[55] See dissents in Adamson v. California, 332 U.S. 46 at 123; Wolf v. Colorado, 338 U.S. 25 at 41 and 47. They differ from Justices Black and Douglas in that they would not limit the Fourteenth Amendment to the federal bill of rights.

[56] Haley v. Ohio, 332 U.S. 596 at 607, 68 S.Ct. 302 (1948). "The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government." "The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them." Adamson v. California, 332 U.S. 46 at 66. "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples." Id. at 67. See Rochin v. California, 342 U.S. 165, also.

[57] See Rochin v. California, 342 U.S. 165 at 169-172.

[58] See dissenting opinion in Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781 (1945).

Roberts may generally be regarded as opposed to federal interference with state evidentiary rules except where such rules result in fundamental unfairness.[59] The flexibility of their position is intermediary between those of Frankfurter and Stone. While they also differ from Frankfurter and Stone in their belief that some of the first eight amendments are incorporated in the Fourteenth Amendment by a process of selective assimilation,[60] they do recognize that the federal exclusionary rules of evidence have no constitutional compulsion behind them.[61] Justice Jackson, a firm opponent of exclusionary rules based solely on a policy of preventing police misconduct, would not give any such rules constitutional sanction either.[62] Consequently, he would look only at the reliability of the evidence in applying the due process clause, thus approaching, but not reaching, Stone's position from a direction opposite to that of the other Justices.[63] The remainder of the present Justices have not expressed their opinion in writing in this field, but have usually sided with Justice Reed.[64] The Court's position in any case is thus the product of the interplay of these varying philosophies.

II

The Better Approach

A. *A Historical Perspective.* An orderly legal procedure is one of the essential requirements of a civilized society. In recognition of this, the Magna Carta guarantees that "no freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or any ways destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."[65] Out of this guarantee evolved the due process clause of the Fifth, and later the Fourteenth, Amendment.[66] While the concept was clearly a pro-

[59] See Lisenba v. California, 314 U.S. 219 at 236-238, 62 S.Ct. 280 (1941); Adamson v. California, 332 U.S. 46 at 57.

[60] Adamson v. California, 332 U.S 46.

[61] E.g., Justice Reed supported the majority opinion in Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949), which held that while the Fourteenth Amendment incorporated the guarantee of the Fourth Amendment, it did not require exclusion of the evidence.

[62] See Justice Jackson's dissenting opinions in Ashcraft v. Tennesse, 322 U.S. 143 at 156; Watts v. Indiana, 338 U.S. 49 at 57. Jackson also supported the decision in Wolf v. Colorado, 338 U.S. 25.

[63] I.e., Justice Jackson would limit the Court's power of review of state policy determination to an even greater degree than Stone. Therefore, it is difficult to understand Jackson's failure to dissent in the Rochin case.

[64] See Haley v. Ohio, 332 U.S. 596; Watts v. Indiana, 338 U.S. 49; Wolf v. Colorado, 338 U.S. 25; Adamson v. California, 332 U.S. 46; Rochin v. California, 342 U.S. 165.

[65] Chapter 39 of the Magna Carta as translated by 1 STUBBS 659.

[66] STORY, ON THE CONSTITUTION, 5th ed., §§1941-1944 (1891), and cases cited therein.

cedural one—a guarantee of a fair hearing—at the time of its incorporation into the Constitution,[67] its protection was gradually expanded, under the influence of natural law[68] concepts, to include certain substantive rights regarded as fundamental.[69] A corollary of this development was the broadening of the procedural due process guarantee to incorporate the concept of "fundamental justice."[70]

With such flexible standards within which to work, it is not surprising that the individual philosophies of the various Justices have played a major part in the molding of the broad general contours of the due process clause through the gradual process of judicial delimitation. The unifying interest in protecting the individual's freedom of will, combined with divergent philosophies as to the extent to which the collective interest of society should be allowed to restrain the actions of the individual and also as to the power of the federal government to override policies deemed desirable by the individual states, led the Court to decide individual cases without regard to any underlying unifying principle to be used as a touchstone.[71] The suggestion that due process was an embodiment of the federal bill of rights (i.e., the first eight amendments) was rejected.[72] Any other set of specific "commandments" would presumptively have suffered the same fate. But in 1937, out of the maze of cases already then in existence, Justice Cardozo tendered a unifying hypothesis:

> "There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Few would be so narrow and pro-

[67] Davidson v. New Orleans, 96 U.S. 97 at 105 (1878); Pennoyer v. Neff, 95 U.S. 714 (1878).

[68] See Grant, "The Natural Law Background of Due Process," 31 COL. L. REV. 56 (1931). "In fact, the modern definition of 'due process' is merely the 'natural justice' of Story, Marshall, Miller, Field, et al. under a new name, 'reasonableness.'" Id. at 65.

[69] This growth is described in Haimes, "Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures," 3 TEX. L. REV. 1 (1924).

[70] Herbert v. Louisiana, 272 U.S. 312 at 316, 47 S.Ct. 103 (1926); Foster v. Illinois, 332 U.S. 134, 67 S.Ct. 1716 (1947); Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937).

[71] Of course, the general legal training of the individual justices undoubtedly operated to prescribe certain subjective guiding principles, as Cardozo so aptly described in THE NATURE OF THE JUDICIAL PROCESS.

[72] Adamson v. California, 332 U.S. 46; Palko v. Connecticut, 302 U.S. 319.

vincial as to maintain that fair and enlightened system of justice would be impossible without them."[73]

This has become the basic test, at least verbally, of due process of law.[74] This is not to suggest that due process, as so defined, is a molded concept incapable of reflecting a changing social philosophy;[75] rather it is a recognition that growth and change must be geared to a criterion which is itself at all times an end product of current social thought if they are to reflect accurately accepted, rather than idiosyncratic individual, standards.

B. *What Is Due Process?* Due process may be summarized then as a protection of the personal rights of the individual against arbitrary action by the state. Translated into procedural concepts, this means that the individual is guaranteed "a fair trial." However, the *Rochin* case, together with the *Rochin* interpretation of the confession cases, interprets "fair" to mean the opposite of "unethical" rather than of "arbitrary." While both of these terms, being value concepts, inherently involve philosophical determinations, the standards looked to differ measurably. "Arbitrary" merely means material deviation from a standard of conduct having virtually universal approval, the test being whether the standard sought to be enforced by the state is generally followed. "Unethical" on the other hand requires an inquiry into whether a particular standard, whether or not generally accepted, is good or bad in the abstract (i.e., desirable or undesirable in relation to some ultimate indefinable standard). Therefore, while the traditional view of due process regarded it as primarily a legal concept, requiring an objective determination of fact as to the existence of a generally accepted basic right in civilized judicial systems, the *Rochin* view of due process treats it as essentially an equitable concept, requiring a more philosophical and subjective policy determination. In other words, the *Rochin* view involves a judicial balancing of the equities of the parties, the parties being the public in the collective capacity of the state on the one hand and the public in an individual capacity on the other.[76] The fact that the inadequacy of other remedies and the

[73] Palko v. Connecticut, 302 U.S. 319 at 325.

[74] Whether this is the actual test utilized is difficult to ascertain, particularly in the light of Rochin v. California, 342 U.S. 165.

[75] "Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase. It expresses a demand for civilized standards of law. It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society." Malinski v. New York, 324 U.S. 401 at 414, 65 S.Ct. 781 (1945).

[76] In other words, the Court balances the interest of the public in solving the crime and punishing the criminal against the interest of the individual to be free from abusive treatment by the state.

unclean hands of the plaintiff state are regarded as important factors demonstrates that this is essentially a plea to the judicial conscience.[77] Thus the conflict can be resolved into one basically between legal and equitable justice.[78]

III

Conclusions

The difference in approaches is apparent. Whether the *Rochin* approach should be approved is problematical. The basic inquiry must be to the question of what is the proper function of the Court under the due process clause. If the Court is merely the guardian of the fundamental rights of the individual,[79] the *Rochin* approach must be rejected and the traditional view reaffirmed. If the Court is also to determine what rights the individual *should* have, the *Rochin* approach must be accepted. However, under the constitutional separation of powers doctrine, which is basic to the American form of government, policy determinations are generally regarded as legislative, rather than judicial, matters.[80] Besides, the analogical nature of judicial reasoning and the removal of the judiciary from direct popular control do not make the courts a particularly suitable body for determining proper policy. In addition, the federal government has no power to prescribe local policies for the states, who have the status of quasi-sovereigns under the constitutional division of powers, except in the exercise of federal powers. However, with the present concern by the Court over individual rights, it may be predicted that the *Rochin* approach will continue to be utilized where the members of the Court, or at least a majority of them, find that the state, through its officers, has engaged in particularly obnoxious conduct.[81]

Allan Neef, S.Ed.

[77] The dissent in Wolf v. Colorado, 338 U.S. 25, and the majority opinion in Rochin v. California, 342 U.S. 165, evidence this. Whether other equitable doctrines will also be applied can only be speculated on.

[78] See supra note 48.

[79] As those rights are determined by society in general.

[80] That the legislature is sometimes slow to act, see POUND, JUSTICE ACCORDING TO LAW, c. 3 (1951).

[81] The Rochin reasoning would directly apply to such things as blood tests, as Justice Douglas recognizes in his separate opinion in Rochin v. California, 342 U.S. 165 at 177. However, in Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509 (1952), the Court completely ignored the Rochin reasoning where the petitioner in a habeas corpus proceeding was forcibly abducted by state officers so that the courts of the state could acquire criminal jurisdiction over him.