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Constitutional Law--Due Process--Illegally Secured Evidence (Rochin v. People of California, 72 Sup. Ct. 205 (1952))

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instant case would be unenforceable under the *McMullen* decision because of the necessity of pleading the illegal contract. Nor does the severability rule apply, since there was no separate consideration shown to be apportioned for the legal part of the venture.

There is persuasive authority in New York for denying an accounting to a partner in an illegal venture. In *Leonard v. Poole*,[19] a number of firms agreed to advance the price of lard, in violation of the penal law. An action for an accounting was brought against a broker who had participated in the scheme as an agent only. The court, treating *all* parties to the illegal agreement as *principals*,[20] held that an action would not lie against the broker.

The underlying purpose of denying enforcement of illegal agreements, not always expressed in the decisions, is the discouragement of their formation.[21] It is submitted that a decision in conformity with the rule in the *McMullen* case would more adequately serve this purpose than does the ruling in the instant case.

CONSTITUTIONAL LAW — DUE PROCESS — ILLEGALLY SECURED EVIDENCE.—Antonio Rochin was convicted in the Superior Court of Los Angeles County on a charge of possessing narcotics.[1] Three deputy sheriffs, without either a warrant of arrest or search warrant, forced their way into petitioner's bedroom. As they entered, petitioner swallowed two capsules that were lying on a table next to the bed. The sheriffs forcibly attempted to extract these capsules from petitioner's mouth. This effort proving futile, they then removed him to a nearby hospital, where the capsules were recovered by forcing a rubber tube down his throat and pouring an emetic solution down this tube. The capsules thus obtained were found to contain morphine and were the chief evidence used against him on the trial. *Held,* conviction reversed. The methods employed to elicit evidence in this case were so brutal and offensive to human dignity as to render the evidence inadmissible under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Rochin v. People of California,* 72 Sup. Ct. 205 (1952).

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[19] 114 N. Y. 371, 21 N. E. 707 (1889).

[20] *Id.* at 378, 21 N. E. at 709.

[21] 5 WILLISTON, CONTRACTS § 1630 (Rev. ed. 1937); *see* Attridge v. Pembroke, 235 App. Div. 101, 102, 256 N. Y. Supp. 257, 258 (4th Dep't 1932); Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 389, 108 N. Y. Supp. 830, 834 (1st Dep't 1908).

[1] A petition for a rehearing was denied. People v. Rochin, 101 Cal. App. 2d 140, 225 P. 2d 1 (1950), *hearing denied,* 225 P. 2d 913 (Cal. 1951).

When Justice Sutherland of the United States Supreme Court gave his decision in the now famous case of *Powell v. Alabama,*[2] he undertook to examine the several methods by which the Supreme Court tests whether or not state action is violative of procedural due process.[3] In the course of the opinion, he discussed four distinct tests, which may be classified as follows: (1) historical test,[4] (2) Hurtado rule,[5] (3) fundamental rights test,[6] and (4) comparative test.[7] Only the latter two have application to the present discussion, since stomach pumping, a modern method of securing evidence, was unknown to the common law, and the application of the Hurtado rule has been greatly limited by later decisions.[8]

The comparative test encompasses, as its name implies, an analysis of the applicable law of the several states and of the Federal Government, to determine how the specific problem involved is treated in the various jurisdictions. If a great majority of these sovereigns recognize the particular procedure as lawful, it is probably not violative of due process.[9] Comparison in this instance, however, reveals a wide divergence of views. The federal courts exclude evi-

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[2] 287 U. S. 45 (1932).

[3] *Ibid.*

[4] "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation." Powell v. Alabama, 287 U. S. 45, 65 (1932); Ownbey v. Morgan, 256 U. S. 94 (1921); *see* Williams v. New York, 337 U. S. 241, 246 (1949); Louisiana *ex rel.* Francis v. Resweber, 329 U. S. 459, 463 (1947).

[5] The case of *Hurtado v. California* decided that the words "due process of law," in the Fourteenth Amendment of the Constitution of the United States, do not necessarily require an indictment by a grand jury in a state prosecution. After pointing out that the Fifth Amendment, which limits federal procedure, contained both a due process clause and also a clause providing for grand juries, the Court stated: "According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is that, in the sense of the constitution, 'due process of law' was not meant or intended to include, *ex vi termini,* the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect." 110 U. S. 516, 534 (1884); Powell v. Alabama, 287 U. S. 45, 65 (1932).

[6] Powell v. Alabama, 287 U. S. 45, 67 (1932).

[7] *Id.* at 73.

[8] Powell v. Alabama, 287 U. S. 45, 65 (1932); Grosjean v. American Express Co., 297 U. S. 233, 243 (1936).

[9] Betts v. Brady, Warden, 316 U. S. 455, 471 (1942).

dence which is obtained through an unlawful search and seizure under the exclusionary rule of *Weeks v. United States*.[10] Use of a stomach pump to obtain evidence was condemned by one court, reasoning that if such methods were condoned, it would also be proper to inflict a surgeon's knife to procure incriminating evidence.[11] The great majority of state courts, however, permit the introduction of illegally secured evidence, and hold that the defendant is not thereby denied a fair trial.[12] Under the comparative test, therefore, use of the evidence in the present case could not be considered unconstitutional.

The fundamental rights test involves a determination of whether or not the enumerated rights of the first eight amendments are absorbed into the Due Process Clause of the Fourteenth Amendment, and thereby become restrictions on state action. To be considered part of Due Process, the rights involved must be of such character that a ". . . fair and enlightened system of justice would be impossible without them." [13] In *Wolf v. Colorado*,[14] it was decided that the Fourth Amendment's prohibition against unreasonable search and seizure *is* such a right. The Court further held, however, that it is not essential to due process of law that evidence so obtained be excluded, so long as other remedies are available to the victim.[15] Hence, the application of this test also fails to render the state procedure in the present case unconstitutional.

Since the preceding tests would fail to sustain the result reached in the instant case, it would seem that the Court has established a new criterion to test the validity of state procedure. The term "inherent due process" may be applied to the test that is invoked. The decision presents a new point of view on the subject of illegally secured evidence by drawing an analogy between the use of a stomach pump and the coercion of confessions.[16] Coerced confessions are unconstitutional because they violate civilized standards of conduct.[17] Although state tribunals are given great latitude in regulating their own procedure, the torture chamber may not be substituted for the

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[10] 232 U. S. 383 (1914).

[11] United States v. Willis, 85 F. Supp. 745, 748 (S. D. Cal. 1949).

[12] State v. Alexander, 7 N. J. 585, 83 A. 2d 441 (1951); People v. One Mercury Sedan, 74 Cal. App. 2d 199, 168 P. 2d 443 (1946). See the grouping of state decisions in Wolf v. Colorado, 338 U. S. 25 (1949).

[13] Palko v. Connecticut, 302 U. S. 319, 325 (1937).

[14] 338 U. S. 25 (1949). See 25 ST. JOHN'S L. REV. 86 (1950).

[15] *Ibid.* People v. Defore, 242 N. Y. 13, 19, 150 N. E. 585, 586 (1926). "The officer might have been resisted, or sued for damages, or even prosecuted for oppression . . . . He was subject to removal or other discipline at the hands of his superiors."

[16] The Court in the present case adopted the reasoning of the dissenting judges in the state court. These judges felt that no distinction could be made between a verbal confession and evidence taken from defendant's body by physical abuse. People v. Rochin, 225 P. 2d 913, 917 (1951).

[17] Malinski v. New York, 324 U. S. 401, 414 (1944); Watts v. Indiana, 338 U. S. 49 (1949).

witness stand.[18] Similarly, in the present case, although the petitioner's rights against unreasonable search and seizure are not violated by the introduction of this evidence, conduct that "shocks the conscience," [19] or "offend[s] the community's sense of fair play and decency" [20] will be stamped unconstitutional.

This analogy, however, is not too convincing. Confessions that are forcibly elicited may be untrustworthy as evidence.[21] On the other hand, there is no untrustworthiness engendered by the introduction into evidence of a morphine capsule. There is no rigidity to the rule that is presented in the *Rochin* decision. Each case will have to be decided on its particular facts and circumstances.[22] Flagrant abuses of personal liberties will be condemned although they are not specifically forbidden by statutory enactment or decisional gloss.[23]

The reasoning of the majority opinion was violently attacked in separate concurring opinions by Justices Black and Douglas. These justices asserted that the evidence should be excluded solely because its admission would violate the self-incrimination clause of the Fifth Amendment. This view represents a renewal of their objection to the case of *Adamson v. California*,[24] which held that a denial of the privilege against self incrimination, as set forth in the Fifth Amendment, was not such a deprivation of rights as to violate due process of law.[25] The *Adamson* case conclusively established that restrictions upon the privilege against self-incrimination do not deprive a defendant of a fair trial and that the privilege is therefore not a limitation on state procedure.[26]

The result in the present case is certainly praiseworthy. An obvious injustice has been corrected. On the other hand, the decision is bound to lead to some confusion. Acts that would shock one mind may leave another passive. It is therefore not difficult to sympathize with the plight of the concurring justices. Their goal is the enforcement of civil liberties on a higher plane.[27] The decision, how-

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[18] Brown v. Mississippi, 297 U. S. 278, 285, 286 (1936).

[19] Rochin v. People of California, 72 Sup. Ct. 205, 209 (1952).

[20] *Id.* at 210.

[21] 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940); Gallegos v. State of Nebraska, 72 Sup. Ct. 141 (1951).

[22] Rochin v. People of California, 72 Sup. Ct. 205, 210 (1952).

[23] *Id.* at 208.

[24] 332 U. S. 46 (1947).

[25] "When evidence is before a jury that threatens conviction, it does not seem unfair to require him [defendant] to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes." Adamson v. California, 332 U. S. 46, 57 (1947).

[26] For a distinction between the right of a state to withdraw the privilege of self-incrimination, and the right of a state to admit coerced confessions into evidence, see Brown v. Mississippi, 297 U. S. 278, 285 (1936).

[27] The reason for their concurrence in the result could probably best be summed up by quoting from the dissenting opinion of the late Mr. Justice Rutledge in *Wolf v. Colorado:* "'Wisdom too often never comes, and so one

ever, may be considered a step in the right direction, guiding state courts to a more vigilant protection of personal liberties.

CONSTITUTIONAL LAW — REGULATION OF FILLING STATION PRICE SIGNS.—Defendant, owner and operator of a retail gasoline station, was arrested and charged with the violation of a Delaware statute regulating the location and maximum size of motor fuels price signs.[1] Specifically, the information charged him with the display of signs with dimensions in excess of the statutory maximum. Defendant moved to quash the information, asserting that the regulatory statute was an unlawful infringement on the right of free speech, unconstitutionally burdened interstate commerce, and was a deprivation of property without due process of law.[2] *Held,* the subject statute does not offend the constitutional guarantee of free speech, nor does it constitute an unlawful burden on interstate commerce.[3] It does, however, effect a deprivation of property without due process of law, and is therefore unconstitutional. *State v. Hobson,* 83 A. 2d 846 (Del. 1951).

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ought not to reject it merely because it comes late.' Similarly, one should not reject a piecemeal wisdom, merely because it hobbles towards the truth with backward glances." Wolf v. Colorado, 338 U. S. 25, 47 (1949); see Mann, *Rutledge and Civil Liberties,* 25 IND. L. J. 532, 551 (1950).

[1] "Every retail dealer in motor fuel shall publicly display and maintain on each pump or other dispensing device, from which motor fuel is sold by him, at least one sign and not more than two signs stating the price per gallon of the motor fuel sold by him from such pump or device, which price shall be the total price for such motor fuel, including all State and Federal taxes. Said sign or signs shall be of a size not larger than four inches by six inches . . . .

"No signs stating or relating to the prices of motor fuel, and no signs designed or calculated to cause the public to believe that they state or relate to the price of motor fuel, other than the signs referred to in the preceding paragraph, shall be posted or displayed on or about the premises where motor fuel is sold at retail." 48 LAWS OF DELAWARE c. —, § 1 (1951), quoted in State v. Hobson, 83 A. 2d 846, 849-50 (Del. 1951).

[2] The defendant asserted two other defenses which were not sustained, and which will not be treated here. The first was a contention that the act conflicted with the ceiling price regulations of the Office of Price Stabilization, and hence was invalid under the Supremacy Clause of the Federal Constitution. The other contention was grounded on a supposed formal deviation from that requirement of the Delaware Constitution, which provides that no bill shall embrace more than one subject which shall be expressed in its title. State v. Hobson, 83 A. 2d 846, 850 (Del. 1951).

[3] The court disposed of this contention with the assertion that retail sales of gasoline are intrastate rather than interstate in character. It further opined that even if the sales were to be considered as interstate in nature, they were nevertheless subject to regulation in the absence of a showing of discrimination. *Id.* at 852-53.