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Current Decision, Due Process--Use of Blood Tests to Determine Intoxication Not Violative of Due Process

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of administration. Its value may be nil,[22] but it will serve for purposes of administration. In one instance the wrecked auto (value $50) fulfilled the asset requirement for purposes of administration.[23]

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DUE PROCESS—USE OF BLOOD TESTS TO DETERMINE INTOXICATION NOT VIOLATIVE OF DUE PROCESS

Following an automobile accident in which one person was killed, *D* was taken to a hospital for treatment. While *D* was still in an unconscious state, a hypodermic needle was used to extract five cubic centimeters of blood from her. One cubic centimeter was used to determine the percentage of alcohol in *D's* blood. The test results, indicating intoxication, were admitted into evidence at *D's* trial for manslaughter. On the ground that the subsequent conviction violated due process, *D* appealed to the California Supreme Court. *Held*: affirmed,[1] with two justices dissenting. The admission of such evidence did not cause the conviction to fall under the ban of the due process clause of the Federal Constitution[2] as applied by the United States Supreme Court in the case of *Rochin v. California*.[3]

While the argument advanced by the defendant in the instant case is not original, it has never before been given such extended consideration.[4]

Until the *Rochin* decision, the most frequently raised objections to the use of such evidence were that the privilege against self-incrimination was violated and that the security against illegal search and seizure was invaded.[5] The *Rochin* case, however, raised a further

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[22]Cases cited note 5 *supra*.

[23]Power v. Plummer, 93 N.H. 37, 35 A.2d 230 (1943).

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[1]People v. Haeussler, 260 P.2d 8 (Cal. 1953).

[2]U.S. CONST. AMEND. XIV, § 1.

[3]342 U.S. 165 (1952). In this case suspecting the defendant of being in possession of narcotics, state police officers broke into the defendant's bedroom. The defendant promptly swallowed two capsules containing the incriminating evidence. After an unsuccessful attempt to recover the evidence from the defendant's mouth, the officers used force and retrieved the evidence by use of a stomach pump. The Court held that the use of this evidence to convict the defendant violated due process. See 24 ROCKY MT. L. REV. 386 (1952).

[4]See State v. Smith, 91 A.2d 188 (Del. 1952), and Justice Moore's dissenting opinions in Kallnbach v. People, 125 Colo. 144, 166, 242 P.2d 222, 234 (1952) and in Block v. People, 125 Colo. 37, 44, 240 P.2d 512, 516 (1951), *rehearing denied* (1952), indicating that the argument was urged, although the majority opinions failed to consider it.

[5]See People v. Tucker, 88 Cal. App.2d 333, 198 P.2d 941 (1948); Kallnbach v. People, 125 Colo. 144, 242 P.2d 222 (1952); Block v. People, 125 Colo. 37, 240 P.2d 512 (1951); State v. Cram, 176 Ore. 577, 160 P.2d 283 (1945); Apodaca v. State, 140 Tex. Cr. 593, 146 S.W.2d 381 (1940).

Although the defendant in the instant case apparently did not argue the questions of self-incrimination and illegal search and seizure, the California court considered them and concluded (1) that such evidence, not being a testimonial utterance, could not be deemed self-incriminating, and (2) that even if the evidence

question, namely, whether or not the use of such evidence would constitute a denial of due process.[6] The defendant's argument in the instant case, which would resolve this question in the affirmative, is not without merit[7] for the applicability of the *Rochin* rule would appear to be essentially a matter of degree.

Prior to the *Rochin* case, the United States Supreme Court had maintained a consistent policy of leaving the regulation of state police officers in securing evidence almost exclusively to the state courts.[8] Except in cases of coerced confessions, the Court made no attempt under the Fourteenth Amendment[9] to supervise state police activity as closely as it regulated federal police activity under the Fourth and Fifth Amendments.[10] However, in several of the coerced confession cases, the Court indicated that the use of coerced confessions as evidence was objectionable not only because of their unreliability, but also because of the offensive tactics utilized by the state police officers in procuring them.[11] The Court's rejection of the evidence in *Rochin v. California* was clearly based on this latter objection,[12] for the reliability of the evidence used against the accused could not be questioned. The *Rochin* decision seemed to indicate that the Court intended to subject to its review the procedures of state police officers in acquiring evidence from the body of an accused.[13]

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were obtained by an illegal search and seizure, it is, notwithstanding, admissible under California law without violating the due process clause, citing Wolf v. Colorado, 338 U.S. 25 (1949).

[6]See, *e.g.*, Doyle, *Blood, Whiskey and the Constitution,* 24 ROCKY MT. L. REV. 459 (1952).

[7]On the facts as presented, the California court would have had to reverse had the concurring opinion of Mr. Justice Douglas in Rochin v. California been that of the majority. See Rochin v. California, 342 U.S. 165, 179 (1952).

[8]Wolf v. Colorado, 338 U.S. 25 (1949); Gallegos v. Nebraska, 342 U.S. 55 (1951). *Cf.* Lyons v. Oklahoma, 322 U.S. 596 (1944). The same policy prevails as to state criminal prosecutions generally. Bute v. Illinois, 333 U.S. 640 (1948); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934).

[9]U.S. CONST. AMEND. XIV, § 1.

[10]*Compare* Wolf v. Colorado, 338 U.S. 25 (1949) *with* Weeks v. United States, 232 U.S. 383 (1914). Steadfastly, the Court has rejected the argument that the Fourteenth Amendment was intended to incorporate the Bill of Rights and make their commands equally binding upon the states. Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937).

The supervision over police procedures, state or federal, is not direct. Rather it is the ultimate result of supervision over trial court procedures in general. See note 8 *supra.*

[11]See Stroble v. California, 343 U.S. 181, 190 (1952); Malinski v. New York, 324 U.S. 401, 404 (1945); Lisenba v. California, 314 U.S. 219, 236 (1941). It would appear that the Court has rejected this rationale in the recent case of Stein v. New York, 346 U.S. 156 (1953). To the extent that the Court has rejected it, the policy of the Court would appear to be inconsistent with the decision in the *Rochin* case.

[12]Rochin v. California, 342 U.S. 165, 173 (1952).

[13]The language of the California court in the principal case seems to suggest a different conclusion: "Contrary to . . . [the defendant's] . . . contention, the *Rochin* opinion does not rest upon the premise that the taking of evidence from the person of a defendant or by entry into his body is the decisive factor." People v. Haeussler, 260 P.2d 8, 12 (Cal. 1953). It is submitted that the court is using the word "decisive" with reference to a *reversal* but not with reference to a *review*; that is, the United States Supreme Court may review but will not necessarily reverse.

To paraphase the majority opinion in the *Rochin* case, the test for determining whether the admission of evidence obtained from the body of the accused violates due process is whether or not the tactics used by the state police officers in obtaining such evidence are brutal and offensive to human dignity.[14] In construing the *Rochin* opinion in the instant case, the California court adopted this view. The court did not expressly preclude the applicability of the *Rochin* rule to all blood tests for determining intoxication.[15] Rather it indicated that it would be a question in each particular case whether the means employed to obtain the evidence were or were not brutal.

On the facts presented to the court in the instant case, it was unable to see why taking blood from an unconscious person would constitute a brutal act.[16] If the defendant had been conscious and expressed objection with the result that force had to be applied, the court would have been confronted with a far more difficult problem.

While the test as adopted by the California court is necessarily vague, in the light of the facts and the language of the United States Supreme Court in *Rochin v. California,* it would appear to be sound.[17] It is also probable that the test will become more clearly defined and limited as new fact situations are presented to the United States Supreme Court.[18] More significant perhaps is the fact that state courts have been compelled to scrutinize and review certain police procedures which they have heretofore allowed to persist with little more than a word of condemnation.[19] And, although the dividing line beween brutal and non-brutal acts is indeed nebulous, it is not so inarticulate as to render the rule of the *Rochin* case unworkable. At worst, the principle case aptly illustrates that although the case of *Rochin v. California* may well be a landmark in constitutional law, it will be a constant source of argument for many years to come.

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[14]The Court concluded: "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." Rochin v. California, 342 U.S. 165, 174 (1952).

[15]This would be apparent from the following language: "The taking of a blood test, *when accomplished in a medically approved manner,* does not smack of brutality." People v. Haeussler, 260 P.2d 8, 12 (Cal. 1953) (italics added).

[16]It is interesting to note that four cubic centimeters of the blood taken from the defendant were used to type the blood for a transfusion. People v. Haeussler, 260 P.2d 8, 10 (Cal. 1953).

[17]See note 14 *supra.* The language quoted therein might well have justified a holding by the California court in the principal case that the *Rochin* rule was not intended to apply to blood tests for determining intoxication at all. See Doyle, *Blood, Whiskey and the Constitution,* 24 ROCKY MT. L. REV. 459 (1952).

[18]Such has been the history of the rule forbidding the use of coerced confessions. See cases cited in note 11 *supra;* and Watts v. Indiana, 338 U.S. 49 (1949); Lyons v. Oklahoma, 322 U.S. 596 (1944); Ward v. Texas, 316 U.S. 547 (1942); Brown v. Mississippi, 297 U.S. 278 (1936).

[19]See, *e.g.,* California v. Rochin, 101 Cal. App.2d 140, 225 P.2d 1 (1950), *hearing denied* 101 Cal. App.2d 140, 225 P.2d 913 (1951).