COMMENTS

CONSTITUTIONAL LAW — PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT — COERCED CONFESSIONS

At 9 A. M. on July 1, 1949, three deputy sheriffs of Los Angeles County, having "some information that Petitioner Rochin was selling narcotics," forced open his bedroom door. Rochin immediately grabbed two capsules from a table and clapped them into his mouth; whereupon the deputies seized him and attempted to recover them by choking him. Apparently discovering that he had swallowed them, the officers took him to a hospital, strapped him to an operating table, and, by forcing an emetic down his throat, succeeded in having him vomit up the capsules. These proved to contain morphine. With their use as evidence, Rochin was convicted by the Superior Court of Los Angeles and sentenced to sixty days for possessing a narcotic. The District Court of Appeal affirmed the conviction on the ground that evidence illegally obtained was nevertheless admissible in California. One judge concurred only because he felt bound by prior decisions of the Supreme Court of California, although to him the record "reveals a shocking series of violations of constitutional rights."[1] A rehearing was denied by the California Supreme Court,[2] two judges dissenting from the denial.[3] The United States Supreme Court granted certiorari,[4] "because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States."[5] That

1. People v. Rochin, 101 Cal. App.2d 140, 225 P.2d 1 (1950).
2. People v. Rochin, 101 Cal. App.2d 140, 143, 225 P.2d 913 (1951). "The petition for a rehearing is addressed to the discretion of the California Supreme Court and a denial has apparently the same significance as the denial of certiorari in this court. . . ." Rochin v. California, 72 Sup. Ct. 205 (1952).
3. The first dissenter discussed the recommendation of legislation which would "force the courts of this state to uphold the constitutional provisions [U. S. CONST. AMEND. IV; CAL. CONST., art. I, § 19] guaranteeing the right of privacy to residents of this state." Rochin v. People, 101 Cal. App.2d 143, 144, 225 P.2d 913, 914 (1950). The second spoke of "self-incrimination" and "coerced confessions" in the same breath. *Id.* at 150, 225 P.2d at 918. These standards combined with those of the justices of the U.S. Supreme Court, *infra*, demonstrate the interesting differences as to what to denominate the deputies' actions.
4. 341 U.S. 939 (1951).
5. Rochin v. California, 72 Sup. Ct. 205, 207 (1952).

Court, without dissent, reversed the conviction. Mr. Justice Frankfurter delivered the opinion of the Court, Mr. Justice Minton taking no part in the consideration or decision, and Justices Black and Douglas each filing separate concurring opinions.

THE BACKGROUND

In these opinions may be found a recent extension of that involved controversy: does the Fourteenth Amendment in any way incorporate the protections of the Bill of Rights and apply them to the states? The attempt to apply the Bill of Rights directly to state as well as federal action met with immediate failure in *Barron v. Baltimore.*[6] The adoption of the Fourteenth Amendment after the Civil War presented a new possibility: could that Amendment be used as an instrument to apply the guarantees of the first eight amendments to state action? The *Slaughter House Cases*[7] first disposed of that question and set the pattern for future decisions. They held, albeit by a five-four decision, that the "privileges and immunities" clause applied to only a very few rights arising from a citizen's relations with his national government,[8] and that the "equal protection" clause was designed for the protection of racial minorities and should be restricted to such cases.[9]

Then, in 1904, a New Jersey citizen was found guilty of a high misdemeanor in a state court, which had instructed the jury that an unfavorable inference might be drawn from his failure to testify in denial of incriminating evidence against him. This case, *Twining v. New Jersey,*[10] eventually reached the Supreme Court. Mr. Justice Frankfurter has called the decision rendered there "the judicial process at its best . . . an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court."[11] It was held that the privilege against self-incrimination was not applied to the states by the "privileges and

6. 7 Pet. 243 (U.S. 1833).
7. 16 Wall. 36 (U.S. 1873).
8. This view was departed from once, Colgate v. Harvey, 296 U.S. 404 (1935); but the departure was later overruled, Madden v. Kentucky, 309 U.S. 83 (1940).
9. An example being the protection from all-white juries, Strauder v. West Virginia, 100 U.S. 303 (1879); Patton v. Mississippi, 332 U.S. 463 (1948), and cases cited therein.
10. 211 U.S. 78 (1908).
11. Adamson v. California, 332 U.S. 46, 59 (1947).

immunities" clause, and, if it were so applied by the "due process" clause, it is not because these rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the concept of due process of law.[12] The Court's answer to the latter consideration in the case was that the privilege was not so included. Mr. Justice Harlan rendered a dissenting opinion. In *Palko v. Connecticut*,[13] Mr. Justice Cardozo briefly disposed of the contention that the states are subjected to the Bill of Rights by the Fourteenth Amendment with the statement, "There is no such general rule."[14] He pointed out that the question to be asked about state action allegedly violative of due process is, "Does it violate those 'fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions'?"[15] This has been the continuing opinion of the majority of the Court, although dissents have been numerous and vigorous. Under this theory, due process under the Fourteenth Amendment does not necessarily require, for example, trial by jury,[16] indictment by grand jury,[17] prevention of retrial in a criminal case at the instance of the state,[18] or protection against self-incrimination.[19] On the other hand, this theory of due process does require a "fair trial," with the right of counsel,[20] and without the use of coerced confessions.[21]

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12. Twining v. New Jersey, 211 U.S. 78, 99 (1908).
13. 302 U.S. 319 (1937).
14. *Id.* at 323.
15. *Id.* at 328.
16. Maxwell v. Dow, 176 U.S. 581 (1900).
17. Hurtado v. California, 110 U.S. 516 (1884).
18. Palko v. Connecticut, 302 U.S. 319 (1937).
19. Twining v. New Jersey, 211 U.S. 78 (1908).
20. Powell v. Alabama, 287 U.S. 45 (1932).
21. Brown v. Mississippi, 297 U.S. 278 (1936). It should be noted here that among the rights protected under the Fourteenth Amendment are now found those of freedom of speech, press, and religion, which are protected against abridgement by Congress by the First Amendment. These are safeguarded against state action, however, not by that latter Amendment, but because they are among our "fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment." Gitlow v. New York, 268 U.S. 652, 666 (1925). The First and Fourteenth Amendments have, however, become fused in many minds. See, for example, Everson v. Board of Education, 330 U.S. 1 (1947), and McCarthy, *The Application of the First Amendment to the States by the Fourteenth Amendment of the Constitution*, 22 NOTRE DAME LAW. 400 (1941).

ADAMSON V. CALIFORNIA

This was the background when, in 1947, a case was reviewed with facts quite similar to those of *Twining v. New Jersey.* In four opinions, covering a total of seventy-eight pages; *Adamson v. California*[22] reaffirmed the holding and the theory of the *Twining* case by a five-four decision. The case is especially interesting for its lengthy theoretical argument and has provoked much comment as a leading case.[23] The opinion of the Court, delivered by Mr. Justice Reed, assumed that the Fifth Amendment would have been violated had the trial been in a federal court,[24] and all the opinions proceeded on this assumption. The Court restated the position that neither the "privileges and immunities" clause nor the "due process" clause incorporated the Bill of Rights. Mr. Justice Black filed a lengthy dissenting opinion,[25] followed by an even lengthier Appendix.[26] His thesis was that the Fourteenth Amendment was intended to apply the Bill of Rights to state action by those who passed and adopted it, that the Court had ignored this intent, and that the majority had substituted in its stead a " 'natural law' formula which . . . should be abandoned as an incongrous excrescence on our Constitution."[27] He was not unmindful of the connection of this subject with "due process" in the property rights field and was disturbed by the wide exercise of discretion by the Court that he found in both this field and that of civil rights. The Bill of Rights, which is not "an outworn 18th Century 'straight jacket,' " should provide the only guide for the Court's action, he concluded. Mr. Justice Douglas concurred in this view. Mr. Justice Murphy dissented separately, asserting, "I agree that the specific guarantees of the Bill of Rights should be carried intact into . . . the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights."[28] Mr. Justice Rutledge concurred in this latter dissent.

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22. 332 U.S. 46 (1947).
23. The reader is referred to the fifteen articles listed under the case in the INDEX TO LEGAL PERIODICALS—August 1946 - July 1949. To these may be added Comment, 58 YALE L. J. 268 (1949).
24. Adamson v. California, 332 U. S. 46 (1947).
25. *Id.* at 68-92.
26. *Id.* at 92-123.
27. *Id.* at 73.
28. *Id.* at 124. This view would not, of course, have the same limiting effect on the Court as that advanced by Justices Black and Douglas.

Finally, Mr. Justice Frankfurter filed a separate concurring opinion, as if in rebuttal, in which he defended the prevailing interpretation of the "due process" clause. He praised the judges who had formed that interpretation, and dismissed the historical arguments of Mr. Justice Black by stating,

> The short answer to the suggestion [that the Fourteenth Amendment was intended to include the Bill of Rights] . . . is that it [the language of the Fourteenth Amendment] is a strange way of saying it. . . . Remarks of a particular proponent of the Amendment . . . are not to be deemed part of the Amendment.[29]

Mr. Justice Frankfurter further urged the unwisdom of disrupting state procedures by the wholesale incorporation of the first eight Amendments, and even condemned as "subjective" the selective incorporation of the various rights enumerated therein.[30] His strong preference was for the "historic" use of "due process" to ascertain whether state proceedings offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples."[31] This, he asserted, is not an idiosyncratic standard.

This summary cannot pretend to do justice to the various

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29. *Id.* at 63-64. As to which view of the orginal purpose of the Amendment is the more accurate, see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding*, 2 STAN. L. REV. 5 (1949), supporting Mr. Justice Frankfurter's view; Mr. Justice Black cited FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT *passim* (1908), among other sources, in support of his argument, Adamson v. California, 332 U.S. 46, 72 n.5 (1947). Some of the provisions of the Bill of Rights can refer by their terms only to the federal government, of course.

30. Mr. John Raeburn Green of the St. Louis Bar has criticized the present policy of the Court for its uncertain and discretionary qualities, and for the "insupportable burden" in numbers of cases it lodges on the justices. He suggests, "Each right should be considered on its merits, not each trial on its merits." This position might be called an additional one to the three expressed in the *Adamson* case in the opinions of the Court and Mr. Justice Frankfurter, of Mr. Justice Black, and of Mr. Justice Murphy. Green, *The Bill of Rights, The Fourteenth Amendment, and the Supreme Court*, 46 MICH. L. REV. 869 (1948), drawn in part from three articles entitled *Liberty under the Fourteenth Amendment*, 27 WASH. U. L. Q. 497 (1942), 28 WASH. U. L. Q. 251 (1943), 43 MICH. L. REV. 437 (1944).

31. Adamson v. California, 332 U.S. 46, 67 (1947). This is not the statement of a pure "natural law" or "fundamental justice" philosophy, it will be noted. Mr. Green, however, calls the Fair Trial Rule "Natural Law at its worst." Green, *The Bill of Rights, The Fourteenth Amendment, and the Supreme Court*, 46 MICH. L. REV. 869, 899 (1948).

points of view, which have been the object of much discussion; it does show, however, at what points battle was joined at the time of the *Adamson* case.

THE PRINCIPAL CASE

Rochin v. California[32] may be viewed as a continuation of the controversy in question. Mr. Justice Frankfurter, it will be noted, delivered the opinion of the Court, and in it he restates and defends his position in much the same terms as outlined above. Despite the fact that the responsibility for the administration of criminal justice lies with the states, he writes, the Court has its responsibility to review convictions under the Fourteenth Amendment. Judges are not left at large, however, by the prevailing and settled theory of the Court, but are guided by "limits . . . derived from considerations that are fused in the whole nature of our judicial process . . . in reason and in the compelling traditions of the legal profession."[33] He defends "due process" as so conceived as

> . . . not to be derided as a revival of 'natural law.' To believe that this judicial exercise of judgment could be avoided by freezing 'due process of the law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges. . . . Even cybernetics[34] has not yet made that haughty claim.[35]

Indeed, he says, the procedure calls for exactly those qualities that we have a right to expect from our appellate judges. He then proceeds to the conclusion that the deputies' activities produced, in effect, a coerced confession which offends the "due process" clause.[36]

Mr. Justice Black, however, protests against the interpretation of the majority, although he concurs in the result. Referring to the *Adamson* case for his reasons, he would make the protection of the Fifth Amendment against self-incrimination the ground for reversal, since he feels that "the Bill of Rights insures a more

32. 72 Sup. Ct. 205 (1952).
33. *Id.* at 209.
34. The science of calculators or "thinking machines." WEINER, CYBERNETICS (1948); Time, Jan. 23, 1950, p. 54.
35. 72 Sup. Ct. 205, 209 (1952).
36. Note that the Fourteenth Amendment has been held recently not to exclude, in a state court, the admission of evidence obtained by unreasonable search and seizure. Wolf v. Colorado, 338 U.S. 25 (1949).

permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority."[37] Then he indicates a series of quotations from the opinion of the Court which apparently form an attempt to point up what he believes to be that nebulousness. He concludes:

> What paralyzing role this same philosophy will play in the future economic affairs of this country is impossible to predict. Of even graver concern, however, is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordian-like [sic] qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. Reflection and recent decisions of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.[38] [Footnotes omitted.]

Mr. Justice Douglas also urges that the protection against self-incrimination should be binding on the states. Pointing out that the evidence in the case would be admissible in the majority of the states where the question has been raised, he feels that

> . . . we cannot in fairness free the state courts from that command [of the Fifth Amendment against self-incrimination] . . . and yet excoriate them for flouting the decencies of civilized conduct when they admit the evidence. That is to make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here.[39]

He also concludes that the view of the Court "is part of the process of erosion of civil rights of the citizen in recent years."[40]

CONCLUSION

The principal case is useful not only as a supplement to the theoretical arguments involved, but it also adds the weight of a six-two split decision to this statement by Mr. Justice Frankfurter:

> The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again after impressive consideration. . . . The issue is closed.[41]

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37. Rochin v. California, 72 Sup. Ct. 205, 211 (1952).
38. *Id.* at 212.
39. *Id.* at 213.
40. *Ibid.*
41. Wolf v. Colorado, 338 U.S. 25, 26 (1949).

The death and replacement of two of the incorporation theory adherents has reduced the minority to two. As a result, any lawyer will be well advised, when attacking state procedure in the Supreme Court, to approach his problem from the point of view of Mr. Justice Frankfurter. Those who would apply the various protections of the Bill of Rights to the states can, at best, only hope at present that these protections will, one by one, be gradually absorbed by the Fourteenth Amendment in a manner similar to the inclusion of the First Amendment.[42] Even the possibility of the deliberate selection of individual provisions for inclusion seems precluded.

This is the situation; whether or not the prevailing philosophy is the best one is a matter of judgment, and it would be presumptuous to attempt to decide the question here.[43] The strength of the United States does indeed lie, not in mechanistic applications of law, but in the adherence of the vast bulk of its citizens to its tradition, and without that adherence no Bill of Rights could save us. On the other hand, the written Constitution, as a binding statement of that tradition, has been a useful instrument in the development of both our strength and our liberties. The "fair trial" rule does not, to any great extent, use that instrument, but relies, rather, on the opinions of judges. It thereby leaves itself open to the charge of being a rule of men and not of law. If some workable method may be found to give strength, definiteness, and regularity under the Federal Constitution to the procedural protection of individuals from state action, few objections could be raised. This is not an area in which the federal government could be legitimately criticized for undue interference with state sovereignty It is indeed possible to object to incorporation on the ground of unworkability. If all applicable elements of the Bill of Rights were enforced against the states on a wholesale basis, a vast and unnecessary disruption of state procedure would certainly occur. In addition, if Mr. Justice Black's argument that "due process" included only the Bill of Rights were adopted literally, the Court would be restricted in the long-developed use of the "due process" clause in other fields, unless that Bill was itself construed more broadly as, for ex-

42. See note 21 *supra*.

43. For an interesting controversy, see Collins, *Constitutional Aspects of the Truman Civil Rights Program*, 44 ILL. L. REV. 1 (1949), and Watt, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949).

ample, by a new interpretation of the Ninth Amendment. Even an over-mechanistic application of single guarantees from the first eight amendments would be objectionable.

It is, however, difficult to see why the Court should not undertake a gradual and fluid definition of some of these specific guarantees so that they would fall within the concept of "due process" under the Fourteenth Amendment, for the states, as well as under the first eight, for the federal government. One may venture to say that the citizen would welcome the application to state action of many of the procedural protections of the Bill of Rights, if, indeed, he realizes they are not now so applied. In the end, the answer will be worked out in the Court, which realizes, we may be sure, that strict adherence to a set theory can be as unworkable as strict adherence to a document.

JOHN M. DRESCHER, JR.