To: The Chief Justice

From: Frankfurter, J.

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#83 - FF

The word "only" added on p. 8 as indicated

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1951.

Antonio Richard Rochin, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal for the Second Appellate District of the State of California.

[January —, 1951.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Having "some information that [the petitioner here] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, his common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found 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 one 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.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of

possessing "a preparation of morphine" in violation of the California Health and Safety Code, 1947, § 11,500. Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers "were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," and "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital." 101 Cal. App. 2d 140, 143, 225 P. 2d 1, 3. One of the three judges, while finding that "the record in this case reveals a shocking series of violations of constitutional rights," concurred only because he felt bound by the decisions of his Supreme Court. These, he asserted, "have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts." *Ibid.* The Supreme Court of California denied without opinion Rochin's petition for a hearing.[1] Two justices dissented from this denial, and in doing so expressed themselves thus: ". . . a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse. . . . Had the evi-

[1] The petition for a hearing 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. Cal. Const., Art. VI, §§ 4, 4 (c); "Rules on Appeal", Rules 28, 29, 36 Cal. 2d 24–25 (1951). See 3 Stan. L. Rev. 243–269 (1951).

dence forced from the defendant's lips consisted of an oral confession that he illegally possessed a drug . . . he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this State are permitted to base a conviction upon it. [We] find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse." 101 Cal. App. 2d 143, 149–150, 225 P. 2d 913, 917–918.

This Court granted certiorari, 341 U. S. 939, 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.

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const., Art. I, § 8, cl. 18. Broadly speaking crimes in the United States are what the laws of the individual States makes them, subject to the limitations of Art. I, § 10[1], in the original Constitution prohibiting bills of attainder and *ex post facto* laws and the provisions of the Thirteenth and Fourteenth Amendments.

These limitations, in the main, concern not restrictions upon the power of the States to define crime except in the nonimportant area where Federal authority has preempted the field, but restrictions upon the manner in which the States may enforce their penal code. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the

most far-reaching and most frequent federal basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from State courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." *Malinski* v. *New York,* 324 U. S. 401, 412, 418. Due process of law, "itself a historical product," *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31, is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice.

However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski* v. *New York, supra,* at 416–417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, or are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325.[2]

[2] What is here summarized was deemed by a majority of the Court, in *Malinski* v. *New York,* 324 U. S. 401, 412 and 438, to be "the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime." They have been applied by this Court many times, long before and since the *Malinski* case.

The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the Federal courts have a definite meaning. No changes or chances can alter the content of the verbal symbol of "jury"—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant.[3] On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed for all time and every circumstance but is a process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Thus it is that even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.

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[3] This is the federal jury required constitutionally although both in England and in at least half of the States a jury may be composed of less than twelve or a verdict may be less than unanimous. Arizona State Legislative Bureau, Legislative Briefs No. 4, Grand and Petit Juries in the United States v–vi (Feb. 15, 1940); Council of State Governments, The Book of the States 1950–1951, 515.

The vague contours of the Due Process Clause do not leave judges at large.[4] We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as resort to a revival of "natural law." [5] To believe that this judicial exercise of judgment could be avoided by

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[4] Burke's observations on the method of ascertaining law by judges are pertinent:

"Your committee do not find any positive law which binds the judges of the courts in Westminister-hall publicly to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before them. But the course hath prevailed from the oldest times. It had been so general and so uniform, that it must be considered as the law of the land." Report of the Committee of Managers on the Causes of the Duration of Mr. Hastings's Trial, 4 Speeches of Edmund Burke (1816), 200–201.

And Burke had an answer for those who argue that the liberty of the citizen cannot be adequately protected by the flexible conception of due process of law:

". . . the English jurisprudence has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, and juridical traditionary line of decisions . . . ." *Id.*, at 201.

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freezing "due process of 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 for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim. Of course to practice the requisite detachment and to achieve sufficient objectivity demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in any progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience.

Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. It was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, but obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only illustrations of the universal due process requirement, pointed out by Mr. Chief Justice Hughes for a unanimous Court in *Brown* v. *Mississippi,* 297 U. S. 278, 285–286, that States in their prosecutions respect certain decencies of civilized conduct. Due process of law as a historic and generative principle precludes defining these standards of conduct more precisely, and thereby confining them, than to say that prosecutions cannot be brought about by methods that offend "a sense of justice." 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.

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reason for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even

though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side the various cases in the State courts which have arisen through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent those decisions to suggest that they sanction force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record. Indeed the California Supreme Court has not sanctioned this mode of securing a conviction. It merely exercised its discretion to decline a review of the conviction. All the California judges who have expressed themselves in this case have condemned the conduct in the strongest language.

We are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is "intended to preserve practical and substantial rights not to maintain theories." *Davis* v. *Mills*, 194 U. S. 451, 457.

On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be

Reversed.

MR. JUSTICE MINTON took no part in the consideration or decision of this case.

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To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reason for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is not constitutionally obnoxious because of their unreliability. They are inadmissible under the Due Process Clause even

though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side the various cases in the State courts which have arisen through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent those decisions to suggest that they sanction force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record. Indeed the California Supreme Court has not sanctioned this mode of securing a conviction. It merely exercised its discretion to decline a review of the conviction. All the California judges who have expressed themselves in this case have condemned the conduct in the strongest language.

We are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is "intended to preserve practical and substantial rights not to maintain theories." *Davis* v. *Mills*, 194 U. S. 451, 457.

On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be

Reversed.

MR. JUSTICE MINTON took no part in the consideration or decision of this case.

December 3, 1951.

MEMORANDUM FOR THE COURT

Re: No. 83 - Rochin v. California.

I shall substitute the following for the paragraph on page 9 beginning with the sentence, "We are deciding this case and not cases not now before the Court."

"In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side the various cases in the State courts which have arisen through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent those decisions to suggest that they sanction force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record. Indeed, the California Supreme Court has not sanctioned this mode of securing a conviction. It merely exercised its discretion to decline a second appellate review of the conviction. All the California judges who have expressed themselves in this case have condemned the conduct in the strongest language.

We are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is 'intended to preserve practical and substantial rights not to maintain theories.' Davis v. Mills, 194 U.S. 451, 457."

F.F.

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Changes on pp. 2, 6

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possessing "a preparation of morphine" in violation of the California Health and Safety Code, 1947, § 11,500. Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers "were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," and "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital." 101 Cal. App. 2d 140, 143, 225 P. 2d 1, 3. One of the three judges, while finding that "the record in this case reveals a shocking series of violations of constitutional rights," concurred only because he felt bound by the decisions of his Supreme Court. These, he asserted, "have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts." *Ibid.* The Supreme Court of California denied without opinion Rochin's petition for hearing.[1] Two justices dissented from this denial, and in doing so expressed themselves thus: ". . . a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse. . . . Had the evi-

[1] The petition for hearing 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. Cal. Const., Art. VI, §§ 4, 4 (c); "Rules on Appeal", Rules 28, 29, 36 Cal. 2d 24–25 (1951). See 3 Stan. L. Rev. 243–269 (1951).

dence forced from the defendant's lips consisted of an oral confession that he illegally possessed a drug . . . he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this State are permitted to base a conviction upon it. [We] find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse." 101 Cal. App. 2d 143, 149–150, 225 P. 2d 913, 917–918.

This Court granted certiorari, 341 U. S. 939, 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.

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const., Art. I, § 8, cl. 18. Broadly speaking crimes in the United States are what the laws of the individual States makes them, subject to the limitations of Art. I, § 10 [1], in the original Constitution prohibiting bills of attainder and *ex post facto* laws and the provisions of the Thirteenth and Fourteenth Amendments.

These limitations, in the main, concern not restrictions upon the power of the States to define crime except in the nonimportant area where Federal authority has preempted the field, but restrictions upon the manner in which the States may enforce their penal code. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the

most far-reaching and most frequent federal basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from State courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." *Malinski* v. *New York,* 324 U. S. 401, 412, 418. Due process of law, "itself a historical product," *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31, is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice.

However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski* v. *New York, supra,* at 416–417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, or are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325.[2]

[2] What is here summarized was deemed by a majority of the Court, in *Malinski* v. *New York,* 324 U. S. 401, 412 and 438, to be "the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime." They have been applied by this Court many times, long before and since the *Malinski* case.

The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the Federal courts have a definite meaning. No changes or chances can alter the content of the verbal symbol of "jury"—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant.[3] On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed for all time and every circumstance but is a process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Thus it is that even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.

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[3] This is the federal jury required constitutionally although both in England and in at least half of the States a jury may be composed of less than twelve or a verdict may be less than unanimous. Arizona State Legislative Bureau, Legislative Briefs No. 4, Grand and Petit Juries in the United States v–vi (Feb. 15, 1940); Council of State Governments, The Book of the States 1950–1951, 515.

The vague contours of the Due Process Clause do not leave judges at large.[4] We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as resort to a revival of "natural law." [5] To believe that

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[4] Burke's observations on the method of ascertaining law by judges are pertinent:

"Your committee do not find any positive law which binds the judges of the courts in Westminister-hall publicly to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before them. But the course hath prevailed from the oldest times. It had been so general and so uniform, that it must be considered as the law of the land." Report of the Committee of Managers on the Causes of the Duration of Mr. Hastings's Trial, 4 Speeches of Edmund Burke (1816), 200–201.

And Burke had an answer for those who argue that the liberty of the citizen cannot be adequately protected by the flexible conception of due process of law:

". . . the English jurisprudence has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, and juridical traditionary line of decisions . . . ." *Id.*, at 201.

[5] Morris R. Cohen, "Jus Naturale Redivivum," 25 Philosophical Review 761 (1916), and "Natural Rights and Positive Law," Reason and Nature 401–426 (1931); F. Pollock, "The History of the Law of Nature," Essays in the Law 31–79 (1922).

this judicial exercise of judgment could be avoided by freezing "due process of 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 for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim. Of course to practice the requisite detachment and to achieve sufficient objectivity demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in any progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness

or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government in obtaining evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. It was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, but obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only illustrations of the universal due process requirement, pointed out by Mr. Chief Justice Hughes for a unanimous Court in *Brown* v. *Mississippi,* 297 U. S. 278, 285–286, that States in their prosecutions respect certain decencies of civilized conduct. Due process of law as a historic and generative principle precludes defining these standards of conduct more precisely, and thereby confining them, than to say that prosecutions cannot be brought about by methods that offend "a sense of justice." 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.

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reason for excluding coerced confessions. Involuntary

verbal confessions are not constitutionally obnoxious because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

We are deciding this case and not cases not now before the Court. We are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical difficulties despite seemingly logical extensions. But the Constitution is "intended to preserve practical and substantial rights not to maintain theories." *Davis* v. *Mills,* 194 U. S. 451, 457. We therefore put to one side problems that have come before State courts in connection with modern methods and devices for discovering wrongdoers and bringing them to book.

On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be

Reversed.

MR. JUSTICE MINTON took no part in the consideration or decision of this case.

To: The Chief Justice

From: Frankfurter, J.

Circulated: 11/16/51

Recirculated:

83 - FF

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1951.

Antonio Richard Rochin, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal for the Second Appellate District of the State of California.

[November —, 1951.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Having "some information that [the petitioner here] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, his common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found 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 one 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.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of

possessing "a preparation of morphine" in violation of the California Health and Safety Code, § 11,500. Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers "were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," and "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital." 101 Cal. App. 2d 140, 143, 225 P. 2d 1, 3. One of the three judges, while finding that "the record in this case reveals a shocking series of violations of constitutional rights," concurred only because he felt bound by the decisions of his Supreme Court. These, he asserted, "have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts." Ibid. The Supreme Court of California denied without opinion Rochin's petition for hearing. Two justices dissented on grounds fairly represented by these short extracts: ". . . a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse. . . . Had the evidence forced from the defendant's lips consisted of an oral confession that he illegally possessed a drug . . . he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this State are permitted to base a conviction upon it.

[We] find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse." 101 Cal. App. 2d 143, 149–150, 225 P. 2d 913, 917, 918.

This Court granted certiorari, 341 U. S. 939, 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.

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const., Art. I, § 8, cl. 18. Broadly speaking crimes in the United States are what the laws of the individual States makes them, subject to the limitations of Art. I, § 10 [1], in the original Constitution prohibiting bills of attainder and *ex post facto* laws and the provisions of the Thirteenth and Fourteenth Amendments.

These limitatons, in the main, concern not restrictions upon the power of the States to define crime except in the nonimportant area where Federal authority has preempted the field, but restrictions upon the manner in which the States may vindicate their penal code. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from State courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." *Malinski* v. *New York,* 324 U. S. 401, 412,

418. Due process of law, "itself a historical product," *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31, is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice.

However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski* v. *New York, supra,* at 416–417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, or are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325.[1]

The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not

[1] What is here summarized was deemed by a majority of the Court, in *Malinski* v. *New York,* 324 U. S. 401, 412 and 438, to be "the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime." They have been applied by this Court many times, long before and since the *Malinski* case.

speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the Federal courts have a definite meaning. No changes or chances can alter the content of the verbal symbol of "jury"—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant.[2] On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed for all time and every circumstance but is a process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Thus it is that even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.

The vague contours of the Due Process Clause do not leave judges at large.[3] We may not draw on our merely

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personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as a resort to an offensive revival of natural law. To believe that this judicial exercise of judgment could be avoided by freezing "due process of 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 for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim. Of course to practice the requisite detachment and to achieve sufficient objectivity demands of judges the habit of self-discipline and self-criticism, incertitude that one's own

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mittee of Managers on the Causes of the Duration of Mr. Hasting's Trial, 4 Speeches of Edmund Burke (1816), 200–201.

And Burke had an answer for those who argue that the liberty of the citizen cannot be adequately protected by the flexible conception of Due Process:

". . . the English jurisprudence has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, and juridical tradiionary line of decisions . . . ." *Id.*, at 201.

views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in any progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government in obtaining evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. It was not true even

before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, but obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only illustrations of the universal due process requirement, pointed out by Mr. Chief Justice Hughes for a unanimous Court in *Brown* v. *Mississippi*, 297 U. S. 278, 285–286, that States in their prosecutions respect certain decencies of civilized conduct. Due process of law as a historic and generative principle precludes defining these standards of conduct more precisely and thereby confining them, than to say that prosecutions cannot be brought about by methods that offend "a sense of justice." 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.

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reason for excluding coerced confessions. Involuntary verbal confessions are not constitutionally obnoxious because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was so condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the the temper of a society.

We are deciding this case and not cases not now before the Court. We are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical difficulties despite seemingly logical extensions. But the Constitution is "intended to preserve practical and substantial rights not to maintain theories." *Davis* v. *Mills,* 194 U. S. 451, 457. We therefore put to one side problems that have come before State courts in connection with modern methods and devices for discovering wrongdoers and bringing them to book.

On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be

Reversed.

#83 - Black, Concurring

To: The Chief Justice

From: Black, J.

Circulated: 12/18/51

Recirculated: .....

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1951.

Antonio Richard Rochin, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal for the Second Appellate District of the State of California.

[January —, 1952.]

Mr. Justice Black, concurring.

Adamson v. *California,* 332 U. S. 46, 68–123, sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that "No person . . . shall be compelled in any criminal case to be a witness against himself." I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. Cf. *Boyd v. United States,* 116 U. S. 616; *Counselman* v. *Hitchcock,* 142 U. S. 547, 562; *Bram* v. *United States,* 158 U. S. 532; *Chambers* v. *Florida,* 309 U. S. 227. California convicted this petitioner by using against him evidence obtained in this manner. The Fifth Amendment forbids a conviction obtained in this way and I agree with Mr. Justice Douglas that the case should be reversed on this ground.

In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California's use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. I believe that adherence to the Bill of

Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if they conclude that it authorizes conduct that "shocks the conscience," offends "a sense of justice" or runs counter to the "decencies of civilized conduct." The majority emphasize that these statements do not refer to their own conscience or to their sense of justice and decency. For we are told that "we may not draw on our merely personal and private notions"; our judgment must be grounded on "considerations deeply rooted in reason, and in the compelling traditions of the legal profession." We are further admonished to measure the validity of state practices, not by our reason, or by the traditions of the legal profession, but by "the community's sense of fair play and decency"; by the "traditions and consciences of our people"; or by "those canons of decency and fairness which express the notions of justice of English-speaking peoples." These canons are made necessary, it is said, because of "interests of society pushing in opposite directions."

If the Due Process Clause does vest this Court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an "evaluation based on a disinterested inquiry pursued in the spirit of science on a balanced order of facts."

Some constitutional provisions are stated in absolute and unqualified languaue such for illustration as the First

Amendment stating that no law shall be passed prohibiting the free exercise of religion or abridging the freedom of speech or press. Other constitutional provisions do require courts to choose between competing policies, such as the Fourth Amendment which, by its terms, necessitates a judicial decision as to what is an "unreasonable" search or seizure. There is, however, no express constitutional language granting judicial power to invalidate *every* state law of *every* kind deemed "unreasonable" or contrary to the Court's notion of civilized decencies; yet the constitutional philosophy used by the majority has, in the past, even been used to deny a state the right to prevent bakers from palming off smaller for larger loaves of bread, *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504; or the right to fix the price of gasoline, *Williams* v. *Standard Oil Co.,* 278 U. S. 235. What role this philosophy will play in the future economic affairs of this country is impossible to predict. Moreover, application of the evanescent standards of this philosophy has not been limited to economic affairs. I long ago concluded that this accordian-like due process interpretation would imperil even the individual liberty safeguards specifically enumerated in the Bill of Rights.[1] Reflection and recent decisions [2] have only served to strengthen this conclusion.

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[1] *E. g., Adamson* v. *California, supra,* and cases cited in the dissent.

[2] *Communications Assn.* v. *Douds,* 339 U. S. 382; *Feiner* v. *New York,* 340 U. S. 315; *Dennis* v. *United States,* 341 U. S. 494.

#83 - Douglas Concurring

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No. 83.—October Term, 1951.

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[January 7, 1952.]

Mr. Justice Douglas, concurring.

The evidence obtained from this accused's stomach would be admissible in the majority of states where the question has been raised.[1] So far as the reported cases reveal, the only states which would probably exclude the evidence would be Arkansas, Iowa, Michigan, and Mis-

[1] See *People* v. *One 1941 Mercury Sedan*, 74 Cal. App. 2d 199, 168 P. 2d 443 (pumping of accused's stomach to recover swallowed narcotic); *Rochin* v. *California*, 101 Cal. App. 2d 140, 225 P. 2d 1 (pumping of accused's stomach to recover swallowed narcotic); *People* v. *Tucker*, 88 Cal. App. 2d 333, 198 P. 2d 941 (blood test to determine intoxication); *State* v. *Ayres*, 70 Idaho 18, 211 P. 2d 142 (blood test to determine intoxication); *Davis* v. *State*, 189 Md. 640, 57 A. 2d 289 (blood typing to link accused with murder); *Skidmore* v. *State*, 59 Nev. 320, 92 P. 2d 979 (examination of accused for venereal disease); *State* v. *Sturtevant*, 96 N. H. 99, 70 A. 2d 909 (blood test to determine intoxication); *State* v. *Alexander*, 7 N. J. 585, 83 A. 2d 441 (blood typing to establish guilt); *State* v. *Gatton*, 60 Ohio App. 192, 20 N. E. 2d 265 (commenting on refusal to submit to blood test or urinalysis to determine intoxication); *State* v. *Nutt*, 78 Ohio App. 336, 65 N. E. 2d 675 (commenting on refusal to submit to urinalysis to determine intoxication); but cf. *Booker* v. *Cincinnati*, v *Ohio* Supp. 152 (examination and urinalysis to determine intoxication); *State* v. *Cram*, 176 Ore. 577, 160 P. 2d 283, 164 A. L. R. 952, 967 (blood test to determine intoxication); *Commonwealth* v. *Statti*, 166 Pa. Super. 577, 73 A. 2d 688 (blood typing linking accused to assault).

souri.[2] Yet the Court now says that the rule which the majority of the states have fashioned violates the "decencies of civilized conduct." To that I cannot agree. It is a rule formulated by responsible courts with judges as sensitive as we are to the proper standards for law administration.

As an original matter it might be debatable whether the provision in the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" serves the ends of justice. Not all civilized legal procedures recognize it.[3] But the choice was made by the Framers, a choice which sets a standard for legal trials in this country. The Framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal court house, it is impossible for me to say it is not a requirement of due process for a trial in the state court house. That was the issue recently surveyed in *Adamson* v. *California,* 332 U. S. 46. The Court rejected the view that compelled testimony should be excluded and held in substance that the accused in a state trial can be forced to testify against himself. I disagree. Of course an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or

[2] *Bethel* v. *State,* 178 Ark. 277, 10 S. W. 2d 370 (examination for venereal disease); *State* v. *Height,* 117 Iowa 650, 91 N. W. 935 (examination for venereal disease); *State* v. *Weltha,* 228 Iowa 519, 292 N. W. 148 (blood test to determine intoxication, limiting rules on search and seizure); but cf. *State* v. *Benson,* 230 Iowa 1168, 300 N. W. 275 (comment on refusal to submit to blood test to determine intoxication); *People* v. *Corder,* 244 Mich. 274, 221 N. W. 309 (examination for venereal disease); but see *People* v. *Placido,* 310 Mich. 404, 408, 17 N. W. 2d 230, 232; *State* v. *Newcomb,* 220 Mo. 54, 119 S. W. 405 (examination for venereal disease); *State* v. *Matsinger,* 180 S. W. 856 (examination for venereal disease).

[3] See Ploscowe, The Investigating Magistrate in European Criminal Procedure, 33 Mich. L. Rev. 1010 (1935).

that, and to try on a cap or a coat. See *Holt* v. *United States,* 218 U. S. 245, 252–253. But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment.

That is an unequivocal, definite and workable rule of evidence for state and federal courts. But we cannot in fairness free the state courts from that command 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.

The damage of the view sponsored by the Court in this case may not be conspicuous here. But it is part of the same philosophy that produced *Betts* v. *Brady,* 316 U. S. 455, denying counsel to an accused in a state trial against the command of the Sixth Amendment and *Wolf* v. *Colorado,* 338 U. S. 25, allowing evidence obtained as a result of a search and seizure that is illegal under the Fourth Amendment to be introduced in a state trial. It is part of the process of erosion of civil rights of the citizen in recent years.

The Chief Justice
from Douglas, J.
12-31-51
Changes p. 1

#83-Douglas
Concurring

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1951.

Antonio Richard Rochin, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal for the Second Appellate District of the State of California.

[December —, 1951.]

Mr. Justice Douglas, concurring.

The evidence obtained from this accused's stomach would be admissible in the majority of states where the question has been raised.[1] Only in Arkansas, Iowa, Michigan, and Missouri would the evidence be clearly inadmissible.[2] Yet the Court now says that the rule which

[1] See *State* v. *Ayres*, 70 Idaho 18, 211 P. 2d 142 (blood test to determine intoxication); *Davis* v. *State*, 189 Md. 640, 57 A. 2d 289 (blood typing to link accused with murder); *Skidmore* v. *State*, 59 Nev. 320, 92 P. 2d 979 (examination of accused for venereal disease); *State* v. *Sturtevant*, 96 N. H. 99, 70 A. 2d 909 (blood test to determine intoxication); *State* v. *Gatton*, 60 Ohio App. 192, 20 N. E. 2d 265 (commenting on refusal to submit to blood test or urinalysis to determine intoxication); *State* v. *Nutt*, 78 Ohio App. 336, 65 N. E. 2d 675 (commenting on refusal to submit to urinalysis to determine intoxication); but cf. *Booker* v. *Cincinnati*, 1 Ohio Supp. 152, 30 N. E. 2d 152 (examination and urinalysis to determine intoxication); *State* v. *Cram*, 176 Ore. 577, 160 P. 2d 283, 164 A. L. R. 952, 967 (blood test to determine intoxication); *Commonwealth* v. *Statti*, 166 Pa. Super. 577, 73 A. 2d 688 (blood typing linking accused to assault); *Green Lake County* v. *Domes*, 247 Wis. 90, 18 N. W. 2d 348, 159 A. L. R. 204, 209 (examination for intoxication).

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To the Chief Justice
from
Douglas J.

12-1-51

#83 - Jackson concurring

To: The Chief Justice

From: JACKSON, J.

Circulated: 12/21/51

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 83.—October Term, 1951.

Antonio Richard Rochin, Petitioner, *v.* People of the State of California.	On Writ of Certiorari to the District Court of Appeal for the Second Appellate District of the State of California.

[January —, 1952.]

Mr. Justice Jackson, concurring.

I agree with the result and, generally, with the opinion. But I do not wish to be committed to the proposition that involuntary confessions are not constitutionally objectionable because of their unreliability. As I understand it, judges found forced confessions inherently unreliable and for that reason alone began excluding them before the community in general began to take offense at the "third degree" and before there was a Due Process Clause. The point seems to have little bearing on this case, but it may be significant in later ones. Until then, I forego further discussions.

Supreme Court of the United States
Washington 13, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

November 29, 1951.

Dear Chief:

It may interest you to know that both Stanley and Harold have joined Rochin.

If perhaps you should infer from my telling you this that I care deeply about Rochin you would be only 100% correct. I think, however, I do not deceive myself in feeling that I care about it because of the views expressed regarding the proper attitude toward the Due Process Clause and not because of the way in which I have expressed those views. Honest to God, I do not deem what I have written as literarily inspired. I do think it profoundly important that we should express in some such way as I have tried to do what kind of an instrument the Due Process Clause is against the States, thereby restating the conception of the Due Process Clause which this Court has enforced ever since the Fourteenth Amendment was adopted, and rejecting the notion that that clause is a handbag for the eight original Amendments. It is because the dissenters in Malinski v. New York, 324 U.S. 401, felt the importance of making that view the Court's view that they, under the lead of Stone, C. J., made the views that are expressed therein in my concurring opinion "the controlling principles upon which this Court reviews on constitutional grounds a State court conviction for crime." 324 U.S. at 438.

In short, if you gather that I deem the Rochin case important, you will be just 100% correct.

Faithfully yours,

FF.

The Chief Justice.

Friesens

ROCHIN

State officers lawlessly broke into petitioner's home and into the privacy of his bedroom. They saw capsules on a bedside table and suspected that they contained narcotics, although they were not sure. R 43. Petitioner swallowed the capsules. The officers chocked petitioner, struck him and one pushed his fingers into petitioner's mouth, all in an unsuccessful effort to recover the capsules. They handcuffed petitioner, took him to a hospital, strapped him to a table and forced petitioner to eject the capsules by what is known as a stomach pump. The matter exracted from petitioner's stomach was introduced as an exhibit at petitioner's trial for possession of narcotics, together with testimony that the matter contained morphine.

Justice Frankfurter describes the course of proceedings by the officers as "conduct that shocks the conscience". It certainly does. But the opinion does not even cite, much less explain, Wolf, where this Court held that Due Process does not forbid the use as evidence of objects obtained in violation of rights of privacy that are basic to a free society, fundamental, and implicit in the concept of ordered liberty and therefore enforceable against the States through the Fourteenth Amendment. One might have thought from the opinion in Wolf that illegal or even unconstitutional means used to obtain evidence did not bar the use of that evidence in a state court.

It is stated in the opinion, for the first time since a single concurrence in Malinsky, that the confession cases rest on the theory that evidence obtained by shocking means can not be used to obtain a conviction. In the landmark confession case, Brown v. Mississippi, the Court held that coerced confessions cannot be used to obtain convictions, not because of the privilege against self-incrimination, and not merely because of the shocking means used by officers to obtain evidence, but because the State,

was substituting a trial by ordeal for the required fair trial. Lisenba v. California, 314 US 219, 236-237 (1941), states the rationale:

> "The aim of the [common law] rule [of evidence] that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. ... The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such rule as she elects, whether it conform to that applied in the federal or other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession.
>
> "To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extra-judicial confession shich is used as evidence in the courtroom. [citing Brown v. Mississippi]"

This last quoted paragraph has been the rationale of the other confession cases. Ashcraft v. Tennessee, 322 US 143, 154-155 (1944). See also Lee v. Mississippi, 332 US 742, 745-746 (1948); and Williams v. United States, 431 US 97, 101 (1951).

To those who joined Adamson, it is not relevant to characterize the admission of evidence in this case as violating the privilege against self-incrimination. In addition, it is by no means clear that the privilege covers physical objects since, as a matter of history at least, the privilege has been limited to preventing testimonial compulsion. See Holt v. United States, 208 US 245, 252-253 (1910); 8 Wigmore on Evidence § 2251 et seq; Inbau, Self Incrimination (1950).

The facts of this case can suggest several constitutional theories. But if federal officers were involved, it seems clear that the evidence would be held inadmissible as the product of an unreasonable search of petitioner's house and person, in violation of the Fourth Amendment. Under Wolf, the Fourth Amendment is binding on the States through Due Process but State's may base convictions on evidence unconstitutionally

obtained. To merely state that the means used by the officers in this case are shocking would not seem to answer Wolf. One would have thought that the violation of basic, fundamental constitutional rights by the officers in Wolf should have been shocking as well. And the prejudice to a defendant from the admission of physical evidence at his trial would seem to be the same whether the evidence was unconstitutionally seized from his house or person, externally or internally.

In other words, it does not answer the problems presented by this case to mechanically attach the label "confession". Nor is it consistent with the opinion in Wolf to stress the admittedly shocking means used by the officers to obtain the evidence. Nor is it proper to merely attach the label "search and seizure", since the facts of this case can be treated as a hybrid situation if the confession cases and their rationale can be extended to physical evidence. If the fact that the officers did not know exactly what petitioner swallowed is stressed, it can be said that the chocking and stomach pumping amounted to a trial by ordeal to ascertain petitioner's guilt of the charge of possessing narcotics. Under the rationale of Brown v. Mississippi, it can be said that the results of that trial by ordeal may not be substituted for a fair trial and hence may not be used as the basis for a conviction. Such a result does not do violence to the heretofore accepted basis for the confession cases and at least faces up to the problems presented by Wolf.