"The vague contours of the Due Process Clause do not leave judges at large. ... [Its] limits are derived from considerations that are fused in the whole nature of our judicial process ... considerations deeply rooted in reason and in the compelling traditions of the legal profession."—Justice FRANKFURTER

"I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards enumerated in the Bill of Rights."—Justice BLACK

Rochin v. California

342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

Suspecting Antonio Rochin of dealing in narcotics, Los Angeles police forcibly entered his room. Before they could seize the two capsules they spotted, Rochin swallowed them. After failing to extract this evidence from Rochin's mouth, the officers took him to a hospital and, against Rochin's will, directed a physician to pump the suspect's stomach. The vomited matter contained the remains of the capsules, which the state used to convict Rochin of possessing morphine. The California supreme court refused review, and the U.S. Supreme Court granted certiorari.

Mr. Justice **FRANKFURTER** delivered the opinion of the Court. ...

In our federal system the administration of criminal justice is predominantly committed to the care of the States. ... Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment[,] ... "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 [1945]. ...

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. ..." *Ibid.* 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 [1934], or are "implicit in the concept of ordered liberty." Palko v. Connecticut [1937].

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. ... 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 but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. 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. 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*. 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." 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. ... Even cybernetics has not yet made that haughty claim. To practice the requisite detachment and to achieve sufficient objectivity no doubt demands [*sic*] 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 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, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a 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. This 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.

... Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." ...

... 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 the law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society. ...

Reversed.

Mr. Justice **MINTON** took no part in the consideration or decision of this case.

Mr. Justice **BLACK**, concurring.

Adamson v. California [1947] 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. ... I believe that faithful adherence to the specific guarantees in 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 its application "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 consciences or to their senses 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 conscience 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 language such ... 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, been used ... to nullify state legislative programs passed to suppress evil economic practices. ... Of even graver concern ... is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. ...

Mr. Justice **DOUGLAS,** concurring. ...

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. But the choice was made by the Framers, a choice which sets a standard for legal trials in this country. ... I think that words taken from [an accused's] 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. ...

Editors' Notes

(1) **Query:** "Words being symbols do not speak without a gloss," Frankfurter wrote. Does this sentence merely state the obvious or does it significantly affect an answer to the question of WHAT the Constitution includes? Did Black disagree with Frankfurter about the validity of this sentence? If Black agreed, how does his conception of WHAT the Constitution includes differ from Frankfurter's?

(2) **Query:** To what extent is *Rochin* compatible with Jacobson v. Massachusetts (1905), reprinted above, p. 125. To put the question another way, was the Court in *Rochin* finding that a right to bodily integrity was protected by the "whole nature of the judicial process" and/or "the compelling traditions of the legal profession"? Or was the Court merely setting outer limits to

such terms in the constitutional document as "self-incrimination" and "unreasonable searches and seizures"? Whatever one believes the majority to have been doing in *Rochin*, the concurring opinions of Black and Douglas were much more limited and positivistic in their reasoning. The reasoning of several more recent opinions of the Court dealing with efforts to obtain evidence from the bodies of suspects have also tended to be more positivistic than that of the Court in *Rochin*, but Black and Douglas dissented against those results, while they were still on the Court:

> (i) Breithaupt v. Abram (1957) sustained a conviction for drunken driving based on a test done on a sample of blood taken from a suspect while he was unconscious. The majority found nothing "brutal" or "offensive" in such procedures: "As against the right of an individual that his person be held inviolable even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road."
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> (ii) Schmerber v. California (1966) upheld a conviction based on a similar test, even though conducted on a conscious and protesting suspect. The majority conceded that the basic reason underlying constitutional protection against self-incrimination and unreasonable searches was concern for human dignity: "If the scope of the privilege [against self-incrimination] coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated." The majority, however, found the privilege more limited and chose to follow *Breithaupt.* Nevertheless, the Court added: "The integrity of the individual is a cherished value of our society. That we today hold that the Constitution does not forbid the State's minor intrusion into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions or intrusions under other conditions."
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> (iii) South Dakota v. Neville (1983) allowed use in evidence of a defendant's refusal to take a blood test to determine sobriety.
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> (iv) Bell v. Wolfish (1979) ruled that defendants being detained in jail awaiting trial could be subjected to routine searches of bodily cavities to detect smuggling of contraband.
>
> (v) Skinner v. R'way Lbr Executives (1989) held that the Fourth Amendment does not bar compulsory testing, without a warrant, of railroad workers for drugs and alcohol.
>
> (vi) Nat'l Treasury Union v. Von Raab (1989) sustained similar testing of federal officers whose work involves enforcement of laws against drugs, carrying a firearm, or handling classified material.
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> (vii) Vernonia v. Acton (1995) upheld random drug-testing of student athletes as

constitutional, and Chandler v. Miller (1997) upheld a Georgia statute mandating candidates for certain offices to take drug tests, while Ferguson v. Charleston (2001) held a state hospital's non-consensual maternal urine tests unconstitutional.

See also:

(i) Mills v. Rogers (1982), which involved a challenge by patients in a Massachusetts mental institution protesting against being compelled to take certain kinds of drugs. The Supreme Court remanded (sent back) the case to the U.S. court of appeals for reconsideration in light of a ruling by the Massachusetts supreme court that non-institutionalized mental patients have a right to refuse such treatment.

(ii) Youngberg v. Romeo (1982), which held that patients involuntarily institutionalized for mental illness have rights to safe conditions, to freedom from restraints except as necessary to protect them or others, and to such training as may be necessary to ensure their safety or to enable them to live safely without restraints.

(3) For general efforts by the justices to explain how they discover rights not listed in the constitutional document as well as attacks on such efforts, see not only the various opinions in *Griswold* but also the dissenting opinions of Douglas and Harlan in Poe v. Ullman (1961; reprinted as the next case), the opinions of White and Blackmun in Bowers v. Hardwick (1986; reprinted below, p. 1322), those of Scalia and Brennan in Michael H. v. Gerald D. (1989; reprinted below, p. 158), and the various opinions in Planned Parenthood v. Casey (1992; reprinted below, p. ____).