THE DUE PROCESS CLAUSE AS A JUDICIAL BALANCE*

A novel approach to the application of the Due Process Clause of the Fourteenth Amendment[1] as a judicial balance between the right of the states to determine the enforcement of their penal codes, on the one hand, and the individual's right to certain personal immunities, on the other, has been suggested by a study of Justice Frankfurter's opinions in several Supreme Court cases involving state criminal proceedings.

The Traditional Approach

The Due Process Clause has been defined "by the gradual process of judicial inclusion and exclusion." [2] Traditionally, the Justices have followed two schools of reasoning in applying the clause: I. The clause should be invoked whenever an individual's right to those personal immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental" [3] is endangered; or II. The clause is inclusive of the Bill of Rights,[4] and places the same limitations on state action as the first eight Amendments place on federal action. Justices Frankfurter and Black are credited with the current leadership of these two schools.[5]

The two traditional applications are indicated by the majority and the concurring opinions in *Rochin* v. *California*.[6] In this case the Supreme Court reversed a state conviction under a local narcotics statute. At the trial the prosecution introduced in evidence narcotic capsules which had been forcibly extracted from the stomach of the accused. This "stomach pumping" was performed at the direction of deputy sheriffs who had been unsuccessful in preventing the accused from swallowing the capsules after they had entered his bedroom without a warrant.

Justice Frankfurter, proponent of school I, wrote for the majority, finding "conduct that shocks the conscience," and holding that the evidence and the means of obtaining it violated the Fourteenth Amendment's constitutional guarantee of due process.

Justices Black and Douglas, expounding school II, concurred in separate opinions on the grounds that this was a violation of the accused's privilege against self incrimination, protected in federal prosecutions by the Fifth Amendment,[7] which they believe should also apply to state prosecutions. These concurring opinions both refer to Justice Black's dissent in *Adamson* v. *California*,[8] an extensive argument in behalf of his position that the Fourteenth Amendment is inclusive of the Fifth Amendment.[9]

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[1] U. S. Const. Amend. XIV, § 1.

[2] Davidson v. New Orleans, 96 U.S. 97, 104 (1878).

[3] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[4] U.S. Const. Amends. I through X.

[5] See 40 Calif. L. Rev. 311 (1952).

[6] 342 U.S. 165 (1952).

[7] U.S. Const. Amend. V.

[8] 332 U.S. 46, 68 (1947).

[9] The difference between the application of the two Amendments was ably discussed by Chief Justice Hughes in Brown v. Mississippi, 297 U.S. 278 (1936).

The Novel Approach

That the meaning of the Due Process Clause may be derived from a judicial balance is suggested in the *Rochin* case by the majority's regard for the use of the flexible definition of due process as an assurance that the clause "is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice" [10] while at the same time reversing the decision of the California Supreme Court.

Justice Black's: "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," [11] supporting his denial that the Due Process Clause vests the Court with the unlimited power "to invalidate every state law of every kind deemed unreasonable or contrary to the Court's notion of civilized decencies," [12] enabled him to reach the same decision as the majority on the facts.

In *Malinski* v. *New York*,[13] the court discredited state proceedings which permitted coercion to be used in obtaining a confession, which, although not introduced in evidence, was repeatedly referred to by the state in establishing a subsequent confession which the accused had repudiated. Justice Frankfurter speaking for the court said:

> "In reviewing a state criminal conviction we must be deeply mindful 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. On the other hand, in the discharge of that duty we must give no ear to the loose talk about society being 'at war with the criminal' if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people." [14]

A concise statement, indicating the key word "conflict" as perhaps the fulcrum of this judicial balance, is found in *Haley* v. *Ohio*,[15] where Justice Frankfurter, concurring, writes:

> "This court must give the freest possible scope to states in the choice of their methods of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with the deeply rooted feelings of the community." [16]

Conclusion

In addition to considering the requirements of the Due Process Clause as standards for conduct, either fixed by the Bill of Rights or by the flexible "conscience of our people," it may be helpful in studying cases involving the

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[10] 342 U.S. 165, 168.
[11] *Id.* at 175.
[12] *Id.* at 176.
[13] 324 U.S. 401 (1945).
[14] *Id.* at 418.
[15] 332 U.S. 596 (1948).
[16] *Id.* at 604.

application of this clause to state criminal proceedings to approach the question from a consideration of the relative effect of the decision on (1) the effectiveness of state criminal enforcement, and (2) the preservation of personal liberty.[17]

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[17] Other writings by Justice Frankfurter which tend to indicate the presence of a balance approach are his concurring opinion in Louisiana v. Resweber, 329 U.S. 459, 471 (1947); and his dissent in Leland v. Oregon, 343 U.S. 790, 807 (1952).