

Summer 1999

The Perversion of Science in Criminal and Personnel Investigations

Fred E. Inbau

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Fred E. Inbau, *The Perversion of Science in Criminal and Personnel Investigations*, 89 *J. Crim. L. & Criminology* 1377 (1998-1999)

This Tribute is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in *Journal of Criminal Law and Criminology* by an authorized editor of Northwestern University School of Law Scholarly Commons.

THE PERVERSION OF SCIENCE IN CRIMINAL AND PERSONNEL INVESTIGATIONS*

FRED E. INBAU

A suspected dope peddler by the name of Rochin was about to be arrested by California law enforcement officers. He threw two capsules into his mouth and swallowed them. Believing that the capsules contained narcotics, the officers took him to a hospital where they enlisted the aid of a physician in the use of a "stomach pump" for the purpose of obtaining the capsules. Up they came, and a subsequent laboratory test revealed their contents to be morphine.

Another triumph for science? Or was this a perversion of science?

The physician in this case might attempt to justify his participation by saying that no real physical harm, but only temporary discomfort, could have resulted from the "stomach pumping" operation; and that he assumed his actions to be legally proper since the request for his assistance came from responsible law enforcement officers. On their own behalf the deputy sheriffs could say that the arrestee in this case was not just an ordinary citizen, suspected of an ordinary type of criminal offense, but rather a criminal guilty of one of the most despicable of all crimes—dope peddling. They might also say that they were not on an indiscriminate search for incriminating evidence, since they had good reason to suspect Rochin of possessing dope and even saw him swallow the receptacles customarily used for concealing such contraband. The officers could also add that they knew at the time of the stomach pumping operation that the California courts had gone on record as approving the use of incriminating evidence regardless of the manner in which it had been obtained. But these various considerations, however valid they may be, do not necessarily fur-

* Originally printed in 42 J. CRIM. L., CRIMINOLOGY & P.S. 128 (1952).

nish a negative answer to the question of whether the *Rochin* case stomach pumping episode represents a perversion of science. Back of all of this there is a rather abstract factor to consider—the instinctive public disapproval of overzealous investigative procedures of this sort, even when used against our most undesirable element. That feeling is reflected, as well as perpetuated, in court decisions from time to time. Let us take a look, therefore, at the outcome of the *Rochin* case, first in the California courts and then in the United States Supreme Court.

In California, as in about half of the states, evidence can be used in court even though it was obtained by illegal means. Adhering to its precedents to this effect, the California trial court in the *Rochin* case admitted the scientific evidence against the accused, and he was convicted. The California appellate courts sustained the trial court's decision, although not without dissents from some of the judges.¹ When the case reached the United States Supreme Court, however, the conviction was set aside. The decision of the Court was unanimous.²

Despite the California appellate court's affirmance of *Rochin's* conviction, the appellate judges were very critical of the investigative procedures employed. They accused the deputy sheriffs and the doctor of being guilty of "unlawfully assaulting, battering, torturing, and falsely imprisoning the defendant." The suggestion was made that *Rochin* sue them for damages and that the qualifications of the deputies and the doctor be reviewed by the appropriate authorities. One of the California Supreme Court judges was sufficiently incensed to state that he would request the California legislature to enact a law which would prohibit the use of *any* evidence obtained in violation of *any* law or constitutional privilege. In an extreme reaction of this sort we can see very clearly what a damaging effect the conduct of the officers and the doctor in the *Rochin* case has already had in California. Let us now survey the additional damage disclosed in the decision and in the written opinions of the United States Supreme Court justices.

Up until the *Rochin* case the United States Supreme Court had held that it did not have the power to dictate to the state

¹ 101 Cal. App. (2d) 140, 225 P. (2d) 1 (1950). The Supreme Court of California denied a review of the case, but Justices Carter and Schauer of that court dissented from the order denying a hearing and each wrote vigorous dissenting opinions. See 225 P. 2d 913 (1951).

² 342 U.S. 165 (1952).

courts what they should or should not do with regard to illegally seized evidence. The search and seizure doctrines of the state courts and their self-incrimination problems were considered beyond the scope of Federal review and control, because the provisions in the U. S. Constitution respecting these matters were viewed as restrictions upon the Federal government only and therefore applicable exclusively to federal officers and federal courts.³ Only when state officers and state courts did something which deprived a person of life, liberty, or property "without due process of law" would there be any interference by the United States Supreme Court; then it could intervene because the 14th amendment provision to that effect applied directly to the states. For instance, the use of a coerced confession has been considered a violation of due process which warrants a Supreme Court reversal of a state case in which such a confession is used as evidence.⁴ This, however, involves something basically dangerous, basically wrong—in fact and in principle. But the Supreme Court had held that the use by state courts of illegally seized evidence was not sufficiently dangerous or wrong as to be considered a violation of any basic right implicit in the meaning of "due process."⁵ And the same view has prevailed with regard to self-incrimination matters, so that a state could, if it wished, require accused persons to submit to a judicial interrogation or to testify in cases in which they are on trial.⁶

If the *Rochin* case had been handled by the Supreme Court in its traditional fashion, the chances are the California conviction would have remained undisturbed. But the excessively abusive conduct toward Rochin apparently impelled the Supreme Court to pervert some of its own legal doctrines and established principles in an effort to reverse the conviction and condemn the practices involved in that case. So what did the Court say? It said that the action against Rochin by the officers and their physician aid constituted *a violation of due process*—a completely new line of reasoning to justify what the Supreme

³ *Palko v. Connecticut*, 302 U.S. 319 (1937), and *Wolf v. Colorado*, 338 U.S. 25 (1949). See Allen F. A. *The Wolf Case: Search and Seizure, Federalism and The Civil Liberties*, 45 Ill. L. Rev. (1950).

⁴ *Brown v. Mississippi*, 297 U.S. 278 (1936); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Also see, upon the subject of confession admissibility generally: 40 J. Criminal L. & Criminology 211 (1949).

⁵ See note 3.

⁶ *Palko v. Connecticut*, supra note 3.

Court considered a desirable result. One of the judges was sufficiently disturbed to say that he considered the forcible taking of anything from within the body—a specimen of blood, for instance—as violative of a Federal right.

The decision in the *Rochin* case and the use of the “due process” clause to cover such a situation will serve as a stumbling block to the future efforts of fair minded investigators, forensic scientists, and prosecutors in cases in which incriminating evidence will be sought from accused persons in a reasonable manner and in well warranted situations.

It is too late to repair the damages done by the *Rochin* case, but it certainly can be used by law enforcement officers and by forensic scientists as a lesson for their future guidance.

Rather than endanger the utility of a scientific test or technique, it is better to limit its application to situations not involving an invasion of a person’s body against his will. However morally justified the officers or scientists may feel in a particular case involving an obviously guilty person, the adverse overall effect that may result from their conduct will endanger the future usefulness of the test or technique in instances where its application is very appropriate in point of law as well as morality. By way of illustration, then, it is advisable to avoid the extraction of urine, breath, or blood from an unwilling subject, even though, on the basis of currently existing state decisions, such a procedure is in fact legally permissible.⁷ Compulsory tests of this nature tend to discredit the scientific methods and evidence generally, even when the test specimens have been obtained from willing subjects.

Medical men and forensic scientists will do well to preserve the integrity of their professional standards and maintain their own self respect as men of science rather than comply with the requests of overzealous investigators to participate in such a venture as the stomach pumping procedure in the *Rochin* case. Then, too, the law enforcement officers themselves should be fully conscious of the public resentment toward the police profession and police methods generally which can result from even a well intentioned effort to secure evidence under these circumstances. Moreover, they should realize that reasonably intelligent and trained investigators can usually persuade an ac-

⁷ See Inbau, F. E., *Self-Incrimination: What Can An Accused Person be Compelled to Do?* (1950) 78-79.

cused person to consent to a test, even though it requires a relatively slight bodily invasion such as the extraction of a specimen of blood from the arm. In any event, if the accused person is unwilling to give up something from within his body it is better to forego the procurement of the desired evidence in this particular case rather than incur the unfavorable consequences of compulsory conduct. Different considerations are involved, of course, as regards the taking of fingerprints or the examining of the outside areas of an accused person's body. Compulsory investigative conduct will be tolerated in cases of that type both at law and in the public mind.⁸ As regards things or fluids within the body, however, compulsory conduct apparently will not be considered acceptable.

Now for another illustration of the perversion of science and the extensive wreckage which may follow in its wake. In this instance the wave of indignation was generated in the United States Senate.

On January 17, 1952, Senator Wayne Morse of Oregon arose in the Senate to report a case involving the use of the lie-detector technique in the testing of an applicant for a position of trust in the Defense Department. What he found in that case, and the impression he gained of the technique's use for such screening purposes, led him to state, at the conclusion of his address, that if the use of the technique as an employment testing procedure was not abandoned by federal agencies, he would introduce legislation to outlaw its use. As a matter of fact, Senator Morse's disclosures and complaint in this case caused the immediate abandonment of lie-detector applicant testing within the Defense Department.

Although Senator Morse expressed his general disapproval of the use of the lie-detector technique for federal employment applicant testing, there was one aspect of the test in this particular case which seemed to be especially objectionable to him.⁹ It is also the one feature of the case upon which this present discussion shall be centered. The lie-detector operator had used a so-called "personal embarrassing question" as a control question. According to Senator Morse, the operator, who was working for a private agency furnishing the service to the Defense Department on a contract basis, told the subject, toward the end

⁸ *Supra* note 7 at pp. 9-52.

⁹ 98(7) Congressional Record 261-265 (Jan. 17, 1952).

of the test: "Now I wish to ask you a very, very personal question," which was not actually asked since the purpose was considered served by the mere stimulating effect of the question itself.

This "personal embarrassing question" feature of the lie-detector technique as used by many examiners has not only served to engender public resentment toward the technique, but it actually is practically useless and scientifically unreliable for control testing purposes. Incidentally, Senator Morse would be shocked even more if this had been a case in which the operator had asked: "Have you ever gone down . . . on X Street?", which represents some examiners' conception of a control question.

If the "personal embarrassing question" (e.g. "Now I'm going to ask you a very personal question") were used merely to ascertain whether a subject is a "responsive" person (one who is capable of lie reactions) it might possess some merit. But many examiners use it for control purposes. In other words they evaluate the reaction or lack of response to a question pertaining to the larceny or other offense under investigation by the way in which it compares with the recording made during the asking of the "personal embarrassing" question. Except possibly in a sex offense case, the reaction or lack or [sic] reaction to this stimulus question is not only ordinarily insignificant for control purposes, but it can also prove to be very misleading to the examiner using it. The factors involved in the stimulating effect of a "personal embarrassing question" are totally different and unrelated to those pertaining to a question about the offense (larceny, etc.) under investigation. For control purpose the operator might just as well set off a fire cracker as to ask a "personal embarrassing question."

This practice of resorting to "personal embarrassing questions" ought to be discontinued. For testing a person's responsiveness and for control or guilt complex questions, there are other inoffensive and far more reliable methods.

Considering the ever increasing difficulties being encountered by criminal investigators and also by employers and governmental agencies concerned with security problems, we certainly need all the aids that science can offer. A continuance of the excesses and abuses of the type we have been discussing—in other words, the perversion of science—may ultimately result in a complete rejection of the very tests and techniques

most needed in the fight against crime and in our struggle for security safeguards in government and industry.

