results of the tests was incompetent even if the parties stipulated for its use. It is difficult to see how the lie detector can be regarded as so completely unreliable that the parties cannot voluntarily stipulate that the results of the test shall be admissible.[24]

[24] See State v. Lowry, 163 Kan. 622, 185 P.2d 147, 152 (1947).

SELF-INCRIMINATION OR SEARCH AND SEIZURE?

Three deputy sheriffs, suspecting Rochin of selling narcotics, forced their way into his bedroom without benefit of a search warrant. He immediately swallowed two capsules that were in the room despite the efforts of the officers forcibly to prevent it. He was taken to a hospital, where his stomach was "pumped" with emetics under the direction of the officers and the capsules recovered. In a prosecution for possessing narcotics, the capsules were admitted in evidence over Rochin's objection and a conviction obtained. The conviction survived review in the California appellate courts. The Supreme Court of the United States granted certiorari and held that the judgment be reversed. The Due Process Clause of the Fourteenth Amendment prohibits the utilization of such methods in the enforcement of state penal codes. The brutal methods used to obtain the evidence shock the conscience and offend a sense of justice. Such evidence may be likened to coerced confessions, which are inadmissable under the Due Process Clause even though independently established as true.

Justices Black and Douglas, in separate concurring opinions, reiterate their views that the Fifth Amendment, applied to the states through the Fourteenth, prevents the use of such tesimony.[1]

The extent to which the limitations on the federal government arising from the Fourth and Fifth Amendments also apply to the states has been a vexed one. The "series of recent cases" dealing with coerced confessions, referred to by Justice Frankfurter in the *Rochin* case, have marked out to a limited degree the applicability of Fifth Amendment principles.[2] A case decided in the same term as the *Rochin* case, *Gallegos v. Nebraska*,[3] raised the problem in a new form. It was alleged that Texas police officials had pressured from an alien in wrongful detainment a confession of murder com-

[1] Rochin v. California, 72 Sup. Ct. 205 (1952).

[2] Stroble v. California, 72 Sup. Ct. 599 (1952); Gallegos v. Nebraska, 72 Sup. Ct. 141 (1951); Watts v. Indiana, 338 U.S. 49 (1949); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1935).

[3] 72 Sup. Ct. 141 (1951).

mitted in Nebraska. A Nebraska conviction, based in part upon the confession, followed. While the majority of the Court found no violation of standards of decency and justice, Justice Jackson pointed out that the reason these confessions are excluded rests upon a dual ground. To the extent that such evidence is inherently unreliable, it is objectionable no matter by whom obtained, Texas or Nebraska. But insofar as the purpose of exclusion is to regulate police methods, it would not apply ". . . where a state of confession sought no conviction and the state of conviction did not seek the confession."[4]

In the *Gallegos* case Justice Jackson expressly disclaims resolving the question. In the *Rochin* case Justice Frankfurter seems to decide it by *dictum* at least. Writing for a six man majority, he says, "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."[5]

While the *Gallegos* case, involving a confession, would seem to be a Fifth rather than a Fourth Amendment problem, the *Rochin* case might well be characterized as a search and seizure question. The evidence was not in the form of extra-judicial verbal utterances, but was "real" evidence highly probative of the possession of narcotics.

The decision in the latter case would seem to cut down the possible scope of the recent decisions on the extent to which state courts may utilize evidence obtained by unlawful search and seizure. In *Wolf v. Colorado*[6] private records of a physician were discovered and seized by state officers acting without a warrant. The entire court agreed that the liberties afforded by the Fourth Amendment were implicit in the Fourteenth, but the majority denied that due process required the exclusion of the evidence. Even Justice Black, who conceives of due process as incorporating the first eight amendments of the Bill of Rights, agreed that the exclusionary rule is solely federal in its application.[7] The majority indicates that if a state were to "affirmatively sanction" such an

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4 *Id.* at 150 (concurring opinion).

5 72 Sup. Ct. 205, 210 (1952).

6 338 U.S. 25 (1949) (6-3 decision). Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950); Fraenkel, *Search and Seizure*, 33 IOWA L. REV. 472, 491 (1948); Comment, *Due Pocess and the Admissibility of Evidence*, 64 HARV. L. REV. 1304 (1951).

7 338 U.S. 25, 39-40 (1949) (concurring opinion). The statement in State *ex rel.* Kuble v. Bisignano, 238 Iowa 1060, 1066, 28 N.W.2d 504, 508 (1947), that ". . . the Fourth and Fifth Amendments to the Federal Constitution . . . do not apply in the state courts." is in accord when it is noted that the court deals specifically with the exclusionary rule.

invasion of rights, however, due process might be violated.[8] And in *Stefanelli v. Minard*,[9] decided in the same term as the *Rochin* case, the Court, with Douglas the lone dissenter, referred to the above views and said, "There was disagreement as to the legal consequences of this view, but none as to its validity. We adhere to it."

Though none of the three *Rochin* opinions seem to consider the case as a self-incrimination question, and none refer to *Wolf* or *Stefanelli*, it seems to impinge upon the search and seizure area. And the majority of the court has persistently treated the due process limitations as *sui generis*, disregarding the distinction between Fourth and Fifth Amendment problems when reviewing state criminal proceedings.[10] The emphasis seems rather to be placed upon the unlawful and sometimes brutal treatment of the accused's person and personal privacy, rather than upon any property rights he may possess.[11]

The concurring opinion of Justice Douglas in the *Rochin* case lists Iowa as one of the few states which would probably exclude the capsules if faced with the case.[12] He cites for this statement *State v. Height*[13] and *State v. Weltha*.[14] The validity of those two cases is the subject of much doubt in Iowa today, and *Rochin* seems certain to accentuate that doubt.

The Iowa Constitution contains a prohibition against unlawful search and seizure[15] in terms virtually identical with the wording of the Fourth Amendment to the United States Constitution. There is no express provision in the Iowa Constitution which prevents compelling incriminating testimony, though there are cases indicating that it may be considered implicit in the due process clause

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[8] 338 U.S. 25, 28 (1949). Reynard, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L.J. 259, 308 (1950). Two tavern operators in the City of Des Moines have recently been cited for contempt of court for evading and obstructing officers attempting to serve search warrants. Des Moines Register, Apr. 4, 1952, p. 1, col. 4; Des Moines Tribune, Feb. 20, 1952, p. 1, col. 3. In the unlikely event that Iowa should attempt to impose this penalty for evading a *void* warrant, it would appear to be an "affirmative sanction."

[9] 72 Sup. Ct. 118, 120 (1951).

[10] See, *e.g.*, Palko v. Connecticut, 302 U.S. 319, 322 *et seq.* (1937); Brown v. Mississippi, 297 U.S. 278, 285-286 (1936); Twining v. New Jersey, 211 U.S. 78 (1908) *passim*. But see the dissenting opinions in Adamson v. California, 322 U.S. 46, 68 *et seq.* (1947). In Wolf v. Colorado, 338 U.S. 25, 47-48 (1949), Justice Rutledge joined Justices Black, Douglas and Murphy, in separate opinion, in the position that the 14th Amendment incorporated the first eight. But the "judicial miracle" failed to occur, and only Black and Douglas of the present court would appear to entertain that view. Nor does Black think that the exclusionary rule is a part of the 4th Amendment; see his concurring opinion in Wolf v. Colorado, *supra* at 39-40.

[11] See Rochin v. California, 72 Sup. Ct. 205, 209 (1952); cases cited note 10 *supra*.

[12] 72 Sup. Ct. at 212.

[13] 117 Iowa 650, 91 N.W. 935 (1902).

[14] 228 Iowa 519, 292 N.W. 148 (1940).

[15] ARTICLE I, § 8.

of Article I, Section 9.[16] The *Height* case does support Justice Douglas' statement, but in the leading case of *State v. Tonn*[17] the majority held that I.W.W. literature seized without a warrant was admissible in a prosecution for criminal syndicalism. *Height* was distinguished on the score that it rested upon the privilege against self-incrimination.[18] The *Tonn* case was subsequently attacked and doubted, but it survived until *State v. Weltha*[19] in 1940, where the court held that a blood sample showing alcoholic content taken by a coroner from an adjoining county while the accused was in a state of shock on a hospital table and not under arrest was not admissible in a prosecution for manslaughter. The majority spoke critically of the *Tonn* case, and a concurring opinion would bluntly have overruled it. *State v Nelson*[20] again raised the question in 1941, and *Tonn* was emphatically reaffirmed as to liquor seized under a void warrant.

The *Weltha* case, involving an involuntary taking of blood, is the Iowa case most similar on its face to the *Rochin* case, and the court reached the same conclusion. It may well be doubted if the later cases overrule *Weltha* on its specific facts;[21] Iowa seems to be within the presently defined area in its holdings in the other search and seizure cases, the great bulk of which involve liquor violations.[22]

Whether there is any probability of future narrowing of the use of unlawfully obtained evidence in Iowa courts is pure guesswork. Seven of the present justices concurred in the last reported case applying the *Tonn* rule.[23] And if the narrowing is to come from without, the limitations of the *Rochin* case are apparently minor in scope, since in the same term *Wolf v. Colorado* was reaffirmed.[24]

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16 State v. Sentner, 230 Iowa 590, 298 N.W. 813 (1941); Duckworth v. District Court, 220 Iowa 1350, 264 N.W. 715 (1936); State v. Height, 117 Iowa 650, 91 N.W. 935 (1902). *But cf.* State v. Ferguson, 226 Iowa 361, 283 N.W. 917 (1939); Davison v. Guthrie, 186 Iowa 211, 172 N.W. 292 (1919). The last case may be a direct holding on the point but it seems to have been "lost", and has never been cited by the court. The effect of IOWA CODE §§ 14-16 (1950) has kept the question from becoming too important.

17 195 Iowa 94, 191 N.W. 530 (1923). The Iowa rule has been severely criticized. Comment, 30 IOWA L. REV. 456 (1945). It is clearly in accord with the majority view, however. Note, 35 MINN. L. REV. 457 (1951).

18 195 Iowa 94, 104, 191 N.W. 530, 534 (1923).

19 228 Iowa 519, 292 N.W. 148 (1940). Ladd and Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication*, 24 IOWA L. REV. 191, 215-230 (1939).

20 231 Iowa 177, 300 N.W. 685 (1941).

21 State v. Nelson, *supra* note 20; State *ex rel.* Kuble v. Bisignano, 238 Iowa 1060, 28 N.W.2d 504 (1947).

22 See, *e.g.*, State v. Bradley, 231 Iowa 1112, 3 N.W.2d 133 (1942); State v. Parenti, 200 Iowa 333, 202 N.W. 77 (1925). And see State v. Rowley, 216 Iowa 140, 248 N.W. 340 (1933) (abortion instruments).

23 State *ex rel.* Kuble v. Bisignano, 238 Iowa 1060, 28 N.W.2d 504 (1947). One of the justices who did not sit in that case, Justice Wennerstrum, wrote the vigorous affirmance of the Tonn rule in State v. Nelson, 231 Iowa 177, 300 N.W. 685 (1941).

24 *See* Stefanelli v. Minard, 72 Sup. Ct. 118, 120 (1951).

A lawyer who wants to raise the problem, hoping to come within the "affirmative sanction" caveat of the *Wolf* case, must exercise care in preserving the question. The practice required in the federal courts is the making of a timely pre-trial motion to suppress or recover the evidence.[25] That this would be wise, at least, in making an Iowa record is indicated by *State v. Gillam*,[26] holding that a motion to quash evidence not made until a second trial of the case, more than a year after the return of the indictment, was not timely; the delay had waived any right that might have existed.

A post-conviction method of obtaining federal review exists. After all state remedies are exhausted[27] the prisoner may apply to the federal district court in the district of confinement for a writ of habeas corpus on the ground that he has been deprived of his liberty in violation of the Fourteenth Amendment.[28] But this does not increase his rights; it is merely another procedure by which he may attack the state proceeding.[29]

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[25] Fed. R. Crim. P. 41(e).
[26] 230 Iowa 1287, 300 N.W. 567 (1941).
[27] 28 U.S.C. § 2254 (1948); Note, 34 MINN. L. REV. 653 (1950). A petition for certiorari is a state remedy which ordinarily must be exhausted. Darr v. Burford, 339 U.S. 200 (1950).
[28] 28 U.S.C. § 2241(c)(3) (1948); Note, 61 HARV. L. REV. 657 (1948).
[29] Note, 61 HARV. L. REV. 657, 667 (1948).

THE CONSENT STATUTE: DRIVER'S DECLARATIONS AND OWNER'S LIABILITY

> "In all cases where damage is done by any car by reason of negligence of the driver, and driven with the consent of the owner, the owner of the car shall be liable for such damage."[1]

Liability of the owner under this statute depends upon (1) liability for negligence on the part of the driver and (2) the consent of the owner to the use of the car.[2]

A problem has appeared in the case where evidence of negligence of the driver consists of admissions and declarations of the driver as to his conduct or condition, made at or after the time of the accident.[3] For example: plaintiff collides with an automobile then being operated by a driver who has the owner's consent. Immediately upon alighting from the car the driver says, "I know I was driving fast.[4] I lost my head and stepped on the accelerator instead of the brakes."[5]

In an action by the plaintiff against the driver alone, plaintiff may introduce in evidence these statements to prove the driver's negligence because they fall within the admission-of-a-party-opponent exception to the hearsay rule.[6]

In an action by plaintiff against the owner alone, the plaintiff must prove negligence of the driver as a part of his cause of action. These same statements of the driver would not then be admissions of a party opponent; to be admissible at all they must fall within some other exception. The one most frequently employed is called spontaneous or excited utterances, or, as it is generally described by the Iowa Court, res gestae.[7] This distinction depends upon the proposition that an admission of a party opponent is available only as against that party,[8] while the area generally described as res gestae depends not upon the status of the declarant but upon his condition at the time the statements were made.[9]

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[1] IOWA CODE § 321.493 (1950).

[2] Robinson v. Bruce Rent-A-Ford Co., 205 Iowa 261, 215 N.W. 724 (1927); Note, 61 A.L.R. 866 (1929).

[3] Skalla v. Daeges, 234 Iowa 1260, 15 N.W.2d 638 (1944); Broderick v. Barry, 212 Iowa 672, 237 N.W. 481, 75 A.L.R. 1530 (1931); Duncan v. Rhomberg, 212 Iowa 389, 236 N.W. 638 (1931); Ege v. Born, 212 Iowa 1138, 236 N.W. 75 (1931); Wieneke v. Steinke, 211 Iowa 477, 233 N.W. 535 (1930); Looney v. Parker, 210 Iowa 85, 230 N.W. 570 (1930); Cooley v. Killingsworth, 209 Iowa 646, 228 N.W. 88 (1930); Wilkinson v. Queal Lumber Co., 208 Iowa 933, 226 N.W. 43 (1929).

[4] See Duncan v. Rhomberg, 212 Iowa 389, 236 N.W. 638 (1931).

[5] See Looney v. Parker, 210 Iowa 85, 230 N.W. 570 (1930).

[6] *E.g.*, Tuthill v. Alden, 239 Iowa 181, 30 N.W.2d 726 (1948).

[7] *E.g.*, Skalla v. Daeges, 234 Iowa 1260, 15 N.W.2d 638 (1944); Duncan v. Rhomberg, 212 Iowa 389, 236 N.W. 638 (1931).

[8] 4 WIGMORE, EVIDENCE § 1076 (3d ed. 1940).

[9] 3 JONES, EVIDENCE § 1196 (2d ed. 1926).