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FEDERAL CONSTITUTIONAL LIMITATIONS ON THE USE OF COERCED CONFESSIONS IN THE STATE COURTS

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The admission in state courts of confessions coerced by physical torture is clearly condemned by the United States Supreme Court as violative of the due process clause of the fourteenth amendment to the Federal Constitution.[1] This is so well established in the law that when the court finds that a confession was extorted by such means, it is automatically voided, and the conviction reversed.[2] As the Court said in *Brown v. Mississippi:* "That complaint is not of the commission of mere error, but of a wrong so fundamental, that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."[3] There is, today, no litigable issue here.

The controversies of the past years have centered around confessions which were coerced by psychological means.[4] Since the 1940 case of *Chambers v. Florida*, this form of coercion has likewise been outlawed.[5]

Unhappily, just what constitutes psychological coercion is not clear,[6] as an analysis of the decisions will show.[7] Throughout the years, numerous

[1] Brown v. Mississippi, 297 U.S. 278,286 (1936). The due process clause requires "that state action shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." The use of a coerced confession deprives the accused of life and liberty without application of the fundamental principles of justice intended in due process of law.

[2] Stein v. New York, 346 U.S. 156, 182 (1952); Haley v. Ohio, 324 U.S. 596 (1948).

[3] See note 1, *supra.*

[4] Note, 37 B. U. L. Rev. 374, 375 (1957); Note, 8 W. Res. L. Rev. 538,539 (1957).

[5] 309 U.S. 227 (1940).

[6] Note, 37 B. U. L. Rev. 374, 375 (1957).

[7] Chambers v. Florida, 309 U.S. 227 (1940), was the first state psychological confession case to reach the Supreme Court. Chambers, an uneducated Negro, confessed after being held incommunicado for eight days and subjected to sustained questioning for a period of five days and one night. Reversed. This was followed by a series of *per curiam* reversals, which all cited *Chambers*: Canty v. Alabama, 309 U.S. 629 (1940); Lomax v. Texas, 313 U.S. 544 (1941); Vernon v. Alabama, 313 U.S. 547 (1941).

White v. Texas, 309 U.S. 631 (1940), was a case that had elements of both psychological and physical coercion. White, an illiterate farmhand was held incommunicado for six days and periodically taken out in deep woods by Texas Rangers for "questioning." Reversed.

Lisenba v. California, 314 U.S. 219 (1941), was the first case to reach the Court wherein the conviction was affirmed. The accused, an intelligent business man, was questioned intermittently for several days. One slap was established. He was held for three days without arraignment.

Ashcraft v. Tennessee, 322 U.S. 143 (1943), introduced the concept of "inherent coercion" based on sustained relay questioning. The accused, a citizen of good reputation, was held incommunicado for thirty-six hours and continuously questioned by relays of

guides for use in making this determination have been advocated by various Justices of the Supreme Court. Justice Douglas has long felt that any confession obtained following a period of illegal detention should be outlawed,[8] because "the practice of obtaining confessions prior to arraignment breeds the third-degree and the inquisition."[9] A majority of the Court has consistently refused to adopt this rule, saying that illegal detention is relevant only as bearing on the accused's claim that he was coerced into confessing.[10]

Justice Black has said that a confession obtained after an accused was subjected to thirty-six hours of questioning by continuous relay teams of police officers was "inherently coercive," and therefore void.[11]

Justices Black and Douglas, in the above instances, spoke out for a strictly *objective* type of test, as neither made any mention of the effect of these practices upon the particular defendant involved. Thus, it was not the veracity of the confessions that was felt to violate due process, but the practices employed in obtaining them,[12]

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police officers. He had no sleep or rest, and a spotlight was held on him constantly. Reversed.

Lyons v. Oklahoma, 322 U.S. 596 (1944), was the first of several "consecutive confession" cases. A first confession was admittedly coerced after eight hours of continuous questioning, which included a display of the victim's bones. Lyons confessed again twelve hours later in the District Attorney's office. The latter confession was admitted in evidence. Affirmed. The opposite result was reached in Malinski v. New York, 324 U.S. 401 (1945). The accused was held incommunicado for four days. During the first day he was stripped and left naked for three hours, then given a blanket for nine hours. At this point, he confessed. After three more days of intermittent questioning, he confessed again, and this confession was admitted in evidence. Gallegos v. Nebraska, 342 U.S. 55 (1951), was a third case of this type. Gallegos, an illiterate Mexican who could neither speak nor write English, was held twenty-five days without arraignment, and twenty-seven days without a lawyer. He confessed the first time after four days of intermittent questioning, no session lasting over two hours. After the twenty-five days, he was taken before a court for the first time, and confessed again. Affirmed. See also: Leyra v. Denno, 347 U.S. 556 (1954). Stroble v. California, 343 U.S. 181 (1952), also involved consecutive confessions, but here the first one was voluntary, and the second one was coerced. The first confession was admitted in evidence. Affirmed.

Haley v. Ohio, 332 U.S. 596 (1948), introduced a series of cases that applied the "inherent coercion" doctrine of *Ashcraft*. The accused, a fifteen year old boy, was subjected to all night relay questioning, plus confrontation with alleged confessions of cohorts. Reversed. See also: Watts v. Indiana, 338 U.S. 49 (1949), (The accused was held incommunicado six days, much of the time in solitary confinement. He was continuously interrogated during this period by teams of officers until well past midnight. Reversed.); Turner v. Pennsylvania, 338 U.S. 62 (1949), (Accused subjected to five days and nights of relay questioning while held incommunicado. Reversed.); Harris v. South Carolina, 338 U.S. 68 (1949), (Harris, an illiterate Negro, confessed after threats to arrest his mother plus relay questioning for five days and nights. Reversed.).

Stein v. New York, 346 U.S. 156 (1952), introduced a departure from the "inherent coercion" test of *Ashcraft*. The Court looked not only at the coercive practices alleged, but also weighed these against the power of the accused to resist. The accused confessed after two days of questioning and after hearing of the confession of a cohort. More significantly, he bargained for a "deal" before he confessed. Affirmed. This approach has been followed in the subsequent case of: Fikes v. Alabama, 352 U.S. 191 (1957), (Illiterate defendant was held incommunicado in a state prison far from home and questioned intermittently for five days. He finally confessed in response to leading questions. Reversed.); Payne v. Arkansas, 356 U.S. 560 (1958), (The accused, an illiterate, nineteen year old Negro, was held incommunicado for three days with little food. He confessed after subtle threats by the Chief of Police. Reversed.); Thomas v. Arizona, 356 U.S. 390 (1958), (The accused, of normal intelligence, confessed in a court of law twenty hours after threats of lynching. Affirmed—coercive effect had worn off).

The three most recent cases have all centered around the absence of a lawyer for the accused during the period of interrogation. In the first, Crooker v. California, 357 U.S. 433 (1958), the accused had attended a year of law school. He confessed after fourteen hours during which his repeated requests for a lawyer were denied. Affirmed. Cicenia v. La Gay, 357 U.S. 504 (1958), involved an accused who had retained a lawyer, but claimed coercion since he was unable to confer with him immediately before confessing. Affirmed. Cicenia and Crooker were both murder suspects. In the case of Spano v. New York, 27 U.S. L. WEEK 4483 (U.S. June 23, 1959), the accused was an ignorant twenty-five year old Italian immigrant. He confessed to murder after an all night session of sustained questioning following his indictment for the crime. His repeated requests for a lawyer were ignored. The majority reversed on the ground that the confession was coerced, four justices concurred in the reversal on the ground of denial of legal counsel after indictment.

[8] See Justice Douglas' concurring opinion in Haley v. Ohio, 332 U.S. 596 (1948); and his opinions in Crooker v. California, 357 U.S. 433 (1958); Stroble v. California, 343 U.S. 181, 203 (1952); Harris v. South Carolina, 338 U.S. 68, 71 (1949); Turner v. Pennsylvania, 338 U.S. 62, 66 (1949); Watts v. Indiana, 338 U.S. 49, 56 (1949).

[9] Stroble v. California, 343 U.S. 181, 203 (1952).

[10] Stein v. New York, 346 U.S. 156, 187 (1952); Stroble v. California, 343 U.S. 181, 197 (1952), citing Lisenba v. California, 314 U.S. 219, 234, 235, 240 (1941); Gallegos v. Nebraska, 342 U.S. 55, 59, 65 (1951); Lyons v. Oklahoma, 322 U.S. 596, 597, n.2 (1943).

[11] Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944): "We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."

[12] Watts v. Indiana, 338 U.S. 49, 55 (1949): "In holding that the Due Process Clause bars police pro-

i.e., a censure of the police by the Court.[13] The objective test, then, as used in this comment, means that any evidence of coercive practices used in obtaining a confession will suffice to void the conviction—with no consideration of the effect of such practices upon the individual involved.

The views of Justice Jackson represent the opposite extreme, a *subjective* test: "The limits in any case depend upon a weighing of the circumstances of pressure against the power of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[14]

Justice Jackson, then, did not condemn police practices, *per se*, but only when they combined to overcome the power of a particular accused to resist. He contended that the fourteenth amendment does not enact a rigid exclusionary rule for confessions based on compulsive practices. Rather, in his view, it guarantees against a conviction based on untrustworthy evidence.[15] This represents a very close approach to the state court tests of simple trustworthiness—true or false. If the outside evidence shows that the confession is true, it is admitted.[16]

Which of these views, objective or subjective-trustworthiness, represents the law of confessions today?

The first case in which the Court considered the problem was *Chambers v. Florida*,[17] where a confession was obtained after sustained questioning of the accused for a period of five days, including one all-night session. Justice Black, writing for a unanimous Court, held that "the undisputed facts showed that compulsion was applied."[18] It is not clear from the opinion whether Justice Black was using an objective or subjective test. As is indicated above, he ostensibly based his decision on the sole fact that there was evidence of compulsion having been applied. This is clearly an objective approach. Yet he was also well aware of the fact that the accused was an "ignorant Negro."[19] What leads to the conclusion that the objective approach was dominant in Justice Black's mind was the fact that he vigorously condemned the inquisitorial procedure followed, but said nothing of the effect of this on the veracity of the confession.[20]

The Court reversed several more convictions in the next year, in *per curiam* opinions which relied upon *Chambers*.[21] Then the case of *Lisenba* v. *California* came before the Court.[22] In this case, the accused was an intelligent, white business man, and the Court affirmed the conviction in an opinion written by Justice Roberts. Justices Black and Douglas dissented. The facts here were similar to those in *Chambers* in that the accused was subjected to sustained questioning for some forty-two hours and was held incommunicado for three days before arraignment. There is little doubt that this would have resulted in a reversal had a strict objective test been applied. Thus, it would appear that in concurring with Justice Black in the *Chambers* case, most of the members of the Court placed more emphasis than Justice Black on the fact that an ignorant Negro was there involved. Since the only distinguishing feature between *Lisenba* and *Chambers* was the race and intelligence of the accused, the majority of the Court in *Lisenba* clearly used a subjective test—applying the coercive facts alleged to the accused himself.[23] By dissenting, Justices Black and Douglas clearly showed they were in favor of a strictly objective test.

The next case decided by the Court, *Ward* v.

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cedure which violates the basic notions of our accusitorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken." Also see Justice Roberts opinion in Lisenba v. California, 314 U.S. 219, 236 (1941): "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."

[13] Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U. L. REV. 77 (1957).

[14] Stein v. New York, 346 U.S. 156, 185 (1952).

[15] *Id.* at 192, 193.

[16] Note, 18 U. PITT. L. REV. 823 (1957); Note, 8 W. RES. L. REV. 538 (1957).

[17] 309 U.S. 227 (1940).

[18] Chambers v. Florida, 309 U.S. 227, 239 (1940).

[19] *Id.* at 238. Justice Black continually referred to the accused as young, poor, ignorant, terrified, and the like. Yet, he concluded that the circumstances were calculated to "break the strongest nerves or the stoutest resistance."

[20] See, *supra*, note 18.

[21] Ward v. Texas, 316 U.S. 547 (1942); Vernon v. Alabama, 313 U.S. 541 (1941); Lomax v. Texas, 313 U.S. 544 (1941); White v. Texas, 309 U.S. 631 (1940); Canty v. Alabama, 309 U.S. 629 (1940).

[22] 314 U.S. 219 (1941).

[23] *Id.* at 240: "The petitioner has said that the interrogation would never have drawn an admission from him had his confederate not made a statement;" at 241: "exhibited a self possession, a coolness, and an acumen . . ." Such considerations would have been immaterial had a strict objective test been followed.

Texas, again involved an ignorant Negro and further pointed out the increasing tendency of the Court to consider the nature of the defendant.[24] In this case, the accused was threatened and questioned in three different jails on three different days, far from his home. Writing for a unanimous Court, Justice Byrnes, in reviewing the cases, concluded that confessions had been set aside that were "extorted from *ignorant persons* who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient for reversal." (Emphasis added)[25] By referring to *ignorant persons*, a line was clearly drawn between *Lisenba* and the balance of the cases. Where an ignorant defendant was involved, the Court felt that any one of the above enumerated practices would require a reversal. If the defendant happens to be reasonably intelligent then the Court, on the strength of *Lisenba*, would balance the compulsion applied against the individual involved.

But then, in the famous case of *Ashcraft v. Tennessee*,[26] Justice Black again wrote the majority opinion, and made it clear that he had never waivered from his position of a strictly objective test, regardless of the individual involved or his intelligence. The accused, a white man of good reputation in the community, confessed to murder after thirty-six hours of continuous questioning by teams of interrogators. Considering this fact alone, Justice Black, speaking for the Court, held that the practices used to obtain the confession were "inherently coercive" and reversed the conviction.[27]

This "inherently coercive" doctrine was the objective test in full flower—the first case where it was clearly applied. Oddly enough, this case also saw the birth of the subjective test as we know it today. Up to this point, with the exception of a brief flame in *Lisenba*, it had been developed only by implication—from the continued emphasis of the Court on the race and intelligence of the defendant. But here, Justice Jackson, in a strong dissent in which Justices Roberts and Frankfurter joined, urged the Court to apply the facts to the individual in order "to determine whether the confessor was in possession of his own will and self-control at the time of confession."[28] In this opinion, Justice Jackson keynoted the position he was to take for the rest of his time on the bench.[29]

Up to this point, *Ashcraft* was the only case where it can be unquestionably said that the objective test was applied, since an intelligent white man of good reputation was involved. It will be recalled that while Justice Black wrote for a unanimous Court in *Chambers*, it subsequently developed that all the Justices, except for himself and Justice Douglas, made it apparent that they gave no small weight to the fact that ignorant Negroes were there involved. The *Ashcraft* case is doubly significant, then, both for its holding, based on a clearly objective test, and its dissent, calling for the subjective test.

The *Ashcraft* case left the states in a considerable dilemma.[30] As Justice Jackson pointed out in his dissent: "If thirty-six hours [of continuous interrogation] is more than is permissible, what about 24? or 12? or 6? or 1? All are 'inherently coercive.' "[31] In short, there is no doubt that many cases where there are no clues would remain unsolved if there was no interrogation—and sustained interrogation at that.[32] The *Ashcraft* case left the police with absolutely no idea of how much interrogation of the accused was permissible prior to the trial. As Justice Jackson himself asked, at what point does interrogation become "inherently coercive"? A retreat was clearly necessary to give the courts a rule that was more practical and easily administered.[33]

Yet, rather than retreat, the Court further confused the issue in an era marked by several inconclusive opinions.[34] The most significant feature

[24] 316 U.S. 547 (1942).
[25] *Id.* at 555.
[26] 322 U.S. 143 (1943).
[27] *Id.* at 154.
[28] *Id.* at 162.
[29] See Justice Jackson's opinions in Watts v. Indiana, 338 U.S. 49, 59 (1949); and Stein v. New York, 346 U.S. 156 (1952).
[30] Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 444 (1948).
[31] Ashcraft v. Tennessee, 322 U.S. 143, 162 (1943).
[32] Inbau, *supra*, note 30, at 448.
[33] *Id.* at 463.
[34] Haley v. Ohio, 332 U.S. 596 (1948) (All night relay questioning of a fifteen year old boy plus confrontation with the alleged confessions of cohorts. Reversed). This case was followed, in the next year, by three cases decided the same day, and all resulting in reversals. The opinions were written by Justice Frankfurter. Watts v. Indiana, 338 U.S. 49 (1949) (The accused was held incommunicado six days, much of the time in solitary confinement. During this time he was continuously interrogated by teams of officers until well past midnight.); Turner v. Pennsylvania, 338 U.S. 62 (1949)

of this group of cases was the marked shift by Justice Frankfurter. It will be recalled he joined with Justice Jackson in dissenting from the objective test of *Ashcraft*. However, he wrote the opinion in three of the four cases referred to above, wherein the convictions were reversed. In each, the key element of compulsion was 5 or more days of relay questioning,[35] though each accused was a Negro, as opposed to white as in *Ashcraft*. Justice Frankfurter did an about face and spoke in terms of the "inherent compulsion" of *Ashcraft*: "A confession by which life becomes forfeit must be the product of free choice. . . . But if it is the product of sustained pressure from the police, it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental torture. . . . The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right."[36] Thus Justice Frankfurter seemed to reverse completely his former opinion, saying nothing with respect to the actual effect of the questioning upon the defendants. He thus placed his stamp of approval on the *Ashcraft* doctrine.

Accordingly, the dilemma of *Ashcraft* not only remained, it was reinforced. And still another problem came up during this period—the problem of consecutive confessions. The states began the practice of extracting confessions by admittedly coercive means, getting the accused to repeat the confession at a later time, and then admitting only the second confession into evidence.[37] The Court dealt with this problem on the basis of "the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances."[38]

In *Lyons v. Oklahoma*, the second confession occurred twelve hours after the first, and in a new locale, the accused having been taken from the coercive atmosphere of the jail to the District Attorney's office.[39] The Court held that the coercive influence of the first confession had worn off, and that the subsequent confession was voluntary.

In two later cases, *Malinski v. New York*,[40] and *Leyra v. Denno*,[41] the Court reversed convictions based on essentially the same facts. The basis of distinction was that in the latter cases, the defendants had been retained in the jail after the first confession and questioned for several more days before they again confessed. Those were cases where the Court said the coercive effect of the first confession continued up to the time of the second one. This is a much easier position to understand because as Justice Rutledge pointed out in his opinion in the *Malinski* case, everything the accused does after he confesses the first time is colored by that confession.[42] If he reaffirms it, it is with the idea that they have the first one anyway, and if he denies it, he knows that the state can use the first one to impeach him.

Therefore, it is extremely difficult to really determine when the coercive effect of the first confession wears off—beyond a bald guess. Yet, policy-wise, it would not do to invalidate a confession for no other reason than that a prior one was coerced. The best way out of this problem seems to be to adopt the suggestion of Justice Murphy that, if the first confession was coerced, "Subsequent confessions should automatically be invalidated unless there is proof beyond all reasonable doubt that such an atmosphere has been dispelled and the accused has completely regained his free individual will.[43]

Thus, the seven year period between 1945 and 1952 saw the states confronted with the *Ashcraft*

(The accused was subjected to five days and nights of relay questioning while being held incommunicado.); Harris v. South Carolina, 338 U.S. 68 (1949) (An illiterate Negro was subjected to questioning for five days and nights, and threatened with arrest of his mother.) Only the *Haley* case had an opinion in which four Justices concurred. In the other three only Justices Rutledge and Murphy joined with Justice Frankfurter.

The convictions were affirmed in both Gallegos v. Nebraska, 342 U.S. 55 (1951) and Stroble v. California, 343 U.S. 181 (1952), but it is difficult to say just what test was applied. In *Stroble*, the accused confessed just four hours after apprehension, and in *Gallegos*, he confessed before he was even told why he had been apprehended. Upon these facts, the convictions could be affirmed under either the objective or subjective tests, but in Comment, 32 TEX. L. R. 429, 434-436 (1954), the author thought that these two cases ushered in the subjective test.

[35] Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949).

[36] Watts v. Indiana, 338 U.S. 49, 53-54 (1949).

[37] Leyra v. Denno, 347 U.S. 556 (1954); Malinski v. New York, 324 U.S. 401 (1945); Lyons v. Oklahoma, 322 U.S. 596 (1944).

[38] Lyons v. Oklahoma, 322 U.S. 596, 602 (1944).

[39] 322 U.S. 596 (1944).

[40] 324 U.S. 401 (1945).

[41] 347 U.S. 556 (1954).

[42] Malinski v. New York, 324 U.S. 401, 428 (1945).

[43] *Id.* at 433.

dilemma, and a series of opinions which did nothing to resolve it.

The first case in which the majority of the Court, speaking through Justice Jackson, faced the issue squarely was *Stein v. New York*, which ushered in the subjective test for which Justice Jackson had been crusading.[44]

This case involved the confessions of two defendants accused of felony murder. The confessions were obtained after twelve hours of intermittent questioning over a thirty-two hour period of incommunicado detention. These men were hardened criminals, each with a lengthy police record.[45] One, Cooper, confessed only after bargaining with the District Attorney, who agreed not to apprehend Cooper's brother, a parole violator.

The twelve hours of questioning was thought by Justice Frankfurter, dissenting, to bring the case within the *Ashcraft* doctrine: "not the candor of a guilty conscience, the need of an accused to unburden himself, but the means of release from the tightening of the psychological police screws."[46]

Justice Frankfurter thus went fully about from his position in *Ashcraft*, where he dissented with Justice Jackson, aligning himself with Justices Douglas and Black, who, since Chambers,[47] had never waivered in their belief in the objective test.

Justice Jackson, writing for the majority, while not referring to, or overruling *Ashcraft*, certainly modified it. He first admitted that: "a process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish extraction of an involuntary confession."[48] Having thus acknowledged *Ashcraft*, he then pointed out the need for interrogation: "Interrogation is *not inherently coercive*, as is physical violence. Interrogation does have social value in solving a crime, as physical force does not.... Indeed, interrogation of those who know something about the facts is the chief means to solution of crime." (emphasis added)[49] Since this case dealt with hardened criminals who were not really subjected to sustained relay questioning of the nature of *Ashcraft*, this is dictum rather than holding, but it clearly indicates a retreat from the "inherently coercive" doctrine of *Ashcraft*.

Justice Jackson then proceeded to re-evaluate the importance of sustained questioning as an element of coercion. Rather than requiring an automatic reversal as in *Ashcraft*, "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing"[50]

Another way of looking at the test as expressed in *Stein* is to inquire as to when a confession is voluntary, rather than when is it coerced. And, as Justice Jackson said, confessions are considered voluntary whenever the confessors apparently were "convinced that their dance was over and the time had come to pay the fiddler."[51] No confession can ever be more voluntary than that, unless you want to compare a voluntary confession to a confession made to a priest or lawyer.[52]

In adopting the subjective test, Justice Jackson advanced an entirely new philosophy for the exclusion of coerced confessions. He stated that the fourteenth amendment does not enact a rigid exclusionary rule for confessions based on compulsive practices—rather it guarantees against a conviction based on untrustworthy evidence.[53] Justice Jackson recognized the need for interrogation by police, but condemned coercion which led to a confession against the will of the individual and which was so strong as to make the confession presumptively untrue.[54]

This is the opposite of the rationale of the objective test, as Justice Douglas recalls in his dissent,[55] where he claimed that the Court is not concerned with the innocence of the accused, but rather with whether his constitutional rights have been protected.[56]

Yet, the test of *Stein* can, by no means, be equated with the strict subjective-trustworthiness

[44] 346 U.S. 156 (1952). See Justice Jackson's dissent in Ashcraft v. Tennessee, 322 U.S. 143, 162 (1943). Also see his opinion in Watts v. Indiana, 338 U.S. 49, 57 (1949), wherein he affirms the Watts decision and dissents from the holdings of Turner v. Pennsylvania, 338 U.S. 62 (1949) and Harris v. South Carolina, 338 U.S. 68 (1949).

[45] Stein v. New York, 346 U.S. 156, 176 (1952).

[46] *Id.* at 200.

[47] See, *supra*, note 8.

[48] Stein v. New York, 346 U.S. 156, 184 (1952).

[49] *Ibid.*

[50] *Id.* at 185.

[51] *Id.* at 186.

[52] *Ibid.*

[53] *Id.* at 192, 193.

[54] *Id.* Justice Jackson at 192: "Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence."

[55] *Id.* at 203, Justice Douglas' dissent.

[56] See, *supra*, note 12.

test of the states.[57] Rather than looking at the facts involved and then deciding if the amount of compulsion indicated the confession was probably untrue, the Court looks at the facts and determines if the accused was coerced into confessing against his will—thus the only real difference between Justices Jackson and Douglas is that Justice Douglas will just look at the facts to see if there was coercion, whereas Justice Jackson will look at the facts and apply them to the individual.

There is an even more significant difference between a simple truthfulness test and the subjective test. If truthfulness were the sole criterion, it would follow that the Supreme Court would automatically affirm a conviction if the available evidence aside from the confession supported it—a thing they do not do.[58]

Following *Stein*, then, there were three different tests—the objective test of *Ashcraft*, the subjective-truthfulness test of the states, and now, the *Stein* test; applying the amount of coercion alleged to the individual.

From this point onward, the *Stein* test has held sway. It was soon afterwards applied in *Fikes* v. *Alabama*, wherein a murder conviction was reversed by the Court.[59] Quoting the test as it first appeared in *Stein*, the Court contrasted the hardened criminals of that case with Fikes, an ignorant Negro, and concluded that his power to resist was definitely overcome by the coercive pressures applied.[60] Fikes was held incommunicado in a state prison far from his home, and confessed after being questioned intermittently for five days.

Justice Frankfurter wrote a concurring opinion in which he remarked that the totality of circumstances brought the result below "the Plimisoll line of 'due process.' "[61] Though the *Stein* test was clearly applied,[62] Justice Frankfurter, by writing a separate opinion indicated that he, at least, had not abandoned the objective test.

The *Stein* test was also applied in *Thomas v. Arizona*,[63] where the conviction was affirmed, and in *Payne v. Arkansas*,[64] which resulted in a reversal. *Payne* involved an illiterate nineteen year old Negro who was held incommunicado for three days with little food and was subjected to subtle threats by the chief of police. The Court talked of "the totality of this course of conduct", and commented that it did not constitute "an expression of free choice."[65] Thomas was a man of normal intelligence who confessed in a court of law twenty hours after a lynching threat. The Court felt that the coercive effect of this threat had worn off.[66]

Crooker v. California[67] and *Cicenia v. La Gay*[68] were both cases where the defendants claimed coercion solely on the grounds that they did not get to see a lawyer before they confessed. The Court affirmed both convictions because Crooker had had a year of law school and therefore knew his rights and Cicenia had hired a lawyer and spoken to him prior to his confession. No coercion of these two men was found from the fact that no lawyer

[57] Note, 18 U. PITT. L. REV. 823 (1953); Note, 8 W. RES. L. REV. 538 (1957).

[58] If the Court finds, from the undisputed facts, that the confession was coerced, they reverse: Thomas v. Arizona, 356 U.S. 390, 397 (1958); Haley v. Ohio, 332 U.S. 596, 598 (1948); Malinski v. New York, 324 U.S. 401, 404 (1945); Lyons v. Oklahoma, 322 U.S. 596, 601 (1944); Ashcraft v. Tennessee, 322 U.S. 143, 147, 148 (1943); Gallegos v. Nebraska, 342 U.S. 55, 61 (1951); Ward v. Texas, 316 U.S. 547, 550 (1942); Lisenba v. California, 314 U.S. 219, 237 (1941); Chambers v. Florida, 309 U.S. 227, 228 (1940).

When testimony in the lower court as to coercion is conflicting, the Court accepts the findings of the triers of fact: Watts v. Indiana, 338 U.S. 49 (1949); Ward v. Texas, 316 U.S. 547, 552 (1942); Lisenba v. California, 314 U.S. 219, 238 (1941).

This is true regardless of the amount of outside evidence available to sustain the conviction: Stroble v. California, 343 U.S. 181, 190 (1952); Gallegos v. Nebraska, 342 U.S. 55, 63 (1951); Haley v. Ohio, 332 U.S. 596, 599 (1948); Malinski v. New York, 324 U.S. 401, 404, 410 (1945); Lyons v. Oklahoma, 322 U.S. 596, 597 (1944); Ashcraft v. Tennessee, 327 U.S. 274, 279 n.1 (1943); Ward v. Texas, 316 U.S. 547, 549 (1942).

In Stein v. New York, 346 U.S. 156, 192 (1952), Justice Jackson tried to modify this rule by stating that when the issue of coercion was initially given to the jury, and they voted for conviction after finding the confession coerced, then the Supreme Court would affirm on the outside evidence. This is dicta, as the confession was held voluntary in *Stein*, and, further, it was later rejected in Payne v. Arkansas, 356 U.S. 560 (1958).

[59] 352 U.S. 191 (1957).

[60] It is interesting to note that Justice Warren, while quoting Justice Jackson's *Stein* test with approval in Fikes v. Alabama, 352 U.S. 191, 197 (1957), says that this is the same test that was applied in *Watts*. It is submitted that this is error, as *Watts* followed the objective test of *Ashcraft*. In *Watts*, Justice Frankfurter said if a confession is "the product of sustained pressure from the police, it does not issue from a free choice." Watts v. Indiana, 338 U.S. 49, 54 (1949). This is clearly the "inherently coercive" language of *Ashcraft*.

[61] Fikes v. Alabama, 352 U.S. 191, 199 (1957).

[62] *Id.* at 193. Chief Justice Warren: "It is, of course, highly material to the question before this Court to ascertain petitioner's character and background."

[63] 356 U.S. 390 (1958).

[64] 356 U.S. 560 (1958).

[65] *Id.* at 567.

[66] 322 U.S. 596 (1944); Malinski v. New York, 324 U.S. 401 (1945). Also see: Lyons v. Oklahoma, 322 U.S. 596 (1944).

[67] 357 U.S. 433 (1958).

[68] 357 U.S. 504 (1958).

was present. Though they did have a legal right to counsel at pre-trial proceedings,[69] at the time of these investigations the accused were merely suspects and had not been indicted.

In the most recent case to reach the Supreme Court, *Spano* v. *New York*,[70] Chief Justice Warren clearly continued the subjective test of *Stein*. This case involved a twenty-five year old Italian immigrant who had had only one half year of high school and also had a record of emotional instability. He was indicted for murder and subsequently surrendered. He was then subjected to an all-night questioning session in which fifteen interrogators participated. He finally "confessed" after one of these men, a life long friend, made an impassioned plea. The friend claimed that he and his family would be in serious trouble and that his position as a rookie policeman would be jeopardized if the accused did not confess. The accused made repeated requests during the night to see his lawyer. They were denied.

After a discussion of the above facts, Chief Justice Warren concluded that: "Petitioner's will was overborn by official pressure, fatigue and sympathy falsely aroused, after considering all the facts in their post indictment setting."[71]

This case is clearly distinguishable from both *Crooker* and *Cicenia* in that not only was the accused much more untutored, but also he was subjected to a great deal more pressure. Further, both Crooker and Cicenia were only suspects at the time of their interrogations. Spano had already been indicted and thus unquestionably had an absolute right to counsel at every step of the investigation.[72]

Crooker and *Cicenia* simply held that a lawyer need not be present at all pre-indictment proceedings.

All other considerations aside, there is a sound practical basis for affirming these pre-indictment "lawyer" cases. Otherwise, any confession obtained out of the presence of a lawyer could easily be held coercive *per se*. The effect of this on legitimate police practice is so obvious as to require no comment.

This policy consideration portends a virtual abandonment of the objective test in the very near future, if *Stein* and the subsequent cases have not already done so. It will be recalled that the original reason for overturning a coerced confession was a blanket condemnation of the police methods used.[73] Yet, the very number of cases arising was a powerful indication that the police were oblivious to this censure—they had gotten their confession and closed the books. By the time the Supreme Court decision came down, the case was out of sight and out of mind.

What of these police practices? It has already been mentioned that interrogation over a period of time is a necessary and perhaps the only method of solving crimes where there are no other clues.[74] And, as Justice Jackson pointedly asked: "Is it his [defendant's] right to have the judgement on the facts? Or is it his right to have a judgement based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before?"[75]

Against this must be balanced the fact that abuse does exist in the coercive techniques employed by the police, or so many cases would not reach the Supreme Court. While this does give strength to the basis of the objective test, where a confession was voided at once when evidence of this practice was present, it has already been seen that this has little appreciable effect as a deterrent. A more direct approach to this problem—increased supervision of the police by the various states, to attack the problem at the source—is a far more satisfactory solution.[76]

Thus the law as it has evolved, and as policy clearly dictates, involves a close examination by the Court of the alleged compulsive facts, balanced against the power of the defendant to resist—the *Stein* test.

What does the *Stein* test do to the dilemma posed by *Ashcraft*? Justice Black in *Ashcraft* enunciated the doctrine of "inherent coercion" from sustained interrogation, leaving the states with no workable rule—no yardstick of just what they could do to secure a confession. Today there is no clear cut yardstick either, but at least we know that whatever practices are engaged in by the police, as long as they are not physical, a resultant con-

[69] Powell v. Alabama, 287 U.S. 45 (1932).

[70] Spano v. New York, 27 U.S. L. WEEK 4483 (U.S. June 23, 1959).

[71] *Id.* at 4485.

[72] *Id.* at 4486, concurring opinions of Justices Douglas, Black, Stewart and Brenhan. Also See: Powell v. Alabama, 287 U.S. 45 (1932).

[73] See, *supra*, note 12; 37 B. U. L. REV. 374, 375 (1957).

[74] Stein v. New York, 346 U.S. 156 (1952). Inbau, *supra*, note 30, at 448.

[75] Watts v. Indiana, 338 U.S. 49, 59 (1949).

[76] Inbau, *supra*, note 13.