Twenty-five Years of State Criminal Confession Cases in the U. S. Supreme Court

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A quarter of a century ago, in 1936, the U. S. Supreme Court for the first time reviewed and set aside a state conviction of a defendant accused of a violation of state law, on the ground that the admission into evidence of a confession had violated the fourteenth amendment prohibition against a state depriving a person of life or liberty without due process of law.\(^1\) In all, during the twenty-five years that have passed since this first decision in *Brown v. Mississippi*,\(^2\) the U. S. Supreme Court has reviewed thirty-one cases, not counting denials of petitions of certiorari, involving state convictions alleged to have

\(^1\)During this quarter century the subject has been extensively written upon. The principal law articles are:

- McCormick, The Scope of Privilege in the Law of Evidence, 16 Tex. L. Rev. 447 (1938);
- McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Tex. L. Rev. 239-78 (1946);
- Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442-63 (1948);
- Allen, Due Process and State Criminal Procedures: Another Look, 48 Nw.L. Rev. 16 (1955);
- Gorfinkel, The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts", 41 Calif. L. Rev. 672-91 (1953);
- Miller, The Supreme Court's Review of Hypothetical Alternatives in a State Confession Case, 5 Syracuse L. Rev. 52-61 (1953);
- Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317-54 (1954);
- Paulsen, The Fourteenth Amendment and the Third Degree, 6 Stanf. L. Rev. 111-37 (1954);
- Scott, State Criminal Procedure, The Fourteenth Amendment, and Prejudice, 49 Nw. U.L. Rev. 319-32 (1954);
- Arens and Meadows, Psycholinguistics and the Confession Dilemma, 56 Colum. L. Rev. 19-16 (1956);
- Inbau, Restrictions in the Law of Interrogation and Confessions, in Symposium, Are the Courts Handcuffing the Police?, 52 Nw. U. L. Rev. 77-89 (1957);
- Liebowitz, Safeguards in the Law of Interrogation and Confession, in Symposium, Are the Courts Handcuffing the Police?, 52 Nw. U.L. Rev. 88-89 (1957);

\(^2\)297 U.S. 278 (1936).
been obtained by the use of involuntary confessions. The Court reversed twenty-two convictions and affirmed nine convictions.

The large majority of these cases involved convictions for heinous crimes and literally presented questions of life and death. Twenty-five cases, or 80 per cent of the total, involved convictions for murder, with the death penalty having been imposed in nineteen cases and life imprisonment in the other six. Two involved convictions of manslaughter, with ten-year and three-year sentences imposed. There were two cases of rape and one of burglary with intent to commit rape, with the death sentence imposed in all three. There was one robbery conviction in which a ten-year sentence had been imposed.

The U. S. Supreme Court reversed fourteen and affirmed five of the nineteen convictions of murder in which the death sentence had been imposed. It reversed all three of the other convictions carrying the death penalty, two for rape and one for burglary with intent to commit rape. Three of the murder convictions carrying life sentences were reversed and three affirmed. The manslaughter conviction carrying the ten-year sentence was affirmed and the one with the three-year sentence was reversed. The robbery conviction with the ten-year penalty was affirmed.

All of these cases involve confessions in the sense that there has been "an acknowledgment in express words, by the accused in a

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9A short textual discussion of these reversals is contained in the 1961 report of the United States Commission on Civil Rights, Book 5 entitled *Justice* at pages 16-18 under the title "The third degree and coercion of confessions." The same publication in Appendix VII, table 1, pp. 256-62, gives a list of "Reversals of convictions based on coerced confessions, The U.S. Supreme Court (Feb. 17, 1936, to June 12, 1961)." Although the text at p. 17 refers to 21 reversals, this list includes 22 cases. The discrepancy probably is explained by the inclusion in the appendix list of Rochin v. California, 342 U.S. 165 (1952), the stomach pump case; Rochin is excluded from the present article as it probably was from the Civil Rights Commission's textual compilation as not being a confession case. The appendix to the Civil Rights Commission report does not include Johnson v. Pennsylvania, 340 U.S. 881 (1949), a case which is included in this article.

The material for this article was prepared without reference to the race of the defendants. The *Justice* appendix shows that Negro defendants were involved in fourteen of the cases and white defendants in six, with the race not given in the other two. (The text of the Civil Rights Commission report at p. 17 says "at least 12 of the victims [defendants?] were Negroes.")

The appendix to the Civil Rights Commission report undertakes to describe in tabular form the incidents that brought about the U.S. Supreme Court reversal in each case. These descriptions should be used with some caution. For example, both the text of the report at p. 17 and the appendix at p. 262 strongly infer that physical coercion was used in Reck v. Pate, 367 U.S. 433 (1961). The opinion of the Court, however, was based on the premise "that the officers did not inflict deliberate physical abuse or injury upon Reck during the period they held him in their custody." 367 U.S. at 440.
criminal case, of the truth of the guilty fact charged. While a confession is a form of admission, the latter term is broader and also covers an admission as to a matter that only tends to show guilt of crime and which does not constitute the acknowledgment of guilt itself. Although these cases deal only with confessions proper, it would seem that the Supreme Court in appropriate cases would extend the same rules to admissions that are not confessions.

The Supreme Court has acted unanimously in nine cases and divided in twenty-two cases, that is, all members of the Court have been agreed on the law and its application in less than 30 per cent of the cases.

Of the eleven cases decided between 1936 and 1948, beginning with Brown v. Mississippi in 1936, and up to, but not including Haley v. Ohio6 in 1948, the Supreme Court reversed nine state judgments and affirmed two. However, significantly, of the nine reversals seven were unanimous,7 while only two reversals8 and two affirmances9 were by divided courts. The first six cases in this series, those between 1936 and 1941, were decided unanimously.10 In 1941, divisions in the Court appeared and by 1948 these divisions on the law and its application had seemingly become irreconcilable.

Of the twenty decisions between 1948 and 1961, there were affirmances of state convictions in seven cases—all by divided courts.11 Of

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4 Wigmore, Evidence § 821 at 238 (3d ed. 1940). Wigmore completes the definition with the phrase “or of some essential part of it.” In all the Supreme Court cases being considered the accused admitted the crime itself.

5“A confession is a voluntary statement made by a person in which he acknowledges himself to be guilty of an offense or discloses the evidence of the act and the share or participation which he had in it. The distinction between a confession and an admission is that the latter is only a self-incriminating statement short of an acknowledgement of guilt, or a statement of an isolated or independent act tending only to show guilt or criminal intent.” Hawk v. Commonwealth, 284 Ky. 217, 144 S.W.2d 496, 499 (1940).

6322 U.S. 596 (1948).


10Supra note 7, first cases cited.

the thirteen reversals of state court convictions, two were by unanimous courts, and eleven by divided courts.

In summary, then, during the first half of the period under review during which the U. S. Supreme Court has supervised state convictions involving confessions, that is, between 1936 and 1948, the Court acted unanimously in seven of eleven cases, or in 64 per cent of the total. During the second half of the period, between 1948 and 1961, the Court acted unanimously in only two cases, or in 10 per cent of the total. Conversely, of course, the divisions in the Court's membership have increased from 36 per cent of the cases in the first half of the period to 90 per cent of the cases in the second half.

Perhaps of greater significance, though, has been the fact that frequently the Court has not been able to agree on an opinion. Thus in 1945 and 1948 the Court reversed state convictions of murder by 5-4 decisions, but in opinions the Court was split 4-1-4. Again, in 1949 in *Watts v. Indiana* a state conviction of murder was reversed by a 6-3 vote, but in opinions the Court split 3-1-1-1-3. Also in 1949, in *Turner v. Pennsylvania* and *Harris v. South Carolina* state convictions of murder were reversed by 5-4 decisions, with the opinions split 3-1-1-1-3. The phenomenon was not a passing one, for the latest decision involving confessions, *Culombe v. Connecticut,* shows a reversal by a 6-3 vote, but a 2-1-3-3 opinion split.

This article will undertake to discuss three principal questions that have divided the Supreme Court in the confession cases. On first impression the questions seem to be so elementary that their answers would be relatively easy to find. But the contrary seems to have been the reality. Answers that are clear, concise, and consistent are yet to

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14In Lisenba v. California, 313 U.S. 537 (1941), the judgment below was first affirmed by an equally divided court; on rehearing the judgment was affirmed by an 8-2 decision. 314 U.S. 219 (1941). In Gallegos v. Nebraska, 338 U.S. 55 (1951), the state judgment of conviction was affirmed by a 6-2 vote, but with the opinions split 4-2-2.
16338 U.S. 49 (1947).
18338 U.S. 68 (1949).
be given. These questions are: I. What is an involuntary confession? II. What is the reason for excluding involuntary confessions from evidence? III. How is the fact that a confession is involuntary determined? The thesis proposed and the conclusion drawn is that the answers to all three of these questions are so closely related as to be essentially one and that it, while often hinted at, even stated, has never been fully and openly acknowledged.

A second article will consider the subsequent histories of the confession cases that have been reversed by the U.S. Supreme Court, and on the basis of that material and the analysis presented in this article, conclusions will be drawn as to the present value and the future of this particular type of Supreme Court control of state criminal proceedings.

I. What is an involuntary confession?

An involuntary confession was early defined, in 1783 in Waricks-hall’s Case,²⁰ as one “forced from the mind by the flattery of hope, or by the torture of fear.”²¹ The U.S. Supreme Court speaks in terms of this traditional definition, with the understanding that the torture of fear includes fear induced by both physical and psychological coercion.²² The character of a confession as voluntary or involuntary is said to depend upon the state of mind of the person confessing. Mr. Justice Stewart, speaking for the Court in Reck v. Pate²³ said, “The question in each case is whether a defendant’s will was overborne at the time he confessed.”²⁴ Mr. Justice Frankfurter, in Culombe v. Connecticut,²⁵ undertook to give a somewhat fuller statement of what an involuntary confession is, and how its character is ascertained. He said:

“The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external, ‘phenomenological’ occurrences and events surrounding the confession. Second, because the con-

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²¹ Id., 1 Leach at 263-64, 168 Eng. Rep. at 235.
²² The American Law Institute, Model Code of Evidence, Rule 505 (1942), defines involuntary confessions in terms of the “infliction of physical suffering... or threats thereof” to the person confessing, and “threats or promises,” likely to cause a false statement, made by a person reasonably believed to have authority and made with reference to the particular crime. There also may be a threat in the sense that unless the defendant confesses he may expect no leniency from the court. People v. Brommel, 15 Cal. Rptr. 909, 361 P.2d 845 (1961).
²⁴ Id. at 140.
cept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal 'psychological' fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.\footnote{25}

According to these expressions, both voluntariness and involuntariness are viewed by the Court as particular states of mind, common to all men—to the mature and the young, to the intelligent and the ignorant. In this respect they are comparable to other states of mind long familiar in the criminal law, which cause the defendant to act purposely, knowingly, recklessly, or negligently.\footnote{27} The voluntary and involuntary states of mind are ascertainable constants, although existing in persons of very different physical and personality characteristics.

Thus, two principal factors seem to be involved in determining whether a particular individual had a voluntary or involuntary state of mind at the time he confessed: (1) the individual's personal characteristics; and (2) the pressures that were applied to induce the confession. As Mr. Justice Jackson, speaking for the Court, in \textit{Stein v. New York} said:

"The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."\footnote{28}

An involuntary state of mind results when the strength of the pressures applied to induce the confession exceed the resistance of the person confessing. In other words, there must be a causal connection between the methods used by the police to obtain the confession and the defendant's act of confessing.

The concept of "cause" is familiar in the criminal law. A situation somewhat analogous to the confession cases is to be found where insanity is raised as a defense to the defendant's being held criminally responsible for an act which he admittedly committed. Under the \textit{Durham} test of insanity,\footnote{29} to use an example recently formulated, the defendant is not criminally responsible if he suffers from a mental disease or defect which caused his anti-social act. Nevertheless, an ac-

\footnote{25} Id. at 603.
\footnote{27} This listing is taken from the A.L.I., Model Penal Code § 2.02 (Tent. Draft No. 4, 1955). See also § 201.1 (Tent. Draft No. 9, 1959).
\footnote{29} Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
cused suffering from a mental disease or defect "would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act." In the same way, it would seem, a person might confess after the police had used improper methods to secure such a confession, without the improper methods having caused the confession. It is, of course, difficult to establish whether or not the defendant's confession was in fact caused by the actions of the police. But such an inquiry should be no more difficult than establishing whether or not the defendant's act was caused by his mental disease or defect. In the confession cases, at least, the defendant may be of sane mind, a condition of mind more susceptible of understanding by the trier of facts, than the mind that has a disease or defect.

From the standpoint of law enforcement officials, though, this analysis is something of an oversimplification. A court with the benefit of hindsight seeks to determine whether at the critical time the defendant's anti-social act was the product of mental disease or defect or whether at the time of confessing the accused had a voluntary or involuntary state of mind. On the other hand, where confessions are involved, law enforcement officials must recognize the subtle change in the accused from a voluntary to an involuntary state of mind, unless the law enforcement officials are to be required to stop seeking to obtain a confession at some point in time before the defendant does confess.

So long as the accused asserts his innocence, he has, by definition, a voluntary state of mind. It is not until the accused finally does confess that his statements can be termed "involuntary." When he confesses he may be doing so voluntarily, or he may be confessing because his will has been overborne and so he is making an involuntary confession. How can it be determined which he is doing?

If two persons with the same physical and mental characteristics, one guilty and one innocent of the crime with which he is charged, are subjected to the same pressures, the guilty one will confess sooner than the innocent person. This is because the innocent person will have the strength that innocence gives, and moreover, he will be able to husband whatever strength he has, since he will not be subjected to the pressures of lying and trying to cover up the irreconcilable contradictions that will develop in his story. To deny this would be to deny that truth and innocence are greater sources of strength than falsehood and guilt.

30Id. at 875.
A test then, probably the best test, of whether the defendant confessed voluntarily or involuntarily is whether the confession is true or false. If it is true, that is, if the defendant is guilty, it must be presumed that he confessed sooner than an innocent person with the same personal characteristics subjected to the same amount of pressure would have. Therefore, the confession of this particular individual is the product of guilt and not the product of the pressures exerted by the police. On the other hand, if the confession had been false, that is the accused is innocent, the defendant's will must have in fact been overborne because he made a false acknowledgment of guilt as a preferable alternative to further subjection to outside pressure.

This leads to the conclusion that if an involuntary confession is defined as “one forced from the mind,” or as one coerced from an involuntary state of mind, then two corollary propositions must also be accepted. These are: (1) A confession can only be considered involuntary if it was the product of or caused by the methods used by law enforcement officers during the period when the confession was made. (2) The guilt or innocence of the accused is of compelling relevancy to the question of whether the police methods in fact caused the accused to confess.

The latest expressions from the U. S. Supreme Court shows that these two corollary propositions are no longer being accepted. Mr. Justice Frankfurter, speaking for the Court in Rogers v. Richmond said that the question in a confession case is:

“[W]hether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.”

The emphasis here is on the behavior of the police, rather than on the effect of that behavior on the accused. The question is not the factual one of whether the police behavior did in fact overbear the defendant's will, but the hypothetical one of whether the police behavior was of such a nature as to overbear the defendant's will.

The conclusion to be drawn is that while the Court still couches its opinions in terms of a factual inquiry into the state of the defendant's mind at the time of confessing, the Court has actually abandoned this approach. The Court is more concerned with the nature of the methods used by the police at the time the confession was obtained.

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31 Supra note 21.
33 Id. at 544. (Emphasis added.)
than with the effect those methods had on the particular individual. This point can be more fully developed by considering the reasons that are given for excluding involuntary confessions from evidence.

II. WHAT IS THE REASON FOR EXCLUDING INNOLUNTARY CONFESSIONS FROM EVIDENCE?

Historically, involuntary confessions were excluded from admission into evidence against persons accused of crime on the theory that they had been obtained under such conditions that they were, as Wigmore said, "untrustworthy as testimony," since a person whose confession follows physical or psychological torture very possibly confessed to terminate the torture, rather than because he committed the crime. Wigmore took the view that this principle of testimonial untrustworthiness excluded, necessarily, a doctrine that confessions are excluded because of any illegality in the methods by which they are obtained. Professor McCormick, however, suggested that the exclusion of confessions obtained by force or fear savored of privilege. He wrote:

"[T]his principle of testimonial untrustworthiness excluded, necessarily, a doctrine that confessions are excluded because of any illegality in the methods by which they are obtained. Professor McCormick, however, suggested that the exclusion of confessions obtained by force or fear savored of privilege."

In its consideration of the first confession cases the Supreme Court seems quite clearly to have been motivated by an evidence theory, that an involuntary confession is not competent evidence because it is untrustworthy. In the first case, Brown v. Mississippi, the defendant's claim was that the confessions had been obtained by physical

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1Wigmore, Evidence § 882 at 246 (3d ed. 1940).
2Wigmore even considered use of the terms voluntary and involuntary to be unsound. Id., § 824 at 231-52.
3Id., § 823 at 248-49.
4McCormick, The Scope of Privilege in the Law of Evidence, 16 Tex. L. Rev. 117, 123-25 (1938). McCormick agreed that the exclusion of confessions because of promises of leniency must rest on a principle of untrustworthiness, since no outside interest meriting a privilege is involved. Id. at 455-56.
5McCormick, Some Problems and Developments in the Admissibility of Confessions, 21 Tex. L. Rev. 239, 245 (1946). Professor Morgan also has taken the view that the question is one of privilege. Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27-30 (1919).
torture and that they were "false." In reversing, Chief Justice Hughes said, "Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury," and that a trial is "a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence." A unanimous Court in 1940 in *Chambers v. Florida* extended the same doctrine to psychological torture or coercion. Four per curiam reversals by a unanimous Court followed in 1940-41.

The unanimity of the Court, though, had ended in 1941 with the case of *Lisenba v. California*, in which a conviction of murder, carrying the death penalty, was first affirmed by an equally divided Court and after rehearing affirmed by a seven-to-two vote. In *Lisenba*, the Court for the first time seems to have recognized that the evidence theory of untrustworthiness did not provide a satisfactory constitutional basis for overturning state convictions. Reversal on the basis that the confessions are not trustworthy or credible is only another way of saying that the evidence does not support the verdict. If state convictions are to be set aside because the defendant's confession is not credible, convictions may also be set aside because the prosecutrix's testimony in a rape case or the accomplice's testimony in a murder case is not believable. Once it is accepted that the U.S. Supreme Court can review state convictions to determine whether the evidence supports the conviction, a whole large new area for Supreme Court review has been opened. In fact, since a defense motion that the evidence does not support the verdict is virtually routine, the Supreme Court could review practically any state conviction on this basis. In 1941 in *Lisenba* the Court began to search for a constitutional, as distinguished from a common law, basis for setting aside state convictions based on involuntary confessions. In addition the Court was becoming concerned with the fact-finding process and the

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297 U.S. at 278.
Id. at 279.
Id. at 286.
309 U.S. 227 (1940).
313 U.S. 537 (1941).
314 U.S. 219 (1941).
The Court said that a trial judge's refusal to direct a verdict on the ground of insufficiency of evidence would not be a denial of due process. Id. at 227.
The door to this type of review has already been cracked since the Court is now reviewing cases to determine whether the convictions are "totally devoid of evidentiary support." *Garner v. Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).
basis by which it, as an appellate court, re-examined and re-determined facts duly found by the state judiciaries. These problems led Mr. Justice Roberts, speaking for the majority in Lisenba, to say:

"[T]he fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. These vary in the several States. 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. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession.”

Under the Lisenba view a confession could be voluntary under state law so as to be competent evidence and yet involuntary under federal constitutional law so that its admission would constitute “fundamental unfairness in the use of evidence.” Such a distinction might be satisfactory if the competency of evidence was solely a question of state law and if federal constitutional adjudication was not a function of the state judiciaries. The former proposition is contrary to the rationale of Brown v. Mississippi that confessions obtained by physical torture are so inherently untrustworthy as evidence that to base a conviction thereon is to deny due process of law to the defendant. The latter proposition simply ignores that state courts are also expected to apply federal constitutional law. It was, therefore, inevitable that the Lisenba could not last long.

Before the rationale in state confession cases had been more clearly resolved, the Supreme Court in 1943 decided McNabb v. United States in a way designed to curb police interrogation abuses. The Court said, “Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.” While the decision did not apply to state confession cases, and in fact rested

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*314 U.S. at 236. Justices Black and Douglas dissented, being of the opinion that the facts showed the confessions were “the result of coercion and compulsion.” Id at 241.
*318 U.S. 332 (1943).
*Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 412, 413 (1948).
*318 U. S. at 340.
on the basis that different considerations apply to the Court's review of state and federal cases, nevertheless its philosophy has influenced the state cases. McNabb recognized a basis for excluding certain confessions, even though they are termed voluntary.52

The influence of McNabb is evident in the majority opinion in Ashcraft v. Tennessee53 in which Mr. Justice Black, speaking for the Court, said that thirty-six hours of continuous questioning was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom."54 Mr. Justice Jackson argued in dissent that the Court was creating an irrebuttable presumption, or rule of law, that any confession obtained as the result of extended police interrogation was involuntary, without any inquiry as to the actual effect of the coercion of extended questioning on the mind of the person confessing.55 Justice Jackson, though, was prepared to go along with the irrebuttable presumption where actual or threatened violence was involved. He said, "We need not be too exacting about proof of the effects of such violence on the individual involved, for their effect on the human personality is invariably and seriously demoralizing."56

Ashcraft thus represents an abandonment of a causal connection as an essential requirement to finding a confession to be involuntary, so that under this decision it is no longer necessary to inquire into the actual effect of the questioner's coercion on the person questioned. There was no basic disagreement in Ashcraft between the majority and dissenting justices as to whether a causal connecting requirement should be abandoned, but only a disagreement as to when it should be disregarded. Since Ashcraft the Court has taken an ambivalent viewpoint. A confession is involuntary and must be excluded under the fourteenth amendment if it is: (1) involuntary in fact, or (2) if it is involuntary as a matter of law because obtained under circumstances that are inherently coercive. While the Court still prefers to speak in terms of a factual involuntariness,57 more realistically viewed, the reversing decisions are based on findings of involuntariness as a matter of law.

52The whole rationale of excluding certain confessions was somewhat further confused when Mr. Justice Reed, the single dissenter, said, that involuntary confessions in the federal courts are excluded because they are "violation of the provision of self-incrimination in the Bill of Rights." 318 U.S. at 349.
53322 U.S. 143 (1944).
54Id. at 154.
55Id. at 155, 157-58. Justices Roberts and Frankfurter joined in the dissent.
56Id. at 160.
57See text supra at notes 23-26.
The abandonment of a causal requirement also involved the necessary abandonment of an evidence or trustworthiness test as the basis for excluding involuntary confessions. In order for a confession to be untrustworthy because coerced, it must be shown that the coercion caused the confession. If the coercion did not cause the confession, it cannot be said that the confession is untrustworthy, because in such a situation the person confessing is not doing so as a preferable alternative to being subjected to continued pressure.

A little more than a month after Ashcraft abandoned a causal requirement, and so an evidence theory of trustworthiness, the Court in Lyons v. Oklahoma\textsuperscript{58} returned to an evidence theory, and so by inference to the causal requirement. However, Lyons v. Oklahoma illustrates the abstract nature of Supreme Court review of confession cases and the inconsistencies that develop in the process.

The case involved a triple murder, followed by arson to conceal the crime. The defendant confessed orally after about ten hours of questioning, during which time “a pan of the victims’ bones was placed in Lyons’ lap by his interrogators to bring about his confession.”\textsuperscript{59} Later, Lyons signed a written confession, and it was this second confession, not the first, that was introduced into evidence. The federal question, according to the Court, was whether the second confession was involuntary, because obtained as a result of “the continuing effect of the coercive practices.”\textsuperscript{60} that procured the “admittedly involuntary” first confession.\textsuperscript{61} The Court said, “The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of ‘mental freedom’ to confess or to deny a suspected participation in a crime.”\textsuperscript{62} A majority of the Court concluded that the second confession was voluntary.\textsuperscript{63}

The Court seems to have taken different approaches in considering the two confessions in the case. As regards the first “involuntary” confession the Court did not require any causal connection between the police methods and the confession, but as regards the second “voluntary” confession the Court found that it was voluntary because no causal connection between the police methods and the confession had been established. The first confession was obtained after about ten

\textsuperscript{\textsuperscript{58} U.S. 596 (1944).}
\textsuperscript{\textsuperscript{59}Id. at 599-600.}
\textsuperscript{\textsuperscript{60}Id. at 602.}
\textsuperscript{\textsuperscript{61}Id. at 597.}
\textsuperscript{\textsuperscript{62}Id. at 602.}
\textsuperscript{\textsuperscript{63}Three justices dissented.}
hours of questioning, a period considerably less than that in Ashcraft. The evidence as to physical violence was conflicting, and so presumably not relied upon by the Court. The only other undisputed fact mentioned in the Court's opinion was the use of the pan of the victims' bones. This apparently was what led the Court to say, "Here improper methods were used to obtain a confession."

The effect on a guilty person of being forced to hold a pan of the victims' bones is quite easy to imagine. But would the effect be the same on an innocent person? Would it induce a false confession, or might it not have precisely the opposite effect, strengthening the person in maintaining his innocence? Since no inquiry was made into the matter it seems apparent that the Court found this police method to secure a confession to be improper without reference to the causal effect on the individual involved.

If the first confession in Lyons was truly involuntary it seems quite unrealistic to assume that a removal of the pressure that brought about the confession would give back to the defendant, without reference to his guilt or innocence, the "mental freedom" he had before confessing. If the defendant was innocent and the threat of force was removed he would regain "mental freedom", the natural reaction being to repudiate the confession immediately. On the other hand a guilty defendant would recognize that he had given away the truth, so that another confession could do him no additional harm. It is too much to expect, unless the defendant has been advised by counsel, that the confessing defendant will know the law so well that he will act on the basis that the first confession was involuntary and inadmissible into evidence. Consequently, the second confession, which was made when the person was free to repudiate the first one, constitutes strong evidence of guilt. To deny that the first confession, no matter how obtained, is not a strong inducing factor to obtaining the second confession is to ignore realities. But this approach permitted the Court to return again to an evidence rationale as the basis for review. Mr. Justice Reed said, "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt."
In a series of cases beginning in 1945, continuing through 1948, and 1949 the Court was so badly split that no single opinion could obtain adherence of a majority. In 1949 the nature of these conflicting positions became clarified. Five justices were espousing a due process theory, of somewhat varying degrees of stringency, as the basis of exclusion, while four justices were still adhering to an evidence theory.

In 1949 in *Watts v. Indiana*, Mr. Justice Frankfurter expressed his view of the due process theory of exclusion as being derived from an Anglo-American system of criminal justice that is "accusatorial as opposed to the inquisitorial system" so that "the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime." Mr. Justice Black, as shown by citation of authority, preferred to adhere to the views he had voiced in *Ashcraft*. Mr. Justice Douglas was now prepared to go the farthest down the due process route, extending the doctrines of *McNabb* to the states and outlawing any confession obtained during a period of unlawful detention. The other four justices continued to adhere to a view that involuntary confessions are excluded because of their untrustworthy nature as evidence, and would accept state determinations on this question as very nearly conclusive.

Although membership on the Court has changed since 1949 this general pattern of disagreement is still evident. Most significant, though, from the standpoint of the development of a rationale, has been the fact that three of the five justices who in 1949 espoused a due process theory have remained on the bench until 1962, while all four of the justices favoring the evidence theory have been replaced. With a nucleus of three justices in favor of the due process theory, except...
for a brief period during the early 1950's, this theory has prevailed. So far, however, the Court and the individual justices have not been willing to rely upon the due process theory exclusively, preferring whenever possible to rely upon both it and an evidence theory. This is evident in such cases as Spano v. New York in which Chief Justice Warren said:

"The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

Two years later, Mr. Justice Frankfurter, speaking for the Court, in Rogers v. Richmond set forth the due process theory as the sole reason for excluding involuntary confessions. He said:

"Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law— that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

And yet this opinion was hardly in print before the same Justice indirectly returned to the evidence theory in Culombe v. Connecticut by outlining the nature of the inquiry in confession cases as involving a search for the mental state that can be characterized as having the quality of "voluntariness." As has been pointed out such an inquiry necessarily involves a search for a causal connection between the po-

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78Justices Murphy and Rutledge, both of whom adhered to the due process theory, died in 1949. Their successors, Justices Clark and Minton, favored the evidence theory. As a result in the early 1950s a majority of the justices were following a trustworthiness test. This is evident in a series of cases affirming state convictions. Gallegos v. Nebraska, 342 U.S. 55 (1951); Stroble v. California, 343 U.S. 181 (1952); Stein v. New York, 346 U.S. 156 (1953).
80Id. at 320-21.
82Id. at 540-41.
83See text supra at note 26.
lice methods and the defendant's act of confessing, and such a search is unrealistic unless the probable guilt or innocence of the defendant is taken into account. And this is precisely the factor that Mr. Justice Frankfurter said in Rogers must be excluded. The due process theory denies the requirement of a causal connection between police methods and the defendant's act of confessing, and so denies any real inquiry into the quality of the defendant's mind at the time he confesses.

III. HOW IS THE FACT THAT A CONFESSION IS INVOLUNTARY DETERMINED?

In the final analysis, whether a confession is the product of an involuntary state of mind, and so an involuntary confession as traditionally defined, is a question of fact. This point, that a state of mind is a fact, has never been made clearer than by Lord Justice Bowen, who said, "The state of a man's mind is as much a fact as the state of his digestion." No amount of discussion can clarify or obscure the fact that the U.S. Supreme Court in reviewing state convictions and in characterizing some confessions as voluntary and others as involuntary is deciding questions of fact. No apologies are needed, for when the Court is properly exercising an appellate jurisdiction, it has under the Constitution a jurisdiction "both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Whether it is desirable for the Court to exercise this fact-finding function is a different question, which it is not necessary to consider at this point. Suffice it to say that the Court in confession cases follows the rule that when the state prisoner claims his confession was involuntary:

"[W]e are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both." in the first confession cases the U.S. Supreme Court found records, which, in its opinion, established without doubt that the convictions had been based on confessions that were involuntary or coerced. In

84 Edgington v. Fitzmaurice, 29 Ch. Div. 459, 483 (C.A. 1885).
85 U.S. Const. art. III, § 2.
87 Mr. Chief Justice Stone, dissenting in Malinski v. New York, 324 U.S. 401, 434 (1945), said of these early cases: "We have, in appropriate cases, set aside state convictions as violating due process where we were able to say that the case was improperly submitted to the jury or that the unchallenged evidence plainly showed a violation of the constitutional rights of the accused. Brown v. Mississippi, 297 U.S. 278; Chambers v. Florida, 309 U.S. 287; Ward v. Texas, 316 U.S. 547." Id. at 438.
the earliest cases the Court first ruled that confessions obtained by the use of physical violence were involuntary, and then extended the rule to confessions obtained by psychological violence. The Court thought the records were so clear in these early cases that it acted unanimously and the applicable law seemed so clear that after the first two decisions the Court only filed per curiam opinions.

In *Lisenba v. California* which came before the Court in 1941, the Court was for the first time faced with a situation in which the evidence was conflicting and the state courts, after due deliberation in light of the *Brown* decision, had resolved the issue in favor of voluntariness. So the Court was presented with the question of the effect to be given to a state court finding on conflicting evidence of the fact that the confession was voluntary.

The Court made an independent examination of the evidence, recognizing that this would be least difficult where “the evidence bearing upon the question is uncontradicted.” Since the majority’s independent examination led to the same conclusion as had been reached by the state court, that is, the confession was voluntary, the Court experienced no difficulty in resolving conflicting evidence. However, the Court did make an independent examination “of the record” and not just of the uncontradicted evidence.

This issue of conflicting evidence was avoided in *Ashcraft*, since the decision was based on the presence of a single uncontradicted fact, a thirty-six hour period of questioning. The problem, however, could not be avoided in *Malinski v. New York* in 1945 wherein the evidence was not only conflicting as to the voluntariness of several confessions, but as to whether a first confession had been submitted

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91 314 U.S. 219 (1941).
92 It of course takes some considerable time for cases to reach the Supreme Court involving police practices engaged in after and in light of one of the Court's decisions, such as that in *Brown v. Mississippi*. That decision was handed down on February 17, 1936. 297 U.S. 278. The murder in *Lisenba* was committed in August, 1935, the defendant was arrested in April, 1936, and the confessions were made in early May, 1936. The Supreme Court of California affirmed the conviction in 1939, which was before the second confession case, *Chambers v. Florida*, 309 U.S. 227, had been decided on February 12, 1940.
93 314 U.S. at 238.
94 See text supra at note 86.
95 Supra text beginning at note 53.
96 324 U.S. 401 (1945).
to the jury as a confession. In delivering the opinion of the Court, Mr. Justice Douglas, although he only spoke for himself and three other justices, said:

"[T]he question whether there has been a violation of the due process clause of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts. Chambers v. Florida, 309 U.S. 227; Lisenba v. California, 314 U.S. 219; Ashcraft v. Tennessee, 322 U.S. 143." This formulation represented, where the evidence is in conflict, something of a subtle change in approach. In Chambers the Court found that the record indisputably showed a coerced confession; in Ashcraft the Court singled out a single undisputed fact that as a matter of law made the confession involuntary; but in Lisenba where there was conflicting evidence the Court only said that it would make "an independent examination of the record," not base a decision on the undisputed facts.

In his summation to the jury in Malinski, the prosecutor had indicated that the police are justified in letting the defendant "think he is going to get a shellacking." This undisputed summation was relied upon by Douglas "to fill in any gaps on the record before us and to establish that this confession was not made voluntarily." However, Mr. Chief Justice Stone, speaking for himself and three other justices in dissent, said: "The testimony as to whether the first confession to the police was coerced was sharply conflicting," and he did not consider that the prosecutor's argument resolved the conflict. Therefore, he said, "The Court's decision thus sets aside the conviction by the process of re-weighing the conflicting testimony as to the alleged coercion, in the light of the arguments addressed to the jury," and so a state court jury verdict was being overturned "by weighing the conflicting evidence on which it was based."
The Court's rule that it decides confession cases on the basis of the uncontradicted facts only means that each justice reaches a conclusion on what to him are the uncontradicted facts, and not that the members of the Court reach conclusions without disagreement as to what the uncontradicted facts are. In *Malinski v. New York*, all agreed as to what the prosecutor said, but the members of the Court disagreed as to whether this established physical violence as an uncontradicted fact.

Along with this "uncontradicted facts" rule of fact-finding, the Court has developed a "total facts" rule. As Chief Justice Warren said in *Fikes v. Alabama*, the Court looks at "the totality of the circumstances that preceded the confessions." The Court seems never to have recognized that the two rules are quite contradictory. If the "total facts" are truly looked at, it is necessary to resolve conflicting evidence so as to obtain a complete picture. An examination of "the totality of the circumstances that preceded the confessions" as evidenced by the uncontradicted facts is just that, and no more; it is not a view of the total facts.

Essentially the Court's approach seems to be a search for the single uncontradicted detail that symbolizes the complete picture, and enables the Court to say that as a matter of law the confession was involuntary. Such a detail can be called a badge of coercion, by analogy with the badges of fraud of the law of fraudulent conveyances. In *Ashcraft v. Tennessee* the badge of coercion was thirty-six hours of continuous questioning. In *Malinski v. New York*, Mr. Justice Douglas found a badge of coercion in a sentence from the prosecutor's summation. In *Watts v. Indiana*, Mr. Justice Jackson found a badge of coercion in "the State's admissions as to the treatment of Watts."
In *Payne v. Arkansas*, Mr. Justice Harlan found a badge of coercion in the somewhat ambiguous answers of the sheriff on cross-examination.\(^{113}\)

The difficulties of fact-finding in an appellate court has led the Supreme Court to make determinations of fact, independent of those made by the state courts, on the basis of the "unchallenged facts" and the "total facts." Even if these two somewhat contradictory rules can be resolved, the question is still left unanswered as to the effect to be given to state determination of this same issue.

Presumably, the Court could take the view that it will accept state determinations of the character of confessions as final, provided the state has used the appropriate procedural machinery to make the determinations. In this way the Court would review, not the facts, but the procedures by which the facts were found. Such a procedure is quite consistent with appellate review, reviewing questions of law rather than of fact. Superficially, at least, the problem has been complicated by the different techniques used by state courts to determine when a confession is voluntary.

Professor Meltzer has pointed out in a law review article on the subject\(^{114}\) that the trial procedures used to determine whether confessions are voluntary vary in the different states, the principal variations being in the allocation of responsibilities as between judge and jury. Although often blurred, four basic approaches are discernible.

(1) *The Orthodox View.* The trial judge alone decides the question of whether the confession is voluntary or involuntary, and if he rules it to be voluntary the jury is bound to accept the confession as competent evidence, although the jury will still pass on its credibility.\(^{115}\)

The defendant alleged that the sheriff said he would be protected from a lynching mob of 30 to 40 people if he confessed. On cross examination the sheriff was asked, "State whether or not anything was said to the defendant to the effect that there would be 30 or 40 people there in a few minutes that wanted to get him?" The answer was, "I told him that would be possible there would be that many—it was possible there could be that many." It is possible that this statement implied that the sheriff would protect the defendant from a mob, on condition that he confessed. But it is also possible that the Sheriff only was admitting that he made a statement of fact, and was not conditioning his protection of the prisoner on a confession. In reaching a conclusion that the confession was involuntary, Mr. Justice Harlan singled out this and five related questions and answers as requiring acceptance of the claim that the confession was obtained by fear of mob violence. 356 U.S. 560, 569 (1958).


\(^{114}\)"When the State offers a confession in a criminal trial and the defendant objects on the ground it was not voluntary, the question thus raised is determined by the judge in a preliminary inquiry in the absence of the jury." State v. Outing,
Massachusetts View. Although the judge makes the initial determination of whether or not the confession is voluntary, under certain circumstances the jury may review a determination that it is voluntary and nevertheless find it to be involuntary. 116 (3) The New York View. While the judge may rule a confession to be involuntary as a matter of law, if he finds that reasonable men may differ, without himself making any final determination he submits the issue of voluntariness to the jury as a question of fact, under instructions to disregard the confession if it is found to be involuntary. 117 (4) A Discretionary View.


116"In this State the procedure followed as to confessions is that the admissibility is first determined by the trial court then, if admitted, it is submitted to the jury for its ultimate determination." Parker v. State, 225 Md. 288, 170 A.2d 210, 211 (1961).

117"In Stein v. New York, 346 U.S. 156 (1953), Mr. Justice Jackson gave this description of the New York View. 'The procedure adopted by New York for excluding coerced confessions relies heavily on the jury. It requires a preliminary hearing as to admissibility, but does not permit the judge to make a final determination that a confession is admissible. He may indeed, must—exclude any confession if he is convinced that it was not freely made or that a verdict that it was so made would be against the weight of evidence. But, while he may thus cast the die against the prosecution, he cannot do so against the accused. If the voluntariness issue presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness. People v. Wemer, 248 N.Y. 118, 161 N.E. 441. The judge is not required to exclude the jury while he hears evidence as to voluntariness, People v. Brasch, 193 N.Y. 46, 85 N.E. 809, and perhaps is not permitted to do so, People v. Randazzo, 194 N.Y. 147, 199, 87 N.E. 112, 117." Id. at 172.

A recent expression from Texas of what seems to be the New York View is as follows: "In the absence of the jury, the trial judge heard evidence on the voluntary character of the confession and concluded that it was not inadmissible as a matter of law. But he recognized that there was an issue as to whether appellant's confession was voluntary and in his charge instructed the jury that before they could consider the statement they must find that no threats, duress or physical violence was used to induce him to make the confession." Odis v. State, 345 S.W.2d 529, 530-31 (Tex. Crim. App. 1961).

Pennsylvania is also listed by Professor Meltzer as following the New York View. Supra note 114 at 321 n. 21. A recent case from Pennsylvania, though, indicates the lack of clarity with which the rule is often phrased. In one paragraph the Pennsylvania court said, "At trial the court, outside the presence of the jury, held a hearing, after such hearing, the court decided that the question of the voluntary nature of the confession was one of fact to be determined, under appropriate instructions, by the jury." This would indicate that the trial judge, finding the evidence to be in conflict, followed the New York View and did not himself decide that the confession was voluntary, but left the issue to the jury. In the very next paragraph, however, the court said, "On the state of this record both the trial court and the jury acted with propriety in finding that Ross' confession
The trial judge has discretion to follow the Orthodox View and make his own ruling that the confession is voluntary—binding on the jury, or he may follow the Massachusetts View and after ruling the confession to be voluntary also give the jury a chance to pass on the issue. It is often difficult to determine under which of these four views a particular decision belongs. And it seems that the distinctions in the different views may be more semantical than real.

There is one characteristic that is common to all these state rules. The trial judge must determine in the first instance whether as a matter of law a confession is inadmissible in evidence. He may do so for one or both of two reasons: (1) the confession is untrustworthy as evidence, or (2) the confession was obtained by improper police methods that make its use against the defendant unfair. This does not mean that every confession excluded from evidence is necessarily untrustworthy; nor does it mean that every confession admitted into evidence is necessarily trustworthy. An involuntary confession may in fact be trustworthy, as where the confession provides leads that turn up additional evidence that demonstrates its truthfulness. The exclusion of such a confession, no matter how strong the coercion by which it was obtained, must rest on the second and not the first reason. In fact, whenever a guilty person confesses, by definition the substance of the confession is truthful and so factually trustworthy, whatever may be the human evaluation of its credibility. On the other hand, an entirely voluntary confession may not be truthful, as where it is made for the purpose of committing suicide, to assume responsibility for
another's crime, or for some similar reason. The whole doctrine of *corpus delicti* in the criminal law is based on the proposition that even the most voluntary confession is not alone sufficient evidence that a crime has even been committed.\(^{121}\)

When these points are kept in mind it becomes evident that exclusion of confessions cannot be discussed solely in terms of whether confessions are voluntary or involuntary, nor in terms of whether exclusion of confessions is based on competency of the evidence or on privilege,\(^{122}\) nor whether the rationale for such exclusions is an evidence theory or a due process theory. It is easy to evoke memories of the rack, the screw, the wheel, and the other instruments of torture in support of excluding confessions, regardless of theories or definition.\(^{123}\) The confession obtained by breaking on the rack is excluded because—using the evidence theory of competency, it is inherently untrustworthy and probably untruthful, or, using the due process theory of privilege,—it was obtained by methods that offend the community's sense of fair play and justice.

When the colorful epithets derived from history are put aside and consideration given solely to the proper function of appellate review, it becomes evident that the single question that can properly be considered by an appellate court is whether the trial judge should have excluded the confession as a *matter of law*.\(^{124}\) Recognition of this point

\(^{121}\) Under the better view of the corpus delicti rule, it is only necessary to establish by evidence other than the defendant's confession that a crime has been committed. The defendant's confession alone then is sufficient to establish the identity of the perpetrator. 7 Wigmore, Evidence § 2072 (3d ed. 1940). However, some courts have also included the identity of the perpetrator of the crime as a part of the corpus delicti. See for instance, Lucas v. Commonwealth, 201 Va. 599, 112 S.E.2d 915 (1960). This means that there must be corroborating evidence other than the defendant's confession of the identity of the perpetrator of the crime. Wigmore said that this view was "too absurd to be argued with," since it makes the corpus delicti cover the prosecution's entire case. 7 Wigmore, Evidence § 2072 (3d ed. 1940).

\(^{122}\) In terms of definition, Professor McCormick treats confessions excluded because of untrustworthiness as being based on competency, while exclusion because of improper police techniques savor of privilege. McCormick, The Scope of Privilege in the Law of Evidence, 16 Tex. L. Rev. 447, 451-57 (1938); McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Tex. L. Rev. 239, 245 (1946).

\(^{123}\) The principal empirical study on which charges of general police brutality in obtaining confessions is based is the 1931 report of the Wickersham Commission. The Commission said that "the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions— is widespread." National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 4 (1931).

\(^{124}\) The Supreme Court of North Carolina, which follows the Orthodox View, says, "The trial judge hears the evidence, observes the demeanor of the witnesses
by the U.S. Supreme Court would have relieved the Court of some of the questions with which it has been plagued in confession cases.

It is the trial judge who must decide in the first instance whether the evidence on the question of voluntariness of the confession is in conflict, and who, having due regard to conflicts in the evidence, must decide whether the confession should go to the jury or be ruled inadmissible as a matter of law. The Supreme Court recognized in *Stein v. New York*\(^1\) that the trial judge has the initial responsibility for Mr. Justice Jackson, referring to New York procedure, said that the trial judge “may—indeed, must—exclude any confession if he is convinced that it was not freely made or that a verdict that it was so made would be against the weight of evidence.”\(^2\) Moreover, if the trial judge submits the confessions to the jury and a verdict of guilty is returned, the trial judge has “broad powers to set aside a verdict if he thinks the evidence does not warrant it.”\(^3\)

In *Stein* the trial judge found that the confessions involved were not involuntary as a matter of law, and in accordance with the New York View, submitted them to the jury. The jury returned a general verdict of guilty, which the trial judge sustained as not being against the weight of the evidence. The action of the trial judge in admitting the confessions in the first instance presented a question of law appropriate for appellate review. Should the confessions on the whole evidence have been ruled involuntary as a matter of law? After the New York courts sustained the trial judge’s action, the U.S. Supreme Court in reviewing the case also considered the evidence relating to the confessions and concluded that they were not involuntary as a matter of law.\(^4\)

Erroneously, though, it is submitted, the U.S. Supreme Court approached the question from the wrong end of the trial. It should have looked only to see whether the trial judge committed constitutional error in admitting the confessions. Instead, it looked to see whether the trial judge committed constitutional error in sustaining the verdict of the jury at the end of the trial. If the trial judge made the latter error, he must also have made the first one. While the first approach leads to the heart of the issue, since the verdict of the jury and resolves the question. The appellate court must accept the decision if it is supported by competent evidence.” *State v. Outing*, 255 N.C. 468, 121 S.E.2d 847, 849 (1961).

\(^1\) *U.S.* 156 (1953).

\(^2\) Id. at 172.

\(^3\) Id. at 174.

\(^4\) Id. at 182-88. Mr. Justice Frankfurter reached the opposite conclusion and thought the conviction was based on “a coerced confession.” *Id.* at 201.
was a general one of guilty, the one followed by the Court led into consideration of a series of hypotheticals: Did the jury find the confession to be voluntary and base its verdict thereon; or did the jury find the confession to be involuntary, ignore it, and base a verdict of guilt on other sufficient evidence; or did the jury follow some intermediate variation of these hypotheticals; or was the verdict a compromise; or did different jurors use different approaches to reach a common conclusion? Such an inquiry has a certain Circelike quality, but it is quite beside the point.

From the standpoint of appellate review, the only law question involved is whether reasonable men can differ as to whether the confession is voluntary or involuntary, and this question is not modified because the state must prove beyond a reasonable doubt that the confession was voluntary. Where the defendant raises insanity as a defense under a plea of not guilty, even if the state must prove sanity beyond a reasonable doubt, the evidence admitted on behalf of the prosecution is not limited to that which proves sanity beyond a reasonable doubt. And if the jury returns a verdict of guilty, the court does not inquire whether the jury might, in spite of the court's instruction, have found the defendant insane and nevertheless returned a verdict of guilty.

The approach taken by the majority of the Court in Stein led to an untenable position, which called forth vehement protests from a minority of the Court, protests, though, that did not take exception to the approach itself. Looking at the case from the standpoint of whether the verdict should have been set aside by the trial judge, the Court concluded that even if the jury found the confession to be involuntary, the conviction should be affirmed since there was other evidence to support it. To the charge that this meant that constitutional error could be dismissed as harmless error, the Court could only assertively reply that the decision was based "not upon grounds that error has been harmless, but upon the ground that we find no constitutional error."

This aspect of the Stein case was abandoned in later cases in favor of a rule of automatic reversal of convictions, whenever an involuntary confession, as determined by the U.S. Supreme Court, has been
admitted into evidence. Mr. Justice Whitaker, speaking for the Court in *Payne v. Arkansas*,123 said:

'[W]here a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.124

*Payne* still looks at the matter from the standpoint of the trial judge’s sustaining a jury verdict. The trial proceedings are treated as having been legally correct, thus distinguishing the situation from those in which there has been an error in jury instructions or in the admission of evidence,125 so that the constitutional error found is a factual one. A preferable approach, from the standpoint of the nature of appellate review, would be to examine the correctness of the trial court’s ruling in letting the confession go to the jury in the first place. Did the trial court err in ruling as a matter of law that the confession was not involuntary? Beyond this there are no questions for appellate review, at least at the U.S. Supreme Court level, the states being free to follow different procedures for finally determining whether a confession is voluntary or involuntary as a matter of fact.

An alternative possibility has been advocated by Professor Meltzer.126 He suggests that the U.S. Supreme Court as a matter of constitutional law should sanction the Orthodox View and outlaw the others. This would mean that the trial judge, and not the jury, becomes the trier of facts where there is conflict in the evidence as to the voluntariness of the confession. It is difficult to see how this particular change resolves the difficulties or aids the defendant, as Professor Meltzer seems to think.127 Already, under all views, the trial

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124Id. at 568. *Stein* is distinguished on the ground that no coerced confession was found in that case. Id. at 568 n. 16. Mr. Justice Clark dissented in this case, taking the view that *Stein* had held that a conviction will not be set aside if a coerced confession is admitted into evidence if there is other sufficient evidence to support the conviction.
126Supra note 114 at 338-39.
127We are not here concerned with other “reforms” suggested by Professor Meltzer, such as whether a hearing on the voluntariness of a confession should be held in the presence of the jury, or whether the defendant should be permitted
judge must decide whether the confession is involuntary as a matter of law. If the trial judge is also to be the trier of fact who makes "a clean-cut adjudication of the voluntariness issue" the fact question left to the jury is the credibility of a "voluntary" confession. Since innocent persons seldom voluntarily confess crimes, an instruction by the judge to the jury that the confession must be accepted as voluntary suggests rather strongly to the jury that the defendant is guilty. The common sense mind finds it difficult to understand why a person voluntarily confesses to a crime he did not commit.

The point was again considered in Spano v. New York in which Chief Justice Warren, speaking for the Court reaffirmed a rule of automatic reversal, saying:

"But Payne v. Arkansas, 356 U.S. 560, 568, authoritatively establishes that Stein did not hold that a conviction may be sustained on the basis of other evidence if a confession found to be involuntary by this Court was used, even though limiting instructions were given. Stein held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it."140

The Chief Justice's language is consistent with the approach here advocated as in accordance with the nature of the appellate review. He said that "when a confession is not found by this Court to be involuntary, this Court will not reverse" In other words, if the confession is not ruled involuntary as a matter of law, and so inadmissible in evidence in the first place, the Supreme Court will not make any further inquiry as to how the jury characterized the confession or what credit the jury gave to it.141

Some doubt, though, must be expressed as to whether the Court really meant this, or that this represents a final, settled position. The reasons for these doubts have three principal bases: (1) A matter of semantics; (2) The opinion of Mr. Justice Frankfurter for the Court in Rogers v. Richmond, and (3) The Supreme Court's own precedents on the technique of fact finding in its own review of these confession cases.

Firstly, as to semantics. Does the phrase "not found by this Court to be involuntary" mean "not involuntary," or is it a double negative

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140 Supra text beginning at note 124.
expressing the affirmative and meaning that the Court will reverse unless the confession is affirmatively "found by this Court to be voluntary?" When the evidence is in conflict, the distinction may have far-reaching significance.

Secondly, Mr. Justice Frankfurter's opinion for the Court in Rogers v. Richmond242 both supports the view being suggested and leaves the issue in confusion. In the early paragraphs the Justice says "the trial judge ruled" and the Supreme Court of Errors of Connecticut sustained "the trial judge's admission of the confession" and that "the attention of the trial judge" was focused on the wrong standard, concluding:

"This means that a vital confession may go to the jury only if it is subjected to screening in accordance with correct constitutional standards."143

All of this indicates that the Court was reviewing the trial judge's ruling as to whether the confessions should go to the jury. But then the Justice confuses the issue by talking about "trial judge or trial jury—whichever is charged by state law with the duty of finding fact pertinent to a claim of coercion"144 as though the jury's findings of fact were or might be the subject of review.

In Spano, Chief Justice Warren said that the Court would not reverse if the confession was not found to be involuntary even though "the jury might have found it involuntary and might have relied on it."145 In Rogers, however, Mr. Justice Frankfurter says that the U.S. Supreme Court will reverse if a trial jury passes upon a defendant's claim of coercion "under an erroneous standard of constitutional law."146 Why should the U.S. Supreme Court reverse if, as Justice Frankfurter says, the jury using an erroneous standard finds the confession to be voluntary, and yet not reverse if, as the Chief Justice says, the jury using a correct standard finds the confession to be involuntary?

Obliquely, Mr. Justice Frankfurter seems to give an answer to such an inquiry in this passage:

"A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state

143 Id. at 545. (Emphasis added).
144 Id. at 546. However, the Justice in the last footnote to his opinion again says that the reason for reversal is "the application of an erroneous standard to his federal claim by the state trial judge in allowing the confessions to go to the jury." Id. at 548 n. 5.
145 Supra text at note 140.
146 365 U.S. at 546.
judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment."\textsuperscript{147}

Since the opinion, however, gives no recognition to different procedures followed in the states, it is difficult to determine precisely what is the Justice's meaning. He speaks of the state judge and the state jury in the alternative, as though one or the other, but never both, consider confessions in determining the issue of the defendant's guilt. Furthermore, the Justice seems to ignore entirely the fact that the credibility of even the voluntary confession has always been left to the jury.

According to the Rogers opinion, the test under the fourteenth amendment is "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not [the defendant] in fact spoke the truth."\textsuperscript{148} When this test is given to the jury does it mean that the jury must determine the guilt or innocence of the defendant, but in doing so they are completely barred from considering the truth or falsity of the defendant's confession? Obviously, this is absurd. Therefore, Mr. Justice Frankfurter must mean that the jury is to be given two standards and make two determinations. Firstly, the jury must determine whether the confession was "voluntary" under the test set forth above, this being a determination made without reference to the truth or falsity of the confession. Secondly, the jury will be expected to inquire as to the truth or falsity of the confession, and on this point its voluntary character will be relevant. But since there will likely be little evidence regarding this, other than the evidence relating to how the confession was obtained, the "first" determination that the confession was voluntary will almost inevitably lead to a "second" determination that the confession was truthful. Again, the jury will be asking why a person "voluntarily" confesses unless he is guilty.

Unless the jury is to be permitted to consider their truth or falsity, confessions are not even relevant and ought not to be admitted in evidence. Consequently, Justice Frankfurter's statement that the jury when applying a constitutional test must completely disregard the truth or falsity of the confession cannot be a complete statement regarding the nature of the jury's consideration of the confession.

\textsuperscript{147}Id. at 547-48.
\textsuperscript{148}Id. at 544.
Furthermore, if it is constitutionally permissible for the states to follow the Orthodox View and leave the determination of the voluntariness of the confession to the judge alone, it ought also to be permissible for states to follow the Massachusetts view, which does all this and in addition gives the defendant the benefit of a second determination on the same issue. If a state following the Massachusetts view chooses to use a different, even an erroneous standard, in submitting the question to the jury, surely the defendant is in no worse position than under the Orthodox View.

The major difficulty, then, in the Rogers opinion is that it shows no appreciation of the distinction between the competency of evidence going to the jury and the credibility of the evidence the jury receives, a difficulty that would be obviated if Supreme Court review was limited to the question of competency, that is, the trial judge's determination of whether the confession should go to the jury in the first place.

If the proper scope of review for the Supreme Court is of the trial judge's initial admission of the confessions, the question arises as to how a trial judge decides as a matter of law whether a confession is involuntary and so inadmissible in evidence, or not involuntary and admissible. Does he look at all the evidence and take the view most favorable to the prosecution; or looking at all the evidence take the view most favorable to the defendant; or put aside all conflicting evidence and look only at the uncontradicted evidence; or does he take still some other approach?

Suppose, for example, the gist of the defendant's claim is that the confession was obtained as the result of physical violence by the police, but the alleged violence is categorically denied by the police. Obviously, there is a crucial conflict in the evidence. If the trial judge takes the view most favorable to the state, he will find that there was no physical violence and admit the confession. Such an approach would enable the police, simply by lying, to secure admission of the confession. On the other hand, the trial judge could take the view most favorable to the defendant and find that there was physical violence and so rule the confession to be involuntary as a matter of law. This approach would enable the defendant, simply by lying, to secure a denial of the admission of the confession. The trial judge could look only at the uncontradicted evidence, which would mean that he would disregard the crucial issue. None of these approaches are satisfactory. It would seem that the trial judge must look at the total evidence, including a consideration of the demeanor of the witnesses, and on this view of the total evidence determine whether as a matter of law
the confession is involuntary. The trial judge does not have to resolve every conflict in the evidence. He is searching for the truth, and indications as to which witness is lying and which one is telling the truth is of greater significance than certainty as to any specific detail.

If this is the proper method of approach for the trial judge, it is apparent that under present precedents the U.S. Supreme Court uses quite a different approach to determine the correctness of the trial judge's decision. This is a third reason for feeling doubts that the Supreme Court really meant what it said in Spano. The Supreme Court says that it looks only to the uncontradicted evidence. Since in the situation supposed the evidence is in conflict as to whether there has been physical violence, the Court, in theory at least, disregards the entire matter and looks for some other uncontradicted details. The unsatisfactory nature of this method of review would seem apparent.

But, as has already been pointed out, it is to be doubted whether the Court, in spite of its expressions on the matter, does entirely ignore the evidence in conflict. Why is the presence of conflicting evidence so often referred to, if it is ignored in reaching decisions?

IV Conclusion

For the last quarter century the U.S. Supreme Court has been reviewing and reversing state convictions on the ground that they were based on involuntary confessions. In doing so the Court has spoken in terms of a search for a fact—whether the defendant at the time he confessed had an involuntary state of mind. To meet the difficulties inherent in fact finding by an appellate court sitting miles distant in space and years distant in time from the actual scene, the Court says that it considers only the uncontradicted facts, but the Court also says it looks at the totality of the circumstances. The Court is seemingly unaware that it cannot do both, since these two approaches are mutually exclusive, and contradictory whenever the evidence on crucial points is in conflict.

Furthermore, the Court has never been able to decide precisely what it is that is being reviewed: the trial judge's admission of the confession in the first place; the instructions the trial judge gives the jury regarding the confession; the jury's finding of fact regarding the confession, cloaked beneath the mantle of a general verdict of guilty; or the trial judge's refusal to set aside the verdict of guilty returned by the jury. This article has undertaken to show that the only proper subject for appellate review at the level of the U.S. Supreme Court is the trial judge's initial admission of the confession
into evidence. If it is found that the trial judge used proper standards, and that his decision on admissibility is supported by the evidence, the function of appellate review has been performed.

Appellate review of any of the trial proceedings other than the trial judge's ruling that the confession is admissible into evidence is open to some objection. Since the trial judge, using the Orthodox View, can finally determine that the confession is voluntary and give the jury binding instructions to that effect, there can be nothing constitutionally wrong in the New York and Massachusetts Views under which the defendant has the additional benefit of a second determination, by the jury, of the issue of voluntariness. And if the trial judge has used the correct standard to admit the confession in the first place, the defendant cannot be prejudiced if the greater benefits accorded to him under these latter views involve the use of different or even theoretically erroneous standards. The attempt to look behind a jury general verdict of guilty, as has been done in some of the cases, to find out how the jury characterized a confession, or whether the jury relied upon it or on some other evidence, is both unrealistic and fanciful. While a trial judge's refusal to set aside a verdict of guilty does provide an appropriate subject for appellate review, at this stage of the trial there are other factors involved in reviewing the trial judge's admission of the confession into evidence. That question is presented in clear-cut form only at the beginning of the trial.

The fixing of precisely what it is that the Supreme Court is reviewing—the trial judge's initial admission of the confession clarifies the difficulty inherent in such review. It has been pointed out that the trial judge can properly determine whether a confession should be ruled inadmissible as a matter of law only by considering the total evidence in an endeavor to find where the truth lies. If the trial judge must, thus, consider the conflicting evidence in making his ruling, can an appellate court reviewing the correctness of the ruling do less?

Since the Supreme Court cannot by looking solely at uncontradicted evidence determine whether a trial judge who has looked at the total evidence made a correct ruling, the "uncontradicted facts" rule should be abolished. An example will clarify this point, if clarification is necessary. Suppose the defendant should allege that the confession was obtained by physical violence, the violence consisting of a twisting of his arms. The police deny that the defendant's right arm was twisted. Presumably, the record now contains uncontradicted evidence that the police did twist the defendant's left arm. Surely, though, the "fact" of police violence has been established only in a most superficial and abstract way. The conflicting evidence regarding
the twisting of the defendant's right arm shows that someone was lying. If a police lie on this point can be established, it would be reasonable to infer that the police also lied about twisting the left arm. If, on the other hand, the defendant lied about the police twisting his right arm, it is reasonable to infer that the defendant also lied about the twisting of the other arm. The lack of an explicit denial does not establish the truth of the allegation, especially if it is reasonably evident that the defendant did lie about twisting the right arm. The lacuna of the record may be due to a lapse by the prosecutor on direct examination, the adroitness of the defense attorney on cross-examination, or for some other reason evident to the trial judge, but which was never expressly stated and put in writing so as to be patent to the U.S. Supreme Court on the remote, very remote at the time, chance that Court some years later would search the record for "uncontradicted fact."

Someone may point out that this analysis means, since the Supreme Court cannot resolve conflicting evidence, that the Court must simply accept as final, state determinations of fact in confession cases, and so the Court will fail to discharge its oft-asserted responsibility to make an independent determination of the facts to insure that the defendant's constitutional rights have not been violated. The point is, of course, well taken. Nevertheless, if fact-finding is not consistent with appellate review, it can hardly be said that there is any responsibility on the Court to assume the function. If the responsibility is self-assumed, it may, with propriety, be laid aside. But if there is a responsibility on the Court to find facts in confession cases, which is here denied, no amount of legal writing can be of any assistance to the process. The gift of omniscence must be sought from sources other than the pages of law reviews, legal tomes, and court opinions.

Actually, the burden of the analysis contained in this article is that the U.S. Supreme Court, in spite of what it says, has in any realistic sense long since abandoned fact-finding in confession cases. Essentially, the Court searches for significant symbolic details, or badges of coercion. While the Court speaks in terms of looking at the effect the police methods had on the state of mind of the individual to induce a confession, in reality the Court looks to the personal characteristics of the defendant to determine the propriety of the methods used by the police.

In principle, though not in name, the rule of MacNabb v. United States has already been extended to state confession cases. It is only the full rigor of the rule that is still to follow. There are no basic differences in the views of at least a majority of the Court, although
they prefer to express those views in separate opinions. For example, there almost always appears to be a division among the three justices who have been longest on the bench, Justices Frankfurter, Black, and Douglas, and who, therefore, have considered the largest number of state confession cases. All three Justices are in basic agreement that convictions based on confessions obtained by improper police methods should be reversed, and that no inquiry into the actual effect of the police methods on the person confessing is required. In determining what are improper police methods, Justice Frankfurter prefers a subjective, almost omniscient approach, while Justices Black and Douglas prefer what is, superficially at least, a more objective approach, based on automatic reversal whenever the police have acted illegally. In fact the justices are so close together in viewpoint that one might say that the Frankfurter reasoning provides the best rationale for the Black-Douglas conclusion, and the Black-Douglas conclusion provides the best argument against the Frankfurter rationale. Although the approach of Justices Black and Douglas involves drawing a line at a somewhat different point than under Justice Frankfurter's view, in the final analysis it will likely prove as subjective. This is because the police have traditionally questioned suspects in an endeavor to solve crimes, so that there is no body of present law determining precisely what is illegal police conduct in obtaining confessions. In making this determination the Black-Douglas approach will prove to be as subjective as that of Justice Frankfurter.

On the somewhat more distant horizon there are two other possibilities that may bring a drastic solution to the confession problem. The members of the Court, and most particularly Justices Douglas and Black, have frequently adverted to the fact that confession cases usually also involve a denial of counsel. It is entirely possible that a majority of the Court will eventually conclude that the use of any confession made while the defendant has been denied counsel violates the fourteenth amendment. This view will largely eliminate the confession problem by eliminating the confessions. The other possibility derives from Mr. Justice Frankfurter's frequent description of the rationale of the exclusion of confessions in terms indicating that it is essentially a privilege against self-incrimination. If the Court accepts the view that the use of a confession violates the defendant's privilege against self-incrimination, the confession problem will also be solved by eliminating all confessions.

The Supreme Court rule on confessions has not yet become stabilized. In fact it could not be stabilized as long as an apparent semantical certainty cloaks intrinsic contradictions. An eventual settled
rule will be the result of a striving for greater certainty. This could be the result of giving greater credit and finality to state findings of fact in criminal cases involving confessions. Present prospects though suggest an effort will be made to achieve greater certainty through extension of the McNabb rule to the states.

The last confession case decided at the 1960 Term was *Culombe v. Connecticut*, which covers seventy-five pages of the official reports, without any expression of viewpoint securing the support of a majority of the justices. The question argued seems basically to have been, "Should the McNabb rule be extended to the states?" On the same day that *Culombe* was decided the Court also decided *Mapp v. Ohio*. There is no basis in logic for the extension of the Weeks rule to the states, which will not also support an extension of the McNabb rule. It would not have taken very much work on the part of a legalistically minded gremlin to have garbled the opinions in *Culombe* and *Mapp* so that the states would now be under the McNabb rule, but still free of the Weeks rule. As it is, there are strong prospects that the Supreme Court will, without the aid of gremlins, soon extend McNabb to the states.

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