The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts"

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On the Last Day of the 1952 Term, the Supreme Court rendered its decision in Stein v. New York.¹ The majority opinion by Mr. Justice Jackson has implications of far-reaching character and may mark the beginning of a new trend in the application of 14th Amendment due process² to state criminal proceedings; an application in which the test of due process will be whether the defendant got what he deserved rather than whether the proceedings were consistent with fundamental guarantees.

The significance of the decision does not lie so much in the actual holding as it does in some of the statements in the majority opinion. Mr. Justice Jackson, a dissenter in so many of the decisions³ involving 14th Amendment due process, is the writer of that majority. An understanding of the possible scope of the Stein case requires an analysis first, of some of the previous decisions in this field, and second of Mr. Justice Jackson's philosophy of the due process clause and the philosophy of the other members of the majority, as expressed in earlier opinions and as contrasted with the views of the dissenting justices.

Prior to the adoption of the 14th Amendment, state criminal proceedings were comparatively free from constitutional restraint. Barron v. Baltimore⁴ had early settled the proposition that the provisions of the Bill of

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² "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amend. XIV. For convenience this article uses the term "due process"; the "equal protection clause" of the 14th Amendment is also involved; see the grand jury cases discussed infra, text at note 26 et seq. On the privileges and immunities clause, see text at note 13 infra.


Rights were restraints on Congress and the Federal Courts and not on the States, and the only constitutional limitations of any significance on state criminal proceedings were the prohibitions in Article I, section 10 relating to ex post facto laws and bills of attainder.\(^5\)

_Hurtado v. California\(^6\)_ in 1884, gave only a limited scope to the application of 14th Amendment due process by its argument that due process, as used in that amendment meant the same thing as due process in the Fifth Amendment; that due process in the Fifth Amendment did not include the specific guarantees contained elsewhere in the first eight amendments, and therefore 14th Amendment due process did not incorporate or include any of the specific guarantees of the Bill of Rights.\(^7\)

A hint in the _Hurtado_ case became a suggestion,\(^8\) was turned into a _dictum_ in _Hebert v. Louisiana\(^9\)_ and was finally elevated to a decision in _Powell v. Alabama\(^10\)_ The rationale of the _Hurtado_ case was repudiated; those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions\(^11\)" are embraced within 14th Amendment due process, even though specifically enumerated in the first eight

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\(^6\) 110 U.S. 516 (1884).

\(^7\) Id. at 534-535.

\(^8\) The language is, of course, borrowed from Mr. Justice Frankfurter's dissenting opinion in United States v. Rabinowitz, 339 U.S. 56, 75 (1950): "These decisions . . . merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision." The path followed by the phrase "fundamental principles of liberty and justice" from _Hurtado_ to the present is interesting. In _Hurtado_ the statement is: " . . . [due process] refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." 110 U.S. 516, 535 (1884) (emphasis added). In _Hebert v. Louisiana_, 272 U.S. 312, 316 (1926) the language is: "What it [the due process clause of the Fourteenth Amendment] does require is that state action . . . be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" _Powell v. Alabama_, 287 U.S. 45, 67 (1932) quotes this _dictum_ as follows: "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment . . ."


\(^9\) 272 U.S. 312 (1926).

\(^10\) 287 U.S. 45 (1932).

\(^11\) See note 8 _supra_.
amendments. This repudiation of the Hurtado rationale did not result in the incorporation of the entire Bill of Rights into the 14th Amendment.22

Paralleling this development was the argument that the Privileges and Immunities Clause of the 14th Amendment13 was designed to incorporate the entire Bill of Rights as limitations on state action. In Twining v. New Jersey14 the Court refused so to construe that clause. The incorporation theory was again advanced in the dissenting opinions in Betts v. Brady,15 Adamson v. California,16 Bute v. Illinois17 and Wolf v. Colorado18 and in the concurring opinion in Rochin v. California.19 Only two members of the present Court, Justices Black and Douglas, remain firmly committed to the “incorporation” theory.

The Powell decision’s repudiation of the Hurtado rationale, and the refusal to adopt the incorporation theory of the Adamson dissent has resulted in the doctrine that rights protected by the 14th Amendment are those essential to a “scheme of ordered liberty”20 and then only to the extent necessary to insure a fair trial. A “selective approach”21 was adopted; some rights were excluded entirely because their preservation was not essential to “ordered liberty” or “fair trial”;22 others were included in diluted form.23 As to the latter, the test became whether the recognition and preservation of that particular right in that particular case as applied to that particular defendant was necessary to insure him a fair trial.24 The application of this test raised a further question to which Stein v. New York

22 See text at note 20 et seq. infra.
13 Supra note 2.
14 211 U.S. 78 (1908). Mr. Justice Harlan dissented at 114, contending that the Privileges and Immunities clause of the 14th Amendment incorporated Fifth Amendment self-incrimination as a limitation on the states.
15 316 U.S. 455, 474 (1942).
16 332 U.S. 46, 68 (1947).
17 333 U.S. 640, 677 (1948).
18 338 U.S. 25, 40 (1949).
21 Among the best expositions of majority and dissent on the selective approach, are, for the majority view: Justice Cardozo’s opinion in Palko v. Connecticut, 302 U.S. 319 (1937), and the opinion of Chief Justice Stone in Lisenba v. California, 314 U.S. 219 (1941), and Justice Frankfurter’s opinions in Mallinckrodt v. New York, 324 U.S. 401 (1945) and Rochin v. California, 342 U.S. 165, 174 (1952); for the dissenting view, Justice Douglas’ concurrence in Rochin v. California. For similar views in the field of civil procedure, with particular reference to problems of jurisdiction, see the majority and concurring opinions in International Shoe Co. v. Washington, 326 U.S. 310 (1945).
22 E.g., the requirement of indictment by a grand jury, Hurtado v. California, 110 U.S. 516 (1884).
FOURTEENTH AMENDMENT

may provide the answer. The question is this: Is a fair trial one that is fair in the means used, or is it one that reaches an apparently just result? If the defendant is obviously a scoundrel, clearly guilty of the offense charged, who received his just deserts, does it matter that the state, in effecting a conviction violated his constitutional rights? Is due process satisfied, even though there has been a violation of constitutional rights, if such violation did not produce prejudicial error? Or does due process require further that the means adopted to procure conviction must be beyond reproach?

Two illustrations from past decisions, together with an hypothetical situation, well point up the problem.

The grand jury that indicted the defendant in Cassell v. Texas had been selected with purposeful exclusion of Negroes in a manner that violated the equal protection clause of the 14th Amendment. Defendant was convicted after a fair trial, by a trial jury that had been selected in a fair manner and on evidence that was overwhelming. The Court found no fault in the actual trial. The conviction was reversed for the denial of constitutional rights in the selection of the indicting grand jury.

The evidence obtained in Rochin v. California by violent physical invasion of the defendant's person unquestionably established guilt. That violent invasion of his person "shocked the conscience," and the conviction did not stand.

Assume a confession is obtained under circumstances that constitute coercion of the defendant. That confession may furnish the lead to further investigation and the production of other evidence which inevitably links the defendant with the crime, or it may be supported by other confessions, given at other times and under other circumstances that are beyond constitutional objection. Does the use of the tainted confession vitiate the entire proceeding, or is the conviction to be set aside only when it can be said that the confession is a false premise from which to infer guilt and the evidence as a whole is such that it does not reasonably support or warrant a finding of guilt?

This last is the specific question that Stein v. New York poses; the Court's answer to it and the inferences to be drawn from language in the majority opinion, together with what the dissenters say the majority opinion means, indicate that due process merely requires a seemingly just result.

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29 E.g., Watts v. Indiana, 338 U.S. 49 (1949).
rather than a trial that follows and adheres to fundamental principles of fairness.

There were three defendants in Stein v. New York, Stein, Cooper and Wissner. All were convicted of murder and sentenced to death. The New York Court of Appeals affirmed the convictions without opinion, and the United States Supreme Court granted certiorari. The constitutional issues were (i) whether the confessions by Stein and Cooper were admissible or were coerced,\(^3\) (ii) whether the issue of coercion was properly left to the trial jury, (iii) whether, assuming the confessions were coerced and the jury so found, the convictions could be sustained.

Cooper was arrested on June 5, about 9 in the morning; he was kept continuously under guard and was taken later that day to state police headquarters; questioning began about 8 that evening and continued for four or five hours; questioning was resumed about 10 a.m. on the 6th and continued until about 6 p.m. when Cooper began to talk about confessing. Cooper insisted upon first discussing the matter with a parole officer since his brother, though not implicated in the crime itself, had been arrested as a parole violator and Cooper wanted to clear him. About 10 p.m. that day Cooper made an oral confession to the Parole Commissioner and early the next morning signed a written confession.

Stein was arrested about 2 a.m. on the 6th and taken to state police headquarters. He was questioned intermittently on the 6th, with no results. About 2 a.m. on the 7th, and after Cooper's signed confession was obtained, Stein was informed that Cooper had confessed and implicated him. Stein was told to "sleep on it." Later Stein signed a written confession and the next day went over the scene of the crime with the police and explained in detail how it had been committed.

Wissner never confessed; he was arrested after Cooper's confession had implicated him.

There was no direct evidence of the use or threat of force.\(^8\) The police denied there had been any. None of the defendants testified.

The trial court followed the customary New York procedure.\(^3\) A preliminary hearing on the admissibility of the confession was held, with the jury present. On such hearing, it was the duty of the trial court, if satisfied that the confession was coerced, to exclude it. Having determined that a question of fact existed, the trial court left the question of coercion to the

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3. The circumstances under which the confessions were obtained are set forth in the majority opinion, 346 U.S. at 166-170.

8. There was testimony that "when first physically examined, the day after arraignment, they showed certain bruises and injuries which could have been sustained from violent 'third degree' methods." Id. at 169. There was no evidence as to when or how defendants came by these bruises or injuries.

3. The procedure is set forth in the majority opinion, id. at 170.
jury under an instruction\textsuperscript{34} that defined coercion as including not only actual coercion resulting from force or the fear or threat of force, but also any implied coercion because of the manner in which the defendants had been kept in custody. This instruction imposed upon the state the burden of proving beyond a reasonable doubt that the confessions were voluntary as thus defined.\textsuperscript{35}

The United States Supreme Court held that this procedure was consistent with due process.\textsuperscript{36}

The Supreme Court then considered the confessions. It held that under the "admitted facts rule,"\textsuperscript{37} it must accord full respect to the state court's determination of the ultimate facts and circumstances attending the obtaining of the confessions, that in view of those facts the state court could properly have found that the confessions were not the result of coercion, physical or psychological, and "if the jury resolved that the confessions were admissible as a basis for conviction it was not constitutional error."\textsuperscript{38}

Thus far the Supreme Court's opinion raised no serious question. It seems clear that on the basis of past decisions in confession cases\textsuperscript{39} and in accord with the "admitted fact rule" these confessions were not "coerced" unless every confession obtained during a period of illegal detention after arrest and prior to arraignment must be excluded.\textsuperscript{40} A majority of the Court has never accepted the latter view.

It is the next step in the Court's opinion that is the most significant part of the Stein decision. For the Court proceeded to consider whether the con-

\textsuperscript{34} The instruction is contained in footnote 17 to the majority opinion, \textit{id.} at 173.

\textsuperscript{35} \textit{Ibid.}

\textsuperscript{36} "The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions as between judge and jury as they see fit . . . Despite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom." \textit{id.} at 179. For the federal rule, see United States v. Carignan, 342 U.S. 36 (1951).

\textsuperscript{37} " . . . In all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here . . . This brings us to the undisputed circumstances which must determine the issue of due process in this case." Watts v. Indiana, 338 U.S. 49, 51-52 (1949).

\textsuperscript{38} 346 U.S. at 188.


\textsuperscript{40} This is the rule in the Federal courts, established by McNabb v. United States, 318 U.S. 332 (1943) as a rule of procedure and not as a constitutional command. For development and application of the federal rule, see United States v. Carignan, 342 U.S. 36 (1951); Upshaw v. United States, 335 U.S. 410 (1948); United States v. Mitchell, 322 U.S. 65 (1944).
viction could stand if the jury, under the instructions of the trial court, had determined that the confessions were not admissible.\(^4\) Admittedly this was pure speculation; since the jury convicted with a general verdict of guilty, without special verdict or finding, there was no way of knowing whether the jury accepted the confessions and convicted on that basis, or rejected the confessions and convicted on other evidence, or used confessions and other evidence as make-weights, each to bolster the other, or whether some jurors arrived at their verdict by one path and some by another.\(^4\) And it is at this point that the majority seems to be stating the rule that since it clearly appears that the defendants were guilty and got their just deserts, it does not matter whether the confessions were coerced or not; their admission could not have affected the result and could not have prejudiced the defendants. Such a holding would be contrary to previous decisions, notably *Malinski v. New York*\(^4\) and *Stroble v. California*;\(^4\) it could lead to far-reaching consequences in other situations where the credibility of evidence is not affected by the means by which it was procured, a repudiation of the *Rockin* decision\(^4\) and a validation of blood tests taken against the will or without the consent of the defendant;\(^4\) it could mean a reversal of the grand jury cases\(^4\) and might even affect some of the trial jury cases.\(^4\)

In order to determine whether that is what the majority opinion really means, it seems advisable to review with care earlier pronouncements by members of the majority, and particularly such pronouncements by Mr. Justice Jackson, the spokesman for that majority.

There seems to be a consistent pattern running through Mr. Justice Jackson's prior opinions which indicates that his concern in state cases is primarily with the end result, and not with the means used to reach that result.\(^4\)

*Cassell v. Texas*\(^5\) is a good illustration. In that case Mr. Justice Jack-

\(^4\) 346 U.S. at 188.

\(^4\) Id. at 177.

\(^4\) 324 U.S. 401 (1945).

\(^4\) 343 U.S. 181 (1952).

\(^4\) 342 U.S. 165 (1952). The principal evidence against defendant consisted of narcotics which he swallowed at the time of his arrest and which were recovered by forcible administration of a stomach pump. The conviction was reversed. For a statement of the court's rationale, see text at note 87 infra.

\(^4\) See the recent decision of the California Supreme Court in *People v. Haussler*, 41 A.C. 256, 260 P.2d 8 (1953) (holding Rochin v. California inapplicable under the facts).

\(^4\) See text at note 26 supra.

\(^4\) See dissenting opinion of Mr. Justice Douglas, 346 U.S. at 206, quoted infra note 91.

\(^4\) This caveat needs to be noted; Justice Jackson while often voting against the claimed constitutional right in state criminal prosecutions has been a strong advocate of imposing strict limitations on Federal enforcement officers, as witness his position in the following: (a) self-incrimination cases: Shapiro v. United States, 335 U.S. 1 (1948); United States v. Hoffman, 335 U.S. 77 (1948); (b) District of Columbia jury cases: Dennis v. United States, 339 U.S.
son was the lone dissenter from a judgment reversing a conviction because Negroes had been systematically excluded from the indicting grand jury. The opening paragraphs of his opinion express the underlying rationale for his dissent:

"The case before us is that of a Negro convicted of murder . . . No question is here as to his guilt. We are asked to order his release from this conviction upon the sole ground that Negroes were purposefully discriminated against in selection of the grand jury that indicted him . . .

"In setting aside this conviction, the Court is moved by a desire to enforce equality in that realm where, above all, it must be enforced—in our judicial system. But this conviction is reversed for errors that have nothing to do with the defendant's guilt or innocence, or with a fair trial of that issue. This conflicts with another principle important to our law, viz., that no conviction should be set aside for errors not affecting substantial rights of the accused."

Later in the course of the same opinion, he states: "It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice." He concludes: "I do not see how this Court can escape the conclusion that any discrimination in selection of the grand jury in this case, however great the wrong toward the qualified Negroes of the community, was harmless to this defendant."

Another indication of Mr. Justice Jackson's views, this time in a series of coerced confession cases, is in his separate opinion in the Harris, Turner and Watts cases, concurring in the result in Watts and dissenting in Turner and Harris. In all three cases judgments of convictions were reversed by the United States Supreme Court because of the use of coerced confessions.

The admitted facts as to the circumstances under which those confessions had been obtained would seem to require the holding that they were coerced, if any confession obtained by methods that fall short of physical...
violence is to be regarded as coerced. They were death sentence cases; Harris was illiterate; Harris and Watts were identified in the reports as Negroes; each defendant had been subjected to prolonged grilling while held incommunicado and without being permitted to see friends or counsel.

Mr. Justice Jackson stated in part:\textsuperscript{68}

"In each, confessions were made and received in evidence at the trial. Checked with external evidence, they are inherently believable, and were not shaken as to truth by anything that occurred at the trial.

"\ldots I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment 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?

"\ldots But if ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect’s help [sic] in solving a crime merely because he was confined and questioned when uncounseled?

"We must not overlook that in these, as in some previous cases, once a confession is obtained it supplies ways of verifying its trustworthiness. In these cases before us the verification is sufficient to leave me in no doubt that the admissions of guilt were genuine and truthful.

"\ldots I doubt very much if ... [the Constitution and Bill of Rights] require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as ‘due process of law’? And if not a necessary one, should it be demanded by this court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

Three other members of the Stein majority, Chief Justice Vinson and Justices Reed and Burton, dissented from the judgments of reversal in the Harris, Turner and Watts cases. They filed no opinion and did not indicate acceptance or rejection, in whole or in part, of Justice Jackson’s opinion, but merely noted “On the record before us and in view of the consideration given to the evidence by the state courts and the conclusion reached ... the judgment should be affirmed.”\textsuperscript{67}


\textsuperscript{67}I\textsuperscript{d} at 62. It is not possible to determine whether the dissent’s reference to the “record before us” and the “evidence” is to the record and evidence on the issue of coercion, or to the record and evidence as a whole on the issue of guilt. In only one of these cases did the state court stress the corroboration of the confession by other evidence of guilt. Commonwealth v. Turner, 358 Pa. 350, 58 A.2d 61 (1948). The Pennsylvania Supreme Court stated that “there can be no reasonable doubt of the story’s truthfulness,” \textit{id}. at 355, 58 A.2d at 64, and later: “Turner's
Opinions by other members of the Stein majority have expressed ideas similar to those of Mr. Justice Jackson.

In *Cassell v. Texas* Mr. Justice Clark expressly agreed with the theory of Justice Jackson's dissent, but joined with the majority solely on the basis of stare decisis.\(^\text{58}\)

In *Palmer v. Ashe*\(^\text{59}\) a majority of the Court had held that petitioner was entitled to a hearing in the state courts on his petition for habeas corpus. The petition alleged, and the answer to the petition admitted, that he was imprisoned following an uncounselled plea of guilty, and his petition further alleged that when his plea was entered, special circumstances existed which deprived him of the ability fairly to defend himself.

The dissenting opinion, by Mr. Justice Minton, concurred in by Chief Justice Vinson and Justices Reed and Jackson, contains this significant statement: "For aught that appears in his petition, he did commit the offenses—he alleged only that he did not plead guilty to them."\(^\text{60}\)

Still another indication is that some members of the Stein majority, in earlier confession cases, had stated that the rationale for the exclusion of a coerced confession was that such evidence was untrustworthy and an unsound foundation on which to predicate guilt. Mr. Justice Reed stated, speaking for the majority in *Lyons v. Oklahoma*:\(^\text{61}\)

"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."


\(^{\text{59}}\) 342 U.S. 134 (1951).

\(^{\text{60}}\) Id. at 142.

\(^{\text{61}}\) 322 U.S. 596, 605 (1944).
Although the Lyons majority limited its statement by a footnote:

"Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal."

it is highly significant that the Stein majority now refers to that footnote as a dictum, unnecessary to the decision.3

And this brings us to a consideration of what the majority opinion in Stein v. New York may mean for the future.

That opinion is replete with statements which indicate that the constitutional issue with respect to coerced confessions is to be resolved by determining whether the admission of the confession prejudiced the defendant.

First, many of the earlier cases in which the Court had said that the admission of a coerced confession requires reversal are disposed of with the statement that such expressions were dicta because the confessions had been held admissible.4 Other cases are distinguished on the grounds that without the confession there was no evidence to support a conviction.5

While these remarks in the Stein case were directed to a narrow issue—whether if the jury had rejected the confessions under the instructions, it was disqualified from finding a conviction on other sufficient evidence—they indicate, when taken with what follows, that even if the confessions should have been rejected as a matter of law, the convictions could stand because of the other sufficient evidence. The majority opinion continues with this statement:6

63 346 U.S. at 189.

"This Court's power to reverse such a conviction was first exerted in Brown v. State of Mississippi . . . in which the only evidence in the trial consisted of a confession admittedly secured through mob violence. The Court there reasoned that if the defendant's 'trial' consisted solely of the introduction of such evidence, he had only a 'mere pretense' of a trial; the actual trial had occurred during the extortion of the confession . . . In Ashcraft v. State of Tennessee . . . and Ward v. State of Texas . . . we noted that without the confession there could be no conviction. And in Lyons, there was no credible evidence of guilt in the record except the confession; in the Gallegos case, it is noted that conviction without the confession 'would logically have been impossible.'"

It is to be noted that in Brown v. Mississippi the confession was procured by physical torture, consisting of whippings and hangings until defendants confessed. Does the majority opinion here suggest that if the other evidence were ample, the conviction could have been affirmed?

66 346 U.S. at 191 (emphasis added).
"We would have a different question if the procedure had been that which may have been in mind when some of our cases were written. Of course, where the judge makes a final determination that a confession is admissible and sends it to the jury as part of the evidence to be considered on the issue of guilt and the ruling admitting the confession is found on review to be erroneous, the conviction, at least normally, should fall with the confession."

At this point, it would appear that the opinion has considered two alternatives. One is the tentative offer of a confession under instructions to the jury that they are not to consider it if they determine it was not voluntary and the circumstances attending the obtaining of that confession are such that the reviewing court, as in the Stein case, cannot say that the confession was coerced. We may accept the Court's conclusion that in such circumstances the conviction stands, if for no other reason than under the "admitted facts" rule, the record does not sustain the charge of a coerced confession. The second alternative is the positive offer of a confession under a trial court ruling that it is admissible and the circumstances attending that confession are such that the reviewing court must hold that the confession was coerced. What is the significance of the qualifying phrase that "the conviction, at least normally, should fall with the confession"?

We must assume that the "at least normally" was purposely inserted. It can only mean that the conviction does not necessarily fall with the confession; that there are circumstances and cases where a conviction can stand even though a coerced confession is put before the jury positively and not tentatively.

This is clearly a repudiation of the Stroble and Malinski decisions where a majority held that the tentative admission of a coerced confession vitiates a conviction, even though the evidence otherwise is more than ample to convict. Thus in Malinski, a majority stated: "And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict." Stroble was to the same effect.

67 324 U.S. 401, 404 (1945).
68 The California Supreme Court had assumed that defendant's first confession was coerced. People v. Stroble, 36 Cal. 2d 615, 623, 226 P.2d 330, 335 (1951). It held that the admission of that confession did not require reversal because at least five other confessions of materially similar substance and unquestioned admissibility were in evidence and the outcome of the trial would have been the same if the first confession had been excluded. Id. at 623-624, 226 P.2d at 336. The United States Supreme Court stated: "We take a somewhat different view. If the confession which petitioner made in the District Attorney's office was in fact involuntary, the conviction cannot stand, even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict." Stroble v. California, 343 U.S. 181, 189-190 (1952). This quotation is from the majority opinion, written by Justice Clark and concurred in by Chief Justice Vinson, and Justices Reed, Jackson, Burton and Minton, the same justices who characterize this statement as dictum in the Stein majority opinion.
The Stein majority disposes of the Malinski and Stroble decisions by asserting that such statements were dicta or were addressed to procedural situations substantially different from Stein. These arguments are not convincing. The confessions in Malinski and Stroble were put before the jury in substantially the same manner as in Stein. A determination of whether they were coerced, and if coerced whether their tentative admission required reversal, was necessary in both cases.

This unconvincing disposition of Malinski and Stroble and the characterization of the Lyons footnote as dicta, coupled with the qualifying phrase "at least normally," would seem to indicate that even the positive admission of a coerced confession does not always require reversal. This can only mean a rule of "prejudice."

This leads to the third alternative, which the court does not expressly consider, and which indeed it could not, as not within the issues of the case. A confession is put before the jury tentatively, as in the Stein or Stroble cases, and not positively, and the jury convicts; unlike the result in Stein, the reviewing court holds the confession constitutionally coerced; however, the remaining evidence, without the confession, is more than adequate. Perhaps some or all of that evidence has been developed as the result of leads obtained from the tainted confession; perhaps not. It would seem that the Stein majority necessarily implies that in such a case the conviction stands. Certainly if the confession put forth positively does not absolutely compel reversal, the confession put forth tentatively is less repugnant. Such a conclusion would seem to follow from the use of the "at least normally," with respect to confessions positively admitted, but we are not without additional guides to the ideas of the majority in Stein v. New York. That opinion tells us, reverting to the earlier statement in Lyons, that the reason why coerced confessions should not be admitted is not to vindicate constitutional rights; the reason is they are untrustworthy or illusory.

"We could hold that such provisional and contingent presentation of the confessions precludes a verdict on the other sufficient evidence after they are rejected only if we deemed the Fourteenth Amendment to enact a rigid exclusionary rule of evidence rather than a guarantee against conviction on inherently untrustworthy evidence. We have refused to hold it to enact an exclusionary rule in the case of other illegally obtained evidence .... Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession

346 U.S. at 189.
70 Id. at 191.
71 See People v. Malinski, 292 N.Y. 360, 55 N.E.2d 353 (1944) and dissenting opinion in Malinski v. New York, 324 U.S. 401, 435 (1945); on the procedure followed by California and the instructions to the jury in the Stroble case, see Stroble v. California, 343 U.S. 181, 189 (1952).
73 Text at note 61 supra.
vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A beaten confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire-tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so."

And finally, from the closing paragraph of the majority opinion: "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty." Does this not imply, that if the illusion and deception are adequately dispelled, if the confession is no longer "a false foundation" because shored up by solid, uncontradicted evidence, police lawlessness will no longer void the conviction and coercion in obtaining the confession is a mere technicality?

It would seem clear from the past expressions of Mr. Justice Jackson, from the views expressed by Justices Minton, Clark and Reed in the opinions which have been quoted, from the dissents of Justices Burton and Reed and Chief Justice Vinson, in the Harris, Turner and Watts cases, and from the concurrence of all these Justices in the Stein case, that the Stein majority, with Justice Jackson as its spokesman has used the Stein decision as a springboard to indicate a broad and sweeping doctrine, that to have constitutional error there must be prejudicial error.

There is one caveat to these conclusions. There is, running through Mr. Justice Jackson's opinions, the indication that when the action taken by the

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74 346 U.S. at 192 (emphasis added). Compare with the following statements by the Pennsylvania Supreme Court in Commonwealth v. Turner, 358 Pa. 350, 58 A.2d 61 (1948), rev'd, 338 U.S. 62 (1949): "His narrative dovetailed so accurately with the physical facts surrounding the crime and with the story told by his accomplices that there can be no reasonable doubt of the story's truthfulness." Commonwealth v. Turner, supra at 355, 58 A.2d at 64. "Turner's statements appear to be those of a man whose narrative was based on first-hand knowledge and not on induced fabrication. What he stated fitted into all the admitted facts." Id. at 362, 58 A.2d at 67. "The test to be applied to confessions secured by police officers is this long established and judicially sanctioned one, to wit: 'Was the confession secured under such circumstances and by such methods as to make it testimonially trustworthy?' Only when it is manifestly worthless as evidence should it be summarily rejected." Id. at 365, 58 A.2d at 68. Compare also the statements of the California Supreme Court in the Stroble case, with which the United States Supreme Court took a "different view," note 68 supra.

75 346 U.S. at 196 (emphasis added).

76 Note also the following statements in the majority opinion in Stein v. New York: Cooper's confession "is twelve pages long, in great detail; it is corroborated throughout by other evidence, and its general character is such that it could have been fabricated only by a person gifted with extraordinary creative imagination." And "This [Stein's] seven-page statement, like Cooper's, was so complete and detailed and so dovetailed with the extrinsic evidence that, if it were not true, its author was possessed of amazing powers of divination." Id. at 168.
law enforcement officers violates some “strong social policy” a conviction will not stand regardless of how trustworthy or how credible the evidence may be. Similar language appears in the Stein case, where in discussing review of the evidence under the admitted facts rule, he states:

“It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.”

Apparently there are some kinds of conduct in violation of constitutional rights, which are so offensive as to preclude conviction regardless of the evidence. What those areas may be remains uncertain; perhaps Rockin v. California is such a case; perhaps the purposeful exclusion of Negroes from trial juries is another.

There is a further guide to the import of the majority opinion. Dissenting opinions can serve a purpose other than the exposition of the views of the dissenters. A dissent may shed greater light on the meaning and implications of the majority, meaning and implications which do not appear in the words of the majority opinion, but may have been gleaned by the dissenters from views expressed in conference. In this respect a dissent can be a valuable guide to what the majority meant by what it said. Such a guide appears to be furnished here by Mr. Justice Frankfurter’s dissent. His dissent seems particularly significant since it is not conditioned, as the dissents of Justices Black and Douglas may have been, by long adherence to the “incorporation theory” which would make rights in state proceedings identical with rights in federal proceedings, and would thus have disposed of the confession issue on Fifth Amendment self-incrimination, rather than on 14th Amendment due process.

Mr. Justice Frankfurter has been a consistent adherent of the Stone-Cardozo approach, of the selective process, and of the due process clause as equated with the “concept of ordered liberty.” This approach has been

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77 See for example, On Lee v. United States, 343 U.S. 747, 755 (1952): “In order that constitutional or statutory rights may not be undermined, this Court has on occasion evolved or adopted from the practice of other courts exclusionary rules of evidence going beyond the requirements of the constitutional or statutory provisions . . . In so doing, it has, of course, departed from the common-law rule under which otherwise admissible evidence was not rendered inadmissible by the fact that it had been illegally obtained. Such departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy.”

78 346 U.S. at 181.

79 Id. at 199.

80 See cases cited in text at note 13 supra.

81 See 346 U.S. at 208.

82 See text at note 20 supra. One of the best expressions of his views is in his dissent in On Lee v. United States, 343 U.S. 747, 758 (1952) quoted infra at note 84.
particularly noticeable in his majority opinion in *Rochin v. California*, his dissent in *On Lee v. United States* and his concurrence in *Malinski v. New York*. While it has put him in theoretical opposition to Justices Black and Douglas as to the path to be followed in reaching a result, it has often placed him on their side with respect to the result reached. The essence of his approach has been that the end does not justify the means, that certain conduct is not to be tolerated because it is “dirty business” and soils the hands of a society that engages in it.

His views on admissibility of confessions and the strength of other evidence were clearly expressed in *Rochin v. California*:

“It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. To attempt in this case to distinguish what lawyers call ‘real evidence’ from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community’s sense of fair play and decency.”

*FOURTEENTH AMENDMENT* 687

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83 “Regard for the requirements of the Due Process Clause ‘inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking people even toward those charged with the most heinous offenses.” 342 U.S. 165, 169 (1952), quoting in part from his opinion in Malinski v. New York, 324 U.S. 401, 416-417 (1945).

“... we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.” 342 U.S. at 172.

84 “The law of this Court ought not to be open to the just charge of having been dictated by the ‘odious doctrine,’ as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicality. It derives from a preoccupation with what is episodic and a disregard of long-run consequences. The method by which the state chiefly exerts an influence upon the conduct of its citizens, it was wisely said by Archbishop William Temple, is ‘the moral qualities which it exhibits in its own conduct’... criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which ‘the dirty business’ of criminals is outwitted by ‘the dirty business’ of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet.” 343 U.S. 747, 758-759 (1952).

85 324 U.S. 401 (1945), quoted in part at note 83 supra.

86 See note 84 supra.

He repeats those views in the Stein case: 58

This issue [whether the confession was coerced] must be decided without regard to the confirmation of details in the confession by reliable other evidence. The determination must not be influenced by an irrelevant feeling of certitude that the accused is guilty of the crime to which he confessed. Above all, it must not be influenced by knowledge, however it may have revealed itself, that the accused is a bad man with a long criminal record. All this, not out of tenderness for the accused but because we have reached a certain stage of civilization.

This would seem to mark the difference between the approach of the majority opinion and Mr. Justice Frankfurter's dissent in the Stein case. He clearly regards the majority as departing from prior opinions of the Court not only as to whether, on the record, the confessions were in fact coerced, but also as to the effect of the admission of a coerced confession.

... I am compelled to conclude that the confessions here were the product of coercive police pressure ... I regret that the Court reaches another conclusion on the record, though I respect a conscientious interpretation of the record differing from mine.

But the Court goes beyond a mere evaluation of the facts of this record. It makes a needlessly broad ruling of law which overturns what I had assumed was a settled principle of constitutional law. It does so sua sponte ... Unless I am mistaken about the reach of the Court's opinion, and I profoundly hope that I am, the Court now holds that a criminal conviction sustained by the highest court of a State, and more especially one involving a sentence of death, is not to be reversed for a new trial, even though there entered into the conviction a coerced confession which in and of itself disregards the prohibition of the Due Process Clause of the Fourteenth Amendment. The Court now holds that it is not enough for a defendant to establish in this Court that he was deprived of a protection which the Constitution of the United States affords him; he must also prove that if the evidence unconstitutionally admitted were excised there would not be enough left to authorize the jury to find guilt.

An impressive body of opinion, never questioned by any decision or expression of this Court, has established a contrary principle. And this not only with reference to the admissibility of coerced confession; the principle has governed other aspects of disregard of the requirements of the Fourteenth Amendment in State trials. I refer inter alia to cases of discrimination in the selection of personnel of a grand jury which found an indictment. We have reversed in such cases even though there was no error in the conduct of the trial itself. 89

And finally he foresees serious implications in that "... if law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confessions provided only that, perhaps through the very process of extorting them, other evidence has been procured on which

58 346 U.S. at 200.
89 Ibid.
a conviction can be sustained, police in the future even more so than in the past will take the easy but ugly path of the third degree. I do not remotely suggest that any such result is contemplated by the Court. But it will not be the first time that results neither desired nor foreseen by an opinion have followed."

Mr. Justice Frankfurter is not alone in his interpretation of the majority opinion. The dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black, makes the same observation:

If the opinion of the Court means what it says, we are entering upon a new regime of constitutional law that should give every citizen pause. Heretofore constitutional rights have had greater dignity than rules of evidence. They have constituted guarantees that are inviolable. They have been a bulwark against overzealous investigators, inhuman police, and unscrupulous prosecutors. They have placed a prohibition on practices which history showed were infamous. An officer who indulged in the prohibited practices was acting lawlessly; and he could not in any way employ the products of his lawless activities against the citizen whose constitutional rights were infringed. But now it is said that if prejudice is not shown, if there was enough evidence to convict regardless of the invasion of the citizen's constitutional rights, the judgment of conviction must stand . . . .

One other matter needs to be considered—what showing will a defendant be called upon to make in order to establish that he was prejudiced by an asserted denial of constitutional rights? Three alternatives are open. One is to require him to carry the burden of establishing prejudice, of showing that it is not reasonable to believe that a conviction could have been obtained without the confession or such other denial of rights as may be involved. A second is to require only a showing that there is reasonable doubt that a conviction could have been obtained without the claimed denial of rights. The third is to rely on and give full deference to the state court's determination and to accept that court's decision in the matter unless it was founded on "incorrect constitutional standards of judgment."

This is essentially what the Court has done heretofore in applying the

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90 Id. at 203.
91 Ibid. Note also the following statement:
"The denial of a right guaranteed to a defendant by the Constitution has never been treated by this Court as a matter of mere error in the proceedings below which, if not affecting substantial rights, might be disregarded . . . We indeed said in the Avery case [Avery v. Georgia, 345 U.S. 559, 561 (1953)] that if the jury commissioners failed in their duty to use a non-discriminatory method of selecting a jury, the 'conviction must be reversed—no matter how strong the evidence of petitioner's guilt.' The reason is plain. The Constitution gives Negroes the right to be tried by juries drawn from the entire community, not hand-picked from the white people alone. Must a Negro now show that he suffered actual prejudice because none of his race served on the jury?" Id. at 206.
92 The phrase is from Mr. Justice Jackson's majority opinion in Stein v. New York, 346 U.S. at 182.
“admitted facts” rule\(^9\) and seems to be the alternative indicated by the Stein majority.\(^8\)

It would seem from the foregoing that we are entering upon a new trend in the application of the 14th Amendment to state criminal proceedings, a trend that had its beginnings with the 1949 term of court when Justices Clark and Minton replaced Justices Murphy and Rutledge.\(^5\) Viewed in the light of this trend, Stein v. New York appears to be part of a larger pattern of Supreme Court reluctance to interfere with criminal prosecutions, especially state prosecutions, unless the cards are so stacked against the defendant as to indicate that he may have been unjustly convicted rather than unfairly tried. There have already been clear-cut reversals of prior decisions. Darr v. Burford,\(^9\) even as limited by the later decision of Brown v. Allen,\(^7\) has made application to the federal courts for habeas corpus more difficult for state prisoners who claim they are confined in violation of constitutional rights. The meaning of “unreasonable” as applied to search and seizures\(^9\) by federal officers, has been limited by United States v. Rabinowitz\(^9\) overruling Trupiano v. United States.\(^10\) The application of the McNabb rule,\(^10\) on admissibility in federal courts of confessions obtained during a period of detention, has been limited by United

\(^9\) Text at note 37 supra.

\(^8\) "They [petitioners] say that affirmance without opinion may mean that, while the Court of Appeals thought the treatment of the confessions erroneous, it may have affirmed on the basis that, in view of other sufficient evidence, the error was harmless. The New York statute, like the Federal Rules of Criminal Procedure, commands reviewing courts to disregard errors and irregularities which do not affect substantial rights. That such a general legislative mandate is constitutional is not in question. If the general rule is not prohibited, the question in each case becomes one as to the propriety of its application to the evidence. In a trial such as this, lasting several weeks, where objections by three defense counsel required in excess of three hundred rulings by the trial court without the long deliberation and debate possible for appellate court consideration, it would be a miracle if there were not some questions on which an appellate court would rule otherwise than did the trial judge. The harmless-error statutes have been adopted to give discretion to overlook errors which cannot be seen to do injustice. But, whatever may have been the grounds of the Court of Appeals, we base our decision, not upon grounds that error has been harmless, but upon the ground that we find no constitutional error." 346 U.S. at 193.

\(^9\) See Mr. Justice Frankfurter dissenting in United States v. Rabinowitz, 339 U.S. 56, 86 (1950): “Especially ought the Court not reenforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court’s composition and the contingencies in the choice of successors.”


\(^1\) 344 U.S. 443 (1953).

\(^9\) “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. Const. Amend IV.


\(^10\) 334 U.S. 699 (1948).

\(^1\) Supra note 40.
In each instance the vote of either Justice Clark or Justice Minton, contrary to the position previously taken by Justices Murphy and Rutledge, turned the decision.

The last three significant confession cases decided prior to the deaths of Justices Murphy and Rutledge were the *Harris, Turner* and *Watts* cases. Two of those decisions were five to four; it now appears from the *Stein* case that the dissenters in those cases, joined by Justices Clark and Minton have constituted a new majority, with Justice Jackson as its spokesman, which presages the overruling of these decisions, either on the basis above suggested, or on the narrower basis that relentless police interrogation of a suspect prior to arraignment is not a violation of due process. If the latter position is taken, with some of the language of the *Stein* majority explained or limited, then the effect of the *Stein* case may not extend beyond the confession cases. But if the Court follows the broader rationale of the *Stein* majority, then the implications of that decision will affect all fields of criminal due process except where some "strong social policy" is involved.

Which path the Supreme Court will eventually follow is, of course, pure speculation. There is at least one pending case whose decision may shed some light, *Irvine v. California*, in which part of the incriminating evidence was obtained by a recording device installed in defendant's residence after an unlawful trespass. The Court's decision in this case and the reasons it gives for that decision may indicate the potential scope of the *Stein* majority.

In the last analysis only one thing is now certain. Until the implications and underlying meaning of the *Stein* majority are more fully explained, counsel for a defendant who claims a denial of constitutional rights had better be prepared to urge in the state court, and in the Supreme Court if review is obtained, that such denial actually prejudiced his client.