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discussed above. Although the goal of such legislation is admirable, the path has not been entirely free from obstacles. Nevertheless, until such time as an international cooperative effort is undertaken to relieve the current situation, there would appear to be no other course. The injustice produced in certain instances could largely be remedied by means of a more uniform judicial application. A single, reasonable standard for determining whether or not actions falling within the statute were voluntarily performed, and a common sense adaptation of the election provisions to meet the circumstances of the particular case,[61] would together constitute a safeguard for the incalculable privilege of American citizenship while in no way impairing the effectiveness of the Act. The right of expatriation should remain just that and should not, even for the most praiseworthy end, be transformed into a penalty.

THE DANGEROUS IMPLICATIONS OF THE STEIN CASE

> "American criminal procedure has its defects, though its essentials have behind them the vindication of long history. But all systems of law, however wise, are administered through men and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to counteract inevitable, though rare, frailties is the mark of a civilized legal mechanism."
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> Mr. Justice Frankfurter
> in Rosenberg v. United States,
> 73 Sup. Ct. 1152, 1171 (1953).

On June 15, 1953, the Supreme Court of the United States handed down its opinion in the case of *Stein v. New York*,[1] popularly known as the "Reader's Digest Murder Case." Often the opinions of a court are noteworthy for their dicta rather than the

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[61] For example, in Gualco v. Acheson, 106 F. Supp. 760 (N. D. Cal. 1952), petitioner, a dual national, living in Italy, was inducted and served in the Italian army. He was captured by the Germans and released in ill health after which he remained in Italy until long past his majority. The court, nonetheless, held that since his residence since that time was in part involuntary, due to sickness, he had a *reasonable* time within which to exercise his right of election rather than the strict statutory period. He first attempted to return here 31 months after his release by the Germans and was held not to have lost his American citizenship.

[1] 73 Sup. Ct. 1077 (1953).

point of law actually decided therein. The opinion in the *Stein* case falls into this category. Because of the peculiar facts of the case, the Court's *holding* is limited in scope. However, the opinion of the Court, delivered by Mr. Justice Jackson, gives rise to several interesting and important collateral issues which seem to require a revaluation of, and investigation into, the principles and laws governing our administration of criminal law, with special emphasis upon the persisting confession dilemma. The *Stein* case is chosen as the medium through which to view the problem because it depicts, with dramatic poignancy, the ever-present abuses of false arrest, unreasonable delay in arraignment and coerced confessions, and represents, in the writer's opinion, retrogression rather than progress in the search for justice.

The Facts

The facts of the *Stein* case, as presented to the Supreme Court, were as follows: The three appellants were convicted of felony murder in Westchester County, New York.[2] At the trial the district attorney offered as evidence two confessions allegedly made by Harry Stein and Calman Cooper while in the custody of the State Police. The defendants objected to the introduction of the confessions on the grounds that they were obtained by coercive methods and were wholly involuntary. The trial judge, after a preliminary hearing in the presence of the jury on the issue of coercion, left the decision of the issue to the jury under instructions to consider the confessions only if it found them to have been voluntary.[3] The jury, after hearing all the other evidence at the trial, returned a general verdict of guilty. Six members of the Supreme Court held that the conviction should stand. Recognizing that it was impossible to separate the jury's decision on the voluntary nature of the confessions from the general verdict of guilty, the Court went on to decide that on the evidence presented the jury would have been justified in finding the confessions to be voluntary and thus the conviction should not be disturbed.[4] This was the true holding of the *Stein* case and up to this point the decision is firmly supported by prior law on the subject. The Court, however, apparently unwilling to let the alternative of the question pass without comment posed this hypothetical:[5]

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[2] The defendants were convicted of murder in the first degree for the slaying of one Andrew Petrini, during the robbery of a delivery truck belonging to the Reader's Digest Publishing Company. N. Y. PENAL LAW § 1044(2).

[3] It is interesting to note that the trial judge outlined his charge to the jury from the case of *Malinski v. New York*, which is the case the Supreme Court now tells us is not controlling. Transcript of Record, p. 1280, People v. Cooper, 303 N. Y. 856, 104 N. E. 2d 917 (1952).

[4] *See* Stein v. New York, 73 Sup. Ct. 1077, 1089, 1092 (1953).

[5] Actually the hypothetical was originally proposed by the attorneys for the

Would it be the duty of this Court to reverse the conviction if the jury had found the confession to be involuntary but had nonetheless convicted on the basis of the other strong evidence of guilt? A majority of the Court answered this inquiry in the negative claiming that "due process" required them to reverse a conviction based on a coerced confession *only* if the other evidence of guilt would have been insufficient without the confession.[6] The Court dismissed as mere dicta the language of *Malinski v. New York* [7] wherein it was claimed that ". . . if it [the coerced confession] 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." [8] Thus the majority of the Court is of the opinion that a jury can effectively disregard a confession of guilt, found to be involuntary, and render an unbiased decision upon the basis of the other evidence introduced, without that process endangering the defendant's right to a fair and impartial trial.

The Confessions

The majority of the Court has assumed that the confessions made by Stein and Cooper were voluntary, that is, not made under threats or torture or promises of immunity. In his opinion Mr. Justice Jackson points to certain circumstances surrounding the confessions which, to the minds of the majority at least, substantiate the alleged voluntary nature of the confessions.[9] Choosing Calman Cooper as an example, let us review the circumstances surrounding his confession and then revaluate the merits of the claim that it satisfied the requirements of voluntariness prescribed by the New York Code of Criminal Procedure.[10] Most prosecutions start with an arrest and Calman Cooper's was no exception. He and his father were arrested around 9:00 A.M. on June 5. Neither was informed of the charge against him and indeed there appears to have been no *valid* reason for the arrest of Cooper's father.[11] Both men were taken to a police station

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defense, but since the Court has adopted it this article shall refer to it as "the Court's hypothetical."

[6] *See* Stein v. New York, *supra* note 4 at 1094-1095.

[7] 324 U. S. 401 (1945).

[8] *Id.* at 404.

[9] See Stein v. New York, *supra* note 4 at 1091-1094.

[10] N. Y. CODE CRIM. PROC. § 395. "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime has been committed."

[11] It is interesting to note that the arrests of Cooper and his father seem to have been technically unlawful. The district attorney claimed that he had a parole warrant for Cooper's arrest but did not produce the warrant because he believed it to be inadmissible since it would indicate to the jury that Cooper

in New York City and held, until around 1:00 P.M. of the same day, without being booked.[12] They were then taken to the State Police Barracks at Hawthorne, New York. It is not clear from the testimony whether any record was kept of their presence at the barracks but it is clear that no such record, if made, was available to any one but the police.[13] Upon arrival at the barracks father and son were separated. Calman Cooper was taken to one room in which he remained, constantly, for at *least* thirty hours.[14] During this time he was questioned for long periods by various officers.[15] His father was taken to another part of the building and, from all appearances, was forgotten until some sixty hours later when he was *unhandcuffed* and released because his son had finally confessed.[16] During this period Calman's brother, Morris, had been arrested in New York City and was being held on a parole violation charge.[17] Calman Cooper confessed at approximately 2:00 A.M. on June 7, some forty

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had a prior criminal record. However, the arrest of Cooper's father is inexcusable. Sgt. Sayers, the arresting officer, testified first that he had no charge against Cooper's father but admits that the latter was handcuffed for at least sixty hours. Transcript of Record, pp. 1310, 1365, 1371, People v. Cooper, 303 N. Y. 856, 104 N. E. 2d 917 (1952). He later testified that he was holding Cooper's father as a material witness. Record, p. 1367. This claim would seem to have no reasonable foundation since not only did Sayers fail to commit the father pursuant to the provisions of the Code of Criminal Procedure, but it does not appear that he or anyone else questioned Cooper's father during the sixty hours of his detention to determine whether or not he knew anything about the crime. This practice of holding a person as a "material witness" has been condemned as a method of circumventing the prompt arraignment requirements of Section 165 of the New York Code of Criminal Procedure. *See* People v. Perez, 300 N. Y. 208, 221, 90 N. E. 2d 40, 47 (1949) (dissenting opinion), *cert. denied,* 338 U. S. 952 (1950).

[12] There is no explanation given for this procedure, but it is clear that the man could have been arraigned at that time.

[13] Failure to maintain accurate records of persons detained by the police is a dangerous practice since under such circumstances, a person may be held indefinitely without any opportunity to exercise his rights. In the *Stein* case records were made of the defendants' fingerprints but the record on appeal clearly indicates that no other record of their detention was available to the defense attorneys.

[14] The approximate length of time during which Cooper was detained in the one room can be inferred from the testimony of Corporal McLaughlin. Transcript of Record, p. 1208, People v. Cooper, *supra* note 11. This same state trooper testified that he was not familiar with Section 1844 of the New York Penal Law, which makes it a misdemeanor for anyone to delay the arraignment of a prisoner. Record, p. 1222.

[15] The questioning of Cooper continued over a twelve-hour period and was accomplished by police interrogators using a relay technique. Stein v. New York, 73 Sup. Ct. 1077, 1093 (1953).

[16] Cooper's father was fingerprinted, handcuffed and left in a room at the police barracks apparently forgotten. He was unceremoniously released some sixty hours later when it no longer seemed expedient to hold him. See testimony of Sgt. Sayers, Transcript of Record, pp. 1365-1375, People v. Cooper, *supra* note 11.

[17] *See* Stein v. New York, *supra* note 15 at 1084.

hours after his arrest, but not before he had secured promises for his father's release and assurance that his brother would be unmolested.[18] All three defendants were finally arraigned on the evening of June 8.[19] The prison doctor who examined him testified that Cooper had bruises on the chest, stomach, right arm, and both buttocks.[20]

The trial judge charged as a matter of law that the delay in arraignment was unreasonable so there is no controversy on that score.[21] One of the most startling aspects of this case is that the police officers who testified all blandly stated that it never occurred to them that the prisoners should be taken before a magistrate.[22]

Mr. Justice Jackson tells us that Cooper's bargaining for the release of his father and brother ". . . reduces to absurdity his present claim, that he was coerced into confession." [23] There are a variety of methods by which a man's will may be broken. A strong man who can sustain personal physical torture beyond belief may well cringe in terror at the thought of such torture being inflicted upon the person of his father or brother. Furthermore, a confession obtained by bargaining, as a general rule of evidence, is considered highly untrustworthy.[24] In this respect it should be noted that the New York statute governing "promises of immunity" is entirely too limited in scope to be effective.[25]

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[18] The promise to Cooper that his brother would not be prosecuted was made by Parole Commissioner Donovan after Cooper had refused to accept the promise of one Reardon, an employe of the parole board. *Ibid.*

[19] The record on appeal discloses that while the defendants were being arraigned, there were large groups of state troopers surrounding them, many of whom were the former interrogators. Transcript of Record, p. 1329, People v. Cooper, 303 N. Y. 856, 104 N. E. 2d 917 (1952).

[20] 73 Sup. Ct. 1077, 1085 (1953). Wissner, one of the defendants, had a broken rib, various bruises and abrasions on the side, legs, stomach and buttocks. *Ibid.*

[21] Transcript of Record, p. 2777, People v. Cooper, *supra* note 19.

[22] See testimony of Corporal McLaughlin, Transcript of Record, p. 1210, and Sgt. Sayers, Transcript of Record, pp. 1360, 1367, People v. Cooper, *supra* note 19.

[23] Stein v. New York, *supra* note 20.

[24] See 3 WIGMORE, EVIDENCE § 834 (3d ed. 1940).

[25] Section 395 of the New York Code of Criminal Procedure provides that promise of immunity must be made by the district attorney or someone authorized by him, in order that the confession made in reliance on such promises be rendered inadmissible. It would seem that this is true because the district attorney is the only one in the position to carry out such promises, and thus the prisoner cannot reasonably rely on the promise of a lesser person. *See* People v. Stielow, 161 N. Y. Supp. 599, 610 (Sup. Ct. 1915), *aff'd mem.*, 217 N. Y. 641, 112 N. E. 1069 (1916). Furthermore it would seem, from a reading of the New York statute, that the promise must be for the defendant's *personal* immunity and thus would not cover a situation like that of the *Stein* case, where the promises inured to the benefit of the defendant's family. It is difficult to imagine why such a distinction should be made if basic unreliability is the objection to confessions obtained in this manner. For the view of the

The majority, in an effort to offset the apparent unreliability of such a confession, points to the almost perfect "dove-tailing" of the confessions with the extrinsic facts which it says ". . . could have been fabricated only by a person gifted with extraordinarily creative imagination." [26] It is submitted that the absence of contradiction in the confessory statement of a man accused of a crime is as indicative of a single controlling hand, *i.e.*, the police interrogator's, as it is of veracity.[27]

The prosecution's entire case of rebuttal to the coercion charges consists of denials by police officers, admittedly guilty of violating the New York Code of Criminal Procedure [28] and apparently of unlawful arrest.[29] Furthermore, the only explanation the police can offer for the multiple fractures and bruises suffered by all three defendants is that they might have occurred before arrest.[30] It should here be noted that in the State of New York the burden of explaining such injuries to a prisoner is upon the prosecution.[31]

The majority of the Court tells us that the weakness of the defendants' claim is demonstrated by their failure to testify on their own behalf.[32] A glance at the prior criminal records of these men will serve to explain their reluctance to subject themselves to impeachment.[33] Mr. Justice Jackson frequently refers to these criminal records as evidencing the defendants' guilt. The writer cannot help but agree with the majority that in all probability these men were guilty of the crime charged. This conclusion, however, is not determinative of the coercion question nor does a defendant's guilt render inconsequential a denial of "due process."

A close reading of the majority opinion in the *Stein* case, especially in view of the Court's answer to the hypothetical question, gives the reader cause to wonder whether the Court actually believed the confessions to have been voluntary. The question posed by the Court, as to the effect of a coerced confession where the other evidence is ample to sustain conviction, has never, in the opinion of Justice Jack-

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courts of California on this subject, see People v. Orloff, 64 Cal. App. 2d 614, 151 P. 2d 288, 291 (1944). The *Stein* case points up the danger of restricting the rule to promises made by the district attorney since in that case the only logical person to promise immunity for Cooper's brother was Parole Commissioner Donovan. See note 18 *supra*. A broader, more comprehensive rule is set forth in the Model Code of Evidence, Rule 505. See note 65 *infra*.

[26] Stein v. New York, 73 Sup. Ct. 1077, 1084 (1953).

[27] For another example of a too perfect confession, see People v. Mummiani, 258 N. Y. 394, 404, 180 N. E. 94, 98 (1932).

[28] N. Y. CODE CRIM. PROC. § 165. The defendant must in all cases be taken before a magistrate without unnecessary delay.

[29] See note 11 *supra*.

[30] *See* Stein v. New York, *supra* note 26 at 1085.

[31] *See* People v. Valletutti, 297 N. Y. 226, 230, 78 N. E. 2d 485, 486 (1948); People v. Barbato, 254 N. Y. 170, 176, 172 N. E. 458, 460 (1930).

[32] Stein v. New York, 73 Sup. Ct. 1077, 1088, 1092 (1953).

[33] *Ibid.*

son, been directly before the Court,[34] so that the *Stein* case may have presented an irresistible temptation to the Court to express its opinion on the matter. Another related question which springs into mind is: Why did the Court of Appeals affirm the conviction without rendering an opinion?[35] Surely the opportunity for adopting or rejecting the language of the *Malinski* case was as apparent to that Court as it was to the United States Supreme Court. In the writer's opinion the Court of Appeals, recognizing that any answer it could make to the question would seriously affect the New York practice of allowing juries to settle the coercion questions, considered it better policy to affirm on the narrow facts of this case and wait for the Supreme Court to make the first move.

A better understanding of the problems arising from the *Stein* case can be gained by a brief reference to the New York courts' procedure in cases of this type since it is this procedure which lies at the root of the controversy. Pursuant to statute in New York, confessions obtained by duress or made in response to promises of immunity by the district attorney are inadmissible as evidence.[36] It is also clear that in New York, as well as the other forty-seven states, the admission of a coerced confession into evidence is violative of "due process" if that confession is a contributing factor toward the conviction.[37] If otherwise admissible, it is no objection to a confession that it was obtained during an unreasonable delay in arraignment.[38] However, such delay is a factor to be considered in determining the ultimate question of voluntariness.[39] The question as to whether the confession is voluntary or involuntary is, in the first instance, for the judge to decide.[40] If the evidence pertaining to coercion gives rise to a substantial question of fact the judge may submit the question to the jury with instructions to disregard it if they find it to have been involuntary.[41] The burden of proving the confession to be voluntary in nature is upon the prosecution.[42]

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[34] *Id.* at 1095. Mr. Justice Jackson had hinted at his belief that the hypothetical question was a novel one to the Supreme Court in his concurring opinion in Gallegos v. Nebraska, 342 U. S. 55, 70 (1951). The majority opinion in that case, however, reiterated the rule of Malinski v. New York, 324 U. S. 401 (1945). *Id.* at 63.

[35] People v. Cooper, 303 N. Y. 856, 104 N. E. 2d 917 (1952).

[36] N. Y. CODE CRIM. PROC. § 395.

[37] Brown v. Mississippi, 297 U. S. 278 (1936); Chambers v. Florida, 309 U. S. 227 (1940); Malinski v. New York, *supra* note 34; Watts v. Indiana, 338 U. S. 49 (1949); Haley v. Ohio, 332 U. S. 596 (1948); People v. Leyra, 302 N. Y. 353, 98 N. E. 2d 553 (1951), *cert. denied*, 345 U. S. 918 (1953).

[38] See People v. Alex, 265 N. Y. 192, 192 N. E. 289 (1934); People v. Cohen, 243 App. Div. 245, 276 N. Y. Supp. 851 (2d Dep't 1935).

[39] See People v. Malinski, 292 N. Y. 360, 55 N. E. 2d 353 (1944); People v. Mummiani, 258 N. Y. 394, 180 N. E. 94 (1932).

[40] *See* People v. Weiner, 248 N. Y. 118, 122, 161 N. E. 441, 443 (1928).

[41] *See* People v. Doran, 246 N. Y. 409, 416, 159 N. E. 379, 381 (1927); People v. White, 176 N. Y. 331, 350, 68 N. E. 630, 636 (1903).

[42] *See* People v. Doran, *supra* note 41 at 416, 159 N. E. at 381.

Where the judge, after a preliminary hearing on the coercion issue, declares the confession to be involuntary and excludes it, there is no problem. Similarly, if the confession is clearly the product of a free will, its admission into evidence violates no right of the defendant.[43] On the other hand, it is well settled that a conviction based largely on a coerced confession which has been admitted into evidence cannot be permitted to stand since not only does it contravene Section 395 of the New York Code of Criminal Procedure, but its admission is also violative of "due process." [44] The problematical questions which arise in connection with coerced confessions are twofold.

1. If a confession, clearly the product of coercion, was declared to be voluntary by the judge and admitted into evidence, should the conviction be permitted to stand if it appeared that the other *admissible* evidence was sufficiently indicative of guilt?

2. If the question of coercion is submitted to the jury because a substantial question of fact has arisen, and *that* body finds the confession to have been coerced but nevertheless convicts on the basis of other evidence, will that conviction be permitted to stand?

Mr. Justice Jackson agrees that the first question should be answered in the negative for he tells us, "Of course, where the judge makes a final determination that a confession is admissible and sends it to the jury as a 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." [45] The majority balks, however, at rendering a negative answer to the second question, suggesting that such an answer would be an unwarranted encroachment upon the province of the jury. The confusion of the majority seems to be due to a failure to recognize the fact that since we have as yet developed no procedure by which the jury, in a case of this type, may render a special verdict, an appellate court will never be called upon to consider the second question in its exact form. At the appellate level, question two will appear in the following form: If the question of coercion is submitted to the jury, *even though it was clearly coerced,* and the jury returns a general verdict of guilty, must the conviction be reversed

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[43] *See* People v. Burke, 72 Misc. 336, 338, 131 N. Y. Supp. 122, 124 (Sup. Ct. 1911); see N. Y. CODE CRIM. PROC. § 395.

[44] See note 37 *supra.* It is interesting to note that the New York Court of Appeals considered itself bound by the *Malinski* case and its reasoning, since in People v. Leyra, 302 N. Y. 353, 364, 98 N. E. 2d 553, 559 (1951), they reiterated the principle of the *Malinski* case and reversed the conviction. Finally, on a second appeal, after the involuntary confession had been excluded from evidence and a new jury had convicted Leyra, the Court of Appeals affirmed the conviction. People v. Leyra, 304 N. Y. 468, 108 N. E. 2d 673 (1952), *cert. denied,* 345 U. S. 918 (1953).

[45] Stein v. New York, 73 Sup. Ct. 1077, 1096 (1953).

if the other evidence of guilt, exclusive of the confession supplies a sufficient basis for the conviction?

It is submitted that there is, in essence, no distinction between the first question and the second, *as it will appear to an appellate court,* and the answer to one must be controlling of the other. In both cases the jury has heard a confession which should never have reached their ears and the defendant is no less prejudiced by one procedure than the other. The clear holding of *Malinski v. New York* [46] requires a reversal where such procedure has been followed, regardless of the sufficiency of the other evidence. The attempt by the majority of the Court in the *Stein* case to classify the statements of the *Malinski* case as dicta and their general approach to the reasons for holding coerced confessions to be violative of "due process," clearly indicates the Court's desire to halt a trend toward giving the "due process" clause a new, broader meaning, which has become apparent as of late.[47]

Before embarking on a discussion of the "new trend," let us briefly examine the controversial case of *Malinski v. New York.* In the *Malinski* case it appeared that the defendant had made four confessions to different people at various times. Of these four confessions, only the one made to the police was found by the Supreme Court to be involuntary. The other three confessions, if believed by the jury, would have been sufficient to sustain the conviction.[48] Nevertheless, the Court reversed the conviction stating that "due process" required a reversal where a coerced confession appeared in evidence even though the other admissible evidence might be sufficient proof of guilt.[49] That the Supreme Court considered this rule binding upon them is uniquely demonstrated in *Stroble v. California.*[50] There the Supreme Court of California found one of seven confessions to be involuntary as a matter of law, yet allowed the conviction to stand since it felt that five other confessions sufficiently justified a verdict of guilty.[51] The Supreme Court of the United States, recognizing that if the California court's determination of the involuntary nature of the confession was correct, the rule of the *Malinski* case would require reversal of the conviction,[52] re-examined the cir-

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[46] 324 U. S. 401 (1945).

[47] See Matherne, *Pretrial Confessions—A New Rule,* 22 TENN. L. REV. 1011 (1953); 40 CALIF. L. REV. 311 (1952). Compare cases note 37 *supra.*

[48] *See* Malinski v. New York, *supra* note 46 at 402. Mr. Justice Rutledge was so impressed by the fact that the other confessions, which in his opinion were coerced, might afford a basis for a jury to convict that he felt it necessary to dissent in part because all the confessions were not excluded. *Id.* at 420-432.

[49] *Id.* at 404.

[50] 343 U. S. 181 (1952).

[51] People v. Stroble, 30 Cal. 2d 615, 226 P. 2d 330 (1951).

[52] *See* Stroble v. California, 343 U. S. 181, 190 (1952). See also 40 CALIF. L. REV. 311 (1952).

cumstances surrounding the confession and declared it to have been voluntarily made. This was indeed an unusual decision for the Supreme Court and it is submitted that such a radical change of general policy would not have been made if the Court had not considered the rule of the *Malinski* case to be binding upon them.

It appears that the heart of the controversy over coerced confessions lies in the reason why their exclusion is required to effect "due process" of law. Some authorities advance the proposition that coerced confessions are inadmissible as evidence because of their intrinsic unreliability.[53] From a strictly "evidence" point of view this would seem to be a proper conclusion. However, in the United States, we have an additional requirement with which confessions must comply, *i.e.*, "due process of law." Mr. Justice Jackson and a majority of the Court in the *Stein* case seem to be of the opinion that it is the basic *unreliability* of a coerced confession which renders its use as evidence against a defendant violative of "due process." [54] However, the Supreme Court has time and time again reiterated the principle that the question is not one of truth or falsity, but rather the objection is to the methods used in obtaining the confession.[55] The extent to which this censure of barbaric police work will be carried is best illustrated by the recent development in the area of "unreasonable search and seizure." The interdict of the Fourth Amendment to the Constitution of the United States was first declared applicable to the several states in *Wolf v. Colorado*.[56] That case made it clear, however, that the states were free to choose their own methods for protecting their citizens from unreasonable searches and seizures. Although the federal courts give sanction to the Fourth Amendment by excluding evidence obtained in violation thereof, the *Wolf* case held that the state courts were not bound to that method.[57] In *Rochin v. California* [58] it appeared that some narcotics were pumped up from the defendant's stomach for use as evidence. The California courts do not follow the federal rule excluding evidence illegally obtained, and thus the drugs were admitted into evidence at the trial. The Supreme Court of the United States, unwilling to disturb their holding in *Wolf v. Colorado*,[59] proclaimed

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[53] See 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

[54] *See* Stein v. New York, 73 Sup. Ct. 1077 (1953) *passim*.

[55] Watts v. Indiana, 338 U. S. 49 (1949); Haley v. Ohio, 332 U. S. 596 (1948); Chambers v. Florida, 309 U. S. 227 (1940); Brown v. Mississippi, 297 U. S. 278 (1936); People v. Leyra, 302 N. Y. 353, 98 N. E. 2d 553 (1951), *cert. denied*, 345 U. S. 918 (1953). See also note 47 *supra*. "If torture is to be accepted as a means of securing confessions, let us have no pretense about it but repeal section 395." Pound, J., in People v. Barbato, 254 N. Y. 170, 178, 172 N. E. 458, 461 (1930).

[56] 338 U. S. 25 (1949).

[57] *Ibid.*

[58] 342 U. S. 165 (1952).

[59] See note 56 *supra*.

the admission of the evidence to be entirely consistent with the provisions of the *Fourth* Amendment. However, the barbaric methods employed by the police so shocked the conscience of the Court that it was moved to hold the introduction of the evidence obtained thereby to be violative of the "due process clause" of the *Fourteenth* Amendment.[60] Surely it cannot be contended that narcotics are rendered *unreliable* as evidence simply because the methods used to obtain them are illegal. Evidence of *any* type, obtained by violent, illegal intrusion upon a defendant's person,[61] is inadmissible because it violates the spirit of fairness of this nation's accusatorial criminal administration system and thus contravenes an enlightened concept of "due process of law." [62]

Thus, prior to the *Stein* case, it appeared that, if the states failed to control their lawless police, the Supreme Court would do so by reversing every conviction where it appeared that a coerced confession was admitted into evidence.[63] It seemed obvious that the Supreme Court was of the opinion that a fair trial could not be had if such a confession had been admitted regardless of the sufficiency of the other evidence. However, the majority of the Court in the *Stein* case disagreed with this view. They felt that "due process" requires a reversal only if the confession was absolutely essential to the verdict of guilty. This view fails to recognize that a confession of guilt is perhaps the most damning form of evidence which can be introduced against a defendant.[64] Since it is impossible to tell what weight a jury has given to a confession and because of the undeniably prejudicial nature of such evidence, it would seem that a fair trial is practically impossible where a coerced confession has been admitted, regardless of the other evidence.[65] The rule of the *Malinski* case and

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[60] Rochin v. California, 342 U. S. 165, 172 (1952), 26 ST. JOHN'S L. REV. 338; see 40 CALIF. L. REV. 311 (1952).

[61] See 66 HARV. L. REV. 122, 124 (1952).

[62] *See* Rochin v. California, *supra* note 60 at 169.

[63] In this manner the Supreme Court made known its intention to effectuate the expandability of the "due process" clause so as to meet new threats to human dignity as they arise.

[64] *See* People v. Bennett, 37 N. Y. 117, 133 (1867) (concurring opinion); see RICHARDSON, EVIDENCE § 413 (7th ed. 1948); 3 WIGMORE, EVIDENCE § 867 (3d ed. 1940); 1 GREENLEAF, EVIDENCE § 215 (15th ed. 1892).

[65] The New York system of allowing a jury to decide the coercion issue is a dangerous one. See note 64 *supra*. Juries are unpredictable and have been known to convict on feeling rather than fact. See BARNES AND TEETERS, NEW HORIZONS IN CRIMINOLOGY 312-315 (2d ed. 1951). Furthermore, as has been indicated in note 25 *supra*, the "promise of immunity" provision of the present New York statute is entirely too limited. The Model Code of the American Law Institute contains a more comprehensive view upon the subject. The Model Code would leave the coercion issue strictly up to the judge. Further, it would rule out a confession induced by promise made to the defendant "... which concerned action to be taken by a public official with reference to the crime and were made by a person whom the accused reasonably believed to have

the *ratio decidendi* of the *Rochin* case represent an enlightened concept of "due process" which recognizes that clause as an expandable principle, capable of meeting the challenge of unforeseen "subtle intrusions" upon the inalienable rights of the people of the United States.

The problems of crime prevention and law enforcement are infinitely more complex on the state level than are those facing the federal courts, due mainly to sheer volume.[66] In recognition of this fact, the Supreme Court has been extremely reluctant to interfere with the methods of law enforcement employed by the states. However, this reluctance should not be confused with condonation of those procedures which endanger basic rights and privileges and, as has been suggested, the states should acquiesce in the "fundamental dignity" of the principle expounded by the Supreme Court.[67]

The practice of obtaining confessions by violence is detrimental to the interests of the citizens of New York in several ways.

First: Since it is apparent that the Supreme Court will reverse a conviction based on such evidence regardless of guilt or innocence, the chances of a criminal escaping punishment are increased.[68]

Second: More subtle applications of torture may result in the conviction of an innocent man.[69]

Third: Barbaric and inhuman police tactics represent an affront to human dignity and may result in a depraved and demoralized society.[70]

The problem then is, by what measures may we reduce these practices to a minimum, if not completely eliminate them? Elevation of the moral, intelligence and *salary* standards of the police would be the most effective method;[71] however, the budget limitations of

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the power or authority to secure the execution of the threats or promises. . . ." MODEL CODE OF EVIDENCE, Rule 505 (1942).

[66] *See* Michelson v. United States, 335 U. S. 469, 486 (1948).

[67] See 40 CALIF. L. REV. 311 (1952).

[68] *"The third degree impairs the efficient administration of criminal justice in the courts."* IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT 189 (1931).

[69] For a compilation of methods of torture employed by the police see Note, 43 HARV. L. REV. 617 (1930). Innocent men have been convicted, see BORCHARD, CONVICTING THE INNOCENT (1932) *passim;* BARNES AND TEETERS, NEW HORIZONS IN CRIMINOLOGY 250-253 (2d ed. 1951).

[70] ". . . [T]he history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case." Watts v. Indiana, 338 U. S. 49, 55 (1949). *"The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public. . . ."* IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT 190 (1931).

[71] Admittedly this would be the most effective and direct attack upon the problem of police brutality. However, since it seems apparent that such a

the state may render this impractical. Reliance upon the Supreme Court's reversal of coerced confession cases would be misplaced since in all probability very few of the officers who engage in such practices read the opinions of the Supreme Court,[72] and it is doubtful whether the few that do are greatly impressed by that tribunal's proclamations. A further danger in such reliance is the possibility of the coercive tactics being more skillfully applied so as to avoid detection by a reviewing court.[73] It would seem that at present there are but two practical methods of insuring against coerced confessions. Since almost without exception a coerced confession is preceded by an unreasonable delay in arraignment,[74] such a delay should render a confession obtained during its continuance inadmissible per se. The adversaries of a rule of evidence which would exclude confessions obtained during an unlawful delay in arraignment argue that such a rule would unduly restrict officers of the law in their fight against crime and is, in addition, an indirect rather than direct assault upon the problem of coerced confessions. It is further argued that such a rule would allow an admittedly guilty criminal to escape punishment for the most flagitious of crimes simply because the police have also violated the law.[75] It should be remembered that the rule of evidence would exclude only those confessions obtained during an *unreasonable* delay in arraignment and thus a *valid* reason for delay would remove the confession from the operation of the rule.[76] As to the argument that the rule would permit criminals to escape justice, it may be answered that the use of a coerced confession in evidence has often had the same effect due to a reversal by a higher court.[77] Furthermore, to argue that incidental illegality of police procedure has no direct bearing on the voluntary nature of a confession is to ignore the obvious. The federal courts have wisely recognized that where no reasonable explanation for the delay exists,

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program, if it is undertaken at all, will take a considerable time to develop, we must have some immediate legislation to handle the problem in the interim.

[72] Bader, *Coerced Confessions and the Due Process Clause,* 15 BROOKLYN L. REV. 51, 70-71 (1948).

[73] *Ibid.*

[74] If the reader will check, he will find that almost every case cited in this article which involves a coerced confession also involves a delay in arraignment. The connection is too close to attribute to mere coincidence. If no *reasonable* explanation can be advanced for the delay in arraignment and a confession has been obtained during this period, the conclusion is inescapable that the delay was for the purpose of extracting the confession. Destroy the breeding places and you destroy the disease.

[75] Judge Cardozo advanced such an argument against the federal rule of evidence which excludes articles which have been obtained through an unlawful search and seizure. People v. Defore, 242 N. Y. 13, 23, 150 N. E. 585, 588, *cert. denied,* 270 U. S. 657 (1926).

[76] For an appraisal of the broadened interpretation of what constitutes a necessary delay in arraignment, see 100 U. OF PA. L. REV. 136, 139 (1951).

[77] See cases note 37 *supra.*

the probability that it was intended to, and did, secure an involuntary confession is increased to the degree of practically excluding any other possibility.[78] Such logic should commend itself to the legislature of New York. Furthermore, the heretofore ignored provisions of Section 1844 of the Penal Law, making it a misdemeanor to unreasonably delay a prisoner's arraignment, should be strictly enforced.[79] In this manner, the sovereign State of New York would indicate to its police that lazy, brutal, and unconscionable methods of criminal investigation will be no more tolerated in the courts of this state than they are in the Supreme Court of the United States. It is to be further hoped that the *Stein* case will be limited to its peculiar facts and that the policy of the *Malinski* and *Rochin* cases, envisioning a growing concept of "due process," will continue to be the law of the land.

SHIPOWNER'S LIABILITY FOR THE "UNSEAWORTHINESS" OF A VESSEL DUE TO AN ASSAULT BY A FELLOW CREWMEMBER

The seaman, in his position as the favored "ward of Admiralty," has historically been treated generously in compensation benefits for disabilities suffered during employment. The passage of years has in no way diminished the propensity of the courts to aid an injured seaman. Indeed, the courts' patronage has become so zealous that Judge Learned Hand apparently felt that it was time to apply the judicial brakes just short of holding the employer to be an absolute insurer of the safety of workers in his employ. In the recent case of *Jones v. Lykes Bros. S.S. Co.*,[1] the Court of Appeals for the Second Circuit refused to hold a shipowner liable to an employe for injuries sustained due to an assault by a fellow crewmember. The plaintiff and a seaman named Hunter had an argument in the ship's engine room. Upon returning to his quarters, plaintiff was viciously as-

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[78] The federal rule of evidence established in McNabb v. United States, 318 U. S. 332 (1943), modified by United States v. Mitchell, 322 U. S. 65 (1944), and clarified in Upshaw v. United States, 335 U. S. 410 (1948), recognizes that when the delay in commitment was for the sole purpose of extracting a confession, the probability of coercion is so great that an irrebuttable presumption of its presence arises. See 26 ST. JOHN'S L. REV. 351 (1952).

[79] Diligent research has failed to reveal *one* case in which a police officer was prosecuted under this section although violations of § 165 abound in the field of criminal procedure. See Bader, *Coerced Confessions and the Due Process Clause*, 15 BROOKLYN L. REV. 51, 70-71 (1948).

[1] 204 F. 2d 815 (2d Cir.), *cert. denied*, 74 Sup. Ct. 72 (1953).