

of police interrogation was no unheralded novelty in *Miranda v. Arizona*.<sup>318</sup> Though the historical basis of the rule excluding coerced and involuntary confessions, in both early state confession cases<sup>319</sup> and earlier cases from the lower federal courts,<sup>320</sup> was their untrustworthiness,<sup>321</sup> in *Lisenba v. California*,<sup>322</sup> Justice Roberts drew a distinction between the common law confession rule and the standard of due process. “[T]he fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.” Over the next several years, while the Justices continued to use the terminology of voluntariness, the Court accepted at different times the different rationales of trustworthiness and constitutional fairness.<sup>323</sup>

Ultimately, however, those Justices who chose to ground the exclusionary rule on the latter consideration predominated, so that, in *Rogers v. Richmond*,<sup>324</sup> Justice Frankfurter spoke for six other Justices in writing: “Our decisions under that [Fourteenth] Amendment have made clear that convictions following the admission into

<sup>318</sup> 384 U.S. 436 (1966).

<sup>319</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *White v. Texas*, 310 U.S. 530 (1940).

<sup>320</sup> *Hopt v. Utah*, 110 U.S. 574 (1884); *Wilson v. United States*, 162 U.S. 613 (1896).

<sup>321</sup> 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 882, at 246 (3d ed. 1940).

<sup>322</sup> 314 U.S. 219, 236 (1941).

<sup>323</sup> Compare *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), with *Lyons v. Oklahoma*, 322 U.S. 596 (1944), and *Malinski v. New York*, 324 U.S. 401 (1945). In *Watts v. Indiana*, 338 U.S. 49 (1949), *Harris v. South Carolina*, 338 U.S. 68 (1949), and *Turner v. Pennsylvania*, 338 U.S. 62 (1949), five Justices followed the due process-fairness standard while four adhered to a trustworthiness rationale. See 338 U.S. at 57 (Justice Jackson concurring and dissenting). In *Stein v. New York*, 346 U.S. 156, 192 (1953), the trustworthiness rationale had secured the adherence of six Justices. The primary difference between the two standards is the admissibility under the trustworthiness standard of a coerced confession if its trustworthiness can be established, if, that is, it can be corroborated.

<sup>324</sup> 365 U.S. 534, 540–41 (1961). Similar expressions may be found in *Spano v. New York*, 360 U.S. 315 (1959), and *Blackburn v. Alabama*, 361 U.S. 199 (1960). See also *Culombe v. Connecticut*, 367 U.S. 568, 583 n.25 (1961), in which Justice Frankfurter, announcing the judgment of the Court, observed that “the conceptions underlying the rule excluding coerced confessions and the privilege against self-incrimination have become, to some extent, assimilated.”