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Criminal Law—New York Procedure to Determine Voluntariness of a Confession Ruled Invalid (Jackson v. Denno, 378 U.S. 368 (1964))

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hands of one man, even the President, is very close to governmental censorship of the news and may well be an unconstitutional limitation on the freedoms of speech and press.

On the other hand, the present state of our relations with Cuba is so delicate that it may be in the national interest that such a restriction be sustained, especially since provision is made for at least a few exceptions and is, hopefully, a temporary measure.



CRIMINAL LAW—NEW YORK PROCEDURE TO DETERMINE VOLUNTARINESS OF A CONFESSION RULED INVALID.—Petitioner was convicted of murder in the first degree in a trial during which the judge submitted to the same jury both the questions of guilt and the voluntariness of his confession in accordance with New York procedure. The conviction was affirmed by the New York Court of Appeals and thereafter Jackson filed a petition for habeas corpus in the federal district court, alleging the unconstitutionality of the New York procedure. After both the district court and the court of appeals affirmed the conviction, the United States Supreme Court reversed and remanded, *holding* that the New York procedure violated the due process clause of the fourteenth amendment by denying defendant's right to a fair and separate determination of the voluntariness of his confession. *Jackson v. Denno*, 378 U.S. 368 (1964).

Under common law a confession, when "not the product of any meaningful act of volition"¹ on the part of the accused, was held inadmissible as evidence in criminal trials since there was a judicial belief in its probable falsity.² This rule of evidence, sometimes enacted into state law,³ caused some state courts to exclude coerced confessions without relying on the constitutional principles of due process of law.

Although the passage of the fourteenth amendment in 1868 applied the concept of due process to the states, no case involving a state conviction based on an allegedly involuntary confession reached the United States Supreme Court until 1936 in *Brown*

China. N.Y. Times, Dec. 8, 1959, p. 29, col. 1. It would seem that since Mr. Worthy was not among these representatives his travel to Cuba would be "unsafe."

¹ *Blackburn v. Alabama*, 361 U.S. 199, 211 (1960).

² 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

³ See, e.g., N.Y. CODE CRIM. PROC. § 395; TEX. CODE CRIM. PROC. art. 727 (1907).

v. Mississippi.⁴ In *Brown*, the uncontradicted evidence established that defendants, two Negroes, had been convicted of first degree murder solely on the basis of confessions obtained after severe beatings by police officers. The state court conviction was so clearly violative of our "fundamental principles of liberty and justice"⁵ that the Court unanimously reversed, without discussing the nature of coerced confessions.⁶ While *Brown* and similar decisions⁷ have been interpreted as relying on the old common-law reasoning behind exclusion, *i.e.*, the untrustworthiness of the confession as evidence,⁸ such a conclusion is not apparent from the decisions themselves. The Court's position was soon clarified when in 1941 it declared that "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."⁹ Thus the Court rejected the common-law reason for exclusion and applied as its new standard the "fundamental unfairness" test.

The Court, in applying this test, developed two approaches: the subjective approach,¹⁰ in which the Court studied the conditions surrounding the confession in light of the accused's age, education, intelligence and other personal factors, to determine whether his mind had in fact been overcome; and the objective approach,¹¹ which was applied when the conditions under which the confession was made were so inherently coercive that involuntariness could be found as a matter of law.

In deciding whether there was coercion under either approach, the Court either reached its conclusion on a case presenting undisputed facts, or would look into the entire record if the facts were disputed.¹² If it found sufficient evidence to support the conclusion that the confession was not involuntary, the conviction was affirmed. It should be noted, however, that this was not an affirmative finding that the confession was voluntary, but merely judicial recognition that the lower court finding was supported by the record. On the other hand, a finding that the confession was involuntary automatically meant a reversal, regardless of whether other evidence existed which was sufficient to convict. The Court necessarily presumed that the jury had relied upon

⁴ 297 U.S. 278 (1936).

⁵ *Id.* at 286.

⁶ See also *Chambers v. Florida*, 309 U.S. 227 (1940).

⁷ *Chambers v. Florida*, *supra* note 6; *Canty v. Alabama*, 309 U.S. 629 (1940).

⁸ Ritz, *Twenty-five Years Of State Criminal Confession Cases In The U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35, 43-44 (1962).

⁹ *Lisenba v. California*, 314 U.S. 219, 236 (1941).

¹⁰ *Blackburn v. Alabama*, *supra* note 1, at 208.

¹¹ *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

¹² *Payne v. Arkansas*, 356 U.S. 560 (1957).

the confession in reaching its verdict, although, in fact, it had no way of knowing this with certainty.

Until the case of *Stein v. New York*¹³ the Court had dealt with its usual determination of the voluntariness of a confession. In *Stein*, for the first time, the issue of whether the trial court procedure for deciding voluntariness was consistent with due process was raised. The New York procedure in question provided that the judge, if so requested, would hold a preliminary hearing on the coercion issue and would, as a matter of law, exclude the confession if in no circumstances it *could* be deemed voluntary. If, however, he would find a fair question as to its voluntariness, he would be required to submit the question to the jury. The jury would then be instructed to disregard the confession if it found coercion, but to consider the confession's weight or degree of veracity in reaching a verdict if it were deemed voluntary. The basis for this procedure was the principle that questions of law must be decided by the judge, and questions of fact are reserved for the jury.¹⁴

Other jurisdictions¹⁵ apply the so-called "orthodox" or "Wigmore" rule, whereby the judge makes the final determination as to voluntariness in all cases since the problem is viewed as basically one of admissibility.¹⁶ A third procedure, popularly called the "Massachusetts" rule,¹⁷ provides that the judge is to determine whether the confession is voluntary or coerced. If voluntary, he admits it together with an instruction that the jury must also find it voluntary before it may be considered as evidence of guilt. Still other procedures exist in some jurisdictions which are basically variations or combinations of the three rules discussed above.¹⁸

Although prior to *Stein* the various procedural rules were never tested in the Supreme Court, the "orthodox" rule was accepted without question and the other two were thought to have been sanctioned in the case of *Wilson v. United States*.¹⁹ In *Stein*, petitioners had requested the judge to instruct the jury that if the confessions were deemed by them to be involuntary, they were required to return a verdict of acquittal. The petitioners, on appeal, alleged that the trial judge's refusal to instruct the jury as requested was a violation of their constitutional rights

¹³ 346 U.S. 156 (1953).

¹⁴ *People v. Doran*, 246 N.Y. 409, 159 N.E. 379 (1927).

¹⁵ *E.g.*, Connecticut, Illinois, Florida, Virginia.

¹⁶ 3 WIGMORE, *op. cit. supra* note 2, § 861.

¹⁷ *Commonwealth v. Preece*, 140 Mass. 276, 277, 5 N.E. 494, 495 (1885).

¹⁸ For the purposes of this article the variations will not be discussed.

¹⁹ 162 U.S. 613, 624 (1896). The statement relied upon is: "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

based on due process.²⁰ The Court found the requested instruction too far-reaching since the jury under New York procedure might properly convict on other evidence, even though it rejects the confession as involuntary. There was, however, no way of knowing whether this had occurred in *Stein*, since only a general verdict had been rendered. Thus, the Court found it necessary to review the entire record to determine whether there existed sufficient evidence, exclusive of the confession, to support a conviction. Upon analysis, the Court found not only that ample evidence existed to convict without the confession, but that the circumstances surrounding the confession itself would justify a finding that it was voluntary. Having given such close scrutiny to the mechanics of the New York procedure, and having affirmed the convictions, the Court sanctioned the New York rule of admissibility.

However, *Stein* contained the seeds of its own future rejection by the Court since Mr. Justice Jackson, writing for the majority, conceded that a jury might confuse the issue of voluntariness with the issue of guilt.²¹ The Court's reasoning that even if the admitted confession were coerced, ample evidence existed to sustain the conviction, was apparently a departure from the procedure followed by previous cases wherein it was held that the admission of a coerced confession vitiated the trial.²² Authorities commenting on *Stein* rationalized the Supreme Court's view by theorizing that the jury's rejection of a coerced confession that had been admitted gives it the same status as a confession never admitted²³ since in both cases the confession was not being used to convict.

An important indication that *Stein's* apparent approval of the New York procedure would be short-lived came in the case of *Rogers v. Richmond*²⁴ in 1961. In that case the Connecticut courts, in applying the "Wigmore" rule, considered the reliability

²⁰ The authority chiefly relied upon was *Malinski v. New York*, 324 U.S. 401, 404 (1945), where the Court 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."

²¹ *Stein v. New York*, 346 U.S. 156, 177-78 (1953). "Perhaps a more serious, practical cause of dissatisfaction is the absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confession but returning an unanalytical and impressionistic verdict based on all they had heard."

²² *E.g.*, *Payne v. Arkansas*, *supra* note 12, at 568; *Gallegos v. Nebraska*, 342 U.S. 55, 63 (1951).

²³ Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 346 (1954); Scott, *State Criminal Procedure, The Fourteenth Amendment and Prejudice*, 49 Nw. U.L. REV. 319, 320 (1954).

²⁴ 365 U.S. 534 (1961).

of the allegedly coerced confession in determining its voluntariness. The Supreme Court expressly noted the violation of due process rights when the question of voluntariness was allowed to enter into the determination of guilt by either judge or jury.²⁵

The clarification of the Court's views on the admissibility of coerced confessions, made necessary by the ambiguities of *Stein*, was attempted by the Court in *Jackson v. Denno*.²⁶ The New York procedure was held to violate due process by depriving a defendant of his right to a reliable determination of the voluntariness of his confession, uninfluenced by its probable truth or falsity. The Court based its reasoning on the psychological impossibility, inherent in the New York procedure, for a jury to make a clearly separate judgment as to guilt or innocence when the question of coercion was simultaneously submitted to it. The jurors first hear all the evidence relating to both the voluntariness of the confession and other indications of guilt, and are then instructed to forget all they heard about the confession if they find it involuntary. Thus, the Court concluded, evidence concerning the confession cannot be entirely erased from the jurors' minds, so that a confession rejected as involuntary may subconsciously influence them in finding the defendant guilty. On the other hand, should the jury find the confession voluntary, and rely upon it, there is no assurance to a reviewing court that the finding of voluntariness was not prompted by a belief in the defendant's guilt, based upon other evidence. Thus the constitutional rule set forth in *Rogers*, that a defendant is entitled to a determination of the voluntariness of the confession without reference to its truth, is inherently violated in the practical application of the New York procedure. *Stein*, which had presumed the jury's ability to follow the instructions explicitly, was therefore overruled.

The basic premise of the majority opinion, the jury's inability to perform the mental gymnastics required by the New York procedure, appears to be countered by the dissent of Mr. Justice Harlan, joined by Justices Clark and Stewart. The dissent cites two previous Supreme Court decisions²⁷ in which juries were given instructions even more complicated and demanding than those in *Jackson*. Both cases strongly upheld the ability of juries to make fine distinctions, for to hold otherwise would be to weaken belief in the jury system itself. The dissent also noted that while the majority continues to sanction the "Massachusetts" procedure, there is no realistic difference between it and the New York rule. In Massachusetts, the judge's determination is final only

²⁵ *Id.* at 545 n.3.

²⁶ 378 U.S. 368 (1964).

²⁷ *Delli Paoli v. United States*, 352 U.S. 232 (1957); *Leland v. Oregon*, 343 U.S. 790 (1952).

if he deems the confession involuntary. Therefore, if the judge has a doubt as to voluntariness, he is likely to resolve that doubt by admitting the confession and allowing the jury to have the final say on the question.²⁸ Accordingly, the "Massachusetts" procedure provides that the judge instruct the jury that it must also find the confession voluntary before it may be considered as a factor in the determination of guilt. This situation is quite similar to a court's tentative submission to the jury of a doubtful confession, a procedure condemned in the instant case. The result is a grave doubt as to the justification of prohibiting one procedure and sanctioning the other.

In addition, the dissent noted that state criminal procedures should be interfered with only when they infringe upon "rights fundamental to decent society" and the New York procedure was not of such a character. Mention was also made of the confusion that could result if *Jackson* were to be applied retroactively, and of the difficulty of attaining state compliance with constitutional standards when the Court makes such sudden and drastic changes in its interpretation of due process.

In a separate opinion, Mr. Justice Black noted that the commentators,²⁹ on whom the majority had relied so heavily, had advanced no "factual data" to support their claim that the New York procedure is unfair to the accused. He opposed the rejection, on the basis of mere "theoretical contemplation," of a procedure of such wide-spread and long-continued use.

In basing its rationale on the inability of a jury to follow the instructions required by the New York procedure, the Court may have revealed, as the dissent seems to fear, a basic lack of confidence in the jury system itself. This distrust could extend to other situations in which two or more issues, one of which is dependent upon another, are submitted to a jury for a general verdict. If so, the procedures by which juries determine guilt along with other dependent issues, for example, insanity,³⁰ could also be questioned. Likewise, any finding by a jury that had been given difficult or complicated instructions could become suspect. It remains to be seen whether the Court will extend its apparent distrust of the jury to other situations or confine it to the procedure questioned in the instant case.

As a result of the decision in *Jackson*, the New York courts are left without a procedure for dealing with allegedly coerced confessions. To fill the vacuum, New York must adopt a rule

²⁸ Meltzer, *supra* note 23, at 329.

²⁹ Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929).

³⁰ *People v. Carpenter*, 102 N.Y. 238, 242, 6 N.E. 584, 585 (1886).

which will conform to the constitutional standard³¹ set forth in the instant case. One possible replacement is the "Massachusetts" procedure, but in view of the standard announced in *Jackson*, it is a questionable choice. That procedure would appear to subject the accused to the same danger which the Court found in the New York rule, viz., the possible confusion of issues by a jury which must consider both the voluntariness of a confession and the guilt of a defendant. The fact that the judge in the "Massachusetts" procedure has made the initial determination does not alter the fact that the final, and perhaps vital determination, is made by the same jury that decides guilt.

Even the use of the "Wigmore" procedure does not preclude the possibility of the confusion of the voluntariness and truth of a confession. This was seen in *Rogers*,³² where the judge, in his instructions to the jury, revealed that he himself had considered the reliability of the confession in reaching his decision to admit it as voluntary. The capacity for error, which, in the words of Mr. Justice Black, is "inherent in any confession fact-finding by human fact-finders,"³³ is present in judges as well as in jurors.

Since both of the existing alternatives to the rejected rule are in some way defective, New York may well seek a third procedure. The courts of that state have traditionally held that voluntariness is a question of fact and must therefore be submitted to a jury.³⁴ It is suggested, therefore, that in its search for a new procedure, New York should consider a system whereby a confession presenting a fair question as to its voluntariness would be submitted to a jury for a determination of that issue alone. If held involuntary, the confession would be excluded from evidence in the later trial, where a different jury would determine guilt. If, on the other hand, the confession were found voluntary, then perhaps the jury could be retained and presented with the evidence of guilt. Such a system would appear to comply with both the constitutional standard of separate determination required by *Jackson*, and with the view traditionally held in New York that voluntariness is a question of fact for the jury.

³¹ "These procedures must, therefore, be fully adequate to insure a reliable and clear cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend," *Jackson v. Denno*, 378 U.S. 368, 391 (1964). The Court also stated that the defendant has a constitutional right "to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." *Id.* at 377.

³² *Rogers v. Richmond*, 365 U.S. 534 (1961).

³³ *Jackson v. Denno*, *supra* note 31, at 402 (separate opinion).

³⁴ N.Y. CODE CRIM. PROC. § 419; *People v. Doran*, *supra* note 14.