SMU | Dedman School of Law

SMU Law Review

Volume 18 | Issue 4 Article 7

January 1964

Due Process and the Role of the Trial Judge in Determining the Voluntariness of a Confession - A New Constitutional Rule

Eldon L. Youngblood

no especially odious burden is placed on him to state those facts more fully and completely.

The enforcement of the *Aguilar* decision will, no doubt, reduce those arrests made by officers without "probable cause." A form affidavit will be practically impossible to draw since the facts necessary to issue a valid search warrant will vary radically from case to case. The net effect of the changes brought by *Aguilar* is difficult to forecast. It is a worthwhile attempt to preserve those constitutional rights basic to our freedoms; but, unfortunately, it is accompanied by some undesirable ramifications.

CaMille Bruce

Due Process and the Role of the Trial Judge in Determining the Voluntariness of a Confession — A New Constitutional Rule

I. Due Process Restrictions on State Handling of the Coercion Issue

Since 1936[1] the United States Supreme Court has repeatedly invoked the due process clause of the fourteenth amendment to limit the state courts' use of involuntary confessions.[2] Due process of law has been construed not as a rigid exclusionary rule of evidence,[3] but as a constitutionally imposed standard of "fairness" required of all state proceedings.[4] Although not without criticism,[5] the fairness test of due process has provided the rationale for an impressive line of decisions which has progressively broadened the protection afforded an accused against a conviction based on an involuntary confession.[6]

[1] Brown v. Mississippi, 297 U.S. 278 (1936).

[2] In the past, the Supreme Court's restrictive powers over state court proceedings have been more limited than in the federal system in which the fifth amendment provides the authority. United States v. Mitchell, 322 U.S. 65 (1944). In a recent case, however, the Court declared that the fourteenth amendment makes the fifth amendment prohibition against compulsory self-incrimination applicable to the states. Malloy v. Hogan, 378 U.S. 1 (1964).

[3] Schwartz v. Texas, 344 U.S. 199 (1952); Stroble v. California, 343 U.S. 181 (1952); Wolf v. Colorado, 338 U.S. 25 (1949).

[4] Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); Hebert v. Louisiana, 272 U.S. 312 (1926); Twining v. New Jersey, 211 U.S. 78 (1908).

[5] Adamson v. California, 332 U.S. 46, 68-92 (1947), (dissenting opinion of Black, J.) See also his concurring opinion in Rochin v. California, 342 U.S. 165, 174-77 (1952).

[6] Bader, *Coerced Confessions and the Due Process Clause*, 15 Brooklyn L. Rev. 51 (1949); Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U. S. Supreme Court*, 19 Wash. & Lee L. Rev. 35 (1962).

The early cases in which the Supreme Court reversed state findings on the issue of coer-

During the preceding two decades, rapidly expanding concepts of fairness have given birth to a number of principles which have been declared essential to due process if an issue arises as to the voluntariness of a confession.[7] In *Lisenba v. California*,[8] the Court announced the rule that no conviction may be based upon a coerced confession. Shortly thereafter, a series of confession cases established the principle that if an involuntary confession is admitted in the trial court a defendant's subsequent conviction must be reversed[9] even if there is other evidence sufficient to convict.[10] In recent years an imposing group of confession cases has explicitly reaffirmed these principles.[11]

Inevitably, the Court, focusing attention upon procedural deprivation of due process,[12] enunciated the defendant's right to a fair and reliable determination of the issue of voluntariness.[13] It has been held that this determination must be an objective one, uninfluenced by irrelevant considerations such as the truth or falsity of the confession.[14] Thus, the *manner* in which the state courts resolve the coercion issue became a matter for the Supreme Court to measure by traditional standards of due process of law.[15]

---

cion involved physical violence which was clearly coercive. Ward v. Texas, 316 U.S. 547 (1942); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). More subtle police methods were rebuked in Ashcraft v. Tennessee, 322 U.S. 143 (1944) (accused questioned continuously for thirty-six hours). Further refinement of the Court's stand against "psychological" coercion was effected by Haley v. Ohio, 332 U.S. 596 (1948), and Malinski v. New York, 324 U.S. 401 (1945).

[7] See Fairman, *Compulsory Self-Incrimination*, Fundamental Law in Criminal Prosecutions 59 (Harding ed. 1959); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Texas L. Rev. 239 (1946).

[8] 314 U.S. 219 (1941).

[9] Stroble v. California, 343 U.S. 181 (1952); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Lyons v. Oklahoma, 322 U.S. 596, 597 n. 1 (1944).

[10] For example, in Malinski v. New York, the Court said, "If [an involuntary 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.*" 324 U.S. 401, 404 (1945). (Emphasis added.)

[11] Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958).

[12] See Allen, *Due Process and State Criminal Procedures: Another Look*, 48 Nw. U.L. Rev. 16 (1953); Boskey & Pickering, *Federal Restrictions on State Criminal Procedures*, 13 U. Chi. L. Rev. 266 (1940).

[13] Haley v. Ohio, 332 U.S. 596 (1948) (dissenting opinion of Vinson, C.J., and Burton, Reed, and Jackson, JJ.). In Rogers v. Richmond, 365 U.S. 534, 547-48 (1961), Mr. Justice Frankfurter urged that "a state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a judge or a state jury under appropriate state procedures which conform to the requirements of the fourteenth amendment."

[14] Rogers v. Richmond, note 13 *supra*; Gallegos v. Nebraska, 342 U.S. 55 (1951); Malinski v. New York, 324 U.S. 401 (1945); Lyons v. Oklahoma, 322 U.S. 596 (1944). See also Stein v. New York, 346 U.S. 156, 199 (1953) (dissenting opinion of Frankfurter, J.).

[15] The Court's notion of the scope of its review in confession cases seems to have undergone some modification since *Brown v. Mississippi*, 297 U.S. 278 (1936). The rule was accepted very early that only the "uncontradicted facts" available from the record should

II. State Procedures for Determining the Issue of Voluntariness

Most of the states follow one of three procedural patterns in determining the issue of voluntariness.[16] For purposes of identification these variant procedures have been termed (1) the orthodox rule, (2) the Massachusetts rule, and (3) the New York rule.[17] Each may be distinguished by the manner in which responsibility for resolving the coercion issue is allocated between judge and jury.[18]

Under the orthodox rule, which appears to be followed in at least twenty states,[19] the trial judge alone resolves all questions of fact

be considered by the Supreme Court in reviewing the trial court's determination of the coercion issue. Malinski v. New York, note 14 *supra*. Alongside this rule the Court later developed the theory that it must look at "the totality of circumstances" that preceded the confessions to determine if in fact the confession admitted in the trial court was involuntary. Fikes v. Alabama 352 U.S. 191 (1957). This theory was applied in Reck v. Pate, 367 U.S. 433 (1961), in which the Court contended that, upon review, "all the circumstances attendant upon the confession must be taken into account." *Id.* at 440. In Rogers v. Richmond the Court reversed a state court conviction on the ground that the trial judge's instructions had allowed the jury to determine the issue of voluntariness "under an erroneous standard of constitutional law." 365 U.S. 534, 546 (1961). Here, the Court focused not on the "uncontradicted facts" nor on the "totality of circumstances," but looked beyond the facts or circumstances of the case to the standard of due process inhering in the state court's determination of the issue. See Ritz, *supra* note 6, at 63.

[16] The Supreme Court, in Wilson v. United States, 162 U.S. 613 (1896), appeared to sanction a fourth variation for the federal courts, by which the judge is allowed to follow the orthodox or the Massachusetts procedure, at his discretion.

[17] For a perceptive comparison of these procedures, see Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. Chi. L. Rev. 317, 319-24 (1954). See also 3 Wigmore, Evidence § 861 (3d ed. 1940) and (Supp. 1953); Annot. 170 A.L.R. 567 (1947); Annot. 85 A.L.R. 870 (1933).

[18] The Massachusetts and New York rules seem to be modifications of the older orthodox rule. The present divergence in trial procedures may be partially attributed to the confusion which has generally attended the allocation of functions between judge and jury for determining fact questions bearing on admissibility. See Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv. L. Rev. 392 (1927); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165 (1929).

[19] *Alabama:* Blackburn v. State, 38 Ala. App. 143, 149, 88 So. 2d 199, 204 (1954). *Colorado:* Read v. People, 122 Colo. 308, 318-19, 221 P.2d 1070, 1076 (1950). *Connecticut:* State v. McCarthy, 133 Conn. 171, 177, 49 A.2d 594, 597 (1946). *Florida:* Graham v. State, 91 So. 2d 662, 663-64 (1956). *Illinois:* People v. Fox, 319 Ill. 606, 616-19, 150 N.E. 347, 351-52 (1926). *Indiana:* Caudill v. State, 224 Ind. 531, 532, 69 N.E.2d 549, 552 (1946). *Kansas:* State v. Seward, 163 Kan. 136, 144-46, 181 P.2d 478, 484-85 (1947). *Kentucky:* Ky. Rev. Stat. § 422.110 (1960); Bass v. Commonwealth, 296 Ky. 426, 431, 177 S.W.2d 386, 388 (1944). *Louisiana:* State v. Kennedy, 232 La. 755, 762-63, 95 So. 2d 301, 303 (1957). *Mississippi:* Jones v. State, 228 Miss. 458, 474-75, 88 So. 2d 91, 98 (1956). *Montana:* State v. Rossell, 113 Mont. 457, 466, 127 P.2d 379, 383 (1942). *New Mexico:* State v. Armijo, 64 N.M. 431, 434-35, 329 P.2d 785, 787-88 (1958). *But see* State v. Armijo, 18 N.M. 262, 268, 135 Pac. 555, 556-57 (1913) (dictum that trial judge may choose to follow the Massachusetts rule). *North Carolina:* State v. Outing, 255 N.C. 468, 472, 121 S.E.2d 847, 849 (1961). *North Dakota:* State v. English, 85 N.W.2d 427, 430 (N.D. 1957). *Tennessee:* Tines v. State, 203 Tenn. 612, 619, 315 S.W.2d 111, 114 (1958). *Utah:* State v. Crank, 105 Utah 332, 346-55, 142 P.2d 178, 184-88 (1943). *Vermont:* State v. Blair, 118 Vt. 81, 85, 99 A.2d 677, 680 (1953). *Virginia:* Durrette v. Commonwealth, 201 Va. 735, 744, 113 S.E.2d 842, 849 (1960). *Washington:* State v. Moore, 60 Wash.2d 144, 146-47, 372 P.2d 536, 538 (1962). *West Virginia:* State v. Vance, W. Va., 124 S.E.2d 252, 257 (1962).

and determines the issue of voluntariness in a preliminary hearing.[20] If he finds the confession to be voluntary it is admitted into evidence and the jury is not permitted to re-examine the issue.[21] However, once the confession has been admitted as voluntary the jury may consider all of the evidence surrounding the taking of the confession in determining its credibility and weight.[22] If the judge finds the confession to be involuntary, it is completely excluded from the trial.

Under the Massachusetts rule, observed in at least fourteen states,[23]

[20] Most jurisdictions, regardless of the prevailing rule, favor exclusion of the jury during the preliminary hearing. See, *e.g.*, State v. Green, 221 La. 713, 730, 60 So. 2d 208, 213-14 (1952) (orthodox rule); State v. Schabert, 218 Minn. 2, 8, 15 N.W.2d 585, 588 (1944) (New York rule). See also United States v. Carignan, 342 U.S. 36, 38 (1951), in which the Supreme Court recognized the defendant's right to have the jury excluded from the preliminary hearing during his testimony on the issue of voluntariness. *But see* note 28 *infra*.

[21] Professor Wigmore was among the most adamant proponents of the orthodox view: "The admissibility of the confession . . . is a question for the judge, on elementary principles defining the functions of judge and jury." 3 Wigmore, Evidence § 861 (3d ed. 1940). Conceding that "the heresy of leaving the question [of voluntariness] to the jury has made rapid strides" in this century, *Ibid.*, he sharply reproved that practice:

> This is decidedly improper; first, because it makes abject surrender of the fixed principle that all questions of admissibility are for the judge only; secondly, because in particular, the confession rules are artificial, based on average probabilities or possibilities only and do not attempt to measure the ultimate value of a given confession, and the tribunal which is to weigh all evidence finally ought not to be artificially hampered by them; thirdly, because the jury is not familiar enough with them to employ them. *Ibid.*

[22] In Burton v. State, 107 Ala. 108, 18 So. 284 (1895), the jury's prerogative as to the issue of credibility was carefully distinguished from the judge's responsibility under the orthodox procedure for determining the question of admissibility:

> The jury have no authority to reject [confessions] . . . as incompetent. But the jury are the sole judges of the truth and weight to be given confessions, as they are of any other fact. In weighing the confessions, the jury must take into consideration all the circumstances surrounding them, and under which they were made, including those under which the court declared they were voluntary. In weighing confessions, the jury necessarily consider those facts upon which their admissibility, as having been voluntarily made, depends. While there is no power in the jury to reject the confessions, as being incompetent, there is no power in the court to control the jury in the weight to be given to facts. The jury may, therefore, in the exercise of their authority, and within their province, determine that the confessions are untrue, or not entitled to any weight, upon the grounds that they were not voluntarily made. *Id.* at 290.

[23] *Alaska:* Smith v. United States, 268 F.2d 416, 420-21 (9th Cir. 1959). *Arizona:* State v. Hudson, 89 Ariz. 103, 106, 358 P.2d 332, 333-34 (1960). *But see* State v. Preis, 89 Ariz. 336, 362 P.2d 660, 661-62 (1961) (conflicts in the evidence for the jury after judge "reasonably satisfied" confession not coerced); State v. Owen, 94 Ariz. 404, 409, 385 P.2d 700, 703 (1963) (vacated and remanded on authority of the case being noted). *California:* People v. Gonzales, 24 Cal. 2d 870 876, 151 P.2d 251, 254 (1944). *Delaware:* Wilson v. State, 49 Del. 37, 48, 109 A.2d 381, 387 (1954). *Hawaii:* Territory v. Young, 37 Hawaii 189, 193 (1945). *Idaho:* State v. Van Vlack, 57 Idaho 316, 342-43, 65 P.2d 736, 748 (1937). *But see* State v. Andreason, 44 Idaho 396, 401-02, 257 Pac. 370, 371 (1927) (seems to state orthodox rule). *Maine:* State v. Robbins, 135 Me. 121, 122, 190 Atl. 630, 631 (1937). *Maryland:* Parker v. State, 225 Md. 288, 291, 170 A.2d 210, 211 (1961). *But see* Jones v. State, 188 Md. 263, 270-71, 52 A.2d 484, 487-88 (1947). *Massachusetts:* Commonwealth v. Preece, 140 Mass. 276, 277, 5 N.E. 494, 495 (1885). *Nebraska:* Cramer v. State, 145 Neb. 88, 97-98, 15 N.W.2d 323, 328-29 (1944). *New Hampshire:* State v. Squires, 48 N.H. 364, 369-70 (1869). *New Jersey:* State v. Tassiello,

the judge makes a full determination of the issue in a preliminary hearing, as under the orthodox rule.[24] If found to be involuntary, the confession is excluded. If the confession is admitted as being voluntary, however, the jury is instructed that it may reconsider the issue and find the confession involuntary, in which case it must be entirely disregarded.[25]

It is the New York rule which has proved most controversial of the three, compelling the attention of a number of commentators.[26] At least fifteen states appear to use this procedure.[27] Under the New York rule the judge makes a preliminary inquiry into the manner

39 N.J. 282, 291-92, 188 A.2d 406, 411-12 (1963). *Oklahoma:* Williams v. State, 93 Okla. Crim. 260, 265, 226 P.2d 989, 993 (1951). *But see* Cornell v. State, 91 Okla. Crim. 175, 183-84, 217 P.2d 528, 532-33 (1950) (seems to state orthodox rule). *Rhode Island:* State v. Boswell, 73 R.I. 358, 361, 56 A.2d 196, 198 (1947).

[24] Indeed, the similarities in the two procedures are striking. In either case the jury considers all the facts going to the issue of coercion after the judge has rendered a determination of voluntariness. Compare, however, the jury's right to find the confession "untrue, or not entitled to any weight" on grounds of involuntariness as discussed in Burton v. State, 107 Ala. 108, 18 So. 284 (1895), with the jury's *duty* to "exclude the confession" if involuntary as seen in Commonwealth v. Preece, 140 Mass. 276, 277, 5 N.E. 494, 495 (1885); see note 22 and note 25.

[25] Commonwealth v. Preece, 140 Mass. 276, 277, 5 N.E. 494, 495 (1895): "When there is conflicting testimony, the humane practice . . . is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession, if, upon the whole evidence in the case they are satisfied that it was not the voluntary act of the defendant." *Id.* at 495.

[26] See generally Maguire, Evidence of Guilt § 307(3) (1959); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 104-05 (1956); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury,* 21 U. Chi. L. Rev. 317 (1954); Stevens, *Confessions and Criminal Procedure—A Proposal,* 34 Wash. L. Rev. 542 (1959).

[27] *Arkansas:* Monts v. State, 233 Ark. 816, 823, 349 S.W.2d 350, 355 (1961). *Georgia:* Garrett v. State, 203 Ga. 756, 762-763, 48 S.E.2d 377, 382 (1948). *Iowa:* State v. Jones, 253 Iowa 829, 834-35, 113 N.W.2d 303, 307 (1962). *Michigan:* People v. Crow, 304 Mich. 529, 531, 8 N.W.2d 164, 165 (1943). *Minnesota:* State v. Schabert, 218 Minn. 1, 15 N.W.2d 585 (1944) (appears to state New York rule but cites authority from jurisdictions which adhere to Massachusetts rule, as well as authority from New York rule states). *Missouri:* State v. Goacher, 376 S.W.2d 97, 103 (Mo. 1964). *New York:* People v. Doran, 246 N.Y. 409, 416-18, 159 N.E. 379, 381-82 (1927). *Ohio:* State v. Powell, 105 Ohio App. 529, 530-31, 148 N.E.2d 230, 231 (1957); Burdge v. State, 53 Ohio St. 512, 516-18, 42 N.E. 594, 595-96 (1895) (judge may follow New York rule or Massachusetts rule, at his discretion). *Oregon:* State v. Bodi, 223 Ore. 486, 491, 354 P.2d 831, 833-34 (1960). *Pennsylvania:* Commonwealth v. Oister, 201 Pa. Super. 251, 257-58, 191 A.2d 851, 854 (1963), *vacated and remanded sub nom.* Oister v. Pennsylvania, 378 U.S. 568 (1964). *South Carolina:* State v. Bullock, 235 S.C. 356, 366-67, 111 S.E.2d 657, 662 (1959). *South Dakota:* State v. Hinz, 78 S.D. 442, 449-50, 103 N.W.2d 656, 660 (1960). *Texas:* Harris v. State, ___ Tex. Crim. ___, 370 S.W.2d 886, 887 (1963), *vacated and remanded sub nom.* Harris v. Texas, 378 U.S. 572 (1964); Lopez v. State, 172 Tex. Crim. 317, 366 S.W.2d 587 (1963), *vacated and remanded sub nom.* Lopez v. Texas, 378 U.S. 567 (1964); Marrufo v. State, 172 Tex. Crim. 398, 402, 357 S.W.2d 761, 764 (1962); Odis v. State, 171 Tex. Crim. 107, 109, 345 S.W.2d 529, 530-31 (1961); Newman v. State, 148 Tex. Crim. 645, 649-50, 187 S.W.2d 559, 561-62 (1945); Gipson v. State, 147 Tex. Crim. 428, 429, 181 S.W.2d 76, 77 (1944); Cavazos v. State, 143 Tex. Crim. 564, 566-67, 160 S.W.2d 260, 261 (1942); Ward v. State, 144 Tex. Crim. 444, 449, 158 S.W.2d 516, 518 (1942). *Wisconsin:* State v. Bronston, 7 Wis. 2d 627, 638, 97 N.W.2d 504, 511 (1959). *Wyoming:* Clay v. State, 15 Wyo. 42, 59, 86 Pac. 17, 19 (1906).

in which the confession was obtained,[28] but he will make a final determination of the issue only if there is no reasonable conflict of factual evidence.[29] If such a conflict is found, the confession is admitted tentatively and the issue is given to the trial jury to be resolved alongside other issues in the case.[30] The jury is instructed that it may use the confession if it is found to be voluntary, affording it credibility and weight as justice requires. If found to be involuntary, it must be completely disregarded and guilt or innocence determined solely on the basis of the other evidence.[31]

In *Stein v. New York*[32] the Supreme Court measured the New York rule by the requirements of the fourteenth amendment.[33] The Court attempted to reconcile the New York practice of submitting the issue of voluntariness to the jury with established principles of due process.[34] In affirming the petitioner's conviction, the majority reasoned that the New York procedure produces one of two alternative results, neither of which is violative of established requisites to due process: either the jury (1) finds the confession voluntary and lawfully considers it or (2) finds the confession involuntary and, pursuant to the court's instructions, dutifully disregards it.[35] Certainly not blind to the rule's imperfections,[36] the Court in *Stein* con-

[28] Under New York State procedure the judge is not required to exclude the jury during the preliminary hearing. It is not entirely clear whether he is allowed to do so. See People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909); People v. Brasch, 193 N.Y. 46, 85 N.E. 809 (1908). *But see* note 20 *supra.*

[29] Although it is clear that the judge may make a final determination of involuntariness, there is a lack of uniformity among jurisdictions following the New York rule as to whether he may make a conclusive finding of voluntariness as well. *Compare* State v. Scott, 209 S.C. 61, 64-65, 38 S.E.2d 902, 903 (1946), *with* People v. Pignatoro, 263 N.Y. 229, 240-41, 188 N.E. 720, 724 (1934).

[30] The court need not resolve the evidence and make a finding; it is required only to determine that a finding of voluntariness could reasonably be made. *E.g.*, People v. Leyra, 302 N.Y. 353, 364, 98 N.E.2d 553, 559 (1951).

[31] See note 44 *infra.*

[32] 346 U.S. 156 (1953).

[33] The issue of whether the New York rule is inconsistent with the fourteenth amendment was squarely before the Court for the first time although the Supreme Court had reviewed numerous confession cases in which the issue of coercion had been resolved in the trial court pursuant to the New York rule. See Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Ward v. Texas, 316 U.S. 547 (1942).

[34] 346 U.S. 156, 170-71 (1953).

[35] *Id.* at 190.

[36] [T]his procedure does not produce any definite, open and separate decision of the confession issue. Being cloaked by the general verdict, petitioners do not know what result they really are attacking here. . . .

This method of trying the coercion issue to a jury is not informative as to its disposition. Sometimes the record permits a guess or inference, but where other evidence of guilt is strong a reviewing court cannot learn whether the final result was to receive or to reject the confessions as evidence of guilt. 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 doubts of

cluded, over an angry dissent,[37] that the New York procedure is not injurious to the standard of fairness required by the fourteenth amendment. This view went unquestioned by the Supreme Court[38] until the stimulus of dissident commentary[39] and subsequent decisions reaffirming traditional principles which were cast in doubt by *Stein*[40] induced the Court to re-examine the issue in *Jackson v. Denno*.[41]

III. JACKSON V. DENNO

Petitioner, accused of murdering a policeman during a holdup attempt, under questioning confessed the killing to police detectives while he was awaiting an emergency operation for gunshot wounds received at the scene of the robbery. Petitioner had no counsel present when the confession was elicited, certain preoperative sedatives had been administered to him, and he had been denied a glass of water.[42] His version of the circumstances under which the confession was obtained differed in several respects from that of police witnesses. The trial judge, according to well established New York procedure,[43] submitted the question of voluntariness to the jury. The jury was instructed to use the confession if found to be voluntary, affording it proper credibility and weight. Alternatively, the court charged that if the confession were found to be involuntary, it must be completely excluded from consideration and a verdict reached wholly on the basis of the other evidence.[44]

---

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 confessions but returning an unanalytical and impressionistic verdict based on all they had heard. *Id.* at 177-78.

[37] None of the dissenters attacked the Court's assumptions about jury regularity. However, the issue of whether the New York procedure violates settled principles of due process would seem to turn on the validity or invalidity of those assumptions. See discussion in text accompanying note 45 *infra*.

[38] See Spano v. New York, 360 U.S. 315 (1959); Thomas v. Arizona, 356 U.S. 390 (1958).

[39] See generally the sources cited in note 26 *supra*.

[40] See the cases cited in note 11 *supra*.

[41] 378 U.S. 368 (1964).

[42] Mr. Justice Black, concurring in part, contended that the conditions under which the confession was elicited were "inherently coercive." 378 U.S. at 401. See Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).

[43] This procedure has persisted unchallenged in New York for over a century. See People v. Doran, 246 N.Y. 409, 416, 159 N.E. 379, 381 (1908) and cases cited therein.

[44] Under our law, a confession, even if true and accurate, if involuntary, is not admissible, and if it is left for the jury to determine whether or not it was voluntary, its decision is final. If you say it was involuntarily obtained, it goes out of the case. If you say it was voluntarily made, the weight of it is for you. So I am submitting to you as a question of fact to determine whether or not this statement was made by Jackson, or allegedly made by Jackson, whether it was a voluntary confession, and whether it was true and accurate. That decision is yours.

Should you decide under the rules that I gave you that it is voluntary,

In *Jackson* the Court undertook a more realistic analysis of the New York rule and its effect upon due process than had been attempted in *Stein*. The majority maintained that the Court in *Stein*, by deducing that only two alternative results may be accomplished by the New York procedure,[45] overlooked the significance of other effects which seriously undermine an accused's constitutionally required protection against the use of coerced confessions. Specifically, the Court noted that (1) irrelevant considerations may influence the jury's decision on the issue, (2) the jury may not be able to ignore a confession it finds to be involuntary, or (3) the issue may not be resolved at all.

A. *Irrelevant Considerations May Influence The Jury's Decision On The Issue*

After all of the evidence has been presented, the jurors' irrelevant impressions as to the truthfulness of the confession may wrongfully induce them to determine the issue in favor of voluntariness.[46] Pointing out that *Stein* failed to censure the intermingling of the issues of credibility and voluntariness, the Court attributed this error to the underlying false assumption of *Stein* that the inherent untrustworthiness of coerced confessions is the only factor which compels their exclusion.[47] If this assumption were valid, a credible confession need not be rejected because it is involuntary.[48] But Mr. Justice White, speaking for the majority in *Jackson*, went to considerable lengths to demonstrate that an equally important reason for excluding such confessions is the desirability of negating the results of abusive police tactics.[49] Accordingly, the majority reasoned that a procedure

> true and accurate, you may use it, and give it the weight you feel that you should give it. If you should decide that it is involuntary, exclude it from the case. Do not consider it at all. In that event, you must go to the other evidence in the case to see whether or not the guilt of Jackson was established to your satisfaction outside of the confession, beyond a reasonable doubt. 378 U.S. at 375.

[45] See note 35 *supra*.

[46] Dissenting in *Stein*, Mr. Justice Frankfurter set forth the standard adopted by the Court in the principle case: "This issue 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." Stein v. New York, 346 U.S. 156, 200 (1953). See Rogers v. Richmond, 365 U.S. 534 (1961) and the other cases cited in note 15 *supra*.

[47] The majority in the *Stein* case had contended that "a coerced confession vitiates a conviction because such a confession combines the persuasivenss of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence." Stein v. New York, 346 U.S. 156, 192 (1953).

[48] Indeed, some courts have held that independent corroborating evidence renders a coerced confession trustworthy and admissible. See 3 Wigmore, Evidence §§ 856-858 (3d ed., 1940).

[49] It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of con-

in which the coercion issue is resolved by the trial jury,[50] comprised of laymen fully cognizant of evidence going to other issues in the case, does not adequately protect the defendant's right to an objective, reliable determination of the issue of voluntariness.

B. *The Jury May Not Ignore A Confession It Finds To Be Involuntary*

Having found the confession to be involuntary, individual jurors may be incapable of wholly disregarding it.[51] The majority questioned the jury's ability to abide strictly by the court's instructions and expressed fear that the damaging effect of the inadmissible confession evidence would overcome doubts about the sufficiency of the other evidence.[52] The Court concluded that the resultant threat to an accused's constitutional right to have an involuntary confession *entirely* disregarded is inconsistent with the standard of fairness required of state proceedings. In this connection, the majority reaffirmed the principle that reversal must follow if the reviewing court finds that a coerced confession was admitted at the trial,[53] and—in opposition to *Stein*[54]—declared the rule applicable regardless of the possi-

fessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will" . . . and because of "the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." 378 U.S. at 385-86.

[50] The Court did not object to a determination of the issue by a separate jury: "Whether the trial judge, another judge, or another jury, fully resolves the issue of voluntariness is not a matter of concern here. To this extent we agree with *Stein* that the States are free to allocate functions between judge and jury as they see fit." *Id.* at 391 n. 19.

[51] "Under the New York procedure, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false." *Id.* at 388.

[52] In this connection, the majority observed that the efficacy of instructions to disregard inadmissible evidence has frequently been doubted. See Krulewitch v. United States, 336 U.S. 440 (1948) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."); Rideau v. Louisiana, 373 U.S. 723, 727 (1962). *But see* Delli Paoli v. United States, 352 U.S. 232 (1956); Leland v. Oregon, 343 U.S. 790 (1951) (cited by Harlan, J. dissenting in *Jackson*, 378 U.S. at 427).

[53] An impressive number of cases decided after *Stein* have unequivocally supported the rule of "automatic reversal." See Haynes v. Washington, 373 U.S. 503 (1963); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Leyra v. Denno, 347 U.S. 556 (1954). *Cf.* Mapp v. Ohio, 367 U.S. 643 (1961).

[54] Mr. Justice Jackson, speaking for the majority in *Stein*, attempted to extricate the New York procedure from the rule's censure: "But here the confessions are put before the jury only tentatively, subject to its judgment as to voluntariness and with binding instructions that they be rejected and ignored unless found beyond reasonable doubt to have been voluntary." Stein v. New York, 346 U.S. 156, 192 (1953).

bility that the jury followed instructions to disregard it and based its conviction wholly on the other evidence.[55]

C. *The Issue May Not Be Resolved At All*

Even in *Stein* the Court professed awareness of the problems created by limiting the jury's expression of its conclusions to a general verdict.[56] Similarly, the majority in *Jackson* bemoaned the lack of assurance that the jury had properly resolved the issue of voluntariness and the factual disputes underlying it.[57] Under the New York rule, the obvious peril is that no definite determination will be made, in which case individual jurors may use the confession evidence in varying degrees as they develop their respective conclusions concerning the guilt or innocence of the accused. Indeed, even if the issue is properly decided, there is no record of the jury's finding to notify the reviewing court or the convicted petitioner whether the confession was regarded as voluntary or coerced. Long perplexed by the problems of fact-finding in its review of confession cases,[58] the Supreme Court asserted in *Jackson* that the findings of the tribunal which determines the issue of coercion must be discernible to the appellate court before it can properly ascertain if the defendant's constitutional rights have been violated.

Four Justices dissented,[59] vigorously resisting what they considered to be an attack by the Court on the jury system.[60] Mr. Justice Black, joined by Mr. Justice Clark, saw the majority's charge that a trial jury's determination of the issue is tainted with unreliability as a challenge to the fundamental concept in the Constitution that juries

[55] A refutation of the "other evidence" rule would effectively nullify the jury's efforts to disregard a coerced confession. In a post-*Stein* federal habeas corpus proceeding it was held that "when it appears that a confession was in fact coerced, and when it cannot be determined that such coerced confession was or was not used by the jury to arrive at their verdict of guilty, the writ [of habeas corpus] should issue." Cranor v. Gonzales, 226 F.2d 83, 90 (9th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956). See Spano v. New York, 360 U.S. 315, 324 (1959); Payne v. Arkansas, 356 U.S. 560, 568 (1958).

[56] See note 36 *supra*.

[57] In jurisdictions following the orthodox rule . . . or those following the Massachusetts procedure . . . the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings are expressly stated or may be ascertainable from the record. In contrast, the New York jury returns only a general verdict upon the ultimate question of guilt or innocence. . . . [There is no] indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other. 378 U.S. at 378-80.

[58] See note 15 *supra*.

[59] Dissenting were Justices Clark, Harlan, and Stewart; Mr. Justice Black dissented in part and concurred in part.

[60] "Dependence on jury trials is the keystone of our system of criminal justice and I regret that the Court lends its weight to the destruction of this great safeguard to our liberties." 378 U.S. at 426 (from separate dissenting opinion of Clark, J.).

are to be trusted in resolving questions of fact.[61] The possibility that irrelevant evidence might wrongfully influence the jury to make use of a coerced confession, he argued, is a possibility "inherent in any confession fact-finding by human fact-finders—a possibility present perhaps as much in judges as in jurors."[62] Mr. Justice Harlan took issue with the Court's second ground for striking down the New York procedure. Quoting liberally from previous opinions of the Court, he demonstrated that the Supreme Court has repeatedly rejected speculation that the jury might have disregarded instructions as grounds for reversal.[63] Each of the dissenters attacked the majority decision on the ground that the fourteenth amendment does not justify federal interference with a state court's procedure for determining the coercion issue. Mr. Justice Black used the opportunity to continue his war on the "fairness" test of due process.[64] Mr. Justice Harlan contended that the freedom of the states to work out their individual problems of criminal administration should be abridged "only where it is demonstrable that their own adjustment of the competing interests infringes rights fundamental to decent society," adding that "the New York rule . . . is surely not of that character."[65]

These protestations are difficult to justify.[66] The Court's refusal to allow the trial jury to determine the admissibility of a confession can hardly be termed a departure from traditional concepts of the jury's function.[67] Issues of competency have always been within the ambit of the trial judge.[68] Our system of jury trial presupposes that the judge will apply the exclusionary rules before evidence is submitted to the jury.[69] Indeed, this aspect of the system manifestly reveals our awareness of the jury's inability to ignore improper evi-

[61] *Id.* at 405.

[62] *Id.* at 402.

[63] *Id.* at 430-36. *But see* note 52 *supra.*

[64] "My wide difference with the Court is in its apparent holding that it has constitutional power to change trial procedures because of its belief that they are not fair. There is no constitutional provision which gives this Court any such lawmaking power. . . . I have repeatedly objected to the use of the Due Process Clause to give judges such a wide and unbounded power, whether in cases involving criminal procedure . . . or economic legislation. . . ." *Id.* at 407. See also the cases cited in note 5 *supra.*

[65] *Id.* at 439.

[66] The foregoing are not the only grounds on which the dissenters challenged the majority decision. However, these protests question the *authority* of the Court to strike down the New York procedure, while others, some of which are alluded to below, disparage the *effects* of the majority opinion. See *e.g.* note 79 *infra.*

[67] In Bass v. Commonwealth, 296 Ky. 426, 431, 177 S.W.2d 386, 388 (1944) the Kentucky Supreme Court construed a state statute which compelled the courts to repudiate the New York rule and return to the orthodox rule. The statute had been challenged on grounds that it violated the right of trial by jury. The court held that because the earlier rule was being returned to, there was no *departure* from the traditional right to jury trial.

[68] 3 Wigmore, Evidence § 861 (3d ed. 1940).

[69] 9 Wigmore, Evidence § 2550 (3d ed. 1940).

dence. Moreover, in construing the fourteenth amendment to proscribe the New York rule, the Court has not varied its *standard* of due process beyond that of previous decisions in which a state's handling of the coercion issue has been condemned.[70] Rather, it has applied established principles to a heretofore neglected area—state procedure for resolving the issue. In substance, the Supreme Court has merely acknowledged the fact of jury irregularity and recognized its injurious effect upon the due process rights of an accused confronted with a pretrial confession.[71]

IV. Conclusion

It would seem that the Court in *Jackson v. Denno*[72] reached a forseeable conclusion. During the past two decades the Supreme Court has been engaged in perfecting its confession doctrines, continually broadening the protection afforded an accused.[73] The task has been to achieve that degree of protection which the fluid "concept of ordered liberty"[74] requires. As our standard of due process has developed, guiding principles have been established to reflect that standard, and incompatible practices have been discarded.[75] It is consistent with the character of this development that the Court should censure a state trial procedure which deprives an accused of the constitutional guarantees enumerated by those guiding principles. Indeed, this decision, by denouncing the erosion of due process fostered by an inadequate state procedure for determining the issue of voluntariness, fills a substantial gap in the wall of protection the Court has been erecting since *Brown v. Mississippi*.[76]

However, although the majority criticized *Stein*[77] for its failure to consider the practical effects of the trial procedure it sanctioned, it seems to have fallen into the same error, at least in dicta. The Court in *Jackson* acquiesced in the Massachusetts rule, explaining that "given the integrity of the preliminary proceedings before the judge," the defendant's rights are fulfilled by the initial determination, and, if the confession is admitted, a subsequent jury consideration of the issue cannot be damaging.[78] The trial court, however, probably will be inclined to decide close issues in favor of voluntari-

[70] See notes 11 and 15 *supra*.
[71] See also note 37 *supra*.
[72] 378 U.S. 368 (1964).
[73] See note 6 *supra*.
[74] Palko v. Connecticut, 302 U.S. 319, 325 (1937).
[75] See Harding, *Introduction*, Fundamental Law in Criminal Prosecutions 1 (Harding ed. 1959).
[76] 297 U.S. 278 (1936).
[77] Stein v. New York, 346 U.S. 156 (1953).
[78] 378 U.S. at 378-79.

ness. It is likely that a trial judge, conscious of the jury's duty to make a de novo resolution of the admissibility issue, would rather err on the side of caution than make the final disposition of an issue which alone may compel the verdict. Moreover, the trial jury, imbued with the inadequacies observed by the majority in *Jackson,* would naturally be disinclined to traverse a finding which has received the court's "stamp of approval."[79] Thus, under the Massachusetts rule, irrelevant considerations tend to induce *both* judge and jury to determine the issue against the accused.

If the Court's opinion had been entirely consistent with its apparent intent to assure realistic protection to the defendant it would have championed *only* the orthodox procedure. According to *Jackson,* due process requires a preliminary hearing in which the issue of voluntariness is isolated and determined free of the influence of irrelevant considerations. Of the three procedures discussed, only the orthodox practice measures up to that standard under close scrutiny.[80]

Yet it is the Massachusetts rule which is most likely to be adopted by the states which have followed the New York rule. Their predilection for a jury consideration of the issue may make a transition to the orthodox rule seem much too distasteful.[81]

In states in which persons have been convicted after a determination of the issue of voluntariness solely by the convicting jury, such prisoners apparently will be entitled to a new hearing upon petition for habeas corpus[82]—at least on the coercion issue.[83] Obviously, then,

[79] Mr. Justice Black was quick to point out the probability of the judge's finding influencing the jury:

> But it should be obvious that, under the Court's new rule, when a confession does come before a jury it will have the judge's explicit or implicit stamp of approval on it. This Court will find it hard to say that the jury will not be greatly influenced, if not actually coerced, when what the trial judge does is the same as saying "I am convinced that this confession is voluntary, but, *of course,* you may decide otherwise if you like." *Id.* at 404.

He apparently ascribed this shortcoming to the orthodox procedure as well as the Massachusetts rule. But under the former practice the judge's decision is binding on the jury; there is no improper influence, because the jury does not consider the issue of admissibility. It is true that under the orthodox rule the jury may disbelieve the confession on the ground that it was involuntarily given, and, accordingly, exercise its prerogative to give it no weight. But in that instance the court's finding of voluntariness would seem to be a *proper* indicium of credibility, not—as under the Massachusetts rule—an unwarranted influence on the jury's de novo resolution of the issue of admissibility.

[80] See note 79 *supra.*

[81] *But see* note 67 *supra;* Ky. Rev. Stat. § 422.110 (1960); State v. Moore, 60 Wash. 2d 144, 146-47, 372 P.2d 536, 538 (1962).

[82] Though the majority opinion was silent on the matter, the dissent in *Jackson* assumed that the Court's decision would apply retroactively. Indeed, the constitutional rules announced in Mapp v. Ohio, 367 U.S. 643 (1961) and Gideon v. Wainright, 372 U.S. 335 (1963) were so applied, and certainly the habeas corpus principles advanced in Fay v. Noia, 372 U.S. 391 (1963), noted in 18 Sw. L.J. 475 (1964) are consistent with such a view. It may be said, however, that the point is yet to be conclusively decided.

[83] The Court, upon granting the writ of habeas corpus, maintained that the petitioner's