1964

Constitutional Law: New York Criminal Procedure Permitting Jury to Determine Voluntariness of a Confession Held Unconstitutional

Minn. L. Rev. Editorial Board

ownership, will probably continue to receive capital gains treatment. It is apparent, however, that the bases upon which such treatment is extended or denied under section 402(a)(2) are most arbitrary. Congress might well re-examine this source of inequitable treatment of taxpayers.[37] In the meantime, the harsh consequences of taxing at ordinary rates lump-sum payments not meeting the *Mary Miller* test can be avoided, even though the plan has been terminated, by continuing the trust or by purchasing retirement annuities.[38]

Constitutional Law: New York Criminal Procedure Permitting Jury To Determine Voluntariness of a Confession Held Unconstitutional

Petitioner was charged with first degree murder in a New York State court. Under New York procedure the question of the voluntariness of his confession was submitted to the jury. His conviction was affirmed on appeal[1] and certiorari was denied.[2] Petitioner sought a writ of habeas corpus, challenging the constitutionality of New York's method for determining the voluntari-

37. The policies behind the capital gains provision of § 402(a)(2) provide no justification for the discriminations in tax treatment that have been made between various recipients of lump-sum distributions. "There is no doubt that the policy argument in favor of capital gains treatment of 'bunched' income is as applicable to liquidating payments of termination of a plan as it is to lump-sum payments on separation from service." Instant case at 954.

It has been noted that capital gains treatment is more favorable than is necessary to solve the "bunched" income problem. See Eckerman, *supra* note 9, at 11. An alternative solution to the "bunched" income problem is now available in the ordinary income averaging provisions of INT. REV. CODE OF 1954, § 1301–05 (§ 232 of the Revenue Act of 1964). But Congress evidently did not feel that this was an adequate substitute for capital gains treatment under § 402(a)(2)—incident to passing the new averaging provision, in Revenue Act of 1964, § 232b, 1964 U.S. CODE CONG. & ADM. NEWS 321, Congress repealed Int. Rev. Code of 1954, § 72(e)(3), ch. 1, 68A Stat. 22, which provided special treatment of lump-sum proceeds of annuity contracts, but did not repeal § 402(a)(2) providing special treatment of lump sums from qualified plans. Perhaps Congressional intent is to specially favor recipients of lump sums from qualified plans in order that they might be able to provide for themselves the retirement benefits they would have enjoyed under the plan. If so, this policy also applies which equal force to all lump-sum distributions from qualified plans.

38. Treas. Reg. § 1.402(a)–1(a)(2) (1960).

1. People v. Jackson, 10 N.Y.2d 780, 177 N.E.2d 59, 219 N.Y.S.2d 621, *remittitur amended*, 10 N.Y.2d 816, 178 N.E.2d 234, 221 N.Y.S.2d 521 (1961).

2. Jackson v. New York, 368 U.S. 949 (1961).

ness of a confession.[3] The district court denied the petition, and the Second Circuit affirmed.[4] The Supreme Court granted certiorari[5] and *held* the New York procedure unconstitutional under the due process clause of the fourteenth amendment, expressly overruling *Stein v. New York*[6], which had found the procedure constitutional.[7] *Jackson v. Denno*, 378 U.S. 368 (1964).

There are three basic procedures for determining the voluntariness, and therefore the admissibility, of a confession.[8] Under the first procedure, the orthodox or Wigmore rule, the judge decides the question. Only if the confession is received does the jury consider the same evidence in determining the credibility of the confession.[9] The second procedure, the Massachusetts rule, also provides that the judge determine admissibility. However,

3. Application of Jackson, 206 F. Supp. 759 (S.D.N.Y. 1962). Petitioner also claimed that his confession was in fact involuntary. *Id.* at 760. The Supreme Court refused, for the time being, to consider this second claim because it felt that the question of the voluntariness of petitioner's confession should first be constitutionally determined in the State's courts. 378 U.S. at 393.

4. Jackson v. Denno, 309 F.2d 573 (2d Cir. 1962).

5. Jackson v. Denno, 371 U.S. 967 (1963). In his dissent in the instant case, Mr. Justice Clark challenged the Court's judisdiction over the question of the constitutionality of the New York procedure, because petitioner had failed to raise the issue in the State courts in the prior criminal action. In assuming jurisdiction the majority relied on Fay v. Noia, 372 U.S. 391 (1963). 378 U.S. at 370 n.1.

6. 346 U.S. 156 (1953). This overruling was anticipated in Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956).

7. The Court disposed of the instant case by conditionally granting the writ of habeas corpus and returning the case to the district court, allowing the State a reasonable time to provide the petitioner, at a minimum, with a constitutional determination of voluntariness. If the confession is determined to be involuntary the petitioner must receive a new trial without admission of the confession. A determination of voluntariness allows the conviction to stand, and a failure by the State to give the defendant a hearing will require the federal habeas corpus court to release the defendant. 378 U.S. at 391–95. Presumably the petitioner will be able to directly appeal and then collaterally attack a new determination of voluntariness. *Id.* at 392–93.

This disposition will, at least initially, relieve the State of the burden of retrying Jackson, and of retrying other petitioners as the case is given retroactive effect. See United States *ex rel.* Gomino v. Maroney, 231 F. Supp. 154, 156 (W.D. Pa. 1964), stating that as a case brought up on habeas corpus, *Jackson* must be given retroactive effect.

8. Professor Meltzer points out a fourth procedure under which the trial judge chooses between the orthodox and the Massachusetts procedures. Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 320 (1954). *Jackson* points out the possibility of another procedure: using a second jury to determine the coercion question. 378 U.S. at 391 n.19.

9. *Id.* at 378–79; 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940).

if admitted, the jury must redetermine the confession's voluntariness before determining its credibility.[10] Under the New York rule, the third procedure, the judge considers the issue of voluntariness at a preliminary hearing, but resolves it only if the evidence is undisputed; in all other cases the jury makes the determination.[11]

The basis of the Supreme Court's decision in *Jackson* to limit the states' power to assign trial functions between judge and jury is that the New York procedure poses "substantial threats"[12] to the defendant's constitutional rights to have a coerced confession ignored[13] and to have a fair, reliable and reviewable determination of the issue of voluntariness. The decision does not make clear whether meeting a minimum standard of adequate protection is all that is required or whether states must use the procedure or procedures which the Court deems most protective of a defendant's rights. The major threat inherent in the New York rule is that in considering the coercion question, the jury will be exposed to most involuntary confessions,[14] and so a strong probability arises that later instructions will not prevent the jury's knowledge of a coerced confession from affecting its final verdict.[15] Disregarding the extralegal possibility that the jury will fail to con-

10. 378 U.S. at 378 n.8; see, *e.g.*, Commonwealth v. Preece, 140 Mass. 276, 5 N.E. 494 (1885).

11. 378 U.S. at 374–75; see, *e.g.*, People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951); People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928). It is not clear if the judge can make a final determination that the confession is voluntary. See Meltzer, *supra* note 8, at 321–22 & n.23.

12. 378 U.S. at 389.

13. A defendant may not be convicted on the basis of an involuntary confession. *Id.* at 376; Rogers v. Richmond, 365 U.S. 534 (1961). This is true even if there is corroborative evidence to sustain a conviction. Payne v. Arkansas, 356 U.S. 560 (1958); Stroble v. California, 343 U.S. 181 (1952); Malinski v. New York, 324 U.S. 401 (1945). For a list of the major periodical articles dealing with confessions see Ritz, *Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35 n.1 (1962).

14. In practice mere conflicting accounts of the events surrounding the confession will result in the issue of coercion being submitted to the jury. See Annot., 85 A.L.R. 870, 872 (1933).

15. See 378 U.S. at 388–89; 2 MORGAN, BASIC PROBLEMS OF EVIDENCE 289–90 (1961); MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 103–05 (1956); Meltzer, *supra* note 8, at 326–27, 351; Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 169 (1929); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 424–25 (1954). See generally Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927).

sider the question,[16] even when the confession is formally rejected by the jury as coerced, the confession may increase the weight given to corroborating evidence in the determination of the final verdict.[17] Alternatively the threat exists that the jury's knowledge of other corroborating evidence of guilt will distort its determination of the voluntariness issue by undermining the defendant's credibility[18] and reducing the significance of any extrinsic evidence indicating involuntariness, thus creating pressure on the jury to resolve the underlying factual disputes and the coercion question against the accused.[19] Furthermore, since the general jury verdict provides no record of the resolution of the coercion issue,[20] the defendant cannot attack an improper determination of that issue.[21] He can only attack the trial judge's giving of the question to the jury. In order to cure these defects *Jackson* would seem to require a complete separation of the determination of the question of voluntariness from the trial of the main issues of the case.

The Court also discusses a problem related to the apparent requirement of separation — the trial judge refusing to hold the preliminary hearing outside the presence of the jury.[22] In the federal courts it is reversible error for a judge to so refuse.[23] Although this problem was not before the *Jackson* Court, the same rule should be applied in the future to state court proceedings[24] because of the strong likelihood that a jury will not be able to disregard an involuntary confession it hears at the voluntariness hearing.[25]

16. See 378 U.S. at 379–80; Meltzer, *supra* note 8, at 326.

17. 378 U.S. at 388.

18. *Id.* at 381.

19. *Id.* at 381–84, 386; MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 104 (1956); Meltzer, *supra* note 8, at 342. Mr. Justice Harlan, in dissent, raised the possibility of having the jury bring in a special interlocutory verdict on voluntariness before hearing other evidence. 378 U.S. at 427 n.1. *But see id.* at 391 n.19. This would be impractical since a new jury would have to be chosen whenever a confession was determined to be involuntary.

20. 378 U.S. at 379–80.

21. *Id.* at 380. In *Stein* the Court had concluded that the jury's determination of the coercion issue had to be a valid one. 346 U.S. at 193–94.

22. 378 U.S. at 390 n.18.

23. United States v. Carignan, 342 U.S. 36, 38 (1951).

24. State v. Owen, 96 Ariz. 274, 394 P.2d 206 (1964) (reading *Jackson* as requiring hearing outside the presence of the jury); UNIFORM RULE OF EVIDENCE 8; *cf.* United States *ex rel.* Gomino v. Maroney, 231 F. Supp. 154, 156 (W.D. Pa. 1964). See generally Annot., 148 A.L.R. 546 (1944).

25. Similarly, this case may indicate a future overruling of Delli Paoli v. United States, 352 U.S. 232 (1957), which allowed the admission of the confession of one conspirator implicating the other conspirators, at the joint trial of all

The Supreme Court also discusses other defects that are not limited to the New York procedure. The first problem is that there are no findings of fact.[26] As a result the defendant is left without a basis for appealing a determination of voluntariness on grounds of improper application of legal standards to the findings. The Court did not consider the problem of inadequate or nonexistent findings under the Massachusetts and Wigmore rules — it assumed that adequate findings are always made.[27] This assumption is probably unwarranted. It is unlikely that all trial transcripts provide findings specific enough to be used to discover or appeal an improper application of the law to the findings.[28] Although the lack of adequate findings may not be sufficient in itself to make the Massachusetts and Wigmore rules unconstitutional, failure to provide adequate findings is likely to result in cases being sent back for a new trial or for a new voluntariness hearing because of the inadequacy of the record on review. In the absence of another decision setting forth a minimum requirement of specificity, a self-imposed standard of expressness at the trial level is highly desirable.

A second imperfection noted by the Court is that if the defendant takes the stand at the preliminary hearing to testify as to the involuntariness of his confession, he is then open to cross-examination and impeachment for all other purposes at the main trial.[29] The result is that many defendants are forced to choose not to testify for fear of prejudicing the adjudication of the ultimate issues of the case.[30] This deprives the fact finder of relevant testimony on the issue of coercion.[31] Since the defendant is usually the only person whose testimony is likely to establish the involuntariness or nonexistence of a confession, his failure to testify makes the reliability of a resolution of the issue suspect, thus impairing his right to be free of a conviction based

of them, with instructions to disregard the statement except when adjudicating the guilt of the confessor. *Cf.* Scott, *Federal Control Over Use of Coerced Confessions in State Criminal Cases — Some Unsettled Problems,* 29 IND. L.J. 151, 154–55 (1954). See generally Annot., 54 A.L.R.2d 830 (1957). However, it should be pointed out that the defendant's right to have the confession disregarded in *Delli Paoli* is probably not of constitutional dimension.

26. 378 U.S. at 379–80.

27. *Id.* at 378–79 & n.8.

28. *Id.* at 437–38 (dissent of Mr. Justice Harlan).

29. *Id.* at 389 n.16.

30. See Meltzer, *supra* note 8, at 330–36. The problem should be considered in the light of Malloy v. Hogan, 378 U.S. 1 (1964), which held the fifth amendment applicable in state proceedings. Compare United States *ex rel.* Gomino v. Maroney, 231 F. Supp. 154, 156 (W.D. Pa. 1964).

31. 378 U.S. at 389 n.16.

on an involuntary or nonexistent confession. The Court intimates that continued failure to protect the defendant who testifies at the preliminary hearing cannot be justified. The defendant who testifies only at the voluntariness hearing should be subject to cross-examination and impeachment, at the hearing exclusively. Similarly, the defendant whose confession is ruled voluntary by the judge under the Massachusetts procedure should have the right to testify only on the issue of voluntariness before the jury. Perhaps a defendant whose confession was determined to be voluntary under the Wigmore rule should also be able to testify before the jury as to circumstances surrounding the giving of his confession that reflect on its credibility without further waiving his fifth amendment rights.

Although the Supreme Court voiced its approval of the Massachusetts rule,[32] the conclusion is questionable. Constitutionality is based on the assumption that the judge does as thorough a job as if his decision were final, and as if he were untempted by the clean-up role of the jury.[33] There is, however, a good possibility that when the judge is not solely responsible for the decision it will not be made with the care required when his is the only determination made.[34] Furthermore, the irrevocability of a determination of voluntariness can cause a judge to pass the final decision to the jury by calling the confession voluntary.[35] When the judge does not fully discharge his duty the jury will often consider involuntary confessions and, for all practical purposes, the Massachusetts procedure will function in the same way as the New York procedure.[36] In view of this substantial

32. *Id.* at 378 n.8.

33. See *ibid.* For a questioning of the judge's ability to function properly in the Massachusetts procedure see Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 176 (1929).

34. See Morgan, *The Law of Evidence, 1941–1945*, 59 HARV. L. REV. 481, 488–89 (1946).

35. See State v. Andrew, 61 N.C. 205, 207–08 (1867); MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 103 (1956); Maguire & Epstein, *supra* note 15, at 421; Meltzer, *supra* note 8, at 329–30; Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 176–77 (1929); *cf.* The Queen v. Dudley, 14 Q.B.D. 273, 288 (1884); Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 619 (1949).

36. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 103 (1956); Meltzer, *supra* note 8, at 329–30. There are, however, significant differences between the Massachusetts and New York rules. See *id.*, at 324. Primary is the fact that when the New York procedure functions properly the jury still learns of involuntary confessions. This cannot happen if the Massachusetts rule works correctly.

threat to the defendant's constitutional rights, the Court may have to reconsider its present approval of the Massachusetts rule. The constitutionality of the Massachusetts rule may depend on whether *Jackson* requires that the states choose the best procedure available for protecting defendants' rights or whether the case only requires that state procedures meet a minimum standard of protectiveness. Under the first theory the Massachusetts rule is probably unconstitutional because it apparently poses a greater threat to a defendant's constitutional rights than the Wigmore rule. Under the second theory, which is the more likely one, the constitutionality of the procedure rests on the substantiality of the threat that the judge does not do his job properly.

The *Jackson* decision is in no sense an attack on the jury system. The policy behind an exclusionary rule of evidence is best implemented by the orthodox method of having the judge determine the factual disputes related to admissibility and apply the exclusionary rule before the jury learns of the evidence.[37] In failing to do this the New York rule was an unorthodox procedure,[38] and *Jackson* is a return to orthodoxy. The problem the Court deals with in this case is not jury inability to execute instructions, but its well-known inability to disregard improper evidence that it has received, an inability which has been acknowledged and compensated for in various other contexts.[39]

37. See Meltzer, *supra* note 8, at 327. See also 9 WIGMORE, *op. cit. supra* note 9, § 2550; see generally Maguire & Epstein, *supra* note 15. *But see* 378 U.S. at 401 (Mr. Justice Black's dissent).

38. See Morgan, *The Law of Evidence, 1941–1945*, 59 HARV. L. REV. 481, 488–89 (1946).

39. See, *e.g.*, Esser v. Brophey, 212 Minn. 194, 3 N.W.2d 3 (1942) (evidence of previous compromise not admissible); Blais v. Flanders Hardware Co., 93 N.H. 370, 42 A.2d 332 (1945) (proof of subsequent repairs in a negligence action not admissible); People v. Formato, 286 App. Div. 357, 143 N.Y.S.2d 205, *aff'd*, 309 N.Y. 979, 132 N.E.2d 894 (1956) (proof of previous convictions not admissible to establish guilt); Rodzborski v. American Sugar Ref. Co., 210 N.Y. 262, 104 N.E. 616 (1914) (existence of insurance in a negligence action not admissible). See generally Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).