Michigan Law Review

Volume 63 | Issue 2

1964

The Role of a Trial Jury in Determining the Voluntariness of a Confession

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The Role of a Trial Jury in Determining the Voluntariness of a Confession

The Supreme Court of the United States has vigorously implemented the principle that criminal prosecution is an investigative, not an inquisitorial, process. Evidence of guilt must be obtained by methods free from physical or psychological coercion.[1] Protections in the Bill of Rights against illegal search and seizure,[2] self-incrimination,[3] and trial without counsel[4] have been extended to the states through the due process clause of the fourteenth amendment. Safeguards against the admissibility of coerced confessions into evidence have also been instituted.[5] Because a confession practically determines the ultimate question of guilt,[6] the critical standards for admissibility are frequently challenged on appeal.[7] Three procedural methods for determining voluntariness have been employed: the orthodox, the Massachusetts, and the New York rules.[8] Under the orthodox rule, the trial judge determines voluntariness after hearing all of the evidence on that issue. If the confession is admitted by the judge, the jury then considers its probative value.[9] The

1. "[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." Rogers v. Richmond, 365 U.S. 534, 541 (1961). See, *e.g.*, Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960); Rochin v. California, 342 U.S. 165, 172-74 (1952); Watts v. Indiana, 338 U.S. 49, 54-55 (1949).

2. See, *e.g.*, Stoner v. California, 376 U.S. 483 (1964); Mapp v. Ohio, 367 U.S. 643 (1961). See generally Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUPREME COURT REV. 1 (Kurland ed.).

3. See Malloy v. Hogan, 378 U.S. 1 (1964).

4. See, *e.g.*, Escobedo v. State, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963). See generally BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).

5. See Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, U. Chi. Law School Record (Special Supp.), Autumn 1958, pp. 10-13. See generally MASON & BEANEY, THE SUPREME COURT IN A FREE SOCIETY 217-84 (1959); Scott, *State Criminal Procedure, The Fourteenth Amendment, and Prejudice*, 49 Nw. U.L. REV. 319 (1954).

6. See 3 WIGMORE, EVIDENCE § 821 (3d ed. 1940) [hereinafter cited as WIGMORE].

7. Since 1936, the Supreme Court has heard over forty appeals on confession issues. For a collection of confession cases, see Way, *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53, app. table 2 (1963) (listing thirty-two). See, *e.g.*, Escobedo v. State, 378 U.S. 478 (1964); Fahy v. Connecticut, 375 U.S. 85 (1963); Haynes v. Washington, 373 U.S. 503 (1963).

8. The states are divided rather evenly. See Jackson v. Denno, 378 U.S. 368, 410-23 (1964) (separate opinion). But not all the states and federal judicial circuits can be classified within these three procedures. Some jurisdictions leave the choice to the discretion of the trial judge; others vary the rule on different occasions. See *id.* at 378 n.9, 396-400; 3 WIGMORE § 861 n.3; Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 319 & n.11, 323-24 (1954).

9. See Jackson v. Denno, *supra* note 8, at 378; *id.* at 411-14 (separate opinion); 3 WIGMORE § 861; 9 *id.* § 2550; Meltzer, *supra* note 8, at 320-21; Comment, *The Role*

Massachusetts rule similarly requires the judge to pass initially on admissibility, but the jury must also find the confession voluntary before it may consider the credibility of the confession.[10] Under the New York procedure, however, the judge leaves the question of admissibility to the jury when there is a factual dispute concerning voluntariness over which reasonable men could differ. If the jury finds the confession involuntary, it must reach its verdict on the other evidence,[11] disregarding the confession. In *Jackson v. Denno*,[12] the United States Supreme Court, while expressing approval of both the orthodox and the Massachusetts procedures, held that the New York rule is unfair and unreliable in permitting the jury to determine both voluntariness and guilt and, consequently, that the New York rule deprives the defendant of liberty without due process of law.

The defendant in *Jackson* robbed a Brooklyn hotel and shot a policeman while escaping. Wounded himself, the defendant went to a local hospital where preoperative sedatives, demorol and scopolamine, were administered to him.[13] Immediately thereafter, he was interrogated, and he confessed. This confession and corroborating testimony were introduced into evidence at the New York state trial without objection by defense counsel,[14] although an attempt was made to impeach the credibility of the confession by proving the defendant's wounded and drugged condition.[15] Because the defendant's condition and testimony presented a factual dispute on the voluntariness of the confession, this issue was submitted to the jury with instructions that it consider the probative value of the confes-

of Judge and Jury in Determining a Confession's Voluntariness, 48 J. CRIM. L., C. & P.S. 59, 60 (1957).

10. See Jackson v. Denno, *supra* note 8, at 378 n.8; *id.* at 417-20 (separate opinion); Meltzer, *supra* note 8, at 323. See also Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165 (1929).

11. See Jackson v. Denno, *supra* note 8, at 377; *id.* at 414-17 (separate opinion); Meltzer, *supra* note 8, at 321-23. See also Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392 (1927).

12. 378 U.S. 368 (1964). Mr. Justice Black concurred in a separate opinion. Justices Clark, Harlan, and Stewart dissented.

13. Jackson was given fifty milligrams of demorol and one-fiftieth of a grain of scopolamine. Demorol, given intraveneously, makes a patient "dopey" immediately, and, taken with scopolamine, it intensifies drowsiness, impairs alertness, and produces an amnestic effect. Furthermore, scopolamine has the effect of "truth serum." See Townsend v. Sain, 372 U.S. 293, 302, 308 & n.5 (1963); Brief for Petitioner, pp. 14-15, Jackson v. Denno, *supra* note 8. See generally Comment, *Admissibility of Confessions and Denials Made Under the Influence of Drugs*, 52 NW. U.L. REV. 666 (1957); Note, 30 BROOKLYN L. REV. 111 (1963); Note, 16 OKLA. L. REV. 431 (1963). Since Jackson's dosage was twice the amount given to the defendant in the *Townsend* case *supra*, the Supreme Court could easily have ordered a hearing on voluntariness as it did in *Townsend*. However, the Court in *Jackson* ignored this simple ground for reversal, it would seem, in order to modify the rules of evidence.

14. Jackson v. Denno, *supra* note 8, at 374 & n.4; *id.* at 423-25 (dissenting opinion).

15. *Id.* at 374 & n.4; *id.* at 423-25 (dissenting opinion).

sion only if it was first found voluntary. The jury found the defendant guilty of first degree murder and sentenced him to death.[16] The constitutionality of the New York rule in permitting this confession to be submitted to the jury was first questioned in defendant's petition for a writ of habeas corpus in a federal district court. The denial of this petition was affirmed by the Court of Appeals for the Second Circuit.[17] The Supreme Court reversed, holding that state and federal hearings on voluntariness may be conducted by the trial judge, another judge, or an independently convened jury, but not by the trial jury.[18]

The rationale of the majority opinion is that jury deliberations on voluntariness may be unreliable and unfair to defendants.[19] Because the jury hears all the testimony under the New York procedure, evidence corroborating the reliability and credibility of a confession might influence its determination of voluntariness. This would be prejudicial error because the sensitive constitutional standards for voluntariness require that this finding be made without extraneous evidence going to its reliability.[20] Moreover, even if the jury finds the confession involuntary, the possibility exists that it may still be influenced by the confession in assessing the other evidence to reach a verdict.[21] In addition, when the issue of voluntariness is resolved by the trial jury, findings of fact cannot be ascertained from the general verdict; consequently, an appellate court

16. People v. Jackson, 10 N.Y.2d 780, 219 N.Y.S.2d 621, 177 N.E.2d 59, *motion to amend remittitur granted and remittitur modified*, 10 N.Y.2d 816, 221 N.Y.S.2d 521, 178 N.E.2d 234, *cert. denied*, 368 U.S. 949 (1961).

17. *In re* Jackson, 206 F. Supp. 759 (S.D.N.Y.), *aff'd sub nom.*, United States *ex rel.* Jackson v. Denno, 309 F.2d 573 (2d Cir. 1962), *rev'd sub nom.*, Jackson v. Denno, 378 U.S. 368, 370 (1964). Failure to contest a constitutional issue in the state courts does not preclude a federal hearing on a writ of habeas corpus unless the issue was avoided deliberately in the state court. See Fay v. Noia, 372 U.S. 391, 426-27, 439 (1963). *But see* Jackson v. Denno, 378 U.S. 368, 424-25 (1964) (Clark, J., dissenting).

18. Jackson v. Denno, *supra* note 17, at 391 & n.19.

19. See *id.* at 390-91.

20. See *id.* at 390. The holding is narrowly confined to voluntariness of confessions, although the breadth of the Court's rationale in questioning a jury's capability to judge admissibility solely on the issue of voluntariness and to disregard confessions found to be involuntary suggests a wider scope. It is probable that other admissions short of confessions will be treated like confessions in determining voluntariness. See United States *ex rel.* Gomino v. Maroney, 231 F. Supp. 154, 157 (W.D. Pa. 1964); State v. Owen, 94 Ariz. 404, 409, 385 P.2d 700, 703 (1963), *vacated sub nom.*, Owen v. Arizona, 378 U.S. 574 (per curiam), *rev'd on remand sub nom.*, State v. Owen, 394 P.2d 206 (Ariz. 1964); Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35, 37 (1962). However, it seems doubtful that this case presages the application of the orthodox rule to dying declarations and other evidence where admissibility may also determine the outcome of the suit.

21. See Jackson v. Denno, *supra* note 17, at 380-89. The Court overruled Stein v. New York, 346 U.S. 156 (1953), which had upheld the New York procedure despite its acknowledged shortcomings. *Stein* rested on the premise that coerced confessions were inadmissible only because they were unreliable. Thus, it followed that evidence concerning the trustworthiness of a confession was relevant and that a jury could consider both credibility and voluntariness together.

can only speculate on which evidence actually led to the verdict of guilty.[22] Finally, under the New York procedure an accused is handicapped in testifying before a jury about police coercion because the prosecution's permitted cross-examination[23] may disclose a record of prior convictions which otherwise would not reach the jury.[24]

The majority opinion, however, does not emphasize what might be regarded as a major secondary effect of rejecting the New York rule. Requiring a hearing on voluntariness that is independent of the trial jury will facilitate federal review of state confession cases, enabling the federal courts more easily to enforce the constitutional criteria for voluntariness, and thus effectuate the Court's goals of deterring "third degree" methods and protecting the individual's right of privacy against police interference. The Supreme Court has, by interpretation, expanded the applicability of federal habeas corpus writs for reviewing the voluntariness issue.[25] Federal district courts have been broadly directed to conduct a trial de novo on the voluntariness issue when the state trier-of-fact fails to provide a full and fair evidentiary hearing.[26] Under the orthodox and Massachusetts rules, the trial record reveals whether the constitutional standards for voluntariness are satisfied because the trial judge makes the determinations of law and the findings of fact.[27] Under the New York rule, however, the general verdicts and typically cursory jury instructions[28] do not clarify the applicable findings of fact and rulings of law, and thus they are not easily reviewed to ascertain

22. Jackson v. Denno, *supra* note 17, at 380; *accord*, Stein v. New York, 346 U.S. 156, 177 (1953).

23. See Jackson v. Denno, *supra* note 17, at 389 n.16 (dictum); McCORMICK, EVIDENCE 89-94 (1954); Meltzer, *supra* note 8, at 332-33. *But cf.* United States v. Carignan, 342 U.S. 36, 38 (1951); UNIFORM RULE OF EVIDENCE 21 (limiting evidence of prior convictions to crimes involving dishonesty and false statements).

24. See, *e.g.*, McNabb v. United States, 123 F.2d 848, 852 (6th Cir. 1941), *rev'd on other grounds*, 318 U.S. 332 (1943); Meltzer, *supra* note 8, at 333 n.71.

25. See, *e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). See generally Hart, *Foreword: The Time Chart of the Justices, The Supreme Court 1958 Term*, 73 HARV. L. REV. 84, 101-25 (1959); Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 17-26 (1956).

26. Townsend v. Sain, *supra* note 25, at 312-13, 317-18.

27. Both rules require that the judge's determination of voluntariness be reflected in the trial record. Jackson v. Denno, 378 U.S. 368, 378-79 (1964). With the law and the facts enunciated, federal district courts may conveniently review allegations of error in habeas corpus petitions.

28. See, *e.g.*, *id.* at 375 n.5: "[I]f you should decide that it was gotten by influence, of fear produced by threats, . . . then reject it." United States *ex rel.* McNerlin v. Denno, 214 F. Supp. 480, 483 (S.D.N.Y.), *aff'd*, 324 F.2d 46 (2d Cir. 1963), *vacated on other grounds*, 378 U.S. 575 (1964) (per curiam): "If it was the result of the use of threats or fear, regardless of how true the statement may be, you may not consider it . . . ." Haynes v. Washington, 373 U.S. 503, 517 n.13 (1963): "[A confession is voluntary] except when made under the influence of fear produced by threats . . . ." *Cf.* Meltzer, *supra* note 8, at 342.

voluntariness. Removing this shield of ambiguity will force trial courts to articulate the law and the findings of fact in detail, thereby permitting convenient and meaningful appellate review.[29]

In simply overturning the New York rule, without enunciating guidelines on many collateral issues raised by its holding, the Supreme Court was silent upon a series of problems that seem certain to be the subject of future litigation. First, although in theory the Massachusetts approach may aid the defendant because both the judge and the jury must separately find the confession voluntary before it may be admitted, in practice this procedure may have many of the objectionable characteristics of the New York rule. Under the Massachusetts rule, a trial judge, knowing that the jury must also pass on voluntariness, may have a tendency to resolve difficult factual disputes by finding the confession voluntary,[30] thus allowing the jury to make the final decision, even though the jury may thereby be swayed by the reliability of the confession or other evidence of guilt in determining voluntariness. On the other hand, if the trial judge instructs the jury that he has already found the confession to be voluntary, it seems likely that a jury will be influenced by the judge's findings, and thus the advantage of the Massachusetts rule to a defendant is minimized.[31] Second, under the orthodox approach, it is arguable that a defendant is deprived of his constitutionally protected right to a trial by jury because the judge must make the factual determinations on voluntariness,[32] a decision that often determines the ultimate issue of guilt or innocence. Third, the majority opinion in *Jackson* fails to indicate which of the three burdens of persuasion—the preponderance of evidence, clear and convincing proof, or beyond a reasonable doubt[33]—should be employed by the trier-of-fact as the constitutional standard for determining voluntariness. If a trial judge, for example, admits a confession under the preponderance burden and instructs the jury that the confession is voluntary, the jury, by relying on the confession, may convict a defendant on less than proof beyond a reasonable

29. *Cf.* Brennan, *The Judge's Supervisory Role*, 2 AMERICAN CRIM. L. Q. 53, 57-59 (1964).

30. See Jackson v. Denno, 378 U.S. 368, 436-38 (1964) (dissenting opinion); Meltzer, *supra* note 8, at 329-30; Ritz, *supra* note 20, at 55-57.

31. See Jackson v. Denno, *supra* note 30, at 404 (Black, J., separate opinion); Brief for Petitioner, p. 9, *id.*; Meltzer, *supra* note 8, at 329-30; Comment, *The Role of Judge and Jury in Determining a Confession's Voluntariness*, 48 J. CRIM. L., C. & P.S. 59, 64 (1957).

32. Jackson v. Denno, *supra* note 30, at 405-08 (Black, J., separate opinion).

33. Of the few courts that have considered the issue at the appellate level, the jurisdictions are split among the three rules. See, *e.g.*, *In re* Jackson, 206 F. Supp. 759, 762 (S.D.N.Y.) ("clear and conclusive proof"), *aff'd sub nom.*, United States *ex rel.* Jackson v. Denno, 309 F.2d 573 (2d Cir. 1962), *rev'd on other grounds sub nom.*, Jackson v. Denno, 378 U.S. 368 (1964); People v. Sammons, 17 Ill. 2d 316, 319, 161 N.E.2d 322, 324 (1959) ("preponderance of the evidence"); State v. Stewart, 238 La. 1036, 1046, 117 So. 2d 583, 586 (1960) ("beyond a reasonable doubt").

doubt.[34] Finally, a number of decisions under the Massachusetts system indicate that the judge may determine the voluntariness of a confession in the presence of the jury.[35] It would seem, however, almost a necessary implication from the rationale of the *Jackson* holding that, because juries are likely to be influenced by knowledge of an involuntary confession, all hearings on voluntariness by the judge must be outside of their presence.[36]

The Supreme Court in *Jackson* was also silent on whether the burden of proof for voluntariness is upon the prosecution or the defendant, even though the proper allocation of this burden seems essential in order to achieve the Court's declared goal of fair and reliable hearings and though the states are divided on this issue.[37] The parties' access to evidence and their ability to aid counsel should be determinative of this question.[38] While an accused may fully understand the circumstances surrounding a confession, the large number of cases in which the facts are disputed or unknown justify placing the burden on the prosecution. During detention and interrogation, the accused is likely to be in a highly emotional condi-

34. *Cf.* Jackson v. Denno, 378 U.S. 368, 405 (1964) (Black, J., separate opinion).

35. See, *e.g.*, Smith v. United States, 268 F.2d 416, 420 (9th Cir. 1959); People v. Gonzales, 24 Cal. 2d 870, 877, 151 P.2d 251, 255 (1944); State v. Tassiello, 39 N.J. 282, 291, 188 A.2d 406, 411 (1963). The Court relied heavily upon the inability of the jury to disregard an involuntary confession in reaching a verdict, yet failed to stipulate that the jury be excluded during testimony before the judge on voluntariness. *But cf.* Jackson v. Denno, *supra* note 34, at 390 & n.18. Following the Court's rationale of jury waywardness, it is unclear why defendant would not be prejudiced by the mention of a "confession" within the jury's hearing. See Meltzer, *supra* note 8, at 330; *cf.* United States v. Carignan, 342 U.S. 36, 38 (1951) (defendant in federal prosecution may testify out of jury's presence).

36. See State v. Owen, 394 P.2d 206, 207 (Ariz. 1964). *Owen* interpreted *Jackson* as holding that all testimony on voluntariness must be out of the jury's hearing. *But see* People v. Milford, 33 U.S.L. WEEK 2123 (N.Y. Sup. Ct. Aug. 25, 1964), which interprets *Jackson* to permit the jury to determine voluntariness when the confession is the only evidence against the defendant. *Milford* seems unjustifiable and inconsistent with the principal case. It also seems to reflect the ambiguities of *Jackson* and the shortcomings of the Court's guidelines for evidentiary procedures in this chaotic area of criminal law.

37. A strong minority of the jurisdictions in which the issue has been resolved place the burden on the defendant to show that the confession was involuntary. See, *e.g.*, Nail v. State, 231 Ark. 70, 74, 328 S.W.2d 836, 839 (1959); Britt v. State, 242 Ind. 548, 555-56, 180 N.E.2d 235, 239 (1962); Commonwealth v. Beaulieu, 333 Mass. 640, 655, 133 N.E.2d 226, 235, *cert. denied*, 351 U.S. 957 (1956). Another group of states require only that the prosecution make a prima facie showing of voluntariness before the burden shifts to the defendant. See, *e.g.*, State v. Preis, 89 Ariz. 336, 338, 362 P.2d 660, 661, *cert. denied*, 368 U.S. 934 (1961); Cochran v. State, 117 So. 2d 544, 545 (Fla. 1960); People v. Davis, 10 Ill. 2d 430, 440, 140 N.E.2d 675, 682, *cert. denied*, 355 U.S. 820 (1957). Compare United States *ex rel.* McNerlin v. Denno, 214 F. Supp. 480 (S.D. N.Y.), *aff'd*, 324 F.2d 46 (2d Cir. 1963), *vacated on other grounds*, 378 U.S. 575 (1964) (per curiam).

38. See Meltzer, *supra* note 8, at 321 n.18. The determination of where the burden of evidence shall lie is generally resolved by considerations of fairness and public policy. See, *e.g.*, MCCORMICK, EVIDENCE 672-76 (1954); MAGUIRE, EVIDENCE—COMMON SENSE AND COMMON LAW 179 (1947); MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 75-76 (1956); 9 WIGMORE § 2486.

tion[39] and is often under a physical or mental disability.[40] Circumstances surrounding arrests, detentions, and interrogations may be confusing and secretive.[41] As a result, the police probably have better access to the evidence, including witnesses and records, that can establish voluntariness.[42] In addition, requiring the prosecution to prove voluntariness will help deter illegal police methods, consistent with the reasoning behind the exclusionary rule,[43] because the officers involved will know that they may have to testify in detail about how the confession was obtained.[44]

It is not clear that the due process deficiencies which the Court found in the New York rule will be corrected by an independent adjudication of voluntariness. The fairest and most reliable deliberation would be by a second jury that considers only the single issue of voluntariness without testimony concerning the credibility of the confession.[45] This procedure, however, is unlikely to be utilized because of the added delay and expense.[46] The alternative, a judge determination, creates problems of fairness and reliability.[47] The judge faces the same difficulty as the jury in excluding a confession when the coercion is slight and the defendant is clearly guilty, and he may give sizeable, unrecorded weight to a confession's accuracy in determining voluntariness.[48] Judges may also have extra-judicial knowledge of the defendant's record and conduct, supplementing

39. See, *e.g.*, Ashdown v. Utah, 357 U.S. 426 (1958) (five-hundred interrogation immediately after husband's funeral); *cf.* INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 29-34 (1962).

40. See, *e.g.*, Jackson v. Denno, 378 U.S. 368, 373 (1964) (sedatives and truth serum); Townsend v. Sain, 372 U.S. 293, 298-99 (1963) (narcotics); Culombe v. Connecticut, 367 U.S. 568, 620 (1961) (mentally handicapped); Reck v. Pate, 367 U.S. 433, 437 (1961) (sick); Pea v. United States, 324 F.2d 442 (D.C. Cir. 1963) (per curiam), *vacated on other grounds*, 378 U.S. 571 (1964) (per curiam) (wounded); Bell v. United States, 47 F.2d 438, 439 (D.C. Cir. 1931) (alcohol).

41. See Culombe v. Connecticut, 367 U.S. 568, 575 (1961) (dictum); Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., C. & P.S. 21, 44-46 (1961); *cf.* Way, *supra* note 7, at 60-61.

42. See INBAU & REID, *op. cit. supra* note 39, at 135-39; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149-50 (1960).

43. See, *e.g.*, Haynes v. Washington, 373 U.S. 503, 514-15 (1963); Rogers v. Richmond, 365 U.S. 534, 541 (1961); Ritz, *supra* note 20, at 42-43.

44. Compare United States *ex rel.* McNerlin v. Denno, 214 F. Supp. 480, 482-86 (S.D. N.Y.), *aff'd*, 324 F.2d 46, 48-49 (2d Cir. 1963), *vacated on other grounds*, 378 U.S. 575 (1964) (per curiam). The prosecution met its prima facie burden with only one witness. Defendant contradicted the witness by testifying about police coercion. The state did not call any of the other witnesses to the confession. Forcing the state to produce all available witnesses would enable the trial and reviewing courts to ascertain more clearly the voluntariness of the confession.

45. *Cf.* JOINER, CIVIL JUSTICE AND THE JURY 124-34 (1962).

46. *Cf. id.* at 73-75, 222-33.

47. The Supreme Court willingly assumes the integrity of proceedings before a judge, yet rejects the reliability and trustworthiness of the jury. Jackson v. Denno, 378 U.S. 368, 378 n.8, 381-82 (1964).

48. *Cf.* Schaefer, *supra* note 25, at 13-14.

the testimony on the reliability of the confession.[49] Moreover, some trial judges may feel obligated to support local police officers, whereas the jury is unburdened by considerations of police morale. Whether a judge will accept an accused's claim of coercion, over denials by local police, as readily as a jury is uncertain. It would seem possible, therefore, that judge deliberations on voluntariness are little fairer or more reliable to a defendant than jury determinations under the New York rule.

As in other recent criminal cases,[50] the Supreme Court in *Jackson* did not rule upon the retroactive effect of its holding. Despite the unconstitutional evidentiary procedure, the Court did not grant the petitioner a new trial but rather remanded the case to a New York state court for a fair hearing on the issue of voluntariness. This disposition of the case reflected a recent technique for splitting litigation to aid judicial administration.[51] Application of this technique to confession cases seems to manifest an intention that the holding in *Jackson* be employed retroactively since bifurcating the voluntariness issue from the trial process will facilitate rehearings on all past convictions based upon confessions under the New York rule.[52]

Given other recent Supreme Court decisions concerning individual rights in criminal prosecutions,[53] the standards of the exclusionary rule for coerced confessions and the privilege against self-

49. *Cf.* Williams v. New York, 337 U.S. 241 (1949).

50. See Escobedo v. State, 378 U.S. 478 (1964) (refusal to let defendant consult with counsel during interrogation violates due process); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment against self-incrimination extended to states); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961). *But see* Norvell v. Illinois, 373 U.S. 420 (1963) (limiting the retroactive application of the requirement that trial transcripts be provided to indigents); Eskridge v. Washington State Bd., 357 U.S. 214 (1958) (per curiam) (providing indigents with trial transcripts retroactively). *Compare* Hall v. Warden, 313 F.2d 483 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963) (*Mapp* applied retroactively), *with* United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *cert. granted*, 377 U.S. 930 (1964) (*Mapp* not applied retroactively). See generally Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Comment, 71 YALE L.J. 907 (1962).

51. See Jackson v. Denno, 378 U.S. 368, 410 (1964) (separate opinion); *id.* at 426 (Clark, J., dissenting); United States v. Shotwell Mfg. Co., 355 U.S. 233 (1957).

52. Generally in confession cases, the Supreme Court has reversed convictions obtained with unconstitutional procedures in accordance with the "automatic reversal rule." See Meltzer, *supra* note 8, at 344. *Compare* United States *ex rel.* Gomino v. Maroney, 231 F. Supp. 154, 156 (W.D. Pa. 1964) (applying *Jackson* retroactively), *with* People v. Milford, 33 U.S.L. WEEK 2123 (N.Y. Sup. Ct. Aug. 25, 1964) (refusing to apply *Jackson* retroactively). Because of the Court's willingness to hear constitutional issues not raised at the trial or appellate levels, it would be inconsistent to limit the retroactive application of *Jackson* to those cases where the issue was previously raised. See Tucker, *The Supreme Court and the Indigent Defendant*, 37 SO. CAL. L. REV. 151, 178 (1964); *cf.* Fay v. Noia, 372 U.S. 391, 426-27, 439 (1963).

53. See notes 1-5 *supra* and accompanying text. *Cf.* Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313, 320-26 (1964), which develops arguments for equality of conditions between the prosecutor and the accused before a trial.

incrimination seem to be merging.[54] Dicta in *Malloy v. Hogan*[55] asserts that the voluntariness issue is controlled by the privilege against self-incrimination,[56] a position which most commentators favor.[57] In the near future, the Court may hold that a defendant has a constitutional privilege against the admission and use of a confession in a criminal trial unless he intelligently and freely waives this privilege.[58] It seems, however, that the Court should expand its requirements for waiver of a privilege against confessions slowly, paralleling the improvements in police investigative techniques.[59] Gradually, the Supreme Court may expunge the remnants of the inquisitorial system and achieve an investigative criminal procedure.

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54. The history of the two rules differ, and, in practice, the two doctrines have separate boundaries. See 3 WIGMORE § 823; *id.* §§ 2250, 2266 (McNaughton rev. 1961). However, in principle, the resemblance is unavoidable. See *id.* §§ 2252 n.27, 2266. "[T]he privilege, with its unclear boundaries and apparently unending capacity for transmogrification and assimilation, is now sometimes invoked to effect exclusion even though the disclosure was not compelled from a person under legal compulsion." *Id.* § 2266, at 402.

55. 378 U.S. 1, 6-8 (1964); *cf.* United States v. Carignan, 342 U.S. 36, 41 (1951) (leaving open the application of the fifth amendment to confessions); Bram v. United States, 168 U.S. 532, 542-43 (1897); Stein v. New York, 346 U.S. 156, 208 (1953) (Douglas, J., dissenting).

56. See Malloy v. Hogan, 378 U.S. 1, 7 (1964).

57. The arguments advanced for extending the privilege to confessions are summarized in 8 WIGMORE, § 2252 n.27 (McNaughton rev. 1961). Authorities favoring such an extension include: MODEL CODE OF EVIDENCE rules 203, 232 (1942); UNIFORM RULE OF EVIDENCE 25; MCCORMICK, EVIDENCE 228-29 (1954); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 27-30 (1949); Weisberg, *supra* note 41, at 46. *Contra*, 3 WIGMORE § 823. See generally FELLMAN, THE DEFENDANT'S RIGHTS 175-85 (1958); Scott, *Federal Control Over Use of Coerced Confessions in State Criminal Cases—Some Unsettled Problems*, 29 IND. L.J. 151, 153-54 (1954); Comment, *The Privilege Against Self-Incrimination: Does It Exist in the Police Station?*, 5 STAN. L. REV. 459 (1953).

58. The voluntariness standard now appears to be so sensitive that police refusal of any reasonable request constitutes coercion. See, *e.g.*, Escobedo v. State, 378 U.S. 478 (1964); Haynes v. Washington, 373 U.S. 503 (1963). The clearest indication of a relinquishment of a privilege against extra-judicial confessions would be the waiver test in Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). *Cf.* Gallegos v. Colorado, 370 U.S. 49 (1962). If the requirement to provide counsel is extended to the moment of detention, it could be argued that extra-judicial confessions might categorically be held inadmissible without substantially interfering further with the prosecuting attorney. *Cf.* People v. Dorado, 61 Cal. 2d 892, 394 P.2d 952 (1964).

59. The realistic needs of public safety should be considered. See, *e.g.*, Hall, *Police and Law in a Democratic Society*, 28 IND. L. J. 133, 161-77 (1953); Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U. L. REV. 77, 80-82 (1957); Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436 (1964); *cf.* Barrett, *Police Practice and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962).