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Constitutional Law - Due Process - Coerced Confessions and the Stein Case

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COMMENTS

CONSTITUTIONAL LAW—DUE PROCESS—COERCED CONFESSIONS AND THE STEIN CASE—*Stein v. People of State of New York*,¹ a coerced confession case decided by the Supreme Court last June, at first suggests some rather startling propositions about the effect of a denial of procedural due process. Since *Brown v. Mississippi*² in 1936 it has been well settled that the admission of a coerced confession into evidence in

¹ 346 U.S. 156, 73 S.Ct. 1077 (1953).

² 297 U.S. 278, 56 S.Ct. 461 (1936).

a state³ criminal proceeding contravenes the due process guaranty of the Fourteenth Amendment. In the confession cases subsequently considered by the Supreme Court it has been consistently held that the admission of an extorted confession vitiates the entire proceeding and renders the conviction void.⁴ Moreover, the cases have indicated that where a coerced confession has been used in evidence the conviction must fall even though there is evidence apart from the confession sufficient to sustain the jury's verdict.⁵ Indeed, this is in accord with the general constitutional doctrine that a denial of procedural due process is jurisdictional in nature, resulting in a nugatory proceeding irrespective of the weight of evidence pointing to the guilt of the accused.⁶

However, the majority of the Court in the *Stein* case held that even though a coerced confession may⁷ have been admitted into evidence, the conviction would be sustained because there was other evidence sufficient to warrant a finding of guilty by the jury. The purpose of this comment is to examine the implications of this decision and to attempt to determine to what extent it overrules well-settled constitutional principles.⁸

³The Supreme Court has exacted an even higher standard than due process in exercise of its general supervisory powers over federal courts. *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608 (1943). See also 50 MICH. L. REV. 772 (1952). While this comment will be confined to due process requirements in state criminal proceedings, these requirements apply a fortiori in the federal courts.

⁴*Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472 (1940); *Ward v. Texas*, 316 U.S. 547, 62 S.Ct. 1139 (1942); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921 (1944); *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781 (1945); *Haley v. Ohio*, 332 U.S. 596, 68 S.Ct. 302 (1948); *Watts v. Indiana*, 338 U.S. 49, 69 S.Ct. 1347 (1949); *Turner v. Pennsylvania*, 338 U.S. 62, 69 S.Ct. 1352 (1949); *Harris v. South Carolina*, 338 U.S. 68, 69 S.Ct. 1354 (1949).

⁵*Lyons v. Oklahoma*, 322 U.S. 596 at 597, 64 S.Ct. 1208 (1944); *Malinski v. New York*, 324 U.S. 401 at 404, 65 S.Ct. 781 (1945); *Haley v. Ohio*, 332 U.S. 596 at 599, 68 S.Ct. 302 (1948); *Gallegos v. Nebraska*, 342 U.S. 55 at 63, 72 S.Ct. 141 (1951); *Stroble v. California*, 343 U.S. 181 at 190, 72 S.Ct. 599 (1952). See 66 HARV. L. REV. 125 (1952).

⁶*Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932); *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265 (1923); *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891 (1953).

⁷The Court decided the case in the alternative: (1) there was evidence to support a jury finding that the confessions were not coerced, and (2) if they were coerced, their submission did not make unconstitutional a conviction based on other evidence. Therefore, it is impossible to state whether the confessions were found to be coerced or voluntary.

⁸Several problems arising in the confession cases, such as what constitutes coercion for the purpose of due process and the scope of review by the Supreme Court, are outside the scope of this comment. See generally Bader, "Coerced Confessions and the Due Process Clause," 15 BROOKLYN L. REV. 51 (1948); Inbau, "The Confession Dilemma in the United States Supreme Court," 43 ILL. L. REV. 442 (1948); McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 TEX. L. REV. 239 (1946); Wicker, "Some Developments in the Law Concerning Confessions," 5 VAND. L. REV. 507 (1952); comments, 50 MICH. L. REV. 567 (1952); 50 MICH. L. REV. 1367 (1952); 28 N.C. L. REV. 390 (1950).

I. *The Dilemma in Instructing the Jury*

A. *The Facts of the Stein Case.*⁹ The defendants were tried for the crime of felony murder¹⁰ in New York. Confessions obtained from two of the defendants, Cooper and Stein, were submitted to the jury, along with other evidence, since the New York practice is to submit the issue of the voluntariness of a confession to the jury when the trial judge finds that it presents a fair question of fact. The jury was instructed to consider the confessions as evidence of the guilt of the defendants only if they found beyond a reasonable doubt that the confessions were voluntary and free from coercion. The jury returned a general verdict of guilty. On review by certiorari in the Supreme Court the part played by the confessions and the finding of the jury as to their voluntariness was uncertain and unascertainable, requiring the Court to consider the constitutional effect of either alternative, i.e., that the jury found the confessions voluntary, or that the jury found them coerced and convicted the defendants on the basis of other evidence. In either event, the Court held that the convictions were valid. Speaking for six members of the Court,¹¹ Justice Jackson held that the jury might have found the confessions voluntary tested by due process standards,¹² but that if it found the confessions coerced, acquittal was not required in view of other evidence sufficient to warrant conviction.

B. *The Role of the Jury.* There are two principal views with respect to the role of the jury in determining the use of a confession as evidence in a criminal proceeding. The use of a confession raises somewhat different problems under these two views.

1. *The orthodox rule.* Although followed by only a minority of states today,¹³ the orthodox rule is that the admissibility of a confession,

⁹ One aspect of the case is not discussed—the problem of Wissner, a third defendant who did not confess but was implicated by the confessions of the other two defendants. The court held that no constitutional right of Wissner was violated. This case is popularly known as “The Reader’s Digest Murder Case”; for a lighter treatment of the case prior to the Supreme Court decision, see OURSLER, *THE READER’S DIGEST MURDER CASE* (1952).

¹⁰ First degree murder because committed by a person engaged in the perpetration of a felony. N.Y. Penal Law (McKinney, 1944) §1044(2).

¹¹ Chief Justice Vinson and Justices Burton, Clark, Minton and Reed joined in the majority opinion. Separate dissenting opinions were filed by Justices Black, Frankfurter, and Douglas.

¹² I.e., the confessions were not obtained by use of physical violence or psychological coercion, nor did illegal detention render them inadmissible. For general treatment of due process standards, see references in note 8 supra.

¹³ According to 170 A.L.R. 569 (1947) only twelve jurisdictions are definitely committed to this rule. The problem is complicated by the fact that in some states it is not clear what rule is followed. Wigmore indicates in his treatise that this is the majority rule, but his citations, particularly considering those in the supplement, do not support this statement. 3 WIGMORE, *EVIDENCE*, 3d ed., §861 (1940). See also note 18 infra.

like any other piece of evidence, is a question of law for the judge.¹⁴ If the trial judge rules the confession admissible, the evidence adduced at the preliminary inquiry by the court relating to the circumstances under which the confession was given is sent to the jury, along with the confession, and the jury is instructed that it may determine the weight or credibility to be given to the confession,¹⁵ as in the case of any other evidence submitted to the jury.

Under this view that the admissibility of a confession is determined solely by the court, it would seem that the failure to exclude the confession would be so prejudicial that a new trial would be required, if the ruling is found to be erroneous on appeal. The majority opinion in the *Stein* case indicates that where this is the practice the conviction would normally fall with the confession,¹⁶ but the important point to note is that double jeopardy concepts do not prevent the ordering of a new trial in this event.¹⁷ Hence, the *Stein* decision probably does not affect those states which follow the orthodox rule that the judge determines the admissibility of confessions.

2. *The prevailing practice.* The prevailing rule in the United States today is that the trial judge makes only a preliminary determination on the admissibility of a confession, leaving to the jury the resolution of the question of voluntariness, and hence ultimate admissibility.¹⁸ As will be recalled from the statement of the facts in the *Stein* case, New York follows this practice. It is in jurisdictions following this view that the confession dilemma becomes acute. In the *Stein* case, the defendants requested an instruction to the jury that if it found the confessions to have been coerced it must return a verdict of acquittal. Under such an instruction, if the jury finds the confession submitted to it to have been extorted and returns a verdict of acquittal solely because of the use of the confession, the defendant would go free, for double jeopardy concepts would prevent a new trial. Obviously, such a result would be intolerable and would be a grave miscarriage of justice. Yet this would seem to have been the required instruction in cases where there was a confession and independent

¹⁴ 3 WIGMORE, EVIDENCE, 3d ed., §861 (1940).

¹⁵ *Ibid.*

¹⁶ Principal case at 191-192.

¹⁷ *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192 (1896). Cf. *Brock v. North Carolina*, 344 U.S. 424, 73 S.Ct. 349 (1953).

¹⁸ 170 A.L.R. 569 (1947); 5 WASH. & LEE L. REV. 130 (1948); McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 TEX. L. REV. 239 at 250-251 (1946). Wigmore terms this practice heresy. 3 WIGMORE, EVIDENCE, 3d ed., §861 (1940). For a good judicial discussion of the problem, see *State v. Crank*, 105 Utah 332, 142 P. (2d) 178 (1943) (holding admissibility to be a question of law for the judge).

evidence which must be submitted to the jury for simultaneous deliberation, if the position of the dissenters had been adopted.¹⁹ The use of a special verdict or interrogatories, a possible alternative, has not been developed in American criminal procedure,²⁰ and there is some doubt as to its constitutionality.²¹ Other alternatives under a doctrine contrary to that of the *Stein* case would seem to demand either a return to the orthodox rule of requiring the judge to pass on the admissibility of confessions, or the use of only those confessions to which the accused fails to object.²² However, as a result of the *Stein* decision, jurisdictions following the practice of submitting the confession to the jury when it presents an issue of fact as to voluntariness apparently may continue to do so by instructing the jury to disregard the confession if it finds the confession to have been involuntary.

II. *Effect of Evidence Apart from a Confession Sufficient to Convict*

It is quite clear from language in the cases prior to *Stein* that even though evidence apart from the confession might be sufficient to sustain the jury's verdict, if the evidence contains an involuntary confession the conviction cannot stand.²³ Whether this was ever expressly held is doubtful,²⁴ but it unquestionably accords with well-settled due pro-

¹⁹ Of course, if the Supreme Court had reversed in this case, it would not have prevented retrial of these defendants. See note 17 *supra*.

²⁰ E.g., no provisions for special verdicts or the use of interrogatories may be found in the Federal Rules of Criminal Procedure. See also principal case at 178.

²¹ The common law concept of jury trial in criminal cases embraced only a general verdict. A special verdict may well be held to be an impairment of jury trial. *People v. Tessmer*, 171 Mich. 522 at 529, 137 N.W. 214 (1912); *State v. Boggs*, 87 W.Va. 738 at 749, 106 S.E. 47 (1921). However, it should be noted that the Federal Constitution imposes no requirement of jury trial on the states. *Maxwell v. Dow*, 176 U.S. 581, 20 S.Ct. 448 (1900); *Hallinger v. Davis*, 146 U.S. 314, 13 S.Ct. 105 (1892).

²² As a practical matter, it would seem that the accused would object if he has counsel where the circumstances of the acquisition of the confession provide a possible argument that the confession was coerced.

²³ See note 5 *supra*.

²⁴ In most of the cases where these statements were made they were dicta, in that the Court held that the confessions were not in fact coerced. *Lyons v. Oklahoma*, 322 U.S. 596, 64 S.Ct. 1208 (1944); *Gallegos v. Nebraska*, 342 U.S. 55, 72 S.Ct. 141 (1951); *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599 (1952). In *Haley v. Ohio*, 332 U.S. 596, 68 S.Ct. 302 (1948), the only question decided was whether the confession was coerced, the Court finding that it was. *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781 (1945), comes closest to holding that where evidence apart from a confession is sufficient to convict, and a coerced confession is admitted, due process is violated. However, only four members of the Court joined in the majority decision on this point. Four justices dissented. Justice Frankfurter's concurring opinion turned the tide in favor of reversal, but his opinion was based on somewhat different grounds, i.e., that considering all the factors, *Malinski* was denied a fair trial. *Id.* at 417-418.

cess concepts.²⁵ In view of the *Stein* case it becomes important to determine to what extent such language and settled doctrines are now overruled.

A. *Bases for Exclusion of a Coerced Confession.* The traditional rationale for the exclusion of involuntary confessions, as a general rule of evidence, is that they are testimonially untrustworthy, lacking in probative value as evidence.²⁶ This theory has been articulated by several members of the Supreme Court as the constitutional criterion for determining whether there has been a denial of due process.²⁷ A second theory is that admission of a forced confession violates the privilege against self-incrimination.²⁸ However, the most widely accepted criterion for testing the constitutional validity of the use of a confession was stated by Justice Roberts in *Lisenba v. California*: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."²⁹ Clearly this goes beyond the requirement of reliability, and in effect often amounts to an attempt to regulate police conduct in the acquisition of evidence.³⁰ This concept of due process has been decried by writers,³¹ and even disclaimed by the Court on occasion.³²

It is not clear whether the denial of due process under this "fundamental unfairness" test results from the *extraction* of the confession or its *admission* into evidence. Illegality in the manner of obtaining evidence is not a valid basis for objecting to its admissibility under

²⁵ See note 6 *supra*.

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

²⁷ See Jackson, J., in *Watts v. Indiana*, 338 U.S. 49 at 59-60, 69 S.Ct. 1347 (1949); Burton, J., in *Haley v. Ohio*, 332 U.S. 596 at 607, 68 S.Ct. 302 (1948).

²⁸ *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183 (1897). Justices Black and Douglas, consistent with their thesis expounded in dissent in *Adamson v. California*, 332 U.S. 46, 67 S.Ct. 1672 (1947), would make the self-incrimination clause of the Fifth Amendment a part of the due process clause of the Fourteenth Amendment. See dissenting opinions of Black and Douglas in the principal case. See also comment, 50 MICH. L. REV. 567 at 570 (1952), for a discussion of self-incrimination as a basis for excluding a coerced confession.

²⁹ 314 U.S. 219 at 236, 62 S.Ct. 280 (1941).

³⁰ This third theory is termed "protection against illegality in procedure theory" in 50 MICH. L. REV. 567 at 571 (1952). See also Perlman, "Due Process and the Admissibility of Evidence," 64 HARV. L. REV. 1304 at 1309 (1951); Allen, "Due Process and State Criminal Procedure: Another Look," 48 N.W. UNIV. L. REV. 16 at 20 (1953); 28 N.C.L. REV. 390 (1950); 52 COL. L. REV. 423 (1952); 1 BAYLOR L. REV. 171 (1948); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952).

³¹ Waite, "Police Regulation by Rules of Evidence," 42 MICH. L. REV. 679 and 909 (1944); 3 WIGMORE, EVIDENCE, 3d ed., §851 (1940); Bader, "Coerced Confessions and the Due Process Clause," 15 BROOKLYN L. REV. 51 (1948); Inbau, "The Confession Dilemma in the United States Supreme Court," 43 ILL. L. REV. 442 (1948).

³² *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359 (1949).

common law doctrines,³³ and in several unlawful search-and-seizure cases arising in state courts the Supreme Court has held the admission of such evidence consistent with due process, even though the acquisition of the evidence violated due process.³⁴ This would seem consonant with a trustworthiness theory as to the admissibility of evidence. However, *Rochin v. California*³⁵ indicates that shocking conduct in the extraction of evidence, despite its veracity, may infringe due process. In the confession cases the controlling question in determining admissibility according to due process criteria is usually whether the activities of the police in obtaining the confession amounted to coercion. It would seem impossible and highly artificial to attempt to divorce the extraction of a confession from its use, for the circumstances of its extraction determine its admissibility. In appealing a conviction, however, the gravamen of a defendant's petition for reversal is a denial of a fair trial, not a disregard of due process prior to his trial.³⁶ Hence, in the final analysis, it is the *admission* of the confession which constitutes the violation of due process.

What is the effect of *Stein* on these theories? Language in the majority opinion indicates that the result rested in part on a trustworthiness theory; it was said that the Court would overturn a verdict which could be based on other sufficient evidence only if it construed the due process clause as requiring a rigid exclusion of illegally obtained evidence, rather than as simply prohibiting conviction on inherently untrustworthy evidence³⁷ Justice Douglas in his dissent criticized this language in the majority opinion, arguing that the trustworthiness test is a departure from the rationale of prior decisions.³⁸ Whether in fact this decision indicates a return to the trustworthiness test may be doubted,³⁹ as will appear more fully below.

³³ 8 WIGMORE, EVIDENCE, 3d ed., §2183 (1940).

³⁴ *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359 (1949); *Stefanelli v. Minard*, 342 U.S. 117, 72 S.Ct. 118 (1951).

³⁵ 342 U.S. 165, 72 S.Ct. 205 (1952).

³⁶ *Lisenba v. California*, 314 U.S. 219 at 235, 62 S.Ct. 280 (1941). However, the defendant may have a civil cause of action against police officers, e.g., under the Federal Civil Rights statutes. See *Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576 (1951).

³⁷ Principal case at 192.

³⁸ Principal case at 207.

³⁹ Justice Jackson has rather consistently espoused the trustworthiness criterion [except in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952)], but he has not obtained much support from other members of the Court. See comment, 50 MICH. L. REV. 1367 at 1377 (1952); Jackson's opinion in *Watts v. Indiana*, 338 U.S. 49 at 59-60, 69 S.Ct. 1347 (1949). Perhaps Justice Burton also would apply the trustworthiness test; see *Haley v. Ohio*, 332 U.S. 596 at 607, 68 S.Ct. 302 (1948).

B. *Corroborated Coerced Confessions.* Most states require corroboration in the form of evidence independent of a confession tending to establish the corpus delicti in any case where the state relies on a confession, on the theory that confessions are generally an unreliable class of evidence.⁴⁰ But suppose a state allows the use of a confession which is admittedly involuntary but which is independently established as true by other evidence?⁴¹ This is a situation somewhat akin to the facts in the *Stein* case except that the confession there had not yet been found coerced at the time it was submitted to the jury. Does the decision in *Stein* now legalize such a practice? Apparently, this precise question has never been ruled on by the Supreme Court,⁴² but prior language of the Court clearly indicates that the use of a coerced confession even though corroborated by independent evidence would amount to a denial of due process,⁴³ and this has been understood to be the rule.⁴⁴

It may be argued that if trustworthiness is the constitutional criterion, then a coerced confession corroborated by other evidence should not be regarded as a denial of due process under the *Stein* decision, since the possibility of unreliability has been dispelled. However, it is doubtful whether a majority of the Court would accept this argument. In the *Rochin* case, a unanimous Court held that evidence obtained as a result of stomach-pumping was inadmissible, despite its unquestionable trustworthiness. Moreover, as pointed out above,⁴⁵ the opinion of Justice Jackson in the *Stein* case indicates that in those states where the court determines the admissibility of a confession, an erroneous admission of a confession found on appeal to have been coerced will result in reversal. This suggests that the *Stein* case does not stand for the proposition that due process permits a coerced confession to be admitted when corroborated by other evidence, but rather

⁴⁰ McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 *TEX. L. REV.* 239 at 245 (1946).

⁴¹ Some states, including Texas, apparently permit this practice. See 1 *BAYLOR L. REV.* 171 (1948).

⁴² This is essentially the same problem discussed in note 24 *supra*. See also comment, 50 *MICH. L. REV.* 1367 at 1371 (1952).

⁴³ *Watts v. Indiana*, 338 U.S. 49 at 50, n. 2, 69 S.Ct. 1347 (1949); *Rochin v. California*, 342 U.S. 165 at 173, 72 S.Ct. 205 (1952), where it is said in dictum that coerced confessions "are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true." *Stroble v. California*, 343 U.S. 181 at 190, 72 S.Ct. 599 (1952).

⁴⁴ "The rule now makes inadmissible confessions which may be corroborated by independent evidence." Perlman, "Due Process and the Admissibility of Confessions," 64 *HARV. L. REV.* 1304 at 1309 (1951); 1 *BAYLOR L. REV.* 171 at 177-178 (1948); 50 *MICH. L. REV.* 1367 at 1371 (1952).

⁴⁵ See note 16 *supra* and accompanying text.

that it lays down a much narrower rule, viz., that a confession may be submitted with independent evidence when under state practice the jury determines the ultimate admissibility of the confession. In short, it appears that *Stein* does not sanction the use of evidence apart from the confession for the purpose of corroborating the confession, but only as an independent basis for guilt in the event the jury finds the confession submitted with the other evidence to have been coerced.

• III. *Conclusions*

Although unprecedented and initially somewhat startling, it is believed that the result of the *Stein* case is consistent with established due process concepts, for all that was decided is that it is not a denial of due process to submit a confession, objected to as obtained by coercion, to a jury along with other evidence.⁴⁶ The aim of due process is to give an accused a fair trial; it is difficult to see how submitting a confession to a jury along with other evidence denies a fair trial in a legal system which regards jury trial in a criminal case a valuable right of an accused. But if the case is regarded as a somewhat aberrant notion of a non-prejudicial infringement of procedural due process,⁴⁷ it seems reasonably clear that the doctrine will be carefully limited to the confession cases in those states which allow the jury to play a part in the determination of the admissibility of a confession. The most significant consequence of the decision is that it recognizes the legality of existing practices with respect to submitting confessions to juries in states such as New York. In the states where the ultimate determination on the admissibility of a confession is made by the trial judge, it would seem that the decision is of little consequence. The alarm voiced by the dissenters that the case overturns settled principles of constitutional law seems largely unjustified. In light of practical considerations and the fact that due process safeguards are not appreciably diluted, *Stein v. People of State of New York* seems to be a sound decision.

Marvin O. Young, S.Ed.

⁴⁶ Justice Jackson makes this clear in the principal case at 193 where he says: ". . . we base our decision, not upon grounds that error has been harmless, but upon the ground that we find no constitutional error."

⁴⁷ It is interesting to note that in areas outside criminal procedure, an aggrieved party may have to show prejudicial denial of procedural due process. See, e.g., *Market Street Ry. Co. v. Railroad Commission of California*, 324 U.S. 548, 65 S.Ct. 770 (1945); *NLRB v. Ford Motor Co.*, (6th Cir. 1940) 114 F. (2d) 905 (both cases involved a claim of denial of due process in an administrative proceeding).