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CONFESSIONS AND CRIMINAL PROCEDURE—A PROPOSAL

GEORGE NEFF STEVENS*

The time has come to review in the light of United States Supreme Court decisions the procedures presently employed by state courts in testing the voluntariness of confessions in criminal cases. If these procedures be wanting, new procedures should be and must be devised which will give promise of assuring compliance with the standards established by these United States Supreme Court decisions.

State courts have adopted different procedures for resolving the issue of admissibility of a confession under attack as involuntary. The orthodox rule, which according to Wigmore "is well recognized in the majority of jurisdictions," states that the admissibility of a confession is a question for the judge. However, in recent years, the practice has spread until today it is followed in a substantial majority of the states of permitting, authorizing, or requiring the jury to pass on the admissibility of a questioned confession. There are several variations of this practice, but for the purposes of this paper it is not necessary to examine them in detail. The vital point, regardless of the variations, is the fact that the jury hears evidence of and about a confession which the Supreme Court of the United States concludes was involuntary.

Since the state of Washington is among those which have adopted "the heresy of leaving the question to the jury" approach, as Wigmore calls it, a review of the procedure in that state will serve to illustrate and highlight a state court's efforts to deal with this problem of coerced confessions.

Since territorial days, 1854 to be exact, the statute law of the territory and later the state of Washington with respect to confessions as evidence in criminal cases has been as presently set forth in RCW 10.58.030:

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1 3 Wigmore, Evidence § 861, at 346 (3d ed. 1940).
2 3 Wigmore, Evidence § 861 (3d ed. 1940) and supplement thereto. Distinguish the practice, and a worthy one, under which a confession, ruled by the judge to be admissible as voluntary, goes before the jury, along with evidence as to circumstances surrounding its taking or making, to be accepted or rejected or given such weight as the jury chooses—i.e., credibility.
3 For an excellent review of the practices in the various states, see in addition to 3 Wigmore, op. cit. supra, Professor Bernard D. Meltzer's article, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317 (1954).
4 3 Wigmore, Evidence § 861, at 346 (3d ed. 1940).
Confession as evidence. The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.

In *State v. Washing,* decided in 1904, the Washington Supreme Court, in construing this statute, held that "usually the admissibility of evidence is a question for the court to decide as a matter of law" and that in confession cases, "when it appears to the court that the admissions or confessions are involuntary, they should be excluded." The court, quoting a United States Supreme Court case,* added:

When there is a conflict of evidence as to whether the confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant.

It is quite apparent that the Washington court placed emphasis on the words "if the court decides that it is admissible," for it went on to say "We think there was enough in this case to show *prima facie* that the statements of the appellant were made voluntarily, and it was therefore not error to submit the evidence to the jury.”

Six years later, the Washington Supreme Court, in *State v. Barker,* was asked to decide whether it was the duty of the lower court to determine the voluntary or involuntary nature of the confession under our statute outside the presence of the jury. The court pointed out that:

Under this statute, when it appears to the court that a confession is made under the influence of fear produced by threats, of course it is the duty of the court to exclude the evidence. It is proper for the court to hear the evidence relating to duress and to decide upon the admissibility of such evidence, but there is nothing in the statute requiring such evidence to be taken without the presence of the jury. If the evidence is clear that no threats were made and that the admissions were voluntary, it cannot be error for the whole evidence to be heard by the jury.

The court continued, after referring to an earlier Washington case:6

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6 36 Wash. 485, 491, 78 Pac. 1019 (1904).
6 Wilson v. United States, 162 U.S. 613, 624 (1896).
7 36 Wash. 485, 491, 78 Pac. 1019 (1904).
8 56 Wash. 510, 512, 106 Pac. 133 (1910).
9 State v. Mann, 39 Wash. 144, 150, 81 Pac. 561 (1905), which held, “The question whether a defendant is under the influence or fear produced by threats, when he makes statements imputing guilt of the crime charged against him, is a mixed question of law and fact . . .”
But this does not indicate that there must be two examinations of the witness, one in the presence of the jury and the other without the presence of the jury. It indicates that the whole examination shall be made in the presence of the jury. The presiding judge must decide upon the admissibility of the evidence, and must strike it out or direct the jury to consider it, according to his conclusion that it is or is not made under the influence of fear produced by threats. The conclusion of the trial judge is reviewable upon this question as upon any other question of law or fact passed upon by the court.

In 1912, in State v. Wilson, the Washington Supreme Court held that "Unless it appeared that the confession was made under the influence of fear produced by threats, it was the duty of the court to admit the confession or statement in evidence. Where the evidence is in conflict upon this point, the question is then for the jury," citing State v. Washington.

Jumping over the years to 1944, the Washington Supreme Court in State v. Van Brunt, with no reference to either State v. Washington or State v. Barker, held:

An analysis of these [earlier Washington] cases reveals that, where an issue of fact arises as to the question of the influence of fear produced by threats and confessions made under inducement, it is not a question of law for the court to decide, but is a question of fact for the jury under proper instructions. Where threats or inducements are conceded by the state or where facts are admitted which as a matter of law constituted threats or inducements, it is a question of law for the court.

This language would seem to indicate a departure from the approach of the Washington case, and the rule of the Barker case, which took the position that the question of admissibility was for the court, whether or not the facts giving rise to the question were in dispute.

In State v. Meyer, the Washington Supreme Court was faced with the contention that "under this statute, if a confession is made under

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10 In State v. Barker, supra, note 8, the judge heard one witness outside the presence of the jury, and being satisfied with this testimony, recalled the jury and permitted the witness to state the confession with all the surrounding circumstances.

11 68 Wash. 464, 467, 123 Pac. 795 (1912).

12 Supra, n. 5. Later Washington cases are in accord, see, for example, State v. Clark, 21 Wn.2d 774, 153 P.2d 297 (1944) and State v. Bird, 31 Wn.2d 777, 198 P.2d 978 (1948).

13 22 Wn.2d 103, 107, 154 P.2d 606 (1944).

14 Contrast the language of the Barker case, at page 512 of 56 Wash. "If the evidence is clear that no threats were made and that the admissions were voluntary, it cannot be error for the whole evidence to be heard by the jury," with the last sentence above quoted from State v. Van Brunt to the effect that the court can exclude only when conceded or admitted facts, as a matter of law, show threats or inducements!

the influence of fear produced by threats, it must not go before the jury, and whether such is the fact must be determined by the court.” The supreme court pointed out that “authority in support of the position of the appellants is found in 3 Wigmore on Evidence (3d ed.), 342, § 860 and following sections.” The court held:

We have decided that it is for the jury to determine whether a confession was obtained under the influence of fear produced by threats. [Citing earlier Washington cases including both Barker and Van Brunt, but not Washing.] We pointed out in the Barker case that if it should appear to the court that a confession was made under the influence of fear produced by threats, it was its duty to exclude the evidence, and that it was proper for the court to hear the evidence relating to duress and decide upon the admissibility of such evidence. We held that there was nothing in the statute requiring such evidence to be taken without the presence of the jury and that there need not be two examinations of the witnesses, one before the court and the other with the jury present. A situation may arise in the trial of a case where the court might, in its discretion, make some inquiry in the absence of the jury with reference to how a confession was obtained, but the theory of our decisions is that the court is not required by the statute to do so.

It is rather difficult to reconcile the first two sentences of the above quotation. By the first sentence, a disputed confession calls for a jury determination. But, the balance of the paragraph, from the second sentence on, clearly confirms the power, and duty, of the court to pass on admissibility, and contains no such restrictions as were set forth in State v. Van Brunt.10

The above series of cases supports the following conclusions with respect to the Washington procedure for challenging questioned confessions:

First. The trial judge has the power, and the duty, to pass on the question of admissibility, whether or not the evidence surrounding the taking of the confession be in dispute.17

Second. Where there is a conflict of evidence as to whether a confession is or is not voluntary, this question (1) according to one line of cases may be left to the jury, if the court decides that is is admis-
sible, or (2) according to the second line, must be left to the jury. Under either approach the jury is to be instructed to reject the confession "if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

Third. In making his determination, the trial judge may, but need not, hear the evidence surrounding the taking of the confession outside the presence of the jury.

Fourth. Conversely, in making his determination, the trial judge may, but need not, hear the evidence surrounding the taking of the confession in the presence of the jury.

Fifth. If the trial judge in making his determination hears the evidence in the presence of the jury, and concludes that it is inadmissible, he must instruct the jury to disregard all that they have heard.

Sixth. The conclusion of the trial judge that the confession is admissible is reviewable upon this question as upon any other question of law or fact passed upon by the court.

Seventh. The sufficiency of the evidence to support a finding either by the trial judge or the jury that the confession was freely given may be challenged.

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18 See cases cited in footnote 17.
20 State v. Washing, 36 Wash. 485, 491, 78 Pac. 1019 (1904), and see, State v. Van Brunt, 22 Wn.2d 103, 154 P.2d 606 (1944), and State v. Winters, 39 Wn.2d 545, 548, 236 P.2d 1038 (1951).
22 See cases cited in footnote 21.
23 No Washington cases are directly in point. But see State v. Barker, 56 Wash. 510, 513, 106 Pac. 133 (1910).
25 State v. Washing, 36 Wash. 485, 491, 78 Pac. 1019 (1904): "We think there was enough in this case to show prima facie that the statements of the appellant were made voluntarily, and it was therefore not error to submit the evidence to the jury"; State v. Barker, 56 Wash. 510, 513, 106 Pac. 133 (1910): "In this case the evidence of the witness examined without the presence of the jury was ample to show that the confession was not made under duress, but was the voluntary confession of the defendant made upon two different occasions. . . . There was, therefore, no error in receiving the evidence or in determining that it was admissible in the presence of the jury."
26 State v. McCullum, 18 Wash. 394, 397, 51 Pac. 1044 (1897), where the court held, "A person who has been induced by fear to make a confession is not bound by such confession, and the practice of extorting confessions from persons accused of crime by confining them in dark cells until a confession is wrung from them, is a practice that cannot be condemned too strongly. It cannot receive judicial sanction."; State v. Miller, 61 Wash. 125, 111 Pac. 1053 (1910), wherein the court held inadmissible a confession where the facts showed threats by the prosecuting attorney of a series of prosecutions unless he confessed, subjectio to solitary confinement in a dark cell, and brutal treatment by police, in spite of jury's verdict of guilty. The philosophy behind the outlawing of coerced confessions is well put by the court at pages 129-130 of 61 Wash.; State v. Miller, 68 Wash. 239, 122 Pac. 1066 (1912), holding that error in admission of a confession induced by threats of prosecution, imprisonment in a dark cell, personal
The Washington practice with respect to questioned confessions was challenged and found wanting in Cranor v. Gonzales, which arose out of a habeas corpus proceeding in the United States District Court for the Eastern District of Washington, Southern Division, wherein petitioner sought (and, as it turned out, successfully) to secure his release from custody under judgment of conviction for murder in the Washington courts, on the ground that the confession admitted in evidence at his state trial was obtained as a result of physical violence and threats of further physical violence.

Because of this decision, the Washington Judicial Council was requested to look into the confession procedure problem. Early in 1958 it made a recommendation which the Washington Supreme Court adopted and put into effect, in January 1959, as follows:

violence by police, is not cured by evidence of a second confession made four days later, but while still in custody. The court points out that the accused was denied permission to communicate with his attorney, in violation of what is now RCW 9.33.020.

Oppression Under Color of Office. Every officer, or person pretending to be such, who unlawfully and maliciously, under pretense or color of official authority shall . . . (5) No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity or threats for the purpose of extorting from such person incriminating statements or a confession. Any person violating the provisions of this section shall be guilty of a misdemeanor.

And, at page 245 of 68 Wash. “The confession was procured in direct violation of this statute . . .”; State v. Harvey, 143 Wash. 161, 259 Pac. 21 (1927) holding that a confession was coerced where the accused were told they would be locked up until they were willing to talk and that unless they confessed they would be prosecuted on a series of charges.

But, compare these earlier cases, which are worthy of serious attention, with State v. Van Brunt, 22 Wn.2d 103, 154 P.2d 606 (1944). The undisputed facts in this case, see pages 106, 107 of 22 Wn.2d, show “solitary confinement for three days and nights . . ., with the electric lights burning so that he could not sleep; being called a liar; assurances of the Sheriff’s friendship and help if he would sign the confession; and, generally speaking, what might be termed an overreaching of the defendant.” Yet the court held, at page 108 of 22 Wn.2d, “In the case at bar, the jury held against appellant’s contentions as to threats and inducements, and it was within their province to do so.” It is not clear from the opinion how the court knew how the jury had decided this particular issue. All that the record shows is a judgment on a general verdict of guilty. And see, State v. Seablom, 103 Wash. 53, 55, 173 Pac. 721 (1918), where the court said, with respect to the issue of coercion in obtaining a confession, “It being at best a disputed question of fact, the verdict of the jury concluded appellant to pursue the question further . . .”, which was quoted, with italics, in Van Brunt. These later cases are illustrative of why procedures such as that employed in Washington are under attack in the Federal Courts.

27 226 F.2d 83, 94 (9th Cir. 1955), cert. denied 350 U.S. 935 (1956): “The evidence, sufficient to convince the judge that Gonzales had in fact been beaten in the course of coercion of a confession, when considered in the light of the inherently unsatisfactory character of the State court proceedings, warranted the exercise of the court’s discretion to hear the case and determine the constitutional issue.”

28 For an excellent review of this case and the issues see Hendel, Habeas Corpus—Jurisdiction of a Federal District Court with Respect to State Prisoners, 31 Wash. L. Rev. 304 (1956). For an excellent discussion of the general problem, see Beverly, Federal-State Conflicts in the Field of Habeas Corpus, 41 Calif. L. Rev. 483 (1953).
Rule 101.20W. Confession Procedure.

(1) Where the circumstances surrounding the taking of a confession are placed in issue either at the time of trial or prior thereto, the trial judge shall be the trier of the question of admissibility.

(2) If the defendant testifies at the hearing on this matter, the fact that he so testifies shall not be mentioned to the jury, nor shall it waive any of the rights of the defendant.

(3) If an objection is made to the admissibility of the confession, such objection is not waived by any offer of evidence or cross-examination with respect to the confession point during the trial.29

Does this rule solve the problem? Is it an adequate confession procedure?

In order to answer these questions, it is necessary to discover what the United States Supreme Court has had to say about procedures under which the jury hears evidence as to the voluntariness of confessions.

In 1896, in Wilson v. United States,30 the court said: "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

In 1924, in Wan v. United States,31 the Court pointed out: "The undisputed facts showed that compulsion was applied. As to that matter there was no issue upon which the jury could properly have been required or permitted to pass."

In 1936, in Brown v. Mississippi,32 the Court stated:

Compulsion by torture to extort a confession is a different matter.

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." . . . The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information . . . But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an

29 Wash. Rules, Pleading, Practice, Procedure 101.20W.
30 162 U.S. 613, 624 (1896).
31 266 U.S. 1, 16 (1924).
accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process.

In 1951, in *United States v. Carignan*, the Court held:

>The United States concedes . . . that the better practice, when admissibility of a confession is in issue, is for the judge to hear a defendant's offered testimony in the absence of the jury as to the surrounding facts. . . . We think it clear that this defendant was entitled to such an opportunity to testify.

>The evidence on the new trial will determine the necessity for or character of instructions to the jury on the weight to be accorded the confession, if it is admitted in evidence . . .

In 1953, in *Stein v. New York*, the Supreme Court said:

At pages 159-160:

>The trial court heard evidence in the presence of the jury as to the issue of coercion and left determination of the question to the jury. Petitioners claim that such use of these confessions creates a constitutional infirmity which requires this Court to set aside the conviction.

At page 170:

>In the setting of these facts, the constitutional issues raised by petitioners involve procedural features not heretofore adjudicated by this Court. . . .

At page 172:

>The procedure adopted by New York for excluding coerced confessions relies heavily on the jury. It requires a preliminary hearing as to admissibility, but does not permit the judge to make a final determination that a confession is admissible. He may—indeed, must—exclude any confession if he is convinced that it was not freely made or that a verdict that it was so made would be against the weight of evidence. But, while he may thus cast the die against the prosecution, he cannot do so against the accused. If the voluntariness issue presents a fair question of fact, he must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness. . . . The judge is not required to exclude the jury while he hears evidence as to voluntariness, . . . and perhaps is not permitted to do so, . . . [Citing New York cases].

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33 342 U.S. 36, 38, 39 (1951). This case arose in the territory of Alaska.

34 346 U.S. 156 (1953), at pages indicated in the text.
At page 177:

Petitioners suffer a disadvantage inseparable from the issues they raise in that this procedure does not produce any definite, open and separate decision of the confession issue. . . . If the method of submission is, as we believe, constitutional, it leaves us to review hypothetical alternatives.

This method of trying the coercion issue to a jury is not informative as to its disposition. . . .

At pages 178-179:

But this inability of a reviewing court to see what the jury has really done is inherent in jury trial of any two or more issues . . . The uncertainty, while the cause of concern and dissatisfaction in the literature of the profession, does not render the customary jury practice unconstitutional.

The Fourteenth Amendment does not forbid jury trial of the issue. The states are free to allocate functions as between judge and jury as they see fit. . . . [D]espite the difficult problems raised by such jury trial, we will not strike down as unconstitutional procedures so long established and widely approved by state judiciaries, regardless of our personal opinion as to their wisdom.

Accordingly, it is clear that state procedures which permit the jury to hear and to pass upon evidence as to the voluntariness of confessions are not, as such, in violation of the United States Constitution. The converse is equally clear. The United States Constitution does not require a jury trial in state courts on the issue of admissibility of a questioned confession. And it follows that even a state constitutional provision requiring a jury trial of this issue, if there were one, would not free the state court's decision of United States Supreme Court supervision, since a right protected by the United States Constitution is involved.

These conclusions become even more apparent upon examination of yet another side of the problem, and that is the effect of jury consideration of a coerced confession. The United States Supreme Court, in dealing with state cases involving confessions, has ruled, time and again, that the admission in evidence over objection of a confession, found by the Court to be involuntary, vitiates a judgment of conviction. The reason for this is that the use in a state criminal case of a defendant's confession obtained by coercion, whether physical or mental, is forbidden by the fourteenth amendment to the United States Constitution.35

35 See, for example, Wilson v. United States, 162 U.S. 613, 622 (1896); Wan v.
Even more important from the standpoint of the practicality of the procedure under review, the United States Supreme Court has ruled that if the confession is found by it, the Supreme Court, to be involuntary, 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 of guilty. The reason behind this rule is that a conviction in a case where the jury has heard evidence concerning a confession, which the United States Supreme Court finds was coerced, regardless of how the jury may have dealt with it, constitutes a deprivation of liberty without due process of law under the fourteenth amendment to the United States Constitution.

Thus, while the procedure under consideration is constitutional, its use will result in a reversal unless the United States Supreme Court finds the confession voluntary. It follows that the accused has no right to a trial by jury on the issue of admissibility of a questioned confession. Also, it suggests that for all practical purposes, the responsibility for screening confessions must be placed in the judge, and he must make his investigation in the absence of the jury.

The decisions of the United States Supreme Court, above discussed, are predicated on the power and duty of the Court to make its own


See cases cited in footnote 33, particularly Brown v. Allen, 344 U.S. 443, 475—"The mere admission of the confessions by the trial judge constituted a use of them by the state, and if the confessions were improperly obtained, such a use constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment." Contrast the majority approach with the dissent in Leyra v. Denno, 347 U.S. 556, 557, 586 (1954); and see, Payne v. Arkansas, 356 U.S. 560 (1958) and Spano v. New York, 360 U.S. 315 (1959). Inherent in this decision is the fear that the jury, or at least some of the jurors, will not abide by the court’s instructions. Mr. Justice Jackson put it well in Krulewitch v. United States, 336 U.S. 440, 453 (1949), “The naive assumption that prejudicial effects can be overcome by instructions to the jury, ... all practicing lawyers know to be unmitigated fiction.”

See Spano v. New York, 360 U.S. 315, 324 (1959): “Stein held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it.”
decision as to whether a confession was voluntary or coerced. This power and duty have been explicitly enunciated, or quite obviously assumed, in case after case involving questioned confessions, whether the facts surrounding the confession were disputed or undisputed. The United States Supreme Court has made it equally clear that in

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41 Lisenba v. California, 314 U.S. 219, 238 (1941): "[W]here the evidence is conflicting, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process;" the dissents in Haley v. Ohio, 332 U.S. 596, 607, 615, 621, 624 (1948), point out that the facts surrounding the confession were in dispute and argue that since the procedure employed by the Ohio court is not criticized by this Court, the decision of the trial judge and jury acting under proper instructions should be accepted, but they were not!; Watts v. Indiana, 338 U.S. 49 (1949)-"On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court..." But "issue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroversial happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights...there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear as by force..."; Stroble v. California, 343 U.S. 181, 190 (1952)-"In the present case, however, we need not cover a conclusion drawn from uncontroversial happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights...there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear as by force..."; Stroble v. California, 343 U.S. 181, 190 (1952)-"In the present case, however, we need not cover a conclusion drawn from uncontroversial happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights...there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear as by force..."

making its own examination of the record to determine whether the claim is meritorious, the performance of this duty cannot be, and is not, foreclosed by the findings of a court or the verdict of a jury, or both.\footnote{360 U.S. 315, 315, 320-321 (1959); see and compare Washington cases cited in footnote 26.}

Thus, a change in procedure, alone, is not enough. There must be a sympathetic understanding of the judicial philosophy behind this series of cases. This philosophy was clearly enunciated in Spano v. New York:\footnote{[O]ur review penetrates its [the Court of Appeal's] judgment and searches the record in the trial court, and at 180-182, "At the threshold of our inquiry, therefore, lies the question: What, if any, weight do we give to the verdict of the jury, the rulings of the trial judge and the determination of the state appellate court? . . . Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. But that does not mean that we give no weight to the decision below, or approach the record de novo or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. . . . It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primarily, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts. . . . When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect. . . ." The Court then proceeded to weigh the evidence and reach its own conclusions, at page 184 as to physical violence, and 186 as to psychological coercion! Payne v. Arkansas, 356 U.S. 560, 561-562 (1958), "Enforcement of the criminal laws of the States rests principally with the state courts, and generally their findings of fact, fairly made upon substantial and conflicting testimony as to the circumstances producing the contested confession—as distinguished from inadequately supported findings or conclusions drawn from uncontroverted happenings—are not this Court's concern; yet where the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious. 'The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both.' The question for our decision then is whether the confession was coerced. That question can be answered only by reviewing the circumstances under which the confession was made. We therefore proceed to examine those circumstances as shown by this record."} This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment. As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement. . . .

And

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on
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. Accordingly, the actions of police in obtaining confessions have come under scrutiny in long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. The facts of no case recently in this Court have quite approached the brutal beatings in Brown v. Mississippi, 297 U. S. 278 (1936), or the 36 consecutive hours of questioning present in Ashcraft v. Tennessee, 322 U. S. 143 (1944). But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitution protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. . . .

Whether they like it or not (and very few will disagree on principle, although some will complain that it adds to the work of police and prosecutor), police officials,45 prosecuting or district attorneys,46 and judges of state courts at all levels47 must face up to the necessity of meeting and complying with the standards set by the United States Supreme Court with respect to confessions or face reversal of convictions where confessions, involuntary in the opinion of the United States Supreme Court, were submitted to the jury. The kinds of conduct which, alone or in combination, make confessions involuntary are indicated in the decisions of the United States Supreme Court, were submitted to the jury. The kinds of conduct which, alone or in combination, make confessions involuntary are indicated in the decisions of the United States Supreme Court. For convenience of police officials, prosecuting or district attorneys, and judges of state courts at all levels, some of these fact patterns are set forth in the footnote hereto.48

45 See, for example, Haley v. Ohio, 332 U. S. 596, 600-601 (1948).
46 See, for example, Brown v. Mississippi, 297 U. S. 278, especially at 285 (1936); Malinski v. New York, 324 U. S. 401, 405, 406-407 (1945). Canon 5, all too frequently overlooked, is quite explicit: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." Canons of Professional Ethics, American Bar Association; RCW 2.48.230; Wash. Rules, Canons, Professional Ethics 5.
47 See, for example, Brown v. Mississippi, 297 U.S. 278, 285, 287 (1936). Canons of Judicial Ethics, Canon 3, Constitutional Obligations: "It is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees." American Bar Association; Wash. Rules, Canons, Judicial Ethics 3.
48 Fact patterns which have been held to make confessions involuntary and therefore inadmissible:
1) Seven days of interrogation. Wan v. United States, 266 U.S. 1 (1924).
In order to measure up to this responsibility, state trial and supreme court judges must re-evaluate the worth and legality of their decisions and the constitutionality of state statutes, if any, pertaining to the admissibility of confessions. For example, it should by now be quite apparent that the Washington statute on Confessions as Evidence, RCW 10.58.030, which is set forth in full above, is unconstitutional, as a violation of the due process clause of the fourteenth amendment.

3) Held incommunicado for 36 hours, under constant questioning by relays of police officers, without sleep or rest. Ashcraft v. Tennessee, 322 U.S. 143 (1944).

4) Held incommunicado without being arraigned for several days, intermittent questioning, not permitted to see his lawyer, misconduct of prosecutor. Malinski v. New York, 324 U.S. 401 (1945).

5) Fifteen year old boy questioned in relays from midnight until he confessed at 5:00 A.M., held three days thereafter incommunicado. Haley v. Ohio, 332 U.S. 596 (1948).

6) Held without arraignment, without aid of counsel or friends for six days, at times in solitary confinement, no bed or chairs, with interrogation by relays of police, usually late at night. Watts v. Indiana, 338 U.S. 49 (1949).


8) Twenty-seven year old, uneducated negro of low mentality, held incommunicado, without preliminary hearing, without advice of counsel or friends, with intermittent questioning by police for several hours at a time over a ten day period. Fikes v. Alabama, 352 U.S. 191 (1957).

9) Slow, mentally dull, arrested without a warrant, held incommunicado for over forty-eight hours in spite of requests to see him, not fed regularly, threatened with a lynching mob. Payne v. Arkansas, 356 U.S. 560 (1958).

10) Foreign born, junior high education, record of emotional instability, leading questions by relays of five lawyers and police, for over eight hours without let up during evening and night, denial of request for counsel in the face of known instructions of counsel to keep quiet, and abuse of friendship with a police officer. Spano v. New York, 360 U.S. 315 (1959). With respect to the denial of a request to contact counsel as a ground for holding a confession inadmissible, four judges in Spano stressed that this factor, alone, should be sufficient. However, the majority of the Supreme Court held to the contrary in a case in which this contention was directly before the Court—Crooker v. California, 357 U.S. 433 (1958). And see, Cicenia v. Lagay, 357 U.S. 504 (1958).

11) With respect to delay in arraignment as a ground for holding state confessions inadmissible, note the following: Malinski v. New York, 324 U.S. 401, 404 (1945). The New York court instructed the jury that "although the delay in arraignment was not conclusive, they might consider it in passing on question of voluntariness"; Brown v. Allen, 344 U.S. 443, 476 (1953)—"If the delay in the arraignment of petitioner was greater than that which might be tolerated in a federal criminal proceeding, due process was not violated"; Stein v. New York, 346 U.S. 156, 187 (1953), after stating that illegal detention for three or four days alone does not make a confession inadmissible, pointed out—"To delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third-degree' methods. Therefore, we regard such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion"; Fikes v. Alabama, 352 U.S. 191, n. 2 on p. 194 (1957): "Until the cases of that State [Alabama], violation of this requirement (prompt arraignment) does not render inadmissible a confession secured during such detention... Nevertheless, such an occurrence is 'relevant circumstantial evidence in the inquiry as to physical or psychological
to the United States Constitution, in so far as it purports to authorize
the admission in evidence of any confession of a defendant, made
under inducement, with all the circumstances, except when made
under the influence of fear produced by threats. The exception is
much too narrow. From Wilson to Spano, as has been demonstrated,
the United States Supreme Court has held consistently that confes-

..."

Fact patterns where confessions were held voluntary and therefore admissible:

1) Failure to arraign promptly, detention over forty-eight hours. Lisenba v.
California, 314 U.S. 219 (1941).

2) Presence of nineteen police officers, no force or threats of force, some
evidence of a kick by a police officer during search at time of arrest hours

3) Held without arraignment for eighteen days, no physical brutality, no
prolonged questioning, proper warnings as to his right to counsel and to

4) Illegal detention for three or four days, no physical brutality found, twelve
hours of intermittent questioning by several different officers over a thirty-
two hour period, with proper opportunity to sleep and eat. Stein v. New
York, 346 U.S. 156 (1953).

5) A 31 year old college graduate who had attended law school for one year
and studied criminal law, during fourteen hours of intermittent question-
ing between arrest and confession had asked for but was denied a request
to consult with counsel on several occasions, was told of his right not to
answer and had refused to answer many questions and to take a lie detector
test, was given coffee, milk and sandwiches and was permitted to smoke.

49 An example of a decision which requires reevaluation on the basis of its reason-
ing and in its strict application of the Washington statute is State v. Winters, 39 Wn.2d
545, 236 P.2d 1038 (1951). In this case the confession had been attacked as involun-
tary because of delay in arraignment. The Washington Supreme Court stated, at page
549 of 39 Wn.2d, that "Threats which do not produce fear will not eliminate considera-
tion of the confession." (Emphasis is the Court's). And, at pages 249-250, "There is
no constitutional or statutory provision in the state of Washington having to do with
the use of confessions as evidence against the defendant in a criminal trial, except ...
[RCW 10.58.030]. Under the purview of the statute it was not error to admit the
confession." Defendant had tried to raise the federal due process question, but his
choice of United States Supreme Court cases was such that the Court, and quite
properly so, found them not in point. In fact, they support the Washington Supreme
Court's position that the rule they announce is predicated on a rule of procedure. See
McNabb v. United States, 318 U.S. 332 (1943); Upshaw v. United States, 335 U.S.
410 (1948); Mallory v. United States, 354 U.S. 449 (1957). The decision in the
Washington case, as distinguished from its reasoning, is, perhaps, still the law. But
see discussion of the United States Supreme Court cases on the prompt arraignment
problem herein in footnote 47, paragraph 11, and note an increasing concern on the
part of the United States Supreme Court with violations of this particular state law
by state police officials. Thus; while the Washington Supreme Court was "right" on
the facts of this case at that time, its approach to the problem invites review by appeal
to the United States Supreme Court or by habeas corpus proceedings in Federal
District Courts because the reasoning of the Washington Supreme Court does not
guarantee a full and careful consideration by the court of the accused's federal con-
stitutional rights with respect to the admissibility of confessions which are not the
result of fear produced by threats.
sions "are inadmissible if made under any threat, promise, or encouragement of any hope or favor," if they are the result of the accused's will having been "overborne by official pressure, fatigue and sympathy falsely aroused," or, to summarize, if the facts show either physical or psychological coercion. The "influence of fear produced by threats" category of the Washington statute is but one of many types of coerced confessions which have been held to be inadmissible. State officials would do well to be guided by the test set forth in Wilson v. United States: "In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."

Reverting to the conclusions set forth above with respect to the Washington confession picture, these United States Supreme Court decisions made it quite clear that:

The First conclusion is sound, both legally and practically—the trial judge has the power, and the duty, to pass on the question of admissibility, whether or not the evidence surrounding the taking of the confession be in dispute.

The Second conclusion, both parts (a) and (b), is impractical, if not unconstitutional, and should be abandoned—in the conflict of evidence situation. The jury simply cannot be exposed to testimony about what may turn out to be a coerced confession.

The Third conclusion must be altered by eliminating the alternative. A practical rule of procedure must require the trial judge to hear the evidence of the confession outside the presence of the jury.

The Fourth conclusion must be abandoned. The trial judge must not hear the evidence in the presence of the jury, for reasons above set forth.

The Fifth conclusion will not satisfy the United States Supreme Court. The jury simply must not hear any testimony about a coerced confession; if they do, an instruction will not cure the error; only a new trial will correct this fatal mistake.

The Sixth conclusion stands—the conclusion of the trial judge that the confession is admissible is reviewable upon this question as upon any other question of law or fact passed upon by the court.

The Seventh conclusion remains as an accurate statement of the law—that the sufficiency of the evidence to support a finding either

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50 Wilson v. United States, 162 U.S. 613, 622 (1896); Spano v. New York, 360 U.S. 315, 323 (1959); and cases cited in footnote 47.

by the trial judge or the jury that the confession was freely given may be challenged. But, a good procedure should eliminate this problem in so far as the jury is concerned by leaving to the jury only the question of the weight and credibility which they wish to give to a confession found admissible by the court.

Rule 101.20W—Confession Procedure, above set forth, complies with these conclusions in so far as, in subsection (1), it makes the trial judge the trier of the question of admissibility, but it is not clear, in subsection (3), as to what the jury's responsibility is with respect to a confession questioned at the trial. Nor does subsection (2) deal effectively with the problems raised by the possible desire of the defendant to take the stand on the coercion issue at the hearing before the judge or at the trial.

What, then, should be the procedure used in state courts to pass upon the admissibility of a confession? It is submitted that the following rule, for the reasons indicated, would meet both constitutional requirements and practical considerations.

**Proposed Rule—Confession Procedure**

(1) In every criminal case in which a confession or confessions of the accused are to be offered in evidence, the judge, either at the time of the trial or prior thereto, shall hold a hearing, in the absence of the jury, for the purpose of determining whether, in the light of the surrounding circumstances, the confession was voluntary, and, therefore admissible. A court reporter shall record the evidence adduced at this hearing.

*Comment:* The trial judge must realize that on him, and him alone, rests the expensive and far-reaching consequences of an erroneous decision admitting in evidence a coerced confession. The jury cannot save him. His error can be corrected only by a new trial. Because of his mistake, a dangerous person who might well have been convicted on other evidence in the case, or available through additional investigation, might be turned loose on society. At best, society must bear the costs of a new trial. If he must err, the trial judge should err in favor of strict application of the philosophy behind the rejection of coerced confessions. While the responsibility for decision rests in the judge, the prosecuting or district attorney, in the light of Canon 5 of the Canons of Professional Ethics, has a grave responsibility in this matter. It is his responsibility to decide in the first instance whether a confession should be offered in evidence. This decision must be made on the basis of the law of the land and with the realization that "good" advocacy might, where the facts in the opinion of the United States Supreme Court do not warrant it, lead in the long-run to reversal.

The proposal that all confessions be examined is included in order to prevent or at least make extremely unlikely a successful cry, years later,
when the facts are pretty hard to ascertain, that the confession was coerced.\textsuperscript{52}

The need for the presence of a court reporter will become apparent in section 3 of this proposal.

(2) It shall be the duty of the trial judge to inform the defendant that: (a) he may, but need not, testify at the hearing on the circumstances surrounding the confession; (b) if he does testify at the hearing, he will be subject to cross-examination with respect to the circumstances surrounding the taking of the confession and with respect to his credibility for purposes of impeachment as a witness; (c) even though he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (d) if he does so testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he takes the witness stand on the confession issue during the trial.

Comment: Since the issue at the hearing is the admissibility of the confession, the defendant should be given the opportunity to testify with respect to the surrounding circumstances without subjecting himself to cross-examination on the facts of the crime with which he is charged, and without waiving his right not to take the stand at the trial. However, if he does decide to testify at the hearing his testimony on the point at issue should be subject to impeachment. "Certainly the Constitution does not prohibit tests of credibility which American law uniformly applies to witnesses."\textsuperscript{53}

(3) After the hearing the trial judge shall set forth in writing (a) the undisputed facts; (b) the disputed facts; (c) his conclusions as to the disputed facts; (d) his conclusion as to whether the confession was voluntary and admissible, or involuntary and inadmissible, with reasons in either case.

Comment: The objective is to assure a careful consideration of the facts and of the law by the trial judge.\textsuperscript{54} These findings of fact and conclusions of law will, when properly prepared, prevent unnecessary appeals and

\textsuperscript{52} An interesting example of this possibility was reported in the Seattle Post-Intelligencer, July 22, 1959, p. 21, col. 5. It involved a habeas corpus proceeding in the federal district court, resulting in an order by a Federal District Judge, that a prisoner, one Geither Horn, who had served 23\(\frac{1}{2}\) years under a state conviction be released, on the ground that his confession had been coerced. The petitioner said he had been taken at night from the County Jail to the edge of an open grave and told, in effect, that he would be buried alive if he didn't confess. Three police officers denied this. They said Horn had been taken out of jail one night "to visit the scene of the crime." The Federal District Judge evidently decided to believe the petitioner. A proper procedure should require such issues, present or potential, to be resolved when the facts are fresh—not five, ten or twenty-five years later.


\textsuperscript{54} Haley v. Ohio, 332 U.S. 596 (1948) and its dissents make it quite clear that the solution to the problem of admissibility of confessions does not lie in procedure alone, but only in the intelligent use of an adequate procedure by a trial judge who thoroughly understands and applies the United States Supreme Court's philosophy on admissibility of confessions. This includes, as pointed out above, a reevaluation of state statutes and case law on admissibility of confessions. And see footnote 48.
reduce applications for habeas corpus on the one hand, and will facilitate correction by appeal where error is apparent on the other.

(4) If the trial judge rules that the confession is admissible, and it is offered in evidence: (a) the defense may offer evidence, or cross-examine the witnesses, with respect to the circumstances surrounding the confession, without waiving an objection to the admissibility of the confession; (b) no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession, unless the defendant takes the witness stand on the confession issue at the trial; (c) if the defendant takes the witness stand on this issue, he shall be subject to cross-examination to the same extent as would any other witness; and (d) if the defense raises the issue of voluntariness under (a) above, the jury shall be instructed that they may give such weight and credibility to the confession, in view of the surrounding circumstances, as they see fit.

Comment: If the defense wants jury consideration of the facts surrounding the confession for purposes of weighing or testing its credibility, this rule permits it, without waiver of an objection, if any, as to the question of admissibility. Furthermore, since under this procedure, the jury’s concern is with weight and credibility, and not admissibility, no problem arises out of the fact that, under a general verdict, it is impossible to tell how the jury treated the confession issue.

The rule also covers the controversial question of the right of a defendant to take the witness stand in a criminal case on this specific issue without subjecting himself to unlimited cross-examination. This proposal takes the position that the accused if he wishes to become a witness at the trial should be treated as any other witness during the trial. The United States Supreme Court has had this problem before it on at least two occasions. In Fikes the Court refused to pass on a question raised because of the refusal of the trial judge to permit petitioner to testify concerning the confession without subjecting him-

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55 See Brown v. Allen, 344 U.S. 443, 464 (1953): “Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time [as was done in Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955)] when satisfied that federal constitutional rights have been protected.”

56 It should be quite apparent from the discussion of the United States Supreme Court cases on the effect of jury consideration of confessions, found by the U.S. Supreme Court to be coerced, that the defendant has no right to a jury trial concerning the admissibility of a confession challenged as involuntary. However, he should have the right to have the jury weigh the credibility of the confession in the light of the surrounding circumstances, if he wishes. See, United States v. Carignan, 342 U.S. 36 (1951), wherein the second issue was “a failure of the trial court to submit to the jury, as a question of fact, the voluntary or involuntary character of the confession,” and the Court held, at page 39, “The evidence on the new trial will determine the necessity for or character of instructions to the jury on the weight to be accorded the confession, if it is admitted in evidence . . .” (Emphasis added).

57 Spano v. New York, 360 U.S. 315, 324 (1959): “Stein held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it.”

self to unlimited cross-examination as to the facts of the crime charged, since the Court found the confession coerced and reversed on that ground. The same question, however, was raised and discussed in Stein. "An attack on the fairness of New York procedure is that petitioners could not take the witness stand to support, with their own oaths, the charges their counsel made against the state police without becoming subject to general cross-examination . . ." The Court, in discussing this point, said: "It is not impossible that cross-examination could be employed so as to work a denial of due process." Then, the court pointed out, at page 175, "If they had given such testimony, it would have been in direct conflict with that of the police, and the decision would depend on which was believable. Certainly the Constitution does not prohibit tests of credibility which American law uniformly applies to witnesses. . . ." And, at page 177, "The Constitution safeguards the right of a defendant to remain silent; it does not assure him that he may remain silent and still enjoy the advantages that might have resulted from testifying."

This makes sense. The rights of the accused are adequately protected by the proposed preliminary hearing procedures. If he wishes to testify at the trial, he should be treated the same as any other witness, for under this procedure the issue on the confession during the trial is weight and credibility, not admissibility.

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60 Id. at 174.