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The Law of Confessions as Affected by Supreme Court Decisions

husband and wife. The court permitted the eavesdropper who used the device to testify, stating that it made no difference whether such privileged communications were obtained by one concealed nearby or by means of an electrical device.[50] It does not appear what weight such evidence had in this case, but it is conceivable that in some cases a conviction might not be had except for evidence procured in such a manner.

There seems little justification for retaining the anachronistic eavesdropper exception. The manifest intention of the parties that the communication be confidential should not be subverted by circumstances beyond their knowledge and control.

THE LAW OF CONFESSIONS AS AFFECTED BY SUPREME COURT DECISIONS

In recent years the United States Supreme Court has reviewed a number of state convictions in which the use in evidence of the defendant's confession was found to be a denial of due process. Due process requires, as the Court has phrased it, that the confession be obtained by methods fundamentally fair to the accused. This is a stricter test of admissibility than that which the states have traditionally applied. In state courts, for the main, the admissibility of a confession has turned upon its credibility rather than upon abuse of the rights of the accused. In addition the Supreme Court has held that confessions involved in federal cases, if obtained during an unlawful delay in arraignment, are inadmissible in federal courts.[1] This comment will consider the effect, if any, which the "due process" or "fundamental fairness" test and the "delay in arraignment" doctrine will ultimately have upon the state law of confessions.

By definition, "a confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it."[2] The law relating to the admissibility of a confession has undergone an extensive metamorphosis in its development. Wigmore states that there are four stages in the history of the law of confessions.[3] At the earliest stage there was no restriction at all upon their reception. Not until the second half of the eighteenth century was it recognized that some confessions are to be rejected as untrustworthy. This was the second stage. The nineteenth century marked the beginning of the third stage where the principle of

50. Id. at 574, 120 N.E. at 212.

1. In Mallory v. United States, 354 U.S. 449 (1957) the Court, reversing the conviction, held that a confession obtained during a 7½ hour delay in arraignment was procured in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. Such evidence unlawfully obtained is not generally admissible in federal courts. See, e.g., Weeks v. United States, 232 U.S. 383 (1914). Congress reacted unfavorably to this decision and an attempt was made to limit the delay in arraignment doctrine. See p. 400 infra.

2. 3 Wigmore, Evidence § 821 (3d ed. 1940).

3. 3 id. § 817.

exclusion developed under certain influences to an abnormal extent and exclusion became the rule and admission the exception.

Finally a trend indicating a reaction to wholesale exclusion is now arising but, Professor Wigmore predicts, it will have little present effect upon the law.

Admissibility of Confessions in State Courts

Confessions are admissible as competent evidence upon the logical principle that no one would make a voluntary admission against himself unless it were true.[4] Conversely the principle of exclusion in state law is predicated upon the untrustworthiness of such evidence under certain conditions.[5] It has been universally accepted that a confession becomes untrustworthy when it is not voluntarily made.[6] Some states apply a broad rule without attempting to define as a matter of law any particular circumstances which would render a confession untrustworthy.[7] Most states have declared a confession inadmissible when coercion is used upon the accused.[8] Whatever the criterion of admissibility may be and however it may be phrased, it is safe to say that the ultimate test is whether there has been an inducement sufficient to elicit an untrue confession.[9] A sufficient inducement may consist of physical coercion,[10] threats,[11] promises,[12] or psychological duress.[13] Some states have adopted statutory definitions of inducements which exclude a confession some of which are more liberal than the common-law rule and others more stringent.[14] But even in this apparent diversity the underlying concept of trustworthiness has been the sole basis for excluding a confession rather than any wrong which may have been inflicted upon the accused.[15]

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4. 3 id. § 866.

5. 3 id. § 822.

6. Wilson v. State, 19 Ga. App. 759, 92 S.E. 309 (1917); State v. Novak, 109 Iowa 717, 79 N.W. 465 (1899); Parker v. State, 91 Tex. Crim. 68, 238 S.W. 943 (1922).

7. See, e.g., State v. Graffam, 202 La. 869, 13 So. 2d 249 (1943).

8. See, e.g., Simmons v. State, 206 Miss. 535, 40 So. 2d 289 (1949).

9. 3 Wigmore, op. cit. supra note 2, § 831.

10. Balding v. State, 77 Okla. Crim. 36, 138 P.2d 132 (1943).

11. Harrison v. State, 152 Fla. 86, 12 So. 2d 307 (1943).

12. State v. Duran, 127 Mont. 233, 259 P.2d 1051 (1953).

13. Macon v. Commonwealth, 187 Va. 363, 46 S.E.2d 396 (1948).

14. An example of such a statute is N.Y. Code Crim. Proc. § 395: "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor. . . ." It should be noted that the New York statute is more strict than the common-law rule in that only a stipulation of the district attorney that he will not prosecute is sufficient to exclude the confession. Of course such a stipulation is considered that of the district attorney where it is made with his authority. At common law a promise not to prosecute would exclude a confession even if made by a policeman or persons of even lesser authority. See Watts v. State, 99 Md. 30, 57 Atl. 542 (1904); People v. Wolcott, 51 Mich. 612, 17 N.W. 78 (1883).

15. People v. Buffom, 214 N.Y. 53, 56-57, 108 N.E. 184, 185-86 (1915).

THE SUPREME COURT AND THE DUE PROCESS TEST

The Law Prior to Brown v. Mississippi

Supreme Court rulings with respect to confessions have also passed through several stages. The Supreme Court's earliest treatment of confessions was *Wilson v. United States*.[16] There it was pointed out that trustworthiness is the underlying test of admissibility. For a confession to be trustworthy the Supreme Court required that it be made voluntarily.[17] Upon that basis a confession was held inadmissible in *Bram v. United States*[18] where the accused made the confession after being taken from aboard ship, held in custody and interrogated by the police following an unlawful arrest in a foreign port. In *Ziang Sung Wan v. United States*[19] a Chinese student confessed to a murder committed in Washington, D. C. The police had apprehended him in New York City, returned him to Washington and had interrogated him continuously for several days without benefit of counsel, friends or relatives. The Supreme Court reversed the conviction because it was based upon an involuntary confession. The Court said, "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made."[20] Looking back upon these cases the Court has pointed out that it formulated tests which were to govern in federal courts, just as the states had evolved their own various tests.[21] In this first aspect of the doctrine the Supreme Court too considered trustworthiness the sole basis of admissibility of a confession.

The Due Process Test

Within the past twenty-five years, however, the Supreme Court has added further restrictions upon the admissibility of a confession. Trustworthiness is no longer the sole consideration. It was not until 1936 in *Brown v. Mississippi*[22] that the Court had squarely before it the question of whether the fourteenth amendment[23] was violated by state officers in obtaining a confession. There the conviction was based solely upon a confession shown to have been extorted by torture of the accused. The Supreme Court reversed the conviction declaring that the use of such a confession did not measure up to that degree of fairness imposed by the due process clause of the fourteenth amendment.[24] The *Brown* case marked the development of the second and, beyond a doubt, the most far-reaching aspect of the Supreme Court doctrine. The state court's

16. 162 U.S. 613 (1896).
17. Sparf v. United States, 156 U.S. 51 (1895).
18. 168 U.S. 532 (1897).
19. 266 U.S. 1 (1924).
20. Id. at 14.
21. Lisemba v. California, 314 U.S. 219, 236 (1941).
22. 297 U.S. 278 (1936).
23. U.S. Const. amend. XIV, § 1 "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."
24. 297 U.S. at 285-86.

finding that the confession of the accused was voluntary, and admissible as trustworthy evidence, was not reviewed by the Supreme Court. The case was brought before it upon the constitutional question of due process, which petitioner had raised in the state court, and not to review the application of Mississippi law as to the admissibility of confessions. The Court in effect held that, though the confession may have been true, the means by which it had been obtained and its use in evidence to secure a conviction deprived the accused of his life and liberty without the due process of law imposed by the fourteenth amendment.

Subsequently it was held explicitly that whether a confession is involuntary and hence untrustworthy or whether it is violative of due process and hence unconstitutional are two distinct issues.[25] Of this distinction the Court has said, "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."[26] The Court has not defined this "fundamental unfairness" which denies due process. It must be gathered case by case through a process of factual analysis. In *White v. Texas*[27] a conviction of rape was reversed because it was based on a confession obtained from the defendant, an illiterate farmhand, after being held for six or seven days, without the filing of a charge, without benefit of counsel and after being taken several times to an isolated woods for interrogation. These circumstances, the Court said, violated due process. In *Ward v. Texas*[28] the confession was obtained from the defendant after an arrest without a warrant and when, for a period of several days, he had been taken to strange towns, incarcerated in several jails and told of possible mob violence against him. Again the use of the confession was held to violate due process. A divided Court in *Haley v. Ohio*,[29] invalidating a confession of a fifteen-year-old boy, considered, among other factors, the tender years of the accused, his subjection to a prolonged midnight interrogation by the police, the absence of counsel, and the fact that he was uninformed of his constitutional rights up to the time he signed the confession. In this case Justice Frankfurter, in a concurring opinion, characterized a "coerced" confession as one which necessarily denies due process and, on the whole, the opinion reflects the vagueness which is involved in efforts to formulate principles of "unfairness."[30] Other decisions have held that due process is violated when a conviction is based upon a confession made when

25. Chambers v. Florida, 309 U.S. 227 (1940). In this case the issues of fear, threats and coercion had been submitted to the jury which found these issues against the petitioners, thus finding the confessions voluntary. The Supreme Court, relying on the Brown case, held that the issue was whether the confessions had been improperly obtained thus rendering their use in evidence a violation of due process and that the jury's findings did not preclude the Court on that issue.

26. Lisemba v. California, 314 U.S. 219, 236 (1941).

27. 310 U.S. 530 (1940).

28. 316 U.S. 547 (1942).

29. 332 U.S. 596 (1948).

30. Id. at 603 (concurring opinion).

the accused is subjected to prolonged and incessant interrogation,[31] when held incommunicado for ten days,[32] and when the accused makes a confession under the deception of a psychiatrist.[33] To formulate a simple rule from the cases is impossible. That circumstances which probably would not violate the trustworthy test for confessions can violate due process is evident from the fact that so many convictions upheld by the state courts have been reversed by the Supreme Court. At the same time it can be argued that circumstances making a confession untrustworthy will also violate due process at least where threats, fear or physical or mental duress are involved. Whether a confession based solely upon hope of reward would violate due process is open to doubt but it is unlikely that the question will be decided since such a case is not likely to escape the state court's application of the trustworthy rule.

The McNabb Rule

In 1943 a third and final restriction was imposed by the Supreme Court in *McNabb v. United States*.[34] This case involved a conviction of murder in a federal case which was reversed by the Court because the confession upon which it was based was obtained after a delay in the arraignment of the accused. Federal officers failed to bring the accused promptly before a magistrate as required by federal statute.[35] The rationale of the *McNabb* case was not immediately clear. Portions of the Court's opinion offered the discouragement of undesirable police practices as its reason,[36] while room was left for commentators to speculate that delay in arraignment was merely an element of coercion making the confession inadmissible as untrustworthy or violative of due process. The view that an otherwise admissible confession would be excluded solely to discourage certain police tactics was not popular then or now. That delay in arraignment, in and of itself, was not the basis of the *McNabb* decision seemed certain when, in *United States v. Mitchell*,[37] an attempt to invoke the *McNabb* rule was rejected by the Court where the confession was initially and freely given *prior* to a period of illegal detention. It was pointed out, however, that to admit the confession was not a case of allowing the federal officers to enjoy the fruits of their misconduct since the confession preceded and did not result from the delay in arraignment.[38] Finally in *Upshaw v. United States*[39] the Supreme Court unequivocally defined the *McNabb* rule as permitting the reversal of a conviction merely because it was based upon a confession obtained during a delay in arraignment. Within the narrow limits of this rule the delay itself was sufficient whether it was reasonable or not.

31. Chambers v. Florida, 309 U.S. 227 (1940).
32. Fikes v. Alabama, 352 U.S. 191 (1957).
33. Leyra v. Denno, 347 U.S. 556 (1954).
34. 318 U.S. 332 (1943).
35. Fed. R. Crim. P. 5(a). Formerly 18 U.S.C. § 595 (1940).
36. 318 U.S. at 344.
37. 322 U.S. 65 (1944).
38. Id. at 70.
39. 335 U.S. 410 (1948).

EFFECT OF THE SUPREME COURT DOCTRINE UPON STATE LAW

The threefold doctrine of the Supreme Court, of course, applies in all respects to federal cases. Not all of the three facets of the doctrine will apply to state cases.

Tests of voluntariness which the Supreme Court has adopted to determine the trustworthiness of a confession apply only to the federal courts and each state may adopt such rules for the prosecution of crimes and the admissibility of evidence as it elects.[40] Federal courts are not empowered to determine what the local rules of admissibility shall be.[41]

40. Lisemba v. California, 314 U.S. 219 (1941).

41. Buchalter v. New York, 319 U.S. 427 (1943). Some doubt, however, is cast upon the future validity of this principle in its broadest sense in view of the holding of the Court in Rea v. United States, 350 U.S. 214 (1955). In that case federal officers, proceeding under an invalid federal search warrant, obtained from petitioner evidence of his possession of narcotics. Petitioner was indicted in the federal district court whereupon he moved to suppress the evidence obtained under the invalid warrant. The motion was granted and the indictment dismissed. Thereafter petitioner was indicted in the state court for illegal possession of narcotics. While his trial was pending, he moved in the federal district court to enjoin the federal officers from testifying in the state proceedings and for an order directing them to recover the evidence obtained under the warrant if it had already been transferred to the state authorities. The district court denied the motion, — F. Supp. —, aff'd, 218 F.2d 237 (10th Cir. 1954), cert. granted, 348 U.S. 958 (1955). The Supreme Court in a 5-4 decision reversed the judgment holding that the motion should be granted.

The majority said, "[W]e have then a case that raises not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies. Cf. McNabb v. United States, 318 U.S. 332. . . ." 350 U.S. at 217. The majority, therefore, proceeded upon the principle that the federal rules bind federal officers and the federal courts have the right to enforce obedience to these rules by such officers. The Court further said, "The fact that their violation [federal rules] may be condoned by state practice has no relevancy to our problem." 350 U.S. at 217.

The dissent took the position that the decision impinged upon the principle recognized by the Court in the past that "in criminal law enforcement . . . the States should be left free to follow or not the federal exclusionary rule [that evidence unlawfully obtained is inadmissible]. . . ." 350 U.S. at 221. The dissent also rejected the contention of the majority that this was an exercise of the Court's "supervisory powers" under the McNabb rule. It was pointed out that McNabb was primarily establishing a rule of evidence for federal courts and was not concerned with law enforcement practices as such.

It is submitted that this decision severely weakens the authority of the proposition that a state may admit and use unlawfully obtained evidence whatever the source. It may well herald an intrusion by the Supreme Court upon a field which has been traditionally considered a question of state law only, that is, admissibility of evidence. If the Supreme Court will enjoin a federal officer from testifying in a state court where his testimony springs from some violation of federal law and will enjoin him from delivering to state officers any physical evidence obtained as a result of that violation, is it not safe to assume that the Court might reverse a state conviction based upon such evidence? If so, then at least one aspect of the state law as to admissibility will have been destroyed for the states could no longer use evidence turned over to them by federal officers where such evidence had been obtained in violation of federal law. The states are themselves divided

If the constitutional question of due process is raised relative to the circumstances surrounding a confession then the Supreme Court may apply its tests of "fairness" to determine whether a conviction may stand.[42] The Court is not concluded by a jury finding that such a confession was voluntary but will determine that question itself from the evidence.[43] Indeed, in one case a conviction has been reversed solely because a state court refused to permit an accused to raise the due process question after he had previously denied making any confession at all.[44]

In a number of decisions the Supreme Court has said that if due process has been violated by the use of a confession the conviction is reversible regardless of other independent and sufficient evidence upon which the conviction could stand.[45] However, in *Stein v. New York*[46] it was held that merely presenting a confession to a jury to decide whether, from the circumstances surrounding it, the confession was to be ignored did not provide a basis for reversal. In that case there was sufficient evidence to convict even without the confession. The opinion pointed out that where there is provision only for a general verdict there is no way to determine whether the verdict was based in whole or in part on the questionable confession. The Court said, "we could hold that such provisional and contingent presentation of the confessions precludes a verdict on the other sufficient evidence after they are rejected only if we deemed the fourteenth amendment to enact a rigid exclusionary rule of evidence rather than a guarantee against conviction on inherently untrustworthy evidence."[47] The earlier seemingly inconsistent statements of the Court were declared dicta and reversals of convictions prior to the *Stein* case on due process grounds were stated to have occurred only where the confessions were the sole sufficient evidence.

While the *Stein* case may have mitigated to some extent the due process aspect of the Supreme Court doctrine it still has a vast effect on state court decisions. In affirming a conviction which the defendant claims was obtained in violation of due process a state court necessarily determines that the admission of the confession did not constitute a denial of due process and thereby renders its decision reviewable by the Supreme Court.[48] Thus state courts will

upon the question but all consider it to be a purely state question. See Annot., 50 A.L.R.2d 531, 575, § 9(d) (1956).

42. Lisemba v. California, 314 U.S. 219 (1941).

43. Chambers v. Florida, 309 U.S. 227 (1940).

44. Lee v. Mississippi, 332 U.S. 742 (1948).

45. Malinski v. New York, 324 U.S. 401 (1945); Lyons v. Oklahoma, 322 U.S. 596, 597 n.1 (1944).

46. 346 U.S. 156 (1953).

47. Id. at 192.

48. White v. Texas, 310 U.S. 530 (1940). The Court implied that part of the recognized test of the admissibility of confessions in state courts was whether due process had been accorded the defendant. It seems odd, if that were a recognized test, that so many state courts could have been so wrong as to what constituted due process. It is submitted that the number of reversals occurred precisely because state courts were not applying a due process test based upon fairness to the defendant but rather the trustworthy test based upon the credibility of the confession as evidence. The same facts may have been

have to determine whether a confession conforms to the degree of "fairness" required by the Supreme Court. *People v. Leyra*[49] is illustrative of this point. The New York Court of Appeals reversed a conviction based on a confession obtained under circumstances which were held to be fundamentally unfair to the accused. On the other hand, as the Supreme Court itself noted,[50] the rejection of confessions under the due process clause may cause state appellate courts to give a merely perfunctory review of convictions based upon confessions since the defendants have been adequately protected by the Supreme Court in the past. It would seem more likely and practical that the states will conform to the Supreme Court standards and thereby eliminate sure reversal of costly prosecutions.

The major difficulty with the due process test is that it is so general and so much a question of fact that the various courts are bound to disagree as to what facts will constitute a denial of due process in a given case. In *Thomas v. Arizona*[51] Justice Clark, writing for the majority in affirming the conviction, distinguished the case from cases involving incommunicado detention or intimations of mob violence which the Court had already determined might render a confession so obtained violative of due process.[52] Justice Clark, however, dissented in *Payne v. Arkansas*[53] in which there was ample evidence of both intimations of mob violence and incommunicado detention saying, "I believe that on this record the state courts properly held petitioner's confession voluntary."[54] The main ground of his dissent, it is true, was that there was other sufficient evidence in the record for conviction.[55] However the statement quoted is illustrative of the fact that the due process test becomes, in effect, a test of the impact of the circumstances surrounding a confession upon the sense of "fundamental fairness" of the individual judge. It would seem that only in cases of the most flagrant abuses can general unanimity be expected in applying the test.

The McNabb Rule and Due Process

The *McNabb* decision, involving a federal prosecution and predicated upon a federal statute, is limited to federal courts. It has been held to have no

considered but the emphasis was different. Many of the states permit the jury to determine the question of whether the confession was voluntary, i.e., trustworthy and the state courts felt that they were bound by the finding of the jury. See, e.g., Chambers v. Florida, 309 U.S. 227-28 n.2 (1940).

49. 302 N.Y. 353, 98 N.E.2d 553 (1951). It is important to note that the New York Court of Appeals in this case expressly cited the leading Supreme Court "due process" cases as controlling. Id. at 364, 98 N.E.2d at 559. The defendant was subsequently retried without the use of any of the confessions obtained and his conviction was reversed by the court of appeals on the ground that the evidence was not sufficient to sustain the conviction. 1 N.Y.2d 199, 134 N.E.2d 475, 151 N.Y.S.2d 658 (1956).

50. Stein v. New York, 346 U.S. 156, 180 (1953).

51. 356 U.S. 390 (1958).

52. Fikes v. Alabama, 352 U.S. 191 (1957).

53. 356 U.S. 560 (1958).

54. Id. at 569 (dissenting opinion).

55. See discussion of the Stein case p. 402 supra.

application to state cases.[56] A confession is not excluded by the fourteenth amendment merely because it was obtained during an illegal detention.[57] Notwithstanding these assertions the fact remains that delay in arraignment has been a factor the Court deemed worthy of emphasis in many reversals of state convictions on the basis of due process.[58] Recently in *Fikes v. Alabama*[59] the Supreme Court reversed a state conviction upon little more than an illegal detention as the basis for applying the due process clause of the fourteenth amendment. Even in that case it was admitted that the "flouting of the requirement of prompt arraignment prevailing in most States is in and of itself not a denial of due process."[60] In theory at least the *McNabb* rule remains applicable only to federal cases.[61]

Proposed Legislation Concerning the McNabb Rule

In *Mallory v. United States*[62] the Supreme Court applied the *McNabb* rule in reversing a District of Columbia conviction for rape where the delay was only seven and one-half hours. This decision prompted Congress to consider legislation to abrogate that rule. The House passed the so-called Mallory Bill which provided that a confession would not be excluded from evidence solely because it was made during a delay in arraignment. The Senate Judiciary

56. Gallegos v. Nebraska, 342 U.S. 55 (1951).

57. Ibid.

58. See notes 27-29 supra.

59. 352 U.S. 191 (1957).

60. Id. at 199 n.1 (concurring opinion).

61. The opinions in Fikes v. Alabama, supra notes 59 and 60, however, raise some doubt as to whether the Court is beginning to "absorb" the McNabb Rule into the due process test. The Chief Justice, while conceding that a detention in violation of an Alabama statute does not render a confession inadmissible by the law of that state, makes the cryptic comment that "nevertheless, such an occurrence is 'relevant circumstantial evidence in the inquiry as to physical or psychological coercion' Stein v. New York, 346 U.S. 156, 187." 352 U.S. at 194 n.2.

Justices Frankfurter and Brennan, concurring, while stating that undue detention is not a violation of due process, pointed out "it is to disregard experience not to recognize that the ordinary motive for such extended failure to arraign is not unrelated to the purpose of extracting confessions." 352 U.S. at 199 n.1 (concurring opinion).

Justices Harlan, Reed and Burton, dissenting, said the following: "The absence of arraignment, much as that practice is to be deprecated, loses in significance in light of the State's representation . . . that this was not an unusual thing in Alabama. As this Court recognizes, it did not of itself make the confessions inadmissible." 352 U.S. at 200 (dissenting opinion). The dissent concluded: "In the absence of anything . . . which 'shocks the conscience' or does 'more than offend some fastidious squeamishness . . . about combatting crime too energetically,' [citation omitted], I think that due regard for the division between state and federal functions in the administration of criminal justice requires that we let Alabama's judgment stand." 352 U.S. at 201 (dissenting opinion). The dissent, while not forcefully attacking the implications of the majority decision, seems clearly to fear that an "absorption" of undue detention into due process may be taking place despite the recognition by the majority that failure to promptly arraign in itself does not violate due process.

62. 354 U.S. 449 (1957).