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a discretion guided by certain criteria such as: (1) bad faith on the part of the member in violation of the rules; (2) disruptive friction which may be aroused within the organization by judicial interference; (3) the presence or absence of any interest of substance; (4) public interests and interests of third persons; (5) seriousness of the breach;²³ (6) probable effect of resort to the internal remedies of the association if such remedies might accomplish the desired result; (7) adequacy of other judicial remedies.

Whether or not the court will grant injunctive relief in the final analysis should depend on the particular circumstances of each case. The eventual answer must be one based upon practical considerations, a balance of the seriousness of violation and the need for relief against the disadvantages of intervening in the affairs of the particular association involved.

W. BRAXTON SCHELL.

Constitutional Law—Due Process—Admissibility of Confessions and Police Abuses

The Supreme Court of the United States, in an effort to protect the individual against certain police practices, is imposing on the state courts a new test for the admissibility of confessions. The test might be called the "pressure-abuses" test. It is prescribed for the states under the Due Process Clause of the Fourteenth Amendment and is designed to displace the old "testimonial trustworthiness" test. The latest application of the new test came in three cases decided last summer, *Watts v. Indiana*,¹ *Turner v. Pennsylvania*,² and *Harris v. South Carolina*.³

The old test, generally accepted over the country, was simply this: If a confession were the result of such pressure that there would be a fair chance that the accused would tell a lie, the confession was excluded. The courts talked of "voluntary" and "involuntary" confessions, of promises, threats, and physical abuses, but the underlying idea of nearly all the cases was that a confession would be excluded if it were given under such pressure that it would be untrustworthy.⁴ The extent of police abuses—illegal detention, delay in arraignment, failure to ex-

²³ Dean Pound suggests that the chancellor might well ask these questions: Is the injury serious enough to warrant the extraordinary interposition of equity? Is it serious enough to warrant the expense and consumption of public time involved in a judicial proceeding? In cases involving fraternal orders, churches or secret societies, is it serious enough to balance the practical difficulty involved in the court's endeavor to learn, interpret and apply the laws and customs of the organization? Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 680 (1916).

¹ 338 U. S. 49 (1949). ² 338 U. S. 62 (1949). ³ 338 U. S. 68 (1949).

⁴ 3 WIGMORE, EVIDENCE §§822, 824 (3d ed. 1940). But Dean McCormick disagrees that the sole underlying basis for the confession rule is desire to protect against untrustworthiness. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 451-457 (1938).

plain rights, etc.—was not considered, except in so far as those abuses might tend to make the confession untrustworthy from the evidence standpoint. North Carolina, too, followed the “testimonial trustworthiness” test.⁵

The test which the United States Supreme Court has now prescribed for the states is a stricter one. It says that not only will a confession be excluded which is testimonially untrustworthy, but also a confession will be excluded which, even though trustworthy, is obtained by some degree of pressure coupled with substantial police abuses.

In federal courts if a confession is obtained after the proper time for arraignment has passed, it is inadmissible regardless of its trustworthiness and regardless of the decorum of the police.⁶ This federal court rule is based on the idea that there is little chance for police abuse if arraignment is early. The rule is one of evidence, not an expression of a constitutional right. The new state court test is much more nebulous. It demands a weighing of pressures and abuses, and it is made no easier to grasp and apply by the fact that the Supreme Court continues to talk of “voluntary” and “involuntary,” language traditionally associated with the old test. Indeed it is only by examining the fact situations in particular cases and by reading some of the dissents that we can be sure a new test has been laid down.

Perhaps the first indication that the Supreme Court was going to demand more of state courts than testimonial trustworthiness came in *Ward v. Texas*,⁷ decided in 1942, but it was not until the famous case of *Ashcraft v. Tennessee*⁸ that the new test became clearly discernible. Ashcraft, a white man of good reputation and standing in the community, was arrested on a Saturday evening and questioned continuously until early Monday morning, when he confessed. There was no warrant for his arrest, and he was not arraigned until after his confession

⁵ “The test accordingly laid down in the more recent decisions is whether the confession ‘was made under circumstances that would reasonably lead the person charged to believe that it would be better to confess himself guilty of a crime he had not committed.’” STANSBURY, NORTH CAROLINA EVIDENCE §183 (1936).

⁶ *Upshaw v. United States*, 335 U. S. 410 (1948); *McNabb v. United States*, 318 U. S. 332 (1942).

⁷ 316 U. S. 547 (1942). The Court cited the following cases, but it is to be noted that none of them clearly adopts the new test: *Wan v. United States*, 266 U. S. 1 (1924) (arose in federal court); *Brown v. Mississippi*, 297 U. S. 278 (1936) (state court did not contend confessions anything but coerced); *Chambers v. Florida*, 309 U. S. 227 (1940) (case might be considered first to apply new test, but not clear that old test of testimonial trustworthiness not applied); *Canty v. Alabama*, 309 U. S. 629 (1940) (per curiam); *White v. Texas*, 310 U. S. 530 (1940) (brief opinion; not clear new test applied); *Vernon v. Alabama*, 313 U. S. 547 (1941) (per curiam); *Lomax v. Texas*, 313 U. S. 544 (1941) (per curiam, but facts given in state court opinions suggest that this decision looks toward new and stricter rule; police abuses seem less extreme than in some earlier cases; *Lomax v. State*, 136 Tex. Cr. R. 103, 124 S. W. 2d 126 (1939), *second appeal*, 142 Tex. Cr. R. 231, 144 S. W. 2d 555 (1940), *rev'd again per curiam*, 313 U. S. 544 (1941), *third appeal*, 146 Tex. Cr. R. 531, 176 S. W. 2d 752 (1943)).

⁸ 322 U. S. 143 (1944).

on Monday. He was kept incommunicado and deprived of sleep. Even so there was evidence that his confession was not the result of intimidation by the police. Mr. Justice Black for the majority talked of the "inherently coercive"⁹ situation and stressed the abuses of power by the police. He was not very greatly concerned with the testimonial reliability of the confession. Mr. Justice Jackson, writing a three-judge dissent, called attention to the fact that a new test was being imposed on the state courts.¹⁰

The *Ashcraft* doctrine was reaffirmed in *Malinski v. New York*.¹¹ Malinski was arrested before eight o'clock one morning and confessed late that afternoon. In the meantime he was held without warrant in a Brooklyn hotel room and made to strip. He may have feared a "shal-lacking," but he was not questioned continuously. Mr. Justice Douglas, for the Court, talked the old language of fear and coercion, but it seems clear that a much stricter test than that of testimonial trustworthiness was applied; the Court seems to have had one eye on police abuses. Mr. Justice Frankfurter, concurring, said that the whole proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous crimes."¹²

Again in *Haley v. Ohio*¹³ a majority of the Court applied the new test. There a fifteen-year-old Negro boy was arrested about midnight and questioned for five hours or so until he confessed. The four dissenting justices seemed to think that something nearer the old test of testimonial trustworthiness should have been applied, for Mr. Justice Burton said, "The question in this case is the simple one—was the confession in fact voluntary?"¹⁴ But the majority held that, in view of the boy's age and race and in view of the intensity of the questioning and of the fact that he was without counsel, there was a "disregard of the standards of decency." As in the *Ashcraft* case, the opinion emphasized the "inherently coercive" situation and refused to accept the jury's verdict that this particular defendant was not in fact coerced to the point of untrustworthiness.

The three cases decided last summer all involved Negroes arrested without warrants¹⁵ and held for five or six days of more or less intensive questioning before confessions were obtained. No counsel or relatives were permitted to see the persons accused, and no preliminary examinations were held until after the confessions were obtained. In

⁹ *Id.* at 154.

¹¹ 324 U. S. 401 (1945).

¹³ 332 U. S. 596 (1948).

¹⁰ *Id.* at 156.

¹² *Id.* at 417.

¹⁴ *Id.* at 615.

¹⁵ In *Harris v. South Carolina*, 338 U. S. 68 (1949), a warrant had been issued charging the accused with stealing a pistol, but the warrant was not read to him, and he was not informed of the charge against him. In actuality he was wanted as a suspected murderer.

one of the cases the accused was kept for two days in a place called "the hole,"¹⁶ where he had to sleep on the floor. In another the accused was an illiterate,¹⁷ and in all of the cases there were other aggravating circumstances. It seems from the facts given in the state and federal reports that the evidence of actual coercion in these three cases was greater than in the *Ashcraft* case and perhaps greater than in the *Ward*, *Malinski*, and *Haley* cases. And, although it is difficult to evaluate the various police abuses, they would seem to have been as flagrant in these three cases as in any of the four earlier cases.¹⁸ Indeed the decision in the three latest cases, in view of *Ward*, *Ashcraft*, *Malinski*, and *Haley*, seems to have been a logical necessity. The fact that the state courts in the three cases did not use the new test may indicate either an unawareness that the old test has been changed or a dislike of the new one.¹⁹

The new test rests on a handful of opinions and a few per curiam decisions. In all of the cases with full opinions, the *Ward* case alone excepted, there were strong dissents. The *Ashcraft* and *Watts* cases were six-three decisions. The *Malinski*, *Haley*, *Turner*, and *Harris* cases were five-four decisions. The permanence of the new test seems, therefore, uncertain, especially in view of the fact that two of the justices who have consistently been with the majority, Justices Murphy and Rutledge, have died since the last cases were decided.

PRESSURE-ABUSES TEST AND THE DUE PROCESS CLAUSE

It has long been established that the Due Process Clause of the Fourteenth Amendment does not fasten on the states eighteenth or nineteenth century common law modes of trial and procedure. Rather the Clause guarantees "immunities . . . implicit in the concepts of ordered liberty,"²⁰ "standards of fundamental fairness,"²¹ principles of justice so rooted in the traditions and consciences of our people as to be ranked

¹⁶ *Watts v. Indiana*, 338 U. S. 49 (1949).

¹⁷ *Harris v. South Carolina*, 338 U. S. 68 (1949).

¹⁸ Under any system of weighing police abuses, clearly one important element would be length of time that a suspect is unlawfully detained before the confession is made. In the *Ward* case the time was perhaps 40 hours; in *Ashcraft*, 36 hours; in *Malinski*, 10 hours; in *Haley*, 5 hours; while in the three latest cases the time was five to six days. In the *Ashcraft* and *Haley* cases it might even be argued that there was no unlawful detention since the periods of detention were presumably at times magistrates were not available. Of course such other elements of police abuse as over-lengthy periods of questioning, failure to explain constitutional rights, and deprivation of sleep and food must be considered in connection with the length of detention and with the nature of the person accused.

¹⁹ *State v. Harris*, 212 S. C. 124, 46 S. E. 2d 682 (1948) (court mentioned federal decisions but stated, without explaining, that they did not apply); *Watts v. State*, 82 N. E. 2d 846 (Ind. 1948) (no mention of United States Supreme Court decisions on admissibility); *Commonwealth v. Turner*, 358 Pa. 350, 58 A. 2d 61 (1948) (express statement that old rule on admissibility was proper one).

²⁰ *Palko v. Connecticut*, 302 U. S. 319, 324 (1937).

²¹ *Fay v. New York*, 332 U. S. 261, 294 (1947).

as fundamental."²² Indeed the Clause as construed seems nearly as large as fairness and justice themselves. It is clear that any conviction based on a confession that is not trustworthy would be a deprivation of life and liberty without fairness and would therefore violate the Clause.²³ But the new test says that an element which is to be considered along with pressure on the accused is police abuse. Does such a test represent a radical departure in interpretation of due process?

It should be noted first that the Clause has not been limited to a requirement that the proper result be reached in the particular trial; the Court has gone further and demanded that that result be reached with some dignity. Thus a reversal may sometimes be had even though the defendant is clearly guilty as charged.²⁴

But has the Clause as traditionally interpreted extended to pre-trial events? Some of the language in cases, other than those which enunciate the new test, indicates that the Clause does extend beyond the trial and protect against substantial pre-trial irregularities.²⁵ Logic seems to demand this result; if at the trial itself we are concerned, not solely with getting a fair conviction, but also that that conviction be obtained with some dignity of method, why should that same dignity of method not be required of pre-trial events? An abuse before the trial is no less a violation of "civilized standards,"²⁶ no less a denial of "fundamental principles of liberty."²⁷ The pre-trial irregularity, however, is different in one important respect: a new trial cannot correct it; to hold it fatal would be to turn the criminal lose. The Supreme Court's solution is to consider the pre-trial irregularity but to insist that it contribute in some way to the result of the trial. A new trial which disregards the fruits of the irregularity is held to cure the defect. In *Lisenba v. California*²⁸ there were police abuses which the Court condemned, but the abuses had not led to the challenged confession. The Court refused to reverse for the abuses alone since they had not "fatally infected the trial."²⁹

²² *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934).

²³ *E.g.*, *Brown v. Mississippi*, 297 U. S. 278 (1936).

²⁴ *E.g.*, *Tumey v. Ohio*, 273 U. S. 510, 535 (1927). General statements of scope of Due Process Clause support this view. *E.g.*, *Carter v. Illinois*, 329 U. S. 173, 175 (1946) ("ultimate dignities of man") and *Palko v. Connecticut*, 302 U. S. 319, 324 (1937) ("ordered liberty").

²⁵ *Chambers v. Florida*, 309 U. S. 227, 236 (1940) (Fourteenth Amendment protects people "charged with or suspected of crime"). But in other cases there is language which sounds as if the Due Process Clause, except for its effect in restraining substantive laws of states, is limited to the trial itself. *E.g.*, *Frank v. Mangum*, 327 U. S. 309, 340 (1915); *Twining v. New Jersey*, 211 U. S. 78, 110 (1908) ("Due process requires that the court . . . shall have jurisdiction . . . and that there shall be notice and opportunity for hearing"). But such restrictive language has been used in cases involving only the trial itself; pre-trial irregularities were not under consideration.

²⁶ *Cf.* *Malinski v. New York*, 324 U. S. 401, 414 (1945) (Mr. Justice Frankfurter concurring).

²⁷ *Cf.* *Hebert v. Louisiana*, 272 U. S. 312, 316 (1926).

²⁸ 314 U. S. 219 (1941); *accord*, *Lyons v. Oklahoma*, 322 U. S. 596 (1944).

²⁹ 314 U. S. 219, 236 (1941).

It thus appears that the pressure-abuses test is not a radical departure in the theory of due process. But in practice the test obviously carries the Clause into new areas, and the question which immediately arises is: How far will this extension of application go? If the Court now frankly sets about to reform the manners of state police officials, will there be any stopping place short of complete standardization of police and court procedure throughout the country?

One answer to this widespread fear is that the Court has a long tradition of self-restraint on due process questions. The cases are full of statements that the states are free to choose their own methods for dealing with crime so long as "fundamental rights of the prisoner shall not be taken from him arbitrarily."³⁰ "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice."³¹

Certainly it is to be hoped that the Court will continue to recognize the value of local responsibility and initiative in the administration of justice. If the Court sits over the nation exercising its conscience on every detail of police procedure, state courts and legislatures will tend to abdicate their duties. State citizens will learn to feel that the solution to every police abuse comes, not from local and state initiative, but from the remote and standardizing opinions of the Court in Washington. Local experimentation will die along with local consciences. But if the police abuses are as gross as were those in the cases last summer, perhaps occasional interference from the Supreme Court will prove to be just the spur needed by state citizens and courts.

PRESSURE-ABUSES TEST AND LAW ENFORCEMENT

It remains to be considered whether the new test on admissibility is desirable from the standpoint of its effect on law enforcement.

Miss Irene Savidge and Sir Leo Money were sitting on a bench in Hyde Park in 1928 when they were arrested by two policemen on a charge of behaving "in a manner reasonably likely to offend against public decency." They were taken before a magistrate, who dismissed the charge, but later the Director of Public Prosecutions asked that a statement be obtained from Miss Savidge. She was visited at her place of employment and voluntarily agreed to attend an inquiry at Scotland Yard. The inquiry lasted about four hours. Tea was served at four o'clock, and Miss Savidge and the two officers enjoyed a cigarette apiece. About six-thirty Miss Savidge was driven home by the chief inspector.³²

³⁰ Frank v. Mangum, 327 U. S. 309, 334 (1915); Avery v. Alabama, 308 U. S. 444, 446 (1940) (Fourteenth Amendment "not intended to bring to the test of a decision of this Court every ruling made in the course of a state trial").

³¹ Fay v. New York, 332 U. S. 261, 295 (1947).

³² Reported in National Commission on Law Observance and Enforcement, Report No. 11, *Lawlessness in Law Enforcement*, 259-261 (1931).

This interrogation of Miss Savidge precipitated a debate on the floor of Commons, a commission of three to investigate the case, and a Royal Commission of eight to investigate the entire field of police powers and procedure—so sensitive are the English to police abuses!

The English police are told that after they have made an arrest they must forego any questioning at all until the prisoner is in the police station.³³ Then the charge is explained to the prisoner, and he is told that he is not obliged to talk but may do so if he wishes and that anything said may be used in evidence. Even if the prisoner then chooses to make a statement, no questions may be asked him except to clear up ambiguities. If the police have made no arrest but are merely seeking a statement from a prospective witness, it is suggested that they preface their remarks as follows: "I am a police officer. I am making inquiries into (so-and-so), and I want to know anything you can tell me about it. It is a serious matter, and I must warn you to be careful what you say."³⁴

The new pressure-abuses test is a development in the direction of England, but the Supreme Court in this test is far indeed from prescribing English rules for our police.³⁵ The Court is not attempting to outlaw all arrests on suspicion nor all questioning before arraignment. In the *Watts* case the Court said that the evil aimed at was "protracted, systematic and uncontrolled subjection of an accused to interrogation."³⁶ It may be that the Court would even sanction an inquisitorial system modeled on that of the Continent provided the state adopting it also adopted that system's safeguards.³⁷ The attempt is to attain, whatever the system, the "rudimentary requirements of a civilized order."³⁸

In 1931 the Wickersham Commission reported that the extortion of confessions by the police by mental or physical pressure was widespread in this country.³⁹ Although it may be hoped that such abuses are less

³³ Royal Commission on Police Powers and Procedure, CMD. No. 3297 at 114. Quoted 3 WIGMORE, EVIDENCE §847.

³⁴ *Ibid.*

³⁵ It is true, of course, that the problem of law enforcement in England is different from that in this country. England's well-selected and well-trained police operate in a small country and deal with a society which has a low crime rate and a strong tradition of respect for the police and of co-operation with them. But England and America are alike in sharing the accusatorial, as opposed to the inquisitorial system; in both countries formal presentment and the privilege against self-incrimination are basic assumptions in the administration of justice. Hence we may expect to learn something from England's experience in the hope of moving toward the "order, dignity, urbanity, and dispatch" which seem to characterize her criminal law. See HOWARD, CRIMINAL JUSTICE IN ENGLAND (1931).

³⁶ 338 U. S. 49 (1949).

³⁷ *Ibid.* The Court pointed out that under the accusatorial system the accused is "protected by the disinterestedness of the judge in the presence of counsel. See Keedy, *The Preliminary Investigation of Crime in France*, 88 U. OF PA. L. REV., 692, 708-712 (1940)."

³⁸ *Ibid.*

³⁹ National Commission on Law Observance and Enforcement, *op. cit. supra* note 32, at 153.

frequent now, the three cases of last summer indicate that long detentions and protracted examinations are not yet unknown. It has often been argued that such practices are necessary to law enforcement.⁴⁰ But England and those American cities which are almost completely free of the third degree provide a powerful counterargument.⁴¹ What the third degree gains in the immediate case it seems to lose in the long run. When illegal procedures are adopted to achieve a worthy end, not only are the liberties of the individual infringed, but the police sacrifice some of the public's respect and willingness to co-operate. Secret detention naturally tempts to a distortion in Court of the facts of the detention. The end result is that the police are demoralized, and the public, suspecting abuse, fails to hold the police in the high esteem which proper enforcement of the law demands.⁴² It seems logical to assume, moreover, that the possibility of illegal detention and questioning discourages scientific investigation and leads to reliance on "unimaginative crude force."⁴³

It is not within the scope of this note to say what the precise limitations on pre-arraignment police practices should be. But surely detention on mere suspicion of from five to seven days, deprivation of counsel and friends, and intensive questioning through the detention are an unjustifiable invasion of the liberty of one who is presumed to be innocent. Furthermore such practices, it is believed, are harmful in the long run to the police departments and to the cause of efficient law enforcement. Civil suits and criminal prosecutions against the officers have proved ineffective.⁴⁴ The exclusion of confessions obtained by such extreme abuses seems a salutary development in criminal law.

JOHN P. KENNEDY, JR.

Domestic Relations—Child's Interest in the Parental Relation— Suit by Infant for Enticement of Mother

One of the ideas most often asserted and most generally accepted in the field of jurisprudence in recent years is that law should be squared with the knowledge developed by the social sciences.¹ This does not

⁴⁰ For an excellent recent statement of this argument see Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948).

⁴¹ See survey of third degree practices in fifteen representative cities, National Commission on Law Observance and Enforcement, *op. cit. supra* note 32, at 83-152, 188-189.

⁴² See *Chambers v. Florida*, 309 U. S. 227, 240 n. 15 (1940).

⁴³ *Haley v. Ohio*, 332 U. S. 596, 606 (1948) (Mr. Justice Frankfurter concurring). See National Commission on Law Observance and Enforcement, *op. cit. supra* note 32, at 187-189; 8 WIGMORE, EVIDENCE §2251.

For a delightful discussion of the whole problem of police abuse see Warner, *How Can the Third Degree Be Eliminated?*, 1 BILL OF RIGHTS REV. 24 (1940). Also McCormick, *Admissibility of Confessions*, 24 TEXAS L. REV. 239 (1946).

⁴⁴ ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 28-31, 66 (1947).

¹ POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 98 (1922); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 75 (1921).