Cornell Law Review

Volume 50
Issue 3 *Spring 1965*

Article 5

New Trial Procedure on Confessions in New York

Arthur J. Paone

THE NEW TRIAL PROCEDURE ON CONFESSIONS IN NEW YORK

Arthur J. Paone†

The United States Supreme Court last summer threw another chain around the reluctantly conforming apparatus of state criminal procedure. By finding yet another reason to review thousands of state convictions, this time in at least seventeen states and six federal circuits, the Court is continuing to push for uniformity of state and local criminal procedure to the evolving federal standard. Questions are being raised as to whether state and local courts are not already mere adjuncts to the federal system in trying criminal cases.

In *Jackson v. Denno*[1] the Supreme Court found unconstitutional the procedure by which New York managed confessions in criminal cases, a procedure it had only eleven years before thoroughly approved.[2] The *Jackson* case arose on a federal habeas corpus proceeding in a two year old conviction and the Court made it obvious that the new rule would be retroactive,[3] thus applying to thousands of convictions in the twenty-three jurisdictions following the New York procedure.[4] The New York Court of Appeals concluded as much in its conforming decree, *People v. Huntley*,[5] where it also expanded its coram nobis remedy, thereby retaining the minimal dignity of reviewing its own prior criminal convictions.[6]

According to pre-*Jackson* procedure in New York, the trial court had to hold a preliminary examination or *voir dire* if any question was raised concerning the voluntariness of a confession offered in evidence. The court was to exclude the confession only if as a matter of law the confession was involuntary, that is, under no circumstances could the confession be voluntary. If the court found that there was a disputable issue as to

† A.B. 1961, Georgetown University; LL.B. 1964, Cornell University. Member of the Board of Editors of the Cornell Law Quarterly. Law Assistant, N.Y. State Supreme Court, Appellate Division (3d Dep't). Member of the New York Bar.

1 378 U.S. 368 (1964).

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

3 Supra note 1, at 388-91; see id. at 406 (Black, J., dissenting); Redlich, "Constitutional Law, 1964 Survey of N.Y. Law," 16 Syracuse L. Rev. 211, 217 (1964).

4 For a listing of these jurisdictions, compare the Appendix to the majority opinion with the Appendix A-II and B-II of Justice Black's dissent in Jackson, supra note 1, at 396, 414, 421. See Siegel, "The Fallacies of Jackson v. Denno," 31 Brooklyn L. Rev. 50, 51-52 (1964).

5 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

6 The dissent in Huntley, written by Judge Van Voorhis and concurred in by Judge Scileppi, vigorously opposed the enlargement of the coram nobis remedy, arguing essentially that if the federal courts have created the new need for review, then the federal courts ought to do the reviewing themselves; New York has already given a complete remedy to every defendant. Id. at 78, 81, 204 N.E.2d at 184, 185, 255 N.Y.S.2d at 844, 846.

whether the confession was voluntary, it submitted the confession to the jury which would determine its voluntariness as a question of fact.[7]

In *Jackson* the United States Supreme Court, in holding the procedure a violation of the due process clause of the fourteenth amendment, maintained that such a procedure permits the jury to see every statement which is not involuntary as a matter of law—in effect, most confessions.[8] Even if the jury decided that the statement was involuntary, it may still in fact have considered the confession to be true, thus allowing the confession, though involuntary, to affect the jury's determination of guilt or innocence. The Court did not believe that the jury could remain unprejudiced in such a case because it would have already seen the disputed statement.[9]

The Court apparently approved two alternative procedures, which are known as the Orthodox or Wigmore method and the Massachusetts or Humane method.[10] Under the Orthodox method the trial court decides whether the confession is voluntary or not, and, if it is, the court submits the statement to the jury which determines its weight only (called at different times: credibility, truthfulness, accuracy).[11] Under the Massachusetts procedure, the court first determines for itself whether the statement is voluntary. Then, finding it voluntary, it submits the statement to the jury not only to determine its weight and accuracy, but to fully reconsider the question of voluntariness. The jury can, on the same facts, overrule the court's determination.[12]

I

Procedures for Analogous Issues

The question of the admissibility of a confession or of its voluntariness was similar to, but carefully distinguished from, other questions in New York procedure, namely, questions of fact, questions of law, preliminary questions of fact, questions of admissibility of other evidence, and the procedure established by the legislature on illegally obtained evidence.

Generally, a question of fact is for the jury to determine; a question of law, for the judge; preliminary questions of fact, for the judge; and the

[7] E.g., People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951); People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928); People v. Doran, 246 N.Y. 409, 159 N.E. 379 (1927).

[8] Jackson v. Denno, 378 U.S. 368, 381 (1964).

[9] Id. at 381-84, 386; see Meltzer, "Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury," 21 U. Chi. L. Rev. 317 (1954). The court relied much upon Morgan, "Functions of Judge and Jury in the Determination of Preliminary Questions of Fact," 43 Harv. L. Rev. 165 (1929).

[10] Jackson v. Denno, supra note 8, at 378 & n.8.

[11] 3 Wigmore, Evidence § 861 (3d ed. 1940).

[12] Jackson v. Denno, supra note 8; Commonwealth v. Lee, 324 Mass. 714, 88 N.E.2d 713 (1949); Wigmore, supra note 11, at § 861.

admissibility of evidence or the competency of witnesses for the judge.[13] In the matter of illegally obtained evidence, the legislature reserves to the judge the primary role on a motion to suppress.[14]

The procedure formerly employed by New York and that presently used by Massachusetts-type jurisdictions for resolving the voluntariness issue are unlike any of the above situations. Under either procedure, where the voluntariness of a confession was in question, both the judge and the jury played an essential, though not clearly defined, part. (Under the Massachusetts procedure the jury has a less prominent role, but still equal to that of the judge.) The Orthodox method for determining the voluntariness of a confession, however, bears a significant resemblance to the procedure for determining the admissibility of ordinary evidence. When objection is made to certain evidence or to the competency of a witness, the judge, who may conduct a *voir dire* or preliminary hearing, determines once and for all that the evidence is admissible or that the witness is competent.[15] The jury does not review this question, though it of course still must determine whether the evidence thereby admitted is true or accurate. The jury determines weight or credibility. On the confession issue the division of responsibility is not as clear-cut in the New York or Massachusetts procedures. In the former New York and the present Massachusetts procedures the jury would determine both questions of voluntariness and truthfulness, though in the Massachusetts procedure the judge must have previously determined that the confession was voluntary. Under the Orthodox method, however, the procedure is more familiar and regular. It is the usual procedure of admissibility. The judge, by once and for all determining that a confession is voluntary, admits the confession and the jury thereafter performs its familiar function of determining the credibility or weight to be given to the evidence thus admitted.[16]

Another complicating factor distinguishing the former New York confession procedure from the other situations mentioned is that up to the present it appears that New York required the jury to be present during the *voir dire*.[17] In all the other situations, including both civil and criminal cases, where the judge takes testimony or other evidence to help him determine a question of fact or admissibility, he has discretion to al-

---

[13] N.Y. Code Crim. Proc. §§ 149, 419-20; 6 Carmody-Wait, New York Practice §§ 72, 73, at 512-13 (1953); Fisch, New York Evidence § 26 (1959); Richardson, Evidence §§ 114-18 (9th ed. 1964). See generally, Morgan, supra note 9.

[14] N.Y. Code Crim. Proc. §§ 813-c to -e (Supp. 1964). See discussion infra.

[15] See note 13 supra; 2 Wigmore, supra note 11, § 497(c).

[16] See notes 10-11 supra.

[17] People v. Randazzio, 194 N.Y. 147, 158, 87 N.E. 112, 116-17 (1909) (dictum); see People v. Brasch, 193 N.Y. 46, 54, 85 N.E. 809, 812 (1908).

low the jury to remain or to excuse it.[18] This issue will be discussed below in connection with recommended future procedure.

II

THE ESSENCE OF *Jackson v. Denno*

The *Jackson* decision has been severely attacked for not only unnecessarily raising a simple procedural matter which was not essentially unfair to the heights of a due process question, but also for sanctioning a procedure (Massachusetts) which is different from the one condemned in semantics alone.[19] Mr. Justice Black in his dissent also viewed this decision as an attack upon the guarantee of a trial by jury. The decision, according to Mr. Justice Black, downgrades the jury and throws doubt upon its reliability as a finder of fact.[20]

That many cases decided under the former New York type of procedure are indistinguishable from cases decided in Massachusetts-type jurisdictions[21] is no reason, however, to conclude that *Jackson* does not state a sound and distinguishable rule. The gist of *Jackson*, in the opinion of this writer, can be summed up in the word "separate." As long as someone or some distinct body other than the trial jury has made an independent determination, resolved fact issues, and concluded that the confession is voluntary, then the possibility of prejudice to the accused has been removed. Even should the jury confuse the question of voluntariness with truthfulness under the Massachusetts procedure where it fully redetermines the question of voluntariness, there has still been an independent factual determination beforehand that the confession was voluntary.

III

QUESTION ANSWERED FOR NEW YORK BY *Huntley*

Some of the procedural questions left open by *Jackson* were answered by the New York conforming decree of *People v. Huntley*, but only "for the present and tentatively . . . pending further development by the courts or by the Legislature, or both."[22] The defendant in *Huntley* was denied leave to appeal by the Court of Appeals in April of 1962. After

---

[18] N.Y. Rules Civ. Prac. § 164, abrogated by N.Y. Civ. Prac. Law § 10002 (no similar provision exists in the CPLR, probably because the procedure is unquestioned); Fisch, supra note 13, § 22.

[19] Jackson v. Denno, 378 U.S. 368, 404-05 (1964) (Black, J., dissenting); id. at 436-38 (Harlan, J., dissenting); People v. Huntley, 15 N.Y.2d 72, 78, 204 N.E.2d 179, 184, 255 N.Y.S.2d 838, 844 (1965) (dissent); Siegel, supra note 4.

[20] Jackson v. Denno, supra note 19, at 401, 405.

[21] Compare the New York type procedure and charge in Stein v. New York, 346 U.S. 156, 173-74 (1953), with cases in Massachusetts type jurisdictions, e.g., Smith v. United States, 268 F.2d 416, 420-21 (9th Cir. 1959); People v. Appleton, 152 Cal. App. 2d 235, 313 P.2d 154, 156-57 (1957).

[22] People v. Huntley, supra note 19, at 74, 204 N.E.2d at 181, 255 N.Y.S.2d at 840.

Jackson came down in June of 1964, Huntley sought a reconsideration of his application for leave to appeal. The Court of Appeals held the *Jackson* rule to be retroactive and applicable to every prior conviction.[23] It distinguished *People v. Muller*[24] which denied reconsideration in a similar case on an illegally obtained evidence or *Mapp v. Ohio*[25] question. The court further overruled as much of *People v. Hovnanian*[26] as was contrary. The Second Department in *Hovnanian* had held in part that *Jackson* did not apply retroactively to a case which had exhausted its regular appellate remedies. According to *Huntley*, the *Jackson* rule is to be applied to cases in or out of the normal appellate process.

For those prisoners who have exhausted their normal appellate remedies, the procedure to be used is coram nobis.[27] This in fact represents a serious extension of the coram nobis remedy, which technically had been limited to matters not in the record and not capable of being raised in the normal appellate process.[28] Issues such as lack of counsel at the pretrial stage could not be raised on coram nobis because defendant's trial lawyer could have raised it at trial or on appeal.[29] The court rejected use of habeas corpus because of the requirement in section 7004(c) of the CPLR that the writ be returnable in the county where the person is being detained. The court preferred these cases to be heard in the counties of the original trial and preferably by the same judge who presided at the trial. Notice was taken, however, of the possible enlargement of the habeas corpus remedy under the CPLR.[30]

The procedure for handling these cases on appeal or on coram nobis where the trial had been under the former New York rule is carefully laid out in *Huntley* and few questions should arise on that procedure.[31] As to future trials, the Court of Appeals chose the Massachusetts procedure over the Orthodox.[32] The reasons given by the court for this choice are (1) that the New York constitutional guarantee of trial by jury requires the Massachusetts procedure and (2) that giving the defendant two chances on the question of voluntariness, before both judge and jury, is

---

[23] Id. at 77, 204 N.E.2d at 182, 255 N.Y.S.2d at 842.
[24] 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421 (1962), cert. denied, 371 U.S. 850 (1963).
[25] 367 U.S. 643 (1961).
[26] 22 App. Div. 2d 686, 253 N.Y.S.2d 241 (2d Dep't 1964).
[27] People v. Huntley, 15 N.Y.2d 72, 76-77, 204 N.E.2d 179, 182-83, 255 N.Y.S.2d 838, 842-43 (1965).
[28] Frank, Coram Nobis 96 (1953).
[29] People v. Howard, 12 N.Y.2d 65, 187 N.E.2d 113, 236 N.Y.S.2d 39 (1962).
[30] People v. Huntley, supra note 27; N.Y. Civ. Prac. Law §§ 7002-03.
[31] People v. Huntley, supra note 27, at 76-78, 204 N.E.2d at 182-83, 255 N.Y.S.2d at 842-43.
[32] Id. at 78, 202 N.E.2d at 183, 255 N.Y.S.2d at 843.

a more humane procedure.[33] The judge is to determine voluntariness beyond a reasonable doubt and make express findings of fact and conclusions of law. The People have the burden of proof to prove beyond a reasonable doubt that the confession was voluntary. The confession is then to be submitted to the jury which fully redetermines the question of voluntariness on the same facts.[34]

The court did not go into great detail; however, it ought not to have been any more detailed than necessary in such a pioneering decision in establishing the method for properly raising and hearing the voluntariness question. The court did rule that the prosecutor before trial is to notify the defense whether any alleged confession or admission will be offered at trial. The defense, if it intends to question the voluntariness of the confession or admission must "notify the prosecutor of a desire by the defense of a preliminary hearing on such issue (cf. Code Crim. Proc., § 813-c)."[35]

IV

Parallel Procedure: Suppression of Illegally Obtained Evidence

Thus the Court of Appeals cryptically pointed to the kind of procedure it would probably like to see used, or at least tested. The court apparently hopes that trial courts will by hit and miss decisions send up enough interpretations of this directive to enable it to fashion from them a fully satisfactory procedure. The reference to section 813-c of the Code of Criminal Procedure is to the pretrial motion for suppression of illegally obtained evidence which the legislature devised to comply with the mandate of *Mapp v. Ohio*.[36] Using this small but significant lead as a starting point, trial courts, district attorneys, and defense counsels can with some measure of safety, develop their management of the voluntariness issue along the outline suggested by the various statutory and case-law rules on the suppression of illegally obtained evidence.[37] By this simple and organized device, the questions left unanswered by *Huntley* can be answered with something more than pure speculation, though of course no more than "for the present and tentatively."[38]

---

[33] Ibid.

[34] People v. Huntley, 15 N.Y.2d 72, 77-78, 204 N.E.2d 179, 182-83, 255 N.Y.S.2d 838, 843 (1965).

[35] Id. at 78, 202 N.E.2d at 183, 255 N.Y.S.2d at 844.

[36] 367 U.S. 643 (1961).

[37] Previous to Huntley some trial courts had ruled that the pretrial procedure of N.Y. Code Crim. Proc. § 813-c could not be used as a device to obtain, before trial, rulings on the admissibility of evidence not obtained by search or seizure. People v. Mitchell, 41 Misc. 2d 839, 247 N.Y.S.2d 16 (Sup. Ct. N.Y. County 1963); People v. Steenstra-Toussaint, 40 Misc. 2d 43, 242 N.Y.S.2d 729 (Sup. Ct. Queens County 1963). But see People v. Logan, 39 Misc. 2d 593, 241 N.Y.S.2d 344 (Sup. Ct. Queens County 1963).

[38] Some rules, however, have already been determined differently, e.g., burden of proof

The defense, upon being informed by the People that a confession or admission may be introduced as evidence at trial should, with reasonable diligence, if it intends to raise a question of voluntariness, make a motion in the court having jurisdiction of the indictment, information, complaint, or charge prior to the commencement of the trial to determine the voluntariness of the alleged confession or statement.[39] The objection to a confession would be waived unless raised before commencement of the trial[40] except where (1) defendant was unaware of the existence of a confession or statement, or (2) defendant, though aware of the confession before trial, had obtained information that it was coerced only after trial has begun, or (3) the defendant had not had adequate time or opportunity to make the motion before trial.[41] In only these situations should defendant be allowed to raise the question for the first time at trial.[42]

The hearing should be held by the court without a jury, whether on pretrial motion or on motion during trial. If the motion is made at trial the jury is to be excused while the court hears evidence on the motion as it would on a pretrial motion.[43] A hearing on a pretrial motion should be completed before trial begins, except in cases of misdemeanors and offenses where the court may entertain such motions during the trial, according to the rule of the court or the discretion of the judge before whom the motion is made.[44] Unless it is established that defendant has obtained additional evidence of coercion after a pretrial motion has been determined, the determination of such motion should be binding on the trial court.[45]

The hearing on a confession's voluntariness, whether pretrial or at trial, should be a quasi-formal hearing, that is, a record should be kept[46] and the judge should clearly express therein his resolution of the issues of fact[47] and his determination that the confession was involuntary or that

---

is on the People in the voluntariness question, but in search and seizure it is on defendant to sustain his claim of illegally obtained evidence. See, e.g., People v. Boyle, 39 Misc. 2d 917, 242 N.Y.S.2d 90 (City Ct. Port Jervis 1963).

39 Cf. N.Y. Code Crim. Proc. §§ 813-d(1), 813-e (Supp. 1964). See generally Fisch, supra note 13, chs. 20, 25 (Supp. 1964); Richardson, supra note 13, ch. 6.

40 Cf. N.Y. Code Crim. Proc. §§ 813-d(4) (Supp. 1964).

41 Cf. N.Y. Code Crim. Proc. § 813-d(1) (Supp. 1964).

42 Cf. People v. McCall, 19 App. Div. 2d 630, 241 N.Y.S.2d 439 (2d Dep't 1963). This rule, of course, should not be strictly enforced until defense counsel have become familiar with it or until it is adopted by some court in proper circumstances.

43 Cf. N.Y. Code Crim. Proc. § 813-d(3) (Supp. 1964).

44 Ibid.

45 Cf. N.Y. Code Crim. Proc. § 813-d(2) (Supp. 1964).

46 Cf. People v. Entrialgo, 19 App. Div. 2d 509, 245 N.Y.S.2d 850 (2d Dep't 1963); People v. Del Giorno, 19 App. Div. 2d 849, 243 N.Y.S.2d 1010 (4th Dep't 1963).

47 People v. Huntley, 15 N.Y.2d 72, 77-78, 204 N.E.2d 179, 183, 255 N.Y.S.2d 838, 843 (1965); cf. People v. Lombardi, 18 App. Div. 2d 177, 239 N.Y.S.2d 161 (2d Dep't), aff'd, 13 N.Y.2d 1014, 195 N.E.2d 306, 245 N.Y.S.2d 595 (1963).

it was voluntary beyond a reasonable doubt.[48] But the usual rules of evidence, such as the hearsay rule, should not be strictly applied and the judge should be given wide discretion in conducting the hearing.[49]

Defendant should have no right to appeal from a determination finding the confession voluntary,[50] but can have it reviewed on the regular appeal from a judgment of conviction.[51] The People, however, should be allowed in certain cases to appeal directly from a pretrial order finding the confession involuntary; for example, where there would be no case against the defendant without the confession.[52]

This motion should not be allowed to prevent an allegedly involuntary confession from being presented to the grand jury, since should an indictment be returned, such evidence may be challenged by the pretrial motion available to defendant by the suggested procedure.[53]

A finding that a confession is involuntary should also result in the exclusion of the "fruits" of the confession.[54] Nor would there be a requirement of standing, but any person who has reasonable grounds for believing that a confession or any evidence obtained by the help of that confession is to be used against him should be able to make a pretrial motion to determine its voluntariness.[55]

The philosophy, common sense, and practical reasons which caused the above rules to be applied in motions to suppress illegally obtained evidence are as compelling in the area of involuntary confessions.[56] The adoption of these rules would not only be appropriate for the confession procedure, but would also offer some degree of symmetry and familiarity to the courts and its officers who are burdened enough as it is with

---

[48] People v. Huntley, supra note 47.

[49] Cf. People v. Coffey, 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721, remittitur amended, 13 N.Y.2d 726, 191 N.E.2d 910, 241 N.Y.S.2d 856 (1963).

[50] Cf. People v. Oliver, 38 Misc. 2d 320, 238 N.Y.S.2d 220 (Oneida County Ct. 1963).

[51] Ibid. See, e.g., People v. Lopez, 19 App. Div. 2d 809, 243 N.Y.S.2d 333 (1st Dep't 1963).

[52] Cf. N.Y. Code Crim. Proc. § 518 (Supp. 1964).

[53] Cf. Hochhauser v. O'Connor, 33 Misc. 2d 92, 223 N.Y.S.2d 888 (Sup. Ct. Queens County 1961); People v. Maiorello, 31 Misc. 2d 981, 222 N.Y.S.2d 53 (Ct. Gen. Sess. 1961).

[54] Cf. People v. Rodriguez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962).

[55] Cf. People v. Smith, 35 Misc. 2d 533, 230 N.Y.S.2d 894 (Kings County Ct. 1962); People v. Cocchiara, 31 Misc. 2d 495, 221 N.Y.S.2d 856 (Ct. Gen. Sess. 1961); Richardson, Evidence, supra note 13, § 145, at 117-18. California follows this liberal rule on motion to suppress illegally obtained evidence. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

[56] I do not think, however, that the federal rule in Walder v. United States, 347 U.S. 62 (1954), which allows evidence obtained by illegal search and seizure to be admitted to impeach defendant should be followed. Such a rule in the case of confessions would, by informing the jury of the confession, defeat much of the object sought by excluding involuntary confessions.

I also believe that the rule of People v. Trybus, 219 N.Y. 18, 113 N.E.2d 538 (1916), which permits a defendant who testifies on the voluntariness issue to be cross examined on the merits of the case, should not be followed. This rule will be less damaging today since preliminary hearings will probably be had outside the hearing of the jury, but it still is a hindrance to the defendant. See Richardson, supra note 13, § 334-b, at 319.

the ever-increasing constitutional mandates being issued by the energetic United States Supreme Court.

VI

MASSACHUSETTS VERSUS ORTHODOX PROCEDURE

The main reason given by the New York Court of Appeals in *Huntley* for its preference for the Massachusetts method, namely, the New York constitutional guarantee of trial by jury,[57] is somewhat confusing. First of all, it is evident that the better procedure would be to exclude the jury during the preliminary hearing.[58] Though New York courts have until recently assumed that juries had to be present during the preliminary hearing on the voluntariness of a confession,[59] no case has held this to be a requirement, and certainly none have held it to be constitutionally required.[60] On the other hand, when objections, including constitutional ones, were made against excluding the jury from a preliminary hearing on the question of the competency of a *dying declaration*, the courts properly overruled such objections pointing out that juries might be prejudiced if they heard all the facts surrounding the declaration, and that the jury would be confused by all the preliminary questions they would have to decide.[61] The courts distinguished the question of the admissibility of a *dying declaration* from the admissibility of a confession on the ground that in the latter situation a jury had to be present since it had the sole responsibility of determining whether the confession was voluntary.[62]

After *Jackson*, the jury no longer has sole responsibility for determining the voluntariness of a confession, and that issue can be treated in the same manner as is the admissibility of a dying declaration. The judge, by

---

[57] N.Y. Const. art. I, § 2.

[58] Nearly all states excuse the jury during the preliminary hearing and it would probably be held error if the jury were present during a voir dire after which the court found the confession involuntary. Annot., 148 A.L.R. 546, 549 (1944). But several states and federal circuits under both the Orthodox and Massachusetts procedures have stated that it is not error to have the jury present. E.g., Andrews v. United States, 309 F.2d 127, 129 (5th Cir. 1962), cert. denied, 372 U.S. 946 (1963) (Orthodox or Massachusetts); Smith v. United States, 268 F.2d 416, 420-21 (9th Cir. 1959); Denny v. United States, 151 F.2d 828, 833 (4th Cir. 1945), cert. denied, 327 U.S. 777 (1946); People v. Childers, 315 P.2d 480, 482 (Cal. Dist. Ct. App. 1957); Tipton v. State, 111 Fla. 830, 150 So. 243 (1933); State v. Fiumara, 110 N.J.L. 164, 164 Atl. 490, 491 (Ct. Err. & App. 1933); Jamerson v. State, 47 Okla. Crim. 112, 287 Pac. 775, 776 (1930).

[59] People v. DePinna, 18 App. Div. 2d 681 (2d Dep't 1962) (memorandum decision). Trial courts have, since Huntley, been hearing pretrial motions on voluntariness without juries.

[60] People v. Brasch, 193 N.Y. 46, 54, 85 N.E.2d 809, 812 (1908) (held permissible to have jury present during voir dire); People v. Randazzio, 194 N.Y. 147, 158, 87 N.E. 112, 116-17 (1909) (in dictum stated that the jury was required to be present).

[61] E.g., People v. Smith, 104 N.Y. 491, 10 N.E. 873 (1887) (not error to either allow jury to be present or to excuse it); People v. Becker, 215 N.Y. 126, 109 N.E. 127 (1915).

[62] Ibid. See People v. Marks, 6 N.Y.2d 67, 75-76, 160 N.E.2d 26, 30-31, 188 N.Y.S.2d 465, 470-71 (1959).

himself, once and for all may determine the confession's voluntariness and then, if voluntary, submits it to the jury who determines its weight—in short, the Orthodox method. The admission of a dying declaration may be as damaging as the admission of a confession, yet it has been held that sole determination by the judge of the admissibility of a dying declaration is not a violation of the guarantee of trial by jury.[63]

Furthermore, the twenty-three American jurisdictions which employ the Orthodox method[64]also have constitutional guarantees of trial by jury,[65] yet have no problem reconciling such a guarantee with the Orthodox method. It is difficult to understand why the Court of Appeals should have such a problem.

As a practical matter also, Mr. Justice Black made a very convincing observation when he stated that the jury in a Massachusetts-type jurisdiction which receives the confession from the judge with his "imprimatur" of voluntariness on it, is hardly in any different position from the jury in an Orthodox type state which receives a confession with a "final" finding of voluntariness. Each in effect has only the weight or credibility of the confession to determine.[66]

With such little difference between the Massachusetts and Orthodox procedures, why should the Orthodox be adopted in New York? It appears to this writer that the use of the Massachusetts procedure in New York would in effect vitiate the purpose of *Jackson.* The gist of *Jackson* was to have a separate and independent factual determination of the voluntariness question by a person or body other than the trial jury. The procedure which New York followed before *Jackson* is very similar to the Massachusetts procedure.[67] The only adjustments New York trial courts need to make are: (1) to state for the record on admitting a confession that it is voluntary as a matter of fact, the fact issues involved having been decided against the accused and (2) perhaps to exclude the jury. The inevitable temptation which this hardly significant change has for the trial judge is obvious: he will employ the same standards he used before *Jackson* in determining admissibility and leave the real burden of deciding whether a confession is voluntary or not upon the jury as previously. Thus, instead of actually resolving factual disputes in the evidence

---

63 Ibid.

64 For listing and cases, see Appendix of majority and Appendices A-I and B-I of Justice Black in Jackson v. Denno, 378 U.S. 368, 369, 411, 421 (1924); Siegel, "The Fallacies of Jackson v. Denno," 31 Brooklyn L. Rev. 50, 52 n.9 (1964).

65 2 Cooley, Constitutional Limitations 864-65 & n.1 (8th ed. 1927); Columbia University Legislative Drafting Research Fund, Index Digest of State Constitution 579 (1959).

66 Jackson v. Denno, supra note 64, at 404-05 (Black, J., dissenting).

67 Justice Harlan in dissent in Jackson, as did Justice Black, supra note 64, saw the difference between the Massachusetts procedure and the New York procedure as a matter of semantics only. Id. at 436-38.

on voluntariness one way or the other, he will pass the question on to the jury whenever a dispute arises and the confession was not obviously involuntary. If New York courts are merely asked to shift slightly so as to adjust to the Massachusetts procedure, then the New York Court of Appeals will probably have ostensibly complied with *Jackson* while avoiding its mandate.

A further reason for adopting the Orthodox method is that there will be less doubt as to the applicability of the rules described above which are presently employed in the procedure for handling the suppression of illegally obtained evidence where the judge has sole responsibility.

In summary, while the New York Court of Appeals in *Huntley* has established some rules for handling the *Jackson*-voluntariness question, trial courts and attorneys, provided the legislature does not act first, should adopt, for the sake of symmetry and familiarity, the rules established for the suppression of illegally obtained evidence, except where contrary rules are already in force. Furthermore, the Court of Appeals should reconsider its tentative adoption of the Massachusetts procedure and instead adopt the Orthodox procedure which will assure compliance with the essential rule of *Jackson* and better allow familiar procedures to be employed.