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Validity of the Admission-Confession Distinction for Purposes of Admissibility

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Validity of the Admission-Confession Distinction for Purposes of Admissibility

An admission might very well be called a confession's little brother. A confession includes an acknowledgment of all of the essential elements in the crime charged and is generally defined as an acknowledgment of guilt.[1] Admissions, however, are merely acknowledgments of one or more facts which fall short of supplying all of the essential elements necessary to constitute the offense charged. Accordingly, an admission, if it is to be distinguished from a confession, must be something short of an acknowledgment of guilt.[2]

In determining the admissibility of confessions, the courts have uniformly held that confessions induced by force or threat are inadmissible in evidence,[3] and where the accused asserts such improper inducement, he is entitled to a preliminary hearing on that issue.[4] There is, however, no such unanimity of opinion with respect to admissions.

One line of authority places an admission on a plane with a confession, and the safeguards relating to the voluntary character of confessions are considered equally applicable to admissions.[5] In these jurisdictions, if the accused alleges that his admissions were the result of improper inducement, he is entitled to a preliminary hearing on that issue. The other line of authority, however, does not apply such a test to the mere admissions of an accused and permits the introduction of admissions in evidence without a preliminary hearing—in other words,

1 State v. Novak, 109 Ia. 717, 79 N. W. 465 (1899); McCloud v. State 166 Ga. 436, 143 S. E. 538 (1928); People v. Wynecoop, 359 Ill. 124, 194 N. E. 276 (1935).

2 3 Wigmore Evidence (3rd Ed. 1940) §821 at 239. "A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offense has been committed and does not apply to a mere statement or declaration of an independent fact from which guilt may be inferred." *Accord:* State v. Porter, 32 Ore. 135, 48 Pac. 964 (1897); Chappell v. State, 71 Ga. App. 147, 30 S. E. (2d) 289 (1944).

3 Bram v. United States, 168 U. S. 532 (1897); McNabb v. United States, 321 U. S. 332 (1943); Ford v. State, 181 Md. 303, 29 Atl. (2d) 835 (1943). The scope of this note is limited to a consideration of extra-judicial confessions and admissions, *i.e.*, statements made outside of court.

4 Bram v. United States, 168 U. S. 532 (1897); Rossi v. United States (C.C.A. 9th, 1922), 278 Fed. 349; Winchester v. State, 163 Miss. 462, 142 So. 454 (1932). As to who has the burden of proving the confession voluntary, see 3 Wigmore, §861 *et seq.* and annotation, Voluntariness of a Confession Admitted by Court as Question for Jury (1935) 85 A. L. R. 870.

5 Ashcraft v. Tennessee, 327 U. S. 274 (1945); Gullota v. United States (C.C.A. 8th, 1940), 113 F. (2d) 683; Sykes v. United States, 143 F. (2d) 140 (1944); McGuire v. State, 299 Ala. 315, 194 So. 815 (1940); Louette v. State, 152 Fla. 495, 12 So. (2d) 168 (1943). And for cases which by inference also hold to the same effect, see: Bram v. United States, 168 U. S. 532, 562 (1897); Chambers v. Florida, 309 U. S. 227 (1940); McNabb v. United States, 321 U. S. 332 (1943); State v. Durkee, 68 R. I. 73, 26 Atl. (2d) 604 (1942).

without a determination of their trustworthy or voluntary character.[6] Thus, in the latter jurisdictions, the distinction between an admission and a confession becomes highly significant, for on that distinction hinges the right of the accused to a preliminary hearing concerning the admissibility of statements obtained from him by improper police interrogation methods.[7]

The validity of the admission-confession distinction as a test for determining the admissibility of extra-judicial statements of the accused can best be evaluated by an inquiry into the purpose of such a classification and the policies behind the rule which subjects confessions to a preliminary hearing before admitting them in evidence. Clearly, if admissions are within the scope and policy of the "confession rule," no such distinction can justifiably be maintained.[8]

The basis of the admission-confession distinction can be found in the peculiar rules which grew up with regard to the admissibility of confessions. In the early common law periods there were no restrictions at all upon the reception in evidence of admissions or confessions; but, as the courts came to recognize that confessions induced by force or threat might be untrustworthy evidence, the rule of exclusion developed.[9] This rule, broadly stated, is that no confession shall be admissible as evidence unless shown to be voluntarily rendered or free from any inducement which may have made the confession untrustworthy as evidence.[10] Its purpose was originally to prevent the conviction of the innocent as founded upon a false confession,[11] and in accordance with that purpose, the necessity of holding a preliminary hearing to test the trustworthy character of a defendant's confession became apparent. For, suppose that a confession were admitted in evidence and during the trial it was shown to be the result of coercion. Even though the judge might instruct the jury to disregard the confession, it is doubtful whether the jury could or would forget it. Realizing then, the inherent prejudice a coerced and untrustworthy confession might have on the right of the accused to a fair trial, the courts have uniformly required

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6 Commonwealth v. Haywood, 247 Mass. 16, 141 N. E. 371 (1923); State v. Linsey, 26 N. M. 526, 194 Pac. 877 (1921); People v. Fowler, 178 Cal. 657, 174 Pac. 892 (1918); State v. Garvey, 45 Idaho 768, 265 Pac. 628 (1928); State v. Gibson, 69 N. D. 70, 284 N. W. 209 (1939).

7 2 Wharton Criminal Evidence (11th Ed. 1935) §646.

8 Problems which have been dependent upon defining with great care the elements of a confession and have, as a result, applied the admission-confession distinction are those which involve the judge's charge to the jury as to whether defendant's statements are a confession or an admission, Owens v. State, 120 Ga. 296, 48 S. E. 21 (1904); Moore v. State, 220 Wis. 404, 265 N. W. 10 (1936); requirements of corroboration of a confession in proving corpus delicti, United States v. Warsower (C.C.A. 2d, 1940), 113 F. (2d) 100; State v. McLain, 208 Minn. 91, 292 N. W. 753 (1940); the admissibility of statements of the accused in a criminal case, with or without a preliminary hearing. (Herein considered.) It is this author's view that only one of these problems need depend upon a strict definition of a confession.

9 3 Wigmore Evidence (3rd Ed. 1940) §§816, 817, and 821 *et seq.*

10 Professor Inbau points out that "while legal scholars differ somewhat as to which is the historically accurate test—the test of voluntariness or the test of trustworthiness—as a practical matter it would seem to make little difference which of the tests is applied. For example, the type of force, threat, or promise that would be considered sufficient to render a confession involuntary (by a court applying the test of voluntariness) would in all probability be declared sufficient to render a confession untrustworthy (by a court applying the test of trustworthiness)—and *vice versa.*" Inbau, Lie Detection and Criminal Interrogation (2nd Ed. 1948) 150.

11 *Supra,* note 9.

a preliminary hearing to determine the trustworthy character of all confessions.[12] If the judge decides the confession is a result of improper inducement, the jury will never hear a word of it.

Admissions were not originally subject to the confession rule, both because their character as substantive evidence against the accused was significantly less[13] and because it was thought that there was less chance for mere admissions to be untrustworthy.[14] This, however, is not necessarily true and depends largely upon where the line is drawn between an admission and a confession. It is very probable that the risks of testimonial untrustworthiness are nearly as great in the case of an admission of some *material* fact as they are in the case of confessions which embody complete acknowledgments of guilt.[15] Wigmore recognized this when he defined a confession as "an acknowledgment of the truth of the guilty fact charged or some essential part of it."[16] By expanding the definition of a confession from its generally accepted meaning as an acknowledgment of guilt to an acknowledgment of some essential part of it, Wigmore hoped to bring within the scope of the confession rule all statements which would raise a reasonable inference of untrustworthiness. Some courts reached a like result by merely holding that all *incriminating* admissions, as distinguished from an admission of subordinate fact, would be subject to the same tests of admissibility as a full confession.[17] These authorities were clearly correct, for it followed logically that if statements of an incriminatory nature, i.e., statements admitting a material fact or some essential element of the crime charged, were admitted in evidence without a preliminary hearing, the prejudicial effect upon the accused would be nearly as great as in the case of a confession. This is so even though the judge, upon the finding of improper inducement, instructed the jury to disregard such statements; for, as with confessions, a great deal of the harm would already have been done.

Admissions of *subordinate facts* were excluded from the necessity of a preliminary hearing by Wigmore and other authorities on two theories. The first, based upon an assumption of trustworthiness, reasoned that the accused would necessarily be unable to purchase freedom from

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12 *Supra*, note 5.

13 State v. Guie, 56 Mont. 485, 186 Pac. 329 (1919) "The distinction between a confession and an admission is not a technical refinement, but based upon the substantive differences of the character of evidence deduced from each."

14 3 Wigmore Evidence §821 at page 243. "An acknowledgment of a subordinate fact, not essential to the crime charged, is not a confession; because the supposed ground of untrustworthiness of confessions is that a strong motive impels the accused to expose and declare his guilt as the price of purchasing immunity from present pain or subsequent punishment; and thus by hypothesis, there must be some quality of guilt in the fact acknowledged. Confessions are thus only one species of admissions, and all other admissions than those which directly touch upon the fact of guilt are without the peculiar rules affecting the use of confessions." See also, 2 Wharton Criminal Evidence (11th Ed. 1935) §580.

15 Morgan, Admissions (1937), 12 Wash. L. Rev. 180 at 190.

16 3 Wigmore Evidence (3rd Ed. 1940) §821 at page 238.

17 People v. Heide, 302 Ill. 624, 135 N.E. 77 (1922); Winchester v. State, 163 Miss. 462, 142 So. 454 (1932); Louette v. State, 152 Fla. 495, 12 So. (2d) 168 at 172 (1943). "The term 'confession' does not apply to a mere admission or declaration of an independent fact which tends to prove guilt . . . but when an admission of an incriminating fact, or fact from which guilt may be inferred, is sought to be introduced, the rules governing the admissibility thereof are similar to the rules governing the admissibility of a confession."

coercion or other improper inducement by a mere admission of independent facts that do not of themselves directly touch upon some essential element of guilt.[18] The second theory reasoned that even though a false or doubtful admission of subordinate fact were admitted in evidence, the substantive weight of such an admission would be so small that the accused might still receive a fair and impartial trial if, upon a subsequent finding of improper inducement, the judge should instruct the jury to disregard it. This was the type of evidence which authorities believed the jury could, in fact, forget.[19] Accordingly, while the dangers that the accused may not receive a fair trial if an admission of subordinate fact is admitted without a preliminary hearing are not so great, it would seem clear that the courts are relying on a very thin and elusive distinction in applying the rule that confessions, as distinguished from admissions, must be proven trustworthy at a preliminary hearing before admissible as evidence. For who is to foretell which piece of evidence will sway the jury one way or another?

By failing to realize that the trustworthy policy of the confession rule is aimed not alone at the exclusion of confessions improperly induced but also at *any statement* which, if coerced, would have a prejudicial effect on the right of the accused to a fair trial,[20] many statements, though admissions in a proper sense (i.e., statements short of a complete acknowledgment of guilt), have been admitted without a preliminary hearing in spite of their inherent qualities of untrustworthiness. Examples of this are numerous.[21] For instance, a Massachusetts court held that a statement by an accused, indicted for adultery, that he was guilty as charged was not to be treated as a confession but as an admission when the statement was offered against him in a later prosecution charging the same act of intercourse as incest.[22] As a result of this ruling, the defendant was not entitled to a preliminary hearing on his claim that the statement was obtained under circumstances which would have made a confession inadmissible. And in a New Mexico case[23] the defendant,

18 *Supra,* note 14.

19 A perfect example of this is seen in Herring v. State, 242 Ala. 85, 5 So. (2d) 104 (1941). In this case the defendant objected to the introduction of certain statements without a preliminary hearing. The statements were given in answer to a question asking when he (the defendant) last put on his "drawers." The defendant replied, "Friday night," and subsequent scientific examination of these "drawers" made his statements highly incriminatory. Few authorities, however, would say that an admission of this type of evidence, even though it had been proven the result of coercion during the trial, would seriously impair the defendant's right to a fair trial if the judge had made proper instructions to the jury to disregard it.

20 McCormick, The Scope of Privilege in the Law of Evidence (1938) 16 Texas L. Rev. 447, 452-457; McCormick, Some Problems and Developments in the Admissibility of Confessions (1946) 24 Texas L. Rev. 239.

21 Note, Involuntary Admissions Are Not Competent Evidence, 19 Temple L. Q. 485, where the author sets out many cases which demonstrate the failure of the courts to recognize the trustworthy policy of the confession rule.

22 Here, since all that was necessary to sustain a conviction was the showing of the relationship necessary to constitute the crime of incest, there should be little reason to treat it differently than a confession. In A. L. I. A Model Code of Evidence, Rule 505, p. 240, it is stated in reference to the above case, "With all such holdings this rule is in conflict." See Note (1946) 19 Temple L. Q. 485, Involuntary Admissions Are Not Competent Evidence.

23 State v. Linsey, 26 N. M. 526, 194 Pac. 877 (1921). The court also made the broad ruling that an admission is always receivable in evidence without preliminary proof that it was made voluntarily. How could a ruling like that possibly satisfy the policy of the confession rule in all cases, whether the policy of the confession rule is based on a "voluntary in fact" principle or the normal trustworthy test?

charged with bigamy, admitted a previous marriage but insisted he did not know whether he had been divorced from his first wife. The court held that since there was no admission of a second marriage, the statement was not a confession and need not be given a preliminary hearing. Could not the court here also have held that this was a highly incriminatory admission, one which would have been equally as untrustworthy as would have been an express acknowledgment of guilt? Finally, in an Idaho case,[24] there was an admission by the defendant to the sheriff that he wanted to plead guilty to the charge of statutory rape. The court, after considering this statement "in the nature of a confession," held it an admission and admissible as such without a preliminary hearing—this in spite of the fact that it was the only substantial evidence available to corroborate the testimony of the prosecutrix.

The preceding illustrations should serve to demonstrate the invalidity of the admission-confession distinction as the sole operative basis of admitting extra-judicial statements of the accused with or without a preliminary hearing. The mere classification of a statement as an admission or confession has no direct bearing on its trustworthy character. A confession is excluded from the jury's consideration because it may be untrustworthy evidence. The same test should be used with respect to admissions. A more appropriate inquiry would be: Were the extra-judicial statements of the accused, whether admissions or confessions, of such an incriminatory nature that, had they been coerced, they would be untrustworthy evidence for the jury's consideration? More simply stated, would the admission of such statements, without a preliminary hearing, impair the defendant's right to a fair trial?

Heretofore, the discussion of the problems involved in maintaining the admission-confession distinction for the purposes of admissibility has assumed that the sole policy of the confession rule is to exclude untrustworthy evidence from the jury's consideration.[25] This is not the whole truth, however, for some authorities have found a kinship between the confession rule and the privilege against self-incrimination. They see in the test of voluntariness an indication that the rules restricting the use of confessions are prompted by a desire to protect the subject against torture[26] as well as by a desire to protect the trustworthiness of the evidence.[27] The United States Supreme Court was obviously persuaded by

24 State v. Garvey, 25 Idaho 768, 265 Pac. 668 (1928).

25 *Supra*, note 21.

26 Although Wigmore points out that the establishment of the rule was highly inconsistent with the modern doctrine, 3 Wigmore, Evidence (3rd Ed. 1940) §865 and 8 Wigmore Evidence (3rd Ed. 1940) §2266 at page 387, and depended largely upon the collateral conditions indirectly affecting the judge's attitude (these conditions being the social cleavage, absence of the right to appeal in criminal cases, and the inability of the accused to testify for himself or have counsel defend him), the "Wickersham Report" gave startling information to support the modern doctrine. "The third degree—the infliction of pain, physical or mental, to extract confessions or statements—is widespread throughout the country." National Commission on Law Observance and Enforcement, Report No. 11, Lawlessness in Law Enforcement (1931) at 153 (The "Wickersham Report").

27 McCormick, The Scope of Privilege in the Law of Evidence (1938) 16 Texas L. Rev. 447, 452-457; McCormick, Some Problems and Developments in the Admissibility of Confessions (1946) 24 Texas L. Rev. 239. And in Bram v. United States, 168 U. S. 532 (1897) the court said, "In criminal trials in the courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person shall be compelled in any criminal case to be a witness against himself."

these broader considerations when it laid down its "civilized standards" rule for Federal cases and its "inherent coercion" rule as a test of due process in state cases.[28] Accepting this policy,[29] it is only too evident that whether the extra-judicial statements of the accused are admissions or confessions in a proper sense, if either had been obtained by compulsion or threat, the Supreme Court would prohibit its use as evidence. In fact the first and second *Ashcraft* cases gave direct approval to the view that admissions and confessions should be subject to the same tests for purposes of admissibility.[30] After rejecting the admissibility of a confession in the first *Ashcraft* case because it had been obtained under circumstances which were merely "inherently coercive," the Supreme Court of the United States remanded the case to the state court. The state court proceeded to convict the defendant again—this time largely on the weight of extra-judicial statements of the defendant which the state court decided were not confessions and therefore not subject to the safeguards of the confession rule. Upon appeal to the Supreme Court from the second conviction, the Court said, "We see no relevant distinction between the introduction of this statement (here the statement was in the form of a highly incriminatory admission, exculpatory in nature) and the unsigned confession, except for the possibility that the admission of this long concealed knowledge was perhaps a more effective confession of guilt . . . than the written unsigned alleged confession would have been. All the reasons given for the reversal of the judgment in the first case apply in full force."[31] Such a decision may indeed be a warning to the state courts that the admission-confession distinction is completely invalid for purposes of admissibility.

Recognizing, then, that protecting the individual from abusive police practices, as well as protecting the trustworthy character of the evidence, are the reasons for requiring a preliminary hearing before admitting a confession in evidence, it would seem clear that one of two solutions should be adopted by those jurisdictions which now apply the admission-confession distinction as a test for determining the admissibility of extra-judicial statements of the accused. Either the present definition of a confession should be broadened to include a statement that admits an integral element of the crime charged (as was done by Wigmore) or the

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28 Ashcraft v. Tennessee, 322 U. S. 143 (1944). See also a very realistic discussion of police interrogation before trial in Inbau, Lie Detection and Criminal Interrogation (2nd Ed. 1948) and his article, Inbau, Confession Dilemma in the United States Supreme Court (1948) 43 Ill. L. Rev. 442.

29 It is now possible to directly attribute the policy of deterring "uncivilized" police practices to the Supreme Court because of their ruling in Upshaw v. United States, ___ U. S. ___, 69 S. Ct. 170 (1948). This opinion expressly dispelled previous doubts that the Court would use their power of shaping rules of evidence as an indirect mode of disciplining misconduct. From this, in spite of a vigorous dissent in the Upshaw case, there seems to be a definite trend to the views long ago promulgated by Justice Holmes when he exprssed the opinion that, apart from the Constitution, the government should not use evidence obtained by criminal act. We must, he stated, make a necessary choice between two conflicting desires. First, that all available evidence be used in the detection of criminals; second, that the government should not itself foster and pay for other crimes in order to secure evidence. Such evidence should be inadmissible because "it is a far less evil that some criminals should escape than that the government should play an ignoble part." Olmstead v. United States, 277 U. S. 438 (1928).

30 Ashcraft v. Tennessee, 322 U. S. 143 (1944); Ashcraft v. Tennessee, 327 U. S. 274 (1945).

31 Ashcraft v. Tennessee, 327 U. S. 274, 278 (1945).

same test should be used to determine the admissibility of both confessions and admissions.

Expanding the definition of a confession to include any statement admitting an integral element of the crime charged is, however, a backhanded solution to the problem, for once again the courts will be depending upon a needless classification which furnishes no real insight into the policies which necessitate a preliminary hearing. Such a solution not only fails to give complete recognition to the policy of protecting the accused from coercion and other improper inducement, but it will also lend further confusion to other evidence problems which necessarily depend upon an application of the admission-confession distinction in reaching a correct ruling.[32] Therefore, in order to eliminate the confusion now existing in distinguishing these problems, and, of more importance, to give fuller recognition to the policy of protecting the accused from "uncivilized" interrogation methods, it is suggested that the admission-confession distinction be abandoned as a test for determining the admissibility of extra-judicial statements of an accused.

Objectively viewed, the distinction between a confession and an admission is a difference of degree and not of kind. The use of this distinction to determine the admissibility of extra-judicial statements not only fails to recognize the unpredictable nature of the jury, but it also fails to apprehend the difficulty which confronts the judge in attempting to apply such a thin and elusive test to the facts of a particular case. Therefore, while it may be true that some admissions are not subject to the same fear of untrustworthiness as are confessions, the difference in degree does not call for a different test of admissibility. The same reasoning applies when considering the policy of protecting the accused from abusive police practices, for the mere fact that a statement is an admission rather than a confession carries no real assurance that such a statement

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32 Examples of the confusion occurring in evidence problems which have depended upon the admission-confession distinction in order to reach a result are numerous. Perhaps the best example of this may be seen in People v. Fowler, 178 Cal. 657, 174 Pac. 892 (1918). There the defendant admitted killing "X" but claimed that it was done in self-defense. The court, in applying the admission-confession distinction as a test of admissibility, proceeded to define with great care the elements of a confession and distinguish it from an admission. Deciding that the defendant's statement lacked all of the elements necessary to constitute a confession (holding that his assertion of self-defense was, in fact, a denial of guilt), the court introduced this highly incriminatory statement without a preliminary hearing. In support of this improper result, the California court merely quoted from three other cases which had been concerned with the problem of distinguishing an admission from a confession and adopted the definition of a confession therein set out. Each of these three cases was in turn concerned not with the problem of admissibility but with the problems of sufficiency of the evidence to convict and the correctness of the judge's characterization of the defendant's statements to the jury. Accordingly, in adopting a definition of a confession, these three cases adopted a narrow definition of a confession (a confession as a full acknowledgment of guilt)—a definition which was entirely inappropriate for use in the admissibility problem involved in the Fowler Case. It is believed that this confusion is due largely to an over-reliance upon an elusive distinction. The admission-confession distinction is not only unnecessary for purposes of admissibility but it tends to obscure the policies which lie beneath the rule of law invoked. The following cases clearly demonstrate the proposition now asserted: Moore v. State, 220 Wisc. 404, 265 N. W. 101 (1936); State v. Novak, 109 Ia. 717, 79 N. W. 455 (1899); State v. Cook, 188 Ia. 655, 196 N. W. 674 (1920); Powell v. State, 101 Ga. 9, 29 S. E. 309 (1879); Pressley v. State, 201 Ga. 267, 39 S. E. (2d) 478 (1946).