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# Chapter 20: Evidence

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PART III

# Adjective Law

## CHAPTER 20

# Evidence

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## A. Court Decisions

**§20.1. Hearsay rule: Excited utterance exception.** Out-of-court statements made by persons while under the influence of an exciting event are likely to be made before there has been time for reflection and fabrication. If so made, they possess a sufficient guarantee of trustworthiness so that the trial judge, in his discretion, can admit them as an exception to the hearsay rule.[1] The usefulness of this exception in Massachusetts has heretofore been extremely limited by the requirement that the statement be contemporaneous with the exciting event. This requirement was applied as early as 1857. In *Lane v. Bryant*,[2] a bystander was allowed to testify at trial concerning a statement made by the defendant's servant. The statement, made after the accident occurred, indicated that the plaintiff was not to blame. In reversing, the Supreme Judicial Court held that the evidence, since it did not accompany the principal act, was only an opinion of a past occurrence and no more competent because it was made immediately after the accident than if made a week or a month afterward. Subsequent cases followed this rule and required that the statement be contemporaneous to the act.[3]

In *Rocco v. Boston-Leader, Inc.*,[4] the Supreme Judicial Court upheld, as within the trial court's discretion, the exclusion of a state-

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§20.1. 1 6 Wigmore, Evidence §1750 (3d ed. 1940).
2 75 Mass. 245 (1857).
3 E.g., Ronkin v. Brockton Public Market, Inc., 257 Mass. 6, 153 N.E. 97 (1926); Eastman v. Boston and Maine R.R., 165 Mass. 342, 43 N.E. 115 (1896).
4 340 Mass. 195, 163 N.E.2d 157 (1960).

ment made not more than a second or two after the accident. In dictum, however, the Court intimated that in the future it might abandon the requirement that to be admissible a statement must be contemporaneous with the act:

> With respect to spontaneous utterances the guiding principles have been stated — and in our view correctly — by Prof. Wigmore: "The utterance must have been before there has been time to contrive and misrepresent. . . . It is to be observed that the statements need not be strictly contemporaneous with the exciting cause. . . ."[5]

During the 1967 SURVEY year, the Court in two holdings confirmed the dictum in the *Rocco* case and in effect overruled the earlier cases. In *Commonwealth v. Hampton*,[6] the deceased victim, Thomas Turner, was stabbed in his second-floor apartment. Four to five minutes later he knocked on the door of an upstairs apartment and in response to a question said: "Call the police, my wife stabbed me."[7] This statement was admitted by the trial judge as part of the res gestae. The Supreme Judicial Court held that excited utterances made before the speaker has time to reflect and contrive are admissible even though not contemporaneous with the event. Applying this test, the Court refused to reverse the ruling as an abuse of discretion, noting that the out-of-court declarant had just received serious wounds and was in a state of shock.[8]

The new test was adhered to in *Hetel v. Messier's Diner, Inc.*,[9] where the defendant excepted to the admission of the following statement made by a waitress just after the plaintiff fell: "Oh, my God. I told the other girl to clean this mess up ten or fifteen minutes ago."[10] The Court rejected the contention that it was a mere recital of a past event, reasoning that the trial judge could have found it was made spontaneously even though not contemporaneously with the fall. The Court, therefore, refused to reverse the trial judge's exercise of discretion.

**§20.2. Hearsay rule: Exception for statement of present mental condition.** *Commonwealth v. DelValle*[1] casts grave doubts on the admissibility, in a murder case, of the victim's statements to witnesses that the defendants had threatened to kill him. It is clear that since these statements were made out of court and were offered for their

5 Id. at 196-197, 163 N.E.2d at 158.
6 351 Mass. 447, 221 N.E.2d 766 (1966).
7 Id. at 449, 221 N.E.2d at 767.
8 Although not discussed in the opinion, it would appear from the facts of the case that the statement would also be admissible as a dying declaration if it could be shown that the victim was aware of impending death at the time the statement was made.
9 1967 Mass. Adv. Sh. 385, 223 N.E.2d 922.
10 Id. at 386, 223 N.E.2d at 923.

§20.2. 1 351 Mass. 489, 221 N.E.2d 922 (1966).

truth that they were hearsay. The Commonwealth argued that the statements should be admitted under the exception to the hearsay rule that out-of-court statements indicating the state of the declarant's mind may be properly admitted. The trial court admitted the statements on this basis, reasoning that they showed, at the time they were made, that the victim was afraid of the defendants. The prosecution relied on *Commonwealth v. Trefethen*[2] to support its position. In *Trefethen,* the victim made statements to a medium the day before her death that she was contemplating suicide. The Supreme Judicial Court held that the exclusion of these statements by the trial court was improper.

On the surface, it might appear that the *DelValle* case and the *Trefethen* case are similar. In *Trefethen,* evidence of intent to commit suicide was offered by the defense to negate murder, and in *DelValle,* evidence of threats was offered by the prosecution to negate the theory of suicide. When analyzed in terms of the hearsay dangers and the alternatives for other satisfactory evidence, however, the two cases are quite different. An expression of intention to commit suicide is the best evidence available that an individual is so disposed, and a jury can very properly infer that someone with that intention did in fact carry it out in the future. The inferential link between a state of mind and future action carried out by the actor alone, based upon his state of mind, is direct and easily followed.

The situation in the *DelValle* case is much different. Here the victim is not speaking directly about his own state of mind. The trier of fact is to determine the effect on the victim's mind of actions by other parties. While these actions of other parties might have affected his state of mind, and thus raise the inference that he did not commit suicide, they were independently relevant to the principal issue in the case. The fact that the defendants threatened the victim leads to the inference that the threats were carried out. The jury could not be expected to confine the relevance of the statements to the victim's state of mind. Such statements, therefore, should not have been admitted.

The Supreme Judicial Court reached essentially this result in a somewhat circuitous manner. The evidence was admitted as part of the Commonwealth's case in chief and without a cautionary instruction to the jury limiting the statements to proof of the deceased's state of mind prior to death. Thus, the Court held the admission of the statements as prejudicial, as the jury would likely view the statements as support of the defendants' guilt rather than as rebuttal of the decedent's suicide. The Court further noted that the threats were immaterial to the issue of the decedent's suicide.

**§20.3. Confessions and admissions.** *Johnson v. New Jersey*[1] left

[2] 157 Mass. 180, 31 N.E. 961 (1892).

§20.3. [1] 384 U.S. 719 (1966), also noted in §9.8 *supra.*

to the discretion of the states whether to apply *Miranda v. Arizona*[2] retrospectively. The Supreme Judicial Court, in several cases, has refused to give *Miranda* retrospective effect.[3] In Massachusetts, therefore, *Miranda* applies only to cases which are tried after June 13, 1966. While *Miranda* requires obvious changes with respect to interrogations and the admissibility of confessions, the application of the case to admissions by silence and admissions of a co-defendant may raise some difficult problems. Four cases decided during the 1967 SURVEY year indicate the problems that may arise.

In *Commonwealth v. McCambridge,*[4] the Court approved the admission of testimony by a police officer who arrived at the scene of an automobile accident immediately after it happened and observed the defendant and the victim engaged in a violent struggle over a gun. The officer testified that as he opened the door the victim said: "He's got a gun. He just shot me."[5] Later, when asked in the presence of the defendant what happened, the victim said: "The son of a b.... pulled a gun on me."[6] It appeared from the instructions later given to the jury that the trial judge admitted the accusatory statements and the failure to deny the accusations as an admission by silence. The Supreme Judicial Court upheld the admission of this testimony as an admission by silence, refusing to apply *Miranda* retrospectively.[7] It would appear, however, that the admission of such statements is doubtful in post-*Miranda* cases. The rule of admission by silence requires a defendant to affirmatively deny an accusation.[8] If he fails to do so, testimony as to the accusation and the refusal to deny will be admitted into evidence.[9] Clearly, if a defendant's right to silence, as guaranteed by *Miranda,* is to be meaningful, it should not be subverted by requiring him to deny the accusation, on penalty of admission of the accusation and refusal to deny into evidence.

Ironically, it would appear from the facts of the case that the statements were admissible on two separate theories, both of which had nothing to do with admissions. They could have been admitted as excited utterances which were part of the res gestae,[10] or they could have been admitted, after proper foundation had been laid, as a dying declaration.[11]

The case of *Commonwealth v. McGrath,*[12] decided the same day as the *McCambridge* case, is a more striking example of the necessity of limiting the admissions-by-silence exception in order to make *Miranda*

2 384 U.S. 436 (1966). For an intensive discussion of *Miranda,* see §20.4 *infra.*
3 E.g., Commonwealth v. Morrissey, 1967 Mass. Adv. Sh. 11, 222 N.E.2d 755.
4 1967 Mass. Adv. Sh. 23, 222 N.E.2d 763, also noted in §9.6 *supra.*
5 Id. at 24, 222 N.E.2d at 764.
6 Id.
7 Id. at 26-27, 222 N.E.2d at 765.
8 See Commonwealth v. McGrath, 1967 Mass. Adv. Sh. 41, 44, 222 N.E.2d 774, 775.
9 Id.
10 See §20.1 *supra,* note 1.
11 See 6 Wigmore, Evidence §§1432-1437 (3d ed. 1940).
12 1967 Mass. Adv. Sh. 41, 222 N.E.2d 774, also noted in §9.5 *supra.*

meaningful. The defendant, McGrath, was charged with assault with a dangerous weapon upon a girl with whom he had been living. At the trial, the girl refused to identify him as her assailant. A neighbor and the police made accusatory statements to the defendant at the police station. The defendant, who did not then have counsel, made replies which did not admit the accusations but did not categorically deny them. The trial judge admitted the accusations and the equivocal replies into evidence under the admissions-by-silence exception. The Supreme Judicial Court upheld the conviction, again refusing to apply *Miranda* retrospectively.

Five months later, in *Commonwealth v. Freeman*,[13] the Court showed greater concern for the damage a defendant can suffer from the misuse of the admission-by-silence doctrine. The facts in this case differed from the facts in the above cases in that the accusation was made by a complaining witness at the police station in the presence of the defendant's lawyer. An innocent individual in the presence of counsel is not likely to speak up to refute the accusation. The admission-by-silence doctrine should, therefore, not apply when the accused was in the presence of his counsel. The trial judge, however, admitted testimony as to the accusation and charged the jury that they might consider the police station identification as an admission by silence. The Supreme Judicial Court considered the error sufficiently harmful to reverse the conviction, despite the fact that the defendant's counsel did not protect him by excepting to the charge. The Court, in dictum, indicated that even had the attorney not been present, the doctrine of admission by silence would not apply,[14] indicating that the Court will, to a limited extent, adhere to the policy underlying *Miranda,* even though *Miranda* was not specifically applied.

In addition to casting grave doubts on the admissions-by-silence exception, *Miranda* raises questions concerning the admissibility of a co-defendant's confession, when such a confession implicates the defendant. When the two defendants are tried together, the prosecution can place this confession before the jury as an admission by the party who made it. The defendant who did not make the confession is entitled to an instruction that the jury is not to consider this evidence against him, but as every experienced trial lawyer knows, juries are not capable of such mental gymnastics. For all practicable purposes, except the directed verdict situation, the evidence is going to be considered against the second defendant by the jury.

This situation arose in the case of *Commonwealth v. Grant*[15] where the trial judge gave the proper limiting instructions, but the defendant's lawyer objected on the ground that the two cases were being tried together.

13 1967 Mass. Adv. Sh. 879, 227 N.E.2d 3, also noted in §9.8 *supra.*

14 Id. at 885, 227 N.E.2d at 8.

15 1967 Mass. Adv. Sh. 721, 226 N.E.2d 197, also noted in §9.4 *supra.*

The proper procedure on the part of defense counsel would not be an objection at trial, but a motion to sever the cases before trial. This had not been done in the instant case. The Supreme Judicial Court upheld the conviction, resting its decision on the ground that the other party's confession was not illegally obtained. This case would have presented a difficult problem had a proper motion to sever been made. Although the granting of the motion has been held to be within the trial judge's discretion, it would seem, in light of *Miranda,* that the motion should be granted on the above facts. It is inconsistent to provide such great protection for a defendant's own out-of-court statements, on the one hand, and, on the other, let the out-of-court statements of a co-defendant become the effective means of convicting him.

## B. Student Comment

**§20.4. Admissibility of offered confession: Burden of proving coercion: Commonwealth v. Johnson.**[1] During the 1967 Survey year the Supreme Judicial Court was faced with the question of admissibility of a confession alleged to have been coerced. Johnson had been arrested for the murder of a police officer during the commission of a robbery.[2] He was put in several police lineups and questioned continuously from 9:35 p.m. until 5:30 the next morning, at which time he made a confession to the police. No counsel was present during the questioning or at the time of the statement. Johnson challenged the voluntariness of his confession on voir dire, contending that he had requested, and was denied, counsel and further, that his confession was coerced by physical abuse. The trial judge decided against the defendant[3] and admitted the confession into evidence. No objection to the voluntariness of the confession was made upon its introduction at trial, nor was a request made for an appropriate instruction to the jury. Johnson was subsequently convicted.

On a motion for a new trial, based on admission of the confession into evidence, the trial judge made further findings that Johnson was not warned of his right to remain silent and that he did not waive such right. He also found that Johnson did not request counsel and did not know what his rights were at the time of interrogation.[4] The motion for a new trial, however, based on the claim of physical abuse, was denied. On appeal the Supreme Judicial Court HELD: the judge's

§20.4. [1] 1967 Mass. Adv. Sh. 581, 225 N.E.2d 360, *cert. granted sub nom* Johnson v. Massachusetts, 36 U.S.L.W. 3163 (Oct. 17, 1967) (No. 702).

[2] A co-defendant was also taken into custody and was eventually found guilty of murder and armed robbery.

[3] The only issue considered at the voir dire was Johnson's claim of physical coercion. Id. at 584, 225 N.E.2d at 364.

[4] Johnson's trial took place before the effective date of Miranda v. Arizona, 384 U.S. 436 (1966), which held that the defendant must be informed of his rights to counsel before interrogation. Id. at 444. The Supreme Court has held that Miranda does not apply retroactively. Johnson v. New Jersey, 384 U.S. 719 (1966).

ruling, at the completion of the voir dire, that the confession was admissible did not deprive defendant of due process of law. The Court reasoned that "when the statement was sought to be introduced at trial, it was prima facie voluntary. . . . The burden was on the defendant to show that the statement was not voluntarily made."[5]

Under Massachusetts procedure, the question of the voluntariness of a confession is first raised and determined on voir dire by the trial judge.[6] To have a confession declared incompetent on voir dire, the defendant must overcome an initial presumption that a confession is voluntarily given and must convince the court of the involuntariness of his statement.[7] Otherwise, it will be allowed in for consideration by the jury. At trial, the jury will again pass on the admissibility of the confession, using the same presumption of voluntariness. In *Johnson,* however, the question of the validity of the confession was not presented by the judge in his charge to the jury because Johnson's counsel apparently failed to object to the confession's introduction at the trial proper.

This section will examine whether the procedure used in Massachusetts for determining voluntariness of a confession presently meets the Fourteenth Amendment due process requirements,[8] as they have been recently interpreted by the United States Supreme Court; and whether the procedure satisfied requirements in effect at the time of trial for cases now on appeal. Three specific elements of the Massachusetts procedure will be examined to determine how they comport with federal due process requirements. These issues, raised by the *Johnson* case, are: (1) which party should have the burden of showing compliance or non-compliance with the applicable federal standards concerning coercion; (2) who should bear responsibility for deciding when the burden has been met; and (3) how heavy should the burden be—that is, to what degree of proof should the burdened party be held. These issues will be discussed first in the context of Massachusetts law prior to the United States Supreme Court decision in *Miranda v. Arizona.*[9] The effect of the *Miranda* decision on Massachusetts law will then be discussed.

The *Johnson* decision was an accurate application of the Massachusetts law concerning the placing of the burden.[10] A confession will not be presumed to be the result of force or threats[11] or promise of

5 1967 Mass. Adv. Sh. at 582, 225 N.E.2d at 363.

6 See Commonwealth v. Marshall, 338 Mass. 460, 461, 155 N.E.2d 798, 800 (1959).

7 E.g., Commonwealth v. McGarty, 323 Mass. 435, 438, 82 N.E.2d 603, 605 (1948).

8 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, §1.

9 384 U.S. 436 (1966).

10 See Commonwealth v. McGarty, 323 Mass. 435, 438, 82 N.E.2d 603, 605 (1948); Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E.2d 630, 639 (1943), *cert. denied,* 320 U.S. 213 (1943).

11 Commonwealth v. DeStasio, 294 Mass. 273, 284, 1 N.E.2d 189, 196 (1936).

favor.[12] The defendant must overcome the presumption of voluntariness,[13] and it is his responsibility to accomplish this by showing the confession was not a product of a free choice to admit or deny.[14]

The second point of comparison concerns the allocation of responsibility, as between judge and jury, for deciding whether that burden has been met. Under Massachusetts practice, the judge must make a preliminary determination on the issue of voluntariness[15] and, if satisfied that the confession is voluntary, allows it into the trial, but charges the jury so that they may consider the question de novo.[16] This procedure, known as the "Massachusetts Rule,"[17] is basically a hybrid of two other rules, known as the "New York"[18] and "Orthodox"[19] rules. Under the "New York" rule, it is the function of the jury alone to decide whether an offered confession is involuntary. The practice is to allow the confession in at the trial as long as reasonable men could differ concerning its voluntairness. The judge then instructs the jury that the confession is to be considered only if the jurisdiction's voluntariness test has been met.[20] Under the "Orthodox" rule, the judge alone acts as finder of the fact of voluntariness or involuntariness. The question of admissibility is never submitted to the jury.[21]

The Massachusetts procedure for allocating responsibility between the judge and jury incorporates what would appear to be the most desirable elements of both alternatives. Like a judge in an "Orthodox" rule jurisdiction, the Massachusetts trial judge hears the evidence bearing on voluntariness, personally resolves all factual conflicts relating thereto, and makes a determination on that issue. If the confession is found involuntary, it will not be admitted into evidence. If found voluntary, the confession will be admitted, but with accompanying instructions that the jury is to make its own independent determination of admissibility. If the jury then finds it to be involuntary, it is to be disregarded; if found voluntary, then it is to be admitted, but the jury may still make allowances for weight and credibility.[22]

In Massachusetts, the defendant must persuade the factfinder, by a preponderance of the evidence, that the offered confession was produced involuntarily.[23] The burdened party, theoretically, must prove

12 Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E.2d 630, 639 (1943), *cert. denied,* 320 U.S. 213 (1943).

13 E.g., Commonwealth v. Beaulieu, 333 Mass. 640, 133 N.E.2d 226 (1956), *cert. denied sub nom.* Boisvert v. Massachusetts, 352 U.S. 857 (1956).

14 E.g., Lisenba v. California, 314 U.S. 219, 241 (1941).

15 Commonwealth v. Makarewicz, 333 Mass. 575, 585, 132 N.E.2d 294, 300 (1956), noted in 1956 Ann. Surv. Mass. Law §§11.4, 12.1, 22.2, 22.7.

16 E.g., Commonwealth v. Rogers, 1967 Mass. Adv. Sh. 29, 222 N.E.2d 766.

17 Jackson v. Denno, 378 U.S. 368, 378 n.8 (1964).

18 Stein v. New York, 346 U.S. 156, 172 (1953).

19 3 Wigmore, Evidence §861, at 345-346 (3d ed. 1940).

20 See Jackson v. Denno, 378 U.S. 368, 377 (1964).

21 3 Wigmore, note 19 *supra.*

22 Jackson v. Denno, 378 U.S. 368, 417-420 (1964).

23 Note, Developments in the Law — Confessions, 79 Harv. L. Rev. 935, 1069-1070 (1966).

only by a preponderance of the evidence, before either the judge or jury, that his confession was involuntary.[24] It appears, however, that in practice the degree of proof needed is more like a clear and convincing amount[25] to offset the natural, and generally unreviewable, tendency to allow close cases in for the jury's assessment.[26] Review of the trial judge's decision that a given confession is voluntary and thus admissible is complicated by the fact that his decision will not be reversed unless, from the evidence, a finding of coercion was necessarily required.[27] Consequently, although the trial judge is supposed to find a confession involuntary simply by a preponderance of the evidence before excluding it, there is no effective way to challenge his decision, except in the rare case where his decision is patently without support.

The state of the law in Massachusetts governing proof of coercion of a confession, prior to *Miranda,* is that (1) the burden is on the defendant (2) to convince either the judge or jury (3) by at least a preponderance of the evidence that his confession is involuntary. The question remains, however, as to how Massachusetts law comports with federal due process requirements. Before 1966, the United States Supreme Court had, from time to time, elaborated on the conditions and actions which would tend to establish the involuntariness of a confession;[28] but it had carefully declined to say which party had the burden of proving or disproving the existence of those conditions.[29] In 1966, however, the Supreme Court decided *Miranda v. Arizona.*[30] The holding was later limited to prospective application only.[31] Mr. Chief Justice Warren, delivering the opinion of the Court, indicated it was necessary that the defendant validly waive his Fifth[32] and Sixth[33] Amendment rights to silence and counsel for a confession to be admissible.[34] To help ascertain whether, in a specific case, a valid

[24] In Massachusetts, preponderance of the evidence is defined as where the "proponent's contention is more probably true than false." Leach and Liacos, Handbook of Massachusetts Evidence 42 (4th ed. 1967).

[25] In Massachusetts, clear and convincing has been defined as being "greater than 'a preponderance' but less than 'beyond a reasonable doubt.'" Leach and Liacos, note 24 *supra,* at 43.

[26] E.g., Commonwealth v. Makarewicz, 333 Mass. 575, 584-589, 132 N.E.2d 294, 299-302 (1956) noted in 1956 Ann. Surv. Mass. Law §§11.4, 12.1, 22.2, 22.7; Note, Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1061 (1966).

[27] Commonwealth v. McGarty, 323 Mass. 435, 438, 82 N.E.2d 603, 605-606 (1948).

[28] See Sobel, New Confession Standards — "Miranda v. Arizona" 11-28 (1966).

[29] Jackson v. Denno, 378 U.S. 368, 405 (1964) (Black, J., dissenting in part and concurring in part).

[30] 384 U.S. 436 (1966), noted in 67 Colum. L. Rev. 645 (1967).

[31] Johnson v. New Jersey, 384 U.S. 719, 721 (1966).

[32] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V.

[33] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

[34] 384 U.S. 444-445. The Supreme Court has defined "waiver" as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

waiver has been made, the opinion set forth four "warnings" which must be given when the defendant is taken into police custody.[35]

In order to be sure that the warnings have in fact been given, and that this point is considered at each trial, the Supreme Court assigned the burden of demonstrating fulfillment of the requirement to the prosecution.[36] In addition, not only does the prosecution bear the burden of showing that the required warnings were in fact given, but it must also show that a valid waiver of the right to counsel preceded any statement obtained afterwards. Furthermore, the Court described the burden as being a "heavy" one.[37]

An understanding of the impact of *Miranda* requires a distinction between the question of the voluntariness of the confession and the question of the voluntariness of the waiver. It is conceivable that a confession could have been voluntarily made, but still would not be admissible unless there had been a valid waiver of the rights to silence and counsel. In effect, *Miranda* holds that failure by the prosecution to give warning of, and obtain a valid waiver of, the stated rights is de jure coercion.[38] Issues of coercion will henceforth arise in the context of whether there was or was not a voluntary waiver after the required warnings. All of those circumstances, which formerly could be used to show coercion of the confession, will now be used to show that the statement or document sought to be introduced is inadmissible for failure to obtain a valid waiver.[39]

In this respect, *Miranda* represents a major departure from the previous means of determining a confession's admissibility. In addition, warnings and waiver of Fifth and Sixth Amendment rights by a person in police custody, are made absolute requirements for the admissibility of an offered confession. Further, a burden has explicitly been placed upon the prosecution to show compliance with the established requirements. Thus, with respect to the first of the three points of Massachusetts law being examined in this section, it is apparent that federal due process requirements now place upon the prosecution the burden of showing that a waiver was obtained without resort to coercive methods.

35 384 U.S. at 467-473.

36 Id. at 444.

37 Id. at 475.

38 Id. at 469. This is not the same as saying that Miranda directly answered the question of who had the burden of showing the voluntariness or involuntariness of a confession. Miranda has had the broader effect of precluding that question from ever arising in the future. This comes about because the voluntariness of a confession is no longer the criterion for admissibility. Instead the criterion is whether there has been a "valid waiver," i.e., a recognition of the rights to silence and counsel and a voluntary relinquishment of them.

39 Thus, since the waiver is valid only if all of the prescribed circumstances were absent at the time it was made, then necessarily the confession following upon it is also voluntary. In those rare instances where the confession does not follow shortly after the waiver or where there is a problem of whether the waiver extends to all elements in the statement made, the problem is still whether there was in fact a waiver covering the questioned statement, not whether the statement itself was voluntary.

Since federal due process requirements are applicable to the states through the Fourteenth Amendment,[40] changes must be made in the Massachusetts procedure for all cases reaching trial after *Miranda.* The present Massachusetts requirement that the defendant bear the burden of overcoming a presumption that his confession was voluntary,[41] must now be changed to allocate to the prosecution the burden of showing that the waiver was free from coercion.

With respect to the second point, that of assigning responsibility for deciding if the burden has been met, an underlying presumption of *Miranda* was that the satisfying of the new procedural test was to be done initially before the judge, away from the jury.[42] It was the very problem of too many incompetent confessions being admitted for consideration by the jury which prompted the decision in *Miranda.*[43] The *Miranda* decision did not discuss the issue of whether a jury is to review the trial judge's initial determination on the issue. In 1964, however, the Supreme Court, in *Jackson v. Denno*[44] rejected the "New York" rule of allocating responsibility primarily to the jury as a denial of due process. The Court reasoned that in practice it was an impossible intellectual feat for the average juror consistently to separate the issue of voluntariness from the apparent truth or falsity of the offered confession.[45] In *Jackson,* the Court mentioned both the "Orthodox" and "Massachusetts" rules and indicated that either was acceptable, since both provided judicial screening before the issue of voluntariness went to the jury.[46] Federal due process requirements, therefore, indicate that the trial judge should have primary responsibility for deciding if the prosecution's burden has been met, but that a jury may review that decision. On this point, therefore, Massachusetts practice would appear to be in accord with the present due process demands.

The Massachusetts practice would appear to be more desirable than the "Orthodox" rule. With a reallocation of the burden to the prosecution and a tightening of the degree of proof to be required, the Massachusetts rule is capable of providing all the protection required under the federal standard.[47] The rule has been called a "humane practice,"[48] "giving the defendant two chances: first before the presiding judge, who may decide to exclude the statements; and then before the jury, who may disregard them."[49] It would seem desirable to give the jury a chance to pass on the question of the voluntariness

40 Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964).
41 Commonwealth v. McGarty, 323 Mass. 435, 82 N.E.2d 603 (1948).
42 See Jackson v. Denno, 378 U.S. 368 (1964).
43 384 U.S. at 439, 445.
44 378 U.S. 368 (1964).
45 378 U.S. at 382.
46 378 U.S. at 378-379.
47 "Given the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not, in our opinion, pose hazards to the rights of a defendant." Jackson v. Denno, 378 U.S. 368, 378 (1964).
48 Commonwealth v. Lee, 324 Mass. 714, 720, 88 N.E.2d 713, 717 (1949).
49 Commonwealth v. Marshall, 338 Mass. 460, 462, 155 N.E.2d 798, 800 (1959).

of the waiver. The matter is a question of fact and as such comes within the realm of normal jury responsibility. Although the jury should be protected from specious confessions, it should also be able to disagree with the judge's finding of voluntary waiver. The jurors should also be able to examine the weight and credibility of evidence offered on the waiver issue itself, as well as the weight and credibility due the confession per se. Thus, the "Massachusetts" rule itself is essentially a desirable rule, the viability of which should be maintained if possible.[50]

The third point of comparison, the degree of proof required to establish waiver, presents greater difficulties. No United States Supreme Court cases, prior to *Miranda,* appear to have defined a standard as to the degree of proof required to establish the voluntariness of a confession. *Jackson v. Denno* offered no guidelines as to the degree of proof which was required to determine admissibility of a confession.[51] In the subsequent case of *Boles v. Stevenson,*[52] the Supreme Court again did not articulate a requirement other than to repeat the language of *Jackson.*

In *Miranda,* the Supreme Court described the burden of establishing voluntariness of the waiver as "a heavy burden [which] rests on the government. . . ."[53] Unfortunately the Court did not go further to define the standard of proof that would have to be met to carry this "heavy burden." Nonetheless the language in *Miranda* indicates that the prosecution will be held to a high degree of proof if it wishes to offer a confession in evidence.

The courts have delineated five standards of proof in determining the adequacy of evidence on a particular issue before them. First, the judge may be allowed to decide that there has been a valid waiver in any situation where the evidence indicates it is at least possible that the waiver was valid.[54] Second, he may allow the offered confession into evidence merely by balancing the probabilities between the conflicting evidence.[55] Under this alternative, the proof of the validity of the waiver need not be inherently probable. It would only be necessary that this evidence be more probable than any evidence presented to show there was no valid waiver. The third standard would require

[50] It is interesting to note that after its own rule was struck down, New York adopted the "Massachusetts" rule. People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179 (1965).

[51] 378 U.S. at 405 (Black, J., dissenting in part and concurring in part). However, after Jackson, some of the lower federal courts did deal with the problem and appeared split on the issue. See United States v. Inman, 352 F.2d 954 (4th Cir. 1965) (trial judge must find voluntariness beyond a reasonable doubt); but see Clifton v. United States, 371 F.2d 354 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 995 (1967).

[52] 379 U.S. 43, 45 (1964).

[53] 384 U.S. at 475.

[54] This amounts only to saying that, as a matter of law, it is not necessary that the judge find for the defendant.

[55] James, Civil Procedure §7.6, at 250 n.12 (1965).

that the preponderance of evidence show that it be inherently probable that there was a valid waiver.[56] As a fourth alternative it may be required that the evidence showing a valid waiver be clear and convincing before allowing in a resultant statement.[57] Fifth, the judge may be held to the standard that the evidence indicating waiver must be certain beyond a reasonable doubt.[58] In determining which standard is appropriate in assessing the admissibility of an offered confession, it must be remembered that *Miranda* requires the prosecution to carry a "heavy burden."

It is submitted that only the fifth standard of proof — that the evidence offered be beyond a reasonable doubt — is in accord with the "heavy burden" requirement of *Miranda.* The first three standards would be inappropriate under *Miranda,* since they would fail to constitute a "heavy" burden. Instead they are similar to the standard of proof required in a civil action where the relative probabilities of the conflicting claims, rather than the particular likelihood of an individual claim, is the governing criterion.

The choice then would appear to be between the fourth and fifth alternatives. The fourth alternative, a requirement that the evidence need be "clear and convincing," has the advantage of being a "heavier" burden than is usually found in civil cases.[59] As such it would appear to meet the *Miranda* requirement. There would still be problems, however, in using this standard. Foremost would be the fact that the "clear and convincing" standard has generally been limited in application to a few types of civil cases.[60] And since the standards of proof employed in civil and criminal actions can be distinguished by the fact that the presumption of the defendant's innocence plays no part in a civil case, it can be argued that the "clear and convincing" standard would not be directly transferrable for use in criminal actions. Evidence which might be "clear and convincing" within the framework of a civil case could be less than that in a criminal case, where there is the additional operating presumption of the defendant's innocence. Consequently, although the name of the test might be retained in a criminal action, it would really be a new test, different from that employed in civil actions. This would raise problems of judicial interpretation of the meaning of the test. It might be difficult to give some objective meaning to the standard which would be sufficient to distinguish it from the "beyond a reasonable doubt" requirement. Therefore, "beyond a reasonable doubt" appears to be the most feasible standard to be used in proving waiver.

Initially, it might seem that requiring the trial judge to be con-

56 Id. at 250-251.

57 Id.

58 See Leach and Liacos, note 24 *supra,* at 42-47; James, note 55 *supra,* §§7.5-7.9.

59 This is with the probable exception of certain types of litigation such as will contests and disputed documents cases. Leach and Liacos, note 24 *supra,* at 42-43.

60 James, note 55 *supra,* at 251.

vinced beyond a reasonable doubt of the waiver would be too much proof rather than not enough. If he was sure beyond a reasonable doubt, reasonable men presumably could not differ with such a finding and he would be forced to issue a judgment non obstante verdicto if the jury later disagreed with him and the confession was the only evidence in the case. Those jurisdictions, however, which have adopted the "beyond a reasonable doubt" standard have treated the trial judge's certainty on the issue of waiver as certainty "beyond a reasonable doubt" only insofar as his own feelings are concerned.[61] In effect, he acts as a thirteenth juror with an initial veto power. Should the other jurors choose to reject his finding of voluntariness that is their prerogative. Nonetheless, unless the judge is fully convinced of the validity of the waiver, the damaging statement would be excluded.[62]

*Miranda* itself militates strongly towards a full determination of warnings and waivers before admission of any confession. Nowhere in *Miranda* is there an indication that the standard of proof should be less than the highest possible. Consequently, the requirement that the trial judge be convinced beyond a reasonable doubt of the validity of the defendant's waiver would appear to be supported by *Miranda.*

Thus, on the third point of comparison, the degree of proof to be required of the burdened party, federal requirements are that the prosecution bear a "heavy burden," and this would appear to be most realistically interpreted as requiring proof beyond a reasonable doubt of the voluntariness of the waiver. Massachusetts presently requires only that the defendant persuade the factfinder by a preponderance of the evidence. Compliance with present federal due process would appear to require that in Massachusetts the prosecution must henceforth prove a valid waiver beyond a reasonable doubt.

Many cases decided under pre-*Miranda* law are still in the regular course of appeal and will continue to present reviewable questions for several years. Since *Miranda* operates prospectively only,[63] a confession offered in such a case would be found to be free from coercion if it were "voluntary" within the meaning of the tests applied before 1966. Before 1966, the test would be directed to the voluntariness of the confession rather than the voluntariness of the waiver. Under that test, a confession would be found to be coerced only if induced by promise and hope of reward or benefit, or by judicial compulsion, violence, threats or fear, or made while the defendant was mentally incapacitated.[64] Characteristically, in those cases the "totality of circumstances," including the above factors, was examined to see if the

[61] E.g., People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179 (1965).
[62] Id.
[63] Johnson v. New Jersey, 384 U.S. 719 (1966).
[64] See cases cited at 2 Underhill, Criminal Evidence 973 n.28 (5th ed. 1956). For a comprehensive discussion of criminal insanity, see §9.16 *supra.*

confession was the product of a "free choice to admit, to deny or to refuse to answer."[65]

As to pre-*Miranda* cases such as *Johnson,* placing the burden of proving involuntariness on the defendant appears to be unassailable in terms of both Massachusetts[66] and federal law prior to *Miranda.*[67] Nonetheless, although reversal might be sought in these cases on the ground that the burden was placed on the defendant, many states have historically allocated this burden to the defendant and, like Massachusetts, have, until *Miranda,* consistently followed this method of allocation with no federal intervention.[68] This would imply that, as to pre-*Miranda* cases, allocating the burden to the defendant was constitutionally permissible.[69] It may be argued, however, that, although *Miranda* operates prospectively with respect to showing waiver of the rights to silence and counsel, it may operate retrospectively with respect to the placing of the burden for showing voluntariness.

Besides the pre-*Miranda* question of the constitutionality of giving the defendant the burden of proving coercion, there is the further question of the constitutionality of the Massachusetts practice of not considering any circumstances bearing on voluntariness unless raised by defense counsel.[70] The "circumstances" affecting admissibility are all part of the due process requirements of the Fourteenth Amendment.[71] In other words, there is a question as to whether a state court should refrain from making a complete examination of the factors affecting voluntariness and concentrate exclusively on the grounds urged by the defendant, particularly when others appear on the face of the record.[72] Inasmuch as a confession admits all the elements of the crime,

65 Lisenba v. California, 314 U.S. 219, 241 (1941). Those restrictions and others were the product of case law as developed in some three dozen cases from Brown v. Mississippi, 297 U.S. 278 (1936), to Davis v. North Carolina, 384 U.S. 737 (1966).

66 Commonwealth v. Sheppard, 313 Mass. 590, 48 N.E.2d 630 (1943), *cert. denied,* 320 U.S. 213 (1943).

67 2 Underhill, note 64 *supra,* at 1026-1028 n.26.

68 3 Wigmore, Evidence §860 (3d ed. 1940).

69 See Commonwealth v. Sheppard, 313 Mass. 590, 48 N.E.2d 630 (1943), *cert. denied,* 320 U.S. 213 (1943).

70 Commonwealth v. Johnson, 1967 Mass. Adv. Sh. 581, 587, 225 N.E.2d 360, 365.

71 Note, Developments in the Law — Confessions, 79 Harv. L. Rev. 935, 962-998 (1966).

72 From the record available to the Supreme Judicial Court in Johnson, it was apparent that Johnson was not informed of his right to remain silent or of his right to counsel, and that no counsel was present during the interrogation. Furthermore, there was conflicting evidence indicating an I.Q. possibly as low as 86. Aside from the factor of general intelligence, Johnson was bleeding about the head and may have been suffering from the effects of an automobile accident sustained during his apprehension. In addition, he confessed after eight and one-half hours of lineups and interrogations. During the lineups he was repeatedly confronted by witnesses claiming to identify him. Bleeding about the head from scrapes and bruises, he must have been a remarkable sight in comparison with those standing beside him. All the foregoing factors were available to the Supreme Judicial Court in passing on

waiver of possible grounds for objection would be tantamount to a guilty plea. The Supreme Court has pointed out in *Johnson v. Zerbst* that waiver of a constitutional right will not be lightly inferred.[73] The right to silence would be so completely circumvented by admission of an involuntary confession that the failure of trial counsel to explicitly specify some of the circumstances from which coercion would be inferred should not be considered sufficient to have them excluded from further consideration.[74] Where facts sufficient to negate a finding of voluntariness were available at trial and on appeal, even if introduced for other purposes, due process should require that they be included in the consideration of the voluntariness issue.

For cases now on appeal, even if the burden is left on the defendant to show coercion, that should not alter the fact that once the voluntariness issue has been raised on voir dire, there are numerous federally recognized circumstances which, if relevant, should be considered to determine whether the voluntariness test has been met. It might seem anomolous, with the burden on the defendant, to have the court consider factors additional to those raised by the defendant's counsel. There is, however, nothing inherently improper with the court's considering all relevant factors, even those not raised by the defense counsel, while leaving the burden on the defendant.

In summation, federal due process requirements governing admissibility of a confession require that the prosecution bear a "heavy burden" to show that the accused made a valid waiver of his rights to silence and counsel. That burden, both before judge and jury, would best be characterized as requiring proof "beyond a reasonable doubt." For post-*Miranda* cases, the Massachusetts procedure for determining voluntariness must be altered to comply with the federal standard. This will mean shifting the burden to the prosecution and requiring that the federal standard of proof be met. The present Massachusetts practice of allowing the jury to review the trial judge's decision on admissibility is acceptable and strong policy reasons favor its retention. For those cases on appeal and tried under pre-*Miranda* decisional law, there are still possible due process deficiencies traceable to the Massachusetts procedure for determining voluntariness of a confession.

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the trial judge's decision to admit the confession, and to the trial judge on the motion for new trial, yet neither ruling indicated any acknowledgment of those factors. Brief for Appellant at 34-38, Commonwealth v. Johnson, 1967 Mass. Adv. Sh. 581, 225 N.E.2d 360.

[73] 304 U.S. at 464.

[74] Cf. Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963).