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approach, the concept is not unknown to the courts,[38] and has been approved in Virginia and the District of Columbia.[39]

Thus it appears that many of the problems in this area are self-created, in that the courts fail to determine whether they are dealing with a property settlement or a support agreement. It is suggested that this determination can and should be made at any one of several stages in the proceedings. First, the parties should state in the agreement whether it is a property settlement or support agreement. While such a statement is not binding on the courts, it will be given weight if reasonable.[40] Secondly, the trial court in the divorce action should make the decision when it has the benefit of the testimony of the parties.[41] Thirdly, if that court fails to make the determination, the trial court in an action on the agreement should adjudicate the issue. If the case reaches the appellate level without a sound decision on the point, the appellate court should make its own decision as to the nature of the agreement. Irrespective of the stage at which the determination is made, it is submitted that it must be made, for a clear decision as to this initial problem will simplify the decision of the remaining issues.

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THE THIRD DEGREE AND COERCED CONFESSIONS IN STATE COURTS

It has long been recognized that law enforcement officers and prosecuting attorneys frequently employ the third degree[1] or Star Chamber tactics in securing confessions from persons suspected of participation in crimes.[2] In order to protect accused persons, the gen-

[38]The most striking example of a contract involving independent clauses is a lease. See, 3 Williston, Contracts § 890 (rev. ed. 1936).

[39]Rogers v. Rogers, 203 F.2d 61 (D.C. Cir. 1953); Gloth v. Gloth, 154 Va. 511, 153 S.E. 879, 891 (1930).

[40]Puckett v. Puckett, 21 Cal. 2d 833, 136 P.2d 1 (1943); Pearman v. Pearman, 104 Cal. App. 2d 250, 231 P.2d 101 (Dist. Ct. App. 1951).

[41]In Michigan, a rule of court requires the judiciary to separate the support and property settlement provisions before incorporation. Mich. Ct. R. 51(5).

[1]"In its original conception, the term 'third degree' did not have its present sinister meaning. In studying the etymology of the term we find that it is merely a step in the arrest and conviction of the criminal. Thus, the arrest was the first degree, the incarceration in jail was the second degree, and *the preliminary examination was the third degree.*" Report of Committee on Lawless Enforcement of Law, 1 Am. J. of Police Science, 579 n.9 (1930) (emphasis added); 3 Wigmore, Evidence § 851 (3d ed. 1940).

[2]Report of Committee on Lawless Enforcement of Law, 1 Am. J. of Police Science,

eral rule developed that involuntary or coerced confessions were inadmissible as evidence in criminal cases.[3] While it was agreed that the exclusion of such confessions was desirable, there was inconsistency in the application of the rule[4] because the choice between various tests of voluntariness was left to the states.[5]

In the 1936 landmark case of *Brown v. Mississippi*,[6] the United States Supreme Court extended the application of the due process clause of the fourteenth amendment to strike down convictions based upon alleged involuntary confessions obtained by means of physical force and violence.[7] Four years later, the Supreme Court unanimously held in *Chambers v. Florida*[8] that confessions made after long periods of questioning under "circumstances calculated to inspire terror" were involuntary and therefore also barred by the fourteenth amendment.[9] By thus recognizing that coercion can be mental, as well as physical, the Court greatly expanded the application of the due process clause to involuntary confessions.

In the recent case of *Blackburn v. Alabama*,[10] the Supreme Court again applied the principles established by its earlier decisions. In 1944 the petitioner, Blackburn, was discharged from the armed forces

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575 (1930). It is suggested that the third degree is used everywhere in the United States. For excellent discussions of methods used in extracting confessions and the historical development of tests to determine whether such confessions are admissible, see Note, 43 Harv. L. Rev. 617 (1930) and Note, 8 Va. L. Rev. 527 (1922).

[3]Lester v. State, 170 Ala. 36, 54 So. 175 (1910); People v. Rogers, 303 Ill. 578, 136 N.E. 470 (1922); Pinckard v. State, 62 Tex. Crim. 602, 138 S.W. 601 (1911). Some courts developed the practice of holding confessions in abeyance until all persons present when the confession was elicited had been examined regarding the circumstances at the time the confession was made. People v. Spranger, 314 Ill. 602, 145 N.E. 706 (1924); People v. Rogers, supra. Note that these cases were decided prior to 1936 and were based purely on evidence, rather than constitutional, considerations. (This distinction is explained more fully in the text.)

[4]Lester v. State, supra note 3; State v. Thomas, 193 Iowa 1004, 188 N.W. 689, 695 (1922); Pinckard v. State, supra note 3.

[5]Lisenba v. California, 314 U.S. 219, 236 (1941); Brown v. Mississippi, 297 U.S. 278, 285 (1936); 3 Wigmore, Evidence §§ 823, 824 (3d ed. 1940). See note 45 infra.

[6]297 U.S. 278 (1936).

[7]Comment, Evidence—Invalidity Under Due Process of Convictions Based on Confessions Obtained by Duress, 5 Wash. & Lee L. Rev. 243 (1948).

[8]309 U.S. 227 (1940).

[9]Petitioners, ignorant Negro farmers, were questioned individually over a five-day period, ending in an all-night interrogation, by policemen and citizens "who held their very lives—so far as the ignorant petitioners could know—in the balance." Id. at 238. Petitioners were not allowed to see counsel, friends, or relatives at any time. In rendering its opinion, the court said that, "to permit human lives to be forfeited upon confessions thus obtained would make the constitutional requirement of due process of law a meaningless symbol." Id. at 240.

[10]361 U.S. 199 (1960).

and declared permanently disabled by a psychosis. He received treatment in a Veterans Administration hospital until 1948, at which time he was discharged from the hospital because of his failure to return from an authorized absence. Shortly thereafter, petitioner was arrested on suspicion of robbery; he subsequently confessed to participation in the crime. The confession was obtained after Blackburn had been interrogated for eight or nine hours in a small room by as many as three officers at a time without the aid or comfort of counsel, friends, or relatives. Prior to the trial, petitioner was declared insane and committed to the Alabama State Hospital. The commitment was based upon examinations conducted by a panel of physicians and the finding of a lunacy commission. Blackburn remained in the hospital until 1952 when he was declared mentally competent to stand trial. The admission of the 1948 confession into evidence,[11] over petitioner's objection, resulted in his conviction, which was affirmed by the Alabama Court of Appeals.[12] The Supreme Court, in considering the "totality of the circumstances"[13] and relying upon its previous decisions,[14] reversed, holding that the confession was involuntary and, as such, inadmissible.[15]

It has been repeatedly recognized that the due process clause requires "that state action ... shall be consistent with the fundamental principles of liberty and justice ...,"[16] and as stated in *Lisenba v.* California:[17]

> "The aim of the requirement of due process [with regard to the admissibility of confessions] is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.
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> "* * * Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt."[18]

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[11]Id. at 200 n.1. The only other significant evidence was circumstantial and probably of little probative value by itself.

[12]Blackburn v. State, 109 So. 2d 736 (Ala. 1958).

[13]Fikes v. Alabama, 352 U.S. 191, 197 (1957). Accord, Gallegos v. Nebraska, 342 U.S. 55, 65 (1951); Watts v. Indiana, 338 U.S. 49, 53 (1949).

[14]The Supreme Court had reversed two state court convictions because of evidence that the confessors were possessed of "[a] history of emotional instability," Spano v. New York, 360 U.S. 315, 322 (1959), and "low mentality, if not mentally ill," Fikes v. Alabama, 352 U.S. 191, 196 (1957), in addition to other circumstances weighing against the voluntariness of the confessions used in evidence. See also Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

[15]361 U.S. at 208.

[16]Herbert v. Louisiana, 272 U.S. 312, 316 (1926). Accord, Rochin v. California, 342 U.S. 165, 169 (1952); Adamson v. California, 332 U.S. 46, 54 (1947).

[17]314 U.S. 219 (1941).

[18]Id. at 236-37.

With this in mind, the Supreme Court has, with but few exceptions,[19] uniformly adhered to its rulings in *Brown* and *Chambers* that the admission into evidence of a coerced confession completely vitiates a state court conviction, notwithstanding the presence of other evidence sufficient to warrant submission of the case to the jury.[20] For a confession to be admissible in evidence, it must have been voluntarily made, and if the confession is the product of "sustained pressure" by officials, it is not a free choice statement.[21] To be voluntary, however, it need not necessarily be volunteered;[22] for as stated by the court in *Lyons v. Oklahoma*,[23] "the voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime."[24]

Questioning a suspect is, of course, permissible, and the fact that it is done while the suspect is under arrest or in the custody of police officials does not of itself constitute a violation of the fourteenth amendment.[25] Although the primary emphasis in determining whether a confession has been coerced is apparently upon the length of the interrogation period,[26] the test advanced by the Supreme Court is a consideration of the "totality of the circumstances"[27] appearing from

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[19]314 U.S. 219 (1941). This is one of the rare occasions in which the Supreme Court, while applying the recognized test, found that the confession in question was not coerced. The Court felt that a lapse of eleven days between the last interrogation and the confession was sufficient to nullify the coercive quality of the interrogations. See also Thomas v. Arizona, 256 U.S. 390 (1958), wherein the Court adopted similar reasoning in refusing to reverse a state court conviction obtained by using a confession in evidence.

[20]Spano v. New York, 360 U.S. 315, 324 (1959); Payne v. Arkansas, 356 U.S. 560, 567-68 (1958); Brown v. Allen, 344 U.S. 443, 475 (1953); Stroble v. California, 343 U.S. 181, 190 (1952); Gallegos v. Nebraska, 342 U.S. 55, 63 (1951); Haley v. Ohio, 332 U.S. 596, 599 (1948); Malinski v. New York, 324 U.S. 401, 404 (1945); Lyons v. Oklahoma, 322 U.S. 596, 597 n.1 (1943).

[21]Watts v. Indiana, 338 U.S. 49 (1949).

[22]Ibid.

[23]322 U.S. 596 (1944).

[24]Id. at 602. See also Leyra v. Denno, 347 U.S. 556, 561 (1954); Ashcraft v. Tennessee, 322 U.S. 143, 154 (1954); Hysler v. Florida 315 U.S. 411, 413 (1941).

[25]Brown v. Allen, 344 U.S. 443, 476 (1953); Lisenba v. California, 314 U.S. 219, 239-41 (1941); Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924).

[26]"The most commonly used method [to coerce a confession] is persistent questioning, continuing hour after hour, sometimes by relays of officers. It has been known since 1500 at least that the deprivation of sleep is the most effective torture and certain to produce any confession desired." Report of Committee on Lawless Enforcement of Law, 1 Am. J. of Police Science 575, 580 (1930). See Ziang Sung Wan v. United States, 266 U.S. 1, 69 (1924).

[27]See note 13 supra.

the undisputed facts in the record.[28] In examining the facts of a particular case,[29] the court considers such circumstances as unlawful detention,[30] systematic persistence of interrogation,[31] length of periods of questioning,[32] failure to advise the suspect of his right to remain silent,[33] absence of counsel or friends,[34] mental capacity of the suspect,[35] his character[36] and his age.[37] These enumerated factors are by way of example only, and it is impossible to state as a rule that any single circumstance or combination will render a confession involuntary. In realizing that the scope of its inquiry into each particular case is limited to the peculiar facts and circumstances of that case, the Supreme Court said in *Stein v. New York*:[38]

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[39]

Since the due process clause has been made applicable to the use of involuntary confessions in state criminal cases, what had previously been an evidence problem has been turned into a constitutional problem. Nevertheless, while examining the problem from the constitutional standpoint, the evidence considerations are not ignored. Historically, coerced confessions were excluded at the state trial court level

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[28]Crooker v. California, 357 U.S. 433, 435 (1958); Leyra v. Denno, 347 U.S. 556, 558 (1954); Stroble v. California, 343 U.S. 181, 190 (1952); Gallegos v. Nebraska, 342 U.S. 55, 63 (1951); Watts v. Indiana, 338 U.S. 49, 52 (1949); Malinski v. New York, 324 U.S. 401, 404 (1945).

[29]Gallegos v. Nebraska, supra note 28 at 65.

[30]Turner v. Pennsylvania, 338 U.S. 62, 63 (1949). While officers who unlawfully detain prisoners before taking them before a magistrate may be punished for a misdemeanor, such detention or delay does not of itself render a confession coerced. Gallegos v. Nebraska, 342 U.S. 55 (1951); Lisenba v. California, 314 U.S. 219, 234-35 (1941). Cf. the McNabb-Mallory rule obtaining in the federal courts, note 44 infra and accompanying text.

[31]Driver v. State, 201 Md. 25, 92 A.2d 570, 572 (1952).

[32]Ibid.

[33]Ibid. See Turner v. Pennsylvania, 338 U.S. 62, 64 (1949).

[34]Driver v. State, 201 Md. 25, 92 A.2d 570, 572 (1952). See Spano v. New York, 360 U.S. 315, 325 (1959); Powell v. Alabama, 287 U.S. 45, 57 (1932).

[35]See note 15 supra.

[36]Harris v. South Carolina, 338 U.S. 68, 71 (1949).

[37]Driver v. State, 201 Md. 25, 92 A.2d 570, 572 (1952). In Haley v. Ohio, 332 U.S. 596 (1948) the court relied heavily upon the youthfulness (fifteen years old) of the petitioner in reversing the state court conviction. The Haley case is commented upon in 5 Wash. & Lee L.Rev. 243 (1948).

[38]346 U.S. 156 (1953).

[39]Id. at 185.

either because they were testimonially untrustworthy[40] or because of a policy consideration that a prisoner is privileged against making statements under coercive circumstances,[41] whether such statement is true or not.[42] Prior to the *Brown* decision, a determination of the evidence issue by the highest court of the state was final. Since *Brown* the United States Supreme Court applies its own policy considerations in determining whether, under given circumstances, the petitioner's constitutionally protected rights have been violated.[43]

In recent years, the confessions which have most frequently been characterized as coerced are those made in situations involving some period of illegal detention or unnecessary delay in arraignment. In this particular area of the general problem, the federal courts apply a pure evidence rule, the so-called *McNabb-Mallory* rule,[44] which comes into effect when Rule 5(a) of the Federal Rules of Criminal Procedure has been violated. Rule 5(a) requires that arrested individuals be brought before a committing magistrate without unnecessary or unreasonable delay. Thus, all confessions obtained during such delays are rendered inadmissible without reaching the reliability and constitutional considerations. This rule has not been made applicable to criminal proceedings in state courts,[45] although apparently there is hope among some of the Supreme Court Justices that eventually it will be.[46]

In light of holdings that the admission of coerced confessions vitiates a state court conviction regardless of the presence of other evidence establishing a prima facie case, it is submitted that the Supreme Court

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[40]3 Wigmore, Evidence § 822 (3d ed. 1940).

[41]McCormick, Evidence § 75 (1954).

[42]Ibid.

[43]Gallegos v. Nebraska, 342 U.S. 55, 61 (1951); Lisenba v. California, 314 U.S. 219, 238 (1941).

[44]Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). The development and present status of the rule is discussed in Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

[45]Gallegos v. Nebraska, 342 U.S. 55, 64 (1951). There are various tests applied by courts to determine: "Was the inducement such that there was any fair risk of a false confession?" 3 Wigmore, Evidence § 824 (3d ed. 1940). The fourteenth amendment leaves the choice of tests to the state, but adoption of a rule does not preclude inquiry in a particular case to determine whether the application of the rule deprives the prisoner of life or liberty without due process of law. Lisbena v. California, 314 U.S. 219, 236 (1941).

[46]See the dissenting opinion of Justices Black and Douglas in Stroble v. California, 343 U.S. 181, 203 (1952), and Gallegos v. Nebraska, supra note 45 at 73, and the concurring opinions of Justice Douglas in the following cases: Watts v. Indiana, 338 U.S. 49, 56 (1949); Turner v. Pennsylvania, 338 U.S. 62, 66 (1949); Harris v. South Carolina, 338 U.S. 68, 71 (1949).