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Constitutional Law - Criminal Law - Confessions Need Not Be Proved Voluntary Beyond a Reasonable Doubt Prior to Being Admitted into Evidence

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CONSTITUTIONAL LAW—CRIMINAL LAW—Confessions Need Not be Proved Voluntary Beyond a Reasonable Doubt Prior to Being Admitted into Evidence.

In 1961, Don Richard Lego was convicted of armed robbery after a jury trial in Cook County, Illinois. He was sentenced to the state penitentiary for a term of twenty-five years.

Included in the evidence introduced against the defendant at the trial was a confession made to police officers after Lego had been arrested and taken into custody.

Prior to trial, the defendant moved to have the confession suppressed on the grounds that it was not given voluntarily. The trial judge conducted a full hearing, out of the presence of the jury, on the issue of voluntariness. At the hearing, Lego testified that he gave the confession after being beaten by the police. He introduced a photograph which had been taken of him after his confession showing his face swollen and with traces of blood. Four police officers also testified. They denied that Lego had been beaten or threatened in any manner. They explained the condition of Lego in the photograph as being the result of a struggle with the robbery victim. Lego admitted to this struggle. The trial judge admitted the confession as being voluntarily made.¹

At the trial, Lego testified on his own behalf as to the circumstances surrounding the taking of the confession. He did not deny making the confession or even its truth, but argued that he had not given it voluntarily.² The trial judge instructed the jury as to the state's burden of proof but gave no instruction that the jury was also required to find the confession voluntary before it could be used in their determination.

1. In ruling the confession admissible, the trial court concluded: "I don't believe the defendant's testimony at all that he was beaten up by the Police. The condition he is in is well explained by the defendant himself."

2. The defendant also testified, however, that he would have made the statements even without any claimed police brutality.
Following conviction, Lego appealed directly to the Illinois Supreme Court which affirmed the conviction.³

Four years later, Lego sought to challenge his conviction by filing a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. He claimed that the trial judge should have found his confession voluntary beyond a reasonable doubt before admitting it into evidence.⁴ In the alternative, he argued that the voluntariness issue should have been submitted to the jury for a separate determination.⁵ The District Court heard the issue on its merits, denying any relief;⁶ the Seventh Circuit Court of Appeals affirmed.⁷ The United States Supreme Court granted certiorari on March 29, 1971.⁸

In affirming the lower court rulings and in denying the contentions of the petitioner, the Supreme Court⁹ held that there is no constitutional requirement that a trial judge determine that a contested confession is voluntary beyond a reasonable doubt before it can be admitted into evidence. Using a lesser standard is not a violation of the due process requirement that a criminal defendant must be proven guilty beyond a reasonable doubt as to all the elements necessary to consti-

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³ People v. Lego, 32 Ill. 2d 76, 203 N.E.2d 875 (1965). On his appeal to the Illinois Supreme Court, Lego did not raise the issue that his confession would have to be proved voluntary beyond a reasonable doubt before it could be admitted at trial. Among other issues, he attacked the voluntariness question on its merits. That court held that "... the question of the voluntary character of a confession is for the trial court to determine and unless it can be said that the decision of the trial court is manifestly against the weight of the evidence, the decision of the trial court will not be disturbed. People v. Weger, 28 Ill. 2d 370; People v. Miller, 13 Ill. 2d 84; People v. Townsend, 11 Ill. 2d 30." 32 Ill. 2d at 79.

⁴ Illinois law states that a confession may be admitted as voluntary if, after a full hearing out of the presence of the jury, the trial judge finds the confession voluntary by a preponderance of the evidence. People v. Sammons, 17 Ill. 2d 316, 161 N.E.2d 322 (1959); People v. Wagoner, 8 Ill. 2d 188, 133 N.E.2d 24 (1956).

⁵ Illinois follows the so-called "orthodox" procedure where the voluntariness of the confession is determined solely by the judge and is not resubmitted to the jury. People v. Thomlinson, 400 Ill. 555, 91 N.E.2d 434 (1948); People v. Jackson, 41 Ill. 2d 102, 242 N.E.2d 160 (1968); ILL. REV. STAT. Ch. 38 § 114-11 (1964). Other states follow the Massachusetts procedure where if at a hearing the trial judge finds a confession to be voluntary it is admitted into evidence, but the jury is also asked to determine the issue and is instructed to disregard a confession it finds to have been involuntarily given. Commonwealth v. Marshall, 338 Mass. 460, 155 N.E.2d 798 (1959); Jackson v. Denno, 378 U.S. 368, 378 (1964). Appendix A, filed by Mr. Justice Black, in his dissent to Jackson, contains a state by state compilation of which method is employed.


⁷ The Seventh Circuit's affirmance is unreported. Lego v. Pate No. 18313 (7th Cir. Oct. 8, 1970).


tute a crime. The Court also held that there was insufficient reason shown for expanding current exclusionary rules to require a higher standard for admissibility of confessions than any other evidentiary material. Finally, the Court denied Lego's argument that his right to trial by jury was violated when the issue of voluntariness was not also submitted to the jury. It reaffirmed the traditional doctrine that admissibility of evidence is a question for the court rather than the jury.

Lego v. Twomey is concerned exclusively with the standards for admissibility of confessions; it neither adds to nor detracts from the conceptual definition of voluntariness which has been the focus of past decisions. In the 1936 case of Brown v. Mississippi10 the United States Supreme Court for the first time reversed a state conviction based on the use of an extorted confession. The rationale for the decision was that confessions that were obtained as a result of physical abuse by the police were likely to be untrustworthy. The major concern was for protecting the innocent person who might have been coerced into confessing something for which he was not guilty.

As the Court heard more and more appeals from state convictions based on allegedly involuntary confessions, the inherent unreliability of the statements as a reason for reversal took on a lesser degree of importance. The Court began ordering the exclusion of coerced confession as a method for controlling police conduct without regard to whether they were true or false. Speaking for the majority in Spano v. New York,11 Chief Justice Warren explained this change in emphasis:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.12

This shift in emphasis has now been completed so that today it is reversible error to accept any evidence at all as to the truth or falsity of the statements at a voluntariness hearing. The focus at the hearing should be on whether the State's law enforcement officials acted in such a way as to overcome petitioner's will to resist, and truthfulness "... is not a permissible standard under the Due Process Clause of the fourteenth amendment."13 The concern now is not only with pro-

12. Id. at 320-21.
tecting the innocent against the possibility of false confessions, but also with protecting even the guilty against the use of illegal methods in obtaining the confession.\textsuperscript{14}

In the 1964 case of \textit{Jackson v. Denno},\textsuperscript{15} the Court held that a criminal defendant who challenges the voluntariness of a confession sought to be used against him at trial has a due process right to a "... reliable and clear-cut determination of the voluntariness of the confession..."\textsuperscript{16} In \textit{Jackson}, the Court struck down the New York procedure for determining voluntariness as being inadequate and a denial of due process. Prior to \textit{Jackson}, New York and several other states used a procedure whereby the judge would exclude a confession only if it could not under any circumstances be found voluntary. Normally the issue was submitted to a jury which was instructed to pass first upon the voluntariness question and, if involuntary, to exclude the confession when determining guilt or innocence. If, however, they found the confession to have been voluntarily given, they were to give it whatever weight they thought it deserved in judging the defendant's guilt.\textsuperscript{17}

The Court found this system failed to meet due process standards because it was impossible to determine how the jury resolved the question of voluntariness whenever a conviction was returned. There was no way of determining whether the jury accepted the confession as voluntary and found the defendant guilty on that basis or if they found the confession involuntary and convicted on other evidence. There was never any clear-cut determination of whether the confession was found to be voluntary or not. The \textit{Jackson} Court also felt that it was too much to ask of a jury to ignore a coerced confession if other evidence indicated that the confession was probably true.

It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession... and even though there is ample evidence aside from the confession to support the conviction... Equally clear is the defendant's constitutional right at

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\textsuperscript{14} See, Twenty-five Years of State Criminal Confessions in the United States Supreme Court, 19 WASH. & LEE L. REV. 35 (1962).  
\textsuperscript{15} 378 U.S. 368 (1964).  
\textsuperscript{16} Id. at 391.  
\textsuperscript{17} Jackson v. Denno includes a thorough description of the New York procedure, 378 U.S. at 377-391. For a pre-\textit{Jackson} description of the three methods used in determining the voluntariness of a confession (the New York procedure; the Orthodox procedure: the Massachusetts procedure), see Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. CHI. L. REV. 317 (1954).
\end{flushleft}
some stage in the proceeding to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.\textsuperscript{18}

Despite a prodding dissent by Mr. Justice Black,\textsuperscript{19} the majority in \textit{Jackson} gave no indication of any standard that must be met in order to prove the confession voluntary.\textsuperscript{20} Thus, left without direction, the state and federal courts that have decided on the quantum of proof have adopted a variety of standards. Those courts which have discussed their reasons for adopting the beyond a reasonable doubt standard have generally stated that they consider the higher standard necessary because of the tremendous impact a confession is likely to have. They have equated the admissibility of a confession with a finding of guilt.\textsuperscript{21} The courts that have adopted a lesser standard have often held that beyond a reasonable doubt is not the applicable standard for admissibility; it is relevant only in the determination of guilt or innocence.\textsuperscript{22} Several courts have not stated a burden of proof which must

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  \item\textsuperscript{18} 378 U.S. at 376-377 (citations omitted).
  \item\textsuperscript{19} "The Court has not said that its new constitutional rule, which requires the judge to decide voluntariness, also imposes on the State the burden of proving this fact beyond a reasonable doubt. Does the Court's new ruling allow the judge to decide voluntariness merely on a preponderance of the evidence? If so, this is a distinct disadvantage to the defendant." 378 U.S. at 405 (dissenting opinion).
  \item\textsuperscript{20} In most American jurisdictions, once the voluntariness of a confession has been contested by a defendant, the prosecution has the burden of proof that it was not coerced. 3 \textsc{Wigmore}, Evidence § 860 (Chadbourn rev. 1970).
  \item\textsuperscript{21} Eleven states and two federal Circuit courts have specifically adopted the beyond a reasonable doubt standard. The cases are: United States v. Inman, 352 F.2d 954 (4th Cir. 1965); Pea v. United States, 397 F.2d 627 (D.C. Cir. 1968); State v. Ragsdale, 249 La. 420, 187 So. 2d 427 (1966), \textit{cert. denied}, 385 U.S. 1029 (1967); State v. Keiser, 274 Minn. 265, 272, 143 N.W.2d 75, 80 (1966) ("Because of the persuasive character of a confession as evidence, it would only seem fair to say that on the issue of voluntariness a mere prima facie showing or a preponderance of the evidence should not satisfy the court . . . the evidence of voluntariness should be of such persuasive force as to satisfy the court to a moral certainty or beyond a reasonable doubt."); Lee v. State, 236 Miss. 716, 112 So. 2d 254 (1959); State v. Longmore, 178 Neb. 509, 139 N.W.2d 66 (1965); State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967) (because reasonable doubt standard likely to be federally imposed, trial judges advised to begin using it); People v. Huntley, 13 N.Y.2d 72, 204 N.E.2d 179 (1965); State \textit{ex rel.} Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), \textit{cert. denied}, 384 U.S. 1017 (1966); State v. Thundershield, 83 S.D. 414, 160 N.W.2d 408 (1968); Lopez v. State, 384 S.W.2d 345 (Tex. Crim. 1964); \textit{Commonwealth v. Mayhew}, 297 Ky. 172, 178 S.W.2d 928 (1945) (any doubt should be resolved in favor of the defendant); People v. Stroud, 273 Cal. App. 670, 70 Cal. Rptr. 270 (1969).
be met at a voluntariness hearing.23 In Lego, the United States Supreme Court, for the first time, confronted this issue head-on. The Court answered two arguments in holding that there is no constitutional requirement that a confession be found voluntary beyond a reasonable doubt. The first contention was that using a less strict standard deprives a defendant of due process and violates the Court's decision of In Re Winship.24 The second argument was that by insisting on the highest standard of proof to show that a confession was voluntary, the courts would offer concrete protection to the important values which the exclusionary rule was formulated to serve. For this argument Lego tried to show that confessions, because of their powerful effect on the jury, have a special nature which requires the application of the higher standard.

Lego's major argument was that if a trial court judge may admit a confession as voluntary by less than beyond a reasonable doubt, the result is likely to be that a criminal defendant might be found guilty by less than beyond a reasonable doubt. The introduction of a confession at trial is going to have an overwhelming effect on a jury. Once a confession is admitted, any doubts the jury might have concerning guilt are almost certain to disappear; having heard a confession, a jury will be almost certain to be predisposed to convict. The decision that a confession was voluntarily given and is admissible is almost tantamount to a decision that the defendant is guilty. The judge's determination of voluntariness by a mere preponderance25 of this evidence will rapidly

23. Six federal Circuit courts and five states have not stated a burden of proof which must be met at a voluntariness hearing. The cases are: United States v. Feinberg, 383 F.2d 60 (2nd Cir. 1967) (cited cases which have used the beyond a reasonable doubt standard); Fisher v. United States, 382 F.2d 31 (5th Cir. 1967); Monts v. Henderson, 409 F.2d 17 (6th Cir. 1969); United States v. Taylor, 374 F.2d 753 (7th Cir. 1967); Wakaksa v. United States, 367 F.2d 639 (8th Cir. 1966); Moser v. United States, 381 F.2d 363 (9th Cir. 1967) (enough evidence from which the jury might determine beyond a reasonable doubt that the confessions were voluntarily given); Brooks v. State, 229 A.2d 833 (Del. 1967) (question brought up but not decided); People v. Pallister, 14 Mich. App. 139, 165 N.W.2d 319 (1968) (same); Dodel v. State, 232 So. 2d 235 (Fla. 1970); Smith v. State, 249 N.E.2d 493 (Ind. 1969); State v. Clybourn, 273 N.C. 284, 159 S.E.2d 868 (1968).

24. 397 U.S. 358 (1970), in which the Supreme Court specifically held that the beyond the reasonable doubt standard was an essential element for all criminal convictions.

25. The Lego Court sanctioned the preponderance rule. "... when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession
melt into a jury's determination of guilt beyond a reasonable doubt. Allowing a confession to be admitted which has been deemed voluntary by only a preponderance of the evidence is, in effect, allowing the defendant to be found guilty by only a preponderance of the evidence. This potential result, the argument concludes, would violate the mandate of *In Re Winship* in which the Court held that all criminal defendants have a due process right to the beyond a reasonable doubt standard in a determination of guilt or innocence.

The Court answered this argument by analyzing the purpose for which a voluntariness hearing is held. Such a hearing, the Court stated, has nothing to do with enhancing the reliability of jury verdicts nor is it aimed at reducing the possibility of convicting innocent men. The sole purpose of the hearing is to determine whether the confession was in any way coerced. The beyond a reasonable doubt standard, as required by *Winship*, is applicable only in the determination of guilt or innocence. The purpose of the higher standard is to ensure against unjust convictions and to give concrete effect to the presumption of innocence; it is the standard to be used by the jury; it has nothing to do with judicial standards for admissibility of evidence. Thus, confessions are not excluded because of any possible unreliability. The judge alone determines admissibility; the jury determines reliability. It is possible that even an involuntary confession may be persuasive enough to convict beyond a reasonable doubt. By this analysis the Court held that the use of the preponderance rule for determining voluntariness is not a violation of *Winship*.

If one can accept the Court's premise that the voluntariness of a confession is essentially an evidentiary matter and the normal standards of admissibility are also applicable to confessions, it would be difficult to fault the *Lego* decision. There are, however, some major philosophical considerations which transcend the purely mechanical test which the

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27. 18 U.S.C. § 3501(a): "In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntary it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant testimony on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."
28. The opposing arguments over whether the reasonable doubt standard should be required at voluntariness hearings are well set out and discussed in Clifton v. United States, 371 F.2d 354 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 995 (1967).
Court used. Although it is probably true that "there is only a relative-
ly narrow zone of cases in which a judge in a criminal matter will be
satisfied of voluntariness though he harbors a reasonable doubt",29 it is
within that "narrow zone" where the standard of proof becomes vital.
At a voluntariness hearing there will almost always be conflicting tes-
timony as to the circumstances surrounding the taking of the confession
and when the conclusion of the factfinder is controlled by which of two
conflicting accounts is accepted, it is clear that the standard of persu-
asion will be determinative.30

The United States Supreme Court has repeatedly indicated that the
Constitution requires that no one should be convicted based on a con-
fession unless that confession was freely and voluntarily given and, to the
greatest extent possible, coerced confessions should be eliminated with-
out regard to their truth or falsity.31 A basic question then arises:
Does admitting confessions, which have been shown to be voluntary
by a preponderance of the evidence adequately protect against the use
of involuntary confessions at criminal trials? The Lego majority
pointedly failed to answer or even discuss this question. It preferred
to base its decision on a mechanical distinction between the functions
of the judge and those of the jury. While the Court did discuss the
use of the high standard of proof in Winship to give substance to the
presumption of innocence,32 it also insisted that a high standard of
proof at a voluntariness hearing has nothing to do with ensuring
against unjust convictions. "A guilty verdict is not rendered less reli-
able . . . simply because the admissibility of a confession is deter-
mined by a less stringent standard."33

Accepting the Court's reasoning concerning the distinct functions of
the judge and of the jury, the fact still remains, as pointed out by the
dissent, that

. . . given the factual nature of the ordinary voluntariness deter-
mination, . . . permitting a lower standard of proof will neces-
sarily result in the admission of more involuntary confessions than
would be admitted were the prosecution required to meet a higher
standard. The converse, of course, is also true. Requiring the
higher standard means that some voluntary confessions will be ex-

29. Clifton v. United States, 371 F.2d at 364 (concurring opinion).
30. See 404 U.S. 492 (Justice Brennan dissenting).
(1964); Blackburn v. Alabama, 361 U.S. 199 (1960); Jackson v. Denno, 378 U.S. 368
(1964).
32. 404 U.S. at 486-87.
33. Id. at 487.
cluded as involuntary even though they would have been found voluntary under the lower standard.\textsuperscript{34}

A similar argument was used in \textit{Winship} concerning the prosecution's standard for proving the defendant guilty of the actual crime.\textsuperscript{35} Using the beyond a reasonable doubt standard will necessarily mean that fewer innocent defendants will be convicted but it also means that more guilty persons will be freed. Mr. Justice Harlan in his concurring opinion justified this result by stating: “In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.”\textsuperscript{36} He concluded that the requirement of proof beyond a reasonable doubt is “bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”\textsuperscript{37}

Arguing by analogy to Mr. Justice Harlan's views in \textit{Winship}, does it then follow that the Lego majority feels that it is no worse to admit an involuntary confession than it is to exclude a voluntary one? An affirmative answer to that question would seem to follow from the Court's statement that “. . . from our experience . . . no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence.”\textsuperscript{38}

This raises Lego's second major argument: the fifth amendment privilege against compulsory self incrimination is an “essential mainstay”\textsuperscript{39} of our system of criminal justice and, as such, the utmost protection should be afforded a criminal defendant to ensure that no involuntary confessions or statements will be used against him. The only truly adequate way to protect this essential mainstay, Lego contends, is to require proof of voluntariness beyond a reasonable doubt. The Court admitted that this argument “is straightforward and has appeal.”\textsuperscript{40} Yet the Court refused to accept it because it was “. . . unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond a reasonable doubt.”\textsuperscript{41}

\textsuperscript{34} \textit{Id.} at 493 (dissenting opinion).
\textsuperscript{35} 397 U.S. at 371-372 (concurring opinion of Justice Harlan).
\textsuperscript{36} \textit{Id.} at 372.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} 404 U.S. at 488.
\textsuperscript{39} Malloy v. Hogan, 378 U.S. 1, 7 (1964).
\textsuperscript{40} 404 U.S. at 488.
\textsuperscript{41} \textit{Id.}
A prime element in Lego's argument is that a confession, because of its very potent effect upon a jury, is a unique piece of evidence and therefore requires a unique standard for admissibility. There is, of course, no question that a confession can be of such overwhelming evidentiary value that its admission is likely to have such a persuasive effect upon a jury as to substantially determine the outcome of the trial. As was stated by Judge Levanthal in his concurring opinion in *Clifton v. United States*: 42

The determination by a judge of the voluntariness of a confession is so significant in the final assessment of guilt or innocence, and relates to such basic values in our system of jurisprudence, that it must be governed by the same standards as apply to the elements of a crime, and it is not to be relegated to a lower plane on the ground that it is a mere ruling on a point of evidence.43

This argument that a confession, because of its effect on a jury, is thereby unique loses much of its force when compared with other pieces of evidence and their potential impact on a jury. The testimony of an eye-witness, for example, is likely to be as damaging as a confession. The same might be said for the testimony of an undercover agent, or tapes of an accused’s conversations, or the defendant’s fingerprints found on a murder weapon. The introduction of any of these evidentiary materials is likely to carry an overpowering weight with the jury. In *United States v. Schipani,*44 in which the court argued that the beyond a reasonable doubt standard should be imposed at all suppression hearings, the trial judge also commented on the persuasive value of confessions as compared to other pieces of evidence:

Any evidence which is illegally obtained may be damning, so that the decision cannot turn on the importance of a confession in a case. Frequently, having lost on a motion to suppress, the defendant's chance of avoiding conviction is hopeless. A 'confession' may contain exculpatory material, be incomplete, or be unreliable so that it is no more the equivalent of a plea of guilty than is key evidence illegally obtained. Certainly the burden of proof at a preliminary hearing should not depend on how critical the evidence sought to be suppressed may be at the trial . . . . There is some possibility that the jury will discount a confession which is in fact not voluntary but almost none that it will ignore evidence obtained by illegal electronic surveillance, wiretaps or searches.45

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42. 371 F.2d 354 (D.C. Cir. 1966) (concurring opinion).
43. Id. at 361-362. For a similar argument in favor of the reasonable doubt standard because of the “dual character” of a confession—as a piece of evidence and also as the equivalent of guilt, see *The Reasonable Doubt Standard in Preliminary Proceedings to Determine the Voluntariness of a Confession*, 42 Temple L.Q. 60 (1968).
44. 289 F. Supp. 43 (E.D.N.Y. 1968).
45. Id. at 58.
Because it is virtually impossible, other than by “common sense” arguments, to accurately weigh the impact any one piece of evidence is likely to have on a jury, it is also almost impossible to show that confessions are inherently different and more damaging than other pieces of evidence. Lacking such proof, a court facing the issue in the Lego case would have two widely divergent choices available. It could hold, as did the Schipani court, that whenever a criminal defendant moves to have any piece of evidence suppressed as having been illegally obtained, the prosecution would have to prove beyond a reasonable doubt that the evidence was not in any way tainted. It would be very difficult to justify imposing the higher standard for admissibility for one piece of evidence—such as whether a confession was voluntarily given—and then require a different, lesser standard for others—such as whether a photographic identification was suggestive.

Taking this first choice and imposing the beyond a reasonable doubt requirement in all suppression hearings would constitute a broad expansion of the exclusionary rules and would impose significantly more difficult burdens on the prosecution. Perhaps this is the real reason why those courts which have argued that beyond a reasonable doubt is not the “normal” standard for admissibility have refused to apply that standard at voluntariness hearings.

The second choice, the one adopted in Lego, is simply to deny that the important values which the exclusionary rule was designed to protect would be in any way enhanced by requiring admissibility to be proved beyond a reasonable doubt. The Lego Court concluded:

Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries and by revising the standards applicable to state collateral proceedings. Sound reason for moving further in this direction has not been offered nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution’s burden of proof in fourth and fifth amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence. 46

Given the Court’s sanction of the preponderance rule, it would be worthwhile to examine what is meant by “preponderance of the evi-

46. 404 U.S. at 488-89.
idence.” Professor James has defined this standard as simply requiring the trier of fact “to believe the existence of a fact is more probable than its non-existence . . . .”47 Using that standard in a voluntariness hearing would merely require the trial judge to find that it was more probable that a confession was voluntary than not. However, an analysis of the cases which have adopted the preponderance rule indicates that the courts appear to be demanding something more than just the weight of probabilities. In People v. Thomlinson,48 which was cited by the Lego majority as authority for the preponderance rule in Illinois, the Illinois Supreme Court stated:

The mere denial of the officers of the illegal methods employed are not considered conclusive of the voluntary character of the confession . . . . The courts should scrutinize with the utmost care facts concerning the alleged voluntary confession to police officers and not deem itself bound by their testimony alone, without taking into consideration all of the circumstances surrounding it.49

The Eighth Circuit, in Wakaksan v. United States,50 although not holding the prosecution to any specific standard of proof, ruled that in determining voluntariness “. . . . close scrutiny to the facts of each individual case is the necessary approach and the totality of the circumstances dictates the decision.”51 The United States Supreme Court has also indicated that it would demand a high level of reliability for a determination of voluntariness; a level that would appear more demanding than “more probable than not.” In Jackson v. Denno,52 the principal case relied on by the Lego Court in affirming the preponderance rule, the Supreme Court recognized the difficulties inherent in the suppression hearing when it stated: “The overall determination of the voluntariness of a confession has become an exceedingly sensitive task. . . .”53 Later in the same decision, the Court, in commenting on the methods to be used, further stated: “These procedures must, therefore, be fully adequate to ensure a reliable and clearcut determination of the voluntariness of the confession.”54

In the landmark case of Miranda v. Arizona55 the United States Su-

47. JAMES, CIVIL PROCEDURE 250-252 (1965).
48. 400 Ill. 555, 81 N.E.2d 434 (1948).
49. 400 Ill. at 560, 81 N.E. at 440 (emphasis added).
50. 367 F.2d 639 (8th Cir. 1966), cert. denied, 386 U.S. 994 (1967).
51. Id. at 640 (emphasis added).
52. 378 U.S. 368 (1964).
53. Id. at 390 (emphasis added).
54. Id. at 391.
preme Court stated: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination."\textsuperscript{56}

Given these views which the various courts have expressed concerning the burdens to be met at a voluntariness hearing, it is perhaps justified in concluding that the courts have been, in effect, demanding proof beyond a reasonable doubt without ever really saying so.\textsuperscript{57} If this is true, there must be some justification for formally denying the applicability of the beyond a reasonable doubt standard to questions of admissibility of confessions.

The argument most commonly presented for refusing to apply the higher standard has been that ruling on admissibility of evidence is a function of the trial judge and, therefore, imposition of the reasonable doubt standard would be an exception to the court's normal procedure in the admission of evidence.\textsuperscript{58} In \textit{Clifton v. United States},\textsuperscript{59} the court stated the argument:

\begin{quote}
It is one thing to call for this high standard of proof from the ultimate fact-finder and quite another to ask that this issue be resolved preliminarily by the judge beyond a reasonable doubt contrary to all the law governing the admissibility of evidence. . . . We are not persuaded that it is more logical or reasonable that a confession, alone among all the myriad of evidentiary material, be singled out for a unique standard of appraisal.\textsuperscript{60}
\end{quote}

When \textit{Clifton} was later overruled by \textit{Pea v. United States},\textsuperscript{61} in which the District of Columbia Circuit adopted the reasonable doubt standard, the dissent commented that: "It is indeed a remarkable anomaly in the law that a trial judge, in passing on the admissibility of a piece of evidence, do so by any particular quantitative standard."\textsuperscript{62} The Lego majority also apparently felt that there was no legal justification for imposing any quantitative standard of proof for judging the admissibility of confessions.\textsuperscript{63}

\textsuperscript{55} 384 U.S. 436 (1966).
\textsuperscript{56} \textit{Id.} at 475 (emphasis added).
\textsuperscript{57} Some of these same comments have been used in determining that beyond a reasonable doubt is the better standard; \textit{See, e.g.}, State v. Yough, 49 N.J. 587, 231 A.2d 598 (1965).
\textsuperscript{58} United States ex. rel. Lego v. Pate, 308 F. Supp. 38, 40 (N.D. Ill. 1970).
\textsuperscript{60} \textit{Id.} at 358.
\textsuperscript{61} 397 F.2d 627 (D.C. Cir. 1967).
\textsuperscript{62} \textit{Id.} at 639 (dissenting opinion).
\textsuperscript{63} The Court stated: We did not think it necessary or even appropriate in \textit{Jackson} to announce that prosecutors would be required to meet a particular burden of proof in a
To paraphrase the Pea dissent, "it is indeed an anomaly" if, as these courts insist, a confession is to be treated as any other piece of evidence and then to have these same courts give their approval to a standard for admissibility which is not applied to all other pieces of evidence. For proof by a preponderance of the evidence is no more the "normal" standard by which admissibility of evidence is to be determined than is proof beyond a reasonable doubt. Preponderance is also a quantitative standard.

In non-confession suppression hearings based on an application of the exclusionary rule, the courts have not been as reluctant to impose burdens of proof that the evidence was not obtained in violation of the defendant's constitutional rights. In *United States v. Jordan*, the court stated that the government has a "heavy burden" in proving voluntary consent to search. The Eighth Circuit, in *Evans v. United States*, commented that "the district court was required to make a finding on the record with 'unmistakable clarity' that (1) the Miranda warnings were given; (2) the defendant knowingly and intelligently waived his privilege against self-incrimination." Several other courts have also imposed a certain burden of proof at suppression hearings.

All of these cases indicate that where potential violation of important constitutional rights are involved, the courts will not hesitate to impose high quantitative standards for admissibility despite the argument that "... a sufficiency test cannot be applied to questions of admissibility." That argument can be characterized as essentially a demand for form over substance.

*Jackson* hearing held before the trial judge. Indeed, the then-established duty to determine voluntariness had not been framed in terms of a burden of proof, nor has it been since *Jackson* was decided. 404 U.S. at 484.

64. *McCormick*, EVIDENCE § 26 (1954). The concurring opinion in *Clifton* states that the standard of proof that governs finding of fact in ordinary rulings on evidence is "to the satisfaction of the court."

65. 399 F.2d 610 (2nd Cir. 1968).
66. *Id.* at 614.
67. 375 F.2d 355 (8th Cir. 1967).
68. *Id.* at 360.
69. *United States v. Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968) (beyond a reasonable doubt should be the standard imposed at all suppression hearings where the evidence is attacked as having been illegally procured); *United States v. Smith*, 308 F.2d 657, 666 (2d Cir. 1962) (consent to search must be proved by "clear and positive evidence"); *United States v. Page*, 302 F.2d 81, 83-84 (9th Cir. 1962) (consent to search must be proved by "clear and positive testimony"); *United States v. Tagliani-etti*, 274 F. Supp. 220, 226 (D.R.I. 1967) (legality of electronic surveillance must be proved beyond a reasonable doubt); *Gillison v. United States*, 399 F.2d 586, 588 (D.C. Cir. 1968) (state must show that line of questioning was harmless beyond a reasonable doubt).
The imposition of these high standards of proof before certain pieces of evidence will be admitted at trial reflects a judicial determination that select constitutional guarantees will be protected even if it means going beyond the "normal" rules for admitting evidence. The Lego Court, by adopting the preponderance rule, is apparently treating as identical the objectives of the fourth and fifth amendments' exclusionary rule. By failing to discuss any possible difference they are implicitly rejecting the worth of any such an argument. However, by accepting the quantitative standard of preponderance for the voluntariness of confessions they are, in effect, applying different standards.

Whether this decision is an indication of a reluctance on the part of the Court to expand the exclusionary rules is problematic. What is clear, however, is that the Court is going to demand firm proof that an expansion is warranted. Simply putting the criminal defendant in a more advantageous position is not sufficient justification for such an expansion.

Other more practical problems remain when a trial judge is allowed to admit confessions as voluntary by a preponderance of the evidence. One of these problems is the effect such leeway will have on the judge, himself. Another is the difficult strategic position in which a defendant is placed after a determination that his statements have been voluntarily given.

When a judge hears evidence at a suppression hearing concerning the circumstances in which a confession was given, he is expected to make his decision on admissibility without any regard to the truth or falsity of that confession. As a practical matter, however, evidence as to the authenticity of the statements made is very likely to come out at the hearing. If evidence that the confession is truthful is offered, the judge is put in a very awkward position. He is expected to ignore the probable credibility of the statements and make his decision based solely on whether he has been convinced by a preponderance of the evidence that the confession was voluntary. The Lego Court recognized this problem by stating: "As difficult as such tasks may be to accomplish, the judge is also duty-bound to ignore implications of reliability in facts relevant to coercion. . . ." When facts concerning the truthfulness of the confession do come out, the judge is put in the same position which the Jackson Court found unacceptable for jurors.

72. 404 U.S. at 485, n.12.
In commenting on the rationale for *Jackson*, the *Lego* Court said: "... we feared that the reliability and truthfulness of even a coerced confession could impermissibly influence a jury's determination as to voluntariness."  

At least one authority has expressed those same fears concerning judges' ability to keep the two issues of voluntariness and credibility separate. Professor McCormick, in his text on Evidence, voiced the opinion that judges as well as juries would have a tendency to find the confession voluntary because they "will often be more interested in punishing the crime with which the prisoner is charged than in protecting the civil rights of a probably guilty man by disregarding the extorted confession." Despite the harshness of that opinion, it should be fairly clear that under the preponderance rule the trial judge will admit confessions even when he has some doubts as to their voluntariness. This tendency can only be increased when the judge has also heard testimony which supports the reliability of the statements.

After a determination by the trial judge that a confession is voluntary and admissible, a defendant is still allowed to argue to the jury that it was, in fact, coerced and, therefore, unreliable. The defendant can re-present all the evidence surrounding the taking of the confession which he had offered at the suppression hearing. He can also attack the credibility of his statements. Theoretically, the jury is free to give the confession whatever weight they think it deserves and even to reject it entirely as unworthy of belief. In most cases, however, in order to present his evidence to the jury, the defendant, himself, is required to testify to his version of the events surrounding the confession. By doing so, however, he runs the risk of impeachment on cross examination. Yet the necessity of making this hard choice cannot be said to put the defendant in a constitutionally unfair position.

Even if a defendant does testify, and the jury hears evidence of the circumstances attendant to the giving of the confession, and even if the jury concludes that the confession was, in fact, coerced, how feasible is it that they will disregard it when determining guilt or innocence? It is the unlikely juror, who after hearing that the defendant has already confessed to the crime, will be able to suspend belief in the confession merely because evidence is introduced to show coercion. These men-

73. *Id.* at 485.
tal gymnastics which a juror would be asked to perform would be com-
pounded under the Massachusetts procedure in which the jury is in-
structed that they must first find the confession voluntary; if they find
it involuntary they are not to use it regardless of its believability. This
is essentially the same situtaion with which the Supreme Court found
fault in *Jackson.*

*Lego* specifically approved the procedure used in Illinois where the
voluntariness of the confession is determined solely by the trial judge.\(^7^7\)
In denying Lego's contention that he has a right to have the issue of
voluntariness re-submitted to the jury, the Court said: "We are not
disposed to impose as a constitutional requirement a procedure we have
found wanting merely to afford petitioner a second forum for litigating
his claim."\(^7^8\)

It is doubtful, however, whether a great many criminal defendants
would be willing to testify at the trial at all. It is likely that most will be
reluctant to do so because of the fear of possible impeachment on
cross-examination. As a practical matter, therefore, evidence concern-
ing the alleged coercion will seldom reach the jury; the trial judge's
determination will, more often than not, be the last word on the sub-
ject. If the evidence of coercion is going to be heard only by the judge,
is it not then " . . . unjust if such evidence raised a reasonable doubt
only to find that this doubt was ignored by the judge . . . and was
never available to the jury?"\(^7^9\)

**CONCLUSION**

The criminal defense bar can take little encouragement from the *Lego*
decision. Allowing the judge to determine voluntariness by a prepon-
derance of the evidence will be a distinct disadvantage to certain crim-
inal defendants. Because the gap between preponderance and beyond
a reasonable doubt is measured differently by different judges, it would
be very hard to predict how many defendants will be actually affected
by this decision. Certainly it would have made no difference to Lego's
trial judge; there was no doubt in his mind that the confession was vol-
tary. But still it is probably fair to assume that, except in those

\(^{76}\) *Supra*, note 5.

\(^{77}\) "We also reject petitioner's final contention that, even though the trial judge
ruled on his coercion claim, he was entitled to have the jury decide the claim anew."
404 U.S. at 489.

\(^{78}\) 404 U.S. at 490.

\(^{79}\) Clifton v. United States, 371 F.2d 354, 363 (D.C. Cir. 1966) (concurring
opinion).
states which have already adopted the beyond a reasonable doubt standard for admissibility,\textsuperscript{80} more confessions will be admitted as voluntary than were previously. Because of \textit{Lego}, the trial judge will have less fear of being reversed when he admits a defendant’s statements into evidence.

Despite the many difficulties the criminal defendant might face by having his statements deemed voluntary by a preponderance of the evidence, it is evident that the Court is unwilling to erect additional constitutional roadblocks simply to ease his situation. A contrary decision would have imposed added barriers to the prosecution’s burden of proof. It would have expanded the exclusionary rule and have generated a great deal of pressure for further expansion. All this would have happened without any concrete showing that, as a result, our system of criminal jurisprudence would be in any way improved. Given all of these factors, one can only conclude that the \textit{Lego} decision was right and proper.

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\textsuperscript{80} \textit{Supra}, note 21. It will be of interest to note what effect the \textit{Lego} decision will have on those states that have accepted the higher standard. They are free to retain it if they wish but it is likely that \textit{Lego} will generate pressure for a revision downward.