

of the confession no matter what was determined with regard to its voluntariness. The rule was reiterated in *Sims v. Georgia*,<sup>410</sup> in which the Court voided a state practice permitting the judge to let the confession go to the jury for the ultimate decision on voluntariness, upon an initial determination merely that the prosecution had made out a *prima facie* case that the confession was voluntary. The Court has interposed no constitutional objection to use of either the orthodox or the Massachusetts method for determining admissibility.<sup>411</sup> It has held that the prosecution bears the burden of establishing voluntariness by a preponderance of the evidence, rejecting a contention that it should be determined only upon proof beyond a reasonable doubt,<sup>412</sup> or by clear and convincing evidence.<sup>413</sup>

## DUE PROCESS

### History and Scope

“It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just.”<sup>414</sup> The content of due process is “a historical product”<sup>415</sup> that traces all the way back to chapter 39 of Magna Carta, in which King John promised that “[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”<sup>416</sup> The phrase “due process of law” first appeared in a statu-

<sup>410</sup> 385 U.S. 538 (1967).

<sup>411</sup> *Jackson v. Denno*, 378 U.S. 368 and n.8 (1964); *Lego v. Twomey*, 404 U.S. 477, 489–90 (1972) (rejecting contention that jury should be required to pass on voluntariness following judge’s determination).

<sup>412</sup> *Lego v. Twomey*, 404 U.S. 477 (1972).

<sup>413</sup> *Colorado v. Connelly*, 479 U.S. 157 (1986).

<sup>414</sup> *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting). Due process is violated if a practice or rule “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>415</sup> *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

<sup>416</sup> Text and commentary on this chapter may be found in W. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 375–95 (Glasgow, 2d rev. ed. 1914). The chapter became chapter 29 in the Third Reissue of Henry III in 1225. *Id.* at 504, and see 139–59. As expanded, it read: “No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land.” See also J. HOLT, *MAGNA CARTA* 226–29 (1965). The 1225 reissue also added to chapter 29 the language of chapter 40 of the original text: “To no one will we sell, to no one will we deny or delay right or justice.” This 1225 reissue became the standard text thereafter.