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INTRODUCTION: RASKOLNIKOV AND *STATE V. WILEY*

By admitting to the police Inspector that he murdered two people, Raskolnikov delivers literature's most famous criminal confession. The Inspector has done virtually nothing to procure the confession; all he did was tell Raskolnikov that he knows Raskolnikov committed the murder. The marvel of *Crime and Punishment* is its exploration of Raskolnikov's relentless, multi-faceted conscience, which alone drives him to admit his guilt.[1]

Would Raskolnikov's confession be admissible under Maine law? It depends. Here, from its 2013 decision in *State v. Wiley,*[2] is how the Maine Supreme Judicial Court, sitting as the Law Court, states the pertinent law:

> A confession is admissible in evidence only if it was given voluntarily, and the State has the burden to prove voluntariness beyond a reasonable doubt [3]
> . . . A confession is voluntary if it results from the free choice of a rational mind, if it is not a product of coercive police conduct, and if under all of the circumstances its admission would be fundamentally fair.[4]

Whether Raskolnikov's confession is the product of "the free choice of a rational mind" hinges on one's point of view. Yes, because the Inspector did not provoke it. No, because Raskolnikov was mentally tortured, and a confession induced by torture cannot be a "free" choice. Given that the State has to prove the voluntariness of Raskolnikov's confession "beyond a reasonable doubt," the chances are that

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I owe thanks to many people. Foremost, to Gail Hupper, who patiently critiqued drafts of the article and helped me improve it greatly. Professor William Ickes of the Department of Psychology at the University of Texas at Arlington generously helped me understand "empathic inference." Peter L. Murray, who helped with the discussion of jury instructions. Nancy Rabasca, librarian extraordinaire, supplied valuable research support. Frank Underkuffler helped me through the morass of "free will." And my favorite Queen of Espionage, Gayle Lynds, helped keep the whole thing coherent.

1. Using *Crime and Punishment* as a point of takeoff was Maine Law School Professor Mel Zarr's idea. Thirty years ago I participated in a panel that discussed the law of voluntary confessions. What prompted the colloquy was a recent Law Court decision suppressing a confession—*State v. Caouette,* which I discuss in note 186 *infra*—and an article I'd published in the Maine Law Review criticizing the decision. The defendant had confessed, without any inducement from law enforcement, out of a powerful sense of guilt. Prof. Zarr wisely compared that circumstance with Raskolnikov's. Enough has been written about the American law of voluntary confessions to fill an encyclopedia. I read some of those authorities when I wrote that article, and my learning then is the foundation for this piece. I will not cite again, here, the authorities I relied upon then, because they're in that article for anyone to find.

2. 2013 ME 30, 61 A.3d 750.

3. *Id.* ¶ 15 (citing State v. McCarthy, 2003 ME 40, ¶ 12, 819 A.2d 335).

4. *Id.* ¶ 16 (quoting State v. Mikulewicz, 462 A.2d 497, 501 (Me. 1983)).

Raskolnikov wins the motion to suppress in our Law Court.[5]

What provokes this article is the fact that nothing justifies suppressing the confession. *Wiley* extends the Law Court's history of unsound jurisprudence in this field.

The court's view of the law is flawed for five reasons. First, its definition requires the State to prove that the confession "results from the free choice of a rational mind." As I will explain, "the free choice of a rational mind," and its correlatives, "free will" and "voluntariness," are undefinable; proving the undefinable is a futility. Second, if proving the undefinable is futile, proving it "beyond a reasonable doubt," as the State must, is immeasurably futile. Third, even if "voluntariness" were definable, objectively determining whether someone else's behavior was "voluntary" is impossible. Fourth, what "coercive" police conduct means, how much is too coercive, and whether something is "fundamentally fair," are pure value judgments, and not given to factual proof. Fifth, the Law Court has jeopardized "the security of all"[6] in Maine by spiritualizing the Fifth Amendment.

Excluding the impossible, the inapposite, and the unjustified, the standard should be amended thus:

> The State has the burden of persuasion that, under all of the circumstances, the admission of a confession would be fundamentally fair.

The "voluntariness" doctrine is the creation of the United States Supreme Court. The Law Court acknowledges the former's controlling authority in this field but decided, pursuant to the Supreme Court's license, to augment the federal burden of proof—a preponderance—by requiring the prosecution to prove "voluntariness" beyond a reasonable doubt.[7] Neither the Supreme Court's approach to this issue, nor the Law Court's, deserves approbation.[8] And although I have no expectation that this article will persuade the federal courts to alter their doctrine—they're wedded to "free will" and divorce is unlikely—I urge the Law Court to alter its own. I have entitled this piece an "essay" because my objective is not especially academic. I want to explain why the court's confession law doesn't work, and to suggest improvements.

I begin by discussing what "free choice of a rational mind" means. I propose that we don't know. I then focus on *Wiley,* and explain why neither the majority opinion nor the minority opinion is persuasive. Part III discusses why the Supreme Court's approach to confessions is equally unpersuasive. In Part IV I criticize the Law Court's decision to raise the prosecution's burden of proving "voluntariness" to the criminal standard, and I end by explaining that the only way we can reasonably attempt to determine why a defendant decided to confess is if the defendant tells us.

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5. There is federal precedent to the contrary: Colorado v. Connelly, 479 U.S. 157 (1986); see the discussion in the text *infra* accompanying note 122. However, the Law Court has declared a confession that was offered under similar circumstances inadmissible under the authority of the Maine Constitution. State v. Caouette, 446 A.2d 1120, 1122 (Me. 1982). That decision has never been overruled. See the discussion in note 186 *infra*.

6. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (citing Haynes v. Washington, 373 U.S. 503, 515 (1963)).

7. *See infra* Part IV of this Article.

8. The "voluntariness" test has been described by commentators as "useless," "elusive," and "double-talk." *See* WAYNE LAFAVE, 2 CRIMINAL PROCEDURE § 6.2(b) (3d ed. 2007) [hereinafter LAFAVE].

I. THE "FREE CHOICE OF A RATIONAL MIND"

Voluntary confession law assumes a person possesses free will—an unadulterated freedom of self-control—that the interrogation by the police then adulterates.

The phrase "free choice of a rational mind" is the Law Court's formula representing that pre-existing freedom of self-control. In what follows I mean to demonstrate that the formula is illusory. The bottom line is that free will—the foundational concept supporting the "free choice of a rational mind"—cannot be defined and may not exist.

To demonstrate why this is so, I start at the end of the phrase and work forward: first, what does "rational mind" mean; then what does "choice of a rational mind" mean; finally, how do we interpret "free choice of a rational mind"?

A. Rational Mind.

My dictionary[9] offers, among several other choices, the following. For "rational," it suggests "based on reasoning, not foolish or silly, sensible."[10] For "mind," it offers, "intellect, intelligence, consciousness, psyche, memory, reason."[11] The implication is that "rational mind" involves reasoning and intelligent processes. But not all intelligent behavior is based on reasoning: consider religious faith and altruism. Moreover, some intelligent behavior can be unwise—consider courage—and intelligent, reasonable people are capable of behaving irrationally.

Finally, we have cause to doubt we know how "intelligent" our "intelligence" is—something the rest of this portion of the article addresses. For now, suffice it to say we think we know what "rational mind" means, but we may not.

B. Choice of a Rational Mind.

Plainly, for "rational mind" to have legal significance it must have a meaning that exceeds the mere combination of definitions. The obvious candidate as the source of such meaning is the noun that next precedes "rational mind" in the doctrinal phrase, *i.e.* the "choice" of a "rational mind."

The term "choice" suggests a calculation, perhaps a cost-benefit analysis, like this: "They want me to confess. Should I? And why should I? Is it in my interest to do so?"

The analysis cannot rest there however, for reasons illustrated by *Brown v. Mississippi*:[12]

> [A]bout one o'clock p.m. on Friday, March 30, 1934. . . . one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime [of murder]. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung

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9. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (1958) [hereinafter WEBSTER'S].
10. *Id.* at 1496.
11. *Id.* at 1144.
12. 297 U.S. 278, 281-82 (1936).

> him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.[13]

More suspects were rounded up, and all were tortured. Not surprisingly, they all "chose" to confess—they engaged in a cost-benefit analysis, and the immediate benefit of confessing outweighed whatever the cost might become. And their decisions were certainly the "choice of a rational mind," because they were "based on reason, not foolish or silly, sensible."[14]

Does the fact that they "chose" to confess make any difference to the admissibility of their confessions? Certainly not: it's immaterial, because whipping someone is intolerable. So "choice of a rational mind" cannot be a test of voluntariness and, therefore, cannot provide the meaning we're looking for. The essential term we're looking for must be the only one left in the phrase—the "*free* choice of a rational mind."

C. Free Choice of a Rational Mind.

What is a "free" choice? To interpret "free" I again resorted to the dictionary. There was a multitude of definitions, but the following seemed the most helpful:

> [N]ot under the control of some other person or arbitrary power; able to act or think without compulsion or arbitrary restriction; not restricted by anything except its own limitations or nature, as *free* will.[15]

What jumps out from that series of definitions is the idea of artificial force: "arbitrary power," "compulsion," and "restriction." And that certainly fits the lesson of *Brown v. Mississippi*:

> Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that

13. *Id.* at 281-82.

14. The Supreme Court suppressed all confessions in the case: "[T]he freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand." *Id.* at 285-86.

15. WEBSTER'S, *supra* note 9, at 729.

> lay behind these practices and prohibited them in this country.[16]

So it appears that the "freedom" we're focusing on involves the absence of compulsion.

This, however, raises another question: compulsion from what source? As Justice Felix Frankfurter once observed, "[t]here is torture of mind as well as body."[17] *Brown* exemplifies the latter, *Crime and Punishment* the former because the Inspector left Raskolnikov to stew in his own juices. What produced the famous confession was an internal force: the irresistible pressure of Raskolnikov's own conscience, exclusive and internal to him. In order to understand whether Raskolnikov's decision to confess was "voluntary," therefore, we must know whether it was "free."

1. Internal Force.

Do internal forces such as Raskolnikov's play a part in our analysis of "the free choice of a rational mind"? Here I explain why no answer currently exists.

I will illustrate the problem on three levels: the psychological, the scientific, and the philosophical. But first, this proviso: What follows is an *extreme* simplification of a gargantuan conundrum—graduate school thesis material, at least. My objective is limited to illustrating why it is fruitless to try proving "free will" and its correlative, the "free choice of a rational mind."

a. The Psychological Definition of Free Will

Everyone "suffers" from something; a few common examples are shyness, a desire to be liked, lack of self-confidence, shame, and hot-headedness. Alice Munro, I think, said it best: "[W]hatever troubled him and showed in his face might have been just the same old trouble—the problem of occupying space in the world."[18] Take, for instance, the desire to be liked. Suppose a suspect's need for approbation is strong enough to be called an obsession, a result of having been neglected as a child. Assume that a law enforcement officer has "questioned" the suspect: they run into each other when she's paying a parking ticket at the police station and he asks her what happened. Suppose further that she confesses to having done something wrong, solely because she seeks the officer's approval for being honest. Is that a "free" act? To put the question another way, at what point does an emotional predisposition or a mental disorder deprive us of "freedom"?

It takes an arbitrary judgment to answer that question. To illustrate, try distinguishing those conditions that do not impair "free choice," from those that do, in the following list of "disorders" found in the American Psychiatric Association's Diagnostic and Statistical Manual V (DSM V):[19]

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16. 297 U.S. at 287 (citation omitted).

17. Culombe v. Connecticut, 367 U.S. 568, 605 (1961).

18. "The Love of a Good Woman," *in* FAMILY FURNISHINGS: SELECTED STORIES, 1995-2014 (Knopf 2014) at 32.

19. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

- Attention-deficit/hyperactivity disorder (predominantly hyperactive/impulsive presentation): symptoms include difficulty sustaining attention, subject does not seem to listen when spoken to directly, avoids tasks that require sustained mental effort, talks excessively, blurts out answers before the questions are finished.[20]
- Bipolar I disorder (mild), depressive episode, with mixed features: elevated, expansive mood, more talkative than usual, excessive involvement in activities that have a high potential for painful consequences.[21]
- Premenstrual dysphoric disorder: marked depressed mood, anxiety, a sense of being overwhelmed or out of control.[22]
- Depressive disorder due to another medical condition: significant impairment in social, occupational or other important areas of functioning.[23]
- Generalized anxiety disorder: excessive anxiety about a number of activities, accompanied by difficulty concentrating and irritability.[24]
- Agoraphobia: anxiety about being in places or situations from which escape might be difficult or may not be available.[25]
- Acute stress disorder: inability to experience positive emotions, altered sense of the reality of one's surroundings, efforts to avoid external reminders that arouse distressing memories of traumatic events.[26]
- Unspecified neurocognitive disorder: "symptoms characteristic of a neurocognitive disorder that cause clinically significant distress or impairment in social, occupational or other important areas of functioning predominate but do not meet the full criteria for any of the disorders in the neurocognitive disorders diagnostic class."[27]
- Mild frontotemporal neurocognitive disorder: "behavioral disinhibition, apathy . . . prominent decline in language ability, in the form of . . . word comprehension."[28]
- Antisocial personality disorder: "impulsivity or failure to plan ahead . . . reckless disregard for safety of self . . . consistent irresponsibility."[29]

This far-from-exhaustive list—the text of the DSM V is over 800 pages long—illustrates the problem: to debate whether a person's particular mental condition or combination of conditions permits the person's decision to be "free," or renders it "unfree," is like asking whether light is a wave or a particle.[30]

What, therefore, does the Law Court require the prosecution to prove beyond a reasonable doubt? Is it that the declarant does not possess any of the conditions

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20. *Id.* ICD-9-CM 314.01 at 59-60.
21. *Id.* ICD-9-CM 296.41 at 149-50.
22. *Id.* ICD-9-CM 625.4 at 171-72.
23. *Id.* ICD-9-CM 293.83 at 180.
24. *Id.* ICD-9-CM 300.02 at 222.
25. *Id.* ICD-9-CM 300.22 at 217-18.
26. *Id.* ICD-9-CM 308.3 at 280-81.
27. *Id.* ICD-9-CM 799.59 at 643.
28. *Id.* ICD-9-CM 780.09 at 614-15.
29. *Id* ICD-9-CM 301.7 at 659.
30. Or both. The Supreme Court managed to avoid this issue by declaring that, absent any attempt to induce a confession by the police, there is no "state action" that warrants the exclusion of the statement on constitutional grounds. Colorado v. Connelly, 479 U.S. 157, 169-70 (1986). Whether the confession is admissible for its probative value is a different question.

described in the DSM V, or perhaps only one or two, and if so which ones? Is it only those that interfere with "free will"? If so, which are they? How much interference is allowed? The Law Court has never said.

b. The Scientific Concept of Free Will

In a recent experiment by John-Dylan Haynes,[31] subjects were given two buttons and told to make up their minds about which button to push, and then once they'd decided, immediately to push it. Using a form of MRI, Haynes discovered that:

> [W]ithout realizing it, [about 20% of them] unconsciously formed prior-to-choice plans to push one of the two buttons. They unconsciously stored this information in their brains, and then when the time came, these plans were activated. . . . The claim is that *all* of us *sometimes* fail to be free. We are all *sometimes* driven by things like unconscious plans. But we aren't *always* driven by such things.[32]

As scientific analysis of brain function improves, so will experiments about free will, and it is certain that within a generation or two we will understand our minds better. But for now, we're on notice that we exercise conscious choice perhaps only 80% of the time. If by "free" choice we mean one that results from conscious functioning—and I believe we must—we can't prove to better than an 80% certainty that a choice was "free." Such a 20% margin of error precludes proof beyond a reasonable doubt.[33] And, for all the reasons I'm explaining in Part I of this article, we're still left with the problem of knowing how much if any of that 80% is "free."

c. The Philosophical Concept of Free Will

The only things I've ever found more difficult to understand than the philosophy of free will are (1) quantum mechanics and (2) Finnish grammar.[34] What follows is a brief description of some of the many philosophical approaches to free will.[35]

i. Determinism, or Why I Hate Onions.

When I was a young child, my grandmother served me what she considered her specialty: boiled onions. It was the first time I'd had onions, and I didn't like the taste—in fact, I can recall gagging on the first one. Of course, being of the old

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31. Chun Siong Soon, Marcel Brass, Hans-Jochen Heinze & John-Dylan Haynes, *Unconscious Determinants of Free Decisions in the Human Brain*, NATURE NEUROSCIENCE 2008 (Apr. 13, 2008), http://www.nature.com/neuro/journal/v11/n5/full/nn.2112.html. I initially found reference to this study in MARK BALAGUER, FREE WILL (MIT Press Essential Knowledge Series, 2014) [hereinafter BALAGUER], and my description of it is Balaguer's.

32. BALAGUER, *supra* note 31, at 109-10.

33. I will not attempt to quantify reasonable doubt. Suffice it to say that an 80% chance you're right may be good betting odds, but hardly proof to "a moral certainty." *See* JOHN HENRY WIGMORE, TRIALS AT COMMON LAW § 2497 at 405 (Chadbourn ed., 1981).

34. Some people, especially Finns, claim they understand Finnish grammar. But then some people claim they understand particle physics, too.

35. The discussion of determinism, randomness, and non-randomness are based on Balaguer's book, *supra* note 31 except for the quotation from Robert Kane, *Libertarianism*, *in* FOUR VIEWS ON FREE WILL 5 (2007), and the text accompanying note 38.

school, my grandmother insisted that I eat them all, which didn't help because not only did I dislike them initially, but I *really* disliked them thereafter.

What caused my original gag response to onions? Who knows? Why can't I stand them now? Because I never could, or maybe because I resent my grandmother having forced them down my throat. So if I'm at some friends' house and they offer me onions, do I exercise free will by accepting or rejecting them? Certainly not if I reject them. And if I elect to eat them, it might be because (1) my mother taught me always to accept food because it's good manners, or (2) I don't ever want to disappoint a host, or (3) I fear the disapproval of others so I will eat onions if the others do. Under those circumstances, I'm not exercising free will because *something in my background* controls any choice I make.[36]

If I'm asked to confess to a crime, the same may be true: something historical in me controls the choice.[37] If so, *Wiley*'s "free choice of a rational mind" cannot occur.

ii. Randomness: Flipping a Coin.

A second interpretation of free will is the case of someone who'd neither tasted onions nor had any other experience with them, first- or second-hand (i.e., a friend hadn't told him or her they're delicious), was hungry enough to try them, and had no subconscious directive one way or another; faced with a choice between eating onions or not, he or she just flips a coin or rolls a die.

To a degree, randomness does enhance the argument for free will because rolling the die, and delegating the choice to something external and uncontrollable, was the person's choice. Or maybe not:

> Suppose a choice was the result of a quantum jump or other undetermined event in a person's brain. Would this amount to a free and responsible choice? Undetermined effects in the brain or body would be unpredictable and impulsive—like the sudden emergence of a thought or the uncontrolled jerking of an arm—quite the opposite of what we take free and responsible actions to be. [Such spontaneous events] would be more likely to *undermine* our freedom [i.e. our free will] than *enhance* it.[38]

However one characterizes them, random acts can't be what the Law Court means by "the free choice of a rational mind."

iii. Non-randomness: The Fork in the Road.

It is also possible to posit that decisions may be made that aren't related to one's background—i.e., aren't deterministic—but that aren't random either. Here's an illustration: I'm driving down a road I've never been on before, and I come to an

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36. What if I accepted onions because (1) I wanted to see if my taste has changed, or (2) I didn't want to leave on an empty stomach? Are those choices determined by my background, or do they form boundaries within which I may exercise free will? *See infra* note 44 and accompanying text for the discussion about compatibilism.

37. For several additional examples of this phenomenon, *see infra*, Part II, subsection B.

38. Kane, *supra* note 35, at 9.

unmarked fork in the road. Both options look equally wide, well-paved, and well-travelled, I have no idea which one I should take to get to my destination, and a pulp truck[39] is bearing down on me from behind so I have to do something quick. Whichever fork I take, it cannot be said that my decision will be deterministically caused. Nor will it be random, because it won't simply *happen* to me; I won't roll a die and let the die decide what I should do. It is *I* who will choose what to do. I realize my decision will be arbitrary and I will make a decision anyway. I consciously control the decision.[40]

Let me apply that to the confession problem. Assuming that the fork-in-the-road metaphor describes someone's decision to confess, can such a decision *ever* be "the free choice of a rational mind"? To put it another way, does our court really require the State to prove, beyond a reasonable doubt, that the defendant's choice was capricious?

iv. Libertarianism: The Boston Marathon Bomber.[41]

The classic view of free will is the libertarian concept, which associates the exercise of free will with moral responsibility. Free will, from this view, is our conscience—what the Russian Inspector expected would drive Raskolnikov to confess.

Relying on a libertarian concept of free will is common. Consider the Boston Marathon bomber, Dzhokhar Tsarnaev. If the determinists are right, Tsarnaev couldn't help it. Everything he did was pre-determined by culture, psychological predispositions, bad role models, DNA-driven instinct, and so on. But nobody is willing to believe that. We believe he *could* have helped it and *should* have done so. In other words, we believe that there's a significant element of human behavior that cannot be deterministic: we have abilities beyond whatever we've been programmed to do. This concept of free will, in Tsarnaev's case, is *necessary* if we are to justify his execution.

This is probably what judges have in mind when they talk about the "free choice of a rational mind": leaving the decision to confess up to an individual's sense of responsibility and preference.

But there is this uncertainty: are we so sure Tsarnaev possessed the ability to have chosen to obey the law? We assume we have moral standards of behavior because we have free will, but is the converse not equally possible? Perhaps we need moral standards of behavior to quash anarchy so, in order to justify them, we assume free will exists?[42] We've done something similar before: where did the Garden of Eden come from if not a socio-psychological need to vindicate our existence? So,

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39. Because everyone in Maine knows what a pulp truck is, and because nobody outside of Maine is likely to read this article, I won't explain it.

40. Beware, however, of the possibility that my conscious control will not be that at all. For example, what if, whenever as a child I was bad, my mother had always slapped my right hand, not my left one. Now, how much "control" will I have exercised if I take the left fork?

41. In this portion of the article I rely on Kane, *supra* note 35.

42. JONATHAN M.S. PEARCE, FREE WILL? AN INVESTIGATION INTO WHETHER WE HAVE FREE WILL, OR WHETHER I WAS ALWAYS GOING TO WRITE THIS BOOK loc. 2043 (2010) (ebook).

have we invented free will—or do we hope it exists—to vindicate our condemning what the Tsarnaevs around us might otherwise do? Which is real: free will or the need to have it?[43]

In a larger sense, do we ourselves have the "free will" to determine whether the libertarian theory is correct, or is our choice of that theory driven by the very nature of human society: the need to control individuals' behavior? If so, the libertarian theory of "free will" is itself deterministic.

Here is that question in the context of this article: does a person have a choice whether or not to confess, or do we pretend that the choice exists, without really knowing, in order to justify using the confession to convict? I suspect the truth lies with the latter alternative.

v. Compatibilism: The Laptop.[44]

At first glance, libertarianism and determinism seem *in*compatible. How can we hold a criminal defendant morally responsible, under the former theory, if the defendant's behavior was pre-determined and beyond the person's control under the latter?

Compatibilism maintains that libertarianism and determinism are just what the term suggests, harmonious. There are many versions of compatibilism, including the following, an example based on an idea of John Locke (the laptop was my idea, not his). A man is bedridden in a hospital room following an operation. He considers walking out the door and down the hall to steal a laptop at the nurses' station.

- He decides not to try. Unbeknownst to him, his physical condition would have prevented him from getting out of bed anyway.
- He decides not to try. Unbeknownst to him, the door is locked from the outside so he couldn't have stolen the laptop if he'd tried.
- He decides to try stealing the laptop. However, as he's getting out of bed he sees a sign on the door: "Door locked; to exit call nurses." He stays in bed.
- Finding the door locked, he picks the lock and steals the laptop.

The fact of *choosing*—the "free will" component—occurs in each example, but the fact of *doing* occurs only in the fourth. Whether he was aware of it or not, in each of the other examples something beyond the man's control prevented or would have prevented the *acting*. The converse is also possible: One could also posit the case in which a person *does* something that is not his or her choice.[45] In either event,

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43. If all we have is a need to control behavior, then perhaps we don't have free will, right? If we don't have free will, Tsarnaev couldn't help choosing to kill people, so it's unjust for us to execute him, right? Welcome to the debate about free will.

44. The illustration here comes from John Martin Fischer, *Compatibilism*, *in* FOUR VIEWS ON FREE WILL 44, 57 (2007). My description of compatibilism will probably horrify compatibilists because of the degree to which I've simplified it, but I'm not writing for philosophers.

45. Fisher tells of a "Frankfurt-example," an invention of the contemporary philosopher Harry Frankfurt: A person standing in a voting booth who up until now has been undecided is about to cast a vote for Republican Presidential candidate Mitt Romney. Unknown to that person, a dyed-in-the-wool Democrat neuroscientist has planted a device in the voter's brain that senses the imminence of such choice and countermands it. The person thus votes for Obama. The voter has thus *done* something—voted for a Democrat—without having *chosen* to do so. *Id.* at 57-58.

compatibilism conjoins libertarianism—the power of choosing—with determinism—the impediment to the exercise of choice.

For the purposes of this essay, compatibilism doesn't help answer whether a suspect's confession is the "free exercise of a rational mind" because we can't tell whether (1) libertarian "free will" exists and (2) the "choice" to confess was a deterministic one.

vi. Recapping the Philosophies of Free Will.

The foregoing discussion skims only a portion of the extensive surface of an enormously profound subject. I have avoided Kant, Spinoza, Hobbes, Aquinas, Plato, Popper, Rousseau, and Aristotle (among a boatload of other philosophers). I have stayed away from the arcana of "free will" debates, such as hard incompatibilism, causal reductionism, non-reductive physicalism, revisionism, positivism, recurring patterns of embodied experience, and "P Nfc" (among a separate boatload of other concepts).[46] And then there's quantum mechanics, which I reference a couple of times in this article (and from which I then flee).

Does Maine adhere to any of the foregoing theories of free will? I'd guess libertarianism, but one reviews Law Court decisions in vain to find any such election, or even concern about it.

d. Summary: The "Free Choice of a Rational Mind" Tells Us Nothing About Internal Coercion.

The Law Court's "free will" analysis—if "analysis" is an appropriate term—fails psychologically, scientifically, and theoretically. For the purpose of deciding the critical issue of whether highly probative evidence may be used in criminal trials, it is useless. So I urge that we cease employing "free will," "free choice of a rational mind," and "voluntariness" as the basis for determining the admissibility of confessions.

2. Forces Internal to the Person, and External to the Person, Combined.

Raskolnikov's was an unusual case: a suspect who confesses without any inducement from the police. Now add official participation: does our assessment of the declarant's "voluntariness" change? Obviously not: except in occasional cases, such as *Brown,* the addition of an external force doesn't endow us with a greater ability, or additional tools, to analyze what occurs internally. The *only* thing we can measure is what we can observe, record, and catalog: (1) the behavior of the police and (2) the behavior of the declarant.[47]

II. VOLUNTARINESS AND THE PROBLEMS WITH *WILEY*

State v. Wiley was not a unanimous decision. Justice Levy wrote for the four-

46. *See generally* JOSEPH M. BOYLE, JR., GERMAIN GRISEZ & OLAF TOLLEFSEN, FREE CHOICE: A SELF-REFERENTIAL ARGUMENT (1976); NANCEY MURPHY & WARREN S. BROWN, DID MY NEURONS MAKE ME DO IT? (2007); Kane, *supra* note 35.

47. We can consider the defendant's inner psychological, psychiatric, and emotional goings-on if he or she will enable us to do so. See the discussion in Part V of this article.

Justice majority and was principally concerned with the interrogating officer's conduct. Justice Alexander wrote for the three dissenters; he criticized the majority for focusing on the officer's conduct, and argued that what counts most is the declarant's state of mind.

I disagree with both of the opinions, for reasons that follow. But first, let me outline the case.

A. Wiley*'s Facts and Opinions.*

William Wiley was convicted of having had sexual contact with his stepdaughter when she was approximately twelve years old.[48]

Sheriff's detective Jason Bosco had met Wiley at his home, told him he was investigating something, and asked him to ride with him back to the Sheriff's Office.[49] Wiley agreed.[50] A recorded interview followed.[51] Bosco told Wiley he was not under arrest and was free to leave whenever he wanted; Bosco did not read Wiley the *Miranda* warnings.[52]

Soon after the interview began Bosco told Wiley "he knew that Wiley had molested the victim."[53] Wiley, who was a long-time elementary school teacher,[54] got upset, began sobbing, and

> eventually slid to the floor of the room in a fetal position while the questioning continued. Approximately forty minutes into the interview, Wiley raised the prospect of being sent to jail, and the detective continued to urge Wiley to describe what he had done. Detective Bosco informed Wiley that he had two options: he could "own up" to his mistake and serve "a little bit of jail time" in county jail followed by probation, thus preserving his relationship with his son, or he could refuse to disclose the sexual contact with the victim and serve a sentence in state prison.[55]

Writing for the majority, Justice Levy summed up what he considered to be the essence of the interrogation:

> [I]t is inescapable that the overall effect of Detective Bosco's representations—which he alternately described as an "offer," "option," "opportunity," and chance to "write[] your own punishment"—was to establish that if Wiley confessed to the crimes he would get a short county jail sentence with probation, and thereby avoid state prison. Wiley was told, "[t]he only reason you're getting this opportunity is because people spoke very highly of you," and that "[t]his offer's going to expire if . . . you're not going to do the right thing."[56]

Justice Levy concluded:

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48. State v. Wiley, 2013 ME 30, ¶ 2, 61 A.3d 752
49. *Id.* ¶ 3.
50. *Id.*
51. *Id.* ¶ 4.
52. *Id.*
53. *Id.* ¶ 5.
54. *See id.* ¶ 44 (Alexander, J., dissenting).
55. *Id.* ¶ 5.
56. *Id.* ¶ 25.

> Detective Bosco's concrete representation of a short jail sentence followed by probation in exchange for Wiley's cooperation was . . . the primary motivating force for the ensuing confession.
>
> . . . .
>
> . . . A confession is not voluntary where an interrogating officer, with no more than apparent authority, leads a suspect to believe that a confession will secure a favorable, concrete sentence, and that belief motivates the suspect to confess.[57]

The confession being "involuntary," it was therefore inadmissible.

Justice Alexander wrote a dissent on behalf of himself and two other Justices, and offered this criticism of the majority decision: "[T]he Court has failed to focus on the critical aspect of the analysis—Wiley's state of mind—and it has instead focused on the officer's statements."[58] He explains further in an accompanying footnote: "the decision regarding voluntariness requires an individualized assessment of the defendant's state of mind in the context of the officer's actions and conduct."[59] In addition, the dissent accused the majority of exceeding its authority: since there was adequate evidence in the record to support the trial court's factual findings, and precedent to support its legal conclusion, the obligation of the appellate court was to sustain the lower court's ruling. For both of those reasons, therefore, the dissenters would have found the confession "voluntary" and admissible.

What prompted this article is my belief that the law cannot be what either opinion claimed it to be. So I dispute the majority's assertion that the State failed to meet its burden of proof. I disagree with the dissent's theory of the method by which a judge is supposed to determine whether a confession was "voluntary." And I dispute the assumption underlying both opinions that "the free choice of a rational mind" can be determined. I will start by discussing the dissent, because therein lies my principal objection to Maine's view of "voluntary" confessions.

B. The Dissent.

I disagree with Justice Alexander's position on two grounds.

1. "Individualized Assessment."

First, I differ from Justice Alexander's view that a court hearing a suppression motion must make "an individualized assessment of the defendant's state of mind."[60]

What, exactly, should a trial court "assess"? Should the record on Wiley's appeal demonstrate that the trial court considered whether Wiley was Catholic and had been raised to confess his sins? Would this have diminished Wiley's dependency on the officer's plea bargain offer enough to render his confession "voluntary"? (This notwithstanding the contradiction between determinism and free will.) Suppose Wiley lived in a small town, and the officer and the suspect were cousins, and the officer used to coach him on the little league baseball team. Should the trial court have considered small-town dynamics? Perhaps Wiley was so psychologically insecure that he was bound, under the slightest pressure, to expose his inner

57. *Id.* ¶¶ 30-31 (citations omitted).
58. *Id.* ¶ 32.
59. *Id.* ¶ 32 n.7.
60. *Id.*

thoughts? If so, what prompted the confession was Wiley's inner fragility, not Bosco's offer of leniency. (This notwithstanding the problem of distinguishing psychological predisposition from free will.)

What, in fact, should a trial court *not* consider when making such an "individualized assessment of the defendant's state of mind in the context of the officer's actions and conduct"? An "individualized assessment" thorough enough to provide proof beyond a reasonable doubt would include Wiley's

- predisposition to confess;
- respect for authority;
- respect for propriety;
- discomfort in the presence of police;
- aversion to deceit;
- concern for his reputation for honesty;
- concern for his job;
- fear of punishment;
- sadness;
- shame;
- guilty conscience;
- hope that honesty would assuage his shame and guilt;
- hope that honesty would get him a light sentence;
- desire to please;
- feelings of his own victimization if what he'd done had been done to him; and, if so,
- sympathy for his victim;
- desire to get the interrogation over with;
- need for the companionship of someone more amiable than Detective Bosco,

plus any other pertinent characteristics, plus, *necessarily*, the significant clinical features and psychological disorders one would expect of a person who had committed a sexual act against a child. How the State would get this information, given the Fifth Amendment and the present state of Maine law, is undetermined,[61] but it must prove "voluntariness" beyond a reasonable doubt, so it would need someone qualified as an expert in this field to present such an assessment. Assuming the prosecution has an expert armed with such information, Wiley would need to rebut with expert testimony of his own. If Justice Alexander was correct, motions to suppress confessions need to be full-blown trials involving experts on both sides.

But Justice Alexander cannot have been correct in any event. Here is his opening description of the process by which a court determines whether a confession was "voluntary": "The trial court may find a defendant's statements voluntary if it finds that the statement is the result of the defendant's 'own free will and rational intellect . . . as opposed to one that results from threats, promises or inducements made to the defendant.'"[62]

The implicit premise of that statement is that there is a starting point, a pre-existing norm: the defendant's "free will and rational intellect." The trial court's job is to determine whether, and to what degree, the incipient state of the defendant's

61. *See* discussion *infra* in Part V of this article, where I offer a suggestion.

62. *Wiley*, 2013 ME 30, ¶ 33, 61 A.3d 750 (quoting State v. McCarthy, 2003 ME 40, ¶ 12, 819 A.2d 335).

"free will and rational intellect" was altered by law enforcement's behavior. But how is the defendant's incipient state to be discerned? Doing what Justice Alexander suggested requires one to identify, define, and quantify the defendant's "free will and rational intellect" *ab initio*, *before* the police started interfering with it. That prerequisite—that absolute essential—and how to achieve it get no mention.

Nor have they ever gotten mention. As Justice Alexander illustrated through the precedents he cited in support of his argument,[63] for decades the Law Court has been sending trial courts on a fool's errand without referencing the prerequisite of the inquiry, the consequential magnitude of its mandate or, in the alternative, the simple impossibility of the task. The Law Court has not contemplated the preliminary inquiry that its mandate requires. Nor has it intended to turn motions to suppress into complex litigation. It cannot have confronted the fact that, absent expert testimony, it has been requiring trial judges to declare a confession admissible only after determining the undeterminable—and, of course, beyond a reasonable doubt.

2. Nonexistent Standards for Law Enforcement.

My criticism of the dissent in *Wiley* extends beyond the impossibility of its directive. If the appellate standard for admissibility pivots on the trial court's "individualized assessment of the defendant's state of mind," the standard works an injustice on the public. The public is entitled to effective law enforcement and, as *Crime and Punishment* famously illustrates, confessions are a significant law enforcement tool.[64] But by making an "individualized assessment of the defendant's state of mind" the standard for admissibility, the Law Court gives police and prosecutors no guidance whatsoever. This contradicts the very purpose of "voluntary" confession law, because if the trial court, and then the Law Court, will look over an officer's shoulder, after the fact, to "assess" the suspect's "state of mind," so, it seems, the officer must also, and constantly, "assess" the suspect's "state of mind." But how? What is the officer looking for?

This the Law Court has never explained. It is, however, something the Supreme Court sought to address in *Miranda v. Arizona*:[65]

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63. Justice Alexander cited four of them: State v. Lavoie, 2010 ME 76, ¶¶ 18-21, 1 A.3d 408 (affirming trial court findings that statements that officers could help defendant get treatment for his alcohol problem if he would "step up to the plate" and admit that he made a mistake did not render confession involuntary, although officers could not provide the promised treatment); State v. Nadeau, 2010 ME 71, ¶ 57, 1 A.3d 445 (concluding that a police officer's statement to the defendant that "the more cooperative you are, the better things are for you" was not a threat or promise of leniency) (alteration omitted); State v. Wood, 662 A.2d 908, 911 (Me. 1995) (concluding that a confession was voluntary when detectives, after repeatedly disclaiming any authority over sentencing, assured the defendant that he was not in trouble for possessing a handgun used in a murder); State v. Hutchinson, 597 A.2d 1344, 1346 (Me. 1991) (concluding that even if a police officer's statement to a defendant that telling the truth would "clear things up" constituted an implied promise, the confession was voluntary because the defendant "clearly considered whether speaking would be in his best interest, but he was simply wrong in his conclusion").

64. See the further discussion in the text *infra* accompanying note 141, concerning the Law Court's inadequate reasons for raising the prosecution's burden of proof from a preponderance to beyond a reasonable doubt.

65. 384 U.S. 436 (1966).

> [The Supreme] Court's effort to determine on a case-by-case basis whether the [confessing] defendant had acted out of free will had resulted in disaster. . . . Before *Miranda* the illusive and contradictory character of free will provided every defendant with an arguable claim that his or her will had been overborne. . . . By transmogrifying free will into the concrete warning-and-waiver procedure, the Court tamed the contradictions that would otherwise continually threaten the legitimacy of punishment in a liberal democracy. . . . An individual policeman, untrained in the philosophical intricacies of free will, now knew precisely what it was that he [or she] was supposed to do before talking to a suspect.[66]

Our Law Court's failure to have clarified this field of law for those who are required to apply it first-hand may be a symptom of the court's four-decade-long disregard for the public interest in law enforcement in preference for individual defendants' rights, which I discuss below.[67]

C. The Majority Decision.

Justice Levy wrote for the majority, asserting that the State failed to meet its burden of proof that the defendant's confession was "voluntary": "[w]e would need to disregard both experience and common sense to conclude that Detective Bosco's concrete representation of a short jail sentence followed by probation in exchange for Wiley's cooperation was not the primary motivating force for the ensuing confession."[68]

Justice Levy could have concluded that: (1) the officer made an offer of leniency without the authority to guarantee it, and a confession ensued (irrespective of the defendant's motivation); (2) doing that was improper; (3) such impropriety renders the confession inadmissible. That is a straightforward rule and is supported by the facts in the record. Moreover, it's easy for the police to understand and for the courts to apply. Had Justice Levy stopped there, I wouldn't have written this article.

But Justice Levy went further, attempting to associate the improper offer with the defendant's motivation to confess. What linked the offer to the confession was Justice Levy's "experience and common sense" but, given the complexity of the human psyche, that's unpersuasive. Such complexity suggests an intricate combination of "motivating forces" within Wiley, including perhaps, but not necessarily limited to, his:

- predisposition to confess;
- respect for authority;
- respect for propriety;
- discomfort in the presence of police;
- aversion to deceit;
- concern for his reputation for honesty;
- etc. (see above).

Identifying one element that controlled the decision to confess is guesswork.

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66. Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 742-43, 746-47 (1992). Of course *Miranda* didn't resolve the enduring problem of deciding the "voluntariness" of a waiver of the rights.

67. *See infra* Part IV.

68. State v. Wiley, 2013 ME 30, ¶ 30, 61 A.3d 750.

An additional complication, of which Justice Levy was likely unaware, is the possibility that, and the degree to which, Wiley's choice was deterministic.

And there's more. For Justice Levy to have understood Wiley's "motivation" he would also have had to understand how Wiley digested the information Bosco provided him with, which requires employing the language of human information processing:

> Human performance can be described either in terms of subjective experience or in terms of brain processes. The language of human information processing provides a common vehicle for the integration of these two approaches. On the one hand, information processing can be related to subjective experience, since verbal reports often serve as a method for accumulation of evidence and can be viewed as the output of a specialized processing system that has its own objective status within an information processing theory. On the other hand, the language of information processing provides an analysis of psychology that is congenial to physiology because it places emphasis on different levels of processing and the time course of their activation. Information processing language provides an alternative way of discussing internal mental operations intermediate between subjective experience and activity of neurons.[69]

Assuming that Justice Levy did not consider the interface between Wiley's subjective experience and his neural activity, and employed only "experience and common sense" to estimate the defendant's mental process, Justice Levy could have hit upon Wiley's particular—unique—motivation to confess only by an outside chance or if the defendant's mind was sub-humanly unsophisticated. It follows that our law of "voluntary" confessions operates by equally thin fortuity or at an equally unsophisticated level.

I will leave this inquiry at this point, but resume it when I reconsider Justice Levy's resort to "experience and common sense" as I compare Maine's standard of "voluntariness" with the Supreme Court's in a later portion of the article.[70] There I also explain how, given the foregoing discussion, we nevertheless can determine *mens rea.*

1. Common Sense or Camouflage?

As the title to this piece may suggest, I consider common sense an ultimate measure of good law. So it may seem inconsistent for me to criticize Justice Levy's express reliance on common sense, but I do so because I believe that "experience and common sense" merely camouflaged his purpose, for this reason:

- The officer broke the rule about offering leniency. That rendered the confession inadmissible. But declaring probative evidence inadmissible in a criminal case is unjustifiable unless supported by policy. It was necessary, therefore,
- [t]o employ the language of voluntary confession law in order to assert that a

69. MICHAEL I. POSNER, *Information Processing, in* 2 HANDBOOK OF PERCEPTION AND HUMAN PERFORMANCE, at V-3 (Kenneth R. Boff, Lloyd Kaufman & James P. Thomas, eds., John Wiley & Sons 1986).

70. *See infra* Part III(B), text accompanying note 101.

ruling of inadmissibility is founded on established, constitutional doctrine.

This means Justice Alexander's criticism of the majority opinion characterized it correctly—Wiley's "voluntariness" had nothing to do with it—and that Justice Levy's concluding paragraph, presented here in full, misstates the basis for the decision:

> A confession is not voluntary where an interrogating officer, with no more than apparent authority, leads a suspect to believe that a confession will secure a favorable, concrete sentence, and that belief motivates the suspect to confess. Considering the circumstances as a whole, and mindful that it is the State that bore the burden to prove voluntariness beyond a reasonable doubt, we conclude that the finding that Detective Bosco "did not engage in any conduct or invoke any techniques that would render the defendant's statements involuntary" was clear error.[71]

First, Justice Levy did not know, or conscientiously attempt to know, what principally "motivate[d] the suspect to confess." Second, therefore, the decision was based entirely on the officer's behavior—in this case, the unauthorized offer of leniency.[72] Third, the reference to the prosecution's burden of proof—"mindful that it is the State that bore the burden to prove voluntariness beyond a reasonable doubt"—was a formal gesture and immaterial to the decision because "voluntariness" was simply the packaging in which the decision was wrapped.[73] Fourth, the State actually met its burden of proof, because it proved the only thing that mattered, the facts: the interview was recorded and there was no doubt whatsoever about what the officer said to the suspect.

It is disappointing that Justice Levy's decision is so transparent. Bereft of the ornament of "voluntariness," the decision is sound: the officer crossed the line and the confession is inadmissible. I do not mean to suggest that Justice Levy misapplied the law. As I will explain in the next part of this article, he applied it in the only way that makes sense. I criticize Justice Levy's opinion, in part, because he didn't acknowledge that.

III. THE SUPREME COURT'S CONFESSION LAW DOCTRINE

Another reason why I criticize Justice Levy's opinion is that he didn't explain *why* the officer crossed the line. It's not, as Levy says, that the officer convinced Wiley to take the bait. Rather, the reason is that Levy *himself* would have taken the bait.

A. The Supreme Court's Definition of "Voluntariness"

Let me begin to explain why by presenting part of the Supreme Court's most elaborate explanation of "voluntariness," from Justice Felix Frankfurter's exegesis

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71. *Wiley*, 2013 ME 30, ¶ 31, 61 A.3d 750 (citations omitted).

72. I've over-simplified here. As I will explain *infra* in the text accompanying note 96, the decision was based on how the officer's promise of leniency affected *Levy*.

73. *Wiley*, 2013 ME 30, ¶ 31, 61 A.3d 750.

about "voluntary" confessions in *Culombe v. Connecticut.*[74]

The starting point to determine whether a confession was "voluntary," he said, is to consider "all of the circumstances" under which it was given.[75] In confession law since *Brown,* that requirement has never been disputed.[76] But then Justice Frankfurter said this:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[77]

That suggests the inquiry must focus primarily on the consequence of the interrogation for the individual defendant—what this particular person actually felt—and only secondarily on what the police did to him or her. It seems, therefore, that if the police were to use precisely the same interrogation method on two ostensibly identical people, one of them might confess "voluntarily" and the other "involuntarily." No matter how the police behaved, then, they would be incapable of protecting the admissibility of the confession they obtained.

Or perhaps not? How significant is the individual defendant? To answer that question, consider the following. Quoting again from Frankfurter's *Culombe* opinion, it seems at first that everything pivots on how the particular defendant received and reacted to the words and behavior of the police:

- "if he has willed to confess";[78]
- "if . . . his capacity for self-determination [has been] critically impaired";[79]
- "[t]he line of distinction is that at which governing self-direction is lost";[80]
- "all of the surrounding circumstances . . . [including the defendant's] physical and mental state";[81]
- "'voluntariness' . . . describe[s] an internal psychic state" and involves an "internal, 'psychological' fact.'"[82]

Elsewhere, however, Frankfurter seems to abandon concern for the individual's

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74. 367 U.S. 568 (1961). Frankfurter was writing the Court's lead opinion, and it was not well received by some. Chief Justice Warren concurred in the result of the case but accused Frankfurter of rendering an advisory opinion. The dissenters approved of Frankfurter's analysis but not his result.

75. *Id.* at 606 ("[J]udgment as to legal voluntariness *vel non* under the Due Process Clause is drawn from the totality of the relevant circumstances of a particular situation . . . .").

76. "Totality of the circumstances" is the standard by which the Supreme Court considers the "voluntariness" of confessions. *Culombe,* 367 U.S. at 606 ("[J]udgment as to legal voluntariness *vel non* under the Due Process Clause is drawn from the totality of the relevant circumstances of a particular situation."); *see also* Massiah v. United States*,* 377 U.S. 201, 204 (1964); Spano v. New York*,* 360 U.S. 315, 323 (1959).

77. *Culombe*, 367 U.S. at 602.

78. *Id*.

79. *Id*.

80. *Id*.

81. *Id*.

82. *Id*. at 605, 603.

reaction and suggest reliance on something else:

- "There is torture of mind as well as body . . . [a]nd there comes a point where this Court should not be ignorant as judges of what we know as men."[83]
- "[T]here is the imaginative recreation, largely inferential, of internal, 'psychological' fact."[84]
- "[W]here [the defendant] has acted as a man would act who is subjected to such an extracting process . . . ."[85]
- "[T]he apprehension of mental states is almost invariably a matter of induction . . . ."[86]
- "[T]he trier of fact [must] draw inferences which the historical facts compel."[87]
- "[I]nvoluntariness . . . can never be affirmatively established other than circumstantially—that is, by inference."[88]

Whose "imaginative recreation"? Induction from, or inference based on, whose experience? Frankfurter mentions how "a man would act who is subjected to such an extracting process," but who is that "man"—the defendant, or the generic Man in the Street, or us? Whose "voluntariness" is really at stake? Frankfurter seems, perhaps unintentionally, to befog the question. To clarify it, I start first by asking, can we know what a particular defendant was sensing?

A partial answer to that question lies with a psychological phenomenon known as "empathic inference," which is the "'everyday mind reading' that people attempt whenever they want to perceive other people's thoughts and feelings."[89] A measure of the success of such mind reading attempts is called *empathic accuracy*, which has been defined more precisely as "accuracy in inferring the specific content of other people's thoughts and feelings."[90] The results of several psychological studies of empathic accuracy in two-person interactions have enabled researchers to estimate that the average degree of such accuracy for pairs of strangers chosen at random is about 20%; for close, same-sex friends about 30%; and for married couples about 35%.[91] In other words, people's ability to "read" each other's thoughts, feelings, and intentions is clearly limited, even in the closest of relationships.

Those figures, moreover, indicate accuracy in the context of immediate, ongoing interactions: how well two people sitting and conversing in a room together can determine what's going on in each other's mind. Judges, on the other hand, must assess the *past* experiences of the defendant and must do so at a location other than where the interrogation occurred. If a high-quality video recording exists that can

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83. *Id*. at 605-06.
84. *Id*. at 603.
85. *Id*. at 605.
86. *Id*. at 604.
87. *Id*. at 605.
88. *Id*.
89. WILLIAM ICKES, *Measuring Empathic Accuracy*, *in*, INTERPERSONAL SENSITIVITY: THEORY AND MEASUREMENT 219 (J. A. Hall & F. J. Bernieri eds., 2001).
90. WILLIAM ICKES, *Judging Thoughts and Feelings*, to appear in J. A. Hall, M. Schmid Mast, and T. West (eds). THE SOCIAL PSYCHOLOGY OF PERCEIVING OTHERS ACCURATELY (Cambridge U. Press, 20__), draft on file with this author, at 2.
91. *Id.* at 7.

bring that past interaction into the present, a judge *might* be able to approximate the empathic accuracy that he or she might have had if present for the interrogation. But that uncertainty, compounded by the mere 20% degree of empathic accuracy that face-to-face strangers achieve in general, mandates against relying on the notion of empathy as a vehicle for determining constitutional rights.[92]

Justice Frankfurter may have realized that too, because nowhere in *Culombe* does he suggest that empathy should play a role in this field. Instead, he employs terms of strict logic: induction and deduction (i.e., inference: "imaginative recreation" and "what we know as men"). This, he maintains, will enable one to determine the defendant's "internal psychic state" at the time of the interrogation.

That is virtually impossible. The particular form of reasoning Frankfurter meant to describe is called "abductive" reasoning—filling gaps in the evidence with one's own experience. It's how we use circumstantial evidence. A standard Maine jury instruction goes like this: You awaken in the morning to find snow on the ground. It was not there when you went to bed. You have seen snow falling before and covering the ground, so you infer that snow must have fallen overnight. From what you observe, you fill in the gaps—what you did not see—by reasoning abductively from what you know.

There is another source of snow: a snow-making machine. If you're unaware that such a thing exists,[93] you can't infer the possibility that the snow is artificial. Your own experience limits your analysis; the scope of your "imaginative recreation"—Frankfurter's term—is confined to your own, peculiar-to-you perceptions *and* interpretation of those perceptions.

This means analyzing the effect of an interrogation on another person cannot be an objective inquiry into the effect on *that* person. How would a judge's own experience help determine the effect of an interrogation, for example, on the defendant in *Culombe,* who was "illiterate and mentally defective—a moron or an imbecile. He spent six years in the third grade and left school at the age of sixteen. He ha[d] twice been in state institutions for the feeble-minded."?[94] Or consider a male judge trying to determine the effect of an interrogation on a woman who was suffering from premenstrual dysphoric disorder,[95] or any judge intuiting what John Dillinger's "internal psychic state" might have been during an interrogation. Except for the ultra-rare occasion when the judge's and the defendant's experiences and personalities coincide, Frankfurter's assertion that logic is a means to determine the defendant's "voluntariness" is false.

This is another way of illustrating why Justice Levy's attempt to know what Wiley underwent during the interrogation was a shot in the dark,[96] and it is the ultimate basis for my argument against trying to assess whether a confession was a

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92. I owe the information in this and the previous paragraph to Dr. William Ickes, Distinguished Professor in the Department of Psychology at the University of Texas at Arlington, who edited this portion of the article for me.

93. And did not hear it overnight; you slept soundly.

94. Culombe v. Connecticut*,* 367 U.S. 568, 639 (1961) (Douglas, J., concurring). Other factors, such as prolonged custody and repeated questioning also contributed to the Court's decision.

95. *See supra* note 22.

96. *See supra* note 69 and accompanying text.

defendant's "free choice." Not only is it impossible to determine whether such a thing as a "free choice" exists, or whether someone can exercise such a choice, but it's immaterial to our assessment of other peoples' conduct. The only question we can address is how we believe *we* would react to what we have learned about the other person's experience, if we can even know. Given the gap in the evidence—we can't burrow into the other person's psyche to find out what was going on—we fill that gap by examining ourselves. Ignoring Frankfurter's intellectualization, we rely on our own wisdom, i.e., "the faculty of making the best use of knowledge, experience, [and] understanding."[97]

This approach to confessions is the same as the method by which we assess a person's *mens rea*. The fact finder—jurors in this example—determine the facts, based upon all of the information the parties give them—which may or may not include the defendant's character, age, health, education, and other things that make up, in the Supreme Court's words, "the totality of the relevant circumstances."[98] From the facts they find, the jurors infer the intent from their own experience with human behavior.

Consider the Boston Marathon bombing case. The jurors would not have examined the inner workings of Tsarnaev's mind, and we do not expect them to have done so. Nobody asked them to consider such Frankfurterian concepts as the defendant's "internal psychic state" or his "internal, 'psychological' fact[s]."[99]

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97. WEBSTER'S, *supra* note 9, at 2099.

98. "Totality of the relevant circumstances" is the standard by which the Supreme Court considers the "voluntariness" of confessions. *See Culombe,* 367 U.S. at 606 (holding that "judgment as to legal voluntariness vel non under the Due Process Clause is drawn from the totality of the relevant circumstances of a particular situation."). *See also* Missouri v. Seibert, 542 U.S. 600, 608 (2004) (citing Dickerson v. United States, 530 U.S. 428, 444 (2000)); Spano v. New York, 360 U.S. 315, 323 (1959) ("totality of the situation"). In a criminal trial before a jury the consideration of circumstances is controlled by relevancy. In a jury-waived trial, relevancy applies to the determination of guilt in the same way as it applies to the determination of "voluntariness": the judge considers what counts and disregards what does not.

99. The *Tsarnaev* jury instruction on *mens rea* was not publicly available at the time of this writing. Nor has the First Circuit adopted a jurisdiction-wide pattern or standard instruction on the issue. (Tsarnaev was tried in a federal District Court in Boston, within the First Circuit. I wrote to the judge who presided in the Tsarnaev trial, Hon. George A. O'Toole, Jr., requesting information about the *mens rea* instruction, but received no response.)

What follows is the proposed instruction on intent and knowledge from KEVIN F. O'MALLEY, JAY E. GRENIG, AND WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL (Fifth Ed., West, 2000) § 17.07 at 622:

> The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts [*done*] [*omitted*] by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.
>
> You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

Rather, having been presented with "the totality of the circumstances" of the case, they had to infer from what Tsarnaev did that he must have intended to kill people. The jury's inquiry was this: what would *they themselves*, having "occup[ied]" Alice Munro's "space in the world," have been intending if they'd done what Tsarnaev did. To be sure, the jurors were instructed to find Tsarnaev's intent beyond a reasonable doubt, and that formula involves the intellectual exercise of excluding a doubt for which one may ascribe a reason. But the foundation for a reasonable doubt, or excluding the same, is experience and the common sense that experience cultivates.[100]

Intent, of course, is rarely the issue in confession law, because nearly everyone who confesses intends to do so—the defendants in *Brown* intended to confess. The issues in confession law are what prompted or induced that intent—*i.e.*, *why* the defendant confessed—and that question's correlative, whether the police improperly induced the statement.

Why the defendant confessed—motive—and intent—the *mens rea* for a crime—may be different intellectual concepts, but that is immaterial for the purposes of this discussion. We did not ask the Tsarnaev jurors to inspect the defendant's mental goings-on when considering the intellectual element of that crime. They aren't mind readers. Changing the inquiry from *mens rea* to motive doesn't turn any fact finder into a telepathist. All we have to go on is what we know.

B. The Law Court's Application of the Supreme Court's Standard.

That is precisely how Justice Levy reached his decision. His summary:

> We would need to disregard both experience and common sense to conclude that Detective Bosco's concrete representation of a short jail sentence followed by probation in exchange for Wiley's cooperation was not the primary motivating force for the ensuing confession[ ][101]

had nothing to do with Wiley's own "voluntariness," and everything to do with Levy's.

This raises a further problem. Given our inability to place ourselves in the mind of a defendant, judges who maintain that they have done so run headfirst into an age-old legal axiom. Our Rules of Evidence generally discredit testimony that is not based on personal knowledge: "[a] witness may not testify to a matter unless . . . the witness has personal knowledge of the matter."[102] Since nobody can know what someone else felt in the past, testimony based on a witness's claim that he or she does know would be as inadmissible as a psychic's. How ironic it is, then, that our Law Court, claiming psychic powers, should base the determination of constitutional

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Observe that this prescription opens with the axiom "there is no way of directly scrutinizing the workings of the human mind." That, of course, is the very thing which Justice Frankfurter claimed to do in *Culombe,* and which Justice Levy asserted he was doing, and Justice Alexander advocated doing, in *Wiley*.

100. If the jurors cannot put themselves into the circumstances the evidence describes, they may be unable to reach an accord on the *mens rea*. Such might well be the case with a jury dealing with someone like Culombe's criminal intent.

101. *See Wiley,* 2013 ME 30, ¶ 30, 61 A.3d 750.

102. ME.R. EVID. 602.

rights on a type of assertion that has long been discredited as inherently unreliable.

So I disagree both with Justice Levy's assertion that Wiley's "voluntariness" counts, and with Justice Alexander's claim that "the court's focus must be on the effect of the officer's alleged inducements on the defendant himself."[103] As I explain in the next section, that assertion and that claim exemplify the argot in this field from which the Law Court must distance itself.

C. Considering the Interrogation Methods of the Police.

If a tenet of confession law—reading the mind of the defendant—is a fiction, is it even possible to establish a standard upon which to determine the admissibility of a confession? My answer, however ironic it may seem, is to study case law.

1. The Supreme Court's Goals.

Let me start by discussing the Supreme Court's two, somewhat inconsistent objectives in this field. First, of course, it means to enable people to decide for themselves whether they want to confess.

The Court's second objective, and notwithstanding the first, is to let the police persuade the defendant to confess:

> The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation. If that is so, if the "suction process" has not been at the prisoner and drained his capacity for freedom of choice, does not the awful responsibility of the police for maintaining the peaceful order of society justify the means which they have employed?[104]

How the police "midwife" confessions involves a spectrum of methods, from whipping (*Brown v. Mississippi*), to waiting them out (the Russian Inspector). Some methods are permitted, others not, where to draw the line has never been certain.[105] I will not attempt to draw it here. What I will do is describe the distortions of reason that proceed from attempts to build a constitutional doctrine upon the imaginary.

Nothing better illustrates the sophistry embedded in confession law than the Seventh Circuit decision, *United States v. Villalpando,*[106] that Justice Alexander quoted in his dissent.[107] Referring in the opening phrase to the defendant's burden on appeal, the federal court said,

> For [the defendant] to succeed here [on appeal], he has to establish that his interrogator made him a promise that was materially false and thus sufficient to overbear his free will . . . The reason we treat a false promise differently than other somewhat deceptive police tactics (such as cajoling and duplicity) is that a false

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103. *Wiley*, 2013 ME 30, ¶ 36, 61 A.3d 750 (Alexander, J., dissenting).

104. *Culombe*, 367 U.S at 576.

105. *See id.* at 601: "[I]t is impossible . . . to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved."

106. 588 F.3d 1124 (7th Cir. 2009).

107. *Wiley,* 2013 ME 30, ¶ 40, 61 A.3d 750 (Alexander, J., dissenting).

> promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable.[108]

That statement is nonsense:

> a. The appellate court does not pause to define "free will." That, the court apparently believes, needs no attention.
> b. Having failed to explain what "free will" is, the court also fails to explain what it takes to "overbear" it. Nor, apparently, has the court considered the prerequisite I mentioned above, determining the state of the defendant's "free will" as it existed before the police began tampering with it.[109]
> c. Why does some duplicity make a statement irrational whereas other duplicity does not?[110] If the officer falsely asserts that the suspect's accomplice has already confessed—something the Supreme Court permits[111]—and the suspect then confesses, the defendant's choice to do so is no less rational—no less reasoned—than it would be if the offer involved leniency.[112]
>
> Nor does the truth or falsehood of the same formal inducement make a difference. Consider this: the interrogator has made an offer of leniency, and the suspect has accepted it and confessed, and:
>
> the officer had authority to offer leniency; or
> the officer lacked authority to offer leniency; or
> the officer lacked authority to offer leniency but, after the confession, obtained it; or
> the officer had authority to offer leniency but, after the confession, lost it.
>
> The rationality of the choice never changes; whether the offer is true or not has no effect on the defendant's thought processes. What is doubly bizarre about the federal court's proposition is the implication that the birth of the authority to make the offer—its legitimization—*after* the confession renders the initially "irrational" statement "rational" (and vice versa for the authority's extinguishment). Perhaps the Seventh Circuit is employing some legal version of Schrödinger's cat?[113]
> d. For the same reason, the reliability of a confession is unrelated to the truth or falsity of a promise. Even the Supreme Court conceded that.[114]

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108. *Villalpando*, 588 F.3d at 1128 (7th Cir. 2009) (citing United States v. Montgomery, 555 F.3d 623, 630 (7th Cir. 2009)).

109. The Seventh Circuit is not to blame for this problem. *See Culombe*, 367 U.S. at 602: "[I]f his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

110. *See infra* text accompanying note 120.

111. *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969) ("The fact that the police misrepresented [that a codefendant had confessed] is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible.").

112. This, notwithstanding that the first may be an act of surrender, with an implicit hope for mercy, rather than an acceptance of express mercy.

113. "Schröedinger's cat" is a paradox of quantum physics, in which something can be both dead and alive at the same time, and only "dies" when it is observed. There is a good MinutePhysics description of it on YouTube. The metaphor here is that the confession is both rational and irrational until the officer's authority is determined. *See generally* John Gribbin, SCHRÖDINGER'S KITTENS AND THE SEARCH FOR REALITY (Little Brown & Co. 1995).

114. *See* Rogers v. Richmond, 365 U.S. 534, 541 (1961) (noting that "in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use

The real reason why some duplicity renders a confession inadmissible, while other duplicity does not, has nothing to do with "voluntariness." The reason is that some duplicity is unfair, while other duplicity is *less un*fair. But judges flinch at acknowledging such thinking so they fancy it up.

2. The Law of Rules and the Law of Standards.

In fact, however, fairness, like common sense, is a fundamental element of good law. Those two concepts form the basis for something called the law of standards, which is the little-acknowledged flipside of the coin bearing the law of rules. The latter is hyper-logical black letter law, *e.g.* most of the Restatement of Agency, most of the Uniform Commercial Code, and motor vehicle and traffic statutes. The former is equity, *e.g.* specific performance, much of divorce law, and the unconscionability and good faith provisions of the U.C.C.[115] Call it left-brain versus right-brain reasoning; they are equally important.[116]

Some will argue that the law of standards is arbitrary. They miss the point: the law of rules is itself arbitrary, because it can impose results we do not condone.[117] The Law Court employed just such an approach recently when it decided that the District Court has subject-matter jurisdiction to determine the maternity of a child.[118]

The plaintiffs were the intended parents of a child born to a gestational carrier.[119] Their declaratory judgment action asked the court to declare that the intended mother would assume the carrier's status as the legal mother of the child. The trial judge refused on jurisdictional grounds, and was right: no statute in Maine, either expressly or intentionally, gave the District Court authority to declare any such thing.

The Law Court understood that subject matter jurisdiction is something it cannot fabricate. But to avoid an intolerable alternative—unfairness to a motherless child and her hopeful but unfulfilled parents, soon to be followed by more as the use of gestational carrying increases—the court employed language out of the Uniform Act on Paternity—*pa*ternity, you understand—and fabricated it anyway.[120]

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of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.").

115. *See, e.g.,* 11 M.R.S. § 2-302 (2014).

116. For an extraordinary discussion of the relationship between the law of rules and the law of standards, *see* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

117. Standards also provide room in the law for behaviors we admire but that the logic of rules doesn't accommodate, such as altruism, courage and loyalty.

118. *See* Nolan v. LaBree. 2012 ME 61, 52 A.3d 923.

119. A gestational carrier is a person who bears a child that is genetically unrelated to her—i.e. the egg that was conceived came from a different woman. A surrogate mother, on the other hand, is a person who bears a child who was conceived with her own egg. In each case, the birth mother carries and bears the child with the intention that another person will parent the child.

120. Maine's version of the Uniform Act on Paternity is 19-A M.R.S. §§ 1551-1570 (2014). The court quoted from section 1556: "The District Court has jurisdiction over an action to determine parentage. There is no right to demand a jury trial in an action to determine parentage." The court did not explain how "parentage" could refer to the person giving birth in a statute whose sole intent was to identify and assign responsibilities to the person not giving birth.

When standards control decisions, judges should say so. In that maternity case, the Law Court should at least have acknowledged that the legislature had created a dilemma for the court by dropping the ball.[121] Ignoring the obvious, and propounding doubletalk like "a false promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable," bruises credibility and jeopardizes a decision's usefulness in the future.

3. Relying on Case Law.

How, then, do we determine what is a fair interrogation technique? We think we know it when we see it, but our perceptions are not objective. So the best way to do it—the most objective way—is by resort to case law.

It may seem ironic that, on the one hand, I criticize American courts for pursuing the non-entity of "free will," and the impossible objective of determining something's prior effect on someone else while, on the other hand, suggesting that decisions based on such snipe hunts should provide a guide to later rulings. I do so because (1) notwithstanding jargon, what have probably controlled many if not all decisions are unspoken considerations of fairness, (2) over time such considerations have more or less gelled into coherence, and (3) case law is the best measure we have. As in other fields in which fairness is a controlling issue—the division of marital property between divorcing spouses is an example—case law may be *all* we have to render an initially subjective analysis as objective as possible.

Moreover, case law can establish clear rules. *Brown* drew one: torture's unconscionable. *Colorado v. Connelly*, a 1986 Supreme Court decision,[122] drew another. In *Connelly,* the defendant walked up to a police officer and said he wanted to talk about a murder he had committed. After the police gave Connelly the *Miranda* warnings twice, he told them whom he had murdered and took them to the

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I have this confession to make: I submitted an *amicus curiae* brief in *LaBree* in which I expressly advocated using, for the purpose of deciding maternity, the language from the Act on Paternity that the Law Court relied on. So blame me (and whatever other non-judicial participant who may have made the same argument) for suggesting it. As an advocate, however, I did not argue against my argument. More importantly, I also said that 14 M.R.S.A. §§ 5953 and 5957 authorized the District Court

> To issue declaratory judgments, and thereby to "declare rights, status and other legal relations." This includes the authority to issue a judgment that "will remove an uncertainty" — such as which of a variety candidates will be the parents.

See Brief of *Amicus Curiae*, Supreme Judicial Court Docket no. Pen-11-393 at 7.

Ironically, the legislature has since repealed (effective in 7/1/16) the very language—and only the language — the court quoted in support of its decision. The statute will read:

> The District Court has jurisdiction for the enforcement of judgments for expenses of pregnancy and confinement for a wife or for education, support or funeral expenses for legitimate children and all remedies for the enforcement of these judgments apply. The court has continuing jurisdiction to modify or revoke a judgment for future education and support. All remedies under the Uniform Interstate Family Support Act are available for enforcement of duties of support under this subchapter. P.L. 2015, ch. 296, § 1556.

121. The court has done just that in the past. *See* Davies v. City of Bath, 364 A.2d 1269, 1273 (Me. 1976). There, the court urged the legislature to pass what ultimately became the Maine Tort Claims Act (14 M.R.S. §§ 8101-8118) with this threat: "We will no longer dismiss actions in tort brought against the State or its political subdivisions solely on the basis of governmental immunity."

122. 479 U.S. 157.

scene of the crime. None of the officers involved in this encounter perceived any disability in the defendant. Writing for the majority, Chief Justice Rehnquist summarized the evidence at the suppression hearing:

> [A] psychiatrist testified that the defendant was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17, 1983, the day before he confessed. Metzner's interviews with respondent revealed that respondent was following the "voice of God." This voice instructed respondent to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver. When [the defendant] arrived from Boston, God's voice became stronger and told [the defendant] either to confess to the killing or to commit suicide. Reluctantly following the command of the voices, respondent approached Officer Anderson and confessed.[123]

The trial court ruled the confession inadmissible, and the Colorado Supreme Court sustained, notwithstanding that there was no evidence of any police "coercion" of any sort:

> [N]o state action is involved in the accused's making an admission of guilt to a private citizen. State action enters the picture, however, when a trial court permits the prosecution at a jury trial to utilize as evidence of guilt a confession which is extracted under circumstances that so overbear the individual's will as to render the statement involuntary, that is, "not the product of a rational intellect and a free will."[124]

The Supreme Court reversed: "[A]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[125]

Brown and *Connelly* describe opposing boundaries in confession law: unconscionable police behavior rendering the confession constitutionally inadmissible, versus the absence of police behavior with a corresponding absence of constitutional evidentiary consequence.[126] At first impression, those decisions focused not on *why* the defendant confessed but on what the police *did*. But there's more. The boundaries the cases set represent the two opposing principles at stake: in *Brown,* the protection of defendants, who face the oppressive force of the government, and in *Connelly,* the public right to the "security of all."[127]

Assuming those decisions mark the peripheries of the spectrum of the Supreme Court's confession doctrine, they encompass a bewildering array of decisions for and

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123. *Id*. at 161.

124. People v. Connelly, 702 P.2d 722, 728 (Colo. 1985) (quoting Townsend v. Sain, 372 U.S. 293, 307 (1963)).

125. Colorado v. Connelly, 479 U.S. at 164.

126. Whether the reliability of the confession would affect its admissibility would be governed by Colorado's Rules of Evidence. *Id*. at 167.

127. "[The security of all" is from Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973). Chief Justice Rehnquist explained it this way: "[J]urists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." Colorado v. Connelly, 479 U.S. at 166 (citing United States v. Janis, 428 U.S. 433, 448-49 (1976)). These interests—private versus public—counterbalance each other—except in Maine, as I will discuss in the next section of the article, following note 139.

against the exclusion of defendants' admissions. I can't describe the ins and outs of those decisions here; refer to the LaFave *Criminal Procedure* treatise for the specifics.[128] LaFave's summary, however, is helpful. Confession cases generally address:

- Whether the confession was provoked by police using methods that may not affect its reliability but are intolerable anyway; or
- Whether the confession was provoked by police using methods that may not have rendered it unreliable but are intolerable anyway; or
- Whether the confession was obtained "under circumstances in which the defendant's free choice was significantly impaired, even if the police did not resort to offensive practices."[129]

The first category depends on facts and intuition. The facts include "all of the circumstances" that led up to the confession.[130] Intuition tells us whether or not the police behavior may have distorted the truth of the confession. Whatever conclusion we reach is based on our own experience.

The second category depends on the facts and fairness. Given what the police did to provoke the confession, was it fair? Highfalutin rhetoric aside, that is what *Brown v. Mississippi, Culombe v. Connecticut, Miranda v. Arizona,* and all the rest, are about, and it is the only thing that explains *Wiley*. What is fair or not is an opinion derived from our experience.

The last category depends not on whether "the defendant's free choice was significantly impaired," because "free choice" can't be determined. When the police have behaved properly, the only basis for the exclusion of a confession is a concern for fairness. *Connelly* again: "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence."[131]

Nothing illustrates these principles better than *Culombe* itself. The defendant, who had spent six years in the third grade and had twice been institutionalized for being "feebleminded," was held in custody—a "carefully controlled environment"[132]—for four days, questioned every day, not given a lawyer after he asked for one, not told he had the right to remain silent, not taken promptly to a magistrate as Connecticut law required, and charged initially with a misdemeanor as a ruse to keep him away from a magistrate while the police investigated the murder he was soon to be accused of. The police, in short, employed everything but physical abuse to produce the confession.

Frankfurter concluded that "this man's will was broken Wednesday afternoon."[133] He, with an intellect the size of Rhode Island, purported to assess the "will" of someone who had failed third grade at least five times. He, who never paused to determine what this "feebleminded" defendant's "will" was at the

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128. *See generally* LAFAVE, *supra* note 8, § 6.2(c).
129. *Id.* § 6.2 (b) at 614.
130. *See infra* note 139.
131. *Connelly*, 479 U.S. at 167 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).
132. Culombe v. Connecticut*,* 367 U.S. 568, 631 (1961).
133. *Id.* at 634.

beginning of the interrogation, was nevertheless certain that it "was broken Wednesday afternoon."[134]

Intellect Frankfurter might have had, but sophistry this certainly was. *Culombe* reversed the defendant's conviction because the police had treated him in an unconscionable manner. If Frankfurter had only said that, we might not find ourselves in the morass I'm writing about. We'd know that everything depends on the law of standards in general, and fairness in particular, and we'd realize that whatever objectivity exists in this field at all is found in case law.

Common law will not, of course, resolve all debates; cases will arise without precise factual antecedents, and people can—and in this field frequently do—differ about standards. Nor will common law provide the police with as much definition as they ought to have—and as *Miranda* attempted to give them—of the limits of their interrogations. But it's *something,* and better than requiring the police to make an "individualized assessment of the defendant's state of mind."[135] For example, after *Wiley*, Detective Bosco will know better than to make an unauthorized offer to ameliorate a suspect's sentence. Moreover, those law enforcement agencies that employ interrogation protocols such as the Reid Technique[136] can adapt their procedures to judicial doctrine. And lawyers, at least, are familiar with this approach, because it's the caselaw method they encountered in law school: determine the controlling legal principles, consider all the facts and circumstances of the present case, compare them with appellate decisions involving similar facts and circumstances, and advocate for or against the precedent.[137] Whenever it's a close call it is appropriate, as in all criminal law, that the State lose.

D. Reflection

For decades, state and federal courts have attempted the same sort of "voluntariness" analysis as *Villalpando*.[138] In this field of law, the only jurisprudential virtue has been constancy.

Culombe has never been overturned and, in fact, it served as the Supreme Court's paradigm, twelve years later, for determining the "voluntariness" of those

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134. *Id.*

135. See the discussion *supra* in the text accompanying note 60.

136. *See* Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, THE NEW YORKER, Dec. 29, 2009, http://www.newyorker.com/magazine/2013/12/09/the-interview7 (writing that "John E. Reid & Associates, Inc., trains more interrogators than any other company in the world. Reid's clients include police forces, private security companies, the military, the F.B.I., the C.I.A., and the Secret Service—almost anyone whose job involves extracting the truth from those who are often unwilling to provide it. The company's interview method, called the Reid Technique, has influenced nearly every aspect of modern police interrogations, from the setup of the interview room to the behavior of detectives.")

137. And lawyers know to turn to treatises when they need guidance. I have referred to LAFAVE, *supra* note 8, many times during the preparation of this article.

138. For a general overview see LAFAVE, *supra* note 8, § 6.2 (c) at 629-36. Suffice it to say that federal and state courts have a lamentably scattered history of determining what kind of police trickery is okay, what kind amounts to "coercion," what renders a confession either unreliable, "involuntary" or both, and why.

who consent to warrantless searches.[139] But that's inconsequential because Frankfurter's "voluntariness" is a Questing Beast, and rendering it useful would be a fanciful achievement.

Will a resort to case law offend the federal jurisprudence of "free choice" and "voluntary" confessions? No, because the federal courts have encased themselves in a structure of pure glass. Until they provide us with a coherent method of proof, federal judges can have no quarrel with any state court that tries a different approach, provided such court achieves results reflecting federal case law. Nor can the federal bench dispute the ultimate objective: fairness to both the defendant and the public.

The Law Court should do as the federal courts do, not as they say.

IV: THE BURDEN OF PROOF

Justice Levy introduced the controlling law of confessions in *Wiley* thus: "A confession is admissible in evidence only if it was given voluntarily, and the State has the burden to prove voluntariness beyond a reasonable doubt."[140]

The reason why the State must prove "voluntariness" beyond a reasonable doubt is because, in its 1972 decision, *State v. Collins,*[141] the Law Court decided to bump up the federal requirement that the prosecution prove the "voluntariness" of a confession by a preponderance.[142] That decision is flawed for three reasons.

A. Proving "Voluntary" Behavior.

Here is how the court explained its decision:

> The constitutional privilege against self-incrimination, as a limitation upon government, provides its own inherent evidentiary exclusionary doctrine predicated upon 'voluntariness.' It reflects a high priority commitment to the principle that excluded as available to government is any person's testimonial self-condemnation of crime unless such person has acted 'voluntarily' i.e., unless he has 'waived' his constitutional privilege against self-incrimination by choosing, freely and knowingly, to provide criminal self-condemnation by utterances from his own lips. . . . [T]o confirm and preserve the value reflected in the constitutional privilege against self-incrimination we must minimize the risks of allowing legal effectiveness to 'non-voluntary', or 'involuntary', testimonial self-condemnation even at the expense of producing a loss of evidence which might have probative

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139. *See* Schneckloth v. Bustamonte*,* 412 U.S. 218, 225-26 (1973). *Culombe* was cited as authority again in 1985: Miller v. Fenton, 474 U.S. 104, 109 (1985). In 1986, the Court distinguished *Culombe* by holding that determinations of voluntariness are legal, not factual, conclusion, notwithstanding that Justice Frankfurter had said that judges must find the "psychological fact[s]" that produced a confession. *Miller*, 474 U.S. at 115-16. *Miller* illustrates another, associated issue. That case decided whether a state court's finding that a confession was "voluntary" is an issue of fact, about which federal courts must defer to the state court's determination, or an issue of law, which gives federal courts *de novo* review power. *Id*. at 453. The Supreme Court opted for the latter. Given the means by which courts necessarily determine "voluntariness," however, the answer has to be that such determinations are factual—just like a jury's determination of criminal intent. See the discussion about proving intent *supra* at note 99.

140. State v. Wiley, 2013 ME 30, ¶ 15, 61 A.3d 750 (citing State v. McCarthy, 2003 ME 40, ¶12, 819 A.2d 335).

141. 297 A.2d 620 (Me. 1972).

142. *See* Lego v. Twomey, 404 U.S. 477, 489 (1972).

> value; such was the price that our society had chosen to pay when it conferred constitutional protection upon the privilege against self-incrimination.[143]

Missing from the decision is any indication that the court comprehended the thing it was now requiring the State to prove beyond a reasonable doubt.[144] Proving "voluntariness," it seems, is the same as proving the result of a blood-alcohol test.

B. The Warren Court's Influence.

The decision to require proof beyond a reasonable doubt occurred during an era when criminal defendants' rights were in the ascendancy. The decade leading up to *Collins* saw the Supreme Court issue a string of decisions favoring the procedural rights of accused individuals in their struggles against "hostile forces"[145] of the government. They included:

1961:	Culombe v. Connecticut[146]
	Mapp v. Ohio[147]
	Rogers v. Richmond[148]
1963:	Gideon v. Wainwright[149]
	Douglas v. California[150]
	Haynes v. Washington[151]
	Lynumn v. Illinois[152]
1964:	Aguilar v. Texas[153]
	Beck v. Ohio[154]
	Escobedo v. Illinois[155]

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143. *Collins*, 297 A.2d at 626-27.

144. Nor did the Supreme Court in the decision upon which *Collins* rested, Lego v. Twomey.

145. Culombe v. Connecticut*,* 367 U.S. 568, 575 (1961).

146. *Id*. (holding a confession "involuntary" where a person who was "mentally defective of the moron class" was questioned intermittently from Saturday until Wednesday without an attorney, even though he requested counsel, and without an arraignment required by state law).

147. 367 U.S. 643 (1961) (extending to the states the obligation to honor the Fourth Amendment).

148. 365 U.S. 534, 544 (1961) (holding that "[t]he attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.").

149. 372 U.S. 335 (1963) (extending to the states the obligation to provide counsel in all criminal cases).

150. 372 U.S. 353 (1963) (requiring counsel for indigent defendants in state appeals).

151. 373 U.S. 503 (1963) (16-hour incommunicado detention that violated state law rendered the confession inadmissible).

152. 372 U.S. 528 (1963) (a confession was coerced where the police said a suspect might lose custody of her children unless she confessed).

153. 378 U.S. 108 (1964) (magistrate issuing a search warrant based on a confidential informant's information must be advised of the basis for believing the informant is credible).

154. 379 U.S. 89 (1964) (absent probable cause to arrest, search and seizure of evidence in the arrested defendant's car unconstitutional).

155. 378 U.S. 478 (1964) (the investigation had focused on the defendant, who was interrogated in custody after he had obtained counsel, with whom he asked to meet before the interrogation proceeded. He was prohibited from consulting counsel and then made damaging statements. In the absence of counsel, defendant must be advised of right to silence).

	Jackson v. Denno[156]
	Malloy v. Hogan[157]
	Massiah v. United States[158]
1965:	Pointer v. Texas[159]
1966:	Miranda v. Arizona[160]
1967:	Katz v. United States[161]
	United States v. Wade[162]
1968:	Duncan v. Louisiana[163]
	Bruton v. United States[164]
1970:	In re Winship[165]
1972:	Coolidge v. New Hampshire[166]
1972:	Furman v. Georgia[167]

One scholar has asserted that the Warren court "made the constitutional law of criminal *justice* into something narrower and less useful: a constitutional law of criminal *procedure*."[168] *Collins* not only replicated that procedural approach, but did so incautiously.

First, the decision reflects a dismissive view of the importance of confessions in criminal law enforcement—something the Supreme Court had long acknowledged. The following is from *Hopt v. Utah*[169] in 1884:

> A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession . . . is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession

156. 378 U.S. 368 (1964) (a non-jury evidentiary hearing must be held to determine the voluntariness, and therefore the admissibility, of a confession).

157. 378 U.S. 1 (1964) (extending to the states the obligation to honor Fifth Amendment privilege).

158. 377 U.S. 201 (1964) (incriminating statements of defendant, obtained by secret recording device after he had obtained counsel, deprived defendant of the right to counsel).

159. 380 U.S. 400 (1965) (use at trial of transcript of complaining witness's testimony at a preliminary hearing, in lieu of the witness's live testimony at trial, deprived defendant of right of confrontation where the defendant did not cross-examine at the preliminary hearing or have counsel).

160. 384 U.S. 436 (1966) (custodial interrogation inherently coercive; warnings of constitutional rights required).

161. 389 U.S. 347 (1967) (warrantless eavesdropping on suspect violated Fourth Amendment).

162. 388 U.S. 218 (1967) (at post-indictment lineup, defendant entitled to counsel).

163. 391 U.S. 145 (1968) (defendants have right to jury trial in all state criminal cases).

164. 391 U.S. 123 (1968) (because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of a co-defendant's confession in the joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment).

165. 397 U.S. 358 (1970) (juveniles tried for offenses that would be crimes if committed by adults entitled to proof beyond a reasonable doubt).

166. 403 U.S. 443 (1971) (search warrant must be issued by "neutral and detached" magistrate).

167. 408 U.S. 238 (1972) (death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

168. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 210 (2011).

169. 110 U.S. 574 (1884).

> of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.[170]

Eighty years later, in *Culombe,* Justice Frankfurter had this to say:

> The dilemma posed by police interrogation of suspects in custody and the judicial use of interrogated confessions to convict their makers cannot be resolved simply by wholly subordinating one set of opposing considerations to the other . . . The least criticism of police methods of interrogation deserves to be most carefully weighed because the evidence which such interrogation produces is often decisive; the high degree of proof which the English law requires—proof beyond reasonable doubt—often could not be achieved by the prosecution without the assistance of the accused's own statement.[171]

In a subsequent decision, the Court summed it up this way: If the police lacked the tool of interrogation, "those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished."[172]

Compare the foregoing, all from the Supreme Court, to this from *Collins*:

> [W]e must minimize the risks of allowing legal effectiveness to "non-voluntary," or "involuntary," testimonial self-condemnation even at the expense of producing a loss of evidence which might have probative value . . . .[173]

By acknowledging only that confessions "*might* have probative value," the Law Court both understated their importance and did precisely what Frankfurter warned against: "subordinating one set of opposing considerations to the other."[174] It is as if one of the two confession-law poles—*Connolly*'s—barely existed, so it seems unlikely that our court "most carefully weighed" the public's interest against the individual's.[175]

Second, the Law Court's view of constitutional history is flawed. Here is the court's analysis again; I have italicized that portion which is untrue:

> In assessing public policy for the State of Maine and the appropriate resolution of the values (we) find at stake, we go beyond the objective of deterrence of lawless conduct by police and prosecution. We concentrate, additionally, upon the primacy of the value . . . of safeguarding "'the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances .

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170. *Id.* at 584-85 (citation omitted).

171. Columbe v. Connecticut, 367 U.S. 568, 587, 576 (1961).

172. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (citing Haynes v. Washington, 373 U.S. 503, 515 (1963)).

173. 297 A.2d at 627.

174. *Columbe*, 367 U.S. at 587.

175. The importance of confessions to the public interest is something the Supreme Court has repeatedly emphasized. *See* Colorado v. Connelly, 479 U.S. 157, 166 (1986) (noting that "the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence.") (quoting United States v. Janis, 428 U.S. 433, 448-49 (1976)). *See also* United States v. Havens, 446 U.S. 620, 627 (1980), and United States v. Calandra, 414 U.S. 338 (1974).

. .'

> We decide, therefore, that to confirm and preserve the value reflected in the constitutional privilege against self-incrimination we must minimize the risks of allowing legal effectiveness to "non-voluntary," or "involuntary," testimonial self-condemnation even at the expense of producing a loss of evidence which might have probative value; *such was the price that our society had chosen to pay when it conferred constitutional protection upon the privilege against self-incrimination.*[176]

I wonder what the authority for that final statement might be. It sounds as though Justice Wernick, *Collins*'s author, was trying to bolster this new policy with the weight of history. The objective of the opinion was not simply to assert the "primacy of the value . . . of safeguarding" the right to silence; more importantly, the opinion had to establish why that "value" has "primacy." Otherwise, the election to establish a higher standard of proof would be a simple preference. Historical authority based on the Fifth Amendment, however, would reinforce the decision.

But it doesn't. Resorting to Professor Wigmore's treatise on evidence (then the pre-eminent authority on the subject) would have led Justice Wernick to this: "there was no *historical* connection . . . between the constitutional clause and the confession-doctrine."[177]

The Fifth Amendment was not designed to protect defendants in custody from confessing, but *witnesses* from testifying at *trial.*[178] The early American privilege

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176. *Collins,* 297 A.2d at 626-7 (emphasis added) (quoting Lego v. Twomey, 404 U.S. 477, 491 (Brennan, J., dissenting).

177. 3 WIGMORE, EVIDENCE § 823, at 338-39 (Chadbourn rev. 1970), *quoted in* Note, *Developments in the Law: Confessions*, 79 HARV. L. REV. 935, 960 (1966). *Collins* relied principally on the majority opinion in Lego v. Twomey for its authority to assign a higher burden of proof to confessions, and on the dissent in *Lego* for the reason to do so. (*Lego* decided what Jackson v. Denno, 378 U.S. 368 (1964), didn't decide: the burden of proof of "voluntariness" in state courts). Both of *Lego*'s opinions assumed without comment the accuracy of *Jackson*'s explanation for the exclusion of "involuntary" confessions:

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will,' and because of '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.'

378 U.S. at 385-86 (quoting Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960)). It appears, therefore, that Justice Wernick disregarded *Lego*'s foundation in the Due Process Clause of the Fourteenth Amendment.

In *Jackson* and *Lego,* each opinion referenced "voluntariness" (and in *Jackson* "overbearing" an accused's "will") without considering whether those concepts were definable.

178. *See* Katherine B. Hazlett, *The Nineteenth Century Origins of the First Amendment Privilege Against Self-Incrimination*, 42 AM.J.LEGAL HIST. 235, 240 (1998).

> Courts in the early 1800s spoke often of a privilege not to incriminate oneself, but never mentioned the Fifth Amendment in such a context. Rather, discussions of a right against self-incrimination referred to the witness privilege, which courts explained as a common law principle.

See also John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine 1791-1903,* 77 TEX. L. REV. 825, 841 (1999) (citations omitted).

could not have applied to criminal defendants, because they had to represent themselves:

> So long as the accused had to conduct his own defense, there could be no effective privilege against self-incrimination. Only after the rule against defense counsel was overcome was the privilege extended to protect the accused, a development overwhelmingly of the nineteenth and twentieth centuries.[179]

Moreover, the Fifth Amendment privilege did not apply to state prosecutions until 1964,[180] so the assertion that the loss of evidence in *state* courts was "the price our society had chosen to pay" when it adopted the Fifth is untrue as well.

It appears that Justice Wernick overlooked the fact that the Supreme Court has historically derived the "voluntary" confession doctrine from the fairness quotient of the Due Process Clause, without reference to the Fifth Amendment.[181]

Perhaps, on the other hand, Justice Wernick meant the Fifth Amendment had, over time, *become* the criminal defendant's shield against interrogation. That is true under federal constitutional law. *Miranda v. Arizona* established that:

> [T]he Fifth Amendment privilege is available outside of criminal court proceedings

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> In the first years of the nineteenth century, the witness privilege in American practice was repeatedly said to protect witnesses not just from self-incriminating testimony, but from testimony that revealed the witness's infamy; cast "a shade" over the witness's character; subjected the witness to civil liability, or charged the witness with a debt.

Id. at 10, 170-1. "Hawkins' treatise" refers to William Hawkins' 1721 PLEAS OF THE CROWNOTE *Id.*

179. *See* John H. Langbein, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (Oxford U. Press 2003) at 284. The "rule against defense counsel" was a centuries-old principle in English law.

> [T]he judges severely restricted the scope of counsel's activity, in order to keep pressure on the accused to continue to serve as an informational resource at trial. . . . [T]he judges allowed defense counsel into the felony trial for the limited purpose of assisting the accused in examining and cross-examining witnesses. But felony defense counsel was not permitted to comment on the evidence or to narrate the accused's version of the events.
>
> . . .
>
> The judge-created restriction against defense counsel addressing the jury remained nominally in effect until Parliament intervened in 1836 to extend full defense of counsel to felony defendants . . . .

Id. at 254-5 (footnotes omitted).

180. Malloy v. Hogan, 378 U.S. 1 (1964).

181. *See* Colorado v. Connelly, 479 U.S. 154, 163 (1986):

> The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Just last term, in Miller v. Fenton, 474 U.S. 104, 109 (1985), we held that, by virtue of the Due Process Clause, certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned. See also Moran v. Burbine, 475 U.S. 412, 432-34 (1986).
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> Indeed, coercive government misconduct was the catalyst for this Court's seminal confession case, *Brown v. Mississippi*, 297 U.S. 278 (1936). In that case, police officers extracted confessions from the accused through brutal torture. The Court had little difficulty concluding that, even though the Fifth Amendment did not at that time apply to the States, the actions of the police were "revolting to the sense of justice." *Id.* at 286. The Court has retained this due process focus, even after holding, in *Malloy v. Hogan,* 378 U.S. 1 (1964), that the Fifth Amendment privilege against compulsory self-incrimination applies to the States.

> and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.[182]

That was not true, however, under Maine's constitutional version of the Fifth Amendment.[183] Had he carefully read the Maine precedent he cited to support his decision, the 1902 Law Court decision in *State v. Grover*,[184] Justice Wernick should have discovered this:

> When . . . the confession was made under such circumstances as show that it was extorted from the respondent by some threat, or drawn from him by some promise, and was made to avoid the evil threatened, or to obtain the good promised, rather than from a desire to relieve his conscience or to state the truth, it is regarded by the law as involuntary, and hence not to be used against him. This rule of exclusion was adopted, not because such a confession has no probative force at all, but rather out of tenderness for the respondent, in view of his unfavorable and even dangerous position.[185]

Exclusion of "involuntary" confessions, therefore, was Maine judicial policy—fairness again, "tenderness for the respondent"—not derived from Maine's version of the right to silence. It seems Justice Wernick was so focused on reaching an end—establishing a particular burden of proof in Maine confession law—that he was impetuous about the means.

To address this error, all Justice Wernick had to do was adopt *Miranda*'s premise: custodial interrogation is now deemed to jeopardize the privilege. He had the Supreme Court backing him up, so he didn't need history. Instead, however, he tried mining our state's precedent, and was careless in doing so. That flawed pliancy; the casual dismissal of the evidentiary importance of confessions; the inattention to the puzzlement of "free will"; all in the shadow of the defendants' rights ethos of the Warren Court, suggest that *State v. Collins* did not articulate a reasoned policy. What *Collins* articulated was feel-good jurisprudence.[186] Justice Wernick swapped "the

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182. Miranda v. Arizona, 384 U.S. 436, 467 (1965).

183. Me. Const. art. I, § 6: "The accused shall not be compelled to furnish or give evidence against himself or herself . . . ."

184. 52 A. 757 (Me. 1902).

185. *Id.* Concluding that paragraph, the court said:

> In earlier days, when the respondent could not have counsel, and could not testify in his own behalf, the courts were ordinarily and properly quite strict in keeping from the jury evidence of confessions when there was any reasonable doubt of their being voluntary. Since the respondent is now allowed counsel, and is also allowed to testify in explanation of his acts and statements, there is less reason for such restrictions, and more may be left to the jury as to the probative force of such confessions.

186. Justice Wernick was a dyed-in-the-rules judge. (See his strict, black-letter—and short-sighted—interpretation of Maine's Marital Property Act in *Grant v. Grant,* 424 A.2d 139 (Me. 1981)). Why would a jurist so grounded in rules-based law as Justice Wernick write such a purely sentimental decision? I have only one explanation: it was based on patterning from the repeated and unrelenting pro-defendant decisions of the Warren Court. In short, it was a deterministic choice.

The court's feel-good jurisprudence hit its nadir in *State v. Caouette,* 446 A.2d 1120 (Me. 1982). In that case the defendant was in jail, accompanied by a jailer. *Id.* The defendant wanted to confess but the jailer told him not to. *Id. Three times* the jailer told him not to, but the defendant finally spilled his guts. *Id.* The confession was "involuntary," the Law Court declared, because the defendant was upset

security of all" for sentiment.

C. Collins*'s Obsolescence.*

The criminal-rights era of the Warren court[187] has been succeeded by a far more profound, nation-wide, and decades-long, assertion of victims' rights. Mothers Against Drunk Drivers is a prominent example. On a broader scale—and specifically as to *Wiley*—the public campaign to deter domestic violence and child abuse gained momentum only after *Collins*.

I will speak from my own experience. I was the prosecutor for Franklin County, Maine, from 1978 until 1982.[188] Every criminal case prosecuted under state law in that county for that period came across my desk.[189] In not a *single one* was a person charged with domestic violence or child abuse.

I remember only one case that *involved* domestic violence. A defendant was accused of aggravated assault for having ordered his dog to attack a neighbor. At trial, he called his wife to testify that he did no such thing, and she complied. He was unaware that she had recently, and secretly, sought refuge from him in a battered-women's shelter (that's what such places were called in those days; resort

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and wasn't thinking clearly, so his statement was not the "free choice of a rational mind." *Id.* at 1122. That ruling, of course, licensed every defendant who confessed thereafter to avoid his or her admission by claiming emotional distress.

Caouette was *Collins* on steroids: feel-good jurisprudence based on no policy whatsoever. Like *Collins, Caouette* bore no evidence of research: WIGMORE, available everywhere, contained multiple warnings, but nobody seems to have looked at it.

Fortunately, the Law Court distanced itself from *Caouette* a year later, in *State v. Mikulewicz*, 462 A.2d 497, 501 (Me. 1983), when the court reestablished the necessity of police misconduct. But *Mikulewicz* raised another problem. In that decision, the court effectively reversed *Caouette,* but neither overruled it nor even acknowledged its error. In fact, the court cited it with some approval:

> More recently . . . we held that "in order to find a statement voluntary, it must first be established that it is the result of defendant's exercise of his own free will and rational intellect." *State v. Caouette,* 446 A.2d 1120, 1123 (Me.1982). The requirements of Catlin and Caouette are complementary and can be restated as follows: A confession is voluntary if it results from the free choice of a rational mind, if it is not a product of coercive police conduct, and if under all of the circumstances its admission would be fundamentally fair.

Caouette has never been overruled, and was cited as authoritative as recently as 2013, in *State v. Lowe*, 2013 ME 92, 81 A.3d 360.

187. To some degree, the Warren court's concern for criminal procedural rights and protections reflected the concern for racial equality of the previous decade. "For supporters [of *Miranda*], constitutional protection for criminal defendants was a symbolic means of vindicating the promise of equality and humane treatment." Seidman, *supra* note 66, at 678. Thus the argument could be made that the Warren court's pursuit of criminal, procedural justice was a two-decade phenomenon, perhaps long enough to qualify as a "trend."

Assuming that to be true, however, my criticism of *Collins* remains the same. *Collins* addressed only criminal procedure—not the "promise of equality"—and, within that body of law, only the 5th Amendment. The Law Court was tuned exclusively to the Warren court's criminal procedural vibes.

188. The prosecutorial district I served included Franklin, Oxford and Androscoggin Counties. I was the Assistant District Attorney for Franklin County. The District Attorney's main office was in Androscoggin County.

189. The only state criminal offense that my office would not have handled was murder, the sole prerogative of the Maine Attorney General's office. No murders were prosecuted there during my tenure.

to such shelters was done in secrecy). Nor did he learn it during that trial (that I know of). I could have cross-examined her about her recent sanctuary. That would have discredited her testimony, while also illustrating her husband's propensity for the violence for which he was on trial. But to avoid risking his post-trial retribution against her, I declined to cross-examine her.[190]

Nor did I prosecute him for having beaten her. She never complained to the police about him, I assume because she had no alternative to the home he was providing for her—no support system then existed that offered her an alternative to returning home—and the police and I were unwilling to press forward with a reluctant witness. This illustrates how primitive our view of domestic violence was in that era: nobody facilitated, or even considered facilitating, her power to resist her husband's atrocities.

Similarly, there was no significant public support for victims of sexual abuse. It was only after I left the D.A.'s office in 1982 that the state's first sexual-abuse support project was initiated[191]—and its services were limited to female victims. Since then, of course, domestic violence, sexual abuse, and child abuse have become topics of universal concern.[192]

D. Summary.

In comparison with the generation-long promotion of victims' rights—victims *exactly* like Wiley's—*State v. Collins* is as anachronistic now as it was unjustifiable when written. The Law Court should consider why it keeps us frozen in time and subservient to whimsy.

V. THE DEFENDANT'S STATE OF MIND

In much of the foregoing discussion I've been arguing that we can only pretend to know what induced most defendants to confess. In cases of torture—*Brown*—we do know. At the other extreme—*Connolly*—we don't need to know. In between, however, it's a muddle, partly because this is a field governed by standards rather than rules, and partly because we've been naive about identifying what "voluntariness" means and whose "voluntariness" we're considering.

I do not intend to suggest, however, that (*Brown* and its ilk excepted) we can *never* know what truly provoked a defendant to confess. We *can* if a credible defendant tells us.

It's the actor—the defendant—who must explain why the police went too far: why their not-overtly-improper procedure "coerced" him or her. If such an explanation is proffered, it becomes a constituent of the stew of facts the judge must consider, and compare to case law, to decide whether the confession is admissible.

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190. The jury acquitted him. I do not mention this case because I seek kudos as a victim-rights pioneer. There were two victims in that prosecution: the wife and the neighbor—another woman—who'd been attacked by the dog. I achieved neither protection nor justice for either of them.

191. As a member of the initial board of directors in the early 1980s, I incorporated the organization, which was located in Franklin County, and called Sexual Abuse Victims Emergency Services (SAVES).

192. My mother used to punish me by spanking me with a hairbrush. If she did that these days she would have been suspended by the N.F.L for domestic violence.

If it is not proffered, the judge proceeds with whatever facts have been presented. In either event, the judge relies on common sense and resorts for guidance to that self-same common law, and does not attempt to determine whether the defendant confessed "voluntarily."

Requiring the criminal defendant to establish the facts supporting the claim that a confession was coerced is almost the same, and as proper, as requiring the criminal defendant to establish the facts supporting an affirmative defense.[193] According to Professor Wayne LaFave, the leading American authority in the field of criminal procedure, the defendant who asserts such a defense has the burden of producing evidence because

> [e]xperience shows that most people who commit crimes are sane and conscious; they are not compelled to commit them; and they are not so intoxicated that they cannot entertain the states of mind which their crimes may require. Thus *it makes good sense* to say that if any of these unusual features are to be injected into the case, the defendant is the one to do it; *it would not be sensible to make the prosecution in all cases prove the defendant's* sanity, sobriety and *freedom from compulsion*.[194]

If it's permissible to make the defendant produce evidence about compulsion regarding the substantive elements of the crime, it's permissible to do so regarding a confession. After all, what counts in the end is whether a procedure makes good sense.

I have qualified the foregoing by acknowledging that giving the burden of production on a particular issue to the defendant regarding his or her confession is "almost" the same as doing so for purposes of trial on the merits. It's not quite the same because, if the defendant has to testify about his or her reaction to the police interrogation, the defendant may be exposed to cross-examination of a wider scope, and his or her responses might subsequently be employed by the prosecution as evidence of guilt. Whether that's permissible has yet to be resolved.[195] Therefore, a procedure or rule of evidence necessarily awaits crafting.[196]

But, as with all of the proposals I've been making, that one will never materialize until the Law Court stops admiring our federal Emperor's new clothes.

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193. *See generally* Patterson v. New York, 432 U.S. 197, 207-08 (1977) (discussing the rationale behind allocating burdens of proof for affirmative defenses).

194. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.8 (c) at 83 (2d ed. Thompson/West 2003) (emphasis added) (citations omitted). I acknowledge that in confession law there's this distinction: interrogation in the police station, *Miranda* tells us, is inherently coercive—coercion is the norm. But that's a given, and does not require any production of evidence. If there is something *else* about the interrogation, however, that (1) isn't observable and (2) amounts to coercion from the defendant's point of view, it "makes good sense" for the defendant to identify it.

195. In *Simmons v. United States,* 390 U.S. 377 (1968), the Supreme Court held that a defendant's testimony at a hearing to determine his standing to object to illegally seized evidence could not be used against him in the trial on the merits. However, in U.S. v. Rosalez*,* 711 F.3d 1194 (10th Cir. 2013) a federal appeals court held that, in the circumstances of that case, the defendant's testimony at the suppression hearing was admissible against him in the prosecution's case in chief. *See* LAFAVE, *supra* note 8, § 10.5(c).

196. Perhaps it already exists but I, a former prosecutor, have not heard of it. Certainly it does not exist in Maine law, because the obligation to prove everything about "voluntariness," beyond a reasonable doubt, rests on the prosecution.

CONCLUSION

I sympathize with Justice Alexander's criticism of *Wiley*'s result. As he persuasively explained, there was ample evidentiary and legal support for the trial court's decision, so the Law Court lacked the authority to substitute its preferred outcome. The majority ignored its own law.

At least in this field, that is encouraging. It provides hope that the Law Court may at last reject the chimerical in favor of the comprehensible. And that, once again, brings me full circle, to the title of this essay and common sense. I challenge you to make sense of this:

Law Court:	"The State must prove beyond a reasonable doubt that the confession was voluntary."
Trial Judge:	"What does 'voluntary' mean?"
Law Court:	"It means the confession was the free choice of a rational mind."
Trial Judge:	"What does 'free choice of a rational mind' mean?"
Law Court:	"That depends on the totality of the circumstances."
Trial Judge:	"What circumstances?"
Law Court:	"It depends."
Trial Judge:	"Won't you define what I have to determine *before* I have to determine it?"
Law Court:	"No."
Trial Judge:	"But if you won't define what 'it' is, how can I know whether I've judged 'it' properly?"
Law Court:	"Just do the best you can and we'll decide when we get the appeal."
Trial Judge:	"But if you won't define 'it,' how can *you* know whether I've judged 'it' properly?"
Law Court:	"We'll decide when we get the appeal."
Trial Judge:	"And I have to find whatever 'it' is beyond a reasonable doubt?"
Law Court:	"Yes."
Trial Judge:	"So I have to consider 'circumstances' that lack definition, and apply to them a standard that lacks definition, and then determine whether the result is 'almost certainly true'?"[197]
Law Court:	"Exactly."
Trial Judge:	"Why?"
Law Court:	"Because it's the law."

197. "Almost certainly true" is Maine's formula describing reasonable doubt. State v. Estes, 418 A.2d 1108, 1116 (Me. 1980).