

# Maine Law Review

---

Volume 54  
Number 2 *UNIVERSITY OF MAINE SCHOOL OF  
LAW LECTURE SERIES*

---

Article 9

June 2002

## Revisiting the Voluntariness of Confessions after *State v. Sawyer*

Michael Theodore Bigos  
*University of Maine School of Law*

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Michael T. Bigos, *Revisiting the Voluntariness of Confessions after State v. Sawyer*, 54 Me. L. Rev. 411 (2002).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol54/iss2/9>

This Case Note is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

# REVISITING THE VOLUNTARINESS OF CONFESSIONS AFTER *STATE V. SAWYER*

- I. INTRODUCTION
- II. LEGAL BACKGROUND CONCERNING THE ADMISSIBILITY OF VOLUNTARY  
CONFESSIONS
  - A. *Development of the Federal Confession Law*
    - 1. *Substantive Requirements of Confession Law*
    - 2. *Substantive Aspects of Presumptions in Confession Law*
  - B. *Development of the Confession Law in Maine*
  - C. *Recent Developments*
- III. THE *SAWYER* DECISION
  - A. *Background Facts*
  - B. *Procedure, the Appeal, and Disposition*
  - C. *The Dissent*
- IV. DISCUSSION
- V. CONCLUSION

## REVISITING THE VOLUNTARINESS OF CONFESSIONS AFTER *STATE V. SAWYER*

### I. INTRODUCTION

Every individual in our society needs confidence in our criminal justice system to know that one cannot be convicted of a crime unless a fact finder is convinced of every necessary element with the highest assurances of the truth.<sup>1</sup> The process of establishing facts in a criminal trial is highly dependent upon how decision-making power is allocated between the judge and the jury and upon the fairness of that allocation. This Note discusses the areas of confession law and burdens of proof in the context of how federal criminal constitutional doctrines that affect the fact-finding process offer less than clear guidance to the states. In particular, this Note compares the separate forces of fundamental fairness and the constitutional limits of presumptions in the law of confessions.

In *State v. Sawyer*,<sup>2</sup> the Maine Supreme Judicial Court, sitting as the Law Court, heard the State's appeal of a trial court evidence-admissibility ruling<sup>3</sup> that excluded a criminal defendant's arrest and alleged confession on the ground that the confession was involuntary and thus inadmissible.<sup>4</sup> A divided Law Court held that the exclusion of the confession was not warranted and remanded the case for a second suppression hearing.<sup>5</sup>

*Sawyer* presented the Law Court with an opportunity to refine the common law of determining the voluntariness of confessions in Maine.<sup>6</sup> The majority opinion took that opportunity by ruling that the trial court should, on remand, base its decision partly on the legal principle that criminal defendants bear a burden of producing evidence to show that their confession was involuntary.<sup>7</sup> Has the substantive law now been changed? And what is its impact, if any, on principles of the Fifth and Fourteenth Amendments to the United States Constitution?

This Note analyzes the Law Court's decision and recommends that the court clarify the *Sawyer* holding by reviewing the role of presumptions in the law of confessions during its next confession case that includes a burden of production issue of law. The Note traces the development of the Maine law of criminal confessions and critiques the Law Court's recent decision as a potential departure from state case law doctrine that generally offers substantial protection to defendants. It also examines the underlying legal principle that the court included in its opinion: that criminal defendants who may have confessed to a crime bear a bur-

---

1. *In re Winship*, 397 U.S. 358, 364 (1970).

2. 2001 ME 88, 772 A.2d 1173.

3. The Augusta District Court Judge heard a motion that Sawyer filed to suppress his statements and arrest. *State v. Sawyer*, No. AUG-2000-375 (Me. Dist. Ct. 7, S. Ken., Jul. 31, 2000) (Vafiades, J.) (Order on Motion to Suppress).

4. *State v. Sawyer*, 2001 ME 88, ¶¶ 1, 4, 772 A.2d 1173.

5. *Id.* ¶ 11, 772 A.2d 1173. Justice Dana wrote the opinion of the Court, and he was joined by Chief Justice Wathen and Justices Clifford, Rudman, and Saufley. Justice Alexander wrote the dissenting opinion and was joined by Justice Calkins.

6. *See id.* ¶ 7, 772 A.2d 1173.

7. *See id.* ¶ 11 n.5, 772 A.2d 1173 (citing cases on defendant's burden of production).

den of producing some evidence to generate an issue of fact regarding the voluntariness of their alleged confession.

After considering some alternative models, this Note concludes that the Law Court should revisit this area of the law and specify the substantive law of confessions in Maine with respect to constitutional limitations. In doing so, there should remain a constitutionally permissible alternative providing that a defendant may rebut a prosecution's *prima facie* showing of voluntariness without requiring that criminal defendants testify against themselves or provide other indirectly incriminating evidence<sup>8</sup> in order to avoid an unfavorable evidentiary ruling.

## II. LEGAL BACKGROUND CONCERNING THE ADMISSIBILITY OF VOLUNTARY CONFESSIONS

### A. Development of the Federal Confession Law

American courts have a deeply rooted rule against admitting involuntary confessions into evidence.<sup>9</sup> The rule is recognized today as a constitutionally guaranteed due process safeguard<sup>10</sup> and is derived from the English common law rule against self-incrimination.<sup>11</sup> Since colonial times, the right against self-incrimination has been provided to citizens by various statutes designed to prevent confessions by torture.<sup>12</sup> This right was subsequently written into the Bill of Rights and the constitution of almost every State.<sup>13</sup>

The rule against admitting involuntary confessions developed only as a common law rule<sup>14</sup> until 1936, when *Brown v. Mississippi*<sup>15</sup> was decided. In *Brown*, the Supreme Court held that an involuntary confession was inadmissible in a state criminal case under the Due Process Clause of the Fourteenth Amendment.<sup>16</sup> Over the next thirty years, the Court changed the involuntary confession rule by implementing new policy objectives that increased the reliability of evidence<sup>17</sup> and that

---

8. The Fifth Amendment of the U.S. Constitution and Article 6 of Maine's Constitution prohibit a person in any criminal case from being compelled to testify against oneself.

9. See generally, Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497, 498 (1992).

10. *Id.* at 498-99.

11. See 1 MCCORMICK ON EVIDENCE § 114, at 452-53 (John W. Strong ed., 5th ed. 1999).

12. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 344-45 (1968).

13. 1 MCCORMICK, *supra* note 11, § 114, at 453.

14. *Id.*, § 148, at 529-31; see also Herman, *supra* note 9, at 498, n.537 (remarking "[t]hat the involuntary confession rule was generally perceived as a common law rule" due to its treatment in evidence treatises including 1 SIMON GREENLEAF, EVIDENCE, §§ 219-35 (John Henry Wigmore rev.) (Boston, Little, Brown 16th ed. 1899)).

15. 297 U.S. 278 (1936). This landmark confessions case involved three defendants' confessions that were obtained by brutal police torture and violence. *Id.* at 279-82. The trial court admitted the confessions into evidence, found them guilty and had sentenced them to death. *Id.* at 279.

16. *Id.* at 285-86.

17. See, e.g., *Jackson v. Denno*, 368 U.S. 378, 386-87 (1964) (holding that truthfulness of confession is irrelevant to the voluntariness inquiry).

were meant to generally conform police officers' conduct to a lawful, civilized, and non-inquisitorial standard.<sup>18</sup>

In 1966, the Supreme Court decided *Miranda v. Arizona*,<sup>19</sup> which revolutionized federal constitutional confession law<sup>20</sup> by extending Fifth Amendment privileges to suspects during custodial law enforcement interrogations.<sup>21</sup> Before *Miranda*, pressure was building to broaden the self-incrimination privilege because, in an isolated police station setting, the compulsion to speak "may well be greater than in courts or other official investigations,"<sup>22</sup> even though law enforcement had no legal authority to compel responses to their questions.<sup>23</sup> To effectuate the privilege in a custodial interrogation,<sup>24</sup> the Court designed protective devices to ensure that illegally obtained confessions would be excluded from evidence as a matter of Fifth Amendment law. The most notable of these devices are voluntariness standards,<sup>25</sup> the right to counsel,<sup>26</sup> and the explicit, pre-interrogation *Miranda* warning.<sup>27</sup> In *Lego v. Twomey*,<sup>28</sup> however, the Supreme Court held that, while elements of a crime need to be proven beyond a reasonable doubt, voluntariness in confession law need be proven only under a preponderance standard.<sup>29</sup> States were free, however, to adopt a higher standard of proof, even though the Court determined that a higher standard was not constitutionally necessary.<sup>30</sup>

A new dimension was added to American confession law twenty years later, in *Colorado v. Connelly*.<sup>31</sup> The result of *Connelly* is that spontaneous statements made while not under interrogation are inadmissible only when accompanied by "coercive police activity."<sup>32</sup> Before *Connelly*, confessions were generally subject to an analysis that discouraged, but did not require, coercive police activity.<sup>33</sup> For example, Maine considered internally coercive factors, such as one's mental state, as well as external law enforcement coercion in determining whether a statement

---

18. See Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 749-50 (1987) (collecting cases). See *Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986) (suggesting that police conduct should not shock the Court's conscience with physically and psychologically coercive tactics); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (asserting that an accusatorial system instead of inquisitorial techniques should be used by police); *Spano v. New York*, 360 U.S. 315, 320-21 (1959) (stating that police must obey the law).

19. 384 U.S. 436 (1966).

20. 1 McCORMICK, *supra* note 11, § 149, at 533.

21. *Miranda v. Arizona*, 384 U.S. at 460-61.

22. *Id.* at 461.

23. 1 McCORMICK, *supra* note 11, § 149, at 533.

24. For *Miranda* protections to apply, a suspect must be in "custody" and "interrogated." *id.* § 150, at 537 (explaining constitutional standards for establishing each of the elements of custodial interrogation).

25. See generally, *id.* § 152, at 541-43; see also, David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 193-94 (1988).

26. *Miranda v. Arizona*, 384 U.S. at 470.

27. *Id.* at 473.

28. 404 U.S. 477 (1972).

29. *Id.* at 489.

30. *Id.*

31. 479 U.S. 157 (1986).

32. *Id.* at 160, 167.

33. E.g., *Miranda v. Arizona*, 384 U.S. 436.

should be suppressed as involuntary.<sup>34</sup> However, the *Connelly* Court was presented with a new question: should confessions require police overreaching to be inadmissible?<sup>35</sup>

In *Connelly*, the petitioner, a schizophrenic, approached a police officer and admitted to committing a murder.<sup>36</sup> This led to the quick involvement of a detective who prompted Connelly to offer "what he had on his mind."<sup>37</sup> This caused Connelly to convey many details of an unsolved murder and eventually led police to the exact location of the killing.<sup>38</sup> The Court reversed the trial court's suppression of Connelly's confession, which the trial court had ruled was involuntary due to his psychosis despite the absence of coercive police activity.<sup>39</sup> The Court established a new requirement, holding that there must be coercive police activity to find a confession involuntary,<sup>40</sup> and suggested that the coercive conduct at issue must be causally related to the confession itself to render a confession unconstitutionally inadmissible.<sup>41</sup>

### 1. Substantive Requirements of Confession Law

A discussion of how the *Connelly* case changed the substantive law of confessions for the states is important. Prior to *Connelly*, the question of accuracy of a particular confession was carefully distinguished from the constitutional question of voluntariness.<sup>42</sup> Due process concerns had prohibited the use of "a legal standard which took into account the circumstance of probable truth or falsity" in a trial court's determination of admissibility of a confession that was challenged on the issue of voluntariness.<sup>43</sup> Thus, evidence that would suggest the inaccuracy or accuracy of a confession or a part thereof should have been immaterial to the voluntariness inquiry.<sup>44</sup> A leading treatise on the subject contends that the prohibition of a case-by-case consideration of accuracy is consistent with principles that suggest the unreliability of involuntary confessions—"they tend to be so subtly unreliable [due to the coercive nature] that juries and judges are likely to give them more weight than can objectively be justified."<sup>45</sup>

---

34. See, e.g., *State v. Mikulewicz*, 462 A.2d 497, 501 (Me. 1983) (considering internal factors of intoxication and nakedness for determining that confession was involuntary). Apparently, this facet of Maine confession law is still on the books in light of *Connelly*. See Donald W. Macomber, *A Call for Consistency: State v. Caouette is No Longer Viable In Light of Colorado v. Connelly and State v. Eastman*, 50 ME. L. REV. 61, 64 (1998). In his article, Macomber advanced the proposition that *Colorado v. Connelly*, 479 U.S. 157 (1986), implicitly rejected the Maine approach—which technically does not require police overreaching—to involuntary confessions. *Id.* He also observed that even though the Law Court states that it follows the same rationale as the U.S. Supreme Court, it does not in fact do so. *Id.* at 62.

35. *Colorado v. Connelly*, 479 U.S. at 163-67.

36. *Id.* at 160.

37. *Id.* (internal quotations omitted).

38. *Id.* at 160-61.

39. *Id.* at 157, 162.

40. *Id.* at 167.

41. *Id.* at 164.

42. 1 MCCORMICK ON EVIDENCE, § 147, at 567-68 (John W. Strong ed., 4th ed. 1992). The Fourth Edition of McCormick on Evidence was chosen here and in several footnotes below for its extensive post-*Connelly* analysis of how the confession law changed. Much of this analysis appears to have been edited from the Fifth Edition of McCormick.

43. *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961).

44. 1 MCCORMICK, *supra* note 42, § 147 at 568.

45. *Id.*

*Connelly*, however, broadened this facet of the law to further remove concerns of accuracy from the voluntariness inquiry. The Court held that the Due Process Clause should not be a device to exclude presumptively false evidence, but is primarily aimed at preventing "fundamental unfairness in the use of evidence, whether true or false."<sup>46</sup> Further, under *Connelly*, matters of unreliability should be governed not by the Due Process Clause of the Fourteenth Amendment, but by the laws of evidence of that jurisdiction.<sup>47</sup> The *Connelly* decision also made the presence of offensive law enforcement conduct an absolute prerequisite, which was a significant change from the previous case law that merely emphasized the need to discourage coercive police activity used to elicit confessions.<sup>48</sup> Once the "prerequisite" of coercion is found, however, the suspect's decision-making process is relevant to the inquiry. If police coercion is established, a court must determine whether the defendant's will was overborne.<sup>49</sup> At this point, the susceptibility to coercion, exacerbated by the defendant's mental condition, becomes relevant.<sup>50</sup> As such, evidence of psychological persuasion used to obtain a confession, even if subtle, has the effect of making the defendant's mental condition more significant in resolving the voluntariness inquiry.<sup>51</sup>

*Connelly* also signaled a change in the timing of consideration of the numerous factors that a court would evaluate in a voluntariness challenge. After the *Connelly* decision, courts were required to determine whether there was police coercion before inquiring into a defendant's actual subjective circumstances and reactions thereto.<sup>52</sup> This change marked a subtle departure from a traditional, multi-factored voluntariness test that gave significant weight to the following factors: the time of day or night; duration of the interrogation; the conditions surrounding the defendant while being held; the age of the accused (the younger, the more likely the confession was to be involuntary); degree, if any, of physical infirmity or injury; level of education; degree of experience with police methods and tactics (little or no experience suggested involuntariness); whether the suspect was warned of his or her right to silence; whether the right to keep silent was explained, even though not necessary; and whether the suspect appreciated the gravity of that right.<sup>53</sup> The above factors were essentially an early "totality of the circumstances" test that courts used to determine the ultimate question of voluntariness.<sup>54</sup> The modern test, which has several substantive changes, is discussed below.

---

46. *Colorado v. Connelly*, 479 U.S. at 167 (citing *Lisenba v. California*, 314 U.S. 219, 236 (1941)) (internal quotations omitted).

47. *Id.*

48. 1 McCORMICK, *supra* note 42, § 147, at 568-69.

49. *Id.* § 147, at 569-70.

50. *Id.*

51. *Id.* at 569, n.28 (discussing case law requirements and quoting *Connelly* for the proposition that "'mental condition is surely relevant to an individual's susceptibility to police coercion'" (quoting *Colorado v. Connelly*, 479 U.S. at 164-65)).

52. *Id.* § 147, at 571.

53. *Id.* § 147, at 570 (citing several cases for individual factors to be considered: *Greenwald v. Wisconsin*, 390 U.S. 519, 519-21 (1968) (time of day, physical illness, education level, holding conditions, and lack of knowledge of constitutional rights); *Watts v. Indiana*, 338 U.S. 49, 52-53 (1949) (duration); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (age); *Mincey v. Arizona*, 437 U.S. 385, 398-99 (1978) (physical injury); *Lynum v. Illinois*, 372 U.S. 528, 534 (1963) (ignorance of criminal law)).

54. *See id.* at 571.

One important trend in the post-*Connelly* era, however, has been the reluctance of lower courts to fully embrace the need to find police coercive activity before inquiring into the subjective beliefs of a criminal defendant.<sup>55</sup> This may be caused by the “view that the concept of official coercion is so vaguely defined that it can generally be found on most facts by courts predisposed to find it.”<sup>56</sup> On the other hand, as the McCormick treatise postulates, the requirement of official coercion is an insignificant barrier to a voluntariness analysis.<sup>57</sup> Yet, as we will see in the *Sawyer* decision below, the requirement is but one source of confusion when the separate tests for finding coercion and involuntariness overlap and are used to justify the appellate court’s *de novo* review of the case.<sup>58</sup> At any rate, the ultimate resolution of a voluntariness claim requires an analysis of policy considerations as to whether the means used to elicit the confession at issue “are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means.”<sup>59</sup>

Logically implicit in a finding of voluntariness is that a defendant waived the right against self-incrimination and the right to counsel, that the defendant had knowledge or intelligence of what those rights were, and that those rights applied to the defendant when making an incriminatory statement or confession.<sup>60</sup> However, such intelligence is merely a factor to consider, and is not an absolute requirement.<sup>61</sup> The Supreme Court has commented that the prosecution is never required to prove, in its initial burden, that a defendant was aware of his or her right to refuse to answer a police officer’s questions.<sup>62</sup> This means that there is no general sub-requirement of “intelligence” of persons waiving their substantive rights for the prosecution to meet its initial burden of production for a finding of due process voluntariness.<sup>63</sup> However, there is an intelligence requirement, discussed below, for custodial interrogation<sup>64</sup> settings.

Much confusion lingers in the wake of *Miranda* and *Connelly* as to how law enforcement officers must conduct themselves to comply with admissibility standards and exactly how lower courts shall administer the voluntariness rule.<sup>65</sup> In fact, the Supreme Court acknowledges that many impermissible interrogation prac-

---

55. *Id.* at 571. See also *State v. Rees*, 2000 ME 55, ¶¶ 7-9, 748 A.2d 976.

56. *Id.*

57. *Id.*

58. In *Sawyer*, the trial court seems to have merged the coercive police activity test with the custody (for *Miranda* purposes) test when analyzing a police cruiser’s physical position. See *infra* notes 136, 146. The merger of these tests would be an example of lower courts’ “reluctance to give up their traditional prerogative[s].” 1 MCCORMICK, *supra* note 42, § 147 at 571.

59. 1 MCCORMICK, *supra* note 42, § 147 at 572 n.49 (quoting *Miller v. Fenton*, 474 U.S. 104, 116 (1985)).

60. *Id.* at 571.

61. *Id.* (“[T]he defendant’s awareness of his right is relevant, [but] there is no absolute requirement that he be shown to have been cognizant of his legal right to decline a self-incriminating admission.”).

62. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973).

63. 1 MCCORMICK, *supra* note 42, § 147 at 571.

64. Despite the numerous contextual references and functional definition tests in confession law, a “custodial interrogation” can be defined as: “Intense police questioning of a detained person.” BLACK’S LAW DICTIONARY, 825 (7th ed. 1999). “Interrogation” is defined as: “The formal or systematic questioning of a person; [especially] intensive questioning by the police, [usually] of a person arrested for or suspected of committing a crime.” *Id.*

65. See generally, 1 MCCORMICK, *supra* note 42, § 147 at 573.



tices have not been deterred, at least partially because of the lack of guidance from the courts: "Problems raised by subtle interrogation techniques had not been addressed, practical guidelines for interrogating officers had not been developed, and recurring instances of what the Court regarded as clearly impermissible interrogation practices demonstrated that the costs being paid for the voluntariness rule were not deterring prohibited interrogation practices."<sup>66</sup>

Finally, the burden imposed upon prosecutors with regard to custodial interrogation requires that they at least make a showing of an effective (i.e., voluntary) waiver of the suspect's right to remain silent.<sup>67</sup> What this means is less than clear.<sup>68</sup> A confession obtained during an interrogation would seem to necessitate a higher standard to find that a person waived his or her rights than in a non-custodial setting, because the suspect's interests are at a greater risk when in custody.<sup>69</sup> However, the burden does not require a higher standard when the confession takes place during a custodial interrogation.<sup>70</sup> In order to make a *prima facie* showing, the prosecution must generally show that the suspect appeared to decide freely to provide an incriminating statement and was not threatened or promised anything in exchange for the statement.<sup>71</sup> If defense counsel introduces evidence that suggests coercive law enforcement activity was present and that the coercion causally relates to the elicited confession, the prosecution may have to respond to this rebuttal with additional evidence to meet its burden of persuasion.<sup>72</sup> In addition, the prosecution's burden is higher if the suspect was re-approached subsequent to invoking his or her right to remain silent.<sup>73</sup>

## 2. Substantive Aspects of Presumptions in Confession Law

The *Sawyer* case involved an interesting juncture between confession law, rebuttable presumptions, and the privilege against self-incrimination.<sup>74</sup> As such, a brief discussion of the law of presumptions is necessary.

Establishing presumptions in confession law is inherent in jurisprudence and helps make constitutional rights "more meaningful."<sup>75</sup> Cases that discuss presumptions can illuminate the nature of the authority of how a trial should be conducted. As one scholar describes, "cases and commentary about constitutional limits on presumptions are best understood as expressions of, and factors in, the creation of the changing concept of what due process is all about."<sup>76</sup>

---

66. *Id.* at 573-74.

67. *See id.* § 151 at 593. Waiver of the right to counsel is also necessary. *Id.*

68. *Id.*

69. *Id.* at 594.

70. *See id.* (quoting *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986)).

71. *Id.* at 597.

72. *Id.*

73. *Id.* at 595. Although not relevant to this Note or the *Sawyer* case, *Michigan v. Mosley*, 423 U.S. 96 (1975), outlines a multifactor-test for determining whether a defendant has waived the right to silence after invoking that right. 1 MCCORMICK, *supra* note 42, at 595-96.

74. *See State v. Sawyer*, 2001 ME 88, ¶ 12, 772 A.2d 1173 (Alexander, J., dissenting) (mentioning the Fifth Amendment, burdens of proof, and voluntariness requirements).

75. Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 472 (1999).

76. Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 309 (1986).

Presumptions of fact have traditionally been developed by courts and legislatures in an effort to reshape the substantive law and to functionally define the distribution of power between judge and jury.<sup>77</sup> As a result of several Supreme Court cases,<sup>78</sup> however, constitutional limitations upon the due process requirements have developed, the most important of which is that legislatures may not adopt statutory presumptions to satisfy and reallocate the burden of *persuasion* of an element of a crime to a criminal defendant.<sup>79</sup> Factors that determine criminal liability, however, are constitutionally permissible to develop and the factors may include which party shall bear the burdens for each factor.<sup>80</sup> In 1975, the United States Supreme Court decided *Mullaney v. Wilbur*,<sup>81</sup> holding that a rebuttable presumption that shifts the burden of persuasion of any element of a crime<sup>82</sup> from the prosecution to the defendant is unconstitutional.<sup>83</sup> The *Mullaney* holding appears not to extend so far as to require the prosecution to bear the burden of persuasion on every fact that is relevant to an assessment of culpability—a significant change which would have required substantial revision of burden-of-persuasion allocation for affirmative defenses in many jurisdictions.<sup>84</sup>

Presumptions that allow proof of one fact (a “proved” fact, such as presence of a firearm in an automobile) to be sufficient to prove another (a “presumed” fact, such as possession of the firearm by the automobile occupants<sup>85</sup>) in order to satisfy a burden of *production* are also permissible, but subject to constitutional limitations.<sup>86</sup> In 1979, the Supreme Court decided *Ulster County Court v. Allen*,<sup>87</sup> which sounded a significant change in the substantive law of rebuttable criminal presumptions. In *Ulster County Court*, four defendants were charged with and convicted of unlawful possession of firearms in an automobile in which they were riding.<sup>88</sup> A New York statute provided that “the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle.”<sup>89</sup>

Upholding the New York statute, the Court reaffirmed the requirement of a

---

77. *Id.*

78. *See, e.g.*, *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *Ulster County Ct. v. Allen*, 442 U.S. 140 (1979); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

79. *Mullaney v. Wilbur*, 421 U.S. 684, 702-03 nn.30-31 (1975); Harris, *supra* note 76, at 309.

80. Harris, *supra* note 76, at 309.

81. 421 U.S. 684 (1975).

82. Of course, the prosecution’s burden of persuasion for all elements of a crime must be proven beyond a reasonable doubt. *See generally In re Winship*, 397 U.S. 358 (1970).

83. *Mullaney v. Wilbur*, 421 U.S. at 702.

84. Harris, *supra* note 76, at 331-32 (citing John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1338-44 (1979)). *See also*, John C. Sheldon, *Presumptions Against Criminal Defendants, Affirmative Defenses, and a Substantive Due Process Interpretation of County Court of Ulster v. Allen*, 34 ME. L. REV. 277, 278 (1982) (arguing that the rebuttable burden-of-persuasion-shifting-presumption is analogous to an affirmative defense).

85. *See infra* notes 88-93 and accompanying text.

86. Harris, *supra* note 76, at 335.

87. 442 U.S. 140 (1979).

88. *Ulster County Ct. v. Allen*, 442 U.S. at 143-44.

89. *Id.* at 142 (citing N.Y. PENAL LAW § 265.15(3) (McKinney 1967)).

"rational connection" between proven and presumed facts<sup>90</sup> and divided presumptions into the two categories of "permissive" and "mandatory."<sup>91</sup> The Court stated about the general context of the law:

Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more "evidentiary" or "basic" facts. . . . The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. . . . [T]he ultimate test of any [presumption] device's constitutional validity . . . remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt [under *In re Winship*].<sup>92</sup>

The Court then held that as long as presumptions are not the sole and sufficient basis for a finding of guilt, a presumed fact is admissible if rationally connected and "more likely than not to flow from" the proved fact.<sup>93</sup>

The relevance of *Ulster County Court* here is that burden allocation rules have constitutional guidelines that, if met, allow a jurisdiction to shape the expectations of how criminal defendants are treated in the criminal justice system.<sup>94</sup> States are free to establish presumptions based on their view of "fairness," as long as the proof beyond a reasonable doubt requirement for elements of a crime is met, such that it provides assurances that persons convicted of crimes are in fact guilty.<sup>95</sup>

---

90. *Id.* at 165 (The Court reaffirmed the "Leary test," stating that there must be a "'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and [that] the latter is 'more likely than not to flow from' the former." (quoting *Leary v. United States*, 395 U.S. 6, 36 (1969))).

91. *Id.* at 157.

92. *Id.* at 156 (citations omitted).

93. *Id.* at 165, 167.

94. See Harris, *supra* note 76, at 355.

95. *Id.* at 356. There is a vast array of state law doctrines on presumptions of voluntary confessions, each having their own rationales of efficiency, truth finding, and fairness. Today, at least the following states explicitly require that a defendant rebut the presumption of voluntariness after a *prima facie* showing by the prosecution: *Chambers v. State*, 742 So. 2d 466, 468 (Fla. Dist. Ct. App. 1999) ("[O]nce the State has made a *prima facie* showing of the voluntariness of a confession, the burden of proof then shifts to the defendant to show that the confession was not voluntary."); *People v. Patterson*, 610 N.E.2d 16, 30 (Ill. 1992) ("The burden is upon the State to establish that the confession was voluntary, and upon the establishment of a *prima facie* case, the burden of going forward with proof properly shifts to the accused."); *Johnson v. State*, 235 N.E.2d 688, 693 (Ind. 1968) ("[A] confession is *prima facie* admissible and the burden showing its incompetency is on the accused . . ."); *Spann v. State*, 771 So.2d 883, 900 (Miss. 2000) ("After the State has made out its *prima facie* case [that the defendant's confession was voluntarily made], the defendant must rebut the State's evidence by offering testimony that violence, threats of violence, or offers of reward induced the confession."); *State v. Day*, 970 S.W.2d 406, 409 (Mo. Ct. App. 1998) ("After the state has made a *prima facie* case [that the defendant's incriminating statement was voluntary], the defendant must produce evidence showing any 'special circumstance' that may have rendered the confession involuntary." (quoting *State v. Simpson*, 606 S.W.2d 514, 516-17 (Mo. Ct. App. 1980))).

The following states explicitly treat confessions as *prima facie* involuntary: *Ex parte Price*, 725 So.2d 1063, 1067 (Ala. 1998) (a confession or extrajudicial inculpatory statement is *prima*

*B. Development of the Confession Law in Maine*

In Maine, the voluntary confession case law generally followed the federal common law,<sup>96</sup> with at least two notable distinctions relevant to this discussion.<sup>97</sup> First, with regard to burdens of proof, Maine case law traditionally presumed that confessions were voluntary and required that the defendant rebut such a presumption before a jury.<sup>98</sup> However, until *Sawyer*, this common law rule appeared to have faded away in light of several U.S. Supreme Court decisions.<sup>99</sup> Evidence of this appears through the abrogation of the rule allowing juries to determine the legal admissibility of confessions.<sup>100</sup> Since 1972, the Law Court has not referred to the antiquated presumption of voluntariness that was designed to be used in the company of a jury. Second, Maine surpassed the constitutional requirement of establishing voluntariness by a preponderance of evidence outlined in *Lego v. Twomey*,<sup>101</sup> by adopting a "beyond a reasonable doubt" requirement in the land-

---

facie involuntary, and the prosecution must show voluntariness and that proper *Miranda* warnings were given to have it admitted); *State v. Trostle*, 951 P.2d 869, 879 (Ariz. 1997) ("Because confessions are prima facie involuntary, the state has the burden of showing voluntariness by a preponderance of the evidence."); *Dorsciak v. Gladden*, 425 P.2d 177, 180 (Or. 1967) ("[A] confession of guilt is prima facie involuntary, and . . . a burden is placed upon the state to show that it was voluntarily made *without the inducement of either fear or hope*." (quoting *State v. Schwenson*, 392 P.2d 328, 336 (Or. 1964))).

96. Macomber, *supra* note 34, at 68-69. This Article also provides a detailed comparative analysis of the early Maine confession cases and their federal counterparts. *Id.* at 66-72. For a pre-*Connelly* overview of federal confession cases, see John C. Sheldon, *The Obsolescence of Voluntary Confessions in Maine*, 35 ME. L. REV. 243, 249-56 (1983). Sheldon's article postulates, *inter alia*, that almost all confessions in Maine are unjustifiably inadmissible after the *Caouette* decision (discussed *infra* note 155, and accompanying text). *Id.* at 257.

97. For other distinctions between federal and Maine cases that are beyond the scope of this Note, see John C. Sheldon, *Sobriety Checkpoints, the Rational-Basis Test, and the Law Court*, 8 ME. B.J. 80 (1993). Additionally, for more background and a dialogue of whether Fifth Amendment protections should be extended to field sobriety tests as they are to inculpatory evidence in Maine, see Michael J. Waxman, *Fifth Amendment, Shmifith Amendment: For Real Protection Against Compelled Self-Incrimination in OUI Prosecutions, Look to the Maine Constitution*, 11 ME. B.J. 148 (1996); Donald W. Macomber, *The Maine Constitution's Privilege Against Self-Incrimination Revisited—A Response to Mr. Waxman*, 11 ME. B.J. 380 (1996); Michael J. Waxman, *Mr. Waxman Responds*, 12 ME. B.J. 22 (1997).

98. *State v. Merrow*, 161 Me. 111, 116-17, 208 A.2d 659, 662 (1965); *State v. Robbins*, 135 Me. 121, 123, 190 A. 630, 632 (1937); *State v. Grover*, 96 Me. 363, 368, 52 A. 757, 759 (1902).

99. *E.g.*, *Colorado v. Connelly*, 479 U.S. 157 (1986); *Miranda v. Arizona*, 384 U.S. 436 (1966).

100. *State v. Collins*, 297 A.2d 620, 636 (Me. 1972). In *Collins*, the court stated that, *inter alia*, *Grover*, *Robbins*, and *Merrow* were, "held to be without continuing force, as precedent, to indicate the law of this State," regarding the jury's role in evidentiary admissibility of confessions. *Id.* The court did not specifically comment on the status of the rebuttable presumption confession law and apparently it has not done so until the *Sawyer* case.

101. 404 U.S. 477 (1972). In this case, the Court held that states must establish voluntariness by a preponderance of the evidence at a minimum. *Id.* at 489. Well before *Lego*, the government was always expected to "shoulder the entire load" of proving voluntariness. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 317 (John T. McNaughton rev. ed. 1961); but see Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 934 (1979) (asserting that the accused is often asked to share "the load").

In *Lego*, the Court reasoned that due process requirements are based upon concern that jurors would improperly view coerced confessions that were reliable and truthful as probative. *Lego v. Twomey*, 404 U.S. at 485. The fact that juries might not recognize the inaccuracy of an involuntary confession was not the primary rationale behind their holding. *Id.* at 484-85. As a result, the possibility that juries' reliance on inaccurate confessions might produce wrongful convictions does not suggest that a high burden must exist to establish admissibility. *Id.*

mark *State v. Collins*<sup>102</sup> decision. Several other states have taken advantage of the option to impose higher standards to prove voluntariness in their constitutions<sup>103</sup> and sometimes in conjunction with other requirements,<sup>104</sup> and each with varying degrees of proof.<sup>105</sup>

Many of the other aspects of Maine's contemporary confession law are substantively similar to the federal constitutional guidelines. First, police officers typically need a "reasonable and articulable suspicion" to justify stopping a person who is thought to have committed a crime.<sup>106</sup> Unless this is done, the investigatory stop may constitute a search that is violative of the Fourth Amendment.<sup>107</sup>

Next, if an officer's actions became an interrogation and custodial in nature, a suspect's statements are inadmissible if a proper *Miranda* warning was warranted, but not given.<sup>108</sup> Determining whether a defendant was in custody is often difficult, especially if an officer's initial contact resembles normal procedure for asking a bystander for voluntary information to assess the general situation or other contact that is employed to preserve the officer's personal safety.<sup>109</sup> Volunteered statements are not within the *Miranda* rule and statements obtained as part of a general investigation must be distinguished from those secured in a custodial interrogation.<sup>110</sup> A court will establish that a defendant was "in custody" if subjected to a formal arrest or "a restraint on freedom of movement of the degree associated with a formal arrest."<sup>111</sup>

The 1998 *Michaud* decision stated the factors to be considered in a "totality of the circumstances test" for a determination of custody and voluntariness<sup>112</sup> as follows:

---

102. 297 A.2d at 627.

103. *E.g.*, *State v. Monroe*, 711 A.2d 878, 883 (N.H. 1998) (noting that proof of voluntariness beyond a reasonable doubt is required by the New Hampshire Constitution (citing *State v. Beland*, 645 A.2d 79, 80 (1994))).

104. *E.g.*, *State v. Hopkins*, 799 So. 2d 1234, 1236 (La. Ct. App. 2001) (stating that the state must prove beyond a reasonable doubt that a confession is admissible when the defense moves to suppress a confession).

105. *E.g.*, *State v. Brouillard*, 745 A.2d 759, 762 (R.I. 2000) (saying the state must show effective waivers of right to silence by clear and convincing evidence).

106. *State v. Lear*, 1998 ME 273, ¶ 5, 722 A.2d 1266. To justify making an investigatory stop, an officer must have a subjective, articulable suspicion of criminal activity and that suspicion must be objectively reasonable "in the totality of the circumstances." *Id.*

107. *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (describing the Fourth Amendment requirements of a lawful investigative "Terry stop" and quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

108. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966); *State v. Michaud*, 1998 ME 251, ¶ 3, 724 A.2d 1222.

109. *See State v. Philbrick*, 436 A.2d 844, 849 (Me. 1981). In *Philbrick*, a police officer, who knew nothing about whether the defendant had committed a possible crime, conducted an inquiry that was found to be lawful because it was merely a general, initial on-the-scene request for information that police officers have a duty to perform in their usual investigation of criminal incidents. *Id.*

110. *Id.*

111. *State v. Holloway*, 2000 ME 172, ¶ 14, 760 A.2d 223 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995)); *see also State v. Michaud*, 1998 ME 251, ¶ 4, 724 A.2d 1222 (quoting *Stansbury v. California*, 511 U.S. 318, 322 (1994)).

112. The contemporary voluntariness requirement for admissibility, after considering the "totality of the circumstances," is that a defendant's statement must be the result "of his own free will and rational intellect." *State v. Rees*, 2000 ME 55, ¶ 3, 748 A.2d 976 (quoting the suppression judge's order granting the motion to suppress).

To determine whether a defendant was restrained to the degree associated with a formal arrest, a court must ascertain "whether a reasonable person in the defendant's position would have believed he was in police custody and constrained to a degree associated with formal arrest." In making this "reasonable person" analysis of whether a defendant is "in custody," a court may examine a number of objective factors, including:

- (1) the locale where the defendant made the statements;
- (2) the party who initiated the contact;
- (3) the existence or non-existence of probable cause to arrest (to the extent communicated to the defendant);
- (4) subjective views, beliefs, or intent that the police manifested to the defendant, to the extent they would affect how a reasonable person in the defendant's position would perceive his or her freedom to leave;
- (5) subjective views or beliefs that the defendant manifested to the police, to the extent the officer's response would affect how a reasonable person in the defendant's position would perceive his or her freedom to leave;
- (6) the focus of the investigation (as a reasonable person in the defendant's position would perceive it);
- (7) whether the suspect was questioned in familiar surroundings;
- (8) the number of law enforcement officers present;
- (9) the degree of physical restraint placed upon the suspect; and
- (10) the duration and character of the interrogation.<sup>113</sup>

Finally, the Law Court has established standards of review for determining whether a trial court made an error with regard to factual findings or the application of the law. Factual findings are reviewed deferentially for "clear error" and the application of law is subject to stricter "independent appellate review."<sup>114</sup> In other words, the Law Court looks at the big picture and will not disturb a trial court's conclusion that a statement was involuntary if it is rationally supported by the evidence.<sup>115</sup>

The standard of review that appellate courts apply to confession decisions varies significantly.<sup>116</sup> Commonly, intermediate courts apply traditional deference to trial judges and only overturn them if the decisions are an abuse of discretion or are clearly erroneous.<sup>117</sup> However, many appellate courts distinguish and reserve "ultimate" questions for *de novo* review; whether a challenged confession was voluntary is a frequent example of this sort of "ultimate" question.<sup>118</sup> This

---

113. *State v. Michaud*, 1998 ME 251, ¶ 4, 724 A.2d 1222 (citing *Stansbury v. California*, 511 U.S. at 322; *State v. Gardiner*, 509 A.2d 1160, 1163 n.3 (Me. 1986); and *State v. Thibodeau*, 496 A.2d 635, 639 (Me. 1985)).

114. *State v. Coombs*, 1998 ME 1, ¶¶ 7, 8, 704 A.2d 387.

115. *State v. Caouette*, 446 A.2d 1120, 1124 (Me. 1982).

116. 1 MCCORMICK, *supra* note 42, § 162 at 663.

117. *Id.*

118. *Id.* "[F]actual findings regarding circumstances will be overturned only if clearly erroneous, but 'legal sufficiency of those findings show [that] voluntariness is . . . a question of law which we review *de novo*.'" *Id.* n.43 (quoting *United States v. Bartlett*, 856 F.2d 1071, 1084-85 (8th Cir., 1988)).

practice is not contradicted by any federal requirements. Determinations of credibility (that only a trial court can make) are not fundamental to resolving an issue of voluntariness.<sup>119</sup>

### C. Recent Developments

The right to silence today is arguably in a state of flux and not immune from proponents of a system that would make more confessions admissible in order to obtain more convictions.<sup>120</sup> In *Dickerson v. United States*,<sup>121</sup> the United States Supreme Court recently reaffirmed a beacon of the *Miranda* doctrine: that an irrebuttable presumption of involuntariness arises upon any violation of *Miranda* warning requirements.<sup>122</sup> At issue in *Dickerson* was the constitutionality of 18 U.S.C. § 3501, a 1968 congressional repeal of the *Miranda* exclusionary rule.<sup>123</sup> Shortly after the *Miranda* case, Congress sought to reverse its holding by way of § 3501 to specifically return to a voluntariness inquiry in lieu of *Miranda's* irrebuttable presumption principle.<sup>124</sup> Apparently, this provision had never been vigorously enforced and, until the Clinton Administration, had remained constitutionally unchallenged.<sup>125</sup>

---

119. See *Miller v. Fenton*, 474 U.S. 104, 116 (1985) (stating that the issue of voluntariness "has always had a uniquely legal dimension" and that "techniques for extracting the statements . . . [must be] compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means").

120. See Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 432 (2000) (explaining unsuccessful congressional attempts to erode the constitutional right to silence and citing analogous academic commentary).

121. 530 U.S. 428 (2000).

122. *Id.* at 432.

123. *Id.* The Court quoted at length from § 3501, stating:

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

*Id.* at 435-36 (quoting 18 U.S.C. § 3501).

124. *United States v. Dickerson*, 166 F.3d 667, 668 (4th Cir. 1999).

125. James R. O'Neill, Note, *United States v. Dickerson: The Beginning of the End for Miranda?*, 51 MERCER L. REV. 1359, 1364-65 (2000).

To support the affirmation of the *Miranda* principle, in a 7-2 decision, Chief Justice Rehnquist stated that “*stare decisis* weigh[ed] heavily against overruling [the exclusionary rule] now.”<sup>126</sup> The Court neglected to examine *Miranda* on its merits, which may infer its susceptibility and that of other right-to-silence doctrines to future erosion.<sup>127</sup>

Arguing on the side of preserving the right to silence under the merits of *Miranda*, perhaps for the next Supreme Court challenge to follow *Dickerson*, are Professors Daniel Seidmann<sup>128</sup> and Alex Stein,<sup>129</sup> who assert that “by making silence advantageous to guilty suspects, the right to silence helps the innocent as well as the guilty: without this right, the guilty would lack an inducement to separate themselves from the innocent.”<sup>130</sup> The research of these scholars indicates that the absence of the right to silence would result in a “pooling of all suspects,” thus impeaching the exculpatory evidence of innocent suspects and defendants with the addition of guilty suspects’ own exculpatory stories.<sup>131</sup> Further, they argue that guilty suspects prefer silence over lies because silence is not refutable, unlike lies—and that this has the effect of producing true stories from innocent suspects, which, when combined with the requirement to prove all elements beyond a reasonable doubt, helps expose who the innocent defendants really are.<sup>132</sup>

### III. THE SAWYER DECISION

#### A. Background Facts

On December 4, 1999 around 1:00 A.M., a municipal police officer observed a truck passing another vehicle at seventy-three miles per hour in a fifty miles per hour zone, forcing the officer’s car into a breakdown lane to avoid collision.<sup>133</sup> The officer then turned on the cruiser’s blue lights and reversed direction to follow the vehicles, temporarily losing sight of them in the process.<sup>134</sup> After reversing direction once again, the officer found both of the vehicles in a residential driveway in an apparent attempt to elude the police officer.<sup>135</sup> The officer then parked the police cruiser behind the vehicles, although the facts are unclear as to whether there was actually enough room for one or both of the vehicles to get past the

---

126. *Dickerson v. United States*, 530 U.S. at 443.

127. Seidmann & Stein, *supra* note 120, at 432. Seidmann and Stein address the argument that relevant rules should be amended to encourage more criminal suspects’ voluntary statements during police interrogations and more defendants’ testimony in court, rather than remaining silent. *Id.* at 433. They suggest, however, that because guilty suspects currently choose to remain silent instead of lying for fear that lies will be used against them to infer guilt, removing the right to silence would enhance the incentive to lie. *Id.*

128. Professor of Economics, Economics Department, University of Newcastle-upon-Tyne. *Id.* at 431.

129. Sylvan M. Cohen Professor of Law, Faculty of Law, The Hebrew University of Jerusalem. *Id.*

130. *Id.*

131. *Id.* at 439.

132. *Id.* at 449, n.62 (citing Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1505 (1999)).

133. *State v. Sawyer*, 2001 ME 88 ¶ 2, 772 A.2d 1173.

134. *See id.*

135. *See id.*



parked cruiser to re-enter the roadway.<sup>136</sup> This fact later became significant to the question of whether the defendant was "in custody."

The officer encountered four males and stated that he was conducting an investigatory stop based on a civil violation; he inquired as to which person was driving the truck at the time of the high-speed passing.<sup>137</sup> One of the males, William Sawyer, was asked to move away from the truck and was then asked if he was the driver, to which Sawyer answered affirmatively.<sup>138</sup> Next, the officer conducted a field sobriety test upon Sawyer, during which Sawyer told the officer that he had been drinking too much.<sup>139</sup> At that time, the officer placed him in handcuffs, and positioned him into the cruiser.<sup>140</sup> No *Miranda* warnings were administered before Sawyer was questioned.<sup>141</sup>

### *B. Procedure, the Appeal, and Disposition*

The State of Maine charged Sawyer with criminal Operation Under the Influence ("OUI"), to which Sawyer pleaded not guilty.<sup>142</sup> Sawyer subsequently filed motions to suppress the arrest and statements that he made to the arresting officer on the basis that they were an unconstitutional interrogation and arrest.<sup>143</sup> The trial court held a hearing at which only the officer testified; subsequently the court granted the motion to suppress Sawyer's arrest and his admission to operating the truck.<sup>144</sup> Sawyer's motion to suppress the statement of his drinking too much was denied, and thus was admissible in evidence.<sup>145</sup>

On appeal, two of the trial court's legal conclusions were the focus of review: (1) that Sawyer was not in custody while being asked questions by the officer and as he was standing next to his vehicle (which was at least partially blocked by the police cruiser)<sup>146</sup>, and (2) that Sawyer's admission to operating the truck was involuntary.<sup>147</sup>

---

136. See *id.* ¶ 11, 772 A.2d 1173. The Court described the positions of two vehicles relative to the police cruiser. *Id.* The significance of this was a factor for determining whether the defendant was not free to leave and thus in custody for *Miranda* purposes. *Id.*

137. *Id.* ¶ 2, 772 A.2d 1173.

138. *Id.* ¶ 3, 772 A.2d 1173.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* ¶ 4, 772 A.2d 1173.

144. *Id.*

145. See *id.*

146. *State v. Sawyer*, No. Aug-2000-375 (Me. Dist. Ct. 7, S. Ken., Jul. 31, 2000) (Vafiades, J.) (order on motion to suppress). The suppression order stated the following:

[The] officer's conduct was not of such a coercive nature nor the physical setting so unfriendly that the defendant would have believed he was in police custody or constrained to the degree associated with formal arrest. The court finds that the defendant was not in custody and Miranda warnings were not required.

*Id.*

147. *State v. Sawyer*, 2001 ME 88, ¶ 6, 772 A.2d 1173. The District Court found that Sawyer's admission was not voluntary because, "a reasonable person would believe that he had no choice but to answer the officer's questions." *Id.*

The State urged the Law Court to reverse the trial court's suppression order<sup>148</sup> on the grounds that the factual findings were "questionable,"<sup>149</sup> and that two legally inconsistent conclusions were reached based upon the evidence presented at the suppression hearing: that Sawyer was not in custody, but gave an involuntary confession.<sup>150</sup> Typically, a conclusion of involuntariness is supported by findings of being in custody for *Miranda* purposes and that questioning by law enforcement amounted to an interrogation.<sup>151</sup> Conversely, a conclusion of voluntariness is usually supported by a finding that a suspect was not in custody and was not interrogated.<sup>152</sup>

The State also contended that Sawyer failed to allege that his statements were involuntary.<sup>153</sup> The State suggested that *State v. Caouette*<sup>154</sup> provided the test to properly determine voluntariness and that it should be used as a basis for establishing the proper standard of review: "to find a statement voluntary, it must first be established that it is the result of the defendant's exercise of his own free will and rational intellect. . . . [The trial court's decision] will not be disturbed on appeal if there is evidence providing rational support for its conclusion."<sup>155</sup> Relying on *Caouette*, the State argued that the trial judge "misapprehended" the substantive law by producing a legally incorrect result.<sup>156</sup> The State argued that the Law Court must determine whether the trial court's findings were rationally supported.<sup>157</sup> Lastly, the State contended that the judge's application of law and findings of fact did not rationally support the conclusion that Sawyer's admission was involuntary.<sup>158</sup>

Sawyer primarily argued, on appeal, that the State did not prove beyond a reasonable doubt that his admission to driving the truck was a voluntary statement.<sup>159</sup> Sawyer asserted that the State carried the whole burden to prove that his admission was voluntary.<sup>160</sup> Sawyer also claimed that he did not have the option

---

148. *Id.* ¶ 4, 772 A.2d 1173. The trial court concluded the following: (1) the officer's investigatory stop was justified, (2) Sawyer was not in custody, but the officer did interrogate him, (3) the officer did not have to give *Miranda* warnings, (4) Sawyer's statement that he was driving the truck was made involuntarily, and (5) Sawyer's statement about drinking too much was made voluntarily. *Id.*

149. Brief of Plaintiff-Appellant at 14, *State v. Sawyer*, 2001 ME 88, 772 A.2d 1173 (No. KEN-00-466).

150. *Id.* at 9.

151. *See, e.g.*, *State v. Mikulewicz*, 462 A.2d 497, 500 (Me. 1983).

152. *See, e.g.*, *State v. Theriault*, 425 A.2d 986, 990 (Me. 1981).

153. Brief of Plaintiff-Appellant at 1, *State v. Sawyer*, 2001 ME 88, 772 A.2d 1173 (No. KEN-00-466). The State argued Defendant presented no evidence that the statements were involuntary, *id.* at 6, and that "the Court had no evidence concerning [his] subjective state of mind." *Id.* at 11.

154. 446 A.2d 1120 (Me. 1982).

155. Brief of Plaintiff-Appellant at 11, *State v. Sawyer*, 2001 ME 88, 772 A.2d 1173 (No. KEN-00-466) (quoting *State v. Caouette*, 446 A.2d 1120, 1123-24 (Me. 1982)). Interestingly, the State subtly rephrased the term "not voluntary" from the suppression order to "involuntary" when it suggested the standard of review. *Id.* at 13. The Law Court did not discuss this change of terminology.

156. *Id.*

157. *Id.*

158. *Id.* at 18.

159. Brief of Defendant-Appellee at 6, *State v. Sawyer*, 2001 ME 88, 772 A.2d 1173 (No. KEN-00-466).

160. *Id.*

to not answer the officer's questions and that the State did not provide any evidence to show that his statement was voluntary.<sup>161</sup>

Sawyer sought to refute the State's assertion that the trial court came to two legally inconsistent conclusions by claiming that the trial judge "had no choice but to rule" that the State failed to prove voluntariness beyond a reasonable doubt.<sup>162</sup> Moreover, Sawyer countered the State's argument that the judge's findings inadequately supported her "not voluntary" conclusion by arguing that the State presented nothing regarding Sawyer's mental or physical capacity in order to assess the totality of the circumstances.<sup>163</sup> Finally, in arguing that the trial court should be affirmed, Sawyer added that he "ha[d] no burden of his own."<sup>164</sup>

The Law Court vacated the order suppressing Sawyer's admission to driving in favor of the State.<sup>165</sup> Citing *State v. Coombs*<sup>166</sup> and *State v. Rees*,<sup>167</sup> the court embraced the requirements that the prosecution must prove voluntariness beyond a reasonable doubt, and that voluntariness must result from the "defendant's free will and rational intellect."<sup>168</sup> The court also noted the three "fairness" policy objectives that are effected by fulfilling the requirements to find voluntariness outlined in *State v. Mikulewicz*.<sup>169</sup> The court reasoned that a "totality of the circumstances analysis" should be applied to the factual findings of the trial court in order to determine whether Sawyer's admission was not part "of his own free will and rational intellect."<sup>170</sup> The court held that the suppression order should be vacated because the trial court had "placed great importance on the irrelevant subjective belief of the police officer, as to whether Sawyer was free to walk away."<sup>171</sup>

---

161. *Id.* at 4, 6.

162. *Id.* at 8.

163. *Id.*

164. *Id.* at 11.

165. *State v. Sawyer*, 2001 ME 88, ¶ 11, 772 A.2d 1173.

166. 1998 ME 1, 704 A.2d 387.

167. 2000 ME 55, 748 A.2d 976.

168. *State v. Sawyer*, 2001 ME 88, ¶ 8, 772 A.2d 1173 (quoting *State v. Rees*, 2000 ME 55, ¶ 3, 748 A.2d 978). The *Coombs* and *Rees* cases are recent embodiments of the *Caouette* test. See *supra* text accompanying notes 154-55.

169. *State v. Sawyer*, 2001 ME 88, ¶ 8, 772 A.2d 1173 (citing *State v. Mikulewicz*, 462 A.2d 497 (Me. 1983) (holding that the voluntariness requirement "(1) . . . discourages objectionable police practices; (2) . . . protects the mental freedom of the individual; and (3) . . . preserves a quality of fundamental fairness in the criminal justice system.")).

170. *Id.* (quoting *State v. Rees*, 2000 ME 55, ¶ 3, 748 A.2d 976). In an apparent instructional narrative for remand, the court compared the facts and holdings of recent confession cases. *Id.* ¶¶ 9-10, 772 A.2d 1173. The "involuntary" cases cited in *Sawyer*, *id.* ¶ 9, 772 A.2d 1173, included: *State v. Rees*, 2000 ME 55, ¶¶ 1-2, 748 A.2d 976 (defendant's statements found involuntary as a result of his suffering from dementia); *State v. Mikulewicz*, 462 A.2d at 498-99, 501 (Me. 1983) (defendant's statements found involuntary because he was elderly, naked, and sick, while interrogation was long, continuous, and conducted by many officers who allowed him to drink in hopes that he would talk); and *State v. Caouette*, 446 A.2d 1120, 1121, 1124 (Me. 1982) (defendant's statements found involuntary because he was "incarcerated, . . . vomiting, crying, frightened, emotionally upset, and . . . had no conscious intent to discuss the case.").

The "voluntary" cases cited in *Sawyer*, 2002 ME 88, ¶ 10, 772 A.2d 1173, included: *State v. Coombs*, 1998 ME 1, ¶¶ 5-6, 11-12, 704 A.2d 387 (defendant's statements found voluntary beyond a reasonable doubt, despite formal detention setting, because testimony showed that defendant was not threatened or promised leniency in exchange for confession); and *State v. Theriault*, 425 A.2d 986, 990 (Me. 1981) (defendant's statements found voluntary beyond a reasonable doubt despite officer's non-coercive, yet coaxing remarks: "it would be better to tell us [the truth]" and "people would think more of [you] if [you] got it off [your] chest.").

171. *State v. Sawyer*, 2001 ME 88, ¶ 11, 772 A.2d 1173.

In a footnote, the court embraced a legal requirement that Sawyer needed to rebut the prosecution's initial showing of voluntariness to indicate that his statement was involuntary, and as such, that Sawyer failed to meet that burden.<sup>172</sup> The court constructed its holding from two cases that allocated the burden of production to the defendant after a *prima facie* showing of voluntariness by the prosecution, citing an Illinois intermediate appellate court decision<sup>173</sup> and a Maine case<sup>174</sup> for persuasive authority.<sup>175</sup>

### C. The Dissent

The dissent rejected the notion that the accused should ever have to present evidence pertaining to the voluntariness of a statement by emphasizing the constitutional protections that prevent a court from compelling a criminal defendant to testify against oneself.<sup>176</sup> They noted that a criminal defendant may be required to raise an issue of voluntariness, which is accomplished by the minimal act of filing a proper motion to suppress.<sup>177</sup> Under this rationale, the dissent contended that Sawyer satisfactorily generated the issue of voluntariness.<sup>178</sup> The dissent's reasoning appears to give substantive meaning to how little the defendant should produce to meet the *burden of going forward* (or burden of production to avoid a directed verdict) after a *prima facie* showing by prosecution of voluntariness.

The dissenting opinion advanced pre-*Caouette* voluntariness rules: (1) that a defendant may rely solely on the facts presented by the proponent of the issue, (2) that reasonable inferences may be drawn from those facts, and (3) that the court has discretion to disbelieve the proponent's witness, even if the testimony is undisputed.<sup>179</sup> Further, they maintained that Sawyer's arguments were consistent with these rules and that he was merely successful in urging the judge to conclude that the State's proof was insufficient.<sup>180</sup> The dissent also insisted that a finding of voluntariness cannot be compelled if the trial judge used his or her discretion to disbelieve parts of the State's only witness and that the trial court should be reversed only if the evidence compelled a finding of voluntariness.<sup>181</sup> The dissent asserted that the evidence did not show that the defendant was free from the officer's compulsion.<sup>182</sup> Lastly, the dissent implied that the majority mischaracterized the

---

172. See *id.* n.5, 772 A.2d at 1777 n.5.

173. *People v. Cozzi*, 416 N.E.2d 1192, 1195 (Ill. App. Ct. 1981). This case holds, *inter alia*: "Where the State makes *prima facie* showing that a confession was voluntary, the burden of producing evidence to show that confession was involuntary shifts to the defense, and shifts back to the State only when defendant has produced such evidence." *Id.*

174. *State v. Eaton*, 577 A.2d 1162, 1167 (Me. 1990). The *Sawyer* court interpreted the *Eaton* decision as "finding a statement to be voluntary when the officer testified to the non-coercive nature of the incident and the defendant did not produce contrary evidence." *State v. Sawyer*, 2001 ME 88, n.5, 772 A.2d 1173.

175. *State v. Sawyer*, 2001 ME 88, n.5, 772 A.2d 1173.

176. See *id.* ¶ 12, 772 A.2d 1173 (Alexander, J., dissenting) (citing U.S. CONST. amend. V; and ME. CONST. art. I, § 6).

177. *Id.* (citing M.R. CRIM. P. 12(b)(3) & 41A(a)).

178. *Id.*

179. *Id.* ¶ 15, 772 A.2d 1173.

180. *Id.*

181. *Id.* ¶ 16, 772 A.2d 1173 (citing *State v. Caouette*, 446 A.2d 1120, 1123-24 (Me. 1982)).

182. *Id.* ¶ 18, 772 A.2d 1173 (citing *State v. Caouette*, 446 A.2d at 1123-24) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

trial judge's findings as issues of law instead of issues of fact in order to broaden the scope of review and eventually overturn the trial court.<sup>183</sup>

The dissent agreed with the majority in one aspect of the case—the arrest—agreeing that it should not have been suppressed because, as a matter of law, the officer had probable cause to believe that Sawyer violated the law by operating the vehicle.<sup>184</sup> The dissent recognized that probable cause to arrest “may be based on a wide variety of information, some of which may be inadmissible at trial.”<sup>185</sup>

#### IV. DISCUSSION

The full practical impact of the *Sawyer* decision will probably be determined in Maine's next several confession cases. As they unfold, one should logically ask: How thoroughly did the majority sketch out any changes to the substantive law and how fair is the policy of allocating some of the burden of production to a defendant, as Illinois does<sup>186</sup> in admitting evidence of a confession? Illinois and Maine are not alone in this explicit burden allocation rule. Indiana, Mississippi and Missouri also make clear that a defendant has an obligation to produce evidence in order to avoid an unfavorable ruling after the prosecution makes a prima facie showing of voluntariness.<sup>187</sup> Remember, however, that the burden of persuasion ultimately remains with the prosecution to convince the trier of fact beyond a reasonable doubt of all necessary elements.

At least two factors should be considered when comparing a burden-allocation policy with other alternatives: (1) whether statutory law complements a jurisdiction's case law rule of obligating the defendant to rebut the presumption of voluntariness; and (2) whether voluntariness only needs to be proven by a preponderance or by the higher beyond-a-reasonable-doubt standard of the evidence.

Rebuttable presumptions in the criminal law are commonly open to constitutional challenge on due process grounds.<sup>188</sup> The most common rebuttable presumption rule in confession cases operates in such a way that once the prosecution has proved facts for a prima facie case, the presumption of voluntariness is permissive for the jury rather than mandatory, even if the defendant offers no evidence to rebut the prima facie case.<sup>189</sup> Take, for an analogous example, a situation in which an officer stops an automobile, wishes to conduct a search for illicit drugs, and later asserts that the driver-defendant was warned of the right to refuse consent.

---

183. *Id.* ¶¶ 19-20, 772 A.2d 1173.

184. *Id.* ¶ 22, 772 A.2d 1173.

185. *Id.*

186. The burden shifting rule in *Cozzi*, 416 N.E.2d 1192, 1195 (Ill. App. Ct. 1981), appears to remain as good law and has been cited in many Illinois decisions. For a brief overview of confession law in Illinois, see Stephanie Rae Williams, *The Untimely Demise of the Involuntary Confession Material Witness Rule in Illinois*, 14 N. ILL. U. L. REV. 105, 108-10 (1993). Williams explains that Illinois statute requires the prosecution to prove voluntariness by a preponderance of the evidence and to carry the initial burden of proof at a suppression hearing, but that the defense then “has an ‘evidentiary obligation to rebut’ the prima facie case.” *Id.* at 110 (quoting *People v. Reid*, 554 N.E.2d 174, 186 (Ill. 1990)). The Illinois statute is 725 ILL. COMP. STAT. ANN. § 5/114-11(d) (West 1992).

187. See *supra* note 95 (listing states with burden shifting to the defendant).

188. See generally 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW, CRIMINAL PRACTICE SERIES*, § 2.13, at 223 (1986).

189. *Id.* § 1.8, at 79-80.

While the Government would desire to show that the suspect had knowledge of this right, such knowledge is only a factor, but not required to establish a voluntary consent.<sup>190</sup> However, the defendant needs to make some sort of showing that he or she did not know of the right to refuse consent: this can be done by simply failing to testify to that knowledge or refusing to admit, if asked, that the warnings were given.<sup>191</sup>

In developing these principles, the Supreme Court has largely borrowed from confession law to articulate a standard of voluntariness for consent searches. In *Schneckloth v. Bustamonte*,<sup>192</sup> the Court stated that there was "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question had arisen."<sup>193</sup> In deciding that voluntariness<sup>194</sup> of a consent to a search is a question of fact to be determined by a totality of all the circumstances test, the Court noted that the competing needs for legitimate searches and assurances of coercion-free police activity must be accommodated.<sup>195</sup>

The inquiry into the allocation of burdens of production, then, is a difficult one. The nature of a defendant's subjective understanding is what the trier of fact must determine. Should it be enough that defendants can adequately meet that burden by testifying that they did not know they could leave the situation, which would be only slightly more than the defendant offered in the *Sawyer* case? Or should a defendant be required to produce more evidence and perhaps elicit more testimony that could push the boundaries to just short of violating one's privilege against self-incrimination? Some scholars criticize the notion that government must carry the entire burden of proof and advocate for "eliciting admissible fruit" from defendants before trial by actually restricting their Fifth Amendment privileges.<sup>196</sup> On the other hand, the Michigan Supreme Court has stated: "There can be no such thing as confession of guilt by silence in or out of court. The unanswered allegation by another of the guilt of a defendant is no confession of guilt on the part of a defendant."<sup>197</sup> Consequently, the *Sawyer* decision was less than clear regarding what level of additional evidence would be good enough to rebut the prosecution's showing.

Commentators agree that a court may adopt rebuttable presumptions and thus allocate burdens of proof in order to meet its obligation to achieve accurate fact finding during its admissibility inquiries.<sup>198</sup> Perhaps if a court can legitimately decide that evidence is insufficient to overcome a prima facie showing of a rebuttable presumption,<sup>199</sup> then extending such a pro-prosecution approach to cases beyond the area of voluntariness should be proper. The inquiry necessarily leads

---

190. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

191. See Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1470 (2000).

192. 412 U.S. 218 (1973).

193. *Id.* at 224.

194. The Court held, *inter alia*, that "there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'" *Id.* at 229.

195. *Id.* at 227.

196. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: the Self-Incrimination Clause*, 93 MICH. L. REV. 857, 893-95 (1995).

197. *People v. Bigge*, 285 N.W. 5, 6 (Mich. 1939).

198. Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 945 (2000).

199. Strauss, *supra* note 25, at 194.

to questions of what alternative presumptions exist, which ones are "better," and for whom.<sup>200</sup> Professor Stephen J. Schulhofer contends that, "[a] conclusive presumption of compulsion [or involuntariness] is in fact a responsible reaction to the problems of the voluntariness test, to the rarity of cases in which compelling pressures are truly absent, and to the adjudicatory costs of case-by-case decisions in this area."<sup>201</sup> At least Alabama, Arizona and Oregon follow this model of initially presuming involuntariness of confessions, thus allocating the burden to the prosecution.<sup>202</sup> This discussion of presumptions, of course, is overshadowed by the irrebuttable presumption that statements are "compelled" for Fifth Amendment purposes if statements are obtained in contravention to *Miranda's* admissibility requirements.<sup>203</sup>

Perhaps the Maine-style burden of proving voluntariness beyond a reasonable doubt at a pre-trial suppression hearing suggests that juries must consider evidence of a confession, if admitted, as super-reliable, whereas in Illinois, jury consideration of confession evidence is permissive instead of mandatory.<sup>204</sup> If this is true about Maine's law, the Law Court should clarify whether *Sawyer* has changed the substantive law, and if so, how the law relates to the constitutional prohibition of relieving the prosecution of the duty to prove every element of a crime beyond a reasonable doubt<sup>205</sup> as required by *In re Winship*.<sup>206</sup>

If the prosecutor's burden of production is very high, as we are accustomed to thinking that it is for a jury to rationally find that all elements are proven beyond a reasonable doubt, that standard should adequately protect innocent defendants, and reduce the need for right-to-silence protection.<sup>207</sup> Conversely, if the burden of production is functionally lowered, then guilty suspects would probably not remain silent if confronted with the existence of unfavorable witness reports that the prosecution might offer in evidence, and the lack of protection associated with such incriminating evidence.<sup>208</sup> In other words, the lower the burden of production is for the prosecutor, the stronger the incriminating evidence necessarily becomes; and the higher the standard is, incriminating evidence becomes functionally weaker.

The facts of the *Sawyer* decision did not present strong evidence of involuntariness. There was only the arrest and two incriminating statements, if allowed in evidence, by which the jury could possibly find *Sawyer* guilty.<sup>209</sup> If the Law

---

200. See *supra* note 95 (listing states with various forms of voluntariness presumptions).

201. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 453 (1987). Frank and Bernice J. Greenberg Professor of Law, and Director of the Center for Studies in Criminal Justice, University of Chicago Law School. *Id.* at 435.

202. See *supra* note 95 (listing states with various forms of involuntariness presumptions).

203. Strauss, *supra* note 25, at 191-92. In his article, Strauss rejects Professor Grano's harsh criticism of the *Miranda* decision as an illegitimate use of the Supreme Court's power, and that the Court should rather adopt a "rebuttable presumption" with regard to statements obtained in violation of *Miranda's* police interrogation requirements. *Id.*

204. See *People v. Patterson*, 610 N.E.2d 16, 25 (Ill. 1992) ("The voluntariness of a confession, under ordinary circumstances, only needs to be established by a preponderance of the evidence." (internal quotation and citation omitted)).

205. See *Francis v. Franklin*, 471 U.S. 307, 313-15 (1985) (recognizing that states are prohibited from using evidentiary presumptions that essentially relieve the State of proving elements of a crime beyond a reasonable doubt).

206. 397 U.S. 358, 364 (1970).

207. Seidmann & Stein, *supra* note 120, at 470.

208. *Id.*

209. *State v. Sawyer*, 2001 ME 88, ¶ 3, 772 A.2d 1173.

Court has indicated that it is willing to classify similar issues as questions of law in the future, this may result in a functional definition of voluntariness that will frequently assign to the defendant the burden of production to rebut the prosecution's initial showing of voluntariness. This would probably result in an increased rate of convictions.

On the other hand, the Law Court may embrace the view that the burden allocation has not functionally changed, and that absent an unsupported finding of the trial court, questions of determining the factors of voluntariness shall remain questions of fact that shall not be disturbed on appeal. This approach would probably not affect the rate of convictions based on questions of voluntariness, but would certainly allow defendants the opportunity to at least make a showing to generate an issue for an admissibility ruling, with assurances that the inquiry would not be a never-ending search for incriminating statements of the defendant to be used as substantive evidence for the jury. This approach would be preferred, in order to promote fairness to the accused.

In crafting a functional definition of the substantive law, the state's policies that reflect "institutional realities"<sup>210</sup> should be articulated in order to provide trial court guidance for its proper administration. First, a defendant has the burden of pleading specific ground(s) of involuntariness in a motion to suppress a confession. Sometimes the prosecution only has limited evidence, which may make a *prima facie* showing of a voluntary confession possible, but difficult. In such a situation, the defendant should still have to show a reason why the prosecution's evidence is either not sufficient or why the evidence should be discredited. The prosecution should not be required to negate specific claims if the defendant does not sufficiently raise them.<sup>211</sup>

The point here is that how the substantive law of confessions is functionally defined will determine whether the jury is allowed to hear a confession. Prosecutors have an interest in ensuring that a defendant meets his or her burden of pleading involuntariness: they may want to put in evidence only enough to prevail on a suppression motion and strategically save other evidence until later in a trial. Perhaps defendants should benefit from such a strategic consideration if they can meet their burden—thus allocating a higher functional burden of production on the prosecution, but be denied the benefit of "previewing" the state's evidence if they have insufficient ground(s) to suppress an alleged confession.

This model would reflect an expectation that defense counsel should be prepared at a suppression hearing if it expects to keep an alleged confession from the ears of a jury. If the confession is admitted, defense counsel still would have a right to present a complete defense to a jury, including evidence of the environment surrounding the alleged confession that would discredit its reliability.<sup>212</sup>

---

210. See Strauss, *supra* note 25, at 208 (arguing that under any plausible constitutional interpretation, state courts are implicitly required to take "institutional realities" into account—and should be encouraged to do so—when constructing doctrines that govern future admissibility cases).

211. See *Commonwealth v. Mahnke*, 335 N.E.2d 660, 679 (Mass. 1975) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.") (quoting *Harris v. New York*, 401 U.S. 222, 225-26 (1971)), *overruled on other grounds by Commonwealth v. Dyke*, 474 N.E.2d 172 (Mass. 1985).

212. *Smith v. State*, 439 S.E.2d 483, 485-86 (Ga. 1994).



A second institutional reality is that a trial judge should be able to uniformly administer the substantive law. Describing that it would be the state's preliminary burden to establish a confession's voluntariness for admissibility, the Law Court might choose to ask defendants who deny voluntariness to then "go forward with evidence to support his position,"<sup>213</sup> in those cases in which a defendant has superior access to the evidence of involuntariness.<sup>214</sup> In order to ensure fairness to the defendant, it may be helpful for the trial judge to distinguish between suppression motions that are based on *internal* coercive factors, such as in *State v. Rees* where the defendant suffered from dementia,<sup>215</sup> and those motions based on *external* coercive factors, such as in *State v. Mikulewicz* where several police officers allowed the defendant to consume excessive amounts of alcohol in hopes of fostering inculpatory statements.<sup>216</sup>

With regard to motions that are based on internal coercive factors, defense counsel should be allocated a functional burden of production because they are the party with superior knowledge of evidence of those factors.<sup>217</sup> If defense counsel fails to meet that burden, the motion should probably be denied. If defense counsel meets this burden, the prosecution must then meet its burden of *persuasion*, which it always has. The motion could be granted if the prosecution fails to prove voluntariness beyond a reasonable doubt. This suggestion would also require that from the pleadings, a trial judge determine whether the suppression motion is based on internal or external coercive factors. Finally, a suppression motion would also need to assert that offensive law enforcement conduct was present, in order to meet the United States Supreme Court standard of prerequisite police coercive activity in *Colorado v. Connelly* in order to find a confession involuntary.<sup>218</sup>

With regard to motions that are based on external coercive factors, the prosecution should be allocated a higher functional burden of production than with an internal coercion-based motion to suppress, because they are the party with superior knowledge of evidence of how law enforcement personnel conducted themselves.<sup>219</sup> If, for example, defense counsel meets his or her burden of pleading on a motion to suppress, the state must meet its burden of production and persuasion, which it always has, to prove voluntariness beyond a reasonable doubt.

In other words, the issue of which party should bear the burden of production is probably not answerable with a one-size-fits-all rule, irrespective of the nature of the involuntariness asserted. A list of persuasive, but not conclusive *factors to consider* that would successfully allocate a higher functional burden of production from defense counsel to the state might include: evidence of impermissible police

---

213. *Reddish v. State*, 167 So. 2d 858, 864 (Fla. Oct. 7, 1964), *modifying* 167 So. 2d 858 (Fla. July 22, 1964).

214. *See generally*, 2 MCCORMICK, *supra* note 11, § 337, at 413 ("A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."); FLEMMING JAMES JR. ET AL., *CIVIL PROCEDURE* § 7.16 (5th ed. 2001) ("The burden of proof traditionally is placed on the party having the readier access to knowledge about the fact in question.").

215. *State v. Rees*, 2000 ME 55, ¶ 2, 748 A.2d 976.

216. *State v. Mikulewicz*, 462 A.2d 497, 498-99 (Me. 1983).

217. *See sources cited supra* note 214.

218. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). *See also supra* text accompanying notes 31-51. *But see State v. Rees*, 2000 ME 55, ¶¶ 7-9, 748 A.2d 976.

219. *See sources cited supra* note 214.

conduct, actual or threatened violence, offers of reward, or coercive pressures that were not dispelled.<sup>220</sup> Without a sufficient basis of involuntariness from defense counsel (which need not be testimony from the accused) the State should not need to produce additional evidence for the trial judge to rule.<sup>221</sup> The trial judge then would consider all of the witnesses' evidence to the alleged confession using a totality of the circumstances-consideration test to determine whether it was voluntary.<sup>222</sup> This approach incorporates constitutional requirements and would allow the Law Court future opportunities to expand or refine the lists of internal and external factors as the case law develops. Prosecutors and defense attorneys would also have a better picture of the substantive law from this approach, and trial judges would retain flexibility in making voluntariness determinations.

## V. CONCLUSION

The Law Court should clarify the confession law, and how it would fit into the relevant constitutional provisions as well as taking institutional realities into account.<sup>223</sup> At the very least, the court would be helpful to clarify the status of Maine's rebuttable presumption with respect to the fact that since 1972, only judges make admissibility rulings.<sup>224</sup> The responsibility of a jury is much narrower than that in the pre-*Miranda* era on the admissibility of confessions because they are no longer assigned the role of trier of fact on questions of voluntariness.<sup>225</sup> Further, clarifying the constitutional implications (or lack thereof) would help functionally define voluntariness and enhance the predictability of trial court rulings on the matter. In other words, the court can and should keep trying to make the process work "better."

Unlike the suppression judge's reasoning in *Sawyer*, custody and interrogation findings are usually elements that together make up the basis of a finding of involuntariness.<sup>226</sup> Despite the Law Court's criticism of how the judge supported her conclusion, an issue that the *Sawyer* decision has created is whether Maine's law of confessions has in any way reallocated or raised the bar for a criminal defendant, and if so — how high is it? Regardless of whether such a new rule has been created, the Law Court has an opportunity to delve into the policy rationales that support the extension of burden allocation at a suppression hearing as well as those that warn against it. Undoubtedly, revisiting this area would clarify for prosecutors and criminal defense attorneys what expectations and requirements will permit admissible confessions in the State of Maine.

*Michael Theodore Bigos*

---

220. *Spann v. State*, 771 So. 2d 883, 900 (Miss. 2000); *State v. Amaya-Ruiz*, 800 P.2d 1260, 1272 (Ariz. 1990).

221. *See State v. Trostle*, 951 P.2d 869, 879 (Ariz. 1997) (denying defense motion without further state evidence).

222. *Id.*

223. *See Strauss*, *supra* note 25, at 208.

224. *Compare State v. Collins*, 297 A.2d 620, 636 (Me. 1972), with *State v. Merrow*, 161 Me. 111, 116-17, 208 A.2d 659, 662 (1965) (It is not clear if Maine case law still requires a defendant to "rebut [a] presumption [of voluntariness] by evidence" (quoting *State v. Grover*, 96 Me. 363, 368, 52 A. 757, 759 (1902))).

225. *State v. Collins*, 297 A.2d at 636.

226. *E.g.*, *State v. Michaud*, 1998 ME 251, ¶¶ 3-4, 724 A.2d 1222.

