Voluntariness of Waiver of Fifth Amendment Rights

B E N  B U R S T E N ,  M . D . *

The fifth amendment clause, "nor shall [any person] be compelled in any criminal case to be a witness against himself," expresses a fundamental constitutional right against self-incrimination. When a defendant gives a confession to investigating officials, he or she waives that constitutional right. The law takes such a waiver very seriously, as expressed in Amendments VI and XIV. The U.S. Supreme Court has asserted that the standard for such waiver is "an intentional relinquishment or abandonment of a known right or privilege, and every presumption against waiver is to be indulged." The "intentionality" in this instance has come to be known as "voluntariness," and an impressive line of decisions starting in 1936 has held that involuntary confessions are inadmissible as evidence because they violate due process. Thus, at the outset, there are two separable questions about confessions — are they true, and were they given voluntarily (or, more precisely, were the fifth amendment rights waived voluntarily). Of course, if it is found that the confession was not voluntary, the issue of truth does not arise.

When the issue of voluntariness has been raised, the burden of proof rests with the State; it must be established that by a preponderance of evidence the fifth amendment rights have been waived voluntarily. If the issue rests on medical considerations, the State's proof of voluntariness must be bolstered by expert medical testimony.

In 1971, a U.S. District Court maintained that an incompetent person is incapable of waiving any constitutional rights. Although not stated explicitly, a reading of the decision strongly suggests that incompetents could be either persons of subnormal intelligence or persons who are mentally ill.

Voluntariness may be broken down into three elements: (a) coercion of a physical or psychological nature, (b) knowledge (the informed aspect of informed consent), and (c) impulse-control, which includes motivational themes and the ability of the defendant to delay action, to deliberate and to plan.

Coercion itself involves the question of knowledge, because a defendant who does not know that he or she has the right to remain silent

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may feel compelled to confess. This point was stressed in *Miranda*. The Court went further, however, and asserted that psychological coercion, such as fear, domination by authorities, tricks and even such conditions as isolation, could so impair voluntariness that confessions obtained under these circumstances might be inadmissible. Mere giving of the "Miranda warnings" does not suffice to establish voluntariness. Psychological coercion may still exist despite the fact that the defendant "knows" his or her rights.

The U.S. Code lists five items when considering the voluntariness of confession: the time since arrest, knowledge of the nature of the offense, knowledge of the right not to make a statement, knowledge of the right to counsel, and the question of whether the defendant actually had the assistance of counsel. The Code makes it plain that these items are not the totality of considerations; as we have seen above, the mere knowledge of rights does not suffice. Furthermore, the question of assistance by counsel is of great significance. Where counsel is not present, the voluntariness of the confession must be particularly carefully scrutinized.

Perr recently discussed the psychiatric issues in "copping a plea" — pleading guilty as a part of the plea-bargaining process. Although somewhat different from the case to be presented below, where there is no evidence of bargaining or promises made by the State, "copping a plea" does represent one form of waiver of fifth amendment rights. The psychological standard of voluntariness on which Perr seems to rely is a knowledge and understanding standard — the second element of voluntariness. Essentially, this element requires an understanding of the nature and consequences of the act (in this case, the waiver). As such it speaks chiefly to cognitive issues which enter into tests of competency. Two degrees of the knowledge element are spelled out by Roth et al.: does the person have the ability to understand and does he or she actually understand by virtue of having been instructed about the issues and giving evidence of comprehension.

In 1961, the Supreme Court broadened the test for the mental state adequate to waive fifth amendment rights voluntarily. The Court noted, "is this confession the product of an essentially free and uncontrolled 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. . . . because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal 'psychological' fact" (italics mine). This standard is broader than one of knowledge standard and extends consideration to the third element — impulse-control. One can only speculate whether this decision, coming seven years after Durham, was an attempt to apply to voluntariness of waiver of Constitutional rights the wider scope of psychological data being applied to insanity defense.

The Court was more specific in *Gault*. "If counsel was not present for
some permissible reason, when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary in the sense, not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights, or of adolescent fantasy, fright or despair" (italics mine). This (especially "despair") clearly goes beyond both a coercion issue and a knowledge standard. That same year (1966) a U.S. District Court16 asserted that the assessment of voluntariness of waiver of rights "involves an evaluation of psychological factors and elements that may be reasonably calculated to influence the human mind." This statement establishes a broad scope indeed in terms of what may be relevant to the issue of voluntariness; the specific issue in this case was the influence of a judge's promise — a situation akin to the undue influence criterion in testamentary capacity.

In 1969, a U.S. District Court,17 while defining voluntariness as the understanding of the rights to be relinquished and of the consequences of the waiver (a knowledge test), went on to enumerate several factors which should be considered, including the sixteen-year-old defendant's being frightened, tired, tearful. The distress signified by the crying was given even more emphasis by the Circuit Court on appeal.18

Two things are clear from the above discussion. The psychological standard for voluntariness may go beyond the element of lack of feeling that one is being coerced, and it goes beyond a narrowly construed knowledge test. Fantasy, fright, despair, internal psychological fact, undue influence, a product test, all widen the scope of relevant data and take it beyond the cognitive sphere; they open the door to emotional and judgmental factors.

II

With the foregoing legal framework in mind, let us consider the following case. A twenty-five-year-old man was charged with first degree murder and robbery of an elderly lady at her home in a small rural city. He had been apprehended on the day following the incident and was being held in one of two maximum security cells of the county jail. Five days later, at a preliminary hearing, he maintained his innocence as he had previously. He was returned to the jail and that evening he slashed both wrists several times with a razor. He did not call out for help, but the prisoner in the adjacent cell, noticing the blood on the floor in front of the defendant's cell, summoned the sheriff. The bleeding had stopped and the defendant was taken to an office in the jail where, after being informed of his rights and after waiving his right to have his attorney present, he confessed to the crime. Prior to the taping of the confession, the criminal investigator noted the condition of the defendant's wrists, and he acknowledges that he knew the defendant would have to be taken to the hospital. Following the confession, he was transported to the local hospital for suturing, and returned to the jail.

These facts were not in dispute. However, there was controversy about
other aspects of the situation. The defendant and the prisoner in the adjacent cell maintained that the sheriff had made threatening and intimidating remarks prior to the incident in question and had physically abused the defendant when summoned to his cell that evening. The defendant further claimed that the sheriff threatened him and beat him during the course of the interrogation. The sheriff, on the other hand, stated that when he arrived at the cell that evening the defendant asked to make a confession. The sheriff told him that he "didn't think we needed a confession," but the defendant insisted, saying, "I want to get this off my mind, I want to give a confession now." Both the sheriff and the criminal investigator maintained that neither physical nor psychological coercion was employed. Certain sounds made by the defendant during the taping are also in dispute. The defendant stated that they were groans of pain when he was physically abused; the criminal investigator maintained that the defendant was clearing his throat. Regarding the defendant's mental state at the outset of the confession, the interrogator stated, "He was very calm and collected when he was sitting in the bullpen there near the cell. He was not complaining of any pain and he was not bleeding. . . . There wasn't anything about what I saw that alarmed me."

The report from the hospital and the testimony of the doctor were not particularly helpful. There were several superficial lacerations on the palmar aspects of both wrists, with no neurological or tendon damage. These were attended to in silence; no one at the hospital talked with the defendant and no estimates of his mental state could be given.

Following the incident, the defendant told his attorney his version of the occurrences, and he has maintained his innocence ever since.

Approximately nine months later, I was called by the defendant's attorney. A hearing on the motion to suppress the confession because of lack of voluntariness was to be held the following week. The issue put to me was not primarily that of physical or even psychological coercion resulting from the circumstances of the interrogation. The primary issue was whether the defendant's mental state was such, during the interrogation, that he could not voluntarily, intelligently, and freely give the confession. Then, secondarily, if voluntariness were significantly affected by his mental state, if there were coercion, would that further affect the ability to volunteer a waiver of rights? I framed two questions in my mind: 1) Was the defendant's mental state significantly hampered by the effects of the wrist slashing, such as pain, loss of blood, etc.? 2) Was the defendant's mental state during the evening in question, as signified by the fact of the wrist slashing, such that it affected his voluntariness in the waiver of his rights? If either of these questions, bearing on the primary issue put to me, could be answered in the affirmative, it was clear that the secondary issue (that of adding the effects of coercion) could be answered affirmatively.

In attempting to ascertain whether the defendant was suffering from serious mental disability due to the effects of the wrist slashing, I listened
to the tape of the confession. The defendant was clearly oriented to the situation; he knew the nature of the charges and knew he had waived his rights. I could hear nothing to make me feel that he was unaware of the consequences of the confession. His answers were logical, relevant and coherent. His story from one part of the tape to another was internally consistent. Recall of events was specific, with no evidence of vagueness or clouding of consciousness. He expressed considerable certainty about the events he related. On only one occasion did he have to correct his story — a correction which was made immediately and spontaneously and which concerned the time of day that a specific event occurred. The disputed sounds (groans or throat clearing) did not come through with sufficient clarity that I could make a judgment about them. So far as I could tell from the tape, affect was subdued but appropriate. There was no evidence of thought disorder.

When I questioned the defendant about the interrogation, he told me that he had been physically abused and was in some pain from the abuse. The pain from his wrists was not severe, and he denied having either fainted or become dizzy subsequent to the slashing. His memory of the main events during the confession was sharp and specific. Thus, I could find no evidence to support the hypothesis that voluntariness was hampered by an altered mental state as an effect of the wrist slashing.

With regard to my second question (the significance of the fact of the wrist slashing as an indication of a mental state impinging on voluntariness), I interviewed the patient in an attempt to find out what kind of person he is and what his frame mind was during the evening in question.

The State attempted to dismiss the significance of the wrist slashing by raising the question of whether it might be malingering. The district attorney general pointed out that the cuts were superficial and thus did not signify serious suicidal intent. He asked whether it was likely that the defendant was merely trying to be removed from the jail to a more comfortable situation in a hospital. I found it difficult to see the gain from the wrist slashing followed immediately by a voluntary confession with full knowledge of the possibility of the death penalty, absent the assumption that without the confession, no medical attention or hospitalization would be offered. Further, apparently no appeal was made to the doctor in the emergency room. Although the cross-examination regarding malingering was fairly extensive, let us assume for the purposes of the issues to be raised in this paper that malingering does not enter the picture in any significant manner.

By the age of twenty-five, the defendant had had two unsuccessful marriages. In his late teens and early twenties, he had experimented with a variety of drugs and on one occasion had passed out from an overdose. His girlfriend gave him mouth-to-mouth resuscitation, which he feels saved his life. Overcome with gratitude, although he now says he did not love her, he married her shortly thereafter. They separated after only
three weeks. At a psychiatric examination one month following his wrist-slash incident, he said his first wife was a "damn good woman — much better than this one [his second wife]."

His second marriage was about one year-and-a-half prior to the incident, although he had been living with this woman for some months before the marriage. She was one-and-one-half years his senior and had a little boy from a previous marriage. The marriage was very stormy. The wife was described as "high strung," spending his money on herself and the child and having a violent temper. She had attempted suicide with pills on several occasions.

The defendant worked on a boat on the Mississippi River and was away from home intermittently. Although he denied using drugs during the past few years, he did drink moderately heavily, particularly when he was home. He acknowledged that he too had a violent temper and had hit his wife on several occasions, even when he had not been drinking. At times, his subsequent memory for these events was hazy.

After the arguments with his wife, he would become "depressed" and begin to think that life was futile. He had had thoughts of killing himself on several occasions, but had never made an attempt or gesture (the drug overdose is equivocal in this regard). His sleep pattern was disturbed. Although he could fall asleep easily, he would be wakened by frightening dreams of his wife harming him. Once awake, he would look at her sleeping and be relieved. He would go back to sleep and sleep through the night. His appetite and sexual interest were unchanged, although at times he had "difficulty keeping food down." Several months prior to the incident, he was so tense that his physician put him on chlordiazepoxide, but his wife took all the pills and he never obtained replacements.

The defendant separated from his wife one month prior to the incident. He now claims that he still loves her and never loved his first wife. However, he realizes that the marriage will not work. The disturbing dreams continue. He tried living briefly with two other girls but these arrangements did not work out either.

During the first few days of his incarceration, he was still concerned about his impending divorce, and he was bothered both by the dreams and by a sense of futility. The events of the hearing in the morning added to his bleakness. Asked why he cut his wrists, the defendant replied, "Well, my nerves were messed up. I was going through a divorce and then this [the accusation of murder and the incarceration] came down and it just seemed like it was more than I could stand." Although the defendant claims that the threats and intimidation he received in jail added to his burden, for the purposes of considering the first issue put to me, this claim is discounted.

In the interest of brevity, I shall omit his detailed life history except for a few points. The defendant was the second of two children, brought up by a strict "teetotaling" mother and a father who was away intermittently working on the Mississippi River. After a school history marked by truancy, fighting and unruliness, he left at age sixteen because "I didn't
like the ninth grade." He started to drink at age fifteen and to take drugs at eighteen. He had been in minor trouble with the law about drinking and drug issues. While he had some acquaintances, his life seemed devoid of strong, lasting friendships. The opportunity to get away on the river suited his needs and he did well on his job. The family history was negative for mental illness, suicide or alcoholism.

During my interview with him, he was alert, oriented, cooperative, and showed no signs of a formal thought disorder. Intelligence was adequate and his ability to comprehend and communicate was good. Memory was intact. Affect was appropriate. There was some circumstantiality to his speech, particularly when he wanted to give me background on the oppressive conditions of the jail. He seemed hopeful because he had confidence in his attorney, but he had no clear goals or objectives for his life upon his anticipated release. He felt that he was drifting through life, and, although he was not suicidal, he felt that life was not worth living. There was no suggestion of delusions nor were there evidences of a history of a cyclic mood disorder.

While I cannot make a definitive personality diagnosis on the basis of this limited interview, the data I do have are at least consistent with a borderline personality organization. I failed to find adequate support for a diagnosis of depression, and nothing suggested to me the existence of a frank psychosis. The impulsivity, lack of stable relationships, violent outbursts with little guilt, involvement with drugs and alcohol all point to what Kernberg called a "presumptive" diagnosis of borderline organization. Consistent with this diagnosis is the history of rapid involvements with subsequent need for distance and the periods of being overwhelmed and of bleakness. It is well known that such people may cut themselves, particularly in times of serious stress and distress, often as an undifferentiated rage reaction or discharge in the face of a sense of hopelessness or as an attempt to bolster a precarious sense of self by feeling pain.

With these data before me, then, while I could not say with any degree of certainty what the defendant's mental state was on that evening nine months earlier, with regard to a hypothetical, I could state that he could well have been distraught and in such an impulsive state that he could not bring his usual judgment to bear on the decision-making process of voluntariness. In this regard, the fact of the wrist slashing enhanced the possibility of the hypothetical. At this point, then, the burden rested upon the State to prove that in actuality he was not, or could not, have been in such a mental state, or to demonstrate that such a mental state was irrelevant.

III

Guidelines for which elements or standards are applicable in the case of voluntariness of waiver of fifth amendment rights have not been specifically set down. Although the line of cases cited above suggests a
progressive broadening of the issues to be considered, I have not been able to find a succinct statement of which elements will legally constitute voluntariness; this is in contrast to the well-known statements of standards for the insanity defense or for competency to stand trial.

I have stated at the beginning of this paper that I consider three elements in evaluating voluntariness of confession: coercion, knowledge and impulse-control. In the case reported above, I could support the defense of non-voluntariness of confession by virtue of the defendant's having failed the impulse-control test. While the elements of coercion and knowledge are widely accepted in most areas of the law, the inclusion of impulse-control as an element of voluntariness of an act requires some justification and explanation lest it become an escape hatch for all unlawful activities.

One approach to the question of standards for the mental state of voluntariness is to consider it as a test of competence — competence to volunteer to waive a constitutional right. The problem here is that tests of competence vary according to the transaction. Competence to have committed a crime rests on different standards than does competence to make a will, to care for a child, or to handle one's finances. For the sake of developing a line of argument, however, let us consider the mental standards of competence to enter into a contract. Prior to the 1960's, a "knowledge" standard was generally employed. Then, in 1963, a New York Court found a man suffering from manic-depressive psychosis incompetent in the contractual sphere since he "acted under the compulsion of a mental disease or disorder...." Thus following Durham we see the broadening scope not only in the area of waiver of fifth amendment rights but also in competence to enter into contracts. In 1969, the appeals court in Ortelere drew back a bit from the broad motivational test and limited it to psychosis. However, the Restatement (Second) of Contracts has two standards of competence — a knowledge (understanding) test and an ability "to act in a reasonable manner" test. Commenting on this, Kowalski has stated, "The Restatement (Second) of Contracts does not restrict its test to psychotics." He has pointed out that even "severely neurotic persons would not be arbitrarily denied the opportunity to avoid a contract simply because experts decided that their illness belonged in one category rather than another." Indeed, the Comment in the Restatement notes that a person may be incompetent if he "lack[s] capacity to control his acts in the way that the normal individual can and does control them...."

Now, if competency standards are to vary according to the transaction, one parameter should be the importance of the transaction to society. Commercial transactions, governed in part by contracts, are indeed important in a modern and specialized society, and in order to protect these transactions, the law has a tendency to limit claims of incompetence which would undo them. Thus, as Kowalski has pointed out, the "public policy favoring contract security" is promoted by placing the burden of...
proof on the person claiming he or she was not competent. Now, the waiver of fifth amendment rights deals with a basic and more important public policy — justice. A U.S. Circuit Court has said that waiver of constitutional rights, especially where the right is abandoned, is recognized by the State as "critical in the scheme of fundamental justice" and is not lightly to be inferred, and every reasonable presumption against waiver must be indulged. In support of this concept, we find the burden of proof here to rest with those who challenge the defendant's assertion of incompetence. Can we not conclude, then, that the standards of competence with respect to waiver of fifth amendment rights should be at least as broad as, if not broader than, standards for contracts? Should not the elements we consider when dealing with fundamental constitutional rights be at least as inclusive as those we consider in the area of business transactions?

Another approach to the elements question might be a sort of risk-benefit formula. Kaimowitz made it clear that the higher the risks, the more stringent are the demands placed on the ability to give consent. This reasoning has found very detailed expression in the proposed HEW regulations regarding human subjects. What are the benefits of a confession? There may be the promise to seek a lighter sentence, although in the present case there is no evidence that such hope was held out. There is also, for some, the relief of guilt — an emotional benefit which may not be inconsiderable. What are the risks? In this case, they were electrocution or life imprisonment — very serious risks indeed. In other cases, they may be lesser, but almost always they involve loss of liberty — a high value risk in our society. Thus, from both the viewpoint of the nature of the transaction (fundamental constitutional rights) and the viewpoint of a risk-benefit formula, it would seem justifiable to use a relatively broad test of competence.

But how broad should the standard be? After I had described the characteristics of the borderline personality, the district attorney general asked me on cross-examination if these characteristics did not apply to all criminals. I replied that they did apply to many, but that my point was not that the existence of a borderline personality per se spoke for possible non-voluntariness. It was the evaluation of the significance of wrist-slashing by a person with this type of personality which led me to believe that voluntariness could have been impaired. Conceivably, one might accept a voluntary waiver from a person with borderline organization in his or her usual state, but at the time of an impulsive act which signifies distress, the ability to control with usual standards of judgment is impaired.

Evaluation in the area of impulse-control may be difficult. Even a voluntary decision to confess may be attended by distress, crying, anxiety, etc. One must look for evidences of distress other than those clearly tied in with the process of confessing. For example, the unintelligible sounds made by the defendant during the confession and
audible on the tape might well have been throat-clearing. Repeated throat-clearing is evidence of anxiety and distress, but this distress can reasonably be imputed to the anxiety of confessing itself; it should not bear on the voluntariness issue. The wrist-slashing, however, is reasonably separable from the process of confession, and indicates a mental state at the time of the decision.

The mental elements in voluntariness of waiver of constitutional rights will probably be set in a zig-zag fashion by the Courts — alternately broadening and narrowing. Because of the serious and fundamental nature of the transaction, I suggest that the elements to be considered go beyond coercion and a knowledge and understanding test, and beyond a psychosis test; they should include motivational, impulse-control and judgmental factors. In cases of manifest psychosis, such a broad standard need pose little problem. In cases where there is no psychosis, the defendant’s mental state around the time of the confession should be scrutinized. Where evidence of loss of impulse-control, diminution of ability to utilize adequate judgment, or (for example) sudden, impulsive self-destructive tendencies appear, these data should be relevant to the question of voluntariness. They should be deemed relevant as a matter of law. A psychiatric opinion should be solicited.

If the issue is reasonably raised, the burden should rest upon the State to prove that the test of impulse-control, as well as knowledge and non-coercion, has been met. The decision about whether the standards have been met lies with someone other than the psychiatrist.

One can well understand the desire of criminal investigators to “strike while the iron is hot.” But justice cuts both ways: society has an interest not only in the needs of the public not to let crime go unpunished but also in protecting the constitutional rights of all people — even those accused of crime. If the confession is truly voluntary and deliberate, it should not be difficult to obtain during a period when the accused is not severely distraught. “Striking” while the defendant gives evidence of significant distress, particularly when the evidence is independent of the emotions involved in the process of giving the confession itself, may well impair the voluntariness necessary for the waiver of fifth amendment rights.

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