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Rovner casts spotlight on one area where courts have turned blind eye

Last year, binge-watchers were transfixed by Netflix's Emmy Award-winning documentary "Making a Murderer." It detailed the story of Steven Avery, a man who was convicted of attempted murder and sexual assault in Wisconsin in 1985.

After serving 18 years in prison, he was released when DNA evidence provided exoneration. Yet he returned to criminal court after being charged with the murder of Teresa Halbach in 2005. He was then convicted and sentenced to life imprisonment.

The series exhaustively reviews the evidence against Avery and makes a case that he may have been wrongfully convicted.

Yet the series also details the equally compelling story of the co-defendant, Avery's 16-year-old nephew Brendan Dassey. Dassey was a special education student with an IQ between 74 and 81. After many hours, alone, during a police interrogation, Dassey confessed to aiding Avery in the murder, rape and burning of the victim's body. Despite the lack of even a single piece of physical evidence linking Dassey to the crime, Dassey was also convicted and sentenced to life imprisonment.

Even a casual viewer had to have doubts about the veracity of Dassey's confession. The videotaped interrogation showed an overmatched, low-IQ teenager repeatedly contradicting himself over the course of hours of questioning.

He appeared to be searching to say what he thought the interrogators wanted him to say. (In fact, a psychological expert at trial described Dassey as being more suggestible than 95 percent of the population.)

For viewers wondering how a court could find culpable grounds from the confession, we now have an answer.

On June 22, the 7th U.S. Circuit Court of Appeals held that "no reasonable court could have any confidence that this was a voluntary confession" and granted Dassey's habeas petition. *Dassey v. Dittman*, No. 16-3397.

The fact that the case concerns the voluntariness of a confession makes it especially significant for those involved in criminal law. Before *Miranda v. Arizona* added a second due process protection in 1966, the primary test for admissibility of confessions had been the "voluntariness test" found in the due process clause. But since *Miranda*, the vast majority of Supreme Court opinions dealing with admissibility of confessions have dealt with *Miranda* issues.

For example, since 1966 the U.S. Supreme Court has decided around 90 confession cases involved with *Miranda*. On the other hand, since *Miranda* was decided, the Supreme Court has not found a single confession produced by custodial interrogation to be "involuntary."

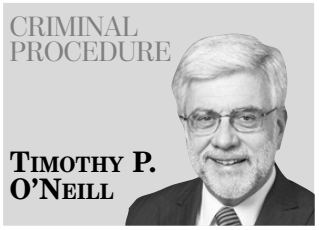
I repeat not one.

Because the U.S. Supreme Court simply stopped refining the "voluntariness test," the court has not really acknowledged the major development in confession law since the DNA revolution in the 1990s: The recognition that there is such a thing as a false confession. But Judge Ilana Diamond Rovner's 104-page opinion does a superb job of applying the voluntariness test while acknowledging this very real problem.

She begins by bluntly framing the issue: "We know ... that innocent people do in fact confess and do so with shocking regularity." She notes that of the 1,994 exonerations in the U.S. since 1989, there were 227 cases of innocent people falsely confessing that's over 11 percent of the exonerees. Other studies indicate that false confessions may occur in anywhere from 15 to 24 percent of wrongful convictions nationally.

Rovner then turns to the crucial factor in Dassey's case: "Nowhere is the risk of involuntary and false confessions higher than with youth and the mentally or intellectually disabled."

A survey of false confession cases from 1989 to 2012 found that 42 percent of exonerated defendants who were younger than 18 at the time of the crime falsely confessed, as did 75 percent of exonerees who were mentally ill or mentally retarded; this compared to only 8 percent who were adults with no known mental disabilities. To put it another way, only 16 percent of exonerees were juveniles, mentally disabled or both, yet they accounted for an astounding 59 percent of false confessions.



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Rovner notes that the U.S. Supreme Court has long held that voluntariness of a confession must be evaluated under a "totality of circumstances" test that takes into account both the objective factors of the police behavior as well as the subjective factors of the individual suspect.

> *"... 'Be honest' simply became code for 'Guess again, that is not what we wanted you to tell us.' "*

This means there is an interplay between the two. Rovner describes it as an "inverse sliding scale": The more vulnerable or suggestible a suspect, the less coercion it will take to overcome his free will.

Rovner faults the Wisconsin court for completely failing to assess such factors as the following: Promises made by the interrogators; the effect of these promises on a person of Dassey's limited intellectual abilities; the absence of a friendly adult with Dassey; his apparent confusion throughout the questioning; and the fact that his answers changed throughout the interrogation.

As Rovner concludes, "It is not that the state court did not do enough; we can have no confidence that it considered the totality of the circumstances at all."

But not only did the state court not engage in the proper test to determine voluntariness; the 7th Circuit also concluded that the state court's ultimate conclusion that the confession was voluntary was also wrong.

Rovner analyzed Dassey's repeated contradictions and retractions. She concludes that the interrogators' repeated commands to "Tell the truth" and "Be honest" simply became code for "Guess again, that is not what we wanted you to tell us." Unlike the ordinary confession that "increases in clarity as the suspect reveals more information, this interrogation was just the opposite."

Rovner also emphasizes that certain remarks by the interrogators that might have no effect on an average adult suspect could have a very real effect on a mentally challenged juvenile.

For example, at one point the interrogator informed Dassey, "Honesty is the only thing that will set you free." The average adult suspect would probably interpret this as only a metaphor. Yet in response to this, after confessing to raping the victim, slitting her throat and burning her body, Dassey asked the police if he could get back to school that afternoon to turn in a class project.

When the police announced he was under arrest, Dassey asked, "Is it only for one day?"

A short column cannot do justice to the entire analysis in Rovner's 104-page opinion. But after reading it, you will understand why the Dassey interrogation is now used as a "what not to do" lesson in at least one certified interrogation course. (See Ft. 10 of opinion.)

Netflix may have won an Emmy for "Making a Murderer." But Rovner and the 7th Circuit deserve an award for "Unmaking a Murderer."