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## Comment: WYSIATI and False Confessions

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# Comment: WYSIATI and False Confessions

Michael R. Hoernlein

*Truth is tough. It will not break like a bubble, at a touch; nay, you may kick it all day like a football, and it will be round and full at evening.* – Oliver Wendell Holmes, Sr.

## INTRODUCTION

Decades after the Supreme Court mandated in *Miranda v. Arizona*<sup>1</sup> that police advise suspects of their constitutional rights before custodial interrogation, confusion remains about the contours of the rule, and some law enforcement officers still try to game the system. In his excellent Note, “*No Earlier Confession to Repeat*”: Seibert, Dixon, and *Question-First Interrogations*, Lee Brett presents a careful analysis of the legal landscape applicable to so-called question-first interrogations. Mr. Brett offers a compelling argument urging courts not to interpret *Bobby v. Dixon*<sup>2</sup> as limiting the application of *Missouri v. Seibert*<sup>3</sup> to two-step (i.e., question-first) interrogations only when there’s an “earlier confession to repeat.”

Mr. Brett does an excellent job explaining and analyzing *Dixon*, *Seibert*, and how they fit into the *Miranda* framework. The Supreme Court should, as Mr. Brett suggests, step in to provide much-needed clarity for lower courts and law enforcement. Until then, defense lawyers should continue to challenge midstream warnings.

I’m a little biased about this topic: I was one of the lawyers representing Bobby Johnson in petitioning the United States

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1. 384 U.S. 436 (1966).
  2. 565 U.S. 23 (2011) (per curiam).
  3. 542 U.S. 600 (2004).

Supreme Court to review his case, which was the backdrop for Mr. Brett's Note.<sup>4</sup> Mr. Brett has done such an outstanding job that there's not much left for me to say about those legal issues. So, I'd like to use this opportunity to explore false confessions and how the field of behavioral economics—specifically, the phenomenon that psychologist Daniel Kahneman dubs WYSIATI (What You See Is All There Is)—can help explain false confessions and the convictions they produce.

## I. FALSE CONFESSIONS

I've watched the video of Bobby Johnson's interrogation many times. Not only do I believe that the detectives deliberately flouted *Miranda* and *Seibert* when they questioned Mr. Johnson, but I also believe that they elicited a false confession.

The Fifth Amendment's right against self-incrimination wasn't rooted in a concern for ensuring reliability or protecting innocent people from making false confessions; it was first and foremost intended to protect the integrity of a person's free will against government intrusion. Over time, regard for the reliability of confessions grew as a factor in how courts understood the Fifth Amendment. Courts have recognized for some time that a suspect might falsely confess to a crime. For example, the Supreme Court noted in *Miranda* that "[i]nterrogation procedures may even give rise to a false confession."<sup>5</sup>

In recent years, the proliferation of true-crime documentaries, movies, tv shows, and podcasts have shone a spotlight on the prevalence of false confessions.<sup>6</sup> As more and more police departments across the country have started recording interrogations on video, we've had unprecedented

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4. See generally Petition for Writ of Certiorari, *Johnson v. North Carolina*, 140 S. Ct. 122 (2019) (No. 18-1542).

5. *Miranda*, 384 U.S. at 455 n.24.

6. See, e.g., *PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS* (Home Box Office 1996), *THE CENTRAL PARK FIVE* (Sundance Selects 2012), *Making a Murderer* (Synthesis Films 2015), *The Confession Tapes* (A24 2017), *When They See Us* (Harpo Films 2019), and *The Innocent Man* (Campfire 2018).

visibility into what happens in interrogation rooms before suspects incriminate themselves. And as DNA evidence has led to exonerations of many wrongfully convicted defendants, it's become impossible to ignore the role that false confessions can play in sending the wrong people to prison.

The jury is no longer out (so to speak): Under the right conditions, psychologically coercive interrogations can lead innocent people to lie about committing crimes in which they didn't participate at all—sometimes terrible, almost unimaginable, crimes. Still, it remains very difficult for the average person to accept that a suspect would implicate himself in a crime that he had nothing to do with—which makes it a particularly fascinating phenomenon.

And a tragic one: Often the suspects who falsely confess are just children or have some form of emotional or intellectual deficit. In some of the more outrageous cases, police and prosecutors secured convictions of not just one innocent person but multiple innocent people—usually with no physical evidence tying any of them to the crime. Their nicknames have become synonymous with wrongful convictions based on false convictions: The West Memphis Three, the Norfolk Four, the Central Park Five, the Beatrice Six.

Sometimes, interrogations are so effective—not at getting at the truth but at manipulating the suspect—that suspects start to believe that they must have committed the crime. They might even develop false memories through repeated, manipulative interrogation sessions.

Fortunately, DNA evidence occasionally proves the true perpetrator's identity and exonerates the wrongfully convicted. But when faced with contrary physical evidence, prosecutors often change their theory to account for a new suspect: *Sure the guy whose DNA is all over the scene was obviously involved, but that doesn't mean all the others were innocent. They just managed to avoid leaving any trace.* The prosecutors modify their narrative to incorporate the new evidence without revising their underlying theory, which usually requires some creative—or fanciful—speculation. That resistance to admitting the mistake and getting the justice train back on the tracks can rob the wrongfully accused of many additional years of freedom.

False confessions tend to reflect common themes: questioning that goes on for hours in a small, strategically arranged room with no window; an isolated suspect with a poor understanding of his rights; interrogators who get in the suspect's face, accuse him relentlessly of having committed the crime, lie about the available evidence, threaten him with a long prison sentence or death, offer to put in a good word with the district attorney, and suggest possible explanations for the crime to minimize the suspect's culpability. That's no coincidence—that's the playbook. The goal isn't to gather information: since the questioner already believes that the suspect is guilty, the goal is to wear down the suspect until he confesses.

## II. WYSIATI

There's an extensive (and increasingly sophisticated) body of scholarship on the factors that contribute to false confessions. The field of behavioral economics offers useful principles for making sense of such confessions.

One key concept that sheds light on the dynamics of false confessions is WYSIATI, a term that psychologist and Nobel Prize winner Daniel Kahneman coined in his breakthrough book *Thinking, Fast and Slow*.<sup>7</sup> WYSIATI is a powerful feature of human psychology that often leads people to jump to incorrect conclusions. It can lead investigators away from the truth, make false confessions more likely, and induce a judge or jury to embrace a false narrative that conflicts with other available evidence.

An understanding of WYSIATI requires a brief introduction to Kahneman's project. Kahneman illuminates the mechanisms of human judgment and decision making using the framework of what psychologists refer to as System 1 (the part of the mind that "operates automatically and quickly, with little or no effort and no sense of voluntary control")<sup>8</sup> and System 2 (the slower,

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7. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 86 (2011).

8. *Id.* at 20.

deliberative part that handles more “effortful mental activities”).<sup>9</sup>

Navigating our complex world requires us to think fast. We can’t analyze everything that confronts us in our day-to-day lives. Simple tasks would quickly overwhelm us. System 1 facilitates daily life by generating automatic impressions and intuitions that allow us to make sense of the world around us and that, in general, serve as a sound basis for belief and action. As Kahneman explains, System 1 allows us to do things like compute  $2 + 2$ , read a billboard, detect anger in someone’s voice, think of Paris when someone mentions the capital of France. Those come to us automatically—in fact, it’s almost impossible to shield ourselves from the immediate impressions that arise when we encounter the expression “ $2 + 2$ ”, a billboard, an angry voice, or mention of the capital of France.

Sometimes, though, we need to engage the slower System 2 for heavier mental lifting. System 2 takes care of a wide variety of attention-intensive tasks, like multiplying 13 by 27, focusing on a particular voice in a noisy room, filling out a tax form, or telling someone our phone number. Those tasks are not automatic—they require effort.

System 1 turns out to be prone to specific kinds of systematic errors. And one key aspect of System 1 is that it “excels at constructing the best possible story that incorporates ideas currently activated [in associative memory], but it does not (and cannot) allow for information it does not have.”<sup>10</sup> In other words, WYSIATI is System 1’s tendency to “jump[] to conclusions on the basis of limited evidence.”<sup>11</sup>

To illustrate how WYSIATI works, Kahneman offers an example: “Will Mindik be a good leader? She is intelligent and strong . . . .’ An answer quickly came to your mind, and it was yes. You picked the best answer based on the very limited information available, but you jumped the gun. What if the next two adjectives were corrupt and cruel?”<sup>12</sup>

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9. *Id.* at 21.

10. *Id.* at 85.

11. *Id.* at 86.

12. *Id.* at 85.

With the first two bits of information about Mindik (that she's intelligent and strong), most people can't help but think of an answer instead of withholding judgment until more information becomes available. Although the answer might change as we learn more about Mindik (and even if we're aware that we have limited information), there's a bias in favor of accepting System 1's initial impression.

As Kahneman puts it, "The measure of success for System 1 is the coherence of the story it manages to create. The amount and quality of the data on which the story is based are largely irrelevant."<sup>13</sup> That statement goes a long way toward explaining how people think.

It's easier to connect fewer dots than more dots. So, the less information we have, the easier it is to construct a story with narrative integrity. But coherence alone shouldn't be enough for us—we want to be right. We want the truth. And a narrative that not only has internal coherence but is also *true* will be able to accommodate any *reliable* evidence that it runs up against. As Justice Holmes's father noted, "Truth is tough. It will not break, like a bubble, at a touch; nay, you may kick it about all day, like a football, and it will be round and full at evening."<sup>14</sup> When investigators and prosecutors try to shield their narrative from additional evidence, fearing that it might "break . . . like a bubble," it's a major red flag.

Those initial impressions and intuitions that arise in the early stages of a case can impede efforts to uncover the truth, since System 1 is "radically insensitive to both the quality and the quantity of the information that gives rise to impressions and intuitions."<sup>15</sup>

WYSIATI also helps explain many cognitive biases that can lead us away from the truth and toward an "alternative" version of reality. A few salient examples are:

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13. *Id.*

14. OLIVER WENDELL HOLMES, THE PROFESSOR AT THE BREAKFAST TABLE 109 (1859).

15. KAHNEMAN, *supra* note 7, at 86.

<b>overconfidence</b>	faith in intuition, blindness to missing information, “fed by the illusory certainty of hindsight” <sup>16</sup>
<b>framing effects</b>	being swayed by the way information is presented to us
<b>confirmation bias</b>	seeking (or crediting) evidence that supports a preexisting view and ignoring (or discounting) contrary evidence
<b>availability bias</b>	magnifying more recent or more memorable events or information

These biases (and others) operate on us even when we know that we’re susceptible to them.

### III. WYSIATI AND INVESTIGATORS

It’s not hard to see how WYSIATI and cognitive biases can infect investigations. An investigation is an iterative process of acquiring knowledge. It requires gathering and analyzing evidence over time, usually beginning with a limited set of information or allegations.

Impressions and intuitions can be helpful—especially if they’re based on extensive experience—but they’re no substitute for careful evaluation of evidence by System 2.

From an investigation’s inception, the investigator’s mind automatically starts crafting a coherent narrative using the limited information available. System 1 doesn’t wait until there’s enough evidence that’s adequately tested for reliability. It synthesizes whatever’s available—no matter how meager or unreliable—and constructs the best narrative that it can without regard to all the unknowns. WYSIATI kicks in even though the investigator is missing pieces and knows it. Again, System 1 is “radically insensitive to both the quality and the quantity of [available] information.”<sup>17</sup>

The danger is in allowing those initial impressions and intuitions from System 1 to harden into conclusions prematurely; jumping to conclusions can steer an investigation

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16. *Id.* at 14.

17. *Id.* at 86.



in the wrong direction. The seed of many wrongful convictions is planted when inept investigators “go with their gut.” A detective might think, *The husband did it. He’s acting suspicious. There was no sign of forced entry. And the couple had been arguing in recent days. I’ve seen this a hundred times.* That seed might then get fertilized (so to speak) with some junk science, questionable eyewitnesses, creative speculation . . . and on and on.

Good investigators have a well-developed System 2 that doesn’t just rubberstamp System 1. They methodically assess the available evidence, look for new evidence, reevaluate the situation, test their hypotheses periodically, and remain willing to scrap a theory that is too fragile when new facts are injected.

Bad investigators, on the other hand, get hung up on initial impressions, seek out information that supports their preferred narrative, ignore contrary evidence, and use speculation to fill in gaps and resolve apparent inconsistencies.

#### IV. WYSIATI AND SUSPECTS

During an interrogation of a suspect believed to be guilty, an investigator who is determined to extract a confession can use WYSIATI against the suspect. The interrogator isolates the suspect in the interrogation room, cutting off his access to information. The interrogator selectively highlights facts about the crime. The interrogator supplements the facts with lies (“your buddy says you pulled the trigger,” or “your prints were all over the knife,” or “you failed the polygraph test.”).

With those cherry-picked ideas active in associative memory—without regard to the quality of the information—the suspect’s System 1 generates impressions of the suspect’s situation, leaving it to System 2 to sort everything out and lead the suspect to a conclusion about what to do.

As the interrogation drags on, the suspect’s stress level skyrockets and fatigue sets in. The suspect’s System 2 falters and produces a twisted cost-benefit analysis: *They don’t believe me. They’ll never believe me. They have evidence that will convict me. I want to get out of here now. I’m better off giving them what they want. Since I know I didn’t do it, they’ll realize it too before this goes too far.*

## V. WYSIATI AND JURORS

Fast forward to the jury trial. The judge will tell the jury that the indictment is just a set of allegations, that the defendant is innocent until proven guilty, that the government has the burden of convincing the jury of the defendant's guilt beyond a reasonable doubt.

But what data points are available to the jury? As the trial begins, all the jurors know is that the government charged *this* defendant with committing *that* crime. What they see is all there is. In the absence of any other information, each juror's System 1 says, "He probably did it." It's up to System 2 to say, "Not so fast. We don't have any evidence yet."

Before and during trial, the defense and the prosecution will fight over what evidence the judge should allow to come in and what evidence should be excluded. For example, in Bobby Johnson's case, the defense was unsuccessful at excluding the post-*Miranda* interrogation. On the other hand, the prosecution successfully excluded the pre-*Miranda* portion of the interrogation. The jury only saw part of the video and didn't see the first four or five hours, in which Bobby denied any involvement, cried, and banged his head on the table.

The rules of evidence include very blunt tools for judges to control the information flow to the jury. If a false confession is introduced, it's pretty much game over. Judges and juries give confessions tremendous weight, often to the complete exclusion of everything else. Many exonerees were convicted based on confessions where no physical evidence implicated them. Even a confession that is totally implausible, that includes inconsistent claims, that flies in the face of physical evidence—including DNA evidence—can be hard for juries to discount.

## CONCLUSION

We can't shut System 1 off at will. But if we care about the truth, we can temper System 1's effects with a robust sense of humility. We should be self-aware about the limits of our ability to acquire knowledge and about our susceptibility to cognitive biases. And we should recognize our fallibility and our tendency to be led astray.

Defendants in criminal cases have important protections in this country. Some are enshrined explicitly in the Bill of Rights: the right against self-incrimination, right to confront witnesses, right to trial by an impartial jury, right to counsel. Some are implicit, like the presumption of innocence and the reasonable-doubt standard.

But those safeguards can be effective only if we understand and apply them in a way that accounts for what we know about how people actually think. Legislators at the state and federal level should continue seeking ways to update our laws to reflect the current state of scientific knowledge. Courts should calibrate procedural rules and individual rulings—for example, on evidentiary questions and jury instructions—to how people actually form judgments and make decisions in the real world. And prosecutors and police should foster cultures of humility, flexibility, and accountability to guard against securing and relying on false confessions.