MAINE STATE BAR ASSOCIATION

MAINE BAR JOURNAL

THE QUARTERLY PUBLICATION OF THE MAINE STATE BAR ASSOCIATION

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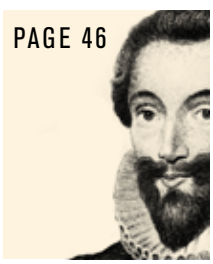

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PRESIDENT'S PAGE:

Maine State Bar Association: Embracing the Future Together

By Susan Bernstein Driscoll

It is an honor to serve as the 127th president of the Maine State Bar Association and the 13th woman. It is an even greater honor to be a member of a bar where women, who comprise 40 percent of Maine's attorneys, occupy so many leadership positions, including the chief justice, the attorney general and the dean of the law school, to name a few. All of Maine's attorneys—men and women of three generations—represent the highest standard of the profession. We're guided by mutual respect, our passion for the law and our shared dedication to a fair and just society. Now, as much as ever, we need to bring together our unique and common perspectives to identify and solve the emergent issues of our time.

Bar associations everywhere recognize similar challenges facing lawyers, clients and the legal profession. How do we serve underserved rural areas, particularly as our bar is aging and facing attrition? How are we addressing issues of inclusion and diversity? How are we ensuring wellness among attorneys where alcohol and substance abuse are statistically high? How are we mentoring newer lawyers and partnering with law schools to ensure the next generation is motivated and competent? How do we maintain work/life balance and retain top practitioners in a demanding environment? How do we utilize technology to deliver legal services and compete in the marketplace? How does technology threaten the legal profession and test our ethical rules?

The issues we face are profoundly influenced by the changing technological landscape. In 1891, when the Maine Legislature created the Maine State Bar Association "for the purpose of promoting the interest of the legal profession, and of instituting legal reforms," the founders could not have imagined a world with self-driving cars, Twitter, bots, and the Dark Web. Technology engulfs us even as our basic goals remain the same.

In 2013, Richard Susskind wrote:

> Most inhabitants of today's legal world tend to look for solutions by extrapolating from the past and on the assumption of continuity in the legal profession. In contrast, I foresee discontinuity over time and the emergence of a legal industry that will be quite alien to the current legal establishment. The future of legal service is neither Grisham nor Rumpole. Nor is it wigs, wood-paneled courtrooms, leather-bound tomes, or arcane legal jargon. It will not even be the now dominant model of lawyering, which is face-to-face, consultative professional service by advisers who meet clients in their offices, whether glitzy or dusty, and dispense tailored counsel. To meet the needs of clients, we will need instead to dispense with much of our current cottage industry and re-invent the way in which legal services are delivered. Just as other professions are undergoing massive upheaval, the same must now happen in law. Indeed it is already happening.[1]

Then, a few years later, he wrote:

> Legal technologists are asking whether court is a service or a place; whether people and organizations in dispute really need to congregate in physical courtrooms to settle their differences. One alternative is the virtual court . . . Another alternative is online dispute resolution (ODR) . . . used to sort out a staggering 60 million disagreements that arise amongst traders each year amongst eBay users (more than three times the total number of lawsuits filed in the entire US court system) based on a widely available platform for ODR known as Modria . . . Another is Cybersettle . . . another is Resolver . . .
>
> Online legal communities are emerging . . . non-lawyers are beginning to contribute, sharing their practical experiences of resolving legal problems . . .
>
> [I]nterest is developing in embedding legal requirements into our social and working lives, so that, for example, automatic compliance with health-and-safety regulations can be integrated into the design of buildings . . . human beings do not need to know the law and make a conscious decision to comply, and consequently, lawyers' direct involvement is not needed.
>
> [T]he future of legal services is unlikely to look like John Grisham or Rumpole of the Bailey. More probably . . . traditional lawyers will in large part be 'replaced by advanced systems, or by less costly workers supported by technology or standard processes, or by lay people armed with online self-help tools'.[2]

One legal company boasts on its website, "We use artificial intelligence and machine learning to predict legal outcomes. We look at all the data and make sure you don't miss anything. We make your research smarter, faster, and more accurate."[3]

In an Australian article entitled "*Don't Fear Robo-Justice. Algorithms Could Help More People Access Legal Advice*," the author writes, "While robots are unlikely to replace judges, automated tools are being developed to support legal decision making. In fact, they could help support access to justice in areas such as divorce, owners' corporation disputes and small value contracts."[4] Criminal courts in the U.S. are utilizing computer programs to gauge risk assessment and impose bail. "With promises to replace judicial instincts with validated algorithms and to reserve detention for high-risk defendants, risk assessment tools have become a hallmark of contemporary pretrial reform."[5]

None of this is without controversy and we don't know what our legal system will look like in as little as 5 or 10 years. But we can and must have a say in it.

I begin my year as MSBA president with grateful thanks to my predecessor Al Ayre, the Board of Governors and the dedicated staff. I ask you to help shape our future together. The MSBA serves as the point organization to convene, educate and keep the conversation going. Call me any time with your ideas and concerns. And join me and your colleagues for human interaction at CLEs, section meetings, and the Annual Bar Conference at Sugarloaf in June. We are not the sum of our algorithms!

SUSAN BERNSTEIN DRISCOLL *is a civil litigation trial lawyer. She earned her B.A. in 1981 from Rutgers University in New Jersey and her law degree in 1989 from Northeastern University School of Law in Boston. Susan began her practice in Boston and relocated to Maine in 1995. She has been an MSBA member since then and began serving on the Board of Governors in 2012. Her diverse practice includes employment, torts, real estate and boundary disputes, family law, municipal and commercial litigation and she also serves as a mediator. Sue is a member of Bergen & Parkinson LLC, which has offices in Kennebunk and Saco.*

In addition to her work for the MSBA, Sue currently sits on boards of the Maine Justice Foundation and Justice Action Group and serves as chair of the Zoning Board of Appeals in the City of Biddeford. Sue and her husband, Dan, have two sons, Joe who lives in Nashville and Sam currently of NYC, and two pups, Paco and Petey.

[1] Susskind, Richard, *Tomorrow's Lawyer,* Oxford Univ. Press 2013, Introduction xv

[2] Susskind, Richard and Susskind, Daniel, *The Future of The Professions, How Technology Will Transform The Work of Human Experts*, Oxford Univ. Press 2015, Ch. 2.4.

[3] www.bluejlegal.com

[4] Zeleznikow, John, Don't Fear Robo-Justice. *Algorithms Could Help More People Access Legal Advice,* The Conversation.com, October 22, 2017

[5] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, Feb. 9, 2018.

FROM THE EXECUTIVE DIRECTOR:

A Review of 2017, and a Peek Ahead to 2018

By Angela P. Weston

Your MSBA Board of Governors and staff had a very busy 2017! We began 2017 in excellent shape, thanks to the stewardship of Past President Stephen Nelson of Houlton. And, newly installed President Al Ayre of Portland took over in January and got right to work. With the beginning of a fresh new year, I wanted to take a moment to let you know just a few of the many important issues your bar association worked on last year and some of the goals we have for 2018.

1. The Board of Governors adopted the following antitrust statement:

> *The Maine State Bar Association (MSBA) is organized to promote the honor, dignity and professionalism of lawyers; advance the knowledge, skills and interests of its members; and support the public interest in a fair and effective system of justice. The MSBA, its officers, Board of Governors and employees shall not, and do not, play any role in the competitive decisions of its members or their employees, or in any way restrict competition in any aspect of the legal profession. By adoption of this statement of policy, the MSBA makes clear its unequivocal support for the fair and effective policy of competition served by the antitrust laws and its uncompromising intent to comply strictly in all respects with those laws.*

2. The Board of Governors created and adopted the following Policy on Public Positions:

> *The MSBA is a non-partisan organization that may take public positions on public policy statements, initiatives or actions at the state or federal level that concern the Constitution, the rule of law, the independence of judicial institutions, or the Mission Statement of the MSBA. The Association shall take such positions by action of the Board of Governors. The Board may also authorize advocacy by the MSBA in support of these positions. The Association's positions or advocacy may include (but are not limited to) press releases, op-ed pieces, member alerts, lobbying, financial contribution, advertising, and the like. The Association recognizes and appreciates the diversity of views of its members. The risk that some members may disagree with positions the Association takes consistent with this policy and the Association's mission should not prevent the Association from taking these positions.*

3. The MSBA maintains a presence in the State House in order to represent attorneys in legislation that concerns the practice of law and access to justice in Maine. Jim Cohen of Verrill Dana serves at the Association's lobbyist. The Maine Legislature considers numerous bills and amendments during each legislative session, and conducts numerous hearings and committee meetings with many such actions subject to very short notice. Whereas the Board of Governors meets only once a month, it was clear that in order to stay abreast of legislative action and to be better able to serve MSBA members, the Board determined that legislative action must be followed throughout the month by a group smaller than the entire Board and capable of reviewing such action on a daily basis. With this in mind, the Board created a Legislative Review and Response Committee.

4. The Board reviewed the MSBA Charter, or Articles of Incorporation, from 1891 and determined that the Charter needed to be revised due to the dollar amount listed in Section 2:

> *Section 2. Said corporation may elect such officers as it may deem necessary, and may take, hold and convey real and personal prop-*

erty to an amount not exceeding two hundred thousand dollars in value, and may adopt such constitution, by-laws, rules and regulations, not inconsistent with the laws of this state, as they may deem proper, for the management of their affairs, including the admission, government and expulsion of members.

The Board approved an amendment that deletes "to an amount not exceeding two hundred thousand dollars in value" from the Charter. According to the MSBA Bylaws, this proposed amendment must be brought before the membership for a vote. We will present this to you at the 2018 Annual Bar Conference in June.

5. The MSBA has continued to improve and expand its website. We launched our integrated association management software and website back in November of 2016, but spent much of 2017 implementing available website options in order to improve website navigation and functionality, and to provide you with valuable and relevant data and resources that make practicing law easier. A major effort associated with the website last year was the implementation of online dues renewal. Although a majority of you chose to renew through the mail or by phone, many of you took advantage of this new and easy way to renew your MSBA membership. We are very pleased to be able to offer this additional opportunity for payment of dues and member profile updates.

6. Did you attend the 2017 Annual Bar Conference and 125th Anniversary Celebration? If you did, then you know how much fun we had—if not, you missed out! Admittedly there were food issues, which we are already working on for 2018. But overall, the programming, networking, Capitol Steps, and fireworks were a huge success! Even the weather cooperated. We also implemented, for the first time ever, online registration for the Annual Bar Conference, streamlining our internal processes. Our thanks goes out to everyone involved in the planning, to the Judicial Branch for its involvement, to the MSBA members who attended, and to the volunteer faculty for the wonderful CLE programs. We hope to see you at the 2018 Annual Bar Conference on June 20-22 in Sugarloaf!

I'd like to thank Past President Al Ayre for a successful 2017, and for his leadership and guidance. I also want to send a warm welcome to 2018 President Susan Driscoll of Saco. Sue has jumped into her presidential duties head first. What's on the agenda for 2018? Here are a few of the items we are already working on:

1. Professionalism, Conduct and the #MeToo Movement Survey.
2. 2018-2020 Strategic Planning Retreat in April.
3. 2018 Annual Bar Conference at Sugarloaf on June 20-22.
4. Leadership Academy Class of 2019 in November.
5. Judicial evaluation surveys throughout 2018.
6. Veterans Legal Services Initiative—a partnership between the MSBA, the Veterans' Law Section and Pine Tree Legal Assistance.
7. Membership survey.
8. MSBA visits to county bar associations and firms across the state.

Looks like another busy year! Questions? Ideas? Want to volunteer? Please give me a call…I'd love to chat with you!

ANGELA P. WESTON *is the Maine State Bar Association's executive director. She can be reached at aweston@mainebar.org.*

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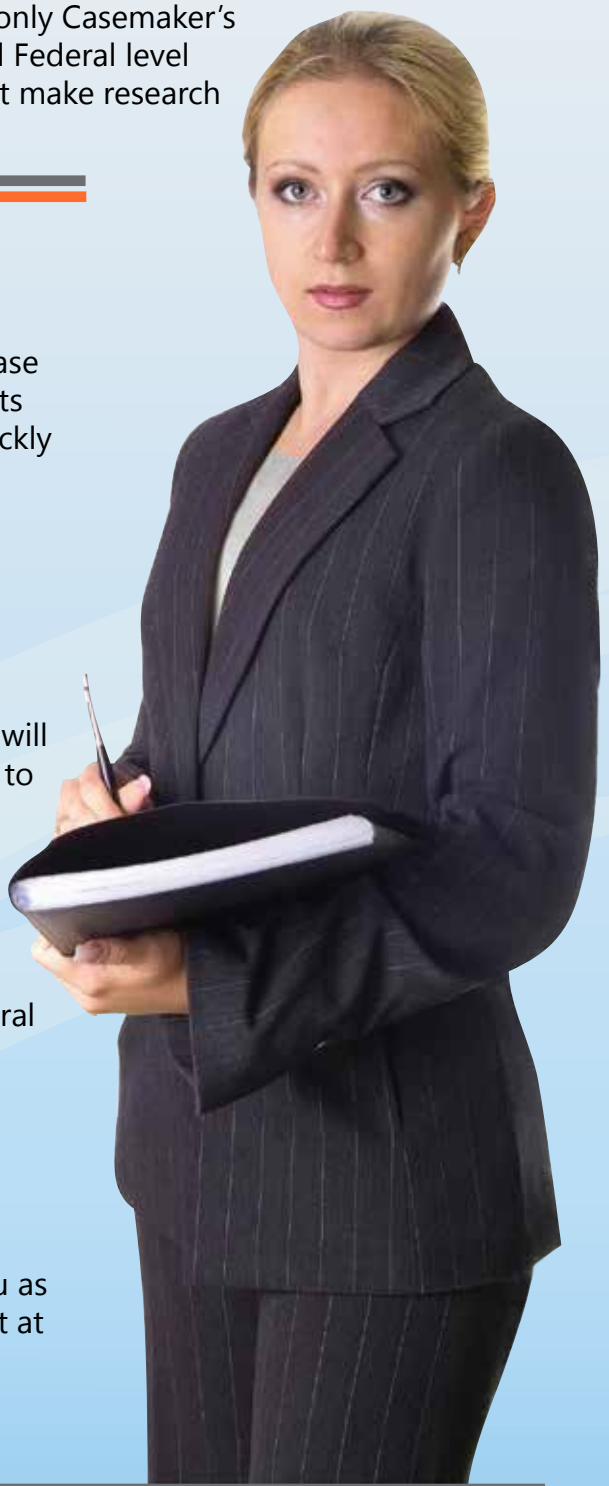

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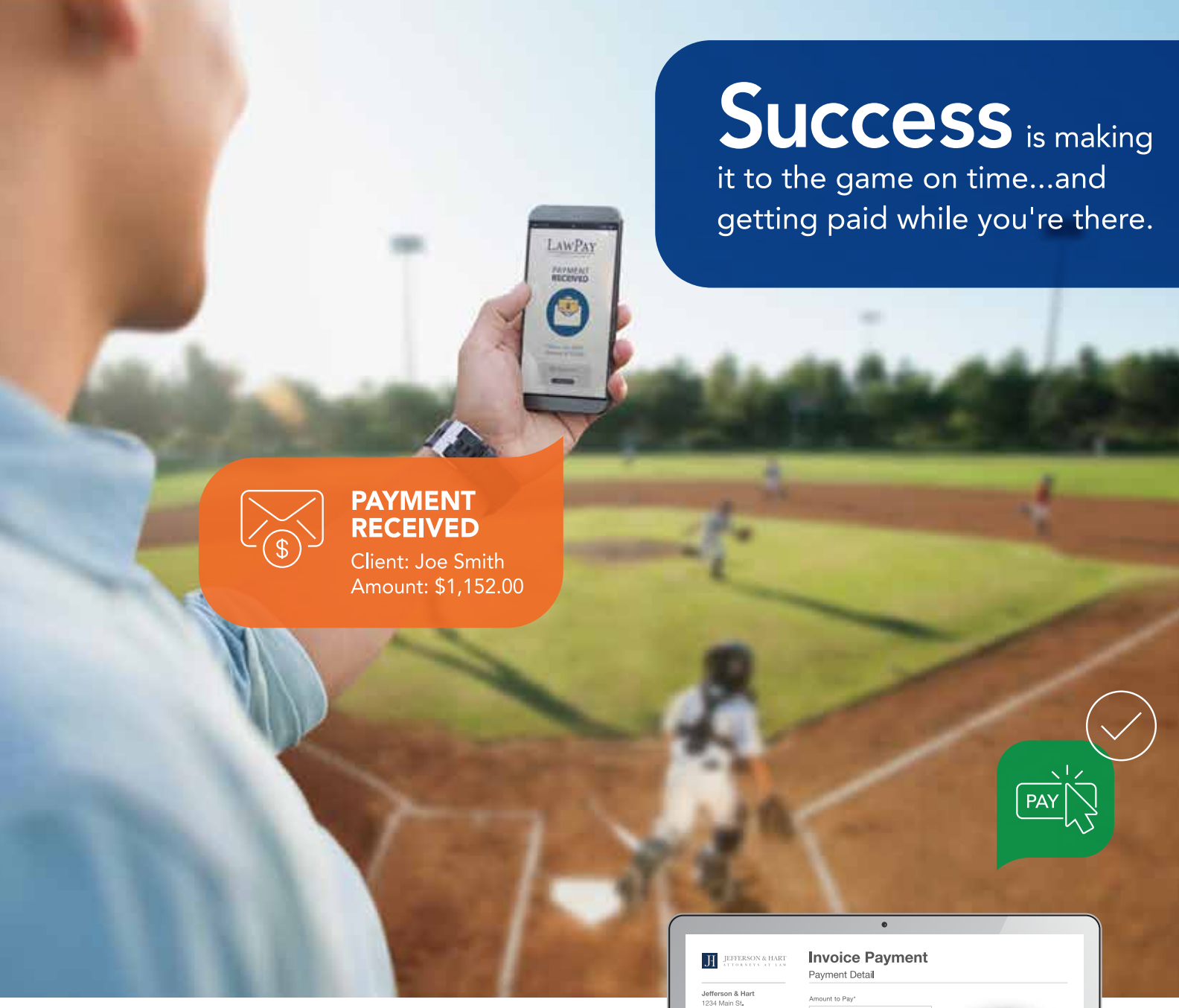

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Clarifying Maine's Confession Law

By John C. Sheldon

In the 2016 Law Court decision *State v. Hunt*,[1] Justice Ellen Gorman helped to dispel confusion about Maine's law on the admissibility of confessions: "With this opinion, we hope to clarify the law and process to be applied when determining the voluntariness of a confession in the face of a challenge to police action."[2] The decision revises and greatly improves our approach to confessions. At the same time, however, it also leaves some important questions unanswered. In this article I discuss that revision and those questions, and suggest some solutions.

First, the facts. Timothy Hunt's I.Q. was between 75 and 81. After he was indicted on a charge of the sexual abuse of an eight-year-old child, the police asked him to come to their station to talk about it.[3]

During the interview Hunt expressed concern that, if convicted, his name might go on "that list," an apparent reference to the Maine Sex Offender Registry. The police told him not to "worry" about the "list," said that "not everybody ends up on the list," and assured him that "[g]uys like you . . . don't end up [in] situations like that dramatic. They get help . . . ." The police continued to deny he had to worry about the Registry: "The list thing you're worried about? It's for the other end of the spectrum. That's for the people that are problematic. . . . You know . . . not everyone goes on a list. Okay? Not everyone does."[4]

Hunt confessed, and then said, "I'm not even close to being on that list, you know? That it should be fine." Only after receiving the confession did the police reveal that they were "not in control of that list."[5]

After a hearing on Hunt's motion to suppress, the Superior Court justice rejected his claim that his confession was involuntary, and observed, in part, that "[t]he detectives' interviewing techniques were fundamentally fair and Hunt's confession was not a product of coercive police conduct."[6]

Writing for a unanimous Law Court, Justice Gorman reversed:

> Although the officers' statements might not have rendered a different defendant's confession involuntary, the issue of Hunt's cognitive limitations also plays a significant role in our analysis. . . . Although no single factor renders Hunt's confession involuntary, the totality of the circumstances–in particular, the officers' misleading statements in light of Hunt's cognitive disability and his apparent reliance on their representations—rendered Hunt's incriminating statements involuntary as a matter of law.[7]

Due Process or the Right to Silence?

Justice Gorman relied on due process standards to suppress Hunt's confession:

> [W]e examine whether his statements were free and voluntary or whether, considering the totality of the circumstances under which the statements were made, their admission would be fundamentally unfair. "The Due Process Clause . . . prohibits deprivations of life, liberty, or property without fundamental fairness through governmental conduct that offends the community's sense of justice, decency and fair play."[8]

Because it was her purpose to clarify Maine confession law, and because what emerged from *Hunt* is a due process standard, it follows that due process analysis will control the admissibility of confessions hereafter. That, however, isn't a clarification of Law Court precedent. Instead, it's a continental shift.

Ever since its 1972 decision, *State v. Collins*,[9] the Law Court has measured the admissibility of confessions by employing not a Fourteenth Amendment due process analysis but one based on the right to silence of the Maine Constitution:

> We concentrate . . . upon the primacy of the value . . . of safeguarding ". . . the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances."

> Since this value has been endowed with the highest proprity [sic] by being embodied in a constitutional guarantee—the constitutional privilege against self-incrimination—we believe that it must be taken heavily into account in the formulation of the public policy of this State . . . .
>
> We decide, therefore, that to confirm and preserve the value reflected in the constitutional privilege against self-incrimination we must minimize the risks of allowing legal effectiveness to "non-voluntary," or "involuntary," testimonial self-condemnation.[10]

To that end, *Collins* requires the prosecution to prove voluntariness beyond a reasonable doubt.[11]

In *Hunt*, Justice Gorman distinguishes and declines to employ the *Collins* approach "because no one has claimed that a confession was 'forced' out of Hunt."[12] Her very analysis of the facts and the law, however, contradicts that assertion and disarms the distinction.

In the concluding paragraphs of the opinion, Justice Gorman cites three appellate court decisions—from the 9th Circuit, and the Kansas and Wisconsin Supreme Courts—as direct support for her ruling.[13] All of those decisions involve facts similar to those in *Hunt*—especially regarding the defendants' mental disadvantage—and all of them describe the police conduct as forceful. The 9th Circuit says the police "methods . . . confuse[d] and compel[led] a confession";[14] the Kansas case involves—in Justice Gorman's own words—"some degree of police coercion";[15] the Wisconsin court calls the police conduct "coercive."[16]

Having explicitly relied on those decisions, Justice Gorman could have used them as a basis for deciding that Hunt's own interrogation involved compulsion and/or coercion. Since the Maine constitution accords persons the right not to be "compelled" to give evidence against themselves,[17] the decision could have concluded that the police violated Hunt's constitutional right to silence. Therefore, and despite the earlier assertion that a right-to-silence analysis is inappropriate in this case, the opinion puts that privilege—and *Collins*—at center stage.

So why abstain from the analysis that the opinion validates? I believe there may be two explanations. The first is that *Collins* is anachronistic. When the Law Court issued it in 1972, much of the nation's judiciary was influenced by the Warren Supreme Court's advancement of criminal defendants' procedural rights, an element of the Court's civil rights agenda.[18] Underprivileged defendants—and especially those of color—needed bolstering against what Justice Felix Frankfurter called the "hostile forces" of state governments.[19] *Collins* emphatically committed us to that agenda by imposing on the prosecution the burden of proving voluntariness not by a preponderance—the Supreme Court's rule[20]—but beyond a reasonable doubt. Writing for the Law Court, Justice Sidney Wernick justified doing so thus:

> [W]e must minimize the risks of allowing legal effectiveness to "non-voluntary," or "involuntary," testimonial self-condemnation even at the expense of producing a loss of evidence which might have probative value . . . .[21]

Excluding evidence—no matter how persuasive—that might prove guilt. If it's difficult to understand why that's now outdated, one should try telling it to a resident of an emergency women's shelter, or one of the victims of the recent Las Vegas mass shooting, or a survivor of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, or a recent enlistee in Mothers Against Drunk Driving, or the parent of a victim at the Sandy Hook Elementary School—and, of course, there's 9/11.[22] The civil rights era generated invaluable, and ongoing, gains in social and criminal justice, but experience since then has broadened both our awareness and our concern, and necessarily expanded our priorities to include public safety. Directly in the headlights of that concern is the fact that "the exclusionary rule imposes a substantial cost on the societal interests in law enforcement by its proscription of what concededly is relevant evidence."[23]

A second reason why Justice Gorman avoids *Collins* may be that the concept of due process she adopts is expansive enough to subsume any worry for a defendant's right to silence:

> The Due Process Clause . . . prohibits deprivations of life, liberty, or property without fundamental fairness through governmental conduct that offends the community's sense of justice, decency and fair play.[24]

If due process "prohibits deprivations of . . . liberty" and protects "the community's sense of justice," it isn't necessary to safeguard any particular constitutional right. Whether the police "coerce" someone into confessing, or "force" a confession out of him or her, due process will suffice to address the wrong. Consider *Brown v. Mississippi*,[25] the Supreme Court's decision about confessions, in which white police officers bullwhipped the black suspects until they confessed. The Court employed a due process analysis to veto the

convictions.[26] Now that Maine's confession law employs the same approach,[27] *Collins*' attention to criminal defendants' constitutional right to silence—their right, as Justice Gorman put it, not to have confessions "'forced' out of" them—is redundant.

Ending *Collins'* domination over confessions would be an important advancement for our law—if that's what Justice Gorman has intended to do. But we don't know, because *Hunt* doesn't tell us.[28]

The Defendant's Free Will

Traditionally, Maine's law on confessions requires that a confession must be the defendant's "voluntary" act. Here is Justice Donald Alexander's entirely accurate summation, in a confession case also involving police duplicity, of the law as it existed up to 2013:

> our focus [has been] on the defendant's state of mind, looking to evidence of exercise of the defendant's "own free will and rational intellect" . . . . [I]n each instance the appellate court looked at the defendant's state of mind motivating the confession, not the content of the police statements inviting the confession.[29]

Contrast that with Justice Gorman's description of the law in 2016:

> Although no single factor renders Hunt's confession involuntary, the totality of the circumstances—in particular, the officers' misleading statements in light of Hunt's cognitive disability and his apparent reliance on their representations—rendered Hunt's incriminating statements involuntary as a matter of law.[30]

Notice how Justice Gorman has inverted the law as Justice Alexander had described it. Not only does she emphasize the significance of the officers' statements, but she also virtually dismisses what Justice Alexander described as the "focus" of confession law, "the defendant's state of mind motivating the confession." All Justice Gorman requires is an "apparent reliance on their [the police's] representations."[31] That relatively nonchalant assessment of "the defendant's state of mind motivating the confession" is an acknowledgment of the obvious. If a confession occurs during an interrogation we almost always know what motivated the defendant to confess: it's what the police did during the interrogation.[32] After all, that's the very purpose of police interrogations (and the reason we allow the practice): to say and do things that get the suspect to confess.[33]

So instead of pondering the obvious, we proceed to the nature of the interrogation itself, applying the "totality of the circumstances" test, which includes not only the officers' untruthfulness and the suspect's cognitive disability, but also anything else—good or bad—that might have provoked the suspect to confess.[34]

This is a significant change in the law. Prior to *Hunt*—and as recently as 2013—the Law Court employed this formula as its fundamental statement of the law of confessions:

> A confession is voluntary if it results from the free choice of a rational mind, if it is not a product of coercive police conduct, and if under all of the circumstances its admission would be fundamentally fair.[35]

In fact, *Hunt* quotes that same statement,[36] and the decision refers to voluntariness many times over, as if they both matter.[37] But by ignoring the law as Justice Alexander so recently described it, Justice Gorman implicitly removes "free choice of a rational mind" and voluntariness from the equation.[38]

Doing so is an apparent concession to the fact that the policy of identifying the "free choice of a rational mind" and voluntariness has been a false front. Nobody can tell whether another person's act—or, for that matter, one's own act—is "voluntary." To understand why, you could immerse yourself in the complex, ever baffling and perpetually unresolved philosophical debate about whether free will even exists.[39] (Be prepared to consider determinism, positivism, non-reductive physicalism, randomness, non-randomness, and compatibilism—to start with.) Or, if that challenge is unappealing, at least consider Freud.[40] And modern psychiatry, with its 800-page compendium of mental-freedom-aborting conditions, the Diagnostic and Statistical Manual V.[41] And psychotherapy, which serves those with thoughts and behaviors they can't help.

This baffling problem is made even more difficult when one considers the judge's quandary. The only way a judge can determine a defendant's "free choice" is to be in his or her mind, reading it as the defendant proceeds toward the decision to confess. Judges are no better than the rest of us at mind reading—telepathic power isn't a prerequisite for judicial appointment—and although they've been required for decades to *say* that's what they've done, and then make beyond-a-reasonable-doubt findings, the whole enterprise has been illusory.[42]

Hunt is typical. The police made false promises, and the defendant took the bait. The trial judge knew perfectly well why he did so: he relied on what the police told him. The judge's decision that the confession was "voluntary" had nothing to do with his mental processes but with her belief that what the police did was okay: "The detectives' . . . interviewing techniques were fundamentally fair and Hunt's confession was not a product of coercive police conduct."[43] Justice Gorman reversed because she believed what the police did wasn't okay: they lied repeatedly, the defendant was unintelligent, confession suppressed. The bottom-line issue is not "voluntariness" or "state of mind" or Hunt's "own free will and rational intellect." It can't be: do we even know how to measure the effect of an interrogation on the "free will" of someone with an 81 I.Q., or determine the "state of mind" and the "rational intellect" of such a person—let alone do so beyond a reasonable doubt? Rather, the decision is all about fairness: what the cops did to that mentally deficient person stank.

This is Justice Gorman's ample contribution to confession law. *Hunt* enables us to consider not what's subjective but what's objective, not what's fanciful but what's demonstrable.[44]

There's a problem, of course, with grounding the critical constitutional right to due process of law in a concept as amorphous as fairness. Recognizing that difficulty, Justice Gorman doesn't simply decry what the police did to Hunt as unconstitutional; she draws upon decisions involving facts like those in this case from three different appellate courts.[45] Those rulings give a sense for what the wider judicial community considers fair under the particular circumstances of the *Hunt* case, and confidence that the decision to suppress the confession is just.

And how does the judicial community's consensus arise? How do judges now, and the judges who came before them, and those before them, etc., determine what's fair? At bottom, the issue is equity. What's "conscionable" about a certain provision in a contract? What's "reasonable" about a certain warrantless search? What makes a particular division of marital property "fairer" than another? What metamorphosis of "fairness" condemned racial segregation and expanded criminal procedure to require the *Miranda* warnings?[46] Fairness isn't defined anywhere; it's that nebulous, experiential quality that, over time, distinguishes good law from bad. It's the product of legal evolution, the DNA of due process.[47]

What it's not is reading minds. By shifting the confession law analysis to due process, Justice Gorman acknowledges, implicitly, that the court's decades-old attempts to "focus on the defendant's state of mind" and to pinpoint the defendant's voluntariness have been a naked emperor. *Hunt* mostly clothes him.

"Compulsion However Infused"

Our royalty's still missing a garment, however: a discussion of the free will doctrine as used in the Law Court's 1982 decision, *State v. Caouette*.[48] The case involved a jail inmate who confessed to a jailer:

> Defendant was permitted to call his wife, and after the call he began to cry. Stating that he was feeling ill again, he asked to stay in the medical room and talk. The deputy testified that he repeatedly told defendant that he did not want to discuss his case because he was not the investigating officer. He also told defendant that anything he said could be used against him. Subsequently defendant made admissions which could be considered inculpatory. The deputy testified that after each such statement he repeated the warnings. There is no testimony indicating that the deputy asked any questions, although he did offer to contact the investigating officers. Finally, unable to stop the defendant from talking, the deputy returned him to the cell area.[49]

The Law Court sustained the trial court's suppression of the confession on the ground that, because the defendant "was incarcerated . . . was vomiting, crying, frightened, emotionally upset, and . . . had no conscious intent to discuss the case."[50] Therefore, he was not "free of compulsion of whatever nature."[51] The court explained, "The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."[52]

Caouette's justification for suppression has likely perished under our new, due process approach to confessions. The reason: due process requires that some agent of government must have induced the confession. The Supreme Court announced this rule in *Colorado v. Connelly*,[53] a 1986 decision involving a person who, unbidden, approached a police officer and announced he wanted to confess to a murder. He did so only because he was a schizophrenic and had heard voices commanding him to do so.[54]

The case went to the Supreme Court on a *writ of certiorari*, brought by the prosecution after the state's Supreme Court had suppressed the confession using an analysis based

on the Fourteenth Amendment's Due Process clause. The Colorado court had held that "[o]ne's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure."[55] Notwithstanding that the police had done nothing to provoke the confession, it wasn't admissible because it wasn't "the product of a rational intellect and a free will."[56] The Supreme Court reversed because self-generated compulsion wasn't enough:

> The flaw in [the defendant's] constitutional argument is that it would expand our previous line of "voluntariness" cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision. . . .
>
> We hold that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.[57]

Since Maine's view of due process is identical to that of the Supreme Court,[58] *Hunt*'s due process approach to confession law necessarily incorporates *Connelly*'s analysis and overrules *Caouette*.

But there's a fly in the ointment: the Law Court expressly rejected the *Connelly* analysis in its 2000 decision, *State v. Rees*,[59] in which the court let stand a trial court's decision to suppress the confession of a defendant suffering from dementia.[60] There was no suggestion that the police had treated the defendant improperly.[61] *Rees* vigorously reaffirmed *Caouette* and was based on *Collins*' state-constitutional, right-to-silence approach to confession law:

> *Connelly* was decided on federal constitutional grounds and *Caouette* was decided on state constitutional grounds. . . . [I]n *State v. Collins* . . . we adopted a more stringent standard of proof for establishing the voluntariness of statements in order to better secure the guarantee of freedom from self-incrimination. . . . It must be remembered that the privilege exists in this case by virtue of the Maine Constitution.[62]

Any clarification of Maine law must address the fundamental inconsistency between *Hunt* and *Connelly* on the one hand, and *Rees* and *Caouette* on the other. But Justice Gorman never mentions *Connelly* or *Caouette*, and makes no attempt to explain or distinguish *Rees*. About this elemental contradiction, *Hunt* leaves us guessing.[63]

Clarifying the Clarification

By now, it may be clear that a "voluntary" confession is an admissible one. In this field, "voluntary" and "admissible" are synonyms for each other.[64] Conversely, an "involuntary" confession is an inadmissible one. Simpler being better, we should call a confession that passes the due process test not a "voluntary" confession but simply an "admissible" one. Likewise, an improperly induced confession should be called "inadmissible."

In the same vein, one might also consider the term "psychological fact," something Justice Gorman has drawn from a 1998 Law Court decision:[65]

> Although sometimes framed as an issue of "psychological fact," the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. . . .
>
> We clarify that although the determination of the historical facts underlying a question of voluntariness must be made by the trial court, and will be reviewed deferentially, the "psychological fact" of the voluntariness of a confession is a determination of law and is subject to de novo review.[66]

According to this "clarification," the trial court's and appellate court's functions are these: (1) the trial court determines the historical facts (beyond a reasonable doubt[67]); (2) the trial court then determines the "psychological fact," which is whether the confession was "voluntary" or "involuntary"; (3) depending on that determination, the trial court then decides whether due process permits or bars the evidentiary use of the confession; (4) the Law Court defers to the trial court's determination of the historical facts[68]; (5) the Law Court determines the "psychological fact" *de novo*, which is whether the confession was "voluntary" or "involuntary?"; (6) depending on that determination, the Law Court decides *de novo* whether due process permits or bars the evidentiary use of the confession.

Bereft of jargon, what all of that means is: (1) the trial court determines the historical facts; (2) the trial court decides, as a matter of due process, whether the confession is admissible; (3) the Law Court defers to the trial court's determination of the facts; (4) the Law Court decides, as a matter of due process, whether the confession is admissible.

Form, Substance, and the Balancing of Interests

What, then, is a "psychological fact?" What purpose does it serve?

Whatever it may be, a "psychological fact" isn't a fact, because *Hunt* declares it a "determination of law."[69] Nor is there any associated burden of proof, unlike under the *Collins* line of cases, which requires the prosecution to prove the actual *fact* of voluntariness by the strictest standard:

> The voluntary or involuntary nature of a confession is a question of fact to be determined by the presiding Justice under the caveat that the voluntariness thereof must be established beyond a reasonable doubt by proof adduced by the prosecution.[70]

Perhaps "psychological fact" is a means to preserve the appearance that the Law Court hasn't jettisoned its abundant voluntariness-based caselaw precedent. Justice Gorman has sandwiched the finding of the "psychological fact" chronologically between the trial court's determination of the historical facts and its ruling on admissibility. This gives the impression that, in addition to deciding the real facts and whether due process validates or condemns the confession, a court has also paused to consider the "fact" of voluntariness—a gesture to the past caselaw—before ruling finally on the motion to suppress.[71] If so, "psychological fact" is a cosmetic.[72]

A second possible explanation is that employing the idea of the "psychological fact" preserves the appearance that our due process approach is constitutional. In its 1972 decision *Lego v. Twomey*[73] the Supreme Court required federal and state prosecutors to prove the confessing defendant's voluntariness by at least a preponderance.[74] If we in Maine measure only fairness, without express regard to voluntariness, we might be accused of defying the Supreme Court.

That would place form before substance, of course. The purpose of the voluntary confession doctrine is twofold. The first is to prevent law enforcement from engaging in unconscionable conduct, like the police who used the bullwhips in *Brown v. Mississippi*. The second is to prevent law enforcement from using methods that are likely to cause suspects to give unreliable confessions.[75] False promises of leniency, like those in *Hunt*, belong to this suspect class.[76] So long as our policy discourages those wrongs by excluding confessions from evidence, it doesn't make any difference whether or not we talk about "psychological facts." We've served *Twomey*'s purpose.

Collins' Legacy

And that raises a final issue. By side-stepping *Collins*, Justice Gorman has left in limbo its policy of heavily disfavoring the use of confessions. That omission gives the Law Court the opportunity to reconsider the balance between the public's interest in safety and the individual's constitutional protections.

In *Twomey* the Supreme Court took a more even-handed approach to this issue than did the Law Court in *Collins*:

> [I]t is very doubtful that escalating the prosecution's burden of proof [above a preponderance] in Fourth and Fifth Amendment suppression hearings would be sufficiently productive . . . to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence. [77]

Nominally loyal to *Collins'* higher burden of proof, *Hunt* nevertheless muddles it. The prosecution doesn't have to prove the "fact" of voluntariness any more. What's to be "proven," besides the historical facts, is whether a particular police behavior satisfies due process. But that's a legal analysis, and not susceptible of factual proof. The prosecution certainly has the burden of persuading the trial court and then the Law Court that there's been no due process violation, but the degree of persuasion required isn't clear. Is there such a thing as a burden of persuasion, concerning a legal analysis, beyond a reasonable doubt? Ought there be? [78]

An additional issue lurks. Now that the Law Court has necessarily adopted the Supreme Court's rule that an agent of the state must have induced the confession, one must ask *how much* inducement. Suppose, in addition to their lie about the "list," the police had also told Hunt some things that were both true and persuasive, and it wasn't clear why the Hunt confessed—which assertion he relied on. Justice Gorman says it's enough that Hunt "apparently relied" on the representations of the police. How much reliance is that? To put it another way, what degree of *disproof* is required of the state to avoid suppression? [79]

There is no present answer to any of those questions. Perhaps, now that it has apparently shed *Collins'* influence and accepted the Supreme Court's due process approach to confessions, the Law Court will also consider the resurgent concern for public safety, and adopt the Supreme Court's assessment that public and individual needs in criminal law are equally important:

> At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. . . . Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. . . .

At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.[80]

Conclusion

Bertrand Russell may have said it best: "Freedom . . . demands only that our volitions shall be . . . the result of our own desires, not of an outside force compelling us to will what we would rather not will." [81] "Outside force"—external causation, not internal: that which can be ascertained objectively. By requiring proof of the provable, *Hunt* has substantially advanced our confession law. However, the decision fails to entirely eliminate uncertainty about our confession law because it clings to bygones. If clarity is among the Law Court's goals, it should abandon terms like "voluntary" confessions and "psychological fact," it should fill in the blanks about the burden of proof, and it must explain the status of *Collins, Rees,* and *Caouette.*

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[1] 2016 ME 172.
[2] *Id.,* ¶ 17. *See also:* ¶ 34: "we clarify today that although the determination of the historical facts. . . ."; ¶ 35: "we also clarify that the degree to which police conduct appears to have motivated the defendant's decision to confess . . . ."; ¶39: "With the clarifications explained above . . . ."
[3] *Id.,* ¶¶ 10. Before they began to question him they read him the *Miranda* warnings. *Id.* ¶ 8.
[4] *Id.,* ¶¶ 10, 2, 8, 4, 5, 6.
[5] *Id.,* at ¶ 7.
[6] *Id.,* at ¶ 12.
[7] *Id.,* at ¶ 42-43.
[8] *Id.,* at ¶ 19, quoting *State v. McConkie,* 2000 ME 158 ¶ 9.
[9] 297 A.2d 620 (Me. 1972).
[10] *Id.* at 626-7, quoting *Lego v. Twomey,* 404 U.S. 477, 491 (1972).
[11] 297 A.2d 620, 627: "[A]s an extra precaution to ensure that the privilege against self-incrimination is being plenarily implemented, [Maine courts] must apply the strict standard that the prosecution establish the legal admissibility of a confession by 'proof beyond a reasonable doubt.'"
[12] 2016 ME 172 ¶ 19.
[13] *Id.* ¶¶ 37, 38.
[14] *United States v. Preston,* 751 F.3d 1008, 1010, 1028 (9th Cir. 2014).
[15] *State v. Swanigan,* 106 P.3d 39, 279 Kan. 18, 39 (Kan. 2005). The quoted language is Justice Gorman's own description of that case, 2016 ME 172 ¶ 38.
[16] *State v. Hoppe,* 661 N.W.2d 407, 414 (Wis. 2003).
[17] The Maine Constitution, Article I, Section 6, provides: "The accused shall not be compelled to furnish or give evidence against himself or herself."
[18] I discuss this in my article, *Common Sense and the Law of "Voluntary" Confessions: An Essay,* 68 Me. L. Rev. 119 (2016), beginning at 151.
[19] *Culombe v. Connecticut,* 367 U.S. 568, 575 (1961).
[20] *Lego v. Twomey*, 404 U.S. 477, 489 (1972): "[W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact, voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary."
[21] 297 A.2d at 627.
[22] After I prepared the text for this article two more mass shootings occurred, one in in Sutherland Springs, Texas, and the other at Parkland, Florida.

For a fuller description of the Warren Court's influence on the nation's judiciary, and of the subsequent rise of concern for victims' rights, *see* my article, *supra* n. 18, beginning at 151.

An additional reason why *Collins* shouldn't control any more is that the historical analysis on which it was based is flawed. Justice Sidney Wernick, who wrote *Collins,* claimed that the constitutional right to silence was created to protect criminal defendants, but it wasn't. It was originally intended to protect witnesses other than the defendant. *See* the same article beginning at p. 154.

[23] *United States v. Janis,* 428 U.S. 433, 448-49 (1976), quoted in *Colorado v. Connelly,* 479 U.S. 157, 166 (1986).

In a footnote, Justice Gorman quotes part of *Collins'* justification for raising the state's burden of proof to beyond a reasonable doubt. 2016 ME 172 ¶ 17 n. 4. She does so to provide the authority for her identification of that standard of proof in the text of the opinion. Her objective is not, however, to consider the worthiness of *Collins* as a whole or of that particular doctrine; in fact, she carefully avoids any explicit discussion of either. *See* the text following n. 12, *supra*. It's that avoidance which causes me to suggest that *Collins* may wind up on the Law Court's chopping block in the future.
[24] 2016 ME 172 at ¶ 19, quoting *State v. McConkie,* 2000 ME 158 ¶ 9.
[25] 297 U.S. 278 (1936).
[26] *Id.* at 286: "It would be difficult to conceive of methods more

revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."

[27] Maine's interpretation of criminal due process is identical to the Supreme Court's. *See* n. 58, *infra.*

[28] It is odd that Justice Gorman cites the Fifth Amendment of the U.S. Constitution as grounds for the protection of defendant's rights:

> There is a distinction between those statements that must be excluded pursuant to the Fifth Amendment because they are the product of compulsion, and those statements that must be excluded because their admission would otherwise create an injustice. . . . Here, because no one has claimed that a confession was "forced" out of Hunt, we examine whether admission of his confession violated his right to due process.

2016 ME 172 ¶ 19. In Maine, confessing defendants enjoy the protection of the Maine Constitution's right to silence. *See* the text following n. 59, *infra.*

[29] *State v. Wiley,* 2013 ME 30 at ¶ 35 (Alexander, J., dissenting), quoting *State v. Lavoie,* 2010 Me 76 ¶ 21. Justice Alexander was dissenting from the majority decision that excluded a confession because the police made false promises of leniency. *See* the further discussion *infra* at n. 42.

[30] 2016 ME 172 at ¶ 43.

[31] Justice Gorman mentions the appearance of reliance also in ¶ 35: "one of the factors to be considered by a court in determining the *legal* question of whether that conduct constituted an improper inducement is the degree to which police conduct appears to have motivated the defendant's decision to confess."

[32] I say "almost" always because there are some cases in which the police do absolutely nothing to induce the defendant to confess. Such a case is *Colorado v. Connelly,* which I discuss in the text below following n. 53.

[33] Some law enforcement agencies have become sophisticated in this extraction process. The Reid Technique "has influenced nearly every aspect of modern police interrogations, from the setup of the interview room to the behavior of detectives." Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?,* The New Yorker, Dec. 29, 2009, http://www.newyorker.com/magazine/2013/12/09/the-interview?.

[34] Here is Justice Gorman's recitation of some of the "relevant circumstances":

> the details of the interrogation; duration of the interrogation; location of the interrogation; whether the interrogation was custodial; the recitation of *Miranda* warnings; the number of officers involved; the persistence of the officers; police trickery; *threats, promises or inducements made to the defendant;* and the defendants age, physical and *mental health, emotional stability,* and conduct.

2016 ME 172 ¶ 22 (italics original). Compare the "relevant circumstances" that apply when courts decide whether a person is in "custody" and therefore entitled to the *Miranda* warnings before interrogation: *State v. Perry,* 2017 ME 74 ¶ 15.

[35] *State v. Wiley,* 2013 ME 30 ¶ 16. *See* the several citations to precedents there.

[36] 2016 ME 172 at ¶ 21, quoting *State v. Mikulewicz,* 462 A.2d 497, 500-1 (1983).

[37] See, e.g., the quotation at n. 2 in the text *supra*.

[38] Implicitly, Justice Gorman also removed the second phrase, "not a product of coercive police conduct," because it's redundant of both the third phrase of the formula and also her due process approach: if the police "coerce" someone to give an inculpatory statement, it would be unfair — intolerable in a justice system committed to due process — to admit the statement into evidence.

[39] For an introduction to this complicated subject, and to its wholly inappropriate use as a legal standard, in my article, *supra* n. 18, at 126-130.

[40] This is from Ernst Lewy, *Responsibility, Free Will, and Ego Psychology,* 42 Int'l J. Psychoanalysis 260, 264 (1961):

> [O]ne of the basic tenets of psycho-analysis [is] that, in the functioning of the mind, everything that happens is strictly determined by what happened before, by "antecedent conditions.". . . The very concept of unconscious drives that determine to a great extent the behavior of man seems to cast doubts on a justification for any assumption that man is capable of making free decisions.

[41] I've listed some psychiatric conditions described in that tome and that interfere with our behavior in the same article, *supra* n. 18, at 124-26. If any proof of the existence of free will ever be found, it will probably emerge from science. *See* the article, *supra* n. 18, at 126.

[42] What usually happens is that, instead of reading the defendants' minds, the judges read their own minds. Consider *State v. Wiley,* 213 ME 30, in which Justice Jon Levy threw out a confession the defendant made after the police falsely offered him leniency. Justice Levy summed it up: "We would need to disregard both experience and common sense to conclude that [the false promises by the police were] not the primary motivating force for the ensuing confession." *Id.* at ¶ 30. Justice Levy had no way of knowing whether the defendant had exercised common sense. All Justice Levy knew was what *his own* experience and common sense told him.

[43] 2016 ME 172 ¶ 12.

[44] Some will argue that the doctrine of the voluntary confession is designed to protect the defendant's freedom of choice. You can't bullwhip people, or threaten them, or deceive them into confessing, because you want them to decide if they want to confess or not.

So far so good. The problem comes when jurists pretend they enjoy insight into the defendant's mental processes. There are three reasons why we want to avoid that pretense.

First, determining whether someone has decided to do something "freely" is, as I've explained, hopeless. Constitutional protections must not rest on quicksand.

Second, when the admissibility of a confession depends on the guesswork of a judge nobody gains. The objective analysis of the nature of interrogations better informs police what's permissible and what's not, and thereby better protects defendants from intolerable interrogation practices. As difficult as it may be to define what a fair interrogation method is, objectivity beats subjectivity every time.

Third, basing suppression decisions on demonstrable evidence maintains the judiciary's credibility.

Curious about whether anyone actually *can* read someone else's mind, I researched the subject of telepathy and discovered something called "empathic inference," which I discussed in my article, *supra* n. 18, beginning at 137.

[45] *See* the text accompanying n. 13 *et seq*.

[46] *Miranda v. Arizona,* 384 U.S. 436 (1966) sought to protect defendants' Fifth Amendment rights during custodial interrogations. In doing so, the Court emphasized the "compulsion inherent in custodial surroundings." *Id.* at 458. In this respect, the decision necessarily involves due process concerns.

[47] *See* the further discussion of the objectives of confession law in the text *infra* accompanying n. 73.

To be sure, the decisions Justice Gorman relies on claim concern for the defendant's "voluntary" choice, so it is possible to argue that they are inapposite to analyses that are limited to fairness. While such terms as "voluntary" and "voluntariness" are prominent in those decisions, what drives them is the concern for equity.

For an explanation of the role of equity in black letter law, see Duncan Kennedy's article *Form and Substance in Private Law Adjudication,* 89 Harv. L. Rev. 1685 (1976).

[48] 446 A2d 1120 (Me. 1982).

[49] *Id.* at 1121.

[50] *Id.* at 1124.

[51] *Id.*

[52] *Id.* at 1123. The language quoted from *Caouette* text appeared originally in *Culombe v. Connecticut,* 365 U.S. 568, 602 (1961).

[53] 479 U.S. 157.

[54]According to a psychiatrist who examined him, the day before the defendant confessed,

> [he] was following the "voice of God." This voice instructed respondent to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver. When respondent arrived from Boston, God's voice became stronger and told respondent either to confess to the killing or to commit suicide. Reluctantly following the command of the voices, respondent approached Officer Anderson and confessed.

479 U.S. at 161-2.

[55] *People v. Connelly,* 702 P.2d 722, 728 (Colo. 1985).

[56] *Id.* at 729.

[57] 479 U.S. at 165-6, 167. Chief Justice Rehnquist, author of the majority opinion, went on to reject the notion of free will in the specific context of the waiver of the right to silence: "[N]otions of free will . . . have no place there. . . . The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense." *Id.* at 169-170.

[58] *State v. McConkie,* 2000 ME 158, ¶ 10 n. 5: "This Court has long adhered to the principle that the Maine Constitution and the Constitution of the United States are declarative of identical concepts of due process." (Citations omitted.)

[59] 2000 ME 55. The Law Court sustained the trial court's ruling that, "[a]s the record clearly indicates that the Defendant suffers from dementia, the court cannot conclude, beyond a reasonable doubt, that his statements to law enforcement officers were the product of the free exercise of his will and rational intellect."

[60] *Id.* ¶ 2. The suppression of a confession is an issue of constitutional law. The exclusion at trial of the confession of a person with dementia, for example because the confession is unreliable, is an issue of evidentiary doctrine. M.R.Evid. 401. *Connelly* speaks to this issue, 479 U.S. at 166-7:

> Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence . . . . A statement rendered by one in the condition of the respondent might be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.

[61] The trial court held, and the Law Court did not dispute, that "this ruling makes no finding of improper or incorrect conduct upon the part of the investigating officers." *Id.*

[62] 2000 ME 55 ¶ 5 (citations omitted).

[63] Since *Hunt* appeared, and as of this writing, the Law Court has issued three more decisions that deal with the admissibility of confessions that followed threats or promises of leniency.

In *State v. McNaughton*, 2017 ME 173, the defendant sought to exclude his confession because the police offered promises of leniency. Employing *Hunt's* totality of the circumstances as well as the obligatory reference to voluntariness, the court held:

> [T]he detectives made no specific suggestions or promises about how the process of prosecution or sentencing would be better for McNaughton if he confessed to the murder. Instead of offering a "concrete

> promise of leniency" . . . they explained "mitigating factors" only in the abstract. We conclude that the court made no error in weighing the totality of the circumstances and determining that McNaughton made the incriminating statements at issue voluntarily.

2017 ME. 173, ¶ 37 (citation omitted).

In *State v. Seamon*, 2017 ME 123, the defendant sought to suppress the confession on the grounds that the police officer interviewing him had been friendly, that he wasn't feeling well at the time, and that he was a "people-pleaser." *Id.,* ¶¶ 20, 21. The court dismissed the first claim out of hand, and using the totality of the circumstances test to address the second and third found no impropriety.

Most recently, in *State v. Annis*, 2018 ME 15, the defendant argued that confession should have been suppressed because his case was just like Hunt: the police made threats and/or promises and he suffered from a mental disability. The Law Court disagreed. First, what the investigator told the defendant was that "it would make the situation one hundred times worse 'if . . . all you hear is denial, and people look at this and say that this person is not willing to take responsibility, he is a danger.'" *Id*., ¶ 15. That statement, the court decided, was a "vague and generalized statement" and didn't amount to an impermissible threat or promise of leniency. Second, unlike in *Hunt*, "'[t]here was no evidence . . . that if the Defendant did in fact have any mental health issues, they played any role in the Defendant speaking with the officers.'" *Id.*, ¶ 16 (quoting the trial court's decision).

Annis does provoke this question: which party has the responsibility to raise the issue of the defendant's "mental health issues," and how is it done? Does it entail the same process as an affirmative defense to the charge of a substantive offense? Or does the spirit of *Collins* control, placing the heaviest of burdens on the prosecution and none on the defense?

[64] They're also synonymous with "motion to suppress denied," but since propriety dictates that a motion to suppress should be formally granted or denied, I don't propose that a judge's order should conclude simply by declaring that a confession is admissible or inadmissible.

[65] 2016 ME 172 at ¶ 32, citing *State v. Coombs,* 1998 ME 1, ¶ 9, and quoting *Miller v. Fenton,* 474 U.S. 104, 115-16 (1985).

[66] 2016 ME 172 ¶¶ 32, 34

[67] One assumes that, since a court must find "voluntariness" beyond a reasonable doubt (*id.* n. 2), the court must find the facts supporting that conclusion by the same standard.

[68] The standard of deference is clear error. 2016 ME 172 ¶ 16.

[69] *Id.* ¶ 34.

[70] *State v. Tardiff,* 374 A.2d 598, 600 (Me. 1977), *citing State v. Collins,* 297 A.2d 620, 636 (Me. 1972). If *Tardiff* and *Collins* are no longer controlling, one would expect them to have been overruled, but by merely "clarifying" the law Justice Gorman stops short of overruling anything, thus generating grist for uncertainty's mill.

[71] If one were to apply Justice Gorman's prescription to search and seizure law, once a warrantless search is deemed "reasonable," a court should then determine the legal "fact" that the evidence is "proper," before declaring it admissible.

[72] It will be interesting to see whether a trial court's order finding the facts and moving directly to admissibility, without mentioning the "psychological fact," gets reversed for that omission. In the Law Court's three decisions since *Hunt*, *see supra* n. 63, the Law Court made no reference to "psychological fact" and neither, apparently, did the trial court. However, that omission was not the basis for either appeal.

[73] 404 U.S. 477 (1972).

[74] *Id.* at 489. The Court permitted state courts to increase the burden under their own constitutions—hence, *Collins. Twomey,* 404 U.S. at 489; *Collins,* 297 A.2d at 626.

[75] Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test,* 114 Mich. L. Rev. 1, 23 (2015):

> [T]here are two different strands of voluntariness doctrine, each of which is animated by different values.
>
> The first strand of voluntariness is concerned with police actions that are judged to be inherently bad, regardless of the effects that those have on suspects. The second concerns police actions that are bad because they tend to cause suspects to give unreliable confessions.

[76] *Id.* at 28.

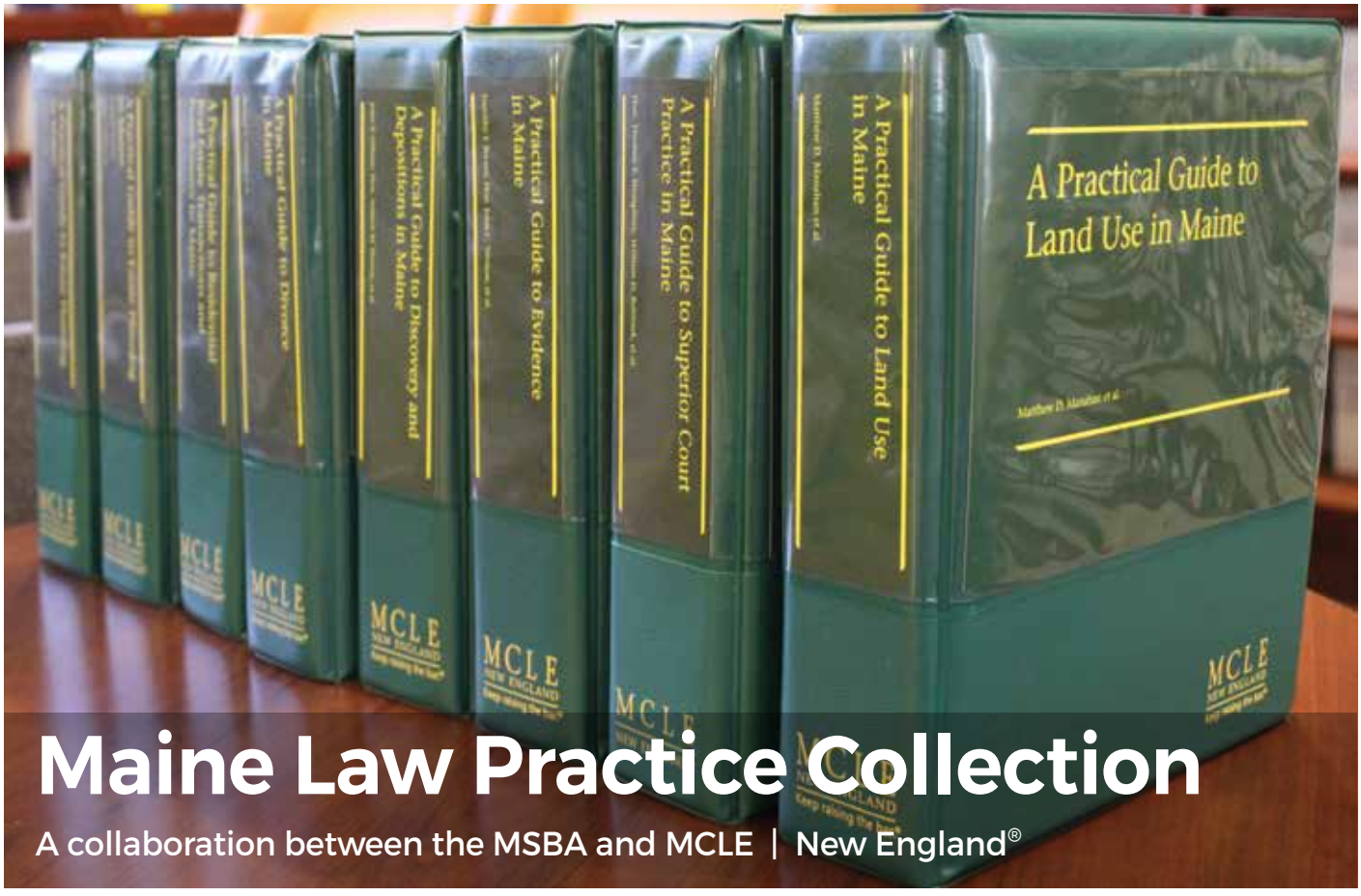
[77] 404 U.S. at 488-89.

[78] By implicitly adopting *Connelly's* due process analysis, the Law Court puts us in the position of also adopting its position on the burden of proof: "We have previously cautioned against expanding currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries." 479 U.S. at 166, citing *Twomey*, 404 U.S. at 488-89.

[79] The same issue arose in the court's 2013 decision *State v. Wiley*, *supra* n. 42. Justice Levy said, "We would need to disregard both experience and common sense to conclude that [the false promises by the police were] not the primary motivating force for the ensuing confession." 2013 ME 30, ¶ 30. How "primary" must the motivating force be?

[80] *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (citations omitted).

[81] Bertrand Russell, *Dictionary of Mind, Matter and Morals*, Open Road Media, "Free Will."



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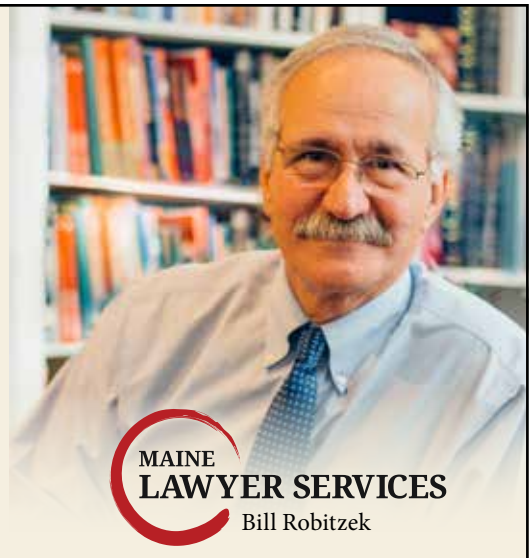

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Perry v. Dean: A Catalyst for Removing DHHS as Public Guardian

By Bruce A. McGlauflin

In March 2017, the Law Court held that the Department of Health and Human Services (the Department) is immune from breach of fiduciary duty claims in its role as public guardian.[1] There is no remedy for the protected person harmed by the breach, because, as a public agency, the Department enjoys sovereign immunity.[2] Pursuant to *Perry v. Dean,* Maine law now permits a public guardian to act with impunity when it causes harm to a protected person by abusing, neglecting, or otherwise breaching a fiduciary duty owed to the person. Even the most insensitive souls among us might agree that basic principles of fairness and justice should compel us to consider reforming this aspect of Maine law.

While one solution may be a waiver, or limited waiver, of sovereign immunity, allowing a protected person to sue the Department, this article argues that the solution should instead focus on preventing harm, not compensating for it. The presenting issue in *Perry* was the lack of a remedy, but the best response to *Perry* is to prevent future harm by removing the Department as public guardian. A careful review of Maine's public guardianship system will show that having the Department serve in that role poses significant risks of harm on a regular basis due to a systemic conflict of interest, and that the appointment of an independent entity as public guardian would not only provide greater protection for vulnerable wards, but also avoid the inevitable litigation costs associated with waiving sovereign immunity.

Removing the Department as the public guardian is not a new idea. In 2011, the 125th Legislature enacted Resolve, Chapter 80, entitled *To Develop a Plan To Improve Public Guardianship Services to Adults with Cognitive Disabilities*.[3] The Resolve directed the Maine Developmental Disabilities Council (the Council) to work with a stakeholder group to develop a plan "to separate the service coordination for individuals with cognitive disabilities function from the public guardianship function" and to recommend "the model the group determines is the most appropriate for implementation in this State."[4] The Council issued a report to the Maine Legislature's Joint Standing Committee on Health and Human Services, recommending that the Department take certain steps toward the goal of transferring its public guardianship responsibilities to an independent entity, subject to independent oversight.[5] This author has been unable to discover any action taken to implement the Council's recommendation that steps be taken to transfer responsibility to an independent entity. This article contends that the Department's conflicts pose real harm on a regular basis and that the lack of any remedy announced in *Perry* should reignite the debate for reform.

The Maine Probate Code currently provides that the Department shall be appointed as the public guardian or conservator for incapacitated adults in need of protective services whenever there is no suitable private guardian or private conservator available.[6] For simplicity, this article uses the term guardianship to encompass both guardianships and conservatorships, as the legal principles and issues discussed relate equally to both. The Department's authority as public guardian is exercised by its Commissioner, or her designee.[7] As guardian, the Department has the power and duty to make personal and property decisions for the individual being protected. Because the Department also provides essential services to most of the individuals under public guardianship, an inherent conflict of interest arises. While this article focuses on the conflicts related to Department programs that serve people with intellectual disabilities, similar issues arise in other Department service programs that serve the elderly and the mentally ill.

Many Maine politicians and human services administrators readily acknowledge, and frequently remind us, that adults with intellectual disabilities are among the most vulnerable of Maine's citizens.[8] Often, intellectual disabilities limit one's capacity to make competent decisions necessitating the appointment of a guardian or conservator by the Probate Courts. The vulnerability of a person with intellectual

disabilities is heightened when there is no family member, friend, or other caring individual willing to serve as guardian or conservator. The only option available in that circumstance in Maine is to have the Department appointed to make decisions and advocate for the person's best interest. The Department is currently the public guardian and/or public conservator for 627 adults with intellectual disabilities or autism.[9]

A guardian, including the Department as public guardian, generally has the same powers and duties of a parent.[10] Unless otherwise ordered by the court, the Department is entitled to custody of the person and may establish the person's place of abode;[11] it is obligated to arrange for the "care, comfort and maintenance of his ward and, whenever appropriate, arrange for his training and education";[12] and it has authority to make health care decisions for the ward.[13]

The duties of a guardian are governed by general common law and equitable principles as well as the Maine Probate Code.[14] The common law rule that "a guardian stands in a fiduciary relationship to his ward" was not abrogated by the adoption of the Probate Code.[15] "[T]he general rule [is] that a guardian may not have interests that conflict with those of the ward."[16] A guardian owes undivided loyalty to a ward such that his "obligation not to place his own interests before those of the ward is paramount."[17] If a guardian "brings his interests in conflict with those of his ward, he should be discharged."[18] Any transaction affected by a substantial conflict of interest is voidable unless the transaction is approved by the court.[19] These principles apply equally to public guardians and private guardians.[20]

In other words, the Department has the duty and obligation to act in, and advocate for, the protected person's best interest in all aspects of the person's life, and to have undivided loyalty in performing these duties. It is impossible, however, for the Department to serve a protected person with undivided loyalty while also managing the programs that provide services to the person. Virtually all individuals with intellectual disabilities under public guardianship receive a variety of services through Department programs, either in an institutional or community setting.[21] The services are necessary and essential to maintaining basic quality of life conditions; they include personal care and support, medical care, protective services, and training and education when appropriate.[22] Some of the services are mandated by federal Medicaid law[23] or Maine law.[24]

While the Department is obligated by law to provide services to these individuals, it is also fiscally responsible to the Governor, the legislature, and federal Medicaid agencies to manage the programs efficiently, and its ability to provide the

services is limited by legislative and administrative budgetary decisions. Conflicts arise whenever there is an issue related to eligibility, or the adequacy of services and supports, or the infringement of a protected person's rights within the service delivery system. As guardian, the Department has a duty to advocate for its ward to obtain the best services possible, but as the administrative agency funding the services, it is subject to budgetary and other public policy dictates that cause it to deny, limit, or restrict those services. The Department is placed in a structurally untenable situation; it cannot serve both masters and only one master has the power and leverage to determine the scope of services and supports to be provided. Every decision that the Department makes that adversely affects a protected person and financially benefits the state is a conflict-of-interest transaction.

Political and administrative realities dictate that the Department must at times manage its fiscal obligations by limiting or denying services to eligible individuals.[25] The individuals affected necessarily include some of those to whom the Department owes fiduciary duties as public guardian. This creates a systemic disqualifying conflict of interest. The Department's fiscal obligations and program management decisions cannot be squared with its fiduciary obligations to its public wards.

The legislature has recognized that a person with a financial interest related to the delivery of services to a ward must be disqualified from serving as a guardian; the Probate Code prohibits the appointment of persons who have "a substantial financial interest in a facility or institution licensed" as a hospital, nursing home, or residential care facility.[26] The Law Court has also recognized this irreconcilable conflict between having a financial interest in the delivery of care and having a duty to advocate for the best interest of a person. In *Estate of Peter C.*, a guardian was the administrator and the sister of a co-owner of the children's home where the protected person lived. The Court held that the guardian must be removed because "her loyalties [were] divided," and noted:

> Were a question to arise about the propriety of any aspect of Peter's care or education, his guardian would be required to act in his interest alone. If [Peter's guardian] was influenced by her family and employment ties, who would speak for Peter? It is not enough to say that she must resolve any conflict in favor of her ward. A fiduciary should not be in that position. [27]

This principle requires the same result when the Department and its employees act as a guardian of a person served by Department programs.

In order to protect the person's best interests, a guardian must advocate on behalf of the person and is specifically authorized to "[i]nstitute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty."[28] A case worker or other Department employee, acting as public guardian designee, cannot advocate for the protected person's best interests, uninfluenced by the interests of his or her employer, without fear of direct or indirect retaliation in the workplace. Based on many years of advocacy work on behalf of persons with intellectual disabilities, it is this author's observation that the Department does not engage in advocacy in its capacity as public guardian on behalf of protected persons whose services are inadequate. It does not appear to join the voices of private guardians at administrative and legislative hearings to complain about Department actions that may adversely affect adults with intellectual disabilities. It is not likely to file grievances against itself when services are denied or become inadequate to meet the needs of its protected person, or to bring suit against itself.

The systemic failure of the Department to provide the most basic protection and advocacy for people with intellectual disabilities in Maine has been recently documented in the report issued by the Office of Inspector General for the U.S. Department of Health and Human Services.[29] The report found extensive non-compliance by the Department with basic Medicaid and state law requirements for responding to critical incidents in the lives of people with intellectual disabilities receiving services from the Department.[30] The report provides compelling evidence that the Department has failed on a regular basis to investigate and address critical incidents, including abuse, neglect, rights violations, and even death.[31] The report does not specify whether the Department was the public guardian in any of the uninvestigated or unaddressed incidents.

The absence of any meaningful advocacy by the Department as public guardian is particularly problematic because the Department has also failed to provide statutorily mandated independent advocacy services. The Department is required to contract with the agency designated as the protection and advocacy agency for persons with disabilities[32] to provide advocacy services for all adults with intellectual disabilities.[33] That agency is Disability Rights Maine (the Agency). The advocacy services contracted to the Agency include taking actions to protect the rights of individuals with intellectual disabilities or autism, "except that the agency may refuse to take action on any complaint that it considers to be trivial, to be moot or to lack merit or for which there is clearly another remedy available."[34] The Agency has a conflict of interest policy by which it declines to advocate for someone whose complaint seeks funding or services that other Agency

clients may also seek or need, an exception not authorized by the statute.[35] The Department's failure to provide alternate advocacy services to fill this gap violates the statutory mandate.

The Department's performance as public guardian also violates Medicaid law, which requires "clear conflict-of-interest guidelines for all planning participants" in the person-centered planning process, which is used to develop service plans for Medicaid recipients with intellectual disabilities.[36] A guardian serves a critical role in the personal planning process.[37] With its inherent conflict of interest, the Department, as public guardian, should either be disqualified from participating, or at a minimum, comply with very strict conflict of interest guidelines. This author has been unable to find any such Department guidelines, policies, or regulations.

Conclusion

The *Perry* decision should draw attention to the Department's role as public guardian. A careful review of that role sheds light on the very real and potential harm created by the Department's systemic conflicts of interest inherent in its public guardianship role. The law pronounced in *Perry* is that the most vulnerable of our citizens must bear the burden of these harms without remedy or recourse. This untenable circumstance can be best corrected by amending the Probate Code to replace the Department as the designated public guardian with a truly independent public guardianship program.

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[1] *Perry v. Dean*, 2017 ME 35, ¶ 1, 156 A.3d 742.
[2] *Id.* ¶ 27.
[3] Resolves 2011, ch. 80.
[4] *Id.*
[5] Me. Developmental Disabilities Council, Report of the Work Group Pursuant to Resolve, Chapter 80, To Develop a Plan to Improve Public Guardianship Services to Adults with Cognitive Disabilities (2012).
[6] 18-A M.R.S.A. §§ 5-601(b), 5-602 (2012 & Supp. 2017).
[7] 18-A M.R.S.A. § 5-606(b) (2012 & Supp. 2017).
[8] Editorial, *Our View: Maine's 'Most Vulnerable' Citizens Are Failed Again*, Portland Press Herald, Aug. 13, 2017", http://www.pressherald.com/2017/08/13/our-view-maines-most-vulnerable-citizens-are-failed-again/ ("Mainers with intellectual and developmental disabilities . . . along with seniors . . . are the residents mentioned at every turn by LePage administration officials to justify cutting Medicaid rolls and other services—they are the 'most vulnerable' for whom state funding in other areas must be sacrificed.").
[9] Me. Dep't of Health & Human Servs., Office of Aging & Disability Servs., Biennial Plan for Services to Adults with Intellectual Disabilities or Autism 2017-2018 (2017). In a previous biennium, the Department reported being public guardian for 647 individuals. Me. Dep't of Health & Human Servs., Office of Aging & Disability Servs., Biennial Plan for Services to Adults with Intellectual Disabilities or Autism 2013-2014. (2013).
[10] 18-A M.R.S.A. § 5-312(a) (2012).
[11] *Id.* § 5-312(a)(1).
[12] *Id.* § 5-312(a)(2).
[13] *Id.* § 5-312(a)(3).
[14] 18-A M.R.S.A. § 1-103 (2012).
[15] *Estate of Peter C.*, 488 A.2d 468, 470 (Me. 1985).
[16] *Id.* at 471.
[17] *Id.*
[18] *Id.*
[19] 18-A M.R.S.A. § 5-422 (2012).
[20] 18-A M.R.S.A. §§ 5-601(c), 5-607 (2012 & Supp. 2017).
[21] 34-B M.R.S.A. § 5003-A(2)(C) (2010 & Supp. 2017) (providing that the Department must "[p]rovide programs, insofar as resources permit, for appropriate services and supports to persons with intellectual disabilities or autism regardless of age, severity of need or ability to pay").
[22] 34-B M.R.S.A. §§ 5001(6), 5201(4), (6), 5206 (2010 & Supp. 2017).
[23] 42 U.S.C. §§ 1396-1396w-5; 42 C.F.R. §§ 430-456 (2016) (mandating long-term care to eligible individuals in an institutional setting—skilled nursing facility, intermediate care nursing facility, or an intermediate care facility for intellectual disability ("ICF/ID")). Medicaid law does not mandate community-based services, but it does authorize such services in so-called "waiver" programs, which themselves have mandatory requirements. 42 U.S.C. § 1396n(c)(2010); 42 C.F.R. §§ 441.300-441.310 (2016).
[24] 34-B M.R.S.A. §§ 5001-5611 (2010 & Supp. 2017).
[25] Corlyn Voorhees, *After a Decade of Funding Cuts, Dozens of Homes for Maine People with Disabilities Are Shutting Down*, Bangor Daily News, June 22, 2017, http://www.bangordailynews.com/2017/06/22/news/after-a-decade-of-funding-cuts-dozens-of-homes-for-maine-people-with-disabilities-are-shutting-down/ (reporting on years of funding reductions for services to persons with intellectual disabilities).
[26] 18-A M.R.S.A. § 5-311(c) (2012).

[27] *Estate of Peter C.*, 488 A.2d at 471.
[28] 18-A M.R.S.A. § 5-312(a)(4)(i) (2012).
[29] U.S. Dep't of Health & Human Servs., Office of Inspector Gen., A-01-16-0001, Maine Did Not Comply with Federal and State Requirements for Critical Incidents Involving Medicaid Beneficiaries with Developmental Disabilities (2017).
[30] *Id.* at 4-5.
[31] *Id.* at 10-21. "Therefore, the State agency failed to demonstrate that it has a system to ensure the health, welfare, and safety of the 2,640 Medicaid beneficiaries with developmental disabilities covered by the Medicaid waiver in accordance with 42 CFR 441.302(a)." *Id.* at 21-22.
[32] 5 M.R.S.A. § 19502 (2013).
[33] 34-B M.R.S.A. § 5005-A (Supp. 2017).
[34] *Id.* § 5005-A(2)(C). After the Department began contracting with the Agency, it obtained a revision to the advocacy statute removing language that directed the Agency to "[a] ssist individuals with intellectual disabilities or autism in any hearing or grievance proceeding pertaining to their rights and dignity," replacing this with discretionary language stating that the Agency "may" pursue legal remedies to protect the rights of individuals with intellectual disabilities. P.L. 2013, ch. 310, § 2.
[35] Eric Russell, *Maine Man Evicted for Using Pot to Calm His Seizures Now Calls Hospital Home*, Portland Press Herald, Sept. 24, 2017, http://www.pressherald.com/2017/09/24/a-maine-patients-ordeal-waiting-for-placement/ (reporting that the family of a disabled man "reached out to Disability Rights Maine, the group established to advocate for individuals like [him], but were told nothing could be done . . . because of a conflict of interest"). Over the past few years, this author has received inquiries from several individuals needing advocacy services who reported that the Agency was unable to assist due to this conflict of interest policy. The unfortunate irony is that the Department ignores conflict of interest principles thereby failing to advocate for the person, and the Agency punctiliously adheres to conflict principles thereby failing to advocate for the person.
[36] 42 C.F.R. § 441.301(c)(1)(v) (2016).
[37] 34-B M.R.S.A. § 5470-B(2)(D) (2010 & Supp. 2017).

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The National Highway Traffic Safety Administration (NHTSA) has set standards that car manufacturers must meet to receive a crashworthiness rating for different types of crashes. Vehicles are tested for their performance in frontal collisions, side-impact crashes, and rear-impact crashes. Crashworthiness cases typically involve injuries that are sustained as a result of a safety defect in a vehicle.

Manufacturers have a duty to build vehicles with structures, restraint systems, and interior surfaces that give the occupants reasonable protection in the event of a collision. However, sometimes the design and manufacturing systems for a vehicle are not sufficient to provide reasonable protection to the occupants which can cause serious injury or even death.

In crashworthiness cases, the cause of the accident is not considered as important as the "second collision" - the one in which passengers collide with the interior of the vehicle and internal organs contact the musculoskeletal systems. To avoid second collisions, car manufacturers have designed a number of safety features including air bags, seat belts, roll bars, and headrests. All are designed to minimize injury and the risk of fire, as well as prevent ejection from the vehicle.

There are five principles of crashworthiness:

- Maintain survival space
- Provide proper restraint
- Prevent ejection
- Channel and distribute injurious crash forces
- Prevent post-crash fires

During a collision, a vehicle's occupants are subject to a number of forces that can result in injury, including rapid deceleration and rapid acceleration. An effective crashworthy vehicle design will distribute these forces over as great a period of time and distance as possible, including directing them to parts of the body that are more capable of withstanding them.

There are three types of product defects that can lead to injury:

- Manufacturing defects - injury occurs when there is a flaw in the manufacturing process. For example, failure of an air bag to deploy, side structure weakness or failure, insufficient side impact protection safety, inadequate safety cage, seat belt failure, seat back failure/collapse, tire defect.
- Design defects - injury occurs when a vehicle is unsafe because of the manufacturer's design. For example, a fuel tank placed in a location that makes it likely to explode upon impact.
- Failure to warn - injury occurs when the manufacturer is aware of a dangerous aspect of a vehicle but fails to warn or provide adequate warning to consumers.

Injuries caused by a vehicle's crashworthiness are considered (and can be compensated) apart from the injuries that were caused by the accident itself. This distinction can be difficult when the time comes to prove your injuries and their causes, especially medical proof of an enhanced injury that could have been avoided if the vehicle had been crashworthy.

In order to recover in a claim based on a motor vehicle's crashworthiness, your client likely needs to show that a design feature that was reasonably avoidable either caused an injury in an automobile accident, or increased the risk of that injury. One of the most effective ways to establish this is to show that a safety device was available, and that such a device could have and should have been used. An experienced product liability attorney will consider all legal options in your client's case, and will enlist the help of expert vehicle design and safety consultants in order to ensure that your client's right to compensation for their injuries is fully protected.

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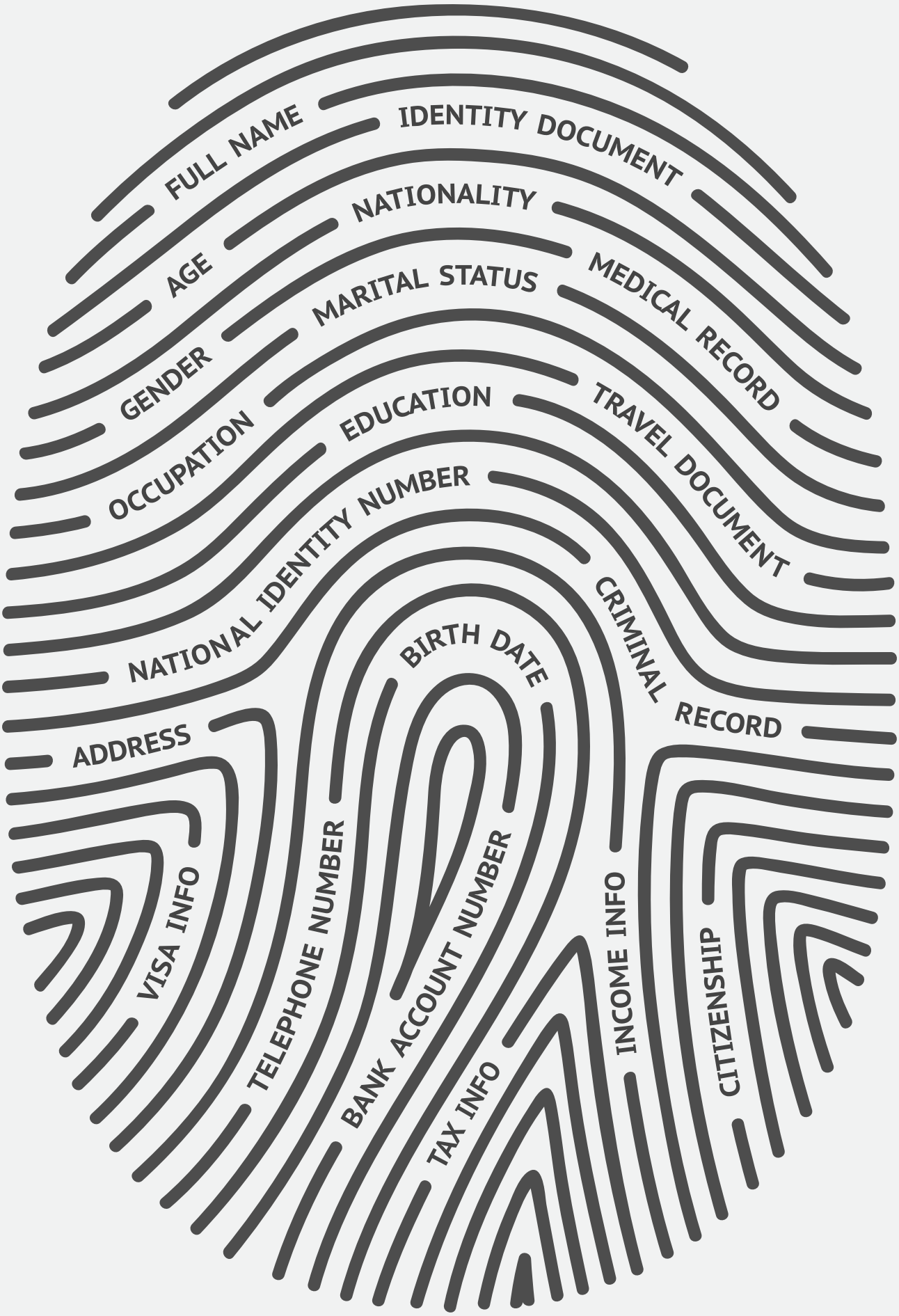
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Why Study Privacy Law?

By Peter J. Guffin

As a professor teaching privacy law, I'm often asked by students why they should study this subject. And as a practitioner specializing in privacy law, I'm likewise frequently asked by lawyers, including my colleagues in my law firm, why they should devote time learning about privacy.

For the most part my answer is the same, although the specifics vary depending on the interests of the particular individual. The reasons I give for studying privacy law, formed by my own observations and experience in this field over the years, are multifaceted and generally fall into two broad categories: practical and altruistic. While each reason is worthy of consideration in its own right, when considered together these reasons make a compelling case for lawyers and law students to learn about this area of law.

In this essay I endeavor to explain some of the major reasons for learning about privacy law, starting with the most practical ones. First, there is a growing demand for legal services in the privacy field, both in government and the private sector, in the U.S. and abroad. According to the International Association of Privacy Professionals (IAPP), for those individuals entering the privacy profession, which is still relatively new, the most common background by far is law (35 percent). And those coming to privacy from the legal field tend to make the highest salaries – a median of $141,600.

Additionally, IAPP estimates that 75,000 Data Protection Officers (DPOs) will be needed globally due to the European Union's recently enacted General Data Protection Regulation (GDPR) which goes into effect in May 2018; many of them will be lawyers. IAPP now has over 35,000 members, up more than 10,000 from just over a year ago. About 40 percent of its members are lawyers.

Anecdotally, a number of privacy lawyers in the European Union have told me that they have had to turn away business and clients as a result of being too overstretched helping other clients with regulatory compliance under the GDPR. Put simply, there are good job opportunities for lawyers who have knowledge and skills in this area.

Even if one is not interested in specializing in privacy law, however, there is another practical reason for learning about this subject. Privacy law touches nearly all aspects of general law practice today. This should not come as a surprise to anyone, given the rapid pace of development in information technology and its deployment by governments and businesses across the globe, coupled with the explosion of new data protection laws and regulations that have been enacted over the last several decades in the United States and abroad. Personal data, stored as bits on servers, is the fuel that drives the economic engine. It is said that the only companies that have to worry about specific privacy and information security requirements are those companies that have customers and/or employees. Well, this means just about everyone, for just about all personal data!

The extent of privacy law's reach into general law practice today can be seen just by looking at the nature and breadth of the topics covered in my introductory information privacy law course, which include: Privacy Torts, Fair Information Practices Principles, Health Information, International Frameworks, Financial Information, FTC Enforcement, Law Enforcement (4th Amendment and Electronic Communications Privacy Act), Government Records (FOIA and Privacy Act of 1974), National Security, Big Data, Marketing and Behavioral Advertising, Social Networking, Children's Privacy, State Attorneys General Enforcement, Information Security, Data Breach Notification, Workplace Privacy, Lawyers and Cybersecurity – Legal Ethics and Beyond, Genetic Information, GDPR and EU-U.S. Privacy Shield framework, and Practical Obscurity and Court Records.

Whatever the nature of their practice, lawyers inevitably will en-

counter privacy law issues. This is true for lawyers in every type of practice, from rural lawyers who deal with a wide variety of issues involving individuals and small businesses, to city lawyers who represent mostly large businesses. Whether their practice involves business and commercial transactions, M&A, health care, financial services, employment and labor, immigration, insurance, civil litigation, criminal justice, education, government, intellectual property, technology, or family and domestic matters, to name just a few – privacy law issues abound in each of these areas and lawyers need to be able to recognize these issues and know when to seek additional expertise.

My own experience at my law firm bears this out. I'm regularly called upon by my colleagues in different practice areas across my firm to provide a diverse range of firm clients – representing just about all major sectors of the economy – with advice and assistance on different privacy law matters. It might be assisting an organization with navigating its regulatory compliance obligations under one of the many privacy law regimes or assisting a business with privacy and data security due diligence and risk analysis in an M&A transaction. Or assisting an organization with vendor due diligence in an IT outsourcing or technology procurement matter. Or advising a U.S.-based organization with respect to compliance with the GDPR and cross-border transfer issues, including self-certification under the EU-U.S. Privacy Shield framework. Or advising and assisting a client that has been the victim of a malicious hacking incident. The list of examples goes on and on.

The Rules of Professional Conduct are yet another practical reason to learn about privacy law. To fulfill our ethical and legal obligations to protect client confidential information from unauthorized disclosure, we as lawyers must now possess a certain level of competence in the areas of privacy and cyber security, regardless of the nature of our law practice. The need for lawyers to become more knowledgeable about these subjects is driven in large part by the law profession's increasing embrace of new and various technologies designed to improve productivity and efficiency in the delivery of legal services and the concomitant risks of the use of such technologies. It's also driven by the ever-increasing use of social media and reliance on digital records in all business and government sectors.

By way of illustration, on the subject of securing communication of protected client information, in its Formal Opinion 477 issued in May 2017, the ABA advises that "[a] lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct *where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."* (Emphasis added.) As lawyers, we need to learn how to protect client information in this new technological world. Determining what constitutes "reasonable efforts" requires an analytical framework that includes factors such as the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, cost of employing additional safeguards, and difficultly of implementing the safeguards. Such frameworks are familiar territory for privacy lawyers and can be useful to help inform attorneys as to their ethical obligations.

Maine Ethics Opinion #207 issued in 2013 similarly addresses the obligations of Maine attorneys who wish to use cloud computing and storage on client matters, advising lawyers in some technical detail about the types of privacy and data security safeguards that they must put in place to ensure that the attorney's use of this technology does not result in the violation of any of the attorney's obligations under the various Maine Rules of Professional Conduct.

In sum, as far as practical reasons go for the study of privacy law, whatever the nature of your law practice, all lawyers inevitably will encounter privacy and data security issues. Having basic knowledge of these subjects is necessary to be able to provide competent advice to clients as well as to meet the lawyer's ethical and legal obligations. Moreover, regardless whether one wants to specialize in privacy law or not, demand for lawyers with information privacy and cyber security skills is strong and growing.

Next we turn to the altruistic reasons, including civic engagement and public service. These arguably are the most compelling reasons for learning about privacy law. Privacy is one of today's most pressing and important societal issues. Every day brings news about some advance in information technology or new threats to our individual and collective privacy interests resulting from the deployment of certain technologies, including social media. These advances include facial recognition software, artificial intelligence, self-driving cars, drones, and personal assistant robots. Some of these developments raise serious civil liberties issues, including concerns about government and private sector surveillance and interference with the election process at the state and national levels. Many raise far-reaching questions about the future of privacy, including difficult questions about how to protect the most vulnerable persons in our society from being victimized. The role of law is central to answering many of these questions.

For example, recent developments in technology have dramatically altered society's conception of citizens' privacy rights and expectations. We see this change being recognized in an increasing

number of recent federal court decisions involving the Fourth Amendment of the U.S. Constitution. Illustrative of this recognition is Justice Sotomayor's concurring opinion in *United States v. Jones*, in which she wrote:

> "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection." (565 U.S. 400, 417 Sotomayor, J., concurring).

The cases remind us of the critical role the courts must play to "keep pace with the inexorable march of technological progress," creating rules that can evolve as technology develops. *United States v. Warshak*, 631 F.3d 266, 285 (6th Cir. 2010) (holding that individuals have a "reasonable expectation of privacy" in their electronic communications). They also remind us of the important constitutional and public policy issues at stake. In *re United States for an Order Authorizing the Release of Historical Cell-Site Info.*, 809 F. Supp. 2d 113, 127 (E.D.N.Y. 2011) (requiring search warrant to obtain historical CSLI records, stating: "While the government's monitoring of our thoughts may be the archetypical Orwellian intrusion, the government's surveillance of our movements over a considerable time period through new technologies, such as the collection of cell-site-location records, without the protections of the Fourth Amendment, puts our country far closer to Oceania than our Constitution permits. It is time that the courts begin to address whether revolutionary changes in technology require changes to existing Fourth Amendment doctrine.")[1]

An example closer to home is the Maine Judicial Branch's planned move to the digital world and putting court records in electronic form, resulting in increased accessibility to the public. Personal information in those records, once protected by the practical difficulties of gaining access to the records, would thus become increasingly less obscure. The question presently facing the Maine court system is what policies and rules to put in place to try to strike the appropriate balance between the twin goals of open access to court records and protection of citizens' privacy rights.

There is a vast difference between digital records which are made available online 24/7 via the internet and paper-based records which are accessible only at the courthouse during regular business hours. In addition to unfettered accessibility, broad and widespread dissemination, and no user accountability, there is a complete loss of control with digital records, such that they effectively become permanently available – the internet never forgets.

The Maine state court system handles many different types of matters and special dockets, which often involve the collection by the courts of very intimate and sensitive personal information of individuals, some of whom are extremely vulnerable. Individuals generally are not in a position to refuse providing this information to the court, so choice is not always an option for individuals. In addition, many of the matters in the Maine state court system, such as divorce, parental rights, parentage, veteran, and domestic violence proceedings, are handled by the parties without representation of counsel.

If appropriate policies and rules are not put in place to protect such personal information by the Maine Judicial Branch, individuals may be at significant risk of potential physical, emotional and other harm, including blackmail, extortion, stalking, bullying, and sexual assault. In addition to privacy rights, other constitutionally protected citizens' rights may be implicated if the court grants online public access to such information without appropriate controls in place.

Unwarranted invasion of privacy should not be the price citizens have to pay to litigate private matters in court. As Justice Brennan once cautioned: "[B]road dissemination by state officials of [sensitive personal] information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests. *Whalen v. Roe*, 429 U.S. 589, 606 (1977) (Brennan J., concurring). As he also presciently observed: "The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology." (Id. at 607)

Similarly, in a case quashing a government subpoena for redacted medical records relating to late-term abortions performed at a hospital, Judge Posner observed:

> "Some of these women will be afraid that when their redacted records are made a part of the trial record in New York, persons of their acquaintance, or skillful "Googlers," sifting the information contained in the medical records concerning each patient's medical and sex history, will put two and two together, "out" the 45 women, and thereby expose them to threats, humiliation, and obloquy. . . . "[W]hether the patients' identities would remain confidential by the exclusion of their names and identifying numbers is questionable at best. The patients' admit and discharge summaries arguably contain histories of the patients' prior and present medical conditions, information that in the cumulative can make the possibility of recognition very high." (*Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004)).

For those who are interested in learning about privacy law for altruistic reasons, there is much work to be done. Whether it be taking on individual *pro bono* matters or volunteering on advisory boards, commissions, or court committees, civic engagement and public service can take many forms. For my part, I have been fortunate to find opportunities to use my knowledge and experience in privacy law by taking on *pro bono* matters, such as advising a government intelligence agency with respect to its privacy practices, counseling an animal welfare organization and its veterinarian members with respect to privacy and data security issues under the state's prescription monitoring program, serving as a member of the Maine Judicial Branch Task Force on Transparency and Privacy of Court Records (TAP),[2] where I have been able to lend my voice to the debate regarding open access and privacy, and volunteering to teach and mentor students, lawyers and others who are interested in learning about privacy law or entering the field.

Public service, the highest calling of those in our profession, can be extremely fulfilling. In addition to the personal satisfaction that comes from being able to help others, lawyers who are involved in public service activities get to work on cutting edge issues. Of course, that is the very nature of public interest work. It is law-reforming, a challenge to the status quo. It also can be fun, intellectually stimulating and richly rewarding.

Finally, I'd like to leave you with this single cautionary note. Whatever your reasons or motivations, if you choose to study and learn about privacy law, be forewarned that the study of privacy can get a hold on you. Privacy issues stand out because of their immense complexity, philosophical, cultural and historical richness, and contemporary relevance. For nearly a decade, the topic of privacy has had a strong hold on me. However, talking from personal experience, it is worth every bit of the adventure.

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[1] Oceania is the setting for the novel "Nineteen Eighty-Four" published in 1949 by English author George Orwell. The adjective *Orwellian* is often used to describe a totalitarian dystopia that is characterized by government control and subjugation of the people.
[2] More information about TAP is available here: http://www.courts.maine.gov/maine_courts/committees/tap/index.html.

Yes, I Know It's a Pain. Do It Anyway.

By Mark Bassingthwaighte

Last fall, I had one of those days. You know, a day where things just don't go as planned. The day started out with a training session on ransomware. Unfortunately, as such programs are apt to do, it made me start to think that selling everything I have, disconnecting from the wired world, and moving to some remote island where I could live out my life selling tapas on the beach might be a really good idea. I suspect more than a few of you might have responded similarly.

What got me going was learning about one of several new ransomware "business models" hackers have come up with. In short, after a computer or network is breached and the data encrypted, some hackers are starting to offer their victims two choices instead of the normal one, which was to pay the ransom amount in order to obtain the decryption key and get their files back. Now the victim can either pay the ransom or they can help spread the ransomware by sharing a malicious link with two people they know. If those two unsuspecting folks become infected and pay the ransom within seven days, then the initial victim would receive the decryption key and be able to recover their files for free. This is troubling, to say the least.

As soon as my training was over, I started going through my email to include reading all the tech stuff I normally review every day trying my best to stay current and informed. Of course, the headlines were what they are on any given day. "Hackers Named Runner-Up for Time Magazine Man of The Year," "Governments and Nation States are Now Officially Training for Cyberwarfare," "The Botnet That Broke the Internet Isn't Going Away," and "Ransomware Now Being Used to Cover Network Intrusions" were just a few of the delightful reads that morning.

Then the phone rang. Seems a couple of lawyers came to work only to discover that their firm had been broken into and three laptops containing all kinds of client information were on the list of items taken. Of course, the first question they asked was what should they do now. It's a legitimate question and one deserving of an answer; but I needed to know more. It was then I learned the laptops were not password protected, were not encrypted and contained no laptop tracking software. With that news, my answer was the only thing that could be done now was to take whatever steps they could to prevent anyone from using the stolen hardware to break into the firm's network. They should also file a claim with their cyber insurance carrier and notify all clients impacted by the theft. Beyond that, everyone was going to have to live with the reality that the data on those laptops was in someone else's hands, and may eventually fall into the hands of a number of others, none of whom will have the firm's or the firm's clients' best interests at heart.

After this call ended, I just sat there shaking my head wondering why these lawyers took no steps to try to prevent access to client and firm data should something unexpected, like a break-in, ever occur. Sadly, I have an inkling. Security experts tell me they see this all the time, which makes me think it goes back to how I responded to my morning training. We live in a crazy cybercrime world and, the crazier it seems to become, the more we all look for ways to escape from it, be it a dream of getting away, denying that something bad will ever happen, or ignoring it because there's nothing anyone can do anyway. While these are normal responses when things seem overwhelming, they can also lead to serious trouble if any particular response prevents someone from taking steps to responsibly deal with the reality of the situation. This is what I believe is behind a failure

of a firm to take proactive steps to secure all its technology. In all seriousness, I've seen it in the eyes of too many. We'll be talking about things like the use of encryption, of strong passwords coupled with password managers, or even the necessity of ongoing cyber security training when the willingness and motivation to do something just seems to disappear.

Look, I really do get it. As the Borg, an alien race in the Star Trek Next Generation TV series, used to say: "Resistance is futile." That line hits home for me when I start to think about cyber security. The news headlines tell us daily that it's a losing effort, so why even try. But we must try. If the lawyers mentioned above had just taken the single and simple step of encrypting the hard drives of those laptops, the difficult and problematic task of notifying all clients of the breach, not to mention the potential long-term fallout of having their own personal identities stolen, could have been avoided entirely.

If you count yourself as one of the folks who believe it won't ever happen to you, feel that ignorance is bliss, believe there's nothing you can do to prevent it (so why bother?), or are just counting the days until the dream of getting away can become a reality, all I can say is this: Yes, becoming cyber secure can be a pain. Do it anyway. Trust me, the headache that comes with being proactive is going to be far less than the one that comes with being a hacker's next victim. Want proof? Look at the impact of the global WannaCry ransomware attack and the far deadlier GoldenEye wiper malware attack that occurred shortly thereafter. (And for those of you unfamiliar with the term wiper malware, a wiper seeks to permanently destroy data. Those attackers don't play the ransom game.) If these two global attacks don't underscore that it's only a matter of time, I don't know what else I can say to try and convince you to take action other than this: Once disaster strikes, call your IT support and see if there's a way to pick up the pieces. Just be sure to sit down before placing that call because you're not going to like what you hear.

ALPS Risk Manager **MARK BASSINGTHWAIGHTE, ESQ.,** *has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. Mark can be contacted at mbass@alpsnet.com.*

Look, I really do get it. As the Borg, an alien race in the Star Trek Next Generation TV series, used to say: "Resistance is futile."

Thank you!

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**Fellows who have made an additional contribution to the Bar Fellows Endowment.*

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The following have made an additional gift of $1,500 or more to support the Bar Fellows Endowment:

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Douglas S. Carr
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ACCESS TO JUSTICE By Mathew Scease

The Bar Fellows: Supporting Access to Justice for All Mainers

It was way back in 1990 that Verrill Dana's Bill Harwood, the president of the then-Maine Bar Foundation, and others suggested that the foundation should create another stream of income to supplement the funds generated by Maine's IOLTA program.

IOLTA (Interest on Lawyers' Trust Accounts) has been a linchpin of legal aid funding in Maine for more than 30 years. In that time, the foundation has distributed more than $26 million in IOLTA funds to Maine's providers of civil legal aid. Those agencies provide free legal assistance to the poor in family law, benefits, immigration, housing and many other areas. They have represented spouses seeking protection from abuse orders, kept thousands of Maine families in their homes, and have made sure countless other Mainers got their day in court.

After research and review of established Fellows Programs at the American Bar Association and in other states, the solution that Bill and others suggested in 1990—a permanent endowment—did indeed come to pass. It happened because of their hard work in establishing the Bar Fellows program—and because so many lawyers have contributed generously as Fellows.

We can now boast a roster of over 400 Bar Fellows, each of whom has made a contribution of $1,500 to the Bar Fellows Endowment. Today the endowment stands at nearly $900,000, providing a significant and stable source of revenue to support legal aid to the poor.

To all those who have given over the years, you have our heartfelt gratitude and appreciation. Thank you. Your Fellows gifts have made a huge difference in the lives of Mainers who would not otherwise have access to the justice system.

The Fellows is an honorary organization of attorneys, judges, law faculty, and legal scholars who have been elected by their peers. They have demonstrated outstanding achievements and dedication to the welfare of their communities and to the highest principles of the legal profession.

Eligibility is reserved for those outstanding lawyers, judges, and teachers of law, licensed to practice or performing equivalent legal work in any jurisdiction for at least 10 years, who have:

- demonstrated an uncompromised dedication to integrity and high personal and professional ethical standards;
- made outstanding and recognized contributions to the legal profession or to the public good; and
- demonstrated a strong commitment to the objectives and purposes of the Maine Justice Foundation.

The Bar Fellows Endowment supplements the Foundation's other funding sources, including the IOLTA program, the Campaign for Justice, the Coffin Fellows program, and funds from the Bank of America settlement, to name just a few.

Our goal is to increase the Fellows endowment to $1 million, and to do so, the Foundation's board recently authorized the creation of a new category: Honorary Life Fellows. We invited those attorneys who have been Bar Fellows for a decade or more to become Honorary Life Fellows by making an additional pledge of $1,500 to the endowment.

Thanks to Bill Harwood's leadership this year, more than 60 attorneys have generously stepped up to become Honorary Life Fellows by "renewing" their initial Bar Fellows contributions.

Another new initiative of the Bar Fellows program is to develop an annual project in which Bar Fellows can take part. We will give the Fellows the opportunity to devote some of their time and energy to creating new projects that address gaps and emerging issues in access to justice. The projects might promote legislative issues relating to access to justice or include researching and reporting on important access to justice issues.

We are grateful to the attorneys below who have made very generous additional commitments to access to justice as Honorary Life Fellows:

Hon. John R. Atwood
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David E. Warren

MATHEW SCEASE *is development director at the Maine Justice Foundation. He can be reached at mscease@justicemaine.org.*

** Patron-level gifts of $5,000 or more.*

A Few Thoughts On The Fellows Program

In this fast-changing world, it is reassuring to see some worthwhile projects carry on and succeed for decades. The Maine Justice Foundation's Fellows Program is certainly one of those projects.

Twenty-six years ago, I had the privilege to help initiate this project to create a fund to support access to justice for all Maine citizens, regardless of wealth or income. At the time we were unsure of its success. Today, with a Fellows Endowment of almost $900,000 created by the generous donations of over 400 Fellows, we can unequivocally call it a huge success!

But the job is not finished. Each year, new attorneys are elected Fellows in recognition of their outstanding contribution to the legal profession, who then donate generously to build the Endowment. And this year, a new category of Honorary Life Fellows has been created to give more senior lawyers even greater recognition and an opportunity to increase their original contribution to the Fellows Endowment. This will help achieve our goal of a $1 million endowment.

The Fellows program is a shining example of the dedication, compassion and generosity of the Maine bar. Thank you. We can all take pride in its success.

BILL HARWOOD *is a partner at Verrill Dana LLP. He can be reached at wharwood@verrilldana.com.*

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IN THE ALTERNATIVE By Jonathan Mermin

Let's Stop Telling Each Other What Summary Judgment Is

I've never understood why lawyers and judges devote so much space in their briefs and opinions to reciting legal standards that lawyers and judges already know. Take the summary judgment standard. As we insist on announcing whenever the issue arises, "A party is entitled to summary judgment when the statements of material fact and referenced evidence establish that there is no genuine issue of material fact and that a party is entitled to a judgment as a matter of law." *In re George Parsons 1907 Trust*, 2017 ME 188, ¶14. Sometimes the announcement goes on for quite a bit longer than that.

Are you still reading? I ask because it's hard not to tune out when someone starts belaboring the obvious. Maybe there's a case to be made for including this basic information in court opinions for the benefit of non-lawyer readers—although I don't get the sense that many court opinions are written with that audience in mind. But there's no reason at all, other than force of habit, to go on about it in a brief.

This used to be just my opinion. But now I have evidence to support it, in the form of a line of Massachusetts cases that, over two decades, have offered a nonsensical variation on the summary judgment standard—that no one appears to have noticed. See if you can spot the problem with this statement of the summary judgment standard by the Massachusetts Supreme Judicial Court (which I now, uncharacteristically, urge you to read):

> Summary judgment shall be granted where there is no material fact in dispute, and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. Where the party moving for summary judgment does not have the burden of proof at trial, this burden may be met by either submitting affirmative evidence that negates an essential element of the opponent's case or by demonstrating that proof of that element is unlikely to be forthcoming at trial. Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact in order to defeat the motion.

SCA Servs. v. Transportation Ins. Co., 419 Mass. 528, 531 (1995) (citations and quotation marks omitted).

One problem, of course, is that in contrast to the Law Court's mercifully concise statement of the obvious, the Massachusetts court lingers on it for well over 100 words (and that's with the citations omitted!). The second problem is in the last sentence: "Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing *the existence of a material fact* in order to defeat the motion." So you can defeat summary judgment by establishing "the existence of a material fact"? That doesn't make any sense. Material facts always exist; the question for summary judgment is whether any of them are *disputed*. If you could defeat summary judgment simply by establishing the existence of a material fact, summary judgment would never be granted.

This mixed-up formulation of the summary judgment standard first appeared in *Jaffe v. Falzone*, 1993 Mass. Super. LEXIS 156, *6. *Jaffe* cited the SJC's decision in *Pederson v. Time, Inc*.—but *Pederson* had gotten the summary judgment standard right:

> If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a *genuine issue of* material fact in order to defeat a motion for summary judgment.

404 Mass. 14, 17 (1989) (emphasis added). *Jaffe* just left out the words "genuine issue of"—as have dozens of subsequent superior court decisions, a few decisions by the Massachusetts Appeals Court, and three decisions by the Supreme Judicial Court. *See SCA* (*supra*); *Doe v. Liberty Mut. Ins. Co*., 423 Mass. 366, 368 (1996); *Drakopoulos v. United States Bank Nat'l Ass'n*, 465 Mass. 775, 778 (2013).

What is the lesson of this line of cases? I submit that the lesson is that no one is reading this stuff—not even the people who are writing it. A judge who was doing anything more than filling space with obligatory boilerplate would not write that the existence of a material fact could defeat summary judgment. And if judges aren't paying attention to the statements of the summary judgment standard in their own opinions, they probably aren't spending much time on the corresponding sections of our briefs.

I suggest that we all just agree that we know what summary judgment is and get on with our arguments.

JONATHAN MERMIN *is Of Counsel at Preti Flaherty. He can be reached at jmermin@preti.com.*

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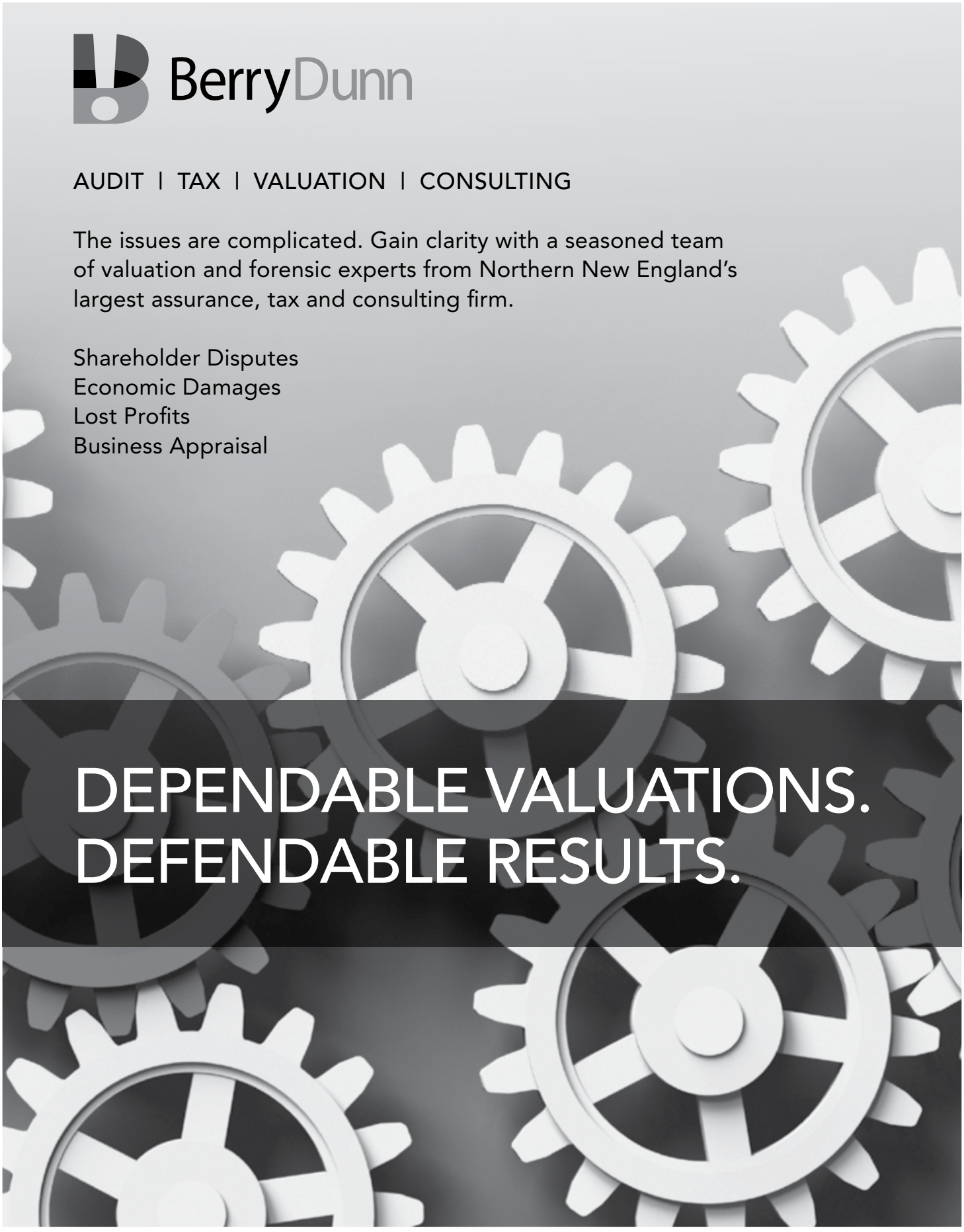
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Texts and Tweets: Can This Writing Be Saved?

In 1953, the *Ladies' Home Journal* began featuring the long-running column, "Can this Marriage be Saved," featuring real-life couples facing serious marital issues.[1] The columns were divided into three parts: first, the wife's view of the problem, followed by the husband's perspective, concluding with a judgment by a counselor from the now defunct American Institute of Family Relations. Sometimes, the marriage was deemed to be unsalvageable. The negatives simply outweighed the positives by too great a margin. Frequently, however, the counselor concluded that the marriage could be saved if the marital partners made some serious changes. Typically, the husband was told to stop flirting with the couple's women friends at parties or curtail his nightly visits to the neighborhood tavern. The wife would be advised to become more amorous or interested in her husband's work or golf game.

Although the advice was loaded with outdated, sexist overtones, the process was a good one. I found myself remembering it as I pondered whether two modern forms of written communication—texting and tweeting—were worth saving and, if so, what changes were warranted to make them more effective.

Texting: A Hybrid Form of Communication

Texting is a form of communication that more closely resembles speaking than writing. Although composing a text on a smartphone does involve typing on a keyboard, those key strokes frequently do not produce actual, written words. As in speaking, where thoughts instantaneously burst into audible words, in texting, thoughts instantaneously burst into symbols on a cellphone screen. Some of those symbols are letters, but often they do not group themselves into traditional words. They form shorthand abbreviations for words like "pls" for "please" or "IMHO" for "in my humble opinion." Although mastering texting lingo involves a steep learning curve, people who text eventually learn to understand the meaning intended by this shorthand, especially when it is accompanied by emojis, little pictures used to illustrate and enrich text messages.

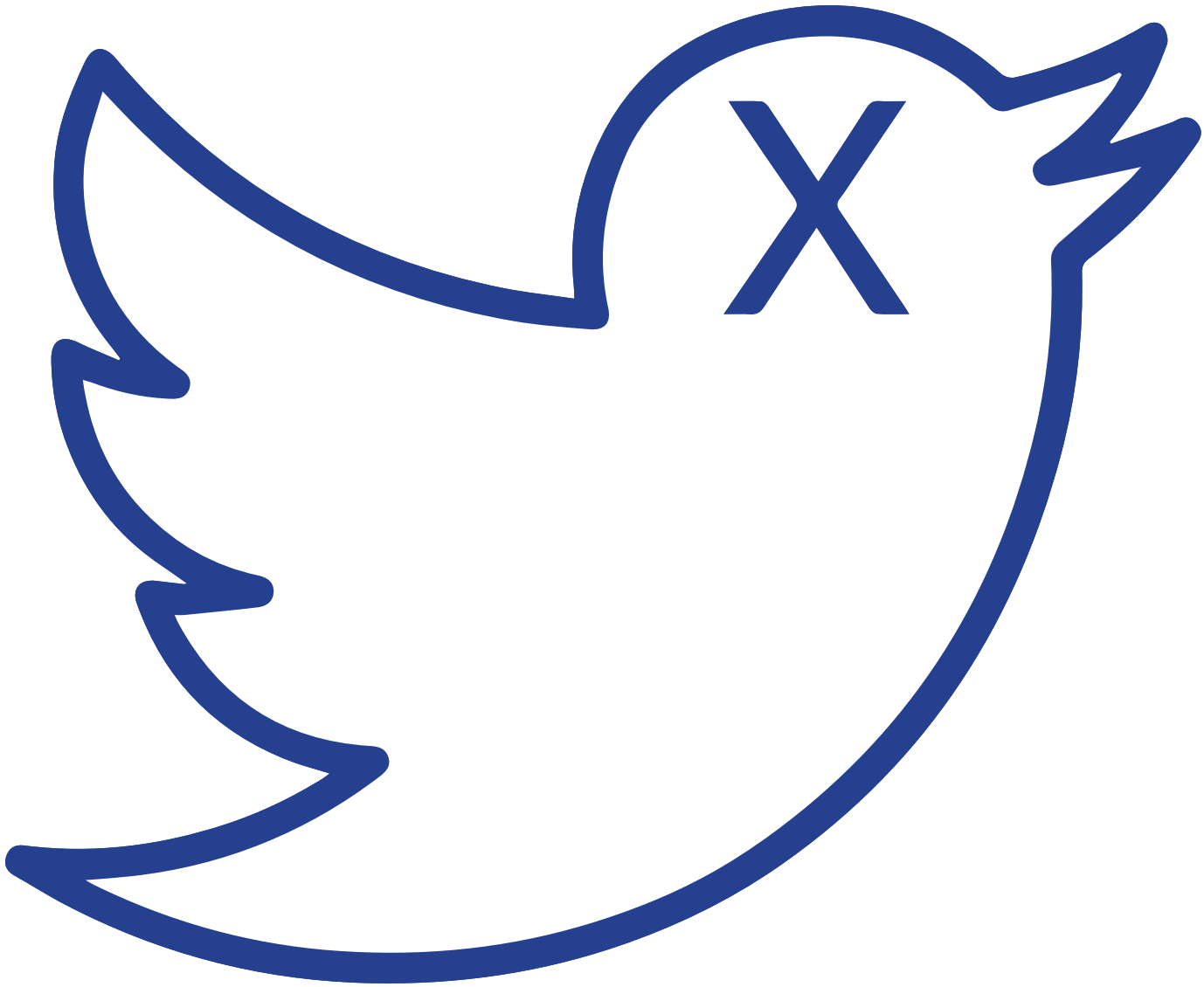
Speed: Texting's Biggest Advantage and also its Biggest Disadvantage

The advantages of texting are obvious: It is quicker than any other form of written communication. Depending on the sender's thumb-typing speed (and eyesight), a text can be created and sent in a matter of seconds. When it arrives at its destination, a "ding" alerts the recipient of its arrival. That ding even repeats itself if the recipient fails to read the text immediately. Unlike snail mail, which takes much longer to compose and be delivered, and email, which may sit unread in a recipient's folder for hours, days, or even weeks, texts can be written quickly and delivered in a matter of seconds. Most importantly, texts are more likely to be read immediately because of that persistent ding. Although the ding may be annoying or thrilling, depending on your perspective and whether it goes off in a public setting, it is bound to grab the recipient's attention and prompt a quick response.

The disadvantages are equally obvious. All the dangers inherent in email communication are multiplied when texting. Speed leads to carelessness, which has the potential for serious harm. Texts written in the heat of passion are particularly dangerous. Once sent, they cannot be called back, and they can never really be permanently deleted. Moreover, they can be stored on the recipient's cell phone and forwarded to others or used as evidence in a lawsuit or criminal trial. Text messages may be considered even more reliable evidence than messages written on paper or even in emails; their very speed provides strong evidence of the text-writer's state of mind. Other dangers include sending texts to the wrong recipient, copying someone accidentally, and missing a change made by autocorrect that completely alters your meaning, potentially making your message misleading, insulting, or simply ridiculous. These outcomes are even more likely to occur when texting than emailing because hardly anyone takes the time to proofread their texts. Where speed is the objective, proofreading has no place.

Can Texting Be Saved?

Although texting may be anathema to some, especially those who abhor the dangers of texting while driving or the sight of people texting while dining with friends in a restaurant or spending time with their children, it is probably here to stay. Nevertheless, like the flawed marriages described in *Ladies' Home Journal*, serious changes will need to be made.



As a legal writing teacher, I am tempted to suggest that texts become more literate—more like actual writing—but I know that is a lost cause. Writing complete sentences, composed of actual words rather than shorthand, would undermine the biggest advantage of texting: its speed. Furthermore, the abbreviations and emojis are part of texting's charm. Receiving a congratulatory text with little hearts and flowers sprinkled through it or a conciliatory text ending with a tiny face, showing concern, followed by little clouds dripping with rain, can brighten a person's day.

The first step in changing text messaging for the better lies in recognizing that it really isn't "writing" at all. It is a form of written communication that sometimes uses words, but that is where its resemblance to prose ends. Once seen for what it is—and isn't—texting can be liberated from rigid rules of grammar, punctuation, and spelling. Creativity, rather than conformity, can be the order of the day. Communication can be the goal—whether achieved through words, abbreviations, or symbols.

Having set aside the need for proper grammar, punctuation, and spelling, the real problems with texting become obvious. Like protected speech, texting should not be banned. Rather, it should be regulated regarding time, place, and manner. Simply stated, texting should not occur while driving, enjoying the great outdoors, or spending time with friends or family. Cell phones should be silenced in public places or anywhere their incessant dinging might bother others. Finally, despite its advantages, text messaging should never be used when personal contact or a

hand-written note is more appropriate, such as when expressing condolences on a death in the family. Used properly, texting can be an effective form of communication. Used improperly, it can cause distracted driving and missed opportunities to enjoy life in the moment. Like a good marriage, texting can be saved, but only if it is handled with care.

Tweeting: Broadcasting Short Messages to the World

Twitter is an online news and social networking service people use to post and receive short messages called "tweets." Until November 7, 2017, English-language tweets were restricted to 140 characters; now, tweets can be twice as long, containing 280 characters.[2] Registered users can read and post tweets, but unregistered users can only read them. Since 2010, the service has grown from 30 million to 330 million users in the United States.[3] Users and non-users alike can check Twitter for news and information.

Communication on Twitter involves the concept of "followers." Users may choose to "follow" other Twitter users, whose tweets will appear in reverse chronological order on their main Twitter page. Many users never tweet at all; they just read the tweets they receive from the people they are following. Twitter can also be used to send private messages that can only be read by the person to whom they are sent.

Users can group posts together by topic or type by using "hashtags," which are words or phrases prefixed with a "#" sign. Similarly, the "@" sign followed by a username is used for mentioning or replying to other users. A word, phrase, or topic that is mentioned more often than others is said to be a "trending topic."

Like text messages, tweets do not inspire good writing. In fact, the limit on the number of characters available encourages people to abbreviate words and write ungrammatical sentences, often lacking subjects and verbs. Tweets are more like advertising slogans or quick jabs than anything else. Although concise writing is a worthy goal, tweets often lend themselves more to slap-dash writing that reflects momentary thoughts and emotions rather than well-thought-out observations.

Advantages of Tweeting

The biggest advantages of tweeting are its speed and its ability to reach literally millions of people in an instant. These characteristics have made tweeting a powerful tool of communication. The president has used tweets to announce policy decisions, such as banning transgender people from the armed services.[4] Egyptian protestors relied on social media, including Twitter, to overthrow the government.[5] According to one protester, they used "Facebook to schedule the protests, Twitter to coordinate, and YouTube to tell the world."[6]

Lawyers and law firms can use Twitter as a marketing tool to reach new audiences and build relationships with other experts. They can promote their accomplishments by providing links to their firms' websites and articles relating to their successful cases. Used with care, particularly concerning client confidentiality, tweets can be an effective tool of communication for lawyers.

Disadvantages of Tweeting

As with text messaging, the disadvantages of tweeting stem directly from its advantages. People often tweet without carefully considering the consequences of their messages. Although it is possible to write eloquent tweets, all too often, people end up embarrassing themselves with incoherent tweets containing misspelled words and thoughtless messages.

Such embarrassment presumably occurred when our newly inaugurated president tweeted the following message: "Despite the constant negative press covfefe."[7] Questions about the tweet mounted when, after many hours had elapsed, it had still not been deleted: Had the president experienced a medical episode partway through the tweet or was he actually trying to communicate something? Soon, discussion of the "covfefe" tweet consumed social media and late-night television. The next morning, the president finally deleted the tweet, but not before countless jokes had been told at his expense. T-shirts with messages involving the word "covfefe" were selling like hotcakes. Attempting to stem the tide of derision, press secretary Sean Spicer reported that "[t]he president and a small group of people know exactly what he meant."[8] In the following months, the president continued to stir up controversy by tweeting policy decisions that would negatively affect millions of Americans. Moreover, many people thought he seemed insensitive when he posted impersonal tweets expressing sympathy to victims of natural disasters and gun violence, rather than contacting them personally by telephone or in a letter.

Can Tweeting be Saved?

Like text messaging, Twitter is probably not going away any time soon. Unlike texts, however, which are generally only read by a small number of recipients, tweets are primarily intended for a much larger audience, often an audience of millions. For this reason, if tweeting is to be saved, users must be diligent when composing their tweets. Even more harm can come from a thoughtless, illiterate, or insulting tweet than a poorly written text-message.

Like text messages, tweets do not inspire good writing. In fact, the limit on the number of characters available encourages people to abbreviate words and write ungrammatical sentences, often lacking subjects and verbs. Tweets are more like advertising slogans or quick jabs than anything else. Although concise writing is a worthy goal, tweets often lend themselves more to slap-dash writing that reflects momentary thoughts and emotions rather than well-thought-out observations.

Former President Barack Obama has often used tweets to inspire and console the American people. His tweet, quoting Nelson Mandela, after violence erupted during a rally by white nationalists at the University of Virginia is the most admired tweet in the medium's history: "No one is born hating another person because of the color of his skin or his background or his religion . . . ." [9] Hillary Clinton also inspired and consoled her many supporters when she sent the following tweet on November 9, 2016: "To all the little girls watching . . . never doubt that you are valuable and powerful & deserving of every chance & opportunity in the world."[10]

As President Obama and Hillary Clinton have shown, tweets can be an effective means of communication, especially when written with sensitivity and careful attention to grammar, punctuation, and spelling.

Conclusion

Just as marriage has changed since the 1950s, when the *Ladies' Home Journal* introduced its advice column, communication in the 21st century has undergone a revolution. Some of the marriages described in the column did not deserve to be saved. Others, however, had a chance for success if certain changes occurred. Similarly, texting and tweeting are here to stay, but certain changes are needed to make them more effective tools of communication. The key to those changes—both in the potentially happy marriages and in texting and tweeting—involves careful attention to detail. Without that attention, harmful mistakes can be made. With that attention, effective communication—the key to almost any successful endeavor—will occur, possibly even leading to a "happily-ever-after" ending.

[1] Sara Boboltz, *Awful '50s Marriage Advice Shows What Our Mothers and Grandmothers were Up Against* (Sep. 26, 2014), https://www.huffingtonpst.com/2014/09/26/can-this-marriage-be-saved-advice_n_5829870.html.
[2] Selena Larson, *Twitter Doubles Character Limit* (Nov. 7, 2017), http://money.cnn.com/2017/11/07/technology/twitter-280-character-limit/index.html.
[3] *Number of Monthly Active Twitter Users in the United States from 1st Quarter 2010 to 3rd Quarter 2017 (in millions),* https://www.statista.com/statistics/282087/number-of-monthly-active-*twitter-users/.*
[4] Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People will not be Allowed in the Military* (July 26, 2017), https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?_r=0.
[5] Maeve Shearlaw, *Egypt Five Years On: Was it Ever a "Social Media Revolution"?* (Jan. 25, 2016), https://www.theguardian.com/world/2016/jan/25/egypt-5-years-on-was-it-ever-a-social-media-revolution.
[6] *Id.*
[7] Alexander Smith, *"Covfefe": Donald Trump Invents New Word that Conquers Twitter"* (May 31, 2017), https://www.nbcnews.com/politics/donald-trump-invents-new-word-conquers-twitter-n766496?cid=sm_npd_nn_tw_ma.
[8] *Id.*
[9] *See* Chris Murphy, *Barack Obama has 6 of the Top 10 Most-liked Tweets of All Time* (Aug. 16, 2017), http://fortune.com/2017/08/16/obama-most-liked-tweets/.
[10] *See id.*

NANCY A. WANDERER *is Legal Writing Professor Emerita at the University of Maine School of Law. For decades, she has overseen the updating of* Uniform Maine Citations, *and her articles on proper citation, email-writing, and judicial opinion-writing have appeared in the* Maine Bar Journal, *the* Maine Law Review, *and the* National Association of State Judicial Educators News Quarterly. Off and Running: A Practical Guide to Legal Research, Analysis, and Writing, *co-authored with Prof. Angela C. Arey, is being used as a textbook in first-year legal writing classes. Nancy may be reached at wanderer@maine.edu.*

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Mr. Libby earned his B.S. from West Point, an M.A. from Boston University and his J.D. from the University of Maine School of Law. He served on active duty with the U.S. Army in Berlin from 1971 to 1975. He was admitted to practice in all courts in Maine and Massachusetts, including the U.S. District Court, in 1979. Mr. Libby's practice focuses on civil litigation, with an emphasis on insurance law, personal injury, professional negligence, construction law and product liability.

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SUPREME QUOTES *By Evan J. Roth*

No man is an island.

Sierra Club v. Morton, 405 U.S. 727, 760, n.2 (1972) (Blackmun, J., dissenting) (quoting John Donne, Devotions XVII) (spelling modernized).

In 1969, the Forest Service approved a Walt Disney Enterprise proposal to build a $35 million ski resort at Mineral King Valley in California's Sierra Nevada Mountains. To provide access to the resort, the U.S. Department of the Interior approved the construction of a 20-mile highway, and a high-voltage power line, that would traverse nearby Sequoia National Park.

In an effort to block the development, the Sierra Club sought Administrative Procedure Act judicial review on the grounds the Department of Interior's approval violated various statutes and regulations. The Sierra Club sued as an organization with a "special interest" in the conservation and maintenance of national parks, but none of the named plaintiffs alleged they used the park or would be personally affected by the proposed resort, road, and utility lines.

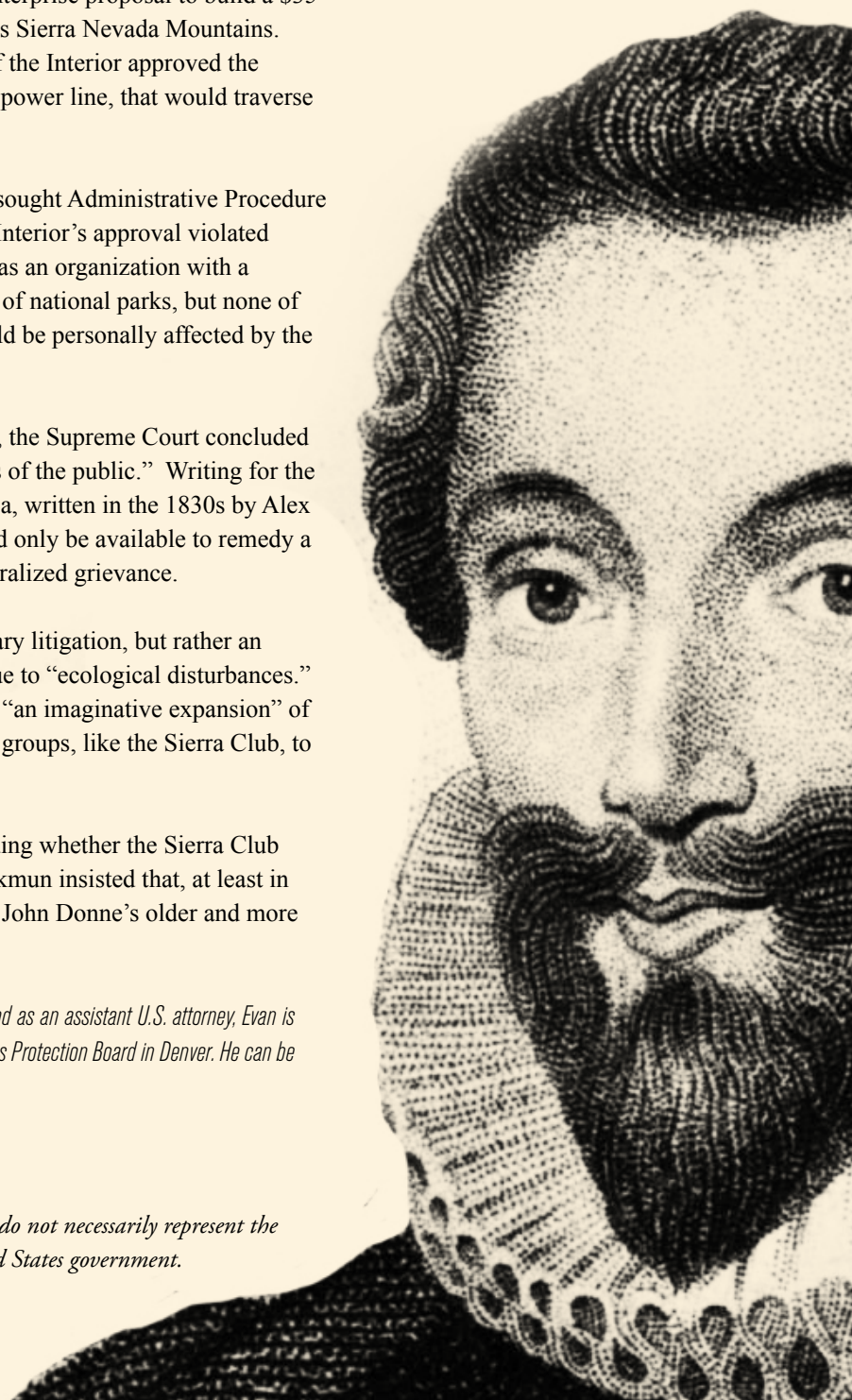
In the absence of a "personal stake" in the controversy, the Supreme Court concluded the plaintiffs lacked standing to sue as "representatives of the public." Writing for the majority, Justice Stewart quoted Democracy in America, written in the 1830s by Alex de Tocqueville, who warned that judicial review should only be available to remedy a concrete injury, as opposed to a partisan faction's generalized grievance.

Justice Blackmun dissented because this was no ordinary litigation, but rather an example of the "world's deteriorating environment" due to "ecological disturbances." For such cases, Justice Blackmun would have allowed "an imaginative expansion" of traditional standing concepts to allow well-recognized groups, like the Sierra Club, to litigate on behalf of the public interest.

As for the majority's reliance on de Tocqueville regarding whether the Sierra Club had a "personal stake" in the controversy, Justice Blackmun insisted that, at least in the environmental context, he would personally prefer John Donne's older and more pertinent observation, quoted above.

EVAN J. ROTH *After nearly 20 years in Portland as an assistant U.S. attorney, Evan is now an administrative judge for the Merit Systems Protection Board in Denver. He can be reached at evan.j.roth@icloud.com.*

Disclaimer: The views expressed are those of the author and do not necessarily represent the position of the Merit Systems Protection Board or the United States government.



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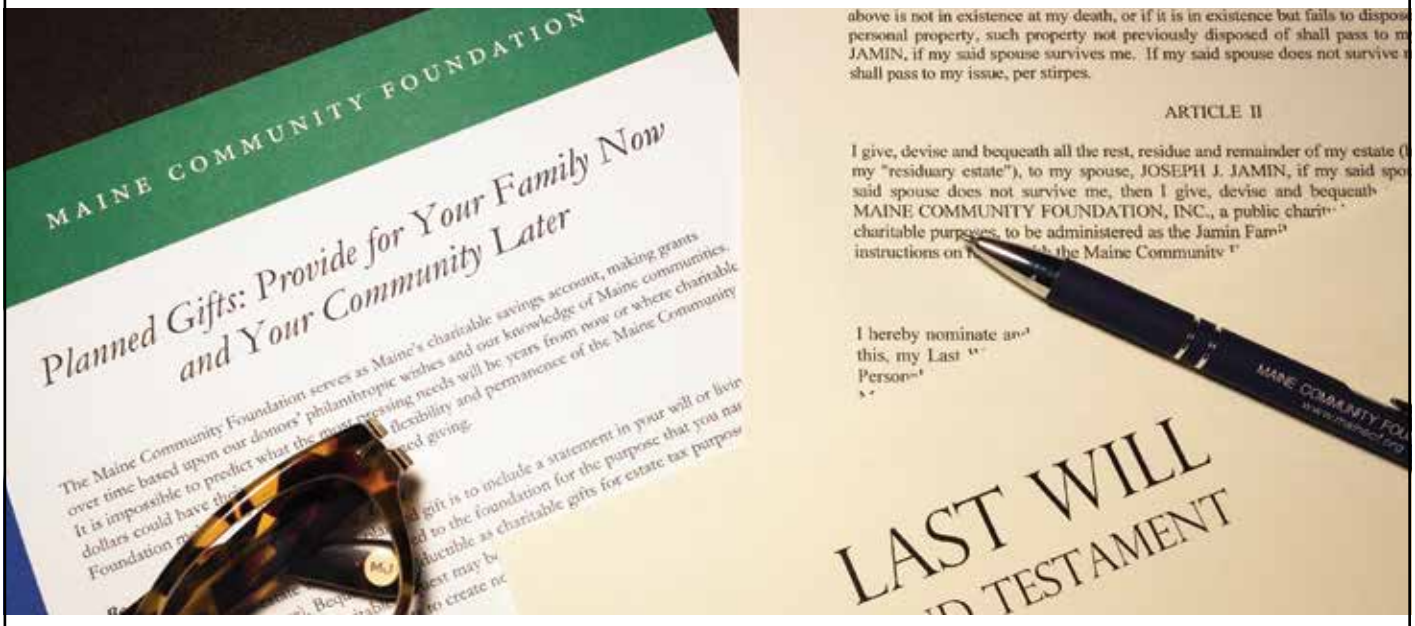

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