

CRIMINAL LAW BRIEF

American University Washington College of Law

Providing a Medium for Students, Practitioners, and Academics to Explore, Discuss, and Debate the Far-Reaching Elements of Criminal Law

SPECIAL FEATURE: INTERNET GAMBLING

**Criminalizing Internet
Gambling: Should the
Federal Government Keep
Bluffing or Fold?**

Wesley Scott Ashton

**Bluffing? The Legislative
Response to Internet
Gambling**

Jon Feldon

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**The Prosecutor's Role: A
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Children Who Kill Their
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**Courts, Cops, Citizens, and
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Can Fix It**

Justin D. Heminger



LETTER FROM THE EDITOR

Criminal Law. Often the first thing that comes to mind when you ask someone about criminal law is Law & Order, CSI or another made-for-TV version of the criminal justice system. The reality though is far more complex and controversial.

Criminal justice in this country reaches far beyond prosecution and defense, and the bulk of the action takes place not in the courtroom, but behind closed doors in the late-night writing of complaints and motions. Justice can take years - not an hour with commercials. The content of this issue reflects the complexity of this ever-changing field. Internet gambling represents billions of dollars of revenue for companies and Wesley Scott Ashton argues that rather than continuing to criminalize Internet gambling, the federal government should move towards regulation. Julie Rowe explores the highly charged and yet not often discussed issue of parricide, when children kill their parents, and the Battered Child Syndrome defense. The jurisprudence regarding when police may or may not question suspects before advising them of their Miranda rights is explored at length by Justin Heminger. All of these articles, touching very different aspects of criminal law, represent the varied and constantly changing landscape of the field.

*There are competing interests in our criminal justice system as evidenced by the inherent tension between the roles of prosecutors and defense attorneys. In our first issue, WCL Professor, and former director of the Public Defender Service for the District of Columbia, Angela Davis, contributed an article arguing that prosecutorial misconduct is widespread and that the current criminal justice system has fostered "a culture in which prosecutors feel free to engage in misconduct." She called on the legal profession to take the lead in instituting meaningful reform. In this issue, Randall Eliason, a WCL adjunct Professor and former federal prosecutor, provides a response to Professor Davis's article. He argues that Professor Davis's general condemnation of prosecutors is an unfair characterization of thousands of ethical prosecutors who honor their job to, as Justice Sutherland described it in *Berger v. U.S.*, 295 U.S. 78, 88 (1935), see that "guilt not escape nor innocence suffer." The importance of this dialogue cannot be understated, and one of the goals of this Brief is to provide a forum where this and other such discussions can continue.*

The response to our first issue was overwhelming and has contributed to our growth this past year. In the last eight months, our distribution has increased, reaching new markets nationally, and our staff has doubled in size. Looking forward, we are publishing two issues this year and co-sponsoring with the WCL Business Law Brief a half-day symposium in February exploring current issues in corporate crime. This second issue of the Criminal Law Brief represents the tireless efforts of all those who contributed to our success - our authors, editors and dedicated staff - and I would be remiss in not acknowledging their invaluable contributions.

*Laurita M. Denny
Editor-in-Chief*

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CRIMINALIZING INTERNET GAMBLING: SHOULD THE FEDERAL GOVERNMENT KEEP BLUFFING OR FOLD?

Wesley Scott Ashton*

Introduction

Worldwide, millions of people gamble on Internet gambling sites, generating billions of dollars of online revenue. Many of these online gambling operations presently accept bets from United States citizens in violation of U.S. federal laws. Most of these Internet gambling operations are based in foreign jurisdictions where Internet gambling is legal. Consequently, it is rare for the U.S. Government to prosecute these crimes. In addition, other changes to the gambling landscape in the U.S. and the world, such as the rise in state-sponsored lotteries, the growth of gambling operations on Native American reservations, and the increase in mainstream foreign investment in online gambling, beg the question: should the Federal Government continue to bluff on the issue of outlawed Internet gambling, or is it time to fold and encourage the creation of state and federal mechanisms for constructively regulating this industry?

This paper first describes the various aspects of Internet gambling, and then reviews the U.S. criminal laws that apply to gambling conducted online. As part of this review, several criminal and civil cases involving Internet gambling activities are discussed. Finally, how the rapidly changing gambling landscape in the United States and the world may affect future federal lawmaking efforts for controlling Internet gambling is considered.

The Evolution of Internet Gambling

In 1999, there were 700 Internet gambling sites.¹ However, by 2004 more than 1,800 offshore gambling Internet sites received about seven billion dollars in bets, with the online gambling industry projected to be an 18.4 billion dollar per year industry by 2010.² Internet gambling sites offer a variety of gambling venues, such as casino-style gambling, off-shore sports booking operations for betting on sporting events and horse races, etc., and, recently, increasingly popular interactive Internet party poker games. A brief explanation of how these various Internet gambling sites operate follows.

An Internet gambling casino is designed to mimic a real casino, and the gambler is typically invited to download gambling software, open an account, wire money to the account to purchase virtual "chips," before the gambler may proceed to play various online games of chance such as slots, blackjack or roulette.³ The outcomes of play are determined by a random number generator.⁴ The winnings are credited to, and the losses are debited from, the user's account.

Another Internet gambling business model is patterned off of bookmaking on sporting events, where the gambler opens an account and then can place bets on various sporting events.⁵ Internet bookmaking activities may charge a commission, called a "vig," on each bet. The vig can be as high as 10% of the total

bet. Similar to the online casino, the winnings are credited to, and losses and fees are debited against, the gambler's account.

A recent addition to Internet gambling is the formation of online poker sites where players log-on to play against other players.⁶ Under this business model, the website operator does not directly participate in the gambling; instead, the web operator manages the poker pot while the players gamble between themselves. The website's random number generator determines what cards the players get and the web operator takes a cut, called a "rake," of each pot, which is the total amount of money bet in a single game. Typically, the rake is 2 to 5 % of the pot. Under this model, the operator of the online poker site does not gamble against the poker players. Only the poker players are gambling, and they gamble against one another.

Federal Laws Applicable to Internet Gambling

There are many federal laws applicable to Internet gambling activities, including (1) 18 U.S.C. § 1084, known as the "Wire Act," which criminalizes the use of interstate telephone facilities by those in a gambling enterprise to transmit gambling-related information, (2) 18 U.S.C. § 1952, known as the "Travel Act," which criminalizes the use of any interstate facility with intent to promote an unlawful activity such as illegal gambling, (3) 18 U.S.C. § 1955, known as the "Illegal Gambling Business Act," which prohibits illegal gambling businesses involving five or more persons, (4) 18 U.S.C. §§ 1956 and 1957, which criminalize money laundering, and (5) 18 U.S.C. §§ 1961 and 1962, which outlaw racketeer influenced and corrupt organizations.⁷ While other federal gambling statutes may conceivably apply to Internet gambling activities, the present article is limited to discussing the seven statutes listed above.⁸

The Wire Act

The Wire Act⁹ pertains to (1) persons engaged in the business of betting or wagering, who (2) knowingly use a wire communication facility (i) for the transmission of bets or wagers, or information assisting the placement of bets or wagers, in interstate commerce or foreign commerce on any sporting event or contest, or (ii) for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or (iii) for information assisting in the placing of bets or wages.¹⁰ However, the Wire Act includes a "safe harbor" provision which exempts from criminal liability the transmission, in interstate or foreign commerce, of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from which a state or foreign country, where betting on that sporting event or contest is legal, into a state or foreign country in which such

betting is legal.¹¹

In other words, the Wire Act prohibits persons engaged in the business of betting or wagering from using interstate telephone facilities to transmit gambling related information. More specifically, the Wire Act prohibits the transmission of any gambling related information and it prohibits the transmission of sports bets. Because the Wire Act is addressed to persons “engaged in the business of betting or wagering,” it applies to those persons operating a betting or wagering business, but not to the customers (i.e., the bettors) who use the services of the business. In order to apply the Wire Act to Internet gambling, the government needs to prove: (1) the website is engaged in the business of betting, (2) the website owner knows that the bets are being transmitted through a wire communication facility, (3) the bets are being transmitted in interstate or foreign commerce, and (4) the Internet gambling business or the players are able to receive money or credit as a result of the bets.¹² However, the scope of the Wire Act may be limited to gambling on sporting events or contests, and may not apply to other forms of Internet gambling such as the virtual casinos or online poker sites.¹³

While the Wire Act has not been invoked extensively in combating illegal gambling, it has been applied to at least one published appellate case of Internet gambling: *U.S. v. Cohen*.¹⁴ In *Cohen*, defendant Jay Cohen had moved to Antigua in 1996 and established himself as President of World Sports Exchange (“WSE”), a bookmaking business patterned after New York’s Off-Track Betting.¹⁵ WSE’s business involved bookmaking on American sports events and was not limited to gambling on horse races.¹⁶

WSE operated an “account-wagering system,” wherein new customers would open an account with WSE and wire at least \$300 into WSE’s Antiguan bank account.¹⁷ A gambler seeking to place a bet would then contact WSE via either telephone or the Internet to bet.¹⁸ WSE would then issue an immediate, automatic acceptance and confirmation of the bet and would subtract losing bets from the gambler’s account and credit winnings to this account.¹⁹ WSE also made money by retaining a “vig” or commission of 10% of each bet.²⁰ WSE advertised its bookmaking operation in the United States by radio, newspaper and television.²¹ WSE’s customers were primarily gamblers located in the United States.²² WSE was successful, and in one fifteen-month period WSE collected about \$5.3 million dollars in funds from U.S. gamblers.

The FBI investigated WSE’s bookmaking operation. FBI agents called WSE from New York, where sports-betting is illegal, and opened accounts and placed sports bets with WSE in Antigua, where it is legal.²³ In 1998, Cohen was arrested and, after a 10-day jury trial, was convicted of five counts of violations of 18 U.S.C. § 1084(a).²⁴ Cohen appealed the Wire Act convictions alleging that (1) the safe harbor provision of 18 U.S.C. § 1084(b) should have been applied, and (2) the government had not shown that Cohen had “knowingly” violated the statute.²⁵ Cohen’s appeal also requested the 2nd Circuit invoke the rule of lenity and reverse the conviction on the grounds the statute was too unclear to provide adequate warning of what conduct is prohibited.²⁶

The 2nd Circuit ruled that the safe harbor provision of 18 U.S.C. § 1084(b) pertains to transmissions wherein (1) bet-

ting is legal in both the place of origin and the destination of the transmission, and (2) the transmission is limited to mere information that assists in the placing of bets as opposed to including the bets themselves.²⁷ Cohen argued that betting was legal in both Antigua and in New York, and that the transmissions by the customers merely assisted in the placing of bets, which was affected in Antigua by WSE. The 2nd Circuit rejected both of these arguments.

First, the 2nd Circuit opined that there was no doubt betting was illegal in New York, which expressly prohibits betting in its Constitution²⁸ and in its General Obligations Law.²⁹ Therefore, the 2nd Circuit concluded the safe harbor provision, 18 U.S.C. § 1084(b), did not apply to Cohen’s case as a matter of law.³⁰ Next, the 2nd Circuit rejected Cohen’s argument that WSE’s account wagering system used transmissions between gamblers and WSE containing only information enabling WSE to place bets in Antigua on behalf of its customers.³¹ The 2nd Circuit noted that WSE could only place bets its customers had requested and authorized to be booked. Therefore, the 2nd Circuit concluded that, by making betting requests and having these requests accepted, WSE’s customers were placing bets, which is conduct falling squarely in violation of § 1084(a) and outside the scope of the safe harbor provision of § 1084(b).³²

The 2nd Circuit also rejected Cohen’s argument that he lacked the requisite *mens rea* to sustain a conviction.³³ The 2nd Circuit ruled that it was only necessary for the government to establish Cohen knowingly committed the deeds violating § 1084(a), not that Cohen intended to violate the statute.³⁴ Therefore, the court concluded that Cohen’s admission that he knowingly transmitted information assisting in the placement of bets was sufficient to satisfy the *mens rea* requirement of the statute.³⁵

Regarding whether lenity should be granted by the court, Cohen argued the statute did not provide fair warning of (1) whether the phrase “bet or wager” included WSE’s “account wagering,” (2) whether “transmission” included receiving information as well as sending information, and (3) whether betting must be legal or merely non-criminal in a particular jurisdiction in order to be considered “legal” in that jurisdiction.³⁶ The 2nd Circuit rejected all of Cohen’s arguments for lenity.

Specifically, the 2nd Circuit explained the rule of lenity applies where there exists a “grievous ambiguity” in a statute such that a court would have to “guess” as to what Congress intended.³⁷ In this case, the 2nd Circuit ruled that § 1084(a) was clear so lenity would not be applied.³⁸ With respect to “bets or wagers,” the 2nd Circuit held it was clear that WSE’s account-wagering was in fact “wagering” because a gambler would request a bet by telephone or via the Internet and WSE would accept the bet.³⁹ The 2nd Circuit explained that WSE’s requirement for gamblers to maintain a fully-funded account as a condition to place bets did not obscure the issue.⁴⁰

Regarding the term “transmission,” the 2nd Circuit noted that Cohen had used two wire facilities, the telephone and the Internet, and had marketed these facilities to the public for the express purpose of transmitting bets and betting information.⁴¹ The court noted that Cohen had received transmissions from customers placing bets, and in response, sent acceptance and confirmation transmissions back to these

customers. On these facts, the 2nd Circuit concluded that it was clear that a “transmission” in accordance with § 1084(a) had occurred whether the signal was the betting information provided by the gambler or the confirmation signal provided by WSE.⁴²

Lastly, with respect to Cohen’s third argument, the 2nd Circuit ruled it was plain to all that an act must be permitted by law to be legal.⁴³ The 2nd Circuit reiterated that the safe harbor provision of § 1084(b) was clear and did not apply to the facts of Cohen’s case.⁴⁴

The Travel Act

Under the Travel Act⁴⁵, it is unlawful for a person to (1) use any facility in interstate commerce, (2) with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity (i.e., a business enterprise involving illegal gambling), and (3) thereafter perform or attempt to perform any of the following acts: (i) distribution of the proceeds of the unlawful activity, (ii) commit any crime of violence to further the unlawful activity, or (iii) otherwise act to promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of the unlawful activity.⁴⁶ Under 18 U.S.C. § 1952(b) of the Travel Act, any business enterprise involving gambling in violation of the laws of the state in which the acts are committed, or in violation of the laws of the United States, is an “unlawful activity.”⁴⁷

Stated otherwise, it is a federal crime to use a facility of interstate commerce to promote, manage, establish, carry on or facilitate any unlawful business enterprise involving gambling, where the gambling enterprise violates either state or federal law. It is important to realize that the Travel Act criminalizes the use of both interstate and foreign facilities in furtherance of unlawful gambling, and not the violation of state law.⁴⁸ Consequently, it is not necessary for the government to prove that a state crime was ever completed.⁴⁹ Furthermore, the Travel Act does not define the term “gambling” per se, so it is likely that Travel Act violations encompass any form of Internet gambling prohibited either by the state or federal law so long as a facility of interstate or foreign commerce is employed.⁵⁰

At least one state court has concluded that gambling via the Internet from New York to an offshore site in Antigua violates New York Penal Law and the Travel Act. In *People v. World Interactive Gaming Corp.*, the Attorney General of the State of New York sought to enjoin World Interactive Gaming Corporation (“WIGC”) from operating within New York or offering to residents of New York the ability to gamble over the internet.⁵¹ At issue was whether the State of New York could enjoin a foreign corporation, which was legally licensed to operate a casino offshore, from offering Internet gambling to individuals located in New York.⁵²

The state court ruled that New York State could enjoin WIGC from offering Internet gambling services to persons located in New York because (1) Article 1 of the New York State Constitution expressly prohibited any kind of gambling not authorized by the state legislature, and (2) Internet gambling would violate New York Penal Law and § 1952(a) of the Travel Act.⁵³

WIGC was a Delaware corporation that maintained corporate offices in New York and wholly owned Golden Chips Casino, Inc. (“GCC”), an Antiguan subsidiary corporation licensed to operate a land-based casino in Antigua.⁵⁴ GCC developed the interactive software and assembled and installed the necessary servers in Antigua that allowed individuals from around the world to gamble from their home computers using GCC’s web-based casino.⁵⁵ GCC promoted its online casino by advertising on the GCC’s website, by advertising elsewhere on the Internet, and by publishing advertisements in a U.S. national gambling magazine.⁵⁶ GCC’s promotions were viewed by residents in New York and across the nation.⁵⁷

In 1998, the Attorney General of New York began investigating WIGC when the company began soliciting investors in Texas and elsewhere for a private securities offering in violation of certain New York laws.⁵⁸ The Attorney General discovered WIGC had informed potential investors that profit margins of web-based casinos were conservatively 80-85%.⁵⁹ As part of its investigation, the Attorney General’s office logged onto the GCC website, downloaded gambling software and began placing bets.⁶⁰

In opening an account with GCC, a user had to enter his permanent address.⁶¹ Users submitting an address in a state that permitted land-based gambling, such as Nevada, were able to access the GCC casino, whereas users submitting an address in a state that did not permit land-based gambling, such as New York, were denied access to the GCC casino.⁶² The Attorney General soon learned that the GCC software did not verify a user’s address, so an individual located in New York would be granted access to the GCC casino by simply changing the state of residence entered into the GCC database from New York to Nevada.⁶³ Once granted access to GCC’s Internet casino, an individual located in New York could play virtual slots, blackjack or roulette.⁶⁴

Subsequently, the Attorney General filed suit seeking to enjoin WIGC and its subsidiary GCC from running any aspect of their Internet gambling business within New York State.⁶⁵ WIGC moved to dismiss the suit on the grounds of lack of subject matter jurisdiction of New York to prosecute alleged violations of the Wire Act⁶⁶, the Travel Act⁶⁷, and the Paraphernalia Act.⁶⁸

In short, WIGC argued that New York lacked subject matter jurisdiction over the Internet gambling activity because the gambling occurred outside of New York State.⁶⁹ The court rejected this argument on the grounds that, under New York Penal Law § 225.00(2), when a person engaged in gambling is located in New York, then New York is construed as the location where the gambling occurred.⁷⁰ The court considered the facts that the monies used to gamble were located in Antiguan accounts and that gambling is legal in Antigua irrelevant because the act of entering a bet and transmitting it from New York via the Internet adequately constituted gambling activity within New York.⁷¹

The New York court also opined that the Wire Act, the Travel Act, and the Paraphernalia Act all applied to WIGC’s Internet gambling activities.⁷² The court explained that the Wire Act applied to businesses involved in betting or wagering, and the Travel Act applied to the use of a facility in interstate or foreign commerce with intent to distribute proceeds of any unlawful activity or to otherwise promote, manage, establish, carry

on, or facilitate any unlawful activity under 18 U.S.C. § 1952.⁷³ In particular, the New York court noted that the Internet is accessed by telephone wire in the same manner as a prohibited telephone call from an illegal gambling facility.⁷⁴ The court reasoned that when a person in New York uses a telephone wire to connect to the GCC server for the purpose of logging onto the illegal gambling website, followed by gambling activity using the website and the transmission by the GCC server of betting information back to the user in New York, there has been a violation of both the Wire Act and the Travel Act.⁷⁵ The New York court also concluded that by hosting a virtual casino, which is created for a time in the gambler's computer in New York, and by exchanging betting information with this computer user, GCC had conducted an illegal gambling communication in violation of the Wire Act and the Travel Act.⁷⁶ Inherent to the court's conclusion is the notion that access to the Internet necessarily involves use of a wire communication facility (i.e., telephone wires), which is an element of a Wire Act violation, and that the Internet is a facility used in interstate or foreign commerce, which is an element of a Travel Act violation.

The Illegal Gambling Business Act

The Illegal Gambling Business Act⁷⁷ pertains to (1) those who conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business, wherein (2) an "illegal gambling business" means a gambling business (i) in violation of the law of the state or political subdivision in which it is conducted, and (ii) involving five or more persons who conduct, manage, supervise, direct, or own all or part of the business, and (iii) that has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000.00 in any single day.⁷⁸ Gambling is defined under the statute as including, but not limited to, pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.⁷⁹

Congress passed the Illegal Gambling Business Act as part of the Organized Crime Control Act of 1970 in an effort to combat large scale illegal activities.⁸⁰ The Illegal Gambling Business Act does not apply to individual players, and is unlikely to apply to Internet service providers, because they are not gambling businesses in accordance with the statute. The statute does not require those operating an illegal gambling business to actually be convicted in a state court, but only that (1) there be some state law violated by the business, (2) the gambling business involved five or more persons, and (3) the business remained in substantially continuous operation for more than thirty days or grossed more than \$2,000.00 in any single day.⁸¹ Furthermore, to be construed as a person involved in the business, it is only necessary for the individual to be considered necessary and helpful.⁸² Thus, computer operators, computer maintenance crews, accountants, telephone operators, on-line help desk operators, and owners may be included as persons involved in the business even though not all of these individuals participate in the actual gambling.⁸³ One interesting feature regarding the Illegal Gambling Business Act is that it may be applied to strictly intrastate illegal gambling businesses.⁸⁴

Based on what is known about online gambling websites, it is likely that these activities involve a violation of state gambling laws⁸⁵, involve five or more people, and have been in substantially continuous operation for 30 days or more or have grossed over \$2,000.00 in revenue in any single day. Specifically, § 1955(b) of the Illegal Gambling Business Act explicitly defines bookmaking activities as "gambling," so online sports betting sites clearly fall within the scope of this Act. Though online casinos rely upon random number generators to play virtual slots, roulette, dice and other traditional casino games, it is uncertain whether they would fall within the scope of the Illegal Gambling Business Act. Section 1955(b) explicitly defines gambling to include activities involving "maintaining slot machines, roulette wheels or dice tables."⁸⁶ It would be reasonable for the courts to construe any corresponding virtual casino games, which determine chance outcomes using electronic random number generators, as falling within the open ended definition of "gambling" provided by the statute.

Less clear is whether online poker sites are involved in "gambling" as defined under the Illegal Gambling Business Act, because it is the players who gamble and not the site operators. Since online poker sites depend upon random number generators to determine which cards are dealt to the players, and since the poker site receives a fee for this service in the form of the rake, the Illegal Gambling Business Act could reasonably apply to online poker sites if the activity is construable as "selling chances" in accordance with § 1955(b)(2) of the Act. Despite the fact that Internet gambling operations have likely violated the Illegal Gambling Business Act, there is no published case of a prosecution of an Internet gambling business under this statute.

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Money Laundering Statutes

To deal with money laundering, Congress has enacted various statutes including 18 U.S.C. §§ 1956 and 1957, both of which address the financial disposition of proceeds of various state and federal crimes, including violations of the Wire Act, the Travel Act, the Illegal Gambling Business Act, or any state gambling law punishable by over one year imprisonment.⁸⁷ Section 1956 encompasses several distinct crimes including: (1) laundering with intent to promote an illicit activity such as an illegal gambling business; (2) laundering to evade taxes; (3) laundering to conceal or disguise the nature, location, source, ownership, or control of funds derived from illegal activities; (4) conducting transactions in a way so as to avoid state or federal reporting requirements (i.e., smurfing); (5) international laundering; and (6) "laundering" conduct represented to a government agent authorized to investigate or prosecute § 1956 violations (i.e., laundering conduct by those caught in a government sting operation).⁸⁸

Section 1957 criminalizes the spending of money or assets that are criminally derived, and the elements of such an offense include: (1) knowingly (2) engaging or attempting to engage in (3) a monetary transaction (4) in criminally derived property that is of a value greater than \$10,000.00 and is derived from specified unlawful activity, (5) wherein the § 1957 offense takes place in the United States or in a special maritime and territorial jurisdiction of the United States or the offense takes place

outside of the United States and its jurisdictions but the defendant is a United States citizen.⁸⁹

There has yet to be a reported prosecution of an Internet gambling operation for violations of U.S. federal money laundering statutes. However, it is likely Internet gambling sites are involved in one or more of the placement, layering and integration stages of money laundering.⁹⁰ Placement is the act of depositing illegally derived funds into a financial institution or the act of converting the funds into other monetary instruments. Layering is the act of breaking up and transferring the deposited funds to different accounts and institutions in order to conceal the origin of these deposited funds. Lastly, integration is the act of using the layered funds to purchase legitimate assets or to fund further criminal activities.

Typically, Internet gambling sites require prepayment in electronic dollars (i.e., payment via online credit services or via wire).⁹¹ In addition to providing credit accounts, many Internet gambling services also offer other financial services such as fund transmittal services, check cashing services, and currency exchange services.⁹² Therefore, online gambling sites may collect lawful fees for these ancillary services. Furthermore, Internet gambling is a global industry and many of the customers of these gambling sites are citizens of foreign countries gambling from jurisdictions that do not prohibit Internet gambling.⁹³ Consequently, funds derived from illegal gambling with U.S. citizens are likely intermingled with lawful funds. When Internet gambling sites process these mixed funds with various financial institutions, it is conceivable that one or more of the U.S. money laundering statutes are violated.

Racketeer Influenced and Corrupt Organization Statutes

To combat organized racketeering enterprises, Congress has enacted a series of laws directed to Racketeer Influenced and Corrupt Organizations (“RICO”).⁹⁴ Because the Wire Act, the Travel Act, the Illegal Gambling Business Act, and any violation of a state law punishable by more than one year imprisonment are all RICO predicate offenses, illegal gambling may violate the RICO statutes.⁹⁵ To establish a RICO offense pursuant to § 1962(c), the government must establish (1) an enterprise existed; (2) the enterprise affected interstate or foreign commerce; (3) the defendant was employed by or associated with the enterprise; (4) the defendant conducted or participated, either directly or indirectly, in conducting the affairs of the enterprise; and (5) that the defendant conducted or participated in the enterprise through a pattern of racketeering by committing at least two racketeering predicate offenses within a ten year period.⁹⁶ The RICO Act includes a civil remedies provision, so a private individual may sue for damages incurred as a result of racketeering activities.⁹⁷

While there has been no published federal prosecution of an Internet gambling site provider under the RICO Act, there has been a civil suit to collect damages for alleged RICO violations.⁹⁸ Internet gambling litigation ensued in *In re MasterCard International Inc.* when two luckless gamblers from Kansas and New Hampshire filed suit against the credit card companies and the issuing banks for extending them credit, which allowed the gamblers to gamble at online casinos. On the following facts, the Fifth Circuit Court of Appeals denied the gamblers’ complaint against the credit card companies.⁹⁹

The plaintiffs individually accessed various casino websites where they were instructed to purchase “credit” for gambling.¹⁰⁰ The plaintiffs then entered their billing and credit card information on these websites, and their credit cards were charged for the purchase of the credits.¹⁰¹ Thereafter, plaintiffs were allowed to place wagers.¹⁰² Net winnings would be wired to the plaintiffs and not credited to the credit card account.¹⁰³ One plaintiff purchased \$1,510 in gambling credits and lost it all.¹⁰⁴ The other plaintiff purchased \$16,445 in gambling credit and lost a significant portion of it.¹⁰⁵

The plaintiffs argued that the availability of credit and the ability to gamble are inseparable.¹⁰⁶ By authorizing online casinos to accept credit cards, by making credit available to gamblers, by encouraging the use of credit card transactions through placement of their logos on the Internet gambling sites, and by processing “gambling debts,” the plaintiffs alleged that the credit card companies were facilitating an unlawful gambling enterprise in violation of 18 U.S.C. § 1962(c).¹⁰⁷ In other words, the defendant credit card companies, along with unnamed Internet casinos, had created and were operating a worldwide gambling enterprise in violation of the RICO statutes.¹⁰⁸ The litigation sought recovery of damages under the civil remedy provision of the RICO Act.¹⁰⁹

The appellate court noted that in order to prevail, plaintiffs must show that (1) a person has engaged in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct or control of an unlawful enterprise.¹¹⁰ Furthermore, a showing of “a pattern of racketeering activity” requires establishing two or more predicate offenses and demonstrating the racketeering predicate offenses are related to a continued criminal activity.¹¹¹ In support of their claim, plaintiffs alleged violations of Kansas and New Hampshire state felony gambling laws,¹¹² and federal violations of the Wire Act, the Travel Act, money laundering statutes and mail fraud and wire fraud statutes. The appellate court concluded, for the reasons set forth below, that these allegations were unsubstantiated and therefore that plaintiffs had failed to show a pattern of racketeering activity or the collection of an unlawful debt.¹¹³

As to whether Kansas and New Hampshire state felony gambling laws were violated, the court first determined that only sections (c) and (e) of the Kansas commercial gambling statute were applicable to the present case. However, the court interpreted, under these sections, that the offending conduct can only take place after some form of gambling has been completed. The court ruled that, because the credit card transactions were completed before gambling activities occurred, there was no violation of the Kansas law.¹¹⁴ Regarding the allegation of crimes under the New Hampshire gambling statute, the court held this statute was patently inapplicable to the facts of the case.¹¹⁵ Implicitly, the court’s decision reflected the fact that there was no evidence showing that the credit card companies were involved in conducting, financing, managing, supervising, directing, or owning Internet casinos.

The court also dismissed the plaintiffs’ allegations of federal predicate offenses.¹¹⁶ Regarding the Wire Act, the court ruled that this law was limited to sports bookmaking operations and did not necessarily apply to online casinos.¹¹⁷ Since the plaintiffs’ evidence did not establish gambling on sporting events or contests, the court concluded that no violation of the

Wire Act had been established.¹¹⁸ This court's decision, therefore, raised doubt about the scope of the Wire Act, which at least one state court and the U.S. Department of Justice believed was not limited to sports-related gambling.¹¹⁹ While the Justice Department has recommended that Congress amend the Wire Act to explicitly encompass all forms of gambling, Congress has yet to pass any such legislation.¹²⁰ Regarding the plaintiffs' reliance on federal mail or wire fraud violations as predicate RICO offenses, the court concluded that the plaintiffs could not show that the credit card companies had made any false or fraudulent misrepresentations, or reliance by the plaintiffs on such misrepresentations.¹²¹ The court decided that because online casino gambling did not violate the Wire Act, the plaintiffs' gambling debts were legal.¹²² Consequently, the credit card companies could not fraudulently misrepresent the nature of the gambling debt nor could the issuing banks be involved in a scheme to defraud the plaintiffs.¹²³ In addition, the court noted that the plaintiffs had failed to show that they relied on the defendants' representations in deciding to gamble, which, though not a statutory requirement of mail or wire fraud, courts have required when these offenses are alleged as RICO predicates.¹²⁴ Moreover, the court held that plaintiffs' failure to establish a violation of any state or federal law, as required under 18 U.S.C. §§ 1952 and 1957, compelled the conclusion that no Travel Act or money laundering violations had been shown.¹²⁵ The court concluded that because the plaintiffs had failed to prove that the defendant credit card companies had engaged in a pattern of racketeering, the case had been rightly dismissed under Rule 12(b)(6).¹²⁶

Even though the plaintiffs lost their suit, the *In re MasterCard* litigation may have had an effect on whether some American credit card companies do business with Internet gambling sites. For example, PayPal, Western Union and American Express do not do business with Internet gambling sites,¹²⁷ although MasterCard and Visa do.¹²⁸ It is conceivable that some credit card companies have shied away from doing business with online gambling business out of fear of criminal and/or civil litigation. As a result, new offshore money transfer companies have arisen to service this niche, such as NETeller, a publicly traded company on the London Stock Exchange based in the Isle of Man.¹²⁹ NETeller derives 80% of its revenue from Internet gambling, with projected net earnings of \$32 million for 2004 and \$70 million for 2005.

Changing Gambling Environments in the United States and in the World

The scope of any law depends upon the nation's ability to enforce it. While there are many federal statutes criminalizing various Internet gambling behavior, prosecutions of illegal Internet gambling activities are rare, although in July 2006 the U.S. Justice Department charged eleven people for operating offshore Internet gambling sites, including BetOnSports, a gambling enterprise that handles billions of dollars in bets per year and that is incorporated in the United Kingdom and listed on the London Stock Exchange.¹³⁰ One obstacle to enforcing U.S. federal gambling statutes against online gambling activities, such as BetOnSports, is that the managing organizations are generally based in foreign jurisdictions where Internet gambling is permitted. Since Internet gambling has proven so profitable, there is lit-

tle incentive for foreign countries to curb access by U.S. citizens to online gambling sites, which lawfully generate revenue and jobs in these countries. Thus, change in the global gambling environment has created a disincentive for continued federal criminalization of Internet gambling businesses for many of the following reasons.

Expansion of Global and U.S. Gambling

Since Congress enacted various federal anti-gambling statutes, the gambling landscape in the United States and throughout the world has changed dramatically with the advent of Internet gambling, the increase of state-sponsored gambling and the rise of Indian gaming. Around 1995, the first offshore Internet casinos appeared.¹³¹ By 1999 there were 700 Internet gambling sites, and in 2004, more than 1,800 offshore gambling sites received about \$7 billion in bets. About fifty-four foreign governments sanction some form of Internet gambling.¹³² Interestingly, many of the governments sanctioning Internet gambling are English-speaking countries and former members of the British Commonwealth.¹³³

Recently, online gambling was approved by the Nevada Gaming Control Board and became publicly available to Nevada residents located in that state.¹³⁴ While no other state has approved online gambling, gambling in some form is legal in nearly every state. As of 1999, thirty-seven states and the District of Columbia operated lotteries, and as of 1997 eleven states permitted commercial casino gambling, and about half of the states hosted Class III Indian gaming.¹³⁵ The fact that legal land-based gambling is so widespread in the United States tends to erode the rationale for continued criminalization of web-based gambling.

Rise of Indian Gaming

Oddly, or not so oddly, enough, an unusual American player striving to legitimize online gaming are the Indian nations.¹³⁶ At about the same time Congress was enacting laws to federally criminalize gambling enterprises violating state laws, American Indian tribes began experimenting in the late 1960s and early 1970s with gaming in an attempt to reverse the poverty resulting from decades of genocide and pillage.¹³⁷ In 1987, a U.S. Supreme Court decision paved the way for further expansion of Indian gaming when the Court ruled that state laws regulating bingo and card games did not apply to tribal lands governed by tribal law.¹³⁸ In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA")¹³⁹ to reaffirm tribal authority to use Indian gaming to promote tribal economic development, tribal self-sufficiency and strong tribal government. The result of this positive governmental stance on Indian gaming is that 223 tribes are presently operating Indian gaming facilities in 28 states, generating tribal government revenue through gambling.

Then came tribal online gaming. In 2000, the Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan, a federally recognized Indian tribe, operated the Lac Vieux Desert Resort & Casino, a Class II Bingo facility located in Michigan.¹⁴⁰ At that time, this tribe began developing "Proxy Play Bingo," which was a form of Internet gambling.¹⁴¹ During Proxy Play Bingo, the actual game was conducted live on tribal land but a principal could watch the progress of the game from

a remote location via the Internet while a proxy-agent on the reservation played for the principal.¹⁴² The game was played as a typical bingo game until either a proxy-agent or an on-reservation bingo card holder declared bingo.¹⁴³ The result of the game was then posted on the Internet.¹⁴⁴

When the Tribe's planned proxy bingo gaming was reviewed by the General Counsel for the National Indian Gaming Commission, which was the agency responsible for overseeing Class II Indian Gaming under the IGRA, the agency disapproved because proxy bingo would involve players that were located off the Indian reservation.¹⁴⁵ The agency concluded such remote gaming via Internet would fall outside of the IGRA's safe harbor and expose the game operators to possible criminal prosecution under state and federal laws.¹⁴⁶ Hearings on Internet Proxy Bingo were subsequently held before the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee.¹⁴⁷ Following the hearings, the Department of Justice sent a letter to the Lac Vieux Tribe warning them that proxy bingo, if conducted in part off of Indian lands, could violate state and federal laws.¹⁴⁸

The Lac Vieux Tribe filed suit against the United States Federal Government for declaratory and injunctive relief.¹⁴⁹ However, the federal court dismissed the action for lack of subject matter jurisdiction.¹⁵⁰ The district court explained that the Tribe was seeking judicial review of a non-reviewable agency decision, a judicial order pre-empting future enforcement action, and a statement that the IGRA authorized Proxy Play Bingo, and remedies unobtainable from the court.¹⁵¹ While the Lac Vieux Tribe was not successful in obtaining an exception under the IGRA authorizing Internet gaming originating from the Indian reservation, the suit serves to demonstrate an interest on the part of at least one Tribe in the legalization of Internet bingo and online gaming as a whole.

U.S. Obligations Under GATS

Additional pressure to legalize Internet gambling has been exerted by a foreign interest desiring to legalize online gambling activities in the United States through enforcement of the General Agreement on Trade in Services ("GATS"), an international trade treaty.¹⁵² In this trade dispute, Antigua, a former British colony and member of the Commonwealth, filed a complaint in 2003 with the World Trade Organization ("WTO") against the United States alleging that, through state and federal laws, the United States had imposed a "total prohibition" against the cross-border supply of gambling and betting services from Antigua.¹⁵³ Antigua contended that such a "total prohibition" against Antigua's Internet gambling industry was contrary to the obligations of the United States under GATS.¹⁵⁴

The reason for Antigua's concern was that it derived millions of dollars of government revenue from licensing fees to about 119 licensed Internet gambling and betting operations. Therefore, it was in Antigua's interest to expand Internet gambling to markets in the U.S. Antigua argued that the GATS agreement included specific commitments on gambling and betting services, and that state and federal laws of the United States

prohibiting Internet gambling were contrary to its obligation to grant full market access to Antigua's gambling interests.¹⁵⁵

A panel was established to consider Antigua's complaint. In 2004, the panel concluded Antigua had established a prima facie case that certain U.S. federal laws, such as the Wire Act, the Travel Act, and the Illegal Gambling Business Act, as well as numerous state laws, created an impermissible ban against the supply of cross-border Internet gambling services, which was contrary to the obligations of the United States under certain provisions of the GATS.¹⁵⁶ The panel also concluded, in view of the Interstate Horse Racing Act¹⁵⁷, that the United States had failed to show that it did not permit pari-mutuel wagering on horse races via telephone and the Internet.¹⁵⁸

The United States appealed the decision of the Panel, and the matter was considered by the Appellate Body of the WTO. After considering additional arguments filed by Antigua and the United States, the Appellate Body came to six conclusions: (1) the United States had obligated itself under GATS to

Since Internet gambling has proven so profitable, there is little incentive for foreign countries to curb access by U.S. citizens to online gambling sites, which lawfully generate revenue and jobs in these countries.

specific commitments on gambling and betting services; (2) by maintaining the Wire Act, the Travel Act and the Illegal Gambling Business Act, the United States was acting inconsistently with its GATS obligations; (3) the concerns addressed by the Wire Act, the Travel Act and the Illegal Gambling Business Act fall within the scope of public morals and/or public order and are measures necessary to protect public morals or to maintain public order; (4) the United States had demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act were necessary to protect public morals and/or maintain public order, thereby justifying acts other-

wise inconsistent with GATS; (5) in light of the Interstate Horseracing Act authorizing off-track wagering on horse races, the United States did not demonstrate consistent application of the Wire Act, the Travel Act, and the Illegal Gambling Business Act in accordance with its public morals/public order exception to the GATS obligations; and (6) while the United States had demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Act are measures necessary to protect public morals or to maintain public order, the United States did not demonstrate, in view of the Interstate Horseracing Act, that the prohibitions embodied in the above measures were applied to both foreign and domestic suppliers of remote betting for horse racing.¹⁵⁹ Therefore, the Appellate Body concluded the United States had not demonstrated that the Wire Act, the Travel Act, and the Illegal Gambling Business Act were measures either protecting public morals or maintaining public order.¹⁶⁰

In other words, the Appellate Body decided the United States had an obligation, under GATS, to permit Internet gambling, though this obligation could be overruled by the need to protect the public morals and/or to maintain public order.¹⁶¹ However, the Appellate Body concluded that, in light of the Interstate Horseracing Act which permitted interstate off-track betting on horse races, the measures applied by the United States to protect public morals and to maintain order, namely the Wire Act, the Travel Act and the Illegal Gambling Business Act, were inconsistently applied and therefore did not meet the requirements of the public morals/public order exception.¹⁶² The Appellate Body also concluded that, by allowing interstate off-

track betting on horse racing, the United States was not applying the prohibitions provided by the Wire Act, the Travel Act and the Illegal Gambling Business Act against both foreign and domestic providers of off-site gambling services relating to horse racing.¹⁶³

In summary, the Appellate Body of the WTO has determined that the United States had not shown it was meeting its GATS obligations regarding gambling and betting services pertaining to off-track wagering on horse racing. How the United States will respond to this interpretation of GATS, as applied to Internet wagering on horse races, remains to be seen.

The Internet Gambling Prohibition and Enforcement Act

In November 2005, H.R. 4411, also known as the "Internet Gambling Prohibition and Enforcement Act," was introduced in the House seeking to strengthen the prohibition on Internet gambling.¹⁶⁴ This measure seeks to strengthen the Wire Act by prohibiting the use of credit cards and electronic fund transfers for the payment of gambling debts.¹⁶⁵ The Act also creates regulations requiring financial institutions to block credit card and electronic fund transfers to Internet gambling businesses whether domestic or overseas.¹⁶⁶ Worth noting is the fact that the Act has no limiting effect on pari-mutuel wagering, which includes off-track betting on horse races.¹⁶⁷ Consequently, the Act maintains the present carve-out exception for interstate off-track gambling involving the Internet. The Act makes no attempt to bring the United States into compliance with the GATS obligations voiced by the WTO in response to the Antigua 2003 complaint.

H.R. 4411 passed in the House on July 11, 2006 and is now on the Senate Legislative Calendar.¹⁶⁸ It remains to be seen though whether the bill will be passed by the Senate; and even if enacted into law, whether it will have any practical effect on the Internet gambling industry.

Summary

The Internet gambling industry is rapidly growing, and foreign online gambling sites are being created at an amazing rate. Yet Internet gambling has been embraced by only one state, Nevada, and remains an activity otherwise prohibited by many state and federal laws. Despite a multitude of federal laws, such as the Wire Act, the Travel Act, the Illegal Gambling Business Act, and RICO statutes for combating Internet gambling, Internet access to foreign-based gambling websites is readily available to U.S. citizens, and it is rare for an operator of one of these online sites to face federal criminal prosecution.

At the same time, the gambling landscape in the United States is transforming so rapidly with the expansion of state-sponsored gambling, the rise of Indian gaming, and the permissive posture of the U.S. government towards interstate off-track betting on horseracing that continued efforts to criminalize Internet gambling appear both futile and irrational. As the scope of land-based gambling and off-site gambling continues to expand, it is likely that the United States will have continued difficulties in meeting its obligations under GATS if the United States continues its absolute ban on foreign Internet gambling services.

Thus, as to whether the United States Federal Government should continue its efforts to criminalize Internet

gambling, the economics of the gaming industry and the practical limitations regarding enforcement of present or future criminal laws leads to one conclusion: know when to fold. The time is ripe to switch from criminalization to regulation.

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¹ *Hearing on H.R.1223 and H.R. 21 Before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary, United States House of Representatives (2003)(statement of John G. Malcolm, Deputy Assistant Attorney General) available*

at www.cybercrime.gov/Malcolmtestimony42903.htm (last visited on March 13, 2005).

² Tony Batt, *Net bet debater mentions Station*, LAS VEGAS REV. - J., February 26, 2005, at 1D.

³ *See, e.g., People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 847 (N.Y. Sup. Ct. 1999); *In re MasterCard Int'l Inc.*, 313 F.3d 257, 260 (5th Cir. 2002); *International Bancorp, L.L.C. v. Societe Des Bains De Mer Et Du Cercle Des Etrangers A Monaco*, 192 F. Supp. 2d 467, 474 (E.D. Virginia, 2002).

⁴ *See generally* Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26, n.10 (2004) (stating that focus of the article, similar to the focus of this article, was on Internet casino games conducted online that have their outcome determined by a random number generator).

⁵ *See United States v. Cohen*, 260 F.3d 68, 70 (2d Cir. 2001).

⁶ Andrew Bary, *Full House*, BARRON'S, February 21, 2005, at 21.

⁷ Charles Doyle, *Internet Gambling: An Abridged Overview of Federal Criminal Law*, CRS REPORT FOR CONGRESS (Congressional Research Service) (November 29, 2004).

⁸ *See* 18 U.S.C. § 1953 (2006) (prohibiting the interstate transportation of wagering paraphernalia); 28 U.S.C. § 3702 (2006) (prohibiting unlawful sports gambling).

⁹ 18 U.S.C. § 1084 (2006).

¹⁰ 18 U.S.C. § 1084 (a) (2006).

¹¹ 18 U.S.C. § 1084 (b) (2006).

¹² Seth Gorman and Antony Loo, Comment, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling*, 16 LOY. L.A. ENT. L. REV. 667, 671 (1996).

¹³ *In re MasterCard*, 313 F.3d at 262-63.

¹⁴ *Cohen*, 260 F.3d at 68.

¹⁵ *Id.* at 70.

¹⁶ *Id.* at 70 n. 2.

¹⁷ *Id.* at 70.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 70-71.

²³ *Id.* at 71.

²⁴ *Id.*

²⁵ *Id.*

26 *Id.*
27 *Id.* at 73.
28 N.Y. Const. art. I, § 9
29 N.Y. Gen. Oblig. L. § 5-401
30 *Cohen*, 260 F.3d at 74.
31 *Id.* at 74-75.
32 *Id.* at 76.
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.* at 76-77.
41 *Id.*
42 *Id.*
43 *Id.* at 77.
44 *Id.*
45 18 U.S.C. § 1952 (2006).
46 18 U.S.C. § 1952 (a) (2006).
47 18 U.S.C. § 1952(b).
48 *See* *United States v. Campione*, 942 F.2d 429, 434 (7th Cir. 1991) (citing *United States v. Peskin*, 527 F.2d 71, 79 n.3 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976)) (stating 18 U.S.C. § 1952's reference to state law is only to identify the defendant's unlawful activity; the federal crime to be proved is the use of interstate facilities, thus not requiring the completion of a state crime).
49 Jeffrey Rodefer, *Federal Travel Act Scope and Predicates*, available at www.gambling-laws-us.com/Federal-Laws/travel-act.htm (last visited February 28, 2005).
50 Gottfried, *supra* note 4, at ¶ 52 (citing 18 U.S.C. § 1952 (2003); *See United States v. Smith*, 209 F. Supp. 907 (E.D. Ill. 1962)).
51 *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).
52 *Id.* at 854.
53 *Id.* at 853.
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.* at 855.
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.* at 855-56.
66 18 U.S.C. § 1084(a).
67 18 U.S.C. § 1952.
68 18 U.S.C. § 1953.
69 *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d at 856.
70 *Id.* at 850.
71 *Id.*
72 *Id.* at 852-53.

73 *Id.* at 861-63.
74 *Id.* at 862.
75 *Id.* at 852.
76 *Id.*
77 18 U.S.C. § 1955 (2006).
78 18 U.S.C. §§ 1955(a) and (b) (2006).
79 18 U.S.C. § 1955(b)(2) (2006).
80 Gorman and Loo, *supra* note 12, at 675.
81 *United States v. Murray*, 928 F.2d 1242, 1245 (1st Cir. 1991).
82 *United States v. DiMuro*, 540 F.2d 503, 508 (1st Cir. 1976).
83 *See United States v. Schullo*, 363 F. Supp. 246, 249-50 (D. Minn. 1973), *aff'd*, 508 F.2d 1200 (1975), *cert. denied*, 421 U.S. 947 (1975) ("Congress' intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles, and whether they be labeled agents, runners, independent contractors or the like. Only customers of the business were to be excluded.").
84 *See generally* *United States v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996); *United States v. Farris*, 624 F.2d 890, 892 (9th Cir. 1980); *see also United States v. Kerrigan*, 514 F.2d 35 (9th Cir. 1975).
85 *E.g.*, General Obligations Law, N.Y. Gen. Oblig. L. § 5-401; New York Penal Law § 225.00(2)).
86 18 U.S.C. § 1955(b)(2).
87 Doyle, *supra* note 7.
88 18 U.S.C. § 1956; *see also* Doyle, *supra* note 7.
89 18 U.S.C. § 1957; *see also* Doyle, *supra* note 7.
90 *See* Gottfried, *supra* note 4, at ¶ 19 - 25 (laying out the concept of money laundering and ways gambling, particularly Internet gambling can facilitate money laundering).
91 *See World Interactive Gaming Corp.*, 741 N.Y.S.2d at 847; *Cohen*, 260 F.3d at 70; *In re MasterCard*, 313 F.3d at 260.
92 Gottfried, *supra* note 4, at ¶ 20 (citing *Hearing on H.R.1223 and H.R. 21 Before the Subcommittee on Crime, Terrorism, and Homeland Security Committee on the Judiciary*, United States House of Representatives (2003) (statement of John G. Malcolm, Deputy Assistant Attorney General) available at www.cybercrime.gov/Malcolmtestimony42903.htm (last visited on March 13, 2005).
93 *See* Gottfried, *supra* note 4, at ¶ 1 (noting 54 governments sanction online gambling); *see also* Bary, *supra* note 6 (stating that the major online poker websites are located out of the United States because of online gambling's status in the United States).
94 *See* 18 U.S.C. §§ 1961-1965 (2006).
95 18 U.S.C. § 1961.
96 18 U.S.C. § 1962(c).
97 18 U.S.C. § 1964(c).
98 *See In re MasterCard*, 313 F.3d 257, *passim*.
99 *Id.* at 264.
100 *Id.* at 260.
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*

106 *Id.*
107 *Id.* at 260-61.
108 *Id.*
109 *Id.*
110 *Id.* at 261.
111 *Id.* at 261-62.
112 *Id.* at 260, (Kan. Stat. Ann. § 21-4304. This statute, which states that commercial gambling is a “level 8, nonperson felony,” defines commercial gambling as : “(a) Operating or receiving all or part of the earnings of a gambling place; (b) Receiving, recording, or forwarding bets or offers to bet or, with intent to receive, record, or forward bets or offers to bet, possessing facilities to do so; (c) For gain, becoming a custodian of anything of value bet or offered to bet; (d) Conducting a lottery, or with intent to conduct a lottery possessing facilities to do so; or (e) Setting up for use or collecting the proceeds of any gambling device,” and N.H. Rev. Stat. Ann. § 647:2 (I-a)(b). This statute provides that “[a] person is guilty of a class B felony if such person conducts, finances, manages, supervises, directs, or owns all or part of a business and such person knowingly and unlawfully conducts, finances, manages, supervises, or directs any gambling activity on the business premises....”).
113 *Id.* at 261.
114 *Id.* at 262.
115 *Id.*
116 *Id.* at 262-63.
117 *Id.*
118 *Id.* at 263.
119 Gottfried, *supra* note 4, at ¶ 46 (citing *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 850-51 (N.Y. Sup. Ct. 1999) (stating the New York state court applied the Wire Act to an Antigua-based Internet casino).
120 James D. Thayer, *The Trade of Cross-Border Gambling and Betting: The WTO Dispute Between Antigua and the United States*, 2004 DUKE L. & TECH. REV. 0013 (2004) (See para. 10).
121 *In re MasterCard*, 313 F.3d at 263.
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.* at 264.
127 Bary, *supra* note 6.
128 *See, e.g.*, www.playmc.com/about.html, (last visited May 3, 2005). This Internet Gambling Website states it is licensed in Canada by the Kahnawake Gaming Commission, Mohawk Territory of Kahnawake, is operated by a subsidiary of a Fortune 500 company listed on the NYSE, offers casino gambling, sportsbetting, and online poker, and accepts payments using Visa, MasterCard, Swatch, and Solo credit services.
129 Bary, *supra* note 6. (explaining that “NETeller profits from a 3% fee charged to Internet gambling companies when funds are transferred from NETeller account holders into the gaming firm’s bank account.”).
130 D. Koenig, *Officials Charge 11 from Offshore Gambling Site*, available at www.msnbc.msn.com/id/13907293/>1=8307 (published

July 18, 2006). The Justice Department alleges defendants committed conspiracy, racketeering and fraud in taking sports bets from U.S. residents, and failed to pay federal wagering excise taxes on more than 3.3 billion dollars in U.S. wagers.
131 Gorman and Loo, *supra* note 12, at 667.
132 Gottfried, *supra* note 4, at ¶ 1.
133 Bary, *supra* note 6 (noting that Sportingbet, is based in the United Kingdom and publicly is traded on the London Stock Exchange; the Kahnawake Gaming Commission is located on a Mohawk Indian reservation in Canada and PartyPoker has operations in India).
134 Batt, *supra* note 2.
135 *See Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 187 n.5 (1999).
136 *See Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft*, 360 F. Supp. 2d 64 (D.D.C. 2004).
137 Geoffrey Precourt, *The Next Generation*, FORTUNE, Vol. 151, No. 5, March 7, 2005, at S4.
138 *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222 (1987).
139 102 Stat. 2467, 25 U.S.C. § 2701 et seq.
140 *Lac Vieux Desert Band*, 360 F. Supp. 2d at 65.
141 *Id.* at 65.
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.* at 65-66.
146 *Id.* at 66.
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.* at 68.
151 *Id.*
152 *See generally* World Trade Organization Appellate Body, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005) (hereinafter “*Cross-Border Supply*”).
153 *Id.* at ¶ 2.
154 *Id.*
155 *Id.*
156 *See id.* at ¶ 4.
157 Interstate Horseracing Act of 1978, Pub. L. No. 95-515, 92 Stat. 181 (codified as 15 U.S.C. §§ 3001-3007 (2005)). The Interstate Horseracing Act provides that “[a]n interstate off-track wager may be accepted by an off-track betting system” when certain conditions specified by the Act have been met.
158 *See Cross-Border Supply*, *supra* note 152 at ¶ 7 of Annex I.
159 *Id.* at ¶ 373.
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*
164 H.R. 4411, 109th Congress, (2006), available at <http://thomas.loc.gov/cgi-bin/thomas>.
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*

BLUFFING? THE LEGISLATIVE RESPONSE TO INTERNET GAMBLING

Jon Feldon*

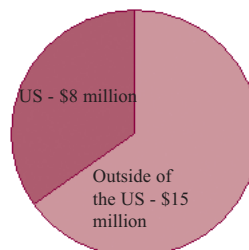
The Law

On September 30th, Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”) to address the difficulties enforcement agencies face in delineating which actions by internet gambling sites constitute criminal activity, and which are allowable as symptoms of an unregulated industry.¹ The new act, awaiting presidential approval, applies to all bets and wagers “unlawful under any applicable federal or state law.”² Furthermore, the Act bans the use of banks, credit cards, and online money transfers to pass money between bettors and “unlawful” gambling sites.³ If President Bush signs UIGEA into law, the Act will make the use of credit cards, checks, or any electronic fund transfers illegal as means to settle gambling debts.⁴ Congress did not go so far as to require internet search engines like Google to independently scan the web to identify and block gaming sites like they must with child pornography sites. UIGEA does, however, allow federal prosecutors and state attorneys general to force search engine companies to remove links to internet gambling pages on a case-by-case basis.⁵ Representative Robert Goodlatte of Virginia proposed a bill to expand the Wire Act,⁶ currently used to prosecute internet gambling, to explicitly apply to the internet.⁷ Congress shied away from Goodlatte’s proposed approach, regarded by many as the most direct and efficient strategy, leaving UIGEA open to criticism that the act is an empty gesture by comparison.⁸

The Problem

Congress’s failure to clearly identify the meaning of the term “unlawful” in the wording of the Act represents the most glaring difficulty in UIGEA’s approach to resolving the legal gray zone surrounding internet gambling in the United States.⁹ The issues surrounding the legality of different types of online betting are an example of how the phrase “unlawful under any applicable federal or state law” renders UIGEA ineffective. Horse-race betting sites such as Youbet.com have argued that other federal laws make their form of online gambling legal, and UIGEA does nothing to resolve the dispute because the Act is only applicable in situations where such a conflict has already been resolved and the disputed practice falls under the category of “unlawful under any applicable federal or state law.”¹⁰ A federal appeal in 2002 legalized casino-type online gambling while barring internet sports betting,¹¹ but American authorities have been largely indifferent to the distinction. U.S. law enforcement has arrested foreign businessmen running sports betting gambling sites, such as David Carruthers of Betonsports.com, but also seized money without hesitation from online casino gambling businesses such as Partygaming.com in 2004 and Vulcan Sports Media, Inc. through settlement in 2006.¹² Whereas legislators like Goodlatte would prefer to modify the existing law currently used to prosecute illicit internet gambling companies,¹³ and to make relevant statutes directly applicable to the problem,

UIGEA in its present form arguably creates more ambiguity, and will most likely create more legal questions than it resolves. Online gambling companies will still have difficulty identifying the legality of some of their practices, and law enforcement will still shoulder the burden of establishing the unlawfulness of any given practice.



Internet Gambling Use

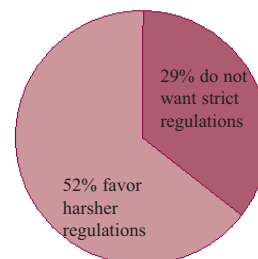
In 2005, nearly 23 million people gambled on the internet. 8 million, or 35% of those people, were from the United States.^a

Online Bets Placed

In 2005, \$12 billion dollars worth of bets were placed online worldwide. The United States alone wagered \$6 billion.^b

Public Opinion

52% of Americans favor increasing regulations for internet gambling while only 29% believe that there is no need for harsher regulations.^c



The Industry

Despite its ambiguity, UIGEA has already had a profound effect on the \$13 billion online gaming industry.¹⁴ The passage of the bill through Congress caused stock prices for internet gambling companies primarily targeting the United States to plummet,¹⁵ including Party Gaming PLC, 888 Holdings PLC, and Sportingbet PLC.¹⁶ The dramatic effect of American legislation is due to the fact that U.S. market accounts for more than half of the patronage of internet gaming sites.¹⁷ Some companies have reacted by shifting their focus from the U.S. to Asia, while others are attempting to skirt legal issues by adjusting their names and procedures, or diversifying their service offerings.¹⁸ Party Gaming PLC, the world’s largest online gambling company, and 888 Holdings PLC have both announced that if President Bush approves UIGEA, they will cease operations in the United States, a move that will immediately cut off the source of 76% of Party Gaming’s profits and 50% of 888 Holding’s.¹⁹

Most industry representatives are unhappy with UIGEA, feeling that the U.S. is unfairly shutting foreign com-

panies out of the American market.²⁰ Nigel Payne of World Gaming PLC called the act “absurd protectionism” after the online gaming crackdown resulted in the arrest of Sportingbet.com chairman Peter Dicks and killed Sportingbet.com’s interest in acquiring World Gaming.²¹ I. Nelson Rose, an expert on internet gambling from Whittier Law School, describes the Act as a well-timed political maneuver rather than a fully conceived attempt to address online gambling issues.²² A number of foreign online gaming companies share Rose’s sentiments and are content to wait and see what effect the law will have, if any, in nine months when the UIGEA committee presents its ideas for what regulations the act will contain.²³ Similarly, companies that serve as intermediaries, such as Neteller.com and Firepay.com, may or may not be affected significantly, depending on how the Treasury Department constructs its regulations to accompany the act.²⁴

Some experts say that UIGEA will result in a temporary halt in internet gambling, followed by a rush of new companies, designed to fill the legal ambiguities created by UIGEA.²⁵ Other experts say that privately held companies will be virtually unaffected, and UIGEA will serve only to shut out the large, prominent companies, with U.S. online gamblers continuing to play without a pause.²⁶

Is the UIGEA a congressional bluff? Maybe.

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¹ See David Wessel, *Law is Unlikely to Corral Internet Gambling*, Wall Street Journal, October 5, 2006, at A2; see also H. Res. 907, H.R. 4777: Internet Gambling Prohibition Act.

² *Id.*

³ See *id.* (detailing the different internet transactions to be covered by UIGEA).

⁴ See Jessica Hodgson, *Gambling Companies Move To Diversify Outside U.S.*, Wall Street Journal, October 3, 2006, available online, last visited October 30, 2006 (indicating that settling gambling debts over the internet will become illegal under UIGEA).

⁵ See Wessel *supra* note 1 (adding that prosecutors will have a limited power to compel search engines to act as filters, through the use of court orders).

⁶ See 18 U.S.C.A. § 1084, Transmission of Wagering Information (criminalizing the transmission of bets or wagers, information or authorization concerning bets or wagers through interstate or foreign commerce by means of a “wire transmission facility”).

⁷ See Wessel *supra* note 5 (crediting Representative Goodlatte, R-VA, for his attempts to have UIGEA amend the Wire Act).

⁸ See *id.* (relating Congress’s refusal to adopt Goodlatte’s bill containing an amendment to the Wire Act to explicitly cover internet gambling).

⁹ See *id.* (supporting the assertion that the wording of UIGEA’s main clause severely weakens its effectiveness).

¹⁰ See *id.* (addressing the controversy surrounding the legality

of different forms of online gambling).

¹¹ See *id.* (mentioning that a federal appeal resulted in a largely ignored legal differentiation between different types of internet gaming).

¹² See *Will Google Pull Online Gambling Links?*, October 9, 2006, available at <http://www.bettingmarket.com/ggg-gooole109876.htm>, last visited 10/16/2006 (ascribing a failure to acknowledge the legality of some internet gambling forms to U.S. legal enforcement agencies).

¹³ See generally Wesley Scott Ashton, *Criminalizing Internet Gambling: Should the Government Keep Bluffing or Fold*, preceding article, 2 CRIM. L. BRIEF 4 (explaining the various U.S. laws under which prosecutors currently attack internet gambling, including the Wire Act, the Travel Act, the Illegal Gambling Business Act, state money laundering statutes, and racketeer-influenced and corrupt organization statutes).

¹⁴ See Hodgson *supra* note 4 (acknowledging the far-reaching, international effects of the U.S.’s legislation against internet gambling).

¹⁵ *Id.*

¹⁶ See Christina Binkley and Jessica E. Vascellaro, *Despite Crackdown, Online Gamblers Aren’t Ready to Fold*, Wall Street Journal, October 3, 2006, at A17 (confirming the international effect of U.S. legislation on online gambling businesses).

¹⁷ See *id.* (providing support for the contention that U.S. legislation is highly influential, due to the sizable U.S. gambling market).

¹⁸ See Hodgson *supra* note 4 (listing the different ways in which internet gambling companies intend to react to the passage of UIGEA).

¹⁹ See Binkley *supra* note 15 (predicting the potential loss of revenue for the two largest internet gambling companies should UIGEA remove the U.S. market).

²⁰ See Hodgson *supra* note 3 (highlighting the industry reaction to UIGEA).

²¹ See *id.* (quoting an industry leader and noting the events that helped lead to the formulation of his opinion).

²² See *Online Gambling Moves Are More Politics Than Poker*, available at <http://www.online-casinos.com/news/news3055.asp>, last visited 10/16/2006 (discussing I. Nelson Rose’s position).

²³ See *id.* (relating the strategy of those companies taking I. Nelson Rose’s position that the UIGEA is composed of more political bluster than substance).

²⁴ See Binkley *supra* note 15 (illustrating how additional contributions by the Treasury Department will play a significant role in the ultimate effect of UIGEA).

²⁵ See *id.* (predicting through experts how UIGEA will affect internet gambling in the U.S.).

²⁶ *Id.*

Endnotes for Charts and Graphs

^a American Gaming Association, <http://www.americangaming.org> (last visited October 21, 2006).

^b *Busted Flush*, THE ECONOMIST, Oct. 5, 2006, <http://www.economist.com/business/displaystory.cfm?storyid=7997055>.

^c *A Virtual Roll of the Dice*, available at <http://www.rasmussen-reports.com/2006/September%20Dailies/InternetGambling.htm>

THE PROSECUTOR'S ROLE: A RESPONSE TO PROFESSOR DAVIS

Randall D. Eliason*

Editor's Note: The following article is in response to Prosecutorial Misconduct: An Abuse of Power and Discretion, 1 CRIM. L. BRIEF 16 (2006), by American University Washington College of Law Professor and former Director of the Public Defender Service for the District of Columbia, Angela Davis. In her article, which appeared in the last issue of this journal, Professor Davis argued that there is a widespread culture of prosecutorial misconduct that has gone unchecked by the courts, that this misconduct has reached epidemic proportions, and that the legal profession must take the lead in instituting meaningful reform. Professor Davis's article can be found at: <http://www.wcl.american.edu/journals/clb/>

"The United States wins its point whenever justice is done its citizens in the courts."¹

Johnny St. Valentine Brown, Jr. was a veteran narcotics detective. Brown – who went by the nickname “Jehru” – had nearly thirty years of experience investigating drug cases on the streets of the District of Columbia. He had worked as an undercover officer buying drugs, as a detective investigating major drug rings, and in virtually all other aspects of narcotics law enforcement. He had worked for the federal government in the Office of National Drug Control Policy and as an investigator for a congressional committee studying drug trafficking. Brown was so good that the D.C. United States Attorney's Office regularly asked him to teach new prosecutors about illegal drugs and how they are used, packaged, and sold. When I joined the U.S. Attorney's Office in 1989, Brown gave the narcotics lecture to my training class of new Assistant U.S. Attorneys.

Jehru's real fame, however, was as an expert witness. Almost all criminal drug cases, even the most routine, require the prosecution to present a “drug expert.” These witnesses, usually experienced narcotics investigators, testify about such matters as police procedures for handling drug evidence and the packaging and sale of illegal drugs on the street. Due to the volume of drug prosecutions, these experts are in great demand. Good ones may testify in several different cases in a single day.

As a drug expert, Brown was a prosecutor's dream. He was good looking, well-dressed, and charismatic, with a rich baritone voice. He would turn and speak directly to the jury when testifying, like a college professor patiently instructing a class of freshmen. He was always professional, always prepared, incredibly knowledgeable, and never lost his cool. Juries loved him. Defense lawyers feared him. Prosecutors would rearrange the order of witnesses they intended to call, just to accommodate Jehru's busy schedule. Brown was not only good, he was prolific. According to one report, by the late 1990's Brown had testified in more than four thousand trials in twenty-six jurisdictions and one hundred and twelve cities, although his primary venue was the District of Columbia.²

Expert witnesses usually begin their testimony by discussing their background and training, in order to establish their

qualifications. Brown was no exception, and each time he testified he began with a lengthy recitation of his considerable experience. It was almost a matter of rote; while he was talking to the jury about his background, prosecutors would review their notes and defense attorneys would plan their cross-examination. Everyone who tried drug cases knew Jehru. Everyone knew he was eminently qualified and that there could be no serious challenge to his expertise.

In the summer of 1999, Brown was retained by the D.C. government as an expert witness for the defense in a civil case. The government was being sued by the family of a young man who was killed while working as a confidential informant for the police. When the plaintiff's lawyer took his deposition, Brown testified that in addition to his extensive experience within the police department, he had earned a graduate degree from the Howard University School of Pharmacy. The plaintiff's lawyer was unfamiliar with Brown and decided to check him out. With a few phone calls, he learned that Brown had never attended Howard University, much less obtained a degree. When the civil attorney exposed these lies, Brown was removed as an expert witness in the case.³

This all came to light while I was serving as the Chief of the Public Corruption/Government Fraud section of the U.S. Attorney's Office – the unit charged with prosecuting police misconduct. Our review of the transcripts in a few recent drug cases confirmed our fears: Brown had told similar lies in a number of criminal trials while testifying as an expert for the prosecution. He had regularly claimed to have earned an undergraduate or graduate degree in pharmacology from Howard University in the 1960's. In a number of cases he had falsely testified that he was a board-certified pharmacist. Sometimes he had testified that he actually worked for a time as a pharmacist, dispensing prescription drugs at several local drugstores and grocery stores. These claims had been made during the rote recitations of his credentials that lawyers in drug cases had heard so many times, and had gone unchallenged by both prosecutors and defense attorneys.

Faced with what we had learned, my colleagues and I had to decide what to do. We considered it extremely unlikely that Brown's lies had actually affected the outcome of any cases. There was no evidence that he had lied about anything other than his own credentials. He had testified only as an expert, he was not a fact witness who identified the particular defendants or testified about their involvement in the case. The matters about which he testified were generally uncontroversial and could have been testified to by scores of other experts. Most significantly, Brown's true expertise was based on his years of work on the streets as a narcotics investigator; any formal education that he did or did not have paled in significance next to that experience. Nevertheless, although the prosecutors had not known it at the time, our office now had information that a government witness had lied under oath in numerous cases that had resulted in criminal convictions. We also knew that most defense attorneys who had represented clients in those cases probably were unaware that this was even an issue, and likely would remain unaware – unless we told them about it.

So we told them about it. The U.S. Attorney's office identified every case we could in which Brown had testified for us as an expert. We wrote to all defense counsel in those cases and informed them of the potential issue, in order to allow them to review the records and consider filing any appropriate motions. We also wrote letters to the local and federal public defender's offices notifying them of the potential problems with Brown's testimony. In addition, we published a notice about Brown's perjury in the *Daily Washington Law Reporter*, a widely-read local legal periodical, to try to get the word out to as many defense attorneys as possible.⁴ In a few cases where we believed Brown's testimony was arguably more consequential, we voluntarily agreed to vacate the convictions or allowed the defendants to plead guilty to lesser charges. In dozens of other cases, defense attorneys filed motions to vacate the convictions, and those motions were resolved by a judge.⁵

We also indicted Brown on multiple counts of perjury and sent him to federal prison.⁶

Nearly ten years before the Jehru incident, when I was prosecuting narcotics cases in federal court, a case was transferred to me that was about to go to trial. The defendant was charged with distribution of crack cocaine. It was a typical "buy-bust" case. In such a case, a team of investigators went to a known drug market and an undercover officer walked into the area to buy drugs. After a successful purchase, the undercover officer would leave the area and radio a description of the seller to an arrest team waiting nearby. The arrest team (also called the "jump outs") would then drive quickly to the area, jump out of their vehicles, and stop the suspect who fit the description. The undercover officer would come by in a car and make a "drive-by identification," telling the jump outs whether they had the right person. If the identification was positive, the suspect would be placed under arrest. I had handled dozens of such cases, as had every prosecutor in the narcotics section.

As I began to prepare for trial, however, some things about this particular case didn't feel right. The more I examined the evidence, listened to the tapes of the police radio transmissions, and interviewed the officers, the more uncomfortable I became. No single glaring problem stood out, but based on my experience with many such cases, I was troubled. Too many little things did not add up. I began to doubt whether the police had actually arrested the right person.

I knew that if I took the case to trial, there was a good chance the defendant would be convicted. After all, the undercover officer was ready to testify that the defendant was the same man who had sold him the drugs. Jurors who had not seen many such cases before might not pick up on some of the issues that were bothering me, and the defense attorney might miss some or all of them as well. I knew my doubts could be wrong, and that the defendant might well be guilty. But I also knew that the defendant was facing a mandatory minimum ten-year sentence, and that I would be the one putting him in jail.

I have always believed that, as a prosecutor, you can't stand in front of a jury and ask them to do something you would not do yourself. I was not convinced beyond a reasonable doubt of this defendant's guilt, so I knew I could not in good conscience ask a jury to convict him. I spoke with my supervisor

about my concerns, and he said I was authorized to do what I thought was best. On the morning of trial, I walked into court and dismissed the case.

In a more recent and much more high-profile case, federal prosecutors in Alexandria, Virginia were seeking the death penalty in the prosecution of Zacarias Moussaoui. Moussaoui, the so-called "twentieth hijacker," was accused of being involved in the plotting that led up to the September 11, 2001 terrorist attacks. During the trial, an attorney for the Transportation Security Administration ("TSA") committed a flagrant violation of the court's orders. The attorney (who was not a prosecutor but had been working with the prosecution team) e-mailed transcripts of trial testimony to upcoming government witnesses, thus sharing with them what other witnesses had said. This was a violation of the so-called "rule on witnesses" typically invoked in almost every case. The TSA attorney also appeared to be coaching the witnesses on how to shape their upcoming testimony.⁷

I have always believed that, as a prosecutor, you can't stand in front of a jury and ask them to do something you would not do yourself.

How did the judge learn of this misconduct? The prosecutors told her. As soon as they learned of the TSA attorney's actions, the prosecutors notified the court and defense counsel, who did not know about it and who may have never learned about it. The prosecutors did so even though they knew the revelation would do tremendous damage to the most important case of their careers. In court papers disclosing the TSA attorney's actions to the court and defense,

the prosecutors called her behavior "reprehensible."⁸ The judge, when explaining to the jury what had happened, noted that the prosecutors deserved "great credit" for bringing the matter to the court's attention.⁹

None of these stories strike me as particularly remarkable or noble. They are simply examples of prosecutors doing their jobs and trying to do the right thing. These stories would seem strangely out of place, however, in the prosecutorial world described by Professor Angela J. Davis in the debut issue of this Journal (*Prosecutorial Misconduct: An Abuse of Power and Discretion*, Criminal Law Brief, Spring 2006). Professor Davis argues that prosecutorial misconduct is widespread and routine and has reached epidemic proportions.¹⁰ She claims that prosecutors consistently and deliberately violate their ethical and professional obligations, and even break the law, in pursuit of a "win at any cost" agenda.¹¹

In the world portrayed by Professor Davis, the U.S. Attorney's Office no doubt would have tried to bury the information about Detective Brown's lies in the criminal trials, in hopes that defense attorneys would never learn about them. We certainly would not have prosecuted our former star witness for perjury, thus calling attention both to his misdeeds and to our own failure to notice them. In that world, I vigorously would have sought to convict the defendant in the drug case, despite my personal doubts, in order to add another "win" notch to my belt. The prosecutors in the Moussaoui trial would have simply instructed their witnesses to say nothing about how they had been improperly coached and would have gone on with their case. But fortunately for the criminal justice system, and for all of us, Professor Davis has painted a seriously flawed and distorted picture of what prosecutors do every day.

Let me be clear at the outset: my aim is neither to deny that prosecutorial misconduct occurs nor to condone it when it does. There are more than 35,000 prosecutors working around the country in more than 2,300 state and local prosecutor's offices, U.S. Attorney's Offices, and at the Department of Justice.¹² Any time you have a human enterprise that large, you are going to have some people who will break the rules. There are bad prosecutors, just as there are bad corporate CEO's, bad doctors, bad bankers, and bad defense attorneys. And because prosecutors wield a great deal of power, a prosecutor with corrupt motives can cause tremendous harm. True prosecutorial misconduct, when it occurs, should be condemned and swiftly punished.

Prosecutorial misconduct, however, is the exception, not the norm. When it does take place, good prosecutors – who know how serious true misconduct is and who must live with the fallout and damage to the reputation of their profession – are perhaps more upset by it than most people. The vast majority of prosecutors are dedicated public servants striving to do a difficult job in an ethical and honorable way. The prosecutorial world described by Professor Davis would be completely alien to them, as it is to me.

The Prosecutor's Role

A criminal defense lawyer's duty is to her client. Her job is to represent her client zealously within the bounds of law and ethics and to try to win, even if she knows her client is guilty. She has no obligation to seek the truth; in fact, in many cases, she will be doing her job if she can obscure the truth and keep it from coming to light.¹³

The prosecutor, however, has a different role, one unlike that of any other advocate. That role was most famously described by the Supreme Court decades ago:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁴

Many other cases have likewise recognized this duty of a prosecutor to seek to do justice and not merely to win.¹⁵ Prosecutors are expected to be zealous, but are to temper that zeal with a recognition of their broader obligations. As one former prosecutor has written, “[p]rosecutors of course are not as impartial as judges, nor are they asked to be. But they are asked to be more impartial than defense attorneys.”¹⁶

The unique role of the prosecutor also is recognized in various ethical and professional standards. The American Bar Association's Model Rules of Professional Conduct, which

have been adopted by nearly every state,¹⁷ include Rule 3.8, entitled “Special Responsibilities of a Prosecutor.”¹⁸ Rule 3.8 provides, among other things, that a prosecutor must not knowingly bring charges not supported by probable cause, must work to ensure that the rights of the defendant are protected, and must make timely disclosure to the defense of all exculpatory evidence (also known as *Brady*¹⁹ material). The American Bar Association Standards for Criminal Justice similarly provide that the “duty of the prosecutor is to seek justice, not merely to convict.”²⁰ The National District Attorneys Association Prosecution Standards state that the “primary responsibility of prosecution is to see that justice is accomplished.”²¹

Each day, in thousands of cases around the country, prosecutors decline to bring indictments, dismiss charges, turn over evidence favorable to the defense, and take countless other actions that benefit criminal defendants or make prosecuting a case more difficult. They do it because it's their job, and their professional obligation, to be focused on something more than simply winning. Their duties require them to do their best to play by the rules, respect the rights of the accused, be completely candid with the court, and above all, to be certain they are prosecuting the right people.

These obligations were drilled into me from the beginning of my time at the U.S. Attorney's office.²² Over the years, I attended – and later taught – numerous training sessions on issues such as *Brady* obligations, charging decisions, and the proper exercise of prosecutorial discretion. I attended professional conferences with other prosecutors from around the country, where we shared our experiences and talked about how best to fulfill our obligations while doing our jobs. I participated in countless discussions with colleagues concerning such issues as whether to bring particular charges, whether to investigate a particular defendant, or whether certain evidence constituted *Brady* material. We often wrestled with these issues, not to decide how best to win (because then the decision is easy) but to decide how best to fulfill our legal and ethical responsibilities during the course of a prosecution.

Many may believe the notion that prosecutors would actually seek to do justice is nothing more than a quaint platitude. Prosecutors are often portrayed in books and movies as ruthless, political animals bent on winning at any cost, even if it means knowingly convicting the innocent. Some of the recent excesses of the current Justice Department in alleged furtherance of the fight against terrorism have further added to public skepticism of law enforcement. In this cynical age, it is easy to dismiss the special obligation of prosecutors as simply a naïve and unrealistic ideal.

I don't agree. To most prosecutors – and to all good prosecutors – this duty to seek justice really does mean something. It becomes ingrained as part of your professional identity. I saw it practiced every day during my twelve years as an Assistant U.S. Attorney. Prosecutors may not always agree with each other, and certainly may not always agree with defense counsel, about how best to fulfill that obligation in a given situation. But they always know that the obligation is there.

It is interesting, although perhaps not surprising, that those commentators who believe that prosecutors do in fact seek to meet this higher obligation tend to be former prosecutors,²³ while those who are the most vocal about alleged wide-

spread prosecutorial misconduct tend to be current or former criminal defense attorneys.²⁴ In my experience, relations between prosecutors and defense attorneys are generally collegial and certainly no worse than relations among attorneys in other segments of the bar. It has also been my experience, however, that some criminal defense attorneys – particularly those who, like Professor Davis, work or have worked as public defenders – have very strong feelings about prosecutors. They seem to believe that prosecutors are morally suspect, simply by virtue of their profession. Indeed, in the title of a recent article, one former public defender went so far as to ask, “Can you be a good person and a good prosecutor?”²⁵ Her answer: probably not.²⁶

I have no quarrel with the role of the defense attorney in the criminal justice system: to represent her client with vigor and put the government to its proof. I do take issue, however, with Professor Davis’s portrayal of how prosecutors operate within that same system. The prosecutor’s role carries with it a unique set of obligations. Seeking to fulfill the duty to do justice is the foundation of the prosecutor’s job, and is at the heart of every good prosecutor’s professional identity. There is no basis for the claim that prosecutors are routinely disregarding these ethical and legal obligations to “abuse [their] power and discretion.”²⁷

Prosecutorial “Misconduct” vs. Prosecutorial Error

The first difficulty with Professor Davis’s analysis lies in the term “prosecutorial misconduct” itself. Although this problem did not originate with Professor Davis, it severely undermines her arguments. The problem is this: much of what is labeled “prosecutorial misconduct” is not “misconduct” at all, at least not as that term is commonly understood.

The word “misconduct” generally denotes some kind of intentional wrongdoing.²⁸ “Prosecutorial misconduct” therefore suggests that the prosecutor has purposely acted in a way that is unfair, unethical, or even illegal. In truth, however, “prosecutorial misconduct” is a catch phrase used by the courts to describe virtually anything done by the prosecution in a criminal case that is subject to objection and possible legal challenge.²⁹ Use of the term says nothing about the prosecutor’s intent or lack of good faith.³⁰

In many cases, the label “prosecutorial misconduct” is actually quite unfair to the prosecutor. It is applied even to routine, inadvertent missteps that may be made by advocates in any case – the kinds of mistakes that everyone who tries cases will make from time to time. It may refer to asking an improper question, mentioning evidence that has not been properly admitted, or making a misstatement during closing argument. Such mistakes can occur as a result of inexperience, nerves, carelessness, a misjudgment about what the law allows, or simply through an excess of zeal in the heat of battle. The mistakes may still be serious and may even justify reversal of a conviction, but they are not “misconduct” as that term is commonly understood.³¹ In such cases, a more appropriate term would be “prosecutorial error.”³²

Let me provide a couple of examples. In the District of Columbia, as well as in other jurisdictions, it is generally considered misconduct for the prosecutor to say during closing argu-

ment that the jury should “send a message” on behalf of the community by finding the defendant guilty.³³ This is considered improper because the jury is supposed to focus only on the facts and whether the government has proved its case, not on pursuing social policy by sending messages.³⁴ In another D.C. case, it was held to be misconduct when the prosecutor in closing argument referred to the victim of a brutal homicide as having been “shot down like a dog in the street” and called the killing an “assassination.”³⁵ The court said these statements were an improper attempt to inflame the passions of the jury.³⁶

One can debate the merits of the rulings in such cases. All can agree, however, that this type of so-called “misconduct” by an advocate in the middle of trial is fundamentally different from the behavior of a prosecutor who deliberately buries exculpatory evidence or knowingly prosecutes an innocent man. All of these wide-ranging acts, however, are routinely grouped together under the single heading of “prosecutorial misconduct.”³⁷

Nor are the rules about what will constitute “misconduct” always clear. For example, some cases hold that it is prosecutorial misconduct in closing argument to call the defendant or a witness a liar.³⁸ Other cases, however, have found that this is not misconduct.³⁹ In any event, it is fine to argue that the evidence proves a witness’s testimony could not be true (in other words, the witness is lying) as long as you don’t use the “L” word.⁴⁰ Similarly, a prosecutor cannot vouch for a witness by saying “I believe he was telling you the truth,” but is free to argue, “the evidence shows that he was telling you the truth,” which of course tells the jury exactly what the prosecutor believes.⁴¹ The “shot down like a dog in the street” line was held

to be unduly inflammatory, but other cases have upheld language that seems indistinguishable or even worse, including such lines as calling the defendant a “sadistic killer.”⁴² Distinctions are made in the minds of appellate judges that likely are lost on juries, as well as on most advocates.⁴³ Even seasoned prosecutors are sometimes uncertain where the lines will be drawn.

There are several important points to note about this category of “prosecutorial misconduct” – the category that I suggest would better be called “prosecutorial error.” First, the errors take place in open court. The defense attorney is able to object, and the trial judge is able to inter-

vene, admonish the prosecutor, and issue a curative instruction to the jury if necessary. Nothing is done in secret or concealed from the defense, the jury, or the judge. The defense attorney is able to follow up with her own questioning and argument and may even be able to exploit the “misconduct” by suggesting to the jury that the prosecution is not playing fair.

Second, these types of errors are not committed only by prosecutors. Defense attorneys also make improper arguments, refer to inadmissible evidence, and harass witnesses, both intentionally and inadvertently.⁴⁴ Indeed, given their duty of zealous representation, they may be more likely to do so than the prosecutor, who has to worry about her obligations to justice and about creating appellate issues.⁴⁵ The difference is that a defense lawyer who breaks the rules, even deliberately, likely will receive at worst a scolding from the judge. A prosecutor who makes even an honest mistake, however, will be branded as having engaged in “misconduct.”

As Professor Davis notes, alleged *Brady* violations are another common source of claims of prosecutorial misconduct.⁴⁶ *Brady* violations take place when the government fails to fulfill its obligation to disclose material information in the government's possession that is favorable to the defense.⁴⁷ Again, however, simply labeling something a "*Brady* violation" tells you nothing about the underlying circumstances or the motives of the prosecutor, and the fact that a *Brady* violation is found does not mean that the prosecutor engaged in willful misbehavior. The good faith or bad faith of the prosecutor is irrelevant to the *Brady* analysis.⁴⁸ In fact, a *Brady* violation may be found where the prosecutor himself *didn't even know* about the information that was not disclosed, as long as the police or someone else on the prosecution team was aware of it.⁴⁹

Brady material can range from compelling evidence that clearly exculpates the accused to evidence that is arguably cumulative and may not even be admissible. Most difficult *Brady* questions involve judgment calls about the value of the evidence, and reasonable people can disagree. Trial judges and appellate judges themselves often differ over whether particular information was *Brady* material. As a prosecutor, however, if you make a good-faith decision about *Brady* material and a judge later disagrees, you haven't just made a mistake: you've engaged in "prosecutorial misconduct."

Simply looking at statistics about the number of cases that discuss prosecutorial misconduct or *Brady* violations therefore tells you very little about what actually happened in those cases. Such statistics also greatly overstate the incidence of true willful misbehavior by the prosecution. Most cases involving allegations of "prosecutorial misconduct" do not involve deliberate wrongful conduct by the prosecution, and would more accurately be characterized as prosecutorial error.⁵⁰ Lumping all of these cases together under the heading "prosecutorial misconduct" obscures the very different issues and concerns that underlie the different types of claims, and makes the problem of true willful misconduct sound far greater than it actually is.

It's Called Harmless Error for a Reason

As Professor Davis points out, most cases involving allegations of prosecutorial misconduct are upheld under the "harmless error" doctrine.⁵¹ In other words, courts usually find that the events labeled "prosecutorial misconduct" did not affect the fundamental fairness of the trial or call into question the result, and thus do not require a new trial. This would be harder to understand if most prosecutorial misconduct actually involved deliberate wrongdoing by the prosecution. It makes sense, however, when we realize that much that is labeled "misconduct" when done by the prosecution is better understood simply as trial error, and often harmless error at that.

Professor Davis seems to suggest that the harmless error standard is somehow illegitimate, a way for judges to ignore or excuse the misbehavior of prosecutors. The harmless error doctrine, she argues, demonstrates that the courts place a "higher premium on affirming convictions than [on] punishing prosecutors who do wrong."⁵² The problem with this claim is that it suggests (incorrectly) that most allegations of "misconduct" involve willful misbehavior that would make "punishment" appropriate. Because most of what is termed misconduct does not involve deliberate wrongdoing, this criticism is mis-

placed.

The harmless error doctrine, of course, was not something invented by judges to allow them to excuse prosecutorial misconduct. In federal cases, for example, the harmless error standard is contained in both the Criminal Rules and the United States Code and applies to all aspects of a trial, not just to mistakes by prosecutors.⁵³ Furthermore, it's not clear exactly what Professor Davis would propose as an alternative. She may believe it would be more appropriate if *any* finding of prosecutorial error – whether deliberate or not, and no matter how trivial or inconsequential in the scheme of the overall trial – resulted in the automatic reversal of a conviction. This is an argument that a defendant is entitled to a perfect trial, not merely a fair one. That is a worthy ideal but is something that has never been required and, given the frailties of human actors, probably can never be achieved.⁵⁴

It is true that most cases where prosecutorial misconduct is alleged are not reversed on appeal. This is not because judges are blindly allowing prosecutors to run roughshod over the rights of defendants. Rather, it is because most claims of prosecutorial "misconduct" are either without merit or involve what is better characterized as prosecutorial error. It's easy for the defense to cry "prosecutorial misconduct" and attempt to create an issue on appeal, and this is increasingly done as a defense tactic. In reality, however, most such claims have little basis. Most of the errors that do occur truly are harmless, and characterizing them as "misconduct" doesn't change that.

Lies, Damned Lies, and Statistics⁵⁵

The second major flaw in Professor Davis's analysis is the lack of any empirical basis for her claims of widespread, flagrant prosecutorial misconduct. The few studies on which she does purport to rely do not come close to supporting her conclusions.

To bolster her claims about an "epidemic" of prosecutorial misconduct, Professor Davis relies primarily on two studies.⁵⁶ The first, by the nonpartisan Center for Public Integrity ("CPI"), examined 11,452 cases in which allegations of prosecutorial conduct were reviewed by appellate judges. The study looked at cases over about a 30-year period.⁵⁸ The second study involved a series published in the *Chicago Tribune* in 1999 by reporters Ken Armstrong and Maurice Possley.⁵⁹ This study also examined about 11,000 cases, this time over a 36-year period.⁶⁰

A few points need to be made about these studies. First, as discussed above, statistics on the number of cases involving allegations of prosecutorial misconduct or *Brady* violations say nothing about the intent of the prosecutors, the underlying merits of the allegations, or whether true professional misconduct was involved. In the CPI study, of the more than 11,000 cases reviewed only about 2,000 resulted in reversal of a conviction or other relief to the defendant.⁶¹ In the great majority of cases, either the claim of misconduct was not upheld or the misconduct was found to be harmless error – again, most likely because the "misconduct" was in fact simply a trial error or minor *Brady* violation that did not affect the trial. Similarly, the *Chicago Tribune* study found that convictions were reversed in only 381 of the 11,000 cases studied.⁶²

I do not condone or excuse the conduct of any prosecutor found to have engaged in true misconduct. Any intentional misconduct by the prosecution is reprehensible and must be taken seriously. At the same time, however, these numbers have to be considered in context. The 2,000 cases of serious misconduct over 30 years found in the CPI study works out to a rate of about 66 cases per year; the 381 reversals in 36 years in the *Tribune* study is an average of about 11 cases per year. By contrast, in 2003 there were more than 70,000 federal criminal cases filed in the United States District Courts, and more than *twenty million* criminal cases filed in state courts.⁶³ Even if we limit the state criminal cases to felonies, the number is still nearly three million.⁶⁴ Sixty-six cases a year out of several million is a vanishingly small number. Even if the true incidence of prosecutorial misconduct, reported and unreported, were *500 times greater* than what was found in the CPI study, it would still involve only about one percent of all serious criminal cases filed in a year.

There are about 30,000 state and local prosecutors in the United States and more than 5,000 more working for the Department of Justice.⁶⁵ Sixty-six cases of misconduct in a year means that fewer than one-fifth of one percent of all prosecutors were found to have committed misconduct. If we assume that the truly bad prosecutors are recidivists with multiple claims of misconduct filed against them, then the number of individual prosecutors involved is even smaller.⁶⁶

These are hardly “epidemic” numbers. If anything, the data from these studies actually demonstrates that prosecutorial misconduct is quite rare.⁶⁷ Recognizing the limitations of what they had found, the authors of the CPI study noted that “[m]ost of the nation’s approximately 30,000 local trial prosecutors strive to balance their understandable desire to win – a desire supported by the vast majority of the citizenry – with their duty to ensure justice.”⁶⁸ One will search in vain for any such acknowledgement by Professor Davis.

Cases of egregious misconduct make headlines. This is the same phenomenon that applies to all news. When media coverage is criticized as too negative or sensationalistic, it is often observed that no one reports on all the planes that don’t crash. Similarly, no one reports on the thousands of cases every day where prosecutors fulfill their obligations and follow the rules. Those cases don’t make their way into the reported decisions or legal treatises. Nobody writes lengthy newspaper series investigating how prosecutors are doing their jobs properly. Like the thousands of safe airline flights every day, these cases proceed unnoticed through the system, because the system is operating as it should.

Studies talking about a few dozen cases per year therefore provide no support for claims of routine, widespread prosecutorial misconduct. Professor Davis, however, has a response to this: because much of what prosecutors do takes place in secret, she says, a great deal of misconduct must occur that we simply never hear about.⁶⁹ She notes darkly that “there are many opportunities for prosecutors to engage in misconduct that are nearly impossible to discover.”⁷⁰ Prosecutors interview witnesses, make charging decisions, conduct grand jury investigations, and carry out other duties shielded from the public

eye. These activities provide many opportunities for misconduct that may never come to light. Because they have the opportunity, she argues, prosecutors routinely and purposefully engage in misconduct, believing they will never be caught.⁷¹

Of course, defense attorneys also do a great many things in secret. Defense attorneys may mislead, intimidate, or even threaten witnesses when meeting with them prior to trial. They have the opportunity to coach witnesses, including their clients, to commit perjury, and knowingly to sponsor perjured testimony. They have the ability to destroy or otherwise tamper with physical evidence. There have certainly been documented cases of all of these things occurring,⁷² and all of this takes place outside of the public eye. Indeed, unlike prosecutors, defense attorneys are unhampered by any special ethical responsibilities to be fair or to seek the truth, and they know for certain that their actions will never be reviewed as part of a claim of “misconduct.” Presumably they would feel even more at liberty than prosecutors to engage in secret wrongdoing.

Applying Professor Davis’s reasoning, then, are we to conclude that deliberate misconduct by defense attorneys is widespread and has reached epidemic proportions? I think not, although my logic and evidence are just as compelling as hers – which is to say, not compelling at all.

If history teaches us anything, it is that the truth has a way of coming out.⁷³ Some witnesses who are abused will report what happened to them. Evidence that was thought to be destroyed will come to light in another form.

Individuals victimized by misconduct or scandal will come forward to report it. If this pervasive, secretive “culture of misconduct” existed, at least some of the hundreds of thousands of people involved in various aspects of law enforcement would come forward as whistleblowers to expose it. It is simply implausible to suggest that prosecutorial misconduct is as widespread and routine as Professor Davis claims, but we just don’t hear about it.

There is no empirical support for Professor Davis’s charges of rampant prosecutorial misconduct. Her argument boils down to a claim that this lack of proof is simply evidence of how effectively the secretive “culture of misconduct” is operating.⁷⁴ This reminds me of the old joke that prosecutors tell about conspiracy: “Don’t worry if you have no evidence of the conspiracy; that simply proves how effective the conspirators have been at covering it up!” One can only imagine how Professor Davis, as a defense attorney, would justly ridicule any prosecutor who leveled charges against a defendant with evidence as flimsy as that used by her to accuse all prosecutors.

Don’t Go to Aruba!

To further attempt to bolster her claims of widespread misconduct, Professor Davis discusses the facts of a few specific cases where the prosecutors’ behavior was truly abhorrent. From those cases, she then leaps to the conclusion that this type of misconduct is the norm. This is a flawed argument, a fallacy known as Hasty Generalization.⁷⁵ It is akin to discussing the facts of the highly-publicized disappearance of Natalee Holloway, and concluding that therefore most teenage girls who travel to Aruba disappear without a trace⁷⁶

For example, Professor Davis spends a fair amount of time discussing the case of Delma Banks.⁷⁷ The conduct of the prosecutors in that case was indeed appalling: they concealed evidence proving that the prosecution's star witnesses had been coached and had perjured themselves, and that one was a paid government informant. They also knowingly relied on the perjured testimony to argue their case to the jury. Banks was convicted of murder and nearly executed before the Supreme Court intervened.⁷⁸ As Professor Davis notes, the misconduct was so outrageous that a number of former judges and other public officials – including several former U.S. attorneys, a former Assistant Attorney General for Civil Rights, and a former FBI director – filed *amicus* briefs on Banks' behalf.⁷⁹

After discussing *Banks*, however, Professor Davis makes the startling assertion that *Brady* violations “as egregious as those in Banks' case” are “very common in prosecutors' offices,” and that the prosecutorial misconduct in that case was “not unusual.”⁸⁰ In other words, she believes it is “very common” and “not unusual” for prosecutors to coach witnesses to lie, and to commit crimes themselves by knowingly sponsoring perjured testimony. This is the stuff of police states: kangaroo courts and show trials where the prosecution has no concern for due process or the rule of law. If Professor Davis is correct that such conduct is commonplace, then the foundations of the criminal justice system have truly crumbled. Surely she must have some convincing evidence to back up this serious accusation?

No, she does not. In fact, in support of her sweeping charge, Professor Davis cites only a single article, written by a law student, which actually makes no such claim and certainly contains no facts to support such a claim.⁸¹ The reality, of course, is that there is no support for the accusation that such blatant misconduct is routine because that is simply not true. The *Banks* case is notorious precisely because the misconduct in that case was so unusual and shocking.⁸²

Professor Davis makes a similar error when she argues that prosecutors who engage in misconduct suffer no adverse consequences. She discusses a handful of particular cases before concluding that therefore “[m]ost prosecutors” who engage in misconduct “not only escape punishment, but advance in their careers.”⁸³ This is the *Aruba* fallacy again: because we can identify a few prosecutors who have been accused of misconduct and have gone on to further their careers, therefore this is what happens in “most” such cases.

Some of Professor Davis's arguments in this area are particularly interesting, coming from a former defense attorney. For example, she discusses the trial of several prosecutors and sheriff's deputies indicted for alleged misconduct in an Illinois case involving a defendant named Rolando Cruz.⁸⁴ All of the law enforcement defendants were ultimately acquitted, and several went on to advance in their careers. Professor Davis criticizes this result as evidence that misbehaving prosecutors are rarely held to account. Ordinarily, one would expect a defense attorney to argue that a defendant who is acquitted by a jury is still presumed to be innocent and is fully entitled to get on with his life. Perhaps this principle does not apply when the defendant is a prosecutor.⁸⁵

Once again, discussing a handful of particular cases proves nothing about what happens to “most” prosecutors who commit misconduct. As Professor Davis acknowledges, many

types of state bar disciplinary proceedings are not public.⁸⁶ Federal prosecutors are also subject to investigation and discipline by the Department of Justice Office of Professional Responsibility.⁸⁷ Perhaps most important, the many forms of internal discipline that take place – denial of a promotion, denial of plum assignments, a negative performance evaluation that affects a prosecutor's salary, and the like – are confidential personnel matters that are not made public.⁸⁸ The truth is that neither Professor Davis nor anyone else has sufficient information to say what happens to “most” prosecutors who engage in wrongful behavior. It is safe to say, however, that there is no reason to believe that prosecutors may routinely engage in deliberate misconduct with no fear of professional repercussions.

Why Do Prosecutors Seek Justice?

I believe that most prosecutors, most of the time, try to uphold their duty to seek justice and do not engage in deliberate misconduct. Other than my personal experiences with many prosecutors over the years, why do I believe this is the case?

The first and most important reason is simply that it is a prosecutor's job to do so. As outlined above, prosecutors are ethically, legally, and morally bound to seek justice; to see that the guilty are punished but the innocent do not suffer. They are required to prosecute only those they honestly believe to be guilty, to safeguard the rights of the defendant, to disclose exculpatory evidence to the defense, and to be completely candid with the court.

In the law, as in other fields, we generally presume that practitioners will strive to follow the ethical and legal requirements of their profession. If this were not the case, codes of professional conduct and other such rules would be of little use. Prosecutors will strive to fulfill their obligation to seek justice first and foremost because they are bound by law, ethics, and their oaths of office to do so. I do not believe we should just assume that such obligations have no affect on an individual.⁸⁹

Indeed, this is what I find most remarkable about Professor Davis's article. She has no hesitation about impugning the character of tens of thousands of attorneys, despite the lack of any solid support for her claims. She asserts that prosecutors – simply by virtue of their profession – routinely engage in conduct that in many cases is not only unethical, but criminal. Apparently we are to presume that prosecutors, unlike attorneys in any other area of practice, routinely disregard their legal and ethical obligations when given the opportunity. I am at a loss to understand how Professor Davis can make such a broad accusation based on such flimsy evidence. Perhaps she too believes that one cannot be both a good prosecutor and a good person.

There is another, and much more practical, reason to believe that prosecutors will generally play by the rules and try to do the right thing: that is the type of prosecutor who is most effective and, in the long run, most successful. Much of what a prosecutor does depends upon the ability of others to trust her word and her character. Judges must be willing to trust that when the prosecutor makes a representation to them, it is the truth. Witnesses must be able to rely on the prosecutor's word about what will happen at trial. Defense attorneys representing a client who is considering pleading guilty and cooperating

with the government must be able to trust the prosecutor's word concerning their client's status and what the prosecution will do in exchange for the client's cooperation. A prosecutor who cannot be trusted cannot, in the long run, be successful.

The single most important asset that any prosecutor has is his good name. Even in large cities, the criminal bar is a relatively small community. If a prosecutor gains a reputation for being dishonest or corrupt, the consequences will be extremely damaging. For one thing, judges will no longer accept the prosecutor's word, which will make his day-to-day life in court much more difficult. Unlike most attorneys, prosecutors regularly appear before the same judges time and time again. Those judges make countless rulings in the prosecutor's cases, not only on substantive issues, but on matters such as scheduling. A disgruntled judge has the ability to make a prosecutor's life extremely unpleasant.⁹⁰

Similarly, if defense attorneys believe that a prosecutor cannot be trusted, they will be less likely to advise their clients to cooperate with the government. Without cooperating witnesses, building any kind of major prosecution is virtually impossible.⁹¹ A defense lawyer can also make an untrustworthy prosecutor's life much more difficult simply by refusing to engage in the informal give-and-take that normally takes place concerning discovery, possible guilty pleas, and other matters. Everything will become formalized. Defense counsel will insist that everything be in writing and on the record, generating more work for the prosecutor. The defense also will be more likely to file discovery motions and other pleadings seeking the court's intervention if they feel the prosecutor cannot be trusted to fulfill her obligations. These pleadings must be responded to, further increasing the prosecutor's workload.

Even juries have the ability to punish the unscrupulous prosecutor. In a trial, if the prosecutor's conduct draws repeated objections from the defense and admonitions from the judge, the jury may come to believe that the prosecutor is not "playing fair" and may register their disapproval with their verdict. On a broader scale, if a prosecutor's office gains a reputation in the community for being unethical or for engaging in misconduct, the public will come to distrust the prosecutor's office. Because the members of the community also make up the jury pools for all of the office's cases, this reputation will damage a prosecutor's ability to win the confidence of a jury.

Finally, there is the matter of professional reputation and standing. No prosecutor wants to have his name in a judicial opinion finding that he committed "misconduct." In addition to tarnishing his professional reputation, any such finding, whether or not it has merit, will likely result in disciplinary proceedings and reviews of the prosecutor's conduct. None of this will be very pleasant for the prosecutor. It is not a badge of honor among prosecutors to be known as some kind of cowboy who flaunts the rules. Just as a defense attorney presumably does not relish a court finding that he rendered "ineffective assistance of counsel," so too a prosecutor has a personal and professional interest in seeing that she retains a reputation for fairness and competence.

In short, the best way for a prosecutor to be effective and to advance her career is to be scrupulously fair and ethical.

An unethical or dishonest prosecutor may be able to secure a conviction in a particular case, but over the long run the acts of such a prosecutor will catch up with her.

Conclusion

I believe that criminal prosecution is an honorable profession, and is one of the most rewarding jobs a lawyer can have. Standing before a court and jury as the representative of the people in a criminal proceeding is both humbling and immensely gratifying. I never met a prosecutor who chose his career out of some immoral lust for abusing witnesses and locking up innocent people. Lawyers become prosecutors because they rightly see it as satisfying, fulfilling work and as an important service to the community. Those who work as prosecutors often make considerable personal and financial sacrifices to pursue a career in public service. They deserve better than to be tarred by sweeping, unsupported attacks on their ethics and character.

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¹ Inscription on the wall of the U.S. Department of Justice, Washington D.C., quoted in *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

² Jason Cherkis, *False Witness*, WASH. CITY PAPER, July 21-27, 2000, at 1.

³ See Bill Miller, *Narcotics 'Expert' Said to Be Fraud*, WASH. POST, Feb. 4, 2000, at B8.

⁴ See Daily Wash. Law Reporter, Dec. 21, 1999, at 2283.

⁵ Of the cases that were litigated, the U.S. Attorney's Office won more than fifty and lost only one. In other words, in virtually every case, a judge agreed with our assessment that Brown's lies about his background had no material impact on the verdict.

⁶ *United States v. Johnny V. Brown, Jr.*, CR 00-35-01 (HHK) (D.D.C. 2000). See Bill Miller, *D.C. Detective Receives Two-Year Term*, WASH. POST, June 3, 2000, at B2.

⁷ See Jerry Markon & Timothy Dwyer, *Judge Halts Terror Trial*, WASH. POST, Mar. 14, 2006, at A1.

⁸ *Id.*

⁹ *Id.*

¹⁰ Angela J. Davis, *Prosecutorial Misconduct: An Abuse of Power and Discretion*, 1 CRIM. L. BRIEF 16, 24 (2006).

¹¹ *Id.*

¹² See <http://www.usdoj.gov/criminal> (listing 430 attorneys employed by the Department of Justice Criminal Division); E-mail from Executive Office of U.S. Attorneys to the author, June 9, 2006 (listing 5,263 Assistant United States Attorneys currently employed) (on file with the author); Prosecutors in State Courts – 2001, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs>; Steven Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, The Center for Public Integrity, available at <http://www.publicintegrity.org/pm/default.aspx?act=main> [hereinafter *Breaking the Rules*] (noting there are more than 30,000 state and local prosecutors nationwide).

¹³ See *United States v. Wade*, 388 U.S. 218, 256-58 (1967)

(White, J., concurring in part and dissenting in part).

¹⁴ *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁵ See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995); *United States v. Bagley*, 473 U.S. 667, 676 n.6 (1985); *United States v. Agurs*, 427 U.S. 97, 110 (1976); *Brady*, 373 U.S. at 87-88.

¹⁶ David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 *FORDHAM URB. L.J.* 509, 527-28 (1999). See also Bruce Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URB. L.J.* 607, 615 (1999) ("The professional obligation to 'seek justice' places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other.").

¹⁷ See http://www.abanet.org/cpr/mrpc/model_rules.html. According to the American Bar Association, New York, California, and Maine are the only states that have not adopted the Model Rules of Professional Conduct. See *id.* The ethical codes of these states, however, also contain rules that contain special obligations for prosecutors. See CAL. RULES OF PROF'L CONDUCT, R. 5-110; MAINE CODE OF PROF'L RESPONSIBILITY, R. 3.7(i); NEW YORK STATE BAR ASS'N, LAWYER'S CODE OF PROF'L RESPONSIBILITY, DR 7-103.

¹⁸ The full text of Rule 3.8 provides:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by an applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from mak-

ing an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.8.

¹⁹ Under the doctrine announced in *Brady*, 373 U.S. at 87, the prosecution is required to turn over to the defense all material information in the government's possession that is favorable to the defense. See generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT, Ch. 5 (2d ed. 2002).

²⁰ American Bar Association, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993), at 3-1.2(c).

²¹ Nat'l District Atty's Ass'n, NATIONAL PROSECUTION STANDARDS (2d ed. 1991) at 1.1.

²² Other former prosecutors have also discussed the regular training they received concerning their ethical obligations. See, e.g., Panel Discussion, *The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 *FORDHAM URB. L.J.* 737, at 739-43 (1999) (comments of Mark Pomerantz and Michael Bromwich); B. Green, *supra* note 16, at 607.

²³ See D. Sklansky, *supra* note 16, at 528 ("Many people scoff at the notion that prosecutors have a 'twofold aim.' Prosecutorial impartiality, they suggest, is an oxymoron, an institutional impossibility. . . . But like most prosecutors and former prosecutors, I think the skeptics are wrong."). See also Fred C. Zacharias & Bruce Green, *The Uniqueness of Federal Prosecutors*, 88 *GEO. L.J.* 207 (2000); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695 (2000); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *FORDHAM URB. L.J.* 553 (1999); Panel Discussion, *supra* note 22; B. Green, *supra* note 16; Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

²⁴ See, e.g., Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 *PENN. ST. L. REV.* 1133 (2005); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *IOWA L. REV.* 393, 414 (2001); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355 (2001). See also Alan Dershowitz, *Foreword to First Edition* of J. LAWLESS, PROSECUTORIAL MISCONDUCT (3d ed. 2003) (alleging that prosecutorial misconduct is "rampant").

²⁵ A. Smith, *supra* note 24.

²⁶ See *id.*

²⁷ A. Davis, *supra* note 10.

²⁸ See, e.g., WEBSTER'S NEW WORLD DICTIONARY (2d college ed. 1978) (defining misconduct as "1. unlawful, bad, or dishonest management, esp. by a governmental or military official; specif., malfeasance; 2. willfully improper behavior").

²⁹ See Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 *WASH. U. L. Q.* 713, 720-22 (1999) (noting that courts use the term "prosecutorial misconduct" as a catch-all that applies to a wide variety of conduct without regard to the prosecutor's intent).

³⁰ See *id.*

³¹ See Steven Weinberg, *A Question of Integrity: Prosecutors Dispute the Significance of "Prosecutorial Misconduct,"* The Center for Public Integrity (available at <http://www.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=34>) [hereinafter *A Question of Integrity*] (noting the concerns that have been raised by prosecutors about the use of the term "prosecutorial misconduct" to apply to non-willful behavior).

³² This idea is even recognized implicitly in the title of some commentary concerning prosecutorial "misconduct." See, e.g., Charles L. Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 AM. J. TRIAL ADVOC. 535 (2003).

³³ See *Coreas v. United States*, 565 A.2d 594, 604-05 (D.C. 1989); C. Cantrell, *supra* note 32, at 555.

³⁴ See C. Cantrell, *supra* note 32, at 554-55.

³⁵ *United States v. DeLoach*, 504 F.2d 185, 193 (D.C. Cir. 1974).

³⁶ See *id.*

³⁷ See also Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 734 & n. 48 (2001) (noting that "[t]he phrase 'prosecutorial misconduct' is bandied about relatively indiscriminately").

³⁸ See, e.g., *United States v. Garcia-Guizar*, 160 F.3d 511, 520 (9th Cir. 1998). See also C. Cantrell, *supra* note 32, at 545 ("Characterizing a witness's testimony as a 'lie' or using the word 'liar' is usually considered improper").

³⁹ See, e.g., *United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1996); *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987).

⁴⁰ See B. GERSHMAN, *supra* note 19, at § 11:26.

⁴¹ See B. GERSHMAN, *supra* note 19, at § 11:25.

⁴² *Drew v. Collins*, 964 F.2d 411, 419 (5th Cir. 1992) (not improper for prosecutor to refer to defendant as a "sadistic killer" and to trip during which murder occurred as a "rolling torture chamber"); see *United States v. Pungitore*, 910 F.2d 1084, 1127 (3d Cir. 1990) (not misconduct for prosecutor in closing to refer to defendants as "cold blooded murderers" and "mob killers").

⁴³ For just a sampling of the many confusing and seemingly inconsistent court rulings in this area, review the lengthy footnotes in the Georgetown Law Journal's *Annual Review of Criminal Procedure* under "Prosecutorial Misconduct." See 35 GEO. L.J. ANN. REV. CRIM. PRO. 576 (2006).

⁴⁴ I understand, of course, that errors by the defense do not implicate the due process concerns that are raised when the same errors are committed by the prosecution. My point is simply that these types of errors are not committed only by prosecutors and (unlike, for example, grand jury abuse) are not things that only the prosecution has the power to do. The fact that no one keeps track of instances of "defense attorney misconduct" does not mean that it does not frequently take place.

⁴⁵ See B. Green, *supra* note 16, at 617 ("Criminal defense lawyers play close to the line. Prosecutors play in the center of the court"); F. Zacharias, *supra* note 37, at 754 (noting the view of many commentators that "criminal defense lawyers have a higher than normal duty to press ethical boundaries to the limits when that is in the interests of their clients").

⁴⁶ See A. Davis, *supra* note 10, at 19.

⁴⁷ See *Brady*, 373 U.S. at 87. See generally B. GERSHMAN, *supra* note 19, at Ch. 5.

⁴⁸ See *Brady*, 373 U.S. at 87 (holding that failure to produce exculpatory evidence to the defense violates due process "irrespective of the good faith or bad faith of the prosecution").

⁴⁹ See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); B. GERSHMAN, *supra* note 19, at § 5.11.

⁵⁰ See S. Weinberg, *A Question of Integrity*, *supra* note 31, (quoting sources for the proposition that most prosecutorial "misconduct" would be better characterized as "prosecutorial error").

⁵¹ Under the harmless error doctrine, a mistake made during the course of a defendant's trial does not require reversal of a conviction if a court concludes that the error did not affect the substantial rights of the defendant and thus was harmless. See *United States v. Lane*, 474 U.S. 438, 445 (1986); *Chapman v. United States*, 386 U.S. 18, 21-22 (1967).

⁵² A. Davis, *supra* note 10, at 23.

⁵³ See 28 U.S.C. § 2111; FED. R. CRIM. P. 52(a).

⁵⁴ See *United States v. Hasting*, 461 U.S. 499, 508-09 (1983) ("[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial.").

⁵⁵ "There are three kinds of lies: lies, damned lies, and statistics." Attributed to Benjamin Disraeli; popularized in the U.S. by Mark Twain. THE COLUMBIA WORLD OF QUOTATIONS (1996).

⁵⁶ See A. Davis, *supra* note 10, at 17, 19.

⁵⁷ S. Weinberg, *Breaking the Rules*, *supra* note 12.

⁵⁸ See *id.*

⁵⁹ Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1, available at <http://www.chicagotribune.com/news/nationworld/chi-020102trial1,1,1548798.story?page=1>.

⁶⁰ See *id.* Professor Davis also refers briefly to a 1998 study by reporter Bill Moushey that appeared in the Pittsburgh Post-Gazette and examined about 1500 cases. Bill Moushey, *Win at all Costs*, PITTSBURGH POST-GAZETTE, available at <http://www.post-gazette.com/win/default.asp>. After that series appeared, Deputy Attorney General Eric Holder wrote a letter to the Post-Gazette that spelled out in detail the many factual errors and distortions contained in the study and took issue with the study's conclusion that federal prosecutors and agents "routinely" engage in misconduct. See Eric Holder, *Win at all Costs: The Justice Department Responds*, available at <http://www.post-gazette.com/win/justice.asp>.

⁶¹ See S. Weinberg, *Breaking the Rules*, *supra* note 12.

⁶² See K. Armstrong & M. Possley, *supra* note 59.

⁶³ Data for the federal courts from Judicial Business of the United States Courts, available at <http://www.uscourts.gov/judbusc/judbus.html>. Data for state courts from National Center for State Courts, available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Main_Page.html.

⁶⁴ National Center for State Courts, *supra* note 63.

⁶⁵ See sources cited *supra* note 12.

⁶⁶ See S. Weinberg, *Breaking the Rules*, *supra* note 12 (discussing recidivism among prosecutors who engage in misconduct).

⁶⁷ In connection with the PITTSBURGH-POST GAZETTE study,

Deputy Attorney General Holder made a similar point when he noted that the reporter had discussed only 70 cases during a time period when prosecutors had brought approximately 500,000 criminal cases. See E. Holder, *supra* note 60.

⁶⁸ See S. Weinberg, *Breaking the Rules*, *supra* note 12.

⁶⁹ See A. Davis, *supra* note 10, at 17.

⁷⁰ *Id.*

⁷¹ *Id.* at 18.

⁷² See, e.g., *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998) (defense attorney convicted of conspiracy and obstruction of justice for working with his client to thwart a federal investigation of the client's conduct); *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) (defense attorney convicted of conspiracy and obstruction for actions during criminal case).

⁷³ Consider, as recent examples, the revelations about abuse at the Abu Ghraib facility, clandestine overseas CIA prisons, and National Security Agency interception of domestic telephone calls.

⁷⁴ A. Davis, *supra* note 10, at 18.

⁷⁵ The logical fallacy of Hasty Generalization occurs when a person draws a conclusion about a population based on a sample that is too small. For example: "Fred, the Australian, stole my wallet. Thus all Australians are thieves;" or, "The plane that crashed was being flown by a woman. I guess women don't make very good pilots." See NICHOLAS CAPALDI, *THE ART OF DECEPTION: AN INTRODUCTION TO CRITICAL THINKING* 118-19 (1987).

⁷⁶ Natalee Holloway was an Alabama teenager who disappeared in May 2005 while on a graduating class trip to Aruba with more than one hundred other students. Despite widespread publicity, the case has yet to be solved. See http://www.allpointsbulletin.org/Natalee_Holloway.html.

⁷⁷ *Banks v. Dretke*, 540 U.S. 668 (2004).

⁷⁸ *Id.* at 689; see A. Davis, *supra* note 10, at 20-21.

⁷⁹ See *Banks*, *supra* note 77, Brief of John J. Gibbons et al. as *amicus curiae* in support of petitioner, at 2003 WL 21673772; Brief of William G. Broadus et al. as *amicus curiae* in support of petitioner, at 2003 WL 21649672.

⁸⁰ A. Davis, *supra* note 10, at 21.

⁸¹ See A. Davis, *supra* note 10, at 21, citing Carissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255 (2002). Indeed, far from supporting Professor Davis's accusations, Hessick concludes that "Whether or not prosecutors are repeatedly suborning perjury and engaging in other forms of misconduct remains a factual dispute." *Id.* at 280.

⁸² Professor Davis apparently misses the irony in her own discussion of the *Banks* case, where she points out that former federal prosecutors and other law enforcement officers joined in *amicus* briefs urging the Supreme Court to reverse *Banks*'s conviction. See A. Davis, *supra* note 10, at 21. If in fact the misconduct in the *Banks* case was "very common" and "not unusual," as Professor Davis claims, then presumably prosecutors and other law enforcement officers would not be upset by it – they would consider it business as usual. Cf. Steven Weinberg, *Turning on Their Own*, Center for Public Integrity, available at <http://store.publicintegrity.org/pm/default.aspx?act=sidebars&aid=29> (discussing another case where former prosecutors filed a brief with the Supreme Court supporting the defendant and accusing the prosecution of misconduct).

⁸³ A. Davis, *supra* note 10, at 23.

⁸⁴ See *id.* at 22.

⁸⁵ Equally interesting is Professor Davis's discussion of the Paul Howes case, the most notorious example of prosecutorial misconduct to come out of my former office in recent memory. See A. Davis, *supra* note 10, at 23. Howes was found to have regularly abused the witness voucher system to make improper payments to cooperating witnesses and their families and friends. Howes had been one of the top homicide and gang prosecutors in the office. He left the office in disgrace, was subject to multiple bar and Department of Justice disciplinary proceedings and investigations, and moved across the country to the west coast to join a private firm. It's not clear to me how this constitutes "advancing in your career." About the best that can be said about the case from Howes' perspective is that he managed to avoid being indicted.

⁸⁶ There may be a number of institutional reasons why state bar disciplinary proceedings against prosecutors are relatively rare. Professor Zacharias performed a study which found that state bar authorities generally seem reluctant to proceed against any attorneys involved in the criminal process – both defense attorneys and prosecutors. He also notes that many ethical rules (such as those dealing with handling client matter or client funds) by their nature do not apply to prosecutors. See F. Zacharias, *supra* note 37, at 750-54. In addition, much of what prosecutors do falls within the realm of discretionary acts. Even if a court later finds that there was "prosecutorial misconduct," bar discipline proceedings generally will not be brought based on an exercise of a lawyer's discretion. See *id.* at 736; Leslie Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 282-84 (2001).

⁸⁷ Information on the Office of Professional Responsibility is available at <http://www.usdoj.gov/opr>.

⁸⁸ See F. Zacharias, *supra* note 37, at 763 (discussing the impact of allegations of misconduct on the performance evaluations, salaries, and job retention of prosecutors).

⁸⁹ Cf. G. Lynch, *supra* note 23, at 2150 ("[W]e should not be entirely cynical about the possibility that government officials can conduct themselves with fairness and in the broadest public interest . . . it is a simple fact that most do.").

⁹⁰ See F. Zacharias, *supra* note 37, at 740 (arguing that prosecutors are "fairly unlikely" to violate certain ethical rules "because of their need to maintain an ongoing professional relationship with judges before whom they appear routinely"); Bruce Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?* 8 ST. THOM. L. REV. 69, 70-71 (1995) (discussing informal "judicial controls" on prosecutors).

⁹¹ Cf. Frank Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt in "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 56-58 (1999) (arguing that a prosecutor cannot be effective if she gains a reputation for behaving unfairly during plea and cooperation agreement negotiations). See generally Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996) (discussing the use of cooperating defendants to build criminal cases).

ESCAPING A LIFE OF ABUSE: CHILDREN WHO KILL THEIR BATTERERS AND THE PROPER ROLE OF “BATTERED CHILD SYNDROME” IN THEIR DEFENSE

Julie Rowe*

Introduction

Parricide, when a child kills his or her parent, is an act that naturally receives much attention in the media. In the United States, many firmly believe that children should respect and obey their parents, regardless of the quality of their parenting.¹ The crime of parricide shocks the conscience of society, challenging the widely accepted and revered commandment of “honor your father and your mother.”² Therefore, when a child commits the gravest crime of murder against his or her own parent, society reacts in astonishment and quickly advocates for retribution.³ Yet, when a child who kills his or her parent has been physically, sexually, or psychologically abused by that parent, should society react differently?

Recently, a highly publicized and televised murder trial illustrated the ever-increasing dilemma of how to fairly treat a child who murders his or her parents, yet claims the murder was in self-defense. Cody Posey, now sixteen-years-old, killed his father, step-mother, and sister in July, 2004.⁴ At his trial, Cody’s defense attorney presented evidence of the physical and emotional abuse Cody suffered throughout his life.⁵ Witnesses testified that Cody’s father severely physically abused him with shovels, lariats, rocks, a hay hook, and other farm tools.⁶ In addition to the physical abuse, Cody’s father humiliated and isolated Cody.⁷ The night before the murder, at what was arguably Cody’s breaking point, Cody’s father tried to force Cody to have sex with his step-mother.⁸ The next day, after killing his sister and step-mother, Cody shot his father as his father walked through the door.⁹ After twelve hours of deliberation, the jury found Cody guilty of voluntary manslaughter for the murder of his father – a verdict much less severe than first-degree murder.¹⁰

Cody Posey, like others who have killed an abusive parent, may have believed that committing murder was the only way to escape a life characterized by hurt, fear and shame.¹¹ How should society and the criminal justice system treat abused children who do not receive help from other adults in their life and see no other alternative but murder? How can the court system adequately uphold the fundamental principle of retribution, yet appropriately seek rehabilitation for these psychologically damaged and distraught children?

This paper seeks to explore the intricacies of parricide when committed by a juvenile in a non-confrontational situation. Part II will focus on the characteristics of parricide, the victims, and the offenders. Part III will examine defenses and strategies available to parricide offenders, certain state statutes that allow for expert testimony regarding “Battered Child Syndrome,” and important cases dealing with this issue. Part IV will analyze an appropriate judicial response to battered children and advocate for a more unified understanding of

“Battered Child Syndrome” in the courts. Part V will conclude the discussion.

A Profile of Parricide, the Offenders, and Their Victims

Characteristics of the Typical Crime

Although it is usually highly publicized, parricide is “the rarest form of intra-family homicide,” accounting for only two percent of all homicides annually.¹² Sons killing one or both parents account for approximately 90% of all parricides, and the least frequent form of parricide involves daughters killing their mothers.¹³

Cody Posey, like others who have killed an abusive parent, may have believed that committing murder was the only way to escape a life characterized by hurt, fear and shame.

When a child commits parricide, he or she usually commits the murder in a seemingly cold and calculating manner.¹⁴ The child frequently kills in a nonconfrontational situation when the parent is sleeping, watching TV, or looking away.¹⁵ Parricide is rarely committed when the child is in the midst of a violent confrontation with the parent.¹⁶ Absent a crime scene involving a violent struggle or confrontation, prosecutors seek first-degree murder for these offenders.

Society may initially judge parricide offenders as wayward youths, depraved and devoid of morals or conscience. On the contrary, children who commit parricide usually do so in response to years of extreme physical or psychological abuse.¹⁷ In recent estimations, 90% of all parricides are committed by children who have suffered abuse at the hands of their parents over a long period of time.¹⁸ In some cases, a child feels he or she must act because of fear that his or her own death is imminent.¹⁹ Many children believe that killing one or both parents is the only way to stop the abuse and free themselves from a life lived in constant fear.²⁰

Characteristics of the Victims (a.k.a. the Abusers)

Parents who severely abuse their children and are consequently murdered by their children may not be distinguishable from other parents.²¹ They are generally hard-working without any criminal history, yet they may tend to have intimidating or controlling personalities.²² The type of parent who is killed by his or her child “doesn’t care about reforming the child’s behavior – instead he is addicted to his power over the child and the pleasure derived from exercising it.”²³ Many times, a parent such as this will couple physical abuse with severe psychological abuse. The parent may accomplish this by rejecting, isolating, exploiting, or berating the child.²⁴ This type of verbal abuse is usually accompanied by severe domination, and the child may be “controlled so strictly that the parental restraint amounts to virtual imprisonment.”²⁵

In reality, parents kill their children by abuse or neglect ten times as often as children kill their parents.²⁶ In California, 133 children died from child abuse or neglect in

2001.²⁷ Nationally, in 2003, 1,500 children were killed by their parents, and 78.7% of those children were under three years old.²⁸ Clearly, child abuse is a serious problem in the United States, causing a large number of deaths annually. Yet when children fight back against the abuse, after failed attempts to receive help from relatives or social services, they are ushered into the court system as the worst kind of criminals.

Characteristics of the Child Offenders

Most children who commit parricide have been physically harmed for extended amounts of time and are frequently psychologically damaged as well. Dr. C. Henry Kempe introduced the term “Battered Child Syndrome” in a 1962 study to describe “a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent.” Battered Child Syndrome was primarily used to prosecute child abusers, and courts began to allow expert medical testimony regarding Battered Child Syndrome to prove that a child had been physically abused over long periods of time. Yet there are many psychological and emotional elements of Battered Child Syndrome that have not yet gained proper recognition in the social work arena or the court system. Unless social workers, attorneys, and courts take notice of the severe psychological trauma resulting from a lifetime of abuse, the true root of parricide will remain unexposed and these children’s acts of desperation will be seen as nothing more than random, heartless violence.

Helplessness and Self-Blame

The average parricide offender does not have a reputation of violence or aggression.³⁴ On the contrary, he or she is usually intelligent, compliant, respectful of adults, and polite.³⁵ While some prefer to be alone and isolate themselves, many appear to pose no threat to society.³⁶ Underneath the docile and somewhat fragile façade, however, are the emotional scars of abuse.³⁷ “Prolonged exposure to severe and unpredictable abuse results in feelings of powerlessness, embarrassment, constant fear, self-blame, depression, isolation, low self-esteem, and fear of reprisal by the abuser on themselves or other family members.”³⁸ Instead of responding aggressively, battered children learn to adapt to their environment and cope with the parent’s actions by avoiding situations that trigger abuse or devising techniques to endure the abuse.³⁹

Often, battered children do not trust others with information about the abuse.⁴⁰ Many times, the child’s parent will threaten him or her with death or serious injury if he or she reports the abuse to anyone.⁴¹ Sometimes, when a child does seek help, he or she fails to receive adequate support from relatives, schools, or social agencies.⁴² Social agencies are often reluctant to investigate allegations of child abuse if the child cannot show immediate signs of physical harm, such as bruises or welts.⁴³ Also, many hold to the belief that what occurs inside a family’s home is private and should not be questioned or interfered with by those on the outside.⁴⁴ Whatever the reason for their inaction, adults and social agencies should be aware that one of the main factors that lead a child to commit parricide is

the feeling of helplessness that results from a lack of outside support or help.⁴⁵ In fact, when adults know about the abuse and do nothing, the child may naturally infer that all adults condone the abusive behavior.⁴⁶ This only adds to the child’s sense of helplessness.⁴⁷

An abused child also harbors feelings of self-blame.⁴⁸ Because of the nature of the parent-child relationship, children naturally bond with and connect to their parents regardless of how they are treated.⁴⁹ Even if the parent is abusive, he or she is still the primary caretaker of the child, and the child depends on the parent for his or her emotional, physical, and financial needs.⁵⁰ Extended periods of abuse can disfigure a child’s sense of self, causing him or her to blame himself for the abuse and seek to please the parent even more.⁵¹ Feelings of helplessness and self-blame can build, leading the child to believe that there is no alternative but to murder the parent.⁵²

Psychological Effects

In reality, parents kill their children by abuse or neglect ten times as often as children kill their parents.

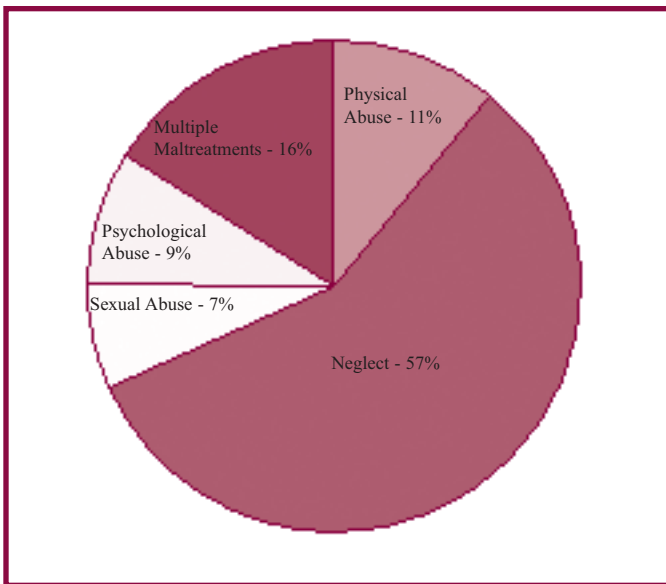
Two important psychological conditions or disorders characterize a child suffering from Battered Child Syndrome: hypervigilance and Post-Traumatic Stress Disorder (PTSD).⁵³ Both are important to consider if the child seeks to claim self-defense at his or her trial for murder.

A hyper-vigilant child is one who is “acutely aware of his or her environment and who remains on the alert for any signs of danger.”⁵⁴ They look for clues in their parent’s behavior and mannerisms and learn to judge when the parent is in a pre-aggressing state or when the threat of violence is imminent.⁵⁵ Therefore, they are constantly monitoring the situation in order to predict violence and impending abuse.⁵⁶ After this type of monitoring becomes routine, the child will learn to react to certain stimuli that might accompany certain threats, actions, or looks from the parent.⁵⁷

An understanding of hyper-vigilance aids a trier of fact in a murder trial because it illustrates why a child may feel that abuse is imminent when, in fact, the parent is not yet inflicting violence.⁵⁸ In an abusive relationship, threats of imminent danger manifest in subtle cues and are not easily perceived by others.⁵⁹ Therefore, an abused child might sense impending violence and react by killing the parent in a non-confrontational situation, when the child knows he or she will be successful and not suffer immediate harm.⁶⁰

PTSD is similar to hyper-vigilance but is defined as “an anxiety-related disorder which occurs in response to traumatic events outside the normal range of human experience.”⁶¹ A child with PTSD will likely suffer from severe anxiety, hyperactivity, episodes of terror, nightmares, and fatigue.⁶² The highest level of PTSD “involves heightened symptoms of hyperactivity, vigilance, scanning, and motor tension, fixation on somatic symptoms believed to have resulted from the traumatic event, and a secondary manifestation of depression.”⁶³ A court faced with a child accused of murdering their parent should evaluate the reasonableness of the child’s actions in light of the debilitating effects of these disorders. The court should take into account any psychological conditions from which the child suffers to lessen or mitigate the charge or sentence.

Types of Maltreatment by Parents, 2003^a



Within the Court System: Available Defenses, Pivotal Court Cases, and Relevant Statutes for Parricide Offenders

Available Defenses

Inevitably, a child who kills a parent will be prosecuted. If the child is fourteen-years-old or older, he or she will likely be tried in adult criminal court exclusively, bypassing the juvenile court altogether because of the nature of his or her crime.⁶⁴ Statutory waiver, as this process is known, creates the possibility that the child could receive any applicable adult sentence.⁶⁵ He or she could be charged with murder, and in the worst case scenario, receive life in prison without possibility of parole.⁶⁶

It is important, therefore, to effectively communicate to a jury the special circumstances under which the child committed the crime. It is difficult for a child who commits parricide in a non-confrontational situation to claim self-defense or show the existence of mitigating circumstances. Thus, expert testimony is necessary to educate the jury about the child's past history, subjective state of mind, and sense of danger at the time of the murder.⁶⁷

Insanity

A parricide offender suffering from PTSD may be able to utilize an insanity defense by using expert testimony to show he or she suffered from a mental defect that prevented him or her from either comprehending his or her act or from freely choosing that act.⁶⁸ If an expert can testify affirmatively that the child suffers from PTSD and a jury believes that the child was not acting out of his own free will at the time of the crime, the child may be able to successfully defend against the murder charge.⁶⁹

Although a successful insanity defense will save a parricide offender from prison, the child may then be committed to

a mental institution, which may be an equally undesirable outcome.⁷⁰ Depending on the child's case, considering factors such as length of abuse, psychological disorders, and incidents leading to the murder, a better defense strategy may either be self-defense or mitigation of the charge or sentence.

Self-Defense

If successful, a parricide offender's self-defense claim will result in an acquittal, making it the child's best hope for exoneration.⁷¹ Most jurisdictions will allow claims of self-defense only if the defendant reasonably believed that death or serious bodily harm was imminent.⁷² In California, juries are required to apply the objective standard of a "reasonable person" to determine if the defendant's acts were reasonable in light of the imminent threat of danger.⁷³ Yet if the child kills the parent in the absence of any violent confrontation, a jury may be reluctant to believe the killing was in self-defense without any evidence of "imminent danger."⁷⁴

The most difficult issue facing parricide offenders is how to successfully prove to a jury that the danger they faced was "imminent" and that a "reasonable person" in the battered child's situation would have acted in the same manner.⁷⁵ The objective standard of a "reasonable person" is a hard standard to reach without expert testimony regarding Battered Child Syndrome.⁷⁶ The average juror has likely never experienced the life of an abused child and therefore cannot easily comprehend the mental state of the defendant.⁷⁷ Expert testimony regarding Battered Child Syndrome seeks to prove that the child lived in an environment where the threat of abuse was persistently imminent and where he or she could sense when the next incident of abuse would occur.⁷⁸ Thus, expert testimony on the psychological elements of Battered Child Syndrome coupled with the defendant's testimony of his or her history of abuse is essential, for it explains to the jury that his or her belief of imminent danger was real.⁷⁹ Also, it is important for the jury to take into account any incident that occurred directly before the murder, causing the child to believe his or her life was in danger.⁸⁰

The court may still be reluctant to acquit a child who killed his or her parent in a non-confrontational situation because of society's policy of properly punishing those who take another's life.⁸¹ Also, courts may be reluctant to allow a defense that may encourage other battered children to kill their abusers without first attempting to seek outside help.⁸² However, in these instances, expert testimony may be relevant at trial to either lessen the charges or to encourage a lighter, more rehabilitative-based sentence.

Mitigation or Partial Excuse

A child who commits parricide may offer evidence regarding the history of abuse and extent of psychological damage to prove his or her lessened moral culpability, thereby partially excusing or mitigating the crime.⁸³ A partial excuse, in general, allows the jury to consider the defendant's subjective state of mind at the time of the murder, whereas a self-defense claim employs a more objective standard.⁸⁴ A murder may be partially excused according to the doctrine of provocation,

which recognizes the objective external pressures the child faced, or the “internal pressures of a reasonably explained extreme mental or emotional disturbance.”⁸⁵

This approach of excuse or mitigation may be the most attractive to the defendant, for the jury can focus on the defendant’s specific history of abuse and subsequently lessen his or her punishment for the crime. The jury can therefore express its understanding of the defendant’s actions, yet still hold him or her accountable for the crime.⁸⁶ In most jurisdictions, a defendant offering a partial excuse is eligible to receive a conviction for voluntary manslaughter, defined as “an intentional homicide committed under extenuating circumstances which serve to mitigate the killing.”⁸⁷

According to existing U.S. Supreme Court case law, a judge and jury must consider an array of mitigating factors when determining a proper sentence for a juvenile offender. In *Lockett v. Ohio*,⁸⁸ the Court held that the Eighth and Fourteenth Amendments require that a judge consider any mitigating factors the defendant offers as reasons for a sentence less than death.⁸⁹ Similarly, in *Eddings v. Oklahoma*,⁹⁰ the Court remanded a sixteen-year-old defendant’s case to the trial court because the trial court failed to consider the defendant’s age, emotional development, and family background before deciding whether or not to impose the death sentence.⁹¹ Although these two cases dealt specifically with juveniles facing the death penalty, their main tenets remain applicable for any juvenile who offers mitigating factors to reduce his or her sentence at trial. Also, these cases are important for battered children, for the right to offer mitigating factors was declared to be a Constitutional right.

While cases such as *Lockett* and *Eddings* ensure that parricide offenders can offer mitigating evidence of their abusive histories to potentially lessen their ultimate sentences, they do not specifically allow expert testimony regarding Battered Child Syndrome at trial. If a battered child seeks to mitigate his or her charge of first-degree murder, expert testimony would be a great aid to the judge and jury to help them understand the intricacies and particular characteristics of Battered Child Syndrome. Some state courts and legislatures have begun to realize the necessity of expert testimony in this area, however this realization is not universal among jurisdictions.

Case Law Regarding Battered Child Syndrome Testimony and Self-Defense

As stated earlier, the term “Battered Child Syndrome” originated as a medical diagnosis, and expert medical testimony on the syndrome was widely used to prosecute child abusers.⁹² California was one of the first states to recognize Battered Child Syndrome as a valid medical diagnosis. In 1971, in *People v. Jackson*,⁹³ the California Court of Appeals upheld the trial court’s use of expert testimony on Battered Child Syndrome because it found that the syndrome was based on extensive studies in medical science and was useful to prove that the child’s injuries were inflicted intentionally as opposed to the result of an accident.⁹⁴

Even though case law in many states recognizes

Battered Child Syndrome as substantiated medical science, states have been reluctant to allow the use of expert testimony regarding the psychological aspects of Battered Child Syndrome in the defense of parricide offenders.⁹⁵ Because a defendant may offer evidence of mitigating factors in a murder trial, regardless of a claim of self-defense, the largest existing dispute in state courts is whether to allow expert testimony when the defendant claims self-defense to prove the child killed in response to a perceived “imminent” threat of danger.⁹⁶ Because of the child’s long history of abuse, the child’s perception of impending danger leads to the belief that he or she acted reasonably under the circumstances.⁹⁷ Expert testimony could aid the jury in its understanding of the child’s perceptions.

State v. Janes: Landmark Case

State courts have only recently begun to recognize and accept testimony regarding Battered Child Syndrome in parricide cases. The Washington Supreme Court, in *State v. Janes*,⁹⁸ wrote the first judicial decision validating expert testimony on Battered Child Syndrome in 1993.⁹⁹ Seventeen-year-old Andrew Janes killed his mother’s boyfriend, Walter Jaloveckas, in 1988.¹⁰⁰ Andrew shot Walter with a pistol as Walter walked in the door of their home after returning from work.¹⁰¹ At trial, evidence was presented that Walter physically and emotionally abused Andrew for over ten years, and Andrew witnessed Walter abuse both his mother and younger brother.¹⁰² Witnesses to Walter’s abuse of Andrew called

Child Protective Services numerous times, but no action was ever taken.¹⁰³ On the night before the murder, Walter yelled at Andrew’s mother for a long period of time, then leaned his head into Andrew’s room and spoke to him in a threatening voice.¹⁰⁴

The next day, Andrew videotaped himself and left a message including the statement: “I don’t want this life anymore. So I shall take care of the problem myself. Mom, if you find this, I hope you will forgive me. I’m doing this in your best wishes.”¹⁰⁵

At trial, Andrew’s attorney proffered a psychiatrist to testify that he suffered from PTSD which impaired his ability to premeditate.¹⁰⁶ The expert was also willing to testify that Andrew feared imminent harm on the day he shot Walter.¹⁰⁷ Yet the trial judge excluded this expert testimony and denied Andrew’s attorney’s request for a self-defense instruction.¹⁰⁸

The Washington Supreme Court heard the case to resolve whether “expert testimony regarding ‘Battered Child Syndrome’ is generally admissible to aid in the proof of self-defense.”¹⁰⁹ Holding that expert testimony could aid the jury in understanding the reasonableness of the defendant’s perceptions, the court upheld the use of Battered Child Syndrome in cases where a defendant claims self-defense.¹¹⁰

Subsequent Cases Considering Battered Child Syndrome Testimony

The Supreme Court of Ohio has issued decisions in line with *Janes*. Brian Nemeth, a sixteen-year-old Ohio resi-

dent, shot his mother five times in the head with a bow and arrow.¹¹¹ Nemeth's mother had physically and emotionally abused him for several years, and she was an excessive drinker.¹¹² At Nemeth's murder trial, the trial court judge denied his request to offer expert testimony regarding Battered Child Syndrome and denied a jury instruction on voluntary manslaughter.¹¹³ On appeal, the Supreme Court of Ohio, considered "whether Ohio recognizes Battered Child Syndrome as a valid topic for expert testimony in the defense of parricide."¹¹⁴ The Court answered in the affirmative after considering Nemeth's past history of abuse, the content of the proffered expert testimony, and the expert's ability to aid the jury's understanding of the issues of the case.¹¹⁵ Although it held that Battered Child Syndrome itself cannot be a defense, the Court recognized that expert testimony regarding the defendant's impaired psychological ability should be offered in support of a self-defense claim or as a justification for a lesser included offense.¹¹⁶

Similarly, in *State v. Smullen*, the Maryland Court of Appeals held that although Battered Child Syndrome cannot be a complete defense, it may be offered in parricide cases to show that the defendant responded to a reasonable, honestly perceived, imminent threat of death.¹¹⁷ A few courts in various other states have handed down similar decisions, but the percentage of states that allow expert testimony on Battered Child Syndrome through judicial precedent is small.¹¹⁸ Some states have actually rejected a parricide offender's attempt to offer evidence of Battered Child Syndrome at trial; however, the majority of states have not yet considered this issue.¹¹⁹

Legislative Response

Only a few states have enacted legislation regarding the admissibility of Battered Child Syndrome in parricide cases. Louisiana and Texas are the pioneers in this area, for each state has specific legislation that defines Battered Child Syndrome and permits evidence of the effects of abuse in parricide trials where self-defense is at issue.¹²⁰ Similarly, Arizona and Ohio both have statutes in which Battered Child Syndrome is made available through court rulings; for example, Ohio's Evidence Rule 702 has case notes providing that expert testimony on Battered Child Syndrome should be admissible when it is relevant and meets the requirements of the statute.¹²¹

Considering that only a few states have addressed Battered Child Syndrome in either their courts or legislatures, it is evident that our justice system does not sufficiently recognize the long history of abuse suffered by most parricide offenders.¹²² Even if the general public would support statutes that allow expert testimony on Battered Child Syndrome, courts will be reluctant to allow it if society's sentiments are not eventually codified.

Analysis: The Proper Role of Battered Child Syndrome

A child who has endured a lifetime of abuse and sees murder as the only viable escape from that life deserves mercy in the courts and in the eyes of the public. Yet the way these children carry out their crimes affects the way they are viewed by society and how they are prosecuted. At first glance, a crime involving a child who kills his or her parent while the parent is

sleeping or engaging in a non-threatening activity is one of the worst possible crimes. Many may advocate that justice must be done and affirm the fundamental principle of retribution. But in this context, when a child is responding to years of physical and emotional abuse, how is justice properly defined and executed?

The Lesser Culpability of Battered Children Must Be Recognized

The U.S. Supreme Court recently opined that juveniles, as a class, are less morally culpable for their crimes; in two specific cases involving juveniles accused of first degree murder, the Court overturned death sentences on the basis of the defendants' lessened culpability.¹²³ In *Thompson v. Oklahoma*, the Court declared that juveniles are "less mature and responsible than adults," "less able to evaluate the consequences of [their] conduct," and "more apt to be motivated by mere emotion or peer pressure."¹²⁴ Therefore, any crime a juvenile commits cannot be as "morally reprehensible as that of an adult."¹²⁵ Likewise, in *Roper v. Simmons*, the Court stated that juveniles' "vulnerability and comparative lack of control over their immediate surroundings mean [they] have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."¹²⁶

If the U.S. Supreme Court has determined that juveniles in general possess these characteristics, certainly courts should recognize the diminished culpability of a physically or emotionally abused child. A battered child's psychological awareness is usually heightened depending on the length and severity of abuse, and the child will usually perceive that he or she is in constant imminent danger.¹²⁷ A battered child who lives in perpetual fear and hyper-vigilance will be more likely to strike out against an abuser than a child residing in a more functional environment.¹²⁸

Another important factor to recognize is that children are unable to escape their environment.¹²⁹ Children, in general, are economically and emotionally dependent on their parents.¹³⁰ Running away is illegal, and law enforcement officials and social work agencies will simply return a run-away child to his or her home.¹³¹ No shelters exist for battered children,¹³² and children cannot support themselves apart from their parents.¹³³

The special circumstances leading to parricide must be considered by the justice system. First, the U.S. Supreme Court has declared that juveniles, even those who kill, should be held less morally responsible for their crimes. Second, battered children do not possess the characteristics of an average child. Third, abused children have no way to escape the abuse because they are dependent on their parents for support. Considering all of these characteristics, society should not hold a battered child to the same standard as others who murder in non-confrontational situations. Yet the question remains: should society excuse a crime as serious as murder?

Core Principles of the Criminal Justice System Should Be Preserved

In parricide cases, the traditional philosophies underlying homicide and self-defense may become blurry if society tries to accommodate an abused child who kills his or her par-

ent.¹³⁴ Courts may wonder how to balance society's interest in both protecting children from abuse and punishing murderers for their crimes.¹³⁵

Certain theories about the purpose of criminal law are woven throughout the common law, current case law, statutory regulations, and the general sentiment of the American public. The law serves to protect individuals from harm by discouraging self-help and prosecuting those who break the law and injure others.¹³⁶ Our society's laws indicate that life is valuable and that society as a whole should adhere to a certain standard of conduct.¹³⁷ Rightly then, the most severe sentences are imposed on those who kill other human beings. Still, American laws recognize that there may be instances where an individual must kill to save his or her own life, and these murders may be excused only in the most "narrow, societal-determined set of circumstances."¹³⁸

Many scholars argue that by allowing expert testimony on Battered Child Syndrome in parricide cases, the doctrine of self-defense will be severely compromised.¹³⁹ In most jurisdictions, self-defense is determined by the objective standard of a "reasonable person."¹⁴⁰ Yet in parricide cases, the defense often asks the jury to consider expert testimony regarding the defendant's subjective state of mind at the time of the killing.¹⁴¹ Additionally, when the child kills in a non-confrontational setting, the established requirement that the threat be "imminent" is hard to satisfy.¹⁴² Public policy demands that the requirements for self-defense be strict to prevent "pre-emptive strikes, self-help, and retaliatory killings."¹⁴³ In parricide cases, it may be hard for a jury to distinguish between a child who genuinely sensed imminent harm and a child who killed his or her parent for revenge.¹⁴⁴

Allowing expert testimony on Battered Child Syndrome in support of a self-defense claim could unnecessarily weaken the doctrine of self-defense by allowing consideration of subjective rather than objective factors and by broadening the definition of "imminence." As such, for preservation of society's fundamental notions of criminal justice and self-defense, Battered Child Syndrome should not be used as a perfect defense in parricide cases to acquit the parricide offender.¹⁴⁵

What is "Justice" in a Parricide Case?

While courts have a duty to preserve the narrow doctrine of self-defense, they also must uphold society's duty to protect children from the abuse of their parents.¹⁴⁶ Society should bestow compassion upon abused children who kill by allowing them to offer expert testimony regarding Battered Child Syndrome at trial to mitigate or lessen their sentences.¹⁴⁷

The history of abuse, the severity of the abuse, the child's psychological makeup, and the child's perceptions at the time of the murder should all be taken into account by a judge and jury when considering how to charge and sentence the juvenile. Whereas the child should not be able to escape responsibility for murder, his or her unique circumstances must be taken into account to bring about true justice.¹⁴⁸ True justice for these

children can be achieved through creative and rehabilitative-based sentences to both appease society's need for retribution and the child's need for counseling and restoration.¹⁴⁹

If a parricide offender can prove, through expert and other testimony, that he had an honest yet unreasonable belief of imminent danger, he may receive a lesser charge than first-degree murder.¹⁵⁰ In many cases, if a defendant shows that his actions were affected by extenuating circumstances, his charge may be lessened to voluntary manslaughter.¹⁵¹ Charging a parricide offender with voluntary manslaughter, and sentencing him accordingly, would uphold society's interest in preserving the self-defense doctrine while at the same time saving the child from long and harsh prison terms reserved for those who commit first-degree murder.¹⁵²

For example, in the Cody Posey case, the judge could have convicted the child of first degree murder with a sentence of life in prison without possibility of parole but instead chose to convict him only of voluntary manslaughter for killing his father. If testimony regarding Battered Child Syndrome had not been admitted in order to show the extensive abuse Cody endured throughout his life, the court system would have failed him by not pursuing true justice.

Many states have not yet codified any specific provision for battered children who commit parricide, but the admissibility of Battered Child Syndrome should be considered by legislatures nationwide. A child who commits parricide in one state may experience "justice" differently depending solely on the jurisdiction in which he or she lives. Therefore it is imperative that all states allow abused children to present evidence of their subjective state of mind at trial.

The concept of rehabilitating wayward youth is a foundational principle of the juvenile justice system.¹⁵³ As such, it would be proper to prescribe more rehabilitative sentences for juveniles who can affirmatively show that they have the ability to be rehabilitated.¹⁵⁴ Abused children who kill their batterers pose little threat to society – in reality, they are not violent by nature.¹⁵⁵ What these children need primarily is intensive therapy and placement in an environment that will encourage them to begin their lives as contributing members of society.¹⁵⁶

A few judges have recognized the needs of these children and have creatively sentenced abused parricide offenders. A Maryland judge sentenced a parricide offender convicted of voluntary manslaughter to eight years in prison, which was suspended, probation, and participation in a program for emotionally disturbed children for two years.¹⁵⁷ Similarly, a judge considering the case of another parricide offender sentenced the juvenile to probation and ordered him to perform eight hundred hours of community service, teaching reading, writing, and arithmetic to prisoners in jail.¹⁵⁸ In the case of Cody Posey, to the shock of many in the legal community, the judge sentenced Cody to six years in a juvenile detention facility, until his 21st birthday.¹⁵⁹ Contributing to the judge's decision was the expert testimony establishing that Cody suffered from PTSD and was able to be rehabilitated.¹⁶⁰

As shown in these cases, judges play pivotal roles in the trials and sentencing of juvenile parricide offenders. They

Those who knew, but were afraid to act; those who knew, but decided it was none of their business ... all share with the abused child and his or her parents some moral responsibility for the ultimate tragedy.

must first allow expert testimony on Battered Child Syndrome to demonstrate the offender's lessened culpability, and then they must creatively sentence these juveniles to rehabilitative treatment. Only then will true justice for these abused children be achieved.

Conclusion

Paul Mones, a defender of children who commit parricide, has insightfully stated: “[t]hose who knew, but were afraid to act; those who knew, but decided it was none of their business; and even those who tried in some small way to help, but then gave up: all share with the abused child and his or her parents some moral responsibility for the ultimate tragedy.”¹⁶¹ It is true that murder under any circumstances is a tragedy. But when a child has been severely physically and mentally abused throughout his or her lifetime, receives no help from the outside world, and ultimately kills his or her parent to escape the nightmare of abuse, society struggles to respond appropriately.

Parricide offenders most often suffer from psychological and social disorders as a result of the abuse, and if state legislatures and courts do not recognize Battered Child Syndrome, these children may receive unnecessarily harsh sentences in prison. Justice requires that expert testimony regarding Battered Child Syndrome be admitted at trial, not to acquit the juvenile but to lessen or mitigate the charge or sentence. Only then will the juvenile have the chance to become a healthy, contributing member of society.

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¹ P. Mones, *Parricide: Opening a Window Through the Defense of Teens Who Kill*, 7 STAN. L. & POL’Y REV. 61, 64 (1996) [hereinafter Mones, *Parricide*] (“In our culture, people feel that children should respect their parents through childhood and into adulthood, extolling upon their parents and kind of eternal gratitude.”); see also R. Hegadorn, *Clemency: Doing Justice to Incarcerated Battered Children*, 55 J. MO. B. 70, 70 (1999).

² Exodus 20:12 (New American Standard); see also Deuteronomy 27:16 (“Cursed is he who dishonors his father or mother.”) (New American Standard).

³ L. Goldman, *Nonconfrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of the Subjective Self-Defense and the Merits of Partial Excuse*, 45 CASE W. RES. L. REV. 185, 186 (1994).

⁴ Emanuella Grinberg, *Teen Cody Posey Convicted of Murder; Manslaughter for Killing His Family*, COURT TV NEWS, Feb. 8, 2006, http://www.courtstv.com/trials/posey/020706_verdict_ctv.html [hereinafter Grinberg, *Teen Cody Posey*].

⁵ *Id.*

⁶ *Id.*

⁷ Emanuella Grinberg, *Psychologist: A Lifetime of Abuse, Depression Led Teen Shooter to Despair*, COURT TV NEWS, Jan. 27, 2006, http://www.courtstv.com/trials/posey/012606_ctv.html [hereinafter Grinberg, *Psychologist*].

⁸ Grinberg, *Teen Cody Posey*, *supra* note 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Grinberg, *Psychologist*, *supra* note 7.

¹² Mones, *Parricide*, *supra* note 1, at 61.

¹³ PAUL MONES, WHEN A CHILD KILLS: ABUSED CHILDREN WHO KILL THEIR PARENTS at 25 (Pocket Books 1992) [hereinafter MONES, *When a Child Kills*].

¹⁴ MONES, *When a Child Kills*, *supra* note 13, at 14.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Jennifer L. Layton, *The Abused Child Fatally Says “No More!”: Can Parricide Be Self-Defense in Ohio?*, 18 U. DAYTON L. REV. 447, 447 (1993) (“These children are often victims of physical, sexual, and psychological abuse inflicted upon them by one parent or by both parents.”); Mones, *Parricide*, *supra* note 2, at 61 (“Parricide occurs after years of the most brutal, extreme abuse.”).

¹⁸ S. Smith, *Abused Children Who Kill Abusive Parents: Moving Toward An Appropriate Legal Response*, 42 CATH. U. L. REV. 141, 141 (1992).

¹⁹ Beth Bjerregaard & Anita Neuberger Blowers, *Chartering a New Frontier for Self-Defense Claims: The Applicability of The Battered Person Syndrome as a Defense for Parricide Offenders*, 33 U. LOUISVILLE J. FAM. L. 843, 865 (1995) (citing CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 129 (1989)) (“Abused persons know that the abuse often increases in both frequency and severity over time. Thus, the battered person may very reasonably believe that subsequent encounters will be more life-threatening.”); Jamie Heather Sacks, *A New Age of Understanding: Allowing Self-Defense Claims for Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL’Y 349, 357 (1993).

²⁰ Sacks, *supra* note 19, at 349.

²¹ Mones, *Parricide*, *supra* note 1, at 62.

²² MONES, *When a Child Kills*, *supra* note 13, at 13.

²³ *Id.* at 14.

²⁴ Mones, *Parricide*, *supra* note 1, at 64.

²⁵ *Id.*

²⁶ *Id.* at 61.

²⁷ STATE CHILD DEATH REVIEW COUNCIL, CALIFORNIA ATTORNEY GENERAL’S OFFICE, CHILD DEATHS IN CALIFORNIA 1999-2001 (2005), http://ican-ncfr.org/library/CDR_CA_1999-2001.pdf.

²⁸ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD MALTREATMENT 2003 (2005), http://ican-ncfr.org/library/Child_Maltreatment_2003.pdf.

²⁹ Layton, *supra* note 17, at 447.

³⁰ MONES, *When a Child Kills*, *supra* note 13, at 30.

³¹ C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 17 (1962).

³² Hegadorn, *supra* note 1, at 71.

³³ See Joelle Anne Moreno, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, 1301 (1989) (“Although the frequency and severity of physical attacks may vary, the psychological and emotional abuse is often constant.”).

³⁴ Smith, *supra* note 18, at 142.

- ³⁵ *Id.*
- ³⁶ *Id.*; Mones, *Parricide*, *supra* note 1, at 62.
- ³⁷ Mones, *Parricide*, *supra* note 1, at 62.
- ³⁸ Layton, *supra* note 18, at 452; *see also* JAMES LEEHAN & LAURA PISTONE-WILSON, *GROWN-UP ABUSED CHILDREN* 3 (1985) (identifying five main characteristics of parricide offenders: 1) mistrust of others; 2) low self-esteem, shame, and feelings of incompetence; 3) inability to form relationships; 4) helplessness; and 5) difficulty in acknowledging and disclosing feelings).
- ³⁹ Layton, *supra* note 17, at 453 (“[A]n abused child generally becomes sensitized to his abuser, and develops a strategy for monitoring his environment.”); MONES, *When a Child Kills*, *supra* note 13, at 37.
- ⁴⁰ Bjerregaard & Blowers, *supra* note 28, at 869.
- ⁴¹ MONES, *When a Child Kills*, *supra* note 13, at 37.
- ⁴² For example, in 1996, seventeen-year-old Will Snyder killed his father with a baseball bat. It was not until after the crime had occurred that people in the community came forward to testify that Will had been a severely abused child. By the end of the trial, over 70 people including friends, neighbors, other parents, and ex-girlfriends admitted that they had seen acts of violence and signs of abuse, and heard Will tell them of the abuse. Regina Brett, *Defense of Abused Teen in His Father’s Slaying Made Ohio Court History*, THE BUFFALO NEWS, Apr. 21, 1997, available at 1997 WLNR 1251737.
- ⁴³ Mones, *Parricide*, *supra* note 1, at 62.
- ⁴⁴ *Id.* at 62-63.
- ⁴⁵ KATHLEEN M HEIDE, *WHY KIDS KILL PARENTS: CHILD ABUSE AND ADOLESCENT HOMICIDE* (Sage Publications, Inc. 1992).
- ⁴⁶ Jane Eisner, *Karo Ought to Get Kind Treatment*, PHILADELPHIA INQUIRER, May 18, 2003, available at 2003 WLNR 14774679.
- ⁴⁷ Bjerregaard & Blowers, *supra* note 18, at 868 (“[C]hildren who experience prolonged abuse are more likely to perceive their situation as hopeless and see themselves as lacking ability to see alternative remedies.”); Sacks, *supra* note 20, at 355-56 (citing Mavis J. Van Sambeek, *Parricide as Self-Defense*, 7 LAW & INEQ. J. 87, 104 (1988)) (“Battered children frequently have a pervasive sense of helplessness that results from feeling trapped in a situation from which they cannot escape.”).
- ⁴⁸ Layton, *supra* note 17, at 452; MONES, *When a Child Kills*, *supra* note 13, at 34.
- ⁴⁹ MONES, *When a Child Kills*, *supra* note 13, at 33-34.
- ⁵⁰ *Id.* at 34; Bjerregaard & Blowers, *supra* note 19, at 869.
- ⁵¹ Layton, *supra* note 17, at 452.
- ⁵² Heide, *Why Kids Kill Parents*, *supra* note 45 at (“[T]hose who are classified as ‘severely abused children’ kill the abusive parent for either or both of two reasons: they are desperate and see no other way to end the abuse; and/or are terrified that they or other family members will be killed or will continue to suffer from serious abuse.”).
- ⁵³ *See* Sacks, *supra* note 20, at 356. Other possible psychological effects could be “inability to empathize with fellow human beings, low self-esteem, depression, masochistic and self-destructive behavior, as well as lack of trust, social isolation, and generalized hostility and aggression.” Goldman, *supra* note 3, at 236.
- ⁵⁴ Sacks, *supra* note 19, at 356.
- ⁵⁵ Mones, *Parricide*, *supra* note 1, at 63; Sacks, *supra* note 19, at 356.
- ⁵⁶ Mones, *Parricide*, *supra* note 1, at 63.
- ⁵⁷ Sacks, *supra* note 19, at 356.
- ⁵⁸ Bjerregaard & Blowers, *supra* note 19, at 866 (“[A]n abused or battered person comprehends the situation differently than a person outside the predicament. Behaviors that a jury may deem as innocuous may be perceived by the child as a precursor to impending violence.”).
- ⁵⁹ Moreno, *supra* note 33, at 1286 (“Battered children and women perceive, more acutely than strangers, the imminence and degree of danger at the hands of their abusers. To a battered person, subtle changes, like a new method of abuse, may create a reasonable fear of imminent severe or deadly violence that might be imperceptible to an outsider.”).
- ⁶⁰ Bjerregaard & Blowers, *supra* note 19, at 864-65 (“In this type of situation, defendants will often defend themselves at the only time they perceive themselves as having the opportunity.”).
- ⁶¹ Sacks, *supra* note 19, at 356 (quoting *State v. Janes*, 850 P.2d 495, 501 (Wash. 1993)).
- ⁶² Goldman, *supra* note 3, at 236-37.
- ⁶³ C.B. SCRIGNAR, M.D., *POST-TRAUMATIC STRESS DISORDER: DIAGNOSIS, TREATMENT, AND LEGAL ISSUES* 69-72 (Prager Publishers 1984).
- ⁶⁴ Eric J. Fritsch & Craig Hemmens, *An Assessment of Legislative Approaches to the Problem of Serious Juvenile Crime: A Case Study of Texas 1973-1995*, 23 AM. J. CRIM. L. 563, 579 (1996); *see also* CAL. WELF. & INST. CODE § 707(b) (West 1998); NEV. REV. STAT. § 62B.390 (2005).
- ⁶⁵ David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1555 (2004).
- ⁶⁶ *See id.*; Before March 2005, juveniles between the ages of sixteen and eighteen could also receive the death penalty if transferred to adult criminal court. The United States Supreme Court recently ruled this practice unconstitutional under the Eighth Amendment. *See Roper v. Simmons*, 543 U.S. 551 (2005).
- ⁶⁷ Sacks, *supra* note 19, at 362-63.
- ⁶⁸ Goldman, *supra* note 3, at 218. If the child re-lives a previous episode of abuse or torture through a flashback or hallucination and, believes he or she is presently in danger from the abuser, he or she could also raise an insanity defense. *Id.* at 219.
- ⁶⁹ *Id.* at 218.
- ⁷⁰ *Id.* at 221.
- ⁷¹ Smith, *supra* note 18, at 157.
- ⁷² Bjerregaard & Blowers, *supra* note 19, at 850-51; *see also* Goldman, *supra* note 4, at 198-99 (“[T]he analysis of self-defense must focus on the presence of external circumstances which can be identified neutrally and applied to all claims rather than on the presence of factors specific to the individual actor.”).
- ⁷³ Carin C. Azarcon, *Battered Child Defendants in California: The Admissibility of Evidence Regarding the Effects of Abuse on a Child’s Honest and Reasonable Belief of*

Imminent Danger, 26 PAC. L.J. 831, 844-45 (1994-1995); *People v. Lucas*, 160 Cal. App. 2d 305, 310 (1958), *People v. Williams*, 75 Cal. App. 3d 731, 739 (1977); see also CAL. PENAL CODE §§197-98 (Deering 2006).

⁷⁴ Goldman, *supra* note 3, at 205 (“In a nonconfrontational situation . . . no external evidence of imminent danger supports the requisite reasonableness of the defendant’s belief in impending harm.”).

⁷⁵ Bjerregaard & Blowers, *supra* note 19, at 851 (“Specifically, these cases challenge traditional methods of determining reasonableness, appropriateness of expert testimony, and interpretations of ‘imminent’ harm.”).

⁷⁶ Goldman, *supra* note 3, at 193-94; Sacks, *supra* note 20, at 362 (“In almost every parricide case, the expert is needed to educate the judge and jury of the dynamics at work in a battering relationship.”).

⁷⁷ Sacks, *supra* note 19, at 362 (“[T]he life experiences of the average juror are usually inadequate to support an informed evaluation of reasonableness, especially when the facts of the case involve an area in which an average juror has no knowledge.”).

⁷⁸ Bjerregaard & Blowers, *supra* note 19, at 866 (“Defendants must convince the court that the homicide was not only a necessary response, but that it was a reasonable response under the circumstances.”).

⁷⁹ *Id.* at 864; Sacks, *supra* note 19, at 363 (“Because battered children perceive danger differently from other children, expert testimony aids the jury in understanding the unusual situation that battered children face.”); Moreno, *supra* note 34, at 1289.

⁸⁰ Mones, *Parricide*, *supra* note 1, at 63 (“[T]he child’s hyper-vigilance also explains why the last act of abuse prior to the homicide would provide a fear response in the child which seems out of proportion to the actual abusive event.”)

⁸¹ Bjerregaard & Blowers, *supra* note 19, at 844 (“[P]ublic sentiment is reluctant to favor legal responses that permit defendants of serious violent offenses to escape criminal responsibility.”).

⁸² See Goldman, *supra* note 3, at 209-10.

⁸³ *Id.* at 213.

⁸⁴ Kathleen M. Heide et. al., *Battered Child Syndrome: An Overview of Case Law and Legislation*, 41 No. 3 CRIM. L. BULL. 1 (2005) [hereinafter Heide, *Battered Child Syndrome*].

⁸⁵ Goldman, *supra* note 3, at 231.

⁸⁶ See *id.* at 213; Hegadorn, *supra* note 2, at 76.

⁸⁷ Goldman, *supra* note 3, at 224.

⁸⁸ 438 U.S. 586 (1978).

⁸⁹ *Id.* at 604.

⁹⁰ 455 U.S. 104 (1982).

⁹¹ *Id.* at 113-14.

⁹² See *supra* Part II.C.

⁹³ 18 Cal. App. 3d 504 (1971).

⁹⁴ *Id.* at 507; see also Estelle v. McGuire, 502 U.S. 62, 68 (1991) (“California law allows the prosecution to introduce expert testimony and evidence related to prior injuries in order to prove ‘battered child syndrome.’”).

⁹⁵ See Heide, *Battered Child Syndrome*, *supra* note 85.

⁹⁶ See Gail Rodwan, *The Defense of Those Who Defend Themselves*, 65 MICH. B.J. 64, 66 (1986).

⁹⁷ See Heide, *Battered Child Syndrome*, *supra* note 84.

⁹⁸ 121 Wash. 2d 220 (1993).

⁹⁹ Heide, *Battered Child Syndrome*, *supra* note 85.

¹⁰⁰ *Janes*, 121 Wash. 2d at 223.

¹⁰¹ *Id.* at 225.

¹⁰² *Id.* at 223.

¹⁰³ *Id.* at 228-29.

¹⁰⁴ *Id.* at 223.

¹⁰⁵ *Id.* at 224-25.

¹⁰⁶ *Id.* at 226-27.

¹⁰⁷ *Id.* at 227.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 232.

¹¹⁰ *Id.* at 236. The Court went on to state that “the jury can then use such knowledge to determine whether the defendant’s belief that he was in imminent danger of serious bodily injury or loss of life was reasonable under the circumstances.” *Id.*

¹¹¹ *State v. Nemeth*, 82 Ohio St. 3d 202, 202 (1998).

¹¹² *Id.*

¹¹³ *Id.* at 204.

¹¹⁴ *Id.* at 205.

¹¹⁵ *Id.* at 205-08.

¹¹⁶ *Id.* at 205. The Court stated that evidence that the defendant suffered from battered child syndrome was relevant in determining whether Nemeth: 1) acted with prior calculation and design, 2) had acted with purpose, 3) had created the confrontation or initiated the aggression, and 3) had an honest belief that he was in imminent danger. *Id.* at 207. It also stated that “expert testimony is necessary to dispel the misconception that a non-confrontational killing cannot satisfy the elements of self-defense.” *Id.* at 209.

¹¹⁷ *State v. Smullen*, 380 Md. 233, 250-51 (2004). The Court made observations about the role that Battered Child Syndrome can play in the defense of a parricide offender and stated that introduction of Battered Child Syndrome demands “a more careful and sophisticated look at the notion of imminent threat and what constitutes ‘aggression,’ of understanding that certain conduct that might not be regarded as imminently dangerous by the public at large can cause someone who has been repeatedly subjected to and hurt by that conduct before to honestly, even if unreasonably, regard it as imminently threatening.” *Id.* at 250.

¹¹⁸ See, e.g., *State v. Gachot*, 609 So. 2d 269 (La. Ct. App. 1992); *People v. Cruickshank*, 484 N.Y.S.2d 328 (N.Y. App. Div. 1988); *Freeman v. State*, 269 Ga. 337 (1998).

¹¹⁹ *Azarcon*, *supra* note 73, at 862; see *Jahnke v. State*, 682 P.2d 991 (Wyo. 1984) (holding that the jury could not consider defendant’s subjective state of mind at the time of the killing or history of abuse thereby affirming defendant’s conviction of first-degree murder); *State v. Crabtree*, 805 P.2d 1 (Kan. 1991) (holding that the trial court was correct in refusing to give jury instructions on self-defense and in refusing to allow the jury to consider the effects of abuse on defendant’s state of mind).

¹²⁰ Heide, *Battered Child Syndrome*, *supra* note 84; Sacks, *supra* note 20, at 370; see LA. CODE EVID. ANN. art. 404(a) (2005); TEX. CODE CRIM. PROC. ANN. art. 38.36 (Vernon 2004) (“[I]n order to establish the defendant’s reasonable belief that use of force or deadly force was immediately necessary, [the defendant] shall be permitted to offer: 1) relevant evidence

that the defendant had been the victim of acts of family violence committed by the deceased and 2) relevant expert testimony regarding the condition of the defendant at the time of the offense, including those relevant facts and circumstances relating to the family violence that are the basis of the expert's opinion.”).

¹²¹ Heide, *Battered Child Syndrome*, *supra* note 84; see ARIZ. REV. STAT. ANN. § 13-1103(A)(1) (2001); OHIO REV. CODE ANN. § 702 (2004).

¹²² See Heide, *Battered Child Syndrome*, *supra* note 84 (“Our review of the literature, state statutes, and case law for all fifty states reveals that the concept of battered child syndrome in cases of adolescent parricide offenders remains open to judicial interpretation amid often vague legislation.”).

¹²³ See *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Roper*, 543 U.S. 551.

¹²⁴ *Thompson*, 487 U.S. at 835.

¹²⁵ *Id.*

¹²⁶ *Roper*, 543 U.S. at 570.

¹²⁷ *Rodwan*, *supra* note 96, at 66; *Janes*, 121 Wash. 2d at 234.

¹²⁸ *Moreno*, *supra* note 33, at 1286.

¹²⁹ *Janes*, 121 Wash. 2d at 234.

¹³⁰ Bjerregaard & Blowers, *supra* note 19, at 869; Hegadorn, *supra* note 1, at 71 (“Escaping a violent household is all but impossible for most abused children, as they rarely have access to the resources that would permit them to survive away from home or simply cannot break the emotional bonds that still remain between themselves and their abusive parent.”).

¹³¹ Brett, *supra* note 42.

¹³² *Id.*

¹³³ Bjerregaard & Blowers, *supra* note 19, at 869 (“Children are even more economically dependent upon their parents and are almost always incapable of surviving independently.”).

¹³⁴ *Moreno*, *supra* note 33, at 1306.

¹³⁵ Smith, *supra* note 18, at 173.

¹³⁶ Goldman, *supra* note 3, at 198.

¹³⁷ *Id.*

¹³⁸ *Id.* at 203.

¹³⁹ See *id.* at 196-97 (“There are powerful policy reasons for precluding the introduction of battered child syndrome testimony and denying a self-defense instruction when a child kills an abusive parent in a patently non-confrontational situation.”).

¹⁴⁰ Azarcon, *supra* note 74, at 844.

¹⁴¹ See Bjerregaard & Blowers, *supra* note 19, at 865-66.

¹⁴² *Id.* at 851.

¹⁴³ Goldman, *supra* note 3, at 208.

¹⁴⁴ *Id.* at 211.

¹⁴⁵ See *id.* at 208 (“Only by excluding battered child syndrome testimony and maintaining the integrity of an objective standard of imminence can society be sure that self-defense claims in non-confrontational situations are rooted in necessity rather than retribution.”); Donald L. Creash, *Partially-Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 627 (1982) (“Society has a powerful interest in carefully circumscribing the situations in which citizens are permitted to protect themselves.

The American criminal justice system must delicately balance the citizen's right to safety with the system's commitment to maintaining a stable, predictable society that punishes only after due process, thus preventing vigilante law enforcement.”).

¹⁴⁶ See Smith, *supra* note 18, at 173.

¹⁴⁷ See Azarcon, *supra* note 73, at 874 (“Allowing evidence regarding the state of mind of an abused child defendant in a parricide case will provide the trier of fact with essential information surrounding the circumstances of the killing. Without this information, the trier of fact will not be able to adequately assess the culpability of the child defendant.”).

¹⁴⁸ See Smith, *supra* note 18, at 176-77 (“[E]vidence demonstrates that neither convictions of first-degree murder with lengthy prison terms nor acquittals by self-defense are likely to succeed in meeting the interests of the individual, society, or criminal justice system. Therefore, a balance is necessary.”).

¹⁴⁹ See Hegadorn, *supra* note 1, at 77.

¹⁵⁰ Bjerregaard & Blowers, *supra* note 19, at 872.

¹⁵¹ Smith, *supra* note 18, at 177.

¹⁵² Hegadorn, *supra* note 1, at 76; Smith, *supra* note 18, at 160-61.

¹⁵³ See *In Re Gault*, 387 U.S. 1, 15-16 (1967) (“The idea of crime and punishment was to be abandoned. The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive”); *Lanes v. State*, 767 S.W.2d 789, 791 (1989) (“The philosophical basis of this separation was to create a system wherein juveniles were rehabilitated rather than incarcerated, protected rather than punished – the very antithesis of the adult criminal system.”); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 144 (1997) (citing Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 109-10 (1909)) (“[T]he belief was that the delinquent youth was on a path to a criminal career, from which he could be diverted, through rehabilitation, or toward which he would proceed without appropriate intervention.”).

¹⁵⁴ Goldman, *supra* note 3, at 232.

¹⁵⁵ *Id.* at 237.

¹⁵⁶ *Id.* at 246 (“[E]vidence suggests that most battered child defendants are amenable to treatment and are able to adjust well to become productive, law-abiding members of society.”).

¹⁵⁷ Smith, *supra* note 18, at 174-75.

¹⁵⁸ *Id.* at 175-76.

¹⁵⁹ *Posey Sentenced as a Child*, KOBTV.com, February 23, 2006, <http://www.kobtv.com/index.cfm?viewer=storeyviewer&id=24434&cat=NMTOPSTORIES>.

¹⁶⁰ *Id.*

¹⁶¹ Mones, *Parricide*, *supra* note 1, at 64.

Endnotes for Charts and Graphs

^a U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD MALTREATMENT 2003 (2005), http://ican-ncfr.org/library/Child_Maltreatment_2003.pdf.

COURTS, COPS, CITIZENS, AND CRIMINALS: HOW COURTS MISAPPLY *SEIBERT* TO QUESTION-FIRST INTERROGATIONS AND HOW THEY CAN FIX IT

Justin D. Heminger*

I. Introduction

“Do you know why we’re here?”¹ This was Virginia homicide Detective David W. Allen’s first question to Jayant Kadian, who was suspected of killing his mother.² “Yeah,” Kadian replied, “because I stabbed my mom in the neck.”³ Immediately after that response, Detective Allen read *Miranda* warnings to Kadian, who then confessed in chilling detail to the murder.⁴

Detective Allen’s simple question and Kadian’s surprising answer and subsequent confession eventually led to a suppression hearing in a Virginia courtroom.⁵ At the hearing, the judge suppressed the confession, relying on *Missouri v. Seibert*,⁶ the United States Supreme Court’s fractured decision which mandates suppression of some confessions obtained during a question-first interrogation.⁷ The judge found that Detective Allen’s initial “question ‘makes no particular sense except as an attempt to [elicit] an incriminating response.’”⁸ As the judge explained, “[A]sking such a question, then giving a defendant *Miranda* warnings, then asking about the incident in question makes a hash of the whole process of giving a defendant notice of his rights.”⁹

However, in many, if not most, state and federal jurisdictions across the United States, the judge’s ruling would be reversed by an appellate court. The hypothetical appellate court’s opinion would begin by laying out the relevant Supreme Court cases, starting with *Miranda v. Arizona*¹⁰ and *United States v. Dickerson*,¹¹ then moving to *Oregon v. Elstad*¹² and ending with *Seibert*. The appellate court would explain that both *Elstad* and *Seibert* addressed question-first situations, where the police asked the suspect a question or began to interrogate the suspect before reading the *Miranda* warnings, then later read the suspect *Miranda* warnings and began asking questions again. In *Elstad*, the Court allowed the subsequent warned confession to be admitted into evidence during the prosecution’s case-in-chief, while in *Seibert*, the Court did not. As this Article explores, distinguishing between *Elstad* and *Seibert* is complicated.

When analyzing *Seibert*, the hypothetical appellate court would first observe that there was no majority opinion. Then it would discuss *United States v. Marks*,¹³ where the Court established the “narrowest grounds” doctrine, allowing lower courts to identify or derive a controlling opinion or holding from within one of the Court’s fractured decisions. If the appellate court followed the majority approach to the *Marks* analysis, the hypothetical court would quickly conclude that Justice Kennedy’s concurrence was the controlling opinion.

Justice Kennedy’s concurrence only calls for excluding a postwarning statement where the interrogator deliberately used a question-first strategy to obtain the statement. It is the deliberateness requirement that seems to be missing in Kadian’s case, and that is why the judge’s decision to suppress Kadian’s confession would be reversed by the hypothetical appellate court.¹⁴ In Kadian’s case, the hypothetical became real when

the Court of Appeals of Virginia reversed the judge’s suppression of Kadian’s statements and remanded the case for trial.¹⁵

Nevertheless, the Court of Appeals of Virginia decision to reverse the trial court and allow Kadian’s confession might ultimately be wrong. Under a correct *Marks* analysis, there is no controlling opinion in *Seibert*. Therefore, when given the choice, lower courts should address question-first *Miranda* violations by applying the *Seibert* plurality opinion, rather than Justice Kennedy’s concurrence. The Fifth Amendment declares that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself,”¹⁶ and the judiciary is the institution entrusted with the responsibility to guard that constitutional right from state encroachment, including the threat posed by question-first tactics.

The next part of this Article, Part II, traces the development of *Miranda* jurisprudence, highlighting the four Supreme Court decisions most relevant to question-first interrogations, *Miranda*, *Elstad*, *Dickerson*, and *Seibert*. After laying this foundation, Part III explores *Marks* as applied by the Supreme Court and lower courts, ending with a survey of lower court opinions applying *Marks* to *Seibert*. Part IV explains why, contrary to the majority approach, Justice Kennedy’s concurrence is not the narrowest grounds in *Seibert*. Part IV concludes by proposing that, after *Seibert*, lower courts are free to decide what rule to apply to question-first interrogations. Taking the next logical step, Part V evaluates the four possible approaches that lower courts might take to question-first interrogations. Part V concludes that the plurality test is the best choice. The Article concludes by exhorting courts to reflect carefully upon the constitutional right at stake when police obtain a confession through a question-first technique.

II. From *Miranda* to *Seibert*: The Supreme Court Struggles with Its “Constitutional Role”

Beginning with *Miranda v. Arizona*, the Supreme Court has struggled to define the scope of the privilege against self-incrimination, and, in particular, how to deal with question-first interrogations. Over the following decades, the Court created exceptions to *Miranda*, including *Elstad*, which allowed some confessions that could be products of question-first tactics to be admitted. In *Dickerson*, the Court answered the underlying question of whether *Miranda* warnings are constitutionally required. Yet, the fractured decision in *Seibert* proves that the debate over the privilege’s scope is ongoing and that the Court still disagrees about how to handle confessions obtained through question-first interrogations.¹⁷

Miranda v. Arizona

Miranda is relevant to question-first interrogations on at least four levels. First, *Miranda* was and is a constitutional paradox: It went far beyond the Constitution’s text, yet pro-

scribed concrete constitutional rules.¹⁸ In the opening paragraph, the majority explained that it was addressing the Fifth Amendment privilege's relationship to evidence and procedure.¹⁹ That promise was fulfilled in the third section of the opinion, which dictated the four *Miranda* warnings and procedural rules for admitting warned confessions and excluding unwarned confessions.²⁰ Although the majority insisted that the "decision in no way creates a constitutional straitjacket," encouraging Congress and the states to find alternatives to the warnings,²¹ this was a false assurance. In reality, the majority stated that Congress and the states would have to demonstrate to the Court "procedures which are at least as effective" as the warnings,²² a seemingly impossible challenge. Therefore, on its face, *Miranda* is invincible: It claims to be replaceable but only by a rule that provides *more* protection for the privilege.²³

Second, *Miranda* relied on two fundamental principles that speak to the continuing debate over the privilege against self-incrimination in question-first interrogations: personal autonomy and evidentiary reliability.²⁴ With respect to personal autonomy, the Court placed a high value upon the individual defendant's rights when juxtaposed against the interests of government and society as a whole.²⁵ With respect to evidentiary reliability, the Court was concerned that modern interrogation techniques made confessions less reliable in the absence of an advocate or impartial observer.²⁶ The *Miranda* Court used both the personal autonomy and evidentiary reliability principles to justify placing a "heavy burden" on the government to "demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."²⁷

Third, *Miranda* is relevant to question-first tactics because it is an explicitly objective doctrine.²⁸ Admittedly, the majority considered the state of mind of the interrogator and the suspect.²⁹ The first section of the opinion focused entirely on the many techniques law enforcement officers employed to produce a calculated result: an admission of guilt.³⁰ However, in the end, the majority chose an objective rule, from the *Miranda* warnings to the knowing and intelligent waiver.³¹ In fact, the majority emphatically rejected a subjective standard for determining whether the defendant knew his right to remain silent.³² Since *Miranda*, the Court has continued to debate the value of subjective versus objective tests in protecting the privilege against self-incrimination.³³

Finally, the *Miranda* majority arguably addressed question-first tactics, a point often overlooked. When the majority described its holding, it repeatedly declared that the warnings must be given *first*, before any interrogation.³⁴ The *Miranda* majority also placed substantial value on the temporal element of the warnings when applying its holding to the specific cases under review.³⁵ The Court even went so far as to treat one of the *Miranda* cases, *Westover v. United States*,³⁶ as a question-first interrogation.³⁷

Oregon v. Elstad

Although *Miranda* initially appeared to be a bright-line rule, the Court has since created many exceptions to *Miranda* in its struggle to define the scope of the privilege against self-incrimination.³⁸ The exception most directly relat-

ed to question-first tactics is *Oregon v. Elstad*.³⁹ In *Elstad*, the Court held that when a suspect has made an unwarned, but voluntary admission, a subsequent warned and voluntary statement is admissible.⁴⁰ As Justice O'Connor wrote for the majority,

It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.⁴¹

Therefore, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion."⁴² Additionally, the *Elstad* majority felt that a fifth *Miranda* warning, that the "prior statement could not be used against" the suspect, was "neither practicable nor constitutionally necessary."⁴³

The *Elstad* majority unambiguously rejected two arguments for excluding the second statement. It found neither the "fruit of the poisonous tree"⁴⁴ nor the "cat out of the bag"⁴⁵ theory justified excluding the second statement. Consequently, *Elstad* could have ended the question-first debate. Twenty years later, however, the *Seibert* Justices disagreed about how to interpret *Elstad*. The *Seibert* plurality interpreted *Elstad* as creating a good-faith mistake exception for *Miranda* violations,⁴⁶ while the *Seibert* dissent interpreted *Elstad* as requiring all question-first interrogations to meet the traditional Fifth Amendment voluntariness test.⁴⁷ Separating from the other eight Justices, Justice Kennedy interpreted *Elstad* as adequately addressing all interrogations except for deliberate two-step interrogations.⁴⁸ *Elstad* contains language that supports each position, so it is not surprising that the Court disagreed.⁴⁹

Dickerson v. United States

*Dickerson v. United States*⁵⁰ is central to the discussion of question-first tactics because the Court used *Dickerson* to reaffirm *Miranda*'s constitutional nature. In *Dickerson*, the Court rejected Congress' attempt to statutorily overrule *Miranda*.⁵¹ The seven-justice majority, led by Chief Justice Rehnquist, refused to allow Congress to overrule *Miranda* and, relying on *stare decisis* principles, refused to overrule *Miranda* itself.⁵²

The *Dickerson* majority reaffirmed several key *Miranda* doctrines. First, the majority noted that "*Miranda* announced a constitutional rule."⁵³ The majority reconciled this statement with the *Miranda* exceptions by claiming that the *Miranda* exceptions "illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable."⁵⁴ Second, the *Dickerson* majority admitted that *Miranda* placed a higher cost on society because it was an objective rule. Chief Justice Rehnquist conceded: "The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result."⁵⁵ However, the Chief Justice and six other

Justices believed that society still benefited from *Miranda*'s objectivity because the alternative totality of the circumstances test would be harder to administer.⁵⁶

Missouri v. Seibert

*Missouri v. Seibert*⁵⁷ represents the latest episode in the Court's quest to define the scope of the privilege against self-incrimination. In *Seibert*, the Court reconsidered the constitutionality of question-first tactics in light of *Elstad*. The result was a fractured decision that left lower courts with the task of finding constitutional law somewhere within four opinions, none of which received more than four votes.

The Facts

The defendant in *Seibert*, Patrice Seibert, had a twelve-year-old son, Jonathan, with cerebral palsy.⁵⁸ When Jonathan died in his sleep, Seibert was afraid she would be charged with neglect because Jonathan had bedsores.⁵⁹ *Seibert* conspired with her other two sons and their friends to set fire to their trailer house and burn Jonathan's body in it. To make the plan complete, Seibert planned to leave another mentally ill teenager, Donald Rector, in the trailer when they set it on fire.⁶⁰ The fire was set, and Donald died in it.⁶¹

In the subsequent investigation, Seibert became a suspect. Before Seibert's arrest, Officer Richard Hanrahan instructed the arresting officer not to read Seibert her *Miranda* rights.⁶² At the police station, Officer Hanrahan interrogated Seibert for about half an hour, pressuring her to admit that Seibert knew Donald would be left in the fire.⁶³ When Seibert admitted she knew, Officer Hanrahan gave her a break from the questioning, read her *Miranda* warnings, obtained a signed *Miranda* waiver, and then continued questioning *Seibert*.⁶⁴ During the second interrogation, Officer Hanrahan walked Seibert through her earlier statement, repeating questions and even reminding her of answers she gave in the first interrogation. Eventually, Seibert confessed and was convicted.⁶⁵

The Plurality Opinion

Justice Souter wrote for the plurality in *Seibert*, joined by Justices Stevens, Ginsburg, and Breyer.⁶⁶ The plurality first observed that *Miranda* warnings were designed "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause."⁶⁷ The plurality explained that "*Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent."⁶⁸ But the plurality found that law enforcement departments were promoting question-first tactics to neutralize the effectiveness of *Miranda* warnings.⁶⁹ As the *Miranda* Court had done over thirty years earlier, the plurality considered how the interrogation practice would affect a suspect's knowing and voluntary exercise (or waiver) of the privilege against self-incrimination, as protected through the *Miranda* warnings.⁷⁰ For the plurality, "[t]he threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires."⁷¹ The plurality concluded that the warnings

were likely to be ineffective.⁷²

Once the plurality concluded that question-first tactics could make *Miranda* warnings ineffective, it turned to the State of Missouri's argument that *Elstad* was controlling.⁷³ Justice Souter declared that Missouri's argument "disfigures" *Elstad*.⁷⁴ *Elstad*, wrote Justice Souter, created a good-faith mistake exception to *Miranda*, while the facts in *Seibert* "by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings."⁷⁵ *Elstad* was therefore distinguishable based on "a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object."⁷⁶ These facts turned into a five-factor test to measure the efficacy of *Miranda* warnings.⁷⁷

Justice Breyer's Concurrence

Justice Breyer wrote a brief concurrence in which he declared that he "join[ed] the plurality's opinion in full."⁷⁸ However, he wanted to apply the "fruit of the poisonous tree" rationale which the *Elstad* majority had dismissed, and he believed that the plurality's approach would have that effect.⁷⁹ Most importantly, Justice Breyer endorsed the good faith exception reading of *Elstad* that was vital to the plurality's decision.⁸⁰

Justice Kennedy's Concurrence in the Judgment and Opinion

Playing *Seibert*'s Lone Ranger, Justice Kennedy concurred in the judgment but wrote a separate opinion. He noted that while he agreed with "much" of the plurality's opinion, his "approach does differ in some respects, requiring this separate statement."⁸¹ Justice Kennedy based his opinion on a practical balancing of public and private interests inherent in interrogations.⁸² He explained that the *Miranda* exceptions illustrated this interest-balancing approach: "[N]ot every violation of the [*Miranda*] rule requires suppression of the evidence obtained. Evidence is admissible where the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction."⁸³ Justice Kennedy identified the central concerns of *Miranda* as "'the general goal of deterring improper police conduct'" and "'the Fifth Amendment goal of assuring trustworthy evidence.'"⁸⁴

Elstad, Justice Kennedy felt, properly balanced the interests in most two-step interrogations.⁸⁵ However, where "[t]he police used a two-step questioning technique based on a deliberate violation of *Miranda*," the balance of interests shifted because, when applied intentionally, the technique "distorts the meaning of *Miranda*" and "furthers no legitimate countervailing interest."⁸⁶ Therefore, when police deliberately employed question-first tactics to violate *Miranda*, Justice Kennedy believed that "postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps."⁸⁷

In a crucial portion of his opinion, Justice Kennedy distinguished his approach from that of the plurality.⁸⁸ He wrote that the plurality's "test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations."⁸⁹ He explained, "In my view, this test cuts too broadly. . . I

would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.”⁹⁰ Justice Kennedy envisioned *Elstad* as the general rule and *Seibert* as the exception where “the deliberate two-step interrogation was employed.”⁹¹

The Dissenting Opinion

Justice O’Connor, who wrote the *Elstad* majority opinion, wrote the dissent in *Seibert*. She applauded the plurality for not applying a “fruit of the poisonous tree” analysis and for not focusing on the interrogator’s subjective intent.⁹² Much of the dissent was devoted to explaining why Justice Kennedy’s use of subjective intent was wrong.⁹³ However, the dissent disagreed with the plurality about the need to protect the defendant from coercion caused by the two-step interrogation tactic.⁹⁴ Two-step interrogations should be “analyze[d] . . . under the voluntariness standards central to the Fifth Amendment and reiterated in *Elstad*.”⁹⁵

On Subjective Versus Objective Standards

Although it only earned a footnote in the plurality’s decision, the debate over objective versus subjective standards in evaluating question-first interrogations is central to the disagreement between the nine *Seibert* Justices. Justice Kennedy unambiguously endorsed the interrogator’s deliberate violation of *Miranda* warnings as the triggering factor for a different constitutional inquiry, arguably a subjective standard. The dissent, on the other hand, vehemently rejected subjective intent, thus subscribing to an objective standard. The real question is, therefore, where the plurality falls in the debate.

When the plurality distinguished *Elstad* as a good-faith mistake, it was relying on the officer’s intent to justify the *Miranda* exception.⁹⁶ On the other hand, the plurality quickly differentiated the facts in *Elstad* from the facts in *Seibert*: “At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings.”⁹⁷ This statement led to the footnote which appeared to signal the plurality’s commitment to an objective rather than subjective test: “Because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work.”⁹⁸ This footnote is consistent with the plurality’s objective threshold question, which questions the potential “effectiveness” of *Miranda* warnings in light of question-first tactics, disregarding the actual or likely intent of either the interrogator or the suspect.⁹⁹

Furthermore, at the end of the opinion, Justice Souter clarified the objective nature of the plurality’s test. The test is objective from the reasonable person standard: “These [question-first interrogation] circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect’s shoes would not have understood them to convey a message that she retained a choice about continuing to talk.”¹⁰⁰

One commentator has questioned whether “the plurality foreclosed subjective characteristics entirely.”¹⁰¹

Admittedly, the plurality did not reject a subjective inquiry as clearly as it found such an inquiry unhelpful and unnecessary. The Court may resolve the objective-subjective debate when it next considers question-first tactics. Meanwhile, lower courts attempting to understand *Seibert* should accept the basic premise that the plurality’s test is objective. Otherwise, the quandary posed by the fractured decision makes little sense. Both the plurality and Justice Kennedy agreed that the confession should be suppressed.¹⁰² But Justice Kennedy distinguished his position from that of the plurality by characterizing the plurality’s test as “an objective inquiry from the perspective of the suspect [that] applies in the case of both intentional and unintentional two-stage interrogations.”¹⁰³ Finally, in her dissent, Justice O’Connor praised the plurality for rejecting an intent-based test.¹⁰⁴

The Court will continue to debate the scope of the privilege’s suppression remedy. However, at least until the Court’s next *Miranda* opinion, lower courts must play the cards they have been dealt. This means lower courts must scrutinize *Seibert* in light of the Court’s guidance on fractured decisions to determine what binding precedent applies to question-first interrogations.

III. From *Marks* to *Seibert*: Plurality Opinions, Concurrences, and the Narrowest Grounds Doctrine

Because *Seibert* has no clear majority opinion, lower courts addressing question-first tactics must decide whether one or more of the four opinions in *Seibert* is, or contains, controlling precedent. For lower courts, the most popular approach to this question is to apply the “narrowest grounds” doctrine. As Part III.A explains, the Supreme Court developed the “narrowest grounds” doctrine in *Marks v. United States*,¹⁰⁵ a First Amendment obscenity case. However, Part III.B notes that the Court has been inconsistent in its own application of *Marks*, recently failing in *Grutter v. Bollinger*¹⁰⁶ to resolve a circuit split on how *Marks* should be applied. Despite the Court’s partial silence on *Marks*, many lower courts have applied *Marks* to *Seibert*. As the jurisdictional survey in Part III.C shows, the majority of lower courts that have applied a *Marks* analysis have concluded that Justice Kennedy’s concurrence is the controlling opinion in *Seibert*. However, a minority of lower courts disagree with that analysis and offer logical alternatives.

United States v. Marks and the Narrowest Grounds Doctrine

The “narrowest grounds” doctrine arose in *United States v. Marks*¹⁰⁷ as part of the Court’s resolution of long-standing disagreements among the Justices over the First Amendment status of obscenity.¹⁰⁸ In *Marks*, the defendants were charged with transporting obscene materials interstate.¹⁰⁹ Their criminal conduct ended in February 1973.¹¹⁰ In June 1973, the Court decided *Miller v. California*,¹¹¹ finally establishing, by majority opinion, a controlling precedent for obscenity cases, including a new definition of obscenity.¹¹² At trial, the defendants argued that they should be tried under the definition of obscenity in the 1966 plurality opinion, *Memoirs v. Massachusetts*,¹¹³ which they claimed constituted the Court’s

obscenity rule before *Miller*.¹¹⁴ The district court refused to apply *Memoirs* and applied *Miller*'s more stringent test, under which defendants were convicted.¹¹⁵

The Sixth Circuit heard the defendants' appeal.¹¹⁶ In their decision affirming the district court, the Circuit court "noted correctly that the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and [the court] apparently concluded from this fact that *Memoirs* never became the law."¹¹⁷ The circuit court reasoned that if *Memoirs* was not controlling, then the last opinion where a majority of the Supreme Court agreed would be the proper rule, and because *Miller* was consistent with that earlier decision, it was fair to use *Miller* to convict the defendants.¹¹⁸

The Supreme Court reversed.¹¹⁹ Justice Powell wrote for the majority, "[W]e think the basic premise for this line of reasoning is faulty."¹²⁰ He then stated what is now known as the "narrowest grounds" doctrine: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'"¹²¹ Justice Powell then analyzed *Memoirs* using the Narrowest Grounds Doctrine:

Three Justices joined in the controlling opinion in *Memoirs*. Two others, Mr. Justice Black and Mr. Justice Douglas concurred on broader grounds in reversing the judgment below. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity. Mr. Justice Stewart also concurred in the judgment, based on his view that only 'hardcore pornography' may be suppressed. The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided governing standards. . . . Materials were deemed to be constitutionally protected unless the prosecution carried the burden of proving that they were 'utterly without redeeming social value,' and otherwise satisfied the stringent *Memoirs* requirements.¹²²

Justice Powell concluded that "*Memoirs* therefore was the law," and the defendants should have been tried under the *Memoirs* standard for obscenity, rather than the new *Miller* test.¹²³ Thus was born the *Marks* narrowest grounds doctrine.

The Supreme Court's (Non)application of the Narrowest Grounds Doctrine

Commentators have criticized the "narrowest grounds" doctrine because the Court itself has refused to apply *Marks* to fractured decisions where lower courts struggled to find the narrowest grounds.¹²⁴ The most prominent example is *Grutter v. Bollinger*,¹²⁵ where the Court refused to apply a *Marks* analysis to its fractured decision in *Regents of the University of California v. Bakke*.¹²⁶ In *Bakke*, Justice Powell provided the fifth vote to strike down a particular race-conscious admissions program when the other eight justices were split evenly.¹²⁷ However, Justice Powell agreed with the dissent that race could be a proper factor in higher education admissions programs.¹²⁸ After *Bakke*, lower courts applied

Marks to determine the holding in *Bakke*, concluding, at least in some instances, that Justice Powell's opinion controlled.¹²⁹ However, when the Supreme Court decided *Grutter*, it refused to do a *Marks* analysis of *Bakke*.¹³⁰ Instead, it simply adopted Justice Powell's *Bakke* opinion as the rule in *Grutter*.¹³¹

The Court's pattern of avoiding *Marks* has led some to question how firmly the "narrowest grounds" doctrine binds lower courts.¹³² One respected article describes the "narrowest grounds" doctrine as "a doctrine of limited applicability."¹³³ The article concludes:

[The "narrowest grounds" doctrine] is only useful where the plurality and concurring opinions stand in a "broader-narrower" relation to each other. Many of the most troublesome plurality opinions, however, do not fit into this mold, and lower courts have been left to their own devices to determine the precedential value of most plurality opinions.¹³⁴

The Court has failed to clarify the meaning of the doctrine,¹³⁵ so it is appropriate to consider how lower courts have treated it.

An Alternative Perspective on the Narrowest Grounds Doctrine

The United States Courts of Appeals for the District of Columbia, the Third Circuit, and the Second Circuit have each recognized that "the *Marks* 'narrowest grounds' doctrine is not universally applicable."¹³⁶ But instead of avoiding its complexities, as the *Grutter* Court did, these federal circuits have confronted the "narrowest grounds" doctrine and reached a conclusion: The "narrowest grounds" doctrine does not always provide an answer to the Court's fractured decisions.

The District of Columbia Circuit, in *King v. Palmer*,¹³⁷ was the first circuit to offer an alternative to a rigid application of the "narrowest grounds" doctrine. In *King*, the court had to decide on the availability of contingency enhancements to attorneys' fees.¹³⁸ The Supreme Court's most relevant opinion, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*¹³⁹ ("*Delaware Valley II*"), was a fractured decision with a four-Justice plurality in which Justice O'Connor concurred in part and concurred in the judgment.¹⁴⁰ Before *King*, the District of Columbia Circuit had used *Marks* to find Justice O'Connor's concurrence in *Delaware Valley II* controlling.¹⁴¹ Upon reconsideration, however, the *King* majority found that *Marks* had a more limited applicability than previously believed:

Marks is workable—one opinion can be meaningfully regarded as "narrower" than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.¹⁴²

The *King* majority agreed that some of the Court's fractured decisions, such as *Marks*, were cases in which the "'narrowest grounds' approach yielded a logical result."¹⁴³ However, the *King* majority was concerned about some fractured decisions

where applying *Marks* raised serious problems:

When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.¹⁴⁴

In *King*, the majority was unable to find enough “common ground” between Justice O’Connor’s concurrence and the plurality decision in *Delaware Valley II* to decide “when to apply contingency enhancements.”¹⁴⁵ Furthermore, the *King* majority was completely at a loss to try to perform a *Marks* analysis on the question of “how the contingency enhancement should be calculated.”¹⁴⁶ Here, the *King* majority wrote, “We do not see how either approach can be thought ‘narrower’ than the other; they are simply different.”¹⁴⁷ As a result, the District of Columbia Circuit was “left without a controlling opinion or a governing test for awarding contingency enhancements under *Delaware Valley II*.”¹⁴⁸

Relying upon the reasoning in *King*, the Third Circuit, in *Rappa v. New Castle County*,¹⁴⁹ recognized that there must be a “common denominator in the Court’s reasoning” before *Marks* could be applied.¹⁵⁰ The *Rappa* Court observed that “[i]n some splintered decisions, there will be three or more distinct approaches, none of which is a subset of another; instead, each approach is simply different.”¹⁵¹ Where there was no common denominator, “no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the Court.”¹⁵²

Recently, the Second Circuit applied the reasoning in *King* and *Rappa* to reach a similar result in *United States v. Alcan Aluminum Corp.*¹⁵³ The court agreed with the *King* majority that the “narrowest grounds” doctrine “works . . . only when that narrow opinion is the common denominator representing the position approved by at least five justices.”¹⁵⁴ Therefore, the court recognized that “[w]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court.”¹⁵⁵

One commentator agreed with these circuit courts’ alternate perspective on the “narrowest grounds” doctrine: “*Marks* provides no useful guidance in those cases in which different Justices take different approaches to the issues. Such decisions cannot be forced into the *Marks* ‘narrowest grounds’ mold because of the absence of any logical connection between the concurring opinions.”¹⁵⁶ In *King*, *Rappa*, and *Alcan Aluminum Corp.*, three federal circuits refused to blindly apply *Marks*, choosing instead the uncertainty of finding no controlling rule. One lesson to be gained from these decisions is that lower courts should apply the narrowest grounds doctrine with a critical eye.

A Survey of Lower Court Cases Applying Marks to Seibert

The following survey of cases in which lower courts have applied the *Marks* “narrowest grounds” doctrine to *Seibert*¹⁵⁷ evaluates the majority and two minority approaches. The majority of lower courts view Justice Kennedy’s opinion as the narrowest grounds and, therefore, as controlling. The minority of lower courts take one of two positions: the first group treats both the plurality’s and Justice Kennedy’s opinions as controlling, avoiding the need to choose between them; the second group, currently comprised of only two judges, holds that *Seibert* does not have a narrowest grounds and, consequently, does not have a controlling opinion.

Majority Approach

A majority of courts that have applied the *Marks* “narrowest grounds” doctrine to *Seibert* have concluded that Justice Kennedy’s concurrence is the controlling opinion. Among the federal circuits, the Third,¹⁵⁸ Fourth,¹⁵⁹ Fifth,¹⁶⁰ Seventh,¹⁶¹ Eighth,¹⁶² and Ninth¹⁶³ Circuits have followed the majority approach. At the federal trial court level, judges on the district courts for the District of Minnesota,¹⁶⁴ the District of Nebraska,¹⁶⁵ the Eastern District of Pennsylvania,¹⁶⁶ and the Western District of Pennsylvania¹⁶⁷ apply the majority approach. State appellate courts in the following states have also followed the majority approach: California,¹⁶⁸ Kentucky,¹⁶⁹ Maryland,¹⁷⁰ and Washington.¹⁷¹

The Ninth Circuit’s recent opinion in *United States v. Williams*¹⁷² is an example of the majority approach. After describing *Elstad* and *Seibert*, the court noted that in *Seibert*, “[a]lthough five Justices agreed that *Seibert*’s postwarning statement was inadmissible, the case did not produce a majority opinion.”¹⁷³ Therefore, lacking a majority opinion, the court had to “decide how to interpret *Seibert* in light of these splintered opinions.”¹⁷⁴ Citing the *Marks* “narrowest grounds” doctrine, the court declared that it “need not find a legal opinion which a majority joined, but merely ‘a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.’”¹⁷⁵ The court believed that “[t]o determine whether *Seibert* contains a precedential holding, [it] must identify and apply a test which satisfies the requirements of both Justice Souter’s plurality opinion and Justice Kennedy’s concurrence.”¹⁷⁶

The *Williams* court then applied *Marks* to *Seibert*. The court noted that while “the plurality would consider all two-stage interrogations eligible for a *Seibert* inquiry, Justice Kennedy’s opinion narrowed the *Seibert* exception to those cases involving the deliberate use of the two-step procedure to weaken *Miranda*’s protections.”¹⁷⁷ The court found that the plurality and Justice Kennedy agreed that confessions obtained through a deliberate use of two-stage interrogations were inadmissible.¹⁷⁸ Consequently, “[t]his narrower test—that excludes confessions made after a deliberate, objectively ineffective mid-stream warning—represents *Seibert*’s holding.”¹⁷⁹ All other two-stage interrogations would still be controlled by *Elstad*’s voluntariness test.¹⁸⁰

After establishing that Justice Kennedy's test was controlling, the *Williams* Court observed that Justice Kennedy failed to provide guidance for what constituted a deliberate two-step interrogation.¹⁸¹ The court believed that both objective and subjective evidence should be considered when deciding if the two-step interrogation was deliberate.¹⁸² This forced the court to use the plurality's five-factor test to analyze the facts for deliberateness.¹⁸³ Only if there was a deliberate two-step interrogation would the court have to determine whether the mid-stream warnings were effective.¹⁸⁴ Again, the court believed that it should "look both to the objective circumstances the plurality cited . . . and to the curative measures [described by Justice Kennedy]" to decide the effectiveness of the warnings.¹⁸⁵

The First Minority Approach

A minority of lower courts that have applied *Marks* to *Seibert* have not found Justice Kennedy's concurrence controlling. These courts have followed one of several different approaches. The first minority approach is used by the Eleventh Circuit,¹⁸⁶ the United States District Courts for the Northern District of Iowa,¹⁸⁷ the Southern District of Indiana,¹⁸⁸ and the Court of Appeals of Alaska.¹⁸⁹ It could be called the "alternative argument" approach. The alternative argument is familiar to many lawyers from their law school days, when professors instructed them to argue in the alternative on their exams; it also shares some similarities with the concept of alternative pleading in the Federal Rules of Civil Procedure.¹⁹⁰ Courts using the alternative argument approach generally analyze the facts under both the plurality decision and under Justice Kennedy's concurrence.¹⁹¹ As long as the results of the two analyses are the same, the courts do not specify which analysis is outcome determinative.¹⁹²

Courts use the alternative argument approach to avoid committing to a position unless absolutely necessary. However, because the alternative argument approach does not resolve the fractured decision dilemma, it is a delay tactic rather than a solution. At one time, the Eighth Circuit was in the alternative argument camp, but as more panels heard question-first cases, the circuit gradually pitched its tent further and further away until it landed squarely in the majority approach's camp.¹⁹³ The Eleventh Circuit will eventually face the same decision.

The Second Minority Approach

The second minority approach rejects Justice Kennedy's concurrence as the narrowest grounds and allows the court to create its own rule. So far, only two judges have endorsed this approach. The first is Ninth Circuit Judge Marsha S. Berzon in her dissenting opinion in *United States v. Rodriguez-Preciado*.¹⁹⁴ Unlike the other two judges on the panel in *Rodriguez-Preciado* who held that *Seibert* was not applicable, Judge Berzon's dissent reached the *Seibert* issue.¹⁹⁵

Judge Berzon began her *Marks* analysis by explaining that "[g]enerally, where there is no majority opinion, the narrowest opinion adhered to by at least five Justices controls. Applying the *Marks* rule to *Seibert*, however, is not a straightforward analysis."¹⁹⁶ In a subtle critique of Justice Kennedy's

opinion, Judge Berzon conceded that Justice Kennedy's reasoning was "arguably narrower" than the plurality's but observed in a footnote that it was Justice Kennedy himself who "characterized his opinion as 'narrower.'"¹⁹⁷

Judge Berzon identified Justice Kennedy's concurrence as focusing on the "deliberateness on the part of the police—or lack thereof" rather than "the objective effectiveness factors outlined in Justice Souter's plurality opinion."¹⁹⁸ However, seven justices "decisively rejected any subjective good faith consideration, based on deliberateness on the part of the police."¹⁹⁹ This analysis led Judge Berzon to conclude that Justice Kennedy's opinion had the support of "two Justices, at most" (because Justice Breyer had at least partially concurred in Justice Kennedy's opinion).²⁰⁰ Therefore, *Marks* did not provide a solution.²⁰¹ The only answer that *Marks* provided was that Justice Kennedy's opinion could not be controlling.²⁰²

The next question facing Judge Berzon was what to do if Justice Kennedy's opinion was not controlling.²⁰³ Neither the dissent nor the plurality was binding, thus, there was no controlling precedent, and the Ninth Circuit was free to decide the issue.²⁰⁴ Judge Berzon concluded that the Ninth Circuit should adopt the plurality position, something other circuits had done in similar situations.²⁰⁵ Subsequently, in *United States v. Williams*,²⁰⁶ the Ninth Circuit refused to adopt Judge Berzon's analysis and went with the majority approach.²⁰⁷

Joan M. Azrack, the Chief United States Magistrate Judge for the Eastern District of New York, also adopted the second minority approach in *United States v. Cohen*.²⁰⁸ In *Cohen*, Judge Azrack analyzed *Seibert* in light of *Marks* and concluded that Justice Kennedy's opinion could not be the "narrowest grounds" for two reasons and, therefore, could not be controlling.²⁰⁹ The first reason Justice Kennedy's opinion was not the "narrowest grounds" was that at least three of the Justices in the plurality and the four dissenting Justices rejected Justice Kennedy's reliance on subjective intent.²¹⁰ Therefore, "Justice Kennedy's rule, rejected by a large majority of the court, cannot be *Seibert*'s holding."²¹¹ As discussed above in Part II.D.6, while the plurality did not explicitly reject a subjective standard, it endorsed an objective standard and implied that a subjective standard was unnecessary and would normally be worthless.²¹²

The second reason Justice Kennedy's concurrence was not the narrowest grounds was that Justice Kennedy's "analysis . . . is 'simply different' than that articulated by the plurality, not a logical subset."²¹³ This lack of congruence between Justice Kennedy's and the plurality's positions meant that *Marks* could not produce a satisfactory rationale for the holding in *Seibert*.²¹⁴ In other words, although Justice Kennedy and the plurality agreed about the result in *Seibert*, they did not agree about how to reach the result in such a way that Justice Kennedy's reasoning could be categorized as a subset of the plurality's reasoning.²¹⁵ Under such circumstances, *Marks* was not designed to lead to a conclusion, and there was no possible narrowest holding.²¹⁶

Judge Azrack relied upon the decision in *Alcan Aluminum Corp.*, where the Second Circuit explained, "[W]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one stan-

dard commands the support of a majority of the Supreme Court.”²¹⁷ The only identifiable result from *Seibert* was that “*Elstad* does not control all situations of question-first interrogations; that sometimes warned confessions related to previous unwarned confessions must be suppressed.”²¹⁸

Without a controlling opinion to apply, Judge Azrack reasoned she was “left to devise a test to determine whether to suppress statements made in a question-first situation, in other words, to determine whether midstream *Miranda* warnings could be considered effective.”²¹⁹ Judge Azrack’s solution was to synthesize the plurality’s five-factor test with Justice Kennedy’s concern for curative measures to evaluate the effectiveness of the *Miranda* warnings.²²⁰ Applying this test, Judge Azrack found the warnings were effective, and so the second statement was admissible.²²¹

No other court has yet taken the bold approach of Judges Berzon and Azrack, but as Part IV explains, their approach is one that courts should consider when faced with question-first interrogations.

IV. Why Justice Kennedy’s Concurrence in *Seibert* is Not the “Narrowest Grounds”

Despite what a majority of lower courts have held, under a correct *Marks* analysis, Justice Kennedy’s concurrence in *Seibert* is not the narrowest grounds. The majority approach in applying *Marks* to *Seibert* is incorrect, as Section IV.A explains. The correct approach is the second minority approach, which says that there is no narrowest grounds in *Seibert*, and courts must therefore decide for themselves how to handle statements derived from question-first interrogations, the topic of Part V.

The Majority Approach to *Seibert* is Incorrect

The majority approach, using *Marks* to declare that Justice Kennedy’s concurrence is the controlling opinion in *Seibert*, is incorrect for at least five reasons. The first reason is the most convincing: seven Justices disagreed with Justice Kennedy. With regard to the plurality, Justice Kennedy himself noted their differences with him.²²² As discussed above, the plurality endorsed an objective test for question-first interrogations and implicitly found a subjective inquiry unnecessary.²²³ Granted, the plurality did not shy away from calling question-first tactics “a police strategy adapted to undermine the *Miranda* warnings,”²²⁴ but the plurality immediately qualified this recognition by explaining that “the focus is on facts apart from intent that show the question-first tactic at work.”²²⁵ This is at least partly “[b]ecause the intent of the officer will rarely be as candidly admitted as it was” in *Seibert*.²²⁶ At the very least, the four Justices comprising the plurality did not believe that Justice Kennedy’s deliberateness test would adequately protect suspects’ constitutional rights.²²⁷ Justice O’Connor, speaking for the four dissenting Justices, was more outspoken in her criticism of allowing the interrogator’s subjective intent to play a role in admissibility determinations, stating, “I believe that the approach espoused by Justice Kennedy is ill advised.”²²⁸

In *Rodriguez-Preciado*, Judge Berzon suggests that Justice Breyer’s concurrence indicates that he may agree with

Justice Kennedy on the intent issue.²²⁹ This is debatable, since Justice Breyer joined in the plurality opinion in full and endorsed a good-faith interpretation of *Elstad*.²³² However, that still leaves a seven-to-two majority rejecting Justice Kennedy’s deliberateness test.²³¹ While the *Marks* rule may be satisfied at a highly theoretical and superficial level, it is paradoxical to find that the “narrowest grounds” doctrine is satisfied under such circumstances.²³²

The second reason the majority approach is incorrect is that Justice Kennedy’s concurrence is “simply different” than the plurality’s opinion.²³³ The “narrowest grounds” doctrine implies that one of the concurring opinions will be “narrower,” but here “neither [of the analyses] is a logical subset of the other.”²³⁴ The very nature of Justice Kennedy’s subjective intent inquiry is different than the plurality’s objective, factor-based test.²³⁵

The “simply different” concept is best illustrated by two analogies from mathematics. The first is the common denominator, which, in mathematics, is a number by which two other numbers are both divisible. For example, a common denominator of 4 and 6 is 2. The three federal circuits that have found an alternative approach to *Marks* each believed that only a common denominator in legal reasoning between two non-majority opinions could be the narrowest grounds.²³⁶ If two opinions did not have a common denominator, there could be no narrowest grounds between them. Consistent with the principles in *King*, *Rappa*, and *Alcan Aluminum Corp.*, Judge Berzon and Judge Azrack found no common denominator between Justice Kennedy’s concurrence and the plurality’s opinion in *Seibert* because Justice Kennedy’s reasoning was “simply different” than the plurality’s.²³⁷ Justice Kennedy focused on the deliberate nature of the interrogation while the plurality focused on the circumstances of the interrogation.²³⁸

The second mathematical analogy is to Venn diagrams, in which groups or collections of objects or things (called “sets” in mathematics) are drawn as circles that may (1) overlap entirely; (2) overlap partially; or (3) not overlap at all. The *King* court described this principle in layman’s terms: “*Marks* is workable—one opinion can be meaningfully regarded as ‘narrower’ than another—only when one opinion is a logical subset of other, broader opinions.”²³⁹ Although the *result* from Justice Kennedy’s and the plurality’s tests could overlap partially, the *reasoning*—the “grounds” used to reach the result—does not overlap: In one case, the grounds are the subjective intent of the interrogator, in the other, the circumstances of the interrogation.²⁴⁰ As Judge Berzon summarized this analysis, “The only point not enjoying the assent of five Justices is the appropriate admissibility standard to apply [to exceptions to *Elstad*], on which the Court is split 4-1-4.”²⁴¹ Echoing Judge Berzon, Judge Azrack wrote, “Only a recognition that deliberate circumvention of *Miranda* is unconstitutional [the partially overlapping result], but for different reasons and after separate analyses [the grounds], binds the plurality and Justice Kennedy’s concurrence.”²⁴² The reasoning in Justice Kennedy’s concurrence is “simply different,” so his opinion is not the narrowest grounds upon which the plurality agreed with him; the narrowest grounds upon which the plurality agreed with Justice Kennedy is his concurrence in the judgment.

At least three other criticisms may be leveled at the majority approach to the *Marks-Seibert* question. The first criticism is that the majority approach relies upon circular reasoning. Some lower court opinions, rather than thoroughly applying *Marks*, rely upon Justice Kennedy's own characterization of his opinion as "narrower" to justify finding that Justice Kennedy's opinion is the narrowest grounds.²⁴³ Citing to Justice Kennedy's self-interpretation short-circuits the necessary legal reasoning.

The second criticism is that some lower courts that applied *Marks* to *Seibert* were hasty in their consideration of the issues and did not fully evaluate how the Supreme Court and the federal circuits have applied *Marks* in the past.²⁴⁴ Courts need to make decisions based on imperfect guidance from the Supreme Court; however, several circuits, including the Eighth and the Eleventh, at least temporarily avoided making a hasty decision through the alternative argument approach.²⁴⁵

The final criticism is that *Elstad* already encompasses most circumstances that would arise under Justice Kennedy's concurrence. Even Justice Kennedy admits his test would "apply . . . only in the *infrequent* case" where question-first tactics were deliberately employed; he would place most interrogations under *Elstad*'s voluntariness test.²⁴⁶ However, as the *Seibert* dissent notes, Patrice Seibert's second statement might still be suppressed under *Elstad*.²⁴⁷ Any time the interrogator affirmatively expresses a subjective intent to violate *Miranda* through the question-first tactic, the interrogator will probably also use other coercive techniques that would make both the pre- and post-warning interrogations involuntary.

The Second Minority Approach to Seibert is Correct

The second minority approach embodies the correct application of the "narrowest grounds" doctrine to *Seibert*. As discussed in Part IV.A above, both Judge Berzon and Judge Azrack properly concluded that *Marks* did not lead to a "narrowest ground" between the plurality's opinion and Justice Kennedy's concurrence. To the contrary, these two judges believed that it would be counterintuitive and unsound for Justice Kennedy's concurrence to be the controlling opinion under *Marks*.²⁴⁸ This principle was supported by the Second Circuit, the D.C. Circuit, and, implicitly in *Grutter*, the Supreme Court: Where the "narrowest grounds" doctrine cannot produce a logical basis for the judgment, it is counterproductive to try to create one.²⁴⁹

While rejecting Justice Kennedy's concurrence as the narrowest grounds, Judge Berzon and Judge Azrack recognized that *something* must be drawn from *Seibert*.²⁵⁰ Judge Azrack identified that something as simply "the specific result" and went on to observe that "[a] fair characterization [of the result] is that *Elstad* does not control all situations of question-first interrogations; that sometimes warned confessions related to previous unwarned confessions must be suppressed."²⁵¹ What those situations are is a matter for lower courts to decide.²⁵²

V. What Should Courts Do?

If there is no controlling precedent for at least some question-first scenarios, lower courts must "decide how to

decide" the admissibility of defendants' statements obtained through question-first interrogations.²⁵³ Courts have four options, ranked here by merit: (1) adopt the plurality opinion; (2) synthesize Justice Kennedy's concurrence with the plurality opinion; (3) adopt Justice Kennedy's concurrence; or (4) devise a new test. The best of these options is the first.

Courts Should Adopt the Plurality Opinion

Given the choice, courts should adopt the *Seibert* plurality opinion. The Constitution guarantees to each person the right to not "be compelled in any criminal case to be a witness against himself."²⁵⁴ The judiciary is the institution entrusted to protect this constitutional right from being trampled or abused by the other two branches of government. For fifty years now, the judiciary has defended the privilege through *Miranda* warnings. Today, question-first tactics threaten the efficacy of those warnings.

Most importantly, the plurality opinion protects the efficacy of the *Miranda* warnings from being manipulated by the state. As the *Seibert* plurality observed, the state often gains a benefit from giving *Miranda* warnings because the warnings almost always ensure that subsequent statements will be admissible for purposes of proving guilt.²⁵⁵ However, this "virtual ticket of admissibility"²⁵⁶ presumes that the suspect's constitutional rights have been provided to him. Question-first tactics manipulate this guarantee by withholding those rights at the moment a suspect most needs to know them, when he is in custody and facing interrogation.²⁵⁷ The *Miranda* Court instituted the warnings because it was primarily concerned with psychological, rather than physical, coercion in interrogations.²⁵⁸ When facing question-first interrogations, courts face the same question: Should the state be permitted to take advantage of a suspect's psychological vulnerability? The plurality opinion's five-factor test allows courts to wrest ultimate control over the interrogation out of the hands of law enforcement. While a police officer may swear from the stand that she did not intend to violate *Miranda* by questioning first, the trial court can assess "the completeness and detail of the questions and answers in the first round of interrogation" and "the overlapping content of the two statements" to decide for itself whether the state manipulated the efficacy of *Miranda* warnings.²⁵⁹

The plurality opinion also prevents the state from turning the *Miranda* warnings against the suspect. Withholding the warnings when the suspect most needs them and giving them to him when the state most needs them is like grabbing the suspect's constitutional shield, turning it into a sword, and attacking him with it. The primary purpose of *Miranda* warnings is to protect the suspect's privilege against self-incrimination, not to assist the state in eliciting a confession from the suspect (this is a by-product of the warnings). The *Miranda* Court believed that it was the state's job to prosecute the suspect, and courts were therefore charged with the responsibility of ensuring that the state did not depend upon "the cruel, simple expedient of compelling [incriminating evidence] from [the suspect's] own mouth."²⁶⁰ The *Seibert* plurality's test, by requiring the warnings to precede any questioning, prevents the state from timing *Miranda* warnings to its advantage.

Besides providing appropriate protection for constitutional rights, the *Seibert* plurality opinion is consistent with *Miranda*, with the most relevant *Miranda* cases, and with the Court's general criminal procedure jurisprudence. First, at the most basic level, the plurality opinion is consistent with *Miranda* itself. The plurality is consistent with *Miranda*'s original holding, which requires warnings to be given *before* any interrogation begins.²⁶¹ The plurality opinion is also consistent with *Miranda*'s quasi-constitutional nature because it protects the Fifth Amendment privilege with a judicially-created, fact-based procedural mechanism to protect the privilege.²⁶² Finally, the plurality opinion is consistent with *Miranda*'s two rationales, personal autonomy and evidentiary reliability.²⁶³ With respect to personal autonomy, the objective factor-based test prevents interrogators from using psychological manipulation or coercion to obtain a confessions from their subjects and imposes a threshold of conduct which an interrogator may not cross without risking exclusion of the defendant's statements.²⁶⁴ With respect to evidentiary reliability, the plurality opinion is consistent with two principles the *Miranda* Court expressed: Courts will not question whether the test must be met in particular cases, but if the test is met, there is a "virtual guarantee" of admissibility.²⁶⁵

The plurality opinion is consistent with the most relevant *Miranda* cases, *Elstad* and *Dickerson*. It treats *Elstad* as a good-faith mistake exception, which "pos[es] no threat to warn-first practice generally."²⁶⁶ At the same time, it supports *Dickerson*'s reaffirmation of the "constitutional character" of *Miranda* by responding to a "new challenge to *Miranda*" with new prophylactic protections, refusing to return to what the *Seibert* plurality calls the "old way of doing things" through a case-by-case voluntariness determination.²⁶⁷

Furthermore, the plurality opinion is consistent with the Court's criminal procedure jurisprudence. Justice O'Connor devotes over three pages of her dissent to this topic, during which she praises the plurality for rejecting both the fruit of the poisonous tree analysis and Justice Kennedy's intent-based test.²⁶⁸ Justice O'Connor found the plurality's opinion to be consistent with several of the Court's criminal procedure cases, including *Moran v. Burbine*, *New York v. Quarles*, *United States v. Patane*, *Harris v. New York*, *United States v. Leon*, and *Whren v. United States*.²⁶⁹

Finally, as Judge Berzon observed in *Rodriguez-Preciado*, several federal circuits have adopted Supreme Court plurality decisions in other contexts, relying on them as persuasive authority rather than binding precedent.²⁷⁰ This is the course that Judge Berzon ultimately recommends.²⁷¹ For all of these reasons, the plurality opinion is the best approach a court could choose to respond to the new challenge posed by question-first tactics.

Courts Should Not Synthesize Justice Kennedy's Concurrence with the Plurality Opinion

Another option for lower courts deciding how to evaluate the admissibility of postwarning statements is to synthesize Justice Kennedy's concurrence with the plurality opinion. There are many ways to synthesize the plurality opinion with Justice Kennedy's concurrence. The first minority approach to the *Marks* analysis of *Seibert* is the most logical synthesis

because it applies both the plurality's five-factor test and Justice Kennedy's deliberateness inquiry. While this approach would seem to honor the merits of the plurality without ignoring Justice Kennedy's contribution, incorporating a "deliberateness" inquiry would be unhelpful in most cases and could distract courts from more important questions.

If the synthesis relies heavily on the "deliberateness" inquiry in Justice Kennedy's concurrence, it would conflict with the views of at least seven of the *Seibert* Justices.²⁷² Furthermore, in practice, an inquiry into an officer's subjective intent would likely be unfruitful. As the plurality argued, rarely will an officer testify to a judge that the officer did his best to violate *Miranda*.²⁷³ More than likely, the officer will swear that he never intended to violate *Miranda*, and this will give him an opportunity to explain away the circumstances of the interrogation. In the end, "deliberateness" would only be helpful if the state chose to shoot itself in the foot by admitting that it tried to violate *Miranda*. In all other situations, the deliberateness inquiry would simply distract the court from evaluating the circumstances of the interrogation. Even the Ninth Circuit, in *Williams*, found that Justice Kennedy's concurrence did not provide sufficient guidance for determining "deliberateness," forcing the court to rely upon the plurality's five-factor test.²⁷⁴

A less controversial synthesis would incorporate Justice Kennedy's "curative measures" into the plurality test. For example, the plurality and Justice Kennedy each place some weight upon the absence of an additional warning that a previously made, unwarned statement may be inadmissible.²⁷⁵ This is essentially Judge Azrack's approach in *Cohen*.²⁷⁶ Judge Azrack applied the plurality's five-factor test, but he identified where Justice Kennedy's curative measures fit into the factors.²⁷⁷ Nevertheless, before endorsing any synthesis, courts should acknowledge that it is something on which the Justices themselves were unable to agree.

Courts Should Not Adopt Justice Kennedy's Concurrence

The third possible option for lower courts deciding what test to apply to question-first interrogations is to rely on Justice Kennedy's test. Besides the concerns expressed by the plurality and dissent in *Seibert*, it is worthwhile to consider another defect in the subjective test: the burden of proof. One commentator notes that Justice Kennedy's "new bad faith test shifts an impossible and inappropriate burden onto the defendant, who must now prove that a particular police officer acted in bad faith."²⁷⁸ This requirement "creates the risk that future pretrial *Miranda* hearings will devolve into credibility battles focused on irrelevant and unanswerable questions inevitably won by the men and women in blue."²⁷⁹ Under most circumstances, the state would be foolish to admit bad faith, so the defendant will have to prove intent circumstantially. And even if the initial burden of proof was manageable, Justice Kennedy's test allows the state to redeem itself after the fact by applying cheap "Band-Aides" in the form of curative measures, which could be as simple as a fifth-warning.²⁸⁰

Courts Could Devise a New Test

The last option for courts deciding how to address question-first interrogations is to devise an entirely new test. In this context, five sitting Justices have already declared their positions. However, with Chief Justice John Roberts and Associate Justice Samuel Alito joining the Court since *Seibert* was decided, the Supreme Court's *Miranda* jurisprudence should continue to evolve, and this could allow lower courts to explore new solutions to question-first tactics.

VI. Conclusion

At the end of this Article, it is worthwhile to return to its beginning—to return to *Miranda*. When Chief Justice Warren, in *Miranda*, recounted the historical development of the privilege against self-incrimination, he observed that “[t]he privilege was elevated to constitutional status and has always been ‘as broad as the mischief against which it seeks to guard.’”²⁸¹ Chief Justice Warren believed that the Court was compelled to honor that principle: “We cannot depart from this noble heritage.”²⁸² Today’s courts are no less obligated to protect the constitutional rights and privileges of its citizens, and the scope of those rights and privileges must remain “as broad as the mischief against which [they] seek to guard.”²⁸³ Although there has been much debate over the *Seibert* Justices’ positions, all nine Justices acknowledged the potential for mischief caused by question-first interrogations.

On a normative level, a correct *Marks* analysis shows that Justice Kennedy’s opinion in *Seibert* is not the narrowest grounds and is, therefore, not controlling. On a positive level, courts should consider *Miranda*’s underlying policies in light of the mischief caused by question-first tactics before selecting a governing standard.

One may argue that a particular defendant, such as Jayant Kadian, does not “deserve” the rights and privileges which he or she is granted under the Constitution, particularly when that privilege is given effect by courts. Nevertheless, the Constitution does not govern only that defendant. The Constitution governs courts, cops, citizens, and criminals, and that is why Chief Justice Warren’s statement is still true today: “We cannot depart from this noble heritage.”

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⁶ 542 U.S. 600 (2004).

⁷ See *Seibert*, 542 U.S. at 617 (plurality opinion). The terms “question-first interrogation,” “two-step interrogation,” and “two-stage interrogation” all refer to a modern law enforcement interrogation tactic: An officer will question the suspect in custody without giving him *Miranda* warnings; then, after the suspect has admitted his guilt, the officer will give him *Miranda* warnings and question him again, this time recording the statement to use against the suspect in criminal proceedings. The only detailed record of the first interrogation may be that of the eyewitnesses and participants. Justice Souter described question-first interrogation tactics in *Seibert*. See *id.* at 609-11. In Kadian’s case, other officers had read him *Miranda* warnings before Detective Allen arrived, but Detective Allen did not read Kadian his rights until after Kadian confession to the killing. See Jackson, *supra* note 1.

⁸ Jackson, *supra* note 1.

⁹ Jackson, *supra* note 1.

¹⁰ 384 U.S. 436 (1966).

¹¹ 530 U.S. 428 (2000).

¹² 470 U.S. 298 (1985).

¹³ 430 U.S. 188 (1977).

¹⁴ See Jackson, *supra* note 1 (quoting several law professors who agreed that Detective Allen’s question did not have the necessary markings of deliberateness that Justice Kennedy required).

¹⁵ See *Commonwealth v. Kadian*, Record No. 3036-05-4, 2006 WL 1458128, *1-4 (Va. Ct. App. May 30, 2006) (reversing trial court’s ruling to suppress confession).

¹⁶ U.S. CONST. amend. V.

¹⁷ See Peter Bowman Rutledge & Nicole L. Angarella, *An End of Term Exam: October Term 2003 at the Supreme Court of the United States*, 54 CATH. U. L. REV. 151, 179-80 (2004) (“*Seibert* demonstrates that *Miranda* issues will continue to divide the Court despite the so-called ‘détente’ announced several terms ago in *Dickerson v. United States*.”).

¹⁸ In his dissent, Justice Harlan criticized “the Court’s new constitutional code of rules for confessions.” *Miranda v. Arizona*, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting). He later described “the Court’s asserted reliance on the Fifth Amendment . . . as a *trompe l’oeil*.” *Id.* at 510 (Harlan, J., dissenting).

¹⁹ See *id.* at 439 (majority opinion) (“[W]e deal with the admissibility of statements . . . and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment . . .”).

²⁰ See *id.* at 467-79.

²¹ See *id.* at 467.

²² See *id.*

²³ This is the quality in *Miranda* that later frustrated Justice Scalia in *Dickerson v. United States*, 530 U.S. 428 (2000). As he accurately observed in his dissenting opinion, “[T]he Court has (thankfully) long since abandoned the notion that failure to comply with *Miranda*’s rules is itself a violation of the Constitution.” *Dickerson*, 530 U.S. at 450 (Scalia, J., dissenting). With this observation in hand, Justice Scalia painted a false dichotomy between upholding Congress’s voluntariness test in 18 U.S.C. § 3501 and declaring *Miranda* “an illegitimate exercise of [the Supreme Court’s] authority to review state-court judgments.” *Id.* at 461. The third possibility, which Justice Scalia refused to acknowledge, was that Congress could in theory enact other procedural rules, besides Section 3501, that satisfied *Miranda*’s threshold, thereby obviating the need for the judicially enforced *Miranda* warnings.

¹ Tom Jackson, *Judge Invalidates Admission by Va. Slaying Suspect*, WASH. POST, Dec. 12, 2005, at B3.

² See *id.*

³ *Id.*

⁴ See *id.*

⁵ See *id.*

²⁴ See William T. Pizzi & Morris B. Hoffman, *Taking Miranda's Pulse*, 58 VAND. L. REV. 813, 816 (2005) (describing these two rationales as arising from a "disapproval of coerced confessions . . . that has always been grounded [even pre-*Miranda*] in the confluence of twin evils).

²⁵ See *Miranda*, 384 U.S. at 460 (espousing that "all policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.") (citations omitted).

²⁶ *Id.* at 453, 455-56, 461, 470.

²⁷ *Id.* at 475.

²⁸ See *Missouri v. Seibert*, 542 U.S. 600, 624 (2004) (O'Connor, J., dissenting) (agreeing with the plurality's "rejection of an intent-based test" and citing *Miranda* as support).

²⁹ See *Miranda*, 384 U.S. at 448-55 (describing modern interrogation techniques intended to produce a confession from the suspect); *id.* at 468-69 (rejecting a subjective test for knowledge of the right to remain silent).

³⁰ See *id.* at 445-58.

³¹ See *id.* at 478-79 (requiring the state to produce evidence at trial that it gave defendant the *Miranda* warnings and that the defendant made a knowing and intelligent waiver of his rights).

³² See *id.* at 468-69. Besides the uncertain nature of a subjective test, the Court identified a second reason for requiring the test to be objective, related to the reliability of the confession: "More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Id.* at 469.

³³ See *Seibert*, 542 U.S. at 624-27 (O'Connor, J., dissenting) (debating subjective and objective standards); see also Peter B. Rutledge, *Miranda and Reasonableness*, 42 AM. CRIM. L. REV. 1011, 1014-18 (2005) (listing three factors in the subjective-objective debate as (1) the administrability of the rule; (2) the protection of individual rights; (3) and the balancing of interests between the individual and law enforcement).

³⁴ See *Miranda*, 384 U.S. at 477. For example, the Court stated:

The principles announced today deal with the protection which *must* be given to the privilege against self-incrimination when the individual is *first* subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at *this point* that our adversary system of criminal proceedings commences, distinguishing itself *at the outset* from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at *this point*.

Miranda, 384 U.S. at 477 (emphases added). Similarly, in the Court's summary of its holding, Chief Justice Warren wrote that the defendant being interrogated "must be warned prior to *any* questioning." *Id.* at 479 (emphasis added).

³⁵ See *id.* at 492 n.67, 495-97.

³⁶ 342 F.2d 684 (9th Cir. 1965), *rev'd*, *Arizona v. Miranda*, 384 U.S. 436 (1966).

³⁷ The Court found in *Westover* that, where the defendant had undergone a lengthy state interrogation and the federal "interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings," the "giving of

warnings alone [by the federal agents] was not sufficient to protect the privilege." *Miranda*, 384 U.S. at 496-97. The Court noted that "[a] different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." *Id.* at 496.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), Justice O'Connor dismissed the *Miranda* Court's analysis of *Westover* as a finding of actual coercion. *Elstad*, 470 U.S. at 310. After noting that *Westover* was decided with *Miranda*, Justice O'Connor wrote, "Of the courts that have considered whether a properly warned confession must be suppressed because it was preceded by an unwarned but clearly voluntary admission, the majority have explicitly or implicitly recognized that *Westover*'s requirement of a break in the stream of events is inapposite." *Id.* at 311 & n.2. By relying on a "majority" of lower courts, Justice O'Connor avoided confronting the *Miranda* Court's analysis of the facts in *Westover*.

³⁸ See Paul G. Alvarez, Comment, *Taking Back Miranda: How Seibert and Patane Can Keep "Question-First" and "Outside Miranda" Interrogation Tactics in Check*, 54 CATH. U. L. REV. 1195, 1202-12 (2004) (describing how the Supreme Court "took definitive steps toward tempering the bright-line rule of *Miranda*" through "a series of five major cases over the twenty years following *Miranda*"). The most significant *Miranda* exceptions include *Harris v. New York*, 401 U.S. 222 (1971), *Michigan v. Tucker*, 417 U.S. 433 (1974), *Oregon v. Hass*, 420 U.S. 714 (1975), *New York v. Quarles*, 467 U.S. 649 (1984), *Oregon v. Elstad*, 470 U.S. 298 (1985), *United States v. Patane*, 542 U.S. 630 (2004), and *Missouri v. Seibert*, 542 U.S. 600 (2004).

³⁹ 470 U.S. 298 (1985).

⁴⁰ *Id.* at 318.

⁴¹ *Id.* at 309.

⁴² *Id.* at 314.

⁴³ *Id.* at 316.

⁴⁴ See *id.* at 306 (dismissing the defendant's "fruit of the poisonous tree" argument).

⁴⁵ See *id.* at 311 (rejecting the reasoning of the defendant's second argument that the first statement "let the cat out of the bag," so that the suspect would face "a subtle form of lingering compulsion" when making the second statement).

⁴⁶ *Missouri v. Seibert*, 542 U.S. 600, 614-15 (2004) (plurality opinion).

⁴⁷ *Id.* at 628 (O'Connor, J., dissenting).

⁴⁸ *Id.* at 619 (Kennedy, J., concurring in the judgment).

⁴⁹ But see Joëlle Anne Moreno, *Faith-Based Miranda?: Why the New Missouri v. Seibert Police "Bad Faith" Test is a Terrible Idea*, 47 ARIZ. L. REV. 395, 410-13 (2005) (arguing that Justice Souter and Justice Kennedy both misread *Elstad*'s facts and that their interpretations of the *Elstad* majority opinion are therefore wrong).

⁵⁰ 530 U.S. 428 (2000).

⁵¹ See *id.* at 443-44.

⁵² *Id.* at 444.

⁵³ *Id.*

⁵⁴ *Id.* at 441.

⁵⁵ *Id.* at 444.

⁵⁶ *Id.*

⁵⁷ 542 U.S. 600 (2004).

⁵⁸ See *id.* at 604 (plurality opinion).

⁵⁹ See *id.*

⁶⁰ See *id.*

- 61 *See id.*
- 62 *See id.*
- 63 *See id.* at 605.
- 64 *See id.*
- 65 *See id.*
- 66 Justice Breyer concurred “fully” in the plurality opinion, and he also wrote a separate concurrence in which he argued for an application of the “fruit of the poisonous tree” doctrine. *See id.* at 617-18 (Breyer, J., concurring). Justice O’Connor, in her *Seibert* dissent, wrote that “[t]he Court today [in *United States v. Patane*, 542 U.S. 630 (2004)] refuses to apply the traditional ‘fruits’ analysis to the physical fruit of a claimed *Miranda* violation. The [*Seibert*] plurality correctly refuses to apply a similar analysis to testimonial fruits.” *Id.* at 623-24 (O’Connor, J., dissenting). This suggests that Justice Breyer was the only vote for a traditional fruit of the poisonous tree analysis.
- 67 *Id.* at 608 (plurality opinion) (quoting *Chavez v. Martinez*, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part)).
- 68 *Id.* at 609.
- 69 *See id.* at 611-13. Justice Souter concluded that “[t]he upshot of all this advice [given by police departments and even a national police training organization] is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy.” *Id.* at 611.
- 70 *See id.* at 612-13.
- 71 *See id.* at 611-12.
- 72 *See id.* at 613. Justice Souter explained, “By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content.” *Id.* He reasoned that this was why police departments were applying question-first techniques. *See id.*
- 73 *See id.* at 614.
- 74 *Id.*
- 75 *Id.* at 615-16.
- 76 *Id.* at 615.
- 77 *Id.* The five factors are: (1) “the completeness and detail of the questions and answers in the first round of interrogation”; (2) “the overlapping content of the two statements”; (3) “the timing and setting of the first and the second”; (4) “the continuity of police personnel”; (5) “the degree to which the interrogator’s questions treated the second round as continuous with the first.” *Id.* at 615. Arguably, the plurality added a sixth factor when it stated that the absence of “a formal addendum warning that a previous statement could not be used” was “clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new, interrogation.” *Id.* at 616 & n.7. Some lower courts, however, describe the test as comprising five factors. *See, e.g., United States v. Briones*, 390 F.3d 610, 613 (2005) *reh’g and reh’g en banc denied*, 2005 U.S. App. LEXIS 3084 (2005), *cert. denied*, 125 S. Ct. 2925 (2005).
- 78 *See Seibert*, 542 U.S. at 617-18 (Breyer, J., concurring).
- 79 *See id.*
- 80 *See id.* at 617 (“Courts should exclude the ‘fruits’ of the initial unwarned questioning unless the failure to warn was in good faith.”) (citations omitted).
- 81 *Id.* at 619 (Kennedy, J., concurring in the judgment).
- 82 *See id.*
- 83 *Id.* at 618-19. Justice Kennedy referred to four *Miranda* excep-
- tions as appropriately balancing public and private interests: *Harris, Quarles, Patane*, and *Elstad*. *See id.* at 619-20.
- 84 *Id.* at 619.
- 85 *See id.* at 620 (“*Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning.”). Justice Kennedy quoted approvingly the following statement from *Elstad*: “It is an unwarranted extension of *Miranda* to hold that a simple failure to administer warnings . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.” *Id.* at 620 (quoting *Oregon v. Elstad*, 470 U.S. 298, 309 (1985)).
- 86 *Id.* at 621.
- 87 *Id.* Justice Kennedy required that “[c]urative measures should be designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.” *Id.* at 622. He hypothesized that “a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.” *Id.* (citations omitted).
- 88 *See id.* at 621-22.
- 89 *Id.* at 621.
- 90 *Id.* at 622.
- 91 *Id.*
- 92 *Id.* at 623 (O’Connor, J., dissenting).
- 93 *See id.* at 624-27.
- 94 *See id.* at 627-28. The dissent characterized the plurality’s approach as “indistinguishable” from the “cat out of the bag” argument that the *Elstad* majority rejected. *Id.* at 627.
- 95 *Id.* at 628.
- 96 *Id.* at 615 (plurality opinion) (“Although the *Elstad* Court expressed no explicit conclusion about either officer’s state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally.”).
- 97 *See id.* at 616.
- 98 *See id.* at 616 n.6.
- 99 The plurality believed that the circumstances of the interrogation would create a situation in which *Miranda* warnings would be ineffective for a person in the suspect’s shoes. *See Seibert*, 542 U.S. at 613.
- 100 *See id.* at 617 (note omitted).
- 101 *See Rutledge, supra* note 33, at 1024.
- 102 *Compare Seibert*, 542 U.S. at 617 (plurality opinion) *with id.* at 622 (Kennedy J., concurring in the judgment).
- 103 *See id.* at 621 (Kennedy, J., concurring in the judgment). In other words, the objective nature of the plurality’s test is most evident as a negative inference from Justice Kennedy’s opinion.
- 104 *See id.* at 624 (O’Connor, J., dissenting) (applauding “the plurality’s rejection of an intent-based test”).
- 105 430 U.S. 188 (1977).
- 106 539 U.S. 306 (2003).
- 107 430 U.S. 188 (1977).
- 108 *See BOB WOODWARD & SCOTT ARMSTRONG, THE BROTHERS 192-204* (Simon & Schuster 1979) (describing how, in the context of the 1971 term, current and former Supreme Court justices had disagreed strongly about the status of obscenity under the First Amendment).
- 109 *See Marks*, 430 U.S. at 189.
- 110 *See id.*

- 111 413 U.S. 15, 24 (1973).
- 112 See *Marks*, 430 at 190 & n.3 (detailing the three-part test created by the *Miller* court to determine whether material was obscene and therefore not entitled to First Amendment protection).
- 113 383 U.S. 413 (1966).
- 114 See *Marks*, 430 U.S. at 190-91 (reiterating the plurality in *Memoirs* which held that “three elements must be coalesce” for the material to be found obscene and thus outside the protection of the First Amendment).
- 115 See *id.*
- 116 See *id.* at 191.
- 117 *Id.* at 192.
- 118 See *id.* at 192-93.
- 119 *Id.* at 193.
- 120 *Id.*
- 121 *Id.* (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).
- 122 *Id.* at 193-94 (citations omitted).
- 123 *Id.* at 194. The constitutional basis for overturning the defendants’ convictions in *Marks* was an Ex Post Facto Clause argument. See *id.* at 191.
- 124 See Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 436-42 (1992) (detailing “the Supreme Court’s disregard for the ‘narrowest grounds’ doctrine” and observing that, through 1992, “[t]he Court has cited *Marks* only four times for the ‘narrowest grounds’ rule - three times in dissent”); Rafael A. Seminario, *The Uncertainty and Debilitation of the Marks Fractured Opinion Analysis—The Supreme Court Misses an Opportunity: Grutter v. Bollinger*, 2004 UTAH L. REV. 739, 759-62 (2004) (criticizing the Court for side-stepping a *Marks* analysis of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) in *Grutter v. Bollinger*, 539 U.S. 306 (2003), when many lower courts had struggled to apply *Marks*).
- 125 539 U.S. 306 (2003).
- 126 438 U.S. 265 (1978); see Seminario, *supra* note 124, at 759-62.
- 127 See Seminario, *supra* note 124, at 743.
- 128 See *id.*
- 129 See *id.* at 751, 760.
- 130 See *id.* at 760. In *Grutter*, Justice O’Connor acknowledged for the majority that “[i]n the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell’s diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*.” *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). She continued, “As the divergent opinions of the lower courts demonstrate, however, ‘[t]his test is more easily stated than applied to the various opinions supporting the result in [*Bakke*].’” *Id.* (citations omitted). Therefore, Justice O’Connor concluded, the majority “d[id] not find it necessary to decide whether Justice Powell’s opinion is binding under *Marks*. It does not seem ‘useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.’” *Id.* (citation omitted).
- 131 Seminario, *supra* note 124, at 760.
- 132 See Thurmon, *supra* note 124, at 442 (suggesting that “[l]ower courts should take the Supreme Court’s rejection of the *Marks* rule as an invitation to follow suit”); Seminario, *supra* note 124, at 762 (recognizing that “instead of clarifying the proper use of the *Marks* analysis in *Grutter*, the Court has most likely increased the likelihood that it will be subject to whimsical application, subjective interpretation, and more importantly, divisive disagreement . . .”).
- 133 Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 767 (1980).
- 134 Novak, *supra* note 133, at 767.
- 135 See Seminario, *supra* note 124, at 760 (“The Court’s avoidance of the *Marks* analysis severely weakened the analysis as a tool for judicial interpretation of fractured opinions.”).
- 136 Thurmon, *supra* note 124, at 442.
- 137 950 F.2d 771 (D.C. Cir. 1991) (en banc).
- 138 *Id.* at 773.
- 139 483 U.S. 711 (1987).
- 140 See *King*, 950 F.2d at 776-77.
- 141 See *id.* at 780.
- 142 *Id.* at 781.
- 143 *Id.*
- 144 *Id.* at 782.
- 145 *Id.* at 782-83 (emphasis in original).
- 146 *Id.* at 783 (emphasis in original).
- 147 *Id.*
- 148 *Id.*
- 149 18 F.3d 1043 (3d Cir. 1994).
- 150 *Id.* at 1058.
- 151 *Id.* (citations omitted).
- 152 *Id.*
- 153 315 F.3d 179 (2d Cir. 2003).
- 154 *Id.* at 189.
- 155 *Id.*
- 156 Thurmon, *supra* note 124, at 442.
- 157 This survey is intended to provide an overview of case law in this area. As of April 7, 2006, Westlaw Keycite indicated that *Seibert* has been cited in approximately 172 cases. Of those cases, approximately forty refer to *Marks*, and this survey is representative of those. While several courts have applied *Seibert* without performing a *Marks* analysis, see, for example, *People v. Paulman*, 833 N.E.2d 239, 246-47 & n.5 (N.Y. 2005), their decisions cannot be given much weight because they fail to address a central question in *Seibert*: which opinion controls and under what circumstances. See *id.*
- 158 See *United States v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir. 2005); *United States v. Latz*, 162 Fed. App. 113, 119-20 (3d Cir. 2005); *United States v. Kiam*, 432 F.3d 524, 532-33 (3d Cir. 2006).
- 159 See *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005).
- 160 *United States v. Sinclair*, No. 05-40544, 2006 WL 616030, at *1 (5th Cir. Mar. 13, 2006).
- 161 See *United States v. Stewart*, 388 F.3d 1079, 1089-90 (7th Cir. 2004); see also *United States v. Peterson*, 414 F.3d 825, 827-28 (7th Cir. 2005) (citing *United States v. Stewart*, 388 F.3d 1079, 1086-90 (7th Cir. 2004)).
- 162 See *United States v. Ollie*, No. 05-2503, 2006 WL 829755, at *5-7 (8th Cir. Mar. 31, 2006) (“Because Justice Kennedy provided the fifth vote and his concurrence resolved the case on narrower grounds than did the plurality, it is his reasoning that rules the present case.”).
- 163 See *United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1129-30 (9th Cir. 2005). The 8th Circuit’s early opinions in 2004 applied what is essentially the first minority approach analyzing question-first interrogation under both the plurality opinion and Justice Kennedy’s concurrence while hoping the tests agreed. See, e.g., *United States v. Aguilar*, 384 F.3d 520, 524-25 (8th Cir. 2004). The Eighth Circuit is now fully aligned with the majority. See *United States v. Ollie*, No. 05-2503, 2006 WL 829755, at *6 (8th Cir. Mar. 31, 2006).

164 See *United States v. Banks*, No. Civ. 05-426JNE/FLN, 2006 WL 839508, at *8-10 (D. Minn. Mar. 30, 2006).

165 See *United States v. Hansen*, No. 8:05CR186, 2005 WL 2655468, at *2 (D. Neb. Oct. 18, 2005).

166 See *United States v. Kiam*, 343 F. Supp. 2d 398, 408-10 (E.D. Pa. 2004).

167 See *United States v. Yamba*, No. 2:04 CR 329, 2006 WL 41182, at *13 (W.D. Pa. Jan. 6, 2006) (citing *United States v. Naranjo*, 426 F.3d 221 (3d Cir. 2005)).

168 See *People v. Roberts*, No. D043221 (Super. Ct. No. SCD169869), 2005 WL 615851, at *12 (Cal. Ct. App. March 17, 2005); *In re Richard G.*, No. H026504 (Santa Clara County Superior Court No. J125855), 2005 WL 428967, at *8-11 (Cal. Ct. App. Feb. 23, 2005); *People v. Brown*, No. H026138 (Santa Clara County Super. Ct. No. CC256280), 2004 WL 2384330, at *10 (Cal. Ct. App. Oct. 26, 2004); *People v. Knight*, No. C042870 (Sup. Ct. No. TF030730A), 2005 WL 1478995, at *9 (Cal. Ct. App. June 21, 2005); *People v. Dutra*, No. C044075 (Sup. Ct. No. SF085258B), 2005 WL 1177582, at *12 (Cal. Ct. App. May 18, 2005); *People v. Hall*, No. C042586 (Sup. Ct. No. 01F00138), 2004 WL 2526699, at *8-9 (Cal. Ct. App. Nov. 9, 2004). As a caveat, the author notes that none of the California Court of Appeal decisions was reported in the state reporter, and, therefore, none of them may be cited as binding precedent in California. However, six unpublished opinions from the California Court of Appeal arguably together constitute an implicit precedent.

169 See *Callihan v. Commonwealth*, 142 S.W.3d 123, 125-26 (Ky. 2004); *Jackson v. Commonwealth*, Nos. 2004-SC-0118-MR, 2004-SC-0319-MR, 2006 WL 733991, at *6 (Ky. March 23, 2006) (plurality opinion).

170 See *Cooper v. State*, 877 A.2d 1095, 1107 (Md. Ct. Spec. App. 2005).

171 *State v. Andrusiv*, No. 53923-0-I, 2005 WL 1345438, at *2 & n.14 (Wash. Ct. App. June 6, 2005); *State v. T.R.*, No. 54156-1-I, 2005 WL 221888, at *3 n.14 (Wash. Ct. App. Jan. 31, 2005).

172 435 F.3d 1148 (9th Cir. 2006).

173 *Id.* at 1155.

174 *Id.* at 1157.

175 *Id.* (quoting *Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)).

176 *Id.*

177 *Id.* at 1157.

178 See *id.* at 1158. The *Williams* Court explained,

In other words, both the plurality and Justice Kennedy agree that where law enforcement officers deliberately employ a two-step interrogation to obtain a confession and where separations of time and circumstances and additional curative warnings are absent or fail to apprise a reasonable person in the suspect's shoes of his rights, the trial court should suppress the confession.

Id. (emphasis in the original).

179 *Id.*

180 See *id.* (concluding that *Elstad* controls the admissibility of post-warning confessions where question-first tactics are not employed deliberately).

181 *Id.* at 1158 & n.11.

182 *Id.* at 1158-59.

183 See *id.* at 1160.

184 See *id.*

185 *Id.*

186 See *United States v. Gonzalez-Lauzan, Jr.*, 437 F.3d 1128, 1137-1139 (11th Cir. 2006).

187 See *United States v. Johnson*, No. CR05-4063-MWB, 2005 WL 2704892, at *14 (N.D. Iowa Oct. 20, 2005).

188 See *United States v. Thomas*, No. IP04-0106-CR-01-H/F, 2004 WL 3059794, *8 (S.D. Ind. Dec. 16, 2004).

189 See *Crawford v. State*, 100 P.3d 440, 450 (Ala. Ct. App. 2004).

190 See FED. R. CIV. P. 8(a) (“Relief in the alternative or of several different types may be demanded.”).

191 See, e.g., *Johnson*, 2005 WL 270489 at *14.

192 See, e.g., *United States v. Gonzalez-Lauzan, Jr.*, 437 F.3d 1128, 1137-39 (11th Cir. 2006) (deciding not to resolve the “dispute over whether *Elstad* or *Seibert* controls”). The Court of Appeals of Alaska varies the alternative argument approach by applying the plurality test and then finding that the dissent's broader test was also met. See *Crawford*, 100 P.3d at 450 (concluding that the defendant's post-*Miranda* statements must be suppressed under the *Seibert* plurality opinion and under the reading of *Elstad* advocated by the *Seibert* dissenters).

193 See *supra* note 162.

194 399 F.3d 1118 (9th Cir. 2005); see also *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (acknowledging Judge Berzon's dissent).

195 See *Rodriguez-Preciado*, 399 F.3d at 1129-30, 1133 (Berzon, J., dissenting in part).

196 *Id.* at 1139 (Berzon, J., dissenting in part).

197 See *id.* at 1139 & n.10 (Berzon, J., dissenting in part).

198 *Id.* at 1139 (Berzon, J., dissenting in part).

199 *Id.* at 1133 (Berzon, J., dissenting in part).

200 See *id.* at 1139 & n.12, 1140 (Berzon, J., dissenting in part).

201 See *id.* at 1141 (Berzon, J., dissenting in part).

202 See *id.* (Berzon, J., dissenting in part) (“As I read it, in agreement with other circuits' opinions discussed above, *Marks* does not prescribe the adoption as governing precedent of a position squarely rejected by seven Justices. Justice Kennedy's opinion on the admissibility standard therefore cannot govern.”).

203 *Id.* (Berzon, J., dissenting in part).

204 See *id.* (Berzon, J., dissenting in part) (setting forth that the *Seibert* dissent could not govern, yet nothing prevented the court in this case from adopting the *Seibert* plurality opinion).

205 See *id.* (Berzon, J., dissenting in part).

206 435 F.3d 1148 (9th Cir. 2006).

207 See *id.* at 1156-61 (holding that a narrower test that excluded confessions made after deliberate ineffective mid-stream warnings is the true holding of *Seibert*); see also discussion *supra* Part III.C.1.

208 372 F. Supp. 2d 340 (E.D.N.Y. 2005).

209 *Id.* at 353 (“I disagree with courts which have found Justice Kennedy's concurrence to be the narrowest grounds for the judgment, and do not consider the concurrence controlling.”); see *Cooper v. State*, 877 A.2d 1095, 1107 n.5 (Md. Ct. Spec. App. 2005) (recognizing that Judge Azrack disagreed with the position taken by three federal circuits). Cf. *Sorto v. Herbert*, 364 F. Supp. 2d 240-41 (E.D.N.Y. 2004) (relying on Justice Kennedy's concurrence to reject defendant's argument of an alleged question-first *Miranda* violation).

210 *Cohen*, 372 F. Supp. 2d at 353-54.

211 *Id.* at 354.

212 See discussion *supra* Part II, p. 39.

213 *Cohen*, 372 F. Supp. 2d at 354 (quoting *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir.1991) (en banc)).

214 *Id.* at 354.

215 *Id.*

216 See *id.*

217 *Id.* at 353 (quoting *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (citations omitted)).

218 *Id.* at 355.

219 *Id.*

220 See *id.* at 355-58.

- 221 *See id.* at 358-59.
- 222 *Missouri v. Seibert*, 542 U.S. 600, 621-22 (2004) (Kennedy, J., concurring in the judgment).
- 223 *See supra* Part II, p. 39.
- 224 *Seibert*, 542 U.S. at 616 (plurality opinion).
- 225 *Id.* at 616 n.6.
- 226 *Id.*
- 227 *See id.* at 602-04 (plurality opinion).
- 228 *Id.* at 626 (O'Connor, J., dissenting).
- 229 *See United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1139 n.12 (9th Cir. 2005) (Berzon, J., dissenting in part).
- 230 *See Seibert*, 542 U.S. at 617-18.
- 231 *See Rodriguez-Preciado*, 399 F.3d at 1140 n.12 (Berzon, J., dissenting in part); *cf. United States v. Cohen*, 372 F. Supp. 2d 340, 353-54 (E.D.N.Y. 2005) (“Justice Kennedy’s rule, rejected by a large majority of the court, cannot be *Seibert*’s holding.”).
- 232 *See King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc) (“When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.”).
- 233 *See United States v. Cohen*, 372 F. Supp. 2d 340, 354 (E.D.N.Y. 2005) (“Justice Kennedy’s opinion cannot be the narrowest for another reason. Justice Kennedy laid out an analysis which is ‘simply different’ than that articulated by the plurality, not a logical subset.” (quoting *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc))).
- 234 *Id.* at 354.
- 235 *Id.*
- 236 *See discussion supra* Part III.C.
- 237 *See Cohen*, 372 F. Supp. 2d at 353-54; *Rodriguez-Preciado*, 399 F.3d at 1140; *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994); *King v. Palmer*, 950 F.2d 771, 777-78 (D.C. Cir. 1991) (en banc).
- 238 *See Missouri v. Seibert*, 542 U.S. 600 at 611-12, 621-22 (2004).
- 239 *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).
- 240 *See Cohen*, 372 F. Supp. 2d at 354 (“The *Marks* methodology reviews splintered opinions to determine whether any of the grounds for the result are a logical subset of other grounds, not whether a result is within a larger category of results.”).
- 241 *Rodriguez-Preciado*, 399 F.3d at 1141.
- 242 *Cohen*, 372 F. Supp. 2d at 355.
- 243 *See, e.g., United States v. Naranjo*, 426 F.3d 221, 231 (3d Cir. 2005) (“Justice Kennedy would therefore apply a ‘narrower test’” (quoting *Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment))). This point was subtly highlighted by Judge Berzon in *Rodriguez-Preciado*. *See United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1139 & n.10 (9th Cir. 2005) (Berzon, J., dissenting in part) (noting that while Justice Kennedy’s reasoning was “arguably narrower,” it was the Justice himself who first “characterized his opinion as ‘narrower.’”).
- 244 *Cf. United States v. Thomas*, No. IP04-0106-CR-01-H/F, 2004 WL 3059794, at *4-5, 8 (S.D. Ind. Dec. 16, 2004) with *United States v. Cohen*, 372 F. Supp. 2d 340, 351-59 (E.D.N.Y. 2005).
- 245 *See discussion supra* Part III, p. 42.
- 246 *Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment) (stating that post-warning statements should be governed by *Elstad* unless a deliberate two-step strategy was used).
- 247 *Seibert*, 542 U.S. at 628-29 (O'Connor, J., dissenting).
- 248 *See discussion supra* Part IV, p. 43.
- 249 *See discussion supra* Part III, pp. 40-41.
- 250 *See United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140-41 (9th Cir. 2005); *United States v. Cohen*, 372 F. Supp. 2d 340, 355 (E.D.N.Y. 2005).
- 251 *Cohen*, 372 F. Supp. 2d at 355. Judge Berzon seemed to agree: “The existence of exceptions to *Elstad* enjoys the support of five Justices.” *Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., dissenting).
- 252 *See Cohen*, 372 F. Supp. 2d at 355 (allowing the court to create its own test to determine whether to suppress statements); *Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., dissenting) (arguing, in essence, that neither *Seibert* opinion governs).
- 253 *See Cohen*, 372 F. Supp. 2d at 355 (creating an analysis by which to decide the issue of suppression); *Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., See *Cohen*, 372 F. Supp. 2d at 355 (creating an analysis by which to decide the issue of suppression); *Rodriguez-Preciado*, 399 F.3d at 1141 (Berzon, J., dissenting) (advocating for the use of the *Seibert* plurality although it is not binding).
- 254 U.S. CONST. amend. V.
- 255 *See Missouri v. Seibert*, 542 U.S. 600, 608-09 (2004) (plurality opinion).
- 256 *Id.* at 609.
- 257 *See id.* at 612-14 (providing that when *Miranda* warnings are used in the midst of interrogation they are likely to deprive a defendant of his knowledge of his rights).
- 258 *See Miranda v. Arizona*, 384 U.S. 436, 448 (1966) (stressing the fact that modern interrogation is psychologically oriented).
- 259 *Seibert*, 542 U.S. at 615 (plurality opinion).
- 260 *Miranda*, 384 U.S. at 460.
- 261 *See discussion supra* Part II, pp. 36-37.
- 262 *Id.*
- 263 *Id.*
- 264 *See Missouri v. Seibert*, 542 U.S. 600, 612-14 (2004) (plurality opinion) (“Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect’s part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision.”).
- 265 *Cf. Seibert*, 542 U.S. at 617 (excluding defendant’s postwarning statements “[b]ecause the question-first tactic effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose”).
- 266 *See id.* at 614-15.
- 267 *Id.* at 609.
- 268 *See id.* at 623-27.
- 269 *See id.*
- 270 *See United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1141 (2004) (Berzon, J., dissenting in part).
- 271 *See Rodriguez-Preciado*, 399 F.3d at 1141.
- 272 *See discussion supra* II, p. 39.
- 273 *See Seibert*, 542 U.S. at 616 n.6 (plurality opinion).
- 274 *See discussion supra* Part III.D.1.
- 275 *See Seibert*, 542 U.S. at 616 & n.7, 622.
- 276 *See Cohen*, 372 F. Supp. 2d at 355-59.
- 277 *See id.*
- 278 *Moreno, supra* note 49, at 397-98.
- 279 *Moreno, supra* note 49, at 398.
- 280 *See Seibert*, 542 U.S. at 622 (Kennedy, J., dissenting).
- 281 *Miranda v. Arizona*, 384 U.S. 436, 459-60 (1966).
- 282 *Id.* at 460.
- 283 *Id.* at 459-60.

SUPREME COURT WATCH: UPCOMING CRIMINAL CASES ON THE 2006-2007 DOCKET

CLB Staff*

Wharton v. Bockting

Docket: 05-0595

Ninth Circuit Court of Appeals

Questions Presented:

1. Whether the Ninth Circuit erred in holding that the Supreme Court's 2004 decision in *Crawford v. Washington*, regarding the admissibility of testimonial hearsay evidence under the 6th Amendment, applies retroactively to cases on collateral review?
2. Whether the Ninth Circuit's ruling that *Crawford* applies retroactively to cases on collateral review violates the ruling in *Teague v. Lane*?
3. Whether the Ninth Circuit erred in holding that 28 U.S.C. sec. 2254(d)(1) and (2) adopted the *Teague* exceptions for private conduct which is beyond criminal prosecution and watershed rules?

Facts:

In Bockting's trial for the rape of his stepdaughter, the judge declared the six year-old girl unavailable as a witness and allowed prosecutors to introduce the testimony of both the investigating detective and the child's mother regarding statements made by the child, despite the presence of hearsay evidence. Bockting had no opportunity at any point during the trial to cross-examine the six-year old complaining witness. Ultimately, the trial court convicted Bockting of rape, and sentenced him to life in prison. The Nevada courts denied his appeals and the U.S. District Court for the District of Nevada denied his petition for habeas corpus. The Ninth Circuit Court of Appeals reversed, basing its decision on *Crawford v. Washington*. The *Crawford* rule, which is aimed at upholding the Confrontation Clause, states that hearsay evidence is admissible only if (1) the witness is unavailable and (2) the defendant has had the opportunity to cross-examine the witness prior to trial. Applying *Crawford* to Bockting's case, he was entitled to a new trial; however, because *Crawford* was issued after Bockting's trial, the Ninth Circuit had to determine whether the *Crawford* rule could be applied retroactively.

In order for a rule to be applied retroactively, it must first be considered a "new rule." The Ninth Circuit Court found that *Crawford* deviated enough from the precedent in *Teague v. Lane*, which previously governed hearsay evidence, to consider it a "new rule." Second, the court determined that the new rule fell into one of two categories of exceptions to non-retroactivity—"a bedrock rule of criminal procedure"—making it retroactive. The Ninth Circuit Court subsequently determined that the Nevada Supreme Court, by failing to apply *Crawford* and dismissing Bockting's habeas claim, violated the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Ninth Circuit Court's opinion is contrary to other federal appeals courts that have concluded that *Crawford* is not retroactive.

Burton v. Waddington

Docket: 05-9222

Ninth Circuit Court of Appeals

Questions Presented:

1. Is the holding in *Blakely v. Washington* a new rule or was it dictated by *Apprendi v. New Jersey*?
2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

Facts:

Lonnie Lee Burton was convicted of raping a 15-year old boy in 1991, and sentenced to almost 47 years in prison for rape, robbery, and burglary. Burton's sentence was approximately 21 years longer than the sentencing guidelines suggested and was to run consecutively instead of concurrently. Burton claimed that the judge should not have been allowed the discretion to increase his sentence. A decade after Burton's conviction, the U.S. Supreme court ruled in *Blakely v. Washington* that any factors increasing a sentence beyond a determined sentencing guideline must be found by jury beyond a reasonable doubt, effectively limiting judicial discretion on sentencing. Burton filed a habeas corpus petition, claiming that *Blakely* should be applied to his case. Burton also argued that his sentence violated *Apprendi v. New Jersey* which held that factors increasing the sentence beyond the statutory maximum must be proved beyond a reasonable doubt to a jury.

The Ninth Circuit Court of Appeals held that *Blakely* is a new rule that cannot be applied retroactively. The Court also held that, although *Apprendi* did apply to this case, Burton's sentence did not violate *Apprendi* because the sentence imposed did not exceed the statutory maximum—life imprisonment.

Ornoski v. Belmontes

Docket No. 05-0493

Ninth Circuit Court of Appeals

Questions Presented:

1. Does *Boyde v. California* confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction when a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?
2. Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence constitute a "new rule" under *Teague v. Lane*?

Facts:

Belmontes was charged with first-degree murder, and subsequently convicted by a jury. During the trial's penalty phase, prosecutors brought up his violent past, including prior criminal charges. Defense lawyers introduced witnesses who told jurors of Belmontes' impoverished and abusive life, and that he adjusted to prison life and embraced Christianity during a prior incarceration. During jury instructions, the trial court

judge told jurors to consider several factors in deciding whether or not Belmontes would receive life imprisonment or the death penalty including, his prior convictions, age, and “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” The last instruction is known as the “unadorned factor (k).” Jurors sentenced Belmontes to death.

In *Boyd*, the Court upheld factor (k) and rules that it didn’t prevent jurors from taking into account a defendant’s pre-crime background and behavior in determining death sentences. The Ninth Circuit Court of Appeals overturned Belmontes death sentence and stated that the jury instructions given in the trial court confused jurors by leading them to consider his violent past and crimes instead of his probable future as a model prisoner. Two years later, in *Brown v. Payton*, the Supreme Court again upheld “factor (k)” ruling that it did not preclude jurors from taking into account a defendant’s post-crime behavior. The Court vacated the 9th Circuit’s judgment and ordered it to reconsider the case in light of the *Payton* decision. The Ninth Circuit reaffirmed its decision, based on the “factor (k)” instruction. The Ninth Circuit also ruled that *Payton* did not apply because Belmontes’ federal appeals predated the Antiterrorism and Effective Death Penalty Act of 1996, which curtails the ability of federal courts to hear death penalty appeals stemming from state courts.

Lawrence v. Florida

Docket No. 05-8820
Eleventh Circuit Court of Appeals

Questions Presented:

1. Whether the one-year statute of limitations period of the Antiterrorism and Effective Death Penalty Act denies habeas relief?
2. Does the confusion around the statute of limitations—as evidenced by the split in the circuits—constitute an “extraordinary circumstance,” entitling a defendant to equitable tolling during the time when his claim is being considered by the U.S. Supreme Court on certiorari?

Facts:

Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) after the Oklahoma City bombing to fund anti-terrorism efforts and to limit the appeals process open to death-row inmates. AEDPA bars federal courts from considering any petition for habeas corpus unless the state court has “unreasonably” interpreted some portion of the constitution in finding the prisoner guilty. The Act has a one-year statute of limitations for habeas appeals in federal court. Lawrence was convicted of first-degree murder and the jury recommended the death penalty. The sentence was affirmed by the Florida Supreme Court. After unsuccessfully appealing his sentence twice, Lawrence sought habeas relief in federal court. Lawyers for the state argued that his claim should be dismissed because he had already exceeded the time limit on both his original and amended petition based on AEDPA. The district court held that Lawrence’s petition was invalidated by exceeding the allotted time, but he was issued a certificate of appealability. Lawrence appealed to the Eleventh Circuit.

The Eleventh Circuit stated that the district court was wrong to grant Lawrence a certificate of appealability, but

acknowledged a disparity among the federal circuits in how the time limit for habeas appeals is applied.

Carey v. Musladin

Docket Number: 05-0785
Ninth Circuit Court of Appeals

Question Presented:

1. Did the appearance of the deceased’s family in court with large photographic buttons of the deceased violate the constitutional rights of the defendant in a murder trial in which the defendant claimed self-defense?

Facts:

Matthew Musladin shot and killed one of two men who approached him during the course of his argument with his estranged wife. The two men lived with the woman and approached Musladin carrying a gun and a machete, respectively. The family members of Tom Studer, the man killed by Musladin, attended the trial wearing buttons with his image. Musladin was convicted and his conviction was upheld in federal district court. It was overturned in the Ninth Circuit Court of Appeals, and the state appealed. Musladin relied on earlier rulings holding that spectators for a trial wearing buttons proclaiming “women against rape” were prejudicial to a jury as they assumed the defendant’s guilt, as well as cases that held that requiring that a prisoner appeared shackled and in prison garb could also prejudice the outcome of a trial.

Cunningham v. California

Docket Number 05-6551
California Court of Appeals, First Appellate District

Question Presented:

1. Whether a judge is allowed to consider facts not determined by the jury or admitted by the defendant, as allowed by the California Determinate Sentencing Law, or whether this law is unconstitutional?

Facts:

When sentencing John Cunningham for a conviction of child sexual abuse, the judge made an upward departure from the sentencing guidelines based on facts that were not found by the jury to be true beyond a reasonable doubt. Under California law, these aggravating factors were allowed to contribute to the judge’s sentencing determination. The defendant challenged his sentence under the 6th and 14th Amendments, alleging that the California statute violated his right to a jury trial and his right to due process of law. The state court of appeals upheld the sentence, and the defendant appealed, citing the U.S. Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296, 301 (2004), which held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”

** The general staff and members of the Executive Board contributed to the compilation of material presented in this section. Extremely helpful to this compilation was Northwestern’s Medill School of Journalism’s U.S. Supreme Court News section, “On The Docket,” which can be found at <http://docket.medill.northwestern.edu>.*

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Articles that are entirely theoretical or are derived wholly from secondary sources will be considered on a case-by-case basis. All articles **MUST** include an executive summary with an overview of all pertinent points. Authors should state their objective in writing the piece and identify the target segments of the readership. The more the editors know about the author's intent and targeted audience, the easier it is to judge an article's appropriateness.

The CLB will inform selected authors as soon as possible, after a serious and thorough review of each article. On receipt of a manuscript, the editors will confirm the submission with the author. From there, the review period varies, but will be conducted diligently. Authors withdrawing a submission should inform the CLB as quickly as possible.

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