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**ESPIONAGE AND YOU: THE EDWARD SNOWDEN AFFAIR
IN HISTORIC PERSPECTIVE**
Mark E. Stout, PhD

FALSE CONFESSIONS ON TRIAL
Allison D. Redlich, PhD

WHAT YOU SHOULD KNOW ABOUT FINANCIAL WARFARE—AND WHY
Tanya Beder

BACKLASH: INVESTIGATING ATHLETES' INVISIBLE INJURIES
Steve Fainaru & Mark Fainaru-Wada

Quarterly



Annual Meetings

2015: March 8–14, Ritz-Carlton Key Biscayne,
Key Biscayne, Florida

2016: April 10–16, Grand Del Mar,
San Diego, California



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ESPIONAGE AND YOU: THE EDWARD SNOWDEN AFFAIR IN HISTORIC PERSPECTIVE*

Mark E. Stout, PhD**

I INTRODUCTION

One of the things historians and intelligence analysts and lawyers have in common is that they think it's important to consider the sources of information they get. Given the potentially controversial topic of my speech today, I think it's probably important that you know a little bit more about me. Let me just say that I am not an apologist for the US Intelligence Community. I certainly think the US intelligence community (IC) has done its share of stupid things. I would point to the CIA's paying for parapsychology and remote viewing (extrasensory perception) as among those. Buying garbage intelligence about Iraqi weapons of mass destruction programs from fabricators would be another one.

The IC has made its share of mistakes, as well, notably assessing that Iraq had weapons of mass destruction that didn't exist. (And I will cop to a mistake myself: In the late 1990s, I was consistently wrong in one of my tasks—assessing Russian arms-control behavior.)

And the Community has done a few things, not many, but a few things, that were simply evil, notably harassing Martin Luther King

* Address delivered at the Annual Convention of the International Society of Barristers, Wailea, Maui, Hawaii, 7 March 2014.

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Jr., for instance, and hounding quite a number of innocent people who were falsely accused of being spies. Now, lest there be any conspiracy theorists in this audience—and I would hope you're all sufficiently erudite that none of you fall into that category—I do not believe that planning the September 11 attacks or allowing them to happen is among the evil things the CIA has done.

Overall, however, I'm a big believer in intelligence and its role in protecting my country and its friends and allies. I believe that the mission is a good one; and I know that at the end of the day the United States is well served by its intelligence agencies.

II EDWARD SNOWDEN

With that as background, let's talk about this gentleman, Edward Snowden,¹ for a minute. There's probably nobody in the English-speaking world who hasn't heard of Edward Snowden—nor, probably, in the German-, French-, Portuguese-, or Russian-speaking worlds either. As everybody knows, Edward Snowden worked for the CIA briefly, where he became disenchanted with the US Intelligence Community when



exposed to the realities on the ground of actual espionage operations. He then took a job as a contractor, working for the National Security Agency, the agency of the US government that intercepts communications, breaks codes, and that sort of thing.

He took a job as a contractor with the NSA, actually here in Hawaii, already knowing when he did so that he was going to blow

1. Source of photo: http://commons.wikimedia.org/wiki/Category:Edward_Snowden.

the lid off of NSA's operations. He used his access as a system administrator to gather a huge number of documents, allegedly something on the order of 1.7 million, all very highly classified. There are reports—and this is disputed—that he may have conned coworkers into divulging their passwords so he could take advantage of their access, as well. He denies that. On the other hand, some NSA employees have in fact in been punished for inadvertently helping him in that way.

Snowden gave these documents to the press, notably to Glen Greenwald, then of *The Guardian*, whose work he admired. Then Snowden fled the United States—first to Hong Kong, where he spent several days, a few of them unacknowledged, staying at the Russian consulate there. From Hong Kong, he went to Russia, where he's been given a visa to stay for at least two years. Somebody in Russia got him a job with a high-tech firm. That hasn't been the end of his bennies in Russia.

One of these benefits might have been Anna Chapman. You may recall that, back in 2010, the FBI arrested ten Russian spies—I should extend professional courtesy: *intelligence officers*—most of whom had been here undercover for a very, very long time. Well, one of them was Anna Chapman. Anna and the other Russian spies were fairly quickly swapped and sent back to Russia. There, Anna promptly appeared in the Russian version of *Maxim* magazine. After Edward Snowden arrived in Russia, Anna Chapman proposed marriage to him. This is actually true. She may not have meant it seriously, but it did in fact happen.

At any rate, Snowden was stripped of his US passport, and he's now likely to spend the rest of his life in places like Russia and Ecuador.

Now, the press—particularly *The Guardian*, but also numerous other papers—have been publishing excerpts from the documents that Snowden leaked. The initial stories were about the so-called NSA metadata program—basically that the National Security Agency

was collecting call data: so, what number was calling what number, when, and for how long, on more or less every phone call in the United States. You can do some really interesting analytic things with that information, even without hearing the content of a telephone call. You can figure out social networks, for instance.

Snowden also leaked information about something that's been reported to be called the Prism Program under which NSA was collecting information about foreign targets that passed through the US internet. So the NSA was collecting information not on Americans, but on others, out of the internet in the United States. Later stories covered a broad range of topics, most of them having nothing to do with domestic collection inside the United States.

I don't know if any of you are familiar with a blog site called *Lawfare*. The bloggers have compiled something they call a catalog of Snowden revelations, which I would recommend to you. Some of these have included things that may have been bad policy, like tapping the telephone of German Chancellor Angela Merkel. But most of the things that have been revealed were exactly what NSA should be doing. Reportedly, Snowden released information on how NSA intercepts the communications of the Taliban, how it monitors the Russian military, and how it collects information on nefarious activities like drug trafficking and human trafficking. He's also revealed a lot of the secrets of NSA's foreign partners, like the British and Canadian signals intelligence service.

Snowden's main ally, Glen Greenwald, has said that the National Security Agency is collecting millions upon millions upon millions of our phone and email records. He has said that the NSA's is a globalized system designed to destroy all privacy, which, when you think about it, is a fairly dramatic claim. It's not clear to me why the United States Government would want to destroy your privacy. Its intelligence officers don't find most of you that interesting. The American national interest will not be served by knowing that the school nurse called to tell you that your kid has a sore throat.

Nobody at NSA is going to get promoted for a hot report about the argument you had over your phone about your mother-in-law extending her visit.

Now, Snowden, not surprisingly, has come in for a great deal of abuse from US and British officialdom. General Mike Hayden, former head of NSA and also of the CIA, has written that Edward Snowden will likely prove to be the most costly leaker of American secrets in the history of the republic. And the head of Britain's MI6—that's James Bond's agency—told the British parliament that our adversaries are rubbing their hands with glee.

Meanwhile, of course, Snowden has been eloquent in his own defense. He's said that he was appalled by the wanton violation of privacy of Americans and of foreigners and that this compelled him to speak out. He was quoted from Russia as saying, I am still working for the NSA right now; they're the only ones who don't realize it. As for Glen Greenwald, he has a lucrative book deal.

A lot of Americans have compared Snowden to some genuine American heroes who were whistleblowers and leakers in their own right—Daniel Ellsberg, for instance, who leaked the Pentagon Papers, which showed that the Johnson Administration had repeatedly lied about America's policy on Vietnam. Snowden has also been compared to Mark Felt, former Deputy Director of the FBI, better known as Deep Throat, who gave key information to Woodward and Bernstein, which allowed them to report on the Watergate scandal. (We now know, by the way, that Mark Felt did that because he was angry at having been passed over for the directorship position, himself.) Snowden has also been compared to Jeffrey Wigand, who worked for a tobacco company and went public with his knowledge of how the tobacco companies were manipulating their products to maximize their addictive potential.

However, those cases are not exactly like Snowden's, which means we're in the realm of analogy. And the analogies we make to Snowden matter in how we think about him. If Snowden really *is* like

Jeffrey Wigand, he's a great guy and he deserves to marry Anna Chapman. But if he's like John Walker, Vasili Mitrokhin, the Citizens' Committee to Investigate the FBI, or Philip Agee—the four cases I'm going to talk about briefly—then maybe that leads us to different conclusions. Each of those cases has substantial similarities to Snowden. And I hope that examining the similarities and the differences between Snowden and these various cases can help us clarify how we really should think about Snowden.

III

WHAT WE SHOULD THINK ABOUT SNOWDEN

A. John Walker

In terms of the volume of classified material compromised, Snowden has really only one competitor, as far as we know, in American history. That's John Walker, who was a US Navy Chief Warrant Officer.² During the Cold War, he put together what became known as the Walker-Whitworth Spy Ring. He recruited his brother Arthur, his son Michael, and his friend Jerry Whitworth, all of whom were also in the Navy, to spy for the Soviets, which they did for quite a number of years—in fact from 1967 to 1985.



Walker was ultimately turned in by his estranged wife. She'd get drunk, and when she got drunk, she'd get angry, and she'd call the FBI and slur out to the FBI over the phone, "You know, my husband's a spy; you should investigate him." The FBI gave every bit as much attention to that as you would imagine they would, not unreasonably. But, eventually, somebody from the FBI went to visit

2. Source of photo: <http://www.fbi.gov/about-us/history/famous-cases/the-year-of-the-spy>.

her and actually listened to her. And, gosh, it all sounded alarmingly plausible. One thing led to another, and he's in jail.

John Walker and his colleagues compromised cipher systems and other classified information to the Soviets for about eighteen years. It was so much information, in fact, that according to a Soviet defector, the KGB was forced to build an entirely new building to house all the analysts working on the data Walker got them. For instance, as just one example, Walker compromised the integrity of something called the Fleet Broadcasting System from 1967 to 1974. The Fleet Broadcasting System, or FBS, was used to transmit all US Navy operational orders to ships at sea during that time. In other words, it appears that Walker provided detail to the Soviets of all US Navy operations during the period of most intensive fighting in Vietnam.

In the course of compromising the cryptographic systems used to protect the FBS, Walker also compromised systems used to protect the communications of other branches of the armed forces and those of other US government agencies, such as the CIA and the State Department. And he compromised the communication systems of quite a number of America's NATO allies. The US military had to spend something on the order of a hundred million dollars to buy new cipher systems after what Walker had done. President Reagan's Secretary of the Navy, John Lehman, suggested that Walker's activities could have had war-winning implications for the Soviets if, God forbid, there had been a World War III.

How was Walker like Snowden? First off, obviously in terms of just the volume of information compromised, Walker would in fact probably beat Snowden on that. He also compromised, as did Snowden, information of other agencies, not just the Defense Department, and of other countries, and he provided information to our adversaries that could aid them in wartime, specifically.

How was Walker different? He gave away primarily cryptographic systems—systems for securing American information,

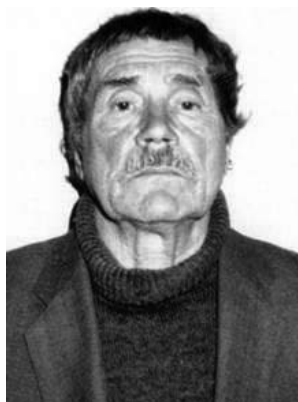
not the methods by which America and its allies were collecting intelligence. The biggest difference, though, was in his motivation. His motivation, unlike Snowden's, was money. Walker was once quoted, after being convicted and sent to jail, as saying,

Everyone makes a big deal out of the fact that I became a spy. It's because spying is such an unusual crime. But what they don't understand is that I became a spy because that is what I had access to. If I'd worked in a bank, I'd have taken money. If I'd had access to dope, I'd have been a drug dealer. The fact that I became a spy is really insignificant. The point is that I became a spy because I needed money. It was as simple as that.³

Quite different from Edward Snowden.

B. Vasili Mitrokhin

Case number two, Vasili Mitrokhin, was a Russian who joined the KGB, the Soviet Intelligence Service, in 1948.⁴ His early career in the KGB came during the late Stalin era. His first posting overseas for the KGB was in the Middle East, where he was involved in penetrating the Russian Orthodox Church. He later briefly did a stint as a KGB escort for the Soviet Olympic team going to the Melbourne Olympics in 1956. The escorts' main job



3. Lydia R. Wilson, *Reversal Theory: Understanding the Motivational Styles of Espionage*, in 3 INTERNATIONAL JOURNAL OF INTELLIGENCE ETHICS 87 (2012).

4. Photograph of Mitrokhin as he looked when he appeared at the US Embassy. Source of photo: <http://www.independent.co.uk/news/uk/home-news/the-mitrokhin-archive-kgb-defectors-copied-files-reveal-soviet-dismay-at-constantly-drunk-burgess-9588032.html>.

was to make sure that no Soviet athletes defected. He became disenchanted with the Soviet system—the way the KGB crushed dissent in the Soviet Union, the invasion of Czechoslovakia in 1968—and he became a little too outspoken for his own good. In fact, he was described by one of his superiors as a member of the “awkward squad.”

Mitrokhin was assigned as an archivist in a building called the Lubyanka, which was, at the time, KGB headquarters in downtown Moscow. Lubyanka is a frightening place to Muscovites. In the Stalin era, people were imprisoned in its basements and shot in the back of the head. In the Czarist times, actually, it had been the headquarters of an insurance company. One of those stories that’s too good to check was that over the door of the main entrance to the building of this insurance company was carved the inscription, “Have you insured your life?”—which took on a whole new meaning when it became KGB headquarters.

At any rate, in 1972, Mitrokhin was assigned to oversee the move of the KGB First Chief Directorate—that is to say, the part of the KGB that did intelligence operations abroad—into a new facility out in the suburbs. This was his chance. He began taking notes on scraps of paper about the files he was moving. He’d smuggle these out in his shoes. Then he started taking out notes on regular paper. On weekends, he would take his notes to his dacha outside Moscow, and he’d bury them underneath the dacha in a milk churn. Later, as he filled that up, he buried the papers in various other containers, too. He describes how he had to contend with rats and animal feces and all sorts of unpleasant things under the dacha as he buried the containers full of notes. But he actually took comfort in that, figuring that nobody was likely to follow him down there and dig this stuff up.

Mitrokhin retired from the KGB in 1984. Time goes by, and eventually, at the end of 1991, the Soviet Union breaks up. In March of 1992, Mitrokhin takes the train to the newly independent state of

Latvia. He puts in the bottom of his suitcase some of these documents, which have been lying for years buried in a milk churn underneath his dacha, underneath animal feces. These go into the bottom of his suitcase; he puts his clothes on top of that, puts his lunch on top of that, and with this he approaches the US embassy in Latvia. He says to them, "Trust me; I'm a former KGB officer, and I've got these secrets to give you." And he pulls out the sausages and the clothes and then pulls out these probably worm-eaten papers and says, "Here."

The US embassy wanted nothing to do with him, even after three tries. So he went to the British, where a very nice young lady met him and recognized the potential of what he was offering.

The Brits exfiltrated him, his family, and his archive of about 25,000 pages of notes on KGB secrets. The notes contained lots of interesting information—for instance, about KGB arms caches buried in various foreign countries, information about KGB disinformation operations against western journalists and politicians who had taken anti-Soviet stances. We now know that the KGB was among the very first to spread the story that J. Edgar Hoover was a homosexual. Also, the KGB had tried to discredit Martin Luther King Jr. because they were afraid he would *prevent* a race war in the United States. Salvador Allende, the President of Chile, who was famously overthrown in a coup in 1973 and replaced by Augusto Pinochet, had been on the KGB's payroll. And the KGB had planned to break the kneecaps of ballet dancer Rudolph Nureyev after he defected to the West. This was among the stuff that Mitrokhin passed on.

Mitrokhin also revealed the names of thousands of Soviet spies—people who had betrayed their countries and sold secrets to the Soviets—many, probably most, of whom were already dead. Of those still living, almost none was still active, but a few prosecutions did result, in the 1990s. One of those was of Robert Lipka, a National Security Agency employee who had spied for the Soviets in the '60s.

The FBI sent a Special Agent who pretended to be Russian, recontacted Lipka, and got him to say incriminating things, and he was sent to jail. Now, the Russians basically refused to acknowledge any of this. They said Mitrokhin had an unimportant position and didn't have access to this kind of information. So, basically, all this information was lies.

Now, how is Mitrokhin like Snowden? Mitrokhin also betrayed large volumes of information to his nation's adversaries, though not nearly as great a volume as Snowden did, and he, too, did it for ideological reasons. Specifically, Mitrokhin claimed that he thought the KGB was evil, much as Snowden thinks that the NSA system is evil and has gotten out of control. In particular, both of them seem concerned about the use of intelligence agencies against their own populations. But mostly what they revealed was about the operations of those agencies abroad.

How is he different? Well, basically, the political system that each was betraying differed vastly. That's the key difference there.

C. The Citizens' Committee to Investigate the FBI

Case number three, the Citizens' Committee to Investigate the FBI: On March 8, 1971, the night of the Ali-Frazier Fight of the Century, burglars broke into the FBI office in Media, Pennsylvania, and emptied out its files. We now know that this group, which called itself the Citizens' Committee to Investigate the FBI, consisted of a religion professor, a daycare worker, a graduate student in the health field, another professor, a social worker, and two full-time antiwar activists. But at the time, they were completely anonymous. Nobody knew what this group was, who they were. They went through months of planning, casing the FBI office, holding logistical meetings, practicing lock picking—that sort of thing. And, as I say, on March 8, 1971, they emptied out the files of this FBI office. Not long thereafter they started sending materials they'd found to reporters

and to some liberal politicians like George McGovern, saying, “Hey, look what we found; you should make a ruckus about this.”

Predictably, and similarly to how the Snowden case evolved, Attorney General John Mitchell issued a press release urging anybody who’d received any of these materials to return them to the FBI for fear of jeopardizing national-intelligence capabilities and warning that this material could endanger the lives of federal agents and the security of the United States. George McGovern, who had received some of these files, actually did send them back to the FBI. He issued a press release saying that he supported the idea of congressional investigation of FBI abuses but could not condone the lawbreaking by these burglars. Later, the activists published a selection of these papers under the title “The Complete Collection of Political Documents Ripped off from the FBI Office in Media, Pennsylvania.”

Now, of particular importance in the case of the media’s receiving these materials were the efforts of NBC reporter Carl Stern, who ran across a very strange word in some of these documents, a word that no one had ever heard: COINTELPRO. He started investigating what “COINTELPRO” meant. It turned out that COINTELPRO stood for Counterintelligence Program. What the term meant, and what the FBI had done, as I’m sure many of you know, was to take the counterintelligence techniques that they had used to eviscerate the Communist Party of the United States and apply them against a variety of other domestic groups here in the United States.

Right after the break-in, the FBI pretty much immediately terminated COINTELPRO. But investigators discovered that it was set up—and this is quoting the FBI—“[to] expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of protest groups” that the FBI thought were somehow threatening the security of the United States.⁵ The groups that the FBI was targeting with these

5. DAVID CUNNINGHAM, SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE 37 (2004).

techniques were mostly left-wing groups—the New Left, the Socialist Workers’ Party, people like the Black Panthers—but also mainstream civil-rights groups, like the Southern Christian Leadership Conference, and a few so-called “white hate” groups like the Ku Klux Klan. Interestingly enough, these documents revealed that one of the goals of this program was to “enhance the paranoia” of antiwar activists through repeated interviews and harassments.⁶ These revelations led to congressional hearings and, in 1974, an acknowledgment and an apology by the FBI for its actions against domestic targets. As for the Citizens’ Committee to Investigate the FBI, its members were never caught. They remained anonymous, never speaking about this to anybody, including each other, until just recently. There’s a book out on this case just this year called *The Burglary*.⁷

As with the Snowden case, the release of stolen intelligence files was an activity done by Americans against an American agency. They stole classified materials and they managed to avoid prosecution for their theft. It was politically motivated. Both Snowden and the Citizens’ Committee claimed that their actions were intended to expose domestic abuses, and they worked through journalists.

As for some key differences from the Snowden case, Snowden has released all sorts of NSA information and foreign secrets that have nothing to do with domestic surveillance, whereas the Citizens’ Committee actually kept back and did not release things that didn’t relate to domestic abuses. They stole all sorts of FBI files about garden-variety, perfectly reasonable criminal investigations—exactly the kind of thing that the FBI is supposed to be doing—probably including investigations of lots of people who turned out not to have done anything wrong. The Citizens’ Committee didn’t spill that stuff;

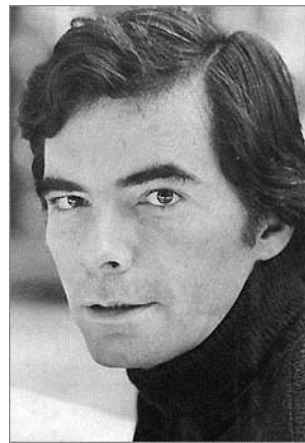
6. FRANCIS WHEEN, *STRANGE DAYS INDEED: THE 1970S: THE GOLDEN AGE OF PARANOIA* 306 (2009).

7. BETTY METZGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER’S FBI* (2014).

they showed some degree of restraint; they culled their material, if you will. Furthermore, much of the COINTELPRO activities were in fact illegal, which is not true with the vast, vast majority (possibly any, but at least the vast majority) of the NSA activities that Snowden has revealed. And the material that the Citizens' Committee released was not relevant to ongoing international conflicts or to US security policy or operations vis-à-vis the outside world. Nobody was going to die as a result of this, no matter what John Mitchell said.

D. Philip Agee

The last case I'll talk about is Philip Agee. A good-looking guy, you must admit.⁸ Agee was a CIA "case officer." Case officers at the CIA are the people who are employed to go abroad, meet foreigners who have secrets of national-security interest to the United States, and figure out what makes them tick and what it will take to make them betray their country and sell their secrets to us. Analysts like I was are on the receiving end of that information. We figure out what it all means. But these are the guys who are going overseas and doing the stuff at the pointy end of the spear.



Agee was a case officer who worked primarily in Latin America, and his final tour was in Mexico City in the late 1960s. By the time he went on his final assignment, he already knew that he wanted to leave the CIA, which he did in 1968. Now, he said that the reason he left the CIA was because his Catholic conscience was bothering him about CIA operations in Latin America and about America's involvement in the Vietnam War. He said he was

8. Source of photo: <http://www.nnn.se/pox/agee.htm>.

concerned in particular about the plight of the working class in Latin America. He believed that the CIA's opposition to communists in that region allowed the continuing oppression of the huddled masses there. He said that the CIA's purpose was "to corrupt politicians and to promote political repression."

Agee elaborated on this in 1975 in an interview with *Playboy* in which he said, "[M]illions of people all over the world [have] been killed or at least [have] had their lives destroyed by the CIA and the institutions it supports."⁹ By contrast, the CIA, perhaps not surprisingly, had a slightly different view on why he left. They said he was forced to resign because he drank too much, engaged in financial mismanagement, and had a nasty tendency to proposition the wives of colleagues. It's possible that both sets of explanations are true, but clearly there is some disagreement there.

In any event, Agee had been out of the CIA for about five years. Now it's 1973, and he approaches the KGB residency—the KGB station, if you will—at the Soviet embassy in Mexico City, offering them information about the CIA. The local KGB officers thought this was some sort of political provocation, and they turned him away, which caused all sorts of hair pulling back at KGB headquarters in Moscow. But Agee was sort of like Mitrokhin: he wasn't to be denied, and he went down the street to the Cuban embassy. The Cuban intelligence service was more than happy to take him in and receive his information. The result was three different books that named some 2000 alleged undercover CIA officers and a variety of their clandestine contacts, i.e., those foreigners the CIA had recruited to betray their countries and sell out secrets. Later, Agee also launched a magazine called *The Covert Action Information Bulletin* as a venue for releasing even more CIA secrets, and, over the years, more and more books about the CIA followed.

9. The Mail Archive, *The CIA's Real Agenda (Philip Agee): Playboy Interview with Ex-CIA Agent Philip Agee* (Tues., 23 Nov. 1999), <https://www.mail-archive.com/ctrl@listserv.aol.com/msg29496.html>.

Agee said that the publication of name after name after name of undercover CIA case officers and, in some cases, of their clandestine contacts was a political act in the “long and honorable tradition of dissidence in the United States”¹⁰ and was definitely not espionage. It’s also worth noting as an aside that many of the names, perhaps most of them, even—we don’t really know—that he outed over time weren’t actually people he personally knew about. They were names that the Cuban service and then later the KGB (with which he did eventually develop a relationship), gave to him to use as a front for outing these people. Interestingly enough, my former boss at the International Spy Museum, Peter Earnest, was one of the people he outed.

Now, the US government not surprisingly said that both Snowden and Agee have done immense damage to the national security. Specifically, on Agee, in 1980 the Senate Select Committee on Intelligence reported that it was “increasingly concerned about the systematic effort by a small group of Americans . . . to disclose the names of covert intelligence agents. . . . Foremost among them has been Philip Agee The destructive effects of these disclosures has been varied and wide ranging.”¹¹ There were even claims in the 1970s that, when the CIA chief in Athens, Greece—a man named Richard Welch—was killed, this was because he’d been outed by Philip Agee. We now know that this was not true. Welch’s name had made it broadly into the Greek press before that, but, at that time, Agee’s complicity was widely believed. In fact, Barbara Bush, former First Lady, had made this claim in a book she wrote and eventually had to settle a lawsuit brought against her by Philip Agee.

Like Snowden, Agee was stripped of his US passport. He lived for a number of years in Western Europe where he was very popular

10. Joe Holley, *Philip Agee, 72; Agent Who Turned Against CIA*, WASHINGTON POST, (January 10, 2008).

11. Christopher Andrew and Vasili Mitrokhin, *THE SWORD AND THE SHIELD: THE MITROKHIN ARCHIVE AND THE SECRET HISTORY OF THE KGB* 234 (1999).

with *The Guardian*—again, like Snowden. Later, he lived in nice places like Nicaragua under the Sandinistas and in communist Grenada. And he spent the last years of his life in Castro’s Cuba.

Now, as I say, Agee always maintained that he was doing these things on principle. But we now know that Agee had in fact received substantial support from intelligence services hostile to the United States. He received something on the order of a million dollars—plus visas and assistance in research for his books and magazine articles—from the KGB and from Fidel Castro’s intelligence service. They used him as a mouthpiece to out people. And we know this, among other things, from the Mitrokhin archives, which, by the way, gave us Agee’s KGB codename: PONT. We also know this from the memoirs of a former KGB general, Oleg Kalugin, who’s on the board of the International Spy Museum and a Cuban defector. We’ve got this guy nailed to rights—there’s no doubt about Agee’s motivation.

Now, similarities to Snowden: Agee, like Snowden, claimed that he did this for political reasons. Agee apparently damaged American ability to collect intelligence. And he certainly engaged in political hyperbole, which reminds me very much of the kinds of thing you hear coming out of Snowden, and out of Glen Greenwald.

Differences from Snowden: there’s no reason at this point—and I’d frankly be surprised if it does show up—to think that Snowden is on the Russian’s payroll, which we now know Agee was (though, according to newspapers, whether Snowden is, is under investigation right now—a very reasonable thing to investigate).

III

OBSERVATIONS: COUNTERINTELLIGENCE COMMONALITIES

Now, historians believe, of course, that everything is *sui generis*. This is what sets us aside from political scientists, who are all about making generalizations. So historians as a class are very cautious about historical analogies and generalizations. But the human mind—the minds of historians, no less than those of anybody

else—seems to like analogies and generalizations and categorizing things. So in that spirit, I want to offer a couple of observations.

First off is that running through all of these cases, plus Snowden's, are a lot of classic principles of the counterintelligence business. Counterintelligence officers will tell you that, broadly speaking, four different things in various combinations tend to motivate people to spy and, I would argue, to leak what they've discovered. They sum up to an acronym: MICE. "M" is for money. You saw that in a number of these cases. "I" is for ideology. You could call that politics; you could call that principle; you could call that ethics—whatever you want. "C" is for compromise, which I don't think played much of a role in any of these cases: compromise in cases like these means blackmail or manipulating people with things like sex or romance or that sort of thing. And the "E" is ego—the intelligence officer or the person with access to secrets who, for instance, thinks he has unrealized potential to be James Bond (that's an alarmingly common malady) or thinks he is just manifestly so much smarter than everybody else that he should be allowed to make judgments that no mere mortals should be allowed to make. I think you see that MICE acronym going through a lot of these cases.

Coming back specifically to these four cases, I also think that all four of these potential analogies to Snowden have things to recommend them but also some shortcomings. Walker is a good analogy in terms of the volume of information made available to our adversaries and in terms of its happening in a time of conflict, but Walker's motivations were quite different from Snowden's. He was about money. He never claimed to do it for the public good, and no social good whatsoever came out his espionage. So if you use this analogy, then, you are painting Edward Snowden as a villain and a spy with absolutely no redeeming qualities whatsoever.

Vasili Mitrokhin's motivations, though, were really rather similar to Snowden's, and he also released a very large volume of material. So in terms of the specifics of the actions taken by our

actors here, this is actually a fairly good analogy. But if you adopt this analogy, you are inescapably analogizing the United States' political system to that of the Soviet Union, which is not a serious proposition, no matter what you may read in the comments sections of *Guardian* stories.

At least two of the participants who have outed themselves as having been members of the Citizens' Committee to Investigate the FBI have, themselves, actually compared their theft and release of documents to what Snowden did. They've said that Snowden is more or less the present-day version of us. And, again, the alleged motivation seems similar. The Citizens' Committee was focused primarily on domestic abuses, as Snowden has been—or said he has been. But if you use this analogy, you are implicitly saying that the enormous volume of what Snowden has revealed that has nothing at all to do with domestic surveillance and is about legally legitimate intelligence activities abroad is irrelevant. Under this theory, his one arguably good act—telling us about NSA domestic surveillance, particularly the phone-metadata program—is so important that everything else he leaked is negligible; we needn't even talk about it.

Finally, if on the other hand you've compared Snowden to Philip Agee, you may be implying that Snowden is a liar who is likely to be receiving support from hostile foreign intelligence agencies and that they may even be using him as a mouthpiece to discredit or embarrass the United States. Alternatively, you may be praising Snowden, and many people, notably including military and intelligence historian John Prados, still actually think highly of Agee as a whistleblower.

In sum, I think we need to think critically about the historical analogies we apply and what the key similarities and differences are between those analogies and the present-day situation with which we are faced. This is, I would argue, a general lesson that we could learn. And perhaps we should also think about the implications of those similarities and differences. I also think we need to be humble

about our understanding both in factual terms and in moral, philosophical terms, if you will, of recent events. History is always in motion. Indeed, we should be very cautious in thinking about Snowden. And we should take inspiration from the words of Zhou En-Lai who, when asked in 1972 by Henry Kissinger what he thought of the French Revolution, reportedly said, "It's too early to tell."

Whatever analogy you prefer, if any, to Edward Snowden, one thing is sure: There will be more leakers. There will be more spies. The Director of National Intelligence, James Clapper, said recently that we cannot stop the next Snowden. This brought him in for a good bit of ridicule and abuse, but the fact of the matter is, it's true. That we have so many plausible analogies to Edward Snowden shows that we're going to see him or versions of him again.

FALSE CONFESSIONS ON TRIAL*

Allison D. Redlich, PhD**

I INTRODUCTION

We are in the Age of Innocence. It's very different from the one written about by Edith Wharton. According to the National Registry of Exonerations, since 1989 more than 1300 people who are factually innocent have been officially exonerated. Approximately fifteen to twenty percent of those made false confessions.

The first forensic application of DNA resulting in a false-confession exoneration in the United States was in the case of Gary Dotson, in 1989. But the marker for the beginning of this Age of Innocence seems to have been two years earlier—1987. This was the publication date for *The Blooding*, a book by Joseph Wambaugh, about a false-confession exoneration in England. It's an absolutely fascinating story, about two young girls—Lynda Mann and Dawn Ashworth—who were murdered in the small town of Leicester, England, and what happened thereafter. It was a very high-profile crime. Eventually, because of Alec Jeffreys, who developed the DNA genetic fingerprinting that we now have come to use in both exonerating and implicating people in crimes, the 2000 men in Leicester were all made to give their blood. But what the procedure did first was exonerate a false confessor.

What is a false confession?

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	NO CONFESSION	YES CONFESSION
INNOCENT	GOOD!	False Positive
GUILTY	False Negative	GOOD!

This is a two-by-two table; we are talking about factually innocent people who give confessions to the police. I also study what I call false guilty pleas, which are another type of confession. But here I'm going to be talking about police interrogation. These are the false positives. Again, these people are not *legally* innocent, but they are *factually* innocent—they did not commit the crime.

II A GENUS OF FALSE CONFESSIONS

There are three types of false confessions. The first type is called voluntary false confessions. A quintessential example of the voluntary false confession was after the Charles Lindbergh baby kidnapping. Two hundred people came forward and gave false confessions. Another example is the Black Dahlia case in Los Angeles in the 1950s, when over fifty people did likewise.¹ Another type of voluntary false confession is by people who want to protect the true perpetrator and who come forward voluntarily, on their own, and give a false confession.

The second two types of false confessions are coerced, induced through police interrogation. One of these is often called *coerced compliant*. This is the type of false confession in which the person knows that he or she is innocent, but through the interrogation process comes to give a false confession. The second, *coerced internalized*, are people who, again, through a coercive interrogation

1. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*. 34 *LAW AND HUMAN BEHAVIOR*, 3-38 (2010) (on file with the journal).

process, actually come to believe that they committed the crime when in fact they did not. Yet this belief is usually temporary.

Coerced confessions, especially the compliant type, are those people think about when they think of the Innocence Project and of DNA exonerations. They are the most studied. Those studies include scientific research, such as scientific-consensus papers, “white papers.” The white paper my colleagues and I wrote on this topic covers over thirty years of research on false confessions and the police interrogation process.² The second source of study is proven cases. A seminal study came out in the *North Carolina Law Review* in 2004 about 125 proven false confessions.³ Such a cluster reveals some commonalities—characteristics common to false confessions.

A false confession can be a *proven* false confession in four ways: first, “no-crime” cases, in which the crime never occurred, and, second, “wrong-man” cases, in which the wrong person is implicated in the crime. The third way is when the actual perpetrator comes to light, whose guilt can be proven conclusively. The fourth is when scientific evidence, such as DNA evidence, proves the confessor’s innocence.⁴

III HOW DO FALSE CONFESSIONS HAPPEN?

A. From Physical to Psychological Coercion

Starting in the 1930s, the United States changed its interrogation practices. You could perhaps track that change back to the 1936 case of *Brown v. Mississippi*, in which three African-American tenant farmers were whipped and gave false confessions.⁵ Since then, third-

2. Kassin et al., *supra* note 1, at 49.

3. Steven A. Drizen & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

4. *Id.* at 925–26.

5. 297 U.S. 978 (1936).

degree methods of police interrogation have been no longer. The police had to come up with a new way of interrogating people. That became psychological interrogation. It began officially with the 1962 first edition of *Criminal Interrogation and Confessions* by John Reid and Associates.⁶ It is now in its fifth edition.⁷ The Reid Technique is generally how US detectives and police officers interrogate people today. It is a confrontational, accusatorial method.

B. Mistaken Deception Detection

False confessions come about in what can be seen as a three-stage process. The first stage is called “mistaken deception detection”—when the police mistake an innocent person for someone they think is guilty. A mistaken deception detection would come about in the officer’s first interview with a person of interest. An interview and an interrogation are significantly distinct; it’s not just semantics. The interview is more informal, it’s not in a controlled setting, and its purpose is to determine whether the person being interviewed is being deceptive. So, is this person who is now a person of interest, let’s say, is she being deceptive? Is this someone whom I want to subject to accusatorial interrogation? Once I make that decision, everything changes. The interrogation, by contrast, is in a controlled setting; it’s very formal; it’s orchestrated. And it’s guilt presumptive.

In order for the police to make this determination—whether someone is being deceptive, whether this is someone they want to formally interrogate—they ask a series of questions during the Behavioral-Analysis Interview, or the BAI. One type of question is

6. John Reid was the manual’s author, who has since died; but the organization that bears his name is extant and offers a range of interviewing services, including behavior-analysis interviews and polygraph examinations. http://www.reid.com/services/r_services.html.

7. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (5th ed. 2011).

called the Purpose Question. This is from *The Investigator Anthology*,⁸ a book that overviews the Reid Technique:

“Andy, what’s your understanding for the purpose of the interview with me today?” Suspect 1 says, “Well, last Sunday morning, when the bookkeeping department was making up the deposit, they said the deposit envelope from the men’s department was missing, but I know for sure that I put it in the safe. So, the reason I’m here is to prove that I didn’t steal it.” Suspect 2 says, “Well, I guess they must have misplaced the deposit envelope, and I’m just here to help them find out what might have happened to it.”⁹

So, which one do you think is guilty? Suspect 1 or Suspect 2? It’s supposed to be intuitive: Suspect 1 is the innocent person because he’s insistent that he didn’t commit the crime, whereas Suspect 2 is much more vague and ambiguous.

The manual also has the Punishment Question. In the hypothetical case of a workplace arson, suspects may be asked, “What do you think should happen to the person who started this fire?”¹⁰ Suspect 1—“Well, I suppose it depends on the circumstances’ or ‘He obviously needs psychological counseling,” versus, Suspect 2—“He should be sent to prison!” or “I hope they throw the book at him!”¹¹ So, which one is guilty, 1 or 2? The person who is guilty is Suspect 1 according to the manual, which explains that “[a] guilty subject has a difficult time discussing the possible serious consequences for his [own] crime. . . . [so] his response to the punishment question tends to be much more lenient.”¹² It’s simply because the guilty are putting themselves in that position and they don’t want to be convicted, prosecuted, and punished.

8. BRIAN C. JANE & JOSEPH P. BUCKLEY, *THE INVESTIGATOR ANTHOLOGY* (1999).

9. *Id.* at http://www.reid.com/educational_info/critictechnique.html (scroll down to “Sequence of Interviews [PURPOSE].”

10 . FRED E. INBAU ET AL., *supra* note 7, 160–61.

11. *Id.*

12. *Id.* at 161.

The point here is that the police use these questions, and their answers, to diagnose people as either deceptive or nondeceptive. Again, this is an important turning point because it may lead to the decision to interrogate.

How accurate are these deception-detection techniques? Reid claimed that their methods can train investigators to be 85% accurate in detecting deception. When asked, police officers themselves think that they are about 77% accurate (although they think their colleagues are only about 60% accurate). The science shows a very different picture. It's around 50%. It's not significantly different than if I flipped a coin and said, "You're innocent, you're guilty; you're lying, you're telling the truth." That's what the science shows.

One study came out of testing more than 12,000 people over the years. In the typical study, the researchers show videos of people being interviewed and asked the participant whether the person was lying, telling the truth—those kinds of things. The researchers found only twenty-nine people whom they considered to be "wizards." Wizards are people who were correct consistently, 80% or more of the time. Police officers have been found to be the same as college students in this regard; they're just more confident, thinking themselves to be 77% accurate. Wizards are just as rare among their cohort. And when police officers do make errors, they tend to see that people are lying rather than telling the truth. Of course, they're trained to be suspicious, so when they do make errors, they're not erring on the side of a truth bias but rather a deception bias. Simply put, regardless of training in the Reid Technique, there is just no single behavioral cue that is definitively indicative of deception.

In the United States, the police tend to rely on what are called anxiety-based cues. If I were to ask you, "How do you know when somebody's lying?" Very commonly, people say the suspect is twirling her hair or he's not making eye contact or fidgeting around—all of those kinds of behaviors. What's hard to determine is

whether someone's lying or is simply nervous. Of course, whether you're innocent or guilty, you're going to be nervous in an interrogation situation.

Three cases in point: These are all three proven false confessors, where the police misread their emotions and their demeanor in the beginning and set them on an erroneous course, leading to three miscarriages of justice. In Michael Crowe's case it was a wrongful arrest.¹³ The other two cases were wrongful convictions: Marty Tankleff and Jeffrey Deskovic each spent about seventeen years in prison before being exonerated.¹⁴ Michael Crowe and Marty were both accused of murdering loved ones: Michael's sister and Marty's parents. Jeffrey was accused of murdering an acquaintance, a high-school classmate, whom he didn't know too well. Michael and Marty were pegged as not being emotional enough, whereas Jeffrey was pegged as being too emotional, which raised suspicions.

The stereotype of innocence, I think, helps to partially explain this. Stereotypes are generalizations. There is some truth in stereotypes; that's why society holds a shared view of them. The problem with stereotypes is that they're oversimplifications, and when they are applied to everybody in a group, they're problematic. The stereotype is that innocent people are supposed to behave a

13. Michael Crowe, 14, was accused of stabbing his sister to death in her bedroom. Confronted by the police with compelling, but false, physical evidence of his guilt, Michael was persuaded: "I'm not sure how I did it. All I know is I did it." He came to be convinced that he had a split personality and that the "bad Michael" had killed his sister while the "good Michael" kept him from remembering he had done so. Kassir et al., *supra* n. 2, at 61.

14. Marty Tankleff, 17, was accused of killing his parents. He confessed after a lengthy interrogation, reasoning he must have acted in a blackout. See <http://www.falseconfessions.org/cases-the-exonerated/31-marty-tankleff>.

Jeffrey Deskovic, 16, was accused of raping and murdering a classmate and confessed after a six-hour, good-cop-bad-cop interrogation with neither lawyer nor parent present. See *Joseph Berger, Exonerated and Freed at 32, but Feeling 17*, N.Y. TIMES, Feb. 4, 2007, <http://www.nytimes.com/2007/02/04/nyregion/nyregionspecial2/04wecol.html>.

certain way: they're not supposed to invoke their rights, they're not supposed to be too emotional or underemotional—those kinds of things. That's when we have mistaken deception detection.

C. Presumption of Guilt

The second stage leading to a false confession is the idea of presumed guilt. Again, interrogations in the United States are, by definition, guilt presumptive. The professionals at John E. Reid and Associates, Inc., claim that they don't interrogate innocent people because they've already excluded them during the first phase. But of course we know that's not always true. What the presumption of guilt leads to is all of these terms, which are basically synonymous: tunnel vision, confirmation bias, self-fulfilling prophecy, expectancy theory. They all basically mean the same thing. And they're ubiquitous: no one is immune to them. A presumption of guilt sets in motion a chain of events wherein you discount all information contrary to your hypothesis; you ignore evidence that's contradictory; you actively reinterpret evidence that's to the contrary. It's dangerous to have an interrogation model that is built on the presumption of guilt. It's hard to see anything else.

D. Modern-Day Interrogation Techniques: The Process

Stage three is the application of modern-day interrogation techniques, which are, again, accusatorial and confrontational. The first step of the nine-step Reid interrogation process is what's called Direct Positive Confrontation. This is the detective going into the interrogation saying, "I know you're guilty. You can't say anything to the contrary; we have all the evidence [or whatever it may be]. Now I need to you to basically tell me how you did it."

The second step is what's called Theme Development. Theme Development is the scenario that the police generate to give the person a morally acceptable "out" to confessing. It may be, "You know, you're not a greedy person, you're hungry. You needed to feed

your family.” It’s that kind of psychological ploy whereby the interrogator first raises the person’s anxiety level and then tries to bring it down by minimizing the crime by posing these kinds of scenarios.

The third step is converting the oral confession into a written confession. Again, the interrogation proceeds step-by-step.

The Reid Manual suggests that the interrogation room be set up according to guidelines that maximize the suspect’s focus on the questions he’ll be asked:

Establish a sense of privacy. The room should be quiet, with none of the usual “police” surroundings and with no distractions within the suspect’s view. . . . The room should be as free as possible from outside noises and should be a room into which no one will have occasion to enter or pass through during an interview. This will instill a sense of privacy. Also[,] the less the surroundings suggest a police detention facility, the less difficult it will be for the suspect or arrestee who is really guilty to implicate himself. The same surroundings will also be reassuring to the innocent suspect. . . .

Remove locks and other physical impediments. The room should also be devoid of any large objects or drapes that might cause a suspect to believe that a concealed third person can overhear his conversation with the interrogator.

Remove all distractions. Interview rooms should be of plain color, with smooth walls, and should not contain ornaments, pictures, or other objects that would in any way distract the attention of the person being interviewed. Even small, loose objects, such as paper clips or pencils, should be out of the suspect’s reach so he cannot pick up and fumble with anything during the course of the interview. Tension-relieving activities of this sort can detract from the effective-

ness of an interrogation, especially during the critical phase when a guilty person may be trying desperately to suppress an urge to confess. . . .

Select proper lighting. Lighting fixtures should be arranged in such a way as to provide good, but not excessive or glaring, illumination of a suspect's face. Certainly, any lighting that interferes with the interrogator's full view of the suspect's facial features and expressions should be avoided. Also, there should not be any glaring light on the interrogator's face. This will interfere with the interrogator's observations of the suspect and may distort the interrogator's facial indications of understanding or sympathy. Diffused overhead lighting is more appropriate.

Minimize noise [from telephones, beepers or cell-phones or from heating or ventilating systems] to reduce . . . distraction.

Arrange chairs properly. The chairs for the interrogator and suspect should be separated by about four or five feet and should directly face each other, without a desk, table, or any other object between them. The chairs should be of the type normally used as office equipment without rollers. . . .

Straightback chairs should be used for the suspect as well as the interviewer. Other types of chairs induce slouching or leaning back, and such positions are psychologically undesirable. A suspect who is too relaxed while being questioned may not give his full attention to the interrogator, and this will create an unnecessary hurdle. Similarly, this is no occasion for the interrogator to relax. His full attention and alertness are highly essential. Whenever possible, the seating arrangement should be such that both the interrogator and the suspect are at the same eye

level. Avoid chairs with lowered front legs or other deviations that place the suspect in an “inferior” posture or prevent him from making normal changes in his posture.

The manual notes that observation rooms with one-way mirrors have commonly given way to audio or video monitoring. It cites the advantages of electronic monitoring (and a few studies detailing these advantages), among them, notably, enabling investigators to observe the interview and evaluate the suspect’s “behavior symptoms” [while maintaining] the necessary privacy.¹⁵ Still, the text warns,

[E]lectronically recording an interview or interrogation [can] inhibit[] the truth-telling process. Without question, when the suspect can see a tape recorder, camera, or third person in the room, it is more difficult for the suspect to tell the truth.¹⁶

Of course, the police use a variety of techniques in order to get people to confess—both positive and negative incentives. The positive include such things as Theme Development, in which the interrogators normalize, minimize, the crime; they provide sympathy and moral justifications; they feign friendship. But they combine these positive approaches with negative ones: a key, defining feature of interrogations is to isolate the suspect. You want to have the suspect in your house—in the police station, if at all possible. Accuse guilt in a direct, positive confrontation; make authoritative assertions; disallow denials and alibis; and present the suspect with evidence that’s real or manufactured.

15. INBAU ET AL., *supra* note 7, at 46–48.

16. *Id.* at 51.

E. Modern-Day Interrogation Techniques: Risk Factors

But the techniques themselves don't really explain how a false confession happens. When we talk about false confessions, or when I testify in front of a judge or a jury, I talk about two different types of risk factors. The first are situational risk factors, having to do with the physical situation itself. One of these is physical custody and isolation. Most interrogations last from about a half hour to about two hours. Reid Associates themselves say that about three to four hours is typically sufficient to get the job done. But if you look at proven false-confession cases, the average was about sixteen hours.¹⁷ False confessions tend to have had very lengthy interrogations. A lengthy interrogation, though, is neither a necessary nor a sufficient condition. False confessions have certainly originated from much shorter interrogations, especially with juveniles or people with mental-health impairments. The lengthy interrogation, though, is prolonged isolation. By nature, humans are social beings. You come to rely on your interrogator; they've set it up that way. There's also sleep deprivation; basic needs aren't being met. This just exacerbates the suspect's need to have it stop. When false confessors are asked, "Why did you give a false confession?," they commonly answer that they just needed to have the interrogation stop, and they came to realize that they were not going to be leaving that room until they gave the police what they wanted to hear.

Another situational factor is lying and deceit. In the United States, it's legal for the police to lie to a suspect, to use trickery and deceit. This principle stems from a 1969 US Supreme Court case, *Frazier v. Cupp*, which held that the coercive effect of misrepresentation on the voluntariness of the suspect's confession depends on viewing the "totality of the circumstances" of the interrogation.¹⁸

17. A. Drizen & R.A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891-1007 (2004).

18. 394 U.S. 731 (1969) ("The fact that the police misrepresented the statements that Rawls had made is, while relevant, is insufficient in our view to make this

Michael Crowe, accused of murdering his sister, was told that he had failed the computer voice-stress-analysis test, which is similar to a lie-detector test, but it relies on your voice and is pretty much junk science, in my opinion. Michael was also told that the investigators had found his hair in his sister's hand. Information of this sort becomes very confusing, especially after hours and hours of being accused. Marty Tankleff was told that his father had awakened from his coma and said Marty was the perpetrator, which was not true—his father never regained consciousness after he and Marty's mother were attacked. Again, such false information creates a lot of confusion. Oftentimes, as well, these lies are paired with authority-invoking statements such as, "A doctor is telling me this" or "I've been a police officer for twenty years"—statements that can be understood to validate the truth of the misinformation and that increase the suspect's confusion.

The third situational tactic is to minimize the suspect's moral and psychological culpability. This is Reid's Step 2. But this tactic can minimize legal culpability as well; it turns murder into manslaughter or even into self-defense: "You didn't mean this, it was an accident"—this is a common theme. A case just went to the New York State Court of Appeals in which the suspect, Adrian Thomas, was interrogated for about ten hours. His interrogators repeated, over and over, "You're going home tonight. This is just an accident." He was convicted. On the first appeal, all five judges upheld the conviction.¹⁹ But the New York State Court of Appeals just overturned it.²⁰ Luckily, because most people think Thomas is innocent. Thomas was retried and acquitted.

otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances')

19. *People v. Thomas*, 93 A.D.3d 1019, 941 N.Y.S.2d 722 (2012), rev'd, 22 N.Y.3d 629, 985 N.Y.S.2d 193 (2014).

20. *People v. Thomas*, 22 N.Y.3d 629, 642, 8 N.E.3d 308, 314 (2014) ("Most prominent among the totality of the circumstances in this case is the set of highly coercive deceptions. They were of a kind sufficiently potent to nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-

The second type of risk factor is a class of dispositional risk factors. These are aspects about the suspect, himself or herself. The most common ones mentioned are youthfulness, immaturity, mental impairment—both mental-health problems and mental retardation. But it really can be anything that makes the suspect vulnerable. I'm working on a case right now in which the person has seizures and was denied his seizure medication. In another case, the person was diabetic. Another common vulnerability is drug abuse, including alcohol: the person just has to get out of the room. She's either going through withdrawal or he might be intoxicated. These are all situational risk factors.

E. A Case in Point: The Blooding

I want to tell you a little bit about the person who was exonerated in the case that led to Joseph Wambaugh's book, *The Blooding*, just to illustrate some of the points I've been making. Richard Buckland was a seventeen-year-old kitchen porter at what they called the lunatic asylum in Narborough, a village near Leicester, England. He was accused of raping and strangling to death Lynda Mann, a fifteen-year-old girl, in 1983. This was the second of two murders of young women in the vicinity. Richard would have been fourteen at the time of the first. He was described by one detective as simple-minded: "a thruppence short of a pound."²¹ Another called him "the flippin village idjit you always hear about."²² Richard had several dispositional factors going for him: he may have had some intellectual disabilities, and he was very young.

In terms of situational risk factors, his was a very long interrogation: he was interrogated for fifteen hours. His parents were kept away; they were told that he was just helping with

determination when deployed against defendant, an unsophisticated individual without experience in the criminal justice system.")

21. JOSEPH WAMBAUGH, *THE BLOODING* 146 (1989).

22. *Id.*

inquiries, so he was being treated as a witness. (This is what happened in the Michael Crowe case, as well. Michael's parents had no idea that he was being interrogated and was considered a suspect. They just thought he was being questioned as a witness.) The interrogation of Richard Buckland was highly confrontational. They said, "[W]e know that you're not telling the truth, and we *must* have the truth."²³ In these kinds of cases, the truth becomes equated with a confession. You can see evidence of minimization in Richard's interrogation: "Something's happened, and if an accident's happened, for goodness' sake, say so. If something went wrong, . . . maybe you're not to blame for that."²⁴ Again, minimization is very common.

This case was a highly publicized criminal case that put considerable pressure on the police to be solved—a feature somewhat common in proven false-confessions cases.

Richard's statement itself was highly inconsistent but appeared credible on its face. He mentions feelings he'd had, though he wasn't sure why: "I feel bad that I done something I shouldn't have done. . . . I'm not quite sure what I done."²⁵ He supplies a motive, saying, "Because I had an erection. I wanted to get rid of it somehow so I wanted to find out what it was really like so I done it."²⁶

This kind of narrative filling in between the lines is actually more common than you think in false-confession cases. And it helps to explain how false confessions turn into wrongful convictions: they often appear credible. These false confessions include statements of remorse, motivation, apologies—all of these kinds of things—in part because, I think, the police are aware that a mere "I did it" is not sufficient in terms of getting the person convicted. In all of the false-confession cases that I've seen, it's not that the police think they have

23. *Id.* at 123.

24. *Id.* at 124.

25. *Id.* at 137.

26. *Id.*

an innocent person. They really, truly believe that the person is guilty and they think that they're doing the right thing and putting away the right person.

It is important to understand that police interrogation techniques "work." Approximately sixty-five percent of suspects give a confession to the police when it's certainly not in their best interest to do so. About seventy-five percent of suspects waive their *Miranda* rights. The problem with these techniques is that they also "work" on the innocent. The techniques work too well, if you will. There's no good way to distinguish between guilty and innocent suspects. It's not necessarily the techniques themselves that are ineffective or that produce false results, though there are some I would do away with. I don't think we need to lie to suspects in order to get them to confess. To me, the root of the problem is the first phase, when officers misidentify people who are innocent as guilty.

IV

THE CORRUPTIVE INFLUENCE OF CONFESSIONS

A. How Confessions Corrupt

The Chinese have a saying that convictions begin with confessions. China's criminal system is highly reliant on confessions. I would argue that the United States' system is, as well.

Confessions corrupt because confession evidence is highly valued in the courtroom. McCormick wrote, "The introduction of a confession makes the other aspects of a trial in court superfluous."²⁷ I know that many of you are trial lawyers; my understanding is that most of you are not criminal lawyers. Even in a civil case, if you have some kind of admission of responsibility, it goes a long way. There've been many cases in which confessions have trumped even the DNA. For instance, in the Central Park Five jogger case that many of you

27. CHARLES TILFORD MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1972).

might be familiar with, the DNA came back before trial and exculpated all five defendants. But the district attorney went ahead with the prosecution anyway, saying in effect, Just because we didn't get all of them didn't mean we didn't get some of them.²⁸ So the prosecutors knew at the time, and the jurors heard, that the DNA did not match the suspects, but they had the confessions. It was the same with the Jeffrey Deskovic case: DNA testing of semen found on the victim *excluded* Deskovic as its source, but the case went ahead, regardless.²⁹ The train has left the station.

It's not just jurors who are corrupted.

I'll tell you about one case with which I have a personal connection. This is the Gemini Giant. He is on old Route 66 in the small town of Wilmington, Illinois, in Will County, about sixty miles south of Chicago. It's where my husband grew up. We go there maybe once a year.



It's a very small town, about 5000 people, about 4.2 square miles. In 2004, it was the site of a very sad case, as all of these are. A three-year-old girl, Riley Fox, was taken out of her home, sexually assaulted, and then drowned in a creek. The police had no leads, and eventually they set their sights on the father, Kevin Fox. They really had no reason to suspect that Kevin Fox had done it, except for the fact that in these kinds of cases the perpetrator is often a family member or someone close to the child. Stranger abductions are extremely rare. It appeared that the investigators were victims of

28. Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?* 60 AM. PSYCHOLOGIST 215, 215 (2005).

29. Press Release, Innocence Project, DNA Proves Jeffrey Deskovic's Innocence 16 Years After He Was Wrongly Convicted as a Teenager (Sept. 20, 2006), available at http://www.innocenceproject.org/Content/DNA_Proves_Jeffrey_Deskovics_Innocence_16_Years_After_He_Was_Wrongly_Convicted_as_a_Teenager.php#.

tunnel vision. They interrogate Kevin for fourteen and a half hours and eventually get a false confession from him. They show him pictures of his dead daughter in the creek. They're yelling and screaming at him. What happens after that is one of the most egregious things I think about this case: the police call the lab where they had sent the DNA evidence and said, "Oh, no need to test it any longer. We have our guy, he just confessed."

Kevin was able to get a really good attorney to help him, and eventually they did test the DNA. It came back and excluded Kevin Fox. This was not a wrongful-conviction case. Kevin spent about eight months in jail before he was exonerated. Fox also went on to sue Will County and others in the county because of this wrongful arrest and wrongful incarceration. He was awarded \$15 million because of these egregious actions by the police. The judge eventually reduced it to \$8.5 million. Six years later, the FBI got involved. It turns out that a guy, Scott Eby, who lived right down the street from the Foxes had killed Riley. He had tried to commit suicide the same day Riley was murdered. The police had collected sneakers near the crime scene, and Eby's name was in them. But they'd never looked. That's one way how confessions corrupt.

Another way confessions corrupt is that the trial investigation ends. Confessions tend to result in guilty pleas. I know that part of your mission statement is to retain the trial process, which I completely agree with. Even people who are innocent confess, and they're more likely to enter false guilty pleas. Guilty pleas, as you know, abdicate the entire adversarial process: the prosecutor doesn't have to prove his case beyond a reasonable doubt; the evidence doesn't undergo cross-examination; the investigation stops. That's dangerous. In experiments with college students, confessions have been found to induce the students to change their eyewitness choices. Confessions have been found to induce fingerprint analysts to unwittingly change their match decisions. If a fingerprint analyst is told that somebody confessed, she may change what she said ten

years earlier. Confessions have also been found to induce polygraph examiners to see deception where there is none, simply because they know the person has confessed.

One study examined Innocence Project cases in which the researchers looked at the number of the errors in the investigation.³⁰ The study's authors compared false confessions with mistaken eyewitness identifications. In the false-confession cases, only about a third had no other errors. Compare that with mistaken-eyewitness identifications: fifty-two percent of them had no other errors. You may ask which came first. The answer is that the confession came first in about sixty-five percent of the cases: in thirty of forty-six cases, the confession came first, and other errors came subsequently, such as forensic-science errors, eyewitness-identification errors—those kinds of things. That's how confessions corrupt.

V CONCLUSION

Where does this leave us? False confessions are real and more prevalent than you would think. They're easy to hide and hard to discover. Police should not interrogate to obtain a conviction, or even to get a confession, and our criminal-justice system should not rely on confession evidence to the extent that it does. This is a quote from Justice Goldberg in *Escobedo v. Illinois*:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.³¹

30. Saul M. Kassin, Daniel Bogart, & Jacqueline Kerner, *Confessions that Corrupt: Evidence from the DNA Exoneration Case Files*, *PSYCHOL. SCI.* 23 (2012).

31. *Escobedo v. Illinois*, 378 U.S. 478, 488–89 (1964).

And, I would add, trial advocacy that depends more on “extrinsic evidence independently secured through skillful investigation” than on a supposed confession will likewise be more reliable, more trustworthy, and more fair.

QUESTIONS & ANSWERS

Q: How often do you see the instance of false evidence being planted in criminal investigation?

A: False evidence being planted? Not too often. I think that would be a very difficult thing to prove. Are you’re talking about where the police believe that they’ve got their guy, that he’s confessed, and then they plant evidence? Then in my experience it’s not too common, actually. Again, it just may be hidden.

Q: I wonder if you could comment on the Amanda Knox situation and on the confession and the role it played in that case.

A: It’s false. In my opinion, it’s clearly a false confession and I think Italy just needs to just abandon the case.

Q: One of my law-school classmates is Barry Scheck, who is with the Innocence Project. I’ve heard him speak on a number of occasions, and he suggests as an antidote to this problem videotaping every police interrogation. How do you feel about that?

A: That is the number-one reform people have put forward in terms of false confessions. What I like to say is, again, it’s necessary but it’s not sufficient. There was a videotape in the Adrian Thomas case I mentioned earlier that just went to the New York State Court of Appeals. I always like to say that, on the one hand, we’re here because they had a videotape; on the other hand, we’re still here and they still had the videotape. Again, the twelve jurors and the five appellate court judges did not see the coercion that New York state

Court of Appeals judges eventually did. We need to combine such videotapes with expert testimony. In the Adrian Thomas case, the trial judge had disallowed expert testimony. So another issue on the appeal, which they didn't actually decide because they threw out the confession, was whether to let an expert testify.

Q: We're from Montana and from Barry Beach country. . . . The Barry Beach case is one of these confession cases. They don't have any DNA. So they've been through what the rules now are on reversing these convictions, obtained with a confession, and you need to have something like DNA. You can't just say a new witness showed up and said, "Well, I think it was different." Anyways, it's the big rage in Montana right now. I didn't know if you'd know about it .

A: I'd heard about it several years ago, and it is unfortunate. But you do raise a very good point. Only about ten percent of cases have DNA evidence, which is why the DNA exonerations are so heavily focused on murder and rape cases—because those are the cases that have DNA. That said, however, the National Registry of Exoneration cases, which now exceed 1300 cases, include 22% exonerations that are not homicide or sexual assault.³²

32. See The National Registry of Exonerations, Exonerations in 2013 (Feb. 4, 2014), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.

* * *

WHAT YOU SHOULD KNOW ABOUT FINANCIAL WARFARE—AND WHY *

Tanya Beder**

I INTRODUCTION

In discussing financial warfare and why it's such a game changer, I'm hoping to convince at least some of you to be interested in evaluating some of the missing but appropriate legal frameworks that are necessary in this new financial world. Before I do that, I'll be touching on some key historical moments in the evolution of financial engineering. I'll be talking about why financial warfare is such a game changer. What can you do about financial warfare? What can we *all* do?

If you watched the news today, you no doubt saw the tanks rumbling through Ukraine and memorial photos of the Orange Revolution at Kiev's Independence Square. In addition, you can think of pictures of hand-to-hand combat going back to the Civil War, to World Wars I and II, the Korean War, and the Vietnam War. You can also imagine images of chemical and biological warfare, where there is perhaps less blood, but certainly devastation and loss, nevertheless. And, finally, you can imagine radiological warfare, which might involve newer delivery systems, such as intercontinental ballistic missiles and drones.

Now, what images of financial and economic distress might financial warfare evoke? One image you've probably seen numerous times is folks in Germany after World War I, pushing wheelbarrows of cash just to purchase a loaf of bread. Or the image of welfare

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lines—those that have taken place recently, in the Great Recession, and those from the Great Depression: frantic depositors waiting in line when a bank fails or, most recently, when a Ponzi scheme comes to light.

The weapons in financial warfare, itself, are not totally new. For example, you've read in the past about embargos. You've read about sanctions and about Cold War controls or other controls put in place at the end of a war. What are some new weapons of financial warfare? Well, one near and dear to me—I've been a victim of it—is identity theft. Cyberattacks as well. We read about these daily.

I'm going to take you into a world of more complex, hard-to-detect forms of financial warfare and talk about why these are potential game changers. In order to do that, I need to set the stage. I thought very seriously about how to give you an encapsulated history of financial engineering. This could be the topic of multiple courses, so I looked for how to present those six steps in a succinct fashion. I settled on what has got to be one of the best frameworks for telling the story of something in six days. That's the story of the Creation in *Genesis*.

II

SIX STEPS: A HISTORY OF FINANCIAL ENGINEERING

In the beginning, financial engineering was without form, and void and darkness were upon the face of the markets. And some visionaries who had worked very hard to create the world's first supercomputer said, "Let there be light." And there was light. And, lo, some budding scientists, later known as financial engineers, saw the light and that it was good. And they divided what could be computed and stored from what could not. And the visionaries called the light superdata and computing. And so ended the first step with technological advances.

Then some visionary said, "Let there be a firmament to link the computers, yet let it divide one computer from the next." And lo,

WATS lines were installed and cables laid under the seas and satellites launched into the skies. And the visionaries called it global communications. And so ended the second step.

Then some sheiks in the Middle East said, "Let our oil be gathered together unto one place and let OPEC appear." And it was so. The politicians wailed, "It's a cartel!" But the budding financial engineers saw that oil-price changes would need to be managed. So they kept at their work, and thus ended the third step.

Then some leader said, "Let the currencies float via the firmaments to divide countries of strength from those of weakness and let exchange rates float for seasons and for days and for years." And lo, the leaders disbanded Bretton Woods. The budding financial engineers saw that currency risk would need to be managed, so they continued their work. And thus ended the fourth step.

Then the prophet Ezekiel Volker made a great proclamation: "Let interest rates move with Treasury securities, each after their kind." And he blessed the first money-market fund saying, "Be fruitful and fill the global markets with many sizes and types." The budding financial engineers saw that the floating interest rates would need to be managed, and they continued their work. And thus ended the fifth step.

And then some visionaries said, "Let us make tools to manage these risks. And let them multiply, replenish value, subdue loss, and have dominion over all the markets of the earth." And the financial engineers said, "Behold, we have all the elements that we need." And to every beast of the market and to everything that creepeth, wherever there was risk to manage, there was technology to do so and tools to employ and computations to make. And it was so.

Thus the world of derivatives and financial engineering was made in six steps.

To summarize: We had to have a lot of technology. We had to have global communications. We had to have risks to manage—from the cost of energy to the level of interest rates to the value of

currencies—and we had to have a tremendous number of linkages for the derivatives world and the financial markets to be able to do what they did.

(Let me also say, as an aside for anyone who prefers the evolution story, I actually tried using the Darwin framework as well and if anybody would like a copy of financial engineering according to Darwin, just send me an email. I'd be happy to send it along.)

III FINANCIAL ENGINEERING TODAY

My point is that the evolution, or the creation, of financial engineering has been rapid and it has been recent. When I show the picture of the ENIAC (Electronic Numerical Integrator and Computer) to my young students—graduate students, but very young nevertheless—and I ask them when the ENIAC computer was made, they say it looks like it's from the 1800s. It was made in 1946, which is still ancient history in the computer world. It's quite a shock to them to learn that so much of the development of computer technology was done in just thirty to forty years. But that has been the tremendous pace of evolution.

A. Financial Engineering Pluses and Minuses

Yet rapid evolution has brought drawbacks as well as benefits. What are the pluses and minuses of financial engineering? Let's start with a few of the pluses: Derivatives in financial engineering have transformed life as we know it. In the past, even a rural farmer in India who grew rice had to wait for a middleman to come along to set a price for that rice. And that price was often not the most advantageous price and may not have had much to do with the world rice markets. In today's world, farmers in rural locations—in India or in any other market around the world—have personal data assistants (PDAs—smartphones), and through those PDAs they can

see those futures markets. The length of the chain between the grower and the buyer has shortened substantially, and that's been much to the benefit of both. Airlines use derivatives to manage their fuel expenses. Manufacturing companies all over the world—whether they use hard metals or agricultural items or other commodities—also use derivatives to connect directly to the market for their goods. Banks and insurance companies, pension funds, and the like all actively use interest rates and currency derivatives. And even something like microfinance, where someone is making a loan of one or two hundred dollars, which can be a life changer in many of the markets using microfinance, are able to package these loans together and take them into the institutional investment space. So there've been enormous benefits from the creation of these instruments; their impact on our daily lives is breathtaking.

Take, for example, personal banking. I grew up in a world with a passbook savings account. If I wanted to get cash, I literally had to see a teller in person during banking hours. Now I can go to an ATM virtually anywhere in the world, at any time of the day or night, and I can deposit a check from my PDA—without ever setting foot inside a bank.

Financial investments used to be paper- and certificate-based. When I started on Wall Street in the middle of the 1970s, runners were chained to carts, and inside those carts were the stock certificates and the bond certificates. And when brokers did a transaction, those certificates had to be moved around Wall Street in order to do the settlement on the transaction. Today, we use electronic line entry with central depositories, and paper certificates are an artifact of the past. This is a huge change in how transactions happen. There are many more examples. With currencies, we've moved from being backed by gold to being backed by confidence. These changes have been both rapid and enormous.

Yet the proliferation of those changes has been quite different from one country to the next. Here are a few statistics important to

understanding why financial warfare has become such a challenging issue for some countries: According to the International Monetary Fund, there are about 250 trillion dollars' worth of wealth represented by financial instruments such as stocks, bonds, bank loans, and the like. Thirteen percent of the global population represented by the US, the Eurozone, and Japan own seventy-five percent of these financial instruments. So the proliferation of wealth and how that has come about with globalization and technology and electronic forms of instruments has been focused heavily in the developed world. To give you a contrast for the size of those financial assets—that \$250 trillion of monetized assets in the world—the amount of established OPEC reserves, for example, using a price of oil of about around \$100 a barrel comes out to about \$150 trillion.

The Bank for International Settlements also tracks financial numbers. It has estimated that the size of derivatives in the over-the-counter market is about \$750 trillion and that ninety-six percent of those are in only thirteen countries. Within that cohort, though, there are other striking differences. Compare the United States and the Eurozone: In the Eurozone, eighty percent of the moneys that companies borrow is done through direct bank lending, rather than through stocks or bonds or the capital markets. In the United States, though, the 80/20 rule goes the other way: only twenty percent of the funding for companies comes through the banks. So the dependence of the US economy on those financial instruments is extraordinary in terms of how they're monetized, distributed, and in terms of companies' dependence on those financial vehicles. Sovereigns in the Eurozone also have a huge dependence on those financial vehicles. This is really what lays the groundwork for attack.

B. The Financial Crisis: A Few Exemplary Attacks

We read in the mainstream media about the financial markets in Portugal, Ireland, Italy, Greece and Spain—"PIIGS." These markets were attacked heavily through a financial instrument called credit

default swaps. Certainly, without the tremendous support of the European Central Bank, it would have been impossible for those countries to have survived the attacks, for their interest rates were approaching twenty-five, thirty percent in the shadow markets.¹

We saw Bear Stearns and Merrill Lynch and Lehman Brothers come under heavy attack during the financial crisis. Two of them went into shotgun weddings with JPMorgan and Bank of America. Lehman Brothers was forced to file for bankruptcy because it could not survive the onslaught of attack in markets such as the commercial paper market, the bond market, the credit-default-swap market and in shorting² via the equity markets. Consider the vulnerability of a financial institution in this scenario versus one in which debt is held more closely and not transmitted through the financial markets. It is this type of vulnerability and the risks it entails that must be faced on a financial-warfare front.

There have been other vulnerabilities exposed to other kinds of attacks. You probably read a few years ago about the Stuxnet cyberworm that was purportedly designed by folks trying to shut down Iran's uranium-enrichment plants. We have other vulnerabilities—the power grid, the water-supply system, transportation systems. All of these have a lot of technological and infrastructure vulnerabilities like those of the financial market, under whose infrastructure the financial instruments are distributed, as is cash.

More recently, we've all read about identity theft and other cyberattacks—on Target, Sears, Niemen-Marcus and many of the major banks.

1. "An unregulated private market in which investors can purchase shares in companies that are not currently publicly traded." <http://www.investopedia.com/terms/s/shadow-market.asp>.

2. "Shorting" is "[t]he sale of a borrowed security, commodity or currency with the expectation that the asset will fall in value." <http://www.investopedia.com/terms/s/short.asp>

This is the tip of the iceberg. The genie is out of the bottle. Financial derivatives and financial engineering have been of enormous benefit; it wouldn't make sense, nor in a world of such technology and globalization, would it be possible, to put the genie back in the bottle. And, much as we'd like to, it's equally impossible to put the bad side of the genie back into the bottle.

C. The Bad Side of the Genie

Imagine, if you will, how going to conferences has changed. Certainly, when I went to conferences thirty years ago—whether they were in South America or Asia, or even Hawaii, for that matter—I'd spend a fair amount of time making sure I had a cash advance, traveler's checks (remember those?), and some small bills to be able to do what might be needed. How many of you got travelers' checks to come on this trip? Most of you probably left, as I do when I travel now, assuming you could use credit cards and ATMs just about anywhere to get just about anything you might need.

But what happens if all a sudden there's a crisis in a currency or we're not able to use the credit cards or the ATM machines—whether this occurs through some type of cyberattack, financial warfare, a failure of confidence in the financial system or a problem with some of its infrastructure? In survival we say that there's the two, two, and two rule: you can last two minutes without oxygen, you can last two days without water, and you can last two weeks without food. But what about financial survival—how long could you last if, right now, whatever you have with you is it? No more cash than what's in your pockets. No more ATMs to dispense more. No more credit cards that work. No more ability to access those electronic-line entries that represent your wealth in central depositories, so you can't prove you even *have* any money. In fact, the vision of the type of mayhem that would come out of a population unable to buy food—or anything else— even for a few

days is extraordinary. The level of preparedness people have for this type of a risk is de minimis.

Here's a second example of a type of warfare that is also easy to conjure up: Have you heard of the London Whale and what happened with JPMorgan in Europe, which lost about \$6 billion on one trader's trades?³ I'll describe this with the following groundwork: Some large financial institutions are critical to the economics and well-being of any one country. These large, too-big-to-fail financial institutions are executing hundreds of thousands of trades on multiple desks around the world on a daily basis. These trades involve over one hundred currencies and hundreds of interest rates, equities, credits, bonds, commodities, and derivatives within those currencies. For foreign-exchange transactions alone (which, again, are dominated largely by dealers in thirteen countries), over five trillion dollars' worth per day are passing through the markets. Because there are millions of different financial instruments, and transactions being done twenty-four hours per day, simplification assumptions have to be made to estimate and to analyze a large bank's position at any point in time in order to monitor risk. Even in this day and age, it is impossible to stop the music of the clocks that trade twenty-four hours a day, to get all of the precise information in one place to analyze, and to do the complex risk analysis in real time. To get anywhere, simplifying assumptions have to be made. So you're always limited—both in the analyses that *can* be performed and in their detail: you're analyzing a simplified version of

3. In February 2012, JPMorgan suffered sizable losses from "a complicated trading strategy that involved derivatives, [in this case,] financial instruments that derive their value from [changes in credit quality]. . . . The trades took place in the chief investment office of JPMorgan. [D]esigned as hedges, [the trades were so big that they eventually threw] markets out of kilter. The trades were reportedly put on by . . . a French trader, Bruno Iksil" and the strategy became nicknamed "the London whale." Jessica Silver-Greenberg & Peter Eavis, *JPMorgan Discloses \$2 Billion in Trading Losses*, N.Y. TIMES (May 10, 2012), <http://dealbook.nytimes.com/2012/05/10/jpmorgan-discloses-significant-losses-in-trading-group/>.

something that happened before versus something that's happening in the moment.

Positions—binding commitments to buy or sell financial instruments—can be taken, and if there's an error in the simplification, or if a trader figures out how to game a simplification, then the risk of loss may be as large—or even larger—than the underlying positions and may cause even larger repercussions in the market at large if a too-big-to-fail firm gets into trouble. There were simplification errors, among others, in the case of the London Whale. This also happened with subprime mortgages. Imagine that I have hundreds of thousands of transactions being done on the trading floor, and thousands of instruments are then packaged into securities such as subprime CDO (collateralized debt obligation) securities.⁴ No financial firm can have three people checking every single loan or trade and every single number or every single activity of every single employee. The billions of dollars in legal settlements related to flawed simplification processes are a testament that the risk managers and C-suite (the top managers, e.g., the CEO, CFO, COO) of the too-big-to-fail banks failed to catch the risky behavior. Many risk managers and executives no longer have their jobs. A lot of regulatory scrutiny has gone on since then, and a lot of work has been done on how to improve this governance, how to enhance the oversight of large-scale activity, how to test for weaknesses in simplification, and how to be on the lookout for risky behavior.

That said, now imagine an infiltrator into the organization who operates as a “bad” trader, rather than as a “good” employee on the trading desk. This is a very real risk that's not too hard to imagine: infiltration of the critical, too-big-too-fail financial institutions in an economy, infiltrating to exploit the simplification process and to execute harmful trades and cause enormous losses. In fact, we can take that scenario a little farther and think about it as what could be

4. You may have read about these in such books as *The Big Short* (Michael Lewis, *The Big Short: Inside the Doomsday Machine* (2010).)

a bad-agent problem. For example, there are lower-regulated areas, where hedge funds and other types of opaque financial vehicles may be formed and thereafter have little oversight or transparency. It's not difficult to imagine a scenario in which a bad agent forms fifteen or twenty or fifty different vehicles and uses them to attack banks or important companies in the target country. The securities lawyers know that the bad agent can do 4.9% positions without making disclosures, and across twenty or thirty or forty or fifty vehicles, that agent can have 100% control of a target. Attacking the target could cause pandemonium. Such chaos could lead a government to act—for example, by closing down trade or markets—but to act could lead to a real crisis in a currency due to loss of confidence in that government's actions. These types of deleterious transactions are easy to imagine in everything from gold to individual stocks to the currencies of countries.

Another example: Think about big transactions someone might do to change the power hierarchy of currencies. You're probably all aware, for example, that the US is the dominant global currency and a lot of the US government's Treasury securities are held overseas, for example by China. Some people spin out a financial-warfare scenario wherein China announces, "We are not going to buy US Treasury securities anymore." But a more devastating type of move might be for China to say, "Well we're still going to buy your treasuries, but we want them now to be denominated in the Chinese currency." This would potentially unseat the US currency as having the dominant role it now has. It would be a substantial game changer and thus a financial-warfare threat.

D. Financial Warfare: A Defense

Why am I so passionate about the topic of financial warfare as something we all need to be thinking about? Well, in words attributed to Winston Churchill, "Although personally I am quite content with the existing explosives, I feel we must not stand in the

path of improvement.”⁵ And, boy, is financial warfare the next improvement! I’ll give you a contrast: According to the statistics that fly around in the press (that may or may not be correct on this point), I can launch an intercontinental ballistic missile and send it out ten thousand kilometers in thirty minutes. Well, financial signals are transmitted in microseconds. A microsecond is one millionth of a second. To put that into a context for you, a microsecond is to a second as one second is to eleven and a half days. So very quick.

So, from a financial warfare perspective, the conclusion is that it may be a huge Achilles’ heel to be so dependent on such financial signals. This is certainly so, if you think of some of the firms attacked in the latest downturn and the tremendous government intervention required to save them. And, not all firms were able to be saved, causing enormous job loss and economic loss.

So what do you do about financial warfare and the vulnerability of the markets? I think we need to have some early-warning systems. For example, think about a national guard of financial markets. We need at-the-ready support in the same way that we need to have a military who oversees and protects our nation. We need to be ready for potential attacks on our financial markets and key firms—whether cyberattacks or financial warfare of the types I’ve discussed today. There also are other examples of possible lines of attack on key financial infrastructure, including on the operational workings of financial firms and markets.

A big help would be to embrace big data as our friend, rather than be gun-shy about exploiting it due to something like the National Security Administration controversy. For every set of facts that can be used to hurt you is the flipside: facts that can help you, providing useful information to combat financial warfare. So someone needs to generate some brilliant ideas as to how to create appropriate legal frameworks that can put the information together

5. Source unknown. *See* http://en.wikiquote.org/wiki/Talk:Winston_Churchill.

so defenders can look at it and so help prevent attacks. With the creation of bitcoins and other cyber tools, the race is on to an even greater degree, given their opacity yet growing role in our daily lives.

Two quotes sum up my advice on these matters: The first, attributed to Thomas Jefferson, “Eternal vigilance is the price of liberty.”⁶ The second, from one of my favorite ladies, Mae West, “Those who are easily shocked should be shocked more often.”

QUESTIONS & ANSWERS

Q: About bitcoins: Is there a future for them?

A: Well, I have to say that the technology underlying bitcoins in terms of the mathematics is a huge step forward computationally. I think many applications are going come out of it—certainly in the security arena in general, and I don’t mean just military security. I think corporate and intellectual-property security as well. I do think that bitcoins are a bit misunderstood in terms of being considered a project of the libertarian community. Many of its features would appeal to the libertarian community, but certainly the appeal of a currency that can’t be expanded to a huge money supply that’s backed just by confidence but that has some kind of limited supply harkens back to a gold-backed currency. If bitcoin can get through some of its rough starts (as with the MtGox exchange’s bankruptcy following a massive cyber theft of its bitcoin accounts),⁷ I do think that—besides the confidence factor—one of the greatest benefits is that anything shortening the line between the two transaction points of the supplier of funds and the user of funds is bound to have

6. The source of the quote is probably originally not Jefferson, but John Philpot Curran, an Irish orator, who said in 1790, “The condition upon which God hath given liberty to man is eternal vigilance.” See <http://www.monticello.org/site/blog-and-community/posts/eternal-vigilance>.

7. See, e.g., *MtGox Bitcoin Exchange Files for Bankruptcy*, BBC News: Technology (28 Feb. 2014), <http://www.bbc.com/news/technology-25233230>.

success. And this has virtually zero transaction cost. That has a lot of benefits. It has a lot of security. Imagine the difference between something tracked through financial institutions that can be exposed to the type of attack I talked about earlier versus something that can be done through a direct electronic handshake between the folks who are spending bitcoins and those who are taking them. Bitcoin transactions have a lot of elements that we need in today's marketplace, given some of its frailties. Whether bitcoin can survive without what no doubt comes with all financial transactions—the need for the appropriate legal framework underneath it—needs to be addressed. I think folks will try to figure out a way to do that. Whether it will be something better than how the International Tribunal in The Hague works, I don't know; I think the jury is out on that. Warren Buffett has said he thinks bitcoin is toast in ten years. But I'm not so sure. I think that there is a real need to have some type of instrument like that, a global type of money.

Q: Aren't you really talking about putting a tripwire in the control of the government in some way, shape, or form so that with a continual monitoring of the transactions that are happening so fast that someone can determine that foul play is afoot and trip the market and stop it?

A: Certainly, a tripwire type of tool would be good. But that's a dicey process because anything that trips the markets also creates an endless amount of fear. When markets shut down unexpectedly or without an explanation, the aftermath can be terrible. One need only look at the lines outside banks during the Great Depression and again during the Great Recession—or on the flight of capital from countries in whom there is a loss of confidence—to confirm that investors do not like unexpected shutdowns.

**BACKLASH:
INVESTIGATING ATHLETES' INVISIBLE INJURIES***

Steve Fainaru
Mark Fainaru-Wada†**

**I
INTRODUCTION**

Mark: What we'll first do is tell you a little bit about how this book Steve and I wrote got started, what it entails, and how it also morphed into a documentary *Frontline* produced, which was accompanied by controversy some of you may have heard about.¹ And we'll go back and forth a bit. And then I would really prefer to have Q & A, because we think what you guys want to know is much more interesting oftentimes than what we have to say.

Let me tell you a little bit of background about how we started doing this. We're both investigative reporters on a unit at ESPN that does largely investigative work. We work mostly for a show called *Outside the Lines*, and for ESPN's website, ESPN.com. A couple of years ago, I got assigned to do a story about a gentleman named Fred McNeill, who had played about twelve years in the NFL; he'd been a linebacker for the Minnesota Vikings. He'd been very successful; he'd played in a couple Super Bowls. But football had become a means to his second career—interestingly enough, as a lawyer. He became a

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1. The *Frontline* documentary can be viewed at <http://www.pbs.org/wgbh/pages/frontline/league-of-denial/>.

lawyer upon retiring from football; he was successful at that, too, and became a partner in his firm. At one point he ended up specializing in workers' compensation law, representing former Vikings and some of his former teammates against the Vikings, arguing for compensation for their injuries. But by the time we found Fred, he was suffering from early-onset dementia. He had lost his partnership in his firm. He no longer could practice law, and he was being taken care of on a daily basis almost entirely by his ex-wife and his two sons, then in their 20s.

The interesting story about Fred was that by the time we hooked up with him, he was suing the Vikings in California for workers' compensation damages. Part of his argument was that his early-onset dementia had been brought on by football. As far as we knew, Fred was the first case—at least the first workers' compensation case—in which someone was arguing that football had brought on his dementia. As some of you probably know, in California, the workers' compensation laws are generous. So long as Fred had played even a single football game in California, he could make his case in California against the Minnesota Vikings.

At the time, I knew nothing about this subject. There had been great reporting on Fred's story, already, but I hadn't covered it at all. My background before getting to ESPN had largely been covering this steroid scandal.

In the course of the reporting on Fred's story, we interviewed a doctor in West Virginia named Julian Bailes. Bailes was one of the foremost neurosurgeons in the country, and he had been a former Pittsburgh Steelers team doctor. When I met with Bailes, I started to learn more of what had happened on this issue in the NFL. Bailes was familiar with our book *Game of Shadows*, which I had written with my colleague, Lance Williams.² He asked us, "Hey, are you guys going to do a book on this?" And I said, "Well, no. Surely not." All this

2. MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS* (2007).

great reporting had already been done: the *New York Times* had done fantastic reporting, and one of our colleagues at ESPN—Peter Keating—had done terrific work on this. *GQ* had done two stories, including one on Fred McNeill. So we said, “No, someone else is going to do a book.” And Lance said, “I don’t think anybody is doing a book. You guys should do it.”

So I came home. I came back to talk to Steve, in the Bay Area, where Steve and I both live. (Steve always tells me at this point in the story to make sure I point out that I didn’t come back to the Bay Area to *our* house, as if we still lived together and shared bunk beds. I live in Petaluma, in the North Bay, and Steve lives in Berkeley, in the East Bay.)

Steve: (Not that you don’t suggest that, on occasion.)

Mark: So I came back and said to Steve, “Hey, look. We’ve always wanted to work together. We never have worked together before, and we’ve always said it would be fun if we could come up with a project.” (We’re only-siblings; it’s just the two of us. Nobody could have survived raising more of us.) So I said, “What do you think?” And Steve is—all kidding aside—the best reporter I know. I am biased, obviously. But he is just a phenomenal reporter, as is evidenced not only by his Pulitzer, but by everything else he does. One of the many talents he has is seeing stories and narratives with great clarity. So I began to tell him the contours of what I knew, and Steve was saying, “We’re doing this book. Absolutely. Let’s do it.” And the next thing you know, we put together a proposal, and we had a book project. Which of course was great, except that then we actually had to write a book.

So over the next two years, we proceeded to do the reporting on this story, which became *League of Denial*.

II

THE LEAGUE OF DENIAL STORY

Mark: The *League of Denial* story really begins with the story of Mike Webster. Webster was one of the greatest centers to play the game of football—arguably *the* greatest center to ever play the game. He’s a Hall of Famer. He played in Pittsburgh, for the Steelers. He is a blue-collar guy who grew up in northern Wisconsin. He was sort of smallish for a linesman; people thought there was no way he’d make it—he was just too small. But he literally willed himself to escape a pretty horrid upbringing in northern Wisconsin and make it as an NFL player—not only make it, but make it as a Hall of Famer and one of the greatest players ever.

Webster was a smart player, as well—part of the bedrock of four Super Bowl teams, the dynasty of the Steelers in the 1970s. People thought he was very sharp; people thought that he would either become a coach upon retiring or that he might become a broadcaster, like his teammate Terry Bradshaw. But what in fact happens to Mike over the course of his retirement after a seventeen-year career is a trajectory in which Mike basically goes mad. He loses his mind. And his family experiences this; it happens before their very eyes. Mike gets to the point that he becomes not only estranged from his wife and his kids, but unrecognizable to the people around him. He spends increasing amounts of time away from home, staying for a spell in a storage closet above the weight room in the Kansas City Chiefs’ stadium, or intermittently sleeping in a train or bus station.

The book tells in vivid detail about Mike’s descent into madness. Eventually, he becomes a prolific letter writer, and he writes thousands of letters that he sends to his wife or leaves for his lawyer. He starts to battle the NFL, believing—recognizing—that he is losing his mind because of having played football. He starts to

wage a war against the NFL and to recover compensation for this late-appearing, but devastating, injury.

Mike Webster hires a lawyer named Bob Fitzsimmons in Wheeling, West Virginia, who is a powerful guy. Fitzsimmons becomes a friend of Mike's, who lets Mike stay in the basement of his law office. He finds Mike lying on the couch, and Mike uses the bathroom in the law-office basement to shower and bathe. Fitzsimmons would go down into the basement of his law office and find towels and water all over the place because Webster is living out of the office, or he's living out of a car.

Mike is sending these letters to Fitzsimmons and others that are just heartbreaking: at one point they might be somewhat coherent screeds against the NFL and what has happened to him, and at other points they are just heart-wrenching babble, basically—the incoherent ramblings of a man you just don't understand.

Mike is also physically completely destroyed as a human. His feet, as the *Front Line* documentary shows at the end, have massive cracks in them, and his fingers are so crooked he can't hold a pen. Duct tape becomes his favorite tool, and he starts duct-taping his hands together so that he can use a pen to write. At one point he had such bad disc issues that his kids, swimming in the pool with him, could see the disc bulging from his back. He is a destroyed human being. Ultimately, Mike dies at the age of fifty, of a heart attack.

Normally, a guy dies of a heart attack and nobody would think twice about saving his brain. But this is where the NFL story changes. Mike Webster becomes patient zero in the NFL's concussion crisis.

Here's how that happened: On the day Mike dies in Pittsburgh, his story becomes a huge media story—the news talks about the tragic trajectory of his life. He ends up in the Allegheny County coroner's office, where a young neuropathologist, Bennet Omalu, just happens to be on call.

Omalu is a Nigerian-born doctor who has come to the states. He is one of the most educated guys you will ever meet. He collects one college degree after another, including, at this time, finishing up his education in neuropathology. So he's very curious about the brain. But Omalu is an interesting character in that he doesn't know a thing about the NFL. When Mike Webster's body showed up in the coroner's office, Omalu asked, "Who is Mike Webster?" In Pittsburgh, the idea of asking, "Who is Mike Webster?" caused the people in the coroner's office to ask, Who is *this* guy? But Omalu has no idea. He doesn't even know what a Super Bowl is.

But Omalu has heard the little bit about Webster's trajectory on the news. He decides to study Webster's brain. There's a powerful moment when he's doing the autopsy on Webster. They are finishing up, and he says to his assistant, "Fix the brain"—which is saving the brain to be studied. The assistant looks at him as if to say, "What, are you crazy? This man died of a heart attack. Why are we fixing his brain?" And Omalu says, "Fix the brain." He's determined.

It's that decision by Omalu that changes the course of the NFL. It sets us off on this concussion crisis and where we end up today.

Steve: Mark came back to the Bay Area and started talking about this story, this book. It took me about thirty seconds before I was on board. There were a couple of very simple and clear reasons I was so ready: One was what the NFL has become in this country. Most of us are NFL fans. I have season tickets to the 49ers; I played football in high school; I love the sport. And yet, at the same time—like many people—I had become more and more aware of the force that football is in our culture. I will cite just a few statistics that illustrate what the NFL has become as a business entity: The NFL now earns \$10 billion a year as a business. Half of that revenue—\$5 billion—comes from television, including \$2 billion a year from our own employer, ESPN, which broadcasts Monday Night Football. ESPN broadcasts seventeen games a year, and for that privilege they

pay \$2 billion. When you start to do the math, you realize that ESPN is producing the equivalent of a Hollywood blockbuster film every week.

The reason for those immense earnings is quite simple. Almost all of the most highly rated television programs right now are NFL games. When you look at the list of the highest rated shows on TV, nearly all of them, invariably, every year, are NFL games. The twenty highest rated shows ever are Super Bowls. Some 111.5 million people watched the last Super Bowl. The NFL has become a huge cultural force. What Mark was describing is what we're looking at now: this huge cultural force in our lives, this huge business, which is now faced with an existential problem that's not just on the fringes of the sport, but at the very heart of the sport.

What is the sport doing to the athletes we watch every weekend, those we grow to love and become attached to? What is the cost of our entertainment? That question, I think, is at the heart of our book as we tried to examine what Mark has described—this chain of events that began with Mike Webster and with Bennet Omalu looking at Webster's brain—a chain of events that has led us to where we are today, where now more than fifty NFL players have been diagnosed post mortem with brain damage that neuropathologists believe is related to playing football.

As we began to approach this book, we started to think about how we were going to unpack the issue, deconstruct it. We decided to look at it chronologically—from its very beginning—which is natural in a project of this magnitude, in trying to track a thirty-year history.

A. Bennet Omalu

Steve: So we started with Bennet Omalu. Coincidentally, he lives quite close to us—in Lodi, in the heart of the San Joaquin Valley—about an hour and a half from San Francisco. One of the first things we wanted to do was find out who is this guy who changed

the NFL—who is this man who has changed professional football as we know it? So we drove out to Lodi. Omalu had asked to meet him at a restaurant called Wine and Roses, which became his preferred spot for us to interview him. It's a restaurant that's sort of out of the movie *Sideways*. It's like that: it's an oasis in the middle of the agricultural heart of San Joaquin County.

So Mark and I are sitting there in the Wine and Roses, and people are eating quiche and drinking mimosas. It's a bucolic scene. We're waiting for Omalu. And after a few minutes this gleaming Mercedes pulls into the parking lot, and out of this car walks this impeccably dressed Nigerian guy. It's a weekend, and he's the best-dressed guy in the place. He is probably 5'6", maybe. And he walks into the restaurant carrying his files—all his files—and his computer, which he then plops down. One of the very first things he does is open up his computer and start showing us basically the greatest hits of his autopsies. So here, in the middle of this restaurant is a disemboweled guy. Not even football players, just sort of random autopsy photos. "This is another case that I worked on." And Mark and I are kind of looking around and wondering is anybody else actually seeing this?

Mark: I've put my fork down at this point. I'm done with breakfast.

Steve: Exactly. I'll have the water.

And then Omalu proceeds to unspool this amazing tale of his own life. As Mark said, he is one of the most brilliant guys you will ever meet. He has I think at this point four different degrees, including an MBA and a Masters in Public Health. He has three medical certificates, including this certificate in neuropathology. But he has almost completely no self-awareness. None. He'll say and do pretty much anything.

Mark: Maybe you were going to say this, but I thought that when we got the random autopsy photos, nothing could be more strange, and I was like, “Okay, I’m almost out of here.” But I’m riveted, of course. Then, though, he starts to unspool a tale of sexual dysfunction over the course of . . .

Steve: He starts talking about his own sexual dysfunction as a motivating force. And then he starts talking—very matter-of-factly—about how he believes he can talk to the dead. So while he’s actually doing the autopsies he’s carrying on a dialogue with, say, Mike Webster. You know—“Mike, please let me help you.” “Let me tell the world what happened to you.” That kind of thing. This habit comes from Omalu’s history in Nigeria. He grew up as one of the Igbu tribe, whose members’ beliefs are based on a sort of fusion of Roman Catholicism and Igbu tribal mysticism. It’s those beliefs and rituals that inform a lot of his work, including the work he has done with the brains of deceased NFL players.

The first time Mark and I interview this guy takes probably four hours. I remember driving back to San Francisco, thinking, “We’ve got it made. You couldn’t make this guy up. We’re set.” Since that first interview, Mark and I have been working to fix our impressions of Omalu but never really doing him justice because the guy is just so unbelievable. We interviewed him, I don’t know, maybe thirty hours. We kept going back. He handed over his emails and his files, and these proved to be incredibly helpful.

Our next goal was to try to figure out what the NFL had done about this evidence of brain injury in its football players. The implications for the NFL were obvious if it was seeing a person who had played seventeen years in its league and finding that his brain was riddled with tau protein. (Tau protein essentially strangles the brain cells—strangles the neurons and turns the player into a completely different person, as it had Webster.) If this is what the NFL was seeing, then the implications for football were obvious. But

what did the NFL do when it was presented with this information? What it did, basically, was . . .

Mark: Tell them what Omalu thought it would do. (You can swear, probably. Right? Can we swear?)

Steve: We want to get it verbatim. Omalu, among other things, loves to swear. I mean, it's part of his thing. And, as we say in the book, he makes the word "motherfucker" sound like poetry. And he speaks about himself in the third person. So when he made this discovery, he said something like, "I thought that they would look at Omalu and treat him like a hero." He goes, "I thought they would just look at this motherfucker and give him a big, wet kiss."

B. The NFL's Own Research

Mark: That's not what happened. Basically, in the 90s, the NFL had created something called the "Minor Traumatic Brain-Injury Committee" in response to a number of very high-profile concussions in NFL players, including Steve Young and Troy Aikman. There is a very poignant scene in both the film and the book in which Aikman, while playing for the Cowboys against the 49ers in the NFC championship game in '93, suffers a concussion and then ends up in the hospital completely unaware of why he's there, what happened to him.³ He ends up repeating the same series of questions to his agent over and over again—who then becomes quite alarmed. Two weeks later, Aikman plays in the Super Bowl but remembers none of it. To this day Aikman really has no memory of the Super Bowl that year.

Despite the Minor Traumatic Brain Injury Committee, Paul Tagliabue, who was the NFL commissioner at the time, came to the

3. The film can be viewed at <http://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/>.

issue of brain injury from the very beginning with a very high degree of skepticism. There is a scene we describe in the book in which Tagliabue is on a panel in New York with two other commissioners—Gary Bettman, of the NHL, and David Stern. The moderator is the late journalist David Halberstam, a very famous guy—famous for the stories he did at the *New York Times* and many, many books. Halberstam had covered Vietnam at length and had butted heads with the Pentagon. Halberstam asks Tagliabue about the concussion issue, and Tagliabue starts reeling off all these statistics: “Well, when you really look at it, it’s really not that big of a deal. You’re talking about one concussion for every 22,000 plays. And we feel like we have it under control.” And Halberstam cuts him off and says, “I feel I’m back in Vietnam hearing McNamara give statistics.”

So because this issue is embarrassing for the league, it creates the Minor Traumatic Brain Injury Committee and assigns not a neuroscientist to head it, but a rheumatologist, who happens to be Tagliabue’s personal physician. He also happens to be the team doctor for the New York Jets, who has been putting players with concussions back on the field repeatedly, for years. The rest of the committee is packed mostly with other NFL doctors who have also been downplaying concussions. And this becomes the NFL’s research arm.

One of the things this research arm does is attack Omalu’s own research. Omalu publishes a paper in *Neurosurgery*.⁴ But even that has been co-opted by the NFL in many ways: the editor of *Neurosurgery* is a doctor for the New York Giants. The MBTI committee tries to get the paper retracted, which in the scientific community is almost unheard of: to get a paper retracted that has already been peer-reviewed, its error has to rise to the level of something like plagiarism or fraud. It just does not happen very

4. Bennet Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 *NEUROSURGERY* 125 (July 2005).

often. But the NFL goes on a very, very concerted attack on Omalu. And at the same time it uses the same journal to publish its own research. Over a period of six years starting in 2003, the NFL publishes something on the order of sixteen papers. The thrust of the research is that concussions are fine. No problem. You could get an unlimited number of concussions and not be affected at all. It's okay, their research showed, for an NFL player to go back into the same game after being knocked unconscious without any possible long-term effects. The papers state repeatedly that NFL players don't get brain damage. Period. Full stop. Somehow professional football players, when they get to the level of the NFL, are almost superhuman; they're impervious to brain damage. This obviously contradicted what Omalu is beginning to publish.

C. Other Players, Other Studies, a Congressional Inquiry, and a Class Action

Steve: After Omalu published the Webster paper, other neuroscientists looked at other brains, and those brains too had the same chronic traumatic encephalopathy. Neuroscientists like Julian Bailes were beginning to publish their own, very disturbing, research suggesting that NFL players have higher rates of incipient dementia and higher rates of clinical depression—pretty much anything related to brain damage or brain disease. So the NFL is consistently trying to shoot down this information at every turn—in the press, in these same scientific journals. At the same time that the science is moving along, the NFL is engaged in a sort of delaying action.

The science is moving along, and more and more players are being diagnosed as they die. And there are more and more incredibly grotesque and horrific episodes involving these players. One guy kills himself by ingesting antifreeze. Another player drives his pickup truck at 110 miles an hour on the opposite side of the interstate until he dies in a fiery collision with a tanker truck. Later, of course, players like Dave Duerson and Junior Seau shoot themselves in the

chest—in Duerson’s case, explicitly to preserve his brain for science. In Seau’s case, he didn’t leave a note, but it is suspected that he may have had the same intentions. So it got to the point where the NFL really had to deal with it.

The NFL was basically at the point of a legal bayonet—brought to a moment in which they had to acknowledge that this was an issue in some way. They were hauled before Congress. The current commissioner, Roger Goodell, was embarrassed. Then, of course, a huge number of players ended up suing the league for allegedly concealing the link between football and brain damage over a period of some two decades. It started off as a single lawsuit in the state of California that was ultimately consolidated into a mass class-action tort in Philadelphia. Before this previous NFL season the two sides reached a settlement for \$765 million, which at first blush may sound like a lot. But when you look at the revenue that’s now generated by the league—and, even more important, when you look at the number of players who have now been diagnosed with some form of neurological illness—the money really can go fast.

Mark and I did a story on the football–brain damage issue for ESPN about six months ago, raising the question whether this was enough money for all the players, because we don’t really know at this point how many brain-damaged players are out there. The people who were behind the settlement attacked us and said that it wasn’t true, that they had done the math and they had actuarial data to show that it was going to be more than enough money. But then, three months later, the judge in the case said she wasn’t convinced; she needed more information.

That’s where things stand now. The NFL is very much trying to put this issue behind them. But I think what we’re seeing, on a number of different levels, is that we’re at the beginning.

QUESTIONS & ANSWERS

Q: In the *Frontline* trailer, a majority of those hits would [appear to] cause mild traumatic brain injury. For those of us who do plaintiffs' work, we know the consequences of that because car accidents produce the same kind of injury. Isn't it just game over? There is no way that that game can be played without the kinds of injuries these folks are sustaining. Isn't that your view?

Mark: Well, it's not my view. That's a leading question. (I'm sorry. I couldn't resist.)

Q: Just so you know, I haven't even begun.

Mark: I think that is the question at the youth level. I think, frankly, everybody is beginning to ask themselves [whether, for the young, the game is over]. You know, there is a poignant part we describe in the book that is also in the film, where Omalu, for the first time, is presenting his findings to an NFL doctor—Joe Maroon, who has worked for the Steelers for years. Maroon keeps saying to Omalu, "Do you understand the implications of what you found?" And Omalu says, "Yeah. I think I understand," in his Omalu kind of way. Then Maroon says, "No, I don't think you do." And he says it again. Three or four times they go through this. Omalu finally says, "Okay, what are the implications?" And Maroon says, "If ten percent of mothers begin to see football as dangerous, that's the end of football as we know it." That's an ominous statement.

Steve and I did a story for ESPN a few months ago reporting that indeed participation in Pop Warner football is down ten percent over the last two years. The medical director for Pop Warner football—Julian Bailes, whom we talked about earlier—believes that this decline is a direct consequence of the issue around concussions.

But I think the issue at the NFL level is a different story. I mean, players have known for years that playing the game could possibly destroy their bodies. It was an accepted consequence. They knew they might end up with shredded knees. They would need shoulder

replacements, hip replacements, everything. There is a really poignant part in the film of an interview of [Jim Otto] for NFL Films in which he describes very clearly his understanding that he is basically committing his body to destruction by playing the game. But what he and virtually every other player would now tell you, those who are around, is that they didn't understand that their brains might be damaged by playing this sport.

Now, no player can argue at the NFL level they don't understand that risk, too. I think we're past that point. So now the question is, What *is* the sport, and what do you want it to be? What risks do players want to accept, playing? I think Steve and I feel similarly on this. I don't like to speak for my brother, but I will.

Steve: Oh, yeah. Right.

Mark: You know, one of the things that appeals to people about the NFL—and to us, frankly—is that it's a brutal, violent, destructive sport. People love that about it. The NFL is built on its violence. There is a litany of DVDs—and there were VCRs—of the greatest NFL hits. That's what the league sold for years: its violence. Now it's trying to sell safety in some fashion, both at the youth level and at the professional level. And I'm not sure that's really possible.

So on the one hand, I think there is clearly a dramatic shift in where we are. But I don't buy the idea that for the NFL the game is over. It is, again, a \$10 billion industry. As Steve noted, 111 million people watched the Super Bowl last year, despite the fact that we know all of this now about concussions.

Q: With all respect—your book is fantastic, by the way.

Mark: Thank you.

Q: Great book.

Mark: Here comes the "but."

Q: That's what everybody says when I stand up. Seems to follow me around wherever I go.

The issue is not whether the guys who are playing major college football or professional football are basically involved in a question of informed consent—because they now know the story, and they know what it is.

The issue for people like us—who have children and grandchildren who may be interested in playing football—is this: What is going to be the effect on the 99% of the kids who start playing football but are never good enough to make it at the big-time college level or in the NFL? We aren't going to have an answer to that question unless somebody starts studying the brains of those young people whose lives may take a different trajectory than they would have if they hadn't been involved in football. That seems to me to be the real societal issue here. Not what happens to the very, very, very small percentage of players who end up playing professional football.

And if I could add (and actually at some point get around to asking a question here), I am an avid sports fan, okay? There are only two sports that train their players to hit harder and do damage to the opponent to try to gain a competitive advantage. (I'm going to leave boxing out for now, because I can't even get my head around where that fits in here). Of those two, one is obviously professional football. The other is hockey. You hit. You hit hard. You check. And at least hockey has some rules about not hitting opponents when they don't have the puck on their stick, and other such things.

Here's my question: Isn't the plain and simple fact that with the training aspects of football along the way—high school, college, and now professional—the players have gotten to be so big, so fast, so talented that no equipment manufacturer is ever going to be able to stay out in front of this thing and protect these people? And don't we really have to be worried about the kids who never become the professional players?

Mark: Yes. Where to start? Regarding the issue of the players' getting bigger, in our book we describe what Tim Gay, a physicist at

the University of Nebraska, has to say about the physics of the game. He has calculated that the amount of kinetic energy—basically the amount of destructive force—that is generated at the line of scrimmage in an NFL game has doubled over the last forty years. The amount of force being generated now he analogizes to basically unloading the chamber of a .357 magnum into the defense. Every single play. It's that much force.

For all its research, the NFL itself did some biomechanical work that didn't get a lot of attention but was really quite revealing—about the amount of violence taking place on the field. On some of the most destructive hits, the amount of force being absorbed by some of these players is basically like getting hit in the head with a ten-pound cannonball traveling at thirty miles an hour. And that is happening a lot.

One of the things that got the NFL in trouble was that it was trying to do exactly what you are suggesting: create a concussion-proof helmet. Of course, a lot of neuroscientists recognize intuitively that protecting against a concussion with a helmet is essentially impossible because a concussion is an injury that is occurring, of course, inside your head. But the NFL plowed ahead with it. Riddell, which was the official helmet maker of the NFL, picked up on the issue and commissioned its own study at the University of Pittsburgh. This resulted in Riddell's purported claim that their helmet reduced concussions by thirty-one percent, which a lot of people knew immediately could not have been true. The FTC investigated Riddell's claim and agreed that it had no basis. Riddell ended up pulling the advertising.

So I do agree—and I know my brother does, without his saying so—that the game is inherently violent. And that's one of the reasons why we all like it. The idea that this is somehow going to change, or that we're going to be able to mitigate the violent nature of the game in some way? I don't think so.

Nor do I necessarily agree that this is totally a kid's issue. I do think we may get to a point with just the NFL where we will know the prevalence of this disease. Fifty-four brains of NFL players have been examined, and fifty-two were found to have chronic brain damage. But no one really knows what the incidence is. If it turns out that it is something on the order of fifty percent and that thousands of players are getting this—I do think that a moment will come when we're all going to have to sort of take stock and say, "Okay, well, what is it that we're really rooting for?" But we're not nearly there yet.

Q: From the medical viewpoint, wasn't it true that in the CTE studies, it wasn't so much the single concussion, or successive concussions the following year, or the next—wasn't it the fact that the first concussion wasn't allowed time to heal? Didn't the studies show it was the repetitiveness of having concussions that didn't have a clearance period—when the second concussion happens on top of the first one before it's totally healed—that really leads to the CTE?

Mark: Well, I think the science really still is emerging on this issue. A lot of questions still remain. The theory of repetitive brain trauma is that CTE is not so much a result of the obvious hits—where, for example, we see a wide receiver get blown up by a defensive back—the footage that gets replayed time and again on ESPN and on every network. The theory is that CTE results more from the plays that Mike Webster incurred at the line of scrimmage, that were happening on every single play on every single down. In that case, in Webster's era, those guys were practicing and hitting all of the time in practice.

Now players are hitting less in practice. If there is any change the league has made to address the issue, I would argue that this is the most significant—minimizing the amount of practice-time hitting that goes on. Ann McKee, who has now looked at more brains of former NFL players than anybody, and her colleagues at Boston University will tell you that they've looked at the positions of the

players who have been diagnosed: most of them are offensive or defensive linemen or linebackers, right? The theory goes that those are the people who are not incurring these big, obvious hits but rather experiencing the repetitive-impact nature of the sport, time and again. Of course, that's the worst answer for the NFL, because you can't change that. The same goes for youth sports.

Q: I've got a question. I come from the frozen north, in Canada. You made some reference earlier to hockey, in terms of there being at least some rules in hockey that control these things.

I should tell you this, by way of an observation: In Canada, in the states where hockey is prevalent, the same sort of issues with concussions have arisen. But, as you probably know, hockey is unique among professional sports in that hockey allows fighting. Encourages it. And one of the things we've seen—and the people who follow hockey will know it—is that in the last three or four years every hockey team seems to have its enforcer, its tough guy. In the last three or four years, a number of those enforcers—people who are admired because of their toughness and their physical abilities—have committed suicide after their careers, or in the midst of their careers. These include Derek Boogaard, from the Minnesota Wild; Rick Rypien from the Vancouver Canucks; Wade Belak, from the Toronto Maple Leafs. Do you know—you or any of your colleagues—is there anything ongoing in terms of looking at that aspect of that sport? In Canada, hockey is infused in our culture to the degree—perhaps even more—that football is in your culture. Nonetheless, in the last two years, for the first time in Canadian history, more kids are playing soccer than are playing minor hockey.

So, to your knowledge, has there been any study done of this enforcer vigilante mentality in professional sports? In hockey?

Mark: There are definitely studies going on around the issue of brain damage from hockey. And the NHL is facing its own lawsuit, as is the NCAA. I don't know of anybody who's looking specifically at

the incidence of CTE in enforcers, but there is definitely research going on around hockey. There is also research going on around soccer and lacrosse. I mean, they are definitely looking at those questions.

Steve: For a parent, these are incredibly difficult questions. Mark and I were on the Stephen Colbert show a few weeks ago, and the first question was, “So, you guys are killing football.”

I don’t think we have any aspiration to be known as those guys, because we really love the sport. I think I’m like a lot of parents. The sport is great, and, undeniably, it has a lot of really great qualities. As does hockey. Do we want our kids to be ruled by fear of what might happen to them? I think for me the answer is no. So where do you draw that line, particularly when the science isn’t advanced enough to help you make that decision? I think that that’s true of all these sports. Soccer is starting to experience this, as Mark mentioned, as is lacrosse. So is any sport that involves any kind of head trauma. We are just going to have to see where it goes.

III

BACKLASH: WAVERING SUPPORT

Mark: One of the questions we get repeatedly is about the tension that exists because we work for ESPN, which—as Steve pointed out—spends \$2 billion a year on televising football and about how that has played out for us. It played out in a very dramatic way that shows you the sort of power of the corporate entity—the NFL as a corporate entity and ESPN as a corporate entity.

About a month or two after Steve and I started this book, we ran into an old colleague of Steve’s. He worked for the *Washington Post* and was Steve’s boss at the *Post*; he was now the managing editor at *Frontline*. His name is Phil Bennett. And Phil asked us what we were doing, and we told him about *League of Denial*. It wasn’t

titled “League of Denial” at that point, but we told him about the book. And he said, “Geez; that’s something *Frontline* should do.” And he said, “Would you guys be interested?”

We, of course, didn’t know a thing about documentaries. I mean, we’re both print hacks who knew virtually nothing about television until we got to ESPN. And still don’t, in many ways. But we knew, obviously, about *Frontline*. It’s one of the great journalistic entities around—not just in television—they just do fantastic work. So we said, “Sure, that sounds great.” And that agreement launched what became a fifteen-month partnership.

When ESPN heard that *Frontline* was interested in partnering with us, ESPN suddenly said, “Hey, that sounds really good; we’d like to be a part of that.” So ESPN became a co-producer of the documentary. It was a *Frontline* production all the way. But ESPN would be part of it. And of course, as ESPN employees, we knew we were going to be generating a lot of information as we went about the reporting of the book, so we thought it was important, if we came across really good news or newsworthy stories, to provide those to ESPN as they were happening.

So we began a partnership of about fifteen months that could not have worked more flawlessly, in which we produced I think maybe nine different stories for ESPN, many of which became TV stories, also for *Outside the Lines*. Our stories were also moved to *Frontline*’s website and co-branded as a Frontline/ESPN production. These were powerful stories that we were proud of.

One of the first stories we did, as we started to look into Mike Webster’s issues, grew out of time we spent with a lawyer we talked about earlier, Bob Fitzsimmons, in Wheeling, West Virginia. As we were going through all of Webster’s medical records and legal documents, we found a piece of paper that showed that the NFL’s disability board—the group affiliated with the NFL that awarded money based on injuries in football—had determined that in fact Mike Webster had injuries to his brain as a result of playing football.

Fitzsimmons would describe the document as a “smoking gun” to us, and it was the first time that we’d seen a document that acknowledged football’s associating brain damage with its sport, despite very public denials of the opposite over the next decade or two. So we did that story.

We did another story. You know, Junior Seau’s death set off this crazy, unseemly battle for his brain because everybody wanted to be the group that diagnosed and determined whether Junior Seau’s brain had CTE. That story developed into revelations about how the NFL had inserted itself into the effort to [get access to] Seau’s brain, and they directed it away from Bennett Omalu and from Ann McKee at Boston University, who had been talking very publicly—to the National Institutes of Health—about the link between football and brain damage. And the NFL had insinuated itself into the science through its own researchers. So Junior Seau’s story got a lot of attention for both ESPN and *Frontline*.

So everything was moving along swimmingly towards what was going to be a joint airing of the film and the book’s coming out on October 8th. About two months before that . . .

Steve: Less.

Mark: Maybe a month or six weeks before that, we’re in Los Angeles at a sort of television-critics preview. They have a week of previews, in which all the networks show their upcoming shows. PBS holds a panel for the critics, in which they are revealing *League of Denial* for the first time. And there is a trailer, which you just saw. So, for the first time, the title *League of Denial* is out there in a very public way. And at the very end of the trailer, Ann McKee, the doctor from Boston University, says, “I am very concerned that virtually every single player is going to have this.”

So we have this PSB panel for the critics. Everything seems to be going fine. Our boss from ESPN—our direct boss, immediate

boss—is there. We talk about the book and the documentary. Everybody is very happy about it.

Well, about two weeks after that Steve and I are at home (not our same home). And we get a call from our boss, who says—in a formal sort of way (and he’s not a formal guy at all; it’s almost as if he’s reading from a script), “So, uh, ESPN is no longer going to be, uh, identified as branding or being part of the documentary.” Steve and I were like, “What? Huh?” And they said, “ESPN is no longer going to be part of the documentary.”

Needless to say, we were shocked. Troubled. Dismayed. Wondering what the hell was going on. We flew back to Bristol, Connecticut, to try and get some answers. And while we were in Bristol, the *New York Times* published a story reporting that, two or three days before ESPN pulled out of its partnership with *Frontline*, the commissioner of the league—Roger Goodell—had met with the head of ESPN, John Skipper, had had lunch, and had complained about the documentary. Subsequently, ESPN had pulled its name from the documentary.

It was a complete and total nightmare, and would have been for any journalist. The worst message you could possibly get: it raised all the questions that Steve and I have confronted for years, about if you’re going to be working at ESPN, what are the implications of working for a place that obviously has a large financial relationship with the NFL?

That was a really troubling turn of events for us. We had colleagues who were just beside themselves. Could we continue to work there? What did this mean? What were its implications? So, on the one hand, it was a really horrible event. But on the other hand, what ended up happening was that our bosses—and our main boss, the head of ESPN—assured us that this was a corporate issue; they were just taking our name off it. But nothing would change. “You guys are still part of this documentary; you can still cover the story.” And we were still going to cover it in the same way.

And, indeed, what ends up happening over the course of the next six weeks, and then when the book and the documentary come out, is that ESPN runs excerpts of the book and airs excerpts of the documentary, and we're on a ton of shows, talking about the book and the documentary.

The end result of this very odd, surreal circumstance—which is not a good one for journalism—is that it actually pushes the book and the documentary even more; it draws more attention to it. The ratings for *Frontline*, when the documentary airs, are through the roof. And the book hits the *New York Times* Bestsellers List. Though we're still wary, we end up in a much more comfortable place because ESPN has backed up what it said it was going to do. Yet overall, it very much put into focus the tension in working at a place that has this real conflict of interests. Steve, what would you add to that?

Steve: I think that was an excellent summary.

Mark: Thank you.

Steve: Of our four days of hell.

Mark: We like to call it the implosion.

Steve: You know, for Mark and me it obviously cut both ways. On the one hand, our immediate editors were totally behind us, as were all our colleagues. It's hard to describe how huge ESPN is. It's owned by Disney; I think forty to fifty percent of all of Disney's revenue now comes from ESPN. It's just huge. Something on the order of like 5000 people work in Bristol, alone. And we work for its investigative unit, which is probably the biggest investigative unit in the country of any news organization.

Mark: Not just sports.

Steve: Not just sports. But in context—in the context of ESPN—what we described in the book is just a cubbyhole. It's a very, very, very small part of what ESPN does. But, as Mark said, ESPN has this very awkward identity as being a place that is almost always investigating the very products it is selling. It's not just the NFL. The NFL just happens to be ESPN's biggest product. But it's all the sports: it's the NBA, it's MLB, it's the NHL. It's CrossFit, right? Mark is doing a story on CrossFit. And ESPN has a contract to broadcast CrossFit. So it is a very strange thing. On the one hand, in our concussion story, the corporate interests of ESPN came into play in a very dramatic way. But the journalistic interests of ESPN ultimately held together, which was uncomfortable but gratifying in the end.

And that's where we are now. After the implosion, we're back to doing what we do. In many ways, ESPN has used this event to double down on the issue, and the demand for these stories continues long after the book and the film. And, even now, we're continuing to do stories that directly implicate the NFL. So I think we're feeling basically pretty good about it.

But the experience definitely raised an issue that is recurring more and more. Journalism is facing these kinds of issues now because of what's happening to newspapers, because of the way funding of news is changing, because of the different entities getting involved now that are very different from the sort we all grew up with. So corporate interests are inevitably going to come into play. Journalists like us are going to be constantly caught in the middle of this tension between the people who are funding the journalism and the people who are the target of our journalism—and sometimes they're actually the same people.

Mark: That's the *Frontline* story.

IV

BACKLASH: CRIMINAL CONVICTION

Mark: Before the NFL concussion issue came to light, I was covering a story known as BALCO [Bay Area Laboratory Cooperative]. It was a steroids case that developed in northern California in which some of the highest-profile athletes were implicated for using performance-enhancing drugs. The most notable was Barry Bonds, the home-run king of baseball.

When Lance Williams and I got assigned at to do this story for the *San Francisco Chronicle*, we learned there was an ongoing federal investigation into this. A grand jury had been empanelled to hear testimony from the players. They were treating it like a regular old drug case, basically, in which they were calling the players in to testify. Then they would move up the food chain and go after the drug dealers.

The players were coming in to the federal grand jury on a weekly basis. Of course, this is playing out in a courthouse in San Francisco in quiet. Media were showing up every Thursday, because that was the grand jury day, taking pictures of Bonds walking into the grand jury. So were Jason Giambi and a bunch of other great athletes, including Marion Jones and Tim Montgomery, the world-record holder in the 100 meters. So we begin covering this story.

Of course, to us, the story is not the drug dealers. It's not a traditional drug story. The story is the athletes who are using these drugs, arguably to perpetuate a fraud on the public. So we want to know who is using, and who is using what. And because it's a federal investigation, it's generating not only grand-jury testimony, but a ton of investigative documents that.

In February of 2004, four guys are indicted whom you have never heard of. By now, people have heard of Victor Conte, the CEO of BALCO, who was the legendary mastermind behind the whole

deal. But four guys are indicted.⁵ My colleague had covered courts, and cops, for years. He presumed that when the indictments were announced, all the documents would be released. They would be made public, and we would know who had done what. Well, in this case the government redacted the names of all of the athletes who'd been identified as purchasing the drugs from the drug dealers, or they were identified in generic terms. So where Marion Jones would have been mentioned, the document just said, "an Olympic athlete." Or where Barry Bonds was named, it just said, "a major league baseball player."

So for our purposes and for those of virtually everybody who was interested in the story on all sides of the case, from prosecutors to defense, it appeared that the case was being prosecuted upside down. This was not a deal where you were going after traditional drug dealers—somebody who sold crack on the corner for twenty-five bucks. In this case, the players were the story. The holy grail of reporting that story was, What did the players tell the grand jury?

When the indictments had come down, the judge laid a protective order on the material in the case. The grand jury had done its business. It had completed its term. The indictments had been dealt with. Now there was a protective order on the material the grand jury had considered. But we wanted to know what had the athletes said? When they were coming out of court after testifying, of course and asked whether they had used any of these substances, they had all said, "Oh, no—I never touched a drug in my life. Never touched a performance-enhancing drug. I don't know what you're talking about."

(Here's a funny side story. Jason Giambi shows up at training camp the following spring, after testifying the preceding winter. He's some forty pounds lighter. Someone asks him, "Why are you forty

5. See Press Release, Dep't of Justice, Four Individuals Charged in Bay Area with Money Laundering and Distribution of Illegal Steroids (Feb. 12, 2004), *available at* http://www.justice.gov/archive/opa/pr/2004/February/04_ag_083.htm.

pounds lighter if you didn't use steroids?" And he's like, "Oh, I stopped eating at Burger King over the winter.")

Ultimately, though, we got our hands on grand-jury testimony. We had a source who believed that the prosecution was being directed in a way that protected the athletes. We had other stories generated by other sources that all said the same thing. Some were parts of documents. But when we did start to get our hands on grand-jury testimony, it obviously did not please the court. At one point the court held a hearing, and one of the defense lawyers volunteered that everybody should sign a document saying they [hadn't divulged any information about the athletes' testimony]. So everybody, of course, had to sign a document saying they'd not been sources, and everybody did.

Well, fast forward. The government decides to come after us, the reporters, and get us to reveal our source. We ended up getting subpoenaed to testify. Now, if this had been a state case, there would have been no problem: California has a shield law that is fantastic. But because it was federal law, we had no protection. So we went to court and argued that we should not have to reveal our source. We were sentenced to up to fifteen months in prison. The only nice thing the judge did that day was to stay the sentencing while the Ninth Court of Appeals considered our conviction. We went to DC and started lobbying on our own behalf and for a federal shield law.

Early the next year, 2005, the President of the United States—George W. Bush, at the time—congratulated us on doing great work, even though it was his attorney general who had subpoenaed us. But on Valentine's Day, the government announced that they had found our source by separate means: they had gotten a defense lawyer who had provided the information to us to admit that he had done so by getting a former private investigator of his, with whom he'd had a falling out, to wear a wire. The defense attorney ended up with a three-year sentence for obstruction of justice and contempt of court.

(That was, by the way, four to ten times more than any of the drug dealers got in the case.)

The defense attorney ended up serving ten months, getting out early for good behavior. But his life is shredded now. He can't practice law anymore. And I know that's a controversial issue, especially for a roomful of lawyers. For me, it's a personal one: we had sources—not just that one—who were whistleblowers in the truest sense. And they did what whistleblowers do, which sometimes breaks the law.

So that's an abbreviated version of what happened to me.

V

BACKLASH: GETTING SUED

Steve: My story is not nearly as dramatic as what happened to Mark. But I think it illustrates how important it is to stick with the story, and the vagaries of whether you are backed by your institution or not.

In a nutshell, when I was covering the Iraq War, we at the *Washington Post* launched an investigation into the use of private security contractors in Iraq. What we found very quickly was that they weren't governed by any rule of law. They weren't subject to Iraqi law, because they had been granted immunity by the occupation authority after the United States invaded. They weren't subject to the Uniform Code of Military Justice, or any other apparent code of conduct that would have subjected them to prosecution.

This became problematic because there was a growing number of shootings involving Iraqi civilians and these security contractors. What we found was that literally hundreds of these companies had grown up almost overnight in response to what was happening with the American prosecution of the war.

The question became, What do you do about them? The mercenaries, as they were sometimes dubbed, had their own rules, basically. I was investigating one story, and I asked a guy, "Well, what

happens if you get involved in a shooting?” He said, “Well, my company told me that if that ever happens they’ll put me in the back of a truck and spirit me out of the country in the middle of the night.” And that actually did happen. There was one shooting of an Iraqi politician in the green zone in Baghdad, where the shooter got pulled out of the country by his company without any prosecution.

So my story, in a nutshell, was that I was investigating a shooting incident on the Baghdad airport road. It involved a guy named Jake Washbourne, who was from Tulsa and worked for a company called Triple Canopy. He was the team leader of a convoy that was running protective missions to and from the airport, which was very dangerous at the time. He was in a vehicle with three other guys who later testified that, just for fun, he decided to shoot into the windshield of a moving taxi.

When we heard about this, we did a story about it. From a journalistic perspective it was as airtight a story as you could possibly have. I interviewed the three other guys in the vehicle and, in fact, traveled to Fiji to interview the third guy, who was a Fijian. They all gave the same story that they had given to their company and that they later gave in sworn testimony in a lawsuit filed in Virginia.

We ran the story in the *Washington Post*. It created an enormous amount of attention around the rules for these private security contractors. And then it became a chapter in a book that I wrote called *Big Boy Rules*,⁶ in which Washbourne appeared on the cover.

About four years after the book came out, Washbourne sued me and he sued the publisher—Da Capo, which is a division of Perseus—in Tulsa. And so I got dragged into the suit. And really, if Oklahoma had had an anti-SLAPP statute like California’s,⁷ the suit

6. STEVE FAINARU, *BIG BOY RULES: AMERICA’S MERCENARIES FIGHTING IN IRAQ* (2009).

7. The law provides one sued “primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of

would have immediately gone away. But because Oklahoma doesn't, the case didn't.

To make a long story short, I ended up in a mandatory settlement conference. I came to the conference, committed not to be in any way involved in any kind of settlement around this issue because the story was rock-solid. There was no way I was going to settle a lawsuit for something that was so clearly not a triable offense.

So we get into the conference, and the first thing the judge says to me is, "Do you have all the documents that you describe in your book?" And I said, "Yes, of course your Honor; I have a whole box full of them." And he said, "Well, I don't see how he has any case against you." He said to me, "The one thing you should know that it's probably going to cost, I would say, \$300,000 to \$500,000 to try the case." And I said, "So be it." We were being represented by the lawyer for the publisher. But the only ones in the room with the judge were the insurance company for the publisher, a representative of the publisher, and me. The publisher and its insurer were very much of a mind to get rid of the case at that point and to try and reach some kind of a settlement. But I, of course, was opposed to it.

The compromise they reached was to have me completely dismissed from the case. And I refused to support anything they did under the settlement that would involve my journalism.

One of the things Washbourne had brought into the suit was my use of his photograph, which had been given to me by a source and which we'd used on the cover. The judge said, "You know, I think it is questionable—whether you can use that to market your book. A likeness of him." The publisher then worked out a very small settlement with Washbourne around that picture. But it had nothing

grievances," CDP § 425.16(a), a special motion to strike. *See* <http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-16/>.

to do with the journalism. I felt uncomfortable with it, even then, because I just felt that this was a guy who was accused of committing what was really a crime by people who had given sworn testimony. And even on an issue such as a photograph, he shouldn't have been cut any slack. But that's the way it went down.

My point is, I guess, that good journalism depends a good deal on the business relationships that exist and the support a reporter has as a journalist.