

THE LEGAL EAGLE

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Juvenile Strikes Count in Three Strikes Law

by Maria Wood

"Three strikes and you're out" doesn't just refer to baseball, it also applies to those who commit serious crimes in the Garden State. New Jersey is one of 28 states that have three strikes laws on the books.

Passed in 1995, New Jersey's Three Strikes Law is based on a federal law, also passed in 1995, known as the Violent Crime Control and Law Enforcement Act. The law imposes mandatory life imprisonment for repeat offenders convicted of serious crimes at the federal level.

In February 2022, the New Jersey Supreme Court ruled that offenses committed while a defendant was under the age of 18 could be counted as a strike under the state's Three Strikes Law, known as the Persistent Offender Accountability Act. New Jersey's **statute** sets a mandatory sentence of life without parole for anyone convicted of a serious offense three times. Those offenses include murder, manslaughter, aggravated assault, kidnapping, sexual assault and robbery.



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U.S. Supreme Court Rules in Favor of Praying Football Coach

by Suzi Morales

In June 2022, the U.S. Supreme Court upheld the right of a football coach employed at a public school to pray on the field after games. The Court's decision illustrates the complexity of interpreting the five clauses in the U.S. Constitution's First Amendment.



The case, *Kennedy v. Bremerton School District*, involves Joseph Kennedy, an assistant high school football coach for the Bremerton School District in Bremerton, Washington, who prayed alone and with students. When the school district learned of Coach Kennedy's activities, they communicated with him

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Right to Remain Silent? Not About Passcodes

by Michael Barbella

Increasingly, the nation's courts need to look to the U.S. Constitution to interpret laws dealing with 21st century technology as digital devices become entrenched in everyday life, as well as in criminal activity.

Computers, cellphones, and other electronic devices were centuries from development when the U.S. Constitution was drafted; however today these devices have triggered numerous legal disputes over privacy, tracking, and unlawful searches. In August 2020, New Jersey's top court was asked to address whether a criminal **defendant** must turn over the passcode to a lawfully seized cellphone.

Robert Andrews, the defendant in the case, claimed a Fifth Amendment right against self-incrimination. The New Jersey Supreme Court ruled in *State v. Andrews* that cellphone passcodes are not protected by the U.S. Constitution's Fifth Amendment guarantee against self-incrimination.



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The case

Robert Andrews is a former Essex County Sheriff's Officer. In 2015, Andrews alerted an alleged drug dealer, Quincy Lowery, about a pending narcotics investigation. The pair were members of the same motorcycle club and had known each other for about a year when Andrews supplied Lowery with information about the investigation and advice on how to avoid prosecution. According to court documents, Andrews and Lowery exchanged 114 calls and text messages over a six-week period in the spring of 2015.

An Essex County grand jury **indicted** Andrews on official misconduct, hindering apprehension, and obstruction charges. Although law enforcement knew about the text messages after questioning Lowery, investigators could not access the

call records and text messages on Andrews' devices (he had two cellphones) without his passcodes. The records were not available from Lowery because he had already wiped his phone. The government eventually obtained a court order to force Andrews to reveal his cellphone passcodes, which Andrews claimed was a violation of his Fifth Amendment rights.

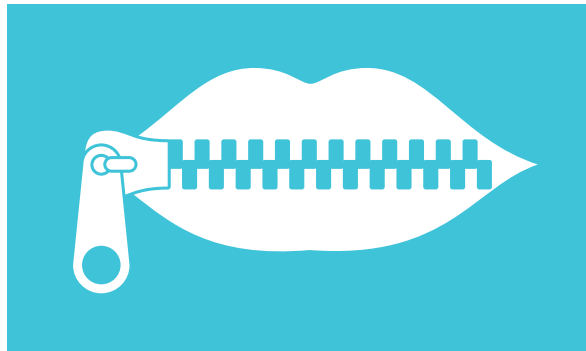
The right to remain silent

The U.S. Constitution's Self-Incrimination Clause in the Fifth Amendment prevents the U.S. government from forcing individuals to reveal damaging information about themselves, in other words "give testimony" or be a "witness against oneself." Specifically, the Fifth Amendment states in part:

"No person...shall be compelled in a criminal case to be a witness against himself..." People who invoke this right can refuse to answer questions or provide incriminating documents about themselves to authorities.

Advancement in technology has muddled the waters about what it means to be a "witness against oneself." For instance, there is a lot of personal information on our cellphones. By revealing a phone's passcode to law enforcement in order for them to gain access, should that be considered "giving testimony?"

The Self-Incrimination Clause was central in deciding *State v. Andrews*. The issue was whether providing a phone's passcode was protected under the Fifth Amendment (like providing testimony). Ultimately, the Garden State's top court decided, agreeing with two New Jersey lower courts, that Fifth Amendment rights and New Jersey common law



protections do not apply to cellphone passcodes.

"Although disclosure of a passcode is evidence of ownership and control of a

cellphone and its contents, the State has already established both of those facts," Justice Lee A. Solomon wrote for the majority in the court's *State v. Andrews* ruling. "The passcodes then, as amalgamations [mixtures] of characters with minimal evidentiary significance, do not themselves support an inference that a crime has been committed, nor do they constitute 'clues.' Said another way, where ownership and control of an electronic device is not in dispute, its passcode is generally not **substantive** information, is not a clue to an element of or the commission of a crime and does not reveal an inference that a crime has been committed."

Reaching a 'foregone conclusion'

The New Jersey Supreme Court relied heavily on past U.S. Supreme Court rulings to decide *State v. Andrews*, specifically citing the 1976 case of *Fisher v. United States*, where an exception to the rights afforded under the Fifth Amendment was established. The "foregone conclusion" exception allows law enforcement to compel the production of information that adds "little or nothing" to the information the government already knows.

The *Fisher* case dealt with divulging tax documents and stated: "The existence and location of the papers are a foregone conclusion, and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."

Although the New Jersey Supreme Court conceded that cellphone



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passcodes themselves can have testimonial value, it applied the U.S. Supreme Court's "foregone conclusion" exception from the *Fisher* decision to the passcodes at issue in *Andrews*, determining they had "minimal value" as evidence.

"The theory is that if the government already knows of the existence of the evidence, the defendant is not being required to incriminate himself," explains Thomas Healy, a professor at Seton Hall University School of Law.

Professor Healy, who teaches courses in criminal procedure and constitutional law, says the foregone conclusion exception applies only where the government can show: 1) that it knows of the existence of the evidence; 2) that it knows the defendant possesses the evidence; and 3) that it can establish the authenticity of the evidence without the defendant's testimony.

"In *Andrews*, the Court held that all three requirements were met because the government knew the phone had a security password, knew the defendant had the password for his cellphone, and could show the password was authentic if it unlocked the phone," Professor Healy says.

Some courts have ruled that the 'foregone conclusion' exception does not apply to the disclosure of security passwords, Professor Healy notes. For example, a Pennsylvania case, *Commonwealth v. Davis*, decided by the Supreme Court of Pennsylvania in 2019, ruled that forcing someone to disclose a password to a lawfully seized computer violated the Fifth Amendment Self-Incrimination Clause. A lower Pennsylvania court applied the "foregone conclusion" exception; however, Pennsylvania's high court said revealing a password/passcode is "testimonial." The court's majority ruled: "A passcode is necessarily memorized, one cannot reveal a passcode without revealing the contents of one's mind."


Room for doubt

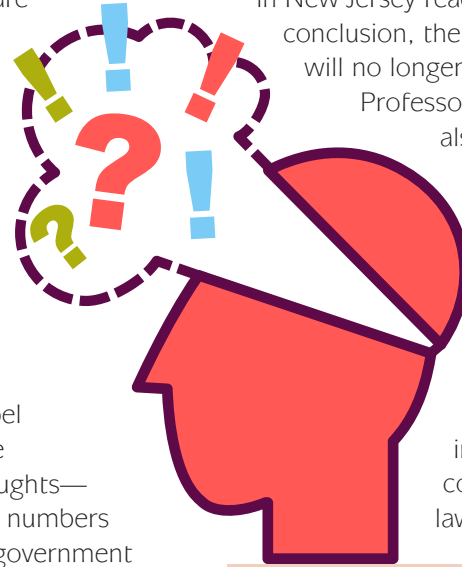
Like the majority in the Pennsylvania case, New Jersey Supreme Court Justices Barry T. Albin, Jaynee LaVecchia, and Walter F. Timpona, disagreed with their colleagues, arguing that memorized passcodes are "classic contents-of-mind material" and should be "off-limits" under the Fifth Amendment's Self-Incrimination Clause.

"We are at a crossroads in our law. Will we allow law enforcement—and our courts as their collaborators—to compel a defendant to disgorge undisclosed private thoughts—presumably memorized numbers or letters—so that the government can obtain access to encrypted smartphones?" Justice LaVecchia wrote in the court's **dissenting opinion**. "In my view, compelling the disclosure of a person's mental thoughts is **anathema** to fundamental principles under our Constitution and state common law. There is no real difference between forcing one to divulge the mentally stored combination of a safe—the very example the Supreme Court has used more than once as a step too far in ordering a defendant to assist in his or her own prosecution—and forcing one to divulge the passcode to a smartphone."

In January 2021, *Andrews'* attorneys petitioned the U.S. Supreme Court to review the case. The American Civil Liberties Union and Electronic Frontier Foundation, a nonprofit organization that defends civil liberties in the digital world, urged the Court to review the *State v. Andrews* ruling. In May 2021, the Court denied the petition. Pennsylvania's *Davis* case was also **appealed** to the U.S. Supreme Court and was denied a review.

"Because the U.S. Supreme Court declined to hear the [*Andrews*] case, that ruling will remain the law in New Jersey for the foreseeable future. However, federal courts have final say on the meaning of the U.S. Constitution, so if a federal court in New Jersey reaches a contrary conclusion, the result in *Andrews* will no longer be good law,"

Professor Healy says. "It is also possible that the U.S. Supreme Court could address the question in a different case. If that happens, it won't help the defendant in *Andrews*, but it could change the law." 



DISCUSSION QUESTIONS



1. What do you think of the Self-Incrimination Clause of the Fifth Amendment? Is it clear enough for these modern times when there are more ways to incriminate yourself? Explain your answer.
2. The article discusses two cases—Pennsylvania's *Commonwealth v. Davis* and New Jersey's *State v. Andrews*—with differing arguments and outcomes based on the "foregone conclusion" exception. Which argument do you find more persuasive? Explain your reasoning.
3. The world has changed a lot since the U.S. Constitution was written. What other modern advances can you think of that would be hard to govern via the U.S. Constitution?

over time about possible limitations on his activities. Eventually, he was suspended and did not return to coaching the following year.

In August 2016, Coach Kennedy sued the school district in the U.S. District Court for the Western District of Washington to get his job back. The district court ruled for the school district, a decision that was **upheld** by the Court of Appeals for the Ninth Circuit. Coach Kennedy's attorneys **appealed** that decision to the U.S. Supreme Court. After sending the case back to the lower courts, the U.S. Supreme Court granted the request for review in September 2021.

Schools can't punish quiet, personal prayer

The U.S. Supreme Court held 6-3 that the school district could not fire Coach Kennedy for "engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment."

The First Amendment protects five freedoms—speech, religion, press, assembly and the right to petition the government. Specifically, the First Amendment says:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances."

The *Kennedy* case examined three specific clauses of the First Amendment—the Establishment Clause, the Free Speech Clause and the Free Exercise Clause. The school district stated that it was concerned that allowing Kennedy to pray publicly would mean that it was endorsing his religion, which would violate the First Amendment's Establishment Clause that bans government endorsement of religion. Kennedy, on the other hand, argued that the school district violated his rights under both the Free Speech and Free Exercise clauses.

"These Clauses work in tandem," Justice Neil Gorsuch wrote in the Court's **majority opinion**. "Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."

The majority opinion focused on Kennedy's actions after his discussions with the school board. By that time, he had limited his prayer to silently praying alone on the 50-yard-line. He did not invite students to join him, though students and others prayed alongside him. The majority in *Kennedy* took the position that, given the "private, quiet prayer" of Coach

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MORE RELIGIOUS LIBERTY CASES DECIDED AT THE U.S. SUPREME COURT

In addition to *Kennedy v. Bremerton School District*, the U.S. Supreme Court handed down rulings in two other religious liberty cases at the end of their term in June 2022. Those cases are *Carson v. Makin* and *Shurtleff v. Boston*.

Carson v. Makin

The case of *Carson v. Makin* concerned a Maine state program that provides tuition money to students in rural parts of the state to attend private schools if there is no public high school in their area. If a public high school is not an option, the state will pay up to \$11,000 toward tuition at a private school, provided the school is not religious.

The two schools at issue in *Carson* were Bangor Christian School and Temple Academy. In court documents, Maine alleged that both schools discriminate against other religions, as well as LGBTQ+ students and teachers.

In a 6 to 3 decision, the Court ruled the state of Maine could not withhold state-funded tuition vouchers to a school simply because it is religious.

"There is nothing neutral about Maine's program," Chief Justice John G. Roberts wrote for the Court's majority. "The State pays tuition for certain students

at private schools—so long as the schools are not religious. That is discrimination against religion."

In a dissent, Justice Sonia Sotomayor wrote, "This Court continues to dismantle the wall of separation between church and state that the Framers fought to build. The majority, while purporting to protect against discrimination of one kind, requires Maine to fund what many of its citizens believe to be discrimination of other kinds."

Chief Justice Roberts, however, contended, "Maine's decision to continue excluding religious schools from its tuition assistance program...promotes stricter separation of church and state than the Federal Constitution requires."

While *Carson* was making its way through the court system, the Maine Legislature strengthened the Maine Human Rights Act, which bans discrimination based on race, gender, sexual orientation, ethnicity, or disability. The strengthened law clarifies its scope relating to education, making it clear that discrimination in education based on the above criteria violates the Maine Human Rights Act.

In a statement, Maine's Attorney General Aaron Frey said the education provided by the two schools in question is contrary to public education. "They promote a single

Football Coach CONTINUED FROM PAGE 4

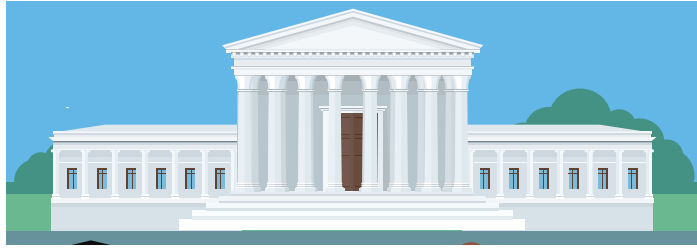
Kennedy, there was not a conflict among the various clauses of the First Amendment in this case.

No more lemons

The *Kennedy* decision also overruled a 1971 U.S. Supreme Court decision that had applied a balancing test to Establishment Clause cases. In *Lemon v. Kurtzman*, the Court established a three-part test, called the Lemon test, in which the court

“must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority” to determine whether the law violates the Establishment Clause of the First Amendment.

According to David Callaway, a religious freedom specialist at the Freedom Forum, a non-profit whose mission is to foster and educate about First Amendment freedoms, the *Lemon* test has not played a major role in U.S. Supreme Court Establishment Clause cases in about 30 years, although lower courts still use the three-factor test. During the oral argument in the *Kennedy* case, Callaway notes that Justices Neil Gorsuch and Brett Kavanaugh made statements indicating a position



that *Lemon* was no longer in use. The majority opinion reflected that.

“In place of *Lemon* and the endorsement test,” Justice Gorsuch wrote in the opinion, “this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”

In Justice Sonia Sotomayor’s **dissenting opinion**, she criticized the consideration of “historical practices and understandings,” stating that,

“While the Court has long referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus.”

Dissent emphasizes coach’s public actions

While the majority opinion characterized Coach Kennedy’s actions as quiet, private prayer not performed in front of students, the dissenting opinion highlighted the coach’s earlier actions, which included inviting students to pray with him, giving religious post-game speeches, and going on a media tour after his case began making headlines. The dissenting opinion also cited *amicus curiae* “friend of the court” briefs

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religion to the exclusion of all others, refuse to admit gay and transgender children, and openly discriminate in hiring teachers and staff,” Frey said.

Jamison Coppola, a spokesman for the American Association of Christian Schools, said in a statement, “We don’t look at it as discrimination at all. We have a set of principles and beliefs that we believe are conducive to prosperity, to the good life, so to speak, and we partner with parents who share that vision.”

Shurtleff v. Boston

In a unanimous decision, the Court ruled that the city of Boston was wrong to prohibit a Christian group from flying a ceremonial flag in front of city hall. There are three flagpoles in front of Boston City Hall—one flies the U.S. flag, another flies the state flag of Massachusetts and the third usually flies the flag of Boston. Occasionally, however, the city allows certain groups to temporarily replace the Boston flag and fly their own flags to raise awareness for certain causes, for instance, gay pride. Over a 12-year period, the city allowed 284 such requests from various groups.

In 2017, the city rejected a request

from Camp Constitution, who wanted to fly a “Christian flag.” The flag was red, white and blue, and featured a red cross on a blue square. Boston officials wanted to avoid a violation of the U.S. Constitution’s Establishment Clause, which forbids government endorsement of religion. The director of the group, Harold Shurtleff, sued on free speech grounds.

The Court held that the use of a religious-themed flag in this way on government property was not government speech and, therefore, was not a government establishment of religion. The Court’s ruling declared that Boston violated Camp Constitution’s free speech rights and should not have banned the organization from flying its flag.

“While the historical practice of flag flying at government buildings favors Boston, the city’s lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag railings [flag poles] as private, not government speech—though nothing prevents Boston from changing its policies going forward,” Justice Stephen G. Breyer wrote for six members of the Court (the other justices wrote **concurring opinions**).

—Jodi L. Miller



Three Strikes **CONTINUED FROM PAGE 1**

State v. Samuel Ryan

The New Jersey case involved Samuel Ryan, now age 49. In 1996, when Ryan was 23, he was sentenced to life without parole under the New Jersey Three Strikes Law. His adult crime was robbing a gas station and shooting the attendant. The gas station attendant survived. The Three Strikes Law was applied to Ryan's case because he was convicted of two armed robberies when he was 16 years of age.

Ryan **appealed** the decision, arguing the convictions while he was young should not be counted. His appeal noted that in recent years, the U.S. Supreme Court has ruled in a number of landmark cases that juveniles should not be subject to the same harsh penalties as adults.

In a 4-2 decision, the New Jersey Supreme Court denied the appeal and upheld the state's Three Strikes Law, allowing that, even if offenses were committed while a person was 18 or younger, those convictions may count toward the three strikes.

In the **majority opinion**, Justice Lee Solomon pointed to Ryan's conviction at 23 after serving in prison for his juvenile crimes. "Defendant was not only undeterred by incarceration, but his crimes committed after release from state prison grew increasingly violent."

Justice Barry Albin dissented, saying the ruling counteracted evolving judicial philosophy regarding juvenile sentencing.

"No one disputes that Ryan has committed serious crimes warranting punishment and a lengthy sentence," Justice Albin wrote. "But a law that mechanically imposes a grossly disproportionate sentence, a law that strips a court from considering the incapacitating element of youth, and a law that denies the court all discretion in fashioning a sentence based on a youthful conviction cannot be reconciled with our federal or state constitutional **jurisprudence**."

In his dissent, Justice Albin quoted Governor Phil

Murphy, who said in 2020, after signing criminal sentencing reforms related to juveniles, "The social, emotional and mental maturity of a youthful defendant is complex and nuanced. That very fact makes it critical for the age of a defendant to be factored by the court in criminal culpability."

Strict interpretation of the law

Laura Cohen, Director of the Criminal and Youth Justice Clinic at Rutgers Law School, says the court based its ruling on a strict interpretation of the state's law.

"Because the law didn't specifically say youth offenses could not count as strikes, then the legislature must have meant for those offenses to be included," Professor Cohen says and adds that the ruling is an example of how checks and balances work between the judicial and legislative arms of government.

"Unless a court finds a statute violates the constitution, the court is going to defer to what the legislature did," explains Professor Cohen, who has also worked with the New York City Legal Aid Society's Juvenile Rights Division. "But at the same time, statutes can always be amended."

Evolving juvenile jurisprudence

Because of the *Ryan* decision's limited scope, it will not impact other court rulings that may take into account a young person's developmental immaturity and impaired decision-making ability when sentences are imposed, Professor Cohen says. Recent decisions in New Jersey and at the U.S. Supreme Court have struck down lengthy sentences for juveniles convicted of serious crimes, she notes. In January 2022, a month before the *Ryan* ruling, the New Jersey Supreme Court handed down a decision in the combined cases

of James Comer and James Zarate.

At age 17, Comer received a 75-year sentence for a series of armed robberies in 2000 during which one person was killed. In 2009, Zarate was sentenced to life in prison when he was 14 years old for his part in a murder.

In the Comer/Zarate ruling, the New Jersey Supreme Court said a "mandatory sentence of at least 30 years without parole, which the murder statute requires, is unconstitutional as applied to juveniles." Therefore, the

Court ordered that lengthy sentences for young persons could be revisited after 20 years.

Due to the Court's ruling, Comer, who has served 22 years of his sentence, is immediately eligible to apply for **parole**.

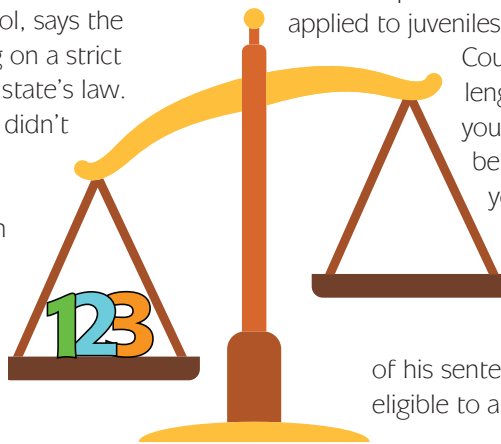
Zarate will be able to petition for release in approximately three

years.

According to a brief filed in the *Comer* case, the American Civil Liberties Union estimates approximately 60 inmates could be affected by the state's ruling. Meanwhile, a survey of juvenile life without parole sentences by the Sentencing Project, a Washington, DC-based research and advocacy center working to reduce incarceration in the U.S., found 1,465 people nationwide serving life or what amounts to life sentences for crimes committed as juveniles.

Psychology & the Court

The U.S. Supreme Court has held that juveniles, even when convicted of serious crimes, should be treated differently. In a 2004 article titled, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty," published in *American Psychologist*, the authors argued "there is sufficient indirect and suggestive



Three Strikes CONTINUED FROM PAGE 6

evidence of age differences in capacities that are relevant to criminal blameworthiness to support the position that youths who commit crimes should be punished more leniently than their adult counterparts.”


The year after that article was published, the U.S. Supreme Court struck down the death penalty for an offender charged with murder when he was 17. The Court’s decision in *Roper v. Simmons* launched what Professor Cohen termed a renewed look at juvenile justice, taking into account the differences between children and adults. In other words, because of their lack of maturity to make good decisions, young people may be less culpable. Because of their youth, they are also more likely to reform as they grow older, she contends. Such factors should come “into play as we consider how children are sentenced,” Professor Cohen says.

Other U.S. Supreme Court decisions have been based on the same philosophy. In *Graham v. Florida*,

the Court struck down a sentence of life without parole for a 16-year-old convicted of burglary. In perhaps the most significant decision relating to juveniles, the U.S. Supreme Court decided in the 2012 case of *Miller v. Alabama* that life without parole should not be imposed on youth even when convicted of homicide. In that case, a 14-year-old was convicted of murder after setting a neighbor’s trailer on fire.

Going back to the *Ryan* decision, Professor Cohen notes that the Court’s reasoning was based on the last strike, when Ryan was 23, not the previous strikes as a juvenile. “So, the argument about lesser culpability and potential for change that attach to adolescence didn’t apply in the same way.”

Professor Cohen notes that states have revised juvenile sentencing in different ways. Some states mandate automatic parole for young persons. Others, like New Jersey, have created a resentencing process. Even though *Miller* and similar cases were decided a

decade ago, Professor Cohen says that juvenile jurisprudence is “still a work in progress.” 

DISCUSSION QUESTIONS



1. What do you think about the New Jersey Supreme Court’s ruling in *State v. Ryan* and their decision to count his juvenile offenses as strikes? Can you think of other remedies that the justice system could have taken to prevent Ryan from committing more crimes?
2. The U.S. Supreme Court has consistently ruled with more leniency when considering juvenile cases, because of their “lack of maturity” and their likelihood to “reform as they grow older.” Do you agree or disagree with the Court’s reasoning? Explain your answer.

Football Coach CONTINUED FROM PAGE 5

filed by students stating that they felt coerced to participate in prayer.

Justice Sotomayor’s dissenting opinion included photos of Coach Kennedy praying in the center of a group of students and emphasized the ban on the establishment of religion by the government, warning against students being forced to participate in religious activity.

“This decision does a disservice to schools and the young citizens they serve, as well as to our Nation’s longstanding commitment to the separation of church and state,” Justice Sotomayor wrote. “Today’s decision elevates the rights of a school coach who voluntarily accepted public employment, over the rights of students required to attend public schools and who may feel obligated to join in prayer.”

In her opinion, Justice Sotomayor wrote quite a bit about the possible coercion felt by students. Other organizations were concerned with that issue as well.

“The ruling will open the door to organized prayer in schools and hinder future challenges to religiously coercive

activity,” the Anti-Defamation League said in a statement issued after the *Kennedy* decision was released.

“Students look up to their teachers and coaches as role models and seek their approval,” Justice Sotomayor wrote.

“Students also depend on this approval for tangible benefits. Players recognize that gaining the coach’s approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting.”

Callaway says reading the majority and dissenting opinions in this case “made it feel like there were two different cases.” He also notes,

however, that the majority’s interpretation of a right to quiet, personal prayer does not represent a major shift in the state of First Amendment law.

Similar NJ case—different outcome

In 2008, New Jersey courts dealt with a similar religious liberty case. *Borden v. School District of the Township of East Brunswick* also involved a football coach that prayed with players, cheerleaders and



Football Coach CONTINUED FROM PAGE 7

other students before and after games. Marcus Borden had been the head football coach at East Brunswick High School since 1983 where he led his team in a pre-game prayer, as well as pre-meal grace. When students and parents expressed discomfort with these religious practices, the coach was asked to stop. He did not, and in 2005 sued in the U.S. District Court for the District of New Jersey, claiming East Brunswick's policy violated his right to free speech. The school district maintained its policies were designed to adhere to the separation of church and state.

The district court sided with Coach Borden in 2006, ruling that the school district had violated Borden's First Amendment rights by making him refrain from participating in team prayers. The court said the coach should be allowed to bow his head and bend his knee when the team captains led the players in prayer. The school district appealed to the U.S. Court of Appeals for the Third Circuit. A three-judge panel **overturned** the lower court's decision.

"The conclusion we reach today is clear," Judge D. Michael Fisher wrote in the court's opinion, "because he organized,



participated in and led prayer activities with his team on numerous occasions for 23 years, a reasonable observer would conclude that he is continuing to endorse religion when he bows his head during the pre-meal grace and takes a knee with his team in the locker room while they pray."

When the ruling was announced, Richard B. Katskee, assistant legal director of Americans United for Separation of Church and State, who represented the East Brunswick School District, said, "The bottom line is that all public school activities, including athletics and cheerleading, should be free from religious pressure, direct or indirect. No student should ever get the impression that you've got to pray to play."

Coach Borden's attorneys **appealed** to the U.S. Supreme Court; however, they were denied a review, which means that the appeals court decision stands. While the Court's decision in *Kennedy* doesn't change anything for the New Jersey case, if a similar case were to be brought today, the facts might be analyzed differently and result in a different outcome.

What Kennedy means for students

Following the decision in the *Kennedy* case, Callaway notes that it is important for students to understand their own rights in public schools. He says

that the Free Speech and Free Exercise clauses of the First Amendment allow students to pray in public schools as long as their prayer doesn't cause a disruption. On the other side of the coin, Callaway says students should not be forced to pray as part of their education. 🗡️

DISCUSSION QUESTIONS



1. In the U.S. Supreme Court's decision in *Kennedy v. Bremerton School District*, do you agree or disagree that Coach Kennedy's free speech rights were violated? Explain your reasoning.
2. The dissenting opinion in the case focused a lot on the possibility of students feeling coerced into praying. Have you ever felt pressured to do something you didn't want to do? How did it make you feel?
3. Compare and contrast the *Kennedy* case and the New Jersey case mentioned in the article. What are the similarities and differences and how do you think they affected the eventual outcomes of the cases? Explain your answer.

GLOSSARY

anathema — offensive; repugnant.

appealed — when a decision from a lower court is reviewed by a higher court.

concurring opinion — a separate opinion delivered by one or more justices or judges that agrees with the decision of the court but not for the same reasons.

defendant — in a legal case, the person accused of civil wrongdoing or a criminal act.

dissenting opinion — a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues.

jurisprudence — the philosophy of law.

indict — to charge someone with a criminal act.

majority opinion — a statement written by a judge or justice that reflects the opinion reached by the majority of his or her colleagues.

overturn — in the law, to void a prior legal precedent.

parole — a conditional release from prison which allows a person to serve the remainder of his or her sentence outside of an institution but under state supervision.

statute — legislation that has been signed into law.

substantive — important, meaningful.

upheld — supported; kept the same.