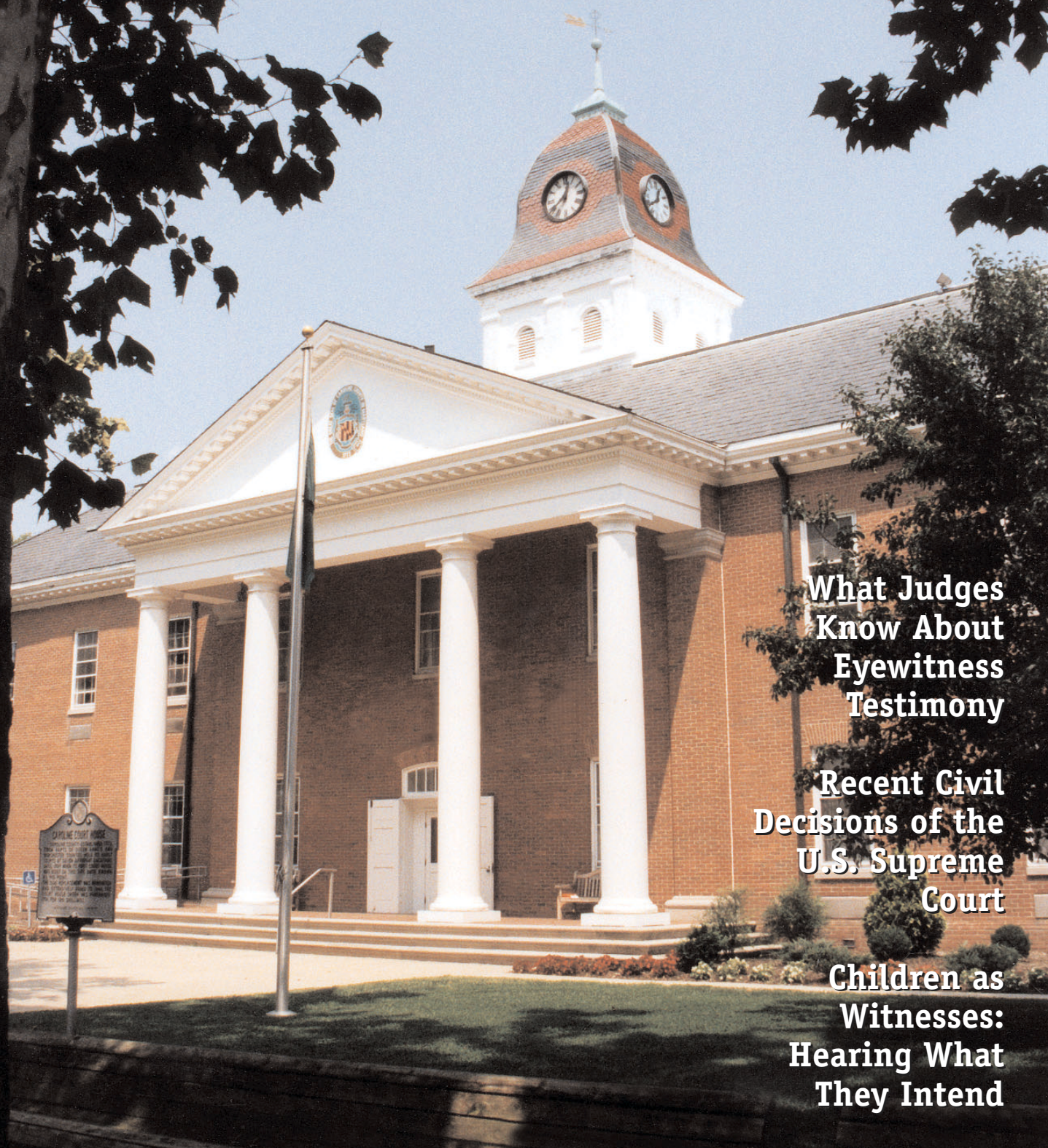


Volume 40, Issue 1  
Spring 2003

# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION



**What Judges  
Know About  
Eyewitness  
Testimony**

**Recent Civil  
Decisions of the  
U.S. Supreme  
Court**

**Children as  
Witnesses:  
Hearing What  
They Intend**

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## T A B L E O F C O N T E N T S

### ESSAY

- 4** Children as Witnesses:  
What We Hear Them Say May Not Be What They Mean

*David B. Battin & Stephen J. Ceci*

### ARTICLES

- 6** A Survey of Judges' Knowledge and Beliefs  
About Eyewitness Testimony

*Richard A. Wise & Martin A. Safer*

- 18** Recent Civil Decisions of the United States Supreme Court:  
The 2002-2003 Term

*Charles H. Whitebread*

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### DEPARTMENTS

- 2** Editor's Note
- 3** President's Column
- 36** The Resource Page

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# Court Review

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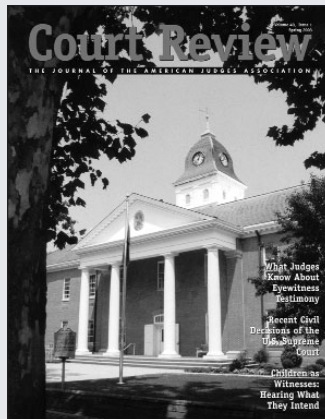
## EDITOR'S NOTE

The lead article in this issue gives you a chance to test your beliefs about what leads to accurate—or to mistaken—eyewitness testimony. For 14 separate propositions on which research has given relatively clear answers, researchers Richard Wise and Martin Safer summarize the conclusions of researchers in the field. They also report the results of a survey of judges that tested judicial knowledge in these 14 areas, plus a few others. Thus, a review of this article will let you compare your knowledge both to other judges and to the best research available today.

Wise and Safer argue that better safeguards against erroneous eyewitness testimony are needed in light of the wrongful convictions proved by DNA testing; a great percentage of those appear to have been based on erroneous eyewitness testimony. It may not be surprising that Wise and Safer, who are trained psychologists, conclude that the best proven method of giving jurors sufficient education in this area is through the use of expert testimony. And, to be sure, there may also be other useful ways of approaching the situation, some of which are also discussed in the article. Nonetheless, Wise and Safer have provided a useful overview of both the state of judicial knowledge and present research, as well as suggested actions the judiciary can take to improve the situation.

The issue also contains Professor Charles Whitebread's annual review of the past year's civil decisions by the United States Supreme Court. As Whitebread notes, last year's decisions included some blockbuster cases: the approval of affirmative action, the striking down of bans on gay sexual relations, further restriction on punitive damage awards, and a turnabout in the Court's federalism revolution. All of the civil decisions of note are briefly reviewed in this article. Last year's criminal cases will be in our next issue.

I will note two other items that I hope you'll review in this issue. The issue includes an essay by David Battin and Stephen Ceci on children as witnesses. They explain some of the communication difficulties encountered when standard English is used with kids between 3 and 10 years old. The essay provides some useful background context to keep in mind when evaluating the statements of children. I would also ask you to read the American Judges Association's President's Column on the facing page. It reprints the remarks given by present president Michael McAdam at last year's annual conference. He provides a useful overview of what the AJA is, and of what it will be doing this year. —SL



*Court Review*, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States, Canada, and Mexico. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 38 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

*Court Review* is in full text on LEXIS and is indexed in the Current Law Index, the Legal Resource Index, and LegalTrac.

Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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© 2004, American Judges Association, printed in the United States. *Court Review* is published quarterly by the American Judges Association (AJA). AJA members receive a subscription to *Court Review*. Non-member subscriptions are available for \$35 per volume (four issues per volume). Subscriptions are terminable at the end of any volume upon notice given to the publisher. Prices are subject to change without notice. Second-class postage paid at Williamsburg, Virginia, and additional mailing offices. Address all correspondence about subscriptions, undeliverable copies, and change of address to Association Services, National Center for State Courts, Williamsburg, Virginia 23185-4147. Points of view or opinions expressed in *Court Review* are those of the authors and do not necessarily represent the positions of the National Center for State Courts or the American Judges Association. ISSN: 0011-0647.

# President's Column

Michael R. McAdam

The following is an edited version of remarks given at the American Judges Association's Annual Educational Conference in Montreal on September 18, 2003.

I'm very honored and humbled to be your President. The American Judges Association is a special organization with special attributes that no other judicial organization possesses. We are uniquely an association **of** judges, run **by** judges, **for** judges. And, we are uniquely an **independent** association of **all** judges.

Every other judicial organization that I'm aware of has either a limited membership criterion (trial judges, Missouri judges, juvenile judges, federal judges, appellate judges, presiding judges, etc.) or it has an open membership but is controlled by someone else and is divided into impervious sections. These are all important and vital associations but not one of them does what the AJA does. We exist to serve **all** judges.

It doesn't matter whether your jurisdiction is limited or general, trial or appellate. It doesn't matter whether you are the chief justice of the supreme court of your state or a part-time municipal judge in a town of 2,000 people—in either case you are a judge and the AJA exists to help you become a better judge. The AJA treats you equally. It doesn't create sealed compartments, divisions, or sections. It is open to allow the free flow of ideas among all kinds of judges. This is a simple yet powerful organizing concept.

There are two people who particularly led me to become involved in the leadership of this association, AJA past president, Judge Terry Elliott, and the late Kansas Supreme Court Chief Justice, Richard Holmes, co-founder of the AJA. I particularly want you to remember Chief Justice Holmes, who began his judicial career as a municipal court judge. He was an honest, fair, intelligent, and straight-talking man. He was a dynamo of energy in a deceptively humble package. He was a true gentleman who had a tremendous influence on those he touched.

Judge Terry Elliott, also from Kansas, inspired me to pursue the course of leadership that I have chosen in the AJA by his example of hard work and dedication.

I had the privilege of working with both Chief Justice Holmes and Judge Elliott on the AJA's Long-Range Planning Committee in the late 1990s (commissioned by then-president John Mutter), along with other past and future presidents: Jerry Gertner, the late Bob Anderson, Leslie Johnson, Chris Williams, and Fran Halligan. One of the regular arguments we had in that committee can be summarized in a question:

*Is the AJA a serious, important judicial organization or is it a fun-loving, social organization?*

After all these years of going to AJA conferences and reading *Court Review* I'm prepared to answer that question tonight. The answer is . . . yes, both.

The AJA has for more than 40 years provided high-quality, low-cost, timely educational programs for judges covering a wide range of subjects of interest to a national judicial audience. Because our members serve on all levels of the state and federal judiciary, we have, necessarily, provided a broad selection of judicial educational. This must be the ongoing mission of the AJA.

If we were to not offer such programs at our annual conferences, very few judges would attend. If we didn't publish articles of high quality in *Court Review*, very few judges would remain members of AJA. Thus, it's important that we pursue this worthy goal by continuing to offer first-rate education at our conferences and by publishing articles of substance in *Court Review*. If we want the AJA to be the voice of the judiciary, we must continue these worthy pursuits.

The AJA has provided something else for over 40 years at our annual and midyear meetings: friendship. Perhaps, regarded by some as an unimportant goal of such meetings, to me it is the social contact and camaraderie that marks an AJA gathering. It's what I look forward to the most when I plan to attend an AJA event and I don't think my experience is unique. This camaraderie is a bond that holds the AJA together and is therefore something to be encouraged and continued.

During the next year we will continue to pursue both goals. We will have a strong educational program at our annual conference in San Francisco in October 2004 with an emphasis on the critical topic of judicial independence. Before that, we will have a unique midyear meeting this winter in Savannah, Georgia, sharing ideas and fun with our colleagues from the National Association for Court Management.

During the next year, we will strengthen our important relationship with the National Center for State Courts when the AJA's Executive Committee meets in Williamsburg, Virginia, and sees the National Center firsthand (for some committee members for the first time). At that meeting, the Executive Committee will look to the future of the AJA and discuss the important issues facing it. And through it all we will continue to make new friends, renew old acquaintances, and have a great time. It promises to be an important and fun year ahead for the AJA.



# Children as Witnesses:

## What We Hear Them Say May Not Be What They Mean

David B. Battin & Stephen J. Ceci

Children present a special challenge when they become participants in the legal system. Jean Piaget said that the work of a child is to play. That is the basis for most interactions between children and adults. The child plays and the consequences of that play are unimportant to adult affairs—that is, unless the child is under the age of 6 or 7 and is required to serve as a witness. In that situation the consequences of what the child says or chooses not to say can be truly significant.

The special challenge for adults hearing the child's testimony is to accurately infer what the child means from the words that are used. Entertaining the possibility that the child could intend to convey a meaning different from—and even opposite to—what a legally trained listener would mean using the same words is crucial to maximizing the value of the child's testimony.

The child witness presents a double bind for those conducting a forensic interview. Young children produce a higher percentage of accurate and relevant information in a free recall situation in which they are merely asked to tell in their words everything they remember, without prompts, cues, or suggestions. However, preschoolers produce little or no information when simply asked to "tell us what you remember." The aggravation of this situations stems from the demonstrated inability of these very young children to use questions posed to them as clues to what additional information is needed.

In a recent experimental investigation of children's reports of a wrongful act they had seen on videotape, most children aged 3 to 10 years made a first reference to the perpetrator, who acted alone, as "they." In adult usage, "they" almost always indicates more than one person. The older children in this study were able to refine their reference in response to directive questions such as, "Do you know which person did it?," but a signif-

icant number of preschoolers never made a singular reference.

Most interrogative experiences that children have outside the legal system are not carefully evaluated for consistency or truth value. The adult who asks questions such as "What happened at daycare today?" or "What did you do at Molly's birthday party?" have a "script" in mind of what occurs during the typical event (e.g., a typical birthday party or a typical day at nursery school). Anything the child says that fits the script goes unchallenged. It is usually not important to the adult questioner whether the child played with Legos today or on some other day, or whether the child played with Legos himself or watched a peer play with them.

Courtroom communication differs from everyday conversation in that it is designed to promote shared context to a very high degree. The codes and statutes are available for everyone to read. Evidence is shared through discovery. Jurisprudence is an unusual venue that employs the same language (i.e., semantics, syntax, and pragmatics) that is used for other communication but often defines terms differently and provides exact and special meaning to words in the general lexicon. This prescribed and delimited mutual context facilitates the process for those with access to it.

This is precisely why communication between those trained in the law and those without legal training can go awry. Recognizing that even non-indoctrinated adults have a high degree of variability in their success with this system, children are at a profound disadvantage. They not only lack this specialized knowledge, but they lack substantial general knowledge of the world and certain language skills we expect in adults. They are less likely to admit they don't understand a question, to correct an adult if the child's answer is misinterpreted, or to admit they don't know the answer to a question.

Perhaps the most obvious way that

communication can break down with children is in semantics or word meaning. If a child is asked, "What color jacket was the lady wearing?," and she answers, "Blue," without hesitation, then it is easy to accept that answer at face value. Most three- and four-year-olds know the names of all the primary colors, but the percentage of those children who can accurately match a color name to its corresponding hue increases dramatically between 36 months and 60 months.

Prepositions such as *above*, *below*, *behind*, *in front of*, *on*, *before*, and *after* are familiar to three- and four-year-olds, but a significant percentage of these children confuse the physical or temporal relationship represented by these words. Prepositions such as *on*, *with*, and *to* have multiple meanings, some of which are acquired years before others. For example, the sense of *on* that locates an object in space ("The book is on the table.") is acquired prior to the sense of *on* that shows connections or relations between things ("Did he have on his pajamas?"). In turn, both these senses of the preposition are acquired years before the sense that carries the meaning of an agent or action ("Show me on the doll how he touched you."). The risk for a forensic interviewer is to assume that the child understands a question with a given word because the word, although in her vocabulary, is not understood in the way the interviewer employs it.

When it comes to temporal terms, the situation is even dodgier. A child might assent to the question, "Did that happen before your birthday?" when the child's birthday is in July. Yet, the same child might subsequently answer the question, "Tell us again when that happened?" with, "In August." For many three- and four-year-olds this couplet of answers would not present a contradiction.

These examples illustrate the critical bind encountered by those interviewing young children. There is extensive scientific evidence that children provide the

most accurate information in a free recall situation in which they are asked to tell what they know about a situation without additional prompting from the interviewer. Unfortunately, most young children do not provide sufficient details about events to allow a naïve listener to reconstruct the episode. This is true even in experimental situations that have been designed to present the child with a relatively simple scenario, people with highly salient physical characteristics, and a single salient event.

Presented with claims such as, "They did something bad," the interviewer is compelled to resort to directive questions to find out what was done and who did it. As the interview proceeds and the child asserts, "The lady did it," directive questions with fewer options for response need to be presented. If, in response to the question, "Do you know what the lady was wearing?," the child says, "A coat," the stage has been set for the color question, which the child recognizes requires a single-word answer with a finite set of options.

This bind becomes a double bind when the witness is only three or four years old. These children will predictably provide the least information in free recall—in our work, many often produce no information at all. In addition, there is a body of converging evidence that these very young children lack the pragmatic skill to use the interviewer's questions as evidence that they need to supply more information. In the study mentioned earlier, three- and four-year-olds produced response patterns during interviews that indicated they were not responding to directive questions at all. After asserting, "They did it," successive questions about who "did it" were responded to with "the people," "they," "those guys," etc. Some of these children eventually identified "they" as either a solo man or a woman, illustrating the

very real risk that young preschoolers will use a plural pronoun even though they know an individual person is responsible. Interestingly, very few of the children in our study initially used clothing or other physical characteristics to identify a singular definite reference (e.g., the man with the white shirt). One can imagine the suspicions of a forensic interviewer when a child witness asserts that a crime was perpetrated by "they" rather than "he"—a barrage of follow-up questions to elicit possible unindicted perpetrators. Yet, it is a common characteristic of preschoolers to mislabel singular perpetrators with a plural noun or pronoun.

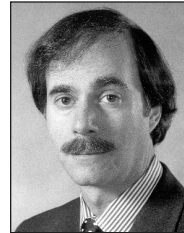
Transcripts of depositions and in-court testimony include copious examples of exchanges in which children fail to recognize potential ambiguity. For instance, children often answer embedded questions such as, "Did you or did you not...?" with "Yes" or "No." Children try to answer the questions that are posed to them, even when they are not precisely sure what information is being requested. In such situations, the miscommunication problem can be masked by the adult assumption that what people say is going to be relevant. Most conversational responses could be interpreted in a variety of ways if they were context free. The success of communication requires that we interpret what is said as if it is relevant in the present discourse context. If the context of very young children is characteristically divergent from the adult context, that interpretation may be in error.

The key to anticipating the problems in adult-child communication is to recognize that the child's perspective is vastly different from that of an adult. They have less knowledge of the world, alternative meanings for common words, different responses to unknown versus powerful people, less ability to reconstruct past events *in situ*, and highly differential

approaches to using what is said to them to evaluate what their discourse participant knows or does not know. Most children want to cooperate with an interviewer and will do their best to answer the questions posed to them, with or without understanding their import. It seems incumbent on those charged with the task of taking a statement from a young child to be aware of these tendencies and to seek expert guidance in structuring their interview.



*David B. Battin is a doctoral candidate in human development at Cornell University. His research focuses on the behavior of preschool-age children engaged in discourse with an unfamiliar adult. He has coauthored manuscripts dealing with more general issues of children's testimony and served as a student reviewer for a peer-reviewed journal.*



*Stephen J. Ceci is the Helen L. Carr Professor of Developmental Psychology at Cornell University. He co-authored (with Maggie Bruck) the 1995 book, *Jeopardy in the Court-**

*room: A Scientific Analysis of Children's Testimony, which won the prestigious William James Book Prize awarded by the American Psychological Association. Ceci's many honors include an NIH Research Career Scientist award and a Senior Fullbright-Hayes fellowship. He is the author of more than 300 articles, chapters, and books, mostly in the area of child intellectual development. Ceci serves on the editorial board of several scholarly journals.*

# A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony

Richard A. Wise & Martin A. Safer

**F**orensic DNA testing suggests that potentially large numbers of innocent persons are being convicted of crimes.<sup>1</sup> Case studies conducted both prior to and following the advent of DNA testing indicate that eyewitness error is at least partially responsible for the majority of wrongful convictions. Empirical research has shown which factors contribute to eyewitness error and has identified procedural changes that could be made in the criminal justice system to significantly reduce the number of erroneous eyewitness identifications.<sup>2</sup>

We report the results of a brief survey of what U.S. judges know and believe about eyewitness testimony. The present survey highlights what judges already know about these eyewitness factors and procedural changes and indicates what additional knowledge judges may need to significantly reduce the number of wrongful convictions.

## THE NUMBER OF WRONGFUL CONVICTIONS

Although there is no precise figure, it is possible to suggest lower and upper estimates for the annual number of wrongful convictions in the United States. Almost 1 million persons were convicted of felonies in the United States in 1998.<sup>3</sup> Huff surveyed criminal justice officials in Ohio and, based on their answers, estimated that wrongful convictions occur in about 1 of every 200 felony criminal cases (.5%).<sup>4</sup> Huff's estimate would translate into 5,000 wrongful felony convictions in 1998. However, DNA testing of criminal suspects suggests that the percentage of wrongful convictions may be much higher than .5%.

In 1995 a survey of public and private forensic laboratories in the United States indicated that they had conducted DNA

tests in 21,621 criminal cases.<sup>5</sup> DNA testing excluded suspects in approximately 23% of the cases. The exclusion rate would be about 27% if cases with inconclusive tests were omitted.

A number of studies have estimated that one-half of all persons charged with serious crimes are ultimately convicted.<sup>6</sup> Accordingly, if the suspects cleared by DNA evidence are similar to the suspects who would have been indicted prior to the widespread use of DNA testing, then there may have been a false conviction rate in the past of greater than 10% for cases where DNA testing is now possible. Dripps asserts that DNA-exonerated suspects are very similar to the persons who would have been indicted prior to the use of DNA testing.<sup>7</sup> More importantly, Dripps argues that factors such as eyewitness error, which might have led to wrongful indictments in DNA cases, continue to produce wrongful indictments in the vast majority of criminal cases where there is no testable biological evidence. A false conviction rate of 10% would imply almost 100,000 wrongful felony convictions every year. Clearly, the high exclusion rates in DNA testing of suspects, along with the well-publicized cases of post-conviction DNA exonerations, challenge the presumption that wrongful convictions rarely occur. Indeed, they strongly suggest that more innocent persons than previously believed are being wrongfully convicted of felonies.

## ERRONEOUS EYEWITNESS IDENTIFICATIONS

Eyewitness error occurs in half or more of all wrongful convictions. Thus, Borchard reported that eyewitness error occurred in 45% of 65 cases of wrongful conviction,<sup>8</sup> Huff found eyewitness error in nearly 60% of approximately 500 wrongful convictions,<sup>9</sup> and Rattner concluded that eyewitness

## Footnotes

Authors' Note: This article is based on Richard A. Wise's dissertation, which was submitted in partial fulfillment of requirements for a doctoral degree in psychology awarded by the Catholic University of America. The internet version of the survey may be viewed at <http://research.cua.edu/eyewitness>. Correspondence concerning this article should be addressed to Martin A. Safer, Department of Psychology, Catholic University of America, Washington, DC 20064. E-mail: Safer@cua.edu.

1. See generally, Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635 (1999).
2. See John C. Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 CT. REV., Summer 1999, at 12-25; see also Saul M. Kassin et al., *On the*

*"General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405-16 (2001).

3. *Criminal Sentencing Statistics (2002)*, U.S. Department of Justice, Bureau of Statistics, <http://www/ojp.usdoj.gov/bjs/sent.htm> (last visited August 19, 2002).
4. C. Ronald Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 RES. IN SOC. PROBS. & PUB. POLY 99-115 (1987).
5. Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Dep't Justice, National Institute of Justice (1996).
6. See e.g., Dripps, *supra* note 1.
7. *Id.*
8. EDWIN BORCHARD, *CONVICTING THE INNOCENT* (1932).
9. Huff, *supra* note 4.

error occurred in 52% of 205 wrongful convictions.<sup>10</sup> These wrongful convictions studies were conducted before the invention of DNA testing, and the different authors included some of the same cases in their analyses. Scheck et al. analyzed 62 cases where DNA evidence exonerated persons convicted of felonies, and they found that mistaken identifications were involved in 52 of the 62 cases (84%).<sup>11</sup> Seventy-seven witnesses in these 52 cases had erroneously identified the defendants as the perpetrators of the crimes. At trial, these witnesses undoubtedly appeared very confident in their identifications.

#### EMPIRICAL RESEARCH ON EYEWITNESS FACTORS

Over the past 30 years, researchers have documented extensively many factors and procedures that can affect the accuracy of eyewitness identification.<sup>12</sup> For example, researchers have shown that the presence of a weapon can impair an eyewitness's ability to accurately identify the perpetrator's face;<sup>13</sup> that an eyewitness's confidence can be influenced by post-event experiences that are unrelated to identification accuracy;<sup>14</sup> and that a law officer who knows which member of a lineup or photo array is the suspect can bias a witness's selection.<sup>15</sup> Researchers have also developed new techniques for interviewing witnesses that yield more complete reports, as well as identified simple procedural changes that could be made in the criminal justice system, which would reduce the number of eyewitness identification errors.<sup>16</sup>

The present study is the first to determine judges' knowledge about a wide range of factors and procedures that affect eyewitness accuracy. Judges also indicated what they believe jurors know about eyewitness factors, and what legal safeguards they would permit attorneys to use to inform jurors about the effects of eyewitness factors on identification accuracy. Judges' answers to these two questions are important because research indicates that jurors do not know how many eyewitness factors affect identification accuracy.<sup>17</sup> Research has also shown that expert testimony is the only legal safeguard that is effective in sensitizing jurors to eyewitness factors.<sup>18</sup> Nonetheless, the most common reason judges give for excluding eyewitness expert testimony at trial is that the expert's testimony is within the knowledge of the jury<sup>19</sup> and, therefore, "would not assist the trier of fact."

In summary, our survey may help identify some facets of eyewitness testimony where judges need additional training. It may also give some indication of how accurately judges perceive jurors' knowledge of eyewitness testimony, and how willing they are to permit legal safeguards, including expert testimony.

**Research has shown that expert testimony is the only legal safeguard that is effective in sensitizing jurors to eyewitness factors.**

#### METHOD

A request to complete a brief, anonymous ten-minute questionnaire on eyewitness testimony was distributed on the listserves of the American Judges Association and the Judicial Division of the American Bar Association. Judges were informed that they could complete the survey on the linked website, print out the survey from the website and mail it, or request a copy of the survey from its authors and then return it by mail.

We obtained 143 completed questionnaires on the website and 17 completed paper surveys, for a total sample of 160. The respondents included 142 state judges, 10 federal judges, 7 retired judges, and 1 Indian tribal judge. There were 146 trial judges, 6 appellate judges, and 8 (mainly the retired judges) who did not indicate their current position. Prior to becoming judges, 22 respondents had been prosecutors (14%), 42 had been defense attorneys (26%), 57 had been both prosecutors and defense attorneys (36%), and 39 had not practiced criminal law (24%). Respondents had practiced law for an average of 13.96 years and had been on the bench for an average of 12.48 years.

The questionnaire covered many key issues about eyewitness testimony. The judges were asked to indicate their agreement or disagreement with 14 statements about eyewitness factors and procedures, to answer 4 other related questions, and to provide personal background information that was summarized in the preceding paragraph. The eyewitness factors and procedures in the 14 statements were selected because of strong

10. Arye Rattner, *Convicted But Innocent*, 12 LAW & HUM. BEHAV. 283-93 (1988).

11. BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

12. See Gary Wells et al., *From Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 AM. PSYCHOLOGIST 581-98 (2000).

13. Elizabeth Loftus et al., *Some Facts about "Weapon Focus,"* 11 LAW & HUM. BEHAV. 55-62 (1987); see also Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413-24 (1992).

14. See C. A. Elizabeth Luus & Gary Wells, *The Malleability of Eyewitness Confidence: Co-witness and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714-23 (1994); John S. Shaw, *Increases in Eyewitness Confidence Resulting from Postevent Questioning*, 2 J. EXPERIMENTAL PSYCHOL.: APPLIED 126-46 (1996).

15. Mark R. Phillips et al., *Double-Blind Photoarray Administration as*

*a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940-51 (1999).

16. See Wells, *supra* note 12.

17. See e.g., R. C. Lindsay et al., *Mock Juror Belief of Accurate and Inaccurate Witnesses*, 13 LAW & HUM. BEHAV. 333-39 (1989) [hereinafter Lindsay (1989)]; R. C. Lindsay et al., *Can People Detect Eyewitness Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79-89 (1981) [hereinafter Lindsay (1981)]; Gary Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440-48 (1979) [hereinafter Wells (1979)].

18. See Steven D. Penrod & Brian L. Cutler, *Preventing Mistaken Convictions in Eyewitness Identification Trials*, in PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE 89-118 (Ronald Roesch et al. eds., 1999).

19. Cindy J. O'Hagen, Note, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 758 (1993).

empirical evidence on how they affect identification accuracy, and because they describe issues that occur frequently in criminal trials. For 5 of the eyewitness statements, the judges also indicated how they believed the average juror would answer the statement and what legal safeguards they would permit attorneys to use to inform jurors about the effects of the eyewitness factors on identification accuracy. For 8 of the eyewitness statements (Statements 3, 5-11), we were able to compare the judges' responses to those of 64 experts on eyewitness testimony.<sup>20</sup> The experts answered whether the eyewitness statement was sufficiently reliable for an expert to testify about in court and whether knowledge of how the factor affects identification accuracy is a matter of common sense.

## RESULTS

We first report the judges' responses to the 14 statements about eyewitness factors and the 4 related questions, and where appropriate, we provide a brief justification for the correct answer. We have renumbered the statements from the original survey to improve the clarity and conciseness of this report. In Tables 1, 2, and 5, an asterisk next to a response indicates a correct answer. Percentages were rounded to the nearest whole number and, therefore, may not total exactly 100% for every statement. In calculating percent correct, we combined the judges' responses of "strongly agree" and "agree," as well as the responses of "strongly disagree" and "disagree," because judges rarely responded, "strongly agree" or "strongly disagree."

## EYEWITNESS STATEMENTS 1-6

- 1. It is significantly harder for a witness of a crime to recognize a perpetrator who is wearing a hat during the commission of a crime than a perpetrator who is not wearing a hat.** Even simple disguises can reduce identification accuracy.<sup>21</sup> A hat disguises hair and facial shape, which are important cues to recognizing a person's face.<sup>22</sup> Only 45% of the judges correctly answered that it is significantly harder to recognize a perpetrator who is wearing a hat. (See Table 1, row 1.)
- 2. A witness's ability to recall minor details about a crime is a good indicator of the accuracy of the witness's identification of the perpetrator of the crime.** Memory for minor or peripheral details is inversely related to eyewitness accuracy, because an eyewitness who attends to peripheral details has fewer resources available to process the perpetrator's face.<sup>23</sup> Only 24% of the judges correctly disagreed with this eyewitness statement. The majority of judges (57%) mistakenly believed that an eyewitness's ability to recall peripheral details about a crime indicates that the witness has a better memory than a witness who cannot recall peripheral details.
- 3. An eyewitness's perception and memory for an event may be affected by his or her attitudes and expectations.** Expectancies can exert a powerful influence on attention and recall of relevant information.<sup>24</sup> In the Kassin survey,

**TABLE 1**  
**DISTRIBUTION OF JUDGES' RESPONSES TO EYEWITNESS STATEMENTS 1-6**

Topic	Strongly agree	Agree	Neither	Disagree	Strongly disagree
1. Effects of a hat	6%*	39%*	50%	6%	0%
2. Minor details	4%	53%	20%	22%*	2%*
3. Attitudes & expectations	26%*	69%*	4%	1%	1%
4. Conducting lineups	25%*	38%*	18%	20%	1%
5. Effects of post-event information	17%*	67%*	8%	6%	1%
6. Confidence-accuracy	3%	31%	34%	28%*	5%*

**Note:** The asterisks next to the responses in the table indicate the correct answers.

20. See Kassin, *supra* note 2.

21. See generally K. E. Patterson & A. D. Baddeley, *When Face Recognition Fails*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 406-17 (1977); Peter N. Shaprio & Steven D. Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139-56 (1986).

22. Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629-37 (1987); Brian L. Cutler et al., *The Reliability of Eyewitness Identifications: The Role of System and Estimator Variables*, 11 LAW

& HUM. BEHAV. 223-58 (1987).

23. See Gary Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APPLIED PSYCHOL. 682-87 (1981); BRIAN L. CUTLER & STEVEN D. PENROD, *MISTAKEN IDENTIFICATIONS: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW* (1995).

24. Edward R. Hirt et al., *Expectancies and Memory: Inferring the Past from What Must Have Been*, in *HOW EXPECTANCIES SHAPE EXPERIENCE* 93-124 (Irving Kirsch ed., 1999).

92% of the eyewitness experts agreed that this statement was sufficiently reliable to present in court.<sup>25</sup> Of the judges, 95% agreed with this statement, and, therefore, there was no significant difference between the experts' and judges' responses to this statement.

**4. A police officer who knows which member of the lineup or photo array is the suspect should not conduct the lineup or photo array.** A lineup administrator can intentionally or unintentionally influence a witness to select the suspect from a lineup or photo array.<sup>26</sup> In the survey, 63% of the judges correctly answered that a lineup administrator should not know who is the suspect. However, in most criminal cases, the police officer who conducts the lineup knows which lineup member is the suspect, and the police are reluctant to change this practice.<sup>27</sup>

**5. Eyewitness testimony about an event often reflects not only what a witness actually saw but information obtained later on.** Post-event information can influence eyewitnesses' description of a crime, their description of the perpetrator of the crime, and which member of a lineup they identify as the perpetrator.<sup>28</sup> Altogether, 84% of the judges correctly agreed with this statement, as did 94% of the eyewitness experts, which is not a significant difference.

**6. At trial, an eyewitness's confidence is a good predictor of his or her accuracy in identifying the defendant as the perpetrator of the crime.** This is a particularly important statement because jurors rely heavily on eyewitness confidence in evaluating identification accuracy.<sup>29</sup> However, by the time of trial, eyewitness confidence has little probative value because of the many post-identification factors that affect confidence, but have no effect on identification accuracy.<sup>30</sup> (See also statement 5 for the effects of post-event information and statement 7 for a discussion of "confidence malleability.") Almost all eyewitness experts would disagree with Statement 6.<sup>31</sup> In sharp contrast, there was little consensus among the judges on this critical question. Only 33% of the judges correctly disagreed, 34% wrongly agreed, and 34% neither agreed nor disagreed. Clearly, the correct answer to this very important issue is not a matter of "common sense."

### EYEWITNESS STATEMENTS 7-11

For eyewitness statements 7 through 11, the judges answered for themselves, as well as for how they believed the average juror would respond to the eyewitness statement. In Table 2, the percentages in italics before the slash are what the judges believed about the eyewitness statement. Percentages after the slash are what the judges believed the average juror

**TABLE 2**  
**DISTRIBUTION OF JUDGES' RESPONSES TO EYEWITNESS STATEMENTS 7-11,**  
**AND WHAT JUDGES BELIEVE JURORS KNOW ABOUT THESE STATEMENTS**

Topic	Generally true	Generally false	Jurors do not know
7. Confidence malleability	90%* / 36%	1% / 4%	— / 32%
8. Weapon focus	69%* / 24%	4% / 9%	— / 37%
9. Mug-shot-induced bias	74%* / 38%	4% / 3%	— / 28%
10. Lineup format	19%* / 4%	15% / 6%	— / 29%
11. Forgetting curve	31%* / 18%	25% / 13%	— / 30%

**Note:** The asterisks next to the responses in the table indicate the correct answers. The percentages in italics before the slash are what the judges believed about the eyewitness statements. The percentages after the slash are what the judges believed the average juror thinks about the statement. "I don't know" responses by judges, either as to their own knowledge or indicating they did not know what jurors would understand about an issue, are not reported here.

25. Kassin, *supra* note 2.

26. See Lynn Garrioch & C. A. Elizabeth Brimacombe, *Lineup Administrator's Expectations: Their Impact on Eyewitness Confidence*, 25 LAW & HUM. BEHAV. 299-315 (2001); Phillips, *supra* note 15.

27. Wells, *supra* note 12.

28. See Robert E. Christiaansen et al., *Influencing Eyewitness Descriptions*, 7 LAW & HUM. BEHAV. 59-65 (1983); Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 LAW & HUM. BEHAV. 323-34 (1980); ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1979).

29. Gary Wells et al., *Eyewitness Identifications Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603-47 (1998).

30. John S. Shaw III & Kimberley A. McClure, *Repeated Postevent*

*Questioning Can Lead to Elevated Levels of Eyewitness Confidence*, 20 LAW & HUM. BEHAV. 629-53 (1996); Wells, *supra* note 29.

31. The Kassin experts actually rated the statement "An eyewitness's confidence is not a good predictor of his or her identification accuracy." Kassin, *supra* note 2. In the judges' survey, we slightly rewrote the statement as well as added the introductory phrase "at trial" because judges are likely to be confronted with this issue at trial rather than in the investigatory phase of a case. Altogether, 87% of the experts thought that the lack of a strong relationship between confidence and accuracy was a reliable enough fact to present in courtroom testimony. Because witness confidence becomes even less predictive of accuracy over time (see statement 7 on confidence malleability), we suspect that nearly 100% of the experts would have disagreed with the modified confidence-accuracy statement in the judges' survey.

thinks about the statement. The correct answer for each of these five statements is “generally true.” (See Tables 2 and 3.)

**7. An eyewitness’s confidence can be influenced by factors that are unrelated to identification accuracy.** Factors such as post-event questioning, witness preparation and rehearsal, and confirming feedback can greatly increase a witness’s confidence without a corresponding change in a witness’s accuracy.<sup>32</sup> In Kassin’s survey, 95% of the eyewitness experts agreed with this statement,<sup>33</sup> as did 90% of the judges in the current survey. This nearly unanimous agreement about the effects of “confidence malleability” contrasts with the judges’ response to statement 6, where only 33% of the judges correctly disagreed with the statement, “At trial, an eyewitness’s confidence is a good indicator of identification accuracy.” Judges apparently do not fully appreciate the extent that confidence malleability can undermine the value of eyewitness confidence as a predictor of eyewitness accuracy at trial.

Only 10% of the experts believed that the average juror would be aware of the relationship between confidence malleability and eyewitness accuracy. In contrast, 36% of the judges believed the average juror would think statement 7 to be generally true. Thus, a significantly larger percentage of judges than experts thought that the average juror would know the correct answer to this statement.

**8. The presence of a weapon can impair an eyewitness’s ability to accurately identify the perpetrator’s face.** A weapon impairs an eyewitness’s ability to identify the perpetrator of a crime.<sup>34</sup> In the Kassin survey, 87% of the eyewitness experts agreed with this statement, and 34% of the experts believed that understanding the statement was a matter of common sense (i.e., the average juror would

understand the effect of weapon focus on eyewitness accuracy).<sup>35</sup> Of the judges, 69% correctly believed this statement was true, and 24% believed that jurors would think the statement was true. In short, the percentage of judges who agreed with this statement was significantly less than the percentage of experts. However, their beliefs about whether the average juror would know the correct answer did not differ significantly from the experts.

**9. Exposure to mug shots of a suspect increases the likelihood that the witness will later choose the suspect from a lineup.** Researchers have shown that a witness who views a mug shot of a suspect is more likely to later choose that person from a lineup, in comparison to a witness who did not see the mug shot.<sup>36</sup> In Kassin’s survey, 95% of the eyewitness experts agreed that there was a mug shot induced bias, and 13% indicated that understanding it was a matter of common sense.<sup>37</sup> Of the judges, 74% agreed with the statement, and 38% responded that the average juror was aware of the mug-shot-induced bias. Thus, a significantly smaller percentage of judges than experts agreed with this statement, but, a significantly larger percentage of judges than experts believed that understanding the mug-shot-induced bias is a matter of common sense.

**10. Witnesses are more likely to misidentify someone in a culprit-absent lineup when it is presented in a simultaneous (i.e., all members of a lineup are present at the same time) as opposed to a sequential procedure (i.e., all members of a lineup are presented individually).** The traditional simultaneous lineup encourages witnesses to make a relative judgment about which lineup member most closely resembles the perpetrator of the crime.<sup>38</sup> In sequential lineups, the eyewitness makes a yes-no decision about a

**TABLE 3**  
**DISTRIBUTION OF EXPERTS’ RESPONSES TO EYEWITNESS STATEMENTS 7-11,**  
**AND WHAT THEY BELIEVE JURORS KNOW ABOUT THESE STATEMENTS (KASSIN, SUPRA NOTE 2).**

Topic	The eyewitness statement is sufficiently reliable for an expert witness to present in court.	The correct answer is a matter of common sense.
7. Confidence malleability	95%	10%
8. Weapon Focus	87%	34%
9. Mug-shot-induced bias	95%	13%
10. Lineup format	81%	0%
11. Forgetting curve	83%	29%

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32. See generally Wells, *supra* note 29; Shaw & McClure, *supra* note 30; Gary Wells & Amy L. Bradfield, *Distortions in Eyewitnesses’ Recollections: Can the Postidentification-Feedback Effect Be Moderated?*, 10 PSYCHOL. SCI. 138-44 (1999).

33. Kassin, *supra* note 2.

34. See Steblay, *supra* note 13; Patricia A. Tollestrup et al., *Actual Victims and Witnesses to Robbery and Fraud: An Archival Analysis*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND

DEVELOPMENTS 144-160 (David F. Ross et al. eds., 1994).

35. Kassin, *supra* note 2.

36. See e.g., Evan Brown et al., *Memory for Faces and Circumstances of Encounter*, 53 J. APPLIED PSYCHOL. 311-18 (1977).

37. Kassin, *supra* note 2.

38. See R. C. Lindsay & Gary Wells, *Improving Eyewitness Identification from Lineups: Simultaneous Versus Sequential Lineup Presentations*, 70 J. APPLIED PSYCHOL. 556-64 (1985).

lineup member without knowing the number or characteristics of other members in the lineup. Studies that have compared simultaneous and sequential lineups have consistently found that sequential lineups significantly lower the risk of false identifications compared to simultaneous lineups without reducing the number of accurate identifications.<sup>39</sup>

In Kassin's survey, 81% of the experts agreed with a slightly different phrasing of this statement, and 0% thought it was a matter of common sense.<sup>40</sup> Of the judges, 67% neither agreed nor disagreed with the statement, which suggests that most of the judges are unfamiliar with the differences between sequential and simultaneous lineups.<sup>41</sup> Only 19% of the judges correctly agreed with the statement, and 4% of the judges thought the average juror would agree. Thus, the percentage of experts and judges who agreed with this statement differed significantly. However, a similar negligible percentage of experts and judges believed that the answer to this statement was a matter of common sense.

**11. The rate of memory loss for an event is greatest right after an event and then levels off over time.** This statement describes the relatively rapid loss of memory for the details of an event, such as a crime, which takes place shortly after an event occurs.<sup>42</sup> In the Kassin survey, 83% of the experts agreed, and 29% of them stated that understanding the forgetting curve was a matter of common sense.<sup>43</sup> In contrast, only 31% of the judges agreed that it was generally true, and 18% stated that the average juror would agree. Moreover, 44% of the judges answered that they "don't know" the answer to this eyewitness statement. In sum, there was a considerable difference between the percentage of judges and experts who agreed with this statement. This implies that a large number of the judges are unaware that an eyewitness's memory for the details of a crime decreases rapidly shortly after the crime occurred. Similar percentages of judges and experts believed that understanding the forgetting curve is not a matter of common sense.

In sum, for eyewitness statements 7-11, the responses

of the judges and experts differed significantly on weapon focus, exposure to mug shots, lineup format, and the forgetting curve. Moreover, a significantly larger percentage of judges than experts believed that the correct answers to two of the five statements (confidence malleability and exposure to mug shots) were a matter of common

**[T]he responses of the judges and experts differed significantly on weapon focus, exposure to mug shots, lineup format, and the forgetting curve.**

sense. However, for each of the five statements, judges were much more likely to know the correct answer themselves than to believe that the average juror would know the correct answer. Thus the judges, like the eyewitness experts, believe that knowledge of factors and procedures affecting eyewitness testimony is not just a matter of common sense.

## USE OF LEGAL SAFEGUARDS

For eyewitness statements 7 through 11, the judges were also asked which, if any, of five legal safeguards (i.e., voir dire, cross-examination, expert witness, closing argument, and jury instruction) they would permit an attorney to use to inform a jury about the effect of the eyewitness statement on identification accuracy. They could choose as many or as few of the five legal safeguards as they believed were necessary. They could also respond that they would not permit any of these safeguards or that they did not know what safeguard they would permit. As shown in Table 4, the percentage of judges who would permit a particular safeguard, averaged across the five eyewitness statements, was 53% for voir dire questions, 80% for cross-examination questions, 44% for expert witness, 74% for closing arguments, and 24% for jury instructions. Of the judges, 35% would not permit expert testimony for any of the five eyewitness statements, even though expert testimony is the only safeguard that has been shown to be effective in increasing jurors' sensitivity to eyewitness factors.<sup>44</sup>

39. See e.g., Brian L. Cutler & Steven D. Penrod, *Improving the Reliability of Eyewitness Identification: Lineup Construction and Presentation*, 73 J. APPLIED PSYCHOL. 281-90 (1988); Lindsay & Wells, *supra* note 38; Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459-73 (2001).

40. Kassin, *supra* note 2. Kassin's eyewitness statement on lineup format stated: "Witnesses are more likely to misidentify someone by making a relative judgment when presented with a simultaneous (as opposed to sequential) lineup." Furthermore, Kassin's survey of eyewitness experts was conducted prior to the publication of Steblay's meta-analytic review (see Steblay, *supra* note 39) that showed that sequential lineups significantly lower the risk of false identifications compared to simultaneous lineups without reducing the number of accurate identifications. If this review had been published prior to the eyewitness experts completing Kassin's survey, undoubtedly a higher percentage of them would have agreed that sequential lineups reduce the number of false

identifications compared to simultaneous lineups.

41. See Veronica Stinson et al., *How Effective Is the Motion-to-Suppress Safeguard? Judges' Perceptions of the Suggestiveness and Fairness of Biased Lineup Instructions*, 82 J. APPLIED PSYCHOL. 211-20 (1997).

42. Kenneth A. Deffenbacher, *A Maturing of Research on the Behavior of Eyewitnesses*, 5 APPLIED COGNITIVE PSYCHOL. 377-402 (1991).

43. Kassin, *supra* note 2.

44. Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185-91 (1990); Penrod & Cutler, *supra* note 18. Several studies have shown that jury instructions are ineffective in educating jurors about the effects of eyewitness factors on identification accuracy. See Edith Greene, *Judge's Instructions on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED PSYCHOL. 252 (1988); Gabriella Ramirez, Dennis Zemba, and R. Edward Geiselman, *Judges' Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31 (1996).

**GENERAL PRINCIPLES OF EYEWITNESS TESTIMONY**

Eyewitness statements 1 through 11 tested the judges' knowledge of specific eyewitness factors, such as whether a hat makes it significantly more difficult for an eyewitness to identify the perpetrator of the crime. Eyewitness statements 12 through 16 are grouped together because they all concern more general principles of eyewitness testimony.

**12. Attorneys know how most eyewitness factors affect identification accuracy.** Several studies show that attorneys have limited knowledge of eyewitness factors.<sup>45</sup> Only 41% of the judges correctly disagreed with the statement that attorneys know how most eyewitness factors affect identification accuracy.

**13. Jurors know how most eyewitness factors affect identification accuracy.** Researchers have used questionnaires, prediction studies, and simulated trials to determine how knowledgeable jurors are about eyewitness testimony. All three methods have shown that jurors have limited knowledge of eyewitness factors.<sup>46</sup> In the survey, 64% of the judges correctly disagreed that jurors know how most eyewitness factors affect identification accuracy. Accordingly, a majority of judges in the survey realize that knowledge of how eyewitness factors affect identification accuracy is not just a matter of common sense.

**TABLE 4  
PERCENTAGES OF JUDGES WHO WOULD PERMIT A PARTICULAR LEGAL SAFEGUARD TO BE USED FOR EYEWITNESS STATEMENTS 7-11.**

Eyewitness Factor	Voir dire	Cross	Expert	Close	Jury instru.	No action	Don't know
7. Confidence malleability	58%	86%	45%	79%	27%	1%	6%
8. Weapon focus	66%	91%	51%	86%	34%	0%	2%
9. Mug-shot-induced bias	60%	87%	43%	80%	29%	1%	6%
10. Lineup format	35%	62%	37%	56%	14%	7%	22%
11. Forgetting curve	46%	72%	44%	70%	17%	6%	13%
Average	53%	80%	44%	74%	24%	3%	10%

**Note:** Voir dire=voir dire questions, cross=cross-examination, expert=expert witness, close=closing argument, and jury instru.= jury instruction

**TABLE 5  
DISTRIBUTION OF JUDGES' RESPONSES TO EYEWITNESS STATEMENTS 12-15**

Topic	Strongly agree	Agree	Neither	Disagree	Strongly disagree
12. Attorney's knowledge	3%	29%	28%	40%*	1%*
13. Jurors' knowledge	1%	9%	26%	51%*	13%*
14. Jurors distinguish eyewitnesses	1%	28%	33%	31%*	8%*
15. Convictions solely from eyewitnesses	5%	18%	29%	36%	12%

**Note:** The asterisks indicate the correct answers to the eyewitness statements. There is no correct answer for eyewitness statement 15.

45. See generally John C. Brigham & Melissa P. Wolfskeil, *Opinions of Attorneys and Law Enforcement Personnel on the Accuracy of Eyewitness Identifications*, LAW & HUM. BEHAV. 337-49 (1983); George L. Rahaim & Stanley L. Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 12 LAW & HUM. BEHAV. 1-15 (1982); Stinson, *supra* note 41; A. Daniel Yarmey & Hazel P. Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in

EVALUATING WITNESS EVIDENCE 13-40 (Sally M. A. Lloyd-Bostock & Brian R. Clifford eds., 1983).

46. See John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19-30 (1983); Saul M. Kassin & Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. APPLIED PSYCHOL. 1241-49 (1992); Lindsay (1981), *supra* note 17.

**14. Jurors can distinguish between accurate and inaccurate eyewitnesses.** In several studies, researchers have staged crimes and then had witnesses testify about the events in mock trials. Some witnesses were accurate and some were inaccurate, but mock jurors were generally unable to distinguish between the testimony of accurate versus inaccurate witnesses.<sup>47</sup> The results indicated that 29% of the judges agreed with this statement, 33% neither agreed nor disagreed, and 39% correctly disagreed with this statement. Accordingly, for this critical eyewitness statement, most judges were unaware of jurors' inability to distinguish accurate and inaccurate eyewitnesses.

**15. Only in exceptional circumstances should a defendant be convicted of a crime solely on the basis of eyewitness testimony.** Only 23% of the judges agreed with this summary statement, even though the unreliability of some eyewitness testimony, and jurors' inability to distinguish accurate from inaccurate witnesses, suggests that this statement may be true.

**16. Out of 100 cases of wrongful felony convictions, how many do you think on average would be due at least in part to eyewitness error?** A conservative estimate is that eyewitness error occurs in at least half of all wrongful felony convictions.<sup>48</sup> Thirty-one judges (19%) did not respond to this question, which suggests that many judges were unsure how often erroneous eyewitness identifications play a role in wrongful convictions. Of the 129 judges who responded to this eyewitness statement, the mean estimate was 37.86 cases. Only 43% of the respondents estimated that eyewitness error plays a role in at least half of all wrongful convictions.

#### EDUCATION ABOUT EYEWITNESS TESTIMONY

Eyewitness statements 17 and 18 ascertained what types of eyewitness educational materials the judges have been exposed to, and whether they believe that judges should receive more eyewitness training. The bolded statements for 17 and 18 are not the exact statements in the survey.

**17. The judges' exposure to educational eyewitness materials.** Of the judges, 71% reported that they had read a law review or psychological article about eyewitness testimony, 26% had read a book on eyewitness testimony, and 69% had attended a lecture or seminar on eyewitness testimony. Only 14% of the judges reported that they had not been exposed to any type of educational materials on eyewitness testimony.

**18. Whether judges should receive more training about eyewitness testimony.** In the survey, 75% responded that judges should receive more training on eyewitness testi-

mony, 10% responded that judges receive adequate training, and 15% did not know if judges should receive more training.

#### CORRELATES OF JUDGES' KNOWLEDGE OF EYEWITNESS TESTIMONY

Empirical research clearly identifies a correct answer for eyewitness statements 1 through 14, and on average for the 14 statements, judges answered correctly 55% of the time (i.e., averaged 7.66 correct answers). We computed correlations to ascertain whether knowledge of eyewitness factors was related to other beliefs about eyewitness testimony.<sup>49</sup> Judges who were most knowledgeable, based on the number of correct answers to these 14 statements, also tended to be more critical of the value of eyewitness testimony. More knowledgeable judges were: (a) more likely to know that eyewitness error plays an important role in wrongful convictions (statement 16); (b) more likely to agree that only in exceptional circumstances should a defendant be convicted solely on the basis of eyewitness testimony (statement 15); (c) more likely to believe that jurors have limited knowledge of eyewitness factors (judgments about jurors in statements 7 to 11); (d) more likely to permit the use of legal safeguards, including expert testimony to educate jurors about eyewitness factors (judgments about safeguards in statements 7 to 11); and (e) more likely to agree that judges need more training on eyewitness factors (statement 18). Thus, greater knowledge of eyewitness factors was associated with a variety of beliefs and behaviors that may be necessary for judges to reduce the number of wrongful convictions.

The judges in the survey on average had practiced law for 14 years, had been on the bench for 12 years, and 76% of them had been a prosecutor, defense attorney, or both prior to becoming a judge. There was no significant relationship between knowledge of eyewitness factors and either legal experience, prior criminal law experience, judicial experience, or judicial position. Thus, even extensive legal and judicial experience does not ensure that judges know how eyewitness factors and investigative procedures affect the accuracy of eyewitness testimony.

In summary, judges in the survey appear to have a limited understanding of eyewitness factors, as they averaged only about 55% correct on the 14-item knowledge scale. The judges also showed little consensus on several important issues, such as whether at trial, eyewitness confidence is a good indicator of eyewitness accuracy, and if jurors can distinguish accurate from inaccurate eyewitnesses. Many judges appeared to be unfamiliar with simultaneous lineups, with the forgetting curve, and

**[J]udges in the survey appear to have a limited understanding of eyewitness factors, as they averaged only about 55% correct on the 14-item knowledge scale.**

47. Lindsay (1989), *supra* note 17; Lindsay (1981), *supra* note 17; Wells (1979), *supra* note 17.

48. BORCHARD, *supra* note 8; Huff, *supra* note 4; Rattner, *supra* note 10; SCHECK, *supra* note 11.

49. Richard A. Wise & Martin A. Safer (in press), *What U.S. Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. (2004).

**Increasing judges' knowledge of eyewitness testimony may be an important step in reducing wrongful convictions.**

with studies indicating that half or more of all wrongful felony convictions are due at least in part to eyewitness error. However, most judges were aware of how attitudes and expectations, administrator-blind lineups, post-event information, weapon focus, mug-shot-induced bias, and confidence malleability affect identification accuracy.

respondents to the questionnaire were state trial judges. Only 7% of the judges who completed the survey were federal judges, and only 4% were appellate judges. We suspect that judges who voluntarily participated in the survey were more interested in and perhaps more knowledgeable about eyewitness testimony than judges in general.

Another limitation is that we asked judges about only a small subset of factors affecting identification accuracy, and so their knowledge scores may not represent their true knowledge about eyewitness testimony. However, we asked mainly about issues that have strong empirical support and that frequently arise in many criminal trials involving eyewitness testimony.<sup>51</sup> We avoided issues where there is less empirical support and consensus among experts, such as the effects of stress on memory, and more esoteric issues, such as the nature of repressed memories.

**JUDGES' BELIEFS ABOUT JURORS' KNOWLEDGE OF EYEWITNESS TESTIMONY**

The most frequent reason judges give for not permitting an eyewitness expert to testify during a trial is their belief that the subject matter of the expert's testimony is already within the knowledge of the jurors.<sup>50</sup> For each of the five eyewitness statements (7-11) where judges were asked if jurors know the correct answer to the statement, a majority of the judges responded that jurors did not know the answer. For each of the five statements, judges were much more likely to know the correct answer themselves than to believe that jurors know the correct answer. On statement 13, 64% of the judges disagreed with the statement that jurors know how most eyewitness factors affect identification accuracy. Thus, contrary to what published judicial opinions sometimes suggest, judges appear to believe that jurors have a limited understanding of eyewitness factors. On the other hand, the judges' beliefs about jurors' knowledge of eyewitness testimony may simply reflect their own difficulty in responding to the questionnaire.

**EDUCATION ABOUT EYEWITNESS FACTORS**

Judges' self-reported exposure to educational materials on eyewitness testimony (e.g., reading a book) was only marginally related to knowledge of eyewitness factors. This result suggests that current educational materials may have limited effectiveness in teaching judges about eyewitness factors. Furthermore, 75% of the judges agreed that judges should receive more training on eyewitness testimony, and only 10% stated that judges receive adequate training on eyewitness testimony. Thus, most judges in the survey recognized a need for more judicial training on eyewitness testimony.

**LIMITATIONS**

Although there are several potential limitations to the study, we believe our results are still valid and informative. Some incorrect judgments about statements 1 through 14 may represent misinterpretations of the statements, rather than lack of knowledge. For example, some judges may have interpreted statement 11 as forgetting the event itself, as opposed to the details of the event. Another limitation may be that the primary

**CONCLUSIONS**

Increasing judges' knowledge of eyewitness testimony may be an important step in reducing wrongful convictions. More knowledgeable judges were more aware of the dangers of convicting defendants solely on the basis of eyewitness testimony; more willing to permit legal safeguards, including expert testimony; and more aware that jurors have limited knowledge of eyewitness factors. Increasing judges' knowledge of eyewitness testimony is also important because expert testimony is not a panacea for erroneous eyewitness testimony. Expert testimony is effective in only some circumstances.<sup>52</sup> It is also expensive and time-consuming, and there are a limited number of experts.<sup>53</sup> Accordingly, the long-term solution to erroneous eyewitness identifications may lie in educating judges and the other participants in the criminal justice system (e.g., police, lawyers, and jurors) about eyewitness factors and procedures to minimize eyewitness error, so that expert testimony would be less necessary in criminal cases. It may also be possible for judges who are knowledgeable about eyewitness testimony in some criminal cases to draft jury instructions and conduct trials in such a manner that expert testimony would not be needed.

The present study suggests that current judicial educational materials on eyewitness materials have limited effectiveness. This may occur because judges' exposure to eyewitness materials may be too brief, infrequent, and superficial to be of benefit. Fisher discusses very similar problems in training police officers to use more effective interviewing techniques with eyewitnesses.<sup>54</sup>

Perhaps another reason for the limited effectiveness of judicial education is that the primary focus of the legal system is to detect witnesses who are lying and not witnesses who make erroneous identifications. Thus, the legal system requires witnesses to take an oath to tell the truth and makes perjury a crime. On the other hand, witnesses are not required to swear that they will use reasonable care when making an identifica-

50. See *United States v. Hall*, 165 F.3d 1095, 1104-05 (7th Cir. 1999).  
51. See Kassir, *supra* note 2.  
52. See Cutler, *supra* note 44; CUTLER & PENROD, *supra* note 23.

53. Wells, *supra* note 29.  
54. See generally, Ronald P. Fisher, *Interviewing Victims and Witnesses of Crime*, 1 PSYCHOL. PUB. POL'Y & L. 732-64 (1995).

tion, and there is no sanction for an erroneous identification even if it is made recklessly. In sum, until judges realize that erroneous eyewitness identifications pose a grave threat to the validity of criminal verdicts, judicial education programs on eyewitness testimony are likely to continue to have limited effectiveness. Indeed, an analysis of the first 62 cases involving post-conviction DNA exoneration found that mistaken identification occurred in 52 cases, whereas false witness testimony occurred in just 15 cases.<sup>55</sup>

Although it is unrealistic to expect judges to become eyewitness experts, they need at least to understand the basic principles of eyewitness testimony if they are to reduce the number of erroneous eyewitness identifications. We make a few suggestions about what judges need to know about eyewitness testimony, and recommend that Brigham,<sup>56</sup> Technical Working Group for Eyewitness Evidence,<sup>57</sup> and Wells<sup>58</sup> be consulted for a more detailed discussion.

1. Although human memory can be reasonably accurate, it does not operate like a passive security camera. Memory of a crime is not preserved like a videotape with near-perfect fidelity, and it cannot simply be rewound and replayed to extract additional, accurate information. Some information may never be recorded, and forgetting of details can occur rapidly (statements 1, 2, 8, and 11). Moreover, recall of a crime is a partially reconstructive process, with witnesses filling in the “blanks” of what they perceived by adding information based on both their expectancies and information obtained after the crime (see statements 3 and 5). As Wells states: “The important point is that witnesses will extract and incorporate new information after the witnessed event and then testify about that information as though they actually witnessed it.”<sup>59</sup> Thus, many factors can affect how accurately a witness remembers a crime, whom the witness identifies as the perpetrator of the crime, and the witness’s level of confidence at trial. Accordingly, the finder of fact should always carefully analyze both the witnessing conditions and the investigative procedures that may have affected the witness’s testimony, rather than assuming that a witness’s testimony is accurate simply because the witness is testifying in good faith and with a high degree of confidence (statements 4, 6, 7, 9, and 10).
2. Eyewitness error is the primary cause of wrongful convictions not because it is inherently unreliable, but rather because the criminal justice system has not yet implemented many procedural safeguards that could significantly reduce the number of erroneous eyewitness identifications.<sup>60</sup> For example, a few procedural changes in how lineups are conducted, such as the use of administrator-blind lineups and sequential rather than simultaneous lineups (see statements 4 and 10), could greatly reduce the number of erroneous eyewitness identifications without

affecting the number of accurate identifications.<sup>61</sup> Judges should require that police and prosecutors implement such procedures in criminal cases and realize that the failure to use them significantly increases the risk of erroneous eyewitness identifications. In addition, they should consider suppressing evidence obtained from biased procedures.

3. Knowledge of eyewitness testimony is not just a matter of common sense.

Therefore, judges need to be more cautious in excluding the testimony of eyewitness experts because of their belief that jurors already know how an eyewitness factor or procedure affects identification accuracy. Moreover, extensive legal and judicial experience is not sufficient to ensure that participants in the criminal justice system know how eyewitness factors and procedures affect identification accuracy. Accordingly, not only jurors but also the other participants in the criminal justice system have limited knowledge of eyewitness factors and procedures. This finding means that jurors, law officers, and attorneys, as well as judges, need to be better educated about eyewitness factors and the impact of investigative procedures on eyewitness identifications.

4. The only legal safeguard that has been empirically shown to be effective in educating jurors about eyewitness testimony is expert testimony. Other legal safeguards, such as voir dire questions, cross-examination, etc., may be useful adjuncts to expert testimony. Empirical research indicates that jurors cannot distinguish accurate from inaccurate eyewitnesses. Although eyewitness experts cannot tell jurors if an eyewitness has made an accurate identification, they can educate jurors about eyewitness factors and procedures. With this information, jurors can better evaluate the likelihood that an eyewitness has made an accurate identification of the perpetrator of a crime.
5. A greater dialogue between judges and eyewitness researchers about eyewitness testimony would be very useful in reducing eyewitness error because both groups could benefit from the others’ experiences and expertise. A collaboration between judges and eyewitness experts is also important because, as Wells points out, the “scientific study of eyewitness memory is a continuing process.”<sup>62</sup> Accordingly, it is important that judges stay abreast of the

**Knowledge of eyewitness testimony is not just a matter of common sense. Therefore, judges need to be more cautious in excluding the testimony of eyewitness experts . . . .**

55. SCHECK, *supra* note 11.

56. Brigham, *supra* note 2.

57. TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999).

58. Wells, *supra* note 12.

59. *Id.* at 583.

60. See generally *id.*

61. See Dep’t Justice’s *Recommendations for the Collection and Preservation of Eyewitness Evidence*, TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, *supra* note 57.

62. Wells, *supra* note 12, at 590.

latest scientific research on eyewitness testimony and that researchers receive feedback from judges on how best to implement their findings into the criminal justice system. Moreover, because scientific knowledge is constantly evolving as a result of new research and new methods, our knowledge of how eyewitness factors and procedures affect eyewitness accuracy will never be complete. There will always be some experts who disagree with the majority of experts on how eyewitness factors and procedures affect accuracy.<sup>63</sup> Incomplete knowledge, controversies, and disagreements are inherent in the nature of scientific research. Consequently, if judges exclude the testimony of eyewitness experts merely because scientific knowledge on a topic is incomplete or because there is some disagreement among experts, then judges will be excluding eyewitness experts because of a misconception about the nature of scientific research. They will also be depriving fact finders of an essential tool for minimizing eyewitness error.

Judges are the guardians of the judicial system, and with increased knowledge about eyewitness testimony, they may be able to meaningfully address the problem of wrongful convictions. Reducing wrongful convictions is essential because the continual discovery of wrongful convictions undermines the credibility of the legal system. Reducing wrongful convictions is also vital because they cause incalculable suffering both to the innocent persons who are wrongfully convicted and to the victims of crimes that are committed because the real perpetrator of a crime has not been brought to justice.



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63. Howard Egeth, *Expert Psychological Testimony about Eyewitnesses: An Update*, in *PSYCHOLOGY, SCIENCE, AND HUMAN AFFAIRS: ESSAYS IN HONOR OF WILLIAM BEVAN* 151-66 (Frank Kessel ed., 1995); Rogers Elliott, *Expert Testimony about Eyewitness Identification: A Critique*, 17 *LAW & HUM. BEHAV.* 423-37 (1993).

# Recent Civil Decisions of the United States Supreme Court: The 2002-2003 Term

Charles H. Whitebread

The past term of the United States Supreme Court was dramatic, unexpected, and produced constitutional decisions that affect the nature and fabric of our society. The term had three or four “star” cases: the approval of affirmative action, the striking down of bans on gay sexual relations, the U-turn in the Court’s federalism revolution, and the restriction on punitive damage awards. These decisions and the other rulings in constitutional law outside the criminal field made up the bulk of the Court’s opinions for the 2002-2003 term.<sup>1</sup>

## FIRST AMENDMENT: INTENTIONAL MISREPRESENTATIONS IN CHARITABLE SOLICITATIONS

In *Illinois v. Telemarketing Associates, Inc.*,<sup>2</sup> a unanimous Court held that the First Amendment leaves open fraud claims based on nondisclosure if charitable solicitations are accompanied by misleading statements regarding what percentage of donations fundraisers will retain for themselves. The Illinois Attorney General filed a complaint against a solicitor raising funds for a charitable organization, alleging common-law and statutory claims for fraud and breach of fiduciary duty on the grounds that the solicitor misrepresented to donors that a large part of their donations would be given to the charity, when in fact only 15%-20% actually were. The charitable solicitor moved to dismiss the fraud claims, “urging that they were barred by the First Amendment.” Based on precedent, specifically *Schaumburg v. Citizens for a Better Environment*,<sup>3</sup> *Secretary of State of Md. v. Joseph H. Munson Co.*,<sup>4</sup> and *Riley v. National Federation of Blind of N.C., Inc.*,<sup>5</sup> the Court recognized that “had the complaint against Telemarketers charged fraud based solely on the percentage of donations the fundraisers would retain, or their failure to alert potential donors to their fee arrangements,” it would dismiss the case. However, the complaint made different allegations, ones that “target misleading affirmative misrepresentations about how donations will be used.” The Court concluded that First Amendment precedent did not protect these misrepresentations.

## FIRST AMENDMENT: SYMBOLIC CONDUCT

In *Virginia v. Black*,<sup>6</sup> the Court determined that a Virginia statute banning cross burning with the intent to intimidate violated the First Amendment because it treated the act of the

cross burning as prima facie evidence of intent. The statute provides that “[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.” It further states, “Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” Respondents were separately convicted under this statute. The majority of the Court determined that cross burnings fall into a category of proscribed speech. In making this determination, the Court noted that states may “ban a ‘true threat[:]. . . statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.’” The speaker need not intend to carry out the threat, rather “the prohibition . . . protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” The majority concluded that the Virginia statute “does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate.” Yet, the Court still determined the statute to be unconstitutional.

Justice O’Connor, writing for a plurality, said, “The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional.” Because the “jury instruction is the Model Jury instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction’s construction of the prima facie provisions ‘is a ruling on a question of state law that is binding on us as though the precise words had been written into’ the statute.” Justice Scalia concluded that the Court “should vacate and remand the judgment to the Virginia Supreme Court so that the court can have an opportunity authoritatively to construe the prima-facie-evidence provision.” Justice Souter, also concurring in the judgment and dissenting in part, said that no “exception should save Virginia’s law from unconstitutionality under the holding in *R.A.V. v. St. Paul*,<sup>7</sup> or any acceptable variation of it.” The statute discriminates against expression based on content, he said, and the prima facie evidence provision merely “skews the statute toward suppressing ideas.” Justice Thomas dissented, arguing

## Footnotes

1. For a more in-depth review of the decisions of the past term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 2002-2003 (Amer. Acad. of Jud. Educ. 2003).
2. 123 S. Ct. 1829 (2003).

3. 444 U.S. 620 (1980).
4. 467 U.S. 947 (1984).
5. 487 U.S. 781 (1988).
6. 123 S. Ct. 1536 (2003).
7. 505 U.S. 377 (1992).

that “this statute prohibits only conduct, not expressions” and “the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problem.” In his view, an inference “does not compel a specific conclusion,” and there is no “procedural consequence of shifting the burden of production.” It neither chills speech nor violates “due process.”

#### **FIRST AMENDMENT: CORPORATE CONTRIBUTIONS TO POLITICAL CANDIDATES**

Federal law “makes it ‘unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with’ certain federal elections.”<sup>8</sup> The statute does allow the creation of political action committees (PACs), however, for the “administration, and solicitation of contributions.” In *Federal Election Comm’n v. Beaumont*,<sup>9</sup> the Court, with Justice Souter writing for the majority, held the ban on direct corporate contributions under 2 U.S.C. § 441b, even as applied to nonprofit advocacy corporations, does not violate the First Amendment.

The Court begins with the history of and purposes behind the corporate contribution laws, stating, “Any attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations’ potentially ‘deleterious influences on federal elections.’” Citing to *Federal Elections Comm’n v. National Right to Work Comm’n.*,<sup>10</sup> the Court said that prior decision “all but decided the issue against” the nonprofit group’s position. *National Right to Work* involved “the provision of § 441b restricting a nonstock corporation to its membership when soliciting contributions to its PAC.” In *National Right to Work*, the Court “considered whether a nonprofit advocacy corporation without members of the usual sort could be held to violate the law by soliciting donations to its PAC from any individual who had at one time contributed to the corporation.” The Court held that solicitation beyond “members” violated section 441b and that the prohibition was not invalid under the First Amendment. The Court concluded that “the congressional judgment to regulate corporate political involvement ‘warrants considerable deference’ and ‘reflects a permissible assessment of the dangers posed by [corporations] to the electoral process.’”

The Court noted that “later cases have repeatedly acknowledged, without questioning, the reading of *National Right to Work* as generally approving the § 441b prohibition on direct contributions, even by nonprofit corporations ‘without great financial reserves.’” In *Federal Election Comm’n v. National Conservative Political Action Committee*,<sup>11</sup> the Court reaffirmed “that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corpora-

tions exhibit.” Similarly, in *Austin v. Michigan Chamber of Commerce*,<sup>12</sup> the Court “sustained Michigan’s ban on direct corporate contribution, even though the ban ‘included within its scope closely held corporations that do not possess vast reservoirs of capital.’”

#### **FIRST AMENDMENT: OVERBREADTH DOCTRINE**

In *Virginia v. Hicks*,<sup>13</sup> a unanimous Court found Virginia’s Richmond Redevelopment and Housing Authority’s (RRHA) trespassing policy, which resulted in a conviction for trespass of Kevin Hicks, was not facially invalid under the First Amendment’s overbreadth doctrine. The RRHA owns and operates a housing development for low-income residents called Whitcomb Court. The streets were closed to public use. The RRHA also enacted a policy authorizing Richmond police, to serve notice, either orally or in writing, to any person who is found on the RRHA’s property when “such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property.” After notification, a person could be arrested.

The Court noted that under *Members of City Council of Los Angeles v. Taxpayers for Vincent*<sup>14</sup> and *Broadrick v. Oklahoma*,<sup>15</sup> the overbreadth doctrine is an exception to the normal rule regarding the standards for facial challenges, and that a showing that a law punishes a “substantial” amount of protected free speech, “judged in relation to the statute’s plainly legitimate sweep . . . suffices to invalidate all enforcement of that law, ‘until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.’”

The Court asserted that Hicks had not made a showing that the RRHA policy as a whole was unconstitutional, even assuming the unlawfulness of the policy’s “unwritten” rule that demonstrating and leafleting at Whitcomb Court requires permission. As for the written provision authorizing the police to arrest those who return to Whitcomb Court after receiving a barment notice, the Court concluded that this provision “certainly” does not violate the First Amendment as applied to persons whose post-notice entry is not for the purpose of engaging in constitutionally protected speech. The Court said that this policy had nothing to do with the First Amendment, and was sufficiently similar to a person being lawfully banned from a public park for vandalizing it and then reentering the park to participate in a political demonstration. Simply, “[h]ere, as there, it’s Hicks’ nonexpressive *conduct*—his entry in violation of the notice-barment rule—not his speech, for which he is

**[T]he Court determined that a Virginia statute banning cross burning with the intent to intimidate violated the First Amendment . . . .**

8. 2 U.S.C. § 441b(a).

9. 123 S. Ct. 2200 (2003).

10. 459 U.S. 197 (1982).

11. 470 U.S. 480 (1985).

12. 494 U.S. 652 (1990).

13. 123 S. Ct. 2191 (2003).

14. 466 U.S. 789 (1984).

15. 413 U.S. 601 (1973).

**The Court concluded that the Copyright Term Extension Act complied with the “limited times” requirement of the Constitution . . . .**

punished as a trespasser.” Most importantly, both the notice-barment rule and the “legitimate business or social purpose” rule apply to *all* persons who enter the streets of Whitcomb Court, not just to those who seek to engage in expression. “Hicks has not shown, based on the record in this case, that the RRHA trespass

policy as a whole prohibits a ‘substantial’ amount of protected speech in relation to its many legitimate applications,” the Court concluded.

**FIRST AMENDMENT: COPYRIGHT TERM EXTENSION ACT**

The Copyright and Patent Clause of the Constitution, Article I, § 8, cl. 8, provides as to copyrights: “Congress shall have Power . . . to promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings.” In *Eldred v. Ashcroft*,<sup>16</sup> Justice Ginsburg, writing for a 7-2 Court, held the Copyright Term Extension Act’s (CTEA) extension of existing copyrights does not exceed Congress’s power under the Copyright Clause or violate the First Amendment. The CTEA,<sup>17</sup> enacted by Congress in 1998, extended the duration of copyrights by 20 years. Now, “for works created by identified natural persons, the term now lasts from creation until 70 years after the author’s death” and “for anonymous works, pseudonymous works, and works made for hire, the term is 95 years from publication or 120 years from creation, whichever expires first.”

The Court concluded the CTEA complied with the “limited times” requirement of the Constitution and, furthermore, was a “rational exercise of the legislative authority conferred by the Copyright Clause.” The Court adopted a traditional “rationality” test, rather than a three-part test that engages a heightened scrutiny as encouraged by Justice Breyer in his dissent, because “it is not [the Court’s] role to alter the delicate balance Congress has labored to achieve.” The Court added, “The CTEA reflects judgments of a kind Congress typically makes, judgments [the Court] cannot dismiss as outside the Legislature’s domain.” The passage of the CTEA, and its extended time frame for copyright protection, clearly reflects Congress’s intention of ensuring that “American authors would receive the same copyright protection in Europe as their European counterparts.”

Moving to the petitioners’ First Amendment claim, the Court rejected petitioners’ arguments (1) that “the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment” and (2) “for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards.” Considering the narrower version of petitioners’

claim—the CTEA’s extension of existing copyrights violated the First Amendment—the Court noted that the Copyright Clause and First Amendment were adopted close in time and this, according to the Court, indicates “copyright’s purpose is to promote the creation and publication of free expression” by “establishing a marketable right to the use of one’s expression.” Furthermore, “copyright law contains built-in First Amendment accommodations.” First, “it distinguishes between ideas and expression and makes only the latter eligible for copyright protection.” Second, “the ‘fair use’ defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.”

**FIRST AMENDMENT: CHILDREN’S INTERNET PROTECTION ACT**

In *United States v. American Library Association*,<sup>18</sup> the Court found that Congress’s condition that public libraries use filters on their computers to block internet access to obscene material and child pornography to secure federal funding, contained in the Children’s Internet Protection Act (CIPA), does not violate the First Amendment, nor is it an invalid exercise of its spending power. Chief Justice Rehnquist announced the judgment of the Court and wrote the plurality opinion, in which Justices O’Connor, Scalia, and Thomas joined. Justices Kennedy and Breyer filed concurring opinions. Justice Souter filed a dissent, in which Justice Ginsburg joined. The plurality recognized that “Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives,” with the caveat, of course, that it may “not ‘induce’ the recipient ‘to engage in activities that would themselves be unconstitutional.’” In determining whether the restriction violates the First Amendment, the Court determined that a heightened judicial standard of review was “incompatible with the discretion that public libraries must have to fulfill their traditional missions”—“Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.” Furthermore, the possibility that a filter might “overblock” does not render the statute unconstitutional. The Court wrote, “Assuming that such erroneous blocking presented constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled.”

The Court next addressed the issue of whether the statute “imposes an unconstitutional condition on the receipt of federal assistance.” It noted that “under this doctrine, ‘the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.’” The Court concluded that it need not decide that issue because, “even assuming that appellees may assert an ‘unconstitutional conditions’ claim, this claim would fail on the merits.” The Court relied on its decision in *Rust v. Sullivan*,<sup>19</sup> where it upheld Congress’s restriction on using federal funds in programs that provided

16. 123 S.Ct. 1505 (2003).

17. Pub. L. 105-298 § 102(b) and (d) amending 17 U.S.C. §§ 302, 304.

18. 123 S. Ct. 1012 (2003).

19. 500 U.S. 173 (1991).

abortion counseling. The Court recognized, as here, “that ‘the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized.’”

#### **FIRST AMENDMENT: PRISONERS’ VISITATION RIGHTS**

In *Overton v. Bazzetta*,<sup>20</sup> Justice Kennedy delivered the opinion of the Court, which held that restrictions on prisoners’ visitation rights do not violate the First Amendment if rationally related to a legitimate penological interest. The regulations at issue in this case were enacted by the Michigan Department of Corrections and severely restricted the visitation rights of prisoners in order to maintain better control during visitation periods and to prevent smuggling, drug trafficking, and other harmful conduct, some of which was displayed before children who were visitors to the prison facilities. The regulations were challenged as they pertained to prisoners who were only entitled to noncontact visitations. In upholding the regulations, the Court addressed whether these regulations infringed upon the constitutional right of association under the First Amendment, recognizing that the Constitution “protects ‘certain kinds of highly personal relationships.’” The Court noted, however, “many liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration.” The Court did not “attempt to explore or define” the asserted right of association because the regulations at issue in this case “bear a rational relation to legitimate penological interests,” which “suffices to sustain the regulation in question.”

#### **FOURTEENTH AMENDMENT: EQUAL PROTECTION CLAUSE**

In *Grutter v. Bollinger*,<sup>21</sup> the Court, in a 5-4 decision, endorsed Justice Powell’s opinion in *Regents of Univ. of Cal. v. Bakke*,<sup>22</sup> and determined that a law school admission policy that considers race as only one of many factors in evaluating applicants to achieve the institution’s goal of a “diverse” student body does not violate the Equal Protection Clause. In *Bakke*, Justice Powell wrote that “‘the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.’” Therefore, both must be accorded the same protection. When a “governmental” decision touches upon an individual’s racial or ethnic ground, “he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.” The only interest Justice Powell accepted as valid was “the attainment of a diverse student body,” with the proviso that “constitutional limitations protecting individual rights may not be disregarded.” Justice Powell was “careful to emphasize that in his view race ‘is only one element in a range of factors a university properly may consider in attaining the goal of a

heterogeneous student body.” The Court in *Grutter* concluded that the law school’s admission program was consistent with Powell’s *Bakke* approach—a narrowly tailored system designed to achieve a diverse student body.

#### **FOURTEENTH AMENDMENT: AFFIRMATIVE ACTION**

Addressing the issue of affirmative action, the Court, in *Gratz v. Bollinger*,<sup>23</sup> held an undergraduate admissions policy that assigned a certain number of “admission” points to individuals based on race or ethnicity was in violation of the Equal Protection Clause. Justice Rehnquist, writing for a 5-4 Court, reviewed the admission policy of University of Michigan’s College of Literature, Science, and the Arts. Their policy automatically assigned 20 points to an applicant in an underrepresented class. First, in light of its opinion set forth in *Grutter v. Bollinger*, the Court found that “diversity” is a valid compelling state interest. However, the Court determined that the University’s policies were not “narrowly tailored to achieve such an interest.” The Court cited Justice Powell’s opinion in *Bakke* for the proposition that such programs “‘preferring members of any one group for no reason other than race or ethnic origins is discrimination for its own sake.’” While “race or ethnic background may be deemed a plus in a particular applicant’s file,” a policy must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.” The Court found that the university’s current policy “does not provide such individualized consideration.”

#### **DUE PROCESS CLAUSE: SAME-SEX RELATIONSHIP**

In a landmark decision, the Court in *Lawrence v. Texas*<sup>24</sup> held a Texas statute criminalizing certain private, consensual sexual acts between individuals of the same sex violates their liberty rights under the Due Process Clause of the Fourteenth Amendment. Justice Kennedy wrote the opinion for the court and Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice O’Connor filed an opinion concurring in the judgment. Justice Scalia, Chief Justice Rehnquist, and Justice Thomas dissented. In its decision, the Court began by recognizing “there are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases.” Following its line of decisions from *Griswold v. Connecticut*,<sup>25</sup> to *Bowers v. Hardwick*,<sup>26</sup> the Court said that “our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” The Court said “the emerging recognition should have been apparent when *Bowers*

**In *Grutter v. Bollinger*, the Court, in a 5-4 decision, endorsed Justice Powell’s opinion in *Bakke* . . . .**

20. 123 S. Ct. 2162 (2003).

21. 123 S. Ct. 2325 (2003).

22. 438 U.S. 265 (1978).

23. 123 S. Ct. 2411 (2003).

24. 123 S. Ct. 2472 (2003).

25. 381 U.S. 479 (1965).

26. 478 U.S. 186 (1986).

**The Court concluded, “Bowers was not correct when it was decided, and it is not correct today.”**

correct today. It ought not to remain binding precedent.” The Court overruled *Bowers* and invalidated the Texas statute.

#### **FOURTEENTH AMENDMENT: EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS**

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,<sup>27</sup> Justice O’Connor wrote the opinion for the unanimous court. In this decision, the Court held that a non-profit housing agency, Buckeye Community Hope Foundation, failed to state a claim for an equal protection or substantive due process violation when it alleged the City of Cuyahoga Falls and its officials violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment “in allowing a site plan approval ordinance to be submitted to the electors of Cuyahoga Falls through referendum and in rejecting [its] application for building permits.” The Cuyahoga City Charter granted voters “the power to approve or reject at the polls any ordinance or resolution passed by the Council within thirty days of the ordinance’s passage.” The voters of Cuyahoga, using this process, stalled the issuance of the building permits and subsequently passed a referendum repealing an ordinance allowing Buckeye to construct low-income housing. The Ohio Supreme Court subsequently declared the referendum unconstitutional and the necessary building permits were issued to Buckeye. However, Buckeye maintained this action in federal court for violation of the fourteenth Amendment.

Addressing the equal protection claim first, the Court said, “We have made clear that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” Buckeye, however, did not claim injury from the referendum itself, but the “petitioning process.” The Court concluded that “neither of the official acts [Buckeye] challenge[s] reflects the intent required to support equal protection liability.” The “City acted pursuant to the requirements of its charter, which set out a facially neutral petitioning procedure.” Likewise, the city engineer, in refusing to issue the appropriate permits while the referendum was still pending, “performed a nondiscretionary, ministerial act.” Buckeye did not point to any evidence “suggesting these official acts were themselves motivated by racial animus.” The Court also rejects Buckeye’s reliance instead on the “allegedly discriminatory voter sentiment” to show an equal protection violation, stating “statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant . . . do not,

was decided.” While “*stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law,” it is not an inexorable command. The Court concluded, “*Bowers* was not correct when it was decided, and it is not cor-

rect today. It ought not to remain binding precedent.” The Court overruled *Bowers* and invalidated the Texas statute.

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in and of themselves, constitute state action for the purposes of the Fourteenth Amendment.” The Court concluded that there was no evidence presented to show that these private motives should be attributed to the state.

The Court also found that Buckeye failed to allege a substantive due process violation. Buckeye asserted two grounds by which the City violated its due process rights: (1) Buckeye had a “legitimate claim of entitlement to the building permits, and therefore a property interest in those permits . . . [and] the City engaged in arbitrary conduct by denying [Buckeye] the benefit of the plan”; and (2) “submission of an administrative land-use determination to the charter’s referendum procedures constitutes *per se* arbitrary conduct.” The Court did not consider whether Buckeye had a property interest in the permits “because the city engineer’s refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct,” the type of conduct necessary to find a substantive due process violation. Instead, the city engineer acted according to the advice of the city attorney and the city charter. Second, the Court rejects Buckeye’s arguments of *per se* arbitrary conduct. The Court has previously refused to make such a distinction between legislative and administrative referendums, as evidenced in *Eastlake v. Forest City Enterprises, Inc.*<sup>28</sup> In that case, the Court held that “because all power stems from the people, ‘a referendum cannot . . . be characterized as a delegation of power,’ unlawful unless accompanied by ‘discernable standards.’” The people retain the power to govern through referendum “with respect to any matter, legislative or administrative, within the realm of local affairs.” The Court said that “though the substantive result of a referendum may be invalid if it is arbitrary and capricious,” Buckeye was not challenging the referendum itself, merely the city’s compliance.

#### **FOURTEENTH AMENDMENT: EXCESSIVE PUNITIVE DAMAGES AWARD**

Addressing excessive punitive damages award in a civil action, the Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>29</sup> held a punitive damage award of \$145 million, where full compensatory damages were \$1 million, was excessive and violated the Due Process Clause of the Fourteenth Amendment. Justice Kennedy delivered the opinion of a 6-3 Court, which relied heavily on *BMW of North America, Inc. v. Gore*.<sup>30</sup> In *Gore*, the Court instructed reviewing courts to consider three guideposts: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” Justices Scalia, Thomas, and Ginsburg dissented on grounds that the Due Process Clause does not constrain the size of punitive damage awards.

27. 123 S.Ct. 1389 (2003).  
28. 426 U.S. 668 (1976).

29. 123 S.Ct. 1513 (2003).  
30. 517 U.S. 559 (1996).

### FEDERALISM: FAMILY MEDICAL LEAVE ACT OF 1993

In *Nevada Dept. of Human Resources v. Hibbs*,<sup>31</sup> Justice Rehnquist delivered the opinion of the Court, which held that an individual may sue a state under the family-care provision of the Family Medical Leave Act (FMLA), which provides 12 weeks of unpaid leave, as the provision is a valid exercise of Congress's power under section 5 of the Fourteenth Amendment. The Court began by noting that "the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." However, "Congress may . . . abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." The Court held that here FMLA clearly "enables employees to seek damages 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction.'"<sup>32</sup> A "public agency," as defined by Congress, "include[s] both 'the government of a State or political subdivision thereof' and 'any agency of . . . a State, or a political subdivision of a State.'"<sup>33</sup> Furthermore, the Court determined that FMLA's enactment was appropriate under section 5 because it "aims to protect the right to be free from gender-based discrimination in the workplace."

### FEDERALISM: SUPPLEMENTAL JURISDICTION

In *Jinks v. Richland County, South Carolina*,<sup>34</sup> a unanimous Court, in an opinion written by Justice Scalia, held that 28 U.S.C. section 1367(d), which tolls the statute of limitations for state law claims filed in a federal court under supplemental jurisdiction, is not unconstitutional even as applied to a state's political subdivisions. Petitioner filed an action in federal court, which included supplemental state claims against the county for wrongful death and survival. The district court dismissed these claims without prejudice, and petitioner filed a state action within 30 days of the dismissal. The county argued these claims were time-barred on the grounds that section 1367(d) is "facially invalid because it exceeds the enumerated powers of Congress" and, even if facially valid, "should not be interpreted to apply to claims brought against a State's political subdivision" because it interferes with their right to sovereign immunity.

The Court began by recognizing that Article I, section 8 of the Constitution authorizes Congress "to make all Laws which shall be necessary and proper for carrying into Execution [Congress's Article I, § 8] Powers and all other Powers vested by this Constitution in the Government of the United States." The Court found section 1367(d) "necessary," because it is "'conducive to the due administration of justice' in a federal court and is 'plainly adapted' to that end." Furthermore, the Court concluded that section 1367(d) was "'plainly adapted to the power of Congress to establish the lower federal courts and provide for the fair and efficient exercise of their Article III powers." Neither party suggested that section 1367(d) was a

"pretext" for an improper objective or is so attenuated with Congress's authority "as to undermine the enumeration of powers set forth in Article I, § 8."

The Court also found that the tolling provision set out in section 1367(d) did not constitute "an impermissible abrogation of 'sovereign immunity.'" The Court determined that those provisions did not encroach upon a state's sovereign immunity as applied to its political subdivisions. First, as recognized in *Alden v. Maine*,<sup>35</sup> while "Congress lacks authority under Article I to override a State's sovereign immunity from suit in its own courts, it may subject a *municipality* to suit in state court if that is done pursuant to a valid exercise of its enumerated powers." Municipalities do not enjoy the same constitutional immunity as states.

### FEDERALISM: NEGATIVE COMMERCE CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE

In *Hillside Dairy, Inc. v. Lyons*,<sup>36</sup> the Court, in an opinion written by Justice Stevens, held a California state law that burdens or discriminates against out-of-state suppliers is subject to a challenge under the negative Commerce Clause. It is subject to challenge when it is not expressly immunized to such a challenge by federal statute, and is subject to a challenge under the Privileges and Immunities Clause, even when it does not on its face make a distinction against an individual based on residency or citizenship. In most of the United States, not including California, "the minimum price paid to dairy farmers producing raw milk is regulated pursuant to federal marketing orders." In California, "three related statutes establish the regulatory structure for milk produced, processed, or sold in California." In 1997, the California Department of Food and Agriculture "amended its plan to require that contributions to the pool be made on some out-of-state purchases." Petitioners, out-of-state producers, brought an action challenging the 1997 amendment as discriminatory against them. California argued that it was exempt from regulation based on § 144 of the Federal Agriculture Improvement and Reform Act of 1996.<sup>37</sup> Congress passed section 144, which exempts California only regarding the composition of milk products, because California's composition standards exceed some of those set by the federal Food and Drug Administration.

The Court concluded, based on the plain language of the statute, that section 144 "does not encompass pricing and pooling laws," and therefore, "California's pricing and pooling laws [are not insulated] from a Commerce Clause challenge." Furthermore, the Court also determined that the individual petitioners were not banned from raising a Privileges and Immunities Clause challenge. Article IV, section 2 of the

**[A]n individual may sue a state under the family-care provision of the Family Medical Leave Act . . . .**

31. 123 S. Ct. 1972 (2003).  
32. 29 U.S.C. § 2617(a)(2).  
33. § 203(x), 2611(4)(A)(iii).  
34. 123 S.Ct. 1667 (2003).

35. 527 U.S. 706 (1999).  
36. 123 S. Ct. 2142 (2003).  
37. 7 U.S.C. § 7254.

**Justice Stevens concluded that the “question is whether there is a probability that Maine’s program was preempted by the mere existence of the federal statute.”**

Constitution provides: “The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” The Court concluded that, while the lower courts correctly banned the corporate petitioners from raising this argument, the individual petitioners could go forward with their claims. The Court cited to its holding in *Chalker v. Birmingham & Northwestern R. Co.*,<sup>38</sup> stating that it could be interpreted

two ways: (1) the Clause applies “to classifications that are but proxies for differential treatment against out-of-state residents”; or (2) it prohibits “any classification with the practical effect of discriminating against such residents.” The Court concluded that, in this case, it did not matter which interpretation was correct because under either the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment was not sufficient for rejecting this claim.

#### **FEDERALISM: STATE MEDICAID REGULATIONS**

In *Pharmaceutical Research and Manufacturers of America v. Walsh*,<sup>39</sup> the Court determined that the petitioners did not meet their burden for a preliminary injunction by showing that the Maine statute providing “supplemental rebate programs to achieve additional cost savings on Medicaid purchases as well as purchases made by other needy citizens” (the “Maine Rx Program”) was preempted by federal law, or that it violated the negative Commerce Clause. Justice Stevens announced the judgment of the Court. Prior to 1990, the Medicaid statute did not “specifically address” outpatient prescription drug coverage. In 1990, Congress created a rebate program for prescription drugs in an amendment contained in the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990). The plan had two parts: (1) “It imposed a general requirement that, in order to qualify for Medicaid payments, drug companies must enter into agreements either with the Secretary or, if authorized by the Secretary, with individual States, to provide rebates on their Medicaid sales of outpatient prescription drugs,” and (2) “Once a drug manufacturer enters into a rebate agreement, the law requires the State to provide coverage for that drug under its plan unless the State complies with one of the exclusion or restriction provisions in the Medicaid Act.” The Court wrote, “Most relevant to this case, Congress allowed States, ‘as a condition of coverage or payment for a covered outpatient drug,’ § 1396r-8(d)(5), to require approval of the drug before it is dispensed.” In the OBRA 1993, Congress further amended the Act to allow States to use “formularies” subject to strict limitations.

Justice Stevens concluded that the “question is whether there is a probability that Maine’s program was preempted by

the mere existence of the federal statute.” In analyzing this question, Justice Stevens focused on “the centerpiece of petitioner’s attack on the Maine Rx Program, [which] is its allegedly unique use of a threat to impose a prior authorization requirement on Medicaid sales to coerce manufacturers into reducing their prices on sales to non-Medicaid recipients.” However, Justice Stevens recognized that it was petitioners’ burden to show that “no Medicaid purpose” exists, and that a preliminary injunction is improper “if the program on its face clearly serves some Medicaid-related goal or purpose.” He found that three such purposes existed. First, “the program will provide medical benefits to persons who can be described as ‘medically needy’ even if they do not qualify for AFDC or SSI benefits.” Second, “there is a possibility that, by enabling some borderline aged and infirm persons better access to prescription drugs earlier, Medicaid expenses will be reduced.” And third, patients will be protected from “inappropriate” prescriptions, and the use of cost-effective medications will be encouraged. While these reasons ultimately might not be enough to save the statute from preemption, it was “incorrect for the District Court to assume that any impediment, ‘no matter how modest,’ to a patient’s ability to obtain the drug of her choice at the State’s expense would invalidate the Maine Rx Program.”

The Court said that petitioner’s “Commerce Clause challenge focuses on the effects of the rebate agreements that will follow manufacturer compliance with the program.” The Court concluded that Maine’s Rx Program “does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect.” First, “Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price.” Second, “Maine is not tying the price of its in-state products to out-of-state products.”

#### **FEDERALISM: PREEMPTION BY FEDERAL FOREIGN POLICY**

In *American Insurance Association v. Garamendi*,<sup>40</sup> Justice Souter delivered the opinion of the Court, holding California’s Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which requires an insurer doing business in the state to disclose information about policies sold by it or its affiliates in Europe between 1920 and 1945, was preempted under the foreign affairs doctrine of federal executive authority to set foreign relations. The Court began by recognizing that the President has independent authority under the Constitution to decide foreign policies and that “an exercise of state power that touches on foreign relations must yield to the National Government’s policy.” The President can execute executive agreements with foreign countries, requiring no ratification by the Senate or approval by Congress; this power includes “the settlement of claims.”

In July 2000, the President and German Chancellor Schroder signed an executive agreement, called the German Foundation Agreement, to reach a remedy regarding the numerous unsettled claims individuals had against German companies that stemmed from the Nazi era in Germany. In terms of insurance policies, both countries agreed that the

38. 249 U.S. 522 (1919).

39. 123 S.Ct. 1855 (2003).

40. 123 S.Ct. 2374 (2003).

German Holocaust Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization formed in 1998, whose primary purpose is to negotiate with European insurers “to provide information about unpaid insurance policies issued to Holocaust victims and settlement of claims brought under them.”

The German Foundation Agreement does not expressly state that it preempts laws like HVIRA, leaving the government only with the argument that preemption rests because of “interference with foreign policy those agreements embody.” Turning to its decision in *Zschering v. Miller*,<sup>41</sup> in which the majority reasoned “state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict,” the Court concluded that HVIRA is sufficiently in conflict with foreign policy as to require preemption.

First, the Court concluded that resolving Holocaust-era insurance claims “is a matter well within the Executive’s responsibility for foreign affairs.” Second, in this instance, the government has a foreign policy regarding the law addressed by HVIRA: “the three settlement agreements are enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions.” Finally, the Court determined that HVIRA “conflicts” with these policies: “California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail.”

The Court refused to address whether California’s “iron fist” approach was superior to the President’s “kid glove” approach as it is not within its role to make such a determination. However, it did address the state’s arguments “that even if HVIRA does interfere with the Executive Branch foreign policy, Congress authorized state law of this sort in the McCarran-Ferguson Act, . . . and the more recent U.S. Holocaust Assets Commission Act of 1998.” The Court rejected both claims. First, the McCarran-Ferguson Act leaves insurance regulation generally to the States, but even if HVIRA could be considered as a law regulating the business of insurance, “a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.” Second, the Holocaust Commission Act, set up to study and develop a historical record of the collection and disposition of Holocaust era assets, clearly focuses on assets held by the Government “and, if anything, the federal Act assumed it was the National Government’s responsibility to deal with returning those assets.” Furthermore, the reference to “compiling information” specifically states that “to the degree information is available,” and does not authorize “state sanctions interfering with federal efforts to resolve such claims.”

#### **STATUTORY INTERPRETATION: CIVIL RIGHTS ACT OF 1964**

A unanimous Court in *Desert Palace, Inc. v. Costa*<sup>42</sup> held direct evidence of discrimination is not required to obtain a mixed-motive instruction under Title VII of the Civil Right Act of 1964. The Court’s decision in *Price Waterhouse v. Hopkins*<sup>43</sup> left open the issue of when the burden of proof may be shifted to an employer to prove the affirmative defense of legitimate purpose in a mixed-motive case. In its 1991 Act, Congress addressed this issue with two new provisions. The first established an alternative for proving that an “unlawful employment practice” occurred, allowing an employee to move forward with his or her action once they had established “an unlawful employment practice.”<sup>44</sup> If discrimination is proven, an employer can affirmatively show it would have taken the same action even absent the impermissible factor. The limited defense does not absolve the employer of liability, but limits the remedies of the plaintiff.<sup>45</sup> After the 1991 Act was enacted, the Courts of Appeals “divided over whether a plaintiff must prove by direct evidence that an impermissible consideration was a ‘motivating factor.’”

In determining that direct evidence was not required, the Court first turned to the text of the statute and determined that section 2000e-2(m) clearly states that an employee “need only ‘demonstrate’ that an employer used a forbidden consideration with respect to ‘any employment practice,’” not “make a heightened showing through direct evidence.” Second, the Court concluded that Congress “explicitly defined the term ‘demonstrates’ in the 1991 Act, leaving little doubt that no special evidentiary showing is required.” Third, the Court noted that “[t]he adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.” Finally, the Court also noted, that the use of the term “demonstrate” in other provisions of Title VII tends also to show that “§ 2000e-2(m) does not incorporate a direct evidence requirement.”<sup>46</sup>

#### **CIVIL STATUTORY INTERPRETATION: FEDERAL TRADEMARK DILUTION ACT**

In *Moseley v. Victoria’s Secret Catalogue, Inc.*,<sup>47</sup> the Court determined that under the Federal Trademark Dilution Act (FTDA), objective proof of actual injury to the economic value of a famous mark is required for relief, as opposed to a presumption of harm arising from a subjective “likelihood of dilution” standard. In 1995, through the FTDA, Congress amended section 43 of the Trademark Act of 1946 to provide a

**A unanimous Court . . . held that direct evidence of discrimination is not required to obtain a mixed-motive instruction under Title VII . . . .**

41. 398 U.S. 429 (1968).

42. 123 S. Ct. 2148 (2003).

43. 490 U.S. 228 (1989).

44. 42 U.S.C. § 2000e-2(m).

45. 42 U.S.C. § 2000e-5(g)(2)(B).

46. *See, e.g.*, 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), 2000e-5(g)(2)(B).

47. 537 U.S. 418 (2003).

**“[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, . . . the general words are construed to embrace only objects similar in nature . . . .**

remedy for the “dilution of famous marks.” The Court first noted that, unlike infringement law, dilution law does not stem from common law and is not motivated by consumer protection. Therefore, competition between the two enterprises is irrelevant. The Court noted that to avoid possible First Amendment challenges, Congress included two provisions, one to allow use of a mark in comparative

advertising, and the other to allow the use of a mark for non-commercial use. The committee report stated that the “purpose [of the bill] is to protect famous trademarks from subsequent uses that blur the distinctiveness of the mark or tarnish or disparage it, even in the absence of a likelihood of confusion.” The Court reasoned that the contrast between the state statutes, which expressly refer to both “injury to business reputation” and to “dilution of the distinctive quality of a trade name or trademark,” and the federal statute, which refers only to the latter, supports a narrower reading of the FTDA. The relevant text of the FTDA provides that “the owner of a famous mark is entitled to injunctive relief against another person’s commercial use of a mark or trade name if that use ‘causes dilution of the distinctive quality’ of the famous mark. . . .” This text unambiguously requires a showing of actual dilution, rather than a likelihood of dilution. The Court cautioned that its conclusion does not mean direct proof of dilution, such as an actual loss of sales, is always necessary; circumstantial evidence of dilution may be sufficient in a given case.

#### **CIVIL STATUTORY INTERPRETATION: SOCIAL SECURITY ACT**

In *Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler*,<sup>48</sup> the Court, in a unanimous opinion written by Justice Souter, determined that the Washington State Department of Social and Health Services (DSHS), as payee representative to children beneficiaries of Social Security benefits under both Social Security Income scheme and Old-Age, Survivors, and Disability Insurance plan, is not barred by 42 U.S.C. section 407(a) from recovering its initial expenditures under state law for the care and maintenance of such beneficiaries in their state foster-care program. Washington, through the DSHS, makes foster care available to abandoned, abused, neglected, or orphaned children who have no other guardians or custodians available. Although the state pays for such care, it has a policy “to attempt to recover the costs of foster care from the parents of the children.” The department adopted a regulation providing “that public benefits for a child, including under SSI or OASDI, ‘shall be used on behalf of the child to help pay for the cost of foster care

received.” Section 407(a), commonly referred to as the “anti-attachment” provision, provides, “The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.”

A class of children who are in the department’s foster care and who receive OASDI or SSI benefits brought an action in state court alleging that the “department’s use of their Social Security benefits to reimburse itself for the costs of foster care” violated this provision. The Court determined it does not. The Court began by stating, “Section 407(a) protects SSI and OASDI benefits from ‘execution, levy, attachment, garnishment, or other legal process,’” not “creditor-type acts.” It recognizes that “the questions to be answered in resolving this case, then, do not go to the State’s character as a creditor . . . [but to] whether the department’s effort to become a representative payee, or its use of respondents’ Social Security benefits . . . amounts to employing an ‘execution, levy, attachment, garnishment, or other legal process.’” The Court easily dismissed the possibilities that the state’s activities involve an “execution, levy, attachment, or garnishment,” as these are legal “terms of art” and refer to “formal procedures” by which a person gains control over the property of another. The Court said “the case boils down to whether the department’s manner of gaining control of the federal fund involves ‘other legal process.’” The Court determined the answer is no: “[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, ‘where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’” In this instance, since the phrase “other legal process” is used after execution, levy, attachment, and garnishment, therefore, at a minimum, section 402(a) “would seem to require utilization of some judicial or quasi-judicial mechanism . . . by which control over property passes from one person to another.”

#### **CIVIL STATUTORY INTERPRETATION: ERISA**

In *Kentucky Ass’n of Health Plans, Inc. v. Miller*,<sup>49</sup> a unanimous Court, in an opinion written by Justice Scalia, found that Kentucky’s “Any Willing Provider” statutes, which mandate that health insurers not discriminate against willing providers, were saved from preemption by ERISA under the new rule adopted by the Court to determine whether a state law “regulates insurance” under 29 U.S.C. section 1144(b)(2)(A). State laws are saved from preemption under section 1144(b)(2)(A) if they are laws that “regulate insurance.” Making a clean break from the McCarran-Ferguson factors it had used previously, the Court decided that “for a state law to be deemed a ‘law . . . [that] regulates insurance’ under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance . . . . Second . . . the state law must substantially affect the risk pool-

48. 537 U.S. 371 (2003).

49. 123 S.Ct. 1471 (2003).

ing arrangement between the insurer and the insured.” Although the McCarran-Ferguson factors were never an “essential component” of the analysis surrounding section 1144(b)(2)(A), the Court had used them to “buttress” its decisions. This has “misdirected attention, failed to provide clear guidance to lower federal courts, and . . . added little to the relevant analysis.”

#### **CIVIL STATUTORY INTERPRETATION: HIGHWAY SAFETY ACT**

In *Pierce County v. Guillen*,<sup>50</sup> a unanimous Court found that 23 U.S.C. section 409, which protects information “compiled or collected” in connection with certain federal highway safety programs from being discovered or admitted into evidence, is a valid exercise of Congress’s authority under the Commerce Clause. The Highway Safety Act of 1966 was enacted “to improve the safety of our Nation’s highways by encouraging closer federal and state cooperation with respect to road improvement projects.” This act includes the Hazard Elimination Program, “which provides state and local governments with funding to improve the most dangerous sections of their roads.” To implement the Hazard Elimination Program, Congress adopted section 409 to protect certain data from discovery. The Court analyzes the scope of section 409 with regards to two well-recognized principles: (1) “Evidentiary privileges must be construed narrowly because privileges impede the search for the truth,” and (2) “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” With these principles in mind, the Court concluded section 409 protects all documents “compiled or collected for § 152 purposes, but does not protect information that was originally compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point ‘collected’ by another agency for § 152 purposes.”

After determining the scope of section 409, the Court addressed its constitutionality. Relying on the Commerce Clause and Congress’s “well established . . . [power] to ‘regulate the use of the channels of interstate commerce,’” the Court found that “both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce.” The adoption of section 409 was reasonable to eliminate the “unforeseen side effect of the information-gathering requirement of § 152” and encourage “more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decision making, and, ultimately, greater safety of the Nation’s roads.”

#### **CIVIL STATUTORY INTERPRETATION: FAIR HOUSING ACT**

In *Meyer v. Holley*,<sup>51</sup> Justice Breyer delivered the opinion for a unanimous Court holding that the traditional principles of vicarious liability apply to actions brought under the Fair

Housing Act. It imposes liability on a corporation, not its directors and officers, for discrimination by one of its employees or agents. The respondents brought an action against the sole shareholder, president, and licensed “officer/broker” of a real estate agency, claiming he was “vicariously liable in one or more of these capacities” for a real estate agent’s discriminatory conduct. The Fair Housing Act forbids “any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate.”<sup>52</sup> It states that a “‘person’ includes, for example, individuals, corporations, partnerships, associations, labor unions, and other organizations,” but, it says nothing about vicarious liability.<sup>53</sup> The Court noted that “it is well established that the Act provides for vicarious liability” as “an action brought for compensation by a victim of housing discrimination is, in effect, a tort action.” In finding that the traditional rules of vicarious liability apply, the Court said, “When Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.” Furthermore, it “found no convincing argument in support of the Ninth Circuit’s decision to apply nontraditional vicarious liability principles.”

#### **CIVIL STATUTORY INTERPRETATION: TRIBAL ACTIONS UNDER 42 U.S.C. SECTION 1983**

In *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*,<sup>54</sup> the Court held the tribe’s complaint was not actionable under 42 U.S.C. section 1983, because a tribe did not qualify as a “person” for the purposes of that statute. Justice Ginsburg delivered the opinion of the Court, in which all the justices except Justice Stevens, who wrote an opinion concurring in the judgment, joined. The tribe filed a section 1983 action against the county alleging that by acting beyond the scope of its jurisdiction and without authorization of law in executing a search warrant to obtain employment records from its casino, the county violated the tribe’s and its corporation’s Fourth and Fourteenth Amendment rights and the tribe’s right to self-government. Section 1983 permits “‘citizens’ and ‘other persons within the jurisdiction’ of the United States to seek legal and equitable relief from ‘persons’ who, under the color of state law, deprive them of federally protected rights.” The Court determined, however, that a tribe is not a “citizen” for the purposes of maintaining a section 1983 action. The Court first turned to its decision in *Will v. Michigan Dept. of State Police*,<sup>55</sup> where it held that “a State is not a ‘person’ amenable to suit under § 1983,” and reasoned, “Congress did not intend to override well-established immunities or defenses

**“When Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules . . . .”**

50. 537 U.S. 129 (2003).  
51. 537 U.S. 280 (2003).  
52. 42 U.S.C. § 3605(a).

53. 42 U.S.C. § 3602(d).  
54. 537 U.S. 701 (2003).  
55. 491 U.S. 58 (1989).

**[A] 7-2 Court held a shareholder-director may qualify as an “employee” under the American with Disabilities Act.**

under the common law,’ including ‘the doctrine of sovereign immunity.’” The Court recognized that the present case did not necessarily fit within this holding, but determined, with the agreement of the parties, that tribes, like states, “are not subject to suit under § 1983.” With this determination in place, the

Court focused on the issue as presented by the parties and said that “[a]s we have recognized in other contexts, qualification of a sovereign as a ‘person’ who may maintain a particular claim for relief depends not ‘upon bare analysis of the word person,’ but on the ‘legislative environment’ in which the word appears.” The Court concluded, “Section 1983 was designed to secure private rights against government encroachment, not to advance a sovereign’s prerogative to withhold evidence relevant to a criminal investigation.” Therefore, the Court said, “[W]e hold that the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims.”

**EMPLOYMENT LAW:  
FEDERAL EMPLOYERS’ LIABILITY ACT (FELA)**

In *Norfolk & Western Railway Co. v. Ayers*,<sup>56</sup> Justice Ginsburg delivered the opinion of the Court, which held: (1) mental anguish damages are recoverable under the Federal Employers’ Liability Act (FELA) by an employee suffering from actionable asbestosis if the claim is part of asbestos-related pain and suffering damages and the fear is genuine and serious; and (2) a railroad employer is not entitled to reduction in damages for the contributory negligence of a non-railroad employer. Section 1 of FELA<sup>57</sup> “renders common carrier railroads ‘liable in damages to any person suffering injury while . . . employed . . . if the injury or death resulted in whole or in part from the [carrier’s] negligence.’” With respect to a claim under FELA, “Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers.” Turning to its decisions in *Consolidated Rail Corporation v. Gottshall*,<sup>58</sup> and *Metro-North Commuter R.R. v. Buckley*,<sup>59</sup> the Court said that “stand-alone emotional distress claims not provoked by any physical injury, for which recovery is sharply circumscribed by the zone-of-danger test; and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted.” The Court concluded, therefore, that plaintiffs who suffer from asbestosis, but not cancer, can recover damages for fear of cancer under FELA without proof of physical manifestations of the claimed emotional distress with two important caveats: first, it must be a part of his “asbestosis-related pain and suffering damages,” and second, he must “prove that his alleged fear is genuine and serious.”

The Court next considered the second issue in the case:

whether the trial court “erred in instructing the jury ‘not to make a deduction [from the damages awards] for the contribution of non-railroad [asbestos] exposures’ to the asbestosis claimants’ injuries,” and concluded that it did not. The statutory language supports the trial court’s instructions: “Every common carrier by railroad while engaging in [interstate commerce], shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of . . . such carrier.”<sup>60</sup> The Court said the conclusion that “FELA does not mandate apportionment is also in harmony with this Court’s repeated statements that joint and several liability is the traditional rule.”

**EMPLOYMENT LAW: AMERICAN WITH DISABILITIES ACT**

In *Clackamas Gastroenterology Associates, P.C. v. Wells*,<sup>61</sup> Justice Stevens, delivering the opinion for a 7-2 Court, held a shareholder-director may qualify as an “employee” under the American with Disabilities Act (ADA). The Court determined that the question was answered by applying common-law principles of the master-servant relationship and determining whether that person acts independently and participates in the managing of the organization, or whether the individual is subject to the organization’s control. Referencing its decision in *Nationwide Mutual Ins. Co. v. Darden*,<sup>62</sup> the Court stated, “When Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” The ADA does not provide much insight and “simply states that an ‘employee’ is ‘an individual employed by an employer.’” Therefore, the Court will look to common-law principles to define the term. At common law, which is in accord with the view of the Equal Employment Opportunity Commission, the relevant factors defining the master-servant relationship focus on the master’s control over the servant.

The Court rejected the argument that it should answer the question by asking whether the shareholder-director appears to be the functional equivalent of a partner, concluding partnerships may include hundreds of members, “some of whom may well qualify as ‘employees’ because control is concentrated in a small number of managing partners.” Furthermore, the Court determined that the Ninth Circuit’s view, which did indeed pay “particular attention to ‘the broad purpose of the ADA,’” could not be adopted because it ignored two important considerations: (1) “the congressional decision to limit the coverage of the legislation to firms with 15 or more employees has its own justification that must be respected—namely, easing entry into the market and preserving the competitive positions of smaller firms” and (2) “congressional silence often reflects an expectation that courts will look to the common law to fill gaps.”

56. 538 U.S. 135 (2003).

57. 45 U.S.C. § 51.

58. 512 U.S. 532 (1994).

59. 521 U.S. 424 (1997).

60. 45 U.S.C. § 51.

61. 123 S.Ct. 1673 (2003).

62. 503 U.S. 318 (1992).

### THE JUDICIARY: FEDERAL MAGISTRATE ACT OF 1979

In *Roell v. Withrow*,<sup>63</sup> a 5-4 Court held that a party's consent to having any or all proceedings in a civil matter held before a magistrate judge under 28 U.S.C. section 636(c)(1) does not need to be express and may be inferred from a party's conduct during litigation. Justice Souter delivered the opinion of the Court. The Court first concluded that 28 U.S.C. section 636(c)(2) and Rule 73(b) require "advance, written consent communicated to the clerk" by the parties for a magistrate judge to hear the proceedings. However, given the language of the statute and the Rule, the Court concludes that, aside from the fact that § 636(c)(2) and Rule 73(b) require specific written consent and that neither of these provisions are only "advisory," "the text and structure of the section as a whole suggest that a defect in the referral to a full-time magistrate judge under § 636(c)(2) does not eliminate that magistrate judge's 'civil jurisdiction' under § 636(c)(1) so long as the parties have in fact voluntarily consented."

### THE JUDICIARY: ARTICLE IV JUDGES

In *Nguyen v. United States*,<sup>64</sup> a 5-4 Court, in an opinion written by Justice Stevens, held an appellate panel consisting of two Article III judges and one Article IV judge did not constitute an appropriate panel. Petitioners, pursuant to 28 U.S.C. section 1294(4), appealed their convictions in a federal district court to the Court of Appeals for the Ninth Circuit. Two of the three judges on the panel were Ninth Circuit Article III judges and the third judge, the Chief Judge of the District Court for the Northern Mariana Islands, was an Article IV judge. Petitioners did not challenge the make-up of the panel until their petition for certiorari before the Court. The Court began with "the congressional grant of authority permitting, in certain circumstances, the designation of district judges to serve on the court of appeals." The statute, 28 U.S.C. section 292(a), authorizes "the chief judge of a circuit to assign 'one or more district judges within the circuit' to sit on the Court of Appeals 'whenever the business of that court so requires.'" The statute "does not explicitly define the 'district judges' who may be assigned to the Court of Appeals." The Court concluded, however, that other provisions of law make it perfectly clear that Article IV judges are not included. The Court also concludes that petitioners' failure to raise the issue earlier in the proceedings did not bar the claim. The Court said that it was confronted with a "fundamental" question of "judicial authority" in this case. The appointment is one that "could never have been taken at all," not one "which could have been taken, if properly pursued." It was impermissible from the start and was not a waivable error.

### THE JUDICIARY: REMAND TO THE BUREAU OF IMMIGRATION APPEALS

In a per curiam decision, the Court in *Immigration and Naturalization Service v. Ventura*<sup>65</sup> held that the Ninth Circuit should have applied the ordinary rules of review and remanded the case to the Bureau of Immigration Appeals for its consid-

eration of the changed circumstances issue instead of determining the issue in the first instance. In this case, respondent petitioned for asylum based upon "fear and threat of persecution 'on account of' a 'political opinion.'" His petition was denied by the immigration judge and by the BIA. The Ninth Circuit reversed the BIA's holding, determining the evidence "compelled" such a contrary finding and, furthermore, "changed country conditions," which were not considered by the BIA, warranted a different result. In reversing and remanding the case to the BIA for consideration of this issue in the first instance, the Court determined the ordinary remand rules applied and the Ninth Circuit's decision not to remand the case "seriously disregarded the agency's legally-mandated role" and "independently created potentially far-reaching legal precedent about the significance of political change in Guatemala," without giving the BIA the opportunity to address it first.

### ELECTIONS: JUDICIAL REDISTRICTING

In *Branch v. Smith*,<sup>66</sup> Justice Scalia wrote the opinion for the Court, holding a district court could, pursuant to 2 U.S.C. section 2c, create a redistricting plan instead of ordering at-large elections pursuant to 2 U.S.C. section 2a(c)(5). Mississippi failed to create and submit for preclearance a redistricting plan after the 2000 census. In anticipation of the March 1, 2002 state deadline for the qualification of candidates, "Beatrice Branch and others filed suit in a Mississippi State Chancery Court in October 2001, asking the state court to issue a redistricting plan for the 2002 congressional elections." In November 2001, John Smith filed a similar suit in the United States District Court for the Southern District of Mississippi, "claiming that the current district plan, dividing the State into five, rather than four congressional districts, was unconstitutional and unenforceable." He also asked the court to enjoin the state court's redistricting plan. Initially, the district court declined to act, but, when it became clear that no new plan would be forthcoming, it "enjoined the State from using the Chancery Court plan and ordered use of the District Court's own plan in the 2002 elections and all succeeding elections until the State produced a constitutional redistricting plan that was precleared."

The Court addressed the issue of "whether . . . the District Court was governed by the provisions of 2 U.S.C. § 2c; or . . . by provisions of 2 U.S.C. § 2a(c)(5)." The Court wrote, "The tension between these two provisions is apparent: Section 2c requires States entitled to more than one Representative to elect their Representatives from single-member districts, rather than from multimember districts or the State at large. Section

**[A] 5-4 Court held an appellate panel consisting of two Article III judges and one Article IV judge did not constitute an appropriate panel.**

63. 538 U.S. 580 (2003).

64. 123 S. Ct. 2130 (2003).

65. 537 U.S. 12 (2002).

66. 123 S.Ct. 1429 (2003).

**[T]he Court held that it was a matter for the arbitrator to interpret and apply rules of the NASD.**

2a(c), however, requires multi-member districts or at-large elections in certain situations.” The Court recognized that prior to the enactment of section 2c, many district courts reviewing redistricting plans “had suggested that if the state legislature was unable to redistrict to correct malapportioned congressional districts, they would

order the State’s entire congressional delegation to be elected at large.” The Court concluded, “With all this threat of judicially imposed at-large elections, and (as far as we are aware) no threat of legislatively imposed change to at-large elections, it is most unlikely that § 2c was directed solely at legislative reapportionment.” In support of this conclusion, the Court said that “every court that has addressed the issue has held that § 2c requires courts, when they are remedying a failure to redistrict constitutionally, to draw single-member districts whenever possible.”

**ELECTIONS: SECTION 5 OF THE VOTING RIGHTS ACT—PRECLEARANCE**

In *Georgia v. Ashcroft*,<sup>67</sup> the Court, in an opinion written by Justice O’Connor, decided that when determining whether a redistricting plan results in a retrogression of a minority group’s “effective electoral franchise,” a court must look at the plan on a statewide basis and make a determination in light of the totality of circumstances, not only whether a minority group can elect the candidate of its choice. After the 2000 census, Georgia created a senate redistricting plan and sought preclearance pursuant to section 5 of the Voting Rights Act by filing an action for a declaratory judgment in the United States District Court for the District of Columbia. The district court, after having reviewed ample evidence from both sides, “held that Georgia’s State Senate apportionment violated § 5, and was therefore not entitled to preclearance.” The Supreme Court reversed on the grounds that the district court had failed to consider all the relevant factors when examining whether Georgia’s Senate plan resulted in a retrogression of black voters’ effective exercise of the electoral franchise. The Court noted that section 5 “has a limited substantive goal: ‘to [e]nsure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.’” To determine if the plan should be precleared, a court must determine whether the plan leads to a retrogression in the position of racial minorities with respect to their effective exercise of the “electoral franchise,” a concept the Court undertook to delineate for the first time in this case.

First, the Court concluded that “in examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole.” Second, “any assessment of the retrogression of a minority group’s effective exercise of the

electoral franchise depends on an examination of all the relevant circumstances,” *i.e.*, “assessing a minority group’s opportunity to participate in the political process.” The Court noted that the “totality of the circumstances” is not limited to “the comparative ability of a minority group to elect a candidate of its choice.” The Court pointed to another factor important for consideration—“the extent to which a new plan changes the minority group’s opportunity to participate in the political process.” Last, the Court said that in “assessing the minority group’s opportunity to participate in the political process,” a court can “examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts.”

**IMMIGRATION: DETENTION PRIOR TO REMOVAL PROCEEDINGS**

In *Demore v. Kim*,<sup>68</sup> the Court reviewed and upheld the constitutionality of section 236(c) of the Immigration and Nationality Act,<sup>69</sup> which provides that “the Attorney General shall take into custody any alien who is removable from this country because he has been convicted of one of a specified set of crimes.” Forgoing a hearing to determine whether he was covered by section 1226(c), respondent filed a petition for habeas corpus attacking the constitutionality of section 1226(c). Justice Rehnquist, writing for the majority, found the provision constitutional. The majority began by noting the statute, which “mandates detention during removal proceedings for a limited class of deportable aliens—including those convicted of an aggravated felony,” was adopted “against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens.” In the end, “Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability.” The Court followed by stating, “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” While “[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings,” the Court, nonetheless, has recognized “detention during deportation proceedings as a constitutionally valid aspect of the deportation process.”

**OTHER SIGNIFICANT DECISIONS: INDIAN TUCKER ACT**

In *United States v. White Mountain Apache Tribe*,<sup>70</sup> the Court held the 1960 Act creating a tribal trust in favor of the White Mountain Apache Tribe gives rise to Indian Tucker Act jurisdiction in the Court of Federal Claims over the tribe’s suit for money damages against the United States. In 1960, Congress enacted a statute that provides that the “‘former Fort Apache Military Reservation’ would be ‘held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purpose.’” In 1993, the tribe “commissioned an engineering assessment of the property, resulting in a finding that as of 1998 it would cost

67. 123 S. Ct. 2664 (2003).

68. 538 U.S. 510 (2003).

69. 8 U.S.C. § 1226(c).

70. 537 U.S. 465 (2003).

about \$14 million to rehabilitate the property occupied by the Government . . . .” In 1999, the tribe sued the United States in the Court of Federal Claims claiming damages in this amount, “citing the terms of the 1960 Act, among others, and alleging breach of fiduciary duty to ‘maintain, protect, repair, and preserve’ the trust property.” The Court of Federal Claims dismissed the complaint for lack of subject matter jurisdiction because under the Tucker Act, which invests the Court of Federal Claims with jurisdiction over action by tribes against the United States, the waiver of sovereign immunity is only applicable “when underlying substantive law could fairly be interpreted as giving rise to a particular duty, breach of which should be compensable in money damages.” In a 5-4 decision, the Court, with Justice Souter writing for the majority, reversed.

The Court first recited the basic rules of subject matter jurisdiction: “Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity.” The Tucker Act contains such a waiver “giving the Court of Federal Claims jurisdiction to award damages upon proof of ‘any claims against the United States founded either upon the Constitution, or any Act of Congress.’”<sup>71</sup> The Indian Tucker Act<sup>72</sup> “confers a like waiver for Indian tribal claims that ‘otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe.’” The Court then noted that “[n]either Act, however, creates a substantive right enforceable against the Government by a claim of money damages.” However, the 1960 Act creates such a right, providing a “fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee” based on “elementary trust law,” which “confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.”

#### **OTHER SIGNIFICANT DECISIONS: ARBITRATION AND JUDICIAL REVIEW**

In *Howsam v. Dean Witter Reynolds, Inc.*,<sup>73</sup> Justice Breyer delivered the opinion of the Court. Here, the Court held that it was a matter for the arbitrator to interpret and apply rules of the NASD. In this action, an arbitration agreement was in place between the parties that allowed the petitioner to choose the forum. She did, choosing the National Association of Securities Dealers (NASD) and signing the NASD’s uniform submission agreement, which stipulates that no dispute shall be eligible for submission after six years has elapsed. Respondent filed an action in the district court arguing that the six-year time period had lapsed. The Court began by stating “the ‘question of arbitrability,’ is ‘an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.’” The “question of arbitrability” as a “gateway dispute” hinges on whether the parties would have been likely to expect a court to have decided the gateway matter. At the same time, the Court has found the phrase “question of arbitrability” not applicable in other kinds of general circumstance where

parties would likely expect that an arbitrator would decide the gateway matter. Thus procedural questions that grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide. The Court concluded that the NASD time limit rule closely resembles the gateway questions that the Court has found not to be “questions of arbitrability,” but a question presumptively for the arbitrator to decide.

#### **OTHER SIGNIFICANT DECISIONS: SUPREME COURT JURISDICTION**

In *Nike, Inc. v. Kasky*,<sup>74</sup> the Supreme Court initially granted certiorari to decide two questions: (1) “whether a corporation participating in a public debate may ‘be subjected to liability for factual inaccuracies on the theory that its statements are commercial speech because they might affect consumers’ opinions about the business as a good corporate citizen and thereby affect their purchasing decisions;” and (2) assuming it was commercial speech, “whether the First Amendment permits subjecting speakers to the legal regime approved” by the California Supreme Court. After 34 briefs were submitted and oral argument heard, the Court decided to dismiss the writ “as improvidently granted.” Justice Stevens, with whom Justice Ginsburg joined, and Justice Souter joined only as to part, wrote to concur in the dismissal because he said that “the Court’s decision to dismiss the writ of certiorari is supported by three independently sufficient reasons: (1) the judgment entered by the California Supreme Court was not final within the meaning of 28 U.S.C. § 1257; (2) neither party has standing to invoke the jurisdiction of a federal court; and (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case.” Justice Breyer, dissenting, wrote that in his view, “under similar circumstances, the Court has found that failure to review an interlocutory order entails ‘an inexcusable delay of the benefits [of appeal] Congress intended to grant.’”



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71. 28 U.S.C. 1491(a)(1).  
72. 28 U.S.C. § 1505.

73. 537 U.S. 79 (2002).  
74. 123 S. Ct. 2554 (2003).