

# Court Review

Volume 37, Issue 3  
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THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

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## EDITOR'S NOTE

In this issue, we present Professor Whitebread's annual summary of the past Term of the United States Supreme Court. As usual, civil and criminal cases are separately reviewed, providing a good overview of the Court's most recent case law pronouncements.

We also have two features arising out of this year's annual meeting of the American Judges Association: an interview with Arizona Supreme Court Chief Justice Thomas Zlaket and an article by National Center for State Courts President Roger Warren. Both of them spoke at the AJA's 2000 meeting in Kansas City. We took the opportunity to visit with Chief Justice Zlaket about a number of topics of interest—public trust and confidence in the courts, what to do with pro se litigants, and why Arizona is such a hotbed of court reform, just to name a few. We also jumped at the chance to print the remarks Judge Warren made in Kansas City, which discuss the link between public confidence in the courts and the extent to which the procedures we use meet public expectations for fairness and openness.

The issue also includes a useful overview of the United States Supreme Court's recent decisions on the admissibility of expert witness testimony, in the form of the winning paper from the American Judges Association's law student writing competition. Along with that article, we also report on a new study that suggests that, in real life, the standard for admissibility of expert testimony has tightened somewhat, at least in federal trial courts.

Last, our Resource Page features its usual round-up of new books and noteworthy items, as well as a break-down of the judicial appointments of the Clinton Administration.

In closing, let me express my happiness at simply, finally, getting this issue out the door. Virtually every word that goes into *Court Review* finds its way through my own personal computer along the way, and that computer has suffered its third (and perhaps final) total breakdown, all during the preparation of this issue. Please accept my apologies, and those of my (anonymous) computer manufacturer, for the delay in publication of this issue. It's tough enough editing a journal while also holding down the "day job" as a judge that makes all of this of interest; it's too much, these days, without a working computer.—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. 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 17. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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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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# President's Column

Chris Williams

In September 2000, at the American Judges Association annual convention, I accepted the responsibility of president and the formidable tasks of leading this organization and its executive committee throughout the coming year. I am extremely honored to serve as your president, and I look forward to the challenges and prospects that the coming year holds.

One of the steps in preparation for serving as president of this great organization was to streamline our committee responsibilities. It is also a priority that we emphasize the importance of our membership and endeavor to increase it, thus strengthening the association.

I do want to stress an area that I believe we have yet to fully develop. As you are aware, we have studied and examined the concepts that created us a public entity. Courts are created by the people of our respective states and providences through elections or through appointment. These structures ensure our existence.

We have stressed concepts of the Trial Court Performance Standards and of public trust and confidence, but we have yet to empower ourselves by providing to our membership additional, substantive help in carrying out the ultimate goals of judicial independence and accountability. Judges must be more involved locally, in our jurisdictions, to redevelop the confidence and trust of the people who have placed us in office.

My goal this year is to ensure that we formulate "best practices" through our respective committees, and that we disseminate the proper information to our members, allowing them to better improve the administration of justice in their own courts. Best practices is the one approach that I feel will best serve the needs of our membership. Instituting best practices and allowing our judges the opportunity to improve methods of adjudication in different substantive fields will greatly enhance our judges' abilities in resolving issues and making final decisions in cases that affect the lives of their citizens.

We have seen a major change in the way we as judges deal with problems. We have come up with practical solutions, including, merely by way of example, drug courts. They may eventually achieve the goal of rehabilitating a criminal instead of just jailing him or her to meet the interests of the public. Yet, in reaching for practical solutions, we also must always be mindful of judicial ethics to avoid any appearance of impropriety on the part of the court and how it is perceived by the public.

To achieve these goals, we must set forth our best practices in each of the respective substantive areas of law. Judges can implement the Trial Court Performance Standards, and improve public trust and confidence, through best practices. This can only be achieved by proper judicial education and involvement with the public. We must achieve these goals while also maintaining our judicial independence and staying out of positions that might violate our own codes of judicial conduct.

As we left our conference in September, the respective AJA

committees promised that they would report to me three best practices for each of their respective substantive committees. I will be eagerly awaiting these best practices prototypes. Ultimately, we will publish this information for the use of our membership.

As most members are aware, the Conference of Chief Justices and the Conference of State Court Administrators have been working toward developing a best practices program. The AJA must immediately work toward putting together our own best practices that we use each and every day to move this effort along as rapidly as possible. Our most useful purpose as judges in this association is to educate our membership and, at the same time, to give productive and useful guidelines to them.

What does all this mean to us as members of the American Judges Association? In my mind, it means at least five things:

- We must aggressively approach the issue of best practices and come up with our own best practices through the substantive committees of our association.
- We must bolster our ability to ensure that this information is disseminated to our membership so that they can put these practices to use in their courts.
- We must protect our judicial integrity and independence, and yet fulfil our obligations to promote public trust and confidence. We should do this by incorporating the Trial Court Performance

Standards in our best practices implementation.

- We must strengthen our organization internally by increasing our membership and by offering more relevant and technologically updated services for our members.

- We must bring our committees and executive committees together in this technological age. Through the efforts of our previous president, our executive committee is set up to communicate immediately on a moment's notice. We must have similar interaction among our committees, and especially our membership committee, in order that they may achieve the goal of increasing our membership.

It is obvious that all the goals set out here are within our reach. It is important that we stay the course, complete these projects, and transfer the information to our membership, so that they may put the substantive portion of our program this year to work in their own courts.

The bottom-line result of all this is that we will all be better judges and the public will know us in a more favorable light, so that we can continue to maintain their respect and dignity as one of the three, separate branches of government in the United States, Canada, and Mexico.

I want to close by thanking our Canadian members who came to the annual conference this past year in Kansas City. I am appreciative of their eagerness to be involved in this association. This can only help all of us as judges, wherever we live and work. My thanks to the Canadian judges for their efforts in improving the American Judges Association.



# An Interview with Thomas Zlaket

**A**rizona Supreme Court Chief Justice Thomas A. Zlaket joined that state's highest court less than a decade ago, with no prior judicial experience. He has quickly become one of the country's most influential jurists, encouraging additional, innovative practices in the forward-looking Arizona court system and leading national efforts to improve public trust and confidence in the courts.

Zlaket's quick rise to leadership in the courts should not have been a surprise. A successful trial lawyer in Tucson, he had been the president of the Arizona Bar Association.

As a lawyer, he headed a commission to reform civil case discovery. That effort resulted in what are known in Arizona as the "Zlaket Rules," reforms instituted in 1992 that placed limits on overall discovery, provided for required initial disclosures, limited most depositions to no more than four hours, increased judicial involvement in managing the discovery process, and encouraged alternate dispute resolution. Zlaket worked for these reforms outside of his own state as well. When a committee appointed by the Illinois Supreme Court considered discovery rule changes in 1995, Zlaket came to Illinois to testify.

"There has been resistance from lawyers because the rules contain a cultural change," Zlaket told the panel. But, he asserted, the changes were necessary ones. "We have forgotten that discovery was a place to get ready for trial," he said. "It has turned into an economic war of oppression."

Zlaket began a five-year term as chief justice of the Arizona Supreme Court in 1997. Once again, he has promoted change, whether it be change in the culture of the courts to greater emphasis on customer service, improvement in collections and enforcement of support, expanded Internet access, or reforms to the lawyer discipline system. He co-chaired the 1999 National Conference on Public Trust and Confidence in the Justice System. In 2000, Zlaket received

the Paul C. Reardon Award from the National Center for State Courts in recognition of his already highly distinguished service to the judiciary on a national level.

**COURT REVIEW:** *Usually I'd start with an easier question, but let's get right to it. What do you think are the major issues facing courts nationally today?*

**ZLAKET:** Well, obviously building and maintaining public trust and confidence is the number one issue. And, as you know, it has been the focus of my efforts now for several years. Not just me, but



many people across the country have been concerned about the issue, have devoted considerable time to it, and I think now we're becoming aware of the fact that this institution that we have taken for granted . . . really does require some nurturing. So I think the first thing is to build public trust and confidence and to realize that that's an ongoing effort; it's not a one-time deal. It is something that needs to be done perpetually by dedicated people who want to expose the public to the court system and to want to make the court system responsive to the public—that's the first thing.

And that's a big umbrella-type issue that lies over the top of a lot of other things.

The most pressing issue that comes to mind now for me is the status of *pro se* litigants and what we do with them. You know, we have for a very long time taken the attitude that people who come into a courtroom without a lawyer assumed the risks, so to speak. They take the chance of being there without a lawyer, without any knowledge of the law, without any knowledge of the rules of evidence or the rules of procedure, and we have treated them as though they're going to be held to all of those rules, even though they have no formal training or background or experience in them. That, I think, is a mistake. And what we are now seeing, given the fact that lawyers' fees have gone from \$50 an hour to \$150 an hour to \$250 an hour—in some major metropolitan areas, they're up to \$300 and \$400 and even \$500 an hour. I keep saying, "Who can afford those prices?" I can't. I don't know if you can, but I can't. And most of the people with whom I speak cannot afford to pay a lawyer those kinds of rates. That being true, I expect that we will see what I sometimes call a tidal wave of *pro se* litigants probably just to get people's attention. I may be exaggerating a little bit for effect, but I do think that we now see in the statistics an increase in self-represented litigants who either have chosen not to hire a lawyer or don't feel they can afford a lawyer, and so they'd rather represent themselves. And, as a consequence, we have to deal with these folks. Now some people respond, and they say, "Well, you see those in domestic relations courts." That's wrong. We're seeing them in all kinds of civil cases now.

**CR:** *What do you say to judges who feel that the system works better with lawyers, and, therefore, they shouldn't do anything to encourage pro se litigants?*

**ZLAKET:** I agree the system does work better with lawyers. So what? That's my answer. So long as we, as judges, cannot solve the problem of providing lawyers

to people because of the cost of providing lawyers to folks, to ordinary citizens, to the average Americans, we are stuck with the problem of self-represented litigants at the door. They walk in the courthouse; they want justice, and they're entitled to it under the Constitution, just like the person who has a lawyer. So what do I say to those judges? If you can't solve the problem of providing expensive legal representation to people—if you can't somehow solve the problem of finding lawyers, then you have an obligation to take care of those who are self-represented.

**CR:** *Do you find lots of resistance to helping pro se litigants?*

**ZLAKET:** I get that same response that you raised in your question all the time. I'm about to go to Utah later on this week and speak to their judges, and we're talking about *pro se* litigants. And I know, I know that question is coming. Because every time I discuss it with a group, there is a small group of judges who say, "You know what, I don't want us to make it easier for *pro se* litigants to come in the courthouse doors. I don't want to hear about your self-service center in Phoenix where you help *pro se* litigants fill out the forms and file their own cases. I don't want to hear about your quick-court experiment, where you've had these automated kiosks all over Arizona where people could go, and for a very inexpensive price, get court-ready forms ready for filing. I don't want to hear about any of those efforts on the Internet that you out there in Arizona have undertaken to provide forms and some keys to the mysteries of the courthouse over the Internet to people who don't want to hire lawyers, because you are making it easier for self-represented litigants to come in the door, and that complicates our lives as judges, because it's harder to manage a case with self-represented litigants." I hear that! And I'd say to those people, "You're supposed to be judges. This justice system doesn't just exist for people with lawyers. How can we as judges—you and I—justify that kind of an approach?" I rather think the answer is that we need to find solutions for unrepresented litigants to make it easier, not harder. Otherwise, we're going to turn away a lot of people who need justice and who can't get through the door.

**CR:** *Have you found or been able to tell whether your discussion with that group of judges who are skeptical of efforts to help pro se litigants is effective? Are you able to change minds there, or is there a hard-core group that appears to be resistant to any change that would encourage pro se litigation?*

**ZLAKET:** There is a hard-core group. But, you know, they're all pretty wise, and even though they come into the discussion with a built-in bias, or they have very strong feelings, they cannot answer the one question that is the stumbling block for all of us when we reach the point in the discussion where we ask, "What is the answer to that?" Do we turn these people away? Do we close our eyes to them? Do we continue to say what we used to say and have for so many years? I mean you've heard the litany from the bench. I've heard the litany from the bench. It goes, "Mr. Jones, I have to tell you that you don't have a lawyer in this courtroom, and you are at a distinct disadvantage, and I want you to know that the law requires that I treat you the same way as I would treat you if you had a lawyer. That means I'm going to hold you to the rules of evidence, which you don't know; I'm going to hold you to the rules of procedure; I'm going to hold you to the law, which you've never studied; and I have to do that. I cannot favor you; I cannot help you. Therefore, you are at a distinct disadvantage in this courtroom, and I'm telling you that right up front."

Now, I've heard that litany. I've been in a courtroom representing clients when I was a lawyer when the other side was unrepresented, and the judge engaged in that litany, and I thought to myself, "That's a pretty intimidating speech." Now if we start really giving that every time we have self-represented litigants, and we are seeing those numbers increase, I think we're chasing people away from the very forum in which they're entitled to get some adjudication of their rights and obligations.

**CR:** *When a trial judge takes that posture and not only gives the speech, but also practices the speech, obviously, a pro se litigant would be at a significant disadvantage, and arguably, justice would not be achieved. Do you see any approach that an appellate court would take in that situation, or is that one that simply ends up in the trial court discretion category?*

**ZLAKET:** [It] probably ends up in the trial court discretion category. In my state, there are appellate decisions that talk about the fact that *pro se* litigants should be held to the same standards as those who have lawyers and to the same rules, and so all judges feel obliged to follow those precedents—and they should. But we haven't had any recent decisions dealing with this subject for a long, long time. All of those precedents are old. They're 30, 40, 50 years old.

The world has changed a lot. Legal fees have gone up a lot. We've seen more *pro se* litigants now. I think it's the obligation of appellate courts—and especially supreme courts in those jurisdictions where supreme courts set the rules of procedure—I believe it's our obligation to reexamine the way we do business and to reexamine the rules that we follow. And if we see, as I do, a continuing trend toward more and more self-represented litigants in our courthouses and in our courtrooms, I think we need to revise the rules by which we operate.

And I say this to lawyers, and they look at me skeptically. The bar associations are in denial. They don't want to see this coming. But my answer is that those of us who are charged with administering this justice system—the judges, you and I, the administrators, the people who are duty-bound to make sure the courthouse stays open for citizens to adjudicate their rights and obligations—those of us in that position have got to do something. If we cannot figure out how to get cheaper legal services to the people, then my only other answer, the only one I could think of, is to change the rules to accommodate the increase in the number of self-represented litigants, because it has historically been that we designed the judicial system for lawyers.

We've designed our present system with the idea in mind that most people would have lawyers, and historically, that's been true. So we put in all these rules, evidence, procedures that are designed really for lawyers to understand and apply. If we're going to recognize that the number of lawyers in our courtroom is going down, then I think we need to change the rules to accommodate the majority of people that we see. And that majority is starting to look like it's going to be self-represented in more and more kinds of cases, starting

with domestic relations, moving on to landlord-tenant, starting to creep into the tort area. Small-claims courts are getting bigger and bigger jurisdiction, at least in my state they are. It used to be \$500. Well, it's not \$500 anymore. Limited jurisdiction courts are getting bigger and bigger civil jurisdiction. So I think it's inevitable.

And now the question is—are we up to the task of redesigning a court system that can still accommodate lawyers and can still put the safeguards in, or maintain the safeguards that the rules of evidence and our current rules of procedure were designed to provide, but at the same time, make it easier to deal with self-represented litigants? Easier for them to get in and get the justice they need, easier for us to manage them, because it's a terrible management problem. Any good judge—any experienced judge will tell you it's a lot easier to handle a court proceeding where there are lawyers and where we all know what the rules are than when you've got litigants who are confused, who sometimes speak out of turn, who argue with rulings, who just don't know how to behave. So it is a real challenge, and I can't figure out any other answer. It just seems to me we've got to go back to the drawing board and make some changes in the way we do things.

Now there are a couple of other things that people have suggested. Obviously, if legal insurance ever takes off in this country the way health insurance has, that might alleviate some of this problem. It might make lawyers more available to the average citizen, and that's who we're talking about. You and I have talked for years about providing legal services for the poor. When I was president of the bar association in Arizona more than a decade ago, we used to concentrate our efforts on how we get legal services to the poor. We talked about the Legal Services Corporation, and we talked about our local efforts to stimulate *pro bono*, and volunteer lawyers' programs, and things like that. The rich already had their lawyers and the major corporations. We never worried about them. But the middle class in those days was able to afford a lawyer once in awhile. Now what's happening is that the middle class is rapidly falling out of the group that can afford to hire a lawyer, and so the poor, as we use it in the analysis, the term "poor" is

including more and more Americans when you talk about the ability to hire a lawyer. So if some insurance company or companies get going with an idea of a huge-coverage legal insurance across a wide spectrum of citizens in this country, assuming they think they can make money at it . . . , that might be one answer. I've been working hard on getting lawyers to give *pro bono* time, and we've been successful, but we aren't keeping up with the demand. I mean we've got firms giving more and more and more *pro bono* hours every year, and they're doing it voluntarily, and they're doing a great job, and we keep falling further and further behind in terms of the number of people who don't have lawyers.



**CR:** Do you have a statewide reporting requirement for *pro bono* ?

**ZLAKET:** We have an aspirational goal—I think it is 50 hours a year per lawyer—and there is a statewide report in process that the state bar goes through, but it's not mandatory. . . . I haven't heard about mandatory *pro bono* for a long time. I'm not much in favor of mandatory *pro bono*. To me it's an oxymoron to say mandatory *pro bono*. I mean it insults the legal profession, because it says that this great profession that serves the public will only respond if it's made to do so. So I don't think it does any favors in terms of the public perception of the lawyers. At the same time, I would not want to be a client that had a lawyer representing me who was forced to represent me. I wouldn't

like that much. I wouldn't be sure that that lawyer would be helping me all that much or very enthusiastic about our case.

**CR:** On the public trust and confidence front, one thing I understand that you have initiated in Arizona that may be unique is to bring in to your supreme court groups that may be interested in policy issues, like domestic violence advocacy groups. What have you done, and how have you responded to people that would say the courts need to stay independent of people who are advocating positions?

**ZLAKET:** I guess you could take that attitude if you want. I never thought that there was much benefit to sticking my head in the sand and acting like the problems will go away on their own. Quite frankly, I have not seen any inclination on the part of the victims' rights groups or the court-watchers to go away. If anything, they are becoming more active in my state and more vocal in my state. They're publishing newsletters, providing letters to the press about the justice system and about particular judges in courts. I hear judges say, "Ignore them." I don't want to ignore them. I've never solved a problem in my life by ignoring it. I'm not suggesting these are problems. I've got to tell you that I have now met with a number of victims' rights groups and a number of court-watcher groups, and I have discovered that some of their criticisms are right on [target]. They do have legitimate complaints against some judges and some courts.

**CR:** Do you meet with them personally, or do you have a meeting of your whole court, or what have you been doing?

**ZLAKET:** So far, we've been meeting with representatives of the various victims' rights groups together, not the whole court, but I met with them with my vice chief justice. The two of us met with them several times, and then I've missed the last couple of meetings, but he has been there, and we have also had staff there. We've had our AOC executive director and his number two person. We've had some of the AOC department heads who deal with various areas about which there may be complaints, whether it's juvenile issues or whether it's probation issues. In other words, we're giving them a chance to talk to us, and then we're investigating their complaints and trying to see if we can make things a little better.

Sometimes a phone call to a judge is all

that's required, because a lot of our judges are so busy, so stressed, they have fallen into bad habits and don't realize that an offhand remark or constantly coming out on the bench late or treating an occasional witness badly sends the wrong message. And to those people out in the audience, to those people who are watching, it doesn't look like a little thing. It might seem to the judge like it's a little thing. And taken in the context of the judge's whole calendar, whole day, and all the important issues that he or she is dealing with—it seems like a little thing. But it's not a little thing to those people in whose case that outburst took place or those people who are watching in the back of the court.

So it kind of follows my philosophy and all, that we're dealing in a new age. I have encouraged my judges to get out of their offices, to get out of their black robes, to get out into their communities and be visible. I understand that there are ethical constraints on all of us—you and me. I'm not suggesting that we change roles. I still believe that there have to be restraints on judges in terms of their community involvement. I don't think judges can raise funds. I don't think we can attend certain kinds of gatherings, politically or for fund-raising purposes. I do think we have to be careful about appearances and anything that suggests partiality or favoritism. But I think we make a terrible mistake when we disappear.

I have thought for years that you and I have known lawyers who have been really community activists. I mean really out there: Boy Scouts, boys and girls clubs, Big Brothers, Little Brothers—they've been in everything. And people see them and say, "Oh, he's a lawyer," or, "She's a lawyer. Boy, they're very active." And then all of a sudden they go on the bench, they put on a black robe, and they disappear from the face of the earth. I think that's a terrible mistake.

I look at my own court, the Supreme Court of Arizona, which in former years had been perceived as hiding, mysterious beings, who never come out of their chambers. Editorials written asking, "Who are these guys?" I mean, you know, it's like *Butch Cassidy and the Sundance Kid*: Who are these guys? And I think that's a mistake. I think that when you are invisible that it's easy to

demonize the court. When judges don't come out and show their human side, they're easily demonized. They're easily characterized as aloof and arrogant. When their decisions then come out, it's like it's handed down by some oracle coming from on high. I don't think that's helpful. I want our judges to be out talking about the justice system, talking about how good it is, talking about how careful we try to be, and how it's still human, and we sometimes will make mistakes. And we're no different than anybody out there in our courtrooms. We're not special. We have a different job, but we live in the same neighborhoods, and our kids go to the same schools, and we pay the same taxes, and



you and I've got the same car payment and mortgage payment, and we have parents who get old and die, and we worry about our kids, and we cry and laugh. We're no different. We just have a different job. People out there need to know that. And I found that every time I've gone out and had a dialogue with citizens' groups around my state, once they find that you're human, once they find out they can talk to you, all of a sudden the barriers drop, and it is a dialogue that's so productive about how we might get better, how we might do things better in the courthouse, how it might be friendlier and less intimidating. It's really, really good.

I still remember a gal who came up to me in Flagstaff, Arizona, after we had a citizens' summit all day, and she walked up to me. I was getting in my truck, and

she said, "You know what? You're not a bad guy." She said it in such a way that it sent a real message. I mean she had come to this thinking the Chief Justice of Arizona must be some weirdo or some intellectual snob or some special person. When she found out I wasn't any different than she was, all the barriers were down, and I think that's a lot healthier than a relationship where we try to set ourselves apart because we're special—or we think we're special.

**CR:** *You've talked about judicial outreach as being something that not only includes judges going out into the community, as you've been describing, but also involves judges making the person's experience in the courthouse less intimidating—that a person who arrives at the courthouse and goes through the metal detectors is immediately a little less comfortable than they might be in their own home or business and that there are very few things we do in the process to make them feel at home. What do you see as the judge's role inside the courthouse in making it a better public service institution?*

**ZLAKET:** Well, the judges, if they have time—and that's quite frankly what the problem is, that most of the judges I know are really working very hard morning until night. They don't have much time. They're either in the courtroom or they're working on under advisement motions, or they're trying to manage their own calendars, or they're filling in for somebody else. What I would really like to see is a judge every once in awhile going out and talking to the people in the courthouse. "How are you doing? I'm a judge here, and I just wondered, you know, how you're being treated. I'd like to know: Is my staff taking care of you? Is there anything that we could do to make it better?"

Yes, I understand that we are a public institution with a very weighty obligation of resolving human disputes. At the same time, some people have suggested that we need to treat our—our customers like they're customers. I mean, every time I use that word, a lot of traditionalists shy away. Lawyers and judges don't like to hear the word "customer." And while I understand they're not technically customers in the same way that Kmart has customers, I do think the word sends a pretty clear message that we are in a public service enterprise, and

that we need to give public service. And I don't know how you rate yourself or how your people are doing without talking to the public once in awhile.

Our judges have gone some extra steps in an effort to make the experience a little more pleasant. For example, I have presiding judges in Pima and Maricopa counties who meet with a new panel of jurors whenever a new panel is sworn in, and they sit and talk with them. They don't wear black robes during that. They come down in a coat and a tie, and they just sit down and introduce themselves, and they talk about the experience as jurors, and we have the one-day-per-year rule, you know, and so they explain that to them, and they talk about civic duty, and our judges are very frank. They say to those prospective jurors, "We wish we could pay you more, and we've tried to get more money for you from the legislature, and we can't, but please understand that what you're doing is important." I think there are benefits to be reaped from that. We have surveys of our jurors who say, "That was really nice. We kind of like somebody coming down rather than the old way." When I was a lawyer, those jurors never saw any judge, except when they got pulled into the courtroom, and that figure came out in the black robe, sat up on the bench, and started saying, "Call the jurors into the box." I think the same is true with the people that stand in line at our clerk's counters. I think the same is true with witnesses, how we treat our witnesses, and whether they're made comfortable.

Now I understand that we're all restricted in terms of our finances, and some of the rooms we put these people in are stark and badly furnished and not comfortable at all, and I want to try to make that experience a little better if I can get somebody to do it. And I just think the whole idea of educating our people in the courthouse—from the security guard that runs that x-ray machine at the door to the clerk to the bailiff to the people in the clerk's office who process the paperwork—they need to be told every day that you are here to serve the public. Do it with a smile, and do it with courtesy. And treat these people—understand that they're nervous; most of them don't want to be here—treat them with some courtesy, and it'll

pay off in the long run. I don't expect anybody walking out saying, "Wow, that was fun. I want to come back tomorrow." I think that's unrealistic. I mean, nobody wants to go there, but I would like them to walk out saying, "I think I got treated fairly, and I think I was treated well." That's all.

**CR:** *On the public trust and confidence front, the national conference that you co-chaired in 1999 suggested as one of its themes that a perception of inequality in the courts was, if not the biggest problem, at least one of the biggest problems—that minority groups, in particular, felt that they were not treated fairly in America's court system. Given that that's a societal problem as well as a courts' problem, is*



*there anything effective that the courts can do about it?*

**ZLAKET:** I hope so, because I think if we don't address it head-on, and if we don't get involved in a dialogue about how to solve it, it's an issue that is so explosive that I think it could bring this court system to its knees, and I'm not exaggerating. I don't think it's a perception anymore, I think it's a reality. We can talk about perception of inequality all we want. But I think that there's more than that, as you know from the conference in Washington. The message came back pretty loud and pretty clear that the justice system in America favors the rich over the poor and that the justice system in America favors majorities over minorities. Well, on the latter

point, I don't think it takes much imagination to know that that's more than a perception: that's a reality. All you have to do is go through any of our juvenile detention centers. All you have to do is go through any of our prisons and look at the faces. What you see is a huge minority population compared to the majority population. Now that may not be true across the country, because there are some states that have very small minority populations. But you come from my state, where there's a large Hispanic population, for example, and you see that it is true, and you wonder, why is that? And it's not just a question of how our judges are treating people. This is a bigger problem. Your question alludes to the bigger problem.

When complaints are registered against the justice system, most complainants don't discriminate. They don't say "the court system." They don't say "the third branch of government." They don't understand that there's any distinction. For them, the justice system starts with a cop on the street, and it doesn't do much good to say to those people, "Oh, that's the executive branch; that's not the judicial branch." They don't want to hear what branch of government it is. They don't care about that. Their justice system starts with that cop that pulls up and stops them, maybe because they're black, maybe because they're brown, maybe because of the neighborhood they're in. They don't think they're being treated equally. And every conference I've been to where this has been discussed, that's at a very high level. There has always been the same complaint by the minorities. It is: "All we want to is to be treated the same as you. We don't want to be treated any better, but we don't want to be treated any worse. If the police officer doesn't stop you when you're driving through the neighborhood, why stop us when we're driving through the neighborhood?"

**CR:** *So what does the justice system do?*

**ZLAKET:** The justice system has to enter a dialogue that starts with the cop on the street—at least I'm talking now about the criminal justice system—a dialogue that starts with a cop on the street and goes all the way through to the corrections officers. Now we're in the middle of that. The third branch is in the middle of that, but the front-

end—the cops, the prosecutors—those are executive branch people. Then comes the court system. And then comes the corrections people, and they're the executive branch. There needs to be a discussion that starts with all of those people getting together and recognizing the problem and starting to address it. We're not going to address it ourselves because we can't control who comes through the courthouse doors. We have no control over that. If you bring us a disproportionate group of minorities, if you bring us a disproportionate group of poor people, it looks like our system is discriminating. We've got to include in that dialogue the front end and the back end—the police and the prosecutors, because the prosecutors right away make charging decisions, obviously, that may or may not be skewed—and I don't know—that may or may not be balanced according to race or according to wealth. And the back end, the probation departments, the corrections people, you need all of those.

**CR:** *Have you begun any discussions like that?*

**ZLAKET:** Oh, you bet. We're meeting with police officers. We had a meeting with our state police and our big metropolitan police officers. We've got the attorney general in on the discussion. We've got the county attorneys and the big counties in on the discussion, and we're starting to address the problem. It's a huge problem, and it's not going to be solved easily. It is a problem that is going to require our best minds.

The other half of it, of course, is—you know, I have to laugh when I listen to all of the politicians talk about, there's been a decline in violent crime in the last decade in this country. I just saw another article about it. Everybody takes credit for it. The legislature says it's because we passed all those really tough sentencing laws, and we're locking all those people up. The cops say it's because we've really gotten tough on crime, and we're locking those people up and throwing away the key.

**CR:** *You're not going to say it's the judiciary, are you?*

**ZLAKET:** I'm not going to say it's the judiciary. I'm going to say it's the economy. I think that anybody who doesn't recognize that [this is] an era when this country has [had] more prosperity the

last eight to ten years than it had seen in a long time, the unemployment rate among majority and minority citizens is as low as it's ever been. What a surprise that the violent crime rate goes down. I mean, does anybody doubt that there's a correlation? I'm no sociologist, but I think I do understand enough to know that poverty is a contributor to crime. And when people are more prosperous, the crime rate goes down. And the next time we have a recession or a depression, the crime rate will go up. So I don't think there's any magic bullet in locking people up.

But go to the second part of your question, the presumption that the justice systems favors the rich over the



poor. Is that just a perception based on O.J. Simpson and some of these other high-profile defendants that have been able to amass a defense team that had to cost millions of dollars? I don't think it's perception: I think it's clearly a reality. I do think rich people do better in our courts than poor people, because they can afford to hire all the expert witnesses, all the help, all the jury consultants, all the high-priced lawyers. What can we do about that? I don't have the answer to that one. That one may become an eternal problem. We're worried now, as our earlier conversation today shows, we're worried just about getting people lawyers, just getting the average citizen a lawyer, much less getting the average citizen a Johnny Cochran team with all the

experts and all the jury consultants and all the things that major corporations and the very rich in our society now are able to bring into our courtrooms.

**CR:** *You're not about to announce a constitutional right to jury consultants in Arizona?*

**ZLAKET:** No. We're not going to do that.

**CR:** *Let me ask you –*

**ZLAKET:** Nor are we going to prohibit them.

**CR:** *Let me ask about a couple of other topics. First, I'd like to talk with you a moment about your philosophy as a justice of a state supreme court. How would you describe your own judicial philosophy?*

**ZLAKET:** I'm going to leave that to the people who read my opinions. I really hate labels. I really do. I have grown up with a deep aversion to the practice of labeling people as "liberal" or "conservative," to the practice of calling judges "activists." That is a word that to me has never meant anything, except that people who use it misunderstand the role of the judge in the development of the common law, which is what we do in this country.

**CR:** *If someone were willing to read your opinions and wanted to start with one of your opinions to look at how you approach and decide cases, what would be a good starting point?*

**ZLAKET:** I don't know. I can't answer that. I really can't. I have no favorite opinions. Each one I take as best I can.

My biggest complaint has been—and I'm sure that all appellate judges feel this way, and I think all trial judges feel this way—we're criticized on the basis of what the press reports as our results. I've heard criticism about my decision, and I've always asked—the first question I ask, whoever the critic, is, "Did you read the opinion?" The answer is inevitably "no." I have never had someone who said, "Yes, I read the opinion. I disagree with it." That person would win me over instantly. I'd say, "Well, then, I want to hear what your comments are. Tell me why you disagree. I really want to know."

That never happens. Instead, it's, "Did you read the opinion?"

"No, I read the newspaper article about it."

"Really? I spent 35 pages and six months working like a slave over this

opinion, drafting and redrafting, reading all the cases, trying to do the research, working with my law clerks to produce this thing, and you're going on the basis of six inches of type in a newspaper? Please! How can we have any discussion?"

We publish our opinions on the Internet. Anybody can access them there. Nobody wants to read it. Nobody wants to know what goes on in your trial courtroom, if you are a trial judge. They just read about the fact that so-and-so was turned loose by you on the streets, that you acquitted this particular defendant, or that you suppressed certain evidence that was found. You suppressed drugs that were found in the trunk of the car.

Remember the federal judge in New York, Judge Baer, when he suppressed the drugs that were found in the car? God, the political fuel was incredible—by a bunch of people who had no idea what went on in that courtroom. They only read something in the newspaper. And they were political people who should have known better, because they were lawyers. The President of the United States, a lawyer; his political opponent at the time was a lawyer. [They] should've known better, these lawyers, and they didn't. They criticized until the judge finally changed his decision, which I thought was a disgraceful period in our American legal history, a disgraceful black mark on us, because it smacked right against the independence of the judiciary.<sup>1</sup>

People misunderstand that term, too. I don't mean independence in the sense that we are so independent that we're not publically accountable, but I do mean that when a judge decides a case, he or she must be free from outside pressure, whether it's political or any other kind of pressure.

**CR:** *Let me ask you about a final topic, a more positive one. Arizona has influence in the national judiciary beyond its popu-*

*lation base. One of the members of the Supreme Court, Justice O'Connor, obviously, is from Arizona. Arizona's been a leader in the jury reform movement –*

**ZLAKET:** Two of the members of the Supreme Court—Bill Rehnquist, the Chief Justice, is from Arizona.

**CR:** *Did he practice in Arizona?*

**ZLAKET:** He did.

**CR:** *Well, two of nine is even better for this question. Arizona's been a leader in the jury reform movement, a leader with pro se litigation, a leader in a number of other ways. What makes Arizona a leader among the nation's courts?*

**ZLAKET:** The dry heat. (Chuckle) I don't know. I've been asked that question so many times, and it really is true—we seem to be on the cutting edge of a lot of issues. We seem to be more willing to experiment with things that other courts are reluctant to try. I don't know why. I don't think that we're any more adventuresome than anyone else. I think we are tied to precedent and tradition just like every other court in the country. But I would like to say that our leadership, present company excepted, has been rather visionary, and I think we have realized that this is a different world.

I tell a story about a meeting that I was at not long ago where there were a number of chief justices present, and I want to kind of keep this unidentifiable, because I don't want to name any names. Everybody was in good faith during this discussion. And we were talking about making changes, how you make change happen in this system. And there was a group that thought that the change had to come from the top, and it came from the top in the form of almost an order.

I mean, if you're in a constitutional structure, as I am in Arizona, where the supreme court has administrative authority over all the courts, and the chief justice really has that administrative authority, then change sometimes comes about with an order that says,

from this point on, we're going to do things this way in all the courts, and it's not optional, it's mandatory. Or, sometimes, we'll adopt an experiment on a limited basis in a few select courts around the state to try something new. But we're able to do that because the chief justice is able to issue an order saying, "On an experimental basis, we're going to try this just to see how it works, and if it works, we'll expand it to the rest of the state." Like our model court program—we were one of nine model courts. We process kids now—dependent children—we get them in and out fast. Within a very short time, these kids are either reunited with their parents back home, or they're put up for adoption so that they can get into a loving home at a reasonable age, unlike our old practice which went on for much too long, where we keep kids in foster care for God knows how long. It was a tragedy. And then they'd get too old to be adopted. So we tried that on an experimental basis, and then we expanded it statewide. Now every court in the state is following that model court process. But it has to come from the top, the direction, the vision has to come from the top.

Now, sometimes it comes from the bottom. Sometimes, somebody, one of the judges says, "I've got an idea." I mean that was Judge Dann's jury reform. And it comes to the chief justice—who was not me at the time (it was my predecessor), who was receptive to it, and said, "Let's give it a try." Well, it was heresy at the time. A lot of people still think we're a little wacky. But we tried it, and we think it works well. And now others are starting to copy. So it is this idea that we encourage some experimentation and some different thoughts. And here's the reason why: Our branch of government tends to be the most tradition-bound branch of all. We are the slowest to change, we're the most reluctant to change. It may have something

1. Editor's Note: The case discussed was before United States District Judge Harold Baer. In his initial decision, he suppressed as evidence a large quantity of cocaine that had been found in the defendant's car. *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996). After that decision was criticized, during the presidential campaign, by President Clinton, Senator Bob Dole, and 140 members of Congress, Judge Baer had a rehearing and reversed the suppression

order. *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996). For a general review of the facts and issues involved, see Monroe H. Freedman, *A Symposium on Judicial Independence: The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 *HOFSTRA L. REV.* 729, 737-43 (1997). Professor Freedman concluded that the Baer case was "[a]n instance in which a judge's independence was, in fact, compromised." *Id.* at 737.

to do with the fact that we are trained to rely on precedent.

Our whole lives are precedent. The word precedent binds us. When I first came to government eight and a half years ago, I was a private practitioner before I got this job. When I first came, I was stunned at the number of times people would say to me—when I asked why we did something a particular way—they would respond, “Because we’ve always done it that way.” I have encountered that in clerks’ offices. I have encountered that in judges’ chambers. I have encountered that at judicial conferences. And it’s the silliest answer I’ve ever heard. There is no business that is surviving today in this country that does not periodically reevaluate itself and look at the way it does business and try to improve to meet the changing society.

Back to my story. There was a group of chief judges—chief justices and chief judges—who said, “Well, I can’t tell my judges what to do. I can expose them to best practices and hope that they adopt them over a period of time. I can’t tell them what to do.” And there was this group that said, “Nonsense! We’re going to tell them what to do, and we’re going to make some changes. Otherwise, it’s going to take years to turn this boat around.” It’s like turning the *Queen Mary*, you know, it takes a long time.

Finally, a fellow in the back of the room held up his hand. He was a guest there at this meeting, and he was the chief counsel for a huge multinational corporation with its headquarters in this country. And he said, “I’ve listened to you people talk. I’ve got to tell you, you just don’t get it. You don’t have a clue what’s going on out in this world today.” He said, “We’re in an age of instantaneous transactions. My company will do hundreds of millions of dollars worth of business on the Internet this coming year with a push of a button, the push of a key on a keyboard. And I hear you talking about changing slowly, and you’re going to make these changes slowly, and you’re going to let your judges come to it. You don’t get it. It’s just the same reason why big business now is looking for alternatives in civil dispute resolution. We’re going to private judges, we’re going to arbitrators

and mediators. We can’t wait three to five years for a decision from your court system. We’ve got to make some business decisions based on what you decide our rights and obligations are. Tell us whether we win or lose, but tell us quickly so that we can make those business decisions and get with it, because the economy’s moving too fast, and you are moving too slow.”

And then he sat down. You could’ve heard a pin drop in that room when he was done. And the message was: We, as a court system, can’t sit still. We constantly need to look at how we work, how we operate, how we move paper, how we move cases, how we process people through the system, how we file.



Everybody’s talking about electronic filing. Is there any doubt in my mind that it’s a reality? It’s not an experiment. It’ll be here. It won’t be here in 20 years; it’s going to be here in two years, or less. I mean, technology is changing every six to eight months in a revolutionary way.

So I think that we have seized on the idea that we can’t sit still. We’ve got to look at everything that we do, and see if there’s a better way to do it, or at least to try a new way. And we have failed a lot. I don’t want to sit here and say all of our experiments have been successes. Sometimes we tried some things that we don’t like very well, and we discard them. We say, “Okay, we tried that, but the results are inconclusive, or it really hasn’t been good enough, or we can’t

afford to fund it, or let’s forget it.” But [at least] we’re thinking.

We’re building some courtrooms now that are in Maricopa County, which is Phoenix, state-of-the-art courtrooms. They have got all the cameras and audio equipment and computer hookups and everything you can imagine. I don’t think we’ll be building any more old-style courtrooms in Arizona, assuming we can afford to build the new courtrooms. Along the way, though, it causes problems. We’ve got court reporters who are worried about their longevity in our system and there’s a tradition that we have to break away from. I’m not suggesting, by the way, that we’re going to get rid of our court reporters. There’s no move afoot to do that. But, just look at court reporters. They’ve gone from the court reporter I knew when I was a lawyer to the real-time court reporter of today, and you can sit and watch them produce on a screen the testimony you just heard two seconds before.

So everybody’s got to get with the program, including the courts. And I don’t know why we’ve been in the forefront of that, except just a willingness on the part of our leadership and our court administration people to give it a try. That’s our motto: “Give it a try.” If it doesn’t work, we’ll try something else, but let’s see if we can do it better.

**CR:** Thank you.

# Public Trust and Procedural Justice

Roger K. Warren

Popular dissatisfaction with the administration of justice isn't new. As Roscoe Pound reminded us almost 100 years ago in his famous 1906 address to the American Bar Association on "The Causes of Popular Dissatisfaction with the Administration of Justice," it is "as old as law." But today, unlike in 1906, we have the benefit of sophisticated public opinion survey research to help us clarify the causes of popular dissatisfaction. With support from the Hearst Corporation, the National Center for State Courts last year conducted a national survey on "How the Public Views the State Courts" to examine the causes of popular dissatisfaction as we enter the 21st century.

In these remarks, I will first briefly summarize current public opinion about the performance of our state courts, focusing on public concerns in key areas that implicate the fundamental values that courts embody. Second, I will identify the key issues affecting public confidence in the courts, and the actions which must be taken at a national level to address those issues, as identified at the National Conference on Public Trust and Confidence in the Justice System held in Washington, D.C., in May 1999. Third, and most important, I will examine the relationship between "public trust" and "procedural justice," and the implications of that relationship—especially for trial judges.

The National Center's 1999 survey found that the public had some good things to say about the courts' performance. Seventy-nine percent agreed, for example, that judges are generally honest and fair in deciding cases, and 74% agreed that other court personnel are helpful and courteous. Eighty-five percent agreed that courts do a good job at protecting defendants' constitutional rights.

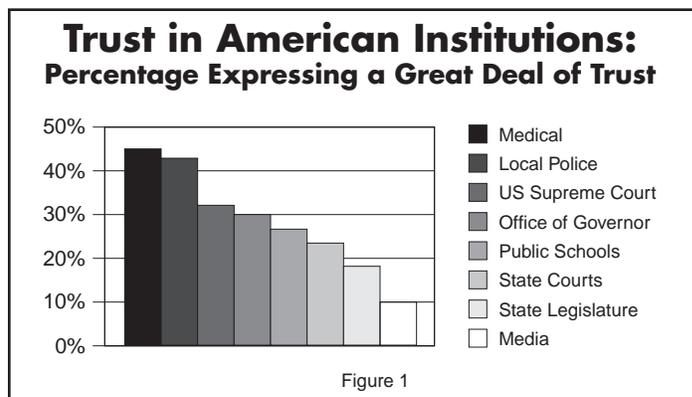
But the survey also revealed important areas of dissatisfaction, many going to the heart of what the American court system is all about. Let's quickly review a few of these key findings and their relation to fundamental goals and values of our judicial system.

## I. THE TRIAL COURT PERFORMANCE STANDARDS AND PUBLIC OPINION

One source to which we may look for an expression of the fundamental goals of American courts is the Trial Court Performance Standards, which establish basic standards by which to measure the performance of general jurisdiction trial courts. The 22 standards are organized into five areas, or goals: (1) access to justice; (2) expedition and timeliness; (3) equality,

fairness, and integrity; (4) independence and accountability; and (5) public trust and confidence. The fifth goal, public trust and confidence, appears to be the most important because, as the commentary to the standards points out, public trust and confidence in a court is likely to be present where a court's performance as measured against the other four goals is good, and the court's public communications are effective.

What is the current state of public trust and confidence in America's state courts? As depicted in Figure 1, 23% of the American public expressed a great deal of trust in the state courts. That is approximately half the degree of trust expressed in the medical profession, but more than twice the extent of trust expressed in the media. Other polls indicate, for example, that the military also enjoys particularly high levels of trust, but that lawyers and the United States Congress do not.



What are the sources of public dissatisfaction within each of the Trial Court Performance Standards' goal areas that appear to diminish the overall level of public trust in America's courts?

## Access to Justice

More than two-thirds of those surveyed felt that it was not affordable to bring a case to court. Eighty-seven percent of respondents indicated that the cost of lawyers contributed "a lot" to the cost of going to court; more than a majority of respondents said that the complexity of the law, and slow pace of litigation, also contributed "a lot" to the cost of going to court. Forty-four percent felt that courts were "out of touch" with what's going on in their communities; more than half of Hispanic respondents, and two-thirds of African-American respondents, felt courts were "out of touch" with their communities.

*Editor's Note: This article is based upon the Honorable Tom C. Clark Lecture presented at the 40th Annual Conference of the American Judges Association. It was presented on September 11, 2000, in Kansas City, Missouri.*

### **Expedition and Timeliness**

About half of all respondents felt that courts did not adequately monitor the progress of cases, and 80% said cases are not resolved in a timely manner.

### **Equality, Fairness, and Integrity**

The American public seems to seriously question whether all Americans receive equal treatment from the courts. Eighty percent felt that the wealthy receive better treatment in the courts than others, and almost a majority of Americans feel that African-Americans and Hispanics are treated worse. More than a majority of Americans feel that non-English-speaking people are treated worse. It is particularly noteworthy that although 43% of white Americans agree that African-Americans are treated worse by the courts, fully two-thirds of the African-American community feel that African-Americans are treated worse.

### **Independence and Accountability**

More than 81% of respondents felt that judges' decisions are influenced by political consideration, and 78% agreed that elected judges are influenced by having to raise campaign funds.

In short, we can conclude from these findings that a substantial majority of Americans feel that the actual performance of the courts does not live up to the courts' own goals and values.

## **II. THE NATIONAL CONFERENCE ON PUBLIC TRUST AND CONFIDENCE IN THE JUSTICE SYSTEM**

In May 1999, the National Center convened a national conference on public trust and confidence in the justice system to determine what should be done at both state and national levels to address these issues.<sup>1</sup> The conference was sponsored by the Conference of Chief Justices, American Bar Association, Conference of State Court Administrators, and League of Women Voters. More than 90% of the participants agreed that the relatively low level of trust in the American court system was a real problem for the courts; more than a majority felt that the judiciary had the primary responsibility for addressing the issue. The conference led to development of a national action plan on public trust and confidence, which is available on the National Center's Web site at <http://www.ncsc.dni.us/ptc>. Almost three-quarters of the conference participants agreed that implementation of the national action plan would, in fact, improve public trust in the courts.

The 500 conference participants used electronic voting devices to prioritize the issues affecting public trust and confidence, as well as the strategies and actions to be pursued to address those issues. Not surprisingly, in light of the public opinion survey responses reviewed earlier, fully two-thirds of the conference participants felt that it was "critical and essential" that the courts address the issue of unequal treatment in

the justice system. A majority of participants felt that the high cost of access to the justice system and lack of public understanding of the role of the courts were also critical issues that must be addressed.

Conference participants prioritized the actions that should be taken at the national level in order to improve public trust in the court system. The three top priority national activities called for were: (1) development and dissemination of models and "best practices"; (2) examination of the role of lawyers and their impact on public trust; and (3) education programs to improve public understanding of the court system. Building upon these priorities, the national action plan provides a useful guide to state and national organizations that wish to undertake activities to improve public trust in the court system.

## **III. PUBLIC TRUST AND PROCEDURAL JUSTICE**

But what about individual trial judges? What are the implications of public opinion survey findings for trial judges and how does the courtroom conduct of trial judges affect public trust in the court system?

In order to address these questions, one must first determine which sources of public dissatisfaction actually affect the overall level of public trust in the court system. The National Center's 1999 survey, as well as other research conducted by the National Center and other organizations, demonstrates that, among the various sources of public dissatisfaction, perceptions of the relative fairness of court dispute resolution processes are what ultimately determine the level of public trust.<sup>2</sup> Although, for example, the public expresses great dissatisfaction with the high cost of access to the courts and the slow pace of litigation, it is not primarily those factors, but rather the fairness of court processes, that is associated with varying levels of public trust. This is especially true for minorities.

Importantly, it is the fairness of court processes, not the fairness of court outcomes or decisions, that are most important. Literature in the procedural justice field indicates that both litigants and the general public can—and do—distinguish between the fairness of the process, and the fairness, or even favorability, of the outcomes.<sup>3</sup> In evaluating judicial performance, and in determining the level of trust in judicial authority, the fairness of the dispute resolution process is more important than even a favorable outcome. In the minds of litigants, the importance of a favorable outcome is consistently outweighed by the impact of an unfair process. In other words, a prevailing litigant might look back upon a recent court experience and say, "Yes, I won the case, but I don't know if it was worth it. It cost me too much, the judge wouldn't let me speak, I didn't understand what the judge was talking about, I was treated like dirt. I hope I never have to go through that again." On the other hand, an unsuccessful litigant can leave the courtroom saying, "I lost my case but I had my day in court, I was treated fairly, I can move on."

### **Footnotes**

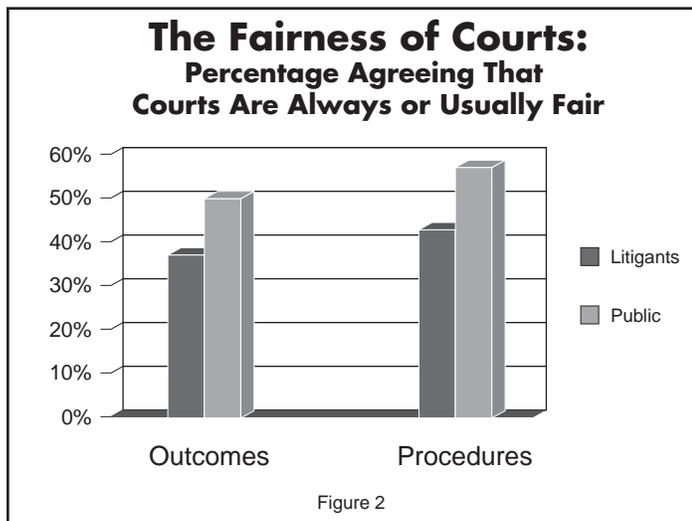
1. The Fall 1999 issue of *COURT REVIEW* was a special issue on public trust and confidence, containing the major addresses made at the national conference and other materials related to the topic. The full Fall 1999 issue on public trust and confidence issues can be

found on the American Judges Association's Web site at <http://aja.ncsc.dni.us/courtrv/review.html>.

2. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

3. See, e.g., Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 *SWISS J. ECONOMICS & STATISTICS* 219 (1997).

Not only do litigants and the public feel that fair processes are more important than favorable outcomes, but they also feel that courts do a somewhat better job in using fair procedures than in arriving at fair outcomes. The most recent public opinion survey conducted by the National Center in spring 2000 demonstrated, as shown in Figure 2, that 43% of litigants and 57% of the general public feel that court procedures are “always” or “usually” fair, whereas only 37% of litigants and 50% of the public feel that court outcomes were “always” or “usually” fair. Equally important, however, is that recent litigants are significantly less likely than the public generally to feel that either court procedures or court outcomes are fair.<sup>4</sup> The percentage of recent litigants who feel that courts are fair is 13% to 14% lower than the comparable percentage of the general public.<sup>5</sup>



These findings on the relationship between procedural justice and public trust are important for a number of reasons. First, most judges tend to focus on outcomes, not process, *i.e.*, on the legal correctness of their rulings and decisions rather than on the fairness of their decision-making processes. Yet it is often the fairness of these decision-making processes, rather than the judicial decisions themselves, that are important to litigants and the general public, and it is this sense of fairness that forms the basis of judicial performance evaluation and determines the level of trust in judicial authority. As judges, we should pay more attention to the fairness of our decision-making processes.

Second, it is the fairness of our decision-making processes that makes our courts unique. The fundamental goals and values of the American court system are procedural, not substantive. It is *how* decisions are reached in our judicial system, rather than the decisions themselves, that distinguishes the work of American courts from the work of the other two branches of government and explains why the American judi-

cial system is increasingly the envy of both developed and developing countries throughout the world. It is the values inherent in the Trial Court Performance Standards and in the concept of the rule of law that distinguish the decision-making processes of the judicial branch from those of the political branches. As former New York Governor Mario Cuomo said in his remarks at the National Conference on Public Trust and Confidence in the Justice System: “The judicial system is different from the political branches of our government and that difference makes all the difference to our strength and glory as a democracy.”<sup>6</sup>

Finally, procedural justice is a fundamental shared value—shared by litigants, the American public, and people around the world. It is the courts’ commitment to procedural justice that can allow the courts to connect much more successfully with the communities that we serve.

But what is procedural justice? Procedural fairness can mean different things to different people. Among judges and lawyers, procedural justice is often defined as procedural due process, *i.e.*, notice and opportunity to be heard before a neutral and detached magistrate. But what does fairness mean to litigants and the public? Something quite different. For litigants and the public, fairness appears to consist of four principal elements: (1) neutrality; (2) respect; (3) participation; and (4) trustworthiness.<sup>7</sup>

The first element, “neutrality,” is very familiar to judges. The notions of a “neutral” magistrate, an impartial decision maker, a judicial officer free of bias, interest, or improper motive, and committed to equality under the law, are central to the concepts of judicial independence and the rule of law. Maybe Supreme Court Justice Anthony Kennedy puts it best when he refers to our law’s “constitutional promise of neutrality.”

The element of “respect” refers to whether the judicial officer is viewed as courteous and respectful, and the manner in which proceedings are conducted. The third element, “participation,” refers to the extent to which the judicial officer allows the litigants an active voice in the decision-making process, whether litigants feel they have “been heard” and whether the judicial officer has good communication and “attentive listening” skills.

The fourth, and probably most important, element is “trustworthiness.” Whether a judicial officer is trustworthy does not depend primarily on the officer’s honesty or reliability. It is generally assumed that judges are honest. Rather, “trustworthiness” is based upon a perception of the judge’s motives, *i.e.*, whether the judge truly cares about the litigant (demonstrates “an ethic of care”) and is seeking to do right by the litigant. Trustworthiness is not a measure of the judge’s knowledge, skills, or abilities. It is a measure of the judge’s character, not the judge’s competence. The litigant usually does not feel qualified to evaluate the judge’s competence, but often feels fully

4. Recent litigants were those who had been to court within the previous year.

5. On the more general issue of the relationship between court experiences and public trust, see David B. Rottman, *On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?*, Winter 1998 COURT REVIEW at 14. Dr. Rottman is the associate director of research at the National Center and directs the National

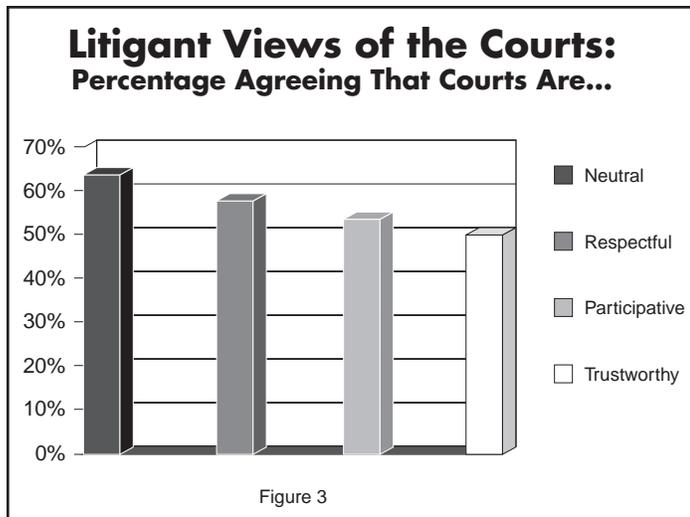
Center’s public opinion survey research.

6. Mario Cuomo, *We Must Lead the Charge*, Fall 1999 COURT REVIEW 14, 16.

7. See, e.g., Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Service Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 887 (1997).

qualified, based upon the judge's reputation, demeanor, and behavior, to evaluate the judge's motives.

I noted earlier that the National Center's most recent survey found that litigants tend to be significantly less satisfied with the fairness of court procedures and outcomes than the general public. In the same survey, we questioned recent litigants regarding the four elements of procedural justice described above in order to determine the extent to which recent litigants feel that the courts demonstrate those qualities of fairness. The survey responses indicated that more litigants feel that courts are neutral and respectful than feel they are participative or trustworthy. As noted in Figure 3, respondents felt that the quality of trustworthiness was least often demonstrated by the courts.



How do these criteria—by which litigants evaluate judicial performance—compare with the criteria by which we as judges evaluate our own performance? An analysis of the criteria utilized by those states with court-sponsored judicial performance evaluation programs reveals that there are six basic criteria commonly used in such evaluations.<sup>8</sup> The six criteria are set forth in Figure 4. In comparing these criteria with the four elements of procedural fairness described above, several observations emerge.

First, knowledge of the law and the rules of legal procedure play a very limited role in evaluating judicial performance, both from the perspective of litigants as well as in court-sponsored evaluation programs. The criterion of substantive knowledge of law and legal procedure is but one of the six criteria set forth in Figure 4. Second, three of the four fairness qualities identified by litigants and the public (neutrality, respect, and participation) are also addressed by the performance criteria in court-sponsored evaluation programs.<sup>9</sup>

Third, and most important, trustworthiness, one of the most critical elements of fairness to litigants and the general public,

## Judicial Performance Evaluation Criteria

- Knowledge of the Law and Court Rules
- Integrity / Impartiality
- Ability to Communicate
- Preparation, Attentiveness, Courtesy, and Temperament
- Administrative Skills
- Punctuality

Figure 4

does not appear to be recognized at all in traditional judicial self-evaluation programs. Neither our current judicial self-evaluation processes, nor our current judicial education programs for that matter, appear to promote “an ethic of care” on the part of judges. The quality of trustworthiness is often most important to litigants, but least often demonstrated by the courts, and least often recognized in our own self-evaluation processes.

Recently, “problem-solving courts” (including drug courts, domestic violence courts, mental health courts, truancy courts, gun courts, etc.) have sought to introduce an “ethic of care” and principles of therapeutic jurisprudence into court processes. Focusing on the extent to which court practices promote the psychological or physical well-being of the people affected, these courts often try to address the social and psychological problems that underlie legal disputes. But they also seek to introduce an “ethic of care” into court processes and to generally refocus on the qualities of respect, participation, and trustworthiness often cited by litigants and the general public.

What is the foreseeable impact on the level of public trust in the judiciary of initiatives like problem-solving courts, which refocus attention on these qualities of procedural fairness? In the National Center's most recent public opinion survey, we described some of the characteristics of problem-solving courts to respondents and asked whether, and how strongly, the respondents supported or opposed such courts. As depicted in Figure 5, 82% of the respondents indicated support for such courts and 50% of the respondents indicated “strong” support. Efforts by the courts to improve the fairness of court processes in ways often identified by litigants and the general public appear to win strong public support. This finding supports the conclusion that improvement in the fairness of court processes would result in significantly higher levels of public trust.<sup>10</sup>

8. KEVIN M. ESTERLING AND KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES 24-27 (Am. Jud. Soc. 1998).

9. Court-sponsored evaluation programs include two additional criteria (“administrative skills” and “punctuality”) that tend not to be explicitly identified by litigants and the public.

10. Greater procedural justice may also reduce recidivism. One study, for example, has shown that among men arrested for

domestic violence those who felt that they were treated respectfully by the police went on to commit 40% fewer offenses. See Raymond Paternoster, Robert Brame, Ronet Bachman, & Lawrence Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spousal Assault*, 31 LAW & SOC. REV. 163 (1997).

## Public Support for Problem-Solving Courts

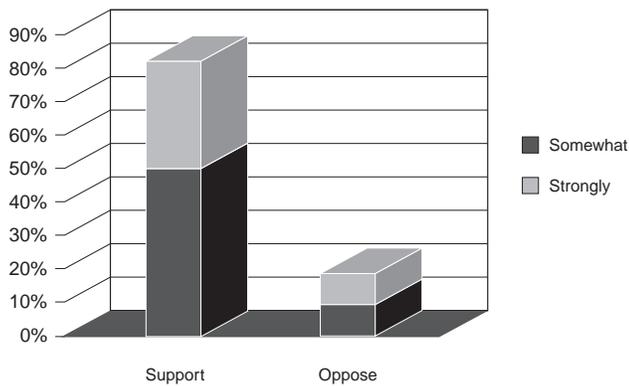


Figure 5

In addition, a less formal survey reported in *Court Review* indicated that judges who work in problem-solving courts report a higher level of litigant respect and gratitude than judges assigned to more traditional courtrooms.<sup>11</sup> Ninety-two percent of judges working in drug treatment courts reported feeling respected by litigants, compared to 72% of judges serving in traditional family courts. Eighty-one percent of the drug court judges reported feeling that litigants were grateful for the help received from the court compared to 33% of the judges serving in traditional family court.<sup>12</sup> The same survey also reported higher levels of judicial satisfaction among drug court judges. Ninety-one percent of drug court judges reported that their assignment had affected them in a positive way, compared with 64% of traditional family court judges. Moreover, it was the fact that litigants were grateful that appeared to result in the higher satisfaction levels of the drug court judges. The factor of litigant gratitude was the most common predictor of whether drug court judges felt positively affected by their assignment.<sup>13</sup>

### CONCLUSION

In order to improve public trust in the justice system, courts must improve their performance in key performance areas affecting fundamental goals and values: access, timeliness, fairness, equality, integrity, independence, and accountability. The area of court performance that most directly affects litigant and public evaluation of court performance—and levels of public trust—is the fairness of court processes.

As viewed by litigants and the general public, the fairness of court processes depends on the extent to which judicial officers are neutral and unbiased, respectful, allow those affected

to participate meaningfully in the decision-making process, and, most importantly, are trustworthy. Trustworthiness depends, in the minds of litigants and the public, not on the competence of the judicial officer but on the judge's motives and character. Ultimately, as Justice Felix Frankfurter reminded us, the authority of the court is a moral one, rooted in fundamental shared values and the good character of its officers. And, ultimately, that authority rests on our ability as judges to live up to those values, to meet the reasonable expectations of litigants and the public, to put a human face on who we are, what we do, and how we do it, to show that we care about the people affected by our processes and decisions—in short, to demonstrate that we are worthy of the public's trust.

**“The Court’s authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction.”**

**– Justice Felix Frankfurter**



Roger K. Warren became the president of the National Center for State Courts in 1996, leaving behind a successful career as a trial judge in California. His judicial career began as a municipal judge in Sacramento, California, where he served for six years. He then became a judge on the Sacramento Superior Court, where he served from 1982 to 1996, including several years of service as a presiding judge of the court or its divisions. A graduate of the University of Chicago Law School, Warren was named the California Jurist of the Year in 1995 by the California Judicial Council.

11. Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, Spring 2000 COURT REVIEW at 12-19.

12. *Id.* at 16, Tables 4-5.

13. *Id.* at 16-17, Table 7.

## Court Review Author Submission Guidelines

*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. 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.

*Court Review* is received by the 3,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative law judges.

**Articles:** Articles should be submitted in double-spaced text with footnotes, preferably in WordPerfect format (although Word format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 17th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

**Essays:** Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

**Book Reviews:** Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

**Pre-commitment:** For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

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# Recent Criminal Decisions of the United States Supreme Court: The 1999-2000 Term

Charles H. Whitebread

The 1999-2000 United States Supreme Court Term was indeed an exciting one. The Court took the opportunity to address search and seizure rights, the *Miranda* warnings, and several other significant criminal procedure topics.<sup>1</sup> With discussion during the presidential campaign of the type of justices each candidate might appoint, and the prevalence of split decisions, the national importance of the Supreme Court's holdings has come to the forefront of public discussion.

## FOURTH AMENDMENT

In *Florida v. J.L.*,<sup>2</sup> a unanimous Court led by Justice Ginsburg held that an anonymous tip lacks the sufficient indicia of reliability to establish the reasonable suspicion necessary to conduct a search under *Terry v. Ohio*.<sup>3</sup> Although "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop,'" the Court found this was not the case here. The Court found *Alabama v. White*<sup>4</sup> to be instructive. In *White*, an anonymous informant gave specific details of time, clothing, vehicle description, and destination that led to a *Terry* search of a woman transporting cocaine. The Court, however, noted a crucial difference between *White* and the instant case. In *White*, the suspicion necessary to conduct a *Terry* search existed only after the police, acting on a tip, conducted surveillance on the defendant and determined that the anonymous tipster, based on the particularity of his statement, had specific knowledge of a drug deal in progress. Justice Ginsburg stated that "[t]he anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility." As the instant tip lacked the indicia of reliability necessary to establish reasonable suspicion under *Terry*, and since the Court was unwilling to adopt a firearms exception to its standard search analysis, the Court affirmed the decision of the Florida Supreme Court, finding the search to be in violation

of J.L.'s Fourth Amendment rights.

Chief Justice Rehnquist, writing for the Court in *Bond v. United States*,<sup>5</sup> held that a law enforcement officer's manipulation of a bus passenger's carry-on luggage violated the passenger's Fourth Amendment right against unreasonable searches and seizures. Relying on *California v. Ciraolo*,<sup>6</sup> the government urged the Court to liken the agent's conduct to a brief, visual observation. In *Ciraolo*, the Court upheld the Fourth Amendment validity of a visual search of a private backyard from a police airplane flying overhead. The Court was unconvinced by the government's comparison. Rehnquist distinguished *Ciraolo* "because [it] involved only visual, as opposed to tactile, observation." The Court further stated that "[a]lthough [the agent] did not 'frisk' petitioner's person, he did conduct a probing tactile examination of petitioner's carry-on luggage." In explaining the significance of carry-on luggage, Rehnquist said, "[T]ravelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand." Passengers "[do] not expect that [those on the vehicle] will, as a matter of course, feel the bag in an exploratory manner."

The Court once again employed its *Terry* analysis in upholding a Fourth Amendment search of a suspect who, in a high-crime area, fled, unprovoked, upon seeing approaching police officers. In *Illinois v. Wardlow*,<sup>7</sup> the Chief Justice, writing for a divided Court, explained that "[i]n *Terry*, we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Rehnquist, applying the *Terry* standard of "reasonable suspicion," stated that "[i]n this case . . . it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion but his unprovoked flight upon noticing the police." The Court, upholding the constitution-



## 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, 1999-2000 (Amer. Acad. of Jud. Educ. 2000).
2. 529 U.S. 266 (2000).

3. 392 U.S. 1 (1968).
4. 496 U.S. 325 (1990).
5. 529 U.S. 334 (2000).
6. 476 U.S. 207 (1986).
7. 528 U.S. 119 (2000).

ality of the search, stated that “[i]t was in this context that Officer Nolan decided to investigate Wardlow after observing him flee.” The Court noted that “[h]eadlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” Thus, the Court concluded that “Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and . . . in investigating further” and, therefore, reversed the judgment of the Illinois Supreme Court and remanded the case for further proceedings consistent with its opinion.

## FIFTH AMENDMENT

In *Dickerson v. United States*,<sup>8</sup> the Supreme Court held that *Miranda v. Arizona*<sup>9</sup> and the cases that followed govern admissibility of statements made during custodial interrogation in both state and federal courts. The Court thus found that 18 U.S.C. § 3501, a statute enacted in the wake of *Miranda* that made the admissibility of confessions obtained through the custodial interrogation process turn on whether or not they were voluntarily made, is unconstitutional. Although “Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution,” the Chief Justice, writing for a seven-member majority, concluded that “Congress may not legislatively supercede our decisions interpreting and applying the Constitution.” The Court of Appeals in the instant case had “concluded that the protections announced in *Miranda* are not constitutionally required.” The Court disagreed, noting several factors that point to a conclusion that *Miranda* is a constitutional decision. The Court first explained that *Miranda* applied the rule to proceedings in state court. Second, the Court looked to the *Miranda* opinion. The Court stated that “[t]he *Miranda* opinion itself begins by stating that the Court granted certiorari ‘to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.’” Chief Justice Rehnquist explained that “[i]n fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule.” The Court did not see § 3501 as meeting the “constitutional minimum” with respect to protecting a suspect’s right against self-incrimination. Despite additional remedies that are now available to deal with police misconduct that did not exist at the time of the *Miranda* decision, those remedies, in combination with § 3501, are not “an adequate substitute for the warnings required by *Miranda*.” The Court explained that “[section] 3501 explicitly eschews a requirement of pre-interrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect’s confession.” The majority reasoned that the *Miranda* Court “concluded that something more than the totality test was necessary.” Since “[section] 3501

reinstates the totality test as sufficient,” the statute “cannot be sustained if *Miranda* is to remain the law.”

In *United States v. Hubbell*,<sup>10</sup> the Court held that an indictment must be overturned where the Government makes “derivative use” of a testimonial component of the defendant’s act of producing documents under a subpoena. The Court explained that “we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence.”

Justice Ginsburg, writing for the Court in *United States v. Martinez-Salazar*,<sup>11</sup> held that a defendant’s exercise of peremptory challenges pursuant to Rule 24(b) is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been removed for cause. The Court stated that “[a]fter objecting to the District Court’s denial of his for-cause challenge, [Martinez-Salazar] had the option of letting [the juror] sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal.” The Court emphasized the fact that respondent had a choice in the matter, noting, “The District Court did not demand—and Rule 24(b) did not require—that Martinez-Salazar use a peremptory challenge curatively.”

## SIXTH AMENDMENT

Justice O’Connor, writing for the Court in *Roe v. Flores-Ortega*,<sup>12</sup> held that an attorney’s failure to file a notice of appeal without the consent of the defendant was not per se deficient or ineffective assistance of counsel. Although “a lawyer who disregards a defendant’s specific instructions to file a notice of appeal acts in a professionally unreasonable manner,” the Court explained that the question in the instant case was whether counsel was deficient “for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other.” Furthermore, “[i]n making this determination, courts must take into account all the information counsel knew or should have known.” Justice O’Connor reasoned that “[o]nly by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal or that the particular defendant sufficiently demonstrated to counsel an interest in an appeal.”

The Court, in *Portuondo v. Agard*,<sup>13</sup> held that a prosecutor’s closing arguments bringing to the attention of the jury the fact that a criminal defendant has had the opportunity to listen to all other witnesses and to, thus, tailor his testimony accordingly, did not violate his rights under the Fifth, Sixth, and

**The Court [noted] several factors that point to a conclusion that *Miranda* is a constitutional decision.**

8. 530 U.S. 428 (2000).  
9. 384 U.S. 436 (1966).  
10. 530 U.S. 27 (2000).

11. 528 U.S. 304 (2000).  
12. 528 U.S. 470 (2000).  
13. 529 U.S. 61 (2000).

**[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt . . . .**

unconvinced, stating that “[t]he process by which criminal defendants were brought to justice in 1791 [when the Bill of Rights was adopted] largely obviated the need for comments of the type the prosecutor made here.”

#### **EIGHTH AMENDMENT**

In *Weeks v. Angelone*,<sup>15</sup> the Court held that a defendant whose trial jury is directed to a paragraph of a constitutionally sufficient instruction on the effects of mitigating evidence has not had his constitutional rights violated. The Court explained that the trial judge gave the same instruction “upheld in *Buchanan v. Angelone*<sup>16</sup> as being sufficient to allow the jury to consider mitigating evidence.” The Court further noted that “he gave a specific instruction on mitigating evidence—an instruction that was not given in *Buchanan*—in which he told the jury that ‘[y]ou must consider a mitigating circumstance if you find there is evidence to support it.’” The Court concluded that “so far as the adequacy of the jury instructions is concerned, their sufficiency here follows a foriori from *Buchanan*.”

#### **DUE PROCESS**

Justice Stevens, writing for a divided Court in *Apprendi v. New Jersey*,<sup>17</sup> held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt, as mandated by the Constitution. The Court explained that “[a]t stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without ‘due process of law,’ Amdt. 14, and the guarantee that ‘[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,’ Amdt. 6.” The Court, citing *United States v. Gaudin*,<sup>18</sup> stated that “[t]aken together, these rights indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” The

Fourteenth Amendments. Relying on the Court’s rationale in *Griffin v. California*,<sup>14</sup> Agard contended that the closing comments of the prosecutor in his case unlawfully burdened his Sixth Amendment right to be present at trial and to confront the witnesses against him, as well as his Fifth and Sixth Amendment rights to testify on his own behalf. The Court was

Court based its conclusion on several factors. First, the Court noted that “the historical foundation for our recognition of these principles extends down centuries into the common law.” Second, “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” Third, citing *In re Winship*,<sup>19</sup> the Court explained that “the ‘reasonable doubt’ requirement ‘has a vital role in our criminal procedure for cogent reasons.’” The Court concluded that “[s]ince *Winship*, we have made clear beyond peradventure that *Winship*’s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’”

#### **FEDERAL HABEAS CORPUS**

In *Williams (Terry) v. Taylor*,<sup>20</sup> the Court held that § 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) provides for ultimate federal jurisdiction in determining constitutional issues associated with state habeas cases. Referring to the appeals court decision below, the Court stated that “[a]s the Fourth Circuit would have it, a state court judgment is ‘unreasonable’ in the face of federal law only if all reasonable jurists would agree that the state court was unreasonable.” Explaining that “reasonable lawyers and lawgivers regularly disagree with one another,” the Court stated that a restriction on habeas corpus relief, based on the unanimous agreement of jurists, was unrealistic. The Court based its analysis of § 2254(d)(1) on basic concepts of federal jurisdiction. Justice Stevens, citing *Marbury v. Madison*,<sup>21</sup> noted that “[w]hen federal judges exercise their federal-question jurisdiction under the ‘judicial power’ of Article III of the Constitution, it is ‘emphatically the province and duty’ of those judges to ‘say what the law is.’” According to the Court, the AEDPA codified *Teague v. Lane*<sup>22</sup> in which reliance on “new rules” created after a conviction was prohibited. To this end, a court may deny relief “that is contingent upon a rule of law not clearly established at the time the state conviction became final.” As to the requirement that the relevant law be “determined by the Supreme Court of the United States,” Stevens stated that “[i]f this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar.” The Court, in Part III of the opinion, addressed the application of *Strickland v. Washington*<sup>23</sup> to *Williams*. Finding that the Virginia Supreme Court’s decision rejecting *Williams*’ ineffective assistance claim was both “contrary to” and an “unreasonable application of” doctrine well-established in *Strickland*, the Court believed that *Williams* was eligible for habeas relief.

14. 380 U.S. 609 (1965).  
15. 528 U.S. 225 (2000).  
16. 522 U.S. 269 (1998).  
17. 530 U.S. 466 (2000).  
18. 515 U.S. 506 (1995).

19. 397 U.S. 358 (1970).  
20. 529 U.S. 362 (2000).  
21. 1 Cranch 137 (1803).  
22. 489 U.S. 288 (1989).  
23. 466 U.S. 668 (1984).

The Court, in *Ramdass v. Angelone*,<sup>24</sup> held that the Court's decision in *Simmons v. South Carolina*,<sup>25</sup> which provides for a jury instruction about a defendant's ineligibility for parole, does not apply unless the defendant was actually ineligible for parole at the time of sentencing. *Ramdass* contended that he was entitled to federal habeas relief pursuant to 28 U.S.C. § 2254(d)(1) (1994 ed., Supp. III) because the Virginia Supreme Court's decision either "improperly applied," or was "contrary to," the Court's opinion in *Simmons*. In rejecting petitioner's argument, the Court stated that "[t]he Virginia Supreme Court's ruling in the case before us was neither contrary to *Simmons* nor an unreasonable application of its rationale." Justice Kennedy explained that "[i]n this case, a *Simmons* instruction would not have been accurate under the law; for the authoritative determination of the Virginia Supreme Court is that petitioner was not ineligible for parole when the jury considered his sentence."

Justice Scalia, writing for the Court in *Edwards v. Carpenter*,<sup>26</sup> held that "the Sixth Circuit erred in failing to recognize that a procedurally defaulted ineffective-assistance-of-counsel claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself." Citing *Coleman v. Thompson*,<sup>27</sup> Justice Scalia noted that "[t]he procedural default doctrine and its attendant 'cause and prejudice' standard are 'grounded in concerns of comity and federalism.'" Furthermore, citing *Murray v. Carrier*,<sup>28</sup> the Court explained that the doctrine is to be "appl[ie]d alike whether the default in question occurred at trial, on appeal, or on state collateral attack."

The Court, in *Williams (Michael Wayne) v. Taylor*,<sup>29</sup> held that under 28 U.S.C. § 2254(e)(2), as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), a failure to develop a claim's factual basis in state court proceedings is not established unless there is a lack of diligence, or some greater fault attributable to the prisoner or his counsel. The Court, however, first dealt with the applicability of the AEDPA and found that it was applicable, as Williams did not file his federal habeas petition until after the effective date of the AEDPA. The Court went on to state that because Williams conceded that his case did not comply with 28 U.S.C. § 2254(e)(2)(B), "he may only receive an evidentiary hearing if his claims fall outside the opening clause." The conditional opening clause asks whether a factual basis was developed in the state court. "Here the answer is no," explained Justice Kennedy. Rejecting the argument of the Commonwealth that the opening clause provides for a no-fault approach to developing a factual claim in the state court, the Court embraced a more "ordinary, contemporary, [and] common" interpretation of the phrase "failed to." The Court explained that "[t]o say a person has failed in a duty implies

he did not take the necessary steps to fulfill it. . . . [and] [h]e is, as a consequence, at fault and bears responsibility for the failure." The Court reasoned that Congress, had it intended to effect a no-fault standard, would have easily been able to do so by using the phrase "did not" in place

of "has failed to." The Court supported its interpretation of the statute with *Keeney v. Tamayo-Reyes*,<sup>30</sup> stating that "[s]ection 2254(e)(2)'s initial inquiry into whether 'the applicant has failed to develop the factual basis of a claim in State court proceedings' echoes *Keeney's* language regarding 'the state prisoner's failure to develop material facts in state court.'" The Court found that Williams was diligent in developing the facts associated with his juror bias and prosecutorial misconduct claims. Williams's claim of juror bias rested on questioning of potential jurors during voir dire. Bonnie Stinnett, who would eventually become the jury foreperson, remained silent when asked whether she was related to any of the individuals on the witness list, or had ever been represented by any of the counsel present at the trial. Stinnett had previously been married to the Commonwealth's lead witness for a period of 17 years, and had been represented by a member of the prosecution during her divorce. By her own literal interpretation, Stinnett did not see herself as "related to" the witness in question since she had not been married to him for over 16 years. Regardless, "Stinnett's failure to divulge material information in response to the second question was misleading as a matter of fact because, under any interpretation, [the prosecutor] had acted as counsel to her and [her ex-husband/lead witness] in their divorce." Justice Kennedy concluded that "[c]oupled with [the prosecutor]'s own reticence, these omissions as a whole disclose the need for an evidentiary hearing."

In *Slack v. McDaniel*,<sup>31</sup> the Court held that an appeal of the dismissal of a habeas corpus petition undertaken after April 24, 1996 is governed by the certificate of appealability (COA) requirements contained in 28 U.S.C. § 2253(c). The Court held that "when the district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, a COA should issue . . . if the prisoner shows . . . that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Furthermore, a habeas petition dismissed without reaching the merits for failure to exhaust state remedies is not a "second or successive" petition. The Court's analysis began with a determination that post-AEDPA law governed the right

**Congress, had it intended to effect a no-fault standard, would have easily been able to do so . . . .**

24. 530 U.S. 156 (2000).  
25. 512 U.S. 154 (1994).  
26. 529 U.S. 446 (2000).  
27. 501 U.S. 722 (1991).

28. 477 U.S. 478 (1986).  
29. 529 U.S. 420 (2000).  
30. 504 U.S. 1 (1992).  
31. 529 U.S. 473 (2000).

**[D]efense counsel may effectively waive a defendant's right to trial within 180 days . . . by agreeing to a trial date beyond that time limit.**

application of a statute is triggered by the commencement of a case, the relevant case for a statute directed to appeals is the one initiated in the appellate court.” The Court stated that the Court of Appeals “should have treated the notice of appeal as an application for a COA.” To determine whether the Court of Appeals should have granted Slack’s application for a COA, the Court looked to the requirements concerning habeas applicants in § 2253(c) of the AEDPA. The state contended that only constitutional rulings, and not procedural rulings, could be appealed, citing the statute’s requirement that a COA may issue only upon the “substantial showing of the denial of a constitutional right.” Kennedy, in rejecting the state’s assertion, concluded that “[t]he writ of habeas corpus plays a vital role in protecting constitutional rights,” and found that Congress “expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.”

**RICO**

The Court, in *Beck v. Prupis*,<sup>33</sup> held that a person may not bring suit under 18 U.S.C. § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) predicated on a violation of § 1962(d) for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute. The Court began its analysis by looking at the “combined effect of two provisions of RICO that, read in conjunction, provide a civil cause of action for conspiracy.” Section 1964(c) provides a civil cause of action to anyone “injured . . . by reason of a violation of section 1962,” while § 1962(d) makes it unlawful for a person “to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” Justice Thomas turned to the “well-established common law of civil conspiracy” in order to determine what it means to be injured by reason of a conspiracy. The Court stated that “[b]y the time of RICO’s enactment in 1970, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious.” The Court concluded that “when Congress established in RICO a civil cause of action for a person ‘injured . . .

to appeal in the instant case. Citing its holding in *Lindh v. Murphy*,<sup>32</sup> the Court explained that § 2253 applies to appellate proceedings initiated after the effective date of the AEDPA. Justice Kennedy stated that “[w]hile an appeal is a continuation of the litigation started in the trial court, it is a distinct step. . . . [and] [w]hen Congress instructs us (as *Lindh* says it has) that

by reason of’ a ‘conspir[acy],’ it meant to adopt these well-established common-law civil conspiracy issues.” Since “[Prupis]’ alleged overt act in furtherance of their conspiracy [was] not independently wrongful under any substantive provision of the statute,” Beck’s claim was rendered invalid.

In *Rotella v. Wood*,<sup>34</sup> the Court held that civil suits under the Racketeer Influenced and Corrupt Organizations Act (RICO) are subject to a 4-year statute of limitations that begins running from the time of the discovery of the injury to the plaintiff. The 4-year statute of limitations with respect to RICO civil actions was established by the United States Supreme Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*<sup>35</sup> The District Court held that the 4-year period started to run from the time that petitioner discovered his injury, which petitioner concedes was 1986. As such, petitioner’s 1997 RICO suit would fall well beyond the bounds of the statute of limitations. The Fifth Circuit Court of Appeals affirmed, rejecting petitioner’s argument that the statute of limitations should not run until the plaintiff not only became aware of the injury, but also the pattern of racketeering activity. The United States Supreme Court explained that “[a] pattern discovery rule would allow proof of a defendant’s acts even more remote from time of trial and, hence, litigation even more at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.” For these reasons, the Court affirmed the Fifth Circuit.

**OTHER CRIMINAL STATUTORY INTERPRETATION**

In *Johnson v. United States*,<sup>36</sup> the Court held that sanctions imposed upon revocation of supervised release are part of the initial offense. The Sixth Circuit treated the revocation of supervised release as “impos[ing] punishment for defendant’s new offenses for violating the conditions of their supervised release.” The Court disagreed and held that revocation of supervised release should be treated “as part of the penalty for the initial offense.” The Court explained that “[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense.” Justice Souter thus concluded that post-revocation penalties are attributable to the original conviction.

In *New York v. Hill*,<sup>37</sup> a unanimous Court, led by Justice Scalia, held that defense counsel may effectively waive a defendant’s right to trial within 180 days as prescribed in the Interstate Agreement on Detainers (IAD), Article III(a), by agreeing to a trial date beyond that time limit. Although the IAD fails to address the consequences associated with a criminal defendant’s assent to trial outside the 180-day time limit, the Court, citing *United States v. Mezzanatto*,<sup>38</sup> presumed the availability of such a waiver “in the context of a broad array of

32. 521 U.S. 320 (1997).  
33. 529 U.S. 494 (2000).  
34. 528 U.S. 549 (2000).  
35. 483 U.S. 143 (1987).

36. 529 U.S. 694 (2000).  
37. 528 U.S. 110 (2000).  
38. 513 U.S. 196 (1995).

constitutional and statutory provisions.” Justice Scalia stated that “[w]hat suffices for waiver depends on the nature of the right at issue.” The Court indicated that the defendant’s right to counsel, or to plead not guilty, were examples of the types of rights that can only be waived by a defendant personally. Other rights, opines the Court, may be waived by the action of defense counsel. “Scheduling matters are plainly among those for which agreement by counsel generally controls.” Defense counsel is generally in the best position to determine the benefit or detriment to a defendant associated with a delay in trial commencement. Although respondent argued that the IAD speedy-trial language explicitly limits the types of delays that are allowable, the Court disagreed. “[T]he specification in that provision that the ‘prisoner or his counsel’ must be present suggests that it is directed primarily, if not indeed exclusively, to prosecution requests that have not been explicitly agreed to by the defense.” Additionally, the Court rejected Hill’s argument that the societal benefits attached to IAD’s time limits removed them from the scope of defendant waiver. The interest in resolving outstanding charges in the most expedient way, the main societal benefit from the contested IAD provision, is not “so central to the IAD that it is part of the unalterable ‘statutory policy.’” Thus, a defendant’s waiver in such an instance does not also waive the rights of society at large.

## CONCLUSION

As can be seen from the cases addressed during this term, the ideological balance of the Supreme Court will be of increasing importance in coming years. Even though this Court defies traditional labels in so many cases, no new president should be too confident of what any new appointee might do in the criminal justice cases to come.



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# Recent Civil Decisions of the United States Supreme Court: The 1999-2000 Term

Charles H. Whitebread

In this exciting Supreme Court Term, the Court addressed many crucial civil-law topics. Of particular note are the various First Amendment issues that the Court examined, including freedom of expression, freedom of association, and the establishment of religion. Additionally, the Court addressed race qualifications in voting, age discrimination, and several federalism issues.<sup>1</sup>

## FIRST AMENDMENT

In *Boy Scouts of America v. Dale*,<sup>2</sup> a divided Court held that applying New Jersey's public accommodations law to require the Boy Scouts to admit a homosexual assistant scoutmaster violates the Boy Scouts' First Amendment right of expressive association. The Court began its analysis by enumerating the right of expressive association. Citing *Roberts v. United States Jaycees*,<sup>3</sup> the Court stated that "[i]mplicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in the pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" The Court explained that "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express." Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate." Citing *New York State Club Ass'n, Inc. v. City of New York*,<sup>4</sup> the Court stated that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." Therefore, the Court concluded that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the rights to freedom of expressive association." As such, the Court held that "the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law."

In *California Democratic Party v. Jones*,<sup>5</sup> the Court held that California's blanket primary violates a political party's First Amendment right of association. The Court stated that while they recognize "States have a major role to play in structuring and monitoring the election process, including primaries,"

they have not held "that the processes by which political parties select their nominees are wholly public affairs that states may freely regulate." Justice Scalia stated, "To the contrary, we have continually stressed that when states regulate parties' internal processes they must act within limits imposed by the Constitution." Furthermore, the Court noted that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." The majority called attention to the fact that "[t]he formation of national political parties was almost concurrent with the formation of the Republic itself." The Court, citing *Tashjian v. Republican Party of Connecticut*,<sup>6</sup> thus concluded that "[c]onsistent with this tradition, the Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs.'"

In *Hill v. Colorado*,<sup>7</sup> the Court held that a Colorado statute regulating speech-related conduct within 100 feet of the entrance to any medical care facility did not offend the First Amendment. The Court focused on the fact that the instant statute was designed to protect the unwilling listener and stated that "[t]he unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases." Though the Court has "recognized that the 'right to persuade' . . . is protected by the First Amendment," the Court, citing *Rowan v. Post Office Dept.*,<sup>8</sup> stated that "no one has a right to press even 'good' ideas on an unwilling recipient." The Court explained that "[w]hile the freedom to communicate is substantial, 'the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.'"

Justice O'Connor delivered an opinion for a split Court in *Erie v. Pap's A.M.*<sup>9</sup> and held that the city's public nudity ban did not violate the First Amendment. The city of Erie, Pennsylvania, enacted a statute banning public nudity following the Supreme Court's decision in *Barnes v. Glen Theater*<sup>10</sup> in which the Court upheld a "strikingly similar" law. Respondent, Pap's A.M., operated a nude-dancing establishment in Erie called Kandyland and raised a constitutional challenge to the statute, charging that it was an impermissible

## 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, 1999-2000 (Amer. Acad. Of Jud. Educ. 2000).

2. 530 U.S. 640 (2000).

3. 468 U.S. 609 (1984).

4. 487 U.S. 1 (1988).

5. 530 U.S. 567 (2000).

6. 479 U.S. 208 (1986).

7. 530 U.S. 703 (2000).

8. 397 U.S. 728 (1970).

9. 529 U.S. 277 (2000).

10. 501 U.S. 560 (1991).

restriction on First Amendment freedom of expression. In determining the level of scrutiny to be applied, the Court, citing *Texas v. Johnson*,<sup>11</sup> looked at “whether the State’s regulation is related to the suppression of expression.” Finding the Erie statute to be a “general prohibition on public nudity” that “does not target nudity that contains an erotic message,” the Court determined the statute was subject to analysis under *United States v. O’Brien*.<sup>12</sup> In *O’Brien*, the Court reasoned that a justification for regulation unrelated to the suppression of expression is content-neutral and thus is subject to a lower level of scrutiny than content-based distinctions. The Court, in the instant case, rested its analysis on the asserted interest of Erie to “combat the negative secondary effects associated with adult entertainment establishments like Kandyland.” This, said the Court, “is unrelated to the suppression of the erotic message conveyed by nude dancing.” Finding the Erie ordinance to be content-neutral, and in compliance with the *O’Brien* standard, the Court reversed the Pennsylvania Supreme Court and remanded for further proceedings consistent with their holding.

The Court, in *Santa Fe Independent School District v. Doe*,<sup>13</sup> held that a student-led prayer delivered over a public address system before a high school football game violated the Establishment Clause of the First Amendment of the Federal Constitution, which provides that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.” The Court relied on its decision in *Lee v. Weisman*,<sup>14</sup> as did the District Court, in which the Court held that a prayer by a rabbi at a middle school graduation ceremony violated the Establishment Clause. The Court reasoned that “[a]lthough this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*.” Petitioner argued that the messages at issue in this case were private student speech and not public speech. The Court, however, did not agree. Justice Stevens stated that “[t]hese invocations are authorized by a government policy and take place on government property at government-sponsored school-related events.” The Court saw the selection process by which students were allowed to deliver an invocation or benediction as being restrictive, noting that “the school allows only one student, the same student for the entire season, to give the invocation.” The Court found this particularly troubling because “the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced.” The Court drew parallels between the instant case and its recent decision in *Board of Regents of the University of Wisconsin System v. Southworth*<sup>15</sup> in which school elections were used in order to determine which programs would receive funding. The Court explained that “[l]ike the student referendum for funding in *Southworth*, this student election does nothing to protect minority views but rather places the

students who hold such views at the mercy of the majority.” Quoting its decision in *West Virginia Board of Education v. Barnette*,<sup>16</sup> the Court unequivocally stated, “[F]undamental rights may not be submitted to vote: they depend on no elections.” Applying the test articulated in *Lemon v. Kurtzman*,<sup>17</sup> the Court found the instant policy invalid since it “lack[ed] a secular legislative purpose.” The Court concluded by stating, “We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.”

In *Mitchell v. Helms*,<sup>18</sup> the Court held that Chapter 2 of the Education Consolidation and Improvement Act of 1981, as amended, 20 U.S.C. §§ 7301-7373, was not a law respecting the establishment of religion. Chapter 2 of the Act channels federal funds to local education agencies (LEAs) through state education agencies (SEAs) to assist in the education of primary and secondary students. The Court stated the applicable precedent was *Agostini v. Felton*<sup>19</sup> in which the Court established a test for determining the purpose and effect of a statute in the establishment of religion. In *Agostini*, the Court held that to show a statute has such an effect, it must “result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.” Here, however, the Court stated that “[i]n this case, our inquiry under *Agostini*’s purpose and effect test is a narrow one.” The Court explained that “[b]ecause respondents do not challenge the District Court’s holding that Chapter 2 has a secular purpose, and because the Fifth Circuit also did not question that holding, we will consider only Chapter 2’s effect.” The Court found that “Chapter 2 does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates the aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content.” The Court further found that Chapter 2 does not “define its recipients by reference to religion.” Therefore, the Court concluded that in “[a]pplying the two relevant *Agostini* criteria, we see no basis for concluding that Jefferson Parish’s Chapter 2 program ‘has the effect of advancing religion.’”

In *Los Angeles Police Department v. United Reporting Publishing Company*,<sup>20</sup> the Court held that a private company may not make a facial challenge to an amended state statute when there is neither the threat of prosecution nor a possible cutoff of funding as a result of the amendment. The Court stated that “[t]he traditional rule is that ‘a person to whom a

**The Court concluded by stating, “We refuse to turn a blind eye to the context in which this policy arose . . . .”**

11. 491 U.S. 397 (1989).  
12. 391 U.S. 367 (1968).  
13. 530 U.S. 290 (2000).  
14. 505 U.S. 577 (1992).  
15. 529 U.S. 217 (2000).

16. 319 U.S. 624 (1943).  
17. 403 U.S. 602 (1971).  
18. 530 U.S. 793 (2000).  
19. 521 U.S. 203 (1997).  
20. 528 U.S. 32 (1999).

**The Court . . .  
held that *Buckley v. Valeo* is controlling authority with regards to state campaign contribution**

statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.” However, an important exception to this rule is a statutory challenge based on First Amendment overbreadth. This challenge must

be protected because of the cherished societal value associated with personal expression. The Court saw no such situation in this case. Following the traditional rule, the Court underscored two “cardinal principles” of its constitutional analysis: “the personal nature of constitutional rights and the prudential limitations on constitutional adjudication.” The Court thus held that the exception to the rule, First Amendment overbreadth analysis, is “strong medicine” not to be “casually employed.”

The Court, in *Nixon v. Shrink Missouri Government PAC*,<sup>21</sup> held that *Buckley v. Valeo*<sup>22</sup> is controlling authority with regards to state campaign contribution limitations. In *Buckley*, the Court upheld a \$1,000 limitation on individual political contributions per candidate. However, the Court struck down a similar limitation on independent expenditures linked to specific candidates. The Court reasoned that a limit on expenditures “precludes most associations from effectively amplifying the voice of their adherents.” The majority found *Buckley* applicable to the instant statute and stated that “[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute.” The Court was suspicious of respondent’s claim that he would not be able to run an effective campaign given the limitations on campaign contributions. The Court stated that “[e]ven if we were to assume that the contribution limits affected respondent Fredman’s ability to wage a competitive campaign (no small assumption given that Fredman only identified one contributor, Shrink Missouri, that would have given him more than \$1,075 per election), a showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*.” The Court further dismissed the argument of respondent that the limitations were unconstitutional as too low because of inflation since the *Buckley* decision. Justice Souter noted that “the issue in later cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming.” The Court, therefore, upheld the statute as constitutional, reversing the Court of Appeals for the Eighth Circuit and remanding for proceedings consistent with its opinion.

In *Board of Regents of the University of Wisconsin System v.*

*Southworth*,<sup>23</sup> the Court held that mandatory university programming fees do not violate the First Amendment rights of students, so long as those fees are distributed without regard for the viewpoints of the organizations that receive them. The Court began its analysis with *Abood v. Detroit Board of Education*<sup>24</sup> and *Keller v. State Bar of California*.<sup>25</sup> In *Abood*, union members paid mandatory fees that were being used to subsidize political expression that went against their personal beliefs. The Court found this to be a violation of First and Fourteenth Amendment Rights of the union members. *Keller*, in which mandatory bar membership and fees were upheld with respect to California lawyers, reiterated this point. Justice Kennedy saw this only as a roadmap, however, stating that “[w]hile those precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university.” The Court saw the mandatory fee at the University of Wisconsin as a valuable way to stimulate the academic and social discourse of its students. However, in order to protect the First Amendment rights of objecting students, the Court utilized the viewpoint neutrality principle enunciated in *Rosenberger v. Rector and Visitors of University of Virginia*.<sup>26</sup> The Court stated that “[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.” Thus, the Court concluded that “[t]he proper measure, and the principal standard of protection for objecting students . . . is the requirement of viewpoint neutrality in the allocation of funding support.” Here, Justice Kennedy found that the justification for allowing the mandatory fund in the first place was its ostensibly inherent viewpoint neutrality.

In *United States v. Playboy Entertainment Group*,<sup>27</sup> the Court held that § 505 of the Telecommunications Act of 1996 (the Act) violated the First Amendment because it was not the least restrictive means of accomplishing a legitimate government objective. Appellee Playboy Entertainment Group produces programming for adult television networks. Cable operators receive programs from appellee and, in turn, broadcast them to subscribers in scrambled form. Although all homes in a given area may receive the signal, only customers who have paid for the adult programming will have the converter box necessary to descramble the signal. In some instances, however, imperfections in the scrambling scheme allow for portions of audio and/or video from these adult programs to “bleed through.” Section 505 of the Act<sup>28</sup> was enacted in order to deal with the problem of children hearing and seeing sexually explicit material on television because of signal bleed. This section required cable operators who provide channels “primarily dedicated to sexually-oriented programming” either to “fully scramble or otherwise block” those channels or to limit their transmission

21. 528 U.S. 377 (2000).

22. 424 U.S. 1 (1976).

23. 529 U.S. 217 (2000).

24. 431 U.S. 209 (1977).

25. 496 U.S. 1 (1990).

26. 515 U.S. 819 (1995).

27. 529 U.S. 803 (2000).

28. 47 U.S.C. § 561(a) (1994 ed., Supp. III).

to hours when children are unlikely to be viewing, between 10 p.m. and 6 a.m. The Court began by noting that the material at issue was presumed to be offensive, while at the same time fully protected by the First Amendment. In determining the level of scrutiny to be applied to § 505, Justice Kennedy explained that “[t]he speech in question is defined by its content; and a statute which seeks to restrict it is content based.” The Court noted that, “[n]ot only does § 505 single out particular programming content for regulation, it also singles out particular programmers.” The majority, wary of such a statute, stated that “[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.” After determining that § 505 was a content-based speech regulation, the Court, citing *Sable Communications of California, Inc. v. FCC*,<sup>29</sup> found that the statute “can stand only if it satisfies strict scrutiny.” The Court went on to explain that, under strict scrutiny analysis, “[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest . . . [and] [i]f a less restrictive alternative would serve the Government’s purpose, the government must use that alternative.” The majority focused on the “less restrictive alternative” available to the government in this case. Following the reasoning of the three-judge district court, the Court concluded that § 504, the section preceding § 505 in the Act, was a less restrictive alternative. Section 504 allows a cable subscriber to have any channel fully blocked by the cable provider, free of charge. The Court reasoned that, if properly publicized to cable customers, § 504 would provide the protection of children that the government was looking for without having to effectively block an entire category of protected speech during the daytime hours. Justice Kennedy explained, “Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.” The Court then turned to the probable effectiveness of “targeted blocking” and stated that “[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.” During the time that § 504 was in effect, very few households made any request to have channels blocked in their homes. In looking at the “tepid” response that cable customers had toward § 504, the Court, in following the district court panel, was unconvinced of the severity of the “signal bleed” problem. The Court thus stated that “[t]he District Court’s thorough discussion exposes a central weakness in the Government’s proof: There is little hard evidence of how widespread or how serious the problem of signal bleed is.” Justice Kennedy characterized the government’s evidence as largely anecdotal, noting that “[i]f the number of children transfixed by even flickering pornographic images in fact reached into the millions we, like the District Court, would have expected to be directed to more than a handful of complaints.” The Court further noted that “[t]he First Amendment requires a more careful assessment and char-

29. 492 U.S. 115 (1989).  
30. 528 U.S. 62 (2000).

acterization of an evil in order to justify a regulation as sweeping as this.” Finding the evidentiary basis for the government’s assertion of § 504’s ineffectiveness to be lacking, the Court found that “[t]here is no evidence that a well-promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed . . . and their rights to have the bleed blocked.” The Court offered other solutions as well, namely, technological innovations within the marketplace like televisions that display a blue screen when receiving a scrambled signal. Finding the government’s restriction of speech in the instant case to be impermissible under the First Amendment, the Court invalidated § 505.

**The Court noted a general lack of evidence pointing to a need for the legislation in the first place, in addition to a complete lack of evidence linking states to unconstitutional age discrimination.**

#### FEDERALISM

In *Kimel v. Florida Board of Regents*,<sup>30</sup> the Court held that the Age Discrimination in Employment Act (ADEA) is not a valid exercise of Congress’s power under § 5 of the Fourteenth Amendment, and thus does not abrogate the sovereign immunity guaranteed to the States by the Eleventh Amendment. The ADEA makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual’s age.”<sup>31</sup> The Court began by addressing whether “Congress unequivocally expressed its intent to abrogate (the States’) immunity.” Invoking its decision in *Dellmuth v. Muth*,<sup>32</sup> the Court stated that “Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.” The ADEA passed this “simple but stringent” test. The Court concluded that “the plain language of these provisions clearly demonstrates Congress’ intent to subject the States to suit for money damages at the hands of individual employees.” Rebutting the arguments of respondents, as well as the assertions of Justice Thomas, the Court found no ambiguity in the intention of Congress to abrogate the states’ Eleventh Amendment immunity. The Court stated that “[o]ur examination of the ADEA’s legislative record confirms that Congress’ 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem.” The Court noted a general lack of evidence pointing to a need for the legislation in the first place, in addition to a complete lack of evidence linking states to unconstitutional age discrimination. This evidentiary dearth, combined with the “indiscriminate” scope of the Act’s requirements upon employers,

31. 29 U.S.C. § 623 (a)(1).  
32. 491 U.S. 223 (1989).

**[T]he Court held that . . . the civil remedies provision of the Violence Against Women Act violated the Commerce Clause . . . .**

led the Court to hold that “the ADEA is not a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment.” Thus, the “purported abrogation of the States’ sovereign immunity” associated with the ADEA was invalid.

In *United States v. Morrison*,<sup>33</sup> the Court held that 42 U.S.C. § 13981, the civil remedies provision of the Violence Against Women Act,

violated the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment. The majority began by looking at the statute’s constitutionality under Article I, § 8 of the Constitution (the Commerce Clause). Resting its analysis on its decision in *United States v. Lopez*,<sup>34</sup> the Court found that § 13981 falls well beyond the scope of authority granted to Congress by the Commerce Clause. Even though “Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than . . . previous case law permitted,” the Court was unwilling to extend that latitude to this statute. The Court next examined the validity of § 13981 under § 5 of the Fourteenth Amendment. While the Court found that Congress may “‘enforce’ by ‘appropriate legislation’ the constitutional guarantee that no State shall deprive any person of ‘life, liberty, or property, without due process of law,’ nor deny any person ‘equal protection of the laws,’” the majority found that limitations “inherent in § 5’s text and constitutional context have been recognized since the Fourteenth Amendment was adopted.” Those limitations proved to be determinative in the instant case as “[f]oremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.” This limitation on congressional power is “necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.”

In *United States v. Locke*,<sup>35</sup> the Court held that Washington’s regulations enforcing requirements on the operation, manning, and design of oil tankers were preempted by the Ports and Waterways Safety Act of 1972 (PWSA), in reliance on the Court’s interpretation of that statute in *Ray v. Atlantic Richfield Co.*<sup>36</sup> The Court analyzed the instant Washington regulations under field preemption. The Court thus found that Washington had legislated where only the federal government had power to do so. The regulations at issue created training requirements, English proficiency requirements, and navigation watch requirements for the crews of tanker vessels. These

types of regulations were preempted “as an attempt to regulate a tanker’s ‘operation’ and ‘manning’” inconsistent with federal regulations of the same nature. In invalidating the regulations, the Court concluded that “[t]he issue is not adequate regulation, but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate.”

The Court, in *Reno v. Condon*,<sup>37</sup> held that the Driver’s Privacy Protection Act (DPPA) is a proper exercise of Congress’s authority to regulate interstate commerce under the Commerce Clause, and does not violate the Tenth Amendment principles enunciated in *New York v. United States*<sup>38</sup> and *Printz v. United States*.<sup>39</sup> The Court explained that “[i]n *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.” In *New York*, the Court struck down a congressional measure that required the state to “enact a particular kind of law.” The Court additionally noted that its decision in *Printz* “invalidated a provision of the Brady Act which commanded ‘state and local enforcement officers to conduct background check[s] (sic) on prospective handgun purchasers.’” In distinguishing the instant case, the Court “agree[d] with South Carolina’s assertion that the DPPA’s provisions will require time and effort on the part of state employees, but reject[ed] the State’s argument that the DPPA violates the principles laid down in either *New York* or *Printz*.” The Court, alternatively, relied on its decision in *South Carolina v. Baker*,<sup>40</sup> in which it “upheld a statute that prohibited States from issuing unregistered bonds because the law ‘regulate[d] state activities,’ rather than ‘seek[ing] to control or influence the manner in which States regulate private parties.’” Chief Justice Rehnquist explained that “[l]ike the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens.” Furthermore, “[i]t does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.” The Court therefore concluded that “the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.”

In *Crosby v. National Foreign Trade Council*,<sup>41</sup> the Court held that a Massachusetts law, which restricted business practices with Burma, was invalid under the Supremacy Clause of the Federal Constitution. The Court began by stating that “[a] fundamental principle of the Constitution is that Congress has the power to preempt state law” and explained that federal law preempts state law when either the federal law “occup[ies] the field” of the state law, or when the state law is at conflict with the federal law. The Court, applying the standard enunciated

33. 529 U.S. 598 (2000).

34. 514 U.S. 549 (1995).

35. 529 U.S. 89 (2000).

36. 435 U.S. 151 (1978).

37. 528 U.S. 141 (2000).

38. 505 U.S. 144 (1992).

39. 521 U.S. 898 (1997).

40. 485 U.S. 505 (1988).

41. 530 U.S. 363 (2000).

in *Hines v. Davidowitz*,<sup>42</sup> viewed “the state Burma law as an obstacle to the accomplishment of Congress’s full objectives under the federal Act.” Furthermore, the Court found that “the state law undermine[d] the intended purpose and ‘natural effect’ of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.”

In *Jones v. United States*,<sup>43</sup> the Court held that an owner-occupied private residence is not property “used in” commerce or commerce-affecting activity. Petitioner Jones threw a Molotov cocktail through a window in a personal dwelling owned and occupied by his cousin. The ensuing fire severely damaged the home. A federal grand jury indicted petitioner on three separate counts, the first of which was a violation of 18 U.S.C. § 844(i): arson. Under this statute, it is a federal crime to damage or destroy, “by means of fire or explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.” The unanimous Court was hesitant to adopt the government’s “expansive” interpretation of the instant statute, which would render virtually every building within its scope stating that “[p]ractically every building . . . is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection . . . or bear some other trace of interstate commerce.” The Court relied on its decision in *United States v. Lopez*<sup>44</sup> wherein it invalidated the Gun-Free School Zones Act, former 18 U.S.C. § 922(q) (1988 ed., Supp. V), as an improper exercise of Commerce Clause power that essentially abrogated the state’s duty to regulate violent crime. The Court in the instant case drew a comparison to *Lopez* where there is “legislation aimed at activity in which ‘neither the actors nor their conduct has a commercial character.’” Thus, the Court concluded that “[section] 844(i) is not soundly read to make virtually every arson in the country a federal offense.” Consequently, the Court found that the activity in the instant case fell within “traditional state concern” and held that the statute was an invalid exercise of power under the Commerce Clause.

## THE FOURTEENTH AMENDMENT

The Court, in *Stenberg v. Carhart*,<sup>45</sup> held that Nebraska’s statute criminalizing the performance of “partial birth abortion[s]” violates the federal Constitution, as interpreted in *Roe v. Wade*<sup>46</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>47</sup> The Court began by listing the appropriate standards as set forth by the Court in *Casey*. “First, ‘before viability . . . the woman has a right to choose to terminate her pregnancy.’ Second, ‘a law designed to further the State’s interest in fetal life which imposes an undue burden on the woman’s deci-

sion before fetal viability’ is unconstitutional. . . . Third, ‘subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’” The Court concluded that the Nebraska law at issue violates

the federal Constitution for two reasons. “First, the law lacks any exception ‘for the preservation of the . . . health of the mother.’” Secondly, “it imposes an undue burden on a woman’s ability’ to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself.” Looking to the third substantive holding of *Casey*, the Court discussed the lack of a “health” exception in the statute and stated that “[s]ince the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.” Nebraska argued that there is no need for such an exception as “safe alternatives remain available.” The Court, like the district court below, was unconvinced. Justice Breyer explained that “[t]he problem for Nebraska is that the parties strongly contested this factual question in the trial court below; and the findings and evidence support Dr. Carhart.” As such, the Court found the instant statute violated the Fourteenth Amendment to the federal Constitution.

In *Troxel v. Granville*,<sup>48</sup> the Court held that Wash. Rev. Code § 26.10.160(3), as applied, is an unconstitutional infringement of the fundamental parental right to make decisions concerning the care, custody, and control of one’s children. The Court began by noting the impetus for nonparent rights statutes like the one at issue, stating that “it is difficult to speak of an average American family.” Furthermore, the Court noted that oftentimes, many third parties, like grandparents, may have a valuable stake in relationships with children, especially those that live in “non-traditional” settings. However, the Court was unwilling to extend the rights of grandparents in a way that eclipsed what it believed were the more central rights of parents. The Court relied on the Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law,” and, citing *Meyer v. Nebraska*,<sup>49</sup> stated that “the ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and to ‘control the education of their own.’” The Court viewed the instant statute as infringing upon this fundamental right and, therefore, held it was unconstitutional.

**[T]he Court was unwilling to extend the rights of grandparents in a way that eclipsed what it believed were the more central rights of parents.**

42. 312 U.S. 52 (1941).

43. 529 U.S. 848 (2000).

44. 514 U.S. 549 (1995).

45. 530 U.S. 914 (2000).

46. 410 U.S. 113 (1973).

47. 505 U.S. 833 (1992).

48. 530 U.S. 57 (2000).

49. 262 U.S. 390 (1923).

**The Court concluded that “[a]ncesty can be a proxy for race,” as it was here, and thus, held the statute unconstitutional.**

## ELECTIONS

The Court, in *Rice v. Cayetano*,<sup>50</sup> held that a Hawaii statute limiting voters to those persons of “Hawaiian” or “native Hawaiian” ancestry violates the Fifteenth Amendment as an impermissible denial or abridgement of voting rights based on race. The Court began by stating that “[t]he purpose and command of the Fifteenth

Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race.” The Court explained that “[t]he design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise.” Furthermore, “[f]undamental in purpose and effect and self-executing in operation, the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race.” Citing its decision in *Guinn v. United States*,<sup>51</sup> the Court explained that “[t]he Fifteenth Amendment was quite sufficient to invalidate a scheme which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise.” The Court concluded that “[a]ncesty can be a proxy for race,” as it was here, and thus, held the statute unconstitutional.

## CIVIL STATUTORY INTERPRETATION - ENVIRONMENT

In *Friends of the Earth v. Laidlaw*,<sup>52</sup> the Court held that the proper inquiry when determining Article III standing with regards to Clean Water Act suits is injury to the plaintiff, not injury to the environment. Additionally, the Court held that a defendant’s voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. In addressing the issue of Article III standing, the Court, citing *Hunt v. Washington State Apple Advertising Commission*,<sup>53</sup> explained that “[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” The Court felt, as did the district court, that the statements of petitioner organization’s members “adequately allege[d] injury in fact,” as they documented the experiences of persons “‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity,” citing *Sierra Club v. Morton*.<sup>54</sup> Consequently, petitioner had Article III standing to sue as an organization on behalf of its

members. In addressing the issue of mootness, the Court, citing *United States v. Concentrated Phosphate Export Ass’n*,<sup>55</sup> stated that the test for determining mootness based on voluntary defendant conduct is whether “subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” Noting that the Court of Appeals “confused mootness with standing,” Justice Ginsburg was unsatisfied with that court’s characterization of mootness as “standing set in a time frame,” which she felt was, at best, “not comprehensive.” The Court did not believe that the “formidable burden” of showing that the toxic emissions could not “reasonably be expected to recur” had been met by respondent. Not only did respondent retain its NPDES permit, but “[t]he effect of both Laidlaw’s compliance and the facility closure on the prospect of future violations is a disputed factual matter.” Therefore, the Court concluded that the instant case was not moot.

## CIVIL STATUTORY INTERPRETATION - HEALTH

The Court, in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,<sup>56</sup> held that the Food and Drug Administration (FDA) lacks authority to regulate tobacco products as customarily marketed. The Court, led by Justice O’Connor, followed the reasoning of the Court of Appeals and stated that “[t]he FDA’s findings make clear that tobacco products are ‘dangerous to health’ when used in the manner prescribed.” Given this conclusion by the FDA, the Court found that “there are no directions that could make tobacco products safe for obtaining their intended effects.” Therefore, the Court concluded that if “tobacco products [were] within the FDA’s jurisdiction, the Act would deem them misbranded devices that could not be introduced into interstate commerce.”

## CIVIL STATUTORY INTERPRETATION - AGE DISCRIMINATION

In *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>57</sup> the Court held that a prima facie case of age discrimination, and sufficient evidence of pretext, may permit a trier of fact to find unlawful discrimination, though such a showing will not always be adequate to sustain a jury’s finding of liability. The Court also held that a court, in entertaining a motion for judgment as a matter of law, should review all evidence on the record. The Court, finding sufficient evidence in the instant case to warrant a jury verdict for petitioner, reversed the Fifth Circuit.

## PRODUCTS LIABILITY

The Court, in *Geier v. Honda*,<sup>58</sup> held that “no air bag” tort claims are at opposition with the objectives of Federal Motor Vehicle Safety Standard 208, and are thus preempted. Petitioner Alexis Geier was involved in a solo vehicle accident in her 1987 Honda Accord. Although she was wearing her seatbelt, petitioner was severely injured. The vehicle was not

50. 528 U.S. 495 (2000).  
51. 238 U.S. 347 (1915).  
52. 528 U.S. 167 (2000).  
53. 432 U.S. 333 (1977).  
54. 405 U.S. 727 (1972).

55. 393 U.S. 199 (1968).  
56. 529 U.S. 120 (2000).  
57. 530 U.S. 133 (2000).  
58. 529 U.S. 1913 (2000).  
59. 15 U.S.C. § 1397(k) (1988 ed.).

equipped with an airbag or any other passive restraint device. Federal Motor Vehicle Safety Standard 208 (FMVSS 208), promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966 (the Act), required automobile manufacturers to equip some, but not all, of their 1987 cars with passive restraint systems. The Court began by addressing whether the Act's express preemption provision preempted the instant lawsuit. The preemption provision, which prohibits any state from establishing its own vehicle safety requirements where the federal government has already created its own standards, is followed by a "saving clause." This clause provides that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law."<sup>59</sup> The Court favored a narrow reading of the preemption provision that excludes common-law suits. Justice Breyer explained that "[w]e have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances." Furthermore, "[g]iven the presence of the saving clause, we conclude that the pre-emption clause must be so read." The Court next inquired as to whether ordinary preemption principles apply in light of its reading of the materials. The Court, answering in the affirmative, concluded that the saving clause "does not bar the ordinary working of conflict pre-emption principles." Justice Breyer stated that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." In addition, the Court found that "[i]t is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provisions applicability had it wished the Act to 'save' all state-law tort actions, regardless of their potential threat to the objectives of the federal safety standards promulgated under that Act." Justice Breyer also questioned why Congress would have want-

ed to eschew ordinary preemption doctrine in favor of a more "complex" system in which "state law could impose legal duties that would conflict directly with federal regulatory mandates." Thus, the Court concluded that "there is no reason to believe congress has done so here."

## CONCLUSION

The Court, having tackled some of the most divisive issues existing today during its latest Term, continues to serve as the ultimate crucible of the ideology of right and wrong. The firestorm of public reaction to several decisions this Term illustrates a growing awareness of the importance of the Court. The proliferation of close decisions during the 1999-2000 Term further exemplifies the delicate balance that exists with respect to some of the nation's most hotly contested issues. In the 2000 election, the American people had the opportunity to tip the ideological scales of the Court to a greater extent than in any other election year in recent memory. Notwithstanding the election, however, the Court will likely bring us another exhilarating Term for 2000-2001.



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# Expert Evidence:

## The Road from *Daubert* to *Joiner* and *Kumho Tire*

Janusz Puzniak

Experts have been used to explain specialized and scientific knowledge to laymen in legal controversies for centuries. Judge Learned Hand traced the use of experts in legal disputes to the fourteenth century.<sup>1</sup> In courts, experts have assisted litigants at least since the 1620s,<sup>2</sup> and their testimonial contributions have led to the development of rules governing their appearance in the courtroom.<sup>3</sup> Since the late nineteenth century, the usefulness of experts has intensified greatly because of the rapid development of scientific methodologies and the increased credibility of experimental results. Indeed, the help of an expert became indispensable at the point when the “untrained layman” could not intelligently understand the issue in dispute,<sup>4</sup> or when the layman, without bringing in scientific or technical evidence, could not satisfy the burden of proof.<sup>5</sup> As a consequence, the need for scientific and technical expertise, and the heightened trust in the beneficial assistance that experts could provide for the judicial process, resulted in the liberalization of rules controlling their testimony. On the other hand, the increased ease of hiring experts willing to argue both sides of the same controversial issue alerted courts to the need to carefully check the reliability of experts’ testimony.

In the mid- and late 1990s, the United States Supreme Court provided new answers to the dilemmas of how “scientific” or how widely “accepted” the expert evidence needed to be in order to be admitted in courts and what is the appropriate scope of appellate review of the district courts’ admission of expert testimony. First, in 1993, the Court settled the principles of admission of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals* (the *Daubert* test).<sup>6</sup> Four years later, it established the standards of appellate review of such testimony in *General Electric Co. v. Joiner*,<sup>7</sup> and, two years after that, in 1999, in *Kumho Tire Co. v. Carmichael*,<sup>8</sup> it decided to subject both the scientific and nonscientific expert testimony to equal admission standards based on the *Daubert* test. The *Daubert-Joiner-Kumho* trilogy provides a set of basic principles that control expert testimony in federal courts at the beginning of the twen-

ty-first century. This framework has recently been codified by the December 2000 amendments to the Federal Rules of Evidence. Furthermore, given the importance of expert evidence to the contemporary judicial process, this framework still is likely to evolve further.

This article begins by introducing the traditional common-law “general acceptance” test (the *Frye* test) and summarizing the Federal Rules of Evidence as they existed when the trilogy cases were decided. The article then traces the major developments concerning expert evidence from *Daubert* to *Kumho Tire*. Finally, it speculates about the amendments to the Federal Rules and the proposed amendments to the state-law Uniform Rules of Evidence.

### I. THE “GENERAL ACCEPTANCE” TEST AND THE FEDERAL RULES OF EVIDENCE

Before the twentieth century, courts generally did not impose greater reliability requirements on expert evidence than on testimony from other witnesses.<sup>9</sup> For example, in *Spring Co. v. Edgar*,<sup>10</sup> the Court stated that it was “a matter of discretion with the court whether to receive or exclude the [expert] evidence,”<sup>11</sup> and that “the appellate court will not reverse . . . [a lower court’s decision] unless the ruling is manifestly erroneous.”<sup>12</sup> Because the importance of expert evidence in trials has increased substantially in the twentieth century, courts began to demand that expert testimony be relevant and reliable.<sup>13</sup> This approach resulted in the 1923 District of Columbia Court of Appeals’ decision in *Frye v. United States*,<sup>14</sup> which created the so-called general acceptance test. Considering whether to admit polygraph evidence, the *Frye* court ruled that “the thing from which the deduction [by an expert] is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs.”<sup>15</sup> In practice, *Frye* provided a two-step analysis: first, the trial judge identified the scientific field of the testimony; then, the judge determined whether a specific principle was generally accepted by scientists in that field. The *Frye* test was relative-

#### Footnotes

1. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 42 (1901).
2. Jonathan R. Schofield, *A Misapplication of Daubert: Compton v. Subaru of America Opens the Gate for Unreliable and Irrelevant Expert Testimony*, B.Y.U. L. REV. 498 (1997).
3. *Schultz v. United States*, 2 Ct. Cl. 364 1st page, 380-382 (1866).
4. Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952).
5. Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 MINN. L. REV. 1345, 1348 (1994).
6. 509 U.S. 579 (1993).
7. 522 U.S. 136 (1997).
8. 526 U.S. 137 (1999).

9. Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 474-75 (1986).
10. 99 U.S. 645 (1878).
11. *Id.* at 658.
12. *Id.*
13. At the turn of this century Judge Learned Hand demanded that expert evidence be reliable in order to both have “possible weight” regarding an issue and be admitted for consideration by a trier of fact. Without reliability, the evidence lacks relevance to the inquiry. Learned Hand, *supra* note 1, at 42.
14. 293 F.1013 (D.C.Cir. 1923)
15. *Id.* at 1014 (emphasis added).

ly simple, but rigid in its all-or-nothing approach. It was praised as guaranteeing uniformity of decisions, eliminating the need for prolonged admissibility hearings, and providing an effective method to determine the admissibility of the evidence by the specialists. The test was criticized, however, for establishing too large a threshold for useful and otherwise reliable scientific testimony that was novel and not yet “generally accepted” in the field. The *Frye* test appeared to have survived the adoption by Congress of the Federal Rules 1975 and was the key element of the common law governing the admissibility of evidence in federal courts until the 1993 Court’s landmark decision in *Daubert*.

The advent of the Federal Rules and of state evidence statutes, which the Federal Rules inspired, spawned the new era of admission of expert testimony. In his excitement about the Federal Rules, Albert Jenner, Chairman of the Advisory Committee on the Federal Rules, stated the following to Congress:

The . . . [Advisory] Committee is especially proud of the rules dealing with expert testimony. This area has become encrusted with a heavy and suffocating layer of technicalities wholly inconsistent with the simple facts of life and the intelligence of American jurors . . . . [W]e . . . have long known that intelligent jurors realize that an expert is only stating his opinion, that his testimony is to be treated as an opinion and is not binding upon the jurors and is to be judged in the light of all the evidence in the case, to be accepted or rejected by a juror as he sees fit.<sup>16</sup>

The Federal Rules abolished many of the common-law barriers to admissibility of expert evidence. They also affirmed Congress’s confidence in the jury’s ability to carry out the fact-finding function,<sup>17</sup> and they confirmed the tradition of providing trial courts with broad discretion to make decisions concerning the admissibility of all evidence.<sup>18</sup>

Several of the Federal Rules apply to rulings on admissibil-

ity of expert testimony. First, according to Federal Rule 104,<sup>19</sup> the district court is vested with the determination of preliminary questions concerning the admissibility of evidence. The judge controls the preliminary fact questions upon which the admissibility of evidence depends<sup>20</sup> and then decides about the relevancy of the evidence.<sup>21</sup> Both inquiries employ the “preponderance of the evidence” standard, and in making determinations under this rule<sup>22</sup> the judge is not bound by other rules of evidence.<sup>23</sup> Second, Federal Rule 105 allows the court to admit evidence for a limited purpose.<sup>24</sup> Third, under Federal Rules 401 and 402, the judge must check the evidence for its relevancy,<sup>25</sup> admitting “all relevant evidence not otherwise excluded” by some other rules.<sup>26</sup> Fourth, as with other types of evidence, Federal Rule 403 allows the district court to exclude expert evidence when the danger of unfair prejudice substantially outweighs its probative value by balancing a number of case-specific factors.<sup>27</sup>

Finally, Federal Rules 702 through 705 deal directly with testimony by experts who are selected by the parties. Federal Rule 702<sup>28</sup> governs the admissibility of expert scientific evidence and establishes a higher standard than mere relevance for its admissibility. Procedurally, the district judge first determines whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, and if so, the judge decides whether the scientific, technical, or other specialized knowledge that the expert claims to provide will assist the trier of fact to understand the evidence or to determine a fact in issue.<sup>29</sup> Further inquiry under the Federal Rule 702 focuses on helpfulness to the jury. In order to assure such helpfulness, the rule establishes the two-prong test of reliability and relevance, which was explained in *Daubert*. Expert testimony that offers scientific conclusions based upon flawed underlying research does not support the conclusions and cannot assist the trier of fact: it is mere speculation.

In addition to the relevance and reliability requirements of Federal Rule 702, trial judges need to take into account the requirements of Federal Rule 703,<sup>30</sup> which allows expert tes-

16. *Federal Rules of Evidence: Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary*, 93d Cong., 1st Sess. 87-88 (1973)[hereinafter “Hearings”].

17. *E.g.*, *Rock v. Arkansas*, 483 U.S. 44, 61 (1987).

18. *See* Hearings, *supra* note 16. For example, Albert Jenner, Jr., Chairman of the Advisory Committee, testified: “[W]e could see that [allowing] discretion to be exercised by a judge is preferable to hardening a rule of evidence, to etching it in granite. We always operated . . . to afford the U.S. district judges wise discretion with respect to the admission or exclusion of evidence.” *Id.* at 206.

19. Fed. R. Evid. 104.

20. Fed. R. Evid. 104 (a).

21. Fed. R. Evid. 104 (b).

22. 509 U.S. at 594-95 (The Court stressed the flexible character of this inquiry.)

23. A limited exception exists with respect to those rules concerning privileges.

24. Fed. R. Evid. 105.

25. Fed. R. Evid. 401-02.

26. Fed. R. Evid. 402.

27. Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631 (1991). Judge Weinstein voiced the following opinion regarding Federal Rule 403’s relation to expert evidence: “Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge . . . exercises more control over experts than over lay witnesses.” *Id.* at 632.

28. Federal Rule 702, as it existed at the time of the case law trilogy discussed in this article, provided:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

29. *Id.*

30. *Daubert*, 509 U.S. at 595.

timony to be based on opinion.<sup>31</sup> Because the language of this rule refers to data “reasonably” relied upon, such reliance, arguably, does not have to be “common” within the scientific community. Under Federal Rules 704<sup>32</sup> and 705,<sup>33</sup> expert witnesses enjoy a special status in that they neither have to testify from personal knowledge nor does the basis for their opinions have to be admissible. Furthermore, they may also, unlike other witnesses, opine on the “ultimate issues” that are to be decided by the jury.<sup>34</sup> In addition, Federal Rule 706<sup>35</sup> equips the court with its own power to appoint independent expert witnesses.

The period of liberal admission in the 1980s stemming from the spirit of the Federal Rules was followed by a short period of reaction against liberal admission in the early 1990s,<sup>36</sup> which resulted in proposed amendments to the Federal Rules that included changes in Federal Rule 702 to allow admission of expert testimony only when it would be “reasonably reliable” and “substantially assist” the trier of fact to understand the evidence or to determine a fact in issue. The changes were expected to increase the reliability of expert testimony, while limiting its use, and to preserve the principle that the courts should reject testimony that was based upon premises that lack any “significant support” and acceptance within the scientific community. The Court, however, granted certiorari in *Daubert*, and the proposed modification of Federal Rule 702 did not emerge from the rulemaking process.

## II. THE COMPREHENSIVE STANDARD: DAUBERT

During the seven decades before the 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>37</sup> the federal courts followed the *Frye* “general acceptance” test to determine the admissibility of expert testimony. In *Daubert*, the Court established a more comprehensive test for the admissibility of such

evidence. First, the Court determined that the Federal Rules had “relaxed” the traditional standard of “general acceptance”<sup>38</sup> and confirmed that district courts should play a gatekeeping role to assure that the proffered evidence is both “reliable” and “relevant.”<sup>39</sup> Second, it held that expert scientific testimony can only be reliable if the judge finds its underlying methodology is sound.<sup>40</sup> Finally, in order to help the judge evaluate the soundness of the methodology and overall “reliability” of scientific theory advocated by an expert, the Court directed district courts to consider the following factors (which the Court labeled as its “general observations”): (1) falsifiability of the theory, (2) peer review and publication of the theory, (3) known or potential rate of error and the existence of standards controlling the research on which the theory is based, and (4) general acceptance of the methodology underlying the theory in the scientific community (a remnant of the *Frye* test).<sup>41</sup>

*Daubert* specifically explained that the words “scientific” and “knowledge” in the Federal Rule 702 imply that the testimony must be grounded “in the methods and procedures of science,” be more than “subjective belief or unsupported speculation,” and be supported by appropriate validation “based on what is known.”<sup>42</sup> The Court explained that the distinction between “validity” and “reliability,” that is, between a scientific test or principle and its application in the particular case, approximates the methodology/conclusion distinction.<sup>43</sup> The requirement that an expert’s testimony relate to “scientific knowledge” is one of evidentiary reliability, and in the determinations as to whether the expert’s testimony relates to “scientific knowledge” the trial judge must focus “solely on principles and methodology, not on the conclusions that they generate.”<sup>44</sup>

Procedurally, when the trial judge determines that the reasoning or methodology underlying the testimony is scientifically valid,<sup>45</sup> the testimony is admissible even if the witness’s con-

31. Federal Rule 703, as it existed at the time of the case law trilogy discussed in this article, provided:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

32. Federal Rule 704 states:

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

33. Federal Rule 705 states:

Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underly-

ing facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

34. Fed. R. Evid. 704.

35. Fed. R. Evid. 706.

36. Especially in the early in cases involving issues of causation in toxic tort or drug products liability.

37. 509 U.S. 579 (1993).

38. *Id.* at 588.

39. *Id.* at 590-591.

40. *Id.*

41. The Court cautioned that the list of these four factors should not be considered definitive. *Id.* at 593-95. See also Bert Black, et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 782 (1994) (discussing other factors a court might consider).

42. 509 U.S. at 593-94. When an expert seeks to testify about scientific knowledge pursuant to Federal Rule 702, the inferences or assertions that the expert is making “must be derived by the scientific method.” *Id.*

43. See Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1201 n. 20 (1980).

44. 509 U.S. at 593.

45. *Id.* at 592-93.

clusion is novel and controversial.<sup>46</sup> The trial court must also decide whether the expert's testimony "fits" the facts of the case.<sup>47</sup> As opposed to the standard of reliability, this inquiry pertains to the standard of relevance and is significant because the expert scientific testimony can only be relevant when it assists the trier of fact to understand the evidence or to determine a fact in issue, which, in turn, happens only when the testimony relates to an issue at hand.<sup>48</sup>

Because *Daubert* was a federal common-law clarification of Federal Rules, the decision did not result in a *per se* abrogation of the *Frye* test at the state level, even in the states that adopted rules of evidence mirroring Federal Rules. Even today, the *Frye* test is by no means extinct,<sup>49</sup> although there is a clear tendency to move away from it.<sup>50</sup>

### III. THE "ABUSE OF DISCRETION" STANDARD OF APPELLATE REVIEW: JOINER

Before *Daubert* there was little suggestion that courts of appeal would use any standard other than "abuse of discretion" to review the district courts' decisions on admission of expert testimony.<sup>51</sup> Despite the fact that the court of appeals in

*Daubert*<sup>52</sup> applied a *de novo* standard, the Court reversing that decision chose not to deal with the standard of appellate review at all.<sup>53</sup> Consequently, nearly all the federal courts of appeal that considered this issue after *Daubert* found no basis to alter the traditional approach.<sup>54</sup>

The circuits adhering to the "abuse of discretion" standard<sup>55</sup> explained that "by loosening the strictures on scientific evidence set by *Frye*, *Daubert* reinforces . . . a presumption of admissibility of evidence,"<sup>56</sup> and when the district courts adhere to *Daubert's* parameters, the courts of appeal will not disturb the district courts' findings unless they are "manifestly erroneous."<sup>57</sup> When the district courts took their "gatekeeping function conscientiously,"<sup>58</sup> the court of appeals would not replace the district court's careful decision with its own judgment because "[l]ike the . . . [Supreme Court they were] 'confident that federal judges possess the capacity to undertake this review' [and] their decisions . . . are properly reviewed under the traditional abuse of discretion standard."<sup>59</sup> Contrary to the mainstream cases adopting some variant of the "abuse of discretion" standard, the Sixth Circuit attempted to utilize a "multiple" standard of review by dissecting the admissibility deci-

46. Edward J. Imwinkelried, *The Daubert Decision: Frye Is Dead, Long Live the Federal Rules of Evidence*, Sept. 1993 TRIAL 60, 64.

47. 509 U.S. at 592-93.

48. *Id.* at 591.

49. Some eighteen states still adhere to the *Frye* test. These states are: Alaska, Arizona, California, Colorado, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, North Dakota, Pennsylvania, Utah, and Washington. For a comprehensive list of states, tests, and cases, see *The Revision of Uniform Rules of Evidence Act*, the National Conference of Commissioners on Uniform State Laws, Feb. 1998.

50. The following twelve states adopted the *Daubert* test: Iowa, Kentucky, Louisiana, Montana, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Vermont, West Virginia, and Wyoming. In other states the issue is either unsettled or the states use varying standards. *Id.*

51. Although some courts of appeal expressed their concerns about the trial courts admitting too much expert testimony in or excluding too much out. For example, in *In Re Air Crash Disaster at New Orleans*, 795 F.2d 1230 (5th Cir. 1986), the Fifth Circuit stated:

[W]e adhere to the deferential standard for review of decisions regarding the admission of testimony by experts. Nevertheless, we take this occasion to caution that the standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly in those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a 'let it all in' philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials. *Id.* at 1234.

52. 951 F.2d 1128 (9th Cir. 1991), rev'd, 509 U.S. 579 (1993). The court treated determinations about scientific validity similar to rulings on matters of law, to which "de novo" standards usually apply. 951 F.2d at 1130.

53. *Id.* See also David L. Faigman, et al., *Check Your Crystal Ball at*

*the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799 (1994).

54. See 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW, at 4.02, at n. 12 (2d ed. Supp. 1996) (With respect to application of the *Daubert* test, "it is apparent that most of the decision making is located in the trial judge, which is consistent with . . . abuse of discretion review."); G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 1028 (1996) ("The standard of review of *Daubert* testing on appeal is pretty clear. Though the words vary, the meaning is the same: almost all of the cases say the standard is broad or deferential, it is a clearly erroneous standard, it looks for manifest or clear abuse of discretion").

55. This is called, interchangeably, a "clear error" or "manifestly erroneous" standard. See 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, p. 702.02[2] (2d ed. 1997). "There is no substantive difference between 'manifest error' and 'abuse of discretion.'" *Id.* at 702-7.

56. *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995).

57. *Bradley v. Brown*, 42 F.3d 434, 436-37 (7th Cir. 1994).

58. *Id.* at 438-39.

59. *Duffee by and through Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996) (quoting *Daubert*, 509 U.S. at 593). See also *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1517 (10th Cir. 1996); and *United States v. Davis*, 40 F.3d 1069, 1073 n. 4 (10th Cir. 1994) (noting that *Daubert* "has replaced the historical *Frye*" standard, and observing that the new standard adopts the "liberal thrust" of the Federal Rules).

sions into isolated components.<sup>60</sup> The Sixth Circuit soon rejected that standard.<sup>61</sup>

Although before *Daubert*, the Third and Eleventh Circuits, like others, recognized the “abuse of discretion” standard of review, in the early and mid-1990s they expressed deep concerns about the trial courts keeping too much scientific evidence out. In *In re Paoli R.R. Yard PCB Litigation*,<sup>62</sup> the Third Circuit adopted a “hard look” (also called “stringent”) standard of review of district court decisions excluding scientific evidence. Explaining its decision, the court of appeals voiced doubts about the capacity of district courts to apply properly both the *Daubert* test and the standards of Federal Rules 702 and 703.<sup>63</sup> The court also concluded that the courts of appeal are not in any worse position than the district courts to deal with expert evidence, because “evaluating the reliability of scientific methodologies and data does not generally involve assessing the truthfulness of the expert witnesses and thus is often not significantly more difficult on a cold record.”<sup>64</sup> The Eleventh Circuit, in its opinion in *Joiner v. General Electric*,<sup>65</sup> relied substantially on *Paoli*<sup>66</sup> in imposing its stricter standard of review.<sup>67</sup> Its decision added to the split among the circuits.

In *General Electric Co. v. Joiner*,<sup>68</sup> the Supreme Court held that the Eleventh Circuit erred by reviewing the exclusion of *Joiner*’s experts’ testimony under “an overly stringent” standard and not giving appropriate deference to the trial court’s decision. It stressed that neither *Daubert* nor the Federal Rules required the district court to admit opinion evidence in a case where there was “simply too great an analytical gap between the data and the opinion proffered,”<sup>69</sup> and when “the studies upon

which the experts relied were not sufficient, whether individually or in combination, to support their conclusions.”<sup>70</sup> The Court strongly reiterated that “abuse of discretion” is the proper standard of review of a district court’s evidentiary rulings, and it argued that a trial judge has wide discretion to screen expert evidence in order to ensure that it is both relevant and reliable.<sup>71</sup> The Court insisted that after *Daubert* the Federal Rules had displaced the *Frye* “general acceptance” test, and rejected *Joiner*’s argument that because the granting of summary judgment was outcome-determinative it deserved “a more searching” standard of review than the “abuse of discretion” standard would provide.<sup>72</sup> The Court concluded that “[a] court of appeals applying ‘abuse of discretion’ review . . . may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it.”<sup>73</sup>

#### IV. THE SCIENTIFIC - NONSCIENTIFIC DILEMMA: KUMHO TIRE

A separate set of issues arose after *Daubert* as to whether this test applies to all expert testimony or only to its scientific portion. *Daubert* failed to provide clear direction in this area, and Chief Justice Rehnquist’s worries about this uncertainty bore fruit.<sup>74</sup> Not only were the circuits split on the issue, but also decisions of courts of appeal within several of them were inconsistent with each other.<sup>75</sup> In general, the courts were applying the *Daubert* test along a continuum ranging from: (1) it applies only to novel scientific evidence (the most narrow approach), through (2) it applies to scientific, but not necessarily novel testimony (the intermediate approach), to (3) it applies to all

60. In *Cook v. American S.S. Co.*, 53 F.3d 733, 738 (6th Cir.1995), the Sixth Circuit found the traditional “abuse of discretion” standard to be an “oversimplification” and often incorrect, and applied three different standards of review explaining that:

The trial court’s preliminary fact-finding under Rule 104(a) is reviewed for clear error. These facts include, but are not limited to, whether the witness’s “knowledge, skill, experience, training, or education,” . . . are such as to qualify him or her to testify as an expert at all, and . . . may include a determination of the tests or experiments that the . . . expert conducted, if any. The court’s determination whether the [expert’s] opinion . . . is properly the subject of “scientific, technical, or other specialized knowledge” is a question of law we review de novo . . . . A comparable duty is imposed upon the trial court when the subject of the proposed opinion testimony is not “scientific” knowledge, but “technical, or other specialized knowledge.” Finally, the trial court’s determination whether the . . . expert opinion “will assist the trier of fact to understand the evidence or to determine a fact in issue,” . . . is a relevancy determination and therefore one we review for abuse of discretion.

61. *United States v. Jones*, 107 F.3d 1147 (6th Cir.1997).

62. 35 F.3d 717 (3d Cir.1994).

63. *Id.* at 750. The court stated that “because the reliability standard of Rules 702 and 703 is somewhat amorphous, there is a significant risk that district judges will set the threshold too high . . . .” *Id.*

64. 35 F.3d 717, 749 (3d Cir.1994).

65. 78 F.3d 524, 529 (11th Cir.1996).

66. This came despite the fact that in *Habecker v. Clark Equipment Co.*, 36 F.3d 278, 289 (3d Cir.1994), decided less than three weeks

after *Paoli*, another panel of the Third Circuit applied “a clear abuse of discretion” standard to affirm the trial court’s exclusion of expert testimony.

67. The most visible difference between the Third and the Eleventh Circuit’s heightened standards lay in the former applying it to review rulings resulting in summary judgment or directed verdict and the latter to review all decisions.

68. 522 U.S. 136 (1997).

69. *Id.* at 146.

70. *Id.* at 146-47.

71. *Id.* at 141-44, 146-47.

72. *Id.* at 142-43. The Court took position that because summary judgment resolves the disputed issues of fact and the question of admissibility of expert testimony is not such an issue, it was properly resolved by the district court under “abuse of discretion.”

73. *Id.* at 142 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, (1988) (abuse of discretion review applied to a lower court’s decision to exclude evidence)).

74. Chief Justice Rehnquist commented in partial dissent that “countless more questions will surely arise when hundreds of district judges try to apply [the Supreme Court’s] teaching to particular offers of expert testimony. Does all of this dicta apply to an expert seeking to testify on the basis of ‘technical or other specialized knowledge’—the other types of expert knowledge to which Rule 702 applies—or are the ‘general observations’ limited only to ‘scientific knowledge?’” 509 U.S. at 600.

75. For example, several conflicting opinions were issued in the Seventh Circuit. In *Cummins v. Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996), the Seventh Circuit recognized the application of the *Daubert* framework to the evaluation of technical expert testimony.

# In Practice, *Daubert* Raised the Bar

Steve Leben

**A** survey of federal judges and attorneys involved in federal trials shows that the *Daubert* decision has led to an increase in the number of challenges to expert testimony and a reduction in the number of trials in which federal judges allow all of the proffered expert testimony to be presented.

The survey, sent by the Federal Judicial Center in November 1998, was returned by 303 federal trial judges and by 302 attorneys who had appeared in cases before those judges. Each judge was asked to answer specific questions regarding his or her most recently completed civil trial involving expert testimony; the judges also were asked some more general questions about expert witnesses. Lawyers who had been involved in the specific cases referenced by each judge were then separately surveyed. The survey of judges was similar to a prior one done by the Federal Judicial Center in November 1991, two years before the *Daubert* opinion was issued. The 1998 survey came following *Daubert* and *Joiner*, but preceded the March 1999 decision in *Kumho Tire*.

The judges indicated that they had limited or excluded some expert testimony in 41% of the cases; in 59%, the expert testimony had been allowed without any limitation or exclusion. In almost half (46%) of these cases, however, the judge indicated that admissibility of the expert testimony was not disputed at all. Thus, it appears that most challenges to the admission of expert testimony resulted in at least some limit or exclusion being ordered.

Comparison of the 1998 and 1991 surveys shows an increase in the percentage of cases in which some limits were placed on the expert testimony. As noted, in 1998, the expert testimony was presented without any limitation or exclusion 59% of the time; the comparable figure for 1991 was 75%. What's more, because of the design of the survey, it does not fully reflect the limitations now being ordered on expert testimony, since the survey only included cases in which at least *some* expert testimony was presented. The survey did *not* include cases in which *all* of the expert testimony had been ruled inadmissible.

The survey of attorneys confirmed a post-*Daubert* change in attitude among both federal judges and the trial lawyers who practice before them. Sixty-five percent of the attorneys said that judges were less likely to admit some types of expert evidence in the post-*Daubert* period and 60% said that judges were more likely to hold pretrial hearings

regarding the admissibility of the expert's testimony. In addition, 32% of the attorneys admitted that they now make more motions in limine to exclude opposing experts; 29% of the attorneys said that they now "scrutinize more closely" the credentials of the experts they consider using.

Judges who had excluded some testimony cited several bases for doing so: the testimony was not relevant (47%); the witness was not qualified (42%); the proffered testimony would not assist the trier of fact (40%); the facts or data upon which the opinion was based were not reliable (22%); the prejudicial nature of the testimony outweighed its probative value (21%); and the principles or methods underlying the expert's testimony were not reliable (18%).

Judges and attorneys were separately asked to rate the frequency various problems with expert witnesses are encountered. Respondents could choose a frequency rating from 1 (very infrequent) to 5 (very frequent). Both judges and attorneys agreed on the top five problems, with both groups rating them at 2.5 or above: (1) experts abandon objectivity and become advocates for the side that hired them; (2) excessive expense of party-hired experts; (3) expert testimony appears to be of questionable validity or reliability; (4) conflict among experts that defies reasoned assessment; and (5) disparity in level of competence of opposing experts.

In the roughly 300 federal trials that were part of this study, 45% were tort cases, primarily medical malpractice or other personal injury cases. Also included were a substantial number of civil rights cases (23%), contract cases (11%), and intellectual property cases (10%). The experts involved were predominantly those one would expect to find in personal injury litigation—doctors, engineers, and economists. About 43% of the experts were from the medical or mental health field, including medical doctors, psychologists, and psychiatrists. Another 24% were from engineering or safety areas, including accident reconstructionists, engineers, and police procedure experts; 22% were from the business and financial arena, including economists and accountants; and 7% were from other scientific specialties, including chemists, toxicologists, and statisticians.

The survey was conducted by Molly Treadway Johnson, Carol Krafska, and Joe S. Cecil of the Federal Judicial Center. A preliminary report of their findings can be found on the Web at <http://http://air.fjc.gov/public/fjcweb.nsf/pages/336>.

expert testimony (the most liberal approach), with numerous variations in between the three.

The first of the approaches was the most rigorous of all and required that expert testimony, in order to be subject to the *Daubert* test, be scientific and novel at the same time.<sup>76</sup> Two district court cases illustrate this approach. In *Lappe v. American Honda Motor Company*,<sup>77</sup> the court refused to apply *Daubert* to assess the reliability of a mechanical engineer's testimony on the grounds that *Daubert* would apply only to the admissibility of novel scientific evidence. The court explained that "Daubert's narrow focus is on the admissibility of 'novel scientific evidence' under [Federal Rule] 702 . . . [and that] *Daubert* only prescribes judicial intervention for expert testimony approaching the outer boundaries of traditional scientific and technological knowledge."<sup>78</sup> In *Smith v. Ford Motor Co.*,<sup>79</sup> the court held that "[i]n cases where a novel scientific theory or technique is presented, these four [*Daubert*] factors are effective means of determining whether such a theory or technique 'will assist the trier of fact to understand or determine a fact in issue.'"<sup>80</sup> The court decided that the *Daubert* factors were "not readily applicable" in the case at hand because the expert's testimony was based not on novel scientific evidence, but on "facts . . . and traditional automobile body repair and fire and accident investigation expertise."<sup>81</sup>

The intermediate approach subjected only scientific, but not necessarily novel, testimony to the *Daubert* test. The Second, Fourth, Ninth, Tenth, and Eleventh circuits followed it most of the time.<sup>82</sup> Indeed, one of the first courts that did so was the court of appeals in the *Daubert* case on remand,<sup>83</sup> which recognized that the Court in *Daubert* addressed only the "scientific knowledge" aspect of Federal Rule 702. A typical explanation of this approach was given by the Second Circuit in *Iacobelli*

*Construction, Inc. v. Monroe*,<sup>84</sup> when the court concluded that: "*Daubert* sought to clarify the standard for evaluating 'scientific knowledge' for purposes of admission under [Federal Rules] 702," and the technical expert opinion did "not present the kind of 'junk science' problem that *Daubert* meant to address."<sup>85</sup> Some courts even attempted to list the types of scientific matters for which the *Daubert* test can be applied.<sup>86</sup> Ironically, the second approach frequently resulted in admitting nonscientific (often purely technical) expert testimony without any *Daubert*-like scrutiny on the grounds that the test is designed to analyze only scientific expert evidence and does not apply in other contexts. Some courts created a variant of the intermediate approach by limiting the nonscientific type of expert testimony to the testimony based exclusively on experience or training and enlarging the pool of scientific testimony by testimony that is based upon specific methodology or technique. For example, in *Compton v. Subaru of America, Inc.*,<sup>87</sup> the Tenth Circuit reasoned that:

[T]he application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training . . . [and] was not based on any particular methodology or technique. Rather, [the expert] reached his . . . conclusions by drawing upon general engineering principles and his twenty-two years of experience as an automotive engineer. Without some particular methodology or technique, *Daubert* simply has little bearing on [expert's] testimony.<sup>88</sup>

Finally, the third approach, which submitted all expert testimony to the *Daubert* test, was probably the majority approach. The courts that followed it based their reasoning upon the

ny and specifically recognized that in the nonscientific context some of the *Daubert* factors would not apply. But, in *Tyus v. Urban Search Management*, 102 F3d 256 (7th Cir. 1996), the court held that *Daubert* established the framework to assess all expert testimony. See also *Deimer v. Cincinnati Sub-Zero Products*, 58 F3d 341 (7th Cir. 1995) (using the *Daubert* factors to exclude nonscientific expert). However, in a criminal case, *U.S. v. Sinclair*, 74 F3d 753 (7th Cir. 1996), it held again that *Daubert* "provided a method for evaluating the reliability of witnesses who claim scientific expertise" but not for all expert testimony. See also *Smith v. Ford*, 882 F. Supp. 770 (N.D. Ind. 1995), and *Roback v. VIP Transportation, Inc.*, 90 F3d 1207 (7th Cir. 1996).

76. Some courts applied *Daubert* only to evidence that met the strict definition of "scientific knowledge." For example, in *United States v. Starzeczyzel*, 880 F. Supp. 1027 (S.D.N.Y. 1995) the court held that forensic document analysis did not qualify as scientific knowledge under *Daubert* because there was a lack of systematic empirical validation of the assumptions upon which this theory is based. *Id.* at 1030-44

77. 857 F. Supp. 222, 228 (N.D.N.Y.1994), *aff'd without opinion*, 101 F3d 682 (2d Cir.1996).

78. See *Golod v. Hoffman La Roche*, 964 F.Supp. 841, 848 (S.D.N.Y.1997) (quoting *Lappe*).

79. 882 F.Supp. 770 (N.D. Ind.1995).

80. *Id.* at 774. See also *Edwards v. ATRO Spa*, 891 F. Supp. 1074, 1082-84 (E.D.N.C. 1995).

81. 882 F. Supp. at 774.

82. For example, in *Southland Sod Farms v. Stover Seed Co.*, 108 F3d 1134, 1143 n.8. (9th Cir. 1997), the court stated that "Daubert's holding applies to all expert testimony, not just testimony based on novel scientific methods." In reaching this conclusion, it relied upon footnote 11 in the *Daubert* majority opinion, where the Court stated that "[a]lthough the Frye decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence." See *Daubert*, 509 U.S. at 593 n.11. A similar conclusion was reached by the Ninth Circuit in *Clara v. Burlington Northern R. Co.*, 29 F3d 499, 501 (9th Cir. 1994), where it held that the *Daubert* test applies "to all proffered expert testimony—not just testimony based on novel scientific methods or evidence." *Id.* at n.2.

83. *Daubert v. Merrell Dow Pharmaceuticals*, 43 F3d 1311, 1316 (9th Cir.1995).

84. 32 F.2d at 25.

85. *Id.*

86. For example, in *Benedi v. McNeil-PPC, Inc.*, 66 F3d 1378 (4th Cir.1995), the court listed 33 cases applying the *Daubert* test to such scientific matters as DNA analysis, chromatography, economic testimony, and psychological syndromes. *Id.* at 1383.

87. 82 F3d 1513 (10th Cir. 1996).

88. *Id.* at 1519.

assumption that although the Court's opinion in *Daubert* was limited to the scientific context, it was only because that was the nature of the expertise offered there,<sup>89</sup> and that by acknowledging that Federal Rule 702 also applies to technical and other specialized knowledge in footnote 11 in the opinion,<sup>90</sup> the Court implied that its holding should control all types of expert testimony. The First, Third, Fifth, Sixth, Seventh, and Eighth circuits adopted this approach, with some courts expressing their reservations from time to time. The first example of such reservations is the Fifth Circuit Court of Appeals' decision in *Watkins v. Telsmith, Inc.*,<sup>91</sup> where the court explicitly extended *Daubert* scrutiny to all kinds of expert testimony but made clear that the *Daubert* factors are not necessarily applicable to all kinds of expertise. A second example is the Sixth Circuit's decision in *United States v. Jones*,<sup>92</sup> where the court recognized that the "gatekeeper" requirements of relevance and reliability imposed by *Daubert* apply to all expert evidence, while the *Daubert* factors are only limited to scientific evidence.<sup>93</sup> The court was afraid that by extending the *Daubert* test to all types of expert evidence, many kinds of reliable nonscientific evidence would not be accepted. The court explained:

*Daubert* provides a flexible framework to aid district courts in determining whether expert scientific testimony is reliable. If that framework were to be extended to outside the scientific realm, many types of relevant and reliable expert testimony—that derived substantially from practical experience—would be excluded. Such a result truly would turn *Daubert*, a case intended to relax the admissibility requirements for expert scientific evidence, on its head.<sup>94</sup>

As an addendum to the scientific-nonscientific controversy, we can observe that as a means of escaping the necessity to conduct a comprehensive *Daubert* analysis of expert evidence, many courts simply relied on the expert's credentials and abstained from any analysis of the expert's reasoning. Sometimes, they simply relied on an expert's assurances that he or she followed an appropriate methodology and admitted the testimony. For example, in *McCulloch v. H.B. Fuller Co.*,<sup>95</sup> the Second Circuit held that an expert's extensive practical experience and background qualified him because he gained "specialized knowledge" through experience, training, or education, and ruled that the expert's testimony met the requirements of *Daubert* largely based on his credentials and qualifications. Similarly, in *Carroll v. Morgan*,<sup>96</sup> where the plaintiff claimed that the defendant's expert did not base his testimony on a well-founded methodology or on "generally accepted principles within the medical pro-

fession,"<sup>97</sup> the Fifth Circuit held that although the expert did not present any "objectionable or unconventional scientific theory or methodology," he based the testimony on 30 years of experience and on his review of medical records.<sup>98</sup> Therefore, the testimony was "[grounded] in the methods and procedures of science" and was not mere "unsupported" speculation.<sup>99</sup>

In order to reconcile the conflicting approaches among the circuits, the Court granted certiorari in *Carmichael v. Samyang Tire, Inc.*,<sup>100</sup> which is now known as *Kumho Tire Co. v. Carmichael*,<sup>101</sup> and clarified the controversy. In that case, Carmichael, the plaintiff, had an accident caused by a blowout of one of the tires on his minivan, which made the vehicle overturn, killing one passenger and seriously injuring several others. He filed a products liability claim against the manufacturers of the tire in federal court and produced a tire failure expert who testified that the blowout was a result of a design or manufacturing defect of the tire rather than its "overdeflection."<sup>102</sup> The manufacturers moved for summary judgment and requested a *Daubert* hearing under Federal Rule 104(a) in order to challenge the competency and qualifications of Carmichael's expert. The district court applied the *Daubert* test.<sup>103</sup> It reasoned that the Eleventh Circuit had impliedly rejected distinction between scientific and nonscientific testimony for the purposes of the *Daubert* scrutiny and concluded that even though the plaintiff expert's opinion was "technical" rather than "scientific," the *Daubert* test should govern its admissibility.<sup>104</sup> Although the court found that the expert by virtue of his credentials was qualified to testify on the issue, it held that his testimony did not meet any of the *Daubert* factors, and was not reliable enough to be admissible. Therefore, the court granted a summary judgment for the manufacturers.<sup>105</sup> The Eleventh Circuit reviewed de novo the trial court's decision of whether to apply the *Daubert* test, and it decided that because the tire expert's testimony was based on "experience," not "science," the testimony should not have been subjected to the *Daubert* scrutiny at all and reversed the trial court's decision.<sup>106</sup>

The Supreme Court reversed the court of appeals' decision and held that Rule 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge"<sup>107</sup> in expert testimony and that to acknowledge such a distinction would make it unnecessarily difficult for judges to administer rules that "depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge."<sup>108</sup> The Court concluded that the *Daubert* factors do not have to apply to all experts in every case and that a trial court may consider one or more of the *Daubert* factors in determining the reliability of the proposed expert testimony

89. 509 U.S. at 590 n.8.

90. See *supra* note 82.

91. 121 F.3d 984 (5th Cir. 1997).

92. 107 F.3d 1147 (6th Cir. 1997).

93. *Id.* at 1158.

94. *Id.*

95. 61 F.3d 1038 (2d Cir. 1995).

96. 17 F.3d 787 (5th Cir. 1994).

97. *Id.* at 789.

98. *Id.* at 789-90.

99. *Id.* at 790.

100. 131 F.3d 1433 (11th Cir. 1997).

101. 526 U.S. 137 (1999).

102. *Id.* at 142-44.

103. *Id.* at 145-46.

104. *Id.* at 146.

105. *Id.*

106. *Id.*

107. *Id.* at 147-48.

108. *Id.*

when such factors are helpful.<sup>109</sup> The Court also repeated the already well-established standard that the trial court should enjoy significant discretion in its determination of the reliability of expert testimony.

## V. AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE AND PROPOSED AMENDMENTS TO THE UNIFORM RULES OF EVIDENCE

Proposals for revision of the Uniform Rules and the Federal Rules have come forward following the *Daubert* decision. At the time of this publication, amendments to the Federal Rules had just taken effect, while revisions to the state-law Uniform Rules of Evidence, though drafted, had not yet been adopted. Changes to the Federal Rules, which became effective December 1, 2000, were: (1) Federal Rule 701 now mandates that opinions offered by lay witnesses cannot be based on scientific, technical, or other specialized knowledge,<sup>110</sup> (2) Federal Rule 702 now incorporates the *Daubert* test,<sup>111</sup> but does not fully codify it (*i.e.*, the rule does not include all of the specific factors listed in the *Daubert* opinion),<sup>112</sup> (3) Federal Rule

703 prevents inadmissible hearsay from blanket admission via an expert's opinion,<sup>113</sup> and (4) all expert testimony will be subject to the same level of scrutiny (*i.e.*, the *Daubert* test). The proposal also makes clear that Federal Rule 702 will take precedence over Federal Rule 703 in any determinations of the adequacy of an expert's testimony.

The Drafting Committee of the National Conference of Commissioners on Uniform State Laws took an interesting approach to adapt the Uniform Rules to the recent federal, common-law developments. The proposed changes would drastically change rules 701 and 702.<sup>114</sup> Contrary to the Federal Advisory Committee's approach to amending Federal Rule 702, the state Drafting Committee did not attempt to rigorously follow *Daubert*, but rather suggested incorporating the "general acceptance" test of *Frye* into the Uniform Rules. It did so in order to establish a presumption of the reliability of the expert evidence, which could be rebutted by the adverse party by subjecting the evidence to the *Daubert* test. The new approach would allow the judges to rely on acceptance "within community" in simple cases, and in more difficult cases to

109. *Id.* at 150-51.

110. New Rule 701 reads as follows:

Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

111. The Advisory Committee recognized the inadaptability of many of the specific *Daubert* factors outside the hard sciences (e.g., peer review and rate of error) but stressed its intention to subject to Federal Rule 702 all types of expert testimony and to vest the trial judge with a broad discretion in making the Federal Rule 702 determinations.

112. New Rule 702 reads as follows:

Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

113. New Rule 703 reads as follows:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissi-

ble shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

114. *The Revision of Uniform Rules of Evidence Act*, The National Conference of Commissioners on Uniform State Laws, February 1998. The proposed Rules 701-702 read as follows:

Rule 701. Opinion Testimony by Lay Witnesses.

If a witness' testimony is not based on scientific, technical, or other specialized knowledge the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are rationally based on the perception of the witness, and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 702. Testimony by Experts.

(a) General rule. If a witness' testimony is based on scientific, technical, or other specialized knowledge, the witness may testify in the form of opinion or otherwise if the court determines the following are satisfied:

- (1) the testimony will assist the trier of fact to understand evidence or determine a fact in issue.
- (2) the witness is qualified by knowledge, skill, experience, training, or education as an expert in the scientific, technical, or other specialized field.
- (3) the testimony is based upon principles or methods which are reasonably reliable as established under subdivision (b), (c), or (e), and
- (4) the witness has applied the principles or methods reliably to the facts of the case.

(b) Reliability deemed to exist. A principle or method is reasonably reliable if its reliability has been established by controlling legislation or judicial decision.

(c) Presumption of reliability. A principle or methodology is presumed to be reasonably reliable if it has

establish a presumption of reliability to which the adversely affected party could object by subjecting the evidence to the *Daubert* test. In similar fashion to the enacted amendment to Federal Rule 702, the proposed Uniform Rule 702 does not distinguish between “scientific” and “non-scientific” expert testimony.

## VI. COMMENT

In the mid-1990s, the Federal Judicial Center’s *Reference Manual on Scientific Evidence* presented a grim picture of the federal law governing expert evidence when it concluded that “[c]oherence is at first glance difficult to discern when one surveys the case law on expert testimony. The disagreement among circuits, compounded by the great discretion afforded trial judges, results in a seeming lack of uniformity and consistency that surfaces whenever any two opinions on expert testimony are compared.”<sup>115</sup> Not only were the decisions themselves inconsistent, but also the procedures governing their applications had been diverse.

These landmark cases of *Daubert*, *Joiner*, and *Kumho* strongly reiterate the dominant role of trial courts in determining admissibility of expert evidence, and they conveniently equip district courts with flexible admission standards to scrutinize expert evidence. The regulatory framework governing expert evidence in federal courts is not yet settled, however, and it will not be settled until the federal case law and the new Federal Rules match and reinforce each other.

There are still several intriguing queries about the current status of expert evidence law. First, the regulatory framework to scrutinize expert evidence will not be complete without clear standards for admission of nonscientific testimony given by the Supreme Court. Because the *Daubert* test is flexible, the Court has repeatedly advised district courts to use only as much of the test as needed and has invited them to come up with their own criteria compatible with *Daubert*. However, the courts are by design much more likely to faithfully follow the patterned test than to invent their own variations of it. In the absence of the Court’s specific ruling on how to apply the *Daubert* test to non-scientific expert evidence, the district and appellate courts are likely to search ad hoc for convenient but not necessarily consistent holdings among the circuits. Second, the *Daubert-Joiner-*

*Kumho* trilogy so momentarily empowers the district courts with discretionary determinations about science and technology that dilemmas will develop as to whether such responsibilities are not beyond the scope of the expertise of the judges. Currently, besides Federal Rule 706, which allows courts to employ their own experts, there are very few ways to ease this formidable burden placed on the district judges. Finally, the continuous, substantial adherence to the *Frye* test among many states<sup>116</sup> indicates that the courts welcome the simple all-or-nothing solutions to expert evidence. Although the *Frye* test cannot be revitalized in its original form, it still holds the appeal of producing uniform and predictable results, and it should not be discarded easily. Rather, the test should be creatively incorporated into the expert evidence admissibility framework (including the Federal Rules) as a very useful tool that helps to evaluate the reliability of most of such evidence. The *Frye* test, however, needs to be given more weight than it enjoys now as just one of the *Daubert* factors. One step in this direction that is worthy of careful attention is the state-rule Drafting Committee’s proposal to elevate this test to the level of a rebuttable presumption.

Arguably, there are no more contentious issues pertaining to the admission of expert testimony after the *Daubert-Joiner-Kumho* trilogy. Given the importance of this area to the judicial system today and the ingenuity of the lawyers who put the experts on the stand in pointing to the shortcomings of the existing law, however, the law of expert evidence will certainly undergo additional adjustments in the near future.



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substantial acceptance within the relevant scientific, technical, or specialized community. A party may rebut the presumption by proving as provided in subdivision (e) that it is more probable than not that the principle or methodology is not reasonably reliable.

- (d) Presumption of unreliability. A principle or methodology is presumed not to be reasonably reliable if it does not have substantial acceptance within the relevant scientific, technical, or specialized community. A party may rebut the presumption by proving as provided in subdivision (e) that it is more probable than not that the principle or methodology is reasonably reliable.
- (e) Other reliability factors. When determining the reliability of a principle or method, the court shall consider all relevant additional factors, which may include:

- (1) the extent to which the principle or methodology has been tested;
- (2) the adequacy of research methods employed in testing the principle or methodology;
- (3) the extent to which the principle or methodology has been published and subjected to peer review;
- (4) the rate of error in the application of the principle or methodology;
- (5) the experience of the witness in the application of the principle or methodology; and
- (6) the extent to which the field of knowledge has substantial acceptance within the relevant scientific, technical, or specialized community.

115. FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 44 (1994).

116. See *supra* text at note 49.



# The Resource Page: Focus on the Clinton Judicial Appointees

## TOTAL CLINTON ADMINISTRATION APPOINTMENTS

Supreme Court	2
Circuit Court of Appeals	65
Trade Court	5
District Court, Art. III	305
District Court, Art. I	2
Court of Claims	7
Total	386

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African-American	63	16%
Asian	5	1%
Hispanic	26	7%
Native American	1	0%
Women	115	30%
With Disabilities	5	1%

Source: United States Department of Justice. Figures include only nominations confirmed by the United States Senate.

## A COMPARISON OF JUDICIAL NOMINATIONS

	Clinton I		Clinton II		Bush		Reagan I & II	
Total	233		222		195		385	
Men	160	69%	157	71%	158	81%	353	92%
Women	73	31%	65	29%	37	19%	32	8%
White	169	73%	172	77%	173	89%	361	94%
African-American	42	18%	31	14%	13	7%	7	2%
Hispanic	16	7%	14	6%	8	4%	15	4%
Other Minority	6	3%	5	2%	1	1%	2	1%
Women & Minorities	53%		46%		27%		15%	
ABA rated "well qualified"	65%		53%		52%		53%	

Source: United States Department of Justice. Data for the Clinton Administration includes all nominees except ones that were withdrawn.



# The Resource Page



## NEW BOOKS

ROBERT W. TOBIN, *CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM*. National Center for State Courts, 1999 (\$27). 262 pp.

Robert Tobin places judicial independence within the state courts in context. Prior to 1950, state courts were a separate branch of government only in concept, if that. Without the administrative machinery to carry out its own mission, state appellate courts could not effectively lead their trial court brethren, and trial courts were so intertwined with local governments that they took on the unique characteristics of their fiscal hosts and defied being part of a coherent whole. Tobin reviews the administrative reforms that have turned the state judiciaries into more of a coequal branch of government. For those of us who lack Tobin's four decades of experience in court management and reform, the review of how we got to where we are today places current court reform ideas in their proper context. Tobin doesn't stop, however, with his description of the reform efforts of the past half century. He concludes with a review of the present court reform agenda—court and community collaboration, service-oriented courts, specialty courts, reform of the adversarial process, and the broadening view of what constitutes "justice." Any state court judge who is interested in the world outside his or her own courtroom would find this book of interest.

DAVID C. STEELMAN, JOHN A. GOERDT & JAMES E. McMILLAN, *CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM*. National Center for State Courts, 2000. (\$27). 272 pp.

For judges primarily interested in the world view from within their own chambers, this book is a practical, use-

ful reference. Most judges might look for guidance on managing the flow of cases from their colleagues, from a court administrator, from the brief coverage in a seminar, or from an article they once clipped out. David Steelman and his coauthors have shown, however, that there is much more to be learned on this subject, and they have organized these materials in a way that is readily accessible. The authors suggest that caseload management is the "conceptual heart" of judicial administration, and they bring together the best research on that topic from the past three decades. Specific suggestions are provided for civil, criminal, traffic, juvenile offender, child protection, divorce, and probate cases. In addition, concerns specific to rural and urban courts are discussed. Throughout the book, specific examples are provided. With an investment of \$27 and a little of your time, any judge should be able to get some practical tips from this book that would improve the daily working conditions in chambers.



## WORTH NOTING

### TJ Conference

The Second International Conference on Therapeutic Jurisprudence will be held May 3-5, 2001 in Cincinnati, Ohio. The conference, which will be held at the Glenn Weaver Institute of Law and Psychiatry at the University of Cincinnati, will allow judges, lawyers, educators, and others to explore the potential of therapeutic jurisprudence. A Web site regarding the conference can be found at <http://www.law.uc.edu/tj2001>. For those wanting background on therapeutic jurisprudence, take a look at the special issue of *Court Review* from Spring 2000. It's available on the Web at <http://aja.ncsc.dni.us/courtrv/review.html>.

## Anastasoff Update

The most original assault ever made on rules prohibiting the citation of unpublished appellate decisions has ended with a whimper, not a bang. At least for now. In our Summer 2000 issue, we excerpted the decision of a panel of the United States Court of Appeals for the Eighth Circuit, which had held that such rules, at least in the federal courts, were unconstitutional. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), excerpted in *Court Review*, Summer 2000 at 37-39. That opinion was later vacated in an en banc opinion, 235 F.3d 1054 (8th Cir. 2000), after the government changed its position, mooting the underlying dispute. With respect to the constitutionality of its rule on citation of unpublished opinions, the court concluded, "The constitutionality of [our rule] which says that unpublished opinions have no precedential effect remains an open question in this Circuit." *Id.* at 1056.

## FOCUS ON THE CLINTON JUDICIARY

The Resource Page presents a demographic overview of the judicial appointees of President Bill Clinton at page 43.

## SUGGESTIONS FOR THE RESOURCE PAGE

Each issue of *Court Review* features The Resource Page, which seeks to help judges find solutions to problems they may be facing, alert them to new publications, and generally try to provide some practical information judges can use. Please let us know of resources you have found useful in your work as a judge so that we can tell others. Write to the editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: [sleben@ix.netcom.com](mailto:sleben@ix.netcom.com).