

# Court Review

Volume 48, Issue 4

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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# Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION  
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2012

## EDITOR'S NOTE

**W**e're pleased to begin this issue with a summary of the past year's United States Supreme Court civil cases, written by Professor Todd Pettys, the Associate Dean for Faculty and the H. Blair and Joan V. White Chair in Civil Litigation at the University of Iowa College of Law. Professor Pettys will now be doing an annual survey of these cases for *Court Review*, joining Professor Chuck Weisselberg of Berkeley Law, who has done the criminal cases for us for the past five years.

It has taken us awhile to get replacements for our old friend, Professor Charley Whitebread, who had done the summaries for us for more than 20 years before his death in 2008. This is a *Court Review* feature that many of our judges rely upon to make sure that they haven't missed any important developments each year. We are thrilled to have two outstanding scholars and teachers now on board to prepare these summaries exclusively for us, focusing on the cases most of interest to judges in the state courts.

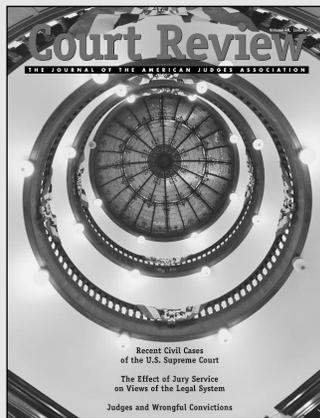
For any of you who haven't provided your email addresses to the American Judges Association, you should know that we recently began a practice of first posting these timely summaries electronically—and notifying AJA members by email—as soon as they are ready. Professor Weisselberg's summary of the criminal cases was sent to AJA members September 10, and Professor Pettys' summary of the criminal cases came out electronically on December 7. To be included next year when these summaries are first available—and for other timely articles that may first be posted electronically—be sure to give the AJA your email address. You can send it by email to [aja@ncsc.dni.us](mailto:aja@ncsc.dni.us).

This issue has three more articles that we think you'll find of interest.

First, a group of researchers looks at the effects of jury service on confidence in the jury system, in state and local judges, and in the United States Supreme Court. About a million people serve on juries each year in the United States, so the impact could be significant. The researchers looked at people summoned for jury service in King County, Washington, and they found that there was a statistically significant improvement in their opinions of the jury system and of state and local judges several months after their jury service. But there was no difference in their opinion of the United States Supreme Court.

Second, Virginia law professor Brandon Garrett summarizes some of the key conclusions from his study of the full record in the first 250 cases of exonerations from DNA evidence. He's written a good book (*Convicting the Innocent: Where Criminal Prosecutions Go Wrong*) fully setting out his findings. We asked him to do a shorter piece for us, and he provided a very engaging and readable article that speaks to how judges might benefit from the lessons that can be learned from 250 exoneration cases.

Last, we have the student essay winner from this year's AJA competition for law students. Sang Jee Park, a recent graduate of the University of Iowa College of Law, reviews the caselaw on the constitutionality of mandatory pretrial DNA testing of those arrested or indicted for a felony offense.—Steve Leben



*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 and Canada. 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 131 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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# President's Column

Toni M. Higginbotham

The American Judges Association Executive Committee recently had its first meeting for 2013. This is where a lot of the hard work for our organization takes place, and this meeting was a huge success in furthering our mission of serving as the Voice of the Judiciary® and in Making Better Judges. I want to take this opportunity to introduce and highlight your executive committee members.

President-Elect Judge Elliott Zide is a trial judge from Massachusetts. He and his wife, Dr. Michelle Zide, a college professor, are the parents of three daughters and three granddaughters. World travelers, they just returned from Africa; they enjoy spending time at their country home in Vermont.

Vice President Judge Brian MacKenzie is a district judge from Michigan, and he and his wife are both active in national court-related organizations. They have been on an adventure in Thailand to celebrate her special birthday.

Secretary Judge John Conery of Louisiana was just sworn in as an appeals-court judge after serving as a trial judge for 18 years. He has served as President of the Louisiana District Judges Association and as Chair of the Capital Crimes Benchbook Committee. Together, he and his wife, Brooksie, have five children and nine grandchildren.

Longtime Treasurer Judge Harold Froehlich just retired as a trial judge in Wisconsin. He continues to serve by appointment, but finds time to live part-time in Florida with his wife. Following in his footsteps, Harold's son was recently elected to the bench. Harold is a big-time Packers fan.

Immediate Past President Kevin Burke is a trial judge from Minnesota, as is his wife, Judge Susan Burke. He is a nationally known writer and teacher to the judiciary. The apple of their eye—and their boss—is their nine-year-old daughter, Kate.

At Large Executive Committee Member Judge Elizabeth Hines is a trial judge from Ann Arbor, Michigan, who is nationally known as a domestic-violence expert. She and her husband, Rusty (who is active in the American Judges Foundation), are the parents of one daughter, a young lawyer, who recently was married.

Executive Committee Member Judge Paul deMahy has served since 1986 on a rural general-jurisdiction trial court in South Louisiana. Paul and his wife, Marilyn, have raised five children in St. Martinville and now have 14 grandchildren. He is active in Kiwanis and the Knights of Columbus.

Executive Committee Member Justice Russell Otter has been a judge in the Ontario Court of Justice since 1993, presiding over family, criminal, and youth cases in Toronto, Ontario. He has been Executive Director of the Canadian Association of Provincial Court Judges for ten years. For over 40 years, he has been a volunteer fitness instructor for the

YMCA. Russ is thrilled to be the Canadian member of the AJA Executive Committee, and he deeply appreciates how the AJA has embraced its Canadian members. Most of all, he is happiest with his three gorgeous grandchildren, two boys and a girl.

Judge John Williams has been a municipal judge in Kansas City, Missouri, since 1995; he has served the court as its presiding judge and created its mental-health court. John and his wife, Molly, an attorney and teacher, are the parents of a beautiful 14-year-old daughter, Natalie, who has been attending AJA conferences since she was born.

Thank you so much for allowing me to serve as your President. I joined AJA in 1997, and it has really made a difference in my judicial life. I served on the district court as a family-court judge for 14 years, before being elected to the Court of Appeal in 2010, where I currently serve. As former President of the Louisiana Council of Family and Juvenile Court Judges, I also served as President of the American Judges Foundation. My husband, Leo, a former judge, and I are parents of four grown children, three of whom are attorneys, and we are the grandparents of six. Currently I am serving as Chairman of the Uniform Rules for Family Courts Committee, developing rules to make it simpler to practice law in all family courts of the state. My joy in life is spending time with my family. I am also a big sports fan.

Our first order of business was finalizing our midyear meeting, which will be held May 2-4 in Orlando at the Wyndham Lake Buena Vista. It will be an opportunity for excellent judicial education, for sharing conversations with our colleagues from the U.S. and Canada, and for collaborating with the Florida Judiciary. Bring your families.

Really exciting is our annual fall conference September 22-27 at the Fairmont Orchid on the Kohala Coast in Hawaii. We believe your Education Committee has developed a premier program for us. The educational program will include sessions with national experts on sentencing, including evidence-based sentencing; dealing with drunk/drugged driving and sobriety courts; electronic discovery/evidence implications; domestic-violence innovations including the area of LGBT; juvenile courts; technology in the courtroom; high-profile cases and the media; and the U.S. Supreme Court review by Professor Erwin Chemerinsky. In addition, professionalism and ethics will round out the program.

One of the exciting developments is the new format that is being offered to take advantage of the educational offerings, as well as the locale. On Tuesday and Wednesday, the hours will be from 7:30 a.m. until 1:00 p.m.—the same maximum number of hours we've always had but starting earlier so that the rest of the day can be used to experience Hawaii. Hope to see you on the Big Island in Hawaii!



# Healthcare, Unions, Ministers, and More:

## Civil Cases in the Supreme Court's 2011-12 Term

Todd E. Pettys

**W**e begin with a dilemma. Is there any corner of the American legal landscape in which readers have not already received word of the Supreme Court's monumental healthcare ruling in *National Federation of Independent Business v. Sebelius*? Then again, can one imagine any retrospective on the Court's 2011-2012 Term that does not make that ruling its headline? We will start by unapologetically giving *NFIB* its due, taking a broad view of the ruling's key elements and of the future battlegrounds to which the ruling points. We then will turn to many of the Term's other civil cases, focusing particularly on decisions that are likely to be of broad interest to those who work or litigate in the nation's state and federal courtrooms. Those rulings address important issues in the areas of administrative law, arbitration, *Bivens* actions, due process, equal protection, federal jurisdiction, qualified immunity, religion, speech, the Supremacy Clause, and more.

### THE HEALTHCARE RULING: COMMERCE, TAXES, AND SPENDING

In the Patient Protection and Affordable Care Act, Congress's central purpose was to bring the nation closer to universal healthcare coverage. In the litigation that was immediately launched against the legislation, two provisions were primarily at issue. First, Congress imposed what became known as the "individual mandate," stating that, beginning in 2014, many Americans would be required to carry "minimum essential [health insurance] coverage."<sup>1</sup> Unless they fell within an exempted segment of the population, those who failed to carry such insurance would be required to pay a "penalty," or a "shared responsibility payment," to the Internal Revenue Service when filing their annual taxes.<sup>2</sup> Second, to help provide healthcare for many who could not afford to buy insurance, Congress adopted a plan to expand the Medicaid program to cover Americans whose incomes placed them below 133 percent of the federal poverty line. The federal government ultimately would pay 90 percent of the costs of that expansion, but the states would cover the rest. States that refused to participate faced powerful repercussions: they could lose *all* of their federal Medicaid funds. Joined by numerous organizations and individuals, roughly half of the nation's states sued, arguing that the individual mandate and the threat to states' Medicaid funding exceeded Congress's enumerated

powers. The Court took up those matters in *NFIB*,<sup>3</sup> one of the most closely watched cases in the nation's history.

### THE COMMERCE POWER AND THE MANDATE

Opponents of the individual mandate famously insisted that, if the mandate were held valid, then Congress could dictate all kinds of purchasing decisions, right down to the food we buy at the grocery store. At times, that argument had the feel of a substantive-due-process claim, drawing some of its rhetorical power from the implied premise that there is a realm of personal decision making that *no* government can invade. Rather than cast their legal arguments in those controversial terms, however, the Act's challengers urged the Court to draw an activity/inactivity distinction under the Commerce Clause, the enumerated power upon which Congress had most vocally relied when adopting the mandate. The mandate's opponents argued that the Commerce Clause empowers Congress to regulate the economic activities of those who have already entered a given market, but does not empower Congress to force people to enter a market in which they do not wish to participate.

Four Justices rejected that argument, finding the mandate easily sustainable under conventional Commerce Clause analysis. Writing for herself and Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg pointed out that most uninsured Americans actively seek healthcare each year—imposing billions of dollars in costs on the healthcare system—and that nearly all uninsured Americans will require healthcare at some point in their lives. States cannot sustainably address the resulting economic challenges on their own, she said, because any state that unilaterally moves toward a system of universal coverage will become a financially strained magnet for economically disadvantaged individuals. Under those circumstances, Justice Ginsburg concluded, the Commerce Clause gave Congress ample power to require many Americans to carry health insurance.

The Court's other five Justices, however, embraced the proposed activity/inactivity distinction. Writing only for himself, Chief Justice Roberts stated that the power to "regulate" interstate commerce is not the power to "create" interstate commerce.<sup>4</sup> He found it unimaginable that the Framers would have authorized Congress to force people to buy goods or services from private sellers. The Chief Justice believed that allowing Congress to wield such a power would "fundamen-

### Footnotes

1. 26 U.S.C. § 5000A(a).

2. *Id.* § 5000A(b); see also *id.* § 5000A(e) (exempting several classes of individuals).

3. 132 S. Ct. 2566 (2012).

4. *Id.* at 2586 (Roberts, C.J.).

tally chang[e] the relation between the citizen and the federal government.”<sup>5</sup> On the government’s reading of the commerce power, he said, Congress could “justify a mandatory purchase to solve almost any problem,”<sup>6</sup> regulating people’s lives “from cradle to grave.”<sup>7</sup> The Commerce Clause authorizes Congress to regulate only extant economic activities, the Chief Justice concluded, and individuals who have not purchased health insurance and are not currently seeking medical care are not active in the healthcare market.<sup>8</sup>

In a rare joint opinion<sup>9</sup> that they formally cast as a dissent, Justices Scalia, Kennedy, Thomas, and Alito made arguments that were substantially the same as the Chief Justice’s. They found that “one does not regulate commerce that does not exist by compelling its existence,”<sup>10</sup> and that saying otherwise would “extend federal power to virtually everything,”<sup>11</sup> making “mere breathing in and out the basis for federal prescription.”<sup>12</sup> The four Justices drew a connection between the decision-making freedom that the Act’s challengers were claiming and the limitations on Congress’s powers, arguing that when we disregard those limitations “we place liberty at peril.”<sup>13</sup>

Although their arguments closely tracked one another, the Chief Justice and the four dissenters did not join one another’s opinions.<sup>14</sup> One is thus left to wonder whether the five Republican appointees’ reading of the Commerce Clause carries the force of binding precedent.<sup>15</sup> The well-known *Marks* doctrine does not squarely answer that question; it simply states that, when five or more Justices agree on which litigant should prevail in a given case but do not agree on the reasons, lower courts should regard themselves as bound by the “position taken by those Members who concurred in the judgment on the narrowest grounds.”<sup>16</sup> In *NFIB*, however, the members of the joint dissent were indeed dissenters, rather than members concurring in the judgment. Does that matter? In a possible attempt to ensure that his analysis of the commerce issue would be seen as essential to the ultimate outcome of the case and thus binding on lower courts (with or without the support of the four dissenters), the Chief Justice wrote that he would

not ultimately have found merit in the government’s Taxing Power argument if he had not first rejected the government’s reading of the Commerce Clause. Whether that explanation is sufficient to give the Chief Justice’s commerce analysis the force of precedent remains to be seen.

#### **THE TAXING POWER AND THE (NON-)MANDATE**

As a fallback argument, the government contended that the individual mandate actually was not a mandate at all. Rather, that provision of the Act could be upheld as a simple exercise of Congress’s power to levy taxes. On this view, individuals are not legally required to purchase health insurance; they simply are assessed an additional tax if they opt not to do so. All nine justices believed that, if Congress had squarely called the “shared responsibility payment” a “tax,” rather than a “penalty,” the legislation could indeed have been sustained on those grounds. But Congress used the language of penalties, not taxes. Did that choice of wording matter?

Not in the eyes of five justices. Joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, Chief Justice Roberts said that Congress’s choice of labels was not dispositive. Under the Court’s precedent, the Chief Justice explained, the Taxing Power allows Congress to impose taxes, but not penalties. These five justices found that the Act’s shared responsibility payment fell into the former category: it was imposed only on those who were required to file federal income taxes; the amount of the payment was to be calculated as a percentage of individuals’ taxable income; the payment requirement was to be enforced by the IRS; the measure was expected to produce substantial revenue for the government; and the legislation lacked the kind of scienter requirement that one typically finds

**One is thus left to wonder whether the five Republican appointees’ reading of the Commerce Clause carries the force of binding precedent.**

5. *Id.* at 2589 (Roberts, C.J.).

6. *Id.* at 2588 (Roberts, C.J.).

7. *Id.* at 2591 (Roberts, C.J.).

8. He rejected the federal government’s arguments under the Necessary and Proper Clause for substantially the same reasons.

9. *Cf. Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ., reaffirming a right to abortion); *Cooper v. Aaron*, 358 U.S. 1 (1958) (jointly and unanimously declaring that state officials are obliged to abide by the Supreme Court’s interpretations of the Constitution).

10. 132 S. Ct. at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

11. *Id.* at 2648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

12. *Id.* at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

13. *Id.* at 2676-77 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

14. That may have been the result of a short-term breakdown in the working relationship among those five Justices. There are strong textual indications that much of the joint dissent was originally written as a majority opinion, with Chief Justice Roberts on board. Soon after the ruling was issued, leaks from the Court to the press

indicated that the Chief Justice and the four dissenters were indeed initially united in declaring the individual mandate unconstitutional. See generally Adam Liptak, *After Ruling, Roberts Makes a Getaway from the Scorn*, N.Y. TIMES, July 2, 2012, at A10; Jonathan Peters, *The Supreme Court Leaks*, SLATE.COM, July 6, 2012, available at [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/07/the\\_supreme\\_court\\_leaking\\_john\\_robert\\_s\\_decision\\_to\\_change\\_his\\_mind\\_on\\_health\\_care\\_should\\_not\\_come\\_as\\_such\\_a\\_surprise\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/the_supreme_court_leaking_john_robert_s_decision_to_change_his_mind_on_health_care_should_not_come_as_such_a_surprise_.html).

15. Compare Randy Barnett, *We Lost on Health Care. But the Constitution Won.*, WASH. POST, June 29, 2012, available at [http://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJuJCW\\_story.html](http://www.washingtonpost.com/opinions/randy-barnett-we-lost-on-health-care-but-the-constitution-won/2012/06/29/gJQAzJuJCW_story.html) (“The Supreme Court has definitively ruled that the [individual mandate exceeded Congress’s commerce power].”), with Deborah Pearlstein, *Early Thoughts on the Health Care Case*, BALKINIZATION, June 28, 2012, <http://balkin.blogspot.com/2012/06/early-thoughts-on-health-care-case.html> (“Aren’t all the opinions (the dissent + Roberts’ opinion for himself) concluding that the mandate exceeds the Commerce Clause power just dicta?”).

16. *Marks v. United States*, 430 U.S. 188, 193 (1977).

**Going forward, one of the big challenges in Spending Clause litigation will be further clarifying the line that separates enticement from coercion.**

in the context of civil and criminal penalties. The majority concluded that individuals thus are free to opt against carrying health insurance; those making that choice simply must pay higher federal taxes when filing their annual returns.

For Justices Scalia, Kennedy, Thomas, and Alito, however, Congress's choice of terminology was controlling. "The issue is not whether Congress had the power to frame the minimum-coverage provision as a tax," the joint dissenters wrote, "but whether it *did* so."<sup>17</sup> In their view, the plain language of the Act indicated that Congress had issued a mandate, enforced by a penalty. "To say that the Individual Mandate merely imposes a tax," the joint dissenters concluded, "is not to interpret the statute but to rewrite it."<sup>18</sup> That argument sets the stage for future battles about when Congress's choice of labels is and is not dispositive on the question of whether Congress has properly exercised a given enumerated power.

**THE SPENDING POWER AND THE MEDICAID EXPANSION**

Although the Court had occasionally suggested that Congress's conditional grants to the States would be unconstitutional if they did not give states the freedom to reject the conditions and decline the federal money, the Court had never struck down a set of conditions on those grounds. In *NFIB*, however, seven justices concluded that Congress had crossed the line separating permissible enticement from unconstitutional coercion.

Joined by Justices Breyer and Kagan, Chief Justice Roberts found that, by threatening to withhold all of a state's Medicaid funds, Congress had not merely encouraged the States to participate in the program's expansion; rather, those conditions were "a gun to the head."<sup>19</sup> The Chief Justice identified three features of the Act that, taken together, were impermissibly coercive: federal Medicaid funds account for a large percentage of many states' annual revenues; "the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid";<sup>20</sup> and the Medicaid expansion was not a mere alteration or amendment of the sort that Congress had reserved the power to make, but instead amounted to an entirely new program, marked by "a shift in kind, not merely degree."<sup>21</sup> The four justices in the joint dissent agreed, finding that "[i]f the anticoercion rule does not apply in this case, then there is no such rule."<sup>22</sup>

Two members of the Court found the conditions permissible. Joined by Justice Sotomayor, Justice Ginsburg found that,

by expressly reserving the right to "alter" or "amend" the Medicaid program, Congress had long ago put the states on notice that a large expansion of the program was possible. States had been further alerted to the possibility of a significant expansion by all of the earlier occasions when, in smaller ways, Congress had placed additional segments of the population under the protection of the Medicaid umbrella. She also doubted the efficacy of her seven colleagues' conclusion: to avoid the constitutional constraints that the majority had identified, she said, Congress simply could have repealed the entire Medicaid program and then announced the creation of a new, much broader benefits program identical to the one that Congress envisioned in the Act.

On the question of what to do about the Spending Clause violation that the other Justices had found, however, Justices Ginsburg and Sotomayor joined the Chief Justice and Justices Breyer and Kagan. Those five justices concluded that the solution was not to invalidate the Medicaid expansion in its entirety, but rather to enforce the Act's conditions only with respect to the *new* funding that Congress was offering for the program's expansion. The four members of the joint dissent would have scrapped the expansion altogether.

Going forward, one of the big challenges in Spending Clause litigation will be further clarifying the line that separates enticement from coercion. What percentage of a state's federal revenues can the federal government permissibly threaten to cut? When and how does a state institutionalize a given federal program to such a degree that Congress cannot safely threaten to eliminate it? How does one distinguish between an amendment to a program and the creation of an entirely new, subsuming program? Were Justices Ginsburg and Sotomayor right when they suggested that Congress could evade the seven Justices' Spending Clause restrictions by canceling an old program altogether and replacing it with a new program of conditional federal spending?

**ADMINISTRATIVE LAW  
DEFERENCE TO AGENCIES**

In *Christopher v. Smithkline Beecham Corp.*,<sup>23</sup> the Court was asked to determine whether pharmaceutical companies' "detailers"—employees who provide physicians with information about drugs with the hope that physicians will prescribe those drugs for their patients—are "outside salesmen" within the meaning of the Fair Labor Standards Act. Dividing 5-4, the Court held that detailers are indeed outside salesmen and that they thus do not benefit from the FLSA's overtime-pay provisions. There was one point, however, on which all nine Justices agreed: the Department of Labor's statutory interpretation did not merit any deference from the Court. Led by Justice Alito, the five Justices in the majority elaborated on their reasons for refusing to defer to the agency's reading of the FLSA. The department's employee-favoring interpretation would "impose massive liability on [pharmaceuticals] for con-

17. 132 S. Ct. at 2651 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

18. *Id.* at 2655 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

19. *Id.* at 2604 (Roberts, C.J.).

20. *Id.* (Roberts, C.J.).

21. *Id.* at 2605 (Roberts, C.J.).

22. *Id.* at 2662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

23. 132 S. Ct. 2156 (2012).

duct that occurred well before that interpretation was announced”; the agency never voiced any objection over the many decades in which pharmaceutical companies treated their detailers as outside salesmen; the agency’s initial interpretation “lack[ed] the hallmarks of thorough consideration” because it was first announced in a 2009 amicus brief without any period for public comment; the agency’s interpretation shifted during the course of litigation; and, in the eyes of the majority, the agency’s reading of the statute was at odds with the plain language of the statute.<sup>24</sup>

### JUDICIAL REVIEW

In *Sackett v. EPA*,<sup>25</sup> the Court unanimously ruled that the owners of a residential lakeside lot were entitled to immediate judicial review of a compliance order issued to them by the Environmental Protection Agency. The Sacketts had filled a portion of their property with dirt and rock. The EPA determined that the Sacketts had thereby discharged pollutants into federal waters, and so issued a compliance order, directing the Sacketts to restore the property. For each day that the Sacketts refused to comply, they faced civil penalties of up to \$75,000. Rather than wait for the EPA to file a civil enforcement action while the possible penalties piled up, the Sacketts sought judicial review under the Administrative Procedure Act, challenging the EPA’s claim that the Sacketts’ lot contained wetlands or waters within the agency’s jurisdiction. Writing for the Court, Justice Scalia found that the EPA’s compliance order was sufficiently final to merit judicial review under the APA and that the Clean Water Act did not bar such pre-enforcement review.

### ARBITRATION

In a trio of rulings, the Court expressed varying degrees of frustration with lower courts for failing to follow what the Court regarded as the clear requirements of the Federal Arbitration Act (FAA).

Most of the Court’s impatience was directed toward the Supreme Court of Appeals of West Virginia in *Marmet Health Care Center, Inc. v. Brown*.<sup>26</sup> In that case, family members of three patients had entered into contracts with nursing homes. A clause in those contracts stated that the parties would arbitrate any disputes that arose between them. After the three patients died, the family members sued the nursing homes, alleging that the homes had negligently caused the patients’ deaths. Denying the defendants’ motion to compel arbitration, the Supreme Court of Appeals of West Virginia did little to disguise its unhappiness with the Supreme Court’s FAA precedent. Citing scholars and dissenting justices, the West Virginia court stated that Congress had intended the FAA “to serve *only* as a procedural statute for disputes brought in federal courts,” that Congress had intended the FAA to apply only in cases involving “contracts between merchants with relatively equal bargaining power,” and that the Supreme Court’s expansive interpretations of the FAA

were the result of “tendentious reasoning” and a willingness to create doctrines “from whole cloth.”<sup>27</sup> The West Virginia court nevertheless believed it had spotted an opening in the Supreme Court’s precedent—the Court had never before explicitly addressed the enforcement of pre-injury arbitration agreements in healthcare contracts or in personal-injury or wrongful-death cases. The state court filled that perceived gap by ruling that the public policy of West Virginia barred enforcing “an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death.”<sup>28</sup>

In a unanimous *per curiam* ruling, the Supreme Court reversed, finding that the West Virginia court had patently “misread[] and disregard[ed]” the Supreme Court’s precedent.<sup>29</sup> Noting the state court’s disparaging remarks about the Court’s FAA rulings, the justices wrote that “[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.”<sup>30</sup> The FAA does not include any exception relating to personal-injury or wrongful-death cases, the Court observed. All three cases thus were governed by the rule that the Court had reaffirmed just two months before the West Virginia court handed down its decision: “[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”<sup>31</sup>

The Florida Fourth District Court of Appeal provoked another unanimous *per curiam* ruling in *KPMG LLP v. Cocchi*,<sup>32</sup> though the tone of the exchange between the two courts was less prickly. In that case, investors who allegedly lost millions of dollars in the Bernard Madoff scandal filed a lawsuit against the partnerships that had invested their money and against those partnerships’ auditing firm, KPMG. With respect to KPMG, the investors stated four causes of action. KPMG moved to compel arbitration based on an arbitration clause that appeared in its contracts with the investment partnerships. The Court of Appeal stated that the arbitration clause could be enforced against the investors only if their claims were derivative in nature, thereby bringing them within the ambit of the partnerships’ contracts with KPMG. Citing Delaware law, the court concluded that two of the investors’ claims against KPMG were direct, and thus beyond the reach of the arbitration clauses. The court failed to say anything about the investors’ other two claims, however, apparently believing that if the court could not compel arbitration of some of the investors’ claims, then the entire case should remain in state court.

The Supreme Court reversed, faulting “the Court of

**[T]he Court expressed . . . frustration with lower courts for failing to follow . . . the clear requirements of the Federal Arbitration Act.**

24. *Id.* at 2167-70.

25. 132 S. Ct. 1367 (2012).

26. 132 S. Ct. 1201 (2012).

27. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 278-80 (W. Va. 2011).

28. *Id.* at 292.

29. 132 S. Ct. at 1202.

30. *Id.*

31. *Id.* at 1203 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)).

32. 132 S. Ct. 23 (2011).

**[T]he Court refused to allow a prisoner to bring an Eighth Amendment *Bivens* action against employees of a privately operated federal prison.**

Appeal's apparent refusal to compel arbitration on any of the four claims based solely on a finding that two of them . . . were nonarbitrable."<sup>33</sup> The Court stated that trial courts are obliged to enforce arbitration agreements "even when the result would be the possibly inefficient maintenance of separate proceedings in different forums."<sup>34</sup> The Court remanded the case with instructions to determine

whether the arbitration agreement was enforceable with respect to the investors' other two causes of action.

The Court's third arbitration ruling of the Term was the only one to spark at least minimal disagreement among the Justices. In *CompuCredit Corp. v. Greenwood*,<sup>35</sup> individuals who had obtained Aspire Visa cards filed a class action against the card's marketer and issuer. The cardholders alleged that, in various ways, the defendants had violated the Credit Repair Organizations Act (CROA), a federal statute regulating organizations that purport to help individuals improve their credit records, histories, or ratings. The defendants moved to compel arbitration, citing an arbitration clause that appeared in the card applications that the plaintiffs had signed. The cardholders resisted, arguing that Congress had intended to exempt CROA claims from the requirements of the FAA. Their argument centered primarily on a statutorily required disclosure statement that the defendants had given them. In that disclosure statement, the defendants had stated that cardholders had "a right to sue a credit repair organization that violates the [CROA]."<sup>36</sup> That statement, coupled with a provision of the CROA that declared certain statutory rights nonwaivable, led the cardholders to the conclusion that they had a right to sue the defendants in court, and that the arbitration clauses in their card applications could not waive that right.

The Ninth Circuit Court of Appeals was persuaded by the cardholders' argument, but a majority of the Supreme Court was not. Writing for six members of the Court, Justice Scalia explained that the disclosure statement told the cardholders that they were entitled to enforce their rights under the statute, but did not itself confer any of those rights. Those rights were conferred in other statutory provisions, he said, and those other provisions did not clearly state that cardholders had a right to sue *in court*. Justice Sotomayor and Justice Kagan concurred in the judgment, stating that the parties' arguments

were "in equipoise" and that the cardholders had thus failed to carry "the burden of showing that Congress disallowed arbitration of their claims."<sup>37</sup> Justice Ginsburg filed a lone dissent. In her view, the majority had ironically interpreted anti-deception legislation in a manner that permitted credit-repair organizations to deceive vulnerable consumers about their rights.

#### **BIVENS AND THE EIGHTH AMENDMENT**

In *Minneci v. Pollard*,<sup>38</sup> the Court refused to allow a prisoner to bring an Eighth Amendment *Bivens* action against employees of a privately operated federal prison.<sup>39</sup> The prisoner claimed that the defendants failed to provide him with proper medical care after he injured his elbows and that the Eighth Amendment itself provided him with a damages remedy. The odds were stacked against him from the beginning: it had been more than 30 years since the Court last agreed to recognize a private cause of action directly under a constitutional provision.<sup>40</sup> An eight-justice majority of the Court continued that streak here.

Writing for the Court, Justice Breyer explained that "the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations."<sup>41</sup> The Court found that, while federal legislation would have barred the prisoner from bringing a state tort action against the prison officials if those officials had been employed directly by the federal government, there was no such bar here because the defendants were employed by a private firm. The Court acknowledged that state tort law might be somewhat "less generous" to the prisoner than the proposed *Bivens* action, but found those differences too small to be dispositive.<sup>42</sup> Justice Ginsburg dissented, arguing that the prisoner's claim should not be "remit[ed] to the 'vagaries' of state tort law."<sup>43</sup>

#### **EQUAL PROTECTION AND RATIONAL-BASIS REVIEW**

In *Armour v. City of Indianapolis*,<sup>44</sup> we were reminded of just how easy it is for legislation to survive rational-basis review under the Equal Protection Clause. For a number of years, the City of Indianapolis paid for sewer projects by imposing those projects' costs upon the owners of abutting properties. In 2004, the city funded a residential sewer project in precisely that way. Pursuant to longstanding practice, homeowners in that neighborhood were given the option of paying their share of the costs (about \$9,000 per household) in one lump sum or over as many as thirty years. The following year, however, the city adopted a new financing system for sewer projects, imposing much lower fees on benefiting property owners and cover-

33. *Id.* at 25.

34. *Id.* (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)).

35. 132 S. Ct. 665 (2012).

36. *Id.* at 669.

37. *Id.* at 675 (Sotomayor, J., concurring in the judgment).

38. 132 S. Ct. 617 (2012).

39. See generally *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (authorizing a Fourth Amendment damages

action against federal employees).

40. See *Carlson v. Green*, 446 U.S. 14 (1980) (authorizing an Eighth Amendment damages action against employees at a prison run by the federal government).

41. 132 S. Ct. at 625.

42. *Id.*

43. *Id.* at 627 (Ginsburg, J., dissenting) (quoting *Carlson*, 446 U.S. at 23).

44. 132 S. Ct. 2073 (2012).

ing the balance of the costs with bonds. When the city made the switch, it told homeowners who were paying their past obligations in installments that their remaining debts were forgiven, but it refused to issue refunds to homeowners who had already paid their debts in full. Many of the homeowners who had already paid off their debts sued the city, alleging a violation of their equal-protection rights.

Affirming Indiana's high court, the Supreme Court found a rational basis for the city's differing treatment of the homeowners. Writing for six justices, Justice Breyer said that either of the city's other alternatives—asking the installment-paying homeowners to continue paying down their debts or issuing refunds to those who had already paid their obligations in full—would have entailed administrative costs that the city rationally could have wished to avoid. Joined by Justices Scalia and Alito, Chief Justice Roberts dissented. The Chief Justice agreed that “we give great leeway to taxing authorities in this area,” but argued that “every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context.”<sup>45</sup>

## FEDERAL JURISDICTION

### FEDERAL CAUSES OF ACTION

In *Mims v. Arrow Financial Services*,<sup>46</sup> the Court unanimously ruled that state and federal courts have concurrent subject-matter jurisdiction over private claims brought under the Telephone Consumer Protection Act of 1991. The Act provides a private cause of action for invasive telemarketing practices and authorizes plaintiffs to sue “in an appropriate court of [a] State” if such an action is “otherwise permitted by the laws or rules of court of [that] State.”<sup>47</sup> The justices found that Congress did not thereby grant state courts exclusive jurisdiction over private claims brought under the Act. Writing for the Court, Justice Ginsburg explained that when federal law creates a cause of action and provides the substantive rules for adjudicating that cause of action, there is a strong presumption in favor of at least concurrent original federal jurisdiction under 28 U.S.C. § 1331. That presumption can be overcome only if—contrary to the facts here—Congress made it clear that it intended to divest the federal courts of their power to adjudicate the claims.

### POLITICAL-QUESTION DOCTRINE

In *Zivotofsky v. Clinton*,<sup>48</sup> the Court clarified the scope of the political-question doctrine. The State Department had adopted a policy directing passport officials to list Jerusalem, rather than Israel, as the place of birth when preparing passports for persons born in Jerusalem. In 2002, Congress responded by enacting legislation stating that individuals born in Jerusalem could, upon their or their guardians' request, list Israel as their place of birth on their birth certificates or passports. Upon Menachem Zivotofsky's birth in Jerusalem, his parents (who were American citizens) applied for a United States passport for him and asked that his place of birth be

listed as “Jerusalem, Israel.” Citing its policy, the State Department refused and issued Zivotofsky a passport that listed only “Jerusalem” as his place of birth. His parents sued the Secretary of State for declaratory and injunctive relief. Affirming the district court's dismissal of the case as a non-justiciable political question, the United States Court of Appeals for the District of Columbia Circuit found that adjudicating the case would interfere with the Executive's exclusive power to recognize foreign sovereigns and determine the political status of Jerusalem. The Supreme Court reversed and remanded. Writing for six members of the Court, Chief Justice Roberts agreed that the federal judiciary cannot itself decide whether Jerusalem is Israel's capital, but found that the case presented separate questions over which the courts do have the power to speak—namely, whether the Secretary of State violated Zivotofsky's federal statutory rights and whether the legislation on which Zivotofsky relied is constitutional. If the statute infringes upon the President's power, the Court wrote, then the courts should declare the statute unconstitutional, rather than declare the case nonjusticiable.

### FIFTH AMENDMENT—DUE PROCESS

Many court-watchers had anticipated that the Federal Communications Commission's recent actions against Fox Television Stations and ABC for fleeting expletives and fleeting nudity would prompt the Court to reassess its 1978 ruling in *FCC v. Pacifica Foundation*.<sup>49</sup> *Pacifica* has come under increasing pressure in recent years, as changes in technology and the media landscape have caused many to wonder whether the *Pacifica* Court's rationales for allowing the government to restrict broadcasts of indecency remain apt. It turns out, however, that the FCC's enforcement actions against Fox and ABC tripped over the Fifth Amendment's Due Process Clause instead, leaving the First Amendment issues to be decided another day.

In *FCC v. Fox Television Stations* (consolidated with *FCC v. ABC, Inc.*),<sup>50</sup> the Court focused on three instances of alleged indecency: Cher's unscripted use of the f-word during the 2002 Billboard Music Awards, broadcast by Fox; Nicole Richie's unscripted use of the s- and f-words during the same awards show on Fox the following year; and a seven-second display of an actress's buttocks (together with a momentary side view of one of her breasts) during a 2003 episode of ABC's *NYPD Blue*.

To understand the Court's decision, a brief timeline is

**[C]hanges in technology and the media landscape have caused many to wonder whether the *Pacifica* Court's rationales for allowing the government to restrict broadcasts of indecency remain apt.**

45. *Id.* at 2087 (Roberts, C.J., dissenting).

46. 132 S. Ct. 740 (2012).

47. 47 U.S.C. § 227(b)(3).

48. 132 S. Ct. 1421 (2012).

49. 438 U.S. 726 (1978).

50. 132 S. Ct. 2307 (2012).

**[T]he Court ruled that both the Free Exercise Clause and the Establishment Clause bar ministers from suing their religious employers for employment discrimination.**

required. When the *Pacifica* Court announced First Amendment standards allowing the FCC to regulate the broadcast of indecent speech, it explicitly noted that it was reserving judgment on whether “an occasional expletive . . . would justify any sanction.”<sup>51</sup> For many years, the FCC took few actions against broadcast indecency. In 2001, the FCC signaled that it would begin to move more aggressively against indecency, but stated that an enforcement action was less likely if the given instance of alleged indecency was “fleeting

in nature.”<sup>52</sup> In response to an award recipient’s use the f-word during NBC’s 2003 broadcast of the Golden Globe Awards, however, the FCC issued what has come to be known as the *Golden Globes* Order, finding that NBC’s broadcast of the f-word was indecent despite its single and momentary use.

The FCC applied the *Golden Globes* standard against Fox and ABC, even though their broadcasts occurred *prior* to the *Golden Globes* Order, and even though in *Golden Globes* itself the FCC opted not to fine NBC because the agency recognized it was using that case to announce new standards. With Justice Sotomayor not participating, eight justices concluded that the FCC’s actions against Fox and ABC were unconstitutional. Justice Kennedy wrote for seven members of the Court, finding that punishing Fox and ABC would violate the fundamental due-process principle “that laws which regulate persons or entities must give fair notice of conduct that is forbidden.”<sup>53</sup> At the time of the FOX and ABC broadcasts, the Court found, the FCC’s policies “gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent.”<sup>54</sup> The Court thus found it unnecessary to determine the constitutionality of the *Golden Globes* Order or to reassess the *Pacifica* standards.

Justice Ginsburg concurred in the judgment, briefly stating that *Pacifica* “was wrong when issued” and that “[t]ime, technological advances, and the Commission’s untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration.”<sup>55</sup> Five months later, concurring in the Court’s denial of certiorari in the case concerning Janet Jackson’s (in)famous “wardrobe malfunction” during a Super Bowl half-time performance,<sup>56</sup> Justice Ginsburg encouraged the FCC to “reconsider its indecency policy in light of technological

advances and the Commission’s uncertain course of conduct since this Court’s ruling in [*Pacifica*].”<sup>57</sup>

**FIRST AMENDMENT—RELIGION**

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,<sup>58</sup> the Court ruled that both the Free Exercise Clause and the Establishment Clause bar ministers from suing their religious employers for employment discrimination. Hosanna-Tabor had hired Cheryl Perich to work as a schoolteacher. Based on Perich’s completion of a variety of academic requirements, Hosanna-Tabor had designated Perich as a “called” teacher, granting her the title of “Minister of Religion, Commissioned.” In that capacity, Perich spent most of her time teaching secular subjects, but she also taught a religion class several days each week, led students in prayer, attended weekly chapel services, and led those chapel services twice each year. After Perich missed a significant portion of the 2004-2005 school year due to illness, Hosanna-Tabor hired another teacher to fill the gap for the remainder of the year. Perich insisted that she be allowed to return to work, but Hosanna-Tabor refused. When Perich threatened to take legal action to protect her rights, Hosanna-Tabor terminated her, citing her threat of litigation. The Equal Employment Opportunity Commission sued Hosanna-Tabor on Perich’s behalf, alleging that Hosanna-Tabor had violated the Americans with Disabilities Act by retaliating against Perich for threatening to vindicate her ADA rights. Hosanna-Tabor argued that it had terminated Perich because, by threatening to sue, she had violated the church’s religious teaching that church members should resolve their disputes internally.

Led by Chief Justice Roberts, the Court ruled unanimously in Hosanna-Tabor’s favor, joining the many circuit courts that had already recognized a “ministerial exception” to employment-discrimination laws. “Requiring a church to accept or retain an unwanted minister,” the Chief Justice wrote, “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”<sup>59</sup> The Court declined “to adopt a rigid formula for determining when an employee qualifies as a minister,” choosing instead to begin its line of “ministerial exception” cases by engaging in a fact-intensive analysis of Perich’s own circumstances.<sup>60</sup> The Court found that Perich was a minister because Hosanna-Tabor had formally designated her in those terms, Perich had held herself out to the church and others as a minister, and Perich’s job duties included conveying the church’s teachings and performing other religious functions. In response to the EEOC’s insistence that recognizing a ministerial exception would license religious groups to engage in

51. 438 U.S. at 750.

52. 132 S. Ct. at 2314 (quoting the FCC’s 2001 policy statement).

53. *Id.* at 2317.

54. *Id.* at 2318.

55. *Id.* at 2321 (Ginsburg, J., concurring in the judgment).

56. The Third Circuit thus had the last word in the Janet Jackson case, invalidating the FCC’s actions against CBS because the agency had “improperly imposed a penalty on CBS for violating a previously unannounced policy.” *CBS Corp. v. FCC*, 663 F.3d 122, 124 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2677 (2012).

57. *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012) (Ginsburg, J., concurring in the denial of certiorari).

58. 132 S. Ct. 694 (2012).

59. *Id.* at 706.

60. *Id.* at 707. Joined by Justice Kagan, Justice Alito wrote separately to say that “formal ordination and designation as a ‘minister’” should not be central to the analysis, lest churches that do not use those procedures or terms be excluded from the protection of the “ministerial” exception. *Id.* at 711 (Alito, J., concurring).

objectionable behavior (such as hiring children or aliens, or punishing ministerial employees for reporting criminal conduct), the Court said that it would “address the applicability of the exception to other circumstances if and when they arise.”<sup>61</sup>

#### FIRST AMENDMENT—SPEECH

In addition to *Reichle v. Howards*<sup>62</sup> (which concerned speech but is better categorized as a qualified-immunity case) and *FCC v. Fox Television Stations*<sup>63</sup> (which has First Amendment implications but is better categorized as a Fifth Amendment case), the Court decided two noteworthy civil free-speech cases last Term.<sup>64</sup>

#### CAMPAIGN FINANCE AND CORPORATE SPEECH

In its 2010 ruling in *Citizens United v. Federal Election Commission*, the Supreme Court ruled (among other things) that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” in American elections.<sup>65</sup> The following year, the Montana Supreme Court declared that, due to that State’s particularly rocky history of corporate corruption in state politics, the Montana Legislature was permitted to impose civil penalties on any corporation that makes “a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party.”<sup>66</sup> In *American Tradition Partnership v. Bullock*,<sup>67</sup> a five-justice majority of the Court summarily reversed in a one-page *per curiam* ruling, finding *Citizens United* wholly dispositive. Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer filed a short dissent, stating that *Citizens United* was wrongly decided and that, even if the Court’s ruling in that case were apt in some jurisdictions, Montana’s history gave it a particularly “compelling interest in limiting independent expenditures by corporations.”<sup>68</sup>

#### UNIONS—NONMEMBERS AND SPECIAL ASSESSMENTS

Although the Court’s holding in *Knox v. Service Employees International Union*<sup>69</sup> is noteworthy in its own right, far more significant is five justices’ suggestion in *dicta* that prior courts have given their blessing to arrangements that might violate the First Amendment.

Under the Court’s past cases, a public-sector union may annually bill nonmember employees in a given unit to help pay the costs of that unit’s “chargeable expenses”—namely, the costs of engaging in the kind of collective-bargaining activities that inure to the benefit of all of a unit’s employees. The Court has said, however, that the First Amendment bars a union from forcing nonmembers to help pay for the union’s political and ideological activities. Following the procedure approved in *Teachers*

*v. Hudson*,<sup>70</sup> a union can annually notify members and nonmembers alike of what the union’s dues will be for the coming year, so long as it gives nonmembers an opportunity to “opt out” from the union’s political and ideological activities and thus pay reduced fees targeted solely for the union’s anticipated chargeable expenses.

In *Knox*, a public-sector union in California (the SEIU) announced to members and nonmembers what the annual dues would be for 2005 and gave nonmembers a period of time to opt out from the political and ideological portion of the tab. After that opt-out period had closed, however, the SEIU concluded that it needed to raise additional money quickly to engage in political battles that were taking shape in the state. The SEIU issued a special assessment aimed at creating what it called “a Political Fight-Back Fund.” It did not give nonmembers the ability to opt out, but it did tell those nonmembers who earlier had opted out from the political and ideological portion of the annual dues that they could pay a comparably reduced portion of the special assessment.

Joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, Justice Alito found that the First Amendment obliged the SEIU to provide nonmembers with a period of time in which to decide whether they wanted to contribute to the Fight-Back Fund, and that the union could collect funds from nonmembers for the Fight-Back Fund only if they affirmatively opted in. Justices Sotomayor and Ginsburg concurred in the judgment, agreeing that the SEIU had violated nonmembers’ rights but objecting to the majority’s decision to require an opt-in (rather than an opt-out) scheme.<sup>71</sup>

What is most significant about the ruling—and what especially drew the criticism of Justices Sotomayor and Ginsburg in their concurrence in the judgment and Justices Breyer and Kagan in their dissent—was the discomfort that the majority expressed with some of the Court’s prior rulings regarding unions and nonmember employees. Justice Alito stressed that forcing public-sector employees to contribute to unions—even if for collective-bargaining activities—raises serious First Amendment concerns. “Our cases to date have tolerated this ‘impingement,’” he wrote, “and we do not revisit today whether the Court’s former cases have given adequate recognition to the critical First Amendment rights at stake.”<sup>72</sup> He

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61. *Id.* at 710.

62. 132 S. Ct. 2088 (2012).

63. 132 S. Ct. 2307 (2012).

64. On the criminal side, see *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (finding an irreconcilable conflict between the First Amendment and the Stolen Valor Act).

65. 130 S. Ct. 876, 909 (2010).

66. MONT. CODE ANN. §13-35-227(1) (2011).

67. 132 S. Ct. 2490 (2012).

68. *Id.* at 2491 (Breyer, J., dissenting).

69. 132 S. Ct. 2277 (2012).

70. 475 U.S. 292 (1986).

71. Justices Breyer and Kagan dissented, relying in part upon arguments relating to administrative burdens and the SEIU’s prior under-charging of nonmembers for chargeable expenses.

72. 132 S. Ct. at 2289.

**[T]he Court ruled . . . that a private attorney may claim qualified immunity when sued under Section 1983 for the role he played in helping city officials investigate allegations of wrongdoing by a city employee.**

that presumption is mistaken. Justice Alito stated that the current arrangement is “a remarkable boon for unions,” that the Court has paid “surprisingly little attention” to the choice between opt-out and opt-in arrangements, and that the Court’s prior approval of opt-out schemes is “an historical accident” resulting from the Court’s thinly considered “dicta” in a case half a century ago.<sup>73</sup> The majority indicated that those past rulings “approach, if they do not cross, the limit of what the First Amendment can tolerate,” but the justices did not find it necessary to resolve that question here.<sup>74</sup> Non-union employees who bristle at the current state of the law undoubtedly will find in *Knox* an invitation to give the Court an opportunity to address these matters anew.

#### **QUALIFIED IMMUNITY**

The Court decided two noteworthy qualified-immunity cases last Term, the first dealing with private individuals’ entitlement to qualified immunity when they do short-term work for governmental bodies and the second dealing with retaliatory arrests.

Invoking memories of a time in American history when private individuals frequently stepped in to help city, state, and federal entities carry out their business, the Court ruled in *Filarsky v. Delia*<sup>75</sup> that a private attorney may claim qualified immunity when sued under Section 1983 for the role he played in helping city officials investigate allegations of wrongdoing by a city employee. The United States Court of Appeals for the Ninth Circuit had held that the attorney could not claim qualified immunity because he was not a city employee. The Supreme Court unanimously reversed. Writing for the Court, Chief Justice Roberts returned to the familiar principle that Section 1983 did not abrogate well-established common-law immunities. Citing numerous examples, the Chief Justice said that, in the years leading up to Section 1983’s enactment, governments frequently retained private individuals to help do the public’s work, and courts did not distinguish between those

private individuals and government employees when affording immunity to suit.

In *Reichle v. Howards*,<sup>76</sup> the Court ruled that Secret Service agents could raise the qualified-immunity defense in a lawsuit arising from an incident that occurred when they were protecting Vice President Dick Cheney at a Colorado shopping mall. Steven Howards had approached the Vice President and told him that the administration’s policies in Iraq were “disgusting,” then touched the Vice President’s shoulder as the Vice President walked away. Secret Service agents approached Howards, who falsely denied touching the Vice President. Possessing probable cause to believe that Howards had lied to them and had physically touched the Vice President, the agents placed Howards under arrest. State officials charged him with harassment, but those charges were later dropped. Howards then sued the agents under Section 1983 and *Bivens*, alleging that the agents had arrested him in retaliation for his remarks to the Vice President about Iraq. Writing for six members of the Court, Justice Thomas found that the agents were entitled to qualified immunity because “it was not clearly established that an arrest supported by probable cause could violate the First Amendment.”<sup>77</sup> The Court reserved judgment on the merits of the overarching constitutional question, declining to say whether a person does indeed have a First Amendment right to be free from a retaliatory arrest when officials have probable cause to arrest on other grounds. Joined by Justice Breyer, Justice Ginsburg concurred in the judgment. Distinguishing ordinary law-enforcement officers from those charged with protecting public officials, she argued that the former would not be entitled to qualified immunity in comparable circumstances, but that officers charged with making split-second assessments of threats to public officials are entitled to rely on an individual’s statements when determining whether that person poses an immediate threat of harm. (Justice Kagan did not participate in the case.)

#### **SOVEREIGN IMMUNITY AND THE FMLA**

In *Coleman v. Court of Appeals of Maryland*,<sup>78</sup> the Court returned to the task of evaluating efforts by Congress to use its powers under Section 5 of the Fourteenth Amendment to abrogate a state’s sovereign immunity. Daniel Coleman had sued the Maryland Court of Appeals (his former employer), alleging that the court violated his rights under the Family and Medical Leave Act by denying him sick leave. The FMLA identifies several circumstances in which an eligible employee is annually entitled to up to twelve weeks of leave. Most of the statute’s provisions concern instances in which an employee needs to care for an ailing family member, but the “self-care” provision on which Coleman relied entitles an employee to obtain leave when “a serious health condition . . . makes the employee unable to perform the functions of” his or her job.<sup>79</sup> The Court already had ruled in *Nevada Department of Human Resources v. Hibbs*<sup>80</sup> that Congress validly stripped the states of their immunity for violations of one

73. *Id.* at 2290.

74. *Id.* at 2291.

75. 132 S. Ct. 1657 (2012).

76. 132 S. Ct. 2088 (2012).

77. *Id.* at 2093.

78. 132 S. Ct. 1327 (2012).

79. 26 U.S.C. § 2612(a)(1)(D).

80. 538 U.S. 721 (2003).

of the family-care provisions because Congress was rectifying a history of sex-based discrimination in states' administration of their family-leave policies. Here in *Coleman*, however, five justices concluded that states retained their immunity against damages suits for violations of the self-care provision.

Justice Kennedy wrote for a plurality of the Court, joined by the Chief Justice and Justices Thomas and Alito. Invoking the Court's reigning Section 5 analysis, the plurality found that the self-care provision was not "congruent and proportional" to any pattern of unconstitutional behavior by the states, and thus amounted to an effort by Congress to rewrite the Fourteenth Amendment.<sup>81</sup> When Congress enacted the FMLA, the plurality wrote, nearly all state employees were covered by paid sick-leave plans, and Congress never identified any pattern of sex discrimination in the states' administration of those plans. The plurality rejected *Coleman's* argument that the self-care provision was meant to attack sex discrimination in tandem with the family-care provisions. *Coleman's* argument went like this: if only the FMLA's family-care provisions had been enacted, some public and private employers would fear that women would miss a lot of work to care for sick family members; those employers thus would have an incentive to discriminate against female job applicants; and so Congress added the self-care provision to provide a category of leave that men would use, thereby helping to close the gap between the amounts of time that men and women could be expected to miss work. The plurality found this argument "overly complicated," "unconvincing," and unsupported by the legislative record.<sup>82</sup>

Justice Scalia concurred in the judgment, reiterating his view that, "outside the context of racial discrimination (which is different for *stare decisis* reasons)," the congruence and proportionality test should be abandoned and Congress's power under Section 5 should be limited to regulating "conduct that *itself* violates the Fourteenth Amendment."<sup>83</sup>

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. She found that Congress wrote the self-care provision in broad, gender-neutral terms to shield women from the discrimination that might result if federal law had more narrowly provided self-care leaves only for illnesses relating to pregnancy and childbirth. Drawing heavily from *Hibbs*, Justice Ginsburg wrote that Congress had substantial evidence of public employers' discrimination against women—especially pregnant women—in the workplace. The dissent concluded by offering employees a measure of solace. As the Maryland court itself conceded, Justice Ginsburg wrote, the self-care provision is inarguably a valid exercise of Congress's power under the Commerce Clause. While that is not sufficient under the Court's precedent to permit Congress to abrogate a state's immunity from suits for damages, she said, it is sufficient for employees to get injunctive relief under *Ex parte Young*<sup>84</sup> and for the federal government to seek relief on an employee's behalf.

## SUPREMACY CLAUSE

In *Douglas v. Independent Living Center of Southern California*,<sup>85</sup> a slim majority of the Court decided to sidestep, at least for the time being, the difficult question on which it had granted certiorari: can Medicaid providers and beneficiaries maintain a cause of action directly under the Supremacy Clause to enjoin state officials from implementing state regulations that allegedly are preempted by federal law? To alleviate stress on its budget, California had announced that it planned to reduce the rates at which it would reimburse certain Medicaid providers. Pursuant to federal requirements, California submitted those plans to the federal Centers for Medicare and Medicaid Services (CMS) for approval. While that request for approval was pending, various Medicaid providers and beneficiaries filed federal lawsuits seeking to enjoin California officials from implementing the reimbursement reductions. The plaintiffs argued that California's plans conflicted with—and thus were preempted by—Section 30(A) of the Medicaid Act, which requires states to provide reimbursements "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area."<sup>86</sup> After the case was orally argued before the Supreme Court, the CMS approved most of the state's planned reductions, finding them consistent with the Medicaid Act's requirements. The Court then had to determine whether the CMS's approval had any bearing on the Court's disposition of the case.

Writing on behalf of himself and Justices Kennedy, Ginsburg, Sotomayor, and Kagan, Justice Breyer concluded that the case should be remanded without immediate resolution of the Supremacy Clause issue. Given the CMS's approval of the reductions, Justice Breyer found, it was possible that the unhappy Medicaid providers and beneficiaries should now be required to seek judicial review of the CMS's decision under the Administrative Procedure Act, rather than continue to press for relief in an action brought directly under the Supremacy Clause. Justice Breyer hinted that the plaintiffs faced an uphill climb: the CMS was not a party to the pending Supremacy Clause litigation, making that litigation an inefficient vehicle for adjudicating the merits of the agency's findings; allowing a Supremacy Clause action to proceed would

**Justice Breyer hinted that the plaintiffs faced an uphill climb: the CMS was not a party to the pending Supremacy Clause litigation, making that litigation an inefficient vehicle for adjudicating the merits of the agency's findings . . . .**

81. 132 S. Ct. at 1335 (plurality op.).

82. *Id.* at 1336 (plurality op.).

83. *Id.* at 1338 (Scalia, J., concurring in the judgment).

84. 209 U.S. 123 (1908).

85. 132 S. Ct. 1204 (2012).

86. 42 U.S.C. § 1396a(a)(30)(A).

**[T]he Court unanimously confirmed the Social Security Administration's finding that the two posthumously conceived claimants . . . did not qualify for survivors benefits under the Social Security Act.**

cause “inconsistency or confusion” if the federal courts ultimately reached a conclusion that differed from the CMS’s findings; and courts typically owe a measure of deference to agencies’ interpretations of the legislation they have been tasked with implementing.<sup>87</sup>

Joined by Justices Scalia, Thomas, and Alito, Chief Justice Roberts dissented, arguing that the Court should have resolved the Supremacy Clause issue in favor of the state. Congress had not itself provided a private cause of action to enforce Section 30(A), the Chief Justice wrote, and so permitting an action

directly under the Supremacy Clause would allow plaintiffs to make an “end-run” around precedent that bars plaintiffs from suing to enforce federal statutes in the absence of a statutory cause of action.<sup>88</sup> Acknowledging the longstanding availability of injunctive relief against state officials under *Ex parte Young*,<sup>89</sup> the dissent argued that such relief is available in the absence of a federal statutory cause of action only if—unlike the Medicaid providers and beneficiaries here—the plaintiff is threatened with a state enforcement proceeding and wishes preemptively to assert a federal defense. In support of that reading of *Ex parte Young*, the dissent cited a line from a 2011 concurring opinion by Justice Kennedy.<sup>90</sup> When a majority of the Court agrees that the time is ripe to resolve this important issue, Justice Kennedy might indeed cast the decisive vote.

#### **OTHER NOTABLE RULINGS**

In *Astrue v. Capato*,<sup>91</sup> the Court unanimously confirmed the Social Security Administration’s finding that the two posthumously conceived claimants in this case did not qualify for survivors benefits under the Social Security Act. To determine whether a given claimant is the “child” of a decedent and thus eligible for survivors benefits, the Act directs the Social Security Commissioner’s attention to the laws of intestacy in the state where the claimant resides: if the claimant is ineligible to inherit under that state’s intestacy laws, the claimant is typically deemed not to be a “child” of the decedent within the meaning of the Act. The two claimants in this case resided in Florida, which restricts intestate succession to individuals conceived during the decedent’s lifetime. The claimants (con-

ceived through in vitro fertilization after the father’s death) thus were ineligible for survivors benefits.

In *FAA v. Cooper*,<sup>92</sup> the Court ruled 5-4 that when Congress stated in the Privacy Act of 1974 that an individual may sue an agency for “actual damages” resulting from certain kinds of “intentional or willful” violations of the Act,<sup>93</sup> Congress did not thereby waive the federal government’s sovereign immunity against claims seeking damages for mental or emotional distress. Rather, it only waived the government’s immunity against claims for pecuniary damages.

In *Freeman v. Quicken Loans, Inc.*,<sup>94</sup> the Court unanimously held that a provision of the Real Estate Settlement Procedures Act (12 U.S.C. § 2607(b)) bars a settlement-service provider from giving or accepting a portion of a settlement-service charge to a different person or entity that did nothing to earn the payment, but it does not bar a settlement-service provider from itself collecting unearned fees from clients. The Court reserved judgment on whether fees paid by borrowers to obtain lower interest rates are settlement-service charges within the meaning of the statute.

In *Golan v. Holder*,<sup>95</sup> the Court held that Congress acted within the constraints of the Copyright Clause and the First Amendment when it granted copyright protection to previously created works that had already entered the public domain.

In *Holder v. Martinez-Gutierrez*,<sup>96</sup> the Court unanimously accepted as reasonable the Board of Immigration Appeals’ conclusion that the Attorney General cannot cancel an alien child’s removal from the United States unless the child himself or herself satisfies the statute’s residency requirements for such cancellation. The parents’ years of residency within the United States cannot be imputed to the child.

In *Mayo Collaborative Services v. Prometheus Laboratories*,<sup>97</sup> the Court denied patent protection to a company that had done little more than identify a correlation between (1) the quantity of a person’s natural production of certain metabolites in response to taking thiopurine drugs to treat autoimmune diseases and (2) the likelihood that the person’s dosage would be either ineffectively low or harmfully high. In seeking patent protection, the Court found, the company had merely described natural laws, rather than set forth a unique way to apply them.

In *PPL Montana v. Montana*,<sup>98</sup> the Court clarified the test by which courts and others are to determine whether states hold title to particular riverbeds. PPL operated numerous hydroelectric facilities on three rivers in Montana. Montana contended that it held title to the full length of any river’s bed within the state’s borders, so long as much (even if not all) of that river was navigable at the time Montana acquired statehood in 1889. The state thus claimed that it could charge PPL

87. 132 S. Ct. at 1210-11.

88. *Id.* at 1204 (Roberts, C.J., dissenting).

89. 209 U.S. 123 (1908).

90. *See Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring).

91. 132 S. Ct. 2021 (2012).

92. 132 S. Ct. 1441 (2012).

93. 5 U.S.C. § 552a(g)(4)(A).

94. 132 S. Ct. 2034 (2012).

95. 132 S. Ct. 873 (2012).

96. 132 S. Ct. 2011 (2012).

97. 132 S. Ct. 1289 (2012).

98. 132 S. Ct. 1215 (2012).

rent. In PPL's view, however, a segment-by-segment analysis was required, with the federal government continuing to hold title to the riverbeds in those particular areas that were not navigable in 1889. Drawing from English common law, a line of nineteenth- and twentieth-century Supreme Court rulings, and a wealth of historical research about the exploration of American rivers, the Court unanimously sided with PPL.

In *Taniguchi v. Kan Pacific Saipan, Ltd.*,<sup>99</sup> the Court held that 28 U.S.C. § 1920(6), which authorizes federal courts to award a prevailing party costs for "compensation of interpreters," only covers costs for oral translations, and not costs for translating written documents. "Based on our survey of the relevant dictionaries," Justice Alito wrote for six members of the Court, "we conclude that the ordinary or common meaning of 'interpreter' does not include those who translate writings."<sup>100</sup>

In *United States v. Home Concrete Supply*,<sup>101</sup> the Court held that the ordinary three-year statute of limitations (rather than a more narrowly available six-year statute of limitations) applies to efforts by the federal government to collect unpaid income taxes resulting from taxpayers' overstatement of their basis in sold property. The statute providing a six-year limitations period applies only when (among other things) a taxpayer "omits from gross income an amount properly included therein."<sup>102</sup> By a 5-4 vote, the Court found that the word "omits" denotes leaving something unmentioned, and thus does not include instances when a taxpayer inflates his or her basis in property.

## LOOKING AHEAD

At the time of this writing, the Court is slated to hear a number of attention-worthy civil cases during the 2012-2013 Term. The case likely to draw the most press is *Fisher v. University of Texas*,<sup>103</sup> in which the Court will take a close look at the University of Texas's race-conscious undergraduate admissions policy. Other pending cases of broad interest to the legal profession will address whether Congress exceeded its constitutional authority when it reauthorized Section 5 of the

Voting Rights Act,<sup>104</sup> a state's effort to require proof of citizenship by individuals attempting to register to vote,<sup>105</sup> employers' vicarious liability under Title VII for harassment committed by supervisors,<sup>106</sup> corporations' civil tort liability under the Alien Tort Statute,<sup>107</sup> whether a state may deny citizens of other states the same right of access to public records that it affords to its own citizens,<sup>108</sup> the United States' liability for damages resulting from its own violations of the Fair Credit Reporting Act,<sup>109</sup> the threshold at which periodic flooding becomes a compensable taking under the Takings Clause,<sup>110</sup> whether courts owe any measure of deference to a federal agency's determination of its own statutory jurisdiction,<sup>111</sup> the circumstances in which a case becomes moot as a result of defendants' settlement offers,<sup>112</sup> whether attorneys can use personal information obtained from a state's department of motor vehicles to identify possible clients,<sup>113</sup> the reach of the Clean Water Act and the modes by which citizens can enforce that legislation,<sup>114</sup> the application of copyright law's first-sale doctrine to copies acquired abroad and imported into the United States,<sup>115</sup> issues relating to patent exhaustion and self-replicating technologies,<sup>116</sup> employees' plan-reimbursement obligations under ERISA,<sup>117</sup> and various issues relating to class actions.<sup>118</sup>



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99. 132 S. Ct. 1997 (2012).

100. *Id.* at 2003.

101. 132 S. Ct. 1836 (2012).

102. 26 U.S.C. § 6501(e)(1)(A) (emphasis added).

103. No. 11-345.

104. *Shelby County v. Holder*, No. 12-96.

105. *Arizona v. Inter-Tribal Council of Arizona, Inc.*, No. 11-71.

106. *Vance v. Ball State Univ.*, No. 11-556.

107. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491.

108. *McBurney v. Hurlbert*, No. 12-17.

109. *United States v. Bormes*, No. 11-192.

110. *Arkansas Game & Fish Comm'n v. United States*, No. 11-597.

111. *City of Arlington v. FCC*, No. 11-1545.

112. *Genesis Healthcare Corp. v. Symczyk*, No. 11-1059.

113. *Maracich v. Spears*, No. 12-25.

114. *Decker v. Northwest Envtl. Def. Ctr.*, Nos. 11-338, 11-347; *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council*, No. 11-460.

115. *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11-697.

116. *Bowman v. Monsanto Co.*, No. 11-796.

117. *U.S. Airways, Inc. v. McCutchen*, No. 11-1285.

118. *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, No. 11-1085; *Comcast Corp. v. Behrend*, No. 11-864; *Standard Fire Ins. Co. v. Knowles*, No. 11-1450.

# Seeing Is Believing:

## The Impact of Jury Service on Attitudes Toward Legal Institutions and the Implications for International Jury Reform

John Gastil, Hiroshi Fukurai, Kent Anderson, & Mark Nolan

The United States jury system is unique in the world in the frequency of its use and its symbolic significance as a democratic institution.<sup>1</sup> As Neil Vidmar writes, the American jury “remains a strong and vibrant institution even as it suffers criticism and calls for reform.”<sup>2</sup> If the jury is “the lamp that shows that freedom lives,”<sup>3</sup> it is ironic that so little is known about what impact the jury system as a democratic institution has on the citizenry who serve as jurors.

Improving our understanding of the jury’s impact is vital, as many nations may choose to adopt or reject the jury based partly on beliefs about how jury service shapes the civic beliefs and actions of citizen-jurors. In particular, legal scholars Kent Anderson and Mark Nolan point out that the proponents of Japan’s new “quasi-jury” system marshaled two arguments in favor of greater public participation in the Japanese legal system—better and equitable legal outcomes<sup>4</sup> and “the belief that it promotes a more democratic society.”<sup>5</sup>

Do juries, in fact, have such impacts? One theoretical justification for believing juries can help to sustain democracy comes from the work of small-group-communication scholar

Ernest Bormann.<sup>6</sup> His Symbolic Convergence Theory has helped to demonstrate that repeated, salient cultural practices can establish habitual ways of communicating in groups. As Bormann explains, successions of otherwise unremarkable public and educational group meetings, along with instruction about effective group behavior, over the course of decades gradually built the “public-discussion model” that emerged in the United States in the 20th century (and persists to this day). For nearly a century, that cultural model has shaped how people talk and think about group problem solving in the U.S.

In a similar way, the cultural-institutional legacy of jury service may be public confidence in jury deliberation itself, as well as in the judges who oversee the process. Thus, we theorize that jury service promotes public support for the larger legal process in which citizens participate as jurors. If true, this finding would have tremendous significance for other nations—including Japan, Taiwan, and Mexico—that are considering implementing the all-citizen jury system, because the reforms they implement could be expected to bolster public faith and confidence in the legal system itself.<sup>7</sup>

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### Footnotes

1. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).
2. Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 1, 7 (Neil Vidmar ed., 2000).
3. PATRICK DEVLIN, *TRIAL BY JURY* 164 (1956).
4. Given the fact that 99.9% of all indicted cases result in automatic convictions in Japan, the introduction of the lay participatory system in law is considered to inject the checks-and-balances mechanism into Japan’s bureaucratic criminal justice system. See J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?* 30 *J. LEGAL STUD.* 53, 53 (2001) (“Conviction rates in Japan exceed 99 percent.”). If ordinary citizens are sufficiently unhappy with the government’s case or evidence presented, they can vote against defendants’ convictions.
5. Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 *VAND. J. TRANSNAT’L L.* 935, 943 (2004).
6. Ernest G. Bormann, *Symbolic Convergence Theory and Communication in Group Decision Making*, in *COMMUNICATION AND*

*GROUP DECISION-MAKING* 81 (Randy Y. Hirokawa & Marshall Scott Poole eds., 2d ed. 1996).

7. Japan implemented a mixed court system called a *saiban-in seido* in 2009. Rather than establishing the U.S.-style all-citizen jury trial, the Japanese government introduced the compromised judicial panel of six lay and three professional judges in criminal adjudication. See Hiroshi Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 *CORNELL INT’L L.J.* 315 (2007). Japan still has a Jury Law, which was passed in 1923, but the Japanese military government suspended it in 1943 in the midst of World War II. The Japan Federation of Bar Associations (JFBA) and many civic activists long advocated the reintroduction of the all-citizen jury trial in Japan, but the Japanese government has failed to activate the Jury Law for the last 70 years. See CHIHIRO SAEKI, *BAISHIN SAIBAN NO FUKKATSU [THE RESURRECTION OF THE JURY TRIAL]* (1996); TAKEO ISHIMATSU, KOKEN TSUCHIYA & CHIHIRO ISA, *ENZAI O UMU SAIBAN-IN SEIDO: BAISHIN SAIBAN NO FUKKATSU NI MUKETE [WRONGFUL CONVICTIONS AND THE SAIBAN-IN SEIDO: THE RESURRECTION OF THE JURY TRIAL]* (2007). On Taiwan’s effort to implement the jury, see June Tsai, *Experts Debate Taiwan’s Proposed Quasi-Jury System*, *TAIWAN TODAY*, June 10, 2012, <http://taiwantoday.tw/ct.asp?xItem=191975&CtNode=428>. For Mexico’s effort to introduce the jury, see Hiroshi Fukurai & Richard Krooth, *The Establishment of All-Citizen Juries as a Key Component of Mexico’s Judicial Reform: Cross-National Analyses of Lay Judge Participation and the Search for Mexico’s Judicial Sovereignty*, 16 *TEX. HISP. J.L. & POL’Y* 37, 40 (2010) (“The 2001 Federal Initiative Reform Code of Criminal Procedure proposed the broader application of jury trials in criminal cases. . . . [T]his initiative was not implemented . . .”).

We begin this essay by offering a more complete justification for our project. In doing so, we explain why legal scholars and reformers should take note of the attitudinal impact of jury service. Next, we elaborate on the theoretical justification for predicting attitudinal changes resulting from jury service, and we review past research that bears on this question. After stating specific hypotheses, we test our claims using a longitudinal survey of jurors from a large county in the northwestern United States. After reviewing the results, we discuss their implications for jury reform in Asia and elsewhere.

### THE IMPORTANCE OF JUROR ATTITUDE CHANGE

It is important to know about the impact of juror service on jurors' attitudes for four reasons. First, in jurisdictions such as the U.S., where jurors are relatively free to discuss their experience as jurors—as the jurors in the Michael Jackson child-molestation trial promptly did following the verdict<sup>8</sup>—it is likely that many comments about the specific and general impact of jury service will be readily expressed in the posttrial media and that the jurors' opinions will carry both symbolic and educational meanings about the importance of jury service and civic responsibilities.

Second, in many jurisdictions that tolerate a reasonably wide range of exemptions from jury service, many jurors become repeat players in the system, and their legal and political attitudes may be shaped by repeated experience of jury service. Given the fact that nearly one million Americans participate in jury trials annually,<sup>9</sup> there are large numbers of repeated jury players, influencing their sense of civic responsibility and governmental legitimacy as well as their interest in future civic participation.<sup>10</sup>

A third important reason for measuring distal effects of jury service is that, like personal interactions with the police, jury service offers a potentially positive experience of firsthand, engaging, and personal contact with of the legal system. Measuring the impact of this experience on a wide range of beliefs and attitudes will give a more sensitive indication of public confidence in the courts, the judiciary, and the political system than may any generic opinion poll.

Finally, an Australian jury commissioner who manages jury

trials in the State of Victoria has pointed out that even reluctant jurors can become the court's strongest "ambassadors" for the political system.<sup>11</sup> For example, in an Australian study of jurors' reactions to prejudicial trial publicity, real jurors expressed disdain for ill-informed comments made by media representatives who were not involved as decision makers in the trial.<sup>12</sup> This

form of ownership over the integrity of the trial process translated not only into a willingness of jurors to defend the trial system but also into their being relatively immune from the negative effects of prejudicial publicity. Further research by Benesh and Howell<sup>13</sup> compared the perceived confidence in the courts of jurors and defendants, suggesting that it is not so much an acquired ownership of the court process that increases institutional confidence but that it is the low-stakes nature of the experience of jurors, in addition to some level of control over the experience, that increases jurors' confidence in jury trials in lower courts. Social commentators, policy makers, and political strategists alike should be interested in knowing more about how and why we create and release ambassadors with such pride in the legal system, and the political system that supports it, following a period of jury service.

### THEORIZING THE ATTITUDINAL IMPACT OF JURY SERVICE

It cannot be taken for granted, however, that jury service has a *positive* impact on attitudes toward the legal system. After all, mock-jury literature and many anecdotal reports from real jurors highlight both positive *and* negative consequences of jury service.<sup>14</sup> The negative stories range from juror complaints about their treatment to empirical measurements of jurors' poor understanding of judicial instructions<sup>15</sup> to the need for therapists to counsel jurors who suffer negative clinical conditions such as depression and post-traumatic stress disorder following participation in jury trials.<sup>16</sup> As if the need for post-juror-service

**It cannot be taken for granted . . . that jury service has a positive impact on attitudes toward the legal system.**

8. See *Jackson Jurors: Evidence "Just Wasn't There": Pop Star Acquitted of All Charges in Molestation Case*, CNN.COM, June 15, 2005, <http://www.cnn.com/2005/LAW/06/14/jackson.trial/index.html>. See also *With Books for Sale, Jackson Jurors Say They Regret Verdict; Defense Lawyer Scoffs at Claims*, GRAND RAPIDS PRESS, Aug. 9, 2005, at A4.

9. Deborah T. Poritz, Chief Justice, New Jersey Supreme Court, Address at Law Day (May 1, 2005) (transcript available at <http://web.archive.org/web/20050524092222/http://www.judiciary.state.nj.us/lawday/lawday-cj05.pdf>) ("Nearly one million Americans serve on juries each year.")

10. See Hiroshi Fukurai & Richard Krooth, *What Brings People to the Courtroom? Comparative Analysis of People's Willingness to Serve as Jurors in Japan and the U.S.*, 38 INT'L J.L. CRIME & JUST. 198 (2010).

11. Rudy Monteleone, *Jurors as the Courts' Ambassadors to the Community*, Paper Presented at the Confidence in the Courts Conference Hosted by the National Judicial College of Australia, the ANU College of Law, and the National Institute of Social

Sciences and Law (Feb. 9-11, 2007), available at <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Confidence%20courts/papers/Monteleone.pdf>.

12. MICHAEL CHESTERMAN, JANET CHAN, & SHELLEY HAMPTON, *MANAGING PREJUDICIAL PUBLICITY: AN EMPIRICAL STUDY OF CRIMINAL JURY TRIALS IN NEW SOUTH WALES* (2001).

13. Sara C. Benesh & Susan E. Howell, *Confidence in the Courts: A Comparison of Users and Non-Users*, 19 BEHAV. SCI. & L. 199 (2001).

14. MALCOLM KNOX, *SECRETS OF THE JURY ROOM: INSIDE THE BLACK BOX OF CRIMINAL JUSTICE IN AUSTRALIA* (2005).

15. James R. P. Ogloff & V. Gordon Rose, *The Comprehension of Judicial Instructions*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 407 (Neil Brewer & Kipling D. Williams eds., 2005).

16. Theodore B. Feldmann & Roger A. Bell, *Juror Stress: Identification and Intervention*, 21 BULL. AM. ACAD. PSYCHIATRY & L. 409 (1993).

**[A] pair of studies have examined how jury service is linked to voting in the U.S.**

counseling was not concerning enough, some mock-trial research highlights a link between gruesome evidence and conviction-prone juries, even when exculpatory evidence is held constant across gruesome-versus-non-gruesome evidence conditions in mock trials.<sup>17</sup>

**EVIDENCE FROM JAPAN**

There is not yet direct evidence of jury service having positive attitudinal effects on individual jurors' views of courts and other public institutions,<sup>18</sup> but there is indirect evidence to that effect. As mentioned above, the socio-political climate surrounding the reintroduction of a criminal jury to Japan has been rich with opinion polls, mock trials, and concerns over the impact of the jury system on jurors. Preliminary mock-trial research in Japan suggests that willingness to be involved in the Japanese jury system may increase *after* jury service, begging the question of whether this, in turn, may have wider-ranging attitudinal effects and social-belief changes of the type anticipated by the architects of the new Japanese jury.<sup>19</sup>

Other research conducted in Japan has also produced evidence of how lay participation in the justice system can increase public faith and confidence in the entire legal system. Japan's Prosecutorial Review Commission (PRC) system is similar to that of America's civil grand jury in that it examines the functioning of local public offices, including the district attorney's office. A PRC is comprised of eleven citizens randomly selected from an electoral register, is appointed to a six-month term, and has the power to review whether or not the disposition of non-prosecution made by public prosecutors is appropriate.<sup>20</sup>

From September to December 2005, eleven prefectural offices of the Japanese Prosecutorial Review Commission Society were contacted, and their members were asked to fill out additional questionnaires (23% of 47 PRC prefectural offices in Japan). The study found that PRC members were more willing to serve on quasi-juries, were less concerned

about obstacles to serving on juries, and had more confidence in the system of popular legal participation. Further, the civic legal experience helped lay citizens develop greater confidence in their capacity to make a fair and just decision, and they were less concerned about a threat of possible retaliation from defendants in criminal trials. Almost all of the PRC members indicated that their PRC experience was positive (99%), and the great majority of them indicated that they were willing to serve again (94%).<sup>21</sup> PRC members showed a high level of confidence in the system of government and justice administration, including criminal justice managers such as judges, prosecutors, defense attorneys, police, and jurors. However, the study also found that the importance of quasi-jury duty has not been widely advocated, and the system of civilian legal participation, including the PRC, still remained relatively unknown in Japanese communities.<sup>22</sup>

**EVIDENCE FROM THE U.S.**

In addition, a pair of studies have examined how jury service is linked to voting in the U.S. The initial study looked at a single locale—Thurston County, Washington.<sup>23</sup> Working with many research colleagues, the first author of this essay collected court and voting records for a period of years and merged them by matching jurors' full names with unique records in the voter database. This study found, after controlling for other trial features and past voting frequency, that citizens who served on a criminal jury that reached a verdict were more likely to vote in subsequent elections than were those jurors who deadlocked, were dismissed during trial, or served as alternates. The effect was augmented by the number of charges against the defendant, with trials including more charges yielding greater increases in jurors' voting rates.

An extensive follow-up of jurors from jurisdictions across the United States yielded two related findings.<sup>24</sup> First, in-depth interviews with a small sample of jurors revealed that citizens typically recognize jury service as a basic civic duty, and two-thirds, without further prompting, compared it to voting. In other words, jurors drew a cognitive connection between jury service and voting. Second, another dataset gathered from Colorado, Louisiana, Nebraska, North Carolina, Ohio, and

17. David A. Bright & Jane Goodman-Delahunty, *The Influence of Gruesome Verbal Evidence on Mock Juror Verdicts*, 11 PSYCHIATRY PSYCHOL. & L. 154 (2004). See also Saul M. Kassin & David A. Garfield, *Blood and Guts: General and Trial-Specific Effects of Videotaped Crime Scenes on Mock Jurors*, 21 J. APPLIED SOC. PSYCHOL. 1459 (1991).

18. The major exception is the book related to the research in this article. See JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER, & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010).

19. Masahiro Fujita, *Can Japanese Citizens Play Active Roles in "Saiban-in Seido"?* Survey Research with Mock Mixed Juries, Poster Presented at the Psychology and Law International, Interdisciplinary Conference (July 7-12, 2003); Anderson & Nolan, *supra* note 5; Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHI.-KENT L. REV. 789 (2011).

20. The law for the Prosecutorial Review Commission was originally created in 1948 during the Allied Occupation of Japan that followed World War II. Because of the Allied influence, the PRC became a hybrid institution resulting from the adaptation of the American civil and criminal grand-jury systems into the Japanese cultural and legal context. After group deliberations on each case, the commission submits one of the following three recommendations: (1) non-indictment is proper, (2) non-indictment is improper, and (3) indictment is proper. A majority vote is needed for the first two options, while the special majority with at least eight votes is needed for the third option. See Hiroshi Fukurai, *Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution*, 6 E. ASIA L. REV. 1 (2011).

21. Fukurai, *supra* note 7, at 336, table 1.

22. *Id.* at 342.

23. GASTIL ET AL., *supra* note 18, at 32-39.

24. *Id.* at 39-49.

Washington<sup>25</sup> found the similar pattern of increasing voting rates, except that this larger dataset revealed that the critical distinction was between those who deliberated (*including* hung juries) and those who did not. Once again, the number of criminal charges against the defendant had an additional, significant effect on post-service voting rates. This analysis also found that the increased voting effects were apparent only for previously infrequent voters (voting less than 50% of the time) who served on criminal trials. Frequent voters and all of those who served on civil juries did not have a significant increase in voting after deliberative experience in jury trials.

## HYPOTHESES AND RESEARCH DESIGN

Based on findings such as these, we came to believe it likely that popular legal participation can significantly alter individual jurors' perceptions of the jury system, as well as of other courts and judges and even other branches of government. We tested these hypotheses by interviewing jurors before and several months after serving on fully empanelled juries to see if their attitudes and opinions changed. By way of comparison, we also collected data on people who reported for jury service but never sat on a jury, as well as a control group of voters drawn from the same jurisdiction who were not summoned to jury service.

Though we will spare the reader the statistical details, if one wishes to know the analytic technique, we used a regression analysis to test the hypothesis that serving on a jury (versus reporting for service but not being seated on a jury) predicted post-service attitudes even after taking into account a wide range of "statistical controls," including demographics and background variables, along with the corresponding pre-jury-service attitudes. We also expected no statistically significant difference between our un-summoned control group of registered voters and those who reported for jury service but never sat in the jury box. Finally, we predicted that the effect of jury service, including jurors' deliberative experience, is strongest the first time one serves on a jury; thus, after conducting our main analyses, we split the sample to test whether the effects of jury service are consistent for both first-time and veteran jurors.

## DATA-COLLECTION METHOD

This study focused on three different samples, each from King County, Washington: people summoned to jury service who did not sit on a jury, a.k.a. "non-jurors" ( $N = 1,579$ ), empanelled jurors ( $N = 1,088$ ), and voters never called to jury duty ( $N = 205$ ).<sup>26</sup> All jurors reported for jury service at the

King County Courthouse, the Kent Regional Justice Center, and the Seattle Municipal Court. Seventy-nine percent of these jurors served on criminal trials, ranging from murder to misdemeanors, with the remainder sitting in an equally diverse set of civil trials.

The surveys used in this study were conducted at two points in time. The Wave 1 juror survey was administered via pen-and-paper surveys during the initial jury-orientation period (February to July 2004), before the jurors were called to a courtroom for jury service. This Wave 1 juror survey yielded a response rate of 78% (with a cooperation rate of approximately 81%, as 4% of those reporting to service were sent to courtrooms before research staff could administer the survey). All empanelled jurors (and a subsample of those reporting but never empanelled) were then re-contacted online and by mail to complete Wave 2 from November to December 2004 (response rate = 73%).

The voter group followed a parallel schedule for the two data-collection periods but was assembled in a different manner. A random sample of registered voters was extracted from a January 2004 copy of the King County voter database, and these individuals received their surveys by mail. The response rate for Wave 1 was 20% ( $N = 270$ ), with 79% of the Wave 1 respondents also completing the Wave 2 survey ( $N = 205$ ). To augment the Wave 2 control group, a replacement sample was also drawn from the same voter database, and it had a response rate of 20% ( $N = 134$ ).

The Wave 1 survey included six items measuring attitudes toward the jury, judges, and other public institutions.<sup>27</sup> Additional items measured previous experience with jury service and a broad range of control variables (sex, age, education, employment, political knowledge, etc.). The Wave 2 survey repeated the attitude items and also measured partisanship, a variable the King County judges were reluctant to measure immediately prior to jury service. The Wave 1 and Wave 2 measures were spaced a minimum of four months apart to ensure that we captured *long-term* attitude changes, as opposed to those that might fade a few days or weeks after jury service.<sup>28</sup>

**We tested these hypotheses by interviewing jurors before and several months after serving on . . . juries to see if their attitudes and opinions changed.**

25. *Id.*

26. These comparisons were made using dummy codings that treated the unused jurors as the "reference group." The choice of reference group is somewhat arbitrary, but the reasoning for this arrangement was to highlight the contrast between jurors and non-jurors, with a secondary test of whether the non-jurors were different from the control group. See JACOB COHEN ET AL., APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES 312-17 (3d ed. 2003).

27. Confidence ratings were given using a five-point scale from "very low" to "very high." Respondents rated the following institutions: "U.S. Congress," "U.S. Supreme Court," "State and local judges,"

and "the jury system." In addition, respondents used a four-point scale (1 = Strongly disagree; 2 = Disagree; 3 = Agree; 4 = Strongly agree) to state their views on these two items: "The criminal jury system is the fairest way to determine the guilt or innocence of a person accused of a crime," and, "The civil jury system is a good way to settle many civil lawsuits."

28. Also, because jurors were recruited for this study over a period of five months, there was considerable variance in lag time between Wave 1 and Wave 2 surveys across participants (average lag time was 221 days ( $SD = 47$ )). This permitted testing for a potential lag effect—with attitude changes either weakening or strengthening over time. For this purpose, the same regression equations shown

**[F]irst-time jurors ended up with increases in the perceived fairness of the criminal jury and heightened confidence in state and local judges . . . .**

**RESULTS AND DISCUSSION**

Once again, for the sake of simplicity, we present the main results of our analyses without burying our findings in the details of our statistical regression analyses.<sup>29</sup> To clear away some underbrush, let us note that across all our analyses, the non-juror-versus-voter contrast never reached significance. In other words, there was no evidence that reporting for jury service without sitting on a jury changed anyone’s attitudes

beyond the same shifts that occurred in the general voting population during the same period.

By contrast, there were important and statistically significant differences in attitude changes between jurors and non-jurors for three of the six attitude measures. Relative to non-jurors, jurors became more confident in the jury system, perceived greater criminal-jury fairness, and developed more confidence in state and local judges.<sup>30</sup> They did not, however, differ from non-jurors in their ratings of the quality of the civil jury nor in their confidence in the U.S. Supreme Court or U.S. Congress.

Though the correlations of statistical controls with the attitude measures were not the central focus of this study, it is worthwhile to note one particular set of findings. The same three attitude measures on which jury service failed to yield changes were the only ones on which the Conservative ideological measure had a significant independent effect. Relative to their more liberal/Democratic peers, Conservative/Republican respondents lost some confidence in the quality of civil juries but gained confidence in the U.S. Supreme Court and U.S. Congress.<sup>31</sup> To observers of American politics, these findings are no surprise, as this study coincided with the 2004 election year, in which the conservative Republican Party sought to keep control of Congress and the Presidency, as well as to solidify its influence over the U.S. Supreme Court. At the same time, Republicans continued an ongoing campaign to plead for “tort reform,” claiming that civil lawyers and juries alike were unfriendly to business.<sup>32</sup>

Finally, we investigated the possibility that the main atti-

tude changes demonstrated in the contrast between empanelled jurors and voters might have occurred primarily for those people serving on a jury for the first time. To test this hypothesis, we split the juror sample into two halves—one group having sat on one or more juries in the past (a.k.a. “veterans”) and the other being assigned to a jury for the first time during their present appearance at the courthouse. The same six regression equations were then run for each of the two samples.

Using this approach, we found that the change in overall confidence in the jury system was roughly equivalent for first-time jurors.<sup>33</sup> On the other hand, first-time jurors ended up with increases in the perceived fairness of the criminal jury and heightened confidence in state and local judges, whereas the corresponding attitudes did not show statistical change for the veteran jurors.<sup>34</sup> In sum, the results supported the hypothesis by showing that first-time jurors experience greater attitude change as a result of their service relative to veteran jurors. Table 1 summarizes these and the other main findings of our study.

It is worth adding a note about the size of the effects

**TABLE 1: SUMMARY OF MAIN FINDINGS FROM STATISTICAL ANALYSES**

	OVERALL JURY-BOX EFFECT VERSUS REGISTERED VOTERS	IMPACT ON THOSE WITH NO PRIOR JURY EXPERIENCE	IMPACT ON THOSE WHO HAD RENDERED VERDICTS BEFORE
OVERALL CONFIDENCE IN JURY SYSTEM	+	+	+
PERCEIVED FAIRNESS OF CRIMINAL JURY	+	+	0
PERCEIVED QUALITY OF CIVIL JURY	0	0	0
CONFIDENCE IN STATE/LOCAL JUDGES	+	+	0
CONFIDENCE IN U.S. SUPREME COURT	0	0	0
CONFIDENCE IN U.S. CONGRESS	0	0	0
MINIMUM SAMPLE SIZE (N)	2,665	1,783	882

below were also run with this lag measure entered as a main effect and an interactive term with jury service, but neither produced significant coefficients. In other words, the results shown below were consistent regardless of the number of months that elapsed between the completion of one’s jury service and the follow-up survey.

29. When assessing longitudinal attitude change with panel data, one approach is to treat the Wave 2 measure as the dependent variable and use the Wave 1 measure as a control. STEVEN E. FINKEL, CAUSAL ANALYSIS WITH PANEL DATA (1995). Using this approach, a comparable regression equation was calculated for each of the five Wave 1-2 attitude measures, with each equation estimating the effect of jury service on a Wave 2 attitude after controlling for the Wave 1

attitude, plus the full set of control variables in the dataset.

30. Semi-partial correlations for these effects were  $sr = .083$  ( $p < .01$ ),  $.036$  ( $p < .05$ ), and  $.055$  ( $p < .01$ ), respectively.

31. Semi-partial correlations were  $sr = -.052$ ,  $.044$ , and  $.166$ , respectively (all  $p < .01$ ).

32. Peter H. Stone, *Trial Lawyers on Trial*, 35 NAT’L J. 2250 (2003). For a contrary view of the evidence, see VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000).

33. Semi-partial correlations were  $sr = .86$  for first-time jurors and  $sr = .72$  for veterans (both  $p < .01$ ).

34. For first-time jurors,  $sr = .44$  ( $p < .05$ ) for perceived fairness of criminal jury and  $sr = .75$  ( $p < .01$ ) for confidence in state and local judges.

observed. All of the effects reported herein are “small” ones,<sup>35</sup> and one might ask whether these attitudinal changes, though detectable, may ever lead to widespread societal impact. First of all, as a matter of principle, it is important to remember that small statistical effect sizes can be illusory in that they may still reflect considerable cognitive and behavioral change. This case may meet Prentice and Miller’s criteria for a small effect being impressive,<sup>36</sup> since the relatively brief experience of jury service on a single case still managed to create long-term change in relatively stable attitudes about all juries and judges. In technical terms, a small manipulation of the independent variable caused substantial change in a difficult-to-influence dependent variable.

Second, it appears that a few days of jury service can produce attitude changes *comparable in effect size to those yielded by a full-throttle national presidential campaign*.<sup>37</sup> The results of this study suggest that the jury experience may be unable to generate such changes when the attitude-object is also the focus of intense partisan debate, but the fact remains that jury service’s effect on overall confidence in the jury, trust in criminal juries, and confidence in state and local judges was comparable to the observed effects of conservative partisanship or ideology on attitudes toward the civil jury and the U.S. Supreme Court during the same time period.

## CONCLUSION

This study found evidence of persistent, long-term (greater than four months) attitude change flowing from juror service, particularly for those people serving for the first time. Many of the empanelled jurors in our sample became more confident in the jury system, perceived the criminal jury to be fairer, and indicated a greater confidence in state and local court judges than they did before serving, and those changes contrasted with the experience of those who had not served on juries as well as those registered voters who had not even been called to serve.

Given the significant impact of civic legal participation on the development of civic confidence in the criminal justice system, many countries in the world are currently trying to create or have recently reinstated their own system of lay participation in law. Bodies ranging from mixed tribunals to all-citizen juries have been implemented or debated in Japan, South Korea, Taiwan, Thailand, and the People’s Republic of China in East Asia; Kyrgyzstan, Kazakhstan, Georgia, Ukraine, and Latvia in the former Soviet Union; and Venezuela and Argentina in South America, among many others.<sup>38</sup>

Similarly, in Japan a new quasi-jury system has been created specifically relying on a rationale confirmed by the results seen

in this project. The quasi-jury system, or *saiban-in seido*, was enacted in 2004 and began quasi-jury trials in 2009. The system is a hybrid, jury-mixed court where a judicial panel of three professional and six lay judges decide both guilt and sentence in serious criminal cases. Japan’s expectation was made expressly in the legislation, which provided the legislative rationale for the new quasi-jury system, stating, “In light of the fact that having lay assessors selected from among the people participating along with judges in the criminal litigation process will contribute to raising the public’s trust in and increasing their understanding of the judicial system, it is necessary to . . . achieve lay assessors’ participation in criminal trials.”<sup>39</sup> The results obtained in this study suggest that Japan’s quasi-jury system may reap some of the very rewards its proponents imagined.

Lest this sound too optimistic, we acknowledge that there is also a history of juries being abused by those in political power, and those proposing the introduction of the jury abroad should be aware of that danger. In the first half of the 20th century, for example, the judicial system of civic participation had been converted into a weapon of oppression by totalitarian political regimes, such as the Bolsheviks’ mixed courts with Communist Party assessors, the Nazi *Volksgerichten* with Nazi Party assessors, and the Popular Tribunals during the Spanish Civil War.<sup>40</sup>

The modern U.S. jury has overcome or mitigated many of its shortcomings, but to maintain its independence from political abuse and corruption, the institution of the jury must base its foundation on egalitarian and representative principles of democracy. Our analysis suggests that politically partisan beliefs exerted significant influence in shaping opinions and attitudes toward jury duty and participation. One of the most important rationales for the institution of lay participation in governance is that it provides an important check on political and judicial power, particularly in societies with clear ideological divisions in which judges often belong to the dominant political group. Hopefully, the establishment of new systems of civic legal participation in many nations can ensure energetic participation from their diverse populations, thereby preserving the democratic character and principles of their larger political systems.

**[I]t appears that a few days of jury service can produce attitude changes comparable . . . to those yielded by a full-throttle national presidential campaign.**

35. Effect-size terminology conventions come from JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* (2d ed. 1988).

36. Deborah A. Prentice & Dale T. Miller, *When Small Effects Are Impressive*, 112 *PSYCHOL. BULL.* 160 (1992).

37. The comparison here is with the 2003-2004 presidential campaign designed to dampen public support for the civil jury, as discussed in note 32.

38. See Hiroshi Fukurai, Kay-Wah Chan, & Setsuo Miyazawa, *Introduction to the Special Issue: The Future of Lay Adjudication and Theorizing Today’s Resurgence of Civic, Legal Participatory Systems*

*in East and Central Asia*, 38 *INT’L J.L. CRIME & JUST.* 141, 143-45 (2010).

39. Kent Anderson & Emma Saint, *Japan’s Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 *ASIAN-PAC. L. & POL’Y J.* 233, 283 (2005) (emphasis added).

40. The use of all-white juries from the pre-Civil War to the anti-war and civil-rights movements in the late 1960s provides another example of the social control of the lay participatory system in making legal decisions. See HIROSHI FUKURAI & RICHARD KROOTH, *RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION.*



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# Judges and Wrongful Convictions

Brandon L. Garrett

“[T]he evidence will show, not that she’s a liar, but that she’s mistaken, that her identification is wrong and it’s a misidentification,” McKinley Cromedy’s defense lawyer told the jury in the opening statement.<sup>1</sup>

The victim, a white college student, had been raped by a black man in her apartment. A few days later, she had helped a police artist draw a composite sketch of a black man with a full face and a moustache. She looked at thousands of photos of black men who had been arrested. One of those photos was of Cromedy. In fact, the police had him in mind as a suspect because he had been seen in the area, but she did not identify him.

Almost eight months later, she saw Cromedy crossing the street. She thought he was her attacker, partly because of his appearance but also because of his unusual way of walking due to a limp, “a swagger,” as she put it. She called the police, who called her back fifteen minutes later to say that they had picked up a man matching her description. She then went to the police station, where police asked her to identify Cromedy, standing in a room behind one-way glass. She positively identified Cromedy as her attacker.

The police officer explained, “I’ve had a lot of experience with identifications and I’m not going to lead somebody. I asked her to see if she recognized this person.” Yet there was no justification for conducting an inherently suggestive showup in which she viewed Cromedy one-on-one, rather than conduct a lineup.

Cromedy’s lawyer argued that the identification was improper, saying that the showup was “like true or false, and to me that is about as suggestive as a procedure you can have. . . . She knows somebody was picked up. What could be more suggestive?”

The trial judge ruled that the identification was admissible, emphasizing, “she was very certain of her identification,” and noting that her composite drawing looked like Cromedy and that “Mr. Cromedy has a very, very unique style of walking. It’s a combination of a swagger and a roll.”

At trial, the victim pointed to Cromedy in the courtroom and agreed she was “absolutely sure” he was her attacker.

Cromedy’s defense lawyer then asked for a special jury instruction, asking the jury to consider “whether the cross-racial nature of the identification has affected the accuracy of the witness’s original perception and/or accuracy of a subsequent identification.” The trial judge denied the request.

Cromedy was convicted. On appeal, though, the New Jersey

Supreme Court reversed his conviction. The court ruled in 1999 that “forty years” of empirical studies documented a risk of heightened error when white eyewitnesses try to identify black subjects. The court noted that some courts, such as in California, Massachusetts, and Utah, had permitted such instructions. The court ruled that under the facts of his case, it was “reversible error not to have given an instruction that informed the jury about the possible significance of the cross-racial identification factor, a factor the jury can observe in many cases with its own eyes.”<sup>2</sup>

The court reversed McKinley Cromedy’s conviction without knowing that he was in fact innocent. After the ruling, however, the prosecution agreed to conduct DNA tests. The results excluded him and he was exonerated. The victim later commented, “I couldn’t believe that I was wrong.”

## CONVICING THE INNOCENT

In my book, *Convicting the Innocent*, published in 2011 by Harvard University Press, I examined the cases of the first 250 people exonerated by postconviction DNA testing. With some difficulty, by contacting lawyers, court clerks, and court reporters around the country, I assembled the original trial records from their cases. I was able to obtain 88% of their trial transcripts (207 trial transcripts from the 234 that had a trial), as well as materials from hearings for 11 of the 16 who had pleaded guilty.<sup>3</sup> I wanted to know what went wrong. Why were these people convicted?

When I examined the records, I learned that cases like Cromedy’s were not idiosyncratic. In fact, cases like his were quite typical. Most DNA exonerees had eyewitness evidence at their trials, since so many of the cases involving DNA post-conviction were rape cases. Thus, 76% had eyewitnesses misidentify them (190 of 250 exonerees). More to the point, eyewitnesses typically described how police used suggestive procedures, like the showup used in Cromedy’s case. All but a handful of the eyewitnesses were certain at the time of trial. An eyewitness in Steven Avery’s case testified, “[T]here is absolutely no question in my mind.” In Thomas Doswell’s case, the victim testified, “This is the man or it is his twin brother” and “That is one face I will never forget . . . .” In Dean Cage’s case, the victim was “a hundred percent sure.” In Willie Otis “Pete” Williams’s case, the victim said she was “one hundred and twenty” percent sure.

Cromedy was one of 74 black or Hispanic exonerees misidentified by a white eyewitness, and almost half of the

## Footnotes

1. Trial transcript cites are from: Trial Transcript, 182, State of New Jersey v. McKinley Cromedy, Ind. No. 1243-07-93 (N.J. Super. Ct. July 27, 1994) (on file with the author). A discussion of this case and a more detailed discussion of eyewitness misidentifications and postconviction rulings in the first 250 DNA-exoneration cases

appears in my book. See BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011).

2. State v. Cromedy, 727 A.2d 457 (N.J. 1999).

3. I have made the data from these 250 exoneree cases and appendices to the book available online at a resource webpage: [http://www.law.virginia.edu/html/librarysite/garrett\\_innocent.htm](http://www.law.virginia.edu/html/librarysite/garrett_innocent.htm).

identifications were cross-racial. As the New Jersey Supreme Court noted, studies have long shown how cross-racial identifications are especially error-prone.

Decades of social science can tell us much more about what went wrong in Cromedy's case. Not only was he convicted based on a cross-racial identification, but as discussed, police used a suggestive showup identification. The eyewitness had earlier seen Cromedy's picture but had been unable to identify him. Yet her confidence had increased by the time of trial, when she was absolutely sure, though she was wrong. I saw exactly the same pattern in other cases of people later cleared by DNA tests. Just as social scientists would have predicted based on upwards of 2,000 studies, as well as meta-analyses and field studies, suggestive lineup procedures can cement eyewitness mistakes. Almost without exception, the eyewitnesses who misidentified innocent people were completely confident at trial, though they were wrong. Most had earlier been uncertain, when first shown the defendant's photo at an array, or seeing the defendant at a lineup. In 57% of the trials studied (92 of 161 cases), witnesses reported they had not been certain at the earlier identifications, or identified other people.

Where did that false confidence come from? In 78% of those trials (125 of the 161 cases involving eyewitnesses in which trial records could be located), there was evidence that police contaminated the identifications. Many of those eyewitnesses were asked to pick out the suspect using suggestive methods long known to increase risks of error. Police made remarks that indicated who should be selected, used unnecessary showups, or used lineups that made the defendant stand out.

## NEW JERSEY'S RESPONSE

In response to such exonerations, New Jersey began a project of revamping its criminal-procedure rules. The New Jersey Attorney General's Office issued guidelines to all law-enforcement agencies in the state requiring that detailed procedures be followed when eyewitnesses are asked to identify a suspect.<sup>4</sup> These guidelines were a landmark reform. New Jersey became the first state in the country to adopt double-blind lineups. That simple reform, having an officer administer the lineup who does not know which one is the suspect, is the most important improvement to lineups. Feedback from police, even unintentional can dramatically increase the confidence of an eyewitness, even when the eyewitness is wrong.<sup>5</sup> It is easy to adopt, and smaller departments that cannot spare another administrator can easily make a lineup blind by using the "folder method": simply placing the photos in folders and shuffling them, with a few blanks, so that the administrator

cannot see inside the folders that the witness is examining.

New Jersey adopted a second key reform: sequential photo arrays, showing photos one at a time to prevent "comparison shopping." More recent field studies have shown how sequential lineups reduce false identifications of "fillers" in lineups, making them an important improvement for police, whose witnesses lose credibility if they identify fillers.<sup>6</sup>

Eyewitnesses were to be instructed that the perpetrator might not appear in the lineup, along with other improvements.

The New Jersey Supreme Court did more. In 2006, the court required that police similarly record or document all eyewitness identifications. The court noted, "Misidentification is widely recognized as the single greatest cause of wrongful convictions in this country."<sup>7</sup> In 2007, the court addressed jury instructions. The court adopted a Model Jury Instruction charging all jurors not to rely on "the confidence level" of an eyewitness, at least not "standing alone."<sup>8</sup>

Finally, the court asked that a special master explore something more fundamental: the U.S. Supreme Court's *Manson v. Brathwaite* test<sup>9</sup> for evaluating admissibility of eyewitness identifications. The master held hearings, with the participation of the New Jersey Office of the Public Defender, Attorney General, Association of Criminal Defense Lawyers, and the Innocence Project. He recommended that the court adopt a new test for evaluating eyewitness identification evidence and require pre-trial hearings to evaluate all eyewitness identifications.<sup>10</sup>

In the landmark decision of *New Jersey v. Henderson*,<sup>11</sup> the New Jersey Supreme Court adopted a comprehensive social-science framework for evaluating eyewitness-identification evidence. Detailed jury instructions are now required to educate jurors on the factors that affect an eyewitnesses' memory. While the U.S. Supreme Court in *Perry v. New Hampshire* declined to further regulate eyewitness identifications, albeit in a case with marginal facts involving an identification not "arranged" by police, reform is now occurring in the states.<sup>12</sup> Most recently, the Oregon Supreme Court in *Oregon v. Lawson*<sup>13</sup> abandoned the *Manson* test and recommended careful examination of factors informed by social science. As I describe in my book, *Convicting the Innocent*, other states have enacted statutes to improve lineup procedures or have adopted detailed model policies for police departments to follow.

**[T]he New Jersey Supreme Court adopted a comprehensive social-science framework for evaluating eyewitness-identification evidence.**

4. Office of the Attorney General, N.J. Department of Law and Public Safety, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001).  
5. See, e.g. Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 360 (1998).  
6. See generally GARY L. WELLS, MANCY K. STEBLAY & JENNIFER E. DYSART, A TEST OF THE SIMULTANEOUS VS. SEQUENTIAL LINEUP METHODS (2011) (American Judicature Society), available at

[www.ajs.org/wc/pdfs/EWID\\_PrintFriendly.pdf](http://www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf).

7. State v. Delgado, 902 A.2d 888, 896-97 (N.J. 2006).

8. State v. Romero, 922 A.2d 693, 703 (N.J. 2007).

9. 432 U.S. 98, 114 (1977).

10. Report of the Special Master, State of New Jersey v. Henderson, No. A-8 (2010).

11. 27 A.3d 872 (N.J. 2011).

12. 132 S. Ct. 716 (2012).

13. \_\_\_ P.3d \_\_\_, 2012 WL 5955056 (Ore. 2012).

**One of the central questions . . . was this: Why was it so hard for innocent people to challenge their flawed convictions?**

New Jersey now provides a leading model for the country, beginning with improving the lineups themselves, but extending to how judges can ensure that more accurate identification evidence is presented in their courtrooms—and it all began with the terrible lesson learned from the case of McKinley Cromedy.

#### **HARMLESS ERROR**

One of the central questions that I posed when examining the cases of these innocent people was this: Why was it so hard for innocent people to challenge their flawed convictions? I did not just study trials, but also all of the claims that exonerees asserted postconviction before they obtained the DNA tests that ultimately led to the vacatur of their convictions.

One of the most difficult tasks of a judge is deciding which mistakes matter and which do not. Legendary California Supreme Court Chief Judge Roger Traynor poetically described the plight of the appellate or postconviction judge confronted by thousands and thousands of claims of trial errors:

Errors are the insects in the world of law, traveling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness.<sup>14</sup>

The cases brought by DNA exonerees, who we now know to have been innocent, provided me with a unique opportunity to examine how judges sort out harmful errors from the harmless. When I reviewed the records in these unusual cases of DNA exonerees, I asked myself why the judges hearing these cases on appeal or habeas review did not correct these errors, long before DNA testing entered the picture.

Of course, asking that the question assumes that these people could somehow show a judge that they were innocent even without getting DNA testing. But at a more fundamental level, the question assumes that after a conviction, higher courts will review the trial record and look for mistakes, to make sure that a miscarriage of justice did not occur. That second assumption is not a very good one. Judge Jerome Frank and Barbara Frank, in their 1957 book about wrongful convictions, called the notion that the court on appeal will correct the mistaken conviction of the innocent the “Upper Court Myth.” They pointed out that the appellate court “knows no more than the jury and the trial judge” and has a limited role. It is “obliged to accept the jury’s verdict” and must typically accept the testimony of the witnesses as true rather than reconsider the case based on a cold record.<sup>15</sup>

In the decades after they wrote, a criminal-procedure revo-

lution has changed the face of appellate and postconviction litigation, creating a host of new avenues to challenge a conviction, but still, very few cases are ever reversed on appeal and postconviction review—no more than 1% or 2%. While Judge Henry Friendly famously and provocatively asked in a 1970 law review article why innocence is not more relevant to habeas review, innocence remains salient mostly when denying relief by finding error harmless;<sup>16</sup> the U.S. Supreme Court has yet to recognize, except hypothetically, a claim of actual innocence.

The exonerees, who in hindsight we know are actually innocent, did earn high numbers of reversals—a 13% reversal rate—in criminal appeals and postconviction proceedings they brought before they obtained the DNA testing that exonerated them. I then discovered that this 13% reversal rate was not unusual. When I compared them to a matched group of defendants with reported decisions involving similar crimes, years, and states, I discovered that the reversal rate in these exonerees’ cases was no different from the reversal rates of other rape and murder trials. The implication is that rape and murder trials may simply produce higher rates of reversible errors. Because courts issued written decisions in about two-thirds of the cases (165 of 250 cases, or 66%), combing through this mass of opinions does not tell us what happened in every case, but it can allow us to make some generalizations about how courts judged innocence.

#### **CHALLENGING TRIAL EVIDENCE**

Cromedy’s case was unusual in that he actually challenged the eyewitness identification in his case, and his case was extremely unusual in that he was able to earn a reversal even before he obtained DNA testing to prove his innocence. Of the 124 exonerees who were convicted on the basis of an eyewitness identification and obtained a judge’s written decision, only 56% challenged the eyewitness identification (70 of 124 cases). Only 7% were successful (5 of 70 cases). Similarly, only 32% of those who had forensic evidence at trial challenged the forensic evidence (36 of 112 cases) and 17% succeeded (6 of 36 cases). Only 36% challenged informant testimony (16 of 45 cases) and 25% succeeded (4 of 16 cases). The largest proportion, 59%, challenged false confessions (13 of 22 cases), but only 8% had any success (just 1 of 13 cases).

I discuss all of these cases in greater detail in my book, and in a law-review article titled *Judging Innocence*.<sup>17</sup> The cases involving forensic evidence are troubling, where invalid forensic analysis and false statistics were apparent just from reading the trial transcripts; still worse, many of the traditional techniques used at the time were invalid and unreliable. Yet judges rarely granted relief, failing to screen unscientific forensic testimony at trial and frequently finding error harmless on appeal or postconviction.

Take the confession cases, for example. One would think that confession evidence would be central at trial and would be a crucial subject for postconviction challenges. However, of the 22 innocent people who were convicted based on false confes-

14. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* ix (1969).

15. JEROME FRANK & BARBARA FRANK, *NOT GUILTY* 33 (1957).

16. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on*

*Criminal Judgments*, 38 U. CHI. L. REV. 142, 159-60 (1970).

17. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76 (2008).

sions and had written decisions in their cases, only seven raised Fifth Amendment claims that their confessions were involuntary, and three more alleged their confessions were obtained in violation of *Miranda*. None of these claims was successful.

The exception among the confession cases—Ronald Williamson’s case—instead involved an ineffective-assistance-of-counsel claim, and failures by his lawyer to challenge the confession, but also a range of failures by his lawyer to challenge other important evidence in the case. Indeed, before trial his lawyer had begged the judge to let him withdraw from the case. “I can’t represent him Judge; I just can’t do it,” his lawyer had insisted. “I’m too damned old for it, Judge. I don’t want anything to do with him, not under any circumstances.”

More representative of the rulings in cases involving false confessions, the Illinois Supreme Court stated that Alejandro Hernandez “did not present an argument which convinces us that he learned the details of the crime contained in his ‘vision’ from law enforcement officers.”<sup>18</sup> A series of other courts similarly emphasized how detailed the confessions were and how overwhelming the evidence of guilt was. Perhaps most remarkable was Nathaniel Hatchett’s case, in which the judge convicted him at a bench trial—despite the fact that DNA tests even at the time excluded him—in the case of a victim raped by a single person. Despite the DNA exclusion, which the judge could not explain, the judge emphasized, “[I]n this case there is an abundance of corroboration for the statements made by Mr. Hatchett to the police after his arrest,” which the judge found “to be of overwhelming importance in determining the outcome of the trial.”<sup>19</sup> His appeal was denied by a court similarly emphasizing how “the prosecution presented overwhelming evidence” and how the detectives had “testified that defendant’s statement included information that only the perpetrator of the crimes would know,” including facts “fully corroborative” of the victim’s account.<sup>20</sup>

Now we know that these false confessions included details that could only have come from law enforcement. All but two of the 40 false confessions that I examined included such details. They were contaminated, but judges did not credit those allegations, failing to believe that police would feed facts to a compliant suspect. Absent any complete recording of the entire interrogations, there was no proof of who said what. Recantations by these innocent people were disbelieved. In response, more and more states and police departments are requiring videotaping of complete interrogations. Whether judges will do more to examine the reliability of confession statements, however, is another question. Judges should insist on a completely recorded and documented interrogation and examine “fit” and whether, although voluntary, the suspect could in fact volunteer corroborated information about the crime. Otherwise, innocent people may be simply fed the facts to make their words fit the crime. Contamination of a confession can happen unintentionally, even, during complex interrogations using psychological techniques. Unless interroga-

tions are recorded and judges carefully screen confessions for reliability, seemingly “overwhelming” evidence may convict the innocent.

### JUDGING GUILT

Of 165 exonerees who had written decisions on appeal or postconviction, harmless error-type rulings were pervasive. In 62% of the cases, judges commented on guilt or found error harmless. In 30% of the cases, judges found error harmless. In 10% of the cases, judges called evidence of guilt “overwhelming.” To be sure, some errors truly are harmless. However, what I describe in these DNA-exoneree cases is a system in which they had little incentive to claim innocence: all who brought innocence claims before obtaining DNA testing lost. They had few incentives to challenge the reliability of the evidence at their trials: despite clear problems with eyewitness procedures used, outright invalid forensics (another subject of my book, which I do not discuss here for lack of space), and the problems described with the confessions, many did not challenge central evidence at trial, and few had any success.

### MISSING EVIDENCE

It has come to light in a host of these exonerees’ cases that evidence that went missing or that was concealed by law enforcement could have supported their claims of innocence at trial. Violations of *Brady v. Maryland* may be far more common than we would like to think: I came across dozens of cases in which exculpatory forensics had been uncovered only after the exoneration, or the fact that eyewitnesses were hypnotized, or deals with informants, and other crucial evidence of innocence.

One high-profile case highlights the importance of ensuring careful preservation and disclosure of evidence. The U.S. Supreme Court did not hear most of these DNA exonerees’ appeals or habeas petitions claims, but it did rule on 38 certiorari petitions filed by these innocent people. It summarily denied each of these petitions without giving reasons, except Larry Youngblood’s. In Youngblood’s case, the Court heard oral arguments and issued a written opinion explaining why it rejected his claim that he should receive a new trial because law enforcement failed to properly preserve biological evidence from the crime scene.<sup>21</sup> Twelve years later, DNA technology had improved enough that the very evidence that had been degraded through law enforcement’s negligence was now testable. The DNA tests exonerated Youngblood and matched another man. The State of Arizona spent more than \$109,000 to keep him behind bars for six and a half years, while the true perpetrator remained free. The DNA test that freed him cost \$32.<sup>22</sup>

**Now we know that these false confessions included details that could only have come from law enforcement.**

18. *People v. Cruz*, 521 N.E.2d 18, 25 (Ill.1988).

19. See discussion in Brandon L. Garrett, *The Substantive of False Confessions*, 62 STAN. L. REV. 1051 (2010).

20. *People v. Hatchett*, No. 211131, 2000 WL 33419396, at \*1 (Mich.

Ct. App. May 19, 2000).

21. *Arizona v. Youngblood*, 488 U.S. 51, 57–59 (1988).

22. Gabrielle Fimbres, *Lab Work a Lot Cheaper Than Lockup*, TUCSON (ARIZ.) CITIZEN, August 23, 2000.

## BETTER JUDGING INNOCENCE

The truth is humbling. These DNA exonerees' cases looked strong at the time. Many of us would have convicted these defendants had we been the jurors. Yet judges are uniquely positioned to prevent evidence from contamination that may make the weak appear strong and allowing fiction to replace truth. Social science research may increasingly help to identify ways to improve the accuracy of evidence at criminal trials.<sup>23</sup> Rulings like those from the New Jersey Supreme Court and the Oregon Supreme Court, and state legislation and efforts at the local level to improve the accuracy of evidence collected early on in criminal investigations, may prevent the tragic miscarriage of justice in our courtrooms.

DNA testing cannot be used in the vast majority of criminal cases. These 250 exonerations (now there have been more than 300 such DNA exonerations) are just the tip of a larger iceberg. However, we do not know which seemingly innocuous routine cases today will be proven false tomorrow. The DNA exonerees' cases provide a set of cautionary tales: we need to more rigorously screen the evidence and adopt more accurate and better-documented investigative procedures. If evidence is contaminated very early in an investigation, it may be impossible to undo the damage at trial or postconviction. Unless judges take on a more active role as gatekeepers to insist on improved practices, however, the same contaminated

confessions, suggestive eyewitness misidentifications, flawed forensics, and false informant testimony will continue to cause wrongful convictions.

Upon vacating convictions, trial judges have often offered the newly exonerated an apology. In James Waller's case, the judge said: "On behalf of any and all public officials at that time, I want to apologize."<sup>24</sup> Nobody can give back to these people the years they lost. But what we can do is work hard to make sure that it does not happen again.



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*Where Criminal Prosecutions Go Wrong, which forms the basis for this article. Professor Garrett attended Columbia Law School, where he was an articles editor of the Columbia Law Review and a Kent Scholar. After graduating from Columbia, he clerked for the Hon. Pierre N. Leval of the United States Court of Appeals for the Second Circuit and worked as an associate at Neufeld, Schneck & Brustin LLP in New York City.*

23. See, e.g. DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 16 (2012) (providing an overview of recommendations to rely on more "accurate and transparent evidence" permitting "the legal actors' trust in the evidence and limit their abil-

ity to distort and hide it" and "narrowing the opportunities for both unjust prosecutions and frivolous defenses").

24. Ralph Blumenthal, *A 12th Dallas Convict Is Exonerated by DNA*, N.Y. TIMES, Jan. 18, 2007, at A14.

# On the Constitutionality of Mandatory Pretrial DNA Tests on Those Arrested or Indicted for a Felony

Sang Jee Park

Development of DNA-testing technology has helped exculpate innocent defendants.<sup>1</sup> Between 1989 and 2003, many of the 74 American prisoners sentenced to death were exonerated thanks to DNA evidence.<sup>2</sup> For instance, in cases where the identity of the perpetrator was the key, DNA evidence can be of “central importance,” especially when it is the only forensic evidence available.<sup>3</sup> However, exculpation of innocent defendants does not provide a satisfactory rationale when the question is whether it is constitutional for governments to require DNA tests on all defendants arrested and charged with a felony.

Currently, some state statutes require DNA tests on all felony arrestees. For example, California’s DNA and Forensic Identification Data Base and Data Bank Act (hereinafter “California DNA Act”) requires that DNA samples be taken from all adults arrested for or charged with any felony offense “immediately following arrest, or during the booking . . . process or as soon as administratively practicable after arrest.”<sup>4</sup> The statute was enacted out of “critical and urgent need . . . for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime.”<sup>5</sup> Once officers collect the DNA sample pursuant to the statute, it is sent to a state laboratory.<sup>6</sup> The laboratory then creates a DNA profile of the arrestee solely for identification purposes.<sup>7</sup> It analyzes thirteen genetic markers known as “junk DNA,” which are non-genetic stretches of the DNA that are not linked to any known genetic traits.<sup>8</sup> After the analysis using “short tandem repeat” technology, it creates a unique profile that law enforcement uses for identification.<sup>9</sup> The laboratory then uploads the DNA profile into the Combined DNA Index System (CODIS), a nationwide collection of federal, state, and local DNA pro-

files.<sup>10</sup> Once an arrestee’s DNA profile is uploaded into CODIS, it is compared with the DNA samples collected from crime scenes.<sup>11</sup> The statute provides some protection against misuse of the information obtained from the tests.<sup>12</sup> For example, only law-enforcement officials may access a DNA profile, and they may not use the DNA for purposes other than to identify criminal suspects.<sup>13</sup> Moreover, state law punishes unauthorized access or disclosure of DNA information by up to a year in prison and a fine of up to \$50,000,<sup>14</sup> and a DNA record may not be permanent and can be expunged under certain circumstances.<sup>15</sup>

There is a federal statute that is largely identical to the California statute. The DNA Fingerprint Act, amended in 2005 and 2006, allows the Attorney General to “collect DNA samples from individuals who are arrested, facing charges” of a federal felony.<sup>16</sup> There are also other state laws that require DNA testing on all defendants arrested for and charged with a felony. For example, the Maryland DNA Collection Act requires the government to collect the DNA samples of people who are charged with felony burglary.<sup>17</sup>

Using California’s DNA Act as the model statute, this article will examine whether it is constitutional to require pretrial DNA testing on all felony arrestees under the Fourth Amendment as well as other parts of the Constitution, specifically the Fifth Amendment privilege against self-incrimination; the Sixth Amendment provision for effective assistance of counsel; substantive and procedural due process; and equal protection. The analysis will apply equally to federal and state courts, because all of these parts of the Constitution apply to states through the Due Process Clause of the Fourteenth Amendment.<sup>18</sup>

## Footnotes

1. *Kansas v. Marsh*, 548 U.S. 163, 207-208 (2006).
2. 548 U.S. at 209 (Souter, J. dissenting) (citing Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson & Nicholas Montgomery, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2006)).
3. See *House v. Bell*, 547 U.S. 518, 540 (2006).
4. CAL. PENAL CODE §§ 296.1 (a)(1)(A), 296(a)(2)(C) (2007).
5. 2004 Cal. Legis. Serv. Proposition 69 § II(b) (West).
6. *Haskell v. Harris*, 669 F3d 1049, 1051-52 (9th Cir. 2012), *rehearing en banc granted*, 686 F3d 1121 (9th Cir. 2012).
7. 669 F3d at 1051-52.
8. *Id.*; see also *U.S. v. Mitchell*, 652 F3d 387, 400 (3d Cir. 2011).

9. *Haskell*, 669 F3d at 1051-52.
10. *Id.*
11. *Id.*
12. *Id.*
13. CAL. PENAL CODE §§ 295.1(a), 299.5(f) (2007).
14. CAL. PENAL CODE § 299.5(i).
15. See CAL. PENAL CODE § 299.
16. 42 U.S.C. § 14135a(a)(1)(A) (2006).
17. MD. CODE REGS. 29.05.01.04(A)(1)-(2) (2012); MD. CODE REGS. 29.14.22.02.02 (2012).
18. See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, *CRIMINAL PROCEDURE* § 2.6 (5th ed. 2009).

## I. FOURTH AMENDMENT

The Fourth Amendment requires that all searches and seizures be reasonable.<sup>19</sup> Mandatory DNA testing constitutes a search under the Fourth Amendment.<sup>20</sup> It is settled law that the DNA-indexing statutes authorize both a physical intrusion to obtain a tissue sample and a chemical analysis to obtain private physiological information about a person and therefore are subject to the Fourth Amendment.<sup>21</sup>

Generally, a valid search under the Fourth Amendment requires a warrant issued upon probable cause.<sup>22</sup> However a warrantless search can be reasonable even without probable cause or any individualized suspicion.<sup>23</sup> In determining whether a warrantless DNA search is reasonable, federal courts have used either the totality-of-the-circumstances test or the special-needs doctrine.<sup>24</sup>

### A. TOTALITY-OF-THE-CIRCUMSTANCES TEST VS. SPECIAL-NEEDS DOCTRINE

Under the totality-of-the-circumstances test, determining whether a search is reasonable involves balancing the degree of intrusion upon an individual's privacy and "the degree to which [the search] is needed for the promotion of legitimate governmental interests."<sup>25</sup> Similarly, the special-needs doctrine involves balancing the individual's privacy expectations against the government's interests.<sup>26</sup> The difference between the two tests is the degree of importance that the governmental interest carries. The totality-of-the-circumstances test does not require as strong an interest as the special-needs doctrine does.<sup>27</sup> Therefore, if requiring DNA testing for all people charged with a felony is to be constitutional under the Fourth Amendment regardless of which test a court uses, it must satisfy the special-needs doctrine.

### B. APPLICATION OF THE TOTALITY-OF-THE-CIRCUMSTANCES TEST

Under the totality-of-the-circumstances analysis, courts are likely to allow governments to mandate DNA tests on all people arrested and charged with a felony. Balancing the intrusion on the arrestee's privacy interests against the government's interest in collecting and testing his DNA, courts have held that conducting pretrial DNA testing on felony

arrestees does not violate the Fourth Amendment.<sup>28</sup>

First, the privacy intrusion involves invasion of bodily integrity and revelation of personal identity.<sup>29</sup> With regard to bodily intrusion, courts are likely to hold that intrusion on bodily integrity is minimal. For example, in *Haskell v. Harris*, the Ninth Circuit held that a buccal swab—a common method for collecting DNA samples—is a "de minimis" invasion because it gently sweeps along an arrestee's inner cheek.<sup>30</sup> Similarly, the Third Circuit held that the act of collecting a DNA sample is "neither a significant nor an unusual intrusion."<sup>31</sup> The court noted that the U.S. Supreme Court has held that blood tests using venipuncture "do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity."<sup>32</sup> It further explained that the FBI's current method of collecting a blood sample involves a finger prick, which is a far less invasive procedure than venipuncture.<sup>33</sup> The court held that this method, as well as the buccal swab, are both "minimal" and are not significant or unusual intrusions.<sup>34</sup>

Regarding the second type of privacy invasion—revelation of identity and other personal information—defendants also face a difficult task. Although arrestees have a greater expectation of privacy than convicted defendants, they are "not entitled to the full panoply of rights and protections possessed by the general public."<sup>35</sup> Such diminished expectations of privacy are justified by the probable-cause finding, which is necessary for a valid arrest.<sup>36</sup> Therefore, arrestees have diminished privacy interests in their identity.<sup>37</sup> Moreover, profiles collected from DNA testing and entered into CODIS reveal only identity and no other significant personal information, such as familial lineage, predisposition to genetic conditions and diseases, or genetic markers for traits such as aggression, sexual orientation, substance addiction, and criminal tendencies.<sup>38</sup> Therefore, it is not likely that arrestee defendants can successfully claim misuse of DNA information in a way that violates their privacy interests.

**Such diminished expectations of privacy are justified by the probable-cause finding, which is necessary for a valid arrest.**

19. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011).

20. *See United States v. Amerson*, 483 F.3d 73, 77 (2d Cir. 2007); *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989).

21. *Amerson*, 483 F.3d at 77; *see Skinner*, 489 U.S. at 616.

22. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989).

23. *Nat'l Treasury Emps. Union*, 489 U.S. at 665; *United States v. Conley*, 453 F.3d 674, 677 (6th Cir. 2006).

24. *Wilson v. Collins*, 517 F.3d 421, 425 (6th Cir. 2008).

25. 517 F.3d at 425 (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)).

26. *Nat'l Treasury Emps. Union*, 489 U.S. at 665-66.

27. *See Wilson*, 517 F.3d at 427-28 ("[T]he governmental interests need not qualify as 'special needs' under the totality-of-the-circumstances test. . .").

28. *Haskell*, 669 F.3d at 1050-51; *U.S. v. Mitchell*, 652 F.3d 387, 389-

416 (3d Cir. 2011); *Haskell v. Brown*, 677 F.Supp.2d 1187, 1193-1201 (N.D. Cal. 2009) (district court opinion in case later styled *Haskell v. Harris*).

29. *Haskell*, 669 F.3d at pincite?; *Mitchell*, 652 F.3d at 406-07.

30. *Haskell*, 669 F.3d at 1050-51.

31. *Mitchell*, 652 F.3d at 406-07 (quoting *United States v. Weikert*, 504 F.3d 1, 12 (1st Cir. 2007)).

32. *Mitchell*, 652 F.3d at 406 (quoting *Winston v. Lee*, 470 U.S. 753, 762 (1985)).

33. *Id.* at 406-07.

34. *Id.* at 407.

35. *Haskell*, 669 F.3d at 1078 (quoting *United States v. Kreisel*, 508 F.3d 941, 947 (2007) (internal citations and quotation marks omitted)); *Haskell*, 677 F.Supp.2d at 1197.

36. *Mitchell*, 652 F.3d at 412.

37. *Id.*

38. *Id.* at 413, 424.

**In sum, cases suggest that governmental interests outweigh the minimal degree of privacy intrusion from DNA testing.**

Compared to this minimal privacy intrusion, courts have held that the government's compelling interests in conducting DNA tests outweigh the privacy invasion.<sup>39</sup> Such compelling interests include promoting increased accuracy in the investigation and prosecution of criminal cases, which involves identifying arrestees; solving past crimes; preventing future crimes; and exonerating the innocent.<sup>40</sup> Particularly, DNA testing is a better and more accurate source of identification than fingerprinting—perpetrators can easily hide their fingerprints by wearing gloves, but they cannot mask their DNA.<sup>41</sup> Moreover, DNA testing will help reduce recidivism because if a felony arrestee knows that his DNA is in the government's database, he is less likely to commit another crime.<sup>42</sup>

In sum, cases suggest that governmental interests outweigh the minimal degree of privacy intrusion from DNA testing. Therefore, mandatory pretrial DNA tests are likely to be upheld under the totality-of-the-circumstances analysis. Nevertheless, further analysis is needed under the special-needs doctrine, which applies stricter standards in reviewing governmental interests.

### C. APPLICATION OF THE SPECIAL-NEEDS DOCTRINE

Under the special-needs doctrine, an otherwise invalid warrantless search under the Fourth Amendment is reasonable if it serves special governmental needs, beyond the normal need for law enforcement.<sup>43</sup> In determining whether there are special government needs, it is necessary to balance the individual's privacy expectations against the government's interests.<sup>44</sup> If balancing the two factors leads to the conclusion that it is impractical to require a warrant or some level of individualized suspicion in the particular context, the warrantless search is considered reasonable.<sup>45</sup>

In *Green v. Berge*,<sup>46</sup> the Seventh Circuit reviewed the spectrum of privacy interests that must be analyzed under the Fourth Amendment. At one end is the privacy interest of an unsuspected person not under any custody, whose interests receive the highest protection.<sup>47</sup> At the other end are the diminished privacy expectations of incarcerated felons.<sup>48</sup> Given this spectrum, the question is: On which side of the spectrum does the privacy interest of a person arrested and

charged with a felony fall? One recent case suggests that privacy expectations of such people are likely to be on the lower side of the spectrum.

In *United States v. Thomas*,<sup>49</sup> the U.S. District Court for the Western District of New York considered a federal statute that authorized the government to subject people charged with federal crimes to DNA tests. The court held that the privacy intrusion was “quite small” due to the defendant's status as an indictee.<sup>50</sup> Regardless of whether a person is under pretrial detention, “when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it.”<sup>51</sup> On the other hand, the government had a compelling interest in rapidly solving crimes by maintaining DNA records of arrestees' identities.<sup>52</sup> Thus, the court upheld the federal statute because the governmental interests outweighed the minimal degree of privacy invasion.<sup>53</sup>

It should be noted that *Thomas* suggests that governmental interests outweigh an indictee's privacy interests, regardless of whether the indictee is in pretrial custody or not. This logic of the court is proper for several reasons. First, because all indictees are treated the same regardless of whether they are in pretrial custody, the results of the analysis do not hinge on unfortunate happenstances. In other words, if the court came to different conclusions based on the assumption that detained indictees and undetained indictees have different privacy interests, results would depend on one's lawyer being competent enough to argue for pretrial release or perhaps on the arbitrariness of the judge at a bond hearing. Second, the logic not only promotes the government's interest of expedited disposition of cases but also furthers the defendant's interest in a speedy trial.

In determining whether a defendant's Sixth Amendment speedy-trial rights are violated, one of the balancing factors is whether the defendant is prejudiced by the delay of trial.<sup>54</sup> A defendant is deemed to be prejudiced by delay if he will suffer oppressive pretrial incarceration with accompanying idleness, loss of a job, and disruption of family life.<sup>55</sup> Moreover, even if the defendant is not under any pretrial custody or if he is released under bail, he will have to suffer anxiety, suspicion, and hostility also recognized in Sixth Amendment analysis.<sup>56</sup> This suggests that courts are concerned with the impact of Sixth Amendment violations on the private life of the defendant.

In a similar vein, the purpose of the Fourth Amendment is to protect the privacy and security of citizens.<sup>57</sup> The Fourth Amendment applies to searches conducted after a person is charged with a crime, just as the Sixth Amendment applies to

39. *Haskell*, 669 F.3d at 1051; *Mitchell*, 652 F.3d at 406-07.

40. *See Haskell*, 669 F.3d at 1062.

41. *Id.* at 1063.

42. *Id.* at 1064.

43. *Nat'l Treasury Emps. Union*, 489 U.S. at 665-66.

44. *Id.* at 665.

45. *Id.* at 665-66.

46. 354 F.3d 675 (7th Cir. 2004).

47. *See Green*, 354 F.3d at 678-79; *Amerson*, 483 F.3d at 80.

48. *See Green*, 354 F.3d at 678.

49. *United States v. Thomas*, 2011 WL 1599641 at \*3 (W.D.N.Y. 2011), *approved*, 2011 WL 1627321 (W.D.N.Y. 2011).

50. *Thomas*, 2011 WL 1599641 at \*9 (quoting *Amerson*, 483 F.3d at 87).

51. *See Thomas*, 2011 WL 1599641 at \*8,\*9 (quoting *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992); *accord Boling v. Romer*, 101 F.3d 1336, 1339-40 (10th Cir. 1996)).

52. *Thomas*, 2011 WL 1599641 at \*9.

53. *Id.* at \*10.

54. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

55. *Id.*

56. *Id.* at 533.

57. *Skinner*, 489 U.S. at 639 (Marshall, J., dissenting).

people charged with a crime. Therefore, Fourth Amendment analysis must not be blind to the concerns embraced under Sixth Amendment analysis. That is, Fourth Amendment analysis should consider factors including the defendant's loss of freedom caused by pretrial custody, or, if the defendant is not under custody, the anxiety, suspicion, and hostility that he suffers.

This framework suggests that courts' decisions upholding mandatory pretrial DNA testing protect defendants from unwarranted intrusions on privacy. By expeditiously finding out the identity of the felon and confirming that the defendant is not the perpetrator, the government can protect the defendant from loss of liberty caused by pretrial incarceration or, if the defendant is not under pretrial custody, can protect the defendant from further suspicion, anxiety, and hostility.

## II. FIFTH AMENDMENT

Under the Fifth Amendment right against self-incrimination, a person must not "be compelled in any criminal case to be a witness against himself."<sup>58</sup> If the prosecution obtains statements from the defendant (either exculpatory or inculpatory) through custodial interrogation initiated by the police without informing him of the procedural safeguards to protect his privilege against self-incrimination, the prosecution may not use such statements against the defendant once the legal proceeding begins.<sup>59</sup> The requirement of DNA testing raises a Fifth Amendment issue because the testing does not involve any prior *Miranda* warnings, such as a person being informed that he has "the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."<sup>60</sup>

### A. CUSTODIAL INTERROGATION

The threshold question would be whether "custodial interrogation" takes place when the government conducts DNA testing. First, a suspect is under "custody" when there is "a formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest."<sup>61</sup> Incarceration of any form satisfies this test.<sup>62</sup> On the other hand, a temporary and relatively nonthreatening detention, such as a traffic stop or *Terry* stop,<sup>63</sup> does not constitute *Miranda* custody.<sup>64</sup> Under the statute mandating DNA tests on all felony arrestees, the DNA test must be done "immediately following arrest, or during the booking."<sup>65</sup> In other words, DNA tests are likely to be done while the defendant is under pretrial custody.

### B. TESTIMONIAL OR COMMUNICATIVE EVIDENCE

Assuming that DNA testing is done when a person is under custody, the next question is whether an interrogation took place. Interrogation encompasses express questioning, as well as any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.<sup>66</sup> DNA testing is not likely to involve express questioning. It would rather involve actions in an attempt to obtain identification information—which may, in effect, be incriminating. In that sense, DNA testing can be regarded as interrogation.

However, regardless of whether there is custodial interrogation, it is important to note that the right against self-incrimination applies only to testimonial or communicative evidence. The U.S. Supreme Court, however, has not provided a clear test as to what constitutes "testimony."<sup>67</sup> Yet, the court has noted that "[i]t is the 'extortion of information from the accused,' the attempt to force him 'to disclose the contents of his own mind,' that implicates the Self-Incrimination Clause."<sup>68</sup> This suggests, first, that the court defines "testimony" as substantive cognition—the product of cognition that results in holding or asserting propositions with truth-value,<sup>69</sup> and second, that the state must cause this cognition for the Fifth Amendment to be implicated.<sup>70</sup> In sum, the government may not compel defendants to reveal incriminating substantive results of cognition caused by the government.<sup>71</sup>

The question then becomes whether the results of DNA testing constitute testimony. The answer is likely to be no, because the tests involve examination of physiological features, and such features cannot be altered by change in the examinee's cognition or perception. Therefore, even if DNA testing is compelled by the government, analysis under the right against self-incrimination is likely to be implausible.

### III. SIXTH AMENDMENT

The Sixth Amendment right to counsel includes the right to effective assistance of counsel.<sup>72</sup> The right to effective assistance of counsel is recognized not for its own sake but because of the effect it has on the ability of the accused to receive a fair trial.<sup>73</sup>

The right to effective assistance of counsel is violated when the accused is not able to receive a fair trial because the chal-

**The question becomes whether the results of DNA testing constitute testimony.**

58. *Schmerber v. California*, 384 U.S. 757, 760 (1966).

59. *Rhode Island v. Innis*, 446 U.S. 291, 297-98 (1980); *Chavez v. Martinez*, 538 U.S. 760, 766 (2003).

60. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

61. *Maryland v. Shatzer*, 130 S.Ct. 1213, 1224 (2010) (quoting *New York v. Quarles*, 467 U.S. 649, 655 (1984)).

62. *Id.* at 1224.

63. *See Terry v. Ohio*, 392 U.S. 1, 11-12 (1968).

64. *Shatzer*, 130 S.Ct. at 1224.

65. CAL. PENAL CODE §§ 296.1 (a)(1)(A), 296(a)(2)(C).

66. *Innis*, 446 U.S. at 300-01.

67. Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. Crim. L. & Criminology 243, 266-67 (2004).

68. Allen & Mace, *supra* note 66, at 266-67.

69. Allen & Mace, *supra* note 66, at 266-67.

70. *Id.* at 268.

71. *Id.* at 267.

72. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

73. *United States v. Cronin*, 466 U.S. 648, 658 (1984).

**This may at first glance suggest that the process of DNA testing falls under the mere preparatory step of gathering evidence.**

lenged conduct has affected the reliability of the trial process.<sup>74</sup> A trial is unfair if the accused is denied counsel at a “critical stage” of his trial.<sup>75</sup> At such a critical stage, the government violates the accused’s right to counsel if it “interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>76</sup>

#### **A. SIXTH AMENDMENT IMPLICATIONS OF THE CURRENT STATUTE**

California’s current DNA statute mandates all felony arrestees to be subject to DNA tests. In other words, even if an arrestee is afforded an attorney, counsel cannot advise the client as to whether he should subject himself to a DNA test. Considering that the results of the DNA test may yield inculpatory evidence, the government essentially prevents the defense counsel from making independent decisions about how to conduct the defense. As a result, a felony arrestee is not afforded effective assistance of counsel during the pretrial phase. Therefore, the important question would be whether the deprivation of the right to effective assistance of counsel takes place at a critical stage of the trial. If so, the government would be violating the defendant’s Sixth Amendment right to counsel.

#### **B. CRITICAL STAGE OF TRIAL**

Critical stages of trial include any stage of the prosecution, formal or informal, in or out of court, where counsel’s absence might detract from the accused’s right to a fair trial.<sup>77</sup> The scope of critical stages reaches pretrial phases because the presence of counsel at critical confrontations, such as at the trial itself, assures that the accused’s interests will be protected in a manner consistent with our adversary theory of criminal prosecution.<sup>78</sup>

Such critical stages are distinguished from a “mere preparatory step” at which no right to counsel is guaranteed.<sup>79</sup> The Constitution does not guarantee the right to assistance of counsel in the prosecution’s preparatory step of gathering evidence.<sup>80</sup> This includes the government’s systematized or scientific analyzing of the accused’s fingerprints, blood sample, clothing, and hair.<sup>81</sup> The rationale is that knowledge of rele-

vant scientific and technological techniques is sufficiently available, and there are few variables in techniques.<sup>82</sup> Therefore, the accused has an opportunity for a meaningful confrontation with the government’s case at trial through cross-examination of the government’s expert witnesses and the presentation of evidence from his own experts.<sup>83</sup>

This may at first glance suggest that the process of DNA testing falls under the mere preparatory step of gathering evidence. However, the Court was careful to note that the rationale behind this distinction is that the accused has the opportunity to meaningfully challenge the government’s case at trial. Therefore, to determine whether the mandated DNA test constitutes a critical stage or a mere preparatory step, the critical question is whether the defendant has an opportunity to meaningfully confront the government’s DNA evidence. The answer to the question is that there is no such opportunity.

For a defendant to have a fair trial, the government’s DNA analysis should be challenged. The results of DNA tests may be biased because DNA experts have intimate connections with the laboratories and financial interests in the DNA tests.<sup>84</sup> Sometimes the experts’ careers hinge on the success of the tests and the admissibility of test results.<sup>85</sup> Almost all crime laboratories are connected to law-enforcement agencies, which raises the risk that laboratories will be subject to police and prosecutor interests in obtaining convictions rather than pursuing objective truth.<sup>86</sup> Nevertheless, there is no opportunity for the defendant to meaningfully challenge the government’s DNA evidence at trial for several reasons.

First, a defense counsel may lack the scientific knowledge required to meaningfully examine the accuracy of the DNA evidence. To clearly explain to the jury what the DNA evidence shows, the defense counsel should know how to present the evidence and identify and refute the prosecutor’s failings.<sup>87</sup> However, defense counsel may not be familiar with specific scientific theories that are at issue in a case and may therefore be unable to provide the detailed analysis that an appointed expert might provide.<sup>88</sup> Moreover, defense counsel cannot testify in front of the jury.<sup>89</sup> Therefore, the only remedy would be to question the prosecution’s expert, who is unlikely to give testimony unfavorable to himself or his processes.<sup>90</sup>

Second, the statute affects the ability of indigent defendants to put forth a meaningful defense in jurisdictions where courts do not appoint independent experts for indigent defendants. In some jurisdictions, an indigent defendant has no such right to appointment of an independent expert on the grounds that

74. *Id.*

75. *Id.* at 659.

76. *Strickland*, 466 U.S. at 686.

77. *United States v. Wade*, 388 U.S. 218, 226 (1967).

78. *Id.* at 226-27.

79. *Id.* at 227-28.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Ricardo Fontg, Comment, *DNA Fingerprinting: A Guide to*

*Admissibility and Use*, 57 MO. L. REV. 502, 529 (1992).

85. *Id.*

86. Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 915 (2011/12).

87. Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always a “Harmless Error”*: DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction, 17 TEX. WESLEYAN L. REV. 403, 421 (2011).

88. *Dubose v. State*, 662 So.2d 1189, 1197 (Ala. 1995).

89. *Id.*

90. *Id.* at 1197-98.

DNA experts can do no more than passively inform or educate a defense attorney.<sup>91</sup> Because uncertainties and ambiguities may affect any DNA test, relying on one expert carries a significant risk that a jury will misunderstand or inaccurately evaluate the meaning or significance of DNA evidence.<sup>92</sup> Experts present the results of a DNA test in “stark, black-and-white terms that do not fully reflect the potential problems that can affect any test.”<sup>93</sup> A jury is often simply informed that two samples match and that the match has a certain statistical significance.<sup>94</sup> Moreover, “an expert who exaggerates the significance of a declared match is not likely to explain how this significance is exaggerated.”<sup>95</sup> As a result, the absence of an independent analysis of the DNA sample will diminish the reliability of the results of the trial.

In sum, a felony arrestee will not have an opportunity to meaningfully confront the government’s evidence at trial. Thus, the moment at which he is subject to DNA test before trial is a critical stage of trial, rather than a mere preparatory step. Therefore, because the statute automatically requires DNA testing on all felony arrestees without any consultation with their counsels, the statute violates the defendant’s right to assistance of counsel.

#### IV. DUE PROCESS

In *Graham v. Connor*, the U.S. Supreme Court held that when “the Fourth Amendment provides an explicit textual source of constitutional protection. . . , that Amendment, not the more generalized notion of ‘substantive due process’” governs the analysis.<sup>96</sup> However, nine years later in *County of Sacramento v. Lewis*,<sup>97</sup> the court held that this holding in *Graham* does not bar the court from reaching the due-process question.<sup>98</sup> The court held that “if a constitutional claim is covered by a specific constitutional provision, such as the Fourth . . . Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”<sup>99</sup> Therefore, if a claim involves “searches and seizures” covered by the Fourth Amendment, a due-process analysis is not appropriate.<sup>100</sup> However, the court cautioned that its holding applies only to executive actions as opposed to legislative enactments.<sup>101</sup> That is, if an executive act is at issue and is covered by the Fourth Amendment, due-process analysis does not apply.<sup>102</sup> An execu-

utive act in violation of the Fourth Amendment would constitute a due-process violation only if it is “arbitrary” and “shocking to the conscience.”<sup>103</sup> On the other hand, if a legislative enactment at issue, due-process analysis may apply.<sup>104</sup> The rationale behind the execu-

tive-act-versus-legislative-enactment distinction is that substantive due process is most apt when invoked to protect individual rights against systematic governmental invasion.<sup>105</sup>

Under the framework set forth in *County of Sacramento v. Lewis*, a DNA statute mandating DNA tests on all people charged with felonies will be subject to due-process analysis if it is legislative enactment. The statute mandating DNA tests is undoubtedly a legislative enactment and therefore would not preclude substantive due-process analysis.

#### A. SUBSTANTIVE DUE PROCESS

The Due Process Clause protects fundamental rights and liberties that are “deeply rooted in this nation’s history and tradition.”<sup>106</sup> It “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>107</sup>

Defendants might claim that liberty interests are affected either at pretrial stages or at trial. The pretrial rights affected at trial are privacy interests and the right not to offer inculpatory evidence. On the other hand, the right implicated at trial is the right to a fair trial.

##### 1. Pretrial rights affected: Privacy interests and the right not to offer inculpatory evidence

Pretrial DNA testing involves an invasion of privacy because DNA sampling involves physical intrusion.<sup>108</sup> Privacy interests are protected as liberty interests under the Due Process Clause.<sup>109</sup> Concerning the development of DNA-testing technology and its accuracy, mandatory DNA tests may be inculpatory evidence. The defendant, however, has no duty to offer such inculpatory evidence.<sup>110</sup> The Due Process Clause places the burden on the prosecution to prove beyond a reasonable

**Defendants might claim that liberty interests are affected either at pretrial stages or at trial.**

91. Jay A. Zollinger, Comment, *Defense Access to State-Funded DNA Experts: Considerations of Due Process*, 85 CALIF. L. REV. 1803, 1810 (1997); Polk v. State, 612 So.2d 381, 393 (Miss. 1992).  
 92. Zollinger, *supra* note 90, at 1835.  
 93. *Id.*  
 94. *Id.*  
 95. *Id.*  
 96. *Graham v. Connor*, 490 U.S. 386, 395 (1989).  
 97. 523 U.S. 833 (1998).  
 98. The Supreme Court 1997 Term Leading Cases, *Constitutional Law: Due Process*, 112 HARV. L. REV. 192, 195 (1998).  
 99. *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272, n.7 (1997)).  
 100. *Lewis*, 523 U.S. at 843.  
 101. The Supreme Court 1997 Term Leading Cases, *supra* note 98, at 195-96.

102. *Id.*  
 103. *Id.*  
 104. *See Id.*  
 105. The Supreme Court 1997 Term Leading Cases, *supra* note 98, at 198 (citing Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327 (1993)).  
 106. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 504 (1977)).  
 107. *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).  
 108. *United States v. Amerson*, 483 F.3d 73, 84 (2d. Cir. 2007).  
 109. *Roe v. Wade*, 410 U.S. 113, 152 (1973).  
 110. *See United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980).

**[T]he result of applying the due-process balancing test is different for the defendant's right to a fair trial.**

ment is depriving the defendants of those interests through pre-trial DNA testing. The next question, then, is whether there is a compelling government interest for mandating pretrial DNA testing, and whether DNA testing is narrowly tailored to that government interest.

There is likely to be a compelling government interest because due process is designed to “enhance the search truth in the criminal trial” by assuring for both the defendant and the government ample opportunity to investigate facts that are crucial in determining guilt or innocence.<sup>113</sup> DNA testing is narrowly tailored to this interest. DNA evidence has a high degree of accuracy in demonstrating a connection between evidence and a specific individual or source.<sup>114</sup> For instance, in a murder case where the identity of the perpetrator is the key, DNA evidence can be critical, especially when it is the only forensic evidence available.<sup>115</sup>

In sum, privacy interests and the right not to offer inculpatory evidence are outweighed by the government interests. However, as demonstrated below, the result of applying the due-process balancing test is different for the defendant's right to a fair trial.

## **2. Rights affected at trial**

### **a) Right to a fair trial: encompassing the right to an independent expert**

A fair trial is a central constitutional goal.<sup>116</sup> Part of what guarantees a fair trial is a defendant's right under the Sixth Amendment to confront witnesses as well as the right of compulsory process for obtaining witnesses in defendant's favor.<sup>117</sup> The Due Process Clause protects both as fundamental rights essential to a fair trial.<sup>118</sup>

Under the Sixth Amendment, an accused can have a meaningful confrontation of the State's case at trial through the ordinary processes of cross-examination and the presentation of evidence from his own experts.<sup>119</sup> “[T]he Confrontation Clause guarantees only “an opportunity for effective cross-examination, not cross-examination that is effective in what-

ever way, and to whatever extent, the defense might wish.”<sup>120</sup>

However, the U.S. Supreme Court has noted that when the “[k]nowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts.”<sup>121</sup>

This suggests that even when the government's evidence involves science and technology, and knowledge about those fields is widely available, a defendant's meaningful challenge of the government's evidence should involve a separate expert witness for the defendant. Moreover, given that the Confrontation Clause guarantees an “opportunity for effective cross-examination,” the presence of the defense's own experts is also a part of preparing for effective cross-examination. It has been noted that DNA technology is complex, and thus it is “doubtful that a defense attorney will have the requisite knowledge to effectively examine autorads, laboratory books, quality control tests, copies of reports by the testing labs, standard deviations, contaminants, etc., without expert assistance.”<sup>122</sup>

### **b) Lack of an independent expert in the context of DNA test results presented as evidence**

#### **i) Violation of the right to fair trial**

As noted above, a DNA sample will be collected and analyzed by the government's experts, and an indigent defendant will have no opportunity to subject it to an analysis by an independent expert. This deprives the defendant of his right to a meaningful chance to confront the witness—the government's expert. Indeed, it might be argued that such a Confrontation Clause violation is only harmless error. Currently all 50 states have harmless-error statutes or rules, and the federal statute also provides that courts' “judgments shall not be reversed for ‘errors or defects which do not affect the substantial rights of the parties.’”<sup>123</sup> Under the harmless-error rule, not all federal constitutional errors are automatically deemed harmful. However, Confrontation Clause errors are subject to harmless-error analysis.<sup>124</sup> Moreover, Confrontation Clause violations will almost always constitute harmful errors.

First, there may be problems in a particular case with how the DNA was collected, examined in the laboratory, or inter-

111. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

112. *Turkish*, 623 F.2d at 774.

113. *Williams v. Florida*, 399 U.S. 78, 82 (1970).

114. NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD S-5, 3-2 (2009), [http://ag.ca.gov/meetings/tf/pdf/2009\\_NAS\\_report.pdf](http://ag.ca.gov/meetings/tf/pdf/2009_NAS_report.pdf).

115. *See* *House v. Bell*, 547 U.S. 518, 540 (2006).

116. *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

117. *Pointer*, 380 U.S. at 403, 405; *Pennsylvania v. Ritchie*, 480 U.S. 39, 45 n.5 (1987).

118. *Ritchie*, 480 U.S. at 45 n.5; *Washington v. Texas*, 388 U.S. 14, 17-

18 (1967).

119. *See* *Gilbert v. California*, 388 U.S. 263, 267 (1967).

120. *United States v. Owens*, 484 U.S. 554, 559 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)).

121. *United States v. Ash*, 413 U.S. 300, 315 (1973) (quoting *Wade*, 388 U.S. at 227-28).

122. *Dubose*, 662 So.2d at 1196.

123. *Chapman v. California*, 386 U.S. 18, 21-22 (1967) (quoting 28 U.S.C. § 2111).

124. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

preted, including mixed samples, limited amounts of DNA, or biases due to the statistical interpretation of data from partial profiles.<sup>125</sup> Whether such contaminating factors are involved can be best explained by an independent expert. Although a lawyer is given an opportunity for cross-examination, he may not have a meaningful opportunity to cross-examine the witnesses because of the intricacies of the technology involved.<sup>126</sup>

Second, without an expert of his own, the defendant will be subject to an unfair trial because of the powerful impact of scientific evidence presented by the government. Surveys of summoned jurors in Michigan gauged their attitudes toward scientific evidence. Jurors generally had high expectations that they would be presented with scientific evidence.<sup>127</sup> Moreover, jurors thought that DNA and other modern scientific techniques were extremely accurate.<sup>128</sup> Jurors viewed DNA evidence to have a “special aura of credibility.”<sup>129</sup> One study found that jurors rated DNA evidence as 95% accurate.<sup>130</sup>

Therefore, by producing inculpatory evidence for the government without an analysis from an independent expert of his own, the defendant will be subject to an unfair trial. The next question then is whether there are compelling governmental interests and whether pretrial DNA tests are narrowly tailored to those interests.

#### **ii) Balancing against governmental interests**

The government’s interest is identical to the defendant’s interest—the search for truth, which can happen only through allowing meaningful examination of the facts by both the prosecution and the defendant.<sup>131</sup> The Supreme Court has noted that discovery in search for truth must be a “two-way street.”<sup>132</sup> Viewed in this manner, the balancing factors all go against mandatory pretrial DNA testing.

Moreover, such a conclusion is supported by the principle underlying due process. If there is a “reasonable probability” that prosecutorial argument undermines confidence in the outcome, the defendant’s substantive due-process rights are violated.<sup>133</sup> If powerful scientific evidence is persuading the fact-finders, and if the defense does not have an independent expert to challenge it, there is a reasonable probability that the prosecution’s DNA evidence will change the outcome—that is, to convict a defendant who would otherwise not be convicted. Therefore, the statute would result in a violation of the defendant’s due-process right to a fair trial.

## **B. PROCEDURAL DUE PROCESS**

Even if a substantive due-process argument may not be viable, the defendant may still bring his claim under procedural due process. Procedural due process involves a two-step analysis: (1) Did the individual possess interests protected under the Due Process Clause? (2) Was the individual afforded an appropriate level of process?<sup>134</sup>

**Even if a substantive due-process argument may not be viable, the defendant may still bring his claim under procedural due process.**

### **1. Does the defendant arrested and charged with a felony possess interests protected under the Due Process Clause?**

Under the Due Process Clause of the Fifth and Fourteenth Amendments, a government may not “deprive any person of life, liberty, or property without due process of law.”<sup>135</sup> The Due Process Clause protects an individual’s property and liberty interests.<sup>136</sup> In the context of DNA testing, the question is whether the government violates any liberty interests of the person arrested and charged with a felony when it compels pretrial DNA testing.

There are two conceivable claims regarding a liberty-interest violation. First, pretrial DNA testing involves a privacy invasion because DNA sampling involves physical intrusion.<sup>137</sup> Second, mandatory DNA testing may violate the defendant’s right not to offer inculpatory evidence.<sup>138</sup> Even assuming that these interests are protected under the Due Process Clause, the question remains whether the defendant is afforded due process—that is, an appropriate level of process.

### **2. Was the individual afforded an appropriate level of process?**

If a government requires all defendants charged with a felony to undergo DNA tests, the government is apparently not affording the defendants with an evidentiary hearing of any type before collecting DNA samples from them. Then the question is whether providing for such a hearing still satisfies procedural due process. Due process is a flexible concept that calls for procedural protections as each particular situation demands.<sup>139</sup> This flexibility is “necessary to gear the process to the particular need,” and therefore what process is due

125. NATIONAL RESEARCH COUNCIL, *supra* note 114, at 3-12.

126. *See Dubose*, 662 So.2d at 1197.

127. Hon. Donald E. Shelton, *Juror Expectations for Scientific Evidence in Criminal Cases: Perceptions and Reality about the “CSI Effect” Myth*, 27 T.M. COOLEY L. REV. 1, 5, 10 (2010).

128. Hon. Donald E. Shelton, *Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the “Polybutadiene” Meets the “Bitumen,”* 18 WIDENER L.J. 309, 377-78 (2009).

129. *Id.*

130. *Id.*

131. *Williams*, 399 U.S. at 82.

132. *Wardius v. Oregon*, 412 U.S. 470, 475 (1973).

133. *See Romine v. Head*, 253 F.3d 1349, 1366 (11th Cir. 2001).

134. *Ward v. Anderson*, 494 F.3d 929, 934 (10th Cir. 2007).

135. *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968).

136. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972).

137. *Amerson*, 483 F.3d at 84.

138. *Turkish*, 623 F.2d at 774.

139. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

**Due process is a flexible concept that calls for procedural protections as each particular situation demands.**

depends on the need to minimize the risk of error.<sup>140</sup> To determine whether procedural due process is satisfied, courts must consider: “(1) the nature of the private interest at stake, . . . (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the government’s interests.”<sup>141</sup> With regard to the first factor—the nature of the private interest at stake—

courts look into the degree to which the defendant is entitled to such interest.<sup>142</sup> For example, a prisoner has only limited privacy interests. With regard to the second factor—the value of the additional safeguard—the defendant must explain the purpose that will be served by pre-deprivation hearings or other processes.<sup>143</sup>

Under the framework, the first factor—nature of the private interest at stake—may be critical, as it would be the case with the right to fair trial. Nevertheless, the two remaining factors weigh against providing for a pre-deprivation hearing. First, the government has a compelling interest in seeking the truth in a criminal trial through identifying the defendant.<sup>144</sup> Moreover, pre-deprivation hearings or other additional safeguards are likely to serve that purpose. In *Wilson v. Collins*, the Sixth Circuit discussed a statute requiring collection of DNA samples from convicted felons. The court held that the lack of a pre-deprivation hearing does not violate procedural due process because the only criterion at the pre-deprivation hearing would be the conviction for a predicate offense.<sup>145</sup> Similarly, in a pre-deprivation hearing for a pretrial DNA test, the only criterion is whether the defendant is arrested or charged with a felony. Therefore, a pre-deprivation hearing would serve little purpose for the defendant arrested or charged with a felony. Lack of a pre-deprivation hearing for a pretrial DNA testing is unlikely to violate procedural due process.

## V. EQUAL PROTECTION

Under the Equal Protection Clause of the Fifth and Fourteenth Amendments, a government must not “deny to any person within its jurisdiction the equal protection of the laws.”<sup>146</sup> Essentially, all people similarly situated should be treated alike.<sup>147</sup> Therefore, a government violates the

Equal Protection Clause if it makes a classification in a way that affects similarly situated groups in an unequal manner.<sup>148</sup> In the context of the DNA statute, the statute makes a classification between people arrested for or charged with felonies and people arrested for or charged with misdemeanors. The question is whether those two groups of people are similarly situated.

Caselaw suggests that people convicted of felonies or convicted of misdemeanors are not similarly situated.<sup>149</sup> A felon is uniquely burdened by diverse statutorily imposed disabilities long after his release from prison.<sup>150</sup> On the other hand, when misdemeanants conclude their sentences, they have no further obligations nor loss of civil rights.<sup>151</sup> Moreover, it is the legislative function to draw a line between what classifies as a felony or a misdemeanor.<sup>152</sup> Courts are not in the position to weigh the gravity of different criminal offenses and assess what commensurate action should be taken.<sup>153</sup>

Likewise, people arrested for and charged with felonies and people arrested for and charged with misdemeanors would respectively be facing different obligations and risks of loss of civil rights. Therefore, a facial equal-protection challenge to the DNA statute is likely to be foreclosed because people charged with felonies and those accused of misdemeanors are not similarly situated. Nevertheless, a defendant may turn to a disparate-impact analysis.

Under the disparate-impact analysis, a statute otherwise neutral on its face must not be applied to invidiously discriminate an identifiable group.<sup>154</sup> Felony arrestees or inditees might claim that the facially non-discriminatory DNA statute has a disproportionate impact on, for example, racial minorities.<sup>155</sup> However, a disparate impact upon an identifiable group, while relevant, is not dispositive of whether a statute violates the Equal Protection Clause. Unless the disparate impact is traced to a discriminatory purpose, it may not support an equal-protection claim.<sup>156</sup> Therefore, unless there are facts connecting the disparate impact to any discriminatory intent on the part of the government, people arrested for or charged with felonies are not likely to persuade the court on their disparate-impact claims.

## CONCLUSION

Current federal statutes and several state statutes require DNA testing on all felony arrestees and inditees. Beyond concerns about privacy of the defendants and the governmental interests of solving crimes, there are more profound concerns

140. *Greenholtz*, 442 U.S. at 13.

141. *Wade v. Brady*, 460 F.Supp.2d 226, 246 (D. Mass. 2006) (quoting *United States v. Ruiz*, 536 U.S. 622, 631 (2002)).

142. *See Wilson v. Collins*, 517 F.3d 421, 430-31 (6th Cir. 2008).

143. *See Wilson*, 517 F.3d at 430.

144. *Williams*, 399 U.S. at 82; *Haskell v. Brown*, 677 F.Supp.2d 1187, 1199 (N.D. Cal. 2009).

145. *Wilson v. Collins*, 517 F.3d 421, 430 (6th Cir. 2008) (citing *Rise v. Oregon*, 59 F.3d 1556, 1562-63 (9th Cir.1995)).

146. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

147. *Cleburne*, 473 U.S. at 439.

148. *People v. Travis*, 139 Cal.App.4th 1271, 1291 (Cal. Ct. App. 2006).

149. *Id.* at 1292.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Johnson v. State*, 965 So.2d 866, 872 (1st Cir. 2007).

155. *Johnson v. Quander*, 370 F.Supp.2d 79, 93 (D.D.C. 2005).

156. *Johnson*, 965 So.2d at 872; *see Johnson*, 370 F.Supp.2d at 94.

behind the statutes. Results of DNA tests can be tainted when laboratories are situated within law-enforcement agencies. Defense counsel may not be able to effectively tackle such tainted results when they are not sufficiently knowledgeable about the complex DNA science. Particularly, when an indigent defendant is not appointed an independent witness, his counsel may provide ineffective assistance at trial. Consequently, the DNA statutes result in depriving the defendant of the opportunity to meaningfully challenge the government's case at trial. That is, the effect of the DNA statutes reaches the criminal defendant's trial in the courtrooms. Because of concern that the DNA statutes violate the defendant's constitutional rights under substantive due process and the right to effective assistance of counsel under the Sixth Amendment, the constitutionality of such statutes should be re-evaluated.



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# The Resource Page



## NEW PUBLICATIONS

**New Papers in the Perspectives in State Court Leadership Series**  
<http://goo.gl/D3lbd>

The Harvard Kennedy School of Government has sponsored a series of “Executive Sessions” over the years on topics such as community policing. The Kennedy School convened a series of Executive Sessions for state-court leaders from 2008 through 2011, focusing on what leaders of state courts can and should do in leading state courts in the 21st Century.

A series of papers is being published online, and we’ll let you know here when papers of particular interest are issued. We published one of them in the last issue of *Court Review—Opinions as the Voice of the Court: How State Supreme Courts Can Communicate Effectively and Promote Procedural Fairness*, by Texas Chief Justice Wallace Jefferson, former California judicial administrator William Vickrey, and California courts researcher Douglas Denton.

We think two more of the recently published papers will be of general interest to judges.

Social-media expert Garrett Graff, the editor-in-chief for *Washingtonian* magazine, provides his view on the significance of the arrival of social media as it alters the expectations and habits of American society. He advises state-court leaders that they “must not only learn how to communicate with new tools; they must also envision new means of judicial engagement with the public through the new social media that can further advance the legitimacy of courts in a democratic society.” His paper is *Courts as Conversations: An Argument for Increased Engagement by Court Leaders*.

Greg A. Rowe, a government official who regularly handles legislative matters, provides advice for court leaders on how

better to interact with the leaders of the other branches of government on budget matters. Rowe is the Chief of the Legislation and Policy Unit for the Philadelphia District Attorney’s Office, and he provides 16 specific recommendations for judicial-branch leaders on dealing with the other branches of government on budget issues. He includes advice on how to understand the political environment, how to develop relationships with key groups and individuals, and how to create a coherent communications strategy. His paper is *Keeping Courts Funded: Recommendations on How Courts Can Avoid the Budget Axe*.

The Harvard Kennedy School of Government and the National Center for State Courts publish the papers. The Bureau of Justice Assistance, the State Justice Institute, and the National Center for State Courts provided funding for the Executive Sessions on court leadership. All of the papers are available at the website noted above.



## WEB RESOURCES

**Center on Court Access to Justice for All**  
<http://www.ncsc.org/atj>

The National Center for State Courts has established a web-based Center on Court Access to Justice for All, which seeks to assist judges and courts in providing better access to justice. The Center works with a number of national organizations, including the American Judges Association, to implement realistic access-to-justice solutions.

One key feature of the Center is a series of “Access Briefs,” short papers on key topics for access to justice. The first paper, issued in November 2012, is on self-help services (<http://goo.gl/FvGv1>). It’s an 11-page paper setting out various options for providing help to the self-represented litigant, with examples of courts that have set up useful websites, courthouse desks or

offices, telephone-based programs, in-person clinics, and courtroom assistance.

The paper is written by two staffers of the National Center for State Courts—Deborah Saunders, a senior knowledge and information services analyst, and Pamela Casey, a principal court research consultant—along with Richard Zorza, a long-time advocate of better resources for the self-represented. One of the best features of the paper, as accessed online, is that there are four pages of endnotes following the paper that are chocked with links to examples of all sorts of methods for helping self-represented litigants as well as key articles in this area that provide greater detail.

The Center also offers technical assistance to state and local courts seeking help in providing better access to justice. Click the “Assistance” tab on the Center’s home page and you’ll find a link to the “technical assistance request form.” The Center can provide help on topics like simplifying forms and using plain language, training court staff to provide information to self-represented litigants, and how to use pro bono attorneys to help the self-represented.

**e-Courts 2012 Conference Materials**  
<http://www.e-courts.org>

More than 500 judges, court administrators, and others attended e-Courts 2012 in Las Vegas in December. Materials from the conference, sponsored by the National Center for State Courts, have been posted online. You can take a look at the program schedule and, for most of the programs, take a look at the PowerPoint or other presentation materials.

For those who want an overview of the issues involved in moving from paper to computer for court records and functions, along with the present state of the art, these materials can be useful. Programs at the conference included the return on investment for switching to the e-court model, tech tips for judges, and ways to improve a court website.