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Court Review

Volume 55, Issue 3

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 55, Issue 3

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EDITOR'S NOTE

Have you heard about one of the proposals to change the U.S. Supreme Court? A current presidential candidate seeks to “depoliticize” the Court by enlarging it to 10 justices appointed as before and adding 5 more chosen by the unanimous vote of the other 10. As the Court becomes more and more the focus of public and political speculation, our annual case round-ups become more beneficial for judges. We are pleased to feature our U.S. Supreme Court Civil Case Review, Civil Cases in the Supreme Court’s October 2018 Term from Professor Todd Pettys of the University of Iowa College of Law. His insightful account is extremely useful to ground our comprehension of what actually took place this past term without media sensationalism. Many important and interesting issues come out of each U.S. Supreme Court term, and Professor Pettys’s guide is crucial to learning and understanding the full gamut.

Presidential candidates are not the only ones involved with the issue of judicial selection. We have argued about how to decide who gets to be a judge since the republic began and before. Some favor choosing judges only through election by the people. Some claim judges should only be picked by some form of appointment, or “merit selection.” Still others prefer various versions of these systems. It is a debate without a winner, it seems. Thus, the arrival of a new and thoughtful book is welcome. Professor Charles Gardner Geyh of the Indiana University McKinney School of Law seeks to examine the debate itself as much the merits of each side. In this issue, we feature a lively piece on “Who Is to Judge?” by combining an introductory review with a central Q&A with the author. All in all, it informs and refreshes our thinking on the “elected v. appointed” standoff, and looks forward to new ways of managing this important issue.

Ever wonder why so many criminal convictions are later overturned by new evidence, even when the evidence included eyewitness identification? The fallibility of eyewitness ID has become an increasingly controversial topic in criminal courts and among legal analysts. Professor Monica Miller of the University of Nevada, Reno examined the most significant recent cases and data regarding eyewitness ID for this issue in “Do Judges’ Instructions About Eyewitnesses Really Work?: A 2019 Update.” Her cogent analysis will help all judges become knowledgeable about the problem, refresh our understanding of the law in this area, and lay a good foundation as it continues to develop.

Both American judges and our Canadian judicial audience will once again benefit in this issue from our regular Canadian contributor, Judge Wayne Gorman’s article, “Refining the Judicial Lexicon: The Supreme Court of Canada Refines the Defences of Consent and Mistaken Belief in Consent”, is an excellent explanation of the notable factors of consent in sex-crime cases in Canadian law. It is sure to draw comparisons with American law and allow some qualitative assistance regarding this complicated area.

Thanks for your continued support.—David Dreyer



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

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The cover photo is the Old Burke County Courthouse in Morganton, North Carolina. It was built in 1833-1835 and was put into use in 1837. It is a two-story, square stone building in the Classical Revival style featuring an elaborate cupola added during a remodeling in 1901. It was listed on the National Register of Historic Places in 1970. Photo by Michael Fairchild.

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President's Column

Peter Sferrazza

Welcome to the latest issue of *Court Review*. It is my honor to serve as president of the American Judges Association. We had an excellent 2019 Annual Educational Conference in Chicago. Future conferences are scheduled for Napa, Philadelphia, San Antonio, and New Orleans.

Our thanks to Justice Robert Torres for his leadership during the past year as AJA President. I appreciate his dedication and hard work. I also want to thank our past presidents, our Board, and committee members who deserve our recognition and thanks for making AJA a great organization.

In this column we commemorate Justice John Paul Stevens (April 20, 1920 – July 16, 2019). He served as an associate justice of the United States Supreme Court from 1975 until his voluntary retirement in 2010. At the time of his retirement, he was the second-oldest-serving justice in the history of the court. He wrote decisions for the court on most issues of American law, including civil liberties, death penalty, government action, and intellectual property. In cases involving presidents of the United States, he held that they were accountable under our Constitution and laws. He also authored numerous books, which discussed his judicial philosophy. Stevens was the second-oldest serving Supreme Court justice in United States history.

When John Paul Stevens was nominated to the Supreme Court by President Ford in the 1970s, he had authored a dissent that claimed it was legal to prevent married women from becoming flight attendants at United Airlines. He was considered too conservative for the Supreme Court by the liberals.

However, those who worried he would push the Supreme Court too far to the right were in for a surprise. He got off to a conservative start, but more than any modern Supreme Court Justice, Stevens embodied change. As the third-longest-serving member of the Supreme Court, he revised his own views on many of the nation's most pressing issues.

At the beginning of his Supreme Court career, he upheld the Second Amendment and the death penalty and railed against affirmative action. By the end, he had done an about-face on all three. His majority opinions decriminalized homosexual activity, paved the way for gay marriage, affirmed the legal rights of Guantanamo Bay detainees, and affirmed a woman's right to choose.

He dissented in *Bush v. Gore*, which settled the 2000 presidential election in Bush's favor, and *Citizens United v. FEC*, which prohibited the government from limiting independent political

expenditures on behalf of political campaigns. After his retirement, he called for repeal of the Second Amendment, calling its premise "a relic of the 18th century."

In 1975 I had the honor to argue a case before Justice Stevens when he was on the Seventh Circuit Court of Appeals. In *Eskra v. Morton*, 524 F.2d 9 (1975), the question presented was whether the federal Bureau of Indian Affairs could discriminate against an illegitimate Indian child when it distributed intestate property. Specifically, did *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 — holding the State of Louisiana could discriminate against an illegitimate child when distributing a deceased father's property — compel a like result when the distributee claimed

through a mother? Justice Stevens authored the opinion that held the Due Process Clause of the Fifth Amendment prevents the federal government from discriminating on the basis of legitimacy.

A couple of years after his ruling in the *Eskra* case Justice Stevens joined the majority in *Trimble v. Gordon*, 430 U.S. 762 (1977). The United States Supreme Court in a five-to-four decision held that Section 12 of the Illinois Probate Act, which allowed illegitimate children to inherit by intestate succession only from their mothers violated the

Equal Protection Clause of the Fourteenth Amendment. (pp. 430 U. S. 766-776). This decision effectively overruled *Labine v. Vincent*.

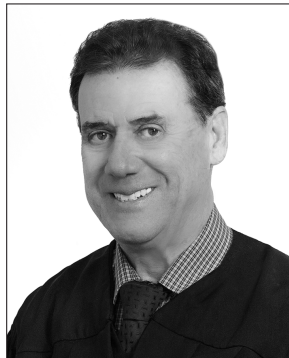
Justice Stevens's role in these cases demonstrated his importance in the interpretation of the Equal Protection Clause of the Constitution of the United States.

We are judges because we believe in "equal justice under the law." We believe that people should be treated equally regardless of their race, color, creed, national origin, sex, gender identity, or legitimacy of their birth.

We believe in reforming our criminal, civil, and juvenile justice system to ensure that everyone who participates in our court system is treated equally and fairly in accordance with the rule of law.

Justice Stevens exemplifies Chief Justice Roberts's statement that "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal justice to those appearing before them. That independent judiciary is something we should all be thankful for."

Thanks for allowing me to share these thoughts with you. I look forward to seeing you in Napa.



Civil Cases in the Supreme Court's October 2018 Term

Todd E. Pettys

The October 2018 Term will not best be remembered for the Court's rulings on such matters as the National Park Service's regulatory authority over the Nation River in Alaska,¹ the relationship between state and federal law for events occurring on the Outer Continental Shelf,² or whether maritime law permits punitive damages on claims of unseaworthiness.³ Anyone who tells this Term's story will surely focus instead on two 5-4 rulings with potentially enormous political implications: one finding that partisan-gerrymandering claims are beyond federal courts' authority, and the other blocking the Trump Administration from including a citizenship question on the 2020 census (at least for the time being).

Although the gerrymandering and census cases dominated the national media's coverage of the Court, the Justices also took on a wide range of additional important matters on the civil side of their docket, from abortion to takings, from alcohol to taxes, from arbitration to Title VII. Below is a full accounting of the Court's most broadly noteworthy civil cases of the 2018 Term.

NEW ABORTION RULING

The Justices took on one abortion case this past Term—*Box v. Planned Parenthood of Indiana and Kentucky, Inc.*⁴—at least in part. The case garnered large media coverage because the Court denied certiorari on one of the claims on appeal: whether Indiana may bar abortions when the abortion provider knows that a woman seeks to terminate her pregnancy because of the fetus's race, sex, or disability. With respect to that question, Justice Thomas filed an opinion, arguing that “abortion is an act rife with the potential for eugenic manipulation”⁵ and predicting that “the Court will soon need to confront the constitutionality of laws like Indiana's.”⁶

Perhaps more important was the claim that was accepted and ruled upon regarding Indiana's law about incineration of fetal remains. An Indiana law bars the incineration of fetal remains with surgical byproducts but permits groups of fetal remains to be incinerated together. As a coauthor of the Court's watershed plurality opinion in 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey* (undue burden standard),⁷ Justice Kennedy long provided a vote for preserving some variant of the abortion right first recognized in *Roe v. Wade*.⁸ With Justice Kavanaugh now fill-

ing the seat that Justice Kennedy once held, there has been a great deal of speculation about *Roe* and *Casey*'s fate and about the role that *stare decisis* should play when the Court squarely confronts that question. But Planned Parenthood did not argue that the surgical-byproduct provision placed an undue burden on a woman's right to obtain an abortion,⁹ so the Justices were not pressed to decide whether to retain the *Casey* standard.¹⁰ Instead, Planned Parenthood argued that the surgical-byproduct provision failed ordinary rational-basis review because the law was based on the premise that fetuses are human beings—a premise that would be contrary to the Court's account of today's abortion right, and seemingly at odds with Indiana's simultaneous-cremation provision. The Seventh Circuit agreed but, in a brief *per curiam* ruling, the Justices reversed. Noting that “[t]his Court has already acknowledged that a State has a ‘legitimate interest in proper disposal of fetal remains,’” the Justices held without elaboration that “Indiana's law is rationally related to the State's interest in proper disposal of fetal remains.”¹¹ So the parties' dispute did not provide an occasion to revisit *Roe* and *Casey*, nor did its outcome provide any clues about Justice Kavanaugh's views regarding those rulings' longevity.

ALCOHOL AND INTERSTATE COMMERCE

Section 2 of the Twenty-first Amendment declares that “[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”¹² To what degree does Section 2 authorize states to enact protectionist legislation that would otherwise violate the dormant Commerce Clause? That was the question before the Court in *Tennessee Wine & Spirits Retailers Association v. Thomas*.¹³ Tennessee had declared that individuals could not obtain licenses to operate liquor stores unless they had resided in the state for the prior two years and that corporations could not obtain such licenses unless all of their officers, directors, and shareholders satisfied the same two-year residency requirement. No one disputed the fact that Tennessee's facially discriminatory law violated well-established dormant Commerce Clause principles. The question was whether Section 2 shielded the law from dormant Commerce Clause scrutiny.

Writing for the 7-2 majority, Justice Alito concluded that Tennessee's law was unconstitutional. Section 2's chief purpose, he

Footnotes

1. *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) (holding that the Nation River is exempt from the National Park Service's ordinary regulatory authority).
2. *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1889 (2019) (holding “that where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS”).
3. *Dutra Group v. Batterton*, 139 S. Ct. 2275 (2019) (holding that punitive damages are not available on unseaworthiness claims).
4. 139 S. Ct. 1780 (2019).

5. *Id.* at 1787 (Thomas, J., concurring).
6. *Id.* at 1784 (Thomas, J., concurring).
7. 505 U.S. 833 (1992).
8. 410 U.S. 113 (1973).
9. See *id.* at 1781, 1782 (twice emphasizing this point).
10. *Casey*, 505 U.S. at 874 (plurality opinion).
11. *Box*, 139 S. Ct. at 1782 (quoting *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 n. 45 (1983)).
12. U.S. Const. amend. XXI, § 2.
13. 139 S. Ct. 2449 (2019).

explained, was to lock into place “the basic structure of the federal-state alcohol regulatory authority that prevailed prior to the adoption of the [Prohibition-installing] Eighteenth Amendment.”¹⁴ In the years immediately prior to Prohibition, the Court said, it was established that “the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations.”¹⁵ The Court found that, rather than authorize economically protectionist legislation, Section 2 simply “allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol and to serve other legitimate interests.”¹⁶ The Court held that those defending Tennessee’s law had failed to identify any way in which the residency requirements were needed to achieve a health, safety, or other legitimate state interest.¹⁷

WHO DECIDES IF ARBITRATION APPLIES?

The Federal Arbitration Act (FAA) declares that, as a general matter, courts are obliged to enforce agreements to arbitrate. In two unanimous rulings handed down within a week of one another, the Court helped to illuminate the scope of that enforcement obligation. In a third ruling on the FAA, however, the justices were deeply divided.

In his first opinion, Justice Brett Kavanaugh wrote for the unanimous Court in *Henry Schein, Inc. v. Archer & White Sales, Inc.*¹⁸ In that case, the parties had agreed that any disputes arising between them would be resolved by arbitration unless the dispute concerned injunctive relief or intellectual property. When one party subsequently filed an antitrust lawsuit against the other and requested both injunctive relief and damages, the defendant asked the district court to send the dispute to an arbitrator. Was the dispute indeed subject to arbitration? And who should answer that question—the district court or an arbitrator?

The district court and Fifth Circuit held that, even if the parties had agreed that an arbitrator would resolve disputes about arbitrability, the court could resolve the arbitrability question for itself because the defendant’s insistence upon arbitration was “wholly groundless.”¹⁹ The Supreme Court, however, unanimously rejected the lower courts’ “wholly groundless” exception to the FAA’s pro-arbitration norm. Under that legislation, Justice Kavanaugh explained, “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract.”²⁰ The Court remanded for the lower courts to determine whether the parties had indeed agreed that an arbitrator would resolve disputes about arbitrability.

Different questions about arbitrability arose in *New Prime, Inc. v. Oliveira*.²¹ Section 1 of the FAA states that courts’ obligation to enforce arbitration agreements does not apply to “contracts of employment of . . . workers engaged in foreign or interstate commerce.”²² That statutory language gave rise to two questions in this

federal lawsuit brought by a truck driver against the company with which he contracted. First, suppose the parties in a given case disagree about whether a “contract[] of employment” exists between them and thus disagree about whether their dispute must be sent to an arbitrator. Does the FAA require courts to let an arbitrator resolve the question of Section 1’s application? Led by Justice Gorsuch, the Court unanimously agreed that courts must resolve the question of Section 1’s application for themselves.

The second question in *New Prime* was whether Section 1’s phrase “contracts of employment” applies to contracts with independent contractors (such as, arguably, the truck driver here) or whether it applies only to employer-employee relationships. The Court unanimously concluded that, when Congress framed Section 1’s language in 1925, the phrase “contract of employment” ordinarily referred to “nothing more than an agreement to perform work,” and thus did not reflect any meaningful distinction between those who worked as independent contractors and those who worked as employees.²³ Absent direction by Congress to the contrary, moreover, courts must assign statutory language the meaning it carried at the time of enactment. The FAA thus did not authorize the court in which the truck driver filed his lawsuit to send the dispute to arbitration.

In a third FAA case, however, the justices divided 5-4. In *Lamps Plus, Inc. v. Varela*,²⁴ a computer hacker had managed to secure the tax information of roughly 1,300 Lamps Plus employees. Frank Varela was among them and, after a fraudulent tax return was filed in his name, he filed a putative class action against Lamps Plus on behalf of himself and all other Lamps Plus employees whose information had been stolen. Lamps Plus moved to compel arbitration—on an individual basis—and to dismiss the lawsuit. The district court dismissed the action, issued an order compelling arbitration and ordered the arbitration to proceed on a classwide basis. When Lamps Plus appealed, insisting that only individual arbitration was appropriate, the Ninth Circuit affirmed, reasoning that the employment contract was ambiguous on whether class arbitration was authorized and that this ambiguity ought to be resolved against Lamps Plus, the drafter of the agreement.

Led by Chief Justice Roberts, the Supreme Court reversed. Accepting the Ninth Circuit’s finding that the employment contract was ambiguous on the question of class arbitration, the Court held that “[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.”²⁵ Empha-

“When the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract.”

14. *Id.* at 2463.

15. *Id.* at 2467.

16. *Id.* at 2474.

17. Joined by Justice Thomas, Justice Gorsuch dissented, arguing that, “in this area, at least, we should not be in the business of imposing our own judge-made ‘dormant Commerce Clause’ limitations on state powers.” *Id.* at 2478 (Gorsuch, J., dissenting).

18. 139 S. Ct. 524 (2019).

19. *Id.* at 528.

20. *Id.* at 529.

21. 139 S. Ct. 532 (2019).

22. 9 U.S.C. § 1.

23. *New Prime*, 139 S. Ct. at 539.

24. 139 S. Ct. 1407 (2019).

25. *Id.* at 1419.

“Auer deference is not appropriate unless a regulation is ‘genuinely ambiguous’...”

sizing that “arbitration ‘is a matter of consent, not coercion,’”²⁶ the court found that “ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to ‘sacrifice[] the principal advantage of arbitration’”—namely, its informality.²⁷ Justices Ginsburg, Breyer, Sotomayor, and Kagan each filed dissenting opinions, objecting on grounds ranging from jurisdiction, to the FAA’s original

purposes, to the majority’s resistance to classwide arbitration as a general matter, to whether the parties’ agreement was indeed ambiguous on the matter of classwide arbitration.

AGENCY DEFERENCE (AUER) UPHELD

Under the Court’s 1997 ruling in *Auer v. Robbins*²⁸ and its comparable 1945 ruling in *Bowles v. Seminole Rock & Sand Co.*,²⁹ federal courts commonly defer to federal agencies’ interpretations of those agencies’ own ambiguous regulations. *Auer* deference (as it is commonly called) is controversial, however, and in this Term’s *Kisor v. Wilkie*³⁰—a case concerning the meaning of a regulation issued by the Department of Veterans Affairs—a litigant asked the Court to halt that deference practice. By a slim 5-4 margin, the Court declined to do so. In the process, the Court placed restraints on *Auer* deference that, in the view of at least three Justices, reduces the significance of the debate about *Auer* deference’s legitimacy.

In portions of her opinion for which Chief Justice Roberts provided the crucial fifth vote,³¹ Justice Kagan stressed that *Auer* deference is not appropriate unless a regulation is “genuinely ambiguous”;³² a court should not deem a regulation ambiguous unless it has “exhaust[ed] all the ‘traditional tools’ of construction”;³³ deference is inappropriate if the agency’s interpretation is unreasonable; and even a reasonable interpretation of an ambiguous regulation is not appropriate unless the interpretation has been made by the agency itself, the interpretation “in some way implicate[s] the agency’s] substantive expertise,”³⁴ the interpreta-

tion is a product of the agency’s “fair and considered judgment,”³⁵ and the interpretation does not “create[] ‘unfair surprise’ to regulated parties.”³⁶ Justice Kagan’s majority also concluded that *Auer* deference was entitled to the benefits of *stare decisis*.

Joined in relevant part by Justices Thomas, Alito, and Kavanaugh, Justice Gorsuch argued that *Auer* deference violates the judicial-review and rulemaking provisions of the Administrative Procedure Act and “sits uneasily with the Constitution.”³⁷ Chief Justice Roberts filed a short opinion concurring in part, suggesting that the disagreements between Justices Kagan and Gorsuch are not as significant as they might initially seem, because “the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency’s interpretation of its own regulation.”³⁸ Joined by Justice Alito, Justice Kavanaugh filed a short opinion of his own, underscoring Chief Justice Roberts’s point.

CITIZENSHIP AND THE CENSUS

In *Department of Commerce v. New York*,³⁹ one of the most closely watched cases of the Term, the Court blocked Secretary of Commerce Wilbur Ross’s effort to include a question about American citizenship on the 2020 census.⁴⁰ As readers surely already know, Secretary Ross had announced the Department of Commerce’s intention to place that question on the upcoming decennial census, saying that the Department of Justice had requested the question to aid enforcement of the Voting Rights Act. Alleging violations of the Enumeration Clause and the Administrative Procedure Act (APA), numerous states, municipalities, and nonprofit organizations filed suit, arguing that including the citizenship question would result in reduced response rates among certain racial and ethnic minority groups, thereby resulting in inaccurate population counts that would cause harms in areas ranging from legislative apportionment to the distribution of federal funding. The Justices divided largely along familiar lines, with Chief Justice Roberts—the author of the Court’s opinion—aligning himself with his conservative colleagues on some matters and with his more liberal colleagues on one key other.

Joined by his fellow conservatives, Chief Justice Roberts first concluded that the Enumeration Clause does not bar the Secretary

26. *Id.* at 1415 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 681 (2010)).

27. *Id.* at 1416 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

28. 519 U.S. 452 (1997).

29. 325 U.S. 410 (1945).

30. 139 S. Ct. 2400 (2019).

31. In the portions of her opinion that Chief Justice Roberts did not join, Justice Kagan offered a substantive defense of *Auer* deference, focusing on Congress’s intentions, agencies’ policy expertise, and the benefits of uniformity; she argued that *Auer* deference is consistent with the judicial-review and rulemaking provisions of the Administrative Procedure Act; and she argued that *Auer* deference does not violate the separation of powers.

32. *Id.* at 2415.

33. *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

34. *Id.* at 2417.

35. *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S.

142, 155 (2012)).

36. *Id.* at 2418 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

37. *Id.* at 2437.

38. *Id.* at 2424 (Roberts, C.J., concurring in part).

39. 139 S. Ct. 2551(2019).

40. A week after the Court’s ruling came down, members of the Trump Administration announced that they were abandoning the effort to include the citizenship question on the upcoming census. See Ann E. Marimow et al., *2020 Census Will Not Include Citizenship Question, Justice Department Confirms*, WASH. POST, July 2, 2019. The President tweeted his disapproval, however, and so there was a brief period when the Administration’s attorneys sought a different path that would lead to the question’s inclusion. See Tara Bahrapour et al., *Trump Administration Scrambles to Save Citizenship Question on Census*, WASH. POST, July 4, 2019. The President ultimately abandoned the effort. See Katie Rogers et al., *President Seeks Citizenship Data by Other Means*, N.Y. TIMES, July 11, 2019, at A1.

from adding the citizenship question to the census, notwithstanding any population-count inaccuracies that inclusion of the question might yield.⁴¹ Since the nation's founding, Chief Justice Roberts pointed out, the government has used the census as an opportunity to gather demographic information extending far beyond a mere headcount, and citizenship has frequently been among the areas of inquiry. The Court found nothing in the Enumeration Clause that would bar the government from asking about citizenship again in 2020. The same group of five Justices concluded that the Secretary's decision was supported by the evidence before him and thus—on those grounds, at least—was not “arbitrary” or “capricious” within the meaning of the APA.⁴² These Justices further found that Secretary Ross had not violated provisions of the Census Act that set deadlines for notifying Congress of the Secretary's plans for the upcoming census and that expressed a preference for using existing administrative records rather than the census for gathering information of interest to the government.

On one key issue, however, Chief Justice Roberts split from his fellow Republican appointees and joined the Court's four other members. Based on an expansive review of the record, this five-Justice majority held that Secretary Ross's Voting Rights Act rationale for including a citizenship question was merely pretextual. Secretary Ross had desired a citizenship question long before talking with anyone about the Voting Rights Act, the Court observed, and he solicited the Justice Department's request for the question (doing so after other agencies rebuffed his efforts to persuade them to ask the Department of Commerce to seek citizenship information on the census). “Our review is deferential,” Chief Justice Roberts wrote, “but we are not required to exhibit a naiveté from which ordinary citizens are free.”⁴³ The Court concluded that Secretary Ross's invocation of the Voting Rights Act “was more of a distraction” than a result of the “[r]easoned decisionmaking” that the APA requires.⁴⁴

Joined by Justices Gorsuch and Kavanaugh, Justice Thomas argued that the majority's ruling against Secretary Ross rested upon “an unauthorized inquiry into evidence not properly before us”⁴⁵ and exhibited “an unprecedented departure from our deferential review of discretionary agency decisions.”⁴⁶ Justice Thomas warned that, “[w]ith today's decision, the Court has opened a Pandora's box of pretext-based challenges in administrative law.”⁴⁷ Justice Alito argued that Secretary Ross's decision was entirely shielded from APA review. “To put the point bluntly,” he wrote, “the Federal Judiciary has no authority to stick its nose

into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons.”⁴⁸

“[F]ederal judges are appointed for life... not for eternity.”

COPYRIGHTS ONLY ENFORCEABLE AFTER REGISTRATION

Suppose you have filed the paperwork necessary to register a copyright, but the Copyrights Office has not yet completed processing your application, and suppose further that you believe someone is already infringing your copyright. Congress has declared that, with only narrow exceptions, “no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title.”⁴⁹ Does the statute bar you from filing an infringement claim until after your application has been fully processed? It does indeed, the Court unanimously ruled in *Fourth Wall Public Benefit Corp. v. Wall-Street.com, LLC*.⁵⁰ On the most natural reading of the statute, the Court said, “registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright.”⁵¹

DEATH AND JUDICIAL POWER

In *Yovino v. Rizo*,⁵² the Court held in a *per curiam* ruling that the votes of deceased federal judges may not be counted when determining a case's resolution. The Ninth Circuit's Judge Stephen Reinhardt had participated in the adjudication of the dispute at issue here—indeed, he was credited as being the author of what was styled as the court's majority opinion—but he died eleven days before the opinion was issued. Judge Reinhardt's vote was important. With it, the *en banc* court would have the votes needed to overturn circuit precedent on an Equal Pay Act issue; without it, the *en banc* court would have narrowly fallen short of the number needed to accomplish that result. After noting that judges are free to change their minds right up to the moment when they issue their rulings, the Supreme Court concluded that the Ninth Circuit had “allowed a deceased judge to exercise the judicial power of the United States after his death.”⁵³ This was impermissible. “[F]ederal judges are appointed for life,” the Court wrote, “not for eternity.”⁵⁴



41. See U.S. Const. art. I, § 2, cl. 3 (requiring a population count every ten years for the purpose of allocating seats in the House of Representatives).

42. 5 U.S.C. § 702(2)(A). Joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Breyer disagreed: The Secretary did not give adequate consideration to issues that should have been central to his judgment, such as the high likelihood of an undercount, the low likelihood that a question would yield more accurate citizenship data, and the apparent lack of any need for more accurate citizenship data to begin with. The Secretary's failures in considering those critical issues make his decision unreasonable. They are the kinds of failures for which, in my view, the APA's arbitrary and capricious provision was written. *Department of Commerce*, 139 S. Ct. at 2595 (Breyer, J., concurring

in part and dissenting in part).
 43. *Department of Commerce*, 139 S. Ct. at 2575 (internal quotation omitted).
 44. *Id.* at 2576.
 45. *Id.* at 2578 (Thomas, J., concurring in part and dissenting in part).
 46. *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part).
 47. *Id.* at 2583 (Thomas, J., concurring in part and dissenting in part).
 48. *Id.* at 2597 (Alito, J., concurring in part and dissenting in part).
 49. 17 U.S.C. § 411.
 50. 139 S. Ct. 881 (2019).
 51. *Id.* at 886.
 52. 139 S. Ct. 706 (2019).
 53. *Id.* at 710.
 54. *Id.*

“[P]artisan gerrymandering claims present non-justiciable political questions.”

EQUITABLE TOLLING TO APPEAL CLASS CERTIFICATION DENIAL

Rule 23(f) of the Federal Rules of Civil Procedure imposes a fourteen-day deadline for seeking a court of appeals’ permission to appeal an order granting or denying class certification. In *Nutraceutical Corp. v. Lambert*,⁵⁵ a federal

district court in California had decertified the plaintiff’s class. Rather than promptly seek the Ninth Circuit’s permission to file an appeal, however, the plaintiff had filed a motion for reconsideration. By the time the district court denied that motion more than three months later, the time to appeal the court’s decertification ruling had long since expired. The Court held that the fourteen-day deadline is not subject to equitable tolling. The Court conceded that Rule 23(f)’s deadline is not jurisdictional in nature, but found this concession inconsequential. “Whether a rule precludes equitable tolling turns not on its jurisdictional character,” Justice Sotomayor explained, “but rather on whether the text of the rule leaves room for such flexibility.”⁵⁶ The Court found no such flexibility in Rule 23(f) and its accompanying provisions. As a result, equitable tolling is impermissible “even where good cause for equitable tolling might otherwise exist.”⁵⁷

PARTISAN GERRYMANDERING

Partisan gerrymandering has been with us ever since the nation’s birth but—with the aid of increasingly powerful data and technological tools—it now is easier than ever for a political party to secure legislative representation that grossly outpaces its share of the popular vote. As Chief Justice Roberts put it in his opinion for a 5-4 majority in this Term’s *Rucho v. Common Cause*,⁵⁸ those electoral results can “seem unjust.”⁵⁹ But are federal courts constitutionally authorized to do anything about it? No, they are not, Chief Justice Roberts and four colleagues concluded in *Rucho*.

At issue were congressional maps in North Carolina and Maryland that, by any reasonable measure, were highly partisan in nature—Republicans got the benefit of the gerrymandering in North Carolina, while Democrats were the beneficiaries in Maryland. The lower courts had found those states’ maps unconstitutional, but the Court here reversed. Distinguishing the Court’s precedents in the areas of one-person-one-vote and racial gerrymandering—areas in which the Court has fashioned clear and judicially manageable standards—Chief Justice Roberts’s majority concluded that partisan gerrymandering claims present non-justiciable political questions. Observing that the Constitution does not guarantee proportional representation along partisan lines in the nation’s legislative bodies and that some degree of

partisan gerrymandering is undoubtedly permissible, the Court concluded that there is no clear, precise, politically neutral standard that federal courts can use to mark a point at which partisan gerrymandering becomes unconstitutionally unfair. Chief Justice Roberts reminded us that egregious partisan gerrymandering can be battled without the assistance of federal courts, such as through state or federal legislation.⁶⁰

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. The dissenters warned that “gerrymanders like the ones here may irreparably damage our system of government” and concluded that, by declining to provide a remedy for “blatant constitutional harms,” the majority had gone “tragically wrong.”⁶¹ Lower courts across the country had coalesced around limited, manageable, politically neutral standards to combat “the worst-of-the-worst cases of democratic subversion” through partisan gerrymandering,⁶² Justice Kagan wrote, and the Court’s rejection of those efforts here was nothing less than an ill-timed abdication of judicial duty.

PREEMPTION OF STATE-LAW CASES

Although unable to agree upon a majority opinion, six Justices concluded in *Virginia Uranium, Inc. v. Warren*⁶³ that the federal Atomic Energy Act (the AEA) did not preempt a Virginia law banning uranium mining. Announcing the judgment of the Court and joined by Justices Thomas and Kavanaugh, Justice Gorsuch pointed out that the AEA does not contain an explicit preemption provision and does not purport to regulate uranium mining unless the mining is occurring on federal land. Along the way, Justice Gorsuch prominently stressed that, when trying to determine whether state legislation has intruded into a field Congress has occupied or whether state legislation is frustrating Congress’s ability to achieve its desired objectives, it is important to focus on the text and structure of the state and federal legislation at issue, rather than on the legislative motives that might underlie it.

Joined by Justices Sotomayor and Kagan, Justice Ginsburg agreed that the AEA did not preempt Virginia’s law, but said that Justice Gorsuch’s “discussion of the perils of inquiring into legislative motive sweeps well beyond the confines of this case, and therefore seems to me inappropriate in an opinion speaking for the Court, rather than for individual members of the Court.”⁶⁴ Joined by Justices Breyer and Alito in dissent, Chief Justice Roberts argued that Virginia was impermissibly regulating “a non-preempted field (mining safety) with the purpose and effect of indirectly regulating a preempted field (milling and tailings).”⁶⁵

In *Merck Sharp & Dohme Corp. v. Albrecht*,⁶⁶ the Court addressed a narrow but important preemption issue that can arise in pharmaceutical failure-to-warn cases. The plaintiffs in the case were more than 500 individuals who suffered atypical femoral fractures while taking Fosamax, a drug sold by Merck. The plaintiffs suffered those injuries during the roughly decade-

55. 139 S. Ct. 710 (2019).

56. *Id.* at 714.

57. *Id.* at 715.

58. 139 S. Ct. 2484 (2019).

59. *Id.* at 2506.

60. *Id.* at 2507.

61. *Id.* at 2509 (Kagan, J., dissenting).

62. *Id.* (Kagan, J., dissenting).

63. 139 S. Ct. 1894 (2019).

64. *Id.* at 1909 (Ginsburg, J., concurring in the judgment) (citation omitted).

65. *Id.* at 1916 (Roberts, C.J., dissenting).

66. 139 S. Ct. 1668 (2019).

long period prior to when the Food and Drug Administration ordered Merck to add a warning about the risk of such fractures to Fosamax's label. Merck argued that the plaintiffs' state-law claims were preempted by federal law because (Merck said) the FDA would not have allowed it to add that warning, thus making it impossible for the company to comply with any duty to warn imposed by state law.

Led by Justice Breyer, the Court held that a preemption-seeking drug manufacturer in a case like this one must "show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning."⁶⁷ The Court further determined that whether the manufacturer has made this showing is a question of law for the judge to decide: answering the question "often involves the use of legal skills," judges are better equipped to interpret the relevant documents, and—given their familiarity with administrative law—"judges are better suited than are juries to understand and to interpret agency decisions in light of the governing statutory and regulatory context."⁶⁸ The Court remanded to the Third Circuit for application of these standards.

RELIGION—LARGE CROSS ON PUBLIC LAND

In *American Legion v. American Humanist Association*,⁶⁹ the Court rejected an Establishment Clause challenge brought against Maryland's decision to keep and maintain a large cross on public land, erected in 1925 as a memorial for local soldiers who were killed in World War I. Writing for the majority, Justice Alito identified four reasons why the Establishment Clause analysis famously prescribed in 1971's *Lemon v. Kurtzman*⁷⁰ was unsuitable for deciding the constitutionality of this particular display. *Lemon* says that the permissibility of a challenged government practice turns on whether the government's actions have a secular purpose, whether a primary effect of the government's actions is to further or impede religion, and whether the government's actions entail an excessive entanglement with religion. Justice Alito explained that, when dealing with monuments established long ago, it can be exceptionally difficult to discern the government's original animating purposes; monuments' purposes can change and multiply as time passes; the messages conveyed by monuments can change and multiply over time, as well; and tearing down monuments that trace their distant origins to religious purposes would strike many today as unduly hostile to religion.⁷¹ As a result, Justice Alito wrote, "[t]he passage of time gives rise to a strong presumption of constitutionality."⁷²

Those opposing the Maryland cross failed to overcome that presumption to the majority's satisfaction. For a great many, the

Court found, the cross-shaped monument has been less a reference to Christianity and more a reference to the deeply moving sight of row after row of white crosses erected on World War I battlefields. Moreover, as time has passed, the cross has taken on added secular significance, such as reminding those who see it of the honorable

sacrifices that America's veterans have made. To order the cross dismantled under these circumstances, the Court said, "would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."⁷³

Justice Thomas concurred in the judgment, questioning the Establishment Clause's application to the states; arguing that, even when the Establishment Clause applies, it only forbids coercion, notably absent here; and arguing that *Lemon* should be altogether abandoned. Joined by Justice Thomas, Justice Gorsuch also concurred in the judgment, arguing that the cross's opponents lacked standing because (he argued) merely feeling offended by a government's allegedly religious practice or display does not rise to the level of an Article III injury.

Justices Ginsburg and Sotomayor were the only dissenters. Writing for the two of them, Justice Ginsburg argued that the cross-shaped monument "elevates Christianity over other faiths, and religion over nonreligion."⁷⁴

REMOVAL OF COUNTERCLAIMS FROM STATE TO FEDERAL COURT

In *Home Depot U.S.A., Inc. v. Jackson*,⁷⁵ Citibank filed an action against George Jackson in North Carolina state court, alleging that Jackson failed to pay a charge he placed on his Citibank-issued Home Depot credit card when buying a water-treatment system. Jackson, in turn, filed third-party class-action claims against Home Depot U.S.A., Inc., and Carolina Water Systems, Inc., alleging misconduct relating to the sale of such water-treatment systems. Citibank subsequently dismissed its claim against Jackson, and one month later, Home Depot filed a notice of removal of the third-party counterclaim to federal court. Did either the general removal statute (28 U.S.C. § 1441(a)) or the Class Action Fairness Act authorize Home Depot—as a third-party counterclaim defendant—to remove the counterclaim filed against it?

No, Justice Thomas answered in a majority opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Thomas explained that Section 1441(a) "does not permit removal based on counterclaims at all," since that statute only grants removal

"[T]he messages conveyed by monuments can change and multiply over time..."

67. *Id.* at 1679 (clarifying an ambiguity left by *Wyeth v. Levine*, 555 U.S. 571 (2009)).

68. *Id.* at 1680.

69. 139 S. Ct. 2067 (2019).

70. 403 U.S. 602 (1971).

71. In portions of his opinion that garnered only the votes of Chief Justice Roberts and Justices Breyer and Kavanaugh, Justice Alito cast further doubt on *Lemon's* utility because it does not take account of the degree to which challenged governmental practices—such as prayer before legislative sessions—have their roots in longstanding traditions.

72. *American Legion*, 139 S. Ct. at 2082.

73. *Id.* at 2090. Joined by Justice Kagan, Justice Breyer filed a short concurrence, saying that the outcome might have been different if the cross had been erected more recently. Justice Kavanaugh also filed a brief concurrence, underscoring *Lemon's* shortcomings and pointing out that those who oppose the Maryland monument can still seek relief through Maryland politics. After all, he said, the Establishment Clause does not require Maryland to retain the monument.

74. *Id.* at 2104 (Ginsburg, J., dissenting).

75. 139 S. Ct. 1743 (2019).

“The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity...”

rights to a defendant (such as Jackson) whom a plaintiff (such as Citibank) has sued in an original “civil action.”⁷⁶ With respect to 28 U.S.C. § 1453(b)—the removal provision of the Class Action Fairness Act—the Court determined that this legislation merely makes a couple of removal-law adjustments that Congress deemed appropriate for class actions (such as not requiring the approval of all defendants as a prerequisite for removal), and does not change “§

1441(a)’s limitation on *who* can remove.”⁷⁷

SECURITIES FRAUD

The Securities and Exchange Commission’s Rule 10b-5(b) makes it unlawful “[t]o make any untrue statement of a material fact . . . in connection with the purchase or sale of any security.”⁷⁸ Suppose that, at the direction of someone else, a person issues a false statement concerning the purchase or sale of a security and does so with the intent to defraud. Can he or she be held liable under Rule 10b-5’s *other* provisions, which make it unlawful to “employ any device, scheme, or artifice to defraud” or “engage in any act, practice, or course of business which operates or would operate as a fraud or deceit”?⁷⁹

That was the question before the Court this Term in *Lorenzo v. SEC*.⁸⁰ At the direction of his supervisor, an investment banker named Francis Lorenzo had sent prospective investors an email making false statements about the value of a company’s assets. In 2011, the Court ruled in *Janus Capital Group, Inc. v. First Derivative Traders*⁸¹ that a person “make[s]” a statement within the meaning of this provision only if he or she “is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.”⁸² The SEC and the Second Circuit both concluded that, even though Lorenzo was not the “maker” of the statement under Rule 10b-5(b) and *Janus Capital Group*, he could still be held liable under Rule 10b-5’s other provisions. The Supreme Court agreed, finding the textual analysis “obvious” and “easy.”⁸³ “[W]e see nothing borderline about this case,” Justice Breyer wrote for the majority, “where the relevant conduct (as found by the Commission) consists of disseminating false or misleading information to prospective investors with the intent to defraud.”⁸⁴ The Court conceded that

liability might be inappropriate for “other actors tangentially involved in dissemination—say, a mailroom clerk.” But Lorenzo had “sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company.”⁸⁵

Joined by Justice Gorsuch in dissent, Justice Thomas argued that the majority had provided “no legal principle . . . that would preclude [the mailroom clerk or] the secretary from being pursued for primary violations of the securities laws.”⁸⁶ In his view, the majority had erased the distinction “between primary and secondary liability in fraudulent-misstatement cases,” yielding a ruling “that is likely to have far-reaching consequences.”⁸⁷

SOVEREIGN IMMUNITY AND THE FUTURE OF STARE DECISIS

In 1979, the Court ruled in *Nevada v. Hall*⁸⁸ that a state may be sued without its consent by a private party in another state’s courts. The Justices were asked to reexamine that conclusion this Term in *Franchise Tax Board of California v. Hyatt*.⁸⁹ The dispute concerned California’s effort to collect income taxes from Gilbert Hyatt, whose purported move from California to Nevada was, in the eyes of California’s tax authorities, a sham calculated to shield Hyatt from his California income-tax obligations. Hyatt believed that California’s Franchise Tax Board had committed torts when auditing him, so he filed an action for damages against it in Nevada state court. Nevada took the case (an unusual step⁹⁰) and ultimately entered a damages verdict in Hyatt’s favor.

Led by Justice Thomas and divided 5-4, the Court reversed, abandoning *Hall* and concluding that “Hyatt unfortunately will suffer the loss of two decades of litigation expenses and a final judgment against the Board for its egregious conduct.”⁹¹ The majority found that “Federalists and Antifederalists alike agreed in their preratification debates that States could not be sued [without their consent] in the courts of other States,”⁹² and that “[t]he Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity.”⁹³ So far as *stare decisis* is concerned, the Court devoted three short paragraphs to the issue, finding that the doctrine does not carry great weight on matters of constitutional interpretation and that the only factor weighing in favor of *Hall*’s retention was Hyatt’s reliance upon it when incurring two decades’ worth of litigation expenses. But Hyatt’s litigation expenditures, Justice Thomas explained, “are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question.”⁹⁴

76. *Id.* at 1748.

77. *Id.* at 1750.

78. 17 C.F.R. § 240.10b-5(b).

79. 17 C.F.R. § 240.10b-5(a), (c).

80. 139 S. Ct. 1094 (2019).

81. 564 U.S. 135 (2011).

82. *Id.* at 142.

83. *Id.* at 1101.

84. *Id.*

85. *Id.*

86. *Id.* at 1111 (Thomas, J., dissenting).

87. *Id.* at 1106 (Thomas, J., dissenting).

88. 440 U.S. 410 (1979).

89. 139 S. Ct. 1485 (2019). At an earlier stage of this complicated and decades-long litigation, the eight-member Court had divided evenly on whether to overturn *Hall*. See *Franchise Tax Board v. Hyatt*, 136 S. Ct. 1277, 1279 (2016).

90. See *Hyatt*, 139 S. Ct. at 1506 (Breyer, J., dissenting) (“The *Hall* issue so rarely arises because most States, like most sovereign nations, are reluctant to deny a sister State the immunity that they would prefer to enjoy reciprocally.”).

91. *Id.* at 1499.

92. *Id.* at 1494.

93. *Id.* at 1498.

94. *Id.* at 1499.

Justice Breyer led the four-member dissent, arguing that *Hall* was rightly decided, that overruling it would be appropriate only if the decision was “obviously wrong,”⁹⁵ and that “[t]oday’s decision can only cause one to wonder which cases the Court will overrule next.”⁹⁶

SPEECH AND THE FIRST AMENDMENT CASES

The Court handed down two significant cases concerning First Amendment speech rights this Term. In the first, *Manhattan Community Access Corp. v. Halleck*,⁹⁷ the Court was asked to decide whether privately operated public-access cable channels are state actors, such that their actions can bring the First Amendment into play. The dispute in that case arose when the Manhattan Neighborhood Network (MNN) —a private nonprofit corporation chosen by New York City to operate the public-access channels on Time Warner’s cable system in Manhattan—barred DeeDee Halleck and Jesus Papoieto Melendez from further use of those channels, allegedly in response to their criticism of MNN in a film they aired on one of the MNN-operated channels. Halleck and Melendez sued, claiming that MNN had violated their First Amendment rights.

Led by Justice Kavanaugh, the five-member majority concluded that the First Amendment did not apply because private operators of public-access channels are not state actors. The Court acknowledged that “a private entity may qualify as a state actor when it exercises ‘powers traditionally [and] exclusively reserved to the State.’”⁹⁸ Emphasizing how rare it is for a private entity’s activities to fall within that description, however, the Court concluded that operating a public-access cable channel is not a traditional and exclusive government function. Across the country, Justice Kavanaugh explained, public-access channels have been operated by a range of actors, “including private cable operators; private nonprofit organizations; municipalities; and other public and private community organizations, such as churches, schools, and libraries.”⁹⁹ The Court further found that a private entity does not become subject to First Amendment constraints simply by opening its property for speech by members of the public.¹⁰⁰

Joined by Justices Ginsburg, Breyer, and Kagan, Justice Sotomayor dissented. She contended that New York City had a property interest in the public-access cable channels, that those channels were public forums, and that because MNN was operating those public forums on the City’s behalf, the First Amendment’s protections for Halleck and Melendez applied no less than they would if the City had exercised its legal authority to operate those channels itself.

The Term’s other speech case, *Iancu v. Brunetti*,¹⁰¹ is the suc-

cessor to 2017’s *Matal v. Tam*.¹⁰² In *Tam*, the Justices struck down the Lanham Act’s ban on registering trademarks that “disparage” people because, the *Tam* Court concluded, the ban impermissibly discriminated based upon viewpoint. In *Brunetti*, the Justices turned their attention to the Lanham Act’s ban on registering “immoral . . . or scandalous” trademarks.¹⁰³ Erik Brunetti had sought registration of the trademark “FUCT” for his clothing line, but the U.S. Patent and Trademark Office refused, finding the mark exceptionally offensive.

With Justice Kagan writing for the majority, the Court held that the “immoral . . . or scandalous” bar impermissibly discriminated based on viewpoint no less than the registration bar struck down in *Tam*. “[O]n its face,” Justice Kagan explained, “the statute . . . distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation.”¹⁰⁴ Justice Kagan’s majority rejected the Government’s suggestion that the statute should be read to bar marks that are offensive not because of the ideas they convey but rather because “their *mode* of expression” is “vulgar.”¹⁰⁵ “To cut the statute off where the Government urges,” Justice Kagan wrote, “is not to interpret the statute Congress enacted, but to fashion a new one.”¹⁰⁶

In separate opinions, Justices Breyer and Sotomayor agreed that the ban on “immoral” marks violated the First Amendment, but argued (for differing reasons) that the ban on “scandalous” marks did not.

STANDING

A lower court concluded that Virginia legislators had racially gerrymandered its state legislative districts in violation of the Fourteenth Amendment. Shortly after the decision came down, Virginia’s attorney general announced that the state would not appeal the ruling. Dissatisfied with that decision, the Virginia House of Delegates sought to pick up the appellate torch itself. In *Virginia House of Delegates v. Bethune-Hill*,¹⁰⁷ the Court ruled 5-4 that Virginia’s House of Delegates did not have Article III standing to invoke the Supreme Court’s appellate jurisdiction. Led by Justice Ginsburg, the Court ruled that the House lacked standing for two chief reasons. First, Virginia legislation assigned the task of representing the state’s interests in civil litigation to the state’s

“[T]he First Amendment did not apply because private operators of public-access channels are not state actors.”

95. *Id.* at 1505 (Breyer, J., dissenting).

96. *Id.* at 1506 (Breyer, J., dissenting).

97. 139 S. Ct. 1921 (2019).

98. *Id.* at 1928 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)).

99. *Id.* at 1929.

100. Possibly signaling future interest in a different question, the Court noted that it was not being asked here to evaluate “the degree to which the First Amendment protects private entities such as Time Warner or MNN from government legislation or regulation requir-

ing those private entities to open their property for speech by others.” *Id.* at 1931, n. 2.

101. 139 S. Ct. 2294 (2019).

102. 137 S. Ct. 1744 (2017).

103. 15 U.S.C. § 1052(a).

104. *Iancu*, 139 S. Ct. at 2300.

105. *Id.* at 2301.

106. *Id.* at 2302.

107. 139 S. Ct. 1945 (2019).

“[T]he ruling has been persistently criticized by Justices and commentators alike...”

attorney general. Second, the House itself had not suffered any cognizable injury from the lower court's ruling. The House had said it was injured when redistricting authority was essentially shifted from it to the lower court, but Justice Ginsburg's majority found that the state's redistricting authority rested with the entire legislature, not with the House itself. Moreover, Justice Ginsburg wrote,

“the House as an institution has no cognizable interest in the identity of its members.”¹⁰⁸

Joined by Chief Justice Roberts and Justices Breyer and Kavanaugh, Justice Alito dissented. He argued that the House had alleged an Article III injury because “[a] legislative districting plan powerfully affects a legislative body's output of work.”¹⁰⁹ When a legislative district's boundaries are redrawn, he wrote, the groupings of constituents and representatives are changed, and those changes are likely to alter “the way in which the district's representative does his or her work.”¹¹⁰

TAKINGS, STATE-FEDERAL JURISDICTION, AND FURTHER STARE DECISIS ISSUES

When a Pennsylvania township told Rose Mary Knick that she had to provide public access to family gravesites located on her land, she sued in federal court under the Takings Clause. Because she had not yet brought a state action for inverse condemnation, the lower federal courts dismissed her Fifth Amendment takings claim as unripe. Those who litigate or adjudicate Fifth Amendment takings claims have long been familiar with the Court's 1985 ruling in *Williamson County Regional Planning Commission v. Hamilton Bank*,¹¹¹ in which the Court held that a federal court must dismiss a property owner's federal takings claim against a state or local government unless the owner has first unsuccessfully tried to obtain just compensation through available state procedures, such as by bringing an inverse-condemnation claim in state court. One need not celebrate or chafe against *Williamson County* any longer because, in *Knick v. Township of Scott*,¹¹² the 5-4 Court overruled it.

Led by Chief Justice Roberts, the majority jettisoned *Williamson County*, holding that the Court in that case had fundamentally erred by failing to recognize that “[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner.”¹¹³ “A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking,” Chief Justice Roberts wrote, “but that does not mean the

violation never took place.”¹¹⁴ In the majority's view, *Williamson County* was not entitled to the benefits of *stare decisis* because its constitutional interpretation was egregiously wrong, the ruling has been persistently criticized by Justices and commentators alike, and the state-litigation rule is unworkable due to the preclusive effects of state courts' rulings in subsequent federal litigation.¹¹⁵ The Court noted that property owners who have suffered a taking should still be denied injunctive relief against the governmental actions constituting the taking, “[a]s long as an adequate provision for obtaining just compensation exists.”¹¹⁶

Joined by Justices Ginsburg, Breyer, and Sotomayor in dissent, Justice Kagan argued that *Williamson County* had been decided in accordance with roughly a century's worth of precedent on when a federal takings claim arises, that the majority's ruling will “channel a mass of quintessentially local cases involving complex state-law issues into federal courts,” and that the decision to overrule *Williamson County* “transgresses all usual principles of *stare decisis*.”¹¹⁷

TAXES, DISCRIMINATION, ESTATES

Congress has declared that states may tax federal employees' wages or retirement benefits, so long as “the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.”¹¹⁸ In *Dawson v. Steager*,¹¹⁹ the Court unanimously concluded that West Virginia had violated this legislation when it taxed the federal pension benefits of James Dawson—a retired employee of the U.S. Marshals Service—but exempted from taxation the retirement benefits of former state law-enforcement employees. Writing for the Court, Justice Gorsuch explained that West Virginia had defined the class of tax-exempt retirees by reference to their former job duties, and there weren't “any ‘significant differences’ between Mr. Dawson's former job responsibilities and those of the tax-exempt state law enforcement retirees.”¹²⁰ It thus was clear that West Virginia's reason for treating Mr. Dawson less favorably was that his pension benefits were coming from the federal government, rather than from the state, a discriminatory distinction that the federal statute expressly forbids.

In *North Carolina Department of Revenue v. Kimberley Rice Kastner 1992 Family Trust*,¹²¹ the Court unanimously held that the Fourteenth Amendment's Due Process Clause bars a state from taxing trust income based solely on the trust beneficiary's residence in the state. North Carolina had sent a hefty \$1.3 million income-tax bill to a trust whose beneficiaries resided there. But no income had been distributed to those beneficiaries, nor did those beneficiaries have any right to demand an income distribution, nor did the trustee administer the trust within North Carolina. “When a tax is premised on the in-state residence of a

108. *Id.* at 1955.

109. *Id.* at 1956 (Alito, J., dissenting).

110. *Id.* (Alito, J., dissenting).

111. 473 U.S. 172 (1985).

112. 139 S. Ct. 2162 (2019).

113. *Id.* at 2170.

114. *Id.* at 2172.

115. Those preclusive effects had been secured by the Court's ruling in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S.

323 (2005).

116. *Id.* at 2176.

117. *Id.* at 2181 (Kagan, J., dissenting).

118. 4 U.S.C. § 111.

119. 139 S. Ct. 698 (2019).

120. *Id.* at 704 (quoting *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 383 (1960)).

121. 139 S. Ct. 2213 (2019).

beneficiary,” Justice Sotomayor wrote for the Court, “the Constitution requires that the resident have some degree of possession, control, or enjoyment of the trust property or a right to receive that property before the State can tax the asset.”¹²²

TITLE VII

Title VII of the Civil Rights Act of 1964—which bars employment discrimination on the basis of race, color, national origin, sex, or religion—requires complainants to file a charge with the Equal Employment Opportunity Commission before commencing a Title VII lawsuit in court. Suppose a complainant does not file a charge, sues in court, and the employer does not timely seek dismissal of the complainant’s lawsuit. Can the employer raise that objection later in the litigation, or is the charge-filing requirement jurisdictional in nature, and accordingly a basis for dismissal at any point?

In *Fort Bend County, Texas v. Davis*,¹²³ the justices unanimously ruled that Title VII’s charge-filing requirement is not jurisdictional in nature, because it does not restrict courts’ adjudicatory authority. Rather, Justice Ginsburg explained for the Court, the charge-filing prerequisite to suit is simply a claim-processing rule that is “mandatory if timely raised,” but that must indeed “be timely raised to come into play.”¹²⁴

TORT LAW AND MANUFACTURERS’ LIABILITY IN MARITIME CASES

Absent congressional intervention, federal courts sit as common-law courts in maritime cases.¹²⁵ That fact gave the Court an opportunity to tackle an interesting question of maritime tort law in *Air & Liquid Systems Corp. v. DeVries*.¹²⁶ After contracting cancer that they believed resulted from asbestos exposure, two Navy veterans sued the manufacturers of equipment that had been installed on Navy ships, contending that the manufacturers had negligently failed to warn them of the asbestos danger. Most of the equipment did not contain any asbestos when delivered to the Navy, but, to function properly, the equipment required the addition of asbestos insulation or asbestos-containing parts. The Navy thus added the asbestos to the equipment. Could the manufacturers be held liable for failing to warn the two plaintiffs of the risks they faced when working with or near the assembled products?

Surveying an array of tort-law authorities, the Court considered and rejected two approaches that sat on opposite ends of the spectrum of possibilities: hold the manufacturers liable so long as it was foreseeable that their products would be used with asbestos-containing parts (“the foreseeability rule”) or hold that the manufacturers are not liable because they did not themselves make or deliver asbestos-containing equipment (“the bare-metal defense”). Led by Justice Kavanaugh, the Court instead took a middle path:

In the maritime tort context, a product manufacturer

has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product’s users will realize that danger.¹²⁷

“Title VII’s charge-filing requirement is not jurisdictional in nature...”

OTHER NOTABLE RULINGS

ADEA AND STATE EMPLOYEES

In *Mount Lemmon Fire District v. Guido*,¹²⁸ the Court unanimously held that the Age Discrimination in Employment Act applies to state and local governmental employers no matter how many individuals they employ. (In contrast, a private employer is bound by the ADEA only if it has twenty or more employees.)

FOIA AND PRIVATE INFORMATION

In *Food Marketing Institute v. Argus Leader Media*,¹²⁹ the 6-3 Court determined that, between 1974 and the present day, numerous lower courts erred by concluding that private-sector commercial information in the government’s possession is “confidential” within the meaning of the Freedom of Information Act—and thus shielded from mandatory disclosure—only if the information’s disclosure would result in substantial competitive harm for the party that provided the government with the information.

SSA ATTORNEYS FEES CAP

In *Culbertson v. Berryhill*,¹³⁰ the Court unanimously ruled that the Social Security Act does not impose an aggregate 25% cap on the fees that attorneys may charge for representing claimants in proceedings before the Social Security Administration and the courts. Rather, the 25% cap described in 42 U.S.C. § 406(b) applies only to attorney fees for successful representation in court proceedings.

DHHS VIOLATED LAW BY FAILING TO PROVIDE NOTICE AND COMMENT

In *Azar v. Allina Health Services*,¹³¹ the 7-1 Court held (with Justice Kavanaugh not participating) that the U.S. Department of Health and Human Services had inexcusably violated its duty under 42 U.S.C. § 1395hh(a)(2) to provide notice and an opportunity for public comment before establishing or changing a “substantive legal standard” affecting Medicare benefits. The agency had posted on its website—without prior notice or public comment—a new formula for determining the amount of additional payments the agency would make to hospitals that provide

122. *Id.* at 2222.

123. 139 S. Ct. 1843 (2019).

124. *Id.* at 1846. The Court noted that it has not yet determined whether claim-processing rules of this sort “may ever be subject to equitable exceptions.” *Id.* at 1849, n. 5 (internal quotation and alteration omitted).

125. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507-08 & n. 21 (2008).

126. 139 S. Ct. 986 (2019).

127. *Id.* at 995. Joined by Justices Thomas and Alito in dissent, Justice Gorsuch argued that the Court should have applied the bare-metal defense.

128. 139 S. Ct. 22 (2018).

129. 139 S. Ct. 2356 (2019).

130. 139 S. Ct. 517 (2019).

131. 139 S. Ct. 1804 (2019).

services for unusually large numbers of low-income Medicare patients.

NATIVE AMERICAN FUEL IMPORTERS ARE TAX EXEMPT

In *Washington State Department of Licensing v. Cougar Den, Inc.*,¹³² the 5-4 Court held that, under an 1855 treaty, the Yakama Nation tribe's fuel importers are exempt from a tax imposed on such importers by the State of Washington.

NON-JUDICIAL FORECLOSURE IS NOT "DEBT COLLECTION"

The Court unanimously concluded in *Obduskey v. McCarthy & Holthus LLP*¹³³ that, for most purposes, a business that merely engages in nonjudicial foreclosure proceedings is not a "debt collector" subject to the restrictions imposed by the Fair Debt Collection Practices Act.

CREDITOR IN CONTEMPT FOR BANKRUPTCY CONDUCT

Rejecting both strict liability and a subjective good-faith standard, the Court unanimously held in *Taggart v. Lorenzen*¹³⁴ that a creditor may be held in civil contempt for violating a bankruptcy court's discharge order "if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful."¹³⁵ Justice Breyer explained for the Court that this is the traditional standard "for determining when a party may be held in civil contempt for violating an injunction."¹³⁶

GOPHER FROG HABITAT DESIGNATION CAN BE REVIEWED

In *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*¹³⁷—a case concerning the Fish and Wildlife Service's designation of a tract of land as "critical habitat" for the endangered dusky gopher frog in Louisiana—the 8-0 Court held (with Justice Kavanaugh not participating) that the Service's critical-habitat designations under the Endangered Species Act are subject to judicial review and that an area can be "critical habitat" for a species only if it is indeed habitat for that species. The Court remanded for further assessment of statutory and factual issues concerning the land in question.

SERVICE ON FOREIGN COUNTRY MUST BE AT PRINCIPAL OFFICE (NOT EMBASSY)

In *Republic of Sudan v. Harrison*,¹³⁸ the 8-1 Court held that litigants relying upon 28 U.S.C. § 1608(a)(3) to serve civil process

upon a foreign state must mail service to the foreign minister at his or her principal office in the foreign state, rather than to the foreign minister at his or her embassy office in the United States.

RAILROAD EMPLOYEE'S LOST WAGE CLAIM IS TAXABLE

In *Burlington Northern Santa Fe Railway Co. v. Loos*,¹³⁹ the 7-2 Court held that a railroad's payment to an employee for lost wages resulting from a workplace injury amounts to taxable compensation under the Railroad Retirement Tax Act.

TVA CAN BE SUED

In *Thacker v. Tennessee Valley Authority*,¹⁴⁰ the Court unanimously held that, in the Tennessee Valley Authority Act of 1933, Congress waived the TVA's immunity against tort suits arising from its performance of discretionary functions.

LOOKING AHEAD

The Court is slated to decide a wide range of important questions in civil cases during its October 2019 Term. These include whether Congress validly abrogated the states' sovereign immunity in actions for copyright infringement,¹⁴¹ whether Title VII prohibits discrimination against transgender people¹⁴² and discrimination based on sexual orientation,¹⁴³ whether a plaintiff claiming a racially discriminatory refusal to contract in violation of 42 U.S.C. § 1981 must show that race was merely a motivating factor in the refusal to contract or whether the claimant must instead establish but-for causation,¹⁴⁴ whether members of the Financial Oversight and Management Board for Puerto Rico are subject to the Appointments Clause,¹⁴⁵ and whether the Department of Homeland Security's decision to terminate the Deferred Action for Childhood Arrivals program is judicially reviewable and lawful.¹⁴⁶



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132. 139 S. Ct. 1000 (2019).

133. 139 S. Ct. 1029 (2019).

134. 139 S. Ct. 1795 (2019).

135. *Id.* at 1799.

136. *Id.* at 1801.

137. 139 S. Ct. 361 (2018).

138. 139 S. Ct. 1048 (2019).

139. 139 S. Ct. 893 (2019).

140. 139 S. Ct. 1435 (2019). The Court remanded to determine whether the TVA might be able to assert immunity under a governmental-activities theory.

141. *Allen v. Cooper*, No. 18-877.

142. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107.

143. *Altitude Express, Inc. v. Zarda*, No. 17-1623; *Bostock v. Clayton County*, No. 17-1618.

144. *Comcast Corp. v. National Association of African American-Owned Media*, No. 18-1171.

145. *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, No. 18-1334; *Official Committee of Debtors v. Aurelius Investments, LLC*, No. 18-1496; *United States v. Aurelius Investment, LLC*, No. 18-1514.

146. *Department of Homeland Security v. Regents of the University of California*, No. 18-587; *McAleenan v. Vidal*, No. 18-589; *Trump v. NAACP*, No. 18-588.

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Elected v. Appointed: Who Wins?

Judicial Selection — Book Review/Q & A

David J. Dreyer

Who Is to Judge?

By Charles Gardner Geyh
(Oxford Publishing 2019)

Imagine this scenario: A state trial judge is running for reelection in a mid-sized U.S. community. He/she receives campaign contributions from a local construction company. A case arises before the judge in which the construction company is accused of negligent safety practices causing worker injuries. A motion to dismiss is pending regarding whether the construction company has a duty to protect the workers on the job. Imagine another scenario: A lawyer applies for an appointed judge position. He/she gets the judgeship by being appointed by a Governor who is the same political party as the new judge. Subsequently, the State is sued for not increasing its budget for child welfare—something the Governor, and the new judge's political party, have always opposed. The new judge is faced with a motion for summary judgment from the State claiming the Governor has sole discretion to decide the budget.

Both of these examples show the unpleasant conflicts inherent in both elected and appointed judicial selection systems. Hopefully, our bench is lacking those who would allow such pressure to affect the merits of a case. But what if data show it does? And what if the public believes it does, regardless? Charles Gardner Geyh, of Indiana University Maurer School of Law, is a leading scholar and thinker about courts and judicial selection. His works include *What's Law Got To Do With It?: What Judges Do, Why They Do It, and What's at Stake* (Stanford University Press 2011), *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (University Of Michigan Press 2008), and *Why Judicial Elections Stink* (*Ohio State Law Journal* 2003). In his latest book published earlier this year, *Who Is to Judge?* (Oxford Publishing 2019), he looks at the age-old debate between advocates for elected judges and appointed judges, and anything in between. His discussion and conclusions will surprise you because he thinks both sides are right—sort of.

Professor Geyh's writing tone and style are a refreshing approach to this well-worn adversarial acrimony. The book reads easy and flows well as we delve into each side's strengths and weaknesses—and as Professor Geyh deftly demonstrates, each side has a *lot* of strengths and weaknesses. One bright spot shows up right away in the Introduction as the author

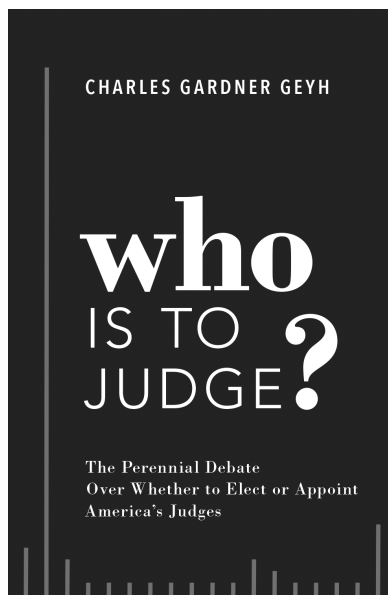
puts us in spectator seats for a great figurative tennis match between the advocates for and against each side. As the pros and cons of each argument are described and evaluated, the score goes back and forth. Finally, the match is a never-ending tie and nobody wins. But we readers are treated to a succinct summary of each argument, and pointed to Professor Geyh's eventual conclusion—nobody wins, or as the book describes, no judicial selection model is optimal for all places at all times. It is quite possible that no one has made this case before, or at least as well.

Judges and lawyers will not wonder why another book about this important topic, but this author justifies it anyway,

and reaches for those beyond the legal profession: “We should care about how America picks its judges because we should care about who becomes judges and the decisions that those judges make.” Judges make a difference because they interpret constitutions and statutes, make common law, and affect the everyday lives of people, he says.

Professor Geyh first takes readers on an adventurous journey through the history of the judicial selection debate focusing on state courts. He navigates waters running through five different selection methods, and how perceived shortfalls of each led to the next: colonial governors appointing (too much power to the King) to state legislatures appointing (too much political cronyism) to partisan elections (too much power to party bosses) to nonpartisan elections (still partisan) to “merit” selection. Why the never-

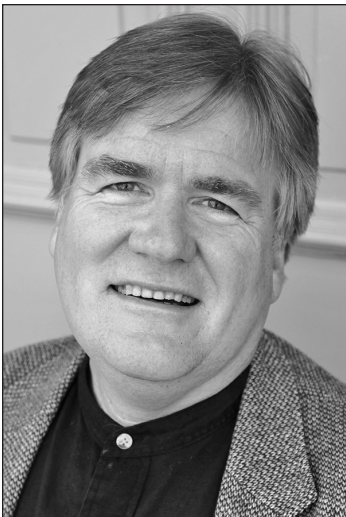
ending debate? Election advocates seek accountability, and the public seems to trust a system more in which they have some control. Appointment advocates seek independence from outside influence and what the electorate may find popular. As the book unfolds, it shows the current judicial selection landscape as a “seismic shift” with more money and more special interest litigation laying a complicated confluence that has not always bode well for either side of the debate. The jewel of the book is halfway through where a whole chapter takes each side—election and appointed—not to decide which is better or weigh the merits or each, but to fully inform and explain. That chapter alone is an excellent primer on this whole field and worth the price of the book. It all depends on how one views judges and what core values one believes are at stake. Election advocates see all judges as politicians who should have to answer to the electorate. Appointment advocates see all judges as unbiased umpires who should be left alone from the pressures of outside influence.



“Whose cause is righteous?” Professor Geyh asks. “Both and neither.” A unique value of the book is the well-chronicled data supporting and refuting claims of each side. For example, those against elected judges can cite research of 470 judges and 28,000 cases to show a “statistically significant relationship” between contributions from special interest groups and results for litigants favored by special interest groups. On the other hand, those against appointed judges can cite studies from distinguished academics finding no difference between the quality of elected and appointed judges, and one that even finds elected judges write more opinions and are more independent. And while the author settles on the appointed system as his preference by “default,” this is a “soft and rebuttable presumption: appointed systems must yield to elective systems when the judiciary’s legitimacy depends on supplying the people a greater measure of control over the judges who serve them.”

Professor Geyh’s book provides a plethora of provocative information and discussion. Those on either side of the debate will find it challenging and compelling. Most of all, it is thoughtful at a time when we need to be more reflective about whether this is a binary choice, or has room for the book’s suggestions for incremental reform. Readers will have to decide if they agree with the authors’ conclusion that the longstanding judicial selection debate is “a condition to be managed rather than a disease to be cured.”

Q & A WITH THE AUTHOR



Charles Gardner Geyh is the John F. Kimberling Professor at the Indiana University Maurer School of Law. His work on judicial independence, accountability, selection, administration, procedure, and ethics has appeared in over eighty books, articles, book chapters, reports, and other publications. Before entering the academy in 1991, he clerked for Thomas A. Clark on the United States Court of Appeals for the Eleventh Circuit, worked as an associate at the Washington, D.C. firm of Covington & Burling, and served as counsel to the House Judiciary Committee. He joined the Indiana University faculty in 1998, where he has served as the law school’s associate dean for research, and has received three

faculty fellowships, three Trustees teaching awards, the Wallace teaching award, and a Carnegie Fellowship.

“[J]udges alter their decision making when elections are impending . . .”

Q: The book often cites data claiming to show elected judges’ decisions are affected by public approval, upcoming elections, etc. Are there any studies about the shortcomings of appointed judges’ performances as well?

A: The issue has less to do with whether judges are appointed or elected, than whether they are subject to reselection processes. Studies show that judges who are subject to reselection—be it reappointment or reelection—tend to make decisions with an eye toward those who control their future. Judges who are not subject to reselection—most notably judges on the U.S. Supreme Court and circuit courts—are less dependent on the preferences of others but can be more influenced by their own ideological preferences, especially in close cases.

Q: Some states have a mixed set of selection systems (elected in some counties, appointed in others, partisan, non-partisan, etc.). Is this prudent and will it last?

A: Local rule has its virtues, but from the perspective of a unified judiciary, having county-by-county variation is chaotic. We have such a situation here in Indiana, which our Chief Justices have proposed to rectify, but old traditions die hard.

Q: You seem to consistently posit the terms “independent” (for appointed) and “accountability” (for elected) as separate descriptions for the sake of analysis. Is that oversimplified?

A: If you are asking whether I think that your summary of my analysis is oversimplified, then yes. Judges are independent and accountable to varying degrees in each of the five systems of selection in use across the states. The primary reason that elected judges are generally regarded as less independent and more accountable than their appointed counterparts, is because most (though not all) states with elective systems require incumbents to run for reelection in contested elections. Studies show that judges alter their decision making when elections are impending, and more so in contested elections than retention elections, because the threat to tenure is more meaningful. That said, appointed judges in the handful of states who are subject to reappointment show signs of being as if not more dependent than their elected counterparts.

Q: What do you think of Presidential candidate Pete Buttigieg’s proposal to “depoliticize” the U.S. Supreme Court by having 10 justices chosen as now, and an additional 5 chosen by unanimous vote of the 10 sitting justices?

“No one system works best for all states and all times . . .”

A: I'm a traditionalist. I take constitutional conventions seriously—including conventions against playing partisan games with Supreme Court size. We are slowly internalizing the reality that the U.S. Supreme Court is a different kind of court—a more political court that may warrant a different system of selection.

But we are not there yet. And I worry that what his proposal might gain by diminishing external political pressure on the composition of the Court, it could lose by exacerbating internal political pressures within the Court, to the detriment of Court cohesiveness and collegiality.

Q: The history that you trace seems to show shortcomings in both elected and appointed selection systems ever since the early 1800s or before. Why does this debate always persist?

A: Ultimately, the issue of whether you want judges to be independent from or accountable to the preferences of the majority implicates competing priorities that have remained in perpetual—and perhaps constructive—tension.

Q: Shouldn't judges be both independent and accountable to ensure public confidence?

A: Of course—and I suspect that almost every thoughtful person would agree. Too much independence and the rule of law suffers because we are helpless to prevent rogue judges from going their own way and disregarding the law. Too much accountability, and the rule of law suffers because judges can be intimidated into disregarding the law and doing what they are told by those who control their future.

Q: In 1913, the American Judicature Society proposed a “council of judges” to create a pool of prospective qualified judges. What do you think about judges choosing judges?

A: Judges do select judges in limited contexts: federal judges, for example, choose federal magistrate judges. Such a practice has the benefit of ensuring that judges will be capable and qualified, because judges know what it takes to be a good judge, and because hiring friends who are incompetent slackers would make life miserable for the judges who selected them. But the risk is that judges so selected could become further and further removed from the people they serve—and that concerns me. In an anti-elitist age when public confidence in government generally is at low ebb, a system in which government officials choose their successors is unlikely to inspire public confidence.

Q: A large conclusion you draw is that any given selection model cannot be optimal for all states at all times. But shouldn't we be moving toward one system?

A: No one system works best for all states and all times, because different systems emphasize different priorities, and

those priorities can change with the times and the circumstances. In my view, a system in which judges make decisions unencumbered by the concern that they might lose their jobs if they reach an unpopular result, better serves the rule of law and is a preferable default. But in jurisdictions where public confidence in the judiciary depends on judges being answerable to the people they serve in periodic elections, an elective model may be essential to preserving court legitimacy.

Q: When judges are not reelected, or not retained, because of public disapproval over one case, doesn't that mitigate the argument that elected judges are compromised and won't be true to the law? And aren't there just as many or more examples of appointed judges who appear compromised in favor of their personal ideology?

A: There are examples of judicial courage, featuring judges who follow the law knowing that it will anger the electorate and put their tenure at risk, just as there are other examples of judges who lost their jobs because of backlash to an unpopular decision that they never saw coming. Ultimately, however, we need to set anecdotes aside and look at the data. And there is no getting past data showing that, on average, judges decide cases differently in the shadow of impending cases, to mollify voters and stay in office. For example, studies in multiple states show that judges impose harsher sentences on defendants during election season than otherwise. Ideological influence is well documented at the Supreme and circuit court levels of the federal system, but less so at the trial level, where appellate oversight, applicable precedent, and the relative absence of ideologically charged issues limit ideology's impact.

Q: How do you reconcile the traditional arguments for appointed judge selection (independence from donors and from public approval, etc.) with the spending from special interest groups for/against Justice Kavanaugh and airing public ads to call senators?

A: When the success of a candidate's campaign to become a judge turns on the support of an individual or organization with an interest in the outcome of the cases that the judge will decide, it can call the judge's impartiality into question. That is so regardless of whether the support takes the form of financial contributions to an election campaign, financial contributions to an appointment campaign, or nonfinancial support. And so, I find the spectacle of the Kavanaugh campaign quite troubling. As a policy matter, however, it troubles me less than the role that money plays in judicial election campaigns for two reasons. First, in the context of judicial elections, a judge's need to keep his campaign supporters happy is ongoing, because the judge will need to stand for reelection. One study shows, for example, that in their last term of office, when there is no further need to mollify their supporters, judges do not align their votes with the views of their principal supporters as closely. For a federal judge, in contrast, once appointed, his dependence on interest group support is at an end. Second, the problem of interest groups attempting to buy influence in federal judicial appointments is not systemic, but is focused

largely on the nine judges who staff a single Court—a Court that is *sui generis*. The perception of money buying influence in judicial election campaigns, in contrast, is far more pervasive, and cuts across states and tiers of court.

Q: Have state judgeships become more political regardless of how they are selected?

A: Yes, I think so. First, after the Warren Court was dismantled and the Supreme Court's support for civil rights and liberties weakened, Justice Brennan and others encouraged groups to move their ideologically charged litigation campaigns to state systems, where state constitutions were often more protective of individual rights than their federal corollary. Second, the movement toward establishing intermediate courts of appeals across the states that began in earnest in the 1950s was typically paired with reducing supreme court caseloads by making their jurisdiction discretionary. As a consequence, supreme courts have tended to leave cases of simple error correction to the intermediate appellate courts and focus on a smaller number of more difficult and often politically charged cases that require them to make new—and controversial—law. Third, the public is increasingly unwilling to accept the premise of the traditional rule-of-law paradigm, that judges set their personal views aside and impartially uphold the law, and is more inclined to suspect that ideology, race, gender, and other extralegal factors play a role in decision making.

Q: How has social media affected judicial selection?

A: The potential impact is at least threefold. First, judicial rulings made in the hinterlands that would never have come to public attention before the age of the Internet can reach a worldwide audience in a matter of hours—rulings that can become fodder for judicial election campaigns. Second, “citizen journalists” who disseminate information via social media, are unencumbered by fact-checking norms that regulate the mainstream media, which increases the extent to which junk news can pollute judicial election campaigns. Third, social media allows the public to mobilize quickly, which can be problematic in states with retention elections, where late-breaking opposition campaigns can leave incumbents helpless to defend themselves.

Q: The book seems to analyze the disputants in the judicial selections debates more than judges' behavior itself. Why is that important?

A: This is a book about the judicial selection debate, and why that debate is never-ending, which lends a natural focus to the arguments on both sides of the debate and who is making them. My last book, *Courting Peril: The Political Transformation of the American Judiciary* focused more on judicial behavior and public perception of that behavior, to the end of explaining why and how the judiciary has become a more political place. That said, the arguments that drive the judicial selection debate, which is the focus of this book, *do* focus on judicial behavior—most notably, studies showing the impact of impending elections on judicial decision making; and studies

showing how judges selected via different systems apply the law differently.

Q: You write that the data shows elected judges' rulings are affected by upcoming elections—how does that affect the balance of the arguments between elected and appointed systems?

A: It may be the strongest argument against elective systems—or, more precisely, against systems that use elections to reselect judges. Some political scientists disagree. They argue that when, for example, judges impose harsher sentences in the shadow of impending elections it channels their discretion away from imposing their own ideological preferences and toward the preferences of the public they serve. I agree that judges do have discretion to exercise, but that discretion is informed by a lifetime of experience and learning that the public lacks. We want judges to give us their best assessment of what the law and facts are—a result that can best be achieved if judges are not under pressure to contort their rulings to appease “constituents.”

Q: There is some discussion in the book that, on one hand, judicial elections provide accountability—but on the other hand, political party labels can actually inhibit democratic accountability. Can you explain?

A: In nonpartisan elections, where voters are foreclosed from voting with reference to party labels, studies show that voters are more likely to base their votes on the decisions that an incumbent has made (or at least as those decisions are described in campaign advertising)—because that is what the voters have to work with. In partisan elections, voters are more likely to vote for judges of their preferred political party, with less regard for the particular decisions that the judges have made. Some political scientists have argued that in this way, partisan elections diminish democratic accountability by making judges in partisan elections less accountable for their decisions. I don't really buy this argument for two reasons. First, I don't think that the rate at which voters throw judges out of office because of their decisions is a good measure of democratic accountability. Second, partisan and nonpartisan systems promote democratic accountability in different ways: Partisan elections focus on voter choice in greater relation to the candidates' party affiliations and the philosophical differences those affiliations connote. Nonpartisan elections focus on voter choice in greater relation to the high-profile cases those judges decide.

Q: What do you mean when you write that judges are neither independent “umpires” nor elected “politicians in robes,” but both?

A: In the book, I say that they are neither and both. I'm really making the common-sense point that judges are acculturated to take the law seriously and uphold the law as they think it is

“[J]udges selected via different systems apply the law differently.”

“Judges tend to think that whichever system selected them is pretty good.”

written, in a manner akin to umpires. But in close cases, when judges have discretion and judgment to exercise, they must bring their background, education, experience, and policy perspectives to bear in deciding what outcome is right or best—which can bring ideological, aka “political,” influences to bear. I see nothing

wrong with that: It is part of the art of judging. And to that extent judges are neither umpires nor politicians but something else.

Q: How do reconcile your general support for appointed judicial selection with the data that shows judicial appointments are less transparent and can adversely affect public confidence?

A: The data do indeed show that, on average, judicial elections are legitimacy enhancing. All else being equal, the public prefers to have a say-so over the public officials who serve them—including judges. Elections, however, are not the only way in which judicial systems protect and preserve their legitimacy. In jurisdictions that do not select their judges in contested elections, legitimacy is promoted by judges’ perceived expertise, impartiality, independence, and integrity. As a consequence, public confidence levels in unelected federal courts and elected state courts are essentially the same. Insofar as elected and unelected judiciaries are both perceived as legitimate, my default is to appointive systems, for two reasons: 1) appointive systems (unencumbered by meaningful reselection processes) avoid judicial dependence on voter preferences when elections are impending, and 2) appointive systems avoid the risk of ugly, expensive, no-holds-barred election campaigns, where the data show that elections can, in extreme cases, diminish the judiciary’s perceived legitimacy.

Q: Some of the sociological analysis in the book includes why people on both sides of this debate are not open-minded. You even include yourself. What changed you?

A: It’s largely a matter of whom I talked to. When my information bubble was limited to organizations like the American Bar Association, the American Judicature Society, and merit selection reformers, my perspective was influenced largely by groups whose antipathy to judicial elections was entrenched. When I began to explore competing views—not for the purpose of countering them but for the purpose of understanding them—particularly the views of leading political scientists and the data that informed their conclusions—I came to the common-sense conclusion that the reason that this debate is endless is because it is complicated, and not just because one side is being stupid. Interesting side note: My innumerable conversations with judges over the years have not played as much of a role in this process, because with only a handful of exceptions, judges tend to think that whichever system selected them is pretty good.

Q: Some trial court judges may dispute the notion that attitudinal influences, and other sociological factors, are less pronounced in lower courts. What would you say to them?

A: I’m not an ivory tower academic, in the sense that I create opportunities to learn from the judges I write about. In the past year or so, I have taught a weeklong class on judges and social science to forty Indiana trial judges, addressed over four hundred federal trial judges at events on the east and west coasts, participated in a mid-career workshop for thirty federal magistrate judges, and addressed 150 state appellate judges at a national conference. In the past ten years I have spoken to around 3,000 state trial judges at judicial conferences around the country. What they have told me is that ideology plays less of a role in their decision making for at least three reasons: 1) They don’t tend to deal with hot-button issues like abortion, gun control, same-sex marriage, prayer in public schools, and so on, where ideology is front and center; 2) their dockets are top heavy with “easy” cases, where the law tends to be pretty simple and clear and their focus is on the facts; and 3) their discretion is sharply curtailed by appellate court precedent—they simply don’t have the latitude to make legal policy. Many trial judges have bemoaned the fact that the public hears about judicial politics on the Supreme Court and incorrectly assumes that it describes courts everywhere, including theirs. Their views are corroborated by studies showing that the evidence of attitudinal influences diminishes as we go from courts of final resort, to intermediate appellate courts, to courts of original jurisdiction. When teaching my class to Indiana trial judges, which I have done several times now, my struggle has been to convince them that ideology matters at all. Two examples I use to make my point (which they tend to buy, albeit grudgingly) are the discretion they exercise when imposing sentence, and when awarding child custody in light of the “best interests of the child.” The consensus among trial judges, with whom I have spoken, is that the extralegal factors that influence their decision making are less attitudinal than strategic: Judges are alert to the impact of their decisions on their communities, and will sometimes temper their rulings accordingly.

Q: When the book uses the term “dueling publics” to explain another point about why disputants are not open-minded, it seems to compare with what many commentators say today about the public divide on all public issues, that is, that we only hear and seek the information for our side and never listen to, or reconsider, anything else. What distinguishes the judicial selection debate?

A: My reference to “dueling publics” does not concern inevitable differences of opinion in garden-variety public surveys. It has to do with the fact that when it comes to public attitudes toward courts and judicial selection there are two different “publics.” One “public” is the general public, comprised of rank and file voters, for whom a good judge is one who engenders public trust by making decisions they regard as politically acceptable. Surveys show that the general public favors judicial elections, and sees no problem with judges who take positions on issues that may come before them, or make promises to decide future cases in specified ways. The other

“public” is the litigating public. It is comprised of litigants for whom a good judge is one who will give them a fair shake in court. The litigating public is likelier to be skeptical of elected judges who could lose their jobs if they make an unpopular decision in the litigant’s favor, or whose latest election campaign was financed by the other party, the other party’s lawyer, or an interest group that wants to see the other side win. And the litigating public will be averse to judges who lock themselves in to a public position on the litigant’s issue before the litigant has had an opportunity to be heard. The net effect is that disputants in the judicial selection debate each think that they have the “public” on their side. They are both right. They are both wrong.

Q: One of your main points is that the judicial selection debate needs to involve “deep inter-disciplinarity.” What is that?

A: In the Indian folk tale of the blind men and the elephant, each of three blind men mis-describes an elephant with reference to the part he is holding, and the same is true with judicial selection. The legal profession appreciates the importance of law in judicial decision making, but has been reluctant to acknowledge the ways in which ideology, race, gender, and other extralegal influences can affect decision making. Political scientists have studied the role that ideology and other non-legal influences can exert on judicial decision making, but are often dismissive of the role that law plays. And neither lawyers nor political scientists pay adequate heed to the roles that psychology, history, and anthropology can play in understanding why judges do what they do. By bringing these different disciplines to the table via deep inter-disciplinarity, we stand a better chance of accurately describing the whole elephant, in all its complexity. And that is the first step toward regulating judicial selection with the nuance it requires. If judges are all about law, as the legal profession often posits, then elections are anathema, because they turn law into a popularity contest. If judges are all about politics, as political scientists often claim, then appointive systems liberate judges to go rogue and satiate their ideological impulses. Bring the two of them together, however, educate them both on what psychology, history, and anthropology add, and the judicial selection choices we make—which are premised on the ways those choices affect judicial decision making—are likely to be better informed.

Q: An interesting feature you propose to counter the effects of personal bias among elected judges is deeper disqualification procedures, such as stricter enforcement and having a third party, like another judge, determine whether to disqualify. Is there any data to support whether this may work?

A: Survey data from West Virginia, amid the Caperton affair, showed that 80% of respondents thought that judges should not decide their own disqualification requests. More rigorous disqualification procedures strike me as a small if useful part of a larger package of proposals that can remediate some of the corrosive effects of judicial elections in states that have them. For example, if judges know that they are subject to disquali-

fication when they take positions on issues that could come before them (notwithstanding their right to take such positions after *Republican Party of Minnesota v. White*), it will make it easier to avoid problems by telling voters that if judges shared their views they would have to disqualify themselves later.

“[J]udges should not decide their own disqualification request.”

Q: Please describe your ideal of what you call “qualified elections.” Is that what you prefer, or is it a consensus model that you have settled on?

A: The qualified election model I develop here is not my “ideal.” Rather, it is a compromise proposal for state high courts that seeks to combine some of the best features of elective and appointive systems, while avoiding the worst.

Here is how a “qualified election” model might work: When a vacancy occurs, a screening commission of judges, lawyers and non-lawyers would solicit applications from prospective judicial candidates. Like nominating commissions in many merit selection states, the commission would be charged with soliciting a diverse array of applicants. Unlike nominating commissions, which winnow the applicant pool to the best of the best, the screening commission’s role would be limited to ensuring that all prospective candidates are capable and qualified—a role similar to that played by the American Bar Association in vetting federal judicial nominees. Nominees pre-cleared by the screening commission would become eligible to run for office in a contested partisan or nonpartisan election. Campaigns would be subject to contribution limits and disclosure requirements, and candidates would be subject to code of judicial conduct restrictions, consistent with current practice in states that elect their judges. Judges who win election would then serve a single, fifteen-year term, or until a specified age. If a judge retires, resigns, dies, or is removed before the end of her term, the governor would appoint a judge to fill the vacancy until an election can be held. The interim appointment would be chosen from a stable of former supreme or intermediate appellate court judges who choose to remain eligible for judicial service, but judges so appointed would be ineligible to run for election to fill the vacancy. Judges selected via a qualified election model would be subject to disqualification if the campaign support they received or the campaign statements they made calls their impartiality into question in future cases that come before the judge’s court. The same pool of former judges that would be available to fill vacancies on an interim basis would also be on call to replace disqualified judges.

The advantages of a qualified election model are 1) it offers the legitimacy-enhancing benefits of contested elections; 2) it provides a safety net to ensure that unqualified candidates are excluded from the pool; 3) eliminating re-selection processes will diminish ongoing judicial dependence on voters and campaign supporters; 4) limiting judicial office to a single term of years or until a specified age seeks to end reselection, while creating an endpoint for judicial service after which the legitimizing benefits of judicial elections can be renewed with a

“I have reluctantly [concluded] that a term limit [for U.S. Supreme Court] is appropriate.”

new generation of candidates; 5) contribution limits, disclosure requirements, and disqualification regimes address perceived partiality problems that judicial campaigns create; and 6) the qualified election model creates a bullpen of capable, qualified, and experienced part-time judges who serve two important purposes.

Q: At one point, you write “America’s ambivalence over judicial

selection is ultimately a condition to be managed rather than a disease to be cured.” Isn’t America already there, that is, a middle ground of various systems according to each state’s preference? How should we manage it?

A: We do indeed have multiple systems of selection in play across the states. But for those who participate in the selection debate, virtually all take the position that the reasons we have multiple systems is because the states that have not opted for the disputant’s preferred model got it wrong. The solution, for them, is to cure the misguided of their affliction. My point is not just that we have multiple systems of selection in play, but that that’s OK, and that the discussion should focus on which system is best for a given jurisdiction at a given time.

Q: At another point, you write that, “being a good politician is in tension with being a good judge.” Doesn’t that presuppose an inflexible assumption of politicians as always negative or suspect? Aren’t there political skills that benefit a judge, whether elected or appointed?

A: As someone who served as counsel to the House Judiciary Committee I do not regard being a politician as a negative. Being a good politician is in tension with being a good judge in one sense only: Good politicians are majoritarian decision makers. Good judges are not. Being a good majoritarian decision maker means representing your “constituency” and being partial to their preferences, making promises to that constituency, and making good on those promises. Good judges do none of those things. Being a good politician can mean other things too: having good people skills, an aptitude for sensible compromise, a sense for the big picture, etc., and there is no tension between those skills and good judging.

Q: The U.S. is just about the only country on Earth, the book indicates, that has a significant number of elected judges. Doesn’t that support an argument that the U.S. logically elects judges as a government of the people?

A: Point taken, if the U.S. stood alone in the world as a “government of the people.” As a matter of democratic theory, there is a “majoritarian difficulty” associated with assigning judges elected by the majority to protect minority rights that we the people have enshrined in our constitutions to protect from majority control. It is a difficulty that every other democracy in the world but Argentina has resolved by insulating judges from

popular election. I acknowledge and respect the inevitability and sometimes the desirability of judicial elections given their unique place in our history, but I’m unprepared to say that the rest of the free world is wrong.

Q: Incremental reforms, such as public financing and donor limits for elected judges, or more stringent judicial discipline and performance evaluations for appointed judges, can narrow the divide in the judicial selection debate, you claim. How optimistic are you?

A: These are proposals at the margins that must be evaluated in the aggregate. I harbor no delusions that any of these reforms, taken in isolation, are potential game changers. But taken together (with the exception of public financing, which leaves me cold), I think that they could move the public confidence needle, particularly if they were marketed to the public as a package aimed at promoting an impartial, independent, and accountable judiciary.

Q: Do you have any preference for proposals to change U.S. Supreme Court selection, term limits, etc.

A: I have reluctantly reached the point of concluding that a term limit is appropriate. When the framers adopted tenure during good behavior, life spans and hence life tenure were shorter. The one linkage that the Constitution creates between federal judges and the people those judges served, is through the Presidents and Senators whom the voters selected to appoint the judges in question. And as judges serve into their nineties, that linkage becomes ever more attenuated—not only because the Presidents, Senators, and voters responsible for appointing those judges are often long dead—but because the ideological orientation of the judges themselves often drifts over time to the point where the judge whom the President and Senate appointed bears little relation to that judge three decades later.

Q: Do you think the U.S. Supreme Court should be selected as other appointed judges are selected, that is, by public application to a commission that nominates to the President?

A: I do not favor commission-based appointment of Supreme Court justices for two reasons. First, for positions so politicized and powerful, having an unelected commission constrain the president to, say, three choices of its choosing would be problematic. Second, one of the primary arguments in favor of a commission-based system is that it weeds out unqualified candidates better than governors apt to appoint cronies, or voters who are ill-equipped to assess candidate qualifications (and the data show that while elective and commission-based appointment systems produce comparably credentialed judges overall, there is some evidence that commission-based systems do a better job of weeding out the least qualified). Given how thoroughly and publicly Supreme Court nominees are vetted, I do not think a commission is needed to screen out unqualified candidates. The last president to nominate an under-qualified candidate was George W. Bush, whose nomination of Harriet

Miers was withdrawn only days after it was announced, following widespread criticism. I confess to making this point with slightly less confidence now than several years ago, given recent experience with the president nominating and Senate confirming some federal judges with limited experience, whom the ABA deemed unqualified.

Q: Today, is the U.S. Supreme Court politicized to the detriment of public confidence?

A: Yes and no. Public support for the Court has rallied a little after decades of decline, but remains strong relative to the other branches. Still, I worry about the nature of that support. What judicial systems want and need is diffuse support—support for the Court even when the public disagrees with its decisions. Increasingly, however, the support the Supreme Court enjoys is contingent, or “what have you done for me lately” support. Support for the Court is superficially stable over time, but that stability masks sizable shifts back and forth between conservatives and liberals, who support the Court or not depending on who the president is, and the Supreme Court’s latest decisions.

Q: You indicate that there is a “peace” now in the judge selection debate? Why do you think that?

A: There are two things going on here. First, the “new politics” of judicial elections, which began in the 1980s and made judicial races “noisier, nastier, and costlier,” is tapering off. Nationwide, expenditures in judicial races are flattening out after spiraling upward for many years. The best explanation for this development is that the drivers of the new politics—business interests intent on peopling state supreme courts with more business-friendly officeholders—have succeeded. Mission accomplished. Second, the history of judicial selection reform has come in waves, with each wave dominated by a new system of selection capturing the imaginations of state policy makers for a period of time. Now, we are between waves: Many states are debating judicial selection reform, but the new flavor of the month has yet to hit the stores.

Who Is to Judge? is available at the general Oxford Publishing website, global.oup.com (find “academic and professional” menu and search for Geyh) or by direct link at <https://global.oup.com/academic/product/9780190887148>.

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Do Judges' Instructions About Eyewitnesses Really Work?: A 2019 Update

Christine M. McDermott & Monica K. Miller

One of the basic tenets of the American legal system is the defendant's right to a jury of one's peers.¹ This process entrusts civilian-jurors who are unfamiliar with legal concepts to settle legal issues. Judges are therefore charged with the difficult task of explaining relevant laws to untrained jurors through judicial instructions. Research on jury instructions indicates that jurors often have difficulty understanding and utilizing instructions when determining verdicts.² These difficulties can be especially relevant in cases involving eyewitnesses since jurors rarely understand the many factors that affect the accuracy of eyewitness testimony, nor the necessarily long and complex judicial instructions.³

Many problems are associated with eyewitness identifications. Perhaps most importantly, eyewitness testimony can predispose jurors toward guilty verdicts,⁴ and has contributed to wrongful convictions and incarcerations.⁵ Indeed, 75% of the wrongfully convicted persons released by DNA evidence were convicted based, at least in part, on eyewitness testimony.⁶ In 2011, New Jersey's Supreme Court in *State v. Henderson* approved new judicial instructions in an attempt to educate jurors about the many factors that can influence the accuracy of an eyewitness,⁷ but subsequent research questions the efficacy of such judicial instructions.⁸ A special issue of *Court Review* released right after the *Henderson*⁹ decision reviewed the psychological research on eyewitnesses. This included an article on judicial instructions in cases involving eyewitnesses, but research regarding *Henderson*

instructions was too new to be included.¹⁰ In the six years since the 2012 review was published, researchers have conducted studies specifically testing the *Henderson* instructions, including the current study which examined the effects of case facts, judicial instructions (including a proposed verdict form), and mock-jurors' pre-existing belief in the fallibility of memory on perceptions of the eyewitness and defendant in a case involving eyewitness testimony. This article has two purposes: 1) to provide an up-to-date summary of the laws and research regarding eyewitnesses and eyewitness memory since the 2012 special issue of *Court Review* and 2) to present the results of a new study testing whether instructions and a verdict form help jurors distinguish between good and bad eyewitnesses. This updated review will ultimately make recommendations for how judges should approach the problem of faulty eyewitnesses and jury instructions—and how jurors interpret their testimony.

THE PROBLEM OF EYEWITNESS MEMORY

There are three main problems associated with eyewitness memory: eyewitness memory is fallible; a variety of factors affect eyewitness accuracy; and jurors have poor understanding of memory.¹¹ These problems were addressed in the 2012 special issue of *Court Review* and we discuss that data below, noting subsequent research as well.

Despite the common perception that memory is like a videotape that can be "rewound" and viewed again accurately, memory

Footnotes

1. The Sixth Amendment guarantees "an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const., amend. VI.
2. c.f., Reid Hastie, David A. Schkade & John W. Payne, *A Study of Juror and Jury Judgements in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 295, 303-4 (1998); Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, 48 CT. REV. 48, 51-2 (2012).
3. Such instructions were one of the foci of *State v. Henderson*, 208 N. J. 208, 27 A. 3d 872 (2011).
4. c.f. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 624 (1998); Joanna D. Pozzulo, Julie M. T. Lemieux, Elisabeth Wells & Heather J. McCuaig, *The Influence of Eyewitness Identification Decisions and Age of Witness on Jurors' Verdicts and Perceptions of Reliability*, 12 PSYCHOL., CRIME & LAW, 646 (2006).
5. Wells et al., *supra* note 4, at 603, 605 [hereinafter Wells et al., *Eyewitness Identification*]; Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. IN THE PUB. INT. 45, 48-9 (2006) [hereinafter Wells et al., *Eyewitness Evidence*]; for up-to date figures on DNA exonerations based on eyewitness testimony, see The Innocence Project website, <http://www.innocenceproject.org>.
6. Wells et al., *Eyewitness Identification*, *supra* note 4; Wells et al., *Eyewitness Evidence*, *supra* note 5.
7. c.f., Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978); *Henderson*, 208 N. J. 208, *supra* note 3.
8. c.f., Brian L. Cutler, Hedy R. Dexter & Steven D. Penrod, *Nonadversarial Methods for Sensitizing Jurors to Eyewitness Evidence*, 20 J. APPLIED SOC. PSYCHOL., 1197-1207 (1990); Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252-276 (1988); Helen M. Paterson, David W. M. Anderson & Richard I. Kemp, *Cautioning Jurors Regarding Co-Witness Discussion: The Effect of Judicial Warnings*, 19 PSYCHOL., CRIME & LAW 287, 297 (2013).
9. *Henderson*, *supra* note 3.
10. Bornstein & Hamm, *supra* note 2.
11. c.f. Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 LEARNING & MEMORY 361, 361-366 (2005); Bornstein & Hamm, *supra* note 2; Sarah L. Desmaris & J. Don Read, *After 30 Years, What Do We Know about What Jurors Know? A Meta-Analytic Review of Lay Knowledge Regarding Eyewitness Factors*, 35 LAW & HUM. BEHAV. 203 (2011); Wells, *supra* note 7.

is a complex constructive, dynamic, and selective process.¹² Unlike a videotape, which precisely records all the information in a scene, eyewitnesses get the “gist” of what is happening and construct a memory based on selected pieces of information and what makes sense to the person in the context of the situation.¹³ This constructed memory incorporates (sometimes inaccurate) information acquired *after* the event, and may quickly and constantly lose reliability.¹⁴ Unfortunately, jurors’ misconceptions regarding memory, as well as the difficulty of weighing factors that influence memory, can lead jurors to overvalue eyewitness testimony, often to the detriment of the defendant.¹⁵

THE FALLIBILITY OF EYEWITNESS MEMORY

As memory is constructed by the individual person, and rapidly and continuously decays, it is subject to distortion and contamination.¹⁶ Research conducted over the last half century has indicated that a person’s memory can be altered through interactions with co-witnesses,¹⁷ interviews with law enforcement,¹⁸ feedback received after identifying a suspect in a lineup,¹⁹ receipt of case information after the event (especially when this information is repeated; e.g., news stories),²⁰ and the passage of time.²¹ As the quality of memories erodes with time, people are particularly susceptible to misinformation that is introduced after the memory has faded.²² Most research investigates memory change based on external influence—that is, influence in which an interaction with another person introduces misinformation to the memory holder. Two articles in the 2012

special edition of *Court Review* discussed how co-witness discussion alters the eyewitness’s memory of the event. This is especially likely to happen if the eyewitness is not confident in his own memory, or the information is repeated.²³ Repeated misinformation from a single source influenced eyewitness memory, even more than the same information from multiple sources. This indicates the need for separation of eyewitnesses as quickly as is practicable.²⁴ Since the release of the special issue, researchers have confirmed the susceptibility of eyewitnesses to memory change and contamination following discussions with co-witnesses and investigators.²⁵

Memories also can change *without* external influence.²⁶ Although research into spontaneous memory change is not as developed as the literature on external corruption, researchers posit that automatic or inference-based processes might account for the phenomenon.²⁷

If memories can change, it then brings up the question whether the person knows that their memory has been changed. A memory is more likely to change if the person does not immediately detect a discrepancy between the misinformation and the memory of the original event.²⁸ However, a memory can change even if the person notices such a discrepancy.²⁹ In this case, the memory holder notices the discrepancy and assumes that the

“[C]o-witness discussion alters the eyewitness’ memory of the event.”

12. Lawrence Pathis et al., *Memory*, in *ENCYCLOPEDIA OF DECEPTION* 656-8 (Timothy R. Levine ed., 2014).

13. *Id.*

14. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 *J. VERBAL LEARNING & VERBAL BEHAV.* 585, 586 (1974).

15. Wells et al., *Eyewitness Identification*, *supra* note 4; Wells et al., *Eyewitness Evidence*, *supra* note 5.

16. Loftus & Palmer, *supra* note 14; Pathis et al., *supra* note 12.

17. Lorraine Hope et al., “With a Little Help from My Friends”: *The Role of Co-Witness Relationship in Susceptibility to Misinformation*, 127 *ACTA PSYCHOLOGICA* 476, 481 (2008); Elizabeth F. Loftus & Edith Greene, *Warning: Even Memory for Faces May Be Contagious*, 4 *LAW & HUM. BEHAV.* 323, 328 (1980); Elin M. Skagerberg, *Co-Witness Feedback in Line-ups*, 21 *APPLIED COGNITIVE PSYCHOL.* 489, 494 (2007).

18. Claudia M. Roebbers & Wolfgang Schneider, *The Effect of Misleading Questions on Eyewitness Memory in Children and Adults*, 14 *APPLIED COGNITIVE PSYCHOL.* 509, 516-521 (2000); Elizabeth F. Loftus & Jacqueline E. Pickrell, *The Formation of False Memories*, 25 *PSYCHIATRIC ANNALS* 720 (1995); Christopher M. Heaps & Michael Nash, *Comparing Recollective Experience in True and False Autobiographical Memories*, 27 *J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION* 920, 923-924 (2001).

19. 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 (1998) [hereinafter Wells & Bradfield, *Identification Feedback*]; Gary L. Wells et al., *Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay*, 9 *J. EXPERIMENTAL PSYCHOL.: APPLIED* 42, 49-50 (2003); Jeffrey S. Neuschatz et al., *The Effects of Post-Identification Feedback and Age on Retrospective Eyewitness Memory*, 19 *APPLIED COGNITIVE PSYCHOL.* 435, 449 (2005).

20. c.f. Elizabeth F. Loftus & M. R. Banaji, *Memory Modification and the Role of the Media*, *SUGGESTION & SUGGESTIBILITY*, 279, 279-293 (1989); Jefferey L. Foster, Maryanne Garry, & Elizabeth F. Loftus, *Repeated Information in the Courtroom*, 48 *CT. REV.* 48, 46-47 (2012).

21. c.f. Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness’s Memory Representation*, 14 *J. EXPERIMENTAL PSYCHOL.: APPLIED* 139, 142 (2008) [hereinafter Deffenbacher et al., *Forgetting*]; Loftus, *supra* note 11.

22. Elizabeth F. Loftus, David G. Miller & Helen J. Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 *J. EXPERIMENTAL PSYCHOL. HUMAN LEARNING & MEMORY* 19, 29-30 (1978).

23. Foster et al., *supra* note 20; Fiona Gabbert, Daniel B. Wright, Amina Memon, Elin M. Skagerberg & Kat Jamieson, *Memory Conformity Between Eyewitnesses*, 48 *CT. REV.* 42-43 (2012).

24. Foster et al., *supra* note 20.

25. c.f. Kazuro Mori & Takeshi Kishikawa, *Co-Witness Auditory Memory Conformity Following Discussion: A Misinformation Paradigm*, 118 *PERCEPTUAL & MOTOR SKILLS* 542 (2014); Fiona Jack, Sarah Zydervelt & Rachel Zajac, *Are Co-Witnesses Special? Comparing the Influence of Co-Witness and Interviewer Misinformation on Eyewitness Reports*, 22 *MEMORY* 3, 251-4 (2014).

26. H. Schmolck, E. A. Buffalo, & Larry R. Squire, *Memory Distortions Develop Over Time: Recollections of the O.J. Simpson Trial Verdict After 15 and 32 Months*, 11 *PSYCHOL. SCI.* 39, 43-44 (2000).

27. Loftus, *supra* note 11.

28. James P. Tousignant, David Hall, & Elizabeth F. Loftus, *Discrepancy Detection and Vulnerability to Misleading Postevent Information*, 14 *MEMORY & COGNITION* 329, 329-338 (1986).

29. Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of New Memories*, 118 *J. EXPERIMENTAL PSYCHOL.: GEN.* 100, 100-104 (1989).

“[T]he legal system has incorporated psychological research into standards surrounding eyewitnesses.”

new/misinformation is correct, and the original memory is flawed. This creates a false memory.³⁰ False memories can range from altered details from true memories³¹ to entirely false, detailed, memories.³²

Such research suggests that, rather than being a perfect representation of the past, memories are instead constantly vulnerable to influence and change.³³ The extent

of the susceptibility is affected by several factors, discussed in the following section, that are present during and after the formation of a memory. Therefore, it is important that members of the legal system (including judges, law enforcement officer, and jurors) recall the vulnerabilities of memory when interacting with an eyewitness. Indeed, the legal system has incorporated psychological research³⁴ into standards and practices surrounding eyewitnesses.³⁵

FACTORS THAT AFFECT EYEWITNESS ACCURACY

As just discussed, memory is malleable.³⁶ Indeed, the body of eyewitness identification research demonstrates that many factors can affect eyewitness memory. Psychologists have divided factors that can influence eyewitness accuracy into two categories: system variables and estimator variables.³⁷ System variables are variables that influence memory that are under the legal system's control, while estimator variables are not. It is important to understand both system and estimator variables discussed in this section, as judicial instructions direct jurors to consider the effects of both types of variables.

System variables. System variables are factors that are control-

lable by the legal system, including blind administration of lineups, pre-identification instructions, lineup construction, lack of feedback, showups, simultaneous vs. sequential lineups, and multiple viewings.³⁸ Each of these factors will be discussed in this section.

Information received by witnesses both before and after making an identification (e.g., in a lineup) can affect their memories.³⁹ “Blind” administration of lineups occurs when the police investigator charged with administering the lineup is either unaware if the suspect is in the lineup (double blind administration), or unaware of the suspect's *position* in the lineup (blind administration). Blind administration is important because administrators who are familiar with the suspect might consciously or unconsciously communicate the identity of the suspect to the witness (e.g., through vocal or body cues).⁴⁰ Pre-identification instructions should indicate to the witness that the suspect might or might not be in the lineup and that the witness should not feel pressure to make an identification. This warning is necessary because, otherwise, witnesses are more likely to select the person in the lineup that *most closely resembles the perpetrator*, which increases the risk of misidentification.⁴¹ After making an identification, witnesses should not be told whether their identification matches the suspect. Confirmation that the eyewitness identified the suspect can artificially inflate his confidence in both the quality and accuracy of his identification.⁴²

Lineup construction also affects the reliability of identifications. A properly constructed lineup has four main features.⁴³ First, lineups should only include people who look alike so that the suspect does not look markedly different from the fillers (i.e., people who are not suspects but match the witness' description).⁴⁴ Second, there should be a minimum of five fillers so that witnesses have to carefully examine their memories.⁴⁵ Showups, in which a single suspect is presented to a wit-

30. Loftus & Pickrell, *supra* note 18; Loftus, *supra* note 11.

31. Loftus & Palmer, *supra* note 14; Loftus & Pickrell, *supra* note 18; Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC'Y 86 (1975).

32. c.f. Heaps & Nash, *supra* note 18.

33. Loftus, *supra* note 11.

34. Wells & Bradfield, *Identification Feedback*, *supra* note 19; Wells et al., *Eyewitness Identification*, *supra* note 4 at 627-636.

35. *Henderson*, N.J. 27 A.3d 872, *supra* note 3; *State v. Lawson*, 352 Or. 724, 291 P.3d 673 (2012); Int'l Ass'n Chiefs Police, *National Summit on Wrongful Convictions: Building a Systematic Approach to Prevent Wrongful Convictions* (2013); Nat'l Inst. Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999); Nat'l Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (2014).

36. Loftus & Palmer, *supra* note 14; Pathis et al., *supra* note 12.

37. Wells, *supra* note 7.

38. *Id.*

39. Wells & Bradfield, *Identification Feedback*, *supra* note 19; Wells et al., *Eyewitness Evidence*, *supra* note 5; Neuschatz et al., *supra* at 19.

40. Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 BEHAV. & BRAIN SCI. 377, 377 (1978); Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 LAW & HUM. BEHAV. 70, 71 (2009).

41. Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283, 285-86, 294 (1997); Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 485 (1981); Steven E. Clark, *A Reexamination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 395, 418-20 (2005).

42. Wells & Bradfield, *Identification Feedback*, *supra* note 19; Wells et al., *Eyewitness Identification*, *supra* note 4; Neuschatz et al., *supra* note 19.

43. Gary L. Wells & Amy L. Bradfield, *Measuring the Goodness of Lineups: Parameter Estimation, Question Effects, and Limits to the Mock Witness Paradigm*, 13 APPLIED COGNITIVE PSYCHOL. S27, S30 (1999) [hereinafter Wells & Bradfield, *Measuring Lineups*]; Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, in HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE, at 155, 156 (R.C.L. Lindsay et al. eds., 2007).

44. David F. Ross et al., *When Accurate and Inaccurate Eyewitnesses Look the Same: A Limitation of the 'Pop-Out' Effect and the 10- to 12-Second Rule*, 21 APPLIED COGNITIVE PSYCHOL. 677, 687 (2007); Wells & Bradfield, *Measuring Lineups*, *supra* note 43; Malpass et al., *supra* note 43.

45. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT* 29 (1999)

ness, increase the risks of misidentifications and should be used sparingly.⁴⁶

Third, people in the lineups should be presented sequentially (one at a time), rather than simultaneously (all at once). A simultaneous lineup forces a witness to say “yes/no, this is/is not the perpetrator” before looking at the next person in the lineup. Once the witness says “yes,” the lineup is over. This reduces the likelihood that the witness will compare all the people at once and select the suspect who most closely represents the perpetrator.⁴⁷ Lineups also should only contain one suspect to reduce the likelihood of a “lucky guess.”

Finally, a suspect should only be presented to a witness once during an investigation to reduce the risk of misidentification. Multiple viewings of the same suspect make it difficult to tell if the witness recalls a familiar looking suspect from the original crime or from earlier lineups.⁴⁸ As system variables can have a profound influence on the accuracy of the eyewitness and are under the control of the legal system, efforts by the legal system to create and maintain best practices are vital.

Estimator variables. Estimator variables are outside the control of the legal system. They are called estimator variables because their exact impact cannot be determined and must be estimated. These variables instead refer to characteristics of the witness, perpetrator, or the event itself.⁴⁹ Known estimator variables include stress, weapon focus, duration of event, distance and lighting, witness characteristics, characteristics of perpetrator, cross-race-bias, exposure to other information, memory decay, and speed of identification. Each of these variables will be discussed in this section.

Some variables present during the crime affect the quality of eyewitness evidence.⁵⁰ The amount of stress an eyewitness is under at the time of the crime can affect his ability to make an accurate identification.⁵¹ While mild amounts of stress can

improve cognitive performance, high levels of stress negatively affect accurate recall of the event and perpetrator.⁵² One source of potential stress is the visibility of a weapon during the crime.⁵³ “Weapon focus” is the tendency for a witness to have his attention drawn from the culprit to the weapon, reducing the reliability of the identification.⁵⁴ This effect is intensified when the interaction is brief, as the witness has no time to adapt to the presence of the weapon and focus on other details.⁵⁵

The witness’s level of intoxication and age also affect the reliability of his identifications.⁵⁶ Greater levels of alcohol consumption reduce eyewitness accuracy compared to lower alcohol levels or sobriety.⁵⁷ The age of the eyewitness also affects identification accuracy. Young children⁵⁸ and older adults tend to be less accurate than young adults.⁵⁹ However, the age of the *perpetrator* might affect these findings, as younger adults are better at recognizing young faces, while seniors either are not affected by perpetrator age, or are better at identifying older perpetrators.⁶⁰

The amount of time a witness has to view the perpetrator, regardless of the presence of a weapon, is important. Brief exposure to the criminal provides less time for the witness to focus on the perpetrator and often results in less accurate identifications than longer periods of exposure.⁶¹ Likewise, the ability to focus on and accurately perceive the suspect is reduced as the physical distance between witness and perpetrator increases, and/or when the lighting becomes poorer.⁶² Witnesses both overestimate the duration of an event and have difficulty estimating distances.⁶³

Factors other than the age of the perpetrator (as discussed above) can affect eyewitness accuracy. Disguises (e.g., sunglasses,

“[H]igh levels of stress negatively affect accurate recall of the event and perpetrator.”

46. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464 (1996). See also several court cases in which showup identifications have been limited in their admissibility, such as *State v. Dubose*, 699 N.W.2d 582, 584-85 (Wis.2005); *Commonwealth v. Martin*, 850 N.E.2d 555, 562-63 (Mass.2006); and *State v. Duuvon*, 571 N.E.2d 654, 656 (N.Y.1991).

47. Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459 (2001).

48. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 299 (2006).

49. Wells, *supra* note 7.

50. Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 699 (2004) [hereinafter Deffenbacher et al., *Stress*]; Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 415-17 (1992) [hereinafter Steblay, *Weapon Focus*]; R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 LAW & HUM. BEHAV. 526 (2008).

51. Deffenbacher et al., *Stress*, *supra* note 50.

52. Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L

J.L. & PSYCHIATRY 265 (2004); Deffenbacher et al., *supra* note 50.

53. Anne Maass & Gunther Koehnken, *Eyewitness Identification: Simulating the “Weapon Effect,”* 13 LAW & HUM. BEHAV. 397, 401-02 (1989); Steblay, *Weapon Focus*, *supra* note 50.

54. Maass & Koehnken, *supra* note 53; Steblay, *Weapon Focus*, *supra* note 50.

55. Steblay, *Weapon Focus*, *supra* note 50 at 421.

56. Jennifer E. Dysart et al., *The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups*, 87 J. APPLIED PSYCHOL. 170, 174 (2002); Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 549, 563, 565 (1998); James C. Bartlett & Amina Memon, *Eyewitness Memory in Young and Older Adults*, in 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE, at 309, 317-19 (R.C.L. Lindsay et al eds., 2007).

57. Dysart et al., *supra* note 56.

58. Pozzulo & Lindsay, *supra* note 56. This meta-analysis only included studies of children 9-13 years of age.

59. Bartlett & Memon, *supra* note 56.

60. *Id.*

61. See Colin G. Tredoux et al., *Eyewitness Identification*, in 1 ENCYCLOPEDIA OF APPLIED PSYCHOLOGY 875, 877 (Charles Spielberger ed., 2004).

62. See, e.g., Lindsay et al., *supra* note 50.

63. *Id.*

“[J]urors can be poor judges of eyewitness quality, which increases the risk of false convictions.”

masks) and other alterations to a perpetrator's face (e.g., plastic surgery, growing facial hair) can affect identification accuracy.⁶⁴ Relatively simple disguises such as a hat⁶⁵ or a beard⁶⁶ reduce identification accuracy. Another relevant characteristic of the perpetrator that can affect identification accuracy is race.⁶⁷ Witnesses are better at identifying perpetrators of their own race

than perpetrators of other races. This effect is called the cross-race identification effect.⁶⁸

Factors that occur *after* a crime is witnessed can also affect identification quality. As discussed earlier in this article, eyewitness memories can be altered through interactions with others. This effect can occur, for example, if a police officer asks leading questions when interviewing the witness.⁶⁹ However, this can also occur when post-event feedback occurs between non-state actors or entities (e.g., other witnesses, newspaper stories). For example, discussions between co-eyewitnesses can affect memories or form false memories.⁷⁰ This effect strengthens when co-witnesses know each other.⁷¹

The amount of time between witnessing a crime and making an identification can also affect identification accuracy. The clarity of a memory declines over time.⁷² This is true for all memories and the process is irreversible, meaning that memories can never improve and the probability of an accurate identification decreases over time.⁷³ For example, a study found that misidentifications rose sharply from two to twenty-four hours after the event.⁷⁴ However, the exact length of time at which memories become unreliable is not known. Further, the speed with which an eyewitness makes an identification might also indicate identi-

fication quality. Research is somewhat mixed, but several studies indicate that witnesses who make identifications quickly (i.e., less than thirty seconds) are more accurate than those who take more time.⁷⁵ As this review suggests, the confluence of system and estimator variables affect the quality of eyewitness identification and testimony. Utilizing this knowledge, an article in the 2012 special edition of *Court Review* posited a method for judges to assess eyewitness accuracy.⁷⁶ It is important for legal professionals to utilize this method or otherwise take such knowledge into account.

According to another article in the 2012 special edition of *Court Review*, conventional legal understanding leads to (a) a failure to appreciate the impact of suggestive procedures, (b) overreliance on eyewitness evidence, (c) failure to understand the factors that influence memory, and (d) generally failure to discourage suggestive procedures.⁷⁷ The need for best practices that are rigorously followed and frequently updated in response to social scientific research is echoed by another article in that 2012 special edition.⁷⁸ The faults of traditional legal understanding, especially concerning understanding of memory, apply to jurors also, as discussed next.

JURORS' UNDERSTANDING OF MEMORY

Several factors that influence eyewitness accuracy discussed above, such as lighting and physical distance from the perpetrator, might seem intuitive; however, jurors generally struggle to properly evaluate eyewitness accuracy.⁷⁹ Due to lack of knowledge of these misconceptions, jurors can be poor judges of eyewitness quality, which increases the risk of false convictions. There are several factors that make it difficult for jurors to evaluate eyewitnesses accurately.⁸⁰ First, jurors are overly influenced by eyewitness testimony, regardless of the quality of the testimony.⁸¹ It is difficult to question a victim who states, “I'm confi-

64. Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629, 635 (1987); K.E. Patterson & A.D. Baddeley, *When Face Recognition Fails*, 3 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 406, 410, 414 (1977).

65. Cutler et al., *supra* note 64.

66. Patterson & Baddeley, *supra* note 64.

67. See Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & LAW 3, 21 (2001).

68. *Id.*

69. Roebbers & Schneider, *supra* note 18; Loftus & Pickrell, *supra* note 18; Heaps & Nash, *supra* note 18.

70. Hope et al., *supra* note 17; Loftus & Greene, *supra* note 17, at 328; Skagerberg, *supra* note 17.

71. Hope et al., *supra* note 17.

72. Schmolck et al., *supra* note 26.

73. Deffenbacher et al., *Forgetting*, *supra* note 21.

74. Carol Kraffka & Steven Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. PERSONALITY & SOC. PSYCHOL. 65 (1985).

75. David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10- to 12-Second Rule for Distinguishing Accurate from Inaccurate Positive Identifications*, 87 J. APPLIED PSYCHOL. 951, 959 (2002); Ross et al., *supra* note 44; Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?*, 85 J.

APPLIED PSYCHOL. 542, 542 (2000).

76. Richard A. Wise & Martin A. Safer, *A Method for Analyzing the Accuracy of Eyewitness Testimony in Criminal Cases*, 48 CT. REV. 31-32 (2012).

77. Laura Smalarz & Gary L. Wells, *Eyewitness-Identification Evidence: Scientific Advances and the New Burden on Trial Judges*, 48 CT. REV. 48, 21 (2012).

78. James M. Doyle, *Ready for the Psychologists: Learning from Eyewitness Errors*, 48 CT. REV. 48, 7 (2012).

79. Tanja Rapus Benton, David F. Ross, Emily Bradshaw, W. Neil Thomas & Gregory S. Bradshaw, *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115-129 (2006); Daniel J. Simons & Christopher F. Chabris, *What People Believe about How Memory Works: A Representative Survey of the U.S. Population*, 6 PLoS ONE 3 (2011).

80. Benton et al., *supra* note 79; Simons & Chabris, *supra* note 79; Brian L. Cutler, Steven D. Penrod & Thomas E. Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41-55 (1988) [hereinafter known as Cutler et al., *Eyewitness Identification*]; Jennifer L. Devenport, Steven D. Penrod & Brian L. Cutler, *Eyewitness Identification Evidence: Evaluation Commonsense Evaluations*, 3 PSYCHOL., PUBLIC POL'Y & LAW 338-361 (1997).

81. Wells et al., *Eyewitness Identification*, *supra* note 4; Wells et al., *Eyewitness Evidence*, *supra* note 5.

dent the defendant is the perpetrator.” Second, many jurors hold faulty beliefs about the nature of memory.⁸² Jurors also have demonstrated beliefs about factors that influence eyewitness accuracy that run contrary to knowledge of experts.⁸³ For instance, jurors often believe that the confidence of a witness equates to accuracy—a finding that is somewhat in dispute in academic circles. Finally, even when jurors understand the influence of factors (e.g., the presence of a weapon) on eyewitness accuracy, these factors are not always utilized when assessing eyewitness testimony.⁸⁴ These issues are discussed in depth in this section.

The core issue is that many jurors have misconceptions about how memory works.⁸⁵ In numerous studies conducted over the last 30 years, lay respondents consistently overestimated the reliability and consistency of memory.⁸⁶ Results of a meta-analysis (which compares results across a range of studies on a single subject) revealed that jurors held beliefs contrary to expert opinion roughly 33% of the time across all factors regarding influences on eyewitness accuracy.⁸⁷ This disagreement was strongest on the factors regarding the link between confidence and accuracy, cross-race bias, length of exposure to the perpetrator, length of time between event and identification, unconscious transference, and weapon focus.⁸⁸ Additionally, lay opinion differed from expert opinion, albeit by a smaller margin, when considering confidence malleability, lineup instructions, mugshot-induced bias, presentation of lineup, question wording, alcohol intoxication, attitudes and expectations, child suggestibility, and post-event information.⁸⁹ These beliefs have the potential to make jurors overvalue the witness’s testimony. Indeed, jurors overestimate the ability of others to make correct identifications.⁹⁰ In several studies, when asked “In my opinion, the testimony of one confident eyewitness should be enough evidence to convict a defendant of a crime,” roughly 37.1% of laypersons agreed compared to 0% of experts,⁹¹ indicating that jurors’ pre-existing beliefs about memory both conflict with those of experts, and likely predispose jurors to accept any form of eyewitness evidence to the detriment of the defendant.

Jurors are also often unable to properly utilize knowledge of factors that influence eyewitness accuracy when evaluating an eyewitness and deciding on a verdict.⁹² Several studies have found that jurors focus only on witness confidence, and do not

consider the conditions under which a witness experienced the event and made the identification (e.g., length of exposure).⁹³ This suggests that, even when jurors understand the factors that influence eyewitnesses, this information is not always used when determining the guilt of the defendant. Indeed, the influence of eyewitness testimony—combined with blindness to the limitations of memory, mistaken beliefs about the influences of external factors on eyewitness accuracy, and a tendency to disregard factors other than confidence when making decisions—potentially lead to false convictions. This is demonstrated through DNA exonerations, of which 75% involved mistaken eyewitness testimony.⁹⁴ Some courts have recognized this problem and made attempts to remedy the situation, as discussed next.⁹⁵

“[J]urors overestimate the ability of others to make correct identifications.”

JUDICIAL INSTRUCTIONS AS A SOLUTION TO THE EYEWITNESS PROBLEM: AN OVERVIEW

Judicial instructions have been the legal system’s chosen safeguard against wrongful convictions due to eyewitness misidentifications.⁹⁶ Two court rulings have specifically addressed the need for judges to educate jurors about the fallibility of eyewitness testimony. In *United States v. Telfaire* (1972), an appellate court ruled that judges should inform jurors of the fallibility of eyewitness testimony; this led to the creation of the *Telfaire* instructions. In *State v. Henderson* (2011), the New Jersey Supreme Court ruled that all judges in New Jersey presiding over cases involving eyewitness testimony must inform jurors about factors that influence eyewitness accuracy. These instructions, known as the *Henderson* instructions, largely relied on the more than thirty years and 2,000 psychological research studies on eyewitness memory and testimony.⁹⁷ In the *Henderson* ruling, the Court stated that such studies “have passed a rigorous test and are generally considered worthy of consideration by the greater scientific community.”⁹⁸ Unfortunately, this ruling did not consider psychological research on the effect of judicial instructions on jurors, which indicates that instructions do not have consistent effects on juror decision making.⁹⁹

82. Benton et al., *supra* note 79; Simons & Chabris, *supra* note 79.

83. Simons & Chabris, *supra* note 79; Desmaris & Read, *supra* note 11.

84. Cutler et al., *Eyewitness Identification*, *supra* note 80; Devenport et al., *supra* note 80.

85. Desmaris & Read, *supra* note 11; Simons & Chabris, *supra* note 79.

86. Simons & Chabris, *supra* note 79; Desmaris & Read, *supra* note 11.

87. Desmaris & Read, *supra* note 11.

88. *Id.*

89. *Id.*

90. Devenport et al., *supra* note 80.

91. Desmaris & Read, *supra* note 11; Simons & Chabris, *supra* note 79.

92. Bornstein & Hamm, *supra* note 2; Lori van Wallandael et al., *Mistaken Identification = Erroneous Conviction? Assessing and Improving Legal Safeguards*, in 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 453 (Roderick C. L. Lindsay et al. eds., 2007); Jennifer L. Devenport et al., *Effectiveness of Traditional Safeguards*

Against Erroneous Conviction Arising from Mistaken Eyewitness Identification, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 51 (Brian L. Cutler ed., 2009).

93. Benton et al., *supra* note 79; Devenport et al., *supra* note 92; R. C. Lindsay, Gary L. Wells & Carolyn M. Rumpel, *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79-89 (1981).

94. Wells et al., *Eyewitness Identification*, *supra* note 4; Wells et al., *Eyewitness Evidence*, *supra* note 5.

95. *State v. Henderson*, 208 N. J. 208, 27 A. 3d 872 (2011).

96. Bornstein & Hamm, *supra* note 2.

97. *State v. Henderson*, 208 N. J. 208, 27 A. 3d 872 (2011).

98. *Id.*

99. Cutler et al., *supra* note 64; Greene, *supra* note 8; Paterson et al., *supra* note 8.

“Juror sensitivity is the desired outcome of judicial instructions...”

JUDICIAL INSTRUCTIONS FOR EYEWITNESS EVIDENCE

The *United States v. Telfaire* (1972) ruling was the first to create standardized instructions for judges regarding issues of eyewitness testimony.¹⁰⁰ The *Telfaire* instructions advised jurors to consider (a) if the eyewitness had the *capacity* to observe the crime; (b) the *strength* of

the identification due to the *circumstances* in which the crime was observed; (c) the *credibility* of the eyewitness; and (d) whether the eyewitness evidence, once evaluated, convinces the juror beyond a reasonable doubt.¹⁰¹ Despite the inclusion of guidelines to evaluate eyewitness testimony, the *Telfaire* instructions did not make clear to jurors *how* to determine what factors (e.g., credibility of the eyewitness or the strength of the identification) might have influenced the witness.¹⁰² Furthermore, the instructions failed to direct jurors on how to use or weigh the factors to assess eyewitness accuracy.¹⁰³

More recently, eyewitness memory researchers worked with the State Supreme Court in *State v. Henderson* (2011) to provide research-based instructions to help jurors evaluate eyewitness testimony.¹⁰⁴ The *Henderson* instructions detail numerous factors that affect eyewitness accuracy, as well as the nature of memory itself.¹⁰⁵ Unlike the *Telfaire* instructions, which instruct jurors to generally “consider the circumstances” surrounding an identification, the *Henderson* instructions provide information about the specific factors that can affect eyewitness accuracy in the specific case.¹⁰⁶ Additionally, judges provide explanations regarding how the factors present in the case affect eyewitness accuracy.¹⁰⁷

PSYCHOLOGICAL RESEARCH OF JUDICIAL INSTRUCTIONS REGARDING EYEWITNESS TESTIMONY

Researchers have long examined the effect of judicial instructions on jurors’ assessments of eyewitness testimony.¹⁰⁸ This research categorizes the effects into three categories: juror confusion, juror skepticism, and juror sensitivity.¹⁰⁹ Juror confusion

occurs when jurors become confused or overwhelmed by the information contained in jury instructions and disregard judicial instructions (and by extension disregard witnessing conditions) when making decisions.¹¹⁰ Juror skepticism occurs when, after receiving judicial instructions, jurors evaluate *all* witnesses more harshly, regardless of witnessing conditions.¹¹¹ Thus, skeptical jurors undervalue the testimony of all witnesses, rather than carefully assessing the value of the testimony of each witness. Juror sensitivity occurs when, after receiving judicial instructions, jurors consider witnessing conditions and accurately evaluate eyewitness testimony.¹¹² Juror sensitivity is the desired outcome of judicial instructions because sensitized jurors can differentiate between good and bad eyewitnesses. The justice system uses judicial instructions to sensitize jurors. Unfortunately, previous research using both *Telfaire* and *Henderson* instructions has produced mixed findings regarding the effect of judicial instructions on juror decision making.¹¹³

RESEARCH USING TELFAIRE INSTRUCTIONS

Most research on the effectiveness of judicial instructions has studied *Telfaire* instructions with mixed results. Many studies found that the *Telfaire* instructions fail to sensitize jurors.¹¹⁴ However, a few studies produced juror skepticism¹¹⁵ or sensitivity.¹¹⁶

Because many investigations into the impact of unmodified *Telfaire* instructions have found no effects,¹¹⁷ researchers have focused on potential modifications to the *Telfaire* instructions. These studies have also had mixed results. For example, studies using modified *Telfaire* instructions found inconsistent outcomes on participant-jurors’ abilities to differentiate between “good” and “bad” eyewitnesses, with some finding that instructions sensitize participant-jurors to eyewitness quality,¹¹⁸ and others finding no effects.¹¹⁹

A more consistent result of instruction modification is increased participant-jurors’ confidence in their verdicts and/or in their comprehension.¹²⁰ However, just because jurors are confident in their ability to comprehend instructions does not mean they actually are able to comprehend. Many studies found no link

100. Greene, *supra* note 8; Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL., PUBLIC POLY., & LAW 817 (1995). [hereinafter Penrod & Cutler, *Confidence & Accuracy*].

101. *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

102. Penrod & Cutler, *Confidence & Accuracy*, *supra* note 100.

103. *Id.*

104. *State v. Henderson*, 208 N. J. 208, 27 A. 3d 872 (2011).

105. *Id.*

106. *Id.*

107. *Id.*

108. Bornstein & Hamm, *supra* note 2; Cutler et al., *Eyewitness Identification*, *supra* note 80; Greene, *supra* note 8; G. Ramirez, D. Zemba, & R. Geiselman, *Judges’ Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31-66 (1996); Brian L. Cutler, Hedy R. Dexter, & Steven D. Penrod, *Expert Testimony and Jury Decision Making: An Empirical Analysis*, 7 BEHAV. SCI. & LAW 215, 221 (1989). [Hereinafter Cutler et al., *Expert Testimony*].

109. Cutler et al., *Eyewitness Identification*, *supra* note 80.

110. *Id.*

111. *Id.*

112. *Id.*

113. Bornstein & Hamm, *supra* note 2; Cutler et al., *Expert Testimony*, *supra* note 108; Greene, *supra* note 8; Ramirez et al., *supra* note 108; Paterson et al., *supra* note 8.

114. Bornstein & Hamm, *supra* note 2; Cutler et al., *Expert Testimony*, *supra* note 108; Greene, *supra* note 8; Ramirez et al., *supra* note 108.

115. Greene, *supra* note 8; Ramirez et al., *supra* note 108.

116. Paterson et al., *supra* note 8. It should be noted that this study was conducted in Australia and used an Australian version of the *Henderson* instructions.

117. Bornstein & Hamm, *supra* note 2; Cutler et al., *Expert Testimony*, *supra* note 108; Greene, *supra* note 8; Ramirez et al., *supra* note 108.

118. e.g., Bornstein & Hamm, *supra* note 2.

119. Paterson et al., *supra* note 8.

120. Bornstein & Hamm, *supra* note 2; Cutler et al., *Expert Testimony*, *supra* note 108; Greene, *supra* note 8; Ramirez et al., *supra* note 108; Paterson et al., *supra* note 8.

between increased juror confidence and actual comprehension of instructions¹²¹ or verdict choice.¹²² Indeed, most modifications to the *Telfaire* instructions fail to affect verdicts.¹²³ After *Henderson*, researchers moved away from testing *Telfaire* instructions and began focusing on *Henderson* instructions, as discussed next.

NEWER RESEARCH USING HENDERSON INSTRUCTIONS

The implementation of *Henderson* instructions in New Jersey began research about effectiveness. Unmodified *Henderson* instructions have either produced no effects on jurors or created juror skepticism.¹²⁴ However, some research indicates that modifying *Henderson* instructions could increase juror sensitivity.¹²⁵

Modified instructions have produced mixed results, depending in part on the type of modification.¹²⁶ Changing the timing of the *Henderson* instructions (e.g., presenting instructions at beginning of the case or presenting instructions multiple times) produced juror skepticism that affected verdicts in some studies,¹²⁷ but not in other studies.¹²⁸ The strategy of asking jurors if a specific factor was present, but only after explaining the *Henderson* factor, sometimes led to juror sensitivity¹²⁹ and sometimes had no impact.¹³⁰ The most sensitizing modification currently appears to be summarizing instructions, rather than presenting a full-length charge, and then asking questions of the jurors regarding the presence of a factor, but after each *Henderson* factor is described.¹³¹ However, neither original nor modified *Henderson* instructions affect juror comprehension of the factors that affect eyewitness accuracy, even when jurors demonstrated sensitization.¹³² This is a troubling finding, as a goal of

the *Henderson* instructions is to educate jurors. Taken together, these studies indicate that the current instructions are not sensitizing jurors, but further research into instruction modification could indicate how the instructions could be effectively modified.

JUROR COMPREHENSION OF INSTRUCTIONS – CURRENT STUDY ABOUT EYEWITNESSES

Through the research process, social scientists have found that jurors often do not understand many types of judicial instructions, and therefore do not utilize judicial instructions when making decisions.¹³³ This lack of comprehension can lead to wrongful convictions, as judicial instructions are provided to give jurors the legal knowledge to make appropriate verdicts.¹³⁴ There are many factors that can make it difficult for jurors to understand and properly utilize judicial instructions, the most common of which include inability to understand “legalese,” complicated wording and sentence structure, presentation of instructions, and omissions of important words.¹³⁵ Researchers have explored a number of strategies to improve juror comprehension, including rewriting legal instructions in “Plain English,”¹³⁶ paraphrasing and clarifying portions of instructions that jurors say have been difficult to understand,¹³⁷ allowing jurors to request clarification from judges,¹³⁸ providing instructions multiple times,¹³⁹ providing jurors with written copies of

“[S]tudies indicate that the current instructions are not sensitizing jurors...”

121. Bornstein & Hamm, *supra* note 2; Cutler et al., *Expert Testimony*, *supra* note 108; Greene, *supra* note 8; Ramirez et al., *supra* note 108.
122. Bornstein & Hamm, *supra* note 2; Cutler et al., *Expert Testimony*, *supra* note 108; Greene, *supra* note 8; Ramirez et al., *supra* note 108; Paterson et al., *supra* note 8.
123. Bornstein & Hamm, *supra* note 2; Cutler et al., *Expert Testimony*, *supra* note 108; Greene, *supra* note 8; Ramirez et al., *supra* note 108; Paterson et al., *supra* note 8.
124. Marlee K. Berman, *Eyewitness Identification Jury Instructions: Do They Enhance Evidence Evaluation?* (Ph.D. diss, City University of New York, 2015), 1, 45; Marlee K. Dillon, Angela M. Jones, Amanda N. Bergold, Cora Y. T. Hui & Steven D. Penrod, *Henderson Instructions: Do They Enhance Evidence Evaluation?*, 17 J. FORENSIC PSYCHOL. RES. & PRAC. 1, 12 (2017); Angela M. Jones, Amanda N. Bergold, Marlee K. Dillon & Steven D. Penrod, *Comparing the Effectiveness of Henderson Instructions and Expert Testimony: Which Safeguard Improves Jurors’ Evaluations of Eyewitness Evidence?*, 13 J. EXP. CRIMINOLOGY 29, 43 (2017).
125. Berman, *supra* note 124 at 69; Jones et al., *supra* note 124; Lindsay M. Perez, *Examining Effectiveness of Judicial Instructions and Gruesome Evidence on Jurors’ Cognitive Processing and Judgments of Eyewitness Evidence* (Ph.D. diss, University of Nevada Reno, 2016), 126.
126. Berman, *supra* note 124 at 51; Dillon et al., *supra* note 124; Jones et al., *supra* note 124; Perez, *supra* note 125.
127. Berman, *supra* note 124.
128. Dillon et al., *supra* note 124.
129. Berman, *supra* note 124; Perez, *supra* note 125.
130. Jones et al., *supra* note 124; Perez, *supra* note 125.
131. Jones et al., *supra* note 124; Perez, *supra* note 125.

132. Jones et al., *supra* note 124 at 186; Perez, *supra* note 125.
133. Shari S. Diamond, Beth Murphy & Mary R. Rose, *The “Kettleful” of Law in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV., 1537, 1557-1588 (2012). For a complete review of judicial instruction comprehension and potential remedies, see Mauricio A. Alvarez, Monica K. Miller & Brian H. Bornstein, *“It Will be Your Duty...” The Psychology of Criminal Jury Instructions*, in 1 ADVANCES IN PSYCHOLOGY AND LAW 119-158 (M. K. Miller & B. H. Bornstein eds., 2016).
134. Bornstein & Hamm, *supra* note 2 at 48.
135. Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV., 451, 475-478 (2006); Peter Tiersma & Mathew Curtis, *Testing the Comprehensibility of Jury Instructions: California’s Old and New Instructions on Circumstantial Evidence*, 1 J. CT. INNOVATION, 231, 250 (2009); Amy E. Smith & Craig Haney, *Getting to the Point: Attempting to Improve Juror Comprehension of Capital Penalty Phase Instructions*, 35 LAW & HUM. BEHAV., 339, 342 (2011).
136. Marder, *supra* note 135; Tiersma & Curtis, *supra* note 135; Smith & Haney, *supra* note 135.
137. Julianna C. Chomos et al., *Increasing Juror Satisfaction: A Call to Action for Judges and Researchers*, 59 DRAKE L. REV., 707, 720 (2011).
138. Marder, *supra* note 135 at 501-502.
139. Vicki L. Smith, *Affect of Pretrial Instruction on Jurors’ Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL., 220, 223-226 (1991); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL’Y & L., 589, 628-629 (1997); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL’Y & L., 788, 796-797 (2000).

“[T]he fallibility of memory significantly related to how participants perceived the eyewitness...”

instructions,¹⁴⁰ and presenting instructions in innovative ways (e.g., flowcharts, linking case facts to appropriate legal standards, explaining common misconceptions about legal concepts).¹⁴¹

To increase juror comprehension, and by extension, to increase the effectiveness of judicial instructions, three of these strategies were implemented in the current study. Specifically, partici-

pants who were assigned to receive judicial instructions were provided *Henderson* instructions both before and after reading case facts; only portions of the *Henderson* instructions relevant to the case were provided; and participant-jurors received written copies of the instructions.

Additionally, the current study tests a new modification: a verdict form. Some of the jurors were given a verdict form which asked them to identify which witness factors were present in the case. They also received the *Henderson* instructions meant to educate jurors about factors that can negatively affect witness memory. Other participants read only the *Henderson* instructions (without a verdict form) or read no instructions and received no form. The main research question—whether instructions—with or without the verdict form—sensitize jurors to be able to differentiate good from bad witnesses.

CURRENT RESEARCH STUDY

The current study examined the effect of eyewitness factors (ideal/poor lighting, cross-race identification, and excessive witness confidence), judicial instructions (no instruction, instruction only, instruction plus a verdict form), and pre-existing belief in the fallibility of memory on perceptions of the eyewitness and defendant in a case involving eyewitness testimony. To investigate the impact of these factors, 206 undergraduate students¹⁴² acted as jurors and read an online trial summary involving a mugging

in which the victim is the eyewitness. To compare the effects of factors that would make an eyewitness more or less accurate, the trial summary indicated that the eyewitness had either ideal witnessing conditions, viewed the perpetrator in poor lighting, was mugged by a man of a different race, or was excessively confident when discussing his identification. Participant-jurors then read either the *Henderson* instructions; the *Henderson* instructions plus a special verdict form, which asked participant-jurors to indicate the presence of each factor¹⁴³; or did not receive instructions or the verdict form. After reading the randomly assigned trial summary and (if applicable) instructions and verdict form, participants rated the accuracy of the eyewitness, rated the likelihood that the defendant was guilty, rendered a verdict, and completed a measure of belief in the fallibility of memory.

Analyses indicate that participant-jurors who were read either *Henderson* instructions alone or with the verdict form had the same perceptions of the eyewitness, perceptions of the defendant, and verdicts as those who received no instructions.¹⁴⁴ However, participant-jurors already knew, without the benefit of judicial instructions, that poor lighting made witnesses less accurate than eyewitnesses in ideal conditions, excessively confident eyewitnesses, and witnesses who made cross-race identifications.¹⁴⁵ This indicates that the participant-jurors were already somewhat familiar with the effect of lighting on eyewitness accuracy. Specifically, participants rated eyewitnesses who viewed the perpetrator in poor lighting as less accurate and viewed the defendant as less guilty when compared to ideal witnessing conditions, but these perceptions did not impact verdicts.

Despite recognizing the impact of lighting on eyewitnesses, participants were not able to differentiate between ideal conditions and excessive confidence¹⁴⁶ or cross-race identifications.¹⁴⁷ Additionally, neither instruction type nor eyewitness condition affected belief in the fallibility of memory,¹⁴⁸ indicating that this belief was pre-existing and somewhat inflexible.

The preexisting belief in the fallibility of memory significantly related to how participants perceived the eyewitness,¹⁴⁹ perceived the defendant,¹⁵⁰ and rendered verdicts.¹⁵¹ As belief in the

140. Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J. L. REFORM, 401, 428 (1990).

141. Smith & Haney, *supra* note 135 at 346-349; Charles W. Otto, Brandon K. Applegate & Robin K. Davis, *Improving Comprehension of Capital Sentencing Instructions: Debunking Juror Misconceptions*, 53 CRIME & DELINQ., 502, 509-512 (2007); Carolyn Semmler & Neil Brewer, *Using a Flow-Chart to Improve Comprehension of Jury Instructions*, 9 PSYCHIATRY, PSYCHOL. & L., 262, 264-266 (2002).

142. This study was a jury simulation in which participants took on the role of jurors and read an online trial transcript. This is an accepted research practice but raises legitimate concerns about the applicability of results for “real” jurors. For an examination of the effects of student participants in research and online research, see *State v. Henderson*, 208 N. J. 208, 27 A. 3d 872 (2011); Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?* 23 LAW & HUM. BEHAV. 75 (1999); Kevin M. O’Neil et al., *Web-based Research: Methodological Variables’ Effects on Dropout and Sample Characteristics*, 25 BEHAV. RES. METHODS, INSTRUMENTS, & COMPUTERS 217 (2003); Brian H. Bornstein & Sean G. McCabe, *Jurors of the Absurd? The Role of Consequentiality in Jury Simula-*

tion Research, 32 FLA. ST. UNIV. L. REV. 443 (2005).

143. Verdict forms are occasionally used to help jurors recognize that the instructions are relevant. For example, North Carolina uses a verdict form in death penalty cases to help weigh aggravators and mitigators; see N.C. Gen. Stat. § 15A-2000 (2016).

144. No main effect for instruction type; $F(6, 384) = 1.01, p = .421$

145. Main effect for witness conditions; $F(9, 467) = 3.48, p < .001$

146. Perceptions of the eyewitness ($MDiff = -.17, SE = .18, p = .348$); perceptions of the defendant ($MDiff = .11, SE = .17, p = .518$); verdicts ($MDiff = .08, SE = .10, p = .396$).

147. Perceptions of the eyewitness ($MDiff = .08, SE = .19, p = .685$); perceptions of the defendant ($MDiff = .28, SE = .17, p = .100$); verdicts ($MDiff = .03, SE = .10, p = .801$).

148. Eyewitness type ($F(3, 194) = 1.97, p = .120$); instruction type ($F(2, 194) = 1.15, p = .318$).

149. $r = .37, t(205) = 5.67, p < .001$. Belief in the fallibility of memory also explained a significant proportion of variance in perceptions of the defendant, $R^2_{adj} = .13, F(1, 205) = 31.99, p < .001$.

150. $r = .46, t(205) = 7.47, p < .001$. Belief in the fallibility of memory also explained a significant proportion of variance in perceptions of the eyewitness, $R^2_{adj} = .21, F(1, 205) = 55.77, p < .001$.

151. $t(1) = 36.41, p < .001$

fallibility of memory increased, the eyewitness was perceived as less accurate,¹⁵² the defendant was perceived as less guilty,¹⁵³ and not-guilty verdicts increased.¹⁵⁴ This indicates that increased belief in the fallibility of memory can cause juror skepticism, as not-guilty verdicts increased regardless of whether the witness had ideal witnessing conditions or flawed witnessing conditions.

RECOMMENDATIONS AND CONCLUSIONS

The recommendations and conclusions from the articles contained in the 2012 special issue of *Court Review* remain sound. Evidence-based best practices should be implemented consistently throughout the legal system, and disincentives for deviating best practices should be both created and enforced.¹⁵⁵ An example of one of these best practices is interviewing eyewitness(es). Eyewitnesses should be interviewed using non-suggestive techniques as quickly as possible after the incident.¹⁵⁶ Likewise, co-witnesses should be separated and interviewed separately.¹⁵⁷ When a case reaches court, judges should evaluate the likely accuracy of the eyewitness before allowing him to testify.¹⁵⁸ Finally, judicial instructions should be modified to aid jurors in comprehending and utilizing information regarding eyewitnesses.¹⁵⁹

The findings of the present study largely supported previous findings on jurors' use of judicial instructions in cases involving eyewitnesses, and *Court Review's* 2012 review of the literature.¹⁶⁰ Specifically, instructions produced no effect of participant-jurors' perceptions of the trial parties or verdicts. Even asking participant-jurors to indicate whether a witness factor (e.g., lighting) was present on a verdict form had no effect; this comports with mixed successes found in other studies,¹⁶¹ despite the differing methodologies of a verdict form and asking participants hypothetical questions.

There are several potential reasons our verdict form failed to sensitize jurors. First, perhaps the use of the actual language in the *Henderson* instructions, rather than simplified language utilized in some other studies, prevented participant-jurors from fully comprehending and utilizing the instructions. Also, the presence of only one factor that influences eyewitness accuracy per condition might have left participant-jurors underestimating the effect of the factor on the eyewitness. Perhaps the use of many simultaneous factors would be perceived as more detrimental to eyewitness accuracy than a single factor. Clearly, more research needs to be done to determine which modifications are successful in sensitizing jurors.

As reported in previous research, participant jurors were also insensitive to many of the factors that affect eyewitness accuracy,

as they were largely unable to differentiate between an eyewitness with ideal witnessing conditions and flawed witnessing conditions; however, unlike previous research, participant-jurors were already sensitive to the detrimental impact of poor lighting on eyewitness performance, regardless of instructions. The lack of impact of this knowledge on verdicts remains troubling, however. Perceptions that an eyewitness is less accurate and a defendant is less guilty (compared to other conditions) *should* affect verdicts. However, in our study, poor lighting conditions affected perceptions of the witness and defendant—but not verdicts. Changing jurors' perceptions is a step in the right direction, but it is of little comfort to a wrongfully convicted defendant.

Despite somewhat disappointing findings regarding the effectiveness of the present *Henderson* instructions and verdict form, there are some promising findings from other studies regarding modifications to the instructions. For instance, dynamic jury instructions (e.g., flowcharts) have helped sensitize jurors to judicial instructions.¹⁶² Other modifications, such as simplifying and clarifying the language in the instructions¹⁶³ and allowing jurors to ask for clarification,¹⁶⁴ have also met with some success. Future research will clarify precisely what modifications are most helpful.

Importantly, participant-jurors' belief in memory in the current study had a strong relationship on their perceptions and verdicts.¹⁶⁵ Because preexisting beliefs about memory related to both perceptions and verdicts, one potentially successful effort to reduce wrongful convictions in cases involving eyewitnesses could therefore be to select jurors with varying degrees of belief in the fallibility of memory. The diversity of beliefs would allow for a more thorough evaluation of the eyewitness, as the jury would include jurors predisposed to believe that the eyewitness is accurate and those predisposed to believe the eyewitness is inaccurate. This more thorough and critical evaluation of the eyewitness would likely reduce wrongful convictions based on uncritical acceptance of eyewitness testimony. However, specifically selecting jurors based on such specific beliefs is likely impractical. Instead, promoting general diversity amongst the jury is a simpler solution. There are several benefits of diverse

“Evidence-based best practices should be implemented consistently throughout the legal system...”

152. $F(5, 52) = 3.19, p = .001$

153. $F(5, 52) = 5.96, p < .001$

154. $F(5, 52) = 1.42, p < .001$

155. Smalarz & Wells, *supra* note 77; Doyle, *supra* note 78. The American Psychology-Law Society has sponsored the development of a scientific review paper on best practices for eyewitness identification procedures that is in the final stages of the review process at the time of this publication. This document will help legal and law enforcement officials create and develop evidence-based practices. For a draft version of this paper, c.f. Gary L. Wells, Margaret Bull Kovera, Amy Bradfield Douglass, Neil Brewer, Christian A. Meissner & John T. Wixted, Scientific Review Paper on Eyewitness Identification Procedures (2019).

156. Gabbert et al., *supra* note 23; Foster et al., *supra* note 20.

157. *Id.*

158. Wise & Safer, *supra* note 76.

159. Bornstein & Hamm, *supra* note 2.

160. Bornstein & Hamm, *supra* note 2.

161. Berman *supra* note 124; Jones et al., *supra* note 124; Perez, *supra* note 125.

162. Semmler & Brewer, *supra* note 141.

163. Marder, *supra* note 135; Tiersma & Curtis, *supra* note 135; Smith & Haney, *supra* note 135.

164. Marder, *supra* note 135.

165. These results were insensitive to eye-witnessing conditions, indicating a skepticism effect, $F(21, 459) = 1.31, p = .164$.

juries, including more thorough understanding of case facts and verdict criteria¹⁶⁶ and higher quality deliberations (e.g., more case facts discussed, longer deliberation, fewer inaccuracies).¹⁶⁷ The simplest method for increasing the likelihood of a diverse jury is to convene a twelve-person, rather than a six-person, jury. An analysis of studies examining the effects of jury size found that six-person juries, when compared to twelve-person juries, contain fewer minority members (and therefore fewer minority members' opinions), discuss trial testimony with less accuracy, and remember fewer evidentiary facts.¹⁶⁸

As the consequences of false convictions and identifications are severe, it is highly worthwhile for judges and researchers to continue to attempt to sensitize jurors to the fallibility of eyewitness identifications and testimony. To this end, legal scholars and the courts should partner together to obtain high-quality research on actual jurors/potential jurors. One of the drawbacks of laboratory studies is a lack of verisimilitude. By partnering with select courts regarding creation or implementation of potential modifications to judicial instructions and access to jurors and/or potential jurors, both researchers and courts can gain a more complete understanding of the solutions to the problems posed by mistaken eyewitness testimony.



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166. Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 L. & HUM. BEHAV. 53, 75-76 (1984).

167. Samuel L. Sommers, *On Racial Diversity and Group Decision Mak-*

ing: Identifying Multiple Effects of Racial Composition on Jury Deliberations, 90 INTERPERSONAL RELATIONS & GROUP PROCESSES 597, 606-608.

168. Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 L. & HUM. BEHAV., 5: 451, 455-459 (1997).

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States 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.

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of Citation. Articles should be of a quality consistent with better state-bar-association law journals and/or other law reviews.

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OBSCURE LEGAL MUSIC by Judge Victor Fleming

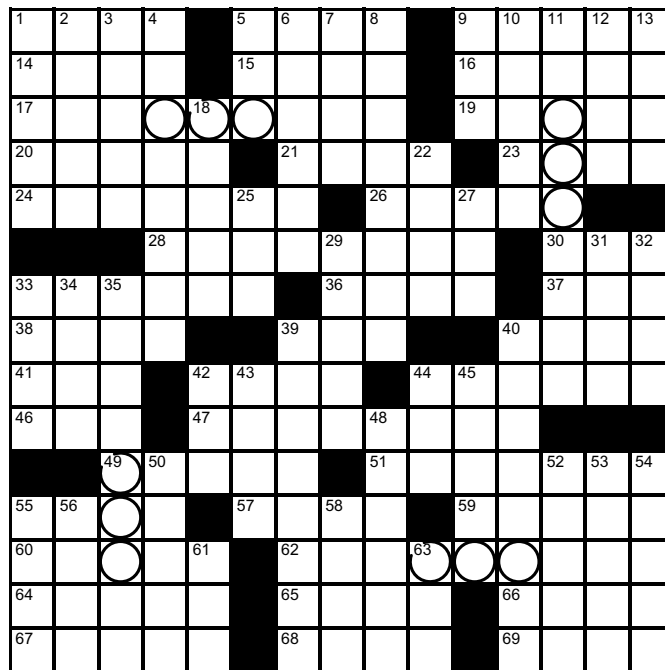
Across

- 1 Kind of fiddle
- 5 Curators' degs.
- 9 What aspiring D.A.'s take
- 14 Don't take this in court!
- 15 "Free Willy" animal
- 16 Assign as one's share
- 17 2015 Eric Church song
- 19 "It's the truth!"
- 20 Letters in cyberspace
- 21 Rind scrapings
- 23 Single-___ scotch
- 24 Dangerous discolored seawater
- 26 "One way" sign symbol
- 28 Container often seen with a brush
- 30 "___ we on the same page?"
- 33 Put a value on
- 36 "The ___ the limit!"
- 37 Lighthouse view
- 38 Facts and figures
- 39 Prof's helpers
- 40 "A ___ Is Born"
- 41 "So ___ heard"
- 42 ___-Pei (dog breed)
- 44 Does 100, say
- 46 Teachers' org. since 1857
- 47 Mentality type for negative thinkers
- 49 ___ on the line
- 51 Confers (upon)
- 55 ___ argument
- 57 Interstate rumbler
- 59 Fortune-telling card
- 60 "I ___ with my own eyes!"
- 62 2004 The Echoing Green song
- 64 Mature insect

- 65 Fruit named for its unsightliness
- 66 "Up and ___!"
- 67 Refuse a request
- 68 Problem for Sylvester the Cat
- 69 Longings

Down

- 1 Apron wearer
- 2 "Spirited Away" genre
- 3 Dressing site
- 4 Soup choice
- 5 Tend the turf
- 6 Fresh alternative
- 7 Caldwell's "God's Little ___"
- 8 Pathetic bumblers
- 9 PC linkup
- 10 Replay effect
- 11 2018 Ollie Thorpe song
- 12 Labor arduously
- 13 Dele killer?
- 18 Hood's pseudonym
- 22 Highchair feature
- 25 Criticize, slangily
- 27 Hosp. workers
- 29 Bygone Russian despots
- 31 Library byword
- 32 "I'm all ___!"
- 33 Score after deuce
- 34 PC command
- 35 1980 Robbie Dupree song
- 39 Like attire lawyers should wear in court
- 40 Put in prison, slangily
- 42 Like some winks and grins
- 43 "___ an Englishman" ("H.M.S.



- Pinafore" song)
- 44 "___ Loves You" (Beatles song)
- 45 Angel hair, e.g.
- 48 Tradable notes
- 50 Come together in agreement
- 52 Emulate Cicero
- 53 Roused from slumber
- 54 Florists' cuttings
- 55 Medical suffix
- 56 Hindu deity of virtue
- 58 O. Henry's "The Gift of the ___"
- 61 Besides
- 63 Gloss target

Vic Fleming is a district judge in Little Rock, Arkansas.

Answers are found on page 119.

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Refining the Judicial Lexicon:

The Supreme Court of Canada Refines the Defences of Consent and Mistaken Belief in Consent

Wayne K. Gorman

In Canada, the *Criminal Code of Canada*, R.S.C. 1985, contains a number of “sexual offences” including the broad and general one of “sexual assault.” The offence of sexual assault has been defined as the touching of “another person in a sexual way without her consent” (see *R. v. J.A.*, [2011] 2 S.C.R. 440, at paragraph 23), in “circumstances of a sexual nature, such that the sexual integrity of the victim is violated” (see *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paragraph 24). Thus, lack of consent is one of the key elements of the offence of sexual assault.

In *R. v. Darrach*, 2 S.C.R. 443 (2000), the Supreme Court noted that it “is common for the defence in sexual offence cases to deny that the assault occurred...or to claim an honest but mistaken belief in consent” (at paragraph 58).

These two issues, the nature of consent and the defence of mistaken belief in consent, have been recently considered by the Supreme Court of Canada.

R. V. BARTON

In *R. v. Barton*, 2019 SCC 33, May 24, 2019, the Supreme Court considered, amongst other issues, how the defence of honest but mistaken belief in consent is to be applied in sexual offence trials. The Court said it was “refining the judicial lexicon” in relation to this defence.

THE TRIAL

Mr. Barton was charged with murder. It was alleged that he killed the victim (Ms. Gladue) in the course of sexually assaulting her, which is characterized in Canada as first-degree murder by section 231(5) of the *Criminal Code*. The accused testified, without a *voir dire* being held or a written application being filed (as required by section 276 of the *Criminal Code*) that he had engaged in sexual activity with the victim on a prior occasion and that his sexual contact with her on the day of her death was consensual. In the alternative, he argued that he believed it to be consensual. He was acquitted.

An appeal to the Supreme Court of Canada was allowed.

THE SUPREME COURT’S RULING

The Supreme Court considered a multitude of issues in this decision, including:

- The scope of the applicability of section 276 of the *Criminal Code*;
- The defence of mistaken belief in consent;
- The meaning of “consent” in the context of the offence of sexual assault;
- The requirement for the accused to take reasonable steps to ascertain consent; and

- When a purported mistake of fact, in the context of the defence of mistaken belief in consent, constitutes an error of law and thus does not constitute a defence.

In addressing these issues, the Supreme Court indicated that it was reformulating the defence of honest, but mistaken, belief in consent to the defence of mistaken belief in “communicated consent.” As will be seen, this reformulation could be seen as having significantly limited the availability of the former defence of mistaken belief in consent. To explain the impact of *Barton*, it is useful to start with what “consent” means in Canadian criminal law.

WHAT CONSENT MEANS IN THE CONTEXT OF SEXUAL OFFENCES

The Court noted in *Barton* that the meaning of “consent” in the context of the offence of sexual assault is defined in section 273.1(1) of the *Criminal Code* as “the voluntary agreement of the complainant to engage in the sexual activity in question.” The Supreme Court pointed out that consent “is treated differently at each stage of the analysis,” including at the *mens rea* stage and the *actus reus* stage.

THE ACTUS REUS

The Court held that for “purposes of the *actus reus*, ‘consent’ means ‘that the complainant in her mind wanted the sexual touching to take place.’... Thus, at this stage, the focus is placed squarely on the complainant’s state of mind, and the accused’s perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent — plain and simple.... At this point, the *actus reus* is complete. The complainant need not *express* her lack of consent, or revocation of consent, for the *actus reus* to be established” (at paragraph 89).

THE MENS REA

The Court held that for “purposes of the *mens rea*, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, ‘consent’ means ‘that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused.’... Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed ‘the complainant effectively said ‘yes’ through her words and/or actions” (at paragraph 90).

In summary, in sexual offence trials in Canada, a lack of consent is effectively established when the complainant testifies that she or he did not consent. The complainant does not have to have expressed this lack of consent to the accused. Once lack

of consent is established, the accused will be convicted, subject to the defence of honest, but mistaken, belief in consent.

THE DEFENCE OF HONEST, BUT MISTAKEN, BELIEF IN CONSENT

The Supreme Court commenced its analysis on this issue by considering the general nature of the defence. It noted that a “mistake of fact defence operates where the accused mistakenly perceived facts that negate, or raise a reasonable doubt about, the fault element of the offence.... Honest but mistaken belief in communicated consent falls within this category of defences” (at paragraph 95).

The Supreme Court suggested that though it has “consistently referred” to this defence as “being premised on an ‘honest but mistaken belief in consent’... this Court’s jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct.” Therefore, “it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an ‘honest but mistaken belief in communicated consent.’ This refinement is intended to focus all justice system participants on the crucial question of communication of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent” (at paragraphs 91 and 92).

The Supreme Court indicated that focusing “on the accused’s honest but mistaken belief in the communication of consent has practical consequences.” In particular, it significantly limits the manner in which prior sexual contact with a complainant can be used by an accused person to form the basis of the defence of honest belief in consent (at paragraphs 93 and 94):

Most significantly, in seeking to rely on the complainant’s prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she communicated consent to the sexual activity in question at the time it occurred.... For example, in some cases, prior sexual activities may establish legitimate expectations about how consent is communicated between the parties, thereby shaping the accused’s perception of communicated consent to the sexual activity in question at the time it occurred... a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact....

However, great care must be taken not to slip into impermissible propensity reasoning. The accused cannot rest his defence on the false logic that the complainant’s prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the “twin myths”, which is prohibited under s. 276(1)(a) of the *Code*.

Thus, in a sexual offence trial in Canada, when an accused person claims that they believed the complainant was consenting

to the sexual activity that occurred, the concentration will not be on the accused’s belief in consent, but on the accused’s belief that the complainant had “communicated” his or her consent.

This is a potentially significant difference. This is illustrated by how the Court in *Barton* makes a distinction between when honest belief will constitute a mistake of fact (and thus a defence) and when it will constitute a mistake of law (and thus not a defence).

MISTAKE OF LAW

On this issue, the Supreme Court indicated that if an accused’s defence of honest but mistaken belief in communicated consent “rests on a mistake of law — including ‘what counts as consent’ from a legal perspective — rather than a mistake of fact, the defence is of no avail” (at paragraph 96). The Court also indicated that “three consent-related mistakes of law are particularly relevant: implied consent, broad advance consent, and propensity to consent” (at paragraph 97).

IMPLIED CONSENT

The Supreme Court suggests that the “defence of implied consent ‘rests on the assumption that unless a woman protests or resists, she should be “deemed” to consent.’” The Court stated that it is “a mistake of law to infer that ‘the complainant’s consent was implied by the circumstances, or by the relationship between the accused and the complainant.’... In short, it is an error of law — not fact — to assume that unless and until a woman says ‘no,’ she has implicitly given her consent to any and all sexual activity” (at paragraph 98).

BROAD ADVANCE CONSENT

The Supreme Court indicated that broad advance consent “refers to the legally erroneous notion that the complainant agreed to future sexual activity of an undefined scope... a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact” (at paragraph 99).

PROPENSITY TO CONSENT

The Supreme Court indicated that the “law prohibits the inference that the complainant’s prior sexual activities, by reason of their sexual nature, make it more likely that she consented to the sexual activity in question.... This is the first of the ‘twin myths’. Accordingly, an accused’s belief that the complainant’s prior sexual activities, by reason of their sexual nature, made it more likely that she was consenting to the sexual activity in question is a mistake of law” (at paragraph 100).

In summary, when an accused person seeks to base a purported belief in consent on such things as the nature of the relationship, silence, or past consensual sexual activity, the defence will fail because it will be based upon a mistake of law.

In Canada, there is an additional factor. It involves the

[T]hree consent-related mistakes of law are relevant: implied consent, broad advance consent, and propensity to consent.

Taking reasonable steps to ensure that consent is being communicated is not very difficult.

requirement for the accused to have taken “reasonable steps” to ascertain consent.

THE REASONABLE STEPS REQUIREMENT

When mistaken belief in consent is raised in Canada, section 273.2(b) of the *Criminal Code* indicates that this will “not” be a defence unless the accused had taken “reasonable steps, in the circumstances known

to the accused at the time, to ascertain that the complainant was consenting” (it appears that this should now be read as requiring the accused to take reasonable steps to ascertain that the complainant communicated his or her consent). The Court considered in *Barton* what constitutes reasonable steps.

The Supreme Court of Canada suggested that the “jurisprudence on the reasonable steps requirement under s. 273.2(b) remains underdeveloped, and academic commentators have highlighted the need for greater clarity.... With that in mind... a few comments and observations are warranted to promote greater clarity in the law and provide guidance for future cases” (at paragraph 103).

The Court noted that section 273.2(b) “has both objective and subjective dimensions: the accused must take steps that are objectively reasonable, and the reasonableness of those steps must be assessed in light of the circumstances known to the accused at the time” (at paragraph 104).

The Court indicated that though “it would be unwise and likely unhelpful to attempt to draw up an exhaustive list of reasonable steps... it is possible to identify certain things that clearly are not reasonable steps” (at paragraph 107):

...steps based on rape myths or stereotypical assumptions about women and consent cannot constitute reasonable steps. As such, an accused cannot point to his reliance on the complainant’s silence, passivity, or ambiguous conduct as a reasonable step to ascertain consent, as a belief that any of these factors constitutes consent is a mistake of law (see *Ewanchuk*, at para. 51, citing *M. (M.L.)*). Similarly, it would be perverse to think that a sexual assault could constitute a reasonable step (see *Sheehy*, at p. 518). Accordingly, an accused’s attempt to “test the waters” by recklessly or knowingly engaging in non-consensual sexual touching cannot be considered a reasonable step. This is a particularly acute issue in the context of unconscious or semi-conscious complainants (see *Sheehy*, at p. 537).

The Court indicated that it “is also possible to identify circumstances in which the threshold for satisfying the reasonable steps requirement will be elevated.” As an example, the Court referred to a situation in which “the accused and the complainant are unfamiliar with one another, thereby raising

the risk of miscommunications, misunderstandings, and mistakes. At the end of the day, the reasonable steps inquiry is highly contextual, and what is required will vary from case to case” (at paragraph 108).

Though section 273.2(b) of the *Criminal Code* requires that an accused person who seeks to rely on the defence of honest but mistaken belief in consent took reasonable steps to ascertain that the complainant was consenting, it now appears, based upon *Barton*, that such an accused must have taken reasonable steps to ascertain that the complainant had communicated her or his consent.

Taking reasonable steps to ensure that consent is being communicated is not very difficult. Asking is not an onerous requirement. This change in focus has the potential to make it more difficult for an accused person in Canada, who argues that they had a belief in consent, to point to evidence of having taken reasonable steps to ascertain the communication of consent. For instance, anything less than asking if the other party is consenting might subsequently be seen as not having taken reasonable steps. It is important to note that in Canada if the trial judge concludes that the accused did not take reasonable steps to ensure consent was being communicated, the defence of mistaken belief in consent cannot be considered. In *R. v. Daigle*, (1998) 1 S.C.R. 1220, for instance, the Supreme Court held that the accused in that case “could not rely on the defence of honest but mistaken belief since he had not taken reasonable steps to ascertain that the victim was consenting” (at paragraph 3).

One might expect that Crown counsel will now be asking the accused the following question in every case in which the defence of mistaken belief in communicated consent is raised: “Did you ask the complainant if [he or she] was consenting”? Since in most sexual assault trials the answer to this question will be “no,” where does this leave the defence of mistaken belief in consent?

The Supreme Court held that a failure to take reasonable steps to ascertain if consent was being communicated, will be “fatal” (at paragraphs 111 and 112):

...where the accused is charged with a sexual offence under ss. 271, 272, or 273, a failure to take reasonable steps is fatal to the defence of honest but mistaken belief in communicated consent by virtue of s. 273.2(b).

With this in mind, in the context of a charge under ss. 271, 272, or 273 where the accused asserts an honest but mistaken belief in communicated consent, if either (1) there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent or (2) the Crown proves beyond a reasonable doubt that the accused failed to take reasonable steps to ascertain consent, then there would be no reason to consider the presence or absence of reasonable grounds to support an honest belief in consent under s. 265(4), since the accused would be legally barred from raising the defence due to the operation of s. 273.2 (b).¹

Footnotes

1. Section 272 defines the offence of “sexual assault with a weapon,”

and section 273 defines the offence of “aggravated sexual assault.”

SECTION 276 OF THE CRIMINAL CODE

As we saw earlier, the accused testified concerning his prior sexual contact with the complainant without a *voir dire* being held or a written application being filed. The Supreme Court indicated that “[w]here the accused seeks to adduce evidence of the complainant’s prior sexual activities, the accused must make a written application to the court setting out (a) detailed particulars of the evidence the accused seeks to adduce, and (b) the relevance of that evidence to an issue at trial” (at paragraph 64).

In *R. v. R.V.*, 2019 SCC 41, the Supreme Court considered section 276 of the *Criminal Code* and indicated that “[b]road exploratory questioning is never permitted under s. 276. Open-ended cross-examination concerning a complainant’s sexual history clearly raises the spectre of the impermissible uses of evidence that the provision was intended to eliminate. Section 276(2)(a) requires the accused to identify ‘specific instances of sexual activity’ to avoid unnecessary incursions into the sexual life of the complainant” (at paragraph 47).

THE APPLICATION OF SECTION 276 TO THE OFFENCE OF MURDER

Section 276 of the *Criminal Code* lists a number of sexual offences to which it applies. This list does not include the offence of murder. However, the Supreme Court held that that “the s. 276 regime applies to any proceeding in which an offence listed in s. 276(1) has some connection to the offence charged, even if no listed offence was particularized in the charging document.... In Mr. Barton’s case, the s. 276 regime was engaged because the offence charged, first degree murder under ss. 231(5)(c) and 235(1), was premised on sexual assault with a weapon contrary to s. 272, which is an offence listed in s. 276(1). That alone was sufficient to engage the s. 276 regime” (at paragraphs 76 and 77).

As a result, the Court held that “[i]t follows that before adducing evidence of Ms. Gladue’s sexual activity on the night before her death, Mr. Barton was required to make an application under s. 276.1(1) and (2)” (at paragraph 82). The Supreme Court concluded that this error warranted the ordering of a new trial (at paragraph 9):

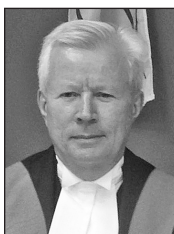
The central error committed by the trial judge was his failure to comply with the mandatory requirements set out under the s. 276 regime. That error had ripple effects, most acutely in the instructions on the defence of honest but mistaken belief in communicated consent, upon which Mr. Barton relied. In particular, non-compliance with the s. 276 regime, which serves a crucial screening function where an accused relies on the complainant’s prior sexual activities in support of his defence, translated into a failure to expose and properly address misleading evidence and mistakes of law arising from Mr. Barton’s defence. This in turn resulted in reversible error warranting a new trial.

CONCLUSION

Barton raises several issues that have the potential of having a significant impact on sexual assault trials in Canada.

At the forefront of the possible impacts is the limiting of the defence of honest, but mistaken belief in consent. Based upon *Barton*’s refinement of the judicial lexicon as regards this defence, its future applicability may be limited. The combination of it being necessary for the accused to have (1) believed the complainant had communicated her consent to the sexual activity and (2) the requirement that the accused took reasonable steps to ascertain that this occurred, may make this a difficult defence to rely upon in Canada in the future.

In addition, the Supreme Court’s formulation of when the defence of honest but mistaken belief that consent was communicated will constitute a mistake of law, may further limit this defence.



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Answers to Crossword

from page 115





The Resource Page

EYEWITNESS IDENTIFICATION

Innocence Project

This organization has worked since 1992 to address wrongfully convicted defendants by spearheading DNA exoneration and improvement of eyewitness identification. The link below is a brief and handy reference to the work among various states and some best practices.

<https://www.innocenceproject.org/eyewitness-identification-reform/>

National Center for State Courts

In 2017, NCSC included an important article in its annual *Trends in State Courts* publication titled “The Trouble With Eyewitness Identification Testimony in Criminal Cases.” The article highlights issues in this area and lists ways to learn more from various jurisdictions, including preventative instructions and academic articles.

<https://www.ncsc.org/microsites/trends/home/Monthly-Trends-Articles/2017/The-Trouble-with-Eyewitness-Identification-Testimony-in-Criminal-Cases.aspx>

“Why Science Tells Us Not To Rely On Eyewitness Accounts” *Scientific American* (January 1, 2010)

Two psychology professors summarize the science about false memories and juror reliance on eyewitness claims. The article uses plain English to succinctly describe the major problems of eyewitness identification and show how science may account for some of these predicaments. For example, research shows that false memories can be constructed by common practices, such as a line-ups or interviews because memory may not be a videotape recording of what we see, but rather a subjective reconstruction of what we can remember, or what is suggested.

<https://www.scientificamerican.com/article/do-the-eyes-have-it/>

Eyewitness Testimony: Civil and Criminal. Fifth edition. Elizabeth F. Loftus. (Lexis-Nexis, 2013)

Since 1987, this distinguished professor has put forth this textbook with other notable authors and academics. In this fifth edition, the material covers elements of

perception and an excellent background of basic eyewitness identification issues. Moreover, it leads the reader to strategies and tactics at each step of a trial that are affected by eyewitnesses.

JUDICIAL SELECTION

Brennan Center for Justice

The Brennan Center at NYU Law School is a longtime think tank and clearinghouse for current issues in the law and related topics. It advocates against elections for state supreme courts and urges states to modify judicial selection systems toward appointment rather than election. But regardless of the reader’s preference on the issue, this resource is a valuable tool for reference and learning about judicial selection. It includes platforms and links for academic articles, data banks, and an interactive map for each state.

<https://www.brennancenter.org/rethinking-judicial-selection>

National Center for State Courts Judicial Selection in the States

The 2017 edition of *Trends in State Courts* includes this thumbnail description of the then current judicial selection playing field and helpful links to other useful articles and summaries, including its own outstanding resource guide.

<https://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/monthly-trends-articles/judicial-selection-in-the-states.aspx>

The Institute for the Advancement of the American Legal System

IAALS is a think tank at the University of Denver that conducts largely empirical research on a wide variety of issues related to the American legal profession. It aims to find practical solutions to well-known issues. This link is a web page titled “Judicial Selection in the United States,” and it shows IAALS work over recent years, including a 2014 model developed by a committee chaired by former Supreme Court Justice Sandra Day O’Connor that describes a somewhat more meaningful appointment process. The material combines general reference guides, scholarly research, and legal discussion.

<https://iaals.du.edu/projects/judicial-selection>

Bonneau, Chris W. and Hall, Melinda Gann, ed. *Judicial Elections in the 21st Century* (New York: Routledge 2017)

This important and critically praised collection is edited by two of the most well-known scholars in the area of judicial selection. It is cited several times in Charles Gardner Geyh’s book reviewed in this issue, *Who Is to Judge?* and includes superb articles by Professor Geyh and many other prominent academics. Overall, the volume is a great review of the election method of choosing judges and evaluates the latest research on how elections actually work, and levels the playing field against the rise of merit selection over the past 20 years.

<https://www.amazon.com/Judicial-Elections-Century-Courts-Politics/dp/1138185892>

Shugerman, Jed. *The People’s Courts: The Rise of Judicial Elections and Judicial Power in America* (Harvard University Press 2012).

The author is a prominent scholar at Fordham University School of Law and is well-known in the field of judicial selection. This book has become one of the definitive resources for examining the election of state court judges. It includes an excellent history of state judicial elections, and documents the long-standing tension between independence and accountability. It is also a very fine overall legal history, as it shows us the political nature of judging and judge selecting.

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