

Court Review

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Summer 1999

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Volume 36, Issue 2

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EDITOR'S NOTE

As we prepare for the AJA's annual conference in Cleveland, we take stock of the progress we have made in making *Court Review* a premier publication for America's judges. We think that recent events and this issue show that we are fulfilling that mission.

We recently were accepted for inclusion in several of the leading indexes of legal publications: the Legal Resource Index, the Current Law Index, and LegalTrac, all published by the Gale Group. Our request for inclusion was unanimously approved by the committee of the American Association of Law Libraries that handles such requests.

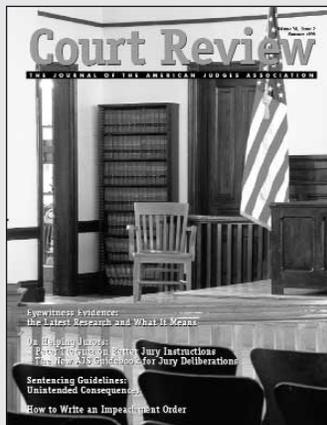
The three non-student articles in this issue are of broad interest and are written by authors whose work we are proud to publish here. The lead article is written by Professor Jack Brigham, the 1997-98 president of the American Psychology-Law Society, and two of his talented graduate students, Adina Wasserman and Christian Meissner. They thoroughly present the accumulated findings of three decades of research on the reliability of eyewitness testimony; they then discuss the extent to which traditional trial safeguards to unreliable eyewitness testimony are successful.

Our second article is by Professor Peter Tiersma, whose recent book, *Legal Language*, provides a thorough review of the sources of legalese and a clarion call for clear and concise language. In this article, he expands upon portions of his book calling for more understandable jury instructions. Professor Tiersma provides troubling examples of instructions that leave jurors in the dark along with appropriate suggestions for improvement.

Our third article is by two researchers at the American Judicature Society, Robert Boatright and Beth Murphy. They are authors of the AJS's new *Guide for Jury Deliberations*. In this article, they present results from initial testing of the guidebook and answer the objections they have encountered to its use.

In addition to these articles, we present two essays. The first, by Alexander Smith and Harriet Pollack, discusses problems encountered with federal sentencing guidelines and some of the responses to these problems that have been noted to date. The authors suggest that, when Congress next visits this issue, they rely most heavily for advice on trial judges, probation supervisors and prison wardens, who have the greatest first-hand experience. The second, by Professor Joseph Kimble, complements Peter Tiersma's call for clear communication by applying plain language concepts to the recent orders issued by the United States Senate in concluding the impeachment trial of President Clinton. Professor Kimble suggests that these plain language concepts should be applied to court orders as well. Last, we present the winning essay from last year's AJA writing competition, which addresses the limits of free speech when publications result in tortious conduct by their readers.

We hope that you find the issue of interest and of value to you. Please feel free to contact us at any time with questions or comments. – SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 30 of the Spring 1999 issue. *Court Review* reserves the right to edit, condense or reject material submitted for publication.

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

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President's Column

Paul Beighle

One of the many pleasant tasks of the presidency is representing AJA at various conferences, symposia and joint task force meetings. Following the annual meeting in Orlando last year, our first member from Mexico, Chief Justice Julio Patino of Vera Cruz invited me to represent AJA at the 22nd annual National Congress of Tribunales Superiores de Justice in Morelia, Mexico.

This was a particularly special honor for AJA because no foreign judges had previously been invited to participate. Justice Patino, president of the Congress, was the kindest of hosts, thoughtfully providing a capable interpreter who accompanied us to all the events. I attended the working sessions of the justices and learned a great deal about the administration of justice in Mexico and about the issues of particular importance to the judiciary in each of the states.

Our visit was enhanced by meeting many judges and establishing ties with their organization. We hope that the contact will lead to increased participation in AJA activities by the judges of Mexico. We extend our special thanks to Justice Patino, his delightful wife, Martha, and to our interpreter, Citlali.

In keeping with the international theme, I would ask AJA members to give some thought to the following issue. We actively seek the membership and participation of judges from Canada and Mexico, and our efforts have brought us members from both countries. Judge Shirley Strickland-Saffold is to be commended for inviting Justice Patino into the AJA. Those members are from the *North American continent* but are not from *America* as we typically think of it.

In order to be more inclusive as an organization, we should give some thought to a name change that would be indicative of our international composition. I have appointed an ad hoc committee, chaired by Judge Sandy Elden, to study the feasibility of adopting a name that would reflect the broader scope of the organization. If you have any thoughts on the matter, or any suggestions, please submit them to Judge Elden for inclusion in his report.

Another major event at which I represented AJA was the national Conference on Public Trust and Confidence in the Justice System, held May 13-15 in Washington, D.C. Sponsors of the symposium included the Conference of Chief Justices, the Conference of State Court Administrators, the American Bar Association and the League of Women Voters. The National

Center for State Courts was the coordinating agency for the conference.

About five hundred participants took part in the program. They included judges, lawyers, court administrators/managers and citizens from various interested groups. AJA attendees included Judge Terry Elliott, Judge Valorie Vega, Judge Steve Leben and Judge Bob Pirraglia. Of course, each of the state chief justices is automatically a member of AJA, and many of them led their state's delegation. The three purposes of the conference were to identify the critical issues affecting public perception, to develop strategies for dealing with the issues and to identify methods for implementing those strategies.

The most critical issues were identified as (1) unequal treatment; (2) the high cost of access to the justice system, (3) lack of public understanding of the justice system and (4) unfair and inconsistent judicial process. The principal strategies for addressing the issues were identified as (1) improving education and training (of both the public and the judiciary); (2) making the courts more inclusive and out-reaching; (3) improving external communication; and (4) providing swift, fair justice.

The issues of public trust and confidence will be matters that national organizations such as AJA will be asked to work on over the coming years. AJA, consisting of judges at all levels of the judiciary, is in a perfect position to be an active, influential participant in the

process. At our annual meeting in Cleveland in October, Chief Justice Thomas A. Zlaket of Arizona, a co-chair of the conference, will address us on the issues raised there. I look forward to his address and promise on behalf of our organization that we will work with the implementation committee to advance the cause of improving public trust and confidence in the judicial system.

As a final note, let me direct your attention to the balance of the program for the Cleveland conference, October 10-15, 1999. Judge Strickland-Saffold and her conference committee, and Judge Jeffrey Rosinek and his education committee, have put together a program that will be educational, informative and entertaining. The speakers are all first-rate and the topics stimulating. We will once again have a vendor's show and a silent auction.

Cleveland will be an exciting city. Don't miss it.



AJA President Paul Beighle, second from right, attended a national meeting of judges in Mexico at the invitation of Chief Justice Julio Patino of Vera Cruz, Mexico. Also attending were Judge Beighle's wife, Jane McCormach, far left, a former president of the American Judges Foundation, and Justice Jan Flores, a member of AJA and of the Arizona Court of Appeals.

Curtailing the Sentencing Power of Trial Judges: The Unintended Consequences

Alexander B. Smith and Harriet Pollack

In the middle 1960s, the President's Commission on Law Enforcement and the Administration of Justice issued *The Challenge of Crime in a Free Society*.¹ One part of the report was "Task Force: Corrections," covering imprisonment, probation and parole. It supported the principle of indeterminate sentencing, which held that in setting a criminal's total sentence, his incarceration should be relatively short and his parole supervision in the community should be long, based on the notion that when the inmate was released, with help from his parole officer, he could more easily be integrated into society and become a conforming, productive citizen.

Since that time, there has been a 180-degree change in the philosophy of corrections. Legislators and politicians have tried to outdo each other in extending the ambit of capital punishment, demanding longer and mandatory sentences, and abolishing parole. The obvious result has been that inmates now serve longer sentences and the number of inmates in prison has increased. What is the price we are paying for this change?

Right now, times are good: the unemployment rate is low, and the FBI reported that, in 1997, serious crimes, including murder, and property crimes had declined for the sixth year in a row.² Despite good times, however, since 1990, the number of federal and state

prison inmates has continued to increase, along with the budgets for prisons. In 1990, of the 65,526 prison inmates who were serving time in the federal prison system, 31,300 were drug offenders. By the end of 1997, the number of inmates had jumped by 47,447 to 112,973, of whom 55,194 were drug offenders.³ At a minimum cost of \$25,000 per inmate, the yearly federal budget has risen by almost \$2 billion in this seven-year period. During the same time period, the number of state prisoners rose by 423,188, from 708,393 to 1,131,581, of whom 23 percent were drug offenders, at a cost of roughly \$10.5 billion, leading to sharp cutbacks in other state programs, particularly university funding.⁴

What is the prognosis for the future? It is generally agreed that when the percentage of 15- to 21-year-olds in the overall population increases (as it is doing right now), and if our economic situation falters, unemployment figures rise, and the number of families below the poverty line increases, the rate of crime will rise. The "drug problem" shows no sign of changing or being solved: even now, heroin use among U.S. teenagers is rising.⁵ Under such circumstances, prison commitments would increase and the federal and state corrections budgets would explode.

Let's look for a moment at the federal corrections system: why have prison commitments increased so much, even

in "good" times? For the answer, we start with a history lesson.

Twenty-seven years ago Marvin Frankel, sitting as a federal district judge in New York City, wrote a book called *Criminal Sentences*,⁶ in which he called attention to the evils of sentence disparity — offenders committing the same offense receiving wildly different sentences by different judges. The problem, for Frankel, was the unlimited discretion given to judges by sentencing laws prescribing indeterminate sentences, such as one to fifteen years, or a choice between probation or prison at the option of the judge. Under such laws, sentences could be, and were sometimes, handed down by judges with individual biases. Prison inmates found themselves serving time with fellow prisoners who had committed the same offense, but received much shorter sentences. Further, the disparity of sentences was frequently irrational in that it was not geared to the severity of the offense. Prison administrators routinely complained about the effects on morale and the injustice of sentence disparity.

Frankel's book started a movement to reform sentencing at both the federal and state levels, and while the resulting reform schemes differed in structure and detail, all were aimed at severely limiting the discretion of the sentencing judge. In the 1980s, Congress formed committees in the Senate and the House of Representatives that held hearings to

Footnotes

1. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).
2. *Crime Drops in '97; Murders Are at 30-Year Low*, N.Y. TIMES, Nov. 23, 1998, at A16.
3. BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 1997* (Aug.

1998).

4. Randal C. Archibold, *Colleges Fall, But Prisons Rise in State Support*, N.Y. TIMES, Dec. 2, 1998, at B18.
5. *Heroin Use Is Rising Among U.S. Teenagers*, N.Y. TIMES, Dec. 8, 1998, at A22.
6. MARVIN FRANKEL, *CRIMINAL SENTENCES: CRIME WITHOUT DISORDER* (1972).

address the problem of disparity in sentencing. The witnesses, for the most part, were academics and appellate court judges; largely missing were trial court judges, probation administrators with hands-on experience in the dimensions and problems of sentencing, and prison wardens and superintendents.

In October 1984, with strong bipartisan support, Congress enacted the Comprehensive Crime Control Act, to be applied to federal offenders who committed crimes after November 1, 1987.⁷ This act abolished parole and the Federal Parole Commission and created a Sentencing Commission to draw up guidelines for federal sentencing. To assess the probable impact of the Guidelines, we developed a questionnaire designed to elicit practitioner reactions to various types of sentencing changes, and in that connection we surveyed a fairly large representative group of judges, prosecutors, parole commissioners and wardens in New York and in the federal government. The responses indicated unenthusiastic support for sentencing guidelines, dissatisfaction with mandatory and flat sentences, and support for post-release supervision. Our findings were published in September 1987, two months before the Federal Sentencing Guidelines were implemented.⁸

As mandated by the new law, the Federal Sentencing Commission developed a scheme that assigned point values to both the offense and the offender. Offenses were assigned points for the heinousness of the crime, whether violence or cruelty was involved, etc., and

offenders were given points for recidivism, substance abuse, and the like. Charts were then constructed with the score for the offense on one axis, and the score for the offender on the other, resulting in something that looked very much like a mileage chart. The judge had only to run his finger along each axis and sentence according to the number of months in the box.⁹ The point and grid scheme constituted sentencing guidelines, which, in theory, would have greatly reduced sentencing disparity. Instead, the dreaded law of unintended consequences has produced something close to a disaster. The most obvious result was a sharp rise in prison commitments. A less obvious result has been disproportionately long sentences for minor offenders and slaps on the wrist for some major criminals.

To begin with, Judge Frankel was wrong in identifying the sentencing judge as the villain of the sentencing process. The real malefactor is the prosecutor. The great majority of criminal cases are disposed of by plea bargaining. The defendant agrees to plead guilty to a lesser offense in return for a lesser charge. Plea bargaining is really sentence bargaining, because the judge has to sentence by the charge, not by the real criminal conduct. Thus, it is the prosecutor who controls the ultimate sentence, not the judge.

Further, sentencing guidelines have resulted in great injustice by forcing judges to sentence minor offenders severely, while major offenders are treated far more leniently. This is because there is a joker in the deck, i.e.,

prosecutors may recommend a substantial reduction in a sentence where the defendant "cooperates" - names names and gives valuable information on his criminal enterprise. Low-level criminals cannot "cooperate" because, being at the bottom of the organization, they haven't any information to give. The result of the lengthy incarceration of minor offenders has been an astronomical increase in the prison population, so severe in some state systems that violent offenders have been released early to make room for minor drug offenders. As a consequence of the guidelines, the length of most commitments were uniform - but only based on the formal level of the convictions (by plea or after trial). That is, all criminals convicted of the same degree of robbery, are, more or less, given similar sentences, as are all criminals convicted of the same degree of homicide, etc. However, when a prosecutor intrudes with a plea bargain, the level of crime for which the criminal is convicted is lowered, as is the resulting sentence, though the underlying conduct is still the same.

We had become aware that many federal trial court judges were profoundly unhappy with the mandatory provisions of the Sentencing Guidelines. In an effort to track this down, we interviewed a number of senior status judges.¹⁰ We chose senior judges because we felt that they were not looking for political advancement and would be more likely to give us objective, nonpolitical responses.

Federal guidelines have proved to be such a disaster that many judges of

7. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

8. Alexander B. Smith, Harriet Pollack & F. Warren Benton, *Sentencing Problems: A Pragmatic View*, 51 FEDERAL PROBATION 3 at 67-74 (Sept. 1987).

9. Sentencing Reform Act of 1984 28 U.S.C. §§ 991-998; 18 U.S.C. §§ 3551- 3673 (1984).

10. Senior status permits federal judges to remain on the bench after reaching the age of 65 if they have served fifteen years, or at age 70 if they have served ten years, or any combination of years of service and age that adds up to 80. As senior judges, they can accept as much of a workload and whatever cases they choose while continuing to receive full pay. Senior status is an alternative option to retirement, and judges may retain such status indefinitely,

although they are periodically re-certified by the chief judge of their court of appeals. A majority of those eligible for retirement elect instead to take senior status because they feel their physical stamina is adequate, the work is interesting and rewarding, and they can enjoy the prestige and deference that goes with being a federal judge. The job of senior judge is no sinecure. The judges work hard and are necessary, indeed essential, to the functioning of the court. Because of the inordinately high caseload, the federal district courts could not function without the services of these judges of senior status. When a federal judge takes senior status a vacancy results, which is filled by appointment. The senior judge slot is not charged to the table of organization, and the particular court ends up with an additional judge.

senior status, who often can choose the cases they wish to hear, have refused to handle criminal cases because they consider the guidelines so unjust. Sentencing judges who attempt to deviate from the guidelines have almost universally been reversed on appeal, and no member of Congress dare suggest reform lest they be accused of being "soft on crime." Most of the judges we interviewed were quite bitter about the operation of the sentencing guidelines. As one of them remarked: "The people who drew up these guidelines never sat in a court and had to look a defendant in the eye while imposing some of these sentences." Some of the judges have attempted to rectify the injustice of the prescribed sentence by deviating from the guidelines, only to have their decisions, accompanied by written explanations justifying their deviation, overturned. Because of their distaste for the rigidities of the sentencing guidelines, most of the senior judges have refused to take on criminal cases, especially drug cases.¹¹ In April 1993, Judges Jack Weinstein and Whitman Knapp publicly announced their refusal to take such cases and were castigated by Representative (now Senator) Charles E. Schumer for picking and choosing the laws they wished to enforce. Schumer invited the judges to "knock on Congress' door and tell us what is happening in their courtrooms,"¹² but, according to the judges, many spokesmen already had done so, and nothing was done.

A lot has been written by legal scholars and practitioners about the serious problems inherent in the sentencing guidelines. This has not moved Congress. No politician wants to be considered as soft on crime. In the last campaign for the U.S. Senate in New York State, there were lively debates between (then) Congressman Schumer and the incumbent, Alphonse D'Amato. Both men tried to outshout each other about how tough they were on crime, how they

had supported legislation to extend capital punishment and increase prison terms, and how they had fought to curtail parole. These debates were typical of what went on throughout the country. There seems to be no representative in Congress, at present, who has any interest in or stomach for modifying, in any way, the sentencing guidelines. With a federal budget surplus, Congress feels no pressure to do anything about the problem of rising prison costs. Three years ago, the Sentencing Commission proposed the modest step of reducing sentences for offenses involving crack cocaine, to eliminate the disparity in penalties for crack and powdered cocaine. The Clinton Administration opposed the amendment, and Congress voted it down.

The U.S. Supreme Court has started to pay attention to the serious problems the guidelines have caused. In 1993, Chief Justice Rehnquist said in a speech that mandatory minimums "frustrate the careful calibration of sentences" that the sentencing guidelines were intended to accomplish. Nothing was done at the time, but in a 1996 decision, the Court finally offered hope that the rigidity of the guidelines might, at least, be modified. That case, *Koon v. United States*,¹³ involved the police officers who beat Rodney King and were subsequently convicted in the federal district court of violating King's civil rights. The guidelines required 70 to 87 months imprisonment. Judge John G. Davies sentenced the defendants to 30 months each, for a variety of reasons, one of which was that King was partially responsible for the beating because he resisted arrest. On appeal, the Ninth Circuit Court of Appeals reversed Judge Davies and imposed the more severe, guideline sentences. The U.S. Supreme Court unanimously reversed the appellate court and said that a trial judge's decision was "due substantial deference" and should be set aside only for "abuse of discretion." Even Justice Stephen G. Breyer, who had

been a member of the Federal Sentencing Commission that drew up the Federal Sentencing Guidelines, concurred with all but one section of the Court's unanimous opinion.¹⁴

Recently, at a conference on sentencing at the University of Nebraska College of Law, Justice Breyer said that although he remained "cautiously optimistic" about the guidelines, the system had become too complex and too intertwined with the dozens of mandatory minimum sentences that Congress has attached to the criminal code. Justice Breyer's views are important because of his close involvement with the guidelines. He was chief counsel of the Senate Judiciary Committee, which helped steer the bill that became the Sentencing Reform Act of 1984. From 1985 to 1989, as a court of appeals judge, he was one of the original members of the Sentencing Commission. In his speech, Justice Breyer recommended that greater judicial discretion be exercised by the trial judges, even though a degree of fairness would be sacrificed. In addition, he said that the system was suffering from administrative neglect and that all seven seats on the Sentencing Commission were vacant and should be filled. Justice Breyer went on to say that the Justice Department should "make the guidelines a high institutional priority. . . . The guidelines cannot succeed without strong leadership from the department, acting not in its role as federal prosecutor, but as a national 'ministry of justice'" that can undertake and encourage research on how the system is working.¹⁵ He did not address the imbalance in the criminal justice system which is the result of the enhanced power of the prosecutor in the sentencing phase of the judicial process; nor did he comment on the rise in prison commitments.

After eleven years, it should be obvious that the system has failed and that it cannot be fixed — even by the Supreme Court — because the criminal justice system has been distorted: the enhanced

11. Alexander B. Smith et al., *Looking Back: Senior Judges of the Second Circuit Reflect on the Criminal Justice System*, in 3 CRIMINAL LAW BULLETIN 252-261 (May-June, 1994).

12. Charles E. Schumer, Letters to the Editor, *The Judges Transgress*, N.Y. TIMES, May 3, 1993, at A14.

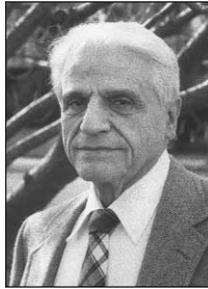
13. 518 U.S. 81 (1996).

14. 518 U.S. at 118.

15. Linda Greenhouse, *Guidelines on Sentencing Are Flawed*, N.Y. TIMES, Nov. 21, 1998, at A14.

power of the prosecutor in sentencing has diminished the traditional role of the judge. The result has been even less fairness, and a huge rise in the prison population. If it is the judge who has to look the defendant in the eye when imposing sentence, and has to answer to the community for the severity or leniency of the sentence, his role should not be diminished or demeaned. As a group, prosecutors are looking to enhance their "batting average," so that they can aspire to higher office. They should not be in a position of prosecuting a defendant and determining his sentence.

Ultimately, Congress will have to face up to the necessity of revising the Guidelines and reconsidering the advisability of reinstating parole. When it does, it should realize that it cannot excessively depend for advice on appellate judges who have not had trial experience or on legal scholars whose knowledge of the criminal justice is, at best, second hand, to give them sufficient insight in improving the system. Congress must call on seasoned trial judges, probation supervisors and administrators, in addition to prison wardens and superintendents, for insight and guidance.



Alexander B. Smith is professor emeritus of social psychology at the John Jay College of Criminal Justice, a part of the City University of New York. Trained in law and psychology, he practiced law and later became a case supervisor in the Kings County Supreme Court in Brooklyn, New York. There, over a ten-year period, he reviewed presentence probation reports and wrote sentence recommendations for at least twenty thousand cases. At John Jay College, he was a professor, chair and dean. Professor Smith has coauthored seventy articles and fourteen books, many of them with Harriet Pollack.



Harriet Pollack is professor emerita of constitutional law at the John Jay College of Criminal Justice, a part of the City University of New York. For twenty-five years, she taught civil liberties and criminal justice courses there. She has written numerous articles and five books, mostly coauthored with Alexander B. Smith. Their most recent book is Criminal Justice: An Overview (West Publishing, 1991).

AMERICAN JUDGES ASSOCIATION

Future Conferences

1999 Annual Conference

October 10-15
Cleveland, Ohio
Marriott Downtown
(\$119.00 single or double)

2000 Midyear Meeting

May 4-6
San Juan, Puerto Rico
Condado Plaza Hotel & Casino
(\$125.00 single or double)

2000 Annual Conference

September 10-15
Kansas City, Missouri
The Westin Crown Center
(\$134.00 single or double)

2001 Midyear Meeting

March 29-31
Hot Springs, Arkansas
Hilton Hot Springs Convention Center
(\$90.00 single or double)

2001 Annual Meeting

September 30-October 5
Reno, Nevada
Silver Legacy Resort
(Room rate to be determined)

Insert 1/3 page ad here

How to Write an Impeachment Order

Joseph Kimble

Obtuse, archaic, and verbose legal language . . . is surely even today a major reason for antipathy toward the legal profession.
– Peter M. Tiersma¹

If lawyers everywhere adopted this goal [of writing in plain language], the world would probably change in dramatic ways.
– Bryan A. Garner²

Let's hope that the next presidential impeachment does not happen for at least another 130 years, if at all. By then, you and I will hardly care, unless the genetic research into prolonging life has paid off for us in miraculous ways. So I don't expect to ever see my suggestions find their way into an order on articles of impeachment. I offer them to posterity — and to current judges who might find them generally useful in writing orders of any type.

You may have noticed that during the recent proceedings the administrators sometimes rooted around in the Andrew Johnson impeachment for procedural and linguistic precedent. Of course, lawyers tend to do that — follow the old forms — which is one reason why legal writing has been so bad for centuries.³ Chalk it up to habit and inertia, proclivities that are all too human. But please don't believe that just because a form has been around a long time, it must be tried and true. We greatly exaggerate the extent to which legal terms have been settled or fixed by precedent.⁴ And no amount of precedent can justify the syntax, sentence length,

verbosity, organization, and design of traditional forms and “models.”

Judicial orders are a perfect example. They don't *have to* be written the way they usually are, they don't *have to* be stilted, but they usually are because that's the traditional style. Few writers will break free.

At any rate, it will probably happen that the administrators of the next impeachment trial will look to this last one. Regardless of the outcome, they'll find the orders below. (Think of looking for food and finding a very old sandwich.) Perhaps — not likely, but perhaps — some future scholar will also find this article and my suggested rewording. Then the administrators, including the presiding Chief Justice, will at least have a choice between legalese and plain language. No doubt they will be grateful for this good fortune and will enter my name into the Congressional Record. Ah, posthumous fame.

But I'd happily settle for less. I hope some judges will read this article — and some lawyers who prepare orders for judges to sign — and our profession will

dump a little legalese as it sails into the new millennium. I hope some judges will make it known that they want orders to be written in the new, the modern, the plain style. If judges will only lead the way, lawyers will follow. And I can't think of an easier starting point than orders.

The Orders on the Articles of Impeachment

Here's the main order that ended the impeachment trial earlier this year:

The Senate, having tried William Jefferson Clinton, President of the United States, upon two articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: it is, therefore, ordered and adjudged that the said William Jefferson Clinton be, and he is hereby, acquitted of the charges in this said article [these said articles?].⁵

Notice some of the familiar characteristics of legalese — even in just this one

Footnotes

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1. PETER M. TIERSMA, *LEGAL LANGUAGE* 42 (1999).
2. BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 661 (2d ed. 1995).
3. See BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* 4 (1991) (“We have a history of wretched writing, a history that reinforces itself every time we open the lawbooks.”); John M. Lindsey, *The Legal Writing Malady: Causes and Cures*, N.Y. L.J., Dec. 12, 1990, at 2 (describing lawbooks as “the largest body of poorly written literature ever created by the human race”).
4. See DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 278-79, 375 (1963) (“[T]he formbooks . . . were decorated with decisions that

had never passed on the language or arrangement of the form. . . . [Moreover,] that vast storehouse of judicial definitions known as *Words and Phrases* . . . is an impressive demonstration of lack of precision in the language of the law. And this lack of precision is demonstrated by the very device supposed to give law language its precision — precedent.”); Mark Adler, *Tried and Tested: The Myth Behind the Cliché*, CLARITY No. 34, Jan. 1996, at 45 (showing how a typically verbose repair clause in a lease is not required by precedent); Benson Barr et al., *Legalese and the Myth of Case Precedent*, 64 MICH. B.J. 1136 (1985) (finding that less than three percent of the words in a real-estate sales contract had significant legal meaning based on precedent).

5. 145 CONG. REC. S1459 (daily ed. Feb. 12, 1999).

sentence:

- The sentence is too long. You might argue that the colon provides a break, but the colon is incorrect because the first half of the sentence won't stand as an independent clause. The colon should be a comma. (And the comma after *The Senate* should go.)
- The sentence is contorted. It begins with two long clauses (so-called absolute clauses): *The Senate having tried . . . , and two-thirds of the Senators present not having found* And each of those two clauses has a reduced internal, or embedded, clause: *[that are] exhibited against him* and *[that are] contained therein*. Then, finally, we get the independent clause: *it is, therefore, ordered* Linguists call this kind of sentence "left-branching" because readers have to fight through incidental branches of meaning before getting to the main point in the independent clause, the linguistic trunk.⁶ This structure is all too common in legal writing: *If . . . and if . . . and if . . . , then Pierce may* No good. Readers would rather see the main subject and verb early on. Sometimes the remedy is to put multiple items, such as conditions or rules, in a list at the end of the sentence — so that it branches right. Sometimes the remedy is to convert to more than one sentence.
- We get an odd negative: *two-thirds of the Senators present not having found him guilty*.
- We get inflated words: *upon* instead of *on*, and *exhibited* instead of *brought*.
- We get one of our beloved doublets: *ordered and adjudged*.
- We get two of the worst antique words: *hereby* and *said* (in place of *the*, *this*, or *those*). Look at the two uses of *said*: *the said William Jefferson Clinton* and *this said article*. The *said* *said*s are as useless as lipstick on a carp. What in the world impels us to talk like this? Why not go all the way and make it *the said Senators*?
- We get other unnecessary words: *contained therein* and *in this said article*.

There are no other charges in sight except the charges in the articles of impeachment. This is the kind of overprecision, or false precision, that is so often put forward to rationalize legal writing.

Here's an alternative. Which one do you vote for?

The Senate has tried William Jefferson Clinton, President of the United States, on two articles of impeachment brought by the House of Representatives. Fewer than two-thirds of the Senators present have found him guilty of those charges. Therefore, it is ordered that President Clinton be acquitted.

Or you could whittle down that version even further:

After a trial on two articles of impeachment against the President, William Jefferson Clinton, fewer than two-thirds of the Senators present have found him guilty. Therefore, it is ordered that he be acquitted.

Now, the proceedings were not yet formally completed. One last order had to be entered:

Ordered, that the Secretary be directed to communicate to the Secretary of State, as provided in Rule XXIII of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials, and also to the House of Representatives, the judgment of the Senate in the case of William Jefferson Clinton, and transmit a certified copy of the judgment to each.⁷

Thus were listeners and readers treated to a few more characteristics of legalese:

- The sentence is again long and contorted. The main trouble here is the big gap between the infinitive verb form (*to communicate*) and the object (*the judgment*). Good writers try to

keep the subject, verb, and object fairly close together.⁸

- We get needless complexity, or so it seems. The Secretary is directed to communicate the judgment and to transmit a certified copy of the judgment. But isn't that all one operation? Presumably the Secretary does not phone in the judgment and follow with a certified copy.
- We get unnecessary information: "as provided in Rule XXIII of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials." Would a federal judge write, "It is ordered that the motion for summary judgment is granted and the complaint is dismissed, as provided in Federal Rule of Civil Procedure 56(b)"? If the reference to the Senate's rules has to stay, it could be relegated to parentheses.
- We get unnecessary prepositional phrases: *the judgment of the Senate* instead of *the Senate's judgment*; and *in the case of William Jefferson Clinton* instead of *in this case*. Besides, we know what case it is by now.
- For good measure, we get Roman numerals: *Rule XXIII*.

Here's an alternative:

It is ordered that the Secretary send a certified copy of the Senate's judgment to the Secretary of State (as provided in Rule 23 of the Senate's rules in impeachment trials) and also to the House of Representatives.

Or if it's really necessary to communicate the judgment and also transmit a certified copy, then a list would work nicely:

It is ordered that the Secretary:

- (1) communicate the Senate's judgment to the Secretary of State (as provided in Rule 23 of the Senate's rules in impeachment trials);
- (2) communicate the judgment to the House of Representatives; and
- (3) send a certified copy of the judgment to both.

6. See BRYAN A. GARNER, SECURITIES DISCLOSURE IN PLAIN ENGLISH 53-56 (1999).

7. CONG. REC., *supra* note 5.

8. See BRYAN A. GARNER, THE WINNING BRIEF 167-70 (1999); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 43-45 (4th ed. 1998).

One More Example

Let's take another example, this one from Irwin Alterman's excellent book on writing court papers.⁹ As you can see, I'm not alone in thinking that court orders contain "an unbelievable amount of gibberish."¹⁰ Alterman says that orders "confirm Mellinkoff's statement that some legal writing is not written for anyone; it is written just to be written."¹¹ Below, without interruption, is one of Alterman's examples and his comments on the example. (Incidentally, the introductory matter, before the order itself, he calls "recitals.")

Traditional Style:

Defendant having filed a motion for summary judgment, the plaintiff having filed a brief in opposition thereto, the matter having come on for hearing, the court being fully advised in the premises, and the court having denied the motion, now therefore

It is hereby ordered

Suggested Style:

Defendant moved for summary judgment. The parties filed briefs and the court heard argument. The court decided to deny the motion for the reasons stated in the bench opinion (or written opinion) of _____, ____.

It is [therefore] ordered:

- 1.
- 2.
- 3.

Alterman's Comments:

- Even the official federal forms fall into the trap of the traditional style. See Fed. R. Civ. P. Forms 31-32.
- The suggested form is not one long assemblage of "having" clauses.
- The form omits *the court being fully advised in the premises*, which is self-

serving nonsense.

- The form does not try to summarize the court's reasoning.
- The form avoids the redundant *ordered, adjudged, and decreed*.

But Where's the Dignity?

I can hear the response. Some will argue that formal acts deserve formal language — and that plain English is not suitable for the solemn and weighty matter of a judicial order, let alone an order on articles of impeachment. The answer to that is twofold.

First, formality is a dangerous thing; it often degenerates into pomposity. A writer can get away with saying *transmit* instead of *send*, or with the occasional extra word or longish sentence. But when you are persistently formal and long, you wind up with the kind of writing in the three orders we just looked at. Certainly, no one will claim — will they? — that those orders are eloquent, elegant, or poetic.

Second, I submit to you that the suggested alternatives are not undignified or even informal. They are simple and straightforward, the way an order should be. The notion that plain language is drab and undignified is one of the great myths — along with the myth that it's usually at odds with settled precedent, the myth that it's not precise, the myth that it's child's play, and the myth that it's only about short sentences and short words. Plain language is, if anything, more precise than traditional legal writing; it takes hard work and embraces a wide range of principles; it can be forceful and literary; and it's fitting for any occasion.¹² Plain English is the American idiom.

So Who Cares?

After all this, you may be thinking, What's the big deal? Nobody (except fussy budgety writing teachers) complains about court orders. They don't cause any

trouble. They are just a short instruction that embodies a previous decision or result. They have minimal content. Their style is not important.

Well, I say that habits of mind are important. The intractability and incremental growth of forms (they never get shorter) is important. The compelling evidence that lawyers overrate traditional style — and that plain language is decidedly more clear and effective — is important.¹³ The myths about plain language are important. A dismissive attitude toward plain language is important.¹⁴ The public's attitude toward our profession is important. The constant criticism, the ridicule, the parodies of legal style — centuries of it — is important.¹⁵ And a willingness to learn and change is important.

So I say that the style of every piece of legal writing is important because, as Blake wrote, it lets us "see a World in a Grain of Sand."¹⁶ Every piece of legalese reflects on the state of our professional currency, our language.

How do you write an impeachment order? The same way you should write any legal sentence, paragraph, page, or document. In plain language.



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9. IRWIN ALTERMAN, PLAIN AND ACCURATE STYLE IN COURT PAPERS § 6.06, originally published in 2 T.M. COOLEY L. REV. 243, 291-93 (1984).

10. *Id.* at 84.

11. *Id.* (quoting DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 65 (1982)).

12. See Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51 (1994-1995).

13. See MELLINKOFF, *supra* note 4; TIERSMA, *supra* note 1; Joseph

Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1 (1996-1997).

14. See, e.g., George Hathaway, *A Plain English Lawyer's Oath* (Part 2), 78 MICH. B.J. 64, 66 (1999) (noting the Michigan Supreme Court's rejection of a plain-English lawyer's oath even as an *optional* alternative to the current oath).

15. See Robert Eagleson, *Plain English: Changing the Lawyer's Image and Goals*, CLARITY No. 42, Sept. 1998, at 34.

16. From the poem "Auguries of Innocence."

Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues

John C. Brigham, Adina W. Wasserman and Christian A. Meissner

Eyewitness testimony, when delivered in a confident manner by a witness, may be more convincing to jurors than any other type of evidence. When a witness declares, "That's the man I saw, right there!" most jurors are persuaded that the identification is accurate. After all, the witness was there: why would he or she be mistaken? This strong belief by jurors in the accuracy of eyewitnesses has been demonstrated time after time by research studies.¹ Yet there is a major problem concerning eyewitness evidence. Knowledgeable legal scholars and social scientists have noted that not only is eyewitness evidence powerful, it is also *more likely to be erroneous than any other type of evidence.*²

Many legal scholars have been aware of this weakness at least since 1932, when Edwin Borchard wrote *Convicting the Innocent*.³ Thereafter, the problematic nature of eyewitness evidence was explicitly acknowledged by the U.S. Supreme Court in a 1967 decision, *United States v. Wade*.⁴ In *Wade*, Justice Brennan noted, "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."⁵ Additionally, the justices cited a well-known legal text by Patrick Wall,⁶ who had written that many judges and lawyers agreed with the assertion that "[m]istaken identifications have been responsible for more miscarriages of justice than any other factor – more so perhaps, than all other factors combined."⁷

Our purpose here is not to suggest that, because of its high error rate, eyewitness evidence should be excluded at trial. More often than not, eyewitness testimony is accurate, and it is frequently the only evidence available. Furthermore, we do not simply wish to bemoan the weakness of eyewitness evidence.



Because such cautions have already been given to the legal community, our intention is not to repeat them here. Rather, our intent is to provide an up-to-date synopsis of the results of scientific research on factors that affect the accuracy of eyewitness identifications, and to suggest ways in which knowledge of these research findings may be helpful to judges and jurors. It is our contention that if judicial decision-makers are aware of the general unreliability of eyewitness evidence, and also are made aware of scientifically-based knowledge about the specific factors that affect eyewitness accuracy, then the utilization of this knowledge might significantly reduce the number of wrongful convictions that occur. Furthermore, research results suggest that this can happen *without* greatly increasing the chances that guilty defend-

dants will go free.

I. ESTIMATING THE PREVALENCE OF EYEWITNESS ERRORS

How do we know that eyewitness evidence is so error-prone? One source of information is the analysis of actual cases of wrongful convictions. Recently, Huff, Rattner and Sagarin,⁸ made an exhaustive search for cases in the United States since 1900 in which clear instances of erroneous convictions had occurred. These were not cases in which substantial doubt remained, but ones in which indisputable evidence of the person's innocence came to light after the conviction, by way of new forensic evidence or confessions by others. They identified 205 such cases and categorized them by the type of error that led most directly to the conviction (e.g., perjury, forensic errors, negligence by criminal justice officials, coerced confessions,

Footnotes

1. See, e.g., CUTLER & PENROD, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND LAW* (1995); LOFTUS, *EYEWITNESS TESTIMONY* (1979); LOFTUS & DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (1987); ROSS, ET AL., *ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS* (1994); SPORER, ET AL., *PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION* (1996).
2. HUFF, ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTIONS AND PUBLIC POLICY* (1996); Huff, et al., *Guilty until Proved Innocent:*

Wrongful Convictions and Public Policy, 32 *CRIME & DELINQ.* 518 (1986).

3. BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1932).
4. 388 U.S. 218 (1967)
5. *Id.* at 228.
6. WALL, *EYEWITNESS IDENTIFICATION IN CRIMINAL CASES* (1964).
7. *Id.* at 26.
8. Huff, et al., *supra* note 2.

etc.). In *more than half* of these cases (fifty-two percent), the primary causal factor leading to conviction was incorrect eyewitness identification.

The National Institute of Justice, under the auspices of the U. S. Department of Justice, recently conducted a study of wrongful convictions that had later been identified via DNA evidence.⁹ They identified twenty-eight such cases in which the convicted person was later exonerated by DNA tests that showed that the convicted individual could not have been the perpetrator. All of these cases involved sexual assault, though many involved other additional offenses. More importantly, all of these cases involved eyewitness identifications, and in the vast majority of them, eighty-six percent, erroneous eyewitness identification was the *primary* evidence that had produced the conviction. The report's authors pointed out that when DNA evidence is not admitted, "we force the courts to rely on inferior evidence, such as eyewitness testimony." In all twenty-eight cases, DNA evidence was not available at trial and the triers of fact had to rely on eyewitness testimony, which turned out to be inaccurate.

What is the magnitude of the problem? There can never be an exact answer, because the prevalence of wrongful convictions can never be known precisely. Still, some social scientists have made an educated guess. In the mid-1980s, Huff, Rattner, and Sagarin¹⁰ conducted a mail survey in Ohio of all presiding judges of common pleas courts, all county prosecutors, all county public defenders, all county sheriffs, and the police chiefs of the seven largest cities in Ohio. The overall response rate was sixty-five percent, and at least sixty percent of those in each category responded. Survey respondents were asked to estimate the percentage of convictions that were "wrongful convictions" of innocent persons. Based upon the pattern of responses, the researchers estimated that the average response was that the overall prevalence of wrongful convictions was about one-half of one percent, or one in every two hundred convictions. Unfortunately, we don't know whether their respondents were thinking only about contested trials, or were including *all* convictions, most of which result from guilty pleas. To be sure, an erroneous eyewitness identification could result in a guilty plea, even if to a lesser charge, just as it could result in a conviction after trial.¹¹ If the wrongful conviction percentage estimate is applied to all convictions, then the numbers would be startling. To illustrate, in the mid-1990s there were 2.8 million arrests per year in the U.S. just for the eight most serious crimes on the FBI index. About seventy percent of those arrested for serious crimes were convicted, producing almost two million convictions per year.¹² If one-half of one percent of those convictions were of innocent people, then nearly 10,000 wrongful convictions occurred each year. If more than half of those wrongful convictions were primarily the result of eyewitness

errors, then more than 5,000 innocent people may have been convicted of felonies each year because of erroneous eyewitness identification! If, on the other hand, the wrongful conviction figures are applied only to contested trials, the numbers would be considerably smaller (*i.e.*, 500 to 1,000 cases per year), since only ten to twenty percent of all felony prosecutions go to trial.¹³ As noted, however, some innocent defendants may accept a plea bargain if they fear that they will be convicted at trial. While we will probably never be able to derive a precise figure for the number of wrongful convictions of innocent defendants that occur, this remains an issue of concern to many, and it is clear that erroneous eyewitness identifications form the backbone of those wrongful convictions that do occur.

II. SCIENTIFIC RESEARCH ON EYEWITNESS IDENTIFICATION ACCURACY

A second source of evidence concerning erroneous eyewitness identification consists of the many scientific studies of eyewitness accuracy that have been undertaken in the past three decades. Researchers have isolated a host of factors that can influence the ultimate identification of a suspect. As several exhaustive reviews are readily available in the scientific literature,¹⁴ our goal here is to describe the most grounded findings, and to highlight the most recent advances in the field. While early research began by examining general factors that affect human perception and memory, recent studies have directly investigated face recognition and eyewitness identifications in more applied respects. In general, studies have focused on the conditions under which a misidentification is likely to occur, including the initial perception of the event or suspect (*the encoding phase*), the period in which the memory trace is stored in *memory (the retention interval)*, and the subsequent recall or identification of the suspect (*the retrieval phase*).

Encoding of the Event/Suspect

During the initial perception of the event or suspect, various factors may influence an eyewitness's ability to accurately encode the stimulus (in this case, the crime event and the criminal's appearance) in memory. Contrary to popular belief, human perception does not work like a camera or video recorder. Rather, what is perceived and stored in memory is often incomplete or distorted as a result of the individual's state of mind or the nature of the event observed. For example, in a violent crime situation, the victim or eyewitness may be paying a great deal of attention to the event, but the high level of arousal that they experience is likely to interfere with their ability to accurately encode details of the event (including the face of the perpetrator).¹⁵ Furthermore, research on the *weapon focus effect* has indicated that when a witness is threatened with a weapon

9. CONNERS, ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

10. Huff, *et al.*, *supra* note 2.

11. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1350 (1997) (noting that 1 of 28 wrongful convictions found in National Institute of Justice study was result of guilty plea).

12. U. S. Department of Justice, Bureau of Justice Statistics (1995).

13. WRIGHTSMAN, ET AL., PSYCHOLOGY AND THE LEGAL SYSTEM (4th ed. 1998).

14. Fruzzetti, *et al.*, *Memory and Eyewitness Testimony*. in ASPECTS OF MEMORY, VOL. 1: THE PRACTICAL ASPECTS 18 (1992); Ross, *et al.*, ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS (1994); Sporer, *et al.*, PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION (1996).

15. Deffenbacher, *The Influence of Arousal on Reliability of Testimony*, in EVALUATING WITNESS EVIDENCE 235 (1983).

[W]itnesses are highly susceptible to suggestions regarding their memory for the previously viewed event.

(e.g., a knife or gun), the witness's attention is drawn to focus on the weapon, making it less likely that the appearance of the person wielding the weapon will be accurately encoded.¹⁶ An individual's expectations of the event can also influence the manner in which details about the event are recalled. This effect, known as the *confirmation bias*, illustrates that eyewitnesses tend to report a scenario that is consistent with what they expected to see.¹⁷ Other studies have indicated that, in general, memory is better for faces or events seen for longer durations under optimal observational conditions such as good lighting, close distance, low stress, and no disguise.

Other studies have indicated that, in general, memory is better for faces or events seen for longer durations under optimal observational conditions such as good lighting, close distance, low stress, and no disguise.

The Retention Interval

The retention interval can be defined as the time from which the individual perceives and encodes the information to the time when he or she is asked to retrieve the information from memory (e.g., view a lineup). During this interval, a number of factors can influence a witness's later recall of the event or suspect from memory. The major finding has been that witnesses are *highly* susceptible to suggestions regarding their memory for the previously viewed event. Such "post-event suggestions" may come from overhearing the recall of other witnesses or from questioning by field officers investigating the crime, and may involve aspects of the situation or facial characteristics of the suspect.¹⁸ For example, several studies have demonstrated that if witnesses are given another eyewitness's description of the suspect, they will be biased toward selecting a member of the photo lineup who most closely matches the other witness's description, even to the extreme of selecting a lineup member who has a mustache, when the perpetrator did not have one.¹⁹ This *post-event misinformation effect* has been shown to be quite powerful across a vast number of studies, stimuli, and situations. Overall, it appears that individuals tend to "commit" to the post-event misinformation by accepting it as if it were an accurate account. Researchers are not certain whether this new information changes the original memory or instead creates a new memory that "overlies" the original memory, thus making

the original memory temporarily inaccessible.²⁰ More recent studies have indicated that the latter explanation may be more plausible, finding that certain conditions at recall appear to enhance the accurate retrieval of the original event from memory.²¹ But regardless of which process occurs, the result is the same — the witness's original memory is no longer accessible.

Retrieving the Memory of the Event/Suspect

Research has shown that many factors can affect the accuracy with which the memory of a crime or a criminal is retrieved (e.g., when describing the criminal to police or when viewing a lineup). For example, the manner in which eyewitnesses are requested to provide a description of the suspect can have important implications on their ability to subsequently identify him/her. Studies from our own lab have indicated that when people are strongly urged to provide a full and "complete" description of the suspect, they tend to guess (often inaccurately) about features they are not sure of. These inaccurate guesses interfere with their later ability to recognize the person's face in a lineup, producing a higher level of misidentifications than for those who were not urged to give a "complete" description.²²

At the time of retrieval, factors surrounding identification of the suspect from a lineup are critically important. A host of studies have investigated the phenomenon labeled *unconscious transference*, wherein different memory images may become combined or confused with one another. Also termed the *bystander effect*, this phenomenon occurs when a witness misidentifies an individual from a photo lineup as the actual suspect when, in reality, the witness previously saw the individual either as a bystander at the event or in a completely different context.²³ Additionally, research has shown that selecting an incorrect person from a showup or lineup strongly increases the likelihood that the same individual will be selected in future lineups or in-court identifications, despite the inaccuracy of the original identification.²⁴ Such errors in memory at the time of retrieval appear to parallel the misinformation effect discussed previously, in which witnesses tend to commit to a response and provide the same response in subsequent attempts at retrieval.

Several theoretical explanations for such retrieval-based phenomena have been put forth. Some researchers believe them to be the result of *source confusion*, a common memory error that occurs when a person knows that a face seems familiar, but

16. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, *LAW AND HUMAN BEH.*, 16, 413 (1992).

17. Darley & Gross, *A Hypothesis-confirming Bias in Labelling Effects*, 44 *J. PERSONALITY AND SOC. PSYCH.* 20 (1983); PETERSON, WITNESSES: MEMORY OF SOCIAL EVENTS (Unpublished doctoral dissertation, Univ. of California at Los Angeles, 1976).

18. Loftus & Ketcham, *The Malleability of Eyewitness Accounts*, in *EVALUATING WITNESS EVIDENCE* 159 (1983); Shaw, et al., *Co-witness Information Can Have Immediate Effects on Eyewitness Memory Reports*, 21 *LAW & HUMAN BEH.* 503 (1997).

19. Jenkins & Davies, *Contamination of Facial Memory through Exposure to Misleading Composite Pictures*, 70 *J. APPLIED PSYCH.* 164 (1985); Loftus & Green, *Warning: Even Memory for Faces May Be Contagious*, 4 *LAW & HUMAN BEH.* 323 (1980).

20. For a review, see Fruzzetti, et al., *Memory and Eyewitness*

Testimony, in *ASPECTS OF MEMORY*, VOL. 1: THE PRACTICAL ASPECTS 18 (1992).

21. Lindsay & Johnson, *Misleading Suggestibility and Memory for Source*, 17 *MEMORY & COGNITION* 349 (1989).

22. MEISSNER. *SELF-GENERATED MISINFORMATION: THE INFLUENCE OF RETRIEVAL PROCESSES IN VERBAL OVERSHADOWING* (Unpublished master's thesis, Florida State Univ, 1998).

23. See Loftus, *Unconscious Transference*, 2 *LAW & PSYCH. REV.* 93 (1976); Read, et al., *The Unconscious Transference Effect: Are Innocent Bystanders Ever Misidentified?*, 4 *APPLIED COGNITIVE PSYCH.* 3 (1990).

24. Brown, et al., *Memory for Faces and the Circumstances of Encounter*, 62 *J. APPLIED PSYCH.* 311 (1977); Gorenstein & Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 *J. APPLIED PSYCH.* 616 (1981).

incorrectly recalls the source of that familiarity.²⁵ Source information is the hardest type of memory information to keep straight, and virtually everyone has experienced this phenomenon in everyday life. Usually the result of such source confusion is often harmless embarrassment; however, when the confusion involves the suspect in a criminal case, this error is no longer trivial. Another possibility involves *memory blending*, a theoretical account which states that the two mental images (e.g., the criminal and a similar-looking person seen in a showup or lineup) are mentally combined into a single memory representation. As a result of this “blending,” the original memory of the criminal may no longer be accessible.²⁶

When police investigators prepare to present a photo lineup to the eyewitness, several key factors may influence the likelihood of a misidentification. Elsewhere we have recently reviewed the scientific research on the various psychological factors involved in the construction and administration of photo lineups.²⁷ Here we will provide a brief synopsis of the major findings.

When constructing a photo lineup, it is critical that the suspect is not a *distinctive* member of the photo lineup. Distinctiveness can occur because the suspect has physical characteristics that the other lineup members do not have, or because he or she more closely fits the description of the perpetrator than the other lineup members do. To prevent the possibility that the witness might select the target simply due to his or her distinctiveness from the other foils, it is important that all members of the photo lineup fit both a general description and the visual image of the suspect.

During the administration of the photo lineup, intentional or unintentional verbal and nonverbal cues given by others (i.e., law enforcement personnel, attorneys, other witnesses, or other lineup members) can significantly bias identification accuracy. In addition, many witnesses feel strong pressure to make a positive identification, whether from law enforcement officials, concerned friends or family members, or themselves (e.g., a desire to be a “good witness” and help the police). Such pressures increase the chance of an erroneous identification any time that the criminal is *not* in the lineup.

The fairness of a lineup can be tested empirically. To do so, individuals who had never viewed the suspect, or had only read a description of the suspect, are shown the lineup and asked to guess who the suspect is. If a lineup is a fair one (constructed based upon the standard above), the frequency of correct guesses by these individuals should be no more than what might be expected by chance (e.g., one in six, or seventeen percent, for a six-person lineup). By utilizing this technique under both lab-

oratory and case-specific conditions, researchers have developed several measures of *lineup size* (a measure based upon the premise that a lineup should have enough suitable members to ensure that the probability of a chance identification of an innocent suspect is low), and *lineup bias* (a measure estimating the degree to which the suspect is distinctive in appearance in the lineup) that can be used to evaluate the fairness of a given lineup. We have asserted that the bias measure is most important and proposed a reasonable standard for estimating lineup fairness that involves combining the size and bias estimates to create an *overall lineup fairness index*.²⁸

Recent research studies have found that a number of other variables, often called “system variables,” are influential during the construction and administration of photo lineups. Factors that recent research has shown to be important include: (1) having the lineup administered by someone who is unaware of which lineup member is the suspect (also known as “double-blind testing”); (2) the use of *unbiased instructions* that explicitly state that the perpetrator “may or may not be present” in the lineup, and that the witness may elect to select no one from the lineup; (3) the use of *sequential lineups*, in which the eyewitness views one photo at a time and makes an identification decision before viewing the next photo, since research indicates that there are fewer “false alarms,” i.e., erroneous identifications with this method than with the typical *simultaneous lineup*, in which the eyewitness views all photos at the same time; and (4) the importance of *videotaping* the entire identification process so that independent evaluations of the procedures can be made later, such as in expert testimony.^{28a}

What happens *after* the eyewitness makes a positive identification can also be important. Recent research has shown that if the eyewitness is told, immediately following the lineup administration, that he or she correctly identified the suspect, two results can occur, one obvious and one more subtle. First, not surprisingly, the eyewitness becomes more confident in the accuracy of the identification. Second, though, the feedback also is likely to change his or her memory for the crime itself. The witness is likely to remember that he or she saw the criminal longer, and under better viewing conditions, than previously reported.²⁹

[I]t is critical that the suspect is not a distinctive member of the photo lineup.

25. See Lindsay, *Memory Source Monitoring and Eyewitness Testimony*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 27 (1994).

26. Ross, et al., *Unconscious Transference and Lineup Identification: Toward a Memory Blending Approach*, in ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 80 (1994).

27. Brigham, Meissner, & Wasserman, *Applied Aspects of the Construction, Administration and Expert Assessment of Photo Lineups*, APPLIED COGNITIVE PSYCH. (in press).

28. *Id.*

28a. These research findings were summarized in the first “Scientific Review Paper” created by a special committee of the American Psychology-Law Society. See Kassir, *Eyewitness Identification Procedures: The Fifth Rule*, 22 LAW & HUMAN BEHAV. 649 (1998); Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUMAN BEHAV. 603 (1998).

29. Wells & Bradfield, “Good, You Identified the Suspect”: Feedback to Witnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCH. 360 (1998).

It appears that men and women may differ in the type of information they recall about an event.

Characteristics of the Eyewitness and Suspect

Several characteristics of the eyewitness can influence the accuracy of his or her memory and subsequent identification of the suspect. For example, age is important. Studies have shown that although children tend to recall less information when compared with adults, the

standard proportion of correct information recalled does not typically differ between the two populations.³⁰ Overall, elderly adults also tend to perform more poorly than do younger adults. Of most importance, children and the elderly also appear to be more susceptible to the effects of suggestive questioning or post-event misinformation.³¹ While children may demonstrate this effect due to their unwillingness to challenge an adult's authority, the elderly appear more likely to forget the source of where they previously learned the (mis)information.

Other demographic variables that have been investigated include gender and occupation of the eyewitness. It appears that men and women may differ in the type of information they recall about an event (e.g., female-oriented items such as clothing vs. male-oriented items such as a type of car).³² With regard to occupation, it is a common assumption that law enforcement officials will be better at identifying faces than will citizens. However, research has failed to support this assumption, finding that officers perform no better in identifying the faces of perpetrators than do laypersons. Studies have also shown that officers are able to provide more detailed accounts of the event, and that they are less susceptible to the effects of post-event misinformation when compared to laypersons.³³ Empirical studies attempting to train individuals to remember events and faces have demonstrated a similar pattern of results; namely, individuals' accuracy can be improved for recalling details of an

event, but not for identification of faces.³⁴

With regard to characteristics of the suspect, research has primarily focused on the perceived typicality of the face. The presence of unusual attributes that make a face distinctive from other faces (e.g., Cindy Crawford's mole, Jay Leno's chin, Sylvester Stallone's droopy eyes) also make it easier to remember. But such distinctive characteristics also appear to make it more difficult to construct a fair lineup, due to the difficulty in finding other individuals with similar distinctive features. Alternatively, faces that are more typical in appearance are significantly more difficult to later recall or to identify from a photo lineup, and often result in a higher likelihood of false identification.³⁵ A recent example of this phenomenon involves the extensive FBI search for Andrew Cunanan, the individual believed to have murdered fashion designer Gianni Versace in Miami, Florida. Cunanan had a very typical-looking face that resulted in thousands of false reported sightings across the nation.

Interactions between Characteristics of the Eyewitness and Suspect

Certain characteristics of the eyewitness and the suspect can also interact to influence identification accuracy. The most commonly cited example of such an interaction involves the *own-race bias* in face recognition.³⁶ This robust phenomenon reflects the finding that recognition memory tends to be better for faces of one's own race than for faces of other races. As Chance and Goldstein³⁷ noted, "Few psychological findings are so easy to duplicate." Furthermore, researchers have endorsed the importance of the effect in a variety of surveys,³⁸ and expert witnesses have widely cited its influence in testimony on disputed cross-race identifications.³⁹ Although the mechanisms responsible for the effect have not been isolated, current research is examining various aspects of cross-race experience and its possible influence on the manner in which individuals attempt to remember same- and other-race faces.

A second example of such an interaction between the eye-

30. Marin, et al., *The Potential of Children as Eyewitnesses*, 3 LAW & HUMAN BEH., 295 (1979); Pozzulo & Lindsay, *Identification Accuracy of Children versus Adults: A Meta-analysis*, 22 LAW & HUMAN BEH. 549 (1998).
31. Yarmey, *The Elderly Witness*, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION, 259 (1996); Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 LAW & HUMAN BEH. 317 (1986); for a review, see Schooler & Loftus, *Multiple Mechanisms Mediate Individual Differences in Eyewitness Accuracy and Suggestibility*, in MECHANISMS OF EVERYDAY COGNITION, 177 (1993).
32. For a review, see Loftus, et al., *Who Remembers What? Gender Differences in Memory*, 26 MICH. QTRLY. REV. 64 (1987).
33. Yuille, *Research and Teaching with Police: A Canadian Example*, 33 INT. REV. APPLIED PSYCH. 5 (1984).
34. Lavrakas, et al., *A Perspective on the Recognition of Other Race Faces*, 20 PERCEPTION & PSYCHOPHYSICS 475 (1976); Malpass, *Training in Face Recognition*, in PERCEIVING AND REMEMBERING FACES (Davies, et al., eds., 1981); Malpass, et al., *Verbal and Visual Training in Face Recognition*, 14 PERCEPTION & PSYCHOPHYSICS 330 (1973); Woodhead, et al., *On Training People to Recognize Faces*,

22 ERGONOMICS 333 (1979).

35. Hosie & Milne, *The Effect of Experimental Design on Memory for Typical and Distinctive Faces*, 4 MEMORY 175 (1996).
36. Bothwell, et al., *Cross-racial Identifications*, 15 PERSONALITY & SOC. PSYCH. BULL. 19 (1989); Brigham & Barkowitz, *Do "They All Look Alike?" The Effect of Race, Sex, Experience and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOC. PSYCH 306 (1978).
37. Chance & Goldstein, *The Other-race Effect and Eyewitness Identification*, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153 (1996).
38. Kassin, et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 AMER. PSYCH. 1089 (1989); Yarmey & Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in EVALUATING WITNESS EVIDENCE: RECENT PSYCHOLOGICAL RESEARCH AND NEW PERSPECTIVES (1983).
39. Brigham, *Disputed Eyewitness Identifications: Can Experts Help?*, 8 THE CHAMPION 10 (1989); Leippe, *The Case for Expert Testimony about Eyewitness Memory*, 1 PSYCH., PUBLIC POLICY, & LAW 909 (1995).

witness and the suspect involves what has been termed the *own-sex bias* in face recognition for women.⁴⁰ Several studies have demonstrated that female participants tend to outperform male participants in remembering female faces. Curiously, though, male and female participants do not consistently differ in their ability to remember male faces.⁴¹

Some Research-Based Conclusions on Eyewitness Memory

Overall, the extensive research on eyewitness memory in recent decades has demonstrated the great range of instances in which an erroneous identification of the suspect might occur. Face recognition is an inherently difficult task under the most optimal conditions. When factors at the crime scene distract the attention and cognitive capacities of the eyewitness, or when questioning or lineup procedures used by law enforcement officials are overly suggestive, the difficulty of this task increases immensely. Most researchers and memory experts would agree that the “weight” assigned to eyewitness evidence should be viewed with great caution. Given the known problems with its accuracy, the most appropriate use of a positive eyewitness identification is not as definitive evidence of guilt, but rather as an indication to law enforcement officials of a potentially valuable direction in which to search for more reliable forms of forensic evidence.

III. U. S. SUPREME COURT RULINGS ON EYEWITNESS EVIDENCE

The first U. S. Supreme Court decisions that specifically addressed eyewitness evidence issues were a trio of 1967 cases: *United States v. Wade*,⁴² *Gilbert v. California*,⁴³ and *Stovall v. Denno*.⁴⁴ The gist of these legal rulings was to determine rights to counsel during identification proceedings, standards regarding suggestibility within identification procedures, and laws regarding in-court identifications if the original identification procedure was determined to be highly suggestive. The *Wade* decision granted a suspect the right to an attorney during a live lineup. However, five years later the Supreme Court reversed the *Wade* ruling in *Kirby v. Illinois*,⁴⁵ limiting the right to counsel only after the initiation of criminal proceedings. Finally, in *United States v. Ash*,⁴⁶ the Supreme Court ruled that there is no right to counsel at any photographic identification procedures. It was believed that since a photo lineup could be reconstructed and subsequently analyzed for suggestivity, counsel was not necessary at the time of the identification.

The U. S. Supreme Court addressed the admissibility of eyewitness identification obtained under suggestive circumstances

in *Neil v. Biggers*⁴⁷ and *Manson v. Brathwaite*.⁴⁸ In evaluating the admissibility of the identification, the Court considered whether, under the totality of circumstances, the identification was *reliable*, even though the confrontation procedure may have been suggestive. The Court established in *Neil*⁴⁹ – and reaffirmed in *Manson*⁵⁰ – five factors that should be taken into account in evaluating the reliability of an identification: (1) the witness’s opportunity to view the criminal during the crime; (2) the length of time between the crime and the subsequent identification (retention interval); (3) the level of certainty demonstrated by the witness at the identification; (4) the (apparent) accuracy of the witness’s prior description of the criminal; and (5) the witness’s degree of attention during the crime.

In the *Neil* and *Manson* cases, the Court’s emphasis appeared to shift from a concern with suggestivity, as demonstrated in the *Wade*, *Gilbert*, and *Stovall* decisions, to an overriding concern with the reliability of an identification, even if it was obtained under suggestive circumstances. At the time of the *Neil* decision, little published scientific research on eyewitness memory existed. The Supreme Court could, therefore, make only “educated guesses” about the factors that might affect eyewitness accuracy. However, scientific research conducted in the ensuing years permits a systematic evaluation of the validity of the five criteria enumerated by the Court. We will briefly examine the validity of each of the five factors that the Court believed were related to eyewitness accuracy, as established by subsequent empirical research.

Research findings indicate that only two of the five *Neil* factors are clearly related to accuracy in the way that the Court assumed. First, as the Court suggested and as we noted earlier, witnesses with a better opportunity to observe the criminal (e.g., better lighting, closer view, longer viewing time) are more likely to make accurate identifications.⁵¹ (But recall also that being told that one’s identification was “correct” can significantly bias one’s memory for how good the opportunity to observe was.) Second, the length of the retention interval (i.e., the time between the crime and the identification) is generally related to accuracy, with longer retention intervals yielding poorer accuracy. But research shows that this relationship is not always simple. Other factors such as race or stress may

Face recognition is an inherently difficult task under the most optimal conditions.

40. Jalbert & Getting, *Racial and Gender Issues in Facial Recognition*, in *PSYCHOLOGY AND LAW: INTERNATIONAL PERSPECTIVES* 309 (1992); Mason, *Age and Gender as Factors in Facial Recognition and Identification*, 12 *EXP. AGING RESEARCH* 151 (1986); Slone, Brigham, & Meissner, *Social and Cognitive Factors Affecting the Own-race Bias in Whites*, *BASIC & APPLIED SOC. PSYCH.* (in press).

41. Lipton, *On the Psychology of Eyewitness Testimony*, 66 *J. APPLIED PSYCH.* 79 (1977); see also Shapiro & Penrod, *Meta-analysis of Facial Identification Studies*, 100 *PSYCH. BULL.* 139 (1986).

42. 388 U.S. 218 (1967).

43. 388 U.S. 263 (1967).

44. 388 U.S. 293 (1967).

45. 406 U.S. 682 (1972).

46. 413 U.S. 300 (1973).

47. 409 U.S. 188 (1972).

48. 432 U.S. 98 (1977).

49. 409 U.S. at 199-200.

50. 432 U.S. at 114.

51. See generally Cutler & Penrod; Loftus; Ross, et al., *supra* note 1.

[O]ne's self-reported confidence in the accuracy of ... identification ... is not a good indicator ...

interact with the length of the retention level and affect eyewitness accuracy.⁵²

The importance of the other three factors for estimating accuracy — witness certainty, description accuracy, and degree of attention — have received mixed support by researchers. With respect to witness certainty, results of thirty-five staged-event studies

showed that there is only a very weak relationship between witnesses' degree of certainty and identification accuracy.⁵³ However, several recent studies have demonstrated that when witnessing conditions are varied to make later identification easier or more difficult (e.g., by shortening or extending the time of encoding), a rather substantial relationship can be found between identification accuracy and confidence of the eyewitness.⁵⁴ To further complicate things, research has demonstrated that witnesses may become more certain of the identification as time passes. Such "confidence hardening" is likely to occur whenever people have publicly committed themselves to their identification, or when they are told that their identification was correct.⁵⁵ Overall, then, one's self-reported confidence in the accuracy of their identification, especially when it is given a considerable time after the identification was made, is not a good indicator of accuracy.

With respect to the apparent quality of a witness's initial description of the suspect, the Court opined that the accuracy of that description would be related to the probable accuracy of the identification. But contrary to the Court's assumption, research has consistently demonstrated that accuracy of description is *not* generally related to accuracy of identification. Further, the apparent "completeness" of a description, the number of attributes that are recalled, also is not related to identification accuracy.⁵⁶ However, there may be one aspect of descriptions that is related to identification accuracy. A recent series of studies in our lab showed that when one looks only at the number of *incorrect* facial features that are recalled, a significant relationship between this aspect of description accuracy and identification

accuracy actually does exist.⁵⁷ To clarify, when people generate incorrect features while giving a description, this appears to lead to later misidentifications. (Unfortunately, this finding is not particularly helpful to law enforcement investigators, since in an actual case one can never be sure which described features are inaccurate descriptions of the perpetrator.) Additional research will be valuable to further specify the precise relationship between characteristics of an eyewitness's description and the accuracy of his or her later identification of the suspect.

Considering the final *Neil* factor, degree of attention, research has found that eyewitnesses who pay a moderate degree of attention to a situation are likely to be more accurate when compared to those who did not pay attention, or to those who were distracted because they were in a stressful crime situation.⁵⁸ Even if someone is trying to be attentive, high fear or stress (if present) is likely to interfere with memory and impair the accuracy of subsequent identifications. The perceptual situation is made even more difficult if a weapon is involved, because the perceiver is likely to focus his or her attention on the weapon (*weapon focus*) rather than on the face of the person holding the weapon. As a consequence, the person does not acquire a strong representation of the suspect in memory.

In several recent cases, courts have held that it was reversible error not to have allowed expert testimony pertaining to several factors outlined in the *Neil* decision, in addition to other factors found to influence eyewitness memory. Specifically, a few cases addressed the research finding that there is not a scientifically significant correlation between confidence and accuracy.⁵⁹ The courts felt this information was particularly relevant not only because the research directly refuted one of the criteria laid out in the *Neil* decision, but also because many jurors believe the opposite to be true: they believe that a strong sense of confidence portends great accuracy. Other cases have addressed factors such as the lack of a significant correlation between description accuracy and identification accuracy, and the effects of stress or weapons on one's ability to remember details of the perpetrator.⁶⁰

While some cases have utilized the *Neil* criteria as a basis for admitting eyewitness expert testimony, the reverse was true in *Farrel v. State*.⁶¹ There, the court decided to exclude eyewitness expert testimony because the victim had both adequate lighting

52. See generally *id.*

53. Bothwell, et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCH. 691 (1987).

54. Lindsay, Read, & Sharma, *Accuracy and Confidence in Person Identification: The Relationship Is Strong When Witnessing Conditions Vary Widely*, 9 PSYCH. SCIENCE 215 (1998); Read, et al., *The Relationship Between Accuracy and Confidence in Eyewitness Identification Studies: Is the Conclusion Changing?*, in EYEWITNESS MEMORY: THEORETICAL AND APPLIED PERSPECTIVES 107 (1997).

55. Hastie, et al., *Eyewitness Testimony: The Dangers of Guessing*, 19 JURIMETRICS J. 1 (1978); Wells, et al., *The Tractability of Eyewitness Confidence and its Implications for Triers of Fact*, 66 J. APPLIED SOC. PSYCH. 688 (1981); Wells & Bradfield, *supra* note 29.

56. See Piggott & Brigham, *Relationship Between Accuracy of Prior Description and Facial Recognition*, 70 J. APPLIED PSYCH. 547

(1985); Piggott, et al., *A Field Study of the Relationship Between Description Accuracy and Identification Accuracy*, 17 J. POLICE SCIENCE & ADMIN. 84 (1990); Wells, *Verbal Descriptions of Faces from Memory: Are They Diagnostic of Identification Accuracy?*, 70 J. APPLIED PSYCH. 619 (1985).

57. Meissner, *supra* note 22.

58. Deffenbacher, *The Influence of Arousal on Reliability of Testimony*, in EVALUATING WITNESS EVIDENCE 235-251 (1983).

59. United States v. Jordan, 924 F. Supp. 443 (W.D. N.Y. 1996); United States v. Stevens, 935 F.2d 1380 (3d Cir. 1991); State v. Chapple, 660 P.2d 1208 (Ariz. 1983); People v. Campbell, 847 P.2d 228 (Colo. App. 1992); People v. McDonald, 690 P.2d 709 (Cal. 1984); Weathered v. State, 963 S.W.2d 115 (Tex. Ct. App. 1998).

60. See United States v. Norwood, 939 F. Supp. 1132 (D.N.J. 1996); People v. Jackson, 210 Cal. Rptr. 680, 164 Cal App. 3d 224 (1985); People v. Lewis, 520 N.Y.S.2d 125 (N.Y. Co. Ct. 1987).

61. 612 N.E.2d 124, (Ind. Ct. App. 1993).

and an extended period of time to view the defendant's appearance. In addition, the eyewitness provided police with a rather detailed description of the defendant immediately following the incident.

IV. CASE LAW PERTAINING TO EXPERT TESTIMONY ABOUT EYEWITNESS EVIDENCE

The Admissibility of Scientific Expert Testimony Generally

Concerned about the conviction of innocent persons on the basis of erroneous eyewitness identifications, the courts have struggled in recent years to balance the rights of defendants threatened by the specter of incorrect eyewitness identification with the need to prosecute cases based upon disputed eyewitness identification evidence. As summarized above, thousands of empirical studies have investigated factors that may affect the reliability of eyewitness identification. One could argue that the wealth of general scientific information that these studies have yielded might be very helpful to decision-makers whose cases involve eyewitness identification. However, this information has not been readily accepted by the court system. The introduction of any new type of expert evidence is typically met with skepticism and challenge, and not necessarily for imprudent reasons. But does the exclusion of expert testimony pertaining to eyewitness identification, a topic in which common beliefs are not always accurate, add to the problem of innocent persons being convicted? Below we will address several of the issues that have faced the courts, and describe how they have been handled through the years.

There is a long history pertaining to the admissibility of expert scientific testimony. The leading case on the admissibility of "novel" scientific evidence is *Frye v. United States*.⁶² The *Frye* test is premised on the "general acceptability" rule, in which the scientific evidence to be presented to the jury must be considered good science, *i.e.*, generally accepted within the relevant scientific community. The purpose of the *Frye* test was to screen out unreliable scientific evidence.

In the recent landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶³ the U.S. Supreme Court found that "general acceptance," as stated under the *Frye* test, was *not* a necessary precondition to the admissibility of scientific evidence under Rule 702 of the Federal Rules of Evidence. The Court opined that the Rule 702 assigned to the trial judge the tasks of ensuring that the expert's testimony was both reliable and relevant to the case at hand, and that the expert is proposing to testify to scientific knowledge that would assist the trier of fact to understand or determine a fact in issue. This "helpfulness" standard of the *Daubert* ruling has been seen as less stringent than the *Frye* test for determining the admissibility of expert testimony.⁶⁴

In explicitly rejecting the *Frye* test, Justice Blackmun wrote for the unanimous majority in *Daubert* that "a rigid 'general acceptance' requirement would be at odds with the 'liberal' thrust of the Federal Rules and their general approach of relax-

ing the traditional barriers to 'opinion testimony.'" The Court stressed that the "overarching subject is the scientific validity" of the research in question, rather than its general acceptance within the relevant scientific community.⁶⁵ Thus, trial judges were assigned the role of gatekeeper, whose task is to decide, in effect, whether the proposed testimony represents methodologically sound research or is "junk science." In *Kumho Tire v. Carmichael*,⁶⁶ the Supreme Court recently reaffirmed this aspect of the *Daubert* decision, ruling that trial judges should be granted broad latitude in determining which factors are applied in assessing the reliability of a given expert's testimony. The Court also extended Rule 702 to include all expert testimony, be it "scientific," "technical," or "other specialized" knowledge.

We should note that the scientific research on factors that affect eyewitness accuracy, which we have very briefly reviewed above, most certainly would meet any reasonable criterion of "good science." The research is published in highly selective, peer-reviewed scientific journals, most of which reject (usually on methodological grounds) about eighty percent of the manuscripts that are submitted to them.

The Admissibility of Expert Testimony on Eyewitness Evidence

While *Frye* and *Daubert* deal with expert testimony in general, our focus is on expert testimony pertaining specifically to the reliability of eyewitness identification. There have been both federal and state court decisions dealing with the admissibility of expert testimony on this subject. In many circumstances, due to contradictory rulings, the overall determination of whether expert testimony on this subject is admissible has not been definitively answered.

Two decades before the *Daubert* ruling, the issue of helpfulness had been raised in *United States v. Amaral*.⁶⁷ The main inquiry in this case pertaining to the admissibility of eyewitness expert testimony was whether the jury would receive "appreciable help" from the proffered expert testimony. Four guidelines were set out in *Amaral* to determine the helpfulness of expert testimony: (1) whether the expert is deemed qualified; (2) whether the testimony proffered is a proper subject for expert testimony, meaning that it will provide information that is not already part of jurors' common knowledge and will not invade the province of the jury; (3) whether the testimony given conforms to a generally accepted explanatory theory; and (4) whether the probative value of the testimony outweighs its possible prejudicial effect. Most decisions based on the *Amaral* ruling have come down against the admittance of expert testimony on the reliability of eyewitnesses.⁶⁸

Three general types of appellate decisions have predominated

[T]his information has not been readily accepted by the court system.

62. 293 F.1013 (D.C. Cir. 1923).

63. 509 U.S. 579 (1993).

64. See Cutler & Penrod, *supra* note 1.

65. 509 U.S. at 594-95.

66. 119 S. Ct. 1167 (1999).

67. 488 F.2d 1148 (9th Cir. 1973).

68. See *United States v. Brown*, 501 F.2d 146 (9th Cir. 1974); *United States v. Brown*, 540 F.2d 1048 (10th Cir. 1976).

[T]he most common appellate view ... is for the trial judge to use... discretion in admitting or excluding such expert testimony.

the case law pertaining to expert testimony on eyewitness evidence. First, some courts, especially in decisions before the 1980s, ruled that expert testimony about eyewitness memory was *per se* inadmissible. A reason sometimes given for this decision was that there was not a sufficiently large body of research on which to base scientific expert testimony (a violation of the third *Amaral* criterion). This would have been a legitimate concern up until the late 1970s, by which time a substantial amount of good eyewitness research had been published. Judicial opinions also sometimes said that expert testimony on this issue would invade the province of the jury to evaluate evidence (the second point in *Amaral*), or that information regarding factors affecting eyewitness identification was part of jurors' common knowledge, thereby constituting an improper subject matter for an expert (also part of the second point in *Amaral*).

A second approach, the most common appellate view in recent years, is for the trial judge to use his or her discretion in admitting or excluding such expert testimony. In coming to these decisions, some appellate courts have expressed pessimism that the expert testimony will be of assistance, while other decisions have noted that under some conditions such expert testimony may be relevant and helpful. For example, in *United States v. Jackson*,⁶⁹ it was decided that the court could have, as a matter within its discretion, admitted expert testimony on eyewitness reliability if such testimony had been offered. Similarly, in *McMullen v. State*,⁷⁰ the court held that when the sole issue in a criminal case is one of identity and the sole incriminating evidence is eyewitness testimony, the admission of expert testimony upon factors that affect the reliability of eyewitness identification is within the discretion of the trial judge. To us, this situation represents one in which expert testimony is the most important and would make the greatest contribution.

Finally, a third set of decisions has ruled that the exclusion of expert testimony about eyewitness evidence constitutes a reversible error by the trial court.⁷¹ Again, courts have ruled this way mostly when the sole evidence against a defendant has been the eyewitness identification. Below, we review decisions

that have established criteria for the admission or exclusion of expert testimony about factors that affect the accuracy of eyewitness memory.

Case Law and Research on Jurors' "Common Knowledge"

The belief that factors affecting the reliability of eyewitness identification are common knowledge to the lay juror has often been cited as a reason for the exclusion of expert testimony on this matter. For example, in *People v. Kelly*,⁷² the court felt that the reliability of eyewitness identification was not beyond the ken of the average juror. It is often believed, therefore, that admittance of opinion and expert testimony on information already known to the jury is a usurpation of the jury's fact-finding province. Several court rulings, both federal and state, have opined that the introduction of expert testimony on eyewitness reliability would, in fact, invade the province of the jury.⁷³ However, there have also been cases in which courts have ruled otherwise, suggesting either that the admission of the expert testimony did not invade the province of the jury,⁷⁴ or that, although the expert testimony may invade the province of the jury, the Federal Rules of Evidence do not preclude its admission into testimony.⁷⁵ The basis for this last caveat is that the jury has the wherewithal to accept or reject the expert opinion and afford it the weight it deems appropriate. As noted previously, admittance of expert testimony on eyewitness reliability has been considered especially important when the case against the defendant rests solely on eyewitness identification, and no other physical evidence exists.⁷⁶ However, when other physical evidence is available (e.g., fingerprints, DNA), the exclusion of expert testimony on eyewitness reliability has often been considered harmless error.⁷⁷

Since many legal decisions have been based on the notion that ideas and testimony proffered by an expert witness are already common knowledge to jurors, it seemed an important task for researchers to determine exactly what the lay person knows about factors affecting eyewitnesses. There have been three basic methodologies used to investigate this information: (1) surveying jury eligible citizens as to their knowledge and beliefs; (2) assessing jurors' ability to predict the outcome in an eyewitness identification experiment; and (3) using mock trials to assess the influence of trial techniques such as cross-examination.⁷⁸

Survey studies, conducted by administering questionnaires such as the Knowledge of Eyewitness Behavior Questionnaire

69. 50 F.3d 1335 (5th Cir. 1995).

70. 660 So. 2d 341 (Fla. 1998).

71. See *State v. Chapple*, 660 P.2d 1208 (Ariz., 1983); *People v. McDonald*, 690 P.2d 709 (Cal., 1984); *State v. Moon*, 726 P.2d 1263 (Wash. App. 1986); *United States v. Stevens* 935 F.2d 1380, 1400-01 (3d Cir. 1991).

72. 631 N.Y.S. 2d 926 (N.Y. App. Div. 1995). See also *United States v. Purham*, 725 F.2d 450 (8th Cir. 1984); *United States v. Larkin*, 978 F.2d 964 (7th Cir. 1992); *Johnson v. State*, 393 So. 2d 1069 (Fla. 1980).

73. See *Amaral*, 488 F.2d 1148; *United States v. Daniels*, 64 F.3d 311 (7th Cir. 1995); *State v. Kemp*, 507 A.2d 1387 (Conn. 1986); *People v. Anderson*, 630 N.Y.S. 2d 77 (N.Y. App. Div. 1995).

74. *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983); *People v. McDonald*, 690 P.2d 709 (Cal. 1984).

75. *United States v. Watson*, 587 F.2d 365, (7th Cir. 1978); *United States v. Downing*, 753 F.2d 1224 (3rd Cir. 1985).

76. See *United States v. Downing*, 753 F.2d 1224 (3rd Cir. 1985); *United States v. Jordan*, 924 F. Supp. 443 (W.D. N.Y. 1996); *State v. Moon*, 726 P.2d 1263 (Wash. App. 1986); *Skamarocius v. State*, 731 P.2d 63 (Alaska App. 1987).

77. See *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986); *State v. Buell*, 489 N.E. 2d 795 (Ohio 1986).

78. Devenport, et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCH., PUB. POLICY, & LAW 338 (1997).

(KEBQ), assess beliefs about factors that affect the accuracy and reliability of eyewitness identification.⁷⁹ The KEBQ consists of fourteen multiple-choice scenarios describing crime scenes, differing in aspects such as retention interval, training, age of the witness, prior photo array identification, and cross-racial identification. Results of such studies have demonstrated that while respondents are sensitive to the influences of cross-race and prior photo array identifications, they appear less sensitive to the effects of age (young or old) and retention intervals on eyewitness reliability. Furthermore, participants tended to believe, contrary to research findings, that training could improve identification accuracy.

A second type of study commonly used is the “post-diction” study, in which participants read written summaries of identification experiments and then guess the accuracy rates that occurred in the experiments. Results indicate that participants usually predict higher accuracy rates for the original subjects than were actually obtained, suggesting that people often believe witnesses to be much more accurate in their judgments than they truly are. For example, Brigham and Bothwell found that more than eighty percent of the registered voters they studied overestimated the accuracy rate of eyewitness research subjects.⁸⁰ Overall, participants in post-diction studies seem to be insensitive to the influence of crime seriousness, instruction bias, and cross-racial identification. Additionally, contrary to research findings, participants seem to believe that confidence is an important variable.

Finally, researchers have used the “mock trial” as a method for assessing jurors’ commonsense knowledge about factors affecting eyewitness reliability. These studies involve manipulating different factors known to influence eyewitness identification accuracy (e.g., observation conditions) and those shown to have little influence on identification accuracy (e.g., witness confidence). Participants are typically asked to assume the role of a juror as they are introduced to the summary of a trial via written transcript, or audio or videotape. Finally, the participants are asked to complete questionnaires assessing their verdicts. For example, Wells, Lindsay, and Ferguson⁸¹ found that witness confidence correlated significantly with whether a juror believed an eyewitness, even though, as noted earlier, research has demonstrated a very weak relationship between witness confidence and eyewitness accuracy.

Researchers have also studied the effects of individuals’ awareness of the conditions surrounding a crime scene at the time of the identification, such as lighting, time of day, and duration of viewing time. For example, in one study

researchers created a transcript stating that the crime occurred at either 9 a.m. on a sunny day, or at 1 a.m., sixty feet from the closest street light. Further, the length of time the witness saw the event was varied between five seconds and thirty minutes. Results demonstrated that jurors displayed a lack of sensitivity to witnessing conditions that may affect identification accuracy, as the conviction rates for groups of subjects who heard about the different conditions did not differ statistically.⁸²

Cutler, Penrod, and Stuve⁸³ investigated the commonsense knowledge of jurors by manipulating ten factors known to influence eyewitness accuracy to varying degrees. Variables studied included the presence or absence of a weapon, whether the perpetrator was wearing a disguise, and whether the crime was violent. Furthermore, the length of the retention interval, the presence or absence of instruction bias and foil bias during identification, and the level of the witness’s confidence were all manipulated. Unfortunately, results demonstrated that jurors seemed insensitive to the factors that should have called the validity of the identification into question. Additionally, participants relied heavily on the expressions of confidence from the eyewitness. A follow-up study demonstrated that college students and jury-eligible citizens were equally insensitive to these important factors.⁸⁴ Researchers have also examined whether jurors can identify factors that would render a lineup biased. Findings suggest that while jurors do have the commonsense knowledge in identifying foil and instruction bias, they have difficulty in applying this knowledge as demonstrated by their verdicts.⁸⁵ Several courts have decided that these sorts of research finding are not necessarily within the jurors’ common knowledge, and that the jury might be missing out on information that might assist them in determining the facts at issue, especially when the eyewitness identification was the sole evidence against the defendant.⁸⁶

[P]eople often believe witnesses to be much more accurate ... than they truly are.

Probative v. Prejudicial Value of the Expert Testimony

As of 1990, psychologists had testified as expert witnesses on the reliability of eyewitness evidence in more than 450 cases

79. Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 LAW & HUMAN BEH. 15 (1982).
80. Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUMAN BEH. 19 (1983).
81. Wells, et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCH. 440, (1979). See also Lindsay, et al., *Can People Detect Eyewitness Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCH. 79 (1981).
82. Lindsay, et al., *Mock-juror Evaluations of Eyewitness Testimony: A Test of Metamemory Hypotheses*, 16 J. APPLIED SOC. PSYCH. 447

(1986).
83. Cutler, et al., *Jury Decision Making in Eyewitness Identification Cases*, 12 LAW & HUMAN BEH. 41 (1988).
84. Cutler, et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUMAN BEH. 185 (1990).
85. DEVENPORT, ET AL., DOES EXPERT PSYCHOLOGICAL TESTIMONY IMPROVE JUROR SENSITIVITY TO LINEUP SUGGESTIVENESS? (unpublished manuscript 1996).
86. See *United States v. Norwood*, 939 F. Supp. 1132 (D.N.J. 1996); *People v. Jackson*, 210 Cal. Rptr. 680 (Cal. App. 1985), *People v. Lewis*, 520 N.Y.S. 2d 125 (N.Y. Co. Ct. 1987).

[T]he expert serves an educational function for the jury.

in 25 states.⁸⁷ Unlike clinical expert testimony on factors such as insanity, competency to stand trial, or child custody, eyewitness experts typically do *not* seek to interview or analyze the individual eyewitness. Rather, the expert serves an educational function for the jury, presenting

the general factors that increase or decrease the likelihood that the average eyewitness will be correct in particular situations. One could suggest that this is like being “a tutor for the jury,” that the eyewitness expert resembles in some ways a judge giving jury instructions. Some courts have ruled that such a role is unnecessary or inappropriate, stating that jurors’ everyday “commonsense knowledge” is sufficient and hence they do not need such “tutoring.” However, it can be argued that such help is both necessary and appropriate, due to the unique status of eyewitness evidence. Research has shown that issues surrounding eyewitness memory are significantly more difficult and counterintuitive than many other issues confronted by jurors.

The function of an expert witness is not to tell the jury what to believe or to imply that a particular witness is either correct or incorrect. The expert does not know whether a particular eyewitness is correct; often, even the eyewitness cannot know this with certainty. What the expert can do is provide the jury members with a *factually based frame of reference* within which to interpret the eyewitness evidence, along with all the other evidence, in reaching a verdict. Awareness of the error factors most relevant to the eyewitness identification in a particular case may cause jury members to weigh the eyewitness evidence more heavily or, conversely, to give it less emphasis than they otherwise would.

This brings us to the fourth component in the *Amaral* decision: the comparison of the probative versus prejudicial value of expert testimony. According to the *Amaral* decision, the probative value of the testimony must outweigh any prejudicial effects. Many courts have felt that the “impressive credentials” an expert brings to the courtroom are enough to create an overwhelming prejudicial effect, thus compromising any ability a juror may have to appropriately weigh the testimony given.⁸⁸ Such thinking cripples the justice system, in that it seems to assume the jurors are unable to make decisions based on weighing evidence when it comes from an expert, as opposed to when it comes from any other witness. Interestingly, it is often believed that police officers carry a

larger amount of persuasive power with juries simply because of their authoritative position, yet their testimony is not usually considered prejudicial.

Some critics have asserted that expert evidence regarding eyewitness reliability may adversely affect jury deliberations by making proper convictions that much harder to obtain. However, research with mock juries has demonstrated this to be untrue, indicating that while jurors do become more skeptical after hearing expert testimony pertaining to eyewitness reliability, it does not result in blanket skepticism. In fact, expert testimony appears to make mock jurors more skeptical in situations where it is appropriate: situations in which the conditions faced by the eyewitness are greatly associated with high error rates. Conversely, in strong cases, where other physical evidence is also introduced, mock juries are just as likely to convict after hearing the expert testimony than after not hearing it. Furthermore, the introduction of expert testimony seems to increase the care with which jurors analyze *all* the evidence, and not just the eyewitness evidence, perhaps encouraging a more deliberate examination of the facts in the case.⁸⁹

V. TRADITIONAL TRIAL SAFEGUARDS FOR DEFENDANTS

Cross-examination

In justifying the refusal to allow expert testimony on the reliability of eyewitness identification, courts often cite the ability or opportunity of defense counsel to use cross-examination as an effective tool in casting doubt upon an eyewitness’s identification of the defendant. Traditionally, skillful cross-examination of opposing witnesses has been seen as the strongest safeguard against mistaken convictions and has been referenced in case law in answer to constitutionality arguments against the ruled inadmissibility of proffered expert testimony. For example, in *United States v. Christophe*,⁹⁰ skillful cross-examination of eyewitnesses, along with jurors’ common sense and experience, were deemed sufficient to alert jurors to specific conditions that would render particular eyewitness identifications reliable. An earlier case, *Jones v. State*,⁹¹ concluded that the defendant’s rights of due process were not violated by excluding the proffered testimony because both of the eyewitnesses were subjected to considerable cross-examination concerning their means and opportunity of observing the perpetrator. This reasoning was repeated more recently in *United States v. Smith*,⁹² which concluded that the proffered expert testimony regarding the reliability of eyewitness identification was inadmissible under the helpfulness prong of *Daubert*, because the jury could

87. FULERO, EYEWITNESS EXPERT TESTIMONY: AN OVERVIEW AND ANNOTATED BIBLIOGRAPHY, 1931-1988 (unpublished manuscript 1993).

88. See *United States v. Collins*, 395 F. Supp. 629 (M.D. Pa. 1975); *United States v. Foshier*, 590 F.2d 381 (1st Cir. 1978); *United States v. Watson*, 587 F.2d 365 (7th Cir. 1978); *United States v. Thevis*, 556 F.2d 616 (5th Cir. 1982).

89. Hosch, et al., *Influence of Expert Testimony Regarding Eyewitness*

Accuracy on Jury Decisions, 4 LAW & HUMAN BEH. 287 (1980); Loftus, *Impact of Expert Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCH. 9 (1980); Maass, et al., *Testifying on Eyewitness Reliability: Expert Advice Is Not Always Persuasive*, 15 J. APPLIED SOC. PSYCH. 207 (1985).

90. 833 F.2d 1296, (9th Cir. 1987).

91. 208 S.E. 2d 850 (Ga. 1974).

92. 122 F.3d 1355 (11th Cir. 1997).

determine the reliability of the eyewitness identification with the assistance of cross-examination.⁹³

Contrary to these opinions, there are two general reasons why cross-examination, no matter how skillfully conducted, cannot be fully effective in illuminating the accuracy of eyewitness evidence. First, in order to effectively cross-examine, the attorney would need to have the opportunity to identify the factors that were likely to affect the identification, be aware of their influence, and be able to inform the judge and jury of these effects. This is highly unlikely, if not impossible, in most instances. Second, lawyerly skill in questioning an eyewitness may be insufficient to distinguish between an eyewitness who is honestly mistaken and one who is accurate. If a witness were lying, it is possible that cross-examination could make the lie apparent. But when a person is telling the truth as he or she knows it, cross-examination will not necessarily determine accuracy. Furthermore, research studies in which eyewitnesses have been cross-examined by experienced lawyers have shown that mock jurors who view the cross-examination cannot distinguish accurate from inaccurate eyewitnesses.⁹⁴

Cautionary Instructions to Jurors

A second traditional safeguard for defendants is the use of cautionary instructions to jurors. Some courts have utilized special judicial instructions about eyewitness identifications for this purpose. Probably the most widely utilized special instructions are those developed in 1972 by the U.S. Court of Appeals for the District of Columbia in *United States v. Telfaire*.⁹⁵ These instructions focus on the previously outlined factors listed in *Neil v. Biggers*.⁹⁶ Although the *Telfaire* instructions have been employed in many cases, a survey of fifty-two judges found that most of them (seventy-eight percent) did not think that they were proper instructions to give to a jury.⁹⁷ There have been several scientific studies of the effect of these instructions on juror decision-making.⁹⁸ Results indicated that the instructions do not adequately enhance jurors' sensitivity to potential problems in eyewitness identification evidence. Because the *Telfaire* instructions were developed from legal precedents, rather than being based on scientific research findings, they do not address several areas that research has shown are important, such as cross-race identifications, stress, unconscious transference, lineup bias, and weapon focus. Additionally, the instructions emphasize witness certainty

(confidence), which is not a strong predictor of accuracy, according to research findings. In general, then, existing cautionary judicial instructions about eyewitness evidence have two major shortcomings: they are seen as improper by many judges, and they are ineffective in informing jurors about the factors that have been shown to affect eyewitness accuracy.

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VI. ON ATTEMPTS TO INFUSE EMPIRICAL RESEARCH FINDINGS AT TRIAL: ROADBLOCKS TO THE ADMISSIBILITY OF EXPERT TESTIMONY

While there has been ample case law that demonstrates a certain willingness to allow scientific expert testimony into the courtroom, there are many cases in which the courts have ruled otherwise. Part of the problem exists because of the inherent differences between scientific research and the law. Whereas legal cases are to be taken each as an individual entity, research results are often the compilation and average of effects across many individuals. In essence, the analogy of comparing apples to oranges may hold true when comparing legal issues to research issues. That is not meant to imply, however, that research into the reliability of eyewitness testimony is not helpful or important.

Another problem stems from the contradictory rulings coming from different state courts pertaining to scientific research itself. For example, in *State v. Chapple*,⁹⁹ the court ruled that the "generality" of the psychologist's testimony was a factor favoring admission. In *Jordan v. State*,¹⁰⁰ the court stated that "too narrow a definition of 'fitting' the case goes beyond the requirements of helpfulness under Rule 702. An expert should not have to address every conceivable factor that might affect eyewitness identification." In contrast, however, much expert testimony on eyewitness identification has been excluded in other cases for this same reason, namely the belief that research findings are too general, or that the testimony given would not help the trier of fact by not enhancing the jury's ability to deduce whether a specific eyewitness was able to make an accu-

93. See *Dyas v. United States*, 376 A. 2d 827 (D.C. App. 1977); *United States v. Larkin*, 978 F. 2d 964 (7th Cir. 1992); *United States v. Langford*, 802 F. 2d 1176 (9th Cir. 1986); *People v. Hurley*, 157 Cal. Rptr. 364 (Cal. App. 1979); *Moore v. Tate*, 882 F. 2d 1107 (6th Cir. 1989); *Jackson v. Ylst*, 921 F. 2d 882 (9th Cir. 1990); *Garth v. State*, 536 So. 2d 173 (Ala. App. 1988).

94. Lindsay, et al., *Mock Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 LAW & HUMAN BEH. 333 (1989); Lindsay, et al., *Can People Detect Eyewitness Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCH. 790 (1981); Wells, et al., *Accuracy, Confidence and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCH. 440 (1979).

95. 469 F. 2d 552, 558-9 (D. C. Cir. 1979).

96. 409 U.S. 188 (1972).

97. Greene, *Judge's Instructions on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED PSYCH. 252 (1988).

98. Cutler, et al., *Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence*, 20 J. APPLIED SOC. PSYCH. 1197 (1990); Greene, *supra* note 97; Katzev & Wishart, *The Impact of Judicial Commentary Concerning Eyewitness Identifications on Jury Decision Making*, 76 J. CRIM. LAW & CRIMINOLOGY 733 (1985).

99. 660 P. 2d 1208 (Ariz. 1983).

100. 928 S.W. 2d 550 (Tex. Crim. App. 1996).

**[E]yewitness
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rate identification.¹⁰¹ Several additional areas in which expert testimony has been proposed will be briefly addressed below.

Cross-Racial Identification

Many experts have proffered testimony regarding the

problems associated with cross-racial or cross-cultural identifications. The basic premise of this issue, supported by research, is that it is generally easier to recognize or identify a person of one's own race, than of another race. The California Supreme Court, in *People v. McDonald*,¹⁰² recognized that this finding may be contrary to most jurors' intuitions. Two aspects of the research findings that the court listed specifically as outside the common knowledge of jurors are (1) that white witnesses who are not racially prejudiced are just as likely to be mistaken in making a cross-racial identification as those who are prejudiced, and (2) that white witnesses who have had considerable social contact with blacks may be no better at identifications than those who have not.¹⁰³

Contrary to the ruling in *McDonald*, however, much of the case law demonstrates a belief that the findings pertaining to cross-racial identifications are actually common knowledge. In *United States v. Watson*,¹⁰⁴ the court ruled that proffered testimony on cross-racial identification was inadmissible because it would not be of probative value to the jury. A similar ruling was made in *United States v. Hudson*,¹⁰⁵ where the court believed that "this issue is one which the jury is already aware." And in *People v. Dixon*,¹⁰⁶ the proffered testimony of the psychologist mentioned that "there is some truth to the folk notions that to whites, all blacks look alike." Based on this comment, the court felt that allowing the testimony to be admitted would only serve to verify an already existing belief, and that the proffer would not go beyond the common knowledge of the experience of the average juror.

Unconscious Transference and Lineup Bias

The phenomenon of *unconscious transference* has been studied extensively, as noted earlier.¹⁰⁷ One example of this phenomenon is when an eyewitness remembers seeing a person from a criminal incident, when he or she may actually be remembering the face from a previous photo lineup (perhaps a biased lineup) or some other contact. It also includes the effects of post-event misinformation on memory.

While there is a great deal of research pertaining to problems

and biases arising from poorly constructed lineups, there is little case law demonstrating a willingness to allow expert testimony regarding this matter. The importance of the issue was noted in *Simmons v. United States*,¹⁰⁸ in which the Supreme Court wrote that "a conviction based on an eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photograph identification was so impermissibly suggestive as to give rise to a very substantial likelihood to irreparable misidentification." On this basis, the court ruled in *United States v. Smith*¹⁰⁹ that an expert's testimony should have been admitted. In *Smith*, the defendant asserted that the identification from the lineup was actually a transference made from the showing of the photospread four months earlier. However, based on other physical evidence, the refusal to allow the testimony was considered harmless error.¹¹⁰

Yet, despite cases like *Simmons* and *Smith*, few courts are willing to allow testimony specific to biased photo lineups. For example, in *Johnson v. State*,¹¹¹ the defendant was the only blond member in the lineup and the only lineup member with a slightly, but noticeably, different color blue shirt. Still, the court ruled against admitting expert testimony regarding the dangers of biased lineups.

VII. CONCLUSIONS: WHAT SHOULD BE DONE?

Overall, the wealth of research on eyewitness memory has identified a host of conditions that may increase the chances that an erroneous identification of an innocent suspect may occur. As a form of forensic evidence, eyewitness evidence is severely limited in its degree of *diagnosticity*, its precision in distinguishing guilt from innocence. Indeed, its level of precision and accuracy does not nearly approximate that of other scientifically validated forms of physical evidence obtained from the crime scene (e.g., fingerprints, DNA, etc.). Nevertheless, eyewitness testimony is consistently touted by both prosecutors and appellate courts as a valid form of evidence. Furthermore, it is believed that jurors possess much "common knowledge" regarding eyewitness evidence, including an awareness of its limitations and possible inaccuracy. However, scientific research has failed to support either of these assertions. In light of such findings, it seems imperative that eyewitness testimony be viewed with caution in the courtroom, and that steps be taken to protect defendants who are being tried solely or largely on the basis of this fallible class of evidence.

Research has demonstrated that eyewitness expert testimony can be extremely beneficial to the judicial system for several important reasons. First, based on the thousands of empirical studies on memory and on the factors that influence eyewitness perception, researchers have found that there are specific con-

101. See *United States v. Foshier*, 590 F.2d 381 (1st Cir. 1978); *United States v. Downing*, 609 F.Supp. 784 (3rd Cir. 1985); *United States v. Dowling*, 855 F.2d 114 (3rd Cir. 1988); *People v. Plasencia*, 223 Cal Rptr. 786 (Cal. App. 1985); *Pankey v. Commonwealth*, 485 S.W.2d 513 (Ky. 1972).

102. 690 P.2d 709 (Cal. 1984)

103. See *Echavvaria v. State*, 839 P.2d 589 (Nev. 1992); *State v. Whaley*, 406 S.E.2d 369 (S.C. 1991).

104. 587 F.2d 365 (7th Cir. 1978). See also *People v. Plasencia*, 223

Cal. Rptr. 680 (Cal. App. 1985).

105. 884 F.2d 1016 (7th Cir. 1989).

106. 410 N.E.2d 252 (Ill. App. 1980). See also *State v. Lawhorn*, 762 S.W.2d 820 (Mo. 1988).

107. See notes 22, 23 and 24 *supra*.

108. 390 U.S. 377 (1968).

109. 736 F.2d 1103 (6th Cir. 1984).

110. See *State v. Calia*, 514 P.2d 1354 (Or. App. 1973).

111. 438 So.2d 774, (Fla. 1983).

ditions, situations, and personal characteristics that may cause an identification to be inaccurate. Some of these factors include the witnessing conditions, the presence of a weapon, stress, suggestive post-event information, unconscious transference, lineup bias, witness confidence, and cross-racial identifications. While many courts have felt that jurors have sufficient common knowledge to evaluate the influence of these factors without the advent of expert testimony, research has clearly indicated that jurors are often insensitive to the effects of many of these factors and overly sensitive to other factors (e.g., witness confidence). Without proper instruction on how each of these factors may effect a witness's perceptual ability, jurors are left to rely on their often incorrect, intuitive beliefs about how memory works. To be sure, our intuitive beliefs usually serve us well in dealing with the world, providing us with a largely accurate view of how things work. But the area of eyewitness memory has been shown to be different. Here, these usually reliable beliefs are *not* accurate enough to ensure fair treatment under the law.

Second, some courts have worried that the opinion testimony from an impressive expert may carry more weight with the jury than it should, having a prejudicial impact. But, contrary to this supposition, studies have concluded that defendants in cases containing strong evidence against them are not convicted less when the jurors heard expert testimony, when compared with cases in which expert testimony was excluded. In fact, the jurors spent more time reviewing all of the evidence when faced with expert evidence on eyewitness reliability, demonstrating a willingness on the part of jurors to carefully weigh all testimony equally.¹¹² This type of deliberate inspection of all relevant material only strengthens the jury system. Furthermore, fewer appeals pertaining to eyewitness identification would have to be heard.

Even with the advent of sound, reliable research methodology, and an overall general acceptance within the scientific community at large, the wholehearted acceptance of empirical research into the legal field has been slow in coming. The juxtaposition of psychological research and the law is a difficult one, as the two disciplines have vastly different foundations — one having an individualistic focus, and the other being an empirical, aggregated focus. However, this does not preclude the possibility that the two can build a strong working relationship in which each may benefit from the knowledge and wisdom of the other.

As one researcher pointed out, "What one generation of lawyers prefer to understand as 'common sense' often depends upon the theory and findings of the previous generation of [scientific] investigators."¹¹³ The challenge faced by attorneys, legal scholars, and researchers involved with disputed eyewitness identifications is to persuade the courts of the relevance of the research findings and the possible benefits of infusing such research (via expert testimony or some other means) into the judicial system. Courts in recent years have become increasingly cognizant of the benefits (and sometimes the necessity) of utilizing scientific findings, often introduced via expert testi-

mony, for issues to which they are relevant. It seems to us that the issue of eyewitness evidence is one for which such testimony is particularly important and relevant. Indeed, such testimony would only seem to strengthen the criminal justice system by reducing the frequency with which innocent persons, victims of the frailties of human perception and memory, have the misfortune of being falsely accused and erroneously convicted of a crime.



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112. See text *supra* at note 89 and note 89.

113. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 227 (1979).

Jury Instructions in the New Millennium

Peter M. Tiersma

The experience of being a juror can sometimes be rather frustrating. Admittedly, it's not as bad as it used to be. In merry old England, jurors were commonly confined "without meat, drink, fire or candle" while they deliberated. If they did not promptly agree, they were supposed to be carried around the judicial circuit in a cart (following the justices, apparently) until they reached a verdict.¹

Some of today's jurors must still deal with physical hardships, such as finding a parking space near the courthouse, child care, or loss of wages. Yet it seems to me that even more importantly, jurors are likely to emerge frustrated by the process. Some of these frustrations are endemic to the system, and may have very good justifications. Jurors will never be dealt a full deck of cards, for instance; the legal system will probably always "hide" some evidence from them. And despite the obvious relevance of hearing a criminal defendant's story in his own words, many juries will never hear a peep out of him. What can also be difficult for the jurors is that they are quite distinctly told not to apply their own notions of right and wrong; rather, they are solemnly sworn to follow the law as the judge instructs them.

The requirement that the jury must follow the law, and not its own conception of justice, is fundamental to our legal system. Most of the work of the appellate courts of our country consists of refining and elaborating on rules of law. Doing so enhances the consistency and predictability — and thus, the fairness — of our system. Judges seem to agree that jurors do their utmost to apply the law that they are given to the facts and reach the correct decision. Yet to apply the law correctly, jurors must understand what the judge reads to them. Unfortunately, all too often the law is presented to jurors in language that is full of legalese, overly formal and abstract, and syntactically convoluted.

In many ways, the problem of jury instructions is part of the much larger issue of legal language. People have complained for centuries about difficulties in understanding the speech and writing of lawyers and judges. The situation was probably worst when the legal system in England made widespread use of French and Latin, an indirect legacy of the Norman Conquest in 1066. The Statute of Pleading was enacted in 1362, condemning French as "much unknown in the said Realm" and noting that parties in a lawsuit "have no Knowledge nor Understanding of

that which is said for them or against them by their Serjeants and other Pleaders." In order that "every Man of the said Realm may the better govern himself without offending of the Law," the statute required that all pleas be "pleaded, shewed, defended, answered, debated, and judged in the English Tongue."² Lawyers seem to have largely ignored it. Later, when the Puritans took control of Parliament, they enacted their own law in 1650 requiring lawyers to use English. This statute was repealed with the restoration of the monarchy in 1660, and for a few decades some lawyers still used Law French on occasion. It was not until 1731 that its use was permanently outlawed.³

After centuries of using foreign languages, the law now was — and still is — entirely in English, the language of the people. Unfortunately, the English that lawyers use remains quite obscure to ordinary citizens. There would probably be nothing wrong with lawyers talking to each other in legalese; after all, most occupations and professions have their own jargon. Communications with the public, on the other hand, should be in language that the public can understand. Unfortunately, one of the great ironies about the legal profession is that some of the most convoluted legalese is used not by lawyers to other lawyers or judges (who would almost certainly not tolerate it), but rather in consumer documents, when the legal profession is trying to communicate with — or on behalf of — members of the public. Wills, consumer credit agreements, leases, and deeds are all of great importance to ordinary citizens, but traditionally tend to be the most obscure of all legal writing.

Jury instructions could be considered a variety of consumer legal document. Early in this century, lawyers and judges had to draft instructions for each case (although they would generally have had some forms available as models). Writing individualized instructions must have been a time-consuming process. California was a pioneer in crafting standard (or pattern) instructions. Before long, many states had followed suit.⁴

Pattern instructions have some real advantages. Perhaps most importantly, they save judges and lawyers time by eliminating the need to write instructions separately for each case. In addition, they should theoretically reduce the number of appeals for faulty instructions. Whether they have actually done so is uncertain, however.⁵

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Footnotes

1. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 89 (3d

ed. 1990).

2. See generally PETER M. TIERSMA, LEGAL LANGUAGE 28 (1999). For the text of the statute, see 1 Statutes of the Realm, 36 Edward III, stat. i, ch. 15.

3. Tiersma, *supra* note 2, at 35-6.

4. ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 6 (1979).

5. William W. Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 737-40 (1981).

Pattern instructions also have drawbacks. Because they are written by lawyers and judges, they tend to be in the same legalese that lawyers use to draft wills, leases, and other such documents. What aggravates the difficulties is that many of the drafting committees believe that the best way to prevent reversal is to copy — verbatim, if at all possible — the exact language of the statute or judicial opinion in which the legal rule originally appeared. The name of California’s civil instructions, *Book of Approved Jury Instructions*, clearly shows this philosophy. Yet every good speaker or writer realizes that probably the most important factor in effective communication is knowing your audience. If judges wish to be understood, they must use language that their audience is likely to understand. All too often in the past, judges and pattern instruction committees have been writing for the appellate courts. Those judges understand legalese quite well, of course. The problem is that the appellate courts are not the ones who have to apply the instructions! If we want jurors to follow the law, we have to explain it to them in language that they can comprehend.

The fact that instructions are written language is also somewhat problematic. Most of us write in a style that is more formal, compact, and syntactically complex than how we speak. Normally this is not a great problem, because the reader has time to mull it over in her mind, or to read something a second time, or to pause and consult a dictionary. Hearers of oral language, on the contrary, must comprehend it immediately, because more words are on their way even as the mind is trying to cope with what it just heard. Good teachers are intuitively aware of this problem and try to monitor whether a class comprehends a point. If students look puzzled, or ask questions that reveal a lack of understanding, the teacher will try to explain it again in other language or to give some examples. Written language, even if read aloud, makes it hard to monitor comprehension in this way. Judges typically read the instructions straight through from beginning to end, and would probably be a bit startled if a juror raised her hand midstream to ask a question.

So far my comments have been quite general. Let me therefore discuss some examples from California, my home state. Mostly I will draw my illustrations from *California Jury Instructions, Criminal*, also known as CALJIC.⁶ The CALJIC instructions are highly regarded for their generally accurate statements of the law. In terms of comprehensibility, they have been less successful, as we will see below. I hasten to add that I did not pick out the CALJIC instructions for special criticism. They happen to be readily accessible and familiar to me as a member of the California bar. More importantly, they illustrate the problems that exist in the jury instructions of almost all the states.⁷

I should add that it is much easier to criticize existing instructions than to write new ones which are not only in ordinary English, but legally accurate as well. I will sometimes offer suggestions for actual instructions below. In practice, of course, any new instruction should be reviewed by judges and lawyers to ensure that it correctly states the law. And it should be reviewed

by at least one person familiar with plain language principles. If possible, it should be tested on a cross-section of ordinary citizens. Reconciling the goals of clarity and accuracy will not always be easy, but it is the essence of the process.

Innocent Misrecollection

The following is one of the instructions on evaluating evidence given in California criminal cases:

Discrepancies in a witness’s testimony or between a witness’s testimony and other witnesses, if there were any, do not necessarily mean that [any] [a] witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.⁸

Note the extremely formal language and the relatively uncommon words, including *discrepancies*, *recollection*, and *misrecollection*. Moreover, *discredit* is not only fairly formal, but appears in an unusual sense: as “not believe,” rather than in its more common meaning of “lose face.” Overly formal or literary language is a pervasive problem with current jury instructions.

Another common problem is instructions that are too abstract and impersonal. This may be a result of standardization, which necessarily leads to a higher level of abstraction so that a single pattern can fit multiple fact situations. A factor that makes instructions like the above so abstract is overuse of **passive** constructions (*be discredited*; *be considered*), which allows for the actor — the person who does the discrediting or considering — to be omitted. As the United States Supreme Court once noted, “When Congress writes a statute in the passive voice, it often fails to indicate who must take a required action. This silence can make the meaning of a statute somewhat difficult to ascertain.”⁹ In this case, a phrase like *discrepancies. . . do not necessarily mean a witness should be discredited* does not indicate who should do the “discrediting.” Why not just tell the jurors: *If there were inconsistencies in a witness’s testimony, or between the witness’s testimony and that of other witnesses, you can still decide to believe the witness?*

The original instruction also has several **nominalizations**, including *failure*, *recollection*, and *misrecollection*. Nominalizations are nouns that derive from verbs (in this case, *fail*, *recollect*, and *misrecollect*). Like passives, they often create abstract constructions that minimize the role of the actor, or obscure it entirely. There is nothing wrong with appropriate use of nominalizations, but jury instructions use them far too often, with a resultant loss of precision and comprehension. Instead of informing jurors that *failure of recollection is a common experience*, the judge could just say that *people often forget things*, with absolutely no loss in meaning.

As for *innocent misrecollection is not uncommon*, this five-word sentence has no less than **three** negative elements (*mis-*, *not*, and

6. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (6th ed. 1996).

7. In the interest of full disclosure, I should mention that I am a member of a Judicial Council task force dedicated to drafting

more understandable criminal instructions in California.

8. CALJIC 2.21.1.

9. United States v. Wilson, 503 U.S. 329, 334–35 (1992).

The problem is that many people poorly understand formal language ...

un-). Research indicates that the more negatives there are in a sentence, the harder it is to process.¹⁰ Why not just say: *people sometimes honestly believe they remember something, but turn out to be wrong?*

At this point I have to admit that on one level, I like those two sentences about recollection. They display a nice parallelism and are almost poetic:

Failure of recollection is common.

Innocent misrecollection is not uncommon.

These sentences make their points with a certain elegance and compact phrasing that the plain language equivalents cannot match — at least, in this case.

Still, the fact remains that this highly abstract and formal style is a poor means of communicating with an ordinary jury. Especially during closing argument, good lawyers try to connect with the jurors and address them in terms they will understand. Lawyers would not be very successful with a jury if they spoke the formal, stilted language found in the typical instructions.

Why is it that in contrast to earlier phases of the trial, the profession refuses to speak clearly to jurors during the instruction ritual? Admittedly, the legal concepts contained in the instructions may be rather complicated. But even complex topics can be explained in simpler terms. The law is no more complicated than many topics that expert witnesses manage to explain in ordinary language.

One explanation for this dramatic shift to extremely formal language must be that judges are now speaking. Presumably, most judges **want** to maintain a certain distance from the jurors, as opposed to the lawyers, who do their best to bond with them. The distancing effect of elevated language is reinforced by the judge's location, physically above the fray. The formal and archaic language, along with the elevation of the judge, endow the instructions with a sense of authority. And the judge's physical isolation from the rest of the courtroom reinforces the notion that the law, as embodied in the judge, is "detached" and therefore objective. Furthermore, judges are no different from anyone else; they may prefer to speak formally because elevated language is commonly associated with intelligence and competence. Practically speaking, therefore, a certain level of formality may be inevitable. In fact, sometimes ritualistic and formal language can be helpful. It clearly **is** important for participants and onlookers to believe that the judge is competent, as well as somewhat distant and detached. To have the bailiff open proceedings by shouting *be quiet — the judge is coming* would create entirely the wrong atmosphere for an event as serious as a court session.

The problem is that many people poorly understand formal language — which is more closely tied to writing than to

speech. Judges should not forget their audience, and the fact that ultimately, what counts most is clear, concise, and comprehensible communication. Ultimately, we must find a tone for jury instructions that conveys an adequate sense of dignity and seriousness without the highly formal language that now characterizes them.

Defining Reasonable Doubt

Other instructions are meant to educate the jurors on the substance of the law that they must apply. In a criminal case, the most critical requirement may be that the prosecution must prove the defendant guilty *beyond a reasonable doubt*. Here is how California judges define this essential concept for the jurors:

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.¹¹

As with many instructions, this is hardly a model of clear communication. It is quite abstract, never addressing the jurors as *you*, but rather speaking of *the jurors* and *they*. It is, moreover, largely phrased in the negative. Furthermore, the pivotal term *abiding conviction* is likely to be somewhat obscure to the average juror. *Abide* is a literary word that is seldom heard in ordinary speech. And *conviction*, in the sense of "belief," is also fairly formal. When *conviction* is heard in the courtroom, it almost always means that someone is going to prison, not that someone firmly believes something.

In part, the obscurity of this and the other instructions results from the fact that they are composed as written legal text. As we saw previously, written language tends to be lexically more dense and syntactically more complex than speech. Furthermore, when something is written down, it tends to resist change. Especially if it has been approved by a judge or legislature, it becomes authoritative text that the legal profession is even more reluctant to modernize. Because they are so distant from oral language, therefore, jury instructions are hard to follow. Furthermore, as Bernard Jackson has observed, there is an inherent difficulty in communicating by speech what was conceived in a written form of discourse.¹² It is bad enough to ask ordinary people to decipher dense written legal language. It is even worse to read it to them and then refuse — as some courts do — to provide them with the written copy.

California's reasonable doubt instruction illustrates these problems. It tracks the language of Penal Code section 1096. The statutory language, in turn, was adopted virtually verbatim from an 1850 Massachusetts case, *Commonwealth v. Webster*.¹³ As Justice Stanley Mosk of the California Supreme Court has observed, the language of *Webster* was "already obsolete" when California adopted it in 1927, and is "hopelessly superannu-

10. See DANIEL B. FELKER ET AL., GUIDELINES FOR DOCUMENT DESIGNERS 69-70 (1981).

11. CALJIC 2.90 (1996).

12. Bernard S. Jackson, *Some Semiotic Features of a Judicial Summing Up in an English Criminal Trial: R. v. Biezaneck*, 7 INT'L J. SEMIOTICS L. 201, 202 (1994).

13. 59 Mass. 295, 320 (1850).

ated” today.¹⁴ Yet it continues to be approved by California courts, and the United States Supreme Court somewhat grudgingly upheld it in *Victor v. Nebraska*.¹⁵

Nonetheless, jurors can be confused about the meaning of this instruction, as evidenced by *People v. Ruge*, a recent case from California.¹⁶ The jury in *Ruge* had been instructed in the language of Penal Code section 1096, using the traditional phraseology. Not surprisingly, reciting this language to the jurors did not especially enlighten them. Before long, they trooped back into the courtroom to inquire: “[W]e would like to know what constitutes reasonable doubt. . . . We read the instructions over and over. We want you to tell us.”¹⁷

The judge cautioned that “greater minds than mine have tried to better the instruction, and about all they get is reversed or they mess it up or somebody up in the Court of Appeal or the Supreme Court says, ‘No, that’s not quite it. You blew it.’” She then bravely tried to translate the concept into ordinary English that the jurors might actually be able to fathom. But her intuitions were right: she blew it, at least according to the court of appeal: “It was error for the court to attempt to embellish the concept of reasonable doubt.”¹⁸

With appellate decisions like this one, it is no surprise that many judges are extremely reluctant to explain any aspect of the instructions. When asked about the meaning of an instruction by the jury, many judges just reread it verbatim.¹⁹ Others refuse to answer.²⁰ In fact, in a survey of fifteen judges in California with respect to jury requests for assistance, one judge replied that he tried to respond to questions in plain English, a few provided a written copy or tape recording of the original instructions, and some would not explain or reiterate them at all. The majority simply reread the original instructions.²¹ As one judge said when he referred a confused jury back to the original instructions, he wished he could be of more help. The foreper-

son responded, “We also wish you could be more help.”²²

Rereading instructions would not be so bad if they were more understandable in the first place. Consider this Ninth Circuit definition, which provides in part: “Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.”²³ Applying this standard will never be easy in practice, but at least the phrase *firmly convinced* has been found to be “accessible and understandable” to jurors.²⁴

With appellate decisions like this one, it is no surprise that many judges are ... reluctant to explain ... the instructions.

The Elements of Mayhem

The issue of overly abstract style arises again in the definitions of the various crimes. A relatively typical list of the elements of a crime is that for mayhem, found in CALJIC 9.30. The instruction begins by noting that the defendant is accused of having committed mayhem. Next comes the statutory definition of the crime. It continues by stating:

In order to prove this crime, each of the following elements must be proved:

1. One person unlawfully and by means of physical force deprived a human being of a member of [his] [her] body . . . and
2. The person who committed the act causing the bodily harm, did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person. . . .²⁵

As is so often the case, the instruction does not directly tell jurors what to do. Are the jurors supposed to prove this crime?

14. *People v. Brigham*, 25 Cal. 3d 283, 295 (1979) (Mosk, J., concurring).

15. 511 U.S. 1 (1994).

16. 35 Cal. Rptr. 2d 830 (Ct. App. 1994).

17. *Id.* at 834.

18. *Id.* at 836.

19. Geoffrey P. Kramer and Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 J. L. REFORM 401, 403 n.14 (1990).

20. Laurence J. Severance and Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 162-73 (1982).

21. Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 223-24 (Autumn 1989).

22. *People v. Klee Green Matthews*, 30 Cal. Rptr. 2d 330, 336 (Ct. App. 1994).

23. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 3.03 (1995).

24. Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 L. & HUM. BEHAVIOR 655, 667 (1996).

25. CALJIC 9.30. The full instruction follows:
MAYHEM—DEFINED—NECESSARY ELEMENTS (PEN.

CODE, § 203)

[Defendant is accused [in Count[s] _____] of having committed the crime of mayhem, a violation of section 203 of the Penal Code.]

Every person who unlawfully and maliciously deprives a human being of a member of [his] [her] body, or disables, permanently disfigures, or renders it useless, or who cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of the crime of mayhem in violation of Penal Code section 203.

In order to prove this crime, each of the following elements must be proved:

1. One person unlawfully and by means of physical force [deprived a human being of a member of [his] [her] body or, disabled, permanently disfigured, or rendered it useless;] [or] [_____ of a human being;] and

2. The person who committed the act causing the bodily harm, did so maliciously, that is, with an unlawful intent to vex, annoy, or injure another person.

[It is not a defense that a disfigurement has been or may be medically alleviated.]

The instruction is also troublesome because it contributes to the problem of information overload.

You would almost think so. Actually, of course, the jurors are supposed to decide whether the defendant is guilty of mayhem, and the prosecution must prove each element beyond a reasonable doubt. No doubt I am beginning to sound like the proverbial broken record, but I can only repeat my earlier advice: if this is what you

mean, say so!

The two elements of mayhem which follow this introductory phrase are equally abstract, once again being very unclear about who must have done what to whom. Essentially, the instruction states that *one person* must have deprived a *human being* of a “member” of his or her body. In addition, *the person who committed the act causing the bodily harm* must have done so with an intent to vex or annoy or injure *another person*. So, how many people must have been involved in this gruesome scenario? We can probably assume that *one person* is the defendant. *The person who committed the act* must also refer to the defendant. A *human being* must be the victim. So far, so good. On the other hand, *another person* almost seems to be a third party, making you wonder whether the doctrine of transferred intent is supposed to apply. It seems unlikely. Yet once again, it is more needless mental exercise for the poor jurors.

Much clearer is the following Ninth Circuit instruction, which begins by identifying the charge as assault and then continues:

In order for the defendant to be found guilty of [the charge], the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally [struck] [wounded] _____; and

Second, as a result, _____ suffered serious bodily injury.²⁶

By mentioning the need to find that the *defendant* did so-and-so, and that he or she did it to the complainant or victim (whose name is inserted in the blank), this instruction tells the jury exactly what it has to decide. My only quibble is that the first phrase contains a passive verb. An improvement would be: *For you to find the defendant guilty of [the charge], the government must prove...*

Malice Aforethought

One of the other major sources of juror confusion and frustration is the use of technical legal terminology. There is no doubt that technical vocabulary is extremely useful to the profession, allowing one lawyer to communicate a complex concept to a colleague via a single word or short phrase. The drawback is that people outside the profession, including jurors, do

not understand most of these terms. (How many judges or lawyers understand linguistic terminology like *allophonic variation*, *ergativity*, or *commissive illocutionary force*?)

A common example of a legal term in jury instructions is *malice aforethought*, one of the elements of murder. The odd word order is a leftover from Law French, in which adjectives usually followed the nouns they modified. Other remnants of this process include *attorney general*, *condition precedent*, *fee simple*, *letters patent*, and *notary public*. Not only is the word order strange, but *malice* is used in an unusual sense. The American Heritage Dictionary defines it as: “A desire to harm others or to see others suffer; extreme ill will or spite.”²⁷ In contrast, CALJIC 8.11 informs jurors that “malice aforethought does not necessarily require any ill will or hatred of the person killed.” No wonder that a Santa Barbara jury recently deadlocked in a homicide case, unsure about the meaning of this term and how to apply it to the facts before them.²⁸

One solution to the problem of technical terms is to leave them in the instruction, but with a definition. CALJIC 8.11 does indeed define *malice aforethought*, but not, in my mind, satisfactorily. For example, the defining instruction begins by stating that malice can be express or implied. “Malice is express when there is manifested an intention unlawfully to kill a human being.” Note the passive verb: *is manifested*. Who exactly must have manifested an intention? Like so many instructions dealing with elements of crimes, this one is an abstract principle of law that forces jurors to make inferences. Read literally, all that the jurors have to find is that someone in the world intended to unlawfully kill some human being. This is absurd, of course, and virtually all jurors are smart enough to figure it out. But jurors have enough on their minds. They have to absorb a lot of law in a short time. Why not make it as straightforward as possible? If the **defendant** must have had an intent to kill the victim, we should just say so. If it suffices for an accomplice to have had this intention, the judge can insert either “defendant” and “accomplice” into the appropriate place. As it is, this level of abstraction is unhelpful and — in the worst case — dangerous.

The instruction is also troublesome because it contributes to the problem of information overload. Jurors have to juggle many new concepts in order to reach a verdict. The last thing the instructions should do is throw unnecessary vocabulary and distinctions at them. I am no expert on criminal law, so I should proceed cautiously. But I wonder whether it’s really necessary to use the term *malice aforethought* and divide it into two categories, *express* and *implied*, as CALJIC 8.11 does. I do not doubt the usefulness of the terminology for the criminal bar, but perhaps we can avoid much of the problem by eliminating these words from the instructions. Perhaps all that jurors really need to know is the nature of the intent that the defendant must have had, not the name that the law invented centuries ago to label that intent.

26. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 8.02F (1995).

27. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE

(3d ed. 1992).

28. Chuck Schultz, *Jury Deadlocks in Case of Slain Husband*, SANTA BARBARA NEWS-PRESS, Feb. 12, 1999.

Aggravation about Mitigation

Nowhere does comprehension have greater significance than when people's lives are literally at stake, as is true in capital cases. The typical death penalty statute requires jurors to consider or balance aggravating and mitigating circumstances. While this scheme does indeed give the jury some guidance on how to decide the defendant's fate, it has a serious flaw: its reliance on the technical terms *aggravation* and *mitigation*. Most judges assume that jurors understand these words in their legal sense. The Supreme Court of Georgia has asserted — with no supporting evidence — that mitigation “is a word of common meaning and usage.”²⁹ California's high court apparently agrees, having held at one time that these words do not have to be defined for the jury.³⁰

The reality is that even in its ordinary sense, *mitigate* is a formal word that many ordinary jurors will not understand very well.³¹ As former Justice Thurgood Marshall observed, in its technical legal usage, *mitigating* is “a term of art, with a constitutional meaning that is unlikely to be apparent to a lay jury.”³² This is confirmed by a study of California's capital jury instructions by Lorelei Sontag, who discovered that even relatively well-educated college students poorly understood the word.³³

In contrast, *aggravate* is a fairly common word. But familiarity can be deceptive. Normally, *aggravating* means something like “annoying” or “irritating” (*that mosquito really aggravates me*). This ordinary meaning of *aggravate* is not a recent innovation. Well over a hundred years ago, John Stuart Mill wrote:

The use of “aggravating” for “provoking,” in my boyhood a vulgarism of the nursery, has crept into almost all newspapers and into many books; and when writers on criminal law speak of aggravating and extenuating circumstances, their meaning, it is probable, is already misunderstood.³⁴

In fact, linguist Otto Jespersen noted that this meaning can be traced back at least as far as 1611.³⁵ *Aggravate* therefore commonly means “annoy” or “irritate.” But surely jurors should not vote to put someone to death merely because the defendant, or his crime, “aggravates” them!

Strong evidence that jurors have trouble with the meaning of these terms comes from several reported cases where capital jurors — after they have been “instructed” — come back to ask the judge to define or clarify what these terms mean, or request

a dictionary to look them up. In one California case, the jury sent a note to the judge requesting “a definition of aggravation and mitigation.” The judge replied that the words should be given their “commonly accepted and ordinary meaning.” The jury responded: “Being unfamiliar with the term of mitigation we would like the dictionary meaning of both mitigation and aggravation, please.”³⁶ In the published American opinions alone, there are at least ten capital cases during the past decade or two in which the jury is reported to have requested a definition or clarification of *mitigating* or *aggravating*.³⁷ No doubt these represent merely the tip of the iceberg.

The study by Lorelei Sontag of capital juries in California came to similar conclusions. Of the thirty post-verdict jurors whom she interviewed, only thirteen showed adequate understanding of the terms *aggravating* and *mitigating*.³⁸ No less than **half** of the juries had asked their trial judges for definitions of these critical terms.³⁹ One juror reported:

The first thing we asked for after the instructions was, could the judge define mitigating and aggravating circumstances. ... I said, “I don't know that I exactly understand what it means.” And then everybody else said, “No, neither do I,” or “I can't give you a definition.” So we decided we should ask the judge. Well, the judge wrote back and said, “You have to glean it from the instructions.”⁴⁰

Another of Sontag's interviewees broke down in tears, confessing, “I still don't understand the difference between aggravating and mitigating.”⁴¹

Using technical vocabulary with lay jurors is one of the surest ways to befuddle them. Yet as mentioned earlier, many judges respond to jury questions by just rereading the original instructions. Fortunately, some appellate courts have begun to suggest that when it is clear that a jury is confused, the trial judge cannot just refer back to the original instructions.⁴² Yet this can place judges in a difficult position. Like the judge in *People v.*

Most judges assume that jurors understand these words in their legal sense.

29. *Cape v. State*, 272 S.E.2d 487, 493 (Ga. 1980).

30. *People v. Lang*, 782 P.2d 627 (Cal. 1989).

31. See Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 14.

32. *Watkins v. Murray*, 493 U.S. 907, 910 (1989) (Marshall, J., dissenting from denial of certiorari).

33. LORELEI SONTAG, *DECIDING DEATH: A LEGAL AND EMPIRICAL ANALYSIS OF PENALTY PHASE JURY INSTRUCTIONS AND CAPITAL DECISION-MAKING* 76 (1990) (available from University Microfilms International in Ann Arbor, Michigan; order number 9033148).

34. STUART MILL, *A SYSTEM OF LOGIC* 451 (People's ed., 1886), *cited in* OTTO JESPERSEN, *GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE* 111 (10th ed. 1982).

35. Jespersen, *supra* note 34, at 111-12.

36. *People v. McLain*, 757 P.2d 569, 580 (Cal. 1988).

37. Tiersma, *supra* note 31, at 15-18.

38. Sontag, *supra* note 33, at 115. See also Craig Haney and Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California Death Penalty Instructions*, 18 LAW & HUM. BEHAVIOR 411, 420-21 (1994) (fewer than half of the subjects could provide even a partially correct definition of mitigation).

39. Two judges told the jurors to derive the meaning from the instructions as a whole. One gave them definitions out of *Black's Law Dictionary*. Another jury got definitions, but the source was unclear. And as to the fifth, the juror who was interviewed recalled only that the judge's response was very obscure. Sontag, *supra* note 33, at 121.

40. *Id.* at 111.

41. *Id.* at 124-5.

42. See, e.g., *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (en banc).

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Ruge, they may fear that their efforts to clarify something for the jury may just lead to a reversal.

A better approach is to define the terms in the instructions themselves, so judges do not have to do so on the fly. This is now the approach of California,

which contains definitions of *aggravating* and *mitigating factors* in CALJIC 8.88:

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the application of the death penalty.

Although explaining the legal definitions of *mitigation* and *aggravation* is an excellent idea, the implementation leaves much to be desired. First of all, the definition is overly formal and syntactically complex. Consider the beginning statement that an aggravating factor is *any fact, condition or event attending the commission of a crime which ...* Why not just state that an aggravating factor is *anything about the crime which ...*? Additionally, how often do you hear terms like the *enormity* of a crime, or *injurious consequences* in everyday speech?

Mitigation is, curiously enough, defined as *extenuation*, which is an even more formal and unusual word. Defining one difficult term with another is no definition at all, but rather what you would expect from a thesaurus. Even worse, the so-called definition starts out by declaring that mitigation does not include a justification or excuse for the crime. This seems to mean that jurors cannot consider possible justifications or excuses as mitigating evidence. Yet that cannot be correct. At least in ordinary speech, aren't many types of mitigation an "excuse" of some sort? Or suppose that the defendant unsuccessfully presented a justification for the crime at the guilt phase — must the jury really ignore that evidence in deciding whether to put him to death?

Much of the problem is that part of the definition can be traced back at least as far as the New York case of *Heaton v. Wright*, decided in 1854 (incidentally, it had nothing to do with the death penalty).⁴³ Its definition of mitigating circumstance was amplified and incorporated into the revised fourth edition of *Black's Law Dictionary*. California cases borrowed the wording from the dictionary, it seems. And the CALJIC committee seems

to have copied the definition directly from the cases. The language might be tolerable in a legal dictionary, which needs to distinguish *mitigation* from similar concepts, like justification. But as part of the concluding instruction in a death penalty case, this statement strikes me as extremely dangerous and — in seeming to exclude justifications and excuses — absolutely wrong.

Paths to Improvement

This article has suggested various ways in which we can improve jury instructions. My concluding comments will summarize some of the existing difficulties with instructions and suggest ways to avoid them.

Fortunately, several federal courts have made progress in this area. Some states have also written more comprehensible instructions, including Alaska (civil), Arizona, and Michigan (criminal). The Judicial Council of California has appointed a task force to make that state's instructions more user-friendly, and there seems to be interest in the topic elsewhere.⁴⁴ Much remains to be done. The following are some suggestions on how to implement reform.⁴⁵

Limit the use of technical vocabulary, and always provide a definition in ordinary language. The point has probably been sufficiently made earlier in this article. One aspect of technical terms not yet mentioned is that they can be divided into categories, depending on how well or poorly they communicate to ordinary citizens. The easiest to deal with are words that are totally or almost totally unknown in ordinary speech, such as *malice aforethought*, *proximate cause*, and *undue influence*. Both judges and jurors generally realize that the average person does not understand these words, so the judge will explain it to them, or the jury will probably ask.

Another class is legal words or phrases with which the public is familiar, including terms like *defendant*, *murder*, *negligence*, *reasonable doubt*, *self-defense*, and *witness*. These words may be problematic because both judges and jurors may believe that the jurors understand them, whereas in fact their understanding may be limited or outright wrong from a legal perspective. This should not surprise us, given that most people probably derive most of their knowledge about the law from watching the O.J. Simpson trial or Judge Judy on television.

Finally, there are words that have both an ordinary meaning and a technical legal usage. Examples include *aggravation*, *assault*, *burglary*, *malice*, or *personal property*. Again, what jurors know about the ordinary meaning of words like *aggravation* or *malice* can be dangerous in a legal context. In common usage, *burglary* requires stealing something and *assault* is similar to what lawyers call *battery*. With such words, which I have elsewhere called **legal homonyms**,⁴⁶ careful definition is essential. Where feasible, avoiding the terms entirely would be even better.

Do not use overly formal or antiquated language. The

43. 10 How. Pr. 82 (N.Y. Sup. Ct. 1854).

44. See Michael Higgins, *Not So Plain English: In Many States, Jury Instructions Are Confusing*, 84 A.B.A.J. 40 (1998).

45. See AMIRAM ELWORK, BRUCE D. SALES, AND JAMES J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Robert P. Charrow and Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306

(1979); FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS (1988) (Appendix A, entitled *Suggestions for Improving Juror Understanding of Instructions*, by Allan Lind and Anthony Partridge, makes suggestions for drafting comprehensible instructions based on the work of the Charrows and the Elwork, Sales and Alfini team).

46. Tiersma, *supra* note 2, at 111-12.

basis for this piece of advice is that you should always remember your audience and use language that the audience is likely to be able to follow. What is appropriate in a law review article is not suitable in jury instructions. Nor is the flowery and often difficult prose of opinions written in the 1850s.

Putting this principle into practice is not always easy. Most judges are well-educated individuals with an extensive vocabulary. They may not realize that what seems to them a perfectly ordinary word is difficult for jurors. As the United States Supreme Court has noted, “[J]urors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges.”⁴⁷

At the same time, the truth of the matter is that deciding whether the “average juror” understands a word is not an easy task. Normally, we base our assessments on how often we hear a word in ordinary conversation. I am fairly confident, for example, that I have never heard *extenuate*, *injurious consequences*, or *misrecollection* in ordinary lay discourse. A study of people called to jury duty in Florida discovered that only fifty-one percent understood the word *demeanor*.

In any event, it is self-evident that the more ordinary word should generally be preferred. In most jury instructions I have seen, the jury never *decides* anything. Rather, jurors only seem to be able to *conclude* or *determine* that something is true. (This is typical for the language of lawyers, who never *say* or *tell* anything; instead, they *indicate* to opposing counsel that they are rejecting a settlement offer, and *advise* their clients that the deposition begins at nine o’clock.)

Some further illustrations of needlessly formal language:

Formal Word	Ordinary Word
append	attach
approximately	about
cease	stop
commence	begin
conceal	hide
deem	consider
demise	death
desist	stop, leave off
detain	hold
donate	give
effectuate	carry out
employ	use
endeavor	try
forthwith	soon, immediately
imbibe	drink
initiate	begin
inquire	ask ⁴⁸

And so the list goes on. Incidentally, most of the ordinary words are English (or Anglo-Saxon) in origin. English has been the

language of ordinary people for roughly the past fifteen centuries. The words in the “formal” column largely derive from French and Latin — the languages of the English elite.

Avoid abstractness. As Judge Learned Hand once wrote, “[i]t is exceedingly doubtful whether a succession of abstract propositions of law, pronounced staccato, has any effect but to give [jurors] a dazed sense of being called upon to apply some esoteric mental processes, beyond the scope of their daily experience.”⁴⁹ The criminal law is supremely abstract, applying to anyone that comes within its scope (*whoever...; any person who...*). Applying abstract principles to specific facts is something that students learn to do in law school. But as Judge Hand observed, it is not part of the experience of the average juror. My colleague, Professor Christopher May, sat on two juries recently and had this to say about his experiences:

[J]uries often confront the serious problem of not knowing what to do with the law they are given. Neither jury I sat on was sure of how to use or access the instructions. To my surprise they did not realize that each of the claims or offenses contained in the charge consisted of a series of elements. It was not obvious to them that in order to reach a verdict it was necessary to go through each claim or offense and determine whether each one of the elements had been satisfied. Moreover, there were times when the jury was unable to relate the facts to the law in the sense of knowing which evidence was to be matched with which legal element.⁵⁰

The lesson is that instructions should tell jurors, as plainly as possible, what to do. Inform jurors that *you may* or *you should* or *you must* do something (avoiding less direct language like *it is required of you to* or *it is your duty*). If you expect jurors to carefully consider whether the defendant’s conduct meets each of three elements and to return a guilty verdict if the answer is yes, say so.

Keep sentences relatively short and simple. Lawyers have a tendency to write long and convoluted sentences. Until fairly recently, statutes typically consisted of a single sentence, including preamble, exceptions, and provisos. Jeremy Bentham lampooned this tendency: “With as much reason, and with similar utility, might the whole of Coke-Littleton [a legal treatise] have been squeezed into one sentence, or the whole of a Serjeant’s-Inn dinner have been mashed up together into one dish.”⁵¹

If CALJIC is any indication, jury instructions no longer have the extremely long sentences that they once did. Complexity also seems to have decreased a bit, but consider the following

[D]eciding whether the “average juror” understands a word is not an easy task.

47. McDonough Power Equipment, Inc., v. Greenwood, 464 U.S. 548, 555 (1984).

48. BRYAN A. GARNER, DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995). See the heading *Formal Words* at 369.

49. *United States v. Cohen*, 145 F.2d 82, 93 (2d Cir. 1944).

50. Christopher N. May, “What Do We Do Now?” : *Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 869-70 (1995).

51. 3 THE WORKS OF JEREMY BENTHAM 264 (John Bowring ed., 1843).

sentence from CALJIC 1.02: "Do not assume to be true any insinuation suggested by a question asked a witness." By itself, shortness is no guarantee of comprehension. This sentence has several levels of embedding, along with two passives (*suggested* and *asked*), as well as the formal phrase *do not assume to be true*. Saving the sentence may require splitting it in two. My suggested revision: *Sometimes a lawyer's question insinuates or suggests something. Do not assume that this insinuation or suggestion is true.*

Pay attention to organization. People expect information to come to them in a fairly predicable sequence. The basic principles of organization require that the general come before the specific, and the rule before any exceptions. With jury instructions, give information when the jurors need it. At least some instructions on evidence (e.g., explaining stipulations and objections) should come at the beginning of the trial, rather than long after the objections have been made and ruled upon. Moreover, some initial comments on the nature of the case and the specific charges will allow jurors to concentrate on and organize the relevant evidence as it is presented to them.

CALJIC mostly adheres to these principles, but not always. Consider CALJIC 1.01:

If any rule, direction or idea [is] [has been] repeated or stated in different ways in these instructions, no emphasis [is] [was] intended and you must not draw any inference because of its repetition. Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others.

Observe that the general rule comes at the very end; it should be first, because that is the basic point of this instruction. The middle sentence should probably come next, because it is the next most general rule. The first sentence is the most specific. Consequently, the last sentence should be first, and the first should be last.

Do not overload jurors with marginally relevant information or unnecessary tasks. In some ways, this may be the most difficult principle to implement. Counsel typically have long lists of instructions they would like to have read. Sometimes the course of least resistance is to include everything that might in any sense be relevant, rather than risk an appeal. This is not my area of expertise, but I wonder whether we are sometimes overloading jurors with marginally relevant information.⁵²

Do we really need to tell jurors that people sometimes forget things (failure of recollection is common), or that sometimes people honestly think they remember something that did not really happen (innocent misrecollection is not uncommon)? Wouldn't experience and common sense inform jurors that they might want to believe a witness even if there were some minor inconsistencies in her testimony? And must we really explain

to jurors that a lawyer's question is not evidence, but the witness's answer is?

Moreover, we may be asking jurors to do too much. Tennessee jurors are instructed on how to reduce a sum to present value, for example.⁵³ Back in California, capital jurors may have to decide whether something is a *bomb* or an *explosive* (CALJIC 8.81.4), whether a peace officer made a lawful arrest (CALJIC 8.81.8), or whether the statement of a co-conspirator is admissible (CALJIC 6.24). Perhaps there are legal obstacles, but logically it makes more sense for judges to make these sorts of decisions. After all, judges have a lot of practice in statutory interpretation and ruling on the admissibility of evidence.

Conclusion

Several hundred years ago, when lawyers and judges were still using Law French, they were well aware of public pressure to switch to English. In 1549, Thomas Cranmer, the first Protestant archbishop of Canterbury, commented: "I have heard suitors murmur at the bar because their attornies pleaded their cause in the French tongue which they understood not."⁵⁴ When pressed, lawyers gave several reasons for retaining French. Sir Edward Coke suggested it protected the public by preventing people from trying to act as their own lawyers. Others argued that Law French was much more precise than English. Roger North claimed that "the law is scarcely expressible properly in English."⁵⁵ As we all know, lawyers and judges shifted to English without any catastrophic results.

Today there are modern doomsayers who continue to claim that the law is scarcely expressible in ordinary English. It is time to prove them wrong.



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52. See also Schwarzer, *supra* note 5, at 747-55.

53. Bethany K. Dumas & Dennis H. Inman, *Jury Instructions from the Judge's Perspective*, presentation made at Law and Society Annual Meeting, Aspen, Colorado, June 4-7, 1998.

54. Tiersma, *supra* note 2, at 35.

55. *Id.* at 28-9.

How Judges Can Help Deliberating Juries: Using the Guide for Jury Deliberations

Robert G. Boatright and Beth Murphy

Over the past decade, many state reform commissions have recommended reforms designed to make jury service more attractive and to make jury decision making more efficient and effective, but few have actually investigated the jury deliberation process itself. Recommendations that have been made about improving the jury system, which include simplifying and expanding jury instructions, providing jurors with an opportunity to take notes or ask questions during the proceedings, and permitting pre-deliberation discussions and brief opening statements by counsel, have been based upon mock jury research and, frequently, upon common sense. But little has been done to assist jurors with the actual task of deliberating and with the problems that may arise in the discourse as jurors move towards a verdict. This neglect is due in part to the lack of empirical evidence on what actually occurs during the deliberation process. It is also due, however, to a fear on the part of the courts and the public of intruding into the sacred confines of the jury room.

It is the contention of the American Judicature Society that there is much courts can do to assist deliberating jurors without impeding their creativity or negatively influencing the quality of deliberations or of jury verdicts. Through a grant from the Bureau of Justice Assistance, U.S. Department of Justice, the AJS has constructed a guidebook for jury deliberations that provides suggestions to jurors on organizing deliberations, on seeking assistance from the court, and on ways of thinking about jury service after the trial is over. We constructed this guidebook with the input of a focus group of former jurors and jury experts, and we have tested this guidebook across a selection of trials, in order to verify that the guidebook achieves its aims without any negative effect upon the trial outcome or the quality of deliberations. The result of the use of this guidebook, we argue, is more efficient and productive jury deliberations, and more satisfied and confident jurors.

The contents of our guidebook and the process through which we arrived at its suggestions are described in greater detail elsewhere.¹ In this article, we briefly describe the contents of this guidebook, and we then devote greater attention to issues surrounding the reaction of judges, attorneys, and jurors to it. We close with our responses to potential objections to guiding jurors more fully about the deliberation process.

I. The Information in the Guide for Jury Deliberations

The comments we solicited while we were preparing our guide indicated that most jury experts believed any juror guidebook should have a positive, yet benign, effect. That is, it should increase the efficiency of deliberations and increase juror satisfaction with deliberations, but it should not alter the verdict or the manner in which jurors consider the evidence. Jurors are already instructed by judges about how they are to consider the charge and evidence at hand; a guidebook should not present information dramatically different from that which a judge would ordinarily provide them. Instead, a guidebook should present hints on organizing the deliberations and getting assistance from the court in deliberations. Accordingly, we identified the major areas of confusion among the jurors in our focus groups, we verified that we would not be impinging upon the flexibility of jurors in providing suggestions in these areas, and we verified that we would not be transgressing the legal restrictions placed upon jurors by the law. The aim of our guidebook is to provide a set of suggestions that direct jurors towards reducing confusion but do not lead them towards any particular deliberation style. In addition, we have sought in our guidebook to provide a tool that makes broad enough suggestions that it can be used across as many different jurisdictions and as many different types of trials as possible.

Below, we discuss the reasoning behind each set of suggestions in our guidebook.

A. Getting Started and Getting Organized

Before they begin the central task of reaching a verdict, jurors must agree on some ground rules for the sequence of their discussions and for the expected participation of each jury member. The process of getting organized can be beneficial to the jury group by "breaking the ice," by overcoming barriers to discussion within the group, and by taking steps to encourage everyone's participation in the discussions. As in any group decision-making activity, once the jury clearly defines a path to follow in reaching a group consensus, the process of arriving at the eventual verdict will be easier, more efficient, and probably more effective. Our guidelines are intended to provide a starting point for discussion. We chose not to recommend one particular method for organizing deliberations, but we do remind jurors to take a few minutes to get to know each other before

Footnotes

1. See Robert G. Boatright & Beth Murphy, *Constructing a Guide for Jury Deliberations*, 82 JUDICATURE (Forthcoming,

September 1999), and BETH MURPHY & ROBERT G. BOATRIGHT, *BEHIND CLOSED DOORS: A RESOURCE MANUAL TO IMPROVE JURY DELIBERATIONS* (1999).

beginning their deliberations, and we encourage them to talk informally and to present different options for organizing discussions before getting down to business.

B. Selecting the Presiding Juror

A major component of these early discussions is the selection of the presiding juror, who is responsible for overseeing the discussions and creating an atmosphere in which jurors freely express their ideas. The presiding juror can wield power over the deliberations, and at times the presiding juror may even influence the way the jury decides to vote. Most jurisdictions leave selection of the presiding juror entirely up to the jurors. Consequently, we believe it is helpful to the jury to suggest some of the desirable traits a presiding juror should have without placing undue importance on the role of the presiding juror or on the way he or she votes.

Our suggestions on the selection of the presiding juror include only general recommendations on what qualities should be considered in light of the various responsibilities of the presiding juror. Our intent is to show that there are no definitive rules for the selection of the presiding juror, but that certain personal qualities might lend themselves better to performing the role of the presiding juror. The guidebook also emphasizes the equality of everyone's opinions in order to dissuade jurors from attaching too much importance to the sentiments of the presiding juror, especially with regard to the voting process.

C. Discussing the Evidence and the Law

The value of our jury system lies in the jury's ability to be an accurate and reliable fact-finding body that competently applies the law to the evidence at hand in order to reach a verdict. This can be a daunting task, and it is at times complicated by the instructions given by the judge. The consequences of not understanding the law are great, and it is often not apparent whether jurors actually understand how to apply the law to the evidence, or whether they even understand the law. Given the delicate nature of providing assistance to jurors in the use of the judge's instructions, however, any further suggestions must clearly be secondary to those of the judge. Throughout this section, jurors are constantly reminded to follow the judge's instructions because they tell the juror exactly what to do with reference to the case at hand. Our suggestions merely seek to simplify the process with a step-by-step approach, using the judge's instructions as the springboard for discussing the evidence and the law. We remind jurors of the importance of considering each charge or claim separately. Such a procedure should not interfere in any way with the natural discussion of the evidence.

D. Voting

The guideline most frequently recommended by our focus group participants was a section on various methods of voting and on the appropriate time for voting on a verdict. This guideline is controversial, but necessary, because research has shown that the method and timing of the jury's first vote can have significant consequences for the style of deliberations. Numerous studies have shown that the initial verdict preference of the majority of jurors is reversed only a small percentage of the time. If an early open ballot is taken, jurors in the majority may dominate the discussions and all jurors, regardless of whether

they are in the majority or the minority on that vote, could be reluctant to change their votes. Thus, the task of reaching a consensus may be facilitated by suggesting that jurors refrain from voting until after considering the evidence.

We chose a discussion of voting for our guidebook that is suggestive of the value of delaying the first vote without specifically ordering the jury to delay voting. We note the merits of spending some time discussing the evidence and the law before voting, and we indicate that if jurors do this they may feel more confident and satisfied with the eventual outcome than they would if they were to vote immediately. Likewise, we mention various voting techniques – for instance, written and secret votes, or open voice votes – as options available to the jury, not as set ways to vote.

We have also included a short statement directing the jurors to ask the judge for advice about what to do if they cannot reach a verdict. The wording of this section avoids any explanation of when jurors might consider themselves to be at an impasse. We feel it is best to advise jurors how to proceed when they are at an impasse, instead of defining what an actual impasse is. This last function is best left to the trial court and should be addressed by specific state law.

E. Getting Assistance from the Court

If the jury does not understand the judge's instructions, or if it is confused about how to reach a unanimous verdict, it is incapable of performing its deliberative function. Jurors' understanding of the judge's instructions is increased and their general sense of confidence in performing their duties and responsibilities may be heightened when they are able to ask questions and receive reasonable responses. There is considerable variance in the ways that judges respond to the questions juries send to them from the deliberation room. Some judges provide written answers to the jury, while others merely direct jurors to reread the instructions already provided and still others prefer not to respond at all. Some judges ask the jury before deliberations begin whether it has any questions about the instructions and attempt to clarify any misunderstandings at that point. It is rare for judges to specifically invite jurors to come back with questions after they have retired to deliberate.

Consequently, the challenge of providing suggestions to jurors on obtaining information from the court is to balance the benefits of generality, *i.e.*, of information suitable to all jurisdictions, with the demands of the rules of individual courts. In order to meet this challenge, we first tell the jurors, in very general terms, the types of information they may request – lists of witnesses or a read-back of parts of the testimony, for instance – and we then explain the types of information they may not request – police reports that were not received in evidence, for example. In specifying what information jurors may not request, we seek to allay the fears of those judges who anticipate being inundated with information requests from jurors if jurors are told only what types of information they may request.

F. The Verdict

In some instances, the jury may not realize how their verdict becomes official and how to present that verdict to the court. In our focus groups, it became apparent to us that the manner in which the verdict becomes official was a source of concern

and confusion, albeit a confusion that often escapes the notice of judges. Likewise, the matter of the verdict's presentation has not been studied by researchers, in part because it is such a minor aspect of deliberations. In most jurisdictions, once the verdict is read in open court, the judge may elect, at the request of the attorneys, to poll each juror for his or her individual vote. Frequently, jurors are not aware of this practice, and they hear about it for the first time in the jury box after the verdict is entered. Telling jurors about how the verdict is to be delivered seems very fair and practical.

G. Once Jury Duty Is Over

For many jurors, jury service is an exhilarating experience, both instructive and stimulating, that provides them with their first contact with our legal system. The feelings they take with them following jury duty are as important as those that preceded jury duty. While jurors may experience a certain amount of anxiety before they begin to serve on a trial – anxiety associated with the anticipated stress and inconvenience of jury duty and with the unfamiliarity of the courtroom and the deliberation room – they may also experience anxiety as they emerge from the courtroom and resume their normal lives. Particularly in difficult or lengthy cases, in high profile cases, or in cases featuring disturbing crimes, jurors may leave the courtroom shaken or uncertain about the verdict they have rendered or potential repercussions of the verdict.

Numerous courts have effectively begun to work to alleviate post-service juror stress. Our comments on what to do once jury service is over were thus kept relatively simple. They are meant primarily to reassure jurors. In order to accommodate jurisdictional differences, our guideline tells the jurors that the trial judge will inform them about her policy regarding speaking to others after the trial while it assures the jurors that they need not talk to anyone if they do not want to do so. This is basic information that is provided as a means of reassuring jurors before, during, and after their deliberations. Its placement at the conclusion of our guidebook also serves as a brief thank-you to jurors for their time and their work.

II. Reactions to the Guidebook

We tested our guidebook in twelve randomly selected cases across six jurisdictions. We surveyed the judges and attorneys in these cases about the use they believed jurors would make of the guidebook, the manner in which the guidebook was presented to jurors, and their beliefs about the likely effect of the guidebook. We then surveyed the jurors about the ways in which they used the guidebook, the manner in which they conducted deliberations, and their satisfaction with jury service. As a control, we also surveyed judges, attorneys, and jurors in a sample of fourteen cases in which our guidebook was *not* used, in order to test for any adverse consequences of the use of our guidebook. The experimental and control groups were relatively comparable – the two groups were similar in type of charge, complexity, and duration. In the experimental group, there were five felony trials, two misdemeanors, one traffic offense, and four civil trials. In the control group, there were eight felony trials, one misdemeanor, one traffic offense and four civil trials.

We received 151 completed surveys from jurors – 75 from the experimental group and 76 from the control group. A total

of 111 jurors who were given the guidebook and 157 jurors who were not given the guidebook were given surveys; hence, we have a 68 percent response rate for the experimental group and a 48 percent response rate for the control group. These survey responses are supplemented by the comments of the judges who presided over these cases; we received 26 completed surveys from judges, although some judges presided over more than one case in the sample. At least one of the lawyers in each case also was surveyed, for a total of 33 completed questionnaires by lawyers.

Our results demonstrate that the guidebook provides enough information that jurors may pick and choose – they are able to focus upon information in the guidebook that is of particular use to them given their level of knowledge of the legal system and given the type of case before them. Judges and attorneys generally did not believe that the guidebook would have a prejudicial effect upon jurors, although in almost all of the cases the guidebook was entered into the trial record as evidence. Our survey showed that the guidebook indeed did not have an effect upon the case outcome or on a number of other factors relevant to the content of deliberations. Instead, the guidebook enabled jurors to devise more organized means of deliberating and to handle disagreements more smoothly than was the case in trials where the guidebook was not used.

The survey text for each of these participants was different. We asked judges questions about the case – how clear the evidence was, how complex it was, what their verdict would have been – and about their jury management techniques. We then asked judges who gave jurors the guidebook their views on the use and effect of the guidebook. The questions we asked attorneys were similar, but we also asked the attorneys to reflect on the abilities of the jury. Were they satisfied with the performance of the jury? Did they believe the jury understood the evidence and the law? How did they rate the jury's fact-finding abilities? How did they rate the strength of their case? Finally, we gave jurors a lengthy survey asking them to describe various aspects of their deliberations. Questions to jurors fell into three broad categories. First, what sort of case was it? How complex was it? Did they believe they understood the relevant evidence and law? How did they evaluate the ability of the judge and the attorneys in providing assistance to them in reaching their decision? Second, how were deliberations structured? How much time did each aspect of deliberations take? How were disputes handled? How well did the presiding juror perform? Third, how did they feel about their experience? Did they feel confident in their verdict? Did they feel that deliberations had been an appropriate length? Had jury service been stressful? Would they do it again?

We now discuss each of these groups of participants in turn.

A. The Judges

Needless to say, the judges who chose to participate in our study were a self-selected sample; no judge who disapproved of the guidebook could be expected to volunteer to distribute it to the jurors. Fortunately, we encountered no judges who declined to participate specifically because of apprehensions about the guidebook; those judges whom we contacted and who chose not to participate instead spoke of time constraints or lack of interest in the project, not of hostility towards it.

Thus, none of the judges in our sample believed the jury

guidebook to be prejudicial or harmful before administering the survey. None changed their views over the course of the trial. While disagreement between judges and jurors certainly cannot be directly linked to use of the guidebook, there were no cases in our experimental group of judge/jury disagreement, and there were only two such cases in our control group.

We left the level of emphasis placed by judges upon the guidebook to the judges themselves. Judges were somewhat split in their decision about when to have the guidebook distributed – seven of the twelve distributed the guidebook after the trial, while five distributed the guidebook before the trial had begun. In ten of the twelve cases, the guidebook was made part of the case’s permanent record. Seven of the twelve judges called attention to the guidebook by reading directly from it to the jurors, while five made little mention of it.

The most significant difference between the experimental group and the control group in regard to judges’ behavior that we might attribute to the presence of the guidebook was that judges in the experimental group were far more likely to speak with jurors after the trial had ended than were judges in the control group. Ninety-two percent (or all but one) of the judges who used the guidebook interviewed the jury after the trial, while only slightly more than half (57 percent) of the judges who did not do so spoke with the jurors. This may be attributable to a view by judges who used the guidebook that they should explain the reason for its use to the jurors.

Table One shows the areas in which judges felt the guidebook would be of use. While at least a large minority, if not a majority, of the judges felt the guidebook would be of use in each of these areas, judges seemed to be most substantially in agreement about the effect of the guidebook on juror satisfaction and confidence. If we compare the “efficiency” questions – would jurors take less time to select a presiding juror, would they spend less time deliberating, would they be better informed of the relevant questions they may ask, as so forth – with the two questions on confidence and satisfaction, it is evident that these judges believed this to be the real strength of using the guidebook.

In their open-ended comments on the guidebook, some judges noted particular jurors for whom the guidebook would be most helpful. Several judges asked jurors what they thought of the guidebook; they received rather positive, though undetailed, feedback. Judges noted that the guidebook would be of particular help to first-time jurors:

[The information in the guide] is common sense but this is a new experience for most jurors so the guidebook provides good help.

and to jurors in more complex cases:

This particular case was short and very simple so it’s difficult to say that the guide clearly had a substantial impact [in this case]. In a more complex case, it would have.

One judge who used the guidebook in three different cases noted in the first two that deliberations were longer than he had expected:

Trial one: Afterwards they said it was helpful, but it still took them two and one-half hours to reach their verdicts.

Trial two: It is difficult to know [how the guide might have affected deliberations]. The jury deliberated for five hours, which was unusually long considering the state of the evidence. They did all say they found the guidebook helpful.

But by the end of the third experimental case over which he presided, this same judge noted:

Trial three: After the trial I asked the jurors if they found the booklet helpful. They responded enthusiastically “Yes.” They said it shortened their deliberation time considerably. . . I am now satisfied that this is an extremely helpful booklet.

As we noted above, the guidebook was designed to reduce the length of deliberations, but we have no firm evidence that it did so, and the possibility does remain that it may actually lengthen them. The judge quoted above is one of two judges who raised this possibility. The second judge, however, noted that if the guidebook does have this effect, it is not necessarily a bad thing:

The guide was very helpful. That is why it was a hung jury. They worked very hard but stood firm when the rules were clearly explained to them.

Finally, eight of the twelve judges in the experimental group stated that they would use the guidebook regularly in the future. None claimed that they would not use it; one said he would use it sometimes – absent objections from counsel – and three did not answer the question. All of the judges believed that the jury understood the suggestions in the guidebook, and all rated the guidebook as a whole “very helpful” or “somewhat helpful.” At least as far as the judges who used the guidebook were concerned, the guidebook seemed to have fulfilled our criteria of having a positive but not prejudicial effect.

Table 1: Judges’ and Attorneys’ Expectations about Effects of the Guidebook

	Judges	Attorneys
Reduce deliberation time	43%	31%
Reduce time selecting presiding juror	43%	67%
Enhance effectiveness of presiding juror	67%	67%
Enhance effectiveness of judge’s instructions	56%	75%
Reduce number of questions from jurors	56%	38%
Reduce likelihood of a hung jury	63%	47%
Increase juror confidence in verdict	88%	77%
Increase juror satisfaction with the process	100%	92%
Number of respondents	12	19

B. The Attorneys

The questions we asked attorneys provide a somewhat stronger means of analyzing the effect of the guidebook upon jurors, although we must be wary of attributing too much weight to attorneys’ opinions of jurors because of their vested interest in the trial’s outcome. We asked attorneys several questions about juror performance. While some of these questions did turn up dissatisfaction with the performance of the jury, none of them revealed significant difference in attorneys’ level of satisfaction with the jury between the experimental and the control group. We also found no difference in attitudes towards the jury or the guidebook by the type of attorney (private, public defender, or prosecutor) or by party represented. Unsurprisingly, those attorneys most dissatisfied with the jurors were attorneys who lost their cases.

The attorneys we surveyed demonstrated rather cautious acceptance of the guidebook. None of them made direct reference to it in their statements to the jurors, but few of them found anything in it to dislike. All of the attorneys we surveyed were given the guidebook during voir dire or before trial proceedings began, and 83 percent, or fifteen out of eighteen, felt this was sufficient time to look over the guidebook. Only 11 percent of the attorneys we surveyed were opposed to any part of the guidebook, and only one attorney claimed that the guidebook was potentially prejudicial.

The handful of negative comments we received about the guidebook addressed both the broader issue of whether jurors need guidance and the more narrow issue of the guidebook's effect on the length of deliberations. The lone attorney who was opposed to use of the guidebook did not believe the guidebook would be prejudicial, but he merely noted that he did not believe jurors needed to be guided. As was the case for the judges, some attorneys felt that the guidebook might extend the length of deliberations – again, a matter that is difficult for us to test because of the large number of intervening variables. In at least one case in our experimental group, both attorneys believed that the use of the guidebook may have led to requests to review testimony. In this case, the attorney for the eventual victor did not regard this as a problem, while the attorney for the losing party did. The losing attorney felt that jurors had been encouraged to ask to be reread testimony by the guidebook, and that this had been counterproductive.

The attorneys were also somewhat more skeptical about the potential uses and effects of the guidebook than were judges, but their views on the strong points of the guidebook were similar to those of judges. Table One also shows the responses of attorneys about the areas in which they thought the guidebook would be most helpful.

The attorneys we surveyed agreed with the judges that the primary influence of the guidebook would be in the area of juror confidence and juror satisfaction. The attorneys also, however, thought that the guidebook would be of particular use to the presiding juror. They were skeptical about the overall effect of the guidebook upon deliberation time and reducing juror questions. In some of their open-ended responses, attorneys noted that the guidebook would be of particular use in complex cases and to first-time jurors. Finally, all but one attorney – the same attorney who believed the guidebook to be prejudicial – claimed that they would be positively disposed toward using the guidebook again, either regularly (65 percent) or sometimes (26 percent).

C. The Jurors

It is only among the jurors in our survey that we are able to analyze meaningful distinctions between particular groups of individuals. In particular, we are able to study differences in deliberation behavior between jurors who received the guidebook and those who did not, and we are able to identify differences in the way the guidebook was used by different types of jurors. Before we present these differences, however, two general statements are in order.

First, our guidebook was designed to address the general needs of the deliberating juror. We expect, then, that jurors will pick and choose among the individual suggestions in the

guidebook what best suits the particular case over which they are deliberating and the particular concerns that they have. As a result, our data indicate that different types of jurors consulted the guidebook for different reasons. The most salient distinction was between first-time jurors and individuals who have served as a juror before. First-time jurors reported that the guidebook was more helpful in understanding the relevant law governing the case, the way to structure a vote, and the way in which to consider evidence than did those who had served before. Jurors who had served before were somewhat less concerned with the suggestions on how to consider the judge's instructions on the law and the evidence, but both groups were equally interested in what the guidebook had to say about selecting a presiding juror and getting deliberations started.

Second, the effects of the guidebook should be primarily at the margins. That is, the guidebook is intended to bring order to an otherwise potentially chaotic procedure. While it is difficult to compare jurors' reflections on the proceedings because of measurement problems – that is, it is difficult to measure levels of satisfaction between the experimental and control groups, or to measure the performance of the presiding juror – it is possible to identify differences in the ways in which deliberations are structured. Comparison of the two populations reveals that jurors using the guidebook structured deliberations differently in two ways. First, the jurors using the guidebook were more likely to devise an organizational theme for deliberations, whether it be around the evidence, around specific charges, or merely by taking turns commenting on the case – than were those without the guidebook. They were less likely to consider the case chronologically and more likely to address alternate means of organization. Second, the jurors using the guidebook were more likely to develop a formal procedure for addressing disagreements among jurors than were those without the guidebook. Few jurors explicitly linked these formal procedures to the guidebook's suggestions, but the existence of these patterns, coupled with the fact that, as noted above, the cases in which the guidebook was used were actually somewhat more complex than those without it, lends suggestive evidence to our claim that the guidebook was beneficial to jurors.

In order to address these general findings, we again focus upon the use and the effect of the guidebook in summarizing data on the jurors.

1. Use of the Jury Deliberation Guidebook

Virtually all of the jurors, 97 percent, reported that the judge had discussed the guidebook with them and had encouraged them to consider it in their deliberations. Almost all jurors eventually did use the guidebook; 99 percent said that they had read the guidebook. We also asked jurors how helpful they found the guide. All of them rated the guidebook at least somewhat helpful; 46 percent rated the guidebook “very helpful.”

Table Two presents the overall use of the guidebook in each relevant area, as well as differences between first-time jurors and more experienced jurors. The framing of these questions to jurors was somewhat different from the manner in which we inquired about potential effects of the guidebook in our sur-

Table 2 : Juror Use of the Guidebook by Level of Experience

	All Jurors Jurors	First-Time Jurors	Experienced
Suggestions from the judge	66%	74%	52%
Getting started	87%	88%	84%
Selecting the presiding juror	62%	61%	64%
Getting organized	73%	74%	72%
Discussing the evidence and the law	66%	74%	52%
Voting	54%	59%	44%
The verdict	41%	37%	48%
Once jury service is over	27%	25%	32%
Number of respondents	74	49	25

veys of judges and attorneys. The first column of this table shows that a majority of jurors reported that the guidebook was of use in every area of deliberations except for actually arriving at a verdict and in the aftermath of jury service. These aggregate results are unsurprising; they provide encouraging evidence that the guidebook was of use during deliberations. Most previous research has shown that the verdict itself is at times instinctual for jurors; jurors may be willing to consider suggestions on technical matters in deliberation but not on how to arrive at a verdict. In addition, we might also expect that after service, jurors know best how to go about returning to their daily routine and only need suggestions in the rare instance of a particularly traumatic trial or a trial about which the media are highly concerned. Few of our experimental cases met this criterion, so this section of the guidebook would only have been of interest to a small number of jurors.

Our results nonetheless indicate that providing information about arriving at a verdict and coping with difficulties after jury service can be of use for many jurors. While the stress level of the individual juror during the case was not related to post-verdict use of the guidebook, a greater percentage of jurors in felony cases (34 percent) used the guidebook after jury service than was the case for jurors in civil trials (18 percent). This finding indicates that jurors who must preside over potentially more disturbing cases may need additional reassurance of options for counseling or of ways to think about jury service after the trial is completed.

The second and third columns of Table Two show the use made of the guidebook by jurors depending on whether they had served as a juror before or not. This variable might be considered a measure of prior knowledge of the courts and of the nature of jury deliberations. We did ask jurors other questions that might be construed in a similar manner, such as their education level, but this is the most direct means in our survey of measuring knowledge about jury service. Unsurprisingly, the general suggestions from the judge that open the booklet were far more useful to first-time jurors than they were to those who had deliberated before. Both groups reported that the guidebook was useful in speeding the organizational aspects of getting deliberations started. First-time jurors found the guidebook more useful in considering evidence and in devising a means of voting than did those with prior jury service. Those who had served before had experience with these matters before

receiving the guidebook and might be expected first to consider how well these two issues had been confronted in their prior service before turning to the guidebook.

2. Effects of the Jury Deliberation Guidebook

On a large number of measures, our experimental group was little different in its behavior than was the control group. One way to explain these findings would be to say that the deliberation guidebook was certainly not harmful to deliberations. It did not prolong deliberations unnecessarily or produce less satisfied jurors. Such a finding should reassure those who feared that there would be negative consequences to the guidebook, but it is scarcely an argument in favor of using our guidebook or, for that matter, any deliberation guidebook.

Marked differences in trial outcomes or procedures between those jurors who used our guidebook and those who did not are not plentiful, nor should they be. Yet there are several aspects of deliberations among those who received the guidebook that present suggestive evidence that the guidebook does increase juror efficiency, confidence, and satisfaction, and that it reduces juror conflict.

First, jurors using the guidebook were more likely to develop formal procedures for handling juror disagreements than were jurors without the guidebook. Those using the guidebook did not all share one particular procedure for resolving disagreements, but they did indicate a greater propensity to respond to disagreements by going over the charges of the case, the evidence, the judge's instruction, or merely by voicing opinions in an orderly fashion than did jurors without the guidebook. Jurors using the guidebook were also less likely to disagree at all, a finding that could not be attributed to the complexity of the case, the clarity of the evidence, or any other case-specific factors. Our guidebook does not directly address resolving disagreements, but we hypothesize that the step-by-step presentation of suggestions in the guidebook inspires jurors to impose order upon their arguments. Table Three presents a breakdown of disagreement resolution methods by guidebook usage. Few jurors specifically mentioned resorting to the guidebook when disagreements arose, but the presence of the guidebook may have led them to seek more orderly dispute resolution techniques.

Table 3: Organization of Deliberations by Guidebook Usage

	Control Group	Used Guidebook
Around each count	4%	11%
Around each element of the charge	8%	6%
Around the judge's instructions	7%	8%
Around the evidence	18%	11%
Around each lawyer's story	4%	0%
Around the witnesses	7%	2%
No set pattern	31%	25%
Took turns going around the table	19%	36%
Number of respondents	72	64

Note: not all of the judges and attorneys answered each question about the effects of the guidebook; percentages reported are for those who responded to each question.

Second, jurors using the guidebook devised a similar, although less obvious, means of organizing discussions in general. While numbers in each of the categories used to code responses are small, the data do suggest a greater tendency for jurors in the experimental group to use elements of the judge's instructions, the charges, or the evidence than was the case in the control group, and a lesser tendency to merely talk about the case at random or to orient discussion around the chronological proceedings of the stories that they were presented. Table Four presents a breakdown of self-reported discussion organization techniques.

	Control Group	Used Guidebook
No strong disagreements	13%	35%
Went back over the evidence	21%	20%
Went back over the judge's instructions	10%	3%
Went back over each element	0%	3%
Just talked it out	57%	35%
Consulted the jury guidebook	N/A	4%
Number of respondents	72	69

Our guidebook does not coach jurors about any particular way to structure deliberations or resolve disagreements. Instead, it merely advises them that they should specify means of doing so when they organize their deliberations. While the results in Tables Three and Four do not necessarily indicate a preference for any particular sort of organization, they do indicate that jurors in the experimental cases experienced less conflict and developed means of resolving disagreements and discussions that did not merely rely upon open, informal debate.

It is unfortunate that we are unable to directly measure the effects of the guidebook in the two areas which attorneys and judges felt the guidebook would be most helpful – in the areas of juror confidence and satisfaction. Our survey instrument does not allow us to do this because, while we did ask jurors about how confident they felt in their verdict and how satisfied they were with their experience as a juror, we have neither a large enough sample of cases nor a detailed enough measurement tool to locate differences in these variables. Because of our small sample size, it is impossible to control for all of the other factors that might influence jurors' attitudes on these two variables. Because jurors who did not receive the guidebook have no way of knowing how their experience would be improved had they used the guidebook, we cannot truly measure whether the guidebook made a difference. We are thus forced to rely upon the comments of the jurors on the guidebook, which, as we note above, were overwhelmingly positive.

III. Why We Should Provide Assistance to Deliberating Jurors: Answering the Objections

The comments of the judges, attorneys, and jurors discussed above indicate that our guidebook does indeed have the effect and the flexibility we desired when we created it. It does not have a strong effect on the conduct of jurors, nor should it.

Extensive research surely remains to be done on means of improving the quality and efficiency of jury deliberations, yet the reflections of these individuals upon our guidebook indicate that it has a positive, yet benign, effect upon deliberations. It is of use to different types of jurors in confronting a number of potential problems inherent in deliberations, but it does not unduly diminish the freedom of jurors to adapt their deliberation style to the case at hand nor to steer them towards any particular style or deliberation outcome.

Our data indicate that the guidebook may make a subtle, yet important, difference in the organization of deliberations in that it steers jurors toward more formal and explicit means of organizing their discussions and resolving disputes. At the very least, it advises jurors to consider these issues before they begin their deliberations. With some rudimentary principles of group dynamics and discussion procedures in mind, jurors appear in our experimental cases to exert greater control over the form of deliberations without altering the substance of deliberations.

When we began this project, we expected to encounter resistance both to some of the specific suggestions in our guidebook and to the idea of providing a guidebook to jurors at all. We were encouraged by the low amount of resistance we faced. We had, however, spent much time preparing ourselves to defend our project against those who would object to providing assistance in deliberations. In conclusion, we believe it is important for us to note some of the objections we encountered, and our responses to them. These responses, coupled with the evidence presented above, will hopefully be of assistance for those readers who wish to make use of our guidebook.

Objection No. 1: Jurors don't need to be guided.

We do not contend that our guidebook alone will make a difference in the verdict of a case. It is not intended to. It is true that all of the deliberations in cases in which our guidebook was used reached the same verdicts that the judges expected the jurors to reach, and it seems highly unlikely that our guidebook altered the outcomes of any trials, for better or for worse. This is a rather narrow reading of the purpose of providing a guidebook to jurors, however. Jury service is a vital aspect of citizen participation in government. The more assistance courts can give jurors in making jury service a satisfying, fulfilling experience, the better served our courts will be in the long run. Most of the judges, attorneys, and jurors whom we surveyed contended that our guidebook would increase juror satisfaction with and confidence in their jury service. This alone seems like an important reason to provide a guidebook to jurors. In addition, if jurors are provided with hints on ways to make deliberations more productive and efficient, the possibility still remains that jurors will reach verdicts in a more efficient manner.

Objection No. 2: Telling jurors how to conduct deliberations may bias the deliberations.

Indeed, specific instructions to jurors may have an effect upon the outcome. They may constrain jurors from arranging their deliberations around the particular evidence they have at hand. This is why our guidebook does not tell jurors anything about how to organize their deliberations. Instead, our guidebook instructs jurors about non-controversial aspects of court proceedings – *i.e.*, how the verdict is read, or what information

they may request from the court – and it only suggests various options for organizing discussion, selecting a presiding juror, and voting. A better informed jury is a better jury, but jurors should not be told how to deliberate. Our guidebook provides options for jurors to consider, but it does not rein in the choices jurors have about how to deliberate. As such, bias resulting from our deliberation guidebook appears highly unlikely.

Objection No. 3: Judges already provide instructions to jurors that are tailored to the case at hand. Providing extra information to jurors is redundant and a waste of time.

We have two responses to this objection. First, nothing in our guidebook should contradict judges' instructions. Our guidebook takes the average juror five minutes to read, so the actual activity of reading the guidebook seems unlikely to unduly lengthen deliberations; even were it to do so, lengthening deliberations so that evidence is considered more carefully can hardly be considered a bad thing. Our guidebook has been tested and commented upon by jurors and former jurors for readability and clarity. Many jurors complain about the technical language of judges' instructions. If judges are instructing jurors about the same matters that we consider in our guidebook, they should feel free to refer jurors to the guidebook and drop those sections from their standard instructions. Judges should view the guidebook as a starting point for their own instructions; in all trials there will be particular matters about which only the judge should instruct jurors and about which our guidebook is silent. The guidebook need not interfere with or reiterate judges' instructions.

Second, we include within our guidebook information that is traditionally covered by many judges' instructions and information that judges rarely discuss with jurors. Few judges, for instance, give jurors advice on how to begin deliberations, what procedure to follow in requesting assistance, or how the verdict is to be read. It may be that it never occurs to court personnel that jurors would be in doubt about such matters. The jurors in our focus groups and in our impact studies, however, did indicate that the guidebook can alleviate confusion about matters that are rarely addressed in judges' instructions to jurors.

A major benefit of this guidebook, however, is that it can be of use to jurors both during and after deliberations. Rarely are jurors allowed to bring the instructions from their case with them when they leave the courthouse. Our guidebook is meant to be kept by jurors, enabling them to reflect upon their jury service after they leave the courthouse. Jurors may review the guidebook's contents and reflect upon the quality of their own deliberations: were there alternate ways their deliberations could have been organized? Did they make the right choice in selecting a presiding juror? Would they have been within their rights to request additional help from the court? Could they have organized their voting differently? Helping jurors to ask such questions will lead, we argue, to a more informed populace – and hence a better qualified pool of potential jurors in the future.

Allowing jurors to keep our deliberation guidebook also serves as a convenient public relations tool for courts. Former jurors may show the guidebook to acquaintances when they are asked about jury service, and the guidebook may serve to allay the fears of others about jury service. Many of the jurors in our

focus groups reported being unaware of what to expect when they went into the deliberation room. For those who are fearful of jury service, our guidebook should be reassuring.

Finally, our guidebook also contains information about how jurors might reflect upon jury service and whether they may discuss their case after deliberations are completed. Many courts provide jurors with information about speaking with others once a case is completed, but some do not. Our guidebook should supplement such materials. Jurors should leave the courthouse confident in their comportment and satisfied with their jury experience.

The costs to our courts of confused or inadequately prepared juries are high. For the parties, they include nullification or incorrect verdicts. For the court, they include feelings of uncertainty or unhappiness on the part of jurors; citizens may leave the court with a feeling that their needs during deliberation were not met by the judge and by the court. Much work has gone into improving the jury system in recent years. It is time for courts to leave behind their timidity about seeking to improve the deliberation process as well. Our guidebook represents a first step – and, we would argue, a successful first step – towards improving the competence, confidence, and efficiency of deliberations. Our guidebook is by no means the last word on the subject. We encourage judges to try our guidebook in their courtrooms and to give us feedback on its impact.



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Time to Reflect:

When Should “Dangerous” Speech Lose its First Amendment Shield?

Carey Brian Meadors

Editor’s Note: This article was the winning entry in last year’s American Judges Association law student writing competition. Although it does not affect the author’s analysis, readers may be interested to know that the underlying lawsuit discussed in the article – *Rice v. Paladin Enterprises, Inc.* – was settled in May 1999 on the eve of trial for several million dollars. See Jean Hellwege, *Hit Man Case Settles*, Trial 114 (July 1999). The publisher, Paladin Press, issued a news release claiming that “it had no say in the insurance company’s decision” to settle, but that, for financial reasons, it “had to go along.” Paladin Press News Release, May 24, 1999 (visited August 8, 1999) <<http://www.paladin-press.com/settlement.html>>. Although Paladin asserted that it withdrew the *Hit Man* book at issue because the author had requested it more than a year before the settlement, *id.*, it was reported that one of the terms of the settlement was that the remaining 700 copies of the book be turned over to the plaintiffs. Hellwege, *supra* at 116. One writer has suggested that the Paladin settlement was “spurred in part” by the \$25 million jury verdict rendered May 7, 1999 against Warner Brothers, the producer of “*The Jenny Jones Show*,” an award that resulted from a lawsuit by the family of a gay man who was shot to death after a prearranged, surprise announcement during a show taping that he had a crush on another male guest. Stuart Taylor, Jr., “Ride-Alongs” Bring Bad News, New York Law Journal, June 1, 1999, at 2.

Courting danger, surrounded by political intrigue and always in the thick of the action, the gunrunner can shape the course of history. But how can the aspiring gunrunner keep from getting shot with his own merchandise or winding up in jail while plying his trade? To find out, a person need only send twenty dollars (plus shipping and handling) to the Paladin Press. In a few weeks she will receive Ragnar Benson’s book, *Gunrunning for Fun and Profit*, and learn “how to make connections, where to buy and sell weapons, . . . how to get paid and much more.” The Paladin Press also offers: *Drug Smuggling; How to Kill*; and *Be Your*

Own Undertaker; How To Dispose Of A Dead Body.¹

Welcome to the world of forbidden information. The Paladin Press publishes hundreds of volumes discussing self-defense, weapons, martial arts, and various ways of “beating the system.” Paladin’s books consistently trumpet the benefits of self-reliance and express disdain for government’s restrictions on individual liberty and, until recently, enjoyed the freedom to do so.²

However, just as cold war Russians were not allowed to view textbooks on Western economics or *Playboy* magazine, and present-day Chinese are punished for the distribution of economic information that “slanders or jeopardizes the national interests of China,”³ some book publishers face the very real possibility of effectively being censored. The censor is not in China or Russia — but is instead here, in the United States.

This article will demonstrate that the First Amendment protects publishers like the Paladin Press. Properly applied, the Supreme Court’s interpretation of the First Amendment in *Brandenburg v. Ohio*⁴ allows the law to punish violent mobs, yet prevents the targeting of unpopular ideas. This article also will demonstrate that when courts stray from *Brandenburg*’s principles, as the Fourth Circuit did in a case involving the Paladin Press, the result can be censorship. The Fourth Circuit’s decision will muzzle not just the Paladin Press, but also more important communications.

Part I of this article explores the historical application of the First Amendment and shows that despite the Amendment’s guarantee that “no law” shall abridge the freedom of speech, some types of speech have always been punishable. Part I also lists the very narrow (and necessarily so) categories of “punishable speech” and exposes the dangers of broadly allowing speech to be punished.

Part II introduces the seminal case of *Brandenburg v. Ohio*, which establishes a four-prong test for finding certain types of speech as “inciting,” and thus punishable. This part explores how other courts have built on the *Brandenburg* test and gives examples about how the *Brandenburg* test protects the ability

The author is grateful for the encouragement and assistance of his father, Carey W. Meadors, and Professor Kenneth Jost.

Footnotes

1. Paladin Press, Vol. 28, No. 1, Paladin Press, Publishers of the Action Library at 62, 74 (1998).
2. See Petition for Writ of Certiorari at 3, *Rice v. Paladin Enterprises,*

Inc., No. 97-1325, *cert. denied*, 523 U.S. 1074 (1998).

3. See Francis X. Clines, *Soviet Students Study The Art Of The Deal*, N.Y. TIMES, Nov. 11, 1990, at 4; *Russian Bare Sets First Appearance in Playboy’s Local-Language Edition*, WALL ST. J., Feb. 15, 1996, at A11; *What’s News*, WALL ST. J., Jan. 1, 1996, at A1.
4. 395 U.S. 444 (1969).

of the mass media to express unpopular ideas while simultaneously protecting citizens from rabble-rousers and angry mobs.

Part III introduces the recent “*Hit Man* case,” in which the Fourth Circuit allowed *Hit Man* book publisher Paladin Press to be liable for the actions of one of its 13,000 readers. Both the trial court’s decision in favor of and the appellate court’s decision against the publisher are analyzed and compared with present-day First Amendment and *Brandenburg* law.

In conclusion, Part IV reveals the errors in the appellate court’s decision to punish the book publisher and argues that the decision’s rationale poses a danger to the free expression of ideas.

I.

Despite the First Amendment’s language that “Congress shall make no law . . . abridging the freedom of speech, or of the press,”⁵ the nation’s founders did not believe that all speech should be protected. Thomas Jefferson would have preferred the free speech portion of the First Amendment to read, “The people shall not be deprived or abridged of their right to speak or write or otherwise publish anything but false facts affecting injuriously the life, property, or reputation of others or affecting the peace of the confederacy with foreign nations.”⁶

Courts agree. The First Amendment does not protect all utterances. In this country’s first 150 years, speech having the potential to “encourage vice, compel the virtuous to retire, destroy confidence, and confound the innocent with the guilty” could be checked.⁷ Obscenity, libel, and incitement were commonly lumped together since all were types of speech having a tendency to lead people to do ill.⁸

In today’s jurisprudence, the categories of speech excluded from First Amendment protection are more narrow and distinct. Various Supreme Court cases have held the First Amendment to “not protect obscene materials, child pornography, fighting words, incitement to imminent lawless activity, and purposefully-made or recklessly-made false statements of fact such as libel, defamation, or fraud.”⁹ In other words, speech is protected unless it falls into one of these categories.

In order to have truly free speech — to have discourse on

public issues that is “uninhibited, robust, and wide-open, and that . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”¹⁰ — these unprotected categories are necessarily narrow. When, in this country’s past, courts and legislatures did not narrowly define speech restrictions, the government exercised its ability to punish speech. The results of this ability are hardly surprising.

James Thompson Callender did not approve of John Adams’s performance as President. “The reign of Mr. Adams,” wrote Callender, “has been one continued tempest of malignant passions . . . Mr. Adams has laboured, and with melancholy success, to break up the bonds of social affection, and under the ruins of confidence and friendship, to extinguish the only gleam of happiness that glimmers through the dark and despicable farce of life.”¹¹ Alleging a violation of the Sedition Act of 1798, the District Attorney issued an indictment against Callender for “publish[ing] libel . . . with intent to bring [the President] into contempt and disrepute, and to excite the hatred of the good people of the United States towards him.”¹² After two hours of deliberation the jury returned a verdict of guilty, and the court sentenced Callender to nine months in jail and assessed a \$200 fine.¹³

The late nineteenth century also received its share of state censorship. Social purists, perceiving a threat to the goal of a morally cohesive community, persuaded Congress to enact the Comstock Act, which forbade “obscene, lewd, or lascivious book[s]. . . or any article or thing designed or intended for the prevention of conception.”¹⁴ The statute created the position of a special agent of the post office to enforce its provisions. The Postmaster General appointed Anthony Comstock — who had tirelessly lobbied for the law known by his name — to this position two days after the enactment of the law, which he held until death in 1915. Comstock seemed to have executed his duties well; in 1913 he claimed that his efforts had led to the destruction of 160 tons of obscene literature, and he boasted a conviction rate of 75 percent.¹⁵

After Dr. Edward Bond Foote sold his book, *Medical Common Sense*, to one of Comstock’s agents, the government convicted and heavily fined the doctor. The government prosecuted Dr. Foote, said Comstock, “not for sending a medical

5. U.S. Const. amend. I.

6. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON at 367, (Julian P. Boyd, ed., 1955).

7. See *People v. Croswell*, 3 Johns.Cas. 337, 353 (N.Y. 1804) (stating argument of Alexander Hamilton).

8. See e.g., 4 W. BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (T. Cooley 2d rev. ed. 1872) (justifying the post-publication punishment of speech with “bad sentiments, destructive to the ends of society”); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 38 (1997) (discussing the common law origins of the “bad tendency” test).

9. *Herceg v. Hustler Magazine, Inc.*, 815 F.2d 1017, 1020 (5th Cir.1987) (footnotes and citations omitted).

10. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

11. *United States v. Callender*, 25 F.Cas. 239, 239 (C.C.D.Va. 1800).

12. *Id.* at 245 (citing 1 Stat. 596-97 (1798)).

13. See *id.* at 258.

14. See Rabban, *supra* note 8, at 28. See also An Act For The Suppression Of Trade In, And Circulation Of, Obscene Literature and Articles of Immoral Use, ch. 258, § 2, 17 Stat. 599 (1873) (enactment repealed, provisions contained in Revised Title: 18 U.S.C. § 1461 (1998)). In interpreting versions of this law, courts have found “incitement to murder” by applying the same test used to find “obscenity.” See *Magon v. United States*, 248 F.201, 202-03 (9th Cir. 1918).

15. See Rabban, *supra* note 8, at 30.

work, but [for] advertisements of an infamous article — an *incentive to crime* to young girls and women.”¹⁶ Note that dirty pictures or lewd displays of sexual activity did not pique Comstock’s interest in *Medical Common Sense*. Specifically, Comstock objected to the book’s *information* about a contraceptive device. “The object of the statute,” the court held, “is. . . to prevent the mails of the United States from being the effectual aid of persons engaged in a nefarious business [and from] distribut[ing] their obscene wares. [The statute] exclude[s] from the mails every form of notice whereby the prohibited information is conveyed.”¹⁷ The Comstock Act had effectively made particular portions of medical knowledge illegal.

Charles T. Schenck, unlike Dr. Foote, did not seek to give “incentive to crime to young girls and women,” but instead targeted men who had been accepted for military service in the First World War.¹⁸ Schenck mailed over 15,000 leaflets to draftees, imploring them to “not submit to intimidation” and to “assert your opposition to the draft.”¹⁹ The Espionage Act of 1917 forbade any attempt to obstruct the draft, and the government prosecuted and convicted Schenck under this Act.²⁰ Justice Holmes, writing for the Court, saw the import of the leaflets. “Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of [the draft] out.”²¹

In dismissing Schenck’s First Amendment defense, Holmes coined what is perhaps the most famous phrase in the free speech debate. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not protect a man from an injunction against uttering words that may have all the effect of force.”²² Holmes justified the conviction by analogizing Schenck’s leafletting to a “clear and present danger.”²³ “It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured. . . .”²⁴

While the Court articulated a seemingly strict standard for

restricting speech — “clear and present danger,” “proximity and degree,” and “words that may have all the effect of force” — it did not apply its articulation to the facts in the case. At no point did the court link these standards to the distribution of propaganda to scattered and distant draftees. Indeed, the Court effectively admitted that Schenck’s leaflets had no adverse effect on the draft at all.²⁵

The Sedition Act, the Comstock Act, and the Espionage Act seem untenable today; citizens regularly write scurrilous statements about the President, promote birth control, and protest wars²⁶ — all without being prosecuted for “inciting” crime. If today’s courts properly followed the landmark Supreme Court case *Brandenburg v. Ohio*,²⁷ one could look back on these instances and dismiss them as outdated jurisprudence created by the reigning emotion of the day.

II.

Clarence Brandenburg telephoned a Cincinnati television station reporter and invited him to a Ku Klux Klan rally to be held on a farm. Klansmen assisted the reporters and cameramen in filming the events. One film showed twelve hooded figures, some with guns, gathered around a large burning cross. Phrases such as “dirty nigger,” “bury the nigger,” and “send the Jews back to Israel” could be heard on the film. Another film featured Klan leader Brandenburg, decked out in his Klan regalia, making a speech.²⁸

This is an organizers’ meeting. We have had quite a few members here today which are — we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio *Dispatch*, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.

We are marching on Congress July the Fourth, four hundred thousand strong. From there we are

16. ANTHONY COMSTOCK, *FRAUDS EXPOSED* 427 (revised ed. 1969) (emphasis added).

17. *United States v. Foote*, 25 F.Cas. 1140, 1141 (S.D.N.Y. 1876). The court refused to recite the alleged obscenity in both the indictment and opinion in order to “prevent[] the proceedings from being the vehicle of spreading obscenity before the public.” *Id.*

18. See *Schenck v. United States*, 249 U.S. 47, 50-51 (1919).

19. *Id.*

20. *Id.* at 48-49.

21. *Id.* at 51.

22. *Id.* at 5.

23. *Id.*

24. *Id.*

25. See *id.* (“It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability . . . might be enforced . . . [But] we perceive no ground for saying that success alone

warrants making the act a crime. Indeed that case might be said to dispose of the present contention if the precedent covers all media conclusively.” (citations omitted)).

26. See, e.g., Mike R. Staup, Letter to the Editor, *Scandal-ridden Clinton*, DAYTON DLY. NEWS, Feb. 20, 1998, at 19A (stating that Clinton is “a disingenuous, immoral, prevaricator”); Gary Rotstein, *Teen Birth Rates Fall; Health Officials Say the Nation Is Realizing the Successes of Programs Focusing on Education, Abstinence, and Contraception*, PITT. POST-GAZETTE, May 1, 1998, at A1 (discussing organizations that advise women about methods of birth control); Debra Lynn Vial, *Teaneck Marchers Say Bombing Iraq Will Hurt Innocents*, THE (NORTHERN N.J.) RECORD, Feb. 22, 1998, at A3 (reporting on activists engaging in rallies, protests, hunger strikes, and distributing anti-war leaflets).

27. 395 U.S. 444 (1969).

28. See *id.* at 445-46.

dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.²⁹

After the rally, the television station broadcast portions of these films on the local station and on the national network.³⁰

The State of Ohio prosecuted Brandenburg under the Ohio criminal syndicalism statute for “advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.”³¹ The trial court sentenced Brandenburg to one to ten years of imprisonment and fined him \$1000.³² The Ohio Court of Appeals and the Ohio Supreme Court dismissed Brandenburg’s appeal. The United States Supreme Court agreed to hear the case and reversed the conviction.³³

The *Brandenburg* decision was a break from the Court’s earlier “incitement” jurisprudence. Previous Supreme Court cases upheld the notion that advocating illegality “involves such danger to the security of the State that the State may outlaw it.”³⁴ In fact, Holmes relied on this type of reasoning in *Schenck*, as did the courts enforcing the Sedition Act and the Comstock Act.³⁵ *Brandenburg*, however, articulates a different rule: The First Amendment will not allow the government “to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁶ The Court repeated the principle that “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”³⁷

Justice Douglas’s concurrence (joined by Justice Black) sheds light on *Brandenburg*’s new incitement principle. The concurring opinion disparages the Espionage Act cases that applied the malleable “clear and present danger” test. That test, Douglas wrote, could easily be “manipulated to crush what Brandeis called ‘[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions’ by argument and discourse.”³⁸ Douglas observed

that “[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.”³⁹

Douglas would prosecute speech only where the “speech is brigaded with action,” such as the classic example of shouting fire in a crowded theater.⁴⁰ There should be no line drawn between advocacy of abstract ideas and advocacy of action.⁴¹ In short, Douglas’s views emphasize the requirement that punishable speech must be enmeshed with the action.

A close look at *Brandenburg* reveals four prongs to the very narrow restriction it places on finding “inciting” speech. First, to be punishable, speech must be *directed to* producing or inciting lawless action.⁴² Second, the lawless action the speech is directed to must be *imminent*.⁴³ Third, the lawless action must be *likely to result* from the speech.⁴⁴ Fourth, the speech in question must steel the group to action, or, as Douglas phrased it, the *speech and lawless action must be inseparable*.⁴⁵ The *Brandenburg* test is the same in both civil liability and criminal cases.⁴⁶ Courts interpreting *Brandenburg* have fleshed out these four prongs.

The “directed to” portion of the *Brandenburg* test requires particular people to be targeted and a particular action to be called for as well. In *Hess v. Indiana*,⁴⁷ the events leading to Hess’s conviction began with an anti-war demonstration on the campus of Indiana University.⁴⁸ During the demonstration approximately 100 to 150 demonstrators moved onto a public street and blocked traffic.⁴⁹ After the protestors ignored the sheriff’s instructions to clear the street, the sheriff and his deputies began walking up the street to move the protestors onto the curb.⁵⁰ As the sheriff walked by Hess (who stood on the curb, not the street),⁵¹ Hess said loudly, “We’ll take the fucking street later.”⁵² The sheriff arrested Hess and charged him with disorderly conduct.⁵³

The Indiana Supreme Court upheld the conviction⁵⁴ since Hess, by his statement, “intended to incite further lawless action on the part of the crowd in the vicinity of [Hess] and was likely to produce such action.”⁵⁵ The United States Supreme Court reversed.⁵⁶ Hess neither directed his statement “to any person or group of persons,”⁵⁷ nor did he direct

29. *Id.* at 446.

30. *See id.* at 445.

31. *Id.* at 444-45 (alteration in original) (quoting Ohio Rev. Code Ann. § 2923.13 (repealed 1971)).

32. *See id.* at 455.

33. *See id.* at 445.

34. *Id.* at 447 (citing *Whitney v. California*, 274 U.S. 357 (1927)).

35. *See supra*, Part I.

36. *See Brandenburg* at 447.

37. *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

38. *Id.* at 452 (Douglas, J. concurring).

39. *Id.* (quoting *Gitlow v. People of the State of New York*, 268 U.S. 652, 673 (1925) (Holmes, J. dissenting)).

40. *See id.* at 456 (Douglas, J., concurring).

41. *See id.* at 457 (Douglas, J. concurring).

42. *See id.* at 447.

43. *See id.*

44. *See id.*

45. *See id.* at 456-57 (Douglas, J. concurring).

46. *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (1987) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) and *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973)).

47. 414 U.S. 105 (1973).

48. *See id.* at 106.

49. *See id.*

50. *See id.*

51. *See id.*

52. *Id.* at 107.

53. *See id.* at 105.

54. *See id.* at 106.

55. *Id.* at 108.

56. *See id.* at 109.

57. *Id.* at 108.

it to any specific action,⁵⁸ and thus his statement could not be incitement.⁵⁹ Hess's utterance had not met all the requirements of *Brandenburg*.

The second prong, imminence, has a temporal quality. An action is imminent only if it is "about to occur."⁶⁰ The Hess court, in addition to finding no "directed to" component in his statement, also found no "imminence" component. "At worst, [Hess's statement] amounted to nothing more than advocacy of illegal action at some indefinite future time."⁶¹ Since Hess did not advocate immediate action, he could not have been "inciting."

Another Supreme Court case affirms this rationale even when illegal action does take place. In *NAACP v. Claiborne Hardware Company*,⁶² Charles Evers had delivered several emotionally charged speeches to the black citizens of Mississippi in 1966.⁶³ Evers urged his listeners to unify, to support and respect one another, and to exercise their political and economic power to boycott white store owners.⁶⁴ Evers used strong, emotional language in his pleas.⁶⁵ The speeches propelled several of the listeners to action.⁶⁶ In two cases, boycotters fired shots into a house; in a third, a person hurled a brick through a windshield; in a fourth, a young boycott participant purposely trampled a woman's flower garden.⁶⁷

Evers could not be punished for the results of his speech, the Court held, because too much time had lapsed from Evers's importuning to the acts themselves. "[T]he acts of violence . . . occurred weeks or months after the . . . speech."⁶⁸ Other courts have whittled down the requisite time delay further. A wait of just one day between the utterance and the act will remove the "imminent" or "immediate" quality of the speech, and thus afford it First Amendment protection. "Immediately" means within a period which does not give time for reflection. . . [which] this court assumes. . . to mean at maximum a twenty-four hour period."⁶⁹

The third prong of *Brandenburg* — that the speech must be "likely to result" in lawless action — is one of the more revolutionary portions of the decision. *United States v. Schenck* (the anti-war leaflet case) would have failed on this prong since Schenck's pamphleteering had no real effect.⁷⁰

On the other hand, some tax protestors have gained no relief from this third prong. The Fourth Circuit affirmed Marc

Kelley's criminal conviction of conspiring to defraud the federal government for urging his audience to "file false [federal income tax] returns with every expectation that the advice would be heeded."⁷¹ Had his audience ignored his advice, Kelley likely would not have been convicted.

Apart from its "likelihood" analysis, the *Kelley* court's application of the *Brandenburg* prongs is disingenuous. The court admits that Kelley "did not take his pen in his hand to complete the forms,"⁷² but instead only advised and instructed his listeners to commit illegal acts.⁷³ Kelley's crime, then, arises only from his speech. According to the *Kelley* court, "the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law."⁷⁴ Inexplicably, *Kelley* cites this holding to *Brandenburg v. Ohio*. Of course, *Brandenburg* says no such thing. *Brandenburg* held the Ohio criminal syndicalism statute to be unconstitutional because it punished advocacy of "the necessity, or propriety of crime, violence, or unlawful methods of terrorism."⁷⁵ *Brandenburg* not only allowed the advocacy of illegality, it overruled cases that conflicted with this principle.⁷⁶ Indeed, the Supreme Court had, in deciding *NAACP v. Claiborne* just three years prior to *Kelley*, reaffirmed this principle. "[M]ere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment."⁷⁷ *Kelley* cites *Brandenburg* as authority for the very proposition that *Brandenburg* itself overruled and with which *NAACP v. Claiborne* conflicts. As this article discusses, the *Kelley* case is not an isolated instance of the Fourth Circuit's disregard for *Brandenburg v. Ohio*.⁷⁸

The fourth and final prong of *Brandenburg* requires that the inciting speech steel a group to action, or be inseparable from the action.⁷⁹ *Herceg v. Hustler Magazine, Inc.*,⁸⁰ relying on John Stuart Mill, explains this prong well. "An opinion that corn-dealers are starvers of the poor, or that private property is robbery ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer."⁸¹

The verb "steel" seemingly has a malleable definition. "To steel" is "to make hard, strong, or obdurate; to strengthen."⁸² Does "steel," then, merely mean encourage, or does it require

58. See *id.* at 109.

59. See *id.* at 108.

60. AMERICAN HERITAGE COLLEGE DICTIONARY 679 (3d ed. 1997).

61. See Hess, 414 U.S. at 108.

62. 458 U.S. 886 (1982).

63. See *id.* at 900.

64. See *id.* at 928.

65. See *id.*

66. See *id.* at 900-01.

67. See *id.* at 904.

68. *Id.* at 928.

69. See *National Organization for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087 (N.D. Ill. 1995).

70. See *supra* note 25 and accompanying text.

71. See *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir.1985).

72. *Id.*

73. See *id.*

74. *Id.* (emphasis added).

75. *Brandenburg v. Ohio*, 395 U.S. at 449 n.3.

76. See *id.* at 449 (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

77. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 927.

78. See *infra* text accompanying notes 137-41.

79. See *Brandenburg*, 395 U.S. at 456-57 (Douglas, J., concurring).

80. 814 F.2d 107 (5th Cir. 1987).

81. *Id.* at 1023 (quoting John Stuart Mill).

82. AMERICAN HERITAGE COLLEGE DICTIONARY 1329 (3rd ed. 1997).

Justice Douglas's "speech brigaded with action?"⁸³ Historically, "steel" has been used to indicate the creation of a strong resolve or firm conviction.⁸⁴ This belies the interpretation of "steel" to be mere encouragement. The *Brandenburg* "steel to action" requirement needs to be defined in the context of "imminent" lawless action. When considering that punishable incitement must be "imminent" — that is, "about to occur" — and simultaneously must be "steeling to action" — that is, creating a strong resolve to act — one realizes that "steeling to action" is best read as Justice Douglas's "speech brigaded with action."

A close reading of *NAACP v. Claiborne* reveals that the Supreme Court later adopted this view. In that case, the Court would have come to a different conclusion had the boycotters committed their violence concurrently with the Evers's speech. "Words that create an immediate panic are not entitled to constitutional protection . . . If [Evers's] language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of the unlawful conduct."⁸⁵ The Court noted that "[i]n this case, however. . . the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech."⁸⁶ Since Evers's speech is separable from the action, it is protected by the First Amendment.

Courts frequently overlap *Brandenburg's* four prongs when deciding lawsuits involving the media. One such suit arose from the August 1981 issue of *Hustler* magazine, which contained, among other things, an article entitled "Orgasm of Death."⁸⁷ The article discussed the practice of masturbating while simultaneously "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm ("autoerotic asphyxiation").⁸⁸ The article found its way into the hands of Troy, a fourteen-year-old adolescent.⁸⁹ Troy apparently attempted autoerotic asphyxiation, but wound up killing himself. A friend found him hanging by the neck, naked and dead, with the "Orgasm of Death" article at his feet.⁹⁰ Even though Troy's mother won a jury verdict against the publisher,⁹¹ the appellate court threw it out.⁹² Citing *Brandenburg*, the court noted that the article failed to

direct a specific action; had not specifically targeted Troy; and did not imminently cause his death.⁹³ The court noted that it did not need to reach the abstract question of "[w]hether written material might ever be found to create culpable incitement."⁹⁴

Television shows receive the same protection under *Brandenburg*. In *Zamora v. Columbia Broadcasting System*,⁹⁵ the (incarcerated) plaintiff claimed that television violence had incited the crime that led to his imprisonment.⁹⁶ Since no particular offending television program could be identified, the court dismissed the suit.⁹⁷ In addition, the court noted that CBS did not direct its programs at one particular viewer, and that no crowd had been incited.⁹⁸

Similarly, the Ozzy Osbourne song "Suicide Solution" found First Amendment protection.⁹⁹ The parents of a teenager who had committed suicide while listening to the tune brought suit, alleging that the song had driven their child to take his own life.¹⁰⁰ Since its lyrics did not "command anyone to do any concrete action at any specific time" and Osbourne's performance was "physically and temporally remote from the listener who only subsequently hears such performance by means of an electronic recording,"¹⁰¹ the court dismissed the lawsuit.¹⁰²

These decisions demonstrate how extraordinarily valuable the *Brandenburg* test is since, properly applied, no mass media production will be punished for some third party's response to its message. *Brandenburg's* restrictions are so narrow that it is difficult to imagine how newspapers, television programs, radio shows, or other expressions could ever legally "incite" the population.¹⁰³ Thus, proper application of *Brandenburg* promotes freedom of the press and prevents the sort of censorship that occurred under the Sedition Act, the Comstock Act, and the Espionage Act, while simultaneously punishing shouters of "Fire!" in a crowded theater.

III.

Some courts are straying from *Brandenburg*, and are thus paving the way to media censorship à la Anthony Comstock. The latest legal deviation begins in Maryland, with paid assas-

83. *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring).

84. See OXFORD ENGLISH DICTIONARY 896 (28th ed. 1989).

85. *Claiborne*, 458 U.S. at 928.

86. *Id.*

87. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987).

88. See *id.* at 1018-19.

89. See *id.* at 1019.

90. See *id.*

91. See *id.*

92. See *id.* at 1025.

93. See *id.* at 1023.

94. See *id.*

95. 480 F. Supp. 199 (S.D. Fla. 1979).

96. See *id.* at 200.

97. See *id.* at 204, 207.

98. See *id.* at 204.

99. *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 3d 187 (Cal. App. 1988).

100. See *id.* at 189-91.

101. *Id.* at 194 n.10.

102. See *id.*

103. *But see Weirum v. RKO General, Inc.*, 539 P.2d 36 (1975). The *Weirum* case is an oddball in incitement jurisprudence. The case arose from a radio station's summer contest which involved broadcasting "repeated importuning" to local teens. The contest required the youth to race from one place to another in search of a cash prize. A car wreck resulted from the station's encouragements. Applying a tort negligence standard to the station's actions, the Court held the radio station liable for damages. At no point did the *Weirum* court cite *Brandenburg*. Other courts have refused to apply a negligence or reckless standard to media broadcasters. See, e.g., *DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d 1036, 1041 (R.I. 1982); *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979).

sin James Perry. Perry, a contract killer hired by Lawrence Horn, murdered Horn's eight-year-old quadriplegic son Trevor, Horn's ex-wife, and Trevor's nurse. Perry shot the wife and nurse; Trevor suffocated after his breathing tube was detached. In soliciting, preparing for, and committing these murders, Perry meticulously followed the instructions contained in *Hit Man: A Technical Manual for Independent Contractors*, published by the Paladin Press.¹⁰⁴ The police solved the crimes and Perry was convicted, receiving three death sentences for the triple homicide and another life sentence for conspiracy to commit murder.¹⁰⁵

The executors of the victims' estates brought suit against Paladin Press, alleging that *Hit Man* assisted in the murders.¹⁰⁶ The plaintiffs, relying on criminal "aiding and abetting" cases in tax and drug prosecutions, asked the trial court to apply the same principle to the *Hit Man* book. Since *Hit Man* assisted Perry, the plaintiffs argued, the publisher of *Hit Man* should be liable as an aider and abettor to Perry's actions.¹⁰⁷

The trial court rightly rejected this argument and dismissed the case.¹⁰⁸ "Here, Defendants are not being charged with the crime of aiding and abetting. Rather, Plaintiffs are asking the Court to allow the Defendants to be subjected to civil liability for murder, based on a theory of civil aiding and abetting. . ." ¹⁰⁹ Recognizing that the First Amendment allowed only a few narrow categories of unprotected speech (and that civil liability for "aiding and abetting" was not such a category),¹¹⁰ the trial court analyzed the case under the *Brandenburg* incitement standard.¹¹¹ Citing the progeny of *Brandenburg* — *Herceg v. Hustler*, *NAACP v. Claiborne*, *Zamora v. CBS* — the trial court observed that "the instant case is very similar to these cases involving violent movies and television programs that were alleged to have caused physical injury or death."¹¹²

The trial court reasoned that, as in *Herceg*, *NAACP v. Claiborne*, and *Zamora*, *Hit Man's* publisher did not command Perry to *immediately* murder his victims.¹¹³ The book did not say "go out and commit murder now," but instead said, effectively, "if you want to be a hit man, here is what you need to do."¹¹⁴ The book has also proven to be unlikely to incite lawless action.¹¹⁵ Only one person out of 13,000 purchasers — Perry — is known to have actually used the book to commit a murder.¹¹⁶ Lastly, and the trial court did not reach this issue, it stands to reason that no book can satisfy the temporal requirement demanded by *Brandenburg* and subsequent cases. Perry had plenty of "time for reflection," as articulated by cases interpreting "imminent."¹¹⁷

The trial court's decision to give First Amendment protection to *Hit Man* did not break new ground. To be unprotected, speech must fall into one of the unprotected categories — obscenity, child pornography, fighting words, incitement, libel, slander, or fraud.¹¹⁸ Time and again, "how-to" instructions have been found not to fall into these categories and have been granted First Amendment protection in civil cases.¹¹⁹

What is new law is the opinion issued by the Fourth Circuit Court of Appeals reversing the trial court's decision, thus removing *Hit Man* from First Amendment protection.¹²⁰ The Fourth Circuit discussed *Brandenburg* but did not hold it applicable in the case of *Hit Man*.¹²¹ Instead, the Court relied on criminal cases punishing the aiding and abetting of crime. Specifically, the court likened the *Hit Man* case to *United States v. Barnett* and *United States v. Freeman*.¹²²

In *Barnett*, the court upheld the defendant's conviction for aiding and abetting (18 U.S.C. § 2) since he had published and distributed instructions on how to make illegal drugs. "The fact that [Barnett's] counsel and encouragement is not

104. See *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 239 (4th Cir.1997), cert. denied 523 U.S.1074 (1998).

105. See *Perry v. State*, 686 A.2d 274, 276 (Md. 1996).

106. See *Rice v. Paladin Enterprises, Inc.*, 940 F. Supp. 836, 838 (D. Md. 1996).

107. See *id.* at 841.

108. See *id.* at 849.

109. *Id.* at 843.

110. See *id.*

111. See *id.* at 844.

112. *Id.* at 846.

113. See *id.* at 848.

114. *Id.* at 838.

115. See *id.* at 848.

116. See *id.*

117. See *supra* text accompanying notes 69-70.

118. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987).

119. See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir.1987) (holding that article on how to perform autoerotic asphyxiation was protected by First Amendment); *High Ol' Times, Inc. v. Busbee*, 456 F.Supp. 1035, 1038 (N.D. Ga. 1978) *aff'd*, 621 F.2d 141 (5th Cir.1980) (holding state statute proscribing distribution of materials on how to smuggle and

manufacture drugs was unconstitutional); *Smith v. Linn*, 563 A.2d 123 (1989), *aff'd*, 526 Pa. 447, 587 A.2d 309 (1991) (holding book on how to diet protected by First Amendment). Criminal convictions for providing detailed instructions have had different results. See *United States v. Buttorf*, 572 F.2d 619 (8th Cir.1978) (holding First Amendment did not protect criminal aiding and abetting tax evasion); *United States v. Barnett*, 667 F.2d 835 (9th Cir.1982) (holding First Amendment did not protect criminal aiding and abetting drug manufacturing).

120. See *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997). It is interesting to note that while the Fourth Circuit quoted at length from *Hit Man*, the court "felt it necessary to omit portions of these few illustrative passages in order to minimize the danger to the public from their repetition herein." *Id.* at 239 n.1. This is eerily similar to the court that presided over the Comstock Act conviction in *United States v. Foote*, which wrote: "[I]t is neither necessary nor proper to pollute the record by a detailed description of obscene matter. . . to a certain extent, it prevents the proceedings from being a vehicle of spreading obscenity before the public." 25 F. Cas. at 1140.

121. See *Rice*, 128 F.2d at 243.

122. See *id.* at 244-45 (citing *United States v. Barnett*, 667 F.2d 835 (9th Cir.1982), and *United States v. Freeman*, 761 F.2d 549 (9th Cir.1985)).

acted upon for long periods of time does not break the actual connection between the commission of the crime and the advice to commit it.”¹²³ At no point did the *Barnett* case address *Brandenburg*.

The *Freeman* case (a tax evasion aiding and abetting case), argued the Fourth Circuit, stood for the proposition that the First Amendment protects only those comments directed at the unfairness of the tax laws generally, but not where Freeman’s speech “directly assisted in the preparation of . . . false tax returns.”¹²⁴ For additional support, the Fourth Circuit quoted, at length, its opinion in *United States v. Kelley* (another aiding and abetting tax evasion case), which interpreted *Brandenburg* to say that the advocacy of illegality was *not* protected.¹²⁵

Having established that speech that serves to “aid and abet” was not protected, the Fourth Circuit then addressed the issue of Paladin Press’s *intent* to aid and abet. The Fourth Circuit focused on the parties’ stipulations and the observation that “*Hit Man* is not generally available or sold to the public from the bookshelves of local bookstores, but, rather, is obtainable as a practical matter only by catalogue.”¹²⁶ The opinion discussed the “requirements of this process” of ordering by catalogue and concluded that a jury could “find that *Hit Man* is not at all distributed to the general public and that, instead, it is available only to a limited, self-selected group of people interested in learning from and being trained by a self-described professional killer . . .”¹²⁷

Finally, the Fourth Circuit observed that Maryland law allows action in tort against people who have aided and abetted a tortfeasor.¹²⁸ Having satisfied the elements of aiding and abetting and having found the requisite intent, the Fourth Circuit concluded that the *Hit Man* book did not warrant constitutional protection and thus, Paladin may be sued for the damage the book caused.¹²⁹

The Fourth Circuit’s stance is not wholly unsympathetic. For the limited purpose of the court’s First Amendment decision, Paladin had stipulated that it knew that some of the 13,000 readers of *Hit Man* would, indeed, use the information to commit a murder.¹³⁰ That stipulation likely cost it the case, since it removed itself from the realm of violent movies and books and into the world of aiding and abetting criminal activity.¹³¹

Additionally, it is extremely difficult to imagine any socially beneficial use for *Hit Man*. It advocates (or, as the Fourth Circuit insisted, “instructs”) murder and mayhem. If the government has the right to prevent any action, certainly it must be allowed to stop contract killing. Because *Hit Man* embod-

ies “not so much as a hint of the theoretical advocacy of principles divorced from action that is the hallmark of protected speech,”¹³² it hardly cries out for constitutional protection.

This kind of argument has many followers. One of the dissenting judges in *Herceg v. Hustler Magazine*,¹³³ the autoerotic asphyxiation case, Judge Edith Jones, equated the allegedly inciting “Orgasm of Death” article to be “exactly the opposite of[] the transmission of ideas,” and thus beyond the scope of First Amendment protection.¹³⁴ Obscenity is banned on the same rationale.¹³⁵ Judge Jones observed, “Despite the grand flourishes of rhetoric in many first amendment decisions concerning the sanctity of ‘dangerous’ ideas, no federal court has held that death is a legitimate price to pay for freedom of speech.”¹³⁶

IV.

The Fourth Circuit’s argument, alluring as it may be, is flawed. First, the Fourth Circuit has misstated and misapplied the law. Second, the Fourth Circuit is establishing a speech policy that is reminiscent of the era when the government, via the Sedition Act, the Comstock Act and the Espionage Act, effectively silenced unpopular ideas. With respect to the rule of law and the robust exchange of ideas and information, there is a real loss if the Paladin Press is held responsible for its actions.

Recall that in interpreting *Brandenburg*, the Fourth Circuit’s opinion in the *Hit Man* case relied on the tax evasion case *United States v. Kelley*.¹³⁷ As this article has demonstrated, *Kelley* flatly contradicts both *Brandenburg v. Ohio* and *NAACP v. Claiborne*.¹³⁸ Contrary to the Fourth Circuit’s assertion, the Supreme Court actually does provide some protection for the advocacy of illegal activity.

The Fourth Circuit’s reliance on *Barnett* and *Freeman* also was ill-placed. First, at no point did *Barnett* consider the *Brandenburg* case. If it had, it would have noted that the documents sold by Barnett — “Synthesis of PCP/Angel Dust,” “Synthetic Routes to Amphetamines,” and “Chemicals Used in Drug Synthesis”¹³⁹ — perhaps could be construed as a part of a drug crime since they may have met the “likelihood” prong of *Brandenburg* — a prong that *Hit Man* cannot satisfy. In this manner, *Barnett* is distinguishable from *Hit Man*. On the other hand, *Barnett* may well be wrongly decided, since the defendant’s only criminal activity was supplying information. It is rather difficult to distinguish, in principle, between the advocacy of illegality in *Hess v. Indiana* (advocating disorderly conduct at some indefinite future time) and *Barnett*.

The Fourth Circuit’s discussion of *Freeman* can be kindly

123. See *Barnett*, 667 F.2d at 841.

124. See *Rice*, 128 F.3d at 245 (interpreting *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985)).

125. See *Rice*, 128 F.3d at 246.

126. See *id.* at 254-55.

127. *Id.* at 255.

128. See *id.* at 251.

129. See *id.* at 267.

130. See *id.* at 241-42 n.2.

131. See *id.* at 266-67.

132. See *id.* at 267.

133. 814 F.2d 1017 (5th Cir. 1987).

134. *Id.* at 1026 (Jones, J., concurring and dissenting).

135. See *Miller v. California*, 413 U.S. 15 (1973).

136. *Herceg*, 814 F.2d at 1025-26. (Jones, J., concurring and dissenting).

137. See *supra* text accompanying note 125.

138. See *supra* text accompanying notes 72-78.

139. See *United States v. Barnett*, 667 F.2d 835, 839 (9th Cir. 1982).

described as misleading. *Freeman*, contrary to the intimations of the Fourth Circuit's opinion, actually reversed twelve of the fourteen counts against the defendant. The *Freeman* court threw out the twelve convictions since "the jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur."¹⁴⁰ The court then cited *Brandenburg v. Ohio*. *Freeman* focused on *Brandenburg*, and each of *Brandenburg's* prongs. The Fourth Circuit, though, ignored that portion of the *Freeman* opinion and instead relied on the two non-reversed convictions in which the defendant directly participated in the preparation of false tax returns. But in the *Hit Man* case, no one alleged that Paladin "directly participated" in Perry's murder; instead the plaintiffs contend that the book "assisted" Perry.¹⁴¹

It is regrettable that, to get the real meaning of *Brandenburg*, *Kelley*, *Barnett*, and *Freeman*, one has to read the cases directly and cannot rely on the Fourth Circuit's spin on the law. However, these are not the opinion's only instances of shading the law and facts. When analyzing the text of *Hit Man*, the opinion cites favorably several Espionage Act cases, including *Schenck v. United States*.¹⁴² The Fourth Circuit failed to mention that these cases were predicated on the fact that the nation was at war.¹⁴³ Finally, the allegation that selling by catalog indicates Paladin's requisite intent since catalog sales create a "self-selected group of people" is absurd. In 1993, more than 8,000 catalog houses issued 12 billion books in the U.S. for total sales of \$55 billion.¹⁴⁴ That statistic, combined with the 13,000 owners of *Hit Man*, flies in the face of the Fourth Circuit's assertion of a "limited" group.¹⁴⁵

Expanding the limited categories of non-protected speech is poor public policy. While *Herceg v. Hustler Magazine's* Judge Jones would like to see those categories broadened,¹⁴⁶ many more publications than just *Hit Man* and *Hustler* would fall prey to punishment. Among other publications giving "assistance" to murderers have been:

Contract Killer (the story of hit man Donald Frankos, which provides technical details of successful contract murders); *Mafia Enforcer* (same, with respect to hit man Cecil Kirby); *Perfect Crimes* (twelve chapters, each a blueprint for a nearly flawless crime); *The Squad* (purportedly a factual account of the methods employed by an illegal hit team within the FBI); and *Wiseguy* (the subject of the film *Goodfellas*) . . . The United States Military publishes instruc-

tional manuals that describe assassination techniques for use against civilians, books that have been broadly republished for informational purposes.¹⁴⁷

Herceg's Judge Jones dismisses these kinds of "slippery slope" arguments. "[T]he 'slippery slope' argument that if *Hustler* is held liable here, *Ladies Home Journal* or the publisher of an article on hang-gliding will next be a casualty of philistine justice simply proves too much: This case is not a difficult one in which to vindicate Troy's loss of life."¹⁴⁸

Judge Jones is not persuasive. Expanding the categories would take Ozzy Osbourne and possibly other songwriters to task for the suicides of teens they never met. The Comstock Era proves the slippery slope argument. Anthony Comstock banned not just obscenity, but also cumulative medical knowledge.¹⁴⁹

Free government demands a free press. The arguments that sweeping First Amendment protections run counter to good order would not have passed muster with the founding fathers. As Jefferson wrote, "[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."¹⁵⁰

A proper application of *Brandenburg* will provide a remedy against angry mobs and violent ringleaders. It will also provide a safe haven for the press from censors and from those who, on their judgment alone, would determine what a person can or cannot safely publish. Courts should maintain First Amendment rights for not just worthy causes, such as the civil rights movement in *NAACP v. Claiborne*, but should also maintain those rights for disfavored parties like the Paladin Press. In order to avoid the less desirable consequences of the Sedition, Comstock and Espionage eras, a federal court ought to strictly apply the excellent test crafted by *Brandenburg v. Ohio*.



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140. See *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

141. *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

142. See *id.* at 249 (citing *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919)).

143. See, e.g., *Schenck*, 249 U.S. at 52.

144. See Gregory A. Patterson, *Retailing: U.S. Catalogers Test International Waters*, WALL ST. J., April 19, 1994, at B1.

145. The Fourth Circuit neglected to mention that Paladin Press books do not necessarily have to be purchased by catalog. They

can also be purchased on the Internet at <http://www.paladinpress.com/>.

146. See *supra* text accompanying notes 134-36.

147. Petition for Writ of Certiorari at 7-8, *Rice v. Paladin Enterprises, Inc.*, No. 97-1325, cert. denied, 523 U.S. 1074 (1998).

148. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1026 (Jones, J., concurring and dissenting).

149. See *supra* text accompanying notes 14 - 17.

150. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787) in 11 THE PAPERS OF THOMAS JEFFERSON 49 (Julian P. Boyd, et al. eds., 1955).

The Resource Page: Focus on Legal Writing



BOOKS

Bryan A. Garner, *A Dictionary of Modern Legal Usage*. Oxford Univ. Press, 2d ed. 1995 (\$65.00). 951 pp.

Like a normal dictionary, its entries are alphabetical, but this dictionary covers questions of usage, not definitions. From standard questions like when to use "which" and "that" or "affect" and "effect" to legal-specific issues like the proper use of the word "precedent" or whether you can use the word "conclusory" even though it's not in the dictionary, Bryan Garner supplies good advice that's clearly written. He also provides good sources, like the citation to *Greenwood v. Wierdsma*, 741 P.2d 1079, 1086 n.3 (Wyo. 1987) ("[W]e like the word *conclusory*, and we are distressed by its omission from the English language. We now proclaim that henceforth *conclusory* is appropriately used in the opinions of this court.").

Merriam-Webster's *Dictionary of English Usage*. Merriam-Webster, Inc., rep. ed. 1993 (\$21.95). 992 pp.

For those of you who like to hear opposing viewpoints, this is a great

SUGGESTIONS FOR THE RESOURCE PAGE

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

English usage book. It draws from dozens of other usage authorities, telling you what's generally accepted and, when appropriate, why some disagree with the generally accepted position.

The American Heritage Book of English Usage: A Practical and Authoritative Guide to Contemporary English. Houghton Mifflin Co. (paperback), 1996 (\$14.00). 290 pp.

Inexpensive but accurate advice is available in this book, which reports in many cases on the opinions of the 158-member American Heritage Usage Panel. Where else can you learn that most of the panel members believe that only women can be called *vivacious*, while only men can be considered *debonair*? Or, in a usage question that may have legal implications, that only 43 percent of the usage panel believe that *wanton* can apply either to men or women. Usage panel members at the time of publication included Justice Antonin Scalia, Carl Sagan, Senator Daniel Patrick Moynihan, James Michener and Garrison Keillor.

Bryan A. Garner, *The Elements of Legal Style*. Oxford Univ. Press, 1991 (\$27.50). 236 pp.

This guide is specifically modeled after the best known general writing style manual, Strunk & White's *The Elements of Style*. It includes much good advice, with a majority of the book devoted to advice specific to legal writing.

Black's Law Dictionary, pocket edition (Bryan A. Garner ed.). West Publishing Co. (paperback), 1996 (\$24.75). 701 pp.

In many ways, this version of *Black's Law Dictionary* is superior to its 1,657-page, hardback cousin. Its definitions are clear, concise and up-to-date. The book is a good one to keep handy at your desk.



USEFUL INTERNET SITES

HyperGrammar

<http://www.uottawa.ca/academic/arts/writcent/hypergrammar/>

Don't want to plunk down \$65 for Bryan Garner's legal usage dictionary? Well, the Web won't give you the same depth of coverage, but you can find the basic rules here at HyperGrammar or at Jack Lynch's site listed below. If you can't remember when it's proper to use a colon or the answer to other basic punctuation questions, this site is a good place to go for the answer.

Jack Lynch's Guide to Grammar and Style

<http://andromeda.rutgers.edu/~jlynch/Writing/>

English professor Jack Lynch of Rutgers University has put together this highly readable site containing basic grammar rules and lots of style suggestions. It is one of the best grammar sites available on the Web.

Strunk's Elements of Style

<http://www.columbia.edu/acis/bartleby/strunk/>

Columbia University has put William Strunk's original, 1918 style manual on the Web, complete with hypertext links. His statements of the rules remain authoritative.

Peter Martin's Legal Citations

<http://www.law.cornell.edu/citation/citation.table.html>

Professor Peter Martin of Cornell Law School has a Web site devoted to helping you figure out the correct citation form according to the current edition of *The Bluebook: A Uniform System of Citation*. You can easily find sample citations to cases, statutes, books and articles.

Court Review thanks Professor Joseph Kimble for his helpful suggestions as we prepared our list of legal writing resources.



The Resource Page



NEW PUBLICATIONS

Rod Smolla, *Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book*. Crown Publishing, 1999 (\$23). 288 pp.

If you find the article on the *Hit Man* case at page 46 of this issue of interest, this just published book will give you all of the details of the case. Author Rod Smolla is a law professor at the University of Richmond whose prior book, *Free Speech in an Open Society*, is a strong voice for free speech and an open culture. Smolla was one of the plaintiff's lawyers who took on Paladin Press in the *Hit Man* case. This book provides insight to the handling of the case and a scholar's discussion of the First Amendment issues as well.

National Center for State Courts, *Report on Trends in the State Courts: 1998-1999 Edition* (Anne Skove ed.). National Center for State Courts, 1999 (free). 65 pp.

If you look at the title of this publication and think *boring*, you're wrong. This is one of the most readable discussions of current trends in the courts that you can find anywhere. There are 18 contributors, all experts in their areas, who have written mini-summaries of the state of things in areas of current developments. Coverage includes a five-page summary of drug courts; a discussion of racial profiling and the courts; an overview of the issues involved in the admission of digital photographic evidence; a summary of New Jersey's pilot ombudsman programs; description of several leading judicial outreach programs; and a comparison of kiosks versus Web sites for public access to court information. The report can be obtained free by calling the NCSC Information Service at

1-800-616-6164 or you can download it from the Web at <http://www.ncsc.dni.us/is/product2.htm>.

National Center for State Courts, *Examining the Work of State Courts, 1997: A National Perspective from the Court Statistics Project* (Brian J. Ostrum & Neil B. Kauder eds.). National Center for State Courts, 1999 (\$25). 108 pp.

Produced by the NCSC's Court Statistics Project, this report thoroughly analyzes caseload data state by state and nationwide. Among the findings: civil and criminal case filings are growing about three times faster than U.S. population; tort lawsuits fell by nine percent in the past decade; and the Welfare Reform Act of 1996 has led to a decline in the number of paternity and interstate support filings. A ten-page section discusses the use of weighted caseload analysis to review judicial workloads. A companion book, *State Caseload Statistics, 1997*, can be ordered at a combined price for the two of \$35.

Robert G. Boatright & Beth Murphy, *Behind Closed Doors: A Resource Manual to Improve Jury Deliberations*. American Judicature Society, 1999 (\$25). 51 pp.

This is the full manual describing the new *AJS Guide for Jury Deliberations*, described in an article by the same authors on page 38 of this issue.

American Judicature Society, *Enhancing the Jury System: A Guidebook for Jury Reform*. American Judicature Society, 1999 (\$25). 48 pp.

This monograph provides an overview of the jury reform efforts in the past few years in Arizona, New York, California, Colorado and the District of Columbia; it describes the work and makeup of each jurisdiction's jury reform commission and tells which of the recommended reforms have been adopted. The

authors also give advice on how to start a similar process in your jurisdiction.

Robert G. Boatright, *Improving Citizen Response to Jury Summonses: A Report with Recommendations*. American Judicature Society, 1999 (\$25). 144 pp.

The one thing we know when large numbers of summoned jurors fail to report is that the jury ultimately chosen is not going to be fully representative of the community. This report carefully examines the available options for dealing with the problem.



INTERNET SITES OF INTEREST

National Center for State Courts
<http://www.ncsc.dni.us>

We've mentioned the NCSC site before and we'll probably mention it again, but if you haven't visited it for awhile, take a look. It can take a bit of work to navigate through it, but you're quite likely to find things of interest. Listed below are some of the parts you might be interested in.

- For a list of Web search engines, go to http://www.ncsc.dni.us/s_tools.htm.
- The NCSC Information Service makes available its judicial salary surveys, court statistics, and reports issued for the past several years at <http://www.ncsc.dni.us/is/product2.htm>.
- To see how your court's Web site compares to others – or to look at others before you set up your own, go to <http://www.ncsc.dni.us/COURT/SITES/Courts.htm> for a list of sites throughout the U.S.

FOCUS ON LEGAL WRITING

The Resource Page focuses on resources that can help you with legal writing on page 55.