Chicago Daily Law Bulletin®

Volume 163, No. 1 Serving Chicago's legal community for 161 years

As times change, the law proves to be a living, breathing thing

So let's start the new year with The Big Question: "What is law?"

Frederick Schauer, a professor at the University of Virginia School of Law, has written a readable essay on this very abstruse concept.

It is called "Law's Boundaries," and it will appear later this year in the Harvard Law Review (free download available at ssrn.com/abstract=2871723).

Schauer begins by noting that when the "case method" began to be used by Christopher Langdell at Harvard Law School in 1871, many students complained that cases were not really "law." They assumed that real law was found in the great treatises such as Coke's and Blackstone's. Case decisions were merely results of the application of law.

Langdell disagreed. He saw the study of law as a science. Case decisions for him were the data from which the "legal scientist" constructed the legal principles that constitute what we actually regard as "law." Law is something that judges make, not merely something they apply.

Other legal commentators began to expand the concept of "law" in other directions. Oliver Wendell Holmes insisted, "The life of the law has not been logic; it has been experience."

Roscoe Pound urged judges and lawyers to adopt a "sociological jurisprudence" by making use of empirical and social science data.

Pound differentiated between what he called "the law on the books" from "the law in action." (Perhaps the most famous example of this kind of work was Louis Brandeis' 1908 brief in *Muller v. Oregon*, which defended the 10-hour workday for women through reference to scientific studies, rather than traditional discussion of "the law.")

Turning to the present, Schauer notes the enduring issue of what material is proper in making a legal argument. As an example, Schauer points to Justice Stephen G. Breyer's use of a book titled "How to Buy and Care for Tires" in a case involving tire failure analysis. The book was not referred to by the parties; Breyer found it on his own.

Schauer also refers to Judge Richard A. Posner's admitted use of internet research in deciding cases when the 7th U.S. Circuit Court of Appeals judge does not believe the parties have provided the court with all relevant information.

Looking to the future, Schauer predicts that we should expect "the law" to include even more expansive domains as the explosion of information continues.

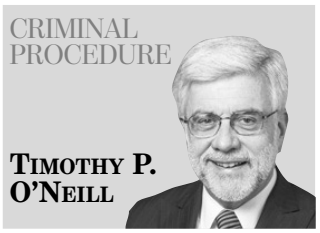
The Schauer article is an excellent introduction to a recent opinion written by 3rd U.S. Circuit Court of Appeals Chief Judge Theodore A. McKee.

James Dennis has been on death row in Pennsylvania since 1992. Relying on a number of grounds in a 9-4 en banc decision, the 3rd Circuit granted his petition for a writ of habeas corpus and remanded the case for a new trial. *Dennis v Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (2016).

McKee's concurrence focuses solely on the issue of eyewitness identification. The dissenters would have affirmed the conviction based on the testimony of three eyewitnesses. Yet McKee begins by noting that "nearly half a century of research teaches that eyewitness testimony can be one of the greatest causes of erroneous convictions."

In 33 pages (and 218 footnotes), McKee skillfully presents a scholarly overview of statistics and behavioral studies which should convince even the most skeptical reader that everything you know about eyewitness testimony is probably wrong. It stands as a modern-day example of Pound's concept of "sociological jurisprudence."

He begins by citing the Innocence Project's statistics showing that eyewitness identifications have been a factor in 75 percent of the wrongful convictions that have been overturned by DNA evidence during the last quarter century.



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Moreover, in 38 percent of the Innocence Project's misidentification cases, the same innocent person was misidentified by multiple eyewitnesses. No wonder that the International Association of Chiefs of Police concluded that of all investigative procedures employed by the police in criminal cases, "probably none is less reliable than the eyewitness identification."

McKee reviews the scientific research that has been conducted on human visual perception and cognition. It has found that certain variables can negatively affect brain functions dealing with facial memory. There are two basic types of variables: system variables and estimator variables.

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System variables are the procedures used by police to elicit eyewitness identifications. These include the types of procedures — lineup, photo array and so forth — to solicit the identification; comments by police to witnesses before the procedure; and comments by police during the procedure.

McKee noted several system variable problems in *Dennis*. For example, lineups and photo arrays should be conducted in a "blind" manner, that is, the officers conducting them should not know who the suspect is. This guarantees that the officers cannot give unconscious cues to the witness.

This was never done in *Dennis*.

Also, it is important for police to tell a witness that his assailant may not be in the lineup or array; this protects against a witness simply selecting the picture that "looks most like" his assailant. That was also not done.

Further, multiple viewings arranged by the police may corrupt a memory. A witness may become more certain of a person's guilt based on a prior viewing rather than the actual memory. Here, the jury was not informed that the eyewitnesses were given three viewings of the petitioner.

The other type of variable is the "estimator variable." This comprises the conditions that surround the formation of the memory; these are obviously beyond the control of the criminal justice system.

The stress of the incident, the lighting conditions and whether the witness may have focused on a weapon involved all can negatively affect memory formation. The jury was not instructed on the significance of these factors.

McKee thus voted to grant the habeas petition.

Among McKee's recommendations for the future, two stand out. One is to allow expert witness testimony to enlighten jurors on these issues. Last year the Illinois Supreme Court largely agreed with this in *People v. Lerma*, 47 N.E.3d 985 (2016).

His other recommendation is to restructure jury instructions to allow juries to more intelligently evaluate the problems inherent in eyewitness identifications. In Illinois we would do well to re-examine our practice by revisiting Illinois Pattern Instruction Criminal 3.14.

McKee deserves credit for writing an opinion in the best tradition of Pound and Brandeis. It is a must-read.