
**SECTION ON CIVIL RIGHTS
NEWSLETTER*
December 2008**

TABLE OF CONTENTS

OFFICERS.....	1
MESSAGE FROM THE CHAIR.....	2
SUPREME COURT NEWS.....	3
NOTABLE PENDING CASES	7
NOTABLE GRANTS OF CERTIORARI.....	8
UPCOMING EVENTS.....	9
PANELISTS' PROFILES.....	9

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** The Section on Civil Rights Newsletter is a forum for the exchange of points of view. Opinions expressed here do not necessarily represent the position of the Association of American Law Schools.*

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MESSAGE FROM THE CHAIR

Jack Beermann

Boston University School of Law

I hope this newsletter finds everyone happy and healthy and looking forward to the coming year. Our section has what I hope everyone will find an interesting panel planned for the AALS Annual Meeting in San Diego. The subject of the panel is Remedies for Exonerated Prisoners, which has been a pretty hot topic in recent years due primarily to the large number of exonerations based on advances in DNA testing. There is also the notable judgment under the Federal Tort Claims Act of a federal court in Boston of more than \$100 million against the Federal government in a case in which four men spent approximately 30 years in state prison for a murder that federal officials knew they had not committed.

Our meeting is scheduled for Friday, January 9, at 1:30 pm in San Diego Salon C, North Tower/Lobby Level, San Diego Marriott Hotel & Marina. The panelists are: Michael Avery, Suffolk, Adele Bernhard, Pace, Fred Lawrence, George Washington, and Heather Weigand, founder of *FocuzUp*, a nonprofit agency focused on creating restorative justice programming in impoverished communities. You can learn more about Heather's organization by looking at <http://www.focuzup.com/Home.html>. A complete description of the panel is available on the AALS website. The Boston University Public Interest Law Journal will publish the papers. Our business meeting will take place after the program, at 3p.m. on Friday, January 9, 2009.

This year promises to be an interesting year in the field of Civil Rights Litigation. The Second Circuit has granted en banc review in *Arar v. Ashcroft*, in which a dual Syrian Canadian citizen sued over his detention and removal to Syria, where he was allegedly tortured. The Second Circuit panel ruled that he could not bring a Bivens action. As this newsletter will elaborate, the Supreme Court has several interesting cases on its docket this year, including important cases about immunities, the requirement of personal involvement for civil rights liability and the relationship between § 1983 and Title IX in the education setting. We will also be watching the new administration to see if civil rights policy of the Justice Department will undergo any significant change.

I wish everyone all the best for the new year, and I hope to see many of our section members at the panel in San Diego.

Jack Beermann

SUPREME COURT NEWS (NOTABLE DECISIONS)

***Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008).**

Question Presented: This case presented a recurring question of proof in employment discrimination cases: Whether a district court must admit “me, too” evidence - testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Tenth Circuit panel majority held that a court commits reversible error by excluding “me, too” evidence. This decision conflicts with those of other circuits. Specifically, four circuits have held “me, too” evidence wholly irrelevant. Five circuits have held that “me, too” evidence may be excluded under Federal Rule of Evidence 403. Certiorari was granted to resolve the conflict between the circuit courts of appeals on this important question of law.

Holding: The United States Supreme Court, Justice Thomas, for a unanimous Court, held that, on appeal from district court's decision to exclude, in Age Discrimination in Employment Act (ADEA) action brought by individual employee, evidence of allegedly discriminatory acts of other supervisors not involved in actions of which plaintiff-employee complained, Court of Appeals should not have assumed that district court had improperly applied per se rule against admission of such evidence, and should not have engaged in its own balancing of probative value of such evidence against its possible prejudicial effect, but should have remanded to district court for clarification and to perform this balancing in first instance, explicitly and on record.

***Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008).**

Question Presented: Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue the Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

Holding: The United States Supreme Court, Justice Kennedy, held that (1) in addition to information required by implementing regulations, i.e., allegation of age discrimination and name of charged party, if filing was to be deemed a “charge” under the ADEA, it had to be reasonably construed as a request for the EEOC to take remedial action to protect employee's rights or otherwise settle dispute between employer and employee; abrogating *Casavantes v. California State Univ., Sacramento*, 732 F.2d 1441 (1984); and (2) EEOC's determination that “Intake Questionnaire” and detailed affidavit was a “charge” was reasonable exercise of its authority to apply its own regulations and procedures in course of routine administration of ADEA.

Justice Thomas filed a dissenting opinion, in which Justice Scalia joined.

Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008).

Question Presented: Whether the federal-sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a, prohibits retaliation against employees who complain of age discrimination.

Holding: The United States Supreme Court, Justice Alito, held that a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA.

Chief Justice Roberts filed a dissenting opinion, which was joined in part by Justices Scalia and Thomas. Justice Thomas also filed a dissenting opinion, which was joined by Justice Scalia.

CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008).

Question Presented: Is a race retaliation claim cognizable under 42 U.S.C. § 1981?

Holding : The United States Supreme Court, Justice Breyer, held that: (1) section 1981 encompasses retaliation claims; (2) cognizable § 1981 retaliation claims include claim by individual who suffers retaliation for having tried to help another; and (3) cognizable § 1981 retaliation claims include employment-related ones.

Justice Thomas filed a dissenting opinion, which was joined by Justice Scalia.

Engquist v. Oregon Dept. of Agriculture, 128 S. Ct. 2146 (2008).

The Ninth Circuit vacated the jury's verdict in favor of Petitioner Engquist and created a divisive split with the seven Circuits that apply the "rational basis" analysis to public employees who claim their termination was a result of unequal treatment, even if that treatment did not result from the employee's membership in a suspect class.

Questions Presented:

1. Whether traditional equal protection "rational basis" analysis under *Village of Willowbrook v. Olech*, 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000) applies to public employers who intentionally treat similarly situated employees differently with no rational bases for arbitrary, vindictive or malicious reasons? The Ninth Circuit also upheld the validity of a state statute that took 60 percent of Engquist's punitive damage award for a public use, aligning the Ninth Circuit with the six state supreme courts that have held such statutes constitutional, and furthering the split with the two state supreme courts that have held such statutes violate the Takings Clause.
2. Whether a state "split recovery" punitive damages statute violates the Takings Clause of the United States Constitution?

Holding (limited to question 1): The United States Supreme Court, Chief Justice Roberts, held that class-of-one equal protection claim is not cognizable in context of public employment.

Justice Stevens filed a dissenting opinion, which was joined by Justices Souter and Ginsburg.

Kentucky Retirement Sys. v. EEOC, 128 S. Ct. 2361 (2008).

The Petition involved a public employee retirement plan that includes normal and disability retirement benefits. A member who is eligible for normal retirement benefits based on attained age plus a minimum service requirement, or based on service alone, is not eligible for disability retirement benefits. Because age may be a factor in determining eligibility for normal retirement, it is an indirect factor in determining eligibility for disability retirement. Moreover, the calculation of disability retirement benefits is based upon actual years of service plus the number of years remaining before the member reaches retirement age or eligibility based on years of service alone; age may thereby be an indirect factor in determining the amount of disability retirement benefits.

Question Presented: Whether any use of age as a factor in a retirement plan is “arbitrary” and thus renders the plan facially discriminatory in violation of the Age Discrimination in Employment Act?

Holding: The United States Supreme Court, Justice Breyer, held that state's disability retirement plan did not violate ADEA, based on its non-age-related purpose and other factors.

Justice Kennedy filed a dissenting opinion, which was joined by Justices Scalia, Ginsburg, and Alito.

Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (2008).

The Age Discrimination in Employment Act (ADEA) prohibits employment practices that have an unjustified disparate impact on older workers, *Smith v. City of Jackson, Miss.*, 544 U.S. 22(2005), but also provides that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f) (1).

Questions Presented:

1. Whether an employee alleging disparate impact under the ADEA bears the burden of persuasion on the "reasonable factors other than age" defense, as held by the Second Circuit in this case in conflict with the decisions of other circuits and a regulation of the Equal Employment Opportunity Commission.
2. Whether respondents' practice of conferring broad discretionary authority upon individual managers to decide which employees to lay off during a reduction in force constituted a "reasonable factor other than age" as a matter of law.

Holding (limited to question 1): The Supreme Court, Justice Souter, held that exemption from liability for disparate impact claim under ADEA for employer actions based on reasonable factors other than age (RFOA) creates an affirmative defense, on which employer bears both the burden of production and burden of persuasion.

Justice Scalia filed a concurring opinion. Justice Thomas filed an opinion concurring in part and dissenting in part. Justice Breyer took no part in the consideration or decision of the case

Crawford, et al. v. Marion County Election Bd., et al., 128 S.Ct. 1610 (2008).

Question Presented: Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

Holding: The United States Supreme Court, Justice Stevens, held that state's interests identified as justifications for Indiana statute requiring government issued photo identification to vote were sufficiently weighty to justify any limitation imposed on voters.

Justice Scalia filed a concurring opinion, in which Justices Thomas and Alito joined. Justice Souter filed a dissenting opinion, in which Justice Ginsburg joined. Justice Breyer filed a dissenting opinion.

Rothery v. Gillespie County, 128 S. Ct. 2578 (2008).

The Sixth Amendment right to counsel attaches when “adversary judicial proceedings have been initiated.” *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). This Court has held that when a defendant is arrested, “arraigned on [an arrest] warrant before a judge,” and “committed by the court to confinement,” “[t]here can be no doubt . . . that judicial proceedings ha[ve] been initiated.” *Brewer v. Williams*, 430 U.S. 387, 399 (1977). In this case, petitioner was arrested and brought before a magistrate judge who informed petitioner of the accusation against him, found probable cause that he had committed the offense based on a police officer’s sworn affidavit, and committed him to jail pending trial or the posting of bail.

Question Presented: Whether the Fifth Circuit correctly held—in a decision that conflicts with those of other federal courts of appeals and state courts of last resort—that adversary judicial proceedings nevertheless had not commenced, and petitioner’s Sixth Amendment rights had not attached, because no prosecutor was involved in petitioner’s arrest or appearance before the magistrate.

Holding : The Supreme Court, Justice Souter, held that: (1) criminal defendant's initial appearance before magistrate judge, where he learns charge against him and his liberty is subject to restriction, marks initiation of adversary proceedings that trigger attachment of Sixth Amendment right to counsel; and (2) attachment of right to counsel does not also require that public prosecutor, as distinct from police officer, be aware of that initial proceeding or involved in its conduct.

Chief Justice Roberts filed a concurring opinion, in which Justice Scalia joined. Justice Alito also filed a concurring opinion, in which Chief Justice Roberts and Justice Scalia joined. Justice Thomas filed a dissenting opinion.

***Riley v. Kennedy et al.*, 128 S. Ct. 1970 (2008).**

The Section 5 of the Voting Rights Act of 1965 litigation involved two decisions of the Supreme Court of Alabama, *Stokes v. Noonan*, 534 So. 2d 237 (Ala. 1988), and *Riley v. Kennedy*, 928 So. 2d 1013 (Ala. 2005). Those decisions concern the manner of filling vacancies on the Mobile County Commission and are based on valid, race-neutral, generally applicable principles of law. The three-judge district court held that both decisions required preclearance to be enforceable. The State submitted the decisions for preclearance, and the Attorney General of the United States interposed an objection. The district court then entered a remedy order vacating a gubernatorial appointment that had relied on these State court decisions to fill a vacancy that had arisen.

Questions Presented:

1. Whether the decision of a covered jurisdiction's highest court that a precleared State law is unconstitutional and, thereby, invalid as a matter of State law is a change that affects voting that must be precleared before it can be enforced.
2. Whether the preclearance of a trial court's ruling that affects voting while that ruling is on appeal and subject to possible reversal establishes a baseline such that the reversal of that decision is a change that must be precleared before it may be enforced.

Holding : The Supreme Court, Justice Ginsburg, held that local law which applied only to one county in Alabama, and which purported to allow mid-term vacancies in county commission to be filled by special election rather than by appointment by governor, was never "in force or effect," as required for this local law to constitute "baseline" and to require, when the Alabama Supreme Court struck this law down upon challenge instituted in response to first special election held pursuant thereto and reinstated the gubernatorial appointment process previously in effect, that this appointment process be precleared pursuant to provision of the Voting Rights Act.

Justice Stevens filed a dissenting opinion, in which Justice Souter joined.

NOTABLE PENDING CASES (QUESTIONS PRESENTED)

***Pearson v. Callahan*, 494 F.3d 891 (10th Cir. 2007).**

Questions Presented:

1. Several lower courts have recognized a "consent once removed" exception to the Fourth Amendment warrant requirement. Does this exception authorize police officers to enter a home without a warrant immediately after an undercover informant buys drugs inside (as the Sixth and Seventh Circuits have held), or does the warrantless entry in such circumstances violate the Fourth Amendment (as the Tenth Circuit held below)?
2. Did the Tenth Circuit properly deny qualified immunity when the only decisions directly on point had all upheld similar warrantless entries? In addition to the Questions Presented, by the petition, the parties were directed to brief and argue the following question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001) should be overruled?"

Argued October 14, 2008.

Fitzgerald, Lisa et vir v. Barnstable School Comm., et al., 504 F3d 165 (1st Cir. 2007).

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), has been interpreted to provide an implied private right of action for sex discrimination by federally funded educational institutions. Section 1983 of Title 42 of the United States Code creates an express remedy for violations of the U.S. Constitution. Three courts of appeals have held that Title IX's implied remedy does not foreclose Section 1983 claims to enforce the Constitution's prohibition against invidious sex discrimination. In contrast, four circuits, including the First Circuit in this case, have held that Title IX's implied right of action is the exclusive remedy for sex discrimination by federally funded educational institutions.

Question Presented: Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.
Argued December 2, 2008.

Haywood, Keith v. Drown, Curtis, et al., 9 N.Y.3d 481 (N.Y. 2007).

Question Presented: Whether a state's withdrawal of jurisdiction over certain damages claims against state corrections employees — from state courts of general jurisdiction — may be constitutionally applied to exclude federal claims under Section 1983, especially when, as here, the state legislature withdrew jurisdiction because it concluded that permitting such lawsuits is bad policy?

Argued December 3, 2008.

NOTABLE GRANTS OF CERTIORARI (QUESTIONS PRESENTED)

Rivera v. Illinois, 879 N.E.2d 876 (Ill. 2007).

Question Presented: Whether the erroneous denial of a criminal defendant's peremptory challenge that resulted in the challenged juror being seated requires automatic reversal of a conviction because it undermines the trial structure for preserving the constitutional right to due process and an impartial jury.

District Attorney's Office for the Third Judicial District, et al. v. Osborne, 521 F.3d 1118 (9th Cir. 2008).

William Osborne was charged with kidnapping, sexual assault, and physical assault. He had the assistance of a competent lawyer who made a reasonable strategic decision to forgo independent DNA testing of the state's biological evidence. He was convicted after an error-free trial. Now, years later, Osborne has filed an action under 42 U.S.C. § 1983, seeking access to the biological evidence for purposes of new DNA testing.

Questions Presented:

1. May Osborne use § 1983 as a discovery device for obtaining post-conviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material?

2. Does Osborne have a right under the Fourteenth Amendment's Due Process Clause to obtain post-conviction access to the state's biological evidence when the claim he intends to assert - a freestanding claim of innocence - is not legally cognizable?

***Gross v. FBL Financial Services, Inc.*, 526 F.3d 356 (8th Cir. 2008).**

Question Presented: Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?

***al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008).**

Question Presented: Does the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorize and if so does the Constitution allow-the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?

UPCOMING EVENTS

- ▶ The 2009 Annual Meeting of the Association of American Law Schools will take place in San Diego, California, from January 6 through January 10, 2009.

- ▶ The Section on Civil Rights Program is scheduled for Friday, January 9, 2009, from 1:30 p.m. to 3:15 p.m. in San Diego Salon C, North Tower/Lobby Level of the San Diego Marriott Hotel & Marina. This year's topic is "Remedies for Exonerated Prisoners," and the program will be published in the *Public Interest Law Journal*.

- ▶ The section's business meeting will immediately follow the program.

PANELISTS' PROFILES

Professor Michael A. Avery (*speaker*) is a Professor of Law at Suffolk University Law School. His practice experience is extensive and includes time with the ACLU Foundation as Special Staff Counsel. At Suffolk Law, he teaches Constitutional Law, Individual Rights, Evidence, and Scientific Evidence. During the program, Professor Avery will discuss the difficulties and limitations of malicious prosecution as a constitutional cause of action for wrongfully convicted persons. He will review other constitutional claims that hold greater promise for such victims, including claims based on the failure to disclose exculpatory evidence, manufactured evidence, and suggestive eyewitness identifications.

Professor Adele Bernhard (*speaker*) is Associate Professor of Law Pace University School of Law. She directs the Criminal Justice Clinic and the Pace Post-Conviction Project. She began practicing law as a public defender with the Legal Aid Society in the South Bronx and has concentrated on criminal law for most of her career. During the program, Professor Bernhard will review legislation designed to compensate the exonerated, touch on why that legislation is necessary, review the current landscape, and speculate about the causes of congressional reticence.

Professor Frederick M. Lawrence (*speaker*) is Dean and Robert Kramer Research Professor of Law at George Washington University School of Law. Before his teaching career, he was an assistant U.S. attorney for the southern district of New York, where he became chief of the office's civil rights unit. He has taught courses on civil procedure, criminal law, civil rights enforcement, and civil rights crimes. During the program, Dean Lawrence will build upon Judge Pierre Leval's celebrated article on no-fault libel suits to discuss law's expressive role in restoring the reputations of the exonerated.

Heather Weigand (*speaker*) is the founder of *FocuzUp*, a non-profit agency that engages in diverse partnerships to create restorative justice programming in impoverished communities. *FocuzUp* uses innovative approaches to address re-entry policy and leadership development for the formerly incarcerated. Heather has served as *The Life After Exoneration Program's* Director of Client Services and began modeling policy and service provision in 2005 for DNA exonerated individuals. Currently, her efforts are directed toward educating policy makers and the public on the aftermath of wrongful conviction – while developing policy avenues for criminal justice reform and restorative justice practices.

Jack M. Beermann (*moderator*) is Harry Elwood Warren Scholar, Professor of Law at Boston University. He teaches Administrative Law, Civil Rights Litigation, Introduction to American Law, and Local Government Law. Professor Beermann will moderate the program.