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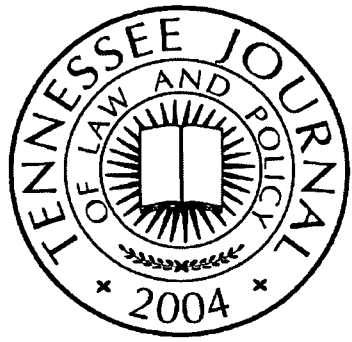

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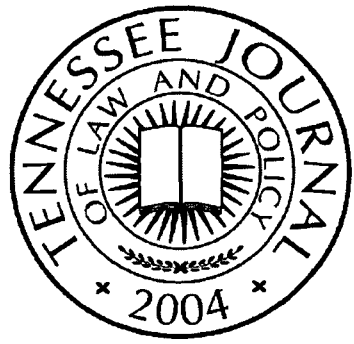

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ON THE ADMISSIBILITY OF EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION: A LEGAL AND SCIENTIFIC EVALUATION

Tanja Rapus Benton,[*] *Stephanie A. McDonnell*,[+] *Judge Neil Thomas*,[±] *David F. Ross*,[*] *& Nicholas Honerkamp*[+ ±]

I. Introduction

This article is a state-by-state and circuit-by-circuit analysis of judicial decisions on the admissibility of expert testimony on eyewitness identification problems. The basis for the admission of expert testimony is analyzed, and then the rationale used in those decisions is considered with regard to the current data from psychological studies. This

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article also addresses the apparent disregard of social science research by the judicial system.

II. Issues Raised in *Daubert* and *McDaniel*

Under both the Federal Rules of Evidence and the Tennessee Rules of Evidence, a witness generally may not give "testimony in the form of opinions."[1] An exception is contained, however, in Rule 702 of the Federal version, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."[2] The Tennessee version of that rule is the same with the exception of one addition; the word "substantially" precedes the word "assist."[3] Additionally, Rule 703 of the Tennessee Rules of Evidence provides that expert testimony shall be disallowed where "the underlying facts or data indicate lack of trustworthiness,"[4] a requirement not contained in Rule 703 of the Federal Rules.[5]

Under Rule 104(a), whether a witness will be permitted to testify as an expert is first a determination for the court.[6] Both Rules 104 and 702 are silent concerning how that determination is to be made.[7] Under the Federal Rules, the United States Supreme Court gave the necessary guidance to the trial court in *Daubert v. Merrell Dow Pharmaceuticals*.[8] The Tennessee Supreme Court

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[1] FED. R. EVID. 701(a); TENN. R. EVID. 701(a).
[2] FED. R. EVID. 702.
[3] TENN. R. EVID. 702.
[4] TENN. R. EVID. 703.
[5] FED. R. EVID. 703.
[6] FED. R. EVID. 104(a).
[7] FED. R. EVID. 104, 702.
[8] 509 U.S. 579 (1993).

provided similar assistance in *McDaniel v. CSX Transportation, Inc.*[9] Or did they?

In *Daubert,* the case went before the United States Supreme Court after the trial court granted summary judgment to the defendant. The trial court did so because the opinions expressed in the expert affidavits submitted by the plaintiffs did not "have general acceptance in the field to which it belongs"[10] under the test articulated in *United States v. Kilgus.*[11] The Court of Appeals affirmed, relying upon *Frye v. United States.*[12] After a granting certiorari, the United States Supreme Court reversed and established a new rule with respect to the admissibility of expert opinions. Holding that the *Frye* test was superseded by the Federal Rules of Evidence, the Supreme Court first examined Rule 402 to determine whether it required "general acceptance" and found that neither Rule 402 nor Rule 702 required such an analysis.[13] The Court held that the *Frye* test was a rigid requirement "at odds with the liberal thrust of the Federal Rules, and their general approach of relaxing the traditional barriers to opinion testimony."[14] In its analysis of the factors that must be applied to determine admissibility, the Court held that the subject of the expert's testimony must be scientific knowledge.[15] The Court used Webster's Third New International Dictionary to define what constituted

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[9] 955 S.W.2d 257 (Tenn. 1997).

[10] Daubert v. Merrell Dow Pharm., Inc., 727 F. Supp. 570, 572 (S.D. Cal. 1989).

[11] 571 F.2d 508 (9th Cir. 1978).

[12] 293 F. 1013 (1923).

[13] Rule 402 provides that all relevant evidence is admissible, and defines relevant evidence as that evidence which has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 402.

[14] *Daubert,* 509 U.S. at 588 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)) (internal quotation marks omitted).

[15] *Id.* at 590.

scientific knowledge. The Court emphasized that science is a process, and "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method."[16] The Court held that the use of scientific knowledge as the basis of expert opinion "establishes a standard of evidentiary reliability."[17] In a footnote to that statement, the Court found that "evidentiary reliability will be based upon scientific validity."[18]

The Court then examined the "assistance" language of Rule 702 and stated that requirement goes to relevance.[19] The Court returned to the requirement under Rule 702 that there should be "a valid scientific connection to the pertinent inquiry."[20]

Next, the Court turned to the factors that should be considered by the trial court in ruling on the admissibility of the expert's opinion. The preliminary assessment, which the trial court must use, is "whether the reasoning or methodology underlying the testimony is scientifically valid."[21] The Court expressed confidence that federal judges possess the capacity to make this assessment, an assumption that will be placed severely in doubt later in this article.

The first of four factors listed by the Court was whether the theory or technique can be and has been tested, also known as falsifiability.[22] Next, the Court listed peer review as a factor, though the decision then stated that in some cases "well-grounded but innovative theories will not

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[16] *Id.*
[17] *Id.*
[18] *Id.* at 591, n.9 (emphasis omitted).
[19] Interestingly, as will be discussed later, the citation given by the Court for this issue is *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), a case admitting expert testimony on eyewitness identification.
[20] *Daubert*, 509 U.S. at 592.
[21] *Id.* at 592-93.
[22] *Id.* at 593.

have been published."[23] Although the Court relied upon whether the theory has been published in a peer reviewed journal, it failed to define the factors under which a journal will be considered a peer review journal. The third factor identified by the Court was the known or potential rate of error, which the Court again failed to state how that determination is to be made.[24] Finally, the Court listed "general acceptance" as a factor, citing *Downing*,[25] but again giving no guidance on how to define this factor.[26] In its opinion, the Court stressed that the determination made by the trial court should focus on the methodology, not the conclusion.[27]

At the end of its decision, the Court made a significant comparison between science and law, the ramifications of which could be momentous. The Court stated, "There are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly."[28] This statement implies that law is not subject to perpetual revision, and, therefore, it implies that under stare decisis the law should change little, even though science may change dramatically.

This article will now address the assistance provided by the Tennessee Supreme Court in *McDaniel*.[29] Although the Tennessee Supreme Court has provided more guidance on this issue than the United States Supreme Court, certain critical issues remain, especially when considering cases decided after *Daubert*. One such issue is the preliminary issue of the role of the trial judge under

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[23] *Id.*
[24] *Id.* at 594.
[25] 753 F.2d at 1224.
[26] *Daubert*, 509 U.S. at 594.
[27] *Id.* at 595.
[28] *Id.* at 596-97.
[29] *McDaniel*, 955 S.W.2d at 257.

Rule 104. After *Daubert*, some suggest that the role of the trial judge is not to become expert enough in the science under consideration or to choose between conflicting scientific theories, but simply to keep an opinion in the form of pure speculation from the jury. On that issue, however, Tennessee is more restrictive as compared to the language in the Federal Rules of Evidence because of the language contained in Rules 702 and 703 of the Tennessee Rules of Evidence. Thus, Tennessee requires the following assessment by the trial court:

> The rules together [702 and 703] necessarily require a determination as to the scientific validity or reliability of the evidence. Simply put, unless the scientific evidence is valid, it will not substantially assist the trier of fact, nor will its underlying facts and data appear to be trustworthy, but there is no requirement in the rule that it be generally accepted.[30]

After making this statement, the court suggested that the trial court "need not weigh or choose between two legitimate but conflicting scientific views."[31] The Tennessee Supreme Court then held that "it is important to emphasize that the weight to be given to stated scientific theories, and the resolution of legitimate but competing scientific views, are matters appropriately entrusted to the trier of fact."[32]

Thus, if there are competing opinions which are admitted because the methodologies are correct, the jury must determine which conclusion is valid. The procedural fact pattern in *McDaniel* was similar to that in *Daubert*. In

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[30] *Id.* at 265.
[31] *Id.*
[32] *Id.*

McDaniel, the trial court held a hearing on the defendant's motion *in limine* to determine the admissibility of plaintiff's experts.[33] After the hearing, the trial court ruled that the evidence was admissible, but certified the issue to the Court of Appeals, which declined to take the interlocutory appeal.[34] Upon application, the Tennessee Supreme Court granted the appeal.[35] Although the court declined expressly to adopt *Daubert*, it gave a list of non-exclusive factors for a trial judge to consider which are almost identical to the factors in *Daubert*:

> A Tennessee trial court may consider in determining reliability: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.[36]

In adopting the foregoing list, the Tennessee Supreme Court declined to adopt a standard for an epidemiological study as a matter of law.[37] The defendant contended that on a scale of 1.0 to 4.0, where 4.0 shows a high correlation of causation between exposure and disease, the court should adopt a relative risk of greater than 2.0.[38] The court

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[33] *Id.* at 258.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 265.
[37] *Id.* at 258.
[38] *Id.* at 259, n.3.

declined.[39]

Finally, the Tennessee Supreme Court directed the issue back to the trial court, stating:

> We recognize that the burden placed on trial courts to analyze and to screen novel scientific evidence is a significant one. No framework exists that provides for simple and practical application in every case; the complexity and diversity of potential scientific evidence is simply too vast for the application of a single test . . .. Nonetheless, the preliminary questions must be addressed by the trial court, *see*, Tenn. R. Evid. 104, and they must be addressed within the framework of rules 702 and 703.[40]

Thus, the Tennessee Supreme Court, like the United States Supreme Court, expresses great confidence in the ability of trial judges, despite their lack of scientific training, to properly sort out conflicting scientific opinions (often at opposite ends of the spectrum) and make a decision on admissibility. Then, to compound matters, if the judge decides that the conflicting opinions are admissible, the jury, often with even less training, is asked to make a decision as to which applies, all because, according to the decisions discussed later in this review, rigorous cross examination and instructions by the court will help them sort it out.[41]

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[39] *Id.* at 260.

[40] *Id.*

[41] J.L. Devenport et al., *How Effective are the Cross-Examination and Expert Testimony Safeguards? Jurors' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 87 J. APPLIED PSYCHOL. 1042-1054 (2002).

III. Issues Raised in *State v. Coley*[42]

In 1996, defendant Eddie V. Coley sought to introduce testimony from Dr. Michael G. Johnson, an expert in the field of eyewitness identification in a Williamson County Circuit Court.[43] The proffered testimony included: information on the relationship between stress and memory for an event; cross-racial identification; the relationship between confidence and accuracy; the effect of time on remembering; and the suggestibility of the photographic lineup used in the case.[44] The State objected to the testimony on the ground that it was unnecessary to help the jury decide the issue of identification.[45] The trial court agreed and excluded the expert's testimony.[46] Coley was subsequently convicted of aggravated robbery and sentenced to twelve years in jail.[47] In 1998, the defendant appealed his conviction to the Court of Criminal Appeals, arguing that the trial court erred in excluding expert testimony regarding eyewitness identification.[48] Upon review, the court referred to its past statement in *State v. Ward*,[49] which stated that the "great weight of authority in this country is that the study of the reliability of eyewitness identification has not attained that degree of exactitude which would qualify it as a specific science."[50] Although the court recognized that this statement may no longer be true, it found no abuse of discretion in the trial court's refusal to admit the

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[42] 32 S.W.3d 831 (Tenn. 2000) [hereinafter *Coley*].
[43] *Id.* at 833.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 832-33.
[47] *Id.* at 833.
[48] State v. Coley, No. 01C01-9707-CC-00270, 1998 WL 712838, at *1 (Tenn. Crim. App. Oct. 13, 1998) [hereinafter *Coley Appeal*].
[49] 712 S.W.2d 485 (Tenn. Crim. App. 1986).
[50] *Id.* at 487.

testimony.[51] At this point, the court did not adopt a per se rule of exclusion of expert testimony regarding eyewitnesses, but instead, stated that the issue was one that should remain a matter for the trial court's discretion on a case-by-case basis.[52] In 2000, Coley renewed his request for permission to appeal from the Supreme Court of Tennessee.[53] This court, however, dealt a much harsher ruling on the issue, proclaiming that the testimony was per se inadmissible under Rule 702 of the Tennessee Rules of Evidence.[54] The Tennessee Supreme Court held that:

> Expert testimony regarding eyewitness identification arguably fails to satisfy the plain meaning of this language. Eyewitness testimony has no scientific or technical underpinnings which would be outside the common understanding of the jury; therefore, expert testimony is not necessary to help jurors "understand" the eyewitness's testimony. Moreover, expert testimony about the eyewitness's accuracy does not aid the jury in determining a fact in issue because the question whether an eyewitness should be believed is not a "fact in issue" but rather a credibility determination.[55]

In reaching this decision, the Tennessee Supreme Court cited two cases, *State v. Ward*[56] and *State v. Wooden*,[57] previously decided in the Tennessee Court of Criminal

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[51] Coley Appeal, 1998 WL 712838, at *3.
[52] *Id.*
[53] *Coley*, 32 S.W.3d at 831.
[54] *Id.* at 838.
[55] *Id.* at 833-34.
[56] *Ward*, 712 S.W.2d at 485.
[57] 658 S.W.2d 553 (Tenn. Crim. App. 1983).

Appeals. Interestingly, *State v. Ward*[58] is the same case that the Court of Appeals cited in Coley's initial appeal stating that the unreliability of this sort of testimony was no longer accurate.[59] The Tennessee Supreme Court apparently overlooked this comment when it referred to the case as a rationale for its holding. While the Court of Criminal Appeals appeared to take a more liberal step towards admitting this type of testimony, the Tennessee Supreme Court did just the opposite. The court found that (1) "expert testimony concerning eyewitness identification simply offers generalities" and lacks scientific or technical underpinnings; (2) "the subject of reliability of eyewitness identification is within the common understanding of reasonable persons"; (3) the testimony might "mislead and confuse" the jury causing undue prejudice because of its aura of special reliability and trustworthiness; and (4) cross-examination and jury instructions are appropriate aids in protecting the rights of the defendant.[60]

This decision shut the door on expert testimony regarding eyewitness identification in the State of Tennessee. Therefore, defendants will never be permitted to introduce this type of testimony at trial. How valid are these conclusions reached by the Tennessee Supreme Court?

IV. Overview of State and Federal Decisions on the Admissibility of Eyewitness Testimony

The decision reached in Tennessee, and the rationale used in making that decision, leads one to wonder if this logic is representative of the thinking of judges across the nation. If the decision in Tennessee was reached

[58] *Ward*, 712 S.W.2d at 485.
[59] *Coley Appeal*, 1998 WL 712838, at *3.
[60] *Coley*, 32 S.W.2d at 837-38.

using the standards outlined in *Daubert*[61] and *McDaniel*,[62] then should similar trends be found in other jurisdictions? In order to answer this query, we took the most direct approach by delving into an extensive search of recent rulings made across the nation on this exact issue. This research analyzed published cases from each state and federal circuit to determine how other courts are ruling on the issue of the admissibility of expert eyewitness testimony. While the most recent authoritative cases on the issue are presented, it should be recognized that they may or may not constitute cases in which the rule is established. However, there will be some discussion of prior precedent. This section will report the results of our comprehensive search. Overall, the results indicate that judicial reasoning and decisions for admitting or excluding eyewitness experts are very inconsistent across the states and federal circuits.

Each case was analyzed for content and sorted according to the ruling made by the court. There are two broad approaches that can be taken by a court when ruling on this issue. The first is known as the *discretionary* approach. This approach leaves the admissibility and limits of expert testimony to the discretion of the trial court, under which appellate judges can affirm the admission or exclusion of the testimony or remand the case to the trial court for further analysis. This is the broadest category and has been adopted by a majority of the courts. Within this approach, several different decisions may be made, all of which allow the appellate court to rationalize its reasons for admitting or excluding the expert testimony on a case-by-case basis. There are five types of decisions under the discretionary approach: (1) those which admit the testimony and declare that the trial court did not abuse its discretion in admitting the evidence, (2) those which admit the testimony and declare that the trial court *did* abuse its

[61] 509 U.S. at 579.
[62] 955 S.W.2d at 257.

discretion in excluding the testimony, (3) those which do not admit the testimony and declare that the trial court did not abuse its discretion in excluding the testimony, (4) those which do not admit the testimony but claim that, in general, the testimony could be admissible under other circumstances, or (5) those which remand the case to the trial court for further review.

The second type of approach taken by courts is known as the *prohibitory* approach. This is a per se rule of exclusion, prohibiting the exercise of discretion and the admission of expert eyewitness testimony under any circumstances. While it initially may appear that courts are turning away from this approach to adopt the approach of the majority in a discretionary view, our analysis reveals that many courts are using the "discretionary" approach as a guise, but are basically still operating in a manner that is nearly per se exclusionary. Table 1 provides further clarification for how a court may rule on the issues.

A. State Analysis

In the most recent cases involving an attempt to introduce an eyewitness expert, the court admitted the testimony in only four states (9%) and excluded it in thirty-eight states (83%). The reviewing court remanded the case back to the trial court for further review in four states (9%).[63] As shown in Table 2, the majority of states (98%) take a discretionary approach to the issue, while only one state (Tennessee) takes a prohibitory approach, ruling the testimony per se inadmissible under all circumstances. Of the states that take a discretionary approach, however, fifteen states (33%) ruled that the testimony was

[63] The review is based on only forty-six states because the issue of eyewitness experts was not addressed in published opinions in the District of Columbia and four states: Hawaii, Montana, New Hampshire, and New Mexico.

inadmissible, using harsh language to suggest a nearly per se rule of exclusion. Twenty-two states (43%) ruled that, in general, the testimony is admissible, but for the circumstances of the particular case, it was not admissible. It should be noted that in four of these cases, partial testimony was admitted. These are marked with an asterisk in the table.

Each court's rationale is shown in Table 3. A review of the rationale used for exclusion of the testimony quickly makes it clear that the problem of variability in judicial decision-making on this topic largely lies in the discretionary approach. The problem is that courts rarely overrule a trial court's exercise of discretion. If the defendant appeals a trial court's decision, the appellate court will only review the lower court decision under an "abuse of discretion" rule. This approach means that, even though the evidence may be otherwise admissible, the trial court decision will only be overturned if the court has abused its discretion in refusing to admit the evidence or if the exclusion was not harmless to the outcome of the case. With this type of review, trial court decisions are rarely overturned, which aids in keeping expert identification testimony out of the court.

By looking at some examples of the rationale used within each category, it is obvious that the rationale used is inconsistent and varies widely. In Tennessee, the only state with a prohibitory approach, the court was very forceful and stringent in its logic in *State v. McKinney*,[64] a decision made subsequent to and making reference to *Coley*.[65]

> Eyewitness testimony has no scientific or technical underpinnings which would be outside the common understanding of the jury; therefore, expert testimony is not

[64] 74 S.W.3d 291 (Tenn. 2002).
[65] 32 S.W.3d at 833-34.

> necessary to help jurors "understand" the eyewitness's testimony. Moreover, expert testimony about the eyewitness's accuracy does not aid the jury in determining a fact in issue because the question whether an eyewitness should be believed is not a "fact in issue" but rather a credibility determination.[66]

With this type of reasoning, Tennessee will never admit expert testimony on eyewitness issues. Now, turning to the rationale used within the discretionary approach, unfortunately some of the same logic used in *State v. Coley* is evident.[67] Fifteen states claim that they hold a discretionary view, yet they use language similar to the language used in *Coley*. For example, in *Utley v. State*, the Supreme Court of Arkansas held, "The question whether these witnesses were mistaken in their identification, whether from fright or other cause, was one which the jury, and not an expert witness, should answer."[68] Thus, the expert's testimony was a matter of common understanding and would not assist the trier of fact. A similar example is *Johnson v. State*, where the Florida Supreme Court found that "a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions."[69] In this case the court ruled, "Reliability of eyewitness identification is within the realm of jurors' knowledge and experience."[70] Similarly, in *State v. Gaines*, the Kansas Supreme Court "continue[d] to follow the previous line of cases and h[e]ld that expert testimony regarding eyewitness identification

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[66] *McKinney*, 74 S.W.3d at 302 (quoting State v. Coley, 32 S.W.3d 831, 833-34 (Tenn. 2000)) (internal quotation marks omitted).
[67] 32 S.W.3d at 831.
[68] 826 S.W.2d 268, 270 (Ark. 1992).
[69] Johnson v. State, 438 So. 2d. 774, 777 (Fla. 1983).
[70] *Id.*

should not be admitted into trial."[71] In the Oregon decision, *State v. Goldsby*, the court even recognized that "eyewitness identification evidence has a built-in potential for error, but concluded that the law does not deal with that potential by allowing experts to debate the quality of evidence for the jury."[72] This rationale makes it quite clear that the court renders this type of testimony unnecessary, implying that the court would be highly unlikely ever to admit it.

Within the largest category, *May Be Admissible: Discretion Not Abused in Excluding*, twenty-two states decided that while under some circumstances this type of testimony may be admissible, under the facts of the particular case, the testimony was not admissible. The rationale used in this category generally suggests that admission of eyewitness experts is possible, but not probable. The barrage of reasoning amounts to little more than general excuses. For example, in *In re Williams*, the Alabama Supreme Court excluded evidence on the basis that the expert was not familiar with facts of case and had no personal contact with victim or knowledge of the event.[73] Similarly, in *State v. McClendon*, the Connecticut Supreme Court held that the expert could not state his opinion to a "reasonable degree of scientific certainty." [74] Also, in *State v. Miles*, the Minnesota Supreme Court decided that there was nothing to suggest that expert testimony would be particularly helpful to the jury in evaluating the specific eyewitness testimony.[75] A number of courts (Indiana, Massachusetts, and Nevada) found that there was other corroborating evidence, which eliminated

[71] 926 P.2d 641, 649 (Kan. 1996).
[72] 650 P.2d 952, 954 (Or. Ct. App. 1982) (quoting State v. Calia, 514 P.2d 1354, 1356) (Or. Ct. App. 1973) (internal quotation marks omitted).
[73] 594 So. 2d 1225, 1227 (Ala. 1992).
[74] 730 A.2d 1107, 1115 (Conn. 1999).
[75] 585 N.W.2d 368, 370-71 (Minn. 1998).

the need for an expert.[76] In summary, all thirty-eight states that would not admit the expert testimony explain the exclusion with reasons which are both general and inconsistent.

However, four states did admit expert testimony pertaining to eyewitness reliability. Three states (Alaska, California, and South Carolina) found that the exclusion of the testimony by the trial court constituted an abuse of discretion, holding that the testimony should have been admitted. As any number of judges would attest, reaching this decision on an issue speaks volumes. Note that the rationale used by these judges is in direct opposition to the rationale used by judges who exclude the experts. For example, in California's landmark case of *People v. McDonald*, the court reasoned,

> It appears from the professional literature, however, that other factors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most. . . . We conclude that although jurors may not be totally unaware of the foregoing psychological factors bearing on eyewitness identification, the body of information now available on these matters is "sufficiently beyond common experience" that in appropriate cases expert opinion thereon could at least "assist the trier of fact."[77]

Additionally, in the Alaska case, *Skamarocius v. State*, the

[76] State v. Cook, 734 N.E.2d 563 (Ind. 2000); Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997); Fraternal Order v. Denver, 926 P.2d 589 (Colo. 1996).
[77] 690 P.2d 709, 720-21 (Cal. 1984).

court explained that the identification of the assailant was the main issue of the case, and that the expert testimony was relevant and would have been helpful to the jury.[78] The court concluded that the error in exclusion was not harmless.[79] Finally, the same issue was addressed in *State v. Whaley*, in which the South Carolina Supreme Court found that the main issue was identification, and numerous factors existed that could have affected the witness identifications.[80] These three decisions hold great weight on the admissibility of expert eyewitness testimony because these appellate courts decided that the trial court's exclusion of the testimony was arbitrary.

It is interesting to note that while the facts in many cases are similar, judges manage to reach completely contradictory decisions. Unfortunately, an analysis of the most recent decisions in the federal circuits paints just as bleak a picture.

B. Federal Analysis

An analysis of eleven circuits reveals that expert testimony on eyewitness identification was not admitted in any circuit.[81] The decisions within the circuits are broken down in the same manner as the states.[82] As shown in Table 4, none of the circuits currently take the prohibitory approach on this issue. Three circuits (25%) found the testimony inadmissible, using such harsh language that the decisions can be construed as a per se rule of inadmissibility. In *United States v. Kime* in the Eighth Circuit, for example, the court concluded that the testimony failed under the *Daubert* prongs because the scientific

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[78] 731 P.2d 63, 66-67 (Alaska Ct. App. 1987).
[79] *Id.* at 66.
[80] 406 S.E.2d 369, 372 (S.C. 1991).
[81] No published cases were found in the U.S. Court of Appeals for the District of Columbia.
[82] *See* Table 2.

evidence would not assist the trier of fact.[83] All three of these circuits (Eighth, Ninth, and Eleventh) defer to the issue that cross-examination and jury instruction are sufficient tools to address problems related to eyewitness identifications.[84] With this rationale in place, just like the rationale of the states in the same category, the expert's testimony is unlikely to ever be admitted.

While recognizing that in certain situations this type of expert testimony may be admissible, over half of the circuits (64%) do not find an abuse of discretion in the exclusion of the expert testimony.[85] The rationale used in this category varies widely, just as we have observed with the states' reasoning. For example, in *United States v. Brien*, the Court of Appeals for the First Circuit held that the defense offered nothing as far as literature or data to affirm the expert's conclusions after being repeatedly asked for it.[86] Other reasons for exclusion include the presence of corroborating evidence (Fifth and Seventh Circuits), no limited circumstances that call for expert eyewitness testimony were present (Fourth Circuit), and the presence of multiple eyewitnesses (Tenth Circuit).[87]

One circuit stands apart from the rest in that it decided that the exclusion of the testimony was an abuse of discretion. However, in its decision in *United States v. Mathis*, the Third Circuit decided that it was an abuse of discretion to exclude the expert, but ultimately found the exclusion to be harmless error.[88] The defendant's conviction was upheld, after the court found that "portions of [the expert's] proffered testimony should have been

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[83] 99 F.3d 870, 883 (8th Cir. 1996).

[84] *See* Table 4 for an example of a case from each circuit along with a description of the decision.

[85] Namely, the 1st, 2nd, 4th, 5th, 6th, 7th and 10th Circuits.

[86] 59 F.3d 274, 277 (1st Cir. 1995).

[87] *See* Table 4 for an example of a case from each circuit along with a description of the decision.

[88] 264 F.3d 321, 342-44 (3d Cir. 2001).

admitted, [but] in the context of the record as a whole, his testimony was highly unlikely to have caused a different result."[89]

In summary, this article has revealed significant variability in the decisions of courts as to whether to admit or exclude testimony from eyewitness experts. The problem lies in the fact that the decisions reached are not based primarily on the facts of the case, but instead based on other factors like jurisdictional characteristics, personal views of the judge, broad discretion granted to the trial judge, and the ambiguity of admission criteria.

V. Scientific Literature on the Issues Raised in *Coley*, *Daubert*, and *McDaniel*

Four main issues which need to be addressed emerge from this review. First, can trial judges, who have little scientific training, adequately evaluate the scientific validity of expert testimony in order to make a decision on admissibility? Second, is the subject of reliability of eyewitness identifications common knowledge to reasonable people—what, in fact, does the average juror, or even the average judge know about eyewitness issues? Third, does rigorous cross-examination and instruction by the court serve as effective safeguard to prevent wrongful convictions based on errors in eyewitness testimony? Fourth, what can be said about the scientific integrity of social science research—is eyewitness memory research sufficiently reliable and valid to warrant expert testimony on the subject? Fortunately, a large body of empirical research exists that can inform and help clarify each one these issues.

[89] *Id.* at 343.

A. The Evaluation of Scientific Testimony

The existing rules and guidelines, such as Rules 702 and 703 of the Tennessee Rules of Evidence, place great responsibility on trial judges because they require judges to evaluate the merit and validity of scientific testimony across diverse domains of knowledge without the benefit of scientific training. Recent findings indicate that judges do not possess the detailed and accurate understanding of scientific methodology necessary to perform this task effectively. In a 2001 study, researchers Gatowski, Dobbin, Richardson, Ginsberg, Merlino, and Dahir surveyed a national sample of state court judges about their knowledge of the *Daubert* factors used to evaluate scientific testimony.[90] These factors included: falsifiability, error rate, peer review, and general acceptance.[91] When asked to define these concepts, a clear lack of comprehension was evident. Only four percent were able to define falsifiability; similarly, only four percent were able to define error rate.[92] While judges showed a better understanding of peer review and general acceptance, there was little consensus about which factors were most important or how to combine the four guidelines in evaluating expert testimony.[93]

Research also shows that judges' evaluations are not sufficiently sensitive to problems in the quality of expert testimony. For example, in a study where judges were presented with expert testimony that varied in terms of the presence or absence of methodological problems and whether or not the research was peer reviewed, the quality of the expert testimony had no impact on judges'

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[90] Sophia Gatowski et al., *Asking Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World*, 25 L. & HUM. BEHAV. 433-458 (2001).
[91] *See id.* at 433.
[92] *Id.*
[93] *Id.*

evaluations.[94] When judges were given training in scientific methodology, however, their evaluations of expert testimony increased in accuracy compared to those of their untrained counterparts even though serious errors in evaluation were still made.[95] Judges are forced to use the *Daubert* standard to evaluate the scientific integrity of expert testimony, although most lack adequate scientific training and requisite knowledge of scientific principles. Whether judges can adequately evaluate expert testimony in general, and more specifically, expert testimony about eyewitness memory, is open to serious debate.

B. Is Knowledge of Eyewitness Memory Really Common Sense?

One of the most commonly cited reasons for excluding eyewitness expert testimony is that knowledge of factors that can affect eyewitness accuracy is a matter of common sense, and thus, jurors do not require assistance in understanding eyewitness testimony.[96] The large body of research that has examined people's understanding of eyewitness memory has revealed significant shortcomings, not only in the scope of the knowledge evidenced, but also in terms of its general accuracy. In survey studies, where jury-eligible citizens complete questionnaires about eyewitness issues, large deficits have been found in what people commonly believe to be true about eyewitness

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[94] *See* M. Kovera et al., *The Effects of Peer-Review and Evidence Quality on Judge Evaluation of Psychological Science: Are Judges Effective Gate-Keepers?* 85 J. APPLIED PSYCHOL. 574 (2000).

[95] *Id.*

[96] Benton, T. Rapus et al., *Has Eyewitness Testimony Research Penetrated the American Legal System?: A Synthesis of Case History, Juror Knowledge, and Expert Testimony, in* 2 INTERNATIONAL HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (R.C.L. Lindsay et al. eds., in press).

memory.[97] Second, what people believe are important factors affecting eyewitness accuracy are often not diagnostic of, and sometimes are even irrelevant to, eyewitness accuracy.[98] For example, the relationship between witness confidence and accuracy has consistently posed a problem for lay persons.[99] While confident witnesses are perceived to be more accurate, research findings show that confidence is not a reliable indicator of eyewitness accuracy.[100] A large number of experimental

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[97] *See id. See also* ELIZABETH E. LOFTUS, EYEWITNESS TESTIMONY (1979); R.C.L. Lindsay, *Expectations of Eyewitness Performance: Jurors' Verdicts Do Not Follow from Their Beliefs, in* ADULT EYEWITNESS TESTIMONY (D. F. Ross et al. eds., 1994); A. Daniel Yarmey & Hazel P. Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?, in* EVALUATING WITNESS EVIDENCE 13-40 (Sally Lloyd-Bostock & Brian R. Clifford eds., 1983); John C. Brigham & Melissa P. WolfsKeil, *Opinions of Attorneys and Law Enforcement Personnel on the Accuracy of Eyewitness Identifications*, 7 L. & HUM. BEHAV. 337, 349 (1983); Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?* 6 L. & HUM. BEHAV. 15, 30 (1982); Marcus D. Durham & Francis C. Dane, *Juror Knowledge of Eyewitness Behavior: Evidence for the Necessity of Expert Testimony*, 14 J. SOC. BEHAV. & PERSP. 299, 308 (1999); Saul M. Kassin & Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. APPLIED SOC. PSYCHOL. 1241, 1249 (1992); Kevin McConkey & Suzanne Roche, *Knowledge of Eyewitness Memory*, 24 AUSTL. PSYCHOL. 377, 384 (1989); Elizabeth Noon & Clive Hollin, *Lay Knowledge of Eyewitness Behavior: A British Survey*, 1 APPLIED COGNITIVE PSYCHOL. 143, 153 (1987); George Rahaim & Stanley Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 L. & PSYCHOL. REV. 1, 15 (1982); John S. Shaw et al., *A Lay Perspective on the Accuracy of Eyewitness Testimony*, 29 J. APPLIED SOC. PSYCHOL. 52, 71 (1999).

[98] Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identifications,* 64 J. APPLIED PSYCHOL. 440-448 (1979).

[99] *Id.*

[100] *Id.*; R.C.L. Lindsay et al., *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 L. & HUM. BEHAV. 333-339 (1989).

studies have demonstrated that eyewitness confidence is a better predictor of mock juror verdicts than eyewitness accuracy, indicating that jurors are swayed by the believability of eyewitnesses.[101] Even more problematic is that experiments show that laypeople have great difficulty distinguishing between accurate and inaccurate witnesses. Mock jurors show a high level of belief in the testimony of both accurate and inaccurate witnesses.[102] Mock jurors also tend to overestimate accuracy rates in eyewitness identification situations, revealing an underlying belief that eyewitnesses tend to be fairly accurate.[103] Brigham and Bothwell found that a majority of their survey respondents (63%) believed that more than fifty percent of eyewitness identifications made are correct. [104]

Third, lay persons underestimate the importance of

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[101] *See* Neil Brewer & Anne Burke, *Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments*, 26 L. & HUM. BEHAV. 353, 364 (2002); Brian L. Cutler et al., *Nonadversarial Methods for Sensitizing Jurors to Eyewitness Evidence*, 20 J. APPLIED SOC. PSYCHOL. 1197, 1207 (1990); Steven Fox & H. A. Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock Juror Judgment*, 10 L. & HUM. BEHAV. 215, 228 (1986); R.C.L. Lindsay et al., *Can People Detect Eyewitness Identification Accuracy Within and Across Situations?* 66 J. APPLIED PSYCHOL. 79, 89 (1981); Lindsay, *Mock-Juror Belief, supra* note 100; Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL., PUB. POL'Y & L. 817, 845 (1995).

[102] Lindsay, *Mock–Juror Belief, supra* note 100; R.C.L. Lindsay et al., *Mock-Juror Evaluations of Eyewitness Testimony: A Test of Metamemory Hypotheses*, 16 J. APPLIED SOC. PSYCHOL. 447-459. (1986).

[103] Brewer & Burke, *Effects of Testimonial Inconsistencies, supra* note 101; Cutler et al., *Nonadversarial Methods, supra* note 101; Fox & Walters, *The Impact of General, supra* note 101; Lindsay et al., *Mock-Juror Belief, supra* at note 100; Penrod & Cutler, *Witness Confidence, supra* note 101.

[104] John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 L. & HUM. BEHAV. 19, 30 (1983).

good indicators of eyewitness accuracy. For example, when mock jurors are presented with information such as lineup instructions and fairness, exposure to mug shots, retention interval, lighting conditions, cross-race identifications, and weapon presence, which are all factors relevant to witness accuracy, this information often fails to impact verdicts.[105] Overall, this body of research shows a clear lack of correspondence between lay knowledge of eyewitness issues and the preponderance of scientific evidence. Thus, it follows that knowledge of eyewitness memory is not a matter of common sense.

More recently, research has focused on the knowledgeability of various professional groups who interact directly with eyewitnesses, specifically assessing what judges, attorneys, and law enforcement professionals know about eyewitness memory issues.[106] Unfortunately, the research findings reveal similar deficits in knowledge among professional groups as those observed with jury-

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[105] Jordan Abshire & Brian H. Bornstien, *Juror Sensitivity to the Cross-Race Effect*, 27 L. & HUM. BEHAV. 471-80 (2003); Cutler et al., *Nonadversarial Methods, supra* note 101; Cutler et al., *The Reliability of Eyewitness Identifications: The Role of System and Estimator Variables*, 11 L. & HUM. BEHAV. 233-58 (1987); Lindsay et al., *Mock-Juror Evaluations, supra* note 102.

[106] A.D. Yarmey & H.P. Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?, in* EVALUATING WITNESS EVIDENCE 13-40 (S. Lloyd-Bostock & B.R. Clifford eds., 1983); Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges, and Law Enforcement to Eyewitness Experts*, 20 APP. COGNITIVE PSYCHOL. 115-129; Brigham & WolfsKeil, *Opinions of Attorneys, supra* note 97; S.M. Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 AM. PSYCHOL. 1089-98 (1989); S.M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 50 AM. PSYCHOL. 405-416 (2001); Noon & Hollin, *Lay Knowledge, supra* note 97; Rahaim & Brodsky, *Empirical Evidence, supra* note 97; Richard A. Wise & Martin A. Safer, *What U.S. Judges Know and Believe about Eyewitness Testimony*, 18 APP. COGNITIVE PSYCHOL. 427-443 (2004).

eligible citizens.[107]

Across questionnaire surveys, attorneys as well as law enforcement officers showed similar levels of overall accuracy as potential jurors (approximately 45%).[108] Further, like lay persons, attorneys and law enforcement personnel expressed the belief that eyewitness identification is relatively accurate. For example, in a 1983 study, Brigham and WolfsKeil found that a majority of their sample of prosecuting attorneys (84%) and law officers (63%) believed that ninety percent or more of the eyewitness identifications they had observed were probably accurate.[109] Furthermore, the great majority of both these groups believed that witness confidence is positively related to accuracy.[110]

Recent studies of judicial knowledge present a similar pattern. Across studies, judges averaged approximately sixty percent correct on eyewitness knowledge questions, which is comparable to accuracy rates obtained from lay jurors whose performance across similar questionnaires ranged from thirty-five percent to sixty-one percent.[111] Furthermore, judges tend to overestimate the accuracy of eyewitness identifications. In a 2004 study, for example, Richard A. Wise and Martin A. Safer surveyed judges about their perceptions of the reliability of eyewitness testimony and its relation to wrongful convictions.[112] Less than half the judges (43%) indicated that eyewitness error contributes to at least half of

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[107] Benton et al., *Eyewitness Memory*, *supra* note 106; R. Seltzer et al., *Juror Ability to Recognize the Limitations of Eyewitness Identifications*, 3 FORENSIC REP. 121-137 (1990).

[108] Noon & Hollin, *Lay Knowledge*, *supra* note 97; Yarmey & Jones, *Is the Psychology of Eyewitness*, *supra* note 106.

[109] Brigham & WolfsKeil, *Opinions of Attorneys*, *supra* note 97, at 342.

[110] *Id.*

[111] Benton et al., *Eyewitness Memory*, *supra* note 106; Wise & Safer, *What U.S. Judges Know*, *supra* note 106 .

[112] Wise & Safer, *supra* note 106, at 428.

all wrongful convictions.[113] It should be noted that greater knowledge of eyewitness issues in this particular sample of judges was also associated with a more cautious assessment of the value of eyewitness testimony in general.[114]

On the basis of these results, we conclude that not only are the limitations of eyewitness memory not common sense to jurors, these limitations are also not common sense to judges, attorneys, and law enforcement officers. This body of research clearly shows that the lack of knowledge is diffused through the legal system, from the law officers who are responsible for collecting and preserving the integrity of eyewitness identification evidence to the judges and jurors who are faced with evaluating the credibility of eyewitness testimony. This conclusion raises an important issue: if judges, attorneys, and jurors have insufficient knowledge about factors affecting eyewitness accuracy, are there effective safeguards in the legal system to detect errors in eyewitness testimony and prevent erroneous convictions?

C. Are Cross-Examination and Judicial Instructions Effective Safeguards?

The legal system has historically recognized the fallible nature of eyewitness testimony and, therefore, has implemented various constitutional safeguards to protect defendants from wrongful convictions based on erroneous eyewitness identification.[115] The most commonly used safeguard is the cross-examination of a witness, which is widely believed to effectively protect defendants from erroneous conviction.[116] While it is also the most

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[113] *Id.* at 435.

[114] *Id.*

[115] Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WIS. L. REV. 529 (2003).

[116] Christopher Walters, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1430 (1985).

commonly used rationale for the exclusion of expert testimony, research findings challenge the use of cross-examination as an effective protective tool.[117] In a 1979 study, Gary Wells, R.C.L. Lindsay, and T.J. Ferguson[118] showed that mock jurors were unable to differentiate between accurate and inaccurate eyewitnesses based on cross-examination.[119] In a further experiment, professional attorneys were used to cross-examine witnesses in a mock trial, but this still did not improve jurors' ability to discriminate between accurate and inaccurate eyewitnesses.[120]

More recently, Devenport, Stinson, Cutler, and Kravitz examined the effectiveness of this safeguard by testing juror sensitivity to three types of bias in lineup procedures—foil, instruction, and presentation format.[121] These types of bias consistently affect the suggestiveness and quality of the lineup procedures.[122] Foil bias is present when the lineup foils do not match the description of the culprit as given by the witness.[123] Instruction bias occurs when the witness is explicitly told that the culprit is in the lineup, or is not given the option to *not* choose a foil.[124] Presentation bias is related to showing witnesses simultaneous lineups (where all the lineup members are presented at the same time) versus sequentially presented lineups (where each lineup member is shown one at a time).[125] Sequential presentation allows the witness' identification decision to be based on the comparison of the

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[117] Devenport et al., *Jurors' Perceptions*, *supra* note 41; Gary Wells et al., *Accuracy*, *supra* note 98.
[118] Wells, *Accuracy*, *supra* note 98.
[119] *Id.*
[120] *See* Lindsay et al., *Mock-Juror Belief*, *supra* note 100.
[121] Devenport et al., *Jurors' Perceptions*, *supra* note 41.
[122] *See* Devenport et al., *Jurors' Perceptions*, *supra* note 41.
[123] *Id.*
[124] *Id.*
[125] *Id.*

lineup member to his or her memory of the culprit rather than to the other lineup members.[126] If the purpose of cross-examination is to focus on the credibility and accuracy of an eyewitness identification, then its effectiveness hinges on both attorneys' and jurors' ability to recognize suggestiveness. This procedural problem can detrimentally affect the accuracy of eyewitness identifications. Research has found that jurors are most sensitive to foil bias, somewhat sensitive to instruction bias, and insensitive to presentation bias.[127] Overall, jurors were weak in their ability to perceive suggestiveness when bias was present in the identification procedure.[128]

Thus, several reasons explain why cross-examination may not be a truly effective safeguard. First, as evidenced earlier, jurors, attorneys and judges all have insufficient knowledge about factors affecting eyewitness accuracy. Second, and more importantly, attorneys and judges also lack awareness of specific factors, such as those affecting the suggestiveness of lineup procedures. In a study designed to examine whether attorneys are sensitive to factors affecting lineup suggestiveness, Stinson, Devenport, Cutler, and Kravitz found that while attorneys rated foil-biased lineups as more suggestive than foil-unbiased lineups, they rated sequential lineups as *more* suggestive than simultaneous lineups.[129] This stands in direct opposition to the research findings.[130] Further, attorneys had difficulties detecting and correcting biases in

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[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *See* Veronica Stinson et al., *How Effective Is the Presence-of-Counsel Safeguard? Attorney Perceptions of Suggestiveness, Fairness, and Correctability of Biased Lineup Procedures*, 81 J. APPLIED PSYCHOL. 64, 75 (1996).
[130] Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603-47 (1998).

lineup instruction and presentation.[131]

Similar results have been found among judges, who rated foil-biased and instruction-biased lineups as more suggestive than foil-unbiased and instruction-unbiased lineups.[132] However, judges also rated sequential lineups as more suggestive than simultaneous lineups.[133] If attorneys are not fully aware of the issues that can compromise witness accuracy, then it is much more difficult to cross-examine properly with respect to them. Consequently, an attorney's ability to develop a truly effective cross-examination strategy is impaired in cases where eyewitness testimony plays a pivotal role.

Given the tremendous importance that accurate eyewitness testimony has in relation to the justice system, over the last few decades, federal and state courts have encouraged judges to instruct jurors about the factors that should be considered in the evaluation of eyewitness evidence.[134] Such judicial instructions represent another safeguard relied upon by the court, assumed to be effective in preventing errors. In *Neil v. Biggers*, the United States Supreme Court recommended five criteria on which evaluations of eyewitness evidence should be based.[135] These include: (1) the certainty of the identification; (2) the quality of the eyewitness' view of the culprit; (3) the amount of reported attention paid to the culprit; (4) the match between the description of and the actual appearance of the defendant; and (5) the time elapsed between

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[131] Veronica Stinson et al., *How Effective is the Presence*, *supra* note 129.
[132] *Id.*
[133] *See* Veronica Stinson et al., *How Effective is the Motion-to-Suppress Safeguard? Judges Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 82 J. APPLIED PSYCHOL. 211, 216-17 (1997).
[134] Neil v. Biggers, 409 U.S. 188, 199 (1972).
[135] *Id.*

witnessing the crime and the identification.[136] Unfortunately, research findings indicate that some of the *Biggers* criteria are not reliable indicators of eyewitness accuracy; yet these criteria are relied on by the court system and, when they are satisfied, they are assumed to imply eyewitness accuracy.[137] As previously delineated, research shows that eyewitness certainty or confidence is not a reliable indicator of identification accuracy, but this belief is represented among the *Biggers* criteria!

The most widely used set of standardized instructions arises from *United States v. Telfaire*.[138] The intent of these instructions is to assist jurors' evaluation of eyewitness identification evidence, emphasizing to jurors the importance of assessing whether the circumstances of identification are, in fact, convincing in determining the guilt of the defendant.[139] To this end, jurors are further instructed to evaluate the credibility and truthfulness of the eyewitness and to consider factors such as: (1) the length of time the witness had to view the offender; (2) the lighting conditions at that time; (3) any previous acquaintance with the offender; and (4) the circumstances surrounding the lineup identification.[140] What impact do these cautionary instructions by the court have on jury decision-making? Research has shown that judges' presentation of *Telfaire* instructions neither sensitized mock jurors to potential

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[136] *Id.* at 199–200.

[137] *See* Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 L. & HUM. BEHAV. 581, 582 (2000); Gary L. Wells & Amy L. Bradfield, *"Good You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessed Experience*, 83 J. APPLIED PSYCHOL. 360, 361 (1998); Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347, 348-49 (1983).

[138] 469 F.2d 552, 558 (D.C. Cir. 1972).

[139] *Id.*

[140] *Id.*

problems with eyewitness testimony, nor increased their skepticism.[141]

As a result, these findings have raised the question of how comprehensible these instructions are to jurors. When the *Telfaire* instructions were modified to be more understandable to mock jurors, Edith Greene observed an increase in skepticism towards eyewitness testimony.[142] Gabriella Ramirez, Dennis Zemba, and R. Edward Geiselman, however, obtained less optimistic results in comparing the impact of presenting both the *Telfaire* instructions and the modified version on mock jurors' evaluations of eyewitness testimony.[143] Rather than improving decision-making, the *Telfaire* instructions reduced mock jurors' sensitivity to the quality of eyewitness evidence and either created skepticism in or over reliance on the testimony depending on when these instructions were presented to jurors.[144] The more comprehensible version of the instructions did not adversely affect juror sensitivity, nor did it serve to significantly improve it.[145] On the basis of these findings, instructions by the court do not appear to have the desired effect of improving jurors' ability to assess eyewitness evidence because they do not seem to provide a clear path for jurors to follow in evaluating an eyewitness.

Further, these findings speak to a more general question related to juror decision-making—how well does the average juror assimilate and comprehend the plethora of information presented in a case? Research indicates that instructions presented to jurors are often misunderstood,

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[141] Cutler et al., *Nonadversarial Methods*, *supra* note 101, at 1205.
[142] Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252, 276 (1988).
[143] *See* Gabriella Ramirez et al., *Judges' Cautionary Instructions on Eyewitness Memory*, 14 AM. J. FORENSIC PSYCHOL. 31, 66 (1996).
[144] *Id.* at 31.
[145] *Id.*

either because they include numerous legal terms or because they are often embedded within other lengthy judicial instructions.[146] A large survey study of citizens called for jury duty found that actual jurors understood fewer than half the instructions they received at trial.[147] More generally, jurors often have difficulty comprehending complex legal cases and the evidence presented to them.[148] These notable problems with interpretation and comprehension of the information and instructions presented in court appear to undermine the effectiveness of judicial instructions as a legal safeguard.

D. On The Scientific Status of Research on Eyewitness Issues

From this review, it becomes evident that courts have created and followed rules that often contradict what the accumulation of empirical research demonstrates on a variety of fronts; yet, the legal system remains skeptical of social science research.[149] It has been observed that the system has failed to integrate procedures recommended by leading social science researchers, thereby making the courts an ineffective solution to a serious problem.[150]

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[146] *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Greene, *supra* note 142; LOFTUS, *supra* note 97.

[147] *See* Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539, 554 (1992).

[148] *See* Jane Goodman et al., *What Confuses Jurors in Complex Cases*, TRIAL, Nov. 1985, at 65-68; Sonya Ivkovic et al., *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 L. & SOC. INQUIRY 441 (2003).

[149] Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002); Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000).

[150] Collins, *supra* note 115.

Keith A. Findley states, "[C]ourts have created rules or followed procedures that ignore or even contradict what the empirical evidence shows."[151] He specifically addresses the issue of expert testimony:

> [H]ard evidence shows that jurors do not understand the psychological processes at work in an eyewitness identification and tend to rely an unwarranted extent on such identifications. . . . Nonetheless, courts in many jurisdictions routinely continue to exclude expert testimony designed to educate jurors on these matters, often on the ground that such information is within the common knowledge of jurors . . ..[152]

In addition, Donald P. Judges notes that despite the years of research that social scientists have devoted to the study of eyewitness identification evidence, experts within the legal community remain "skeptical."[153] "The law's generic skepticism of social science risks deteriorating into a counter-productive bias if the legal system fails to recognize the genuine strides that social science has made in recent decades."[154]

This skepticism and lack of knowledge about the factors that affect eyewitness accuracy underlies not only the misguided assumption that the understanding of these issues is within the purview of "common sense," but also the recurrent reasoning that eyewitness expert testimony is not helpful to the trier of fact. Research indicates that courts tend to be more critical of and look less favorably upon expert testimony from social science researchers.

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[151] Findley, *supra* note 149, at 333.
[152] *Id.* at 334.
[153] Judges, *supra* note 149, at 236-37.
[154] *Id.* at 237.

Researchers Jennifer L. Groscup and Steven D. Penrod conducted a study to assess how courts evaluated different types of testimony, comparing testimony from police officers to testimony from clinical and experimental psychologists.[155] Groscup and Penrod found that testimony from psychologists was admitted only about fifty percent of the time, whereas testimony from police officers was admitted about eight-six percent of the time.[156] Additionally, courts treated clinical and experimental psychologists differently—testimony from experimental psychologists was the least likely to be admitted, with an admissibility rate of twenty-two percent, whereas their clinical counterparts had an admissibility rate of fifty-six percent.[157] Questionnaire surveys further revealed a tendency for judges to dismissively and negatively view the field of social science.[158]

This negative perception of psychological testimony is probably a reflection of the courts' difficulty in evaluating the reliability of scientific testimony in general, and more specifically, the reliability of this particular type of scientific testimony.[159] Several important aspects of research on eyewitness memory need to be highlighted and clarified in order to promote a change in attitude toward eyewitness expert testimony and improve its evaluation by the legal system. All of these aspects speak to the issues of reliability and validity in this field of research. First, the existing body of research on eyewitness memory is large and well-established. To date, 469 eyewitness experiments have been conducted in just the last four decades.[160]

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[155] Jennifer L. Groscup & Steven D. Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists*, 33 SETON HALL L. REV. 1141 (2003).
[156] *Id.* at 1151.
[157] *Id.*
[158] *Id.* at 1144-45.
[159] *Id.* at 1145.
[160] Steven Penrod & B. Bornstein, *Generalizing Eyewitness Research*,

Second, a fairly substantial level of agreement exists among eyewitness experts. Surveys of the opinions of eyewitness experts on a large number of eyewitness phenomena have demonstrated a relatively broad consensus with regard to which variables do and do not impact eyewitness performance.[161] Further, most of these issues were viewed as reliable enough to be presented in court by the majority of the experts.

Third, numerous meta-analyses of the eyewitness research summarize and compare the findings across studies, even those using different methodologies.[162] This

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in 2 INTERNATIONAL HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE (R.C.L. Lindsay et al. eds., in press).

[161] Kassin et al., *The "General Acceptance," supra* note 106; Kassin et al., *On the "General Acceptance," supra* note 106.

[162] BRIAN CUTLER & STEVEN PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995); Brian Cutler et al., *Conceptual, Practical and Empirical Issues Associated with Eyewitness Identification Test Media, in* ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 163 (Ross et al. eds., 1994); Tara Anthony et al., *Cross-Racial Facial Identifications: A Social Cognitive Integration*, 18 PERSP. & SOC. PSYCHOL. BULL. 296, 301 (1992); Robert K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691, 695 (1987); Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & HUM. BEHAV. 687 (2004); Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Facts: A Meta-Analytic Review*, 7 PSYCHOL., PUB. POL'Y & L. 3, 35 (2001); Joanna D. Pozzulo & R.C.L. Lindsay, *Identification Accuracy of Children Versus Adults: A Meta-Analysis*, 22 L. & HUM. BEHAV. 549 (1998); Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*. 100 PSYCHOL. BULL. 139, 156 (1986); Siegfried L. Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 327 (1995); Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & HUM. BEHAV. 413, 424 (1992); Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & HUM. BEHAV. 523 (2003); Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review*

approach permits broader and more confident conclusions to be drawn, not only about what variables affect eyewitness accuracy, but also how they relate to each other because the information from many studies has been combined. By submitting research results to meta-analyses, the reliability of research findings can be empirically determined.

In addition to providing information about the reliability of research findings, meta-analyses also provide us with information about the external validity of this field of research. External validity defines how well experiments, in their structure and design, correspond with real-world situations.[163] Researchers have consistently found that a number of important eyewitness variables, such as lineup presentation (i.e., sequential v. simultaneous), weapon focus, stress, and the cross-race effect, can actually have a larger impact on the performance of eyewitnesses when the experimental context more closely matches real witnessing situations.[164] The implications of this finding are substantial. As Penrod and Bornstein reason, this result indicates that eyewitness research not only possesses external validity, it also reveals that eyewitness research may actually *underestimate* the magnitude of the impact that certain variables have on eyewitness performance.[165]

Consequently, several conclusions can be drawn from this review of eyewitness research. First, contrary to the Court's statement in *Coley*, the field clearly has the

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of Lineup Instruction Effects, 21 L. & HUM. BEHAV. 283 (1997); Ralph N. Haber & Lyn R. Haber, *A Meta-Analysis of Research on Eyewitness Lineup Identification Accuracy: Paper Presented at the Annual Convention of the Psychonomics Society*, Orlando, Fl. November 16, 2001.

[163] DAVID ELMES, BARRY KANKOWITZ, & HENRY ROEDIGER, METHODS IN EXPERIMENTAL PSYCHOLOGY (1981).

[164] Penrod & Bornstein, *supra* note 160.

[165] *Id.* at 543.

"scientific or technical underpinnings which would be outside the common understanding of the jury," as it meets the criterion for scientific knowledge as delineated in *Daubert* and *McDaniel*. Specifically, in order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. Second, researchers compile the eyewitness research data derived from the scientific method, and use it to create a *scientific knowledge* base than can be generalized to real-world eyewitness situations. Third, as Penrod and Bornstein concluded, the empirically established reliability of a number of eyewitness phenomena warrants not only the general consensus observed among eyewitness experts but also the admission of expert testimony on these issues.[166] More pointedly, the admission of expert testimony on eyewitness issues is warranted as *scientific knowledge*.

Fourth, the idea that eyewitness experts will not assist the trier of fact because eyewitness testimony is common sense to jurors, and that research in this area has no scientific or technical basis, is clearly wrong. When viewed in light of research showing that errors in eyewitness memory are the single greatest cause of wrongful convictions, the omission of expert testimony is dangerous to our justice system. This finding dates back to the 1930s and continues to be a major problem facing the legal system.[167] For example, in a National Institute of Justice study conducted by Conners, Lundregan, Miller, and McEwen, DNA analyses were used to exonerate

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[166] *Id.* at 551.

[167] EDWIN MONTEFIORE BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS IN CRIMINAL JUSTICE (Garden City Publishing Co. 1932); R. BRANDON & C. DAVIES, WRONGFUL IMPRISONMENT (1973); BRIAN CUTLER & STEVEN PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995); J. FRANK & B. FRANK, NOT GUILTY (1957); R. Huff et al., *Guilty Until Proven Innocent*, 32 CRIME & DELINQ. 518 (1986).

twenty-eight individuals.[168] It was found that ninety percent of these wrongful convictions were due to errors in eyewitness identification.[169] Analyses of an additional twelve DNA exonerations by Gary Wells, Mark Small, Steven Penrod, Roy Malpass, Solomon Fulero, and C.A.E. Brimcombe found a similar result.[170] Across these two studies, the sample of wrongful identifications included five individuals who were convicted of capital crimes, received the death penalty, and were awaiting execution.

The magnitude of this problem was sufficiently large enough to warrant the attention of Attorney General Janet Reno. A group of thirty-four professionals, including research psychologists, attorneys, investigators, and police, were commissioned to develop guidelines that could be used by law enforcement officials to properly collect identification evidence.[171] The product of the commission was a 1999 Department of Justice publication entitled, *Eyewitness Evidence: A Guide for Law Enforcement.*[172] This Guide is based on a compilation of research that depicts how to properly conduct investigatory lineups and reduce identification bias.[173] In September of 2003, the government published a companion manual entitled, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement.*[174] The manual was developed, in part, from a previous set of guidelines for collecting identification

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[168] Edward T. Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 1996 U.S. Dept. of Just. Rep., NCJ 161258.

[169] *Id.*

[170] Gary Wells et al., *Eyewitness Identification*, *supra* note 130.

[171] *Technical Working Group for Eyewitness Evidence, Eyewitness Evidence: A Guide for Law Enforcement*, United States Dept. of Just., Office of Justice Programs (1999) [hereinafter *Guide*].

[172] *Id.*

[173] *Id.*

[174] John Ashcroft, Deborah J. Daniels, Sarah V. Hard, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement,* U.S. Dep't Just. NIJ Special Report (2003).

evidence published by the American Psychology and Law Society and the American Psychological Association.[175] Clearly, these significant developments indicate that not only is eyewitness evidence not a matter of common sense, but highlight the strong scientific contribution that eyewitness research has already made to social policy.

VI. Conclusion

Some of the conclusions to be drawn from the above discussion are disturbing. First, a majority of courts, both state and federal, appear to reject the data collected and the conclusions reached by eyewitness researchers in the area of social science. This rejection tends to confirm the notion that the operation of the judicial branch of government is largely insular, relying on its own conclusions in areas more properly left to the expertise of others.

Second, the *Daubert* decision has put judges in an extremely difficult position because they are now required to evaluate the validity and reliability of scientific research. This requires judges to comprehend and apply difficult concepts such as peer review, falsifiability, and error rate in their evaluation of science. Judges, however, typically receive no formal training with respect to these concepts; they are rarely taught these in law schools, and the research reviewed here demonstrates judges have very poor comprehension of these concepts. Even in the judicial dissent of the decision reached in *Daubert*, Chief Justice Rehnquist said,

> Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its

[175] Wells et al., *supra* note 130.

> teaching to particular offers of expert testimony.. . . I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.[176]

Thus, without out a solid understanding of science, how could one expect consistency in the judicial evaluation of scientific expert testimony or scientific evidence in general, much less across divergent disciplines that use different research tools and methodologies?

This situation would appear to guarantee a judicial system that lacks reliability, consistency, and validity in terms of reaching proper and accurate conclusions regarding the credibility of scientific evidence. Consequently, it may lead judges to simply "let it all in and let the jury sort it out." Yet, as the eyewitness research reviewed here reveals, jury members lack knowledgeability, and, to compound matters further, they obviously have less training than the trial judge. Thus, it appears that neither the judge nor the jury serve as a safeguard to the system with respect to the evaluation of scientific testimony. This problem is further exacerbated by the appellate standard of review, which affords almost total deference to the trial judge under the abuse of discretion standard. These types of decisions then seem to be made for self-protection and result in a judicial system that is highly resistant to change. With the reasoning of Justice Rehnquist ringing loud and clear, the stare decisis system of common law tends to lock in an incorrect decision for a protracted period of time, thereby rendering the system inflexible.

Perhaps one solution to this problem is to amend

[176] 509 U.S. 579, 600.

Rule 702, return to the *Frye* standard, and look to the acceptability of a scientific finding among experts in the field. Another solution is to provide a stronger mechanism for a trial court to utilize Rule 706, as suggested by Justice Blackmun in *Daubert*.[177] Under Rule 706, a trial judge, faced with completely opposing opinions on an issue, whether medical, engineering, or otherwise, may call an independent expert to assess the methodology used by the opposing experts, and who then provide the trial judge with his opinion on admissibility of the scientific evidence.[178] This action would place the expert in the role of being a "friend of the court" versus being viewed by the court as a hired gun or advocate for the side who is paying his or her fee.

Further, this article's analysis of this issue has revealed additional problems. For example, we learn from this investigation that appellate courts use terminology not contained in Rule 702 time and time again. What does it mean to "invade the province of the jury"? What is the common or ordinary knowledge of a juror? How should a battle of the experts occur if the gatekeeper is watching the gate? If there is a battle of the experts, why is it bad if the jury obtains more knowledge? Why does the system err in favor of keeping information from the jury? How can a court, in retrospect, possibly know if an error was harmless?

Finally, if eyewitness memory were common sense, then why are errors in eyewitness identification the leading cause of wrongful convictions? Furthermore, why would the Department of Justice perceive the problem to be of such magnitude that it would develop and distribute a Guide for law enforcement and a training manual for how to use the Guide? In light of these developments and the eyewitness research on which they are founded, to claim

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[177] *Id.* at 582.
[178] FED. R. EVID. 706.

that eyewitness memory is common sense to a jury and non-scientific is simply nonsensical. Interestingly, the Guide was not mentioned in a single case of our case-by-case analysis.

One obvious solution to the problem is to admit eyewitness experts, allow them to testify about the difference between estimator and system variables, and about how these variables impact eyewitness identifications. Estimator variables are not under the control of the legal system, but are related to characteristics of the witness and the circumstances in which the remembered event was experienced, such as the presence or absence of a weapon, age of the witness, and lighting conditions.[179]

System variables, in contrast, involve the procedures used by law enforcement to collect identification evidence, such as how the lineup is constructed and presented, as well as the nature of the instructions that witnesses are given.[180] The expert could also testify about whether or not the procedures used in a particular case were consistent with the Guide, thus providing an important source of information to the jury concerning the procedural flaws that can adversely affect eyewitness accuracy. Even if this information does not eventually reach a jury, it still can play a pivotal role in earlier stages of the legal process.

It is time for the judicial system to stop being an island and start building bridges to other repositories of information. After all, if a social science has enough credibility to find its way into colleges, universities, and government policy, why can it not be permitted to find its way into our judicial system?

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[179] Gary L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546, 1557 (1978).
[180] *Id.*

Appendix

Table 1: *Judicial Admissibility Decisions on Eyewitness Expert Testimony*

Approach	Decision type	Result	Explanation
PROHIBITORY	**Per se inadmissible**	**Testimony not admitted**	**The testimony will be excluded under all circumstances.**
DISCRETIONARY	**Inadmissible: Discretion not abused in excluding**	**Testimony not admitted**	**The trial court did not abuse its discretionary powers in excluding the evidence; strong language suggests per se inadmissibility.**
	May Be Admissible: Discretion not abused in excluding	**Testimony not admitted**	**Although the testimony is admissible in general, it was not admitted in this case; rationale suggests admissibility of testimony is possible but not probable. This category can also include cases in which some testimony was admitted but the defendant appealed the exclusion of the remaining testimony.**
	May Be Admissible: Discretion not abused in admitting	**Testimony admitted**	**The trial court did not abuse its discretionary powers in admitting the testimony.**

	May Be Admissible: Discretion abused in excluding	**Testimony admitted**	**The trial court abused its discretionary powers in excluding the testimony when it should have been admitted.**
	May Be Admissible; Discretion may or may not have been abused	**Case Remanded**	**The reviewing court finds that the trial court did not properly review the expert testimony and remands it back to the trial court to conduct the proper analysis.**

Table 2: *State and Federal Categorization by Approach*

Type of Approach		States in Each Category		Circuits in Each Category
PROHIBITORY	***Prohibitory***: Court explicitly declares a per se inadmissibility rule.	Tennessee		None
DISCRETIONARY	***Inadmissible***: Under discretionary view, these courts find that discretion was not abused in excluding the testimony. These decisions use strong language which suggests a per se rule of inadmissibility.	Arkansas Florida Kansas Louisiana Maine Maryland Michigan Mississippi	Missouri Nebraska Oregon Pennsylvania Rhode Island Texas Vermont	Eighth Ninth Eleventh
	May Be Admissible, but not admitted in this case: Under discretionary view, although the testimony is admissible in general, the court found that discretion was not abused in refusing to admit, and rationale often suggests admissibility of testimony is possible but not probable. *Partial testimony was admitted in these cases	Alabama Arizona* Connecticut Delaware* Georgia Idaho Illinois Indiana Massachusetts Minnesota Nevada New York	North Carolina North Dakota* Ohio Oklahoma Utah Virginia* Washington West Virginia Wisconsin Wyoming	First Second Fourth Fifth Sixth Seventh Tenth

	May Be Admissible: **Discretion Abused in Refusing to Admit the testimony.**	**Alaska** **California** **South Carolina**	**Third**
	May Be Admissible: **Discretion Not Abused in Admitting testimony.**	**South Dakota**	**None**
	May Be Admissible**: Case Remanded for Further Review.**	**Colorado** **Iowa** **Kentucky** **New Jersey**	**None**

Table 3: *Decisions and Rationale by State*

State	Most Recent Case	Ruling
1. Alabama	*Ex parte Williams*, 594 So. 2d 1225 (Ala. 1992).	Discretionary – **May Be Admissible. Discretion Not Abused in Refusing to Admit.** Expert not familiar with facts of case, had no personal contact with victim or knowledge of event.
2. Alaska	*Skamarocius v. State*, 731 P.2d 63 (Alaska Ct. App. 1987).	Discretionary - **May Be Admissible. Discretion Abused in Refusing to Admit.** Trial court ruling overturned, testimony should have been admitted. Trial court abused its discretion in excluding the expert testimony because the identification of defendant as the assailant by the witness was weak and uncorroborated.
3. Arizona	*State v. Nordstrum*, 25 P.3d 717 (Ariz. 2001).	Discretionary - **May Be Admissible. Discretion Not Abused in Refusing to Admit.** The expert was permitted to testify at length about a variety of eyewitness variables, but was not permitted to express any opinion about the accuracy of the defendant's eyewitness testimony or to address the specifics of this case.
4. Arkansas	*Utley v. State*, 826 S.W.2d 268 (Ark. 1992).	Discretionary - **Inadmissible.** The question whether these witnesses were mistaken in their identification, whether from fright or other cause, was one which the jury, and not an expert witness, should answer. The experts testimony was a matter of common understanding and would not assist the trier of fact.
5. California	*People v. McDonald*, 690 P.2d 709 (Cal. 1984).	Discretionary – **May Be Admissible. Discretion Abused in Refusing to Admit.** Trial court judgment reversed. The exclusion the eyewitness expert was not harmless error. The court found it reasonably probable that a result more favorable to the defendant would have been reached in absence of this error, and the judgment must be reversed.

6. Colorado	*People v. Campbell*, 847 P.2d 228 (Colo. Ct. App. 1992).	Discretionary – **May Be Admissible. Case Remanded.** The trial court erred in relying on Frye as a basis for excluding the proffered testimony. This error was not harmless, and the case was remanded to vacate judgment and reevaluate the admissibility of the expert's testimony.
7. Connecticut	*State v. McClendon*, 730 A.2d 1107 (Conn. 1999).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The general principles should come as no surprise to the average juror. He was unable to state his opinion to a reasonable degree of scientific certainty.
8. Delaware	*Garden v. State*, 815 A.2d 327 (Del. 2003).	Discretionary - **May Be Admissible. Discretion Abused in Refusing to Admit but was Harmless Error.** Partial testimony allowed. Expert testified on a variety of estimator variables but was not permitted to testify on the confidence/accuracy relationship. The exclusion was ruled an abuse of discretion but found to be harmless error.
9. District of Columbia		No cases found.
10. Florida	*Johnson v. State*, 438 So. 2d 774 (Fla. 1983).	Discretionary - **Inadmissible.** Held that a jury is capable of assessing a witness' ability to perceive and remember, given assistance of cross-examination and cautionary instruction.
11. Georgia	*Johnson v. State*, 526 S.E.2d 549 (Ga. 2000).	Discretionary - **May Be Admissible. Discretion Not Abused in Refusing to Admit.** Abundance of corroborating evidence.
12. Hawaii	No Cases Found	No Cases found.
13. Idaho	*State v. Pacheco*, 2 P.3d 752 (Idaho Ct. App. 2000). *See also State v. Hoisington*, 657 P.2d 17 (Idaho 1983).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** Court refused to allow expert to testify on the memory or perceptions of witnesses relative to the presence of a firearm on the ground that such testimony would not assist the trier of fact. This court does recognize, however, that in certain circumstances such testimony may be of assistance to the jury.

14. Illinois	*State v. Tisdel*, 788 N.E.2d 1149 (Ill. App. Ct. 2003).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The record shows that the judge considered the reliability and potential helpfulness of the testimony, balanced the proffered testimony against cases in which this court has upheld the exclusion of such evidence, and found that the testimony would not assist the jury. The court notes, however, that had the trial court allowed the testimony, it would not have been an abuse of discretion.
15. Indiana	*Cook v. State*, 734 N.E.2d 563 (Ind. 2000).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** Defendant failed to establish the factual predicate upon which his expert's testimony would have rested. The number of witnesses identifying defendant as the shooter supports the view that expert testimony in this case would not have assisted the jury in understanding the evidence or determining any fact in issue.
16. Iowa	*State v. Schutz*, 579 N.W.2d 317 (Iowa 1998).	Discretionary – **May Be Admissible. Discretion Abused in Refusing to Admit, Case Remanded.** Per se exclusionary rule overturned. The exclusion of expert testimony is a matter committed to the sound discretion of the trial court, and it was error to apply the per se rule of exclusion. Case remanded to the district court for a new trial.
17. Kansas	*State v. Gaines*, 926 P.2d 641 (Kan. 1996).	Discretionary - **Inadmissible**. Reliability of eyewitness identification is within the realm of jurors' knowledge and experience. We continue to follow the previous line of cases and hold that expert testimony regarding eyewitness identification should not be admitted.
18. Kentucky	*Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002).	Discretionary - **May Be Admissible. Discretion Abused in Refusing to Admit, Case Remanded.** Per se exclusionary rule overturned. Lack of direct evidence against defendant so expert testimony should have been

		admitted. Blanket exclusion of expert testimony was due to the trial court's incorrect belief that that the testimony was inadmissible per se. Case remanded for new trial to determine the relevancy and reliability of the testimony under a proper analysis.
19. Louisiana	*State v. Gurley*, 565 So. 2d 1055 (La. Ct. App. 1990).	Discretionary - **Inadmissible.** Prejudicial effect outweighs its probative value and usurps jury's function. The testimony would not have been an aid to the jury.
20. Maine	*State v. Kelly*, 752 A.2d 188 (Me. 2000). *See also State v. Rich*, 549 A.2d 742 (Me. 1988).	Discretionary - **Inadmissible.** The trial court found that the testimony would not be helpful to the jury, and the court did instruct the jury. Therefore, the court's conclusion that the expert's testimony would not be helpful is not clearly erroneous, and its decision to deny funds for that reason was within its broad discretion.
21. Maryland	*Bloodsworth v. State*, 512 A.2d 1056 (Md. 1986).	Discretionary - **Inadmissible**. Reliability of the witnesses and the identification is better tested by cross-examination than by the opinion of an expert. Defendant failed to make a case for the use of an expert by failing to persuade the court that the technique has general acceptance in the relevant scientific community, and the proffer is not sufficient to persuade exactly what is even being offered to the jury other than some generalized explanation of the studies that have been made. Nothing that has been proffered suggests that it will be helpful.
22. Massachusetts	*Commonwealth v. Santoli*, 680 N.E.2d 1116; (Mass. 1997).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** No error in excluding the testimony where the physical evidence and other facts provided significant corroboration of the victim's identification.
23. Michigan	*People v. Hill*, 269 N.W. 2d 492 (Mich. Ct. App.	Discretionary – **Inadmissible**. The court rejected defendant's assertion that the trial court erred in excluding expert

	1978).	testimony on the process by which people perceive and remember events and how pretrial identification procedures could affect this process. The expert did not interview the eyewitnesses about whom he was to testify and only observed them in the courtroom. Also, the trial court offered to let defendant pursue the matter in closing argument.
24. Minnesota	*State v. Miles*, 585 N.W.2d 368 (Minn. 1998).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** There is nothing to suggest that expert testimony on the accuracy of eyewitness identification in general would be particularly helpful to the jury in evaluating the specific eyewitness testimony. Numerous safeguards are in place, and there was other corroborating evidence.
25. Mississippi	*White v. State*, 847 So. 2d 886 (Miss. Ct. App. 2002).	Discretionary – **Inadmissible.** Evidence did not rely on proven scientific principles and court held that they had been shown nothing to suggest that the science about which the expert was to testify is generally accepted.
26. Missouri	*State v. Whitmill*, 780 S.W.2d 45 (Mo. 1989).	Discretionary – **Inadmissible.** Relates to the credibility of witnesses and constitutes an invasion of the province of the jury.
27. Montana		No cases found.
28. Nebraska	*State v. George*, 645 N.W.2d 777 (Neb. 2002). *See also State v. Ammons*, 305 N.W.2d 812 (Neb. 1981).	Discretionary - **Inadmissible.** Expert testimony on reliability of eyewitness identifications is unnecessary.
29. Nevada	*White v. State*, 926 P.2d 291 (Nev. 1996). *See also Echavarria v.*	Discretionary - **May Be Admissible; Discretion Not Abused in Refusing to Admit.** There was corroborating evidence of identification.

		State, 839 P.2d 589 (Nev. 1992).	
30.	**New Hampshire**	No cases found	No cases found.
31.	**New Jersey**	*State v. Gunter*, 554 A.2d 1356 (N.J. Super. Ct. App. Div. 1989).	Discretionary – **May Be Admissible. Case Remanded.** Because there was no preliminary hearing, we cannot say with any assurance whether the proffered testimony would have actually assisted the jury. Nor can we begin to consider the reliability issue. Case remanded to hold preliminary hearing to determine scientific reliability of expert's testimony.
32.	**New Mexico**	No cases found	No cases found.
33.	**New York**	*People v. Lee*, 750 N.E.2d 63 (N.Y. 2001).	Discretionary - **May Be Admissible; Discretion Not Abused in Refusing to Admit.** The trial court was aware of corroborating evidence in addition to the identification testimony. Given the particular facts and circumstances, we cannot say the trial court's denial constituted an abuse of discretion.
34.	**North Carolina**	*State v. Lee*, 572 S.E.2d 170 (N.C. Ct. App. 2002).	Discretionary - **May Be Admissible; Discretion Not Abused in Refusing to Admit.** Testimony not case specific and lacked probative value.
35.	**North Dakota**	*State v. Fontaine*, 382 N.W. 2d 374 (N.D. 1986).	Discretionary - **May Be Admissible. Discretion Not Abused in Refusing to Admit.** Partial testimony allowed. Expert testified on several estimator variables, but was not allowed to answer a hypothetical question concerning accuracy. The court did not abuse its discretion.
36.	**Ohio**	*State v. Buell*, 489 N.E.2d 795 (Ohio 1986).	Discretionary – **May Be Admissible; Discretion Not Abused in Refusing to Admit.** Expert testimony regarding the credibility of a *typical* witness is admissible, but testimony regarding the credibility of a *particular* witness is not.
37.	**Oklahoma**	*Torres v. State*, 962 P.2d 3 (Okla.	Discretionary - **May Be Admissible; Discretion Not Abused in Refusing to**

	Crim. App. 1998).	**Admit.** While it might be that expert testimony regarding eyewitness identification would have been admissible in this case, defendant did not present any evidence to show what that expert testimony would have revealed or how the failure to present such expert evidence prejudiced him.
38. Oregon	*State v. Goldsby*, 650 P.2d 952 (Or. Ct. App. 1982).	Discretionary - **Inadmissible.** Although eyewitness identification evidence has a built-in potential for error, the law does not deal with that by allowing experts to debate the quality of evidence for the jury.
39. Pennsylvania	*Commonwealth v. Abdul-Salaam*, 678 A.2d 342 (Pa. 1996).	Prohibitory – **Inadmissible.** Testimony would give unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary juror can assess.
40. Rhode Island	*State v. Martinez*, 774 A.2d 15 (R.I. 2001).	Discretionary - **Inadmissible.** In general, the jury does not need assistance in determining the trustworthiness of an eyewitness.
41. South Carolina	*State v. Whaley*, 406 S.E.2d 369 (S.C. 1991).	Discretionary - **May Be Admissible. Discretion Abused in Refusing to Admit.** Trial court ruling reversed and case remanded. It was an abuse of discretion to exclude the expert's testimony concerning eyewitness reliability because the main issue in this case was the identity of the assailant, the only evidence establishing the defendant as the assailant was the testimony of the two eyewitnesses, and other factors existed which could have affected the identification.
42. South Dakota	*State v. McCord*, 505 N.W.2d 388 (S.D. 1993).	Discretionary - **May Be Admissible. Discretion Not Abused in Admitting.** The only case in which the prosecution called an identification expert. The court ruled that jurors do not possess an expert's comprehensive training in assessing the reliability of identification. The court found that the trial court did

		not abuse its discretion in finding this testimony as relevant.
43. Tennessee	*State v. McKinney*, 74 S.W.3d 291 (Tenn. 2002). *See also State v. Coley*, 32 S.W.3d 831 (Tenn. 2000).	**Prohibitory.** Per se exclusionary rule. Expert testimony regarding eyewitness identification is inadmissible and the exclusion of such testimony does not violate a defendant's due process right to present a defense.
44. Texas	*Weatherred v. State*, 15 S.W.3d 540 (Tex. Crim. App. 2000).	Discretionary - **Inadmissible.** Appellant failed to carry his burden of showing that the proffered testimony was scientifically reliable or relevant.
45. Utah	*State v. Maestas*, 63 P.3d 621 (Utah 2002).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The trial court is in the best position to balance the probative value of proffered testimony against the risk of intrusion upon the fact-finding functions of the jury. The trial court acted within its discretion in excluding the testimony.
46. Vermont	*State v. Percy*, 595 A.2d 248 (Vt. 1990).	Discretionary - **Inadmissible.** Juries may be made to understand psychological factors which affect accuracy of an identification through cross-examination and closing arguments.
47. Virginia	*Currie v. Commonwealth*, 515 S.E.2d 335 (Va. Ct. App. 1999).	Discretionary - **May Be Admissible. Discretion Not Abused in Refusing to Admit.** Partial testimony allowed. It was not error to limit expert witness's testimony concerning the correlation between eyewitness certainty and accuracy, and those other areas of witness's proffered testimony which were within the common knowledge and experience of the jurors.
48. Washington	*State v. Nordlund*, 113 Wash. App. 1033 (Wash. Ct. App. 2002).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** During *voir dire*, the trial court found that the potential jurors' answers demonstrated that they already understood each of the factors the expert wanted to explain.

49.	**West Virginia**	*State v. Taylor*, 490 S.E.2d 748 (W.Va. 1997).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The testimony would not have affected the overall outcome of the case. Fees to hire an expert were denied.
50.	**Wisconsin**	*State v. Blair*, 473 N.W.2d 566 (Wis. Ct. App. 1991).	Discretionary - **May Be Admissible, Discretion Not Abused in Refusing to Admit.** All topics proffered were within the common knowledge and sense and perception of the jury.
51.	**Wyoming**	*Engberg, v. Meyer*, 820 P.2d 70 (Wyo. 1991).	Discretionary – **May Be Admissible, Discretion Not Abused in Refusing to Admit.** The court recognizes the modern trend more favorable to the admission of expert testimony relating to eyewitness identification, but holds that their consistent rule is that the admission of expert testimony is within the discretion of the trial court.

Table 4: *Decisions and Rationale by Federal Circuit*

First Circuit **Maine** **Massachusetts** **New Hampshire** **Rhode Island**	*United States v. Brien*, 59 F.3d 274 (1st Cir. 1995).	**May Be Admissible. Discretion Not Abused in Exclusion.** The court of appeals sustained the district court's ruling not to admit the testimony on the ground that the defense offered practically nothing as far as a proffer of data or literature underlying the expert's assumptions and conclusions, despite being asked for it repeatedly. There is no reason it couldn't be supplied, and it was necessary since the expert's testimony "did not concern a single long-established scientific principle."
Second Circuit **Connecticut** **New York** **Vermont**	*United States v. Lumpkin*, 192 F.3d 280 (2d Cir. 1999).	**May Be Admissible. Discretion Not Abused in Exclusion.** The court of appeals upheld the district court's ruling that the expert could not testify on the confidence-accuracy relationship. It "would have confused the jury's assessment of the officers' credibility, thereby usurping their role."
Third Circuit **Delaware** **New Jersey** **Pennsylvania**	*United States v. Mathis*, 264 F.3d 321 (3d Cir. 2001).	**May Be Admissible. Discretion Abused in Exclusion.** Despite finding that the government abused its discretion in not admitting several pieces of the proffered testimony, the court of appeals ultimately decided that had the testimony been admitted, the outcome of the case would not have been different. Harmless error.
Fourth Circuit **Maryland** **North Carolina** **South Carolina** **Virginia** **West Virginia**	*United States v. Harris*, 995 F.2d 532 (4th Cir. 1993).	**May Be Admissible. Discretion Not Abused in Exclusion.** The court affirmed the district court's judgment, finding that none of the limited circumstances under which courts allow expert testimony on eyewitness identification were present in this case.

Fifth Circuit **Louisiana** **Mississippi** **Texas**	*United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986).	**Not Admitted: Admissible, but Discretion Not Abused in Exclusion.** The decision whether to admit this testimony is squarely within the discretion of the trial judge and properly so. This is not a case in which the eyewitness identification testimony is critical. Even if the identifications of the defendants are completely disregarded, the other evidence of guilt are overwhelming.
Sixth Circuit **Kentucky** **Michigan** **Ohio** **Tennessee**	*United States v. Langan*, 263 F.3d 613 (6th Cir. 2001).	**Not Admitted: Admissible, but Discretion Not Abused in Exclusion.** The court of appeals affirmed the judgment of the district court in that it agreed that the testimony failed to meet the second prong of Daubert, which requires that the proposed testimony fit the issue to which the expert is testifying. The court agreed that the "hazards of eyewitness identification are within the ordinary knowledge of most lay jurors."
Seventh Circuit **Illinois** **Indiana** **Wisconsin**	*United States v. Crotteau*, 218 F.3d 826 (7th Cir. 2000).	**Not Admitted: Admissible, but Discretion Not Abused in Exclusion.** The court denies the defendant's motion for the appointment of an eyewitness identification expert because "the facts of the case do not create an unusual or compelling situation in which the aid of an expert witness is required" and "as the Seventh Circuit has stated, cross examination, cautionary instructions, and corroborating evidence can obviate the need for expert testimony on eyewitness identification."
Eighth Circuit **Arkansas** **Iowa** **Minnesota** **Nebraska** **North Dakota**	*United States v. Kime*, 99 F.3d 870 (8th Cir. 1996).	**Inadmissible.** The court agrees with the district's court ruling to not admit the testimony for several reasons: the testimony fails to qualify as "scientific knowledge" under Daubert's first prong; it fails under the second prong because it would not assist

South Dakota		the trier of fact since the evaluation of eyewitness testimony is for the jury alone and the testimony would intrude the jury's domain; the minimal probative value is outweighed by the danger of juror confusion; the concerns were adequately addressed in jury instruction; and the testimony was supported by several other witnesses.
Ninth Circuit **Alaska** **Arizona** **California** **Hawaii** **Idaho** **Montana** **Nevada** **Oregon** **Washington**	*United States v. Labansat*, 94 F.3d 527 (9th Cir. 1996).	**Inadmissible.** The court upheld the district court's denial of the defendants request for funds to hire an expert on eyewitness identification because "as we have previously explained, 'the admissibility of this type of expert is strongly disfavored in most courts' and any weaknesses...can ordinarily be revealed by counsel's careful cross-examination." The defendant has not shown by clear and convincing evidence that he was prejudiced by the lack of expert assistance.
Tenth Circuit **Colorado** **Kansas** **New Mexico** **Oklahoma** **Utah** **Wyoming**	*United States v. Smith*, 156 F.3d 1046 (10th Cir. 1998).	**Not Admitted: Admissible, but Discretion Not Abused in Exclusion.** The district court did not abuse its discretion in excluding the testimony. The district court considered the matter in detail, conducting a lengthy Daubert hearing. There were five eyewitnesses identifications, not one.
Eleventh Circuit **Alabama** **Florida** **Georgia**	*United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997).	**Inadmissible.** The court explains that, under the prior panel precedent rule, it is bound by earlier panel holdings. Expert testimony not needed because the jury could determine reliability under the tools of cross-examination and jury instruction to highlight particular problems in eyewitness recollection. The defendant was successful in this case in getting the district court to instruct the jury about cross-racial identification, potential bias

		in earlier identification, delay between even and time of identification, and stress. Therefore expert testimony not needed.
D.C. Circuit		**No cases found.**

ONE PERSON, ONE VOTE AND THE CONSTITUTIONALITY OF THE WINNER-TAKE-ALL ALLOCATION OF ELECTORAL COLLEGE VOTES*

Christopher Duquette[+] *& David Schultz*[±]

I. Introduction

The Electoral College is an American political and constitutional curiosity. The constitutional framers believed it would produce "extraordinary persons" as presidents because they would be selected by "men most capable of analyzing the qualities adapted to the station" of the presidency.[1] Its more recent defenders, such as Martin Diamond, have justified it as either a constitutional system meant to protect individual and minority rights or a mechanism to overcome regionalism.[2] In Diamond's view, along with the principles of separation of powers and checks and balances, it was necessary to thwart the dangers of factionalism that a popular government posed.[3] Some have noted that, with an Electoral College, national recounts are unnecessary, as only the votes cast in disputed jurisdictions would need to be recounted.[4]

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[1] THE FEDERALIST NO. 68, at 444 (James Madison) (Modern Library 1937).

[2] Martin Diamond, *Democracy and the Federalist: A Reconsideration of the Framers' Intent*, 53 AMER. POL. SCI. R. 52 (1959).

[3] *Id.*

[4] RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 224-27 (2001). *See*

Yet, the Electoral College also has its detractors. It has been criticized as undemocratic, as denying individual liberty and the fundamental right to vote, and as no longer serving the purpose for which it was established.[5] Following the 2000 presidential election—where George Bush lost the national popular vote to Al Gore but won the Electoral College vote—those criticisms intensified.[6]

The 2000 election was not the first to showcase these peculiar aspects of the Electoral College. In 1800, for example, Thomas Jefferson and Aaron Burr deadlocked with equal numbers of electoral votes.[7] The House of Representatives decided the election in favor of Jefferson.[8] In 1824, Andrew Jackson received the plurality of popular and electoral votes, yet lost to John Quincy Adams in the House of Representatives.[9] In 1876, Samuel J. Tilden

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also Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 396 (2001) (examining the various issues surrounding the administration of presidential elections, including state recounts).

[5] *See generally* MICHAEL J. GLENNON, WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION (1992).

[6] *See* VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001); ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 22-26 (2001) (reviewing criticisms of the Electoral College); DOUGLAS KELLNER, GRAND THEFT 2000: MEDIA SPECTACLE AND A STOLEN ELECTION (2001); POSNER, *supra* note 4, at 224-27 (reviewing criticisms of the Electoral College); Jack N. Rakove, *The E-College in the E-Age*, *in* THE UNFINISHED ELECTION OF 2000 201, 221-27 (Jack N. Rakove ed., 2001).

[7] Thomas Jefferson and Aaron Burr were running as a team. At the time, each elector could cast two votes. The candidate receiving the most votes was elected president, and the number-two vote recipient was elected vice president.

[8] DUMAS MALONE & BASIL RAUCH, EMPIRE FOR LIBERTY: THE GENESIS AND GROWTH OF THE UNITED STATES OF AMERICA 323-327 (1960).

[9] *Id.* at 430-32.

received more of the popular vote than did Rutherford B. Hayes, but disputes in Florida regarding who to recognize as electors resulted in a compromise that awarded the presidency to Hayes.[10] Again, in 1888, Grover Cleveland received more popular votes than Benjamin Harrison, but Harrison became President with a majority of the electoral vote.[11] For some, these elections reveal the undemocratic character of the Electoral College.[12]

Others maintain that the Electoral College depresses voter turnout[13] or creates a system of wasted votes.[14] Still others see the Electoral College as discouraging the formation and support of third parties.[15] Ralph Nader and Green Party backers articulated this criticism in recent presidential races.[16] A further criticism of the Electoral College arises from the practice of all states—except for Maine and Nebraska—to award all of their electoral votes to the presidential candidate receiving the plurality of the

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[10] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (Henry Steele Commager & Richard B. Morris, eds., 1988); WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

[11] GREENE, *supra* note 6, at 22 (for a review of the historical problems with the Electoral College).

[12] For a review of these claims, *see generally* GREENE, *supra* note 6; POSNER, *supra* note 4.

[13] Alexander Keyssar, *The Right to Vote and Election 2000*, *in* THE UNFINISHED ELECTION OF 2000 75, 96 (Jack N. Rakove ed., 2001).

[14] An example cited is a situation where an overwhelming majority of the population in a state has one preference, causing some in the minority in that state to abstain from voting. *See* GEORGE C. EDWARDS, III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2004) (arguing that the Electoral College serves to disenfranchise many voters not living in competitive states).

[15] Thomas M. Durbin, *The Anachronistic Electoral College: The Time For Reform*, 39 FED B. N.J. 510 (1992).

[16] *Nader Brushes Off Spoiler Role*, Lubbockonline (November 15, 2000), *available* at http://quest.lubbockonline.com/stories/111500/nad_1115006860.shtml (last visited on September 7, 2006).

popular vote in their states.[17]

In light of the history and criticism levied against the Electoral College, it is worth asking whether awarding electoral votes on a winner-take-all basis is unfair or, more importantly, unconstitutional. In the 1966 case *Delaware v. New York*, the Supreme Court refused to hear an original jurisdiction case that would have argued that question.[18] In particular, the Court was asked to decide whether the state winner-take-all method of allocating electoral votes violated the "one person, one vote" standard that had been articulated in *Reynolds v. Sims*.[19] Without comment, the Court declined review, leaving in doubt how to interpret the unexplained denial.[20]

Since 1966, two conditions have changed, suggesting that the constitutionality or fairness of the winner-take-all method of allocating electoral votes should be revisited. First, in 1966, the reapportionment and "one person, one vote" jurisprudence was in its infancy. Four decades later, it is more constitutionally developed in terms of its application and scope.[21] Second, under the winner-take-all method, the occurrence of a scenario similar to what happened in Florida in 2000 was likely. That scenario very nearly happened in the 1960 election, when Texas and

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[17] GREENE, *supra* note 6, at 25; POSNER, *supra* note 4, at 231, 239; GERALD M. POMPER, *The Presidential Election*, *in* THE ELECTION OF 2000 125, 150 (Gerald M. Pomper ed., 2001). During the 2004 presidential election, voters in Colorado rejected a state ballot measure to amend the state constitution to award that state's electoral votes proportional to the popular-vote vote breakdown. *See* Colorado Secretary of State, Colorado Amendment 36: Selection of Presidential Electors, *available at* http://www.sos.state.co.us/pubs/elections/tb-final99.htm (last visited July 10, 2006).

[18] Delaware v. New York, 385 U.S. 895 (1966).

[19] 377 U.S. 533 (1964).

[20] 385 U.S. at 895, *reh'g denied.*

[21] Specifically, by the time *Delaware v. New York* was filed, it was not clear how far the one person, one vote jurisprudence would be legally applied.

Illinois represented the margin of John F. Kennedy's victory over Richard M. Nixon, amid serious allegations of irregularities in both states.[22] When these allegations arose, they brought the inequities in the operation of the Electoral College to the forefront.

This article will present a new method of assessing the inequities of the winner-take-all method states use to allocate electoral votes, and will show that such a system produces significant inequities in the voting power of citizens across states.[23] In so doing, the article makes two claims. First, states do have broad power to choose electors, but that power must be read in light of the current voting rights and reapportionment jurisprudence. Second, the "one person, one vote" standard for reapportionment calls into question the fairness, if not the constitutionality, of the winner-take-all approach for awarding presidential electors.

In effect, this article argues for the repeal of winner-take-all methods for selecting electoral votes. It contends that if the Court were to hear a case like *Delaware v. New York* today, notwithstanding what Article II of the Constitution says, a candidate or state could make a case that the winner-take-all method of awarding presidential electors is unconstitutional.[24] In the alternative, this article

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[22] THEODORE H. WHITE, THE MAKING OF THE PRESIDENT, 1960, 350-65 (Atheneum 1961).

[23] *See* Hasen, *supra* note 4, at 396 ("The need for uniformity itself is echoed in the Constitution, which requires a uniform day for choosing presidential electors. On the other hand, each state picks its own electors for the Electoral College, so equality in the weighting of votes across states is affirmatively rejected in the Constitution.").

[24] Whether the Court would entertain and accept the argument is a matter of debate. Even if it did not, one can still argue that the inequities in voter strength across states created by the winner-take-all method contribute to the existing criticisms of the Electoral College, and thereby add more fuel to why states should abandon this presidential election selection system in the interest of protecting the voting rights of their citizens.

advocates that states abandon winner-take-all systems on their own in the interest of fairness and enhancing, in many cases, the influence that their citizens have in the selection of the president.

To make these claims, this article briefly discusses the constitutional power that states have to select their presidential electors.[25] This article then provides a brief discussion of the right to vote in the context of reapportionment, especially as it is relevant to the Electoral College and presidential selection.[26] Next, it provides a new way to assess the relative weighting of electoral votes, making the case that the winner-take-all allocation of electoral votes leads to distortions.[27] Finally, the article argues that those distortions violate the "one person, one vote" constitutional standard.[28]

Overall, this article contends that even if the Supreme Court is unwilling to address the constitutionality of the winner-take-all method, as a matter of law or public policy, states might wish to consider eliminating this method of allocating electoral votes. While the winner-take-all method can have the effect of boosting the influence of some states' citizens in presidential elections, it does so by marginalizing the influence of voters from other states.

II. State Power and the Electoral College

From the text of the Constitution, state legislatures appear to have plenary power to determine the selection of their presidential electors. Article II, Sections 2 through 5 of the Constitution, read in conjunction with the Twelfth Amendment, describe the process for the selection of the President. According to Article II, "Each State shall

[25] *See infra* Part II.
[26] *See infra* Part III.
[27] *See infra* Part IV.
[28] *See infra* Part V.

appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[29] Indeed, in the only two cases where the Supreme Court has adjudicated Article II, Section 2, the Justices have given states broad authority to determine how electors are selected.[30]

In *McPherson v. Blacker,*[31] the State of Michigan enacted a law changing the selection of its electors. The Secretary of State challenged this law as a violation of the Fourteenth Amendment. In rejecting this challenge, the Court interpreted the Constitution as giving state legislatures "plenary authority to direct the manner of appointment" of its electors.[32] According to the Court, Michigan was free to determine how its electors would be chosen, subject to the limitations of its state constitution.[33]

Bush v. Gore[34] is the only other case in which the Court has directly addressed the state power over the selection of electors. In this case, the Court considered whether the manner of counting the ballots in the disputed Florida 2000 presidential election violated the Equal Protection Clause of the Fourteenth Amendment.[35] In ruling that it did, the Court built upon its voting rights and reapportionment jurisprudence, indicating that the right to vote was "protected in more than the initial allocation of the franchise."[36] Specifically, the Court extended the right-to-vote protection to the counting of ballots. The Court limited this holding, however, by noting that while the

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[29] U.S. CONST. art. II § 1, cl. 2.
[30] McPherson v. Blacker, 146 U.S. 1 (1892); Bush v. Gore, 531 U.S. 98 (2000).
[31] 146 U.S. at 1.
[32] *Id.* at 25.
[33] *Id.*
[34] 531 U.S. at 98.
[35] *Id.* at 105.
[36] *Id.* at 104.

Constitution does not grant individuals the right to vote in presidential elections, states do.[37] More importantly, the Court, quoting *McPherson*, reiterated that the State's power to determine the selection of their electors is plenary.[38]

In addition to the *per curiam* opinion in *Bush v. Gore*, Justice Rehnquist, joined by Justices Scalia and Thomas, also discusses the authority of states to conduct presidential elections and select electors.[39] The Chief Justice first noted how the text of the Constitution imposes upon states a duty to select its electors.[40] In imposing that duty, Rehnquist cited *McPherson* for the proposition that the Constitution "convey[s] the broadest power of determination and leaves it to the legislature exclusively to define the method of appointment."[41] Thus, as with the per curiam opinion, the Chief Justice seems to suggest that state legislatures have broad discretion to select their electors and conduct presidential elections. In fact, as part of this deference, Congress enacted Title 3 U.S.C. § 5 to present state legislatures with a "safe harbor" for their determination of how electors are to be selected, if disputes over them are challenged in Congress.[42] This safe harbor provision, along with the text of the Constitution, necessitated that the Court review "postelection state-court actions" by the Florida Supreme Court to be sure that these judicial proceedings did not trample upon the power of the State Legislature to determine the manner of selection for its electors.[43] In effect, the power of legislatures to pick their electors is so plenary that it might alter or affect the normal separation of powers within a state such that their

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[37] *Id.*
[38] *Id.*
[39] *Id.* at 111 (Rehnquist, C.J., Scalia, J. and Thomas, J. concurring).
[40] *Id.* at 112.
[41] *Id.* at 113 (quoting *McPherson*, 146 U.S. at 27) (internal quotation marks omitted).
[42] *Id.* at 113-14.
[43] *Id.* at 114.

courts might not be able to second guess how they determine presidential selection.[44]

Notwithstanding Article II, Section 2, *McPherson,* and *Bush*, the near plenary power of states to award their electoral votes does not mean that states can otherwise violate the Constitution. For example, could a state decide to let only women or whites vote in presidential elections or serve as electors? Discriminatory practices that use race or gender as a factor have been declared unconstitutional in many circumstances.[45] The use of race in reapportionment has also been found to violate the Constitution.[46] Legislation, such as the Voting Rights Act,[47] has declared discrimination in voting based on race illegal. Overall, the argument that the plenary power of states to allocate electoral votes must be qualified; such power cannot be exercised in violation of other constitutional and statutory limits.[48]

The Supreme Court has also noted the uniqueness of the presidential selection process and has been willing to address how states conduct presidential elections. For example, in *Anderson v. Celebrezze*,[49] the Supreme Court

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[44] *Id.* at 112-13.

[45] *See* Washington v. Davis, 426 U.S. 229 (1976) (holding that the Fourteenth Amendment bars the intentional use of race by governments); Frontiero v. Richardson, 411 U.S. 677 (1973) (ruling by a four person plurality that classifications on the basis of gender are suspect); Gormillion v. Lightfoot, 364 U.S. 339 (1960) (holding that the use of race in districting violates the Fifteenth Amendment); Korematsu v. United States, 323 U.S. 214 (1944) (holding classifications on the basis of race are suspect).

[46] Shaw v. Reno, 509 U.S. 620 (1993); *Gormillion*, 364 U.S. at 339. *See also infra* Part III.

[47] *See also* Smith v. Allwright, 321 U.S. 649 (1944).

[48] *See generally* Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. L. REV. 535, 536 (2001) (arguing the Constitution should be interpreted to place some limits on the ability of states to deny citizens the right to select presidential electors).

[49] 460 U.S. 780 (1983).

was willing to place limits on how states determine ballot access for presidential candidates. In *Burroughs v. United States,*[50] the Court considered whether the Federal Corrupt Practices Act applied to political committees seeking to influence the selection of presidential electors. Ruling that it did, the Court argued that, even though the power to select electors resided with the states, Congress has the authority to pass legislation to ensure that money does not corrupt the electoral process.[51]

In *Moore v. Ogilvie*,[52] the Court held that the "one person, one vote" principle applied to petition gathering for the selection of presidential electors. At issue was an Illinois law regulating petition signatures for new parties, as it was applied to "independent candidates for the offices of electors of President and Vice President of the United States from Illinois."[53] The law, which mandated a geographic dispersion for signers, was held to violate the "one person, one vote" standard because of the burden it created by mandating that signatures be obtained in at least fifty counties.[54] The Court noted that, because of the way the population was distributed in the state, residents in some counties would have an easier time securing signatures than in others.[55] If "one person, one vote" applies to petition gathering for electors, would it not also apply to how the electors are allocated?

Anderson, Burroughs, and *Moore* all demonstrate that the power of states to select their electors is not absolute. That power is subject to qualifications. While the Court in *Bush v. Gore* declared that individuals have no right to vote in presidential elections unless the states grant

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[50] 290 U.S. 534 (1934).
[51] *Id.* at 545.
[52] 394 U.S. 814, 819 (1969).
[53] *Id.* at 815.
[54] *Id.*
[55] *Id* at 819.

such a power,[56] the Court stipulated in *Moore* that: "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."[57] This prophylactic against discrimination must apply, as the Court stated in *Bush v. Gore*—when it extended the "one person, one vote" standard of *Reynolds* to presidential vote counting—to "more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise."[58] Thus, in cases where states have granted individuals the right to vote in presidential elections, that right mandates that they not arbitrarily interfere with awarding that right or in counting the presidential ballots.

III. Voting Rights, Representation, and Reapportionment

The *Bush v. Gore* holding that the Constitution does not guarantee the right to vote in presidential elections cannot be applied in isolation. The Court has also held that voting is a fundamental right protected under the Constitution,[59] especially in the context of reapportionment.[60]

Article I, Section 2 of the Constitution mandates that the federal government take a federal census every ten years for the purpose of apportioning representation in the House of Representatives.[61] The decennial census forms the basis for the reallocation of House members among the states based on population changes. Nothing in the plain text of the Constitution, however, requires states to draw House districts of equal population size or to redraw

[56] 531 U.S. at 104.
[57] 394 U.S. at 818 (citations omitted).
[58] 531 U.S. at 104.
[59] Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).
[60] *Reynolds*, 377 U.S. at 533.
[61] U.S. CONST. art. I, § 2.

districts to reflect changes in population.

Therefore, elected officials often seek to manipulate the apportionment process to their benefit by drawing lines that will favor their re-election efforts. During the nineteenth century, the majority of the nation's population lived in rural areas, thereby giving those areas significant political representation both in Congress and the state legislatures.[62] By the early to mid-twentieth century, the population centers had shifted to the cities.[63] Yet state legislatures, still controlled by rural interests, refused to reapportion and redistrict, for doing so would diminish the power of the rural areas.[64] In addition, many states, particularly in the South, were reluctant to redistrict because urban areas were more heavily populated by Blacks.[65] Thus, efforts to forestall reapportionment sometimes had a racial motive.[66]

In 1946, after efforts to challenge the malapportionment at the legislative level failed, the Supreme Court reviewed whether the numerical inequality in the apportionment of Illinois congressional districts was constitutional.[67] Writing for the Court, Justice Frankfurter stated that apportionment issues were nonjusticiable political questions best handled by the legislatures and not the courts.[68] Redistricting was a "political thicket" that the courts would do well to avoid.[69]

In 1962, however, the Supreme Court reversed itself. In *Baker v. Carr*,[70] the Court rejected the *Colegrove*

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[62] DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW 228-248 (2004).
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id. See also Gomillion*, 364 U.S. at 339.
[67] Colegrove v. Green, 328 U.S. 549 (1946).
[68] *Id.* at 554-55.
[69] *Id.* at 556.
[70] 369 U.S. 186 (1962).

holding that reapportionment issues are political questions. Instead, the Court held that issues alleging malapportionment raise important constitutional questions that are within the purview of the judiciary. A few years earlier, the Court used the Fifteenth Amendment to strike down a districting scheme in Alabama meant to dilute African-American representation.[71] Race was not a permissible factor for the legislature to consider in reapportionment.[72]

After *Baker*, the Supreme Court ruled on numerous reapportionment issues. In *Reynolds v. Sims*,[73] it held that the right to vote was diluted if some districts were more populous than others and that state legislative seats must be drawn according to a "one person, one vote" standard. In reaching this conclusion, the Court stated, "Legislators represented people, not trees or acres."[74]

The Court has since extended the "one person, one vote" standard to other reapportionment contexts. For example, in *Westberry v. Sanders*,[75] the Court mandated that congressional districts must be apportioned in a manner that achieves numerical equality. In *Avery v. Midland County*,[76] the Court applied the "one person, one vote" principle to local government units. Moreover, in *Lucas v. 44th General Assembly of Colorado*,[77] the Court rejected state analogies to the United States Congress where the Senate was apportioned by geography and the House by population. The *Lucas* Court mandated that all legislative seats must respect the "one person, one vote" standard.[78] In more recent cases, such as *Karcher v.*

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[71] *Gormillion*, 364 U.S. 339.
[72] *Id.*
[73] 377 U.S. at 533.
[74] *Id.* at 562.
[75] 376 U.S. 1 (1964).
[76] 390 U.S. 474 (1968).
[77] 377 U.S. 713 (1964).
[78] *Id.* at 738-39.

Daggett[79] and *Brown v. Thomson*,[80] the Court demanded strict numerical equality for congressional districts while permitting a deviation of approximately five percent from equality at the state level to accommodate local governments and avert the breakup of political subunits.

The *Reynolds v. Sims*[81] line of cases establishes that within the context of voting rights and reapportionment, the "one person, one vote" standard is essential to the protection of franchise and that the unequal weighing of votes is unconstitutional. However, in *Delaware v. New York*, [82] the Supreme Court declined to consider the substantive merit of whether the "one person, one vote" standard applied to the Electoral College. Is there reason to think that the Court erred in not accepting the case and reviewing the question on its merits? Might the winner-take-all allocation of states' Electoral College votes violate the "one person, one vote" standard?

IV. A Statistical Analysis of the Inequities That Follow From Winner-Take-All

The events of the presidential election of 2000 left many uneasy with the Electoral College. In that election, the margin of victory for Republican George W. Bush over Democrat Albert Gore was a mere 537 popular votes in Florida.[83] Those votes—out of nearly six million cast in the state—swung the State's twenty-five Electoral College votes[84] to Bush, who ultimately defeated Gore by a mere

[79] 462 U.S. 725 (1983).
[80] 462 U.S. 835 (1983).
[81] 377 U.S. at 533.
[82] 385 U.S. 895 (1966).
[83] ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001).
[84] In 2000, Florida cast twenty-five Electoral College votes. By the 2004 presidential election, Florida was allotted twenty-seven Electoral College votes.

four votes (271-267) in the Electoral College.[85] For five weeks after the polls closed, the election's outcome remained in doubt as the Bush and Gore camps battled in the courts over the disputed Florida electors.[86] It took the intervention of the United States Supreme Court to settle the battle and determine the outcome of the election in Florida, and thus, the nation.[87]

While the exceedingly narrow margin in Florida in 2000 was atypical, the phenomenon of some states' small margins of victory disproportionately influencing an election's outcome was not. The winner-take-all allocation of each state's Electoral College votes ensures that it will happen in every election. Under winner-take-all, some states' votes will count for more than others in determining the outcome. This effect happens whether the election is a cliffhanger or a landslide. All that changes from one election to the next is the magnitude of its effect.

As noted earlier, the operation of the Electoral College in electing the President is provided for in Article II, Section 1 of the United States Constitution. Each state's Electoral College vote allotment is equal to the size of its congressional delegation. The total number of electors is equal to the total number of members of the Congress, plus two "shadow" Senators and one "shadow" Representative for the District of Columbia. At present, the United States Senate is comprised of 100 members and the United States House of Representatives is comprised of 435 members. Adding the three "shadow" D.C. electors gives the Electoral College its present total of 538 electors.[88] The

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[85] STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2000 (U.S. Gov't Printing Office 2001). The final margin when the Electoral College convened was 271-266, as one of Gore's electors refrained from voting for Gore.

[86] *See generally* GREENE, *supra* note 83.

[87] 531 U.S. at 1046.

[88] The District of Columbia is allotted three Electoral College votes to compensate for its lack of a congressional delegation.

Electoral College convenes in December following a November presidential election, where a majority of the electors is required to elect a President.[89] Therefore, for an Electoral College of 538 electors, 270 electors is the minimum number required to win the presidency. In the absence of a majority, the election is determined by the House of Representatives, with each state's delegation counting as one vote.[90]

Others have noted how the Electoral College disproportionately weighs the votes of smaller states relative to larger states.[91] This disproportionate weighting occurs because each state's Electoral College votes are equal to the sum of its votes in the House of Representatives and the Senate. The House votes are apportioned on the basis of population, with each state guaranteed at least one representative, regardless of population. But the Senate votes are not; each state receives two Senate votes, regardless of its population. For example, California, which has 35 million residents, receives the same number of Senate votes as Wyoming, which has only 380,000 residents. As a result of the "plus-two" Senate bonus, smaller states pack a slightly larger Electoral College punch relative to their populations than do larger states.

More significant, though, is the effect of the winner-take-all allocation of each state's Electoral College votes. At present, in all but two states, Maine and Nebraska, the Electoral College votes are allocated to each state's popular-vote winner. Such a winner-take-all allocation is not mandated by the United States Constitution. Rather,

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[89] 3 U.S.C. § 7 (2006).

[90] *See* U.S. CONST. amend. XII (detailing the presidential selection process in the House of Representatives should no candidate receive a majority of the electoral votes).

[91] *See, e.g.*, John F. Banzhaf, III, *One Man:3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 303 (1968).

the Constitution provides that each state's electors shall be appointed in a manner to be determined by its legislature.[92] The only stipulation is that a sitting member of Congress cannot also serve as an elector.[93]

Because the Constitution allows state legislatures to determine how electors are appointed, it is not surprising that all of the states—with the exception of Maine and Nebraska—have opted for a winner-take-all allocation. At the state level, such a course of action is a rational one. Allocating electors on a winner-take-all basis boosts the likelihood that candidates will visit a state and pay attention to its concerns. For example, if Oregon, with its relatively small population, is shaping up as a swing state, a last-minute trip to the state might appear attractive to a candidate. If the trip went well, it could have the effect of swinging the full complement of the state's Electoral College votes come Election Day. Candidates would be less likely to court the state's voters if the state's Electoral College votes were allocated on some other basis. Clamoring for national candidates' attention, almost every state ends up with a winner-take-all allocation.

What may be rational at the state level, however, can lead to distortions at the national level.[94] The winner-take-all effect ensures that small swings in state-vote margins can disproportionately influence the national Electoral College count. In a close election, such swings can even determine the winner. The extreme case is the 2000 presidential election, where 537 popular votes in Florida represented the difference in awarding the state's

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[92] U.S.CONST. amend. XII.

[93] *Id.*

[94] An analogue is the states' competition for "pork-barrel" spending in the United States Congress. Each state's congressional delegation serves as an advocate for that state's spending priorities. To the extent that they are successful, they boost the size of the federal budget. Either taxes must be raised or deficits must accrue to finance the added spending.

twenty-five Electoral College votes, and, ultimately, the election, to Bush over Gore. Four years later, in the presidential election of 2004, the margin of victory for Bush over Democrat John F. Kerry was the 119,000 votes in Ohio that swung that state's twenty Electoral College votes.[95] In the presidential election of 1976, the margin of victory for Democrat Jimmy Carter over Republican Gerald Ford amounted to 175,000 votes in three critical states: Ohio, Wisconsin, and Texas.[96] Nearly half of Carter's 297-240 Electoral College vote margin over Ford was attributable to his winning Ohio.[97] Carter won Ohio's allotment of twenty-five Electoral College votes by a margin of 11,116 popular votes.[98]

Moreover, the winner-take-all effect holds irrespective of the "plus-two" bonus. When each state's electors are allocated on a winner-take-all basis, distortions can arise. The "plus-two" bonus only serves to magnify the effect of those distortions.

It is possible to quantify the magnitude of the distortion that arises in each presidential election from the winner-take-all allocation of each state's Electoral College votes. The critical element is the number of swing votes—the votes that represented the margin of victory for the winning candidate. This is the number of votes that swing a state to the winning candidate.[99] The rest of the votes for each major-party candidate offset each other. Thus, the

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[95] STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2004 (U.S. Gov't Printing Office 2005).

[96] STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1976 (U.S. Gov't Printing Office 1977).

[97] *Id.* One of Ford's electors defected to vote for Ronald W. Reagan when the Electoral College convened.

[98] *Id.*

[99] The swing votes have also been called "wasted votes." JAMES P. LEVINE & DAVID W. ABBOTT, WRONG WINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE 22-24 (1991); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1606 (1993).

swing votes are the ones that are of particular interest.

The key to this analysis is to determine the relative impact of each state's swing votes in an election. The impact of each state's swing votes is calculated by dividing the number of Electoral College votes at stake by the popular vote margin of victory for the winning candidate. Invariably, the margin of victory dwarfs the number of Electoral College votes, and the resulting fraction is tiny. For ease of interpretation, each state's fraction can be normalized with respect to the middle-ranking state for that election. The states can then be ranked in order of their swing voters' Electoral College impact for each election.

Begin with the most recent presidential election, which occurred in 2004. Recall that Bush defeated Kerry by a 286-252 electoral vote margin, and by 3.5 million popular votes. Table 1 presents the state-by-state Electoral College swing-vote impact rankings, for the fifty states plus the District of Columbia. The results are normalized with respect to that election's middle-ranking state, Alaska (AK).

Table 1: *Relative Electoral College Impact of a Swing Vote, 2004 Presidential Election*

State	Relative EC Impact	State	Relative EC Impact	State	Relative EC Impact
WI	18.57	AR	1.28	TN	0.69
N.M.	13.34	AZ	1.27	WY	0.68
IA	11.38	MO	1.21	S.C.	0.64
N.H.	9.57	CA	1.18	GA	0.60
NV	5.09	W.V.	1.14	MS	0.58
PA	3.61	VA	1.07	N.Y.	0.57
OH	3.21	VT	1.05	KY	0.49
HI	2.36	R.I.	1.02	IN	0.47
DE	2.32	AK	1.00	KS	0.44
OR	2.28	CT	0.96	TX	0.44
MI	2.25	IL	0.90	NE	0.44
MN	2.23	MD	0.81	AL	0.41
CO	1.84	S.D.	0.79	D.C.	0.40
FL	1.55	N.D.	0.77	ID	0.39

N.J.	1.55	N.C.	0.77	MA	0.36
WA	1.38	MT	0.71	OK	0.34
ME	1.35	LA	0.70	UT	0.28

Wisconsin topped the list of states for the 2004 election. Its ten Electoral College votes were won by Kerry by a margin of 11,813 popular votes. Its popular-vote margin was smaller than that of any other state, relative to the number of Electoral College votes at stake. Only New Mexico (N.M.) and New Hampshire (N.H.) had smaller popular-vote margins, and they both carried fewer Electoral College votes. Alaska (AK) was the median state. Bush won its three Electoral College votes by a margin of 65,812 popular votes. At the bottom of the list was Utah (UT). It gave Bush its five Electoral College votes by a margin of 385,337 popular votes. Note the contrast between the top-ranking state and the bottom-ranking state. The popular-vote margin in Utah was over 30 times larger than that in Wisconsin, yet it swung only half as many Electoral College votes.

As the table shows, each swing vote in Wisconsin carried 18.57 times the Electoral College impact of a swing vote in Alaska. Each swing vote in Utah carried 0.28 times the Electoral College impact of a swing vote in Alaska. Therefore, Wisconsin's swing votes packed sixty-six times the punch of Utah's swing votes.

Next, consider the 2000 presidential election. Bush won 271 electoral votes, while Gore only received 267 electoral votes and lost the popular vote by 500,000 votes. Results for the presidential election of 2000 are presented in Table 2.

Table 2: *Relative Electoral College Impact of a Swing Vote, 2000 Presidential Election*

State	Relative EC Impact	State	Relative EC Impact	State	Relative EC Impact
FL	1115.40	MI	1.98	WY	0.82
N.M.	327.31	WA	1.90	KY	0.82
WI	46.17	DE	1.68	AK	0.81
IA	40.47	LA	1.59	R.I.	0.81
OR	24.79	HI	1.42	CT	0.75
N.H.	13.29	VA	1.41	MD	0.73
NV	4.44	CO	1.32	N.J.	0.71
MN	4.09	GA	1.03	OK	0.71
MO	3.35	CA	1.00	MT	0.70
TN	3.28	S.D.	1.00	KS	0.64
OH	3.05	MS	1.00	NE	0.59
W.V.	2.92	IL	0.93	TX	0.56
ME	2.87	N.D.	0.90	ID	0.48
PA	2.87	N.C.	0.90	D.C.	0.47
AR	2.69	S.C.	0.87	N.Y.	0.46
VT	2.46	AL	0.87	MA	0.39
AZ	1.99	IN	0.84	UT	0.38

As those who recall the election of 2000, and its ensuing legal battles, it is not a surprise that Florida (FL) occupies the top spot. Bush won Florida's twenty-five Electoral College votes by the razor-thin margin of 537 popular votes. The median state was California (CA). The state of California had fifty-four Electoral College votes in 2000, the most of any state, but it also had the largest popular-vote margin—for Gore—of 1,293,774 popular votes.[100] Relative to other states, California's popular vote margin was not disproportionate given the number of Electoral College votes at stake. Finishing last again was Utah. Its five Electoral College votes went to Bush by a margin of 312,043 popular votes. *Id.*

The implications of the state-by-state ranking are

[100] California cast fifty-five Electoral College votes in the 2004 presidential election. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2000 (U.S. Gov't Printing Office 2001).

striking. A swing vote in Florida carried over one thousand times the Electoral College impact of a swing vote in California. A California swing vote, in turn, carried nearly three times the Electoral College impact of a Utah swing vote. Again, the explanation pertains to the winner-take-all allocation of each state's electors. To the victor goes the spoils—no matter how small the margin of victory. The Florida-Utah comparison shows how great the disparities can be. In the case of a large state with a razor-tight margin versus a small state with a runaway victor, the disparities can be huge. In Utah, one-fifth as many Electoral College votes were at stake as in Florida; yet Utah's popular-vote margin was almost 600 times that of Florida. As a result, each of Florida's swing votes carried nearly 3,000 times the Electoral College impact of a Utah swing vote. What was already a close election came down to a mere 537 votes in one state due to the winner-take-all allocation of each state's electors.

Both the 2000 and 2004 presidential elections were closer than average.[101] Each election also featured a notable third-party candidate—Ralph Nader.[102] Now consider the presidential election of 1988, which was not a cliffhanger and lacked a major third-party candidate to siphon votes from the Republican and Democratic candidates.[103] In 1988, Republican George H.W. Bush

[101] In Electoral College terms, they were the two closest of the last twelve presidential elections since the size of the Electoral College increased to 538 electors when Alaska and Hawaii joined the union. The last twelve elections saw the winning candidate receive an average of 388 Electoral College votes.

[102] Nader received 2.7% of the popular vote in 2000 and 0.4% in 2004, but received no Electoral College votes in either election. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2000 (U.S. Gov't Printing Office 2001); STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 2004 (U.S. Gov't Printing Office 2005).

[103] The 1992 and 1996 elections saw Democrat William J. Clinton prevail over Republicans George H.W. Bush and Robert J. Dole, respectively, by comfortable Electoral College margins. Both elections

defeated Democrat Michael S. Dukakis by an electoral-vote margin of 426-112.[104] Bush's popular-vote margin over Dukakis was seven million votes.[105] No third-party candidate received more than one percent of the vote.[106] The state-by-state rankings for the 1988 presidential election are provided in Table 3.

Table 3: *Relative Electoral College Impact of a Swing Vote, 1988 Presidential Election*

State	Relative EC Impact	State	Relative EC Impact	State	Relative EC Impact
VT	5.57	R.I.	1.34	TN	0.65
WA	5.35	N.D.	1.23	OK	0.65
IL	4.01	WY	1.20	N.J.	0.60
PA	3.78	CO	1.19	ID	0.60
MD	3.19	MI	1.10	N.C.	0.60
W.V.	3.08	MN	1.08	MS	0.57
N.M.	3.07	AK	1.02	NE	0.57
MT	2.96	IA	1.02	N.H.	0.54
S.C.	2.40	ME	1.00	S.C.	0.54
WI	2.20	MA	1.00	AL	0.54
N.Y.	2.15	LA	0.96	GA	0.52
CA	2.12	KY	0.93	AZ	0.45
MO	2.10	NV	0.87	IN	0.44
OR	1.98	KS	0.85	VA	0.42
HI	1.88	AR	0.81	D.C.	0.36
CT	1.73	OH	0.77	UT	0.36
DE	1.54	TX	0.67	FL	0.35

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also saw a significant third-party challenge from H. Ross Perot, who received 19% of the popular vote in 1992 and 8.4% in 1996. His candidacy helped keep Clinton from receiving more than 50% of the popular vote in either election. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1992 (U.S. Gov't Printing Office 1993); STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1996 (U.S. Gov't Printing Office 1997).

[104] STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1988 (U.S. Gov't Printing Office 1989).

[105] *Id.*

[106] *Id.*

The 1988 election demonstrates that even in an election that was not a cliffhanger and lacked a major third-party candidate, the winner-take-all allocation of Electoral College votes can lead to distortions. In this case, Vermont (VT) was positioned at the top of the list. In Vermont, a popular-vote margin of 8,556 votes made the difference in assigning the state's three Electoral College votes to Dukakis. The middle state, and the one with respect to which the others were normalized, was Maine (ME). Its four Electoral College votes went to Dukakis, who won its popular vote by a margin of 63,562 votes. Florida (FL) held the last position. Although Florida had the smallest popular-vote margin of any state in 2000, it had the largest popular-vote margin in 1988. Its twenty-one Electoral College votes were won by Bush based on a 962,184 popular-vote margin.[107]

In the 1988 election, a swing vote in Vermont carried 5.57 times the Electoral College impact of a swing vote in Maine. It carried 16 times the impact of a swing vote in Florida. The ratio of the top-to-bottom state was smaller for the 1988 election than for either the 2000 or 2004 elections. Still, the existence of a disparity for the 1988 election, and a sizable one at that, reinforces the finding that the winner-take-all allocation of Electoral College votes gives some states' voters a greater influence on an election's outcome than other states' voters.

Each presidential election is different; some are landslides, while others are cliffhangers. Some display more regional variation than others. Some feature significant third-party challenges. Yet, each of these three elections saw great variation across states in the magnitude of a swing vote's Electoral College impact. An indicator of the Electoral College disparity in each presidential election is the ratio of a swing vote's Electoral College impact in

[107] STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1988 (U.S. Gov't Printing Office 1989).

the top-ranked state to that of the bottom-ranked state. Again, the top-ranked state is the state with the smallest popular-vote margin relative to the number of Electoral College votes at stake, and the bottom-ranked state is the state with the largest relative popular-vote margin. In the preceding tables, the ratios were calculated for the 1988, 2000, and 2004 elections. Table 4 presents the ratios for every election dating back to 1960, the first presidential election in which the current number of 538 Electoral College votes were at stake.

Table 4: *Top-Ranked State/Bottom-Ranked State Ratios, 1960-2004 Presidential Elections*

Election	Top-Ranked State	Bottom-Ranked State	EC Impact Ratio
1960	HI	MA	832
1964	AZ	R.I.	63
1968	AR	MA	71
1972	MN	FL	7
1976	OH	UT	88
1980	MA	UT	288
1984	MN	UT	209
1988	VT	FL	16
1992	GA	D.C.	54
1996	NV	MA	59
2000	FL	UT	2,905
2004	WI	UT	65

The table demonstrates that sizable disparities have been present in every presidential election since 1960. In 1960, a swing vote in Hawaii (HI), the state with the smallest popular vote margin relative to its number of Electoral College votes that year, carried 832 times the Electoral College impact of a swing vote in Massachusetts (MA), the largest-margin state. That election was a close one, with Democrat John F. Kennedy prevailing over Republican Richard M. Nixon by 303 to 219 in the

Electoral College, and by 100,000 popular votes.[108] The election of 1972 was a landslide for Nixon over Democrat George McGovern, when Nixon received 521 Electoral College votes to McGovern's 17 and won 18 million more popular votes.[109] That election saw a swing-vote impact ratio of seven for the top-ranked state, Minnesota (MN), to the bottom-ranked state, Florida (FL). Its ratio was the smallest of any of the twelve elections since 1960. The largest Electoral College landslide occurred in 1984, with Republican Ronald W. Reagan prevailing over Democrat Walter F. Mondale by an electoral count of 525 to 13.[110] Reagan's popular-vote margin over Mondale was 16.9 million votes, slightly smaller than that of Nixon over McGovern in 1972.[111] In that election, the swing-vote impact ratio of the highest state, Minnesota (MN), to the lowest state, Utah (UT), was 209.

The Bush-Gore cliffhanger of 2000 was the outlier. It exhibited, by far, the largest swing-vote ratio of any of the last dozen elections. In that election, a swing-vote in Florida carried 2,905 times the impact of a swing-vote in Utah. The key was again the tiny margin in Florida, where a mere 537 popular votes swung the state's twenty-five Electoral College votes to Bush. Only two elections since 1960 saw smaller popular vote margins in any states—Hawaii in 1960 and New Mexico in 2000. But, neither

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[108] Third-party candidate Harry F. Byrd received fifteen Electoral College votes in Alabama and Virginia. STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1960 (U.S. Gov't Printing Office 1961).

[109] McGovern won only the Electoral College votes of Massachusetts (fourteen) and the District of Columbia (three). STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1972 (U.S. Gov't Printing Office 1973).

[110] Mondale's thirteen Electoral College votes came from Minnesota (ten) and the District of Columbia (three). STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1984 (U.S. Gov't Printing Office 1985).

[111] *Id.*

state carried anywhere near the twenty-five Electoral College votes that Florida had in 2000.[112]

In general, the closer elections saw larger disparities and the landslide elections saw smaller disparities. The two elections that saw the largest disparities, 1960 and 2000, were close elections. The two elections that saw the smallest disparities, 1972 and 1988, were landslides. The explanation is that a close election is likely to see more states decided by small margins than would be the case for a landslide election. Close elections tend to have more close states than landslide elections. Still, even a landslide election can have some states decided by narrow margins, like Minnesota in 1984.[113] The key is the variation between states. If the election victor's popular-vote margin of victory was uniform across all fifty states and the District of Columbia, then there would be no Electoral College swing-vote disparity. In that case, the nation's swing voters would be evenly distributed across the land. A swing vote in one state would carry the same Electoral College impact as a swing vote in another state.[114] It is when the distribution is uneven, and each state's Electoral College votes are allocated on a winner-take-all basis, that disparities arise. The uneven distribution means that small shifts in some states' swing votes can swing disproportionately large numbers of Electoral College votes from one candidate to another.

As long as there is variation in candidate preferences from one state to the next, the winner-take-all allocation of Electoral College votes ensures that there will

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[112] In 1960, a margin of 115 popular votes swung Hawaii's then-three Electoral College votes to Kennedy over Nixon. In 2000, a margin of 366 popular votes was the difference in awarding New Mexico's five Electoral College votes to Gore over Bush.

[113] STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF 1984 (U.S. Gov't Printing Office 1985).

[114] It would not be precisely the same, due to the "plus-two" bonus in the distribution of electors among the states, but it would be very close.

be disparities. Of course, state-by-state variations in preference are inevitable in a large, diverse nation such as the United States. In a pluralistic nation of 300 million people scattered unevenly across fifty states, differences will exist from one state to the next. In the most recent election cycle, these differences have even spawned the shorthand of "red states" versus "blue states." The "red states" favor the Republicans, and the "blue states" favor the Democrats. The state-by-state differences are a fixture of the electoral landscape. Since they have persisted and will continue to persist, the winner-take-all allocation of Electoral College votes in presidential elections ensures that there will continue to be disparities in the value of each vote. These disparities have occurred in each of the last twelve presidential elections and will continue to occur.

V. Constitutional Concerns About the Winner-Take-All Allocation of Electors

Why are such disparities in the allocation of Electoral College votes problematic? They are suspect because of the Supreme Court's "one person, one vote" rulings in *Reynolds* and its progeny. "One person, one vote" does not really exist when one state's swing votes carry tens or hundreds or even thousands of times as much impact as another state's swing votes on a national election's outcome. Clearly, it is inequitable, but is it unconstitutional? To be able to articulate such a claim before the courts, three hurdles would have to be surmounted.

First, one would have to deal with the objection that Article II, Section 2 of the Constitution provides that state legislatures may direct how electors are selected. This clause, especially as interpreted by the Supreme Court in *McPherson v. Blacker*[115] and *Bush v. Gore*,[116] gives states

[115] 146 U.S. at 1.

plenary and almost absolute power to implement their presidential vote. There are several responses to this first objection.

What is being challenged is not the authority of states to allocate electoral votes, which is clearly provided for in the Constitution. Rather, the issue being challenged is the winner-take-all method of allocating those votes. As noted earlier, contrary to what the Court indicated in *Bush v. Gore*[117] and *McPherson v. Blacker*,[118] the power of state legislatures to allocate electoral votes is not unlimited. Cases such as *Anderson v. Celebrezze*,[119] *Burroughs v. United States*,[120] and *Moore v. Ogilvie*,[121] illustrate the Supreme Court's willingness to place some limits on the processes state legislatures implement in running their presidential elections, to draw limits on ballot access, political corruption, and most directly, to select presidential electors in conformity with the "one person, one vote" reapportionment standard.[122]

Second, even within *Bush v. Gore*, [123] the logic of the majority opinion—that state legislatures cannot set up an arbitrary process for the counting of votes—seems to suggest limits on the power to select electors. Under the holding of *Bush v. Gore*, it is doubtful that a state legislature could enact a law indicating that in counting ballots, total discretion to ascertain voter intent is left up to election judges. *Bush v. Gore* stands for the claim that the Equal Protection clause limits state legislatures in their discretion to count votes.

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[116] 531 U.S. at 98.
[117] *Id.*
[118] 146 U.S. at 1.
[119] 460 U.S. at 780.
[120] 290 U.S. at 534.
[121] 394 U.S. at 814.
[122] *See supra* Section II.
[123] 531 U.S. at 98.

Finally, as noted earlier,[124] it seems unlikely that a state legislature could limit franchise rights in a presidential election to only whites, and it also seems absurd to think that it could state the same rule for determining who is chosen as an elector. Overall, state legislatures may have broad authority to select their electors, but contrary to what *Bush v. Gore* and *McPherson* indicate, that power is not really plenary and beyond question.

A related hurdle or objection to challenging the winner-take-all method in court is to argue that if the winner-take-all method of awarding Electoral College votes is unconstitutional, it would follow that the equal allocation of senators to big states and small states is also unconstitutional. Here, one can respond by stating that the equal allocation of senators to all states is provided for under the Constitution, and the Court already ruled on that issue in *Lucas v. 44th General Assembly of Colorado*.[125]

In addition, some may argue that if one can challenge the winner-take-all method of selecting presidential electors as unconstitutional under the "one person, one vote" standard, then why is the representational schema of allocating two senators and at least one house member to each state, regardless of population, not also subjected to the same argument. Two responses are in order. First, unlike the representational schema for the House and Senate, which is constitutionally mandated and clearly described in Article I, Sections 2 and 3 of the Constitution, the winner-take-all method is not constitutionally mandated or specified in the text. Instead, Article II, Section 1 of the Constitution, and the Twelfth Amendment merely delegate to state legislatures the power to select their electors without specifying a format. Second, in *Reynolds*,[126] *Baker*,[127] and *Lucas*,[128] the Court

[124] *See supra* Section II.
[125] 377 U.S. at 713.
[126] *Id.* at 571-76.

discussed the relationship between state representation schemes and the "federal analogy" to the Senate. In these cases, the Court noted the historical differences between state and federal representation, the purposes behind the federal system, and why they are different.[129] In effect, the Court rejected the analogies based upon constitutional text and history. Similarly, if one were to challenge the Article I, Sections 2 and 3 congressional representational plan as violating the "one person, one vote" standard, the Court would dismiss the claim because the text of the Constitution provides for such a system.

A third objection or hurdle to address is that even if one could show that state legislative authority to select electors is not unlimited, a question still exists whether the "one person, one vote" standard would apply. Would challenging the allocation of electors be different from simply questioning the constitutionality of the means by which states are initially awarded electors?

Thus, a challenge to one method that a state legislature uses to allocate electoral votes is not a challenge either to their overall authority to determine a method or to the constitutionally explicit language determining the size of a state's total number of elector votes. Yet, in terms of whether one could raise a "one person, one vote" challenge to the winner-take-all method, a few responses are also possible. First, the Court already ruled in *Moore v. Ogilvie* that "one person, one vote" applied within the context of selecting presidential candidates at the state level.[130]

Second, *Delaware v. New York* establishes neither a precedent that review of presidential elector selection is non-justiceable nor that the "one person, one vote" standard does not apply. Instead, *Delaware v. New York* arose at a

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[127] 369 U.S. at 302-07.
[128] 377 U.S. at 738.
[129] 462 U.S. at 738-9.
[130] *See supra* notes 52 to 55 and accompanying text.

time early in the reapportionment jurisprudence. Now, nearly two generations later, one could argue in the same way *Bush v. Gore* pushed this line of cases to apply to the counting of votes, the same logic of "one person, one vote" should extend to the winner-take-all method of allocating electoral votes. After all, allocating votes, or assigning them to a particular candidate, is essentially the same as the counting of votes, or they are at least conceptually related.

Third, if winner-take-all systems create disincentives for some to vote,[131] especially if these non-voters are in a racial minority, and a voter could show that a state retained this type of electoral vote allocation system for discriminatory reasons, one might be able to argue that the right to vote is being diluted in ways no different than in situations found in the early reapportionment cases of the 1960s.[132]

Finally, if the courts still do not wish to address the constitutionality of winner-take-all systems, is the matter dead? Not necessarily. States could on their own change their own systems. The argument here is that winner-take-all systems effectively either disenfranchise some of their own cities vis-a-vis others within the state, or that such a system contributes to a practice across forty-eight states that hurts their own citizens' influence in the selection of the President.

On balance, winner-take-all systems for the allocation of presidential electors raise serious constitutional questions that the courts should address. Winner-take-all systems weigh votes differently. Some voters' decisions end up counting much more toward the outcome of a presidential election than votes of other people under winner-take-all. Such systems would, thus, seem to violate the "one person, one vote" standard that the Court has held to govern the allocation and exercise of the

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[131] *See supra* note 13 and accompanying text.
[132] *See supra* Section III.

franchise.

IV. Conclusion

The Electoral College was instituted as a presidential selection system to give small states more political influence and to offset regional factionalism that might occur if the Chief Executive were selected by popular vote. The Constitution permits state legislatures to award electors in the manner of their own choosing. The winner-take-all method that forty-eight states currently use to select their electors evolved largely as a way to help states maximize their influence in presidential elections. Yet, such a system unfairly weighs the preferences of some voters more than others. This violates the one-person, one-vote standard articulated in *Reynolds v. Sims*,[133] and subsequently applied to aspects of presidential contests such as in *Moore v. Ogilvie*[134] and *Bush v. Gore*.[135]

Despite claims that the state power over selection of presidential electors is absolute, case law suggests the contrary. Instead, claims contesting the constitutionality of some forms of state allocation of electoral votes should be entertained by the courts, or at least by legislatures. While the Court in *Delaware v. New York* was unwilling to adjudicate "one person, one vote" claims in the context of how electors are selected, subsequent maturity of the reapportionment and right to vote case law, as well as the continuing debate over what happened in Florida in the presidential election of 2000, make it ripe to revisit this issue, either judicially or in the alternative, in the state legislatures.

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[133] 377 U.S. at 533.
[134] 394 U.S. at 814.
[135] 531 U.S. at 98.

POVERTY IN THE AFTERMATH OF KATRINA: REIMAGINING CITIZEN LEADERSHIP IN THE CONTEXT OF FEDERALISM

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"I'm walkin' on sunshine ... and don't it feel good!"
"Walking on Sunshine"
by Katrina and the Waves, 1983

I. Introduction

It is a cruel irony that a lead singer with the name Katrina and a back-up band called the Waves performed a pop song in the 1980s with bright lyrics and happy beat. Many years later, a natural disaster bearing the same name, backed by a surge of seawater, consumed the city of New Orleans and the Gulf Coast. In the wake of Hurricane Katrina, America and the rest of the world witnessed the desperate side of the world's wealthiest nation. Many people, who had neither time nor resources to escape the storm's surge, and the destruction that followed, became first-hand witnesses to America's failure to adequately address its poverty problem. The world was shocked to see Americans displaced and immobilized. Chilling reports of the disintegration of the community with rampant plundering and lawlessness punctuated media broadcasts. The ravages of death and deprivation were graphically

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depicted even as relief providers scrambled to address the massive needs of the displaced and injured. The failed infrastructure and lack of services to help the unfortunates who remained behind to weather the storm resurrected the national debate on poverty—who is responsible for giving willing Americans the tools to remove themselves from poverty to become contributing members of society?[1]

While the human and economic toll of this disaster is incalculable, perhaps there is a bright side. The debate over who is responsible for ameliorating poverty and minimizing the divide between the "haves" and the "have-nots," as evidenced by the seeming abandonment of the "have-nots" during the initial days after Hurricane Katrina, may have raised the awareness of the level and gravity of the problem. In turn, this awareness may have created a basis for a public *will* to effectuate change and the *will* to develop a popularly sanctioned *way* to make the change a reality.

A national response to poverty requires an examination of lofty traditional values—such as equal opportunity, economic security, and human dignity, which accompany a contribution to the civilization we live in—blended with a more practical examination of political realities. Reference to political, legal, and sociological literature over a lengthy time span details how Americans view their nation and social heritage and the implications these views create for current public policy development.

This literature leads to a key question—how can this ambitious project find support? Neither our national government nor the American people currently have a *will* to address systemic poverty; and consequently no *way*, or plan to fight poverty, can be implemented.[2] Developing

[1] While the media coverage of Hurricane Katrina displayed the failings of America, particularly in connection with the poor, the coverage soon subsided and with it, the urgency of poverty.

[2] "With public sentiment nothing can fail; without it nothing can succeed." Abraham Lincoln, Lincoln-Douglas Debate at Ottawa,

that *will* is the first step to an anti-poverty program, followed by the creation of a *way*—a plan. Just as no financial institution would lend money for a business venture without a rational business plan, it is irrational to expect government to create and fund an anti-poverty campaign without a comprehensive plan. An effective plan must include citizen participation, the identification of barriers, the evaluation of current programs, and the creation of new strategies. In short, the sequence of events in generating both the *will* and the *way* is central to an effective anti-poverty strategy.

Our development of a *way* requires recognition that only the federal government has the financial resources needed to eliminate the root causes of poverty on a national basis.[3] A serious federal response to poverty in America could result in significant changes in public and private agencies providing poverty services to the poor. Because such changes can affect social service jobs, careers, institutions, and political systems, anticipating bureaucratic and local political resistance to new programs is a prerequisite to the design of a comprehensive anti-poverty initiative. Failure to pay attention to area politics will result in well-intentioned plans being rendered ineffectual at the local level. At the same time, understanding what happens when new programs "hit the ground" in local communities and capitalizing on local knowledge about economic and social issues can greatly assist the implementation of a new federal response to poverty.

Minimizing the angst of change for local service agencies and political institutions requires effective communication and coordination at all levels of government—federal, state, and local. This effect might best be accomplished by utilizing the inherent potential of

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Illinois (August 21, 1858).

[3] MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (Penguin Books 1962).

shared government. Federalism, a product of the American experiment in self-government, affords an effective mechanism to target federally managed resources to communities through locally developed anti-poverty plans.[4] Employed in this way, the resources of the federal government and the strings that such funds would place on them, can afford state and local governments an opportunity to join with other local organizations in a unique and dynamic collaboration.

Local political realities and bureaucratic resistance marginalized past anti-poverty programs.[5] Many nonprofit organizations rely on local political largesse for future funding, which can affect their mission.[6] Local political interference gave the impression of afflicting some anti-poverty programs created in the 1960s.[7] Additionally,

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[4] The 13 colonies experimented with self-government under the Articles of Confederation and the U.S. Constitution. Under the Constitution, the states agree to surrender certain powers to the authority of a centralized governmental structure. As a result, governmental power is bifurcated and shared by the federal government and individual states. This arrangement affords a rich opportunity to experiment with social policy such as anti-poverty plans. Indeed, it affords a directed opportunity for development of programming carefully tailored to the needs of the local community as established on a local basis and geared to talents and commitment of the citizens involved. See *infra* Part V.

[5] Edward C. Banfield, *Making a New Federal Program: Model Cities, 1964-68, in* POLICY AND POLITICS IN AMERICA: SIX CASE STUDIES 124-158 (Allan P. Sindler, ed., 1973). Banfield argues that the complex interplay of federal, state, and local authority and control was one of the most difficult issues to overcome in the boldly ambitious, but unsuccessful, Model Cities Program.

[6] For example, Rick Goldstein, a Pennsylvania businessman, explained that while working for a group of homeless Philadelphians, a local public interest law organization representing the group was intimidated in its efforts against a state agency by a fear of losing state funding. Telephone interview with Rick Goldstein, in Philadelphia, Penn. (Jan. 20, 2006).

[7] When asked to comment on the degree of local resistance to federally funded legal services, the first Director of the Legal Services Program

federal political factors can blunt the best-designed anti-poverty programs.[8] The most important factor in designing a federal response to poverty is its interaction with state and local political realities. Moreover, a serviceable plan can only be written and enforced by local citizens knowledgeable about economic and social conditions.[9]

II. Situational Analysis

Designing an effective national anti-poverty campaign cannot be done in a vacuum; it requires recognition of and deference to local political realities. Social and economic change is difficult to accomplish

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created within the Office of Economic Opportunity in 1964, said, "Political opposition and bureaucratic resistance arose from concern that the Legal Services lawyers would be effective advocates against the established order. The degree of opposition and resistance seemed to develop in direct proportion to the effectiveness of the advocacy." E-mail transmission from Clinton Bamberger, Director of Legal Services, Office of Economic Opportunity (Jan. 25, 2006) (on file with author).

[8] *See The War on Poverty:Then and Now, available at* http://www.brookings.edu/comm/events/20051114.htm (last visited Feb. 6, 2006). A panel discussion about the War on Poverty revealed that the centerpiece of the War on Poverty was a massive public works project which was never pursued because President Johnson refused to consider a tax increase in the 1964 election year.

[9] *See generally* WILLIAM JULIUS WILSON, THE BRIDGE OVER THE RACIAL DIVIDE (Univ. of Cal. Press 1999) (arguing that only multi-racial coalitions can achieve these results); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (Univ. of Chicago Press 1987); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (Random House 1997). Wilson's seminal work over the past twenty years has demonstrated that ghetto areas—normally defined as census tracts where forty percent of the residents are living below the poverty line—are plagued with a loss of jobs and a loss of functioning social institutions-resulting in social isolation for the inhabitants of those areas. *Id.*

under the best of circumstances.[10] The identification and analysis of the enormous costs of poverty (i.e., ghettoization with blight, resulting in flight and disinvestment, increased crime, tax base erosion, and lack of job opportunities for residents trapped in these poor areas) lead to the inescapable conclusion that change is needed.[11]

Although it seems nonsensical for the federal government to ignore the costs of poverty, there has been little attention, let alone action, to address the causes of poverty in the last twenty five years. Clearly no holistic will to address poverty exists today as it existed in generations past.[12] At the dawn of the twenty-first century, even as the national political scene is marked by the emergence of religious groups as discrete and potent political forces, no political *will* has surfaced to address poverty, much less defeat it.[13] The poor do not vote in large numbers and are ignored as a political force.[14] They

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[10] Our nation's experience with issues of slavery, civil rights, prohibition, and women's suffrage bear witness to the upheaval that often accompanies dramatic social change.

[11] *See infra* notes 36-40.

[12] Fifty years ago, President Harry S. Truman said, "We must declare in a new Magna Carta, in a new Declaration of Independence, that henceforth economic well-being and security, that health and education and decent living standards, are among our inalienable rights." *See* DAVID MCCULLOUGH, TRUMAN 967 (1992) (*citing* KANSAS CITY TIMES, June 20, 1956).

[13] Could this be because, in the late 1940s, the reality of the Great Depression was still fresh in the collective conscience of American families? Daily face-to-face contact with poverty by most Americans resulted in a national resolve to tackle poverty. Radical political change followed economic distress. By the late 1940s, almost all politicians claimed to be liberals; no one wanted to be called conservative. *See* ERIC F. GOLDMAN, RENDEZVOUS WITH DESTINY: A HISTORY OF MODERN AMERICAN REFORM (Random House 1990).

[14] *See* http://www.yvoteonline.org/noshows2000_details.shtml (last visited Feb. 17, 2006). "The propensity to vote rises with income, from a low of 33 percent among those with annual household incomes of less

are implicitly, and perhaps explicitly, excluded from participating in our democratic system.[15] Absent political power, the poor lack adequate means to lobby Congress for programs to advance their economic interests. Accordingly, public interest lawyers and active citizens must fill the breach by advocating for the poor and promoting the democratic participation intended by our nation's forefathers.

The will to fight poverty is also depreciated by an abiding cynicism about government's ability to effectively address such social issues. This distrust is not new; it has been evident for nearly fifteen years.[16] Despite a fifty percent reduction in poverty during the 1960s, many now accept the cliché that, in the War on Poverty, poverty won.[17] Today, with increased skepticism about the effectiveness of government programs, many citizens balk

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than $15,000 to a high of 70 percent among those with incomes in excess of $75,000."

[15] *See* http://www.sentencingproject.org/issues_03.cfm (last visited Feb. 17, 2006). "Nationally more than four million Americans are denied the right to vote as a result of laws that prohibit voting by felons or ex-felons." This number includes thirteen percent of all African-American males.

[16] RICHARD PARKER, JOHN KENNETH GALBRAITH: HIS LIFE, HIS POLITICS, HIS ECONOMICS 624 (2005). "Asked whether they trusted their government to 'do the right thing' all or most of the time, by the end of the Bush Administration in 1992, three out of four Americans said they didn't." *See* http://www.pollingreport.com/institut.htm (confirming this mistrust has stayed essentially the same over the past 15 years). In 1994, Peter Hart assembled polling data showing the public was willing to devote resources to fighting poverty but had little confidence in the government implementing those programs. *See* FIGHTING POVERTY IN AMERICA: A STUDY OF AMERICAN PUBLIC ATTITUDES (Ctr. for the Study of Policy Attitudes, 1994).

[17] *See* Ronald Reagan, *State of the Union Address, January 25, 1988, available at* http://reagan2020.us/speeches/state_of_the_union_1988.asp (last visited Feb. 17, 2006). President Reagan said, "My friends, some years ago, the federal government declared war on poverty, and poverty won." *Id.*

at the idea of increased spending for anti-poverty programs. They see little proof that government can reduce poverty. Yet, the public may be unaware of evidence to the contrary.[18] If the case can be made that the economic costs of poverty, especially over a long period of time, are more expensive than the investment in social service programs needed to address these problems, then a public demand may generate politically-driven action. Of course, political awareness and action are the precursors to additional federal funding.

Anti-poverty plans need to be developed locally—not nationally. A local plan will ensure local participation by the stakeholders who can contribute their knowledge of local economic factors, existing services and unmet needs.[19] Each community has its own resources and circumstances for the existence and magnitude of poverty in its region. Local participation not only ensures an accurate analysis of these conditions but could act as an incentive to local communities.[20] The payoff for local

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[18] *See* Arloc Sherman, *Public Benefits: Easing Poverty and Ensuring Medical Coverage* (rev. Aug. 17, 2005), *available at* http://www.cbpp.org/7-19-05acc.htm (last visited Oct. 17, 2006). Key findings are that the safety net cuts the number of Americans living in poverty by half; furthermore, it reduces severe poverty and provides medical coverage for tens of millions of Americans.

[19] In Chester, an effort to understand the reason local residents could not take advantage of employment and training services revealed that they did not understand the complexity of this service because there was no compendium of available programs and services.

[20] *See* Edgar S. and Jean C. Cahn, *The War On Poverty: A Civilian Perspective*, 73 YALE L. REV. 1318, 1352 (1964). This seminal law review article led to the creation of the federally funded Legal Services Program within the Office of Economic Opportunity. The Cahns accurately describe that a War on Poverty needs to include a mechanism for dissenting points of view. It also articulates that a well planned War on Poverty will constitute a monopoly on both services and ideology necessitating a countervailing power of active citizen participation. Unfortunately, despite two generations in which to have learned this vital lesson, national and state public policy rarely do more

communities could be a reward of federal money (authorized by new federal legislation) to implement a plan, which they themselves have designed. Federalism provides the structure to carry out the needed planning and the flexibility to allocate resources to respond to those local priorities.[21]

Once the sources and costs of poverty are fully understood, the public will better grasp that poverty reduction serves the citizenry's self-interests. This awareness will galvanize public sentiment and energize efforts to ensure the interests of the poor are promoted.[22] Educating the populace entails underscoring both the economic costs of poverty and highlighting its moral injustice. An initiative worthy of consideration would call upon Congress to fund programs that support groups that advocate for the interests of the poor.[23] If the American

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than pay lip service to the importance of this issue.

[21] Indeed, one of the "peculiar strengths of our form of government" is its ability to foster experimentation in social and economic programs. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)).

[22] *See* Lynn Neary, *War on Poverty—40th Anniversary*, http://www.npr.org/templates/story/story.php?storyId=1587522 (last visited Oct. 17, 2006). President Johnson advised listeners that in Washington almost everybody had a lobbyist except the poor; so he stated that he was going to be the lobbyist for the poor. *Id.*

[23] *See* KENNETH B. CLARK AND JEANNETTE HOPKINS, A RELEVANT WAR AGAINST POVERTY: A STUDY OF COMMUNITY ACTION PROGRAMS AND OBSERVABLE SOCIAL CHANGE (1968). Clark argues persuasively that the War on Poverty never planned for or gained support in the major metropolitan areas. He further agues that political leaders of both parties rendered the Community Action Program impotent. It threatened the existing status quo and was viewed as unleashing forces for real participation that might not be able to be satisfied. Clark calls for a coalition of professionals and the poor in recognition that

> the poor themselves have so far not been able to plan, sustain, and bring to a positive conclusion effective programs for social change. To expect that they can—as so many

people do not believe that cronyism and lobbying can be brought under control, then it is only fair that the poor have their own advocates. Such an initiative would begin to address the unjust power imbalance, which dominates current political structures, and allow the poor to compete with the myriad of other interest groups.

After educating the public and making an anti-poverty program a priority, the next logical step would be to require that any new federal legislation include a comprehensive impact study.[24] This study would assess the degree to which new legislation will positively or negatively impact the poor.[25] This measure would protect against the launching of federal initiatives that, though well intentioned, would ultimately be ineffectual due to unanticipated local issues. As mentioned above, failed initiatives create and perpetuate the public sentiment that government is unable to alleviate poverty.

The reality of entrenched poverty amidst the world's greatest wealth is glossed over by an age-old mythology that everyone can succeed in America.[26] The Great Depression shook, but did not end, the belief that there is employment for all, that employment pays a living

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> community action programs do—may be viewed as a subtle rationalization for the maintenance of the status quo in the face of inevitable failure. The alternative may be for concerned, committed, and independent professionals to develop machinery and organizations which would mobilize the power of intelligence and concern on behalf of the poor.

Id. at 244.

[24] A local impact study would assess the social, economic, and political impact of all new legislation.

[25] If we agree there is too much poverty today, then we certainly do not need more laws which ignore the needs of the poor. An impact study could help ensure new laws do not add to the number of the impoverished.

[26] *See* GOLDMAN, *supra* note 13.

wage, and that all can economically succeed.[27] Flawed systems and free market economic forces can defeat the most responsible individual initiative. Few would disagree that the American concept of political freedom transcends the legal protections embodied in law; rather, it is a natural right, permanently seared into the American psyche. Indeed, most Americans believe in the American Dream—that hard work and sheer will make anything possible. Yet, despite the broad and optimistic promise subsumed within the abstract concepts of individualism and self-sufficiency, the realities and complexities of modern American life exclude people who lack economic security and access to systems accompanying self-sufficiency from consequential political freedom and the covenant of the American Dream.

III. A *Will* to Fight Poverty

A. Reviewing Negative Myths

The problem of generating a national *will* to fight poverty is exacerbated by the limited political power of the poor, as well as the heterogeneous nature of those stricken by poverty and the concomitant difficulty of efforts to organize the poor toward concerted action. Our political system is built on interest groups competing for power, support, and funding.[28] A dearth of political power leaves the best interests of the poor dependent on the goodwill and selflessness of others. Charity is a wonderful quality as it

[27] *See* DOROTHY B. JAMES, POVERTY, POLITICS AND CHANGE (1972). "Invariably, since the 1930's a majority of Americans have supported only those welfare policies which have approached poverty by attempting to enable individuals to cope more effectively within the existing American economic, social and political system." *Id.* at 50.

[28] The competitive forces influencing the evolution of social and economic reform from the late 1860s to the early 1950s have been the subject of scholarly discussion. GOLDMAN, *supra* note 13.

can satisfy a donor's altruistic desires, and it is certainly appreciated by the willing recipient, but a real solution to poverty requires making people self-sufficient. Future anti-poverty efforts should support efforts to help the poor contribute to the common good, rather than make them mere consumers of poverty services and government-dispensed benefits. This recognition acts to restore a sense of human dignity to the poor and offers additional motivation for the public to address poverty.

Due recognition must be given to the persistent historical and still-prevalent myth that the poor find themselves in poverty because they are morally weak.[29] Another popular excuse for why people do not help the poor is the often-cited and sometimes misunderstood Biblical quotation that the poor will always be with us.[30] The statement's context suggests that it was not meant as a statement of perpetual fact or an excuse for failing to help the poor.[31] Conversely, the Bible contains numerous

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[29] The origins of this attitude derive from fifteenth century Switzerland and John Calvin, whose doctrine of predestination suggested that selection for eternal life was foreordained. Those who were saved could be often recognized by financial wealth; those who would not be saved were often economically disadvantaged, thus demonstrating that they would not be saved. The stigma, if not the rationale, has carried forward to our modern American culture. *See generally* CHAIM I. WAXMAN, THE STIGMA OF POVERTY: A CRITIQUE OF POVERTY THEORIES AND POLICIES (Pergamon Press, 1977). Waxman's thesis underscores the element of a "middle-class" perspective which denigrates distinct behavioral patterns and values of the poor as aberrant. *Id.* at 13.

[30] *Mark* 14:7. "For you always have the poor with you, and you can show kindness to them whenever you wish; but you will not always have me." *Id. See also Matthew* 26:11; *John* 12:8.

[31] *See* Jim Wallis, GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT 211 (2005).

> [B]ecause of our isolation from the poor, American Christians *get the text wrong!* We misuse it to justify ourselves and don't realize how this story offers a deep biblical challenge to how

references commanding help for the poor in both the Old Testament and the New Testament.[32]

> we live. . .. We simply use it as an excuse: "The poor you will always have with you" gets translated into "There is nothing we can do about poverty, and the poor will always be there, so why bother?" Yet that's not what the text is saying at all. The critical difference between Jesus' disciples and a middle-class church is precisely this: our lack of proximity to the poor. The continuing relationship to the poor that Jesus assumes will be natural for his disciples is unnatural to an affluent church. The "social location" of the affluent Christians has changed; we are no longer "with" the poor, and they are no longer with us. The middle-class church doesn't know the poor and they don't know us. Wealthy Christians talk *about* the poor but have no friends who are poor. So they merely speculate on the reasons for their condition, often placing blame on the poor themselves.

Id.

[32] *See e.g.*, *Leviticus* 19:10, 23:22 ("leave corners of field unharvested for the hungry to glean"); *Matthew* 25:35-40 ("whatever you did for one of the least of these brothers of mine, you did for me"); 1 *Corinthians* 13:13 (virtues - "faith, hope and charity . . . and the greatest of these is charity"). The Muslim religion, another Abrahamic faith, also proclaims the importance of charity. It implemented compulsory almsgiving ("zakat") and voluntary giving ("sadaqah") for social welfare. *See* THE HOLY QUR'AN: ENGLISH TRANSLATION OF THE MEANINGS & COMMENTARY, MUSHAF AL-MADINAH AN-NABAWIYAH (The Presidency of Islamic Research, IFTA, Call and Guidance ed.) (1410 Hijrah 1990). *See* Sura 2 A. 177 ("... it is righteousness—To believe in Allah, And the Last Day . . . To spend of your substance, Out of love for Him, For your kin, For orphans, For the needy, For the wayfarer, For those who ask, And for the ransom of slaves; To be steadfast in prayer, And give Zakat. . . . Such are the people Of truth, the God-fearing."). *Compare id.* Sura 9 A. 60 (designating the recipients of sadaqah). "Zakat" derives from the verb "cleansed"—indicating a purification of the donor's wealth. The basis for the permissive gift of "sadaqah" is from the word for "verification," as in verifying one's commitment to Allah. All three religions emphasize the notion of private stewardship, or private responsibility, for the poor. The Q'uran also emphasizes, like the Bible, the importance of justice and righteousness. *Id.* at Sura 16 A.

Some subscribe to the notion that the poor are lazy. However, blaming the poor for having a "bad attitude" is counterproductive, as it diverts attention from constructive action. Moreover, some citizens are accustomed to public assistance and fear accepting a job may do more harm than good. They fear that they may fail in their quest to be gainfully employed, which threatens their future livelihood. Although a large number of welfare recipients have gone to work over the past ten years, as a result of a healthy economy and the sanctions of the Personal Responsibility and Work Reconciliation Act,[33] reduced opportunity for welfare dependency has not reduced poverty.[34] In fact, poverty rates have increased each of the past four years, despite the fact that the numbers of individuals receiving welfare are at historically low rates.[35] These changes suggest that systemic and structural forces are the primary causes of poverty, not individual lack of initiative.

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90 ("Allah commands justice, the doing of good . . ."). *Compare infra* note 46.

[33] Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. No. 104-193, 110 Stat. 2105 (1996).

[34] *See* http://www.csmonitor.com/2005/0831/p02s01-usec.html (last visited Oct. 12, 2006). This article confirms that the poverty rate in 2004 rose for the fourth straight year to 12.7% of the population. *See also* http://cbsnews.com/stories/2006/08/29/national/main1948088.shtml (last visited Oct. 12, 2006). This article reflects that the poverty rate fell from 12.7% to 12.6% which was considered statistically insignificant. The article also stated that in 2000 the poverty rate had been 11.3%. Finally, the number of Americans unable to afford health insurance increased by 1.3 million during the same time period. Although welfare rates have dropped by millions since 1996, the persistence of poverty rates suggests that welfare reform was not an effective policy to reduce poverty. It seems to have just increased the number of working poor.

[35] *See Poverty in the United States: Frequently Asked Questions*, http://www.npc.umich.edu/poverty (last visited Oct. 17, 2006). The National Poverty Center describes the fact that poverty rates have risen each of the past four years. *Id.*

B. Establishing an Affirmative Argument to Fight Poverty

If these unsupportable, but popular, negative myths are properly understood and discarded, the articulation of three key reasons justifying a societal effort to fight poverty becomes meaningful.

1. Economic Costs

Fully exposed, the excessive economic cost of poverty commands a prompt political response. Such costs include: (1) losses caused by high rates of criminal activity, the expenses of criminal justice and prohibitive incarceration costs;[36] (2) huge entitlement costs paid to impoverished families;[37] (3) diminished tax collection from jobless or unemployable wage earners; and (4) lost creative potential of impoverished citizens.[38] Other costs are less

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[36] Impoverished communities have more crime, and it costs the federal government approximately $23,000 annually to incarcerate one convict. State and county jails bear imprisonment costs of $20,000 a year to incarcerate a convict. The total cost per year was a staggering $39 billion in 1999 and was projected to reach $41 billion in 2000. While some might assert that the costs of crime are a direct result of poverty, the correlation between crime and poverty is elusive. *See The Punishing Decade: Prison & Jail Estimates at the Millennium* http://www.cjcj.org/pubs/punishing/punishing.html (last visited Oct. 17, 2006) (noting that recent explosion in prison population bears little correlation to economic conditions or other factors).

[37] *See* Transcript of *The War on Poverty: Then and Now*, *available at* http://www.brookings.edu/comm/events/20051114.htm (last visited Feb. 6, 2006). *See also* http://www.heritage.org/Research/welfare/test030701b.ctm (last visited Feb. 6, 2006). The total cost of means tested programs exceeds $434 billion.

[38] The methodology of calculating the societal economic costs of not nurturing the human creative potential of all our citizens is complex. However, it is obvious that millions of children are not receiving the kind of creative nurturing and programming which would maximize

obvious, but no less real. For example, poverty is frequently place-based, concentrated in certain geographical areas because of the flight of more affluent citizens, business disinvestment, increased crime, tax base erosion, and public education failure, which all culminate in depressed living standards.[39] Moreover, the societal cost of poverty is hundreds of billions of dollars per year.[40]

2. Civic Harmony

Persistent and deepening poverty sows the seeds for discontent, which is especially true where the prevalent values place primacy on material gains. Our nation was born of necessitous circumstances.[41] As the divide

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their potential.

[39] *See* WILSON, *supra* note 9.

[40] Isabel V. Sawhill, *Poverty in the United States in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2003), *available at* http://www.econlib.org/library/Enc/povertyintheUnitedStates.htm (last visited Sept. 6, 2006). The total entitlement cost of poverty approximates $500 billion annually. This figure is in the general range of that cited by the Heritage Foundation. *See* heritage.org, *supra* note 37.

[41] The Founding Fathers understood the British abuses of the colonies and their affirmative efforts to prevent Americans from establishing their own meaningful political process. *See* THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), *available at* http://www.yale.edu/lawweb/avalon/jeffsumm.htm (last visited Feb. 12, 2007). Rankling under vexatious government imposed by colonial power, the Patriots felt the necessity of revolt. *See* THOMAS PAINE, COMMON SENSE (1776), *available at* http://www.constitution.org/tp/comsense.htm (last visited Feb. 12, 2007). Despite the perceived level of affliction, some historians have questioned the actual depth of the subjugation imposed by British rule. *See* THE REVOLUTION THAT WASN'T: A CONTEMPORARY ASSESSMENT OF 1776 (Richard M. Fulton ed., 1981) ("The Americans were not an oppressed people; they had no crushing imperial shackles to throw off. In fact, the Americans knew they were probably freer and less burdened with cumbersome feudal and monarchical restraints than any

between the poor and the rest of society widens, especially given the currency of materialism, so too does the necessity of allowing all citizens to meet their basic needs.

A distinct basis for the initiative rests on cultural grounds. The future of American society has been questioned based on cultural decline. In some measure, the growth of crime is attributable to "the ebbing of religious faith."[42] As we will discuss, a broad-based poverty initiative consistent with the underlying concerns of Abrahamic religions creates a legitimate and fixed reason for societal action and may have the corollary effect of promoting the relevance of religious institutions.[43] In turn, this initiative could reverse the perceived marginalization of religion and herald an era of religious renewal. Moreover, achievement of the core purpose of the anti-poverty program would raise the level of society and reduce the cultural slide.

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part of mankind in the eighteenth century."). *Id.* at 20. *See generally* SARAH PURCELL, SEALED WITH BLOOD: WAR SACRIFICE AND MEMORY IN REVOLUTIONARY AMERICA (2002).

[42] ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 276 (1996). Judge Bork observes that a key element in moral decay has been placed at the feet of religious institutions that have demonstrated doctrinal flexibility reflecting secular concerns. *Id.* at 280-86. Absent a firm mooring in "major premises" from which moral reasoning emanates, religious institutions become less important to their adherents. *Id.* at 279. *But see generally* CLARENCE DARROW, CRIME: ITS CAUSE AND TREATMENT 96 (Patterson Smith 1972). "There is no such thing as crime as the word is generally understood . . . If every man, woman and child in the world has a chance to make a decent, fair, honest living there would be no jails and no lawyers and no courts." *Id.*

[43] Even as Judge Bork decries the fading importance of religious rigid doctrine, his criticisms underscore the possibility that a more motivated and involved congregant may become more vested in a religious institution and more attuned to the established values and traditions of that institution. *See* BORK, *supra* note 42, at 279.

3. Poverty as Injustice

Faith-based and social activists are motivated primarily by values.[44] Those values place a premium on fundamental ideals, which are part of our moral fabric. Some believe that a true analysis of poverty amidst national affluence portrays a disturbing moral indifference. Three years ago a minister penned an article for a legal publication and stated:

> [T]he persistence of poverty, it seems to me, is not so much an economic issue as it is one of justice . . .. The truth is that our society has the economic capacity to do almost anything to which it grants importance. We have the economic capacity to address poverty. What seems to me to be lacking is the political will; poverty is not granted priority.[45]

For thousands of years, religious circles have considered poverty an issue of justice.[46] It is no surprise

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[44] In a culture dominated by materialism, it is often difficult to effect values-based change in the absence of status and resources.

[45] Tim Suenram, *Minority Poverty and the Faith Community*, CLEARINGHOUSE REV. 157 (July-Aug. 2003).

[46] The connection between "justice" and giving to help others is well-established but not often recognized. The Old Testament's references to contributions in order to help others are encompassed by the Hebrew word "T'zedakah," which linguistically derives from "T'zedek" meaning "justice." Justice, charity, and righteousness are integrated concepts within the Jewish tradition. *See* THE TORAH, A MODERN COMMENTARY 1308, (W. Gunther Plaut ed., URJ Press 2005) *See also Genesis* 18:19 ("... teach [them] to keep the way of the Eternal, doing what is right and just . . ."); *Deuteronomy* 16:20 ("Justice, justice shall you pursue . . ."); *Amos* 5:24 ("Let justice well like water, Righteousness like an unfailing stream."). In the twelfth century, a

that the faith-based community and the legal sector have been identified as the best qualified to address poverty. Properly presented, the moral argument outlined is responsive to those who say there is no connection between poverty and morality.

Since the founding of our nation, there has always been a pervasive sentiment that in America there is opportunity for all. As a result, many Americans—particularly the poor—have looked to the government to provide employment where the private sector could not.[47] Yet, the government by itself is ill-equipped to meet this need. Without citizen leadership and business participation, poverty cannot be addressed in a holistic manner. Fortunately, our federal system, which divides power among the three branches of government, provides an adaptable vehicle to communicate and coordinate the "best practices" within local jurisdictions.

Jewish philosopher opined that the highest and noblest form of "t'zedakah" was offering a person the dignity and independence to earn a livelihood. *See* MOSES MAIMONIDES, MISHNAH TORAH, LAWS OF CONTRIBUTIONS TO THE POOR, Chapter 10:7. One prophet stressed the importance of t'zedakah in declaring that through t'zedakah would God be established. *See Isaiah* 54:14. *Compare supra* note 32.

[47] The end of the American frontier, marked by the mass migration from farms to cities, rapid industrialization, and not then fully-comprehended market forces, resulted in massive unemployment. *See* LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO 1919-1939 281-82 (Cambridge Univ. Press 1990) This period crested with the Great Depression, where one in four Americans could not find work. *Id.* In 1935, Fortune Magazine asked Americans of all income levels, "Do you believe that government should see to it that every man who wants to work has a job. *The Fortune Survey*, FORTUNE, July 1935, at 67. Eighty-one percent (81%) of those considered lower middle class, eighty-nine percent (89%) of those labeled poor, and ninety-one percent (91%) of blacks replied in the affirmative, while less than half of those people defined as "prosperous" shared this view. *Id.* Somewhat aghast, the editors of Fortune concluded, "public opinion overwhelmingly favors assumption by the government of a function that was never seriously contemplated prior to the New Deal." *Id.*

IV. A Comprehensive Plan to Fight Poverty

A. Federalism

In accordance with the prevailing normative values, the existence of poverty is immoral and unjust.[48] Moreover, as the disparity between the haves and have-nots widens and threatens our nation, it commands a national *will* for public action. Next, that *will* must translate into effective action, a *way* to fight poverty, through a local anti-poverty strategy or plan. The *will* should be nationally established and nationally funded, but the *way* would be best designed and implemented locally. This design allows the ingenuity of the federal system to maximize the benefits to American citizens based on local requirements and concerns.

Currently, the federal government requires local jurisdictions and states to submit two planning documents, which are described below, that deal with the expenditure of federal dollars related to community development.[49] Although the federal government is the funding source, the state and local governments prepare the plans. This requirement means that fifty different anti-poverty strategies may be developed in each of the fifty states, and among local jurisdictions, thousands of opportunities to experiment with bold anti-poverty strategies.

Our proposal for an effective anti-poverty strategy suggests that the federal government would agree to finance local plans developed under the leadership of local coalitions in local jurisdictions. The federal government would not allow the financing to be released until the plan

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[48] *See supra* notes 29, 31 & 42.

[49] *See* U.S. Department of Housing and Urban Development, *The Consolidated Plan: Questions and Answers: July 2004*, *available at* http://www.hud.gov/offices/cpd/about/conplan/QandA.doc (last visited Feb. 12, 2007).

complied with participation requirements, local matching fund requirements, and innovative criteria. A local government would submit the plan, but the committee of local citizens should ideally be independent from local political vicissitudes. [50] Since a local planning committee is in charge, but relies on local agency involvement, there should be less resistance from local agencies implementing the plan.

B. Planning

The Consolidated Plan (ConPlan) is a Housing and Urban Development (HUD) program that must be submitted every five years.[51] Jurisdictions describe their method for distributing federal community development and housing dollars locally.[52] Each ConPlan describes a community's needs, resources, priorities, and proposed activities to be undertaken with this HUD funding. It is both an application and a plan, and it offers (1) a collaborative process establishing a unified vision; (2) a comprehensive housing affordability strategy (CHAS); (3) a statement of long- and short-term community development objectives; (4) an application for funding under multiple funding sources; and (5) a stated anti-poverty strategy describing funding resources used to assist individuals in poverty. [53] While HUD seeks an articulation of anti-poverty strategies in "brief and concise" form, examination of the actual

[50] It should be noted that the original Founders' ideal of not having a central government composed of career politicians would greatly benefit the plan proposed.

[51] *See Consolidated Plan*, *supra* note 49.

[52] *See* U.S. Department of Housing and Urban Development, *Guidance on Preparing Consolidated Plans for Fiscal Year (FY) 2005 Funding Cycles: June 24, 2004*, *available at* http://www.hud.gov/offices/cpd/about/conplan/toolsandguidance/guidance/2005guidance.doc (last visited Sept. 17, 2006).

[53] *See Consolidated Plan*, *supra* note 49.

strategies submitted by recent grantees raises questions as to the effectiveness of what appear to be simplistic anti-poverty plans.[54]

During our research, we examined an informal sample of anti-poverty strategies to determine their effectiveness. We drew our sample from cities based on their diversity in size and geographic location. The cities studied included: Syracuse, New York;[55] Jackson, Mississippi;[56] Los Angeles, California;[57] Lafayette, Indiana;[58] Clackamas, Oregon;[59] Phoenix, Arizona;[60] and Decatur, Alabama.[61] These anti-poverty submissions,

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[54] *See id.* at 4.

[55] *City of Syracuse Consolidated Plan 2005-2006, available at* http://www.syracuse.ny.us/pdfs/12/ConPlan2005-2006.pdf (last visited Sept. 17, 2006).

[56] *Jackson, MS: Consolidated Plan for 1995 Executive Summary, available at* http://www.hud.gov/library/bookshelf18/plan/ms/jacksoms.html (last visited Sept. 17, 2006).

[57] *Los Angeles County's Anti-Poverty Strategy, Poverty in Context, Poverty in Los Angeles County* [hereinafter *Los Angeles ConPlan*], *available at* http://www.lacdc.org/resources/consolidatePlan/cp/Sec10.pdf (last visited Sept. 5, 2006).

[58] *City of Lafayette, Indiana, Five Year Strategic Plan, Chapter 6 Anti-Poverty Measures, available at* http://www.lafayette.in.gov/Content/global/File/plan/Chapter%206.pdf (last visited Oct. 9, 2006).

[59] *See Clackamas County, Oregon, Housing and Urban Development 2003-2005 Strategic Plan, available at* http://www.co.clackamas.or.us/cd/packets/conplan4.pdf (last visited Sept. 17, 2006).

[60] *See City of Phoenix, Arizona, Consolidated Plan for 2000-2005, Chapter 7, Strategic Plan, available* at http://phoenix.gov/GRANTNSD/conplan.html (last visited Sept. 5, 2006).

[61] *City of Decatur, Alabama, Community Development, Consolidated Plan for Fiscal Years 2005-2010* [hereinafter *Alabama ConPlan*], *available at* http://www.digitaldecatur.com/agencies/comdev/conplan/Consolidated

while varying in length and detail, nonetheless uniformly fall short on substance.

For example, while HUD requires collaboration among community agencies, none of the sampled plans integrated members of the poor as part of their anti-poverty strategy.[62] Moreover, none of these plans mention the inclusion of members of the poor in discussions of poverty solutions.[63] Input from the community to be utilized in crafting real solutions to poverty, however, has been recognized as an indispensable but difficult-to-achieve component of anti-poverty work for decades.[64]

Even the collaborative efforts that were mentioned in these ConPlans—combining resources and brainstorming by like-minded poverty agencies—seem to fall short of effective results. While collaboration is inherently difficult, it is absolutely essential when engaging in anti-poverty work.[65] Los Angeles's reference to "networking and collaboration" rings hollow when it is followed by a vague mention of "[n]ew partnerships with common anti-poverty goals that include housing providers, service providers, funding agencies, and employers;

%20Plan%202005-2010.pdf (last visited Sept. 5, 2006).

[62] *See* the entirety of the Consolidated Plans of Syracuse, New York; Jackson, Mississippi; Los Angeles, California; Lafayette, Indiana; Clackamas, Oregon; Phoenix, Arizona; and Decatur, Alabama, *supra* notes 55-61.

[63] *Id.* (Author's conclusion reached after analyzing the Consolidated Plans).

[64] *See* CLARK & HOPKINS, *supra* note 23. Case-in-point, several years ago while working with a client, we learned that second and third shift jobs were virtually unobtainable because local bus service ceased at 6:00 PM. As providers, we did not consider this to be an obstacle because we had automobiles and rarely used public transportation. Only by listening to the client, did we comprehend the significance of this barrier to self-sufficiency.

[65] The very complexity of poverty, multiple agencies providing services, and bureaucratic rules and regulations necessitates trouble shooting analysis to develop a coherent strategy.

community education; and education of funding sources."[66] Clackamas, Oregon seems to be on a more promising track with a plan to "provide leadership in the County, to identify and resolve issues of poverty,"[67] which at least recognizes the need for leadership when developing anti-poverty strategies.

Despite the dearth of specific collaborative measures in these anti-poverty strategies, several plans reinforce the notion of "self-sufficiency" among families without effectively describing how that will be obtained or measured.[68] Most of the anti-poverty strategies contain broad statements that fail to express specific actions and, most importantly, describe tangible and measurable results.[69] Additionally, legal requirements regarding public notice are not well designed to achieve maximum citizen participation.[70]

Vague objectives and lack of accountability yield little prospect for the federal program's success. Lafayette

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[66] *Los Angeles ConPlan*, *supra* note 57.

[67] Clackamas County, *supra* note 59.

[68] *See Alabama ConPlan*, *supra* note 61; *Los Angeles ConPlan*, *supra* note 57.

[69] Los Angeles' anti-poverty strategy, for example, states that "[e]ducation and training are important for a low-income person to gain the skills needed to obtain and maintain employment" without providing any concrete strategies to make available and maintain such employment. *See Los Angeles ConPlan*, *supra* note 57. Decatur, Alabama's plan does not even bother to enumerate goals; instead, it merely lists "activities and supportive services provided to participating families." *Alabama ConPlan*, *supra* note 61.

[70] *See* Gregory L. Volz et al., *Higher Education and Community Lawyering: Common Ground, Consensus, and Collaboration for Economic Justice*, 2002 WIS. L. REV. 505, 532. *See also* Scott Cummings & Gregory Volz, *Toward a New Theory of Community Economic Development*, 37 CLEARINGHOUSE REV. 158, 167 (July-Aug. 2003). What good are public notice requirements if few citizens understand and/or participate in the public hearing process? One of the authors has witnessed a public notice meeting at which zero residents attended.

admitted to this point when it noted in its most recently submitted ConPlan that poverty had in fact *increased* since their last plan.[71] Although the authors of the Lafayette ConPlan did try to attribute part of the cause to a sluggish post-9/11 economy, they also seemed to take some responsibility for their ineffective initiatives in fighting poverty.[72]

A second type of federal planning document is the Continuum of Care Plan, which refers to a "community plan to organize and deliver housing and services to meet the specific needs of people who are homeless as they move to stable housing and maximum self-sufficiency."[73] The Continuum of Care Plan "includes action steps to end homelessness and prevent a return to homelessness."[74] HUD has identified four fundamental components: (1) outreach, intake, and assessment to (a) identify an individual's or family's service and housing needs, and (b) link them to appropriate housing and/or service resources; (2) emergency shelter and safe, decent alternatives to the streets; (3) transitional housing with supportive services to help people develop the skills necessary for permanent housing; and (4) permanent housing and permanent supportive housing.[75]

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[71] *See supra* note 58, at 2.

[72] *Id.* at 11.

[73] *National Coalition for Homeless Veterans, HUD Homeless Continuum of Care, available at* http://www.hud.gov/offices/cpd/homeless/library/coc/cocguide/intro.pdf (last visited Oct. 9, 2006).

[74] *Id.*

[75] HUD, *What Is the Continuum of Care, and Why Is It Important? in* Guide to Continuum of Care Planning and Implementation, *available at* www.hud.gov/offices/cpd/homeless/library/coc/cocguide/intro.pdf (last visited Sept. 5, 2006); U.S. Department of Housing and Urban Development, Office of Community Planning and Development, *Continuum of Care for States, available at* http://www.hud.gov/offices/cpd/homeless/library/coc/cocstates.pdf (last visited Sept. 5, 2006).

HUD emphasizes that a Continuum of Care program should be a "collaborative process" and include coordinated neighborhood and community development strategies that will assist families in their move to more permanent housing.[76] It also encourages a focus on preventive strategies to help decrease the number of homeless individuals.[77] The Plans, therefore, must include long-rage solutions and plans, making them proactive social policy solutions.

The Continuum of Care Plans, of course, address only homelessness, and while homelessness comprises a large portion of this country's impoverished population, the Plan nonetheless is not focused on assisting those who already have housing options. Glancing at a sampling of Continuum of Care Plans from cities and states throughout the country, however, exemplifies that a considerable amount of thought, collaboration, and planning are channeled into these strategies. In this respect, the Continuum of Care Plans serve as a more useful template, than do the Consolidated Plans required by HUD, as a coherent and organized anti-poverty planning document.[78]

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[76] *See Guidelines, available at* http://www.hud.gov/offices/cpd/about/conplan/toolsandguidance/guidance/local_guidelines.pdf (last visited Feb. 12, 2007).

[77] *Id.*

[78] The City of Chicago, for example, recognizes that financial restraints are not the only impediment in securing stable housing, and it therefore includes wraparound services to achieve this end. *See Chicago's Continuum of Care Plan, available at* www.chicagocontinuum.org/archives/getting-housed-stayg-housd.pdf (last visited Sept. 5, 2006) [hereinafter Chicago's Continuum of Care Plan]. In some cases, support services will be required for life, and may include job training, education, substance abuse treatment, and health or mental health care services. *See id.* Since homelessness can be described as falling off the ladder of economic empowerment, the systematic approach used by a community to prevent homelessness and provide needed services to homeless citizens is an effective model for us to imitate in designing an anti-poverty strategy for a community. The Chicago Plan, while more detailed than the other Plans, still lacks

C. Coalitions

Ideally, a local anti-poverty plan needs to assess local needs, increase communication among service providers, coordinate existing programs, gather new resources, design an implementation strategy, and clearly define how it will assure accountability. This work can best be accomplished through the work of a coalition which would include individuals representing a wide array of stakeholders. Stakeholders would include, but would not be limited to, representatives from the many sectors directly involved in the impoverished community including major institutions which are not poor such as hospitals, universities, businesses, and faith-based institutions.

Many people in the public interest law field might

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specific details, particularly in regard to accountability. *See id.* Additionally, the examination of other Continuum of Care Plans provides similar reports. *See* State of Georgia, *2005 Balance of State Continuum of Care, available at* www.dca.state.ga.us/housing/HousingDevelopment/programs/downloads/2005_CoC_Plan.pdf [hereinafter Georgia Report] (last visited Sept. 5, 2006); Berkley Housing Department, *Berkeley Homeless Continuum of Care Plan, available at* www.ci.berkeley.ca.us/housing/CCP/ccpIII.html [hereinafter *Berkley Continuum of Care Plan*] (last visited Sept. 5. 2006). Both of these continuum of care plans provide extensive information on their respective region's homeless demographics and population. *See* Georgia Report *supra*; *Berkley Continuum of Care Plan supra.* Berkeley recognizes that "there is a need to improve coordination particularly between homeless service providers and providers of services used by homeless people, but which are available to clients regardless of whether they are homeless or not," but the Plan did not very convincingly articulate a way to compensate for this discrepancy. *See Berkley Continuum of Care Plan, supra.* Similarly, Georgia recognized that the planning necessary to confront homelessness could not be confined solely to the "homeless-only" service providers and resources. *See* Georgia Report, *supra.* The state has engaged in forming taskforce committees and implementing training programs, but it still appears uncertain that an effective strategy has been established. *Id.*

not recognize the importance of nontraditional institutions to community coalitions.[79] The coalition should also include participation from community residents as well as individuals involved in public education, workforce development, social service, criminal justice, public interests, philanthropies, and government.[80]

William Julius Wilson has written that only a multi-racial coalition can mobilize the necessary political support and financial resources to implement an intervention strategy capable of resolving the structural causes of ghetto poverty.[81] The planning committee, which could develop the anti-poverty plan and potentially become an advocacy coalition, should be trained and encouraged to develop creative and innovative policies and programs. Over time, the committee will build chemistry and trust among the participants. Community lawyers from the public interest law sector could play a pivotal role ensuring that all sectors of society are represented including the poor.[82] It is doubtful that any other professional class has the perspective and knowledge of the local social service network to analyze funding streams, detail the effectiveness of existing services, recruit needed coalition members, and

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[79] Over the past ten to fifteen years, higher education has produced an impressive body of work in poor communities. Additionally, some visionary academic presidents recognize the obligation of all higher education institutions to help solve America's greatest problems. For example, eight years ago, Al Bloom, President of Swarthmore College, addressed the role of higher education and challenged his colleagues to start "thinking together how our educational institutions might best contribute to eliminating poverty from this nation." Al Bloom, Speech at the First Annual Philadelphia Education Network for Neighborhood Development Conference (Oct. 22, 1997) (on file with authors).

[80] The coalition must be allowed to develop its programs without becoming a pawn in local political squabbles. The coalition should develop a proactive written expression of how it will ensure that politics do not dominate its operations.

[81] WILLIAM JULIUS WILSON, THE BRIDGE OVER THE RACIAL DIVIDE, *supra* note 9.

[82] *See* Volz, *Higher Education*, *supra* note 70.

encourage accountability for precious financial resources.

The maturation of the coalition will be one of the most significant aspects to the success of the proposed anti-poverty plan. When these groups internally develop trust and confidence that their planning will receive financial support, their commitment will further develop a national *will* to fight poverty.[83] If these individual coalitions or planning committees network, then they could learn from each other, inspire each other, create synergies, and reduce institutional inertia. Combined, these consequences create an effective engine of change to overwhelm the forces of poverty.

V. Work

Employment is the great crucible in our polarized political world. Work must be a priority of any anti-poverty strategy or plan. If the government cannot help individuals who want to work but are unemployed through no fault of their own, then it fails in one of the very purposes for which it was created—to provide security for its citizens.[84] One of the most sacred and core values of the United States has always been equal opportunity. Equal opportunity has been a persistent and traditional value ever since its recognition at the birth of the country. Unfortunately, those individuals who lack the basic necessities—to live, to provide for their families, or to have

[83] Recognition of different aspects of the role of individual organizations, the internal culture of each, and the impact of each organization's "personality" on collective action can serve as a check on counter-productive activity.

[84] *See* CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (Basic Books 2004) (showing how President Roosevelt began asserting that economic opportunity as we had known it no longer existed, that a new concept of freedom required economic as well as political freedom, and that the government owed its citizens the basic necessities of life).

the human dignity that comes with producing something of value to society—are estranged from those values.

If everyone had a job paying a living wage, which would adequately provide for his or her family, then little or no poverty would exist.[85] Since insufficient financial resources cause poverty, the most direct anti-poverty strategy would focus on work, employment training and work support, and establishing living wages for all those individuals who want to work. Moreover, each local jurisdiction, rather than the federal government, is best situated to determine the primary causes of labor market failure in its own jurisdiction. Some jurisdictions will conclude that the focus of their anti-poverty plans should concentrate on public education reform; others will articulate that the employment and training system needs restructuring. Many jurisdictions may focus on racial prejudice, while some will focus on regional economic development strategies. Each local community has the collective capacity to analyze and understand what would lift its citizenry up to self-sufficiency. Additionally, local coalitions can generate unique plans targeted to their community's needs. Ultimately, each plan's potential to help citizens go to work will be its litmus test for success. Nonetheless, local anti-poverty plans are the most effective way to ensure that the right of equal opportunity is a reality and not a platitude.[86]

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[85] Richard Taub, *What if Everybody Had a Job?* SHELTERFORCE, at 8 (Sept./Oct. 1996), *available at* http://www.nhi.org/online/issues/89/everyon_job.html (last visited Sept. 7, 2006) (hard copy of the article in possession of the authors). Taub argues "that, if every able-bodied person in a community had a job, many of the other problems and solutions to them would decline in importance." *Id.* at 8. He suggests that the focus of urban solutions should not be placed on "how to deal with the consequences of unemployment and lack of income but [on] how to deal with . . . the lack of income" in the first place. *Id.*

[86] SUNSTEIN, *supra* note 84, at 68. Professor Sunstein points out that, in the famous Commonwealth Club Address on September 23, 1932,

Forty years ago, when the fledgling Legal Services Program attempted to obtain support from the established legal community, its first president Clint Bamberger challenged the American Bar Association. He reminded the ABA that:

> Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effect of poverty. Lawyers must uncover the legal causes of poverty, remodel the system which generates the cycle of poverty and design new social, legal, and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope, and ambition.[87]

We now know that a lack of coherent local planning to fight poverty is at the root of the "cycle of poverty." Yet the question remains: how can we change systemic and structural forces that result in generations of poverty without a plan to lead a community? Therefore, a coherent anti-poverty plan should focus on connecting poor residents to the regional and local economy. Solutions to concentrated poverty require a link between poor citizens and the economy.[88]

Lawyers can contribute significantly to refocusing a local community's attention to the need for family-sustaining employment for all adults. In addition to

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Franklin D. Roosevelt described a transformation of citizen rights growing out of the Depression. *Id.* at 71. Roosevelt said, "Every man has a right to live, [which includes] a right to make a comfortable living." *Id.*

[87] EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 120 (Transaction Books 1978).

[88] *See generally* Taub, *supra* note 85.

performing a connective or intermediary function between institutions such as hospitals, universities, real estate developers, and government agencies who all possess the capacity to wield influence and shape policy, lawyers can help interpret funding streams and planning programs. More specifically, public interest lawyers can reduce the isolation so visible in the aftermath of Hurricane Katrina. Additionally, an organized social or economic movement can profoundly change the way our society views an issue and, consequently, influence the way laws are drafted.[89] Properly trained and seasoned in public interest law, lawyers are indispensable agents for needed change.

One recent report demonstrates that Americans increasingly recognize that poverty requires a response not only by the federal government but by state and local government as well.[90] Carefully cultivated, this

[89] The disability rights movement of the twentieth century serves as a prime example of the impact that organized social awareness can create. Prior to the passage of the Rehabilitation Act of 1973, society viewed a disability as a medical condition that needed to be cured and viewed people with disabilities as "unfortunates." *See* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. J. 1, 12 (2004). Disability advocates, however, successfully argued that a disability is not merely a medical condition that inhibits the potential of a disabled person; rather, it constitutes discrimination necessitating civil rights protection and accommodations for people who have disabilities. *Id.* The disability advocacy movement effectively shifted the focus of how to assist individuals with disabilities from providing public entitlements to empowering individuals by giving them civil rights. *Id.*

[90] *See* University of Georgia, Peach State Poll, *Georgians See Poverty as a Major Problem for the State* (May 20, 2004), *available at* http://www.cviog.uga.edu/peachpoll/poll.php?date=2004-05-20 ("Report & Analysis" link) (last visited Sept.19, 2006). This 2004 poll found that Georgia residents perceived poverty as a serious issue and believed that state and local government played a more important role in fighting poverty than the federal government. *Id.* Interestingly, those Georgia residents polled saw the role of the ordinary citizen as the most important in efforts to fight poverty. *Id.* If this poll fairly reflects nationwide grassroots opinion, the coalition concept offered will resonate with the American people. Interestingly, when asked if

recognition could generate a popular expectation for local- and state-dominated responses to federal edicts. Locally-driven leadership is more suited to designing workforce development systems responsive to local labor force deficiencies. Assisted by competent and inspired legal leadership, citizen coalitions could become a powerful instrument for economic justice.

VI. The *Will* and The *Way*

In order to generate the *will* for proposed change, the proposed plan must (1) stress that structural and systemic forces in each of America's communities require active community participation to address local poverty issues; (2) acknowledge that the societal costs of poverty are immense and apprise the public of these costs; (3) emphasize that the injustice of poverty is unacceptable and its elimination is a moral imperative; (4) draw attention to the media attention paid to poverty in the aftermath of Hurricane Katrina as it provides an opportunity to create a needed national will driven by active citizen participation; (5) act to restore the human dignity which accompanies the ability to work and contribute to the common good; (6) invest in the future, not only to reduce the various economic and personal costs, but also to convert consumers of poverty programs into taxpayers; and (7) create a national response to poverty that will give deference and responsibility to both state and local government.

Additionally, in its national response, the government should (1) generate the political power to provide block grant funds to the states; (2) form local committees composed of representatives from all sectors to develop a plan; (3) require advocates for the poor; (4)

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poverty could be eliminated, seventy-five percent (75%) said no and many of these gave the Biblical admonition that Christ said the poor will always be with us as a justification. *Id.* *See also supra* note 30.

compile impact studies that assess the effect, including economic opportunities and costs, of all federal, state, and local legislation on the indigent; (5) pay special attention to ensure that recipients of poverty services are included in the planning committees; (6) include higher education, business, faith-based institutions, service providers, public health, law enforcement, local government, and other local institutions that devote resources to poverty issues need in the coalition; (7) detail what local resources will be contributed, how the plan will be implemented, and who—including representative recipients—will evaluate the plan in order to ensure accountability; (8) adhere to each anti-poverty strategy and plan; (9) include recommendations for improving the efforts and assuring that allocated resources are being deployed effectively in its evaluation process; (10) implement recommendations after each evaluation; and (11) create a self-perpetuating feedback loop to address change and assure that the local plans remain effective and responsive to the problems being addressed.

VII. Conclusion

Hurricane Katrina focused the world's attention on the existence of America's poor. The mere existence of large numbers of poor people, and the lack of planning to serve their needs in an emergency situation, offered a vivid picture of severe economic imbalance. From our earliest days, equal opportunity has been a bedrock value of the American experience. Today, that value has been relegated to a subordinate position because of the preeminent positions accorded wealth, status, and power.

The federal system developed by our Founding Fathers offers the benefits of central funding and control, while according local stakeholders meaningful input into the development of programs addressing poverty. Therefore, any realistic effort to address poverty demands a change in the mindset of the public and the federal

government's willingness to allocate sufficient resources to local entities that can develop and implement programs to eliminate poverty. Advancing the change in that mindset can be promoted by publicizing the need for equal opportunity and the high cost of poverty programs. Once the public recognizes these ideas, a political imperative should develop to fund the necessary anti-poverty programs. Federal funding will be predicated on the development of comprehensive, accountable, and effective programs. At the same time, the public hue and cry may prompt the development of local coalitions with the knowledge, know-how, and savvy to create programs geared to address the unique problems of local poverty.

Hopefully, the coalescence of these factors will result in a change of policy and the development of systematic programming to eradicate poverty and its attendant problems that currently plague America. Perhaps there are sunny days ahead if a rational recognition of the plague of poverty can become a national priority and its elimination is made possible through the implementation of the program outlined in this article.

TAKING NEW STEPS AGAINST DIGITAL SAMPLING: THE SIXTH CIRCUIT LAYS DOWN THE LAW ON DIGITAL SAMPLING, BUT WILL IT REALLY IMPROVE INDUSTRY PRACTICES?

Kelly Randall[*]

I. In Search of an Infringement Rule

In *Bridgeport Music, Inc. v. Dimension Films*,[1] the Sixth Circuit tackled an issue that has been plaguing the music industry for nearly two decades. Digital sampling is a staple of the rap and hip-hop creative process, but there is very little precedent on or clarity about how to determine if sampling infringes on a sound recording copyright. In *Bridgeport I*, the defendant, No Limit Films, released the film *I Got the Hook Up* (*Hook Up*) and included the song "100 Miles and Runnin'" ("100 Miles") on the film soundtrack.[2] As with many typical rap songs, "100 Miles" sampled from another song. The plaintiff, Westbound Records, Inc. ("Westbound"), claimed co-ownership of the sound recording copyright to the sampled song, "Get Off Your Ass and Jam" ("Get Off"), by George Clinton, Jr. and the Funkadelics.[3] Although No Limit Films obtained an oral license from the co-owners of "100 Miles" to use the song in the film soundtrack,[4] Westbound claimed that "100

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[1] 230 F. Supp. 2d 830 (M.D. Tenn. 2002) [hereinafter *Bridgeport I*].

[2] *Id.* at 833.

[3] Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 393 (6th Cir. 2004) [hereinafter *Bridgeport II*].

[4] *Bridgeport I*, 230 F. Supp. 2d at 833.

Miles" contained an unauthorized sampling of "Get Off."[5]

The process to determine whether digital sampling amounts to copyright infringement is obscured by many factors. Since many sampling cases are settled out-of-court,[6] the scarcity of case law does not provide a definitive road map for making this determination. While the courts are still in the evolutionary stages of creating a standard of analysis for infringement created by sampling,[7] the lack of clear guidelines or rules further complicates the process. In light of an increase in litigation regarding digital sampling and copyright infringement, the Sixth Circuit addressed the need to clarify "what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings."[8] In *Bridgeport II*, the Sixth Circuit reversed the district court's grant of summary judgment to No Limit Films and established a new bright light rule for defining sound recording copyright infringement.[9] The court held that when someone digitally samples, it is a physical taking of another's work and no further analysis, such as de minimis or substantial similarity test, is required.[10]

The purpose of this case synopsis is to demonstrate *Bridgeport*'s departure from the traditional methods of evaluating copyright infringement claims, as well as its potential effect on the music industry and the courts that review those cases. While this case addressed other issues on appeal, this synopsis will focus primarily on Westbound's claim against No Limit Films and the court's establishment of a new bright line rule. Moreover, this synopsis will not include the technical details of digital

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[5] *Id.* at 838.
[6] Susan J. Latham, *Newton v. Diamond: Measuring the Legitimacy of Unauthorized Compositional Sampling—A Clue Illuminated and Obscured*, 26 HASTINGS COMM. & ENT. L.J. 119, 124 (2003).
[7] *Id.*
[8] *Bridgeport II*, 383 F.3d at 397.
[9] *Id.* at 395.
[10] *Id.* at 395, 399.

sampling, as they are discussed in an abundance of scholarly articles written on the topic.[11] While this decision emphasizes the need for the new bright line rule and "ease of enforcement,"[12] it represents a broad departure from the traditional model of determining whether digital sampling amounts to copyright infringement. Furthermore, such a departure may not result in the outcome that the court anticipated. Rather, this decision may create a greater divide between the analyses utilized by the Sixth Circuit and other circuit courts of appeals for copyright infringement cases.

II. Development of Copyright Infringement Analyses

A. Groundwork for Analyzing Infringement

Although *Baxter v. MCA*[13] involved only a musical composition copyright infringement, it provides a genesis for the analyses used to determine copyright infringement. In that case, the plaintiff was the sole copyright owner of the musical composition "Joy,"[14] which he claimed composer John Williams copied for use in the "Theme from E.T."[15] After the district court found that the two works were not substantially similar,[16] the Ninth Circuit laid the groundwork for analyzing a copyright infringement claim. A claimant must prove (1) copyright ownership, and (2) that the defendant copied a "protectible expression."[17] To prove copying, a plaintiff may use circumstantial evidence that (a) the defendant had access to the original

[11] *Id.* at 401.
[12] *Id.* at 398.
[13] 812 F.2d 421 (9th Cir. 1987).
[14] *Id.* at 422.
[15] *Id.* at 423.
[16] *Id.*
[17] *Id.*

work before his work was created, and (b) "substantial similarity of both general ideas and expression between the copyrighted work and the defendant's work."[18] Furthermore, a plaintiff may also show a "'striking similarity' between the works" to infer copying, where there is no evidence of access.[19]

In reviewing the case, the *Baxter* court applied an "intrinsic" test of substantial similarity by relying on the reaction of an ordinary lay person hearing the works.[20] Although the court used this analysis technique to determine that the two works should be heard by the jury,[21] it rejected the defendant's argument that a similarity as minimal as a six-note progression is not copyrightable.[22] In fact, the court highlighted the lack of a bright line rule regarding what amount of copying constitutes infringement.[23] Rather than opt to solve the problem by establishing a rule, the Ninth Circuit left that determination to the jury,[24] preferring to determine infringement as a question of fact rather than law.

B. Simplifying the Analysis for Unauthorized Use

Grand Upright Music Ltd. v. Warner Brothers Records, Inc.[25] is one of the earliest sampling cases involving unauthorized use. The defendant, artist Biz Markie, sought the clearance to use the plaintiff's work, "Alone Again (Naturally)," in his composition, "Alone

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[18] *Id.*
[19] *Id.*
[20] *Id.* at 424.
[21] *Id.* at 425.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 780 F. Supp. 182 (S.D.N.Y. 1991).

Again."[26] However, his record label released the album including "Alone Again" before the defendant could obtain the necessary clearances.[27] The court used the defendant's own actions in attempting to obtain a license, then subsequently releasing an album with a song that included an unlicensed sample, to prove that the defendant knew he was violating the plaintiff's rights as a copyright holder.[28] Essentially, the court used the defendant's own knowledge of unauthorized sampling to prove infringement, thus simplifying the analysis to a process similar to the later developed *Bridgeport* rule.

C. Defining Multiple Analyses for More Complex Infringement

Two years later, a district court in nearby New Jersey decided a more complicated sampling case using a less clear-cut approach.[29] In *Jarvis v. A&M Records*, the defendant used sampled portions of the plaintiff's composition "The Music's Got Me" in his composition "Get Dumb! (Free Your Body)."[30] The court established a three step process to prove copyright infringement, in which the plaintiff must prove that (1) he is a valid copyright owner; (2) the "defendant copied a protectible expression"; and (3) the "copying is substantial enough to constitute improper appropriation of plaintiff's work."[31] Similar to the *Baxter* court's analysis, the *Jarvis* court found that without the defendant's admission of unlicensed sampling, copying can be inferred if the defendant had access to the original work and the defendant's work is

[26] *Id.* at 184.
[27] *Id.* at 185.
[28] *Id.*
[29] Jarvis v. A&M Records, 827 F. Supp. 282 (D.N.J. 1993).
[30] *Id.* at 286.
[31] *Id.* at 288.

substantially similar to the plaintiff's.[32]

In *Jarvis*, however, the defendant admitted to unauthorized use of the sample,[33] and the court moved to the third step in its analysis. The court analogized digital sampling to "taping the original composition and reusing it in another context."[34] This analogy allowed the court to apply Professor Nimmer's doctrine of "fragmented literal similarity," where "literal, verbatim similarity" exists between the two works.[35] Digital sampling by definition is a flawless example of "fragmented literal similarity." To this end, the court further explained that "fragmented literal similarity" infringement may decrease the value of the original work even when only a small, but qualitatively significant portion of the work was copied.[36] While the court found that both quantitatively and qualitatively significant portions of a work can be protectible expressions, it ultimately examined the infringing work's effect on the original work's value to determine unlawful appropriation.[37] On the other hand, the court noted some material may not be "sufficiently original and/or novel" and, thus, is non-copyrightable,[38] but a "sufficiently distinctive" work is copyrightable.[39] *Jarvis* illuminated four of the main analyses for determining copyright infringement: (1) substantial similarity, (2) fragmented literal similarity, (3) quantitative/qualitative, and (4) originality.

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[32] *Id.* at 289.
[33] *Id.*
[34] *Id.* at 286.
[35] *Id.* at 289.
[36] *Id.* at 291.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 292.

D. Compacting the Analyses, But Infringement Still Remains a Jury Question

Nearly a decade later, in *Williams v. Broadus*,[40] the court evaluated and compacted several analyses to determine if sampling is unlawful.[41] Plaintiff Marlon Williams ("Marley Marl") sampled a portion of Otis Redding's song "Hard to Handle" for his song "The Symphony" without obtaining the proper permission from the copyright owner.[42] Ten years after the release of Williams' album, the defendant, Calvin Broadus ("Snoop Dogg") sampled some lyrics and music from "The Symphony" for his own song, "Ghetto Symphony."[43] The defendant argued that due to Williams' own unauthorized sampling, the plaintiff did not have a valid copyright, and therefore, could not meet the first step in a copyright infringement analysis.[44] While the Copyright Act does not protect a derivative work that has unlawfully used other material,[45] a "work is not derivative simply because it borrows from a pre-existing work."[46] Rather, a work is derivative if it infringes on the original copyright holder's right to create a derivative work himself.[47] To establish that a derivative work exists, the infringer must have copied the work and done so to the level of unlawful appropriation.[48] Once again, the substantial similarity test is used to prove unlawful appropriation[49] by relying upon

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[40] No. 99 Civ. 10957 MBM, 2001 WL 984714, at *1 (S.D.N.Y., Aug. 24, 2001).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] 17 U.S.C. § 103(a) (1976).
[46] *Williams*, 2001 WL 984714, at *2.
[47] *Id.*
[48] *Id.*
[49] *Id.* at *3.

the ordinary lay listener's response to the two works.[50]

The court further explained that this case is an example of "fragmented literal similarity,"[51] and offered the de minimis doctrine that some literal copying may be so quantitatively or qualitatively insignificant that it does not amount to infringement.[52] The court acknowledged that its de minimis substantial similarity analysis depends on the significance of the copied material to the original work.[53] After compressing several analyses, the court found that a material issue of fact remained as to whether the defendant's sample constituted a significant portion of the original work,[54] thus continuing to follow the *Baxter* precedent that infringement is a question of fact and not of law.

E. Filtering Out Sound Recording and Musical Composition Infringements

1. The District Court's Approach in *Newton I*

In *Newton v. Diamond*,[55] the court distinguished between musical composition and sound recording copyright infringement. The plaintiff was the sole owner of the musical composition "Choir,"[56] but did not own the sound recording copyright after he had licensed it to ECM Records.[57] The defendants, the Beastie Boys, obtained a license to sample the sound recording from ECM and used

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at *4.
[54] *Id.*
[55] Newton v. Diamond, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) [hereinafter *Newton I*].
[56] *Id.* at 1246.
[57] *Id.*

a six-second long sequence of three notes played over one sustained note in their song "Pass the Mic."[58] Since the plaintiff did not have a sound recording copyright infringement claim, the court first used a process to filter out the unique characteristics of the sound recording from the musical composition.[59]

The court concluded that a musical composition copyright "protects only the sound that would invariably result from" playing the written musical composition,[60] not necessarily the actual sounds performed. While the plaintiff's argument focused on this specific performance technique, the court applied the following test to filter out the performance from the composition by asking (1) what is "unique" about the plaintiff's performance,[61] and (2) whether the defendant's own creation of a similar three-note sequence would infringe upon the musical composition copyright.[62] Next, the court employed the originality analysis, explaining that "not every element of a song is per se protected" and that copyright extends only to the "original and non-trivial" elements of a work.[63] The court countered the plaintiff's focus on the originality of the three-note sequence with prior case law. Similar cases involving less than six notes were successfully protected only where the notes were "qualitatively distinctive" when accompanied by lyrics, went to the "heart of the composition," were repeated frequently within the lyrics, and were analyzed in both the sound recording and the written composition.[64] After using this filtering process, the court found that any originality in the six-second

[58] *Id.*
[59] *Id.* at 1249.
[60] *Id.* at 1251.
[61] *Id.* at 1252.
[62] *Id.*
[63] *Id.* at 1253.
[64] *Id.* at 1254.

sample comes from the sound recording,[65] and further held that a small, common three-note sequence was not protected by copyright.[66]

Lastly, the court employed the de minimis analysis. While the court acknowledged that the three-note sequence is not protected by copyright, it contended that the defendant's use of the sample was nonetheless de minimis.[67] Since a de minimis sample is not substantially similar enough to be recognizable by the average audience,[68] the court adopted a quantitative/qualitative approach by asking whether the defendant's use of quantitative or qualitative elements of the original work "rises to the level of unlawful appropriation."[69] While a quantitative analysis emphasizes the amount of material copied,[70] the qualitative analysis focuses on the significance of the copied material to the original work.[71] Ultimately, the court noted that the qualitative analysis depends on whether someone might recognize the source of the material in question when performed outside the context of the original work.[72] Although a de minimis analysis was not necessary with this particular sample, the court's elaboration of the analysis began to solve the problems associated with the lack of useful guidelines to determine copyright infringement by digital sampling.

2. The Court of Appeals Refines the Process in *Newton II*

On appeal, the Ninth Circuit affirmed the district

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[65] *Id.* at 1256.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 1256-57.
[69] *Id.* at 1257.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 1258.

court's holding in *Newton I* that the defendant's use of the sample was de minimis.[73] However, *Newton II* approached the de minimis analysis in a different manner. Here, the Ninth Circuit, like the trial court, began with a process to "filter out" the elements associated with the sound recording to address only the elements infringing upon the musical composition.[74] The court then incorporated the substantial similarity, "fragmented literal similarity," and the quantitative/qualitative analyses to establish that "the substantiality of the similarity is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole."[75] The court determined that since the three-note sequence appeared only once in "Choir" and was not any more significant than other sections of the work, the sampled portion was "neither quantitatively nor qualitatively significant."[76]

Therefore, the *Newton II* court concluded that the works were not substantially similar and the sample was de minimis because the ordinary listener would not "discern Newton's hand as a composer apart from his talent as a performer" in the Beastie Boys' sample.[77] While the dissenting judge acknowledged the analyses presented by the majority were correct, she explained that a reasonable jury could find substantial similarity in the works, and disagreed with the grant of summary judgment for the defendant.[78]

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[73] Newton v. Diamond, 349 F.3d 591, 592 (9th Cir. 2003) [hereinafter *Newton II*].
[74] *Id.* at 595.
[75] *Id.* at 596.
[76] *Id.* at 597.
[77] *Id.* at 598.
[78] *Id.*

F. Summary

Steadily, courts have established a framework for determining what constitutes copyright infringement in digital sampling cases. Borrowing from other infringement analyses, courts have many options to evaluate digital sampling's effect on copyright, while generally resolving the issue as a question of fact. Such painstaking efforts to set forth precedent should not be taken lightly. Relying more on law review articles than case law, however, the Sixth Circuit chose to depart from this precedent rather than add to it.

III. *Bridgeport*'s Procedural History

A. The District Court Takes the Anticipated Approach and Follows Precedent in *Bridgeport I*

In *Bridgeport I*, the district court incorporated all of the analyses, relying heavily upon the substantial similarity and quantitative/qualitative analyses to find that the defendant's use of the sample was de minimis and thus not actionable. The court first focused on the originality of the sample, concluding that a jury could find that the arpeggiated chord from "Get Off" was sufficiently "original and creative" and therefore a protectible expression.[79] Next, the court pointed out that the de minimis analysis balances the interests of the copyright holders against the potentially "stifling effect" that strict enforcement of copyright laws may have on the artistic expression of new works.[80] In addition, the court highlighted that the analysis is complicated by the scarcity of case law on digital sampling and the "lack of a clear road

[79] *Bridgeport I*, 230 F. Supp. 2d at 839.
[80] *Id.* at 840.

map for de minimis analyses."[81]

After finding that the de minimis analysis was a derivative of the substantial similarity test,[82] the court explained that applying either the quantitative/qualitative or the "fragmented literal similarity" approaches used by other courts would also show that this particular instance of sampling "does not rise to the level of legally cognizable appropriation."[83] Therefore, the *Bridgeport I* court found that the sampled material was a "mere fraction" of the plaintiff's original work and therefore quantitatively insignificant.[84] While reviewing the qualitative significance of the sample, the court found that the mood, tone, and purpose were not substantially similar enough that an ordinary lay listener would recognize the appropriation.[85] In a final note, the court emphasized that copyright law's purpose is to "deter wholesale plagiarism," while striking a balance "between protecting an artist's interests, and depriving other artists of the building blocks of future works."[86] Therefore, the court attempted to weigh those factors when dismissing the plaintiff's claims after finding a lack of substantial similarity and that the sampled material was de minimis. As expected, the district court respected the precedent, evaluated the case under every analysis available from case law, and found that the issue was a question of fact.[87]

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[81] *Id.*
[82] *Id.* at 841.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 842.
[86] *Id.*
[87] Following the Sixth Circuit's decision, the court granted a rehearing based on the defendant's petition and an amicus brief filed by the Recording Industry Association of America in support of that petition, which resulted in a few changes to section II of the decision. *See* Bridgeport Music Inc. v. Dimension Films, 401 F.3d 647 (6th Cir. 2004) [hereinafter *Bridgeport Rehearing*]. Although this case synopsis focuses primarily on section II of the decision, the amendments either

IV. The Sixth Circuit Makes Its Own Rules in *Bridgeport II*

In *Bridgeport II*,[88] the Sixth Circuit took a less analytical approach to the issue of whether digital sampling constitutes copyright infringement. The court created a new bright line rule to address the district court's concern with the scarcity of case law and general lack of clear guidelines for the de minimis analysis.[89] However, the Sixth Circuit departed from the district court's decision and accepted the plaintiff's argument that a de minimis, or substantial similarity, analysis was not necessary in cases where the defendant concedes digital sampling.[90] The court explained that by adopting this bright line rule, both the music industry and the courts benefit from the newly found clarity to determine whether digital sampling amounts to copyright infringement.[91]

In developing the rule, the court first called attention to the statutory language of the Copyright Act,[92] specifically that the sound recording copyright owner has the exclusive right to prepare derivative works of the copyrighted material, including using fixed sounds from the original recording.[93] The court's interpretation of section 114(b) allows a non-copyright holder to simulate or imitate the sounds in a recording, but prohibits making an actual copy of the recording,[94] thus protecting the copyrighted

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clarify the court's language or include additional footnote material that has generally little effect on this synopsis.

[88] *Bridgeport II*, 383 F.3d at 390.

[89] *Bridgeport Rehearing*, 401 F.3d at 840.

[90] *Bridgeport II*, 383 F.3d at 395.

[91] *Id.* at 397.

[92] *Id.* at 399 (citing 17 U.S.C. §§ 106, 114).

[93] *See* 17 U.S.C. §§ 106, 114(a)-(b) (1976).

[94] *Bridgeport II*, 383 F.3d at 398.

work without stifling the creativity of others.[95] Since a sampling license fee could not be higher than either the cost to reproduce the sounds by the non-copyright holder or the cost to litigate the issue, the court explained that the market would determine the fee.[96]

In addition, the court pointed out that "sampling is never accidental" and that the sampler knows that the process of sampling is "taking another's work product."[97] Further, the court emphasized the value of the sample,[98] and interpreted the statute as not only prohibiting the sampling of the whole work, but also smaller portions of the whole.[99] Although a sample is only a portion of the whole work, that portion still has value since the sampler chose that portion to either reduce expenses, add value to the new recording, or both.[100]

In contrast, the court explained that following a de minimis or substantial similarity analysis is not as economical as adopting this new bright line rule.[101] In the interest of the many digital sampling cases pending before the courts, the new rule would eliminate additional analyses and allow the courts to decide the cases quickly, efficiently, and with little variance or error.[102] The *Bridgeport II* court claimed to be less concerned with the rule's judicial economy and more interested in the benefits to the music industry by making it cheaper for an artist to license a work than risk the cost of litigation.[103] Yet, with more than 470 similar cases pending from the original litigation, this bright line rule approach seems more self-serving for the

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[95] *Id.*
[96] *Id.* at 398-99.
[97] *Id.* at 399.
[98] *Id.*
[99] *Id.* at 398.
[100] *Id.* at 399.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 399-400.

court than beneficial to the music industry.

Recognizing that it was setting forth a new rule, the court attempted to justify establishing its own precedent, as well as its sharp departure from the traditional analysis-based approach followed by earlier decisions. First, rather than relying upon judicial precedent, the court followed the statutory interpretation offered by numerous law review articles addressing the issue of digital sampling.[104] Such an unorthodox approach will likely be criticized and followed with caution. Second, the court reasoned that a licensing requirement for digital sampling will in no way stifle creativity, since several artists and companies already choose to properly license the sampled material in their works.[105] Third, the court noted that the responsibility of working out guidelines for proper digital sampling licensing rests with the record industry and not the courts.[106] Fourth, the court pointed out that this new rule is intended to apply only to cases arising after the *Bridgeport II* decision and, thus, should not affect any pending or already litigated cases.[107] Lastly, while the court took a "literal reading approach" to the legislation that was passed before digital sampling existed, it left any responsibility for clarifying or updating the law to Congress, particularly noting that the music industry may prompt such action on its own.[108]

In the end, the Sixth Circuit made digital sampling a question of law when the defendant admits to the unauthorized sampling. Although, a taking without permission is infringement, the court disposed of the need for a jury, and thus, presented digital sampling as a strict liability offense. As a result, any flexibility in the Copyright Act and case law that encouraged artistic

[104] *Id.* at 400.
[105] *Id.* at 401.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 401-02.

expression has been quashed. With strict liability looming, digital samplers are faced with a choice to license their sampled material, no matter how insignificant, or face the consequences.

V. Is a New Bright Line Rule Really What The Music Industry Needs?

While the development of this new bright line rule may appear to provide much needed guidance for assessing how digital sampling infringes upon copyrighted works, the rule may not have the desired effects. Although the court appears to present the rap and hip-hop industry with the "license or else" ultimatum, strict compliance by that industry is unlikely. In fact, it might encourage less obedient behavior and less-than-honest practices, particularly among the newer, budding artists. Rising talent in the music industry rarely is represented by counsel or well-versed in copyright law. In hopes of one day "making it" in the industry, up-and-coming artists frequently depend on a grassroots following, creating and distributing demo tapes, and performing in public as often as possible. This approach can lead to the artist's popularity and, in turn, an increased demand for that artist's work. As money begins to exchange hands for the artist's recordings, whether independently as demo tapes and self-produced recordings or through a professional record company, any digital sampling in the work has either been long-forgotten or cannot be removed without significantly altering the work and potentially lessening the demand. Despite the court's position that many artists and companies already choose to properly license their digital samples, those artists and companies the court identified are already well-established in the industry, represented by counsel, and therefore can no longer operate below the radar. Unfortunately, the court failed to account for the up-and-comer, the grassroots artist, and the hobbyist, who may all one day become established

artists.

As word of this decision spreads through the industry, the potential for artists to become less forthright about their use of digital samples and more creative in altering the samples beyond any recognition will likely reach a higher level than ever before. Although the court offered the suggestion that artists are free to recreate the sounds in a sound recording themselves by imitating or simulating the sounds, it fails to recognize that a creative staple of this genre often involves the use and creative manipulation of other sound recordings. Artists and producers are unlikely to change their creative processes for the sake of avoiding the hassle or expense of licensing other works. Just as a slight modification in another area of strict liability—such as enforcing the speed limit—is not likely to change most drivers' habits on the highway, this bright line rule will have little effect on the habits of the digital sampling community.

After several years of developing and employing analyses for determining copyright infringement, other courts may be hesitant to adopt the Sixth Circuit's new rule. The response from the Second, Third, and Ninth Circuits could determine the authority of this new rule and whether they are likely to change their own precedent on this issue. Especially notable would be the Ninth Circuit's reaction to this decision after its own de minimis analysis in *Newton II* just ten months before *Bridgeport II*. In contrast, the Eleventh Circuit could emerge as the most willing to adopt this new rule considering the burgeoning rap and hip-hop industry in the Atlanta area and an even greater scarcity of that circuit's own precedent in copyright infringement cases. On the other hand, the increased influence of the genre's artists and companies in that circuit could persuade the court to adopt a more sampling-friendly approach. However, with a surge of copyright holders filing infringement suits, courts may start adopting the Sixth Circuit's rule, or a variation thereof, in an effort to

insure their own judicial economy.

VI. Conclusion

Only time will tell whether *Bridgeport*'s new bright line rule will mean a whole new strict liability approach to whether digital sampling amounts to copyright infringement. While rejecting several years of case law that allowed some sampling within confined circumstances, the Sixth Circuit's decision prohibits any unlicensed digital sampling. Amid criticism by some artists and companies, the decision may have an effect on the industry's behavior, but perhaps not the exact outcome that the court envisioned.

THE PRISONER AS MASTER OF HIS OWN LAWSUIT: THE INTERPRETATION OF PRISONERS' §1983 CIVIL RIGHTS CLAIMS AFTER *WILKINSON V. DOTSON*

Lisa A. White[*]

I. Introduction

In *Wilkinson v. Dotson*,[1] the U.S. Supreme Court explored the "jurisdictional periphery of habeas corpus"[2] and re-examined 42 U.S.C. § 1983 as a mechanism to challenge incarceration procedures.[3] The issue before the Court was whether prisoners may seek declaratory and injunctive relief for alleged unconstitutional parole procedures through a § 1983 challenge or "whether they must instead seek relief exclusively under the federal habeas corpus statutes."[4] In *Wilkinson*, two Ohio prisoners individually brought § 1983 claims against the Ohio Department of Rehabilitation and Corrections for violating their civil rights during parole considerations.[5] In each case, the district court held that "the prisoner would have to seek relief through a habeas corpus suit."[6] After the consolidation and reversal of the cases by the Sixth Circuit, the State of Ohio petitioned the Supreme Court for

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[1] Wilkinson v. Dotson, 544 U.S. 74 (2005).

[2] Franceski v. Bureau of Prisons, No. 04 Civ. 8667, 2005 U.S. Dist. LEXIS 5961, at *10-13 (S.D.N.Y. 2005) (explaining that the *Wilkinson* holding does not preclude a prisoner from bringing a single action in habeas and under § 1983).

[3] *Wilkinson*, 544 U.S. at 76.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 77.

certiorari.[7]

In granting review of *Wilkinson*, the Supreme Court revisited and attempted to clarify the "somewhat confusing"[8] intersection between claims which must be brought in habeas after complete exhaustion of state remedies and other claims which are cognizable under § 1983, which only requires the exhaustion of administrative remedies.[9] In this case, William Dotson and Rogerico Johnson, both long-term prisoners in Ohio, individually brought § 1983 actions against the Ohio Department of Rehabilitation and Corrections[10] after the state parole board applied recently adopted—and significantly harsher—guidelines to each inmate's parole consideration.[11]

William Dotson, whose life sentence began in 1981, claimed that the state violated the Constitution's Ex Post Facto and Due Process Clauses when the parole board determined that he "should not receive further consideration for parole for at least five more years."[12] To make this determination, the parole board applied guidelines adopted in 1998 rather than those in place when Dotson committed his crime.[13]

Similarly, the parole board applied the 1998 parole guidelines when it decided Rogerico Johnson was "unsuitable for release" in 1999.[14] Like Dotson, Johnson began his sentence prior to the adoption of the 1998 guidelines[15] and claimed the corrections department violated the Ex Post Facto Clause of the Constitution by

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[7] *Id.*
[8] Dotson v. Wilkinson, 329 F.3d 463, 466 (6th Cir. 2003), *aff'd* 544 U.S. 74 (2005).
[9] *Wilkinson*, 544 U.S. at 92; Preiser v. Rodriguez, 411 U.S. 475, 477 (1973).
[10] *Wilkinson*, 544 U.S. at 76.
[11] *Id.* at 76-77.
[12] *Id.* at 76.
[13] *Id.* at 76-77.
[14] *Id.* at 77.
[15] *Id.*

applying the newer guidelines.[16] Furthermore, Johnson claimed that the parole board's proceedings violated the Due Process Clause "by having too few members present and by denying him an adequate opportunity to speak."[17] Each prisoner sought (1) declarative relief prohibiting the retroactive application of the 1998 parole guidelines, and (2) concomitant injunctive relief.[18] The Supreme Court held that the prisoners had cognizable claims under § 1983[19] because a judgment in their favor would neither "necessarily spell speedier release" nor "imply the invalidity of confinement."[20] Instead, a favorable judgment would only affect the timing and proper procedure of their parole considerations, neither of which "lies at the core of habeas corpus."[21]

This synopsis argues that the majority in *Wilkinson* astutely weighs the importance of protecting the prisoners' civil rights against the state's presumption that the prisoners brought these cases "only because they believe[d] that victory on their claims [would] lead to speedier release from prison."[22] Thus, a deciding factor in whether a claim is cognizable under § 1983, or alternately, whether it must be brought under a habeas corpus suit, rests on the actual relief sought by the plaintiff, rather than on the potential consequences or remote outcome of a judgment in his favor.

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[16] *Id.*
[17] *Id.*
[18] *Id.* at 76.
[19] *Id.* at 82.
[20] *Id.*
[21] *Id.* (citing *Preiser*, 411 U.S. at 489) (internal quotations omitted).
[22] *Id.* at 78.

II. Differentiating Between Civil Rights Actions and Habeas Corpus Petitions

A. The Intersection Between Habeas Corpus and 42 U.S.C. § 1983

Prior to *Wilkinson*, the Supreme Court considered the intersection between the habeas corpus statute, 28 U.S.C. § 2254, and 42 U.S.C. § 1983 in four key decisions, beginning with *Preiser v. Rodriguez* in 1973.[23] In *Preiser*, three New York prisoners brought § 1983 actions, combined with petitions for habeas corpus relief, against the New York State Department of Correctional Services.[24] The prisoners sought injunctive relief to restore their good-time credits, which were revoked through allegedly unconstitutional disciplinary proceedings.[25] For each prisoner, a judgment restoring the good-time credits would result in immediate release from prison.[26] The Supreme Court opined that their action "fell squarely within [the] traditional scope of habeas corpus"[27] regardless of whether restoration of the good-time credits resulted in immediate release or simply shortened their confinement.[28] The Court reasoned that exhaustion of state remedies, required by habeas corpus, but not by a § 1983 claim, is "rooted in considerations of federal-state comity,"[29] in which the state's interest is especially strong.[30] Thus, the Court held that when a state prisoner challenges "the very fact or duration of his physical imprisonment . . . his sole federal

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[23] 411 U.S. 475.
[24] *Id.* at 476.
[25] *Id.* "Good time credits" are reductions in an inmate's sentence for good behavior.
[26] *Id.* at 476-77.
[27] *Id.* at 487.
[28] *Id.*
[29] *Id.* at 491.
[30] *Id.*

remedy is a writ of habeas corpus."[31] The *Preiser* decision specifically did not eliminate § 1983 claims, but instead reaffirmed that "a § 1983 action is a proper remedy for . . . a constitutional challenge to the conditions of . . . prison life."[32]

With its decision in *Wolff v. McDonnell*,[33] the Court began to clarify the edges of the intersection between § 1983 and habeas corpus petitions. In *Wolff*, a group of prisoners brought a § 1983 class action suit against a Nebraska state prison "challenging several of the practices, rules, and regulations of the [prison] [c]omplex."[34] The prisoners sought restoration of their good-time credits, but the Court affirmed that *Preiser* properly foreclosed such a § 1983 claim.[35] The prisoners also sought the "submission of a plan by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which complied with the requirements of due process; and . . . damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures."[36] The Supreme Court affirmed the Court of Appeals' decision, holding that the prisoners had cognizable § 1983 claims in their request for procedural modifications and damages.[37]

Heck v. Humphrey,[38] the third significant case heard by the Supreme Court regarding the intersection between habeas and § 1983, began to analyze the subtleties of the potential outcome when a prisoner seeks relief through a § 1983 claim rather than a writ of habeas corpus.[39] In *Heck*,

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[31] *Id.* at 500.
[32] *Id.* at 499.
[33] 418 U.S. 539 (1974).
[34] *Id.* at 542.
[35] *Id.* at 554.
[36] *Id.* at 553.
[37] *Id.* at 579-80.
[38] 512 U.S. 477 (1994).
[39] *Id.* at 480-90.

the prisoner claimed that county prosecutors engaged in an unlawful investigation and destroyed evidence.[40] After the dismissal of his first federal habeas corpus petition and the denial of his second habeas petition, the prisoner filed a § 1983 civil rights claim.[41] As the Seventh Circuit pointed out in its dismissal of his § 1983 claim, and as the Supreme Court affirmed in its holding, if the prisoner is

> challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so.[42]

Furthermore, the Court clarified dictum in *Preiser*, which indicated that a prisoner's claim for damages could be sought under § 1983.[43] In *Heck*, the Court indicated that if a "claim necessarily demonstrates the invalidity of the conviction . . . the claimant *can* be said to be 'attacking . . . the fact or length . . . of confinement,'" thus resulting in an unacceptable § 1983 suit.[44]

Finally, in *Edwards v. Balisok*,[45] the Court further elaborated on the problem of whether a § 1983 claim attacks a procedure, or whether it instead "impl[ies] the invalidity of the judgment" if it is successful.[46] In *Edwards*, the court held that the prisoner's § 1983 claims for declaratory relief and damages for improper procedures

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[40] *Id.* at 479.
[41] *Id.*
[42] *Id.* at 479-80 (citing Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993)).
[43] *Id.* at 481 (citing *Preiser*, 411 U.S. at 494).
[44] *Id.* at 481-82 (quoting *Preiser*, 411 U.S. at 490).
[45] 520 U.S. 641 (1997).
[46] *Id.* at 645.

in a disciplinary hearing were non-cognizable because they would render the judgment invalid.[47] However, the prisoner in this case also requested injunctive relief regarding a request for a specific procedural modification, the date-stamping of witness statements.[48] On that claim, the Supreme Court held the claim may be proper under § 1983, and remanded the case for the lower court to decide whether the respondent met all of the other requirements for injunctive relief.[49]

B. Procedural History of *Dotson v. Wilkinson*

In *Dotson v. Wilkinson*, William Dotson and Rogerico Johnson individually brought § 1983 actions in federal district court against the Ohio Department of Rehabilitation and Corrections.[50] Each prisoner sought injunctive and declaratory relief against the procedures used by their respective parole boards, which used guidelines adopted after each prisoner's conviction.[51] In each case, the district court concluded that the claims must be brought through a habeas corpus petition rather than through a § 1983 claim.[52] After the district court's dismissal of the cases as not cognizable under § 1983, the Sixth Circuit consolidated the cases and heard the appeals *en banc*.[53] On appeal, the Sixth Circuit reversed, holding that "procedural challenges to parole eligibility and parole suitability determinations . . . do not 'necessarily imply' the invalidity of the prisoner's conviction or sentence and,

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[47] *Id.* at 648.
[48] *Id.*
[49] *Id.*
[50] *Wilkinson*, 544 U.S. at 77 (discussing Dotson v. Wilkinson, No. 3:00 CV 7303 (N.D. Ohio, Aug. 7, 2000); and Johnson v. Ghee, No. 4:00 CV 1075 (N.D. Ohio, July 16, 2000)).
[51] *Id.*
[52] *Id.*
[53] *Dotson*, 329 F.3d at 470.

therefore, may appropriately be brought as civil rights actions, under 42 U.S.C. § 1983 . . .."[54] The state parole officials petitioned for certiorari, which was granted by the U.S. Supreme Court.[55]

III. Current Case

A. The Issue Presented in *Wilkinson v. Dotson*

In granting review of *Wilkinson*, the Supreme Court evaluated whether a prisoner may pursue relief claims through 42 U.S.C. § 1983 rather than—or in addition to—habeas corpus, where a favorable judgment for the prisoner neither invalidates the state's judgment nor necessarily hastens the prisoner's release from prison.[56] Generally, with a habeas corpus petition, a prisoner must pursue a claim "on the ground that he is in custody in violation of the Constitution,"[57] but may file a § 1983 civil rights claim to challenge the conditions of that confinement.[58] Although a habeas action requires the exhaustion of available state remedies,[59] a §1983 claim does not.[60] Therefore, procedurally, a prisoner may prefer a § 1983 claim to a habeas action.[61]

B. Application of Prior Precedent to *Wilkinson v. Dotson*

In *Wilkinson*, each prisoner challenged the procedures that the state applied to his parole hearing

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[54] *Id.* at 472.
[55] *Wilkinson*, 544 U.S. at 77.
[56] *Id.* at 82.
[57] 28 U.S.C. § 2254(a).
[58] *See Preiser*, 411 U.S. at 475.
[59] 28 U.S.C. § 2254(b).
[60] *See Preiser*, 411 U.S. at 477.
[61] *Wilkinson*, 544 U.S. at 87-88.

instead of challenging the parole board decisions.[62] For Dotson, a successful claim would have resulted in "at most new eligibility review, which at most [would] speed *consideration* of a new parole application."[63] For Johnson, a successful claim would have resulted in "at most a new parole hearing at which Ohio parole authorities may [have], in their discretion, decline[d] to shorten his prison term."[64] As evaluated by the majority, neither prisoner challenged the duration nor the legality of his confinement.[65] Furthermore, a favorable judgment for the prisoners would not have necessarily affected the duration of their confinement.[66] Thus, the Court observed that "neither [prisoner's claim] lies at 'the core of habeas corpus.'"[67] In an eight to one decision, the Court affirmed the Sixth Circuit's decision and remanded the case for further proceedings.[68]

IV. Prisoner Requests for Relief v. Prisoner Hopes for Release

A. The Prisoner is the Master of his Lawsuit[69]

In *Wilkinson*, the Court astutely weighed the importance of addressing prisoners' actual claims rather than accepting the state's presumption that the prisoners brought these cases "only because they believe[d] that

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[62] *Id.* at 82.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* (quoting *Preiser*, 411 U.S. at 489).
[68] *Id.* at 85.
[69] The origins of the frequently used phrase, "A plaintiff is the master of his lawsuit," are uncertain. I have intentionally misquoted this phrase to emphasize that prisoners, like all other plaintiffs, have control over the relief requested in their legal challenges as a result of the holding in the *Wilkinson* case.

victory on their claims [would] lead to speedier release from prison."[70] For the purpose of a fair judgment on the merits of a case, the state's assumption that the prisoner *hopes* that his legal claims will result in a reduced sentence is both irrelevant and speculative. The holding in *Wilkinson* indicates that a deciding factor between a cognizable § 1983 claim and one which must be brought under habeas is the actual relief sought, rather than the remote and uncertain consequences of a favorable judgment. The *possibility* of earlier release from a parole hearing "is too tenuous here to achieve [the state's] legal door-closing objective."[71]

In the majority opinion of *Wilkinson*, Justice Breyer writes: "The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief)."[72] Prisons, by their nature and design, are an undesirable place to reside. More than most institutions, the prison community relies on clearly established rules and regulations, along with a series of administrative and legal checks and balances, to function properly. To increase prisoner obedience to expressions of authority, the state offers parole and early release for prisoners' good behavior and withholds parole for disciplinary problems.[73] To challenge the state's authority over the conditions and procedures of their confinement, prisoners may appropriately seek relief through civil rights claims, especially under 42 U.S.C. § 1983.[74] Although the

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[70] *Id.* at 78.
[71] *Id.*
[72] *Id.*
[73] *See generally Edwards*, 520 U.S. 641 (discussing the revocation of good-time credits for alleged disciplinary infractions); *Wolff*, 418 U.S. 539 (discussing prisoners' loss of good-time credits for serious misconduct).
[74] *Id.*

prisoners in *Wilkinson* may hope their good behavior will be rewarded with earlier freedom, their § 1983 challenges to the application of harsher parole guidelines merely seek to reign in the elusive "carrot" held out by the state for good behavior.

In Justice Kennedy's dissenting opinion, he argues that the "inconsistency in the Court's treatment of sentencing proceedings and parole proceedings is . . . difficult to justify. It is, furthermore, in tension with our precedents."[75] Sentencing decisions, unlike parole procedures, specifically address the duration of confinement. Like the prisoners in *Wolff*, Johnson and Dotson sought injunctive and declaratory relief against the unconstitutional procedures of their confinement, which could remotely, but not necessarily, affect the length of their sentences.[76] Although Kennedy's lone dissent expresses a valid argument for consistency in decisions, it misses the mark on the importance of the *Wilkinson* decision. The majority wisely recognizes that, although we may logically presume that all prisoners aspire to freedom, the constitutionality of their confinement—in this case, their parole proceedings—needs to be protected in the meantime.

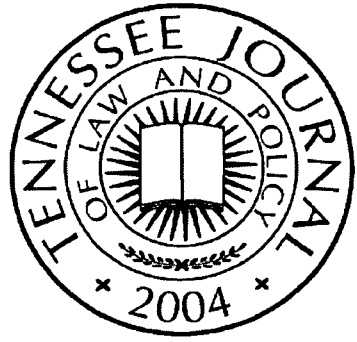
B. *Wilkinson* Reinforces the *Preiser* Standard

Rather than being in tension with the Court's earlier decisions, the holding of *Wilkinson* reinforced the need to closely examine the specific relief sought by a prisoner in a § 1983 civil rights claim. This case clarified the rules for interpreting the precedent set in *Preiser*—that prisoners must use habeas actions for "challenging the very fact or

[75] *Wilkinson*, 544 U.S. at 88 (Kennedy, J., dissenting) ("Challenges to parole proceedings are cognizable in habeas.").
[76] *Id.* at 81-82.

duration of [their] physical imprisonment."[77] Yet, *Wilkinson* also reinforced the notion that prisoners have an enforceable right to constitutional conditions and procedures during their confinement. This case clarified the often fuzzy intersection between habeas petitions and § 1983 claims, while acknowledging that the prisoner *has the right to be* the master of his own lawsuit.

[77] *Preiser*, 411 U.S. at 500.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