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THE GORDIAN KNOT OF THE TREATMENT OF SECONDHAND FACTS UNDER FEDERAL RULE OF EVIDENCE 703 GOVERNING THE ADMISSIBILITY OF EXPERT OPINIONS: ANOTHER CONFLICT BETWEEN LOGIC AND LAW

Edward J. Imwinkelried*

"The life of the law has not been logic . . . ."
–Oliver Wendell Holmes, Jr., The Common Law 1 (1881)

Some commentators have suggested that the American judicial hearing is becoming trial by expert.[1] In the early 1990s, the Rand Corporation released a study of the use of experts in trials in California courts of general jurisdiction.[2] Expert witnesses appeared in 86% of the trials studied, and on average there were 3.3 experts per trial.[3] It is undeniable that in the United States the role of expert witnesses is growing.

Although commentators sometimes refer to the role of the expert at trial, in truth witnesses who qualify as experts can play at least four different roles. Suppose, for example, that an eminent toxicologist is driving to work and observes a traffic accident. Like any witness who has personal knowledge of a fact, the toxicologist could testify at the trial against the driver that she observed the defendant's car run a red light.[4] Next, if the toxicologist had attempted to help the drivers and smelt a strong odor of alcohol on the defendant's breath, the toxicologist would be competent to give the lay opinion that the defendant was intoxicated.[5] Thirdly, suppose that the defendant were prosecuted for drunk driving, and the arresting officer testified that on an intoxilyzer test the defendant registered 0.13, exceeding the statutory limit of 0.08.[6] At the same trial, the prosecutor could call the toxicologist to provide expert testimony about the general reliability of

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[1] William T. Pizzi, *Expert Testimony in the U.S.*, 145 NEW L.J. 82 (1995).

[2] Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1120 n. 19 (1991).

[3] *Id.* at 1119.

[4] FED. R. EVID. 602.

[5] *Id.* at FED. R. EVID. 701; 1 MCCORMICK, EVIDENCE § 11, at 55 n.23 (6th ed. 2006).

[6] 2 PAUL C. GIANNELLI, EDWARD J. IMWINKELRIED, ANDREA ROTH & JANE CAMPBELL MORIARTY, SCIENTIFIC EVIDENCE § 22.01 at 474, 476 (5th ed. 2012).

intoxilyzers as a method of determining blood alcohol concentrations.[7]

Although an expert witness can play any of the above roles, in most instances the attorney calling the witness wants him or her to perform a fourth function, namely, to apply a general theory or technique to the specific facts in the case to generate an opinion. When the expert witness plays this role, the structure of the witness's testimony is essentially syllogistic.[8] In a classic syllogism, the logician applies a major premise to a minor premise to derive a conclusion.[9] When an expert witness testifies in this syllogistic manner, the expert's major premise is the general theory or technique that he or she relies on.[10] For example, a psychiatrist who testifies as an expert witness might posit a set of diagnostic criteria for a particular mental illness: If the patient displays symptoms A and B, the patient is probably suffering from psychosis C. The psychiatrist's minor premise is the case-specific data that he applies the major premise to: This patient's case history includes symptoms A and B. The psychiatrist's conclusion is the opinion generated when he employs the general theory to evaluate the significance of the particular facts in the case: Ergo, the patient is probably suffering from psychosis C.

In its landmark decision on the admissibility of scientific evidence, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[11] the United States Supreme Court indicated that Federal Rule of Evidence 702 governs the question of which theories or techniques an expert may rely on as a major premise.[12] The Court held that to serve as a basis for expert testimony, the theory or technique must qualify as reliable "scientific . . . knowledge" within the meaning of that expression in Rule 702.[13] In contrast, Federal Rule of Evidence 703 answers the question of the types of case-specific data that the expert may rely on as the minor premise.[14] Effective December 1, 2011, restyled Rule 703 reads:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury to evaluate the opinion substantially outweighs their prejudicial effect.[15]

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[7] Federal Rule of Evidence 702 permits an expert to "testify only in the form of an opinion." FED. R. EVID. 702. The original Advisory Committee Notes to Rule 702 state:

> Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.
>
> *Id.*

[8] Edward J. Imwinkelried, *The Educational Significance of the Syllogistic Structure of Expert Testimony*, 87 NW. U. L. REV. 1148 (1993); Edward J. Imwinkelried, *The 'Bases' of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1 (1988).

[9] Imwinkelried, *The Educational Significance of the Syllogistic Structure of Expert Testimony*, *supra* note 8.

[10] *Id.* at 1148.

[11] 509 U.S. 579 (1993).

[12] *Id.* at 589-90.

[13] *Id.*

[14] Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447, 457 (1996); Edward J. Imwinkelried, *The Meaning of "Facts or Data" in Federal Rule of Evidence 703: The Significance of the Supreme Court's Decision to Rely on Federal Rule 702 in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 54 MD. L. REV. 352, 372-73 (1995).

[15] FED. R. EVID. 703.

Since Rule 702 served as the foundation for the Court's celebrated *Daubert* decision, Rule 702 has been the principal focus of the scholarly commentary on scientific evidence.[16] However, Rule 703 has proved to be the more controversial statute and has produced a larger number of splits of authority among the lower courts.[17]

Until 2012, the United States Supreme Court itself had not entered the fray over Rule 703. However, in June 2012, the Supreme Court finally considered a case, *Williams v. Illinois*,[18] in which Rule 703 played a prominent role. Technically, *Williams* is a constitutional criminal procedure decision that governs only in prosecutions.[19] However, as we shall soon see, *Williams* raises questions about Rule 703 that apply to both civil and criminal litigation.

Williams was charged with rape and his case was set for trial.[20] Cellmark is a private laboratory conducting DNA testing.[21] Before Williams's trial, Cellmark extracted a male DNA profile from the rape victim's vaginal swab.[22] Cellmark sent the profile information to the Illinois State Police Laboratory (ISP).[23] At the laboratory Ms. Sandra Lambatos, an ISP specialist, found a match when she compared the Cellmark profile to that of the accused.[24] Ms. Lambatos testified at William's bench trial and answered the following question in the affirmative:

Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male profile that had been identified as having originated from Sandy Williams?[25]

The issue posed in *Williams* was whether Lambatos's reference to Cellmark's statement about the male DNA profile violated the Sixth Amendment.[26] In 2004 in *Crawford v. Washington,*[27] the Supreme Court announced that the Sixth Amendment Confrontation Clause precludes the admission of "testimonial" hearsay statements at trial unless (1) the accused had a prior opportunity to question the declarant and (2) the declarant is unavailable at trial.[28] However, the *Crawford* Court also indicated that the Confrontation Clause does not apply to a statement if, at trial, the statement is admitted for a nonhearsay purpose, that is, for a purpose other than proof of the truth of the assertion in the statement.[29]

In *Williams*, the prosecution argued that Lambatos's testimony did not violate the

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[16] Imwinkelried, *The Meaning of "Facts or Data" in Federal Rule of Evidence 703*, *supra* note 14, at 358 n.54.

[17] Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, *supra* note 14.

[18] 132 S. Ct. 2221 (2012); *see* Richard D. Friedman, *Confrontation and Forensic Laboratory Reports, Round Four*, 45 Tex. Tech L. Rev. 51 (2012); United States v. Turner, 709 F.3d 1187, 1189 (7th Cir. 2013) ("[T]he divergent analyses and conclusions of the plurality and dissent sow confusion as to precisely what limitations the Confrontation Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify at trial.").

[19] *See id.*

[20] *Id.* at 2227.

[21] *Id.*

[22] *Id.* at 2229.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 2236.

[26] *Id.* at 2238.

[27] 541 U.S. 36 (2004).

[28] *Id.* at 59.

[29] *Id.* at 59 n. 9 (quoting Tennessee v. Street, 471 U.S. 409, 414 (1985)).

Confrontation Clause because the reference to the Cellmark statement was not offered for the hearsay purpose of proving the truth of the assertion that the vaginal swab contained that male DNA profile.[30] Rather, according to the prosecution, the reference was used for the limited, nonhearsay purpose of showing the basis of Ms. Lambatos's opinion and helping the trier of fact to evaluate the quality of Ms. Lambatos's reasoning.[31] Both Federal Rule 703 and Illinois law[32] permit expert witnesses to rely on third-party out-of-court statements for that purpose.[33] In *Williams*, however, five justices (the "703 majority" including Justice Thomas in concurrence and four dissenters led by Justice Kagan) found that Cellmark's statement had been used for a substantive purpose at trial.[34] The justices contended that it is illogical to allow the trier of fact to consider an expert opinion that rests on premises that are unsupported by admissible evidence.[35]

At the same time, another five-justice majority (the "*Crawford* majority" including Justice Thomas and a four-justice plurality led by Justice Alito) mooted the Rule 703 issue by holding that Cellmark's statement was not testimonial to begin with.[36] Based on that holding, these five justices voted to affirm Williams' conviction.[37] For its part, the plurality characterized the statement as non-testimonial because the police had not identified any suspect at the time of Cellmark's test.[38] Justice Thomas also characterized the statement as non-testimonial, but he did so for an entirely different reason, namely, the relative informality of the statement.[39] Given the fragmented nature of the decision, the narrowest common ground supporting the affirmance is arguably the proposition that a forensic analyst's statement is non-testimonial if it is both informal and made before the police identified a particular suspect.[40]

The *Crawford* ruling in *Williams* is of concern only to criminal practitioners; the ruling relates to a Sixth Amendment Confrontation Clause limitation on prosecution hearsay.[41] In contrast, although the *Crawford* ruling formally mooted the Rule 703 issue, many lower courts will undoubtedly pay attention to the reasoning of the 703 majority; any time five members of the Supreme Court agree on a proposition, lower court judges tend to sit up and pay attention. The 703 majority's reasoning applies not only to expert evidence offered against a criminal accused but also to expert testimony offered by civil litigants.[42] What precisely does Rule 703 authorize? Does the use sanctioned by Rule 703 constitute a legitimate nonhearsay use of an out-of-court statement? If not, how should the courts apply Rule 703 in the future?

The 703 majority's position has substantial merit. The thesis of this article, however, is that although the falsity of an essential premise of an expert opinion can render the opinion irrelevant, in most cases it is sound to assign the ultimate relevance

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[30] *Williams*, 132 S. Ct. at 2230-33.

[31] *Id.*

[32] *Id.* at 2234-35.

[33] *Id.*

[34] *Id.* at 2256-59 (Thomas, J., concurring), 2268-72 (Kagan, J., dissenting).

[35] *See id.* at 2255-56 (Thomas, J., concurring), 2264-73 (Kagan, J., dissenting).

[36] *Id.* at 2240, 2255 (Thomas, J., concurring).

[37] *Id.* at 2244 (majority opinion).

[38] *Id.* at 2243-44.

[39] *Id.* at 2259-60.

[40] Hugh B. Kaplan, Commentary, *Criminal Law – Confrontation: Divided Supreme Court Says DNA Expert Can Testify About Profile Created By Others*, 80 U.S.L.W. 1747 (2012).

[41] *Williams*, 132 S. Ct. at 2247.

[42] *See id.* at 2247-48 (Breyer, J., concurring).

decision to the jury. In the typical case it is more satisfactory to use the sort of jury instructions approvingly mentioned in Justice Alito's plurality opinion than to empower the judge to exclude the opinion.[43] The first part of this article surveys the state of Rule 703 jurisprudence prior to the *Williams* decision. The second part describes the positions on the Rule 703 issue that the various justices took in *Williams*. The third part highlights the stakes involved in the dispute between the 703 majority and the plurality. The fourth and final part of the article evaluates the merits of the competing positions both as a matter of logic and as a question of statutory construction.

I. THE STATE OF RULE 703 JURISPRUDENCE ON SECONDHAND REPORTS BEFORE THE *WILLIAMS* DECISION

As previously stated, Rule 703 regulates the permissible sources for information about the case-specific data that the expert witness relies on as a basis for an opinion.[44] What are the sources from which the expert may draw information about, for example, a patient's case history or skidmarks and debris found at a traffic accident scene?

A. The State of the Law Prior to the Enactment of Federal Rule of Evidence 703

At early common law, there was only one permissible source for the expert's knowledge of case-specific information: the expert's firsthand, personal knowledge.[45] However, it soon became apparent that the personal knowledge limitation was unrealistic; it was frightfully time-consuming for the expert to personally confirm every fact that he or she intended to use as a basis for the opinion.

Consequently, the common law developed the technique of the hypothetical question.[46] Using this technique, other witnesses supplied admissible evidence of the facts, the attorney asked the expert witness to hypothetically assume the truth of those facts, and the expert testified to an opinion based on the assumed facts:

Dr. Worth, please assume the following facts as true: One, in the accident, the plaintiff sustained a cut three inches in length and 1/8 inch in depth on the right, front part of his head. Two, the plaintiff bled profusely from that cut. Three, immediately after that accident, the plaintiff experienced sharp, painful headaches in the right, front part of his head.[47]

Based on those facts, to a reasonable degree of medical probability, do you have an opinion as to the nature of the injury the plaintiff suffered?

In most cases, the trial judge did not allow the attorney to pose the question to the expert unless the attorney had already[48] presented enough admissible evidence to permit the jurors to find that all the assumed facts were true.[49] It is true that in most jurisdictions

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[43] *See id.* at 2233-34 (majority opinion).

[44] Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, *supra* note 14; Imwinkelried, *The Meaning of "Facts or Data" in Federal Rule of Evidence 703*, *supra* note 14.

[45] 1 MCCORMICK, EVIDENCE § 14, at 87(6th ed. 2006).

[46] *Id.* at 89-90.

[47] EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS § 9.03(4)(d) (8th ed. 2012).

[48] *See* Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 587 (1987); *see also* DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, THE NEW WIGMORE: A TREATISE ON EVIDENCE - EXPERT EVIDENCE § 4.5, at 154 (2d ed. 2010) (part of "the evidentiary record").

[49] 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 7:15, at 892-94 (3d ed. 2007).

the judge had discretion to allow the opinion before the presentation of the admissible evidence and subject to the attorney's later presentation of the evidence.[50] The trial judge might exercise discretion to permit the later presentation of the foundational evidence if, for instance, the only source of admissible evidence of a certain fact was a physician whose surgical schedule precluded her from testifying before the expert witness. Absent such exceptional circumstances, however, trial judges rarely deviated from the requirement that the admissible evidence be presented prior to admission of the expert's opinion. If a judge did admit the expert opinion first and the attorney later neglected to submit the promised evidence, the trial judge might have to strike the expert's opinion; if the judge believed that it was unrealistic to believe that the jury could follow a curative instruction to disregard the stricken testimony, the judge might have to declare a mistrial.[51]

As a general rule at common law, if the expert lacked personal knowledge of a fact and the expert's proponent failed to present other admissible evidence of that fact, the expert could not base an opinion even partially on that fact.[52] Prior to the adoption of the Federal Rules of Evidence,[53] there were only two notable exceptions to the general rule. One exception dealt with testimony by expert physicians.[54] Under this exception, physicians could rely on statements describing the patient's symptoms even if the statements were not admissible under a recognized hearsay exception.[55] The second exception concerned real estate valuation experts.[56] It allowed experts who testified about real estate values to base their opinions on "sources that were technically [inadmissible] hearsay—price lists, newspapers, information about comparable sales, or other secondary sources."[57] In *In re Cliquot's Champagne*,[58] a leading 1865 decision, the Supreme Court approved this practice.[59] In justifying its decision, the Court commented that courts "should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy . . . without giving any additional safeguard in the interests of justice."[60] With those two exceptions, though, the courts forbade experts from relying on inadmissible secondhand reports[61] of facts as a basis for their opinions.[62]

B. The Change Effected by the Enactment of Rule 703

Like the prior common law, Rule 703 permits experts to base opinions on facts that are observed personally and hypotheses that are supported by independent, admissible evidence.[63] The first sentence of Rule 703 states that an expert may base an opinion "on facts or data in the case that the expert has . . . personally observed."[64] The same sentence also allows the expert to consider "facts or data in the case that the expert has been made

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[50] *Id.* § 7:15, at 894.

[51] *See id.* § 7:15, at 894 n.13.

[52] *See* 1 MCCORMICK, EVIDENCE § 14, at 89 (6th ed. 2006); *id.* § 7:15, at 897.

[53] *Id.* § 7:16, at 897; 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6271(13)-(14), at 302-04 (1997).

[54] KAYE ET AL., *supra* note 48, at 155-56.

[55] *Id.* § 4.5.

[56] *Id.* § 4.5.1, at 154-55.

[57] *Id.* § 4.5.1, at 154.

[58] 70 U.S. 114 (1865).

[59] *Id.* at 141.

[60] *Id.*

[61] MUELLER & KIRKPATRICK, *supra* note 49 § 7.13, at 886.

[62] *Id.*

[63] FED. R. EVID. 703.

[64] *Id.*

aware of."[65] That language is broad enough to include facts mentioned in a hypothetical question posed to the expert, and the Advisory Committee Note accompanying Rule 703 expressly endorses the continued use of the hypothetical question.[66]

While the first sentence largely tracks the earlier common law, the second sentence introduces an important innovation with respect to secondhand reports.[67] That sentence reads: "If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."[68] Thus, secondhand out-of-court reports can serve as a basis for an opinion even when the report is neither admitted nor admissible.[69] This provision does not purport to be a hearsay exception[70] authorizing the trier of fact to consider the content of the report for its truth.[71] The provision appears in Article VII governing opinion evidence, rather than Article VIII regulating hearsay.[72] Hence, the secondhand report is admissible only for the limited credibility[73] purpose of helping the trier of fact to understand the basis of the expert's opinion.[74] Given that purpose, under Federal Rule of Evidence 105[75] the trial judge must give the jury a limiting instruction on the opponent's request.[76] The instruction must forbid the jury from treating the report as substantive evidence in the case and explain the permissible nonhearsay use of the evidence.[77]

Even when Rule 703 was initially adopted, there was sharp criticism of the provision permitting the expert to rely on inadmissible secondhand reports as a basis for an opinion. In particular, Professor Paul Rice derided the provision as illogical.[78] Anticipating the position of the 703 majority in *Williams,* Professor Rice argued that in order to accept the ultimate opinion, the factfinder necessarily had to accept the truth of the bases for the opinion.[79] In his view, if the factfinder did not assume the truth of the bases, it made no logical sense to accept the opinion purportedly supported by the bases;[80] the falsity of the premises rendered the opinion itself irrelevant and inadmissible.[81] Moreover, at the time Rule 703 was adopted, many, if not most, other courts in the rest of the common law world still adhered to the traditional view that an expert could not base an opinion on secondhand reports that did not qualify for admission under the hearsay

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[65] *Id.*

[66] *Id.*

[67] MUELLER & KIRKPATRICK, *supra* note 49 § 7.13, at 886.

[68] FED. R. EVID. 703.

[69] 3 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL §703.02[1], at 703-3 (Matthew Bender, 10th ed. 2011).

[70] 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE §703.05[2] at 703-24-26 (Joseph M. McClaughin, ed., Matthew Bender 2d ed. 1997).

[71] *Id.*

[72] FED. R. EVID. 703.

[73] SALTZBURG ET AL., *supra* note 69 §703.02[4], at 703-8.

[74] *See id.* §703.02[4], at 703-8-9.

[75] FED. R. EVID. 105.

[76] *Id.*

[77] *Id.*

[78] Rice, *supra* note 48, at 585-86 (arguing that it is illogical for courts to admit an expert's opinion without admitting the facts that formed the basis for the expert's opinion).

[79] *Id.* at 585.

[80] *Id.* at 584-85.

[81] *Id.*

rule.[82] In the words of one Canadian commentator, logically it was "quite impossible" to justify admitting an expert opinion as substantive evidence when the opinion's essential premises lacked supporting, admissible evidence.[83] Although most states followed the federal lead and adopted a version of Rule 703 essentially identical to the federal statute, some states balked.[84] For example, Ohio substituted a rule requiring that the expert base his or her opinion either on facts the expert had perceived or facts admitted into evidence.[85]

Nevertheless, the Advisory Committee defended the provision as follows:

> [T]he rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, experts performed and subject to cross-examination, ought to suffice for judicial purposes.[86]

The drafters' reference to the needless expenditure of time echoed the Supreme Court's 19th century decision in the *Cliquot's Champagne* case.[87]

With few dissents,[88] it became the orthodox position that under Rule 703 secondhand reports can be used for a legitimate nonhearsay purpose,[89] namely, allowing the trier of fact to assess the bases of the expert's opinion[90] and the quality of the expert's reasoning.[91] It was also the conventional wisdom that a limiting instruction was the proper mechanism for ensuring that the trier of fact considered the secondhand report only for nonhearsay purposes.[92]

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[82] Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1, 23-26 (1991) (citing authorities from Canada, New Zealand, Scotland, and South Africa).

[83] J.H. HOLLIES, *Hearsay as the Basis of Opinion Evidence, in* 10 THE CRIMINAL LAW QUARTERLY 288, 303 (Claude C. Savage ed., 1968).

[84] 2 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §52.1, at 1 (1987).

[85] *Id.*

[86] FED. R. EVID. 703 advisory committee's note.

[87] *In re* Cliquot's Champagne, 70 U.S. 114, 141 (1865) (courts "should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy . . . without giving any additional safeguard to the interests of justice").

[88] *See* 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 6272 (1997)

[89] 3 BARBARA E. BERGMAN & NANCY HOLLANDER, WHARTON'S CRIMINAL EVIDENCE § 13.11, at 456 n. 17 (15th ed. 1999)(citing Barrett v. Acevedo, 169 F.3d 1155 (8th Cir. 1999); MUELLER & KIRKPATRICK, *supra* note 49 § 7:16, at 910; SALTZBURG ET AL., *supra* note 69 § 703.04[4] at 703-8 to 703-9.

[90] *Id.* at 703-9; BERGMAN & HOLLANDER, *supra* note 89 § 13.11, at 457 (citing Barrett v. Acevedo, 169 F.3d 1155 (8th Cir. 1999); MUELLER & KIRKPATRICK, *supra* note 49 § 7:16 at 912-13.

[91] SALTZBURG ET AL., *supra* note 69 § 703-9.

[92] BERGMAN & HOLLANDER, *supra* note 89 § 13.11, at 457.

II. THE POSITIONS OF THE JUSTICES IN *WILLIAMS* ON THE EVIDENTIARY STATUS OF SECONDHAND REPORTS USED UNDER RULE 703

In *Williams*, Justice Alito wrote for a four-justice plurality, Justice Breyer filed a concurrence, Justice Thomas concurred in the judgment, and Justice Kagan authored an opinion for a four-justice dissent.[93] The opinions written by Justices Alito, Thomas, and Kagan all addressed the topic of the evidentiary status[94] of secondhand reports ostensibly admitted for the limited purpose of establishing the basis for an expert opinion.[95]

A. Justice Alito's Plurality Opinion

For the most part, Justice Alito's opinion endorses the conventional wisdom described above in subpart I.B. Justice Alito points out that in *Williams* the prosecutor did not attempt to introduce the Cellmark report itself during Ms. Lambatos's testimony.[96] He then insists that the secondhand oral report about Cellmark's finding was not used to prove the truth of the assertions in the report: "Lambatos did not testify to the truth" of the male DNA profile found by Cellmark.[97] Quoting the Advisory Committee Note to Rule 703, Justice Alito stated that secondhand reports such as the reference to Cellmark's finding "assist[t] the jury to evaluate the expert's opinion."[98] The justice asserted that "the disclosure of basis evidence can help the factfinder understand the expert's thought process and determine what weight to give to the expert's opinion."[99] The justice then elaborated on the possible nonhearsay uses of secondhand reports.[100] For example, in the plurality's view the factfinder may weigh the reports to determine whether "the expert drew an unwarranted inference from the premises on which the expert relied."[101] In other words, assuming *arguendo* the truth of the premises, do the premises provide adequate support for the opinion? Alternatively, the factfinder could consider the secondhand reports to decide whether "the expert's reasoning [process] was . . . illogical."[102] Did the expert commit any evident logical fallacies in reasoning about and from the premises to the conclusion embodied in the opinion? The factfinder can conduct both of those inquiries regardless of the truth of the assertions in the secondhand reports.[103]

However, Justice Alito acknowledged that the falsity of the secondhand reports can sometimes render the ultimate opinion irrelevant.[104] He stated that "[i]f there was no proof that Cellmark produced an accurate profile based on that sample, Lambatos'[s] testimony regarding the match would be irrelevant . . . ."[105] Justice Alito does not propose,

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[93] *Williams*, 132 S. Ct. at 2227.

[94] Rice, *supra* note 48, at 583.

[95] 132 S. Ct. at 2233-69.

[96] *Id.* at 2235 ("Lambatos . . . made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact.").

[97] *Id.*

[98] *Id.* at 2239-40.

[99] *Id.* at 2240.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 2237.

[105] *Id.* at 2238. For that matter, in addition to demonstrating the scientific soundness of the analysis of the sample, the prosecution must establish the chain of custody for the sample analyzed; to do so the prosecution must present independent, admissible evidence of the chain. PAUL C. GIANNELLI, EDWARD J. IMWINKELRIED, ANDREA ROTH & JANE CAMPBELL MORIARTY, SCIENTIFIC EVIDENCE § 7.03 (5th ed. 2012); The identification of physical evidence, including chain of custody, is a conditional relevance issue. Edward J. Imwinkelried, *Determining*

however, that the irrelevance problem be dealt with by tasking the trial judge to pass on the sufficiency of any independent admissible evidence of the fact mentioned in the secondhand report, as the judge would do today if the issue were the sufficiency of the foundation for a hypothetical question.[106] Instead, he seems to contemplate that the trial judge will give the jurors instructions assigning the relevance determination to them.[107] Near the end of his opinion, Justice Alito endorses the general proposition that "the trial judges may, and under most circumstances, must instruct the jury . . . that an expert's opinion is only as good as the independent evidence that establishes its underlying premises."[108] Justice Alito's opinion goes farther. Earlier in the opinion, in discussing hypothetical questions, Justice Alito approvingly quoted a jury instruction from *Forsyth v. Doolittle*.[109] The instruction informed the jurors that "[i]f the statements in these questions are not supported by the proof, then the answers to the questions are entitled to *no weight*, because based upon false assumptions or statements of fact."[110] Near the end of his opinion and immediately after discussing jury instructions, Justice Alito harks back to *Forsyth* and adds that "if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given *any weight* by the trier of fact."[111] That passage lends itself to the interpretation that, rather than precluding the proponent from exposing the jury to the opinion, the judge is to charge the jury to disregard the opinion if it finds that the prosecution has failed to muster such "independent admissible evidence."[112]

B. Justice Thomas' Concurrence

As previously stated, Justice Thomas concurred in the judgment affirming Williams's conviction.[113] He agreed with the plurality's conclusion that the Cellmark report was not testimonial.[114] The plurality reached that conclusion on the ground that the primary purpose of the report:

> was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time.[115]

Justice Thomas found the plurality's rationale unpersuasive.[116] However, in his view only statements "bearing 'indicia of solemnity'" can constitute testimonial

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Preliminary Facts Under Federal Rule 104, 45 AM. JUR. TRIALS 1, 44 – 45 (1992). Consequently, the prosecution's foundational testimony must satisfy the technical evidentiary rules. *Id.* at 58. If the record did not contain such evidence, on proper motion the defense would be entitled to a judgment of acquittal as a matter of law. FED. R. CRIM. P. 29. However, in *Williams* the various opinions do not discuss this argument as an alternative basis for disposing of the case.

[106] 132 S. Ct. at 2241.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 2234.

[110] *Id.* (quoting Forsyth v. Doolittle, 120 U.S. 73, 77 (1887)) (emphasis added).

[111] *Id.* at 2241 (emphasis added).

[112] *Id.*

[113] *Id.* at 2255-65.

[114] *Id.* at 2255 (Thomas, J., concurring in judgment).

[115] *Id.* at 2243 (plurality opinion).

[116] *Id.* at 2258-60 (Thomas, J., concurring in judgment).

assertions.[117] On that basis he distinguished the relatively formal forensic certificates that the Court had previously ruled testimonial in *Melendez-Diaz v. Massachusetts*[118] and *Bullcoming v. New Mexico.*[119] The upshot of Justice Thomas's perspective was that although he rejected the plurality's reason for characterizing the report as nontestimonial, he reached the same result as the plurality and, hence, cast the fifth vote affirming the conviction.[120]

Just as he rejected the plurality reasoning on the testimonial issue, Justice Thomas rebuffed the plurality's position on Rule 703.[121] He declared that "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth."[122] In a footnote, he asserted that "the purportedly 'limited reason' for such testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entails an evaluation of whether the basis testimony is true."[123] As support for his position, Justice Thomas quoted the following passage from the expert testimony text coauthored by Professors Kaye, Bernstein, and Mnookin:

> To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment whether this information is true. If the jury believes that the basis evidence is true, it will likely also believe the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.[124]

Justice Thomas ultimately concluded that "basis testimony is admitted for its truth"[125] rather than "a 'legitimate' nonhearsay purpose . . . ."[126]

As previously stated, in his lead opinion Justice Alito conceded that the falsity of the facts mentioned in secondhand reports can sometimes render the opinion irrelevant.[127] Even in those cases, however, Justice Alito apparently contemplated that the judge would go no farther than delivering jury instructions assigning the relevance or weight determination to the jury; he did not raise the possibility of excluding the opinion itself.[128] In his concurrence, Justice Thomas did not reach the question of whether the judge should bar the opinion itself when the evidentiary record does not contain independent, admissible evidence of the facts mentioned in the secondhand reports the expert relies on.[129]

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[117] *Id.* at 2259-61 (Thomas, J., concurring in judgment) (quoting Davis v. Washington, 547 U.S. 813, 836-37, 40 (2006) (Thomas, J., concurring in judgment in part and dissenting in part)).

[118] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-312 (2009).

[119] Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011).

[120] *Williams*, 132 S. Ct. at 2255. (Thomas, J., concurring in judgment).

[121] *Id.* at 2256.

[122] *Id.* at 2257 (Thomas J., concurring in judgment).

[123] *Id.* at 2257 n.1.

[124] *Id.* at 2257 (quoting KAYE ET AL., *supra* note 48, at 196.

[125] *Id.* at 2258.

[126] *Id.* at 2258 n.4 (quoting Tennessee v. Street, 471 U.S. 409, 417 (1985)).

[127] *Id.* at 2241 (plurality opinion).

[128] *Id.*

[129] *Id.* at 2258 (Thomas, J., concurring in judgment) (discussing out-of-court statements relied on by the expert).

C. Justice Kagan's Dissenting Opinion

While disagreeing with Justice Thomas's characterization of the Cellmark report as nontestimonial, the dissenters agreed with his rejection of the plurality's contention that the reference to the Cellmark report had been used for a nonhearsay purpose.[130] The dissent advances two different arguments as bases for rejecting the plurality's contention.[131] One argument is that it is unrealistic to believe that the jury will be willing and able to follow a limiting instruction precluding the jury's substantive use of the secondhand report.[132] Citing the Kaye text, the dissent dismisses that belief as "factually implausible" and "sheer fiction."[133] The dissent then makes the alternative argument that "as a simple matter of logic,"[134] it is "nonsense"[135] to believe that the secondhand report can be used for a nonsubstantive, nonhearsay purpose.[136] Just as Justice Thomas professed that he could find no "meaningful distinction" between the hearsay and purported nonhearsay uses of secondhand reports under Rule 703, the dissenters quoted *People v. Goldstein*,[137] a 2005 New York decision, to the effect that "[t]he distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful."[138] On the facts of the case, the dissent felt that "the only way the factfinder could consider whether [Cellmark's] statement supported her opinion (that the DNA on L.J.'s swabs came from Williams) was by assessing the statement's truth."[139]

There is a further parallel between the dissent and Justice Thomas's concurrence. As previously stated, Justice Thomas stopped short of discussing the implications of his conclusion that secondhand reports under Rule 703 are necessarily used for the hearsay purpose of proving the truth of the report. In particular, Justice Thomas did not discuss the nature of the judge's authority to admit or exclude an expert opinion when the record is devoid of independent, admissible evidence establishing the truth of a secondhand report that forms an essential premise of the opinion. Likewise, the dissent avoided discussing the implications of its conclusion that secondhand reports are used for hearsay purposes. In the context of *Williams*, the failure to reach that issue is understandable. Although he found that the statement had been used for its truth, Justice Thomas was able to moot the 703 hearsay issue by focusing his analysis on the formality requirement for testimonial statements.[140] In the case of the dissenting justices, their rejection of the plurality's 703 argument led them directly to the testimonial issue, which is where they parted company with Justice Thomas.[141]

The rub is that in *Williams* five Supreme Court justices clearly expressed the view that, in order to be used under Rule 703, a secondhand report must be put to a hearsay purpose.[142] In the procedural setting, neither Justice Thomas nor Justice Kagan

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[130] *Williams*, 132 S. Ct. at 2272 (Kagan, J., dissenting).

[131] *Id.* at 2268-70.

[132] *Id.*

[133] *Id.* at 2269 (quoting KAYE ET AL., *supra* note 48, at 196.)

[134] *Id.* at 2271.

[135] *Id.* at 2269.

[136] *Id.*

[137] People v. Goldstein, 843 N.E.2d 727, 732-33 (N.Y. 2005), *cert. denied*, 126 S. Ct. 2293 (2006).

[138] *Williams*, 132 S. Ct. at 2269 (Kagan, J., dissenting) (quoting People v. Goldstein, 843 N.E.2d 727, 732-33 (N.Y. 2005)).

[139] *Id.* at 2271.

[140] *Id.* at 2260-63 (Thomas, J., concurring in judgment).

[141] *Id.* at 2265 (Kagan, J., dissenting).

[142] *Id.* at 2226 (plurality opinion).

found it necessary to explore the implications of that view. However, since a majority of the Court's members has stated that view, it will now be on the mind of many lower court judges who must apply Rule 703 in post-*Williams* cases.[143] What are the implications of that view? What are the stakes involved in the dispute between the Rule 703 majority and the plurality? The two remaining parts of this article turn to those issues.

III. THE STAKES INVOLVED IN THE DISPUTE OVER THE EVIDENTIARY STATUS OF SECONDHAND REPORTS USED UNDER RULE 703

In his plurality opinion, Justice Alito acknowledges that at least in some circumstances the falsity of a secondhand report used under Rule 703 can render the opinion irrelevant.[144] He does not seem to believe, however, that the lack or insufficiency of independent, admissible evidence of the fact mentioned in the report calls into question the admissibility of the opinion itself.[145] Rather, he apparently views the problem as one of the weight of the opinion.[146] As previously stated, near the end of his opinion he asserts that "the trial judges may and, under most circumstances, must instruct the jury that . . . an expert's opinion is only as good as the independent evidence that establishes its underlying premises."[147] He specifically discusses the extreme fact situation in which the proponent "cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony . . . ."[148] In addressing that situation, he does not even mention the possibility of outright judicial exclusion of the opinion. Rather, he states that in such a circumstance, "the expert's testimony cannot be given any weight by the trier of fact."[149] In that circumstance, the trial judge would presumably give an instruction like the *Forsyth* jury charge that Justice Alito approvingly quoted earlier in his opinion: "If the [facts mentioned in the secondhand reports] are not supported by [independent] proof, then the answers to the questions are entitled to no weight . . . ."[150]

As noted in subparts II.B and II.C, unlike Justice Alito, Justice Thomas and Justice Kagan do not explore the consequences of their conclusion that the secondhand report about the Cellmark test had to be admitted for its truth; after reaching that conclusion, both justices immediately segue to their analysis of the Sixth Amendment Confrontation Clause issue in *Williams*.[151] Yet the obvious, unanswered question is: Where does the logic of their position lead? Their position could lead to the conclusion that the lack or insufficiency of admissible evidence of the fact mentioned in the secondhand report poses an admissibility problem, not merely a weight problem. There is certainly a plausible argument that if (1) secondhand reports are necessarily admitted for the truth of the report, (2) the falsity of the reports renders the opinion irrelevant, and (3) in a given case there is either no admissible evidence or insufficient admissible evidence of the truth of the fact mentioned in the secondhand report, the opinion itself should be excluded. The proper enforcement mechanism would arguably be a judicial ruling

[143] *See, e.g.*, State v. Nararette, 81 U.S.L.W. 1068 (N.M. Sup. Ct. Jan. 17, 2013).

[144] *Williams*, 132 S. Ct. at 2238 (Kagan, J., dissenting).

[145] *Id.* at 2239.

[146] *Id.* at 2237.

[147] *Id.* at 2241.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 2234.

[151] *Id.* at 2259, 2272.

excluding the opinion, not the weaker measure of a *Forsyth*-style judicial instruction telling the jury to assign the opinion "no weight."[152]

Ultimately, the position taken by the 703 majority in *Williams* could lead to the abolition of many of the procedural distinctions between hypothetical questions and questions based on secondhand reports used under Rule 703.[153] As subpart I.A explained, in the case of hypothetical questions, before posing the question to the expert the proponent must ordinarily present independent, admissible evidence of every fact included in the hypothesis.[154] If the proponent neglects to do so, the judge bars the question and prevents the jury's exposure to the opinion.[155] In contrast, if the proponent opts for an opinion based on secondhand reports under Rule 703 rather than a hypothetical question, the judge does not impose the condition precedent that the proponent submit independent, admissible evidence of the fact mentioned in the report.[156] At most, as Justice Alito's opinion indicates, the judge instructs the jury that they should consider the lack of independent evidence of the fact in deciding how much weight to ascribe to the opinion.[157] However, if the 703 majority's position is sound, at first blush the differential treatment of hypothetical questions and questions based on secondhand reports seems indefensible. The position strongly implies that if the presentation of admissible evidence *aliunde* is a condition precedent to posing the hypothetical question, the judge should impose the same condition in the case of questions resting on secondhand reports under Rule 703.

IV. A CRITICAL EVALUATION OF THE MERITS OF THE DISPUTE OVER THE EVIDENTIARY STATUS OF SECONDHAND REPORTS USED UNDER RULE 703

We now turn to the merits of the dispute over the evidentiary status of secondhand reports. We shall evaluate the dispute from two perspectives. Initially, we shall consider whether, as a matter of logic, the plurality or the 703 majority has the better argument. Then we shall analyze the issue as a problem of statutory construction.

A. The Logic of the Use of a Secondhand Report as a Basis for an Expert Opinion

A dissection of the logic of using secondhand reports poses several subissues:

1. Nonhearsay Uses of Secondhand Reports

Can a secondhand report that is used as the basis for an expert opinion ever possess legitimate, nonhearsay logical relevance?

Both Justices Thomas and Kagan believe that whenever an expert relies on a secondhand report as the basis for an opinion, the contents of the report are necessarily being put to a hearsay, substantive use.[158] As subpart III.C noted, when Congress enacted the Federal Rules, most jurisdictions in the common law world were of the same mind.[159]

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[152] *Id.* at 2234.

[153] *Id.* at 2239.

[154] *Id.* at 2241.

[155] *Id.*

[156] *Id.* at 2228.

[157] *Id.* at 2240.

[158] *Id.* at 2259, 2272.

[159] *Id.* at 2239; Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1, 24-29, 34 (1991).

That view, however, was not universal throughout the common law world. [160] One English commentator, Keane, took the position that when secondhand reports serve as the basis for an expert opinion, the reports have "no hearsay quality."[161] A Canadian evidence scholar, McWilliams, agreed that so long as the judge gives the jury a "careful" instruction specifying the proper use of the report, the report is not subject to a hearsay objection.[162] In short, just as the plurality and the 703 majority disagree in *Williams,*[163] the authorities in other countries are divided over the evidentiary status of secondhand reports.

The question recurs: Can such reports possess legitimate nonhearsay logical relevance? The answer is Yes. Justice Alito's opinion suggests two examples.[164]

In one passage, Justice Alito states that a secondhand report possesses plausible nonhearsay relevance to the question of whether "the expert's reasoning was . . . logical."[165] The justice explains that the factfinder's consideration of the secondhand report can help the factfinder assess the quality of "the expert's thought process."[166] By reviewing the secondhand reports mentioned by the expert and the manner in which the expert processed the reports, the factfinder can determine whether the expert committed any evident logical fallacies in reasoning to his or her opinion.[167] The factfinder can make that determination regardless of the truth of the secondhand report.[168] Putting aside the question of the truth of the report, the factfinder's consideration of the report for this purpose can give the factfinder some insight into the caliber of the expert's reasoning.[169] Even if the secondhand report is false, a consideration of the report can help the jury decide whether the expert correctly connected the dots in his or her reasoning.[170]

In another passage, Justice Alito indicates that the factfinder's consideration of the secondhand reports can aid the factfinder in deciding whether "the expert drew an unwarranted inference from the premises on which the expert relied."[171] The factfinder can review all the secondhand reports cited by the expert and inquire whether, cumulatively, they have adequate probative value to support the inference the expert proposes drawing.[172] Considered together, do the secondhand reports furnish sufficient warrant for the expert's claim? Do the reports justify the proposed inference, or is the expert overstating the conclusion that can be drawn from the premises? Once again the factfinder can put the report to this use regardless of its truth.

This second use of secondhand reports brings a traditional nonhearsay use of out-of-court statements—mental input—into play. Under the mental input theory of logical relevance, the trial judge admits the statement for the limited purpose of showing its effect

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[160] Imwinkelried, *supra* note 159, at 23-24.

[161] ADRIAN KEANE, THE MODERN LAW OF EVIDENCE 369-70 (2d ed. 1989).

[162] PETER K. MCWILLIAMS, CANADIAN CRIMINAL EVIDENCE 251 (2d ed. 1984).

[163] 132 S.C t. at 2239.

[164] *Id.* 2240.

[165] *Id.*

[166] *Id.*

[167] ROBERT J. KREYCHE, LOGIC FOR UNDERGRADUATES Ch. 2-3 (3d ed. 1970) (listing the fallacies of equivocation, amphiboly, composition and division, accent, accident, special case, ignoring the issue, begging the question, and complex question).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] 132 S. Ct at 2240.

[172] *Id.*

on the state of mind of the hearer or reader.[173] Suppose, for example, that a plaintiff sued a police officer for false arrest. Under the law of the jurisdiction, the officer is not liable if she based the arrest on a reasonable, albeit mistaken, belief that the defendant had committed a crime. At trial, the officer attempts to testify that before she arrested the plaintiff, a third party told her that he had just observed the plaintiff selling cocaine. Even if the third party's report to the officer is false, the officer's receipt of the report can produce in her mind an honest, reasonable belief that the plaintiff had perpetrated a felony. Under Rule 105, the trial judge would give the jury a limiting instruction that although they could not treat the report as substantive evidence that the plaintiff sold cocaine, they may consider the report in evaluating the honesty and reasonableness of the officer's belief.[174]

By the same token, an expert's receipt of a secondhand report can help establish the reasonableness of the expert's thought process.[175] The jury is surely entitled to inquire whether, on its face, the expert's analytic process is reasonable. The more secondhand data the expert receives, the better grounded the opinion will be. In footnote 3 in his concurrence, Justice Thomas dismisses the application of the mental input theory.[176] However, he considers one variation of the mental input theory: offering the secondhand report of the Cellmark finding "to explain what prompted [Ms. Lambatos] to search the DNA database for a match."[177] He is correct in concluding that use of the evidence in this way would not necessitate disclosing the details that Cellmark had found a male DNA profile in the semen from L.J.'s vaginal swabs.[178] But using the report to explain the recipient's subsequent conduct is only one variation of the mental input theory. As the preceding paragraph demonstrates, the report could also be used to show the honesty and reasonableness of the recipient's state of mind. A proponent offering a secondhand report to establish the reasonableness of an expert's thought process is invoking a variation of the mental input theory. The trial judge may permit a reference to the report for that nonhearsay purpose and give the jury a limiting instruction specifying that purpose.[179]

2. Hearsay Uses of Secondhand Reports

Even if the secondhand report possesses nonhearsay logical relevance, is it realistic to think that the lay jurors will be able and willing to follow the limiting instruction? Or are they likely to disregard the instruction, misuse the evidence for a hearsay purpose, and treat the report as substantive evidence of the fact mentioned in the report?

In many instances, a single item of evidence is logically relevant to the facts on multiple theories.[180] In the preceding discussion, we saw that secondhand reports can sometimes be logically relevant on a nonhearsay theory for the purpose of helping the factfinder evaluate the quality of the expert's reasoning. However, the same report may be relevant for a hearsay purpose as well. Suppose, for example, that a testifying physician relies on a nurse's secondhand report about the plaintiff patient's symptoms. It is clear that the Advisory Committee contemplated Rule 703's application to such reports.[181] The

[173] EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 1004, at 10-17-24 (5th ed. 2011).

[174] *Id.*

[175] Imwinkelried, *supra* note 159, at 14.

[176] 132 S. Ct. at 2258 n.3 (Thomas, J., concurring in the judgment).

[177] *Id.*

[178] *Id.*

[179] IMWINKELRIED ET AL., *supra* note 173 § 1004, at 10-17-24.

[180] DAVID P. LEONARD, THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBILITY § 1.4, (2002).

[181] FED. R. EVID. 703 advisory committee's note (reports and opinions from nurses).

nurse's report, however, could also be logically relevant as substantive evidence on the issue of the plaintiff's damages. The rub is that although relevant to damages, the nurse's report could be inadmissible for that purpose because it might not fall within any hearsay exception.[182] In these dual relevance fact situations when an item of evidence is admissible for one purpose but not for another, the common law solution has been to admit the evidence but to require a limiting instruction.[183] Federal Rule of Evidence 105 continues the traditional practice.[184]

Because the hearing in *Williams* was a bench trial, there was minimal risk that any secondhand report would be misused.[185] The risk of misuse is much greater when the factfinder is a jury of laypersons. In the 1980s Professor Rice asserted that it is an absurd fiction that the jurors can and will comply with the limiting instruction in this setting.[186] More recently, in their text on scientific evidence, Professors Kaye, Bernstein, and Mnookin state that it is "highly unlikely that juries are capable of such mental gymnastics."[187] If the jurors disregard the limiting instruction, Rule 703 becomes a backdoor hearsay exception that admits the secondhand report as substantive evidence.[188]

Evidence scholars are not the only commentators who have expressed skepticism about the jurors' compliance with the limiting instruction. To begin with, as Professors Kaye, Bernstein, and Mnookin point out, there is an extensive body of psychological research indicating that in some circumstances, lay jurors are likely to ignore limiting instructions, including instructions about the limited evidentiary status of secondhand reports.[189] A number of courts have voiced the same skepticism.[190] On the particular facts of specific cases, the United States Supreme Court has occasionally held that it was unrealistic to believe that a limiting or curative instruction to disregard would be effective.[191] Indeed, as amended in 2000, Rule 703 itself reflects an awareness of this danger. In that year, the rule was amended to codify a presumptive rule that the expert may not go into detail elaborating the content of an otherwise inadmissible secondhand report.[192] The Advisory Committee Note accompanying the amendment mentions the danger of "the jury's potential misuse of the information as substantive evidence."[193] The

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[182] *Cf.* FED. R. EVID. 803(4) (exception to the rule against hearsay: statement made for medical diagnosis or treatment).

[183] LEONARD, *supra* note 180 § 1.4. For instance, with a limiting instruction, a judge might admit an accused's prior conviction for impeachment under Rule 609 but bar its use as bad character evidence on the historical merits under Rules 404-05. Likewise, a judge could permit the introduction of evidence of an accused's prior crime on a noncharacter theory to show motive under Rule 404(b) but preclude the prosecution from treating the act as evidence of the accused's general bad character under Rule 404(a).

[184] *Id.* § 1.5.

[185] *Williams*, 132 S. Ct. at 2222, 2242.

[186] Rice, *supra* note 48, at 585.

[187] KAYE ET AL., *supra* note 48 § 3.7.2; *see also* BARBARA & NANCY HOLLANDER, WHARTON'S CRIMINAL EVIDENCE § 4:8, (15th ed. 2012).

[188] 3 *Federal Rules of Evidence Manual*, § 703.2[4] (Matthew Bender 10th ed.).

[189] KAYE ET AL., *supra* note 48 § 3.7.2, at n. 37 (2004).

[190] *E.g.*, People v. Coleman, 695 P.2d 189 (Cal. 1985).

[191] RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 15.3(A), at 439-41 (4th ed. 2010) (discussing Shepard v. United States, 290 U.S. 96 (1933), Jackson v. Denno, 378 U.S. 368 (1964), and Bruton v. United States, 391 U.S. 123 (1968)).

[192] The last sentence of restyled Rule 703 now provides: "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if the probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

FED. R. EVID. 703.

[193] FED. R. EVID. 703 advisory committee's note (amended 2000).

Note counsels trial judges to "consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances."[194]

This line of argument is not so much an attack on Rule 703 as it is a plea for the more frequent invocation of Rule 403. In general terms, Rule 403 allows trial judges to exclude otherwise inadmissible evidence when they believe that the attendant probative dangers such as unfair prejudice substantially outstrip the probative worth of the evidence.[195] The Advisory Committee Note to Rule 403 explains that unfair prejudice includes the danger that the jury will decide the case on an improper basis.[196] More to the point, the Note indicates that the risk of unfair prejudice arises when evidence is admissible only for a limited purpose but the judge believes that the jury will misuse the evidence for another, inadmissible purpose.[197] When a juror misuses the item of evidence and that misuse influences the juror's vote, the misuse can prompt a verdict on an improper basis. Given the right facts and the psychological research into the efficacy of limiting instructions, trial judges should be more receptive to the argument that Rule 403 trumps Rule 703 in a given case because there is an intolerable risk that the jury will ignore the limiting instruction. However, the Supreme Court has rarely found such an intolerable risk.[198] Typically, the Court has done so only when a "perfect storm" created the risk: The out-of-court statement was directly relevant to a critical issue in the case, the declarant presumably had personal knowledge of the fact asserted, and the declarant was a key player in the case—the accused himself or herself, a co-conspirator, or the named victim.[199] In many cases, secondhand reports used under Rule 703 will lack one or more of these characteristics: The report might not bear directly on a vital issue in the case, it may be doubtful whether the declarant possessed firsthand knowledge, or the declarant may have only a minor role in the transaction. Perhaps trial judges should accept such Rule 403 arguments more often, but this line of argument does not undermine Rule 703 itself. In contrast, the next argument represents a more formidable, fundamental challenge to Rule 703.

Even if the secondhand report possesses nonhearsay logical relevance, does the factfinder have to put the report to hearsay use and treat it as substantive evidence of the truth of the report in order to make an intelligent decision whether to accept the opinion based on the report?

The attack discussed above rests on a prediction that in some cases jurors will disregard the limiting instruction and put the report to a substantive, hearsay use. In the final analysis that attack sounds in Rule 403 rather than Rule 703. The next argument, however, rests on logic rather than a prediction of juror behavior. According to this argument, in every case the factfinder must put the report to a substantive, hearsay use in order to decide whether the opinion is relevant and should be accepted.[200] The thrust of the argument is that as a matter of logic, the secondhand report must always be used for that purpose; if the fact mentioned in the report is essential to the validity of the opinion and there is no sufficient admissible evidence of the truth of the fact, the opinion is irrelevant

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[194] *Id.*

[195] FED. R. EVID. 403.

[196] FED. R. EVID. 403 advisory committee's note.

[197] *Id.* (Specifically: "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").

[198] United States v. Martinez, 939 F.2d 412, 414-415 (7th Cir. 1991).

[199] CARLSON & IMWINKELRIED, *supra* note 191 § 15.3, at 441.

[200] Ian Volek, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 FORDHAM L. REV. 959, 977-8 (2011).

and should be excluded.[201]

A number of respected commentators subscribe to this line of argument.[202] They contend that it is "logically incoherent" to admit the opinion absent admissible evidence of the truth of its premises.[203] The validity and relevance of the opinion necessarily depend on the truth of its premises.[204] Absent such evidence of the truth of the premises, the opinion is unsubstantiated and irrelevant.[205] If sufficient admissible evidence supporting the opinion's premises is not available, it is illogical to admit the opinion as substantive evidence in the case.[206] It is fallacious for the factfinder to accept the truth of the opinion absent admissible proof of the truth of the premises.[207] Some courts have embraced this argument[208] and, as previously stated, even Justice Alito acknowledged in *Williams* that the falsity of the premise of the truth of Cellmark's report would render Ms. Lambatos's opinion irrelevant.[209]

As a generalization, this line of argument is correct. When a conclusion or opinion rests on certain premises, the opinion is conditional in nature.[210] When a conclusion is said to be conditional on a certain fact, the validity of the conclusion is contingent on the truth of the condition.[211] That understanding of the nature of a condition is pervasive in the law. For example, Contracts law treats the concept of a condition in that manner.[212] The Federal Rules of Evidence also reflect the concept of conditional validity.[213] If the validity of an opinion is conditional upon the truth of a certain premise, a decision maker cannot accept the opinion as valid unless and until the premise is proven to be true.

There is an important qualification, though, to this generalization: The generalization holds true only when the premise essential to the conclusion. In some instances a secondhand report used under Rule 703 lends further support to the expert's opinion but the fact mentioned in the report is not an essential premise. Consider, for example, a defense psychiatrist's opinion that a person is suffering from a certain mental disorder. The disorder is one of the illnesses for which there are Feigner inclusionary criteria.[214] Assume that the American Psychiatric Association's *Diagnostic and Statistical Manual (DSM) IV-TR* states that there are four classic symptoms of the disorder and that before diagnosing a subject as suffering from the disorder, the psychiatrist must find that

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[201] *Id.*

[202] KAYE ET AL., *supra* note 48 § 4.7.2, at 178-81; Charles Alan Wright et al., 29 FED. PRAC. & PROC. EVIDENCE § 6272 (1997); Rice, *supra* note 48, at 585.

[203] KAYE ET AL., *supra* note 48, at 179.

[204] Rice, *supra* note 48, at 585.

[205] KAYE ET AL., *supra* note 48, at 179.

[206] Wright et al., *supra* note 202, at 320.

[207] KAYE ET AL., *supra* note 48, at 179; Rice, *supra* note 48, at 585.

[208] *See, e.g.*, People v. Goldstein, 6 N.Y.3d 119, 127 (2005) (the court did not see how a factfinder could accept an opinion "without accepting [the] premise . . . that the statements were true . . . .").

[209] *Williams*, 132 S. Ct. 2221, 2238 (2012).

[210] Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1, 33 (1991).

[211] Black's Law Dictionary 293 (6th ed. 1990).

[212] E. ALLAN FARNSWORTH, CONTRACTS § 8.2, at 519 (3d ed. 1999).

[213] FED. R. EVID. 104(b).

[214] *See generally* Jules B. Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 Rutgers L. Rev. 377, 402 (1987) (explaining the Feighner Criteria, their application to certain mental illnesses, and how they are used in legal processes).

the subject's case history includes at least three of the four symptoms.[215] The psychiatrist is prepared to testify that the accused suffers from the disorder and that the basis for her opinion consists of 703 secondhand reports about all four symptoms. Suppose further that while the record contains independent, admissible evidence of three symptoms, there is no such evidence of the fourth. In these circumstances, the prosecution could attack the weight of the psychiatrist's opinion by pointing to the absence of admissible evidence of the fourth symptom. However, since the diagnostic criteria require a finding of only three symptoms, the lack of admissible evidence of the fourth symptom would not render the opinion irrelevant; even if the fourth symptom is absent, there is an adequate basis for the opinion. The absence of independent evidence of the fourth symptom would not make it illogical for the factfinder to accept the psychiatrist's opinion.

Vary the hypothetical. Assume that there is either no evidence or insufficient independent evidence of both the third and fourth symptoms or that the factfinder rejects the evidence of the existence of the third or fourth symptoms. Now the state of the evidentiary record undercuts an essential premise of the opinion; *ex hypothesi* only two of the three necessary symptoms are present in the accused's case history. Given these assumptions, the opinion is irrelevant and it would be illogical for the factfinder to embrace the opinion. Simply stated, the falsity of a truly essential premise[216] invalidates the expert's conditional opinion.

3. The Allocation of the Factfinding Responsibility Between the Judge and Jury with Respect to Secondhand Reports

Does the fact that the falsity of an essential premise of a conditional opinion renders the opinion irrelevant dictate the conclusion that the trial judge should be assigned the task of deciding the truth of the premise and empowered to exclude the opinion whenever he or she would conclude that the essential premise is false? Or is jury is generally competent to perform that task?

As we have seen, the falsity of an essential premise of an opinion can render the opinion irrelevant; if an essential premise of an opinion is false, it is illogical for the factfinder to accept the opinion as true. That analysis, however, does not dictate the conclusion that in all cases the trial judge should be authorized to decide whether an essential premise is false and, if so, bar the opinion. The basic question is one of the allocation of factfinding responsibility between the judge and jury.[217]

In several cases, the common law of Evidence and the Federal Rules assign to the jury the responsibility of deciding facts which determine the logical relevance of an item of evidence.[218] Concededly, the trial judge usually resolves factual questions that determine the admissibility of evidence.[219] Federal Rule of Evidence 104(a) recognizes this practice.[220] For example, suppose that an opponent makes a hearsay objection to testimony about an out-of-court statement offered as an excited utterance under Federal

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[215] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR, (4th ed. text revision 2010).

[216] In the analogous context of hypothetical questions, the trial judge has authority to bar the question when the judge believes that the hypothesis omits an essential premise. The judge determines whether the hypothesis furnishes "an adequate basis" for the expert's opinion. KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE § 14, at 90 (6th ed. 2006).

[217] Rice, *supra* note 48, at 588.

[218] *See generally* Edward J. Imwinkelried, *Determining Preliminary Facts Under Federal Rule 104*, 45 AM. JUR. *Trials* 1, § 33 (1992).

[219] FED. R. EVID. 104(a).

[220] *Id.*

Rule 803(2).[221] The trial judge decides the foundational question of whether the declarant was in a state of nervous excitement at the time of the statement. Similarly, assume that an opponent objects to a question on the ground that the question calls for the disclosure of a communication protected by the attorney-client privilege under Federal Rule 501.[222] These issues fall into the category of foundational or preliminary facts conditioning the "competence" of evidence.[223] The judge decides the question of the existence or truth of these facts.

However, there is another category of foundational facts—those conditioning the logical relevance of evidence.[224] This category includes such foundational facts as a lay witness's possession of personal knowledge[225] under Rule 602 and the authenticity of exhibits[226] under Rule 901.[227] Federal Rule of Evidence 104(b) codifies the conditional relevance doctrine: "When the [logical] relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later."[228]

When a fact falls under Rule 104(b), the trial judge plays a limited, screening role.[229] Rather than passing on the credibility of the proponent's foundational testimony, the trial judge accepts the testimony at face value.[230] The judge then conducts a limited inquiry: If the jury chooses to believe the foundational testimony, does the testimony have sufficient probative value to support a rational, permissive inference of the existence of the foundational fact such as, for instance, the fact that the witness saw the accident or the plaintiff actually authored the letter?[231] Assume the trial judge ruled that there was sufficient evidence. The trial judge would then allow the lay witness to testify about the accident or permit the letter's proponent to submit it to the jury. In the final jury charge, the judge would instruct the jurors that they have to decide the issue of whether the lay witness possessed firsthand knowledge of the accident or whether the plaintiff signed the letter.[232] More specifically, the trial judge tells the jurors that:

- If they find that the preliminary fact is true, they may consider the lay witness's testimony or the exhibit during the balance of their deliberations.
- However, if they find that the preliminary fact is false, they should completely disregard the testimony and exhibit during their deliberations.[233]

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[221] Imwinkelried, *supra* note 218, at § 50.

[222] *Id.* § 42.

[223] EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 133 (5th ed. 2011).

[224] *Id.* § 134.

[225] Imwinkelried, *supra* note 218, at § 10.

[226] *Id.* § 20-22.

[227] *Id.*

[228] FED. R. EVID. 104(b).

[229] Imwinkelried, *supra* note 218, at § 31.

[230] *Id.* § 31.

[231] 45 Edward J. Imwinkelried, *Determining Preliminary Facts Under Federal Rule 104* AM. JUR. TRIALS § 31 (1992).

[232] *Id.* § 65.

[233] Edward J. Imwinkelried, *Trial Judges- Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?* 84 MARQ. L. REV. 1, 11 (2000).

Federal Rules of Evidence 602 and 901 make it clear that the conditional relevance doctrine governs the preliminary facts of a lay witness's personal knowledge and an exhibit's authenticity.[234] For its part, Rule 602 states that a lay witness may testify about a fact or event "if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[235] Rule 901(a) adds that in the case of exhibits such as letters, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it to be."[236]

Why treat these preliminary facts differently than the run-of-the-mill preliminary facts that fall under Rule 104(a) and that are assigned to the trial judge? The title of the doctrine codified in Rule 104(b), "conditional relevance," is suggestive.[237] Suppose that at the outset of their deliberations, the jurors decide that the lay witness called by the plaintiff does not have personal knowledge of the accident he testified about; they are convinced that the witness is lying or mistaken. On that supposition, common sense will naturally lead the jury to disregard the witness's testimony during the remainder of its deliberations. The jurors have literally decided that this witness "doesn't know what he's talking about." This is a common sense notion, not a technical legal doctrine. The justification for classifying the authenticity of exhibits as falling under Rule 104(b) is similar.[238] Assume that, at the beginning of their deliberations, the jurors decide that the letter purportedly signed by the plaintiff is a forgery. Again, they should have no difficulty putting aside the letter for the remainder of their deliberations. Here they have decided that the letter "isn't worth the paper it's written on." Foundational facts are categorized under 104(b) when they condition the logical relevance of the evidence in such a fundamental sense that even lay jurors without legal training will see that the falsity of the fact renders the evidence irrelevant.[239] For that reason, we trust the jury to make the ultimate determination whether the witness has firsthand knowledge or whether the exhibit is authentic. If the jurors decide that the preliminary fact is false, their prior exposure to the witness's testimony or the letter is unlikely to taint the remainder of their deliberations; once they decide that the preliminary fact is false, they will view the evidence as irrelevant and worthless. They should be perfectly capable of putting the testimony out of mind.

There is a strong analogy between these "conditional relevance" preliminary facts and the question of the truth of the essential premises for an expert opinion. If a lay witness lacks personal knowledge of the accident he proposes to testify about, his lack of firsthand knowledge renders his testimony irrelevant. Again, if an exhibit is not genuine, its inauthenticity renders the exhibit irrelevant and patently worthless. Similarly, when an essential premise of an expert opinion is false, its falsity renders the opinion irrelevant.

The question is whether we can generally trust the jury to determine the falsity of the essential premise. The bottom line issue is whether we can be confident that the jurors can and will disregard the expert's opinion if they conclude that an essential premise is false. That does not seem to be too much to ask of lay jurors. Any reasonably intelligent person can understand this common sense argument: A (the opinion) is true only if B (the essential premise) is true; B is false; ergo, A is false. One does not need a college degree,

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[234] David S. Schwartz, *A Foundation Theory of Evidence,* 100 GEO L.J. 95, 100 (2011).

[235] FED. R. EVID. 602.

[236] FED. R. EVID. 901(a).

[237] EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 134 (5th ed. 2011).

[238] *Id.* § 401.

[239] John Kaplan, *Of Mabrus and Zorgs–An Essay in Honor of David Louisell*, 66 CALIF. L. REV. 987, 995 (1978); Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence*? 25 WM. & MARY L. REV. 577, 594 (1984).

much less a J.D. or a B.S., to realize that the conclusion follows inexorably from the premises. We can therefore safely entrust the decision to the jury.[240]

Admittedly, Federal Rule 104(a)'s competence procedure governs some of the foundational facts conditioning the admissibility of expert opinions.[241] For example, in the majority opinion in the celebrated *Daubert* decision, Justice Blackmun explicitly stated that 104(a) controls the judge's determination whether the theory or technique the expert proposes employing has been validated by adequate, methodologically sound empirical reasoning and data.[242] However, the admissibility of a single item of evidence is often conditioned on multiple preliminary facts, some falling under 104(a) and others under 104(b).[243] For example, suppose that a defense counsel offers a conviction to impeach a prosecution witness. Under Federal Rule of Evidence 609(c), the trial judge determines whether the conviction is inadmissible because the witness has been pardoned for the prior crime.[244] However, the conviction is obviously irrelevant and inadmissible for the purpose of impeaching this witness unless the witness is the person who suffered the conviction.[245] The determination of the witness's identity as the convict falls under Rule 104(b).[246] Thus, it is quite possible to assign the jury the task of determining the sufficiency of the admissible evidence of the facts mentioned in the secondhand reports under Rule 703 even though the trial judge has the determinative vote on many of the other facets of the admissibility of the expert's opinion.

If the jury can be assigned this task, the approach outlined in Justice Alito's plurality opinion is generally satisfactory. In the typical case, rather than personally deciding whether the opinion's essential premises are true, the judge instructs the jurors that they have that task; they are to weigh the independent, admissible evidence of the fact stated in the secondhand report to decide whether that fact is true. Moreover, as in *Forsyth,* the judge bluntly tells the jurors that if they find that one of the opinion's essential premises is false, they must give the opinion "no weight."[247]

What about the exceptional situation in which the expert's proponent fails to present sufficient independent evidence of the truth of the facts stated in the secondhand reports used under Rule 703? In that situation, does logic dictate that the opinion is irrelevant and the trial judge should bar the proponent from submitting the opinion to the jury?

The previous paragraphs developed a parallel to Federal Rule of Evidence 104(b).[248] That statute assigns the ultimate conditional relevance determination to the jury. By its terms, however, the statute also prescribes that the trial judge must submit that

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[240] In a given case, it might be tenable to argue that under Rules 403 and 611(a) the trial judge is authorized to deviate from the normal rule allocating the responsibility to the jury. Suppose, for example, that the foundational testimony about the scientific evidence consumed hours of courtroom time and hundreds of pages of transcript. "Understandably, when jurors listen to hours of foundational scientific testimony, they [may] have difficulty ignoring the proof during their deliberations [even after] they find that" the opinion is inadmissible. Imwinkelried, *supra* note 239, at 605. That argument is plausible when the jury realizes that the evidence is being excluded for a technical legal reason. The argument carries less weight in a setting such as here in which the jury has decided that the opinion is irrelevant.

[241] Imwinkelried, *supra* note 231, at § 47.

[242] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993).

[243] Imwinkelried, *supra* note 231, at § 47.

[244] FED. R. EVID. 609(c).

[245] *Id.* at advisory committee's note (1974 Enactment).

[246] Imwinkelried, *supra* note 231, at §19.

[247] *Williams v. Illinois*, 132 S. Ct. 2221, 2234 (2012).

[248] FED. R. EVID. 104(b).

ultimate decision to the jury only when the proponent has "introduced [proof] sufficient to support a finding [by the jury] that the fact does exist."[249] Rule 602's restatement of the standard is explicit; according to Rule 602, the judge must permit the jury to make the final decision "*only* if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[250] Suppose that after reviewing the record, the judge concludes either that the proponent has presented no evidence of the fact or that, as a matter of law, the proponent's evidence is insufficient to support a rational inference. In that situation, the judge makes a peremptory ruling, never submits the question to the jury, and excludes the evidence. In that state of the record the jury could not make a rational finding that the witness possessed firsthand knowledge; to regulate the rationality of the verdict, the judge bars the testimony.

Consider a parallel situation involving secondhand reports. Assume that after reviewing the state of the record at the time the proponent proffers the opinion, the judge concludes that there is no admissible evidence of the fact stated in an essential secondhand report or that the independent evidence is too flimsy to sustain a rational inference. Even if the jurors chose to believe the independent evidence, they could not find the essential premise to be true. As under Rule 104(b), the state of the record calls out for the judge to make a peremptory ruling and exclude the expert opinion.[251] It makes no sense to expose the jury to the opinion when it is clear that it would be irrational for the jury to find the existence of one or more of the essential premises of the opinion. It would hardly enhance the integrity of the factfinding process to give the jury an opportunity to make an undeniably irrational decision.

B. The Legislation Governing the Use of a Secondhand Report as a Basis for an Expert Opinion

Subpart A demonstrates how logic strongly indicates that at least in some cases, the trial judge should bar expert opinions supported by secondhand reported used as the basis for the opinion under Rule 703.[252] Logic, however, is not the only force that shapes the law.[253] Moreover, the use of secondhand reports is not a matter of common law in most jurisdictions; there are statutes on point.[254] In federal practice Rule 703 governs, and the majority of jurisdictions have state statutes modeled after Rule 703.[255] What issues arise under the statute?

Did the drafters perceive a distinction between the facts recited in the attorney's hypothetical question and facts stated in secondhand reports?

It is understandable that the courts and legislatures have insisted that the facts recited in hypothetical questions be supported by independent, admissible evidence. Aside from the independent evidence, the only mention of the fact is the attorney's reference in the question he or she poses to the expert. In virtually every American jurisdiction, there is a pattern jury instruction that the attorney's statements during trial are not evidence.[256]

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[249] *Id.*

[250] FED. R. EVID. 602.

[251] Imwinkelried, *supra* note 231, at 10.

[252] Dana G. Deaton, *The Daubert Challenge to the Admissibility of Scientific Evidence*, 60 AM. JUR. TRIALS § 8 (1996).

[253] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (1881).

[254] *See, e.g.,* ALA. R. EVID. 703 (advisory committee notes) (West 2012); CONN. CODE OF EVIDENCE, §7-4(b) (West, 2012).

[255] JOSEPH & SALTZBURG, *supra* note 84 § 52.2 (1987).

[256] *E.g.,* Cal. Jury Instructions: Criminal §§ 1.02, 5002 (2012).

However, the drafters of Rule 703 viewed secondhand reports as having much more substance than an attorney's bare assertion.[257] Rather than emanating from attorneys, in the words of the Advisory Committee Note, secondhand reports come from other sources such as "nurses, technicians and . . . doctors . . . ."[258] The Note adds that, to an extent, the witness screens or "expertly perform[s]" a "validation" of the report.[259] For instance, over the course of his or her career a forensic pathologist gains considerable experience working with findings from toxicology laboratories and in the process the pathologist may develop a "special talent[]" for evaluating such findings.[260] The Note concludes by pointing out that experts "make[] life-and-death decisions in reliance upon" such secondhand reports.[261] If the expert is willing to place such faith in secondhand reports, it seems silly to bar their use at trial.[262] Professor Rice has gone to the length of arguing that the expert's screening creates such a strong inference of trustworthiness that any secondhand report passing muster under Rule 703 should be treated as admissible hearsay and received as substantive evidence.[263] Citing Professor Rice, Professors Kaye, Bernstein, and Mnookin observe that many secondhand reports are at least as reliable as the out-of-court statements routinely admitted under some hearsay exceptions.[264] Even if one is unwilling to go as far as Professor Rice, the drafters' conclusion that a secondhand report is a more substantial basis for an expert opinion than an attorney's statement in a hypothetical question is defensible.

If the drafters discerned a distinction between secondhand reports and an attorney's statement in a hypothetical question, did they also manifest an intent to treat secondhand reports differently procedurally? In particular, did they manifest an intent to dispense with any necessity for the proponent of an opinion based on secondhand reports to present independent, admissible evidence of the facts stated in the reports?

The Advisory Committee Note to Rule 703 not only demonstrates that the drafters perceived a distinction between secondhand reports and an attorney's reference to a fact in a hypothetical question. More importantly, the Note also indicates that given the perceived distinction, the drafters wanted to treat hypothetical questions and questions based on secondhand reports differently in a procedural sense.[265] Early in the first paragraph in the Note, the drafters mention the requirement that the proponent of a hypothetical question must present independent evidence of the facts recited in the hypothesis.[266] The drafters describe the variant of the hypothetical question in which the expert attends trial, "hear[s] the testimony establishing the facts,"[267] and later opines on the basis of the testimony that has already been admitted.[268] In the middle of the paragraph, the drafters shift the focus from the traditional hypothetical question practice to their innovation permitting reliance on secondhand reports.[269] In the third to last sentence

[257] FED. R. EVID. 703 advisory committee's note (1972 Proposed Rules).

[258] *Id.*

[259] *Id.*

[260] Rice, *supra* note 48, at 591.

[261] FED. R. EVID. 703 advisory committee's note.

[262] SALTZBURG ET AL., *supra* note 69 § 702.02[3] at 702-12.

[263] Rice, *supra* note 48, at 587-88.

[264] KAYE ET AL., *supra* note 48 § 4.7.2, at 180.

[265] FED. R. EVID. 703 advisory committee's note.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

in the paragraph, the drafters state that they intend to allow proponents to use secondhand reports "with[out] the expenditure of substantial time in producing and examining various authenticating witnesses."[270] In the next sentence, the drafters assert that the witness's "validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."[271]

Those two sentences are informative. Requiring the proponent to present independent, admissible evidence of the truth of the secondhand reports would directly frustrate the drafters' express intent to obviate the need for the proponent to expend "substantial time in producing and examining various authenticating witnesses."[272] Furthermore, if the presentation of such evidence is a formal requirement, the expert's screening of the secondhand report no longer "suffice[s]" as a basis for introducing the opinion.[273] Adding that requirement as a judicial gloss would flatly contradict the intent clearly expressed in the Advisory Committee Note. Whatever the appeal or merit of the logic underlying the 703 majority's position in *Williams,* it is difficult, if not impossible, to justify construing Rule 703 as a mandate that the proponent submit such evidence as a condition precedent to presenting the expert opinion to the factfinder.[274]

Even if the drafters intended to treat hypothetical questions and questions based on secondhand reports differently, is the differential treatment unconstitutional?

If the 703 majority in *Williams* is correct, the admission of an expert's opinion based on secondhand reports as substantive evidence is illogical when the record does not contain sufficient, admissible evidence of the facts stated in the reports. Does that conclusion damn Rule 703 to unconstitutionality?

It certainly does not have that effect in civil actions. Consider the related issue of the constitutionality of "illogical" presumptions in civil cases: presumptions in which the basic fact lacks sufficient probative value to support an inference of the existence of the presumed fact.[275] On the civil side, the due process clause imposes minimal constraints.[276] The prevailing view is that the presumption can be constitutional even when, without more, the basic fact would not support a rational, permissive finding that the presumed fact exists.[277] In fashioning a presumption for a civil case, the court or legislature may consider factors other than probability.[278] For example, they may consider policy factors and convenience.[279] The decisionmaker may consider the very sorts of factors that the drafters mentioned in the Advisory Committee Note accompanying Rule 703.[280] The drafters could reasonably conclude that if the witness has "expertly performed" a "validation"[281] of a secondhand report of a fact, there is little to be gained by also requiring admissible evidence of the fact. Further, the drafters may legitimately weigh the

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[270] *Id.*; *see also* 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6272 (1st ed. 1997).

[271] FED. R. EVID. 703 advisory committee's note.

[272] *Id.*

[273] *Id.*

[274] *Williams v. Illinois*, 132 S. Ct. 2221, 2225 (2012).

[275] 2 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE 522 (6th ed. 2006).

[276] *Id.* at 523.

[277] *Id.* at 522-23.

[278] *Id.*

[279] *Id.* at 522.

[280] FED. R. EVID. 703 advisory committee's note.

[281] *Id.*

inconvenience of "the expenditure of substantial time in producing and examining various authenticating witnesses."[282] That inconvenience was one of the policy factors the Court weighed in *Cliquot's Champagne*.[283]

Criminal cases are a different matter. There are at least two situations in which the adoption of the 703 majority's position could lead to a finding of a constitutional violation. First, assume that in *Williams*, the Cellmark report was a formal certificate, like the certified reports in *Mellendez-Diaz*[284] and *Bullcoming*.[285] If that has been the case, Justice Thomas would have sided with the four dissenters on the question of whether the report was testimonial. He concurred with the plurality on the testimonial issue only because the Cellmark report was not a "formalized statement[] . . . characterized by solemnity . . . ."[286] If we vary the facts in that respect, there would have been five votes both for the proposition that the report was testimonial and that Lambatos's reference to the report was used for the truth of the content of the report. On those assumptions, a majority of the justices would have found a violation of the Sixth Amendment Confrontation Clause.

Justice Alito's plurality opinion suggests another possibility. In footnote 8, the justice mentions the Court's 1979 decision in *Jackson v. Virginia*.[287] In *Jackson,* the Supreme Court announced that the Due Process Clause controls the standard the trial judge must use to determine whether the prosecution has sustained its initial burden of production and made out a submissible case for the jury.[288] More specifically, the Court ruled that the trial judge must determine that a hypothetical juror could find the existence of every essential element of the charge beyond a reasonable doubt.[289] The prosecution must meet its burden by presenting admissible, substantive evidence of each element of the offense.[290] Suppose that in a given case, the only substantive prosecution evidence of an essential element is an expert opinion resting on secondhand reports. Assume further that the record does not contain admissible, independent evidence of the truth of an essential premise supported by only a secondhand report. Citing the view of the 703 majority in *Williams*, the defense could argue that it is illogical to treat the opinion as substantive evidence absent such admissible corroborating evidence.[291] Research reveals no case in which a defense counsel has pressed this argument, but post *Williams* it may be only a matter of time before someone does.

While these constitutional attacks are viable, like the Rule 403 argument discussed in subpart IV.A.2, they do not amount to facial attacks on Rule 703 itself. For the most part,[292] the Supreme Court has confined facial constitutional attacks to legislation burdening First Amendment activity.[293] In other contexts, a constitutional attack must be

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[282] *Id.*

[283] *In re* Cliquot's Champagne, 70 U.S. 114, 141 (1866).

[284] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

[285] *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2707 (2011).

[286] *Williams v. Illinois*, 132 S. Ct. 2221, 2261 (2012) (Thomas, J., concurring in the judgment).

[287] *Id.* at 2238 n.8 (citing Jackson v. Virginia, 443 U.S. 307, 314 (1979)).

[288] *Jackson v. Virginia*, 443 U.S. 307, 314 (1979).

[289] *Id.* at 313-14.

[290] *Id.* at 313-14, 317.

[291] *Williams*, 132 S. Ct. at 2258.

[292] *But see* Berger v. New York, 388 U.S. 41, 51 (1967) (a Fourth Amendment case involving electronic surveillance).

[293] Arriaga v. Mukasey, 521 F.3d 219, 223 (2d Cir. 2008) (explaining that facial constitutional attacks are "generally limited to statutes that threaten First Amendment interests."); United States v. Dang, 488 F.3d 1135,

as-applied. If a court adopted the view of the 703 majority in *Williams,* the court might find that a particular application of 703 violated the Fifth or Sixth Amendment.[294] However, even in a criminal case the court would not strike down Rule 703 entirely.[295]

V. CONCLUSION

There are many variations of the famous legend of the Gordian Knot.[296] According to one version, at one time the Phrygians were without a king.[297] An oracle predicted that an eagle would land on the cart of the new king.[298] A peasant named Gordias was driving his ox-cart into town when an eagle landed on the cart.[299] Gordias was proclaimed king.[300] Out of gratitude, Gordias's son Midas dedicated the cart to the Phyrygian gods and tied the cart to a post with an intricate knot.[301] An oracle later prophesied that whoever untied the knot would become the king of all Asia.[302] While wintering nearby in 333 B.C., Alexander the Great was challenged to untie the knot.[303] Alexander could not unravel the mystery of the knot.[304] Frustrated, he unsheathed his sword and slashed through the rope—cutting the Gordian knot.[305] The expression, "cutting the Gordian knot," has become a metaphor for overcoming a seemingly intractable problem by a bold stroke.

The remarks of the 703 majority in *Williams* have converted the evidentiary status of secondhand reports used under Rule 703 into a Gordian knot of sorts. Those remarks introduce a tension into Rule 703 jurisprudence. When a secondhand report is an essential premise of an expert opinion, the logic of the 703 majority's position points to the substantive conclusion that the lack of independent, admissible evidence of the facts stated in the report renders the opinion irrelevant. In turn, that substantive conclusion seems to dictate the procedural outcome that at least in extreme cases, the judge should exclude the opinion and bar its presentation to the jury. However, that logic collides with the legislative intent manifest in the original Advisory Committee Note to Rule 703.[306] The drafters asserted that the expert's screening of the second report ought to "suffice."[307] The drafters were equally emphatic that it would be unnecessary for the expert's proponent to go to the length of incurring "the expenditure of substantial time in

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1142 (9th Cir. 2007) (explaining that the constitutional claim must fail because the overbreadth doctrine does not implicate "First Amendment protections."); Coleman v. DeWitt, 282 F.3d 908, 914 (6th Cir. 2002) ("Neither the Supreme Court nor this court has applied the overbreadth doctrine when the First Amendment was not implicated."); Edward J. Imwinkelried & Donald N. Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42, 50-55 (1975).

[294] *Williams*, 132 S. Ct. at 2223, 2232.

[295] *See id.* at 2262, 2264.

[296] JOHN MAXWELL O'BRIEN, ALEXANDER THE GREAT: THE INVISIBLE ENEMY: A BIOGRAPHY 69 (1992).

[297] *Id.* at 68.

[298] *See id.*

[299] *See id.*

[300] *See id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.* at 69.

[305] *Id.*

[306] FED. R. EVID. 703 advisory committee's note.

[307] *Id.*

producing and examining . . . authenticating witnesses."[308] The tension between the 703 majority's logic and the drafters' intent creates a knotty problem for the lower courts.[309]

There may be a way to cut this Gordian knot. A few lower courts have treated Rule 703 as a hearsay exception.[310] In his often cited 1987 article on Rule 703, Professor Rice called for an amendment to Rule 703 to convert the statute into a hearsay exception.[311] In the ensuing years other respected commentators have lent support to Professor Rice's proposal.[312] That proposal squarely poses the question whether the witness's expert screening of the secondhand report is a sufficient guarantee of the report's reliability to lift the bar of the hearsay rule.[313] Whatever else may be said about the wisdom of the proposal, it would directly and cleanly cut through the Gordian knot created by the comments of the 703 majority in *Williams*. The problem would vanish because any secondhand report used under Rule 703 would be automatically admissible as substantive evidence of the truth of the fact stated in the report.

However, until some legislature or court is bold enough to adopt this proposal, lower courts will have to cope with the tension generated by the 703 majority's position. At the very least it would be advisable for lower courts to administer the sort of jury instructions that Justice Alito approvingly mentioned in his plurality opinion. In an extreme case in which the expert's proponent has presented no or clearly insufficient admissible evidence of an essential premise in a secondhand report, the trial judge ought to charge the jury that without such evidence the opinion is "entitled to no weight." In such extreme cases the judge will have to struggle with the decision whether to take the next step seemingly mandated by logic and bar the proponent from presenting the expert opinion to the jury. That struggle is an important reminder of the contemporary relevance of Justice Holmes's insight that "[t]he life of the law [is] not [exclusively] logic . . . ."[314]

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[308] *Id.*

[309] The pun is obvious but apt.

[310] WRIGHT & GOLD, *supra* note 53, at 318; United States v. Unruh, 855 F.2d 1363, 1376 (9th Cir. 1987) ("the expert testimony exception to the hearsay rules"); United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971) ("this exception to the rule against hearsay").

[311] Rice, *supra* note 48 at 587-88.

[312] WRIGHT & GOLD, *supra* note 53 at 318-20; KAYE ET AL., *supra* note 48 §4.6.

[313] *Cf.* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 156, 166-68 (1988) (the Court construes Federal Rule 803(8)(C), dealing with the admissibility of findings in government investigative reports; the Court makes it clear that such findings can quality for admission even if they are not based on the investigator's personal knowledge; in deciding whether to admit the finding, the trial judge should consider whether the investigator possesses relevant expertise).

[314] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

ADMISSIBILITY COMPARED: THE RECEPTION OF INCRIMINATING EXPERT EVIDENCE (I.E., FORENSIC SCIENCE) IN FOUR ADVERSARIAL JURISDICTIONS

Gary Edmond,[*] Simon Cole,[†] Emma Cunliffe,[‡] and Andrew Roberts[§]

INTRODUCTION

> The single most important observation about judicial [gate-keeping] of forensic science is that most judges under most circumstances admit most forensic science. There is almost no expert testimony so threadbare that it will not be admitted if it comes to a criminal proceeding under the banner of forensic science. . . . The applicable legal test offers little assurance. The maverick who is a field unto him- or herself has repeatedly been readily admitted under *Frye*, and the complete absence of foundational research has not prevented such admission in *Daubert* jurisdictions.[1]

There is an epistemic crisis in many areas of forensic science. This crisis emerged largely in response both to the mobilization of a range of academic commentators and critics and the rise and influence of DNA typing. It gained popular and authoritative support through the influence of the National Academy of Science (NAS) and a surprisingly critical report produced under its auspices by a committee of the National Research Council (NRC). Interestingly, as this article endeavors to explain, the courts themselves seem to have played a rather indirect, inconsistent and ultimately ineffective role in the supervision and evaluation of forensic science evidence. Indeed, in the

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[1] Jane Campbell Moriarty & Michael J. Saks, *Forensic Science: Grand Goals, Tragic Flaws, and Judicial Gatekeeping*, 44 JUDGES J. 16, 29 (2005).

aftermath of recent criticism of the forensic sciences, this essay considers the effect of the dominant admissibility standards that operate in four common law jurisdictions. The revealing result seems to be that although admissibility standards vary across these jurisdictions, actual admissibility practices are remarkably consistent. In this article we will question the extent to which courts (and legal personnel) are able to meaningfully invigilate the use of forensic science evidence in criminal proceedings and consider some of the ideological commitments and institutional pressures that might lead judges in all jurisdictions to prefer inclusive approaches to incriminating expert opinions.

In the first part of the article, we compare rules, jurisprudence and practices, across four jurisdictions: the United States, England and Wales, Canada, and Australia.[2] All profoundly shaped by the English common law, these jurisdictions (and their sub-jurisdictions) tend to use a mixture of common law (e.g. England and Wales and Canada), judge-made rules (e.g. the U.S. Federal Rules of Evidence) and statutory schemes (e.g. the Australian *Evidence Act 1995 Cth* and many states in the United States) to regulate the admission of evidence, including expert opinion.[3] These jurisdictions tend to maintain criminal trial processes that remain reasonably similar and facilitate broad brush comparisons.[4]

Forensic science and medical techniques are used routinely in criminal proceedings. We have selected techniques (and technologies) that are not necessarily standardized, but are regularly used in each of the four jurisdictions.[5] Legal recognition and treatment as distinctive types of evidence enables us to consider what these advanced jurisdictions, with different, though evolving, admissibility standards have done (and are doing) in response to the various techniques and opinions. Our findings suggest that admissibility standards, including the first generation of reliability-based standards, seem to make little, if any, difference to (traditional) admissibility decision-making and practice. Allowing for some variation, the same sorts of forensic science evidence are admitted across all jurisdictions, even where the techniques are not demonstrably reliable and the jurisdiction in question has explicit reliability standards and other rules regulating the admission of expert opinion evidence. Moreover, it is our contention that the legal accommodation of the techniques considered in this article exemplifies a more general response to admissibility and the regulation of forensic science and medicine evidence. In the second part of the article we will consider possible explanations and some of the implications of our findings.

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[2] Our study surveys and summarizes the leading decisions rather than a detailed empirical study of actual case practices across jurisdictions. Both would be interesting and informative, but this offers a first attempt to survey leading decisions against formal rules and overarching criminal justice objectives and values.

[3] *See generally* FED. R. EVID.; FED. R. EVID. 702 (Federal Rule of Evidence concerning expert testimony); *Australian Evidence Act 1995* (Cth) (a statutory scheme covering everything from cross examination to admission of evidence).

[4] It should be noted, however, that there are many differences, not all of which should be considered trivial. Canada, for example, has fewer trials before juries than the other jurisdictions. Many prosecutors and judges in the United States are elected, and the United States retains civil juries, making the admissibility of expert opinion evidence an important, and frequently controversial, issue in civil proceedings (e.g. tort and product liability litigation). There are no capital cases or capital juries in England, Canada, and Australia. Australia and England tend to provide *relatively* well-resourced defense lawyers and are more likely to expend state resources on defense experts than most U.S. states. Undoubtedly, these and a myriad of other differences in practice, traditions, and resourcing (of courts, police and forensic sciences, as well as parties) influence the ways in which forensic science and medicine evidence is developed, contested, and admitted.

[5] While there can be quite significant differences in actual practices, many of the techniques feature remarkably similar ingredients across our sample. Many of these similarities flow from information and technology sharing or the use of proprietary systems.

A. Rules of Evidence and Procedure

A fundamental condition of admissibility is that evidence must be relevant.[6] That means it must be capable of rationally influencing the assessment of *facts in issue* (i.e., the contested or material facts).[7] Ordinarily, opinion evidence is not admissible. Witnesses are normally required to testify about facts.[8] There are exceptions for some kinds of opinion evidence. Lay witnesses are frequently allowed to express opinions, especially those necessary to make sense of the witness' perceptions or impressions.[9] It is, for example, not uncommon for a witness to be allowed to express an opinion on events within their experience: such as a person's emotional state; whether someone was intoxicated; and even whether a car was being driven fast or dangerously.[10] Most of the forensic science evidence considered in this article is opinion evidence and subject to exclusionary rules operating in all of our jurisdictions. Because of its great potential to assist the *tribunal of fact*, all jurisdictions maintain an exception for the opinions of "experts" or for opinions based on "specialized knowledge."[11] Though not all require evidence about the reliability of the method or technique, or the expert's ability, for admissibility purposes. In most common law jurisdictions (with a jury), where the admissibility of expert opinion evidence is contested, the trial judge will conduct a hearing (a *voir dire* or *Daubert* hearing) into the admissibility of the evidence. Such hearings are normally held in the absence of the jury.

Once expert opinion evidence is deemed admissible, the expert witness is subject to direct (i.e., examination-in-chief) and limited re-direct (i.e., re-examination) by the party calling the witness and cross-examination by the other parties. It is not uncommon for an expert's report (or part thereof) to be tendered as his or her evidence-in-chief. In most adversarial jurisdictions the trial judge maintains a discretion to exclude otherwise admissible evidence if its reception would result in unfairness, or the value of the evidence is outweighed by any unfair prejudice it might engender.[12] In practice, where expert opinion evidence satisfies the exception to the opinion rule, trial and appellate judges rarely resort to discretionary powers to exclude incriminating evidence. In some jurisdictions (such as England), depending on the kind of evidence, the judge may offer some guidance or cautionary instructions to the tribunal of fact, in others (parts of Australia, under the uniform statutes, for example), there may be a duty to do so.[13] In recent years, in response to challenges and increasing sensitivity to reliability discourses, some judges have been prepared (or obliged), often in consultation with the lawyers, to prescribe the precise wording of parts of an expert's testimony. On some occasions, reading down the confidence or strength of opinions and conclusions operates as an admissibility compromise.

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[6] *See* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 485 (1898).

[7] *See id.* at 267; *see also* FED. R. EVID. 401 (establishing the Federal Rules of Evidence test for what evidence is relevant).

[8] In practice, courts in all jurisdictions acknowledge the blurred boundary between fact and opinion.

[9] *See* FED. R. EVID. 701.

[10] *See, e.g., id.* §§ 701 & 803(3).

[11] *See, e.g., id.* §§ 702-703; *Evidence Act 1995* (Cth) s 79 (Austl.); Criminal Code, R.S.C. 1985, c. C-46 (Can.); Criminal Procedure Rules, (2012), c. 33 §§ 1-2 (Eng.). We use 'tribunal of fact' interchangeably with 'trier of fact' and 'fact-finder.' A jury is the proto-typical tribunal of fact, but increasingly judges (and appellate courts) are involved in fact-finding. Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1521, 1525 (2012) (discussing the role of appellate courts as fact-finders).

[12] *See, e.g.*, FED. R. EVID. 403; *Evidence Act 1995* (Cth) s 130 (Austl.) (codifying the common law *Christie* Discretion first established in *R. v. Christie* AC [1914] 545 (Austl.)); *Evidence Act 2008* (Cth) s 137 (Austl.).

[13] Civil Procedure Rules, (2012), c. 32 § 1 (Eng.); *Evidence Act 1995* (Cth) s 116 (Austl.).

Once expert opinion evidence is deemed admissible, the "weight" attached is a matter for the tribunal of fact based on what transpires at trial (e.g. cross-examination and rebuttal experts), along with any other evidence and instructions.

All of the jurisdictions considered in this article offer some kind of judicial review or appeal mechanism.[14] Trial and appellate courts appear to hold great confidence in the effectiveness of trial safeguards, and the abilities of tribunals of fact (whether judges or juries) and appellate courts to understand and evaluate incriminating expert opinion evidence.

B. The Epistemological Status of the Forensic Identification Sciences

Before moving to review admissibility rules, jurisprudence and practice in the U.S., England and Wales, Canada and Australia, it is helpful to provide a backdrop to the epistemic status of the forensic comparison techniques that form the primary focus of our study.

In what follows, we draw upon studies that have cast doubt on the adequacy of empirical support for the forensic science techniques that are routinely admitted in *all* of our jurisdictions. Our reason for doing so is that the results of these studies will tend to amplify the implications of our findings. In this respect, an important backdrop to our discussion and understanding of the value of the techniques is a recent report by the National Research Council of the United States National Academy of Science (NAS) published in 2009 (hereafter the NRC report).[15]

The NRC report is authoritative, particularly in relation to understanding the value of forensic science and medical evidence and the effectiveness of admissibility standards. The report is particularly illuminating of a range of "identification" sciences; because the multidisciplinary committee responsible for its drafting was surprisingly critical of the research base, or lack thereof, underpinning many techniques that are routinely relied upon in criminal investigations and prosecutions.[16] According to the NRC report:

> The degree of science in a forensic science method may have an important bearing on the reliability of forensic evidence in criminal cases. There are two very important questions that *should* underlie the law's admission of and reliance upon forensic evidence in criminal trials: (1) the extent to which a particular forensic discipline is founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings and (2) the extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards. These questions are significant: The goal of law enforcement actions is to identify those who have committed crimes and to prevent the criminal justice system from erroneously convicting the innocent. So it matters a great deal whether an expert is qualified to testify about

[14] England and Wales also have a free-standing Criminal Cases Review Commission. Peter Duff, *Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner*, 72 MOD. L. REV. 693, 695-96 (2009); *See generally* LAURIE ELKS, RIGHTING MISCARRIAGES OF JUSTICE?: TEN YEARS OF THE CRIMINAL CASES REVIEW COMMISSION (2008).

[15] NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

[16] Harry T. Edwards & Constantine Gatsonis, *Preface* to NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at xix-xx (2009).

> forensic evidence and whether the evidence is sufficiently reliable to merit a fact finder's reliance on the truth that it purports to support. . . . Unfortunately, these important questions do not always produce satisfactory answers in judicial decisions pertaining to the admissibility of forensic science evidence proffered in criminal trials.[17]

And, directly relevant to this article:

> With the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source. . . . The law's greatest dilemma in its heavy reliance on forensic evidence, however, concerns the question of whether—and to what extent—there is science in any given forensic science discipline.[18]

While image evidence, and several other techniques and methods in widespread use were not included within the scope of its purview, many of the Committee's concerns appear readily applicable to these areas of practice.[19]

The NRC report is salient because the inability to support forensic science techniques and derivative opinion evidence with empirical evidence—and this applies to techniques that have been routinely admitted and relied upon for more than a century—seems to be a common feature of practice in all of our jurisdictions. In other words, the NRC report authoritatively exposes the lack of underlying research support for many forensic science and medical techniques in the United States *and elsewhere*.[20]

The NRC report recommends establishing a National Institute of Forensic Sciences to undertake research, standard setting and accreditation, in response to expressed doubts about the ability of lawyers and judges to credibly respond to what is characterized as the parlous state of affairs.[21]

> The report finds that the existing legal regime—including the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial court decisions, the limitations of the adversary process, and judges and lawyers who often lack the scientific expertise necessary to comprehend and evaluate forensic evidence—is inadequate to the task of curing the documented ills of the forensic science disciplines.[22]

It is also important to indicate that the authors have reservations about the value of many types of forensic science and several of those discussed in this article. In

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[17] NAT'L RESEARCH COUNCIL, *supra* note 15, at 9, 87.

[18] *Id.* at 7, 9.

[19] See STEPHEN GOUDGE, INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO 80 (2008) (discussing forensic pathology).

[20] Scholarly criticisms were frequently dismissed or ignored, but it is much more difficult to challenge the NRC report. See Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence*, 61 UNIV. TORONTO L.J. 343, 367-68 (2011). In Australia, forensic sciences are often defended on the basis of standards and accreditation, but the research underlying these standards is far from always obvious. Edmond is a member of the Standards Australia committee tasked with drafting standards for the forensic sciences in Australia. See also Gary Edmond, *What lawyers should know about the forensic 'sciences'*, 36 Adelaide L. Rev. (2014) (forthcoming).

[21] *See* NAT'L RESEARCH COUNCIL, *supra* note 15, at 19.

[22] *Id.* at 85.

particular, we are concerned that fingerprint, bite mark, image and voice comparison evidence is often relied upon or expressed in ways that are not consistent with existing empirical evidence.[23] Each of us has written about problems with expert evidence, and particularly forensic science and forensic medicine, and the manner in which admissibility standards and practice do not seem to prevent problematic forms of expert opinion evidence being adduced and admitted in criminal proceedings.[24] By way of summary, we share the general outlook expressed by the NRC. Our research and observations affirm that techniques routinely relied upon by investigators, prosecutors, jurors and judges are either unreliable or of unknown reliability.[25] This article represents an attempt to consolidate these experiences in a manner that facilitates a systematic comparison capable of illuminating the limits of current standards, practice and personnel when assessed against the overarching objectives of the accusatorial criminal trial.

The NRC report suggests that DNA evidence generally stands on a stronger scientific foundation than these other techniques;[26] though it should not be seen as infallible. There are continuing problems with DNA evidence that extend beyond chain of custody issues, to interpretations (especially of mixed samples and the random match probabilities for sub-populations), how to respond to increasingly sensitive analyses (such as those associated with low copy number techniques), the transportability of microscopic biological traces, and finally, whether the real-world risk of error (laboratory or otherwise) should be imposed on the fantastically large probabilities (and likelihood ratios) routinely

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[23] We are also engaged in debates about the expression of results in reports and testimony as well as the adequacy of the adversarial trial (and the effectiveness of its various processes and safeguards). *See* Gary Edmond, Kristy Martier & Mehere San Roque, *Unsound Law: Issues With ('Expert') Voice Comparison Evidence*, 35 MELB. U. L. REV. 52, 53-54 (2011) (contending that voice comparison evidence is readily admitted when the probative value is unknown and traditional features of the adversarial trial are inadequate to correct the associated problems).

[24] THE LAW COMM'N, EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND AND WALES 14 (2011) (stating that an expert's opinion evidence must satisfy a threshold of acceptable reliability); SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION, 4-5 (2001) (reflecting on methods of criminal identification that have been suspect, such as fingerprint identification); Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 988-91 (2005) (arguing that fingerprint identification is not error free); Simon A. Cole, *Is Fingerprint Identification Valid? Rhetorics of Reliability in Fingerprint Proponents' Discourse*, 28 L. & POL'Y 109, 109-10 (2006) (considering whether or not latent print identification is valid); EMMA CUNLIFFE, MURDER, MEDICINE AND MOTHERHOOD 2-4 (2011) (arguing that behavioral and scientific evidence cannot provide independent proof of guilt); Gary Edmond et al., *'Mere guesswork': Cross-Lingual Voice Comparisons and the Jury*, 33 SYDNEY L. REV. 395, 396 (2011) (outlining the dangers associated with the allowance of jurors to engage in voice identification and comparison); Gary Edmond at al., *Unsound Law: Issues With ('Expert') Voice Comparison Evidence*, 35 MELB. U. L. REV. 52, 53-54 (2011) (contending that voice comparison evidence is readily admitted when the probative value is unknown and traditional features of the adversarial trial are inadequate to correct the associated problems); Gary Edmond et al., *Law's Looking Glass: Expert Identification Evidence Derived from Photographic and Video Images*, 20 CURRENT ISSUES CRIM. JUST. 337, 337-38 (2009) (illustrating limitations with approaches to the use of images as evidence); Gary Edmond et al., *Atkins v. The Emperor: The 'Cautious' Use of Unreliable 'Expert' Evidence*, 14 INT'L J. EVIDENCE & PROOF 146, 146 (2010) (concerning jurisprudential weakness and problems with photo comparison and facial mapping evidence); Andrew Roberts, *Rejecting General Acceptance, Confounding the Gatekeeper: The Law Commission on Expert Evidence* CRIM. L. REV. 551 (2009).

[25] Professor Edmond is engaged in ongoing observational research. Professor Cole participates as an expert witness and advisor. Professor Cunliffe has undertaken empirical research into the relationship between expert testimony and scientific research. Professor Roberts is primarily a scholarly commentator. *See, e.g.*, Michael Lynch & Simon Cole, *Science and Technology Studies on Trial: Dilemmas of Expertise* 35 SOC. STUD. SCI. 269, 272-73 (2005). *See generally* Simon Cole, *A Cautionary Tale About Cautionary Tales About Intervention*, 16 ORG. 121 (2009).

[26] Although, there would appear to be more chance of accidental (though potentially incriminating) contamination with DNA than with most images and voice recordings, for example. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 100-02 (2011).

generated.[27] There are also problems with the manner in which DNA matches should be expressed that seem to raise profound challenges for a system of trials based on lay assessment of technical *and* other forms of evidence.[28] Moreover, it is unlikely that the possibility of full genetic sequencing will eliminate all of these risks, even if it changes what is meant by 'matching' DNA profiles.[29] Many of the original problems with DNA evidence are known (or "visible") today because of the existence and involvement of scientists (e.g. biologists, geneticists and statisticians) from beyond the institutionalized forensic sciences (and commercial providers). Nevertheless, the inclusion of DNA evidence, as a stabilized and research-based technology, enables us to compare practices associated with less stabilized or more controversial techniques, including some that are not supported by empirical evidence and openly questioned by the NRC and/or most attentive academic commentators.

Those allowed to give evidence, as some kind of expert, routinely use apparent or alleged similarities as the basis for opinions pertaining to the identification of a person of interest (POI). In some cases, as with photo-interpretation and bite marks, there is no established technique for explaining how traces—say images or bruising, respectively—relate to the objects that features in them or produced them. Even where the similarities or artifacts are *real* (or, as is more often the case, not contested) in most circumstances we have little idea of how common a particular feature is, or its relationship to (or independence from) other features. Notwithstanding such deficiencies, techniques based on comparisons are routinely used for the purposes of identification or to assist with identification at trial (and during pre-trial processes).[30] There is little, if any, evidence to support the value of opinions derived from these techniques, and furthermore, many of these forms of evidence are obtained in ways that are likely to create or exacerbate errors.

Taking just one example, it is very common for those using comparison techniques where the identity of an offender or source is at stake—and this even applies to latent fingerprint examiners and the interpretation of DNA profiles (especially in mixed samples)—to have access to information that is strictly irrelevant to their analysis but implicates a particular person, or persons, or source. Consequently, we have a range of individuals of varying levels of training and experience, offering opinions about evidence in conditions where there may be few, if any, empirically established methods or standards, and in circumstances where gratuitous information may influence the interpretation.[31] Moreover, attempts to ascertain proficiency or substantially mitigate many of the problems identified by scholarly commentators (and other critics) and the NRC report are highly variable. Rather, as this article illustrates, admissibility decisions are often relied upon by witnesses and investigative institutions to support techniques, and displace the need for scientific validation and proficiency testing.

One caveat. It may well turn out that some of the techniques and opinions we are discussing have considerable probative value. If evidence emerges that supports the

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[27] *Id.* at 101-02.

[28] *Aytugrul v. The Queen* [2012] HCA 15 (Unreported, 18 April 2012) (Austl.) (an example of a case in which the method of expressing DNA evidence was contested); *see also* Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 HASTINGS L.J. 1159, 1180 (2008) (citing research that indicates the method of expressing DNA match evidence can affect jurors).

[29] Ironically, this might be closer to what the latent fingerprint examiners had historically assumed.

[30] Problems with forensic science and medicine apply to pre-trial negotiations, especially plea-bargaining, where the limits of expert opinion evidence might not be recognized.

[31] *See* Itiel E. Dror et al., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 FORENSIC SCI. INT'L 74, 74 (2006). *See generally*, GARRETT, *supra* note 26.

accuracy of these techniques, that could hardly be seen as a vindication of past legal practice and a liberal approach, particularly in those jurisdictions with formal reliability standards. Moreover, future empirical *vindication* will not overcome the ways in which a range of biases and procedural problems, that may contaminate forensic science practice and conclusions, were and are routinely trivialized. Nor will it address persistent and unanswered questions about the ability of adversarial criminal proceedings and the various participants (i.e., lawyers, forensic scientists, judges and jurors) to credibly manage even highly reliable techniques. It is our contention that unreliable and speculative incriminating expert opinion evidence always threatens important institutional values such as rectitude of decision and the fairness of accusatorial proceedings.[32]

I. COMPARISON

Our comparative review begins with the U.S. because of its influence in the wake of the rise of DNA evidence and the institution of reliability standards and admissibility jurisprudence following the seminal *Daubert v. Merrell Dow Pharmaceuticals, Inc.* decision in 1993.[33]

A. The United States: Admissibility Standards, Jurisprudence, and Practice

The United States is a federal system encompassing 50 state courts as well as federal courts. In recent decades an expectation has emerged that judges will assume a "gate-keeping" role in controlling the admission of expert opinion evidence. Most, but not all, jurisdictions adhere to one of two principal approaches which are generally known by their leading cases: *Frye v. United States* (1923) and *Daubert v. Merrell Dow Pharmaceuticals* (1993).[34] Today, 29 states and the federal courts adhere to *Daubert* or a *Daubert*-like model.[35] *Daubert* has been described as a 'reliability-validity' model.[36] The principal attribute of *Daubert*, as opposed to *Frye,* is that it mandates that the trial court undertake an independent assessment of the evidence to determine its admissibility.[37] This aspect of *Daubert* has been often criticized, most conspicuously in Chief Justice Rehnquist's dissent, for its assumption that judges without scientific training are competent to evaluate scientific evidence.[38] Though commonly described as a four or five-part test, *Daubert* is really a two-part test derived from Rule 702 of the Federal Rules of Evidence (FRE).[39] The two criteria for admissibility under *Daubert* are relevance and

[32] *See* Gary Edmond & Andrew Roberts, *Procedural Fairness, the Criminal Trial and Forensic Science and Medicine* 33 SYDNEY L. REV. 359 (2011).

[33] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[34] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); *Daubert*, 509 U.S. at 579.

[35] David E. Bernstein & Jeffrey D. Jackson, *The* Daubert *Trilogy in the States*, 44 JURIMETRICS J. 351, 355-56 (2004).

[36] DAVID H. KAYE ET AL., THE NEW WIGMORE: EXPERT EVIDENCE 288 n.22 (2d ed. 2010).

[37] *Daubert*, 509 U.S. at 585-93.

[38] *Id.* at 600-01.

[39] *Id.* at 588-89. Rule 702 of the Federal Rules of Evidence was designed to govern the admissibility of expert opinion evidence in United States Federal Courts (as an exception to the general prohibition on opinion evidence provided by the exclusionary Rule 701). The original version of Rule 702 read, "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 thereto in the form of an opinion or otherwise"; *See* FED. R. EVID. 702 (1975) (amended 2011).

reliability.[40] It was by way of explicating the idea of "reliability," that the Court articulated four (or five) criteria: (1) testing, (2) peer review and publication, (3) error rate and standards,[41] and (4) general acceptance in the relevant scientific community.[42] Not intended as a checklist, the criteria were to be applied flexibly to assist with admissibility decision-making.

Daubert was explicated in two further appeals to the Supreme Court, often described as its 'progeny': *General Electric v. Joiner* and *Kumho Tire v. Carmichael.*[43] Reiterating the importance of flexibility, in *Kumho* the Court explained that the *Daubert* criteria may be applied to admissibility determinations for non-scientific forms of expert evidence—i.e., "'technical' or 'other specialized' knowledge."[44] *Joiner,* importantly, states that the standard of review for admissibility decisions by trial courts is "abuse of discretion."[45] In consequence, admissibility decisions are not subject to stringent review and similar types of expert evidence may be treated disparately across jurisdictions, courtrooms and cases, as well as over time.

Rule 702 of the Federal Rules of Evidence, on which *Daubert* and *Kumho* were based, was revised in 2000 to make the need for 'reliability' explicit.[46] It now reads:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[47]

The revised version of Rule 702 seems to have made little discernible difference to practice and is largely conceived as a statutory explication of the *Daubert* and *Kumho* decisions.

Sixteen U.S. states, including some of the most populous, continue to adhere to the 'general acceptance' approach embodied in the earlier *Frye* decision.[48] *Frye* has been

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[40] *Daubert*, 509 U.S. at 594-95; *see* FED. R. EVID. 401, (stating that 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence).

[41] It is these two items which are sometimes—quite logically since they have little obvious relation—disaggregated to purportedly render *Daubert* a five-, rather than a four-, part test. *See, e.g.*, Bond v. State, 925 N.E.2d 773, 779 (Ind. Ct. App. 2010).

[42] *Daubert*, 509 U.S. at 593-94. Sometimes the existence and use of standards is included as a fifth criterion. Perhaps the most notorious addition occurred when, on remand, Judge Kozinski added anxiety about 'science for litigation' into the mix. *See* Gary Edmond, *Supersizing* Daubert*: Science for Litigation and its Implications for Legal Practice and Scientific Research*, 52 VILL. L. REV. 857, 864-65 (2007).

[43] Kumho Tire v. Carmichael, 526 U.S. 137 (1999); General Electric v. Joiner, 522 U.S. 136 (1997). Some legal scholars find *Kumho* to be the most coherent of the three opinions (*Kumho, Joiner,* and *Daubert*) and argue that evidence scholars should speak of a '*Kumho* approach' to evidence, rather than a '*Daubert* approach.' *E.g.*, D. Michael Risinger, *Goodbye to All That, or A Fool's Errand, by One of the Fools: How I Stopped Worrying About Court Responses to Handwriting Identification (and "Forensic Science" in General) and Learned to Love Misinterpretations of* Kumho Tire v. Carmichael, 43 TULSA L. REV. 447, 462, 467 (2007).

[44] *Kumho*, 526 U.S. at 147-48.

[45] *Joiner*, 522 U.S. at 141.

[46] FED. R. EVID. 702(c) (2000) (amended 2012).

[47] *Id.* We use the terms 'trier of fact' and 'tribunal of fact' interchangeably.

[48] Alice B. Lustre, Annotation, *Post-*Daubert *Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453 (2011).

called a 'deference' approach in that, rather than asking the trial judge to evaluate the reliability and validity of proffered evidence, *Frye* suggests that the judge try to ascertain how those scientists best positioned to undertake such an evaluation—'the relevant scientific community'—evaluate the evidence.[49]

Though deference and independent assessment of validity-reliability are quite different philosophically, in practice the two approaches have tended to produce remarkably similar outcomes. Indeed, empirical studies have observed little difference in outcomes between *Frye* and *Daubert* jurisdictions.[50] While the *Daubert* approach retains "general acceptance" as one of its "factors," this does not provide a very persuasive explanation for the apparent convergence.[51] Interestingly, studies suggest that U.S. judges struggle with several of the *Daubert* criteria, and are not in a position to make an assessment of the relevant community or the extent of acceptance.[52] Instead, they tend to use heuristics, such as credentials and experience, when making admissibility decisions in criminal trials and appeals.[53]

In addition, six U.S. states have been characterized as "hybrids" because their admissibility standards combine features from *Frye* and *Daubert*.[54] Three U.S. states have their own independent admissibility regimes.[55] Once again, these alternative admissibility standards have not produced practices or outcomes that diverge significantly from those associated with *Frye* and *Daubert*.

Among evidence scholars (and other observers), the U.S. courts' handling of forensic evidence in admissibility hearings and trials has been soundly and nearly universally excoriated.[56] This critical view was recently endorsed by the NRC Report, which characterized U.S. courts as "utterly ineffective" in using the law of expert evidence to encourage "forensic science professionals . . . to establish either the validity of [their] approach or the accuracy of [their] conclusions."[57]

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[49] *See* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1205 (1980). *Frye* was decided in 1923 but it was not widely used until much later.

[50] *E.g.*, Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards,* 91 VA. L. REV. 471, 511 (2005); Veronica B. Dahir et al., *Judicial Application of* Daubert *to Psychological Syndrome and Profile Evidence,* 11 PSYCHOL. PUB. POL'Y & L. 62, 62, 64, 78 (2005); Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision,* 8 PSYCHOL. PUB. POL'Y & L. 251, 252, 285-86 (2002); Henry F. Fradella et al., *The Impact of* Daubert *on the Admissibility of Behavioral Science Testimony,* 30 PEPP. L. REV. 403, 443-44 (2003); Jennifer Groscup et al., *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases,* 8 PSYCHOL. PUB. POL'Y & L. 339, 339 (2002).

[51] Cheng & Yoon, *supra* note 50, at 478.

[52] Groscup et al., *supra* note 50, at 341, 367.

[53] *Id.* at 357.

[54] Lustre, *supra* note 48.

[55] *Id.*

[56] *E.g.*, DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: FORENSICS (Student ed. 2008); KELLY M. PYREK, FORENSIC SCIENCE UNDER SIEGE: THE CHALLENGES OF FORENSIC LABORATORIES AND THE MEDICO-LEGAL DEATH INVESTIGATION SYSTEM (2007); Margaret A. Berger, *What Has a Decade of* Daubert *Wrought?,* 95 AM. J. PUB. HEALTH S59 (2005); Paul C. Giannelli, *The Supreme Court's "Criminal"* Daubert *Cases,* 33 SETON HALL L. REV. 1071 (2003); Jennifer L. Mnookin, *Fingerprints: Not a Gold Standard,* 20 ISSUES IN SCI. & TECH. 47 (2003); Risinger, *supra* note 43; Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCI. 892 (2005). *E.g.*, André Moenssens, *Fingerprint Identification: A Valid Reliable "Forensic Science"?,* 18 CRIM. JUST. 31 (2003); André Moenssens, *Palmprint and Handwriting I.D. Satisfy* Daubert *Rule*, THE CRIMINALIST (Spring 2004), *available at* http://njiai.org/Criminalist0604.pdf.

[57] NAT'L RESEARCH COUNCIL, *supra* note 15, at 53.

Other potential methods of controlling the reception of expert opinion in U.S. law include the probative value/prejudice discretion and jury instructions. Rule 403, embodying the federal version of the discretion, states that evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusi[on of] the issues, [or] misleading the jury, [or by considerations of] undue delay, [waste of] time, or needless[presentation of] cumulative evidence."[58] Techniques deemed admissible under Rule 702 might, in theory, run afoul of Rule 403. Courts reluctant to tangle with complex reliability debates might go directly to Rule 403 to make a determination on the admissibility of evidence. Such reasoning appears most common in cases involving lie detection techniques, such as the polygraph. Some courts have evaded technical debate over the accuracy of the polygraph by finding that, whatever its accuracy, its potential for prejudice is greater.[59] Because many jurisdictions maintain an explicit reliability standard, once expert opinion evidence is deemed admissible, and therefore implicitly reliable, there is limited scope for subsequently finding that the evidence will create unfair prejudice.[60] Admissibility standards (such as Rule 702), in effect, almost always trump exclusionary discretions (such as rule 403).[61]

Courts might also seek to counter expert testimony that is exaggerated or of questionable validity through jury instructions, similar to those that have been delivered by some courts regarding the accuracy of eyewitness identification or extensions of the standard instructions for expert witnesses. Thus far, the use of jury instructions for forensic science in the U.S. has been quite limited, and much more limited than in the other jurisdictions considered in this article.[62]

Across the many U.S. jurisdictions, there is considerable variation in the selection and quality of judges, prosecutors and defenders, as well as the resources available to public defenders. It is often difficult to obtain public funding for a defense expert, especially in state-based prosecutions.[63] There is, in addition, tremendous variation in the provision and quality of forensic science and medicine evidence by the state. Some facilities employ personnel with academic-level scientific credentials and state of the art equipment and facilities. Others are tiny, poorly equipped laboratories operated by a handful of employees with modest scientific credentials, at best. Some forensic disciplines are situated within police departments, rather than crime laboratories. Some states still rely on coroners, rather than medical examiners. Virtually all U.S. public forensic science providers suffer from serious resource constraints.

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[58] FED. R. EVID. 403.

[59] DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: STANDARDS, STATISTICS AND RESEARCH ISSUES 60 (2002).

[60] *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993); United States v. Dorsey, 45 F.3d 809, 815-16 (4th Cir. 1995). The example of the lie detector probably encapsulates older attempts to manage polygraphs that pre-date the Federal Rules of Evidence and *Daubert*. We might expect that rule 702, *Daubert*, and rule 403 will be applied to manage new techniques of lie detection associated with scanning technologies such as fMRI. Although, several appellate courts have suggests that rule 403 might have more purchase in relation to expert evidence than other kinds of evidence.

[61] *Daubert*, 509 U.S. at 595.

[62] United States v. Starzecpyzel, 880 F. Supp. 1027 (S.D.N.Y. 1995). Perhaps the best known instruction was delivered by the court which analyzed forensic document examination to harbor piloting. State v. Quintana, 103 P.3d 168 (Ct. App. Utah 2004) (Thorne, J., concurring); United States v. Zajac, 2010 WL 4363637 (D. Utah 2010). Disclosure: One of the authors was a consultant to the defendant in this case. Jury instructions have been proposed by attorneys, but not delivered by judges, in cases involving latent prints, and perhaps other areas as well.

[63] Ake v. Oklahoma, 470 U.S. 68, 83 (1985); *see* Paul C. Giannelli, *The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004).

1. Latent Fingerprint Evidence

Latent print evidence was first deemed admissible in the United States in *People v. Jennings* in 1911.[64] In that case, the primary defense argument was oriented toward treating the evidence as "ostensive" evidence—that is, evidence that did not require expert interpretation—rather than exclusion.[65] In finding the testimony of the latent print expert admissible, the decision relied primarily on two propositions which formed the backbone of many subsequent decisions: first, the fact that numerous authorities stated that latent print evidence was reliable; and, second, the reasoning that the reliability of latent print evidence may be inferred from the supposed "uniqueness" of the human friction ridge skin that produces the impressions we call "fingerprints."[66] For good reason, the second proposition has been characterized as the "fingerprint examiner's fallacy."[67]

Subsequent cases generally followed this pattern, culminating perhaps in *Grice v. State,* where the Texas Court of Criminal Appeals suggested "that instead of the state being called upon . . . to offer proof that no two finger prints are alike, it may now be considered in order for those taking the opposite view to assume the burden of proving their position."[68] With this ruling the admissibility of latent print evidence no longer seemed susceptible to challenge until the *Daubert* decision in 1993.

Beginning with *United States v. Mitchell*, there have been numerous admissibility challenges to latent print evidence in the U.S in the aftermath of *Daubert*.[69] Many of these cases have generated reported decisions. In almost all cases, latent print evidence was deemed admissible.[70] Page *et al.* found that 93 per cent of admissibility challenges to

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[64] 96 N.E. 1077, 1083 (Ill. 1911).

[65] *Id.* at 1082. This approach has been adopted by some courts in India. Jennifer L. Mnookin, Images of Truth: Evidence, Expertise, and Technologies of Knowledge in the American Courtroom (1999) (unpublished Ph.D. thesis, Massachusetts Institute of Technology) (on file with author).

[66] *Id.* at 1082.

[67] Simon A. Cole, *Grandfathering Evidence: Fingerprint Admissibility Ruling from Jennings to Llera Plaza and Back Again*, 41 AM. CRIM. L. REV. 1189, 1197 (2004); *see* Simon A. Cole, *Forensics Without Uniqueness, Conclusions Without Individualization: The New Epistemology of Forensic Identification*, 8 L. PROBABILITY & RISK 233, 233-255 (2009).

[68] Grice v. State, 151 S.W.2d 211, 221 (Tex. Crim. App. 1941).

[69] United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004). Although *Mitchell* was the earliest post-*Daubert* admissibility challenge to latent print evidence, heard in 1999, the trial court did not issue a written ruling (after a five-day admissibility hearing), and the appellate decision was not issued until 2004. By that time, cases whose admissibility hearings (or refusals to hold admissibility hearings) has been held later, such as *Havvard,* had already become law, including at least one case, *Llera Plaza,* which had relied upon the admissibility hearing record generated by *Mitchell*. When it finally appeared, however, the 2004 opinion by a respected justice on the Third Circuit of Appeals was quite comprehensive. The decision is perhaps most notable for its very weak interpretation of *Daubert*, in which evidence that relies on 'testable' propositions is deemed admissible, even if, even after nearly a century of courtroom use, those propositions have never been formally 'tested', but only subjected to what the court termed—apparently without irony—'implicit testing.' *See* Simon A. Cole, *'Implicit Testing': Can Casework Validate Forensic Techniques?,* 46 JURIMETRICS J. 117 (2006).

[70] Mara L. Merlino et al., *Meeting the Challenges of the* Daubert *Trilogy: Refining and Redefining the Reliability of Forensic Evidence,* 43 TULSA L. REV. 417 (2007). One group of commentators developed a useful taxonomy summarizing the reasoning used by the federal courts to continue to admit latent fingerprint evidence in this substantial body of cases. For them, the taxonomy amounts to "little more than a catalog of evasions." FAIGMAN ET AL., *supra* note 56, at 187. Reasons include: refusing to hold an admissibility hearing (*e.g.*, United States v. Reaux, 2001 U.S. Dist. LEXIS 11883 (E.D. La. 2001)); reversing of the burden of persuasion (*e.g.*, United States v. Rogers, 26 Fed. App'x 171 (4th Cir. 2001)); misinterpreting *Daubert* and *Kumho* (*e.g.*, United States v. Havvard, 117 F. Supp. 2d 848 (S.D. Ind. 2000); United States v. Havvard, 260 F.3d 597 (7th Cir. 2001)); deferring to the pro-admissibility decisions produced by other courts (*e.g.*, *Havvard*); emphasizing the 'flexibility' language in *Daubert* (*e.g., Rogers*); "bringing the standards down to meet the expertise" (*e.g.*, United States v. Cline, 188 F. Supp. 2d 1287 (D. Kan. 2002)); and relegating the issues to weight rather than admissibility (*e.g.*, *Cline*). Faigman and his colleagues found the reasoning in state cases much the same, regardless of whether the jurisdiction adhered to *Frye* or *Daubert*. "Whatever route is taken," they note dryly,

latent print evidence resulted in unrestricted admission, and that figure is probably conservative given that many of the cases coded as "exclusions" were either only partial exclusions, concerned case specific issues peripheral to reliability, or were reversed on appeal.[71]

The leading case in the post-*Daubert* era is *United States v. Havvard.*[72] The trial court described latent print evidence as "the very archetype of reliable expert testimony."[73] Undoubtedly, the most notorious appeal was *United States v. Llera Plaza.*[74] It represented the first time in nearly a century that latent print evidence was substantially restricted or impugned in any way.[75] Based on the stipulated admissibility hearing record from *Mitchell,* the court found latent print evidence wanting when judged against the *Daubert* "factors,' with the exception of 'general acceptance."[76] The court did not, however, exclude the latent print evidence, preferring to opt for what has subsequently been labeled "split testimony."[77] That is, the examiners were permitted to describe similarities between the two prints but prevented from expressing an opinion about the significance of those findings of similarity.[78] Following a motion for reconsideration and a live hearing, the court reversed itself.[79] Perhaps the most significant move was shifting the burden of persuasion to the defendant and requiring him to show that latent print evidence is *un*reliable.[80]

U.S. courts almost always rule that latent print evidence satisfies whatever admissibility threshold is in place.[81] The few exceptions to this overall trend are: *Virgin Islands v. Jacobs*, in which the government put on no case whatsoever in response to the defendant's motion to exclude the evidence; *Commonwealth v. Patterson,* in which

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"the destination is admission." FAIGMAN ET AL., *supra* note 56, at 212; Simon A. Cole, *Out of the* Daubert *Fire and into the Fryeing Pan? The Admissibility of Latent Print Evidence in* Frye *Jurisdictions,* 9 MINN. J. L. SCI. & TECH. 453 (2008). It is possible, however, that *Frye* jurisdictions, somewhat counter intuitively, offer a more hospitable forum for admissibility challenges to latent print evidence than do *Daubert* jurisdictions. The *State v. Rose* decision provides some anecdotal support for this notion, but it is, of course, difficult to conclude much from a single case.

[71] Mark Page et al., *Forensic Identification Science Evidence Since Daubert: Part I—A Quantitative Analysis of the Exclusion of Forensic Identification Science Evidence*, 56 J. FORENSIC SCI. 1180 (2011).

[72] United States v. Havvard, 260 F.3d 597 (7th Cir. 2001).

[73] United States v. Havvard, 117 F. Supp. 2d 848, 855 (S.D. Ind. 2000).

[74] United States v. Llera Plaza, 179 F. Supp. 2d 492 (E.D. Pa. 2002) *vacated*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).

[75] *Id.* at 494. A second reason for its prominence was probably the eminence of the trial judge.

[76] *Id.* at 515.

[77] Laura Tierney, *Forensic Science Disciplines and* Daubert*: A Trend Toward "Split Testimony,"* Impression & Pattern Evidence Symposium (2010).

[78] *Id.*

[79] United States v. Llera Plaza, 188 F. Supp. 2d 549, 570 (E.D. Pa. 2002).

[80] *But see, e.g.*, FAIGMAN ET AL., *supra* note 56; Cole, *supra* note 67, *passim*; David H. Kaye, *The Nonscience of Fingerprinting:* United States v. Llera Plaza, 21 QLR 1073 (2003); Tara Marie La Morte, *Sleeping Gatekeepers:* United States v. Llera Plaza *and the Unreliability of Forensic Fingerprinting Evidence under* Daubert, 14 ALB. L.J. SCI. & TECH. 171 (2003). Among the most perplexing aspects of the opinion was the way in which the discovery, in the live hearing, that the U.S. Federal Bureau of Investigation imposed extremely *easy* proficiency tests on its examiners somehow increased the court's confidence in the reliability of latent print identification. Another curious aspect of the opinion, quite relevant to the cross-national focus of this article, was the court's reliance on events in the U.K.—specifically its recent abandonment of its historic '16-point standard' for declaring a latent print 'identification' in favor of the North American practice of having no standard at all—as somehow vouching for the reliability of latent print evidence in the U.S., based on the logically and historically dubious reasoning that the British had 'invented' latent print identification. *See* Cole, *supra* note 67.

[81] Cole, *supra* note 70, at 516; Jennifer L. Mnookin, *The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate*, 7 L. PROBABILITY & RISK 127 (2008).

Supreme Judicial Court of Massachusetts deemed latent print evidence in general admissible, but excluded evidence based on "simultaneous" or "cluster" impressions; and, *United States v. Llera Plaza I* (discussed previously).[82] In addition, Judge Michael of the Fourth Circuit Court of Appeals issued a strong dissent to the upholding of the trial court's admission of latent print and handwriting evidence in *United States v. Crisp*.[83] Another glimmer of dissent may be found in a concurring opinion in *State v. Quintana*, where Judge Thorne, though agreeing that latent print evidence should be admissible, argued that the defendant should be entitled to a jury instruction on the fallibility and limitations of latent print evidence.[84]

The most significant exception, however, was *State v. Rose*, in which a Maryland trial judge excluded latent print evidence in a capital murder trial.[85] The government's motion for reconsideration was unsuccessful, and, because Maryland does not allow interlocutory appeals, this decision effectively ended the case.[86] Interestingly, the case was re-filed in federal court, shifting the case from a *Frye* to a *Daubert* jurisdiction, where the evidence was subsequently deemed admissible.[87] *Rose* is one of a handful of admissibility decisions written after the publication of the landmark NRC report.[88] These decisions are significant because it seems plausible that the NRC Committee's findings might have altered the courts' overwhelming tendency toward admission. Specifically, the Report concluded that "ACE-V," the "methodology"[89] that U.S. latent print examiners purport to use, is not validated, and that "individualization," the only inculpatory testimonial conclusion that U.S. latent print examiners are permitted to offer, is not empirically sustainable.[90] The Committee's ability to find only "limited" information on the accuracy and reliability of latent print identification would seem to have some bearing on the admissibility of the evidence.[91] Although the Report never explicitly takes a position on the aforementioned cases, its discussion of cases admitting latent print evidence assumes a critical tone.[92]

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[82] John P. Black, *Pilot Study: The Application of ACE-V. to Simultaneous (Cluster) Impressions,* 56 J. FORENSIC IDENTIFICATION 933 (2006) (discussing a description of 'simultaneous' impressions)

[83] United States v. Crisp, 324 F.3d. 261, 272 (4th Cir. 2003).

[84] State v. Quintana, 2004 UT App 103 P.3d 168, 170 (Thorne, J., concurring).

[85] State v. Rose, No. K06-0545 (Cir. Ct. Baltimore Cty. Md. 2008).

[86] *Id.*

[87] United States v. Rose, 672 F. Supp. 2d 723, 726 (D. Md. 2009).

[88] NAT'L RESEARCH COUNCIL, *supra* note 15.

[89] Sandy L. Zabell, *Fingerprint Evidence*, 13 J.L. & POL'Y 143, 178 (2005). It is almost certainly not correct to call ACE-V. a methodology. Courts generally do so, however, and the dispute is probably of minor importance. *Id.* at 177-78.

[90] NAT'L RESEARCH COUNCIL, *supra* note 15.

[91] *Id.* at 142. See also Expert Working Group on Human Factors in Latent Print Analysis, *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (U.S. Department of Commerce, National Institute of Standards and Technology, 2012). Commissioned by the National Institute of Science and Technology (NIST) and the National Institute of Justice (NIJ) and focused exclusively on latent fingerprints, this multi-authored, multidisciplinary report endorses and develops the concerns expressed in by the NRC committee.

[92] *Id.* at 103-05. It calls evidence scholars' critiques of *Crisp* 'telling' and notes that the Crisp Court's assertion of the 'reliability' of latent print evidence rested solely upon legal precedents but "pointed to no studies supporting the reliability of fingerprint evidence." The Report accuses the *Havvard* Court of 'overstat[ing]' the expert's testimony and "giv[ing] fuel to the misconception that the forensic discipline of fingerprinting is infallible." The Report is conspicuously not commensurately critical of the *State v. Rose* decision excluding latent print evidence, which the Report commends for going "into considerable detail."

Nevertheless, the NRC Report has not exerted the effect that one might have anticipated.[93] There have been no cases excluding latent print evidence since its release. Anecdotally, where the evidence is challenged, courts appear to be eschewing blanket admission or exclusion in favor of the "split testimony" approach.[94] Some courts have precluded very strong conclusions couched in words like "individualized", "identification to the exclusion of all others", and "absolute" by restricting witnesses to describing similarities between two prints but not offering an opinion as to the meaning of those findings. Given the position adopted in the NRC Report, split testimony is likely to remain an attractive option for trial courts.

2. DNA Evidence

During the earliest years in which DNA evidence was introduced, its admissibility was extensively litigated in the U.S. in a series of contests, sometimes labeled as the "DNA wars."[95] In the earliest cases, DNA evidence was either not challenged or not challenged competently, and it was routinely admitted.[96] In later cases, defense attorneys enlisted well-credentialed molecular biologists who were able to gradually expose sloppy practices, failure to adhere to protocols, and unprincipled (and biased) interpretations of data.[97] These interventions and criticisms produced a number of cases in which state courts excluded DNA results, perhaps most famously in *People v. Castro*.[98] Not insignificantly, these exclusions were quickly followed by federal courts deeming similar evidence admissible; in *United States v. Jakobetz* and *United States v. Yee*.[99]

Successful challenges to the admissibility of DNA evidence drew on population genetics to challenge the calculation of the "random match probability" (RMP) which is generally a vital component in the interpretation of DNA evidence. Drawing on debates among geneticists about human mating patterns, defendants argued that the state's RMP calculations were not accepted in the scientific community. These cases helped to trigger the intervention of the National Academy of Sciences—through its National Research Council committees. The NRC issued two reports, in 1992 and 1996, each of which endorsed two different ways of estimating the RMP, the "ceiling principle" and the "product rule" respectively.[100] Following the first report, some courts excluded RMPs

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[93] *See* Harry Edwards, *Solving the Problems That Plague the Forensic Science Community*, 50 JURIMETRICS J. 5 (2010).

[94] Tierney, *supra* note 77. Simon A. Cole, *Splitting Hairs? Evaluating 'Split Testimony' as an Approach to the Problem of Forensic Expert Evidence,* 34 SYDNEY L. REV. 459 (2011) (discussing 'split testimony').

[95] *See* JAY D. ARONSON, GENETIC WITNESS: SCIENCE, LAW, AND CONTROVERSY IN THE MAKING OF DNA PROFILING (2007); DAVID H. KAYE, THE DOUBLE HELIX AND THE LAW OF EVIDENCE (2010). *See also* MICHAEL LYNCH ET AL., TRUTH MACHINE: THE CONTENTIOUS HISTORY OF DNA FINGERPRINTING (2008); Sheila Jasanoff, *The Eye of Everyman: Witnessing DNA in the Simpson Trial,* 28 SOC. STUDIES OF SCI. 713 (1998); Eric Lander, *DNA Fingerprinting: Science, Law, and the Ultimate Identifier, in* THE CODE OF CODES: SCIENTIFIC AND SOCIAL ISSUES IN THE HUMAN GENOME PROJECT 191 (Daniel J. Kevles & Leroy Hood eds., 1992); Michael Lynch, *The Discursive Production of Uncertainty: The OJ Simpson 'Dream Team' and the Sociology of Knowledge Machine,* 28 SOC. STUDIES OF SCI. 829 (1998); Jennifer L. Mnookin, *People v. Castro: Challenging the Forensic Use of DNA Evidence, in* EVIDENCE STORIES 207 (Richard Lempert ed., 2006); William C. Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the 'DNA War',* 84 J. CRIM. L. & CRIMINOLOGY 22 (1993).

[96] ARONSON, *supra* note 95, at 41; KAYE, *supra* note 95, at 65.

[97] ARONSON, *supra* note 95, at 42.

[98] 545 N.Y.S.2d 985, 980 (N.Y. Sup. Ct. 1989). *See also* State v. Schwartz, 447 N.W.2d 422, 428 (Minn. 1989); ARONSON, *supra* note 95, at 57; KAYE, *supra* note 95, at 74; Thompson, *supra* note 95, at 42-43.

[99] ARONSON, *supra* note 95, at 118, 120; KAYE, *supra* note 95, at 75, 94.

[100] ARONSON, *supra* note 95, at 153; KAYE, *supra* note 95, at 98.

proffered by the government: *Commonwealth v. Lanigan, State v. Bible, State v. Cauthron,* and *State v. Anderson*.[101] The second report, however, practically eliminated admissibility challenges based on population genetics. to the extent that the government asserted that it was adhering to the NRC recommendation, admissibility challenges were unlikely to succeed, and subsequent cases upheld admissibility.[102] Since the mid-1990's DNA evidence in general has been universally admissible.[103]

Targeted admissibility challenges are still made. In *People v. Venegas,* the California Supreme Court reversed a conviction because of an improper "binning" procedure in calculating the RMP.[104] Another avenue of challenge concerns how a "cold" database search affects the calculation of the RMP. Since statisticians disagreed about how the fact that a DNA association was generated through a database search should be handled (though all agreed that it mattered), defendants argued that the government's method of calculating the RMP was not "generally accepted."[105] DNA evidence was excluded on this basis in *United States v. Jenkins,*[106] though, this ruling was overruled by the D.C. Court of Appeals in an interlocutory appeal.[107] The appeals court reasoned that the disagreement over which statistic was appropriate to present to the jury fell into the "legal" rather than the "scientific" domain and thus a decision that could be made by the trial court without deferring to the "relevant scientific community."[108] The California Supreme Court, on the other hand, denied a similar appeal by simply rejecting what to statisticians would be an indisputable point—that the manner in which the search is conducted affects the probability that one can assign to the result of that search.[109] The Court concluded that the fact that database search was conducted "simply does not matter."[110] Two years later, however, the California Supreme Court reached the same result but switched its rationale to one more like that employed in *Jenkins*.[111]

There has been some litigation about the conclusions that DNA analysts should be permitted to state in their testimony and that prosecutors should be permitted to state in their summations. In several cases, defendants challenged the use of likelihood ratios to present the probative value of DNA mixtures. These challenges were all unsuccessful.[112] In *Commonwealth v. Girouard,* the defendant sought to exclude what he characterized as

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[101] KAYE, *supra* note 95, at 107.

[102] *Id.* at 158.

[103] ARONSON, *supra* note 95, at 173; DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: FORENSICS 62 (Student ed. 2008); NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 99 (2009). Perhaps the most famous motion to exclude DNA evidence was one that was never filed. Although the defendant's "Dream Team" prepared an extensive motion to exclude DNA evidence in *People v. O.J. Simpson*, sometimes called the "Trial of the Century," they withdrew the motion early in 1995. Instead, the defense team famously—and generally, it would appear, successfully—opted to attack the weight of the evidence at trial by showing sloppy procedures, inadvertent contamination, and possible planting of evidence. *See* ARONSON, *supra* note 95, at 173; KAYE, *supra* note 95, at 152-53; Michael Lynch, *The Discursive Production of Uncertainty: The OJ Simpson 'Dream Team' and the Sociology of Knowledge Machine,* 28 SOC. STUDIES OF SCI. 829, 830 (1998); William C. Thompson, *Proving the Case: The Science of DNA: DNA Evidence in the O.J. Simpson Trial,* 67 U. COLO. L. REV. 827, 831-40 (1996).

[104] People v. Venegas, 954 P.2d 525, 553-55 (Cal. 1998).

[105] *Id.* at 549.

[106] United States v. Jenkins, 887 A.2d 1013, 1015-16 (D.C. Cir. 2005).

[107] *Id.* at 1016.

[108] *Id.* at 1025-26.

[109] People v. Johnson, 43 Cal. Rptr. 3d 587, 590 (Cal. Ct. App. 2006).

[110] *Id.* at 598.

[111] People v. Nelson, 185 P.3d 49, 66 (Cal. 2008).

[112] FAIGMAN ET AL., *supra* note 103, at 90.

an overstated conclusion by the state's DNA expert: that "no one other than [the defendant] is the donor of the DNA."[113] The trial court admitted the testimony, and the Supreme Judicial Court of Massachusetts upheld this decision, reasoning that any problems with such testimony could be rectified through cross-examination or rebuttal expert testimony.[114] In *McDaniel v. Brown*, the Supreme Court accepted that the state's witness had made erroneous calculations and committed the "prosecutor's fallacy."[115] The court adverted to the impropriety of the prosecutor's fallacy, but concluded that the defendant had legally forfeited the claim.[116]

There has thus far been only a small amount of litigation over DNA profiling techniques more exotic than the STR testing that has become standard. An admissibility challenge to Y-STR haplotyping failed in *Curtis v. State,* and this result was upheld by the appellate court.[117] Similarly, a trial court admitted mitochondrial DNA profiling in *State v. Pappas,* and this result was upheld by the Supreme Court of Connecticut.[118] The Court found the procedures for mitochondrial DNA testing to be "generally accepted in the scientific community" and "that the trial court did not abuse its discretion in ruling that the statistical methods used to derive that mtDNA type frequency in this case were scientifically valid," even though a defense expert demonstrated that the particular calculations advanced by the government's expert were flawed.[119] In marked contrast to England, Wales and Australia (more below), there have been no published U.S. cases concerning low copy number (LCN) DNA profiling, though the use of LCN has been litigated.[120] Notably, some of the principal defenders of the use of DNA profiling during the "DNA wars," such as Bruce Budowle, formerly of the FBI, have emerged as critics of LCN.[121]

3. Bite marks

Bite mark evidence has almost always been found admissible by U.S. courts.[122] The earliest reported case seems to be *Doyle v. State* from 1954.[123] Typically, for the time,

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[113] Commonwealth v. Girouard, 766 N.E.2d 873, 882 (Mass. 2002).

[114] *Id.* at 882.

[115] McDaniel v. Brown, 558 U.S. 120, 120 (2010); KAYE, *supra* note 95, at 173. Erin Murphy & William C. Thompson, *Common Errors and Fallacies in Forensic DNA Statistics: An Amicus Brief in McDaniel v. Brown,* 46 CRIM. L. BULL. 709 (2010); William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials,* 11 L. & HUM. BEHAV. 167 (1987) (explaining fallacies in the interpretation of statistical evidence to which lay people are susceptible).

[116] *McDaniel*, 558 U.S. at 120.

[117] KAYE, *supra* note 95, at 211.

[118] *Id.* at 232; State v. Pappas, 776 A.2d 1091, 1095 (Conn. 2001).

[119] *Pappas*, 776 A.2d at 1104-05, 1111; KAYE, *supra* note 95, at 236.

[120] *United States v. Davis*, 602 F. Supp. 2d 658 (D. Md. 2009).

[121] Bruce Budowle et al., *Validity of Low Copy Number Typing and Applications to Forensic Science*, 50 CROAT. MED. J. 207 (2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2702736/.

[122] Marjorie A. Shields, *Admissibility and Sufficiency of Bite Mark Evidence as Basis for Identification of Accused,* 1 A.L.R. 6th 657, 657 (2005); Erica Beecher-Monas, *Reality Bites: The Illusion of Science in Bite-Mark Evidence,* 30 CARDOZO L. REV. 1369, 1369 (2009); FAIGMAN ET AL., *supra* note 103, at 446. Page et al. found that it was admitted without restriction in 83 percent of cases in which it was challenged. Mark Page et al., *Forensic Identification Science Evidence Since Daubert: Part I—A Quantitative Analysis of the Exclusion of Forensic Identification Science Evidence,* 56 J. FORENSIC SCI. 1180, 1183 (2011). This figure is probably an underestimate because several cases, such as *Ege v. Yukins* discussed below, were coded as 'exclusions' notwithstanding their case-specific holdings.

[123] Doyle v. State, 263 S.W.2d 779, 779 (Tex. Crim. App 1954); FAIGMAN ET AL., *supra* note 103, at 447.

the defendant raised only procedural objections that did not extend to the empirical foundations of the technique.[124] The leading case is *People v. Marx,* in which a California appellate court upheld the admission of bite mark evidence.[125] It is important to note that the expert in *Marx* cautioned that the bite mark was particularly distinctive and expressed doubt about the value of less distinctive marks.[126] This cautionary caveat was overlooked by later courts drawing upon *Marx* as authority for the admissibility of bite mark evidence.[127] California is a *Frye* (or *Kelly*) jurisdiction.[128] Nevertheless, the court upheld the admission of the bite mark evidence not because bite mark identification was "generally accepted in the relevant scientific community" (the central requirement of the *Frye* rule), but because of two loopholes in the interpretation of *Frye*.[129] First, bite mark evidence, in contrast to polygraph evidence (about which *Frye* was concerned), was determined to be evidence that the jury could observe and interpret for itself, at least sufficiently so that it would not be compelled to adopt the expert's opinion entirely on faith.[130] Secondly, bite mark evidence was determined to be non-novel and therefore not subject to *Frye*—a decision concerned with a novel lie-detection technique.[131]

In a thorough review of the case law, Beecher-Monas categorized the courts' reasoning in admitting bite mark evidence as follows: some courts admit bite mark evidence because other courts have (for half a century);[132] some courts employ the same non-novelty loophole employed in *Marx*;[133] some courts have reasoned that bite mark evidence is not science and that *Daubert* does not apply to non-scientific evidence;[134] and some courts have employed this reasoning even after the U.S. Supreme Court decision in *Kumho Tire* (and subsequent revision of the FRE in 2000) made clear that "reliability" applies to all expert opinion evidence and the *Daubert* factors may be applied where appropriate.[135]

Bite mark identification evidence has been excluded in only a handful of cases. *Ege v. Yukins* is an interesting example.[136] The trial judge admitted the bite mark evidence.[137] Ege filed and won a federal habeas corpus claim based in part on the federal court's conclusion that the bite mark evidence "was unreliable and not worthy of consideration by a jury."[138] As it turns out, the court's judgment was case specific and did

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[124] *Id.*

[125] People v. Marx, 126 Cal. Rptr. 350, 350 (Cal. Ct. App. 1975); FAIGMAN ET AL., *supra* note 103, at 448.

[126] *Marx*, 126 Cal. Rptr. at 350.

[127] FAIGMAN ET AL., *supra* note 103, at 448.

[128] People v. Kelly, 17 Cal.3d 24, 30 (Cal. 1976).

[129] These loopholes should themselves be the topic of a separate study.

[130] The strangeness of this reasoning has been often discussed. FAIGMAN ET AL., *supra* note 103, at 449. The same reasoning was recently applied to fingerprint evidence as well in an unpublished decision. People v. Greenwood, No. BA351185 (Super. Ct. Cal. Cty. of Los Angeles 2010), *available at* http://www.swgfast.org/Resources/100210_CA-v-Greenwood_Schnegg_Order.pdf. *Frye* was based on a blood pressure test claimed to assist with lie detection.

[131] Cole, *Out of the Daubert Fire*, *supra* note 70, at 526.

[132] Beecher-Monas, *supra* note 122, at 1372.

[133] *Id.*

[134] *Id.* at 1373.

[135] *Id.* at 1397; FAIGMAN ET AL., *supra* note 103, at 457.

[136] Ege v. Yukins, 485 F.3d 364, 374-75 (6th Cir. 2007).

[137] *Id.* at 374.

[138] Ege v. Yukins, 380 F. Supp. 2d 852, 871 (E.D. Mich. 2005), *aff'd in part, rev'd in part* 485 F.3d 364 (6th Cir. 2007).

not apply to bite mark evidence more generally.[139] The court felt that the particular expert used at trial had "been cast into disrepute as an expert witness."[140] Of particular concern was the expert's attempt to attach something akin to an RMP to his testimony.[141] The expert testified that only 1 of 3.5 million people (the population of the city in which the crime occurred) would have dentition consistent with the bite mark.[142] There was, as the court accepted, no basis for this statement.[143]

At least two Oklahoma trial courts have excluded bite mark testimony, one in an unpublished decision.[144] In the reported case of *Garrison v. State,* the court excluded testimony attributing the bite mark to the defendant, but permitted testimony that the mark was a "probable bite-mark."[145] The defendant appealed the admissibility of this testimony and the failure of the trial court to conduct an admissibility hearing, but this appeal was rejected.[146] In *Howard v. State,* the Mississippi Supreme Court expressed some critical remarks about bite mark evidence while reversing Howard's conviction on other grounds.[147] After *Howard* was subsequently re-convicted and his conviction was again appealed, the court held, "without explanation," that the admission of the bite mark evidence was not an abuse of discretion.[148] In another case, one Mississippi Supreme Court justice dissented from an opinion upholding the admissibility of bite mark evidence.[149] In *State v. Adams,* a court precluded a physician who claimed no expertise in forensic dentistry from testifying as to whether a mark was consistent with being a bite mark.[150] In *State v. Fortin,* the court excluded experience based testimony concerning the rarity of a combination of bite marks on different parts of the body without a database upon which to base such an estimate,[151] a holding that presaged *R. v. T.*

Based on this record, the NRC report concluded, "[t]here is nothing to indicate that courts review bite mark evidence pursuant to *Daubert's* standard of reliability."[152]

4. Incriminating Images and Voice Recordings

a. Opinions about Images

Images have been admitted as evidence into U.S. courts for more than a hundred years.[153] In recent decades, in criminal proceedings, images have been used for purposes

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[139] Beecher-Monas, *supra* note 122, at 1394-95; FAIGMAN ET AL., *supra* note 103, at 453.

[140] *Ege*, 380 F. Supp. 2d at 857.

[141] *Id.*

[142] This terminology has been subject to scholarly and judicial censure, especially in Canada.

[143] FAIGMAN ET AL., *supra* note 56, at 13; A similar situation arose for latent print in *Michigan v. Ballard. See* Cole, *supra* note 70, at 120 (explaining that the ruling merely punishes forensic expert witnesses who make their baseless probability calculations quantitative and explicit, while rewarding witness who conceal their baseless probability calculations behind vague verbal formulations like "no one else in the world could be found consistent with this mark").

[144] FAIGMAN ET AL, *supra* note 56, at 15.

[145] *Id.*

[146] BEECHER-MONAS, *supra* note 122, at 1398; FAIGMAN ET AL, *supra* note 56, at 15.

[147] 701 So. 2d 274, 288 (Miss. 1997), *abrogated on other grounds by* Hearn v. State, 3 So. 3d 722 (Miss. 2008).

[148] FAIGMAN ET AL., *supra* note 56, at 17-18.

[149] *Id.* at 18.

[150] Marjorie A. Shields, Annotation, *Admissibility and Sufficiency of Bite Mark Evidence as Basis for Identification of Accused,* 1 A.L.R.6th 657 (2011).

[151] Mark Page et al., *Forensic Identification Science Evidence Since* Daubert*: Part II—Judicial Reasoning in Decisions to Exclude Forensic Identification Evidence on Ground of Reliability,* 56 J. FORENSIC SCI. 913, 914 (2011).

[152] NAT'L RESEARCH COUNCIL, *supra* note 15, at 107 n.81.

related to identification primarily in relation to robberies of banks, convenience and liquor stores with video surveillance facilities.[154]

American juries are permitted, and often required, to interpret surveillance images and make identifications, but in several cases both the state and/or defendants have sought to adduce expert opinion to assist with the interpretation of images.[155] In contrast to England, Canada and Australia, anthropometry—particularly the use of (reverse projection) photogrammetry—is pronounced in the United States.[156] Courts in the United States have been inconsistent in their responses to identification evidence as opposed to descriptions of similarities between a person of interest (POI) and the accused.[157] Generally, positive identification (or individualization) is allowed and on some occasions the inability of a defense expert to positively identify a POI or to exclude the accused, as opposed to criticizing assumptions and techniques, has led to the exclusion of their rebuttal evidence.[158]

United States v. Alexander is an early, though not entirely representative, example of the uses of images for identification purposes.[159] Alexander, a medical doctor, was accused of committing a bank robbery.[160] Three bank employees selected a photograph of Alexander when shown a photo array in the aftermath of the robbery. The state also called four acquaintances who supported the identification.[161] In response, Alexander called five witnesses "who stated that he was not the person photographed by the bank surveillance cameras."[162] Alexander also sought to adduce two expert witnesses—one specializing in cephalometrics and the other a former FBI agent with photographic comparison expertise—both opining that "it was impossible for Dr. Alexander to be the person depicted in the photographs."[163] Prior to *Daubert*, the trial judge excluded the expert witnesses called by the defense.[164] The Court of Appeals concluded that the trial court had abused its (considerable) discretion, explaining: "[b]ecause of the specific nature of the proffered testimony in this case, together with the complete lack of any evidence other than the eyewitness identification connecting Dr. Alexander to the robbery, we find that the district court's exclusion of Dr. Alexander's

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[153] *See* NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 107 (2009); JONATHAN FINN, CAPTURING THE CRIMINAL IMAGE: FROM MUG SHOT TO SURVEILLANCE SOCIETY xii (2009); TAL GOLAN, LAWS OF MEN AND LAWS OF NATURE: THE HISTORY OF SCIENTIFIC EXPERT TESTIMONY IN ENGLAND AND AMERICA 176 (2004) [herinafter LAWS OF MEN]; Tal Golan, *The Emergence of the Silent Witness: The Legal and Medical Reception of X-rays in the USA*, 34 SOC. STUD. OF SCI. 469, 476 (2004); Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy,* 10 YALE J.L. & HUMAN. 1, 13 (1998).

[154] LAWS OF MEN, *supra* note 154, at 209-10.

[155] *See* United States v. Alexander, 816 F.2d 164, 166-67 (5th Cir. 1987); United States v. Johnson 575 F.2d 1347, 1361 (5th Cir. 1978).

[156] Photogrammetry is the process of obtaining information, usually measurements, from images. Lee Dechant, *How a Photogrammetry Expert Can Help You Win Your Case*, 14 NEV. LAW. 19, 19 (2006).

[157] *See* United States v. McGinnis, 201 F. App'x 246, 249-51 (5th Cir. 2006) (discussing expert qualification and the reliability of photogrammetry); *see also* United States v. Welch, 368 F.3d 970, 975 (7th Cir. 2004) (excluding expert testimony in favor of eyewitness identification).

[158] *See* United States v. Brewer 783 F.2d 841, 842 (9th Cir. 1986).

[159] *See* Michael W. Mullane, *The Truthslayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53, 83-84 (1991).

[160] *Id.* at 83.

[161] *Id.*

[162] United States v. Alexander, 816 F.2d 164, 166 (5th Cir. 1987).

[163] *Id.* at 167. Cephalometrics involves measuring the head and its features.

[164] *See* Daubert v. Merrell Dow Pharm., 509 U.S. 579, 596 (1993).

expert witnesses was clearly erroneous."[165] The fact that the "entire case … turned on the photographic identification" rendered the exclusion erroneous.[166] The Court did not hold "that such evidence will always be admissible in every case."[167]

A more representative example of the willingness to exclude defense evidence emerged in *United States v. Dorsey*.[168] Dorsey adduced the opinions of two forensic anthropologists—that he was "not the individual depicted in the Bank … surveillance photographs"—at very short notice during his trial.[169] The trial judge excluded the evidence, questioning whether "this is a recognized science" and noting that all "we are doing here is … comparing some photographs."[170] The Court of Appeals concluded that the evidence was inadmissible under *Daubert*: not amounting to 'scientific knowledge' and not "helpful to a trier of fact."[171] Applying the *Daubert* criteria, the Court of Appeals noted that "Dorsey never contended anywhere in his brief, or during trial, that the forensic anthropologists' method of analysis had been tested."[172] Affirming, they explained: "there is no indication that the expert testimony was at all necessary in the instant case; … the comparison of photographs is something that can sufficiently be done by the jury without help from an expert."[173] The Court of Appeals was reassured in their exclusionary stance by the other evidence suggesting Dorsey's guilt.[174] In *United States v. Crotteau*, the defendant's attempt to call a friend as an expert witness who used crude measurements to compare two videos, one of Crotteau at a bank and the other of a bank robbery, was deemed inadmissible under the FRE.[175] Other friends of Crotteau were allowed to express their opinions about the identity of the bank robber as the state's lay "familiarity" witnesses.[176]

Many appeals against conviction involving the interpretation of images are based on grounds such as exclusion of the defendant's expert(s) was improper or, more commonly, that defense counsel was ineffective for failing to call (or apply for funding for) an expert in photographic interpretation (usually photogrammetry) to counter the state's expert or to explore problems and limitations. In the main, these appeals have been unsuccessful, largely because of the very onerous standards governing the review of decisions made by counsel and admissibility determinations (after *Joiner*).[177]

Generally the state has been allowed to call expert witnesses to testify about height, and similarities in features, and possessions (such as clothing), and sometimes even to positively identify the accused.[178] Figure 2 illustrates the comparison of clothing

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[165] *Alexander*, 816 F.2d at 167.

[166] *Id.* at 169.

[167] *Id.*; *see, e.g.*, United States v. McGinnis 201 F. App'x 246, 249-52 (5th Cir. 2006).

[168] 45 F.3d 809 (4th Cir. 1995).

[169] *Id.* at 811.

[170] *Id.* at 812.

[171] *Id.* at 814-15 (applying the *Daubert* criteria).

[172] *Id.*

[173] *Id.* at 815; *see* Claritt v. Kemp 336 F. App'x 869, 870 (11th Cir. 2009); *see also* United States v. Welch, 368 F.3d 970, 975 (7th Cir. 2004) (finding that the evidence was proposed primarily to cast doubt on the eyewitness testimony), *vacated*, 543 U.S. 1112 (2005).

[174] *Dorsey*, 45 F.3d at 815.

[175] 218 F.3d 826, 830 (7th Cir. 2000).

[176] *Id.* at 833.

[177] *See* General Electric Co. v. Joiner, 522 U.S. 136, 142 (1997).

[178] United States v. Brown, 511 F.2d 920, 924 (2d Cir. 1975); United States v. Fernandez, 480 F.2d 726, 735-36 (2d Cir. 1973) (determining height through superimposition).

photographed during a bank robbery (Figure 1). The Court in *United States v. Sellers* explained that expert testimony to assist the jury with identification would allow an "opinion as to whether the defendant is the person in the picture."[179] In *United States v. McKreith*, the FBI analyst's interpretation of video and still images, led him to testify that a shirt recovered from McKreith "matched the class characteristics of the shirt worn by the bank robber" and a black bag was "'indistinguishable' from the bag seen in the photos."[180] According to the Court of Appeals, Bruegge's opinions were properly admitted, able to be cross-examined and, given the strength of the case, if they were inadmissible his testimony was "harmless in light of the overwhelming evidence."[181] In *United States v. Cairns*, an FBI agent was allowed to testify about similarities in "the nose and mouth area, chin line, hair lines, ear contours and inner folds of the ears, among other things" and then proceeded to positively identify the defendant "or another individual having all of these characteristics."[182] In *United States v. Brown* the state's expert was allowed to take new photographs of the defendant at the bank and compare them with the surveillance images of the actual robbery to assist with identification.[183] Experts called by the state have been allowed to make positive identifications (i.e., to individualize) but have also been restricted, on occasion, to describing similarities between the accused and the person of interest—so-called "splitting."[184] Comparisons, and positive identifications, may be based upon clothing and accessories, weapons, and even mannerisms (such as handedness).[185]

[179] 566 F.2d 884, 886 (4th Cir. 1977).

[180] United States v. McKreith, 140 F.App'x 112, 114 (11th Cir. 2005) (involving Vorder Bruegge, perhaps the most ubiquitous of the United States expert witnesses).

[181] *Id.* at 116.

[182] 434 F.2d 643, 644 (9th Cir. 1970); *see also* Brown, 511 F.2d at 924 (describing ear lobes as "being like a fingerprint").

[183] 511 F.2d at 924; *see also Sellers*, 566 F.2d at 886. The trial court's refusal to support a similar defense request in *United States v. Armstrong* was not considered reversible error. 621 F.2d 951, 954-55 (9th Cir. 1980).

[184] United States v. Alexander, 816 F.2d 164, 168 (5th Cir. 1987); *see also* United States v. Demjanjuk, 367 F.3d 623, 631 (6th Cir. 2004) (where a great deal of time, such as 60 years, has passed); Cole, *supra* note 94, at 462.

[185] United States v. McGinnis, 201 F.App'x 246, 251 (5th Cir. 2006) (jeans); United States v. Johnson, 114 F.3d 808, 811-13 (8th Cir. 1997) (height, shoe size, and logo on baseball cap) *aff'd*, 278 F.3d 839 8th Cir. 2002); United States v. Quinn, 18 F.3d 1461, 1465 (9th Cir. 1994) (guns); People v. Smith, No. D035500, 2004 WL 406991, at *6 (Cal. Ct. App. May 29, 2004) (clothing, masks, and weapons). In *United States v. D'Ambrosio*, the analyst asserted that on the basis of similarities, a pair of the defendant's jeans "were the same" as those in the robbery video. 9 F.3d 1554 (9th Cir. 1993).

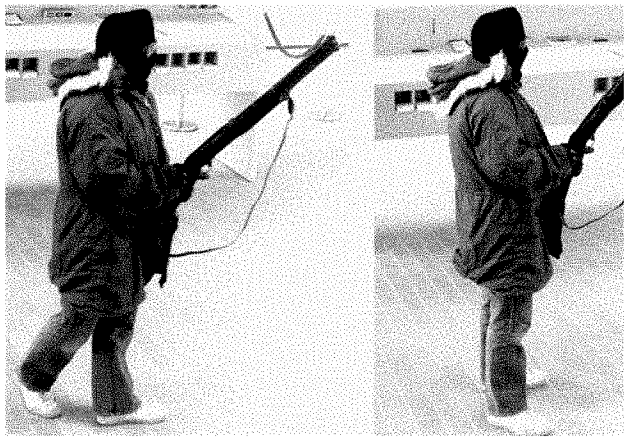

Figure 1: Security images taken during a bank robbery.

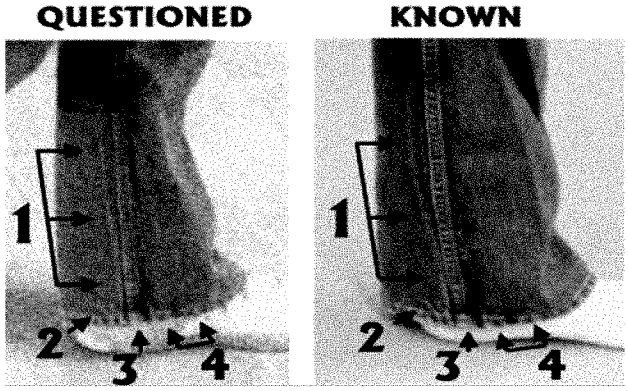

Figure 2: Detail of image of bank robbery ('Questioned' from left-hand image of Figure 1) and jeans belonging to the accused ('Known'). The condition of the seam was used to positively identify the jeans.[186]

Early challenges to the admissibility of the state's reverse projection photogrammetry were unsuccessful and consequently were transformed into grounds of appeal based on the failure of counsel to adequately cross-examine such witnesses or obtain similar expert assistance.[187] After *Daubert*, challenges to photogrammetry, in

[186] Images reproduced from Vorder Bruegge, *Photographic Identification of Denim Trousers From Bank Surveillance Film*, 44 J. FORENSIC SCI. 613-22 (1999); *see also* Kitty Hauser, *A Garment in the Dock; Or, How the FBI Illuminated the Prehistory of a Pair of Denim Jeans*, 9 J. MATERIAL CULTURE 293, 295-305 (2004).

[187] Claritt v. Kemp 336 F.App'x 869, 871 (11th Cir. 2009); Webster. v. Sec'y, DOC, 291 F. App'x 964, 966-67 (11th Cir. 2008); Chappel v. Garcia, No. CIV. S-03-0132, 2006 WL 1748424, at *39-40 (E.D. Cal. June 26, 2006) (noting that Superior Court opined that the decision not to consult his own photogrammetry expert was a

particular, have been unsuccessful[188] or seen as irrelevant.[189] Photogrammetry evidence often passes without comment or challenge.[190] An earlier defense challenge to the reliability of photogrammetry was rejected in *United States v. Everett*, where the perceived inability of the jurors to make an accurate assessment of heights from images was, along with the impartiality of the FBI witness, accepted.[191] More recently, photogrammetrists have tended to testify in terms of a range,[192] rather than a specific height[193] and increasingly tend to place emphasis on their ignorance of the height of the suspect prior to analysis of the images.[194]

In addition, and sometimes without objection or appeal, investigators and analysts are allowed to interpret and narrate images. In *The People v. Apodaca*, a detective was allowed to express his opinion about a video that was said to corroborate the account of the central prosecution witness.[195] Issues about enhancement have not been particularly controversial and even some minor losses from a recording might not render the remaining images inadmissible.[196]

A second strand of image evidence concerns attempts to determine whether an image is "real" or computer generated, an area of expertise that has become important in a sub-set of child pornography prosecutions. Some individuals so accused have offered as a defense the argument that the government cannot rule out the possibility that the image is computer generated, in which case it would not violate the law.[197] In *United States v. Frabizio,* the government initially proffered a computer scientist to testify as to whether child pornographic images depicted real children or were computer generated.[198] Apparently after defense counsel demonstrated that this expert's methods produced a high rate of errors, the government withdrew this expert and proffered an FBI photography expert, who made subjective experience based judgments to render conclusions on the

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reasonable tactical decision); *see also* Dixon v. Admin. Appeal Dep't Office of Info. & Privacy, No. 06 Civ. 6069, 2008 WL 216304, at *6-7 (S.D.N.Y. Jan. 22, 2008) *aff'd*, 336 F. App'x 98 (2d Cir. 2009); *cf.* Hutchinson v. Hamlet, 243 F. App'x 238, 240 (9th Cir. 2007) (challenging ineffective counsel for not obtaining expert assistance to challenge height evidence).

[188] *See, e.g.,* United States v. Kyler, 429 F. App'x 828 (11th Cir. 2011); United States v. Williams, 235 F. App'x 925, 928 (3d Cir. 2007); United States v. Quinn, 18 F.3d 1461, 1465 (9th Cir. 1994); United States v. Everett, 825 F.2d 658, 662 (2d Cir. 1987).

[189] Using "the varying heights of known objects in a photograph . . . to calculate the height of other objects in the photograph, does not require analysis under *Daubert*." McGrew v. Indiana, 673 N.E.2d 787, 798 n.10 (Ind. Ct. App. 1997) *aff'd in part, vacated in part*, 682 N.E.2d 1289 (Ind. 1997).

[190] *See* United States v. Bobbitt, Nos. 98-4489, 98-4490, slip op. at 2 (4th Cir. Jan 31, 2000); *see also* United States v. Smithers, 212 F.3d 306, 309 (6th Cir. 2000).

[191] 825 F.2d at 662.

[192] United States v. Kyler, 429 F. App'x 828, 831 (11th Cir. 2011).

[193] *E.g.*, United States v. Watson, No. 94-10354, 1995 U.S. App. LEXIS 26101, at *6 (9th Cir. Sept. 6, 1995) (precisely same height as accused based on DMV. records: 6'4").

[194] Chappel v. Garcia, No. CIV. S-03-0132, 2006 WL 1748424, at *4 (E.D. Cal. June 26, 2006) (Bruegge testified that when he "made his [height] estimates, he did not know . . . defendant's actual height.").

[195] Apodaca v. Horel, No. 1:08-CV-00414, 2009 WL 1357444, at *5 (E.D. Cal. May 13, 2009); *see also* Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc., 829 F. Supp. 2d 802, 834-36 (D. Minn. 2011) (granting in part and denying in part plaintiffs' and defendants' motions to exclude expert opinion testimony interpreting photographs in suit alleging violation of federal and state deceptive trade practices acts).

[196] Wisconsin v. Avery, 807 N.W.2d 638 (Wis. Ct. App. 2011) (digital video enhancement), *cert. granted*, 810 N.W.2d 221 (2012); United States v. Codrington, No. 07 MJ 118, 2008 WL 1927372 (E.D.N.Y. May 1, 2008) (upholding use of surveillance video where portions of the video were lost due to human error), *aff'd*, No. 08-MC-0291, 2009 WL 1766001 (2009).

[197] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 263-64 (2002) (O'Connor, J., concurring).

[198] United States v. Frabizio, 445 F. Supp. 2d 152, 154 n.2 (D. Mass. 2006).

same question.[199] The government's apparent belief that the testimony based on a subjective judgment and experience was "more admissible" than testimony based on quantifiable, computer science methods has important implications for the subject of this article.[200] Judge Gertner excluded the testimony, based on extensive *Daubert* analysis. Judge Gertner concluded that the government had offered no evidence measuring the ability of the expert to correctly determine whether images were "real" or computer generated.[201] This ruling was later extended to a second proffered witness who used similar techniques.[202]

Interestingly, the government appears to have secured a legal fix for this issue with a subsequent ruling in *United States v. Rodriguez-Pacheco,* holding that expert testimony was not necessary for a court to conclude that an image depicted a real child.[203] Curiously, the expert witness in that case testified to his methodology for analyzing images, but not conclusions.[204] Neither the expert's methodology nor the nature of his expertise is clear from the opinion. The opinion holds that the court was competent to render the conclusion that the images depicted real children based solely on the *conclusion* of a pediatrician that the depicted individuals, if real, would be younger than 18 years old and the testimony of the photographic expert describing his methodology, but not his conclusion.[205]

b. Opinions about Voices (and Sounds)

In contrast to the other techniques discussed in this article, U.S. courts have been equivocal about the admissibility of speaker or voice "identification" evidence offered by professional experts (as opposed to "earwitnesses"), using techniques such as voice spectrography in recent decades. It also seems that the admissibility standard used by the court may influence the outcome of the admissibility ruling.[206] Historically, courts have tended to divide fairly evenly on whether to admit the evidence, with around 60 percent of cases resulting in admission, a pattern that appears to be consistent across time.[207] In a telling analysis, *Faigman et al.* show that the ultimate result has tended to hinge on whether the courts interpreted the "relevant scientific community"—referred to in *Frye*—narrowly as consisting of individuals who perform voice spectrography (thus resulting in admission) or broadly as consisting of a broader group of experts with knowledge relevant to claims of voice spectrographers such as audiologists, acousticians, electrical engineers, linguists, phoneticians, physicists, physiologists, psychologists, and statisticians (thus resulting in exclusion).[208] They also note that the 1979 publication of a National Academy of Science sponsored NRC report on voice identification, which might be conceived as similar to (if somewhat narrower in scope than) the more recent NRC response to the pattern recognition disciplines, had limited impact on court admissibility

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[199] *Id.*

[200] *Id.*

[201] *Id.* at 159 n.9.

[202] United States v. Frabizio, 463 F. Supp. 2d 111, 112-13 (D. Mass. 2006). *Contra* United States v. Christie, No. 07-332, 2009 WL 742722, at *1 (D. N.J. 2009) (expert evidence was admissible under *Daubert* in response to multiple images and video).

[203] United States v. Rodriguez-Pacheco, 475 F.3d 434, 438 (1st Cir. 2007).

[204] *Id.*

[205] *Id.*

[206] Michelle Meyer McCarthy, Annotation, *Admissibility and Weight of Voice Spectrographic Analysis Evidence*, 95 A.L.R. 5th 471 (2009).

[207] FAIGMAN ET AL., *supra* note 56, at 519.

[208] *Id.*

determinations.[209] Revealingly, only one third of subsequent opinions even cite it, and only one opinion suggests substantial engagement.[210]

Several courts have considered the admissibility of voice identification evidence after *Daubert.* The Alaska Supreme Court ruled that a trial court's admission of voice spectrography was not an abuse of discretion.[211] This was based on "a limited and superficial review of the research . . . doing little more than quoting the trial court's conclusory assertions".[212] Voice identification evidence has also been excluded after *Daubert.* A trial court excluded voice spectrography in *United States v. Bahena* (2000) as unreliable, and the Eight Circuit Court of Appeals upheld the decision.[213] In *United States v. Angleton* (2003), the trial court was quite critical of the evidence of reliability put forward.[214] In *United States v. Ramos* (2003) the Fifth Circuit Court of Appeals 'summarily' rejected the claim that exclusion was erroneous. [215] Voice identification evidence was also excluded under *Frye* in *People v. Persaud* (1996).[216] Voice identification evidence was excluded in *United States v. Ricketts* (2005) for lacking probative value.[217] Expert evidence as to whether the defendant had uttered an "intelligible vocalization[]" was also excluded on relevance grounds in *United States v. Naegele* (2007).[218] Not insignificantly, all of these cases concerned voice identification evidence proffered by defendants.[219]

In *State v. Cooke,* the trial court excluded what has been called "negative evidence" testimony proffered by the government—that is, testimony showing that efforts were made to perform voice identification, but that those efforts were unsuccessful.[220] So-called negative evidence is often used in order to correct for the imputed "CSI effect", in which it is claimed that jurors will assume that the absence of testimony about forensic techniques that the jurors believe are available to the government based on their experience viewing television dramas will lead them to infer either that tests excluded the defendant or that the government was negligent in not performing them.[221]

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[209] NAT'L RESEARCH COUNSEL, ON THE THEORY AND PRACTICE OF VOICE IDENTIFICATION 60 (Richard H. Bolt et al. eds., 1979) (explaining that the degree of accuracy and error rates vary from case to case due to the properties of the voices compared, the recording conditions used to obtain voice samples, the skill of the examiner, and the examiner's knowledge about the case. Estimates of error rates are available only for a few situations, and they "[d]o not constitute a generally adequate basis for a judicial or legislative body to use in making judgments concerning the reliability and acceptability of aural-visual voice identification in forensic applications."). *See also* Julie C. Reyonlds & Julius W. Weber, *The Admissibility of Spectrographic Voice Identification in the State Courts*, 70 J. CRIM. L. & CRIMINOLOGY 349, 354 (1973).

[210] FAIGMAN ET AL., *supra* note 56, at 522.

[211] State v. Coon, 974 P.2d 386, 402 (Alaska 1999).

[212] FAIGMAN ET AL., *supra* note 56, at 524.

[213] United States v. Bahena, 233 F.3d 797, 810 (8th Cir. 2000); McCarthy, *supra* note 207.

[214] United States v. Angleton, 269 F. Supp. 2d 892, 898-99 (S.D. Tex. 2003); McCarthy, *supra* note 207.

[215] United States v. Ramos, 71 F. App'x 332, 336 (5th Cir. 2003).

[216] People v. Persaud, 406 N.Y.S. 2d 261 (N.Y. App. Div. 1996).

[217] United States v. Ricketts, 141 F. App'x 93, 95 (4th Cir. 2005).

[218] United States v. Naegele, 471 F. Supp. 2d 152, 159 (D.C. Cir. 2007). This issue assumed significance in a very high profile mass-murder exoneration in New Zealand. *See Bain v. Queen* [2009] NZSC 16 (SC) [2], [5]-[8], [68] (N.Z.).

[219] *Ricketts*, 141 F. App'x at 95; United States v. Ramos, 71 F. App'x 334, 335 (5th Cir. 2003); United States v. Bahena, 223 F.3d 797, 802 (8th Cir. 2000); *Naegele*, 471 F. Supp. 2d at 159; United States v. Angleton, 269 F. Supp. 2d 892, 893 (S.D. Tex. 2003); People v. Persaud, 640 N.Y.S.2d 261, 403 (N.Y. App. Div. 1996).

[220] State v. Cook, 914 A.2d 1078, 1096 (Del. Super. Ct. 2007).

[221] Simon A. Cole & Rachel Dioso-Villa, *Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law,* 61 STAN. L. REV. 1335, 1344 n.48 (2009).

B. England and Wales: Admissibility Standards, Jurisprudence, and Practice

An attempt to state the principles that govern the reception of expert evidence in England and Wales is, in some respects, a relatively simple undertaking. Admissibility is governed for the most part by common law principles.[222] English courts have adopted a characteristically pragmatic approach to determining whether a witness's skills and experience are such that he or she is qualified to provide expert testimony. The essential question is whether the witness can satisfy the court that he or she has "sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value."[223]

Perhaps the most significant obstacle to the reception of a suitably qualified expert's testimony is the principle identified by the Court of Appeal in *R. v. Turner*:[224]

> An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary[.][225]

This principle is considered by many commentators to be an expression of the *common knowledge* rule. The Law Commission interpreted it to require expert evidence to have sufficient probative value to be of assistance to the fact-finder in resolving the issues in the case.[226] In concentrating attention on the assistance that might be derived from developments in science and technology, the courts have elided the significance of reliability.[227] In *R. v. Dallagher*,[228] the Court of Appeal suggested that the English approach was analogous with that established by rule 702 of the U.S. Federal Rules of Evidence.[229] However, the analogy is tenuous. *Daubert* and the text of rule 702 indicate that expert testimony will only assist the tribunal of fact if it is the product of reliable theories and techniques. While *Daubert* provides criteria for the evaluation of scientific and other forms of expert testimony, English courts have taken the view that reliability is primarily an issue for the tribunal of fact in determining the weight to be attached to such evidence, and have declined to identify any specific criteria relating to reliability as a condition of admissibility.

In recent judgments, rather worryingly, the Court of Appeal has cast doubt on the credentials of witnesses called to give expert opinion (almost exclusively for the defense) who have no clinical or investigative experience with the methods or techniques to which

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[222] *See* PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE (2nd ed. 2010); MIKE REDMAYNE, EXPERT EVIDENCE AND CRIMINAL JUSTICE (2001); TRISTRAM HODGKINSON & MARK JAMES, EXPERT EVIDENCE: LAW AND PRACTICE (2010).

[223] Barings v. Coopers & Lybrand (No. 2) [2001] Lloyd's Rep. Bank. 85 (Eng.); *see also* R. v. Robb, [1991] 93 Cr. App. R. 161, 164-65 (Eng.); R. v. Stockwell [1993] 97 Cr. App. R. 260, 264-66 (Eng.).

[224] R. v. Turner, [1974] QB 834 (Eng.).

[225] *Id.* at 841.

[226] Law Commission of England and Wales, Report on *Expert Evidence in Criminal Proceedings in England and Wales* (London: The Stationery Office, 2011) 2.17. Roberts and Zuckerman have taken it to be the articulation of a broader 'helpfulness' principle.

[227] Ian Dennis, THE LAW OF EVIDENCE 895 (London, Sweet & Maxwell, 4th ed. 2010).

[228] [2003] 1 Cr. App. R. 12.

[229] The practice may be analogous, but the governing rules are distinctively different.

their opinions relate.[230] This trend appears to be predicated on the misguided assumption that those who have considerable knowledge and understanding of scientific and methodological principles generally can say nothing of value about the application of those principles in particular forensic contexts. In *R. v. Weller*,[231] the Court went so far as to issue an admonishment to parties (in practice, the defense):

> [W]e do hope that the courts will not be troubled in future by attempts to rely on published work by people who have no practical experience in the field and therefore cannot contradict or bring any useful evidence to bear on issues that are not always contained in scientific journals.[232]

A peculiar feature of English appellate decisions is the frequency with which the South Australian Supreme Court's decision in *R. v. Bonython* is cited as a statement of the rules that govern the reception of expert evidence in England and Wales. One of those rules is that the subject matter of an expert's testimony must form "a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience."[233] The prevailing view in several Australian states seems to be that this principle embodies an approach that is similar to that established by *U.S. v. Frye*.[234] This is not to say that a *Frye*-like test forms any part of the common law in England and Wales (or Australia), for although the Court of Appeal has cited the relevant passage in *Bonython* with some regularity, there has been no pause to consider its meaning or to focus attention on the acceptance (or reliability) of techniques and opinions.[235]

Interestingly, the Law Commission of England and Wales suggested that recent appellate decisions confirm the existence of a common law reliability threshold.[236] In *Reed & Reed*[237] the Court of Appeal held that "a court *must* consider whether "the subject matter of the evidence [is] part of 'a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.'"[238] Despite the obvious allusion to *Bonython*, the Court explained that this did not constitute an enhanced test of admissibility for expert (scientific) evidence:

> [E]xpert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury. There is, however, no enhanced test of

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[230] See, for example, the Court of Appeal's observations regarding the experience of the expert called by the defense to provide opinions relating to the reliability of LCN DNA analysis in R. v. Reed & Reed [2009] EWCA Crim 2698, at [106-110]: "He bases much of his knowledge of DNA and the analysis of Low Template DNA on papers and discussion with other scientists; he does not conduct laboratory research . . . his expertise on the interpretation of DNA profiles is limited, without any relevant first hand laboratory research experience. He is not qualified to make a scene of crime investigation."

[231] [2010] EWCA Crim 1085.

[232] *Id.* at [38].

[233] R. v. Bonython (1984) 38 SASR 45.

[234] In *Kastelein v. Newmont Australia Ltd*, [2006] N.T.M.C. 081, for example, the Northern Territory Work Health Court suggested that in *Runjanjic*, King C.J. had applied the test set out in *Frye*. In Mallard v. The Queen [2003] W.A.S.C.A. 296 (December 3, 2003), the Supreme Court of Western Australia cited *Runjanjic* and the South Australian Supreme Court's decision in *Karger*, S.A.S.C. 64 (March 29, 2001), in support of its observation that 'the Frye test has been adopted in a number of Australian jurisdictions'; [2003] W.A.S.C.A. 296 at [285]. In the latter case, the South Australian Supreme Court, after close analysis of the judgment of King C.J. in Bonython, concluded: 'It is clear from his judgment that King CJ was accepting the [*Frye*] general acceptance test'; at [178].

[235] Roberts, 'Rejecting General Acceptance'; Law Commission, *Expert Evidence,* 2.12.

[236] LAW COMM'N, *supra* note 24, at 14.

[237] [2010] 1 Crim. App. 23 (Eng.).

[238] *Id.* at [111].

> admissibility for such evidence. If the reliability of the scientific basis for the evidence is challenged, the court will consider whether there is a sufficiently reliable scientific basis for that evidence to be admitted, but, if satisfied that there is a sufficiently reliable scientific basis for the evidence to be admitted, then it will leave the opposing views to be tested in the trial.[239]

It seems, then, that *Bonython's* acceptance-orientation has been assimilated into the common law in England and Wales in a way that leaves it devoid of any real meaning. In practice, the common law test of admissibility does not appear to establish anything more substantial than the general position expressed in various appellate court judgments that expert evidence is subject to the "'ordinary tests of relevance and reliability.'"[240]

In view of this, it might be no surprise that trial judges' decisions to admit incriminating expert opinion of questionable reliability have, with a few exceptions, been generally endorsed by the Court of Appeal. A striking example of this tendency is the decision in *Dallagher*, in which the Court rejected a challenge to the admissibility of expert opinion concerning latent ear print impressions.[241] The witness allowed to express an opinion at trial was a Dutch police officer who had developed an interest in ear prints.[242] His evidence was, having compared an ear print found on a window at the crime scene with a print taken from the appellant, he was able to conclude that the print found at the crime scene had been left by the appellant.[243] The foundation for this conclusion was a portfolio of 600 photographs and 300 ear prints compiled by the officer in which he had not found two ear prints that were alike in every detail.[244] Although the police officer and a second expert witness conceded that the assumption that ear prints taken from any two persons are distinguishable was based on limited experience and had little empirical support, the Court of Appeal took the view that the trial judge could not possibly have concluded that the evidence was so unreliable that it ought to be excluded.[245] In other

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[239] *Id.*

[240] *E.g.*, R. v. Dallagher, [2003] 1 Crim. App. 12 at [29] (Eng.). The source of this principle is one of the most well-established texts on the law of evidence in England and Wales, *Cross and Tapper on Evidence*. "The better, and now more widely accepted, view is that so long as the field is sufficiently well-established to pass the ordinary tests of relevance and reliability, then no enhanced test of admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere." COLIN TAPPER, CROSS & TAPPER ON EVIDENCE 523 (9th ed. 1999). The text cites the Canadian Supreme Court decision in R. v. Mohan, [1994] 2 S.C.R. 9 (Can.), discussed below, as authority for this proposition. In light of subsequent cases, however, support for this proposition can no longer be found in the jurisprudence of the Canadian Supreme Court. *See* Christophe Champod et al., *Earmarks as Evidence: A Critical Review,* 46 J. FORENSIC SCI. 1275 (2001) (explaining that there are weaknesses in earmark evidence knowledge base).

[241] 1 Crim. App. at [29].

[242] *Id.* at [9].

[243] Gary Edmond, *Is Reliability Sufficient? The Law Commission and Expert Evidence in International and Interdisciplinary Perspective: Part 1*, 16 INT'L J. EVIDENCE & PROOF 30, 56 (2012) [hereinafter *Reliability*] ("[T]he expert witness might have explained merely that there were consistencies and no inconsistencies as between the defendant's ear print and those from the scene, and given an account of the probability of them coming from the same person.").

[244] *Dallagher*, 1 Crim. App. 12 at [9].

[245] *Id.* at [14], [23]. The salutary postscript in this case is that prior to the re-trial ordered by the Court, the defense submitted genetic material that had been lifted from the crime scene along with the latent print for DNA analysis. At the re-trial the prosecution offered no evidence after analysis of the material suggested that the source of the material and therefore the print was someone other than the appellant. Sean O'Neill, *Expert Evidence Flaws Clear 'Earprint Killer*,' THE TELEGRAPH (Jan. 23, 2004, 12:01 AM), http://www.telegraph.co.uk/news/uknews/1452346/Expert-evidence-flaws-clear-earprint-killer.html. See generally Simon A. Cole, *Forensics Without Uniqueness, Conclusions Without Individualization: The New Epistemology of Forensic Identification*, 8 LAW, PROBABILITY & RISK 242-43 (2009), for a discussion on the

cases, even where the error rate of a technique has been found to be significant (as great as 50 per cent), courts have been willing to admit the opinion.[246] The general view is that reliability is primarily an issue for the tribunal of fact rather than a factor regulating admissibility.

Trial judges in England and Wales also have discretion, under section 78 of the *Police and Criminal Evidence Act* 1984, to exclude evidence the reception of which would have an adverse effect on the fairness of proceedings.[247] Though there is little guidance on the exercise of this discretion, it seems that expert evidence might be excluded where it is presented in a form that would not enable it to be adequately tested through cross-examination. In *R. v. Otway*,[248] for example, the question of whether the methods used by an expert were "sufficiently explained to be tested in cross-examination and so to be verifiable or falsifiable"[249] was considered to be a matter that was the province of a trial judge in determining exclusion under section 78.[250] Similarly, the Court observed in *R. v. Ahmed*,[251] that an expert's refusal to disclose the material that formed the basis of his or her testimony, thus rendering it unchallengeable, "would be *likely* to be a reason for refusing to admit it."[252] Notwithstanding these instances, the exclusionary discretion is typically applied with a very light touch.[253]

The prevailing *laissez faire* approach to the admissibility of expert evidence in England and Wales presumes that juries possess the capacity to distinguish reliable from unreliable expert testimony and attach appropriate weight.[254] However, a series of recent appellate court decisions seem to belie this presumption.[255] These have established that where there is uncontradicted and unequivocal expert evidence, the jury must be directed that it is to accept the expert evidence, it cannot substitute the expert's views with its own.[256] More recently, in *R. v. Henderson*, the Court of Appeal acknowledged the

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difference between the "banal" observation that skin surfaces are unique and a measurable scale of detection that relates to uniqueness.

[246] In *R. v. Luttrell*, [2004] 2 Crim. App. 31 (Eng.), for example, a lip-reading expert was permitted to give incriminating evidence of the words allegedly spoken by the appellants in a surveillance video. This was so notwithstanding that tests previously conducted in order to ascertain her accuracy revealed that in video recording of conversation—containing 890 known words—revealed her accuracy to be about 50 percent. *Id.* at [13]. She also reported over 224 words that were not spoken. *Id.* The Court of Appeal concluded that the trial judge in *Luttrell* had been entitled to admit the expert's evidence. *Id.* at [38]. It was accepted that lip-reading evidence may fall "significantly short of perfection," and that this required the jury to be warned of the limitations of this kind of evidence. *Id.* at [42], [44].Though, there is no general requirement to issue a warning to a jury regarding the reliability of expert evidence. *See id.* at [42] (explaining that a warning is necessary when there is particular evidence about which the jury should be cautioned).

[247] Police and Criminal Evidence Act, 1984, § 78 (Eng.).

[248] [2011] EWCA (Crim) 3 (Eng.).

[249] *Id.* at [17] (quoting *Luttrell*, [2004] 2 Crim. App. 31 at [34]).

[250] *Id.* at [17], [19]-[20].

[251] [2011] EWCA (Crim) 184 (Eng.).

[252] *Id.* at [68] (emphasis added).

[253] LAW COMM'N, THE ADMISSIBILITY OF EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND AND WALES: A NEW APPROACH TO THE DETERMINATION OF EVIDENTIARY RELIABILITY, 2009, Consultation Paper 190, ¶ 3.14. Although the Law Commission has suggested that "the courts permit the adduction of any expert evidence so long as it is not patently unreliable," *id.*, there are a number of appellate cases that cast doubt on the claim that such evidence will be excluded.

[254] *See, e.g.*, R. v. Henderson, [2010] 2 Crim. App. 24, [74]-[77] (Eng.).

[255] *See, e.g.*, Anderson v. R., [1972] A.C. 100 (P.C.) (Eng.); *see also* R. v. Sanders, [1991] 93 Crim. App. 245 (Eng.).

[256] *See, e.g.*, *Anderson*, A.C. at 106 (holding that it was "serious misdirection[]" to instruct the jury to disregard the evidence of an expert); *see also Sanders*, 93 Crim. App. at 248, 250 (holding that a judge is not required to

difficulties that juries will inevitably encounter in evaluating some forms of expert testimony, particularly conflicting medical opinion.[257] The Court acknowledged that in such cases there is a real risk of juries reaching verdicts that do not have a logical basis, and ventured that:

> [T]o suggest, in cases where the expert evidence is fundamental to the case, that the jury should approach [the] expert opinion in the same way as they do in every other criminal case, is inadequate … Juries, we suggest, should not be left in cases requiring [proof beyond reasonable doubt] to flounder in the formation of a general impression. A conclusion cannot be left merely to impression … a jury needs to be directed as to the pointers to reliable evidence and the basis for distinguishing that which may be relied upon and that which should be rejected.[258]

Rather than reflect on whether more rigorous scrutiny of expert evidence was required at the admissibility stage, the response to this concern over the ability of the jury to undertake this task satisfactorily was resort to jury directions and cautionary warnings. The jury should be asked to consider, among other things, whether the witness has strayed beyond the area of his or her expertise, if the witness is able to point to a recognized peer reviewed source for his or her opinions, and whether the expert has recent or contemporary clinical (practical) experience of the matters on which he or she is testifying.

Overall, English jurisprudence and practice is impoverished. There are few obstacles to the reception of incriminating expert opinion evidence. Although there appear to be significant reservations about the ability of advocates to expose the flaws in expert evidence, and the capacity of juries to undertake satisfactory evaluation of it, the general approach to admissibility appears to be grounded on contrary assumptions.

In March 2011, the Law Commission released a report on *Expert Evidence in Criminal Proceedings in England and Wales*.[259] The report recommends the codification of the common law rules supplemented by an explicit reliability standard which would replace the "rudimentary" version associated with the common law, *Bonython*, and *Reed*.[260] Patently influenced by *Daubert* and the revised FRE, a draft bill sets out several factors that might assist a trial judge to determine whether expert opinion evidence is "sufficiently reliable" to admit.[261] The Commission, in addition, recommended greater

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remind a jury about evidence to the contrary of expert testimony). *But c.f. Walton v. R.*, [1978] A.C. 788 (P.C.) at 793 (Eng.) (holding that a jury is not required to accept expert testimony as conclusive).

[257] *See Henderson*, [2010] 2 Crim. App. 24 at [218]-[19] (Eng.).

[258] *Id.* at [218].

[259] LAW COMM'N, *supra* note 24.

[260] *Id.* at 15-16, 18-19.

[261] *Id.* at 3, 18 (discussing the influence of the United States' Federal Rules of Evidence); *Id.* at 83 (discussing Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993)); *Id.* at 148 (clause 4 of the draft bill); *Id.* at 157 (schedule, part 1 of the draft bill); Roberts, *supra* note 24 (explaining the three factors proposed by the Commission to help judges determine admissibility of scientific evidence); *see* Gary Edmond & Andrew Roberts, *The Law Commission's Report on Expert Evidence in Criminal Proceedings*, 11 CRIM. L.R. 844, 844-848 (2011) [hereinafter *The Law Commission's Report*] (explaining the draft proposals of the Law Commission and the difficulties trial judges will face with their implementation); *see generally* LAW COMM'N, *supra* note 254, at 33-41 (laying out the proposals of the Law Commission's draft bill).

scope for judicial review of admissibility decisions, increased use of court-appointed experts at the admissibility stage, and further education for lawyers and judges.[262]

1. Latent Fingerprint Evidence

As in other jurisdictions, there is long-standing acceptance of fingerprint examiners' claims that fingerprints are uniquely distinctive. For many years identification (i.e., individualization) on the basis of fingerprints was predicated on an expert finding 16 points of similarity. The formal adoption of a non-numeric approach was precipitated by the decision in *R. v. Buckley*, in which the Court of Appeal held that where there were eight or more points of similarity, a trial judge "may or may not exercise his or her discretion in favour of admitting the evidence."[263] The Court suggested that the manner in which the discretion is exercised would depend on the experience and expertise of the witness, the number of similar ridge characteristics, whether there are any dissimilar characteristics, and the size and quality of the crime scene print.[264]

The validity of fingerprint evidence has not been subjected to serious or sustained challenge in England and Wales and it seems doubtful that this position will change if the *Daubert*-like approach to admissibility proposed by the Law Commission is enacted.[265] The Commission's draft legislation identifies a number of reasons why expert testimony might not be "sufficiently reliable," among which are that the opinion is based on a hypothesis that has not been subjected to sufficient scrutiny, and that the opinion is based on an unjustifiable assumption.[266] Latent fingerprint evidence might be challenged on either of these grounds. However, the Law Commission envisages that the reliability test need not be applied where the party objecting to admissibility is unable to satisfy the trial judge that the evidence might not be reliable.[267] It cited the remote possibility that two persons will have the same fingerprints as one example of circumstances in which it might not be necessary to apply the reliability test.[268] Were the courts to look to the Commission's report for guidance, if the draft legislation is enacted, it seems unlikely that any challenge to the validity of the claims that fingerprints are unique, and that individuals can be positively identified will be entertained.

As things stand, fingerprint examiners are routinely allowed to assert that a defendant is the unique source of a latent fingerprint found at a crime scene and the courts appear to readily accept such testimony.[269] There is no requirement that the jury be warned about any dangers or limitations.[270]

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[262] LAW COMM'N, *supra* note 24, at 181-82, 195-96; *see also* Edmond & Roberts, *supra* note 32, at 368 (discussing the relationship between the fundamental principles of evidence law and expert evidence) and Edmond, *supra* note 244 (assessing the Law Commission's report and proposals).

[263] [1999] EWCA (Crim) 1191 (Eng.).

[264] *Id.*

[265] *See The Law Commission's Report*, *supra* note 262, at 860 (discussing the "serious problems" with such evidence in England and Wales that the Commission's recommendations are unlikely to solve).

[266] LAW COMM'N, *supra* note 24, at 61.

[267] *Id.* at 32 (explaining that when there is "no meaningful dispute" the court may "disapply" the test).

[268] *Id.* at 32 n.65.

[269] *See, e.g.*, R. v. Arbia, [2010] EWCA (Crim) 2417, [8] (Eng.); R. v. Brown, [2011] EWCA (Crim) 80, [10] (Eng.).

[270] The inquiry in Scotland following *HM Advocate v. Shirley McKie* (1999) (acquitting McKie of perjury after she stated fingerprints collected at a crime scene were not attributable to her), along with several other national and international mistakes, have caused some disturbance in the United Kingdom. *See* SIR ANTHONY CAMPBELL, THE FINGERPRINT INQUIRY REPORT 600, § 34.21 (2011).

2. DNA Evidence

Although it has not benefitted from the unencumbered route into criminal proceedings that fingerprint evidence enjoyed, the science of DNA analysis has been broadly accepted. In *Gordon*, for example, the Court of Appeal stated that it had no doubts over the validity and value of DNA evidence in general, suggesting that "unlike fingerprinting, a DNA profiling match is not unique."[271] The challenge that the Court considered was not to the validity of DNA analysis generally, rather to the manner in which the expert had arrived at the match probability.[272] Anticipating the effect that probabilities running into many millions to one may have on juries, the Court accepted that the jury in the particular case may not have convicted had it had the benefit of expert evidence concerning the effect on the match probability of variation produced by differing equipment and the tolerances that are applied in the subjective process of comparison.[273] Although such issues remain salient, they have not received close attention in any subsequent appellate proceeding.[274]

While it appears to be presumed that the jury has the capacity to evaluate the (partially subjective) analysis that results in a random match probability, in *Adams*, the Court of Appeal deprecated defense use of Bayesian analysis to evaluate the probability that the defendant left the genetic material at the crime scene on which DNA analysis had been conducted.[275] The Court doubted whether the jury should be led into the realms of theory and complexity that the presentation of a Bayesian approach to evidence would entail.[276]

The most significant recent challenge in the United Kingdom has been to the admissibility of LCN DNA analysis, a relatively new technique that enables DNA alleles found in very small samples of genetic material to be amplified in order to obtain a DNA profile that can be used for forensic analysis.[277] Doubts were expressed over the reliability of LCN DNA analysis in *R. v. Hoey*,[278] a first instance decision in Northern Ireland.[279] The problem is that the quantities of DNA available for analysis are so small that the process used to amplify the samples is susceptible to statistically random (i.e., stochastic) effects, which give rise to a risk of both false positive and false negative results. More recently, however, the Court of Appeal has admitted the testimony of biologists, about the significance of LCN DNA results, in circumstances where the analyst was unable to attach a mathematical expression in the form of a RMP or likelihood ratio.[280]

In *Reed & Reed*,[281] the Court of Appeal held that evidence of LCN DNA analysis on samples of genetic material that were not susceptible to stochastic effects were

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[271] R. v. Gordon, [1995] 1 Crim. App. 290 at 290, 294 (Eng.).

[272] *Id.* at 296.

[273] *Id.* at 295-96.

[274] In *R. v. Hookway*, [2011] EWCA (Crim) 1989, [15]-[20], [33] (Eng.), the Court of Appeal rejected a submission that disagreement between experts over the appropriate statistical model for generating a random match probability in relation to LCN DNA warranted exclusion of the evidence. Such disagreement ought to be addressed in an appropriate direction to the tribunal of fact. *Id.* at [33].

[275] R. v. Adams, [1998] 1 Crim. App. 377 at 383-84 (Eng.).

[276] *Id.* at 384.

[277] *See* David Bentley & Peter Lownds, *Low Template DNA*, 1 ARCHBOLD REV. 6, 6-7 (2011) (explaining the current court challenges to low template DNA admissibility and procedures in the U.K.).

[278] [2007] NICC 49 (N. Ir.).

[279] *See* Charles Foster, Comment, *Untwining the Strands*, 158 NEW L.J. 157, 157 (2008).

[280] R. v. Dlugosz [2013] EWCA (Crim) 2 (Eng.).

[281] [2009] EWCA (Crim) 2698 (Eng.). .

admissible and suggested that even where there was a risk of them occurring the expert evidence may still be admissible.[282] In *Broughton*,[283] the Court was more emphatic, declaring:

> In our judgment, the science of [LCN DNA] is sufficiently well established to pass the ordinary tests of reliability and relevance and it would be wrong wholly to deprive the justice system of the benefits to be gained from the new techniques and advances which it embodies, in cases where there is clear evidence … that the profiles are sufficiently reliable.[284]

Generally, evidence that was susceptible to random statistical effects would be admissible where repeat testing (even a low number of repeat tests) produced consistent results.[285] In cases where the profiles generated were "wholly and obviously unreliable," it was envisaged that the prosecution would not seek to rely on them, and if it did, then the trial judge ought to exclude the evidence if he or she considered them unreliable.[286] In cases in which the probative value of the profiles was more debatable, the evidence may properly be adduced and its weight established by 'adversarial forensic techniques.'[287] The Court of Appeal appears to have great faith in the capacity of pre-trial management hearings, which impose various reporting duties on experts, on prosecutorial restraint, and the ability of advocates to reveal in cross-examination any shortcomings in methodology used and opinions expressed by expert witnesses to address the uncertainties surrounding such nascent forensic techniques.[288] Where the empirical basis for opinions proffered by an expert has been inadequate, the court has resorted to the "experience of the expert" as a means of bridging the scientific gap.[289] In *Reed & Reed*, although the Court acknowledged that with respect to the mechanisms through which DNA may be transferred from one object or place to another, there was little research and much more was needed, an expert could still enumerate the possible means of transfer of small quantities of DNA.[290] The admissibility of this form of expert evidence was renewed in *Weller*.[291] The appellant submitted that if a proper review of the scientific literature concerning transfer of DNA were to be undertaken, it would show that the state of scientific knowledge to be such that no evaluative judgment on the possible means of transfer could be made.[292] This submission was rejected by the Court of Appeal, which was satisfied that an expert's practical experience could provide 'a sufficiently reliable scientific basis for a forensic science officer to give evidence of the evaluation of the possibilities of transfer' in the circumstances of the particular case.[293]

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[282] *Id.* at [114].

[283] R. v. Broughton, [2010] EWCA (Crim) 549 (Eng.).

[284] *Id.* at [36].

[285] *See* Andrew Roberts, *Drawing on Expertise: Legal Decision-Making and the Reception of Expert Evidence*, 6 CRIM. L.R. 443, 446 (2008) ("[W]here the validity of a new hypothesis or method is demonstrated through repeat testing it might come to be so widely accepted as methodologically sound and reliable that it may be judicially noticed.").

[286] *Broughton*, [2010] EWCA (Crim) at [35].

[287] R. v. Broughton, [2010] EWCA (Crim) 549, [36] (Eng.).

[288] *See id.* at [32].

[289] *Id.* at [32].

[290] R. v. Reed, [2009] EWCA (Crim) 2698, [119] (Eng.).

[291] R. v. Weller, [2010] EWCA (Crim) 1085, [45] (Eng.).

[292] *Id.* at [23].

[293] *Id.* at [44].

3. Bite Marks

Bite mark evidence has not attracted the degree of judicial scrutiny in England and Wales that it has in other jurisdictions.[294] It seems that odontologists have been permitted to proffer a range of opinion on the significance of similarities found in the bite mark impressions left on the skin of a victim of crime (or an object found at the scene of a crime) and dental impressions taken from a defendant.[295] In some cases, this appears to have been restricted to evidence that an impression left on a victim corresponds with an impression of a defendant's teeth.[296] In others, it has been claimed on the basis of similarities in such impressions, that the defendant was the source of the bite marks.[297] It would be in keeping with the approach in respect of other forms of forensic science and medical evidence for experts to be given significant latitude in the terms used to state the significance of their findings where the basis for the evaluation is their own experience.[298]

4. Incriminating Images and Voice Recordings

Incriminating expert opinions concerning identification from voice recordings and images are routinely admitted in criminal proceedings in England and Wales. In common with other forms of forensic comparison evidence, the reliability of the techniques that form the basis of such opinion is not subject to any form of rigorous scrutiny for the purposes of determining admissibility.

a. Image Comparison Evidence (So-Called 'Facial Mapping')

A range of individuals with expertise and/or experience in anatomy, medical art, photography, information technology and military intelligence (and so on) have been allowed to interpret images and express opinions about the identity of persons of interest appearing in them. In addition, police and other investigators are entitled to express opinions about identity from repeated exposure to images. There is, in contrast to Australia (and Canada), no need for prior familiarity (with the suspect/POI) or something beyond what a jury might be able to do through its own examination of the images and the accused during the course of a trial.

Since the 1980s, courts have been admitting identification evidence derived from photographs—initially of soccer riots and robberies—by investigators and more recently digitally-recorded images and videos, analyzed by a range of investigators and consultants.[299] Since the early 1990s, English courts have allowed police officers and other witnesses—formally qualified as expert witnesses and frequently described as "facial mappers"—to express incriminating opinion evidence, even in circumstances where the CCTV evidence and the witnesses' interpretation was the only evidence against the

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[294] *See, e.g.*, R. v. Bourimech, [2002] EWCA (Crim) 2089, [13] (Eng.); R. v. Singleton, [1995] 1 Crim. App. 431 at 434 (Eng.); R. v. Egan, [1992] 95 Crim. App. 278 at 280 (Wales).

[295] *See* R. v. Egan, [1992] 95 Crim. App. 278 at 280 (Wales); R. v. Bourimech, [2002] EWCA (Crim) 2089, [13] (Eng.).

[296] In *R. v. Bourimech*, a forensic odontologist read a statement to the jury: "to the effect that there was no doubt that the bite mark to the complainant's left shoulder corresponded in detail with the dental impressions taken from the appellant." [2002] EWCA (Crim) 2089, [13]. *See also, e.g.*, R. v. Singleton, [1995] 1 Crim. App. 431 at 434 (Eng.) (finding a match between a cast of the defendant's teeth and bite marks found on the victim, a forensic odontologist claimed the marks identified the defendant as the assailant).

[297] *See* R. v. Egan, [1992] 95 Cr. App. R. 278 at 280 (Wales) ("She had a bite mark on her lower right thigh which on the evidence of an odontologist must have been caused by the appellant.").

[298] *See* R. v. Liverpool City Council, [2007] EWHC (Admin) 1477, [46] (Eng.).

[299] R. v. Hookway, [1999] Crim. L.R. 750 (A.C.); R. v. Clare and Peach, [1995] 2 Cr. App. R. 333 at 335-38; R. v. Clarke, [1995] 2 Cr. App. R. 425 at 429-31; R. v. Stockwell, [1993] 97 Cr. App. R. 260 at 261-66. *See* Ruth Costigan, *Identification from CCTV: the risk of injustice*, CRIM L.R. 591, 591-605 (2007).

accused.[300] With the massive expansion in the number of images available from publicly funded CCTV schemes, along with the proliferation of private security systems and mobile recording devices, English courts have maintained their generally liberal approach to the admission of images and opinions based on images.[301] Two leading cases indicate the receptiveness to image comparison evidence.

In *Attorney-General's Reference No 2 of 2002*, the Court of Appeal confirmed four circumstances in which photographic comparisons are acceptable.[302] The two of immediate interest are where the remote witness (often an investigator) spends time viewing and analysing images "thereby acquiring special knowledge [as an ad hoc expert] which the jury does not have" and "a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images."[303] In both cases, the images should be available to the jury and the admissibility 'subject to appropriate directions in summing up'.[304] Considering the admissibility of a "sufficiently qualified expert" in *R. v. Atkins,* the Court of Appeal confirmed that his evidence was admissible provided limitations were made clear to the jury.[305] The Court explained that there was no rule against positive identification (i.e. individualization), though the absence of statistical information about the frequency or interrelatedness of facial features (i.e., some kind of database) ought to be disclosed.[306] General methodological critiques and frailties with techniques employed by the analyst were matters for weight at the trial.[307]

In the decades since it first appeared in courts, facial mapping in England has largely abandoned any pretensions to mathematical precision and measurement (i.e., anthropometrics).[308] Witnesses now tend to testify in terms of general morphology and similarities. While courts do not proscribe individualization, the witnesses themselves tend to prefer the use of scales that facilitate the provision of qualified opinions derived from subjective impressions of the strength of the evidence (*see* Figure 3 and Table 1).[309] Such opinions are routinely admitted even though, as the Court in *Atkins* recognized, they do "not have a scientific basis."[310]

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[300] *See Hookway*, [1999] Crim. L.R. 750.

[301] Gary Edmond, *Just truth? Carefully applying history, philosophy and sociology of science to the forensic use of CCTV images*, 44 Studies in the History and Philosophy of Biological and Biomedical Sciences (2013) 80-91. This may be technologically-driven. The sheer abundance of images seems to demand judicial consideration. *See, e.g.,* BENJAMIN J. GOOLD, CCTV. AND POLICING: PUBLIC AREA SURVEILLANCE AND POLICE PRACTICES IN BRITAIN (Oxford Univ. Press ed., 2004).

[302] Attorney-General's Reference No 2 of 2002, [2002] EWCA (Crim) 2373, [9]-[12] (Eng.).

[303] *Id.* at [19].

[304] *See also* R. v. Abnett, [2006] EWCA (Crim) 3320, [14], [20] (Eng.). In the nineteenth century English judges had been reluctant to allow investigators to express opinions based on knowledge/experience gained during the course of an investigation; *See also* R. v. Crouch, (1850) 4 Cox C.C. 163 (H.C.) 164.

[305] R. v. Atkins, [2009] EWCA (Crim) 1876, [31] (Eng.).

[306] Use of such scales is difficult to reconcile with the criticism of the misuse of statistics in R. v. Clark, [2003] EWCA (Crim) 1020, [174]-[175]. Reliance on warnings was also a feature of permissive responses to the use of images for the purposes of identification. *See e.g.,* R. v. Dodson, [1984] 1 W.L.R. 971 at 979 (Eng.); R. v. Downey, [1995] 1 Cr. App. R. 547 at 556 (Eng.).

[307] Gary Edmond et al., *Atkins v. The Emperor: The "Cautious" Use of Unreliable "Expert" Opinion*, 14 Int'l Journal of Evidence & Proof 146, 148 (2010).

[308] *See* COMPUTER-AIDED FORENSIC FACIAL COMPARISON (Martin Paul Evison et al. eds., 2009).

[309] These are crude attempts to mimic the likelihood ratios associated with DNA results.

[310] R. v. Atkins, [2009] EWCA (Crim) 1876, [20]; *see* Michael C. Bromby, *At Face Value?*, 2003 NEW L.J. EXPERT WITNESS SUPPLEMENT 301, 302, *available at* http://ssrn.com/abstract=1562655 (discussing the use of facial mapping and CCTV. image analysis for identification).

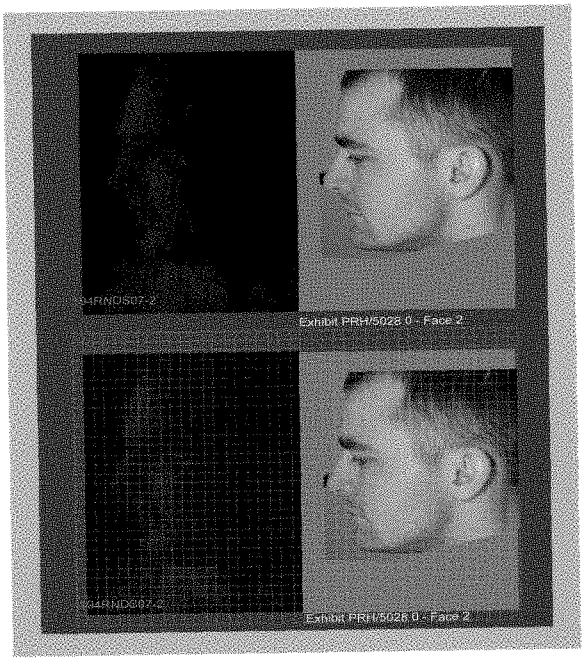

Figure 3: Single image from the crime scene in *R. v. Atkins* (top left). One of the accused (top right). Same images with grids reproduced below.[311]

Level	Description
0	Lends no support
1	Lends limited support
2	Lends moderate support
3	Lends support
4	Lends strong support
5	Lends powerful support

Table 1: "Expert's" assessment of the probative value of the image from *Atkins* in terms of identity (taken from expert's report).[312]

There has been some controversy around facial mapping evidence in England. In this regard, the response to the opinions of one facial mapping witness (Harrow) are suggestive.[313] After many appearances, Harrow came to be seen as 'an expert who over-

[311] The left images in Figure 3 contain the single image retrieved from a security camera system after a home invasion after enhancement. The image on the right is of one of the Atkins brothers. Photographs courtesy of Joe Stone.

[312] R. v. Atkins, [2009] EWCA (Crim) 1876, [8] (this is an attempt to mimic a Bayesian approach to the provision of evidence with no underlying research support).

[313] *Id.* at [12].

stepped the mark' and whose reliability "appeared seriously questionable."[314] Rather than consider Harrow's mistakes as exposing or exemplifying a wider range of problems with facial mapping evidence, the lack of a research base and absence of standardized techniques, as Justice Mitting did in *R. v. Gray,* most courts have preferred to characterize Harrow as a "bad apple", thereby restricting *Gray* to its particular facts.[315] *Atkins* explicitly exemplifies this tendency.[316]

Much of the image comparison evidence, apart from opinions expressed by investigating police officers, is supplied by (or outsourced to) independent consultants (rather than state-employed forensic scientists).[317] Experience with facial mapping indicates how judges may be implicated in the creation and perpetuation of some forensic "fields" and how those fields may possess little, if any, scientific credibility.[318] Facial mapping, *per se*, does not exist beyond its incarnation in law enforcement and investigative communities.

b. Voice Comparison Evidence

Although it is widely accepted that voice identification using only auditory analysis is an unsatisfactory basis of speaker identification, in *R. v. Robb* the Court of Appeal considered such analysis to be admissible evidence.[319] The Court acknowledged that the great weight of informed opinion, including world leaders in the field, was that such techniques unless verified by acoustic analysis were an unreliable basis of speaker identification.[320] It also observed that respected forensic institutes had rejected the use of auditory analysis without supplementation as a basis of voice identification.[321] Further, the Court noted that the expert in question was part of a very small minority of practitioners who were prepared to testify solely on the basis of auditory analysis, that he had not tested the accuracy of his findings and had published no material that would allow such testing to be conducted.[322] It concluded that his opinion had not been shown to be wrong and had therefore been properly admitted at trial.[323]

In *R. v. Chenia* and *R. v. Flynn,* the Court of Criminal Appeals expressed the need for caution when the witness purporting to identify a voice was an investigating police officer whose interpretation might be contaminated by knowledge of the investigation.[324] Such cases now require careful warnings and where possible recordings should be made available so the jury can undertake its own comparison.

It is notable that the Court of Appeal of Northern Ireland, when called upon to consider the admissibility of voice comparison evidence, declined to follow the casual

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[314] *Id.* at [16].

[315] R. v. Gray, [2003] EWCA (Crim) 1001, [16] (Eng.).

[316] R. v. Atkins, [2009] EWCA (Crim) 1876, [16]–[18].

[317] This may, in part, be a risk management strategy.

[318] On co-production, *see* SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA (1995).

[319] R. v. Robb, [1991] 93 Cr. App. R. 161 at 166-68 (Eng.). *See* David C. Ormerod, *Sounding Out Expert Voice Identification Evidence*, CRIM. L.R. 771 (2002) (UK); David C. Ormerod, *Sounds Familiar? Voice Identification Evidence*, CRIM. L.R. 595, 595-98 (2001) (UK).

[320] *Robb*, 93 Cr. App. R. at 164-166.

[321] *See id.* at 164-166.

[322] *Id.* at 164-66.

[323] *See id.* at 167.

[324] R. v. Flynn, [2008] EWCA (Crim) 970, [53] (Eng.); R. v. Chenia, [2002] EWCA (Crim) 2345, [100], [102] (Eng.). Note that such concerns do not ordinarily arise in relation to other types of comparison evidence such as images.

approach adopted in *Robb*.[325] In *R. v. O'Doherty*, it declared that in light of the state of scientific knowledge at the time, no prosecution ought to proceed in Northern Ireland in which the Crown proposed to rely predominantly on auditory analysis of voice recordings.[326]

C. Canada: Admissibility Standards, Jurisprudence, and Practice

Canada is a federal system, divided into ten provinces and three territories. The federal government has exclusive jurisdiction over criminal law, but courts administration, policing and some prisons are provided provincially. Federal and provincial evidence acts establish some rules of admissibility, however common law is the leading source of evidence law.[327] Though originating in England, the common law of Canada has departed from contemporary English law in some important respects. In particular, the Supreme Court of Canada has adopted a principles-based approach to evidence, seeking to articulate and apply a uniform set of values to guide trial judges when deciding the admissibility of evidence.[328] Principles such as necessity, reliability and the right to a fair trial have been judicially defined and are balanced against one another at the time of the admissibility decision.[329] In adopting this approach, the Court has moved away from the traditional rigid approach based on categories of admissibility. In many areas, this has led to a more liberal (i.e., inclusive) admissibility standard, although it is sometimes suggested that expert evidence has become more difficult to tender under the principles-based approach.[330]

Since 1982, the Canadian constitution has incorporated a Charter of Rights and Freedoms.[331] The Charter has had an enormous impact on criminal procedure and evidence, and particularly on investigative practices. Rights protected under the Charter include a right to be free from unreasonable search and seizure, a right to a fair and public trial, and a right to legal counsel.[332] Three decades of jurisprudence has given texture and limits to these rights, and set out the manner in which courts must safeguard Charter rights in their procedures. The focus on Charter protections has outweighed the articulation of other evidentiary principles in relation to forensic science and medicine, and the vast majority of defense challenges to the admissibility of forensic evidence are predicated on an alleged Charter violation such as a warrantless search, illegal arrest or denial of counsel. In light of this emphasis, Canadian trial practice on such issues as the reliability of forensic evidence has at times become an afterthought to the procedural protections afforded by the Charter. The seeming reluctance of trial counsel to challenge the reliability of expert opinion evidence is particularly striking given recent decisions from the

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[325] Although part of the United Kingdom, Northern Ireland is a distinct common law legal jurisdiction, although its criminal procedure is, in many respects, similar to that in England and Wales.

[326] R. v. O'Doherty, [2003] Cr. App. R. 5, 91 (N. Ir.).

[327] Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence*, 61 U. TORONTO L.J. 343, 346-47 (2011).

[328] *Id.*

[329] *Id.* at 392.

[330] ALAN D. GOLD, EXPERT EVIDENCE IN CRIMINAL LAW: THE SCIENTIFIC APPROACH 1-2 (2d ed. 2010). *See also* Edmond & Roach, *supra* note 327, at 375. The leading textbook on Canadian evidence law is ALAN W. BRYANT, SIDNEY N. LEDERMAN & MICHELLE K. FUERST, THE LAW OF EVIDENCE IN CANADA (3d ed. 2009) (the introduction to this text provides a very helpful review of the trends within Canadian evidence law, elaborating on the principles/rules distinction described in the text accompanying this footnote).

[331] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

[332] Canadian Charter of Rights and Freedoms, s. 8, s. 10, s. 11, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 8-10, 11. (U.K.).

Supreme Court of Canada endorsing *Daubert* and its criteria, and a body of critical work that has emerged from high profile wrongful convictions.[333]

The leading Canadian case on the admissibility of expert evidence is *R. v. Mohan*.[334] A unanimous Court moved away from the relevance and helpfulness standard in place in English law, holding that:

Admission of expert evidence depends on the application of the following criteria:

(a) relevance;
(b) necessity in assisting the trier of fact;
(c) the absence of any exclusionary rule; [and]
(d) a properly qualified expert.[335]

On behalf of the Court, Justice Sopinka explained that relevance is a broad inquiry, encompassing logical as well as legal relevance, and requiring a trial judge to assess the reliability of the putative evidence against its costs, including the risk of distortion or over-valuation.[336] Necessity was described as a standard that is higher than the "helpfulness" requirement set out in English precedent, but that should not be judged "by too strict a standard."[337] However, novel scientific evidence (which seems to mean evidence that has not previously been accepted in a court, but may extend to new applications of established techniques) must be "essential" in the sense that a jury will be unable to come to the correct decision without the evidence, in order to be admissible.[338] The requirement that another exclusionary rule must not apply is consistent with rules applied elsewhere in the Commonwealth.[339] The qualification requirement was described by Sopinka J as a need for the expert to demonstrate "special or peculiar knowledge [acquired] through study or experience."[340] While the qualification requirement was initially relatively lax, and arguably remains so in some fields, the identification of wrongful convictions attributable to poor quality expert evidence has led to some instances of a more rigorous assessment of qualifications. Trial judges are increasingly being encouraged by appeal courts to identify and enforce the boundaries of a witnesses' expertise.[341]

Rules prohibiting an expert from testifying on the ultimate issue and requiring that expert evidence go beyond matters that are common knowledge have become less important over time, though they retain some formal status and are occasionally

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[333] *See, e.g.*, STEPHEN T. GOUDGE, INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO: REPORT 514 (2008), *available at* http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v3_en_pdf/Vol_3_Eng.pdf; PATRICK J. LESAGE, REPORT OF THE COMMISSION OF INQUIRY INTO CERTAIN ASPECTS OF THE TRIAL AND CONVICTION OF JAMES DRISKELL 172-73 (2007), *available at* http://www.driskellinquiry.ca/pdf/final_report_jan2007.pdf; FRED KAUFMAN, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN 12-13 (1998), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_ch1.pdf.

[334] R. v. Mohan, [1994] 2 S.C.R. 9, para. 32 (Can.).

[335] *Id.* at paras. 17-21.

[336] *Id.* at paras. 22-23.

[337] *Mohan*, [1994] 2 S.C.R. 9, para. 26. *See also* R. v. D.D., 2000 SCC 43, para. 21 (Can.); R. v. J.-L.J., 2000 SCC 51, para. 56 (Can.).

[338] *Mohan*, [1994] 2 S.C.R. 9, para. 32.

[339] *See, e.g.*, R. v. Morin, [1988] 2 S.C.R 345, paras. 54-64 (Can.).

[340] *Mohan*, [1994] 2 S.C.R. 9, para. 31.

[341] *See* R. v. Abbey, 2009 ONCA 624, paras. 62-64 (Ont. C.A.); GOUDGE, *supra* note 333, at 457; Emma Cunliffe, *Without Fear or Favour? Trends and Possibilities in the Canadian approach to Human Behaviour Evidence*, 10 INT'L J. EVIDENCE & PROOF 280 (2006) (a longer discussion of the Canadian admissibility test and its application).

invoked.[342] Canadian judges have been reluctant to admit expert evidence on matters they regard as being common knowledge, such as the inadequacies of human memory in eyewitness identification.[343] The Supreme Court of Canada suggested for a time that expert evidence is admissible regardless of the extent to which the facts underlying the opinion have been proven, but that the jury should be instructed to consider the extent of proof in deciding what weight to give the evidence.[344] More recent cases seem to have backed away from this laissez-faire approach, holding instead that a lack of admissible proof of underlying facts can undermine the admissibility of the opinion.[345] The latter approach is certainly more consistent with the cost/benefit analysis adopted by the Court in *Mohan*.

During the last decade the Supreme Court has formally supplemented the *Mohan* approach with a more explicit recognition of the need for evidence of reliability.[346] Conspicuously influenced by *Daubert,* this standard is sometimes characterized as "threshold reliability."[347] In *J-LJ, DD* and most recently *Trochym*, the Court referred approvingly to *Daubert* and/or endorsed the reliability criteria.[348] Subservient to *Mohan, Daubert*-style criteria have not been strictly applied, especially to types of evidence that have long been admitted or are not easily assessed in terms of validation and proficiency testing.[349]

Despite the relatively large number of Supreme Court of Canada decisions on the admissibility of expert evidence, much expert evidence (particularly evidence tendered by the Crown) is admitted with, at best, a perfunctory admissibility enquiry.[350] A study of the courts of British Columbia by Cunliffe suggests that when admissibility is contested, trial judges most often admit the expert testimony and leave reliability as an issue of weight to be determined by the tribunal of fact. Expert evidence is rarely excluded on the basis of unreliability, particularly when that evidence relates to what is considered as a routine forensic procedure. Police officers and other investigative professionals are at times qualified by trial judges as expert witnesses on the basis of relatively slight experience, or to testify about the results of tests developed and performed in the context of a specific case.[351] At other times these opinions are admitted as non-expert opinion evidence.[352]

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[342] *See* R. v. Marquard, [1993] 4 S.C.R. 223 (trial judge did not commit error of law when expert was allowed to testify outside area of expertise); R. v. R(D.), [1996] 2 S.C.R. 291 (evidence was admissible but trial judge must give reasons for reaching conclusions or a new trial will be ordered); R. v. Burns, [1994] 1 S.C.R. 656 (expert testimony admissible to explain human behavior).

[343] *Compare* R. v. McIntosh (1997), 35 O.R. 3d 97, para. 25-26 (Can. Ont. C.A.); *and* R. v. Myrie (2003), 57 W.C.B. 2d 72 (Can. Ont. Sup. Ct. J.), *and* Lee Stuesser, *Experts on Eyewitness Identification: I Just Don't See It*, 31 MAN. L.J. 543 (2006) (A representative discussion), *with* PETER CORY, THE INQUIRY REGARDING THOMAS SOPHONOW: THE INVESTIGATION, PROSECUTION, AND CONSIDERATION OF ENTITLEMENT TO COMPENSATION (2001) (Man.), *available at* http://www.gov.mb.ca/justice/publications/sophonow/toc.html.

[344] R. v. Abbey, [1982] 2 S.C.R. 24, para. 52 (Can.).

[345] R. v. Lavallee, [1990] 1 S.C.R. 852 (Can.); R. v. Abbey, 2009 ONCA 624, paras. 147-49 (Can. Ont. C.A.).

[346] *See, e.g.*, R. v. Trochym, 2007 SCC 6, para. 33 (Can.); R. v. D.D., 2000 SCC 43, para. 57 (Can.); R. v. J-L.J., 2000 SCC 51, paras. 31, 33 (Can.).

[347] *Trochym*, 2007 SCC 6 at para. 33.

[348] *Id.* at paras. 36, 139-40; *D.D.*, 2000 SCC 43 at paras. 36, 57; *J.-L.J.*, 2000 SCC 51 at paras. 33, 59.

[349] *Compare* R. v. Abbey, 2009 ONCA 624 para. 48 (Can. Ont. C.A.), *with* Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence*, 61 U. TORONTO L.J. 343, 344 (2011).

[350] *See* Att'y Gen. of Can. v. D.O.L., [1993] 4 S.C.R. 419, para. 52 (Can.) (declaring a trend toward inclusion), *quoted in* R. v. Nikolovski, [1996] 3 S.C.R. 1197, para 18 (Can.); R. v. Graat, [1982] 2 S.C.R. 819, para. 48 (Can.).

[351] R. v. Nikitin (2003), 176 C.C.C. 3d 225, paras. 6-7 (Can. Ont. C.A.); R. v. Collins (2001), 160 C.C.C. 3d 85, para. 9 (Can. Ont. C.A.); R. v. Brooks (1998), 129 C.C.C. 3d 227, paras. 7-9 (Can. Ont. C.A.), *rev'd*, 2000 SCC 11 (Can.); R. v. Laverty (1979), 47 C.C.C. 2d 60, para. 3 (Can. Ont. C.A.).

These trends in trial courts suggest a lack of engagement with the recommendations made by commissions of inquiry into wrongful convictions. Successive commissioners have recommended closer trial scrutiny of investigative practices associated with forensic science: most recently in the Goudge Inquiry into child homicide cases.[353] In many of these inquiries forensic science or medicine was identified as a source of error that positively, and sometimes systematically, contributed to wrongful convictions.[354]

The leading provider of forensic services is an arm of the Royal Canadian Mounted Police (RCMP), and there is no independent forensic science institute like those that currently exist in some parts of Australia (e.g., South Australia) and once existed in England—before the demise of the Forensic Science Service (FSS). Only one published judgment cites the NRC report (without engaging with it substance), and the number of challenges to the reliability of forensic science and medicine evidence does not seem to have increased since its publication. Legal aid funding is a particular concern, in this regard. As is true in other jurisdictions, the amount of funding available to legally aided defendants is inadequate and has been declining over time. This presents a considerable barrier to contested trials of any sort, preventing robust analysis of Crown (or state adduced) forensic science and medicine evidence.[355] Defense experts are out of the question in many cases.

In the vast majority of criminal trials in Canada a trial judge, rather than a jury, acts as the tribunal of fact.

1. Latent Fingerprint Evidence

Canada came relatively late to latent fingerprint evidence, although the RCMP began using latent fingerprint identification as an investigative technique in the early twentieth century. The first two reported decisions on the admissibility of fingerprint evidence were both decided in 1934, and in both cases the evidence was excluded.[356] In *R. v. Wiswell,* the Nova Scotia Court of Appeal suggested that the knowledge and practices underlying fingerprint identification had not been sufficiently proven to admit the evidence.[357] In *R. v. De'Georgio & Servello*, the Crown argued that a fingerprint identification was a question of fact rather than of expert opinion.[358] The judge treated the officer's evidence as potential expert testimony, and excluded it on the basis that the officer had given no account of how he reached his conclusion.[359]

The first reported case in which fingerprint evidence was admitted was *R. v. Buckingham & Vickers*.[360] Justice Robertson distinguished the earlier cases, finding that the police officers who testified to a match on this occasion had given "a very complete

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[352] R. v. Graat, [1982] 2 S.C.R. 819, para. 10 (Can.); R. v. Walizadah, 2007 ONCA 528, para. 36 (Can. Ont. C.A.); R. v. Ilina, 2003 MBCA 20, para. 64 (Can. Man. C.A.).

[353] STEPHEN T. GOUDGE, INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO: REPORT 420 (2008).

[354] *E.g.*, LESAGE, *supra* note 333; ANTONIO LAMER, THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF: RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN (2006); KAUFMAN, *supra* note 333.

[355] *See, e.g.,* MELINA BUCKLEY, MOVING FORWARD ON LEGAL AID, RESEARCH ON NEEDS AND INNOVATIVE APPROACHES (2010); AB CURRIE, THE UNMET NEED FOR CRIMINAL LEGAL AID: A SUMMARY OF RESEARCH RESULTS (2003).

[356] R. v. Wiswell, [1935] 1 D.L.R. 624, para. 9 (Can. N.S. Sup. Ct.); R. v. De'Georgio, [1934] 3 W.W.R. 374, para. 18 (Can. B.C. Cnty. Ct.).

[357] R. v. Wiswell, [1935] 1 D.L.R. 624, para. 9.

[358] R. v. De'Georgio, [1934] 3 W.W.R. 374, para. 7.

[359] *Id.* at paras. 7, 19.

[360] R. v. Buckingham (1943), [1946] 1 W.W.R. 425, paras. 7, 22 (Can. B.C. Sup. Ct.).

and adequate explanation as to why they came to the conclusion that these fingerprints are the same as those of the accused."[361] There was no other evidence linking the accused to the crime in this case, and the accused was ultimately acquitted by the jury.[362] *Pelletier. v. Le Roi* was the first Court of Appeal decision to confirm the admissibility of latent fingerprint evidence.[363] The Quebec court affirmed the reliability and universal admissibility of fingerprint evidence, effectively approving this evidence for use in criminal trials thereafter.[364] By 1988, the Supreme Court of Canada felt sufficiently confident in latent fingerprint comparison to describe the technique as 'an invaluable tool of criminal investigation . . . because it is virtually infallible.'[365]

There appears to be no reported case in which fingerprint evidence has been excluded since *Pelletier. v. Le Roi* affirmed admission in 1952.[366] From time to time, judges acknowledge that experts must exercise judgment in declaring a match,[367] or provide a critical assessment of the inferences that may or may not be drawn from the presence of matched fingerprints at a crime scene.[368] In other cases, judges declare that fingerprinting is so widely accepted that it can be admitted with little or no screening.[369]

Canada has no investigative or evidentiary requirements of a minimum number of similar points to declare a match.[370] Experts tend nonetheless to testify to the number of similar features identified, at times using visual aids to demonstrate them to the tribunal of fact. Experts usually testify to a "match" between the accused's fingerprints and those found at a scene. The advent of *Mohan*, with its emphasis on case-by-case determinations of the admissibility of expert evidence, does not seem to have affected fingerprint evidence.[371] Effectively, this and the other familiar forms of forensic evidence considered in this article seem to have been grandfathered out of the *Mohan-Daubert* framework.[372]

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[361] *Id.* at para. 22.

[362] *Id.* at paras. 9, 24.

[363] Pelletier. v. R., [1952] B.R. 633 (Can. Que. K.B.).

[364] *Id.* at para. 21.

[365] R. v. Beare (1987), [1988] 2 S.C.R. 387, para. 21 (Can.).

[366] Pelletier. v. R., [1952] B.R. 633 at para. 21 (Can. Que. K.B.).

[367] R. v. Murrin (1999), 181 D.L.R. 4th 320, para. 74 (Can. B.C. Sup. Ct.); R. v. Borden (1993), 124 N.S.R. 2d 163, para. 147 (Can. N.S. C.A.).

[368] *See* R. v. Mars (2006), 206 O.A.C. 387, paras. 19-21 (Can. Ont. C.A.).

[369] R. v. Johnston (1992), 69 C.C.C. 3d 395, para. 92 (Can. Ont. Ct. J.).

[370] Jeff Wise, *Under the Microscope: Legal Challenges to Fingerprints and DNA as Methods of Forensic Identification*, 18 INT'L REV. L., COMPUTERS & TECH. 425, 427 (2004).

[371] R. v. Mohan, [1994] 2 S.C.R. 9 (Can.).

[372] Wise, *supra* note 371, at 427.

2. DNA Evidence

The leading Canadian case on the admissibility of DNA evidence is R. v. Terceira.[373] In that case, the Court confirmed that the Mohan test applies to DNA evidence, and defined a "match" as a "failure to exclude a suspect's DNA."[374] The Terceira court regarded reliability as the touchstone of admissibility for a novel technique (as RFLP analysis was in 1991).[375] Evidence on the statistical probability of a random match was also accepted, although the Court held that the admissibility of this evidence should be considered on a case-by-case basis.[376] While probability evidence was often ruled inadmissible in the 1990s, evidence of a match was invariably admitted from the first cases. Probability estimates are now routinely admitted.

Early Canadian case law on the admissibility of DNA relied heavily on U.S. judges' conclusions regarding the reliability of DNA matching and the appropriateness of forensic techniques adopted in crime investigation laboratories.[377] As new techniques were introduced (e.g. PCR and mtDNA), this reliance on U.S. precedent has persisted. Questions about the applicability of probability-based statistics to indigenous populations and ethnic minorities have been recurrent.[378] In one Alberta case, a defense expert who testified about the shortcomings of the statistical evidence given by prosecution witnesses, partly in reliance on the first NRC report,[379] was found to have given irrelevant and unreliable evidence by a judge who ultimately relied on the Crown expert's evidence that a match had been found.[380] However, in the first decision on the admissibility of mitochondrial DNA evidence, the Supreme Court of British Columbia ordered that proficiency tests be disclosed to the accused, and carefully considered evidence regarding both proficiency and validity testing.[381] In keeping with earlier decisions, Henderson J concluded that the risk of contamination occurring in a particular case is a matter for the jury which should not preclude admission of the evidence.[382]

The openness towards DNA evidence that has been shown by Canadian courts is not restricted to human DNA. Forensic scientists have been permitted to testify that a comparison of the phylogenetic profile of HIV made it highly likely that an accused infected 11 victims with HIV.[383] Phylogenetic comparisons were also admitted in an effort to establish that HIV contaminated blood was used in a coagulant product administered to hemophiliacs in the mid 1980s, although the application of the technique in that case was ultimately found unreliable by the trial judge.[384] In another case, cat hairs found on a jacket similar to one the accused had been known to wear were alleged to match the DNA

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[373] R. v. Terceira (1998), 38 O.R. 3d 175, para. 12 (Can. Ont. C.A.), *aff'd*, [1999] 3 S.C.R. 866, paras. 2-3 (Can.).

[374] *Id.* at paras. 15, 19.

[375] *Id.* at para. 29.

[376] *Id.* at para. 43.

[377] R. v. Lafferty, [1993] 4 W.W.R. 74, para. 44 (Can. N.W.T. Sup. Ct.); R. v. Baptiste, 1991 CarswellBC 1277 (Can. B.C. Sup. Ct.) (WL); R. v. Bourguignon, [1991] O.J. No. 2670 (Can. Ont. Ct. J.) (QL); R. v. Bourguignon, [1990] O.J. No. 1205 (Can. Ont. Provincial Ct.) (QL).

[378] R. v. Lafferty, [1993] 4 W.W.R. 74, para. 44; R. v. Baptiste, 1991 CarswellBC 1277, paras. 54-56; R. v. Bourguignon, [1991] O.J. No. 2670.

[379] NAT'L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992).

[380] R. v. Love, [1994] A.W.L.D. 761, paras. 162-167 (Can. Alta. Ct. Q.B.) (discussing that probability statistics given by Crown experts ranged from 1 in 470 billion to 1 in 1.19 trillion), *aff'd*, 174 A.R. 360 (Can. Alta. C.A.).

[381] R. v. Murrin (1999), 181 D.L.R. 4th 320, paras. 76, 108 (Can. B.C. Sup. Ct.).

[382] R. v. Murrin (1999), 181 D.L.R. 4th 320; *see also* R. v. G.J.T. (2001), 200 Nfld. & P.E.I.R. 81 (Can. Nfld. Sup. Ct.) (discussing the Profiler Plus test).

[383] R. v. Aziga, [2008] O.J. No. 5131, paras. 24-26 (Can. Ont. Super. Ct. J.) (QL).

[384] R. v. Armour Pharmaceutical Co. (2007), 226 C.C.C. 3d 438, para. 94 (Can. Ont. Super. Ct. J.).

of the victim's cat.[385] In response to defense criticisms of the number and homogeneity of cats included in the ad hoc sample of local cat DNA assembled for this case, the forensic scientist testified, "We used a lot of loci instead of a lot of cats."[386] The evidence was admitted, and its admissibility was upheld on appeal.[387]

There seem to be no Canadian cases in which DNA evidence was wholly excluded from trial.

3. Bite Marks

In Canada, bite mark evidence has been associated with exculpation in high profile cases. Two important examples are *R. v. Unger*,[388] in which a forensic odontologist testified that bite marks on the victim were not made by the accused; and *R. v. Reynolds*, where a forensic pathologist opined that wounds were made by scissors leading to murder charges being laid against the victim's mother.[389] Unger is now considered to have been wrongly convicted, and Reynolds is also widely regarded as innocent of the charges that were laid against her.[390] In *Reynolds*, a forensic odontologist concluded that the puncture wounds were made by a dog.[391] Forensic odontology seems to be one of relatively few fields in which defense experts are occasionally called in Canada.

A review of cases in which bite mark evidence is admitted suggests that lawyers and judges allow bite mark specialists wide latitude when testifying. For instance, courts have permitted bite mark witnesses to testify about the force required to leave a particular mark;[392] about the psychological state experienced by a person when biting;[393] and about whether an injury to a victim's head was caused by a boot.[394] In some of these cases, the court suggested that little weight should be given to the opinion—nonetheless, the testimony was permitted.

A rare example of a more critical assessment of bite mark evidence is *R. v. Taillefer; R. v. Duguay*.[395] In this case, the expert testified that a bite mark was consistent "beyond reasonable doubt" with the accused's bite pattern.[396] The expert had previously given an opinion that the same mark was caused by a different suspect.[397] The Supreme Court of Canada upheld the accused's appeal from conviction on the basis of non-disclosure of the earlier opinion.[398] While discussing the relevance of the inconsistent opinion to the expert's credibility, the Court did not comment on the reliability arguments

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[385] R. v. Beamish (1999), 177 Nfld. & P.E.I.R. 265, para. 9 (Can. P.E.I. Sup. Ct.).

[386] *Id.*at paras. 9-10.

[387] *Id.* at para. 19.

[388] R. v. Unger (1993), 83 C.C.C. 3d 228, para. 9 (Can. Man. C.A.).

[389] GOUDGE, *supra* note 354, at 23 (Crown withdrew the case before proceeding to verdict).

[390] *See* GOUDGE, *supra* note 354, at 25; Gabrielle Giroday, *Unger's Murder Conviction Overturned*, WINNIPEG FREE PRESS (Mar. 11, 2009, 4:54 PM), *available at* http://www.winnipegfreepress.com/breakingnews/Conviction-of-Unger-overturned-41085982.html; *Kyle Unger Acquitted of 1990 Killing*, CBC NEWS (Oct. 23, 2009, 9:38 PM), http://www.cbc.ca/news/canada/manitoba/story/2009/10/23/mb-unger-acquitted-manitoba.html.

[391] GOUDGE, *supra* note 354, at 23.

[392] R. v. Ho (1999), 141 C.C.C. 3d 270, para. 69 (Can. Ont. C.A.).

[393] R. v. J.A.A., 2011 SCC 17 at para. 31 (Can.).

[394] R. v. Smith, 2005 BCSC 1624, paras. 76-79 (Can. B.C. Sup. Ct.).

[395] R. v. Taillefer, 2003 SCC 70 (Can.).

[396] *Id.* at para. 36.

[397] *Id.*

[398] *Id.* at paras. 134-135.

raised by the accused.[399] The Court did not suggest that the patent reliability concerns in this case mandated exclusion of the evidence.[400]

4. Incriminating Images and Voice Recordings

a. Opinions about Images

Expert testimony about images is rarely offered in Canada for two reasons. First, in *R. v. Nikolovski*, the Supreme Court of Canada held that a tribunal of fact may reach its own conclusion about identification by comparing images of a person of interest with the accused person, even in cases where no other evidence links the accused with the crime.[401] Trial judges are exhorted to emphasize the care required to reach such a verdict, but the Mohan criteria will not condition the admissibility of footage or photographic evidence for this purpose. Secondly, Canadian courts routinely permit a witness who knows the accused to testify that he or she can identify the accused as the person depicted in video or photographic images.[402] Often, the witness called by the Crown for this purpose is a police or probationary officer, or prison guard. Nonetheless, and perhaps reassuringly, the case law includes several examples of those accused being acquitted in circumstances where images and supplementary identification evidence are the only evidence presented to establish identity.[403] However, while judges frequently rehearse the general dangers of identification evidence, they never disclose any familiarity with technical literature on the topic, nor offer an analysis of the special issues associated with image identification beyond occasional references to image quality.[404]

We have identified only three reported decisions in which expert testimony was admitted to assist the court to interpret video imagery.[405] In R. v. Brown, the defense led expert evidence from an anthropologist (relying on facial morphology, photo-anthropometry and video superimposition) to support its claim that the accused were not the individuals shown in a video linked to the charged murder.[406] The trial judge allowed the evidence over the Crown's objections, finding that it was likely respectable within its field and that any frailties in the expert's methodologies could be fully canvassed in cross-examination.[407] In R. v. Eakin, the Manitoba Court of Queen's Bench admitted expert evidence proffered by the Crown to show that the movements captured on a video were consistent with the accused punching the alleged victim, and inconsistent with the

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[399] *Id.* at paras. 46, 54, 105.

[400] *Id.*

[401] R. v. Nikolovski, [1996] 3 S.C.R. 1197, para. 23 (Can.).

[402] *E.g.*, R. v. Leaney, [1989] 2 S.C.R. 393, paras. 18, 28 (Can.); R. v. Anderson, 2005 BCSC 1346, para. 25 (Can. B.C.) (summarizing indicia relevant to determining whether a witness is sufficiently familiar with the accused to perform this role).

[403] *See, e.g.*, R. v. Copeland, 2011 ONSC 1568 (Can. Ont.) (holding that a fingerprint "match" was not conclusive proof of identity where there may have been an innocent explanation for its existence); R. v. New, 2010 ABPC 391, paras. 30, 36, 48 (Can. Alta.); R. v. Boersma, 2009 ONCJ 178, paras. 35, 42-43, 48 (Can. Ont.); R. v. Gamble, 2009 SKPC 65, paras. 34-36 (Can. Sask.); R. v. Grewal, 2008 BCPC 211, paras. 41, 63 (Can. B.C.); R. v. D.A.H., 2006 BCPC 400, paras. 60, 62 (Can. B.C.); R. v. Chohan, 2006 BCPC 421, paras. 23-24, 28 (Can. B.C.); R. v. Martin, 2005 NSPC 32, paras. 29-30 (Can. N.S.); R. v. Moyou, 2003 BCPC 63 (Can. B.C.); R. v. Gibbons, 2003 ABPC 114, paras. 10, 24-25 (Can. Alta.); R. v. Griffith, 1997 CarswellBC 2819, paras. 20, 22 (Can. B.C. S.C.). *But see* R. v. R.H., 2010 ONCA 704, paras. 6-7, 9-10 (Can. Ont.) (holding that the trial judge's reliance on videotape evidence was not error).

[404] *See* R. v. Lindgren, 2010 BCPC 283, para. 9 (Can. B.C.); R. v. Elkins, 2007 BCSC 929, para. 21 (Can. B.C.); R. v. Aitken 2012 BCCA 134 (Can. B.C.).

[405] R. v. Eakin, 2000 MBQB 107, para. 5 (Can. Man.); R. v. Brown, 1999 CarswellOnt 4703, paras. 1, 4 (Can. Ont. Sup. Ct. J.) (WL).

[406] *Brown*, 1999 CarswellOnt at paras. 1, 4.

[407] *Id.* at para. 8.

accused's version of events.[408] In *R. v. Aitken* the British Columbia Court of Appeal upheld admission of the analysis of video by a podiatrist (so-called gait analysis) to help identify the accused.[409]

b. Opinions about Voices (and Sounds)

Voice identification evidence is routinely admitted in Canada, almost always via lay witnesses.[410] Courts allow police officers to testify to voice identifications that match intercepted communications based on a few words spoken by an accused person at the time of arrest.[411] This evidence is considered directly admissible as a question of fact, and is expressly not subject to the rules regulating opinion and expert evidence.[412] Accordingly, arguments about the reliability of voice identification go to weight rather than admissibility.[413]

The tribunal of fact is encouraged to consider several aspects of a purported identification before acting on it.[414] The factors set out in the case law regarding jury instructions are effectively indicia of reliability. Because lay identification evidence is directly admissible, the vast majority of challenges to the admissibility of voice identification evidence are made on the basis of alleged Charter violations, without raising reliability.[415] The Canadian receptivity towards lay voice identification does not seem to have been disturbed by two high profile wrongful convictions that relied upon lay voice identification evidence.[416]

Given that lay voice identification is so readily accepted, expert evidence about voice identification is very rarely called. One of the first Canadian cases in which an expert was admitted was *R. v. Medvedew*.[417] The trial judge allowed a trained police officer to testify on the basis of spectrographic analysis that two voices were "the same."[418] Instructions encouraged the jury to provide "a respectful audience,", but also to consider the possibility of error.[419] Unusually, a defense expert was also called in this case.[420] The defense expert was highly critical of the methods used by the Crown expert.[421] The defense also argued that the Crown expert should have tendered the

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[408] *Eakin*, 2000 MBQB at para. 5.

[409] *Aitken* 2012 BCCA 134.

[410] Although the trier of fact, as with images, may make its own interpretation of both the identity of a speaker and of the content or meaning of what was allegedly spoken. *See, e.g.*, R. v. Turpin, 2011 ONCA 193, para. 36 (Can. Ont.).

[411] R. v. Lepage, 2008 BCCA 132, paras. 20, 25 (Can. B.C.); R. v. Parsons (1977), 17 O.R. 2d 465, para. 26 (Can. Ont. C.A.), *aff'd*, Charette v. R., [1980] 1 S.C.R. 785, 786 (Can.).

[412] R. v. Adam, 2006 BCSC 1884, para. 136 (Can. B.C.); R. v. Chan, 2001 BCSC 1180, para. 28 (Can. B.C.); R. v. Williams (1995), 80 O.A.C. 119, para. 18 (Can. Ont. C.A.); *Parsons*, 17 O.R. 2d at para. 18.

[413] *Williams*, 80 O.A.C. at para. 17.

[414] *Adam*, 2006 BCSC at paras. 137-40.

[415] R. v. Ngo, 2003 ABCA 121, para. 13 (Can. Alta.); R. v. Scarpino, [1998] B.C.J. No. 1563, para. 1 (Can. B.C.) (QL); R. v. Rendon, [1997] O.J. No. 5505 (Can. Ont. Sup. Ct. J.) (QL).

[416] R. v. Henry, 2010 BCCA 462, para. 118 (Can. B.C.); R. v. Morin, [1991] O.J. No. 2528, paras. 260-61 (Can. Ont.) (QL); FRED KAUFMAN, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN, 405-06, 964-66 (1998).

[417] R. v. Medvedew (1978), 91 D.L.R. 3d 21, paras. 8-10, 25 (Can. Man. C.A.). *See also* R. v. Montani (1974), 26 C.R.N.S. 339, para. 25 (Can. Ont. P.C.).

[418] *Medvedew*, 91 D.L.R. 3d at para. 16.

[419] *Id.* at para. 14.

[420] *Id.* at paras. 17-18.

[421] *Id.* at para. 18.

spectrogram results for the jury's consideration.[422] The trial judge left all of this evidence to the jury, and a majority of the Manitoba Court of Appeal found that he was right to admit the evidence and that there was no error in the instructions provided to the jury.[423] A strong dissent was issued, referring to inadequacies in the Crown case and explaining the controversies then raging about voice identification evidence in the United States.[424] Justice O'Sullivan held that the trial judge should not have qualified the Crown expert without first being satisfied that the technique was scientifically valid.[425] While O'Sullivan JA's dissent has occasionally been favorably mentioned in subsequent cases, it has never formally been adopted by an appeal-level court.

A second dimension to "expert" testimony about voice identification is the use of translators to identify a speaker. At times, courts have been willing to extend the field of expertise (translation) in which a translator is qualified to include expertise in identifying individual voices speaking in the translator's language.[426] However, even in this context, the question of expertise rarely arises because of the readiness with which lay identifications are admitted.

D. Australia: Admissibility Standards, Jurisprudence, and Practice

Australia is also a federal system. The six states and two territories are responsible for the vast majority of criminal laws and prosecutions. There are basically two systems of evidence law operating among the various state, territory and federal jurisdictions.[427] The older, common law system was originally drawn from England and continues to resemble contemporary English practice. The more recent addition is the uniform evidence law (UEL), introduced in 1995 following the coordinated enactment of a series of largely standardized evidence statutes.[428] The common law continues to apply in South Australia, Queensland, Western Australia and the Northern Territory.[429] The Commonwealth (i.e., federal courts), the Australian Capital Territory, New South Wales, Tasmania and Victoria apply the UEL.[430] This slowly expanding second group comprises the most populous states where the majority of commercial and criminal litigation occurs. In general, Australian judges in both systems have developed liberal (or inclusive)

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[422] *Id.* at para. 19.

[423] *Id.* at paras. 20-21.

[424] *Id.* at paras. 41-55.

[425] *Id.* at para. 55.

[426] *E.g.*, R. v. Hoang, 2000 ABPC 55, paras. 9, 46 (Can. Alta.). *But see* R. v. Ngo, 2003 ABCA 121, paras. 13, 36 (Can. Alta.) (excluding voice evidence on the basis of a Charter breach).

[427] For an overview of Australian evidence law, *see* JOHN D. HEYDON & RUPERT CROSS, CROSS ON EVIDENCE (8th ed. 2009); ANDREW LIGERTWOOD & GARY EDMOND, AUSTRALIAN EVIDENCE: A PRINCIPLED APPROACH TO THE COMMON LAW AND THE UNIFORM ACTS (5th ed. 2010). For an annotated commentary of the UEL, *see* STEPHEN ODGERS, UNIFORM EVIDENCE LAW (9th ed. 2010). On expert evidence, *see* IAN FRECKELTON & HUGH SELBY, EXPERT EVIDENCE: LAW, PRACTICE AND ADVOCACY (2005); Gary Edmond, *Specialised Knowledge, the Exclusionary Discretions and Reliability: Reassessing Incriminating Expert Opinion Evidence*, 31 U.N.S.W. L.J. 1 (2008).

[428] Also described as the "uniform law" or the "new evidence law," the UEL is comprised of the following: *Evidence Act* 1995 (Cth); *Evidence Act* 2011 (Aust. Cap. Terr.); *Evidence Act* 2008 (Vict.); *Evidence Act* 2001 (Tas.); *Evidence Act* 1995 (N.S.W.).

[429] In all of these jurisdictions, parochial evidence acts supplement the common law: *Evidence Act* 1977 (Queensl.); *Evidence Act* 1939 (N. Terr.); *Evidence Act* 1928 (S. Austl.); *Evidence Act* 1906 (W. Austl.). The rules of evidence regulating expert opinion in criminal proceedings are mainly common law and remarkably consistent across these jurisdictions.

[430] *Evidence Act* 1995 (Cth) s 4(1) (Austl.). The UEL does not apply to Commonwealth Family Court proceedings unless on appeal from certain State courts, most federal and state tribunals, and until 1998 did not apply to Indigenous land claims under the Native Title Act 1993 (Cth). *Evidence Act* 1995 (Cth) s 5-6 (Austl.).

approaches to incriminating expert opinion evidence and there is considerable convergence between the two systems.[431]

At common law, as in England and Canada, those with expertise are normally allowed to express opinions, provided the opinions are sufficiently relevant to the facts in issue.[432] The witness must have undergone training (and received appropriate qualifications or certification) or hold experience, and the opinion should be derived from a recognized "body of knowledge" (or "field"") or experience.[433] The opinion should also be of assistance to the tribunal of fact.[434] Rules preventing expert witnesses from expressing opinions on *the ultimate issue* or trespassing on matters considered to be within *common knowledge*—because of their invasion of the prerogatives of the jury—have in effect become moribund. Although, Australian common law judges (and their UEL counterparts) remain reluctant to admit the testimony of experimental psychologists on matters pertaining to human sensory experience and memory (e.g., on eyewitness identification).[435]

There is, in addition, a supplementary consideration: the *basis rule* (which persists under the UEL).[436] In its more technical guise, the basis rule requires that the facts on which an expert opinion is based must be identified, and in its strictest form, supported by admissible evidence.[437] This approach has been described by the full Federal Court as "a counsel of perfection" and, in consequence, tempered.[438] Another strand, requires the expert witness to explain the process or technique through which his or her opinion is derived—the so-called basis of the technique and opinion.[439] Provided the witness can articulate some kind of process, even if it involves speculative and untested techniques, that will ordinarily satisfy this version of the rule. In practice, both strands tend to be either ignored or treated perfunctorily in criminal proceedings.[440]

Under the UEL, there is an exception to the proscriptive opinion rule (s 76) for opinions substantially based on "specialized knowledge" derived from the witness's 'training, study or experience' (s 79).[441] Section 79 states:

> If a person has specialized knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an

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[431] Victoria, however, may be slightly more exclusionary than the other UEL jurisdictions. *Compare Evidence Act* 1995 (Cth) s 76 (Austl.), *with Evidence Act* 2008 (Vict.) s 76 (Austl.).

[432] The common law maintains *sufficient* relevance, rather than *logical* relevance associated with the Evidence Act. *Evidence Act* 1995 (Cth) ss 55, 56 (Austl.).

[433] R. v. Bonython [1984] 38 SASR 45, 46-47 (Austl.).

[434] Clark v. Ryan [1960] 103 CLR 486, 491 (Austl.); Bonython, 38 SASR at 47.

[435] *See, e.g.*, R. v. Smith, [1987] VR 907, [14]-[17] (Austl.); *Evidence Act* 1995 (Cth) ss 79(2), 80. Judges are also reluctant to admit evidence about truth telling, as with polygraphs.

[436] LAW REFORM COMM'N, REPORT NO. 26 (INTERIM) EVIDENCE, para. 750 (1985).

[437] Makita (Austl.) Pty. Ltd. v. Sprowles [2001] 52 NSWLR 705, [85] (Court of Appeal) (Austl.); Dasreef Pty. Ltd. v. Hawchar [2011] 277 A.L.R. 611, [91]-[92] (Austl.).

[438] Sydneywide Distrib. Pty. Ltd. v. Red Bull Austl. Pty. Ltd. [2002] FCAFC 157, [7] (Austl.). *See also* Dasreef [2011] HCA at [25]; Alphapharm Pty. Ltd. v. H Lundbeck [2008] FCA 559, [758]-[59] (Austl.).

[439] Usually the derivation is linked to Davie v. Magistrates of Edinburgh, [1953] S.C. 34 (Scot.).

[440] *See, e.g.*, R. v. Jung [2006] NSWSC 658 (Austl.).

[441] *Evidence Act 1995* (Cth) s 76(1) (Austl.): "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

> opinion of that person that is wholly or substantially based on the knowledge.[442]

Judges in UEL jurisdictions have not taken the opportunity to read the need for "reliability" into "specialized knowledge" or to substantially revise their common law practice.[443] Somewhat paradoxically, the leading case in NSW explicitly rejected the need to consider "an extraneous idea such as 'reliability."[444]

In consequence, UEL practice tends to resemble the common law, as lawyers and judges focus attention upon the qualifications of the witness and whether there is a "field" of "specialized knowledge".[445] There are relatively few criminal decisions where incriminating expert opinion evidence is examined in detail or where the precise terms of s79 are applied rigorously to incriminating expert opinions.[446] Consequently, most incriminating opinion evidence is simply admitted and its weight left to the tribunal of fact. Under the UEL, the ultimate issue and common knowledge rules have been formally tempered, if not quite abandoned (s80).[447]

In addition, drawing upon and contorting authority from New Zealand and the Australian High Court—in relation to the preparation of transcripts of voice recordings—several Australian jurisdictions have developed the concept of the *ad hoc* expert.[448] These witnesses, usually investigators, though sometimes translators or formally qualified individuals, have been allowed to express their incriminating opinions on the basis of exposure to (or analysis of) some kind of evidence: usually repeated exposure to voice recordings or incriminating images. Originally developed to facilitate the admission of transcripts as an aid for the tribunal of fact when they were required to listen to the content of voice recordings of inferior quality, in recent years the use of *ad hoc* experts has dramatically expanded as Australian courts have allowed a variety of witnesses to express incriminating opinions about identity drawn from the rapid increase in the availability of images and voice recordings.

Allowing *ad hoc* experts to express opinions sits awkwardly with the common law because often the witnesses do not have appropriate qualifications and, to the extent that there is a relevant body of knowledge or experience, these particular individuals are not part of, or familiar with, it. Recourse to *ad hoc* experts also contravenes the explicit

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[442] The influence of the original Federal Rules of Evidence should be obvious. *Compare* Fed. R. Evid. 702, *with Evidence Act 1995* (Cth) s 79(1) (Austl.).

[443] *See, e.g.*, Velevski v. The Queen (2002) 187 ALR 233, [82] (Austl.); HG v. The Queen (1999) 197 CLR 414, 438-39 (Austl.).

[444] Notwithstanding the statutory interest in 'specialised knowledge' under the UEL, common law jurisdictions are slightly more likely to exclude expert evidence where the evidence is unreliable. R. v. Tang (2006) 161 A Crim R 377, 378 (Austl.).

[445] There is an explicit exception for opinions from indigenous persons on traditional laws and customs (s 78A), and s 79 was recently extended to make clear that opinions are not inadmissible merely because they concern the impact of sexual assault on the behavior of children: *Evidence Act 1995* (Cth) s 79(2)(a) and s 79(2)(b). *Evidence Act 1995* (Cth) s 78A (Austl.); *Evidence Act 1995* (Cth) s 79 (Austl.).

[446] There are very few civil trials before juries in Australia. In consequence, trial judges do not need to be as exclusionary in their civil justice practice. The participation of wealthy parties, frequently corporations, means that in many civil cases the parties dedicate considerable amounts of time and resources to developing and challenging expert opinion evidence. This is far less likely to occur in the very asymmetrical criminal contest, especially as the state has an effective monopoly on many sources of expertise and, in most trials, the resources available to the defense.

[447] *Evidence Act 1995* (Cth) s 80 (Austl.): "Evidence of an opinion is not inadmissible only because it is about: (a) a fact in issue or an ultimate issue; or (b) a matter of common knowledge."

[448] G. Edmond and M. San Roque, *Quasi-Justice: Ad Hoc Expertise and Identification Evidence*, 33 CRIM. L.J. 8, 11-14 (2009). *Ad hoc* experts have also featured in proceedings in England and Wales, although the use has been questioned recently in R. v. Flynn [2008] 2 Cr. App. R. 20, 266, 271 (Austl.).

terms of the UEL for, s76 imposes an exclusionary rule that appears to cover the field.[449] Those purporting to express opinions on the basis of their interpretation of images or voices invariably possess no "specialized knowledge" or "training and experience" in voice or image comparison and analysis.

Only rarely do Australian judges use discretionary—and in UEL jurisdictions, their mandatory and discretionary—exclusions.[450] Australian judges seem to be reluctant to exclude potentially probative expert opinion evidence even where it is likely to be unfairly prejudicial—that is, unreliable and the jury likely to misuse or overvalue it. Rather than require the state to support the probative value of incriminating expert opinion with evidence of reliability or proficiency, common law and UEL judges tend to admit speculative opinions—such as those of *ad hoc* expert witnesses—because a jury might find unreliable or speculative opinions persuasive (i.e., "accept" them).[451] Questions about the value of evidence are conventionally left for the jury to determine (as matters for weight).

In addition, Australian judges maintain faith in the ability of warnings, directions and cautionary instructions to overcome problems with expert opinion evidence. The ability to comment, usually in quite general terms, about expert evidence and its dangers often facilitates the admission of evidence that might appear unreliable, speculative or controversial.

It is reasonably common for judges to hold a *voir dire*, following challenges to the admissibility of expert opinion evidence. NSW has also experimented with expert witnesses giving evidence *concurrently* in such preliminary proceedings.[452] Preliminary hearings rarely lead to the exclusion of incriminating expert opinion evidence adduced by the state. Though, judges may sometimes direct a witness to avoid the use of certain terms and expressions and encourage "splitting". None of the admissibility and regulatory interventions (e.g., the imposition of preferred expressions) is based on empirical research concerning underlying techniques, the value of trial practices or jury comprehension.

In practice, there is often little difference between the way common law and UEL courts approach the admissibility of expert opinion evidence. Notwithstanding developments in the U.S. and Canada, Australian courts have preferred their common law heuristics (i.e., "field" and qualifications or experience) and been reluctant to consider, let alone incorporate, "reliability" as an admissibility criterion for incriminating expert opinion evidence.[453] Judges in both common law and UEL jurisdictions exhibit a tendency to admit incriminating opinion evidence and leave questions about validity and reliability to the trial and the tribunal of fact. This liberal approach to admissibility and effective disinterest in reliability places both the risk of unreliability and the need to persuade the tribunal of fact of the weakness of unreliable opinions on the accused—all in the context of the accusatorial trial. Australian judges invest considerable confidence in defense

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[449] *Evidence Act 1995* (Cth) s 76 (Austl.).

[450] At common law, *Christie,* and under the UEL, s 137: "In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant." *See also* UEL 135 and 136; R. v. Christie [1914] AC 545 (Eng.); *Evidence Act 1995* (Cth) s 137 (Austl.).

[451] *See, e.g.*, R. v. Shamouil [2006] 66 NSWLR 228, [49] (Austl.); R. v. Carusi (1997) NSW LEXIS 1, 40 (Austl.); R. v. XY [2013] NSWCCA 121 (Austl.). Though compare R. v. Dupas [2012] VSCA 328 (Austl.).

[452] *See* Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 LAW & CONTEMP. PROBS. 159 (2009).

[453] "Reliability" is discussed, incidentally, in several cases. *See, e.g.,* Velevski v. The Queen (2002) 187 ALR 233, [82] (Aust.); HG v. The Queen (1999) 197 CLR 414, [82] (Austl.); Osland v. The Queen (1998) 197 CLR 316, 374 (Austl.); R. v. Bonython (1984) 38 SASR 45, 47 (Austl.).

lawyers and cross-examination, rebuttal experts, directions and warnings,[454] and the common sense of juries to identify and overcome weaknesses and limitations in expert opinion evidence—especially incriminating expert opinions.[455]

Australian judges and law reformers have been pre-occupied with the elimination of partisan bias and improving institutional efficiencies, particularly in civil litigation. Recourse to formal codes of conduct (for experts), along with the desire to extend the use of single experts, joint experts and concurrent evidence (so-called "hot tubs") from civil litigation to the criminal sphere, reinforce the primary interest in institutional efficiencies and longstanding concerns about expert partisanship rather than the validity and reliability of incriminating expert opinion evidence and the accuracy and fairness of criminal verdicts.[456] Except in the immediate aftermath of miscarriages of justice and wrongful convictions, and in response to a few specific types of evidence (e.g., bite marks), Australian judges have been largely disinterested in reliability and have devoted little attention to critical developments in the U.S. (or Canada).[457] Australian judges are yet to cite or engage with the NRC report, though their complacency, and indifference to empirical research and reliability, may be disturbed should the recommendations of the Law Commission of England and Wales, about the need for a formal reliability threshold in criminal proceedings, be embraced by English parliamentarians or judges.[458]

1. Latent Fingerprint Evidence

Latent fingerprint evidence is presumptively admissible in all Australian jurisdictions. The long history of admission, dating back to formal consideration by the High Court in *Parker. v. The King* (1912), has provided a largely uncontested admissibility pathway that has not been substantially revisited during the course of the century, notwithstanding technological refinements, changes in reporting practice and the introduction of the UEL.[459]

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[454] The most a judge might say is: '"Expert evidence is admitted to provide you with … information and opinion which is within the witness's expertise, but which is likely to be outside the experience and knowledge of the average lay person. The expert evidence is before you as part of all the evidence to assist you with … [set out the particular aspect(s) …]. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the [expert/experts], you do not have to act upon it. [Indeed, you do not have to accept even the unchallenged evidence of an expert]." These are taken from Criminal Trial Courts Benchbook (NSW). JUDICIAL COMM'N OF N.S.W., CRIMINAL TRIAL COURTS BENCHBOOK (2012), *available at* http://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html.

[455] The decision, by the defense, to obtain rebuttal expertise, often assuages any judicial concerns about incriminating opinion evidence.

[456] Gary Edmond, *Impartiality, Efficiency or Reliability? A Critical Response to Expert Evidence Law and Procedure in Australia*, 42 AUST. J. OF FORENSIC SCIENCES 83 (2010).

[457] There are a few incidental references to *Frye* and *Daubert*. On *Daubert*, *see* HG v. The Queen (1999) 197 CLR 414, 418 (Austl.); Osland (1998) 197 CLR at 375 (Austl.); Murdoch v. The Queen (2007) 167 A. Crim. R. 329, 354 (Austl.); R. v. Tang (2006) 161 A Crim R 377, 410-11 (Austl.); R. v. Karger [2001] SASR 1 (Austl.); R. v. McIntyre [2001] NSWSC 311, [14-15] (Austl.); R. v. Gallagher [2001] NSWSC 462, [35] (Austl.); R. v. Pantoja [1996] NSWSC 57, [17] (Austl.); R. v. Tillott [1995] NSWSC 83, [106], [111] (Austl.). On *Frye*, *see* R. v. Parenzee [2007] SASC 143, [63]-[64] (Austl.); R. v. Bjordal (2005) 93 SASR 237, 252 (Austl.); Mallard v. The Queen (2003) 28 WAR 1, [271]-[97] (Austl.); R. v. Jarrett (1994) 62 SASR 443, 447 (Austl.); R. v. Rose (1993) 69 A Crim R 1, [15] (Austl.); R. v. Brown [1990] TASSC 28, [25]-[26] (Austl.); Lewis v. The Queen (1987) 88 FLR 104, 121-22 (Austl.).

[458] Australian judges have looked primarily to England for law reform. Many, though not all, of the civil justice reforms were drawn from LORD WOOLF, ACCESS TO JUSTICE (1996) and consequent changes to the English rules of civil procedure (CPR).

[459] (1912) 14 CLR 681, 681 (Austl.). *See, e.g.*, Moreshead v. Police [1999] SASC 162, [8] (Austl.); R. v. SMR [2002] NSWCCA 258, [96] (Austl.). Like many longstanding forensic sciences, these have been effectively 'grandfathered'.

There are no formal restrictions imposed on what a latent fingerprint examiner might say, by way of identification. The expression of opinions, derived from the comparison of prints, is largely determined by latent fingerprint examiners (with sensitivity to other jurisdictions, originally the UK, though increasingly *Daubert* and NRC-inspired responses from the U.S.) rather than anything the court or independent research might demand. No minimum number of points is required, although numbers of points of similarity are frequently referred to in testimony and used to support the declaration of a "match" and the attribution of significance. To the extent that they offer positive testimony, latent fingerprint examiners ordinarily individualize.[460] That is, they declare a match between a latent fingerprint and a print on file as a positive identification to the exclusion of all other individuals.[461] There is no need for a latent fingerprint examiner to bring photographs or workings to court (to show the tribunal of fact), although most would probably be willing to do so. Where examiners do rely on exhibits the jury may be formally exhorted not to engage in its own assessment of the prints.[462]

There are relatively few challenges, and surprisingly few considered decisions on the admissibility and basis for identification evidence derived from latent fingerprint comparison. Positive identifications derived from latent fingerprints are very rarely contested and it is exceptional to have an expert appear for the defense. Cross-examination is usually superficial or non-existent and almost never addresses methodological issues and interpretations, as opposed to possible contamination or obvious mistakes. Judicial instructions do not tend to warn about the dangers of relying upon a latent fingerprint match as positive identification—other than in the general terms that even highly skilled experts might make mistakes.[463]

The few cases where fingerprint (and palm and footprint) evidence has been excluded (or appeals succeeded) involved fingerprint examiners failing to disclose substantial weaknesses in opinions or clearly moving beyond their legally-recognized competence. In *Hillstead v. The Queen* (2005), for example, the examiner purported to link a bloody fingerprint with the accused's presence at the precise moment of death.[464] This witness, however, had no information about the rate at which blood dries, or the temperature and humidity in the room, or whether the blood associated with the accused's latent fingerprint was from a pool or a thin smear.[465] According to the Court, the witness could only testify about the existence of a match and its significance in relation to identification. To say more was to transgress the boundaries of the witness's expertise.[466]

Problems with latent fingerprint evidence are understood and presented as individual failings (due to inexperience or hubris—going beyond the proper scope of the "field", as in the previous example) rather than problems with the underlying methodology and/or the totalizing manner in which results are expressed.

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[460] DNA and fingerprint experts are sometimes called to explain that no fingerprint or DNA sample was recovered.

[461] R. v. SMR [2002] NSWCCA 258, [86]-[91] (Austl.) (discussing Parker. v. The King, (1912) 14 CLR 681, 681 and Moreshead v. Police [1999] SASC 162).

[462] Bennett v. Police [2005] SASC 167, [7] (Austl.). Originally jurors were shown images to consider, but more recent cases suggest that it is experts who should undertake comparisons: R. v. Lawless [1974] VR 398 (Austl.).

[463] There is no heading in the Criminal Trial Courts Benchbook advising on judicial instructions for fingerprint evidence. JUDICIAL COMM'N OF N.S.W., CRIMINAL TRIAL COURTS BENCHBOOK (2012), *available at* http://www.judcom.nsw.gov.au/publications/benchbks/criminal/index.html.

[464] Hillstead v. The Queen [2005] WASCA 116, [34] (Austl.).

[465] *Id.* at [42].

[466] *Id.* at [63].

2. DNA Evidence

DNA evidence is interesting because trial judges and appellate courts were reasonably cautious in their uptake. Notwithstanding the traditionally liberal approach of the common law, several courts initially excluded, or upheld the exclusion of, DNA evidence: because the prejudicial effect was considered to outweigh the probative value; because of problems with the technology (e.g., whether faints bands were artifacts) and the danger that the jury might undertake their own comparison; because of questions associated with population statistics and the size of databases; and, because the jury might be confused or overwhelmed.[467] From the mid-1990s, around the time of the second NRC report (US), Australian courts largely accepted that DNA techniques were admissible (and reliable). Subsequently, challenges were almost always left to the trial and for weight. Since that time the major issues have been the introduction of new techniques and commercial kits (e.g., PCR and Profiler Plus), the soundness of databases and their applicability to indigenous populations, and the appropriate way to express results.

In *R. v. Jarrett*, the South Australian Supreme Court upheld the admissibility of PCR techniques even before the reporting issue was effectively settled by the second NRC report in 1996.[468] For Mulligan J, resolving disagreement between mainstream scientists was a matter for the jury.[469] In *R. v. Humphrey*, Bleby J dismissed an admissibility challenge to the database and distinguished the discretionary exclusions in *R. v. Green* and *R. v. Pantoja*.[470] The same Court also dismissed the challenge to the adoption of the Profiler Plus system, after an unusually lengthy *voir dire* in *R. v. Karger*.[471] More recently, in *R. v. Murdoch*, the Northern Territory Court of Criminal Appeal (NTCCA) expressed ambivalence about incriminating evidence, and expert disagreement, associated with results obtained through LCN techniques, though without deeming the incriminating opinions inadmissible.[472]

Other challenges have appeared in response to the population statistics applied to Australian Aborigines and some unexpected results from criminal databases, *possibly* due to recidivists changing names (i.e., using aliases).[473] Judges, particularly in NSW, continue to wrestle with the expression of results derived from population statistics. Originally, this emerged in relation to paternity indices (as opposed to percentages) and more recently in the way random match probabilities should be presented at trial.[474] The main issues occupying the appellate courts tend to be the expression of probabilities associated with DNA matches[475] and whether DNA evidence alone can sustain a conviction.[476]

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[467] *See* R. v. Pantoja [1996] NSWSC 57, [85] (Austl.); R. v. Jarrett (1994) 62 SASR 443, 455-56 (discussing R. v. Tran (1990) 50 A Crim R 233 (Austl.)); R. v. Lucas [1992] 2 VR 109 (Austl.); R. v. Green (unreported, NSWCCA, 26 Mar. 1993) (Austl.).

[468] R. v. Jarrett (1994) 62 SASR 443, 458 (Austl.).

[469] R. v. Karger (2001) 83 SASR 1, [659] (Austl.).

[470] R. v. Humphrey (1999) 72 SASR 558, 563-64 (Austl.).

[471] Karger (2001) 83 SASR 1, 125 (Austl.) (influential on R. v. McIntyre [2001] NSWSC 311, [8]). *See also* R. v. Gallagher [2001] NSWSC 462, [36] (Austl.).

[472] Murdoch v. The Queen (2007) 167 A Crim R 329, 363-64 (Austl.).

[473] *See, e.g.*, R. v. Pantoja [1996] NSWSC 57, [30]-[31] (Austl.).

[474] R. v. GK (2001) 125 A Crim R 315 (Austl.); R. v. JCG (2001) 127 A Crim R 493, [112] (Austl.); R. v. Lisoff [1999] NSWCCA 364, [49] (Austl.).

[475] Aytugrul v. The Queen (2010) 205 A Crim R 157, 174-76 (Austl.), *aff'd*, [2012] HCA 15 (Austl.). *See also* Andrew Ligertwood, *Can DNA Evidence Alone Convict an Accused?* 33 SYDNEY L. REV. 487 (2011).

[476] *See* Jeremy Gans, *A Tale of Two High Court Forensic Cases*, 33 SYDNEY L. REV. 515, 527-28 (2011).

In trials, the possibility of innocent transfer and the interpretation of results (e.g., electropherograms) are not infrequently explored in cross-examination. There have been a few successful appeals: where experts disagreed over interpretations of a mixed sample (*R. v. Juric*); where secondary transfer was not excluded by the prosecution (*R. v. Joyce*); and, where prosecution disclosure was incomplete (*Hillier. v. R*). Although, these cases should be considered exceptional.[477] Several high profile mistakes with DNA evidence, particularly in Victoria, have stimulated public and private inquiries, but these seem to have done little to temper overall confidence in DNA evidence.[478]

Today there are very few constraints on the admission and presentation of DNA evidence. Short of obvious contamination or clearly inappropriate forms of expression, DNA evidence is admissible and routinely admitted. Most of the institutions undertaking DNA analysis (for the prosecution) tend to report in probabilistic terms—purporting to be conservative, the probabilities almost never exceed 1 in 10 billion in written documents (at least). That is, greater than the number of persons currently believed to be living on earth. Where incriminating DNA evidence is not available the prosecutor often calls a forensic biologist to provide reasons for the failure to obtain any positive (i.e., incriminating) results—so-called "negative evidence."[479]

3. Bite Marks

The admissibility of the opinion evidence of dentists, orthodontists and odontologists on bite mark comparison and identification is complicated by a series of controversial convictions, particularly the role of English and Australian odontologists in the notorious wrongful conviction of Lindy Chamberlain for the murder of her daughter, Azaria ("the dingo baby").[480] Because of this negative experience, since the mid-1980s Australian judges have taken an uncharacteristically skeptical approach to incriminating bite mark evidence and several common law judges have demonstrated a willingness to exclude it.[481]

It is probably no coincidence that bite mark evidence is still considered by some judges and commentators as controversial. In *R. v. Lewis*, perhaps the leading Australian bite mark decision, the Court of Appeal of the Northern Territory considered the reliability, rather than just the field and qualifications (which were actually recognized, as satisfied, in the earlier *R. v. Carroll* (1985) appeal).[482] Interestingly, in considering the admissibility of incriminating bite mark evidence, the Court suggested that the Crown had a duty to explicate through evidence, "in ordinary language", the expert's "discipline and methods necessary to put them in a position to make some sort of evaluation of the opinions he expresses"—a form of the basis rule.[483] Where the expert evidence is of a

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[477] *See* R. v. Juric (2002) 129 A Crim R 408, [15]; R. v. Joyce (2002) 173 FLR 322, [324]; Hillier. v. Rex [2008] ACTCA 3.

[478] *See, e.g.*, F H R VINCENT, REPORT: INQUIRY INTO THE CIRCUMSTANCE THAT LED TO THE CONVICTION OF MR FARAH ABDULKADIR JAMA (2010).

[479] *See, e.g.*, Sankey v. Whitlam (1978) 142 CLR 1, 56.

[480] *See* EVIL ANGELS (Cannon Entertainment 1988); *see also* JUSTICE T.R. MORLING, ROYAL COMMISSION OF INQUIRY INTO CHAMBERLAIN CONVICTIONS (1987) (which was contemporaneous with Lewis v. The Queen (1987) 88 FLR 104 and R. v. Carroll [1985] A Crim R 410 and involved some of the same expert witnesses); *see also* Gary Edmond, *Azaria's Accessories: The Social (Legal-Scientific) Construction of the Chamberlains' Guilt and Innocence* 22 MELB. U. L. REV. 396 (1998).

[481] *See* Lewis (1987) 88 FLR at 115-17.

[482] Lewis (1987) 88 FLR at 123-24. *See* R. v. Carroll [2001] QCA 394, [6]-[8] (discussing R. v. Carroll (1985) 19 A Crim R 410 (Austl.)).

[483] Lewis (1987) 88 FLR 104, 124.

"comparatively novel kind, the duty resting on the Crown is even higher: it should demonstrate its scientific reliability."[484]

Lewis—like the early DNA appeals—is now decades old and sits awkwardly with the very accommodating trend toward incriminating expert opinion evidence currently in vogue under the UEL and the common law.[485] Because the individuals purporting to undertake bite mark analysis and comparisons possess tertiary qualifications, it is likely that Australian judges will gradually admit this evidence, even if longstanding skepticism manifests in restrictions upon the way interpretations are expressed (as in the case of images, below).

4. Incriminating Images and Voice Recordings

a. Opinions about Images

A range of individuals with formal qualifications and/or through repeated exposure are allowed to express opinions about the identity of persons of interest (POI) in images associated with criminal activity (e.g. CCTV recordings) or to interpret what is transpiring in them. Here we can observe how weak "body of knowledge or experience" and "specialised knowledge" are in practice. Judges have tended to allow those with formal qualifications in anatomy and physical anthropology or experience as forensic photographers and intelligence analysts—rather than photo-interpretation—and those who have acquired their "knowledge" or "experience" during the course of an investigation (such as police officers) to express incriminating opinions—usually about the identity of offenders (sometimes as *ad hoc* experts). The former group, with formal qualifications, are sometimes described as "facial mappers" or "face and body mappers."[486] Most use morphological (i.e., impressionistic assessments of form) rather than anthropometrical (i.e., quantitative) techniques of comparison. Of the variety of witnesses qualified as "expert" and allowed to express incriminating opinions, few have expertise in image interpretation and specialization in face and/or body comparison. Few, if any have a demonstrated ability to compare POI in conditions where the images are of low quality, highly distorted, poorly lit, out of focus, and the POI often wear disguises or baggy clothing and hats, and the images may be obtained years, and sometimes decades, apart.

Initially, these witnesses, including some with graduate qualifications, and senior academic positions, were allowed to express positive opinions about the identity of persons of interest (e.g., "one and the same"). However, more recently, they have been required to refrain from making positive identifications (i.e. individualizations) and to restrict their testimony to evidence of similarities and, in theory, differences.[487] Though, it is now common for Australian facial mappers to testify in terms of "high similarity" or "high level of anatomical similarity." Several have adopted the scale relied upon by many English witnesses (*see R. v. Atkins* and Table 1, above).[488]

Image comparison witnesses are routinely sent only two sets of images—one set of the person of interest and one reference set of the suspect (based on a police forensic procedure)—and are often told about the suspect and other features of the case. Such

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[484] *Id.*

[485] *See, e.g.*, R. v. Humphrey (1999) 72 SASR 558, 562-63 (Austl.).

[486] *See, e.g.*, R. v. Bonython (1984) 38 SASR 45, 47.

[487] R. v. Tang (2006) 161 A Crim R 377 at 384; Murdoch v. The Queen (2007) 167 A Crim R 329, 346-47; R. v. Tanner [2010] SADC 128, [5]-[8] (Austl.); *R. v. A* [2010] SADC 126, [7]-[12] (Austl.); R. v. Miller [2008] SADC 86, [90]-[93] (Austl.); R. v. Harradine [2008] SADC 179, [33]-[37]; R. v. Dastagir [2013] SASC 26 (Austl.) R. v. Alrekabi [2007] NSWDC 110, [28]-[34] (Austl.).

[488] *See* R. v. Atkins, [2009] EWCA (Crim) 1876, [16]-[18] (Eng.).

suggestive procedures, to the extent that they are considered problematic or revealed, are treated as issues for cross-examination and weight (rather than admissibility or exclusion—on grounds of unfair prejudice).

Investigating police, with some familiarity of suspects—such as that obtained through the course of an investigation or prior arrest—are not allowed to express opinions based on the interpretation of incriminating images.[489] In contrast to England and Canada, this evidence is treated as inadmissible because of its deemed irrelevance—incapable of rationally assisting with the assessment of facts in issue, because the jury can make the same comparison—rather than because of reliability issues.[490] Police and other investigators are, however, allowed to express opinions, including positive opinions about identity, where they have some perceived advantage over the jury caused by changes in the accused's appearance or because the tribunal of fact will not have an opportunity to observe the defendant in motion (i.e., gait evidence).[491] These exceptions, to the general rule against positive identification, might be based on features as vague as the way a person holds their head, the tendency to swing an arm while walking, or due to a modified hairstyle or weight gain.[492]

Recently, the Court of Criminal Appeal in NSW, has excluded the opinion evidence of an anatomist concerning similarities in body shapes between images of a disguised armed robber and a person accused of the robbery.[493] In the absence of information about his method of photo-interpretation and without credible information about the prevalence of body shapes, the witnesses' similarity evidence was considered inadmissible.[494] The decision seems to have rendered "body mapping" evidence inadmissible (at least where the offender is well disguised) though without restricting the provision of facial comparison evidence relying upon analogous techniques.[495]

b. Opinions about Voices (and Sounds)

Expert opinion evidence about the identity of voices (and sounds) is generally admissible and admitted.[496] Voice identification evidence is even less regulated than the interpretation of images, and frequently (especially under the UEL) is not even treated as evidence of opinion.[497] As in Canada, the identification of a voice is often classified as direct evidence, or evidence of fact rather than interpretation (i.e., opinion). At common law, and under the UEL, language scholars and linguists are allowed to proffer incriminating opinions about identity.[498] Sometimes these opinions may refer to voices

[489] Smith v. The Queen (2001) 206 CLR 650, 655-56, 657-70 (Austl.) (the majority treated the lay opinion evidence as irrelevant and thus inadmissible whereas Kirby, J., treated the lay opinion evidence as relevant but inadmissible).

[490] Smith v. The Queen (2001) 206 CLR at 655.

[491] *See* Nguyen v. The Queen (2007) 180 A Crim R 267, 272-73 (Austl.); Li v. The Queen (2003) 139 A Crim R 281, 294-95 (Austl.); Smith v. The Queen (2001) 206 CLR at 656.

[492] *See* Li (2003) 139 A Crim R at 294-95; Smith (2001) 206 CLR at 656. Limited familiarity may also provide a basis for a police officer to offer positive identification evidence, notwithstanding Smith (2001) 206 CLR at 653. *See, e.g.*, Nguyen (2007) 180 A Crim R at 272.

[493] *See* Morgan v. The Queen [2011] NSWCCA 257, [144]-[46] (Austl.).

[494] *Id.* at [132]-[33].

[495] *See id.* at [123]-[27] (citing R. v. Tang (2006) 161 A Crim R 377, 409).

[496] *See, e.g.*, Li (2003) 139 A Crim R at 292-93.

[497] *Id.* at 289-90.

[498] *See* R. v. Harris (No 3) [1990] VR 310 (Austl.) (citing R. v. McHardie [1983] 2 NSWLR 733; Gilmore [1977] 2 NSWLR 935 (noting that these cases are relatively old and involved the use of apparently discredited techniques such as spectrographs and sonograms)). *See* NAT'L RESEARCH COUNCIL, ON THE THEORY AND PRACTICE OF VOICE IDENTIFICATION (1979).

speaking in languages with which the listener is not familiar, and even where—as in most cases—their actual expertise is not in the realm of voice comparison.[499] Similarly, interpreters and translators and even investigating police officers without voice comparison training or experience, are allowed to express incriminating opinions, all as *ad hoc* experts, on the basis of their exposure to voices during translations, surveillance or interactions with the accused on arrest or during a search.[500]

All of these witnesses are allowed to make positive identifications (i.e., individualize) in circumstances where they are not familiar with the voices and even where the voices they are comparing speak in different languages (e.g., Mandarin and English) and their exposure, or the length and quality of samples, is limited.[501] In many cases, the witness is told by investigators, prior to their analysis, to whom the voice is believed to belong.[502]

As with image analysis, it is not clear that there is a mature field of forensic voice comparison capable of consistently producing reliable evidence about identity.[503] The need for a "field" or "specialized knowledge" tends to be either ignored or trivialized. Faced with the potential exclusion of incriminating opinions judges often refer to the, apparently unpalatable, alternatives of requiring the jury to listen to recordings that are often very long, of low quality and (arguably of) marginal relevance, and sometimes in foreign languages or, more radically, excluding the evidence. Significantly, juries are routinely encouraged to undertake their own voice comparisons, even where they have already heard the opinion evidence and the voices are speaking in different languages (e.g., English and the Nigerian language of Igbo).[504]

II. ANALYSIS AND DISCUSSION

Having supplied a survey of admissibility practices in four jurisdictions, this part draws on similarities and differences between these jurisdictions, as well as our collective research experience, to identify key themes in the admissibility of forensic identification sciences. Observing that admissibility practice tends to be similar across jurisdictions, we first anticipate and counter the proposition that widespread admissibility of forensic identification sciences reflects that the techniques are basically reliable. It is simply not possible to know the reliability of many common techniques because they have never been properly studied. In some instances, techniques that continue to be routinely admitted have

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[499] *Li* (2003) 139 A Crim R at 287-89.

[500] *Compare* R. v. El-Kheir [2004] NSWCCA 461, [96]-[98] (Austl.); *and* R. v. Riscuta [2003] NSWCCA 6, [7]-[8] (Austl.); *and* R. v. Gao [2003] NSWCCA 390, [20]-[24] (Austl.); *and* R. v. Camilleri (2001) 127 A Crim R 290, 296-97 (Austl.); *and* R. v. Leung [1999] NSWCCA 287, [6]-[11] (Austl.); *with* R. v. Rich *(No 6)* [2008] VSC 436 (Austl.); *and* R. v. Harris (No 3) [1990] VR 310.

[501] *See* Li (2003) 139 A Crim R at 287-88. *But cf.* Harris *(No 3)* [1990] VR 310, 322-23 (Ormiston, J., ruling that evidence should be excluded on judge's discretion due to questionable methodology).

[502] Relevant experimental literatures are almost never cited or discussed by lawyers or judges. Problems, to the extent that they are identified and recognized, tend to be conveyed in abstract terms to the jury. *See* Gary Edmond et al., *Unsound Law: Issues With ('Expert') Voice Comparison Evidence* 35 MELB.U.L.REV. 52, 54 (2011).

[503] Although, there is ongoing research into more robust forms of voice comparison. *See, e.g.*, Joaquin Gonzalez-Rodriguez et al., *Emulating DNA: Rigorous Quantification of Evidential Weight in Transparent and Testable Forensic Speaker Recognition*, 15 IEEE TRANSACTIONS ON AUDIO, SPEECH & LANGUAGE PROCESSING 2104 (2007).

[504] *See, e.g.*, Bulejcik v. The Queen *(1996)* 185 CLR 375, 381-82 (Austl.); Korgbara v. The Queen (2007) 210 FLR 36, 36-7 (Austl.); Neville v. The Queen (2004) 145 A Crim R 108, 124-25 (Austl.); Nguyen v. The Queen (2002) 131 A Crim R 341, [138]-[40]. *But see* R. v. Lawless [1974] VR 398 (wherein the jury is formally proscribed from assessing the fingerprint evidence, as opposed to the expert's opinion).

been demonstrated to be incapable of reliable individualization. This leaves us with the surprising conclusion that admissibility standards seem not to make much difference to the rigor with which courts scrutinize expert evidence. We canvass several possible explanations for the broad trend towards admitting expert opinion evidence without a demanding assessment of reliability, and consider some of the implications of this impulse. This part also considers some important differences among and between jurisdictions, and the possible sources of these differences.

A. Basic Conclusion: Admissibility Standards Do Not Seem to Make Much Difference

Our basic conclusion—which may surprise many readers, particularly lawyers, and disappoint those contemplating law reform—is that *formal admissibility standards do not seem to make much difference*. Formal admissibility standards, particularly those incorporating reliability, are not enforced in ways that regulate the reception of expert opinion evidence that is of unknown reliability. On the basis of the preceding examples, there does not appear to be a coherent, let alone principled, approach to the admission of incriminating expert opinion evidence in any of these jurisdictions and admissibility standards do not seem to clearly correlate with admissibility practice.

Table 2 (below) provides a summary of our basic findings. Given considerable variation in rules, the similarities in response should be considered revealing, especially where the reliability and appropriate way to express the results of most of these techniques continues to generate controversy.

Jurisdiction (and admissibility standard)	DNA comparison	Latent fingerprint comparison	Bite mark comparison	Image comparison	Voice comparison
US (reliability)	Admissible (probabilistic)	Admissible (individualization)	Admissible (individualization)	Admissible (individualization)	Admissible (generally not spectrographs)
Canada (reliability)	Admissible (probabilistic)	Admissible (individualization)	Admissible (individualization)	Admissible (non-expert opinion & individualization where familiar)	Admissible (individualization)
England (no reliability)	Admissible (probabilistic)	Admissible (individualization)	Admissible (individualization)	Admissible (individualization)	Admissible (individualization)
Australia (no reliability)	Admissible (probabilistic)	Admissible (individualization)	Admissible (individualization – some caution)	Admissible (similarities only; no 'body mapping')	Admissible (individualization)

Table 2: Summary of admissibility practice with respect to jurisdiction and type of evidence

Regardless of the admissibility standard, whether "assistance to the jury", "specialized knowledge", recognized "expertise" or "experience" (more below), "field" or the need for "reliability", all of the jurisdictions considered in this article admit most forensic science and medical techniques proffered by the state. They "qualify" individuals, sometimes highly trained scientists from adjacent domains, as experts. Individuals without *relevant* expertise or investigators whose only experience was obtained in an unsystematic manner during the course of a criminal investigation (or series of investigations) are also

frequently found by the courts to possess "expertise" that allows them to testify. While there are some variations in what these "experts" are permitted (or might prefer) to say, typically any qualifications imposed by courts bear no relation to what empirical research can support (or what the experts themselves might otherwise say: *see infra* Section II.C.).[505] Sometimes the absence of underlying research is used to impose restrictions (such as limiting those performing image comparison in Australia to descriptions of similarities) as something of an *admissibility compromise*, although that is not always the case (e.g. voice comparison in Australia). Moreover, most jurisdictions enable *legally qualified experts* to express opinions that exceed what available research could credibly support. "Legally qualified" or recognized experts are not necessarily experts in the sense that they are masters of their domain or can even do what they claim.

Contrary to the expectations of some, the introduction of new admissibility standards purportedly indexed to reliability in the U.S. and Canada has not radically disrupted historical settlements around admissibility practices and the expression of opinions.[506] Rather, the response to techniques and opinions, including new techniques, seems to be guided as much by an *inclusionary ethos* as a consistent interest in validity, reliability, error rates or proficiency.[507] Inverting procedural propriety, admissibility standards seem to be indexed to the proffered techniques with a general commitment to admission rather than a genuine interest in reliability (or even relevance).[508] Significantly, DNA evidence was exposed to aggressive challenges, (and higher admissibility standards), because: there was a great deal of published research and specialized knowledge in the possession of non-forensic scientists (i.e., mainstream scientific researchers); the defense eventually obtained access to highly qualified research scientists who were critical of existing practice; there was a good deal of controversy (and criticism from) beyond the courts; and, DNA profiling had many potentially valuable criminal justice uses so it was widely seen as important (by investigative communities, as well as politicians and judges) to "get it right." Even so, it took a public controversy characterized as the "DNA wars", two formal (extra-legal) inquiries, several years and hundreds of millions of dollars, to stabilize the technology and interpretations derived from population statistics.[509] At best, the courts played an indirect and inconsistent role in the refinement of DNA techniques and evidence.[510] Significantly, the responses to DNA evidence are not representative of responses to other types of forensic science and forensic medicine evidence.

Interestingly, recent challenges to the forensic sciences—primarily in the United States—emerged in the aftermath of *Daubert* and largely in the shadow of the controversy

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[505] Interestingly, expert witnesses are often willing to say more than courts will allow. It is the courts, rather than experimental evidence, that often shape the way experts express opinions. If experts had done the necessary research, courts would have much more limited grounds for overriding the bases for opinions. Intervention usually reflects ignorance and judicial concern, even if it does not lead to exclusion.

[506] Edward K. Cheng& Albert H. Yoon, *Does Fry or Daubert Matter?* 91 VA.L.REV. 471 (2005).

[507] *See* Gary Edmond & David Mercer, *Daubert and the Exclusionary Ethos: The Convergence of Corporate and Judicial Attitudes towards the Admissibility of Expert Evidence in Tort Litigation*, 26 LAW &POL'Y 231, 235-36 (2004).

[508] *See* Jane Campbell Moriarty & Michael J. Saks, *Forensic Science: Grand Goals, Tragic Flaws and Judicial Gatekeeping*, 44 A.B.A. J. 16, 28 (2005); Michael J. Saks & David L. Faigman, *Failed Forensics: How Forensic Science Lost Its Way and How It Might Yet Find It*, 4 ANN. REV. L. & SOC. SCI. 149 (2008).

[509] *See* JAY D. ARONSON, GENETIC WITNESS: SCIENCE, LAW, AND CONTROVERSY IN THE MAKING OF DNA PROFILING (2007); *see also* DAVID H. KAYE, THE DOUBLE HELIX AND THE LAW OF EVIDENCE (2010).

[510] *See* Gary Edmond, *Review Essay: The Building Blocks of Forensic Science and Law: Recent Work on DNA Profiling (and Photo Comparison)*, 41 SOC.STUD.SCI. 127 (2011).

associated with DNA evidence and its stabilization.[511] Challenges to the forensic sciences seem to have been an unintended (and largely unforeseen) consequence of *Daubert*—itself a response to perceived problems with expert evidence in civil proceedings—informed by the DNA wars, ongoing skirmishes around a range of forensic techniques (e.g., handwriting, voiceprints, latent fingerprints, bullet lead, ballistics and tool marks) and more recently and directly, authoritative intervention by the National Academy of Sciences (through the NRC) and high profile Innocence Projects.[512]

This is all revealing. It illustrates how admissibility jurisprudence and practice are potentially open to exogenous influences. Admissibility standards stipulating the need for reliable expert opinion evidence, though largely dormant in the criminal justice system, eventually stimulated sufficient dissonance to encourage scholarly criticism that led to NAS intervention. Admissibility standards are always available as a resource with the potential to be mobilized to challenge and exclude expert opinion evidence that is insufficiently reliable. Unfortunately, there seems to be limited interest in questioning technical abilities when it comes to the legal assessment of most of the comparison *sciences*. Not insignificantly, the operation of admissibility regimes predicated upon reliability seem to be confounded by earlier liberal admissibility practices that make reversals (i.e., exclusion) institutionally unsettling in criminal justice systems concerned with rectitude of decision, finality and managing their social legitimacy in societies increasingly anxious about crime and the costs of criminal justice.[513]

B. Reliability?

Before proceeding to consider a variety of issues and implications flowing from our basic conclusion (and research experience), we want to discount one possible response. It might be argued that admissibility *practice* is similar across these four jurisdictions because the various forensic science techniques are basically reliable. We believe this response to be untenable. Returning to the NRC report (and unanswered criticisms directed toward many forensic science and medicine techniques), it is our contention that, with the exception of most of the DNA techniques, among our sample there is limited research supporting many of the claims routinely advanced by forensic scientists in courts. In many domains the value of techniques is simply unknown. Rather than demonstrable evidence of reliability—such as validity studies that would inform our understanding of ability and accuracy—many of these and other techniques (e.g., comparison or analysis or foot, shoe and ear prints, hair and fibers, documents, ballistics, explosives, tool marks, blood spatter, stab wounds, soils and so on) are considered to be effective because they are used in investigations and prosecutions and have assisted in the production of "guilt." That is, forensic sciences (and forensic scientists) are often judged against their role in securing convictions. In some forensic science "fields", legal decisions to admit the evidence, the ability to withstand cross-examination, and contributions to guilty verdicts, represent the primary forms of "proof" of reliability—

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[511] Though, some challenges, such as those to handwriting, pre-date DNA evidence. *See* D. Michael Risinger, *Symposium: Daubert, Innocence, and the Future of Forensic Science: Goodbye to All That, or A Fool's Errand, By One of the Fools: How I Stopped Worrying About Court Responses to Handwriting Identification (and "Forensic Science" in General) and Learned to Love Misinterpretations of* Kumho Tire v. Carmichael, 43 TULSA L. REV. 447, 454 (2007); D. Michael Risinger & Michael J. Saks, *Science and Nonscience in the Court:* Daubert *Meets Handwriting Identification Expertise*, 82 IOWA L. REV. 21 (1996); D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise"*, 137 U.PA. L. REV. 731, 772-73 (1989); NAT'L RESEARCH COUNCIL, *supra* note 498, at 58.

[512] *See generally* BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION & OTHER DISPATCHES FROM THE WRONGLY CONVICTED (1st ed., 2000).

[513] It is our contention that accuracy ought to trump finality.

sometimes characterized as "testing." In the absence of evidence of ability, derived from case-like conditions where correct answers are *known*—thereby excluding trials and guilty verdicts—legal responses do not provide appropriate grounds for epistemic confidence. Premature legal recognition of insufficiently reliable techniques and opinions may discourage research, contribute to the emergence and persistence of inferior techniques, and simultaneously threaten some of the primarily objectives of the accusatorial trial (*see infra* Section II.C.). In many cases unreliable forensic science techniques and misleading interpretations will have contributed to pleas and/or guilty verdicts. Inattention to capabilities and actual reliability means that evidence may have been misleading and processes unfair. The expert evidence may have been mistaken and in some proportion of cases independent opportunities to expose erroneous assumptions or leads, false confessions, or misleading evidence (such as erroneous eyewitness identifications) were lost.[514]

Inattention to the reliability of forensic science and medicine means that prosecution cases may appear stronger than they actually are (or were). Such impressions have the potential to mislead prosecutors, defense lawyers (at trial, and when advising on pleas), juries and judges as well as forensic scientists. The upshot is that legal practice is not a credible platform on which to ground claims about efficacy. The courtroom cannot replace validity, reliability and proficiency studies. Forensic science techniques can only be evaluated through *empirical study separate from* actual investigations and prosecutions.[515]

There is limited evidence to support the reliability of many forensic science techniques (the examples we have chosen are broadly representative), and in consequence, there is a need to explain admissibility in terms other than the actual research base and technical abilities. We accept that DNA profiling evidence represents something of an exception, but have included it as an influential recent development that casts much needed light on many established forensic science institutions, techniques and assumptions.[516] It is significant that many of the most aggressive challenges have been made against DNA evidence. Whether other forms of forensic science and medicine can (or even should) emulate DNA is contentious, though ultimately doubtful.[517]

With respect to many forensic science and medicine techniques (and expert opinions drawn from the social sciences and humanities), mimicking practices associated with DNA will be inappropriate.[518] This should not, however, divert attention from empirical study, notably validity and valuation studies—even if the results will rarely be

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[514] *See* GARRETT, *supra* note 512.

[515] *See* Bruce Budowle et al., *A Perspective on Errors, Bias, and Interpretation in the Forensic Sciences and Direction for Continuing Advancement*, 54 J. FORENSIC SCI. 798, 806-07 (2009).

[516] *See id.* at 804-06. We accept that some areas of forensic science are quite reliable. Many areas of chemistry are, for example, very reliable and, like DNA techniques, closely linked to research and commercial communities beyond the institutionalized forensic sciences. ARONSON, *supra* note 509, at 98. We also recognize that in some contexts, such as around the use of drugs in sport, where there are very considerable resources available (and at stake), the level of assessment and evidence is generally of a much higher standard than in many serious criminal investigations.

[517] This is, in part, a response to the power of DNA evidence, but also reflects the availability of independent experts able to testify about the processes and interpretations initially adopted by the state and manufacturers. *See* Budowle et al., *supra* note 515, at 804.

[518] *See* Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of State's Forensic Science and Medical Evidence*, 61 U. TORONTO L.J. 343 at 391-95 (2011) (discussing R. v. Abbey 2009 ONCA 624).

as compelling as those associated with DNA profiling and population statistics.[519] Responses to DNA evidence, along with conspicuous differences between the responses to DNA evidence and many other areas of forensic science, illuminate inconsistencies (and unsustainable consistencies) in legal practice as well as the epistemic frailty of techniques (and opinions) that are not derived from scientific research and not routinely used by (non-forensic) scientists. Conclusions based on these techniques are routinely expressed in confident terms—where the accused is not merely implicated, but actually identified, often to the exclusion of all other persons in the world (or who have ever lived).[520] Legal responses betray serious limitations in law-science relations, including a remarkably accommodating response to forensic science and medicine evidence and authority, and are suggestive of the difficulties courts have encountered and will experience even more acutely as they endeavor to renegotiate longstanding admissibility settlements.[521]

C. Explanations for the Basic Conclusion

The basic conclusion that admissibility standards seem to make little difference in the admission of many types of forensic science, coupled with our rejection of the proposition that this reflects essential reliability, raises difficult questions about why it has proven difficult to focus legal attention on assessing reliability. In this section, we provide a number of linked explanations for this difficulty. Suggesting that courts have tended to use experience as a proxy for expertise, and that they have been generally uninterested in scientific literatures leads us to the possibility that judges and lawyers have substituted a legally-negotiated concept of reliability (which might be labeled *forensic reliability*) for the empirical concept of reliability that we might have expected to see. A seeming lack of interest in empirical studies of courts' practices has compounded this tendency. When inescapable problems do arise, as when wrongful convictions are produced by poor-quality forensic science and medicine evidence, courts tend to blame those problems on individual experts and thereby sidestep engaging with the possibility that legal processes might create systematic vulnerabilities to unreliable and speculative forms of expert opinion evidence. We suggest that the legal concept of *forensic reliability* is predicated on confidence in the capacity of trial safeguards, such as cross-examination, to reveal shortcomings in expert evidence, and that this trust in trial safeguards is accompanied by a faith in the capacity of triers of fact to understand expert testimony and combine it rationally with other evidence. In short, it may be that lack of attention to empirical research allows judges to remain unpersuaded that careful attention to reliability adds anything of substance to available trial safeguards. Given the disruptive potential of adopting a more critical stance towards routine forensic comparison evidence, and the often-stated desire to avoid intruding too far upon the role of the tribunal of fact, this ambivalence may help to explain judicial reluctance to engage deeply with reliability.

1. Demarcating Science from Non-Science, and 'Testing' and 'Experience'

Boundary work around what constitutes science, as opposed to some technical realm of expertise derived primarily from experience frequently tempers the application of reliability standards. Judges often read down the need for reliability to accommodate the practices of a field or group of practitioners rather than attend to what might be required to

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[519] *See* Jason M. Tangen et al., *Identifying Fingerprint Expertise*, 22 PSCHOLOGICAL SCI. 995, 997 (2011). DNA profiling and population statistics may actually be more straightforward than voice and image comparison. *See* Budowle et al., *supra* note 515, at 804.

[520] *See* Oregon v. Angius, No. 200924231, at *2 (Or. Cir. Ct. July 2, 2010).

[521] Historical confidence in time of death is a good example from forensic medicine. *But see* R. v. Truscott, 2007 ONCA 575 (Can.).

demonstrate that a technique is valid and accurate, or the practitioners genuinely proficient.[522]

There is much that could be said about philosophical and sociological work on science/non-science boundaries.[523] In the context of the forensic sciences, however, the primary issue is not whether some technique or skill is characterized as scientific (or non-scientific) or technical, but rather whether the individual can do what they claim and how we know this. In relation to the vast majority of techniques and practices, gauging proficiency requires some kind of empirical assessment. Too often forensic scientists and others involved in providing technical and scientific opinions in relation to investigations and prosecutions evaluate their performance against past legal recognition, convictions, and appeals to experience, as epistemic justifications. Such metrics are inappropriate. When it comes to techniques and practices that are used reasonably regularly, and especially those used routinely, there should be extensive testing of both the techniques and practitioners in realistic case conditions, *where the correct result is known*. This is the only way to obtain credible information about capabilities and limitations whether classified as scientific, technical or experiential.[524]

"Experience" is often used to recognize "expertise" and facilitate the admission of opinion evidence in the absence of experimental studies. While 'experience' is included as a basis for opinion in several jurisdictions—both common law (e.g., England, Canada and Australia) and "statutory" (e.g., FRE 702 and UEL s79)—courts rarely consider the particular experience in detail and very rarely take notice of how the experience was obtained, the nature of the experience and whether it is systematic and rigorous. One of the problems with recourse to "experience", that includes its role in techniques in regular or even routine use, is that we do not know if the technique works nor how accurate it is, nor if the *expert* performs better than a juror (or judge) or jury.

An individual's experience does not provide a basis to ground the admission of techniques and opinions that can be readily assessed but have not been. There is good reason to believe that people's experiences manifest very differently and equip them in quite divergent ways. Moreover, and this reflects the procedural difficulties associated with opinions predicated upon (or primarily upon) "experience", it can be very difficult to effectively challenge the testimony of persons who purport to base their opinions on experience. Opinions based on experience are frequently *ipse dixit* (i.e., bare assertion) even if they are not presented or understood in this way.[525] Where the witness is an *ad hoc* expert or, as in the case of Canadian image witnesses, proffers non-expert opinion evidence on the basis of quite limited familiarity with the accused, there are even fewer reasons to believe that the opinion offered by the witness is reliable. Moreover, such witnesses are not usually familiar with relevant literatures, appropriate processes or common mistakes, nor methodological limitations that might erode the probative (if not necessarily the persuasive) value of their opinions. Such opinions are difficult to challenge and lay people—both jurors and judges—are likely to assume that techniques in long or widespread use have been properly studied and shown to be reliable. Where experience is relied upon as the basis for admission (and credibility), the accused needs to persuade the judge and tribunal of fact about limitations, but must also overcome the implicit

[522] This has been characterized judicially as 'sufficiently reliable' or 'threshold reliability,' though Professor Edmond prefers the phrase 'demonstrable reliability.' Edmond & Roach, *supra* note 330, at 345.

[523] *See, e.g.*, THOMAS F. GIERYN, CULTURAL BOUNDARIES OF SCIENCE: CREDIBILITY ON THE LINE 93 (1999).

[524] *See* Tangen et al., *supra* note 520.

[525] We do not wish to suggest that experience is not incredibly valuable, but rather to reject the assertion that experience alone is sufficient to ground admissibility for techniques. There is, instead, a need for empirical assessment. *Id.* at 997.

endorsement, even imprimatur, conferred by admission (and prior use). "Experience", in the absence of testing, tends to prevent appropriate scrutiny and weighing. In fact, when confronted with methodological and reliability challenges, it is common for courts and persons recognized (in court) as experts to place great weight on experience and historical use.[526]

2. The Absence of Scientific Literatures and Knowledge

One interesting feature of the focus on experience rather than testing is the infrequency with which courts are presented with relevant and recent research—let alone synoptic literature reviews pertinent to the issues before the court—from professional scholarly communities and researchers.[527] Rather, lawyers and judges often rehearse and imagine a range of issues that may, or may not, bear upon some of the main issues and problems with forensic science techniques and the expression of results as opinions—often from their own experience. These are sometimes expressed, though usually clumsily and only partially, in admissibility challenges and directions and warnings.[528]

In relatively few of the decisions are there references to relevant non-legal literatures or authority.[529] In most proceedings and, consequently reported decisions, the parties and the "experts" do not tend to refer to relevant scientific studies or bring the court's attention to the existence of critical literatures and challenges to the value of techniques or the manner in which evidence is expressed—even when these are known to the state's expert witness (and required by ethical obligations or formal codes of conduct).[530] As a result, lawyers, judges and juries are often oblivious to relevant literatures, critical commentary, experimental research and alternative techniques that might be directly relevant to the evidence and the issues confronting the court.

In most Anglo-Australian jurisdictions, judges are formally proscribed or informally discouraged from undertaking their own research. In consequence, trial and appellate judges are at the mercy of the parties and a system that does not adequately support the defense, particularly in relation to expert evidence. Admissibility decision-making is vitally important, but prosecutors and defense lawyers have been unwilling or incapable of improving admissibility practice. Notably, the NRC report has been cited in about fifty U.S. decisions, though with limited engagement and little deference. Notwithstanding its international implications, it has yet to be cited in a reported English or Australian judgment and its implications for forensic science and legal practice have not been taken seriously by courts.

It is not our intention to suggest that extant research and knowledge is necessarily clear-cut, or would always be decisive, but rather to draw attention to legal-forensic ignorance, omission and indifference. Current practices in all these jurisdictions—though perhaps less so in a tiny proportion of U.S. cases, where some techniques are aggressively

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[526] *See, e.g.*, R. v. Reed [2009] EWCA (Crim) 2698, 1 Crim. App. 23, [72]-[73] (Eng.); *Murdoch v. The Queen* (2007) 167 A Crim R 329, 346-47 (Austl.); *R. v. Harradine* [2008] SADC 179, [33]-[37] (Austl.).

[527] This may be reflected in the lack of references to scientific literatures in many judgments. *See* Gary Edmond et al., *Unsound Law: Issues With ('Expert') Voice Comparison Evidence* 35 MELB.U.L.REV. 52, 54 (2011).

[528] The exceptions would seem to be some amicus curiae briefs in the U.S. and where the defendant is very well-resourced. *See generally*, Brief of Amici Curiae Individuals Exonerated by Post-Conviction DNA Testing in Support of Respondent at 28, Dist. Att'ys Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009) (No. 08-6) (arguing that DNA evidence is conclusive as biological evidence).

[529] Even DNA jurisprudence tends to rely on previous legal decisions. *See generally*, 68 AM. JUR. 2D *Searches and Seizures* § 288 (2012).

[530] *See, e.g.*, *Expert Witnesses in Proceedings in the Federal Court of Australia*, Practice Note CM 7 (2011); Bryan Found & Gary Edmond, *Reporting on the Comparison and Interpretation of Pattern Evidence: Recommendations for Forensic Specialists*, 44 AUSTL. J. FORENSIC SCI. 193, 193 (2012).

challenged (often with assistance from legal scholars and scientists)—have developed in ways that structurally exclude or discourage recourse to those who might actually know more.[531] Experience with DNA profiling would seem to be salutary in this regard.

3. Forensic Reliability?

In the absence of attention to scientific literature, it might be argued that the way judges have interpreted various rules and decisions has created a special legal (or forensic) definition of reliability. Legal negotiations and settlements around what reliability means has produced a somewhat incoherent meaning that has little relationship to what others, particularly scientists might mean by reliability. For judges, 'reliability' is often defined by: whether a person is formally qualified or (minimally) experienced; whether a technique has been used for a long time; whether a technique has been accepted by a court; whether a technique has been reviewed by another "expert" (i.e., peer review); whether a technique has survived cross-examination; whether a technique has been upheld on appeal; and, responsively, to the question of what the alternatives to admission of an expert's opinion might be.[532] These, as well as more orthodox uses, have created a very complicated, indeed incoherent set of resources that enable individual lawyers and judges to construct a very wide range of meanings around reliability that may have little if anything to say about the value of techniques, actual abilities and levels of accuracy.

To the extent that law, or legal institutions, develop their own models of reliability that have very little, if anything to do with ideas of (validity and) reliability in relevant scientific communities (concerned with epistemic considerations) or require attention to underlying research, these would seem to be creating scope for future challenges and dissonance and, in the criminal justice system, might be considered undesirable and possibly pathological. We accept that legal institutions may need to develop and articulate peculiar models of reliability designed for specific legal purposes, but these should be principle-driven, coherent and indexed to evidence or ability and what is known in exogenous knowledge communities.

The objectives of criminal justice systems, increasingly embodied in formal admissibility standards, would seem to require that forensic science and medicine evidence should be demonstrably reliable. That is, expert witnesses should be able to do what they claim, have procedures that minimize risks and error, and have a clear idea of limitations, sources and levels of error. They should also acknowledge evidentiary constraints, controversy and respond to authoritative criticism.

4. Legal Institutions Disinterested in Empirical Studies or Studying Their Own Practices

Compounding the problems presented by legally negotiated reliability standards, courts in all of these jurisdictions have been relatively inattentive to empirical studies of their own practices. Inattention is particularly pronounced in England and Australia.[533] Practicing judges have expressed little interest, and less practical action, in supporting methodologically rigorous studies of courts, trials and institutional practice.

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[531] Such cases often involve attentive scholars, frequently through the production of jointly authored amicus curiae briefs.

[532] *See, e.g.*, R. v. Bonython (1984) 38 SASR 45, 47 (Austl.). For example, judges seem reluctant to exclude 'expert' opinion where the jury might be left to undertake any analysis without assistance. *See* R. v. Tang (2006) 161 A Crim R 377, 381 (Austl.).

[533] *See generally* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008); J.D. Heydon, *Developing the Common Law*, *in* CONSTITUTING LAW: LEGAL ARGUMENT AND SOCIAL VALUES 93 (2011). To be fair, little of this evidence is ever brought before judges and in many situations it is not obvious whether judges should or could respond.

The judicial disinterest in empirical studies is especially important because in many areas of legal practice, including areas where courts routinely admit(ted) techniques and derivative opinions, independent reviews of techniques and research have exposed (and continue to expose) serious methodological shortcomings and misleading forms of reporting opinions. Examples include: the use of voice prints (spectrographs), bullet lead analysis, handwriting comparisons, early population statistics associated with DNA matches, latent fingerprint evidence, and most recently the various techniques criticized in the NRC report. In each of these areas, academic commentators had criticized the techniques and lawyers and courts had, to varying degrees, ignored or marginalized these critiques—preferring jurors to determine the issue at trial. In the main, however, the criticisms of independent scholars have been consistently vindicated. This vindication has come through institutional disclosures, the research emerging from Innocence Projects, and scientific research and interventions (e.g., NRC report).[534]

Nevertheless, in many jurisdictions adjectival law reform tends to be predicated upon perspectives from the top of the legal pyramid (appellate judges and senior practitioners) and based on their unsystematic experience rather than empirical research or commissioned studies.[535] Given the performance of those outside the courts, and the difficulties experienced by lawyers and judges in all of these jurisdictions, it makes sense to think about developing institutional mechanisms, staunchly independent of the institutionalized forensic sciences and the courts, and not populated by stakeholder groups, to provide advice about forensic science and medical techniques that are (or become) controversial regardless of their longevity or apparent value.[536] Criminal courts should be cautious adopters of emerging forensic science and medical technologies.[537]

Given the limited resources available to the defense, along with the past performance of lawyers, judges and many expert witnesses, there is little sense in making the defense responsible for demonstrating that forensic science and medical evidence is unreliable, weak and/or developed in ways that tend to undermine any probative value it might possess.[538] That is, the accused should not bear the risk or responsibility of persuading the tribunal of fact about problems with expert opinion—including the unreliability and limitations with incriminating expert opinion evidence—particularly in the context of an accusatorial trial.

5. Problems Blamed on "Bad Apples"

While courts are particularly resistant to learning from academic research, it is harder to ignore the wrongful convictions and miscarriages of justice that have been associated with problems in forensic science evidence in each of the jurisdictions discussed.[539] Reports written about these miscarriages of justice often identify systemic

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[534] *See generally* GARRETT, *supra* note 512; NAT'L RESEARCH COUNCIL, *supra* note 498, at 58-69.

[535] We do not suggest that empirical research would be unequivocal about what should be done, but that it should be commission and considered.

[536] *See* Gary Edmond, *Advice for the Courts? Sufficiently Reliable Assistance with Forensic Science and Medicine (Part 2)*, 16 INT'L J. OF EVIDENCE & PROOF 263 (2012).

[537] In most jurisdictions, regardless of admissibility standards, judges tend to accommodate emerging, and sometimes unproven, techniques and technologies. *See* R. v. Atkins, [2009] EWCA (Crim) 1876, [27]-[31] (Eng.).

[538] Itiel E. Dror, David Charlton, & Ailsa Péron, *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 FORENSIC SCI. INT'L 74, 77 (2006). *See also* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.

[539] In the U.S., *see, e.g.,* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions* 95 VA. L. REV. 1, 1-97 (2009). In the UK, *see, e.g.,* R. v. Mark Dallagher [2002] EWCA (Crim) 1903 (Eng.). In Canada, *see* GOUDGE, *supra* note 354; FORENSIC EVIDENCE REVIEW COMM., FINAL REPORT (2004). In Australia, *see, e.g.,* VINCENT, *supra* note 478; MORLING, *supra* note 480.

failures within police investigations and the forensic sciences as well as failures of institutional culture.[540] Trial and appellate processes, and lawyers and judges, are less often subject to criticism. However, miscarriages of justice, wrongful convictions and associated inquiries, along with law reform proposals, rarely seem to produce long term or fundamental changes in admissibility practice. Rather, individual wrongful convictions tend to become associated with the poor behavior of particular experts (such as Harrow in the English image cases) or institutions, producing a discourse in which the "problem" of low quality expert evidence will be eliminated by the identification and exclusion of the bad apple(s).[541] On some occasions, scandal leads to censure and even the exclusion, at least for a time, of particular techniques or practices, such as voice spectroscopy in the U.S. and bite marks in Australia.[542] Scandals tend to be localized to particular techniques, practices and disciplines, and only rarely influence analogous practices and methodological indifference in other domains.[543]

The practice of blaming individual experts for their errors seems to mask broader practices that expose criminal investigation and prosecution processes to unreliable forensic science evidence. Unfortunately, any "lessons" are rarely learned and very rarely applied beyond a particular case or, as is more likely, an individual expert (or laboratory) *once discredited*. Even doubts and regular criticisms are unlikely to prevent admission until epistemic failure is confirmed. The case method and focus on individualized justice tends to accentuate these problems and frustrate the scope of more principled practice or reform.

6. Mediating Admissibility Strictures Because of the Trial Safeguards

The practice of relying on legally-negotiated reliability is predicated on judicial confidence in trial safeguards. Judges in all jurisdictions endeavor to ground their admissibility practice in relevant adjectival rules and jurisprudential traditions.[544] Concerns about the admission of "shaky"—that is weak or potentially unreliable opinions—tend to be mediated by the availability of trial safeguards and other protections. Implicitly, the protection provided by cross-examination, rebuttal experts, and instructions and cautionary warnings reduce or eliminate the risks to the accused from unreliable and speculative forms of expert opinion evidence. That is, the ability to cross-examine the expert, to obtain a contradictory or critical expert opinion, and for the judge to give directions and cautionary warnings, all serve to temper the rigorous application of exclusionary rules whether derived from the common law or otherwise (e.g. FRE 702 and UEL s79).[545]

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[540] *See also*, GOUDGE, *supra* note 354; VINCENT, *supra* note 478.

[541] Consider also Dr. Black in the English IRA cases, or Joy Kuhl in *Chamberlain v. The Queen (No. 2)*, Transcript of Record at Testimony of Joy Kuhl (1984) 153 CLR 521 (Austl.), 1984 WL 441785. See Clive Walker and K. Starmer, (eds), MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR (1999). Consider also the responses to the performance of police crime laboratories in St Paul, Minnesota (2013), and Houston, Texas (2003).

[542] *See, e.g.*, Ohio v. Williams, 446 N.E.2d 444, 446 (Ohio 1983) (discussing jurisdictional differences regarding admissibility of voice spectroscopy evidence); Mark Page, Jane Taylor & Matt Blenkin, *Reality bites—A ten-year retrospective analysis of bitemark casework in Australia*, 216 FORENSIC SCI. INT'L 82 (2012).

[543] *See, e.g.*, GOUDGE, *supra* note 354, at 25 (focusing on individual and forensic pediatric pathology, but with relatively little influence beyond).

[544] *See, e.g.*, JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS 27 (2012).

[545] FED. R. EVID. 702; *Evidence Act 1995* (Cth) s79 (Austl.).

A fairly typical expression of this commitment can be found in the *Daubert* decision.[546] On behalf of the majority, Justice Blackmun wrote, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking *shaky* but admissible evidence."[547] In the *civil* sphere, and notwithstanding the 'relevance and reliability' regime he was inaugurating, Justice Blackmun explained that 'shaky' evidence was potentially admissible because it could be substantially addressed through traditional trial safeguards.[548] We question this as a principled response to incriminating expert opinion evidence in *criminal proceedings*. We also note that emerging research questions the effectiveness of trial safeguards both individually and in combination.[549]

In addition to the limited impact of formal admissibility standards, judicial discretions to exclude forms of evidence that might create unfairness, because of their potential to mislead the jury or because they are practically difficult to explain to lay decision makers—such as those embodied in the probative value/unfair prejudice discretion (e.g. FRE 403 and UEL s137)—are rarely used to exclude evidence that is not demonstrably reliable.[550] Once expert evidence is deemed to have satisfied formal admissibility rules—especially in jurisdictions with a reliability threshold—discretions are very rarely used to exclude. It seems that judges rarely consider the probative value of incriminating expert opinion evidence, preferring to leave such issues for the tribunal of fact (and "weight"). In some jurisdictions, a range of supplementary considerations have emerged to facilitate admission, such as compromises around the strength of expression (so-called "splitting"), or liberally admitting incriminating opinion where the defense has access to a "rebuttal" expert.[551]

The value and effectiveness of trial safeguards is uncertain. Cross-examination can have a devastating impact on an expert witnesses' testimony, and a rebuttal witness might change the way in which a decision maker understands expert evidence and even the case. On occasion, the trial judge might even identify the major limitations of an expert's opinions and convey them to a jury through cautionary warnings.[552] Generally,

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[546] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993).

[547] *Daubert*, 509 U.S. at 596. *Daubert*, it should be remembered, was a civil case dealing with the admissibility of epidemiological studies and meta-analyses. *See* CARL F. CRANOR, TOXIC TORTS: SCIENCE, LAW AND THE POSSIBILITY OF JUSTICE (2006).

[548] *Daubert*, 509 U.S. at 596.

[549] Gary Edmond & Mehera San Roque, *The Cool Crucible: Forensic Science and the Frailty of the Criminal Trial*, 24 CURRENT ISSUES IN CRIM. JUST. 51, 62 (2012); EMMA CUNLIFFE, MURDER, MEDICINE AND MOTHERHOOD 196 (2011); Keith A. Findley, *Innocents at risk: Adversary imbalance, forensic science and the search for truth*, (2003) 38 Seton Hall L.Rev 893.

[550] FED. R. EVID. 403; *Evidence Act 1995*, s137 (Austl.); *e.g.*, R. v. Jung [2006] NSWSC 658, [68]-[86] (Austl.).

[551] *See, e.g.*, Jung [2006] NSWSC at [76]-[86] (Austl.). On the 'equality of arms' more generally, *see* JOHN D. JACKSON & SARAH J. SUMMERS, INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS 83-85, 133-35 (2012).

[552] Note that this does not mean they will be understood. The ability to give directions and instructions with the authority of the court often mediates the admission of expert evidence, particularly in England, Wales and Australia. This response is interesting given that the research on judicial instructions, directions and cautionary warnings has repeatedly questioned their influence and therefore value. *See* NAT'L RESEARCH COUNCIL, *supra* note 505, at 58. In addition, a review of directions in Australia in response to voice identification evidence found that the content of instructions did not provide any scientifically-derived information and presented them in a way that made them practically difficult, perhaps impossible, to apply them. Rather than inform juries about the magnitude of risks of error, instructions tend to be remarkably general, often merely pointing to potential difficulties (e.g. the length of exposure was short, or the quality of the recording was poor) or these is no database, or the police officer was not very familiar, and imploring jurors to be cautious. Empirical studies revealing very high levels of error associated with the interpretation of voices and images, statements by learned societies imploring members not to use particular methods for forensic purposes, and the emergence of more

however, trial safeguards tend to be weak—much weaker than credible safeguards ought to be—and inconsistent in their operation. Their existence and presumptive claims as to their effectiveness are often used as grounds for admitting incriminating *expert* opinions that are neither demonstrably reliable nor effectively challenged. The many limitations associated with incriminating expert opinions are not usually canvassed or explained to juries. Juries are rarely provided with much detail and almost never with the assistance of relevant empirical studies, even where they exist.[553] Often, appellate courts treat the poor performance of lawyers, specifically in response to incriminating expert opinion evidence, as strategic decisions in the conduct of the defense.

In relation to these trial safeguards we might note that traditions, especially in England, Canada and some parts of Australia, of prosecutorial restraint seem to have little conspicuous impact on the handling of expert evidence.[554] In theory, the prosecuting attorney should aim to prosecute in a manner that is robust, but also principled and fair. Concerns with rectitude and fairness should extend to the use and reliance placed on incriminating expert opinion evidence that is unreliable or of unknown probative value. In addition, the prosecutor has a responsibility to direct attention to the actual value of expert evidence and concede and convey limitations with that evidence.[555] Where a technique is weak or untested, the state might be obliged to abstain from relying upon it even if the courts are willing to admit it.[556]

The ideal, rather than the reality, of trial safeguards, tends to be used to support admission and reliance upon speculative and unreliable forms of expert opinion evidence in all common law jurisdictions. Ironically, the limits of trial safeguards and prosecutorial restraint, individually and in combination, reinforce the need to be more aggressive about admissibility and to exclude evidence developed through techniques that are not demonstrably reliable.

7. Confidence in Juries and Judges (and Their Ability to Understand Complex Technical Evidence and Rationally Combine It with Other Evidence in an Accusatorial Setting)

Ultimately, the issue of admission determines whether the tribunal of fact—lay, whether jury or judge—will get to hear the testimony of a person formally recognized by the court (and the state) as expert enough to express opinions in criminal proceedings. Most judges express confidence in the ability of fact-finders to assess expert evidence regardless of whether it is adequately contested or explained and regardless of whether it is demonstrably reliable. Nevertheless, the jury's performance depends upon their understanding of the meaning of the decision to prosecute (e.g., that the accused is likely to be guilty), the way the trial is conducted, particularly representations by the prosecution and the adequacy of the defense, the way different types of evidence are combined, as well as general cognitive capabilities.

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technical methods by highly skilled linguists, statisticians and engineers all tend to be disregarded—whether deliberately or inadvertently. *See id.* at 60-69.

[553] *See* Gary Edmond, Kristy Martire & Mehera San Roque, *'Mere Guesswork': Cross Lingual Voice Comparisons and the Jury*, 33 SYDNEY L. REV. 395, 421 (2011).

[554] David S. Caudill, *Lawyers Judging Experts: Oversimplifying Science and Undervaluing Advocacy to Construct an Ethical Duty?*, 38 PEPP. L. REV. 675, 678-79 (2011).

[555] Michael Saks, *Scientific Evidence and the Ethical Obligations of Attorneys*, 49 CLEV. ST. L. REV. 421, 430-31 (2001). *See also* Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1417 (2007).

[556] The appropriate response might be to require research or the reform of investigative practices. *See* NAT'L RESEARCH COUNCIL, *supra* note 505, at 63-66.

Despite the expectation placed on the tribunal of fact, our criminal justice systems are not well designed to facilitate jury (or judicial) comprehension of expert evidence. It is far from obvious that juries perform well with expert opinion evidence or with the integration of different forms of expert and non-expert evidence. There is little evidence that judges perform much better.[557] Where there are serious methodological and/or statistical limitations or problems, or where there is no credible "research base", it is reasonably unlikely that this will be drawn to the attention of juries or explained in a manner that might lead them to appreciate how serious concerns voiced by the NRC, for example, actually are. We do know that juries do not perform well with statistical and probabilistic information (or with likelihood ratios) and this is the way that many types of forensic science are now being expressed—sometimes in the absence of underlying research (*see* Table 1).[558] In addition, there are good reasons to believe that judges and jurors struggle to disaggregate components of the case. Once they have heard evidence, even if it is not particularly probative, they may have serious difficulties discounting it. There is little evidence that judges or juries are capable of ignoring evidence, regardless of its admissibility.[559]

We do not say that juries are incapable of understanding complex evidence—although this requires further attention—but rather that our current institutional arrangements are not particularly well suited to jury comprehension. It may be that procedures could be dramatically improved, but even improvement might not be adequate for lay persons (including judges) to credibly cope with the tremendous variety of expert opinion evidence, and evidence that is especially complex (or technical), unreliable or of unknown reliability.[560] The limits of the tribunal, once again, reinforce the importance of admissibility decision-making and the reliability of incriminating expert opinion evidence. And yet, admissibility gate-keeping is dependent upon legally-trained judges who, for a variety of professional, ideological and pragmatic reasons, tend to maintain confidence in the state and its criminal justice institutions.

D. Implications of the Basic Conclusion

The implications of a lack of judicial attention to reliability are troubling. Most obviously, it is disconcerting that trial practice does not seem to have been altered by a major formal shift in admissibility standards. Courts and prosecutors have not yet engaged with the possibility that past convictions were based on unreliable evidence, or with the responsibility to review past practice that this realization entails. Adherence to forensic (or legal) reliability in lieu of empirical reliability allows courts to cleave to a precedent-based

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[557] There may be exceptions, such as where judges are regularly exposed to particular techniques, but this is not particularly common. *See generally* Margaret Bull Kovera & Bradley D. McAuliff, *The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?*, 85 J. OF APPLIED PSYCHOL. 574 (2000); Joel Cooper et al., *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUM. BEHAV. 379, 387-93 (1996); Groscup et al., *supra* note 50, at 365, 367.

[558] Ben R. Newell et al., *Getting Scarred and Winning Lotteries: Effects of Exemplar Cuing and Statistical Format on Imagining Low-Probability Events*, 21 J. BEHAV. DECISION MAKING 317, 319 (2007); Kristy Martire et al., How Likely Is It that Fact Finders Understand Likelihood Ratios?, paper presented at Impressions and Expressions: Expert Opinion Evidence in Reports and Courts (December 2011), *in* AUSTL. J. FORENSIC SCI. (forthcoming 2012).

[559] Where the trial judge is also the tribunal of fact (i.e. the ultimate decision maker), he or she is obliged to subsequently disregard any evidence deemed inadmissible. Studies in the U.S. and Germany suggest that judges in common law and civilian traditions experience extreme difficulty disregarding evidence. *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1270 (2005); JACKSON & SUMMERS, *supra* note 550, at 73.

[560] *See* Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1144 (1993); Ronald J. Allen, *Expertise and the Daubert Decision*, 84 J. CRIM. L. & CRIMINOLOGY 1157, 1174 (1994).

approach, whereby opinions or techniques that have been admitted before the adoption of reliability standards continue to be admitted. This tendency persists at times even when there has been controversy about a technique or the evidence was originally admitted with caveats. Courts devote selective attention to empirical reliability where demonstrable reliability exists, while seemingly retaining a basic operating assumption that most evidence should be admissible. Worryingly, courts seem to reserve particular skepticism for experts called by criminal defendants. Overall, there is a serious lack of clarity around the expression of results, particularly when it is appropriate to individualize. The prevailing focus on experience rather than expertise discourages forensic scientists from testing the reliability of their work or becoming familiar with scientific literature and reasoning.

1. The Historical Legacy

One of the more confronting implications from revelations about the quality of forensic science and medical evidence, in conjunction with the emerging limits of legal practice, particularly the failure to consistently identify very real epistemic frailties during trials and appeals, is that many past convictions were probably mistaken, and very many criminal proceedings admitted incriminating expert opinions that were either wrong, grossly exaggerated or otherwise misleading. Very many criminal trials were, in consequence, substantially unfair.[561] Similarly, many guilty pleas were undoubtedly accepted from innocent persons—presumably over-represented by minority groups, the poor and the poorly educated—pragmatically responding to accusations predicated upon or bolstered by mistaken or misleading expert opinions. Unreliable and speculative expert opinions were often contaminated by exposure to prejudicial information but appeared as independent corroboration, even when the other evidence was mistaken—such as mistaken eyewitness identifications and confessions obtained under duress.

Where types of evidence, or individuals or laboratories are shown to produce mistakes, these should not be treated as isolated errors. Rather, there should be reviews (or audits) of other cases to determine whether poor practices are more widespread. In the wake of the NRC report, there would seem to be a need to review convictions substantially and systematically dependent on incriminating techniques and "expert" opinions that are not demonstrably reliable.[562]

2. Once Admitted, It's Here to Stay

Once a type of opinion or technique is admitted, typically it remains admissible unless some controversy emerges or evidence suggests that techniques and practices are completely unacceptable. Interestingly, there tends to be limited review of previous evidence, even once a technique is refined or shown to be limited. Moreover, where evidence is initially admitted with reservations or constraints, or because of the particular features of the case or the analysis, these restrictions are not always considered or applied in subsequent decisions. Initial limitations, as in the case of bite marks in the U.S. (following *Marx*) or the need for considerable familiarity to ground non-expert opinion in Canadian image cases (after *Leaney*), were elided or watered-down in subsequent practice.

Often the decision to admit a kind of technique or opinion in one jurisdiction provides support for similar practice in other jurisdictions. Legal practice in foreign

[561] Even where the totality of the evidence might support guilt, admitting speculative opinions—often contaminated by knowledge of other prejudicial information—as independent support for conviction is inconsistent with a fair or rational process.

[562] This would apply to cases involving over-zealous prosecutors, incompetent defense attorneys, and judges who presided over cases.

jurisdictions, though not necessarily determinative, often seems to temper the way in which local rules of admissibility are constructed and may shift attention from demonstrable evidence of reliability (or actually enforcing admissibility standards).

Perversely, in terms of criminal justice principles, it seems much more difficult to have a forensic science or medical technique deemed inappropriate or inadmissible than admissible—regardless of the research support or risks of error.

3. Selective Attention to Reliability

This article documents that judges in the U.S., England and Wales, Canada and Australia have not required forensic scientists to establish, with empirical evidence, that their techniques are reliable, including techniques that have been relied upon for decades. Interestingly, the only technique that seems to have been exposed to quite demanding technical review, DNA profiling, was also the only technique where the defense obtained access to technical insights of undoubted authority at a preliminary stage, and is the only one of our techniques capable of satisfying a credible reliability standard *given the way interpretations are currently expressed.* Judges, in conjunction with the resource constraints on lawyers, have limited the scope and effectiveness of challenges to other (i.e., the non-DNA) forensic science techniques.

It is no coincidence that judges in England, Wales and Australia often refer to reliability, and sometimes validity and occasionally even refer to the copious amount of legal and non-legal published literatures, with respect to DNA. They tend to be less attentive to reliability, and it is of less value as a rhetorical resource, where a forensic science technique is not demonstrably reliable (and/or is controversial). Perhaps the primary exception is in the aftermath of high profile miscarriages of justice where (un)reliability is often an important rhetorical resource.[563]

4. Evidence of Defendants (and Plaintiffs)

Judges seem to believe that admitting as much evidence as possible is basically consistent with the primary goal of rectitude of decision (i.e., accuracy or "truth").[564] There is certainly a conspicuous trend in that direction in the Canadian jurisprudence.[565] Revealingly, the commitment to the admission of the state's expert evidence – approaching "free proof" – is not necessarily extended to expert opinion evidence adduced by plaintiffs in civil proceedings with juries (i.e., in the U.S.).[566] Nevertheless, judges in all common law jurisdictions have admitted *and continue to admit* the various forensic science techniques we have considered notwithstanding remarkably divergent levels of experimental support and quite different formal admissibility standards. Criminal trial

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[563] This occurred in response to the exoneration of the Birmingham Six, Guildford Four as well as the Splatt and Chamberlain Royal Commissions and the Canadian inquiries cited previously. These all led to proposals for change, but not ultimately to reliability-based research and admissibility practices.

[564] *See, e.g.*, LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 120 (2006).

[565] Made explicit by the Canadian Supreme Court in *Nikolovski. R. v. Nikolovski* [1996] 3 SCR 1197 (Austl.).

[566] 'Free proof' entails eliminating rules of admission to enable a more naturalistic (and implicitly rational) approach to the assessment of *all* relevant evidence. *See* JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS (2012). Our essay is, at least implicitly, an argument against free proof—at least in its more non-reflexive guises. Not only are many of the formal rules and principles inconsistent with such a liberal response to incriminating expert evidence, but free proof and its proponents tend to overlook, or underestimate, the weakness of trial safeguards and the willingness of modern juries to convict. The admission of speculative incriminating opinions, expressed by individuals presented as experts, may be difficult to overcome, even where their opinions are contaminated, methodologically frail and mistaken. This has certainly been the case in many of the notorious wrongful convictions and miscarriage of justice cases in recent decades.

principles and values, like the application of admissibility rules, seem to be subservient to admission rather than the other way around.

In theory and practice the adversarial criminal trial is intended to produce accurate outcomes fairly.[567] Quite deliberately, modern criminal trial processes and rules are asymmetrical. Though primarily concerned with correct outcomes, the system is intended to operate in a manner that embodies the presumption of innocence and prevents a certain kind of error—namely, the conviction of the innocent. It is the state, in consequence, that is obliged to prove guilt to the exclusion of all reasonable doubt. With a few exceptions, there are relatively few expectations placed upon those accused of criminality. In addition, trials should be substantially fair - both in the way they are conducted and in the kinds of evidence produced and relied upon. This last point includes the ability to meaningfully respond to incriminating evidence.

All four of our jurisdictions feature a *one-size-fits-all* approach to expert opinion evidence. In theory, the same standard applies to evidence adduced by the state and the accused in criminal proceedings as well as to evidence adduced by plaintiffs and defendants in civil proceedings.[568] Nevertheless, our findings affirm that judges are particularly receptive to incriminating expert opinion evidence. These findings are nuanced by empirical research on criminal trials and appeals, as well as judicial responses to the expert opinion evidence adduced by plaintiffs in civil proceedings.[569] In contrast to the receptive, even *laissez faire* response to the state's proffers in criminal proceedings, the expert opinion evidence adduced by criminal defendants and plaintiffs tends to be more thoroughly scrutinized and held to more demanding standards.

These differential practices are difficult to square with legal principle. In principle, if there is to be disparity in the system, the most onerous standard should apply to incriminating expert opinions. The most accommodating standard should be applied to expert opinion evidence adduced by the accused.[570] Alternatively, all evidence should be held to precisely the same standard. Actual practice, in contrast, seems to invert legal principle.

It might be thought that the presumption of innocence, the requirement that the state prove guilt beyond reasonable doubt and the desire to only convict the guilty might justify the adoption of a more liberal admissibility threshold in respect of expert opinion evidence adduced by the accused.[571] The accused should, if there is any flexibility in admissibility standards, be given (greater) scope to introduce expert evidence that may raise a reasonable doubt or establish innocence.[572] In practice, the state's incriminating expert evidence is likely to secure easy passage, but when expert opinion is tendered by the accused it is more likely to undergo scrutiny and exclusion. In part, this is a result of the differential access to resources and information. Prosecutors tend to have superior

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[567] *See* HO HOCK LAI, A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH FOR TRUTH 54 (2008); WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 7 (1985). This is also a primary goal of civil litigation, but that system is not as asymmetrical and there tend to be greater incentives to settle or produce practical outcomes efficiently.

[568] *E.g.*, LAW COMM'N OF ENG. & WALES, REPORT ON EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND AND WALES 2.17 (2011).

[569] D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 128 (2000); Groscup et al., *supra* note 50, at 346.

[570] *See* Gary Edmond & Kent Roach, *A Contextual Approach to the Admissibility of the State's Forensic Science and Medical Evidence*, 61 U. TORONTO L.J. 343, 376 (2011).

[571] LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 85 (2006).

[572] Regardless of the value of finality, this should be accommodated at any stage of proceedings or incarceration. There will, of course, often be questions about what new techniques and evidence actually establishes.

resources and much better access to forensic scientists and consultants. They also tend to be more specialized and coordinated than many public (and private) defenders and so are in a better position to develop strategies, share information and successfully contest expert opinion evidence adduced by the defense. Expert evidence adduced by the defense, it should be acknowledged, is sometimes of questionable value or speculative and often presented by (forensically inexperienced) academic researchers rather than forensic science practitioners. However, given the preceding discussion of admissibility practice in response to many forensic science techniques that are currently relied upon by the state, allowing the accused to adduce expert opinion that might not be demonstrably reliable (or quite as demanding as any credible standard imposed upon the state) would not seem to be inconsistent with principle or the generally accommodating responses to incriminating expert opinion.[573]

5. Expression of Results

Inattention to what the NRC Report characterized as the 'knowledge base' underpinning many forensic science techniques has meant that the issue of how results should be expressed is often unclear—though not always explored (or conceded).[574] The lack of validation or proficiency testing means that in many areas forensic scientists speculate on the significance of results (often apparent "matches" or "similarities"). This may lead to attempts to express results cautiously, though in the absence of genuine insight about methodological and procedural issues, and information about distributions, imagined cautioned may be too cautious or—more troubling for the accusatorial trial—not cautious enough. Increasingly, lawyers and trial judges negotiate the way results may be expressed in courts, but this negotiation often follows from the lack of experimental research supporting a technique. Negotiations, forming part of an *admissibility compromise*, are not in any obvious sense indexed to empirical evidence. While they might, as in the case of some recent qualifications to latent fingerprint evidence in the U.S. and images in Australia, be better than unregulated assertions, they may nevertheless have no tangible empirical foundations or discernible effects. Recent research suggests that attempts by lawyers and judges to manage and perhaps mitigate the worst impacts of expert opinions through tempering expression may make little, if any, difference to the way incriminating opinions are actually understood—by the tribunal of fact.[575]

Differences in interpretations, conspicuous in the way DNA profiling and other techniques (*see* Table 2) are reported, are also revealing given the lack of research support for non-DNA comparison and pattern-matching techniques. DNA profiling, in contrast, has undergone extensive testing and lengthy discussions by well-resourced specialist groups that practically resolved a range of ongoing difficulties (and uncertainties).[576] Few other forensic science techniques have anything like the level of research support, multidisciplinary consensus, or highly trained experts in non-forensic domains using similar techniques and methods. When we compare the manner in which opinions are

[573] Moreover, the practices of trial and appellate judges cannot be reduced to the quality of the counsel and arguments raised in admissibility hearings and trials. Judges appear to have an ideological proclivity toward the admission of incriminating expert opinion evidence. That proclivity might be based, in part, on a commitment toward admission (and even 'free proof') but again, these ideas and the asymmetrical response to evidence adduced by defendants (and plaintiffs in civil litigation) cannot be credibly explained in such terms.

[574] This emerged recently, controversially, and unsatisfactorily in *R. v. T.* in England. [2010] EWCA (Crim) 2439, 105-06 (Eng.).

[575] *See, e.g.*, Dawn McQuiston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear*, 33 LAW & HUM. BEHAV. 436, 444-45 (2009).

[576] MICHAEL LYNCH ET AL., TRUTH MACHINE: THE CONTENTIOUS HISTORY OF DNA FINGERPRINTING, 83 (2008); ARONSON, *supra* note 515, at 98.

expressed, however, the non-DNA comparison (or identification) sciences are likely to be linked to positive identifications (so-called individualizations). This is the strongest form of expression: converting (apparent) similarities or "matches" into certain conclusions about identity or source. In some instances this may be because investigators and technicians are, or were historically (i.e., pre-DNA evidence), unaware of the complex issues associated with identification and individualization, particularly around similarities, the distribution of features in relevant populations, as well as a range of procedural biases that might influence interpretive and comparative practices.

There is no coherent rationale for the manner in which different types of evidence and opinions are expressed in reports and testimony. Rather, forms of expression are historically contingent, reflecting: the age of techniques and the length of admissibilty (with older techniques generally leading to higher levels of confidence or certitude); the amount of supporting research (the more research the more cautious, and empirically-predicated, expressions tend to be); the nature and extent of challenges; the degree of mobilization (and controversy) beyond the courts; the involvement of (non-forensic) scientists; and, the impact of notorious cases (e.g., bite mark cases in Australia or problems with voice spectrographs in the United States).

Older and empirically tenuous techniques frequently use the strongest forms of expression—e.g. a "match" as positive evidence of identity.[577] Most of these expressions were developed, or shaped, through ongoing interactions between courts and investigative communities. Perhaps inadvertently, and unwittingly, courts have actively participated in the production and legitimation of "expertise" and even "fields" through their admissibility practices.[578] Generally, admission (understood, and represented, as a proxy for reliability) has tended to stall interest in research. Somewhat perversely, verdicts, pleas, admissions, and the opinions of the experts themselves, rather than independent research have all been used to ground and support many of the claims associated with techniques not based on analysis of DNA. In some cases experience acquired during the course of an investigation by a police officer or a forensic scientist is considered adequate to ground admissibility, especially where the alternative is to allow the jury to examine "evidence" unaided or to exclude *potential* evidence. For a variety of reasons, not the least of which is the potential for embarrassment to criminal justice institutions, few prosecutors, judges or forensic scientists have much interest in destabilizing earlier admissibility settlements.

6. Implications for Forensic Science Practices

Legal (i.e., judicial) recognition of "fields" or "expertise" confers social and evidentiary legitimacy in circumstances where there may be few epistemic bases for that status. Courts should be looking for independent—that is, non-legal—evidence of ability. In the criminal sphere courts should be slow to confer their imprimatur (which may imply reliability), especially in jurisdictions requiring "reliability." The alternative is an undesirable tautology where legal recognition substitutes, almost always prematurely, for reliability.

As things stand, it is simply unknown whether many of the experts permitted to testify in courts can actually do what they claim, let alone how accurate they are. This is a deplorable state of affairs for all jurisdictions regardless of the admissibility standard. Courts have been instrumental in recognizing "experts" and "fields" and providing

[577] These techniques are often used by individuals with less scientific and statistical training than scientists and technicians involved in DNA analysis. *See* LYNCH, *supra* note 582, at 11-12.

[578] SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA, 50-51 (1997).

alternative pathways (such as treating the evidence as non-expert lay opinion or treating recognition evidence as fact thereby circumventing opinion rules) that facilitate the admission and reliance on practices and opinions that are not necessarily accepted beyond forensic contexts. Many of those appearing in courts as expert (and non-expert) witnesses are not familiar with standard research methods or the kinds of studies that might illuminate the validity and reliability of their techniques. In consequence, many of those giving forensic science evidence are oblivious to, or inadequately trained to credibly deal with, some of the most pressing questions around validation and reliability and the ways in which to express opinions in reports and before lay persons.[579]

E. Differences Within and Among Jurisdictions

Our study documents the remarkable similarities in admissibility practices across the four jurisdictions (and their many states and territories). In this section we consider some of the differences in our sample. Notwithstanding overarching similarities, there are variations in the way some courts within and across jurisdictions manage different kinds of forensic science evidence and in some of the basic structures and resources that influence jurisdictional practices.

The interpretation of images and bite marks, for purposes of identification, are probably the most varied in our sample. Perhaps the variation stems from the influence of the *Smith* decision on Australian case law and the relative distribution of cameras.[580] In the U.S., England and Wales, and Canada, police with limited exposure to the accused—including "familiarity" acquired during the course of an investigation—are allowed to offer positive identification evidence through watching images of an alleged crime. In Australia, in *Smith*, the High Court largely prevented police identifications.[581] This has led to greater recourse to the opinions of 'experts' and non-investigative familiars.[582] England and Australia both seem to have more expert witnesses testifying in relation to facial, body, gait and clothing comparisons derived from images than Canada and the United States. This may be a consequence of more cameras, but would seem to be more closely linked to their accommodating jurisprudence. In the United States, expert witnesses commenting on images have largely relied upon photogrammetry. They are sometimes called upon by the defense in post-conviction reviews.[583] Allowing police to testify, as 'familiars' rather than "experts," may help to circumvent reliability standards for expert opinions in Canada. In Canada, in the place of expert witnesses, police officers, prison guards and parole officers tend to express their opinions about identity. The early case of *Leaney* provided access to the courts where there is sufficient "familiarity" (or recognition) and since that time there has been little need for more expensive and less predictable "experts."[584] The use of prison guards and parole officers in recent years probably reflects a desire to have individuals who appear independent of the investigation testify. Unavoidably, their participation reveals that the accused has prior convictions, often having served time in prison. This may be seen as acceptable in a jurisdiction relying heavily upon its judges for fact-finding. Notwithstanding these differences, all

[579] Jennifer Mnookin et al., 'The Need For A Research Culture in the Forensic Sciences' (2011) 58 UCLA Law Review 725; Simon A. Cole, 'Acculturating Forensic Science: What Is 'Scientific Culture', and How Can Forensic Science Adopt it?' (2010) 38 Fordham Urban Law Journal 435; Gary Edmond, *Actual innocents? Legal limitations and their implications for forensic science and medicine*, 43 AUSTL. J. FORENSIC SCI. 177 (2011).

[580] *Compare* Smith v. The Queen (2001) 206 CLR 650, 656 (Austl.); *with* Nguyen v. The Queen (2007) 180 A Crim R 267, 274 (Austl.); *and* Li v. The Queen (2003) 139 A Crim R 281, 294 (Austl.).

[581] 206 CLR at 656.

[582] *See* Murdoch v. The Queen [2007] 167 A Crim R 329 (Austl.).

[583] Wisc. v. Avery, 807 N.W.2d 638, 647 (2011).

[584] R. v. Leaney, [1989] 2 S.C.R. 393, 415 (Can.).

jurisdictions enable some kind of 'expert' or criminal justice employee to proffer their incriminating opinions about the identity of persons of interest in images.

These differences are interesting because they imply that the various jurisdictions have different approaches to relevance—a logical concept—as well as the manner in which they treat fact versus opinion evidence at least in relation to images. The same concerns are not applied, or not applied consistently, in other areas, even though there would seem to be few conceptual reasons to distinguish the interpretation of images from the interpretations of sounds, by way of example, at a conceptual level. Moreover, relevance is rarely used to exclude expert evidence, even where the abilities of forensic scientists are uncertain and their opinions might be unreliable and, hence, incapable of rationally influencing the assessment of facts in issue.

Differences in response to bite marks are more difficult to explain. In part, they seem to be linked to underlying problems with techniques and interpretations as well as ongoing controversy associated with notorious miscarriages of justice and critical academic commentary. Although in Canada, dental evidence has been used to suggest problems with the state's allegations. Variation in responses to incriminating images and bite marks, along with the general responses to the other techniques, reinforce the unprincipled nature of admissibility jurisprudence and practice.

While there are differences in the responses to voice comparisons (and spectroscopy), bite marks, LCN DNA techniques and who gets to interpret incriminating images, practical differences, tend to be on the margins or relatively minor. In most cases, such opinion evidence is admissible (in some form), though occasionally subject to qualification or comment or restriction on precisely who is entitled to express the opinion. Even formally discredited techniques, such as some kinds of bite mark interpretations and voice spectroscopy, might be admitted subject to witnesses qualifying their opinions and, in England, Wales, Canada and Australia, judicial warning. Admissibility practice seems to have no direct correspondence with the value of evidence, admissibility standards (especially formally stipulating reliability), or the efficacy of safeguards such as cross-examination or directions and warnings.

III. CONCLUSION

Our comparative study and analysis identifies serious problems with the provision, reception and assessment of many forms of forensic science and medical evidence used routinely to investigate and convict citizens in all adversarial jurisdictions. Our study suggests that admissibility standards have not contributed to the exclusion (or informed systematic evaluation) of unreliable and speculative forms of incriminating opinion evidence in courts. Indeed, admissibility standards seem to have little discernible impact on the quality of forensic science and forensic medicine evidence. This applies to jurisdictions with common law and statutory standards, and includes jurisdictions that expressly stipulate the need for reliability.

In consequence, too much incriminating opinion evidence, based on techniques of unknown value and expressed in terms whose influence on lay persons is simply unknown, is routinely admitted in criminal proceedings. Our findings affirm that admissibility is important, and probably more important than conventionally believed, because adversarial proceedings, especially the quotidian trial (and here we might add plea bargains), are not well suited to identifying and conveying the complexities and limitations of expert opinions or providing a forum conducive to meaningful exploration and evaluation.

In order to improve performances, and to align more closely with espoused goals of accuracy and fairness (or truth and justice) and increasingly efficiency our lawyers and judges must be willing to exclude expert opinion evidence that is not demonstrably reliable. Legal institutions and personnel would seem to need to develop means of obtaining more mainstream and methodologically–sensitive advice and evidence. Without wanting to promote wholesale technocratic reforms, or to be understood to imply that accommodating exogenous knowledge and empirical studies would be straightforward, legal institutions must nevertheless begin to revise the ways in which they identify, admit and assess scientific, medical and other expert opinions. In the face of emerging criticism and evidence of wrongful convictions, continuing reliance upon unreliable and speculative opinions and blind faith in the value of trial safeguards will erode the social legitimacy of criminal justice institutions.[585]

[585] *See* Gary Edmond, *Advice for the Courts? Sufficiently Reliable Assistance with Forensic Science and Medicine (Part 2),* 16 INT'L J. OF EVIDENCE & PROOF 263, 267 (2012).

COLORADO'S UNDEMANDING NOTICE REQUIREMENT: PRO SE DEFENDANTS AND FORENSIC TECHNICIAN TESTIMONY

Sarah M. Morris and Lauren L. Fontana*

"The right of confrontation may not be dispensed with so lightly."[1]

I. INTRODUCTION

"Call my accuser before my face," Sir Walter Raleigh demanded, before his triers refused and sentenced him to death.[2] Raleigh's command, which criminal defendants have echoed since his 1603 trial, is of renewed relevance after a string of decisions by the United States Supreme Court, as well as continuing controversies debunking the accuracy and impartiality of forensic testing.

Since 2004's *Crawford v. Washington*,[3] the United States Supreme Court has transformed the scope of the Sixth Amendment's Confrontation Clause. One facet of this transformation has been the holding, in *Melendez-Diaz v. Massachusetts*,[4] that the Sixth Amendment is violated by the admission of forensic reports without the testimony of their authors.[5] In *Melendez-Diaz*, the Court determined that an accused's Sixth Amendment right to be confronted with the witnesses against him extends to laboratory analysts.[6] This express extension of the right of confrontation to forensic analysts is critical in an era

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[1] Barber v. Page, 390 U.S. 719, 725 (1968).

[2] 541 U.S. 36, 44 (2004) (citation omitted) (internal quotation marks omitted).

[3] *Id.*

[4] 557 U.S. 305 (2009).

[5] *Id.* at 310-11; *see also* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2708 (2011) (determining that said confrontation right is not satisfied by surrogate technician testimony). *But see* Williams v. Illinois, 132 S. Ct. 2221, 2228 (2012) (plurality opinion) (concluding that Confrontation Clause was not violated by expert witness who testified as to DNA match of samples she had not herself tested).

[6] *Melendez-Diaz*, 557 U.S. at 347-48.

when "[s]erious deficiencies have been found in the forensic evidence used in criminal trials."[7]

In the course of reaching its holding in *Melendez-Diaz*, the Court passed on the basic validity of state "notice-and-demand" statutes, which, it said:

> [i]n their simplest form . . . require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.[8]

The decision specifically cited an opinion of the Colorado Supreme Court, *Hinojos-Mendoza v. People*,[9] but neither discussed the merits of that opinion nor passed on the constitutionality of the Colorado statute itself.[10] *Hinojos-Mendoza*, in turn, had upheld the constitutionality of Colorado's notice-and-demand statute, Colo. Rev. Stat. § 16-3-309(5), as to defendants represented by counsel, but expressly left open the constitutionality of the statute as applied to pro se defendants.[11]

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[7] *Id.* at 319; *see, e.g., id.* at 318-19 (documenting how "[f]orensic evidence is not uniquely immune from the risk of manipulation"); United States v. Washington, 498 F.3d 225, 235 (4th Cir. 2007) (Michael, J., dissenting) ("In one notorious case, a forensic serologist at the West Virginia Department of Public Safety falsified hundreds of forensic tests between 1979 and 1989."); Pierce v. Gilchrist, 359 F.3d 1279, 1283-84 (10th Cir. 2004) (documenting misconduct of one Oklahoma forensic chemist across at least four criminal cases and two professional sanctions); Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-*Crawford, 19 CRIM. JUST. 26, 30 (2004) ("Anyone who would question the value of cross-examination in this context need only look at recent newspaper headlines."); Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491-500 (2006) (detailing the "[m]yth of [r]eliability" surrounding forensic evidence and describing scandals at Baltimore and Phoenix crime laboratories); Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J.L. & POL'Y 791, 843 n.86 (2007) (citing problems with DWI testing and with FBI laboratory results); U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., THE FBI DNA LABORATORY: A REVIEW OF PROTOCOL AND PRACTICE VULNERABILITIES i-iii (2004) (reviewing protocol and practice vulnerabilities following discovery of misconduct by DNA analyst who, from 1988-2002, consistently failed to complete control tests in a majority of her cases and falsified laboratory documentation to cover it up); Jack Healy, *Colorado State Lab Accused of Mishandling Evidence*, N.Y. TIMES, June 10, 2013 (reporting how investigation revealed "problems including bias against defendants, inadequate training and flaws in the way evidence is stored at the lab");Joseph Goldstein & Nina Bernstein, *Ex-Technician Denies Faulty DNA Work,* N.Y. TIMES, Jan. 11, 2013, at A15 (discussing New York City laboratory technician who missed and commingled biological evidence in rape cases); Nick Bunkley, *Detroit Police Lab Is Closed After Audit Finds Serious Errors in Many Cases*, N.Y. TIMES, Sept. 26, 2008, at A17 (reporting the closure of Detroit's crime laboratory after an "audit said sloppy work had probably resulted in wrongful convictions"); Denise Lavoie, *Ex-state Chemist Annie Dookhan Pleads Not Guilty; Faces 6 Charges of Obstruction*, BOSTON GLOBE, Jan. 31, 2013, at B2, B22 (documenting criminal charges against former state chemist accused of faking test results, who allegedly would add cocaine to samples and report results as positive without testing); Solomon Moore, *Science Found Wanting in Nation's Crime Labs*, N.Y. TIMES, Feb. 4, 2009, at A1 (describing National Academy of Sciences report containing "sweeping critique of many forensic methods that the police and prosecutors rely on, including fingerprinting, firearms identification and analysis of bite marks, blood spatter, hair and handwriting," which was later cited in *Melendez-Diaz*); Campbell Robertson, *Questions Left for Mississippi Over Doctor's Autopsies*, N.Y. TIMES, Jan. 7, 2013, http://www.nytimes.com/2013/01/08/us/questions-for-mississippi-doctor-after-thousands-of-autopsies.html?pagewanted=2 (describing forensic pathologist who, between the late 1980s and late 2000s, misrepresented his qualifications and testified as to theories well beyond those standard in the field). In short, "[i]t is not difficult to find instances in which laboratory procedures have been abused." *Williams*, 132 S. Ct. at 2250 (Breyer, J., concurring) (citation omitted).

[8] *Melendez-Diaz*, 557 U.S. at 326 (citation omitted).

[9] 169 P. 3d 662, 670 (Colo. 2007).

[10] *Melendez-Diaz,* 557 U.S. at 327 (citing Hinojos-Mendoza v. People, 169 P.3d 662, 670 (Colo. 2007)).

[11] *Hinojos-Mendoza*, 169 P.3d at 670 n.7. ("We offer no opinion on whether the analysis would be altered if Hinojos-Mendoza had been a pro se defendant.").

This Article tackles the question that *Hinojos-Mendoza* left open. Section II reviews the United States Supreme Court's line of cases, beginning with the watershed case of *Crawford v. Washington*, redefining the reach of the Confrontation Clause to bar the admission of testimonial statements of an unavailable witness whom the defendant did not have a prior opportunity to cross-examine. Section III details the Colorado Supreme Court's three pronouncements on the constitutionality of Colorado's notice-and-demand statute, the last of which came after—but, this Article argues, does not follow—*Melendez-Diaz*. Section IV reviews, in the words of dissenting Colorado Supreme Court Justice Martinez, "the U.S. Supreme Court's steadfast refusal to presume waiver [of a fundamental constitutional right] from inaction."[12] Section V adds a review of other state court decisions on the constitutionality or lack thereof of notice-and-demand statutes as enacted across the country. Section VI concludes that the way by which the statute waives an accused's constitutional right to confrontation renders the statute unconstitutional as applied to pro se defendants. In reaching that conclusion, this Article bears in mind the United States Supreme Court's admonition that "[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done."[13]

II. "[W]HAT THE SIXTH AMENDMENT PRESCRIBES"[14]: *CRAWFORD V. WASHINGTON* AND ITS PROGENY

The Confrontation Clause of the Sixth Amendment to the United States Constitution, which extends to federal and state prosecutions,[15] guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him."[16] Until recently, courts held that the admission of an unavailable witness's testimony did not offend the Confrontation Clause if the testimony bore "adequate 'indicia of reliability.'"[17] In a recent line of cases beginning with the watershed case of *Crawford v. Washington*, however, the United States Supreme Court rejected this method of analysis[18] and left in its place a holding that the Confrontation Clause is violated by the admission of testimonial statements of an unavailable witness whom the defendant did not have a prior opportunity to cross-examine.[19] This Section details *Crawford* and its relevant progeny, culminating in the most recent cases that apply *Crawford* to the testimony of laboratory technicians and analysts.[20]

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[12] Cropper v. People, 251 P.3d 434, 442 (Colo. 2011) (en banc) (Martinez, J., dissenting) (citations omitted).

[13] Johnson v. Zerbst, 304 U.S. 458, 462 (1938), *overruled in part on other grounds by* Edwards v. Arizona, 451 U.S. 477 (1981) (citation and internal quotation marks omitted).

[14] Crawford v. Washington, 541 U.S. 36, 62 (2004).

[15] Mendoza v. People, 169 P.3d 662, 665 (Colo. 2007) (en banc) (citing Pointer v. Texas, 380 U.S. 400, 406 (1965)).

[16] U.S. CONST. amend. VI. The analogous provision of the Colorado Constitution guarantees a criminal defendant "the right . . . to meet the witnesses against him face to face." COLO. CONST. art. II, § 16.

[17] *Crawford*, 541 U.S. at 40 (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

[18] *See id.* at 60-62 (characterizing the *Roberts* reliability test as "amorphous" and a "malleable standard [that] often fails to protect against paradigmatic confrontation violations"). The Court further described reliability as "a procedural rather than a substantive guarantee." *Id.* at 61. According to the Court, the *Roberts* test, rather than ensuring that guarantee was realized, operated as "a surrogate means of assessing reliability." *Id.* at 62.

[19] *Id.* at 68.

[20] Two cases in the *Crawford* line, *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011) (holding that murder victim's statements to police identifying defendant after he was shot but before he died were not testimonial because they were intended to help police resolve an ongoing emergency, and *Crawford* did not bar their admission); and Giles v. California, 554 U.S. 353, 355-56, 377 (2008) (holding that a murder victim's statements to police about the defendant three weeks before she was murdered were not admissible pursuant to *Crawford*

A. *Crawford v. Washington*: Redefining the Confrontation Clause's Protection

In the watershed case of *Crawford v. Washington*, the United States Supreme Court announced a new test governing the scope of the Sixth Amendment's guarantee to the accused of the right be confronted with the witnesses against him.[21] Tracing the confrontation right to Roman times, the Court drew two inferences about the meaning of the Sixth Amendment.[22] First, the Court concluded that "the principal evil at which the Confrontation Clause was directed" was the "use of *ex parte* examinations as evidence against the accused."[23] Accordingly, the Court determined that the Framers directed the Confrontation Clause at "witnesses" who "bear testimony."[24] The Court in turn defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[25] Though it ultimately left for another day the pronouncement of a comprehensive definition, *Crawford* did enumerate examples of what it termed the "core class of 'testimonial' statements":

> *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[26]

The second inference that the *Crawford* Court drew was that the Framers, via the Sixth Amendment, "conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine."[27] In its analysis, the Court forcefully described the Confrontation Clause as "a procedural rather than a substantive guarantee,"[28] not intended to be left to "the vagaries of the rules of evidence."[29] The Court

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because the defendant could not confront his accuser, despite the fact that his actions caused her to be unavailable), are excepted, as they do not bear on this Article.

[21] *Crawford*, and for that matter *Davis* after it, were written by Justice Scalia. Some trace the origins of the opinion to Justice Scalia's dissent in Maryland v. Craig, 497 U.S. 836 (1990), in which he rejected the majority's holding that a Maryland statute did not violate the Confrontation Clause by permitting a child abuse victim to testify via one-way closed-circuit television rather than face-to-face in a courtroom against the accused. Justice Scalia characterized the majority opinion as the "subordination of explicit constitutional text to currently favored public policy." *Id.* at 861 (Scalia, J., dissenting). According to Justice Scalia, the holding contravened the Constitution because "[t]he purpose of enshrining [the Confrontation Clause's] protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Id.* Justice Scalia would have required face-to-face confrontation of the child witness because, he stated, "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." *Id.* at 870.

[22] *Crawford*, 541 U.S. at 50, 53-54.

[23] *Id.* at 50; *accord id.* at 53 ("[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object. . . .").

[24] *See id.* at 51 (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (defining "witnesses" as "those who 'bear testimony'") (first internal quotation omitted).

[25] *Id.* at 51 (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (internal quotations omitted).

[26] *Id.* at 51-52, 68 (citations omitted) (internal quotations omitted).

[27] *Id.* at 54.

[28] *Id.* at 61.

[29] *Id.*

summarized its holding as follows: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[30]

B. *Davis v. Washington*: Further Defining "Testimonial"

The day to which *Crawford* left a more comprehensive definition of "testimonial"[31] soon came. In *Davis v. Washington*,[32] the Supreme Court clarified *Crawford*'s definition of "testimonial" within the context of police interrogations.[33] While still refusing "to produce an exhaustive classification," the Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[34]

The key difference, according to the *Davis* Court, is between describing "what is happening" and "what happened."[35] Given that *Davis* addressed only statements in response to police interrogations (and then, not even "exhaustive[ly]"[36]), questions remained concerning the application of "testimonial" to statements made in other contexts.

C. *Melendez-Diaz v. Massachusetts*: Forensic Technician Affidavits Are Testimonial

In *Melendez-Diaz v. Massachusetts*, the United States Supreme Court took up one variant of those remaining questions: whether affidavits from forensic analysts are testimonial statements triggering the protection of the Confrontation Clause.[37] The Massachusetts state court below had admitted into evidence sworn affidavits called "certificates of analysis" that showed the results of forensic analysis performed on the substances seized from the criminal defendant to be cocaine.[38] The defendant had objected on Confrontation Clause grounds, but the court below admitted the certificates pursuant to a state statute "as 'prima facie evidence of the composition, quality, and the net weight of

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[30] *Id.* at 68.

[31] *See id.* ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

[32] 547 U.S. 813 (2006).

[33] *Id.* at 817, 822. *Davis* also determined the companion case of Hammon v. Indiana, 547 U.S. 813, 819-21. As a primary matter, the *Davis* Court clarified, in case *Crawford* had left any doubt, that *Crawford* applies only to testimonial statements. *Id.* at 824. Technically, *Crawford* had not decided this question, nor had it comprehensively defined testimonial evidence. *See Crawford*, 541 U.S. at 52.

[34] *Davis*, 547 U.S. at 822. Importantly, the Court noted that its holding did not imply "that statements made in the absence of any interrogation are necessarily nontestimonial." *Id.* at 822 n.1. The Court was careful to explain that its decision did not "consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* at 823 n.2.

[35] *Id.* at 830. The Court did note the possibility that a conversation might "evolve into testimonial statements." *Id.* at 828 (citation omitted) (internal quotation marks omitted).

[36] *Id.* at 822.

[37] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307 (2009).

[38] *Id.* at 308 (internal quotation marks omitted).

the narcotic . . . analyzed.'"[39] The state courts below held that the certificates were not testimonial hearsay subject to the protections of the Confrontation Clause.[40]

The United States Supreme Court quickly and decisively reversed.[41] The Court had no trouble viewing the documents at issue "quite plainly [as] affidavits" and therefore "within the 'core class of testimonial statements'" described in *Crawford*."[42] Accordingly, "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial."[43] In reaching its holding, the Court rejected two rationales that other courts had employed to admit forensic affidavits as evidence.[44] First, the Court rejected the notion that the Compulsory Process Clause, and a defendant's ability to obtain "witnesses 'in his favor'" under it, could serve as an adequate substitute for an accused's confrontation right.[45] Second, the Court rejected the proposition that forensic analysis affidavits are admissible as business records.[46] Instead, the Court determined: "there [may be] other ways—and in some cases better ways—to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available."[47] "The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."[48]

The Court recognized that its opinion had practical ramifications, but was convinced that those consequences would not be dire.[49] The Court observed, "Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report,"[50] and explicated as follows:

> *In their simplest form,* notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. Contrary to the dissent's perception, these statutes shift no burden whatever. The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. There is no conceivable reason

[39] *Id.* at 309 (quoting MASS. GEN. LAWS, ch. 111, § 13) (omission in original).

[40] *Id.*

[41] *Id.* at 329.

[42] *Id.* at 310; *see also id.* at 329 ("This case involves little more than the application of our holding in *Crawford v. Washington*").

[43] *Id.* at 311 (citing *Crawford*, 541 U.S. at 54) (emphasis in original).

[44] *Id.* at 326-29.

[45] *Id.* at 313-14, 324-25 (quoting U.S. CONST. amend VI).

[46] *Id.* at 321-24.

[47] *Id.* at 318 (footnote omitted).

[48] *Id.* at 325.

[49] *Id.* (explaining that "the sky will not fall after today's decision").

[50] *Id.* at 325-26 (footnote omitted).

> why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial. *See Hinojos-Mendoza v. People, 169 P. 3d 662, 670 (Colo. 2007) (discussing and approving Colorado's notice-and-demand provision).*[51]

The Court expressly disavowed the notion that its opinion constitutionalized anything more than the "simplest form [of] notice-and-demand statutes."[52] The majority opinion offered no discussion of the Colorado Supreme Court's opinion in *Hinojos-Mendoza* other than the citation offered above.

Justice Kennedy's dissent, however, would have drawn a distinction "between laboratory analysts who perform scientific tests and other, more conventional witnesses."[53] The former, Justice Kennedy believed, are not "witnesses against" an accused within the original meaning of those words.[54] Rather, the Framers intended the Confrontation Clause to apply only to the latter, which he defined as witnesses with some personal knowledge of the defendant's guilt.[55] Throughout, Justice Kennedy expressed grave concerns about the practical implications of the Court's holding,[56] and suggested that the holding failed to account for "the increasing reliability of scientific testing."[57] His opinion contains little doubt that the holding granted criminal defendants and the defense bar a tactical advantage that will certainly be deployed.[58]

Importantly, Justice Kennedy rebutted the majority's interpretation of notice-and-demand statutes.[59] His opinion recognized that such statutes, contrary to the majority's reasoning, "do impose requirements on the defendant," which operate to "reduce[] the confrontation right."[60] He named Colorado, and *Hinojos-Mendoza* specifically, among this group.[61] This Article will go on to argue, using the *Hinojos-Mendoza* opinion itself, that Justice Kennedy's interpretation was the better one.

D. *Bullcoming v. New Mexico*: Rejecting Surrogate Technician Testimony

The Court next visited the topic of confrontation of forensic technician witnesses in *Bullcoming v. New Mexico*.[62] There, the prosecution introduced testimonial evidence,

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[51] *Id.* at 325-27 (some internal citations omitted, emphasis added).

[52] *Id.* at 327 n.12 (alteration in original) (internal quotation marks omitted) ("We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the 'simplest form [of] notice-and-demand statutes,' is constitutional." (citation omitted)); *accord* Andrew W. Eichner, Note, *The Failures of* Melendez-Diaz v. Massachusetts *and the Unstable Confrontation Clause*, 38 AM. J. CRIM. L. 437, 450-51 (2011) (observing that after *Melendez-Diaz*, certain variations of notice-and-demand statute may yet be deemed unconstitutional).

[53] *Melendez-Diaz*, 557 U.S. at 330 (Kennedy, J., dissenting).

[54] *Id.* at 343.

[55] *Id.* at 330-31.

[56] *Id.* at 331-43.

[57] *Id.* at 351.

[58] *Id.* at 352-55.

[59] *Id.* at 355-56.

[60] *Id.*

[61] *Id.* at 356-57 (citing, *inter alia*, Hinojos-Mendoza v. People, 169 P. 3d 662, 668-71 (Colo. 2007); COLO. REV. STAT. ANN. § 16-3-309)).

[62] 131 S. Ct. 2705, 2707 (2011). One opinion interceded between *Melendez-Diaz* and *Bullcoming*, but the Court did not use it to offer any substantive guidance on its holding in *Melendez-Diaz*. Four days after the publication of its opinion in *Melendez-Diaz*, the Court granted certiorari in *Briscoe v. Virginia*. 557 U.S. 933 (2009). Several months later, the Court disposed of the case, per curiam, by vacating the judgment of the Virginia high court and remanding the case "for further proceedings not inconsistent with the opinion in *Melendez-Diaz v.*

namely, a forensic laboratory report certifying that the DWI defendant's blood alcohol concentration level was above the threshold for aggravated DWI, but it did so via the testimony of an analyst who neither signed the report nor observed the test reported.[63] Citing *Crawford* and its line, including *Davis*'s pronouncement that the "Confrontation Clause may not be 'evaded by having a note-taking police [officer] recite the . . . testimony of the declarant,'"[64] the Court determined that the right of confrontation is not satisfied by such so-called "surrogate testimony."[65] The Court once again rejected the notion that laboratory reports are non-testimonial, and firmly reiterated its holding in *Melendez-Diaz* that they are.[66] In so doing, the Court disavowed any reliance on the supposed reliability of such reports: "the comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar. This Court settled in *Crawford* that the 'obviou[s] reliab[ility]' of a testimonial statement does not dispense with the Confrontation Clause."[67]

Justice Ginsburg, in a portion of her opinion joined only by Justice Scalia, echoed *Melendez-Diaz* and rejected any notion that its holding imposed an undue burden on prosecution.[68] According to her, any such burden was capable of being reduced.[69] Retesting of the sample at issue by the analyst to be called was always an option.[70] Similarly, the Court reiterated that states may enact notice-and-demand statutes that "specifically preserv[e]" an accused's confrontation right.[71]

Justice Kennedy again dissented, echoing his *Melendez-Diaz* dissent and also tracing the problems with the majority opinion to *Crawford* and the cases extending it.[72] His opinion detailed his view that, via *Crawford* and later cases, the "Court has taken the Clause far beyond its most important application, which is to forbid sworn, *ex parte,* out-of-court statements by unconfronted and available witnesses who observed the crime and do not appear at trial."[73] Making passing reference to notice-and-demand statutes, Justice Kennedy discarded the majority's reliance on such laws as an appropriate "palliative" for the disruption to be wrought by its holding.[74]

Massachusetts." *Briscoe*, 559 U.S. at 32. The holding of the Virginia court on remand, in Cypress v. Commonwealth, 699 S.E.2d 206 (Va. 2010), is addressed in Section 0., *infra*.

[63] *Bullcoming*, 131 S. Ct. at 2709.

[64] *Id.* at 2715 (citing Davis v. Washington, 547 U.S. 813, 826 (2006) (alteration in original) (omission in original) (deletion of emphasis in original)).

[65] *Id.* at 2710. A majority of the Court joined in all but one part of the decision written by Justice Ginsburg. Justice Sotomayor joined in all but Part IV of that decision, *id.* at 2709, and also issued her own concurrence in part, *id.* at 2719-23.

[66] *Id.* at 2717 (majority opinion).

[67] *Id.* at 2715 (citing Crawford v. Washington, 541 U.S. 36, 61 (2004)).

[68] *Id.* at 2717.

[69] *Id.* at 2718.

[70] *Id.* ("New Mexico could have avoided any Confrontation Clause problem by asking Razatos to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe."); Jesse J. Norris, *Who Can Testify about Lab Results after* Melendez-Diaz *and* Bullcoming*?: Surrogate Testimony and the Confrontation Clause*, 38 AM. J. CRIM. L. 375, 385 (2011) ("[T]he Court's opinion did not rule on the constitutionality of surrogate testimony when the surrogate had played some role in or observed the test, or had offered an independent analysis of either an analyst's report that was not admitted into evidence, or machine-generated 'raw data' that was admitted into evidence.").

[71] *Bullcoming*, 131 S. Ct. at 2718.

[72] *Id.* at 2723-28 (Kennedy, J., dissenting).

[73] *Id.* at 2727 (emphasis in original).

[74] *Id.* at 2728.

E. *Williams v. Illinois*: "Nothing Comparable Happened Here"[75]

If *Bullcoming* was a sign that the *Crawford* majority was fracturing, the next case to reach the Supreme Court's docket confirmed it.[76] In *Williams v. Illinois*, the Court took up the issue of whether "*Crawford* bar[s] an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify."[77] At Williams' bench trial, the prosecution called an expert witness who testified that a DNA profile produced by an outside laboratory matched a profile produced by the state laboratory using Williams' blood sample.[78] The expert testified that the outside laboratory was accredited and provided the police with a DNA profile, and explained that according to shipping manifests admitted as business records, swabs taken from the victim were provided to and received back from the outside lab.[79] The expert did not testify as to the accuracy of the profile of the outside lab, nor did he testify as to how the outside lab handled or tested the sample.[80] The outside laboratory report was neither admitted into evidence, nor identified as the source of the expert's opinion; the expert testified that her testimony relied exclusively on the outside report.[81] The problem, as Justice Thomas explained in his concurrence, was that the expert's testimony "went well beyond what was necessary to explain why she performed the [match]."[82]

Justice Alito delivered a plurality opinion, in which Chief Justice Roberts, Justice Kennedy, and Justice Breyer joined. The opinion issued "two independent reasons . . . [to] conclude that there was no Confrontation Clause violation in this case."[83] First, the plurality held that no Confrontation Clause violation was effected by the expert's testimony because his testimony was not considered for the truth of the matter asserted.[84] That is, "the report was not to be considered for its truth but only for the 'distinctive and limited purpose' of seeing whether it matched something else."[85] This portion of the

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[75] Williams v. Illinois, 132 S. Ct. 2221, 2240 (2012).

[76] This fracturing was evident in the fact that *Williams* produced a plurality opinion, as explained in this Section. Justice Alito's opinion went so far as to suggest, "Experience might yet show that the holdings in those cases should be reconsidered for the reasons, among others, expressed in the dissents the decisions produced." *Id.* at 2242 n.13.

[77] *Id.* at 2227. Justice Sotomayor had raised this question in her concurrence in *Bullcoming*, noting that the Court's opinion did not address this issue and therefore it remained to be confronted. *See id.* at 2233 (citing *Bullcoming*, 131 S. Ct. at 2719 (Sotomayor, J., concurring in part)).

[78] *Id.* at 2227. This expert was one of three expert forensic witnesses. *Id.* at 2229.

[79] *Id.* at 2227.

[80] *Id.*

[81] *Id.* at 2230; *see also id.* at 2229-31, 2235-36. In recounting the laboratory technician's testimony, the plurality (and the dissent) focused on the following line of questioning: "Q Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L.J.] to a male DNA profile that had been identified as having originated from Sandy Williams?" "A Yes, there was." *Id.* at 2236 (emphasis omitted) (internal quotation marks omitted).

[82] *Id.* at 2258 n.3 (Thomas, J., concurring); *accord id.* at 2270 (Kagan, J., dissenting).

[83] *Id.* at 2244 (majority opinion).

[84] *Id.* at 2228. According to the plurality, such testimony "fall[s] outside the scope of the Confrontation Clause." *Id.* In reaching this conclusion, the opinion relied in part on the long-standing rule that an expert witness may opine as to facts even if he lacks first-hand knowledge of them. *Id.* at 2233; *see also id.* at 2228 ("[A]n expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true.").

[85] *Id.* at 2240 (citing Tennessee v. Street, 471 U.S. 409, 417 (1985)). In this portion of the decision, the plurality in several instances hinted that is holding was factually dependent on the fact that the trier-of-fact at issue was a judge in a bench trial. *See, e.g.*, *id.* at 2236-37, 2241 n.11. Ultimately, however, the plurality disavowed the "suggest[ion] that the Confrontation Clause applies differently depending on the identity of the factfinder."*Id.* at 2237 n.4; *cf. id.* at 2271 (Kagan, J., dissenting) ("But the presence of a judge does not transform the constitutional question.").

decision was in harmony with *Crawford*,[86] as well as with *Bullcoming* and *Melendez-Diaz*,[87] according to the plurality opinion. Second, the plurality concluded that, even if the report were considered for the truth of the matter asserted, there was no confrontation violation.[88] The plurality distinguished the report at issue in *Williams* as one that "plainly was not prepared for the primary purpose of accusing a targeted individual . . . no[r] to accuse petitioner or to create evidence for use at trial."[89] The plurality stated that this holding, too, comported with *Crawford* and subsequent cases.[90] It distinguished the report at issue from the reports in prior cases by noting that "[i]n all but one of the post-*Crawford* cases in which a Confrontation Clause violation has been found," the statement at issue had "the primary purpose of accusing a targeted individual."[91] It went on to describe *Melendez-Diaz* and *Bullcoming* as holding the forensic reports at issue to be testimonial, but "not hold[ing] that all forensic reports fall into the same category."[92]

Justice Breyer issued a concurrence, in which he stated that he would adhere to the dissenting views in *Melendez-Diaz* and *Bullcoming*, but joined in the plurality.[93] Justice Breyer would have gone farther than the majority and answered the broader question of, "How does the Confrontation Clause apply to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians?"[94] His concurrence adhered to the dissents in *Melendez-Diaz* and *Bullcoming* to determine that the report at issue was not "testimonial" and therefore no confrontation was required.[95] In reaching this decision, he agreed with the plurality's determination that the report at issue was not prepared for the purpose of accusing a targeted individual.[96] Justice Breyer would have created a presumption that "reports such as the DNA report before us presumptively to lie outside the perimeter of the Clause as established by the Court's precedents."[97] That presumption could be rebutted by "good reason to doubt the laboratory's competence or the validity of its accreditation" or "the existence of a motive to falsify."[98]

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[86] *Id.* at 2235 (majority opinion) ("*Crawford* . . . took pains to reaffirm the proposition that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" (quoting Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004)).

[87] *Id.* at 2240. The plurality determined that "[i]n those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted." *Id.*

[88] *Id.* at 2242.

[89] *Id.* at 2243. In this vein, the plurality characterized the report as "not inherently inculpatory" and noted that the technicians who prepare such reports have "no idea what the consequences of their work will be . . . whether it will turn out to be incriminating or exonerating—or both." *Id.* at 2228, 2244.

[90] *Id.* at 2232, 2240.

[91] *Id.* at 2242 (footnote omitted).

[92] *Id.* at 2243.

[93] *Id.* at 2245 (Breyer, J., concurring).

[94] *Id.* at 2244.

[95] *Id.* at 2248.

[96] *Id.* at 2250-51; *id.* at 2248-49 (describing the statements at issue as "made by an accredited laboratory employee operating at a remove from the investigation in the ordinary course of professional work" who was "operat[ing] behind a veil of ignorance that likely prevented them from knowing the identity of the defendant in this case"); *id.* at 2251 (citation omitted) ("[H]ere the DNA report sought, not to accuse petitioner, but instead to generate objectively a profile of a then-unknown suspect's DNA from the semen he left in committing the crime."). Despite this, the California Supreme Court has held that a laboratory analyst's report stating the defendant's blood-alcohol content was not testimonial because "the critical portions of that report were not made with the requisite degree of formality or solemnity to be considered testimonial." *People v. Lopez*, 286 P.3d 469, 477 (Cal. 2012).

[97] *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring).

[98] *Id.* at 2252.

Yet "[f]ive Justices specifically reject[ed] every aspect of [the plurality's] reasoning and every paragraph of its explication."[99] Justice Thomas concurred with the conclusion that the expert testimony did not violate the defendant's confrontation right, but agreed with the dissent that the plurality's opinion was flawed.[100] Justice Kagan, joined by Justices Scalia, Ginsburg, and Sotomayor, dissented.[101] Her dissent determined that the report was identical to those in *Melendez-Diaz* and *Bullcoming*[102] and that the expert's testimony at issue was "functionally identical" to that unconstitutionally proffered in *Bullcoming*.[103] When the expert introduced the substance of the report into evidence, then, the author of "that report 'became a witness' whom Williams 'had the right to confront.'"[104] "The plurality's primary argument to the contrary tries to exploit a limit to the Confrontation Clause recognized in *Crawford*"[105] and created for the prosecution "a ready method to bypass the Constitution."[106] The dissent rejected the "targeted individual" test supported by the plurality, finding that it could not be supported by *Crawford* and its progeny.[107] Under the dissent's reading of the Court's precedents, "[w]e have held that the Confrontation Clause requires something more."[108]

After *Williams*, the fate of the Confrontation Clause as interpreted by *Crawford* is unclear, especially as to forensic witnesses. As Justice Kagan acutely summarized in her dissent,

> What comes out of four Justices' desire to limit *Melendez-Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what. Those decisions apparently no longer mean all that they say. Yet no one can tell in what way or to what extent they are altered because no proposed limitation commands the support of a majority.[109]

III. COLORADO'S NOTICE-AND-DEMAND STATUTE

In the meantime, however, the fate of technician testimony is settled for the time being in Colorado, at least as to defendants represented by counsel. Colorado has a notice-and-demand statute, Colo. Rev. Stat. § 16-3-309(5), and its Supreme Court has passed judgment on it.[110] In its current form, that statute provides:

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[99] *Id.* at 2265 (Kagan, J., concurring).

[100] *Id.* at 2255 (Thomas, J., concurring). Justice Thomas concluded that the "report [wa]s not a statement by a 'witnes[s]' within the meaning of the Confrontation Clause." *Id.* at 2260 (alterations in original).

[101] *Id.* at 2264 (Kagan, J., dissenting).

[102] *Id.* at 2266. Accordingly, Justice Kagan determined that the report was testimonial. *Id.* at 2272-75.

[103] *Id.* at 2267, 2270. Justice Kagan also accurately identified "the typical problem with laboratory analyses--and the typical focus of cross-examination" as "careless or incompetent work, rather than with personal vendettas. *Id.* at 2274.

[104] *Id.* at 2268 (quoting *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011)).

[105] *Id.* at 2268. Like Justice Thomas, Justice Kagan argued that the "admission of the out-of-court statement in this context has no purpose separate from its truth." *Id.* at 2269; *see also id.* at 2258 n.3 (Thomas, J., concurring).

[106] *Id.* at 2270 (Kagan, J., dissenting).

[107] *Id.* at 2274 ("None of our cases has ever suggested that, in addition, the statement must be meant to accuse a previously identified individual.").

[108] *Id.* at 2270.

[109] *Id.* at 2277.

[110] *See* Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. 2003).

> Any report or copy thereof or the findings of the criminalistics laboratory shall be received in evidence in any court, preliminary hearing, or grand jury proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. Any party may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the witness and other party at least fourteen days before the date of such criminal trial.[111]

This Section details the Colorado Supreme Court decisions analyzing the statute both before and after *Crawford*.

A. *People v. Mojica-Simental*: The (Short-Lived) Actual Notice Requirement

Even before *Crawford*, the Colorado Supreme Court took up the constitutionality of Colorado's notice-and-demand statute in the 2003 case of *People v. Mojica-Simental*.[112] Characterizing the statute as a mere precondition on an accused's exercise of his constitutional right, which can be met by "minimal effort" on his part, the Court determined that Colorado's notice-and-demand statute is facially constitutional.[113] Under the Court's conceptualization, the notice-and-demand statute "does not impermissibly shift the burden of proof to the defendant."[114] The Court determined that the defendant's as-applied challenge was not yet ripe for review, but was careful to recognize that "there may be circumstances where it is, in fact, an unreasonable burden and effectively abridges a defendant's right to confrontation."[115] The Court enumerated at least one such circumstance: "[i]f a defendant does not have actual notice of the requirements of the statute, or mistakenly fails to notify the prosecution to have the technician present to testify."[116] In that circumstance, the Court cautioned, "there is a significant possibility that a defendant's failure to act may not constitute a voluntary waiver of his fundamental right to confrontation," as required by the Constitution.[117]

The Court concluded by enumerating "some factors" a trial court might consider before admitting a laboratory report without its author's testimony:

> whether an attorney or a pro se litigant actually knew that he was required to notify the opposing party of his desire to have the witness present; the reasons why notice was late or was not given at all; the difficulty of acquiring the presence of the witness; the significance to the case of the report and of the testimony that would be elicited from the technician; and any other pertinent circumstances.[118]

Underscoring the importance of *actual* notice, the Court stated that the statute would be "best utilized" in practice if both the prosecution and defense "discuss the matter, at some pre-trial opportunity, to ensure that all parties are in agreement as to whether the witness

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[111] Colo. Rev. Stat. § 16-3-309(5) (2012).

[112] 73 P.3d 15, 17 (Colo. 2003).

[113] *Id.* at 17-18.

[114] *Id.* at 19.

[115] *Id.* at 20-21.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 21.

will be present."[119] Unfortunately for defendants, despite the Supreme Court's subsequent pronouncements in *Crawford*, the actual notice requirement that *Mojica-Simental* appeared to impose was soon abandoned by the Colorado Supreme Court.

B. *Hinojos-Mendoza v. People*: "No Constitutional Infirmity in Section 16-3-309(5)"[120]

In *Hinojos-Mendoza*, the Colorado Supreme Court revisited the constitutionality of Colorado's notice-and-demand statute in light of *Crawford*.[121] First, the Court determined that laboratory reports are testimonial statements subject to *Crawford*.[122] This decision predated—but accords with—the United States Supreme Court's later opinions in *Melendez-Diaz* and *Bullcoming*. The Court went on to consider both facial and as-applied challenges to Section 16-3-309(5).[123]

The Court began its analysis by noting that the right to confrontation is waivable[124] and defining waiver "as the 'intentional relinquishment or abandonment of a known right.'"[125] Against this backdrop, the Court conceptualized the statute as nothing more than a statutory procedural requirement and upheld its facial constitutionality:

> The procedure provided in section 16-3-309(5) for ensuring the presence of the lab technician at trial does not deny a defendant the opportunity to cross-examine the technician, but simply requires that the defendant decide prior to trial whether he will conduct a cross-examination. The statute provides the opportunity for confrontation – only the timing of the defendant's decision is changed.[126]

The Court went on to uphold the constitutionality of the statute as applied to Hinojos-Mendoza.[127] Its reasoning on this prong, however, was far more detailed—and convoluted. At trial, the prosecution introduced the lab report without the testimony of its author.[128] Defense counsel objected on hearsay grounds and, when questioned by the trial court, explained that he had not requested the report's author pursuant to Section 16-3-309(5) because he was unaware of the statute.[129] The trial court overruled the objection and admitted the report into evidence.[130] This ruling was not without consequence. A critical fact in determining Hinojos-Mendoza's potential punishment was the net weight of the drugs; because the report was ambiguous on this point, and because the author of the

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[119] *Id.*

[120] Hinojos-Mendoza v. People, 169 P.3d 662, 669 (Colo. 2007).

[121] *Id.* at 664. The Court employed the same reasoning and reached the same result in a case announced the same day, *Coleman v. People*, 169 P.3d 659 (Colo. 2007), *reh'g denied*, No. 06SC155, 2007 Colo. LEXIS 1037 (Colo. Nov. 5, 2007).

[122] *Id.* at 666. The dissenting opinion agreed with this portion of the Court's holding. *Id.* at 671 (Martinez, J., dissenting).

[123] *Id.* at 667-78.

[124] *Id.* at 668 (citing *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Hawkins v. Hannigan*, 185 F.3d 1146, 1154 (10th Cir. 1999)).

[125] *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

[126] *Id.* at 668-69.

[127] *Id.* at 670.

[128] *Id.* at 664.

[129] *Id.*

[130] *Id.* at 664-65.

report was not required to testify to resolve the ambiguity, Hinojos-Mendoza faced a longer potential maximum sentence.[131]

First, the Court abandoned *Mojica-Simental* as foreshadowing a different outcome for Hinojos-Mendoza. It stated, "The dicta in *Mojica-Simental* was based on the faulty premise that the right to confrontation can only be waived if the defendant personally makes a voluntary, knowing, and intentional waiver."[132] Instead, the Court determined, a defendant's right to confrontation may be waived by defense counsel,[133] and it may be waived by defense counsel's failure to comply with the procedural demand of Section 16-3-309(5).[134] On the latter point, the Court issued a conclusive presumption that "where a defendant such as Hinojos-Mendoza is represented by counsel, the failure to comply with the statutory prerequisites of section 16-3-309(5) waives the defendant's right to confront the witness just as the decision to forgo cross-examination at trial would waive that right."[135] This presumption arose from a separate, underlying presumption in Colorado law, that of defense counsel having knowledge of all applicable rules of procedure.[136] The Court's reasoning makes both presumptions irrebuttable, because it applied the presumptions in the face of defense counsel's admission that he was unaware of the statute and had not intended to waive confrontation.[137]

The Court explicitly left open the question of the constitutionality of Section 16-3-309(5) as applied to pro se defendants.[138] This opening, however, did Hinojos-Mendoza no good. For him, the Colorado Supreme Court's opinion was the end of the road. That court denied his petition for rehearing.[139] And four days after the United States Supreme Court announced its decision in *Melendez-Diaz v. Massachusetts*, and the same day it remanded *Briscoe v. Virginia*, that Court denied Hinojos-Mendoza's petition for certiorari.[140]

Two justices of the Colorado Supreme Court would have found in favor of Hinojos-Mendoza's confrontation right.[141] Having discerned in the majority opinion no

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[131] *Id.* at 674 (Martinez, J., dissenting). Crucially, the report "listed the weight of the 'tan tape wrapped block' as 1004.5 grams, but omitted whether the weight included the tape and packaging or was just the net weight of the drugs. . . . The maximum sentence for a class three felony possession with intent to distribute less than one thousand grams is sixteen years in prison. The maximum sentence for one thousand grams or more is twenty-four years in prison." *Id.* (footnote omitted). Because of one ambiguous sentence in a report whose author he was denied the opportunity to cross-examine, Hinojos-Mendoza faced eight more years in prison.

[132] *Id.* at 669 (citing People v. Mojica-Simental, 73 P.3d 15, 20 (Colo. 2003)).

[133] *Id.* ("The right to confrontation falls into the class of rights that defense counsel can waive through strategic decisions.").

[134] *Id.* at 670.

[135] *Id.*

[136] *Id.* (citing Christie v. People, 837 P.2d 1237, 1244 (Colo. 1992)). The Court determined that, "[g]iven this knowledge [of procedural rules], we can infer from the failure to comply with the procedural requirements that the attorney made a decision not to exercise the right at issue." *Id.*

[137] *Id.* at 664; *accord id.* at 672 (Martinez, J., dissenting) ("The majority applies its presumption in this case even though there is evidence rebutting it."); *id.* at 673 ("In effect, the majority creates an irrebuttable presumption by applying the presumption of knowledge of the law when the attorney said on the record that he was unaware of the law."). Indeed, the Court made clear that a trial court need not inquire of the defense lawyer or his client. *Id.* at 670 n.6 ("[T]he trial court does not need to make sure that the attorney's failure to comply with section 16-3-309(5) reflects the informed and voluntary decision of the defendant.").

[138] *Id.* at 670 n.7 ("We offer no opinion on whether the analysis would be altered if Hinojos-Mendoza had been a pro se defendant.").

[139] Hinojos-Mendoza v. People, No. 05SC881, 2007 Colo. LEXIS 1036 (Colo. Nov. 5, 2007). Justices Martinez and Bender would have granted the rehearing.

[140] Hinojos-Mendoza v. Colorado, 557 U.S. 934 (2009).

[141] Hinojos-Mendoza v. People, 169 P.3d 662, 671 (Colo. 2007)

"constitutionally sufficient explanation for how unknowing inaction amounts to an 'intentional' waiver,"[142] Justice Martinez, joined by Justice Bender, dissented.[143] In the dissent's view, *People v. Mojica-Simental* conditioned the constitutionality of Section 16-3-309(5) on a "proper waiver," which could only be achieved by a "voluntary, knowing, and intentional [waiver] . . . by the defendant or his attorney."[144] That is, Justice Martinez agreed that defense counsel may waive the confrontation right on behalf of his client, but disagreed that counsel could do so by inaction.[145] Instead, Justice Martinez would have required, before finding a "proper waiver," the type of voluntary, knowing, and intentional action that would be required of the defendant himself.[146] Justice Martinez refused the majority's conceptualization of the statute as "a matter of timing"[147] and plainly saw the majority's reasoning for what it was: an "irrebuttable presumption" of waiver.[148] In the face of evidence that no such knowing, voluntary, and intelligent waiver had been made by defense counsel here, Justice Martinez would have reversed Hinojos-Mendoza's conviction.[149]

C. *Cropper v. People*: *No-Actual-Notice*-and-Demand Is Constitutional

Hinojos-Mendoza has not been the Colorado Supreme Court's final word on the constitutionality of Colorado's notice-and-demand statute. In the 2011 case of *Cropper v. People*, the Court reviewed an as-applied challenge to the statute based on *Melendez-Diaz*.[150] Cropper argued that Section 16-3-309(5) was unconstitutional because it does not actually require the prosecution to issue constitutionally sufficient "notice," differentiating Colorado's statute from the simple notice-and-demand statutes that *Melendez-Diaz* opined were constitutional.[151]

In Cropper's case, the prosecution had included on its pre-trial witness list the forensic technician who had authored a report stating that a shoe-print found at the crime scene could have been from the same type of shoe the defendant was wearing when he was apprehended.[152] The prosecution had also provided the report in pre-trial discovery.[153] At trial, the prosecution moved to introduce technician's report without his live testimony, explaining that he was unavailable due to family emergency.[154] Finding that the defendant

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[142] *Id.* at 673.

[143] *Id.* at 675 (Martinez, J., dissenting).

[144] *Id.* at 671. The dissent rejected the majority's characterization of *Mojica-Simental*'s pronouncements on waiver as "dicta" and would have categorized them as a holding. *Id.* at 674 n.15. Justice Martinez wrote, "The majority has overruled *Mojica-Simental*'s analytical foundation by discarding the requirement of a voluntary, knowing, and intentional waiver, and leaving it without the central premise upon which the holding of facial constitutionality is dependent." *Id.* at 671. *Crawford* required adherence to, not an abandoning of, *Mojica-Simental*'s holding, in Justice Martinez's view. *Id.* at 675 ("[P]ost-Crawford, *Mojica-Simental*'s waiver requirement has become even more important because it is now the only manner in which the statute can be applied constitutionally without cross-examination.")

[145] *Id.* at 673.

[146] *Id.* at 674 ("[T]hough defendants need not personally waive this right, that does not justify undermining the Sixth Amendment's fundamental constitutional protections.").

[147] *Id.* at 673.

[148] *Id.* at 672 (Martinez, J., dissenting) (rejecting "the majority['s] replace[ment of] *Mojica-Simental*'s requirement of a voluntary, knowing, and intentional waiver with an automatic waiver premised upon an irrebuttable presumption").

[149] *Id.* at 675 (Martinez, J., dissenting).

[150] Cropper v. People, 251 P.3d 434, 435-37 (Colo. 2011).

[151] *Id.* at 437.

[152] *Id.* at 435.

[153] *Id.* at 437.

[154] *Id.* at 435.

had not complied with Section 16-3-309(5), the trial court admitted the report.[155] As in *Hinojos-Mendoza*, the trial court did so in the face of defense counsel's protestation that she was unaware of the statute and had not intended to waive her client's confrontation right.[156]

The Colorado Supreme Court adhered to its prior holding that a waiver may result from defense counsel's inaction,[157] and that defense counsel may waive his client's right to confrontation by not complying with the procedures set forth in Section 16-3-309(5), even where defense counsel is unaware of the statute.[158] While noting that *Melendez-Diaz* had been decided in the years since *Hinojos-Mendoza* and was applicable to the case at issue, the court also (rightfully) acknowledged that "[d]espite [*Melendez-Diaz*'s] discussion of *Hinojos-Mendoza*, the Supreme Court did not pass judgment on section 16-3-309(5)."[159] The Colorado Supreme Court took the opportunity to do so, however, and "h[e]ld that providing the defense with a forensic lab report through discovery is sufficient to put the defendant on notice that, absent a specific request under section 16-3-309(5), the report can be introduced without live testimony."[160] This result was unchanged by the fact that the prosecution had represented that it would call the live testimony of the technician.[161] Also unchanged was the court's strict adherence to its irrebuttable presumption that a defense lawyer who does not adhere to Section 16-3-309(5) intends to waive her client's confrontation right.[162]

Likewise, Justice Martinez, and again Chief Justice Bender with him,[163] remained steadfast in his dissent from the majority's reapplication of its *Hinojos-Mendoza* reasoning.[164] Echoing his dissent in that case, Justice Martinez reviewed the decades of United States Supreme Court precedent in which "the Court has steadfastly refused to presume the waiver of a defendant's constitutional rights from inaction alone."[165] Moving to the most recent relevant United States Supreme Court precedent, *Melendez-Diaz*, and its dicta that simple notice-and-demand statutes are constitutional, Justice Martinez wrote, "Crucial to the Court's reasoning was the fact that simple notice-and-demand statutes, unlike the variety of statutes receiving the notice-and-demand label, require the

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[155] *Id.*

[156] *Id.* at 438.

[157] *Id.* at 435 (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3 (2009)).

[158] *Id.* at 436 (citing Hinojos-Mendoza v. People, 169 P.3d 662, 670 (Colo. 2007)). In fact, the Court considered this case nothing more than a re-application of *Hinojos-Mendoza*. *Id.* at 438 ("Thus, to reach our decision in this case, we need only look to and apply the same reasoning that we employed in *Hinojos-Mendoza*.").

[159] *Id.* at 437.

[160] *Id.*

[161] *Id.* at 437-38 ("Regardless of any representations that the prosecution made that the technician would testify, Cropper had notice of the presence of the report and had an adequate opportunity to assert Cropper's confrontation rights and request that the technician be present for cross-examination."); *see* Jones v. State, 2011 Ark. App. 683, 6 (Ark. Ct. App. 2011) (holding that defendant's failure to provide notice that he wanted to examine analyst who appeared on prosecution's witness list but did not testify waived his Confrontation Clause rights because "the *Melendez-Diaz* Court acknowledged that some states have notice-and-demand statutes, [like Arkansas's], and found them consistent with constitutional requirements").

[162] *Cropper*, 251 P.3d at 438. If anything, that presumption was strengthened, as the Court's language evinced little patience for the defense counsel's unawareness of the statute. *See, e.g.*, *id.* at 438 nn.8-9 (suggesting that Cropper may have a colorable claim for malpractice and observing that "section 16-3-309(5) is not a new statute. It has been in effect since 1984").

[163] *Id.* at 438 (Martinez, J., dissenting).

[164] *Id.* at 440.

[165] *Id.* at 439 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); *Barker v. Wingo*, 407 U.S. 514, 525 (1972)). For a more detailed discussion of this precedent, *see infra* Section 0.

prosecution to provide the defendant with *actual* notice."[166] Justice Martinez reasoned Colorado's statute does no such thing and therefore "is not a simple notice-and-demand statute of the type approved in *Melendez-Diaz*."[167] His dissent perspicaciously recognized that *Melendez-Diaz* listed several state notice-and-demand statutes were of the "simple" type, and Colorado's was "[n]oticeably absent."[168] Justice Martinez interpreted *Melendez-Diaz*'s list as a "refus[al] to approve statutes that lack an actual notice requirement" and thereby "cast[ing] doubt on the constitutionality of section 16-3-309(5) and other notice-and-demand statutes that fail to require the prosecution to provide actual notice to defense counsel."[169] Finding no prosecutorial action that provided actual notice of prosecution's intent to introduce the footprint forensic report without the testimony of its author, Justice Martinez determined that defense counsel's failure to demand that testimony pursuant to Section 16-3-309(5) "was not a constitutionally sufficient communication of waiver."[170] The majority's holding to the contrary effected an unconstitutional application of Section 16-3-309(5) from which Justice Martinez dissented. In reaching this result, Justice Martinez again maligned the majority for creating and applying a conclusive presumption of waiver in the face of evidence rebutting it.[171]

Like Hinojos-Mendoza before him, the Colorado Supreme Court's decision was the end of the line for Cropper. That court denied him a rehearing,[172] and United States Supreme Court denied his petition for certiorari.[173]

IV. "[T]HE U.S. SUPREME COURT'S STEADFAST REFUSAL TO PRESUME WAIVER [OF A FUNDAMENTAL CONSTITUTIONAL RIGHT] FROM INACTION"[174]

The Colorado and United States Supreme Court cases detailed in Sections 0 and III *supra* have not, of course, occurred in a vacuum. Instead, they have occurred against the backdrop of decades of United States Supreme Court case law explaining that inaction is insufficient to give rise to a waiver of a fundamental right, as discussed in *Mojica-Simental* and in Colorado Supreme Court Justice Martinez's dissents from *Hinojos-Mendoza* and *Cropper*.[175] This Section details that case law.

As a primary matter, an accused's right to confront the witnesses against him is a "bedrock procedural guarantee" and a "fundamental right."[176] That "fundamental right" is

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[166] *Id.* (emphasis added) (footnote omitted) (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)). Justice Martinez also traced this point to *Mojica-Simental*, observing that "*Melendez-Diaz* confirms the fundamental importance of our emphasis in *Mojica-Simental* on actual notice." *Id.* at 441 n.11 (citing People v. Mojica-Simental, 73 P.3d 15, 21 (Colo. 2003)).

[167] *Id.* at 440.

[168] *Id.* (citing *Melendez-Diaz*, 557 U.S. at 326).

[169] *Id.*

[170] *Id.* at 441.

[171] *Id.* at 441-42. On this point, Justice Martinez firmly rejected any hint that *Melendez-Diaz* approved of the presumption of waiver created in *Hinojos-Mendoza* and instead read *Melendez-Diaz* to "impl[y] that the mere existence of a statute is an insufficient basis to presume that an attorney made an informed decision to forego the right to confrontation." *Id.* at 440-41.

[172] Cropper v. People, No. 09SC828, 2011 Colo. LEXIS 358 (Apr. 25, 2011). Justice Martinez and Chief Justice Bender would have granted the rehearing.

[173] Cropper v. Colorado, 132 S. Ct. 837 (2011).

[174] Cropper v. People, 251 P.3d 434, 442 (Colo. 2011) (Martinez, J., dissenting).

[175] *Id.* at 439; *Hinojos-Mendoza*, 169 P.3d 662, 671 (Colo. 2007) (Martinez, J., dissenting); *People v. Mojica-Simental*, 73 P.3d 15, 20 (Colo. 2003).

[176] People v. Fry, 92 P.3d 970, 974-75 (Colo. 2004) (citing Crawford v. Washington, 541 U.S. 36 (2004)); *Id.* at 975; *see also Pointer v. Texas*, 380 U.S. 400, 404-06 (1965).

guaranteed under both the United States and Colorado Constitutions.[177] Like other fundamental rights, the right to confrontation is waivable.[178] However, "[g]enerally, the U.S. Supreme Court has refused to presume waiver of a fundamental constitutional right from a defendant's inaction."[179] "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."[180]

To that end, the United States Supreme Court has defined the waiver of a fundamental constitutional right as "an intentional relinquishment or abandonment of a known right or privilege," dependent "upon the particular facts and circumstances surrounding that case."[181] The Colorado Supreme Court has summarized (and harmonized) United States and Colorado case law to require three elements of a waiver: that it be made (1) "knowingly," (2) "intentionally and intelligently," and (3) "voluntarily":

> Thus, a valid waiver must be "knowingly" made, that is, the person waiving the particular right must "know" of the existence of the right and any other information legally relevant to the making of an informed decision either to exercise or relinquish that right. Second, the waiver must be made "intentionally" and "intelligently," that is, *the person waiving that right must be fully aware of what he is doing and must make a conscious, informed choice to relinquish the known right*. And, third, that conscious choice must be made "voluntarily," that is, not coerced by the state either physically or psychologically.[182]

Given the affirmative action required to waive a fundamental constitutional right, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights."[183] This Section details that presumption, as delineated across decades of United States Supreme Court decisions, and across the United States Constitution's protections for the accused.

A. The Right to Counsel

The Supreme Court has consistently recognized the fundamental Sixth Amendment right to the assistance of counsel.[184] The Court has equally consistently held that a defendant's waiver of that fundamental right must be explicit and may not be inferred from his inaction.[185]

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[177] U.S. CONST. amend. VI; COLO. CONST. art. II, § 16.

[178] *See* Hinojos-Mendoza v. People, 169 P.3d 662, 668 (Colo. 2007) (citing Brookhart v. Janis, 384 U.S. 1, 4 (1966); Hawkins v. Hannigan, 185 F.3d 1146, 1154 (10th Cir. 1999)).

[179] *Cropper*, 251 P.3d at 439 (Martinez, J., dissenting); *see also* Metzger, *supra* note 7, at 517-18 (explaining how "application of the demand-waiver doctrine is particularly absurd" in the context of confrontation of forensic witnesses).

[180] *Brookhart*, 384 U.S. at 4; *see also* Boykin v. Alabama, 395 U.S. 238, 243 (1969) (citing Douglas v. Alabama, 380 U.S. 415, 422 (1965)).

[181] Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by* Edwards v. Arizona, 451 U.S. 477 (1981).

[182] People v. Mozee, 723 P.2d 117, 121 n.4 (Colo. 1986) (emphasis added); *see also* Hinojos-Mendoza v. People, 169 P.3d 662, 673 (Colo. 2007) (Martinez, J., dissenting).

[183] *Johnson*, 304 U.S. at 464 (internal quotation marks and footnotes omitted).

[184] U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (noting that "lawyers in criminal courts are necessities, not luxuries").

[185] *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 404 (1977).

Case law generally traces the definition of a waiver, with regard to constitutional rights, to the United States Supreme Court's 1938 decision in *Johnson v. Zerbst*,[186] a case involving the right to counsel. In *Johnson*, a criminal defendant was tried and convicted without the assistance of counsel.[187] The Court "pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"[188] The Court defined a waiver as "an intentional relinquishment or abandonment of a known right or privilege."[189] Importantly, the Court noted that in applying that definition, "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[190] The Court remanded the case to the district court for a factual determination of whether such an intelligent waiver had occurred.[191]

In the decades since *Johnson*, the Supreme Court has repeatedly applied this holding to reject state court attempts to presume waiver of the right to counsel based only on failure of the defendant to appear with counsel.[192] In *Rice v. Olson*,[193] a 1945 case, a criminal defendant pled guilty at his arraignment without being advised of his right to counsel.[194] He alleged that he had been denied his right to counsel and to call witnesses, despite the fact that "he had not waived those rights by word or action."[195] The Nebraska Supreme Court below had held that "[i]t is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty."[196] The United States Supreme Court resolutely rejected the state court's conclusive presumption of waiver.[197] First, the Court noted that "[w]hatever inference of waiver could be drawn from the petitioner's plea of guilty is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action."[198] Instead, the Court held, the defendant's denial raised a question of fact as to whether the defendant had knowingly and intelligently waived his Sixth Amendment rights.[199] The Court remanded for a factual determination of whether the defendant had made such a waiver.[200]

Two decades later, in 1962, the Supreme Court reiterated the impermissibility of a waiver of the right to counsel based solely on the defendant's failure to appear with

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[186] 304 U.S. 458 (1938).

[187] *Id.* at 460.

[188] *Id.* at 464 (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882); Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937)).

[189] *Id.*

[190] *Id.*

[191] *Id.* at 469.

[192] Cropper v. People, 251 P.3d 434, 439 (Colo. 2011) (citing Barker v. Wingo, 407 U.S. 514, 525 (1972); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Carnley v. Cochran, 369 U.S. 506, 516 (1962); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[193] 324 U.S. 786 (1945).

[194] *Id.* at 786-87.

[195] *Id.* at 787.

[196] *Id.* at 788 (internal quotation marks omitted).

[197] *Id.*

[198] *Id.*

[199] *Id.* at 788-89.

[200] *Id.* at 791.

counsel.[201] In *Carnley v. Cochran*,[202] a criminal defendant was tried without the assistance of counsel.[203] Echoing its decision in *Rice*, the Supreme Court rejected a state-court-created presumption that a defendant had waived a fundamental constitutional right based solely on the absence of an appearance of counsel in the record.[204] The Court unequivocally held that "[p]resuming waiver from a silent record is impermissible."[205] This is because "[t]o cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel . . . laid down in *Johnson v. Zerbst*."[206] Instead of presuming waiver from silence or inaction, the Court stated, a waiver only arises if the record shows "that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[207] "[N]o such burden can be imposed upon an accused unless the record . . . reveals his affirmative acquiescence."[208]

B. The Right to Remain Silent

Like the right to assistance of counsel, the right to remain silent is a fundamental constitutional right enjoyed by all citizens.[209] This right arises from Fifth Amendment's privilege against self-incrimination.[210] Because of the fundamental nature of the right, a person subject to custodial interrogation "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed"[211] before he may be questioned.[212] Further, a "defendant may waive effectuation of these rights" only if "the waiver is made voluntarily, knowingly, and intelligently."[213] "[A] valid waiver will not be presumed simply from the silence of the accused after [Miranda] warnings are given or simply from the fact that a confession was in fact eventually obtained."[214]

The Supreme Court has explained that "[e]ven absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement."[215] In determining whether a defendant has voluntarily waived the right to remain silent, the

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[201] Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[202] 369 U.S. 506 (1962).

[203] *Id.*

[204] *Id.* at 513 ("[T]he State Supreme Court imputed to petitioner the waiver of the benefit of counsel on a ground stated in the court's opinion as follows: 'If the record shows that defendant did not have counsel . . . , it will be presumed that defendant waived the benefit of counsel.'" (citation omitted)); *Id.* at 516.

[205] *Id.*

[206] *Id.* at 514.

[207] *Id.* at 516.

[208] *Id.* at 516-17.

[209] Couch v. United States, 409 U.S. 322, 327 (1973) ("The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated by this Court and need not be elaborated. By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." (citations omitted)).

[210] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); *see* Miranda v. Arizona, 384 U.S. 436, 439 (1966).

[211] *Miranda*, 384 U.S. at 444.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 475.

[215] Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (alteration in original) (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)).

Court has employed the waiver test articulated in *Johnson v. Zerbst* with respect to a waiver of the right to counsel.[216]

This right extends beyond the point of conviction and includes a defendant's right to remain silent during sentencing proceedings.[217] In fact, statements made by a defendant facing the death penalty to a court-appointed psychiatrist at an evaluation requested by the prosecution during the sentencing phase of his criminal proceedings may not later be used against the defendant unless he knowingly, intelligently, and voluntarily waived his right to remain silent before making statements to the psychiatrist.[218] Thus, the Court has steadfastly enforced the rule that, "[g]overnments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth,"[219] absent an adequate waiver of this "essential mainstay of our adversary system."[220]

C. The Right to a Speedy Trial

As "one of the most basic rights preserved by our Constitution," the Sixth Amendment right to a speedy trial is yet another fundamental right.[221] It "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."[222] In *Barker v. Wingo*,[223] a 1972 case, the Supreme Court considered the contours of the right to a speedy trial, in the appeal of a criminal defendant's conviction after 16 continuances obtained by the prosecution.[224] The case gave the Court the opportunity to determine multiple potential approaches to protect a right that is "necessarily relative" and "generically different from any of the other rights enshrined in the Constitution for the protection of the accused."[225] One such approach that the Court considered was the "demand-waiver doctrine."[226] "The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right."[227] Citing, *inter alia*, *Johnson*, *Carnley*, *Miranda*, and *Boykin*, the Court decisively ruled this approach unconstitutional: "Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on

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[216] *Butler*, 442 U.S. at 374-75.

[217] Mitchell v. United States, 526 U.S. 314, 330 (1999). In *Mitchell*, the Court held that a district court may not hold a defendant's "silence against her in determining the facts of the offense at [a] sentencing hearing." *Id.*

[218] Estelle v. Smith, 451 U.S. 454, 468-69 (1981). The *Estelle* Court concluded that, "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468. The defendant in *Estelle*, who had been sentenced to death, had his death sentence reversed because his "statements to [the psychiatrist] were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if [he] had been apprised of his rights and had knowingly decided to waive them." *Id.* at 469 (quoting *Miranda*, 384 U.S. at 478).

[219] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[220] *Miranda*, 384 U.S. at 461.

[221] Klopfer v. North Carolina, 386 U.S. 213, 226 (1967).

[222] United States v. Ewell, 383 U.S. 116, 120 (1966).

[223] 407 U.S. 514 (1972).

[224] *Id.* at 515-16.

[225] *Id.* at 519, 522-24.

[226] *Id.* at 524-25.

[227] *Id.* at 525.

waiver of constitutional rights."[228] The Court flatly rejected "the rule that a defendant who fails to demand a speedy trial forever waives his right."[229]

D. The "Several Federal Constitutional Rights . . . Involved . . . When a Plea of Guilty Is Entered in a State Criminal Trial"[230]

The Supreme Court has taken up the issue of waiver of the constitutional rights effected by a criminal defendant's guilty plea and, each time, applied the principle that those rights are not forfeited except by a voluntary, intelligent, and knowing waiver.[231]

In the 1969 case of *Boykin v. Alabama*,[232] the Supreme Court expounded on exactly which rights are waived when a criminal defendant enters a plea of guilty.[233] It found "several": the Fifth Amendment right against self-incrimination, the right to trial by jury, and the right to confront one's accusers.[234] The Court then considered those rights in the context of a criminal defendant who had pled guilty at his arraignment to all indictments against him.[235] Alabama law required sentencing by jury thereafter, and the jury found the defendant guilty and sentenced him to death.[236] The Court determined that *Carnley*'s rationale, rejecting the presumption of a waiver based on a silent record, applied with equal force "to determin[e] whether a guilty plea is voluntarily made."[237] The Court refused to "presume a waiver of these three important federal rights from a silent record."[238] Instead, the Court would have required "an affirmative showing" that waiver of his constitutional rights was made intelligently and voluntarily.[239] Because no such affirmative showing existed in the record, the Court reversed the conviction.[240]

The Court took up the issue again in *Brady v. United States*,[241] wherein it described *Boykin*'s holding as adding a requirement of an affirmative showing to the long-standing requirement that a guilty plea must be voluntary and intelligent.[242] The case again considered whether a guilty plea was made voluntarily, this time in the context of a defendant who faced a maximum sentence of death but received a sentence of 50 years under the plea.[243] The defendant alleged that his plea was not voluntary because (1) the

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[228] *Id.* (footnote omitted).

[229] *Id.* at 528. In its place, the Supreme Court announced a rule "that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." *Id.* The Court made clear that the rule "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." *Id.* at 529. In so doing, the Court was guided by the "unique" nature of the right to a speedy trial, "in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived." *Id.* In making its ruling, the Court "d[id] not depart from [its] holdings in other cases concerning the waiver of fundamental rights, in which [it] ha[s] placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made." *Id.*

[230] Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[231] *Id.*

[232] 395 U.S. 238 (1969).

[233] *Id.*

[234] *Id.*

[235] *Id.* at 239.

[236] *Id.* at 240.

[237] *Id.* at 242.

[238] *Id.* at 243.

[239] *Id.* at 242.

[240] *Id.* at 244.

[241] 397 U.S. 742 (1970).

[242] *Id.* at 747 n.4 (1970) (citing *Boykin*, 385 U.S. at 242).

[243] *Id.* at 744. The sentence was later reduced to 30 years. *Id.*

statute under which he was charged operated to coerce his plea because it authorized a sentence of death, (2) his attorney improperly pressured his plea, and (3) his plea was induced by representations with respect to reduction of sentence and clemency.[244] The Court rejected the argument that the criminal statute was inherently coercive because it authorized a sentence of death.[245] Instead, the Court reaffirmed that the proper test was whether his plea was voluntary and intelligent, as evidenced by an affirmative showing in the record.[246] The Court defined waiver as follows: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done *with sufficient awareness of the relevant circumstances and likely consequences*."[247] Applying this definition, and reviewing the circumstances of the guilty plea, the Court affirmed that Brady made the plea voluntarily and intelligently and thus constitutionally.[248]

E. The Right to Be Confronted with One's Accusers

As described above, an accused's right to be confronted with the witnesses against him is a fundamental right.[249] The Supreme Court has repeatedly held that it may not be forfeited absent a knowing, voluntary, and intelligent waiver. It has done so in the context of the waiver of the confrontation right subsumed in a guilty plea, as described in Section 0(0) *supra*, and it has do so in cases concerning more direct waivers of the confrontation right, as detailed in this Section.

In the 1966 case of *Brookhart v. Janis*,[250] the Court considered the conviction of a defendant after his counsel had agreed to a *prima facie* bench trial.[251] The defendant argued that his confrontation right had been violated by (1) the introduction of an out-of-court alleged confession of a co-defendant and (2) the denial of his right to cross-examine any of the prosecution's witnesses.[252] The Court first observed that the defendant's confrontation right could not have been denied without a valid waiver.[253] It went on to find that the record showed that "that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him."[254] Because the defendant had "neither personally waived his right nor acquiesced in his lawyer's attempted waiver," the Court reversed the conviction.[255]

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[244] *Id.*

[245] *Id.* at 746-47.

[246] *Id.* at 747, 747 n.4 (citing *Boykin*, 395 U.S. at 242).

[247] *Id.* at 748 (emphasis added) (citing Brookhart v. Janis, 384 U.S. 1 (1966); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Patton v. United States, 281 U.S. 276, 312 (1930)).

[248] *Id.* at 758. On this point, the Court pointed to an absence of "evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Id.* at 750. The Court declined to invalidate a guilty plea "whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." *Id.* at 751. Instead, the Court upheld the constitutionality of his plea even though acknowledging it "may well have been motivated in part by a desire to avoid a possible death penalty." *Id.* at 758.

[249] *See supra* notes 176-77.

[250] 384 U.S. 1 (1966).

[251] *Id.* at 5-6.

[252] *Id.* at 2.

[253] *Id.* at 4.

[254] *Id.* at 7. The Court found that "[h]is emphatic statement to the judge that 'in no way am I pleading guilty' negatives any purpose on his part to agree to have his case tried on the basis of the State's proving a prima facie

The Court reached a similar decision in the 1968 case of *Barber v. Page*.[256] There, the Supreme Court considered the conviction of a defendant in which the principal evidence against him was the reading of the preliminary hearing testimony of a witness who, by the time of trial, was incarcerated in a different state.[257] At that preliminary hearing, an attorney for the defendant had not cross-examined the witness, although an attorney for a co-defendant did.[258] Nevertheless, the Court determined that the defendant had not waived his right to confrontation.[259] At that hearing, the Court determined, the defendant could not have been aware that by the time of trial, the witness would be incarcerated out-of-state, and he could also not have been aware that the prosecution would make no effort to produce the witness by trial.[260] According to the Court, "[t]o suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court's definition of a waiver as 'an intentional relinquishment or abandonment of a known right or privilege.'"[261] Even if the defendant had cross-examined at the preliminary hearing, the Court would have reached the same result, because "[t]he right to confrontation is basically a trial right."[262] Determining that "[t]he right of confrontation may not be dispensed with so lightly," the Court reversed the defendant's conviction.[263]

Thus, it is unequivocal that a defendant's fundamental confrontation right may not be forfeited by anything short of his knowing, voluntary, and intelligent waiver.

V. NOTICE-AND-DEMAND PROVISIONS IN THEIR VARIOUS FORMS

The Colorado Supreme Court is not, of course, the only state court to consider the constitutionality of its state's notice-and-demand provision. To contextualize Colorado's judicial opinions on this issue, this Section reviews case law from other states concerning notice-and-demand statutes.

A. Unconstitutional Notice-and-Demand Provisions

Many state courts that have struck down notice-and-demand statutes have employed a variant of the rationale that the automatic waiver of rights effected when a defendant fails to demand testimony is not a waiver that, as the Constitution requires, is knowing, voluntary, and intelligent. Others have construed their state's statute in a way to avoid constitutionally problematic results. Still others have upheld notice-and-demand statutes while employing reasoning that supports the proposition that statutes such as Colorado's are unconstitutional as applied to pro se defendants. This Section details those decisions.

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case which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty." *Id.*

[255] *Id.* at 8.

[256] Barber v. Page, 390 U.S. 719 (1968).

[257] Id. at 720-21.

[258] *Id.* at 720.

[259] *Id.* at 725.

[260] *Id.* Elsewhere, the Court faulted the prosecution for its lack of effort to locate the witness. *Id.* at 724. The Court determined that a witness may not be deemed "unavailable" for confrontation and hearsay purposes "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 724-25.

[261] *Id.* at 725 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Brookhart v. Janis, 384 U.S. 1, 4 (1966)).

[262] *Id.* at 725.

[263] *Id.* at 725-26.

One early decision striking down a notice-and-demand statute was the Illinois' Supreme Court's decision in *People v. McClanahan*.[264] That decision held Illinois' notice-and-demand statute unconstitutional even under the pre-*Crawford*, arguably looser *Ohio v. Roberts* framework.[265] Similar to Colorado's, the Illinois statute permitted the admission into evidence of a laboratory report, unless the defendant demanded testimony within seven days of receipt of the report.[266] The Court found that the automatic statutorily-operated waiver that occurs if the defendant fails to demand "does not guarantee that this waiver is a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences."[267] The Court emphasized that an accused's "right *to be confronted with* the witnesses against him . . . is a mandatory constitutional obligation of the prosecuting authority. It arises automatically at the inception of the adversary process, and no action of the defendant is necessary to activate this constitutional guarantee in his case."[268] Because the statute did not guarantee that this constitutional obligation would be met, the Court struck down the statute as violative of the federal and state Confrontation Clauses.[269]

Other states have joined Illinois. In *State v. Caulfield*,[270] the Minnesota Supreme Court deemed Minnesota's notice-and-demand statute unconstitutional.[271] Minnesota's statute was also strikingly similar to Colorado's in that it "permit[ted] the admission of 'a report of the facts and results of any laboratory analysis or examination if it is prepared and attested by the person performing the analysis or examination in any laboratory operated by the Bureau of Criminal Apprehension,'" but allowed the defendant to demand the live testimony of the analyst at least ten days before trial.[272] The Court struck down the statute because it did not provide adequate notice to the defendant of the consequences of his failure to demand the testimony:

> At a minimum, any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer. Otherwise, there is no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights.[273]

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[264] People v. McClanahan, 729 N.E.2d 470 (Ill. 2000).

[265] *Id.* at 474-75, 478.

[266] *Id.* at 473 (citing 725 ILCS 5/115-15); *see* COLO. REV. STAT. § 16-3-309 (2012).

[267] *McClanahan*, 729 U.S. at 477.

[268] *Id.* (emphasis in original).

[269] *Id.* at 478. In a subsequent case, the Illinois Supreme Court held that defense counsel may waive a defendant's confrontation right by stipulating to the admission of evidence as long as the defendant does not object and the decision to waive is a matter of legitimate trial tactics and strategy. People v. Campbell, 802 N.E.2d 1205, 1213, 1215 (Ill. 2003). Importantly, "[w]here the stipulation includes a statement that the evidence is sufficient to convict the defendant or where the State's entire case is to be presented by stipulation, we find that a defendant must be personally admonished about the stipulation and must personally agree to the stipulation." *Id.* at 1215. The Court thus acknowledged that, even though waiver of confrontation by counsel is permissible in some circumstances, there remain circumstances where a defendant must personally participate in and making a knowing, voluntary, and intelligent waiver of his confrontation right.

[270] 722 N.W.2d 304 (Minn. 2006).

[271] *Id.*

[272] *Id.* at 310 (citing Minn. Stat. § 634.15, subd. 1(a), 2(a)(2004); *see* COLO. REV. STAT. § 16-3-309 (2012).

[273] *Caulfield*, 722 N.W.2d at 313. The dissent in *Caulfield* attempted to find that Minnesota's notice-and-demand statute constitutional by reference to what it deemed "nonexplicit waivers of confrontation rights" authorized by Supreme Court case law. *Id.* at 318 n.2 (Johnson, J., dissenting). This reasoning, however, is unpersuasive. First,

An especially relevant interpretation of a notice-and-demand statute came in the District of Columbia Court of Appeals' decision in *Thomas v. United States*.[274] The District of Columbia's notice-and-demand statute "direct[ed] that a chemist's report is admissible in evidence in the chemist's absence (even if the chemist is available, and even if the defendant had no prior opportunity to cross-examine the chemist), unless the defendant subpoenas the chemist to appear."[275] The court found that direction to be problematic after *Crawford* and chose to construe the statute to preserve its constitutionality.[276] The Court reinterpreted the statute as follows:

> As we now construe § 48-905.06, it still authorizes the government to introduce a chemist's report without calling the chemist in its case-in-chief, but only so long as the record shows a *valid waiver* by the defendant of his confrontation right. Absent a valid waiver, *which usually must be express but under some circumstances may be inferable from a defendant's failure to request the government to produce the author of the report*, the defendant enjoys a Sixth Amendment right to be confronted with the chemist in person.[277]

As to a "valid waiver," the court considered and conformed to the United States Supreme Court formulations of that concept.[278] The court described "the best course for the government obviously" to be to obtain an express waiver from the defendant, perhaps via a stipulation or pretrial hearing.[279] The court suggested one—and only one—circumstance in which a court might permissibly "infer a valid waiver of the right of confrontation, in the absence of an express waiver."[280] That circumstance was as follows:

> [I]f a defendant represented by counsel is provided with the chemist's report and is advised that a failure to request the chemist's presence for purposes of confrontation will be understood as a waiver of the right and as a stipulation to the admissibility of the chemist's report, we think that a trial court would be justified in inferring a valid waiver from an unexplained or unexcused failure by the defendant to respond.[281]

That circumstance leaves open two possibilities where a waiver may not be inferred: (1) where defense counsel explains or excuses failure to respond, and (2) where a defendant is *not* represented by counsel. The District of Columbia Court of Appeals' decision thus acknowledges that pro se defendants must be analyzed differently than represented defendants with respect to waiver of their confrontation rights.[282]

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the dissent itself acknowledged that the cases it cited were distinguishable from the facts at hand, in that those cases all involved instances of defendant misconduct. *Id.* Second, misconduct, of course, is not inaction but affirmative conduct.

[274] 914 A.2d 1 (D.C. 2006).

[275] *Id.* at 18.

[276] *Id.* at 5, 18-20.

[277] *Id.* at 5 (emphases added).

[278] *Id.* at 19 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Barber v. Page, 390 U.S. 719, 725 (1968); Barker v. Wingo, 407 U.S. 514, 525 (1972)).

[279] *Id.*

[280] *Id.*

[281] *Id.* (citing *Barker*, 407 U.S. at 528-29).

[282] *Id.*

The Ohio Supreme Court's pronouncements on Ohio's notice-and-demand statute echo this sentiment. In *State v. Pasqualone*,[283] that court affirmed the constitutionality of Ohio's notice-and-demand statute, but did so in a way that left two openings relevant to this Article.[284] First, the court observed that the notice provided to Pasqualone included notice of the consequences of his failure to demand the analyst's testimony and also otherwise complied in full with the statute, and thus a valid waiver had occurred in the circumstances presented.[285] In making this observation, the court specifically distinguished the case at hand from a prior Ohio Court of Appeals decision wherein the notice provided had *not* stated the consequences of failure to demand testimony pursuant to the statute.[286] The court carefully confined its decision to the facts at hand;[287]at least one Ohio lower appellate case has seized on this distinction to determine that where the prosecution's notice does not state the consequences of failure to demand testimony, no valid waiver can be found.[288] The second crucial point in the court's logic, providing a ground on which the case may be distinguished, is that the court emphasized that the defendant was represented by counsel and that a defendant's counsel may waive his client's confrontation rights without approval.[289] The court cited to *Hinojos-Mendoza* on this point,[290] and again confined its holding to the facts before it, *i.e.*, where the defendant is represented by counsel.[291] The *Pasqualone* opinion therefore does not govern the case of a pro se defendant.

In addition, other state high courts have deemed unconstitutional their state's statutory mechanism for procuring analyst testimony based on the rationale, eventually elucidated in *Melendez-Diaz*, that a state may not shift the burden of calling witnesses against the defendant to the defense.[292] At least one other, the Kansas Supreme Court, has

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[283] 903 N.E.2d 270 (Ohio 2009).

[284] *Id.*

[285] *Id.* at 275.

[286] *Id.* (citing State v. Smith, No. 1-05-39, 2006 WL 846342, at*7 (Ohio Ct. App. 2006)).

[287] *Id.* ("We determine that a valid waiver occurs in the situation presented by the case sub judice.").

[288] *See* State v. McClain, No. L-10-1088, 2012 WL 5508133, at *5 (Ohio Ct. App. Nov. 9, 2012) (citing Tacon v. Arizona, 410 U.S. 351, 355 (1973) (Douglas, J., dissenting)) (citing *Pasqualone* "to implicitly approve the proposition first stated [in *State v. Smith*] that, in order to comply with the Sixth Amendment and R.C. 2925.51 [the notice-and-demand statute], the notice provision in a lab report must convey to the defendant the consequences of failure to demand the laboratory analyst's testimony).

[289] *Pasqualone*, 903 N.E.2d at 275-77.

[290] *Id.* at 276 (citing Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. 2007)).

[291] *Id.* at 280 ("We hold that an accused's attorney is capable of waiving his client's right to confrontation by not demanding that a laboratory analyst testify pursuant to the opportunity afforded by [the notice-and-demand statute].").

[292] *See* State v. Birchfield, 157 P.3d 216, 219-220 (Or. 2007) (striking down, as unconstitutional under the State Constitution's Confrontation Clause, a statutory requirement that the defendant notify the state if he insisted on the right to cross-examine a laboratory analyst); *Cypress v. Commonwealth*, 699 S.E.2d 206, 213 (Va. 2010) (determining, in light of *Melendez-Diaz*, that Virginia statute that shifted the burden of calling witnesses against the defendant to the defense "did not adequately protect [the defendants'] Confrontation Clause rights" and failure to comply with the statute did not operate as a waiver of those rights); Mnookin, *supra* note 7, at 799 n.19 (arguing that notice-and-demand statutes requiring that defendant's demand contain some kind of good-faith showing are "constitutionally problematic"); *cf.* State v. Belvin, 986 So. 2d 516, 525 (Fla. 2008) (citing FLA. STAT. § 316.1934 (2012)) (determining that statute that permits admission of breath test operator's affidavit but also allows defendant to subpoena the operator as an adverse witness "does not adequately preserve the defendant's Sixth Amendment right to confrontation"); State v. Miller, 790 A.2d 144, 156 (N.J. 2002) (construing notice-and-demand statute to require only that defendant object to admission of lab certificate and assert it will be contested, rejecting an interpretation requiring a more detailed objection as it would have placed too great a burden on defendant). The Oregon Supreme Court's decision in *Birchfield* struck down Oregon's statute on this ground, but suggested that a notice-and-demand requirement would indeed be constitutional.

found constitutional infirmity in its notice-and-demand statute on the ground that it extends too far beyond *Melendez-Diaz*'s description of such statutes in their "simplest form."[293]

B. "[T]reat[ing] the Question of Waiver Cavalierly"[294]: Decisions Affirming the Constitutionality of Notice-and-Demand Statutes

By contrast, other state courts have upheld their state's notice-and-demand statutes. Of those, some have done so with fleeting reference to *Melendez-Diaz*'s footnote authorizing notice-and-demand statutes "[i]n their simplest form."[295] Lower appellate courts in Arkansas, Iowa, North Carolina, Texas, and Washington are among this group.[296] Similarly, some state courts have upheld their state's notice-and-demand statute with no consideration whatsoever of Supreme Court case law governing an accused's waiver of his or her constitutional rights.[297] One early example of this type of decision was the Nevada Supreme Court's 2005 decision in *City of Las Vegas v. Walsh*.[298] There, the court determined that a forensic affidavit was a testimonial statement.[299] It further determined that, because the statute permitted the defense to object "in writing" to the admission of the affidavit absent testimony of its author, it "adequately preserve[d] the constitutional right to confront witnesses against a defendant by providing a statutory confrontation mechanism."[300] The statute was therefore constitutional and failure to use the statutory mechanism would result in a waiver.[301] The Nevada Supreme Court reached this

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Birchfield, 157 P.3d at 219-220; *cf.* State v. Willis, 236 P.3d 714, 717 n.1 (Ore. 2010) (observing that *Birchfield* accords with the Supreme Court's decision in *Melendez-Diaz*).

[293] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 326 (2009); *see* State v. Laturner, 218 P.3d 23, 38-40 (Kan. 2009) (severing portion of Kansas' notice-and-demand statute, in order to transform it into a constitutional, simple notice-and-demand statute under *Melendez-Diaz*). The lower appellate court in *Laturner* had considered, and struck down the statute based on the United States Supreme Court's pronouncements on waiver of fundamental rights. *Id.* at 31-32. The Kansas Supreme Court, however, read *Melendez-Diaz* to cast some doubt on that rationale, and instead severed Kansas' statute such that the remaining portions mirrored the "simplest" notice-and-demand statute deemed constitutional by *Melendez-Diaz*. *Id.* at 39. Prior to this decision severing the statute, the Kansas statute "require[d] not just that a defendant demand that the laboratory analyst testify at trial but that the defendant state an objection and the grounds for the objection." *Id.* at 30.

[294] Tacon v. Arizona, 410 U.S. 351, 354 (1973) (Douglas, J., dissenting).

[295] *Melendez-Diaz*, 557 U.S. at 326.

[296] *See* Jones v. State, 2011 Ark. App. 683, at 6-7 (Ark. Ct. App. 2011) (holding that defendant's failure to provide notice that he wanted to examine analyst who appeared on prosecution's witness list but did not testify did not violate Confrontation Clause because "the *Melendez-Diaz* Court acknowledged that some states have notice-and-demand statutes [like Arkansas's], and found them consistent with constitutional requirements"); Watson v. State, No. 2-1057/11-1833, 2013 Iowa App. LEXIS 40, at *14-16 (Iowa Ct. App. Jan. 9, 2013) (noting that the *Melendez-Diaz* Court approved of "such statutes" as Iowa's ten-day notice-and-demand requirement); State v. Steele, 689 S.E.2d 155, 160-61 (N.C. Ct. App. 2010); Carson v. State, No. 11-10-00178-CR, 2012 Tex. App. LEXIS 4721, at *5-7 (Tex. App. June 14, 2012) (per curiam) (determining that *Melendez-Diaz* authorized notice-and-demand statutes and cursorily deciding that, because defendant did not demand testimony of laboratory report author pursuant to the statute, defendant had waived his Confrontation rights); Herring v. State, No. 05-08-01699-CR, 2010 Tex. App. LEXIS 3136, at *2-5 (Tex. App. Apr. 28, 2010) (same); State v. Schroeder, 262 P.3d 1237, 1239 (Wash. Ct. App. 2011) ("This rule comports with *Melendez-Diaz*.").

[297] *See, e.g.*, Culberson v. State, No. 11-06-00196-CR, 2008 Tex. App. LEXIS 2720, at *11 (Tex. App. Apr. 17, 2008) (agreeing with *Deener* that Texas notice-and-demand statute is not facially unconstitutional); Deener v. State, 214 S.W.3d 522, 527-28 (Tex. App. 2006) (determining that criminal defendant suffered no Confrontation violation where his right to confront the witnesses against him was waived by his failure to object under two Texas notice-and-demand statutes).

[298] City of Las Vegas v. Walsh, 124 P.3d 203, 208-09 (Nev. 2005).

[299] *Id.* at 207-08.

[300] *Id.* at 208.

[301] *Id.* at 209.

conclusion with minimal analysis, never considering an as-applied challenge or opining on whether and how the statute might be applied unconstitutionally.

Another example of this minimal analysis came in the North Dakota Supreme Court's decision in *State v. Campbell*.[302] There, the court cited *Walsh* to determine that the defendants waived their confrontation rights by failing to follow the notice-and-demand statute, but the court never once considered the constitutionality of statute itself.[303] Louisiana is another of this group, as it has now twice affirmed its notice-and-demand statute without considering the constitutional validity of the waiver effected by it.[304]

The minimalistic analysis contained in these decisions simply fails to persuade. The United States Supreme Court has "never treated the question of waiver cavalierly,"[305] and state-court decisions that do cannot offer persuasive force on the question of waiver of a federal constitutional right.

VI. "THE RIGHT OF CONFRONTATION MAY NOT BE DISPENSED WITH SO LIGHTLY"[306]: THE UNCONSTITUTIONALITY OF COLORADO'S NOTICE-AND-DEMAND STATUTE AS APPLIED TO PRO SE DEFENDANTS

Against the backdrop outlined in Sections 0-0 *supra*, this Section picks up where footnote seven in *Hinojos-Mendoza* left off and addresses how that opinion's analysis is altered for pro se defendants.[307]

It has long been clear that a criminal defendant has the right to forego his constitutionally guaranteed right to assistance of counsel in order to exercise his right to represent himself.[308] As a result, numerous questions arise regarding whether *pro se* defendants and defendants represented by counsel must (or should) be treated the same way. Dissenting in *Faretta v. California*, Justice Blackmun explicitly listed some of these questions:

> Must every defendant be advised of his right to proceed *pro se?* If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se,* does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se?* Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? *Must the trial court treat the pro se defendant differently than it would professional counsel?* I assume that many of these questions will be answered with finality in due course. Many of them, however, such as the standards of

[302] 719 N.W.2d 374, 378 (N.D. 2006).

[303] Id. at 377-78 (citing *Walsh*, 124 P.3d at 209).

[304] *See* State v. Simmons, 78 So. 3d 743, 745-48 (La. 2012); State v. Cunningham, 903 So. 2d 1110, 1121 (La. 2005).

[305] Tacon v. Arizona, 410 U.S. 351, 354 (1973) (Douglas, J., dissenting).

[306] Barber v. Page, 390 U.S. 719, 725 (1968).

[307] Hinojos-Mendoza v. People, 169 P.3d 662, 670 n.7 (Colo. 2007).

[308] Faretta v. California, 422 U.S. 806, 807 (1975) ("[T]he question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense. It is not an easy question, but we have concluded that a State may not constitutionally do so.").

> waiver and *the treatment of the pro se defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation.*[309]

Unique concerns undoubtedly arise within the context of a defendant representing himself at trial.[310] To that end, at least some judges issuing decisions about the constitutionality of notice-and-demand statutes have recognized a difference between a defendant represented by counsel and a defendant representing himself. For instance, Louisiana Supreme Court Justice Johnson's dissent in *State v. Cunningham*[311] differentiated pro se and indigent defendants from those represented by counsel and expressed concern regarding the effect of Louisiana's defense subpoena statute on such defendants.[312] The District of Columbia Court of Appeals did so even more persuasively when, in *Thomas v. United States*,[313] it suggested at least one circumstance—that of the pro se defendant—in which a waiver may not be inferable from a defendant's failure to demand forensic technician testimony.[314]

Those judges take the better view. As a primary matter, where a defendant has no defense counsel, he is not operating under the principle that his lawyer may waive his rights by inaction or without approval.[315] Similarly, *Hinojos-Mendoza*'s "presum[ption] that attorneys know the applicable rules of procedure"[316] is obviously inoperative in the case of a pro se defendant. The Supreme Court has explicitly recognized that the legal knowledge of a defense attorney may not be presumed on behalf of a pro se defendant. In *Carnley v. Cochran*,[317] the Court pointed out that:

> While [the pro se defendant] was advised that he need not testify, he was not told what consequences might follow if he did testify. He chose to testify and his criminal record was brought out on his cross-examination. For defense lawyers, it is commonplace to weigh the risk to the accused of the revelation on cross-examination of a prior criminal record, when advising an accused whether to take the stand in his own behalf; for petitioner, the question had to be decided in ignorance of this important consideration.[318]

Lower court judges have recognized this distinction as well. For example, Ninth Circuit Judge Stephen Reinhardt, in a dissenting opinion, wrote:

> Finally, unlike Green, who was represented by counsel, Ohman had no lawyer present. The lack of representation is critical here. The message conveyed when a sentencing judge personally addresses a defendant who has a lawyer by his side, and inquires whether the defendant himself wishes to speak to the court regarding his sentence is

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[309] *Id.* at 852 (Blackmun, J., dissenting) (emphases added).

[310] *See* Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 471-72 (2009) ("Trials in which a defendant represents himself present a host of problems that undermine the fairness of the proceedings. Determinations of competency, conflicts with standby counsel, utilization of proper procedure, and overall fairness of the proceedings are called into question when a defendant proceeds pro se." (footnotes omitted)).

[311] 903 So. 2d 1110 (La. 2005).

[312] *Id.* at 1127 (Johnson, J., dissenting).

[313] 914 A.2d 1 (D.C. 2006)

[314] *Id.* at 19.

[315] *Cf.* Hinojos-Mendoza v. People, 169 P. 3d 662, 670 (Colo. 2007); *Thomas*, 914 A.2d at 19; People v. Campbell, 802 N.E.2d 1205, 1213, 1215 (Ill. 2003); State v. Pasqualone, 903 N.E.2d 270 (Ohio 2009).

[316] *Hinojos-Mendoza*, 169 P.3d at 670 (citing Christie v. People, 837 P.2d 1237, 1244 (Colo. 1992)).

[317] 369 U.S. 506 (1962).

[318] *Id.* at 511.

> fundamentally different from the message conveyed when a judge inquires jointly of a *pro se* defendant/advocate and the prosecutor whether they wish to make 'any comments . . . before [she] announce[s] the sentence [she is] inclined to impose.' In the former case, the question is much more likely to be interpreted by the defendant as an opportunity to speak freely about why he deserves leniency. (He also has the benefit of his lawyer's counsel as to what he may and may not say in response to the invitation to speak.) In the latter case, the defendant may well not understand, as Ohman clearly did not, that he should speak in his role as defendant rather than in his capacity as an advocate.[319]

These differences provide a backdrop for the conclusion that, in the absence of defense counsel, a defendant is returned to that baseline principle that waiver of any of his constitutional rights must be done only by himself and only knowingly, intelligently, and voluntarily.[320] That is, in the case of a pro se defendant, a different presumption operates: that by which "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights."[321]

With this different presumption in mind, it is especially important to review how Colorado's notice-and-demand statute operates. *Cropper* provides that merely "providing the defense with a forensic lab report through discovery is sufficient to put the defendant on notice that, absent a specific request under section 16-3-309(5), the report can be introduced without live testimony."[322] This action, as Justice Martinez's dissent in *Cropper* accurately observes, does not serve as "notice" that the prosecution intends to offer the report pursuant to Section 16-3-309(5).[323] This action is a separate duty under Colo. R. Crim. Pro. 16, which governs the prosecution's disclosure obligations; disclosure in discovery pursuant to this rule provides no indication of whether the prosecution will introduce the report at trial.[324]

This review reveals two infirmities in the application of the statute to pro se defendants: that (1) the statute is not within the "simplest" category of such statutes passed on in dicta in *Melendez-Diaz*, and (2) the "notice" provided by the statute does not trigger a knowing, intelligent, voluntary waiver on the part of a pro se defendant. As to the first point, the precise category of "simple" notice-and-demand statutes on which *Melendez-Diaz* remarked was as follows: statutes that "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence *at trial*."[325] Providing the report in discovery provides notice only of the report's existence, not of the prosecution's intent to use it *at trial*. In the case of a pro se defendant, mere provision in discovery cannot be equated with notice of intent to use the report at trial. To complete that equation,

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[319] United States v. Ohman, 13 F. App'x 568, 572-73 (9th Cir. 2001) (Reinhardt, J., dissenting) (alterations and omission in original).

[320] This is reinforced by the fact that federal law controls the waiver of a federally guaranteed constitutional right. *See supra* note 180.

[321] Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by* Edwards v. Arizona, 451 U.S. 477 (1981) (internal quotations marks omitted) (quoting, respectively, Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882); Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937)).

[322] Cropper v. People, 251 P.3d 434, 437 (Colo. 2011).

[323] *Id.* at 441 & n.12 (Martinez, J., dissenting).

[324] *Id.*

[325] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 326 (2009) (emphasis added); *see also Cropper*, 251 P.3d at 439-40 (Martinez, J., dissenting) (citing *Melendez-Diaz*, 129 S. Ct. at 2541).

Cropper resorted to its presumption that defense counsel has knowledge of all procedural rules.[326] In the case of a pro se defendant, there is no presumption available to make the leap from discovery to intent to use at trial. Thus, at least as applied to a pro se defendant, Colorado's is not a notice-and-demand statute in "simplest form."[327] The constitutionality of Colorado's statute is therefore not within *Melendez-Diaz*'s dicta.

As to the second point, as described in *Cropper*, Colorado's notice-and-demand statute is triggered upon the provision in discovery of a forensic lab report.[328] Absent a demand pursuant to the statute, a defendant's right to confront the report's author is waived. [329] A pro se defendant provided a laboratory report via discovery is situated more akin to the defendants in *Johnson*, *Rice*, and *Carnley* than he is to his represented counterpart in *Mojica-Simental*, *Hinojos-Mendoza*, and *Cropper*. As to the pro se defendant, "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[330] The automatic waiver of Colorado Rev. Stat. § 16-3-309(5) cannot govern the pro se defendant, because to do so would "not waive th[ose] right[s] either by word or action,"[331] but would impermissibly "[p]resum[e] waiver from a silent record."[332] As in *Carnley v. Cochran*, "[t]o cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel . . . laid down in *Johnson v. Zerbst*."[333] This is so because the automatic waiver of § 16-3-309(5) neither "reveals [the defendant's] affirmative acquiescence,"[334] nor contains the affirmative showing of waiver of a fundamental constitutional right required after *Boykin v. Alabama*.[335] Perhaps most importantly for the analysis, provision of a laboratory report via discovery utterly fails to make a pro se defendant "sufficient[ly] aware[] of the relevant circumstances and likely consequences." [336] Namely, the consequence that failure to demand the live testimony of the forensic technician upon receipt of his report via discovery waives the right to confront that technician. As applied to pro se defendants, Colorado's statute provides "no reasonable basis to conclude that the defendant's failure to request the testimony constituted a knowing, intelligent, and voluntary waiver of his confrontation rights."[337] Just as in *Barker v. Wingo*,[338] the doctrine of demand-waiver must be rejected as applied

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[326] *See Cropper*, 251 P.3d at 436-48.

[327] *Melendez-Diaz*, 557 U.S. at 326.

[328] *Cropper*, 251 P.3d at 437.

[329] COLO. REV. STAT. § 16-3-309(5) (2012).

[330] Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *overruled in part on other grounds by* Edwards v. Arizona, 451 U.S. 477 (1981).

[331] Rice v. Olson, 324 U.S. 786, 788 (1945).

[332] Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[333] *Id.* at 514.

[334] *Id.* at 516-17.

[335] *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); Brady v. United States, 397 U.S. 742, 747 n.4 (1970) (citing *Boykin*, 385 U.S. at 242)

[336] *Brady*, 397 U.S. at 742, 748 (1970) (emphasis added) (citing Brookhart v. Janis, 384 U.S. 1 (1966); Adams v. United States *ex rel*. McCann, 317 U.S. 269, 275 (1942); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Patton v. United States, 281 U.S. 276, 312 (1930)); *accord* People v. McClanahan, 729 N.E.2d 470, 477 (Ill. 2000); State v. Caulfield, 722 N.W.2d 304, 313 (Minn. 2006); State v. Pasqualone, 903 N.E.2d 270, 275 (Ohio 2009) (citing State v. Smith, No. 1-05-39, 2006 WL 846342 (Ohio Ct. App. 2006)); State v. McClain, No. L-10-1088, 2012 WL 5508133, at ¶ 26 (Ohio Ct. App. Nov. 9, 2012) (citing Tacon v. Arizona, 410 U.S. 351, 355 (1973) (Douglas, J., dissenting)).

[337] State v. Caulfield, 722 N.W.2d 304, 313 (Minn. 2006).

[338] 407 U.S. 514 (1972).

to pro se defendants under Section IV, *supra*.[339] "Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights."[340]

VII. CONCLUSION

The United States Supreme Court has never taken lightly the requirement that any waiver of a fundamental constitutional right must be done "voluntarily, knowingly, and intelligently."[341] This is particularly true for pro se defendants, who are often "ignoran[t] of th[e] important consideration[s]"[342] underlying a waiver of such rights. Allowing a pro se defendant to waive his confrontation rights, including those against forensic technicians, by mere inaction is inconsistent with the longstanding principle that the right to confront one's accusers is a "bedrock procedural guarantee."[343] Colorado's Notice-and-Demand statute, which presumes a waiver by a defendant's inaction,[344] is therefore unconstitutional as applied to pro se defendants.

[339] *See* Metzger, *supra* note 7, at 517-18 (arguing for the rejection of the demand-waiver doctrine in the context of confrontation of forensic witnesses).

[340] *Barker*, 407 U.S. 514, 525 (1972) (footnote omitted); *see also* Rice v. Olson, 324 U.S. 786, 788 (1945) (rejecting state-court-created presumption of waiver of Sixth Amendment right); Carnley v. Cochran, 369 U.S. 506, 513 (1962) (same).

[341] *Miranda*, 384 U.S. 436, 444 (1966).

[342] *Carnley*, 369 U.S. 506, 511 (1962).

[343] *Crawford*, 541 U.S. 36, 42 (2004).

[344] *See* COLO. REV. STAT. § 16-3-309(5) (2012).

THE COST OF COLORADO'S DEATH PENALTY

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This paper analyzes cost of Colorado's death penalty in court days. We compare the number of days in court and the actual length of time from charges until sentencing in death prosecutions and first-degree murder cases with similarly egregious facts. We found that death prosecutions require substantially more days in court, and take substantially longer to resolve than non-death-prosecuted first degree murder cases that result in a sentence of life imprisonment without parole. Moreover, the costs of these prosecutions are not offset by any tangible benefit. Our study shows that not only are death penalty prosecutions costly compared to non-death cases, but the threat of the death penalty at the charging stage does not save costs by resulting in speedier pleas when the defendant wants to avoid the death penalty. In addition, the substantial cost of the death penalty cannot be justified by the possibility of future deterrence insofar as social scientists increasingly agree that the deterrence benefits of the death penalty are entirely speculative. In short, by compiling and analyzing original data, we show that Colorado's death penalty imposes a major cost without yielding any measurable benefits.

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INTRODUCTION

There is something unseemly about putting a price tag on justice. It seems that questions of morality and fairness ought to be one area of law where the "narcotic effect" of a cost/benefit analysis is deemed unsuitable.[1] But in the realm of constitutional rights it has long been recognized that the costs of absolute rights are prohibitive, and thus that there is necessarily a need to balance the costs of the right against its benefit in a particular situation – that is, there is a disconnect between the 'ideal' and the 'real' of constitutional rights.[2] Indeed, the Supreme Court routinely considers the cost of applying a right to a particular circumstance when addressing whether there is a remedy: if the cost of a remedy, in real terms, is too high, then the ideal of the right is not recognized.[3] Cost/benefit analysis is no less necessary in the context of evaluating the appropriateness of various forms of punishment. The cost of any particular punishment, both in dollars and in terms of governmental credibility, should be weighed against its benefits.

Accordingly, although philosophical, religious or moral debates about the death penalty may seem more urbane, a mature society that is mindful of economic realities should take seriously the costs of seeking the ultimate punishment.[4] Just as there are no absolute rights, there ought to be no absolute punishments – cost is always relevant. The Supreme Court has held that a constitutional right is generally undeserving of a remedy if that remedy "cannot pay its way"[5] – that is to say the benefits of the remedy must be balanced against its costs. The same should be true of the death penalty; we should not blithely accept absolutes without considering the relevant costs.[6]

This essay serves as a first reasoned effort to compare the relative costs and benefits of capital punishment in the state of Colorado. The essay proceeds in four parts. In Part I, we provide a brief overview of cost studies in other states, discussing their proliferation as well as their findings. In Part II, we set out the methodology for our original study of the trial costs of Colorado's death penalty, and in Part III we set forth and analyze the results of our study. Finally, in Part IV we examine two claimed benefits of the death penalty and provide a brief overview of the recent studies on the deterrent effect

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[1] Justice Brennan decried over-reliance on such principles in a famous dissent, explaining that cost/benefit analysis "can have a narcotic effect" and "creates an illusion of technical precision and ineluctability." United States v. Leon, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting).

[2] *See* J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277 (2010) (describing the balance between rhetorical attachment to absolute rights with the actual practice of these rights); *see also* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 591 (1983) (describing "Interest Balancing," a theory of constitutional adjudication in which "remedial effectiveness for victims is only one of the factors in choosing a remedy; other social interests are also relevant and may justify some sacrifice of achievable remedial effectiveness."). Professor Gewirtz explains that in an interest balancing approach when "evaluating a remedy, courts in some sense 'balance' its net remedial benefits to victims against the net costs it imposes on a broader range of social interests. Thus, even if a particular remedy would be the most effective in curing the violation, its costs may be sufficiently high that an Interest Balancing court would choose a less effective remedy."

[3] *See, e.g.*, Herring v. United States, 55 U.S. 135 (2009); Stone v. Powell, 428 U.S. 465 (1976).

[4] Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 118 (2010) ("Moral and political debates about the death penalty have a certain timeless quality. Many of the same arguments and even examples (God's sparing of Cain!) reappear from generation to generation. It can truly seem that there is nothing new under the sun. Nonetheless, though its novelty has largely escaped notice, the argument for abolition based on the expense of administering a system of capital punishment is a new phenomenon—one that is extraordinarily powerful in current public policy debates, while being virtually nonexistent in the debates of prior generations.").

[5] *Herring*, 555 U.S. at 147–48 (citing *Leon*, 468 U.S. at 907 n.6).

[6] To be sure, the costs of many rights, for example, the right to Free Speech, may not be purely economic in the way that this paper frames the costs of capital punishment. Instead, pure conceptions of rights often impose costs on other rights or on the social contract more generally.

of capital punishment, which is one of the most commonly identified tangible benefits of the death penalty. In short, this essay provides a platform for weighing the costs of the death penalty, as measured in our study, against the deterrence benefits of capital punishment more generally. Although it is difficult to find reliable estimates about the costs of capital punishment in any given jurisdiction, this essay fills that void for the state of Colorado by providing concrete, easy to understand estimates about the relative costs of a death penalty prosecution in Colorado. We compare the time required by the trials and pleas of death penalty cases to the time required for the prosecution of the most serious of the first-degree murders during the same timeframe.

I. TOWARD AN OBJECTIVE MEASUREMENT OF COST

In recent years, it has become commonplace for policymakers and academics to consider the costs of the death penalty. Substantial public attention has been paid to the realization that a single death penalty prosecution can "drain a county's resources" or leave the state with fewer police officers, fewer drug rehabilitation programs and less training for prosecutors.[7] And with unsolved violent crimes on the rise,[8] the cost of capital punishment for many ailing state budgets has gained considerable prominence. Few studies have received more attention than the California study, which found, among other things, that the death penalty adds at least $137 million dollars of cost to the California budget each year, an additional $308 million per execution.[9] Figures like this have led some to conclude that the death penalty is a "luxury item" -- an unnecessary add-on to a justice system, and one that adds significant cost.[10] Indeed, the cost figures have become so staggering that even conservative pundit Bill O'Reilly recently came out in support of a proposition to abolish the death penalty in California.[11]

The notion that the cost problem can be solved by simply curtailing the opportunities for appeal misses the mark. Many of the procedures provided, such as a review of the adequacy of trial counsel's representation, are constitutionally required. Moreover, a significant portion of the costs of the death penalty occur at the trial level.[12] This fact has not been missed by Colorado's policy-makers. In a recent op-ed, one district attorney, Stan Garnett, wrote that "[p]rosecuting a death penalty case through a verdict in the trial court can cost the prosecution well over $1 million dollars (not to mention the

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[7] *See, e.g.*, Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, *in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 401, 401-03 (Hugo Adam Bedau ed., 1997) (examining budget cuts in some states requiring massive police layoffs while funding for the death penalty persists).

[8] Some states have unsolved rape and murder rates of roughly 50%. *See, e.g.*, Editorial, *End the Death Penalty in California*, N.Y. TIMES, Nov. 6, 2012, at A28; *see also* ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 31 (2011) (discussing rising rates in unsolved homicides).

[9] CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA, at 10 (2008); *End the Death Penalty in California*, *supra* note 8.

[10] Dieter, *supra* note 7, at 404.

[11] Ron Briggs, *Why Conservatives Like Bill O'Reilly and Me Support Proposition 34*, FOX AND HOUNDS DAILY (Oct. 25, 2012), http://www.foxandhoundsdaily.com ("Opponents of Proposition 34 like to say 'let's fix the system.' Truth is, Republicans have had their hand on California's judicial death penalty rudder for 25 years. Voters ousted three liberal justices for failing to affirm death sentences and after nearly 20 years on the court, conservative, Republican-appointed Chief Justice Ronald George concluded that the death penalty system is 'dysfunctional.' Current Republican appointed Chief Justice Tani Cantil-Sakauye has echoed these remarks, saying the system is 'not effective.' Recently retired Justice Carlos Moreno, who believes in the death penalty, supports Proposition 34 because he knows the system can't and won't be fixed.").

[12] Dieter, *supra* note 7, at 405.

expense incurred by the judiciary and the cost of defense counsel, which is almost always funded with taxpayer funds in a death penalty case)."[13] The same district attorney estimated that the death penalty prosecution of a single case, including the trial and appeals to date, has cost some $18 million.[14] On March 19, 2013, Alternate Defense Counsel Lindy Frolich testified before the Colorado House Judicary Committee that, while a regular first degree murder case costs her agency about $16,000 per year, per case for the defense attorneys and costs, a death penalty case costs about $400,000 per year, per case.[15]

Anyone familiar with the process knows that death penalty prosecutions cost every agency more – a lot more. Every day in court entails higher level attorney, clerical, judicial, and investigative personnel, more lawyers per side, more courtroom security, and many more jurors.[16] These proceedings require the best and the brightest, from the attorneys to the scientists and experts, all the way down to the judicial law clerks employed for these complex cases. Everyone looking at a typical courtroom day in a death prosecution case can see that a vast amount of taxpayer money is being spent above and beyond what would have been spent on a prosecution for first degree murder where the maximum penalty is life imprisonment without parole ("LWOP").

The problem, however, is that these dollar figures are somewhat imprecise and anecdotal because of the complexity of figuring out how exactly to assign systemic costs of the death penalty across individual cases. Unlike the costs to the State of building a road or purchasing a new computer system for an agency – in which case the costs are known well in advance – the costs of any particular death penalty case (or the system as a whole) are not only not known in advance, but are not reported to or documented by any one agency or actor in the system.

Recognizing that the costs of the death penalty are spread among many different agencies and across a long period of time, the Board of Governors of the Washington State Bar Association recently explained:

> The costs of pursuing the death penalty are significant, but cannot be calculated with precision. Murder cases are generally among the most complex and challenging cases for lawyers to try and for courts to handle. When the death penalty is sought additional layers of complexity enter the case, both in terms of presentation of evidence and procedural requirements. Because of the ultimate and irrevocable nature of the penalty, numerous extra steps are required by statute, case law, court rules and the standard of practice in death penalty cases. In a capital case, extraordinary responsibility is placed upon the attorneys defending the accused, and also upon the prosecutors and the courts.[17]

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[13] Stan Garnett, *DA: Death Penalty Not Practical for Colorado*, BOULDER DAILY CAMERA (Dec. 16, 2012), http://www.dailycamera.com/guest-opinions/ci_22194910/da-death-penalty-not-practical-colorado.

[14] *Id.* (discussing the Nathan Dunlap case).

[15] Transcript of Proceedings, Colorado General Assembly, House Judiciary Committee, House Bill 13-1264 (March 19, 2013), p. 78 (testimony of Lindy Frolich).

[16] In a death prosecution, typically six to eight alternate jurors present rather than the typical two alternates, and the pool of jurors required to appear for voir dire numbers in the hundreds (approximately 1400-1800 per case), rather than the two or three dozen potential jurors called up for voir dire in a first degree murder prosecution where death is not sought. By statute, jurors and prospective jurors are paid fifty dollars per day. COLO. REV. STAT. ANN. § 13-71-126 (West).

[17] *Final Report of the Death Penalty Subcommittee of the Committee on Public Defense*, WASH. STATE BAR ASS'N (Wash. State Bar Ass'n, Wash.), Dec. 2006, at 14.

All of these same considerations are present in Colorado. The costs of the death penalty are substantial, but because they are spread across numerous steps and procedures, and can vary widely from case-to-case, it is difficult, perhaps unrealistic, to generate a single demonstrably correct price tag for the death penalty relative to other first degree murder prosecutions. But the question – "How much more does it cost to prosecute a death penalty case?" – can be answered with some precision if we focus on a comparison of the time costs of an aggravated murder case in which the prosecution sought the death penalty ("death prosecution") and a similarly-aggravated first degree murder case in which they sought a sentence of life imprisonment without parole ("LWOP prosecution").[18]

Thanks to the work of those involved in the data collection for a recent empirical study of the constitutionality of Colorado's death penalty, the Colorado Death Penalty Eligibility Study (CDPES), we have access to public court documents regarding every murder case filed in Colorado for the twelve-year period from 1999 through 2010.[19] By relying on this dataset we are able to quantify the amount of time involved in a Colorado death penalty prosecution as compared to a Colorado life-without-parole prosecution.[20] We do not make estimates about how much a day in court costs; however, we are able to provide objective information on exactly how much more, as measured by days in court, a death penalty prosecution costs the State.[21] Thus, although we do not have a set dollar figure, the cost figures measured in days in this study are objectively verifiable, not subject to any contradiction, and provide similarly forceful support for the conclusion that the death penalty is a comparatively very expensive system, even relative to prosecutions resulting in a sentence of life without the possibility of parole.

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[18] Of course, even these comparisons understate the cost of capital cases. Death penalty cases require more experienced lawyers, more experts, and likely cost considerably more per day than non-death cases.

[19] The CDPES was based upon data provided by the State Judicial Department regarding murder prosecutions commenced in Colorado between January 1, 1999 and December 31, 2010. Elected prosecutors have shamelessly claimed that the date range for the study was manipulated or contrived. *See, e.g.*, Michael Booth & Kevin Simpson, *If Colorado is to have this death penalty "conversation," start here*, DENV. POST, May 26, 2013, http://www.denverpost.com/news/ci_23325438/if-colorado-is-have-this-death-penalty-conversation (quoting District Attorney George Brauchler as stating, "The 12-year DU study started with 1999, conveniently leaving out a previous flurry of death-sentence cases . . . ."). In reality, the date range was determined by the limited capacity of the State Judicial Department to perform comprehensive electronic searches of its computerized databases before 1999. The Department reported that data prior to 1999 was not electronically searchable, thus limiting the date range of the CDPES. *See* Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many are Called, Few are Chosen*, 84 U. COLO. L. REV. ___ (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210040. *See id.* at 140, notes 148-149 and accompanying text. There are a handful of non-death-prosecuted murder cases in which the district court has sealed the file from public view, but there is no reason to believe that those few cases would change the results of either the CDPES or this cost analysis.

[20] This approach has been taken by other studies that seek to estimate the costs of a death penalty prosecution. For example, the Washington State Bar Association Report suggested analysis of the number of additional days required for a death penalty case: "Some information is available on the cost of operation of the trial court. The Administrative Office of the Courts (AOC) analyzed the personnel costs for a superior court judge and courtroom staff and concluded that the staff cost to the counties for operating one trial court is $2,332 per day. (This cost analysis does not include the general costs of operating the court facilities, such as utilities, maintenance and security.) If an aggravated murder case takes 20 to 30 days longer to try as a capital case than as a non-capital case, then the extra cost in terms of trial court operation would be $46,640 to $69,960." WASH. STATE BAR ASS'N, *supra* note 17, at 18.

[21] It is beyond the scope of this analysis to say what a day in court "costs" the State of Colorado, or the individual jurors, family members, and others who attend and/or participate in the proceeding.

II. METHODOLOGY

The first step was to identify a data set of death penalty jury trial cases that would provide the best means to make a relevant comparison to the present and future costs of death penalty prosecutions. We began with the docket sheets and court information gathered for the CDPES, which included cases initiated between January 1, 1999 and December 31, 2010.[22] This set included thirteen death prosecutions that resulted in jury trials and nine death cases that resulted in a plea bargain rather than a completed trial (including one plea bargain entered during the guilt-innocence trial).

Next, we isolated those death prosecution/jury trial cases that occurred after the United States Supreme Court's landmark 2002 decision, *Ring v. Arizona*. In *Ring*, the Court ruled unconstitutional death penalty schemes like Colorado's, in which judges – not juries – were exclusively responsible for assessing who was eligible for the ultimate punishment.[23] Of the thirteen death prosecutions that resulted in either a completed guilt phase or sentencing phase trial,[24] eight occurred prior to *Ring*.[25] Because these eight pre-*Ring* cases arose prior to the constitutionally-mandated role of jury involvement in capital sentencing, they are less instructive as to the present cost and projected future cost of capital prosecutions under Colorado's post-*Ring* jury sentencing scheme. We thus used the post-*Ring* death penalty trials. These included the five cases found in the CDPES data.[26] In addition to this set, we added one additional case that fell outside the CDPES study range, but for which a capital sentencing jury trial was held in late 2003.[27] These six cases we

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[22] During the twelve-year period of time covered by the CDPES data, there were twenty-two death penalty prosecutions. Marceau et al., *supra* note 19. Information regarding the death prosecutions is contained in Appendix I, *infra*.

[23] Ring v. Arizona, 536 U.S. 584 (2002); Woldt v. People, 64 P.3d 256 (Colo. 2003). *See* People v. Montour, 157 P.3d 489 (Colo. 2007) (declaring a right to jury sentencing even when a defendant enters a guilty plea rather than going to trial). The General Assembly responded to *Ring v. Arizona* with passage of Laws 2002, 3rd Ex. Sess., Ch. 1, § 2, eff. July 12, 2002, which restored jury capital sentencing proceedings to Colorado. *See Woldt*, 64 P.3d at 259.

[24] In one of the thirteen, the death penalty was barred because, prior to the trial, the defendant was found to have mental retardation and was thus ineligible for the death penalty. People v. Vasquez, 84 P.3d 1019, 1020 (Colo. 2004). In another, the death penalty was barred after the trial, but before the judge-sentencing proceeding was scheduled to begin. In the interim, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 609 (2002), which declared judge-sentencing proceedings unconstitutional. In *Hagos*, the General Assembly passed a law designed to subject Hagos to a death penalty jury sentencing proceeding, but that law was held to violate the Colorado Constitution's prohibition on special legislation. *See* People v. Hagos, 110 P.3d 1290, 1291 (Colo. 2005). In addition to these thirteen completed or scheduled trials, there was one case that resulted in a mid-trial guilty plea. *See infra* Appendix 1 (*Than*). We treat this case as a guilty plea case.

[25] *See Woldt*, 64 P.3d 256 (declaring Colorado's three-judge capital sentencing statute unconstitutional in light of *Ring*).

[26] These included People v. Bueno (Lincoln County No. 2005CR73), People v. Perez (Lincoln County No. 2005CR74), People v. (Sir Mario) Owens (Arapahoe County No. 2006CR705), People v. Robert Ray (Arapahoe County No. 2006CR697), and People v. Montour (Douglas County No. 2002CR782). In Montour, a 2003 death sentence was imposed by a single-judge sentencing proceeding that followed entry of Montour's pro se guilty plea. The death sentence was reversed on appeal because the procedure violated *Ring v. Arizona*. People v. Montour, 157 P.3d 489 (Colo. 2007). In 2013, finding that "justice will be subverted if Mr. Montour is not allowed to withdraw his guilty plea," the trial judge permitted Mr. Montour to withdraw the plea. People v. Montour, Douglas County (Colorado) No. 02CR982, Order [2013-04-09] D-325, at 14. As of this writing, the jury trial is scheduled for 2014. For *Montour* case data, we have used actual pretrial proceedings as of June 1, 2013, and used future scheduled dates to calculate the projected trial date and the projected court days required for trial (which have been added to the time spent in the 2002-2003proceedings).

[27] People v. (Dante) Owens (Arapahoe County No. 1998CR2729). An LWOP sentence was imposed in 2004 following a jury sentencing trial. Because prosecution commenced in 1998, this case was outside the time parameters of the CDPES and thus was not included in that study. While the State Judicial Department indicated that large sets of data prior to 1999 was not searchable, individual case data is retrievable. Therefore, to be as thorough as possible, we have included this case, because it is a post-*Ring* death prosecution/jury trial and cost data (as measured in court days and length of time from charge to sentence) is available. A few other death

refer to herein as "death prosecution/trial" cases.[28] We believe this dataset includes every post-*Ring* death prosecution jury/trial case.

To form our comparison dataset for LWOP prosecutions, we identified more recent post-*Ring* cases. Using the CDPES dataset, and going back to 2005,[29] we identified 148 first degree murder cases that resulted in a trial, a conviction, a sentence of LWOP, and a finding by the CDPES that there were one or more aggravators in the case.[30] The 148 LWOP trial cases represent seventeen (17) counties throughout the State of Colorado and include the vast majority of such cases in the state between January 1, 2005 and December 31, 2010. In this analysis, we refer to these 148 aggravated first-degree murder cases as the "LWOP prosecution/trial" cases.

Using the court docket entries gathered for the CDPES, we quantified the time cost of prosecutions by calculating the number of court days spent in the four categories: (1) pretrial proceedings; (2) voir dire; (3) trial; and, if applicable, (4) sentencing. We averaged the court days required for the six death prosecutions and the court days required for the 148 LWOP prosecutions. By comparing the average number of court days required for a death prosecution to the average required for an LWOP prosecution, we are able to get a relative sense of the cost of Colorado's death penalty. We used the following basic procedures for calculating the number of days for each of the four categories: First, for purposes of simplicity, if any proceedings were conducted in court on a particular day, that day was counted as a court day even if the proceeding did not take the entire day. If, however, two proceedings occurred on the same day, for example, the final day of a trial and the first day of sentencing), we did not double count. Instead, when the sentence was imposed on the last day of trial, it was treated as a trial day (and not a sentencing day). By contrast, if the sentence was imposed on a separate day, that was counted as a full day even if the sentencing did not take a full day.[31] In addition, if a case was re-tried following a mistrial, the second round of pretrial hearings, voir dire, and trial was added to the first round for a total figure in each category for the case.

In addition to calculating average number of court days required, we also calculated the average total length of time required for the trial-level proceedings in the

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prosecutions were commenced prior to January 1, 1999 and continued with proceedings after that date; however, they were not included here because none of them involved a jury sentencing trial (as did the Dante Owens case). Therefore, none of the others could provide relevant information for the calculation of the costs of a death prosecution/jury trial.

[28] Four of the six death prosecution/jury trial cases involved a jury trial of guilt and of sentencing (Bueno, D.Owens, Ray, and S. Owens), one resulted in an acquittal at trial (Perez), and one is currently pending a guilt-innocence jury trial following a guilty plea that was later withdrawn following a successful appeal of the judge-imposed death sentence (Montour).

[29] Again, we use the more recent cases because only these cases fairly represent the likely costs imposed by a trial, insofar as prior to this date jury sentencing was not required in capital cases and the length of the sentencing trials and total number of court days was likely lower than it would be had that same trial been held today.

[30] The existence of an aggravating factor makes the defendant who is guilty of first-degree murder death eligible. *See* Marceau et al., *supra* note 19 (manuscript at 11). We used the most serious first-degree murders because we assumed that these cases, in general, would consume more time than second degree or less serious first degree murder cases and would therefore enable us to most closely isolate the additional costs associated with pursuit of the death penalty. We used first degree murder convictions to build in additional assurance that we were matching as closely as possible the egregiousness of the two sets.

[31] Because an automatic LWOP sentence is required for a first degree murder conviction, counting a sentencing as a full day of court tends to exaggerate the costs of an LWOP murder conviction and thus understate the relative amount of time costs imposed by a death penalty sentencing proceeding.

case, *infra* Figure 3. For this calculation, the charge date and final sentence date were used, but any appeals or post-conviction proceedings were not considered.[32]

III. RESULTS: COSTS OF THE DEATH PENALTY

A. Cost of Death Penalty Prosecutions that Go to Trial

On average, a death prosecution/jury trial case consumes approximately 148 days in court, not including any post-conviction proceedings or appeals. This consists of approximately 85 court days of pretrial hearings, 26 days of voir dire, 19 days of presentation of evidence at the trial to determine guilt or innocence, and an additional 21 days in court for the jury sentencing proceeding. These findings appear in Figure 1:

Defendant	Year Sentenced	Pretrial	Voir Dire	Guilt Phase	Sentencing	Total	Result
Bueno	2008	49	30	13	6	98	Jury LWOP verdict
Montour	2014 (scheduled)	120	29	23	23	195	Pending trial now
Owens, D.	2004	98	14	18	14	144	Jury LWOP verdict
Owens, S.	2008	74	25	27	27	153	Jury DP verdict
Perez	2011	62	6	10	n/a	78	Acquittal
Ray	2010	108	52	23	35	218	Jury DP verdict
Average Court Days:		**85.2**	**26**	**19**	**21**	**147.6**	

Figure 1. Days of Court Required for Post-Ring Colorado Death Penalty Jury Trials, by Stage of Proceeding[33]

As illustrated below in Figure 2, the comparison between the number of days spent prosecuting a death penalty case and the number of days spent prosecuting an LWOP case, even though the defendant is in fact death eligible,[34] is stark. There is a marked savings in time and resources when the State opts to pursue LWOP instead of a sentence of death. The LWOP cases required only an average of 24½ total days in court, as follows: 14 court days of pretrial hearings, 1.5 court days of voir dire, 8 court days of trial, and less than a day of court sentencing proceedings.

[32] Given that there is a statutory right to counsel in Colorado state court for post-conviction proceedings when a death sentence has been imposed, and on federal habeas review for death penalty defendants, the amount of time and cost for post-conviction litigation would also be considerably higher for death penalty cases as compared to other murder convictions.

[33] As noted, Montour's case is included because court scheduling orders permit projection of the number of days set aside for trial and any jury sentencing proceeding.

[34] See *supra* note 30.

Type of Case	Pretrial Hearings	Voir Dire	Guilt Phase	Sentencing	Total
Death Prosecution/jury trials (n=6)	85.20	26	19	21	147.60
LWOP Prosecutions/jury trials (n=148)	14	1.50	8.20	0.78	24.48

Figure 2. Comparison of Average Number of Days in Court for Death Prosecution/jury trials and LWOP Prosecutions/jury trials[35]

On average, a death prosecution that goes to trial requires over six times more court days than a comparable LWOP prosecution. The differences at each stage of the case are striking. Voir dire in an average LWOP case takes about a day and a half, but for an average death prosecution the jury selection takes an average of 26 court days. Similarly striking is the cost of a capital sentencing hearing as opposed to an LWOP sentencing proceeding. A capital sentencing proceeding takes an average of 21 days in court), but because a first-degree murder conviction carries a mandatory sentence of LWOP, the LWOP sentencings are almost always simultaneous with the jury's rendering of a verdict of guilty and usually take a matter of minutes..

B. Total Length of Time Between Charge and Imposition of Sentence

Another way that some studies have expressed "cost" of death penalty prosecutions is by reporting the length of time that it takes to resolve a death prosecution as compared with an LWOP prosecution.[36] Victims' families, attorneys, jurors, judges and others experience financial and other hardships when cases take a very long time to resolve. One national organization composed of relatives of murder victims who stand opposed to the death penalty, Murder Victims' Families for Reconciliation, has explained that "[t]he death penalty delays justice and it delays the healing process. Capital cases often take 25 years or more to reach completion, all the while keeping victims' families stuck in the system much longer than is the case with non-capital trials."[37]

Because our study of costs is focused on data relating to the days required to complete a trial and sentencing only – not appeals – we cannot draw firm conclusions about the total length of time needed to bring a death penalty case to "completion." However, our trial level data confirm the fact that a Colorado death prosecution takes longer to resolve than an LWOP prosecution. In fact, as Figure 3 demonstrates, a death prosecution case takes dramatically longer to resolve – even in the trial court, and even if a death sentence does not result.

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[35] As noted above, this is based upon all six of the Colorado post-*Ring* death penalty jury trials that either have occurred (Bueno, D. Owens, S. Owens, Perez, Ray) or are scheduled (Montour), and the set of 148 LWOP prosecutions (1) in which death was not sought, (2) that were commenced on or after January 1, 2005, and (3) that resulted in a conviction for first-degree murder and an LWOP sentence.

[36] *See, e.g.*, Terance D. Miethe, *Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys*, Department of Criminal Justice, University of Nevada, Las Vegas (Feb. 21, 2012), *available at* http://aclunv.org/files/clarkcostreport.pdf.

[37] *How it Causes Harm*, MURDER VICTIMS' FAMILIES FOR RECONCILIATION, http://www.mvfr.org/how-it-causes-harm/ (last visited Feb. 7, 2013).

Type of case	Average length of time from charge to sentence	Additional time from charge to sentence required for death prosecution/jury trial
LWOP prosecution/ Jury trial (n=148)	526 days	--
Death prosecution/ Jury trial (n=6)	1902 days	1376 days for death prosecution (1902 – 526 = 1376)

Figure 3. Comparison of delay in jury trial cases for death and LWOP prosecutions, as measured by average days from filing of charge to imposition of sentence

Figure 3 illustrates that a death penalty trial prosecution takes much longer from charge to sentence than does an LWOP prosecution that goes to trial. Assuming both cases go to a jury trial, the death prosecution takes, on average, 1,902 days, or almost four calendar years longer in district court than an LWOP prosecution.[38]

C. Total Cost of Maintaining the Death Penalty System

As illustrated above, the per-case cost (as measured in number of court days required and length of time from charge to sentence) of a death penalty trial and sentencing compared to an LWOP trial and sentencing is staggering. The total amount of delay and the number of court days required for an LWOP prosecution are a fraction of those required for a death prosecution. Moving beyond the per-case costs, we wanted to know the aggregate cost (as measured in court days required and length of proceedings) of Colorado's death penalty prosecutions. In other words, we wanted to know how many total death prosecutions have been funded by the criminal justice system, with what results.

One methodology might have been to go back to Colorado's reinstatement of the death penalty in 1979,[39] determine the aggregate costs of all of the death penalty prosecutions, and compare this against the "benefit" of the 1997 execution of Gary Davis, who is the only person executed in Colorado since *Gregg v. Georgia* re-authorized the use of capital punishment.[40] However, given the unavailability of electronically-searchable data going back that far, and the fact that capital litigation has grown exponentially in

[38] Even though our focus of this study is on delay in trial court proceedings, we can offer some general observations about the added delay to appeals caused by a death prosecution. Two relatively recent developments in Colorado law have had a dramatic impact on the number of years it takes to resolve a death prosecution. The first was in 1997, when Colorado adopted a unique system for death penalty appeals, which requires defendants to file their post-conviction claims before the appeal can even begin. COLO. REV. STAT. ANN. § 16-12-201 (West 1997). The practical effect of this reform has been to delay the filing of a direct appeal for several years. Second, in 2002, for the first time, Colorado amended its statute to provide for a remand for resentencing in the event that a death sentence is reversed on appeal. COLO. REV. STAT. ANN. § 18-1.3-1201(7) (West 2002). Previously, when a death sentence was reversed, the automatic penalty was life imprisonment without parole ("LWOP"). While only one case has been through this new process so far (Montour), the impact on delay of the case can already be seen. Montour's case was reversed on appeal in 2007, but instead of the automatic imposition of a sentence of life imprisonment without parole, the case was remanded for resentencing. Later, citing unreliability of the pro se guilty plea Montour entered in 2003, the trial court permitted him to withdraw it and set the case for a guilt-innocence trial in 2014 – more than eleven years since the killing that spurred the death penalty prosecution. *See supra* note 26 and citations therein.

[39] Laws 1979, H.B.1269, § 1. This was the first post-*Furman v. Georgia* legislation that was held to be constitutional. See *People v. Dist. Ct.*, 196 Colo. 401, 586 P.2d 31 (Colo. 1978). *See Furman v. Georgia*, 408 U.S. 238 (1972).

[40] *See* Gregg v. Georgia, 428 U.S. 153 (1976).

complexity over the past three decades, such research might have little present-day utility in projecting the present and future costs of Colorado death penalty prosecutions. Thus, we return to the CDPES data as it is a comprehensive, recent, and reliable dataset.

Colorado paid for twenty-two new death prosecutions between January 1, 1999 and December 31, 2010,[41] but (as of this writing in June 2013), has to show for it only five death penalty sentencing proceedings,[42] two possible future executions (Ray and Owens), and the right to continue to seek the death penalty against Montour. The cost of death prosecutions in Colorado is high, and the execution yield is extraordinarily low.

Colorado appears to have a long history of spending resources on many death prosecutions, but coming up with almost no death sentences and even fewer executions.[43] Since 1980, Colorado has paid for well over 110 death prosecutions, but executed only one man, Gary Davis.[44] Perhaps because of the complex procedures involved in attempting to ensure that only the guilty and the deathworthy are executed, most death sentences in Colorado have contained legal, procedural, or constitutional errors such that they had to be reversed on appeal or by later trial court proceedings. Out of a dozen death sentences imposed since 1976, only three case were not reversed on appeal: that of Gary Davis (who was executed in 1997), Frank Rodriguez (who died of natural causes on death row), and Nathan Dunlap (who was just granted an indefinite "temporary reprieve" by the Governor of Colorado).[45] Thus, the fact that a Colorado case may initially result in a death sentence is not a reliable predictor of whether the defendant will, in fact, ever be executed.

It may be a matter of subjective judgment whether the execution rate (less than one execution out of over 110 prosecutions), or the reversal rate (9/12, or 75%) should be regarded as a failure. Even if the death penalty machinery does not produce any executions, it is possible that there is some societal value or good generated by the system (other than executions). But if the point of paying for and maintaining a death penalty system is to produce executions, it can hardly be disputed that Colorado has failed miserably in that regard. Whatever else Colorado's death-prosecution money is buying, it is not buying executions.

Given the undisputable fact that Colorado's death penalty money is not buying executions, it is reasonable to query whether there is some other "commodity" that can be attributed to maintenance of Colorado's death penalty system, and that makes the enormous expenditures worthwhile. There are only two possible arguments that have been offered to justify maintenance of a death penalty system that results in almost no

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[41] The 22 cases are listed in Appendix 1. There was litigation after January 1, 1999 in death prosecutions that were commenced prior to January 1, 1999 and therefore were not included in the CDPES. None resulted in a final death sentence or execution. *See* Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549, 592 (2006). No death sentences resulted from any of the prosecutions. Since December 31, 2010, two additional death penalty prosecutions have been commenced and are noted on Appendix 1; one resulted in a guilty plea and sentence to LWOP for a double homicide, while the other is still pending as of this writing.

[42] *See infra* Appendix 1 (*Montour*, *Paige*, *Bueno*, *Ray* and *Owens*).

[43] *See, e.g.*, Hindson et al., *supra* note 42, at 580-82. As noted above, there were a few death prosecutions immediately preceding the study period, and another shortly after; however, none resulted in an execution or even a final death sentence.

[44] *Id.* at 580, 587 (identifying 110 death prosecutions between 1980 and 1999. There have been an additional thirteen death prosecutions since the conclusion of their investigation). *See infra* Appendix 1.

[45] *Id.* at 586-88. Two additional death sentences were untested by an appeal, but did not result in a Colorado death sentence, because in one the defendant committed suicide (Johnnie Arguello), and in the other the defendant waived his Colorado appeals and was executed by another State (Steven Morin). Hindson et al., *supra* note 42.

executions: leverage in negotiations for swift plea bargains, and general deterrence. In the next sections, we offer a cost-benefit assessment of both of those claims.

IV. BENEFITS OF THE DEATH PENALTY: GUILTY PLEAS AND DETERRENCE

In order to properly appreciate the value of death penalty prosecutions, it is necessary to compare the costs of such prosecutions, as identified in this study, with the benefits of the death penalty prosecutions. On one end of the scale, as our study shows, the costs of the death penalty in Colorado are strikingly high. The benefits, however, appear to be illusory.

Although there exists a wide range of moral arguments that one might level in favor of capital punishment,[46] just as we limit our discussion of costs to quantifiable costs, so too do we limit our examination of benefits. We consider the potential savings associated with the death penalty because of the rise in number and efficiency of plea bargains in cases where death is charged, and we consider the deterrence benefits of the death penalty.

A. Does the Death Penalty Save Money by Resulting in Swift Guilty Pleas?

To test the hypothesis that the threat of the death penalty prompts swift guilty pleas and thus reduces the costs of prosecution while still ensuring an LWOP sentence, we examined death prosecutions that resulted in guilty pleas to first degree murder and resulted in an LWOP sentence. In short, we wanted to see whether existence of Colorado's death penalty system provides a speedy path to an LWOP sentence such that the savings in the guilty plea cases could offset the expenses of maintaining the death penalty system in the non-plea cases.[47]

Approaching this inquiry requires two steps: (1) comparing the costs involved in the death prosecution/LWOP plea cases to the costs of successful LWOP jury trial prosecutions, and (2) comparing the costs involved in "failed" death penalty jury trial prosecutions – i.e., those in which death is pursued all the way through trial, but no death sentence results – with any savings in the death prosecution/LWOP plea cases to determine whether the savings in the plea cases offset the expenses in the failed death prosecutions. Each of these inquiries yields information about whether maintenance of a death penalty system can be justified by its value in producing guilty pleas to LWOP sentences.

1. Costs in Death Prosecution/LWOP Plea Cases[48]

Prosecution for the death penalty rarely results in a plea of guilty to first degree murder.[49] It happened in Colorado only five times during the CDPES study period.

[46] Of course, moral arguments for and against the death penalty all presume a system that results in executions, not a system like Colorado's, which primarily results in process, not executions.

[47] Even though there are many reasons a defendant might enter a guilty plea, and in any given case the plea may not be the result of a defendant's fear of receiving a sentence of death, we examined all guilty pleas without regard for the motivation behind them; in other words, we essentially "credit" the death penalty prosecution with having produced the guilty plea, even if the plea was entered for completely independent reasons.

[48] There were four guilty pleas to a lesser offense. *See* Appendix 1. We did not analyze guilty pleas to lesser offenses for either death prosecutions or LWOP prosecutions, because we wanted the most precise comparison possible between the post-*Ring* dataset of LWOP prosecution/jury trial cases, and, presumably, a plea to a lesser offense can be induced by the threat of an LWOP sentence anyway, making it difficult to isolate the coercive effect of the death prosecution. Thus, assessing or comparing the costs of the non-LWOP guilty plea cases is beyond the scope of this article.

Because there was such a small sample size for the death prosecution/LWOP plea cases (n=5), we expanded the set to include the Sher case, which is the only case that arose after the conclusion of the dataset for the CDPES. We call these six cases the "death prosecution/LWOP plea cases." They are shown in Figure 4.

County	Year Prosecuted	Defendant	Result	Court Days	Length of Time
Denver	1999	Ramirez	LWOP (2 counts)	17	1216
Denver	1999	Than	LWOP (2 counts)	30	736
El Paso	1999	Albert	LWOP	12	499
El Paso	2006	Lee	LWOP	24	746
Douglas	2006	Rubi-Nava	LWOP	41	882
Douglas	2011	Sher	LWOP (2 counts)	17	389
Total spent on death prosecutions/LWOP plea cases (n=6)				**141**	**3798**
Average per case for death prosecution/LWOP plea cases (n=6)				**23.5**	**633**

Figure 4. Colorado death penalty prosecutions that resulted in a guilty plea to first degree murder and an LWOP sentence, cases commenced after January 1, 1999

The next step is to compare the death prosecution/LWOP plea cases with the set of LWOP cases examined above, *i.e.*, the 148aggravated first degree murder cases that resulted in a conviction and LWOP sentence following a jury trial and that could have been, but were not, prosecuted as death penalty cases ("LWOP prosecution/trial cases"). Figure 5 reports the results.

Type of Case	Average court days	Average length (in days)	Comparison to LWOP/jury trial case	
			Average Court Days	Average Length from Charge to Sentence
LWOP prosecution/jury trial cases (n=148)	24.48	526	--	--
Death prosecution/LWOP plea cases (n=6)	23.50	744.66	1 less day	218.66 more days

Figure 5. Comparison of average number of days in court and average length of time required for prosecutions that resulted in convictions for first degree murder, by type of prosecution

[49] *See infra* Appendix 1. To be sure, the prosecution may have threatened a sentence of death in other cases even though they did not explicitly notice the case as a death penalty case. However, there is no way to measure exactly how common such threats are. Nor is there a way of knowing how plausible a death prosecution was in such cases when the prosecution did not even identify one or more aggravating factors in the required charging instrument.The aggravating factors and the decision to seek death must be made within 63 days of the preliminary hearing. COLO. CRIM. P. § 32.1(b) (West 2012).

As a per-case average, it takes more court days to prosecute a death penalty case, even if it results in a guilty plea to LWOP, than it takes to simply prosecute the case as an LWOP jury trial. Figure 5 shows that a death prosecution that results in a *guilty plea* to first degree murder takes an average of about 23 ½ court days, while only about 24 ½ court days are required if the case *goes to trial* and results in a conviction for first degree murder and an LWOP sentence. That is to say, a death prosecution guilty plea costs about the same as an LWOP trial, as measured in court days required.

As measured by our other "cost" factor – length of time from the date of charge to the date of sentencing, the facts also belie the claim that death prosecutions result in speedier justice. The average length of time from filing of charge to imposition of sentence in the death prosecution/LWOP plea cases is 744.66 days, or over 218 days longer for the death prosecution/LWOP plea cases than for the LWOP prosecution/jury trial cases.

These findings substantially undermine the claim that death prosecutions are more efficient because the threat of a death sentence induces a swift or less expensive guilty plea to a first degree murder charge.

As shown in Figure 5, the death prosecution/LWOP plea cases took about a day less in number of court days over the LWOP prosecutions that went to jury trial, but took, on average, a year-and-a-half longer to get from charge to imposition of sentence. These results reveal no empirical support for the claim that the death penalty is cost-effective based on its ability to induce guilty pleas to first degree murder.

As will be seen next, however, a complete cost analysis must take into account that, in order to induce the occasional guilty plea to first degree murder (and to obtain the even more rare death sentences), Colorado must maintain a death penalty system that exacts costs even when it fails to produce executions or guilty pleas to first degree murder.

2. Marginal Costs of Failed Death Penalty Prosecutions

A 2012 analysis of empirical data from Georgia, analyzed by Sherod Thaxton, the Dickerson Fellow at the University of Chicago Law School, suggests that the benefit of induced plea bargains resulting from the threat of execution is illusory at best:

> The empirical findings in this article suggest that the threat of the death penalty has a substantial *causal* effect on the likelihood that a defendant accepts a plea agreement. Nevertheless, the magnitude of the effect is clearly insufficient to offset the substantial administrative and financial costs arising from the occasional capital defendant taking her chances at trial (or, in some instances, even the capital case that incurs significant pre-trial or pre-penalty phase cost prior to a plea agreement). The government's use of the death penalty to obtain convictions quickly and cheaply appears to fail on both of these dimensions—and this may be particularly true in marginal cases because the likelihood of trial, a non-death sentence, or a reversal on appeal is particularly high.[50]

In other words, there is a distinct probability that the death prosecutions that result in guilty pleas would have cost the State the least to try. In contrast, the death prosecutions that actually go to trial may be the marginal ones in which, as Thaxton notes, the chance is lower that a death sentence will result and survive an appeal.

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[50] Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY (forthcoming 2013), *available at* http://ssrn.com/abstract=2138627.

As Thaxton notes, the marginal costs or savings in the death prosecution/LWOP plea cases must include the cost of not merely those cases themselves, but also the cost of maintaining the entire death penalty machinery, without which there is no credible threat of execution which, as the theory goes, is a prerequisite to inducing the guilty plea.[51] Thus, the costs of the entire system must be placed into the mix, including the cost of the "failed" death penalty trial prosecutions – *i.e.*, the cases that are pursued right up to or through trial, and sometimes even through a capital sentencing proceeding, but without a death sentence or execution resulting.

Using our dataset, we first identify Colorado's "failed" death penalty prosecutions and calculate an average per case cost (measured in court days). These are shown in Figure 6.

County	Case No.	Defendant	Result	Court Days
Denver	1999CR2029	Donta Paige	LWOP (judge sentencing)	51
Denver	1999CR2738	Abraham Hagos	DP barred after trial because of Ring v. Arizona; LWOP	56
Teller	2000CR178	Anthony Jimenez	convicted of lesser charge	167
Adams	2000CR1675	Manuel Melina	convicted of lesser charge	42
Adams	2000CR634	John Sweeney	convicted of lesser charge	38
Adams	2000CR638	Jesse Wilkinson	convicted of lesser charge	32
Weld	2002CR457	Allen Bergerud	Hung jury; death penalty dropped before retrial. Convicted in 2nd trial, LWOP.	92
Adams	2002CR2231	Jimmy Vasquez	DP barred before trial because of mental retardation; LWOP	48
Lincoln	2005CR73	David Bueno	Jury LWOP verdict	98
Lincoln	2005CR74	Alejandro Perez	Acquitted of all charges	78
Total days spent on failed death prosecutions			1 Acquittal 4 Convicted lesser charge	**702**
Average court days per case			5 LWOP sentences 0 death sentences	**70.2**

Figure 6. Colorado death penalty trial prosecutions that did not produce a final death sentence, cases commenced after January 1, 1999

In Colorado, including all death prosecutions commenced since January 1, 1999, there were ten "failed" death penalty cases that went through trial (and in two cases, through a capital sentencing proceeding), even though no death sentences resulted. (In five of the ten, the trial did not even result in a first degree murder conviction). In total, 702

[51] *Id.* at 52-53.

court days were spent on these death prosecutions. On average, each case required approximately 70 days in court.

Figure 7 shows the comparison between the average number of court days required to litigate an LWOP prosecution/trial case to conclusion, as compared to a "failed" death penalty prosecution – *i.e.*, one that does not result in a death sentence.

Type of Case	**Average Total court days**
LWOP prosecution/jury trial cases (n=148)	24.48
Failed Death prosecution/jury trial cases (n=10)	70.2
Total Additional Average Court Days for Failed Death Prosecution/Trial Cases	+45.72

Figure 7. Comparison of Average Number of Days Required for "Failed" Death Prosecution/Trial Cases and LWOP Prosecution/Trial Cases

The failed death penalty prosecutions require substantially more court days than do the LWOP trial prosecutions: on average, 45.72 *more* days in court are required for the failed death penalty prosecutions as compared to an LWOP trial. This is in marked contrast to the mere savings of approximately one *less* court day required on average when a death penalty prosecution results in an LWOP plea instead of trial.

The next step is to calculate what Colorado would have spent on ten average LWOP prosecution/trial cases. We take the average 24.48 days (as shown in Figure 2) for the average LWOP prosecution/trial case and multiply it by ten (the number of failed death penalty prosecutions) for a total of 244.8 days that would have been required to simply litigate the failed death prosecutions as LWOP trial prosecutions. Instead, as shown above in Figure 6, Colorado spent 702 court days on those ten death prosecutions.

Thus, using actual data from the cases, it is possible to answer the question whether, for cases commenced since January 1, 1999, Colorado "saved" more court days by prosecuting cases for the death penalty but then accepting a guilty plea to first degree murder and an LWOP sentence. Colorado "saved" approximately six court days by inducing the six guilty pleas to first degree murder, but, above and beyond the cost of those six cases, "spent" 702 additional court days on ten failed death penalty prosecutions, for a net "cost" of 696 days.

In conclusion, in order to make the death penalty system available to "save" about a day in court on each death prosecution/LWOP plea cases, Colorado has to maintain massive expenditures of court days on death prosecution cases that fail to produce death sentences or executions. It is apparent that the marginal savings of the death prosecution/LWOP plea cases are overwhelmed by the marginal costs of the failed death penalty trial cases. A final question remains, however: in spite of the fact that the Colorado death penalty scheme does not result in executions and is vastly more expensive (even accounting for induced LWOP guilty pleas), is there some clear benefit that overwhelms the enormous cost of the system? Proponents of the death penalty sometimes argue that it deters other people from preventing murder. That potential benefit is explored next.

B. Does the Death Penalty Deter Future Murders?

Although it is commonplace to assert that the death penalty is an effective deterrent, recent independent studies undermine this conclusion. Stated differently, although the costs of the death penalty in Colorado are high, the deterrence benefits appear to be entirely speculative.

For decades, scholars have produced conflicting empirical research regarding the effect of capital punishment as a deterrent for homicide; for each article finding a deterrent effect at least one paper finding no such effect was published. In the face of such conflicting empirical conclusions, the National Research Council convened an independent committee to study whether the available data supports the conclusion that the death penalty has a deterrent effect.[52] The findings of this committee, published by the National Academy of Sciences in 2012, are that it is impossible to conclude that the death penalty serves as a meaningful deterrent.[53] Specifically, the committee summarized its findings and conclusions by saying:

> The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.[54]

The most current, comprehensive, and neutral study of the deterrent effect of capital punishment, therefore, concludes that there is no evidence that the death penalty provides even a marginal deterrent benefit above a long prison sentence.[55]

Notably, other recent academic studies have gone even further in suggesting that there is no connection between the death penalty and deterrence. For example, a recent study reported that 88% of the country's top criminologists surveyed do not believe the death penalty acts as a deterrent to homicide.[56] It is safe to say that there is a consensus among leading researchers that the death penalty either does not deter, or that there is no evidence that it deters.

Moreover, it is worth pointing out that any conclusion about the limited deterrence value of the death penalty in general is particularly salient in Colorado where the rate of executions is staggeringly low. Since the reinstatement of the death penalty in

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[52] NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 33 (Daniel S. Nagin & John V. Pepper eds., 2012), *available at* http://www.heinz.cmu.edu/download.aspx?id=3271.

[53] *Id.* at 2.

[54] *Id.*

[55] Notably, the committee also notes that it is unable to conclude that the death penalty has no deterrent effect. Simply put, the findings are that there is no evidence in support of a deterrence thesis; the studies to date have failed to show that the death penalty deters or does not deter crime. *Id.* at 3 ("A lack of evidence is not evidence for or against the hypothesis.").

[56] Michael L. Radelet and Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views Of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 505-506 (2009) (eighty-seven percent concluded that the abolition of the death penalty would not have a significant effect on murder rates and 75% believe that "debates about the death penalty distract Congress and state legislatures from focusing on real solutions to crime problems.")

Gregg v. Georgia,[57] Colorado has only executed one person.[58] If one accepts that actual executions are required in order to generate a meaningful deterrent, then even assuming capital punishment is capable of deterring homicides elsewhere, in Colorado the non-existence of actual executions may have stripped the death penalty of any deterrent value.[59] We do not suggest that the absence of executions in Colorado proves that the state's death penalty is without any deterrent benefit, but it is worth pointing out that the as-yet unsubstantiated deterrence theory is probably even more attenuated in Colorado.[60] With the lack of demonstrable deterrent effect in *any* state, it would be implausible that the death penalty could have any deterrent effect in a state where only one person has been executed since 1967. And given that the most current research does not find any deterrent effect for the death penalty across the United States, the prospect of a deterrent benefit in Colorado seems particularly illusory.

V. CONCLUSION

This essay summarizes the quantifiable costs of the death penalty. We do not address the argument that these sentences impose a moral injury on society. Likewise, in summarizing the benefits of the death penalty, we have focused exclusively on quantifiable benefits and avoided arguments about the moral imperative of the death penalty. Our findings are unequivocal: Colorado's death penalty imposes tremendous costs on taxpayers and its benefits are, at best, speculative, and more likely, illusory.

Specifically, we found that death prosecutions require substantially more days in court, and take substantially longer to resolve, than non-death-prosecuted first degree murder cases that result in a sentence of LWOP. The costs of these prosecutions are not offset by any tangible benefit. Our study shows that not only are death penalty prosecutions costly compared to non-death cases, but the threat of the death penalty at the charging stage does not save costs by resulting in speedier pleas to first degree murder. The difference in court days between guilty pleas in death prosecution cases and complete trials in LWOP prosecution cases is negligible and overwhelmed by the exponentially-increased number of days required for failed death penalty prosecutions that result in neither a plea bargain nor a death sentence.

The substantial cost of the death penalty cannot be justified by the possibility of future deterrence insofar as social scientists increasingly agree that the deterrence benefits of the death penalty are largely non-existent in general, and the deterrent value is likely even less in Colorado where there has been only one execution in three decades. In short, the death penalty imposes a major cost without yielding any measurable benefits.

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[57] 428 U.S. 153 (1976).

[58] *See* Hindson et al., *supra* note 42, at 587 (describing case of Gary Davis).

[59] *See* NAT'L RESEARCH COUNCIL, *supra* note 53, at 33 ("Among states that provide authority for the use of the death penalty, the frequency with which that authority is used varies greatly. . . . [S]ince 1976 three states—Florida, Texas, and Virginia—have accounted for more than one-half of all executions carried out in the United States, even though 40 states and the federal government provided the legal authority for the death penalty for at least part of this period. Constructing measures of the intensity with which capital punishment is used in states with that authority is a particularly daunting problem.").

[60] *Id.* at 29 ("The theory of deterrence is predicated on the idea that if state-imposed sanction costs are sufficiently severe, certain, and swift, criminal activity will be discouraged."); *but see id.* at 33 ("[A]ctual frequency of executions may not alter would-be murderers perceptions of the risk of execution and therefore not alter behavior even if there is a deterrent effect.").

APPENDIX 1

Cost Study Death Prosecutions in Colorado, by year of prosecution[61]

Year	County	Defendant	Procedure	Days in Court	Length from Charge to Sentence	Result
1998	Arapahoe	D.Owens	Trial + jury sentencing trial	144	1964	LWOP (3)
1999	Denver	Ramirez	Plea LWOP (2 counts)	17	1216	LWOP (2)
1999	Denver	Than	Plea LWOP (2 counts)	30	736	LWOP (2)
1999	El Paso	Albert	Plea LWOP	12	499	LWOP
2000	Morgan	Palomo	Plea lesser	26	602	Lesser
2000	Adams	Lopez	Plea lesser	26	465	Lesser
2001	Arapahoe	Brown	Plea lesser	22	644	Lesser
2006	El Paso	Lee	Plea LWOP	24	746	LWOP
2005	Rio Grande	Medina	Plea lesser	14	372	48 years
2006	Douglas	Rubi-Nava	Plea LWOP	41	882	LWOP
1999	Denver	Paige	Trial + judge sentencing trial	51	652	LWOP
1999	Denver	Hagos	Trial	56	2246	LWOP
2000	Teller	Jimenez	Trial	167	1345	Lesser
2002	Adams	Vasquez	Trial	48	740	LWOP
2000	Adams	Melina	Trial	42	738	Lesser
2000	Adams	Sweeney	Trial	38	408	Lesser
2000	Adams	Wilkinson	Trial	32	513	Lesser
2002	Weld	Bergerud	Trial	92	1315	LWOP
2002	Lincoln	Montour	Pending trial	195	4201	pending
2005	Lincoln	Perez	Trial	78	1866	Acquitted
2005	Lincoln	Bueno	Trial + jury sentencing trial	98	854	LWOP
2006	Arapahoe	S.Owens	Trial + jury sentencing trial	153	1007	Death Sentence; pending appeals
2006	Araphaoe	Ray	Trial + jury sentencing trial	218	1520	Death Sentence; pending appeals
2011	Douglas	Sher	Plea LWOP (2 counts)	17	389	LWOP (2)

[61] This is primarily the CDPES dataset of death prosecutions commenced between January 1, 1999 and December 31, 2010, with two additions: The 1998 D. Owens case, which commenced prior to January 1, 1999, is included because there was a post-*Ring* (2003) jury capital sentencing proceeding, providing relevant information for present and future costs of death prosecutions/jury trial cases. The 2011 Sher case, which was commenced after December 31, 2010, is included because it provides relevant information about the present and future costs of death prosecution/LWOP plea cases. *See* Marceau et al., *supra* note 19 (manuscript at 23–26) (describing how the CDPES was performed).

THE DEATH PENALTY SPECTACLE

Tung Yin*

Capital punishment in the United States has a serpentine history. The death penalty was the presumed sentence for a large swath of crimes during colonial times (though often not imposed),[1] and it was not constitutionally limited to punishment for homicides until 1977.[2] The Supreme Court struck down the death penalty in 1972,[3] but, four years later, upheld the revised capital punishment schemes that numerous states had instituted in response to the 1972 decision.[4]

Since then, death penalty cases have produced plenty of spectacles. A ghastly example occurred in 1997, when Florida's electric chair malfunctioned, causing flames to burst from the condemned inmate's face mask.[5] The state Attorney General took the opportunity to warn future would-be killers, "better not do it in the state of Florida because we may have a problem with our electric chair."[6] An absurd example comes from that same year, when David Lee Herman slashed his throat and wrists with a prison razor in a suicide attempt; prison officials saved him only to continue with his execution two days later.[7]

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[1] *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 6-7 (2012).

[2] *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (striking down the death penalty as punishment for non-fatal rape). Notwithstanding *Coker*, Congress has continued to enact federal statutes authorizing capital punishment for crimes such as large scale drug dealing. 18 U.S.C. § 3591(b) (1994). In addition, espionage and treason continue to carry a potential death penalty. *Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder (last updated Feb. 14, 2013).

[3] Furman v. Georgia, 408 U.S. 238, 239-41 (1972) (per curiam).

[4] Jurek v. Texas, 428 U.S. 262, 270-77 (1976).

[5] Miraya Navarro, *Despite Fire, Electric Chair Is Defended In Florida*, N.Y. TIMES, Mar. 27, 1997, at A18.

[6] John Grogan, *Chair, Injection . . . How 'bout Guillotine?*, SUN-SENTINEL, Mar. 30, 1997, at 1B; Tim Padgett, *What's Wrong With Florida's Prisons*, TIME MAG., Oct. 17, 2007, http://www.time.com/time/nation/article/0,8599,1672366,00.html.

[7] Sam Howe Verhovek, *Halt the Execution? Are You Crazy?*, N.Y. TIMES, Apr. 26, 1998, § 4, at 4. Herman is one of many examples of inmates who have been saved after suicide attempts and still executed. *See, e.g.*, Jim Yardley, *Texan Who Took Overdose Is Executed*, N.Y. TIMES, Dec. 9, 1999, at A18 (quoting David Martin

No matter what one's ultimate feelings about the legality or desirability of capital punishment may be, it is difficult to find anything positive about Robert Alton Harris's last night. Harris was strapped into the lethal gas chamber only to be unstrapped and sent back to his cell due to a judicial stay, only then to have the stay lifted and to be strapped in again, with the process repeating itself no fewer than three times. Eventually, the Supreme Court got so fed up that it lifted the last stay of execution with a further order that "No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."[8] Harris was initially scheduled to die at 12:01 a.m., but his execution did not actually take place until after six in the morning.[9]

The Harris debacle is, of course, an extreme example of the typical situation in which capital punishment opponents, including obviously the death row inmate, take all manner of steps to try to mobilize public opinion against execution. Where there is a sympathetic defendant, the media may join in, adding fuel to the anti-capital punishment sentiment.[10] In these typical instances, the death row inmate quite understandably does not want to be put to death.

Occasionally, however, there are situations that transcend the usual spectacle of the inmate and abolitionists teaming up to try to stop the state from carrying out the execution.[11] For example, one newspaper reported that many California death row inmates, if not disenfranchised, would have voted against that state's Proposition 34, which sought to abolish the death penalty.[12] This counterintuitive assessment makes sense when one realizes that the ballot initiative would have the effect of eliminating the right to appointed counsel for post-conviction proceedings,[13] which are statutorily guaranteed only for death row inmates.[14]

But a 2011 case in Oregon goes beyond the theoretical into an actual absurdity.[15] In that case, an inmate who was condemned to death voluntarily waived his remaining appeals, clearing the way for execution.[16] His lawyers argued against his desired outcome, leading him to fire his attorneys.[17] Oregon's Governor then issued a reprieve, suspending the death sentence during his term in office—but not commuting it.[18] Enter the inmate's

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Long's lawyer as saying, "It seems like a pretty sick process when you jerk a guy out of intensive care on a ventilator. . . . What's the huge rush?").

[8] Vasquez v. Harris, 503 U.S. 1000 (1992); Charles M. Sevilla & Michael Laurence, *Thoughts on the Cause of the Present Discontents: The Death Penalty Case of Robert Alton Harris*, 40 UCLA L. REV. 345, 346, 374-78 (1992).

[9] *See* Sevilla & Laurence, *supra* note 8, at 346, 379.

[10] One example was Karla Faye Tucker, who, along with her boyfriend, broke into another friend's house to steal a motorcycle in 1983. While inside, they attacked the homeowner and his lover, killing both with repeated hammer and axe blows. Both assailants were convicted of murder and received the death penalty. Tucker later sought executive clemency on the ground that she had been under the influence of drugs at the time of the killing, and that she had since converted to Christianity and become reformed. The prison warden supported this latter contention. In part because she was scheduled to be the first woman to be executed in the United States since 1984, her case drew large media attention. She was executed in 1998 by lethal injection. Sam Howe Verhovek, *Divisive Case of Killer of Two Ends as Texas Executes Tucker*, N.Y. TIMES, Feb. 4, 1998, at A1.

[11] To be sure, many executions take place without any spectacle. *See* Bob Egelko, *Why Inmates Prefer to Keep Death Penalty; Proposition 34*, S.F. CHRON., Sept. 25, 2012, at A1.

[12] *Id.*

[13] *Id.*

[14] *See, e.g.*, Cal. Gov't Code § 68662 (West 2012).

[15] State v. Haugen, 266 P.3d 68 (Or. 2011).

[16] *Id.* at 71.

[17] *Id.*

[18] Haugen v. Kitzhaber, No. 12C16560, ¶ 4-6 (Or. Cir. Ct. filed Aug. 3, 2012).

new attorney, who brought suit to reject the Governor's reprieve, which the trial court decided to *grant*.[19] In other words, there is a strange spectacle where a death row inmate successfully sues a state Governor for interfering with the inmate's decision to be executed, only to have the Governor appeal that ruling.

This case is a fascinating commentary on, if nothing else, the fiscal waste of having the death penalty in a state that rarely sentences defendants to death (about one per year on average) and does not execute them unless they "volunteer" (only two have been executed since 1962, and both waived their remaining appeals).[20] On the other hand, while abolition of the death penalty sounds appealing, this inmate's case raises a tricky question: he was already serving a life without parole sentence when he murdered another inmate.[21] How should society punish someone like this? Another life sentence is meaningless, and even if one rejects retribution and deterrence as legitimate punishment rationales, incapacitation seems appropriate—executing him would prevent him from killing any other inmates (or guards).

There are, of course, other ways of protecting inmates from fellow inmates: maybe murderous inmates could be subject to solitary confinement for the rest of their lives. The direction of European courts, which have been ahead of our abolitionist movement, as well as the experience here in the United States with Ramzi Yousef, one of the deadliest terrorists in U.S. custody, suggests, however, that such conditions of solitary confinement may become the new Eighth Amendment battleground.[22]

I. THE DEATH PENALTY DEBATE

Currently thirty-two states, the federal government, and the U.S. military retain the death penalty as a potential punishment, almost exclusively for homicide with aggravated circumstances.[23] Debate over the legality and morality of capital punishment has existed at least since Socrates' death.[24] In the 1700s, English philosopher Jeremy Bentham launched one of the more enduring utilitarian-based arguments against the death penalty,[25] while his contemporary Immanuel Kant defended it in appropriate circumstances as just "dessert."[26] In 1972, *Furman v. Georgia* temporarily mooted the issue in the United States by holding that the death penalty, as rendered in the cases before the Supreme Court, violated the Eighth Amendment's prohibition of cruel and unusual

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[19] *Id.* at ¶ 26.

[20] Cliff Collins, *Let the Debate Begin: Oregon Lawyers with a Stake in the Issue Weigh in on the Death Penalty*, 72 OR. ST. B. BULL. 18, 18-20 (2012). *See Summary of Death Row Inmates*, OR. DEP'T OF CORRECTIONS (June 16, 2011) http://www.oregon.gov/DOC/PUBAFF/Pages/cap_punishment/cap_punishment.aspx#List_of_Inmates_on_Death_Row.

[21] Jonathan J. Cooper, *Gary Haugen, Death Row Inmate, Can Reject Clemency, Judge Says*, HUFFINGTON POST (Aug. 3, 2012), http://www.huffingtonpost.com/2012/08/03/gary-haugen-death-row-inm_n_1739775.html.

[22] *See* United States v. Yousef, 327 F.3d 56, 163 (2d Cir. 2003). *See also* Christopher R. Brauchli, *From the Wool Sack*, 30 COLO. LAW. 35, 35 (2001) (citing European leaders asking the United States to abolish the death penalty).

[23] *Crimes Punishable by Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 2011), http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty#BJS. In May 2013, Maryland abolished capital punishment, becoming the eighteenth state. *See* Joe Sutton, *Maryland governor signs death penalty repeal*, CNN, May 2, 2013, http://www.cnn.com/2013/05/02/us/maryland-death-penalty.

[24] *See* Hugo Adam Bedau, *Bentham's Utilitarian Critique of the Death Penalty*, 74 J. CRIM. L. & CRIMINOLOGY 1033, 1036 (1983).

[25] JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT, 168-197 (1775).

[26] *See, e.g.*, IMMANUEL KANT, THE METAPHYSICS OF MORALS 140-45 (Mary Gregor trans., 1991).

punishment.[27] Now, forty years after *Furman* (and 36 years after the reinstatement of the death penalty), there is a slight trend toward slow abolition of the death penalty:

- In the past five years, six states have eliminated the death penalty from their laws, increasing the ranks of abolitionist states to 18, an increase of 50 percent;[28]
- Since peaking in 1999, the annual number of death row inmates who have actually been executed has shown an uneven but decreasing trend;[29]
- Over half of all executions in the United States since 1976 have taken place in Texas, Virginia, and Oklahoma (and over two-thirds with the addition of Florida and Missouri).[30]

This Part of the article briefly summarizes the primary arguments in opposition to capital punishment so as to provide relevant context for evaluating the thorny question of how to respond to prison inmates who kill other inmates or prison guards.[31]

Immorality: Some capital punishment opponents argue that the death penalty is "something absolutely evil which like torture, should never be used however many lives it might save."[32] A variation of this argument is that the State sends the wrong message when it kills someone as punishment for killing someone else.[33] The legal version of these morality-based arguments is that capital punishment constitutes cruel and unusual punishment in violation of the Eighth Amendment,[34] although since 1976, the Supreme

[27] 408 U.S. 238, 239-40 (1972) (per curiam).

[28] *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (2013), http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

[29] *See Executions By Year*, DEATH PENALTY INFO. CTR. (Jan. 17, 2013), http://www.deathpenaltyinfo.org/executions-year.

[30] *See Number of Executions by State and Region Since 1976,* DEATH PENALTY INFO. CTR. (Jan. 17, 2013), http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976.

[31] For an excellent discussion of the abolitionist arguments, see, *e.g.*, Aliza B. Kaplan, *Oregon's Death Penalty: The Practical Reality*, LEWIS & CLARK L. REV. (forthcoming 2013).

[32] *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 72 (1968) (setting forth the argument). Of course, since 9/11, there have been suggestions that in "ticking time bomb" situations, use of torture to extract actionable information to stop an imminent attack might be justified legally, if not morally. *See e.g.*, Alan Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L SCH. L. REV. 275, 277 (2003) (arguing that if torture is going to be used anyway to stop mass terrorism, it would be preferable to regulate it through judicial torture warrants); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 172-73 (2005) (quoting Sen. Charles Schumer as saying in a Senate hearing that "very few people in this room or in America . . . would say that torture should never, ever be used, particularly if thousands of lives are at stake").

[33] *See, e.g.*, Anna Quindlen, *The Failed Experiment: Last Year Only Four Countries Accounted for Nearly All Executions Worldwide: China, Iran, Saudi Arabia and the United States*, NEWSWEEK, June 26, 2006, at 64. In its snarkiest form, this is a facile argument; after all, if taken seriously, it would also mean that we should neither imprison convicted kidnappers nor fine convicted thieves. For a somewhat more sober version of the argument, see BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 70 (Richard Bellamy ed. 1995) ("The death penalty is not useful because of the example of savagery it gives to men.").

[34] *See, e.g.*, Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U.L. REV. 567 (2010) (summarizing arguments); John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1743 (2008).

Court has used that clause only to narrow the pool of convicted criminals who are eligible for the death penalty.[35]

Irrevocability: A second argument against the death penalty is that it is irrevocable; the execution of a wrongly convicted defendant cannot be undone even if the defendant's innocence is later established through, for example, DNA testing.[36] When former Illinois Governor George Ryan commuted all death sentences in the state shortly before leaving office in 2003, one of his stated reasons was concern about possibly executing an innocent person.[37]

Of course, society cannot replace the time that a wrongly convicted person loses when he spends years in confinement before being exonerated. Depending on the law of the state in which he was wrongly convicted, however, such a person might be eligible for financial compensation.[38] Money cannot replace lost years, but it is the standard measure of remedy for civil wrongs and can be used to compensate persons who have been wrongly incarcerated. To a person who has been wrongly executed, however, money is no use.

Fiscal irresponsibility: A third argument against the death penalty is that it is fiscally irresponsible. Studies have concluded that trying a defendant for capital murder, from start to finish, costs anywhere from $1 million to $2.5 million more than trying a defendant when the maximum sentence is life imprisonment.[39] It may seem counterintuitive that incarcerating a person for many more years would cost less than putting him to death, but capital cases involve more complicated trial proceedings, including a separate penalty phase, as well as a statutory right to appointed counsel for post-conviction proceedings.[40]

Of course, the fact that it costs at least $1 million more to try to execute a murderer than to incarcerate him for life does not necessarily mean that the extra money is wasted or destroyed. Some of the increased costs may reflect the results of judicial resistance to capital punishment. In addition, the legal costs and fees pay for services from defense lawyers, investigators, court reporters, and others involved in the legal system.[41]

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[35] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that it violates the Eighth Amendment to execute persons convicted of crimes committed as minors); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that it violates the Eighth Amendment to execute mentally retarded persons).

[36] Since 1984, eighteen death row inmates have been exonerated due to DNA evidence. *See Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CTR. (2013), http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

[37] *See* Eric Slater, *Illinois Governor Commutes All Death Row Cases; Ryan Reduces Terms of 167 Inmates to Life or 40 Years, Calling the State's Capital Punishment System 'Deeply Flawed'*, L.A. TIMES, Jan 12, 2003, at A1.

[38] *See* JIM PETRO & NANCY PETRO, FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT 52 (2011) (noting that slightly more than half of the states have some sort of compensation scheme for eligible wrongly acquitted persons, including Ohio's offer of $40,330 per year plus lost wages and other costs).

[39] *See, e.g.*, Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 14 (1995); Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. L. & SOC. CHANGE 711, 719 (1990/1991); David Erickson, *Capital Punishment at What Price: An Analysis of the Cost Issue in a Strategy to Abolish the Death Penalty* 10 (1993), *available at* http://www.deathpenalty.org/downloads/Erickson1993COSTSTUDY.pdf; GEN'L ADMIN. OFFICE, CRIMINAL JUSTICE: LIMITED DATA AVALABLE ON COSTS OF DEATH SENTENCES 5 (Sept. 1998), *available at* www.gao.gov/assets/220/211785.pdf (estimating cost of death sentence as 42% higher than a life sentence).

[40] *See, e.g.*, Judge Arthur L. Alarcon & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S65-S70 (2011) (dissecting the cost of execution in states like California and discussing whether the death penalty is truly benefitting the public).

[41] *Id.* at S74, S78, S93 n.187 (outlining some of the various costs).

In a time where many law graduates have trouble finding work,[42] perhaps we should not be so quick to dismantle a legal architecture that provides some measure of work, albeit of a highly stressful and specialized nature, for lawyers and others. To the extent that this "lawyer employment" aspect of the death penalty spectacle is at all persuasive, however, its flaw is readily apparent. If we are simply interested in providing "work" for lawyers and we happen to have a spare $1 million lying around for such purposes, we could just as easily hire them to dig a bunch of holes and then fill them in again.[43] Obviously, a more societally productive way to provide publicly-funded "lawyer employment" would be to spend that $1 million per year on any combination of (1) paying lawyers to represent indigent criminal defendants challenging their convictions or their non-capital sentences; or (2) funding public interest law firms that serve the legal needs of the poor who otherwise must proceed *pro se* or forego their legal claims altogether.

To be sure, not all policy decisions are structured on the results of a pure cost-benefit analysis. It would be nearly impossible to quantify the value of retribution, yet retribution remains one of the central goals of punishment.[44]

Uncertain deterrence: The death penalty is supposed to deter would-be killers from carrying out their horrible crimes.[45] Even after decades of study, however, scholars and practitioners have yet to reach a consensus about whether capital punishment actually has a deterrent effect on potential murderers.[46]

Racial bias: A final argument is that, in the United States, the death penalty is administered in a racially discriminatory manner and there is no effective way to eliminate racial bias. David Baldus first confirmed the significance of the racial disparity in death penalty cases in his exhaustive study of over 2,400 homicide cases between 1973 and 2000 in Georgia.[47] Baldus found a race of the *victim* effect; that is, in murder cases with aggravating facts, a defendant who killed a white victim was 4.3 times more likely to be sentenced to death than one who killed an African-American victim.[48] Subsequent studies of the death penalties in other jurisdictions have found "a consistent pattern of white-victim disparities across the systems for which [researchers had] data."[49] There was,

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[42] *See generally* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

[43] In many ways, this is not much of an exaggeration of what happens in states like Oregon, which retain and periodically impose the death penalty, but rarely, if ever, carry out an actual execution.

[44] HART, *supra* note 32, at 9 (defining retribution as "the application of the pains of punishment to an offender who is morally guilty"); MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 233-38 (1984); *see also* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) ("Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death").

[45] *See* Alarcon & Mitchell, *supra* note 40, at S168-S169 (using a California proposition as an example of applying more stringent penalties for felony crimes to deter would-be criminals).

[46] *See, e.g.*, MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 103 (1997); HART, *supra* note 32, at 85; Rudolph J. Gerber, *Death Is Not Worth It*, 28 ARIZ. ST. L.J. 335, 350 (1996) ("[N]o proof exists that general deterrence results from capital punishment as opposed to life imprisonment."); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 10 (1996) ("[T]he death penalty does, and can do, little to reduce rates of criminal violence."). *But see* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (arguing that other studies undervalue "saved" lives in calculations purporting to show no deterrent effect).

[47] *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS *passim* (1990).

[48] *See id.* at 401.

[49] David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 41 CRIM. L. BULL. 11 (2005).

however, no statistically significant disparity based on the race of the defendant,[50] with the exception of the United States armed forces, where race of the victim and of the defendant had effects.[51]

In *McCleskey v. Kemp*,[52] an African-American Georgia death row inmate relied on the first Baldus study in arguing that his death sentence violated the Equal Protection Clause.[53] He argued that he was 4.3 times more likely to receive the death penalty than someone who killed a black victim.[54] In a 5-4 decision, the Court affirmed McCleskey's death sentence, not because of methodological flaws in the study,[55] but because the study could not address whether McCleskey's specific jury, prosecutor, and judge were biased.[56] The court also reasoned that "discretion is essential to the criminal justice process, [so] we would demand exceptionally clear proof before we would infer that the discretion has been abused."[57] William Stuntz concisely summarized the effect of the decision: "*McCleskey* made discrimination impossible to prove."[58]

The persuasiveness of each individual argument against the death penalty obviously varies depending on the reader's sentiments but, collectively, the arguments are powerful. The arguments do not, however, address the problem of what to do with someone like Gary Haugen.

II. GARY HAUGEN AS A CASE STUDY

In 1981, Gary Haugen brutally raped and beat his ex-girlfriend's mother to death with fists, a hammer, and a baseball bat.[59] Apparently, he blamed the victim for causing the break-up of his relationship.[60] Because Haugen was indigent, the trial judge appointed a lawyer to represent him.[61] Haugen pleaded guilty and received a sentence of life imprisonment with a possibility of parole.[62]

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[50] *Id.*

[51] *See* David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1230-31 (2011).

[52] 481 U.S. 279 (1987).

[53] *Id.* at 291.

[54] *Id.* at 321.

[55] *But see id.* at 288-89 (noting district court's findings of methodological problems in the study and its holding that the study "fail[ed] to contribute anything of value"). On appeal, the Eleventh Circuit assumed the validity of the study but nevertheless affirmed the district court's denial of the habeas petition, and the Supreme Court likewise did not challenge the study. *Id.* at 291 n.7.

[56] *Id.* at 294.

[57] *Id.* at 297.

[58] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 291 (2011); *see also id.* at 120 ("The system as a whole may discriminate massively, but as no single decisionmaker is responsible for more than a small fraction of the discrimination, the law holds no one accountable for it.").

[59] *See, e.g.*, Helen Jung, *Gary Haugen, Death Row Inmate in Limbo After Oregon's Execution Ban, Religion*, HUFFINGTON POST, Dec. 10, 2011, http://www.huffingtonpost.com/2011/12/10/gary-haugen-oregon-execution-ban_n_1140197.html; *see also* Natalie Brand, *Family of Haugen's First Murder Victim Speaks Out*, KPTV FOX 12 NEWS, Nov. 28, 2011, http://www.kptv.com/story/16140959/family-of-haugens-first-murder-victim-speaks-out.

[60] *See, e.g.*, Natalie Brand, *Family of Haugen's First Murder Victim Speaks Out*, KPTV FOX 12 NEWS, Nov. 28, 2011, http://www.kptv.com/story/16140959/family-of-haugens-first-murder-victim-speaks-out.

[61] *See* Helen Jung, *Death Row Inmate Gary Haugen Gets Wish for New Attorney as Mental Evaluation Awaits*, OREGONIAN, July 15, 2011.

[62] Jung, *supra* note 59; Under current Oregon law, murder that does not rise to the level of aggravated murder (which is a death-eligible crime) carries a sentence of life imprisonment, except that after 25 years of

On September 2, 2003, Haugen and Jason Van Brumwell killed David Shane Polin, their fellow inmate at the Oregon State Penitentiary, by stabbing him 84 times and smashing his head with a chair.[63] Haugen and Brumwell believed, incorrectly as it turned out, that Polin was an informant who had reported illegal drug use by inmates to prison authorities so that drug tests could be administered in time to test positive.[64]

Haugen and Brumwell were each charged with aggravated murder, which carried a potential death sentence under Oregon law.[65] There were 18 statutory factors that qualified a homicide as an aggravated murder.[66] Polin's killing satisfied two of those factors: Haugen and Brumwell (a) were convicted murderers at the time of the killing[67] and (b) committed the homicide while in prison.[68] Both inmates were convicted and sentenced to death.[69]

After the Oregon Supreme Court affirmed his conviction and death sentence, Haugen wanted to waive his remaining post-conviction challenges.[70] His appointed lawyers, however, moved to have Haugen declared incompetent to waive those rights—at least, in the absence of a psychiatric evaluation—setting up a client-lawyer conflict.[71] In response, Haugen sent his own letter to the judge indicating that he wanted to fire his appointed lawyers.[72] The trial judge discussed the matter with Haugen directly and concluded that Haugen was competent to proceed *pro se*.[73] Haugen's former lawyers were appointed as standby counsel to assist him if he so desired.[74]

At this point, the non-profit organization Oregon Capital Resource Center got involved in the matter.[75] The Center sought review of the trial court's decision allowing Haugen to fire his lawyers "without a sufficient inquiry into Haugen's competence."[76] The State and Haugen both objected but the Oregon Supreme Court agreed that the trial judge had failed to follow the required procedures in capital cases.[77]

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confinement, the inmate can petition to have the sentence changed to life imprisonment with the possibility of parole. OR. REV. STAT. § 163.115(5) (2011). The law in effect at the time Haugen was convicted, however, provided for more lenient parole. OR. REV. STAT. § 163.105(3) (1979).

[63] State v. Haugen, 349 P.3d 174, 176-78 (Or. 2010).

[64] *Id.* at 178-79.

[65] *Id.* at 176.

[66] *See* OR. REV. STAT. § 163.095.

[67] *See id.* § 163.095(1)(c).

[68] *See id.* § 163.095(2)(b).

[69] State v. Haugen, 349 P.3d 174, 176 (Or. 2010).

[70] State v. Haugen, 266 P.3d 68, 70-71 (Or. 2011) [hereinafter *Haugen II*].

[71] *Id.* at 71. See Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 497 (2000), for an account of the conflicts between lawyer and client when the lawyer sees the overriding priority as avoiding the death penalty, but the client is willing to accept the possibility of a death sentence in exchange for litigating guilt.

[72] *Haugen II*, 266 P.3d at 71. Although conventional wisdom suggests that "a lawyer who represents himself has a fool for a client," an observation that would seem even truer when the client is not a lawyer, *Faretta v. California* held that the government cannot force an unwilling criminal defendant to be represented by an attorney. 422 U.S. 806, 807 (1975).

[73] *Haugen II*, 266 P.3d at 71.

[74] *Id.*

[75] *Id.* at 70.

[76] *Id.* at 71.

[77] *See id.* at 72 (discussing OR. REV. STAT. § 137.464 (West 2009), which calls for an evaluation of the defendant's competency by the state Health Authority where "the court has substantial reason to believe that, due

The matter returned to the trial court, which, on Haugen's request, appointed substitute counsel due to Haugen's allegation of a broken attorney-client relationship.[78] Haugen's originally appointed lawyers challenged their removal but were unsuccessful.[79]

Substitute counsel supported Haugen's bid to waive his remaining appeals by having a new psychiatrist perform a mental competency examination.[80] The new doctor concluded that Haugen was competent to waive his rights and so testified.[81] During a hearing on the matter, substitute counsel offered no contradicting evidence such as the opinion of the previous doctor who examined Haugen and concluded that he was not competent.[82] Following this hearing, the trial court found that Haugen was competent.[83] OCRC then filed another motion, asking the Chief Justice of the Oregon Supreme Court essentially to reverse the trial court's decision.[84] By a 4-3 vote, the Oregon Supreme Court denied the request, thus apparently clearing the way for the state to execute Haugen.[85] The trial judge set an execution date of December 6, 2011.[86]

On November 22, 2011, Governor John Kitzhaber acted on a request by various anti-capital punishment groups to stop Haugen's execution by granting a "temporary reprieve" for the "duration of term in office" on the grounds that the death penalty in Oregon was expensive, flawed, and broken:

> It is a perversion of justice that the single best indicator of who will and will not be executed has nothing to do with the circumstances of a crime or the findings of a jury. The only factor that determines whether someone sentenced to death in Oregon is actually executed is that they volunteer.[87]

Governor Kitzhaber did not, however, commute Haugen's sentence to life imprisonment.[88]

Initially, Haugen seemed pleased with the reprieve, saying that it was a victory for him.[89] Soon after, however, Haugen changed his view: "I'm in . . . limbo. . . . I didn't ask for this. I'm ready to go."[90] Perhaps Haugen was disappointed that he was still being

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to mental incapacity, the defendant cannot engage in reasoned choices of legal strategies and options" to be exercised at a death warrant hearing).

[78] *Id.* at 73.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* at 74.

[85] *Id.* at 79.

[86] *See* Death Warrant, State v. Haugen, No. 04C46224, Nov. 18, 2011 (copy on file with author).

[87] Press Release, *Governor Kitzhaber Issues Reprieve - Calls for Action on Capital Punishment* (Nov. 22, 2011), http://www.oregon.gov/gov/media_room/pages/press_releasesp2011/press_112211.aspx. The canceled execution had already cost the state over $57,000 in preparation expenses. Helen Jung, *State Spent $1.3 Million on Lawyers, Drugs and Preparation for Cancelled Execution*, OREGONIAN (Dec. 19, 2011), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/12/state_spent_13_million_on_lawy.html.

[88] Press Release, *supra* note 88 ("I did not [commute] because the policy of this state on capital punishment is not mine alone to decide. It is a matter for all Oregonians to decide."). Technically, the Governor issued a moratorium on all executions, not just Haugen's.

[89] Helen Jung, *John Kitzhaber Moratorium on Death Penalty Leaves Inmate Gary Haugen and Oregon lawmakers Wondering What's Next*, OREGONIAN (Nov. 24, 2011) http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/12/kitzhaber_moratorium_on_death.html.

[90] *Id.*

imprisoned in death row conditions. Not long after, Haugen found a new lawyer to challenge the validity of the reprieve.[91]

At this point, it is worth noting that Haugen's complaint is not devoid of support. If Governor Kitzhaber were to change his mind and lift the reprieve, or if his successor were to lift the reprieve, then Haugen would again face the possibility of execution. While it may seem counterintuitive to see any harm in delaying a death row inmate's execution—as the alternative would be to speed up the execution process—the European Court of Human Rights, among other courts and jurists, has recognized that prolonged stays on death row while awaiting execution can give rise to something known as "death row phenomenon."[92] According to the European Court of Human Rights, an inmate who has "to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death" would be subjected to torture or inhuman or degrading treatment.[93]

Haugen's new lawyer successfully argued that, under Oregon law, a valid reprieve—as distinguished from an outright commutation or pardon—required acceptance by the inmate; because Haugen refused to accept the reprieve, it could not block the execution.[94] At this point, the Governor could have abandoned the fight and let Haugen proceed to be executed, or could have exercised his plenary power to commute Haugen's punishment to a life sentence without the possibility of parole.[95] Instead, Governor Kitzhaber doubled down and appealed the trial court's ruling.[96] In other words, Oregon taxpayers have had and continue to have the privilege of paying for Gary Haugen's lawyer to argue that he should be executed, and for the state's lawyers to argue that he should not be executed—completely backwards from the normal spectacle.

Of course, taxpayers are used to funding both sides of litigation in criminal cases involving indigent defendants but, generally, the lawyer representing the state (*i.e.*, the prosecutor) is seeking to impose punishment, and the lawyer for the defendant is seeking to avoid punishment. The taxpayers' obligation to pay for the defense lawyer is a necessary consequence of the Sixth Amendment.[97] In a situation like Haugen's, however, the taxpayers are paying for the defense lawyer to argue in favor of letting the state do what the state prison officials are ready to do, while also paying for the state lawyers to interfere with the state itself.

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[91] *See Haugen II*, 266 P.3d 68, 79 (Or. 2011).

[92] Soering v. United Kingdom, Ser. A, No. 161, 11 EUR. HUM. RTS. RPTR. 439, 476 (1989).

[93] *Id.; see also* Barbara Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35, 38 (1986) (citing sources of distress); Singh v. Punjab, (1980) 2 S.C.R. 582, 582-83 (India) (recognizing death row phenomenon as basis for commuting death sentence to life imprisonment); Vatheeswaran v. Tamil Nadu, (1983) 2 S.C.R. 348, 360 (India) (also recognizing death row phenomenon as basis for commuting death sentence to life imprisonment).

[94] *See, e.g.*, Letter from Harrison Latto, attorney for Gary Haugen, to the Hon. John Kitzhaber, Governor of Or., regarding Gary D. Haugen (Mar. 12, 2012) (on file with author); United States v. Wilson, 32 U.S. 150, 160-62 (1833); Helen Jung, *Gary Haugen Reprieve Challenge: Judge Appears Receptive to Death Row Inmate's Argument*, OREGONIAN (July 24, 2012, 7:52 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/07/gary_haugen_reprieve_challenge.html.

[95] *See* Arthur B. LaFrance, Op-Ed., *Capital Punishment in Oregon Kitzhaber Should Commute All Death Sentences*, OREGONIAN, Nov. 27, 2011, *available at* 2011 WLNR 24583894.

[96] Helen Jung, *Gov. Kitzhaber Appeals Decision in Gary Haugen Execution Case*, OREGONIAN (Sept. 11, 2012, 3:05 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2012/09/gov_kitzhaber_appeals_decision.html.

[97] *See* OR. REV. STAT. §135.055 (1979); Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

III. PRISON KILLERS: WHAT SHOULD BE DONE WITH THEM?

Haugen's case presents an unusual but not unique situation that is largely overlooked by the conventional death penalty debate—what should be done with a prison inmate serving a life sentence who murders another inmate (or a prison guard)? Prison homicides by inmates are relatively rare, as one would expect given that violent criminals are typically housed in maximum-security facilities and under the watch of prison guards.[98] Yet, they are not unheard of. Polin was the fifth prisoner killed by another prisoner in the Oregon State Penitentiary between 1986 and 2004.[99] Nationwide, prisoner deaths due to homicide have remained relatively stable at low but non-trivial levels, around 1-2 percent of all prisoner deaths.[100] In absolute numbers, from 2001 to 2007, over 500 prisoners were murdered in state or local prisons or jails—about 70 per year.[101]

The government obviously owes a duty to protect imprisoned inmates from known harms;[102] according to the Supreme Court, it is "cruel and unusual punishment to hold convicted criminals in unsafe conditions,"[103] including where those unsafe conditions arise from violence inflicted by other inmates.[104] In fact, in *Helling v. McKinney*, the Court even concluded that a non-smoking inmate could proceed to a trial on his lawsuit alleging that prison officials violated his Eighth Amendment rights by forcing him to share a jail cell with a smoker;[105] to prevail ultimately, he would need to prove that he was being exposed to levels of secondhand smoke that "pose an unreasonable risk of serious damage to his future health," as well as "deliberate indifference" to that risk by prison officials.[106]

It is important to keep in mind that the danger the inmate was exposed to in *McKinney* was not a present harm but a future one.[107] The secondhand smoke might or might not have caused cancer or other health problems down the road, but it was not the same as, say, exposed electrical wiring,[108] where any injury would be immediate. A prison

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[98] *See* MARGARET E. NOONAN, U.S. DEP'T OF JUSTICE, NCJ 239911, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000-2010 – STATISTICAL TABLES (Dec. 2012).

[99] *See* Joseph Rose, *Inmates Charged With Murder in Convict's Beating Death*, OREGONIAN, June 16, 2004, at D10.

[100] *See* NOONAN, *supra* note 99.

[101] *Id.*

[102] Whatever else we may think about convicted felons, we have not yet descended to the point of dumping them into prison, slamming the door shut, and leaving them in something like the anarchistic and despotic fiefdoms depicted in movies like ESCAPE FROM NEW YORK (AVCO Embassy Pictures 1981) and NO ESCAPE (Columbia Pictures 1994).

[103] Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982).

[104] *See, e.g.*, LaMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993); Young v. Quinlan, 960 F.2d 351, 361-62 (3d Cir. 1992); Cortes–Quinones v. Jimenez–Nettleship, 842 F.2d 556, 558 (1st Cir. 1988); Roland v. Johnson, 856 F.2d 764, 769 (6th Cir. 1988); Goka v. Bobbitt, 862 F.2d 646, 649-50 (7th Cir. 1988); Pressly v. Hutto, 816 F.2d 977, 979 (4th Cir. 1987); Morgan v. District of Columbia, 824 F.2d 1049, 1057 (D.C. Cir. 1987); Villante v. Dep't of Corr., 786 F.2d 516, 519 (2d Cir. 1986); Alberti v. Klevenhagen, 790 F.2d 1220, 1224 (5th Cir. 1986); Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986); Martin v. White, 742 F.2d 469, 474 (8th Cir. 1984); Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980).

[105] Helling v. McKinney, 509 U.S. 25, 33 (1993); *cf.* Kathleen Knepper, *Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons*, 21 NEW ENG. J. CRIM. & CIV. CONFINEMENT 45, 94 (1995) (arguing that prison officials might have "a duty to segregate inmates who are highly contagious for one or more of the opportunistic infections which are associated with [HIV]").

[106] *McKinney*, 509 U.S. at 35; *see also* Farmer v. Brennan, 511 U.S. 825, 837 (1994). In the end, McKinney's case became moot when the Nevada prison instituted a smoking ban. *See* Bob Twigg, *Smoke-Free Trend Enters Prison, Jails*, USA TODAY, Aug. 27, 1996, at 04A.

[107] *McKinney*, 509 U.S. at 33 ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition").

[108] *See, e.g.*, Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974).

inmate who demonstrates the capability and willingness to murder another inmate might not pose an *immediate* danger to any other inmate, but may well pose some *future* danger to all other inmates.

At the time that he killed Polin, Haugen was potentially eligible for parole.[109] The possibility of additional prison time (that is, a life sentence with no possibility of parole) or even the death sentence obviously did not deter him from committing his second murder.[110] Haugen's own statements to other inmates confirm as much, because he said a few days prior to the murder, "he was getting ready to do something kind of – kind of foolish and that he was probably getting more time and that we wouldn't be seeing him."[111] In other words, Haugen was aware that there could be severe consequences for killing Polin, yet he went ahead and did so anyway.[112]

More importantly, there is no reason to be confident that he would not kill another inmate in the future for similar reasons. Punishing Haugen for murdering David Polin isn't only about deterrence or retribution. Incapacitation is one of the purposes of punishment.[113] Incarceration of a convicted felon sufficiently incapacitates him from further harming society (assuming that escape from prison is not feasible), so any additional incapacitation from executing the inmate would be marginal—so long as we are talking about society. From the standpoint of other inmates, there is a world of difference between imprisonment and execution when it comes to incapacitating a fellow inmate. The Oregon State Penitentiary has thus far protected the rest of us from Gary Haugen, but it failed to protect David Polin.

Executing a prison inmate murderer like Haugen would thus protect other inmates, as it would remove the source of the threat. Sentencing a convicted prison inmate murderer but refraining from actually carrying out the execution falls short of providing absolute protection to other inmates. It does, however, provide a greater measure of protection than leaving the murdering inmate in the general prison population. Generally, conditions of confinement on death row are fairly restrictive.[114] One typical death row regime consisted of (1) a cell measuring approximately 9 feet by 7 feet; (2) just 6 to 7 1/2 hours of recreation per week; (3) limited visits to the law library or infirmary; (4) one hour per day out of the cell in a common area; and (5) handcuffing and shackling when prisoners move around the prison.[115] Even so, such restrictive conditions do not reduce the risk of intra-inmate killings to zero.[116] The federal Florence Supermax facility, for example, has seen two inmates murdered.[117] Indeed, the Seventh Circuit has admitted that

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[109] State v. Haugen, 243 P.3d 31, 47 n.15 (Or. 2010).

[110] *Id.* at 35 n.4.

[111] *Id.*

[112] *Id.* at 34.

[113] *See, e.g.*, 1 WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.5, 38 (2d ed. 2003) (explaining theories of punishment, specifically incapacitation).

[114] *See generally* Dave Mann, *Solitary Men*, TEXAS OBSERVER, Nov. 10, 2010, at 6.

[115] Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 459 (1989) (describing conditions in a Virginia penitentiary); *see also* Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 8-10 (2006) (describing conditions of solitary confinement).

[116] *See, e.g.*, *Death Penalty Sought in Supermax Killings*, UNITED PRESS INT'L, (Mar. 29, 2011), http://www.upi.com/Top_News/US/2011/03/29/Death-penalty-sought-in-Supermax-killings/UPI-73571301420385/.

[117] *Id.*

"[w]e know from cases in this court involving murders by prisoners in the control units of federal prisons . . . that such units cannot be made totally secure."[118]

Restrictive confinement conditions might therefore be seen as a viable though imperfect alternative to the death penalty if the primary concern is protecting other inmates. Yet, things are not so simple.

For one example of a high-profile convicted defendant sentenced to a term of life imprisonment under extremely restrictive conditions and criticism thereof, one can look at the case of Ramzi Yousef.[119] Convicted in 1996 for leading the "Bojinka plot," an audacious but unsuccessful attempt to bomb eleven Transpacific flights simultaneously, and in 1997 for leading the truck bomb attack against the World Trade Center in 1993, Yousef was sentenced to life imprisonment for the first crime and 240 years imprisonment for the second.[120] Although the decisions regarding where to imprison a defendant, and under what conditions, are typically made by the Bureau of Prisons, district judges are free to make recommendations and, in Yousef's case, Judge Duffy said in open court:

> I recommend that your visitors' list be restricted to your attorneys. The prison should not permit friends, gawkers or media reporters to visit with you. While normally a prisoner in administrative detention might have some visitors from his family, in your case I would expect the prison to require proof positive that one is in fact a member of your family. We don't even know what your real name is. You have used a dozen aliases. Having abandoned your family name, I must assume that you have abandoned your family also.
>
> The restrictions I am imposing are undoubtedly harsh. They amount to solitary confinement for life. . . . Your treatment will be no different than that accorded to a person with a virus which, if loosed, could cause plague and pestilence throughout the world.[121]

The Bureau of Prisons incarcerated Yousef at the federal Florence Supermax facility in Colorado under conditions similar to those endured by death row inmates: 23 hours a day in a small cell, with soundproofing to prevent inmates from communicating with one another; one hour of exercise with "feet shackled together and his every move watched by at least two prison guards"; and "until December 1998[,] . . . no human contact other than that of the omnipresent guards."[122] To be sure, the special administrative measures were imposed on Yousef not merely because of the concern that he might attack others, but also due to the belief that he might be able to incite other

[118] United States v. Johnson, 223 F.3d 665, 672-73 (7th Cir. 2000).

[119] *See generally Yousef*, 327 F.3d 56 (2d Cir. 2003) (extensively detailing convictions relating to 1993 World Trade Center bombing and an unsuccessful plot to bomb multiple airlines simultaneously); *see, e.g.*, SIMON REEVE, THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN, AND THE FUTURE OF TERRORISM 239-43 (1999).

[120] *See, e.g.*, REEVE, *supra* note 120, at 238-43.

[121] *Id.* at 243.

[122] *Id.* at 253. Interestingly, until 2009, Yousef had reportedly never left his cell, because he refused to submit to the strip search that would precede his daily hour of recreation. *60 Minutes: Supermax: A Clean Version of Hell* (CBS television broadcast Oct. 14, 2007, updated June 19, 2009), *available at* http://www.cbsnews.com/2100-18560_162-3357727.html (quoting former Supermax warden Robert Hood). Hood's account is contradicted by investigative journalist Simon Reeve, who reported that Yousef, after getting his confinement conditions relaxed, struck up a friendship of sorts with Ted Kaczinski (the Unabomber). REEVE, *supra* note 120, at 253-54.

prisoners if he were allowed to talk to them, or to pass messages to terrorists through visitors.[123]

Yousef's confinement conditions drew criticism from a variety of sources. Stuart Grassian, a Harvard Medical School psychiatrist, argued that solitary confinement is "a kind of mental torture. . . ."[124] The sensory deprivation causes enormous psychological suffering and mental illness."[125] Harvard law professor Philip Heymann, a former Deputy U.S. Attorney General, opined that long-term solitary confinement raised "substantial issue[s] of cruel and unusual punishment."[126] Amnesty International began to investigate Yousef's situation, which was possibly the catalyst that led the Bureau of Prisons to relax the confinement conditions slightly.[127] Even today, an attorney representing Yousef is trying to get a court to further relax the confinement conditions.[128]

No court has gone so far as to hold that solitary confinement is necessarily cruel and unusual punishment, but the issue has not been presented squarely concerning *permanent* solitary confinement.[129] In *Wolff v. McDonnell*,[130] Justice Douglas disagreed with the majority's holding regarding the amount of process due to a prisoner before being placed in solitary confinement; whereas the majority held that the prisoner need not be afforded an opportunity to confront accusers or to engage in cross-examination,[131] Douglas believed that the consequences of solitary confinement were so significant that the prisoner was entitled to those rights "absent any special overriding considerations."[132] Interestingly, despite acknowledging that solitary confinement can last "months or even years," Douglas did not indicate any substantive opposition to solitary confinement.[133]

In *Hutto v. Finney*,[134] prisoners had won injunctive relief that limited their solitary confinement to 30 days.[135] Prison officials argued that the district court had

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[123] REEVE, *supra* note 120, at 252-54; *see also* United States v. Sattar, 272 F. Supp. 2d 348, 354-56 (S.D.N.Y. 2003) (demonstrating the possibility of communicating through visitors). *Sattar* demonstrated that this concern was not mere fantasy. In *Sattar*, the defense lawyer for Omar Abdul-Rahman (aka the Blind Sheikh), the spiritual inspiration for the 1993 WTC attack, brought her translator to see her client during post-conviction meetings, but instead of translating her conversation with Abdul-Rahman, the translator spoke directly, bringing messages from the outside, and ultimately delivering a message from Abdul-Rahman to his overseas followers. The lawyer, Lynne Stewart, and the translator were both convicted of providing material support to a designated foreign terrorist organization by providing personnel in the form of Abdul-Rahman. *Id.*

[124] REEVE, *supra* note 120, at 253.

[125] *Id.* at 253-54. A former inmate at the Florence Supermax facility said that solitary confinement there "breaks down the human spirit. It breaks down the human psyche. It breaks your mind." *60 Minutes: Supermax: A Clean Version of Hell*, *supra* note 123. No commentator objects to solitary confinement, however. *Cf.* David McCord, *Imagining A Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 121-31 (1998) (arguing for imprisoning aggravated murderers in permanent solitary confinement, with full sensory deprivation on the birthday of the victims).

[126] REEVE, *supra* note 120, at 254.

[127] *Id.* at 253-54 (noting that prison officials apparently permitted Yousef to interact with fellow inmates Kaczynski and Oklahoma City bomber Timothy McVeigh).

[128] *See* Larry Neumister, *Lawyer Seeks to Ease Conditions for '93 WTC Bomber*, ASSOC. PRESS (Aug. 22, 2012 4:26 PM), http://origin.bigstory.ap.org/article/lawyer-seeks-ease-conditions-93-wtc-bomber.

[129] Angela A. Allen-Bell, *Perception Profiling & Prolonged Solitary Confinement Viewed Through the Lens of the Angola 3 Case: When Prison Officials Become Judges, Judges Become Visually Challenged, and Justice Becomes Legally Blind*, 39 Hastings Const. L.Q. 763, 770-72 (2012).

[130] 418 U.S. 539 (1974).

[131] *Id.* at 567.

[132] *Id.* at 595-96 (Douglas, J., dissenting).

[133] *Id.* at 593-94.

[134] 437 U.S. 678 (1978).

[135] *Id.* at 678.

erroneously ruled that indefinite solitary confinement was necessarily cruel and unusual punishment, but the Court held that the prison official's argument was based on a misreading of the lower court's decision:

> Read in its entirety, the District Court's opinion makes it abundantly clear that the length of isolation sentences was not considered in a vacuum. In the court's words, punitive isolation "is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof."
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> . . .
>
> It is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of "grue" might be tolerable for a few days and intolerably cruel for weeks or months.[136]

Note the Court's recognition that the duration of solitary confinement is an important factor to consider in assessing its validity. Similarly, in *United States v. Johnson*, Judge Posner opined that:

> A prison's control unit is not intended as a punishment for the crime that got the prisoner into prison in the first place, like a sentence of imprisonment at hard labor. Its purpose rather is to deter and prevent violations of prison disciplinary rules and to protect prisoners, guards, and in some cases people outside the prison, or the society at large, against dangerous conduct by the prisoner. See 28 C.F.R. § 541.40(a) ("in an effort to maintain a safe and orderly environment within its institutions, the Bureau of Prisons operates control unit programs intended to place into a separate unit those inmates who are unable to function in a less restrictive environment without being a threat to others or to the orderly operation of the institution").[137]

The court examined applicable prison regulations requiring a warden to conduct a risk assessment before imposing any special administrative measures, including solitary confinement, on a disruptive or dangerous inmate, and to review the risk assessment no more than 120 days later.[138] Based on these regulations, the court concluded that "[t]he limitations in these regulations imply that the Bureau of Prisons could not assign a prisoner directly upon his admission to the federal prison system to spend the rest of his life in the control unit without the possibility of reconsideration."[139]

Because *Johnson*'s holding was based on the court's interpretation of the relevant statutes and regulations,[140] it does not directly address whether the government could, in fact, impose indefinite (i.e., life-long) solitary confinement as a punishment for lifers convicted of committing another murder while imprisoned.

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[136] *Id.* at 685-87.

[137] United States v. Johnson, 223 F.3d 665, 673 (7th Cir. 2000).

[138] *Id.* at 672 (citing 28 C.F.R. § 501.3(c) (1997)).

[139] *Id.* ("The regulation requiring the bureau to review an inmate's control unit status 'at least once every 60 to 90 days . . . to determine the inmate's readiness for release from the [Control] Unit,' 28 C.F.R. § 541.49(d), points in the same direction.").

[140] *Id.* (citing 28 C.F.R. §§ 501.3(a), 501.3(c), 541.49(d) (1995)).

As noted earlier, legal and medical experts raised concerns about convicted terrorist Ramzi Yousef's extremely harsh conditions of confinement.[141] Though these conditions were nearly unique, empirical studies of prisoners in general solitary confinement have identified severe psychological and physiological harms that can afflict the confined prisoners with greater frequency than seen in the general prison population.[142] Symptoms include "anger, hatred, bitterness, boredom, stress, loss of the sense of reality, suicidal thoughts, trouble sleeping, impaired concentration, confusion, depression, and hallucinations."[143] Other studies have found that six months of solitary confinement can cause brain impairment on par with someone who has "incurred [] traumatic injury."[144]

Not surprisingly, these negative effects have led many to argue that long-term solitary confinement constitutes cruel and unusual punishment, or even torture.[145] One commentator notes that there is a trend in European countries toward reduced use of solitary confinement, with greater safeguards such as daily physical and mental evaluations by physicians.[146] European prison rules do not impose hard and fast limits on the duration of solitary confinement, but they do allow it "only in exceptional cases and for a specified period of time, which shall be as short as possible."[147]

Other commentators recommend limiting the maximum duration of solitary confinement to no more than two years (absent extraordinary circumstances) or less,[148] and importantly, offering the prisoner an opportunity to demonstrate an ability to behave in controlled settings and thus earn his way out of solitary confinement.[149] Atul Gawande, a medical school doctor, further argues that solitary confinement does not lead to predictable reduction in prison violence because much prison violence stems from overcrowding and conditions that "maximize[] humiliation and confrontation";[150] he points to England's experience in greatly reducing the number of prisoners in isolation by improving their conditions of confinement.[151]

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[141] *See* REEVE, *supra* note 120, at 251-54 (citing Sharon Walsh, *'Proud' Terrorist Gets 240 Years in N.Y. Bombing*, WASH. POST, Jan. 9, 1998, at A01).

[142] Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 476 (2006).

[143] *Id.* at 488; *see also* Bryan B. Walton, *The Eighth Amendment And Psychological Implications of Solitary Confinement*, 21 LAW & PSYCHOL. REV. 271, 277-81 (1997) (more summary of psychological effects); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 515-25 (1997).

[144] *See* Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?*, NEW YORKER (Mar. 30, 2009), http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande#ixzz2AC9MaBCq.

[145] *See Haney & Lynch, supra* note 145, at 542-54; Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 21-24 (2006).

[146] Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 93-95 (2005); Eur. Consult. Ass., *Recommendation Rec(2006)2 of the Comm. of Ministers to States on the European Prison Rules*, R. 43.2, https://wcd.coe.int/ViewDoc.jsp?id=955747.

[147] Eur. Consult. Ass., *Recommendation Rec(2006)2 of the Comm. of Ministers to States on the European Prison Rules*, R. 60.5, https://wcd.coe.int/ViewDoc.jsp?id=955747&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75#P6_138.

[148] Haney & Lynch, *supra* note 145, at 561; *see also* Hresko, *supra* note 147, at 25.

[149] Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 132 (2008).

[150] Gawande, *supra* note 146.

[151] *Id.*

The problem is that none of these suggestions that call for limiting or minimizing the use of solitary confinement actually address how to deal with an inmate like Gary Haugen. Over twenty years passed between when Haugen killed his first victim and when he killed David Polin.[152] Given an opportunity to show that he can "behave," he might be well able to do so simply to get out of solitary confinement. Once released back into the general population, who can say what he might do to the next inmate he were to suspect of being an informant?[153]

To be sure, the situation might be more complicated than it appears. Those twenty years of prison leading up to the day of Polin's killing may have hardened Haugen to the point that he became capable of doing something he otherwise wouldn't have done.[154] It may be that using smuggled drugs was the only way Haugen felt he could cope with enduring his life sentence, and that he believed it was necessary to stop Polin from informing on him. If so, the prison system could be seen as partially responsible for causing him to act the way he did. Still, even if one were to imagine a counterfactual in which the Oregon State Penitentiary implemented the improved prison conditions with which Britain found success, there would be no certainty that Haugen would not have killed Polin. The number of British prisoners in isolation is not zero.[155] Given that Haugen premeditated Polin's murder with the purpose of silencing a person that he believed was an informant, not someone who he felt unable to avoid a confrontation with, it seems questionable whether anything would have kept Haugen from killing Polin.[156] This argument is not to suggest that it would be a bad idea to experiment with improving conditions of confinement to determine whether less restrictive conditions reduce prison violence; it is only to say that we may at best reduce—but not eliminate—prison murders.

Ultimately, prison killers such as Gary Haugen highlight a three-way conflict among the goals of (1) eliminating the death penalty; (2) avoiding secure but restrictive prison conditions that demonstrably harm prisoners mentally as well as physically; and (3) protecting inmates from violence inflicted by other prisoners. Much as the push to reduce false positives will invariably result in an increase in false negatives, here too success in one or two goals will negatively impact the remaining goal. If the choice is between inflicting some unavoidable harm on an inmate murderer, or imposing substantial risk of harm on other inmates at the hands of that inmate murderer, it may be normatively just to choose the former: the harm is simply a by-product of the goal of protecting other inmates.[157]

If this reasoning is seen as unacceptable, it may be tempting to conclude that what we need is "outside the box" thinking. While it would be foolish to assert that no

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[152] *Haugen*, 243 P.3d 31, 34-35 (Or. 2010).

[153] Some "restorativists" may conclude that no one is beyond rehabilitation and redemption with appropriate treatment. *See, e.g.*, BIBAS, *supra* note 1, at 99 (discussing how some extreme restorativists believe that crime victims can be "healed by a cathartic conference, apology, and restitution," and by implication, that the criminals will present no more threat). In Haugen's case, of course, his victim could not be part of such a conference, since he's dead. More to the point, I suspect that the other inmates – and their relatives – would probably find little reassurance in any claimed rehabilitation of an inmate murderer.

[154] *Cf.* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (contrasting the harsh conditions of American prisons with the more lenient conditions in continental European prisons).

[155] Gawande, *supra* note 146.

[156] *Haugen*, 243 P.3d at 35.

[157] This is, of course, a variation of the typical deterrence-based debate about the death penalty: can capital punishment be justified if it is shown to save lives of future murder victims by deterring their would-be killers? One challenge is that the harm inflicted on the inmate is immediate and tangible (death), whereas the "saved" victims are speculative and unknown/unknowable.

solution is possible, a brief review of some fictional high-tech proposals depicted in movies suggests that technology is unlikely to be a neat savior.

Implanted pain/control devices: In the science-fiction thriller *Fortress*,[158] prisoners in a maximum-security prison facility are forced to swallow an "intestinator," which is a device that causes instantly disabling stomach pain upon command of the ever-watchful computer system.[159] The nearest analogue in today's world would be "stun belts," which are devices that can deliver approximately 50,000 volts in an eight-second jolt to paralyze the wearer temporarily.[160] Courts have generally upheld the use of stun belts as an alternative to physical restraints of potentially dangerous prisoners during court proceedings.[161] Challenges to use of the belts, however, have focused on the prejudicial impact at trial of being forced to wear the belt, and not the pain inflicted.[162] As with solitary confinement, a shorter duration of being forced to wear a stun belt—such as during court proceedings—may be tolerable, whereas a permanent requirement to do so may be inhumane. In any event, it is far from clear that the stun belt is an improvement, especially given that accidental triggerings, while rare, are not unheard of.[163] Even a low rate of accidental triggerings would result in a substantial number of unintended shocks over a 20-year period.[164]

Long-term freeze: In the world of *Demolition Man*,[165] prisoners are sentenced to the CryoPrison, where they are "frozen" (*i.e.*, placed in suspended animation) to be thawed out at the end of their prison term.[166] Presumably, the advantage of this approach is that the prisoner is incapacitated for the duration of the sentence, unable to harm anyone else, but without suffering from the harmful effects of solitary confinement.

Cryonics is currently far from being a viable and reliable procedure,[167] but perhaps it can be developed into one. Speculation about its effects raises concerns that it both fails to exact adequate punishment, and yet may also be cruel and unusual in its own way.[168] If indeed the prisoner is frozen for 30 years and then is thawed, and feels no passage of time, then it is somewhat hard to see the retributive value of punishment. On the other hand, the world will have changed in 30 years, and family and friends will have aged or even died, perhaps leaving the prisoner feeling isolate and alone.[169] It's also worth noting that, in the movie at least, Sylvester Stallone's character (who had been frozen as part of a prison sentence) reported that he in fact did experience the passage of time,

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[158] *See, e.g.*, FORTRESS (Dimension Films 1993).

[159] *See id.*

[160] *See, e.g.*, United States v. Durham, 219 F. Supp. 2d 1234, 1238 (N.D. Fla. 2002).

[161] *See, e.g.*, Gonzalez v . Pliler, 341 F.3d 897, 901 (9th Cir. 2003).

[162] *Cf.* Comment, *The REACT Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible Under the United States and Texas Constitutions*, 30 ST. MARY'S L.J. 239, 242–243, 246–247 (1998) ("[A]ctivation of the belt causes immediate immobilization and may result in defecation and urination. . . . [T]he belt's metal prongs may leave welts on the victim's skin . . . [requiring] as long as six months to heal").

[163] *Durham*, 219 F. Supp. 2d at 1238.

[164] *Id.* at 1239.

[165] DEMOLITION MAN (Warner Bros. Pictures 1993); *see also* MINORITY REPORT (Twentieth Century Fox Film Corporation 2002).

[166] DEMOLITION MAN, *supra* note 167.

[167] *See* Ryan Sullivan, *Pre-Mortem Cryopreservation: Recognizing a Patient's Right to Die in Order to Live*, 14 QUINNIPIAC HEALTH L.J. 49, 60-70 (2010) (recapping the current state of cryonics).

[168] *See, e.g.*, J.C. Oleson, Comment, *The Punitive Coma*, 90 CALIF. L. REV. 829, 861-63, 886 (2002).

[169] *See* ALIENS (Twentieth Century Fox Film Corporation 1986) (considering the isolation that Ellen Ripley, who was not a prisoner, felt upon discovering that she spent 57 years in cryogenic sleep).

making the entire experience sound like solitary confinement combined with sensory deprivation.[170] This, too, seems an unpromising alternative to conventional solitary confinement.

Concentration of the dangerous prisoners in one location: In the movies *Escape From New York* and *No Escape*,[171] society has essentially given up on managing prisons for extremely dangerous prisoners.[172] The prisoners are instead dumped onto savage islands with no guards and no rules other than any prisoners attempting to escape will be fired upon.[173] Within the island, however, it is survival of the fittest.[174]

Although the federal prison on Alcatraz Island in the San Francisco Bay held dangerous inmates,[175] much as the current federal Supermax facility in Florence, Colorado, does, our society has not abandoned the idea of managing the prisoners and attempting at least to prevent them from being able to run their own fiefdoms based upon the rule of the strongest. The obvious flaw in this approach is that we would be forsaking our duty to protect inmates from foreseeable harm. About the only thing that could be said to justify such an approach would be to depersonalize the inmates on the theory that anyone put into such a situation would necessarily be someone like Haugen. This too does not seem like a good idea.

Metal boots with magnetizable floor: In *Face/Off*,[176] society has built a high-tech prison called Erehwon (read it backwards) where inmates are forced to wear metal boots at all times.[177] This way, if there is a riot or other physical disturbance, prison officials can activate powerful magnets in the floor, thus immobilizing all prisoners.[178] The movie itself, however, demonstrates that these boots are likely insufficient to prevent an inmate from killing another inmate, either before they can be activated, or if the victim is still within grabbing/punching distance.[179]

Behavioral modification: In *A Clockwork Orange*,[180] a violent young man is arrested after a vicious crime spree that includes beating a man and raping his wife, and beating another woman to death.[181] After receiving a lengthy prison sentence, he agrees to volunteer for an experiment in rehabilitating criminals by modifying their behavior.[182] The procedure consists of forcing him to watch violent movies while being fed drugs that induce severe nausea.[183] Subsequently, violent impulses trigger feelings of nausea.[184]

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[170] *See* DEMOLITION MAN, *supra* note 167.

[171] ESCAPE FROM NEW YORK (AVCO Embassy Pictures 1981); NO ESCAPE (Columbia Pictures 1994).

[172] *Id.*

[173] *Id.*

[174] One could also look to the third season of the television serialized drama *Prison Break*, in which the main character found himself in a fictional Panamanian prison run by the inmates, with the guards outside the facility entirely and charged with keeping anyone from escaping. *Prison Break* (Fox 2005).

[175] Haney, *supra* note 145, at 488.

[176] FACE/OFF (Paramount 1997).

[177] *Id.*

[178] *Id.*

[179] *See id.*

[180] A CLOCKWORK ORANGE (Warner Bros. 1971).

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

Assuming that such behavioral modification could work, it would raise a host of issues not dissimilar to those involved in chemical castration: use of "mind-altering drug[s] purely for purposes of incapacitation (as opposed to medical treatment)."[185] If solitary confinement raises concerns because of its effect on the mental health of prisoners, it is difficult to see how the use of mind-altering drugs to change behavior would be an improvement.

IV. CONCLUSION

The Gary Haugen saga is without doubt unusual, but it does highlight the fiscal insanity of the current death penalty situation—especially in a state like Oregon, which does not execute death row inmates unless they volunteer for it (and for now, under the present Governor, not even then). One can easily imagine more societally productive uses of the money that Oregon has poured into this case since Haugen was convicted of killing David Polin, and yet, without the death penalty, one must wonder, who would be the next David Polin?

Limiting capital punishment to convicted murderers of prison inmates or guards would not answer all criticisms of the death penalty, but it would dramatically narrow the number of people on death row. As a result, some death penalty critics seem willing to accept the death penalty in such circumstances.[186] For those who insist on complete abolition, however, if the abolitionist drive to eradicate the death penalty is an irresistible force, then the ongoing move to limit (if not ban) solitary confinement is an irresistible force with an opposing vector, leaving the safety of other inmates as the immovable object. Something has to give.

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[185] *See* John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 597 (2006) (arguing that state laws permitting chemical castration of convicted sex offenders violate the Eighth Amendment).

[186] *See, e.g.*, Alarcon et al., *supra* note 40, at S182-S183 (noting the narrowness of the federal death penalty in practice, with 11 of 58 on federal death row for murdering other inmates, guards, or during escape); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 138-39 (Gerald Uelmen ed., 2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf (recommending the retention of the death penalty for a narrow set of cases, including murdering another prisoner). Admittedly, restriction of the death penalty to such a purely incapacitation-based pool of murderers is unlikely to garner public support, as it would mean that killers of convicted prisoners are punished more harshly than killers of police officers, children, or even the United States President. *Cf.* Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 444 (1988) (noting the result of the Baldus study that "[w]hen flexible juries use their discretion to impose the ultimate penalty, the lives of victims who happen to be black are simply worth less").

"THEY'RE PLANTING STORIES IN THE PRESS": THE IMPACT OF MEDIA DISTORTIONS ON SEX OFFENDER LAW AND POLICY

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Introduction

Individuals classified as sexual predators are the pariahs of the community. Sex offenders are arguably the most despised members of our society and therefore warrant our harshest condemnation.[1] Twenty individual states and the federal government have enacted laws confining individuals who have been adjudicated as "sexually violent predators" to civil commitment facilities post incarceration and/or conviction.[2] Additionally, in many jurisdictions, offenders who are returned to the community are restricted and monitored under community notification, registration and residency limitations.[3] Targeting, punishing, and ostracizing these individuals has become an obsession in society, clearly evidenced in the constant push to enact even more restrictive legislation that breaches the boundaries of constitutional protections.[4]

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[1] *See generally* Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 514 (2007); *see also*, Bruce J. Winick, *Sex Offender Law in the 1990's: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 506 (1998) (discussing that individuals who commit sex offenses against children are probably the most hated group in our society).

[2] *See generally* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L. J. 1071 (2012).

[3] *Id.* at 1078.

[4] Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 853–54 (1996); David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L. J. 600, 628 (2006); *See* Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 370–71 (2009) (contending that the federal Sex Offender Registration and Notification Act provisions must be amended to meet constitutional muster).

The advancement of technology and mass media communication have spawned a constant influx of information about sexual predators. News headlines and Internet webpages are dedicated to reporting on and highlighting sexual crimes and their infamous perpetrators.[5] There is little disputing that the newest surge[6] in legal attention and efforts to contain sexual predators stems from the mass dissemination of sexual offender media stories available to the general public.[7] Thus, we cannot discuss our national obsession with sexual offenses and offenders without considering how the role of the media has framed our conceptualizations of offenders and influenced resulting legal decisions and legislation.[8]

The public perception of what constitutes a "sex offender" is undoubtedly linked to the media's portrayal of these types of heinous crimes.[9] The media's attention to high profile, violent sexual offenses has been shown to elicit a panic and fear of rampant sexual violence within our communities.[10] This, in turn, places extreme public pressure on legislators to enact more repressive legislation and on judges to interpret such laws in ways that ensure lengthier periods of incarceration for offenders.[11] The media's portrayal of a "largely ineffective" criminal justice system heightens fear;[12] fictionalized portrayals of crime on television dramas may lead viewers to believe that "all offenders are

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[5] *How We Began and the Need for Transition*, Jacob Wetterling Resource Ctr., http://www.jwrc.org/WhoWeAre/History/tabid/128/Default.aspx; *About John Walsh*, America's Most Wanted, http://www.amw.com/about_amw/john_walsh.cfm.

[6] Carpenter & Beverlin, *supra* note 2, at 1078 ("The ensuing years [post the enactment of the Adam Walsh Child Protection and Safety Act] have been marked by a dizzying array of increased registration and community notification requirements, the emergence of harshening residency restrictions, and the elimination of individuated risk assessment."); *see infra* text accompanying notes 164-193, 376-411.

[7] Kristen M. Zgoba, *Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation*, 17 CRIM. JUST. STUD.385, 385 (2004) ("The media frenzy surrounding these publicized cases has created a 'fear factor' among parents and caregivers, begging the question as to whether the incidence of child abduction and molestation has increased or whether the nation's heightened sensitivity is a result of increased media reporting").

[8] On the way that the media frames crime stories in general, *see* SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES 26-31 (1991).

[9] Clive Emsley, *Victorian Crime*, HISTORY TODAY, (1998), *available at* http://www.historytoday.com/clive-emsley/victorian-crime (arguing that nineteenth-century perceptions owed more to media-generated panic than to criminal realities).

[10] Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News*, 4 (2001), *available at* http://www.justicepolicy.org/research/2060 (explaining that three-quarters of the public form their opinions about crime based on news reports-more than three times the number of people who form their opinions based on personal experience); Jill S. Levenson et. al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 1, 2 (2007) (citing L. C. Hirning, *Indecent Exposure and Other Sex Offenses*, 7 J. CLIN. PSYCHOPATHOLOGY & PSYCHOTHERAPY, 105 (1945) ("As early as 1945, academic scholars were commenting on the reactions of the public to sex offenders: '. . . there are periodic so-called sex crime waves often preceded by one or more serious sex offenses which have received wide notoriety in the newspapers. Every sex offender is looked upon as a potential murderer. Emotions run high. There are meetings and conferences; recommendations are made . . . . Meanwhile, sex offenses continue to occur.'"); *see also*, Kate Stone Lombardi, *Fears of Kidnapping Spur Effort on Education*, N.Y. TIMES, March 13, 1994 (reporting on an "educational" video "Street Smart Kids" which shows headlines: "'10-Year-Old Girl Abducted and Sexually Molested' and '11-Year-Old Girl Strangled.' There ensues a scene of an anguished father holding a news conference and pleading for his son's safe return, which is followed by a headline of the child's fate: 'Boy's Severed Head Found in Creek'").

[11] Levenson, *supra* note 10, at 2 ("Sex offenders and sex crimes incite a great deal of fear among the general public and as a result, lawmakers have passed a variety of social policies designed to protect community members from sexual victimization").

[12] Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, And Perceived Police Effectiveness,* 10 J. CRIM. JUST. & POPULAR CULTURE 109, 120 (2003).

'monsters' to be feared."[13] The media, in short, shapes and produces the reality of crime,[14] as it influences "factual perceptions of the world."[15]

Our desire to punish, treat and categorize this "abhorrent" population is not a new phenomenon.[16] The notion of a "sex offender" or someone who engages in immoral sexual acts or desires, has been around for centuries.[17] The fear and hatred of individuals who have committed crimes of sexual violence has existed well before the 20th century[18] and well before our current, infiltrative, grand "mass-media" dissemination of information.[19] Our innate disgust at these types of offenses and our emotionally-charged responses appear to be quite natural, given societies' morals, ethics and codes of decency; yet, legislative actions cannot and should not be based solely (or even predominantly) on distorted media depictions (of both offenses and perpetrators).[20]

Prior to the most recent spate of legislative enactments, the sexual psychopath laws had been enacted in order to provide treatment in lieu of punishment on individuals who commit crimes of a sexual nature.[21] But never before our most recent attempts to deal with the population has there been such a moral panic,[22] accompanied by such a massive,

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[13] *Id.* On how fictional television shows focusing on forensic analysis have become icons "for anxieties within the legal system about truth finding and legal outcomes" and raise questions about "the future of the rule of law," *see* Christina Spiesel, *Trial by Ordeal: CSI and the Rule of Law*, in LAW, CULTURE AND VISUAL STUDIES (Anne Wagner & Richard Sherwin eds., 2013) (in press).

[14] Keith Hayward, *Opening the Lens: Cultural Criminology and the Image*, *in* FRAMING CRIME: CULTURAL CRIMINOLOGY AND THE IMAGE 1, 3 (Keith J. Hayward & Mike Presdee eds., 2010).

[15] RAY SURETTE, MEDIA, CRIME AND CRIMINAL JUSTICE: IMAGES, REALITIES, AND POLICIES 102 (1992).

[16] Catharine R. Stimpson, *Foreword* to JUDITH R. WALKOWITZ, *CITY OF DREADFUL DELIGHT: NARRATIVES OF SEXUAL DANGER IN LATE-VICTORIAN LONDON,* at xxii (1992) ("Victorian London was a world where long-standing traditions of class and gender were challenged by a range of public spectacles, mass media scandals, new commercial spaces, and a proliferation of new sexual categories and identities.").

[17] STEVEN ANGELIDES, THE EMERGENCE OF THE PAEDOPHILE IN THE LATE TWENTIETH CENTURY 4 (2005) (positing that "the 'paedophile' was chiefly an outgrowth of social and political power struggles around questions of normative masculinity and male sexuality, but also that homophobia played a central role in this process.").

[18] Helen Gavin, *The Social Construction of the Child Sex Offender Explored by Narrative*, 10 QUALITATIVE REP. 395, 396 (2005) ("Historical evidence to support the existence of a dominant narrative, perceiving the child sex offender to be inherently 'evil' and 'inhuman' can be seen in National Society for the Protection of Children (NSPCC) rhetoric from 1888 which describes child sexual abuse as the 'vilest crime against childhood' and abusers as 'evil'. In addition, common vocabulary used by Victorian parents in response to abusers included 'dirty beast,' 'dirty old man,' and 'dirty devil.'").

[19] *See* Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 887 n.4 (1995) (noting that Alabama, Arizona, California, Illinois, and Nevada were the first states to introduce sex offender registration laws between 1947 and 1967); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) (claiming that "constitutional proceduralism" of the 1960s spawned the severe punitive justice of the 1970s).

[20] Dorfman & Schiraldi, *supra* note 10, at 7 (the media's coverage of crime often creates a misleading picture of a nation far more dangerous and violent than it is in actuality).

[21] Raquel Blacher, *Historical Perspective on the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 907 (1995); *see generally*, Sarah H. Francis, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 SUFFOLK U.L. REV. 125 (1995).

[22] BENJAMIN RADFORD, MEDIA MYTHMAKERS: HOW JOURNALISTS, ACTIVISTS, AND ADVERTISERS MISLEAD US 66 (2003) ("The media profit from fear mongering through sensationalized headlines. Nothing gets viewers to tune in to a news program like fear: fear of war, fear of disease, fear of death, fear of harm coming to loved ones."); PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 6 (1998);* Ronald Weitzer & Charis E. Kubrin, *Breaking News: How Local TV News and Real-World Conditions Affect Fear of Crime*, 21 JUST. Q. 497, 503 (2004); *see infra* text accompanying notes 202-204 for a fuller discussion of such panics. This is not to say that these panics have no historical antecedents, *see* Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317, 1320 (1998). But the earlier "sex crime panics" did not have the same across-the-board impact on legislation and court decisions that the recent ones have had.

country-wide outcry for retribution and deterrence. Clearly, much of the initial push to contain, confine and monitor offenders, over the last several decades, has, at the least, been *partially* motivated by the availability of mass media information and the media's persistent display and interpretation of shocking and newsworthy sex crimes.[23] It cannot be denied that moral panic is the progenitor of the resulting laws, and therefore the catalyst that spawned the political motivations that led to an outcry for stricter sex offender laws and legislation.[24]

This moral panic has developed primarily due to the media's depiction of a "sex offender " in the news and newspaper articles.[25] The media has focused significantly on the heinous and highly emotionally-charged crimes of individuals such as Earl Shriner, whose crime precipitated the first new generation sex offender law, and Jesse Timmendequas, whose victim is the namesake of Megan's Law.[26] A writer of a *New York Times* op-ed column in 1993 concluded, "There can be no dispute that monsters live among us. The only question is what to do with them once they become known to us."[27] As a result of the incessant media coverage, the general public has conceptualized what it believes to be the prototype of this "monstrous evil" – a male who violently attacks stranger young children[28] -- and has responded by grabbing their pitchforks and lighting their torches[29] in a unified alliance to exterminate and eradicate the beast.[30]

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[23]Television personalities perpetrated much of the media generated panic over child abductions in the 1990's. A prime example is found in Geraldo Rivera. *The Geraldo Rivera Show*: *Lured Away: How to Get Your Child Back; Panelists Discuss Their Horrifying Experiences of Losing Children Through Abductions and Murders; Tips Are Offered on Keeping Children Safe* (Television broadcast Dec. 4, 1997) ("[T]hey will come for your kid over the Internet; they will come in a truck; they will come in a pickup in the dark of night; they will come in the Hollywood Mall in Florida . . . There are sickos out there. You have to keep your children [very] close to you . . . "); *see also*, Jeff Martin, *More Predator Alerts Sent by E-mail: Notifications Delivered When Sex Offender Moves Nearby*, USA TODAY, Dec. 17, 2010, at A3 ("A growing number of law enforcement agencies and states are using e-mail to alert victims and anyone else who wants to know when sex offenders in their area move into the neighborhood, or change jobs or schools").

[24] Dave Goins, *Fear Fuels Sex Offender Legislation*, THE POWER COUNTY PRESS, Feb. 8, 2006, at 4-5 ("There was other cases. But that's a big catalyst . . . after all, that put the national spotlight on Idaho in a way that we really don't appreciate."- Senator Denton Darrington discussing the crimes of William Duncan III and the result of stricter Idaho sex offender legislation); Wendy Koch, *States Get Tougher with Sex Offenders,* USA TODAY, May 23, 2006 ("Public fear of sex offenders is spurring a wave of tougher laws this year, both in Congress and statehouses nationwide.").

[25] Jessica M. Pollak & Charis E. Kubrin, *Crime in the News: How Crimes, Offenders and Victims Are Portrayed in the Media*, 14 J. CRIM. JUST. & POPULAR CULTURE 59, 60 (2007) ("Reality is socially constructed, in large part, through the media, which provide a way for dominant values in society to be articulated to the public."); *Id.* at 64, ("with regards to emotion, newspapers focus on ideas whereas television emphasizes 'feeling, appearance, mood . . . there is a retreat from distant analysis and a dive into emotional and sensory involvement.'").

[26] Earl Shriner's crime provoked Washington State to enact the first of the new generation sex offender laws, and the murder and sexual assault against Megan Kanka by Jesse Timmendequas produced New Jersey's Megan's Law- that served as the "model community notification law" for other states to follow. Both crimes and their cultural and legislative effect will be discussed, in depth, in Part I of this article.

[27] Andrew Vachss, *Sex Predators Can't Be Saved*, N.Y. TIMES, Jan. 5, 1993.

[28] *See generally* Heather E. Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1 (2012); Gavin, *supra* note 18, at 395 ("The dominant narrative construction, in Western societies, concerning child sex offenders identifies such individuals as purely male, inherently evil, inhuman, beyond redemption or cure, lower class, and unknown to the victim . . .").

[29] Compare, in a different context, Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 324 (2008) ("Faceless crowds of online tormentors wield virtual pitchforks, carry virtual torches, and hound innocent targets into hiding and out of the online world entirely.").

[30] Gavin, *supra* note 18, at 397 ("Unidentified sex offenders described in the media frequently have identities created to fit a particular stereotype, labeling the strangers as 'beasts,' 'fiends' 'brutes,' and 'animals.' Dehumanization and depersonalization of sex offenders is a common theme in press coverage . . .").

This paper is not the first inquiry into the media's influence on public perceptions and moral panic;[31] the media's influence on sex offender policy, legislation and public opinion has been highlighted in depth throughout much of the literature and academic writings.[32] The other discussions have generally focused on the media's role as a precursor to the enactment of sex offender legislation,[33] the upholding of sex offender laws in the courts,[34] and as a significant influence on the continuation of moral panic.[35] But what has not been looked at significantly, is whether and how the media coverage and presentation of these issues has been transformed over the past two decades, and what effect, if any, this has had on public perception. What if the media has begun to shift away from simply highlighting and describing the feared beast and has begun to focus more on the problematic results of laws and legislation? Would that, in turn, have an effect on public perceptions and inevitably on the formation and enactment of laws and judicial decisions?

Slowly and somewhat recently, it appears that the tone of the media's portrayal of sex offender issues has begun to shift. In addition to highlighting salient and horrific sexually violent offenses and contributing to community outrage, the mainstream media has increasingly begun to report on significant concerns surrounding the conceptualization, treatment and containment of the sex offender population. News articles – published in popular newspapers and media sites – more readily dedicate information to expressing expert opinions (that were previously embedded in articles dedicated solely to describing heinous crimes and community outrage), reporting on statistics that question the factual basis of our perceptions, questioning the efficacy of the laws designed to protect the community, and touching on the cost of human rights violations resulting from our laws.

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[31] *See* BARRY GLASSNER, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS (2010); Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 560 (2000); RADFORD, *supra* note 22, at 66.

[32] Numerous articles have highlighted the intersection between public fears and the demand for harsher punishments. *See* Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 44-47 (1997) (considering the justifications behind the public's demand for harsher criminal penalties); WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 85–108 (2009) (conceptualizing registration schemes in light of political motivations and societal trends).

[33] Singleton, *supra* note 4, at 602–07 (identifying the link between the media's increase in crime reporting and the move for legislative action). Oprah Winfrey provided the initial impetus for the National Child Protection Act in 1991, when she testified before the U.S. Senate Judiciary Committee, urging that a national database of convicted child abusers be established. On Dec. 20, 1993, President Clinton signed the national "Oprah Bill" into law. Associated Press, *President Clinton Signs the National Child Protection Act*, N.Y. TIMES NAT'L, Dec. 21, 1993 ("At the signing of the National Child Protection Act [also known as the "Oprah Bill"], President Clinton invited Oprah Winfrey, a supporter of the legislation, to speak.").

[34] *See infra* footnotes 155-161; *Children's Safety As First Priority Dictates Custody for Sexual Predators*, SUN SENTINEL, Dec. 12, 1996, http://articles.sun-sentinel.com/1996-12-12/news/9612110231_1_mental-abnormality-leroy-hendricks-sexually-violent-crime (Chief Justice William Rehnquist took society's side at oral argument: "'What's a state supposed to do - wait until he goes out and does it again'?"); Krista Gesaman, *Breaking a Law . . . That Doesn't Exist Yet: Why the Supreme Court Should Overturn the Retroactive Application of a Sex-offender Statute*, NEWSWEEK, Feb. 22, 2010 (quoting Professor Corey Rayburn Yung: "'The court isn't sympathetic to criminals, and they're even less sympathetic to sex offenders . . .'").

[35] AARON DOYLE, ARRESTING IMAGES: CRIME AND POLICING IN FRONT OF THE TELEVISION CAMERA 129 (2003) (noting that television creates a passive role for a wider and more diverse audience that is more prone to accept information they are given as truth); Vincent F. Sacco, *Media Constructions of Crime*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 142 (1995) (official crime statistics indicate that most crime is nonviolent yet the news media suggests just the opposite often creating the perception of an "'epidemic of random violence'"); Robert Reiner et al., *From Law and Order to Lynch Mobs: Crime News Since the Second World* War, *in* CRIMINAL VISIONS: MEDIA REPRESENTATIONS OF CRIME AND JUSTICE (Paul Mason ed. 2003) ("About two-thirds of crime news stories are primarily about violent or sex offenses, but these account for less than 10 percent of crimes recorded by the police.").

This article will consider the role of the media in sex offender issues and further theorize whether the shift in media presentation has affected public perceptions of sex offenders and whether it has had any impact on recent legislation and the future enactment of sex offender laws. As part of this inquiry, we will employ the lens of therapeutic jurisprudence in an effort to assess the broader societal impact of these media depictions.

Part I will offer an overview of the major (media-centered) sex offender laws and legislation, focusing on the media accounts of the crimes upon which they were based. Part II will consider the impact of the media's portrayal of offenders as the pariahs of society in the civil and criminal justice system; Part III will detail the proposed recent shift in media presentation and consider how, if at all, this shift has made an impact on new laws, legislation and court opinions. Part IV weighs these developments in the context of therapeutic jurisprudence, and considers its potential impact on dealing with the aftermath of the first decades of the media's volatile influence on this area of law and policy. We conclude by offering several policy recommendations.

The title of this paper comes, in part, from Bob Dylan's epic song, *Idiot Wind*, a song that one of us has previously characterized as "an angry, coruscating and brilliant polemic,"[36] and as filled with "searing metaphors and savage language,"[37] a song that creates "a perfect milieu for mental disability law analyses."[38] The song is replete with "patches of raw, unalloyed rage,"[39] and can be construed as a "rage against failure;"[40] it "bridges the gap between bitterness and sorrow."[41] It is, in Oliver Trager's words, an "anthem to pain."[42]

The area of law that we are discussing in this paper is surrounded by anger, by "savage language," by "rage" and by "pain." And so much of those emotions flow – directly and inexorably – by the way that the press has focused on the crimes that are at the core of our concerns. The line in question (and the context in which it was written) encapsulates, nearly perfectly, the dilemma we face.

I. THE "PLANTED PRESS STORIES"

A. Introduction

Since the early 1990s, four major legislative acts and one significant court case served as the building blocks of sex offender containment, registration and notification. Public outrage, political pressure, and the emphasis on and distortion of the events preceding these acts in the media, significantly impacted these monumental legislative and legal outcomes.

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[36] Michael L. Perlin, "*The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment,* 82 IOWA L. REV. 1375, 1379 (1997).

[37] Michael L. Perlin, "*What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom": Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than "Idiot Wind?"*, 35 U. Mich. J.L. Reform 235, 241 (2001-02).

[38] Michael L. Perlin, *"Everything's a Little Upside Down, as a Matter of Fact the Wheels Have Stopped": The Fraudulence of the Incompetency Evaluation Process*, 4 HOUS. J. HEALTH L. & POL'Y 239, 243 (2004).

[39] TIM RILEY, HARD RAIN: A DYLAN COMMENTARY 241 (updated ed. 1999).

[40] HOWARD SOUNES, DOWN THE HIGHWAY: THE LIFE OF BOB DYLAN 283 (2011).

[41] CLINTON HEYLIN, BOB DYLAN: THE RECORDING SESSIONS, 1960-1994, 106 (1995).

[42] OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA, 279 (2004).

B. Washington State's Community Protection Act[43]

The first "new generation" law,[44] that was designed to prevent offenders from committing further acts of sexual violence, was enacted in the state of Washington as a response to a heinous crime committed against a young child.[45] Just six years earlier, in 1984, critics had compelled Washington to repeal its sexual psychopath law due to concerns over its constitutionality and effectiveness.[46] Yet the state of Washington, responding to community outrage and mass media coverage, enacted new legislation aimed at enabling post-sentence civil detention for "sexually violent predators."[47]

In 1989, Earl Shriner, a repeat sex offender, raped and sexually mutilated a 7-year-old Tacoma, Washington, boy. A Washington newspaper, *The Spokesman-Review*, reported on the case this way: "The 7-year-old was playing in a vacant lot when sex offender Earl Shriner grabbed him, pulled him into the bushes, raped and sexually mutilated him."[48] The report offered statements by the Tacoma police sergeant who described how Shriner was "well-known" to law enforcement.[49] The police sergeant made specific remarks concerning Shriner and sex offenders in general.[50] Regarding Shriner, the sergeant declared that, "he [Earl Shriner] frequently contacted small children" and that "[h]is fashion [was] to do this sort of thing…[and] Sex Offenders always reoffend."[51] The article went on to detail Shriner's previous crimes (targeting, abducting and abusing children) and the resulting criminal sentences (the last one lasting for only 66 days in county jail).[52]

A month later, another Seattle newspaper, the *Tri-city Herald,* published an article urging stricter sex offender laws.[53] The article called for immediate changes in the

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[43] Community Protection Act of 1990, WASH. REV. CODE ANN. § 71.09 (West 2001).

[44] *See* Brian G. Bodine, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990); John La Fond, *The New Sexually Violent Predator Law – America's Unique Sexual Offender Commitment Law* (paper presented at the American College of Forensic Psychiatry's annual conference), April 1992, S.F. Cal.), as cited in Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 637 n.51 (1993); Grant H. Morris, *The Evil that Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199, 1200 (2000).

[45] Charles Oliver, *Sex Crime and Punishment*, REASON.COM, (Mar. 1993) ("At its heart, the Washington sexual predator law is an emotional reaction to the too-lenient sentences levied on sexual criminals"); *See generally*, Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809 (1992).

[46] Roxanne Lieb, *State Policy Perspectives on Sexual Predator Laws*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, & THERAPY 41, 42 (Bruce J. Winick & John Q. LaFond eds., 2003).

[47] WASH. REV. CODE ANN. § 71.09.02(1) (Supp. 1990). Earl Shriner's crime sparked a push to create a new generation of sex offender laws, thus being the catalyst that began the movement and led other states to enact their own version of sex offender civil commitment and community containment. GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, FINAL REPORT, IV-4 (1989).

[48] Keith Eldridge, *Remembering "Little Tacoma Boy" 20 Years Later*, KOMO NEWS (May 20, 2009, 9:33 PM PDT), *available at* http://www.komonews.com/news/local/45571582.html.

[49] Associated Press, *Tacoma Sex Offender Faces Latest Charges in Mutilation of Boy*, The Spokesman-Review, May 23, 1989, *available at* http://news.google.com/newspapers?id=0mRWAAAAIBAJ&sjid=WfIDAAAAIBAJ&pg=1133%2C1176933.

[50] *Id.*

[51] *Id.*

[52] *Id.* ("In 1977 Shriner pleaded guilty to assault and kidnapping in the abduction of two 16-year-old-girls in Spanaway after he picked them up hitchhiking. He was sentenced to 10 years in prison after Eastern State Officials determined he was not suited for a sexual psychopath program. Since his release in 1987, Shriner has served 66 days in the Pierce County jail . . . .").

[53] Associated Press, *Toughen Sex Offender Laws, Gardner Urged*, TRI-CITY HERALD, (June, 21, 1989) at A7.

way Washington deals with violent sex offenders and urged Gov. Booth Gardner to call a special legislative session.[54] It included these quotations from a community member spearheading the signing of the petition: "The laws have got to change to protect the public" and "what use is a man who goes around preying on women and children." [55] The article focused on a petition of 10,000 signatures, urging the convening of a special legislative session, and specifically describes how a handful of individuals – who were present at a demonstration in Seattle to promote the petition – clapped when a toddler signed his name with a note saying "Governor, please keep me safe."[56] Included with the article was a picture of organized citizens demanding that public safety be the government's *first* priority.[57]

The Governor responded by convening a special task force in order to reevaluate sex offender sentencing.[58] The Governor's Task Force on Community Protection recommended that the Washington legislature adopt a civil commitment procedure for a select group of offenders.[59] The *Seattle Times* described the event and the public's reaction this way: "When that [the crime committed by Earl Shriner] happened, something snapped in the collective conscience. Every fear ever harbored about predatory strangers was realized in that mutilation. And the state struck back with a punitive law that has drawn national attention."[60]

The bill was enacted as the Community Protection Act by the Washington legislature in 1990,[61] the predecessor of the Sexually Violent Predator Law,[62] which allowed the state to detain a person who had served a sentence for a "sexually violent offense" if it could be shown beyond a reasonable doubt that the person suffered from a mental abnormality or personality disorder which made the person likely to engage in predatory acts of sexual violence.[63] The Community Protection Act also mandated that sex offenders register their whereabouts with police upon release from prison or treatment, and authorized law enforcement to pass along that information to the communities into which they move.[64] Critique of the science and procedures behind these laws continued with the "new generation" statutes[65] and the same questions arose regarding accurate

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Exec. Order No. 89-04, WASH. ST. REG. 89-13-055 (1989), *available at* http://www.governor.wa.gov/office/execorders/eoarchive/eo89-04.htm.

[59] David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 538 (1992).

[60] Linda Keene, *Warning Signs -- A New State Law Alerts Parents to Predators in the Neighborhood and the Struggle to Cope Begins*, THE SEATTLE TIMES, Sept. 15, 1991, *available at* http://community.seattletimes.nwsource.com/archive/?date=19910915&slug=1305581.

[61] Deborah L. Morris, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 611 (1997); Sarah E. Spierling, *Lock Them up and Throw Away the Key: How Washington's Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL'Y 879, 892-93 (2001).

[62] WASH. REV. CODE ANN. § 71.09.010 (West 2001) (a "sexually violent predator" has a personality disorder or mental abnormality that is not amenable to treatment, making them likely to engage in sexually violent behavior).

[63] *Id.*

[64] Scheingold et al., *supra* note 45, at 809.

[65] *See generally* Bodine, *supra* note 44.

diagnosis and treatment of this population[66] and the constitutionality of confinement under civil commitment.[67]

Constitutional challenges to the statutes were more often than not unsuccessful.[68] The Washington Supreme Court upheld the Community Protection Act, and found that sexual predator provisions of the state community protection act were constitutional.[69] The Community Protection Act also mandated that sex offenders register their whereabouts with police upon release from prison or treatment, and authorized law enforcement to pass along that information to the communities into which they move.[70]

In the immediate aftermath of the enactment of the Community Protection Act, newspapers reported on the public's fear that drove the passage of the legislation. The Seattle Times reported that 4200 offenders had registered statewide in 1991 with communities being warned about the "most violent."[71] The article describes how "[s]uddenly, real faces have been put on an inhuman crime as predator mug shots stare out from paper bulletins. They have become lightning rods for a long-simmering wrath that reaches back to 1989, when Earl Shriner lured a Tacoma boy from his bike and severed his penis during the assault.[72] The article continued with lengthy quotes from community members, one such individual stating: "I think capital punishment should have been a consideration . . . and I would have no problem being the one to throw the switch," said Ron Wilson, a father of three children who angrily nailed new planks to a fence at his home, in a cul-de-sac accented with American flags.[73] "Someone with a history of sexual assaults against children should never be allowed on the street to re-offend. That's a slap in the face, especially in a neighborhood with lots of children. It's like putting an alcoholic in a tavern and expecting them not to drink." The article quoted University of Puget Sound School of Law Professor, John Q. La Fond, arguing that communities should be protected from predators through tougher prison sentences - not through civil commitment: "This is lifetime preventive detention, solely to prevent possible further crime . . . . The U.S. Supreme Court has never authorized lifetime confinement of someone who is not mentally disabled in some meaningful sense, simply to prevent possible recidivism."[74]

Consider representative additional news headlines from the *Seattle Times* articles covering this law and the containment of sexual predators: *Guest Editorial -- 1990 Act*

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[66] Gary Gleb, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 215 (1991).

[67] Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 158 (1996) ("As the Court decides the sex offender cases, it will likely draw a bright line on the constitutional map of civil commitment.") ((article published prior to the decision in *Hendricks*). A system that compromises our traditional constitutional values cannot last. Sex offender commitment laws confuse too many important values. Obscuring the critical role that mental disorder plays in defining the state's police powers, these laws embrace a dangerous jurisprudence of prevention. We must find other, more truthful and more principled ways to prevent sexual violence.

[68] *In re* Blodgett, 502 U.S. 236 (1992) (upholding statute's constitutionality); *Matter of* Buckhalton, 503 N.W.2d 148 (Minn. Ct. App. 1993) (same); *Matter of* Linehan, 503 N.W.2d 142, 148 (Minn. Ct. App. 1993), *rev'd*, 518 N.W.2d 609 (Minn. 1994) (same) (state failed to prove defendant met statutory standards).

[69] *In re* Young, 857 P.2d 989, 1018 (Wash. 1993); *In re* Haga 943 P.2d 395, 398 (Wash. Ct. App. 1997); *See* Julie Emery, *Rapist Committed as Predator*, THE SEATTLE TIMES, Mar. 8, 1991.

[70] Scheingold et al., *supra* note 45, at 809.

[71] Keene, *supra* note 60.

[72] *Id.*

[73] *Id.*

[74] *Id.*

Helps Guard Against Sex Offenders,[75] *Prosecutor Praises Sex-Predator Ruling -- Law Has 'Constitutional Seal Of Approval*,[76] *Victim's Mother Glad Predators Locked Up -- Special Center Is Only One In U.S.*[77] It would seem likely that the general public – without a significant understanding of the complex constitutional issues involved – would hail the new generation laws as successful by keeping dangerous sex offenders out of their community.[78]

Although the tenor of many of the published news articles seemed to be focused on the danger of sexual offenders and the anger within the community, early 1990's news articles did not ignore some of the concerns over the efficacy of the Act and the containment of violent predators.[79] A 1993 *Seattle Times* article cited Jerry Sheehan, legislative director of the American Civil Liberties Union, who argued that the law creates a false sense of security by focusing on strangers – when, in fact, most sex offenders are family members or acquaintances.[80] The article also offered statistics on the types of offenders, finding that only "4 percent of the 1,058 felonious sexual assaults against children between 1989 and June of [1992] were carried out by strangers. Most, 43 percent, were by teachers, coaches and other acquaintances. Natural parents were the offenders 22 percent of the time, followed by other relatives, 15 percent, and stepparents, 9 percent . . . ."[81] Yet the article continued on and finished with statements from "terrified parents" and issuances by Gov. Mike Lowry, decreeing that "[s]exual predators are (the most) dangerous people as frankly I can think of . . . ."[82]

C. Minnesota's Jacob Wetterling Act[83]

During the same year that Earl Shriner committed his notorious crime in the state of Washington, a small community in Minnesota was outraged over the abduction of Jacob Wetterling who went missing while riding his bike home from a convenience store in the town of St. Joseph.[84] A little over 12 hours after Jacob went missing, reporters

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[75] Robert Shilling, *Guest Editorial – 1990 Act Helps Guard Against Sex Offenders*, THE SEATTLE TIMES, July 22, 1993, *available at* http://community.seattletimes.nwsource.com/archive/ ?date=19930722&slug=1712209.

[76] Tim Klass, *Prosecutor Praises Sex-Predator Ruling – Law Has 'Constitutional Seal of Approval'*, THE SEATTLE TIMES, Aug. 11, 1993, *available at* http://community.seattletimes.nwsource.com/archive/?date=19930811&slug=1715464.

[77] Hal Spencer, *Victim's Mother Glad Predators Locked Up – Special Center is Only One in U.S.*, THE SEATTLE TIMES, May 15, 1994, *available at* http://community.seattletimes.nwsource.com/archive/?date=19940515&slug=1910634.

[78] Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, *available at* http://www.nytimes.com/2007/03/04/us/ 04civil.html?pagewanted=all&_r=1& (Sex offenders selected for commitment are not always the most violent; some exhibitionists are chosen, for example, while rapists are passed over. And some are past the age at which some scientists consider them most dangerous. In Wisconsin, a 102-year-old who wears a sport coat to dinner cannot participate in treatment because of memory lapses and poor hearing.).

[79] Norman J. Finkel, *Moral Monsters and Patriot Acts*, 12 PSYCHOL. PUB. POL'Y & L. 242, 260 (2006) ("Although the print media have written a number of stories and editorials about the legitimacy and effects of community notification and involuntary commitment, it was predominantly the scholarly and scientific press, through law reviews and empirical articles, that took a serious look at what are complex psychological, empirical, normative, and constitutional issues.").

[80] Linda Keene et al., *Legal Dilemma: Rapist's Rights vs. Public's Right to Know*, THE SEATTLE TIMES, July 13, 1993, *available at* http://community.seattletimes.nwsource.com/archive/ ?date=19930713&slug=1710841.

[81] *Id.*

[82] *Id.*

[83] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C.A. § 14071 (1994).

[84] William Plummer & Margaret Nelson, *A Town Prays for a Missing Son*, PEOPLE MAGAZINE, Nov. 20, 1989, vol. 32, no. 21, *available at* http://www.people.com/people/archive/article/0,,20115979,00.html.

swarmed the Wetterling home and the abduction blossomed into a "full-scale media event."[85] One week after, on October 30th, the *New York Times* ran an article in light of the impending holiday of Halloween.[86] The article detailed the fears of the community noting that, "many of the children say they are frightened that the abductor may strike again. They have told teachers they cannot sleep. Few children are expected to go out on Halloween."[87] On the next evening, Peter Jennings and ABC Evening News dedicated a segment to the impact of the crime on the small Minnesota town airing interviews with local parents, Jacob's mother and individuals from Jacob's school.[88] The following night, both NBC Evening News with Tom Brokaw[89] and CBS Evening News with Dan Rather[90] ran segments describing the events of the kidnapping and airing statements by Jacob's parents and other family members. In an article written one month after the abduction, *People Magazine* highlighted how the community had banded together in an effort to find Jacob and prevent any other similar crimes.[91] The article detailed the events leading up to the kidnapping and included statements by Jacob's mother, Patti Wetterling, and other concerned members of the community.[92] One father stated that he "had to help. Every parent sees their children in Jacob. It's terrifying to people to have this happen here."[93]

In 1991, through efforts stemming out of the Jacob Wetterling foundation, the legislature passed the Minnesota Sex Offender Registration Law.[94] In 1994, while Washington State was trying to strengthen and expand the Community Protection Act,[95] Congress passed the federal Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act (SORA),[96] through which the federal government sought to encourage states, through the allocation of federal funding, to establish sex offender registries.[97] The act mandated that offenders who had been convicted of sexual abuse of children or sexually violent crimes against an adult must register their community residential address with local law enforcement for 10 years.[98] Dissemination of

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[85] *Id.*

[86] Dirk Johnson, *Small Town is Shaken by a Child's Abduction*, N.Y. TIMES, Oct. 30, 1989, *available at* http://www.nytimes.com/1989/10/30/us/small-town-is-shaken-by-a-child-s-abduction.html.

[87] *Id.*

[88] *ABC Evening News with Peter Jennings: St. Joseph, Minnesota/ Kidnapping* (ABC television broadcast Oct.. 31, 1989).

[89] *NBC Evening News with Tom Brokaw and Dan Molina: St. Joseph, Minnesota/ Missing Child* (NBC television broadcast Nov.1, 1989).

[90] *CBS Evening News with Dan Rather: St. Joseph, Minnesota/ Missing Child*, (CBS television broadcast Nov. 1, 1989) (segment shows a local woman saying there is "fear in this small town now").

[91] Plummer & Nelson, *supra* note 84.

[92] *Id.* ("'We're sending a message,' says Patty Wetterling, Jacob's mother. 'You can't do this in Minnesota. You can't take our children.'").

[93] *Id.*

[94] The law was later renamed the Predatory Offender Registration law in 1993 and has been amended several times. MINN. STAT. ANN. § 243.166 (1991).

[95] In 1997, after the Kansas civil commitment statute was deemed constitutional and non-punitive in nature, Washington put to rest any concerns as to whether it would abandon its statute. *See* John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655 (1992).

[96] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, PUB. L. No. 103-322, § 170101, 108 STAT. 1796 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)) (repealed 2006) (establishing federal guidelines for state sex offender registration laws).

[97] *Id.*

[98] *Id.*

information of the offenders' whereabouts in the community was justified as "necessary to protect public safety."[99]

D. New Jersey's Megan's Law[100]

Around the time of the final passage of the Jacob Wetterling Act, a heinous crime in New Jersey exploded in the media and spotlighted the need for increased community awareness of the presence of a convicted sex offender.[101] Seven-year-old Megan Kanka was reported missing from her home in Hamilton Township, New Jersey, in 1994.[102] Early on in the investigation, police identified a nearby residence housing three convicted sex offenders.[103] Jesse Timmendequas, who later confessed to the rape and murder of Megan, resided in that nearby home.[104] The proximity of the predator to his prey spearheaded a campaign to enact legislation in New Jersey that provided community notification about specific sex offenders currently living in or upon release to the community.[105] The New Jersey legislation would eventually become the model for the tool by which the federal government could notify the public of convicted sex offenders residing throughout the country.[106]

On October 31, 1994, the New Jersey Legislature enacted the Registration and Community Notification Laws, also known as "Megan's Law,"[107] and made national news for years to come.[108] Megan's Law devised a three-tier system that placed offenders in

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[99] Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2010)). The act provided that the designated state law enforcement agency "shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section." Similar language originated in Washington's Community Protection Act of 1990, WASH. REV. CODE ANN. § 4.24.550 (West 2011).

[100] 42 U.S.C. § 14071.

[101] Andrew Vachss, *How Many Dead Children are Needed to End the Rhetoric?,* THE NEW YORK DAILY NEWS, Aug. 12, 1994 ("It's not only politicians who fear the media. Prosecutors do, too, especially those prosecutors who are politicians in disguise. How many rapists are allowed to plead guilty to 'burglary'? How many child molesters are allowed to plead to 'endangering the welfare of a child'? How many predatory pedophiles are allowed to serve their sentences for dozens of separate crimes concurrently?").

[102] *Id.*

[103] E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997).

[104] *Id.*

[105] The public's reaction to the Kankas' call for reform prompted New Jersey to pass the first Megan's Law just three months after Megan's murder. *See id.* at 1081–82; *See* also, *Megan's Legacy*, N.Y. TIMES, Aug. 31, 1994 ("Like Megan's family and neighbors, the legislators were properly outraged to discover that Jesse Timmendequas, twice convicted of sexually assaulting young girls, had been living undetected in Megan's neighborhood. But the bills they passed to appease that rage were approved without public hearings. Indeed, two of the bills may be constitutionally shaky.").

[106] For a look at litigation in New Jersey coinciding with the federal enactment *see, e.g.*, Artway v. Att'y Gen. of N.J., 81 F.3d 1235 (3d Cir. 1996), *reh'g denied*, 83 F.3d 594 (3d Cir. 1996) (upholding registration aspects of New Jersey's "Megan's Law," and finding that challenge to notification aspects of law was not ripe); Paul P. v. Verniero, 982 F. Supp. 961 (D.N.J. 1997) (New Jersey statute constitutional); Alan A. v. Verniero, 970 F. Supp. 1153 (D.N.J. 1997) (same); E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) (same); W.P. v. Poritz, 931 F. Supp. 1199 (D.N.J. 1996) (denying motion for preliminary injunction against enforcement of Megan's Law).

[107] N.J. STAT. ANN.§ 2C:7-1 to -11 (1994) (constitutionality upheld in W.P. v. Poritz, 931 F. Supp. 1199 (D.N.J. 1996); notification requirements did not impose "punishment" on sex offenders; law constitutional)); *compare* Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (statute constitutional, but community notification provisions subject to prior judicial review).

[108] Mike Allen, *Girl's Slaying Exposes Limits Of Connecticut 'Megan's Law'*, N.Y. TIMES, Aug. 28, 1998; Julia Sommerfeld, *Megan's Law Expands to the Internet*, MSNBC, Aug. 17, 1999; Peter A. Zamoyski, *Will California's "One Strike" Law Stop Sexual Predators, or Is a Civil Commitment System Needed?*, 32 SAN DIEGO L. REV. 1249 (1995); Christine Kong, *The Neighbors Are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 VILL. L. REV. 1257 (1995).

separate tiers based off of their assessed level of dangerousness and required all tiered offenders to register with local law enforcement.[109] The enactment of "Megan's Law" and legislative modification of the Jacob Wetterling Act allowed Congress to lengthen the federal required registration time period from 10 years to lifetime registration,[110] compel further conformity among the states,[111] and include those offenders who qualify as sex crime recidivists and/or were convicted of "aggravated" sexual violence.[112] News headlines – e.g., *Sexual Attack on Youth Shows "Megan's Law" Limit*[113] – discussed the loopholes in notification and paved the way to nationalize the notification requirement.[114] The media's coverage during the pending amendment of the Act in the House of Representative reported on statements from Rep. Dick Zimmer, R-N.J. – "Today we're putting the rights of children above the rights of convicted sex offenders," and Rep. Charles Schumer, D-N.Y. – "Sexual offenders are different . . . . No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children, to molest, abuse, and in the worst cases, to kill."[115] Opposition to the Bill – citing constitutional concerns – was easily lost amongst the crusade for children's rights and the vivid description of the prowling predator.[116]

The Megan's Law amendment to the Jacob Wetterling Act was passed in 1996.[117] Also included in the amendment was the authorization of a national registry that would contain information on offenders who were labeled recidivists, deemed sexual violent predators, convicted of coercive, penetrative sex with anyone and/or those offenders who

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[109] N.J. STAT. ANN. § 2C:7-8 (1994).

[110] Department of Justice Office of the Attorney General, "*Megan's Law: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended*," (Dec. 17, 1998), http://pub.bna.com/cl/19990120/2196.htm (*"Megan's Law"*). Simultaneously enacted was the Pam Lychner Act of 1996, Pub. L. No. 104-236, 110 Stat. 3090-94 (codified as amended at 42 U.S.C. § 14072 (Supp. IV 1998) (1st attempt toward a national registration system)).

[111] If states do not comply with federal registration and community notification laws, they lose 10 percent of their appropriation from the federal Edward Byrne Justice Assistance Grant Program, which provides funding for state and local crime prevention and control programs. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, §170101, 108 Stat. 1796 (1994) (codified as amended at 42 USC. §14071 (2006)); For scholarly analysis see, Kenneth Crimaldi, *"Megan's Law": Election-Year Politics and Constitutional Rights*, 27 RUTGERS L.J. 169 (1995); Kristen Zgoba et al., *Megan's Law: Assessing the Practical and Monetary Efficacy*, 2008 No. 225370 (2006-IJ-CX-0018), U.S. Dept of Justice; Symposium, *Critical Perspectives on Megan's Law: Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1 (1996) (comments of John Gibbons, Ronald Chen, Alexander Brooks, Eric Janus, and Patrick Reilly); Jeff Barker, *Upgrade Sex Offender Law or Lose Grant, Md. Told,* BALTIMORE SUN, Nov. 3, 2001.

[112] "*Megan's Law*," *supra* note 110.

[113] John Sullivan, *Sexual Attack on Youth Shows 'Megan's Law' Limit*, N.Y. TIMES, Aug. 1, 1995 (Prosecutors point to the "limits of the state's law requiring community notification of the presence of sex offenders" and "advocates of the law announced an effort to nationalize the notification requirement.").

[114] *Id.*

[115] Carolyn Skorneck, *House Considers Tougher Version of 'Megan's Law'*, ASSOCIATED PRESS, May. 7, 1996; *see also Remembering Megan,* N.Y. TIMES, Nov. 5, 1994 ("Children are more apt to be sexually abused in the home than outside it. Even so, the threat posed by an unknown predator terrifies American families the most. That is the reason for the community-notification provision that is now part of Federal law -- and for the New Jersey bills that inspired it.").

[116] Skorneck, *supra* note 115 ("Rep. Melvin Watt, D-N.C., raised a lonely voice in opposition. 'Our constitution says to us that a criminal defendant is presumed innocent until he or she is proven guilty. The underlying assumption of this bill is that once you have committed one crime of this kind, you are presumed guilty for the rest of your life.'").

[117] Megan's Law, 42 U.S.C. § 14071 (1996).

had sex with children under the age of 12.[118] News articles post-amendment and adoption of Megan's Law reported the public's response.[119] An Associated Press article, *Parents Praise Megan's Law Findings*, quoted one mother's response to the adoption of the legislation: "I know for sure my daughter was saved from having been molested," and included a statement from the Attorney General confirming that "[a]rming law-abiding citizens with information about sex offenders living in their neighborhoods has spared countless children and families from the advances of sexual predators."[120]

States seeking to adopt the federal statute ran news articles with statistics on sex offenses and the benefits of registration: "U.S. Department of Justice figures show that a forcible rape is committed every six minutes. A California study of the effectiveness of registration programs found that most law enforcement agencies believed registration helped them arrest suspected sex offenders . . . . Another California study on recidivism evaluated sex offenders over a 15-year period and found that nearly 50 percent were rearrested, 20 percent for a subsequent sex offense."[121]

By 2005, the national registry was available on the Internet and was linked to all other state online registries.[122] Presently, every state, as well as the District of Columbia, has enacted sex offender community notification and registration requirement statutes.[123]

In addition to community notification and registration, individual states also enacted residency restriction laws.[124] Coinciding with New Jersey's enactment of Megan's Law, residency restrictions sought to ban sex offenders from residing in specifically designated areas.[125]

> [R]esidency restrictions are "likely a response to high-profile media coverage of child abduction cases. It is probably no accident that passage of the first sex offender residency restrictions in 1995 followed on the heels of the Klaas and Kanka murders in 1993 and 1994, respectively. Prior to the Klaas murder, national coverage of such crimes

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[118] Department of Justice (Megan's Law), *supra* note 110 (An aggravated sexual act is defined as "(1) engaging in sexual acts involving penetration with victims of any age through the use of force or the threat of serious violence; and (2) engaging in sexual acts involving penetration with victims below the age of 12.").

[119] Joshua Wolf Shenk, *Do "Megan's Laws" Make a Difference?*, US NEWS AND WORLD REPORT, Mar. 1, 1998 ("Polls bear out changing attitudes about safety: About half of Washington parents, for example, say they're less likely than before the law was passed to leave their kids alone--even with a baby sitter."); In 1997, the Associated Press released an article that retold the horrific crime and further described specifics of the rape and murder in grave detail: Donna De La Cruz, *In Statement, Defendant Says He Eyed Megan Kanka All Summer,* ASSOCIATED PRESS, May 9, 1997 ("Timmendequas told [detectives] he put a belt around her neck after she screamed and tried to run away when he fondled her. He said he choked her with the belt and covered her head with a plastic bag.").

[120] Scott Lindlaw, *Parents Praise Megan's Law Findings,* ASSOCIATED PRESS, Jun. 13, 1998.

[121] *Needed Changes Will Toughen Megan's Law*, THE BALTIMORE SUN, Aug. 17, 1996.

[122] The Pam Lychner Sex Offender Tracking and Identification Act of 1996 is another amendment to the Wetterling Act: Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996) (amending 42 U.S.C. 14071). This act allows the FBI to establish a national database of the names and addresses of sex offenders who are released from prison and requires lifetime registration for recidivists and offenders who commit certain aggravated offenses. The Act is named for Pam Lychner, who became a victims' rights advocate after she narrowly escaped an attack by a repeat sex offender.

[123] Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 325-26 (2006).

[124] Corey Rayburn Yung, *Banishment By a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 122-27 (2007).

[125] *See id.*; Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, & Alternatives,* 86 WASH. U. L. REV. 1397, 1411-14 (2009).

> was comparatively slight. Beginning with the Klaas case, however, media coverage of such crimes exploded. The increased attention to child abduction cases and the public outcry generated thereby likely led to passage of the first restrictions in 1995.[126]

Residency restrictions prevent individuals who have committed sexual offenses, from living within specific proximities to schools, parks and other areas where children congregate.[127] These ordinances are aimed at prohibiting offenders from residing within particular areas and inevitably within particular cities.[128] Residency restrictions range anywhere from 100 feet to 2,500 feet from any designated area in which minors congregate and apply to the individual regardless of the prior crime or offending history.[129] Therefore, someone whose crime did not include children-as-victims and who has no history of interest in or attraction to children is still subjected to ordinances preventing him from living within a specified distance from where children may be.[130] Residency restrictions that banish "undesirable individuals" from the community are premised on the fear and belief that such individuals would, without a doubt, reoffend if not for such residential bans.[131]

Judicial decisions found these laws constitutional.[132] In *Doe v. Miller,* the Eighth Circuit upheld an Iowa Law, prohibiting any person convicted of certain sex offenses involving minors from residing within 2000 feet of a school or registered child care facility.[133]

There can be no doubt of a legislature's rationality in believing that "[s]ex offenders are a serious threat in this Nation," and that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."[134] "The only question remaining is whether, in view of a rationally perceived risk, the chosen residency restriction rationally advances the State's interest in protecting children."[135]

The impact of judicial decisions that upheld these laws in the courts was compounded by the media's attention to concerns of offenders residing near children in community settings. By way of example, a July 2005 episode of the *O'Reilly Factor*

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[126] Singleton, *supra* note 4, at 609-10.

[127] Cobb v. State, 437 So.2d 1218, 1220 (Miss. 1983) (upholding a probation condition requiring the defendant to "stay out of Stone County").

[128] Steven Brown et al., *What People Think About the Management of Sex Offenders in the Community,* 47 HOWARD J. 3 (July 2008), available at http://onlinelibrary.wiley.com/doi/10.1111/ j.1468-2311.2008.00519.x/full (study finding that the public does not necessarily agree with punitive conditions but is insecure in the effectiveness of community containment and concerned about the reality of reintegration).

[129] ALA. CODE § 15-20A-11(a) (2011) (enlarging the state's residency restriction zone from 1000 feet to 2000 feet); CAL. PENAL CODE § 3003.5 (2011) (increasing the state's residency restriction zone to 2000 feet under Jessica's Law); OKLA. ST. ANN. tit. 57 § 590A (West 2011) (2000 feet).

[130] Jim Nichols, *Tossing the Book at Sex Offenders; Officials Target Hundreds Living Too Close to Schools,* THE PLAIN DEALER, Jul. 31, 2005, at B1.

[131] Karen Sloan, *Towns Fear an Influx of Offenders,* OMAHA WORLD-HERALD, Oct. 4, 2005, at 1A; *see also Des Moines Zones out Molesters,* OMAHA WORLD-HERALD, (Oct. 13, 2005) at 2B.

[132] *Doe v. Miller,* 298 F. Supp. 2d 844, 870 (S.D. Iowa 2004), *rev 'd*, 405 F.3d 700 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

[133] *Id.*

[134] Doe v. Miller, 405 F.3d 700, 715 (8th Cir. 2005) (quoting Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2002) (alterations in *Conn. Dep't of Pub. Safety*).

[135] *Id.* The Eighth Circuit reversed the trial court decision, finding the statute to be constitutional, concluding that the Constitution did not prevent Iowa from regulating the residency of sex offenders in order to protect the health and safety of its citizens. *Id.*

named Alabama as a state that did not care about sex offenders.[136] One week after the episode, Governor Bob Riley convened a special session of the legislature to debate reform to Alabama's sex offender laws.[137] Alabama promptly changed its current laws and, among other things, included residency restrictions for convicted sex offenders. [138]

In the next section, we will discuss our final example of legislation enacted as a result of moral panic. We have focused on how the media influenced states' reactions to offenders entering into the community and will now consider how high profile media cases resulted in keeping them out of communities altogether through the enactment of sex offender civil commitment.

E. The Kansas Experience

While the country was focused on monitoring offenders in the community, Kansas was litigating the constitutionality of their sex offender civil commitment law. In 1994, Kansas enacted its Sexually Violent Predator Act (SVPA) that practically mirrored the state of Washington's sex offender containment act.[139] Kansas wanted to commit an existing "small but extremely dangerous group of sexually violent predators…who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute]."[140] The SVPA established a separate commitment process for "the long-term care and treatment of the sexually violent predator," statutorily defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."[141] Kansas clearly set forth the definition of a mental abnormality defining it as a "congenital or acquired condition affecting the emotional or *volitional* capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[142]

The pivotal case that solidified the constitutionality of the civil commitment of sexual offenders was *Kansas v. Hendricks*.[143] Leroy Hendricks was serving a term of 5-20 years in state prison after being convicted of taking "indecent liberties" with two teenage boys when he clearly stated that he would continue to offend if released to the community.[144] A *Newsweek* article, *Too Dangerous to Set Free,*[145] discussing Hendricks'

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[136] *The O'Reilly Factor: Factor Investigation: Which States are Soft on Child Sex Offenders*? (Fox News television broadcast Jul. 11, 2005).

[137] *Recent Legislation*, 119 HARV. L. REV. 939, 942 (2006).

[138] *Id.* at 941 (Act of July 29, 2005, Ala. Act No. 2005-301 (to be codified in scattered sections of ALA. CODE chs. 13A, 14, and 15) [Sex Offender Act], available at http://arcsos.state.al.us/PAC/SOSACPDF.001/A0003661.PDF. The bill passed unanimously in both houses); *See* Op-Ed., *Safer Children, but How Safe?*, BIRMINGHAM NEWS, Aug. 1, 2005, at 4A; John Davis & Jannell McGrew, *Alabama Lawmakers Line Up Crusades for Next Session* (Online Extra), MONTGOMERY ADVERTISER, Sep. 6, 2005.

[139] KAN. STAT. ANN. § 59-29a01 (2001) (requiring involuntary civil confinement for sexually violent predators with mental abnormalities or personality disorders who are likely to reoffend if untreated).

[140] Kansas v. Hendricks, 521 U.S. 346, 351 (1997).

[141] KAN. STAT. ANN. § 59-29a02(a).

[142] *Id.* § 59-29a02(b) (emphasis added).

[143] *Hendricks*, 521 U.S. at 395-97.

[144] *In re* Care & Treatment of Hendricks, 912 P.2d 129, 130-31 (Kan. 1996), *rev'd*, 521 U.S. 346 (1997); *See also* Jim McLean, *Stovall Preparing to Defend State's Sexual Predator Law for Second Time Before Supreme Court*, TOPEKA CAPITAL-JOURNAL, Oct. 15, 2001, http://cjonline.com/stories/101501/leg_stovall.shtml (discussing the defense of Kansas v. Crane, 534 U.S. 407, 411-13 (2002), [the case that determined whether or not commitment required a complete lack of control], Attorney General Carla Stovall comments on what the effect would be if the

case – then pending in the Supreme Court – along with other terrifying cases of sexual abuse, and made reference to the Megan Kanka murder, but also noted the moral panic generated from the evening news broadcast: "According to the Association for the Treatment of Sexual Abusers [ATSA], the re-offense rate for 'untreated sex offenders who primarily target children' ranges in various studies from 10 percent to 40 percent, not the '80 percent to 90 percent' that many laypeople assume by extrapolating from the 6 o'clock news."[146]

Yet the headlines in other news articles read quite different. An Associated Press article issued an eye-catching title: *Study: Children Were Targets of Most Sex Offenders.*[147] The article inundated its reader with large numbers and various statistics intertwined with quotes from victim advocates groups.[148] One such quote states that: "This high rate of child victims is behind the heightened concern and the growing number of states passing laws that provide for notifying neighborhoods when sexual predators move in [and] [t]he majority of sex crimes are committed against children because they are more helpless, easier targets and easier to intimidate into silence."[149] Embedded within this article was this information: "A third of child molesters had attacked their own child or stepchild. Another half of the molesters were a friend, acquaintance or more-distant relative of their victim. Only one in seven molested a child who was a stranger."[150]

Despite statistics and competing factual information, society continued to respond emotionally to these types of crimes,[151] responses that led to the endorsement of policies that mandated locking sex offenders away indefinitely.[152] In 1997, Associated Press newspaper and broadcast editors voted the debate over the Kansas sexual predator law as the year's top news story.[153] *Sex Predator Biggest Kansas Story*, an 1997 article from the *Topeka Capital-Journal,* ends its report with a quote from John Garlinger – a spokesman for the Kansas Department of Social and Rehabilitation Services, which oversees the sexual predator program – who questioned the selection of the sexual predator decision as the top story of the year: "How you can decide a bunch of perverts are the top story?"[154]

Kansas State Supreme court decision was adopted: "If the Kansas Supreme Court opinion is adopted, the sexual predator program would be obliterated…Hardly anybody, maybe nobody would be committed.").

[145] Jerry Adler, *Too Dangerous to Set Free?*, NEWSWEEK, Dec. 8, 1996, http://www.thedailybeast.com/newsweek/1996/12/08/too-dangerous-to-set-free.html.

[146] *Id.*

[147] Michael J. Sniffen, *Study: Children Were Targets of Most Sex Offenders*, ASSOCIATED PRESS, March 3, 1996.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Remembering Megan*, N.Y. TIMES, Nov 5, 1994 ("Children are more apt to be sexually abused in the home than outside it. Even so, the threat posed by an unknown predator terrifies American families the most."), *available at* http://www.nytimes.com/1994/11/05/ opinion/remembering-megan.html.

[152] Joan Biskupic, *Court Gives States Leeway in Confining Sex Offenders*, WASH. POST, June 24, 1997, § A, at 1 ("At a time when the nation is focused on preventing convicted child molesters from striking again – through longer prison sentences and community notification laws – yesterday's ruling gives legislators significant new leeway to extend the confinement of such convicts."); *See also* Kevin M. Carlsmith et al., *The Function of Punishment in the Civil Commitment of Sexually Violent Predators*, 25 BEHAV. SCI. & LAW 437 (2007) (finding that when the initial criminal sentence was lenient, respondents strongly supported civil commitment without giving any regard to future risk of repeat or dangerous behavior).

[153] Traci Carl, *Sex Predator Biggest Kansas Story*, THE TOPEKA CAPITAL-JOURNAL, Dec. 26, 1997, http://cjonline.com/stories/122697/new_sexpred.html.

[154] *Id.*; *See, Downtown 20/20: No Escape* (ABC television broadcast, June 18, 2001) (Don Dahler of ABC News states, "It's a no-brainer. Convicted sex offenders are bad people, the lowest of the low, perverts. That is sure what a lot of people think here in Corpus Christi, Texas.").

The United States Supreme Court subsequently accepted review in the case of *Kansas v. Hendricks* and found the Kansas statute to be constitutional,[155] thus solidifying the existence of current sex offender civil commitment law in the United States. An article published in the *New York Times* on December 11, 1996, noted that: "It was evident from the arguments that while the Justices have considerable sympathy for the state's goal, they are troubled by the law's open-ended rationale."[156] Six months later, a brief commentary published in the "Health" section of the Times, strongly criticized the Court's ruling.[157] The author echoed the public sentiment and noted that, "[t]he Court's instinct to want to keep this defendant incarcerated is understandable. It would be hard to imagine a less sympathetic defendant than the person who brought the legal challenge, Leroy Hendricks. He is a 62-year-old pedophile who has said only death would guarantee a change in his behavior."[158] But the article raised the concern of the implications of the ruling: "By upholding Kansas' approach to civil commitment, the Supreme Court has raised the troubling prospect of states imposing indefinite confinement in a mental institution based on a loose definition of 'abnormality' and an unreliable prediction that a person is 'likely' to commit dangerous acts in the future."[159]

Post-*Hendricks*, some media outlets urged states to quickly adopt similar legislation. A Florida newspaper urged the "Florida Legislature to act swiftly to enact a law keeping sexual predators confined indefinitely" and "not delay in offering better protection to all Floridians, and especially children, from these violent criminals."[160] By 1997, seventeen states had enacted some form of sex offender civil commitment legislation that was now constitutionally protected under *Hendricks*.[161] Currently, 20 states in total have enacted some form of a sexual violent predator commitment statute.[162]

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[155] Kansas v. Hendricks, 521 U.S. 346, 350 (1997).

[156] Linda Greenhouse, *Justices Sound Sympathetic but Troubled on Law to Confine Sex Offenders*, N.Y. TIMES, Dec. 11, 1996, http://www.nytimes.com/1996/12/11/us/justices-sound-sympathetic-but-troubled-on-law-to-confine-sex-offenders.html.

[157] *Wrong on Sex Offenders*, N.Y. TIMES, June 25, 2007, *available at* http://www.nytimes.com/1997/06/25/opinion/wrong-on-sex-offenders.html.

[158] *Id.*

[159] *Id.*; *see also* Biskupic, *supra* note 152 ("This law is going to spread like wildfire," said Lynn S. Branham, an Illinois attorney and professor who specializes in sentencing law. "This notion of 'mental abnormality' has the potential to dramatically expand the types of persons who can be confined.").

[160] Editorial, *State Should Act Now on Court Ok to Keep Sexual Predators Confined*, SUNSENTINEL.COM, June 25, 1997 (noting that "[t]he U.S. Supreme Court decision upholding a Kansas law clear[ed] a legal path for Florida to better protect its residents from such violent and repeated sex predators as Howard Steven Ault, charged with killing two young sisters in Broward County").

[161] Although constitutional challenges typically involving due process, ex-post facto, and double jeopardy clauses were raised at the outset of the various state legislation, the likelihood of success on the merits was slim given the United States Supreme Court holdings in Kansas v. Hendricks, 521 U.S. 346, 356-58 (1997) and Kansas v. Crane, 534 U.S. 407, 407 (2002).

[162] "Twenty states (Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin) and the District of Columbia have enacted laws permitting the civil commitment of sexual offenders. In addition, the Adam Walsh Child Protection and Safety Act of 2006 authorized the federal government to institute a civil commitment program for federal sex offenders." *Civil Commitment of Sexually Violent Predators,* Aug. 17, 2010, http://www.atsa.com/civil-commitment-sexually-violent-predators; *see* 42 U.S.C. § 16971 (2006).

F. The Adam Walsh case

Probably one of the most significant crimes in recent history occurred on July 27, 1981, when 6-year-old Adam Walsh went missing during a shopping trip with his mother.[163] The child's ensuing abduction and murder began a twenty-plus year crusade that would inevitably alter media and legislative history.[164] Adam's parents established the Adam Walsh Outreach Center for Missing Children on August 19, 1981 – less than one month after the abduction.[165] Two months later, the couple testified before Congress on behalf of the Missing Children Act and the Missing Children's Assistance Act.[166] As a result of their efforts, both of these bills were passed.[167] In 1993, NBC aired a television film covering the story of the kidnapping and the efforts to pass national child protection laws.[168] On the day that the movie was to be aired on NBC, the *New York Times* ran an article prefacing the movie's content and message[169]:

> The first half of "Adam" focuses on the panic and growing despair of the parents as they discover their helplessness in dealing with authorities outside their own police precinct. State and national agencies do not want the added burden of looking for missing kids. They want the problem kept at narrow local levels. Much of the film's fury is directed at the Justice Department and the F.B.I.[170]

In a continuing effort to enable the capture and prosecution of such criminals, Adam's father, John Walsh, guest-hosted the television show, *America's Most Wanted* in 1988.[171] This also served to increase the publicity surrounding Adam's tragic abduction

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[163] Dan Harris & Claire Pedersen, *Adam Walsh Murder: John and Reve Walsh Re-Live the Investigation*, ABC NEWS, Mar. 2, 2011, http://abcnews.go.com/US/adam-walsh-murder-john-reve-walsh-live-investigation/story?id=13037931#.UV2s7hzabms.

[164] Glenn Collins, *The Fears of Children: Is the World Scarier?*, N.Y. TIMES, May 19, 1988, http://www.nytimes.com/1988/05/19/garden/the-fears-of-children-is-the-world-scarier.html ("IN [sic] an era of homelessness, AIDS, drug abuse and ozone-layer depletion, at a time when preschoolers are taught about child abuse and kidnapping, parents and child-development experts are raising new concerns about children's fears."); Donna Leinwand & Emily Bazar, *Adam Walsh's Murder Had Impact Across USA*, USA TODAY, Dec. 17, 2008, at A3 ("Nearly three decades after Toole allegedly abducted Adam from a suburban Florida mall, the nation has a coordinated response to missing children that includes hotlines, the FBI's database, public broadcasting alerts and special federal law enforcement squads that can respond to the scene.").

[165] John Holland, *Adam Walsh Case is Closed After 27 Years*, L.A. TIMES, Dec. 17, 2008, http://articles.latimes.com/2008/dec/17/nation/na-adam17.

[166] *John Walsh Biographical Information*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/en_US/documents/PressKit_JohnWalsh.pdf (last visited Apr. 1, 2013).

[167] *Id.*

[168] The film aired on Oct. 10, 1983 on NBC and was reportedly seen by an audience of 38 million people. At the end of each broadcast of the film, a series of missing children's photographs and descriptions were displayed on the screen for viewers, and a number was given to call if a viewer had information about them. The 1985 photograph series was introduced by President Ronald Reagan in a pre-recorded message, "[M]aybe your eyes can help bring them home." *See* Associated Press, *Adam Again Draws Callers*, MILWAUKEE JOURNAL, April 30, 1985.

[169] John J. O'Connor, *TV: "Adam" Movie on Missing Boy*, N.Y. TIMES, Oct. 10, 1983, http://www.nytimes.com/1983/10/10/arts/tv-adam-movie-on-missing-boy.html ("According to a nonprofit organization called Find the Children, a Federal Government agency estimates that 1.8 million children will be reported missing this year. About 50,000 will never be seen by their families again.").

[170] *Id.*

[171] *John Walsh Biographical Information*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/en_US/documents/PressKit_JohnWalsh.pdf (last visited Apr. 1, 2013).

and murder[172] and brought infamous crime and criminals to the living rooms of every American household.[173]

One of the main goals generated by the Walshes' efforts was the need to better track and monitor offenders on a federal level.[174] A convicted sex offender, interviewed by Fox News, agreed that community notification works: "If people know a sex offender is in their area, they should privately tell the felon his identification is known and he will be closely watched . . . . I think all of us have to be known to the public so that the community can keep its eye on us."[175] In 2005, a *USA Today* article posted images of Shasta Groene[176] and Jessica Lunsford[177] but reported the "surprisingly good news" that "[s]ex crimes against children have dropped dramatically in the last decade."[178] The article praised the legislative efforts thus far and suggested that the decrease in crimes could be attributed to online registries, improved screening for risk factors, and treatment of offenders.[179] It spoke of the pending bipartisan bill in Congress to strengthen Megan's Law and noted that states and communities were "not waiting for Congress to act" and implementing residency restrictions,[180] electronic monitoring[181] and longer prison sentences.[182]

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act (AWA), increasing the pool of individuals required to register as well as the length of time

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[172] *Adam Walsh Act Becomes Law*, AMERICA'S MOST WANTED, July 25, 2006, http://www.amw.com/features/feature_story_detail.cfm?id=1206 (last visited Apr. 1, 2013).

[173] Colleen Long, *"America's Most Wanted" is Still Going Strong*, HUFFINGTON POST, Apr. 8, 2012, http://www.huffingtonpost.com/2012/04/08/americas-most-wanted_n_1411512.html ("There are more than 600,000 monthly visits to the site, and at least 40 captures from online tips.").

[174] Wendy Koch, *Sex-Crimes Bill Poised to Pass; Offenders Would be Tracked in National Database*, USA TODAY, July 20, 2006, at A1 ("The bill aims to help police locate more than 100,000 such offenders who are registered but haven't updated their whereabouts. About 563,000 sex offenders are registered nationwide.").

[175] *When Sex Offenders Do Their Time*, FOXNEWS.COM, Dec. 5, 2003, http://www.foxnews.com/story/0,2933,104890,00.html ("Jeff Goldenflame, who served five years in prison for molesting his 5-year-old daughter, was released from prison in 1991. He said Megan's Law, which requires sex offenders to register with local communities, works.").

[176] Shasta Groene was eight years old when she was kidnapped by a sexual predator. She was found alive six weeks after the kidnapping; her brother and mother were later discovered murdered by the kidnapper. *See* Nicholas K. Geranios, *Videotape Shows Girl, Suspected Abductor*, ASSOCIATED PRESS, July 5, 2005.

[177] Jessica Lunsford's body was found almost a month after she went missing from her Florida home. *See* Mark Memmott, *Girl's Death Raises Questions About Tracking of Sex Offenders; Some Experts Say to Focus on Most Likely Reoffenders*, USA TODAY, Mar. 25, 2005 at A4.

[178] Wendy Koch, *Despite High Profile Cases, Sex Crimes Against Kids Fall*, USA TODAY, Aug. 24, 2005, at A1.

[179] *Id.*

[180] *Id.* ("Binghamton, N.Y., banned moderate- and high-risk sex offenders from living or entering an area within a quarter-mile radius of any school, day care center, playground or park. In June, Miami Beach's Mayor David Dermer banned convicted child molesters from moving within 2,500 feet of such areas, effectively barring them from the city. In July, Brick Township, N.J., set a similar 2,500-foot perimeter for certain pedophiles. Under a new policy, Florida bans certain sex offenders from public hurricane shelters, many of which are in schools. It requires them to seek refuge in prison instead.").

[181] *Id.* ("After the deaths this year of Jessica Lunsford and 13-year-old Sarah Lunde, who was also allegedly molested and killed by a convicted rapist, Florida approved a bill requiring the worst offenders to wear satellite-tracking devices for the rest of their lives. In August alone, Alabama and New Jersey passed laws requiring extensive satellite tracking of high-risk sex offenders. At least three other states — Missouri, Ohio and Oklahoma — approved electronic monitoring this year, and North Dakota, Georgia and New York are considering similar measures.").

[182] *State Statutes Related to Jessica's Law*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Florida's sex-offender law (Jessica's Law) passed in 2006 more than doubles the mandatory sentence for sex crimes against children. Other states are also lengthening prison sentences for sex offenders.), *available at* http://www.leg.state.vt.us/WorkGroups/sexoffenders/ NCSLs_Jessicas_Law_Summary.pdf.

of registration.[183] Title I of the Act, Sex Offender Registration and Notification Act (SORNA) authorized a national registry aimed at creating a database to include information on all sex offenders across all 50 states and required all states to upload their online sex offender databases to the national database by 2009.[184] In order to expand the group of individuals subject to registration, Congress defined a sex offense as a "criminal offense that has an element involving a sexual act or sexual contact with another."[185] Through the expansion of qualifying crimes, this Act was the first to encompass juvenile offenders.[186] The Act mandates three tier levels corresponding to the degree of risk and correlates each to a specific duration of required registration, thus being the first time that Congress considers the specifics of the offense in this line of legislation.[187] Therefore, Tier One, which is the lowest risk, has the least amount of time required to register[188] with Tiers Two and Three following along accordingly. The tiers do not reflect individualized assessments of risk or current dangerousness but merely classify the severity of offenses. After Pennsylvania adopted the requirements of the AWA, a Fayette County Assistant District Attorney told reporters: "Hopefully, by making our laws tougher, we can spare other victims the pain of these kinds of crimes. I think this will bring a heightened awareness about these crimes that might not have otherwise required registration, and there will be increased penalties for people who otherwise prey on children."[189]

In 2007, the issue of retroactive application was resolved, and it was made clear that the AWA applied retroactively in order to be successful in developing a "comprehensive" system that would be effective in protecting the public by widening its

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[183] Adam Walsh Child Protection and Child Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as 42 U.S.C. § 16901 (2006)) (Under the leadership of Republican Congressman Mark Foley (Fl), the Adam Walsh Act was signed into law by President Bush in July 2006, nulling all prior federal registration provisions).

[184] *See* Emanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN, July 28, 2011, http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/ index.html?iref=allsearch (Dru's Law, included within the wide-ranging Adam Walsh Child Protection and Safety Act, establishes a nationwide online sex offender database. The database, named "the Dru Sjodin National Sex Offender Public Website," allows the public to search for sex offender information by zip code or geographic radius. Dru's Law is named for Dru Sjodin who abducted in North Dakota, sexually assaulted, and murdered by a repeat violent sex offender.)

[185] Adam Walsh Act, 42 U.S.C. § 16911(5)(A)(i). *See also No Easy Answers: Sex Offender Laws in the U.S.*, HUMAN RIGHTS WATCH, Sept. 12, 2007, http://www.hrw.org/reports/2007/09/11/no-easy-answers-0 (At least 5 states require registration for adult prostitution-related offenses; 13 states require registration for public urination; 29 states require registration for consensual sex between teenagers; and 32 states require registration for exposing genitals in public); Rainer v. Georgia, 690 S.E.2d 827 (2010) (Supreme Court of Georgia upheld a provision of the state's sex offender registry law that requires the registration of certain persons not convicted of sex crimes).

[186] *In re* T.T., 907 A.2d 416, 418-19 (2006) (whether minor's conduct must have a sexual motivation element for application of the Megan's Law registration requirements; remanded to trial court); Doe v. Weld, 954 F. Supp. 425, 437 (D. Mass. 1997) (Massachusetts juvenile statute constitutional); State v. Heiskill, 916 P.2d 366, 367 (Wash. App. 1996) (juvenile registration statute constitutional); *In re* Welfare of C.D.N., 559 N.W.2d 431 (Minn App. 1997), *cert. denied* (1997).

[187] 42 U.S.C. § 16911(2)-(4) (2010).

[188] *Id.* § 16915(a)(1)-(3) (Tier I offenders must register for 15 years, Tier II for 25 years, and Tier III for life).

[189] Jennifer Harr, *Adam Walsh Act Takes Effect Today*, HERALD-STANDARD, Dec. 20, 2012, *available at* http://www.heraldstandard.com/news/courts/adam-walsh-act-takes-effect-today/article_a7d29629-76d6-58dc-ab5b-9cec191d18c5.html. *But see* Phil Ray, *Pennsylvania Prepares for Adam Walsh Act*, ALTOONA MIRROR, Sept. 9, 2012, ("The federal Adam Walsh Act was called a potential 'nightmare' for Pennsylvania's adult parole and probation departments, as these are the agencies that have to register and maintain a watch over [sex offenders]."), *available at* http://www.altoonamirror.com/page/content.detail/id/564065/Pennsylvania-prepares-for-Adam-Walsh-Act.html?nav=742.

scope and including all offenders regardless of when they were convicted.[190] Linda Baldwin, who directs the U.S. Department of Justice office that determines whether states are compliant with the Walsh Act, told *The Washington Examiner*: "We've seen evidence that sex offenders move from one jurisdiction to another because they may not be as closely monitored. [The Adam Walsh Act] was designed to eliminate gaps and loopholes among states' sex offender registration regulations. Gaps and loopholes allow registered sex offenders to fall off the radar."[191]

"The passage of SORNA redefined the landscape."[192] Never before had statutes been enacted that mandated such a degree of sex offender monitoring. Post-SORNA, states have increased their requirements for community notification – including the controversial subset of juveniles[193] -- and retroactive application to those individuals who were otherwise living a law-abiding life in the community.[194] States have struggled to comply with the federal mandates and are overwhelmed with the difficulty of effectively monitoring a huge pool of registrants – often increased by the Adam Walsh Act requirements – while trying to appease the public by making a showing of being "tough on sexual predators."[195]

G. Conclusion

It seems evident that the media has had a crucial impact on the enactment of sex offender legislation. The emphasis on the sex offender epidemic is reflected and reified in fear-driven quotes by politicians and concerned community members. Although the media reported on some of the more problematic issues that arose in newer legislation and on some discussion on the lack of information and factual basis to support the new laws, those reports were lost amongst the pleas for punishment to lead, ostensibly, to safer communities. In the next section, we will discuss the concept of "media criminology" as it relates to sex offenders as the most reviled individuals and how these dynamics impact the judiciary.

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[190] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72); *see generally* Wayne Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 998-99 (2010).

[191] Freeman Klopott, *Region Resist Fed Sex Offender Rules*, THE WASHINGTON EXAMINER, June 12, 2011, *available at* http://washingtonexaminer.com/article/114982.

[192] Carpenter & Beverlin, *supra* note 2, at 1078.

[193] Associated Press, *Dealing with Child-on-Child Sex Abuse Not One Size Fits All*, USA TODAY (Jan. 7, 2013) ("That public policy includes a federal law, the Adam Walsh Act, with a requirement that states include certain juvenile offenders as young as 14 on their sex-offender registries. Many professionals who deal with young offenders object to the requirement, saying it can wreak lifelong harm on adolescents who might otherwise get back on the track toward law-abiding, productive lives."); Grinberg, *supra* note 184 ("It's always been a difficult decision for the Legislature, the need to register juveniles for public safety versus the idea of confidentiality to rehabilitate juveniles."), *available at* http://usatoday30.usatoday.com/news/nation/story/2012-01-07/child-sex-abuse/52431616/1.

[194] Grinberg, *supra* note 184 (Roy Martin was classified a sexually oriented offender in 1997 which meant he had to register once a year for 10 years after his release. In November 2007 he was reclassified under Ohio's SB 10 as a Tier III offender (in response to Ohio's adoption of the federal mandates) and for the rest of his life, he would have to check in every 90 days with law enforcement to confirm his home address, employer, school address and Internet identifiers and vehicle make. Martin hanged himself in his garage after learning he would be reclassified under Ohio's SB 10.).

[195] *See supra* notes 151-59; Anthony Campisi, *N.J. May Join Wave of States Getting Tougher on Child Sex Criminals*, NORTH JERSEY.COM (Oct. 11, 2012), *available at* http://www.northjersey.com/news/crime_courts/crime_courts_news/NJ_may_join_wave_of_states_getting_tougher_on_child_sex_criminals.html?page=all.

II. THE IMPACT OF THE MEDIA

The media-driven panic over sex offenders has directly influenced judicial decisions – both at the trial and appellate levels – in this area of the law, especially in jurisdictions with elected judges.

In this Part, we will discuss (1) the status of sex offenders as the most despised individuals in the United States, (2) the role of "media criminology" in the way that we view and characterize this cohort of the population, and (3) the susceptibility of the judiciary to public sentiment, both in other aspects of the criminal and civil law, and in this specific area.

A. The Most Despised Citizens

Sex offenders[196] have supplanted insanity acquittees as the most despised segment of the American population.[197] Regularly reviled as "monsters" by district attorneys in jury summations,[198] by judges at sentencings,[199] by elected representatives at legislative hearings,[200] and by the media,[201] the demonization of this population has helped create a "moral panic"[202] that has driven the passage of legislation[203] – much of which has

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[196] On the imprecision and overbreadth of this category, ranging from the stranger pedophiliac rapist to the teenager consensually sending "sexting" pictures of herself to her boyfriend, see Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1208 (1998) ("Sex offenders do not share a common set of psychological and behavioral characteristics."), or the driver who posts an allegedly-obscene bumper sticker, *see, e.g.*, ALA. CODE § 13A-12-131 (1987) (including displaying such a bumper sticker as a sex offense). *See generally*, Cucolo & Perlin, *supra* note 28, at 21 (current system "bundles statutory rape cases that deal with sexual interactions between teenagers -- interactions that would otherwise be consensual but for the age of one of the partners -- with cases of individuals who have committed violent pedophilic offenses").

[197] Michael L. Perlin, *There's No Success like Failure/and Failure's No Success at All : Exposing the Pretextuality of* Kansas v. Hendricks, 92 NW. U. L. REV. 1247, 1248 (1998) ("If we are no longer focusing on insanity defendants as the most "despised" group in society, it is more likely because there is a new universe of 'monsters' replacing them in our demonology: sex offenders, known variously, as mentally disordered sex offenders, or sexually violent predators, the ultimate 'other.'"); *see* Geraghty, *supra* note 1, at 514 ("Sex offenders are arguably the most despised members of our society, and states and municipalities are in a race to the bottom to see who can most thoroughly ostracize and condemn them."); Eric Buske, *Sex Offenders Are Different: Extending* Graham *to Categorically Protect the Less Culpable*, 89 WASH. U. L. REV. 417, 433-434 (2011).

[198] We have yet to find an appellate reversal of a case in which this inflammatory language was used. See, e.g., State v. Henry, 103 So. 3d 424 (La. Ct. App. 2012); Comer v. Schriro, 463 F.3d 934, 960 (9th Cir. 2006), *cert. denied*, 550 U.S. 966 (2007); Jackson v. Ludwick, No. 2:09–CV–11928, 2011 WL 4374281 (E.D. Mich. 2011); People v. Bonner, No. 10–09–00120–CR, 2010 WL 3503858, (Tex. App. 2010); Kellogg v. Skon, 176 F.3d 447, 452 (8th Cir. 1999).

[199] *See, e.g.*, People v. Ball, No. 09-001299-FC, 2011 WL 1086557, at *3 (Mich. Ct. App. 2011).

[200] *See, e.g.*, Timothy Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. MARSHALL L. REV. 73, 92-93 (2003) (quoting Rep. Mark Green); Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 339 (2001) (quoting Senator Hutchison).

[201] *See* Rachel Rodriguez, *The Sex Offender Under the Bridge: Has Megan's Law Run Amok?* 62 RUTGERS L. REV. 1023, 1031-32 (2010), *quoting* John G. Winder, *The Monster Next Door: The Plague of American Sex Offenders,* CYPRESS TIMES (Nov. 20, 2009, 1:49 PM) ("'There's no such thing as monsters.' We tell our kids that. The truth is that monsters are real. . . . These monsters are called 'Sex Offenders…'"), *available at* http:// www.thecypresstimes.com/article/ News/Your_News/THE_MONSTER_NEXT_DOOR_THE_PLAGUE_ OF_AMERICAN_SEX_OFFENDERS/25925.

[202] *See, e.g.*, Filler, *supra* note 200, at 317-18; Eric Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases*, 83 NOTRE DAME L. REV. 2019, 2038-39 (2008); Eamonn Carrabine, *Media, Crime and Culture: Simulating Identities, Constructing Realities*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES (Bruce Arrigo & Heather Bersot, eds.) (2013) (in press) (INTERNATIONAL CRIME). *See generally*, STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 1-2 (3d ed. 2002).

[203] On "legislative panic" in this context, see Wayne Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 371 (2011); Denno, *supra* note 22, at 1320.

been found by valid and reliable research to be counter-productive and engendering a *more* dangerous set of conditions – and judicial decisions, at the trial, intermediate appellate and Supreme Court levels,[204] all reflecting the "anger and hostility the public feels" about this population.[205] The public is thus devoted to a "predator icon" that drives all our law and policy in this area,[206] a devotion that is augmented by the media's "obsession" on criminal justice issues.[207] The term "sexually violent predator" in itself is an emotionally charged one that conjures up many misleading or inaccurate images.[208] By way of example, correctional officers rate sexual offenders as more "dangerous, harmful, violent, tense, bad, unpredictable, mysterious, unchangeable, aggressive, weak, irrational, afraid, immoral and mentally ill" than other prisoners.[209]

B. "Media Criminology"

1. Introduction

Writing in a death penalty context, Craig Haney defines "media criminology" in this manner:

> Media criminology is a commercial product rather than a body of what is ordinarily considered "real" knowledge. Obviously, it is not based on a collection of systematically deduced theoretical propositions or carefully arrived at empirical truths about the realities of crime and punishment. Its substantive lessons are intended to generate audience share rather than to convey accurate information or provide a valid framework for understanding the nature of crime. [210]

The reporting of crime news has become a "morality play."[211] Emerging from the roots of 19th century views on crime and punishment,[212] it "consistently dehumanizes and demonizes perpetrators and effectively exoticizes their criminality."[213] This reinforcing combination of demonization and sensationalization creates an environment in which the "common wisdom" about sex offenders is distorted through a series of prisms that we will discuss in the remainder of this section: the prism of media rhetoric, the prism of public pressure, and the prism of heuristic decision-making.[214] We will then consider the extent

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[204] On "judicial panic" in the context of same-sex marriage cases, see John Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1146 (1999).

[205] Meghan Gilligan, *It's Not Popular But It Sure Is Right: The (In)Admissibility of Statements Made Pursuant to Sexual Offender Treatment Programs,* 62 SYRACUSE L. REV. 255, 271 (2012).

[206] *See, e.g.*, Ray Surette, *Predator Criminals as Media Icons,* in MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME 131, 140, 147 (Gregg Barak ed. 1995); *see id.* at 132 (discussing how the media has raised the specter of the predator criminal to that of an "ever-present image"); *see also*, SURETTE, *supra* note 15, at 45 (discussing how the media paints a society composed of "predator criminals, violent crime fighters and helpless victims").

[207] *See* Craig Haney & Susan Greene, *Capital Constructions: Newspaper Reporting in Death Penalty Cases*, 4 ANALYSES SOC. ISSUES & PUB. POL'Y 129, 129 (2004).

[208] Cucolo & Perlin, *supra* note 28, at 5-7.

[209] J.R. Weekes et al., *Correctional Officers: How Do They Perceive Sex Offenders?* 39 INT'L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 55 (1995), as quoted in Kurt M. Bumby & Marc C. Maddox, *Judges' Knowledge About Sexual Offenders, Difficulties Presiding Over Sexual Offense Cases, and Opinions on Sentencing, Treatment, and Legislation,* 11 SEXUAL ABUSE: J. RES. & TREATMENT 305, 306 (1999).

[210] Craig Haney, *Media Criminology and the Death Penalty,* 58 DEPAUL L. REV. 689, 692 (2009).

[211] STUART HALL ET AL, POLICING THE CRISIS: MUGGING, THE STATE , AND LAW AND ORDER 66 (1980 reprint).

[212] Mark Lawrence McPhail, Rachel Lyon & David Harris, *Digital Divisions: Racial (In)justice and the Limits of Social informatics in* The State of Georgia vs. Troy Anthony Davis, 39 N. KY. L. REV. 137, 149 (2012).

[213] Haney, *supra* note 210, at 729.

[214] *See infra* text accompanying notes 248-81.

to which the available research has, in any way, penetrated this miasma of distorted thought and action, and then consider the impact that the bad laws – there is no other way to couch it – have had on individuals and society.

2. Media Rhetoric

The cliché "if it bleeds, it leads" has become the mantra for print journalism's attitude towards crime of all sort,[215] and "encapsulates the media's unrelenting obsession with sensational crimes."[216] It is not the actuality of crime, but its "symbolic display" that has captured the nation.[217] Between 1990 and 1993, crime leapt from the fifth to the first most covered topic on the national evening news.[218] It is the most popular news category.[219] Popular law and order images are attributable largely to the influences of the mass media.[220] Media and the law most regularly intersect at the point of reporting of crime.[221] The resulting over-reporting of crime itself may cause the populace to believe crime runs rampant,[222] resulting in calls for "more punitive responses to crime,"[223] notwithstanding the reality that crime rates have declined.[224] The crimes least likely to occur in real life are the ones most likely to be emphasized by the media.[225]

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[215] *See, e.g.*, RICHARD L. FOX ET AL., TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY 6-7 (2d ed. 2007).

[216] Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717, 735 (2009); Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness,* 48 WM. & MARY L. REV. 397 (2006); *see also*, Robert Paul Doyle & Craig Haney, Proposition 83, Framing and Public Attitudes Toward Sex Offenders: An Application of Heuristic Models of Social Judgment (Aug. 10, 2009) (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444688, at 3 ("In modern times, the focus on criminal justice borders on an obsession.").

[217] Hayward, *supra* note 14, at 1.

[218] Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 5 J. GENDER RACE & JUST. 281, 287 (2012).

[219] JAMES T. HAMILTON: ALL THE NEWS THAT'S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS 82 (2004).

[220] THEODORE SASSON, CRIME TALK: HOW CITIZENS CONSTRUCT A SOCIAL PROBLEM 126 (1995), *citing* ROBERT ELIAS, VICTIMS STILL (1993).

[221] *See, e.g.*, Samuel Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1922 (2012) (citing statistics).

[222] *See* George A. Weiss, *Prosecutorial Accountability after* Connick v. Thompson, 60 DRAKE L. REV. 199, 230 (2011), *discussing* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 6 (2007). Attentiveness to television correlates strongly with fear of crime. SASSON, *supra* note 220, at 3 (citing George Gerbner et al., *The "Mainstreaming" of America: Violence Profile No. 11*, 30 J. COMM. 10 (1980)); *see generally*, Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37 (1997).

[223] Dowler, *supra* note 12, at 111.

[224] Catherine Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 37 (2010); Beale, *supra* note 216, at 409. "The trends in crime news have been going up as actual crime has declined." W. Lance Bennet, *The Twilight of Mass Media News: Markets, citizenship, Technology, and the Future of Journalism*, in Freeing the Presses: The First Amendment in Action 111, 118 (Timothy Cook ed. 2005), *quoting* Richard Morin, *An Airwave of Crime: While TV Coverage of Murders Has Soared -- Feeding Public Fears – Crime Is Actually Down,* WASH. POST (national weekly edition), (Aug. 18, 1997), at 34. This may, to some significant measure, be because people can "experience crime and criminal justice via the media and come away *with the sensation of actual experience.*" Ray Surette & Rebecca Gardiner-Bess, *Media Entertainment and Crime: Prospects and Concerns*, in INTERNATIONAL CRIME, *supra* note 202(emphasis added).

[225] SURETTE, *supra* note 15, at 34.

Crime reporting is not only superficial, it is also prosecution-biased.[226] By way of example, Michael Tonry places the inspiration for much of the sexual predator legislation on the "national media, especially television, [that] permeate nearly every pore of American life in vivid, repetitive, often hysterical colors, and [on] conservative American politicians [who] have for nearly two decades been playing the crime card and exacerbating public fears and then proposing or enacting repressive legislation in order to allay them."[227] Crime reporting is, also, factually, often simply wrong. A study of crime reporting in Australia, by way of example, concluded that reportage was frequently incorrect as to prevalence of violence, the individuals responsible for violence, and distribution of violence.[228]

This call for more punitive responses is especially so in the area of sex-related crimes with juvenile victims; "the media knows that stories of the most vulnerable amongst us caught up in narratives of sex and violence will capture viewers and readers."[229] The media coverage that focuses disproportionately on violent crime, distorts perceptions of actual criminal offending in multiple ways,[230] "portrays criminal defendants as less than human,"[231] and leads, as will be discussed subsequently in this part, to the enactment of laws that may actually *increase* sex offender recidivism rates.[232]

3. Public Pressure

The media's obsessive preoccupation with the fear of violence leads inexorably to public pressure on legislators to enact more repressive legislation and on judges to interpret such laws in ways that ensure lengthier periods of incarceration for offenders. The mass media "has played a pivotal role in framing the sex-offender crackdown as a domestic 'war.'"[233] Its portrayal of a "largely ineffective" criminal justice system heightens fear;[234] fictionalized portrayals of crime on television dramas may lead viewers

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[226] William R. Montross, Jr. & Patrick Mulvaney, *Virtue and Vice: Who Will Report on the Failings of the American Criminal Justice System?* 61 STAN. L. REV. 1429, 1447 (2009) (attributing this bias, in large part, to changes in the American publishing business); *see also* HERBERT J. GANS, DEMOCRACY AND THE NEWS 21- 55 (2003) (on how market forces distort the news), as discussed in Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195, 231 n. 218 (2005). On how and why the entertainment media's portrayal of crime and justice is "pro crime control," see SURETTE, *supra* note 15, at 39. On the impact of the media and election-year politics on the passage of crack sentencing provisions, see David Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1223-28 (1997).

[227] Michael Tonry, *Rethinking Unthinkable Punishment Policies in America,* 46 UCLA L. REV. 1751, 1786 (1999).

[228] Mark Israel & Rick Sarre, *Defining, Recording and Reporting Crime,* in CONSIDERING CRIME & JUSTICE: REALITIES & RESPONSES 1, 21 (Rick Sarre & John Tomaino eds., 2003, rev. ed.) (CONSIDERING CRIME).

[229] Brian P. LiVecchi, *"The Least of These:" A Constitutional Challenge to North Carolina's Sexual Offender Laws and N.C. Gen. Stat. §14-208.18*, 33 N.C. CENT. L. REV. 53, 54 (2010). On the presentation of sex crime stories on television news in general, see Kenneth Dowler, *Sex, Lies and Videotape: The Presentation of Sex Crime in Local Television News*, 34 J. CRIM. JUST. 383 (2006).

[230] Alice Ristroph, *Criminal Law in the Shadow of Violence,* 62 ALA. L. REV. 571, 572 n. 4 (2011), *discussing* Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 749 (2005).

[231] Lynne Henderson, *Revisiting Victim's Rights,* 1999 UTAH L. REV. 383, 395.

[232] *See, e.g.*, J.J. Prescott & J.E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 J. L. & ECON. 161 (2011).

[233] Corey Rayburn Yung, *The Ticking Sex-Offender Bomb*, 15 J. GENDER RACE & JUST. 81, 87 (2012).

[234] Dowler, *supra* note 12, at 120.

to believe that "all offenders are 'monsters' to be feared."[235] The media, in short, shapes and produces the reality of crime,[236] as it influences "factual perceptions of the world."[237]

This is all the more troubling because the complexity of crime-related problems is a topic "about which most citizens have little or no direct experience."[238] So, "the sensational headlines about a notorious sex offender will continue to instill fear in the American public regarding sexual abuse, [leaving] people with a sense of hopelessness and helplessness in addressing the problem."[239] They then turn to the tool of political pressure.[240] And politicians gladly oblige by "inflaming the rhetoric . . . building upon a social fear of sex offenders."[241] Politicians are, of course "experts at directing how the public thinks."[242] This is all further exacerbated by the way that society (1) accepts the stereotype that persons with *mental* illness are evil,[243] and (2) accepts the stereotype that all sex offenders are mentally ill,[244] a conflation sanctioned by the Supreme Court's decision in *Kansas v. Hendricks*.[245]

Much of the "crackdown" on sex offenders "is motivated by a general public hatred of them as a group, which is fueled in great part by sensational media coverage."[246] And this is not new. According to Professor Deborah Denno, earlier sex crime panics – from 1937 to 1940 and from 1949 to 1955 – were similarly fueled by "a vast change in media reports of sex crimes that were independent of the rise or fall of the actual number of reports of sex crimes."[247]

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[235] *Id.* On how fictional television shows focusing on forensic analysis have become icons "for anxieties within the legal system about truth finding and legal outcomes" and raise questions about "the future of the rule of law," see Christina Spiesel, *Trial by Ordeal: CSI and the Rule of Law*, in LAW, CULTURE AND VISUAL STUDIES (Anne Wagner & Richard Sherwin eds. 2013) (in press).

[236] Hayward, *supra* note 14, at 3.

[237] SURETTE, *supra* note 15, at 102.

[238] Haney, *supra* note 210, at 690.

[239] Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 308 (1997).

[240] *See, e.g.*, Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43 (1998); Eric S. Janus, *Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233, 1233–50 (2004) (discussing how the effect of politics and public outcry fuels the expansion of sexually violent predator programs).

[241] Yung, *supra* note 233, at 86.

[242] Jeffrey Rachlinski, *Selling Heuristics*, 64 ALA. L. REV. 389, 413 (2012).

[243] *See* Michael L. Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, The Insanity Defense, and the Irrelevance of "Ordinary Common Sense,"* 10 WM. & MARY J. WOMEN & L. 1, 9 (2003) [Perlin, *Neonaticide*] (discussing the stereotype of persons with mental illness as evil); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 626 (1989-1990) [Perlin, *Myths*] ("[historically], mental illness was tied to notions of religion and traditionally seen as God's punishment for sin"); on the impact of media focus on the reinforcement of stereotypes in vivid cases involving individuals with mental illness, see Matthias Angermeyer & Beate Schulze, *Reinforcing Stereotypes: How the Focus on Forensic Cases in News Reporting May Influence Public Attitudes Towards the Mentally Ill,* 24 INT'L J. L. & PSYCHIATRY 469 (2001).

[244] *See, e.g.*, Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 NO. 5 CRIM. L. BULL. ART. 1 (2004) ("it is erroneous to view all sex offenders as mentally ill or disordered and in need of treatment").

[245] 521 U.S. 346 (1997) (rejecting constitutional challenges to sexually violent predator commitment statute); *see* Perlin, *supra* note 197, at 1271.

[246] Rodriguez, *supra* note 201, at 1057.

[247] Denno, *supra* note 22, at 1344-45, 1346 n. 138 (discussing role of sensationalistic media reports in the 1930s and citing then-contemporaneous sources).

In short, media distortion feeds public panic and anxieties, and leads inexorably to the sort of legislation under consideration in this Article. In the next section, we will discuss *why* the public continues to consciously close its eyes to empirical realities and, rather, chooses to believe, as unquestionable truth, the incessant distortions of reality that are repeated in an endless loop by the media.

C. The Pernicious Power of Heuristics[248]

"Heuristics" is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks,[249] the use of which frequently leads to distorted and systematically erroneous decisions,[250] and causes decision-makers to "ignore or misuse items of rationally useful information."[251] One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.[252] Empirical studies reveal jurors' susceptibility to the use of these devices.[253] Similarly, legal scholars are

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[248] This section is largely adapted from MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW, chapter 2 (2013) (in press), and from 1 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 2.4 (3d ed. 2014) (in press).

[249] *See, e.g.*, Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 12-17 (1990) [Perlin, *Psychodynamics*]; *see generally* Michael Saks & Robert Kidd, *Human Information Processing and Adjudication: Trial by Heuristics,* 15 LAW & SOC'Y REV. 123 (1980-81); Robert Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices,* 59 S. CAL. L. REV. 329 (1986); Wim De Neys, Sofie Cromheeke & Magda Osman, *Biased but in Doubt: Conflict and Decision Confidence*, *available at* http://www.plosone.org/article/info:doi/10.1371/journal.pone.0015954 (2011).

[250] *See, e.g.*, Saks & Kidd, *supra* note 249; Michael L. Perlin, *Are Courts Competent to Decide Questions of Competency? Stripping the Facade From United States v. Charters*, 38 U. KAN. L. REV. 957 (1990) [Perlin, *Façade*] (arguing that courts' use of heuristic reasoning has led to irrational and erroneous decisions); Michael L. Perlin, Tarasoff *and the Dilemma of the Dangerous Patient: New Directions for the 1990s*, 16 LAW & PSYCHOL. REV. 29, 52–54 (1992) [Perlin, *Dilemma*]; John Carroll & John W. Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology, in* COGNITION AND SOCIAL BEHAVIOR 13, 21 (John Carroll & John Payne eds., 1976); John Coverdale et al, *A Legal Opinion's Consequences for Stigmatisation of the Mentally Ill; Case Analysis*, 7 PSYCHIATRY, PSYCHOL. & L. 192 (2000) (arguing that the media's oversimplification of facts from a case note of a defendant with a history of mental illness has led to a general stigmatization of those with mental illness).

[251] *See* Perlin, *Façade*, *supra* note 250, at 966 n.46 (quoting Carroll & Payne, *supra* note 250, at 21); Perlin, *supra* note 36, at 1417 (same); Douglas Mossman, *Dangerousness Decisions: An Essay on the Mathematics of Clinical Violence Prediction and Involuntary Hospitalization,* 2 U. CHI. L. SCH. ROUNDTABLE 95, 100 n.32 (1995) (quoting Perlin, *supra* note 44, at 660). *See also*, Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 57 n.115 (1992) [Perlin, *Fatal Assumption*] (Heuristics are "simplifying cognitive devices that frequently lead to . . . systematically erroneous decisions through ignoring or misusing rationally useful information"). For a comprehensive overview, *see* Donald Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law,* 46 SMU L. REV. 329 (1992); *see also* Philip Gould & Patricia Murrell, *Therapeutic Jurisprudence and Cognitive Complexity: An Overview*, 29 FORDHAM URB. L.J. 2117 (2002).

[252] *See* Michael L. Perlin, "*His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?,* 42 AKRON L. REV. 885, 892 (2009). *See generally*, David Rosenhan, *Psychological Realities and Judicial Policy* 19 STAN. LAW. 10, 13 (1984). President Reagan's famous "welfare queen" anecdote is thus a textbook example of heuristic behavior. *See, e.g.*, Perlin, *Psychodynamics*, *supra* note 249 at 16 n.59, 20. On the failures of the vividness heuristic as a cognitive device, see Amitai Aviram, *The Placebo Effect of Law: Law's Role in Manipulating Perceptions,* 75 GEO. WASH. L. REV. 54, 73-74 (2006).

[253] *See, e.g.*, Jonathan Koehler & Daniel Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods,* 75 CORNELL L. REV. 247, 264-65 (1990); Perlin, *Psychodynamics*, *supra* note 249 at 39-53; Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions,* 24 U.C. DAVIS L. REV. 1013, 1050 (1991); Joel Lieberman & Daniel Krauss, *The Effects of Labeling, Expert Testimony, and Information Processing Mode on Juror Decisions in SVP Civil Commitment Trials,* 6 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 25 (2009); *see also* Caton Roberts & Stephen Golding, *The Social Construction of Criminal Responsibility and Insanity,* 15 LAW & HUM.

notoriously slow to understand the way that the use of these devices affects the way individuals think.[254] The use of heuristics "allows us to willfully blind ourselves to the 'gray areas' of human behavior,"[255] and predispose "people to beliefs that accord with, or are heavily influenced by, their prior experiences."[256]

Elsewhere, one of us has argued:

> [T]estimony [in mental disability law cases] is further warped by a heuristic bias. Expert witnesses--like the rest of us--succumb to the seductive allure of simplifying cognitive devices in their thinking and employ such heuristic gambits as the vividness effect or attribution theory in their testimony. This testimony is then weighed and evaluated by frequently sanist fact-finders. Judges and jurors, both consciously and unconsciously, often rely on reductionist, prejudice-driven stereotypes in their decision-making, thus subordinating statutory and case law standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.[257]

Thus, through the "availability" heuristic, we judge the probability or frequency of an event based upon the ease with which we recall it.[258] Through the "typification" heuristic, we characterize a current experience via reference to past stereotypic behavior;[259] through the "attribution" heuristic, we interpret a wide variety of additional information to reinforce pre-existing stereotypes.[260] Through the heuristic of the "hindsight bias," we exaggerate how easily we could have predicted an event beforehand.[261] Through the heuristic of "outcome bias," we base our evaluation of a decision on our evaluation of an outcome.[262] Through the "representative heuristic," we

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BEHAV. 349, 372 (1991) (explaining that jurors' pre-existing attitudes toward insanity defense are the strongest predictor of individual verdicts).

[254] Thomas Tomlinson, *Pattern-Based Memory and the Writing Used to Refresh*, 73 TEX. L. REV. 1461, 1461-62 (1995) (citing Perlin, *Myths, supra* note 243, at 611-12). *But see*, Stephen Ellmann, *What We Are Learning,* 56 N.Y.L. SCH. L. REV. 171, 196-97 (2011/2012) (quoting Brook K. Baker, *Practice-Based Learning: Emphasizing Practice and Offering Critical Perspectives on the Dangers of "Co-Op"tation*, 56 N.Y.L. SCH. L. REV. 619, 628 (2011/2012) (on how "learning in the workplace promotes confrontation of ineffective heuristics and their replacement with genuine understandings")).

[255] Perlin, *Neonaticide*, *supra* note 243, at 27.

[256] Russell Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1381 (2009).

[257] Perlin, *supra* note 44, at 629; Michael L. Perlin, "*They Keep It All Hid": The Ghettoization of Mental Disability Law and Its Implications for Legal Education,* 54 ST. LOUIS U. L. J. 857, 875 (2010).

[258] Perlin, *supra* note 36, at 1417; see also, M. Gregg Bloche, *The Invention of Health Law*, 91 Cal. L. Rev. 247, 278 n.107 (2003), discussed in Covey, *supra* note 256, at 1381 n. 24. On the availability heuristic in general, see Rachlinski, *supra* note 242, at 399-401. On the availability heuristic's "potential for exploitation," see *id*. at 405. On how this substantiates Walter Lippmann's observation that the "pictures in [people's] heads" determine their political choices, see SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES 135 (1991).

[259] Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 125 (1991) (use of the typification heuristic by which a treating doctor slots "patients into certain categories, and prescribes a similar regimen for all.").

[260] *See* Perlin, *supra* note 252, at 892. See generally, Laura Stephens Khoshbin & Shahram Khoshbin, *Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law,* 33 AM. J.L. & MED. 171, 171, 182 (2007). (discussing how we attribute human behavior "to a physical source in the head").

[261] Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence,* 8 NOTRE DAME J. L., ETHICS & PUB. POL. 239, 255 (1994).

[262] *Id. See generally* SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL (1981); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel

extrapolate, overconfidently, based upon a small sample size of which we happen to be aware.[263] Through the heuristic of "confirmation bias," people tend to favor "information that confirms their theory over disconfirming information."[264]

Research confirms that heuristic thinking dominates all aspects of the mental disability law process whether the question is one of involuntary civil commitment law,[265] violence assessment,[266] medication refusal,[267] questions of diagnostic accuracy,[268] the insanity defense,[269] incompetency to stand trial procedures,[270] the relationship between homelessness and deinstitutionalization,[271] the impact of neuroimaging evidence in the

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Kahneman et al. eds., 1982) [JUDGMENT]; RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980) (all discussing heuristics in general); Hal R. Arkes, *Principles in Judgment/Decision Making Research Pertinent to Legal Proceedings,* 7 BEHAV. SCI. & L. 429 (1989) (hindsight and outcome biases); Neal V. Dawson et al., *Hindsight Bias: An Impediment to Accurate Probability Estimation in Clinicopathologic Conferences,* 8 MED. DECISION MAKING 259 (1988) (hindsight bias); Anthony N. Doob & Julian V. Roberts, *Social Psychology, Social Attitudes and Attitudes Toward Sentencing,* 16 CAN. J. BEHAV. SCI. 269 (1984) (vividness effect); Shari S. Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing,* 7 BEHAV. SCI. & L. 73 (1989) (same) Baruch Fischhoff, *Hindsight,, Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty,* 104 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975) (both biases); Harold Kelley, *The Process of Causal Attribution,* 28 AM. PSYCHOLOGIST 107 (1973) (attribution); Dan Russell, *The Causal Dimension Scale: A Measure of How Individuals Perceive Causes,* 42 J. PERSONALITY & SOC. PSYCHOL. 1137 (1982) (same); Saks & Kidd, *supra* note 249 (availability); David Van Zandt, *Common Sense Reasoning, Social Change, and the Law,* 81 NW. U. L. REV. 894 (1987) (typification). In mental health contexts, see, e.g., Harold Bursztajn et al., *"Magical Thinking," Suicide, and Malpractice Litigation,* 16 BULL. AM. ACAD. PSYCHIATRY & L. 369 (1988); David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations,* 7 BEHAV. SCI. & L. 485 (1989).

[263] *See, e.g.,* Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers,* in JUDGMENT, *supra* note 262, at 23, 24-25, as discussed in Perlin, *supra* note 252, at 898 n. 89.

[264] Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006), as discussed in Covey, *supra* note 256, at 1381 n. 22.

[265] Virginia A. Hiday & Lynn Newhart Smith, *Effects of the Dangerousness Standard in Civil Commitment,* 15 J. PSYCHIATRY & L. 433, 449 (1987) (aberrant behavior by small number of patients in sample studied "distort[ed] outcome perceptions;" mental health professionals significantly overstate percentage of involuntary civil commitment cases that began as police referrals and that jeopardized staff safety); *accord* Henry J. Steadman et al., *Psychiatric Evaluations of Police Referrals in a General Hospital Emergency Room,* 8 INT'L J.L. & PSYCHIATRY 39 (1986); R. Michael Bagby & Leslie Atkinson, *The Effects of Legislative Reform on Civil Commitment Admissions Rates: A Critical Analysis,* 6 BEHAV. SCI. & L. 45, 46 (1988).

[266] Jennifer Murray & Mary E. Thomson, *Applying Decision Making Theory to Clinical Judgments in Violence Risk Assessment,* 2 EUR. J. PSYCHOL. 150 (2010).

[267] *See* Perlin, *supra* note 259, at 125 (discussing Watkins v. United States, 589 F.2d 214 (5th Cir. 1979) (doctor prescribed 50-day supply of Valium without taking medical history or checking patient's medical records), Hale v. Portsmouth Receiving Hosp., 338 N.E.2d 371 (Ohio Ct. Cl. 1975) (doctor failed to change prescription following his observation of side-effects and onset of self-destructive behavior on patient's part), and Rosenfeld v. Coleman, 19 Pa. D. & C.2d 635 (1959) (doctor prescribed addictive drugs so as to help patient see nature of his addictive personality)). *See generally*, 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 7A-6.4a (2d ed. 2000).

[268] *See also* Arkes, *supra* note 262; David Faust, *Data Integration in Legal Evaluations: Can Clinicians Deliver on Their Premises?,* 7 BEHAV. SCI. & L. 469, 480 (1989) (discussing results found in Robyn Dawes et al., *Clinical Versus Actuarial Judgment,* 243 SCIENCE 1668 (1989); Baruch Fischhoff, *Debiasing, in* JUDGMENT, *supra* note 262, at 422; Sarah Lichtenstein et al., *Calibration of Probabilities: The State of the Art, in* JUDGMENT, *supra* note 262, at 305; Michael Saks, *Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts,* 14 LAW & HUM. BEHAV. 291, 294 (1990).

[269] MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 263-331 (1995); Perlin, *supra* note 36.

[270] Perlin, *Façade, supra* note 250; Perlin, *supra* note 44.

[271] Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness,* 28 HOUS. L. REV. 63 (1991).

criminal trial process,[272] or the scope of a therapist's duty to protect a third party from a tortious act by the therapist's patient or client (the so-called *Tarasoff* obligation).[273] It similarly dominates the public's view of criminal justice policy (animated by a media-driven fear of crime).[274] Additionally, judges – "embedded in the cultural presuppositions that engulf us all"[275] – are as susceptible to heuristics as are all other citizens.[276]

So it is with the development of sex offender law and policy. The media's intense focus on the most heinous sex offenders – making it appear that all persons charged with "sex crimes" share these characteristics – triggers the availability heuristic and the representativeness heuristic, "causing the public to perceive most or all so-called sex offenders as extremely threatening and intractably deviant."[277] By way of example, Daniel Filler has argued that the availability heuristic was significantly responsible for the passage of Megan's Law.[278] James Billings and Crystal Bulges explain comprehensively:

> [T]he representativeness heuristic theory hypothesizes that people judge the likelihood of events by how well they match any previously formed representations of such an event. For example, individuals are more likely to believe all sex offenders are similar to those sex offenders they have already seen. Because most people's readily accessible memories of sex offenders are derived from violent and outrageous media depictions, they are more likely to believe that all sex offenders are like those they see on TV. ..[279] [O]ne of the great dangers of the representativeness heuristic is that it encourages maintenance of these beliefs to the exclusion of other reliable information. Thus, people who come to believe sex offenders are violent predators in this way are very likely to ignore more accurate information that advises toward more realistic beliefs.
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> [Another] example of psychological theory demonstrating the power of media to portray false images is the availability heuristic. The availability heuristic states that individuals judge the likelihood of events by the availability of similar occurrences in their memory. Under this theory, therefore, if instances of violent sexual offense readily come to mind, individuals will presume their occurrence to be more frequent than it really is. The available memories may also include fiction; if

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[272] Michael L. Perlin, "*And I See Through Your Brain": Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial,* 2009 STAN. TECH. L. REV. 4, 5.

[273] Perlin, *Dilemma, supra* note 250; *see also*, Michael L. Perlin, *"You Got No Secrets to Conceal": Considering the Application of the Tarasoff* Doctrine Abroad, 75 U. CIN. L. REV. 611 (2006). In *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 347-48 (Cal. 1976), the California Supreme Court held that therapists have a duty to reveal confidential information about a patient where the patient presents a serious danger of violence to another.

[274] *See, e.g.*, Singleton, *supra* note 4, at 603-04 (discussing the vividness heuristic and the availability heuristic in this context).

[275] MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 47 (2000) (quoting Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy,* 32 WM. & MARY L. REV. 329, 332 (1991)).

[276] *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (discussing judicial susceptibility to heuristics and biases when making decisions).

[277] Julia T. Rickert, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J. CRIM. L. & CRIMINOLOGY 213, 228 (2010) (citing Doyle & Haney, *supra* note 216).

[278] Filler, *supra* note 200, at 346.

[279] On how the availability heuristic affects the way viewers process TV news in general, see IYENGAR, *supra* note 258, at 130-31.

> someone has just seen a movie about a sex offender, he is more likely to inflate the rate of sex offense he believes to be accurate. The media contribute to this theory by providing the prior instances of sex offense with which to compare current events. This is especially true if the media are presenting more violent sex crime information than nonviolent sex crime information; people will thus overestimate the rate of sex offense in general as well as the incidence of violent sex offense. Because most sex offenses are nonviolent, these media portrayals of violent sex offenses cause people to increase their belief in the prevalence of such crimes.[280]

We believe it is impossible to understand the thrall in which the "sex offender story" has captured the public without understanding the pernicious power of these cognitive-simplifying heuristics.[281]

D. The Impact of the Laws

1. Introduction

There can no longer be any question that sex offender laws were enacted without any consideration being given to the valid and reliable research available to (and accessible by) the lawmakers at the time of enactment, and that, frequently, legislators were never asked questions that would have been "essential to understand whether such legislation would be effective in its goal of community protection."[282] This failure to consider such data calls into question the legitimacy of all such legislation.[283] Sexual offender registration laws were enacted "without any systematic study of their consequences"[284] or of the diagnostic accuracy involved in the classification of such offenders.[285] These diagnostic tools that support confinement and containment continue to be flawed.[286] The available evidence indicates that sex offender residency statutes do not protect children and, contrarily, "might increase the danger to the community."[287]

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[280] James A. Billings & Crystal L. Bulges, *Maine's Sex Offender Registration and Notification Act: Wise or Wicked?* 52 ME. L. REV. 175, 242 (2000) (footnotes omitted). See also, Michael L. Perlin & John Douard, *"Equality, I Spoke That Word/As If a Wedding Vow": Mental Disability Law and How We Treat Marginalized Persons,* 53 N.Y.L. SCH. L. REV. 9, 20 (2008-09) ("Every time Detective Benson or Stabler--on NBC's popular *Law and Order: SVU* program--says, 'There's no cure. And they all do it again,' that speaks to society's [false ordinary common sense] about this topic").

[281] *See* Perlin, *Fatal Assumption*, *supra* note 251, at 57 n.115. *Cf.* Rachlinski, *supra* note 242, at 415 (concluding that reliance on heuristics is "inevitable").

[282] Karen Terry, *Sex Offenders: Editorial introduction*, 3 CRIMINOLOGY & PUB. POL'Y 57, 57 (2003). On the frequent disconnect between research findings and adopted legislative policies, see Michael Tonry & David Green, *Criminology and Public Policy in the USA and UK,* in THE CRIMINOLOGICAL FOUNDATIONS OF PUBLIC POLICY: ESSAYS IN HONOUR OF ROGER HOOD 485, 508-10 (Roger G. Hood et al eds. 2003). On how reliable research is often consciously ignored, see Joan Petersilia, *Policy Relevance and the Future of Criminology*, 29 CRIMINOLOGY 1 (1991).

[283] *See generally* Singleton, *supra* note 4, at 625.

[284] J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?* 35 REGULATION 48, 48 (Summer 2012).

[285] *See* Michael First & Robert Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases,* 36 J. AM. ACAD. PSYCHIATRY & L. 443 (2008). *See also*, Robert Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357361 (2006).) (citing twin concerns that "good science" will be unrecognized or misunderstood by the law, and that the pressures of the law will not only use but encourage "bad science").

[286] John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81 (2005).

[287] Singleton, *supra* note 4, at 616.

The common wisdom is that – per the television series, *Law and Order: SVU* – recidivism rates are near 100% for sex offenders.[288] The valid and reliable research paints an entirely different picture: Department of Justice statistics make clear that, "not only do few sex offenders get rearrested for committing a new sex crime, but sex offenders are less likely than non-sex offenders to be rearrested for any crime at all."[289] Beyond that, such research also suggests that currently-prevailing legislation "may actually increase the amount of risk in a community."[290]

As we concluded in an earlier article: These laws do little to protect the public; instead, they serve to ostracize, isolate and destroy any hope of integration, and, contrarily, responding to community pressures, potentially increase the likelihood of recidivism and achieve the exact opposite effect intended by the legislatures.[291]

The laws, then, are fatally flawed. The next question that must be considered is this: to what extent is the judiciary – allegedly the bulwark of freedom in the face of oppressive and discriminatory legislation[292] – susceptible to the same heuristic panic? In this next section, we will first consider the extent to which, generally, public opinion and the media affect judicial decision-making, and will then consider briefly three other areas of the law – civil and criminal – in which the impact of the media and public pressure have been clearly demonstrated.

2. The Public and the Courts

Political scientist Thomas Marshall has argued persuasively that the Supreme Court is largely successful as a policy-maker in part because it tends to follow public opinion, more often than not issuing decisions the public will be inclined to support,[293] and that the Court seems particularly likely to issue a majoritarian decision during "'crisis times' – times when public attention is focused closely on an issue."[294] In concluding that the Court's decision in *Kansas v. Hendricks* fit into this metric, Professor Michelle Johnson observed that "well-established constitutional principles may be curtailed in order to maintain public belief in and compliance with government policy,"[295] a belief stemming from the public's "strong opinions about the release of sex offenders from prison."[296]

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[288] *See* Perlin & Douard, *supra* note 280, at 20.

[289] *See* Tamara Rice Lave, *Throwing Away the Key: Should States Follow* U.S. v. Comstock *by Expanding Sexually Violent Predator Commitments?,* 14 U. PA. J. CONST. LAW 391, 396-97 (2012) (citing Patrick A. Langan, Erica L. Schmitt & Matthew R. Durose, Bureau of Justice Statistics, U.S. Dep't of Justice, Pub. No. NCJ 198281, *Recidivism of Sex Offenders Released from Prison in 1994* (2003), at 2).

[290] Alissa Ackerman & Karen Terry, *Faulty Sex Offender Policies*, in FLAWED CRIMINAL JUSTICE POLICIES: AT THE INTERSECTION OF THE MEDIA, PUBLIC FEAR, AND LEGISLATIVE RESPONSE 149, 162 (Frances P. Reddington & Gene Bonham eds., 2012).

[291] Cucolo& Perlin, *supra* note 28, at 5, citing Zgoba et al, *supra* note 111 (authors thoroughly examined efficacy and cost of Megan's Law by tracking 550 randomly selected sex offenders released between 1990 and 2000 and comparing 10 years before and 10 years after the law was enacted; no reduction in reoffending and no reduction in the number of victims found; costs increased exponentially by $3.9 million per year by 2007).

[292] For the historical perspective, see sources cited in Craig Stern, *What's a Constitution among Friends?--Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1044 n. 3 (1998).

[293] *See* Michelle Johnson, *The Supreme Court, Public Opinion, and the Sentencing of Sexual Predators*, 8 S. CAL. INTERDISC. L.J. 39, 40 (1998) (citing, inter alia, THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 191-92 (1989)).

[294] *Id.* at 41 (citing MARSHALL, *supra* note 293, at 83); *see also*, David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2070-71 (2010) ("as compared to state judges in appointive and merit selection jurisdictions, judges facing elections, particularly partisan elections, are more likely to decide cases in a manner consistent with majority opinion").

[295] Johnson, *supra* note 293, at 85.

[296] Johnson, *supra* note 293, citing Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI., 468, 493 (1997).

Further, archival research has uncovered evidence that Supreme Court justices "have been keenly interested in media portrayals of the Court, or that justices have made various efforts to ingratiate themselves with journalists."[297] This is, perhaps, connected to the findings that positive media coverage increases support for the Court,[298] and that the manner in which the media reports on issues surrounding the judicial branch has a substantial impact on public perceptions of the judiciary.[299]

Judicial elections have become "high-profile political battles."[300] Scholars that have studied the impact of public opinion on judicial decisions in state courts – especially where judges sit for election – have concluded that, as elections approach, judges avoid controversial rulings and become more conservative in deciding criminal cases,[301] and that liberal judges "curb their support" for criminal defendants "in order to avoid opposition from law and order groups."[302] Other judges run for re-election on a "platform" of having "issued rulings to simplify the prosecution of sexual predators."[303] The evidence clearly supports "the widespread belief that judges respond to political pressure in an effort to be reelected . . . ."[304]

Elections have a "chilling effect" on judicial independence,[305] and even, in the cases of appellate judges, on the issuance of dissents from majority opinions.[306] And

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[297] Bradley W. Joondeph, *Judging and Self-Presentation: Towards a More Realistic Conception of the Human (Judicial) Animal Reviewing: Lawrence Baum, Judges and Their Audiences: A Perspective on Judicial Behavior*, 48 SANTA CLARA L. REV. 523, 256 (2008).

[298] Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 29 POL. PSYCHOL. 675, 676 (2008).

[299] Rachel Luberda, *The Fourth Branch of the Government: Evaluating the Media's Role in Overseeing the Independent Judiciary*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 507, 515 (2008).

[300] Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 791 (2010).

[301] G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 52, 58 (Keith J. Bybee ed. 2007) (BENCH PRESS).

[302] LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 121 (2006). *See also*, Gregory Huber & Sanford Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?* 48 AM. J. POLI. SCI. 247 (2004) (elected judges will become more punitive as standing for reelection approaches).

[303] Norman Reimer, *Fear Unleashed: Money, Power and the Threat to Judicial Independence*, 34 CHAMPION at 9,10 (Nov. 2010). *See, e.g.,* Tarr, *supra* note 301, at 54 for an account of the impact of advertising on judicial elections. *See also* Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 232-234 (Summer 2009) (discussing how a judge thwarted a campaign for an early retention election by increasing a defendant's controversial sentence from 60 days to a term of three to ten years in jail). The opportunity for political malevolence here is clear:

> A recent advertisement for the Montgomery County Maryland bench featured a mailing with a mug shot of a convicted sex offender who was allowed to return home. The mailing, which went out days before the election stated, "enough is enough," but what the ad failed to mention was that none of the judges who were opponents of the candidate had anything to do with the case.

Nathan Richard Wildermann, *Bought Elections: Republican Party of Minnesota v. White*, 11 GEO. MASON L. REV. 765, 784-85 (Summer 2003).

[304] Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 169 (Jan. 2009).

[305] Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary,* 14 GA. ST. U. L. REV. 817, 859 (July 1998). There is also valid and reliable research that teaches us that judges facing retention elections tend to decide cases in accord with the ideology of the political party likely to reelect them. *See* Shepherd, *supra* note 304; *See also*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decision*?, 72 N.Y.U. L. REV. 308, 310 (May 1997).

judges are not immune from the impact of "moral panics," flowing from "the public's passive acceptance of media and politician-driven images of the nature and extent of crime."[307] Those images, Professor Andrew Taslitz, concludes, "have likewise led the public to believe that judges impose unduly lenient sentences, despite the ever-harsher nature of sentences via mandatory minimum legislation, sentencing guidelines, moral panics, and a host of other mechanisms."[308]

State judicial determinations of the due process rights of sexual predators have been explicitly found to have "the potential to, at the very least, generate contentious and hard fought retention bids."[309] Media accounts of crimes are the source that voters generally use to form their judgments on courtroom sentencing.[310] The problem is abetted by what Mark Obbie calls "results-oriented legal journalism" – "reporting on the outcome of a court case without acknowledging the legal authority that the court cited in reaching that outcome."[311]

Judges perceive these threats in "all but identical" ways to the ways that "police chiefs . . . politicians and [newspaper] editors" perceive them,[312] threats, again, in significant measure due to the increase in the media's reporting of crime.[313] Professor Catherine Carpenter links this explicitly to the question that we are addressing in this article:

> The proliferation of sex offender registration laws has been linked to the increased media coverage of child abuse cases involving previously convicted sex offenders. One additional fact contributes to this perception. Showcasing high-profile, but rare crimes, turns the symbolic into the pervasive in the eyes of the public. The effect is a skewed perception of the likelihood that the crime will be repeated.[314]

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[306] Melinda Gann Hall, *Constituent Influence on State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1117 (Nov. 1987).

[307] Andrew Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration,* 9 OHIO ST. J. CRIM. L. 133, 174 (2011); *see* Singleton, *supra* note 4, at 628 (discussing how the laws in question "pander to the electorate and pass laws driven by community fear and outrage").

[308] Taslitz, *supra* note 307, at 174, citing Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment,* 51 HASTINGS L.J. 829, 860-67 (2000). Interestingly, judges *agree* that their sentences are "too lenient on [sexual] offenders." Bumby & Maddox, *supra* note 209, at 312.

[309] Eric W. Buetzow, *Ignoring the Supreme Court: State v. White, the Civil Commitment of Sexually Violent Predators, and Majoritarian Judicial Pressures,* 58 HASTINGS L.J. 413, 430 (2006). Notes Professor John La Fond succinctly: "Judges in Washington State are paid very well. They are also elected. As a result, judges generally rule in favor of the prosecution on all contested trial issues." John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 406 (1999).

[310] Paul Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1982 (2010).

[311] Mark Obbie, *Winners and Losers*, in BENCH PRESS, *supra* note 301, at 159. On how this problem may be exacerbated by the ease of Internet access and a concomitant "new era of crabbed and narrow-minded readership." *See* Dahlia Lithwick, *The Internet and the Judiciary: We Are All Experts Now*, in BENCH PRESS, *supra* note 301, at 178.

[312] Philip Jenkins, *Failure to Launch: Why Do Some Social Issues Fail to Detonate Moral panics?* 49 BRIT. J. CRIMINOL. 35, 35 (2009), citing HALL ET AL, *supra* note 211, at 16. Professor Craig Haney has noted: "Media myths and misinformation substitute for real knowledge for many members of the public who--as citizens, voters, and jurors--participate in setting policy agendas, advancing political initiatives, and making legal decisions." Haney, *supra* note 210, at 690. We believe he could have added easily and accurately added "judges" to the "citizens, voters, and jurors" phrase.

[313] Carpenter, *supra* note 224, at 38.

[314] *Id.*, citing, in part, Singleton, *supra* note 4, at 604-05; *see also*, Johnson, *supra* note 293 (discussing generally the public and media influences on courts and on legislatures to enact laws that deal harshly with convicted sex offenders); Anthony C. Thompson, *From Sound Bites to Sound Policy: Reclaiming the High*

In short, when it comes to the questions we are discussing in this paper, judges are far more *like* members of the general public than they are *unlike* them.

3. Judicial Susceptibility to Outside Influence: Some Examples

A brief look at other areas of both the criminal and civil law reveals that judges are not immune from public pressure and from media assaults. Whether the substantive issue is the death penalty, sentencing or tort reform, the conclusion is the same: courts are susceptible to the press and to the threat of electoral opposition.

a. Death Penalty[315]

Judges are especially responsive to constituent influence in death penalty cases.[316] In three states (Florida, Alabama, and Delaware), judges have the ability to overturn jury sentences in death penalty cases.[317] According to a report done by the Equal Justice Institute, in Florida (a state where judges are elected), there has not been a single judicial override of a jury-imposed death penalty in twelve years; in Alabama (another judicial election state), 92 percent of judicial overrides are to impose death sentences in cases in which jurors recommended life imprisonment; on the other hand, in Delaware (where judges are appointed), no judge has ever imposed a death sentence via judicial override.[318] Importantly, judges override juries to impose the death penalty more often in a judicial election year.[319]

b. Sentencing

A recent Colorado study has concluded that "aggressive media coverage also has had an impact on sentencing decisions by government officials,"[320] a finding that is consistent with the research that consistently finds that "judges are not immune to public opinion – or what they perceive public opinion to be,"[321] a public opinion that is shaped, in significant measure, by the overrepresentation of crimes of violence.[322] This misinformed public opinion leads policymakers (including judges) to be reluctant to use less severe punishments for "fear that would lead to even greater public dissatisfaction with

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Ground in Criminal Justice Policy-Making, 38 FORDHAM URB. L.J. 775, 802 (2011) ("The media's role in shaping prevailing perceptions of crime has policy implications for legislators and judges responsive to shifts in public opinion.").

[315] *See generally,* MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 122 (2013).

[316] *See* Melinda Gunn Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*. 54 J. POL. 427, 431 (1992).

[317] Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 793,794 (2011).

[318] *See* Sherrilyn A. Ifill, *Using the Death Penalty to Get Re-Elected*, The Root (July 20, 2011,12:55AM), http://www.theroot.com/search/node/Equal%20Justice%20Initiative%20%2526%20Alabama%20%2526%20Ifill; *see generally,* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 48 (2010).

[319] Ifill, *supra* note 318; *see also*, Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017,1037 (giving examples of judges citing their decisions to override jury life sentences in their campaigns or being voted out of office for their failure to impose or uphold death verdicts). *See generally*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

[320] Philip A. Cherner, *Sentencing for Felony and Misdemeanor Convictions-- Time Actually Served*, 30 COLO. LAW. 27, 31 (Feb. 2010).

[321] Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing,* 14 LAW & HUM. BEHAV. 451, 454 (1990).

[322] *Id.* at 452.

sentencing decisions."[323] Such misinformation feeds the voters' "overwhelming . . . desire [for] courts to get 'tough on crime'"; judicial election-campaign pledges to be "tough on crime" (and tough-on-crime adjudications) "are designed to channel that desire into votes."[324] Similarly, a United Kingdom study confirms that "increasing and incessant punitive rhetoric" has had a further important impact on the decisions of sentencers in England and Wales.[325]

c. Tort Reform

In an effort to obtain legislation limiting tort liability, insurance lobbyists created a perception that the tort system overcompensated victims,[326] effectively changing the attitudes of judges "by a corporate public relations campaign targeted at the public in general and at judges in particular."[327] The resultant pro-tort reform media agenda has led to "an increasingly pro-defendant mind-set among judges," reflected in their propensity "to reject liability-expanding claims, to defer to legislatures and regulatory agencies, and to use tort reform reasoning in their opinions and decisions."[328] Scholars have attributed these changes to pro-tort reform propaganda that has occupied such a prominent role in media writings and commentary.[329] Argues Professor Sandra Gavin:

> It is clear that much of today's "truth" about products liability reform is a response to a semantically created political crisis; it is a result of a war of words taking place in the media rather than the courts. Its foundation is in impassioned rhetoric, often funded by the very constituents seeking to profit from its agenda.[330]

Professor Mark Galanter's explanation of how these perceptions came to dominate the system sounds startlingly like the discussion above with regard to the public's views of sex offender cases: "[Tort reformers'] calculating instrumentalism is set within a complex cycle of media distortion, cognitive overestimation, professional aggrandizement, judicial vacillation, and popular ambivalence, embracing and scorning the enlarged possibilities of remedy."[331]

4. Conclusion

In both criminal and civil cases, judges – especially judges who face re-election – are responsive to media influence and constituent pressure. There is no reason to think

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[323] *Id.* at 465 (discussing recommendations made in NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION, INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990)).

[324] Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime" Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 335 (2010).

[325] Tim Newburn, *"Tough on Crime": Penal Policy in England and Wales*, 36 CRIME & JUST. 425, 459 (2007).

[326] Teresa M. Schwartz, *Product Liability Reform by the Judiciary,* 27 GONZ. L. REV. 303, 316 (1991).

[327] Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U.L. REV. 1637, 1719 n.359 (1993) (citing Schwartz, *supra* note 326).

[328] Bruce A. Finzen & Brooke B. Tassoni, *Regulation of Consumer Products: Myth, Reality and the Media*, 11 KAN. J.L. & PUB. POL'Y 523, 539 (2002) (citing, *inter alia*, Schwartz, *supra* note 326, at 330-33); *see also id.* at 524 ("Although the tort reform campaign has been multi-layered, taking place in the courts, legislatures and in Congress, its most effective efforts have been aimed at convincing influential members of the media to champion a reformist vision of civil justice.").

[329] *Id.* at 539.

[330] Sandra Gavin, *Stealth Tort Reform,* 42 VAL. U.L. REV. 431, 459 (Winter 2008).

[331] Mark Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 11-12.

they would be any less responsive to such pressure in cases involving sex offenders – the most despised of all litigants[332] – than in these other cohorts of cases.

E. Conclusion

We agree with Prof. Thomas Zander that "diagnosis should never be a pretext for social control,"[333] and with Dr. Robert Prentky and his colleagues that the courts need to exert "firmer control" over testimony in sexually violent predator hearings that is of "questionable value."[334] But until we take stock of the realities that we have sketched out in this section of the article – the impact of media distortions on legislative policies, the lack of a factual basis for the public's obsessive fears (fears based on "biased recall and unrealistic crime stereotypes"),[335] the ways that such media distortion and public pressures affect judicial decision-making – we are doomed to endlessly play out a "pathological" morality drama.[336] And we do this in spite of the overwhelming empirical evidence that shows that the laws in question have little or no effect on sexual offending rates and recidivism.[337]

In the next section of this article, we will consider whether there may, actually, be some better news ahead, and will discuss the existence and significance of some recent shifts in media attitudes and approaches, mostly in the context of newer legislative initiatives at both the state and local levels.

III. A MEDIA SHIFT

A. Introduction

In Parts I and II, we demonstrated the impact of the media on the formation and sustainability of legislation and judicial decisions involving sex offenders. Over the past decade, there have been countless stories covering the gruesome details of shocking sexual crimes, and reports of public outcries of rage and demands for punishment and retribution.[338] However, more recently, the media has begun to increasingly report on concerns over the effects of these laws and their impact on the realities of community safety.[339] As much as "[t]he media play[s] an important role in the way the public perceives the criminal justice system" and "present[s] the public with 'an increasingly distorted view of sex offending,'"[340] the media can also be viewed as a "messenger" in this

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[332] *See supra* text accompanying notes 196-208.

[333] Thomas Zander, *Commentary: Inventing Diagnosis for Civil Commitment of Rapists*, 36 J. AM. ACAD. PSYCHIATRY & L. 459, 468 (2008).

[334] Robert Prentky et al., *Commentary: Muddy Diagnostic Waters in the SVP Courtroom*, 36 J. AM. ACAD. PSYCHIATRY & L. 455, 455 (2008).

[335] Doyle & Haney, *supra* note 216, manuscript at 24.

[336] *See* William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505, 511 (2001).

[337] Logan, *supra* note 203, at 402, citing, inter alia, Elizabeth J. Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes*, 37 CRIM. JUST. & BEHAV. 537, 550 (2010); Richard Tewksbury & Wesley G. Jennings, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories*, 37 CRIM. JUST. & BEHAV. 570, 572 (2010).

[338] *See* Pollak & Kubrin, *supra* note 25, at 63 ("The news media allow for private events, or individual crimes, to become public concerns.").

[339] *See* Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2117 (2010).

[340] Marcus A. Galeste et al., *Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers*, 13 W. CRIMINOLOGY REV. 4, 5 (2012).

phenomenon – encouraged to cover the "newsworthy" issues.[341] Regardless of whether the media incites the fear or the fear incites the media to report on the issues in question,[342] the long-view outcome has resulted in judicial decisions and legislation that fail to be effective in the ultimate goal of ensuring safety and removing sexual predators from communities. Although, if the media is, in fact, responsible for distorting the facts and generating fear, then inversely, as it increasingly reports on the defects in legislation and problems with the laws, we would expect to see an impact on the enactment of subsequent legislation if it is similarly designed and implemented.

The media has increased its reporting on the concerns over these laws and the realities of community safety post-enactment.[343] As other academics have noted, concerns with this legislation were raised in the early days of the new generation of sex offender laws,[344] but articles focused upon the problems with these laws and their ineffectiveness have steadily increased in recent years, mostly since the enactment of the AWA.[345] The question to ask, then, is this: what effect, if any, has this had on public sentiment and laws and legislation post 2006?

B. Recidivism Unmasked

News articles have increasingly published pieces on the likelihood of sex offender recidivism – what was previously published as "common truths" about sex offenders is now, finally, openly being questioned and challenged in the mainstream media.[346] An article in the *Wall Street Journal* dispelled prior media reports of re-offense rates and noted past misconceptions as reflected in a quote from a California legislator in 1996 to the *New York Times*: "'What we're up against is the kind of criminal who, just as soon as he gets out of jail, will immediately commit this crime again at least 90 percent of the time,"[347] and a statement from Fox News in 2005: "Not only are they almost certain to continue sexually abusing children, but some eventually kill their young victims."[348] ABC News published information on myths about sex offenders and included statistics (generated from studies in the late 1990s) revealing that "approximately 60 percent of boys and 80 percent of girls who are sexually victimized are abused by someone known to the child or the child's family," and that "[r]elatives, friends, babysitters, persons in positions of authority over the child, or persons who supervise children are more likely than strangers to commit a sexual assault."[349]

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[341] Singleton, *supra* note 4, at 602 ("Americans are preoccupied with fear, particularly fear of crime.").

[342] *See id.* at 603 ("Although researchers may disagree about the cause and effect relationship between media coverage of crime and public perception of crime, there is evidence that the former influences the latter.").

[343] *See infra* text accompanying notes 346-49.

[344] *See generally* Winick, *supra* note 1 (discussing the therapeutic jurisprudence approach to analyze sex offender laws).

[345] This increase in attention to the problems and concerns of sex offender legislation will be shown, considered, and discussed throughout this section of the paper.

[346] Paul Heroux, *Sex Offenders: Recidivism Re-Entry Policy and Facts*, HUFFINGTON POST (Nov. 8, 2011, 2:39 PM) (discussing the realities of re-offense in light of national attention to the Jerry Sandusky case, and suggests that sex offender registries provide a false sense of security), *available at* http://www.huffingtonpost.com/paul-heroux/sex-offenders-recidivism_b_976765.html.

[347] Carl Bialik, *How Likely Are Sex Offenders to Repeat Their Crimes?* THE NUMBERS GUY (WALL ST. J. Blog) (Jan. 24, 2008, 11:35 PM), http://blogs.wsj.com/numbersguy/how-likely-are-sex-offenders-to-repeat-their-crimes-258/.

[348] *Id.*

[349] *Myths About Sex Offenders*, ABC NEWS (Oct. 23, 2008), *available at* http://abcnews.go.com/US/story?id=90200&page=1#.UVNGtFsjqXQ. Some additional myths listed include: "most sex offenders reoffend"; "the majority are caught, convicted and in prison"; "sex offense rates are higher than ever and continue to climb"; "all sex offenders are male"). *Id.*

Not only have media outlets more recently readily reported on previously perceived myths surrounding sex offender recidivism, but, as we will discuss next, news headlines confirmed that there was a "new" type of sex offender targeting our children.

C. The "Sex Offender" in the News

Within the past decade, media stories have increasingly focused on the "new" profile of an offender. We are no longer purely fixated on the "stranger predator" as we were in the 1990s, but are now mesmerized by stories about offenders who had been otherwise considered upstanding members of the community. Countless news stories are dedicated to uncovering the child predators in our "places of worship" – both religious[350] and sports related.[351] This new profile of a pedophile has been found in churches, synagogues, boy scout troops, public schools[352] and universities – to name a few.[353] A *Washington Post* article offered staggering statistics of more than 6,100 accused priests and 16,000 victims since 1950, according to a 2011 analysis by the John Jay College of Criminal Justice in New York City and the latest annual report by the Center for Applied Research in the Apostolate, which tracks statistics of abuse by U.S. Catholic priests.[354] Secrecy in an insular community prevented news reports from listing the numbers of sexual abuse incidents in the ultra-Orthodox Jewish community, but scholars believe that abuse rates are roughly the same as those in the general population; the limited reports stem from the fact that most abuse victims are "fearful of being stigmatized in a culture where the genders are strictly separated and discussion of sex is taboo."[355]

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[350] Dan Gilgoff, *Catholic Church's Sex Abuse Scandal Goes Global*, CNN WORLD (March 19, 2010, 10:23 PM), http://www.cnn.com/2010/WORLD/europe/03/19/catholic.church.abuse/index.html; Neal Conan, *Amidst Church Scandals, Who Still Joins The Priesthood*, NPR: TALK OF THE NATION TRANSCRIPT (Jan. 23, 2013, 1:00 PM) (explaining that a decade after news of the sex abuse scandal in the Boston archdiocese of the Catholic Church broke, reports of abuse continue to emerge), http://www.npr.org/2013/01/23/170085074/amidst-church-scandals-who-still-joins-the-priesthood; *A Guide to Catholic Sex Scandals*, ABC News (Aug. 23, 2010), http://abcnews.go.com/Blotter/slideshow/guide-catholic-sex-scandals-11289279; Barbara Bradley Hagerty, *Abuse Scandal Plagues Hasidic Jews In Brooklyn*, NPR (Feb. 2, 2009, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=99913807.

[351] Kevin Johnson, *Sandusky Sentenced in Penn State Sex Scandal*, USA TODAY, Oct. 9, 2012, http://www.usatoday.com/story/news/nation/2012/10/09/sandusky-sentenced-penn-state-sex-scandal/1609101/; Jesse Mckinley, *Coaches Face New Scrutiny on Sex Abuse*, N.Y TIMES, April 14, 2012, http://www.nytimes.com/2012/04/15/us/new-scrutiny-on-coaches-in-reporting-sexual-abuse.html?pagewanted=all; *see also* An entire CBS News web page is dedicated to "*The Penn State Scandal*" with links to numerous articles discussing the Jerry Sandusky child abuse scandal (Assistant Coach of Penn State's football team who was found guilty on 45 counts of child sexual abuse and convicted of molesting 10 boys over a 15-year period), available at http://www.cbsnews.com/2718-400_162-1332/the-penn-state-scandal/.

[352] Not discussed in this article but necessary to note is the intense media focus on young attractive female schoolteachers who have sex with underage students. *See*, Michael Winter, *Ex-Texas Teacher Guilty of Having Sex With 5 of Her Students,* USA TODAY, Aug. 17,2012, http://content.usatoday.com/communities/ondeadline/post/2012/08/ex-texas-teacher-guilty-of-having-sex-with-5-of-her-students/1#.UU4gIFsjqXQ; *see also The 50 Most Infamous Female Teacher Sex Scandals*, ZIMBIO.COM, http://www.zimbio.com/The+50+Most+Infamous+Female+Teacher+Sex+Scandals (providing a compilation of infamous teachers involved in sex scandals).

[353] *See generally* Thomas G. Plante, *Priests Behaving Badly: What Do We Know About Priest Sex Offenders?*, 10 SEX. ADD. & COMP. 93 (2003); Kathryn A. Dale & Judith L. Alpert, *Hiding Behind the Cloth: Child Sexual Abuse and the Catholic Church*, 16 J. CHILD SEX. ABUSE 59 (2007); Henry A. Giroux & Susan Searls Giroux, *Universities Gone Wild Big Money, Big Sports and Scandalous Abuse at Penn State,* TRUTH-OUT.ORG (Jan. 12, 2012, 3:09 AM).

[354] Cathy Lynn Grossman, *Philadelphia Trial Revives Catholic Church Sex Abuse Crisis*, USA TODAY, June 7, 2012, http://usatoday30.usatoday.com/news/religion/story/2012-06-05/philadelphia-priest-sex-abuse-case/55453208/1.

[355] Sharon Otterman & Ray Rivera, *Ultra Orthodox Shun Their Own for Reporting Child Sexual Abuse*, N.Y TIMES, May 9, 2012, http://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html?pagewanted=all.

Reports of countless incidents of sexual abuse in the Boy Scouts was revealed after 20,000 pages of documents dating back to the 1920s was obtained after a two-year court battle.[356] Sexual abuse in the world of college sports made media headlines throughout the country after Assistant Coach Jerry Sandusky, of Penn State's football team, was found guilty on 45 counts of child sexual abuse and convicted of molesting 10 boys over a 15-year period.[357]

Yet, the focus on predators in closely-knit religious communities or on NCAA Division I college campuses has not conjured the same image of an offender that would otherwise incite public outrage, political movements and calls for legislative mandates that flowed from the "stranger/pedophile murder" cases.[358] For example, numerous cases of abuse within the Hasidic community have been documented in homogeneous and insular neighborhoods in Brooklyn, New York, and Brooklyn District Attorney Charles Hynes has continually been accused by victims' rights advocates of "going easy" on alleged Hasidic child molesters and rapists who reside in those neighborhoods.[359] Hynes had additionally refused to identify the sexual abusers in the Hasidic community who had been charged with offenses.[360] The author of an opinion piece in the *New York Post* stated: "There exists in this city a group of unparalleled perverts that's wrapped in Teflon . . . ."[361] When the documents detailing suspected abuse in the Boy Scouts were released, concern over violation of privacy, due process and the possibility that named individuals were innocent was noted in a news article.[362] And when evidence surfaced showing that a

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[356] *See Experts Say Posting Boy Scouts' Perversion Files' Online Sends Message Against Protecting Molesters*, FOXNEWS.COM (Oct. 19, 2012), http://www.foxnews.com/us/2012/10/19/experts-say-posting-boy-scouts-perversion-files-online-sends-message-against/; *see also* Michael Martinez & Paul Vercammen, *Attorneys Release Confidential Boy Scout Files on Alleged Child Sex Abusers*, CNN (Oct. 18, 2012, 8:29 PM), http://www.cnn.com/2012/10/18/justice/boys-scouts-sex-abuse-report.

[357] Johnson, *supra* note 351; *see also* Keith Ablow, *Sex Offenders at School and Next Door*, FOXNEWS.COM (Nov. 28, 2011) http://www.foxnews.com/health/2011/11/28/sex-offenders-at-school-and-next-door/; *see also* Nicole Auerbach, *Penn State Abuse Probe is Ongoing*, USA TODAY, Nov. 8, 2011, http://usatoday30.usatoday.com/sports/college/football/bigten/story/2011-11-07/Penn-State-sexual-abuse-investigation-continues/51116880/1.

[358] *See generally,* Johnson *supra* note 351. Noteworthy legislation that occurred after the Jerry Sandusky scandal was a Florida law enacted to encourage universities to report sexual abuse and financially penalize them if they knowingly and willfully fail to. *See, e.g.*, Alyssa Newcomb, *After Sandusky, Florida Passes One of Nation's Toughest Sexual Abuse Reporting Laws*, ABC WORLD NEWS (Oct. 9, 2012), http://abcnews.go.com/US/sandusky-florida-passes-nations-toughest-sexual-abuse-reporting/story?id=17434307#.UU4xclsjqXQ ("The Penn State scandal helped shape a new Florida sexual abuse reporting law that has been called the toughest in the nation, holding universities and individuals financially and criminally liable for failure to report suspected abuse."). *But see, e.g.*, Michelle Boorstein & William Wan, *After Child Abuse Accusations, Catholic Priests Often Simply Vanish*, WASH. POST, Dec. 4, 2010 ("[I]t's up to the individual dioceses how, or whether, they keep tabs on priests who are removed from the ministry or defrocked after sex-related allegations"); *see also* Ted Oberg, *The Former Priest Pedophile Next Door*, ABC 13 (April 21, 2008), http://abclocal.go.com/ktrk/story?section=news/in_focus&id=6095496.

[359] Anderson Cooper, *Hasidic Child Sex Abuse Allegations*, CNN (June 18, 2012, 10:50 PM), http://ac360.blogs.cnn.com/2012/06/18/tonight-on-ac360-child-sex-abuse-scandal/ (reporting that District Attorney Hynes is accused of neglecting the prosecution of abuse in order to appease the Rabbis in order to get their support and keep his position).

[360] Jspace Staff, *DA Withholds Names of Sex Offenders from Hasidic Community*, JSPACE.COM (April 30, 2012, 4:08 PM), http://www.jspace.com/news/articles/da-withholds-names-of-sex-offenders-from-hasidic-community/8770.

[361] Andrea Peyser, *Protecting the Unholiest Sinners*, N.Y. POST, May 24, 2012.

[362] *Experts Say Posting Boy Scouts' Perversion Files' Online Sends Message Against Protecting Molesters*, *supra* note 356 ("In a joint statement, attorneys who worked on the case stated: 'In fact, we are in no position to verify or attest to the truth of these allegations as they were compiled by the Boy Scouts of America,' the statement read. 'The incidents reported in these documents attest to notice of potential child abuse given to the Boy Scouts of America and its affiliates and their response to that notice.'"); *see also* Michael Martinez and Paul Vercammen, *Attorneys Release Confidential Boy Scouts Files on Alleged Sex Abusers,* CNN (October 18, 2012),

beloved and renowned college football coach, Joe Paterno, protected the pedophilic activities of his colleague, assistant coach Jerry Sandusky, the general community was hesitant to express itself as to what action, if any, should be taken.[363] A CNN report noted that, "In the aftermath of Sandusky's arrest, Paterno was treated as a victim, a man who was caught up in something he wasn't aware of. Now we know that was a lie."[364] The *New York Times* reported that even after Sandusky "made admissions about inappropriate contact in the shower room" in 1998 to the Penn State campus police, "[n]othing happened . . . . Nothing stopped."[365]

In the next section, we will look at emerging legislation in the 21st century and consider whether increased media reports citing low recidivism, identifying offenders who were trusted members of the community and acknowledging the rarity of the "stranger" sex crime has had any impact on creating new legislation.

D. Effect on Emerging Legislation

Scandals that have occurred in religious and academic institutions have not evoked the same level of demand for reactive legislation, but they *have* kept the focus on pedophiles and child molesters in the media.[366] That focus continues to incite the public and drive legislators to create or reaffirm legislation after every new, shocking sex offense story highlighting a "stranger sex crime" case.[367] Despite the current focus on "familiar" predators and media accounts pointing to low recidivism and re-offense rates,[368] the Florida Legislature enacted "Jessica's Law" in 2005 after Jessica Lunsford was murdered

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http://www.cnn.com/2012/10/18/justice/boys-scouts-sex-abuse-report ("CNN is not linking to the reports because it hasn't verified the allegations that they contain and because the attorneys admit that they haven't checked the veracity of the allegations.").

[363] *See generally*, Johnson, *supra* note 293; Jessica Tully, *Penn State Students Set Up Paterno Statute Watch*, USA TODAY, July 19, 2012; Jay Jennings, *Was Sandusky Protected by Football Culture*, CNN (June 19, 2012, 3:13 PM), http://www.cnn.com/2012/06/18/opinion/jennings-sandusky-football (discussing how popular sports icons are idolized and "seem immune to the rules that apply to the rest of us").

[364] Roland S. Martin, *Joe Paterno was a Coward*, CNN (July 15, 2012, 11:10 AM) http://www.cnn.com/2012/07/15/opinion/martin-paterno-coward ("The most powerful men at Penn State failed to take any steps for 14 years to protect the children who Sandusky victimized," and "documents show[] Paterno, his family and his legion of supporters lied in order to protect Paterno's name. All he cared about was breaking the all-time record set by Grambling State head coach Eddie Robinson.").

[365] Pete Thamel, *State Officials Blast Penn State in Sandusky Case*, N.Y. TIMES, Nov. 7, 2011.

[366] *See* Aaron Levin, *Penn State Scandal Draws Attention to Child Sexual Abuse,* PSYCHIATRIC NEWS, at 14-16 (Dec. 16, 2011), *available at* http://journals.psychiatryonline.org/ newsarticle.aspx?articleid=181079; *see also* Melissa DiPento, *Following Sandusky Case, Parents Call for More Education on Sexual Abuse in Schools*, NJ.COM (Oct. 10, 2012, 6:48 AM), http://www.nj.com/gloucester-county/index.ssf/2012/10/following_the_sandusky_ case_pa.html; Malcolm Gladwell, *In Plain View- How Child Molesters Get Away with It*, NEW YORKER, Sept. 24, 2012.

[367] *See, e.g.*, Jim Doyle, *Public's Overriding Fear: Will They Do It Again? / Anxiety Remains Despite Low Recidivism Among Many Offenders,* SAN FRANCISCO CHRONICLE, July 12, 2004 (reporting on the release of convicted sex offenders from Atascadaro State Hospital); Chris Cassidy, *Robert A. DeLeo to Review Bill to Publicize Sex Offenders*, BOSTON HERALD.COM (Dec. 10, 2012), http://bostonherald.com/news_opinion/local_politics/2012/12/robert_deleo_review_bill_publicize_sex_offenders ("House Speaker Robert A. DeLeo says he will re-evaluate a stalled Beacon Hill bill that would make the names of even low-level sex offenders public, signing the Bay State on to a national online sex-offender database, after horrifying child sex abuse charges against a Wakefield man last week."); Jonathan Zimmerman, *Sandusky and Sexual Abuse: From Apathy to Panic*, PHILLY.COM (June 27, 2012), http://articles.philly.com/2012-06-27/news/ 32425600_1_sexual-abuse-summer-camp-male-victims (analyzing our current views on pedophilia: "Rather than simply vilifying pedophiles like Sandusky, we might also pause to consider how our shifting views of them have affected American childhood.").

[368] Jenkins, *supra* note 312, at 35.

by a convicted sex offender.[369] The law mandated stiff minimum sentences for child abusers and a version of Jessica's Law – the Jessica Lunsford Act – was introduced at the federal level in 2005, but was never enacted into law by Congress.[370] Without support on a federal level, individuals and organizations began a movement to encourage all states to enact similar legislation. Bill O'Reilly – political commentator and host of "The O'Reilly Factor" on the Fox News Network – created an Internet page to inform and urge all states to "pass Jessica's Law."[371]

The unsuccessful attempt to enact Jessica's Law on a federal level, was overshadowed by the politically significant legislative enactment of the Adam Walsh Act (AWA).[372] The AWA –which was developed in response to a boy's abduction by a stranger sexual predator[373] – was enacted in 2006, despite the wide availability of well-known, researched valid and reliable studies that showed low recidivism and re-offense rates by sex offenders, and despite media articles which exposed the unlikely occurrence of stranger attacks.[374] The goal of the AWA was to uniformly track on a national level sex offenders – of whom the public would otherwise be unaware, in spite of the statistical data demonstrating that 60 percent of boys and 80 percent of girls sexually victimized were abused by someone they knew.[375]

Since the AWA became law, there has been an increase in media reports on its failure to keep communities safe.[376] In 2009, newspapers focused their attention on an expansive study by the New Jersey Department of Corrections and Rutgers University on the effectiveness of Megan's Law.[377] The study found that Megan's law "has failed to deter sex crimes or reduce the number of victims since its passage 15 years ago."[378] The

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[369] Jessica Lunsford Act, H.R. 1505, 109th Cong. (2005); Associated Press, *Fla. Gets Tough New Child-Sex Law*, CBS (Feb. 11, 2009. 7:26 PM), http://www.cbsnews.com/8301-201_162-692465.html.

[370] Jessica Lunsford Act, H.R. 1505, 109th Cong. (2005).

[371] Bill O'Reilly, *What Is Jessica's Law*, THE FACTOR ONLINE, http://www.billoreilly.com/jessicaslaw, ("There is simply no question that Jessica's Law will save lives, and similar laws need to be instituted in every state. Which is why we at The Factor have been putting pressure on Governors.").

[372] Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §16901 (2006).

[373] *Id. See supra* text accompanying notes 163-91.

[374] *See, e.g.*, Lin Song & Roxanne Lieb, *Adult Sex Offender Recidivism: A Review of Studies*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, Jan. 1994, at 1; 30 Kristen M. Zgoba & Leonore M. J. Simon, *Recidivism Rates of Sexual Offenders up to 7 Years Later: Does Treatment Matter?*, CRIM. JUST. REV., Sept. 2005, at 155; *see also* Jill S. Levenson, *Sex Offense Recidivism, Risk Assessment, and the Adam Walsh Act* (unpublished study, Lynn University), *available at* http://www.leg.state.vt.us/workGroups/sexoffenders/AWA_SORNsummary.pdf.

[375] Jenkins, *supra* note 312.

[376] Regarding the concern over juvenile registration, see also Jacob Perryman, *Differing Opinions: Local D.A., opponents of changes at odds*, TIMES OBSERVER (Nov. 14, 2012), http://www.timesobserver.com/page/content.detail/id/560865/Differing-Opinions.html?nav=5006 ("It is tragic that PA will register juveniles as young as 14 years-of-age, potentially for the rest of their lives"); Associated Press, *Dealing with Child-On-Child Sex Abuse Not One Size Fits All*, USA TODAY, Jan. 7, 2012 ("Many professionals who deal with young offenders object to the [Adam Walsh Act] requirement, saying it can wreak lifelong harm on adolescents who might otherwise get back on the track toward law-abiding, productive lives."); Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid with Real Boundary Problems?* N.Y. TIMES, July 22, 2007 ("Community notification makes people feel protected — who wouldn't want to know if a sex offender lives next door? But studies have yet to prove that the law does, in fact, improve public safety."); *see also* ABC 20/20, http://abcnews.go.com/2020/AgeOfConsent/ (last visited Mar. 28, 2013) (dedicating an Internet web page to news articles discussing sex offender laws and "age of consent").

[377] *See* Susan K. Livio, *Report Finds Megan's Law Fails to Reduce Sex Crimes, Deter Repeat Sex Offenders in N.J.*, THE STAR LEDGER, February 7, 2009.

[378] *Id.* (explaining that despite wide community support for these laws, there is little evidence to date, including this study [conducted by the state Department of Corrections and Rutgers University], to support a claim that Megan's Law is effective in reducing either new first-time sex offenses or sexual re-offenses); *see also* David Morgan, *Megan's Law No Deterrent to Sex Offenders,* CBS NEWS (Feb. 11, 2009, 1:36 PM),

study made note of the fact that sex offenses in "New Jersey, as a whole, experienced a consistent downward trend of sexual offense rates, with a significant change in the trend in 1994 (the year Megan's Law was passed)."[379] Media reports also focused on the estimated $5.1 million spent in 2007 in order to assist N.J in carrying out the law.[380] Other news reports highlighted the extensive costs other states were facing when trying to conform their state version of Megan's Law with federal mandates under the AWA.[381] California, which received $135.6 million in its 2009-10 federal allocation, decided the changes – to comply with the AWA – were more costly than the loss of grant money.[382] An article in the *Philly Post* , an online newspaper, echoed the concern for costly implementation and whether the expense was worth the benefit:

> There are pushes and petitions for all sorts of laws based on a single, tragic instance: "Jessica's Law," "The Adam Walsh Act," "Kyleigh's Law," "Tyler's Law," "Judy and Nikki's Law." We're so outraged by the actions of one offender that we determine to punish all persons, down through the ages, who behave like that offender. They're laws born of knee-jerk reactions, of the heart, not the head. They're rarely effectual and rarely even used. But they satisfy our deep, primal urge for punishment and revenge.[383]

An op-ed column in the *New York Times* by *Roger N. Lancaster, a professor of anthropology and author of Sex Panic and the Punitive State,*[384] *asserted that "*sex offender laws are expansive, costly and ineffective — guided by panic, not reason" and suggested a new approach:

> [T]o promote child welfare based on sound data rather than statistically anomalous horror stories, and in some cases to revisit outdated laws that do little to protect children. Little will have been gained if we trade a bloated prison system for sprawling forms of electronic surveillance that offload the costs of imprisonment onto offenders, their families and their communities.[385]

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http://www.cbsnews.com/2100-201_162-4780981.html; Beth DeFalco, *Megan's Law Not a Deterrent*, FOXNEWS.COM (Feb. 6, 2009), http://www.nassaupba.org/public/public_interest/ megans_law/ap-newsbreak-report-finds.shtm (noting a 1999 study that suggested that notification laws are counterproductive and that the fear of exposure may cause offenders to avoid treatment, and may encourage pedophiles to seek out children as a result of adult isolation).

[379] Morgan, *supra* note 378.

[380] Livio, *supra* note 377; *see also* Andy Newman, *N.J. Law; Forecast for Enforcing 'Megan's Law': Complicated, Costly*, N.Y. TIMES, Jan. 14, 1996 (illustrating the fact that the *New York Times* forecasted costly implementation of Megan's Law in 1996).

[381] *See* Emmanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN NEWS (July 28, 2011, 11:51 AM), http://www.cnn.com/2011/CRIME/07/28/ sex.offender.adam.walsh.act/index.html.

[382] *See* Chuck Biedka, *Tougher Pennsylvania Megan's Law Act May Hit Snag Because of Costs*, TRIBLIVE NEWS, (April 18, 2010), http://triblive.com/x/leadertimes/news/ s_677001.html#axzz2OV9YffzI.

[383] Sandy Hingston, *Do We Really Need Megan's Law? Maybe not, but what legislator would vote against a dead child?*, The PHILLY POST (Oct. 3, 2011), http://blogs.phillymag.com/the_philly_post/ 2011/10/03/need-megans-law/.

[384] *Roger N. Lancaster, Sex Offenders: The Last Pariahs*, N.Y. TIMES, Aug. 20, 2011.

[385] *Id.*

Other more recent news articles blamed the ineffectiveness of Megan's Law on the lack of resources and lack of conformity to the requirements of the AWA.[386]

The increase of media focus on the costs of implementation and ineffectiveness of Megan's Law, has not, to date, led to the repeal of legislation, but may have helped states decide to not conform to the requirements under the federal AWA. States have struggled to reconcile the difficulty of effectively monitoring a huge pool of registrants, a pool often increased by the AWA requirements, and the desire to appease the public and make a showing of being "tough on sexual predators."[387] Public demands on politicians and states facing loss of federal funding has continued to dictate decisions on whether to comply with the Act.[388] As of 2012, only fifteen states were deemed to be in compliance with AWA (seven in full compliance) and a handful of states have decided to openly opt out of federal funding.[389]

Ohio repealed its version of Megan's Law and subsequently enacted its counterpart to the AWA – providing increased obligations and registration requirements to be applied retroactively to previously-registered sex offenders[390] – but the Ohio Supreme Court declared the law to be unconstitutional on the issue of retroactivity and separation of powers.[391] On December 20, 2011, Pennsylvania Governor Tom Corbett signed into law the "Adam Walsh Bill,"[392] in order to bring the Commonwealth into compliance with the

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[386] *See* Tatiana Morales, *Why Megan's Law is Getting an "F"*, CBS NEWS (Feb. 11, 2009, 7:25 PM), http://www.cbsnews.com/2100-500168_162-694413.html (discussing the failure of Megan's Law as part of a special series on the Early Show, *Broken Promises*); *see also* Brian Freskos, *Adam Walsh Act Reignites Debate of Sex Offender Policies*, STAR NEWS ONLINE (Feb. 3, 2012, 8:41 AM), http://www.starnewsonline.com/article/20120203/ARTICLES/120209899 (discussing North Carolina's abstention from adopting provisions and loss of federal assistance).

[387] *See, e.g.*, John Caher, *New York Opts Out of Compliance With Adam Walsh Act*, N.Y.L.J. (Oct. 7, 2011) (explaining that The Adam Walsh Act would place additional restrictions on anyone convicted of a sex-related crime; although passed by the U.S. Congress and signed into law in 2006, only seven states (Ohio, Delaware, Florida, South Dakota, Michigan, Nevada and Wyoming) agreed to fully comply with that Act. The state of Ohio subsequently declared the Act to be unconstitutional. California does not comply with this Act); Campisi, *supra* note 195; Sean Murphy, *Federal Sex Offender Laws: Arizona, Many Other States Don't Meet Standards*, HUFFINGTON POST (Oct. 4, 2012. 3:36 PM), http://www.huffingtonpost.com/2012/10/04/states-dont-meet-federal-sex-offender-laws_n_1941060.html ("Some lawmakers determined that the program would cost more to implement than to ignore. Others resisted the burden it placed on offenders, especially certain juveniles who would have to be registered for life.").

[388] *See* Ted Gest, *Feds Begin Penalizing States That Haven't Adopted New Sex Offender Law* (April 12, 2012, 4:37 AM), http://www.thecrimereport.org/viewpoints/2012-04-sorna.

[389] Caher, *supra* note 387.

[390] The Adam Walsh Act & Ohio Senate Bill 10, S.B. 10, 127th Gen. Assemb., Reg. Sess. (Ohio 2008), *available at* http://www.legislature.state.oh.us/BillText127/127_SB_10_EN_N.pdf ; *see also State v. Holloman-Cross*, 2008 WL 1973568 (Ohio Ct. App. 2008) (noting that Ohio's Adam Walsh Act does not violate the ex post facto clause of the U.S. Constitution); State v. Davis, 2012 WL 3222667, at *2 (Ohio Ct. App. 2012) (noting that the appeals court previously reached a similar conclusion in another ruling, *State v. Smith*, 2012 WL 253237 (Ohio Ct. App. 2012), and that prior ruling is in conflict with cases from two other appellate courts: "Until the Ohio Supreme Court issues a definitive ruling on this issue or until it remedies the conflict among the districts, we are bound by precedent of this court. Accordingly, we sustain Davis's assignment of error, reverse his sentence, and remand the matter to the trial court to impose a sentence consistent with Megan's Law.").

[391] *See* State v. Bodyke, 933 N.E.2d 753, 766-67 (Ohio 2010) (holding that reclassification violated separation of powers doctrine because it changed the duties imposed by courts); *see also In re* Bruce S., 983 N.E.2d 350, 353 (Ohio 2012) (noting that Ohio's Adam Walsh Act's classification, registration, and community-notification provisions cannot be constitutionally applied to a sex offender who committed his sex offense between July 1, 2007, and Dec. 31, 2007, the last day before Jan. 1, 2008, the effective date of the classification, registration, and community-notification provisions; application of these Adam Walsh Act provisions to offenses before their effective date violates Section 28, Article II of the Ohio Constitution).

[392] PA SB1183, 2011 Leg., Reg. Sess. (Pa. 2011).

AWA.[393] Pennsylvania's adult parole and probation departments considered the federal Adam Walsh Act a potential "nightmare" and maintained that there was "[no] way" present staff could handle all the background checks and other duties required under the AWA.[394] The press article reporting on these developments noted that the neighboring state of Ohio spent millions of dollars on implementation and the ensuing flood of litigation, only to have its law declared unconstitutional.[395] But few politicians dare to vote against such laws, because if they were to do so, the attack ads would practically write themselves.[396]

Despite the significant problems with the AWA, when a sensational media account detailing a horrific act of sexual violence, politicians – in an effort to appease angry constituents – still look to the AWA as the answer.[397] John Burbine, a convicted sex offender who videotaped himself sexually assaulting children from his wife's unlicensed day care business in Massachusetts, provoked a call for compliance with the AWA.[398] In response though, a local Massachusetts newspaper dedicated an article to addressing the problems that come with enacting the AWA.[399] The article discussed the results from a 10-year study by Jill Levinson and colleagues that found that the AWA tier system significantly failed to predict recidivism.[400] The piece also noted the $ 10.4 million it would take for Massachusetts to come into compliance with the AWA and cautioned that "a bloated registry that treats all offenders the same (even though they aren't) usurps valuable resources that could be allotted to those who truly need to be tracked and monitored."[401] An article from the *Boston Globe* echoed similar cautions – noting the recent research on lack of accuracy in determining risk – though the article's author aptly put forth the counter-argument: "It is easy to understand the emotional appeal of the 'if it just saves one child' argument.'"[402] Despite the fear, "basing public policy on the rare horrific crime committed by one registered sex offender, while ignoring the extensive

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[393] *See PA Sexual Offender Management*, PENNSYLVANIA COMMISSION ON CRIME AND DELINQUENCY, http://www.portal.state.pa.us/portal/server.pt/community/pa_sexual_offender_management/20801 (last visited Mar. 31, 2013).

[394] *See* Phil Ray, *Pennsylvania Prepares for Adam Walsh Act*, ALTOONA MIRROR (Sept. 9, 2012), http://www.altoonamirror.com/page/content.detail/id/564065/Pennsylvania-prepares-for-Adam-Walsh-Act.html?nav=742.

[395] *Pennsylvania Fails to Comply with Adam Walsh Sex Offender Law*, 24-7 PRESS RELEASE (Dec. 14, 2011), http://www.24-7pressrelease.com/press-release/pennsylvania-fails-to-comply-with-adam-walsh-sex-offender-law-252404.php.

[396] *See supra* notes accompanying text 375-94; *America's Unjust Sex Laws*, THE ECONOMIST, Aug. 6, 2009 (arguing that America's sex laws are unjust and are doing more harm than good), *available at* http://www.economist.com/node/14165460.

[397] *See* Crimesider Staff, *John Burbine, Convicted Sex Offender, Allegedly Assaulted Children From his Wife's Daycare Business*, CBS NEWS (Dec. 7, 2012, 2:21 PM), http://www.cbsnews.com/8301-504083_162-57557809-504083/john-burbine-convicted-sex-offender-allegedly-assaulted-children-from-his-wifes-daycare-business/.

[398] *See* Shana Rowan, *The Adam Walsh Act is Not the Answer: USA Families Advocate an Intelligent Sex Offender Registry,* CAPE COD TODAY (Dec. 18, 2012, 5:03 PM), http://www.capecodtoday.com/article/2012/12/18/3664-adam-walsh-act-not-answer ("In the wake of the horrific sex abuse allegations against convicted Level 1 sex offender John Burbine, numerous politicians are calling to bring Massachusetts into compliance with the Adam Walsh Act, which would publicize the identities and addresses of Level 1 and Level 2 sex offenders.").

[399] *Id.*; *but cf.* Shana Rowan, *Low Risk Was Never Meant to Mean No Risk*, CAPE COD TODAY (Jan. 25, 2013, 4:26 PM), http://www.capecodtoday.com/article/2013/01/25/16737-low-risk-was-never-meant-mean-no-risk ("Just as studies have shown that most high-risk offenders will never commit another sex crime, some low risk offenders will.").

[400] *See* Rowan, *supra* note 398.

[401] *Id.*

[402] Shana Rowan, *Punish the Sex Offender- Not the Entire Offender Group,* THE BOSTON GLOBE (Dec. 21, 2012).

research of the entire former sex offender population, does not result in a fair and reasoned criminal justice system."[403]

Although states have been hesitant to adopt the strict and costly restrictions under the federal AWA, they have not been hesitant to enact their own strict mandates, nor have states been scaling back their legislative efforts to restrict and monitor sex offenders.[404] Post-AWA and subsequent to the availability of widespread information citing the ineffectiveness of community notification and monitoring, states have enacted a variety of laws in order to further punish, monitor or restrict sex offenders:

1. Forty-six states have passed laws similar to Jessica's Law that mandates steep minimum sentences for those convicted of sexual crimes against a child;[405]
2. Some states have passed ordinances restricting or monitoring Internet access[406] and online gaming[407] for convicted offenders;
3. A growing number of states that have enacted laws restricting the activities of sex offenders on Halloween; [408]
4. One state attempted to restrict a sex offender's access to a public library;
5. Other states have tried to restrict sex offenders' access to church[409] or other public facilities; [410]
6. States have instructed parole and probation officers to track offenders using Global Positioning Systems (GPS)[411] equipment, which the offender is forced to keep on his body at designated times;

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[403] *Id.*

[404] Carpenter & Beverlin, *supra* note 2, at 1089. ("Today, Louisiana's Megan's Law includes one of the most detailed and extensive lists of required information, including palm prints, a DNA sample, and all landline and mobile telephone numbers.") The statute requires sex offenders and child predators alike to provide local law enforcement with detailed information including: the name and aliases used by the offender; physical description of the offender; addresses, including temporary housing, employment, and school; a current photograph; fingerprints, palm prints and a DNA sample; a description of every vehicle registered to or operated by the offender, including license plate number; a copy of the offender's driver's license; and every email address, online screen name, or other online identifiers used by the offender to communicate on the Internet. LA. REV. STAT. ANN. § 15:542(C)(1) (2012).

[405] Campisi, *supra* note 195.

[406] An Indiana law that bans registered sex offenders from using Facebook and other social networking sites that can be accessed by children was found to be unconstitutional. *Doe v. Prosecutor, Marion County*, Indiana, 705 F.3d 694, 695 (7th Cir. 2013); Norimitsu Onishi, *Suit Contests Limits on Online Activites of Sex Offenders*, N.Y. TIMES (Nov. 17, 2012) (Offenders "must inform the authorities of their e-mail addresses, user names, screen names and other Internet handles, as well as report any additions or changes within 24 hours.").

[407] Kevin Collier, *New York Deleted 2,100 Sex Offenders' Online Gaming Accounts*, THE DAILY DOT (Dec. 21, 2012), http://www.dailydot.com/news/new-york-sex-offenders-gaming-accounts-deleted/.

[408] At least ten states and city municipalities have enacted statutes imposing restrictions on the activities of sex offenders on Halloween. The laws seem to fall into one of two main categories: (1) specific restrictions on registered sex offenders, and (2) restrictions on paroled sex offenders, or those on conditional release programs. A California law known as "Operation Boo" allows officials to conduct nighttime checks on the evening of Halloween to make sure some registered sex offenders are insider their homes with the lights out. Nicole Gonzalez, *Parolees Arrested in Operation Boo*, NBC SAN DIEGO (Nov. 1, 2012), *available at* http://www.nbcsandiego.com/news/ local/Four-Parolees-Arrested-in-Operation-Boo-176719141.html#ixzz2TU1vYPBi. Similarly, a New York law known as "Halloween: Zero Tolerance" allows state investigators to make unannounced home visits, curfew checks, and phone calls to enforce the laws. Alv Adair, *National Alert Registry: Prepare for Sex Offenders on Halloween*, YAHOO! VOICES (Oct. 11 2007), http://voices.yahoo.com/national-alert-registry-prepare-sex-offenders-599179.html.

[409] State v. Perfetto, 7 A.3d 1179, 1183 (N.H. 2010).

[410] *Doe v. City of Albuquerque,* 667 F.3d 1111, 1115 (10th Cir. 2012) *(*city failed to show that its ban - restricting access to a public library- was narrowly tailored and that it left other avenues for sex offenders to receive information and ideas from the library.)

7. States have required individuals convicted of certain non-sex crimes to register as sex offenders.[412]

Finally, nothing can compete with the most prevalent and controversial restrictions enacted to keep sex offenders from offending in the community – residency restrictions. As discussed in Part 1, these restrictions were widely adopted and, by 2008, 30 states had enacted residency restrictions for offenders in the community.[413] Although residency restrictions have withstood a vast amount of constitutional challenges,[414] some courts have begun to question the intent of the legislation and render opinions finding certain regulations unconstitutional.[415]

Somewhat in sync with emerging concerns by courts and scholars over the constitutionality and effectiveness of residency restrictions, media articles began to report on the issues that accompanied the legislation.[416] One article noted: "despite research that

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[411] In 2006, as part of the Adam Walsh Act, the federal government offered grant programs and technical assistance to states in order to implement similar electronic monitoring programs: *See* Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, § 621, 120 Stat. 587, 633–34 (2006) (codified as amended at 42 U.S.C. § 16981 (2010)) (authorizing the Attorney General to award grants to states and local governments to carry out programs to outfit sex offenders with electronic monitoring units); Alabama was one of the first states to use GPS, ALA. CODE 15-20A-20 (2011).

[412] Associated Press, *Nebraska High Court Upholds Sex Offender Ruling,* JOURNALSTAR.COM (Jan. 18, 2013), http://journalstar.com/news/state-and-regional/nebraska/nebraska-high-court-upholds-sex-offender-ruling/article_0aa09206-8061-50ca-9d90-ae82118b1190.html (reporting that the Nebraska Supreme Court upheld a law requiring an individual who was *not* convicted of a sex crime to register as a sex offender based off of court records that showed evidence of sexual contact or penetration).

[413] Michelle L. Meloy, Susan L. Miller & Kristin M. Curtis, *Making Sense out of Nonsense: The Deconstruction of State-Level Sex Offender Residence Restrictions*, 33 AM. J. CRIM. JUST. 209 (2008).

[414] Yung, *supra* note 124, at 160 ("Regardless of the reasons for the first restrictions, there can be little doubt that the highly publicized murders of Brucia and Lunsford in 2005 played a significant role in the spate of new sex offender residency restrictions proposed and enacted in 2005 and 2006."). *See generally*, Mann v. State, 603 S.E.2d 283 (Ga. 2004); Thompson v. State, 603 S.E.2d 233 (Ga. 2004); Denson v. State, 600 S.E.2d 645 (Ga. Ct. App. 2004); People v. Leroy, 828 N.E.2d 769; State v. Seering, 701 N.W.2d 655 (Iowa 2005); Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2006), *cert. den. sub. nom* Weems v. Johnson, 550 U.S. 917 (2007) (residency restriction did not violate constitutional right to travel, ex post facto law, or substantive due process); State ex rel. White v. Billings, 860 N.E.2d 831 (Ohio Com. Pl. 2006) (statute prohibiting a sex offender from residing within 1000 feet of school premises was a civil regulatory measure and thus did not violate Ex Post Facto clause).

[415] Some courts have begun to question strict residency restrictions, and whether such restrictions are unconstitutional in their application. See, e.g., United States v. Rudd, 662 F.3d 1257, 1258 (9th Cir. 2011); see also Doe v. Gregoire, 960 F. Supp. 1478, 1486–87 (W.D. Wash. 1997) (holding that public notification provisions are punitive and violate the Ex Post Facto Clause when applied to offenders convicted of crimes which predate the Washington Act); and similarly, State v. Myers, 923 P.2d 1024, 1043 (Kan. 1996), *cert. denied*, 521 U.S. 1118 (1997) (holding that a law permitting unrestricted public access to a sex offender registry violated the constitutional prohibition against ex post facto laws). Consider also the majority opinion of *Doe v. Baker*, 2006 WL 905368 (N.D. Ga. 2006) (holding that "a more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem . . ."). The appeals court in *Mann v. Georgia Dept. of Corrections* determined that an unconstitutional taking had occurred where an offender was forced to move from his home after a child-care facility opened within 1000 feet of his property. 653 S.E.2d 740, 760 (Ga. 2007). In rendering its decision, the Court considered the economic hardship that occurred as a result of the taking as well as the interference with an individual's reasonable investment-backed expectation when purchasing property for a private residence. The Court additionally assessed the statute and found that it effectively empowered private third parties with the state's police power. *Id.* In 2009, Indiana's Supreme Court, in *State v. Pollard*, held that the residency restriction "violates the prohibition on Ex Post Facto laws…because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed [at the time the] crime was committed." 908 N.E.2d 1145, 1154 (Ind. 2009).

[416] Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1 (reporting on the consequences of Iowa's residency restrictions and calling into question

shows sex offender residency requirements actually hamper the rehabilitation of offenders, jurisdictions across the country continue to pass them."[417] Despite evidence of their ineffectiveness, new or expanded laws were proposed in twenty states in 2007 and legislators urged the public to "give it time to work."[418] Illinois Attorney General Lisa Madigan defended the newly enacted laws: "We're trying to protect children [and] [w]e're dealing with people raping children. These are horrible crimes."[419]

Further discussed by the media, was the vast amount of resources necessary to enforce residency laws and their effectiveness is questionable given that "90% of children who are abused are victimized by someone they know and trust."[420] But, according to Dr. Jill Levinson, "residency restrictions are one size fits all . . . . Just because someone is designated a sex offender . . . does not necessarily mean that that person is a sexually violent predator or pedophile."[421] The same article quoting Dr. Levinson mentioned the ongoing problems with the Iowa residency restrictions that were the focus of the *Doe v. Miller* case.[422] Since the decision in *Doe*, Iowa has been unable to keep track of the vast number of registered offenders and the restrictions unduly overburdened parole and probation officers. Regardless, Iowa legislators refuse to be seen as "soft on sex offenders" and even after realizing that "they [the legislators who pushed the residency restriction laws] were wrong and that [the laws] should be overturned," they refused to be the ones to do it and instead, passively-aggressively, left it up to the courts to determine if these laws violated the constitution.[423] Importantly, the article noted that "[t]he general public doesn't really care if it's good public policy," pointing to the moral panic that occurs amongst parents when they learn that a convicted sex offender is moving into the neighborhood.[424]

Other courts, taking a different approach than the Eight Circuit in *Doe v. Miller,* began to erode state residency restriction laws finding that the exclusion from areas amounted to banishment[425] and violated offenders' constitutional rights.[426] Local

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the restrictions' effectiveness); Associated Press, *Sex Offenders Living Under Miami Bridge,* N.Y. TIMES, Apr. 8, 2007, at A22.

[417] Paula Reed Ward, *Residency Restrictions for Sex Offenders Popular, But Ineffective*, PITTSBURGH POST-GAZETTE (Oct. 26, 2008), http://www.post-gazette.com/stories/local/region/residency-restrictions-for-sex-offenders-popular-but-ineffective-618411/.

[418] Wendy Koch, *Sex-Offender Residency Laws Get Second Look*, USA TODAY (Feb. 26, 2007), http://usatoday30.usatoday.com/news/nation/2007-02-25-sex-offender-laws-cover_x.htm (statement by Georgia State Rep. Jerry Keen who advocates children's safety before the convenience of sex offenders).

[419] *Id.*

[420] Ward, *supra* note 417.

[421] *Id.*

[422] *Id.*; Doe v. Miller, 405 F.3d 700 (8th Cir. 2005).

[423] Ward, *supra* note 417 (stating, "they're a fearful bunch…they've done such a good job of selling it, they can't turn and go the other way").

[424] *Id.*

[425] Due to the restrictions upheld by the *Doe* court, individuals may be uprooted and forced to move from established residences, be unable to return home after prison, and may be prevented from residing with their own children, thus further disabling the family unit and removing the needed support of family members. *See* Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54 (2009). The *Doe* court specifically addressed and dismissed the argument of banishment: "While banishment of course involves an extreme form of residency restriction, we ultimately do not accept the analogy between the traditional means of punishment and the Iowa statute. Unlike banishment, § 692A.2A restricts only where offenders may reside. It does not 'expel' the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence." *Doe*, 405 F.3d at 719; *Mann*, 653 S.E.2d at 742 ("Under the terms of [Georgia's sex offender] statute, it is apparent that there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected.); Berlin v. Evans,

communities also began to question whether the expense caused in defending such laws was worth their benefit.[427] Huntington Beach, California "changed its sex-offender park ban after the law's constitutionality was challenged in court" and amended the ordinance to allow authorities to write case-by-case exemptions to the sex-offender ordinance rather than impose a blanket ban restricting all offenders.[428] An ordinance in Montville, Connecticut, was actually repealed before a lawsuit was initiated.[429] Town Council members openly voiced their opinion that the "so-called child and senior safety zone . . . designed to keep registered sex offenders from town-owned and town-leased property . . . was not really enforceable [and] was one of those ordinances that looks good on face value, but it really didn't do anything."[430]

Thus, despite some courts' refusal to uphold the constitutionality of strict residency restrictions and news accounts citing ineffectiveness, the fear of an attack against children continued to be displayed in of the form of ordinances seeking to bar offenders from living in specific areas.[431] For example, in 2012, despite this increase in knowledge and media attention to the ineffectiveness of residency restrictions,[432] Attorney General Kilmartin of Rhode Island praised a Superior Court Justice for her decision for the Court upholding the state's residency restrictions.[433] Ignoring an influx of information dispelling any connection between re-offense rates and proximity to children, Kilmartin felt that "it was eminently reasonable…to set public policy and determine the need to put modest distance between sex offenders and school children."[434] In 2010, New Hampshire

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923 N.Y.S.2d 828, 835 (Sup. Ct. 2011) (acknowledging that the registrant, a tier I offender, was effectively banished from living in Manhattan).

[426] Dana Littlefield, *Court: Law's Restrictions On Sex Offenders Unreasonable*, SAN DIEGO UNION-TRIBUNE (Sept. 15, 2012), http://www.utsandiego.com/news/2012/sep/15/tp-court-laws-restrictions-on-sex-offenders/ (reporting on an appellate court decision upholding a ruling that a state law barring registered offenders from living within 2000 feet of parks and schools is too broad and violates the offenders' constitutional rights).

[427] Sarah De Crescenzo, *Backpedal On Sex Offender Ban Gets Officials' Attention*, ORANGE COUNTY REGISTER (Dec. 7, 2012), http://www.ocregister.com/articles/city-379823-sex-cities.html, ("A sudden about-face by Lake Forest officials on an ordinance barring registered sex offenders from parks is reverberating throughout the county as attorneys and city officials discuss whether the law is worth defending in court.").

[428] Jaimee Lynn Fletcher, *H.B. Changes Sex Offender Ordinances After Lawsuit*, ORANGE COUNTY REGISTER (Jan. 23, 2013), http://www.ocregister.com/articles/ordinance-408906-sex-beach.html.

[429] Izaskun E. Larrañeta, *Montville Rescinds Sex Offender Ordinances*, THE DAY (Jan. 15, 2013, 12:00 AM), http://www.theday.com/article/20130115/NWS01/130119835/1070/NWS1501.

[430] *Id.*

[431] Dan O'Brian, *Sex Offender Case Rekindles Debate on Bans*, THE BOSTON GLOBE (Oct. 18, 2012), http://www.bostonglobe.com/metro/regionals/west/2012/10/17/southborough-sex-offender-case-rekindles-debate-over-bans/xy4EBl8NWCIsRNBEqYtFyI/story.html (reporting that police failed to realize that a registered sex offender was living near a preschool for two years; without making note of the fact that the individual did not reoffend during that time, a community member stated, "When you have these people in an area where there are children, it just heightens their need").

[432] Ward, *supra* note 417 ("Further, studies conducted by the Minnesota Department of Corrections and Colorado Department of Public Safety have not shown any correlation between sex offender recidivism and living near schools or parks."), Eric Zorn, *Restrictions on Sex Offenders Lack sense, Common and Otherwise*, *Restrictions On Sex Offenders Lack Sense, Common and Otherwise*, CHICAGO TRIBUNE (June 21, 2011), http://blogs.chicagotribune. com/news_columnists_ezorn/2011/06/offender.html ("'There was no significant relationship between reoffending and proximity to schools or day cares,' concluded an academic study of such restrictions published last year in Criminal Justice and Behavior, the journal of The American Association for Correctional and Forensic Psychology. 'The belief that keeping sex offenders far from schools and other child-friendly locations will protect children from sexual abuse appears to be a well-intentioned but flawed premise.'").

[433] Press Release, State of Rhode Island Office of the Attorney General, Attorney General Kilmartin Applauds Decision Upholding Sex Offender Residency Restrictions (Nov. 30, 2012), http://www.ri.gov/press/view/18077.

[434] *Id.*

State Sen. David Boutin sponsored a bill to encourage police departments to notify the public when sex offenders are released into a neighborhood.[435] He introduced the legislation to please constituents hoping to banish all the sex offenders from his hometown.[436] Boutin told lawmakers,

> a convicted child sex offender heinously struck again and was charged with felonious sexual assault against a 7 year old [and] [q]uick adoption of this bill and dissemination of notification guidelines to local law enforcement will go a long way towards preventing another sexual assault, with regrettable consequences for the victim, family and community, who all share in the burden of the pain.[437]

Although the bill died on the Senate floor (even in an election year), neighbors of a recently released sex offender in a New Hampshire town started a website and posted the following comments: "You show true restraint by not beating the tar out of this lowlife."; "I hope you guys get rid of the bastard. What a piece of crap."; "This is an incestuous family of whack-jobs and psychopaths, and it makes me feel good to know they are going down."; "Hang 'em high and let the sun set on 'em. Only in a perfect world right? Haha."[438] One of two conclusions can be drawn from the public's continued reaction towards convicted offenders: 1) they are not being exposed to the news reports citing low recidivism, re-offense rates and rarity of stranger sex crimes, or 2) despite new information, they just do not care.

E. Civil Commitment

After *Kansas v. Hendricks*[439], scholars and attorneys aptly predicted that, "[t]his law is going to spread like wildfire."[440] Twenty states[441] and the District of Columbia have enacted laws permitting the civil commitment of sexual offenders.[442] Soon after the decision in *Hendricks,* States' legislators rushed to enact their own civil commitment laws and construct facilities to contain large numbers of sexual predators.[443] As with most other areas of sex offender legislation, media-highlighted sex crimes helped to fuel and support civil commitment. Minnesota's sex offender civil commitment program increased exponentially after the 2003 murder of Dru Sjodin, prompting state prison authorities to

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[435] Chris Dornin, *Sex Offender Laws are Based on Rage and Fear*, CORRECTIONS.COM (March 12, 2012), http://www.corrections.com/news/article/30085.

[436] *Id.*

[437] *Id.* Boutin failed to mention that the case against the offender had been dropped due to lack of evidence.

[438] *Id*; *see also* Steven Brown et al., *What People Think About the Management of Sex Offenders in the Community*, 47 HOWARD J. CRIM. JUST. 259 (2008) (finding that the public does not necessarily agree with punitive conditions but is insecure in the effectiveness of community containment and concerned about the reality of reintegration).

[439] 521 U.S. 346 (1997).

[440] Biskupic, *supra* note 152 (quoting Lynn S. Branham, an Illinois attorney and professor who specializes in sentencing law, "This notion of 'mental abnormality' has the potential to dramatically expand the types of persons who can be confined.").

[441] Association for the Treatment of Sexual Abusers, *Civil Commitment of Sexually Violent Predators* (2010), *available at* http://www.atsa.com/civil-commitment-sexually-violent-predators (listing the twenty state as Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin).

[442] *Id.*

[443] Davey & Goodnough, *supra* note 78 ("Nearly 3,000 sex offenders have been committed since the first law passed in 1990. . . . In Coalinga, Calif., a $388 million facility will allow the state to greatly expand the offenders it holds to 1,500. Florida, Minnesota, Nebraska, Virginia and Wisconsin are also adding beds.").

refer all high-risk offenders for commitment.[444] As years passed, the considerable costs necessary to maintain these institutions drastically dissuaded additional states from enacting their own civil commitment schemes.[445]

New York passed its sex offender civil commitment statute in 2007, notwithstanding numerous concerns of the ineffective treatment and serious financial burdens associated with these laws,[446] per the announcement of State Senator John J. Flanagan that "[w]ith the passage of this legislation, we have the opportunity to save lives, protect our children, and ensure that our communities are safe from sexual predators who roam our streets in pursuit of their next victim."[447] However, an article published soon after enactment reported that in state after state, expectations of the benefits of sex offender civil commitment had "fallen short"[448] and since the United States Supreme Court upheld the constitutionality of these laws…only a small fraction of committed offenders have ever completed treatment to the point where they could be released free and clear.[449] It further reported that, "[t]he cost of the programs is virtually unchecked and growing, with states spending nearly $450 million on them this year [2007]. The annual price of housing a committed sex offender averages more than $100,000, compared with about $26,000 a year for keeping someone in prison, because of the higher costs for programs, treatment and supervised freedoms."[450]

In 2012, the *Seattle Times* ran a four-part series – "*The Price of Protection*" – and revealed the extensive waste of dollars and resources at Washington state's civil commitment center on McNeil Island – a "state of the art" facility that housed about 300 sex offenders on an island across the Puget Sound "behind coils of concertina wire."[451] The articles found that the institution was "plagued by runaway legal costs, a lack of

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[444] *AP IMPACT: Treatment for Sexual Predators Squeezes State Budgets As Programs Grow*, FOXNEWS.COM (June 21, 2010), http://www.foxnews.com/us/2010/06/21/ap-impact-treatment-sexual-predators-squeezes-state-budgets-programs-grow/ [*Treatment Squeezes*]; *see also* Anne Meyer, *Sex Offender's Daughter Speaks Out to Keep Him Locked Up,* KWCH 12 Eyewitness News (Nov. 7, 2011), http://articles.kwch.com/2011-11-07/mental-hospital_30371736 (quoting a daughter who is advocating to civilly commit her sex offender father in Kansas, "I just don't want him getting out and hurting other children. I know I have had to live with what he did to me my whole life, the nightmares it [*sic*] just doesn't ever stop.").

[445] The state of Florida spent an average of $41,835 per committed individual; by contrast, the state spent $19,000 per prison inmate per year. By contrast, Pennsylvania spent $180,000 per year per committed individual and $31,363 per inmate per year. The cost of civil commitment is exponentially higher than prison time. *See* Chart, *A Profile of Civil Commitment around the Country*, N.Y. TIMES (March 3, 2009), *available at* http://www.nytimes.com/imagepages/ 2007/03/03/us/20070304_CIVIL_GRAPHIC.html; Christine Willmsen, *States Waste Millions Helping Sex Predators Avoid Lockup*, SEATTLE TIMES (Jan. 21, 2012), http://seattletimes.com /html/ localnews/2017301107_civilcomm22.html.

[446] *Treatment Squeezes, supra* note 444 ("Some states have steered clear of the civil-commitment system, partly because of financial reasons. In Louisiana, legislation died last year after top lawmakers questioned the cost and constitutional issues. Vermont legislators rejected a similar proposal.")

Of the nearly 3,000 convicted sex offenders sent to civil commitment centers in 18 states from 1990 to 2007, only 50 "graduated" from the courses while 115 have been released due to legal technicality, old age, or terminal health; and even those few who were released wind up living on state prison grounds because communities shun the released. Davey and Goodnough, *supra* note 78; *see also* Monica Davey & Abby Goodnough, *A Record of Failure at Center for Sex Offenders,* N.Y. TIMES (March 5, 2007), http://www.nytimes.com/2007/03/05/us/ 05civil.html?pagewanted=all.

[447] John J. Flanagan, *Senate Passes Civil Commitment Legislation*, NYSENATE.GOV (Jan. 20, 2006), http://www.nysenate.gov/news/senate-passes-civil-commitment-legislation.

[448] Davey & Goodnough, *supra* note 78.

[449] *Id.*

[450] *Id.*

[451] Willmsen, *supra* note 445.

financial oversight and layers of secrecy."[452] The newspaper reported on the poor management of the institution and overwhelming employee misconduct, including consistent misuse of work computers from staff viewing pornography.[453] One article also discussed the questionable reasoning behind the constitutionality of the law, quoting the superintendent of the McNeil Island facility: "It's a highly controversial law . . . . You are talking about restricting someone's freedom after they have served their prison sentence, not for what they have done, but for what they might do."[454] Furthermore, the article went into depth questioning the reliability of the science used to uphold these commitments – questioning the definition and determination of "high risk,"[455] ability to predict recidivism and the value assessment tools,[456] and the credibility of the experts testifying in these types of cases.[457] Professor W. Lawrence Fitch aptly observed that "no one would ever dare offer to repeal because it's just untenable."[458] Regardless of the cost, "no one wants to be . . . perceived to be soft on sex offenders."[459]

By way of example, State Rep. John Trebilcock advocated for civil commitment in Oklahoma following the abduction of a 2-year old girl by a repeat sex offender.[460] Trebilcock stated: "As we have seen with the Penn State scandal, a single child molester is capable of devastating the lives of countless innocent children . . . . These criminals typically remain a public-safety threat even after completing a prison sentence and it is necessary to ensure they are not allowed to return to the communities they have victimized."[461] The article quoting Trebilcock also notes tragedy follows an international scandal in the Catholic church involving widespread abuse of children by priests.[462] Also, still carved in the public's hearts and minds are the murders of those children who became household names; child-protection laws were created in their memory: Polly Klaas, Adam Walsh, Megan Kanka. Civil commitment laws for pedophiles were born out of the revulsion that followed those and other high-profile sex crimes against children.[463]

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[452] Christine Willmsen, *Troubles Persist on Predator Island*, SEATTLE TIMES, Dec. 15, 2012, http://seattletimes.com/html/localnews/2019912618_mcneilisland16m.html [*Troubles Persist*] ("[T]he state . . . wasted millions of dollars because of lack of oversight, unchecked defense costs and delayed commitment trials. The state spends about $170,000 a year for each of the 297 sex offenders on McNeil Island."); Willmsen, *supra* note 445.

[453] Willmsen, *supra* note 445.

[454] Willmsen, *Troubles Persist*, *supra* note 455.

[455] Willmsen, *supra* note 445 ("Psychologists have no precise way to determine if any specific offender will commit a violent sex crime in the future . . . .").

[456] *Id.* (quoting an offender after hearing testimony at his civil commitment hearing: "It would have been cheaper if they would have hired a gypsy and some fortune tellers . . . I would have had just as much luck.").

[457] *Id.* (citing recycled psychological evaluations and the extensive costs billed by experts).

[458] *Treatment Squeezes*, *supra* note 444.

[459] *Id.*

[460] Julie Delcour, *Time to Pass Civil Commitment Law for Sexual Predators*, TULSA WORLD (Jan. 8, 2012), http://www.tulsaworld.com/opinion/article.aspx?subjectid=214&articleid=20120108_214_G1_Perhap64553.

[461] *Id.* ("Civil confinement isn't a perfect solution, but what is the solution in a world of Marcus Berrys [the repeat child molester highlighted in the article] or worse?").

[462] *Id.*

[463] *Id.*

The article also considered the following points from a *New York Times* investigation:

- Sex offenders selected for commitment are not always the most violent; some exhibitionists are chosen, for example, while rapists are passed over. And some offenders are past the age at which some scientists consider them most dangerous. In Wisconsin, a 102-year-old who wears a sport coat to dinner cannot participate in treatment because of poor hearing and memory lapses.
- Treatment programs are often unproven, and patients cannot be forced to participate.
- Program costs are virtually unchecked and mushrooming.
- Unlike prisons and other institutions, civil-commitment mental-health facilities often receive little consistent, independent oversight or monitoring.
- Few states have figured out what to do when offenders are "ready" for release from civil commitment facilities.[464]

Nonetheless, it seems evident that other states have been hesitant to pass their own statutes due to the overwhelming financial costs in creating, running and defending the institutions. An Associated Press analysis found "that the 20 states with so-called 'civil commitment' programs will spend nearly $500 million [in 2010] to confine and treat 5,200 offenders still considered too dangerous to put back on the streets."[465]

Although no other "new" states moved to pass sex offender civil commitment statutes, in 2010, a federal civil commitment scheme to encompass federal prisoners who were in the custody of the attorney general or the federal bureau of prisons was upheld in the case of *United States v. Comstock*.[466] *Comstock* involved Section 4248 of the Adam Walsh Act, which gives the federal Bureau of Prisons the power to detain "sexually dangerous" federal prisoners even after they have served out their entire sentences.[467] Rejecting a constitutional challenge raised by individuals who were in federal custody and deemed "sexually violent," the Supreme Court upheld section 4248 and found that Congress had the authority to create legislation under the Necessary and Proper Clause.[468]

Whether or not the Justices writing for the majority were moved or influenced in any way by public sentiment,[469] they supported the notion that it was necessary and proper for Congress to prevent this "dangerous" cohort of individuals from entering society.[470]

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[464] *Id.*

[465] *Treatment Squeezes, supra* note 444 (citing the 65 million per year it costs Minnesota to house and treat sex offenders).

[466] United States v. Comstock, 130 S. Ct. 1949, 1954 (2010).

[467] 18 U.S.C. § 4248 (West 2012). This provision was incorporated into the Adam Walsh Child Protection and Safety Act, 42 U.S.C. § 16901 (West 2012). *See also Predators and the Constitution*, WALL ST. J. (Jan. 19, 2010), http://online.wsj.com/article/SB10001424052748703652104574652392015371328.html ("Sex offenders are the least sympathetic of the legal plaintiffs. Still, we were dismayed last week to see so many Supreme Court Justices during oral arguments apparently willing to let the federal government take over an area of law governing criminals that the Constitution grants to the states.").

[468] *Comstock*, 130 S. Ct. at 1954 (upholding 18 U.S.C. § 4248, the Supreme Court held this federal civil commitment statute, which authorized the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond his regular release date, to be a constitutional exercise of congressional power under the Necessary and Proper Clause.).

[469] *See id.* at 1959-65.

[470] Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventative Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 996 (2011) ("[T]he majority opinion essentially rewrote law surrounding the Necessary and Proper Clause to allow for virtually unfettered federal power in the area of sex offender civil commitment."). The

Thus, the majority accepted the fact that sexual predators pose a high risk of dangerousness and that future risk can be determined.[471] Notably, three of the five persons who were designated "sexually dangerous" in the *Comstock* case were only convicted of possessing child pornography,[472] not of an offense involving sexual touching or penetration.

It is evident that sex offender civil commitment is not going by the wayside. The number of persons in state and federal detention centers dedicated sex offenders has continued to climb.[473]Clearly, the media focus and attention on the costs and corruption surrounding sex offender civil commitment has been ineffective in repealing current statutes or dissuading enactment of federal civil commitment.[474] No doubt it has also had little effect on the general public who are appeased by any method that keeps offenders out of their communities and limited effect on politicians who could never survive the career repercussions of speaking out against it.

Certainly, a case can be made that we have slowed down in our fervent crusade against this monstrous evil, but we are far from taking steps to reverse the ineffective legislation that has been put in place. Possibly the answer is time: "In America it may take years to unpack this. However practical and just the case for reform, it must overcome political cowardice, the tabloid media and parents' understandable fears."[475]

We now turn to the question of therapeutic jurisprudence: Can this discipline provide the tools to allow us to make better sense of this area of the law?

Comstock Court expressly declined to address whether 18 U.S.C. § 4248 or its application denied equal protection, procedural or substantive due process, or any other constitutional rights. 130 S. Ct. at 1965.

[471] Justice Alito's concurring opinion is focused upon the fears of "dangerousness" and "risk" in allowing this population to return to the community and therefore, must support federal intervention; citing evidence of the States' unwillingness to assume the financial burden of containing these individuals, Justice Alito deemed that the burden thus fell upon Congress to prevent these prisoners to enter the community and "present a danger [wherever] they chose to live or visit." *Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring).

[472] *Id.* at 1955.

[473] JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 145 (Am. Psychol. Assoc. 2005) (referring to the use of civil commitment as a growth industry); WASH. STATE INST. FOR PUB. POLICY, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED (2007), *available* at http://www.wsipp.wa.gov/pub.asp?docid=07-08-1101.

[474] Most of the media accounts of *Comstock* focused more on issues involving the broad powers of Congress and whether these powers were sanctioned by the Constitution's "Necessary and Proper" clause. A *New York Times* article laid out a brief synopsis of the Justices' decisions and quoted Justice Alito: "Just as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners," he wrote, "it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment." Adam Liptak, *Extended Civil Commitment of Sex Offenders is Upheld*, N.Y. TIMES (May 17, 2010) (quoting Justice Alito's concurring opinion in *Comstock*, 130 S. Ct. at 1970).

[475] *America's Unjust Sex Laws supra* note 398.

IV. THERAPEUTIC JURISPRUDENCE[476]

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).[477] Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.[478] The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[479] There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: "the law's use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[480] As one of us has written elsewhere, "[a]n inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[481]

Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives"[482] and focuses on the law's influence on emotional life and psychological well-

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[476] Part IV is largely adapted from the works of Michael L. Perlin. *See* Michael L. Perlin, *Striking for the Guardians and Protectors of the Mind": The Convention on The Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159 (2013) [Perlin, *Guardians*]; Michael L. Perlin, *"John Brown Went Off to War": Considering Veterans' Courts as Problem-Solving Courts*, NOVA L. REV. (forthcoming 2013) [Perlin, *Veterans' Court*]; Michael L. Perlin, *"Wisdom is Thrown into Jail: Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, MICH. ST. U. J. L. & MED. (forthcoming 2013); Michael L. Perlin, *Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity* in INTERNATIONAL CRIME, *supra* note 202 .

[477] *See, e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (Carolina Academic Press, 1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (Carolina Academic Press 1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (Carolina Academic Press, 2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27, 27-32 (1992).

[478] Michael L. Perlin, *What is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 623 (1993); KATE DIESFELD & IAN FRECKELTON, *Mental Health Law and Therapeutic Jurisprudence, in* DISPUTES AND DILEMMAS IN HEALTH LAW 91 (2006) (providing a transnational perspective).

[479] Michael L. Perlin, *And My Best Friend, My Doctor/Won't Even Say What It Is I've Got: The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735 (2005); Michael L. Perlin, *Everybody Is Making Love/Or Else Expecting Rain: Considering The Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals And In Asia*, 83 WASH. L. REV. 481 (2008); Michael L. Perlin, *You Have Discussed Lepers and Crooks: Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 692-97 (2003). On how TJ "might be a redemption tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade,'" *see* Michael L. Perlin, *Baby, Look Inside Your Mirror: The Legal Profession's Willful and Sanist Blindness to Lawyers With Mental Disabilities*, 69 U. PITT. L. REV. 589, 591 (2008), *quoted in* Michael L. Perlin, *Things Have Changed: Looking At Non-Institutional Mental Disability Law Through The Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 544 (2003). *See also*, Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585-86 (2008); Bernard P. Perlmutter, *George's Story: Voice And Transformation Through The Teaching And Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.111 (2005).

[480] David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); *see also, e.g.*, David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179 (1996).

[481] Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, *Where the Winds Hit Heavy on the Borderline: Mental Disability Law, Theory and Practice, Us and Them*, 31 LOY. L.A. L. REV. 775, 782 (1998).

[482] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

being.[483] It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness."[484] TJ understands that, "when attorneys fail to acknowledge their clients' negative emotional reactions to the judicial process, the clients are inclined to regard the lawyer as indifferent and a part of a criminal system bent on punishment."[485] By way of example, TJ "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage."[486]

In recent years, scholars have considered a vast range of topics through a TJ lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.[487] As Ian Freckelton has noted, "it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."[488] It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[489] These alternative approaches optimize the psychological well-being of individuals, relationships, and communities dealing with a legal matter, and acknowledge concerns beyond strict legal rights, duties, and obligations. In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described as "[a] sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism."[490] That is, TJ supports an ethic of care.[491]

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[483] David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Daniel P. Stolle, David B. Wexler & Bruce J. Winick, eds.2000) (PRACTICING THERAPEUTIC JURISPRUDENCE).

[484] Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment, in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

[485] Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 59 (2010).

[486] Claire B. Steinberger, *Persistence and change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 65 (2003). The most thoughtful sympathetic critique of Therapeutic Jurisprudence remains Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, PSYCHOL. PUB. POL'Y & L. 193 (1995).

[487] Michael L. Perlin, *Things Have Changed: Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 544-45 (2003).

[488] Freckelton, *supra* note 482, at 576.

[489] Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement, in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 485, at 465.

[490] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329-30 (2001); *see also*, Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605-06 (2006). The use of the phrase dates to CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

[491] *See, e.g.*, Brookbanks, *supra* note 492; Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); David B. Wexler, *Not such a Party Pooper: An Attempt to Accommodate (Many Of) Professor Quinn's Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 607 (2006).

One of the central principles of TJ is a commitment to dignity.[492] Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness,[493] arguing:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions. [494]

The question to pose here is this: Does our current sex offender legislation make it more or less likely that Prof. Ronner's vision – of voice, voluntariness and validation – will be fulfilled?[495]

Before we consider this question, it is necessary to reflect on the reasons – that we identified in an earlier article[496] – why the legal system has resisted TJ principles in a criminal law context: fear of being seen as "soft on crime," imperiling the judge's re-election chances;[497] judges' traditional adversity to endorsing or utilizing any intervention that might be perceived as being "touchy-feely";[498] the ways that, like the general public, judges have, by and large, bought into myths about sex offenses and sex offenders;[499] the deep need on the part of judges to convince themselves that the "system works,"[500]

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[492] *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005).

[493] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of "voice," *see also*, Freckelton, *supra* note 481, at 588.

[494] Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002); *see generally*, AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE (2010).

[495] On the extent to which current legislation is therapeutic for *victims*, see Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485 (1999).

[496] *See* Cucolo & Perlin, *supra* note 28 .

[497] Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N. C. L. REV. 1965, 1990 (2011). *See also, generally*, John Tomaino, *Punishment and Corrections, in* CONSIDERING CRIME, *supra* note 228, at 171. Again, as earlier noted, the literature is replete with studies of political campaigns –many of which were successful- that turned on this precise issue; *see* Carrington, *supra*, at 1989-90 (discussing the California Supreme Court election of 1986 that led to the defeat of Chief Justice Rose Bird and two other associate justices perceived in this way); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 470-72 (1999) (discussing political campaigns aimed at ousting individual judges for being "soft on crime").

[498] *See* Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L.J. 813, 830 (2007). This is especially relevant in the context of the emotionally-charged area of sex offender law where any alternative approaches could be construed as condoning or minimizing the underlining offense.

[499] *See, e.g.*, Winick, *supra* note 1, at 552 (discussing the "small" likelihood of a judge ever overruling a prosecutor's discretionary determination in such cases).

[500] *See, e.g.*, Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 21 (2007) (discussing ways in which judges can improve the public's satisfaction with the court system in the United States). Judges typically express great faith in the adversary system, *see* Daniel W. Shuman et al.,

especially in the area of sex offender law where alternative solutions are accompanied by deep analytical inspection of science-based studies and complex sociological elements – clearly outside the realm of the judges' knowledge and role.[501]

As we have discussed in the same earlier article,[502] the origins and development of sex offender law have had a profoundly anti-therapeutic effect.[503] Of especial importance is the way that, "the confrontational adjudicative process of traditional courts encourages advocacy of innocence, discourages acceptance of responsibility, and influences [subsequent acceptance] of treatment once sentenced."[504]

Other scholars have considered the impact of TJ on sex offender law, and have, virtually uniformly, found that our law and practices ignore all of the precepts of TJ.[505] In the most extensive analysis, the late Professor Bruce Winick identified a constellation of factors – impact of labeling effects on treatment outcomes and on the reinforcement of antisocial behavior, impact on clinicians who provide sex offender treatment, impact of sexually violent predator laws on persons with genuine mental disorders[506] – that, in the aggregate, "undermine the potential that sex offenders will be rehabilitated."[507] In this analysis, Prof. Winick concludes – unequivocally – that "sexual predator laws . . . pose significant antitherapeutic consequences for both sex offenders and clinicians involved in the sex predator treatment process."[508] Professor Bill Glaser lists multiple ways that the ethical guidelines governing psychology practice are breached by sex offender laws:

An Empirical Examination of the Use of Exert Witnesses in the Courts – Part II: A Three City Study, 34 JURIMETRICS J. 193, 207 (1994) (reporting on survey results), and their opinions typically express a deep-seated "attachment to commonly held beliefs," *see* Lode Walgrave, *Restoration in Youth Justice*, 31 CRIM. & JUST. 543, 547 (2004), notwithstanding the reality that "subconscious influence can cloud their decisions and impede their legal reasoning," even when "they desire to render a 'fair' decision." Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 3 (2006) ("Consequently, in many circumstances, for judges to be fair, they must be capable of identifying subconscious influences on their behavior and they must neutralize the effects of such impulses.").

[501] *See generally*, Fabian M. Saleh, *Pharmacological Treatment of Paraphilic Sex Offenders*, *in* SEX OFFENDERS: IDENFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES 189 (Fabian M. Saleh et al. eds., 2009); Eric Silver et al., *Multiple Models Approach to Assessing Recidivism Risk: Implication for Judicial Decision Making Criminal Justice and Behavior*, 29 CRIM. J. & BEHAV. 538 (2002).

[502] *See* Cucolo & Perlin, *supra* note 28, at 34.

[503] This is so for many reasons: the presumption in current sex offender laws that there is a "standard" type of sex offender; the presumption that all sex offenders are recidivists; the presumption that most sex offenses are committed by strangers; the presumption that "banishment" laws minimize reoffending and provide incentives for sex offenders to engage in treatment in the community or demonstrate a pro-social lifestyle; the fact that the current universe of sex-offender laws ignores the multiple ways that the court process and the roles played by defense counsel and the prosecution—as is done currently—support cognitive distortions that can be used by sex offenders as ways of justifying sexual offending, and, simultaneously, often provide disincentives for sex offenders to undergo treatment. *See id.* at 34-36.

[504] Astrid Birgden & Heather Ellis Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics and Human Rights,* 23 SEXUAL ABUSE: J. RES. & TREATMENT 295, 300 (2010); *see also* Astrid Birgden & Tony Ward, *Pragmatic Psychology through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System,* 9 PSYCHOL., PUB POL'Y & L. 334, 357 (2003) (arguing that offenders will only accept responsibility for their actions if legal actors take a motivational approach towards the offender). On the therapeutic jurisprudence implications of separate "sex offender courts," *see* Kari Melkonian, *Michigan's Sex Offender Registration Act: Does It Make Communities Safer? The Implications of the Inclusion of a Broad Range of Offenders, a Review of Statutory Amendments and Thoughts on Future Changes*, 84 U. DET. MERCY L. REV. 355, 375 (2007).

[505] On ways that TJ can integrate the "health care and social control functions" of the mental health system, *see* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence,* 1 PSYCHOL. PUB. POL'Y & L. 161, 166 (1995).

[506] Winick, *supra* note 1, at 538-49.

[507] *Id.* at 548.

[508] *Id.* at 537.

- The primary measure of treatment success is that of the protection of society rather than alleviation of the offender's suffering.
- Treatment, to be effective, must usually be involuntary.
- Effective treatment requires that confidentiality be breached.
- Generally, the offender must not be allowed any choice of therapy or therapist.
- Offenders may be forced to accept therapy from non-clinicians or unqualified staff, and
- Effective therapy requires multiple other infringements on an offender's dignity and autonomy.[509]

Further, Professor John La Fond has argued that sexual offender predator laws are so destructive to individual and community well-being that TJ "must take a normative stance and assert that the law should be repealed or substantially changed assert its primacy and require change regardless of competing values."[510] This insight has led Astrid Birgden to urge that TJ must "provide a framework for setting a limit when the law is anti-therapeutic toward offender rights."[511] She suggests, by way of example, that alternative monitoring strategies that are more likely to have therapeutic outcomes are available through "appropriate case management, interagency cooperation and community engagement."[512]

Reconsider the role of the media in the dissemination of information (and, more pointedly, *misinformation*) about sex crimes and sex offenders, and the impact that this has had on the enactment of legislation (at the Federal, state and local levels) and on judicial decisions.[513] There has been almost no academic literature about the relationship between TJ and the media in any related context, and other than our prior piece on sex offender recidivism and TJ,[514] virtually none, to the best of our knowledge, about the relationship in this context. Only Bruce Arrigo and a colleague have come to grips with this issue:

> The related doctrines of civil commitment and chemical castration of sex offenders suggest that individual citizen well-being, as an important dimension of therapeutic jurisprudence, gives way to other, competing state interests fueled by intense and adverse media scrutiny and/or public clamor for reform, particularly with explosive issues or high profile cases.[515]

Perhaps LeRoy Kondo's suggestion – that mental health court judges reach out to the media as "advocates of therapeutic jurisprudence"[516] – should be taken to heart by scholars and researchers who know, beyond any doubt, that the media misrepresentations

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[509] Bill Glaser, *Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs*, 4 W. CRIMINOL. REV. 143, 145-46 (2003).

[510] La Fond, *supra* note 309, at 378 .

[511] Astrid Birgden, *Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required*, 78 REV. JUR. U.P.R. 43, 51 (2009).

[512] Astrid Birgden, *Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis,* 14 PSYCHIATRY PSYCHOL. & L. 78, 87 (2007).

[513] *See generally* Part I of this article.

[514] Cucolo & Perlin, *supra* note 28.

[515] Bruce A. Arrigo & Jeffrey J. Tasca, *Right to Refuse Treatment, Competency to be Executed, and Therapeutic Jurisprudence: Toward A Systemic Analysis*, 23 L. & PSYCHOL. REV. 1, 44 (1999).

[516] LeRoy Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders,* 24 SEATTLE L. REV. 373, 422 (2000).

(although finally being remediated by more recent, more sober stories) are so much to blame for the current state of affairs. Such affirmative action on the part of those who know how distorted media depictions have traditionally been will also serve to generate new considerations of the significance of procedural justice[517] and restorative justice[518] to these inquiries.

V. CONCLUSION

This article has analyzed how the media and public perception shapes legislation in monitoring, controlling and detaining those individuals classified as sexual violent predators – looking at both the media accounts that shaped our laws, the effect of media criminology on the political and judicial system and the shift in media representation of sexual crimes and sexual predators. The vast amount of information – news articles, scholarly interpretations and media reports throughout the 20 plus years of the "new generation" laws – is impossible to consider fully in a single law review article, and therefore the authors cannot make any definitive statements as to the *total* effect of the media's impact. However, we can offer some theories and tentative conclusions:

1. Media attention to high profile and emotionally reactive sexual crimes incites general fear that there may be an undetected sexual predator lurking near "our own children," ready to attack at any moment. This fear is understandable but irrational in that it is based purely on emotion and usually without any factual basis of such imminent danger.
2. Reaction based on fear is usually directed towards finding feel-good solutions that briefly calm the fear frenzy. Therefore, politicians calling for legislative changes look to promote laws that appear to offer safety and security. Media reports of other jurisdictions and states enacting these "safety" laws, evoke a need to conform one's own community/state's laws in order to do "everything possible" to foster safety – regardless if the measures are effective or not (or if they, are in fact, counterproductive).
3. Courts confronted with these laws are hesitant to strike them down or to modify their scope and/or range in any way, in large part, because of fear of voter retribution.

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[517] *See* Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85 (2010) ("Procedural justice theory generally posits that an individual's evaluation of the fairness of a decision is not based only on the final conclusion reached by decision makers, but also on the process by which the authorities reached that conclusion."); *see generally,* Jonathan D. Casper et. al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988); Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority,* 56 DEPAUL L. REV. 661 (2007); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

[518] Professor John Braithwaite defines restorative justice as a means by which to restore victims, restore offenders, and restore communities "in a way that all stakeholders can agree is just." John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999). *See also, e.g,* JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11 (2002) (RESPONSIVE REGULATION) ("Restorative justice is a process whereby all the parties with a stake in the offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."). A consideration of the potential impact of the use of these principles on the resolution of cases involving sex offenders is generally beyond the scope of this article *See, e.g.,* Rick Sarre, *Restorative Justice*, in CONSIDERING CRIME, *supra* note 228, at 31; *see generally*, PERLIN, *supra* note 228, chapter 6.

4. Although it appears that the media has increased its reporting on the failures of sex offender legislation, it cannot combat the power of fear. Statistics, facts and expert opinions supporting low recidivism and familial profile of an offender cannot compete with fear and emotional responses to the perceived threat of the safety of loved ones and innocents. The perniciousness of the vividness heuristic discussed extensively above[519] continues to dominate this area of law and policy.
5. Current legislation continues to exist, regardless of its benefit, purely on the hope – even if it has been proven by valid and reliable research evidence to be a *false* hope – that it will make some small difference and – even more substantially – because of the concern that repealing it will leave communities vulnerable and directly lead to the commission of an untold number of horrific sexual offenses. Alternative solutions that might actually have an impact on sex offending are too complex, too multi-textured, and too time-consuming to be considered by the general public and by legislatures.

Idiot Wind, from which the first portion of the title of this article is drawn, is a song of "towering rage";[520] it depicts the moment "when everything breaks apart."[521] Our sex offenders policies were born in "towering rage" and they have resulted in a state of affairs in which their "corrupt ways had finally made [us] blind."[522] We hope this article helps to remediate the ways that politicians, abetted by the media, have "cover[ed] up the truth with lies."[523]

[519] *See supra* text accompanying notes 252-56.

[520] SOUNES, *supra* note 40, at 303.

[521] Carrie Brownstein, *Blood on the Tracks*, in THE CAMBRIDGE COMPANION TO BOB DYLAN 155, 158 (Kevin J. H. Dettmar ed. 2009).

[522] Bob Dylan, *Idiot Wind*, on BLOOD ON THE TRACKS (Columbia Records 1975), *lyrics available at* http://www.bobdylan.com/us/songs/idiot-wind.

[523] *Id.*