The Selected Cases of Myron H. Bright: Thirty Years of His Jurisprudence

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INTRODUCTION

A career of thirty years on the federal bench is difficult to condense. For this article, Judge Bright was asked to select those few cases that, in his opinion, best represent his jurisprudential principles—those cases of which he is most proud. Although one of his selections, *Reserve Mining Co. v. United States*,¹ is treated elsewhere in this issue by Professor Farber, the remainder of his choices fall neatly into three primary categories: Criminal Law, Evidence, and Employment Anti-Discrimination Law. We treat these areas in sequence. Each subsection is then devoted to an individual case and includes a synopsis of the facts and a discussion of Judge Bright's opinion or dissent, as appropriate. The law clerks that worked with Judge Bright augment the summaries with their own recollections and observations.

In large measure, the cases presented here speak for themselves. As you read through the pages that follow, however, we suspect that a unifying theme will emerge. Judge Bright has long been sympathetic to the underdogs of American society, and he maintains keen sensitivities to the problems of the poor and weak. In his cases on criminal justice, evidence, and civil rights—areas of our legal profession where the rubber hits the road and our deepest democratic principles are tested—we see the outlines of a judicial philosophy which respects the little guy, the working woman, and the members of our country's minorities. It is a philosophy with great compassion for the suffering and misfortune of others. It understands the human element in the work of the courts and strives for balance and fairness. Above all, it shows the Honorable Myron H. Bright to be a man and jurist devoted to effecting the very object of the law—Justice.

I. CASES IN THE AREA OF CRIMINAL LAW

A. SUCCESSIVE PETITIONS FOR HABEAS CORPUS: THE SAGA OF JAMES DEAN WALKER

Before Judge Bright reviewed the second habeas corpus petition of James Dean Walker, two separate juries had convicted Walker of murdering a police officer, and the Arkansas
Supreme Court had affirmed his second conviction. Moreover, Walker had previously sought federal habeas corpus relief on similar grounds, a prayer the Eighth Circuit had denied. Faced with a successive habeas corpus petition filed by a man twice convicted of murder, many judges would not have devoted a significant amount of time to its review. Judge Bright's perseverance and devotion to the appeal of James Dean Walker's second habeas corpus petition loudly demonstrates that the Honorable Myron H. Bright is not like many judges.

The circumstances underlying Walker's original murder convictions require brief review. On April 16, 1963, James Dean Walker, Russell Kumpe, Linda Ford, and Mary Louise Roberts were socializing at a nightclub in Little Rock, Arkansas. Following an altercation in which another nightclub patron suffered a gunshot wound, Walker, Kumpe, and Ford left the nightclub and began driving out of town in Kumpe's automobile. Roberts followed in a taxicab driven by Aaron Paul Alderman.

Acting on a report that Walker and Kumpe had participated in the nightclub altercation, North Little Rock police officer Gene Barentine stopped Kumpe's automobile, parking his squad car directly behind the vehicle. Almost immediately thereafter, Officer Jerrell Vaughan arrived. Cabdriver Alderman, and another cabdriver, Thomas Short, also arrived on the scene at the same time as Officer Vaughan.

Officer Barentine ordered Kumpe out of the driver's side of the car and began to search him. Vaughan approached the passenger's side of the car. From this point forward, the precise nature of the ensuing events remains somewhat unclear. Following an exchange of gunfire, Officer Vaughan suffered a single, yet mortal gunshot wound to his heart and Walker lay face down with five gunshot wounds a few feet away from Offi-

4. See Walker v. Lockhart, 763 F.2d 942, 945 (8th Cir. 1985) (en banc).
5. See id.
6. See id.
7. See id.
8. See id.
9. See id.
10. See Walker v. Lockhart, 726 F.2d 1238, 1239 (8th Cir. 1984) (en banc).
11. See id.
In his right hand, Walker held a gun that had not been fired, and which the government conceded was not used to kill Officer Vaughan. Police officers did find a second gun near Walker, however, which police officers later determined to be the gun that fired the shot fatal to Officer Vaughan. Kumpe, who tried to escape during the gunfire, sustained two gunshot wounds from Officer Barentine.

The government charged Walker with first degree murder. The government "proceeded on the theory that Walker shot Vaughan with the gun that was found near his body, and that Barentine then shot Walker." Walker ultimately was convicted of first degree murder and sentenced to death. However, the Arkansas Supreme Court determined that the trial judge improperly allowed irrelevant and prejudicial testimony, and accordingly reversed Walker's conviction and remanded the case for a new trial.

Before the second trial began, Walker's defense counsel petitioned for a new trial judge, arguing that the trial judge from the first trial was prejudiced against Walker. In support of this argument, Walker's defense counsel presented undisputed evidence that the trial judge, upon agreeing to allow Walker to travel to a church to be baptized, told the officer transporting Walker that if Walker attempted to escape, the officer should "shoot him down... because [the judge] intended to burn the S.O.B. anyway." The trial judge rejected the defense's motion and refused to recuse himself for the second trial.

Prior to the second trial, defense counsel acquired ballistics evidence showing that Officer Vaughan had shot Walker. This evidence contradicted the government's original theory of the case, which was that Officer Barentine had shot Walker.

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12. Walker v. Lockhart, 763 F.2d at 945.
13. See id.
14. See id.
15. See id.
16. See id.
17. Id.
18. See id.
20. See Walker v. Lockhart, 763 F.2d at 946.
21. Id. (citation omitted).
22. See id.
23. See id.
24. See id.
Consequently, the government was forced to change its theory for the second trial and asserted instead that Walker fired first and that Officer Vaughan, before dying, managed to return fire and shoot Walker five times.25

During the second trial, the government presented most of the same evidence from Walker's first trial but did not produce Mary Roberts as a witness because the government maintained that she was unavailable to testify.26 Consequently, the government was allowed to read into the record Roberts' prior testimony from the first trial.27 At the conclusion of the second trial, the jury again convicted Walker of first degree murder but spared his life, sentencing him to life imprisonment.28 The Supreme Court of Arkansas affirmed the conviction.29

In response to his second conviction and the unsuccessful conclusion to his direct line of appeal, Walker filed the first of his two federal habeas corpus petitions in 1966. The petition argued, inter alia, that the government had suppressed the exculpatory testimony of Mary Roberts30 and cabdriver Aaron Paul Alderman,31 and that the trial judge had been prejudiced.

25. See id.
26. See Walker v. Bishop, 295 F. Supp. 767, 776 (E.D. Ark. 1967). During the first trial, Roberts testified that she did not witness any of the shooting because she dove into the back seat when the shooting began. See id. at 771.
27. See id. at 771.
28. See id. at 769.
30. At the habeas petition hearing, Roberts recanted her testimony and stated that she did witness the details of the shooting and did not see Walker fire his gun. See Walker v. Bishop, 295 F. Supp. at 776. Roberts further stated that certain police officers coerced her into lying at the first trial and pressured her into leaving town afterwards. See id.
31. At the habeas petition hearing, Alderman testified that he saw Officer Vaughan fire several shots at Walker and that Officer Vaughan remained standing after Walker had fallen to the ground. See Walker v. Lockhart, 763 F.2d 942, 946 (8th Cir. 1985) (en banc). Alderman further testified that he then heard a final shot which had a "hollow, muffled sound," after which Officer Vaughan immediately fell to the ground. Id. Walker argued that this testimony supported a conclusion that Officer Vaughan had been shot by Kumpe from under the automobile, or had been shot with a bullet that ricocheted from Officer Barentine's weapon. See Walker v. Bishop, 295 F. Supp. at 779.

Alderman claimed that he gave his statement to police immediately after the shooting. See Walker v. Lockhart, 763 F.2d at 946. In addition, Alderman also asserted that, although he later moved to Florida, he called the "criminal court office" or the prosecuting attorney's office before the first trial to make himself available as a witness. See id. The government never called Alderman as a witness or even notified him about Walker's trials. See id.
against Walker.\textsuperscript{32} Following a hearing on the habeas corpus petition, the district court ruled that the government did not suppress the testimonial evidence of witnesses Roberts\textsuperscript{33} and Alderman,\textsuperscript{34} and concluded that the trial judge's prejudice against Walker was not sufficient to deny Walker due process.\textsuperscript{35} Accordingly, the district court denied Walker's petition.\textsuperscript{36} A panel of the Eighth Circuit affirmed the district court's order.\textsuperscript{37}

More than a decade later, in 1981, Walker filed a second habeas corpus petition.\textsuperscript{38} The district court determined that Walker had already argued four of the seven claims in his petition.\textsuperscript{39} Therefore, the district court analyzed those four claims under the guidelines for successive habeas petitions and concluded that the "ends of justice" would not be served by a reconsideration of the repetitious claims.\textsuperscript{40} Those claims had been dismissed on the merits and Walker could point to no intervening change in the law or any new evidence.\textsuperscript{41} The district court found that Walker's newly-asserted claims lacked substantial merit and, accordingly, denied Walker's second habeas corpus petition.\textsuperscript{42}

Walker appealed, and the Eighth Circuit heard oral argument. The three-judge panel agreed that Judge Bright should
write the opinion for the panel. Judge Bright asked his law clerk, Patricia Maher, to thoroughly review the entire record. After a lengthy review of the record, Maher reported to Judge Bright and said, in her words: “Judge, I believe that James Dean Walker was framed.” Judge Bright was skeptical of her assessment, but agreed to review the entire record himself before reaching any definitive conclusions.

For the next several weeks, Judge Bright took advantage of every free moment to review each document in the voluminous record. When he was finished, he read it again. After twice reading the entire record, Judge Bright concluded that Walker had received an unfair trial because of the bias exhibited by the trial judge and the suppression of evidence by the government. Nevertheless, Judge Bright wanted to be certain before proceeding. First, he called Judge Gerald Heaney, the only judge who had heard Walker’s appeals on both of his habeas petitions. Then, following a lengthy discussion, both judges agreed that Walker might be entitled to a new trial, notwithstanding the Eighth Circuit’s previous denial of habeas corpus relief.43

Ultimately the panel, comprised of Judges Bright, Heaney and Donald Ross, agreed that because Eighth Circuit rules prevent one panel from reversing the ruling of a prior panel, the case should be reviewed by the entire Eighth Circuit if relief was to be granted. At that time, the Eighth Circuit consisted of seven judges in active service. After the en banc court held its hearing, four judges—Judge Ross, Judge John Gibson, Judge Richard Arnold, and Judge Theodore McMillian—voted to deny relief to Walker. Judge Bright, Judge Heaney and then-Chief Judge Donald Lay comprised the vigorous minority that voted to grant relief.

Judge Gibson accepted the task of writing the proposed opinion for the majority and Judge Bright assumed responsi-
bility for writing the proposed dissent. However, upon reading the two proposed opinions, Judge McMillian elected to change his vote in favor of granting Walker a new trial. Judge McMillian's changed vote, of course, created a 4-3 majority to grant habeas corpus relief and transformed Judge Bright's dissent into the majority opinion.

While Judge Bright finalized the majority opinion, however, two new judges— Judges George Fagg and Pasco Bowman—joined the Eighth Circuit. At that time, the Eighth Circuit had a rule that allowed newly-appointed judges to participate in pending en banc cases. Consequently, the now nine-judge en banc court scheduled a rehearing on Walker's appeal. Following this hearing, Judge Fagg and Judge Bowman concluded that Walker should not receive habeas corpus relief, creating a 5-4 majority to deny relief.44

Judge Arnold, although voting with the majority, agreed in a concurring opinion that Walker had been tried before a prejudiced trial judge.45 Judge Arnold opined that "[i]f due process means anything, it means a trial before an unbiased judge and jury."46 Judge Arnold stated that he did not agree with the court's 1969 decision denying Walker's first petition, but added that his mere disagreement with the court's prior opinion did not justify a successive habeas application.47 Rather, Judge Arnold stated that granting a successive habeas petition required something more, such as a change in the law or "new evidence, unrevealed at the time of the first habeas proceeding."48

Just when Walker's topsy-turvy habeas corpus petition appeared to have once again fallen short, his case took another dramatic turn. Walker filed a petition for recall of the court's mandate, asserting that new evidence had surfaced which warranted a successive habeas corpus petition. Specifically, Walker referred to a diary entry written in 1968 by Russell Kumpe, Walker's companion on the night Officer Vaughan was killed. Kumpe's diary entry indicated that Kumpe had fired his gun when Officer Vaughan was shot. In addition, Walker's counsel offered proof that Kumpe admitted to his former wife

44. See Walker v. Lockhart, 726 F.2d 1238 (8th Cir. 1984) (en banc).
45. See id. at 1249-51 (Arnold, J., concurring).
46. Id. at 1249.
47. See id. at 1250.
48. Id.
that Kumpe, not Walker, shot the officer and that he, Kumpe, wished that he had also killed Walker.

Judge Arnold concluded that the new material "sufficiently add[ed] to the uncertain[ties] of this case to justify additional proceedings," and on that basis he changed his vote. Joining the four dissenters from the previous ruling, he helped to create a new majority to grant Walker's motion to recall the mandate and to remand the case to the district court for a hearing. The district court held an evidentiary hearing, but concluded that the record contained no credible evidence meriting a new trial.

After years of having his arguments rejected and losing his appeals, Walker's appeal of the district court's ruling ultimately provided the relief he sought—his freedom. By a vote of 5-4, the Eighth Circuit granted Walker's habeas corpus petition and ordered a new trial. Judge Bright, writing the majority opinion, ruled that the new evidence provided by Kumpe's diary entries and the testimony of Kumpe's former wife "tip[ped] the balance of the ends of justice standard to permit this court to reconsider Walker's habeas petition." In addition, Judge Bright noted the vast importance of another piece of exculpatory evidence that the government had only recently disclosed to Walker's defense counsel. Interestingly, the government disclosed to Walker's counsel "a most extraordinary and revealing piece of evidence: a transcript of a surreptitiously recorded conversation" between Kumpe and his sister, Mildred Eisner.

According to the transcript, Kumpe stated:

Now look, I am going to explain something to you. You understand that I did shoot at that policeman and he will go crazy trying to figure out what happened to the gun. If they place the gun in my hand naturally they could, no, they couldn't either cause I had been back in his custody, I don't know what they could have done and at the time I didn't care fro everybody was shooting at everybody

49. Id. at 1267 (Arnold, J., concurring). Judge Arnold, in a separate concurrence to the order recalling the mandate, observed that if the new evidence could establish that Kumpe had in fact fired his gun on the night in question, such evidence would give credibility to Alderman's account of the shooting, which exonerates Walker and had never been heard by a court. See id. at 1265.


51. See Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985) (en banc).

52. Id. at 960.

53. Id. at 955.
else and I had some things on me that would have got me a hundred years. I had to get rid of them.\textsuperscript{54}

With respect to this evidence, Judge Bright stated:

\[ \text{[The Kumpe-Eisner transcript contains exculpatory evidence, [which] has been in the State's possession for over twenty years ... . \[The State's failure to disclose it—despite sweeping discovery requests and a 1967 court order directing the State to turn over all material held on James Dean Walker—creates an independent basis for granting habeas relief.}\textsuperscript{55} \]

Judge Bright concluded the opinion by stating that the newly discovered evidence allowed the court, "in order to attain the ends of justice," to reach its ultimate ruling that the trial judge's prejudice against Walker created a "gross miscarriage of justice."\textsuperscript{56}

The State of Arkansas appealed the Eighth Circuit's ruling, but the Supreme Court denied a writ of certiorari.\textsuperscript{57} Instead of retrying the case, however, Walker and the government reached a plea bargain. By agreement, Walker pleaded guilty to a lesser offense that carried a maximum sentence less than that already served by Walker. Walker became a free man.

In Judge Bright's view, the Walker case illustrates the very root principle that has undergirded the writ of habeas corpus since its pre-Constitutional introduction into our body of common law. It demonstrates that The Great Writ of Liberty maintains its vitality, and that it can and should serve as a very real vehicle of justice for those unjustly incarcerated.

\textit{The Observations of Patricia L. Maher}\textsuperscript{58}

I first became aware of James Dean Walker when I was assigned to work on an opinion regarding his habeas corpus petition, brought while he was a prisoner in Arkansas. Walker claimed that he had been tried without due process of law in a state court and convicted of first degree murder in the 1963 shooting death of a Little Rock policeman. Walker's appeal from the denial of his habeas petition came before the Eighth

\begin{footnotes}
\item[54] Id.
\item[55] Id.
\item[56] Id. at 960-61.
\item[58] Patricia L. Maher, a litigation specialist, served as law clerk to Judge Bright from 1981-82. She is a graduate of the Georgetown Law Center and after a lengthy career in private practice, she has recently returned to public service in the Civil Division of the Department of Justice.
\end{footnotes}
Circuit with a strong presumption against granting him relief; he had previously filed a similar habeas petition in 1967 that was denied by the district court in Arkansas and affirmed by the Eighth Circuit. In his subsequent habeas petition, in 1982, Walker argued that his prior state trials had denied him due process of law on two grounds: he had been tried by a biased judge who had expressed his intention to “burn” him, and the police and prosecutors had suppressed exculpatory evidence. Under guidelines established by the Supreme Court in *Sanders v. United States*, the court could not reconsider arguments that had been made in the earlier petition if the first petition was decided on the merits and the ends of justice would not be served by reaching the merits of the later application.

After the panel heard arguments on Walker's habeas petition and his related civil rights claim—namely, that his life would be endangered if he were placed in an Arkansas state prison—Judge Bright was designated to write the opinion for the panel. After the conference, he told me that the panel was inclined to deny the petition because it was largely duplicative of the original habeas petition and the same arguments could not be reconsidered. Nevertheless, Judge Bright said that the panel would want to state that it was denying the petition “after review of the entire record before the court.” In order to do so, someone would actually have to review the record. I was that someone.

It was hard for me to muster much enthusiasm for the project. I knew the panel likely would deny the petition because Walker was relying on essentially the same grounds that he had in his original petition, which had been decided on the merits. In addition, I was discouraged by the voluminous record—especially the many dog-eared transcripts dating back more than fifteen years. For working space, I moved the boxes of transcripts into the vacant chambers that had belonged to the late Judge Vogel, Judge Bright's friend and predecessor on the court. I began to spend my afternoons alone in the emptiness reading transcripts. I worked my way backwards through the habeas proceedings in the district court in Arkansas, to the earlier opinion of the Eighth Circuit, and then back to the original habeas proceeding that Walker had filed in 1967. At some point, I discovered that we did not even have a complete set of the transcripts from Walker's state trials. We had to lo-

cate them and ensure their delivery to Judge Bright's chambers.

As I read through the old transcripts, I began to question the evidence of Walker's guilt, in part because the State's theory that Walker had killed Officer Vaughan seemed to rest on a physical impossibility. At the first trial, the State contended that Walker shot first and had been injured by shots from the officer on the driver's side, Officer Barentine. When ballistics evidence later demonstrated that Walker had been wounded by shots from Officer Vaughan's gun, the State simply changed its theory to comport with that evidence. The State still contended that Walker had shot first, hitting Officer Vaughan in the heart; Officer Vaughan then somehow managed to discharge six rounds from his weapon, five of which hit Walker.

The State's theory failed to account for the fact that the bullet that killed Officer Vaughan did not come from the gun in Walker's hand, which had not been fired at all. Another gun had allegedly been found underneath Walker, but it was unclear whether Walker could have used that gun to fire the fatal shot. The second gun had been seen by one of the taxi drivers named Alderman. Alderman had given a statement to police describing the events he witnessed, including the fact that Vaughan was still standing after Walker had fallen out of the car. Although Alderman was an eyewitness with crucial information, the State never gave Alderman's name to Walker's attorneys. In addition, although Alderman told the prosecutor he would be available to testify and provided him with his new address when he moved out of the state, the State did not call him as a witness at trial. It was not until the first habeas proceeding that he finally told his story.

At the first habeas proceeding, Alderman testified that he saw Officer Vaughan approach the passenger side of the car and order the passenger to get out with his hands up. Alderman testified that he saw Vaughan fire at Walker, and that Vaughan remained standing after Walker had fallen out of the car. There was a pause in the shooting, and then Alderman heard one more shot that he described as sounding like a shot in a barrel or a pipe. After all of the shooting stopped, Alderman approached Walker and removed a fully-loaded gun from his hand. Alderman also took a gun from Officer Vaughan's hand and observed that all six rounds had been fired from it. Alderman also noticed another gun near the back of the car where Kumpe had been during the shooting. Alderman gave
both of the guns he had retrieved to the police and pointed out the location of the third gun under the car to an officer on the scene. That was the gun that allegedly was "found" under Walker.

Because Alderman had given a statement to police at the scene, and was indisputably a material witness to the events that resulted in Officer Vaughan’s death, I was extremely troubled to learn from the record of the first habeas proceeding that he had never been contacted by state prosecutors to testify at trial. It did not seem to be coincidental that the police had never given Alderman’s name to Walker’s attorneys; Alderman’s testimony did not fit with the State’s theory at both trials that Walker had fired the first shot.

Other significant testimony that was not heard until the first habeas proceeding was the testimony of Mary Roberts, who recanted her testimony at the first trial that she had not seen the shooting. That testimony had been read into the record at the second trial based on the prosecutor’s naked representation that Ms. Roberts was “unavailable” to testify in person. The trial judge denied Walker’s counsel even a brief recess to produce Ms. Roberts, whom the defense contended was living in Little Rock.

At the first habeas proceeding, Mary Roberts testified that she had advised the police prior to the second trial that she intended to change her testimony to reflect that she had seen Officer Vaughan fire the first shot, and that she never saw Walker fire his gun at all. When she told police of her intent to testify truthfully at the second trial, Roberts said, the police “suggested” that she leave town before the trial.

Although the court allowed the State to read in the testimony of Linda Ford and Mary Roberts based on their “unavailability,” the court concurrently refused to allow the defense to read into the record a ballistics report produced by a recognized expert from Minnesota, ostensibly because the author of the report was not present in the courtroom. The report itself cast doubt on whether the gun allegedly found near Walker was the murder weapon at all.

After working my way through the record, I told Judge Bright that I had found no direct evidence of Walker’s guilt. My concern about the lack of evidence available to show that Walker had fired the fatal shot at Officer Vaughan was heightened by apparent impropriety by the police and prosecutors in suppressing the testimony of Alderman and Roberts. My con-
clusion, after reading the record, was that the gun Alderman saw under the car had been "dropped" near Walker and used as the basis of the murder charge against him. Although Walker was certainly no choirboy, I was convinced after reviewing the entire record that he had been unfairly tried and convicted—twice—of murdering Officer Vaughan.

I told Judge Bright about my concerns, generally at first and then in greater detail as he became increasingly interested in what he heard about the actual contents of the record. He questioned me in detail about the facts, and I described for him the problems that I perceived had denied Walker due process of law. Eventually, Judge Bright began to spend his own afternoons in Judge Vogel’s chambers, reading through the record himself. As he did so, I researched the case law governing successive habeas petitions and eventually concluded that this was a case in which the court was not precluded from reaching the merits of Walker’s habeas petition. Although it was successive, the ends of justice would be served by hearing the petition and reversing such a gross denial of due process.

By the time I finished my clerkship in August 1982, Judge Bright had embarked on the long, difficult, and, frankly, political process of persuading other members of the Court that the interests of finality should give way to the interests of justice. His efforts in this regard led to a decision by the full court in January of 1984, Walker v. Lockhart, in which the Court ruled 5-4 to deny Walker habeas relief. Judge Bright, of course, wrote the dissent for three other members of the Court. That decision was followed the next year by Walker v. Lockhart, in which Judge Bright authored the opinion for the 5-4 majority, granting Walker habeas corpus relief on the basis of newly discovered evidence.

The Observations of James Dean Walker

Perhaps the most elegant and poignant statement concerning the impact of Judge Bright’s jurisprudence is to be found in the original voices of the litigants, petitioners and defendants for whom he has risen. To that end, we save for last the brave and grateful thoughts of James Dean Walker, as they were expressed in an unsolicited, handwritten letter. Truly, they need no other comment.

60. 726 F.2d 1238 (8th Cir. 1984) (en banc).
61. 763 F.2d 942 (8th Cir. 1985) (en banc).
January 4, 1991

Dear Judge Bright—

I have attempted numerous times to write this letter to you, each time never feeling that the letter adequately expressed my feelings. Perhaps I can do better this time.

It's very difficult to know exactly how to express one's gratitude to a person who is largely responsible for saving your life. I am, also, not certain whether it's proper for an "ex-con" to write to a judge to say "thank you," but I feel so much time has elapsed since your opinion set me free that I may now write and avoid any "appearance of impropriety." If I am breaching some judicial ethic by writing to you, then I ask that you forgive me.

I'm certainly one of the truly fortunate people in this world—fortunate to have survived years of brutalizing conditions, and even more fortunate to have so many true friends who gave so much love and support and hope to me during those many years of confinement under the foulest of conditions. It's difficult to look at the bleakest of circumstances for years duration and not lose hope. Thank you for letting my deepest hopes not be in vain.

At the time I was on death row, and during later years in Arkansas' prison and especially after my capture from escape and extradition back to Arkansas, and those years in solitary confinement, I had no idea that a judge from Fargo, North Dakota would be the person to become so offended by an injustice that occurred in Arkansas some 18 years earlier. I thank you for your integrity and for your willingness to fight to correct what you so aptly labeled a "stain on our criminal justice system."

I owe much to some fine and brilliant attorneys—Mr. Oscar Fendler, Mr. Bill Bristow, Mr. Paul Halvonik, Mr. Gene Worsham—all of whom were offended by the gross miscarriage of justice that they recognized in my case. But their legal efforts would have been for naught had it not been for the fact that you were willing to uphold the integrity of your position and push to set right a very serious wrong. I thank you, sir, for your beliefs, and I thank God that we still live in a society where such a wrong can be corrected—even 22 years late. Perhaps my case proved that there should never be a "doctrine of finality."

My stupidity and lack of direction as a youth led to one half of my adult life being stripped from me. Those years can never be regained—yet I'm thankful for the fact that those years were not entirely lost. I came through a very ugly ordeal gaining much more than was taken from me. I survived with most of my sanity, most of my health, and most of my dignity and self-respect. I thank you for allowing me to do so.

I would like very much to some day meet you in person—to shake your hand and embrace you—to thank you. That may never be possible, so I ask that you accept the words of this letter as words from my heart. They are all I have to offer at this time.
In closing, I say thank you so very much for giving my life and freedom back to me. It's my prayer that your life may continue to be blessed in the most abundant ways.

Sincerely—

James Dean Walker.

B. THE 8TH AMENDMENT, PROPORTIONALITY & PUNISHMENT: HELM V. SOLEM

For those interested in and concerned with the modern American system of criminal justice, the reach of the Eighth Amendment and the application of its proscription against cruel and unusual punishment is something of an enigma. On the one hand, the Eighth Amendment seems, at face value, to offer the possibility of robust protection for those convicted of crimes in our society. On the other hand, it has never been among those elements of the Bill of Rights—the First Amendment's free speech component and the Fifth Amendment's due process protections come to mind as prominent examples—which have been energetically pursued or stretched to their logical extreme. Indeed, the United States Supreme Court has often appeared contradictory in its approach to the Eighth Amendment. This fact has left the lower federal courts, and judges like Myron Bright, to flesh out distinctions in the Court's jurisprudence in a manner that does its best to preserve justice. The following case illustrates the point.

The Court of Appeals for the Eighth Circuit once had its staff attorneys review appeals. The staff attorney would recommend either that the district court decision be summarily affirmed or that the appeal be scheduled for oral argument. When Henry Buckley Helm appealed from the district court's denial of his petition for writ of habeas corpus, the staff attorney recommended summary affirmance of the district court's decision. Fortunately for Helm, however, Judge Bright disagreed with that recommendation.

Helm pleaded guilty to the charge of "uttering a no account check for $100." At the time, that offense under South Dakota law carried a maximum penalty of five years and $5,000.

62. Copy on file with the Minnesota Law Review; original in possession of Judge Bright.
64. See id. at 281 (citation omitted).
A South Dakota statute addressing habitual criminality, however, enhanced the maximum. When a defendant received a felony conviction and had "at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." At sentencing, Helm ignored his counsel's recommendations and admitted to six prior convictions.

Following Helm's revelation, the trial judge sentenced him to life imprisonment. Under South Dakota law, "[a] person sentenced to life imprisonment [was] not eligible for parole by the board of pardons and paroles." Therefore, unless Helm received a pardon or a commutation of his sentence, he faced prison for the rest of his life. Helm appealed his sentence, arguing that his sentence of life imprisonment without parole denied him due process and was tantamount to cruel and unusual punishment. The Supreme Court of South Dakota, by a 3-2 vote, rejected Helm's arguments and affirmed the imposition of the sentence of life imprisonment.

Helm filed a petition for writ of habeas corpus with the federal district court. Helm argued that his due process rights had been violated and that his life sentence without parole violated his right to be free from cruel and unusual punishment. In an unpublished opinion, the district court denied Helm's petition. Discarding his due process argument on appeal, Helm argued solely that his life sentence without parole constituted cruel and unusual punishment. This argument, although of a certain visceral appeal, appeared to be controlled

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65. Helm v. Solem, 684 F.2d 582, 582 n.2 (8th Cir. 1982) (quoting S.D. CODIFIED LAWS ANN. § 22-7-8 (1979)).
66. See id. at 582.
67. See id. at 583.
68. Id. (quoting S.D. CODIFIED LAWS ANN. § 24-15-4 (1979)).
69. See id. at 583.
71. See id. at 499.
72. See Helm v. Solem, 684 F.2d at 583.
73. Id.
74. See id. at 583-84. The district court determined that because Helm waived his right to a pre-sentence investigation, he could not argue that the sentencing judge violated his due process rights by sentencing him without conducting a pre-sentence investigation. See id. at 584. Regarding Helm's argument that his sentence constituted cruel and unusual punishment, the district court determined that United States Supreme Court precedent forced it to reach the conclusion that Helm's arguments lacked merit. See id.
75. See id. at 584.
and adversely determined by a United States Supreme Court decision in a seemingly similar case.

In Rummel v. Estelle, only a few years earlier, the Supreme Court upheld Rummel's mandatory life sentence under a Texas recidivist statute. When convicted for obtaining $120.75 under false pretenses, Rummel had two prior felony convictions on his record. Having triggered the recidivist enhancement, Rummel received the mandatory life sentence. On appeal, he challenged his sentence as cruel and unusual punishment on grounds that the sentence was disproportionate to the offense committed. The Court rejected Rummel's arguments, reasoning that assigning penalties to crimes was the province of the legislature, rather than the judiciary. The Court in Rummel, however, left a small opening in its language and did not foreclose the possibility that a sentence might be so disproportionate as to be unconstitutional. The Court noted: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, if a legislature made overtime parking a felony punishable by life imprisonment."

Judge Bright, writing for the panel, distinguished Helm's life sentence from the life sentence in Rummel because the Texas recidivist sentencing scheme allowed for the possibility of parole, whereas South Dakota's sentencing system did not. Accordingly, Judge Bright stated that Rummel did not foreclose a ruling that Helm's sentence constituted cruel and unusual punishment. In pronouncing that Helm's sentence was unconstitutionally disproportionate to his offense, Judge Bright compared South Dakota's recidivist scheme with the "collective judgment of the fifty state legislatures and the nature of the offense." In so doing, Judge Bright noted that Helm could not have received a life sentence without parole in

77. See id. at 266. Rummel's two prior convictions were for passing a forged check in the amount of $28.36 and fraudulently using a credit card to obtain $80 worth of goods or services. See id. at 265-66.
78. See id. at 266.
79. See id. at 267.
80. See id. at 284-85.
81. Id. at 274 n.11 (internal citation omitted).
82. See Helm v. Solem, 684 F.2d 582, 585 (8th Cir. 1982).
83. See id.
84. Id. at 586.
forty-eight of the fifty states. He explained that "[o]ther states either do not authorize such a drastic sanction for habitual offenders, or require at least one prior felony conviction for a violent crime as a prerequisite to a sentence of life imprisonment without parole."  

Moreover, in comparing Helm's sentence to the nature of the offense, Judge Bright observed that all of Helm's prior felony convictions in some manner resulted from Helm's alcoholism, a condition that Judge Bright stated was "amenable to treatment." Judge Bright concluded that imposing a life sentence without the possibility of parole constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Accordingly, the panel of the Eighth Circuit ordered resentencing for Helm.

The State appealed the Eighth Circuit's ruling to the United States Supreme Court. To the surprise of many, however, Judge Bright was vindicated by the Court and his distinction validated. The Supreme Court affirmed, basing its own analysis very closely on that outlined by Judge Bright.

The Observations of Michael J. Schaffer

I served as a law clerk to Judge Bright for one year in 1981 and 1982. I remember one day Judge Bright called me into his office. He handed me the briefs in the case of Helm v. Solem and told me that the case had been screened by a staff attorney for the Eighth Circuit Court of Appeals for no argument and summary affirmance. I remember Judge Bright telling me that he felt the case deserved oral argument. At Judge Bright's request, the court set Helm v. Solem for oral argument. The argument itself took place at the University of South Dakota School of Law, in the state where the case originated and coincidentally, my home state.

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85. See id.
86. Id. (footnote omitted).
87. Id. at 587.
88. See id.
89. See id.
91. Michael J. Schaffer is a graduate of the University of North Dakota School of Law. He now practices as a litigator in Sioux Falls, South Dakota, where he is a partner with the firm of Davenport, Evans, Hurwitz & Smith, L.L.P.
After the argument and the judges' panel conference, Judge Bright informed me that the panel had tentatively voted to reverse the district court with directions to issue the writ of habeas corpus. Judge Bright said that, in his opinion, Helm's sentence, life without parole, constituted cruel and unusual punishment given the petty nature of the offense and the fact that Helm's alcoholism had contributed to each of his crimes. He then asked me to help him draft the opinion.

I pointed out to Judge Bright that the United States Supreme Court had very recently upheld a similar sentence, in *Rummel v. Estelle*, against an Eighth Amendment attack. Judge Bright, however, remained adamant that *Rummel* was distinguishable because the Texas sentencing scheme, which included the possibility for parole in a life sentence, was qualitatively different from the South Dakota sentence that Helm received.

I also pointed out to the Judge, as did the State of South Dakota, that the United States Supreme Court, just months before, had handed down *Hutto v. Davis.* In *Hutto*, the Supreme Court reversed the United States Court of Appeals for the Fourth Circuit and rejected a prisoner's claim that a forty-year sentence for the possession of nine ounces of marijuana was cruel and unusual punishment. The Supreme Court, in a per curiam opinion, also had chastised the Fourth Circuit for not following its recent decision in *Rummel*, and in so doing, commented, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." I recall Judge Bright's response as if it were yesterday: "If this be judicial anarchy, make the most of it." For those of you who know Judge Bright and his gregariousness and sense of humor, his comments were followed with hearty laughter.

We then set about the serious task of writing the opinion. Judge Bright felt strongly that the Eighth Amendment's prohibition against cruel and unusual punishment required a proportionality analysis in sentences other than just death sentences. He asked me to research the laws of the other states to determine whether Helm could have received a sentence of life without the possibility of parole elsewhere. He sent me to the

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93. *Id.* at 375.
nearest law school, the University of North Dakota, which had a collection of the codes for all fifty states. I recall the painstaking effort it took to go through the criminal codes. Unfortunately, each state's criminal code was unique in its classification of crimes and punishments. I recall thinking at the time that it would have been nice if there would have been a uniform criminal code, similar to the Uniform Commercial Code. In any event, my research revealed that in only one other state could Helm have possibly received the sentence that was handed down in South Dakota.

I have many fond memories of my clerkship with Judge Bright, but I will always remember how he took a case that had been designated for summary affirmance, got it placed on the oral argument calendar, and crafted an opinion that ultimately was affirmed by the United States Supreme Court. What Judge Bright did in *Helm v. Solem* was not judicial anarchy but an exercise of persuasion and compassion by a man who will always be "the Judge" to me.

C. CASES ON SENTENCING

One of the most profound changes in the arena of federal criminal law over the past thirty years has been the advent of the Federal Sentencing Guidelines. Promulgated pursuant to the Sentencing Reform Act of 1984,\(^4\) the Guidelines seek to impose a uniform system of punishment by requiring sentencing courts to select terms of imprisonment from a discrete range of options provided by the United States Sentencing Commission for each criminal offense. The downside to this scheme, of course, is that it largely removes the discretion typically wielded by judges and substantially limits a court's power to craft sentences that reflect the nuanced equities of individual cases.

Judge Bright has been a regular and vocal critic of the Guidelines, particularly with respect to their application in the context of non-violent drug-related offenses.\(^5\) These crimes are


\(^{95}\) See, e.g., United States v. Jones, 145 F.3d 959, 966 (8th Cir. 1998) (Bright, J., concurring in part and dissenting in part) (“In this case, the lowest person on the totem pole, a mere street-level seller with an I.Q. of fifty-three received a heavier sentence than the mastermind of the conspiracy and the conspiracy's primary drug supplier. What kind of system could produce such a result?”); United States v. Romero, 118 F.3d 576, 582 (8th Cir. 1997) (Bright, J., dissenting) (“This case provides a typical, yet disturbing glimpse into the
often treated very harshly under the Guidelines and, perhaps, out of all reasonable proportion to the harm offenders of such laws actually impose on our society. To his credit, Judge Bright's criticism has been frank and open. Recently, during oral argument in *United States v. Jones*, Judge Bright's criticism has been frank and open. Recently, during oral argument in *United States v. Jones*,96 for example, the following exchange occurred:

PROSECUTOR: Judge Bright, I know you're no fan of the Sentencing Guidelines.

JUDGE BRIGHT: That's an understatement.

The judiciary as a whole has been divided in its response to the Guidelines. Although Judge Bright has occasionally persuaded his colleagues to follow his example, more often he has been left in dissent. But regardless of the majority view, he believes that the principle of judicial discretion in criminal sentencing is a value worth preserving. To that end, he has selected two cases to highlight here. Both illustrate the legal reasoning and common sense rationales that support his views.

1. *United States v. Hiveley*

Judge Bright's most comprehensive critique of the Sentencing Guidelines appeared in a concurrence to the per curiam opinion in *United States v. Hiveley*.97 In *Hiveley*, two members of a drug conspiracy, Larry Edward Hiveley and Ansil Ezra Henry, received sentences of 234 months and 260 months, respectively.98 Neither Hiveley nor Henry had a serious criminal history or posed a serious threat to society.99 Judge Bright, viewing this case as a "paradigm of what judges often see in the sentencing of drug law offenders,"100 used this occasion to point out the excessive and needless costs that re-

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96. 145 F.3d 959 (8th Cir. 1998).
98. See id. at 1360.
99. See id. at 1363-64 (Bright, J., concurring).
100. Id. at 1363.
sult from the application of the Sentencing Guidelines and the mandatory minimum penalties. 101

In his concurring opinion, Judge Bright first sought to dispel the notion that lengthy sentences were an effective tool to discourage drug distribution. Specifically, he noted that “[i]n this writer’s opinion based on hearing many drug cases on appeal over twenty-seven years, it is doubtful that heavy sentences for low-level drug offenders have aided the war on drugs. It has only increased the cost to the public.” 102

To illustrate the enormous costs to the public, Judge Bright pointed out that both Hiveley and Henry received sentences that were ten years longer than any reasonable judge would have ordered without the Sentencing Guidelines. 103 Considering that the cost to incarcerate a prisoner is approximately $22,000 per year, Judge Bright stated that the additional, and needless, cost associated with the incarceration of Hiveley and Henry for an additional ten years amounted to nearly $440,000. 104

To further illustrate the magnitude of these unwarranted additional costs nationwide, Judge Bright referred to a 1994 study, conducted by the Department of Justice, on low-level drug offenders with insignificant criminal histories—offenders similar in all respects to Hiveley and Henry. According to the study, sentences of low-level drug offenders “have increased 150% above what they were prior to sentencing guidelines and mandatory minimum sentences.” 105 Furthermore, the study also indicated that the federal government was currently incarcerating 16,316 low-level drug offenders, amounting to 36.1% of all drug offenders. 106 Therefore, Judge Bright calculated, “[i]f these same low-level drug offenders serve an extra five years of imprisonment over what is a proper, non-guideline, sentence, the cost to the taxpayers exceeds one and three-quarters billion dollars ($1,794,760,000.00). And still that is only part of the story.” 107

101. See id.
102. Id. at 1364.
103. See id. at 1363-64.
104. See id. at 1364.
105. Id. (citing U.S. DEP’T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES 3 (1994)).
106. See id. at 1364.
107. Id. at 1365.
Although Judge Bright's attack on the Sentencing Guidelines focuses primarily on the financial costs to the taxpayers, the value that propels Judge Bright's concurrence in *Hiveley*, as well as his other commentaries in Sentencing Guideline cases, is his firm belief that the Sentencing Guidelines and mandatory minimum sentences promote and establish injustice as the norm in sentencing federal offenders. In *Hiveley*, Judge Bright observed, "[a]s an appellate judge, I have seen draconian sentences [meted] out in drug cases where an offender has had no contact with any drugs but may be only a minor functionary in a drug conspiracy where heavy amounts of drugs could be involved."\(^{108}\)

**The Observations of Jonathan S. Rosen\(^{109}\)**

During my clerkship with Judge Bright from 1994 to 1995, I learned that his fairness, practicality, and ability to craft creative solutions to problems make his judging exceptional. *United States v. Hiveley* represents a model of the injustice caused by the excessively long sentences required by the mandatory minimum sentencing provisions and the Federal Sentencing Guidelines. In addition, *Hiveley* exemplifies how Judge Bright never forgets that appellants are real people, with families and lives to lead.

During the year that I clerked, it was apparent that the Sentencing Guidelines caused Judge Bright great concern, especially when excessive sentences were prescribed for low-level drug offenders. In these cases, non-violent offenders, who had only minor roles in drug conspiracies, face sentences decades long because the lengths of their sentences correlate with the sheer weight of the drugs involved in the overall conspiracy and not with their individual culpability. These low-level drug offenders are non-violent individuals with minimal or no prior criminal histories and their offenses do not constitute sophisticated criminal activity. The facts of *Hiveley* were not unique. A federal jury found Ansil Ezra Henry and Larry Edward Hiveley guilty of conspiracy to distribute marijuana. The district court sentenced Henry to twenty-one years eight months and

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108. *Id.*

109. Jonathan S. Rosen served as law clerk to the Honorable Alex T. Howard, Jr., Chief Judge of the United States District Court for the Southern District of Alabama from 1992-93 before serving as law clerk to Judge Bright from 1994-95. He is a graduate of the New York University School of Law and now practices as an attorney for AT & T Corp. in Basking Ridge, New Jersey.
Hiveley to nineteen years six months of imprisonment in accordance with the mandatory minimum sentencing provisions and the requirements of the Federal Sentencing Guidelines.

Henry and Hiveley appealed the sentences. Judge Bright looked to the backgrounds of Henry and Hiveley and saw many factors which led him to doubt that any reasonable judge, un fettered by the Sentencing Guidelines, would have sentenced these men to more than ten years. Henry was forty-four years old. He had no prior serious criminal convictions and only three prior misdemeanor-type crimes. Henry could neither read nor write and would reach sixty-five years of age in prison. Hiveley was forty-eight years old at the time of sentencing, and although he had some brushes with the law in his youth, he had zero criminal history points under the Sentencing Guidelines. Rather than serving reasonable sentences, Hiveley and Henry were to spend the rest of their adult lives behind bars, with little or no chance of returning from jail as productive members of society.

In addition to the personal toll that the Sentencing Guidelines take on the individual defendants and their families, the financial toll of imprisoning people for decades and the Guidelines’ effect on the federal budget disturbed Judge Bright as well. The economic impact of excessively long mandatory minimum sentences had special significance in 1994 and 1995. During that year, cuts in the federal budget loomed large. In fact, little more than six months after the Eighth Circuit decided Hiveley, the federal government shut down for weeks because Congress could not agree on a budget. The fact that the long prison sentences meant big bills for the federal government and taxpayers had special relevance that year.

I worked with Judge Bright not only to draft the per curiam opinion, but also to craft a concurrence that would reach beyond Hiveley and speak to all cases where injustice results from applying the mandatory minimum provisions and the Sentencing Guidelines to low-level, non-violent drug offenders. These cases are tragic because the harsh sentencing destroys offenders’ lives, does not win the “War on Drugs,” and costs the government, and hence taxpayers, billions of dollars.

Judge Bright brought his extraordinary sense of fairness and practicality to the sentencing of these two men and revealed the Sentencing Guidelines’ true cost to society. In addition, he had the courage of his convictions to speak out and comment upon an unreasonable system and urged other judges
to do the same. But this is not unusual. During his thirty years of service to the Eighth Circuit, extraordinary fairness, common sense practicality, and an ability to craft creative solutions to difficult problems have been the hallmark of Judge Bright's jurisprudence.

2. *United States v. Romero*

There is a second case worthy of note with respect to Judge Bright's staunch views on criminal sentencing; a case that "provides a disturbing glimpse into the underbelly of prosecuting non-violent, first time drug offenders under mandatory minimum sentences."\(^{110}\) Taken from Judge Bright's opening sentence in his dissent in *United States v. Romero*, this quotation surely commands the reader's attention and colorfully illustrates his hearty distaste for the present system of sentencing federal drug offenders.

Donna Romero pled guilty to the interstate transport of heroin with her husband, Antonio Grajeda.\(^{111}\) The probation office prepared a "Disclosure Copy" of her presentence report, in which the probation officer concluded that Romero met the requirements for "safety valve" relief from the five-year mandatory minimum sentence.\(^{112}\) The Assistant United States Attorney handling the case, however, objected to an application of the safety valve. In response, the probation office reversed its determination and stated in its final report that "Romero was possibly more involved [in the drug conspiracy] than outlined in the presentence report."\(^{113}\) To support this new theory, the prosecutor proffered the testimony of Romero's husband. Gra
JUDGE MYRON H. BRIGHT

Jedna testified that Romero controlled the drug movements and that "he merely joined her for the ride." To bolster Grajeda’s credibility, the prosecutor presented the district judge with a federal drug enforcement agent’s testimony that Grajeda had taken and passed a polygraph test. The polygraph examiner, however, did not testify at the hearing and the prosecutor did not present any report from the polygraph examination. Based on the purported results of Grajeda’s polygraph examination, the district court determined that Romero did not meet her burden of showing that she had truthfully provided the government with all information about the offense.

A three-judge panel affirmed the district court’s determination. Judge Bright dissented. He began his dissent by criticizing the district court’s reliance on the “worthless” evidence introduced regarding Grajeda’s lie detector test. Although acknowledging that the usual evidentiary rules do not apply in the context of sentencing hearings, Judge Bright noted that polygraph evidence remains a suspect form of evidence of dubious probity. At trial, such evidence therefore requires the building of a very careful evidentiary foundation—such as requiring a qualified polygraph expert to testify and permitting ample opportunity for the cross-examination of that expert. Judge Bright argued that the evidence adduced by the prosecutor regarding Grajeda’s polygraph examination had no foundational support at all. Thus even under the lower threshold of sentencing procedures, it “lacked any trustworthiness or reliability whatsoever.”

Judge Bright then turned to what he considered to be the reason behind Grajeda’s willingness to testify against his own wife. He criticized the methods employed by the United States Attorneys and their tendency to use strong-arm tactics, even in cases in which family members are involved in a drug conspiracy. Judge Bright pointed out that prosecutors routinely turn family members against one another, resulting in harm pri-

114. _Romero_, 128 F.3d at 1199 (Bright, J., dissenting).
115. See id.
116. See id.
117. See id.
118. See _Romero_, 118 F.3d at 578.
119. See _Romero_, 128 F.3d at 1200 (Bright, J., dissenting).
120. See id. at 1199.
121. Id. at 1200.
arily to the children of the family.\textsuperscript{122} Moreover, in this case, Judge Bright noted that when Romero refused to submit to a polygraph examination, the prosecutor sought to penalize her by requesting a harsher sentence for obstruction of justice.\textsuperscript{123} Judge Bright observed that "[t]he sad outcome of this case results from a sentencing structure which improperly confers immense discretionary power upon the prosecutor."\textsuperscript{124} Judge Bright further noted that, unfortunately, "prosecutors sometimes forget that the prosecutor's special duty is not to convict, but to secure justice."\textsuperscript{125}

Judge Bright concluded his dissent with a sweeping critique of the sentencing system for drug offenders:

In my view, sentencing in many federal drug cases is unworthy of American justice, and it pains me that our citizens are often sentenced to lengthy prison terms under circumstances similar to those presented here. What is most disturbing, perhaps, is that this case is not unusual in any significant respect from the seemingly endless drug cases we review. It is precisely the ordinariness of the manner in which we lock away Donna Romero for five years that appalls me. In the end, it is simply another example of excessive mandatory sentences, the use of improper evidence and the destruction of families that results from this country's treatment of its non-violent drug offenders.\textsuperscript{126}

\textit{The Observations of Robert W. Ferguson}\textsuperscript{127}

It was as ordinary a case as one ever finds as a law clerk on the federal court of appeals. Three individuals pled guilty to drug charges and were sentenced to lengthy prison terms. None of the arguments raised by the defendants on appeal, from a purely legal perspective, appeared particularly substantive. As the law clerk assigned to this case, I saw nothing in the record to recommend to Judge Bright anything other than an affirmance.

\begin{itemize}
\item \textsuperscript{122} See \textit{id}.
\item \textsuperscript{123} See \textit{id}.
\item \textsuperscript{124} \textit{Id}.
\item \textsuperscript{125} \textit{Id} (quoting United States v. Guerra, 113 F.3d 809, 818 (8th Cir. 1997)).
\item \textsuperscript{126} \textit{Id} at 1200-01.
\item \textsuperscript{127} Robert W. Ferguson served as law clerk to the Honorable William Fremming Nielsen, Chief Judge of the United States District Court for the Eastern District of Washington (1995-96) before serving as law clerk to Judge Bright from 1996-97. He is a graduate of the New York University School of Law and is now an Associate at Preston Gates & Ellis in Seattle, Washington.
\end{itemize}
When my memorandum was complete, I dutifully dropped it off on the Judge's desk, secure in the knowledge that I would never see it again. I was mistaken. Later that morning, Judge Bright stormed into my office, sat down, propped his feet on my desk and said, "Let's talk about the Romero case." Romero, one of the three defendants, was charged with transporting drugs with her husband. She asserted that she knew they were doing something illegal, but that she did not know precisely what was involved.

Because Romero was a first time, non-violent offender who played a minor role in the crime, the Probation Office recommended that she be considered for a sentence below the five-year mandatory minimum, pursuant to the safety valve provision of the Sentencing Guidelines. The Assistant United States Attorney prosecuting the case, however, felt differently. The prosecutor utilized statements by Romero's husband that she was an organizer of the crime to argue that Romero did not meet the safety valve requirement that one testify truthfully to one's involvement in the offense.

The prosecutor's tactics outraged Judge Bright. Pitting family member against family member to increase an already lengthy prison sentence for a first time, non-violent offender was inexcusable to the Judge. Adding to his anger was the fact that the prosecutor then "pursued a harsher sentence for obstruction of justice, as if a five-year sentence for this first offender was somehow insufficient punishment."

It was not unusual for the Judge to reveal his emotions on a case to his clerks. If a case upset him, you knew it. Usually, however, this visceral response served as an opportunity to release his emotions and allow him to ultimately weigh the case in a more subdued manner. For example, Judge Bright sometimes took pen in hand and hammered out a strongly worded opinion, only to soften it considerably after a night's sleep. More frequently, Judge Bright would ask me to draft an opinion "and give them hell." When I later handed him such a draft, he invariably deleted any language that was overly critical of another judge's legal reasoning. "Don't make it so personal. Remember, I've got to work with these guys." In this

128. Actually, Judge Bright used substantially more colorful language. For purposes of these observations, the discussions I report will be a somewhat sanitized version of our exchanges.
129. United States v. Romero, 118 F.3d 576, 584 (8th Cir. 1997) (Bright, J., dissenting).
case, however, his frustration was directed at our country's criminal justice system as well as the prosecutor, and it did not subside.

The Judge decided to write a dissent and asked me to produce a draft. Before starting such work, I generally received a verbal outline of the opinion from the Judge. I always enjoyed these sessions, in part because they were liable to occur without warning and in rather unexpected situations. It was not unusual, for example, to receive instructions for an opinion inside the cleaners on Broadway while waiting for his shirts, between innings at a Fargo-Moorhead Red Hawks baseball game, or in the middle of Lake Melissa on the Judge's boat while spending a weekend at the Brights' summer cottage. Generally, however, these instructions took place in chambers with the Judge leaning back in his chair, arms folded across his chest, engaging in a legal stream of consciousness while I furiously took notes. Among my notes from the Romero instructions there is one phrase, repeated by the Judge with his finger jabbing at the air, that is in quotes and underlined twice: "Unworthy of American Justice."

I rarely interrupted him during these monologues, in part because it was impossible, and in part because it was an opportunity to sense the appropriate tone for the opinion. Furthermore, these sessions represented the unedited thinking of the man, revealed the breadth of his intellect and offered insight into his views of a particular case. His ability to accurately cite cases and articles from memory was impressive and the Judge often tossed out references to non-legal publications that he wanted me to examine. Romero was no exception: "There's an article a few years ago in the Atlantic Monthly about how our drug sentencing is out of control and destroys families. Get that and read it. If it's any good, quote it." Judge Bright concluded his instructions by making it clear that he wanted a strong dissent.

I drafted the dissent and quoted extensively from the Atlantic Monthly article which was, not surprisingly, quite helpful. As always, however, I did not draft the dissent soon enough for the Judge. He asked about my progress daily and generally greeted me in the morning by shouting down the hallway towards my office, "Where's that Romero dissent?" The Judge maintained his keen interest in the case throughout the writing of the dissent, constantly commenting on the injustice of using the testimony of family members against one an-
Benjamin Cardozo once wrote that "[w]e are not to close our eyes as judges to what we must perceive as men." Judge Bright never suffered from that judicial blindness and always perceived the litigants not as an abstraction or principle of law, but as actual people wrestling with the difficulties of life.

The filing of the *Romero* dissent and majority opinion did not complete the saga of this case. Shortly thereafter, the panel received a "Request For Modification Of Opinion Prior To Final Publication" from the United States Attorney. The Request was highly unusual and contained a sharp critique of Judge Bright's dissent. The Request asked, in no uncertain terms, that Judge Bright dramatically revise his dissent.

By this time, I was nearing the end of my clerkship. I thought I could accurately predict the Judge's reaction to the Request and was confident he would commence tearing up the Request with more than a few choice words when he read the characterization of his dissent as "unfair." To my surprise, the Judge walked into my office a few hours later with a few handwritten changes to the dissent.

The Request then became the subject of animated discussion between the Judge and myself, and I advised him to stand by his dissent. Judge Bright, however, read the Request calmly and viewed its criticisms with objectivity. In fact, he agreed with one of the Request's arguments that his description of the prosecution as "overzealous" was not entirely appropriate because that word contained certain legal connotations that did not accurately reflect his feelings regarding the prosecution in the matter. In the end, he submitted a slightly revised dissent.

Despite his strong feelings regarding the federal sentencing guidelines and the *Romero* case, Judge Bright read the Request and recognized where it made a valid point. In so doing, Judge Bright revealed a side of his judicial temperament that

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130. The *Romero* case recently came to mind when the Special Prosecutor, Kenneth Starr, subpoenaed the testimony of Monica Lewinsky's mother, Marcia Lewis, regarding conversations with her daughter about a sexual relationship with President Clinton. Numerous editorials around the country expressed shock that the government would force a mother to testify against her own daughter. Judge Bright had the ability to see such injustice in a case involving no publicity involving individuals somewhat less sympathetic than Ms. Lewinsky and Mrs. Lewis.

is rarely recognized. It would have been much easier to simply stand by his original dissent, but Judge Bright chose a path that required more reflection and humility. That lesson, applicable beyond the confines of law, is the one that I treasure most from my clerkship.

The Judge’s fire for justice will not soon be extinguished. The observations by his law clerks throughout this tribute are testament to a span of decades in which the Judge continues to see the extraordinary in the routine. The Court of Appeals for the Eighth Circuit now has a more conservative orientation than it did at the start of the Judge’s judicial career. This change requires the Judge to embrace, on occasion, the role of dissenter. During my interview for the clerkship position, I asked the Judge about his approach to drafting opinions. He paused and said wryly, “we call them ‘dissents’ around here.” It is a role that requires the confidence to stand alone, armed only with the courage of one’s convictions. Indeed, Judge Bright personifies the dissenter, “the gladiator making a last stand against the lions,”\textsuperscript{132} in which:

\begin{quote}
[d]eep conviction and warm feeling are saying their last say with knowledge that the cause is lost. The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years.\textsuperscript{133}
\end{quote}

When the day eventually comes to look back and view Judge Myron Bright’s contributions to the federal judiciary in their entirety, his role as a dissenter on the Court of Appeals for the Eighth Circuit may be recognized as his finest hour. Neither his increasing years on the bench nor the shift in alignment of the Eighth Circuit has altered the Judge’s judicial philosophy. I admired him anew each morning he came to work, a gladiator nearing his eighties, shouting from his chambers to my office, “Where’s that \textit{Romero} dissent?”

II. CASES ON THE LAW OF EVIDENCE

The law of evidence plays a crucial role in all trials, both criminal and civil, because it largely determines what information is available for consideration by the appropriate trier of fact. While much of this complex body of law remained constant following the advent of the Federal Rules of Evidence, the

\textsuperscript{132} BENJAMIN N. CARDODOZ, LAW AND LITERATURE 34 (1931).
\textsuperscript{133} \textit{Id.} at 36.
specialized area of law regarding the admission of expert testimony has changed significantly. The revolution in the law of expert testimony was initiated by the Supreme Court's 1993 decision in Daubert v. Merrell Dow Pharmaceuticals, Inc.\textsuperscript{134}

In Daubert, the Supreme Court revamped the standards governing the admissibility of scientific evidence in the federal courts and rejected the seventy-year-old test from Frye v. United States\textsuperscript{135}—a test which had long been the gold standard for novel scientific testimony. The Daubert decision is in some ways quite narrow. Some courts have, for example, applied Daubert only to purely scientific knowledge and not to technical or other specialized knowledge.\textsuperscript{136} In other ways however, Daubert greatly expands the potential range of admissible scientific evidence and transfers broad discretion to trial judges. No longer does such evidence need to have achieved "general acceptance" in order to be introduced. Rather, Daubert applies a flexible test and addresses the reliability of scientific knowledge by reference to four factors: (1) whether the offered scientific theory has been tested; (2) whether it has been subject to peer review and publication; (3) whether there is a significant known or potential rate of error; and (4) whether the theory offered has achieved general acceptance in the scientific community.\textsuperscript{137} No single factor is meant to be dispositive, and a care-

\textsuperscript{134} 509 U.S. 579 (1993).

\textsuperscript{135} 293 F. 1013 (D.C. Cir. 1923). Under the Frye test, federal courts excluded expert opinion based upon a scientific technique unless the technique was sufficiently established to have gained "general acceptance" as reliable in the particular scientific field to which it belonged. See Daubert, 509 U.S. at 584. The Supreme Court rejected the Frye test as incompatible with the Federal Rules of Evidence. See id. at 589.

\textsuperscript{136} See e.g. McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997) (holding that the district court erred in excluding engineer's testimony based on Daubert factors because Daubert applies only to testimony of scientific knowledge, not to testimony based on training and experience); Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), cert. granted, 118 S. Ct. 2339 (1998) (finding that testimony based on experience falls outside the scope of Daubert, and that the district court erred as a matter of law in applying Daubert to the testimony). But see Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293 (8th Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997) (concluding that expert testimony based on engineering principles was properly rejected under Daubert); Smelser v. Norfolk S. Ry. Co., 105 F.3d 299 (6th Cir. 1997), cert. denied, 118 S. Ct. 67 (1997) (concluding that the trial court erred by not excluding, under Daubert, testimony by biomechanical engineer). The Supreme Court is expected to resolve this circuit split in the Carmichael case.

\textsuperscript{137} See Daubert, 509 U.S. at 593-94.
ful analysis is to be conducted by the receiving court. The trial judge is the "gatekeeper" and is charged with the responsibility to ensure that all scientific evidence or testimony admitted is both reliable and relevant.138

Many questions still remain unresolved under Daubert, however, and Judge Bright is among the judges and legal scholars looking for answers to the remaining questions regarding the admissibility of scientific evidence. He has lectured and written widely on the important changes wrought by Daubert, and several of his recent opinions have played a significant role in the further refinement of expert testimony law. Two of the most important—Robinson and Rouse—are discussed below.

A. Robinson v. Missouri Pacific Railroad Co.139

Computer technology has changed many areas of society, and in recent years it has become an integral part of complex litigation. For example, many attorneys use computer-generated reenactments to dramatize their cases to juries. Judge Bright authored the first published circuit court opinion regarding the admissibility of video animation used to illustrate an expert's accident causation theory. In Robinson v. Missouri Pacific Railroad Co., Judge Bright, as a visiting judge in the Tenth Circuit, utilized the Daubert factors in upholding the district court's admission of video animation for demonstrative purposes.140

Julia Ann Turnbull and her infant son, Darwin, were killed when a Missouri Pacific freight train hit her Chevrolet at a gate-and-light-protected crossing in Oklahoma.141 The respective personal representatives for the mother and the infant ("the Robinsons") brought wrongful death actions against Missouri Pacific. The jury, after a five-day trial, awarded Darwin's estate $250,000 and Julia Ann's estate $140,000 and found Missouri Pacific 70% at fault and Julia Ann 30% at fault for the accident.142 Missouri Pacific appealed, arguing that it was entitled to judgments of dismissal as a matter of law and that

138. See id. at 597.
139. 16 F.3d 1083 (10th Cir. 1994).
140. Id. at 1088-89.
141. See id. at 1084.
142. See id. at 1085.
the district court erred by not granting a new trial because of errors at trial, principally involving evidentiary matters.\footnote{143}

On October 31, 1989, Turnbull was driving westbound when she collided with a southbound Missouri Pacific train.\footnote{144} Turnbull, her infant son and three other passengers in her car were killed.\footnote{145} The car was found approximately 2000 feet south of the crossing, a result of the train pushing it straight down the track.\footnote{146}

The Robinsons asserted at trial that the gates had failed to lower at the proper time and allowed Turnbull to enter the crossing at the same time as the oncoming train. To support this theory, the Robinsons argued that, because the train pushed the car straight down the tracks, the train must have struck the car at a perpendicular angle.\footnote{147} The Robinsons called several witnesses to support this theory, including their accident reconstructionist, A.O. Pipkin. Pipkin prepared a video animation to illustrate his opinion that the train struck the car at a perpendicular angle.\footnote{148}

Missouri Pacific, in contrast, argued that the train struck the car at a 17 degree angle while Turnbull attempted to drive around the lowered gates.\footnote{149} Missouri Pacific contended that a sharp angle collision could have resulted in the car being found south of the crossing if the train engine and the car were locked together.\footnote{150} Missouri Pacific asserted that the crossing arms and signal unit were working properly and that Turnbull neg-

\footnote{143. Missouri Pacific argued on appeal that the district court erred in failing to exclude the following evidence: (1) a video reenactment; (2) eyewitness testimony about a near-miss at the same crossing; (3) plaintiff's signal expert's opinion on the cause of the accident; and (4) testimony concerning Missouri Pacific's internal policies. \textit{See id.} at 1086. Missouri Pacific also argued that a juror should have been removed for cause and that the district court erred in denying its motion for judgment notwithstanding the verdict. \textit{See id.} The court affirmed the district court on Missouri Pacific's appeal. The Turnbulls cross-appealed, arguing that the district court erred in granting Missouri Pacific's motion for contribution on Darwin's claim on grounds that Oklahoma's doctrine of parental immunity barred contribution. The court affirmed the district court on the cross-appeal, rejecting this assertion. \textit{See id.} at 1085.}

\footnote{144. \textit{See id.}}

\footnote{145. \textit{See id.}}

\footnote{146. \textit{See id.}}

\footnote{147. \textit{See id.}}

\footnote{148. \textit{See id.}}

\footnote{149. \textit{See id.} at 1086.}

\footnote{150. \textit{See id.} at 1085.}
ligently caused the collision. The jury heard witnesses supporting Missouri Pacific's theory as well.\textsuperscript{151}

On appeal, Missouri Pacific argued that the district court erred by permitting the jury to view the videotape prepared by Pipkin. Pipkin generated the video by creating a scale model of the accident scene that included a train, a car, crossing gates, structures and shrubs found in the vicinity of the accident.\textsuperscript{152} Pipkin then moved the model vehicles by hand with the train at a scaled speed of 49 m.p.h. as testified to by an engineer witness, and the car at a scaled speed of 13 m.p.h., a speed randomly chosen by Pipkin.\textsuperscript{153} The recreation resulted in a "dramatic two-minute silent color video," depicting first the Robinson's theory that the gate was up and then Missouri Pacific's theory that the gate was down.\textsuperscript{154} The video demonstrated that, in the gate up depiction, the train pushed the car straight down the track. In the gate down depiction, however, the video showed the car spinning off the tracks in a south-westerly direction.\textsuperscript{155}

Judge Bright determined that the first scenario easily fit within the Tenth Circuit's precedent supporting the admission of the animation as illustrative of the plaintiff's expert's theory of the collision.\textsuperscript{156} However, the second scenario's admission created a more difficult issue. The second scenario showed what might have happened if the car went around the gate and the train struck the car at a sharp angle.\textsuperscript{157} The recreation ignored the possibility, however, that the collision could have "impaled the vehicle on the front plow of the train, making it impossible for the vehicle to spin off the track."\textsuperscript{158}

Missouri Pacific made a Rule 403\textsuperscript{159} objection to the second scenario being shown to the jury, arguing that the scenario was highly prejudicial.\textsuperscript{160} Judge Bright stated for the court that "given the limited, solely illustrative purpose for introducing

\begin{itemize}
  \item 151. \textit{See id.} at 1086.
  \item 152. \textit{See id.}
  \item 153. \textit{See id.} Pipkin opined that the Chevrolet could not have been traveling more than 20 m.p.h. \textit{See id.}
  \item 154. \textit{Id.}
  \item 155. \textit{See id.}
  \item 156. \textit{See id.} at 1087 (citing Brandt v. French, 638 F.2d 209, 212 (10th Cir. 1981) and Gilbert v. Cosco, Inc., 989 F.2d 399, 402 (10th Cir. 1993)).
  \item 157. \textit{See id.}
  \item 158. \textit{Id.}
  \item 159. \textit{FED. R. EVID. 403.}
  \item 160. \textit{See Robinson, 16 F.3d at 1087-88.}
\end{itemize}
the exhibit, the cautionary instruction to the jury, and the opportunity for vigorous cross-examination, we do not believe the district court abused its discretion in admitting the second scenario."161 Furthermore, Judge Bright noted that any prejudice was, under the circumstances, lessened by testimony from a defense expert that, regardless of the angle of the collision, the train and car would have locked together.162 The verdict apportioning 30% of the fault to Turnbull also demonstrated that the jury did not completely agree that the animated scenes represented a true and complete recreation of the collision.163

Judge Bright then discussed the recreation in the context of the Daubert decision. The opinion concluded that the Daubert standard should be applied to demonstrative scientific evidence and that this evidence fits the flexible standard enunciated in Daubert.164 Judge Bright advised trial judges to review videos outside the presence of the jury and "carefully and meticulously [to] examine proposed animation evidence for proper foundation, relevancy and the potential for undue prejudice."165 The crash recreation fit under the Daubert analysis because the "physical phenomena of crash movements may be explained on scientific principles," but the opinion did note that an argument could be made that the given testimony rested outside established scientific knowledge.166 Under Daubert, the trial judge, as "gatekeeper," should make an evaluation before the trial on the admissibility of film or animation illustrative of scientific expert opinions.167

161. Id. at 1088.
162. See id.
163. See id.
164. See id. at 1088-89.
165. Id. at 1088.
166. Id. at 1089.
167. See id. The opinion also mentioned that many objections could be made to exclude computer simulations and animations. See id. at n.7. In addition to lack of relevancy or reliability, attorneys could also object on the basis of lack of authentication, FED. R. EVID. 901(a), hearsay or lack of foundation, FED. R. EVID. 801, and undue prejudice as an attempted reenactment, FED. R. EVID. 403. See Robinson, 16 F.3d at 1089; see also MYRON H. BRIGHT & RONALD L. CARLSON, OBJECTIONS AT TRIAL 45-49 (2d ed. 1993).
The Observations of Daniel Shacknai

I had the privilege to serve as a law clerk for the Honorable Myron H. Bright as he grappled with the difficult evidentiary issues presented to the Tenth Circuit Court of Appeals in *Robinson v. Missouri Pacific*.

Even though Mr. Pipkin's brief animated video appears somewhat primitive by today's MTV-influenced standards—it featured neither sound nor particularly slick editing—the video nevertheless presented dramatic images of the disparate crash theories advanced by the parties. The principal problem we confronted in reviewing the district court's findings was the extent to which the video (and in particular, the second, "gates down" scenario) unfairly prejudiced the jury toward accepting Pipkin's theory of causation. Another problem concerned whether Pipkin had an adequate scientific foundation for his opinion, depicted by the video's second scenario, that a train striking a car at an angle consistent with driving around lowered crossing gates would necessarily cause the car to spin off the tracks in a southwesterly direction.

Judge Bright ultimately resolved these questions by drawing on his vast experience as both judge and litigator. After giving painstaking consideration to the Supreme Court's then-recent decision in *Daubert*, Judge Bright focused our review on several aspects of the trial that appeared to minimize whatever prejudice the video demonstration might have created. First, Pipkin offered the video solely for illustrative purposes. Whatever the video's effect, it did nothing more than depict graphically what the expert explained in words. Second, the jury received a cautionary instruction from the trial judge advising the jury that the video did not constitute a recreation of the accident. Third, defendants had ample opportunity to undermine Pipkin's opinion through cross-examination. Fourth, the defendants were entitled to present, and did present, their own expert whose opinion clashed with Pipkin's. Judge Bright also found it significant that the jury apportioned

168. Daniel Shacknai served as a law clerk for Judge Bright from 1993 to 1994. He is a graduate of Cornell Law School and currently practices as an Associate General Counsel for the Administration for Children's Services for the City of New York.

169. During lunches with his clerks at the Fargo Radisson or Elks Club, Judge Bright would frequently share stories from his 20 years as a trial lawyer. He also enjoyed telling "war stories" after tennis matches with one particular clerk, even if the outcome of those matches was not to his liking.
fault between the railroad and the car’s driver. The 70-30 allocation of responsibility for the crash suggested, at a minimum, that the video did not wholly blind the jury to the expert and eyewitness testimony introduced by defendants.

In formulating the Robinson opinion, Judge Bright sought to provide guidance to both judges and trial lawyers on the application of Daubert to video “reenactments.” Robinson suggests that to fulfill the gatekeeper function outlined in Daubert, trial judges should attempt to evaluate the admissibility of proffered video or film evidence outside the jury’s presence. Further, courts should evaluate questions of admissibility within the context of the trial as a whole, taking into account the effect of cautionary instructions, objections by the party opposing admissibility, cross-examination of the witness offering the visual evidence, and the opportunity of the opposing party to present their own experts and illustrative materials.

While the key issues in Robinson involved attempts to depict the past, the decision also has a strong forward-looking dimension. The Tenth Circuit’s unanimous ruling based on Judge Bright’s opinion anticipates difficult evidentiary questions emerging more frequently as litigants harness the power of the moving image through rapidly advancing computer animation technology.

B. UNITED STATES V. ROUSE¹⁷⁰

In the Rouse opinions, Judge Bright again played a role in the development of meaningful scientific evidence case law with his argument that the Daubert decision applies to soft science. Desmond Rouse, Jesse Rouse, Garfield Feather, and Russell Hubbeling appealed convictions for aggravated sexual abuse of young children on the Yankton Sioux Indian Reservation.¹⁷¹ They had each received sentences of over thirty years.¹⁷² A divided panel of the Eighth Circuit Court of Appeals, with Judge Bright serving as the author of the majority opinion, reversed the convictions and remanded the case for a

¹⁷⁰ United States v. Rouse, 111 F.3d 561 (8th Cir. 1997), rev’d 100 F.3d 560 (8th Cir. 1996), cert. denied, 118 S. Ct. 261 (1997).
¹⁷¹ See id. at 565.
¹⁷² The defendants—and a fifth defendant, Duane Rouse, who was later acquitted by the jury—were charged with twenty-three counts of aggravated sexual abuse of children under age twelve in violation of 18 U.S.C. § 2241(c). See Rouse, 100 F.3d at 561.
new trial. The court held that the trial court erred in excluding expert opinion testimony that the child complainants had been subjected to a practice of suggestibility. A divided majority on rehearing decided that any error in the exclusion of the expert testimony was harmless and affirmed the convictions. In both opinions, the admissibility of the expert testimony regarding soft science was evaluated under the Daubert standard.

In the original opinion, Judge Bright stated that the controversy in the case revolved around whether an expert in child behavior studies could testify to the following question (made by offer of proof):

Q. And based on your review of the trial testimony and your review of the records, all the files in this matter, is it your belief that there’s been a practice of suggestibility employed in these techniques?

A. Yes, sir.

The prosecutors did not challenge Dr. Ralph Charles Underwager’s expertise. He was an accomplished clinical psychologist who had been practicing or teaching in the profession for about twenty years. Instead, the prosecutors challenged the substance of the offer. The district court agreed with the prosecutors’ objection and rejected the offer, concluding that it was not the proper subject of expert testimony and not reliable or relevant under Federal Rule of Evidence 104(a) and confusing and misleading to the jury under Federal Rule of Evidence 403. The district court concluded that the proposed testimony was not the type of expert testimony contemplated by Daubert. Judge Bright disagreed.

According to Judge Bright, the Daubert standard ensures the reliability and relevance of scientific testimony and evidence. One of the issues in Rouse was whether the testimony offered by Dr. Underwager was scientific knowledge. Judge

173. See Rouse, 100 F.3d at 578.
174. See Rouse, 111 F.3d at 574 (Bright, J., dissenting). In the original opinion, the court held that the district court erred in denying the defendants’ motion for an independent psychological examination of the children. In his dissent on rehearing, Judge Bright stood by this ruling but recognized that this error alone would not justify a new trial. See id. at 574 n.13.
175. Rouse, 100 F.3d at 566.
176. See id.
177. See id.
178. See id. at 566-67.
179. See id. at 569.
180. See id. at 567.
Bright noted that *Daubert* may not apply to certain social science evidence before evaluating the soft science at issue.\(^{181}\) In this case, Judge Bright concluded that the district court had misapplied *Daubert*. He reasoned:

The defense fulfilled the requirements of *Daubert*. The witness did not purport to testify that witnesses had in fact succumbed to any suggestive aspects of the investigation; only that the investigative means in this case were consistent with the psychological studies that similar techniques operated suggestively on young children. In addition, every condition which Dr. Underwager attempted to testify to as creating a practice of suggestibility has been amply demonstrated in the psychological literature as producing undue suggestibility in children's testimony. The importance and relevance is apparent.\(^{182}\)

After reviewing the evidence and literature, Judge Bright concluded that support existed for the defendants' offer of proof. Dr. Underwager, after reviewing files, records, and testimony in the case, concluded that the child complainants had been subjected to "a practice of suggestibility" in the interviews, making them susceptible to faulty memory.\(^{183}\) Support for this conclusion included, in particular, a recent scientific article presented to the district court indicating that many of the techniques used in the interviews with the small child complainants were likely to produce biased, untrue or false memories.\(^{184}\) Furthermore, Judge Bright found that Eighth Circuit case law supported the admission because the testimony was similar to "a qualified expert opining that an abuse victim's symptoms are consistent with sexual abuse syndrome, battered woman syndrome, battered child syndrome and other recognized syndromes."\(^{185}\)

Upon rehearing, the panel reversed itself and affirmed the district court.\(^{186}\) In his dissent to this decision, Judge Bright incorporated the analysis from his former majority opinion and further argued that the error of excluding the expert testimony

\(^{181}\) See *id.* at 567-68.

\(^{182}\) *Id.* at 569.

\(^{183}\) See *id.* at 568.


\(^{185}\) *Id.* at 573. See, e.g., United States v. Johns, 15 F.3d 740, 743 (8th Cir. 1994); United States v. Whitted, 11 F.3d 782, 785 (8th Cir. 1993); United States v. Simpson, 979 F.2d 1282, 1287-88 (8th Cir. 1992).

\(^{186}\) See United States v. Rouse, 111 F.3d 561, 565 (8th Cir. 1997).
of Dr. Underwager was far from harmless error. The majority opinion stated that the error constituted harmless error because the jury heard about Dr. Underwager's theory of faulty memory and that trial testimony corresponded with the children's "free recall." Judge Bright responded that he did not find such "free recall" in the record due to adult influence in all of the early statements made by the children. In addition, the jury would not recognize coercive influences used by the investigators and the effect of lengthy questioning on young children testifying truthfully. Furthermore, the record showed evidence of prejudice by one or more jurors against Native Americans, a fact which made the exclusion of the evidence even more problematic; the disallowed evidence might have effectively overcome such juror bias.

The Observations of Cathleen M. Mogan

Judge Bright worked very hard on the Rouse case. From the beginning, both he and I were deeply disturbed by the voluminous factual record. Originally, one child was taken from home based on possible neglect by a grandparent. After spending several months in a foster home, the foster parent reported that the child had suggested sexual abuse, and a therapist interviewed the child. On the strength of that interview alone and without further investigation, the state agency removed approximately thirteen children from two homes the next day. According to evidence, squad cars pulled up and the children were physically removed while they cried and clung to their uncles' and other adults' legs. The children were told that they could not go home until they told the "truth" about their uncles. Indeed, they did not see their mothers and families again for over six months. The record showed that social workers who interviewed the children broke just about every rule in suggestive interviewing. Some of the stories eventually told by the children were fantastical at best. Approximately nine of the thirteen children adamantly and consistently de-

187. See id. at 579-80 (Bright, J., dissenting).
188. See id. at 572 (majority opinion).
189. See id. at 579 (Bright, J., dissenting).
190. See id.
191. See id. at 580.
192. Cathleen M. Mogan served as law clerk to Judge Bright in 1995-96. She is a graduate of Notre Dame Law School and is now a lawyer with Legal Aid of Western Missouri.
nied being abused and most of the family and many members of the community who testified did not believe the children were abused. The pediatrician who originally examined the children found no evidence of sexual abuse. There were many other troubling aspects of the case, as noted in Judge Bright's original majority opinion.

Against this backdrop, Judge Bright evaluated the question of whether an expert should have been allowed to testify about the suggestive effects of interviewing a child witness. He was concerned primarily with the prejudicial effect of not educating the jury. The expert was not simply prohibited at trial from opining on the credibility of the witnesses, but also from testifying about whether the interviewing and investigative techniques employed in the case were similar to techniques employed in psychological studies which had been shown to operate suggestively on young children. To decide the case, Judge Bright delved deeply into the literature (as he often does) and became well-educated on the subject of suggestive interviewing.

In the end, Judge Bright concluded that the jury needed, and was entitled, to hear the evidence to evaluate whether the sexual abuse to which the children testified actually occurred. He found the expert's testimony to be relevant, proper, supported by Eighth Circuit precedent, and crucial to the defense under the circumstances of the case. In doing so, he explored the history and implications of Daubert, a topic dear to his heart. As always, in working with Judge Bright, his enthusiasm and intelligence energized the process and I feel confident that his involvement in the case gave it the best illumination possible.

III. CASES IN THE DEVELOPMENT OF EMPLOYMENT DISCRIMINATION LAW

The 1950s and 1960s rallied in significant social change in America. Among the most important and meaningful evolutions was the movement toward racial equality.\textsuperscript{193} The movement was fought along many fronts and affected all sectors of daily life, including education, housing, voting rights, and em-

ployment. The legal centerpiece of this great national effort was the passage of the Civil Rights Act of 1964―which included the famous anti-discrimination provisions of Title VII.

The federal courts have, of course, played an instrumental role in the implementation of Title VII, through the interpretation and enforcement of its various provisions. Judge Bright came to the bench in 1968, a time in which many of the fundamental points of Title VII had yet to be interpreted and resolved. In the years that followed, Judge Bright heard numerous cases in this area of prolific litigation and authored opinions attempting to ensure that the legislative intent behind Title VII was carried out. His two most important opinions in this area, both landmarks in the field of employment discrimination law, are *Parham v. Southwestern Bell Telephone Co.* and *Green v. McDonnell Douglas Corp.* The former remains important because it holds that statistics may speak louder than words when assessing possible racial discrimination in the employment practices of a company. The latter, affirmed in part by the Supreme Court in 1973, is of profound historical importance in the area of employment law.


195. Section 703(a) of Title VII provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


196. The legislative purpose behind Title VII was described by the Supreme Court in *Griggs v. Duke Power Co.*:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . .

. . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.


197. 433 F.2d 421 (8th Cir. 1970).

198. 463 F.2d 337 (8th Cir. 1972).

It articulates, for the first time, the necessary elements of a prima facie case of race discrimination under Title VII and explains why it is necessary to shift the burden of proof to employers once a prima facie case has been established.

A. Parham v. Southwestern Bell Telephone Co.

In February of 1967, Arthur Ray Parham, an eighteen-year-old black male, applied for a position as a stockman with the Little Rock, Arkansas office of Southwestern Bell Telephone Company. At the time, there were no vacancies for stockmen at the Little Rock office, but there were positions available for linemen. Parham indicated an interest in filling a lineman position, and his application was processed accordingly. He was interviewed and passed certain standardized tests. Following an additional interview, Parham was scheduled for a physical examination. Before his examination, however, Southwestern Bell advised him that they would not offer him employment because, after considering his school and prior work records, the company had concluded he lacked "the qualifications needed for employment."

Parham filed a complaint with the Equal Employment Opportunity Commission (EEOC) in April of 1967, charging Southwestern Bell with unlawful racial discrimination in its hiring policies. Following investigation, the EEOC found that there was reasonable cause to believe that the defendant was guilty of a discriminatory employment practice, and initiated conciliation proceedings in an attempt to resolve the dispute. In November of 1967, Southwestern Bell offered

200. See Parham, 433 F.2d at 422.
202. See id.
203. See Parham, 433 F.2d at 423.
204. See id.
205. See id. The EEOC's findings, issued in September of 1967, stated: Reasonable cause exists to believe that [Southwestern Bell] is in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 by not hiring [Parham], a Negro, solely because of a poor reference that was not really indicative of his potential at a Company job, although he fulfilled all other requirements for employment; and in addition, no Negro males are employed by [Southwestern Bell] except as service workers. Id. at 423 n.2.
206. See id. at 423. The conciliation proceedings were initiated pursuant to 42 U.S.C. § 2000e-5(a). See Parham, 433 F.2d at 423.
Parham a lineman position, which he declined because he was then enrolled in college.\textsuperscript{207} Southwestern Bell then refused to enter into a conciliatory agreement with the EEOC, arguing that Parham's refusal of employment rendered the dispute moot, because there was nothing left to conciliate.\textsuperscript{208}

Parham filed suit in federal court in April of 1968.\textsuperscript{209} At trial, the district court was presented with two issues. The first issue was whether Parham had suffered any unlawful discrimination at the hands of the defendant. The second, broader issue was whether Southwestern Bell discriminated in general against blacks as a class in its Arkansas operation.

The district court first placed the burden of proving unlawful discrimination, by a preponderance of the evidence, on the plaintiff. The district court went on to say that although discrimination may be inferred by an employer's hiring practices over time in a given area, due consideration must also be given to the number of people in the group allegedly discriminated against who want to work for the employer and are qualified to do so.\textsuperscript{210}

The district court held that Southwestern Bell had not discriminated against blacks as a class, because it found “nothing discriminatory or unusual”\textsuperscript{211} about the company's hiring procedures. The company had revised its hiring policies and issued a non-discrimination statement when the Civil Rights Act was enacted in 1964, and the court accepted the sincerity of that statement at face value.\textsuperscript{212} The court, after considering Southwestern Bell's employment statistics, concluded that the Company, in its hiring of employees may have had “a disinclination . . . to employ Negroes, and to that extent the situation was probably discriminatory.”\textsuperscript{213} However, the court went on to describe other non-discriminatory reasons that might explain

\textsuperscript{207} See Parham, 433 F.2d at 423. Parham had become interested in church and social work, and had spent the summer of 1967 working in Alaska with school aged children. In the fall, he had returned to Little Rock and enrolled in Philander Smith College where he studied for the ministry. See Parham, 1969 WL 109, at *2.

\textsuperscript{208} Parham, 1969 WL 109, at *2.

\textsuperscript{209} See id.

\textsuperscript{210} See id. at *4.

\textsuperscript{211} Id. at *5.

\textsuperscript{212} See id. at *5-6. The court did note, however, that “it was not vigorously implemented for a time and did not itself produce any significant increase in the number of Negroes employed by the company.” Id at *6.

\textsuperscript{213} Id.
Southwestern Bell's dearth of minority employees—such as "a shortage of qualified Negro applicants" and "inbred" hiring practices, in which friends or relatives of existing employees were recruited.

The district court noted that after 1966, Southwestern Bell began to actively recruit minority applicants, and that while there was "still a great disparity" in the number of non-white employees, it could not be "remedied overnight or within a short time by the company regardless of its good will and efforts in that direction." The district court held that it was not necessary or appropriate to issue an injunction against Southwestern Bell because of measures the company had already taken and proposed to take in the future to provide blacks with equal opportunities in employment. The district court further held that Southwestern Bell had not discriminated against Parham individually because poor references from the Arkansas Baptist Hospital, a former employer, provided a reasonable, independent, and non-racial basis for refusing to hire him. It noted that "the fact that an individual Negro is not employed by an employer does not necessarily show any racial discrimination."

When that result was appealed, Judge Bright wrote the opinion for the Eighth Circuit panel that heard the case. He upheld the district court's decision in part, holding that insufficient evidence existed to show that Southwestern Bell had discriminated against Parham individually. He nevertheless
reversed the district court insofar as it dealt with the charge of discrimination against blacks as a class. Reiterating the employment statistics Parham had introduced at trial, he noted that "[n]either the announcement of the Company's equal employment-opportunity policy nor the enactment of Title VII served to produce any noticeable increase in the number of blacks employed from April, 1964, to December 31, 1966." In addressing the class-based discrimination charge, Judge Bright wrote that "statistics often tell much and Courts listen." The statistical evidence introduced by Parham clearly demonstrated the Company's discriminatory employment practices from July 2, 1965, until February, 1967, notwithstanding its previously-announced policy of equal employment opportunities.

The Court of Appeals went on to hold that the statistics, which indicated that the Company hired and employed only a few black employees other than those employed as menial laborers, established as a matter of law that Southwestern Bell was engaging in racially discriminatory employment practices in violation of Title VII. The court also noted that changes made by the company in its employment practices following the suit, including its offer of employment to Parham and its stepped-up minority recruitment efforts, did not absolve the company of its previous racial discrimination against blacks as a class. In Judge Bright's view, "[w]hile an employer's more recent employment practices may bear upon the remedy sought, they do not affect the determination of whether the employer previously violated Title VII.

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220. Parham, 433 F.2d at 424. The court observed that while the company had hired only three more blacks, it had increased its work force by over 400. See id.

221. Id. at 426 (internal citations omitted) (quoting Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), aff'd per curiam, 371 U.S. 37 (1962)).

222. See id. The court also found that Southwestern Bell's referral process, which had relied primarily on referrals from existing employees, operated to discriminate against blacks as a class, because "existing white employees tended to recommend their own relatives, friends, and neighbors, who would likely be of the same race." Id. at 426-27.

223. See id. at 426.

224. Id.
Parham v. Southwestern Bell Telephone Company is among the Title VII cases most frequently cited by courts and commentators. The Parham decision, authored by Judge Bright in the late summer and early fall of 1970, and the key legal principles articulated in the decision, while occasionally criticized and often distinguished, generally have continuing legal significance.

The factual and legal context of the Parham case presented the court with serious difficulties for several reasons. First, the panel that heard the case was a sympathetic pro-Title VII audience. More significant, however, was the fact that the Arkansas federal district judge who heard the case rejected Parham's individual claim of discrimination as a matter of fact. The lower court accepted the defendant's testimony that it had conducted a good faith investigation of Parham's background and rejected his application on that basis instead of on the basis of his race. Based on the record in this regard, the Court of Appeals could not reject these findings as unsupported by the evidence or clearly erroneous. Like its testimony with regard to Parham, the defendant had explanations, again credited by the district court, for its refusal to hire every other witness who testified at trial.

Thus, in order to reverse the lower court, the Court of Appeals was required to deal with the discrimination issues on a close basis and as a matter of law. It did so in several respects. First, it accepted simple statistics as to the extremely small percentage of minorities in the work place, and most of those in menial positions, to establish past discrimination as a matter of law. Second, the court held that a recruitment system predicated upon recommendations of an overwhelmingly white
workforce was discriminatory as a matter of law.\textsuperscript{230} Third, by focusing upon the time of the rejection of Parham’s application and his EEOC complaint, the Court of Appeals could overcome the lower court’s finding that the defendant was not “now discriminating against Negroes as a class,”\textsuperscript{231} while still recognizing the “impressive and salutory” steps the defendant had taken subsequent to institution of the action.\textsuperscript{232} Fourth, the court held as a matter of law that the failure of an individual claim did not preclude granting relief to the class subject to discrimination.\textsuperscript{233} Fifth, even though the lower court denied injunctive relief, and the Court of Appeals affirmed that decision, because of past discrimination, the Court of Appeals remanded “to insure the continued implementation of the appellee’s policy of equal employment opportunities.”\textsuperscript{234} In essence, Judge Bright recognized that each of these legal conclusions was required in order to “carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination.”\textsuperscript{235}

With regard to attorney fees, the court was presented with a pragmatic dilemma. Parham’s individual case had failed, based on the trial court’s findings, and a refusal to award fees based on the class action allegation would have discouraged private plaintiffs from instituting actions. The second important factor was that all Southwestern Bell had accomplished prior to institution of the action by Parham was the adoption of a nondiscrimination policy. After the EEOC complaint was filed, however, the defendant began taking affirmative steps, including offering Parham employment.\textsuperscript{236} The court refused to recognize, as the district court had, that such action could alter the fact that prior discrimination had occurred.\textsuperscript{237} The court assumed, based on the sequence of events, that Parham’s actions served as a “catalyst” which prompted Southwestern Bell to take action to implement its self-pronounced fair employ-

\begin{itemize}
\item \textsuperscript{230} See id. at 427.
\item \textsuperscript{231} Id. at 425.
\item \textsuperscript{232} Id. at 429.
\item \textsuperscript{233} See id. at 428.
\item \textsuperscript{234} Id. at 429.
\item \textsuperscript{235} Id. at 425.
\item \textsuperscript{236} See id. at 426.
\item \textsuperscript{237} See id.
\end{itemize}
ment policies and the requisite public service entitled him to an award of reasonable attorney fees.238

Parham generally represents Judge Bright's judicial philosophy, namely his belief that the courts exist to redress grievances and to insure compliance with both the letter and the spirit of the law. It also reflects his passion to protect individual rights and to insure that fairness is achieved in the workplace. The most often quoted refrain during the summer of 1970 in the second floor chambers above a clothing store in Fargo, North Dakota (one which did not find its way into the Parham opinion due to the exercise of judicial restraint) is that "figures don't lie, but liars figure." Acceptance of that premise served as the foundation for the opinion.

B. GREEN V. MCDONNELL DOUGLAS CORP.

By the early 1970s, the legislative work had been done. Title VII was in full effect, but a crucial issue remained unresolved: what would be the test for determining discrimination in employment? That question came before the Eighth Circuit Court of Appeals in 1972. The decision in Green v. McDonnell Douglas239 was to influence the path of discrimination litigation in this country. The Supreme Court's decision to affirm240 would ultimately prove to be the leading case in the field. Adopting much of Judge Bright's reasoning, the Court articulated both the elements of a prima facie case of discrimination and explained the shifting burden of proof in such cases.241 As evidence of the case's unique importance, it may be noted that as of September 1998, over 8100 cases have cited McDonnell Douglas v. Green for its holding establishing the shifting burdens of proof in discrimination cases.242

Percy Green, the plaintiff, was a black man who had worked for McDonnell Douglas as a mechanic, beginning in 1956.243 In 1964, the company laid off several employees, including Green, during a general reduction in the company's workforce.244 Green, who had been active in the civil rights

238. Id. at 429-30.
239. 463 F.2d 337, 339 (8th Cir. 1972).
241. See id. at 802-03; see also BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 11-16 (3d ed. 1996).
243. See Green, 463 F.2d at 339.
244. See id.
movement for years, protested his layoff as racially motivated. He filed formal discrimination complaints, and participated in protests sponsored by civil rights organizations. The protests were designed to draw attention to McDonnell Douglas's allegedly discriminatory employment practices. The first protest was a "stall-in" where cars were parked on the roads leading to McDonnell Douglas, completely blocking access to the company. The second protest was a "lock-in," where chains and a lock were placed on the front door of the company to prevent McDonnell Douglas employees from leaving.

About three weeks after the lock-in, McDonnell Douglas advertised for qualified mechanics. Green applied for re-employment, but the company rejected his application, stating that its reasons for rejection were based on his participation in the illegal "stall-in" and "lock-in." Green then filed a formal complaint with the EEOC, alleging that McDonnell Douglas had refused to rehire him because of his race and his continuing involvement with the civil rights movement. The EEOC did not make a finding regarding McDonnell Douglas's alleged racial discrimination, but it did find reasonable cause to believe that the company had violated §704(a) by refusing to rehire Green due to his civil rights activities. The EEOC was unable to successfully conciliate the dispute and advised Green, in March of 1968, of his right to institute a civil action in federal court.

Green commenced the action in federal district court in April of 1968, alleging that McDonnell Douglas had discrimi-
nated against him by denying him employment because of his participation in civil rights activities and "because of his race and color."250 The district court struck the latter allegation upon a motion by McDonnell Douglas.251 The district court reasoned that it lacked jurisdiction because the EEOC had not made a finding as to the reasonable cause of this claim.252

After a trial on the remaining allegations, the district court determined that the "controlling and ultimate fact questions [were] (1) whether [Green's] misconduct is sufficient to justify [McDonnell Douglas's] refusal to rehire, and (2) whether the 'stall in' and the 'lock in' are the real reasons for defendant's refusal to rehire the plaintiff."253 The district court answered both questions affirmatively, noting that it was "clear from the record that [McDonnell Douglas's] reasons for refusing to rehire [Green] were motivated solely and simply by [Green's] participation" in the protests against the company.254 The district court then placed the "burden of proving other reasons" on the plaintiff and concluded that Green had not met that burden.255

On appeal, Green raised three contentions. First, he argued that the lower court erred by dismissing his section 1981 claim arising from his layoff.256 Second, Green argued that the

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251. *See id.*
254. *Id.* The district court stated that the evidence presented to the court failed to establish by a preponderance that McDonnell Douglas had refused to rehire Green because of racial prejudice or because of Green's "legitimate" civil rights activity. *See id.* The district court drew a distinction between what it considered lawful and unlawful activities. Since neither the "stall in" nor the "lock in" were lawful forms of civil rights activities, the district court determined they were not protected by Title VII. *See id.* at 851.
255. *Id.* at 850. The district court made the following findings and conclusions, dismissing Green's complaint with prejudice:
(a) Plaintiff has not shown that defendant was motivated by racial prejudice or because of plaintiff's legitimate civil rights activities.
(b) Plaintiff's layoff claim under 42 U.S.C. § 1981 is barred by the statute of limitations.
(c) The Civil Rights Act does not protect activity which blocks entrances into or from an employer's plant or office.
(d) Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire.
256. *See Green*, 463 F.2d at 340.
trial court erred when it determined that his participation in the stall-in and lock-in protests were not protected by Title VII.\textsuperscript{257} Third, Green contended that the district court erred when it struck the portion of his complaint alleging that McDonnell Douglas had denied him re-employment for racially discriminatory reasons.\textsuperscript{258}

Judge Bright wrote the opinion for the majority, affirming that Green's claim arising from his layoff claim under section 1981 was barred by the statute of limitations.\textsuperscript{259} The court also upheld the district court's determination that Green's participation in the "stall-in" and "lock-in" were illegal activities not protected by Title VII.\textsuperscript{260} However, the court held that the district court erred when it struck the allegations of race-based employment discrimination from Green's complaint. Judge Bright wrote:

\begin{quote}
[A] complaining party need satisfy only two jurisdictional prerequisites in order to bring suit against an employer under Title VII: first, he must file a complaint with the EEOC; and second, he must receive the statutory notice of the right to sue. . . . [A]n EEOC finding of reasonable cause is not a jurisdictional prerequisite to suit.\textsuperscript{261}
\end{quote}

Thus, the court held that Green was entitled to judicial review on all of the forms of employment discrimination alleged in his complaint to the EEOC.\textsuperscript{262} Judge Bright further noted that it was possible that Green's application for employment may have been protected by section 2000e-2(a)(1) despite his participation in activities the court had determined were not protected by section 2000e-3(a).\textsuperscript{263} The court reasoned that section 2000e-3(a) was peripheral to Title VII, and was intended to shield employees from employer retaliation. Section 2000e-2(a)(1), in contrast, "expresses Title VII's primary promise—equal employment opportunities for all."\textsuperscript{264} Thus, the court concluded:

\begin{flushright}
\textsuperscript{257} See id.
\textsuperscript{258} See id.; see also Green v. McDonnell-Douglas Corp., 299 F. Supp. 1100, 1102 (E.D. Mo. 1969) (district court's holding).
\textsuperscript{259} See Green, 463 F.2d at 340-41.
\textsuperscript{260} See id. at 341.
\textsuperscript{261} Id. at 342 (citations omitted).
\textsuperscript{262} See id.
\textsuperscript{263} See id. at 343.
\textsuperscript{264} Id.
\end{flushright}
It would be antithetical to the remedial purposes of the Act to inter-relate these sections so as to construe the Act to mean that an applicant's civil rights activities which fall outside § 2000e-3(a) may serve as a basis for employment disqualification without consideration of the separate standards called for by § 2000e-2(a)(1).265

Judge Bright, writing for the court, then considered McDonnell Douglas's position that "it ha[d] the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required."266 The court first noted that "in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination."267 The court further recognized:

Employers seldom admit racial discrimination. Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements. Consequently, a black job applicant must usually rest his case of discrimination upon proof that he possessed the requisite qualifications to fill the position which was denied him.268

The court then articulated its momentous and controversial position, defining a prima facie case of race discrimination and shifting the burden of proof to the defendant. Judge Bright, in the original opinion, wrote:

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job.269

Judge Bright concluded that since McDonnell Douglas had not shown any evidence that Green's participation in the protests would hamper his ability to perform the job, it had not

265. Id.
266. Id. at 352. This citation is to the modified opinion. Subdivision V of the original Eighth Circuit opinion was modified in response to the petition for rehearing by McDonnell Douglas. The court denied the petition in light of the modifications; see also infra note 274 and accompanying text (specifying which judges voted for or against the rehearing).
267. Green, 463 F.2d at 352. The court stated further that "[i]n enacting Title VII, Congress has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice." Id.
268. Id. (citations omitted).
269. Id. at 344.
shown that the reason given was not pretextual. The court remanded to the district court to utilize the appropriate standard to determine if McDonnell Douglas had been motivated by racial bias.270

Judge Donald Lay wrote a concurring opinion, joining in the reversal and remand, but arguing that the company’s use of Green’s participation in the “stall-in” and “lock-in” were in fact pretextual bases for his rejection.271 Judge Johnsen, the third panel member, dissented272 and wrote what Judge Bright would later call “a blistering dissent.”273 McDonnell Douglas petitioned for a rehearing en banc. The Eighth Circuit denied the rehearing in a split decision of 4-4 after Judge Bright agreed to modify the portion of the opinion denunciating the new standard.274

The key part of the modified opinion stated:

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, an applicant’s past participation in unlawful conduct directed at his prospective employer might indicate the applicant’s lack of a responsible attitude toward performing work for that employer.

. . . Green should be given the opportunity to show that these reasons offered by the Company were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision.275

Judge Bright further stated in the modified opinion that McDonnell Douglas and Green would have the opportunity, on remand, to present evidence about whether McDonnell’s decision was racially motivated.276

270. See id.
271. See id. at 345-46.
272. See id. at 346-52.
274. See Green, 463 F.2d at 352. Judges Mehaffy, Floyd R. Gibson, Stephenson, and Matthes voted for the rehearing en banc, while Judges Lay, Heaney, Bright, and Ross voted against it. See Letter from Judge M.C. Matthes to Robert Tucker, Clerk of Court, Eighth Circuit of Appeals (June 19, 1972). Judge Ross, in considering the en banc petition, made suggestions which Judge Bright incorporated to create the standard enunciated in the ultimate opinion. See Lay et al., supra note 273, at CXIV-CXV.
275. Green, 463 F.2d at 353.
276. See id.
The Supreme Court granted certiorari, affirming in part the Eighth Circuit's decision and further defining the elements of a prima facie case. The Court adopted the substance of the Eighth Circuit's holding regarding the shifting of the burden of proof. Justice Powell, writing for a unanimous Court, adopted "almost precisely those standards" Judge Bright had written in the Eighth Circuit opinion. The Supreme Court stated:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

The Supreme Court further recognized that the applicant for employment then "must be given a full and fair opportunity to demonstrate by competent evidence that the presumpively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." The Supreme Court thus remanded the case to the district court for reconsideration in accordance with these standards.

The law governing employment discrimination has developed rapidly since the McDonnell Douglas opinion in 1973. Employment discrimination law will continue to evolve as both state legislatures and Congress continue to amend and enact new laws bearing on employment protections. Examples include the Age Discrimination in Employment Act (ADEA), the Age Discrimination Act, the Americans with Disabilities

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277. See Lay et al., supra note 273, at CXV.
279. See id.
280. Id. at 805.
281. See generally LINDEMANN & GROSSMAN, supra note 241.
283. 42 U.S.C. §§ 6101-6107 (1994) (prohibits age discrimination by recipients of federal financial assistance, but generally does not apply to employ-
Act (ADA), 284 and the Civil Rights Act of 1991. 285 Plaintiffs will continue to pursue their rights to equal employment opportunities, calling on the courts to enforce and interpret the laws. As these laws develop, they will protect and preserve the rights of individuals to equal employment opportunities and keep them free from invidious discrimination. Judge Bright, through his frequent participation on panels hearing Title VII cases and his authorship of cases such as Parham and McDonnell Douglas, has left an indelible mark on the evolution of a body of law guaranteeing equal employment opportunity for all Americans.

The Observations of Maurice T. FitzMaurice 286

The McDonnell Douglas decision illustrates that, on rare occasions, hard cases make good law. By the time that Percy Green's appeal came to the Eighth Circuit, Green had established a reputation in St. Louis as a notorious civil rights demonstrator. He had offended the mainstream citizens by participating in many demonstrations and activities described in the district court's opinion. 287 From the district court to the United States Supreme Court, the judges and justices agreed that, during the stall-in, Green had engaged in illegal conduct specifically directed at McDonnell Douglas. Green's guilty plea to the charge of obstructing traffic during the stall-in left little room to argue that his conduct had not been illegal. 288

In short, given Green's acknowledged misconduct, the case presented difficult facts; so difficult that, in adopting the Eighth Circuit's revised opinion, the Justices of the Supreme Court unanimously agreed that even under the newly articulated burden of proof standard, Green should lose on remand unless he could "demonstrate that [McDonnell's] assigned rea-

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286. Maurice T. FitzMaurice served as a law clerk to Judge Bright in 1971-72. He is a graduate of Notre Dame Law School and is now practicing in Hartford, Connecticut.


288. See id. at 849.
son for refusing to re-employ was a pretext or discriminatory in its application."

Notwithstanding these difficult facts, Judge Bright recognized that the Eighth Circuit’s analysis of Title VII’s requirements in *McDonnell Douglas* would have a profound impact on future Title VII cases. As the revised opinion explains, Title VII was intended to root out historical discrimination in employment against blacks. Title VII would not have its intended effect if the courts sanctioned the use of subjective employment decisions that denied employment to qualified black applicants. Accordingly, these subjective employment decisions must be subject to judicial examination. Judge Bright’s formulation of the new burden of proof standard in *McDonnell Douglas* has provided the means for that judicial examination.

**CONCLUSION**

Over the course of his thirty years on the federal bench, Judge Bright has helped to decide more than 5,000 cases. But it is not his longevity alone that makes him an extraordinary presence in our judiciary. To each of his many cases he has brought his own unique blend of intellect, propriety, and justice. He has diligently sought freedom for the innocent. He has respectfully advocated proportionality and fairness in punishment for the guilty. He has influenced the direction of modern evidence law and made the American workplace a fairer and more welcoming place. For all these efforts, we owe him a debt of thanks.

An even greater debt is owed, however, by those individuals whose lives he has touched: the clerks who have worked for him; the attorneys and litigants who have appeared before him; the colleagues who have sat beside him; and the students who have learned from him. It is interesting to note the evident effect of his personality and humor on those who have known him. The observations of the law clerks in this article, in addition to helping us to understand the cases, radiate deep warmth for the man. The tribute of the Chief Justice, a thoughtful testament by a man who has carved out his place on the opposite philosophical pole, is proof that differences in opinion need not create personal enmity.

We believe that it is this last point that bears repeating. In a time when bitterness and venom seem to be more promi-
nent features of our society and profession than are truth, justice, and compassion, Judge Bright's life, as well as his career, should give us reason to reflect on our own. When we do so, it becomes clear why so many others hold the very Honorable Judge Myron H. Bright in such high regard and esteem.