

A Comment on the Admissibility of Forensic Evidence

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There appears to be little doubt that the law of expert evidence has an odd dichotomy. As Professor Giannelli notes in his contribution to this Symposium, courts presently are willing to admit forensic evidence, such as fingerprint evidence and hair evidence, under circumstances that would not permit the admission of similar evidence in a civil case.¹ Furthermore, the Supreme Court has failed to impose meaningful constitutional constraints on the admissibility of prosecutorial expert evidence.² The result is that defendants in civil litigation are more successful in excluding plaintiffs' expert evidence than criminal defendants are in excluding the government's expert evidence. This seems to be at odds with our fundamental presumption that courts should be more, not less, protective of criminal defendants than civil defendants.

In response to the divergent approaches to expert evidence law in criminal and civil cases, contributors to this Symposium suggest several reforms. First, Professors Friedman, Giannelli, Denbeaux, and Risinger argue that the standards for the admissibility of expert evidence the government offers ought to be heightened to at least the level required of the plaintiff in a civil case.³ Indeed, Professor Friedman would go further and require even more reliability for government expert evidence.⁴ Second, Professor Friedman suggests

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¹ Paul C. Giannelli, *The Supreme Court's "Criminal" Daubert Cases*, 33 SETON HALL L. REV. 1071, 1072-75 (2003).

² *Id.* at 1082-94.

³ *Id.* at 1110; Richard D. Friedman, *Squeezing Daubert Out of the Picture*, 33 SETON HALL L. REV. 1047 (2003); Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. __ (forthcoming in Fall 2003). *But see* Christopher Slobogin, *The Structure of Expertise in Criminal Cases*, 34 SETON HALL L. REV. __ (forthcoming in Fall 2003).

⁴ Friedman, *supra* note 3, at 1047.

much lower standards for the admissibility of defense expert testimony.⁵

Adopting such proposals, I believe, risks unintended consequences that may worsen, rather than improve, the lot of (innocent) criminal defendants. Changes to the laws of admissibility of expert evidence in criminal cases do not occur in a vacuum. Rather, they occur against a mosaic of other criminal procedural rules and actors, which may be affected by a change to a particular rule. Although it is perhaps impossible to predict the precise effects of such changes, I want to suggest two troubling possibilities.

First, lowering the standards for admitting defense expert evidence in criminal cases may well lead to more, not fewer, erroneous convictions of criminal defendants. Admitting more defense expert evidence ought to lower the conviction rate, both for guilty and innocent defendants. It is conceivable that this change in the conviction rate will give rise to other changes in criminal procedure that will ratchet the conviction rate back up. Such a change, however, may result in more *inaccurate* convictions than occurred prior to the initial change. The overall result would then seem to be negative, not positive.

Second, I want to suggest that there may be good reasons to reject the “best evidence” arguments advanced by Professors Friedman and Giannelli: courts ought to exclude forensic evidence to give the government an incentive to engage in validation research.⁶ As they both note, criminal procedure is different than civil procedure, and that includes the incentives of the actual actors. The unique considerations of criminal procedure may militate in favor of not changing the existing system based on speculation that more validation testing might be forthcoming.

I. THE EFFECT OF LOWERING THE STANDARDS FOR CRIMINAL DEFENSE EXPERTS

Criminal procedure consists of a complex set of rules and privileges that, taken together, attempt to strike an appropriate balance between protecting defendants from inaccurate convictions and allowing society to punish those who have committed crimes.⁷

⁵ See *id.*

⁶ See *id.* at 1064-65; Giannelli, *supra* note 1, at 1110; see also Dale Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

⁷ There are other possible goals for the criminal justice system, see, e.g., Charles Nesson, *The Evidence of the Event?: On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) (arguing that public acceptance may be a better goal), but

But just because the system as a whole seeks to achieve such a balance does not mean that individual rights are always set up in a way that the particular rule, viewed in isolation, strikes such a balance. Rather, the right may weigh against other rights (or the absence of other rights) to create the overall balance. The question with the unknown answer is whether altering the rules for the admissibility of forensic evidence has unanticipated consequences for this equilibrium.

As Professor Friedman notes, criminal procedure is much different than civil procedure, and despite the fact that both criminal and civil trials are held under the same rules of evidence, the actual application of those rules in civil and criminal trials can be dissimilar.⁸ Perhaps the two most fundamental differences in criminal and civil litigation are the privilege against self-incrimination and the Double Jeopardy Clause, both of which are very pro-defendant.⁹ As courts have interpreted the privilege, it ensures that the defendant need never—before or at trial—tell the government or the court his side of the story (absent a grant of immunity).¹⁰ To protect this privilege, the Supreme Court has held that the prosecutor cannot argue to the jurors, nor can the trial judge instruct them, that they can infer the defendant's guilt from his silence.¹¹ The result of this state of affairs in criminal procedure is that the person with the most relevant information about the alleged crime frequently never speaks at the trial.

The Double Jeopardy Clause also influences the shape of criminal procedure because it has been interpreted as forbidding the government from appealing from a verdict of not guilty.¹² As Professor Kate Stith has noted, however, there are collateral consequences from this right.¹³ First, there may be a "selection effect" that results from the asymmetric nature of the right to appeal in

for purposes of this Comment I will assume agreement on this point.

⁸ Friedman, *supra* note 3, at 1048-49.

⁹ U.S. CONST. Amend. V.

¹⁰ See *Lefkowitz v. Turley*, 414 U.S. 70 (1971).

¹¹ *Carter v. Kentucky*, 450 U.S. 288 (1981); see also *Griffin v. California*, 380 U.S. 609 (1965).

¹² *Kepner v. United States*, 195 U.S. 100, 126 (1904); see also *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986). Professor Peter Westen has argued that this result protects the right of the jury to nullify. See Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1018 (1980). For an elaboration of other justifications for the rule, see GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* 113-18 (1998).

¹³ See Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1 (1990).

criminal cases.¹⁴ Furthermore, because judges only have a risk of reversal from decisions against the defendant, judges may often have an incentive to err on the side of the defendant. In cases involving novel issues, though, the tendency may be the reverse: a pro-government bias. One need not agree with any of Professor Stith's conclusions to acknowledge that her premise has unsettling consequences for criminal justice. Even if one thinks that the asymmetric right to appeal generally favors the *government*, and not the defendant, the results are individual legal rules that differ from what otherwise would be normatively preferred.¹⁵

Of course, the common reaction to the distinction between civil and criminal litigation is to assume that in criminal litigation the government's job ought to be made harder, and the defendant's easier, than in civil litigation. For example, in this Symposium Professor Friedman argues for heightened admissibility standards for the prosecution and lowered admissibility standards for the defense in criminal cases. This argument is based, in part, on his assumption that there is a "shared perception that the social cost of an inaccurate judgment, given that the defendant is in fact innocent, is many times greater than the social cost of an inaccurate judgment given that the defendant is in fact guilty."¹⁶ In particular, he argues that the possibility of erroneous convictions justifies lenient admissibility of expert evidence for the defense. I believe it is far from clear that the rule ought to be tilted in the way he suggests.

I have argued extensively elsewhere that the "social cost" logic is at best incomplete and perhaps wrong.¹⁷ This conception of the weighing of social costs is most frequently raised, as Professor Friedman himself raises it, to justify the "very high" standard of proof in criminal cases: proof beyond a reasonable doubt.¹⁸ In reality,

¹⁴ *Id.* at 18-19.

¹⁵ For instance, some may argue that the rules of search and seizure may be warped in a pro-government fashion by the fact that all individuals asserting such issues on appeal have been found guilty. Given that the search and seizure rules themselves tend to exclude otherwise relevant evidence of guilt, appellate courts may be quite reluctant to overturn a seemingly accurate conviction based on a "technicality." Were appellate courts to view such cases when brought by plausibly innocent defendants, they might be more open to such claims. This is an argument I first heard made by Bill Stuntz.

¹⁶ Friedman, *supra* note 3, at 1049.

¹⁷ See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002).

¹⁸ See Friedman, *supra* note 3, at 1049. As Professor Friedman notes, it is also frequently raised to justify the preponderance of the evidence standard in civil cases. *Id.*

however, it is quite difficult to justify a high standard of proof using such logic. This is in part because, as Professor Laurence Tribe long ago noted, in addition to weighing the social costs of erroneous convictions, one must also weigh the social benefits of accurate convictions.¹⁹ Once social benefits are included in the calculation, it becomes much more difficult to decide where to set the standard of proof: very high, or perhaps not so high at all. And this is true regardless of one's overarching theory of criminal law.²⁰

Outside of the realm of the standard of proof, it is even harder to locate criminal justice rules that seek only to avoid the costs of erroneous convictions. If that was the only goal of the criminal justice system,²¹ one might expect, for instance, that the right to pre-trial discovery in criminal cases would be weighted heavily in favor of the defense. After all, granting defendants extensive discovery rights would aid their defense and maximize the chances for an acquittal, while restrictive discovery rights for prosecutors would also protect defendants. But this is not what we find. In many jurisdictions, the rights to pre-trial discovery in criminal cases are restrictive for both the government and the defense.²² So, for instance, the Federal Rules of Criminal Procedure provide for generally symmetric discovery. The government must turn over, at the request of the defendant, (a) any statements of the defendant, (b) a copy of the defendant's prior record, (c) any documents or tangible things in the possession of the government that are either "material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial, or were obtained from or belong to the defendant," (d) any reports of examinations or tests that are material to the defendant's defense or are intended to be used by the government in its case at trial, and finally (e) a written summary of any expert testimony.²³ If the defendant requests such evidence, though, he must turn over to the government (upon the government's request) evidence that falls into categories (c), (d), and

¹⁹ Laurence H. Tribe, *Trial by Mathematics: Precision & Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1378-81 (1971).

²⁰ See Lillquist, *supra* note 17, at 130-46.

²¹ Some retributivists might argue that "acquitting the innocent is a constraint on achieving the general aim of increasing the common good." Lillquist, *supra* note 17, at 141. But it seems implicit in such claims that other moral commitments to society and to victims must also be valued, and perhaps weighed against this constraint. *Id.* at 142.

²² See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 24.01 (4th ed. 2000).

²³ FED. R. CRIM. P. 16(a)(1).

(e).²⁴ Beyond this, the government is obligated under *Brady v. Maryland*²⁵ and its progeny to turn over evidence that, if it were not turned over, would create a reasonable probability that the result of the proceeding would be different.²⁶ Functionally, this merely means that if the government fails to turn over information favorable to the defense, the conviction will be vacated only if there is a reasonable probability that with the evidence, the defendant might have been acquitted. Finally, the government is obliged, under 18 U.S.C. § 3500, to turn over any statement by one of its witnesses, but not until after the conclusion of the witness's direct examination.²⁷

Notably excluded from the evidence that the government must turn over are reports written by law enforcement officers or government attorneys that do not fall into the categories mentioned above, as well as any record of the proceedings before the grand jury.²⁸ The latter restriction, when combined with § 3500's requirement that statements by government witnesses need not be turned over until after the completion of the direct examination and the fact that the federal system, at least, does *not* require the government to disclose its witnesses prior to trial²⁹ ensures that the defendant may have little information, prior to trial, as to the case the government has against him.³⁰ Of course, in practice, information about government witnesses and their statements, even in the federal system, are often made available at least a short time before trial.³¹ But even when this fact is taken into account, it remains true that, unlike civil litigation, the government's witnesses need not speak to the defense. Thus, the disclosure of information in criminal litigation is very different than civil litigation, where the defendant and the plaintiff are entitled to vast amounts of information about each other's cases long in advance of trial.³²

²⁴ FED. R. CRIM. P. 16(b)(1).

²⁵ 373 U.S. 83 (1963).

²⁶ See *United States v. Bagley*, 473 U.S. 667 (1985). For an extensive treatment of *Brady* and the cases after it, see WHITEBREAD & SLOBOGIN, *supra* note 22, at § 24.04.

²⁷ See 18 U.S.C. § 3500(b) (2000). The defendant has a similar burden. See FED. R. CRIM. P. 26.2.

²⁸ See FED. R. CRIM. P. 16(a)(2) & (3).

²⁹ There is a limited right to the witnesses list prior to trial in capital cases, but none otherwise. 18 U.S.C. § 3432 (2000).

³⁰ Except, of course, for the defendant's own statements to the government.

³¹ Ellen S. Podgor, *Criminal Discovery of Jenks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 678-92 (1999).

³² Professor John Douglass has recently argued that, in fact, discovery rights are skewed in favor of the government, once one takes into account the ability of the government to obtain information through the use of the grand jury and police

Even in states where more liberal discovery is available—for instance, in New Jersey—it remains true that the discovery rights of the government and the defense are roughly symmetrical. Thus, in New Jersey the defendant is entitled to summaries of his unrecorded statements, lists of any persons known to have relevant information and statements by such people, as well as police reports, all of which might not be available in the federal system.³³ But in return, the defendant is expected to provide all relevant documents in the defendant's possession; a list of all persons who might be called as witnesses, as well as their written statements or any memoranda summarizing those statements; and any written statements of the government's witnesses or memoranda summarizing such statements, that are in the possession of the defendant.³⁴ In a state such as New York, with more limited discovery rights (but perhaps more liberal than those in the federal system), the rights also tend to be relatively symmetric.³⁵

Of course, in many jurisdictions it is true that the defendant controls discovery rights. If the defendant does not himself request discovery, the government is not entitled to discovery.³⁶ This allocation of the triggering power is at least *ex ante* pro-defendant: where the defendant believes he will learn less from the government than the government will learn from him, he can avoid this by not requesting discovery. This triggering right, though, is offset by other involuntary disclosure requirements. In the federal system, the defendant is required to give notice of an alibi or an insanity defense.³⁷ New Jersey's requirements are even broader: the defendant must give notice of alibis and a large number of defenses, including renunciation of criminal purpose, ignorance, mistake, and insanity, among others.³⁸

Discovery rules are not the only place where the rules of criminal

officers. John C. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2147-50 (2000). Professor Douglass focuses on federal cases, but his observation would appear true even for state systems where grand juries are not used, for the government is presumably much better equipped to use its investigative agents to collect information before trial than defense counsel, at least in most cases.

³³ N.J. CT. R. 3:13-3(c) (Gann 2003).

³⁴ N.J. CT. R. 3:13-3(d) (Gann 2003).

³⁵ See N.Y. CRIM. P. L. §§ 240.20, 240.30 & 240.45.

³⁶ See, e.g., FED. R. CRIM. P. 16(b)(1) (allowing government discovery only after the defendant has requested similar discovery); N.J. CT. R. 3:13-3(b) (permitting defendant to waive discovery from government and thereby avoid disclosure obligations).

³⁷ FED. R. CRIM. P. 12.1 & 12.2.

³⁸ N.J. CT. R. 3:12-1 & 3:12-2 (Gann 2003).

procedure take a different form than they would if we assumed that the rules should generally be designed to avoid erroneous convictions with little regard to erroneous acquittals. For instance, in the realm of evidence, one might be surprised to see Federal Rules of Evidence 413 and 414, which admit evidence of prior sexual misconduct. After all, the general approach of the federal rules, at least in theory, is that uncharged misconduct evidence (uncharged in the sense that it is not charged in *this particular case*) is generally inadmissible.³⁹ Of course, in practice, such evidence is often admissible, either because it is admissible for “other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,”⁴⁰ or because it is admitted to impeach a defendant who testifies.⁴¹ Nonetheless, the clear import of Rules 413 and 414 is to increase the admissibility of such evidence in sexual assault and child molestation cases. Couple this with Rule 412, which is designed to exclude evidence of the victim’s prior acts, and we have a regime that can hardly be called pro-defendant.

What I hope these examples illustrate is that particular rules in criminal litigation are often far less protective of defendants than we might predict if the only goal of criminal justice was to avoid inaccurate convictions. For that very reason, many would argue that these rules, as well as others, are normatively unsound. I take away a different conclusion, though. Many of the rules of criminal procedure, in particular the privilege against self-incrimination and the double jeopardy rules, already heavily favor the defendant. In fact, it may well be that such rights and privileges are too skewed in the favor of the defendant.⁴² Once we recall this background, it may be far more easy to understand why so many other rights in criminal practice and procedure do not favor defendants, at least to the extent that some would advocate.⁴³

What I have said so far suggests that the rules governing the prosecution and defense of criminal cases tend to strike a balance between the criminal justice system’s need for accuracy and its need

³⁹ See FED. R. EVID. 404(a).

⁴⁰ FED. R. EVID. 404(b).

⁴¹ FED. R. EVID. 609.

⁴² For arguments pro and con as to the privilege against self-incrimination, see Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGIN AND DEVELOPMENT* 181, 182-83 & nn. 9 & 10 (1997).

⁴³ This is similar to Bill Stuntz’s observation that the rules of criminal procedure themselves often influence the substantive criminal law. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEG. ISSUES 1, 7-19 (1996).

for convictions. If this is true, the rule proposed by Professor Friedman—liberal admissibility of defense expert testimony—has the potential to upset that balance. This is because such a standard is likely to lower the number of convictions, but, I think, unlikely to do so in a way that enhances accuracy. Imagine for the moment that at the present time, the allocation of verdicts is as set forth in Table 1:

TABLE 1

	Guilty Defendants	Not Guilty Defendants
Convicted	90	1
Acquitted	10	9

In this model, we have ninety defendants who are accurately convicted and ten who are erroneously acquitted, along with one defendant who is inaccurately convicted and nine who are correctly acquitted.⁴⁴ The precise numbers do not matter; what is important is that we recognize that at present there are defendants who fit into all four categories.

What is the effect of a rule of liberal admission of defense expert evidence? The overall number of convictions should go down (there is little reason to think that it will rise, and perhaps even less reason to think that the effect is neutral). Furthermore, there is little reason to believe that such a change will *improve* accuracy overall. Assuming that at present the number of erroneous convictions is relatively low, any reduction in the conviction rate should actually *decrease* accuracy. For instance, we might imagine that the result of such a change in the rules of admissibility could result in the following distribution:

⁴⁴ The actual allocation of guilty and innocent defendants at trial is difficult to know. The conviction rate of approximately 80% in federal cases suggests, but by no means proves, that about four times as many factually guilty defendants are tried than factually innocent defendants. Lillquist, *supra* note 17, at 101 n.35. The numbers in the table assume a slightly higher number of factually guilty defendants, but a roughly equivalent conviction rate (82.7%). This reflects an assumption that there are presently more erroneous acquittals than convictions, something else we cannot *know* to be true.

TABLE 2

	Guilty Defendants	Not Guilty Defendants
Convicted	75	0
Acquitted	25	10

The net result is a lowering in the number of guilty defendants who are convicted. First, it is not clear that, as a social matter, this is a justifiable trade-off. One common assertion is that it is better that ten guilty persons go free than one innocent person be convicted.⁴⁵ But in the above example, fifteen guilty persons are going free to spare one innocent person; is that a trade-off we would accept? At best, the commentators would appear to disagree.⁴⁶ Of course, the numbers I have given are completely speculative. In reality, the ratio of guilty to innocent persons acquitted as a result of this change could either be below 10:1 or higher than 10:1. But the fact that we do not know the answer to this question should give us pause before concluding that this is a desirable change.

Second, even if this turns out to be a good trade-off, the resulting overall level of conviction may be socially undesirable.⁴⁷ If so, then the criminal justice system should react to Professor Friedman's change with another rule that will ratchet the number of accurate convictions back up to ninety. What we cannot know in advance is how this rule change will affect the number of not guilty defendants who are convicted. While we can hope that the number stays at zero, it is also possible that it goes up to two or three. Thus, we might end up with the following distribution:

⁴⁵ See Lillquist, *supra* note 17, at 105.

⁴⁶ See *id.*

⁴⁷ Of course, this assumes that a goal of the system is to obtain some number of convictions. Certainly deterrence theorists would accept this, and consequentialists more generally. Even many retributivists would probably accept this as a goal, although not the only goal, and perhaps not as a goal to be valued in some circumstances.

It does not follow from this premise, however, "that most defendants are guilty." Friedman, *supra* note 3, at 1050. In fairness, I am not sure if Professor Friedman directs this response at Professor Park or myself, but nothing in my observations here presuppose the guilt of the defendant. My assumption simply is that some defendants are guilty, some defendants are not guilty, and that at least one goal of the criminal justice system should be to distinguish between the two groups.

TABLE 3

	Guilty Defendants	Not Guilty Defendants
Convicted	90	3
Acquitted	10	7

If so, the net effect of Professor Friedman's proposal is to increase, not decrease, the number of innocent defendants who will be convicted.

Of course, I do not *know* that any of these things I have suggested will come to pass. But I think they are just as plausible as assuming that the overall effect will be positive. Against that background, it seems to me unwise to liberalize the admissibility of defense expert testimony.

II. THE LIMITS OF BEST EVIDENCE

The other suggestion made by Professors Friedman and Giannelli is that the admission of some government expert evidence ought to be made more difficult on a "best evidence" principle: the evidence should be excluded to ensure that the government will undertake the proper validation testing of the evidence.⁴⁸ As applied to evidence that is presently admissible, I believe this suggestion is problematic.⁴⁹

One difficulty with such an argument is that it confuses and conflates the incentives of the government and those of the government's agents: prosecutors and, to a lesser extent here, the police. As commentators have noted, the incentives of both these groups do not always neatly match those of the government more generally.⁵⁰ In particular, prosecutors' goals may be a combination of a desire to reduce their own workloads, balanced by an ambition to further their own careers.⁵¹ Their incentives to seek validation of forensic evidence may be weak compared to their incentives to simply shift resources to prosecuting other cases. After all, seeking validation testing would require the exercise of time and resources

⁴⁸ Friedman, *supra* note 3, at 1064-65; Giannelli, *supra* note 1, at 1110.

⁴⁹ I take no position on whether such a rule might make sense for forensic evidence that has not yet been ruled admissible.

⁵⁰ See Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

⁵¹ See Stuntz, *supra* note 50, at 535, 543.

for an uncertain outcome, whereas simply altering their caseloads would require much less risk. This does not mean no validation testing would occur, just that low-level prosecutors are not likely to be the parties pushing for it to occur.

To understand why this may be so, consider first the cases in which the government will generally seek to admit forensic evidence. Not all crimes are investigated in the same way. So, for instance, the government places relatively little effort into apprehending the perpetrators of most property crimes, but far more resources into apprehending murderers. As a result, there are far higher clearance rates in homicide cases than in property crime cases.⁵² It would seem to follow naturally that forensic evidence should be no different than the other aspects of criminal investigation: much less resources ought to be invested in low-level cases. The result is that we would imagine that such evidence plays a much larger role in murder and sexual assault cases than it does in burglary cases.⁵³

In addition, as Professor Slobogin notes, the type of forensic evidence that the government typically seeks to admit in a criminal case focuses on identity: tying the defendant to the crime.⁵⁴ Thus, forensic evidence is typically used in serious criminal cases where identity of the perpetrator is a contested issue. Excluding such forensic evidence on a “best evidence” principle may give prosecutors an incentive to move resources in other directions: toward cases without identity issues or to less serious crimes.⁵⁵ This means that the greater effect of the exclusion of forensic evidence would be to upset the selection of cases for prosecution, rather than increasing validation testing.

Of course, top-level prosecutors—attorneys-general and district attorneys—may have a more direct incentive to be concerned by the exclusion of forensic evidence than their subordinates. If low-level prosecutors are more likely to avoid cases involving forensic evidence in the face of longer odds in winning convictions, the result should be lower conviction rates in such cases. Furthermore, the very cases in which this will occur are those that are the most likely to be salient

⁵² SAMUEL WALKER, *THE POLICE IN AMERICA: AN INTRODUCTION* 132-34 (3d ed. 1999).

⁵³ So, for instance, one study reported that in 1985, fingerprint evidence led to an arrest in only 300 out of 126,028 burglary cases. *Id.* at 139.

⁵⁴ Slobogin, *supra* note 3.

⁵⁵ In state systems, the second move might be less likely, because prosecutors there are expected to prosecute such crimes. But in the federal system it is a plausible outcome, because prosecutors there generally have more freedom to pick cases. *See generally* Stuntz, *supra* note 50, at 570.

to the public—murder and rape cases—because those are the cases in which such evidence is used.⁵⁶ The top-level prosecutor, particularly if she is elected, might have good reason to push for changes that would make such forensic evidence admissible, so that the conviction rate will rise.

The difficulty is that top-level prosecutors should have (at least) two possible strategies they could pursue to achieve this goal. First, they might request that the legislature fund additional validation research. Alternatively, though, they could simply lobby for changes in state evidence law that might make such evidence admissible, despite the decision of state courts. There is evidence to suggest that the second path is the more likely (but far less desirable) one.

In the field of evidence, the basic premise is that judges decide the admissibility of evidence.⁵⁷ If the judiciary had the sole power to decide the admissibility of forensic evidence, then top-level prosecutors might seek the first path (validation testing) because there would be little hope that the second path (rule alteration) would pay off. After all, lobbying for rule changes to the same judges who made the rule in the first place does not seem too likely to succeed. In practice, however, the authority for setting the rules of evidence in the first place is often divided between the judiciary and the legislature. For instance, under present federal law, the Supreme Court and the Judicial Conference have the responsibility for prescribing the rules of evidence and procedure in the federal system.⁵⁸ But that power is limited—at least practically—by a congressional veto: the Supreme Court must submit such proposed rules to Congress, and Congress can, and has, taken steps to block the implementation of certain rules and to even impose alternative rules.⁵⁹ Perhaps the most prominent example involved the promulgation of the Federal Rules of Evidence. After the Supreme Court promulgated the original draft of the rules in 1972 and submitted them to Congress, Article V of those rules (the evidentiary privilege rules) were rejected in their entirety, and Congress subsequently enacted the other Rules after rewriting many of them.⁶⁰

⁵⁶ See *supra* note 53 and accompanying text.

⁵⁷ FED R. EVID. 104(a).

⁵⁸ 28 U.S.C. §§ 2072 & 2073 (2000); see also Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking”*, 53 HASTINGS L.J. 843, 846 (2002).

⁵⁹ On the requirement to submit proposed rules to Congress, see 28 U.S.C. § 2074 (2000).

⁶⁰ See Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 88 (2002); see also Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 772-77 (2002); Scallen, *supra* note

At the state level, the authority to decide the rules of evidence is also mixed. In some jurisdictions, the rules of evidence are code-based: passed by state legislatures and signed into law by the Governor.⁶¹ In other states, the rules of evidence are still primarily judge-made, either through judicially promulgated rules of evidence or through common-law decision-making.⁶² Even in places where judges retain primary authority for setting forth the rules of evidence, the legislature may have the power to enact specific rules.⁶³

Recognizing that the judiciary does not unilaterally decide the rules of evidence, but rather is either part of a cooperative process with the legislature, or even simply the recipient of legislatively constructed rules, raises the real possibility that top-level prosecutors may prefer to lobby the legislature for rule changes rather than for funds for validation testing of forensic evidence. This is because the payoff from a rule change is both immediate and definitely positive, whereas the payoff from validation testing is both remote and uncertain. So, for instance, legislation mandating the admissibility of fingerprint evidence would instantaneously make such evidence admissible. Validation testing of fingerprint evidence, however, would make such evidence admissible only after a lengthy period of time for study, and even then there would be no guarantee that the evidence would be, in fact, validated. With these very different payoffs, it would seem that prosecutors have a strong incentive to pick the rule-change strategy. Thus, it is not surprising that even today, when defendants are increasingly mounting attacks on the admissibility of forensic evidence, the Department of Justice has remained slow to fund validation testing.⁶⁴

58, at 854. On the history of the rules as a whole, see 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE: EVIDENCE* § 5006, pp. 106-09 (1977). For a contemporaneous view, see James Wm. Moore & Helen I. Bendix, *Congress, Evidence and Rulemaking*, 84 *YALE L.J.* 9 (1974). For a broader history of the evidence rules, see Scallen, *supra* note 58, at 845-56.

⁶¹ In 1984, Professor Margaret Berger reported that at least eleven states had passed evidentiary statutes. Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 *HOFSTRA L. REV.* 255, 256 nn. 4, 7 & 8 (1984).

⁶² EDWARD J. IMWINKELRIED, *THE NEW WIGMORE – A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 4.3.1 (2002).

⁶³ There appear to be some jurisdictions in which the judiciary alone, as a result of state constitutional law, has the power to determine at least some rules of evidence. *See, e.g.*, *Commonwealth v. Reneer*, 734 S.W.2d 794, 796 (Ky. 1987); *Winberry v. Salisbury*, 74 A.2d 406, 408-09 (N.J. 1950). Even in these jurisdictions, though, the judiciary may defer to legislative decisions in some circumstances. *See, e.g.*, *Commonwealth v. Reneer*, 724 S.W.2d 794, 796 (Ky. 1987); *Passaic County Prob. Officers' Ass'n v. County of Passaic*, 374 A.2d 449 (N.J. 1977).

⁶⁴ Margaret Berger, Remarks at the Seton Hall Law Review Symposium, Expert

Furthermore, past experience suggests that legislatures will be willing to respond to such lobbying. For instance, the privilege rules proposed for the Federal Rules of Evidence were removed as the result of heavy post-Watergate lobbying.⁶⁵ The history of the federal sexual crimes rules is similarly instructive. Rules 413, 414, and 415 were created by Congress as part of the Violent Crime Control and Law Enforcement Act of 1994.⁶⁶ Under that act, the Judicial Conference was to submit to Congress within 150 days of the passage of the act a report responding to the new rules. In the event that the Judicial Council's recommendations differed from the rules as set forth in the act, the act's rules were to become effective 150 days after the report, unless, of course, Congress took other action. As it happened, the Judicial Conference urged rejection and/or modification of the rules. In particular, the Judicial Conference believed that the rules would lead to the admission of unfairly prejudicial evidence and would result in "mini-trials" on the alleged prior acts.⁶⁷ Congress, though, took no action (probably because the rules themselves were politically popular)⁶⁸, which resulted in the implementation of the rules. I am not suggesting that the rules were normatively justifiable. Certainly the weight of academic commentary and the near-unanimous opinion of three separate Advisory Committees (Evidence, Civil Rules, and Criminal Rules) suggest that they were not.⁶⁹ But the politically responsive branches—Congress and the Executive (here represented by the Department of Justice)—supported the rules.⁷⁰ As with the history of Article V, this story implies that Congress—and probably other legislatures as well—will be sensitive to complaints of evidence law made by law enforcement groups.

Imagine for a moment, that Judge Pollak had stuck to his

Admissibility: Keeping Gates, Goals and Promises (February 21, 2003).

⁶⁵ See *supra* text accompanying notes 58-63; see also Scallen, *supra* note 58, at 854.

⁶⁶ Scallen, *supra* note 58, at 855-56.

⁶⁷ Report Submitted to Congress in Accordance with Section 320935 of the Violent Crime Control and Law Enforcement Act of 1994, reproduced in FED. R. EVID. 413, historical notes (West 2002).

⁶⁸ See Paul C. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending to the Future?*, 53 HASTINGS L.J. 817, 841 n.59 (2002) (noting that the rules were enacted "to give the appearance that those who supported [them] were tough[] on the kind of crimes of concern to voters").

⁶⁹ But see Roger Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1995) (supporting rules).

⁷⁰ See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994).

decision in *United States v. Llera Plaza*,⁷¹ limiting the testimony of the government's fingerprint examiners and forbidding them from opining that a particular print is from a particular person.⁷² Even if other federal judges did not follow the decision, or if it was eventually overturned on appeal, it seems to me at least possible, if not likely, that Congress would have quickly passed legislation entitled something like the Latent Fingerprint Admissibility Act of 2002. The Justice Department strongly opposed the initial decision in *Llera Plaza* and would no doubt have lobbied on behalf of such a bill. Given the recent success of the Justice Department in achieving other changes to criminal procedure rules, most prominently in the USA PATRIOT Act, I believe there is good reason to assume such an act would pass. More importantly, such an act might well be worse than what we have now.

Furthermore, there is good reason to suspect that, at least at the present time, calls to eliminate many other types of forensic evidence might meet a similar fate. Although I am not currently aware of any data on the issue—and thus my speculation is no doubt inadmissible under *Daubert*—I believe that there are good anecdotal reasons to speculate that society as a whole feels comfortable with much forensic evidence. After all, two of the most popular current shows on television are *C.S.I.* and *C.S.I.: Miami*, which both rely heavily for plot development on some of the very types of forensic evidence that this Symposium finds objectionable. Against this background, it is quite plausible to believe that Congress (and state legislatures) would have little problem overruling other decisions excluding forensic evidence that is presently admissible.

CONCLUSION

There appears to be little debate that the existing law of expert admissibility in criminal cases is flawed. The real question is how to fix it. I suspect that at least some judicially-created solutions are likely to fail, because their negative consequences are likely to outweigh their benefits. That does not mean, though, that reform is not possible, particularly if carefully crafted. To achieve this goal, I believe that close attention must be paid to the likely consequences of such actions. The best way to avoid legislative responses to decisions to exclude forensic evidence may be to obtain popular opinion in favor of such changes. Thus, the proper parties to whom such

⁷¹ 2002 WL 27305 (E.D. Pa. Jan. 7, 2002), *vacated*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).

⁷² *Id.* at *18.

arguments should be first made are not practitioners, academics, or judges, but rather the public at large. Publicizing the ineffective nature of a type of forensic evidence will have far more impact on its admissibility than legal discussion about the proper way to apply *Daubert*, particularly if alterations to the existing structure of forensic evidence admissibility have the unintended consequences I have suggested.

Therefore, I believe it is no coincidence that the one place where forensic evidence has been successfully challenged, handwriting evidence, is the same place where Professors Denbeaux, Risinger and Sacks have created “an academic assembly of all the data.”⁷³ Only by undertaking similar assemblies in other fields are challenges to admissibility likely to be successful.

⁷³ D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 138 (2000).