The Supreme Court’s “Criminal” Daubert Cases

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To put the point more bluntly: if the state does not test the scientific evidence with which it seeks to convict defendants, it should forfeit the right to use it.¹

I. INTRODUCTION

In the process of establishing a new standard for determining the admissibility of scientific evidence under Federal Rule 702, the Supreme Court in Daubert v. Merrell Dow Pharmaceutical, Inc.² handed down what is perhaps the most important evidence case ever decided.³ The Court followed with General Electric Co. v. Joiner⁴ and Kumho Tire Co. v. Carmichael⁵ to make up what is now known as the Daubert trilogy.

One unexpected development has been Daubert’s disparate impact in civil and criminal cases. The notion that expert testimony in criminal and civil cases should be treated differently does not seem, at least to me, to be a remarkable proposition. The issues are very different. Instead of worrying about the “hired gun” phenomenon as in civil litigation,⁶ the criminal defense lawyer often lacks money for any “gun.”⁷ Moreover, the causation issues that loom so large in toxic tort cases are seldom an issue in criminal prosecutions,⁸ and the termination of the litigation before trial

¹ MIKE REDMAYNE, EXPERT EVIDENCE AND CRIMINAL JUSTICE 139 (2001).
³ See United States v. Alatorre, 222 F.3d 1098, 1100 (9th Cir. 2000) (“Daubert has become ubiquitous in federal trial courts.”); see also United States v. Barnette, 211 F.3d 803, 815 (4th Cir. 2000) (“In Daubert, the Supreme Court radically changed the standard for admissibility of scientific testimony.”).
⁶ See In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1234 (5th Cir. 1986) (“[E]xperts whose opinions are available to the highest bidder have no place testifying in a court of law.”); see also Chaulk v. Volkswagen of Am., Inc., 808 F.2d 639, 644 (7th Cir. 1986) (“There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called ‘experts.”’). For an insightful discussion of the “hired gun” problem, see Samuel R. Gross, Expert Evidence, 1991 Wis. L. Rev. 1113.
⁷ See Peter J. Neufeld & Neville Colman, When Science Takes the Witness Stand, 262 Sci. Am. 46, 50 (1990) (“In DNA cases in Oklahoma and Alabama, . . . the defense did not retain any experts, because the presiding judge had refused to authorize funds.”). See generally 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE §§ 4-1 to 4-5 (3d ed. 1999) (discussing the right to defense experts).
⁸ Causation is an issue with some crimes, such as homicide, and sometimes the medical cause of death is an issue—for example, in a “shaken baby” syndrome case. See People v. Cauley, 32 P.3d 602 (Colo. Ct. App. 2001).
through summary judgment is not a concern.\textsuperscript{9}

What is remarkable about the civil-criminal dichotomy is that civil litigants have far greater discovery rights than criminal practitioners even though it is well accepted that pretrial disclosure is critical.\textsuperscript{10} Not only are discovery depositions and interrogatories unavailable, but a defendant in a death penalty case involving DNA can be precluded from seeing an expert’s lab notes before trial.\textsuperscript{11}

What is also remarkable is that stricter admissibility standards would apply in civil cases than in criminal cases.\textsuperscript{12} It is difficult to imagine a federal court in a toxic tort case that would allow a plaintiff’s attorney to admit evidence that passed for “science” in a recent fingerprint case. In \textit{United States v. Harvard},\textsuperscript{13} the court accepted testimony by a FBI expert that: (1) there is a “zero error” rate in fingerprint examinations,\textsuperscript{14} (2) peer review under \textit{Daubert} means a second examiner looks at the prints,\textsuperscript{15} and (3) adversarial

\begin{footnotesize}
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  \item \textsuperscript{9} See Lloyd Dixon & Brian Gill, Rand Inst. of Civ. Justice, Changes in the Standards of Admitting Expert Evidence in Federal Civil Cases Since the \textit{Daubert} Decision xvi (2002) (“Challenges also increasingly resulted in summary judgment.”).
  \item \textsuperscript{10} The ABA Standards note that the “need for full and fair disclosure is especially apparent with respect to scientific proof and the testimony of experts. This sort of evidence is practically impossible for the adversary to test or rebut at trial without an advance opportunity to examine it closely.” Commentary, ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 66 (Approved Draft 1970); see also Paul C. Giannelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 791 (1991).
  \item \textsuperscript{11} Spencer v. Commonwealth, 384 S.E.2d 785, 791 (Va. 1989); see also Murderer Put to Death in Virginia: First U.S. Execution Based on DNA Tests, N.Y. Times, Apr. 28, 1994, at A19 (reporting Spencer’s execution).
  \item \textsuperscript{12} As one commentator has noted, “the heightened standards of dependability imposed on expertise proffered in civil cases has continued to expand, but . . . expertise proffered by the prosecution in criminal cases has been largely insulated from any change in pre-\textit{Daubert} standards or approach.” D. Michael Risinger, Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?, 64 ALR L. Rev. 99 (2000). This issue is not new. The first Bush Administration, by executive order, imposed high standards for the admissibility of expert testimony in civil cases, while federal prosecutors were permitted to argue for lower standards in DNA cases. See Paul C. Giannelli, “Junk Science”: The Criminal Cases, 84 J. CRIM. L. & CRIMINOLOGY 105 (1993).
  \item \textsuperscript{13} 117 F. Supp. 2d 848, 855 (S.D. Ind. 2000) (stating that fingerprint identification satisfies standards announced in \textit{Daubert} and \textit{Kumho}, the court described this expertise as “the very archetype of reliable expert testimony under those standards”), aff'd, 260 F.3d 597 (7th Cir. 2001).
  \item \textsuperscript{14} Id. at 854 (“The government claims the error rate for the method is zero.”). There is an important distinction between not knowing the error rate because systematic testing has not been conducted and a zero error rate.
  \item \textsuperscript{15} The court noted that a second qualified fingerprint examiner verified the conclusion and thus there was “review” by a “peer.” Id. at 854 (“In fact, peer review is the standard operating procedure among latent print examiners.”). In contrast, peer review under \textit{Daubert} means the publication of data in “refereed scientific
testing is the equivalent of scientific testing. How can federal courts demand stringent epidemiological studies in toxic tort cases and then accept such vacuous reasoning in criminal cases?

Other examples are not hard to find. Many of the wrongful conviction cases involved hair comparison evidence. In *Williamson v. Reynolds*, a district court correctly noted that the hair expert’s testimony lacked any scientific support. Nevertheless, the Tenth Circuit reversed on this issue. Williamson was later exonerated by DNA profiling, and the hair evidence was shown to be “patently

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16 *Havward* found that latent print identification had been “tested” for nearly 100 years in adversarial proceedings with the highest possible stakes. In contrast, *Daubert-Kumho requires scientific testing*. The *Daubert Court* wrote:

> [I]n order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., “good grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to “scientific knowledge” establishes a standard of evidentiary reliability.


17 See *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002) (“The district court, after finding that the plaintiffs’ evidence was unreliable, noted that certain types of other evidence may have been considered reliable, including peer-reviewed epidemiological literature, a predictable chemical mechanism, general acceptance in learned treatises, or a very large number of case reports.”); see also Jerome P. Kassierer & Joe S. Cecil, *Inconsistency in Evidentiary Standards for Medical Testimony: Disorder in the Courts*, 288 JAMA 1382, 1382 (2002) (“In some instances, judges have excluded medical testimony on cause-and-effect relationships unless it is based on published, peer-reviewed, epidemiologically sound studies, even though practitioners rely on other evidence of causality in making clinical decisions, when such studies are not available.”).

18 904 F. Supp. 1529, 1554 (E.D. Okla. 1995), *rev’d on this issue*, 110 F.3d 1508, 1523 (10th Cir. 1997).

19 The district court had “been unsuccessful in its attempts to locate any indication that expert hair comparison testimony meets any of the requirements of *Daubert*.” *Williamson*, 904 F. Supp. at 1558. The court further observed: “Although the hair expert may have followed procedures accepted in the community of hair experts, the human hair comparison results in this case were, nonetheless, scientifically unreliable.” *Id.*

20 110 F.3d 1508, 1525 (10th Cir. 1997) (ruling that the due process, not *Daubert*, standard applies in habeas proceedings).
unreliable." In *Coleman v. Commonwealth*, another expert testified that the chances that a crime scene hair sample could come from someone other than the defendant was “possible, but unlikely.” Once again, this statement lacks any empirical basis. After Coleman’s execution, serious questions concerning his guilt were raised. The same hair expert testified in the same manner at Edward Honeker’s trial, and Honeker was later exonerated by DNA. Despite all this, later cases continued to admit this suspect evidence. Indeed, one court judicially noticed the reliability of hair evidence, implicitly finding this fact indisputable. There is an embarrassing lack of empirical validation for this “well-accepted” technique. In a recent

21 Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* 146 (2000).
24 See id. at 75. The trial judge was later interviewed about the case: Years later, in response to the author’s question about what evidence in the case he thought had the most powerful impact on the jury, Judge Persin said it was Elmer Gist’s testimony about the comparison of the pubic hairs. It was, Judge Persin observed, the first and only testimony that seemed to tie Roger Coleman to the murder.
26 E.g., State v. Fukusaku, 946 P.2d 32, 44 (Haw. 1997) (“Because the scientific principles and procedures underlying hair and fiber evidence are well-established and of proven reliability, the evidence in the present case can be treated as ‘technical knowledge.’ Thus, an independent reliability determination was unnecessary.”); McGrew v. State, 682 N.E.2d 1289, 1292 (Ind. 1997) (observing that hair comparison is more a matter of observation by persons with specialized knowledge than a matter of scientific principles); McCarty v. State, 904 P.2d 110, 125 (Okla. Crim. App. 1995) (admitting hair evidence).
27 See Johnson v. Commonwealth, 12 S.W.3d 258, 262 (Ky. 1999).
28 See Fed. R. Evid. 201(b) (limiting judicial notice to facts that are not subject to reasonable dispute); see also Daubert, 509 U.S. at 593 n.11 (“[T]heories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed. Rule Evid. 201.”).
29 See Paul C. Giannelli & Emmie West, *Hair Comparison Evidence*, 37 CRIM. L. BULL. 514 (2001) (discussing the DNA exoneration cases in which hair evidence was
FBI study comparing the results of microscopic hair examinations and mitochondrial DNA analysis, the former were wrong 10% of the time—and this was when the conclusion was limited to an “association” (“consistent with” testimony).³⁰

_Daubert_ is now a decade old, and its development and impact is the subject of this symposium. Part II of this article examines the transformation of _Daubert_ from a case that most courts and commentators believed lowered the barriers to the admissibility of scientific evidence to one that a decade later the Court itself would describe as establishing an “exacting” standard.³¹ Part III reviews what I call the Supreme Court’s “criminal” _Daubert_ cases. Although the _Daubert_ trilogy all involve civil litigation, the Court decided several cases, both before and after _Daubert_, that involved expert testimony in criminal litigation. All these cases involved constitutional issues and hence are not directly comparable to _Daubert_, which involved the interpretation of a federal statute.³² Moreover, these cases all turn on different constitutional rights: cruel and unusual punishment,³³ the right of confrontation,³⁴ the right to preserve defense evidence,³⁵ and the right to present a defense.³⁶ Nevertheless, all involved the use of expert testimony, and all raised reliability issues in one form or another, and in this respect they share a common theme with _Daubert_. One additional point: the defendant lost in each case, and I will argue that in each the Court missed an important opportunity to impose the kind of “exacting” standards in criminal prosecutions that are now required in civil litigation.³⁷

³⁰ Max M. Houch & Bruce Budowle, _Correlation of Microscopic and Mitochondrial DNA Hair Comparisons_, 47 J. FORENSIC SCI. 964, 966 (2002) (“Of the 80 hairs that were microscopically associated, nine comparisons were excluded by mtDNA analysis.”).


³² _Daubert_, 509 U.S. at 587 (“We interpret the legislatively enacted Federal Rules of Evidence as we would any statute.”).


³⁴ Delaware v. Fensterer, 474 U.S. 15 (1985); see infra text accompanying notes 71-89.


³⁶ United States v. Scheffer, 523 U.S. 303 (1998); see infra text accompanying notes 127-46.

³⁷ Compare Dixon & Gill, supra note 9, at xiii (“The rise that took place in both the proportion of evidence found unreliable and the proportion of challenged
Part IV assesses *Daubert*'s effect in criminal cases. Although its impact is far less than in civil cases, it is still significant. Moreover, *Daubert* was only one of several developments that influenced the use of expert testimony in criminal prosecutions during the last decade. As described in Part V, DNA litigation and scientific evidence abuse cases have also played a part. Part VI sets forth recommendations for improving forensic science.

II. **DAUBERT’S TRANSFORMATION**

A. Daubert v. Merrell Dow Pharmaceutical, Inc.

In many ways, *Daubert* was a difficult opinion to interpret even at the time it was handed down. As one commentary observed, “[a]stonishingly, all parties expressed satisfaction with the *Daubert* decision—the lawyers for the plaintiff and defense, and scientists who wrote amicus briefs.”

This alone should have raised red flags. In particular, some initial reviews questioned whether the opinion provided much guidance. “The catch,” as one commentator observed, “is that no one is exactly sure what the new standard is.”

A central question was whether the Supreme Court intended its new reliability standard to be more permissive than the *Frye* “general acceptance” test that it had rejected. There is much language in the *Daubert* opinion that pointed in this direction. For example, the Court commented:

> Given the Rules’ permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “general acceptance,” the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made “general acceptance” the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.

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41 *Daubert*, 509 U.S. at 589.
Other passages noted that “[t]he Rule’s basic standard of relevance . . . is a liberal one” and “a rigid ‘general acceptance’ requirement would be at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to ‘opinion’ testimony.”

Not surprisingly, a number of courts construed Daubert as lowering the admissibility bar. In Borawick v. Shay, the Second Circuit wrote that “by loosening the strictures on scientific evidence set by Frye, Daubert reinforces the idea that there should be a presumption of admissibility of evidence.” Similarly, in United States v. Bonds, the Sixth Circuit explained “that the DNA testimony easily meets the more liberal test set out by the Supreme Court in Daubert.” The polygraph cases also underscore this view. In United States v. Posado, the Fifth Circuit stated that “the rationale underlying this circuit’s per se rule against admitting polygraph evidence did not survive Daubert.” Other circuits followed, and in this altered climate, some district courts admitted polygraph results.

Furthermore, the methodology-conclusion distinction that was so prominent in Daubert further supported a lax standard of admissibility. The Court wrote: “The focus, of course, must be solely on principles and methodology, not on the conclusions that they

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42 Id. at 587.
43 Id. at 588 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)). There is, of course, language in Daubert that points toward a more exacting standard. See supra note 16 (quoting Daubert, 509 U.S. at 590). Moreover, there is the “gatekeeper” language, which also supports a more restrictive view. Daubert, 509 U.S. at 592-93.
44 68 F.3d 597 (2d Cir. 1995) (repressed memory).
45 Id. at 610.
46 12 F.3d 540 (6th Cir. 1993).
47 Id. at 568; see also State v. Doriguzzi, 760 A.2d 336, 341 (N.J. Super. Ct. App. Div. 2000) (“Although Frye has been replaced in the federal court system in favor of the more lenient standards of Federal Rule of Evidence 702 as set forth in Daubert . . . in New Jersey, with the exception of toxic tort litigation, Frye remains the standard.”); Commonwealth v. Crews, 640 A.2d 395, 400 n.2 (Pa. 1994) (“Daubert relaxes, somewhat, the impediments to admission of novel scientific evidence.”).
48 57 F.3d 428 (5th Cir. 1995).
49 Id. at 429.
50 See United States v. Cordoba, 104 F.3d 225, 227-28 (9th Cir. 1997) (noting that its former per se rule of exclusion is inconsistent with Daubert); see also United States v. Call, 129 F.3d 1402, 1404 (10th Cir. 1997).
Consequently, the trial judge reviews only the expert’s methods, not the expert’s conclusion. 55

B. General Electric Co. v. Joiner

The Supreme Court’s second case, General Electric Co. v. Joiner, 54 on first reading, would also seem to support the theme of liberal admissibility. The Court ruled that the appellate standard for reviewing a trial court’s admissibility decision under Daubert was an abuse-of-discretion, 55 a standard adopted without even considering the principal alternative standard: de novo review. 56 The Court’s standard suggests that admissibility decisions would not be second guessed on appeal—giving the trial court more leeway in admitting evidence. In contrast, a de novo review standard would have given appellate courts more authority to control junk science.

On further inspection, however, several aspects of Joiner caution against this reading. First, the evidence was excluded, not admitted. Second, the Court went beyond the question accepted for review and applied the standard without remand to the court of appeals. 57

52 Daubert, 509 U.S. at 595; see also State v. Merwin, 962 P.2d 1026, 1030 (Idaho 1998) (“Even under the holding in Daubert, the focus of the court’s inquiry is ‘on the principles and methodology, not on the conclusions that they generate.’”).
55 Id. at 146-47. The Court wrote:
We hold, therefore, that abuse of discretion is the proper standard by which to review a district court’s decision to admit or exclude scientific evidence. We further hold that, because it was within the District Court’s discretion to conclude that the studies upon which the experts relied were not sufficient, whether individually or in combination, to support their conclusions that Joiner’s exposure to PCBs contributed to his cancer, the District Court did not abuse its discretion in excluding their testimony.
56 Other courts have taken a different approach to the standard of review issue. For example, the Massachusetts Supreme Court has stated that “[i]n considering the issue of scientific validity, our review is de novo because a trial judge’s conclusion will have applicability beyond the facts of the case before him.” Commonwealth v. Vao Sok, 683 N.E.2d 671, 677 (Mass. 1997); see also David L. Faigman, Appellate Review of Scientific Evidence Under Daubert and Joiner, 48 HASTINGS L.J. 969 (1997) (arguing for de novo review).
57 See Michael H. Gottesman, From Barefoot to Daubert to Joiner: Triple Play or Double Error?, 40 ARIZ. L. REV. 755, 766 (1998) (“Had the Court stopped there and remanded the case as defendants had requested, its decision would have been uncontroversial. However, although it had already answered the only question presented, the Court went on to hand the defendants a victory greater than they had sought.”).
Interestingly, the Chief Justice, who in his *Daubert* concurrence, voiced considerable discomfort with the capability of federal judges to understand scientific concepts such as “falsifiability” and who was concerned that they would be turned into amateur scientists, had apparently overcome these fears and revealed no hesitation in reviewing epidemiological and animal studies in *Joiner*. Third, the “methodology-conclusion” dichotomy, so critical in *Daubert*, was drawn into question. The *Joiner* Court remarked that nothing in *Daubert* “requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” In other words, the dichotomy is not as easy to apply as suggested in *Daubert*. Finally, the Court commented that “while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the ‘gatekeeper’ role of the trial judge in screening such evidence.”

The term “somewhat” is riveting. The language in *Daubert* (quoted above) suggested that a heck of a lot more evidence would be admissible under *Daubert* than under *Frye*.

In hindsight, at least, *Joiner* was a transitional case, moving from a liberal standard of admissibility as suggested in *Daubert*, to an exacting standard as noted a decade later.

C. Kumho Tires Co. v. Carmichael

*Kumho Tires Co. v. Carmichael*, the third case in the *Daubert* trilogy, removed any doubts about the Court’s intended direction.

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58 *Daubert*, 509 U.S. at 600-01 (Rehnquist, C.J., concurring). The Chief Justice commented:

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its “falsifiability,” and I suspect some of them will be, too. I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role.

Id.

59 522 U.S. at 146.

60 *Id.* at 142 (emphasis added).


63 At the end of the day, the Court had upheld the exclusion of the proffered expert testimony in all three cases. In *Daubert*, the Court remanded. On remand, the court of appeals again excluded the evidence, and the Supreme Court denied
First, the Court extended *Daubert*'s reliability requirement to nonscientific testimony under Rule 702. In the aftermath of *Daubert*, litigators quickly understood that they might avoid the *Daubert* reliability requirement by simply relabeling their evidence from "scientific" to "technical." The Court had to shut this door or *Daubert*'s impact would have been restricted to a narrow category of cases.

Second, the Court acknowledged the relevance of the *Daubert* factors in determining reliability in this context. In other words, these factors were not limited to "scientific" evidence; they might apply to all expert testimony. This may turn out to be the more critical aspect of the case. Other courts had concluded that the reliability requirement applied to nonscientific expert testimony but had adopted extremely lenient standards for such evidence. For example, the Hawaii Supreme Court had ruled that:

because the underlying scientific principles and procedures are of proven validity/reliability, it is unnecessary to subject technical

certiorari. 43 F.3d 1311 (9th Cir.), cert. denied, 516 U.S. 869 (1995).

The Court concluded that "*Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho*, 526 U.S. at 141. To support its conclusion, the Court noted that: (1) Rule 702 did not distinguish between "scientific" knowledge and "technical" or "other specialized knowledge"; (2) *Daubert*'s gatekeeping rationale was not limited to scientific knowledge; and (3) "it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge." *Id.* at 148.

In determining the admissibility of technical or other specialized knowledge, the Court held that the trial court "may consider one or more of the specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability." *Id.* at 141. The Court characterized the *Daubert* inquiry as "flexible" and noted:

[We can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence... *Daubert* itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

*Id.* at 150-51.
knowledge to the same type of full-scale reliability determination required for scientific knowledge. Thus, although technical knowledge, like all expert testimony, must be both relevant and reliable, its reliability may be presumed.\(^{66}\)

Although the court ruled that technical expert testimony must be reliable, it undercut the significance of that ruling by treating technical evidence as presumptively admissible. The court effectively shifted the burden of proof on the reliability requirement to the opposing party. *Kumho* rejected this approach. Consequently, the reliability requirement is not only wide but it is deep.

The Court confirmed this view in *Weisgram v. Marley Co.*,\(^{67}\) while reviewing a summary judgment in a wrongful death action against a manufacturer of an allegedly defective baseboard heater. Although expert testimony was involved, the Court was not required to elaborate further on the *Daubert-Kumho* standard. Nevertheless, the Court did remark: "Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet.\(^{68}\) Here, the “liberal” standard of the Federal Rules has been explicitly replaced by an “exacting” standard.\(^{69}\) As one district court observed, the Supreme Court in *Daubert* and *Kumho* “is plainly inviting a reexamination even of ‘generally accepted' venerable, technical fields.”\(^{70}\)

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\(^{66}\) *State v. Fukusaku*, 946 P.2d 32, 43 (Haw. 1997).

\(^{67}\) 528 U.S. 440 (2000).

\(^{68}\) *Id.* at 455; *see also* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993) (“When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury’s verdict.”).

\(^{69}\) *See United States v. Horn*, 185 F. Supp. 2d 530, 553 (D. Md. 2002). The court determined that:

Under *Daubert*, therefore, it was expected that it would be easier to admit evidence that was the product of new science or technology. In practice, however, it often seems as though the opposite has occurred—application of *Daubert/Kumho Tire* analysis results in the exclusion of evidence that might otherwise have been admitted under *Frye*.

*Id.; see also* Kassierer & Cecil, *supra* note 17, at 1383 (“In the *Daubert* case . . . the Supreme Court rejected the deferential standard of the *Frye* Rule in favor of a more assertive standard that required courts to determine that expert testimony was well grounded in the methods and procedures of science.”).

\(^{70}\) *United States v. Hines*, 55 F. Supp. 2d 62, 67 (D. Mass. 1999); *see also infra* notes 149-60.
III. SUPREME COURT’S CRIMINAL “DAUBERT” CASES

As noted earlier, the Supreme Court decided a number of criminal procedure cases dealing with expert evidence between 1983 and 2000. Although these cases all involved constitutional issues, I argue that reliability concerns are embedded in each and thus a rough comparison with Daubert-Kumho is possible.

A. Delaware v. Fensterer

In Delaware v. Fensterer,\(^{71}\) a 1985 decision, the Supreme Court considered a confrontation challenge involving the basis of expert testimony. Fensterer was charged with the murder of his live-in fiancée whose body was discovered at a shopping center parking lot. The prosecution contended that Fensterer had strangled the victim in their apartment with a cat leash. The government’s case rested on circumstantial evidence. Two hairs on the leash were similar to the victim’s hair, and an FBI analyst testified that one of the two hairs had been “forcibly removed.” The prosecution argued that the hair had been dislodged during the strangulation. According to the Delaware Supreme Court, the expert’s testimony “established the leash as the murder weapon” and “[t]he leash belonged to Fensterer and [the victim].”\(^{72}\)

The FBI expert testified that there are three methods to determine whether hair has been forcibly removed but could not remember which method he had used in reaching his conclusion.\(^{73}\) He testified: “As to the exact manner in which this particular hair was forcibly removed, I don’t know. I have no indication in my notes other than the fact it was forcibly removed.”\(^{74}\)

On appeal, the Delaware Supreme Court ruled that the FBI expert’s lack of memory precluded the defense from effectively testing the basis for his opinion by cross-examination. This, the court reasoned, violated the accused’s confrontation rights because a

\(^{72}\) State v. Fensterer, 493 A.2d 959, 964 (Del. 1985).
\(^{73}\) The three methods are as follows: (1) The presence of a follicular tag on the hair, (2) the presence of an elongated and misshaped root, and (3) the presence of a sheath of skin surrounding the root area.
\(^{74}\) 493 A.2d at 963 (quoting record of trial). A defense expert vigorously challenged the proposition that the presence of a follicular tag indicated forcible removal. He maintained that “scientific authority contradicted” this theory. Id. at 964. The defense expert further testified that he had telephoned the FBI expert who had stated that his opinion rested on the “follicular tag” theory. The defense expert testified “that he had spoken by telephone with [the prosecution expert], who advised him that his conclusion of forcible removal was based on the presence of the follicular tag.” Fensterer, 474 U.S. at 17.
Special Agent from the FBI “can appear to be a highly credible person to the average lay jury,” and effective cross-examination depends on the expert’s committing himself to a basis for his opinion. “Without an acknowledgment of the basis of his opinion, defense counsel’s cross-examination of the Agent was nothing more than an exercise in futility.”

The United States Supreme Court disagreed and reversed per curiam—without briefs or argument. According to the Court, “the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” On remand, however, the Delaware Supreme Court again held the opinion inadmissible but on evidentiary, rather than constitutional, grounds. According to that court: “While a witness’s mere lack of memory as to a particular fact may go only to the weight of that evidence, an expert witness’s inability to establish a sufficient basis for his opinion clearly renders the opinion inadmissible under D.R.E. 705.”

In a later case, United States v. Owens, the United States Supreme Court, citing Fensterer, applied the same rationale to a lay witness’s memory lapse. However, the two cases could have easily been

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75 Fensterer, 493 A.2d at 964.
76 Id.
77 Justice Marshall dissented “from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits.” 474 U.S. at 23 (Marshall, J., dissenting). Justice Blackmun also voted for “plenary consideration,” as did Justice Stevens, who referred to the case as “novel.” Id.
78 Id. at 20. Later in the opinion the Court returned to this point, writing that “the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.” Id. at 22. The Court held that a sufficient opportunity was provided at trial because the defense counsel’s cross-examination “demonstrated to the jury that [the expert] could not even recall the theory on which his opinion was based. Moreover, through its own expert witness, the defense was able to suggest to the jury that [the FBI expert] had relied on a theory which the defense expert considered baseless.” Id. at 20.
79 Fensterer v. State, 509 A.2d 1106, 1109-10 (Del. 1986).
81 Id. at 559-60. A hospitalized witness, suffering from a fractured skull, identified Owens as his attacker and picked his picture from a photo array. At trial, the witness testified about the attack, including his hospital identification of Owens. On cross-examination, however, he admitted that he could not remember seeing his assailant. The Supreme Court held that the witness’s impaired memory did not deprive Owens of the right of cross-examination. According to the Court, the Confrontation Clause guarantees only an opportunity for effective cross-examination. This right is satisfied when the defendant has the opportunity to
distinguished. It is one thing to acknowledge that we often can do little to prevent memory lapses of lay witnesses (which resulted from a severe beating in *Owens*); it is quite another thing to say the same about an expert. There is no valid reason, legal or scientific, that justifies the failure to document forensic analyses. The American Society of Crime Laboratory Directors recommends it, as did the first DNA report published by the National Academy of Sciences.

Contrast Fensterer with Daubert’s language concerning the scientific method: “Proposed testimony must be supported by appropriate validation—i.e., ‘good grounds,’ based on what is known.” Compare Fensterer with Kumho Tire where the Court wrote: “Daubert pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the ‘assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.’” Is there anything less scientific than failing to record test results?

bring out such matters as a witness’s faulty memory.

*82 The American Society of Crime Laboratory Directors (ASCLD) issued guidelines on casework documentation and reporting. Proper documentation requires a system of note keeping that records the basis for any findings, conclusions, and interpretations, and the retention of all notes, charts, photographs, or diagrams. “The documentation should be such that a knowledgeable analyst or supervisor, in the absence of the primary analyst, would be able to evaluate and interpret the data.” ASCLD, Guidelines for Forensic Laboratory Management Practices, 14 Crime Laboratory Dig. 39, 43 (Apr. 1987). Competent laboratory reports must include (1) an “accurate summary of significant material contained in the case notes,” (2) “interpretive information as well as examination results wherever possible,” and (3) identification of “the analyst(s) and, if appropriate, the testing methodology.”

*83 Nat’l Research Council, DNA Technology in Forensic Science 104-05 (1992) [hereinafter DNA Technology]. The report concluded that:

> The ideal program would contain mechanisms to ensure that: . . . Case records—such as notes, worksheets, autoradiographs, and population databanks—and other data or records that support examiners’ conclusions are prepared, retained by the laboratory, and made available for inspection on court order after review of the reasonableness of a request.

*84 Daubert, 509 U.S. at 590.

*85 Kumho, 526 U.S. at 148 (quoting Daubert, 509 U.S. at 592). Fensterer can also be compared to amended Rule 702, which requires that expert testimony be “based upon sufficient facts or data.” Fed. R. Evid. 702(1).

*86 Georgia Supreme Court Justice George T. Smith criticized the practice as follows:

> It is an insult to intelligent people to say that a scientific test was conducted from which absolutely no notes or records survive. . . . A basic principle of scientific testing is that careful records of test procedure and results are to be scrupulously maintained. A scientific test without an accompanying report of the testing environment, number of trials, raw results and analyzed data is in reality no test at all.
Moreover, had *Fensterer* been decided the other way the chief beneficiary in the long run may have been the prosecution because its experts would have been required to have supporting documentation, and perhaps the Inspector General’s 1997 Report on the FBI laboratory would not have needed to recommend that adequate case files be required. 87

Proper documentation can also preclude a number of abuses. The Journal of Forensic Sciences, the official publication of the American Academy of Forensic Sciences, published a symposium on the ethical responsibilities of forensic scientists in 1989. 88 One article discussed a number of laboratory reporting practices, including (1) “preparation of reports containing minimal information in order not to give the ‘other side’ ammunition for cross-examination,” (2) “reporting of findings without an interpretation on the assumption that if an interpretation is required it can be provided from the witness box,” and (3) “[o]mitting some significant point from a report to trap an unsuspecting cross-examiner.” 89 These practices could be curbed, if not eliminated, by the implementation of proper documentation requirements.

B. Arizona v. Youngblood

In the 1970s, courts began to extend the *Brady* doctrine 90 to the preservation of evidence. 91 In addition to due process, the right of

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87 U.S. DEP’T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1997) [hereinafter FBI LABORATORY]. “The Rudolph files and some of Martz’s work underscore the importance of case files containing all the documentation necessary for another appropriately qualified examiner to be able to understand and replicate the examiner’s data and analysis. We encountered the problem of incomplete or missing documentation in many case files.” Id., pt. 1, at 25.


90 In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court recognized the prosecution’s constitutional duty to disclose exculpatory evidence. The Court wrote: “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Id. at 87.

preservation may be supported by the compulsory process and right of confrontation guarantees. The right of preservation was extensively litigated in scientific evidence cases. Defendants successfully argued that this right had been violated by the prosecution’s failure to preserve drugs, bullets, a fingertip, blood, urine, and trace metal detection results, as well as physical evidence of arson, rape, and homicide. Nevertheless, the scope of the right remained uncertain.

In Arizona v. Youngblood, the Supreme Court addressed the

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92 See Gov’t of V.I. v. Testamark, 570 F.2d 1162, 1166 (3d Cir. 1978) (“Loss or destruction of relevant evidence . . . may also deny a defendant the right to compulsory process.”); Peter Westen, The Compulsory Process Clause, 73 MICH. L. REV. 71, 174-75 n.485 (1974) (“The government’s failure to preserve material evidence in the defendant’s favor . . . violates his right of compulsory process because it precludes him from effectively producing the evidence in court.”).


96 See People v. Morgan, 606 P.2d 1296, 1298 (Colo. 1980).


99 See People ex rel. Gallagher v. District Court, 656 P.2d 1287, 1292 (Colo. 1983).


102 See People v. Sheppard, 701 P.2d 49 (Colo. 1985) (vehicle destroyed); see also State v. Wright, 557 P.2d 1, 67 (Wash. 1976) (victim’s clothing destroyed); People v. Harmes, 560 P.2d 470, 473 (Colo. 1976) (failure to preserve videotape of alleged assault violated due process).

103 488 U.S. 51 (1988). In an earlier case, California v. Trombetta, 467 U.S. 479 (1984), the Supreme Court ruled that due process did not require the preservation of additional breath samples as part of intoxication testing. According to the Court:

Whatever duty the Constitution imposes on the States to preserve
issue in a case involving the failure to preserve semen in a sexual assault case. The evidence was critical. While bad faith is not a requirement in the Brady suppression cases, the Supreme Court nevertheless ruled it determinative in a failure to preserve situation. The Court added: "The failure of the police to refrigerate the clothing and to perform tests on the semen samples can at worst be described as negligent."

Some courts have found “bad faith destruction,” while evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality, . . . [the] evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. at 488-89. The Court held that neither of these conditions was satisfied. Given the reliability of the intoxilyzer, “breath samples were much more likely to provide inculpatory [rather] than exculpatory evidence.” Id. at 489. Moreover, alternative methods of attacking intoxilyzer results were available; the defendant had the right under state law to inspect the intoxilyzer, the right to introduce evidence to show possible interference with the machine’s measurements, and the right to cross-examine the police concerning operator error. Id. at 490. Youngblood differed from Trombetta, however. A serious crime was involved in the former, not a DUI prosecution. Moreover, Youngblood concerned the preservation of evidence already in the police’s possession, not the preservation of evidence that the police would not ordinarily retain.

Disent, Justice Blackmun wrote:

But we do know several important things about the evidence. First, the semen samples on the clothing undoubtedly came from the assailant. Second, the samples could have been tested, using technology available and in use at the local police department, to show either the blood type of the assailant, or that the assailant was a nonsecretor, i.e., someone who does not secrete a blood-type “marker” into other body fluids, such as semen. Third, the evidence was clearly important. A semen sample in a rape case where identity is questioned is always significant. Fourth, a reasonable police officer should have recognized that the clothing required refrigeration. Fifth, we know that an inconclusive test was done on the swab. The test suggested that the assailant was a nonsecretor, although it was equally likely that the sample on the swab was too small for accurate results to be obtained. And, sixth, we know that respondent is a secretor. If the samples on the clothing had been tested, and the results had shown either the blood type of the assailant or that the assailant was a nonsecretor, its constitutional materiality would be clear.

Id. at 68 (citations omitted) (Blackmun, J., dissenting).

104 Dissenting, Justice Blackmun wrote:

105 Id. at 58.

106 E.g., United States v. Bohl, 25 F.3d 904, 906 (10th Cir. 1994) (Government denied defendants “a meaningful opportunity to present a defense by intentionally disposing of potentially exculpatory and highly probative evidence in the face of [defendants’] repeated requests for pretrial access to that evidence”), United States v. Cooper, 983 F.2d 928, 932 (9th Cir. 1993) (bad faith destruction of
numerous courts have not.\textsuperscript{107} This is not surprising since the standard is a difficult one to satisfy.\textsuperscript{108} Indeed, the \textit{Youngblood} approach was so out-of-line with notions of basic fairness that an overwhelming number of state courts have rejected it as a matter of state constitutional law.\textsuperscript{109} The Alabama Supreme Court, for instance, has methamphetamine lab equipment violates due process); People v. Walker, 628 N.E.2d 971, 973 (Ill. App. Ct. 1993) (determining that destruction of clothing satisfies the demanding \textit{Youngblood} test and finding items that were destroyed within six weeks of the crime were based on improper authorization); State v. Jordan, 597 N.E.2d 1165, 1169 (Ohio Ct. App. 1992) ("[B]y destroying and then substituting other evidence and securing indictments based upon it, the police actions in themselves constituted a [due process] violation . . . .").

\textsuperscript{107} E.g., Villafuerte v. Stewart, 111 F.3d 616, 625 (9th Cir. 1997) ("Nor did the failure to conduct tests on the semen sample violate Villafuerte’s due process rights. The record contains no evidence that the semen sample could have had exculpatory value which was apparent at the time the officers failed to perform the tests."); Jones v. McCaughtry, 951 F.2d 475, 477-78 (7th Cir. 1992) (failure to preserve non-motile sperm); Paradis v. Arave, 954 F.2d 1483, 1488-89 (9th Cir. 1992) (panties negligently lost); United States v. McKie, 951 F.2d 399, 403 (D.C. Cir. 1991) (crack cocaine lost after lab tests); United States v. Sandovalc, 913 F. Supp. 494, 497 (S.D. Tex. 1995) ("[T]here is no indication . . . that the agents destroyed the marijuana to circumvent disclosure requirements or for any other improper motive."); State v. Baldwin, 618 A.2d 513, 522 (Conn. 1993) (mistaken destruction of narcotic vials); State v. Dulaney, 493 N.W.2d 787, 791 (Iowa 1992) (routine destruction of blood sample); State v. Mabe, 412 S.E.2d 386, 388 (S.C. 1991) (destruction of cocaine).

\textsuperscript{108} See generally Note, \textit{The Role of Police Culpability in Leon and Youngblood}, 76 Va. L. Rev. 1213, 1223 n.59 (1990) ("Of course, there is the additional difficulty of proving that the police knew the evidence to be exculpatory. Few officers will be willing to admit they destroyed evidence they knew to be exculpatory.").

\textsuperscript{109} In State v. Morales, 657 A.2d 585 (Conn. 1995), the Connecticut Supreme Court recognized that:

\begin{quote}
 Apparently only Arizona and California . . . have concluded that their state charters offer the same limited degree of protection as the federal constitution. Like our sister states, we conclude that the good or bad faith of the police in failing to preserve potentially useful evidence [semen stains that could have been tested for DNA] cannot be dispositive of whether a criminal defendant has been deprived of due process of law. Accordingly, we, too, reject the litmus test of bad faith on the part of the police, which the United States Supreme Court adopted under the federal constitution in \textit{Youngblood}.
\end{quote}

\textit{Id.} at 594 n.20; \textit{see, e.g.,} Thorne v. Department of Public Safety, 774 P.2d 1326, 1331 n.9 (Alaska 1989) ("We have construed the Alaska Constitution’s Due Process Clause to not require a showing of bad faith."); State v. Matafeo, 787 P.2d 671, 673 (Haw. 1990) (bad faith test too restrictive because it precludes courts “in cases where no bad faith is shown, from inquiring into the favorableness of the evidence or the prejudice suffered by the defendant as a result of its loss”); Commonwealth v. Henderson, 582 N.E.2d 496, 497 (Mass. 1991) ("The rule under the due process provisions of the Massachusetts Constitution is stricter than that stated in the \textit{Youngblood} opinion."); State v. Osakalumi, 461 S.E.2d 504, 512 (W. Va. 1995) ("As a matter of state constitutional law, we find that fundamental fairness requires this Court to evaluate the State’s failure to preserve potentially exculpatory evidence in the context of the entire record."); State v. Delisle, 648 A.2d 632, 643 (Vt. 1994)
recognized an exception to the bad faith test where the evidence is so
critical to the defense as to make a criminal trial without it
“fundamentally unfair.” The court applied this exception in a toxic
waste dumping prosecution where the sole evidence, the samples
tested, was not preserved. Similarly, the Delaware Supreme Court
rejected Youngblood and set forth a three-pronged analysis: (1) the
degree of negligence or bad faith involved; (2) the importance of the
missing evidence, considering the probative value and reliability of
secondary or substitute evidence that remains available; and (3) the
sufficiency of the other evidence used at trial to sustain the
conviction.\footnote{111}

The Youngblood test provides no incentive for police departments
to adopt standard operating procedures that ensure the proper
collection and preservation of evidence. Larry Youngblood was later
exonerated through DNA testing—after having spent nine years in
prison. Dr. Edward Blake, a DNA scientist, told a reporter:

We now have before us a flawed legal precedent that stands on
the shoulders of an innocent man. . . . For those organizations
that are poorly run or mismanaged or don’t give a damn, . . . the
Youngblood case was a license to let down their guard and be lazy.
The effect that had was generally to lower the standards of
evidence collection.\footnote{112}

C. Barefoot v. Estelle

\textit{Barefoot v. Estelle},\footnote{113} a capital murder case decided by the Court in
1983, is the case most closely related to \textit{Daubert}. In the penalty phase,

\footnotesize{(Youngblood decision “too narrow because it limits due process violations to only
those cases in which a defendant can demonstrate bad faith, even though the
negligent loss of evidence may critically prejudice a defendant”).

\footnote{110} Ex \textit{parte} Gingo, 605 So. 2d 1237, 1241 (Ala. 1992); see also
Gurley v. State, 639
So. 2d 557 (Ala. Crim. App. 1993) (failure to preserve murder victim’s wallet for
defense testing violates state constitution).

\footnote{111} Hammond v. State, 569 A.2d 81, 87 (Del. 1989). The Hammond court did not
foreclose the possibility of conviction despite the state’s failure to properly preserve
evidence:

We remain convinced that fundamental fairness, as an element of due
process, requires the State’s failure to preserve evidence that could be
favorable to the defendant “[to] be evaluated in the context of the
entire record. . . .” When evidence has not been preserved, the
conduct of the State’s agents is a relevant consideration, but it is not
determinative.

\textit{Id.} (internal citation omitted).

\footnote{112} Barbara Whiteaker, \textit{DNA Frees Inmate Years After Justices Rejected Plea}, N.Y. \textit{Times},
Aug. 11, 2000, at A12.

\footnote{113} 463 U.S. 880 (1983). For a further discussion of Barefoot, see Giannelli, \textit{supra}
ote 12.
the prosecution offered psychiatric testimony concerning Barefoot's future dangerousness. One psychiatrist, Dr. James Grigson, without ever examining Barefoot, testified that there was a "one hundred percent and absolute" chance that Barefoot would commit future acts of criminal violence. Barefoot challenged the admission of this evidence on constitutional grounds due to its unreliability.

In an amicus brief, the American Psychiatric Association (APA) stated that the "large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term dangerousness are wrong in at least two out of every three cases." In a later passage, the brief noted that the "unreliability of [these] predictions is by now an established fact within the profession." A substantial body of research supported the APA position.

Nevertheless, the Court rejected Barefoot's argument. According to the Court, "[n]either petitioner nor the [APA] suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time." In another passage, the Court noted that it was "not persuaded that such testimony is almost entirely unreliable" and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.

If this is a standard at all, it is an incredibly low one. It permitted the admission of evidence, as one commentator noted, "at the brink of quackery" and, in a death penalty case. Justice Blackmun, the author of the Daubert opinion, dissented:

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111 Future dangerousness was a qualifying factor under the Texas death penalty statute. TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1) (West 1981) (requiring a jury finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society").

115 Barefoot, 463 U.S. at 919 (Blackmun, J., dissenting) (quoting from record).


117 Id. at 12.


119 Barefoot, 463 U.S. at 901 (emphasis added).

120 Id. at 898-99


122 On October 24, 1984, Thomas Barefoot was executed based on "junk science." PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 220 (1991) (noting that one could favor the death penalty and "yet still recoil at the thought that a junk science fringe of psychiatry . . . could decide who will be sent to the gallows").
In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person’s life is at stake . . . a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist’s words, equates with death itself.125

In short, Daubert required a far higher standard of admissibility for money-damages than Barefoot required for the death penalty. Nor can Barefoot be distinguished from Daubert as a constitutional, rather than an evidentiary, decision.124 The Court’s Eighth Amendment jurisprudence has long proclaimed that “death is different”125 and imposed higher reliability standards.

D. United States v. Scheffer

United States v. Scheffer127 is in one sense the most difficult case to criticize. In Scheffer, the Supreme Court upheld the military’s per se exclusionary rule of polygraph results in the face of a constitutional challenge.128 Given the state of polygraph research,129 the Court might have rested its decision on reliability grounds alone.130 Nevertheless, even the unreliability argument is not without problems. The most notable is the comparison with Barefoot. The research on polygraph evidence is far more supportive than that on

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125 Barefoot, 463 U.S. at 916.
124 One commentary points out that “Barefoot explicitly did not involve the Rules, but rather the constitutionality of imposing the death penalty based on questionable evidence.” Bert Black & John A. Singer, From Frye to Daubert: A New Test for Scientific Evidence, 1 SHEPARD’S EXPERT & SCI. EVIDENCE Q. 19, 37 (July 1993).
123 See Ring v. Arizona, 536 U.S. 584, 605-06 (2002) (“As Arizona’s counsel maintained at oral argument, there is no doubt that ‘[d]eath is different.’”).
126 E.g., Murray v. Giarratano, 492 U.S. 1, 8-9 (1989) (“The finality of the death penalty requires ‘a greater degree of reliability’ when it is imposed.”) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (Because the death penalty is different, the Court has “invalidated procedural rules that tended to diminish the reliability of the sentencing determination.”). See also Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring) (“In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.”).
126 Id. at 315.
130 As discussed later, however, the Court based its holding on several distinct grounds.
“future dangerousness.” Polygraph evidence easily satisfies the
Barefoot test: not “always wrong . . . only most of the time.” Keep in
mind that the Court’s options were not limited to per se admission or
exclusion. The Court could have rejected the per se ban, as it did with
hypnotically-refreshed testimony in Rock v. Arkansas, and left the
issue to the states to develop alternative reliability standards, which
had been the military court’s position. Such an approach would
have probably resulted in what now exists in federal cases—trial court
discretion that is typically exercised in favor of exclusion in the
absence of a prosecution stipulation.

Moreover, the Court never confronted an issue raised by Justice
Stevens in dissent and mentioned by Justice Kennedy in his concurring opinion. The very government that argued against

131 483 U.S. 44 (1987) (holding that prohibiting all hypnotically refreshed
testimony violated the defendant’s right to testify on her own behalf but leaving open
the possibility that exclusion on a case-by-case approach would be constitutional).
132 In Scheffer, the U.S. Court of Appeals for the Armed Forces had held that
Military Rule 707’s per se exclusionary rule was unconstitutional as applied in that
case. In that court’s view:

A per se exclusion of polygraph evidence offered by an accused to rebut
an attack on his credibility, without giving him an opportunity to lay a
foundation under Mil. R. Evid. 702 and Daubert, violates his Sixth
Amendment right to present a defense. We limit our holding to
exculpatory evidence arising from a polygraph examination of an
accused, offered to rebut an attack on his credibility.

133 E.g., Conti v. Commissioner, 39 F.3d 658, 663 (6th Cir. 1994) (noting that
“unilaterally obtained polygraph evidence is almost never admissible under Evidence
Rule 403”); United States v. Sherlin, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (“[A]n
privately commissioned polygraph test, which was unknown to the government until
after its completion, is of extremely dubious probative value.”). See also I GIANNELLI
& IMWINKELRIED, supra note 7, § 8.4(D).
134 Justice Stevens wrote:

[T]o the extent that the use of the lie detector plays a special role in
the military establishment, military practices are more favorable to a
rule of admissibility than is the less structured use of lie detectors in the
civilian sector of our society. That is so because the military carefully
regulates the administration of polygraph tests to ensure reliable
results. The military maintains “very stringent standards for polygraph
examiners” and has established its own Polygraph Institute, which is
“generally considered to be the best training facility for polygraph
examiners in the United States.” The military has administered
hundreds of thousands of such tests and routinely uses their results for
a wide variety of official decisions.

135 In his concurrence, Justice Kennedy stated:

I doubt, though, that the rule of per se exclusion is wise, and some later
case might present a more compelling case for introduction of the
testimony than this one does. Though the considerable discretion
given to the trial court in admitting or excluding scientific evidence is
polygraph evidence nevertheless spends millions of dollars each year running the Defense Polygraph Institute, sponsors research on the technique, and employs the technique both in and outside of the criminal system.\textsuperscript{136}

Perhaps to avoid these issues, the Court attempted to support its position with other rationales, none of which are very compelling. One rationale was that polygraph evidence would violate the ultimate issue prohibition.\textsuperscript{137} However, commentators have harshly criticized the ultimate issue rule,\textsuperscript{138} and both the Federal and Military Rules of Evidence have rejected the rule outright.\textsuperscript{139} Should DNA evidence be excluded because it treads upon the “ultimate” issue in the case—the identity of the perpetrator? Fingerprint comparisons? Future dangerousness was an ultimate issue in \textit{Barefoot}.

Second, the majority cited the jury’s role in determining credibility.\textsuperscript{140} This argument needs further examination. Assume the accused claims alibi and DNA evidence is admitted against him; the DNA evidence will undoubtedly reflect on the accused’s credibility, and yet no one would suggest DNA evidence is inadmissible on this ground. The Court, of course, may have only been concerned with a “direct” comment on credibility. But as one commentator noted:

\begin{quote}
[T]he very fact that jurors possess common knowledge about credibility puts them in a good position to come to their own conclusions; they may therefore be more skeptical about an expert’s testimony on credibility than about testimony on a more esoteric issue, such as DNA profiling. Some support for this contention comes from the studies of jury reactions to polygraph evidence, which have generally found that juries are not overwhelmed: they draw their own conclusions about credibility,
\end{quote}

\begin{footnotes}

\footnotenumber{136} See Giannelli, \textit{supra} note 51.

\footnotenumber{137} Scheffer, 523 U.S. at 313-14 (“Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at time offering, as in respondents’ case, a conclusion of the ultimate issue in the trial.”).

\footnotenumber{138} 7 JOHN H. WIGMORE, EVIDENCE § 1920, at 18 (Chadbourn rev. 1978) (calling the rule “a mere bit of empty rhetoric”).

\footnotenumber{139} See Fed. R. Evid. 704(a); Mil. R. Evid. 704.

\footnotenumber{140} Scheffer, 523 U.S. at 313 (“By its very nature, polygraph evidence may diminish the jury’s role in making credibility determinations.”).
\end{footnotes}
not always agreeing with the polygrapher’s verdict.\(^{141}\)

Finally, an additional red herring was offered to support the *Scheffer* holding: the avoidance of litigation on collateral issues that “prolong[] criminal trials and threaten[] to distract the jury from its central function of determining guilt or innocence.”\(^{142}\) Justice Holmes once explained this factor: “[S]o far as the introduction of collateral issues goes, that objection is a purely practical one—a concession to the shortness of life.”\(^{143}\) Weighed against this “consideration” is the *constitutional* right to present a defense, which the Court has described as a fundamental right: “The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts. . . . The [defendant] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”\(^{144}\) Thus, it seems rather breathtaking that such a “fundamental” right could be so easily trumped by a lack-of-time rationale.\(^{145}\) The admissibility of DNA evidence often consumes a lot of court time but “collateralness” was never cited as a major concern.\(^{146}\)

**E. Ake v. Oklahoma**

Painting this picture of the Supreme Court decisions would be unfair without mentioning *Ake v. Oklahoma*,\(^{147}\) in which the Court in 1985 recognized for the first time an accused’s right to expert assistance. Although *Ake* has often been interpreted narrowly,\(^{148}\) it

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\(^{141}\) Redmayne, *supra* note 1, at 174.

\(^{142}\) Scheffer, 523 U.S. at 314.

\(^{143}\) Reeve v. Dennett, 11 N.E. 938, 943-44 (Mass. 1887).

\(^{144}\) Washington v. Texas, 388 U.S. 14, 19 (1967); see also Crane v. Kentucky, 476 U.S. 683, 690 (1986) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘meaningful opportunity to present a complete defense.’”) (citations omitted).


\(^{146}\) See United States v. Yee, 134 F.R.D. 161, 168 (N.D. Ohio 1991) ("[H]earings were held for approximately six weeks."); see also People v. Castro, 545 N.Y.S.2d 985, 986 (Sup. Ct. 1989) ("This hearing took place over a twelve week period producing a transcript of approximately five thousand pages.").

\(^{147}\) 470 U.S. 68 (1985).

\(^{148}\) See Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 802 (6th ed. 2000) (“Generally speaking the courts have read *Ake* narrowly, and have refused to require appointment of an expert unless it is absolutely essential to the
remains a landmark case, and the Court deserves credit for recognizing this right. Nevertheless, the Court has passed up many opportunities to strengthen <em>Ake</em>. That case also stands in stark relief to permitting bogus evidence in death penalty cases (<em>Barefoot</em>), refusing to require the police to implement reasonable measures to ensure the safe handling of evidence (<em>Youngblood</em>), and turning a blind eye toward expert testimony lacking such a rudimentary basis as documentation (<em>Fensterer</em>).

**IV. DAUBERT'S EFFECT IN CRIMINAL CASES**

As stated earlier, <em>Daubert</em> has had a far more significant impact in civil litigation than in criminal litigation. That is not say, however, that its affect in criminal cases has been insubstantial. Several significant developments in criminal prosecutions can be traced to <em>Daubert</em>, five of which are discussed in this section.

**A. Reexamination of “Venerable” Techniques**

First, some federal courts have read the <em>Daubert</em> trilogy as inviting a “reexamination even of ‘generally accepted’ venerable, technical fields.”<sup>149</sup> Attacks, some successful and some not, have been launched against handwriting evidence,<sup>150</sup> hair comparisons,<sup>151</sup> fingerprint defense.<sup>152</sup>

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<sup>150</sup> See Hidalgo, 229 F. Supp. 2d at 967. *Hidalgo* thusly limited the introduction of expert handwriting evidence:

> Because the principle of uniqueness is without empirical support, we conclude that a document examiner will not be permitted to testify that the maker of a known document is the maker of the questioned document. Nor will a document examiner be able to testify as to identity in terms of probabilities.

<sup>151</sup> See also United States v. Lewis, 220 F. Supp. 2d 548, 554 (S.D. W. Va. 2002) (“[Expert’s] bald assertion that the ‘basic principle of handwriting identification has been proven time and time again through research in [his] field,’ without more specific substance, is inadequate to demonstrate testability and error rate.”); United States v. Saelee, 162 F. Supp. 2d 1097, 1103 (D. Alaska 2001). The *Saelee* court highlighted the relative lack of credible testing of handwriting identification methods:

> There is little known about the error rates of forensic document examiners. The little testing that has been done raises serious questions about the reliability of methods currently in use. As to some tasks, there is a high rate of error and forensic document examiners may not be any better at analyzing handwriting than laypersons. This is illustrated not only in the Kam studies relied on by Mr. Cawley, but also in a series of proficiency tests carried out by Collaborative Testing
examinations, firearms identification, bitemarks, and

Service under the supervision of the Forensic Sciences Foundation.

Id.; see also United States v. Fujii, 152 F. Supp. 2d 939, 940 (N.D. Ill. 2000) (determining that expert testimony concerning Japanese handwriting was inadmissible and stating that: “Handwriting analysis does not stand up well under the Daubert standards. Despite its long history of use and acceptance, validation studies supporting its reliability are few, and the few that exist have been criticized for methodological flaws.”); United States v. Starzecpyzel, 880 F. Supp. 1027, 1038 (S.D.N.Y. 1995) (“[T]he testimony at the Daubert hearing firmly established that forensic document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot, after Daubert, be regarded as ‘scientific . . . knowledge.”). But see United States v. Jolivet, 224 F.3d 902, 906 (8th Cir. 2000) (affirming admission of expert testimony that it was likely that defendant wrote the questioned documents and finding such opinion reliable because the expert was well-qualified in handwriting analysis and that his testimony “may be properly characterized as offering the jury knowledge beyond their own and enhancing their understanding of the evidence before them”). United States v. Prine, 220 F. Supp. 2d 1203 (W.D. Wash. 2002). See generally Andre Moenssens, Handwriting Identification Evidence In the Post-Daubert World, 66 UMKC L. REV. 251 (1997); D. Michael Risinger et al., Brave New “Post-Daubert World”—A Reply to Professor Moenssens, 29 SETON HALL L. REV. 405 (1998).

See Williamson v. Reynolds, 904 F. Supp. 1529, 1558 (E.D. Okl. 1995) (“This court has been unsuccessful in its attempts to locate any indication that expert hair comparison testimony meets any of the requirements of Daubert.”), rev’d on this issue, Williamson v. Ward, 110 F.3d 1508, 1522-23 (10th Cir. 1997) (ruling that the due process, not Daubert, standard applies in habeas proceedings); see also Paul C. Giannelli & Emmie West, Hair Comparison Evidence, 37 CRIM. L. BULL. 514 (2001) (discussing the DNA exoneration cases in which hair evidence was used to convict the innocent).


See Howard v. State, 697 So. 2d 415, 429 (Miss. 1997). The Supreme Court of Mississippi wrote:

While few courts have refused to allow some form of bite-mark comparison evidence, numerous scholarly authorities have criticized
intoxication testing. Such challenges would not have occurred under Frye. The handwriting challenges triggered research on that subject as well as the establishment of standards and the curtailment of overstated conclusions in some cases. Moreover, there have been more legal articles on these subjects in the last few years.

the reliability of this method of identifying a suspect. . . . There is little consensus in the scientific community on the number of points which must match before any positive identification can be announced. . . . Suffice it to say that testimony concerning bite marks in soft, living flesh has not been scientifically accredited at this time.

Id.; see also I.A. Pretty & D. Sweet, The Scientific Basis for Human Bitemark Analyses—A Critical Review, 41 Sci. & Just. 85, 86 (2001) (“Despite the continued acceptance of bitemark evidence in European, Oceanic and North American Courts, the fundamental scientific basis for bitemark analysis has never been established.”).

155 See United States v. Horn, 185 F. Supp. 2d 530, 549 (D. Md. 2002). As the court described it:

The doctrine of judicial notice is predicated upon the assumption that the source materials from which the court takes judicial notice are reliable. Where, as here, that reliability has been challenged, the court cannot disregard the challenge, simply because a legion of earlier court decisions reached conclusions based on reference to the same then-unchallenged authority. . . . I cannot agree that the HGN, WAT and OLS tests, singly or in combination, have been shown to be as reliable as asserted by Dr. Burns, the NHTSA publications, and the publications of the communities of law enforcement officers and state prosecutors.

Id. (footnote omitted).

156 E.g., Sargur Srihari et al., Individuality of Handwriting, 47 J. Forensic Sci. 856 (2002) (1,500 individual handwriting samples scanned into a computer programmed to compare the samples based on a variety of features such as slant, height, number of interior contours, and number of vertical slope components; computer matched exemplars with a 98% accuracy rate); see also Moshe Kam et al., Writer Identification by Professional Document Examiners, 42 J. Forensic Sci. 778 (1997) (false positive rate for professionals was 6.5% compared to 38.3% for non-professionals); Moshe Kam et al., Writer Identification by Professional Document Examiners, 42 J. Forensic Sci. 778 (1997) (forensic document examiners demonstrated a false positive error rate of only .5%);


158 See United States v. Rutherford, 104 F. Supp. 2d 1190, 1194 (D. Neb. 2000). The court refused to allow the introduction of a handwriting experts testimony, stating:

[T]he Court concludes that FDE Rauscher’s testimony meets the requirements of Rule 702 to the extent that he limits his testimony to identifying and explaining the similarities and dissimilarities between the known exemplars and the questioned documents. FDE Rauscher is precluded from rendering any ultimate conclusions on authorship of the questioned documents and is similarly precluded from testifying to the degree of confidence or certainty on which his opinions are based.

years than in the prior quarter century, which should mean closer scrutiny of this type of expert testimony for the foreseeable future. Whether lawyers have the ability and resources to challenge this testimony through cross-examination and the presentation of defense experts, however, remains to be seen. Even so, the forensic science community views these attacks as serious and is reforming.

B. Closing the Frye Loophole

Second, Daubert closed a major loophole in the Frye rule. Many Frye courts recognize an exception for non-novel evidence, which exempts certain techniques from the general acceptance requirement. For example, California courts apply this exception to bitemark comparisons and evidence based on narcotic detection dogs. Similarly, Arizona courts use this exception to exempt footprint evidence and predictions of recidivism using actuarial models from close scrutiny. Daubert explicitly rejected this “free pass” to admissibility, and Kumho reinforced this view by subjecting

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159 See supra notes 150-54.
160 See Graham R. Jones, President’s Editorial—The Changing Practice of Forensic Science, 47 J. FORENSIC SCI. 437, 437 (2002). Jones pointed out the practical effects Daubert had:

The Daubert Standard goes a step further than Frye and requires the forensic scientists to prove that the evidence is fundamentally scientifically reliable, not just generally accepted by his/her peers in the discipline. Defense lawyers have also become more critical and aggressive in challenging forensic evidence and are more willing to hire qualified forensic experts to assist them.

Id.

161 See supra note 7, § 1-5(D).
162 According to People v. Marx, 126 Cal. Rptr. 350 (Ct. App. 1975), the Frye test “finds its rational basis in the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.” Id. at 355-56. The court went on to hold that bite mark evidence did not involve blind acceptance by the jury. The basis on which the expert reached his conclusions—models, photographs, and X-rays—were shown to the trier of fact, and the expert’s conclusions were verifiable by the court. Thus, the “court did not have to sacrifice its independence and common sense in evaluating” the evidence. Id. at 357.

163 See People v. Sommer, 16 Cal. Rptr. 2d 165, 173 (Ct. App. 1993) (determining that a narcotic detection dog was not subject to Frye).
164 See State v. Murray, 906 P.2d 542, 562 (Ariz. 1995) (en banc) (“Frye analysis is not applicable to footprint [comparisons].”).
165 See State ex rel. Romley v. Fields, 35 P.3d 82, 89 (Ariz. Ct. App. 2001) (“Based upon our understanding of Frye as interpreted by Loganquist, we conclude that the use of actuarial models by mental health experts to help predict a person’s likelihood of recidivism is not the kind of novel scientific evidence or process to which Frye applies.”).
166 Daubert, 509 U.S. at 592 n.11 (“Although the Frye decision itself focused
all expert testimony to the reliability requirement.

C. Effect on Frye Standard

Daubert’s affect on the Frye test has also been noteworthy. Daubert has forced state courts to reexamine their admissibility standard for scientific evidence. Although numerous courts have rejected Frye in favor of Daubert, some jurisdictions have retained Frye, and many of these are populous states, in which many, if not most, criminal cases are tried. Some of these courts believe Frye offers greater protection for defendants than Daubert.

exclusively on ‘novel’ scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence.’); see also People v. Shreck, 22 P.3d 68, 79 n.12 (Colo. 2001). The Schreck court wrote:

We decline to limit the applicability of CRE 702 to only the novel scientific evidence governed previously by Frye. Nothing in the text of the rule requires such a limitation, and our holding is consistent with that of the United States Supreme Court in Daubert, which expressly applied its holding to all scientific evidence.

167 E.g., Shreck, 22 P.3d at 70. As the Schreck court clarified:

We now hold that CRE 702, rather than Frye, governs a trial court’s determination as to whether scientific or other expert testimony should be admitted. Such an inquiry should focus on the reliability and relevance of the proffered evidence and requires a determination as to (1) the reliability of the scientific principles, (2) the qualifications of the witness, and (3) the usefulness of the testimony to the jury.

168 E.g., People v. Leahy, 882 P.2d 321, 323 (Cal. 1994) (describing a veterinarian’s expert opinion on multiple mineral toxicity which alleged that cows were injured by contaminated feed). "[W]e conclude that the framework for evaluating expert opinion testimony in Nebraska should no longer be guided by Frye, but should instead reflect the criteria set forth in Daubert and its progeny." Id. (citations omitted). Other states that have explicitly adopted Daubert include Alaska, Connecticut, Idaho, Indiana, Kentucky, Massachusetts, New Hampshire, New Mexico, Oklahoma, South Dakota, Tennessee, and West Virginia. See 1 Giannelli & Imwinkelried, supra note 7, § 1-13.


169 See Ramirez v. State, 810 So. 2d 836, 843 (Fla. 2001). The Florida Supreme Court asserted that: In keeping with the State’s burden in a criminal trial (i.e., the State must prove each element of the charged offense beyond a reasonable doubt), this Court has continued to use the Frye test when evaluating novel scientific evidence proposed by the State even though the United States Supreme Court, in a civil case, has adopted a different rule.
In addition, terms such as gatekeeper, testability, and peer review have crept into the Frye lexicon. Ramirez v. State illustrates this development. In Ramirez, the Florida Supreme Court rejected the testimony of five experts who claimed general acceptance for matching a knife with a cartilage wound in a murder victim—a type of “toolmark” comparison. The court wrote:

Although several of the State’s experts testified that the underlying principle employed by Hart [the examiner] is generally accepted in the field, we conclude that this testimony standing alone is insufficient to establish admissibility under Frye in light of the fact that Hart’s testing procedure possesses none of the hallmarks of acceptability that apply in the relevant scientific community to this type of evidence.

The court went on to note that the procedure had never been tested, “meaningful peer review” was lacking, the error rate had not been quantified, and objective standards had not been developed. Ramirez represents a reinvigorated Frye test, and it is not alone.

Id; see also State v. Copeland, 922 P.2d 1304, 1314 (Wash. 1996) (en banc). The en banc court determined that:

Where novel scientific evidence is at issue, the additional Frye inquiry allows the judiciary to defer to the scientists precisely where to do so recognizes both the need for admissibility of novel scientific evidence where it is sufficiently accepted, and the need to protect against novel scientific evidence which has not even gained general acceptance in the relevant field. The trial court’s gatekeeper role under Frye involves by design a conservative approach, requiring careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that “pseudoscience” is kept out of the courtroom.

Id.

See Copeland, 922 P.2d at 1314 (describing the “trial court’s gatekeeper role under Frye”).

810 So. 2d 836 (Fla. 2001).

Id. at 849 (emphasis added).

The court described the deficiencies:

The North American articles were written by law enforcement technicians and while several of those articles address principles related to Hart’s theory none undertakes the kind of searching, critical review that is the sine qua non of scientific acceptance. The European articles, on the other hand, were written by medical doctors and professors and are far more discerning; they delineate general studies and contain extensive analyses. The articles in that group, however, address only traditional knife mark theory relative to striation signatures. None address Hart’s testing methodology and the absolute certainty of identification deduced from such a test.

Id. at 850 (footnotes omitted).

Ramirez, 810 So. 2d at 844 (Fla. 2001). The Florida Supreme Court stated:

When applying the Frye test, a court is not required to accept a "nose count" of experts in the field. Rather, the court may peruse disparate
D. Effect on Relevancy Approach

Daubert’s affect on the third approach to scientific evidence, the relevancy approach, may have been the most profound—and yet the least noticed. Under this approach, qualifying the expert generally qualifies the technique employed by that expert. Barefoot illustrates this approach. This, of course, is a very lax standard, one which Daubert implicitly rejected by requiring reliability in addition to relevancy.

sources—e.g., expert testimony, scientific and legal publications, and judicial opinions—and decide for itself whether the theory in issue has been “sufficiently tested and accepted by the relevant scientific community.” In gauging acceptance, the court must look to properties that traditionally inhere in scientific acceptance for the type of methodology or procedure under review—i.e., “indicia” or “hallmarks” of acceptability. A bald assertion by the expert that his deduction is premised upon well-recognized scientific principles is inadequate to establish its admissibility if the witness’s application of these principles is untested and lacks indicia of acceptability.

Id. (footnotes omitted).

See Wilson v. State, 803 A.2d 1044 (Md. 2002) (excluding under Frye probability testimony concerning two children suffering sudden infant death syndrome (SIDS)).


Barefoot, 463 U.S. at 930. “[T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.” Id. at 889. “We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.” Id. at 882.

Wisconsin still follows the relevancy approach. See State v. Peters, 534 N.W.2d 867, 873 (Wis. Ct. App. 1995) (holding DNA evidence admissible). Wisconsin follows neither Frye nor Daubert: “Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment.” Id.; see also State v. Donner, 531 N.W.2d 369, 374 (Wis. Ct. App. 1995) (holding intoxication test admissible). The Donner court wrote:

[B]efore Daubert, the Frye test was not the law in Wisconsin. To that extent, Wisconsin law and Daubert coincide. Beyond that, Wisconsin law holds that “any relevant conclusions which are supported by a qualified witness should be received unless there are other reasons for exclusion.” Stated otherwise, expert testimony is admissible in Wisconsin if relevant and will be excluded only if the testimony is superfluous or a waste of time. . . . Assuming that Daubert in its application represents something beyond Walstad, we observe that we . . . are bound to follow our supreme court case law.

Id. (internal citations omitted).

Daubert, 509 U.S. at 589 (“[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”); see also Kumho Tires Co. v. Carmichael, 526 U.S. 137 (1999) (although
A number of courts had rejected Frye before Daubert was decided. Many of these courts now claim that Daubert is consistent with their former approach. This is true in some instances but not in others. Many of these jurisdictions had, in effect, adopted the relevancy approach, and their movement toward Daubert raises their standard of admissibility.

E. The “Third-prong” Controversy: Daubert “Plus”

Finally, the 2000 amendment to Rule 702 can be traced to Daubert. It goes beyond Daubert and Kumho, however. The amendment, for instance, requires the proper application of the expert qualified, testimony rejected).

Arkansas, Delaware, Georgia, Iowa, Montana, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, and Wyoming. See 1 GIANNELLI & IMWINKELRIED, supra note 7, § 1-14.

E.g., Moore v. State, 915 S.W.2d 284, 294 (Ark. 1996) (“Daubert . . . adopted a reliability approach to Rule 702, comparable to the relevancy approach of Prater in which reliability is the critical element.”); Nelson v. State, 628 A.2d 69, 73 (Del. 1993) ("Our decisions [in prior cases] are consistent with the Supreme Court’s decision in Daubert."); State v. Foret, 628 So. 2d 1116, 1123 (La. 1993) (“Past decisions of this court have espoused similar sentiments [as Daubert] . . . .”); State v. Moore, 885 P.2d 457, 471 (Mont. 1994) (“[T]he guidelines set forth in Daubert are consistent with our previous holding in Barmeyer concerning the admission of expert testimony of novel scientific evidence, and we, therefore, adopt the Daubert standard . . . .”); DiPetrillo v. Dow Chem. Co., 729 A.2d 677, 686 (R.I. 1999) (“Though we declined expressly to adopt the Daubert I standard, our previous cases have endorsed its principles.”).

See State v. Williams, 446 N.E.2d 444, 448 (Ohio 1983). The Ohio position merely left the issue to trial judge “discretion”:

[T]he Rules of Evidence establish adequate preconditions for admissibility of expert testimony, and we leave to the discretion of this state’s judiciary, on a case by case basis, to decide whether the questioned testimony is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue.

Id.

The following was added to Rule 702 in December, 2000: “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” FED. R. EVID. 702.

See Rudd v. General Motors Corp., 127 F. Supp. 2d 1330, 1336-37 (M.D. Ala. 2001). The district court noted that:

[T]he new Rule 702 appears to require a trial judge to make an evaluation that delves more into the facts than was recommended in Daubert, including as the rule does an inquiry into the sufficiency of the testimony’s basis (“the testimony is based upon sufficient facts or data”) and an inquiry into the application of a methodology to the facts (“the witness has applied the principles and methods reliably to the facts of the case”). Neither of these two latter questions that are now mandatory under the new rule . . . were expressly part of the former admissibility analysis under Daubert.

Id.
technique in the particular case, thus settling the *Frye-Daubert* “plus” issue, at least in federal courts.

This issue arose in the DNA cases where some courts had held that, because of the “complexity” of DNA analysis and its “powerful impact” on a jury, “passing muster under *Frye* alone is insufficient.” Accordingly, a three-pronged analysis was adopted: (1) the underlying theory must have been generally accepted, (2) the procedures implementing the theory must have been generally accepted, and (3) the testing laboratory must have followed these procedures. This third prong was labeled *Frye* “plus.” Some federal courts, in DNA and polygraph cases, applied this requirement after *Daubert* was decided—i.e., *Daubert* “plus.” The issue was surprisingly controversial, but this requirement had been applied pre-*DNA* and pre-*Daubert* and is found in virtually every intoxication test (DUI) statute in this country. Nevertheless, the courts had split on the issue, with some holding that the application of proper procedures went to weight and not admissibility.

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187 E.g., United States v. Martinez, 3 F.3d 1191, 1197-98 (8th Cir. 1993). The Eighth Circuit wrote:

> We believe that the reliability inquiry set forth in *Daubert* mandates that there be a preliminary showing that the expert properly performed a reliable methodology in arriving at his opinion. . . . In order to determine whether scientific *testimony* is reliable, the court must conclude that the testimony was derived from the application of a reliable methodology or principle in the particular case.

*Id.*

188 In United States v. Galbreth, 908 F. Supp. 877, 881-82 (D.N.M. 1995), the court wrote: “It is not entirely clear whether *Daubert* requires as a prerequisite to admissibility that the proponent establish the validity of the specific application of a scientific technique.” *Id.* at 880-81. The court continued:

> [A]fter reviewing the case law addressing this issue in the context of other forensic laboratory techniques and after careful consideration of the testimony presented at the hearing regarding the polygraph technique, the Court holds that in the context of polygraph evidence, such scrutiny is imperative to a faithful application of *Daubert*.

*Id.* at 882. The court went on to rule “that in addition to establishing the scientific validity of the polygraph technique in the abstract, the proponent of the proposed testimony must also prove that the specific examination was conducted properly by a competent examiner.” *Id.*

189 See United States v. Bruno, 333 F. Supp. 570 (E.D. Pa. 1971) (chromatographic analysis of ink). “It is widely recognized that the party offering the results of laboratory tests must . . . vouch for its correct administration in the particular case.” *Id.* at 574.

190 See I. GANNELLI & I. IMWINKELRIED, supra note 7, at 36 (listing cases involving polygraph, voiceprints, as well as other types of scientific evidence that adopt this
702 resolves this debate in favor of the more stringent approach.

Furthermore, the Advisory Committee’s Note to Rule 702 specified a number of reliability factors that supplement the ones enumerated in *Daubert*. One is whether the field of expertise claimed by the expert is known to reach reliable results. This provides some “official” support for challenges to entire fields of forensic science (e.g., fingerprints and hair comparisons).

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V. OTHER INFLUENTIAL FACTORS

*Daubert* is only a part of the picture, however. There are at least two other formative influences that should be considered.

A. DNA Evidence

The advent of DNA evidence has also shaped the course of forensic science in significant ways. The DNA admissibility *“wars”* highlighted the need for valid protocols and proficiency testing, and commentators soon began asking why such procedures were not applied in other forensic fields.

More importantly, the research scientists who testified as experts in the DNA cases (for both the prosecution and defense) came from a “scientific” culture, unlike the many forensic examiners who work in crime laboratories and are sometimes described as “cops in lab coats.” The DNA scientists were comfortable with quality control procedures, demanded written protocols, viewed proficiency testing as a positive development, and believed in open science and “not trial by ambush.”

Id. at 834 (citations omitted). The Michigan rule predated *Daubert.* See Mich. R. Evid. 702 (allowing expert testimony only if based on “recognized” scientific, technical, or other knowledge).


195 Eric S. Lander & Bruce Budowle, *DNA Fingerprinting Dispute Laid to Rest, 371 Nature* 735, 735 (Oct. 27, 1994). Lander and Budowle pointed out:

The initial outcry over DNA typing standards concerned laboratory problems: poorly defined rules for declaring a match; experiments without controls; contaminated probes and samples; and sloppy interpretation of autoradiograms. Although there is no evidence that these technical failings resulted in any wrongful convictions, the lack of standards seemed to be a recipe for trouble.

Id. 196 DNA TECHNOLOGY, supra note 83, at 55(“No laboratory should let its results with a new DNA typing method be used in court, unless it has undergone such proficiency testing via blind trials.”).


[F]orensic scientists, like scientist in all other fields, should subject their claims to methodologically rigorous empirical tests. The results of these tests should be published and debated. Until such steps are taken, the strong claims of forensic scientist must be regarded with far more caution than they traditionally have been.

Id. 198 See United States v. Kelly, 420 F.2d 26, 29 (2d Cir. 1969) (“[The] course of the government smacks too much of a trial by ambush, in violation of the spirit of the [discovery] rules. A new trial is required, with a fair opportunity for the defense to
to maturity in an adversarial environment.\textsuperscript{199} The spillover effect of DNA profiling on forensic science has been substantial.

\section*{B. Scientific Abuse Cases}

DNA technology had another unexpected fallout. It exonerated the wrongfully convicted, and in the process, the causes of these convictions were brought into the sunlight. In their book, \textit{Actual Innocence}, Barry Scheck, Peter Neufeld, and Jim Dwyer examined sixty-two DNA exoneration cases secured through Cardozo Law School’s Innocence Project to ascertain what factors contributed to these miscarriages of justice; one of the more startling conclusions was that a third of these cases involved “tainted or fraudulent science.”\textsuperscript{200} This reinforced prior disclosures of expert abuse.\textsuperscript{201} Fred Zain was the most notorious,\textsuperscript{202} but he was not alone; cases in Oklahoma City\textsuperscript{203} and Montana\textsuperscript{204} are currently under investigation.

\begin{itemize}
\item run its own neutron activation tests of the material \ldots \).
\item See Randolph N. Jonakait, \textit{Forensic Science: The Need for Regulation}, 4 HARV. J. L. & TECH. 109 (1991). “Forensic scientists present opinions and conclusions without research. They fail to test the accuracy and reliability of their work until questions are raised by others . . . .” \textit{Id.} at 148. “All available information indicates that forensic science laboratories perform poorly . . . . Current regulation of clinical labs indicates that a regulatory system can improve crime laboratories.” \textit{Id.} at 191.
\item Scheck \textit{et al.}, supra note 21, at 246.
\item Zain was Chief Serologist for ten years in West Virginia. In reviewing a judicial report on Zain’s misconduct, the West Virginia Supreme Court spoke of “shocking and egregious violations,” “corruption of our legal system,” and “mock[ing] the ideal of justice under law.” The report by the judge states:
\begin{quote}
\textbf{The acts of misconduct on the part of Zain included (1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items of evidence had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly alter[ing] laboratory records; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results.}
\end{quote}
\item See Adam Liptak, 2 States to Review Lab Work of Expert Who Erred on ID, N.Y.
The Inspector General’s 1997 report on the FBI laboratory demonstrated the extent of the problem. This investigation found inaccurate testimony, testimony beyond the competence of examiners, insufficient documentation of test results, scientifically flawed reports, inadequate record management and retention, and failures of management to resolve serious and credible allegation of incompetence. The report’s recommendations are revealing because they are so basic. They include: (1) seeking accreditation of the FBI laboratory by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board; (2) requiring examiners in the Explosives Unit to have scientific backgrounds in chemistry, metallurgy, or engineering; (3) mandating the preparation and signing of separate reports instead of having one composite report “without attribution to individual examiners”; (4) establishing report review procedures by unit chiefs; (5) preparing adequate case files to support reports; (6) monitoring court testimony in order to preclude examiners from testifying to matters beyond their expertise or in ways that are “unprofessional”; and (7) developing written protocols for scientific procedures.

These disclosures have had an impact. By 2001, the Florida Supreme Court felt compelled to note:

In order to preserve the integrity of the criminal justice system in Florida, particularly in the face of rising nationwide criticism of forensic evidence in general, our state courts—both trial and appellate—must apply the Frye test in a prudent manner to cull scientific fiction and junk science from fact. Any doubt as to admissibility under Frye should be resolved in a manner that minimizes the chance of a wrongful conviction, especially in a capital case.

VI. RECOMMENDATIONS

Daubert has irrevocably altered the paradigm for the admissibility of expert testimony. While there have been several reforms, much remains to be done. First, basic scientific research is needed. Many forensic techniques gained judicial acceptance before demanding standards were required. Only the federal government—the FBI and National Institute of Justice—have the resources to fund this research. The actual research, however, needs to be done outside

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205 FBI LABORATORY, supra note 87.
206 Ramirez v. State, 810 So. 2d 836, 853 (Fla. 2001) (citations omitted).
forensic science.\textsuperscript{207} It should be done by independent organizations such as the National Academy of Sciences,\textsuperscript{208} which has conducted studies on voiceprints,\textsuperscript{209} DNA,\textsuperscript{210} polygraph,\textsuperscript{211} and comparative bullet lead analysis.\textsuperscript{212}

The need for independent review is illustrated by the DNA experience. In November 1991, Professor Seymour Geisser, a statistician at the University of Minnesota, submitted a critical paper

\textsuperscript{207} See Redmayne, supra note 1, at 25. Redmayne noted the limitations of publishing in forensic journals:

Details of [a] new technique might be published, but this will be in a limited range of journals—Science and Justice, Journal of the Forensic Sciences, Forensic Science International—that probably does not get read much outside the forensic science community. Publication here obviously counts for something, but it is usually only when a technique becomes controversial that the wider scientific community—including, sometimes, those best placed to judge its validity—will take an interest in it.


\textsuperscript{210} Nat’l Research Council, The Evaluation of Forensic DNA Evidence (1996); DNA Technology, supra note 83.

\textsuperscript{211} See Polygraph and Lie Detection, supra note 129.

\textsuperscript{212} This report is scheduled for release in the fall of 2003.
on the forensic use of DNA statistics to the *American Journal of Human Genetics*. The *Journal* asked Professor Geisser to obtain permission from the FBI to use their original data rather than the data submitted by the FBI to defense attorneys. Geisser then requested permission from Dr. Budowle, the FBI’s top DNA scientist. James Kearney, head of the Forensic Science Research at the FBI, informed Geisser that (1) the FBI had made commitments earlier to other scientists (Chakraborty, Devlin, Risch, and Weir) and his study must not conflict with their studies, (2) the FBI data may be used only in a joint collaboration with Dr. Budowle, (3) the use of the data was restricted to this one paper, and (4) all authors must agree to the entire contents of a final manuscript prior to submission to a journal. Geisser believed that:

> an independent study under such provisions would be totally compromised, if not impossible. . . . By the way, Chakraborty, Devlin, Risch and Weir have all published articles based on the FBI databases without Budowle as a co-author. Recently, I analyzed Cellmark databases for a court in Ann Arbor, Michigan. At the insistence of Cellmark, the prosecutor requested that the judge rule that I not be allowed to submit my analysis of their data for publication. So much for open science!\[^{213}\]

Second, the improvement of expert testimony in criminal cases depends on better crime laboratories.\[^{214}\] They should be regulated\[^{215}\] as in New York\[^{216}\] and Oklahoma.\[^{217}\] Labs need to be subjected to a rigorous accreditation process; the American Society of Crime Laboratory Directors’ program is a good start.\[^{218}\] Individual examiners need to undergo certification, a process that should

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\[^{214}\] See Nick Madigan, *Houston’s Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES, Feb. 9, 2003, at A20 (reporting that operations were suspended in December 2002 after an audit found numerous problems).

\[^{215}\] See Eric Lander, *DNA Fingerprinting On Trial*, 339 NATURE 501, 505 (1989) (“At present, forensic science is virtually unregulated – with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row.”).

\[^{216}\] N.Y. EXEC. § 995-b (McKinney 2003).

\[^{217}\] OKLA. STAT. ANN. tit. 74, § 150.37.

\[^{218}\] See Smith v. State, 702 N.E.2d 668, 673 (Ind. 1998) (DNA). The *Smith* court acknowledged the importance of accreditation:

> [T]he lab was accredited by the American Society of Crime Lab Directors in 1990. Furthermore, the lab runs its tests under controlled conditions, follows specific protocols, and conducts quality testing on the kits and the analysts. Any concerns in this respect go to the weight of the evidence, not its admissibility.

*Id; see also Commonwealth v. Rosier, 685 N.E.2d 739, 743 n.9 (Mass. 1997) (DNA).*
include credible proficiency testing, continuing education, and recertification. Finally, standardization of laboratory procedures, including written protocols are needed. All this requires money in an area where the underfunding of crime labs is chronic.

VII. CONCLUSION

Daubert has evolved into a stringent standard in civil cases. Paradoxically, and perhaps shamefully, this standard has not been consistently imposed in criminal cases. Moreover, the Supreme Court has repeatedly missed opportunities to require more exacting standards in the use of scientific evidence in criminal prosecutions. If the government is not willing to do the necessary validation research,

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219 In fingerprint cases, a British fingerprint examiner with twenty-five years experience at New Scotland Yard testified that the FBI proficiency tests were nearly fraudulent: “It’s not testing their ability. It doesn’t test their expertise. I mean I’ve set these tests to trainees and advanced technicians. And if I gave my experts these tests, they’d fall about laughing.” United States v. Llera Plaza, 188 F. Supp. 2d 549, 558 (E.D. Pa. 2002).

220 See State v. Jones, 541 S.E.2d 813 (S.C. 2001). In Jones, the South Carolina Supreme Court observed that:

Kennedy has compared the insole impressions made in some 200 Canadian army boots with the feet of the wearers. He began research in the area in 1989 after earlier work done by Dr. Louise Robbins was discredited. Kennedy testified that different researchers use different methods in making these type comparisons, but that he felt his method (the one used by Agent Derrick) was the best. . . . Here, there was no written protocol in existence when Agent Derrick conducted his testing, much less one which had been subjected to SLED’s quality control policies.

Id. at 818, 819; see also United States v. Bahena, 223 F.3d 797, 809, 810 (8th Cir. 2000) (voicegram analysis rejected). The Eighth Circuit noted that:

[The expert] conceded that the method he used was not in accordance with the standards of the International Association for Identification. It is true, as defendant points out, that there are other organizations in the field, with other standards, but Mr. De Vir did not testify that the methods he used conformed to any recognized standards.

Id.

221 In 1967, President Johnson’s Crime Commission noted that “the great majority of police department laboratories have only minimal equipment and lack highly skilled personnel able to use the modern equipment now being developed.” President’s Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 235 (1967). In 1974, President Nixon’s Crime Commission commented: “Too many police crime laboratories have been set upon budgets that preclude the recruitment of qualified, professional personnel.” Nat’l Advisory Commission on Criminal Justice Standards and Goals, Police 304 (1974). A report on Washington State crime labs revealed that a “staggering backlog of cases hinders investigations of murder, rape, arson, and other major crimes.” Tomas Fuillen & Eric Nalder, Overwhelming Evidence: Crime Labs in Crisis, SEATTLE TIMES, Jun. 19, 1994, at A1, A14.
exclusion of evidence may be the only option.\textsuperscript{222} Citing the “best evidence” principle,\textsuperscript{223} a British commentator has asserted:

[W]hen expert evidence is excluded owing to reliability concerns, the proponent may be able to improve the quality of the evidence in the future. This is most obvious when the proponent is the state, which is in a good position to carry out further research on a technique or theory.\textsuperscript{224}

\textsuperscript{222} See United States v. Crisp, 324 F.3d 261, 272 (4th Cir. 2003) (Michael, J., dissenting) (“The government has had ten years to comply with Daubert. It should not be given a pass in this case.”).

\textsuperscript{223} Professor Nance has argued against the conventional wisdom that posited jury control as the underlying rationale for evidentiary rules, a position put forth by Thayer and endorsed by McCormick. Dale A. Nance, The Best Evidence Principle, 73 Iowa L. Rev. 227 (1988). Nance claimed that litigant control was a better explanatory theory—that is, the exclusion of some types of evidence is intended to require litigants to produce “better evidence.”

\textsuperscript{224} Redmayne, supra note 1, at 126.