

## ***Daubert on a Tilted Playing Field***

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### PART I

Several commentators have suggested that standards governing admission of scientific evidence should be different in criminal and civil cases and that the prosecution in criminal cases should be held to a higher standard than the defense because the prosecution has a higher burden of proof.<sup>1</sup> I prefer to see reasonable doubt as a sufficiency standard that has no impact at the admissibility stage.<sup>2</sup> The reasonable doubt standard should be applied by the trier at the end of the trial, when all the evidence is in.

The reasonable doubt standard reflects dual goals: first to acquit if the doubt is reasonable; second to convict if the doubt is fanciful. Both goals are dealt with in the typical instruction stating that a reasonable doubt is not any possible doubt or a doubt based on speculation, but that it has to be the type of doubt that would cause a juror to hesitate in making an important decision in the juror's own

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\* James Edgar Hervey Professor of Law, University of California, Hastings College of Law. This comment is a response to the version of Professor Friedman's paper given to participants at the Seton Hall Law School Evidence Symposium held on February 21, 2003.

<sup>1</sup> See, e.g., Richard D. Friedman, *Squeezing Daubert Out of the Picture*, 33 SETON HALL L. REV. 1047 (2003), D. Michael Risinger, *Preliminary Thoughts on a Functional Taxonomy for the Post-Kumho World*, 31 SETON HALL L. REV. 508 (2000), Paul Giannelli, *The Supreme Court's "Criminal" Daubert Cases*, 33 SETON HALL L. REV. 1071 (2003) (in passing). Much of Professor Friedman's paper deals with applying the sufficiency standard in entering judgments of acquittal when the prosecution case rests on dubious scientific evidence, but he also advocates a higher standard for the prosecution at the admission stage. See Friedman, *supra*, at 1069 ("In some cases, the courts should simply admit the evidence, notwithstanding doubts about its reliability . . . . This is especially so with respect to defense evidence."); see also *id.* at 1060-61.

<sup>2</sup> Compare *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), where the Supreme Court stated, in discussing the standard of proof applicable to factual findings about the foundation for co-conspirators' statements, that "the evidentiary standard is unrelated to the burden of proof on the substantive issues, be it a criminal case . . . or a civil case. . . ." Professor Risinger predicted that many of us would see it that way. See Risinger, *supra* note 1, at n.53.

life.<sup>3</sup>

When cases are close to the line drawn by the burden of proof, as is true of many if not most cases that go to trial, then there is no reason to think that evidence that is given exaggerated importance will lead to the wrong result more often when it is offered by the prosecution than when offered by the defense. In cases in which dubious expert testimony is available to one side or the other, is the prosecution systematically short of the proof line (so that the dubious testimony might illicitly push the case over the line) or systematically beyond the proof line (so that the dubious testimony might illicitly push the case back)? This is an empirical question for which abstractions about reasonable doubt offer no help.

Thinking that dubious evidence does less harm when it helps the defense than when it helps the prosecution is enticing because acquitting a guilty person is better than convicting an innocent one. But that is not the correct way to frame the issue. When the case is near the proof line, an error on the side of the defense would mean acquitting someone who had just barely been proven guilty beyond a reasonable doubt, and an error on the side of the prosecution would mean convicting someone who has almost but not quite been proven guilty beyond a reasonable doubt. Both errors are equally bad.

To illustrate, suppose that the standard of proof beyond a reasonable doubt is satisfied when twenty guilty people are acquitted for every one innocent person convicted. (If readers do not like the 20-1 ratio, they are invited to substitute their own; the principle is the same.) If so, letting twenty-one guilty people go free for every innocent person convicted is just as bad an error as letting only nineteen guilty go free for every innocent convicted. To say that the first error is less serious is to argue for an elevation of the standard, so that twenty-one guilty are set free for every innocent convicted. Reiteration of this reasoning process would lead to imposing an infinite burden of proof on the prosecution.

## PART II

I share Professor Friedman's hope that better testimony about the limits of forensic science testimony, accompanied by thoughtful instructions, will lead to better results. If particular evidence was admissible when initially offered by the defense, but not when initially offered by the prosecution, that tilt would enhance the

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<sup>3</sup> SIXTH CIRCUIT DISTRICT JUDGES ASS., PATTERN CRIMINAL JURY INSTRUCTIONS ch. 1.03 (1991).

difficulty of assessing the probative value of the testimony and explaining its limits.

If a “mercy rule” were applied to a certain type of forensic evidence, call it Test X, then the defense would be the master of whether results of the test were admitted. Even if the prosecution had incriminating evidence based on the test, the defense would have the choice not to open the door when the defense learned of it on discovery. If the prosecution had no Test X evidence or if the defense thought that dueling experts might increase the chance of acquittal, then the defense could privately go to a Test X expert and get her opinion. If the results were unfavorable to the defense, the defense could either drop the inquiry or look for a more malleable expert. The result would be that the jury would never hear anything about Test X unless the defense got a favorable result. The asymmetric approach would create a nonblind research program in which the principal investigator would report only results that confirmed his hypothesis, and the forum would not publish results unfavorable to the hypothesis except in direct rebuttal of a finding by one of the proponents.

There are many problems with prosecution forensic evidence, but in one respect it starts from a better footing than defense evidence. There is often more than one suspect to be tested. Therefore, the researcher, even if biased toward the state, has more of an incentive to be objective.

Under an asymmetric regime, there would obviously have to be some degree of reciprocity, so that certain proffers by the defendant would open the door to prosecution evidence of a similar nature. If the defense offers evidence that the defendant passed Test X, then the prosecution ought to be allowed to offer evidence that the defendant failed Text X when administered by the prosecution. What would the boundaries of an asymmetric approach be? If the defense passed a defense polygraph test and the prosecution witnesses passed a prosecution polygraph test, would the prosecution be barred from putting in this evidence? Or would the prosecution be permitted to put in the same kind of dubious evidence as the defense, and only be barred from offering different evidence of equal dubiousness? These are vexing questions that would not need to be answered under a symmetric approach.

Under an asymmetric approach, exactly what types of forensic science evidence might be admissible on behalf of the defendant, but not on behalf of the prosecution? In email correspondence with me, Professor Friedman indicated that one example would be polygraph tests.

Before discussing the polygraph example, I would like to note my agreement with Professor Friedman that there ought to be definitive precedent on the admissibility of forensic tests. The Supreme Court is wrong if it means otherwise in its repeated language about trial court discretion over the admission of expert testimony.<sup>4</sup> Identical forensic testimony should not be admissible in one courtroom but inadmissible next door. I also agree with Professors Denbeaux and Risinger that the precedent should be task-specific,<sup>5</sup> and therefore believe that different islands of precedent should apply to the guilty knowledge test as opposed to the control question test, or to findings of deceit as opposed to findings of no deceit. Suppose, then, that the judge is convinced that the control question polygraph test, when used to show lack of deceit, is likely to mislead the jury. Perhaps the judge believes that the test has some value, that it somewhat increases the chance that the subject was not deceitful, but that the jury is likely to give the test many times its true value. Suppose also that presenting testimony to tutor the jury on the true value of the test would be expensive and mainly futile. Should polygraph evidence then be admissible if offered by the defendant, but not if offered by the prosecution? It shares the problems of “Test X.”

There are other reasons to be dubious about freely admitting polygraph tests offered by the defense. Much of the existing research about the effectiveness of polygraph testing has been performed on subjects who are naive about countermeasures. These studies would not be generalizable to actual use at trial if the polygraph became a routine part of the defense arsenal. A judge can exclude this evidence if, as seems probable, training in countermeasures can defeat or seriously impair the effectiveness of the test in detecting deceit.<sup>6</sup> The admission of polygraph tests could also exaggerate the advantage possessed by wealthy defendants. They are in the best position to employ malleable but convincing polygraphers, and to find and benefit from expert tutoring in countermeasures.<sup>7</sup>

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<sup>4</sup> See *General Electric v. Joiner*, 522 U.S. 136 (1997), see also *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

<sup>5</sup> Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. \_\_\_\_ (forthcoming in Fall 2003).

<sup>6</sup> See DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW—FORENSIC SCIENCE ISSUES 589-91 (2002); see also *State v. Porter*, 698 A.2d 739 (1997). For a website that teaches countermeasures, see <http://antipolygraph.org/> (last visited Apr. 12, 2003).

<sup>7</sup> Another problem is that the defendant has a right not to testify, and the prosecution cannot comment on the exercise of that right. Surely the defendant should not be allowed to exercise that right while also putting in the expert

Another danger is that jurors will draw negative inferences from the absence of evidence. If jurors learn that polygraph tests are admissible, they might draw inferences against defendants who do not present the evidence, or against the prosecution for not presenting it. To assist in assessing probative value, will the judge instruct that one defendant could afford the test but the other couldn't? Will he try to explain to the jury why the nontested defendant didn't go to the prosecution for the test? What would the instruction be if the co-defendant who didn't present polygraph evidence had gone to the police for the test, but flunked the police-administered test?

An asymmetrical approach toward expert testimony would also harm the reputation of the courts, because it is the type of rule likely to be understood only by lawyers. Imagine the clinician prepared to testify about rape trauma syndrome. She would look dimly on the legal system were she told that she could testify for a defendant in one courtroom in support of the defense contention that the victim was not raped because she displayed no signs of rape trauma, whereas in the next courtroom she could not testify for the prosecution in support of the contention that the existence of rape trauma symptoms increases the probability that a different victim was raped.

I do not deny that there are some instances in which one can justify treating criminal cases differently than civil cases for purposes of evidence rules. For example, it is justified where exclusion is necessary to prevent or deter abuse of governmental power, as might occur were the fruits of illegal confessions admissible or the defendant's confrontation right abolished. Where the purpose of the rule is to prevent inferential error, however, then an even-handed approach is the better one.

### PART III

Professor Nance has argued, in his paper for this symposium, that courts should consider whether experts are repeat players when deciding whether to admit suppositional science because exclusion can have *ex ante* benefits by causing repeat players to do more research and produce better science. Professor Imwinkelried's critique of that paper questions the foundation for this requirement

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testimony of a polygrapher saying that he was not deceitful when he denied committing the crime. That would deprive the prosecution of cross-examination and encourage the strategic substitution of inferior evidence. Even the leading pro-polygraph case of *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (en banc), would not admit the test unless the person found to be deceitful or nondeceitful testified.

in the text or history of the rules, and also queries its administrability. Regardless of who is right, the concept does not seem to do much to differentiate the prosecution expert and the defense expert in the area of forensic science. The handwriting analyst, polygrapher or ballistics expert who testifies for the defense is just as likely to be a repeat player as a prosecution witness. Indeed, the prosecution witnesses who hone their skills by working full time in a police lab might be encouraged to do more research and make their fields more scientific if they knew that failing to do so would not only diminish their usefulness to the prosecution, but would also shut off a second career as a defense expert.

#### PART IV

I have commented on one procedural advantage provided to the defendant: the reasonable doubt rule. Another advantage is that the trial judge cannot direct a verdict against a criminal defendant, nor grant the prosecution a new trial if the defendant is acquitted. Arguably, judges therefore need to be vigilant in excluding defense evidence that might be given exaggerated importance and lead to a fanciful doubt. David McCord argues that this imbalance is one reason why courts are stricter with defense evidence that blames alternative perpetrators by showing that other people had a motive to commit the crime than with prosecution evidence that shows defendant had a motive.<sup>8</sup> The same argument could be made in support of the position that judges should actually be stricter with defense forensic science evidence than with prosecution evidence.

Ultimately, arguments from procedural advantages provided to the defendant always cut both ways. It can be argued that the advantage reflects a value judgment in favor of the defendant, and that value judgment means that courts should be liberal in admitting defense expert testimony. Or it can be argued that the advantage tilts the field too far in favor of the defendant, and that to offset it or prevent its overexploitation, courts should be cautious in admitting dubious defense expert testimony.

#### PART V

Professor Friedman cites several evidence rules as examples of asymmetric admissibility rules. I think that these rules have a quite different basis. They are either not asymmetric at all or asymmetric

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<sup>8</sup> David McCord, "But Perry Mason Made it Look So Easy:" *The Admissibility of Evidence Offered by a Criminal Defendant to Suggest That Someone Else Is Guilty*, 63 TENN. L. REV. 917, 925-26 (1996).

in very weak sense.

I will begin with a rule that, admittedly, is usually believed to be asymmetric. That is the so-called “mercy rule,” the rule that allows a criminal defendant to call character witnesses attesting to his good character. The prosecution cannot call witnesses attesting to defendant’s bad character until the defendant has opened the door in this fashion.<sup>9</sup>

I think this rule can be fully explained by differences in probative value. Defense character evidence has greater probative value than prosecution character evidence because the prosecution has potent ways to fight back when the defense offers character evidence. The prosecution can not only introduce reputation and opinion testimony, but can also ask the character witness questions about any pertinent bad conduct in the defendant’s life, whether or not it resulted in conviction. It can even ask about arrests that did not lead to charges. Thus, a defendant is unlikely to initiate the inquiry unless his life can bear this sort of examination. So when the defense offers the evidence, it is evidence of an unblemished life, whereas if the prosecution offered it, it would only be evidence of a particular reputation or opinion. If given the opportunity to initiate the character inquiry, the prosecution could introduce character evidence without fear of effective specific-acts rebuttal (impeachment of the witnesses by asking about defendant’s good deeds does not have the same bite). The defense is deterred from presenting character evidence except when it is most probative, whereas prosecution-initiated character evidence would have no such constraints.

If I am wrong, and Rule 404 is truly asymmetric, then the most probable explanation is that defense character evidence helps the powerful and well-connected, and hence is more popular with rulemakers than other pro-defense evidence. If so, I do not think that it is a model that ought to be copied.

Rule 609(a)(2), another rule cited by Professor Friedman as asymmetric, is even easier to explain as a straight distinction based on prejudice and probative value. This is the rule about the admissibility of prior convictions to impeach. In effect, it tells judges to give more protection to criminal defendants than to other witnesses in balancing prejudice against probative value. This rule makes sense, not as a break for criminal defendants, but simply because the evidence is less probative and more prejudicial when offered against

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<sup>9</sup> FED. R. EVID. 404(a).

a criminal defendant than when offered against other witnesses. First, against the witness who is a criminal defendant, the jury might use the evidence for more than its permitted purpose of undermining the witness's credibility. Second, the probative value of the evidence is less because the situational pressure on a guilty defendant to lie is so great that his prior character for lying hardly tells us anything about the probability that he will lie to get out of a serious criminal accusation. As Professor Friedman has stated in another article:

If I am right that character impeachment evidence of a criminal defendant is always, or almost always, more prejudicial than probative and that sometimes character evidence impeaching a prosecution witness may be more probative than prejudicial, then this asymmetry does make sense; it simply responds to different situations with different results, each promoting the truth-determining process. Indeed, in some situations, an asymmetrical evidentiary rule may be considered corrective of an asymmetry inherent in the situation. The accused is simply in a different situation from any other potential witness—for either the prosecution or the defense—in a criminal case. (Note in this connection that I do not argue that there should be a *per se* rule against character impeachment evidence of defense witnesses.)<sup>10</sup>

Professor Friedman also cites Rule 412 as an asymmetrical evidence rule. Apparently Rule 412 is on the list because it prevents the admission of an alleged victim's sexual history to show that she is promiscuous, while the defendant's prior sexual crimes are admissible to show that he is a rapist. Unlike the other examples, if it is asymmetric it is a pro-prosecution asymmetry. One can certainly argue, however, even from the pure accuracy point of view, that the rule is not asymmetrical because the probative value of prior serious sex crimes by the defendant is greater than the probative value of ordinary sexual activity by the victim.<sup>11</sup> At any rate, the rule is a rather weak pillar in support of the proposition that values behind the reasonable doubt rule require greater permissiveness for defense

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<sup>10</sup> Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816, 830 (1994).

<sup>11</sup> For a fuller development of this argument, see David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 568-71 (1994).

evidence; the more obvious and compelling thought is that if the rule is relevant to the issue at all, it cuts the other way.

Rules 803(8)(B) and (C) round out Professor Friedman's list of asymmetric rules. Whether the first of these, 803(8)(B), treats the prosecution and defense differently in any way is not at all clear. It literally provides that police records are not admissible when offered by either side in a criminal case.<sup>12</sup> It is true, however, that some cases treat the rule's apparent ban as a drafting error, and state that the records may be received when offered by the defense.<sup>13</sup>

Even if 803(8)(B) allows the defense but not the prosecution to use the evidence, it is questionable whether the rule is really asymmetric when considered against the background of other evidence rules. Under the hearsay rules considered as a whole, the prosecution would not be able to put in its own adversarially prepared records, but the defense could use the prosecution's adversarially prepared records against the prosecution under the non-literal interpretation of FRE 803(8)(B). Similarly, the defense could not put in the defendant's adversarially prepared records, even though the prosecution could use those records against the defendant under the admissions rule. Either side could use its own routine business records. The system of rules is broadly symmetrical.<sup>14</sup>

Under the explicit language of Rule 803(8)(C), the defense can use factual findings made by the government resulting from an investigation made pursuant to law, absent an indication of lack of trustworthiness, but the government cannot use those findings against the defense in a criminal case. Again, this does not favor the defense as much as it seems to when considered against the background of other evidence rules. Findings by the government can be used against the government but not for it. Findings by the defense can be used against the defense but not for it. To illustrate,

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<sup>12</sup> For years I thought this was a drafting oversight, and as a member of the Minnesota Advisory Committee, I made a presentation to the rule-making body, the Minnesota Supreme Court, on behalf of the Advisory Committee's proposed revision of the rule to correct this perceived error. The revised rule would have explicitly provided that 804(8)(B) evidence was admissible when offered by the defense, but not when offered by the prosecution. A prosecutor stood up and said that police reports often contained unreliable information and shouldn't be admissible against the prosecution. Apparently the Court found her argument more persuasive than mine, because it did not accept the proposed revision.

<sup>13</sup> See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 973 (2d ed. 1999), and cases cited therein at n.2.

<sup>14</sup> Admittedly, the defense might have somewhat of an advantage because of a greater capacity to protect records under the attorney-client privilege.

suppose that a white-collar defendant offers in evidence the results of an internal investigation in which the defendant's investigator made findings of fact with an eye toward litigation. The defendant could not use that self-serving investigation,<sup>15</sup> but the government could use it as the admission of an agent, and the fact that it contains opinion and second-hand knowledge would be no obstacle. The symmetry is not perfect, however, because sometimes the defense investigation would find shelter under the attorney-client privilege, while it is less likely to do so in the case of a prosecution investigation. On the other hand, in some ways the rules governing out-of-court admissions are asymmetric against the defendant because some courts hold that statements by public agents are not admissible under the exemption for agency admissions.<sup>16</sup>

The most clearly asymmetric evidence rule is Rule 804(b)(3), the statement against interest exception. In its present form (an amendment is pending but not assured), the final sentence of this rule provides that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."<sup>17</sup> This rule, which is asymmetric against the defendant, reflects the time-honored suspicion of testimony offered on behalf of the defendant that unavailable third parties confessed to the crime. There is a fear that a naive juror would find fabricated confessions to raise a reasonable doubt when they did not, and that the results would be irremediable because the prosecution could not have a new trial. The same fear could be used to argue, not that defendants should be freely allowed to offer suppositious expert testimony, but that the trustworthiness of the testimony should be clear when it is offered to exculpate a criminal defendant.

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<sup>15</sup> See *Palmer v. Hoffman*, 318 U.S. 109, 110-16 (1943); see also FED. R. EVID. 803(6) advisory committee's note. *But cf.* *Lewis v. Baker*, 526 F.2d 470 (2d Cir. 1975) (defendant railroad's investigation records admissible in civil case).

<sup>16</sup> See ROGER C. PARK ET AL., *EVIDENCE LAW: A STUDENT GUIDE TO THE LAW OF EVIDENCE AS APPLIED TO AMERICAN TRIALS* 258-59 (1998), and cases cited therein. Another evidence rule cited by Professor Friedman, Rule 301, is asymmetric but is not a rule governing the admission or exclusion of evidence. It simply protects the presumption of evidence by limiting the rule that presumptions shift the burden of production to civil cases.

<sup>17</sup> FED. R. EVID. 804(b)(3).

## PART VI

The issue discussed here requires resolution of the value question of what level of proof should be required to convict and the empirical question of whether a looser attitude toward defense expert testimony will help achieve convictions when the proof is sufficient and acquittals when it is not. My own guess is that having different standards of proof for experts will not help achieve the goal. The American system of tendentious paid experts is of dubious help even when the experts testify about valid areas of expertise. When the field itself is weak, courts should use the same standard for defense and prosecution and forbid both to offer the testimony. That is also the simpler solution, leading to less complex precedent, and the solution more intuitively appealing to criminal justice consumers.

When a procedural change increases the number of guilty defendants who go free, there is a danger that new measures will appear to counteract that change. If the playing field tilts to the defendant in terms of evidence advantages at trial, that tilt might be balanced out by increases in punishment without trial. Punishment without trial can be achieved in many ways, including tolerance of police brutality, increases in penalties that give the prosecution more leverage in inducing guilty pleas, civil commitment of persons alleged to be dangerous, or even by executive declaration that the country is at war and that enemies of society, therefore, may be held without trial. We should be wary of remedies that might reduce false positives by increasing false negatives, while looking for reforms that will reduce both.

It is possible to reduce both, or at least to decrease false positives without increasing false negatives. Improving lineups, for example by using sequential blind lineups, could well reduce the risk of false positives without increasing false negatives. Mandatory tape recording of police interrogations might decrease both false positives and false negatives. Establishing independent crime labs, as advocated by Professor Giannelli,<sup>18</sup> is a third possibility. Those are the sorts of evidentiary reforms we ought to be advocating for in the criminal justice system.

There are other political dangers. Once a formal separation of civil and criminal cases is made, those who are interested in loosening the requirements for prosecution evidence have the chance to tinker with the criminal rules. Keeping the two together is

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<sup>18</sup> Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 1 VA. J. SOC. POL'Y & L. 439 (1997).

more likely to promote fairness in screening expert testimony. Those who fear that the prosecution will get away with admitting junk science ought to be happy to ride on the coattails of the large manufacturers who lobby for tort reform in civil cases.

#### AFTERTHOUGHT

I see that I have fallen prey to the law professor's temptation to argue, and have not noted the many points at which I found useful insights in Professor Friedman's draft, or at which I agreed with him. I can only ask the reader to bear in mind that my misgivings are limited and that I admire Professor Friedman's contribution.