

# ***Daubert*: Comments on the Scientific Evidence Symposium**

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The word "expert" suggests that perhaps one was "pert" at an earlier time, but is no longer so. In this capacity, having reached the age of anecdotage, I plan to anecdote away, with comments about this Symposium. But first, a riddle and its answer. The riddle: "What is the difference between apathy and ignorance?" The answer: "I don't know and I don't care." Or, in other words: It is too early to predict whether apathy, ignorance, or some other vice or virtue will control the future of scientific evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>1</sup>

Fifteen years ago, I won the *Shirley*<sup>2</sup> case before the California Supreme Court. The vote was five to two. The court excluded hypnosis (hypnotically-altered testimony) from California court proceedings, except with regard to the defendant, who retains the right to introduce such testimony under the compulsory process clause.<sup>3</sup> Five years later, the United States Supreme Court followed suit in *Rock v. Arkansas*.<sup>4</sup> Judge Kozinski is wrong when he assumes, as he did in this Symposium, that whatever applies to the prosecution must automatically apply to the defense and vice versa.<sup>5</sup> Constitutionally, there is a difference between the goose and the gander.

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<sup>1</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

<sup>2</sup> *People v. Shirley*, 641 P.2d 775 (Cal. 1982), *cert. denied*, 459 U.S. 860 (1982), *modified*, 723 P.2d 1354 (Cal. 1982).

<sup>3</sup> *See People v. Shirley*, 723 P.2d 1354, 1384 (Cal. 1982).

<sup>4</sup> 483 U.S. 44, 56-62 (1987). In *Rock*, the Court held that a per se rule excluding the criminal defendant's hypnotically refreshed testimony is an unconstitutional burden on the defendant's right to testify. *Id.* at 62.

<sup>5</sup> *See Alex Kozinski, Brave New World*, 30 U.C. DAVIS L. REV. 997, 1010 (1997).

Two years ago, I published an article about *Daubert* in *The Champion*, the journal of the National Association of Criminal Defense Lawyers.<sup>6</sup> Paraphrasing Lawrence Durrell in the Alexandria Quartet, I opined that *Daubert* may ravish our emotions without nourishing our values. After all, *Daubert* was a prototype civil case, fought with enormous funds, great legal skills, and profound expertise. The court sees civil cases differently from criminal ones, and I suggested in my article that *Daubert* would be used in criminal cases mainly to exclude evidence. Admittedly, such a prophecy may be reckless. Those who live by the crystal ball frequently end up eating glass. And the taste of glass is everywhere. Still, this was my prediction about *Daubert* at that time. I see no reason to abandon consistency here.

It is possible that *Daubert* will become a breath of fresh air. More likely, however, it will succumb to judicial inertia, in all but some specific exceptions. On the remand of *Daubert* itself, the scientific evidence fared precisely as it had before the Court's decision, with the trial court's orders changing only in their language rather than their effect.<sup>7</sup> We attempt to expand the admissibility of that evidence which favors us and exclude, as "junk," evidence proffered by our opponents. Here the court applies the constitutional test of "the puke factor," once it pukes the evidence remains excluded under any test.

Consider the newly discovered "Litigation Anxiety Syndrome." Or the "Gulf War Syndrome." Or the "Central City Terrible Childhood Syndrome." Under both *Frye v. United States*<sup>8</sup> and *Daubert*, it will be difficult to prove the scientific validity of any of these in a civil action. "Science" is experimentation. Like Duchamp's *Nude Descending the Staircase*,<sup>9</sup> law is cubism, certainty, consensus, and the right to notice. If scientists err, they can modify their findings. If aspirin does not help, Tylenol or Darvan can be tried next. Science triumphs when the headache ends. But the law is different. If a lie detector test is interpreted

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<sup>6</sup> See Ephraim Margolin, *Daubert: Admissibility of Scientific Evidence on Criminal Cases*, CHAMPION, Aug. 1994, at 12.

<sup>7</sup> See *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320 (9th Cir. 1995) (holding expert testimony inadmissible because it was not "derived by the scientific method" (quoting *Daubert*, 509 U.S. at 590)).

<sup>8</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>9</sup> See 4 ENCYCLOPEDIA OF WORLD ART 79 (1961).

wrongly, the *innocent* defendant ends up in jail. If DNA is considered by the jury and the jury convicts, almost everything else on appeal becomes harmless error.

The law will always lag behind science unless we automatically adopt *any* "expert" formulation, uttered for the first time, as legally "scientific," as was done in the *Coppolino* case.<sup>10</sup> However, a true exception to this rule can be found in the case of *People v. Phillips*,<sup>11</sup> where a California court of appeal held that to supply a motive for murder, the prosecution may rely on the "Munchausen Syndrome by Proxy" label. That syndrome was only once identified, in the *Lancet British Medical Journal*,<sup>12</sup> before the trial testimony was allowed.<sup>13</sup> The court did this amazing thing years before *Daubert*, in a *Frye* jurisdiction!

Twenty years ago, I represented a defendant in a Maricopa County preliminary hearing. The charge was growing one acre of marijuana on . . . the local sheriff's property! The police burned the entire crop and tried to bind the defendants for trial by offering the testimony of a cop who opined that the photograph in evidence showed marijuana. I asked him on cross examination whether he knew that some plants which are not marijuana look like it. To my amazement, he answered "yes." Emboldened, I asked him if he could tell oregano from marijuana. He admitted that he could not. Recklessly, I inquired whether he could tell eucalyptus from cannabis. He said no. I expected to win on Penal Code 995<sup>14</sup> review in a higher court, but I lost instead. The superior court judge stated that "this court takes judicial notice that there is no commercial market for Eucalypti in this county." I never understood this ruling. The

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<sup>10</sup> *Coppolino v. State*, 223 So. 2d 68 (Fla. Dist. Ct. App. 1968).

<sup>11</sup> 175 Cal. Rptr. 703 (Ct. App. 1981).

<sup>12</sup> Roy Meadow, *Munchausen Syndrome by Proxy: The Hinterland of Child Abuse*, 2 LANCET 343, 343-45 (1977).

<sup>13</sup> See *Phillips*, 175 Cal. Rptr. at 707.

<sup>14</sup> CAL. PENAL CODE § 995 (West 1985). Section 995 allows courts to set aside an indictment or information, upon the defendant's motion, in the following cases: the indictment was not found, endorsed, and presented as prescribed in the code; the defendant was indicted without reasonable or probable cause; the information was filed before the defendant had been legally committed by a magistrate; or the defendant had been committed without reasonable or probable cause. See *id.*

testimony of the “expert” cop, whose ignorance was appalling, who could not tell marijuana from eucalyptus, was accepted by the court!

The worst aspect of scientific evidence in criminal cases is the admissibility of police testimony based on Federal Rule of Evidence 702,<sup>15</sup> or its local equivalent. Under this rule, the showing that a cop has “experience” (or geriatric staying power) in coppery allows him to testify as an expert. The appeal of John Gotti’s trial to the Second Circuit<sup>16</sup> reflects that more than one quarter of the trial was consumed by the testimony of a cop who was permitted to identify people, comment on videos and wiretaps, explain code words, and opine about motives.<sup>17</sup> Because he had been designated as an expert, the cop was allowed to rely on hearsay. The prosecutor’s case consisted of one-third wiretap evidence, one-third witness statements, and one-third testimony by the “expert” cop. This is perhaps one of the most massive examples of a court allowing hearsay testimony by a non-scientist “expert.” The appeal was decided by the Second Circuit before *Daubert* became law, but its result would be the same today; testimony by experts whose only expertise derives from their police work “experience” is allowed frequently in a counterintuitive manner.

This is how Horizontal Gaze Nystagmus is accepted by some courts, despite its subjectivity.<sup>18</sup> And this is how the “Drug Carrier Profile” is proven.<sup>19</sup> One is subject to the profile if she is the first one to leave the plane, or the last, or somewhere in between. The profile fits everybody’s every action. The testimony

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<sup>15</sup> See FED. R. EVID. 702 (allowing “a witness qualified as an expert” to testify “in the form of an opinion or otherwise” to assist trier of fact in understanding scientific, technical, or other specialized knowledge).

<sup>16</sup> See *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993).

<sup>17</sup> See *id.* at 936.

<sup>18</sup> See, e.g. *People v. Joehnk*, 42 Cal. Rptr. 2d 6, 15 (Ct. App. 1995) (finding that majority of pertinent scientific community finds three-part Horizontal Gaze Nystagmus (HGN) test useful for determining intoxication); *State v. Klawitter*, 518 N.W.2d 577, 585 (Minn. 1994) (holding officer’s opinion testimony of defendant’s intoxication based on HGN admissible).

<sup>19</sup> See, e.g. *United States v. Lim*, 984 F.2d 331, 335 (9th Cir. 1993) (holding drug courier profile testimony admissible to show modus operandi in complex cases); *People v. Derello*, 259 Cal. Rptr. 265, 273 (Ct. App. 1989) (holding characteristics of drug courier profile admissible as evidence of ongoing criminal activity to show elements of crime at issue).

isolates only the specific application sought to be projected in order to secure a conviction. There is no science involved, only intention. By comparison, the lie detector test is rigorously scientific.<sup>20</sup>

I was impressed to hear that in Holland there is an abiding trust in science and in the testimony of government scientists.<sup>21</sup> This is a strange cultural phenomenon: compact, culturally homogenous countries trust their own. But we are a many-cultured society; trust comes harder to us. We are also polarized, aggressive, and litigious. We subscribe to the adversary system of criminal justice, and we do not trust each other's scientists. We believe that the F.B.I. laboratories produce less science than meets the eye.<sup>22</sup> We believe that when not corrupt, government scientists are venal. If not venal, they are biased. We see paid killers, "doctor deaths," who testify about their biases prejudicially in capital cases, and we turn cynical.

American criminal defense lawyers thinking about Holland must feel nostalgic. However, most of the world, including Holland, is rapidly Americanizing. The Dutch and the rest of the world, as they Americanize in their culture, are likely to lose what to us seems like naive, child-like trust. Consider the growing scandal in England surrounding the British process of convicting the accused.<sup>23</sup> Consider the report from Australia in this issue of the *Journal*.<sup>24</sup> Is their trust in their scientists really justified? If so, for how much longer?

We do not trust court-selected experts, for we know court selection does not prevent bias. At least the partisan experts reflect more than one bias. If they reflect their client's positions,

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<sup>20</sup> For a discussion of the nature and reliability of the polygraph or lie detector test, see MCCORMICK ON EVIDENCE § 206 (John W. Strong ed., 4th ed. 1992).

<sup>21</sup> See Petra van Kampen & Hans Nijboer, *Daubert in the Lowlands*, 30 U.C. DAVIS L. REV. 951 (1997).

<sup>22</sup> See Gary Fields, *Suit Filed over FBI Lab Report*, U.S.A. TODAY, Feb. 26, 1997, at 1A (noting that plaintiff National Association of Criminal Defense Lawyers alleges "sloppy work, inadequate training, and analysis slanted to favor prosecutors" by FBI's crime lab); see also Neil A. Lewis, *F.B.I. Lab's Role in Impeachment Reviewed*, N.Y. TIMES, Feb. 26, 1997, at 16A (describing Justice Department's investigation into complaints about FBI's crime lab).

<sup>23</sup> See Mike Redmayne, *Expert Evidence and Scientific Disagreement*, 30 U.C. DAVIS L. REV. 1027, 1039-70 (1997).

<sup>24</sup> See Ian Freckelton, *Judicial Attitudes Toward Scientific Evidence: The Antipodean Experience*, 30 U.C. DAVIS L. REV. 1137, 1157-76 (1997).

they will tend to cancel each other out. But bias is not always conscious. Why not require the opportunity to double-check, re-test, re-examine? The O.J. Simpson criminal trial<sup>25</sup> gave us a taste of this; the retesting was allowed without reference to either *Frye* or *Daubert*. But, more recently, a federal court of appeals disqualified a novel test of DNA as unreliable.<sup>26</sup>

The Simpson criminal case exposed to the public appallingly inadequate scientific preparation, examinations, and testimony. O.J. had the funds to mount a major defense. Suppose you are charged with murder in Los Angeles after the O.J. trial. How would you defend? Would you trust the "experts" for the government? Would you trust the "experts" for the court? We are a society of distrust. After Waco, the Oklahoma City bombing, and the Ruby Ridge shooting in Idaho, mistrust is no longer the exclusive province of the left. We are all becoming skeptics.

In our society, before President Nixon resigned, thirty-seven of his lawyers were indicted for various crimes. Why? Because they were "too" loyal to their client. Loyalty blinds judgement. Lawyers for the Cali Cartel are presently charged with illegal conduct for acting "too loyally" for their clients.<sup>27</sup> This is a "war on drugs" phenomenon. America does not trust American prosecutors. When courts get involved, most of us do not trust the courts.

From 1990 to the date of this Note, the California Supreme Court has affirmed ninety-seven percent of capital convictions in a series of opinions designed to accomplish a goal rather than fairly analyze the trial issues.<sup>28</sup> Federal courts began reversing some of these decisions on writs of habeas corpus, but now habeas corpus itself has been curtailed.<sup>29</sup> You can now execute

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<sup>25</sup> *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County Oct. 3, 1995) (WESTLAW, OJ-TRANS database).

<sup>26</sup> *See Kridl v. McCormick*, No. 96-1339, 1997 U.S. App. LEXIS 1890, at \*2 (Fed. Cir. Feb. 5, 1997).

<sup>27</sup> *See David Adams, Cartel's Lawyers, Legal Profession Also on Trial in Miami*, ST. PETERSBURG TIMES, Aug. 1, 1995, at 1A.

<sup>28</sup> *See Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 799 (1995).

<sup>29</sup> *See Antiterrorism and Effective Death Penalty Act of 1996*, 28 U.S.C. § 2255 (listing requirements defendant must meet before federal courts may assert jurisdiction over habeas corpus petition).

people who were supposedly presumed innocent, even though their guilt was not fairly proven or has been cast into doubt by subsequently discovered evidence. Why trust the courts to be arbiters of science? In death penalty appeals, defense lawyers begin to feel that their function is merely to participate in a process leading to execution. For no one can be executed without a defense lawyer appearing for him on the docket.

When the Supreme Court decided *Daubert*, a paroxysm of creative inventiveness seized the criminal defense bar: should polygraphs now be admitted? How about hypnosis? Could you demand blind retesting of alleged contraband in the government's own laboratories? At the government's expense? Should sniffing dogs be examined under *Daubert*? What is the scientific basis for "profile" evidence? We anticipated that *Daubert* would end the subjectivity of Horizontal Gaze Nystagmus, cause government handwriting experts to enter the ranks of the unemployed, and dispatch a variety of soft science tests, from hair analysis to the mysterious "it is compatible with" opinions of an expert. Hope seemed luxuriously victorious over experience.

We are still waiting. As Chesterton said, "Hope is the power of being cheerful in circumstances which we know to be desperate."<sup>30</sup>

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<sup>30</sup> GILBERT K. CHESTERTON, *HERETICS* 159 (1919).

