The Constitutionality of Introducing Evaluative Laboratory Reports against Criminal Defendants

Edward J. Imwinkelried

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol30/iss3/5

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants

By Edward J. Imwinkelried*

Dean Wigmore, the great Rationalist of American evidence law, was not content to systematize evidence law; he also attempted to systematize the history of evidence law. Wigmore pointed out that in the first, irrational stage of evidence law, decisionmakers relied on such primitive practices as trial by ordeal, battle, and compurgation to resolve factual questions. In its second, rational stage, evidence law turned to the processes of logic and inference to settle factual disputes. Wigmore predicted that evidence law would enter a third, scientific stage in which the courts would adapt the scientific processes of hypothesis and experiment to decide factual issues.

Perhaps Dean Wigmore would be gratified to note the extent to which modern criminal evidence practice has progressed into the scientific stage. One experienced prosecutor recently remarked that "scientific evidence is the backbone of every circumstantial evidence case."

---

* B.A., 1967, J.D., 1969, University of San Francisco. Professor of Law, University of San Diego School of Law. Former member, Subcommittee on the Federal Rules of Criminal Procedure and Evidence, Criminal Justice Section, American Bar Association. The author would like to express his appreciation to Ms. Pamela Slick (class of 1978) and Mr. Paul Martins (class of 1979) for their assistance in conducting the research for this Article.

2. 1 J. Wigmore, Evidence § 8 (3d ed. 1940); J. Richardson, Modern Scientific Evidence §§ 1.1-2, 1.5-6 (2d ed. 1974).
3. 1 J. Wigmore, Evidence § 8 (3d ed. 1940); J. Richardson, Modern Scientific Evidence § 1.3 (2d ed. 1974).
4. 2 J. Wigmore, Evidence § 990 (3d ed. 1940); J. Richardson, Modern Scientific Evidence §§ 1.7-35 (2d ed. 1974).
5. Clark, Scientific Evidence, in The Prosecutor's Deskbook 542 (P. Healy & J. Manak eds. 1971) The same text includes Fong, Criminalistics and the Prosecutor, at 547. Mr. Fong is a criminalist employed by the Laboratory of Criminalistics, Santa Clara County, California. He states: "With the attention focused in recent years on the problem of filling the evidence void created by United States Supreme Court decisions, the role that
Scientific-evidence texts for criminal practitioners abound.\textsuperscript{6} Virtually every seminar on criminal practice includes a presentation on scientific evidence.\textsuperscript{7} Scientific-evidence issues have grown into full courses in law school curricula.

Although prosecutors may welcome the advent of the era of scientific evidence, that era has placed an enormous strain on the limited resources of police laboratories. Some scientific instrumentation is extremely expensive,\textsuperscript{8} and the increased resort to scientific evidence in criminal cases unfortunately coincides with the growing pressure on national, state, and local governments to reduce the level of government spending. In many jurisdictions, police laboratories have been able to cope with growing demands on their facilities only because trial judges have routinely accepted written reports of forensic analysis rather than demanding the analysts' personal appearance in the courtroom.\textsuperscript{9} For example, in some jurisdictions, trial judges customarily accept laboratory reports of drug analyses rather than insisting on the chemist's live testimony. The majority of appellate courts have sanctioned the trial judges' willingness to accept written laboratory reports in lieu of the analysts' personal appearance,\textsuperscript{10} and have thereby eased the burden on police laboratories by admitting reports as business entries,\textsuperscript{11} official records,\textsuperscript{12} or past recollection recorded.\textsuperscript{13} The same courts have brushed aside defense objections to the reports' admission,\textsuperscript{14} including the contention that the reports' admission violates the criminalistics can play in supplying objective scientific evidence has become a matter of critical importance." \textsuperscript{15}


\textsuperscript{8} Stein, Laessig & Indriks, An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of Their Analysts, 1973 Wis. L. Rev. 739, 762.

\textsuperscript{9} English, Should Laboratory Reports Be Admitted at Courts-Martial to Identify Illegal Drugs?, The Army Lawyer, May 1978, at 26. If these courts demanded the analysts' appearance and required analysts to spend much more time in court away from their laboratories, that demand would have an "obviously . . . negative effect upon the volume of requests processed by these laboratories." \textsuperscript{16}

\textsuperscript{10} See, e.g., In re Kevin G., 80 Misc. 2d 517, 519, 363 N.Y.S.2d 999, 1002 (Fam. Ct. 1975) (the "holdings elsewhere are clear and strong to the effect that official reports of drug analyses are admissible without the testimony of the analyst") (citing United States v. Frattini, 501 F.2d 1224 (2d Cir. 1974); Kay v. United States, 255 F.2d 476 (4th Cir. 1958); United States v. Ware, 247 F.2d 698 (7th Cir. 1957).

\textsuperscript{11} See notes 33-41 & accompanying text infra.

\textsuperscript{12} See notes 42-49 & accompanying text infra.

\textsuperscript{13} See note 50 & accompanying text infra.

\textsuperscript{14} See notes 56-82 & accompanying text infra.
defendants' sixth amendment confrontation rights.\textsuperscript{15}

The thesis of this Article is that the introduction against a defendant of evaluative laboratory reports, as opposed to routine reports, that are directly relevant to essential elements of the charged crimes violates the Court's reliability requirement for evidence. The first part of the Article presents a descriptive survey of the majority view. The second segment studies the constitutional requirement that prosecution hearsay evidence be reliable. The third and final part of the Article analyzes the application of the constitutional reliability requirement to the majority view.

**The Majority View: Laboratory Reports Are Admissible Against Criminal Defendants**

The majority view supporting admissibility has emerged notwithstanding an old Supreme Court dictum which seems to ban admission of forensic reports against criminal defendants. In the Court's 1912 decision in *Diaz v. United States*,\textsuperscript{16} Justice Van Devanter stated that an autopsy report "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses face to face."\textsuperscript{17}

Although that dictum has long been ignored, two recent developments may augur the resurrection of Justice Van Devanter's view. First, the Law Enforcement Assistance Administration recently released its Laboratory Proficiency Testing Program report which revealed a startlingly high incidence of errors in analyses performed by police laboratories.\textsuperscript{18} Second, partially in response to a growing realization of the fallibility of police laboratories, several courts have repudiated the majority view and declared that in a criminal prosecution, the introduction of an evaluative laboratory report against the defendant is unconstitutional. In recent years, the Supreme Courts of Pennsylvania\textsuperscript{19} and Tennessee\textsuperscript{20} have embraced the minority view. While

\textsuperscript{15} See notes 81-82 & accompanying text infra.
\textsuperscript{16} 223 U.S. 442 (1912).
\textsuperscript{17} Id. at 450.
\textsuperscript{18} See notes 137-48 & accompanying text infra.
excluding a laboratory report on nonconstitutional grounds, the Court of Appeals for the Second Circuit has strongly suggested that it concurs with the minority view;\(^{21}\) and the Court of Appeals for the Sixth Circuit also seems in sympathy with that view.\(^{22}\)

In most jurisdictions, "clear and strong" precedents say that if properly authenticated,\(^{23}\) a laboratory report is admissible against a criminal defendant even without the analyst's live testimony.\(^{24}\) The courts have admitted a wide variety of laboratory analyses: sanity commission reports,\(^{25}\) firearms-identification analyses,\(^{26}\) blood-alcohol reports,\(^{27}\) autopsy findings,\(^{28}\) analyses of suspected drugs,\(^{29}\) psychiatric evaluations,\(^{30}\) reports of poison tests,\(^{31}\) and analyses of vaginal fluid.\(^{32}\)

**Theories of Admissibility**

To justify the admission of these reports, courts subscribing to the majority view have accepted three theories of admissibility.

The first theory is that the laboratory report qualifies as a business entry. Some courts apply the common-law, business-entry doctrine to justify the report's introduction.\(^{33}\) Numerous courts hold that laboratory reports are admissible under the Uniform Business Records as Evidence Act.\(^{34}\) Recently, in *United States v. Scholle*,\(^{35}\) the Court of

---

24. For example, in *Commonwealth v. Campbell*, 244 Pa. Super. Ct. 505, 368 A.2d 1299 (1976), the authenticating witness was the librarian of the medical records department.
35. 553 F.2d 1109 (8th Cir. 1977).
Appeals for the Eighth Circuit indicated that routinely prepared drug analyses are admissible under Federal Evidence Rule 803(6) just as they were under the predecessor shopbook statute. 36

Given the premise that the analyses are business entries, the courts have been lax in evaluating the prosecution’s foundational evidence. The proponent of a business entry can authenticate a document simply by proving that it comes from proper custody. 37 Consequently, the courts have permitted records custodians, 38 records librarians, 39 and supervising criminalists 40 to serve as authenticating witnesses even when they had no personal knowledge of the laboratory tests described in the reports. In the same vein, most courts have been willing to accept habit evidence to satisfy the various foundational elements of the business entry hearsay exception. 41

Courts adhering to the majority view have been equally receptive to the second theory that laboratory reports constitute official or public records. Some courts rely on the common-law official-records doctrine as the basis for the report’s admission. 42 Others cite the Uniform Official Reports as Evidence Act. 43 Federal courts have mentioned 28 U.S.C. § 1733, the Governments Records Act as an alternative theory of admissibility to the business records exception. 44 States may have a special statute governing the admission of the type of laboratory analysis in question. 45 In the Prohibition era, for example, many states enacted statutes authorizing the admission of laboratory analyses of suspected alcohol. 46 Presently, many jurisdictions have statutes permit-

41. Even if the witness did not participate in the forensic test the laboratory report describes, the witness can lay a foundation by describing the routine manner in which the laboratory employees conduct such tests. Gass v. United States, 416 F.2d 767 (D.C. Cir. 1969); Commonwealth v. Franks, 359 Mass. 577, 270 N.E.2d 837 (1971). See also Russell v. Pitts, 105 Ga. App. 147, 123 S.E.2d 708 (1961).
46. State v. Torello, 103 Conn. 511, 131 A. 429 (1925); Commonwealth v. Stoler, 259
ting the admission of certificates of blood alcohol analysis.\textsuperscript{47} The foundational requirements for official records are even more lax than those for business entries. An official record need not be authenticated by a live, sponsoring witness; an attesting certificate that on its face seems properly executed is sufficient authentication for an attached copy of an official record. The courts have frequently accepted attesting certificates as adequate foundations for police laboratory reports.\textsuperscript{48} Moreover, a laboratory report may be authenticated and admitted as an official record even when there is some defect in the business-entry foundation for the same report.\textsuperscript{49}

Finally, a few courts have accepted prosecution arguments that the report represents the analyst's past recollection recorded. In \textit{United States v. Marshall},\textsuperscript{50} a chemist identified the white powder seized from the defendant as cocaine. The chemist stated that finding in his report. At trial, however, the chemist could not remember the specific occasion when he analyzed the powder. The prosecutor imaginatively argued that the report was admissible as substantive evidence because it was the chemist's past recollection recorded. The Court of Appeals for the Ninth Circuit accepted the argument.

\section*{Objections to Admissibility}

In addition to accepting the prosecution's basic theories of admissibility for laboratory reports, courts adopting the majority view have also rejected the major defense objections to admissibility. One objection is that the report's ultimate finding is an opinion rather than a statement of fact. For example, defense counsel have contended that a report's finding that the unknown is heroin or that the defendant's blood alcohol concentration is .16% is too evaluative to be admissible without supporting testimony of the one who conducted the test. There is substantial merit in this objection. The business entry\textsuperscript{51} and official

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{48}] Kay v. United States, 255 F.2d 476 (4th Cir. 1958); State v. Torello, 103 Conn. 511, 131 A. 429 (1925); Bracey v. Commonwealth, 119 Va. 867, 89 S.E. 144 (1916); see C. McCormick, \textit{Handbook of the Law of Evidence} § 228 (2d ed. E. Cleary 1972); English, \textit{Should Laboratory Reports be Admitted at Courts-Martial To Identify Illegal Drugs?}, \textit{The Army Lawyer}, May 1978, at 27, 35.
\item[\textsuperscript{49}] People v. Mack, 86 Misc. 2d 364, 382 N.Y.S.2d 424 (1976).
\item[\textsuperscript{50}] 532 F.2d 1279 (9th Cir. 1976).
\end{itemize}
\end{footnotesize}
records\textsuperscript{52} hearsay exceptions are generally limited to statements of fact. The drug analyst does not see the unknown substance’s molecular structure, nor does the blood alcohol analyst perceive the alcohol coursing through the defendant’s brain. The findings are certainly not “facts” in the common usage of that term.\textsuperscript{53} Moreover, for purposes of the evidence law governing expert testimony, these statements would unquestionably be considered opinions.\textsuperscript{54} The cases uniformly hold that when an analyst personally appears to testify to these findings, he or she must qualify as an expert because the testimony is opinion.\textsuperscript{55}

Nevertheless, the majority of courts overrule this objection. One response to the objection is that if the document falls within a doctrine such as the business-entry exception, any opinion in the document is admissible. That this response departs from the traditional, common-law view of the scope of the business-entry and official-record exceptions is clear.\textsuperscript{56} However, some courts have explicitly stated that the opinion restriction is inapplicable so long as the court may reasonably assume that the analyst would have been qualified to state the opinion from the witness stand. \textit{Thomas v. Hogan},\textsuperscript{57} a civil case frequently cited in criminal cases,\textsuperscript{58} openly advocates this position. In this case, the Court of Appeals for the Fourth Circuit stated that if a laboratory report qualifies as a business entry, “it makes no difference whether the record reflects an expression of . . . opinion or an observation of objective fact.”\textsuperscript{59} Other courts gloss over the issue by characterizing the opinion as a “finding,”\textsuperscript{60} “objective fact,”\textsuperscript{61} or “medical fact.”\textsuperscript{62} Another group of courts argues more realistically that when the scientific test is “routine”\textsuperscript{63} or “mechanical,”\textsuperscript{64} the scientific opinion is so reliable

\begin{itemize}
\item \textsuperscript{52} Id. §§ 315, 317.
\item \textsuperscript{53} Id. § 12.\textsuperscript{54} Id. § 13; English, \textit{Should Laboratory Reports Be Admitted at Courts-Martial to Identify Illegal Drugs?}, \textit{The Army Lawyer}, May 1978, at 27.
\item \textsuperscript{55} Wolford v. United States, 401 F.2d 331 (10th Cir. 1968); McCarthy v. United States, 399 F.2d 708 (10th Cir. 1968); C. McCormick, \textit{Handbook of the Law of Evidence} § 13 (2d ed. E. Cleary 1972); English, \textit{Should Laboratory Reports Be Admitted at Courts-Martial to Identify Illegal Drugs?}, \textit{The Army Lawyer}, May 1978, at 27.
\item \textsuperscript{56} See notes 51-52 & accompanying text supra.
\item \textsuperscript{57} 308 F.2d 355 (4th Cir. 1962).
\item \textsuperscript{58} See, e.g., United States v. Evans, 21 C.M.A. 579, 45 C.M.R. 353 (1972).
\item \textsuperscript{59} Thomas v. Hogan, 308 F.2d 355, 360 (4th Cir. 1962).
\item \textsuperscript{60} Robertson v. Cox, 320 F. Supp. 900 (W.D. Va. 1970).
\item \textsuperscript{61} Kay v. United States, 255 F.2d 476, 481 (4th Cir. 1958).
\item \textsuperscript{63} Commonwealth v. Campbell, 244 Pa. Super. Ct. 505, 368 A.2d 1299 (1970).
\end{itemize}
that it "approximates" a statement of fact.\textsuperscript{65} The problem is that courts fail to account for the basic difference between such routine reports and one requiring evaluation by the expert.

The second defense objection, based on the Supreme Court's famous decision in \textit{Palmer v. Hoffman},\textsuperscript{66} has generally met the same fate as the first. In \textit{Palmer}, an accident at a railroad crossing gave rise to an action against the railroad's trustees. The railroad prepared a litigation report, and at trial the railroad's trustees attempted to introduce part of the report on the railroad's behalf. The court held that the report was inadmissible as a business entry. Many of the lower courts have construed \textit{Palmer} as holding that reports prepared in anticipation of litigation are too suspect to be admitted on behalf of the preparing party.\textsuperscript{67} Although \textit{Palmer} was a civil action, its holding has been extended to criminal cases.\textsuperscript{68} Thus, the defense bar has urged that police laboratory reports likewise should be regarded as inadmissible litigation reports.\textsuperscript{69} Realistically, the laboratory staff is part of the prosecution team, and the analyst preparing the report anticipates its use in the subsequent prosecution.

Like the first defense objection, this argument has substantial merit. In fact, the objection has won some adherents among the courts, including the Supreme Court of Tennessee. In \textit{State v. Henderson},\textsuperscript{70} that court stated that police laboratory reports "cannot be said to have been prepared for any reason other than their potential litigation value."\textsuperscript{71} In dictum in \textit{United States v. Smith},\textsuperscript{72} the Court of Appeals for the District of Columbia asserted that \textit{Palmer}'s "litigation records" doctrine bars the use of police laboratory reports by the prosecution.\textsuperscript{73} In his vigorous dissent in \textit{State v. Rhone},\textsuperscript{74} Judge Bardgett of the Supreme Court of Missouri argued that the laboratory analyst must be deemed "a member of the prosecuting team."\textsuperscript{75}

\textsuperscript{65} United States v. Evans, 21 C.M.A. 579, 581, 45 C.M.R. 353, 355 (1972).
\textsuperscript{66} 318 U.S. 109 (1943).
\textsuperscript{69} English, \textit{Should Laboratory Reports Be Admitted at Courts-Martial to Identify Illegal Drugs?}, \textit{The Army Lawyer}, May 1978, at 27.
\textsuperscript{70} 554 S.W.2d 117 (Tenn. 1977).
\textsuperscript{71} Id. at 120.
\textsuperscript{72} 521 F.2d 957 (D.C. Cir. 1975).
\textsuperscript{73} Id. at 965-66.
\textsuperscript{74} 555 S.W.2d 839 (Mo. 1977).
\textsuperscript{75} Id. at 847.
Despite its adherents, the Palmer objection has been rejected by most courts considering the issue. Indeed, at least one commentator has argued that Palmer is inapplicable because police laboratory analysts view themselves primarily as scientists rather than law enforcement officers. With that self-image, they can be trusted to conduct their analysis with scientific objectivity rather than prosecutorial bias. Other courts dismiss the Palmer objection with the rejoinder that the analysis is “intrinsically neutral.” If the analysis yields the finding that the unknown is cocaine, the finding helps the prosecution, but the analysis might just as easily yield the opposite conclusion and thereby aid the defendant. In the view of these courts, therefore, reports otherwise qualifying as business entries should be excluded only when the sole purpose for their preparation is future use against the specific defendant.

After the majority courts rejected these common-law objections, the defense bar turned to the constitutional objection that the admission of these reports violates the defendant’s sixth amendment guarantee of confrontation. However, the majority courts have overruled this objection in a sentence or two as if to suggest that the objection is wholly frivolous. As discussed below, this constitutional objection deserves much more exacting analysis.

The Constitutional Requirement That Prosecution Hearsay Evidence Be Reliable

The constitutional objection has received more deliberate and extended analysis in recent opinions. These decisions have created a sharp split of authority which of itself should warrant a critical reassessment of the majority view. If the shockingly high error rates in forensic laboratory analyses revealed by the Laboratory Proficiency Testing Program are considered as well, a reassessment becomes an

77. Id.
79. Id.
81. See, e.g., State v. Henderson, 554 S.W.2d 117 (Tenn. 1977).
83. See notes 19-22 & accompanying text supra.
84. PROJECT ADVISORY COMMITTEE, LABORATORY PROFICIENCY TESTING PROGRAM, SUPPLEMENTARY REPORT—SAMPLES 1-5, at i (1975) (prepared for the U.S. Dep't of Justice);
inescapable mandate. However, before discussing the peculiar constitutional problems posed by police laboratory reports, the governing constitutional standard must be identified.

The Constitutional Requirement of Reliability

There is a fair consensus that the Constitution requires prosecution hearsay evidence to be reliable.⁸⁵ Although there is some disagreement over the source of this requirement,⁸⁶ most courts⁸⁷ and commentators⁸⁸ assume that it is the sixth amendment confrontation clause that demands this reliability.⁸⁹ Most observers trace the reliability requirement to the Supreme Court's decision in Dutton v. Evans.⁹⁰ Evans was

---

⁸⁹ There is, moreover, a continuing controversy as to whether reliability is the only constitutional muster prosecution hearsay must pass. See Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99 (1972); Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567 (1978); Younger, Hearsay and Confrontation, or What Every Criminal Defense Lawyer Should Have in Mind When He Objects to the Prosecutor's Offer of Hearsay, 2 Nat'l J. Crim. Def. 65 (1976). Some argue that reliable prosecution hearsay is admissible even when the prosecution makes no attempt to produce the declarant. Griswold, The Due Process Revolution and Confrontation, 119 U. Pa. L. Rev. 711, 724, 726 (1971). The proponents of this view usually cite Dutton v. Evans, 400 U.S. 74 (1970). Others hold that, at least when the hearsay is crucial to the prosecution or devastating to the defense, the prosecution must not only demonstrate the reliability of the hearsay but also make a good faith effort to produce the declarant in the courtroom. In his concurring opinion in California v. Green, 399 U.S. 149, 182 (1970), for example, Justice Harlan argued that the confrontation clause imposes "an availability rule, one that requires the production of a witness when he is available to testify." The proponents of this view usually rely on Barber v. Page, 390 U.S. 719 (1968). In Dutton v. Evans, 400 U.S. 74, 95 (1970), Justice Harlan retreated from his position that the confrontation clause established "a preferential rule, requiring the prosecutor to avoid the use of hearsay where it is reasonably possible for him to do so—in other words, to produce available witnesses."
prosecuted for murder; Williams was his alleged accomplice. While in prison, Williams stated that if it had not been for Evans, "we wouldn't be in this now." In most jurisdictions, Williams' statement would have been inadmissible against Evans; Williams made the statement so long after the commission of the crime that the statement would not fall within the co-conspirator hearsay exception. However, to Evans' detriment, his case arose in Georgia which has an extraordinarily broad co-conspirator exception—broad enough to admit even Williams' statement. The trial judge accordingly admitted Williams' statement at Evans' trial, and Evans argued on appeal that the statement's admission violated his sixth amendment right to confrontation. Writing for the plurality, Justice Stewart carefully noted that Williams' statement was not "crucial" or "devastating" evidence. He then quickly added that the statement had sufficient "indicia of reliability" to satisfy the confrontation clause. Justice Stewart pointed out that Williams was in a position to know whether Evans was involved, the possibility of Williams' faulty recollection was "remote in the extreme," and Williams had no apparent reason to lie. As several commentators have noted, a majority of the Court subsequently approved the reliability test in Mancusi v. Stubbs.

In light of Dutton and Mancusi, the lower courts have almost universally recognized the existence of a reliability requirement. The Court of Appeals for the District of Columbia has stated that prosecution hearsay must have "earmarks of reliability." The Court of Military Appeals reads Dutton as demanding "hallmarks of authenticity." The Supreme Court of Washington has announced its belief that the evidence's reliability is now the Supreme Court's principal "concern" in confrontation cases.

The commentators are in accord and generally acknowledge that

91. Id. at 77.
92. Id. at 81.
93. Id. at 87.
94. Id. at 89.
95. Id. at 88-89.
97. 408 U.S. 204, 213 (1972), holding that a witness' testimony at a prior trial bore sufficient "indicia of reliability" to be admissible at present trial.
the confrontation clause imposes a reliability requirement. The Court has taken a "functional approach" and demanded that in each case, the lower courts examine "the reliability of the proffered prosecution hearsay statement."

Factors Determining the Reliability of Prosecution Hearsay Evidence

In addition to the agreement as to the existence of the reliability requirement there is also substantial consensus on the factors relevant to determining reliability. The following is not an exhaustive list of the pertinent factors, but does present those factors critical to reassessing the majority view that laboratory reports are admissible against criminal defendants.

One pertinent factor is the objective likelihood that the hearsay declaration is in error. A perceptive article written before Dutton argued that "the likelihood of an inaccurate report" should be a factor in confrontation analysis. Dutton confirmed that the likelihood of error is indeed a proper factor in analyzing the inadmissibility of prosecution hearsay. In Dutton, as previously noted, Justice Stewart analyzed the reliability of Williams' statement in painstaking detail. He specifically underscored Williams' perception, memory, and sincerity which created strong inferences that Williams' statement was objectively accurate. The likelihood of the hearsay statement's substantive accuracy is now widely recognized as pivotal in evaluating prosecution hearsay.

Another factor is how directly the hearsay statement relates to the crime's essential elements. The Court acknowledged this factor in some of its very early confrontation decisions, Kirby v. United States, decided in 1899, and Dowdell v. United States, decided in 1911. In


104. Id. at 1380.


107. Id. at 89.

108. See, e.g., United States v. Eaglin, 571 F.2d 1069, 1080-82 (9th Cir. 1977).


110. 221 U.S. 325 (1911).
Kirby, the Court held the admission of Kirby's accomplices' conviction violated the defendant's sixth amendment confrontation rights and stressed that the prosecution had used the conviction to prove a "vital fact" in Kirby's case.\textsuperscript{111} In contrast, the Dowdell Court stressed the liberal admissibility of "documentary evidence to establish collateral facts."\textsuperscript{112}

The essential-element factor has surfaced in Warren and Burger Court confrontation decisions. In *Douglas v. Alabama*\textsuperscript{113} and *Bruton v. United States*,\textsuperscript{114} the Warren Court dealt with situations in which the jury was likely to misuse prosecution hearsay evidence. In *Douglas*, when the defendant's accomplice invoked the privilege against self-incrimination on the stand, the prosecutor, purporting to refresh the accomplice's recollection, read the accomplice's confession in open court. The Court held that this procedure violated Douglas' confrontation rights. Justice Brennan emphasized that the accomplice's statement was "the only direct evidence" that Douglas had fired the weapon.\textsuperscript{115}

*Bruton* was a joint trial. Bruton's co-defendant had confessed, but the confession was inadmissible against Bruton. The co-defendant did not testify. The trial judge admitted the confession at the joint trial with a limiting instruction that the jury could not consider the confession in deciding Bruton's guilt. The Court held that there was too great a risk that the jury misused the confession as evidence against Bruton. Once again Justice Brennan authored the lead opinion, and once again he took up the theme of the importance of the challenged evidence. In his judgment, the accomplice's confession was "devastating" to Bruton.\textsuperscript{116}

Rather than breaking with the Warren Court on this issue, the Burger Court has continued to scrutinize the effect the challenged hearsay would have on the outcome of the case. In *Dutton*, the plurality stated that Williams' statement was "of peripheral significance at most."\textsuperscript{117} Justice Stewart distinguished *Douglas* and *Bruton* on the precise ground that the evidence in those cases was "crucial" or "devastating."\textsuperscript{118}

A third factor in determining the reliability of prosecution hearsay

\begin{itemize}
  \item\textsuperscript{111} Kirby v. United States, 174 U.S. 47, 55-56, 60 (1899).
  \item\textsuperscript{112} Dowdell v. United States, 221 U.S. 325, 330 (1911).
  \item\textsuperscript{113} 380 U.S. 415 (1965).
  \item\textsuperscript{114} 391 U.S. 123 (1968).
  \item\textsuperscript{115} Douglas v. Alabama, 380 U.S. 415, 419 (1965).
  \item\textsuperscript{116} Bruton v. United States, 391 U.S. 123, 136 (1968).
  \item\textsuperscript{117} Dutton v. Evans, 400 U.S. 74, 87 (1970).
  \item\textsuperscript{118} Id.
is whether the trier of fact is likely to give the hearsay evidence its proper weight. This factor is traceable to a cryptic passage which has appeared in several recent confrontation decisions: "a satisfactory basis for evaluating the truth of the prior statement." Justice White coined the expression in *California v. Green* while explaining that the cross-examination of a witness at a trial about a prior statement made by that very witness satisfied the confrontation clause. In the course of this explanation, he stated that although the cross-examination was not contemporaneous with the prior statement, it gave the jury "a satisfactory basis for evaluating the truth of the prior statement." Later, in *Dutton*, Justice Stewart stated that the jury had "a satisfactory basis for evaluating the truth of" Williams' prior statement. Justice Rehnquist used the same language when he delivered the opinion of the Court in *Mancusi*.

Most lower courts simplistically have equated this language with "indicia of reliability," the indications of the hearsay's substantive accuracy. However, the sounder meaning to be given to the expression is the jury's ability to give the evidence its proper weight. In several confrontation opinions the Supreme Court has expressed its concern about the jury's ability to do just that. In *Green*, for example, the Court refers to "the jury's ability to assess the reliability of the evidence it hears." In *Dutton*, Justice Stewart voiced confidence that the jury would not give Williams' statement "undue weight" because it was rather ambiguous, and in *Davis v. Alaska*, the Court stated that the jury must be in a position to "make an informed judgment as to the weight to place on" prosecution evidence.

Furthermore, two of the leading Supreme Court confrontation decisions, *Douglas* and *Bruton* can be explained in terms of the weight the jury gives hearsay evidence. In *Douglas*, the prosecutor's reading of the accomplice's confession was not entitled to any substan-

121. Id. at 161.
128. Id. at 317.
tive weight because the confession was admitted for the sole purpose of refreshing the accomplice’s memory. The key to the Court’s holding is its conclusion that the jury probably did not give the reading its proper weight but instead treated the confession as substantive evidence of Douglas’ guilt. The same analysis explains the result in Bruton. Under the narrow federal co-conspirator doctrine, the accomplice’s confession was admissible against the accomplice but not against Bruton. As against Bruton, the confession was incompetent hearsay, and the jury should not have given it any substantive weight in its deliberation on his guilt. However, as in Douglas, the Bruton Court quite correctly feared that the jury would not have given the confession its proper weight but would rather misuse the confession and consider it as substantive proof of Bruton’s guilt.

Factoring into reliability analysis the jury’s ability to give prosecution evidence its proper weight serves the purpose of the confrontation clause. In Dutton, Justice Stewart found that Evans had no real need to cross-examine Williams. The possibility that Evans could discredit Williams was “wholly unreal”; and since on its face the statement was ambiguous, the jury would not give the statement “undue weight.” In such circumstances, there is little need for cross-examination. If, on the other hand, the justice had found that the jurors were likely to misjudge the statement’s weight, then the need for personal confrontation in the courtroom would be evident. The jurors would need the benefit of the defense attorney’s cross-examination to clarify and qualify the hearsay statement.

In summary, in deciding whether prosecution hearsay has the requisite reliability, the courts should consider at least the following factors: (1) the likelihood that the hearsay is substantively accurate; (2) how directly the hearsay relates to the crime’s essential elements; and (3) the likelihood that the jury will give the hearsay its proper weight.

Application of the Constitutional Reliability Requirement to the Majority View

Having identified the factors relevant to reliability analysis, this Article will now analyze the majority view in light of them.

134. Id. at 88.
The Likelihood That The Hearsay Is Substantively Accurate

Just as lay jurors tend to attach too much weight to lay eyewitness testimony, attorneys tend to attach too much weight to scientific evidence. However, the Laboratory Proficiency Testing Program report should give the legal community a more realistic view of the possibility of error in forensic analysis. The program began in fall, 1974. Between 235 and 240 crime laboratories from throughout the United States participated in the program. To test the accuracy of these crime laboratories, the Project Advisory Committee prepared samples and submitted them to the laboratories for evaluation. The Committee knew the data that a proper forensic analysis of the samples would generate, and the Committee judged the laboratories' reports against that known data.

The report's findings are alarming. In Test #3, the Committee submitted blood for analysis. Of the laboratories typing for the MN system, only sixty percent reached the correct conclusion. In Test #6, the Committee submitted drugs for evaluation. One hundred seventy-nine laboratories participated in this test. Only 70.4% correctly concluded that the mixture included cocaine. In Test #8, the Committee again submitted blood for analysis. In this test, one question was whether two bloodstains could have shared a common origin. Only 37.4% of the laboratories reached the correct conclusion. Test #9 was similar to Test #8; the Committee submitted glass for common-origin testing. Here only 69.6% of the participating laboratories reached the correct finding. Test #10 involved the submission of

---

136. There seem to be two causes for this phenomenon. First, few attorneys have sufficient scientific expertise to even realize the weaknesses in various types of scientific evidence. Second, lawyers view themselves as professionals and, as such, often have an unjustifiably high regard for other professionals, including scientists.
137. PROJECT ADVISORY COMMITTEE, LABORATORY PROFICIENCY TESTING PROGRAM, SUPPLEMENTARY REPORT—SAMPLES 1-5, at i (1975) (prepared for the U.S. Dep't of Justice); PROJECT ADVISORY COMMITTEE, LABORATORY PROFICIENCY TESTING PROGRAM, SUPPLEMENTARY REPORT—SAMPLES 6-10, at i (1976) (prepared for the U.S. Dep't of Justice) (on file with The Hastings Law Journal).
138. PROJECT ADVISORY COMMITTEE, LABORATORY PROFICIENCY TESTING PROGRAM, SUPPLEMENTARY REPORT—SAMPLES 1-5, at 6 (1975) (prepared for the U.S. Dep't of Justice) (on file with The Hastings Law Journal).
139. PROJECT ADVISORY COMMITTEE, LABORATORY PROFICIENCY TESTING PROGRAM, SUPPLEMENTARY REPORT—SAMPLES 6-10, at 3 (1976) (prepared for the U.S. Dep't of Justice) (on file with The Hastings Law Journal).
140. *Id.* at 7.
141. *Id.* at 9.
paint samples for common-origin testing. Only fifty percent of the participating laboratories reported correct test results. In Test #13, the Committee submitted physiological fluid for analysis. Only eighteen percent of the participating laboratories correctly reported a conclusive finding that the fluid was saliva. The Committee recently released the results of the final six tests, and the results were comparable to those of the earlier tests.

As the Committee cautioned, it is dangerous to generalize from these results: "The Project Advisory Committee could have composed or manufactured samples that would have guaranteed a 99% correct response rate, or samples that would have resulted in a 5% correct response rate. Due to this variation in degree of difficulty, the actual percentage of laboratories submitting correct or incorrect responses may not reflect the actual capability of the participating laboratories." However, the report unquestionably documents a very real possibility of error in the forensic analyses conducted by police laboratories in the United States. In Dutton, Justice Stewart thought that it was "inconceivable" that Evans' cross-examination of Williams would discredit Williams; the possibility of demonstrating the unreliability of Williams' statement was "wholly unreal." In light of the Laboratory Proficiency Testing Program, the same cannot be said of cross-examination of a laboratory analyst.

How Directly the Hearsay Relates to the Crime's Essential Elements

In a high percentage of the reported cases, the conclusion stated in the laboratory reports introduced by the prosecutor is directly relevant to an essential element of the charged crime. In driving-under-the-influence prosecutions, the courts have admitted reports stating blood alcohol levels that presumptively placed the defendant under the

142. Id at 11.
144. Law Enforcement Assistance Administration Newsletter, Sept. 1978, at 1.
145. The results of the hair analysis, Test #18, are particularly shocking. Fifty percent of the participating laboratories failed to identify dog hair, fifty-four percent deer hair, and sixty-seven percent cow hair. Id. at 5. See also Trial, Oct. 1978, at 9.
148. Id at 89.
influence. In drug prosecutions, the courts have often admitted reports stating the contraband character of drugs seized from the defendant. When the issue is insanity, the courts have sometimes admitted sanity commission reports without supporting psychiatric testimony.

In Dutton Justice Stewart emphatically denied that Williams' statement was "crucial" to the prosecution or "devastating" to the defense. Usually when the prosecutor offers a police laboratory report it will be crucial to the case. Indeed, unless the issue is of practical importance in the case, the issue will not merit the expenditure of precious laboratory resources. Moreover, in many cases, the report will be not only practically important but also absolutely essential to the prosecution in order to prevent a directed verdict for the defendant. For example, without proof that the substance seized from the defendant is a contraband drug, the drug prosecution will be dismissed. In the typical case in which the prosecution offers a forensic report, this factor will be essential to the case and will therefore cut in favor of finding a constitutional violation unless the defendant has a right to confront the one who conducted the test.

The Likelihood That the Jury Will Give The Hearsay Its Proper Weight

Some scientific fields have relatively objective standards for evaluating test results. For example, in fingerprint identification, classification systems and standards for identification are universally recognized. However, other scientific fields have few, if any, objective standards. There is, for example, a large element of subjectivity in the interpretation of polygraphs, and the opinions of forensic pathol-

---

154. Id.
155. See J. Richardson, Modern Scientific Evidence §§ 10.1-22 (2d ed. 1974); A.
ogists are often highly judgmental. We shall term these latter reports evaluative. When the subject of the report is evaluative, equally qualified experts in the field will often reach conflicting opinions on the very same facts. Precedent and principle compel the conclusion that there is too great a likelihood that a lay trier of fact will generally be unable to determine the proper weight to assign to an evaluative opinion in a police laboratory report if they do not have the opportunity to have the expert cross-examined.

The precedents under the traditional, common-law, business-entry and official-records hearsay exceptions recognized the distinction between routine and evaluative reports and excluded the latter from jury deliberation. The issue arose most frequently when parties in civil actions offered medical reports. The courts were willing to admit statements which were “objective observations of occurrences.” However, when the diagnosis was “subject to debate” and the opinion involved “judgment or discretion on complex data,” the courts ordinarily excluded the medical record.

Indeed, some of the cases admitting police laboratory reports concede the danger of admitting evaluative reports. One of the most frequently cited precedents in this area is Commonwealth v. Slavski, a 1923 Massachusetts decision. The Slavski court upheld the admission of a written analysis of suspected moonshine. In its decision, however,

---


156. See J. Richardson, Modern Scientific Evidence §§ 5.01-.11.

164. See, e.g., Kay v. United States, 255 F.2d 476 (4th Cir. 1958).
165. 245 Mass. 405, 140 N.E. 465 (1923).
the court stressed that since the report’s accuracy did not depend on the subjective abilities of the analyst, there was little room for variation or misanalysis.\textsuperscript{166} In \textit{Boehme v. Maxwell},\textsuperscript{167} a federal habeas corpus proceeding, the trial court admitted a report of an instrumental blood analysis for poison. The court pointed out, however, that the test entailed “the use of an automatic machine” and that the analyst’s only tasks were “merely putting the samples into the machine and reading the results.”\textsuperscript{168} More recently, in \textit{People v. Porter},\textsuperscript{169} a New York court dealt with the admission of a chemist’s report in a prosecution for driving while intoxicated. The court said that “the conclusion to be drawn was not a matter of judgment but merely one of mathematical computation.”\textsuperscript{170}

However, the most trenchant analysis appears in the cases following the minority view which excludes evaluative reports. In \textit{Commonwealth v. McCloud},\textsuperscript{171} the Supreme Court of Pennsylvania excluded an autopsy report stating an opinion about the legal cause of death. The court wrote that an opinion on that subject is “at best a conclusion based on interpretation of often conflicting medical opinion.”\textsuperscript{172} In \textit{Phillips v. Neil},\textsuperscript{173} the Court of Appeals for the Sixth Circuit rejected psychiatric reports. The court remarked that psychiatry is “a field of conjecture. Even in the diagnosis of actual insanity, cases are rare in which trained psychiatric witnesses do not come to opposite conclusions.”\textsuperscript{174} One commentator endorsed the result in \textit{Phillips}, recognizing that the soundness of the declarant’s opinions “could not be adequately tested without cross-examination of the declarant.”\textsuperscript{175} Finally, in \textit{United States v. Beasley},\textsuperscript{176} the same court clearly distinguished routine from evaluative reports. On the one hand, the court approved the ad-
mission of a sheet on which a laboratory technician processed a latent palm print. The court stated that the processing was "mechanical [and] routine." On the other hand, the court indicated that "the fingerprinting expert who matched the laboratory's print with those of the Appellant . . . , properly, was presented at trial and cross-examined." Beasley represents a particularly strict application of the minority view, since there are fairly objective standards for fingerprint comparison. However, Beasley certainly highlights the danger of admitting evaluative reports.

Principle as well as precedent supports the proposition that the admission of evaluative laboratory reports is unconstitutional. In all the cases in which the Supreme Court has rejected confrontation challenges to prosecution hearsay, the hearsay declarant has been a lay person. A lay juror can appreciate the perception, memory, and narration problems another lay person will encounter. However, evaluative laboratory reports are two steps removed from the admission of lay hearsay declarations. First, almost any laboratory report will be an expert analysis. The traditional view is that expert testimony is admissible only when the subject-matter is beyond the comprehension or ken of the average lay person. The admission of any expert report thus calls into question the jury's ability to assign the report its proper weight. The problem is compounded because of the second step: Now we are dealing with an evaluative expert report—a report in a field where even experts might disagree.

In Richardson v. Perales, the Supreme Court dealt with a due process challenge to a Social Security Act administrative proceeding. The purpose of the proceeding was to determine whether the claimant was disabled, and the hearing officer admitted written reports of physicians who examined the claimant. The confrontation clause is inapplicable to administrative proceedings, and even the due process standard is relaxed in that context. Yet, in finding that there was no

---

177. Id. at 1281.
178. Id.
179. See notes 161-62 & accompanying text supra.
182. See notes 155-56 & accompanying text supra.
184. By its terms, the sixth amendment confrontation guarantee applies only to criminal prosecutions. U.S. Const. amend. VI.
due process violation, the Court felt compelled to stress that the tests the physicians conducted were "routine [and] standard." When the hearsay statement is an evaluative opinion in a laboratory report, common sense dictates that there is too great a risk that the lay jury will not properly assess the weight to be given to the statement. In this situation, the report's admission would violate the Dutton mandate that the lay jury have "a satisfactory basis for evaluating the truth" of the evaluative opinion.

All three factors, reliability, essential element, and proper weight, therefore, point to the conclusion that the admission of evaluative laboratory reports violates the defendant's constitutional rights.

**Counterarguments**

This analysis cannot be concluded, of course, without reviewing several obvious and substantial counterarguments. The first counterargument is that the proposed standard is not judicially manageable in that it requires lay judges to distinguish between routine and evaluative reports. However, the proposed standard is the same standard the Court of Appeals for the Fifth Circuit has used for several years in discovery cases. That court grants the defendant a right to an independent forensic examination of physical evidence when the analysis is "subject to varying expert opinion." If the opinion is evaluative and "subject to expert disagreement," the defendant may inspect the physical evidence and submit it to his or her own expert for evaluation. The wide acceptance of the learned-treatise hearsay exception is further evidence of the growing confidence in the ability of attorneys and judges to work with scientific materials.

Moreover, this counterargument becomes moot if the courts place the burden of establishing that the report's subject matter is too evaluative on the defendant. The Fifth Circuit has assigned the defendant that burden in its discovery decisions by requiring the defendant "bear the burden to prove that the [analysis] . . . is subject to disagreement."

---

189. See, e.g., Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975).
190. Id. at 746.
191. White v. Maggio, 556 F.2d 1352, 1358-59 (5th Cir. 1977).
192. The Federal Rules of Evidence include that exception. Fed. R. Evid. 803(18). Most of the states that have adopted the Rules have also adopted that exception.
193. White v. Maggio, 556 F.2d 1352, 1358-59 (5th Cir. 1977).
Applying the same rationale to laboratory reports, courts could require the defendant to establish that reports otherwise qualifying as business entries or official records are nonetheless inadmissible because they are subject to varying opinions. At the very least, the defendant would have to present texts and articles documenting the lack of objective criteria in the particular scientific field.  

The second counterargument is that the proposed standard would place too great a burden on police laboratories. This standard will have the predictable result of straining the laboratories' resources by forcing analysts to spend an undue amount of time in the courtroom. The laboratories are already overburdened, the argument continues, and the adoption of the standard will exact too great a cost and unduly impede the effective administration of the criminal justice system.  

However, the argument overstates the foreseeable results of the adoption of the proposed standard. The standard does not apply to all laboratory reports; it would exclude only highly evaluative reports. Even more narrowly, if the courts follow the lead of the Fifth Circuit, the standard will exclude only reports the defendant can demonstrate to be highly evaluative. Thus, the standard is not a blanket ban on the admission of police laboratory reports and its adoption should not cause the laboratories undue hardship.  

Moreover, the argument makes the unwarranted assumption that the standard's adoption will necessarily force the analyst to leave the laboratory to testify. Several jurisdictions are now experimenting with the use of closed-circuit television and picturephones for the presentation of testimony. In one case, *Kansas City v. McCoy*, closed-circuit television was used in a drug prosecution to present the chemist's testimony.  

---

194. Although the use of the texts as substantive evidence might seem subject to a hearsay objection, there are several counterarguments. First, at this point in the trial, the attorney is litigating preliminary facts rather than the historical merits. In many jurisdictions, the technical exclusionary doctrines such as the hearsay rule do not apply to the litigation of preliminary facts. *See Fed. R. Evid. 104(a).* Second, a growing number of jurisdictions now recognize the learned treatise hearsay exception. *See Fed. R. Evid. 803(18).* Finally, the Court could simply authorize the receipt of texts and articles on this issue by judicial fiat.  

195. White v. Maggio, 556 F.2d 1352, 1358-59 (5th Cir. 1977).  


198. 525 S.W.2d 336 (Mo. 1975).  

199. Id. at 337.
turephone would reduce the burden created by the proposed standard. In any case, economic hardship on the state is a weak argument when one is confronting an important constitutional right.

A third counterargument contends that it is pointless to produce the analyst. Analysts usually conduct hundreds or thousands of tests, and it is unlikely that they would remember the occasion of the particular test in question. Justice Harlan voiced this argument in his concurring opinion in Dutton: "A rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant."\(^{200}\) Since the analyst will probably not remember the particular test, his or her appearance would be of "extremely limited utility" to the defendant.\(^{201}\) "It is impossible for a police laboratory chemist to recall the tests he performed and their results in an individual narcotics case of a routine nature."\(^{202}\)

This counterargument is unsound. As previously stated, the foundational requirements for business entries and official records are very lax.\(^{203}\) For example, a witness can authenticate a business entry by evidence of its proper custody and lay the hearsay foundation with habit testimony.\(^{204}\) Applying these doctrines, courts have admitted laboratory reports when the analyst was unidentified,\(^{205}\) when the analyst's qualifications were unknown,\(^{206}\) and when there was no showing of the manner in which the test was conducted.\(^{207}\) Given these lax foundational requirements, the report's admission reveals virtually nothing to the jury about the analyst or the specific analysis conducted. In contrast, if the analyst testified personally, the defense attorney could profitably explore such subjects as the analyst's qualifications and testing procedures.\(^{208}\)

It might then be argued that the proper solution is stricter foundational requirements, rather than the analyst's personal appearance. For

\(^{201}\) As an example of his point Justice Harlan cited Kay v. United States, 255 F.2d 476 (4th Cir. 1958) (admitting laboratory analysis).
\(^{202}\) In re Kevin G., 80 Misc. 2d 517, 523, 363 N.Y.S.2d 999, 1005 (Fam. Ct. 1975).
\(^{203}\) See notes 37-41, 48-49 & accompanying text supra.
\(^{204}\) Id.
\(^{206}\) Thomas v. Hogan, 308 F.2d 355, 360 (4th Cir. 1962).
\(^{207}\) Id.
example, the foundational requirements could be revised to include proof of the analyst’s credentials. That solution would be satisfactory in the case of routine reports. However, the solution is inadequate in the case of evaluative reports. In that case, one of the most profitable areas for cross-examination is the lack of objective standards for evaluating the test results. The defense attorney can force the analyst to concede the absence of such standards and to verbalize the standards the analyst employed. This tactic is a favorite of prosecutors impeaching defense psychiatrists.209

The final counterargument is that the fairest solution is to permit the prosecution to introduce the report but to guarantee the defense the right to subpoena the analyst. This solution would ordinarily save the prosecution the inconvenience of producing the analyst as a witness.210 In effect, this argument holds that since the defendant has an opportunity to use compulsory process to subpoena the analyst, he is foreclosed from raising any confrontation or due process challenges to the written analysis.211 The argument is superficially appealing and even finds some support in scattered passages in Supreme Court opinions.212

209. Id.; W. Alexander, Meeting the Insanity Defense, in THE PROSECUTOR’S DESKBOOK 592 (P. Healy & J. Manak eds. 1971) (prosecutor should show the jury that the defense psychiatrist’s standards are “nebulous”). Numerous articles on prosecutorial trial tactics counsel the prosecutor to discredit the defense psychiatrist by exposing the subjective, judgmental nature of psychiatric opinions. E.g., id. Stricter foundational requirements would be an inadequate substitute for cross-examination exposing the personal, subjective standards the analyst used to reach the evaluative opinion. By exposing the subjectivity of the analyst’s standards, the defense attorney can largely destroy the analyst’s claim to scientific objectivity.

210. Some jurisdictions have opted for this solution by case law, United States v. Stern, 519 F.2d 521 (9th Cir. 1975); State v. Snider, 168 Mont. 220, 541 P.2d 1204 (1975); In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev’d on other grounds, 281 N.C. 640, 231 S.E.2d 614 (1977); while others have special statutes, State v. Davison, 245 N.W.2d 321 (Iowa 1976), cert. denied, 430 U.S. 955 (1977); State v. Kramer, 231 N.W.2d 874 (Iowa 1975); State v. Forbes, 310 So. 2d 569 (La. 1975); State v. Larochelle, 112 N.H. 392, 297 A.2d 223 (1972).


212. In Dutton v. Evans, 400 U.S. 74, 88 n.19 (1970), Mr. Justice Stewart’s plurality opinion points out that “[o]f course Evans had the right to subpoena witnesses.” The justice did not explain the significance of that fact. In his concurring opinion, Justice Harlan stated, “Although the fact is not necessary to my conclusion, I note that counsel for Evans conceded at oral argument that he could have secured Williams’ presence to testify, but decided against it.” Id. at 96 n.3. In dissent, Justice Marshall asserted that notwithstanding Evans’ ability to subpoena Williams, “it remains that the duty to confront a criminal defendant with the witnesses against him falls upon the State.” Id. at 102 n.4. It is difficult to deal with this argument because so few Supreme Court decisions deal with the sixth amendment compulsory process guarantee, much less with its relation to the confrontation and due process clauses. However, in this author’s mind the counterargument is unacceptable. Some
This counterargument is suspect as a matter of construction. The sixth amendment's wording guarantees the defendant two distinct rights: confrontation and compulsory process. The counterargument virtually merges the confrontation clause into the compulsory-process clause. One court has stated, for example, that "the accused can assert his right to cross-examination [confrontation] by calling the declarant as a witness." This solution effectively abolishes the defendant's confrontation right and leaves the defendant with only the guarantee of compulsory process. Whenever possible, however, a court should construe separate provisions in a legal document as having independent force. Accepting this counterargument would violate that constitutional maxim.

The counterargument also seems inconsistent with past Supreme Court confrontation decisions. For example, the Dutton opinion makes the implicit assumption that the hearsay declarant's amenability to compulsory process is not determinative of the confrontation issue. If the true facts were as stated in the opinion, Evans could have subpoenaed Williams. Nevertheless, the Dutton Court reached the merits of Evans' confrontation claim. On its facts, Dutton stands for the proposition that Williams' amenability to process did not moot Evans' confrontation claim. Citing Dutton and several other Supreme Court confrontation decisions, the Court of Appeals for the Fifth Circuit has concluded that the hearsay declarant's availability to the defense does not preclude a constitutional challenge under the sixth amendment confrontation clause to the hearsay's admissibility.

The argument that compulsory process satisfies confrontation rights is difficult to reconcile not only with past confrontation precedents but also with the policy underlying the confrontation clause. In
an often-quoted passage\textsuperscript{219} in \textit{Mattox v. United States},\textsuperscript{220} Justice Brown declared:

The primary object of the constitutional provision in question [the confrontation clause] was to prevent depositions or \textit{ex parte} affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.\textsuperscript{221}

The logic of the counterargument would lead to results contrary to that policy as in \textit{United States v. Lloyd}\textsuperscript{222} when "[t]he only evidence offered by the government was a certified and authenticated copy of Lloyd's Selective Service file."\textsuperscript{223} Historical evidence indicates that the Founding Fathers intended to ban precisely this result: cases wherein the prosecution's only evidence consists of relatively formal documents such as affidavits to which the jury is likely to attach great weight.\textsuperscript{224} That is the very result which is possible under the majority view which permits the admission of formal, evaluative laboratory reports to which the lay jurors may attach undue weight.

\section*{Conclusion}

It is important to recognize the limited scope of the constitutional standard proposed in this Article. Laboratory reports which otherwise qualify as business entries or official records may continue to be presumptively admissible against criminal defendants. The defendants would then have the burden of demonstrating that more likely than not the conclusion expressed in the report is so evaluative that it could be the subject of varying expert opinion. However, once the defendant sustains that burden, the prosecution may not introduce the report as direct evidence of an essential element of the crime. That use is forbidden by the constitutional reliability requirement because there is an in-

\begin{itemize}
  \item \textsuperscript{219} E.g., Barber v. Page, 390 U.S. 719, 721 (1968).
  \item \textsuperscript{220} 156 U.S. 237 (1895).
  \item \textsuperscript{221} \textit{Id.} at 242-43.
  \item \textsuperscript{222} 431 F.2d 160 (9th Cir. 1970).
\end{itemize}
 tolerate a high risk that lay jurors will assign an improper weight to the expert's evaluative report.

It is conceivable that the constitutional standard could admit of special exceptions. If the prosecution demonstrates the declarant's unavailability, for example, this might factor into the court's admissibility analysis. The showing of necessity would be especially compelling if the declarant was absolutely unavailable and the scientific test could not be duplicated. Any attempt to delineate the proper exceptions to the norm fashioned here, however, is beyond the scope of this Article.

Like Dean Wigmore, Dean McCormick viewed himself as something of a prophet of the evolution of evidence law. He once remarked that "the manifest destiny of evidence law is a progressive lowering of the barriers" to admissibility. In large part, history has borne out his prophecy. For example, many commentators have viewed the adoption of the Federal Rules and the numerous state codes patterned after them as a triumph for the concept of logical relevance. The general effect of the Rules has certainly been to liberalize admissibility standards.

Despite this gradual liberalization of admissibility standards, the Supreme Court has fashioned new exclusionary rules as safeguards against the admission of particularly unreliable and damaging evidence. The courts should now frame a new constitutional exclusionary rule precluding the admission of evaluative laboratory reports. This Article has demonstrated that the trier of fact is likely to attach

229. There have been other important cross-currents in evidence law. In Stovall v. Denno, 388 U.S. 293 (1967), the Supreme Court announced the inadmissibility of evidence of unnecessarily suggestive, unreliable lineups. Id. at 302. In United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), the Court decreed a counsel requirement at lineups conducted after the initiation of the adversary judicial process. See also Kirby v. Illinois, 406 U.S. 682, 683 (1972). In the final analysis, the trilogy of Stovall, Wade, and Gilbert represents the Court's conclusion that the trier of fact does not realize the critical weaknesses of lay eyewitnesses identification and, hence, tends to attach undue weight to such identification. Levine & Tapp, The Psychology of Criminal Identification: The Gap from Wade to Kirby, 121 U. PA. L. REV. 1079 (1973).
undue weight to these reports. The Laboratory Proficiency Testing Program report, moreover, is convincing proof that the admission of such reports creates a grave possibility of injustice.