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Does the Search for Truth in Our Scholarship Continue in Our Classrooms?

by
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After hearing and reading these stimulating and insightful papers, my reaction is that an enormous split exists between our scholarship and pedagogy, a split that I suspect may run far deeper than in other areas of the law. The consequence is that evidence is perceived as having little to do with issues in the forefront of legal and societal concerns, even though these papers clearly demonstrate the falsity of such an impression.

This chasm between what we publish and what we teach is attributable to a conception of evidence as a body of neutral rules that can be studied effectively in a vacuum, without paying heed to procedural or substantive concerns. This characterization is embodied in the Federal Rules of Evidence, on which we all rely as a heuristic device, and in the casebooks that we use. In our classrooms, evidence is treated as a set of trans-substantive rules that apply across the board to all cases, except for a few carefully noted instances. The trial at which these rules apply is viewed as an isolated, disconnected moment in time. The consequence is the cutting-edge issues that most intrigue us as scholars often cannot be handled meaningfully in our classrooms.

This result becomes apparent if we look at the topic of expertise which Roger Park brilliantly put last at this Symposium. In thinking about expert testimony, we must of necessity face the questions posed by this Symposium's title: Truth and Its Rivals. Even though experts have no personal knowledge about the historic facts in issue, they are permitted to testify because their special knowledge will provide essential guidance to the fact-finder in its search for the truth. An examination of expert testimony should therefore provide us with the ideal vantage point from which to explore some of the illusive questions at the heart of this Symposium. Is an objective truth attainable? How effective are evidentiary rules in ascertaining the truth? What are the values that compete with truth-seeking?

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The limitations that the structure of a traditional evidence course imposes in dealing with these issues becomes apparent if we examine the after-effect of the Supreme Court's 1993 opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ In *Daubert*, the Supreme Court concluded that expert opinions based on "scientific knowledge" must be "ground[ed] in the methods and procedures of science."² In order to determine whether a given expert opinion meets this standard, the Court suggested that trial courts should look at a number of nonexclusive factors. Because the Court viewed science as an empirical endeavor, whether the expert's underlying theory had been tested was deemed the most significant indicator of the proffered opinion's scientific reliability.³ Other factors mentioned by the Court were peer review and publication; the known or potential rate of error, and the existence and maintenance of standards controlling a technique's operation; and "general acceptance" in the scientific community (which is some indication that the expert's proffered testimony is the product of scientific thinking).

Professor Michael Saks' article⁴ demonstrates that *Daubert* has had little impact as yet on the admissibility of forensic identification evidence. Courts have not, to date, required forensic techniques other than those resting on biological markers to be validated by applying the *Daubert* factors of testability, peer review, error rates, or professional standards. "General acceptance" may exist, but this is a general acceptance that was reached within the forensic community even though the searching inquiry envisioned by the first three *Daubert* factors was never attempted. As Professor Saks' discussion of handwriting analysis cases indicates, courts have admitted document examiners' testimony, even after *Daubert*, by characterizing handwriting analysis as something other than science, so that *Daubert* does not apply, and/or by finding the proposed testimony sufficiently helpful to satisfy Rule 702.⁵

My point here is not that handwriting evidence or other forensic

1. 509 U.S. 579 (1993).

2. *Id.* at 589.

3. The opinion quotes with approval a statement by Karl Popper that "[t]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability." *Id.* at 593, quoting K. POPPER, CONJECTURE AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989).

4. Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 HASTINGS L. J. 1069 (1998).

5. Fed. R. Evid. 702. See, e.g., *United States v. Starzecpyzel*, 880 F. Supp. 1027 (S.D.N.Y. 1995) (forensic document examination is not a science; *Daubert* does not apply; evidence is admissible; the examiner is like a "harbor pilot" who has valuable expertise even though it does not rest on a validated theory). See also *United States v. Velasquez*, 64 F.3d 844 (3d Cir. 1995), critiqued at Saks, *supra* note 4, at 1098-99.

identification evidence should be excluded, but rather to compare the judicial treatment of the forensic experts discussed in Professor Saks' article with the treatment accorded experts in certain types of civil cases. In products liability cases, for instance, opinions in three circuits have now excluded testimony by engineers seeking to testify that the defendant could have produced a better alternative design.⁶ These exclusions are directly attributed to *Daubert*—the engineers' opinions were ruled inadmissible because the experts failed to build and test the allegedly superior product,⁷ and two of the cases also commented on the lack of peer review and data on error rates.⁸ Although these opinions concede that engineering may not be a true science, they conclude that technology is enough like a science so that *Daubert* standards ought to apply under Rule 702.⁹ The result is that a prosecutor's forensic expert is allowed to testify against the criminal defendant, but the plaintiff's expert is disqualified from testifying against the civil corporate defendant.

Now certainly this outcome—that some courts seem more invested in searches for scientific “truth” in civil than criminal cases—cannot be explained simply by parsing the text of *Daubert*. Indeed, the less stringent application of *Daubert* in criminal cases is somewhat counter-intuitive in light of the higher burden of proof in those

6. See *Watkins v. Telsmith Inc.*, 121 F.3d 984 (5th Cir. 1997); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293 (8th Cir. 1996); *Cummins v. Lyle Indus.*, 93 F.3d 362 (7th Cir. 1996).

7. See *Cummins*, 93 F.3d at 369 (reasoning that many alternative design considerations “cannot be determined reliably without testing”); *Peitzmeier*, 97 F.3d at 297 (explaining that the alternative was “never designed, built or tested”), *cert. denied*, 117 S.Ct. 1552 (1997); see also *Watkins*, 121 F.3d at 992 (citing *Cummins*, 93 F.3d at 367 n.2 (“This is not to say that alternative product designs must always be tested by a plaintiff's expert, but in this case both [plaintiff's experts] acknowledged the importance of testing in design.”)). Cf. *In re Executive Telecard Ltd. Sec. Litig.*, 979 F. Supp. 1021, 1024 (S.D.N.Y. 1997) (explaining it was “guided” by *Daubert*, the court excluded expert economic testimony proffered by plaintiffs in a securities class action on the ground of defective methodology).

8. See *Peitzmeier*, 97 F.3d at 297-98; *Cummins*, 93 F.3d at 370.

9. See *Watkins*, 121 F.3d at 991 (“[W]hile *Daubert* dealt with expert scientific evidence, the decision's focus on a standard of evidentiary reliability and the requirement that proposed expert testimony must be appropriately validated are criteria equally applicable to ‘technical, or other specialized knowledge. . . .’”) (citation omitted); *Cummins*, 93 F.3d at 367 n.2 (explaining that *Daubert*'s language “counsels against wholesale abandonment” of *Daubert* in cases involving “the application of science to a concrete and practical problem”); *Peitzmeier*, 97 F.3d at 297 (responding to plaintiffs' argument that *Daubert* is inapplicable to basic engineering principles by stating “that our Court has not given *Daubert* so narrow a reading” and citing cases in which *Daubert* was applied to psychological evaluations and testimony of mechanical engineers). The Supreme Court has granted certiorari in *Carmichael v. Kumho Tire Co.*, 131 F.3d 1433 (11th Cir. 1997), *cert. granted*, 118 S.Ct. 2339 (1998) (deciding if engineering testimony is subject to *Daubert* analysis).

cases, and the supposed existence of a presumption of innocence. A doctrinal approach to *Daubert* keeps the student from seeing the distinctive ways in which the "truth" is handled in different settings. It ignores scholarship such as that of Professor Taslitz¹⁰ about the role political and cultural assumptions play in coloring judgments about both the relevancy and reliability of expert opinions.

A doctrinal approach to *Daubert* leaves the student but dimly understanding the opinion's enormous implications. Considering *Daubert* in isolation from substantive concerns prevents students from comprehending the extent to which *Daubert* now operates as the means for terminating civil litigation; in toxic tort cases, it is *Daubert's* impact on the proof of causation, not the substantive law, that is the principal regulator of the billions at stake.¹¹ Understanding how courts exercise this control also requires procedural knowledge about the rules governing expert discovery, the nature of in limine *Daubert* hearings, how these hearings interact with summary judgment proceedings, and appellate standards of review. In addition, a full appreciation of *Daubert's* impact also involves thinking about the application of the *Erie* doctrine to evidentiary determinations. Toxic tort and products liability cases are in federal court because of diversity jurisdiction; decisions such as those excluding the testimony of engineers about better alternative designs will produce different outcomes in federal than in state court. And, Professors Scallen and Weitoff's scholarship suggests that we cannot understand the potential implications of *Daubert* without considering how the opinion affects and perhaps re-orientes the respective roles of judge and jury.¹²

Thus far, I have only been speaking about civil cases; *Daubert's* effect in criminal cases requires background knowledge about an entirely different set of issues. Evidence students, who frequently have not taken a course in criminal procedure, know little about matters such as the limited availability of discovery, the extent to which indigent defendants are entitled to expert assistance, the organization and maintenance of police laboratories, or possible evidentiary treatment of laboratory error.

10. Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L. J. 1039 (1998).

11. Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997). Cf. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1414-15 (D.Or. 1996) (concluding after a lengthy *Daubert* hearing in silicone breast implant litigation that plaintiffs' expert testimony concerning causation of any systemic disease or syndrome would be excluded, but deferring effective date of decision until report of court-appointed experts in multidistrict breast implant litigation became available).

12. Eileen Scallen and William Weitoff, *The Ethos of Expert Witnesses*, 49 HASTINGS L. J. 1143 (1998).

Certainly time constraints do not allow the insights gleaned from *Daubert* scholarship to be incorporated into the basic three or four credit trans-substantive evidence course. It is impossible to do much more than read *Daubert* closely in a course that probably also includes more than a dozen hearsay exceptions and exemptions, five modes of impeachment, at least a half dozen privileges and quasi-privileges, and numerous other doctrines traditionally packaged as evidence and covered on the Multi-State Bar Examination.

This gap between the contents of evidence courses and the concerns addressed by evidence scholarship discloses a paradox. From a law school curricular perspective, evidence has for some time been viewed as a steadily shrinking island on which nothing much happens. Reduced credits seem appropriate because codification has settled most doctrinal issues and because evidentiary rules do not apply in settings of growing significance, such as settlement, plea bargaining, sentencing, pretrial hearings, and ADR.

But the papers at this Symposium demonstrate that solutions to many troubling societal issues, in addition to mass torts, are packaged in evidentiary terms. Changing attitudes towards victims¹³ and women¹⁴ are reflected in new rules, privileges, and syndromes.¹⁵ Disenchantment with crime has led to sweeping suggestions for reformulating the character rules;¹⁶ the recent addition of Rules 413-415, which make admissible a defendant's prior acts of sexual assault or child molestation, may mark the beginning of a movement towards admitting more "other crimes" evidence. Clearly, crucial policy decisions that profoundly affect people's lives are being made in the guise of rulings on evidence. Evidence professors know that the amendment to Rule 415 caused President Clinton's activities with Monica Lewinsky to be relevant at the Paula Jones deposition.

If we are to alert our students to the implications of these decisions made in the name of evidence, we must find some way of handling the evidence course as more than a set of trans-substantive rules. Professor Myrna Raeder has suggested a restructuring that would append criminal evidence to criminal procedure and integrate civil evidence with a civil procedure course.¹⁷ While this proposal has

13. See, e.g., Myrna S. Raeder, *The Social Worker's Privilege, Victim's Rights, and Contextualized Truth*, 49 HASTINGS L. J. 991 (1998).

14. See, e.g., Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L. J. 663 (1998).

15. See, e.g., Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996).

16. See, e.g., Roger C. Park, *Other Crimes Evidence at the Crossroads*, 49 HASTINGS L. J. 717 (1998).

17. See Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and a Rethinking of the Application of a Single Set of Evidence*

the great merit of facilitating the examination of evidentiary principles in the procedural context in which they arise, such a restructuring may not adequately focus attention on the substantive policies that are increasingly expressed in evidentiary terms. Some far more radical reorganization of evidence courses may be needed to highlight the central role evidence now plays—not merely in furnishing the rules of the game for the courtroom, but in implementing a variety of social policies. If evidence professors are to exercise a significant role in critiquing this process we need to consider ways of moving our course more into the mainstream of academic discourse.