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Recommended Citation
David L. Faigman, *Looking for Policy in All the Wrong Places: A Comment on the Strategies of "the Race and Gender Crowd" Toward Evidence Law*, 28 *Sw. U. L. Rev.* 289 (1999).
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Author: David L. Faigman

Source: Southwestern University Law Review

Citation: 28 Sw. U. L. Rev. 289 (1999).

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LOOKING FOR POLICY IN ALL THE WRONG PLACES: A COMMENT ON THE STRATEGIES OF "THE RACE AND GENDER CROWD" TOWARD EVIDENCE LAW

David L. Faigman*

PROLOGUE

When I was asked to comment on the subject of race and gender in evidence law, I was unsure how to proceed. Beyond the obvious sensitivities of the subject, this theme is not presumed to be a central component of the topic with which I am most familiar, scientific evidence. To be sure, it is clear that race and gender occupy a significant role in many aspects of both the law of evidence and the practice of science. Since race and gender issues are endemic to American society, no one seriously contends that law or science can be free of the social context in which they sit. But having been asked to write a comment rather than a book, I decided against addressing broad themes such as science and law in the post-modern age.

My basic view is that although race and gender affect law and science, these two disciplines should, and mainly do, strive to limit and remove that influence. This Essay stems from that basic view. Here, I respond briefly to what appears to be a desire among some scholars to affirmatively embrace race and gender and turn it to their political advantage. This Essay then speaks to those scholars, whom I call "the race and gender crowd," who seek to use race and gender explicitly in the law of evidence and the practice of science in order to achieve certain outcomes. Although I personally share the politics of the race and gender crowd, I disagree with the mechanisms they use to achieve their political ends. The goal of evidence law and scientific practice should be to remove race and gender from the agenda. As I argue

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here, advancing it affirmatively is likely to create many more problems than it will solve.

I. INTRODUCTION

In 1995, the House of Representatives passed an amendment to *Federal Rule of Evidence* 702[1] that, if ratified by the Senate, would have codified *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] In *Daubert*, the United States Supreme Court held that federal trial court judges must be "gatekeepers" who evaluate the scientific validity or evidentiary reliability of scientific evidence.[3] Although the import of *Daubert* was somewhat unclear at first, many courts and commentators interpreted the decision as a stand against so-called "junk science."[4] The House apparently agreed. In codifying this gatekeeping responsibility, however, the House explicitly exempted the criminal justice system from Rule 702's coverage, thereby codifying *Daubert* for only half the federal trial process.[5] The political meaning of the exemption is blatant and outrageous. In the criminal context, prosecutors are by far the biggest consumers of both "good" and "junk" science. In a nutshell, the House of Representatives sought to create a rule that would apply unequally, effectively proscribing poor science in civil cases, where plaintiffs tend to have weaker scientific evidence than defendants, but allowing it in criminal cases, where prosecutors

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1. FED. R. EVID. 702 ("Testimony By Experts").

2. 509 U.S. 579 (1993). The House bill is known as the Attorney Accountability Act of 1995, H.R. 988, 104th Cong. § 3 (1995) (amending FED. R. EVID. 702).

3. *See* 509 U.S. at 597.

4. *See, e.g.*, DAVID L. FAIGMAN ET AL., *The Legal Standards for the Admissibility of Scientific Evidence*, *in* MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1-3.4.1 (1997).

5. The Attorney Accountability Act would have amended FED. R. EVID. 702, with the criminal justice system's exemption in subsection (d), as follows (changes are italicized):

> (a) *In general.*—If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
> *(b) Adequate basis for opinion.—Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion—*
> *(1) is scientifically valid and reliable;*
> *(2) has a valid scientific connection to the fact it is offered to prove; and*
> *(3) is sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403.*
> *(c) Disqualification.—Testimony by a witness who is qualified as described in subdivision (a) is inadmissible in evidence if the witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which the testimony is offered.*
> *(d) Scope.—Subdivision (b) does not apply to criminal proceedings.*

H.R. 988, *supra* note 2.

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would benefit from such a rule. The politics of the Republican-controlled 1995 House are plain. To date, the Senate has not concurred.

But the political right is hardly alone in seeking to codify its biases into evidence law. In fact, the race and gender crowd represents the left's efforts to accomplish similar objectives. By race and gender crowd, I refer to writers who seek to use evidentiary rules or claims of science to achieve specific substantive outcomes that conform to their predominantly leftist political views.[6] The race and gender crowd manipulates evidentiary rules for political profit too, though their efforts are directed more at co-opting the evidence than the rules themselves. In some respects, however, the left's strategy is more insidious than the right's and, ironically, more likely to backfire in their faces. It is more insidious because it disguises itself in the garb of legitimate science and is harder to identify. It is more likely to backfire because it is a disguise that can be worn by the left's political opponents.

Both the House's failed effort to play only part of the deck, and the left's attempts to load the deck, fly in the face of a fundamental principle associated with evidence law. In many respects, the scientific method shares this fundamental principle. Both evidence rules and the scientific method seek to be politically neutral. Obviously, however, both are employed, from time to time, in the service of certain political objectives. But, at bottom, both essentially treat alternative substantive perspectives equally.

The *Federal Rules of Evidence* are procedural rules that are intended to apply to all parties neutrally. For instance, prosecutors should theoretically not be able to employ hearsay any more than defendants. The rules apply equally to both sides. Yet evidentiary rules do affect substantive outcomes. Also, the rules do sometimes treat certain parties either systematically better or worse than other parties. For instance, on their face, the character evidence rules defer somewhat to criminal defendants in regard to opening the matter of the defendants' past behavior.[7] And, at the same time, on their face the

6. My criticism could be extended to all writers who seek to manipulate the rules of evidence and scientific methods in this way. Indeed, that is the point of my criticism of the House's effort to codify *Daubert* for civil cases only. Here, however, I limit my observations to those writers whose political views are ostensibly sympathetic to the results that the traditional left would define as friendly to minorities and women. I do not concede that in fact their approach is especially friendly to these constituencies. Indeed, quite the opposite is true. For example, describing battered women as the "learned helpless" harkens back to old stereotypes that are inimical to all the principles for which feminist scholarship stands.

7. *See* FED. R. EVID. 404(a) (precluding "[e]vidence of a person's character . . . for the purpose of proving action in conformity therewith," with certain exceptions including permitting the accused to offer "[e]vidence of a pertinent trait of character").

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impeachment rules disadvantage criminal defendants.[8] In practice, although I do not have the empirical research to support this claim, the evidence rules probably redound to benefit prosecutors. This is not a defect in the theory underlying the evidence rules, but rather a consequence of the biases of the people applying them.

The scientific method similarly does not come with any particular political agenda attached. Whether silicone implants cause autoimmune disorder, or trichloryethylene causes childhood leukemia, or handwriting is uniquely identifiable, are questions that could be studied without political bias. This does not mean that scientists do not sometimes import their biases into their methods or that scientists and policymakers do not sometimes spin the results to be consistent with their politics. But the scientific method basically is designed to control and eliminate as much prejudice as possible. Techniques such as double-blind experiments and the conventional standard of ninety-five percent confidence levels, among many others, are designed to limit political discretion of individual researchers. Moreover, science deals with hypotheses that are testable. Any one researcher's findings can thus always be (and should always be) replicated.

The rules of evidence and science come together in Rule 702.[9] On its face, Rule 702 treats all scientific evidence equally.[10] This is as it should be. But the House's attempt to amend the rule would have changed that—for a blatantly conservative political end. The House directed its failed effort solely at the rule itself. The race and gender crowd, in contrast, attacks the science side of the connection, seeking to change the neutrality of the evidence-science intersection by manipulating the science side of the equation. Their strategy is likely to backfire. Given the prosecution's consumption of bad science, the left's strategy will, on average, operate to the advantage of prosecutors. Conversely, *Daubert*'s rigorous gatekeeping role for trial judges, if faithfully applied, would generally favor criminal defendants. The left's efforts to dilute the meaning of science therefore are likely to reverberate to the disadvantage of the left's natural constituency.

Of course, scholars looking to import political considerations into the rules of evidence are very optimistic about their prospects for suc-

8. *See, e.g.*, FED. R. EVID. 608 (permitting opinion and reputation evidence of character concerning truthfulness only and precluding the use of extrinsic evidence to prove specific instances of a witness's conduct); FED. R. EVID. 609 (permitting impeachment of the accused by evidence of a previous criminal conviction if "the court determines that the probative value of admitting the evidence outweighs its prejudicial effect . . .").

9. *See* FED. R. EVID. 702.

10. *See id.*; *supra* note 5.

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cess. Their optimism undoubtedly comes from their perceived success in two areas in particular, the Battered Woman Syndrome and the Rape Trauma Syndrome.[11] Both syndromes, however, create more problems for their proponents than they solve and are likely to be abandoned in time as that realization eventually dawns on their users.

For me, the more profound concern is the very idea that evidence law and science are up for grabs and can be or should be subject to political manipulation. First, this idea is objectionable because it is intellectually disingenuous since manipulating evidence and science seems to be perceived as a rhetorical game in which the object is to win, rather than to do justice or determine empirical "reality." This strategy is tolerable among a group of practitioners representing particular clients. It is understandable that an attorney would seek to manipulate the rules or the science in an effort (however misconceived) to best represent a client. But academics should not serve such ends, especially in the name of academic detachment. The only alternative interpretation to deceit is that the race and gender crowd does not understand the procedural basis of evidentiary rules or the nuts and bolts of the scientific method. I suspect, however, that they understand the evidence rules very well indeed, though they generally display little familiarity with the culture of science. Ultimately, I suspect that the main explanation for their views is the sloppy way they understand what it means to do quality scientific research. But, whether a product of intellectual sophistry or sloppiness, their strategy is unfortunate.

A second reason to oppose this strategy is that it is almost certain to fail. Indeed, not only will it fail, but it is very likely to result in the opposite of what the race and gender crowd hopes to accomplish. The debate over the left's strategy is reminiscent of the debate that has taken place in the First Amendment[12] context involving pornography and censorship. The First Amendment debate has also allied conservative forces with some segments of the left in actively calling for censorship. What the left does not seem to understand, however, is that censors are not likely to be selected from their ranks. A similar naiveté is evident in the left's arguments that race and gender politics

11. For a discussion of my views on the Battered Woman Syndrome, see David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997) and David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986). For the Rape Trauma Syndrome, see David L. Faigman, *The Syndromic Lawyer Syndrome: A Psychological Theory of Evidentiary Munificence*, 67 U. COLO. L. REV. 817 (1996).

12. U.S. CONST. amend. I.

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should play a role in evidentiary law. In fact, leftists should be pursuing just the opposite strategy.

Lax evidence rules, and the argument that science is wholly manipulatable, play into the hands of the right, at least insofar as the right is ordinarily associated with prosecutors. Prosecutors employ a bevy of forms of expertise that falls readily into the category of scientific pretension: including handwriting identification, bite-mark analysis, hair identification, fiber identification, fire and arson investigation, and even fingerprints yet to be subjected to the close scrutiny given to DNA profiling. Advocating an evidence law based on sophistry will benefit prosecutors who hold most of the credentials in this arena. For example, the biggest growth area in the context of the Battered Woman Syndrome has been prosecutorial use of syndrome evidence. In both published and unpublished cases, courts have been willing to allow prosecutors to prosecute batterers by extensively using syndrome evidence to explain why a woman might have changed her testimony[13] and to oppose battered woman defendants, both by seeking court-ordered psychological exams and by introducing the woman's past bad acts to counter defense use of syndrome testimony.[14]

The race and gender crowd fails to appreciate that in the evidence rules context, just as in the First Amendment context, if censors are to be had, they will not come from their ranks. If leftists truly believe in their hypotheses they should desire the more neutral standards offered by both the law of evidence and the scientific method. If power, or politics are to dictate evidentiary results or scientific interpretations, then, at least in the United States at the end of the twentieth

13. *See, e.g.*, People v. Morgan, 68 Cal. Rptr. 2d 772, 775 (Ct. App. 1997) (allowing the syndrome "to explain or offer a motive for [the witness's] recantation and thereby reconcile inconsistencies in her testimony"); State v. Grecinger, 569 N.W.2d 189, 193 (Minn. 1997) (confirming that expert testimony on BWS would help "the jury understand the delay in reporting and the inconsistencies in the victim's testimony"). For an example of a court willing to allow expert testimony in an unpublished opinion, see *State v. Bahn*, 578 N.W.2d 208 (Wis. Ct. App. 1998), wherein a psychotherapist was allowed to testify as to BWS's characteristics and "the 'cycle of violence' which can include the victim's recantation of her accusations and delays in reporting episodes of abuse," *id.* at 208.

14. For examples of unpublished opinions admitting evidence of the battered woman's prior bad acts, see *State v. Free*, No. 15901, 1998 WL 57373, at *7 (Ohio Ct. App. Feb. 13, 1998), wherein questions were about the defendant's "previous miscarriage and whom she was dating" because she "'opened the door' to these issues" by claiming that she suffered from BWS; and *State v. Daws*, No. 16270, 1997 WL 736502, at *5 (Ohio Ct. App. Nov. 26, 1997), wherein the court stated that "[b]ecause [the defendant] claimed to be suffering from the Battered Woman Syndrome, we believe the State was entitled to present evidence in rebuttal that [she] was not afraid of her husband and had engaged in prior violent acts against him . . . , all of which cast doubt on her proclaimed status as a victim."

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century, the leftist politics of the race and gender crowd will not dictate these outcomes.

Although I am often misunderstood on this point, I personally share most of the politics of race and gender crowd writers. What I object to is their shortsighted manipulation of both the rules of evidence and the methods of science to achieve otherwise laudable ends. Their manipulation is objectionable enough in itself. It is compounded, however, by the fact that their means are not only unlikely to achieve their designated ends, but will actually produce what they hope to avoid. Thus defendants employing Rape Trauma Syndrome and prosecutors attacking battered women's characters are both by-products of the race and gender crowd's shortsighted strategy. They would achieve more of their desired ends by demanding fair applications of the evidence rules as well as rigorous and conscientious use of the scientific method. Attacking procedural or methodological standards plays into the hands of those in power who have the resources to accomplish their own objectives when freed of procedural restrictions. The race and gender crowd makes this basic mistake. They argue for censorship, but their members will not be the censors. They will be the censored.

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