



# Litigating *DAUBERT*

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# The *Daubert* standard

- Reliability standard for the admission of expert evidence.
- 3 Cases:
  - *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993),
  - *General Electric Co. v. Joiner*, 522 U.S. 136 (1997),
  - *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999)
- Scientific, technical, or other specialized knowledge.

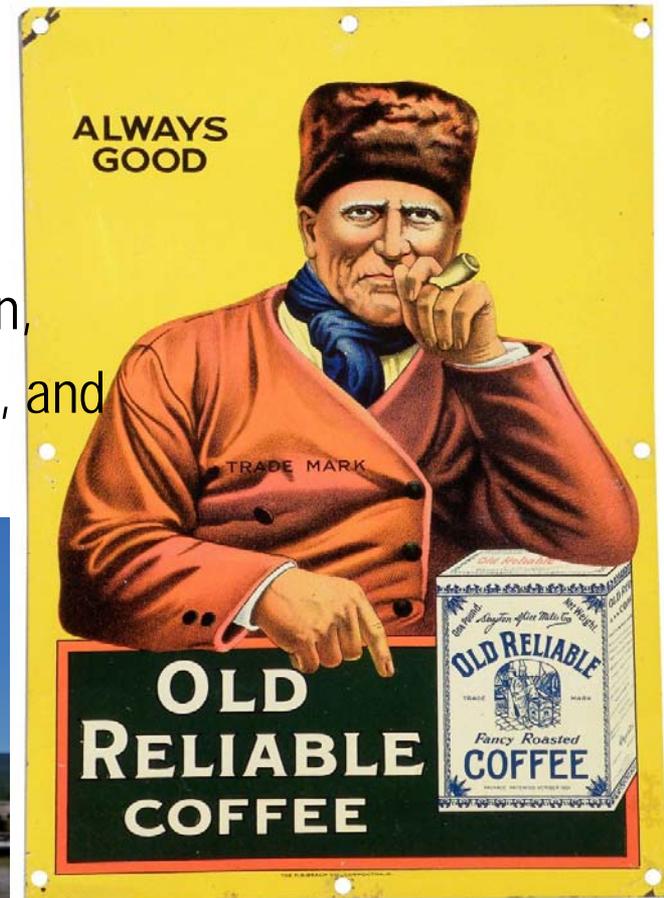


# Wis. Stat. § 907.02

- Scientific, technical, or otherwise specialized knowledge.
- Amended by 2011 Wis. Act 2 to comport to the *Daubert* standard.
- Such evidence is admissible if:
  - Based upon sufficient facts or data,
  - Product of reliable principles or methods,
  - Applied them reliably to the facts of the case

# What makes evidence reliable?

- No bright line test.
- Courts have considered whether:
  - Theory or technique has been tested,
  - Subjected to peer review and publication,
  - Rate, or potential rate, of error is known, and
  - General acceptance in the field.



# Has theory or technique been tested?

- Empirical evidence/data:
  - Information or data produced by an observation or experiment.
  - “Evidence that is collected after the data that is of interest has been defined or operationalized by some measure...”
  - Looking at real data or real people to confirm whether the hypothesis is correct.
- Some examples:
  - Actuarial risk assessment: does recidivism risk estimates match the behavior observed over time by offenders?
  - DNA one way to test theories and techniques once thought to be valid.



# Cross Validation

- One of three stages of test construction.
- Duplication of test procedures.
- Doesn't say anything about its methodology.
- Looks backward (opposed to incremental validity, which looks forward).

# Peer review and publication

- Very specific meaning: "a process that involves the preparation of a manuscript by a researcher and a submission to a journal where the editor distributes the manuscript to reviewers who are experts in the subject matter of the manuscript."

Q Yes.

A I don't recall the exact title off the top of my head, but it had to do with extrapolation beyond short -- he might have used short-term periods of risk to long-term recidivism.

Q And do you know where it was published?

A Yes. It was published in a book edited by Anita Schlink. S C H L A N K, and that book is entitled, I believe it's called Sex Offender -- it's the fourth edition of a series of books -- Sex Offender

# Error rate or potential rate of error

- Error rate is the rate at which errors are made.
- “The ‘error factor’ is seemingly an invitation for some quantitative—and therefore difficult—indicia...[it] invites a number of variations laid upon the ‘gatekeeper,’ such as: Must the error rate be known with exactitude (rather than potential)? Shall the error rate be held to some predetermined standard among scientists or jurists?” (M. Haug & E. Baird, *Finding the Error in Daubert*).
- P value: the probability of obtaining a test statistic at least as extreme as the one that was observed, assuming the null hypothesis is true.
- Bayes Theorem: 
$$P(A|B) = \frac{P(B|A) P(A)}{P(B)} .$$

# General Acceptance

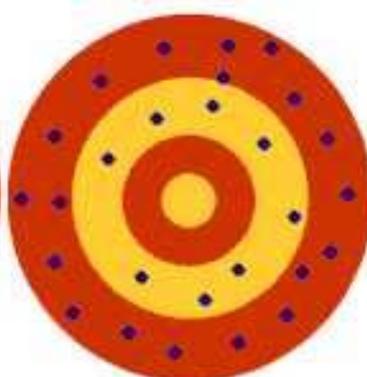
- “General scientific recognition may not be established without the testimony of disinterested experts whose livelihood is not intimately connected with the program.” *People v. Barbra*, 225 N.W. 171, 180 (Mich. 1977).

# Reliability and validity.

- Reliability is the measure of how stable, dependable, trustworthy, and consistent a test is in measuring the same thing each time.
- Validity is the degree to which a test or instrument accomplishes the purpose for which it is being used.



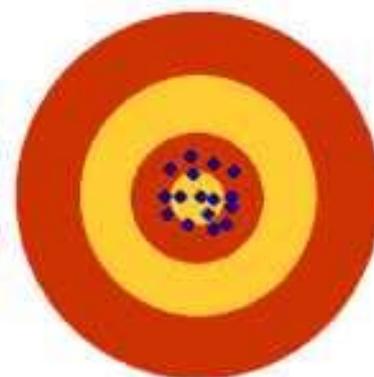
**Reliable, not Valid**



**Valid, not Reliable**



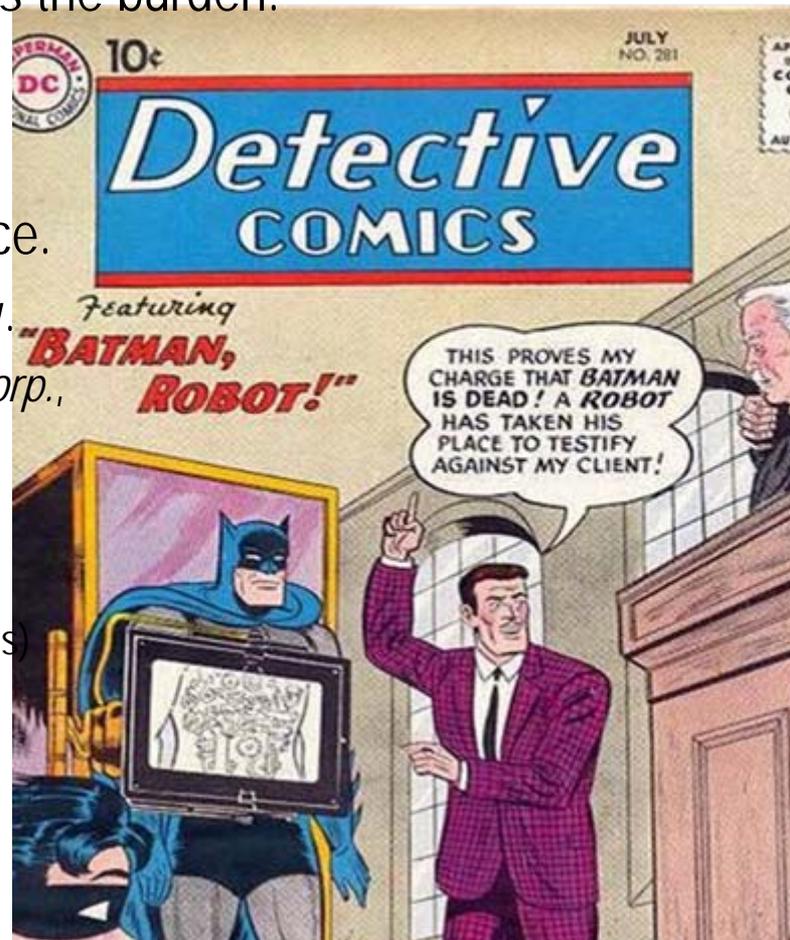
**Neither Valid,  
nor Reliable**



**Both Valid,  
and Reliable**

# Burden of proof

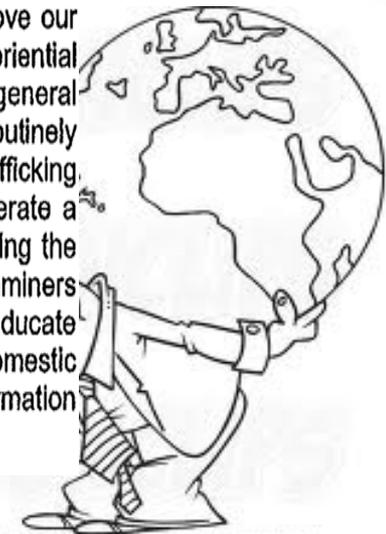
- Proponent of the evidence has the burden.
  - Wis. Stat. § 907.02
- Preponderance of the evidence.
  - Not in statute, but in case law.
    - *Lewis v. Citgo Petroleum Corp.*,
      - 561 Fed 698 (7<sup>th</sup> Cir. 2009)
    - *State v. Albrecht*,
      - 184 Wis. 2d 287 (1994)
      - (voluntariness of confessions)



# Too much of a burden?

Changes in the standard applied to expert testimony may substantially affect our prosecution of criminal, juvenile, traffic, and sexually violent person cases

Even adopting FRE 702 (the *Daubert* standard) would significantly curtail our ability to prove our cases. The standard created by AB-1 would virtually eliminate "experiential experts." "Experiential experts" serve a critical function in educating our citizens on issues outside the realm of general knowledge and dispelling common myths held by many within society. At present, we routinely elicit testimony from experienced police officers testifying as experts regarding drug trafficking methods, criminal gang operations, and the extent of a driver's impairment to safely operate a motor vehicle in drunk driving cases. We also elicit testimony from social workers regarding the impact of child abuse and neglect on families and children, Sexual Assault Nurse Examiners (SANE) to dispel the myth that no injuries means no assault, child forensic interviewers to educate the jury on issues relating to child disclosure, child memory, and child perception, and domestic violence advocates on the impact of trauma on a person's ability to recall and convey information to law enforcement following rape or other forms of violence.



# When does *Daubert* apply?

- 2011 Wis. Act 2 § 45(5):
  - “CIVIL ACTIONS...first apply to actions and proceedings that are commenced on [or after February 1, 2011].”
- Wis. Stat. § 991.11:
  - “Every act and every portion of an act enacted by the legislature...which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated.”

# Questions about applicability

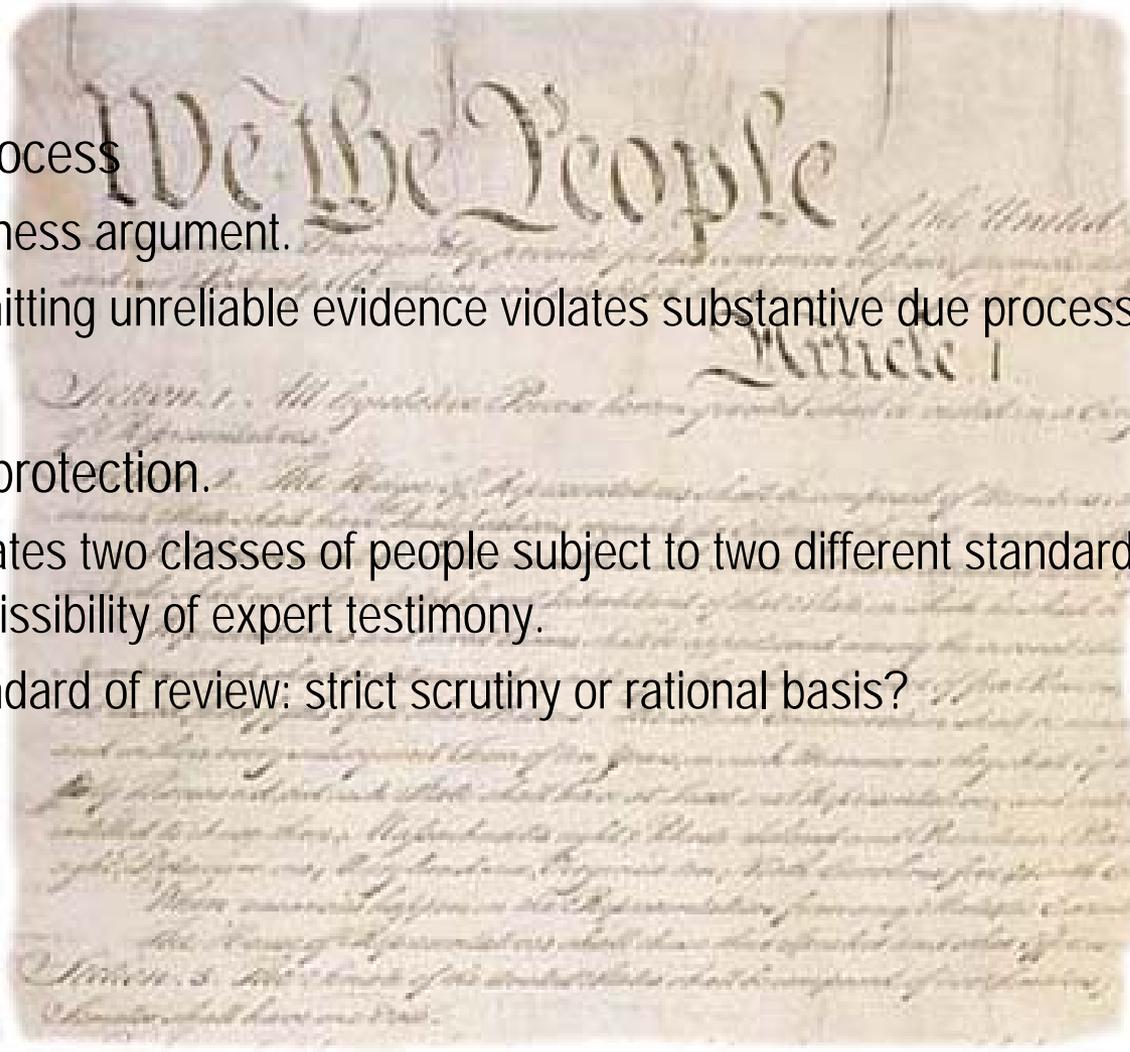
- Issues typically arise in certain cases: ch. 51, 54, 55, and 980 cases.
- Tort reform: the legislature intended to curb certain types of lawsuits.
- Appellate courts have yet to answer question – what constitutes a new action?

# DOJ's position

The circuit court's decision is in the state's favor, and the state would seek to uphold it on appeal. But the state's interest in the issue concerning whether the *Daubert* amendment applies at Whiteman's discharge trial transcends this case. The *Daubert* amendment applicability issue has already arisen in other Chapter 980 cases and has implications beyond Chapter 980 cases. The issue may arise with other amendments to evidentiary or procedural rules containing initial applicability provisions similar to the *Daubert* amendment's. The issue also may arise in a variety of contexts other than Chapter 980 in which circuit courts retain jurisdiction to modify or terminate final appealable orders or to grant other relief after entering a final appealable order: examples include NGI commitment proceedings under Wis. Stat. § 971.17, protective placement proceedings under Chapter 54 and mental health commitment proceedings under Chapters 51 and 55.

# Constitutional Challenges

- Due process
  - Fairness argument.
  - Admitting unreliable evidence violates substantive due process.
- Equal protection.
  - Creates two classes of people subject to two different standards of admissibility of expert testimony.
  - Standard of review: strict scrutiny or rational basis?

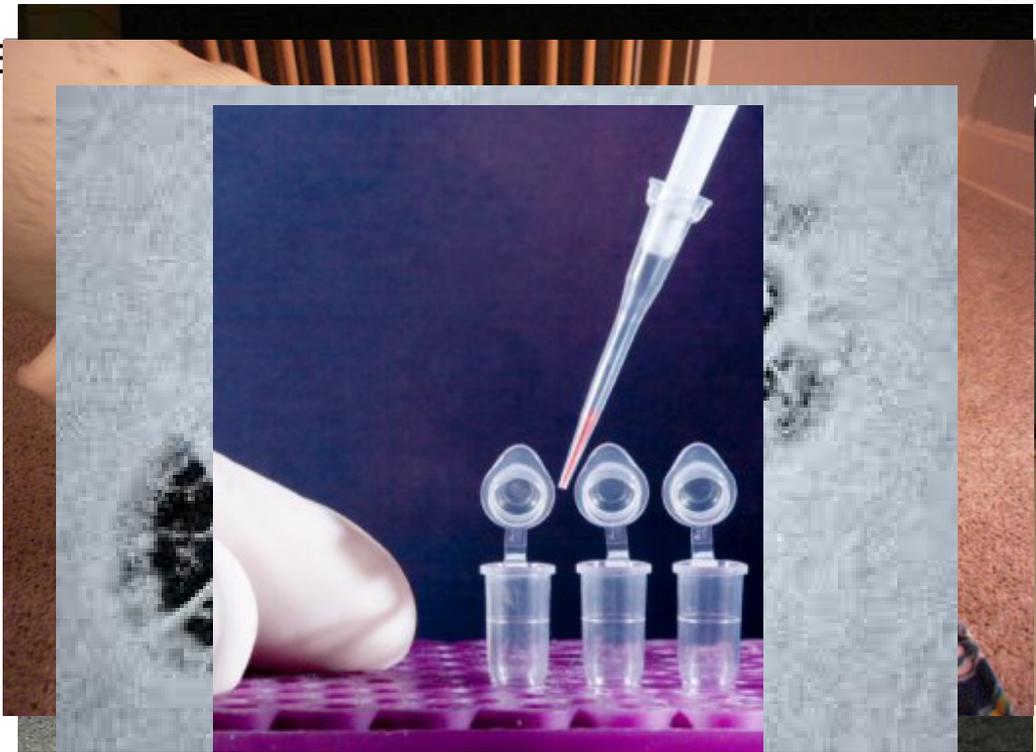


# It's worked!

But the fact is that I think given that, I think strict scrutiny is appropriate to be applied here. I think by the nature of the individual being -- having his liberty potentially taken away for the remainder of his life, that the question can he be treated different. Mr. ██████████, in a group or class that's in this group of cases which is very small and will become smaller with time, and will disappear in a very -- will disappear, hopefully within a very short amount of time, it is unfair to those individuals and a fundamentally violation of due process.

# What can I challenge?

- Admissibility standard for scientific, technical, and/or other specialized knowledge.
  - Handwriting evidence
  - Hair comparisons
  - Fingerprint examination
  - Firearm identification
  - Bite marks
  - Intoxication testing
  - Narcotic detection dogs
  - Footprint evidence
  - DNA evidence



# Other examples...

- WDDA letter outlined various types of testimony and evidence susceptible to *Daubert* challenges:
- Social workers who testify regarding the impact of child abuse and neglect on families.
- Sexual Assault Nurse Examiners (SANE) who testify that no injuries means no assault.
- Child forensic interviewers who discuss issues relating to child disclosure and child perception.
- Domestic Violence Advocates who testify on impact of trauma, the ability to recall information
- Testimony regarding delayed reporting, the underreporting of sex assaults, and/or the low percentage of false reporting.
- Actuarial instruments, other types of assessment instruments, diagnoses.

# Helpful resources

- Websites:
  - North Carolina Public Defender Forensic Resources: <http://www.ncids.com/forensic/index.shtml?c=Training>
  - National Clearinghouse for Sciences: <http://www.ncstl.org>
  - National Academy of Sciences: <http://nasonline.org>
  - American Academy of Forensic Sciences: <http://aafs.org>
- Forensic Practice Coordinators:
  - Anthony Rios: [riosa@opd.wi.gov](mailto:riosa@opd.wi.gov)
  - Travis Schwantes: [schwantest@opd.wi.gov](mailto:schwantest@opd.wi.gov)

# Filing *Daubert* motions

- Proponent has burden, but you need to make the challenge.
- Same types of analysis as with any other type of motion.
  - How much detail should you include?
    - Affidavits
    - Articles
    - Learned treatise



# When to file?

- Keep discovery statutes in mind:
  - Wis. Stat. § 971.23 (criminal discovery)
  - *State v. Schaefer*, 308 Wis. 2d 279 (limited purpose of prelim)
- Wis. Stat. § 980.038(3), required to make disclosure within a reasonable time *after* the probable cause hearing.
- No limit to how many *Daubert* challenges, but you may only get one chance to be effective.

# Whether to file at all?

- Your evidence may also be challenged.
- Need to also consider:
  - Favorable opinion?
  - Theory of the case.
  - Is your evidence vulnerable to a *Daubert* challenge?

# Types of *Daubert* hearings

- Evidentiary hearings are discretionary
- In lieu of an evidentiary hearing, a court can:
  - Rely on paper record (affidavits, briefs, articles)
  - Take testimony at trial subject to a motion to strike.

# Tension between science and law

- Science/Progress vs. Legal system/Precedent

So I think the Court could make a ruling based on the prior case law without even having any testimony because, again, these hearings don't have to have any particular type of format.



# Attacking principles and methods (DRE)

- Not generally accepted:
  - NHTSA and IACP are longtime proponents of the DRE program.
- High error rate:
  - Studies have shown that it's not an accurate predictor of the presence of drugs and is no better than chance.
- Confirmation bias – a form of tunnel vision when someone seeks out evidence to confirm their hypothesis.

# Attacking principles and methods (HGN)

- Not generally accepted.
  - Learned Treatise: “It is apparent that the medical community has not established any uniformity over the types and forms of nystagmus...”  
Edward F. Fitzgerald, *Intoxication Test*, Sec. 80B:4 (2<sup>nd</sup> Ed. 2011).
- Not the product of reliable principles or methods.
  - HGN is 77% accurate. See NHTSA Manual at VIII-11.
- Not applied reliably to the facts of the case.



# Attacking witness's qualifications

- Education – type of degree, level of education.
- Training and experience – specific to the task at hand.
- However, should go hand-in-hand with a challenge to the principles and methods.
  - *Fuesting v. Zimmer Inc.*, 421 F.3d 528, 535 (7<sup>th</sup> Cir. 2005) (criticizing trial judge for unduly relying on the witness's credentials and for not conducting a proper reliability analysis.



# Benefits of litigating *Daubert*

- Exclusion of unreliable evidence.
- Limitation of expert testimony – may prevent state's expert from overstating the reliability or validity of a method or technique.
- Discovery opportunity – mechanism to get more info earlier in the litigation process.
  - Also an opportunity to exclude testimony and evidence if you are not provided with all of the discovery materials (i.e., if underlying data is claimed to be proprietary).
- Scientific community's awareness and reaction to challenges – even if evidence isn't excluded, the scientific community wants to get it right and will push for improvements.
- Better resolutions.

# Where we are and where we want to go

- Advancing science
- Improving cost effectiveness
- Advancing knowledge
- Ensuring fairness

