Reply Essay: A Final Comment--The Importance of the Procedural Framework

Edward J. Imwinkelried
A FINAL COMMENT —
THE IMPORTANCE OF THE
PROCEDURAL FRAMEWORK

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Professor Faigman and his co-authors kindly provided me with an advance copy of their response to my earlier article in this review.¹ In several respects, reading their response was reassuring. Perhaps I was alarmist when I read the 1999 supplement to Modern Scientific Evidence: The Law and Science of Expert Testimony,² but I was delighted to see them state explicitly in their response that they do not favor "a 'best evidence' test."³ In their response, they propose instead "a better evidence analysis." In Section IV.B of the response, they indicate how that analysis would play out in various fact situations. That section discusses various illustrative cases in which better evidence is available and others in which such evidence is unavailable. In that section, they evaluate those cases and specify the admissibility rulings, which they believe the trial judge should make in each case. I even agree with the proposed rulings. After considering those cases, though, it seems to me that there is no need to mention a better evidence principle to rationalize those rulings. Those are the rulings that the judge should make given the nature of the preliminary fact-finding, which Daubert⁴ tasks the trial judge to conduct.

The first part of this brief article reviews the Daubert decision and describes the substantive admissibility standard that the trial judge must employ under that decision. This part points out that to evaluate the sufficiency of the foundation for a proffered scientific opinion, Daubert requires the trial judge to determine under Federal

¹ Professor of Law, University of California, at Davis. Former chair, Evidence Section, American Association of Law Schools.
³ See In re TMI Litigation, 193 F.3d 613, 665 (3d Cir. 1999) ("The test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology . . . .").
Rule of Evidence 104(a) whether the proponent’s expert has properly used valid scientific methodology in arriving at the opinion. The second part describes the procedural framework within which the judge applies this substantive admissibility standard. This part goes into some detail as to the mechanics of judicial fact-finding under Rule 104(a). The third and final part illustrates the application of those procedural mechanics to the cases discussed by Professor Faigman and his co-authors. It is submitted that those procedures virtually dictate the rulings which Professor Faigman and his co-authors favor. If so, there is no need to further complicate the analysis of the admissibility of scientific testimony by announcing even a “better evidence” principle.

I. THE SUBSTANTIVE ADMISSIBILITY STANDARD UNDER DAUBERT

When the trial judge passes on the admissibility of evidence, a number of terms of art apply. The specific testimony that the proponent is attempting to introduce is an item of proffered evidence. In order to demonstrate that the admission of the item would comply with all pertinent evidentiary doctrines, the proponent lays a foundation. For example, if a witness proposes testifying to a hearsay declarant’s out-of-court statement about a traffic accident and the proponent offers the testimony under the excited utterance hearsay exception, by way of foundation the proponent must establish that the declarant was in a state of nervous excitement at the time of the utterance. The existence of that state of mind is a factual question to be resolved by the trial judge rather than the jury. Unless the judge deviates from normal procedure and sequence, the proponent must present the foundational testimony before formally introducing the proffered item of evidence.

Under Daubert, the item of proffered evidence is usually an opinion relevant to the merits of the case. For example, the expert

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5 See CAL. EVID. CODE § 401 (West 1995).
6 See id. §§ 402-03, 405.
7 See FED. R. EVID. 803(2).
8 See CHARLES T. MCCORMICK, 2 MCCORMICK ON EVIDENCE § 272 (John W. Strong et al. eds., 5th ed. 1999).
10 See FED. R. EVID. 611(a).
11 Federal Rule of Evidence 702 states that if a witness qualifies as an expert by reason of possessing “scientific... knowledge,” the witness “may testify thereto in the form of an opinion or otherwise.” FED. R. EVID. 702. The Advisory Committee Note accompanying Rule 702 explains:

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.

FED. R. EVID. 702 advisory committee note.
might be prepared to opine that long-term exposure to a particular pesticide can cause death.

What is the foundational fact that must be proven in order to justify the admission of that proffered opinion? To begin with, it is critical to distinguish the tenor of the proffered item of evidence from the tenor of the foundational fact. In the lead opinion in *Daubert*, Justice Blackmun suggested that distinction when he wrote that the trial judge making the admissibility decision must focus "solely on principles and methodology, not on the conclusions that they generate." Thus, in our example, the judge does not determine whether long-term exposure to the pesticide can be fatal; that is the conclusion embodied in the proffered opinion. If the case is eventually submitted to the jury, that decision will be a question on the merits for the jury. Furthermore, although Justice Blackmun emphasizes that scientific testimony submitted to the jury should be "reliable," "reliability" in a general sense is not the foundational fact that Justice Blackmun identifies. The foundational fact is more specific. The Justice required that the proponent establish the reliability of the evidence in a special sense; as a means to the end of ensuring reliability, the Justice announced that the proponent must lay a foundation demonstrating that "the reasoning or methodology underlying the [proffered item of] testimony is scientifically valid and . . . [that] that reasoning or methodology properly can be applied to the facts in issue." The foundational fact is whether the expert employed sound "[s]cientific methodology" to arrive at the opinion which is the proffered item of evidence. As one of the co-authors, Professor Kaye, recently noted, *Daubert* requires a foundational showing that the expert reached the proffered opinion "in accordance with 'the methods and procedures of science.'"

After describing the substantive admissibility standard, Justice Blackmun expressly held that the trial judge is to follow the procedures prescribed by Federal Rule of Evidence 104(a) in deciding whether the proponent has met this foundational requirement. In order to appreciate the importance of that holding, we must first pause to review those procedures.

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13 *Id.* at 589-90.
14 *Id.* at 592-93; see also *Hall* v. Babcock & Wilcox Co., 69 F. Supp. 2d 716, 724 (W.D. Pa. 1999) ("These cases require that the proponent show that experts' conclusions have been arrived at in a scientifically and methodologically reliable" manner.).
15 *Daubert*, 509 U.S. at 593.
17 See *Daubert*, 509 U.S. at 592.
II. THE PRELIMINARY FACT-FINDING PROCEDURES UNDER FEDERAL RULE OF EVIDENCE 104(A) FOR APPLYING THE Daubert STANDARD

A. Rule 104(b)

When the trial judge makes some admissibility decisions, the judge plays a limited role. For example, when the foundational question is whether a lay witness observed the fact or event he or she proposes testifying about, Federal Rule of Evidence 104(b) controls. Rule 104(b) restricts the judge’s role at the stage of the admissibility ruling in order to protect the jury’s role and power. Even lay jurors lacking legal training can ultimately be trusted to determine whether a witness has actually observed an accident or crime. Lay jurors are not only competent to weigh the testimony indicating whether or not a witness saw an accident. More importantly, we can be reasonably confident that if they decide that the witness did not see the accident, their later deliberations will not be distorted by their prior exposure to the witness’s testimony; if the jurors conclude that the witness did not observe the accident, common sense will naturally lead them to disregard the witness’s testimony about the accident.

To preserve the jury’s power to make that final decision, the Federal Rules of Evidence limit the judge’s screening role in making the admissibility decision. The judge does not consider the credibility of the proponent’s foundational evidence or decide whether in fact the witness observed the accident. As the Supreme Court commented in the Huddleston case, when the judge follows Rule 104(b), he or she “neither weighs credibility nor makes a [true] finding” of fact. Rather, the judge decides only the question of law whether, on its face, the proponent’s foundational testimony is sufficient to support a rational finding or permissive inference that the witness perceived the accident. If the proponent’s foundational testimony has that minimal probative value, the trial judge admits the evidence. When the opponent has rebuttal evidence indicating that the witness did not observe the accident, the opponent submits that evidence to the jury rather than the judge. If the opponent submits such evidence, on the opponent’s timely request the trial judge will instruct the jury that they must decide whether the witness in fact saw the accident. The judge would lastly direct the jury to disregard the witness’s testimony if

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18 See Fed. R. Evid. 602 advisory committee note. Under the Federal Rules, the 104(b) procedure applies to several foundational facts, including the predicate fact of the authenticity of an exhibit such as a letter. Fed. R. Evid. 901 advisory committee note.
19 See Imwinkelried, supra note 9, § 31, at 64-65.
21 See Imwinkelried, supra note 9, § 32, at 64-65.
22 See id. § 32, at 65.
23 See id. § 33, at 65-67.
they conclude that the witness did not observe the accident described in the testimony.

B. Rule 104(a)

Federal Rule of Evidence 104(a) prescribes a radically different set of procedures. Under Rule 104(a), the judge has plenary fact-finding powers. The judge plays an expanded role here because we cannot realistically trust the jury to make these foundational determinations. The paradigmatic example is the foundation determining whether an evidentiary privilege attaches. For example, a party claiming the attorney-client privilege has the burden of proving that there was physical privacy at the time of the allegedly confidential communication. Suppose that the accused is charged with murdering an infant, and in a conversation he confessed to his attorney that he, the accused, had indeed committed the murder. There is a factual dispute over whether the attorney and client were speaking in close ear-shot of a third party. Assume that the judge applied Rule 104(b) and ultimately submitted the dispute to the jury. In the final part of her charge to the jurors, the judge would direct them to disregard the confession if they found that the third party was not close enough to destroy the expectation of privacy of the accused. To be frank, we cannot be confident that all the jurors would be capable of and willing to following the instruction. Assume that at a conscious level, the jurors find that the conversation was private and consequently technically privileged. Nevertheless, having learned that the accused freely confessed to committing this heinous crime, at least at a subconscious level the jurors would be sorely tempted to be influenced by their exposure to the testimony about the confession. In such situations, Rule 104(a) controls.

When Rule 104(a) applies, the judge listens to the testimony by both sides on the foundational questions. After the proponent presents his or her foundational showing, the opponent may both object and conduct a limited voir dire in support of the objection; the voir dire is the method of presenting the opponent’s evidence on the foundational facts. The judge needs the evidence on both sides of the foundational facts because, as the Supreme Court acknowledged in Bourjaily, a judge applying Rule 104(a) passes on the credibility of the foundational testimony and makes a finding of fact as to whether the foundational fact is true. While under 104(b) the judge accepts the proponent’s foundational testimony at face value, under 104(a) the

24 See CAL. EVID. CODE. § 405, assembly committee comment (West 1995).
25 See Imwinkelried, supra note 9, § 62, at 95-97.
judge makes a "credibility determination." Further, again as the Court indicated in *Bourjaily*, the proponent normally has a burden of convincing the judge that the foundational fact is true by a preponderance of the evidence. Lastly, the judge's ruling is final. It is true that the opponent may attack the weight of any testimony the judge decides to admit. However, once the judge has ruled the evidence inadmissible, the opponent cannot re-litigate admissibility to the jury. Under Rule 104(b), on request the judge instructs the jury to finally decide whether the witness saw the accident and to disregard the witness's testimony if the jury finds that the witness did not observe the accident. There is no comparable instruction when Rule 104(a) governs.

III. THE APPLICATION OF RULE 104(A)'S PROCEDURES TO THE ILLUSTRATIVE *DAUBERT* CASES DISCUSSED BY PROFESSOR FAIGMAN AND HIS CO-AUTHORS

As previously stated, the thesis of this short article is that although Professor Faigman and his co-authors reach the right results in the illustrative cases they mention in their response, there is no need to invoke any "best" or "better" evidence principle to justify those results. Rather, those results flow from an application of the substantive *Daubert* admissibility standard and the Rule 104(a) preliminary fact-finding procedures to the facts of the illustrative cases.

In their response, Professor Faigman and his co-authors devote a good deal of their time to a discussion of the illustrative cases. We turn now to an analysis of those cases.

A. Cases in Which the "Better" Foundational Evidence Is Neither Actually Nor Reasonably Available

Professor Faigman discusses cases in which "better" evidence is either actually or at least reasonably available. I take the limited scope of that discussion to imply that when better evidence is neither actually nor reasonably available, Professor Faigman would agree that there are only four questions facing the judge under Rule 104(a): Is

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29 *See* Crane v. Kentucky, 476 U.S. 683, 683 (1986) (holding a defendant deprived of the right to attack the credibility of the admitted evidence was also deprived of his 14th Amendment rights "to a fair opportunity to present a defense").
30 Since the judge has made a final ruling, the judge could forbid the counsel from inviting the jurors to second guess the judge's ruling. If the counsel persisted, the judge could hold counsel in contempt.
31 *See* Inwinkelried, *supra* note 9, § 65, at 102-04.
the proponent's foundational testimony credible? If the judge decides to believe the evidence, does the evidence demonstrate that the proponent's expert used a valid scientific methodology? If so, did the expert use the methodology properly? And finally, if the expert properly used a valid scientific methodology, do the findings yielded by the methodology have sufficient probative value to support the tenor of the specific opinion proffered (the item of proffered evidence)? If the trial judge decides that all four questions should be answered in the affirmative, the foundation is adequate and the proffered opinion ought to be admitted.

B. Cases in Which “Better” Evidence Is Either Actually or Reasonably Available

Assume, though, that the trial judge knows that “better” evidence is either actually or reasonably available. Of course, unless the trial judge judicially notices that proposition or that proposition is stated in the report of a court-appointed expert, the judge will learn of the availability of “better” evidence only by virtue of the opponent's presentation of foundational testimony establishing its availability. The proponent will come forward with his or her foundational testimony, and the opponent would then respond with rebuttal testimony on the foundational issue. Under Rule 104(a) the opponent has the right to submit rebuttal testimony on the foundational issue before the judge makes the final ruling. How should the trial judge rule when the proponent makes an otherwise sufficient showing that the proponent's expert arrived at his or her opinion by properly using a valid scientific methodology but the opponent goes forward with contrary testimony on the foundational fact? I fully agree with Professor Faigman that the answer depends on the state of the record. My point is that in the various states of the record, the judge should reach the results suggested by Professor Faigman—not by virtue of any “better evidence”

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32 One of the fundamental differences between the trial and appellate perspectives is that the trial judge may pass on the credibility of foundational testimony submitted under Rule 104(a). The trial judge has the power to choose to disbelieve the proponent's testimony. Thus, even if the foundational testimony on its face was sufficient to satisfy Daubert, the judge might exclude the proffered item of evidence; like any plenary fact-finder, the judge might simply conclude that the foundational testimony was unworthy of belief.

33 In the initial article, I argued that the sufficiency of the foundation must be assessed relative to the tenor of the opinion proffered. See Imwinkelried, supra note 1, at 42. In a given case, it could be logically relevant for the defense to introduce an opinion that there is a good possibility that the tablets the defendant consumed shortly before a fatal encounter contained a psychoactive drug. The opinion might suffice to raise a reasonable doubt about the existence of the mens rea element for the charged offense. In contrast, in a drug prosecution, the government might be obliged to offer an opinion that the tablets definitely contained the drug. Since the government expert's opinion purports to be more definite than the defense expert's opinion, the former would require a stronger foundation.

34 See FED. R. EVID. 201.

35 See FED. R. EVID. 706.
principle, but simply because of the nature of the judge’s fact-finding task under Rule 104(a) and Daubert. To make that point, it might be helpful to distinguish among several possible states of the record.

1. Cases in Which the Opponent’s Testimony on the Foundational Fact Directly Establishes Flaws in the Methodology Used by the Proponent’s Expert

Suppose that after the proponent presents his or her foundational testimony, the opponent submits rebuttal evidence directly attacking the methodology employed by the proponent’s expert. By way of example, as in Joiner if the proponent relies on an animal study, the defense could establish either through cross-examination or rebuttal testimony that in the study, the animals were exposed to much higher levels of the alleged carcinogen than humans are typically exposed to. Or, again as in Joiner if the proponent relied on an epidemiological study, the defense could counter that the study was flawed because the subjects “had been exposed to numerous potential carcinogens,” not merely the carcinogen which allegedly caused the plaintiff’s illness. The foundational question is whether the proponent’s expert employed sound scientific methodology in arriving at his or her proffered opinion. When the opponent directly attacks the methodology employed by the proponent’s experts and the judge is convinced that those attacks establish serious methodological deficiencies, the trial judge would certainly be reasonable in concluding that the proponent had not established the foundational fact by a preponderance of the evidence.

2. Cases in Which the Opponent’s Testimony on the Foundational Fact Establishes that the Opponent’s Experts Used the Same Methodology but Reached Different Findings

Suppose alternatively that the opponent does not mount any direct attacks on the methodology employed by the proponent’s expert but rather calls experts prepared to testify that they employed the same methodology and reached contrary findings. In effect, the opponent’s rebuttal is a response in kind on the foundational issue. This is a variation of the Daubert fact pattern. In Daubert, the plaintiffs proffered an expert opinion that a mother’s ingestion of Bendectin can cause limb defects in children. As a foundation, the plaintiffs presented epidemiological evidence, specifically an unpublished

36 In General Electric Co. v. Joiner, 522 U.S. 136, 144 (1997), the plaintiff relied in part on animal studies, and the defense directly attacked the probative worth of those studies. The Chief Justice concurred that “the animal studies on which respondent’s experts relied did not support his contention that exposure to PCB’s had contributed to his cancer.” Id. at 144.

37 Id. at 146.
reanalysis of previously published epidemiological studies. The defense, however, had a wealth of contrary epidemiological evidence. A defense expert, Dr. Lamm, "stated that he had reviewed all the literature on Bendectin and human birth defects, more than 30 published studies involving over 130,000 patients. No study had found Bendectin to be a human teratogen (i.e., a substance capable of causing malformations in fetuses)." Faced with this record, again it would be rational for the judge to find that the plaintiff had not established by foundational fact by a preponderance of the evidence. It is not that the judge has the right to resolve the question of whether Bendectin causes limb defects; again, that is question on the merits, which the proffered opinion addresses. The judge rules only on the foundational question. Yet, under Rule 104(a) if the opponent’s experts employ roughly the same methodology as the proponent’s expert and their numerous uses of the methodology uniformly point to the contrary conclusion, common sense suggests that the trial judge ought to have grave doubts about whether the proponent’s expert properly applied the methodology. Again, the judge could rule the proffered opinion inadmissible without adverting to any “best” or “better” evidence rule.

3. Cases in Which the Opponent’s Testimony on the Foundational Fact Establishes that the Opponent’s Experts Used a Different Methodology and Reached Findings Pointing to a Different Conclusion than the One Reached by the Proponent’s Expert

In the prior versions of the state of the record, the opponent either directly attacked the proponent’s expert’s methodology or presented rebuttal foundational testimony, based on the same methodology. However, as Professor Faigman and his co-authors note, the opponent can respond in another way, namely, by presenting rebuttal foundational testimony based on a different—and arguably better—methodology. For instance, even if the proponent’s foundation consists solely of animal studies, the opponent might counter with epidemiological evidence. How should the trial judge approach these situations?

a. Cases in Which the Opponent Presents “Some” Rebuttal Testimony on the Foundational Fact, Based on an Arguably Better Methodology

Professor Faigman and his co-authors state that the proposed better evidence rule “would not support a ruling that all testimony on animal research is inadmissible just because there is some epidemiol-

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39 Id. at 582.
ogical evidence to the contrary.\footnote{40}{David L. Faigman et al.,  \textit{How Good is Good Enough?: Expert Evidence Under Daubert and Kumho}, 50 \textit{Case W. Res. L. Rev.} 645 & n.55 and accompanying text (2000).} I interpret that statement to mean that a proffered opinion, supported by an animal study foundation, would not necessarily be inadmissible merely because there is "some epidemiological" research pointing to a contrary opinion. I agree with that result, but again there is no need to invoke any better evidence principle to explain that result.

Again, the foundational question is whether the proponent's expert arrived at his or her opinion by correctly applying sound scientific methodology. In this variation of the record, using a different methodology, the opponent's experts arrived at a different opinion. To be sure, if the opponent's experts' methodology passes muster under \textit{Daubert}, the opponent is entitled to submit their opinions to the jury on the merits.

However, would the fact that the opposing experts reached a different opinion by using a superior methodology dictate the conclusion that the proponent’s foundation is insufficient? More specifically, does that fact dictate the conclusion that the proponent’s expert used an invalid methodology? That conclusion would obviously be a classic \textit{non sequitur}. The fact that the opponent’s expert derived a different opinion by using epidemiology certainly does not dictate or even justify the conclusion that animal research is an invalid methodology. Alternatively, does that fact alone dictate the conclusion that the proponent’s expert misapplied animal research techniques? Again, the answer must be no. That fact may raise a question in the judge’s mind about the manner in which the proponent’s expert used animal research techniques; but without more, that fact should not preclude the judge from finding that the proponent has established by a preponderance of the evidence that his or her expert correctly applied an animal research methodology. Concededly, the fact is some circumstantial evidence that the proponent’s expert erred. Yet, standing alone, the fact hardly compels the judge to conclude that the preponderance of the foundational evidence favors a finding that the proponent’s expert erred in applying the methodology.

\textit{b. Cases in Which the Opponent Presents Extensive or Substantial Rebuttal Testimony on the Foundational Fact, Based on Arguably Better Methodology}

Professor Faigman contrasts situations in which the opponent submits "extensive,"\footnote{41}{\textit{Id.} at 662 & n.56.} "overwhelming,"\footnote{42}{\textit{Id.} & n.57.} "rich,"\footnote{43}{\textit{Id.} at 663 & n.60.} or "substantial"\footnote{44}{\textit{Id.} at 660 & n.50.}
rebuttal foundational testimony, based on a better methodology. Consider a variation of the *Daubert* record. Suppose, for instance, that the proponent’s expert relied on a single animal study indicating that Bendectin can cause limb defects. Rather than attacking the methodology of the animal study, the opponent presented 30 epidemiological studies finding no nexus between Bendectin use and the incidence of limb defects. Professor Faigman submits that faced with such a record, the trial judge should find the proponent’s foundation insufficient and exclude the proffered opinion. Once again, the judge can reach that result without invoking any “best” or “better” evidence principle. The fact that the opponent’s experts reached a different conclusion by employing a different methodology remains only circumstantial evidence that the proponent’s expert incorrectly applied animal research methodology. However, sometimes circumstantial evidence is highly probative. When the opponent can marshal so many properly designed epidemiological studies supporting a contrary opinion, the judge should have serious doubts about the proponent’s expert’s methodology. When the studies reaching a contrary conclusion are so “numerous,” the judge would be hard pressed to find that the proponent has established the foundational fact by a preponderance of the evidence.

IV. CONCLUSION

Professor Faigman’s description of the “better evidence” principle in the response allays the fears which troubled me when I first read the 1999 supplement to *Modern Scientific Evidence*. As described in the response, the “better evidence” principle seems sound at least in this sense: When the trial judge concludes that the opponent has presented better testimony on the foundational issue of whether the proponent’s expert properly applied a valid scientific methodology, the judge should find that the proponent has not proven the foundational fact by a preponderance of the evidence, as required by Rule 104(a). My only real question is whether the so-called principle adds anything to the analysis of the sufficiency of *Daubert* foundations. In *Daubert*, Justice Blackmun specifically stated that trial judges should follow Rule 104(a) procedures. It seems to me that the application of those procedures to the various states of the record mentioned in the response lead to the very same outcomes Professor Faigman and his co-authors appear to favor; those outcomes are easily explicable in terms of 104(a) procedures. If so, rather than searching for a “better evidence” principle, we should concentrate on the procedural framework in which *Daubert* operates. With the nota-

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45 *See Daubert*, 509 U.S. at 583.
46 Faigman, *supra* note 40, at 662 & n.57 and accompanying text (quoting Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 830 (1988)).
ble exception of Professor Berger, most Evidence scholars have neglected that topic. Hopefully, this exchange will help focus attention on that subject.

In closing, I would like to take this opportunity to thank Professor Faigman and his co-authors. I am indebted to them. Individually, each of the co-authors has made numerous, provocative contributions to the literature on expert testimony. Their collective work, their 1999 supplement and response, do likewise. I must confess that I am one of the Evidence students who, to date has slighted the subject of the procedural framework for applying Daubert. The co-authors’ response to my original article in this law review has forced me to give more thought to that subject. As on so many occasions in the past, their writings will once again force judges, attorneys, and academics to refine their thinking on important, often overlooked issues. As in the past, their writings serve to keep us at the cutting edge of the evolution of the law governing expert evidence.

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