Virginia's answer to *Daubert*'s question behind the question

Who determines if the science is reliable? Virginia assumes the jury can usually be trusted to separate the sheep from the goats.

by D. ARTHUR KELSEY

My interest in *Daubert* lies beneath the shifting tectonic plates of academic debate regarding its specific application to differing schools of scientific knowledge. To me, the more important (and considerably more worrisome) question is not whether this or that type of novel scientific opinion is reliable—but rather who gets to decide whether it is or not.

The *Daubert* Effect

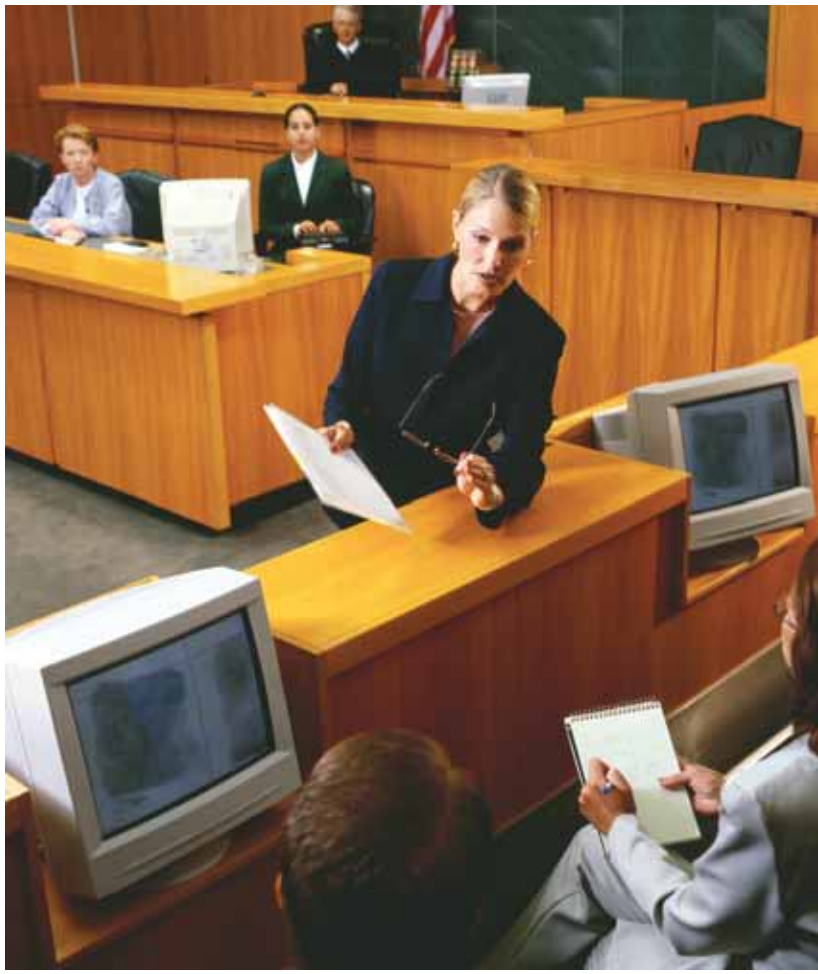
For 70 years, pre-*Daubert* federal courts allowed scientific opinion testimony when the underlying scientific theory or basis of opinion was generally accepted as reliable within the expert's particular field.[1] *Daubert* held that Federal Rule of Evidence 702 superseded the *Frye* standard, replacing it with a flexible test focusing on reliability. *Daubert* described the *Frye* standard as out of sync with the "liberal thrust" of the Federal Rules of Evidence and incompatible with their goal of "relaxing the traditional barriers to 'opinion' testimony."[2] *Frye*'s "austere standard," *Daubert* concluded, could not be reconciled with the "permissive backdrop" of the expert opinion rule.[3] As the Fourth Circuit quite reasonably put it a few years later, scientific opinion evidence under *Daubert* should be admitted "more liberally under Rule 702 than it was under *Frye*."[4]

Problem is, 10 years later, hardly anyone now believes that. Professor Cheng states the consensus view this way:

> Although the practical effects of *Daubert* were initially ambiguous, the enduring legacy of the *Daubert* decision is now relatively clear . . . . *Daubert* has become a potent weapon of tort reform by causing judges to scrutinize scientific evidence more closely . . . . The resulting effects of *Daubert* have been decidedly pro-defendant. In the civil context, *Daubert* has empowered defendants to exclude certain types of scientific evidence, substantially improving their chances of obtaining summary judgment and thereby avoiding what are perceived to be unpredictable and often plaintiff-friendly juries.[5]

Anecdotal evidence from federal trial judges confirms this view. As the Federal Judicial Center reports:

> Compared to 1991, judges in 1998 reported that they were more likely to scrutinize expert testimony before trial and were less likely to admit it. Judges said that they limited or excluded some of the testimony proffered by experts in 41% of the referenced 1998 cases, compared to only 25% of the referenced 1991 cases. These figures support the suggestion that judges may exercise more control over expert evidence post-*Daubert* than was done in pre-*Daubert* times.[6]



CORBIS

The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B). These views, therefore, should not be mistaken for the official views of the Virginia Court of Appeals or my opinion as an appellate judge in the context of any specific case.

1. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
2. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588 (1993) (citations omitted).
3. *Id.* at 589.
4. Cavallo v. Star Enter., 100 F.3d 1150, 1158 (4th Cir. 1996).
5. Edward K. Cheng & Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 472-73 (2005).

Despite all its rhetoric about liberality, truth be told, *Daubert* has undergone a rather illiberal evolution. As revealed by a telling slip of the tongue by Justice Ruth Bader Ginsburg, *Daubert* is now understood to impose "*exacting* standards of reliability,"[7] far less flexible and permissive than anyone anticipated.

The gate-closing instincts of gatekeepers in response to the new open-gate policy (which, for lack of a better expression, I call the "*Daubert* Effect") cannot be easily explained. Perhaps it occurred because of the repeated statements in later opinions about the trial court's "*special* obligation" under *Daubert* to keep out inadmissible expert testimony.[8] From this, trial judges probably reason that *Daubert* requires a higher level of rigor than the evidently not-so-special duty to exclude other inadmissible testimony (hearsay, irrelevancies, and the like) trying to sneak past the gatekeeper during a typical trial.

It may well be, too, that this evolution came about as a result of concurring opinions targeting "junky" science,[9] or gratuitously suggesting that trial judges appoint "special masters" or "specially trained law clerks" to assist in the gatekeeping function.[10] Such additional manpower, one would think, would be needed more to secure the gate in a closed rather than an open position.

I also wonder if the *Daubert* dichotomy between science and law contributed to the *Daubert* Effect. *Daubert* described science as an "exhaustive search for cosmic understanding" and law as a mere "particularized resolution of legal disputes" that, sometimes, must take place without the benefit of "authentic insights and innovations."[11] No doubt this disobliging insight left more than a few gatekeepers supposing that too much expert testimony about the cosmos must have found its way into the courtroom.

Finally, I cannot overlook the cynicism of many trial lawyers, who suggest that trial judges may have responded to their new tasking orders under *Daubert* (particularly the necessity of conducting a pretrial trial in every case involving experts) by concluding that, more often than before, hearing the opinion once is enough.

The question behind the question

I do not know if any of these hypotheses explain how the *Daubert* Effect could have evolved from *Daubert*. Instead, I raise them mostly to preface my main point. As I have argued elsewhere,

> before any serious legal question can be answered, another *a priori* question must first be asked: Who decides? That is, we cannot say what the answer is until we know who gets to make the call. This who-decides question necessarily stems from the comprehensive devolution of power inherent in the American system of government. It is the question that precedes every other. And it is the one question that, if overlooked, will put in doubt all answers to all other questions.[12]

Applied to *Daubert*, this thesis shifts the debate from *whether* this or that bit of expert opinion is reliable to the more important question of *who* gets to decide whether it is or not.

Frye unwittingly delegated the judgment call primarily to the scientific community by admitting into evidence only theories and techniques generally accepted by mainstream institutions of science. The unstated maxim appeared to be, "let the experts judge the experts." In other words, if real experts outside the courtroom regularly treated the proffered theories and techniques as legitimate, then would-be experts inside the courtroom could do so as well. The problem with this approach, though, is that mainstream science becomes mainstream through a cautious, slow-moving process. It gains strength from an institutional inertia that sometimes begrudgingly acknowledges novel, but legitimate, scientific discoveries while dogmatically defending older, but discredited, scientific orthodoxy.

Daubert, on the other hand, delegates the judgment call mostly to individual trial judges by authorizing them to act as "amateur scientists"[13] and then by protecting their decisions from risk of reversal with the highly deferential abuse-of-discretion standard of appellate review.[14] A trial judge under *Daubert* does not ask if a reasonable juror could find the proffered scientific opinion reliable. The judge asks whether *he* personally finds it reliable or unreliable. If the opinion does not pass his application of *Daubert's* "exacting standards,"[15] the jury never hears it.

Exactly the point, *Daubert's* advocates reply. Only by doing so can we be confident that scientific sophistry will not fuel credulous decision making by juries. Though critics scoff at judges "donning white coats and making determinations that are outside their field of expertise,"[16] *Daubert* concedes this weakness, but nonetheless finds it "less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique."[17]

This reasoning troubles me at several levels. Beginning with its elitist tone, this explanation for the *Daubert* Effect betrays a condescending view of juries, one unfitting our proud tradition of viewing the institution of the

6. Carol Krafka et al., Federal Judicial Center, *Judge & Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 322 (2002) (footnote omitted).

7. Weisgram v. Marley Co., 528 U.S. 440, 455 (2000) (emphasis added).

8. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999) (emphasis added).

9. *Id.* at 159 (Scalia, J., concurring).

10. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 149 (1997) (Breyer, J., concurring).

11. *Daubert*, 509 U.S. at 597.

12. D. Arthur Kelsey, *The Architecture of Judicial Power: Appellate Review & Stare Decisis*, 53 VIRGINIA LAWYER, No. 3, at 13, 14 (Oct. 2004), *available at* http://www.vsb.org/publications/valawyer/oct04/index.html (last visited Sept. 1, 2006), *abbreviated version reprinted in* 45 JUDGES' JOURNAL 6-7 (2006), *available at* http://www.abanet.org/jd/publications/jjournal/2006spring/home.html (last visited Sept. 1, 2006).

13. *Daubert*, 509 U.S. at 601 (Rehnquist, C.J., joined by Stevens, J., concurring in part and dissenting in part).

14. *See Gen. Elec. Co.*, 522 U.S. at 139 (rejecting a *de novo* standard of review and adopting an abuse of discretion standard).

15. *Weisgram*, 528 U.S. at 455.

16. Allison v. McGhan Med. Corp., 184 F.3d 1300, 1310 (11th Cir. 1999).

17. *Id.*

jury as an *ad hoc* exercise in popular sovereignty.[18] "To many of the Framers' generation, the jury was 'the lower judicial bench in a bicameral judiciary' and the 'democratic branch of the judiciary power—more necessary than representatives in the legislature.'"[19] "To them, the jury was 'no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.'"[20] "As the 'democratical balance in the Judiciary power,' the jury system secured to the citizenry 'a share of Judicature which they have reserved for themselves.'"[21] From this perspective, "the common man in the jury box, no less than the citizen in the voting booth, was central to a democratic theory that asserted the sovereignty of the people through self-government."[22] "Through juries, the consent of the governed would flow continuously, not just in election-day spurts."[23]

Because the jury served as a core aspect of popular sovereignty, the architects of the Constitution strictly policed the definitional lines between questions of law and fact—the analytical lever distributing decision-making power over a topic either to the judge or to the jury. To be sure, after the Philadelphia Convention issued the original draft of the Constitution, many during the ratification debates were shocked to learn that Article III invested the U.S. Supreme Court with appellate power over questions of "law and fact."[24] This concern contributed to their demand for the Seventh Amendment, which made clear that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." The Framers understood that every decision characterized as a question of law for the court, rather than a question of fact for the jury, transferred power from the people's *ad hoc* representatives (serving as temporary guardians of the popular will) to unelected, life-tenured judges (serving as permanent guardians of the judicial will).[25]

The *Daubert* Effect reformatted the reliability standard into a question of law, thereby giving the judge a preemptory veto over any contrary conclusion the jurors may have otherwise reached had they heard the reliability evidence. From any perspective, however, the reliability of an expert opinion can only be determined by examining the underlying probative weight of the opinion and the personal credibility of the expert—exactly the kinds of factual questions we ordinarily assign to juries.

I am not suggesting courts should exercise no judicial oversight over admissibility decisions concerning problematic expert opinions. Certainly we should. The issue, however, is one of degree. I believe judges should perform the same gate-keeping role they always do when policing the boundaries of jury fact-finding discretion. The delegation of decision-making power to juries presupposes they will exercise it rationally. If they fail to do so, the law revokes their delegation of power and annuls their decisions. This can happen in advance, as with a motion for a directed verdict, or in hindsight, as with a motion to set aside a verdict. Either way, the degree of judicial oversight remains the same.

Borrowing loosely on concepts of syllogistic logic, the law refers to this judicial oversight as an examination of the "sufficiency" of the evidence. Facts are "sufficient" when a rational factfinder *could* find them persuasive under the governing burden of proof.[26] It is unnecessary that the person asking that question (a trial judge when ruling on a motion for judgment as a matter of law or an appellate judge on a sufficiency review) personally finds the evidence persuasive or unpersuasive. It suffices that a reasonable juror could reach this conclusion. Within the bell-shaped curve of rationality, reasonable people can disagree over reasonably debatable matters. Only outliers beyond an acceptable standard deviation, decisions with which *no* reasonable person *could* agree, should be withheld from the factfinding discretion of the jury.

The Virginia answer

Since its earliest years, Virginia has jealously guarded the institution of the jury. It was, after all, one of our favored sons that said with characteristic hyperbole: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[27] We thus had little trouble rejecting *Frye* as an exclusive standard[28] because it gave too much weight to the general consensus of the scientific community and too little weight to the specific consensus of the jury.

In 1993, the Virginia legislature enacted Va. Code § 8.01-401.3(A). It tracked verbatim the then-existing Federal Rule of Evidence 702, the

18. Indeed, just a decade before deciding *Daubert*, the U.S. Supreme Court was "unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence . . . ." Barefoot v. Estelle, 463 U.S. 880, 901 (1983). The Court rejected the alternative argument, finding it was "founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process." *Id.* at 900, note 7.

19. Kelsey, *supra* note 12, at 14 (quoting Akhil Reed Amar & Les Adams, THE BILL OF RIGHTS PRIMER 137-39 (2002) (quoting John Taylor, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950) (1814), and *Essays by a Farmer (IV)*, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert J. Storing ed., 1981))).

20. *Id.* at 14-15 (quoting Blakely v. Washington, 542 U.S. 296, 305-06 (2004)).

21. *Id.* at 15 (quoting Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 11, 94-95 (1998) (citations omitted)).

22. Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 383 (1994).

23. *Id.* at 409.

24. Kelsey, *supra* note 12, at 15 (citing U.S. CONST. art. III, § 2.).

25. *Id.* at 14-15.

26. *See generally* Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); Barnes v. Commonwealth, 47 Va. App. 105, 110, 622 S.E.2d 278, 280 (2005); Haskins v. Commonwealth, 44 Va. App. 1, 7, 602 S.E.2d 402, 405 (2004); Seaton v. Commonwealth, 42 Va. App. 739, 747 n.2, 595 S.E.2d 9, 13 n.2 (2004); Crowder v. Commonwealth, 41 Va. App. 658, 663, 588 S.E.2d 384, 387 (2003).

27. Kelsey, *supra* note 12, at 15 (quoting Blakely v. Washington, 542 U.S. 296, 305-06 (2004) (quoting Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), *reprinted in* 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed. 1958))).

28. Spencer v. Commonwealth, 238 Va. 275, 290 n.10, 384 S.E.2d 775, 783 n.10 (1989) (quoting O'Dell v. Commonwealth, 234 Va. 672, 695-96, 364 S.E.2d 491, 504 (1988)).

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To the framers of the Constitution, the jury was "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."

same version interpreted by *Daubert*. Since then, the Virginia General Assembly has rejected invitations to rewrite that statute to reflect the 2000 amendments to Rule 702, changes intended to better conform the Rule to the specific language of *Daubert*. The Virginia Supreme Court likewise has taken note of *Daubert*, but has conspicuously declined to adopt it[29]—probably for fear that doing so would import into Virginia law the unhelpful mass of federal caselaw giving birth to the *Daubert* Effect.

Using traditional formulations, Virginia law requires that expert testimony meet "certain fundamental requirements."[30] It cannot be founded on "speculative" assumptions or rely on an "insufficient factual basis."[31] Nor can a proffered opinion contain "disregarded" variables,[32] rely on "dissimilar tests,"[33] or create an "illusory impression of exactness."[34] In screening expert opinions, however, Virginia judges do not themselves deem the opinion reliable (and thus admissible) or unreliable (and thus inadmissible). Rather, they make only a "threshold finding,"[35] focusing on whether a reasonable juror *could* find the expert opinion reliable and decide the case in reliance upon it.

Stated differently, the judge asks if the "evidence is *so inherently unreliable* that a lay jury must be shielded from it, or whether it is of such character that the jury may safely be left to determine the credibility for itself."[36] Under this standard,

> where the issue of scientific reliability is disputed, if the court determines that there is a sufficient foundation to warrant admission of the evidence, the court may, in its discretion, admit the evidence with appropriate instructions to the jury to consider the disputed reliability of the evidence in determining its credibility and weight.[37]

In the end, the final decision on "disputed reliability"[38] belongs solely to the jury.

Some commentators dismiss our approach as "laissez faire"[39] which (as the etymology of that French phrase ironically denotes) means "to let the people do as they choose." I see in that very dismissal an apologetic we can confidently endorse. The Virginia approach implicitly answers the question behind the question. The true issue is not whether this or that novel science is reliable, but rather who gets to make the call. Virginia's open-gate policy assumes the jury can usually be trusted to separate the sheep from the goats. Our so-inherently-unreliable principle shuts the gate only on those expert opinions which, if actually relied upon by juries, would violate our trust in their presumptive rationality and thereby justify the revocation of their fact-finding authority. Preserving the traditional balance of power between judge and jury, Virginia honors both and devalues neither.

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29. John v. Im, 263 Va. 315, 322, 559 S.E.2d 694, 697-98 (2002).
30. Tittsworth v. Robinson, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996).
31. Forbes v. Rapp, 269 Va. 374, 381, 611 S.E.2d 592, 596 (2005).
32. *Tittsworth*, 252 Va. at 155, 475 S.E.2d at 263.
33. *Id.*
34. ITT Hartford Group, Inc. v. Va. Fin. Assocs., Inc., 258 Va. 193, 201, 520 S.E.2d 355, 360 (1999).
35. *Im*, 263 Va. at 322 n.3, 559 S.E.2d at 698 n.3 (citing Satcher v. Commonwealth, 244 Va. 220, 244, 421 S.E.2d 821, 835 (1992), and Spencer v. Commonwealth, 240 Va. 78, 97-98, 393 S.E.2d 609, 621 (1990)).
36. *Satcher*, 244 Va. at 244, 421 S.E.2d at 835 (emphasis added) (quoting *Spencer*, 240 Va. at 98, 393 S.E.2d at 621).
37. *Spencer*, 240 Va. at 97-98, 393 S.E.2d at 621 (citation omitted).
38. *Id.*; see Hetmeyer v. Commonwealth, 19 Va. App. 103, 108-09, 448 S.E.2d 894, 898 (1994) ("A challenge to an 'expert's … methods and determinations …, even by other experts, does not render inadmissible expert opinion based on those … methods and computations' but goes to the 'weight of the evidence,' raising 'factual questions to be determined by the jury.'" (citations omitted)).
39. Thomas L. Bohan, *Scientific Evidence and Forensic Science Since Daubert: Maine Decides to Sit out the Dance*, 56 ME. L. REV. 101, 116 (2004).