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A Response to Professor Graham

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A Response to Professor Graham

Professor Graham's comments are on-point in many respects. However, I must recognize that we have a fundamental disagreement regarding the efficacy of jury instructions and other alternative devices as opposed to wholesale admission of the expert testimony in question. Fundamentally, it seems as if we are not in accord on the proper application of *Daubert*. Professor Graham seems to favor the broadest possible spectrum of admissibility, at least in this regard. As discussed at great length in my Comment, I believe that the judiciary should not abrogate its gate-keeping function in favor of unlimited testimony of experts.

I am in complete agreement with Professor Graham that there are a myriad of factors that could tend to undermine eyewitness identifications. I would even agree that at least some of these factors are beyond the ken of the average juror. However, these same statements could be made regarding any number of factors that would be presented at trial. This does not make them fair game for expert testimony, *if* there are reasonably effective alternatives available. Without rehashing the arguments made at great length in my Comment, I firmly believe that there are any number of such alternatives available, which would more than adequately inform the jury of the factors affecting the credibility of eyewitnesses without the dangers presented by expert testimony. Specifically, these other methods avoid both the unnecessary loss of judicial economy and the aura of infallibility that surrounds the expert.

Upon presentation of this Comment, it was suggested that the founding fathers would prefer to let five guilty men go free than convict one innocent individual. Besides the questionable reliance on original intent, I would suggest that the founders did not suggest this their preferential model.¹ If it is possible to tweak the system so that no innocent people are convicted, while the guilty are given their just deserts, this would seem to be the best possible system. Limiting the questioned testimony to situations in which the *Moon* factors are present, as outlined in the body of the Comment, would best serve the needs of original intent and the modern judicial system. Wholesale admissibility simply would not.

THOMAS DILLICKRATH

1. It is interesting that many of those who invoke original intent and formalist analysis in this context would be the first in line to criticize Justice Scalia in his invocation of this method of analysis in other circumstances.