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## PS
## Symposium
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## Political Gerrymandering: *Badham v. Eu,*
## Political Science Goes to Court

# Expert vs. Expert: Lessons from *Badham v. Eu*

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## Introduction

Professors Cain and Grofman were kind enough to suggest that I review the expert witness declarations in *Badham v. Eu* (D.C. California, 1984) in the light of my own previous research on expert witness testimony to identify frequently used modes of argumentation.

The single most important observation I can make about the nature of the expert witness testimony in *Badham* is to note its high quality. The experts in *Badham* are addressing real issues. The differences among these experts rest on differing normative views and on disputes about difficult empirical and methodological questions. Moreover, the genuine expertise of these social scientists cannot be in dispute. Thus, the most common techniques used in disputations among experts: (1) impeaching an expert witness' motives (e.g., accusing him of being a "hired gun" or an "ideological partisan"); (2) downgrading his academic credentials or claims to subject matter expertise; and (3) finding instances where his testimony has been repudiated by the courts, are simply inapplicable. This has not left the experts in *Badham* at a loss for words—but none of the disagreements among them are in the nature of ad hominem attacks.

I have identified five tactics used by the experts in *Badham*.[1] Because the sequence of declarations was Baker and Grofman for plaintiffs, followed a month or so later by Cain and Polsby for the defendants, followed a month later by Grofman with a second declaration rebutting points made by Cain and Polsby, Grofman has *to date* had the last word. This is reflected in the present selections from the declarations.[2]

## Five Techniques of Argument

The most popular technique used in *Badham* is to

(1) *try to make the experts for the other side eat their own previously published words.*[3]

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[1]The reader should not interpret my categorizations here as expressing any position on the merits of any arguments or the truth of any factual assertions in *Badham*.

[2]I urge readers to keep these points in mind as they read the excerpts in this essay.

[3]Cf. "Anything you have ever said may be held against you," quoted in A Wuffle, "Wuffle's Advice to the Expert Witness in Court," *PS*, Vol. 60 (Winter 1984). Polsby cites Grofman, "For Single Member Districts Random Is Not Equal," in B. Grofman, A. Lijphart, R. McKay, and H. Scarrow (Eds.), *Representation and Redistricting Issues* (Lexington, Mass.: Lexington Books, 1982), 55-58. Grofman extensively cites Bruce E. Cain, "Assessing the Partisan Effects of Redistricting," Social Sciences Working Paper 491, Division of Humanities and Social Sciences, California Institute of Technology (September 1983:5), referring to the author of that work as *Professor* Cain and to the author of the Cain Declaration simply as Cain; while Cain in

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Both Cain and Grofman employ this task with glee, and Polsby, too, gets in the act.

Polsby: Plaintiffs' experts . . . conclude that the percentage of what they call "Republican votes" should bear some close proportional relationship to the percentage of congressional seats won by Republican candidates. Yet, this proportionality is, *as Professor Grofman has accurately observed* ("Random Is Not Equal" in Grofman, et al., *Representation and Redistricting Issues,* 1982), rare and "[e]xcept under very special circumstances unlikely to be ever achieved in practice, random [i.e., party blind or group blind] districting will not yield proportionality between a group's vote percentage and the percentage of seats it wins" (emphasis ours).

Cain: *Professor Grofman, in his writings on redistricting,* has identified nearly two dozen criteria for redistricting, and has concluded that "there are multiple and conflicting 'reasonable' goals which have been advocated for reapportionment decision-making." He goes on to say that "many of the proposed criteria are incompatible in whole or in part, and the courts are going to face in the 1980s the task of untangling what various sets of criteria 'really' mean and how reapportionment statutes shall be interpreted when statutory provisions include conflicting criteria." . . . Political fairness is thus only one of many competing values that must be traded off with other values such as respect for city/county lines, compactness, protection of minorities, preserving communities of interest and the like. . . . It is simply not clear how we should weigh political fairness against other criteria, and neither Grofman nor Baker tell us how this could be done (emphasis ours).

Grofman: Furthermore, *as Cain points out in his declaration* (p. 14), incumbency is of increasing importance in congressional elections. Eliminating the seats of Republican incumbents while preserving those of Democrats was a key tool in the Plan I gerrymander, and has continuing critical ramifications in Plan II (emphasis ours).

I agree fully with *Professor* Cain (1983: 35-36, emphasis ours) *when he says* in the conclusions of his research paper:

> [A] proper assessment of the partisan effects of redistricting cannot overlook its impact on incumbency. To be sure, the post-redistricting election will introduce a net set of incumbents who will presumably also enjoy the electoral advantages of holding office. *However, the temporary scrambling of incumbents can have momentous importance at the election that follows the redistricting.* This should not be too surprising to political scientists since it seems logical that in any era when party loyalty counts for less and incumbency counts for more, redistricting tactics should include incumbent considerations. Indeed, if recent trends towards independence from the parties continue, redistrictings in the future could come to focus more on displacement issues and less on the partisan makeup of districts (emphasis in original).[4]

Grofman: *Cain (Declaration, p. 26) asserts that his own research* "revealed five Democratic incumbents whose districts were weakened significantly" by the first round of 1980s redistricting.

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turn cites B. Grofman and H. Scarrow, "Current Issues in Apportionment," *Law and Policy Quarterly*, Vol. 4, No. 4 (October 1982), and Grofman, "For Single Member Districts Random is Not Equal," *ibid.*, *Representation and Redistricting Issues* (Lexington, Mass.: Lexington Books, 1982), 55-58. It is well-known that the best possible testimony for one side of a case can come from testimony offered by witnesses for the other side.

[4]Bruce Cain, "Assessing the Partisan Effects of Redistricting," paper prepared for delivery to the Annual Meeting of the American Political Science Association, September 1983; Social Sciences Working Paper 491, Division of Humanities and Social Sciences, California Institute of Technology, September 1983. Citations are to this latter version.

*Professor* Cain (1983 research paper: 20), on the other hand, says of these so-called Democratic 'martyrs':

> In fact, one of the most striking things about [my data analysis in] Table 3 is the high degree of electoral security enjoyed by all the Democratic 'martyrs.' All of them had Democratic registrations above 55%, and with the added advantage of incumbency, they all had a greater than 95% chance of being reelected even after their districts were altered.

Some of the "martyrs" were reduced a few points in their margin of victory, but the safety of their seats was basically unaffected (emphasis ours).

Grofman: Cain (Declaration, p. 22) asserts that Figure 1 in my previous declaration does not show "that there were fewer seats in the competitive ranges under the legislature's plans than there had been in 1980. . . ." Of course, even if for the sake of argument we accepted Cain's assertion that Figure 1 in my original declaration does not show reduced competition in Plan I compared to the Master's Plan in 1980, Figure 7 in *Professor* Cain's research paper (1982: 33) does show such a decline in competitiveness (emphasis ours).

Cain has worked out an ingenious new wrinkle on the tack of confounding an author by impugning his current views in pending litigation by contrasting them with views expressed in his previous research—a tack which I shall call:

(1b) *Guilt by coauthorship.*

Cain: A second curious allegation in the plaintiff's case is the one that the legislature's plan in 1982 is a "lock-in" of the 1981 results, and that these districts "insure that, in a state which is overall highly competitive, a Democratic majority in the congressional delegation is guaranteed for the rest of the decade." It is particularly remarkable that Grofman should make this claim, *since his frequent coauthor, Howard Scarrow, has demonstrated* that the most skillful redistricting gains are subject to the erosion of demographic change and to the sudden shifts of partisan winds (emphasis ours).[5]

Grofman replied to this charge in his second declaration.

Grofman: Cain quotes my frequent coauthor, Professor Howard Scarrow, on the "short-livedness" of political gerrymanders. However, the New York Republican gerrymander referred to by Professor Scarrow (and Professor Polsby in his declaration) was one in which the Republicans tried to cut their margins too thin and ended up losing marginal seats in which they thought they had given themselves an edge. In California, the Democrats were smarter.

At this point, Grofman seeks to trump Cain's quote of Scarrow by making use of technique #1, quoting Professor Cain back at Cain.

Grofman: As *Professor* Cain (1983 research paper, *op. cit.,* 34-35) shows, key elements of the Democrat gerrymander here in California were incumbent displacement (by the carving up of previously Republican-held districts) and the creation of safe seats disproportionately in Democratic hands (emphasis ours).

A second technique used in *Badham,* designed to sow dissention in the ranks of the "enemy" experts, is to

(2) *play off one expert witness against another expert witness for the same side by claiming that the two have contradicted each other.*

[5] Howard A. Scarrow, "The Impact of Reapportionment on Party Representation in the State of New York," in B. Grofman, A. Lijphart, R. McKay and H. Scarrow (Eds.), *Representation and Redistricting Issues* (Lexington, Mass.: Lexington Books, 1982), 223-236. See also H. Scarrow, "Partisan Gerrymandering—Invidious or Malevolent?" *Journal of Politics* (Fall 1982), pp. 810-821.

Cain: First, there are many possible standards of political fairness, and political scientists do not agree as to which is best, *as is demonstrated by the contradictory arguments in the declarations of Professors Grofman and Baker.* Professor Baker argues for a compactness criterion while Professor Grofman disparages the use of what he terms "formal criteria" such as the shape of district lines and proposes instead a seats-votes measure. Secondly, the standards of political fairness proposed by Grofman and Baker will prove contradictory in many circumstances, and this will force the courts to choose between them (emphasis ours).

Grofman responds with mild sarcasm to this provocation by asserting (under "Minor Points" in his second declaration):

Grofman: Professor Baker and I are alleged by defense reply briefs to hold opposing views on what constitutes a gerrymander. I found this a bit confusing, since he and I are planning to coauthor a research article on gerrymandering because we share common views. We both believe that absence of compactness is simply a potential indicator of an attempt to gerrymander, although often a revealing one, and that a gerrymander's measure is in its political impact. We both believe that tortuously shaped districts require justification (e.g., by showing them to be *necessary* for racial or linguistic representation). As Professor Baker wrote in his declaration, "gerrymandering is the intentional manipulation of legislative boundaries for political advantage."

A standard rhetorical trick used by both sides in *Badham* is to

(3) *create, through hyperbole, a straw man and then knock it down.*

Grofman: My . . . research shows Plan I (and its lock-in by Plan II) to be *far* and away the most artful and the most massive partisan gerrymander in the past two decades of congressional reapportionment history.

This testimony is restated by Cain as follows:

Cain: The fact that the Democratic delegation increased from 22-21 in 1980 to 28-17 in 1982 is indisputable. Since a redistricting occurred in 1981, it is reasonable to suspect that changes in the district boundaries had something to do with the increase in the size of the Democratic delegation. The problem is ascertaining how much of a difference redistricting made. . . .

In this regard, the declarations of Professors Grofman and Baker are somewhat disturbing since they appear to me to be overly eager to conclude that *this was the most heinous act since the Turkish massacre of the Armenians* (emphasis ours).

Cain then goes on to suggest that particular Republican losses might well have occurred even without redistricting and calls attention to the purported flaws in Grofman's treatment of registration changes from Plan I to Plan II. Grofman rebuts by the now familiar tactic of quoting Professor Cain against Cain.

Grofman: Cain in his declaration suggests that plaintiff's experts exaggerate the unfairness of the California congressional plans. He says (p. 14), "My own analysis . . . indicates that there was a redistricting effect, but that it was less than the plaintiffs seem to think it was." *Professor Cain's own 1983 research article containing an evaluation of the effects of the first of these plans (prepared for an academic audience, not a lawsuit) thus can provide the court with a baseline:* the plans are certainly *at least as pernicious and extensive in their effects* as *Professor* Cain demonstrates them to be.

*Professor* Cain's research conclusion (1983 research paper: 35, emphasis ours) was as follows:

> What then has been the total change from 1980 to 1982? . . . The answer would appear to be that the combination of partisan reconstruction and the artful removal of inconveniently placed incumbents can alter the seat distribution and make the majority party more efficiently distributed than the

minority party. *In the case of California, it was enough to help swing five seats to the Democrats.*

My own analyses show that redistricting affected partisan control in five seats and may have had a significant impact on partisan control in a sixth (emphasis added).[6]

A fourth standard practice in confrontation between experts, though relatively rare in the declarations in *Badham,* is to

(4) *nit-pick.*[7]

Cain: There also appear to be numerous factual errors in the Baker and Grofman Declarations. Appendix A of the Baker Declaration indicates that the Masters only split 17 cities whereas the true figure is closer to 61. Grofman claims that the legislature's plan divides 37 cities whereas the legislature's own data indicates that they split 31 cities. Baker eliminates "minor divisions" . . . without applying the same standard to the legislature's plan as comparison. Grofman gives us no explanation for why he contests the legislature's own estimates and no indication of where the discrepancies lie.[8]

Grofman: Cain (Declaration, p. 18) asserts that Professor Baker's Declaration indicates that the Master's plan split 17 cities. Cain has apparently misread the data in Baker's Declaration, Appendix A, p. 3, which is a xerox of material prepared for the Masters. The data in Appendix A, p. 3, shows 11 cities split, not 17. Eleven is also the figure reported by Professor Baker.

Cain: Grofman states that "Clausen's district, already marginal, had net Democratic strength added to it, leaving it vulnerable to a Democratic challenge. In 1982, Clausen lost the seat by 53-47. To start with, Grofman has not stated the facts accurately. The Democratic challenger, Doug Bosco, defeated Clausen 49.8% to 47.2%. As to his claim that redistricting was the culprit, what we might ask, was the "net Democratic strength that was added to the seat? . . ." According to the Secretary of State, the Democratic registration in the old CD2 was 52.2% and according to the May 1982 Report of Registration following the 1981 redistricting, the Democratic in the new CD1 (i.e., Clausen's renumbered seat) was 51.2%. . . . Democratic registration had actually fallen. . . . Even if for the sake of argument we assume that the Secretary of State's figures are less accurate than Professor Grofman's (which is, of course, a rather dubious assumption), the difference according to his own estimates is on the order of 2 registration points.

A final technique which is central to disputes among experts is to

(5) *claim the opposing expert has told the truth but not the whole truth.*[9]

Cain: As an empirical example of the proposition that compactness and proportionality are uncorrelated, consider the seats-votes ratios of three states with unusually compact congressional boundaries. . . . Idaho Democrats got 47% of the vote in 1982, but both of the state's congressional seats went to the Republicans. In Utah, the Democrats got 30% of the vote in 1982, but the Republicans won all three seats. And in New Mexico, the Democrats won 51% of the vote in 1982, but only managed to win one of the state's three seats.

Now we look at Grofman's rebuttal to this argument by Cain.

Grofman: Whether or not they have compact districts, congressional delegations

[6]Footnote from original omitted.

[7]Cf. Confucius say: expert witness like a rubber tire; either one big puncture or lots of little ones and credibility shot (A Wuffle, "Wuffle's Advice to the Expert Witness in Court," *op. cit.*).

[8]Cf. Technique #3, use of hyperbole.

[9]In declarations prepared for use in litigation in federal courts in California, each expert must affirm "under penalty of perjury" that the material in his/her declaration is "true and correct."

with two or three members such as the examples of Idaho and Utah cited by Professor Cain (p. 4 of his declaration) can never be expected to give proportionality of seats and votes because of small-number "lumpiness" effects (the only possible outcomes in a two-member delegation are 0%, 50%, and 100%). Thus, these examples are irrelevant to the case at hand.

On the other hand, consider the following exchange.

Grofman: [One of the] three main factors which demonstrate the gerrymander [is] . . . the large discrepancy between the votes received by Democratic congressional candidates (51.6%) and the proportion of seats won by Democrats in the 1982 congressional election (62.2%).

Cain: The Democratic ratio of 62% of the seats with 52% of the votes is well within the normal range for the decade and taking into account the facts that the size of the delegation changed (so the proportions could not be exactly identical) and that there was a large swing against the Republicans nationally, it is remarkable how much the results in 1974 and 1976 (right after the Masters' redistricting) resemble that in 1982. *Professor Grofman's ahistorical presentation seems designed to shock those who are unfamiliar with the basic facts of California politics.* A more balanced presentation would have acknowledged that the ratio of seats to votes in 1982 was really quite unremarkable despite the genius the popular press has attributed to the late Phil Burton (emphasis ours).

For another example of facts which are true but are alleged to be misleading, consider the following exchange.

Cain: An example of [major change between Plan II and Plan I] . . . is the trade of territory between districts 32, 42, 29, 28, 27, and 38, involving approximately 60,000 persons in each district or 360,000 people in total. Considering that the districts had equal populations in 1982, these were remarkably large trades.

Grofman: Nowhere is there any rebuttal to [the] . . . data which shows Plan II to be Plan I in terms of partisan registration and political effect. Some bodies and some geography have been moved around but the *partisan* gerrymandering is *exactly the same.* For example, Cain calls attention to the trade of territory between districts 42, 29, 28, 27, and 38 involving 360,000 people—but three of these districts had safe Democratic incumbents who stayed safe, and there was only one Democratic incumbent to have his reelection chance significantly affected, in District 38, a marginal seat which was made safer for the Democratic party; while at the same time a Republican in District 42 (who received 69% of the total vote in 1982) was given more Republicans (which he didn't need).

## Concluding Discussion

It is easy to see a duel of experts as being much like a medieval joust. The winner may be he whose lance is most accurately pointed or he who is planted most firmly in the (factual) saddle. However, like the federal court which will eventually hear *Badham,* we must not let ourselves be distracted from the central legal issues in that case, e.g., the justiciability of political gerrymandering, by paying too much attention to the battle between experts except as it bears on those central issues. Also, although one side or the other in *Badham* must *lose,* political science (and *all* the experts who testified in *Badham*) can be said to have *won* to the extent that the debate among these political science experts helps federal courts to better understand a very complex policy question.

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