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# Daubert and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research

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**DAUBERT AND FORENSIC SCIENCE:  
THE PITFALLS OF LAW ENFORCEMENT CONTROL OF SCIENTIFIC RESEARCH**

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Paul C. Giannelli\*

*Abstract.* In 2009, the National Academy of Sciences published a landmark report on forensic science: *Strengthening Forensic Science in the United States: A Path Forward*. The Report represents one of the most important developments in forensic science since the establishment of the crime laboratory in the 1920s. Within months, Justice Scalia cited the report in *Commonwealth v. Melendez-Diaz*, noting that “[s]erious deficiencies have been found in the forensic evidence used in criminal trials” and “[f]orensic evidence is not uniquely immune from the risk of manipulation.” After two years of studying fingerprints, handwriting, ballistics, and other common forensic techniques, the Academy concluded that “some forensic science disciplines are supported by little rigorous systematic research to validate the discipline’s basic premises and techniques.” Indeed, “only nuclear DNA analysis has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between an evidentiary sample and a specific individual or source.”

The NAS Report’s centerpiece is a proposal to establish an independent federal agency, the National Institute of Forensic Science, to control funding and research in the field. This proposal, which is now before Congress, wrests control of forensic science from law enforcement and was attacked by government agencies before the Report was even released. While the Report made clear that the Department of Justice, through the FBI Crime Laboratory and National Institute of Justice, had failed in its obligation to improve forensic science, the Report did not provide details of this failure. This Article supplies those details, documenting how government agencies manipulated science at the expense of both science and justice. As the Report noted, basic research in the forensic sciences is weak. Yet, the only agency currently capable of funding that research, the Department of Justice, has hindered efforts to conduct independent scientific studies.

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*“Forensic evidence is not uniquely immune from the risk of manipulation.” — Justice Scalia (2009)<sup>1</sup>*

## I. INTRODUCTION

The National Academy of Sciences (NAS) Report on forensic science provides a searing critique of the field.<sup>2</sup> Released in 2009, the Report’s findings are disturbing: “Among existing forensic methods, only nuclear DNA analysis has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between an evidentiary sample and a specific individual or source.”<sup>3</sup> Moreover, “some forensic science disciplines are supported by little rigorous systematic research to validate the discipline’s basic premises and techniques. There is no evident reason *why* such research cannot be conducted.”<sup>4</sup>

Coming after a congressionally-funded two-year study, which included a review of fingerprint examinations, handwriting comparisons, firearms identifications (“ballistics”), and other common forensic techniques, these findings by one of the nation’s most prestigious scientific organizations are

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<sup>1</sup> Commonwealth v. Melendez-Diaz, 129 S. Ct. 2527, 2537-38 (2009). The Court also observed: “Serious deficiencies have been found in the forensic evidence used in criminal trials.” *Id.*

<sup>2</sup> NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NAS FORENSICS REPORT]. On November 22, 2005, the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006 became law. Pub. L. No. 109-108, 119 Stat. 2290 (2005). The statute authorized “the National Academy of Sciences to conduct a study on forensic science, as described in the Senate report.” H.R. REP NO. 109-272, at 121 (2005) (Conf. Rep.). The Senate Report states:

While a great deal of analysis exists of the requirements in the discipline of DNA, there exists little to no analysis of the remaining needs of the community outside of the area of DNA. Therefore. . . the Committee directs the Attorney General to provide [funds] to the National Academy of Sciences to create an independent Forensic Science Committee. This Committee shall include members of the forensics community representing operational crime laboratories, medical examiners, and coroners; legal experts; and other scientists as determined appropriate.

S. REP. NO. 109-088, at 46 (2005).

<sup>3</sup> NAS FORENSICS REPORT, *supra* note 2, at 100.

<sup>4</sup> *Id.* at 22 (emphasis added).

riveting. After all, fingerprints have been admitted as evidence since 1911.<sup>5</sup> Soon afterwards handwriting<sup>6</sup> and ballistics<sup>7</sup> were judicially sanctioned as well. Yet, the NAS Report found that (1): “Sufficient studies [on firearms identification] have not been done to understand the reliability and repeatability of the methods,”<sup>8</sup> (2) the “scientific basis for handwriting comparisons needs to be strengthened,”<sup>9</sup> (3) research was needed “[t]o properly underpin the process of friction ridge [fingerprint] identification,”<sup>10</sup> and (4) “testimony linking microscopic hair analysis with particular defendants is highly unreliable.”<sup>11</sup> These problems are exacerbated by “exaggerated”<sup>12</sup> testimony, such as claims of perfect accuracy,<sup>13</sup> infallibility,<sup>14</sup> and zero error rates.<sup>15</sup> The lack of standards in examining evidence was also considered troubling: “Often there are no standard protocols governing forensic practice in a given discipline. And, even when protocols are in place . . . , they often are vague and not enforced in any

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<sup>5</sup> See *People v. Jennings*, 96 N.E. 1077 (Ill. 1911). See generally 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* ch. 18 (4th ed. 2007) (discussing the scientific and legal issues associated with fingerprint identification).

<sup>6</sup> Handwriting comparison testimony was used extensively at the Lindbergh kidnapping trial in 1936. See D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy For Rational Knowledge: The Lessons of Handwriting Identification “Expertise,”* 137 U. PA. L. REV. 731, 738 (1989). See generally 2 GIANNELLI & IMWINKELRIED, *supra* note 5, ch. 21 (discussing the scientific and legal issues associated with questioned document examinations).

<sup>7</sup> The Sacco and Vanzetti trial in 1921 was one of the earliest cases to rely on firearms identification evidence. See G. LOUIS JOUGHIN & EDMUND M. MORGAN, *THE LEGACY OF SACCO & VANZETTI* 15 (1948). See also James E. Starrs, *Once More Unto the Breech: The Firearms Evidence in the Sacco and Vanzetti Case Revisited*, Parts I & II, 31 J. FORENSIC SCI. 630, 1050 (1986). See generally 1 GIANNELLI & IMWINKELRIED, *supra* note 5, ch. 14 (discussing the scientific and legal issues associated with firearms and tool mark identifications).

<sup>8</sup> NAS FORENSICS REPORT, *supra* note 2, at 154.

<sup>9</sup> *Id.* at 166.

<sup>10</sup> *Id.* at 144.

<sup>11</sup> *Id.* at 161. The Report also stated: “There is no science on the reproducibility of the different methods of [bitemark] analysis that lead to conclusions about the probability of a match.” *Id.* at 174.

<sup>12</sup> *Id.* at 4 (“[I]mprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.”).

<sup>13</sup> “The insistence by some forensic practitioners that their disciplines employ methodologies that have perfect accuracy and produce no errors has hampered efforts to evaluate the usefulness of the forensic science disciplines.” *Id.* at 47.

<sup>14</sup> *Id.* at 104.

<sup>15</sup> *Id.* at 143 (“Some in the latent print community [assert] that the method itself, if correctly followed . . . has a zero error rate. Clearly, this assertion is unrealistic . . . . The method, and the performance of those who use it, are inextricably linked, and both involve multiple sources of error (e.g., errors in executing the process steps, as well as errors in human judgment).”). See *also id.* at 142.

meaningful way.”<sup>16</sup> In addition, a technique’s limitations need to be acknowledged in both court testimony and laboratory reports.<sup>17</sup>

The Report’s capstone is a proposal to create an independent federal agency, the National Institute of Forensic Science (NIFS), to control funding and research in the field.<sup>18</sup> The NAS Committee “strongly believe[d] that the greatest hope for success in [reform] will come with the creation of the [NIFS] to oversee and direct the forensic science community. The remaining recommendations in the report are crucially tied to the creation of NIFS.”<sup>19</sup> Among other tasks, NIFS would be responsible for (1) establishing and enforcing best practices for forensic science professionals and laboratories; (2) setting standards for the mandatory accreditation of crime laboratories and the mandatory certification of examiners; (3) promoting scholarly, competitive peer-reviewed research and technical development in the forensic sciences; and (4) developing a strategy to improve forensic science research. This proposal wrests control of forensic science from law enforcement, a controversial but needed reform. A related recommendation urges the removal of crime laboratories from the administrative control of the police.<sup>20</sup>

While the NAS Report made clear that the Department of Justice (DOJ), through the FBI Crime Laboratory and National Institute of Justice (NIJ), had failed in its obligation to improve forensic science — thus creating the need for a new independent agency, it did not provide evidence to support this critical judgment. The Report did state that forensic evidence should be equally available to the police, prosecutors, and defense<sup>21</sup> and that there was the “potential” for conflicts of interest between the needs of law enforcement and those of forensic science. But these reasons would not justify an entirely new entity.<sup>22</sup> The Committee also found that “the research funding strategies of DOJ have not

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<sup>16</sup> *Id.* at 6.

<sup>17</sup> “Forensic reports, and any courtroom testimony stemming from them, must include clear characterizations of the limitations of the analyses, including measures of uncertainty in reported results and associated estimated probabilities where possible.” *Id.* at 21-22.

<sup>18</sup> Recommendation 1. *Id.* at 19-20. This agency would have an administrator and an advisory board with expertise in science and engineering education, the forensic sciences, physical and life sciences, forensic pathology, engineering, information technology, measurements and standards, testing and evaluation, law, national security, and public policy.

<sup>19</sup> *Id.* at 20. Other recommendations include the accreditation of crime laboratories, funding research to determine the reliability of forensic evidence, and undertaking studies on the consequences of human observer bias.

<sup>20</sup> Recommendation 4. *Id.* at 24.

<sup>21</sup> *Id.* at 17.

<sup>22</sup> For example, there are other ways to provide defense expertise. See Paul C. Giannelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004).

adequately served the broad needs of the forensic science community.”<sup>23</sup> This concern could also have been addressed without the creation of NIFS.

The Report came closer to the mark when it determined that some federal entities are “too wedded” to the status quo and “have failed to pursue a rigorous research agenda to confirm the evidentiary reliability of methodologies used in a number of forensic science disciplines.”<sup>24</sup> As a result, these “agencies are not good candidates to oversee the overhaul of the forensic science community.”<sup>25</sup> There is little question that the Committee was referring to NIJ and the FBI Laboratory. The Report noted that, although both had provided “modest leadership” in forensic science, “neither entity has recognized, let alone articulated, a need for change or a vision for achieving it.”<sup>26</sup> Consequently, “advancing *science* in the forensic science enterprise is not likely to be achieved within the confines of DOJ.”<sup>27</sup> These are conclusions, however. The Committee gave no explanation how it reached them.<sup>28</sup>

This Article argues that there is more than adequate support for the Report’s conclusions that meaningful reform requires an independent agency. Scientific values are often antithetical to law enforcement values — or at least frequently perceived to be so by prosecutors and police. In particular, the notion of transparency has repeatedly been trumped by an adversarial process that favors trial by ambush. As Sheila Jasanoff has reminded us: “Science and secrecy do not sit comfortably together.”<sup>29</sup> The Department of Justice, the FBI Crime Laboratory, and some prosecutors have attempted to shape science by controlling the research agenda, hiding unwelcomed test results, attacking legitimate studies that were considered unfavorable, harassing scientists who disagreed with them, and “spinning” these issues in the press. Indeed, NIJ attempted to subvert the recent NAS Report before it was even released.<sup>30</sup> This conduct is troubling precisely because it involves the government. Paradoxically, these are the very

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<sup>23</sup> NAS FORENSICS REPORT, *supra* note 2, at 18.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 16. The Report also stated: “Neither has the full confidence of the larger forensic science community. And because both are part of a prosecutorial department of the government, they could be subject to subtle contextual biases that should not be allowed to undercut the power of forensic science.” *Id.*

<sup>27</sup> *Id.* at 18.

<sup>28</sup> Perhaps, in drawing a blueprint for the future, the NAS Committee wanted to avoid unnecessary controversy. The Report’s title emphasizes this point — i.e., “A Path Forward.”

<sup>29</sup> Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 LAW & COMTEMP. PROB. 21 (2006).

<sup>30</sup> See *infra* text accompanying notes 224-27.

agencies of government that are entrusted to be “ministers of justice.”<sup>31</sup> The problem is exacerbated by the fact that the Department of Justice and the FBI Laboratory control the funding of research in forensic science.

An understanding of the NAS Report requires some appreciation of the developments that led Congress to authorize the NAS study in the first place, a subject addressed in Part II of this Article. Parts III through V examine law enforcement manipulation of science in three areas — DNA profiling, fingerprinting, and comparative analysis of bullet lead.<sup>32</sup> Part VI discusses NIJ efforts to undermine the NAS Report. The Article concludes by urging Congress to establish NIFS, as recommended by the NAS.

## II. THE PARADIGM SHIFT IN FORENSIC SCIENCE

The advent of DNA profiling in the late 1980s,<sup>33</sup> followed by the U.S. Supreme Court’s *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>34</sup> decision, in

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<sup>31</sup> In a famous passage, the Supreme Court wrote:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

<sup>32</sup> These are not the only examples. Government-sponsored research into handwriting comparisons provides another illustration. Professor Michael Saks “has repeatedly requested the data from those [handwriting] studies for purposes of re-examination, and has repeatedly been denied, despite the fact that the youngest of the data sets is now well over three years old and hence well beyond the usual two-year presumptive period of exclusive use . . .” D. Michael Risinger & Michael J. Saks, *Rationality, Research and Leviathan: Law Enforcement-Sponsored Research and the Criminal Process*, 2003 MICH. ST. L. REV. 1023, 1045. These authors also wrote: “Various strategies appear to have been used to insure that any positive results will be exaggerated and any negative results will be glossed over.” *Id.* at 1042. See also D. Michael Risinger et al., *Brave New “Post-Daubert World” — A Reply to Professor Moenssens*, 29 SETON HALL L. REV. 405, 435-39 (1998) (discussing early refusals to share data from government-funded research on handwriting).

<sup>33</sup> See *infra* text accompanying notes \_\_\_\_.

<sup>34</sup> 509 U.S. 579 (1993). The Court followed with *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), to make up what is known as the *Daubert* trilogy. *Daubert* is one of the most important evidence cases ever decided. See *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (“*Daubert* has become ubiquitous in federal trial courts.”); *United States v. Barnette*, 211 F.3d 803, 815 (4th Cir. 2000)

1993, drastically altered the legal landscape for scientific evidence — triggering a “paradigm shift” in the view of some commentators.<sup>35</sup> DNA evidence became the gold standard in forensic science<sup>36</sup> and *Daubert* “revolutionized” how courts scrutinized expert testimony.<sup>37</sup>

### A. The Impact of DNA Profiling

The battles over the admissibility of DNA evidence<sup>38</sup> led to two studies by the National Academy of Sciences, which issued reports noting the importance of certain practices. For example, “[n]o laboratory should let its results with a new DNA typing method be used in court, unless it has undergone . . . proficiency testing via blind trials.”<sup>39</sup> This requirement was unheard of in forensic science, and commentators did not wait long to point out the possible far-reaching implications that DNA profiling might have for other forensic techniques. Citing DNA profiling, Professors Saks and Koehler wrote in 1991 that “forensic scientists, like scientists in all other fields, should subject their claims to methodologically rigorous empirical tests. The results of these tests should be published and debated. Until such steps are taken, the strong claims of forensic scientists must be regarded with far more caution than they traditionally have been.”<sup>40</sup>

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(“In *Daubert*, the Supreme Court radically changed the standard for admissibility of scientific testimony.”).

<sup>35</sup> Michael J. Saks & Jonathan J. Koehler, Review, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892 (2005).

<sup>36</sup> See Michael Lynch, *God’s Signature: DNA Profiling, The New Gold Standard in Forensic Science*, 27 ENDEAVOUR 2, 93 (2003); Joseph L. Peterson & Anna S. Leggett, *The Evolution of Forensic Science: Progress Amid the Pitfalls*, 36 STETSON L. REV. 621, 654 (2007) (“[T]he scientific integrity and reliability of DNA testing have helped DNA replace fingerprinting and made DNA evidence the new ‘gold standard’ of forensic evidence.”).

<sup>37</sup> See David L. Faigman, *Science and the Law: Is Science Different for Lawyers?*, 297 SCIENCE 339, 340 (2002) (“*Daubert* initiated a scientific revolution in the law.”).

<sup>38</sup> See William C. Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons From the ‘DNA War’*, 84 J. CRIM. L. & CRIMINOLOGY 22 (1993).

<sup>39</sup> NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, DNA TECHNOLOGY IN FORENSIC SCIENCE 55 (1992) [hereinafter NRC I]. A second report followed. See NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, THE EVALUATION OF FORENSIC DNA EVIDENCE (1996). The FBI requested and funded both reports. The second report also recommended proficiency testing. *Id.* at 88 (Recommendation 3.2: “Laboratories should participate regularly in proficiency tests, and the results should be available for court proceedings.”).

<sup>40</sup> Michael J. Saks & Jonathan J. Koehler, *What DNA “Fingerprinting” Can Teach the Law About the Rest of Forensic Science*, 13 CARDOZO L. REV. 361, 372 (1991). Professor Zabell would later note that “DNA identification has not only transformed and revolutionized forensic science, it has also created a new set of standards that have raised expectations for forensic science in general.” Sandy L. Zabell, *Fingerprint Evidence*, 13 J.L. & POL’Y 143, 143 (2005). Similarly, Professor Mnookin observed that “[o]ne consequence of DNA profiling and its

DNA evidence had two other important consequences. First, it focused attention on the lack of regulation of crime laboratories. In 1989, Eric Lander, a prominent molecular biologist, who became enmeshed in the early DNA admissibility disputes, wrote: “At present, forensic science is virtually unregulated — with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row.”<sup>41</sup>

Second, the use of DNA profiling to exonerate innocent convicts led to a re-examination of the types of evidence admitted to secure their convictions.<sup>42</sup> Some studies indicated that, after eyewitness testimony, forensic identification evidence was the most common type of testimony that jurors relied on in returning erroneous verdicts.<sup>43</sup> Flawed forensic analyses played a significant role in many of these miscarriages of justice.<sup>44</sup> For example, although bite mark evidence had been admitted at trial for over 40 years, DNA evidence exonerated convicts, some on death row, whose convictions were based on bite mark testimony.<sup>45</sup> Similarly, microscopic hair analysis was often used — and misused — in the wrongful conviction cases.<sup>46</sup>

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admissibility into court is that it has opened the door to challenging fingerprinting.” Mnookin, *supra* note 5, at 43.

<sup>41</sup> Eric S. Lander, *DNA Fingerprinting On Trial*, 339 NATURE 501, 505 (1989). Even today, only a few states require accreditation. See OKLA. STAT. ANN. tit. 74, § 150.37 (2004) (requiring accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or the American Board of Forensic Toxicology); N.Y. EXEC. § 995b (McKinney 2003) (requiring accreditation by the state Forensic Science Commission); TEX. CODE CRIM. PROC. ANN. art. 38.35 (2004) (requiring accreditation by the Department of Public Safety). Texas also created a Forensic Science Commission. TEX. CRIM. PROC. CODE art. 38.01 (2007).

<sup>42</sup> See generally Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543 (2005).

<sup>43</sup> A study of 200 DNA exonerations found that expert testimony (55%) was the second leading type of evidence (after eyewitness identifications, 79%) used in the wrongful conviction cases. Pre-DNA serology of blood and semen evidence was the most commonly used technique (79 cases). Next came hair evidence (43 cases), soil comparison (5 cases), DNA tests (3 cases), bite mark evidence (3 cases), fingerprint evidence (2 cases), dog scent (2 cases) spectrographic voice evidence (1 case), shoe prints (1 case) and fibers (1 case).” Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 81 (2008). This data does not necessarily mean that the forensic evidence was improperly used. For example, serological testing at the time of many of these convictions was simply not as discriminating as DNA profiling. Consequently, a person could be included using these serological tests but be excluded by DNA analysis. However, some evidence was clearly misused.

<sup>44</sup> See Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007).

<sup>45</sup> See Paul C. Giannelli, *Bite Mark Analysis*, 43 CRIM. L. BULL. 930 (2007).

<sup>46</sup> See Paul C. Giannelli & Emmie West, *Hair Comparison Evidence*, 37 CRIM. L. BULL. 514 (2001) (discussing the DNA exoneration cases in which hair evidence was used to

## B. The Impact of *Daubert*

The impact of DNA profiling was reinforced by the *Daubert* decision, which enunciated a new reliability test for expert testimony. *Daubert* listed several factors that trial judges should consider in assessing reliability. The first and foremost *Daubert* factor is testability. Citing scientific authorities, the Supreme Court noted that a hallmark of science is empirical testing. The other factors listed by the Court are generally complementary. For example, the second factor, peer review and publication, is a means to verify the results of the testing mentioned in the first factor; and in turn, verification can lead to general acceptance of the technique within the scientific community. Similarly, another factor, an error rate, is derived from testing.

The first significant post-*Daubert* admissibility challenge occurred in 1995 and involved handwriting analysis. In *United States v. Starzecpyzel*,<sup>47</sup> the district court concluded that “forensic document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot, after *Daubert*, be regarded as ‘scientific . . . knowledge.’”<sup>48</sup> *Starzecpyzel* soon prompted more challenges to handwriting evidence, attacks that further exposed the lack of empirical validation in the field.<sup>49</sup> These challenges had some success

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convict the innocent); Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 COLUM. HUM. RTS. L. REV. 227, 273 (1996) (“If the purveyors of this dubious science cannot do a better job of validating hair analysis than they have done so far, forensic hair comparison analysis should be excluded altogether from criminal trials.”).

<sup>47</sup> 880 F. Supp. 1027 (S.D.N.Y. 1995).

<sup>48</sup> *Id.* at 1038. The court further stated that “while scientific principles may relate to aspects of handwriting analysis, they have little or nothing to do with the day-to-day tasks performed by [Forensic Document Examiners]. . . . [T]his attenuated relationship does not transform the FDE into a scientist.” *Id.* at 1041. Nevertheless, the court did not exclude handwriting comparison testimony. Instead, the court admitted the testimony as “technical” evidence. However, this aspect of the opinion was later undercut by *Kumho Tire*, in which the Supreme Court ruled that *Daubert*’s reliability test applied to all expert testimony, thereby abolishing the distinction between “scientific” and “technical” expertise.

<sup>49</sup> See, e.g., *United States v. Hidalgo*, 229 F. Supp. 2d 961, 967 (D. Ariz. 2002) (“Because the principle of uniqueness is without empirical support, we conclude that a document examiner will not be permitted to testify that the maker of a known document is the maker of the questioned document. Nor will a document examiner be able to testify as to identity in terms of probabilities.”); *United States v. Lewis*, 220 F. Supp. 2d 548, 554 (S.D. W.Va. 2002) (“[Expert’s] bald assertion that the ‘basic principle of handwriting identification has been proven time and time again through research in [his] field,’ without more specific substance, is inadequate to demonstrate testability and error rate.”); *United States v. Saelee*, 162 F. Supp. 2d 1097, 1103 (D. Alaska 2001) (“There is little known about the error rates of forensic document examiners. The little testing that has been done raises serious questions about the reliability of methods currently in use. As to some tasks, there is a high rate of error and forensic document examiners may not be any better at analyzing handwriting than laypersons.”).

— with several courts restricting the reach of a questioned document examiner’s opinion, permitting expert testimony about similarities and dissimilarities between exemplars but not an ultimate conclusion that the defendant was the author (“common authorship” opinion) of the questioned document.<sup>50</sup> In a few cases, specific types of evidence were excluded.<sup>51</sup> More importantly, the handwriting cases opened the door to attacks on other techniques. Indeed, some courts viewed the *Daubert* and its progeny as inviting a “reexamination even of ‘generally accepted’ venerable, technical fields.”<sup>52</sup>

If *Starzeczyzel* unsettled document examiners, *United States v. Llera Plaza*<sup>53</sup> “sent shock waves through the community of fingerprint analysts.”<sup>54</sup> In that case, Judge Pollak ruled that fingerprint experts would not be permitted to testify that two sets of prints “matched” — that is, a positive identification to the exclusion of all other persons. This was the first time in nearly 100 years that such a decision had been rendered.<sup>55</sup> On rehearing, however, Judge Pollak

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<sup>50</sup> See *United States v. Oskowitz*, 294 F. Supp. 2d 379, 384 (E.D.N.Y. 2003) (“Many other district courts have similarly permitted a handwriting expert to analyze a writing sample for the jury without permitting the expert to offer an opinion on the ultimate question of authorship.”); *United States v. Rutherford*, 104 F. Supp. 2d 1190, 1194 (D. Neb. 2000) (“[T]he Court concludes that FDE Rauscher’s testimony meets the requirements of Rule 702 to the extent that he limits his testimony to identifying and explaining the similarities and dissimilarities between the known exemplars and the questioned documents. FDE Rauscher is precluded from rendering any ultimate conclusions on authorship of the questioned documents and is similarly precluded from testifying to the degree of confidence or certainty on which his opinions are based.”); *United States v. Hines*, 55 F. Supp. 2d 62, 71 (D. Mass. 1999) (expert testimony concerning the general similarities and differences between a defendant’s handwriting exemplar and a stick up note was admissible but not the specific conclusion that the defendant was the author).

<sup>51</sup> See, e.g., *United States v. Lewis*, 220 F. Supp. 2d 548, 554 (S.D. W. Va. 2002) (excluding testimony); *United States v. Fujii*, 152 F. Supp. 2d 939, 940 (N.D. Ill. 2000) (holding expert testimony concerning Japanese handprinting inadmissible; “Handwriting analysis does not stand up well under the *Daubert* standards. Despite its long history of use and acceptance, validation studies supporting its reliability are few, and the few that exist have been criticized for methodological flaws.”).

<sup>52</sup> *United States v. Hines*, 55 F. Supp. 2d 62, 67 (D. Mass. 1999) (handwriting comparison). See also *United States v. Hidalgo*, 229 F. Supp. 2d 961, 966 (D. Ariz. 2002) (“Courts are now confronting challenges to testimony, as here, whose admissibility had long been settled.”; discussing handwriting comparison).

<sup>53</sup> 179 F. Supp. 2d 492 (E.D. Pa. 2002), *vacated, mot. granted on recons.*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).

<sup>54</sup> See D.H. Kaye, *The Nonscience of Fingerprinting*: *United States v. Llera-Plaza*, 21 QUINNIPIAC L. REV. 1073, 1073 (2003).

<sup>55</sup> The first reported fingerprint case was decided in 1911. *People v. Jennings*, 96 N.E. 1077 (Ill. 1911). As Professor Mnookin has noted, however, “fingerprints were accepted as an evidentiary tool without a great deal of scrutiny or skepticism.” Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOK. L. REV. 13, 17 (2001). She elaborated: “Even if no two people had identical *sets* of fingerprints, this did not establish that no

reversed himself,<sup>56</sup> and later cases would continue to uphold the admissibility of fingerprint evidence.<sup>57</sup> Yet, the spotlight could not be turned off.<sup>58</sup> News reports,<sup>59</sup> mainstream publications,<sup>60</sup> scientific journals,<sup>61</sup> and television shows covered the case.<sup>62</sup> A spate of legal articles followed,<sup>63</sup> with many commentators believing that *Llera Plaza I* was more faithful to *Daubert* than *Llera Plaza II*.<sup>64</sup>

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two people could have a *single* identical print, much less an identical *part* of a print. These are necessarily matters of probability, but neither the court in *Jennings* nor subsequent judges ever required that fingerprint identification be placed on a secure statistical foundation.” *Id.* at 19 (emphasis added).

<sup>56</sup> *Llera Plaza II* was not a total victory for the prosecution. The rigor of proficiency testing was drawn into question. See *infra* text accompanying notes 168-69.

<sup>57</sup> See, e.g., *United States v. Mitchell*, 365 F.3d 215 (3d Cir. 2004); *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003); *United States v. Sullivan*, 246 F. Supp. 2d 700, 704 (E.D. Ky. 2003).

<sup>58</sup> In *State v. Rose*, No. K06-545 (Cir. Ct. Baltimore, Md., 2007), a trial judge excluded fingerprint evidence. See James E. Starrs, *Will Wonders Never Cease? Fingerprinting Denied its Day in Maryland Trial Court*, 31 SCIENTIFIC SLEUTHING REVIEW, Fall 2007, at 1 (discussing case).

<sup>59</sup> E.g., Associated Press, *Fingerprint Reliability Under Fire*, S. FLA. SUN-SENTINEL, Feb. 25, 2002; Andy Newman, *Judge Who Ruled Out Matching Fingerprints Changes His Mind*, N.Y. TIMES, Mar. 14, 2002, at A; Joseph A. Slobodzian, *Court Ruling Blurs the Future for Fingerprint Experts Linking of Print to Person Not Credible, Federal Judge Says*, MILWAUKEE J. SENTINEL, Feb. 17, 2002, at A; Richard Willing, *Judge Challenges Fingerprint Identification*, USA TODAY, Jan. 10, 2002.

<sup>60</sup> E.g., Michael Specter, *Do Fingerprints Lie? The Gold Standard of Forensic Science is Now Being Challenged*, THE NEW YORKER, May 27, 2002, at 96 (discussing *Llera Plaza*, including an interview with Judge Pollak).

<sup>61</sup> See David L. Faigman, *Science and the Law: Is Science Different for Lawyers?*, 297 SCIENCE 339, 340 (2002).

<sup>62</sup> *60 Minutes: Fingerprints* (CBS television broadcast Jan. 5, 2003).

<sup>63</sup> See Simon A. Cole, *Grandfathering Evidence: Fingerprint Admissibility Rulings from Jennings to Llera Plaza and Back Again*, 41 AM. CRIM. L. REV. 1189 (2004); Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint “Science” Is Revealed*, 75 S. CAL. L. REV. 605 (2002); Kristin Romandetti, Note, *Recognizing and Responding to a Problem with the Admissibility of Fingerprint Evidence Under Daubert*, 45 JURIMETRICS 41 (2004); Tara Marie La Morte, Comment, *Sleeping Gatekeepers: United States v. Llera Plaza and the Unreliability of Forensic Fingerprinting Evidence Under Daubert*, 14 ALB. L.J. SCI. & TECH. 171 (2003); Jessica M. Sombat, Note, *Latent Justice: Daubert’s Impact on the Evaluation of Fingerprint Identification Testimony*, 70 FORDHAM L. REV. 2819 (2002); Nathan Benedict, Note, *Fingerprints and the Daubert Standard for Admission of Scientific Evidence: Why Fingerprints Fail and a Proposed Remedy*, 46 ARIZ. L. REV. 519 (2004).

<sup>64</sup> E.g., Jennifer L. Mnookin, *Fingerprints: Not a Gold Standard*, 20 ISSUES IN SCI. & TECH. 47 (2003) (“Judge Pollak’s first opinion [restricting latent fingerprint individualization testimony] was the better one.”); Sombat, *supra* note 63, at 2825 (“[T]he result Judge Pollak reached when he excluded expert testimony concerning fingerprints [in *Llera Plaza I*] was fair.”); Recent Case, *Evidence – Fingerprint Experts – Seventh Circuit Upholds the Reliability of Expert Testimony Regarding the Source of a Latent Fingerprint*, 115 HARV. L. REV. 2349, 2352 (2002) (“Fingerprint expert testimony does not survive application of the *Daubert* factors . . .”).

*Llera Plaza* was soon eclipsed by a more sensational event — i.e., the FBI’s misidentification of Brandon Mayfield as the source of the crime scene prints in the terrorist train bombing in Madrid on March 11, 2004.<sup>65</sup> More than any other event, the Mayfield affair exposed the myth of fingerprint infallibility.<sup>66</sup> The misidentification resulted in investigations by the Bureau<sup>67</sup> and the Inspector General of the Department of Justice,<sup>68</sup> which in turn triggered a more extensive review of the scientific basis of fingerprint identification by the FBI.<sup>69</sup>

Once *Daubert* attacks on the admissibility of handwriting and fingerprint evidence had been made, it was inevitable that firearms identifications would also be challenged. The initial attacks failed.<sup>70</sup> However, in *United States v. Green*,<sup>71</sup> the court recognized the shortcomings in this field. The expert testified that a match could be made “to the exclusion of every other firearm in the world.” That conclusion, according to the court, “is extraordinary, particularly given [the

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<sup>65</sup> See Sara Kershaw, *Spain and U.S. at Odds on Mistaken Terror Arrest*, N.Y. TIMES, Jun. 5, 2004, at A1 (Spanish authorities cleared Brandon Mayfield and matched the fingerprints to an Algerian national); Flynn McRoberts & Maurice Possley, *Report Blasts FBI Lab: Peer Pressure Led to False ID of Madrid Fingerprint*, CHI. TRIB., Nov. 14, 2004, at 1.

<sup>66</sup> Professor Cole followed with an article identifying twenty-three cases of documented fingerprint misidentifications. See Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985 (2005). The misidentification cases include some that involved (1) verification by one or more other examiners, (2) examiners certified by the International Association of Identification, (3) procedures using a sixteen-point standard, and (4) defense experts who corroborated misidentifications made by prosecution experts.

<sup>67</sup> See Robert B. Stacey, *A Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, 54 J. FORENSIC IDENTIFICATION 707 (2004).

<sup>68</sup> See OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, A REVIEW OF THE FBI’S HANDLING OF THE BRANDON MAYFIELD CASE, UNCLASSIFIED EXECUTIVE SUMMARY 9 (Jan. 2006).

<sup>69</sup> See Bruce Budowle et al., *Review of the Scientific Basis for Friction Ridge Comparisons as a Means of Identification: Committee Findings and Recommendations*, 8 FORENSIC SCI. COMM. (Jan. 2006).

<sup>70</sup> See *United States v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004) (The court ruled that “the matching of spent shell casings to the weapon that fired them has been a recognized method of ballistics testing in this circuit for decades.”); *United States v. Foster*, 300 F. Supp. 2d 375, 377 n.1 (D. Md. 2004) (“Ballistics evidence has been accepted in criminal cases for many years. . . . In the years since *Daubert*, numerous cases have confirmed the reliability of ballistics identification.”); *United States v. Santiago*, 199 F. Supp. 2d 101, 111 (S.D.N.Y. 2002) (“The Court has not found a single case in this Circuit that would suggest that the entire field of ballistics identification is unreliable.”); *State v. Anderson*, 624 S.E.2d 393 (N.C. Ct. App. 2006) (no abuse of discretion in admitting bullet identification evidence); *Commonwealth v. Whitacre*, 878 A.2d 96, 101 (Pa. Super. Ct. 2005) (The court held that there was “no abuse of discretion in the trial court’s decision to permit admission of the evidence regarding comparison of the two shell casings with the shotgun owned by Appellant.”).

<sup>71</sup> 405 F. Supp. 2d 104 (D. Mass. 2005).

expert's] data and methods.”<sup>72</sup> Despite “serious reservations,” the judge felt “compelled” to allow the testimony based on precedent.<sup>73</sup> Significantly, however, the court limited the testimony as it had previously done in handwriting cases.<sup>74</sup> The expert could only describe and explain the ways in which the cartridge cases were similar, but not that they came from a specific weapon “to the exclusion of every other firearm in the world.” In the court’s view, that conclusion “stretches well beyond [the expert’s] data and methodology.”<sup>75</sup> Finally, the court issued a caution: “The more courts admit this type of toolmark evidence without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more.”<sup>76</sup> In sum, the fallout from the *Daubert* challenges, like DNA profiling, were impacting forensic science community.

### C. Response of Scientific Community

By this time, sectors of the scientific community were becoming interested — and alarmed — about how science was being used in criminal cases. In 2002, a stunning editorial appeared in *Science*, one of the country’s top scientific journals. The title alone is remarkable, “Forensic Science: Oxymoron?”<sup>77</sup> Written by the editor-in-chief, the editorial discussed the cancellation of a National Academy of Sciences project designed to examine various forensic science techniques, including fingerprinting, because the Departments of Justice and Defense insisted on a right of review that the Academy, as a scientific institution, found objectionable.<sup>78</sup> The National Academy of Sciences relies on

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<sup>72</sup> *Id.* at 107. Although the expert had seven years of experience in the field, he was not certified, and his lab was not accredited. Moreover, he had never been formally tested by a neutral proficiency examination. Finally, he could not cite any reliable error rates. The expert “conceded, over and over again, that he relied mainly on his subjective judgment. There were no reference materials of any specificity, no national or even local database on which he relied. And although he relied on his past experience with these weapons, he had no notes or pictures memorializing his past.” *Id.* at 112 n.13.

<sup>73</sup> *Id.* at 109 (“I reluctantly come to the above conclusion because of my confidence that any other decision will be rejected by appellate courts, in light of precedents across the country . . .”).

<sup>74</sup> See *United States v. Hines*, 55 F. Supp. 2d 62, 71 (D. Mass. 1999) (expert testimony concerning the general similarities and differences between a defendant’s handwriting exemplar and a stick up note was admissible but not the specific conclusion that the defendant was the author).

<sup>75</sup> 405 F. Supp. 2d at 109.

<sup>76</sup> *Id.*

<sup>77</sup> Donald Kennedy, Editorial, *Forensic Science: Oxymoron?*, 302 *SCIENCE* 1625 (2003). *Science* is published by the American Association for the Advancement of Science.

<sup>78</sup> Other commentaries on problems in forensic science soon followed in *Science*. In 2002, Professor Faigman criticized fingerprint evidence in the wake of the *Llera Plaza* decisions. David L. Faigman, *Science and the Law: Is Science Different for Lawyers?*, 297

the government and private foundations for funding, which creates a “Catch-22” dynamic: the organization with the expertise to commission an independent study is dependent for financial support upon the federal agencies that want to control the research.

Next, a series of articles appeared in *Issues in Science and Technology*, the official publication of the National Academy. One article included the following observation: “The increased use of DNA analysis, which has undergone extensive validation, has thrown into relief the less firmly credentialed status of other forensic science identification techniques (fingerprints, fiber analysis, hair analysis, ballistics, bite marks, and tool marks). These have not undergone the type of extensive testing and verification that is the hallmark of science elsewhere.”<sup>79</sup> Another article criticized how research has been controlled by the prosecution, arguing that “we have a growing body of unreliable research funded by law enforcement agencies with a strong interest in promoting the validity of these techniques.”<sup>80</sup> Other authors discussed deficiencies in fingerprint analysis<sup>81</sup> and crime laboratory regulation.<sup>82</sup>

In 2005, Congress intervened, bypassing the Department of Justice and appropriating \$1,500,000 to the National Academy of Sciences to study forensic science. As previously discussed, the NAS Report’s central recommendation is the establishment of a new independent agency, NIFS.<sup>83</sup> Although this recommendation is emphatic, it is not well supported. The next sections provide the evidence for this recommendation, which is critical for meaningful reform.

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SCIENCE 339 (2002). Professors Cole and Loftus published a letter following the exoneration of Steven Cowan, the first conviction overturned based on DNA profiling in which fingerprint evidence had been crucial in securing the wrongful conviction. Elizabeth F. Loftus & Simon A. Cole, Letter, *Contaminated Evidence*, 304 SCIENCE 959 (2004) (“[F]orensic scientists remain stubbornly unwilling to confront and control the problem of bias, insisting that it can be overcome through sheer force of will and good intentions.”). Professors Saks and Koehler’s article on the paradigm shift appeared next. Michael J. Saks & Jonathan J. Koehler, Review, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892 (2005).

<sup>79</sup> Donald Kennedy & Richard A. Merrill, *Assessing Forensic Science*, 20 ISSUES IN SCI. & TECH. 33, 34 (Fall 2003).

<sup>80</sup> D. Michael Risinger & Michel J. Saks, *A House with No Foundation*, 20 ISSUES IN SCI. & TECH. 35, 35 (2003).

<sup>81</sup> Jennifer L. Mnookin, *Fingerprints: Not a Gold Standard*, 20 ISSUES IN SCI. & TECH. 47 (2003).

<sup>82</sup> Paul C. Giannelli, *Crime Labs Need Improvement*, 20 ISSUES IN SCI. & TECH. 55 (2003).

<sup>83</sup> See *supra* note 2.

### III. DNA PROFILING

Forensic DNA analysis was first introduced in this country in the late 1980s through the efforts of private companies, principally Lifecodes and Cellmark.<sup>84</sup> The introduction of DNA evidence went smoothly in the initial cases, but then a successful challenge to admissibility was mounted in *People v. Castro*.<sup>85</sup> After a fourteen-week evidentiary hearing with a 5,000-page transcript, the court wrote: “In a piercing attack upon each molecule of evidence presented, the defense was successful in demonstrating to this court that the testing laboratory failed in its responsibility to perform the accepted scientific techniques and experiments in several major respects.”<sup>86</sup> In an unusual occurrence, the prosecution and defense experts met without the attorneys and issued a joint statement, including the following: “[T]he DNA data in this case are not scientifically reliable enough to support the assertion that the samples . . . do or do not match. If this data were submitted to a peer reviewed journal in support of a conclusion, it would not be accepted. Further experimentation would be required.”<sup>87</sup> Another problem, which would only be revealed years later, lurked

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<sup>84</sup> In 1985, Dr. Alec Jeffreys of the University of Leicester, England, recognized the utility DNA profiling in criminal cases. Its first use in American courts came the following year. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, GENETIC WITNESS: FORENSIC USES OF DNA TESTS 8 (1990). By January 1990, forensic DNA analysis had been admitted into evidence “in at least 185 cases by 38 States and U.S. military.” *Id.* at 14. The initial technique, Restriction Fragment Length Polymorphism (RFLP) analysis by gel electrophoresis, was soon supplanted by Polymerase Chain Reaction (PCR)-based methods involving the DQ-alpha locus, “polymarkers,” and the D1S80 locus. These, in turn, were replaced by Short Tandem Repeats, the current procedure. In addition to nuclear DNA analysis, courts have admitted evidence based on mitochondrial DNA (mtDNA) sequencing, as well as DNA analyses of animals, plants, and the HIV virus. See generally 2 GIANNELLI & IMWINKELRIED, *supra* note 5, ch. 18 (discussing the scientific and legal basis for DNA profiling).

<sup>85</sup> 545 N.Y.S.2d 985 (Sup. Ct. 1989). See generally Jennifer L. Mnookin, *People v. Castro: Challenging the Forensic Use of DNA Evidence*, in EVIDENCE STORIES 207 (Richard Lempert ed., 2006).

<sup>86</sup> 545 N.Y.S.2d at 996.

<sup>87</sup> Eric S. Lander, *DNA Fingerprinting On Trial*, 339 NATURE 501, 504 (1989). The FBI’s top DNA scientist, Dr. Bruce Budowle, would later acknowledge the shortfalls of DNA evidence when first introduced:

The initial outcry over DNA typing standards concerned laboratory problems: poorly defined rules for declaring a match; experiments without controls; contaminated probes and samples; and sloppy interpretation of autoradiograms. Although there is no evidence that these technical failings resulted in any wrongful convictions, the lack of standards seemed to be a recipe for trouble.

Eric S. Lander & Bruce Budowle, *DNA Fingerprinting Dispute Laid to Rest*, 371 NATURE 735, 735 (1994). See also JAMES D. WATSON & ANDREW BERRY, DNA: THE SECRET OF LIFE 273 (2004) (“Initially, when DNA fingerprinting was done in forensic laboratories without special

beneath the surface in *Castro*. Nearly two decades after his participation as a prosecution witness in *Castro*, Richard Roberts, a Noble Laureate, stated in an interview that “it never occurred to him to ask if [the prosecutors] were withholding any data” — “I assumed they were showing me all they had.”<sup>88</sup> But they were not.

It did not take the FBI Laboratory, the premier forensic facility in this country, long to appreciate the significance of DNA profiling, and the Bureau soon began work to bring its own DNA unit on-line. Indeed, after *Castro*, the FBI Laboratory would achieve hegemony over DNA profiling. However, the lab would withhold data from the general scientific community, selectively share information with scientists it approved, and underwrite their research. Moreover, prosecutors would attack opposing experts *outside* the courtroom.

#### A. *United States v. Yee*

*Castro* was only the opening volley in what came to be known as the DNA admissibility wars,<sup>89</sup> sparking a debate that found its way into the popular press. In response to several critical articles on forensic DNA analysis, John Hicks, the Director of the FBI Crime Laboratory at the time, wrote a letter to the *New York Times*, defending the Bureau’s DNA program:

The procedures employed in these tests have been carefully defined, based on extensive studies. Our procedures and test results have passed muster when subjected to close scrutiny in the scientific community and the courts. The F.B.I. has encouraged wide review of the forensic use of DNA technology through sponsorship of technical seminars and international symposiums and support to studies conducted by the Office of Technology Assessment and the National Academy of Sciences.<sup>90</sup>

This letter was published on February 21, 1990. Yet, the day before, in a courtroom in Ohio, federal prosecutors — at the FBI Laboratory’s behest — opposed turning over data concerning the FBI’s matching criteria, environmental insult studies, population data, and proficiency tests. The case, *United States v.*

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expertise in handling and analyzing DNA, critical mistakes were not uncommon.”). Watson was one of the discoverers of the double helix structure of DNA.

<sup>88</sup> JAY D. ARONSON, *GENETIC WITNESS: SCIENCE, LAW, AND CONTROVERSY IN THE MAKING OF DNA PROFILING* 71 (2007). After testifying, Roberts signed the “joint statement” of scientists. See *supra* text accompanying note 88.

<sup>89</sup> See Thompson, *supra* note 38, at 22.

<sup>90</sup> *DNA Test Proves Itself in Solving Crimes*, N.Y. TIMES, Feb. 21, 1990, at A24, col. 5 (letter to editor by John Hicks).

*Yee*,<sup>91</sup> involved the first major challenge to the Bureau's DNA protocols. According to the presiding magistrate, the need for discovery was underscored by the lack of "extensive independent scientific assessment and replication of the reliability of the procedures that have been developed by the F.B.I."<sup>92</sup> In their efforts to withhold this information, the prosecutors offered a technical (and unpersuasive) argument — i.e., that these materials were not scientific "reports" within the meaning of the federal discovery rule and therefore were not subject to disclosure.<sup>93</sup> Significantly, they did not argue that this information was irrelevant or that it would not help the defense prepare for trial. In the end, the magistrate rejected the prosecution's argument.<sup>94</sup>

When *Yee* was finally decided, the prosecution won; expert testimony based on the FBI's protocols was deemed admissible. Nevertheless, a number of disquieting comments appeared in the opinion. At one point, for example, the magistrate wrote: "[T]he F.B.I. program of [DNA] proficiency testing has serious deficiencies, even without consideration of the troubling hint in the record of an impulse at one point to *destroy* some of the small amount of test data that had been accumulated earlier."<sup>95</sup> There was more than a "hint" in the record: "Internal memoranda obtained through court-ordered discovery from the FBI show that the agency contemplated destroying its own scientific data concerning the performance of its DNA test in proficiency trials rather than turn the data over to defense lawyers."<sup>96</sup> In a later passage, the magistrate commented: "I do not either disregard or discount the accuracy of many of the criticisms about the remarkably poor quality of the F.B.I.'s work and infidelity to important scientific principles."<sup>97</sup>

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<sup>91</sup> 129 F.R.D. 629 (N.D. Ohio 1990).

<sup>92</sup> *Id.* at 631.

<sup>93</sup> See FED. R. CRIM. P. 16(a)(1)(D) [now Rule 16(a)(1)(G)].

<sup>94</sup> The federal magistrate granted the defense discovery motion based on a different provision of the discovery rule, one that required disclosure of documents and tangible objects that are material to the preparation of the defense. He ruled that "predicate materials" were discoverable under this provision. 129 F.R.D. at 635.

*Yee* was not the only case in which important information was withheld in DNA litigation. Timothy Spencer was the first person executed based on DNA evidence. *Murderer Put to Death in Virginia: First U.S. Execution Based on DNA Tests*, N.Y. TIMES, Apr. 28, 1994, at A19. When the defense sought discovery of the prosecution expert's "work notes," which formed the basis of his report, the motion was denied, and the Virginia Supreme Court upheld this ruling. *Spencer v. Commonwealth*, 384 S.E.2d 785, 791 (Va. 1989). See generally Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 801-02 (1991) (discussing unjustifiable limitations on discovery).

<sup>95</sup> *United States v. Yee*, 134 F.R.D. 161, 208 (N.D. Ohio 1991) (emphasis added), *aff'd sub nom.*, *United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993).

<sup>96</sup> Thompson, *supra* note 38, at 98 (citing Memoranda from FBI Legal Counsel to Assistant Director, FBI Laboratory Division, dated April 20, 1990).

<sup>97</sup> *Yee*, 134 F.R.D. at 210.

## B. The *Science* Affair

Dr. Richard C. Lewontin of Harvard University and Dr. Daniel Hartl, then of Washington University, “two of the leading lights of population genetics,”<sup>98</sup> testified for the defense in *Yee*. The prosecution had its own prominent experts, including Dr. Thomas Caskey of Baylor College of Medicine and Dr. Kenneth K. Kidd of Yale University. After the *Yee* admissibility hearing, Lewontin and Hartl submitted a paper to *Science*, which was accepted in accordance with *Science*’s peer review process. Although Lewontin and Hartl did not question the underlying science, they wrote that the estimates of the probability of a matching DNA profile “as currently calculated, are unjustified and generally unreliable.”<sup>99</sup>

Surprisingly, the editors of *Science* changed the normal practice of publishing rebuttals in later issues and instead actively sought out a rebuttal article for the same issue.<sup>100</sup> The events proceeded as follows:

In mid-October Caskey and Kidd [the prosecution experts in *Yee*], who had both gotten hold of the paper, cornered one of *Science*’s editors at a genetics meeting and urged her not to publish it without a rebuttal. *Science* editor Daniel Koshland agreed, commissioning a rebuttal by Kidd and Ranajit Chakraborty of the University of Texas, which was published in the same issue. Koshland also called Lewontin a few days after the genetics meeting, asking for revisions in the [previously peer-reviewed and accepted] paper, which was already in galleys.<sup>101</sup>

Not only was the rebuttal article published in the same issue,<sup>102</sup> it appeared *before* the Lewontin and Hartl piece. Lewontin and Hartl accused Koshland of “caving

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<sup>98</sup> Leslie Roberts, *Fight Erupts over DNA Fingerprinting*, 254 *SCIENCE* 1721, 1721 (1991).

<sup>99</sup> See Richard C. Lewontin & Daniel L. Hartl, *Population Genetics in Forensic DNA Typing*, 254 *SCIENCE* 1745, 1750 (1991). They also wrote: “Appropriately carried out and correctly interpreted, DNA typing is possibly the most powerful innovation in forensics since the development of fingerprinting in the last part of the 19th Century.” *Id.* at 1746.

<sup>100</sup> See Comm. On Scientific Freedom & Responsibility and the Prof’l Soc’y Ethics Group, Am. Ass’n for the Advancement of Science, *Cases and Commentaries*, PROF. ETHICS REP., spring 1992, at 2 (“[T]he normal procedure followed by *Science* is to publish rebuttals in a subsequent issue and to give the authors of the original article an opportunity to respond.”) [hereinafter AAAS ETHICS REPORT].

<sup>101</sup> Leslie Roberts, *Science in Court: A Culture Clash*, 257 *SCIENCE* 732, 735 (1992). Roberts was a staff writer for *Science*.

<sup>102</sup> See Ranajit Chakraborty & Kenneth K. Kidd, *The Utility of DNA Typing in Forensic Work*, 254 *SCIENCE* 1735 (1991).

into political pressure by commissioning the Chakraborty-Kidd rebuttal.”<sup>103</sup> Although some scientists commended Koshland for his “objective approach,”<sup>104</sup> others were shocked: “I am appalled . . . . It seems to me inconceivable that scientists would attempt to suppress publication of a paper because they disagreed with its conclusions, a paper which apparently had gone through what one assumes was a normal and stringent review process . . . .”<sup>105</sup>

In addition, James Wooley, one of the federal prosecutors in *Yee*, “lobbied” Hartl to withdraw the *Science* paper on the ground that the article was “ill-conceived.”<sup>106</sup> While Wooley described the conversation as an “amiable

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<sup>103</sup> Leslie Roberts, *Fight Erupts over DNA Fingerprinting*, 254 *SCIENCE* 1721, 1721 (1991). Lewontin characterized the use of the rebuttal article as “[p]ure politics . . . . I think it is quite extraordinary that an editor would go out and hire two guys to write a rebuttal’ after the article had been peer reviewed and accepted.” *Id.* (quoting Lewontin). Kidd explained: “I felt publishing the article would create a very serious problem in the legal system, and that that was their intent.” Leslie Roberts, *Was Science Fair to Its Authors?*, 254 *SCIENCE* 1722 (1991) (quoting Kidd). Koshland defended this position: “I did it to give a more balanced view of the subject. I was trying to be fair.” *Id.* (quoting Koshland).

<sup>104</sup> Robert A. Bever et al., 255 *SCIENCE* 1050 (1992) (letter to editor).

<sup>105</sup> Lynwood R. Yarbrough, 255 *SCIENCE* 1052 (1992) (University of Kansas School of Medicine, letter to editor). *See also* Don W. Cleveland, 255 *SCIENCE* 1052 (1992) (Johns Hopkins University School of Medicine, letter to editor):

[S]urely it is not often that an Editor insists on revisions to the galleys of an article accepted after peer review. Even more remarkable (and all credit is no doubt due to the Editor) is to commission a rebuttal to the article and to publish it contemporaneously. Save for an uncritical account filtered through a staff report (Leslie Roberts), oddly missing has been direct comment, so often heard on other issues, from the Editor who stands at the center (or more accurately to one side) of the controversy. Having first stirred the pot, where was he when it came time to eat the meal, be it cake or crow?

Two years later the controversy was still simmering. *Compare* Daniel E. Koshland Jr., *The DNA Fingerprint Story (Continued)*, 265 *SCIENCE* 1015 (1994) (editorial) (commenting that the acceptance of DNA evidence is a “rebuke to the judicial process that has been so slow to accept DNA evidence by failing to see that a couple of outspoken individuals were less representative of the scientific community than the vast majority of careful scholars”), *with* Daniel L. Hartl & Richard C. Lewontin, 266 *SCIENCE* 201 (1994) (letter to editor) (“The present editor of *Science* has more than once attempted to nullify our analysis of scientific issues in the forensic use of DNA polymorphism. . . . Now he has used his privileged access to the editorial column of *Science* to publish an attack of his own.”).

<sup>106</sup> Leslie Roberts, *Science in Court: A Culture Clash*, 257 *SCIENCE* 732, 735 (1992) (“In a move he would come to regret, Wooley called Hartl in early October 1991 to ‘lobby him’ him not to publish the article, which he considered ill-conceived.”). *See also* Gina Kolata, *Critic of “Genetic Fingerprint” Tests Tells of Pressure to Withdraw Paper*, *N.Y. TIMES*, Dec. 20, 1991, at A20.

chat,” Hartl, on the other hand, said it was a “chilling experience in which Wooley attempted to intimidate him.”<sup>107</sup>

### C. The *Journal of Human Genetics* Affair

*Yee* altered the landscape of the admissibility battles. The initial skirmishes over laboratory protocols had now metamorphosed into fights over statistical interpretation and population genetics. Accordingly, defense experts needed access to the underlying population data.<sup>108</sup> As it had done in *Yee*, however, the FBI balked. As one court noted: “Alt [the defendant] argues the FBI DNA test results are inadmissible because the FBI does not allow members of the scientific community general access to its data bases. . . . We are troubled by Alt’s allegations of denial of access to the FBI data bases.”<sup>109</sup> Eventually, one court ordered disclosure. The defense expert, Seymour Geisser, a professor of statistics at the University of Minnesota, explained that “the form in which databases were surrendered by the FBI was unusable for proper analysis by the defense. However, the material was supplied, in the form requested, to one of the prosecution experts. Hearing my complaint, the expert generously sent me an appropriate diskette, to the chagrin of the FBI.”<sup>110</sup>

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<sup>107</sup> *Id.* at 735. See also Peter J. Neufeld, *Have You No Sense of Decency?*, 84 J. CRIM. L. & CRIMINOLOGY 189, 193 (1993) (“Dr. Hartl ‘had no doubt,’ both ‘from the tone and intensity of his remarks, that Mr. Wooley, on behalf of the FBI and the Department of Justice, was trying to get me to withdraw the article.”) (citing Hartl’s post-trial affidavit in *Yee*, dated Mar. 16, 1992).

<sup>108</sup> See ARONSON, *supra* note 85, at 44 (“Open access to the materials used to conduct DNA testing (especially the probes), as well as the databases used to determine the frequency of a specific allele, would become a major aspect of the controversy over DNA evidence in mid-1989.”).

<sup>109</sup> *State v. Alt*, 504 N.W.2d 38, 48-49 (Minn. Ct. App. 1993) (admitting DNA evidence). Courts had also criticized private DNA labs on this basis. See *State v. Schwartz*, 447 N.W.2d 422, 427-28 (Minn. 1989) (“The validity of testing procedures and principles is assessed in the scientific community by publishing the data in peer review journals. . . . Efforts to assess the reliability of the commercial laboratories’ methodology consequently have been hindered because this information has not yet been made fully available. For example, Cellmark has not yet published data regarding its methodology and its probes are only selectively available.”). In contrast to the FBI, these enterprises at least have a colorable claim of trade secrets. See ARONSON, *supra* note 85, at 77-87 (discussing *Schwartz*).

<sup>110</sup> Seymour Geisser, *Statistics, Litigation, and Conduct Unbecoming*, in STATISTICS IN THE COURTROOM 71, 79 (Joseph L. Gastwirth ed., 2000). According to a NAS report, “[a]n author’s obligation is not only to release data and materials to enable others to verify or replicate published findings . . . but also to provide them in a form in which other scientists can build with further research.” NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMIES OF SCIENCES, SHARING PUBLICATION-RELATED DATA AND MATERIALS: RESPONSIBILITIES OF AUTHORSHIP IN THE LIFE SCIENCES 4 (2003).

Geisser's travails as a defense witness were only beginning. In November 1991, he submitted a paper on the forensic use of DNA statistics to the *American Journal of Human Genetics*, which, in turn, sent the article out for peer review as Geisser was preparing to testify. On January 15, 1992, a prosecutor demanded discovery (by fax) of any article Geisser had written about DNA, *along with any peer review comments*. Fifteen minutes later Geisser received the peer review comments by fax, two of which raised serious questions about his paper. Geisser believed the reviews were leaked to the prosecutor before he had even seen them.<sup>111</sup>

One of the anonymous peer reviewers, who strongly recommended against publication, was Dr. Ranajit Chakraborty. Recall that he had coauthored the rebuttal article in *Science* and had been aligned with the prosecution in court cases. Geisser questioned his participation in the review process:

Both [Chakraborty and the second referee, Dr. Bruce Weir] have frequently submitted reports and testified for the prosecution when FBI DNA profiles were at issue. I have testified for the defense in some of these cases. They have collaborated with FBI forensic workers, gained access to their data, and have published it. Certainly they should have recused themselves from serving as referees, or at the very least informed the editor of their situation.<sup>112</sup>

Chakraborty had also received a grant from the National Institute of Justice, the agency in the Department of Justice that funds forensic science research.<sup>113</sup> His proposal stated that he expected "to generate publications and make presentation at national meetings that will lend credibility to the FBI's statistical methods."<sup>114</sup>

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<sup>111</sup> The editor (Epstein) later wrote that this incident was "sheer coincidence." AAAS ETHICS REPORT, *supra* note 101, at 4. Chakraborty responded: "I have never discussed this review nor the paper with anyone. I was critical of the manuscript, because I believed that it was unprofessionally written, it contained several fatal errors, and it only reported parts of unpublished data from other laboratories without appropriate credit or consent of the data gatherers." AAAS ETHICS REPORT, *supra* note 101, at 4. The paper was subsequently published. See S. Geisser & W. Johnson, *Testing Hardy-Weinberg Equilibrium on Allelic Data from VNTR Loci*, 51 AM. J. HUMAN GENETICS 1084 (1992).

<sup>112</sup> AAAS ETHICS REPORT, *supra* note 101, at 2 (quoting an affidavit filed by the defense attorneys in *Yee*, which quotes Epstein's letter to Geisser). Later, Epstein would write that his journal had "served as an open forum on the forensic uses of DNA technology. We have published highly 'partisan' but nevertheless carefully reviewed papers on all sides of the issue." *Id.* at 5 (comments of Charles J. Epstein, Editor).

<sup>113</sup> Chakraborty explained: "My co-investigation in a NIJ grant had no connection with my reviewing this manuscript, and my review was to the point of evaluating a 'scientific manuscript on its scientific merit.'" AAAS ETHICS REPORT, *supra* note 101, at 4.

<sup>114</sup> Geisser, *supra* note 111, at 79.

This suggests that the results are foreordained. James Kearney, the head of Forensic Science Research at the FBI Laboratory, sat on the panel that awarded the grant.<sup>115</sup>

Next, the *Journal* asked Geisser to obtain permission from the FBI to use its original data rather than data submitted by the Bureau at trial. Geisser complied, requesting permission from Dr. Bruce Budowle, the top FBI DNA scientist. The FBI informed Geisser that (1) the Bureau had made commitments earlier to other scientists (Chakraborty, Devlin, Risch, and Weir) and his study must not conflict with their projects, (2) the FBI data could be used only in a joint collaboration with Budowle, (3) the use of the data would be restricted to this one paper, and (4) *all authors must agree* to the entire contents of a final manuscript prior to submission to a journal.<sup>116</sup> Geisser concluded that

an independent study under such provisions would be totally compromised, if not impossible. . . . By the way, Chakraborty, Devlin, Risch and Weir have all published articles based on the FBI databases without Budowle as a co-author. Recently, I analyzed Cellmark databases for a court in Ann Arbor, Michigan. At the insistence of Cellmark, the prosecutor requested that the judge rule that I not be allowed to submit my analysis of their data for publication. So much for open science!<sup>117</sup>

Controlling scientific research in this manner is troublesome. In other fields, researchers have noted a “funding effect.” For example, “[t]he best predictor of the conclusions in published reviews assessing the health impacts of passive smoking . . . is whether they are written by authors affiliated with the tobacco industry.”<sup>118</sup> In short, researchers funded by tobacco companies found no passive smoking effect. The problem is not limited to tobacco research. An exhaustive review of 1,140 biomedical studies found that “industry-sponsored studies were significantly more likely to reach conclusions that were favorable to the sponsor than were nonindustry studies.”<sup>119</sup> There is little reason to believe that forensic science research would not be subject to a “funding effect.”

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<sup>115</sup> *Id.* at 82.

<sup>116</sup> Christopher Anderson, *FBI Attaches Strings to its DNA Database*, 357 NATURE 618, 618 (1992) (quoting part of letter). “Kearney says that the FBI is ‘not quite sure of [Geisser’s] intent’ in seeking to analyze the data, pointing out that Geisser has testified for the defence . . . . Kearney acknowledged that the FBI has provided the data to other researches . . . at least two of whom have testified for the prosecution . . . .” *Id.*

<sup>117</sup> AAAS ETHICS REPORT, *supra* note 101.

<sup>118</sup> THOMAS O. MCGARITY & WENDY E. WAGNER, BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH 96 (2008) (listing examples).

<sup>119</sup> Justin E. Bekelman et al., *Scope and Impact of Financial Conflicts of Interest in Biomedical Research*, 289 JAMA 463 (2003).

## D. Spinning the National Academy of Sciences DNA Report

The DNA controversy next moved to Washington, D.C., with the FBI requesting the National Academy of Sciences (NAS) to appoint a committee to investigate the criticisms of the forensic use of DNA evidence.<sup>120</sup> In violation of the Academy's rules, someone leaked a confidential draft of the Committee's report to John Hicks, the FBI Laboratory Director.<sup>121</sup> Apparently undisturbed by this breach of confidentiality, Hicks wrote to the NAS criticizing the draft.<sup>122</sup> Once again, law enforcement advocates penetrated the halls of science.

The specter of conflict of interest also surfaced at this point.<sup>123</sup> Dr. Caskey, the prosecution witness in *Yee*, was pressured to resign from the NAS Committee because of his financial interest in a new type of DNA testing, Short Tandem Repeats, which is now the current protocol.<sup>124</sup>

## E. Harassing Scientists

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<sup>120</sup> NRC I REPORT, *supra* note 39, at 55. A second committee was formed after some aspects of the first report were severely criticized. NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, THE EVALUATION OF FORENSIC DNA EVIDENCE 73 (1996).

<sup>121</sup> See Celia Hooper, *Rancor Precedes National Academy of Science's DNA Fingerprinting Report*, 4 J. NIH RESEARCH 78, 79 (March 1992) ("Hicks says that . . . two members of the NAS committee gave him copies of a preliminary draft of the report."); AAAS ETHICS REPORT, *supra* note 101, at 7 (statement of Barry Scheck) ("Hicks subsequently wrote an unsolicited reply that NAS staff say they did not distribute to the Committee."). See also Shannon Brownlee, *Courtroom Genetics: A Flap Over DNA Evidence Raises Questions About The Relationship of Science to the Law*, U.S. NEWS & WORLD REP., Jan. 27, 1992, at 60, 61 ("Hicks told U.S. News that two panel members, who were unhappy with the panel's conclusion sent him a draft . . .").

<sup>122</sup> The NAS officials refused to pass on the FBI's objections to the committee. Hooper, *supra* note 122, at 80.

<sup>123</sup> The issue had arisen at the time of the *Science* affair. Yarbrough's letter to the editor noted: "The vehemence and lack of scientific objectivity that appear to surround this issue indicate that there may be important concerns other than scientific ones. I urge that *Science* obtain from those most closely involved in this debate information about possible economic interests in DNA typing and provide this information to the reader, as other journals have sometimes done." Yarbrough, *supra* note 106, at 1052. See also Rorie Sherman, *DNA Is On Trial Yet Again*, NAT'L L.J., Mar. 16, 1992, at 1 (discussing conflicts of interest).

<sup>124</sup> See Christopher Anderson, *DNA Fingerprinting Discord*, 354 NATURE 500 (1991) ("Caskey is a prominent supporter of DNA fingerprinting who licenses his techniques to Cellmark Diagnostics, one of the largest DNA fingerprinting companies."); Christopher Anderson, *Conflict Concerns Disrupt Panels, Cloud Testimony*, 355 NATURE 753 (1992) (reporting Caskey's resignation from several panels including the NAS committee). See also ARONSON, *supra* note 85, at 159 (discussing Caskey's resignation from the NAS committee).

In civil litigation, harassment of scientists is one way to influence their behavior. One tactic is the misuse of the subpoena power: “Burdening a scientist with unreasonable document requests does nothing to advance peer scrutiny of the research. . . . [S]uch requests effectively undercut scientific freedom by overwhelming scientists with sanctions-backed demands for documentation and, in some cases by intimidating scientists with the threat of further legal proceedings after they produce the documents.”<sup>125</sup>

*State v. DeMarco*<sup>126</sup> illustrates a variation of this tactic. In that case, the prosecutor issued a subpoena for 234 reports prepared in unrelated cases by the defense expert, Dr. Edward Blake. Blake, a prominent DNA expert who had consulted with both prosecutors and defense attorneys, objected.<sup>127</sup> The subpoena raised significant issues concerning the attorney-client privilege and the Sixth Amendment right to effective assistance of counsel. A N.J. appellate court ruled that the prosecution may not compel discovery of DNA reports prepared by the defendant’s expert witness for other clients in unrelated cases and issued a protective order: “Dr. Blake’s reports contain private and critical information which should be shielded from undue public exposure. Moreover, litigators, public and private, should have access to the assistance of retained experts with a minimum of risk that their reports . . . will surface in unrelated litigation.”<sup>128</sup>

Harassment is one thing; intimidation is quite another. As the DNA wars raged on, prosecutors (and defense attorneys) formed tight knit groups to engage the legal battles. Some prosecutors closely associated with the FBI lab, however, went further.<sup>129</sup> After Professor Lawrence Mueller, of the University of California at Irvine, began appearing as a defense expert, a prosecutor, Rockne Harmon, began stalking him — sending letters to his department chair and the university chancellor.<sup>130</sup> According to an article in *Science*: “Harmon has dogged Mueller’s every move, scrutinizing his testimony in each case and writing him letters when he thinks his science is wrong or his ethics questionable. Indeed,

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<sup>125</sup> MCCARITY & WAGNER, *supra* note 119, at 173.

<sup>126</sup> 646 A.2d 431 (N.J. Super. Ct. App. Div. 1994) (per curiam).

<sup>127</sup> A former prosecutor would later write that Blake was “a noted forensic serologist [who] had become a pioneer in the use of PCR testing in criminal cases” and that “prosecutors and defense attorneys alike enlisted Blake for testing and advice.” GEORGE “WOODY” CLARKE, JUSTICE AND SCIENCE: TRIALS AND TRIUMPHS OF DNA EVIDENCE 41, 42 (2007).

<sup>128</sup> *DeMarco*, 646 A.2d at 436-37. See also Kolata, *supra* note 107 (“When Dr. Ford testified . . . , the prosecutors obtained a court order to examine his laboratory and all papers in it.”).

<sup>129</sup> See Leslie Roberts, *Prosecutor v. Scientist: A Cat-and-Mouse Relationship*, 257 SCIENCE 733, 733 (1992) (“unofficial network of prosecutors and the FBI”).

<sup>130</sup> Kolata, *supra* note 107.

Mueller seems to have almost become an obsession for Harmon.”<sup>131</sup> Mueller viewed this tactic as an attempt to keep him from testifying. Similarly, another defense expert, Professor Simon Ford, a British citizen, felt intimidated by a prosecutor’s threat of loss of his immigration status.<sup>132</sup>

Perhaps the most disturbing episode was a perjury indictment of molecular biologist Randall Libby, a defense expert, based on an affidavit he submitted in a murder case. The prosecutor faxed the indictment around the country, thereby effectively precluding Libby’s participation as a defense expert in other cases. The charges seemed dubious,<sup>133</sup> and Libby, along with a defense attorney, were eventually acquitted in a bench trial. Libby then demanded that the prosecutor notify those he had faxed of the acquittal. When he refused, Libby brought a civil rights action against the state. The case “was finally settled out of court, resulting in the Oregon Department of Justice sending letters to all of the prosecutor’s correspondents that Libby had been acquitted.”<sup>134</sup>

Prosecutors justified their extrajudicial conduct on two grounds. First, they knew that the defense experts were wrong *as a matter of science*.<sup>135</sup> Yet, the views of prosecutors (and defense attorneys) on scientific matters have often been

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<sup>131</sup> Leslie Roberts, *Prosecutor v. Scientist: A Cat-and-Mouse Relationship*, 257 SCIENCE 733, 733 (1992). See also Neufeld, *supra* note 108, at 192-93 (“Harmon wrote to the editors of *Science* in an attempt to thwart the publication of Mueller’s paper. In his letter to *Science*, written on official government letterhead, Harmon . . . derided Dr. Mueller’s technical criticisms as ‘knuckle-headed,’ suggested that the doctor was unethical, and cautioned the editors that publication ‘could conceivably result in a vicious, violent criminal in being freed to continue to prey on society.’”). Harmon’s letter worked.

<sup>132</sup> Geisser, *supra* note 111, at 84. See Kolata, *supra* note 107 (Dr. Ford “said an F.B.I. lawyer asked him about the status of his visa status during cross-examination last year.”).

<sup>133</sup> Libby was a defense expert in the 1994 trial of Bradley Cunningham for the murder of his wife. Cunningham was representing himself. John Hunt, Cunningham’s standby attorney (advisor), was also indicted. The charge of false swearing arose from Libby’s affidavit in the support of a motion for a mistrial, in which Libby asserted that he was not allowed to talk to the defendant in jail in order to prepare to testify. Jail officials said that arrangements would have been made if Libby and Hunt had so requested. However, John Junkin, the county counsel testified at the trial “that he and the jail commander had issued a policy prohibiting Cunningham from meeting privately with anyone except his advisers and investigator. Junkin said a court order would have been necessary for Cunningham to meet with an expert witness, such as Libby.” Eliva Diaz, *Expert Witness, Attorney Acquitted*, THE OREGONIAN, May 9, 1997, at B02. Incredibly, Libby was also charged with tampering with physical evidence — i.e., signing the affidavit. See also Don Hamilton, *Forensic Expert Sues County’s District Attorney*, THE OREGONIAN, Aug. 13, 1996.

<sup>134</sup> Geisser, *supra* note 111, at 84.

<sup>135</sup> One prosecutor referred to a defense expert as espousing “knuckle-headed ideas.” Leslie Roberts, *Prosecutor v. Scientist: A Cat-and-Mouse Relationship*, 257 SCIENCE 733, 733 (1992) (quoting Rockne Harmon). Another referred to a different expert’s views as “ill-conceived.” Leslie Roberts, *Science in Court: A Culture Clash*, 257 SCIENCE 732, 735 (1992) (quoting James Wooley).

notoriously wrong. For example, the paraffin test for the detection of gunshot residue was introduced in this country in the 1930s and admitted at trial for over thirty years before it was debunked.<sup>136</sup> Similarly, “voiceprint” evidence was admitted in numerous trials in the 1970s — until a National Academy of Sciences report undercut its reliability.<sup>137</sup> Attorneys typically lack the educational background to evaluate scientific issues,<sup>138</sup> and the adversarial process frequently distorts any objectivity that they might otherwise have.<sup>139</sup> Second, prosecutors were apparently offended that some defense experts were compensated.<sup>140</sup> This criticism ignores the fees collected by prosecution witnesses<sup>141</sup> and their government-subsidized research grants.<sup>142</sup>

More importantly, attacking defense experts *outside* the courtroom further exacerbates the profound imbalance of resources in criminal cases.<sup>143</sup> Prosecutors

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<sup>136</sup> See Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197 (1980) (discussing the history of the paraffin test).

<sup>137</sup> NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCE, ON THE THEORY AND PRACTICE OF VOICE IDENTIFICATION (1979). See also 1 GIANNELLI & IMWINKELRIED, *supra* note 5, ch 10 (discussing the voiceprint developments).

<sup>138</sup> See Symposium on Science and Rules of Evidence, 99 F.R.D. 187, 233 (1983) (statement of Margaret Berger) (noting “the lack of scientific literacy” of lawyers).

<sup>139</sup> Adversarial pressure on experts is so common that the ABA felt compelled to issue a standard in an attempt to address the problem. ABA Criminal Justice Standard 3-3.3(a) provides: “A prosecutor who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert’s opinion on the subject.” The accompanying commentary states: “Statements made by physicians, psychiatrists, and other experts about their experiences as witnesses in criminal cases indicate the need for circumspection on the part of prosecutors who engage experts. Nothing should be done by the prosecutor to cast suspicion on the process of justice by suggesting that the expert color an opinion to favor the interests of the prosecutor.” Commentary, ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION FUNCTION 59 (3d ed. 1993). A comparable Standard applies to defense counsel. ABA Standard 404.4(a)

<sup>140</sup> E.g., Leslie Roberts, *Science in Court: A Culture Clash*, 257 SCIENCE 732, 735 (1992) (noting that one prosecutor complained that an expert was paid \$28,000 for four-month preparation and trial testimony”); Leslie Roberts, *Hired Guns or True Believers?*, 257 SCIENCE 735, 735 (1992) (reporting that another expert received more than \$60,000 for testifying once a month for several years).

<sup>141</sup> Leslie Roberts, *Hired Guns or True Believers?*, 257 SCIENCE 735, 735 (1992) (reporting that one prosecution witness “appeared 14 times in the past year and a half, bringing in \$3,000 to \$4,000 a case. . . . In fact, witnesses on both sides charge roughly the same amount — \$150 or \$200 an hour, and perhaps \$1,000 a day if they are out of town, plus expenses.”).

<sup>142</sup> See ARONSON, *supra* note 85, at 111 (“In addition to receiving substantial fees for testimony on behalf of the prosecution, members of this group also received significant grants from the National Institute of Justice . . .”).

<sup>143</sup> As Judge Weinstein, has noted, “Courts, as gatekeepers, must be aware of how difficult it can be for some parties — particularly indigent criminal defendants — to obtain an expert to testify. The fact that one side may lack adequate resources with which to fully develop

typically have access to the over 300 crime laboratories in this country.<sup>144</sup> In addition to the FBI facility, the Drug Enforcement Administration, Internal Revenue Service, Postal Inspection Service, Secret Service, Bureau of Alcohol, Tobacco and Firearms, Customs Service, and the military operate crime laboratories.<sup>145</sup> These labs often provide their services for free to state law enforcement agencies.<sup>146</sup>

In contrast, the defense often encounters problems securing expert assistance. Most defendants are indigent and cannot afford experts.<sup>147</sup> Although the Supreme Court recognized a due process right to an expert in *Ake v. Oklahoma*,<sup>148</sup> studies indicate that the right has not been fully implemented and the asymmetry in resources is pronounced.<sup>149</sup> A study of indigent defense

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its case is a constant problem.” Jack B. Weinstein, *Science, and the Challenge of Expert Testimony in the Courtroom*, 77 OR. L. REV. 1005, 1008 (1998).

<sup>144</sup> A survey of approximately 300 crime laboratories revealed that “fifty-seven percent . . . would only examine evidence submitted by law enforcement officials.” Joseph L. Peterson et al., *The Capabilities, Uses, and Effects of the Nation’s Criminalistics Laboratories*, 30 J. FORENSIC SCI. 10, 13 (1985). See also PRESIDENT’S COMM. ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 255 (1967) (Crime laboratories are “the oldest and strongest link between science and technology and criminal justice.”).

The FBI Laboratory, the largest publicly funded forensic laboratory in the country, had 585 full-time employees as of January 2004. The new FBI Lab at Quantico, Virginia, cost of over \$150 million. Joseph L. Peterson & Matthew J. Hickman, *Census of Publicly Funded Forensic Crime Laboratories, 2002*, BUREAU OF JUSTICE STATISTICS BULL. 11 (Feb. 2005). See generally *The History Channel, Modern Marvels: FBI’s Crime Lab* (2004) (documentary); DAVID FISHER, *HARD EVIDENCE: HOW DETECTIVES INSIDE THE FBI’S SCI-CRIME LAB HAVE HELPED SOLVE AMERICA’S TOUGHEST CASES* (1996) (discussing the FBI Lab’s successes).

<sup>145</sup> “It is quite common to find FBI or other federal experts testifying in state criminal cases concerning a diverse array of forensic procedures, including the analysis of drugs, blood, hair, fibers, firearms, fingerprints, gunshot residues, shoeprints, voice comparisons, and the like.” Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1329-30 (2004) (footnotes omitted).

<sup>146</sup> For example, the services of the FBI Laboratory are available without charge to all police departments. See 28 C.F.R. § 0.85(g) (authorizing the FBI lab “to provide, without cost, technical and scientific assistance . . . , for all duly constituted law enforcement agencies, . . . which may desire to avail themselves of the service”).

<sup>147</sup> See also *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (“According to the Department of Justice, approximately eight out of ten state felony defendants use court-appointed lawyers.”); YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 22-23 (10th ed. 2002) (“A sampling of felony defendants in the 75 largest counties indicated that approximately 80 receive court appointed attorneys.”).

<sup>148</sup> 470 U.S. 68 (1985).

<sup>149</sup> In 1990, the *National Law Journal* published the results of a six-month investigation of the defenses of capital murders in the South. One of the “key findings” concerned defense experts: “Judges routinely deny lawyers’ requests for expert/investigative fees.” Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation’s Death Belt*, NAT’L L.J., June 11, 1990, at 30. As part of this investigation, sixty death row trial lawyers were interviewed — “54.2% felt

systems by the National Center for State Courts noted that the “greatest disparities occur in the areas of investigators and expert witnesses, with the prosecutors possessing more resources.”<sup>150</sup> A recent book concluded that “prosecution experts were much more common than experts called by the defense.”<sup>151</sup> The National Academy of Sciences 1992 DNA Report also recognized the need for defense experts.<sup>152</sup> Yet, no defendant, no matter how rich, can conduct extensive empirical studies. A defense expert in a particular case can critique the bases of a prosecution expert’s opinion but can rarely replicate the research upon which that opinion rests.

Of course, if the FBI had made its data publicly available, research scientists could have analyzed it, published their conclusions in peer review journals, and the debate would have been fought out in public, probably saving the taxpayers money in the long run. “According to long-standing and wise scientific tradition, the data underlying an important scientific conclusion must be freely available, so that others can evaluate the results and publish their own

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[the] court provided inadequate investigation and expert funds.” *Id.* at 40. One attorney, who was appointed to represent a death row inmate in Georgia, had his request for the appointment of an expert denied. He commented: “There’s an economic presumption of guilt. . . . The district attorney has all the resources of the state crime lab, and we have to go hat in hand to the judge and the DA on every request.” *Id.* at 38.

In addition, a 1993 report commissioned by the Texas Bar Association concluded that “[t]here is a serious underfunding of essential expert services and other expenses in capital trials and appeals.” *A Study of Representation in Capital Cases in Texas*, 56 TEX. B.J. 333, 408 (Apr. 1993) (Report of The Spangenberg Group prepared for the Texas State Bar).

<sup>150</sup> ROGER A. HANSON ET AL., NAT’L CTR. FOR STATE COURTS, INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL 100 (1992).

<sup>151</sup> NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES 173 (2007) (citing Valerie P. Hans, *The Twenty-first Century Jury: Worst of Times or the Best of Times?*, 1 CRIM. L. BRIEF 3 (Spring 2006)). In their landmark 1966 jury study, Kalven and Zeisel commented: “Again, the imbalance between prosecution and defense appears. In 22 percent of the cases the prosecution has the only expert witness, whereas in only 3 per cent of the cases does the defense have such an advantage.” HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 139 (1966).

<sup>152</sup> “Defense counsel must have access to adequate expert assistance, even when the admissibility of the results of analytical techniques is not in question because there is still a need to review the quality of the laboratory work and the interpretation of results.” NRC I, *supra* note 39, at 149 (“Because of the potential power of DNA evidence, authorities must make funds available to pay for expert witnesses . . .”). A British study came to the same conclusion: “Legal Aid should be granted automatically for one expert assessment of the prosecution work. DNA evidence should only be admissible where an appropriate expert is available to the defence.” BEVERLEY STEVENTON, ROYAL COMM’N ON CRIMINAL JUSTICE, THE ABILITY TO CHALLENGE DNA EVIDENCE, RESEARCH STUDY No. 9, at 44 (1993). According to the *President’s DNA Initiative*, “Even if DNA evidence is admitted, there still may be disagreement about its interpretation—what do the DNA results mean in a particular case?” *President’s DNA Initiative: Principles of Forensic DNA for Officers of the Court* (CD).

findings, whether in support or in disagreement.”<sup>153</sup> Moreover, “[i]f scientific evidence is not yet ready for scientific scrutiny and public re-evaluation by others, it is not yet ready for court.”<sup>154</sup>

## F. The Aftermath

In the end, the defense challenges to DNA evidence had a salutary effect. As one scholar noted, the British Forensic Science Service “adopted a method of calculating DNA match probabilities that had been proposed by statisticians associated with the defence side of the DNA dispute.”<sup>155</sup> Even the DNA experts who worked closely with the FBI subsequently conceded that “most would now agree that this extended debate has been good for the science.”<sup>156</sup> Unfortunately, defendants were being tried and convicted while this process unfolded.

In sum, the government shaped science by controlling the research agenda, hiding unwelcome test results, attacking legitimate studies that were unfavorable, harassing scientists who disagreed, and “spinning” science in the press. As discussed in the next parts of this Article, some of these tactics were repeated in later controversies.

## III. FINGERPRINTING

As discussed previously, after the Supreme Court decided *Daubert*, a number of forensic sciences came under attack. These techniques had gained admissibility long before *Daubert* was decided and were not supported by the type of scientific research that undergirded DNA profiling. Fingerprinting, the gold standard in forensic science before DNA analysis, provoked the greatest controversy.

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<sup>153</sup> NRC I, *supra* note 39, at 93. The Report further commented: “Because the application of DNA typing in forensic science is to be used in the service of justice, it is especially important for society to establish mechanisms for accountability and to ensure appropriate public scrutiny.” *Id.* at 162.

<sup>154</sup> NRC I, *supra* note 39, at 94.

<sup>155</sup> MIKE REDMAYNE, EXPERT EVIDENCE AND CRIMINAL JUSTICE 204 (2001). *See also* ARONSON, *supra* note 85, at 3 (“As a result of defense challenges, scientists were forced to go back to their laboratories and professional societies to develop more robust methods and protocols, better quality control mechanisms, and more effective inclusive per review systems.”).

<sup>156</sup> IAN W. EVETT & BRUCE S. WEIR, INTERPRETING DNA EVIDENCE: STATISTICAL GENETICS FOR FORENSIC SCIENTISTS xiv (1998). *See also* Richard Lempert, *Comment: Theory and Practice in DNA Fingerprinting*, 9 STATISTICAL SCI. 255, 258 (1994) (“[I]n this instance the importation of legal adversariness into the scientific world has spurred both valuable research and practical improvements in the way DNA is analyzed and presented.”); Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOK. L. REV. 13, 70 (2001) (“[W]hile it is easy to disparage ‘battles of the experts’ as expensive, misleading, and confusing to the factfinder, these battles may also reveal genuine weaknesses in proffered expert knowledge.”).

## A. Controlling Research

When fingerprinting was challenged,<sup>157</sup> FBI experts launched a full-bore defense of the technique, insisting in court testimony that the “error rate for the method is zero.”<sup>158</sup> In response to the first post-*Daubert* evidentiary attack in *United States v. Mitchell*,<sup>159</sup> the FBI attempted to support its position by conducting two studies. In one, the Bureau distributed Mitchell’s ten-point fingerprint card and two latent prints from the crime scene to numerous fingerprint examiners and asked them to make a comparison. “Of the thirty-four agencies that responded, nine (27%) reported that they had not identified either one or both of the latent prints with any of the fingers on Mitchell’s ten print card.”<sup>160</sup> Faced with these troublesome results, the Bureau recontacted these agencies, providing more information including enlarged photographs, pointing out their “mistake”, and asking for a “do-over.” The FBI letter to these agencies, disclosed in discovery, reads in part: “Please test your prior conclusion against these enlarged photographs with the *marked* characteristics.”<sup>161</sup> In short, the “test” was rigged.

Lockheed Martin conducted the second test sponsored by the FBI, known as the 50K study, which involved 50,000 fingerprint images taken from the FBI’s Automated Fingerprint System, a computer database. It was intended to establish the uniqueness of fingerprints.<sup>162</sup> Although the study proved persuasive in court,<sup>163</sup> commentators criticized it.<sup>164</sup> For example, one scholar asserted that the “study addresses the irrelevant question of whether one image of a fingerprint is immensely more similar to itself than to other images — including those of the

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<sup>157</sup> The first reported fingerprint case was decided in 1911. *People v. Jennings*, 96 N.E. 1077 (Ill. 1911). See *supra* note 55.

<sup>158</sup> *United States v. Havvard*, 117 F. Supp. 2d 848, 854 (S.D. Ind. 2000), *aff’d*, 260 F.3d 597 (7th Cir. 2001).

<sup>159</sup> 365 F.3d 215 (3d Cir. 2004).

<sup>160</sup> Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint “Science” Is Revealed*, 75 S. CAL. L. REV. 605, 629 (2002). Epstein was the defense counsel in *Mitchell*.

<sup>161</sup> *Id.* at 629 n.132 (quoting FBI letter ) (emphasis added). According to Epstein, “The FBI was so unhappy with the results of the experiment that it sent the nine agencies in question a new response form . . . . This time, however, the FBI took nothing for granted. The FBI provided the agencies with the marked-up enlargements of the fingerprints displaying what the FBI apparently believed to be the common characteristics.” *Id.*

<sup>162</sup>  
<sup>163</sup> E.g., *United States v. Hernandez*, 299 F.3d 984, 991 (8th Cir. 2002); *United States v. Prime*, 220 F. Supp. 2d 1203, 1210 (W.D. Wash. 2002).

<sup>164</sup> E.g., David H. Kaye, *Questioning a Courtroom Proof of the Uniqueness of Fingerprints*, 71 INT’L STATISTICAL REV. 521 (2003); S. Pankanti et al., *On the Individuality of Fingerprints*, 24 IEEE TRANSACTIONS ON PATTERN ANALYSIS 1010 (2002).

same finger.”<sup>165</sup> In contrast, the relevant issue was whether crime scene prints, which are typically distorted, smudged, and a fifth of the size of record prints, are unique. The Lockheed Martin study, which was never published, did not address this issue.<sup>166</sup>

In addition, the rigor of proficiency testing was drawn into question in one case when a fingerprint examiner from New Scotland Yard testified that the FBI proficiency tests were deficient: “It’s not testing their ability. It doesn’t test their expertise. . . . And if I gave my experts these tests, they’d fall about laughing.”<sup>167</sup> A district court agreed, noting that “the FBI examiners got very high proficiency grades, but the tests they took did not. . . . [O]n the present record I conclude that the proficiency tests are less demanding than they should be.”<sup>168</sup> A later FBI report implicitly acknowledged this shortcoming.<sup>169</sup>

## B. Suppressing Independent Studies

During the early stages of the *Mitchell* litigation, the National Institute of Justice was preparing to release a solicitation for fingerprint research. The “Introduction” to the solicitation stated that *Daubert* “require[d] scientists to address the reliability and validity of the methods used in their analysis. Therefore, the purpose of this solicitation is to . . . provide greater scientific foundation for forensic friction ridge (fingerprint) identification.”<sup>170</sup> A DOJ solicitation for greater scientific support for fingerprints carried the risk of

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<sup>165</sup> Kaye, *supra* note 163, at 527-28. In another passage, he wrote: “[T]he study merely demonstrates the trivial fact that the same two-dimensional representation of the surface of a finger is far more similar to itself than to such representation of the source of finger from any other person in the data set.” *Id.* at 527.

<sup>166</sup> Professor Kaye also made the following observations: “The sampling procedure was not described beyond the observation that ‘database retrieval software’ selected ‘the first 50,000 left loop records.’” *Id.* at 524. “The report gives no explanation of the algorithms or how they differ.” *Id.* at 524-25. “The report does not describe these distributions. No values for the means and standard deviations are provided.” *Id.* at 525. “[T]he probabilities . . . are too small, making the demonstration of uniqueness seem stronger than it is.” *Id.* at 526.

<sup>167</sup> *United States v. Llera Plaza*, 188 F. Supp. 2d 549, 558 (E.D. Pa. 2002).

<sup>168</sup> *Id.* at 565.

<sup>169</sup> See Robert B. Stacey, *A Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, 54 J. FORENSIC IDENTIFICATION 707, 716 (2004) (“Verifiers should be given challenging exclusions during blind proficiency tests to ensure that they are independently applying ACE-V methodology correctly . . .”). See also *United States v. Crisp*, 324 F.3d 261, 274 (4th Cir. 2003) (Michael, J., dissenting) (“Proficiency testing is typically based on a study of prints that are far superior to those usually retrieved from a crime scene.”); Jennifer L. Mnookin, Editorial, *A Blow to the Credibility of Fingerprint Evidence*, BOSTON GLOBE, Feb. 2, 2004 (“There are no systematic proficiency tests to evaluate examiners’ skill. Those tests that exist are not routinely used and are substandard.”).

<sup>170</sup> NATIONAL INSTITUTE OF JUSTICE, SOLICITATION: FORENSIC FRICTION RIDGE (FINGERPRINT) EXAMINATION VALIDATION STUDIES 3 (March 2000).

undermining FBI claims that the technique was on solid footing. After the *Mitchell* trial, the defense attorney learned that the solicitation had been postponed, arguably so it could not be used to support the defense challenge in that case.<sup>171</sup> When the case reached the Third Circuit Court of Appeals, Judge Becker commented on the testimony of Dr. Richard Rau, the NIJ official who coordinated the drafting of the solicitation for the Department of Justice: “We are deeply discomforted by Mitchell’s contention — supported by Dr. Rau’s account of events, though contradicted by other witnesses — that a conspiracy within the Department of Justice intentionally delayed the release of the solicitation until after Mitchell’s jury reached a verdict. Dr. Rau’s story, if true, would be a damning indictment of the ethics of those involved.”<sup>172</sup>

The story did not end there. As a result of the court challenges, a project designed to examine various forensic science techniques, including fingerprinting, was under discussion at the National Academy of Sciences. The project was cancelled, however, because the Departments of Justice and Defense insisted on a right of review that the Academy found unacceptable; such a right of review would violate scientific norms. In response, the editor-in-chief of *Science* wrote the “Forensic Science: Oxymoron?” editorial mentioned earlier.<sup>173</sup> He also pointed out that the NIJ “regularly resisted including comprehensive evaluations of the science underlying forensic techniques” in planning sessions for conferences sponsored with the NAS, the American Association for the Advancement of Science, the American Bar Association, and the Federal Judicial Center.<sup>174</sup>

The FBI did not undertake a serious review of fingerprints until it was compelled to address the issue due to the negative publicity surrounding the

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<sup>171</sup> See Epstein, *supra* note 161, at 628 n.122 (“Internal documents of the NIJ presently on file with the author . . . reveal that the Institute was ready to publish the Solicitation in September of 1999, but that at the FBI’s request, publication was delayed until after Mitchell’s trial.”).

<sup>172</sup> United States v. Mitchell, 365 F.3d 215, 255 (3d Cir. 2004). See also *id.* at 232:

[Mitchell’s] most damaging evidence came from Dr. Richard Rau of the NIJ, who coordinated the drafting of the solicitation. Rau testified to conversations at a September 1999 meeting among himself, Donald Kerr (the Assistant Director of the FBI in charge of the FBI crime laboratory), David Boyd (the Deputy Director of the NIJ), and others. Rau claimed that at that meeting Kerr and Boyd agreed to withhold release of the solicitation until the end of Mitchell’s trial. In response to Dr. Rau’s testimony, the government called Kerr, Boyd, and the other individuals at the meeting to testify that Dr. Rau’s account of the delay in releasing the solicitation was incorrect and that the delay was caused by budgetary issues.

<sup>173</sup> See *supra* text accompanying note 77.

<sup>174</sup> Donald Kennedy, Editorial, *Forensic Science: Oxymoron?*, 302 SCIENCE 1625 (2003).

Bureau's misidentification of Brandon Mayfield as a terrorist.<sup>175</sup> One of the most telling comments about the misidentification, according to the FBI's own report, was that the laboratory culture was poorly suited to detect mistakes: "To disagree was not an expected response."<sup>176</sup>

Here, again, the Department of Justice, through the FBI and NIJ, went to great lengths to manage the research agenda on fingerprint comparisons, as it had in DNA analysis. These tactics would once again be used when the science underlying bullet lead analysis was challenged in court.

### III. COMPARATIVE BULLET LEAD ANALYSIS

For over thirty years, FBI experts testified about comparative bullet lead analysis (CBLA), a technique that was first used in the investigation into President Kennedy's assassination.<sup>177</sup> CBLA compares trace chemicals found in bullets at crime scenes with ammunition found in the possession of a suspect. This technique was used when firearms ("ballistics") identification could not be employed. FBI experts used various analytical techniques (first, neutron activation analysis (NAA), and then inductively coupled plasma-atomic emission spectrometry (ICP-AES)) to determine the concentrations of seven elements — arsenic, antimony, tin, copper, bismuth, silver, and cadmium — in the bullet lead alloy of both the crime-scene and suspect's bullets. Statistical tests were then used to compare the elements in each bullet and determine whether the fragments and suspect's bullets were "analytically indistinguishable" for each of the elemental concentration means. Exactly what the phrase "analytically indistinguishable" meant was the central issue — i.e., did such a finding mean that the bullet fragments came from a small or large universe? The probative value of the test results would, of course, differ if only a hundred bullets had the same chemical composition as opposed to several million bullets.

The technique was not seriously challenged until a retired FBI examiner, William Tobin, began questioning the procedure in scientific and legal journals<sup>178</sup>

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<sup>175</sup> See Bruce Budowle et al., *Review of the Scientific Basis for Friction Ridge Comparisons as a Means of Identification: Committee Findings and Recommendations*, 8 FORENSIC SCI. COMM. (Jan. 2006). See *supra* text accompanying notes 65-69.

<sup>176</sup> Stacey, *supra* note 67, at 713.

<sup>177</sup> See generally Erik Randich & Patrick M. Grant, *Proper Assessment of the JFK Assassination Bullet Lead Evidence from Metallurgical and Statistical Perspectives*, 51 J. FORENSIC SCI. 717 (2006) (discussing the original analysis of the bullet fragments).

<sup>178</sup> See Edward J. Imwinkelried & William A. Tobin, *Comparative Bullet Lead Analysis (CBLA) Evidence: Valid Inference or Ipse Dixit?*, 28 OKLA. CITY U. L. REV. 43 (2003); Erik Randich et al., *A Metallurgical Review of the Interpretation of Bullet Lead Compositional Analysis*, 127 FORENSIC SCI. INT'L 174 (2002) (Tobin was a coauthor); William A. Tobin & Wayne Duerfeldt, *How Probative is Comparative Bullet Lead Analysis?*, 17 CRIM.

and in court testimony as well.<sup>179</sup> As a result, the FBI asked the National Academy of Sciences to review the technique.<sup>180</sup> NAS appointed a committee of scientists, statisticians, and attorneys to conduct the review.<sup>181</sup>

One of the first things the committee discovered was the disparate (often inconsistent) interpretive conclusions provided by FBI experts in the reported cases. In some, experts testified only that two exhibits were “analytically indistinguishable.”<sup>182</sup> In other cases, examiners concluded that samples *could have* come from the same “source” or “batch.”<sup>183</sup> In still others, they stated that the samples *came* from the same source.<sup>184</sup> The testimony in numerous cases went much further and referred to a “box” of ammunition (usually 50 loaded cartridges, sometimes 20). For example, two specimens:

- Could have come from the same box,<sup>185</sup>
- Could have come from the same box or a box manufactured on the same day,<sup>186</sup>
- Were consistent with their having come from the same box of ammunition,<sup>187</sup>
- Probably came from the same box,<sup>188</sup>

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JUSTICE 26 (Fall 2002). In 2003, a federal district court excluded CBLA evidence under the *Daubert* standard, the first case to do so. *United States v. Mikos*, 2003 WL 22922197, 2003 U.S. Dist. Lexis 22069 (N.D. Ill. Dec. 5, 2003).

<sup>179</sup> *E.g.*, *Ragland v. Commonwealth*, 191 S.W.3d 569, 577 (Ky. 2006); *Clemons v. State*, 896 A.2d 1059, 1070, 1068 (Md. 2006); *State v. Behn*, 868 A.2d 329, 339-40 (N.J. Super. Ct. 2005) (Tobin’s affidavit submitted).

<sup>180</sup> In *Ragland, v. Commonwealth*, 191 S.W.3d 569, 580 (Ky. 2006), a Kentucky murder case, an FBI examiner, Kathleen Lundy, lied during an admissibility hearing. She “blamed her conduct partly on a sense of crisis in her work, fed by ‘new and repeated challenges to the validity of the science associated with bullet lead comparison analysis.’” Charles Pillar & Robin Mejia, *Science Casts Doubt on FBI’s Bullet Evidence*, L.A. TIMES, Feb. 3, 2003. Lundy subsequently admitted to her superiors that she had lied, and on June 17, 2003, she pleaded guilty to testifying falsely and was sentenced to a suspended ninety-day jail sentence and a \$250 fine.

<sup>181</sup> NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE 6 (2004). The author served on the NAS Committee.

<sup>182</sup> *See Wilkerson v. State*, 776 A.2d 685, 689 (Md. 2001).

<sup>183</sup> *See State v. Krummacher*, 523 P.2d 1009, 1012-13 (Or. 1974).

<sup>184</sup> *See United States v. Davis*, 103 F.3d 660, 673-74 (8th Cir. 1996); *People v. Lane*, 628 N.E.2d 682, 689-90 (Ill. App. Ct. 1996).

<sup>185</sup> *See State v. Strain*, 885 P.2d 810, 817 (Utah Ct. App. 1994); *State v. Jones*, 425 N.E.2d 128, 131 (Ind. 1981).

<sup>186</sup> *See State v. Grube*, 883 P.2d 1069, 1078 (Idaho 1994); *People v. Johnson*, 499 N.E.2d 1355, 1366 (Ill. 1986).

<sup>187</sup> *See State v. Reynolds*, 297 S.E.2d 532, 534 (N.C. 1982).

<sup>188</sup> *See Bryan v. State*, 935 P.2d 338, 360 (Okla. Crim. App. 1997).

- Must have come from the same box or from another box that would have been made by the same company on the same day.<sup>189</sup>

The report noted other inconsistencies as well.<sup>190</sup>

The NAS Report, published in 2004, undercut much of the FBI testimony. The report found that the “available data do not support any statement that a crime bullet came from a particular box of ammunition. In particular, references to ‘boxes’ of ammunition in any form should be avoided as misleading under Federal Rule of Evidence 403.”<sup>191</sup>

### A. Withholding Data

Much of FBI testimony rested on a database, which the Bureau had built up over the course of many years. Although the NAS Committee frequently asked for this data during its year-long investigation, the FBI did not turn over the data until it was too late to include an analysis of the information in its report.<sup>192</sup> The two statisticians who served on the NAS Committee would later write that

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<sup>189</sup> See *United States v. Davis*, 103 F.3d 660, 666-67 (8th Cir. 1996) (“An expert testified that such a finding is rare and that the bullets must have come from the same box or from another box that would have been made by the same company on the same day.”); *Commonwealth v. Daye*, 587 N.E.2d 194, 207 (Mass. 1992); *State v. King*, 546 S.E.2d 575, 584 (N.C. 2001) (Kathleen Lundy “opined that, based on her lead analysis, the bullets she examined either came from the same box of cartridges or came from different boxes of the same caliber, manufactured at the same time.”).

<sup>190</sup> An early case reported that the specimens “had come from the same batch of ammunition: they had been made by the same manufacturer on the same day and at the *same hour*.” *Brown v. State*, 601 P.2d 221, 224 (Alaska 1979) (emphasis added). In another case, the expert used the expressions “rare finding” and “a very rare finding.” *United States v. Davis*, 103 F.3d 660, 666, 667 (8th Cir. 1996). In still another case, the expert “opined that the same company produced the bullets at the same time, using the same lead source. Based upon Department of Justice records, she opined that an overseas company called PMC produced the bullets around 1982.” *Earhart v. State*, 823 S.W.2d 607, 614 (Tex. Crim. App. 1991). One case reports the expert’s conclusion with a statistic. *People v. Villarta*, 2002 Cal. App. Unpub. Lexis 4776 (Cal Ct. App. 2002) (murder). In recent years, the testimony became more limited. A 2002 FBI publication stated the conclusion as follows: “Therefore, they *likely* originated from the same manufacturer’s source (melt) of lead.” Charles A. Peters, *The Basis for Compositional Bullet Lead Comparisons*, 4 FORENSIC SCI. COMM. No. 3, at 5 (July 2002) (emphasis added).

<sup>191</sup> NATIONAL RESEARCH COUNCIL, *supra* note 182.

<sup>192</sup> See Cliff H. Spiegelman & Karen Kafadar, *Data Integrity and the Scientific Method: The Case for Bullet Lead Data as Forensic Evidence*, 19:2 CHANCE 16, 22 (2006) (“During the open sessions of the committee meetings, the FBI claimed to have a ‘complete data file’ of some 71,000+ measurements. Following repeated requests from the Committee, the FBI submitted at its last meeting a CD-ROM that contained two data files with a combined total of 64,869 bullet (not 71,000+) measurement records. . . . This data set could not be analyzed in time for the release of the report . . .”).

their subsequent inspection of the data “identified several peculiarities.”<sup>193</sup> First, the database was incomplete. The FBI claimed to have a “complete data file” of some 71,000+ measurements but only 64,869 were turned over. Moreover, only measurements made by ICP-AES were included; a different analytical method, NAA, had been used before 1997. Both techniques measured the same elements, and therefore the results from either technique would have been suitable for comparison. Further, the numbering system for the bullets was “highly inconsistent and rather unexpected,” suggesting that some bullet measurements had been deleted.<sup>194</sup> Additionally, “a rough investigation of the measurement error indicated many measurement errors that exceeded the FBI’s claimed analytical precision of 2-5%.”<sup>195</sup> Finally, “only 15% of the 1079 cases listed in these two files had measurements from [National Institute of Standards and Technology] . . . making it impossible to determine the frequency of ‘matches’” in some cases.<sup>196</sup> Accordingly, the “missing data and the inconsistent precisions” undermined the Bureau’s public claims.<sup>197</sup>

As researchers steeped in the traditions of science, these authors were puzzled by the FBI’s failure to disclose data. They wrote: “The scientific method is important for science generally; forensic science is no exception. . . . [T]he evidence in this paper suggest that, at least for [CBLA], forensic science failed in the requirement to share the material, methods and data to reach conclusions with the scientific community.”<sup>198</sup>

In short, the NAS Committee, appointed at the behest of and funded by the FBI, was not provided with critical data that would have assisted it in evaluating the technique. This data formed the basis of the Bureau’s testimony in about 500 prosecutions, including death penalty cases.<sup>199</sup> Perhaps the most disturbing case

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* (“[T]he numbering system of the bullets was highly inconsistent and rather unexpected, *e.g.*, the bullets from a suspect in a particular case might be numbered Q13A, Q13B, Q13C, Q14A, Q14B, Q14C, . . . , leading one to wonder what happened to bullets Q01, Q02, . . . , Q12.”). Other illustrations of incomplete data were noted: “[W]hile most of the bullets indicated 3 measurements, about 30 bullets had six or more measurements.” *Id.* “[O]nly about 50% of the bullets in this data set were identified as having come from one of the four major bullet manufacturers in the United States (Cascade Cartridge, Inc.; Federal; Remington; Winchester); the ‘complete data file’ of 71,000 bullets may yield a higher proportion of bullets from these four manufacturers.” *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 22-23.

<sup>199</sup> See Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 198-203 (2007) (discussing CBLA).

is *Earhart v. State*,<sup>200</sup> a capital murder case in which CBLA evidence apparently played a significant role.<sup>201</sup> The trial transcript contains the following expert testimony: “[F]rom my 21 years experience of doing bullet lead analysis and doing research on boxes of ammunition down through the years I can determine if bullets came from the same box of ammunition . . . .”<sup>202</sup> However, according to the NAS Committee, the amount of bullets that can be produced from an “analytically indistinguishable” melt “can range from the equivalent of as few as 12,000 to as many as 35 million 40grain, .22 caliber longrifle bullets.”<sup>203</sup> In other words, tens of thousands of boxes could have been involved, which would have greatly undercut the probative value of the evidence. Earhart was executed before the report was released.<sup>204</sup>

## B. Spinning Science

The FBI’s response to the NAS Report was also disconcerting. The Bureau quickly put out a press release, obscuring the report’s findings.<sup>205</sup> The release highlighted the Committee’s conclusion that the FBI was using appropriate instrumentation and the correct elements for comparison. Yet, these aspects of CBLA were never seriously questioned. Rather, the interpretation of the data was disputed. Only one sentence in the press release addressed this

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<sup>200</sup> 823 S.W.2d 607, 614 (Tex. Crim. App. 1991) (“He concluded that the likelihood that two .22 caliber bullets came from the same batch, based on *all* the .22 bullets made in one year, is approximately .000025 percent, ‘give or take a zero.’ He subsequently acknowledged, however, that the numbers which he used to reach the .000025 percent statistic failed to take into account that there are different types of .22 caliber bullets made each year . . .”).

<sup>201</sup> See *Earhart v. Johnson*, 132 F.3d 1062, 1067 (5th Cir. 1998) (denying habeas relief, the court noted: “Given the significant role the bullet evidence played in the prosecution’s case, we shall therefore assume Earhart could have made a sufficient threshold showing that he was entitled to a defense expert under Texas law.”).

<sup>202</sup> Transcript of Record at 5248-49, *State v. Earhart*, No. 4064, Dist. Ct. Lee County, 21st Judicial Dist., Texas (testimony of John Riley). See also *id.* at 5258 (“Well, bullets that are . . . analytically indistinguishable compositions . . . typically are found within the same box of ammunition and that is the case that we have here. Now, bullets that are the same composition can also be found in other boxes of ammunition, but it’s most likely those boxes would have been manufactured at the same place on or about the same date.”). A different FBI examiner took a different position in another case. See Transcript of Record at 1-2, *Commonwealth v. Wilcox*, Kentucky, Feb. 28, 2002 (*Daubert* hearing; testimony of Charles Peters, FBI examiner): “We have never testified, to my knowledge, that that bullet came from that box. We’d never say that. All we are testifying is that that bullet, or that victim fragment or something, the bullet, either came from that box or the *many* boxes that were produced at the same time.” Transcript.) (emphasis added).

<sup>203</sup> NATIONAL RESEARCH COUNCIL, *supra* note 182, at 6.

<sup>204</sup> See Death Penalty Information Center, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions> (search for “Earhart” under “Find Person” search box) (last visited Oct. 10, 2007).

<sup>205</sup> Department of Justice, FBI News Release, Feb. 10, 2004.

important issue: “Recommendations by the [NAS] include suggestions to improve the statistical analysis, quality control procedures, as well as expert testimony.”<sup>206</sup> The news media read the report quite differently — e.g., “Study Shoots Holes in Bullet Analysis By FBI,”<sup>207</sup> “Report Finds Flaws,”<sup>208</sup> “Panel Questions FBI Bullet Analysis,”<sup>209</sup> and “Report Questions the Reliability of an F.B.I. Ballistics Test.”<sup>210</sup>

The Bureau also included the following passage in the press release: “The basis of bullet lead compositional analysis is supported by approximately 50 peer-reviewed articles found in scientific publications beginning in the early 1970’s. Published research and validation studies have continued to demonstrate the usefulness of the measurements of trace elements within bullet lead.”<sup>211</sup> In contrast, the NAS Report pointed out that there were “very few peer-reviewed articles on homogeneity and the rate of false positive matches” and “outside reviews have only recently been published.”<sup>212</sup> In effect, the FBI cherry-picked favorable statements from the report and downplayed the unfavorable crucial findings.

Over a year later, the FBI discontinued CBLA testing,<sup>213</sup> issuing another slanted press release. Once again, the release minimized the problems, citing the following reason for its decision: “While the FBI Laboratory still firmly supports the scientific foundation of bullet lead analysis, given the costs of maintaining the equipment, the resources necessary to do the examination, and its relative probative value, the FBI Laboratory has decided that it will no longer conduct this exam.”<sup>214</sup> Nevertheless, a month earlier, Dwight Adams, the laboratory director, had written a memorandum to the FBI Director specifying different reasons for abandoning the technique, including the following comments: (1) “We cannot afford to be misleading to a jury” and (2) “We plan to discourage prosecutors

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<sup>206</sup> *Id.*

<sup>207</sup> Maurice Possley, *Study Shoots Holes in Bullet Analysis By FBI*, CHICAGO TRIB., Feb. 11, 2004, at 14.

<sup>208</sup> Charles Pillar, *Report Finds Flaws in FBI Bullet Analysis; Changes are Proposed for the Technique Often Cited in Expert Testimony in Criminal Trials*, L.A. TIMES, Feb. 11, 2004, at 12.

<sup>209</sup> Randolph E. Schmid, *Panel Questions FBI Bullet Analysis*, ASSOCIATED PRESS, Feb. 10, 2004.

<sup>210</sup> See also Eric Lichtblau, *Report Questions the Reliability of an F.B.I. Ballistics Test*, N.Y. TIMES, Feb. 11, 2004, at 22.

<sup>211</sup> FBI News Release, *supra* note 206.

<sup>212</sup> NATIONAL RESEARCH COUNCIL, *supra* note 182, at 100.

<sup>213</sup> Eric Lichtblau, *F.B.I. Abandons Disputed Test for Bullets From Crime Scene*, N.Y. TIMES, Sept. 2, 2005, at A12.

<sup>214</sup> Department of Justice, FBI News Release, Sept. 1, 2005.

from using our previous results in future cases.”<sup>215</sup> Neither concern was reflected in the press release.

In the wake of the National Academy’s report, several state courts excluded CBLA evidence.<sup>216</sup> Surprisingly, the FBI supplied affidavits in several cases supporting prosecutors’ efforts to sustain convictions based on the technique. In one affidavit, the FBI cited the Academy’s report but failed to mention that the report had faulted the Bureau’s statistical methods. The chair of the NAS Committee criticized the affidavit because it did “not discuss the statistical bullet-matching technique, which is key and probably the most significant scientific flaw found by the committee.”<sup>217</sup> The affidavit was also misleading because it estimated that the maximum number of .22-caliber bullets in a batch of lead was 1.3 million, when the NAS Committee found that the number could be as high as 35 million.<sup>218</sup>

On November 18, 2007, *60 Minutes* aired a segment on CBLA.<sup>219</sup> In an interview, the FBI lab director, now retired, acknowledged that testimony about boxes was “misleading and inappropriate.”<sup>220</sup> That broadcast, along with a *Washington Post* investigation, questioned the FBI’s response to the NAS Report. The main problem was that only the FBI had records of all the cases in which its experts had testified, and the Bureau had declined to disclose the names of those cases.<sup>221</sup> Instead, the Bureau relied on the NAS Report, its own press releases,

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<sup>215</sup> John Solomon, *FBI’s Forensic Test Full of Holes*, WASH. POST, Nov. 18, 2007, at A1.

<sup>216</sup> See *Ragland v. Commonwealth*, 191 S.W.3d 569, 580 (Ky. 2006) (noting that “[i]f the FBI Laboratory that produced the CBLA evidence now considers such evidence to be of insufficient reliability to justify continuing to produce it, a finding by the trial court that the evidence is both scientifically reliable and relevant would be clearly erroneous”); *Clemons v. State*, 896 A.2d 1059, 1070, 1078 (Md. 2006) (“CBLA is not admissible under the *Frye-Reed* standard because it is not generally accepted within the scientific community as valid and reliable.”; “Based on the criticism of the processes and assumptions underlying CBLA, we determine that the trial court erred in admitting expert testimony based on CBLA because of the lack of general acceptance of the process in the scientific community.”); *State v. Behn*, 868 A.2d 329, 331 (N.J. Super. Ct. 2005) (finding the technique was “based on erroneous scientific foundations”).

*But see* *Commonwealth v. Fisher*, 870 A.2d 864, 871 (Pa. 2005) (“The CBAL evidence, at best, established a possible connection between Appellant and the bullets recovered from the victim’s body.”). See also *United States v. Davis*, 406 F.3d 505, 509 (8th Cir. 2005) (“Davis’s trial counsel cannot be said to be ineffective for failing to challenge the FBI’s methodology on a basis that was not advanced by the scientific community at the time of trial.”).

<sup>217</sup> Solomon, *supra* note 215 (quoting Ken MacFadden).

<sup>218</sup> *Id.* See also *supra* text accompanying note 143 (quoting NAS Report).

<sup>219</sup> *60 Minutes: Evidence of Injustice* (CBS television broadcast, Nov. 18, 2007).

<sup>220</sup> *Id.*

<sup>221</sup> Solomon, *supra* note 215, at A1 (“Hundreds of defendants sitting in prisons nationwide have been convicted with the help of an FBI forensic tool that was discarded more than

and pro forma letters sent to prosecution and defense organizations to notify defendants. This method of communication was grossly inadequate because the letters neither highlighted the problem, nor its significance.<sup>222</sup> A few days after the *60 Minutes* expose Senator Patrick Leahy, the Chairman of the Senate Judiciary Committee, sent a letter to the FBI Director, noting that the Bureau's letters gave "the false impression that these discredited tests had continuing reliability."<sup>223</sup>

## VI. PRELUDE TO THE NAS FORENSIC SCIENCE REPORT

As noted earlier, the National Academy of Sciences appointed its forensic science committee in 2006. The appointment of a committee with so many independent scientists was apparently a threat to the Department of Justice.<sup>224</sup> On April 10, 2008, at a subcommittee hearing, Senator Richard Shelby, Republican of Alabama, stated that individuals at NIJ had "attempted to derail Fiscal Year 2006 report language that I requested, directing the National Academy of Sciences to conduct an independent forensics study" and that "[c]urrent and former employees at NIJ, along with lobbyists and contractors, have attempted to undermine and influence the National Academies study."<sup>225</sup> The Senator also objected to a NIJ-convened summit designed to undercut the NAS study.<sup>226</sup> He elaborated: "[M]y staff discovered potential conflicts of interest, unethical

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two years ago. But the FBI lab has yet to take steps to alert the affected defendants or courts, even as the window for appealing convictions is closing . . .").

<sup>222</sup> The Innocence Network and the National Association of Criminal Defense Lawyers have formed a task force and are working with the FBI to contact defense attorneys and convicts. See Vesna Jaksic, *Faulty Bullet-test Cases Finding Way to Court*, NAT'L L.J., Feb. 25, 2008 ("The task force is lining up pro bono commitments from several law firms to handle the cases.").

<sup>223</sup> John Solomon, *Leahy Pursues Forensic-Test Answers; Attorney General Is Told to Prepare For Senate Inquiry*, WASH. POST, Nov. 22, 2007, at A2 (quoting). Leahy also wrote: "The new revelations about bullet-lead analysis are just the latest examples of the Department's inadequate efforts to ensure that sound forensic testing is utilized to the maximum extent to find the guilty rather than merely obtain a conviction. Punishing the innocent is wrong and allows the guilty party to remain free." *Id.*

<sup>224</sup> As Dr. Kennedy observed: "federal law enforcement agencies resented 'intervention' of mainstream science — especially the National Academy — in the courts. He said the National Institute of Justice . . . tried to derail the forensic study by refusing to finance it and demanding to review the findings before publication." Solomon Miller, *Science Found Wanting In Nation's Crime Labs*, N.Y. TIMES, Feb. 5, 2009, at A1, A19 (quoting Donald Kennedy, "a Stanford scientist who helped select the report's authors").

<sup>225</sup> U.S. Sen. Richard Shelby, New Release, Apr. 10, 2008 <http://shelby.senate.gov/public/index.cfm?FuseAction=PressRoom>.<http://shelby.senate.gov/public/index.cfm?FuseAction=PressRoom.AudioClips>(last visited Jun. 9, 2008).

<sup>226</sup> *Id.* ("On December 17 and 18th of this past year, the Deputy Director of NIJ even convened a counterproductive forensics summit here in Washington. Many of the attendees deemed the summit a huge waste of more than \$300,000 in taxpayer funds.").

behavior, and a serious void of transparency where lobbyists, including former DOJ employees, were contracted by NIJ to conduct policy forming studies and surveys. These same lobbyists . . . are also representing clients whose business success depends on the results of the studies and surveys their lobbyists conducted.”<sup>227</sup>

Senator Selby was not the only one with a dim view of the Department of Justice. In a presentation to the Committee, an expert from the Secret Service “blasted the F.B.I. for developing questionable techniques ‘on an ad-hoc basis, without proper research.’ He said the Secret Service wanted the National Academy ‘to send a message to the entire forensic science community that this type of method development is not acceptable practice.’”<sup>228</sup>

## VII. CONCLUSION

In *Daubert*, the Supreme Court emphasized the importance of empirical research.<sup>229</sup> The Court quoted Hempel: “[T]he statements constituting a scientific explanation must be capable of empirical test,”<sup>230</sup> and then Popper: “[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.”<sup>231</sup> In their amici brief in *Daubert*, the *New England Journal of Medicine* and other medical journals observed:

“Good science” is a commonly accepted term used to describe the scientific community’s system of quality control which protects the community and those who rely upon it from unsubstantiated scientific analysis. It mandates that each proposition undergo a rigorous trilogy of publication, replication and verification before it is relied upon.<sup>232</sup>

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<sup>227</sup> *Id.* (“I am not so sure the seriousness of this matter has the full attention of the leadership at DOJ. I placed language in the fiscal year 2008 omnibus appropriations bill directing the inspector general to investigate this matter. I encourage you to also check into this matter.”).

<sup>228</sup> Solomon Moore, *Science Found Wanting In Nation’s Crime Labs*, N.Y. TIMES, Feb. 5, 2009, at A1, A19.

<sup>229</sup> *See supra* text accompanying notes \_\_\_\_.

<sup>230</sup> CARL G. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 49 (1966).

<sup>231</sup> KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989).

<sup>232</sup> Brief of the New England Journal of Medicine, Journal of the American Medical Association, and Annals of Internal Medicine as Amici Curiae in Support of Respondent at 2, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Peer review’s “role is to promote the publication of well-conceived articles so that the most important review, the consideration of the reported results by the scientific community, may occur after publication.” *Id.* at 3.

Such research is precisely what the NAS Report found to be lacking with many forensic techniques. In addressing the lack of funding, the Report commented: “Of the various facets of under resourcing, the committee is most concerned about the knowledge base. Adding more dollars and people to the enterprise might reduce case backlogs, but it will not address fundamental limitations in the capabilities of forensic science disciplines to discern valid information from crime scene evidence.”<sup>233</sup> Later the Report observed: “A body of research is required to establish the limits and measures of performance and to address the impact of sources of variability and potential bias. Such research is sorely needed, but it seems to be lacking in most of the forensic disciplines that rely on subjective assessments of matching characteristics.”<sup>234</sup>

Scientists with impeccable credentials should conduct the needed research. Moreover, they should be independent of law enforcement. The most thorough and well-reasoned reports in the field have come from impartial scientific investigations, most done by the NAS, including reports on voiceprints,<sup>235</sup> DNA,<sup>236</sup> polygraph,<sup>237</sup> and bullet lead analysis.<sup>238</sup> The process should also be transparent. Scientists “are generally expected to exchange research data as well as unique research materials that are essential to the replication or extension of reported findings.”<sup>239</sup>

The government has not only failed to conduct the needed research, it has thwarted efforts to do so. Indeed, the conduct described in this Article rivals that of some private corporations such as the tobacco industry<sup>240</sup> — shaping the

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<sup>233</sup> NAS FORENSICS REPORT, *supra* note 2, at 15.

<sup>234</sup> *Id.* at 8. Similar statements are found elsewhere in the Report. *See id.* at 87.

<sup>235</sup> *See* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, ON THE THEORY AND PRACTICE OF VOICE IDENTIFICATION (1979).

<sup>236</sup> *See* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, THE EVALUATION OF FORENSIC DNA EVIDENCE (1996); NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992). *See also* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, GENETIC WITNESS: FORENSIC USES OF DNA TESTS (1990).

<sup>237</sup> *See* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, THE POLYGRAPH AND LIE DETECTION (2002).

<sup>238</sup> *See* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, FORENSIC ANALYSIS: WEIGHING BULLET LEAD EVIDENCE (2004).

<sup>239</sup> NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMIES OF SCIENCES, RESPONSIBLE SCIENCE 11 (1992). *See also* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMIES OF SCIENCES, SHARING PUBLICATION-RELATED DATA AND MATERIALS: RESPONSIBILITIES OF AUTHORSHIP IN THE LIFE SCIENCES 4 (2003) (advocating a “uniform principle for sharing integral data and materials expeditiously” or UPSIDE).

<sup>240</sup> “The tobacco industry is the poster child for bending science, and its often path-breaking strategies will be featured throughout this book.” McGarity & Wagner, *supra* note 119, at 27.

research agenda, limiting access to data, attacking experts who disagree with its positions, and “spining” negative reports. Currently, we have the worst of two possible worlds. Basic research in the forensic sciences is weak, and the only agency currently capable of funding research, the Department of Justice, is sabotaging efforts to conduct rigorous independent studies.

The NAS Report on forensic science provides a blueprint for rectifying this problem. Adoption of all recommendations would be the most important development in forensic science since the establishment of the crime laboratory in the mid-1920s.<sup>241</sup> The centerpiece of the NAS report is the creation of an independent federal agency to control funding and research in the field. This Article provides evidence supporting this proposal. Congress should act on the NAS recommendation and establish a National Institute of Forensic Sciences.

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<sup>241</sup> See RICHARD SAFERSTEIN, *CRIMINALISTICS: AN INTRODUCTION TO FORENSIC SCIENCE* 6 (5th ed. 1995) (“The oldest forensic laboratory in the United States is that of the Los Angeles Police Department, created in 1923 by August Vollmer, a police chief from Berkeley, California.”); John I. Thornton, *Criminalistics: Past, Present and Future*, 11 *LEX ET SCIENTIA* 1, 23 (1975) (“In 1923, Vollmer served as Chief of Police of the City of Los Angeles for a period of one year. During that time, a crime laboratory was established at his direction.”).