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SYMMETRY, ADVERSARIALISM, SCHOLARLY CONVENTION, AND LATENT PRINT IDENTIFICATION: A REPLY TO MERLINO AND SPRINGER

Simon A. Cole*

*Some[body] says
Thank you for saying all the things I never do
I say the thanks I get is to take all the shit for you
It's nice that you listen
It'd be nicer if you joined in
As long as you play their game []
You're never going to win*

—Ani DiFranco, *Face Up and Sing*¹

I am deeply appreciative of the apology offered by Merlino and Springer for the way in which parts of an article by Merlino et al., *Meeting the Challenges of the Daubert Trilogy: Refining and Redefining the Reliability of Forensic Evidence (Meeting)*,² “could . . . be interpreted as a personal attack on [my] expertise, although it was not intended as such.”³ At issue is the conclusion of *Meeting*, which discusses expert testimony I gave in a pre-trial hearing in a criminal case, *People v. Hyatt*,⁴ in 2001. In my response, *Don't Shoot the Messenger by One of the Messengers: A Response to Merlino et al. (Don't Shoot)*,⁵ I interpreted *Meeting* as arguing that purported deficiencies in my testimony somehow “explained” both the overwhelming tendency of trial courts to admit latent print individualization evidence, despite the opinions of many

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1. Ani DiFranco, *Face Up and Sing*, in *Out of Range* (Righteous Babe Records 1994) (CD).
2. Mara L. Merlino et al., *Meeting the Challenges of the Daubert Trilogy: Refining and Redefining the Reliability of Forensic Evidence*, 43 *Tulsa L. Rev.* 417 (2007).
3. Mara L. Merlino & Victoria Springer, *Context and Controversy: Why Questions of Validity and Reliability are Seldom Resolved in an Adversarial Setting*, 45 *Tulsa L. Rev.* 133, 133 (2009).
4. *People v. Hyatt*, No. 50115U (N.Y. Sup. Ct. Oct. 10, 2001).
5. Simon A. Cole, *Don't Shoot the Messenger by One of the Messengers: A Response to Merlino et al.*, 45 *Tulsa L. Rev.* 111 (2009).

legal scholars that it did not meet the *Daubert*⁶ (or, in my opinion, the *Frye*⁷) standard,⁸ and the supposed “reliability” of latent print individualization. In their reply, *Context and Controversy: Why Questions of Validity and Reliability are Seldom Resolved in an Adversarial Setting (Context and Controversy)*,⁹ Merlino and Springer clarify that the intent of their article was descriptive and not explanatory. They assert that “[i]t is clear . . . that our data are descriptive, but Dr. Cole incorrectly characterizes our study as explanatory.”¹⁰ They are baffled by my “assertions that we were inappropriately attempting to use *Hyatt* to demonstrate the reliability of latent print examination, or that we were using this case to explain why latent print testimony is admissible in most U.S. cases.”¹¹ While I accept that their intent was descriptive rather than explanatory, this clarification still does not answer the issue I raised in *Don’t Shoot*: that *Hyatt* is unrepresentative of their data set.¹² And, while I accept Merlino and Springer’s clarification that “[o]ur reason for choosing the *Hyatt* transcript was its extended discussions in direct and cross examination of both *Frye* and *Daubert* issues[,]” Merlino and Springer’s claim that the text of *Meeting* was “clear” in stating that my testimony in *Hyatt* was not meant to explain anything does not seem consistent with the text of a crucial passage of *Meeting*, which I now quote in full:

The content analysis presented in Part I demonstrates that . . . the majority of challenges to this type of evidence [latent prints] have been unsuccessful. Critical examination of published decisions and transcripts of these cases offers some insights into why this is the case. A comprehensive discussion of case law is beyond the scope of this paper, but we offer as one example the exclusion of the defense’s proffer of the testimony of Dr. Simon Cole in *People v. Hyatt*.¹³

I stand by the point I made in *Don’t Shoot* that I am not being oversensitive in imagining that a reader of this passage might reasonably conclude that the admissibility of latent print individualization might somehow be traced to deficiencies in my scholarship or testimony in *Hyatt*.

Merlino and Springer argue that I misread *Meeting* in several places.¹⁴ While I do not agree with all of their claims of misreading,¹⁵ I would like to apologize myself for

6. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (U.S. 1993).

7. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

8. Simon A. Cole, *Out of the Daubert Fire and into the Fryeing Pan? The Admissibility of Latent Print Evidence in Frye Jurisdictions*, 9 Minn. J. L. Sci. & Tech. 453 (2008)

9. Merlino & Springer, *supra* n. 3.

10. *Id.* at 144.

11. *Id.* at 139.

12. Cole, *supra* n. 5, at pt. II(B).

13. Merlino et al., *supra* n. 2, at 443 (emphasis added).

14. *Id.*

15. Merlino and Springer deny my claim that *Meeting* proposed to “redefine” the scientific concept of reliability. Cole, *supra* n. 5, at 115 n. 26. Merlino and Springer say my claim was “mistaken” and they don’t understand why I made it “since [*Meeting*] contains no language to this effect.” Merlino & Springer, *supra* n. 3, at 135–136. But *Meeting* does contain language to this effect; I based this claim on the subtitle of the article, “Refining and Redefining the Reliability of Forensic Evidence.” They note that *Meeting* discusses various ways in which forensic examiners have endeavored to improve their practices, and they conclude, “Given what we actually do say, it would seem evident that ‘refining and redefining the reliability of forensic evidence’ refers to the efforts of the practitioners to improve their fields, and not to efforts to redefine the meaning of a scientific concept.” *Id.* at 136 (emphasis in original).

the ways in which *Don't Shoot* apparently misconstrued some of *Meeting's* arguments. Chief among these is the surprising revelation that I apparently assumed incorrectly (while making clear that this was an assumption on my part) that Merlino et al. believed that the reliability of latent print individualization has been demonstrated.¹⁶ I now know that they do not believe this.¹⁷ This clarification has some interesting implications. Because professional latent print examiners were among the authors of *Meeting*, this clarification converges with other evidence to show that even some professional latent print examiners now agree that the reliability of latent print individualization has not been demonstrated.¹⁸

In light of this revelation, let us summarize the situation: Nearly all scholars, including both the Merlino group and myself, *agree* that the necessary data to measure the accuracy (or "reliability") of latent print individualization is not yet available. And yet, we are engaged in dispute over expert testimony that I gave in which I said precisely that. Why?

Straw Man Arguments

Unfortunately, the main reason there appears to be disagreement is that Merlino and Springer repeatedly misconstrue my position and that of other scholars, despite my efforts to clarify my position in *Don't Shoot*. In *Don't Shoot*, I noted "[t]he distinction between asserting that the reliability of latent print identification is unknown and asserting that latent print identification is unreliable," I asserted that in all my scholarly work and expert testimony I had consistently stated the former not the latter, and I offered evidence, in the form of a quotation from the transcript of *Hyatt* (which is publicly available on the internet), that clearly demonstrated that my testimony had asserted agnosticism as to reliability, rather than unreliability.¹⁹ And yet, in *Context and Controversy*, Merlino and Springer, despite complaining that I based my "response[]

I am glad to hear that Merlino et al. did not intend to redefine the meaning of a scientific concept. If we set aside the issue of how one "refines" the reliability of a process whose baseline reliability remains unknown, a fact recognized by Merlino et al. (*see infra* p. 151), this explains why the title of *Meeting* refers to "refining" the reliability of latent prints and handwriting analysis. It is still impossible, however, to reconcile the process of improvement that Merlino and Springer describe with the verb "redefine." "Redefining" simply does not describe the sort of process of improvement that Merlino and Springer describe, and they do not explain what Merlino et al. intended by including it in their subtitle. At best, the inclusion of this word was simply poor word choice, for which Merlino et al. should bear responsibility, not the reader.

16. In *Don't Shoot*, I noted that *Meeting* did not explicitly take a clear position on whether or not the reliability of latent print individualization has been demonstrated. Given the absence of a clear articulation of Merlino et al.'s position, I inferred their position from a variety of remarks in *Meeting* (while making clear that I was making an inference). Cole, *supra* n. 5, at 123–124. I still contend that I made the most reasonable inference possible, given the text of *Meeting*. I am genuinely surprised—and pleased—to hear that Merlino et al. agree that the reliability of latent print individualization has not been demonstrated.

17. Merlino & Springer, *supra* n. 3, at 135 ("as Dr. Cole has testified on a number of occasions, studies of the reliability and validity of many areas of forensic practice have yet to be conducted, and these questions therefore remain largely unanswered from a scientist's perspective").

18. Ltr. from Robert Garrett, President, Intl. Assn. for Identification, to Patrick J Leahy, Chairman, Sen. Comm. on the Jud., *IAI Letter Re: NAS Report*, (Mar. 18, 2009) (available at <http://www.clpex.com/Articles/TheDetail/300-399/TheDetail397.htm>) ("The IAI has, for many years, sought support for research that would scientifically validate many of the comparative analyses conducted by its member practitioners. While there is a great deal of empirical evidence to support these exams, independent validation has been lacking.").

19. Cole, *supra* n. 5, at 119 n. 55.

either intentionally or unintentionally, on claims that were never made, positions that were never stated”²⁰ and accusing me of “an attempt to create a ‘straw man’ argument,”²¹ still consistently attribute to me and other scholars the position that latent print individualization is unreliable. To enumerate:

After apologizing for the closing paragraph of *Meeting*, Merlino and Springer offer reformulated wording, in which opinions that in *Meeting* appeared to be theirs are in fact attributed to Judge Brennan, the trial judge in *Hyatt*. But their reformulation still characterizes my testimony as having “assert[ed] that forensic testimony is unreliable, biased, or invalid without any properly conducted empirical research”²² Their apology does not address my assertion in *Don’t Shoot* that *Meeting* mischaracterized my testimony.

Merlino and Springer assert that “the critics who have raised questions about the reliability of the forensic fields assert that they are fatally flawed without well-conducted empirical research”²³ No citations are offered in support of this statement. This is not surprising because so-called “critics,” including myself, have never asserted that latent print individualization is “fatally flawed.” A Lexis search for this phrase in conjunction with “fingerprints” and “latent prints” yielded zero results.²⁴ As I sought to clarify in *Don’t Shoot*, what we assert is that its reliability has not been adequately measured. Which of us is creating a “straw man”?

Merlino and Springer suggest that “[a]s a critic of latent print examination” I “may have been predisposed from the start to disagree that forensic science practitioners have made any progress”²⁵ Again, claiming that a reliability study has not been performed is quite different from claiming that no “progress,” has been made, however “progress” is to be defined. Where have I ever made such a claim?²⁶

Symmetry

Having established that scholars *agree* that reliability data on latent print individualization is lacking, Merlino and Springer then invoke the same superficially appealing symmetry principal that I criticized in *Don’t Shoot*.²⁷ Given that scholars have argued that rigorous application of *Daubert* demands that latent print evidence be excluded without reliability data, Merlino and Springer view it as “to the judge’s credit” that, in *Hyatt*, he supposedly applied the same “high standards” symmetrically to the defense expert (me).²⁸ “All expert testimony,” they argue, “should be held to these high

20. Merlino & Springer, *supra* n. 3, at 144.

21. *Id.* at 134.

22. *Id.*

23. *Id.* at 144.

24. A Lexis Academic search for ((fingerprint! or “latent print” or “latent prints”) W/p “fatally flawed”) in the “US Law Reviews and Journals, Combined” database, conducted on December 26, 2009, yielded zero results.

25. Merlino & Springer, *supra* n. 3, at 133.

26. Here, as elsewhere, the lack of reference to any of my scholarly work allows Merlino and Springer to do precisely what they accuse me of doing: attribute claims to me that I do not believe I made. But, in my case my attribution of arguments to them were, at least, grounded in their written text, even if, as they claim, I misinterpreted that text.

27. Cole, *supra* n. 5, at 119 n. 54 and accompanying text.

28. Merlino & Springer, *supra* n. 3, at 134.

standards”²⁹

The notion that, when data is simply lacking, neither side of a scientific controversy should be afforded license to speak seems appealing. Thus, it seems to make sense for Merlino and Springer to say “that scholarly works that do not offer empirical, systematically collected data of the kind that would either support or refute the reliability of latent print analysis” have nothing to offer in the debate over latent print validity and admissibility.³⁰ Merlino and Springer’s argument *would* make sense if the scholarly works in question made affirmative claims about reliability of latent print individualization. But, as Merlino and Springer seem to acknowledge, the vast majority of scholarly literature on the topic does nothing of the sort: it simply asserts, as they do, the absence of empirical data. Merlino and Springer do not explain why it should be “to the judge’s credit” to preclude scholars from testifying to what appears to be not only the consensus scholarly position, but also *their own* position—that reliability data is lacking—in a criminal trial in which latent print individualization testimony was proffered against the defendant.³¹

Only by attributing to “critics” views that they do not hold, as I illustrated above, can Merlino and Springer sustain the illusion of a symmetric controversy in which the exclusion of experts from both sides is appropriate. They do this by constructing a false dichotomy between “critics” and “many academicians and practitioners [by which they presumably mean the authors of *Meeting* since no other scholars are cited] who, based on the current lack of empirical reliability or biased data, remain unconvinced that these fields are so fatally flawed that gross miscarriages of justice frequently occur.”³² Setting aside the issue of how the authors of *Meeting* are able to draw such conclusions from a “lack” of data, this characterization simply distorts the position of the critics. No citations are offered as to which scholar has claimed that because of latent print analyses “gross miscarriages of justice frequently occur.” Speaking merely for myself, I have published a couple of rather lengthy treatments of the issue of latent print identification and wrongful conviction,³³ none of which are cited by Merlino and Springer, and I have made rather careful claims, none of which could be fairly characterized by the language Merlino and Springer employ.

29. *Id.* (emphasis in original). It is worth noting that, in both *Meeting and Context and Controversy*, Merlino et al.’s application of this broad principle seems rather selective. While they applaud Judge Brennan’s application of it to my proffered testimony, they never state whether they think this principle should render latent print individualization (for which they concede reliability data is lacking) inadmissible and, if not, why not. (Given that latent print practitioners are among the authors of *Meeting*, it would be quite sensational if they agreed that latent print individualization should be inadmissible under a rigorous interpretation of *Daubert* or *Frye*.) Nor do they criticize any of the many judges who would seem to have failed to apply this principle to latent print individualization.

30. *Id.*

31. I made this point in *Don’t Shoot*, and it still has not been answered.

32. Merlino & Springer, *supra* n. 3, at 135.

33. Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L. & Criminology 985 (2005) [hereinafter Cole, *More Than Zero*]; Simon A. Cole, *The Prevalence and Potential Causes of Wrongful Conviction by Fingerprint*, 37 Golden Gate U. L. Rev. 39 (2006).

Adversarialism

Context and Controversy is subtitled “Why Questions of Validity and Reliability are Seldom Resolved in an Adversarial Setting,” and adversarialism is often disparaged throughout the article. My “reading” of *Meeting* is criticized as “adversarial rather than objective.”³⁴ Merlino and Springer “attempt to remove our discussion from the adversarial context”³⁵ They lament that “opposing arguments have been made in adversarial circumstances that are not conducive to achieving the environment of trust and cooperation needed to discover where the truth really lies.”³⁶ And, they express their “sincere hope that proponents of both sides of the issue are able to step forward from the adversarial context of legal debate and into a new context of discovery, where collaboration, cooperation, communication, and critical thinking reside, and where true knowledge might really be achieved.”³⁷

Merlino and Springer’s use of the term “adversarial” is somewhat ambiguous: at times, it appears to simply be a reference to the undeniable vigor with which I attacked *Meeting*; at others, it appears to refer to the oft claimed pernicious effect of our adversarial legal system on debates over scientific knowledge. As with the notion of symmetry, decrying adversarialism and extolling presumed virtues like “trust,” “cooperation,” “collaboration,” “cooperation,” and “communication” has a superficial appeal. But Merlino and Springer’s critique of adversarialism deserves a little more scrutiny.

Recall that we have established that we are in a situation in which we *agree* that reliability data is lacking. Of course, no one would disagree with Merlino and Springer’s position “that empirical research establishing the extent of the reliability of the forensic sciences is crucial.”³⁸ Where disagreement lies is in what to do *now*, before the research is done and, to some extent, *how* to motivate the conducting of such research. Merlino and Springer contend that “opposing arguments [that] have been made in adversarial circumstances . . . are not conducive to achieving the environment of trust and cooperation needed to discover where the truth really lies.”³⁹ This might be true if there were two groups of scholars, one asserting the high reliability of latent print individualization, the other asserting the low reliability of latent print individualization. But, as I have shown above, that is not an accurate description of the nature of the scientific controversy in question. Rather, the nature of the controversy is that many scholars, including myself, have asserted that reliability data is lacking (a position with which Merlino et al., recall, agree). One does not require an “environment of trust and cooperation” in order to discover whether this claim is true. It is a claim that may easily be refuted by the production of the very reliability data that we claim is missing. As Thomas Bohan nicely articulates it, what is first needed is not a validation *study*, but

34. Merlino & Springer, *supra* n. 3, at 133.

35. *Id.* at 134.

36. *Id.* at 137.

37. *Id.* at 145.

38. *Id.* at 134; see Natl. Research Council of the Natl. Acad., *Strengthening Forensic Science in the United States: A Path Forward* 85, 108–109 (Natl. Acad. Press 2009) (also calling for research).

39. Merlino & Springer, *supra* n. 3, at 137.

rather a “validation investigation.”⁴⁰ Such an investigation would “determine whether a technique or theory the scientific validation of which has been questioned has in fact already been scientifically validated.”⁴¹ As Bohan notes, “This is . . . necessary . . . given that the practitioners of the respective techniques claim with some heat that their practices have already been validated.”⁴² In other words, at this point we are not debating the validity of latent print individualization; we are debating whether validation has already occurred. On that point, as noted above, Merlino, Springer and I, as well as most scholars, appear to be in agreement that it has not, and this is what I told the *Hyatt* jury.

As I acknowledged in *Don't Shoot*, a claim about a lacuna in the literature can never be “proven” in a definitive sense. Instead, scholars simply trust such claims after enough reputable scholars seem to have done diligent enough literature searches (or “validation investigations”). In this case, however, legal adversarialism actually seems conducive to truth, rather than detrimental to it. As I have argued elsewhere,⁴³ one extra reason to trust *this particular* claim about a lacuna in the literature is that it has been made in “adversarial context[s]” with reasonably high stakes. This should give an external observer all the more reason to believe that if those who assert the lacuna have overlooked something, their opponents would have identified the missing item of research.

Given that most scholars are not making affirmative claims about the accuracy of latent print individualization, but, rather, asserting the same absence of empirical data that Merlino and Springer lament, are such “adversarial” claims actually detrimental to the achievement of “true knowledge”? Here we have a testimonial claim—latent print individualization—for which, Merlino and Springer agree, reliability data is lacking. And yet, expert testimony by latent print examiners that the defendant’s friction ridge skin is the only possible source of a particular latent print to the exclusion of all other possible sources, sometimes accompanied by the claims that the “error rate” associated with this claim is “zero,”⁴⁴ has been routinely allowed by judges and heard by jurors for nearly a century despite what appears to be scholarly agreement that there is no data to support such claims. Under these circumstances, it is unclear why a healthy dose of legal adversarialism is not precisely what is called for, and it is not clear why the jury should not hear about the scholarly agreement that data is lacking.

Similarly, it is not entirely clear that what the current situation calls for is more “trust and cooperation.” While “trust and cooperation” sound like virtues in the abstract, given that what is needed, by all accounts, is measurement of the accuracy of latent print individualization, it is not clear that “trust and cooperation” are necessary to achieving

40. Thomas L. Bohan, *Strengthening Forensic Science: A Way Station on the Journey to Justice*, 55 J. Forensic Sci. 5, 6 (2010).

41. *Id.*

42. *Id.*

43. Simon A. Cole, *Is Fingerprint Identification Valid? Rhetorics of Reliability in Fingerprint Proponents' Discourse*, 28 L. & Policy 109 (2006).

44. Natl. Research Council of the Natl. Acads., *supra* n. 38, at 143 (Feb., 2009); Thomas L. Bohan, *supra* n. 40, at 6; Simon A. Cole, *More Than Zero*, *supra* n.33.

the scientific end of producing that data. In theory, accuracy data can be obtained simply by taking measurements; “trust and cooperation” are not, strictly speaking necessary. Moreover, given that, as I have argued elsewhere,⁴⁵ the current situation allows latent print examiners to testify that latent print individualization decisions are infallible and have an error rate of zero, latent print examiners and the prosecutors who proffer them to testify in court might well view the procurement of accuracy data as not in their interest. Likewise, criminal defendants might also have reasons to view accuracy data as not in their interest.

To be sure, there is indeed a sense in which “trust and cooperation” are necessary to the procurement of accuracy data, in that such data will be difficult to procure without the cooperation of professional latent print examiners. However, this is a political problem, not a scientific one, and it is far from clear that the best solution to this particular problem is “trust” rather than the maligned “adversarialism.” Given that courts currently permit latent print examiners to testify that an “individualization” constitutes the elimination of all possible source of a latent print in the universe but one and to assert an error rate of zero, it is not clear that any amount of “trust” will overcome the profound legal disincentive to gathering accuracy data created by this legal regime. *Excluding* or *restricting* such testimony, through admissibility challenges, however, may well prove quite effective at motivating the production of the empirical data that Merlino and Springer view as so “crucial.”

My larger point, of course, is that, while it is easy and common to malign (legal) adversarialism and adversarialism certainly has many vices, it has virtues as well, and there are situations in which adversarialism may be effective at bringing about desirable outcomes. While this is not the place for an extended discussion of that possibility, there do seem to be good reasons to think that, contrary to Merlino and Springer’s view of adversarialism as pernicious, the fingerprint controversy may be one of those situations in which adversarialism would have a palliative effect—or, at least, it *would* have such an effect *if* admissibility doctrine were applied in a more rigorous manner than it has been thus far.

If, on the other hand, by characterizing my reading of *Meeting* as “adversarial rather than objective,” Merlino and Springer mean that my argumentation is oriented around a legal, rather than a scientific, dispute, the claim would seem to apply better to their reply than to mine. As I noted in *Don’t Shoot*, though I have written a number of scholarly works concerning the validity of latent print individualization, *Meeting* cited or engaged with none of these. Instead, my views were characterized solely through a trial judge’s secondhand characterization of what I had purportedly said in testimony in a pre-trial hearing in 2001.⁴⁶ I also showed, with quotations from that trial transcript, that Merlino et al.’s characterization of my testimony as stating that latent print individualization is “unreliable” was plainly false.⁴⁷ This charge is not answered in *Context and Controversy*, and Merlino and Springer still do not cite any of the scholarly work of either myself or any other scholarly “critic” of latent print individualization,

45. See Cole, *supra* n. 43.

46. Cole, *supra* n. 5, at 131–132.

47. *Id.* at 119 n. 52 and accompanying text.

again mischaracterizing our views. This mischaracterization creates the appearance of a symmetric scientific controversy over the claimed accuracy of latent print individualization in which “[s]cholars on *both sides* of the issue offer thoughtful and meaningful statements of their positions” but which has also been marred by “adversarial circumstances that are not conducive to achieving the environment of trust and cooperation needed to discover where the truth really lies.”⁴⁸ Instead, it seems to me that we have a situation in which scholars *agree* that reliability data is lacking, and yet practitioners and courts insist that the reliability of latent print individualization is somehow known to be very high, thus rendering it legally admissible. Given Merlino and Springer’s expressed hope to “find a way to join together in an effort to set aside current biases and search for a true understanding of the forensic sciences using the principles of science[.]”⁴⁹ I remain disappointed that *Context and Controversy* still does not engage the scholarly literature according to the conventions of scientific debate. Under those circumstances, which of us, I ask, is writing in an “adversarial rather than objective” manner?

48. Merlino & Springer, *supra* n. 3, at 137.

49. *Id.* at 144.

