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Postscript

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In their article *Meeting the Challenges of the* Daubert *Trilogy: Refining and Redefining the Reliability of Forensic Evidence*,[1] Professor Mara Merlino and her co-authors subjected another contributor, Professor Simon Cole, to what has the flavor of (if avowedly not the intent of) an *ad hominem* attack. A response to that attack and a critique of the article on the merits are presented in this issue in Professor Cole's reply, *Don't Shoot the Messenger by One of the Messengers: A Response to Merlino et al.*[2] I write separately because I believe that in his quite understandable reaction to the Merlino article, Professor Cole makes claims about the significance of publication in law reviews which I don't believe are accurate and are important to correct. Moreover, although I think this is arguably an incident in which there was no one clearly at fault, (perhaps not even Merlino et al.) I wanted to say that if anyone *was* to blame, it was I, *not* the student editors of the Tulsa Law Review. First, some background is in order.

A couple of years ago the student editors of the Tulsa Law Review solicited ideas from the faculty for a symposium issue for the Review. I made a proposal that ultimately resulted in the symposium issue entitled Daubert, *Innocence, and the Future of Forensic Science*.[3] I was delighted that Professor Simon Cole agreed to participate. I am an admirer of his work because I teach in both the law school and in a forensic science program.[4] I assign his work to my students and share his interest in "evidence-based evidence."[5] Indeed, if there is one lesson that I hope my students in both programs leave with, it is a heightened degree of skepticism towards claims of certainty.

So, I was extremely troubled when I discovered what appeared to me to be the *ad hominem* (or at least "unsporting," as Cole puts it) attack on his work contained in the last couple of paragraphs of the piece submitted by Merlino et al.[6] I felt as though I had

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1. Mara L. Merlino, Victoria Springer, Jan Seaman Kelly, Derek Hammon, Eric Sahota & Lori Haines, *Meeting the Challenges of the* Daubert *Trilogy: Refining and Redefining the Reliability of Forensic Evidence*, 43 Tulsa L. Rev. 417 (2007).

2. 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).

3. 43 Tulsa L. Rev. 229 (Winter, 2007).

4. I am an adjunct professor at Oklahoma State University's forensics program at OSU's Center for Health Science where I teach a course called "Scientific Evidence" which is designed to educate forensics students about relevant legal concepts. http://www.healthsciences.okstate.edu/forensic/index.cfm (last accessed on March 23, 2010).

5. Simon A. Cole, *Toward Evidence-Based Evidence: Supporting Forensic Knowledge Claims in the Post-*Daubert *Era*, 43 Tulsa L. Rev. 263 (2007).

6. *See* Merlino et al., *supra* n. 1.

invited someone to my home only to have another guest insult him. When I became aware of it, I urged the editors of the Review to offer to publish a rebuttal. They did not need to be convinced. The Board had already come to the same conclusion: Professor Cole should be given a chance to publish a response. As noted earlier, that response is in this issue.[7] What I want to dispute is his characterization of the role of law reviews and to say why I do not think that the appearance of the Merlino et al. piece presents the "internal contradiction"[8] that Cole claims it does.

The crux of the issue is whether there is reason to believe that law reviews serve the function Cole claims that they do–to vouch for the merits of the arguments in the articles they contain.[9] I argue they do not. As Cole himself notes, legal scholars have for some time bemoaned the fact that student editors control the content of law reviews. Because those editors are still only students, they are not in a position to perform the same editorial function performed by editors of peer reviewed journals.[10] (In fact, the ubiquity of this complaint undermines Cole's claim about an "internal" contradiction.) The consumers of law reviews are well aware of this feature of most law reviews. Moreover, as Cole himself notes, it should be said, peer review is no guarantee against fraud or bad scholarship or the parroting of received wisdom. Sometimes the system of peer review is abused or fails to catch errors.[11] There has been rather a rash of such cases recently ranging from those in which data were falsified and slides altered to those in which the authors merely omitted to disclose financial support which some readers thought was necessary in order to properly evaluate a study's conclusions.[12]

Not everyone agrees that it is a problem that law reviews are student-run. Some argue law reviews serve a pedagogical function; that "the law review is a teaching institution."[13] Journal membership offers students an opportunity to polish their writing

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7. Cole, *supra* n. 2.

8. *Id.* at 9.

9. Cole writes that "[b]ecause of the imprimatur of the journal, the reader would expect that the articles contained in the issue contain *trustworthy* expert knowledge about the problem of legal evaluation of expert evidence." *Id.* at 6.

10. *Id.*

11. Nancy McCormack, *Peer Review and Legal Publishing: What Law Librarians Need to Know About Open, Single-Blind, and Double-Blind Reviewing*, 101 Law Libr. J. 59 (2009).

12. *See* Editorial, *Writing a new ending for a story of scientific fraud*, 367 The Lancet 1 (Jan. 7, 2006) (describing Hwang Woo Suk's falsification of stem cell research findings in Science); Editorial, *Fraud in science-Reflections on some whys and wherefores*, 5 DNA Repair 291 (2006) (essay speculating that some of the root causes of falsification involve self-deception as much as the deception of others); Scott Hensley, The Wall St. J. Health Blog, *Senator Grassley Blasts Psychiatrist for Failure to Disclose Industry Funding*, http://blogs.wsj.com/health/2008/09/11/sen-grassley-blasts-psychiatrist-for-failure-to-disclose-industry-funding (Sept. 11, 2008); *see also* Marcel C. LaFollette, *Stealing into Print: Fraud, Plagiarism and Misconduct in Scientific Publishing* (U. Cal. Press 1996) (book length treatment of some of the structural weaknesses in scientific publishing that might conceal or delay the discovery of fraud, plagiarism or other misconduct). Reporting on scientific issues in the mainstream press has suffered from a similar crisis that affects reliability; that is, the over reliance by reporters on press releases. *See* Christine Russell, *Science Reporting by Press Release*, http://www.cjr.org/the_observatory/science_reporting_by_press_rel.php (Nov. 14, 2008) . This is a phenomenon that I have studied in my own work. *See e.g.* Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 Lewis & Clark L. Rev. 367 (2006).

13. Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y. L. Sch. L. Rev. 349, 360 (2007-2008).

skills as well as their judgment. Whatever one's view of legal scholarship,[14] it is axiomatic that law students are, in the main, being trained as practitioners, not as academics. With respect to the quality of their arguments, one would hope these two realms are not that far apart. But they are clearly not identical. Journal membership allows students to exercise their judgment and their analytical skills at a higher level than is demanded of them in the classroom alone. And at the University of Tulsa, like most law reviews, the law review editors are autonomous.

Yet at the University of Tulsa, like most law reviews, the faculty members may have a great deal of influence on the student judgments. There is some danger that it can be too much and faculty will bully students into accepting articles they do not like or to accept work from faculty when they would rather take outside authors. As a consequence, law review editors have tended to jealously guard their autonomy, even while they seek faculty assistance and guidance, and most faculty try to be respectful of that autonomy and try not to interfere too much. This was the balance I was attempting to maintain with the symposium issue.

I was not "the editor" of the issue. Nor was I writing the introduction. Had I been in either position, I might have felt it was my function to read every submission from beginning to end. I had suggested the topic and helped to solicit participants. Thereafter, my function, as I saw it, was to help when asked and to try to ensure that authors had another person to turn to if they felt they were not being properly treated by the Review staff. I did not want an author cut from the issue because he did not meet a deadline. I was also there to deflect heat from the Review staff if authors were difficult or unreasonable. These were the sort of issues that warranted some involvement by me. What occurred with this article was *not* the sort of problem I anticipated.

The article from Merlino et al. initially came to the Review via the Call for Papers, posted on the Internet. It came from Eric Sahota, an employee of the Las Vegas Police Department. Because Sahota was not an academic, I suggested the Review should look at his proposal carefully. Sahota said that an academic author would be involved. I asked the Review to send it to me when the draft came in. They did and I looked at it chiefly with an eye to whether it appeared to follow academic conventions in its format and citations. It did. More than that it seemed to do something I had hoped for; it brought together two groups–forensics practitioners and academics–into one conversation. Merlino had a Ph.D. Seeing that, I did not read much beyond the introductory paragraphs. I did not feel my role was to go beyond that. I was not surprised, given their

14. Law reviews arguably also serve as a resource to the legal profession in producing "doctrinal" scholarship, although the line between doctrinal scholarship and other kinds is not so clear cut, it is sometimes assumed. As legal academics have become more interdisciplinary, some have argued that the work published in law reviews has become of less use to practitioners. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); *see also* Erwin Chemerinsky, *Why Write?* 107 Mich. L. Rev. 881, 885–886 (2009) (noting that mainstream legal scholarship had tended to become more detached from the profession). With respect to the forensic sciences, I think the argument could be made that the great bulk of publication has been of acute significance for the legal profession. Arguably, the problem was not that it was too abstract, but that the profession did not want to listen. Natl. Research Council of the Natl. Acads., *Strengthening Forensic Science in the United States: A Path Forward* 109–110 (Natl. Acads. Press 2009) (discussing courts' seeming reluctance to demand the rigor from forensic experts that is demanded of experts in civil contexts).

background, that the authors made the arguments they did, although I found them flawed for the reasons Cole describes in his reply. But I did not think that meant the Review should not publish it. Rather I thought that the article should be allowed to stand or fall on its own merits, or lack thereof. Alas! I did not read far enough. Had I read all the way to the end, I would have been in a position to let the editors know they should show the article to Cole and give him a chance to respond.

Nevertheless, if I *had* read the article to the end, I would probably have been the only person, aside from the author of the introduction, to be in a position to recognize the need to give Professor Cole an opportunity to respond. Law students are accustomed to the sorts of conflicting accounts presented in these articles. Anyone who has ever read the opposing briefs in an appeal will know that conflicting accounts of the facts and the law, sometimes *very conflicting* accounts of both facts and law, are routine in the practice of law. Sometimes this is because of bad or dishonest lawyering. More often it is simply the plasticity of facts and legal arguments. The students would not necessarily have recognized this as unusual. Moreover, the typical job of the junior editors on the review who work under the article editors is to verify quotes. This they did. Merlino and her co-authors did not misquote the judge.

Only Merlino and her co-authors can say what they intended. Their apology and their defense of their original article also appears here.[15] I have no reason to think that Merlino et al. would have objected *ex ante* to Cole having a chance to respond. Indeed, they might have been *expecting* it if they were relying on previous experience with peer reviewed journals. I think Merlino and her co-authors simply mistook what courts say as "evidence" supporting the validity of the science, when all it really is is evidence of what the court *thinks* of the validity of the science. That these two are not the same thing is the source of the problem.

I am happy that Professor Cole has had an opportunity to respond and that Professors Merlino and Springer had the opportunity to offer their own apologies and to clarify their intentions with respect to their remarks. I am sorry this episode occurred; both on behalf of Professor Cole and on behalf of the Review students who worked so hard on the Symposium and were justifiably proud of producing an issue which I think contains several outstanding contributions.

15. 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 (2009).