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Tribute to Professor Paul Giannelli

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Writing a tribute to Paul Giannelli is no easy feat. In truth, that is partly because his retirement is irrefutable evidence of the approaching autumn of my own academic career. But it also presents a challenge for less overtly selfish reasons: Paul Giannelli simply has written so darn much, and so well.

It is impossible to concisely measure the impact of a scholar as prodigious as that of Professor Giannelli. I will thus leave it to others to address his profound contributions to the substantive criminal law, juvenile law, evidence, and Ohio's criminal justice system. Instead, I plan to focus on the work that first brought Paul Giannelli to my own attention fifteen years ago, and from which I have immensely profited and learned from ever since: his work in expert and forensic evidence.

I have vague recollections of Professor Giannelli's name appearing in my law school textbooks and clinical courses, but at that time I was focused less on the author of an idea than on mastering the idea itself. It was not until I embarked on my own journey from practice to academia that Paul's work affirmatively stopped me in my tracks. I was a young defense lawyer then, in possession of a Westlaw password and the dream of an academic career. Forensic science had just captured my attention, and that of the nation. The well-known television series "CSI: Crime Scene Investigation" debuted in the fall of 2000 and forever secured a place for forensic science in popular culture.¹ The national DNA database had just begun to take root, and forensic evidence was becoming an increasing part of criminal proof. It felt like the country was waking up to the centrality of scientific evidence in criminal cases, and, as an aspiring scholar, I had a notebook full of unanswered questions.

I started using that Westlaw password in search of answers. As I immersed myself in the existing literature, little piles of articles sorted by author sprouted up around my apartment. Among these paper brownstones stood one Empire State Building—or perhaps I should say, one Key Tower. Paul Giannelli's writings on forensic evidence, on expert witnesses, and on the rights of defendants as regards scientific proof were prolific and unmatched. He wrote about polygraphs and hypnosis, about ballistics and comparative bullet lead, about

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1. *CSI: Crime Scene Investigation*, IMDB, http://www.imdb.com/title/tt0247082/?ref_=nv_sr_1 [<https://perma.cc/J758-AKGG>] (last visited Apr. 3, 2018).

bitemarks and fingerprints, about DNA and handwriting. There was not a corner of the field that he had not developed. And the architecture of his work was distinctive. Paul's authoritative voice reflected his training in forensic science and his comfort with scientific methods, and that alone distinguished him from so many others writing in the same field.

As I pored through what felt like the entirety of his writings in forensic science, I quickly learned that there was not a discipline that he had not covered, or an angle that he had not probed. Every time I had an idea or question, it turned out that Paul Giannelli had already written an article that had contemplated its answers. The cycle continued for weeks—each new line of inquiry that rose up in my mind was subsequently quashed by another one of his *tours de force*. At some point, my dispiritedness at being so consistently surpassed turned to curiosity. Who *was* this person who had written so exhaustively, persuasively, and profoundly about what I had hoped to carve as my niche in the law?

Eventually, I had the honor of actually meeting Professor Giannelli, and learning that he was as generous in person as he was in intellect. He does not jealously guard his fiefdom, but rather welcomes all those younger scholars for whom his work has lit an academic path, as it did for me. I have had the pleasure of working with him on several amicus curiae briefs, and at every turn he has inspired me to think as deeply and carefully as he did at the beginning of my journey.

Perhaps most remarkably, Professor Giannelli has achieved in his career that to which most scholars aspire, but all too often eludes us: to see our work affect the actual workings of the law. When I first came to Professor Giannelli's scholarship in the 2000s, his perspective was largely considered an outlier. Professor Giannelli's work systematically exposed the failings of forensic disciplines, the patent inadequacy of support for forensic science performed on behalf of the criminal defendant, and the laughable failure of the rules and institutions intended to safeguard the integrity of forensic evidence.

But as the work of Professor Giannelli and several key others gained increasing attention and accrued scholarly plaudits, the purveyors of faulty forensics gradually found themselves on the defensive. The advent of DNA testing and the revelations of the Innocence Project movement provided definitive proof of the critiques that Professor Giannelli had long made. Suddenly, those early outlier positions became the accepted wisdom, and his work served as a blueprint for reforming a system desperately in need of overhaul. Professor Giannelli did not take direction from his study of the law; the law took direction from studying Professor Giannelli.

For example, in 1980, Professor Giannelli criticized the *Frye* test for admitting scientific evidence in a piece in the *Columbia Law*

Review. He argued against the commonly proposed alternative to *Frye*, which would look only to relevancy, and warned that such an approach would admit too much unreliable evidence. Instead, he proposed his own approach:

[T]he proponent of the evidence should have the burden of production and persuasion. Second, the issue of whether the burden of proof has been satisfied should be decided by the judge as a preliminary question of fact. The last, and undoubtedly the most difficult, issue is the standard of proof. As an initial proposition, the *Frye* test must be rejected. . . . The prosecution in a criminal case should be required to establish the validity of a novel scientific technique beyond a reasonable doubt.²

Thirteen years later, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³ the Supreme Court essentially agreed, overturning *Frye*.⁴ *Daubert* affirmed that the proponent does in fact bear the burden, that the court must decide admissibility as a preliminary fact, and that the ultimate touchstone was in fact reliability (although provable only by a preponderance of the evidence).

In 1988, Professor Giannelli warned, in the *Ohio State Law Journal*, that “[t]he routine admission of laboratory reports can be justified only if the presumption of reliability that generally attaches to business and public records also applies to these reports. Such a presumption is unwarranted.”⁵ He acknowledged hurdles to a more rigorous standard of exclusion in light of existing evidence rules, but nevertheless argued that:

Even if laboratory reports are admissible under a hearsay exception, the Confrontation Clause may require exclusion. A hearsay declarant is, in effect, a ‘witness against’ the accused. Thus, a literal interpretation of the Confrontation Clause would preclude the prosecution from introducing any hearsay statement, notwithstanding the applicability of a recognized

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2. Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1247 (1980). Interestingly, Professor Giannelli proposed a lesser standard—a preponderance—for civil litigants and criminal defendants.
 3. 509 U.S. 579 (1993).
 4. *Id.* at 589.
 5. Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 700 (1988).

hearsay exception. The Supreme Court has never adopted this interpretation.⁶

Of course, twenty-two years later in *Melendez-Diaz v. Massachusetts*,⁷ the Supreme Court adopted just this interpretation of the Confrontation Clause.⁸ *Melendez-Diaz*, and the line of cases that followed, recognized the unique relationship of the forensic analyst to the criminal case described by Professor Giannelli's analysis, and anticipated by his prescient prediction of Confrontation Clause concerns.

These examples are hardly isolated. In 1997, Professor Giannelli called for an independent crime laboratory system.⁹ In 2009, a blue-ribbon panel of experts convened by the National Academy of Sciences heard exhaustive evidence on the state of forensic science and made that very same proposal the capstone of their recommendations.¹⁰ In 1991, he tackled the inadequacy of criminal discovery;¹¹ in 2017, the Department of Justice agreed, acceding to the advice of the National Commission on Forensic Science (on which he served) to provide more extensive documentation with regards to scientific evidence.¹² In 2004, he criticized the anemic implementation of the right to expert assistance for defendants;¹³ recently the Supreme Court seemed to inch closer toward a more expansive vision of that constitutional right.¹⁴

Over the years, Professor Giannelli's work has exposed the hypocrisy of those declaiming "junk science" in civil cases while tolerating

6. *Id.* at 685–86.

7. 557 U.S. 305 (2008).

8. *Id.* at 329.

9. Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997).

10. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

11. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791 (1991).

12. See Memorandum from Sally Q. Yates, Deputy Attorney Gen., to Dep't Prosecutors & Dep't Forensic Sci. Pers. (Jan. 5, 2017), <https://www.justice.gov/archives/ncfs/page/file/930411/download> [https://perma.cc/BQ7G-S68R].

13. Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1417–19 (2004).

14. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (reversing the decision of lower courts on the basis of inadequate implementation of the existing standard for expert assistance and avoidance of the question of broader protection).

equally unfounded “science” in criminal cases;¹⁵ the chicanery of particularly notorious forensic examiners;¹⁶ and structural infirmities in the delivery of forensic evidence.¹⁷ And over the years, each and every one of his views has been, in time, embraced and accepted as the best practice by leaders in the field.

As political factors have propelled state actors to reconsider the validity of conventional forensic science disciplines and work toward improving the delivery of forensic science to criminal courts, Paul Giannelli has stood ready to lend his immeasurable expertise. He has never contented himself with being an ivory tower academic, but has always equally busied himself with the lawyers, judges, and legislators responsible for actually creating and implementing the law. He served with distinction as a reviewer, advisor, author, or committee member for every landmark investigation involving forensics including: the National Research Council’s landmark report on DNA Evidence in 1996, the National Academy of Sciences report on Strengthening Forensic Science in 2009, and the ABA’s Criminal Justice Standards on Biological Evidence. When at last political actors mustered the will to create the National Commission on Forensic Science, it surprised no one that Paul Giannelli was appointed to one of the few spots reserved for legal scholars.

In sum, Professor Giannelli’s towering presence in the field—so long a beacon to those like myself who aspired to follow in his footsteps—will endure long beyond his well-earned retirement. As a more seasoned academic than when we first crossed paths, I cannot help but envy the arc of his career. Not just the productiveness, the distinction, or the many accolades—which describe most accomplished scholars by the time they retire—but what must be the immensely satisfying feeling of entering retirement from his special perch. To reflect at the end of a body of work that opens as utterly contrarian and closes as thoroughly orthodox, and to know that you have helped bend the law your direction. Paul Giannelli has had that rare fortune of shaping and improving the law that he found, and thus the justice and fairness of the criminal justice system in which it operates, as the work that he has generated became the foundation for reforms aimed at remedying the problems that inspired him. It has been my honor and pleasure to have had the opportunity to watch from the sidelines,

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15. Paul C. Giannelli, “*Junk Science*”: *The Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 105, 111–12 (1993).
 16. See Giannelli, *supra* note 9, at 442–43, 449–50, 454–55 (discussing Fred Zain, Ralph Erdmann, and Michael West).
 17. See, e.g., Paul C. Giannelli, *Scientific Evidence in Civil and Criminal Cases*, 33 ARIZ. ST. L.J. 103, 105–06 (2001); Paul C. Giannelli, *Forensic Science*, 33 J. L. MED. & ETHICS 535, 535–41 (2005).

then join him in the game, and now salute him as he leaves the field as the next generation carries the ball forward.