

**GUILTY UNTIL PROVEN INNOCENT: EVIDENCE TAMPERING,
DRUG AND CRIME LAB MISCONDUCT AND LAW
ENFORCEMENT ETHICS**

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On September 17, 2012, Massachusetts Public Health Commissioner John Auerbach resigned from his position amid an investigation into a massive evidence tampering scandal.¹ The former chemist at the heart of the scandal, Annie Dookhan, handled evidence in more than 34,000 drug cases.² Revelations of Dookhan's alleged misconduct prompted the closure of the William A. Hinton State Laboratory Institute in Jamaica Plain, Massachusetts.³ Dookhan has confessed that she failed to perform required drug tests, tampered with evidence bags, altered samples so they would test positive for drugs when they contained no illegal substances, altered the weight of drugs, and forged other chemists' signatures on

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1. Kay Lazar, *John Auerbach Resigns as State Public Health Commissioner amid Drug Lab Scandal*, BOS. GLOBE (Sept. 17, 2012, 3:37 PM), <https://www.boston.com/whitecoatnotes/2012/09/17/john-auerbach-resigns-state-public-health-commissioner-amid-drug-lab-scandal/TSywZ3z1hoaEsdbIQOuQOM/story.html>; Steve Le Blanc, *Mass. Health Commissioner Resigns, Cites Drug Lab*, BLOOMBERG BUSINESSWEEK (Sept. 18, 2012), <http://www.businessweek.com/ap/2012-09-18/mass-dot-health-commissioner-resigns-cites-drug-lab>.

2. Le Blanc, *supra* note 1.

3. *Id.*; see also Brian Ballou & Andrea Estes, "I Messed up Bad, It's My Fault," *Chemist Says; StatePolice Report Admission of Improper Testing, Altering of Results*, BOS. GLOBE, Sept. 27, 2012, at A1.

drug samples.⁴ More than twenty inmates have been freed or had their sentences suspended or bail reduced because of the scandal, but at least 1,141 inmates are still incarcerated based on evidence processed by Dookhan.⁵ Though Dookhan came under scrutiny in 2011 when she removed ninety samples from an evidence room without authorization, she continued to work at the lab until March 2012.⁶ Dookhan even testified as an expert witness after she was suspected of committing misconduct.⁷

How could such extensive evidence tampering occur? Contrary to what is portrayed on TV dramas such as *CSI: Crime Scene Investigation*,⁸ forensic science is fallible. Scientific evidence is like eyewitness testimony—evidence can be tainted by mistakes, prejudice, and corruption. Evidence tampering does not always involve drugs. As crime labs are coming under tighter scrutiny, miscarriages of justice involving DNA and hair and fiber evidence have also been exposed.⁹ The remainder of this commentary analyzes causes of misconduct and recommends enhanced background checks, a discipline matrix, training, and oversight that will protect evidence integrity and help restore justice to the criminal justice system.

4. Ballou & Estes, *supra* note 3; *see also* Le Blanc, *supra* note 1.

5. Ballou & Estes, *supra* note 3; *see also* Andrea Estes & Scott Allen, *Chemist at Center of State Lab Scandal Apparently Lied on Resume*, BOS. GLOBE (Sept. 25, 2012, 8:19 PM), <https://www.boston.com/metrodesk/2012/09/25/chemist-center-state-lab-scandal-apparently-lied-resume/1cX8CpAqGAKF3rEnb3S6mO/story.html>.

6. Estes & Allen, *supra* note 5.

7. *Id.*

8. *CSI: Crime Scene Investigation* (CBS Television).

9. *See, e.g.*, David K. Colapinto, Stephen M. Cohn & Michael D. Cohn, *Protecting the “Accused” and the Public from Forensic Fraud: Misconduct in the FBI Crime Lab*, 55 GUILD PRAC. 32 (1998); Spencer S. Hsu, *Defendants Left Unaware of Flaws Found in Cases*, WASH. POST April 17, 2012, at A1 [hereinafter Hsu, *Defendants Left Unaware*](detailing failure of DOJ to notify convicted defendants that forensic evidence used against them may have been unreliable); Spencer S. Hsu, *Flawed Forensics Spur Case Reviews*, WASH. POST July 11, 2012, at A1 (stating that “[t]he Justice Department and the FBI have launched a review of thousands of criminal cases to determine whether any defendants were wrongly convicted . . . because of flawed forensic evidence”); *NBC Nightly News: Conviction Based on Hair Analysis Under Review* (NBC television broadcast July 12, 2012), *available at* http://usnews.nbcnews.com/_news/2012/07/12/12708918-fbi-to-review-thousands-of-old-cases-for-flawed-evidence?lite (discussing flaws in forensic technology, particularly hair fiber comparisons); Nishi Gupta, *Alleged Misconduct at State Crime Lab Could Challenge Hundreds of Drug Convictions*, KTVB.COM (June 22, 2011, 9:51 PM), <http://www.ktvb.com/news/Letters-sent-to-attorneys-allege-misconduct-at-state-police-forensics-lab-124397669.html> (discussing alleged misconduct at Idaho State Police crime labs); *Unreliable or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Forensic-Science-Misconduct.php> (last visited Nov. 27, 2012) (discussing defective and fraudulent forensic science and its impact on the criminal justice system).

Thorough preemployment background checks should be required for all law enforcement, drug lab, and crime lab personnel. If Annie Dookhan's credentials were checked before she was hired, the lab would have discovered that she had falsified her resume. Not only did she lack the master's degree required for her position, she also had never enrolled in a single graduate course.

Unfortunately, rejecting prospective employees who commit resume fraud, have negative employment or personal references, have negative credit histories, fail psychological tests, fail polygraph examinations, or fail to pass another aspect of preemployment screening, will not prevent all forms of misconduct. Hiring qualified, stable, and reliable employees is the first step in protecting lab and law enforcement integrity.

As an FBI Special Agent, I learned about noble cause corruption. Misconduct is not always motivated by self-interest such as laziness, bias, cravings for drugs, sex, alcohol, gambling, or any other vice. Some law enforcement officers and prosecutors believe it is their mission to get criminals and contraband off the streets and obtain convictions, even if they have to break the law.¹⁰ Individuals who commit noble cause corruption practice an ends-oriented, rather than a means-oriented approach, and rationalize their misconduct as being for society's betterment.¹¹ Employees at drug labs and crime labs occasionally share these beliefs, and law enforcement officers who are corrupt may encourage lab personnel to falsify test results because they "know" defendants are guilty.

If lab personnel do not have faith in prosecutors' ability to win cases because they believe defense attorneys are more skilled, they are more likely to feel it is their "duty" to "help" the police and prosecutors get convictions. In the current Massachusetts state drug lab scandal, some of Dookhan's misconduct likely was motivated by noble cause corruption. For instance, when she altered the weight of drugs to make samples appear heavier, defendants were eligible for longer sentences.

Remedies for noble cause corruption are more likely to succeed if they appeal to potential offenders' moral beliefs. Deterrents should target lab personnel's, law enforcement officers' and prosecutors' value systems and motivations. Though law enforcement training

10. See MICHAEL A. CALDERO & JOHN P. CRANK, *POLICE ETHICS: THE CORRUPTION OF NOBLE CAUSE* 149–212 (rev. 3d ed. 2010).

11. See *id.*; see also Thomas J. Martinelli, *Unconstitutional Policing: The Ethical Challenges in Dealing with Noble Cause Corruption*, *POLICE CHIEF*, Oct. 2006, at 148, available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1025&issue_id=102006; Steve Rothlein, *Noble Cause Corruption*, PUB. AGENCY TRAINING COUNCIL, <http://www.patc.com/weeklyarticles/print/noble-cause-corruption.pdf> (last visited Nov. 27, 2012).

has improved since the 1970s, some police academies still fail to provide adequate training on ethics and criminal procedure.¹² Forensic scientists and other lab personnel are even less likely to be knowledgeable about ethics and constitutional rights if their education focused on hard science. Law enforcement agencies and drug and crime labs should adopt a code of ethics that is value-driven, rather than rules-oriented. Annual in-service ethics training should be mandatory. Training should include information about cases of misconduct that resulted in innocent people being incarcerated while guilty offenders escaped punishment and committed further acts of violence. Employees also should understand that a single incident of evidence tampering has broad ramifications—all evidence processed by the lab could come under scrutiny.

To ensure that lab personnel understand the consequences of violations of quality control standards, evidence tampering, and other types of misconduct, labs should adopt a written discipline matrix.¹³ The discipline matrix should specify the range of sanctions that are imposed for specific types of misconduct. Supervisors should not receive preferential treatment or lesser punishments. Regular disclosure about violations and disciplinary actions, such as through an e-mailed newsletter, will help to deter future misconduct, reinforce the importance of ethics and compliance with institutional values, and reinforce the appearance of fairness. Reporting incidents of misconduct to lab supervisors, to prosecutors, and to defense attorneys, should be seen not only as a legal obligation, but also as a moral obligation consistent with upholding justice.¹⁴

12. See, e.g., *Jenkins v. St. Louis Cnty.*, 2011 WL 5868310, at *2–3 (E.D. Mo. Nov. 22, 2011). Missouri Police Academy training lasts approximately four months and includes approximately six hundred and forty hours of instruction. Only forty-one hours of instruction focuses on constitutional law, compared to eighty-two hours focusing on defensive tactics such as handcuffing techniques. To graduate from the police academy, the minimum score required in each block of instruction, including law, is only seventy percent. *Id.*; see also *Dillingham v. Millsaps*, 809 F.Supp. 2d 820, 833 (E.D. Tenn. 2011) (stating deputy accused of misconduct admitted that “he never received, or saw, a copy of the Monroe County Sheriff’s Department Policy Manual”); Darrell L. Ross, *Emerging Trends in Police Failure to Train Liability*, 23 POLICING INT’L J. POLICE STRAT. & MGMT. 169, 179–81 (2000) (detailing the results of study indicating allegations of inadequate training during litigation are extremely common).

13. See SAMUEL WALKER, *THE DISCIPLINE MATRIX: AN EFFECTIVE ACCOUNTABILITY TOOL?* 4–6 (2003), available at <http://www.unomaha.edu/criminaljustice/PDF/matrixreport.pdf> (discussing the use of the discipline matrix in police department settings).

14. See Hsu, *Defendants Left Unaware*, *supra* note 9. The DOJ has not notified some defendants who were convicted in the 1980s and 1990s based on hair and fiber evidence analysis that later proved to be unsound. Hundreds of these defendants are in prison or on parole, and in one case, a defendant was executed. *Id.*

Ethical lab personnel who previously followed guidelines may begin committing misconduct when experiencing stress like excessive workload, pressure from prosecutors and investigators, sexual harassment or other conflicts with co-workers, financial problems, death of a loved one, or divorce.¹⁵ Stress can contribute to illegal drug use, prescription drug abuse, and alcohol abuse. All laboratory employees should be offered stress management counseling, and employees should have annual random drug testing. Periodic background checks can prevent and detect misconduct because credit and financial history checks can reveal changes in spending patterns that would indicate the individual might be stealing evidence or accepting bribes. For instance, FBI Special Agents have annual random drug tests and have their background checks re-done every three years.¹⁶

The above internal oversight mechanisms should be reinforced by external oversight such as a forensic science laboratory advisory board.¹⁷ Public and private crime labs also can seek accreditation through the American Society of Crime Laboratory Directors-Laboratory Accreditation Board (“ASCLD/LAB”).¹⁸ Accredited labs follow professional standards that increase quality control. If accreditation standards are violated, accreditation can be revoked.¹⁹

When forensic scientists or other lab personnel testify, judges and attorneys should not assume that the expert witness is indeed an expert. The *voir dire* process is another external oversight mechanism that should be used to challenge the validity of the scientist’s credentials. Judges, prosecutors, and defense attorneys also can question the expert about the lab’s accreditation status at the time evidence was processed, testing procedures, and the culture

15. See James D. Sewell, *Identifying and Mitigating Workplace Stress Among Forensic Laboratory Managers*, 2 FORENSIC SCI. COMM. (April 2000), <https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/april2000/index.htm/sewell.htm> (recommending exercise, yoga, dietary changes, and counseling).

16. The information about FBI employment requirements is based on the author’s personal knowledge and experience.

17. See, e.g., *Forensic Science Laboratory Advisory Board*, MONT. DEP’T OF JUSTICE, <https://doj.mt.gov/crime/forensic-science-laboratory-advisory-board> (last visited Nov. 27, 2012). Advisory board members such as prosecutors, public defenders, police, scientists, and judges provide feedback to crime lab administrators and to the Attorney General about work that the lab produces and suggest ways the lab can improve procedures and policies. If misconduct or negligence is alleged, the board conducts independent investigations. *Id.*

18. *Programs of Accreditation*, AM. SOC’Y OF CRIME LAB. DIRS. LAB. ACCRED. BD., http://www.asclcd-lab.org/programs/prgrams_of_accreditation_index.html (last visited Nov. 27, 2012).

19. *Accredited Laboratory Status*, AM. SOC’Y OF CRIME LAB. DIRS. LAB. ACCRED. BD., www.asclcd-lab.org/labstatus/labstatus.html (last visited Nov. 27, 2012).

of the work environment.²⁰

The popularity of crime scene television dramas has made it harder for defense attorneys to impeach forensic scientists who serve as witnesses.²¹ Only defendants who are guilty beyond a reasonable doubt should be convicted. In their quest for conviction stats, prosecutors sometimes forget that bad science equals reasonable doubt.

The recent Massachusetts state drug lab scandal demonstrates the dire consequences of evidence tampering. When justice is perverted, people are more fearful of false arrest. When citizens do not trust police, it is more difficult for officers to conduct interviews and develop informants. Old-fashioned policing techniques like these, not science, often are the best way to solve crimes.

Crime and drug lab personnel, law enforcement officers, prosecutors, and judges have a duty to uphold the constitution and preserve the public trust. How many more innocent people will be incarcerated based on convictions that were obtained with tainted evidence?

20. See *Recommendations to Prevent Forensic Science Malpractice*, CRIME LAB REP., http://www.crimelabreport.com/media_accuracy/recommendations.htm (last visited Nov. 27, 2012).

21. See Simon A. Cole & Rachel Dioso-Villa, *Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1344 (2009) (discussing the claim that "CSI and similar television programming, through their positive and heroic portrayals of state-employed forensic scientists, enhance the perceived credibility of the government's forensic witnesses, thus advantaging the prosecution").