

William Tucker

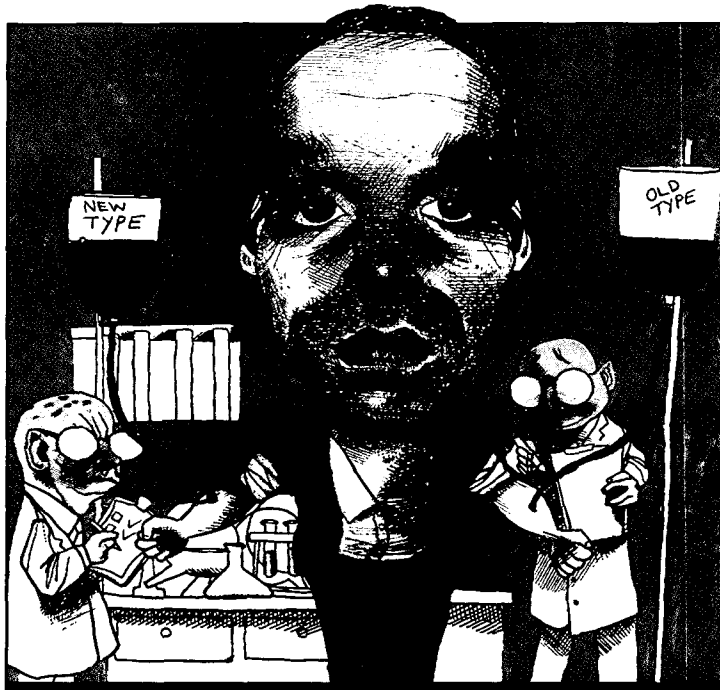
O.J.'s DNA in Court

Blood evidence places Mr. Simpson at the scene of the Brentwood murders, but in a courtroom culture dominated by well-heeled defense lawyers, will it matter?

This fall, O.J. Simpson is standing trial for murder in Los Angeles in what could be one of the most gripping courtroom dramas in decades. Accused of killing his former wife, Nicole Brown Simpson, and a young visitor, Ronald Goldman, Simpson has persistently denied his guilt.

Simpson had a stormy relationship with his ex-wife and had been arrested for beating her. The tape of a 911 call dramatically recorded his efforts to break into her home a year ago. He had reportedly stalked both victims and was seen driving from the scene of the murder acting in an agitated manner. (This witness, however, sold her story to "Hard Copy" for \$5,000, and has been dropped by the prosecution.) Simpson has only a weak alibi, and those people who saw him during the interval seem to contradict his story.

The case against the former football great is largely circumstantial, and there are weaknesses to the case that might make an American jury throw up its hands and declare reasonable doubt. There are no eyewitnesses to the crime. No video cameras were on hand to record the event. The murder weapon has never been found. The policeman who found a bloodstained glove at Simpson's house (matching another found at the crime



scene) has a history of making disparaging remarks about minorities.

There is one piece of evidence, however, that is so powerful that it might easily erase any reasonable element of doubt from the jury's mind. Leading away from the crime scene was a trail of fresh blood, which apparently belonged to the murderer. Simpson had a cut on his left index finger when questioned by police

the next day. At least two separate laboratories have examined this blood, using the technique of "DNA profiling," and have declared that it matches Simpson's DNA profile.

Yet, as the trial began, there was a serious question of whether the jury would be allowed to hear this evidence. Moreover, if Simpson is declared guilty, his conviction will be challenged in a long series of appeals. A California appellate court has already overturned one conviction in a similar case, arguing that DNA evidence was "unreliable." The same situation prevails in eight other states.

How did DNA profiling—almost a decade old and widely employed in other countries—end up having such a rough ride through the American justice system? The science itself is not at issue. There has never been a case where one laboratory declared a match in DNA samples and another laboratory declared the opposite. Believe it or not, the only major controversy now surrounding the technique is whether the chances of an innocent person being falsely

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implicated are 1-in-10,000 (a high estimate arbitrarily chosen by a maverick scientist) or 1-in-10 million (a widely accepted figure that has been verified by an examination of all the DNA records on file with the FBI).

Other forensic evidence long accepted in American courtrooms offers levels of certainty that are nowhere near that range. Blood-type identification, accepted in courts for decades, offers at best only a 90 percent verification (1-in-10 possibility of a chance match-up). Handwriting analysis and psychiatric testimony in insanity cases usually come down to a "battle of experts." Only with "dermatoglyphic" fingerprinting (the marks on the end of your finger) are the probabilities of the same general order of magnitude. Yet with DNA profiling, defense attorneys have successfully argued that, if scientists cannot agree whether the technology is 99.99999 percent certain or 99.99999999 percent certain, then *it shouldn't be used at all*.

DNA profiling begins with the established theory that no two people, except identical twins, have the same genetic make-up. Each cell in the body contains a complete set of genes. A clot of blood, a trace of skin underneath a victim's fingernails, a drop of semen, the follicle attached to a single strand of hair—all contain enough cells to provide the information for a positive or negative match with a criminal suspect.

DNA profiling is particularly useful in rapes and murders in which the victim struggles or the criminal leaves behind some trace of tissue or bodily fluid. A recent newspaper article noted that rapists are now wearing condoms in 20 percent of all attacks. Although the report attributed this to fear of AIDS, a more likely explanation is that word is circulating among rapists that leaving semen at the scene is the equivalent of leaving your calling card.

A complete reading of the human genome is beyond present capabilities. The Human Genome Project has undertaken a 15-year effort to map all twenty-six human chromosomes, and several private firms are trying to short-circuit the process. One day we may be able to read the genome like a telephone directory. At this point, genetic profiling reads only one ten-thousandth of the information in the genome—just as a fingerprint reads only a tiny fraction of the body's physical profile. Because of peculiar characteristics of this portion of the gene, however, this tiny fraction has proved significant for making highly individual identifications.

In 1985, Alec Jeffreys, a geneticist at the University of Leicester, England, proposed making forensic identifications with "junk" DNA, the mysterious, non-functioning genetic material that makes up about 95 percent of the human genome. This material serves no known purpose. It

may just be "hitchhiking" from generation to generation without contributing anything to the organism. Or it may serve as "packing material," protecting the working genes from harmful mutations, the way newspapers stuffed in a box will protect its fragile contents.

Junk DNA varies from one individual to the next. Different people have different DNA sequences at their junk sites. In addition, these characteristic sequences repeat themselves a different number of times in different people—a phenomenon called "variable number tandem repeats" (VNTRs). One person may have only one repetition at his junk site, while another may have two dozen. Most sites have more than a hundred known variations, which are called "alleles."

Other genetic markers such as hair color, height, and weight tend to vary by population. People living near the equator, for example, generally have darker skin, while people in cold climates generally grow bulkier to conserve heat.

VNTRs, however—like fingerprints and blood types—appear to vary randomly across populations, with no ethnic or racial associations.

In 1986, Jeffreys proposed that VNTRs could be used for criminal identifications. He invented a "multi-locus" molecular probe that surveyed about fifteen to twenty VNTR sites, measuring their varying lengths. The chances that any two people would have the same

variation at one site is about 1-in-50. The chance that they would match up at *every* one of the fifteen to twenty sites is well beyond 1-in-1-trillion. (The whole earth's population is only 8 billion.)

The test is now used in paternity suits. In criminal cases, however, "multi-locus" probes did not always prove practical. "The difficulty is that we rarely have enough genetic material in the sample," says Mark Stolorow, director of operations at Cellmark Diagnostics, which is running the tests in the Simpson case. "With paternity suits, we can just take blood samples out of someone's arm. But in criminal cases, we're often dealing with a speck of blood found on the sidewalk." Thus, Jeffreys's multi-locus "genetic fingerprinting" (the name is trademarked) was supplanted by a "single-locus" probe, which, given about 8,000 cells (the amount in a drop of blood), can provide a "genetic profile" with somewhat lower degrees of certainty.

In 1987, Jeffreys licensed his technology to Imperial Chemical, a British firm, which set up Cellmark Diagnostics, in Bethesda, Maryland. Lifecodes, Inc., now in Stamford, Connecticut, also went into the business, using a slightly different technology. Eighty different state crime labs, plus the FBI, have also entered the field. About 4,000 samples of DNA were tested last year, at an average of \$1,000 per test. The number of probes used depends on how much genetic

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material is available and how much a prosecutor wants to spend. At five probes, the theoretical chances of two individuals having the same profile are 1-in-50⁵, or 1-in-312-million.

In actuality, the alleles do not occur with the same frequency. Some are common while others are rare. If you have common alleles, you may match with 2,500 other people in the country (1-in-100,000), while if your alleles are rare, the match may be only 1-in-1-billion. In 1992, Neil J. Risch and Bernard Devlin of Yale University, using the FBI's database, generated 7.6 million genetic fingerprints and found only one chance match at the *three*-probe level. At the four-probe level there were none. They estimated the chances of a match for five probes at 1-in-10-billion. The two separate tests performed in the Simpson case have involved more than five probes.

From its inception, DNA profiling has implicated the guilty and exonerated the innocent in a way that was previously unthinkable. In an early case in England, two adolescent girls in a small village had been raped and murdered over a three-year period. Police asked males in the village to give a DNA sample for comparison. No matches were found, but it was later reported that one Colin Pitchfork had bribed someone else to substitute a sample for him. Pitchfork was checked again and turned out to be a match. (This case was chronicled by Joseph Wambaugh in *The Blooding*.)

In an early incident in the United States, a young couple were murdered at an isolated campground in Colorado. The woman had been raped and a semen deposit was found. A random check against profiles of known sex criminals turned up a match with a paroled felon in Florida. Once he was under suspicion, eyewitnesses were able to place him near the scene of the crime. The man was tried and convicted.

In another instance, a man in Georgia allegedly killed his 10-year-old daughter after raping her. The defendant claimed the rape was actually committed by his 12-year-old son and that he had accidentally killed the daughter in trying to break up the rape. Genetic profiling was done on both father and son. The semen on the little girl's clothes belonged to the father. (Even for close relatives, the chance of a coincidental match-up is only 1-in-1,000.) The man was sentenced to life in prison.

Finally, another 10-year-old girl in Tennessee was molested in her home by a "large black man." A local handyman with a record of child molestation had been seen near the crime by a neighbor, and immediately came under suspicion. A DNA comparison, however, showed the handyman could not have been the attacker. He was promptly dismissed as a suspect.

DNA profiling has proved just as important in clearing the

innocent as it has in implicating the guilty. American laboratories report that 30 percent of tests yield negative matches, exonerating innocent suspects who would otherwise have gone to trial. Scotland Yard reports the same percentages.

So things stood until 1989, when a handful of lawyers mounted a counterattack. The principal players have been Peter Neufeld, a New York defense attorney, and Barry Scheck, a professor at the Benjamin Cardozo School of Law in New York. "The attitude up to that point had been that DNA fingerprinting was infallible," said Neufeld. "Juries were awed. As one juror put it, 'You can't argue with science.' We decided to show you could." Neufeld has not only carried through the battle in court, he has also succeeded in becoming the resident expert on the subject in the pages of *Scientific American*. Not surprisingly, Neufeld and Scheck have been hired by the Simpson defense team as its chief DNA experts.

The first important case involved Jose Castro, a South

Bronx janitor accused of stabbing to death Vilma Ponce and her two-year-old daughter in 1987. When Castro came under suspicion, a speck of blood was found on his watch. The sample was sent to Lifecodes, which said it belonged to the victim. Neufeld and Scheck challenged the admissibility of

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the evidence on the grounds that the lab work was sloppy and there were too many uncertainties in the technology.

Genetic experts from both sides converged on the scene. Before testimony began, Eric S. Lander, of MIT's Whitehead Institute for Biomedical Research, testifying for the defense, and Richard J. Roberts, of Cold Spring Harbor Laboratories, testifying for the prosecution, decided to get together and issue a joint statement. Both were somewhat disenchanted with Lifecodes's performance.

In particular, they were concerned that Lifecodes was declaring matches in instances where the X-ray images that read the VNTRs were identical but shifted slightly out of place—a phenomenon called "band-shifting." The laboratories claim it is not a problem. "It's like having two pieces of identical wallpaper that are hung poorly," says Michael Baird, lab director at Lifecodes. "You can see the patterns are identical, but they're slightly displaced."

Lander and Roberts argued that band-shifting created too much uncertainty. They also pointed out that Lifecodes had declared one match when the bands were outside the 5 percent range of error. In a blind test submitted by the California Association of Criminal Laboratory Directors, Cellmark had also misread one sample in fifty as a match. In 1989, Judge Gerald Sheindlin threw out the evidence tying the blood of the victim to Castro's watch—although evidence showing Castro himself was not the source of the

blood was admitted. Castro pleaded guilty anyway and was sentenced to a lengthy prison term.

Two years later, the battle was joined again in an Ohio case. Three members of the Hell's Angels had killed a young man they mistook for another gang member. Blood from one of the defendants was found in the victim's truck. Neufeld, Lander, and other critics squared off against the Department of Justice, which was supported by two prominent geneticists, Thomas Caskey of Baylor, and Kenneth Kidd of Yale.

This time the prosecution won, but not before a lot of expert blood had been spilled. Lander—who was embarrassed on the witness stand—turned out to have received a \$28,000 fee for testifying. Neufeld and Scheck counterattacked by accusing Caskey of profiting from the technology because he held a patent in the field and received a \$15,000 annual royalty. Neufeld and Scheck twice attempted to have the case reopened on the basis of Caskey's alleged conflict of interest, but the conviction has been allowed to stand.

In 1990, in *Scientific American*, Neufeld laid out the full case against DNA fingerprinting. Neufeld compared DNA profiling to the Greiss test, a chemical test for nitrates from explosives, which had been used to convict six Irishmen in an IRA bombing. "It turns out that a variety of common substances such as old playing cards, cigarette packages, lacquer and aerosol spray will, along with explosives, yield a positive result [in the Greiss test]," wrote Neufeld. Neufeld then outlined similar potential flaws in DNA profiling:

samples were small, DNA could be changed by the presence of impurities and bacteria, the sample might degenerate in a number of ways. The band-shifting problem distorted results. Samples could be accidentally switched or mislabeled—any number of things might happen. As a result of all this an innocent person might be convicted of a crime.

But Neufeld's opening analogy was misleading. The major problem with the Greiss tests was that it produced false positives. Substances other than the target chemical could give the same results. With DNA analysis, however—and particularly with the problems mentioned by Neufeld—the only real problem is false negatives. The chances of an innocent person being implicated are next to nil, but the chances of a guilty person being falsely exonerated are reasonably high.

To simplify, suppose that a suspect has a five-allele code that reads: 26-13-12-27-11. The forensic sample, which also contains his genes, has the same code. Now suppose the forensic sample degenerates, as Neufeld suggested. It can

only degenerate away from a positive match. (In practice, the lab would probably call the results "inconclusive," which happens in 10 to 30 percent of all tests.)

Now suppose the suspect is innocent. What are the chances that a forensic sample will degenerate into his code of 26-13-12-27-11? They are, in fact, approximately the same as the likelihood that a chance mismatch will occur in the first place—about 1-in-10 million.

The great irony is that, while arguing that DNA profiling should not be used against criminal suspects, Neufeld and Scheck are simultaneously representing 600 condemned prisoners who claim that DNA analysis will prove they are innocent. Despite the much greater problem of false negatives, the attorneys argue that DNA evidence is valid when used on the side of the defense.



As a final argument against admissibility, Neufeld also raised what was soon to become the principal objection to DNA profiling: the idea that the genetic markers used in DNA analysis are not randomly distributed by racial groups, that they follow the pattern of hair and eye color, rather than blood types and fingerprints. Thus, when compared against people in a suspect's own racial or ethnic group, the chances of an accidental match-up might be higher.

The argument was later expanded by Richard Lewontin, a maverick population geneticist at Harvard and co-founder (with fellow Harvardian Stephen Jay Gould) of the left-wing academic group Science for the People. In

1991, Lewontin co-authored an article in *Science* that argued that patterns at separate VNTR sites might be inherited as a unit, creating similar genetic profiles among small, inbred populations. This "pose[s] a particularly difficult problem for the forensic use of VNTRs if the wrong ethnic group is used as the reference population." In order to avoid chance mistakes, it would be necessary to develop much more data about "subgroups that are likely to be relevant in forensic applications." The authors identified these groups as blacks, Hispanics, and Amerinds, and speculated that the chances of a false match-up within these populations might be as high as 1-in-10,000.

Now, 10,000-to-1 is still pretty long odds—certainly enough to erase any element of reasonable doubt where other incriminating evidence is present. But Neufeld wanted to go a step further. Instead of merely increasing the odds, he now argued that there was no "consensus" about DNA technology in the scientific community and therefore the technique should be excluded altogether from criminal tri-


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als. Appeals courts in California, Massachusetts, Arizona, Minnesota, and five other states bought the argument and previous convictions were overturned in each state.

The unsubtle point behind Lewontin's talk of forensic "relevance" was this: since blacks, Hispanics, and Indians commit a disproportionate share of all crimes, an individual *within* one of these groups may end up being implicated by the newfangled technology. (Actually, the black population has proved to be more genetically diversified than any other racial group.) As a later *Scientific American* article put it, "An innocent suspect racially or ethnically similar to that of a criminal could have an inflated chance of matching a forensic sample—and thus be wrongly convicted."

All this assumes that suspects are implicated in crimes solely on the basis of their race—which in some cases they are. Critics of forensic DNA like to point to a Texas case where a murderer was selected out of a small, inbred black population. But in other cases, the logic of "ethnic ceilings" is wholly irrelevant. In the case of the campground murder, for example, the suspect could have been anyone. When he was identified, it was not because of his race, but by a semen sample. Thus it made no sense to compute the odds *only* against his racial group. Wherever factors other than race have been the key to singling out a suspect, ethnic ceilings on DNA profiles are irrelevant.

In 1991, the National Academy of Sciences gave the technology a ringing endorsement. In an effort to placate critics, however, the commission recommended that ethnic ceilings be adopted that would give race-adjusted odds for each positive identification. By purely arbitrary choice, the committee proposed that no allele should be assumed to occur with less than 10 percent frequency—a number that still produces odds of more than 6 million-to-1 at five probes. Protests arose, and this year the NAS convened a second panel to reconsider the ceilings hypothesis. In defending O.J. Simpson, Neufeld now argues that the appointment of this new committee proves that the technology is *still* too controversial to be admitted in court.

The Simpson case, of course, is a good example of the ceilings fallacy. Why is O.J. Simpson a suspect in the killing of Nicole Brown and Ronald Goldman? Is it because he is black? Is it because somebody spotted a "dark-skinned intruder" and thought it might be O.J.?

No. Simpson is a suspect because of (1) his previous relationship to one of the victims; (2) his documented record of threats and violence against her; and (3) his failure to give any convincing account of his whereabouts at the time of the murder. The other logical choice is that the murder was committed by an unknown intruder, but that intruder does not have to match Simpson's racial profile. The correct reference group for Simpson's positive DNA match is the entire population of the United States.

Using the figures compiled from the FBI files by Devlin and Kidd as a *conservative* estimate, there is a *1-in-7-million* chance that the blood found at the scene belongs to someone other than O. J. This means that in the entire popu-

lation of Los Angeles (3.5 million), there is less than a 50 percent chance that *any* other individual has Simpson's DNA profile.

Does this seem complicated? Then look at it this way. For the sake of argument, assume there is a 1-in-10,000 chance that Simpson's DNA would match up with that of another black person, as Lewontin's "ceilings" hypothesis suggests. There is still nothing to prove that the intruder was black. The longer odds, according to Lewontin, that Simpson's profile matches with someone of another ethnic group must also be factored into the equation. The result, once again, is that in all of Southern California, there is probably only one person who shares Simpson's genetic profile. The odds that Simpson himself, rather than this unknown person, was the source of the blood at the crime scene seem reasonably convincing.

So why has this kind of technological advance had such a rough time being accepted in American courtrooms?

The answer can be found in the structure of the American legal profession. Among attorneys who practice criminal law, the overwhelming majority are working on the side of the defense. Of the approximately 200,000 lawyers engaged in criminal work, only an eighth are prosecutors, while the remainder are representing criminal clients. Career prosecutors are government functionaries who labor at modest salaries. Many defense attorneys toil in obscurity, but those that are successful are the high rollers of the trade. Moreover, most young prosecutors—however unwittingly—are *training* to become defense attorneys. After serving an apprenticeship with the state, they generally—if reluctantly—switch sides. The incentives are overwhelming. A good prosecutor can triple his salary by going into private (defense) practice.

On the civil side, on the other hand, plaintiff attorneys are the high rollers, raking off contingency fees from the nation's escalating damage awards. Civil attorneys on the defense side are generally corporate functionaries. The American Association of Trial Lawyers is dominated by plaintiff attorneys—just as the criminal justice committees of the state legislatures and bar associations are dominated by defense lawyers.

All this has had an enormous impact on American justice. In *The Litigation Explosion*, Walter Olson has documented how the rules of evidence in civil courtrooms have been widely expanded over the past four decades to favor plaintiffs. The process of "discovery," for example, is completely unique to the American courtroom. In other countries, you sue someone on the basis of evidence you already have at hand. In America, plaintiffs can make vague, unspecified charges and then force a defendant to hand over whole truckloads of corporate or personal information so that the plaintiff can wade through them in search of wrongdoing.

"Depositions," by the same token, were once out-of-court interviews limited to people who were on their

deathbed or otherwise unable to appear in court. Under pressure from the plaintiff bar, however, the courts turned depositions into a format where plaintiff attorneys can hold private interrogations. If your spouse sues you for divorce, his or her attorney can interrogate you about your sex life, your personal thoughts—anything he deems relevant. You have no "right to remain silent," but can only hire your own attorney. It is not surprising that plaintiff attorneys often refer to themselves as "private attorneys general," empowered by the state to ransack people's belongings and personal lives in search of evidence for civil litigation.

On the other hand, the rules of evidence in *criminal* courts have changed radically in the opposite direction. Since the 1960s, the various "exclusionary rules" have limited the power of the police to investigate anything. Search warrants must specify exactly what the police expect to find *before* they start looking. If something turns up that wasn't listed in the warrant, it may not be admissible as evidence, no matter how incriminating. Interrogations, under the *Miranda* rule, must be held in a formulaic setting, with suspects continually reminded of their right to remain silent or contact an attorney. Many defense attorneys profess that there is no such thing as an "uncoerced confession," since any suspect fully aware of his rights would contact his lawyer, who would tell him not to say anything.

Under these circumstances, it is not surprising to find that many lawyers and law professors now argue that it is useless to seek justice in the criminal courts and that the civil courts are the proper place for redressing criminal damages. That is why Ronald Goldman's mother is already suing O.J. Simpson for a "wrongful death." The same legal principles that have kept DNA fingerprinting from being used in criminal trials will be turned around to argue for its admissibility in civil courts. In fact, many of the same attorneys will probably end up making the argument.

Still, one can't come away from the issue without the impression that the attorneys opposing DNA evidence are trying to hold back a tidal wave of scientific research. Genetics is the most rapidly exploding field in the scientific world. Whatever objections can be raised today will probably be overcome tomorrow. The "polymerase chain reaction" (PCR), a technique that uses a microbe found in hot springs to "amplify" small amounts of DNA, is now being used to make identifications with as little as 20 cells. Experts in the field say the VNTR method may be outdated within three years. If critics do succeed in having the few private labs taken off the job, their work will be taken over by the FBI and the state crime labs—an outcome that is unlikely to make opponents any happier. At best, defense attorneys can only hope to continue muddying the waters, grasping at every letter-to-the-editor as proof that a "scientific consensus" has yet to be reached.

O.J. Simpson may be found guilty or innocent, but one thing is certain: When he stands trial in Los Angeles this fall, he will have to account for why blood with his genetic blueprint was at the scene of the crime. □

Christopher M. Byron

Direct-Mail Devilry

The shady economics of interest group fundraising could come back to haunt conservatives.

Last spring, Arkansas Democratic Senator David Pryor complained of the inaccuracy and unfairness of attacks on the Clinton health care bill by little-known but apparently well-heeled direct-mail groups. Pryor charged that the groups weren't interested in the issue at all, but had simply seized upon it as a way to wring contributions out of the elderly.

Pryor was close to the truth, as many who don't necessarily share his politics would agree. "At least 30 percent of the companies in this business are out-and-out frauds," says Denison Hatch, publisher of *Who's Mailing What*, America's top direct-mail trade journal. Critics like Hatch say that many direct-mail fundraisers are little more than chain-letter bucket shops, raising money by intimidating tempting targets—mainly the elderly who often have nothing more to do with their lives than watch TV and wait for the mail.

Such mailings could lead to a backlash against *all* direct-mail fundraising—a development that is bound to be uncomfortable for all sorts of political conservatives, who have in recent years used it prolifically. Senate Republican Jesse Helms of North Carolina has an almost legendary addiction to direct mail. In September, however, Helms sev-



ered his ties with one of his direct-mail fundraisers, the Coalition for Freedom, after the IRS charged that the group had been run, in part at least, for the financial benefit of insiders. Until earlier this year the National Republican Congressional Committee maintained a long-standing relationship with direct-mail marketer Stephen Winchell, whose clients include Empower America and other conservative groups. A committee spokesman says the relation-

ship was terminated because Winchell's company was not performing satisfactorily. "We wanted to bring in new blood," he said.

In fact, rather than being a monolithic, well-oiled and well-financed operation, the much-dreaded conservative fundraising machine turns out to be an industry of cash-starved mom-and-pop operators aiming to hit it big through dubious business practices. In many cases, the resulting donations wind up principally benefiting the fundraisers themselves. It's an open question, in fact, whether direct mail is helping conservative causes or strangling them.

An instructive example of the economics of mailing lists—and of the dubious value of direct mail to conservative causes—is the Senate race of Oliver North.

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