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Why Won't Prosecutors Make Amends for Flawed Investigations?

By Andrew Cohen

For years, federal lawyers, prosecutors, and law enforcement officials failed to inform defense attorneys about inaccuracies in scientific evidence.



Finally, a legal scandal we all can agree upon, one that transcends three consecutive federal administrations and involves sins of commission or omission at virtually every level of the criminal justice system. It is a scandal that erodes a cornerstone of that system: the notion that prosecutors and the police have ethical responsibilities, if not legal duties, to ensure that innocent people are not wrongfully convicted and locked away in prison. And it's a scandal that requires a much more meaningful response from those federal and state authorities who are today responsible for such ongoing injustices all across the country.

The Washington Post's Spencer S. Hsu on Monday offered up an [exhaustive look](#) at how federal lawyers, local prosecutors, and law enforcement officials failed or refused for years to properly inform defense attorneys about material flaws in the scientific evidence that helped convict their clients. It's a story [we've heard before](#) -- on a micro level. But here's a view with a wider lens. Hsu's lead:

Justice Department officials have known for years that flawed forensic work might have led to the convictions of potentially innocent people, but prosecutors failed to notify defendants or their attorneys even in many cases they knew were troubled.

Officials started reviewing the cases in the 1990s after reports that sloppy work by examiners at the FBI lab was producing unreliable forensic evidence in court trials. Instead of releasing those findings, they made them available only to the prosecutors in the affected cases, according to documents and interviews with dozens of officials.

In addition, the Justice Department reviewed only a limited number of cases and focused on the work of one scientist at the FBI lab, despite warnings that problems were far more widespread and could affect potentially thousands of cases in federal, state and local courts.

As a result, hundreds of defendants nationwide remain in prison or on parole for crimes that might merit exoneration, a retrial or a retesting of evidence using DNA because FBI hair and fiber experts may have misidentified them as suspects.

On Tuesday, the feds responded. The Justice Department said that the gravamen of Hsu's story is old news, that "[b]oth the issues with respect to the FBI and the process by which the Task Force operated have been widely reported on for many years. The Task Force culminated its work approximately a decade ago." The Federal Bureau of Investigation, meanwhile, took a similar but slightly more zen approach to the criticism of its lab work, claiming that just because old practices are old doesn't make them wrong:

As with all science, the forensic sciences are constantly evolving as new techniques and instrumentation are available. This inevitably impacts the FBI Laboratory's practices and

testimonies, but it does so by enhancing the use of forensic science for the law enforcement and intelligence communities. It does not, and should not be perceived as diminishing the value of prior practices and testimonies.

And then *The Post* replied, later Tuesday, with a [new story](#) by Hsu and two colleagues, another long take that more directly explained why this is a big deal:

The task force took nine years to complete its work and never publicly released its findings. Not the results of its case reviews of suspect lab work. [Not the names of the defendants who were convicted as a result](#). And not the nature or scope of [the forensic problems](#) it found. Those decisions more than a decade ago remain relevant today for hundreds of people still in the U.S. court system, because [officials never notified many defendants of the forensic flaws](#) in their cases and never expanded their review to catch similar mistakes. ...

The documents and interviews tell a story of how the Justice Department's promise to protect the rights of defendants became in large part an exercise in damage control that left some [prisoners locked away](#) or in the dark for years longer than necessary. The Justice Department continues to decline to release the names of defendants in the affected cases.

A *Washington Post* review of the department's actions shows an agency struggling to balance its goal of defending convictions in court with its responsibility to protect the innocent. The Justice Department's decision to allow prosecutors to decide what to disclose to defendants was criticized at the time and allowed most of the process to remain secret. But by cloaking cases in anonymity, failing to ensure that defendants were notified of troubles with their cases and neglecting to publicly report problems or recommend solutions, the task force [obscured problems from further study](#).

I covered the Frederick Whitehurst story all those years ago. I remember all the stories about how fouled up the crime lab was. That was bad enough. But its downright reprehensible that the trial errors we began to learn about back then -- 17 years ago! -- still have not been formally remedied in court. That's unacceptable on every level. In Hsu's first piece there is a great line from Steven D. Benjamin, president-elect of the National Association of Criminal Defense Lawyers. "It's human to make mistakes," Benjamin told Hsu. "It's wrong not to learn from them."

The Justice Department and FBI are just plain wrong. This is not an old story. This is an ongoing story, and a big one, because every day an innocent man or woman languishes in prison constitutes a new wrong. The Clinton administration screwed up, the Bush administration screwed up, and now the Obama administration is screwing up, too, even as it wants to pretend that it has done what it was supposed to do to make things right. The *Post* story establishes that it

hasn't. For an administration that once prided itself on transparency this is yet another grievous disappointment.

The Senate Judiciary Committee should hold hearings on this -- now, not later this year -- with a focus upon getting direct answers to the most important questions here: how many tainted cases remain and what more must federal and state prosecutors do to finally put things right?

Committee Chairman Pat Leahy (D-Vt.) has long been an outspoken advocate for the concept of "[justice for all](#)." Here's an opportunity for him to show how serious he is about changing government policies that have for decades now resulted in injustice to many.

In every single flawed case, or potentially flawed case, prosecutors should be required to notify defendants and defense attorneys of the specific problem with the forensic evidence at issue in the case. Every trial judge should be notified as well to better ensure that the post-conviction rights of defendants are satisfied. That this should have been done 15 years ago, or 10 years ago, or five years ago, makes it no less worthy of being done now. This is a terrible scandal and I hope that *The Post's* work in reminding us of it finally generates the relief those wrongfully convicted people deserve.

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