

Physician Heal Thyself: Whither the Police and Prosecutor in the Tale of Forensic Science Gone Wrong?

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Jennifer E. Laurin, [Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight](#), 91 *Tex. L. Rev.* 1051 (2013).

On February 15 of this year, the Department of Justice and the National Institute of Standards and Technology in the Department of Commerce announced their partnership in forming a National Commission on Forensic Science (the Commission). The aim of the Commission is to develop “a framework for coordination across forensic disciplines under federal leadership” and to establish national standards for forensic scientists. Both critics and defenders of forensic science in the criminal justice system largely applauded the announcement. Jennifer Laurin, however, probably let out a sigh.

That’s because Laurin’s important new article, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, challenges the assumption that fixing the nation’s crime *laboratory* problem will in turn solve its integrity-of-forensic-evidence problems. Instead, Laurin identifies the analysis of crime scene evidence as but one small part of a greater chain of events that starts when forensic evidence comes into existence and ends with its appearance at trial in a criminal case. Before evidence ever gets seen in a lab, in other words, it must first be collected, preserved, and submitted. And, after submission, evidence may only be as useful as prosecutors allow it to be, for instance via explicit requests for testing, receptiveness to the results that are generated, or timely disclosure and access during discovery prior to trial. Yet, she laments, these critical moments have evaded significant scrutiny even though upstream *users* of forensic science—police and prosecutors—“... select priorities, initiate investigations, collect and submit evidence, choose investigative techniques, and charge and plead cases in ways that have critical and systematic, though poorly understood, influences on the accuracy of forensic analysis and the integrity of its application in criminal cases” (p. 1055).

Indeed, most readers will be shocked to learn that rates of evidence collection for serious offenses can hover around one in five, or that actual testing of evidence occurs in still fewer instances (disclaimer: I recently co-authored a [Slate piece](#) making this point). And, she notes, many scenes are attended only by patrol officers, who may not have received any specialized training and may have other pressing concerns. Even if a scene is searched, evidence may be collected in a way that overlooks important pieces or compromises the integrity of that which is gathered.

Similarly, in a world of backlogs, prosecutors do not always have access to forensic evidence at critical moments like charging, plea negotiating, or even sentencing. In fact, a trial is often the precipitating reason to jump evidence to the front of the queue for analysis, and yet over ninety percent of cases never make it to trial, but instead are resolved by a guilty plea. In those cases in which testing occurs, as Laurin notes, it may happen too late for it to exert much influence over the judicial process. A prosecutor who has already committed to a theory of the case may dismiss or minimize contradictory test results, even if they call into direct question the guilt of the suspect. In other words, to the extent that objective science might whisper in a prosecutor’s ears, it often only gets a chance to do so long after it will be heard as anything other than confirmatory or inconclusive.

Laurin’s keen observations in turn all raise the question of *why*? Why have we systematically ignored these “upstream users” and focused instead on only one small part of the overall problem? Four possible answers emerge. First, perhaps the crisis of bad science was simply *so bad* that triage pointed toward first tackling the problems of the

laboratory. But if that is the case, then what explains the fact that these upstream actors are still ignored when it comes to techniques with more robust scientific footing—like DNA testing? A second answer might be that laboratories made easier targets than lawyers, because lawyers like to protect their own. But that cannot be right, because plenty of accusatory ink has been spilled in the direction of judges (attacked as too complacent, too fearful of science, and too susceptible to the bewitching effects of the white lab coat), defense lawyers (attacked as either incompetent or too willing to roll over in the face of “science” rather than exercise their duty of zealous representation), and even jurors (attacked as beguiled by the so-called “CSI effect”). A third possibility might be the problem of lack of data about the precise roles and responsibilities of police and prosecutors in the generation of forensic evidence, but that seems to falter as well. The major public attention heaped upon crime scene laboratories has been rather recent, and there is no reason that the current interest in crime labs ought not also have spilled over onto police and prosecutors, at least with regard to their role in the forensic evidence process.

To my thinking, the likeliest reason for the general absence of close scrutiny of prosecutors and police when it comes to diagnosing the problems of forensic evidence today is simple: we do not like to question police and prosecutorial decision making, and we do not like to demand that police and prosecutors account for their exercises of discretion. Closer attention to law enforcement’s role in the generation of forensic evidence would entail tighter oversight of everything from policy choices to physical plants to administrative infrastructure. Consider that one study noted that “crime scenes investigated during the 2–10 p.m. shift—when calls for service peak and officer time is most constrained—are least likely to yield a DNA profile.” To mandate a certain set of procedures at every crime scene would directly impact a department’s capacity to engage in other aspects of its law enforcement function. Ignoring the complicity of prosecutors and police in shoring up a shoddy system of forensic science may simply be the natural byproduct of the greater hands-off approach to scrutinizing the priorities set by those offices more generally.

This may also be why the national dialogue about the causes and sources of wrongful conviction shies away from straight talk about the overzealous police and prosecutors who have turned a blind eye on exculpatory or questionable evidence. Instead, both groups have received a pass because the law tends to conceive of prosecutorial or police abuse of power in terms of intentional malfeasance, rather than as a byproduct of the same kind of structural and cultural expectations that characterize crime labs. But if an expert tells a prosecutor that she can tell whether the victim was screaming by examining the shaft of hair found at the scene, do we not expect the prosecutor to have the wits, and then the duty, to verify that the expert’s claims are supported by legitimate science? If the tales of exoneration have made scoundrels out of eyewitnesses, lab analysts, and even defense lawyers, then it is about time that they stop leaving prosecutors and police investigators relatively unscathed.

Author’s note: This jot is adapted from *Physician Heal Thyself: Whither the Police and Prosecutor in the Tale of Forensic Science Gone Wrong?*, 91 **Tex. L. Rev.** (forthcoming, 2013).

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