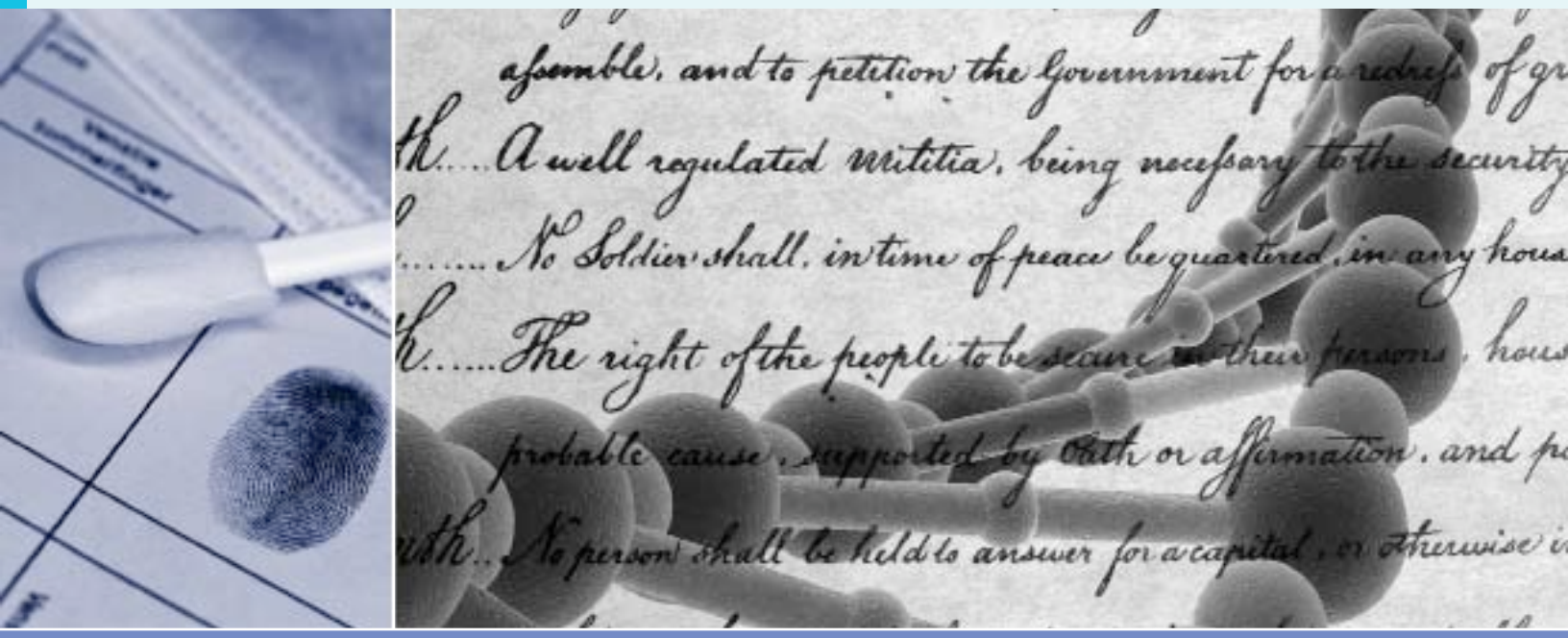

Debating DNA Collection

by Sarah B. Berson

DNA helps law enforcement investigate and prosecute crime, but the new trend of preconviction DNA collection raises serious Fourth Amendment issues for the criminal justice community.

Policymakers are increasingly coming to grips with legal issues related to taking DNA samples from people who have not been convicted of crimes.

The practice of taking DNA samples from convicted criminals is now largely uncontroversial. The courts have routinely upheld laws that authorize DNA collection from both current and former convicts, and the resulting databases of DNA have become powerful tools to analyze forensic evidence collected from crime scenes. The databases help to clear innocent suspects and redirect law enforcement officials away from unproductive investigations.[1] They also help to convict guilty criminals and clear the wrongfully convicted.

A trend that is causing significant debate is gathering DNA samples from people who are arrested but not convicted. About 20 states and the federal government have passed legislation that requires DNA collection upon arrest. This legislation has raised concerns that crime laboratories may be unable to manage an influx of samples from a new source and that preconviction DNA collection may violate Fourth Amendment privacy guarantees.

Some people worry that collecting DNA creates the potential for abuse of genetic information stored in databases. Others point out that the federal and state privacy laws and penalties that apply to crime labs are stringent — far more stringent than the rules governing private entities that collect blood and saliva for medical or insurance purposes. Additionally, crime labs process only the DNA that applies to human identification. They do not process DNA that

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identifies predisposition to diseases. Indeed, most crime labs are incapable of doing that kind of DNA processing.

Proponents of laws to collect DNA from arrested persons say these laws are no different from the long-standing, routine practice of taking fingerprints of arrested suspects. Law enforcement officers run fingerprints against national databases to confirm a suspect's identity and learn of any outstanding warrants against the person. Fingerprints remain on file unless a person makes a formal request to remove them. Proponents believe that taking DNA samples should be thought of in the same way and that the process will yield similar benefits.

Preconviction DNA Sample Collection

The DNA Fingerprint Act of 2005 requires that, beginning January 1, 2009, any adult arrested for a federal crime provide a DNA sample.[2] The law also mandates DNA collection from persons detained under the authority of the United States who are not U.S. citizens or are not lawfully in the country.

Even before passage of the act, five states — California, Louisiana, Minnesota, Texas and Virginia — had statutes that mandated collecting DNA from people arrested for various qualifying offenses. Although some states limit preconviction DNA collection to violent offenses or sex crimes, other states include all felonies, and some extend the requirement to misdemeanors as well. States' legislation requiring preconviction

THE GROWTH OF DNA COLLECTION FROM CONVICTED CRIMINALS

When Congress passed the DNA Analysis Backlog Elimination Act of 2000,[3] it approved a new program of federal aid to states to help them clear their backlogs of DNA samples. The law also approved the collection, analysis and indexing of DNA samples from people convicted of federal crimes.[4]

Today, all 50 states have passed their own statutes that require certain offenders to provide a DNA sample for inclusion in CODIS, the federal Combined DNA Index System database, and state databases after conviction. Indeed, many states, beginning with Colorado in 1988, had statutes mandating DNA collection from various offenders post-conviction that preceded the federal government's move. Often these laws began with a focus on sex offenders (and today, all states collect DNA from sex offenders), although Virginia made its legal debut in this arena with a law mandating collection from all convicted felons.

Congress set up CODIS in 1994 through the Violent Crime Control and Law Enforcement Act.[5] The Federal Bureau of Investigation runs CODIS, which combines DNA databases from the local, state and national levels. CODIS acts as a central repository for DNA data and allows laboratories across the country to compare DNA profiles. Qualifying offenses for compulsory DNA collection from convicted offenders vary by state (that is, offenses for which a convicted offender must supply a biological sample). Only three states — Idaho, Nebraska and New Hampshire — do not provide for collection in all felony convictions. Most states also require collection following conviction for some misdemeanors.

DNA collection varies. Variations include the types of crimes for which samples are collected, applicability of the law to juveniles and procedures for deleting profiles. Some state laws have faced Fourth Amendment challenges in court.

Expunging Profiles

After law enforcement officers collect a DNA sample, laboratory technicians translate the sample into a DNA profile (a numerical sequence). It is that profile, and not the genetic material itself, that enters the DNA database. The information contained in the DNA profile does not predict or identify physical characteristics, race, medical disorders or genetic disorders. The profile remains in the database if a court convicts the person. But what happens if the person is not convicted? That depends on the jurisdiction.

All states with laws allowing preconviction DNA sampling provide a way to expunge profiles if an arrest does not result in a conviction. Nine states automatically expunge a DNA profile if there is no conviction. However, many states require the person to request that their profile be expunged.[6] Louisiana, for instance, requires the person to provide a written request with a court order to expunge the profile.[7] Federal law similarly requires the person to ask that the profile be expunged. The person must provide a certified copy of the "final court order establishing that the charge was dismissed, that it resulted in an acquittal or that no charge was filed within the applicable time period" for each charge.[8] Most states require a written request and certified court order to purge a DNA profile if a conviction is reversed on appeal and the case dismissed.

Privacy and Penalties

Federal law imposes a fine of $250,000 or a year's imprisonment for each instance of wrongdoing involving unauthorized use or disclosure of DNA data collected in an offender or arrestee database. States similarly have penalties, and these vary widely in both fines imposed and imprisonment.

State laws also vary with regard to how samples may be used beyond law enforcement and quality control purposes. Many states explicitly provide for other uses, such as identification of missing persons, identification of remains from natural or mass disasters, and statistical research. Several states, including some states with statutes authorizing DNA sampling from arrestees (e.g., South Dakota, Texas and Vermont), prohibit the use of samples for predicting or identifying medical or genetic disorders.[9]

Some concerns about collecting preconviction DNA samples do not relate directly to the potential misuse of collected information or genetic privacy. Rather, they focus on Fourth Amendment search and seizure issues. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[10] Usually, a "search" is interpreted to require probable cause and a warrant or, at minimum, individualized suspicion.[11] Courts have viewed collecting and analyzing DNA as a "search" in Fourth Amendment challenges to DNA databases.[12] However, the courts have not definitively settled the legal status of preconviction DNA sampling.

Two states — Virginia and Minnesota — have seen challenges to their preconviction DNA collection statutes along this line of argument. The courts have come down on opposite sides of the issue. The Virginia case, *Anderson v. Commonwealth,* involved a DNA sample taken from Angel Anderson when he was arrested for rape in 2001.[13] His sample matched another in the state database — one from the crime scene of an unsolved 1991 rape. Anderson was subsequently convicted of the earlier offense. He appealed his conviction on Fourth Amendment grounds, arguing that taking the sample constituted a search that was not based on reasonable suspicion, as it was unrelated to the crime for which he had been arrested.

The court disagreed with Anderson. It ruled that Virginia's law accorded with the Fourth Amendment under the "established principle that a search incident to arrest is

NIJ HELPS STATES TO PROCESS DNA SAMPLES

Crime laboratories throughout the nation continue to face great increases in the number of requests for DNA testing in criminal cases. Congress increased the National Institute of Justice's funding to expand lab capacity and reduce backlogs to $56.3 million in fiscal 2008. The funding enabled crime labs to work on more than 30,000 criminal cases. The program helps labs to improve their capacity. Labs can update instruments, install robotic systems that speed processing and train forensic scientists.

In addition, NIJ's Convicted Offender and/or Arrestee DNA Backlog Reduction Program helps states to process the DNA profiles of people who have been arrested or convicted of certain crimes. The profiles are then placed in a national database. Such profiles have sometimes helped police identify suspects in previously unsolved crime cases. In fiscal 2008, NIJ funding of $7.1 million helped states process more than 200,000 offender DNA samples.

NIJ has also been active in promoting the use of DNA testing to clear the innocent. More than 200 Americans convicted of serious crimes have been freed from prison after DNA testing showed they could not have committed the crimes. Often, DNA testing was not available when they were convicted. In addition, DNA testing has improved a great deal in recent years, and new testing techniques can yield definitive results in cases that may have been inconclusive in the past.

NIJ's Post-Conviction Testing Assistance Program helps states pay for DNA testing in cases where the testing could prove innocence. In fiscal 2008, NIJ awarded some $7.8 million through the program. The funding helps to clear the innocent and can sometimes help to identify the real perpetrators of the crimes. The funding is used in reviews of homicide, manslaughter and rape cases.

The DNA backlog was a topic at the 2009 NIJ Conference. To listen to a panel that discusses new and potential time- and cost-saving approaches to reduce the backlog, go to http://www.ojp.usdoj.gov/nij/multimedia/audio-nijconf2009-dna-backlog.htm.

permissible within the Fourth Amendment and that such a search may include an attempt to identify the arrestee."[14] The court cited a 1992 Fourth Circuit case that held the suspect's identity "is relevant not only to solving the crime for which the suspect is arrested but also for maintaining a permanent record to solve other past and future crimes."[15]

A month after the Virginia decision, Minnesota's Court of Appeals held that Minnesota's DNA statute violated the Fourth Amendment in *In re Welfare of C.T.L.* When C.T.L. was arrested, the police had a judicial determination that probable cause supported criminal charges but did not have a similar determination that probable cause supported issuing a search warrant. C.T.L. refused to give police a DNA sample after being charged with assault and aiding and abetting robbery.[16] The court agreed with C.T.L.'s argument that the collection would violate his Fourth Amendment rights and held that in the absence of a search warrant, a criminal charge alone was insufficient to permit taking a DNA sample.[17]

With regard to the federal law, in the first case of its kind, a federal judge in California ruled that it was constitutional to take DNA samples at the time of arrest for a felony and that the federal law did not violate the Fourth Amendment.[18] The case involved a man accused of possessing child pornography on his computer. The judge wrote that the invasive nature of obtaining a DNA sample was minimal and likened it "to taking fingerprints as part of the routine booking process upon arrest."[19] He further noted that "an arrestee's identity obviously becomes a matter of legitimate state interest" and acknowledged some of the common concerns about preconviction DNA testing: "While fears of a 'Big Brother' style government harassing or persecuting individuals based on genetic characteristics is always theoretically possible, that is not the purpose of the amendments before the court, nor is it at all likely."[20]

The Constitution protects citizens against unreasonable searches. The balance of reasonableness depends on weighing the extent to which an individual's privacy is violated (that is, the degree of intrusion) against the state's interest in fulfilling the search.

Both American and European courts are grappling with the issue. On December 4, 2008, the Grand Chamber of the European Court of Human Rights ruled against the United Kingdom in a privacy case. "In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public

and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."[21]

DNA is undoubtedly valuable in identifying criminals and solving crimes. The use of DNA to clear innocent people and convict guilty ones has produced remarkable results. But the issue of balancing the costs and benefits of preconviction DNA collection remains open to debate.

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Notes

1. See DNA Initiative, "Solving Crimes," DNA Initiative: Advancing Criminal Justice Through DNA Technology, http://www.dna.gov/solving-crimes.
2. *Violence Against Women and Department of Justice Reauthorization Act of 2005,* Pub. L. No. 109-162, § 1004, 119 Stat. 2960, 3085 (codified as amended at 42 U.S.C. § 14135a). See also *Adam Walsh Child Protection and Safety Act of 2006,* which also authorizes federal officials to collect DNA samples from federal arrestees and non-U.S. citizens detained by federal officials.
3. *DNA Analysis Backlog Elimination Act of 2000,* Pub. L. No. 106-546, § 3, 114 Stat. 2726 (codified as amended at 42 U.S.C. § 14135a).
4. H.R. Rep. No. 106-900, pt. 1, at 8 (2000), quoted in Haines, P., "Embracing the DNA Fingerprint Act of 2005," *Journal on Telecommunications and High Technology Law* 629 (5) (2006): 631.
5. *Violent Crime Control and Law Enforcement Act of 1994,* Pub. L. No. 103-322, § 210304, 108 Stat. 1796 (codified as amended at 42 U.S.C. § 14132 (2000 & Supp. IV 2004)).
6. Colorado seems to have come to an interesting compromise. The former arrestee must initiate the expungement process, but if the profile is not expunged, the state must pay him or her $25,000. Colorado's law does not go into effect until 2010, however, so the relative merits of such a system will not be evaluated for some time.
7. La. Rev. Stat. Ann. § 15:614.
8. See Federal Bureau of Investigation, "Expungement of DNA Records in Accordance with 42 U.S.C. 14132(d)(1)(A)," U.S. Department of Justice, Federal Bureau of Investigation, http://www.fbi.gov/hq/lab/html/expungement.htm.
9. Axelrad, S., "Survey of State DNA Database Statutes," American Society of Law, Medicine & Ethics (2006), http://www.aslme.org/dna_04/grid/guide.pdf.
10. U.S. Const. Amend. IV.
11. See Simoncelli, T., "Dangerous Excursions: The Case Against Expanding Forensic DNA Databases to Innocent Persons," *Journal of Law, Medicine & Ethics* 34 (2) (2006): 391.
12. Ibid.
13. *Anderson v. Commonwealth of Virginia,* 48 Va. App. 704 (Va. 2004).
14. Carling, D., "Less Privacy Please, We're British: Investigating Crime With DNA in the U.K. and the U.S.," *Hastings International and Comparative Law Review* 494 (2008).
15. *Jones v. Murray,* 962 F.2d 302, 306 (4th Cir. 1992).
16. *In re C.T.L.,* 722 N.W.2d 484, 486 (Minn. 2006).
17. Ibid., 492.
18. *U.S. v. Jerry Albert Pool,* CR S-09-0015 EJG GGh, Eastern District of California, May 27, 2009.
19. Ibid.
20. Ibid.
21. *S. and Marper v. the United Kingdom* (application nos. 30562/04 and 30566/04) (2008).