

# The Retention and Subsequent Use of Suspect, Elimination, and Victim DNA Samples or Records

A Report to the  
National Commission on the Future of DNA Evidence

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When DNA evidence is found at the scene of a crime, it can be compared to DNA obtained from five classes of individuals. First, suspects in ongoing investigations may volunteer to supply DNA samples, or they can be ordered to give samples by a court or grand jury. For brevity, we call these “suspect samples.” Second, samples may be obtained purely to eliminate an individual as a possible source of DNA left by the perpetrator of a crime. These can be called “elimination samples.”<sup>1</sup> Third, “victim samples” come from victims of violent crimes. Fourth, relatives of missing persons sometimes provide DNA samples to assist in the identification of remains.<sup>2</sup> Finally, DNA profiles derived from “convicted offender samples” are routinely checked against crime-scene samples.

On September 24-25, 2000, various members of the National Commission on the Future of DNA Evidence, its working groups, and other individuals met to discuss the retention and subsequent use of DNA samples or records from people who were not suspected of criminal activity or who have been eliminated as possible sources of the crime-scene DNA. This group did not attempt to resolve the legal or policy issues arising from these practices of retention and reuse; instead, it sought to identify the nature of the privacy interests and the law enforcement concerns that should inform any such resolution.

This report outlines these issues and concerns.<sup>3</sup> Part I describes how some police agencies and forensic laboratories deal with the first three classes of samples or records—suspect, elimination, and victim. For convenience, we refer to these as “nonoffender samples” or “nonoffender records” to distinguish them from samples and profiles from convicted offenders.<sup>4</sup> Part II describes the legal issues raised by the practice of retaining and reusing nonoffender samples. Part III identifies arguments of public policy that are crucial in deciding how these DNA profiles or samples ought to be handled. The report supplies few definitive answers. Instead, it seeks to frame the issues that must be addressed in developing an appropriate policy for reusing the identifying features of DNA samples that are legally obtained from suspects, victims, and other individuals.

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<sup>1</sup> An example is a sample obtained from a boyfriend in a sexual assault case. *See, e.g.*, *People v. Venegas*, 954 P.2d 525 (Cal. 1998).

<sup>2</sup> *See, e.g.*, KY. REV. STAT. ANN. § 17.175(1) (1998) (“A centralized database of DNA . . . identification records for convicted criminals, crime scene specimens, missing persons, and close biological relatives of missing persons shall be established in the Department of State Police . . .”).

<sup>3</sup> It has benefitted from comments or information from David Coffman, Rockne Harmon, Dawn Herkenham, Edward Imwinkelried, and Victor Weedn, as well as the discussions of all the participants in the September 25-26 meeting.

<sup>4</sup> We do not discuss “missing person” samples and databases explicitly, but the legal principles and policy issues relating to consent described in Parts II and III are applicable to these nonoffender materials.

## I. CURRENT PRACTICES

The DNA Identification Act of 1994<sup>5</sup> authorizes the Director of the FBI to establish a National DNA Database Index System (NDIS) using a computer software program called CODIS (Combined DNA Index System). The purpose of CODIS is to create a national information repository where law enforcement agencies on the national, state and local level may share DNA data obtained from convicted offenders and forensic evidence.<sup>6</sup> City and county CODIS laboratories maintain DNA profiles in a Local DNA Index System (LDIS), which can be used for searching against local casework DNA profiles. LDIS profiles also are uploaded into statewide databases known as SDIS (State DNA Index System), and these are uploaded into NDIS. As of August 2000, the NDIS database contained 375,836 offender profiles and 19,053 forensic profiles from 30 states and two federal laboratories.

A DNA analyst who obtains a DNA profile from biological material uses the CODIS “Specimen Category” software to assign the profile to one of the following categories: Convicted Offender, Forensic-unknown, Population, Suspect-known, Unidentified person, Victim-known, Elimination-known, Child, Proficiency, Other or Missing Person (Biological Mother, Biological Father, Biological Sibling). Only specimens listed as Convicted Offender, Forensic-unknown, Unidentified Person or Missing Person will be accepted at NDIS.

Although the policies and procedures for indexing DNA profiles at the national level are well defined, less is known about how local and state forensic laboratories determine what DNA profiles will be maintained in their databases. To address this question, a survey<sup>7</sup> was posted to an Internet discussion list to which at least 83 case-working or convicted-offender laboratories subscribe.<sup>8</sup> Twenty laboratories responded.<sup>9</sup> Nine of the laboratories were local CODIS participants (city or county), ten were state laboratories, and one did not provide this information.

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<sup>5</sup> 42 U.S.C. §§ 14131-14134.

<sup>6</sup> As of 1998, all states had laws mandating the collection of convicted offender samples. See Robin Cheryl Miller, Annotation, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L.R.5th 239 (2000).

<sup>7</sup> The survey form consisted of 24 questions covering internal policies and procedures, selection criteria for importing DNA profiles into CODIS, and mass DNA screening procedures. Respondents were encouraged to add comments.

<sup>8</sup> The cover message stated that the responses would be used for “a report for the Commission on the Future of DNA Evidence of how case working laboratories make decisions regarding what types of standards are entered into local and state databases” and that “The question is ‘What happens to DNA profiles from ‘Elimination standards’ and suspects who do not match the case evidence DNA profile with regards to what is imported into CODIS.’” Respondents were promised anonymity.

<sup>9</sup> Eighteen laboratories responded via the list and two by telephone.

One laboratory, by statute, can only enter convicted offender samples, but the other 19 enter, at the very least, profiles of convicted offenders, forensic unknowns, and missing persons. The determination of which additional categories of DNA profiles to include in LDIS or SDIS most commonly was made after consulting other local and state CODIS laboratories. Half of the laboratories determined that DNA profiles would be entered into LDIS and SDIS databases based on court opinions and “analyst discretion” (defined as “we import what we’re comfortable importing”). If there is a question regarding entering specific DNA profiles from an individual case into LDIS or SDIS, most analysts will request advice from the state CODIS administrator. For example, in one instance a DNA profile was obtained from sperm on a pair of child’s underwear found in the defendant’s home. The DNA profile from the sperm matched the DNA profile from the defendant. A court ruled that the evidence was illegally obtained and inadmissible. After consultation with the state CODIS administrator, local officials did not enter the profile into the LDIS.

States that have two tiers of CODIS administration—the SDIS laboratories and the LDIS (city and county) laboratories—face issues that do not arise in single statewide CODIS systems. A state CODIS administrator cannot dictate what DNA profiles will be indexed in the local laboratories. The state CODIS administrator does have control of what is uploaded to SDIS but must rely on the local laboratories to follow statutes and any state guidelines.

Seven of the responding laboratories (about one-third) do not have an internal CODIS manual containing such guidelines; these laboratories use the DNA Advisory Board Quality Assurance Standards for Convicted Offender DNA Databasing as a guide. There is considerable variation among CODIS laboratory policies and procedures for entry of DNA profiles into LDIS and SDIS. Over two-thirds of the laboratories have no written description of what constitutes an elimination sample or a suspect standard. When an elimination standard is defined as occurring when “the individual contributing the sample is not considered the perpetrator or in anyway connected to the crime,” 95% of the laboratories would not enter an elimination standard into their database. Even if no written definition is provided, all CODIS administrators stated that when a standard is submitted to the laboratory for comparison, analysts know from law enforcement or prosecutors whether the samples are for elimination purposes or whether they are from a suspect.

Although written guidelines for victim DNA profiles do not exist for many local laboratories, the majority of the CODIS laboratories surveyed do not enter victim DNA profiles.<sup>10</sup> However, two CODIS laboratories enter a victim sample if law enforcement officials advise them that the individual is known to be associated with criminal activity.<sup>11</sup>

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<sup>10</sup> These laboratories do not enter “Victim-Known” samples, and they also refrain from entering a “forensic-unknown” sample that matches a victim’s DNA profile.

<sup>11</sup> These laboratories also enter victim data as an internal quality measure. The rationale is that the laboratory can determine if the profile from one individual would match the DNA profile from another individual.

A third of the responding laboratories have conducted “mass DNA screening” procedures to identify the course of unknown DNA profiles in major cases.<sup>12</sup> All but one law enforcement agency used a consent form in these efforts.<sup>13</sup> If the DNA profile from an individual in a mass screening did not match the forensic-unknown DNA profile, half of the laboratories categorized the DNA profile as an elimination sample and did not enter it into the DNA database. However, the other laboratories treated non-matching DNA profiles from mass screenings as “suspect-known” records. These profiles were entered into LDIS to be routinely searched against all profiles from all other cases. In addition, the DNA profiles from the mass DNA screening were uploaded to SDIS. All but one of the laboratories retained the biological samples.<sup>14</sup> Only two individuals involved in the mass DNA screening requested that their sample not be used beyond the crime in question.

In general, the CODIS administrators surveyed acknowledge the difficulties associated with categorizing DNA profiles from known individuals. Clearly, to assign a CODIS “Specimen Category” or to decide whether to enter a profile into LDIS or SDIS, a DNA analyst must know the source of a biological specimen. What are less clear are the criteria for classifying profiles and the officials who are responsible for defining these criteria. For example, are samples collected during a mass DNA screening considered elimination samples or suspect samples? Furthermore, there is uncertainty as to the legal ramifications of a match between a profile from a mass DNA screening and a forensic-unknown profile from a case for which the screening was not undertaken. Could a law enforcement agency or laboratory personnel be liable for damages in such an instance? If a law enforcement agency requires a consent form for a mass DNA screening, does the laboratory need to verify that the form has been obtained before conducting a DNA analysis?

In sum, state CODIS administrators appear to be taking a cautious and conservative stance on which DNA profiles will be accepted at NDIS and to be evaluating unusual situations on a case-by-case basis. Local CODIS administrators appear to be more liberal in accepting profiles for inclusion in their databases. In general, CODIS administrators stressed the need for specific documented instruction for entering specimens such as elimination, suspect, and victim samples. However, LDIS and SDIS administrators believe that these instructions must come from their individual judicial and law enforcement agencies.

## II. LEGAL PRINCIPLES

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<sup>12</sup> Sometimes this was called “rounding up the usual suspects” or “mass DNA sweeps.” However, the term “mass screen” is subject to interpretation. The number of samples collected in these cases ranged from around 10 to 2000, with most in the vicinity of 100.

<sup>13</sup> Consent forms used by law enforcement agencies for such screenings are reproduced in the appendix to this report.

<sup>14</sup> The laboratory that did not retain the samples returned them to the policy agency that submitted them.

The collection and retention of suspect samples, elimination samples, or victim samples is legally permissible if three conditions hold: (1) the agency collecting and retaining the samples is authorized to do so; (2) no statute or administrative regulation prohibits the practice; and (3) no constitutional provisions prohibit the practice. This section describes the possible sources of authority, statutory prohibitions, and the most pertinent constitutional principles.

## A. Authority to Retain Samples or Records

### 1. The General Power to Investigate and Retain

Police agencies are empowered to prevent crimes and apprehend criminals,<sup>15</sup> and statutes are not needed to prescribe every procedure that they may use to obtain and preserve information that could be helpful in discharging their duties.<sup>16</sup> Under this view, police may follow a suspect, take her photograph at a public place, and retain it even if no statute specifically provides that police have the power to collect and store photographs.<sup>17</sup> Similarly, they have “a common law power to fingerprint

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<sup>15</sup> See, e.g., ARIZ. REV. STAT. § 11-441(A) (1999) (“The sheriff shall: (1) Preserve the peace. (2) Arrest and take before the nearest magistrate for examination all persons who attempt to commit or have committed a public offense.”).

<sup>16</sup> See *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755, 757 (Ind. 1946):

Undoubtedly the General Assembly might prescribe in detail means and methods for conducting the Indianapolis police department. But the legislature has not chosen to do more than authorize in general terms the Board of Public Safety of establish, regulate and operate a police system. . . . [It] is quite clear that the Board, Chief of Police and other police officers are exercising an administrative function of the executive branch of the government, for the obligation and power to enforce the laws is executive, rather than legislative. In the absence of statutory direction or regulation the power to maintain and operate a city police system carries with it the right and duty to exercise reasonable discretion in such maintenance and operation. Courts should be cautious about interference with such an executive discretion.

Moreover, government agencies might want to retain samples or records in light of the possibility of a legal or other challenge to the government’s conduct. They could be of some value in responding to actions for civil rights violations or wrongful arrest.

<sup>17</sup> Cf. *State ex rel. Bruns v. Clausmier*, 57 N.E. 541, 542 (Ind. 1900) (holding that no civil cause of action lies against a sheriff for photographing a prisoner later acquitted of the charge of forgery and placing that photograph in the “Rogues’ Gallery” because “[a] sheriff, in making an arrest for a felony on a warrant, has the right to exercise a discretion, not only as to the means taken to apprehend the person named in the warrant, but also as to the means necessary to keep him safe and secure after such apprehension until lawfully discharged; and he has the right to take such steps and adopt such measures as, in his discretion, may appear to be necessary to the identification and recapture of persons in his custody if they escape”).

persons who have been arrested.”<sup>18</sup> Police laboratories may conduct tests on firearms and retain these records even if no statutes refer expressly to “ballistics databases.” They may use a laser-based device for recording vehicle speeds (and prosecutors may use the results if they satisfy the rules of evidence) without a statute that discusses lasers. If the collection and use of DNA information is just a means to the legislatively authorized end of apprehending of criminals, then under the general-authority theory, statutes that refer expressly to DNA samples and records would not be required for the state to invoke its “police power.”<sup>19</sup>

Nevertheless, as discussed in the next section, within the space of a decade every state enacted statutes to authorize statewide DNA databases. Do these statutes indicate that local and state police had no power to use portions of their general budget for this purpose without these laws? Or did the wave of state legislation arise from a desire to implement a new investigatory tool more rapidly and to qualify the states to participate in the national database being created by the federal government?<sup>20</sup> In itself, the existence of statutes on DNA databases does not contradict the view that this investigatory technique was within the general authority of law enforcement agencies.

In any event, whether police in a particular jurisdiction are authorized to use a new law enforcement tool as soon as it becomes available or must wait for the passage of a specific statute is ultimately a question of that state’s constitutional and administrative law. The usual assumption is that new technologies need not be mentioned by name. However, the possibility remains that a specific statute providing for a statewide DNA database occupies the field and implicitly precludes other initiatives.<sup>21</sup>

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<sup>18</sup> State v. Inman, 301 A.2d 348, 354 (Me. 1973) (referring to the holdings of “[m]any courts”).

<sup>19</sup> “Police power” refers to the organic power of states and localities to provide for the health, welfare, and safety of the public. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 524 (1945); United States v. Beach, 324 U.S. 193, 195 (1945). Of course, as discussed *infra* Part II.C, the Bill of Rights significantly limits exercises of the police power, and it might be argued that state officials cannot exercise the general police power without safeguards codified in statutes that constrain police practices that are especially invasive of privacy. However, one would not need to reach this question if the broad grants of power to police agencies did not confer any authority to collect and use DNA samples and data in the first place.

<sup>20</sup> The DNA Identification Act of 1994, 42 U.S.C. § 14132(b), specifies that the national database “shall include only information on DNA identification records and DNA analyses that are . . . (3) maintained by Federal, State, and local criminal justice agencies pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only” under four enumerated conditions that are incorporated in most of the state laws.

<sup>21</sup> This point is discussed *infra* Part II.B.

## 2. Specific Statutory Authorization

Legislation in all states provides for collecting, analyzing, and retaining DNA information on individuals convicted of specified offenses.<sup>22</sup> Often, this legislation also provides for a database relating to samples from crime scenes.<sup>23</sup> Many of these statutes designate or establish a state laboratory for this purpose<sup>24</sup> and list the types of samples and records that may be included in the statewide database or databases.<sup>25</sup> At least one seems to provide for the retention of all investigatory samples and the inclusion of the profiles in a state database.<sup>26</sup>

### B. Statutory Restrictions on Retention or Reuse

A few DNA database statutes expressly prohibit including in the state database profiles from suspects who are never convicted,<sup>27</sup> but the vast majority are silent as to the retention of data or samples from these individuals. In the absence of a provision expressly authorizing retention and

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<sup>22</sup> Miller, *supra* note 6.

<sup>23</sup> *E.g.*, OHIO REV. CODE § 109.573 (A)(3) (1999) (“‘DNA database’ means a collection of DNA records from forensic casework or from crime scenes . . .”).

<sup>24</sup> *E.g.*, OHIO REV. CODE § 109.573 (B)(1) (1999) (“The superintendent of the bureau of criminal identification and investigation may . . . (a) Establish and maintain a state DNA laboratory to perform DNA analysis of DNA specimens; (b) Establish and maintain a DNA database”).

<sup>25</sup> *E.g.*, OHIO REV. CODE § 109.573 (1999) (authorizing “a DNA database” of convicted offender, casework, and anonymous samples, “an unidentified person database to aid in the establishment of the identity of unknown human corpses, human remains, or living individuals,” and “a relatives of missing persons database”).

<sup>26</sup> *See* TEX. GOV’T CODE § 411.142(g) (1999) (“The DNA database may contain DNA records for . . . (3) a biological specimen that is legally obtained in the investigation of a crime, regardless of origin”).

<sup>27</sup> *See* ALAS. STAT. § 44.41.035(b) (1999) (“The Department of Public Safety shall collect for inclusion into the DNA registration system a . . . sample from . . . a person convicted of a crime against a person . . . [S]amples from [other] persons . . . , and test or identification data related to those samples, may not be entered into, or made a part of, the DNA identification registration system.”); 20 VT. STAT. ANN. § 1938(g) (2000) (“Except for records obtained from forensic unknown samples, no DNA records . . . obtained as the result of either consensual submission of biological evidence or the execution of a [court] order shall be entered into the state DNA database.”); *cf.* CAL. PENAL CODE § 297(b) (1999) (“Samples obtained from a suspect shall only be compared to samples taken from the criminal investigation for which he or she is a suspect and for which the sample was originally taken either by court order or voluntarily.”).

reuse, it could be argued that the state laboratory has no power to retain these samples or to include the profiles in the state database.<sup>28</sup>

It also can be argued that the criminal DNA database statutes affect not only those databases created by the agency charged with the task of administering the statewide databases, but all compilations of DNA records within the state. Indeed, some statutes expressly limit the contents of *any* DNA database maintained by law enforcement authorities. Although it might seem that without such express prohibitions, police could use local databases to store nonoffender profiles for comparison with profiles from unsolved cases, it is possible that the legislative purpose in establishing the state database system was to define and comprehensively regulate the state's authority in this area. If so, a construction of the state law based on this purpose or intent would lead to the result that the state database legislation preempts local databases that are not part of that system.

On the other hand, those who reject the conclusion that state legislation providing for convicted offender DNA databases preempts all other DNA databases within the state would maintain that express authority is not required to supplement a convicted offender database with legally obtained profiles from other sources. The principal purpose of collecting DNA from convicted offenders is to deter and to solve future crimes that might be committed by these offenders. A central feature of these statutes is the requirement that the offender submit to DNA sampling. Indeed, some statutes authorize the authorities to use physical force if necessary, and some require offenders to pay for the testing.<sup>29</sup> In contrast, the purpose of obtaining suspect, elimination, and victim samples is to solve existing crimes. The sources of these samples are not always required by law to submit to sampling, and they never are forced contribute to the cost of collection and analysis. Realistically, the legislature did not consider whether DNA information

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<sup>28</sup> For example, the Massachusetts statute provides that

Any person whose DNA record has been included in the state DNA database may apply to the superior court to have such record expunged on the grounds that the conviction or judicial determination that resulted in the inclusion of the person's DNA record in the state DNA database has been reversed and the case dismissed . . . .

MASS. GEN. L. ANN. 22E § 15 (1999). If an initially convicted offender against whom charges later have been dismissed is entitled to have his DNA records removed from the database, then it is easy to argue that a mere suspect who has been exonerated by DNA profiling should not be subject to inclusion in the database.

<sup>29</sup> FLA. STAT. ANN. § 943.325(10)(a) (2000) ("unless the convicted person lacks the ability to pay, the person shall reimburse the appropriate agency for the cost of drawing and transmitting the blood specimens to the Florida Department of Law Enforcement."); *Id.* § 12 ("Unless the convicted person has been declared indigent by the court, the convicted person shall pay the actual costs of collecting the blood specimens required under this section."); MASS. GEN. L. ANN. 22E § 4(b) (1999) ("The cost of preparing, collecting and processing a DNA sample shall be assessed against the person required to submit a DNA sample, unless such person is indigent . . . .").

obtained in the latter circumstances should be retained after the individual is eliminated from the list of plausible suspects. To the extent that retaining these samples or records would advance the general purposes inspiring the legislation, it can be argued that a court should construe the statute as permitting retention either in local databases or in the statewide database itself.<sup>30</sup> In any event, the ambiguity in many of today's statutes suggests that it might be advisable for these laws to be amended to clarify which, if any, nonoffender samples or records can be retained in various law enforcement databases.

### C. Constitutional Limitations

The constitutional framework presented in previous reports to the Legal Issues Working Group applies to the retention of suspect, elimination, and victim samples or records.<sup>31</sup> The most salient constraint on the practice is the Fourth Amendment, which generally requires that government searches or seizures be justified by probable cause and a judicial warrant. Police typically will obtain these samples either by consent or court order. Although acquiring a DNA sample from the body of a person should be considered a search, an individual can waive the right to be free from unreasonable searches and seizures by consenting to a search. In addition, police probably can obtain DNA samples with a judicial order based on reasonable suspicion rather than probable cause. If adequate protections against unauthorized disclosure of private information are implemented, the constitution allows the DNA data derived from these sample to be stored in a computerized database.

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<sup>30</sup> In *Smith v. State*, 734 N.E.2d 706 (Ind. Ct. App. 2000), Smith was arrested and charged with a rape in 1997. The county crime laboratory analyzed DNA samples that Smith provided as a result of a court order. Evidently, the analysis confirmed his involvement in the alleged sexual assault. At trial, he claimed that the alleged victim consented, and the jury acquitted.

In 1998, the laboratory discovered that Smith's profile matched DNA collected in connection with the rape of a woman attacked in her sleep in 1997. Smith was charged with that rape. He moved to suppress evidence that his DNA matched that of the rapist. He argued that the use of the profile to link him to the second rape was an unreasonable search and seizure and was undertaken in violation of Indiana's DNA database statute. After the trial court denied the motion, Smith was convicted and appealed.

The Indiana Court of Appeals affirmed. It reasoned that "the Crime Lab was [not] legally required to destroy Smith's DNA sample after his acquittal in the 1997 case." The court pointed to the generally recognized power of law enforcement agencies "to retain and reuse fingerprint records as well as other records of arrested parties." It acknowledged that the state's DNA database law did not authorize a database for acquitted defendants, but it was unwilling to construe this law as "prohibit[ing the superintendent of the database] from storing DNA profile records of an arrestee whose DNA was collected pursuant to a valid search warrant or court order."

<sup>31</sup> D.H. Kaye & Edward Imwinkelried, *Forensic DNA Typing: Selected Legal Issues* (2000); D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest* (2000). See also D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, CORNELL J. L. & PUB. POL'Y (forthcoming 2001); Edward Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues*, WASH. L. REV. (forthcoming 2001).

## 1. Consent

If an individual consents to providing a sample, the constitutionality of retaining the sample or profile after eliminating the donor as a suspect depends on the scope of the consent.<sup>32</sup> Three situations should be distinguished: (1) police inform the individual that the sample can be used for *any* investigation; (2) police inform the individual that the sample will be used *only* for a particular investigation; and (3) police obtain consent after saying that the sample will be used in the investigation of a specific crime, but no mention is made of other uses. In the first two situations, the scope of the consent is clear. Only those uses as to which consent was given are permissible.<sup>33</sup> In the third situation, the scope of the consent is ambiguous, but most people might assume that when police ask for a sample to help solve one crime, they will not use the sample indefinitely for other purposes. A strong argument therefore can be made that in the absence of explicit consent to the use of the sample for the investigation of other crimes, retention is constitutionally unreasonable.<sup>34</sup> At a minimum, one might argue that where the consent is given in the context of a specific investigation and the question of additional use is left open, the donor later should be able to clarify the scope of judges consent.<sup>35</sup>

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<sup>32</sup> See, e.g., *United States v. Rodney*, 956 F.2d 295, 297 (D.C. Cir. 1992) (Thomas, J.) (“A consensual search cannot exceed the scope of the consent. The scope of the consent is measured by a test of ‘objective reasonableness’: it depends on how broadly a reasonable observer would have interpreted the consent under the circumstances.”).

<sup>33</sup> Cf. *State v. Gerace*, 437 S.E.2d 862 (Ga. Ct. App. 1993) (impermissible to conduct DNA tests on blood obtained with defendant’s consent for alcohol and drug testing in DUI investigation); *State v. Binner*, 886 P.2d 1056 (Or. Ct. App. 1994) (suppression of test showing marijuana in defendant’s blood was required in a manslaughter case where defendant was transported to a hospital after an automobile accident, provided a blood sample to be tested for alcohol but refused to agree to give a urine sample to be tested for drugs).

<sup>34</sup> For constitutional purposes, voluntariness depends on the totality of the circumstances. The presumption that permission does not extend to undisclosed uses seems strong in a sexual assault case in which the victim submits to a vaginal smear or a husband provides DNA after the prosecuting authority informs him that his DNA is needed to rebut a possible defense argument that DNA from a semen stain might be his rather than the defendant’s.

<sup>35</sup> Cf. Alice Robinson, *DNA of Innocent Rape Suspects Will Not be Kept: Ann Arbor Resident Filed Civil Lawsuit that Spurred Ruling*, MICH. DAILY ONLINE, Nov. 21, 1997, <http://www.pub.umich.edu/daily/1997/nov/11-21-97/news/news12.html>, visited 12/11/98 (reporting that as a result of a ruling affirmed by the Michigan Supreme Court, based on “ a state law that says police cannot keep DNA records of innocent people,” Michigan State Police will send letters advising more than 160 men who provided DNA samples for an investigation of serial rapist identified in 1994 that they may have their samples returned or destroyed).

Nevertheless, at least one state supreme court has held, with little analysis, that consent for one investigation is tantamount to consent for all.<sup>36</sup> In addition, in *Schneckloth v. Bustamonte*,<sup>37</sup> the Supreme Court stated that the validity of consent to a search turns whether the individual is coerced rather than what the individual knows about the right to refuse consent or the implications of granting consent. As such, the Court reasoned that a valid consent can be obtained even from someone who does not even realize that he need not consent to the search.<sup>38</sup> Arguably, the usual principle that the government's constitutional duty is merely to avoid bringing undue pressure to bear on citizens in the course of investigating crime<sup>39</sup> implies that the government has no duty to warn

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<sup>36</sup> In *Washington v. State*, 653 So.2d 362 (Fla. 1994), Alice Berdat, a 93-year-old woman, was murdered in her bedroom. She had been badly beaten and vaginally and anally raped. Anthony Washington was imprisoned at a work release center two miles from the woman's home. He did not show up at his job during the time of the rape, and he sold Berdat's gold watch to a coworker. The detective investigating the murder did not tell Washington that he suspected him of this murder. Instead, he asked Washington for blood and hair samples to use in an unrelated sexual battery case. Washington provided these samples. When the state sought to use the samples in the murder case, Washington moved for to suppress them. The trial court denied the motion, and Washington was convicted of the murder, burglary, and sexual battery. The Supreme Court of Florida affirmed the conviction. It reasoned as follows:

Washington stated that he understood his rights, orally waived them, and freely and voluntarily provided [the detective] with hair and blood samples. [O]nce the samples were validly obtained, albeit in an unrelated case, the police were not restrained from using the samples as evidence in the murder case.

*Id.* at 364.

<sup>37</sup> 412 U.S. 218 (1973).

<sup>38</sup> The Court explicitly rejected "the doctrine of *Johnson v. Zerbst*, 304 U.S. 458, 464, [that] the State must demonstrate 'an intentional relinquishment or abandonment of a known right or privilege.'" 412 U.S. at 235. It stated that:

There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

*Id.* at 241. Consequently, police need not give *Miranda*-type warnings advising suspects of their Fourth Amendment rights to obtain valid consent to a search.

<sup>39</sup> This principle underlies many of the Supreme Court's criminal procedure decisions. For example, the use of undercover agents and "sting" operations rest on the premise that the government can secure information by trickery, or at the very least, without disclosing all the facts that a citizen might wish to know before acting. *See, e.g., Illinois v. Perkins*, 496 U.S. 292 (1990) ("*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow

individuals that the fruits of the search could be used in more than one investigation.<sup>40</sup> Of course, whether the *Schneckloth* Court was right to adopt the pure voluntariness conception of consent surely is debatable.<sup>41</sup>

## 2. Court Order

Two state supreme courts have rebuffed Fourth Amendment attacks on the practice of compelling, by judicial order, a person suspected of a crime to appear for and submit to DNA testing

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prisoner. . . . Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns.”); *Oregon v. Mathiason*, 429 U.S. 492, 495–96 (1977) (per curiam) (officer’s falsely telling suspect that suspect’s fingerprints had been found at crime scene); *Hoffa v. United States*, 385 U.S. 293, 304 (1966) (statements made to an undercover agent placed near a suspect to gather incriminating information are admissible where “no claim ha[d] been or could [have been] made that [they] were the product of any sort of coercion, legal or factual”). The *Schneckloth* majority relied prominently on the conception of voluntariness derived from the interrogation and confession cases (412 U.S. at 223–27) to determine the meaning of “voluntariness” for Fourth Amendment purposes.

<sup>40</sup> Thus, in *Colorado v. Spring*, 479 U.S. 564 (1987), an informant told agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) that Spring was engaged in the interstate transportation of stolen firearms and that Spring had participated in a killing in Colorado. The agents set up an undercover operation to purchase firearms from Spring. They arrested him during the purchase, repeatedly advised him of his *Miranda* rights, and secured his consent to interrogation. However, they did not reveal that they were interested in the Colorado murder, and they proceeded to question him about it. At a trial in Colorado for the murder, Spring moved to suppress statements he made to the ATF agents as well as further statements to the police in Colorado on the theory that all these statements were the result of an invalid waiver of his right not to incriminate himself. The trial court admitted the evidence, but the Colorado Court of Appeals reversed, and the Colorado Supreme Court affirmed this reversal, reasoning that “the absence of an advisement to Spring that he would be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, are determinative factors in undermining the validity of the waiver.” 713 P.2d 865, 874 (1985).

The United States Supreme Court reversed the Colorado Supreme Court. Justice Powell’s opinion for the Court observed that “Spring’s argument strains the meaning of compulsion past the breaking point.” 479 U.S. at 573. The Court explained that “[a]bsent evidence that Spring’s ‘will [was] overborne and his capacity for self-determination critically impaired’ because of coercive police conduct, his waiver of his Fifth Amendment privilege was voluntary . . . .” *Id.* at 574 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961), and citing *Colorado v. Connelly*, 479 U.S. 157, 163–64 (1986)). Emphasizing that “[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege,” *id.*, the Court held that the failure to inform Spring that the questioning could extend beyond the offense for which he was arrested and that his answers could be used in more than one case did not render his consent invalid or limit its scope.

<sup>41</sup> *See, e.g.*, WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 3.10(a), at 247 (3d ed. 2000) (summarizing the “most common criticisms of *Schneckloth*”).

when the state established at least reasonable suspicion.<sup>42</sup> Once a DNA sample is acquired, the invasion of personal liberty and informational privacy associated with sample collection is complete, and it is arguable that subsequent use of the sample or profile in unrelated investigations requires no further justification. In general, most courts accept the premise that once the state legitimately has obtained information for one use, it may put it to other uses that do not constitute an additional invasion of the person or privacy.<sup>43</sup> Several courts have applied this premise to DNA sample collection to uphold the use of the profile in establishing the suspect's involvement in an unrelated crime.<sup>44</sup>

This argument rests on the premise that the only interest the individual can assert is the interest in not being discovered to be associated with a crime on the basis of information that the state lawfully has acquired.<sup>45</sup> As an analogy, suppose that the police have probable cause to believe that a man has a stolen personal computer in his apartment. They secure a warrant to search the apartment and find a personal computer there. However, the serial number does *not* match that of the stolen computer. The police retain the serial number and later discover that it matches the serial number of another computer that later is reported as stolen. Is the retention and investigative use of the legitimately obtained information—the serial number—an unreasonable search and seizure? If

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<sup>42</sup> In re Non-Testimonial Identification Order Directed to R.H., 2000 WL 1234251 (Vt. No. 99-353, Sept. 1, 2000) (upholding the constitutionality of a Vermont rule as applied to an order for a saliva sample on the basis of reasonable suspicion); *cf.* Doe v. Senechal, 725 N.E.2d 225 (Mass. 2000) (even if Fourth Amendment applies to civil actions not involving the government, a court-ordered buccal swab to test whether a member of the staff of a residential treatment facility for mentally ill adolescents fathered the child of a patient is a reasonable search and seizure). Whether or not one agrees with these results, there will be cases in which magistrates authorize DNA searches of the person based on probable cause. *See, e.g.*, Wilson v. State, 752 A.2d 1250 (Md. Ct. Spec. App. 2000).

<sup>43</sup> *See, e.g.*, Harold Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49 (1995) (arguing that the current understanding of the Fourth Amendment should be altered so that “each government use of information about an individual constitutes a separate seizure of that person’s effects” and hence “all such uses must satisfy the reasonableness requirement,” *id.* at 53 n.25). Even if one rejects this dominant understanding of the Fourth Amendment, the court order nevertheless could specify that if the testing does not inculpate the suspect, the police must dispose of the sample and the profile.

<sup>44</sup> Bickley v. State, 489 S.E.2d 167 (Ga. Ct. App. 1997); Smith v. State, 734 N.E.2d 706, 709 (Ind. Ct. App. 2000); Wilson v. State, *supra*, 752 A.2d at 1268–72; People v. King, 663 N.Y.S.2d 610, 614 (App. Div. 1997).

<sup>45</sup> *See, e.g.*, Wilson, 752 A.2d at 1272.

(as most cases suggest) it is not,<sup>46</sup> why should there be a different rule for what is, in effect, a personal serial number encoded in the genome?

One might respond that the genome includes disease-related, behavioral, or other data that police could access. If the police retain the DNA sample, this counterargument goes, it is as if they take not merely the serial number, but a copy of all the files on the hard drive of the computer that was thought to have been stolen. The loci that are used in forensic identification do not reveal medical conditions, disease propensities, or behavioral traits;<sup>47</sup> as such, the profile is comparable to a serial number. But the sample itself contains all the genetic information there is to find about the individual, just as the hard drive contains virtually all the data in the computer.

One response to this counterargument would be to legislate that the government limit its DNA analysis to loci that are no more personally significant than, say, red blood cell or HLA types. In addition, one might forbid the government from retaining the nonoffender sample itself.<sup>48</sup> Such safeguards, combined with meaningful statutory or administrative prohibitions on unauthorized disclosure of DNA, seem sufficient to overcome the argument that creating large, computer-searchable databases is a further invasion of constitutionally protected privacy.<sup>49</sup> Whether local DNA databases that include nonoffender records are administered with such protections in place thus may be an issue of constitutional magnitude.

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<sup>46</sup> See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (“the mere recording of the serial numbers did not constitute a seizure,” but “taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent’s privacy unjustified by the exigent circumstance that validated the entry”); *State v. Wamre*, 599 N.W.2d 268 (N.D. 1999) (holding that the Fourth Amendment was satisfied when the police used a serial number that was in plain view during a search to secure a warrant by telephone that allowed them to seize additional items).

One might argue that the police may make use of the serial number only because it pertains to contraband. However, in *Warden v. Hayden*, 387 U.S. 294 (1967), the Supreme Court rejected the previous “mere evidence” rule that items were subject to lawful seizure only if they were the fruits or instrumentalities of crime as “wholly irrational.” *Id.* at 302. Consequently, if the serial number pertained not to a stolen computer, but to one that the police knew contained evidence of a crime, the result would be the same.

<sup>47</sup> See, e.g., D.H. Kaye, *Bioethics, Bench and Bar: Selected Arguments in Landry v. Attorney General*, 40 JURIMETRICS J. 193 (2000).

<sup>48</sup> See WIS. STAT. § 165.77(2)(a)(2) (1999) (“The laboratories shall destroy specimens . . . after analysis has been completed and the applicable court proceedings have been concluded.”).

<sup>49</sup> The leading case on the constitutionality of computer-searchable databases of private information is *Whalen v. Roe*, 429 U.S. 589 (1977). Read generously, the case intimates that such databases implicate a constitutionally protected privacy interest, but holds that reasonable protections against broad dissemination of private data will insulate these databases from constitutional attack. The narrowest reading of the case is that the interest is not having private information stored in a centralized, searchable database is not within the scope of the Search and Seizure and the Due Process Clauses of the Constitution.

### III. POLICY QUESTIONS

The analysis presented above has considered only what the law might allow, not what practices might achieve the optimal balance between law enforcement interests and personal privacy. Much of the discussion at the September meeting served to elucidate these competing concerns. The themes that were sounded in the meeting are described in this section.

#### A. Principles for Relying on Donor Consent

One position articulated at the outset of the meeting was that law enforcement authorities asking a citizen for permission to provide samples of their DNA sample ought to rely on written, informed consent. However, two contrasting visions of consent emerged. One is akin to the informed consent that is required to obtain tissues from individuals for medical uses. A physician has a duty “to warn of the dangers lurking in the proposed treatment [as] a facet of due care”<sup>50</sup> and as a result of the “fiducial qualities”<sup>51</sup> of the special relationship between doctor and patient.<sup>52</sup> With the movement from medical paternalism to patient autonomy as the governing theoretical construct,<sup>53</sup> medical consent forms now strive to disclose all important risks that a patient would want to know.<sup>54</sup>

The alternative view of consent focuses on the absence of duress rather than disclosure of risks. A physician may have some “duty to reveal to the patient that which it is in his best interests [to] know,”<sup>55</sup> but it would be odd to say that government officials engaged in detecting and prosecuting crime must act in the best interests of every individual who might provide them with useful information. Unlike the doctor who seeks to promote the health and well being of a patient, the government’s role is to bring wrongdoers to justice. Restrictions on how the government may

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<sup>50</sup> *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972).

<sup>51</sup> *Emmett v. Eastern Dispensary & Cas. Hosp.*, 396 F.2d 931, 935 (D.C. Cir. 1967).

<sup>52</sup> On the principles of informed consent in the context of experimentation rather than treatment, see, e.g., NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH (1979).

<sup>53</sup> See *Canterbury*, 464 F.2d at 781 (“To the physician, whose training enables a self-satisfying evaluation, the answer may seem clear, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie.”).

<sup>54</sup> It has been said that the risks to be disclosed are those as to which “a reasonable person, in what the physician knows or should know to be the patient’s position, would be likely to attach significance . . . in deciding whether or not to forego the proposed therapy.” *Id.* at 787.

<sup>55</sup> *Emmett v. Eastern Dispensary & Cas. Hosp.*, 396 F.2d at 935.

fulfill this responsibility are largely designed to ensure that the government does not proceed unfairly or in ways that threaten to produce false convictions. As a result, the consent that is constitutionally required for the waiver of Fourth and Fifth Amendment rights in the investigatory phase of the criminal justice system does not resemble medical informed consent. Rather, the core constitutional question is whether the consenting party was coerced into providing the information or the material.<sup>56</sup> If the government did not force the individual to submit to a search, then the acquiescence is considered voluntary, and the consent is valid.<sup>57</sup>

Yet, some would say that the circumstances under which police request DNA samples from potential or actual suspects are inherently coercive. A person who refuses the request may fear that he will become the focus of more intense investigation by the police. In some, if not many, situations, these fears will be well founded.<sup>58</sup> Concern about coercion, however, goes to the question of whether police should be allowed to use consent searches in the first place or whether they should be able to react to a potential or actual suspect's unwillingness to cooperate. If the police are allowed to collect consent samples, "environmental coercion" may not be a reason to prevent them from using these samples in investigating other crimes.

To ensure that the consent extends to other uses, however, police might be required to be explicit—to give advance warning that the sample or the profile will be available for other investigations. A written form, to be read and signed by a donor, is one way to accomplish this. For example, a form used by the Chicago Police Department for mass DNA screening includes the statement that "I understand that these samples may be used for this investigation and any other investigation or any other legitimate law enforcement purpose."<sup>59</sup> By providing a clear record, such written warnings could simplify and reduce litigation over the scope of consent.<sup>60</sup>

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<sup>56</sup> See *supra* Part II.C.1.

<sup>57</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); LAFAYE, *supra* note 41, § 310(a), at 246–47.

<sup>58</sup> See, e.g., Philip P. Pan, *Pr. George's Chief Has Used Serial Testing Before; Farrell Oversaw DNA Sampling of 2,300 in Fla.*, WASH. POST, Jan. 31, 1998, at B1 (reporting that for "over two months, Miami police" searching for the Tamiami Strangler, a man who had been murdering prostitutes, "stopped about 2,300 men driving through an area known for prostitution [along the Tamiami Trail], asked them to voluntarily provide saliva samples," and "followed up on everybody who was a preliminary match and everybody who refused to consent voluntarily").

<sup>59</sup> See *infra* Appendix. None of the other forms submitted in response to the survey described in Part I are this explicit. *Id.*

<sup>60</sup> Of course, even this disclosure might not be sufficient if the medical informed consent model were to apply in the law enforcement context. Would the person who signs the form know what "other legitimate law enforcement purposes" might include? Have all material risks to having the DNA data on file really been disclosed? Must the disclosure reveal whether the information will be placed in an electronically searchable database? Which such database or databases?

Rather than trying to preserve the option of reusing the DNA sample or profile for later investigations, law enforcement authorities might adopt a policy of routine destruction or return of consent samples.<sup>61</sup> Such a policy has several advantages. It would assure the public that providing tissue specimens does not expose them to any lingering risk of being linked to crimes (correctly or incorrectly) or of having their DNA misused. On the other hand, some materials might have to be retained as part of court records, and they could be needed in connection with postconviction proceedings, but a policy could be devised that would take these possibilities into account.

## B. *Retaining and Reusing Nonoffender Records*

Consent samples are only one category of nonoffender samples. Many suspect samples, and perhaps some elimination samples, might be obtained pursuant to court order. Still others could be obtained without donor consent from private tissue repositories and from saliva or other sources of DNA left in public places. Even if a jurisdiction chose to limit the reuse of consent samples to encourage cooperation with the police, the question of reusing these involuntary samples would arise. At least two such reuses must be considered: single crime searches and full database searches.

### 1. Single-crime Searches

Stored profiles can be used for single crime searches—that is, for determining whether the stored profile matches the DNA in a trace evidence sample from a particular unsolved crime for which the police think the individual might be responsible. Maximum protection for suspects would be achieved by requiring that such searches be conducted only with judicial approval on a showing of probable cause. However, one can ask what interest the proposal of a warrant requirement for reuse furthers. As one court recently emphasized, such a procedure is not used with any other forensic science evidence:

Once an individual's fingerprints [or] his blood sample for DNA testing are in lawful police possession, that individual is no more immune from being caught by the DNA sample he leaves on the body of his rape victim than he is from being caught by the fingerprint he leaves on the window of the burglarized house or the steering wheel of the stolen car. The development of such a new and scientifically reliable investigative tool should give rise, in any sane society, not to a cry of alarm but to a sigh of relief. By the same token, photographs, handwriting exemplars, ballistics tests, etc., lawfully obtained in the course of an earlier

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<sup>61</sup> See Wis. Stat. § 165.77(2)(a)(2) (1999) (“The laboratories shall destroy specimens obtained under this paragraph after analysis has been completed and the applicable court proceedings have concluded.”). Under § 165.77(a)(1), these specimens are those received “pursuant to” a “request from a law enforcement agency regarding an investigation,” “a “request, pursuant to a court order, from a defense attorney regarding his or her client’s specimen,” and a “request . . . from an individual regarding his or her own specimen.” In addition, data derived from these specimens shall not be included in the convicted offender database. *Id.* at § 165.77(a)(2).

investigation are freely available to the police in the course of a new and unrelated investigation.<sup>62</sup>

One possible response is that all these items should be used more circumspectly in a criminal justice system that, in the opinion of many observers, is racially biased. If police disproportionately target racial minorities for investigation, then these groups will be unduly represented in the group of suspect samples. Review of the evidence by an independent judiciary might help to ensure at least that the investigative reuse of the information generated by forensic science is based on something more than racial animus.

## 2. Full-database Searches

Rather than a “one-to-one” reuse of the stored profile, a legitimately acquired DNA profile could be run in a “one-to-many” search against the full database of unsolved crimes. As currently administered, however, the FBI will not run a suspect profile against those in the “forensic index” of profiles from crimes. California followed the same policy for its state database, but an amendment to its statute will allow suspect searches if there is a court order or an indictment or information. As with single-crime searches, however, it is not obvious what public or private interests these limitations are supposed to advance. Inasmuch as a search through the full forensic index is more likely to incriminate someone whose DNA is indexed than is a single crime search, the procedure is both more threatening to individuals and more powerful as a law enforcement tool. Indeed, it is more threatening only to the extent it is more effective in identifying the sources of the DNA left at crime scenes.

### *C. Suspect DNA Databases*

A third possible use of stored suspect profiles can be envisioned—the creation of suspect DNA databases. All the profiles from past investigations could be stored in digital electronic form to allow “many-to-one” searches in which all the suspect profiles are run against a trace evidence profile to develop a lead in the case. The database of suspect profiles could exist either in their own right, or the records could be integrated into convicted offender databases that also are run against profiles in the unsolved case database. Functionally, the location of the data makes little difference. Either version would be more efficient in identifying the sources of the DNA left at crime scenes than are ad hoc, one-to-one searches. Placing the suspect database within the state and federal agencies that are responsible for maintaining the convicted offender and trace evidence databases has the advantage of assuring uniform quality control and accountability.

A pragmatic argument that might be brought against implementing databases of suspect samples is that it would waste money and effort because the rate of matches would not be especially

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<sup>62</sup> *Wilson v. State*, 752 A.2d 1250, 1272 (Md. Ct. Spec. App. 2000).

high. The individuals in the database, after all, have not been found guilty of any serious crime,<sup>63</sup> and most jurisdictions have yet to complete their convicted offender databases. On the other hand, unlike arrestee DNA databanking, the DNA from the suspects already has been analyzed in connection with a previous investigation. The only cost is for coding and uploading the data.

Another objection is that there is no principled basis for distinguishing between suspects and other members of the public who have not been convicted of serious crimes.<sup>64</sup> The issue, in philosophical terms, is one of comparative justice. There may be no individual unfairness in reusing DNA or any other legitimately acquired information about a person to convict and punish that person, but the individual may have a claim of comparative injustice if he or she has been singled out for punishment because of irrelevant factors. Such comparative justice claims are not always compelling, but they carry special force if the irrelevant factors are race or similarly objectionable grounds for differential treatment. Thus, it would be problematic to “round up all the usual suspects” if the usual suspect profiles are themselves the product of an unfair or arbitrary process. For instance, a local database of suspect DNA profiles compiled by police who had a policy of placing only profiles from racial minorities in the database would be unconscionable and constitutionally impermissible.<sup>65</sup>

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<sup>63</sup> This presumes that the jurisdiction collects DNA samples from those convicted of all serious crimes for which DNA evidence might be useful.

<sup>64</sup> Of course, the same concern applies to other criminal justice databases such as those for fingerprints.

<sup>65</sup> *See generally* Whren v. United States, 517 U.S. 806, 813 (1996) (stating in dictum that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause”); United States v. Armstrong, 517 U.S. 456, 464 (1996) (explaining that “the decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification’”); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a conviction for operating a laundry in a wooden building without a permit as required under a San Francisco ordinance violated the Equal Protection Clause of the Fourteenth Amendment because city officials enforced the law almost only against laundries operated by Chinese).

Broward County Sheriff's Office  
P.O. Box 5507  
Fort Lauderdale, Florida 33310-9507

I, \_\_\_\_\_ having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent such a search, hereby authorize \_\_\_\_\_ and \_\_\_\_\_ Deputy Sheriffs of the Broward County Sheriff's Office, Fort Lauderdale, Florida, to conduct a complete search of my residence (and/or vehicle) located at \_\_\_\_\_

These Deputy Sheriffs are authorized by me to take from my residence (and/or vehicle) any letters, papers, materials or other property which they may desire.

This written permission is being given by me to the above named Deputy Sheriffs voluntarily and without threats or promises of any kind.

(Signed) \_\_\_\_\_

WITNESS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



**CONSENT FOR NONTESTIMONIAL IDENTIFICATION PROCEDURE**

I, the undersigned, voluntarily agree to submit to the following procedure(s):

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At this time: \_\_\_\_\_

Date: \_\_\_\_\_

Location: \_\_\_\_\_

\_\_\_\_\_

I agree to submit to this procedure even though I do not have to. I have been informed by \_\_\_\_\_ that the results of the procedure may be used as evidence against me in court.

Dated this the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_

\_\_\_\_\_  
Signature of person giving consent (must be at least 18 years old)

Witnesses:

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## Voluntary Consent To Withdraw Blood

I, \_\_\_\_\_ of \_\_\_\_\_, voluntarily consent to have a sample of my blood taken by qualified medical personnel. I am aware that this blood sample will be submitted for analysis and may be used as evidence. I understand that I am not required or obligated to furnish a sample of my blood.

My consent to have a sample of my blood taken is completely voluntary. I have not been threatened nor have I received promises from any member of the Charlotte-Mecklenburg Police Department.

My signature below indicates my voluntary agreement

Dated this        day of        19

\_\_\_\_\_  
Signature of person authorizing the release

Time:

\_\_\_\_\_  
Witness' signature

**CONSENT TO COLLECT BIOLOGICAL SAMPLES**  
**CHICAGO POLICE DEPARTMENT**

DATE \_\_\_\_\_  
RD NO. \_\_\_\_\_

I, \_\_\_\_\_, have been advised and I understand that I have a constitutional right to refuse to allow biological evidence (e.g. blood, hair, and buccal cells) to be taken without a Judicial order of court first being obtained. I have been further advised and understand that I have the right to refuse to consent to these procedures.

Having been advised and fully understanding these rights, I hereby authorize and give my consent to \_\_\_\_\_ to obtain these biological evidence samples. These samples will be turned over to the members of the Chicago Police Department Identified below. Detective(s) \_\_\_\_\_ and \_\_\_\_\_. I understand that these samples will be presented to the Illinois State Police Forensic Science Center, or other appropriate laboratories for analysis. I understand that those samples may be used for this investigation and any other investigation or any legitimate law enforcement purpose.

I further understand that the results of this analysis can and will be used in criminal investigation(s). The results of this analysis may be turned over to the Cook County State's Attorney's Office or other appropriate prosecutorial agencies. If I am charged, this analysis may be used as evidence against me.

My signature on this document, thereby declares that my consent to take these specimens is being given to the above named member(s) of the Chicago Police Department knowingly, voluntarily, and without threats, promises or duress of any kind.

x \_\_\_\_\_

WITNESS(ES) SIGNATURE(S)

\_\_\_\_\_  
\_\_\_\_\_

**CONSENT TO SEARCH FORM**

Date: \_\_\_\_\_

File: \_\_\_\_\_

I, \_\_\_\_\_, having been informed of my legal right not to have a search made of the premises and/or property listed hereafter without a duly and authorized legal search warrant first having been issued by a competent court, and of my right to refuse to consent to such a search, I hereby authorize officers of the Las Vegas Metropolitan Police Department to conduct a search of the following:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The officers are authorized by me to take from the above listed location any letters, papers, materials, and/or property for investigation purposes; and I have been advised that anything they may take may be presented in a court as evidence. I further have been advised that I do not have to consent to this search and possible seizure, and have the right to have an attorney represent me at all stages of this investigation.

\_\_\_\_\_  
SIGNATURE

WITNESSES:  
\_\_\_\_\_  
\_\_\_\_\_

**MIAMI-DADE POLICE DEPARTMENT  
CONSENT TO PROVIDE DNA SPECIMEN FOR LABORATORY ANALYSIS**

**Name:** \_\_\_\_\_ **Race:** \_\_\_\_\_ **Sex:** \_\_\_\_\_ **DOB:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Social Security Number:** \_\_\_\_\_

**I, \_\_\_\_\_, HEREBY FREELY AND VOLUNTARILY CONSENT TO PROVIDE MDPD POLICE OFFICERS WITH A MOUTH SWAB SPECIMEN FOR INVESTIGATIVE PURPOSES. I HAVE BEEN FULLY INFORMED THAT THIS SPECIMEN WILL BE ENTERED INTO A DNA DATABASE AFTER ANALYSIS.**

**I HAVE BEEN FULLY INFORMED THAT THE INFORMATION MAY BE MADE AVAILABLE TO MY PHYSICIAN UPON MY REQUEST, AND IT WILL REMAIN CONFIDENTIAL AND BE USED FOR NO PURPOSES OTHER THAN INVESTIGATION WHICH MAY LEAD TO CRIMINAL PROSECUTION.**

**I FULLY UNDERSTAND THAT I HAVE A RIGHT TO REFUSE TO GIVE THIS SPECIMEN. I HAVE READ AND UNDERSTAND THE ABOVE STATEMENT AND I CONSENT TO PROVIDE THIS SPECIMEN OF MY OWN FREE WILL WITHOUT ANY THREATS OR PROMISES HAVING BEEN MADE TO ME.**

\_\_\_\_\_  
**SIGNATURE OF CONSENTING INDIVIDUAL**

\_\_\_\_\_  
**DATE/TIME**

\_\_\_\_\_  
**WITNESS - (Print and Sign)      Badge Number**

\_\_\_\_\_  
**DATE/TIME**

\_\_\_\_\_  
**Address**

\_\_\_\_\_  
**WITNESS - (Print and Sign)      Badge Number**

\_\_\_\_\_  
**DATE/TIME**

\_\_\_\_\_  
**Address**

METRO-DADE POLICE DEPARTMENT  
CONSENT TO PROVIDE SPECIMEN FOR INVESTIGATION AND LABORATORY ANALYSIS

I \_\_\_\_\_, HEREBY FREELY AND VOLUNTARILY  
PROVIDE POLICE OFFICERS OF THE METRO-DADE POLICE DEPARTMENT WITH A  
MOUTH SWAB SPECIMEN FOR INVESTIGATIVE PURPOSES.

I FULLY UNDERSTAND THAT I HAVE A RIGHT TO REFUSE TO GIVE SAID  
SPECIMEN AND I ALSO FULLY UNDERSTAND THAT SAID SPECIMEN WILL BE  
ANALYZED AND CAN BE INTRODUCED INTO EVIDENCE IN COURT.

I HAVE READ THE ABOVE STATEMENT AND THIS STATEMENT IS SIGNED OF MY  
OWN FREE WILL WITHOUT ANY THREATS OR PROMISES HAVING BEEN MADE TO  
ME.

\_\_\_\_\_  
SIGNATURE OF CONSENTING INDIVIDUAL

\_\_\_\_\_  
DATE

\_\_\_\_\_  
TIME

\_\_\_\_\_  
WITNESS: DATE/TIME

\_\_\_\_\_  
WITNESS: DATE/TIME