

A PROPOSAL FOR THE UNIVERSAL COLLECTION OF DNA

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I. INTRODUCTION

Imagine the following scenario: A young secretary, out with her pillar-of-the-community boss, refuses her boss's advances. He retaliates by raping and murdering her in her own apartment. The good news is that he left his DNA in her body. The bad news is that nobody has his DNA on file, so nobody can match him to the murder. As a result, the murder goes unsolved. Obviously, nobody would even suspect her boss.

Now, let us change the scenario. This time, the state has a database of everybody's DNA. Thus, when it examines the rape and murder DNA evidence, it gets a hit. It identifies the boss's DNA. After ascertaining from him that he was not having a consensual relationship with the victim, he is arrested, convicted for her rape and murder, and ultimately sentenced to life imprisonment.

All other things being equal, I suppose most of us would prefer the second hypothetical. In the abstract, nobody wants the boss to get away with murder. However, many (including my fellow panelists at the Symposium) would contend that all things are not equal.¹ To have a universal database of DNA, in their view, we would have to accept an intolerable invasion of privacy and personal autonomy, forbidden by the Fourth Amendment.²

In my view, that is not correct. It is possible to have a universal collection of DNA in a manner that does not offend the values underlying the

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1. See, e.g., Wayne A. Logan, *Government Retention and Use of Unlawfully Secured DNA Evidence*, 48 TEX. TECH. L. REV. 269 (2015); Tracey Maclin, *Government Analysis of Shed DNA Is a Search Under the Fourth Amendment*, 48 TEX. TECH. L. REV. 287 (2015); Catherine Hancock, Professor, Tulane Univ. Law Sch., Panelist at the Texas Tech University School of Law Ninth Annual Criminal Law Symposium: The Fourth Amendment in the 21st Century (Apr. 17, 2015).

2. See *supra* note 1.

Fourth Amendment. Well, how is this possible? Although the United States Supreme Court split badly in *Maryland v. King*, it unanimously held that King was subjected to a search.³ But the procedure therein involved was a buccal swab, concededly a mild search, but a search nonetheless.⁴ My proposal calls for something different.

II. THE PROPOSAL

I propose that from and after the enactment of this statute, all babies born shall have their identifying DNA taken from them and placed in a DNA holding facility similar to the FBI's Combined DNA Index System (CODIS).⁵ As for the rest of us, I propose that a convenient depository be set up whereby an individual can deposit DNA by spitting into a cup. Because I do not want this process to be too onerous, I would allow each resident of the community substantial time, perhaps two years, to make the contribution. I would allow the contribution to be made at convenient places, perhaps a section of a police station, a voting place, or even some large workplaces. The point is to make it both easy and painless.

Unlike the procedure in *Maryland v. King*, the proposed procedure does not involve government entry into the body of an individual, even with so mild an intrusion as a buccal swab.⁶ Instead, it requires the individual to provide a DNA sample for the universal database. In legal terms, this looks much more like a subpoena than a search.⁷ Still, we should examine its reasonableness.⁸

Citizens are typically summoned for jury duty, and, in time of war, military duty.⁹ Nobody, especially Andrew Ferguson, would argue that a

3. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

4. *Id.*

5. *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Oct. 20, 2015). The FBI established CODIS to serve as a database that stores DNA profiles of convicted offenders. *Id.* The CODIS database facilitates an electronic exchange of DNA profiles collected from crime scenes and convicted offenders from all fifty states. *Id.*

6. *Compare King*, 133 S. Ct. at 1980 (discussing a search involving a buccal swab), with *supra* Part II (proposing DNA deposition by voluntarily spitting into a cup).

7. *See King*, 133 S. Ct. at 1977–79. I do realize some might argue that compelling a person to turn over his or her property—a policeman saying, “Empty your pockets”—may constitute a search. I do not believe that the universal donation of DNA is in that category. Additionally, as Professor Maclin argues, subjecting blood to testing for drug use or intoxication constitutes a search. Maclin, *supra* note 1. DNA is different, however. Surely testing the DNA that the defendant left on or in the victim cannot constitute a search. And as for testing the DNA left on file, only the identity of the criminal can be disclosed, not whether a crime had been committed, as is the case with blood testing. Finally, the fact that my proposal calls for universal testing rather than singling out a particular individual is relevant in determining whether the procedure is proper. *Cf. Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (explaining that states may implement search methods that do not allow an unconstrained exercise of discretion).

8. *See, e.g., Prouse*, 440 U.S. at 653–54.

9. *See* ANDREW GUTHRIE FERGUSON, *WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION* 9–12 (2013).

citizen so called has been seized.¹⁰ Rather, we would say that she has been summoned to perform her civic duty.¹¹

Quite frankly, several hours, or perhaps days, of jury duty is far more disruptive to the average citizen's life than a few minutes, spent at one's convenience, to deposit a DNA sample into a cup. On the other hand, the information contained in a DNA sample could incriminate an individual and incarcerate him, possibly for life. But it is not the DNA that is responsible. It is his past crime. An innocent person need not worry about the results of a DNA test.

Indeed, for some innocent people, universal DNA collection is a good thing. Let us return to a variant of our original hypothetical. Suppose the boss did not kill his secretary, but for various reasons, the police think that he did. Under today's procedures, the police might question the boss and ask him to provide an alibi; clearly, he would be in the realm of suspicion until he was able to clear himself. Under my proposal, the police would first check the DNA, and on finding that it did not match, would probably never even let him know that he was once a suspect.

In the world that I envision in this proposal, not only would the guilty be more likely to be convicted, but the innocent would be less likely to be hassled as a suspect. More than thirty years ago, I argued the Fourth Amendment should be viewed from the perspective of the innocent.¹² I continue to adhere to that view. Viewed from that perspective, universal collection of DNA is a good thing that should be encouraged.

One must be cautious, however. I am acutely aware of the potential misuse of DNA.¹³ Specifically, in the wrong hands, it can allow others to learn of susceptibility to disease or various other genetic traits that an individual might have.¹⁴ We are right to be alarmed at such potential misuse.

King, however, emphasized that DNA is multifaceted, and that, at least as the Court saw it, only what scientists call junk DNA is relevant for identification.¹⁵ Thus, if *King* is correct, no DNA that is used in identifying criminals, or noncriminals, is even useful for identifying individual characteristics that we would like to keep private.¹⁶

I would limit permissible DNA use to identification purposes. Specifically, I would allow DNA to be used to identify criminals (or exonerate suspected criminals), to identify dead bodies, and to identify amnesiacs. Although surely a closer question, I would probably also allow it

10. *See id.*

11. *Id.* at 7–15.

12. Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1229 (1983).

13. *See* Ashley M. Ellis, Comment, *Genetic Justice: Discrimination by Employers and Insurance Companies Based on Predictive Genetic Information*, 34 TEX. TECH. L. REV. 1071, 1072 (2003).

14. *See id.*

15. *Maryland v. King*, 133 S. Ct. 1958, 1967 (2013).

16. *See id.*

to determine paternity. Other than that, I would make use of DNA information a serious felony, and I would enforce it should the need arise.

III. WHERE IS THE HARM?

Where is the harm in this proposal? Well, I suppose that DNA could be planted or misused.¹⁷ Hopefully, such misuse could be detected.¹⁸ In any event, if the possibility of tampering with or misusing evidence were sufficient to deny its use, there is very little evidence that would ever be admissible.¹⁹ So far as I know, there is no reason to believe that tampering with or planting DNA is more rampant than other forms of evidence, such as fingerprints.²⁰ Indeed, it is DNA's accuracy that makes it the gold standard of evidence.²¹

The manner of giving the evidence certainly should not be problematic. Eventually, all living citizens will have had their DNA taken at birth. Until then, the ease of both time and place in donating DNA is less onerous than jury duty or even paying taxes. So, unless there is an inherent objection to the government having everyone's DNA, the manner of obtaining it should not be a problem.

I understand that the presence of DNA could potentially lead to an incorrect result. For example, in our original hypothetical, posit that the boss really was having a consensual affair with the murdered secretary, but when confronted by the police, he denied it because he didn't want his wife to know. Consequently, the state was able to use his denial plus his DNA to convict him of rape and murder.

Obviously, the above potential is a problem, not to mention a lesson on the wages of dishonesty. Nevertheless, we do not want to convict a man of murder when his actual offense is merely adultery or dishonesty. In most cases, the above scenario would probably not result in a conviction. Rather, the boss would produce motel or dinner receipts to establish that he had a consensual sexual relationship with the victim. If he could not, the situation is no different from other instances in which misleading evidence leads to a wrongful conviction.²²

17. See, e.g., Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always a "Harmless Error": DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 TEX. WESLEYAN L. REV. 403, 425–38 (2011).

18. *Id.*

19. See Doug Linder, *The Trial of Orenthal James Simpson*, UMKC (2000), <http://law2.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonaccount.htm> (last visited Oct. 20, 2015).

20. But see Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 441–42 (1997).

21. See, e.g., Paul C. Giannelli, 52 JURIMETRICS 107, 108 (2011) (reviewing DAVID H. KAYE, *THE DOUBLE HELIX AND THE LAW OF EVIDENCE* (2010)).

22. Linder, *supra* note 19.

IV. THE BALANCE

So does the balance favor adopting my proposal, and if so, why? Obviously, the answer depends on the weight one applies to the benefits and detriments.²³ We must carefully examine this question: Is the average person better off or worse off if the government has some identifying DNA on file? If you believe, as many do, that individuals are worse off if their DNA is on file, that would be a factor against my proposal.²⁴

On the other hand, I believe that individuals are better off with their DNA on file. Why do I say this? Well about thirty years ago, a Texas Tech University student named Timothy Cole was wrongly accused of a rape that occurred right here on this very campus.²⁵ Ultimately, Mr. Cole was convicted and sent to prison, where he died.²⁶ Many years later, based on DNA and the confession of the real rapist, Mr. Cole was exonerated and a statue was erected in his memory less than a mile from where we sit.²⁷

Had my proposal been in effect at the time of that sad incident thirty years ago, the real rapist would have been convicted and Mr. Cole would have been allowed to finish his education and presumably live happily ever after. In this day and time, if everybody's DNA were on file, a person would not have as much to worry about if somebody wrongly thinks that he committed a crime. His DNA would exonerate him. The length of time it takes between submitting DNA and getting the result cuts against this proposal.²⁸ I recently learned that, in Houston, some rape kits sat untested for months while perpetrators committed additional serious crimes.²⁹ Additionally, in *Maryland v. King*, Justice Scalia highlighted the amount of time it took to retrieve a DNA sample in Maryland.³⁰ Excessive time between submitting DNA and obtaining the results undercuts the value of having the DNA in the first place.³¹

My solution is to simply speed up the process. I cannot and do not believe that we are scientifically incapable of processing DNA more rapidly if we choose to do so.³² We have not made it a high enough priority. Could

23. See *supra* Parts II–III.

24. See Sarah B. Berson, *Debating DNA Collection*, 264 NAT'L INST. JUST. J. 9, 10–11 (Nov. 2009), <https://www.ncjrs.gov/pdffiles1/nij/228383.pdf>.

25. Stephanie Gallman, *Lubbock, Texas, Unveiling Statue of Man Who Wouldn't Take 'Freedom on the Cheap'*, CNN (Sept. 17, 2014, 9:42 PM), <http://www.cnn.com/2014/09/17/us/texas-exonerated-rape-statue/>.

26. *Id.*

27. *Id.*

28. See, e.g., Ted Oberg & Trent Seibert, *Delayed DNA Testing Allowed Alleged Rapists to Commit New Crimes*, ABC13 (Jan. 29, 2015), <http://abc13.com/news/while-the-dna-sat-alleged-rapists-did-not-496780/>.

29. *Id.*

30. *Maryland v. King*, 133 S. Ct. 1958, 1983–84 (2013) (Scalia, J., dissenting).

31. Oberg & Seibert, *supra* note 28.

32. See *King*, 133 S. Ct. at 1977 (majority opinion).

we make it more of a priority? I think so. Ask yourself this question: If the President of the United States were assassinated, and the otherwise unknown perpetrator left sufficient DNA to analyze, how long would it take to analyze the DNA?

Given the obvious answer to that question, we all know the process can be expedited. It is simply a matter of will and importance. I attach a great deal of importance to solving crimes, and I think that the government does too (especially given its frequent willingness to violate the Fourth, Fifth, and Sixth Amendments in the name of solving crimes).³³

V. WHY THE MERITS OF THIS PROPOSAL ARE NOT INTUITIVELY OBVIOUS

Although the benefits of this proposal are extremely obvious to me, I do not believe that they are obvious to a majority of the judiciary, professoriate, or even the populace as a whole.³⁴ Four Justices objected to the modest rule upheld in *Maryland v. King*.³⁵ Although that case involved a search, and my proposal, at least in form, does not, I am not sure how persuasive that distinction would be to the Justices. Even if the Court agreed that compulsory spitting in a cup does not constitute a search, it might be tempted to invalidate my proposal on due process grounds.³⁶ I am quite certain I have not persuaded my colleagues on this panel. So, I ask myself, “Why?” I think the answer has to do with fear of the ideas expressed in Orwell’s *Nineteen Eighty-Four*.³⁷ We are concerned that too much information in the hands of a not-always-benevolent government is not a good thing.³⁸ I do not disagree, but it is my fondest hope that I can persuade the reader that the information this proposal allows the government to possess is not too much.

Under my proposal, the government can only learn the identity of criminals, amnesiacs, and dead bodies. Is there good reason to oppose the government learning these things? I really do not think so. Additionally, the government can learn the identity of innocent people by determining that their DNA does not match that of the perpetrator. Surely, this is a good thing.

So, it seems to me that this question involves an abstract harm weighed against a concrete good. The abstract nature of the harm is our fear that harm

33. See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 765 (2003) (describing the government’s regrettably common violation of an individual’s Fifth Amendment right).

34. See generally *King*, 133 S. Ct. at 1976–77 (placing importance only on retrieving DNA incident to arrest).

35. See *id.* at 1980.

36. Ironically, Justice Scalia, who dissented in *King*, might agree with my proposal on the ground that formally, compulsorily spitting in a cup does not constitute a search. *King*, 133 S. Ct. at 1980–90 (Scalia, J., dissenting). And, of course, Scalia has little use for substantive due process. See *Lawrence v. Texas*, 539 U.S. 558, 592–94 (2003) (Scalia, J., dissenting); *Chavez*, 538 U.S. at 781–83 (Scalia, J., dissenting).

37. See generally GEORGE ORWELL, 1984 (1987) (discussing concerns regarding government possession of personal information).

38. See *King*, 133 S. Ct. at 1989 (Scalia, J., dissenting).

will come to an individual if the government has too much information. The concrete good is obvious: Convicting the guilty and absolving the innocent.

VI. CONCLUSION

Because the universal, compulsory collection of DNA does not involve a search, and because, in any event, it is reasonable, it should be allowed and encouraged. It would make a better, safer world for all of us.

