

REVISE POLICIES MANDATING OFFENDER DNA COLLECTION*

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*Recognizing the power of stories about heroes and villains
does not mean that these stories are a solid foundation
for public policy (Goss, 2007).*

Currently, all states in the United States require some categories of convicted offenders to submit physical samples for later DNA analysis. The results of these analyses are DNA profiles available to law enforcement. One of the stated goals of legislation, cited in supporting court cases, has been to deter offenders from reoffending. State legislatures in recent years have increased dramatically the scope of offenders who are required to submit samples. Empirical work on deterrence suggests that these recent expansions are undermining the deterrence potential of these policies. That potential can be restored only by reversing the recent and planned policy expansions.

BACKGROUND

Since the mid-1980s, it has been possible to link DNA extracted from physical evidence recovered at crime scenes with DNA profiles generated from suspect biological samples or from other crime scenes. The implementation of Federal Bureau of Investigation's national-level Combined DNA Index System (CODIS) (FBI, 2007), which is searchable by law enforcement agencies, and its state-level and local-level counterpart databases, has led to rising expectations that DNA will solve past crimes and future prevent crimes and to a dramatic expansion of the samples collected for DNA analysis from arrestees and from convicted offenders.

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This article focuses on legislation mandating collection of DNA samples from arrested or convicted offenders and one of the stated goals of those policies, deterrence. These policies require convicted offenders to submit physical samples, usually obtained by buccal swabs, which yield to DNA profiles after analysis. These profiles are uploaded to state and federal databases. Investigators then seek to match these profiles to DNA evidence from past and current crimes.

The argument made here is as follows: First, specific deterrence — making convicted offenders more reluctant to commit new crimes — has been a salient policy goal of DNA legislation articulated in statutes and in court rulings supporting those statutes. Second, substantial research confirms that past and potential offenders can be deterred and has clarified the conditions under which deterrence is likely. Third, more recent convicted offender and arrestee DNA legislation is making deterrence less likely, undermining a central goal of these policies. It has created substantial delays before DNA profiles are uploaded to CODIS. No risk of immediate detection via DNA exists until that upload occurs. These delays, of course, also adversely affect another policy goal, recidivism detection. Consequently, for the purposes of specific deterrence of known offenders, legislators should (1) abandon all current initiatives to further increase the scope of offenders who are mandated to submit samples and (2) revise current legislation so that there is a decrease in the scope of convicted offenders who are obligated currently to submit DNA samples. This rollback should remain in effect until profiles can be created and uploaded in short order.

If legislators wish to retain the current broad scope of offenders required to submit samples, and/or to continue to expand the scope of offenders required to submit samples, they should publicly acknowledge that deterrence is not one of the goals served by these policies but instead is undermined by them.

This work focuses on only one of the four purposes of DNA offender legislation. Those four include: identifying possible perpetrators and solving crimes, excluding suspects, deterring potential offenders, and detecting recidivists. These aims were stated in Pennsylvania's seminal DNA legislation that became Act 14 in 1995: "The General Assembly finds and declares that DNA data banks are an important tool in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations or prosecutions, *and in deterring and detecting recidivist acts* [emphasis added]."¹ Given these multiple goals, the recommendations

1. The General Assembly of Pennsylvania, House Bill 3, Special Session No. 1 of 1995. Available online: <http://www2.legis.state.pa.us/WU01/LI/BI/BT/1995/1/HB0003P0>

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made here to realign the DNA convicted offender policies to maximize deterrence may conflict with other DNA-related policy aims.

DETERRENCE IS A MAJOR GOAL OF POLICIES
MANDATING OFFENDER DNA
SAMPLE COLLECTION

It is clear from enabling legislation that deterring offenders was one policy goal. Pennsylvania's Act 14, quoted above, is one example. That legislation was framed after extensive consultation with federal and state experts (Taylor et al., 2006). Similarly, the New Jersey State Assembly, in its initial legislation that authorizes DNA sampling, the DNA Database and Databank Act of 1994, found that "DNA databanks are an important tool in criminal investigations and in deterring and detecting recidivist acts."²

Consequently, judges in state and federal courts have recognized the centrality of the deterrence goal. Partly because of that goal, court rulings have concluded that community safety trumps individual offender privacy. See, for example, the decision in the 2007 New Jersey Supreme Court ruling *State of New Jersey v. John O'Hagen* [U.S. A70-05 (2007)] or O'Scannlain's majority opinion (p. 11470) and the concurring opinion of Judge Gould (p. 11472) in the 9th Circuit of the U.S. Court of Appeals 2003 ruling *U.S. v. Kincade* [345 F.3d 1095, 1113-4 (9th Cir. 2003)] (Colb, 2004; Tanner, 2004).³ Both cases reference achieving deterrence explicitly as part of the rationale for the privacy invasion involved in sample collection. State legislators with whom we spoke about DNA legislation in Pennsylvania have expressed similar hopes for deterrence (Taylor et al., 2006).

149.pdf. Bill history is available online: <http://www.legis.state.pa.us/WU01/LI/BI/BH/1995/1/HB0003.HTM>. Referred to subsequently as Act 14.

2. New Jersey DNA Database and Databank Act of 1994, N.J.S.A. 53:1-20.17 – 20.28 (Act). Available online: http://www.dna.gov/rawmedia_repository/6e22d867_0851_4cf6_862f_f533caf9b6b0. For details on the original bill and its amendments, see New Jersey "Senate Budget and Appropriations Committee Statement to Assembly, No. 2617 with committee amendments, Dated May 15, 2003" [Available online: http://www.njleg.state.nj.us/2002/Bills/A3000/2617_S3.PDF].

3. Commentators on *U.S. v. Kincade* have questioned O'Scannlain's linking of society's "undeniably compelling" and "monumental" interest linked to deterrence (Zunno, 2005) and have disagreed with the minority opinions' concerns about the susceptibility of the general population to the same conditions (Colb, 2004).

WHAT DO RESEARCH AND THEORY TELL US ABOUT CONDITIONS OF EFFECTIVE DETERRENCE?

Specific or individual deterrence occurs if a current offender is dissuaded from offending in the future because of the expected swiftness, certainty, and severity of the formal punishment that would occur. General deterrence seeks to dissuade the population, offenders and nonoffenders alike, from offending in the future because those actions would be followed by swift, certain, and severe punishments (Zimring and Hawkins, 1973). For both types of deterrence, risk of detection is pivotal. An alternative conceptualization refers to the impacts of direct and indirect experiences on punishment and punishment avoidance (Stafford and Warr, 2003).

Research confirms several points about deterrence. First, the behavior of offenders and potential offenders appear rational in some respects (Levitt, 2002). Second, deterrence exists: "a consensus has emerged among perceptual deterrence researchers that the negative association between sanction risk perceptions and offending behavior or intentions is measuring deterrence" (Nagin, 1998:15). Third, offenders and potential offenders respond to all three relevant attributes of the punishment: celerity, certainty, and severity (Horney and Marshall, 1992; Levitt, 2002; Nagin, 1998), although the strengths of the impacts may vary depending on the type of offender (DeJong, 1997). The question then becomes whether these perceptions can be manipulated by policies to create additional marginal deterrence (Nagin, 1998). Fourth, policy shifts can create deterrence effects, and they do so this by altering perceptions, albeit perhaps only temporarily (Ross, 1982; Sherman, 1990). Fifth, key to policy shifts creating shifts in perceptions of sanctions are credibility of the threat and sixth, manageability of the target group. "Credibility is assuredly crucial. If a sanction threat is not credible it will not be effective" (Nagin, 1998:34). "Credibility in turn depends on the capacity of the criminal justice system to administer official policy" (Nagin, 1998:8).

The size of the targeted offender group is also important because "If this population gets too large, it may overwhelm the system's capacity to project a credible enforcement threat" (Nagin, 1998:35). Policies which overwhelm the system and make it impossible to administer official policy simultaneously destroy credibility and manageability. Last, of course, the risks of detection and of sanctioning must be communicated to offenders. These risks might be learned about through official channels, by what happens to them, or by what happens to those they know (Stafford and Warr, 2003).

RECENT DNA POLICY SHIFTS UNDERMINE DETERRENCE POTENTIAL

Since the mid-1990s, policies mandating DNA sample collection from offenders have increased the range of relevant offenses requiring sample submission and started targeting offenders prior to adjudication (Taylor et al., 2006). For example, Pennsylvania's initial legislation required samples from those convicted of violent offenses and sex felonies as well as some sex misdemeanors. In 2002, convicted robbers and burglars were added. In 2005, all convicted felons were required to submit samples. The increased load on the system was staggering. It was estimated from two independent sources that the volume of convicted offender samples to be processed in Pennsylvania increased 15–18 times over this period (Taylor et al., 2006). As of this writing, 43 states require all convicted felons to submit samples for DNA analysis (National Conference of State Legislatures, 2006).

State lawmakers around the country continue to seek DNA from more classes of offenders. In 2007 alone, states are seeking to expand DNA collection to some classes of arrestees (23 states), some or all misdemeanants (6 states), some juveniles adjudicated delinquent (3 states), and some classes of persons charged (3 states) (Applied Biosystems, 2007). In 2004, a bill introduced in the New Jersey legislature sought to collect samples for DNA analysis from persons convicted of disorderly person offenses.⁴ In 2006, New York State passed legislation requiring sample collection from all convicted felons and 17 classes of convicted misdemeanants. As of this writing, the New York State Senate has passed a bill mandating samples for DNA analysis from all convicted misdemeanants.⁵

The growing range of offenders who are required to submit DNA samples has overwhelmed state laboratories, creating serious backlogs in the processing of these samples (National Institute of Justice, 2003; Peterson and Hickman, 2005). In many states, the public laboratories responsible for uploading DNA profiles from convicted offender samples are the same ones that process physical evidence for DNA in current and unclosed crime cases. No one knows what the size of the DNA backlog is; estimates vary widely, and it is difficult to come up with a national-level, defensible estimation procedure (but cf. Pratt et al., 2006).

In light of processing delays, Congress has channeled substantial funds for backlog reduction assistance to the states. Information from Pennsylvania suggests, however, that these funding procedures and amounts

4. New Jersey Legislature, Senate, Number 1513, An Act concerning DNA testing and amending P.L.1994, c.136. Introduced: April 29, 2004. [Available online: http://www.njleg.state.nj.us/2004/Bills/S2000/1513_I1.PDF. Accessed May 22, 2007].

5. New York State Assembly, Senate Bill S02094. Introduced 1/31/07. [Available online: <http://assembly.state.ny.us/leg/?bn=S02094&sh=t>. Accessed May 28, 2007].

will not reduce the backlog to a minimal amount any time soon (Taylor et al., 2006). The funding requirements and the timing of disbursement make it likely that other states have similar problems.

Therefore, convicted offenders who submit samples for DNA analysis have a period ranging from a few months to perhaps more than a year—no one knows precisely—until their uploaded profiles will be widely available. The risk of detection from DNA profiles is zero during this time. Criminals who reoffend during this period, and who leave behind DNA at the crime scene—assuming the crime scene samples are processed for DNA—will not be identified through their profile because it has not yet been uploaded. Offenders' direct and indirect experiences (Stafford and Warr, 2003) during this period will suggest no risk of detection.

Granted, the profile will be uploaded eventually, and the risk of detection will rise above zero. Offenders, like citizens, engage in time discounting, paying less attention to future negative consequences (Levitt, 2002).

In addition, if criminals reoffend, and the expected ax does not fall even though they have submitted a sample for DNA analysis, counter-deterrence could be happening.⁶ Offenders may feel relatively invincible and thus may be encouraged to reoffend until they or their acquaintances start getting caught by authorities who have made use of uploaded DNA profiles.⁷

In short, serious DNA processing lags are not likely to be reduced to a trivial level any time soon. The backup is far too massive. "Overwhelming the system," which Nagin (1998) warned against, has happened. Furthermore, the way federal funding assistance protocols work, those additional but crucial funds cannot match demand in a timely way (Taylor et al., 2006). Of course, in addition to eroding the deterrence potential of the policies, these backlogs create justice problems for current cases being processed; potentially they represent justice—whether convictions or exonerations or recidivism detection—delayed.

State legislators are compounding the problem by continuing to introduce legislation that expands the range of offenders who are mandated to submit samples. These initiatives will increase the backlog and the delays in profile uploading and will further weaken the deterrence potential of these policies. For convicted offenders, the delay means the deterrence threat is not credible.

6. We are indebted to Mary DeFusco, Esq., for this term and line of reasoning.

7. Of course this does not take into account the question of whether offenders learn to avoid leaving their DNA to reduce risk of detection in future crime scenes. Although this scenario is taking place, crime scene techniques also are improving apace (e.g., contact DNA), which makes it more difficult for offenders to leave the scene without a trace, at least in the case of sexual assaults and nongun homicides.

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SUMMARIZING

To summarize the issue: Policies mandating the collection of samples for DNA analysis from convicted offenders and/or arrestees include the deterrence of recidivist acts as one of their goals. Enabling legislation speaks directly to this goal, and subsequent court cases have supported it. The rush of state legislatures to expand the pool of offenders from whom samples must be collected, an expansion that has sometimes taken place with the strong encouragement of federal agencies (Taylor et al., 2006), is undermining that very deterrence goal.

Deterrence research tells us that policies shifting the likelihood of detection should subsequent offenses take place, as offender sample collection policies do, must be credible, perceived, and of such a scope so as not to overwhelm the system. The recent policy changes and current initiatives in many state legislatures are making it *less* likely that these policies will create additional deterrence. These policy expansions, past and planned, have undermined and will continue to undermine the deterrence potential because they have created substantial delays in analyses and in profile uploading. These delays have arisen because the required personnel and equipment costs are hefty, and the numbers of offenders to be processed have increased astronomically because of the policy expansions. The threat of linking future crimes to a past offender, intended to increase the certainty of punishment and thus deter the offender, cannot be credible when the profile is not uploaded and thus not widely available. The delay in uploading allows the offender to discount this future detection. Even extraordinary amounts of federal fiscal support—from 1994 through 2005 over \$3 trillion in federal money has already been spent for all DNA funding—will not solve the problem, in part because of the size of the problem and in part because of the way funding mechanisms are structured (Taylor et al., 2006).

SUGGESTIONS

So what should policy makers do?

First, state legislators should withdraw all bills currently under consideration that seek to expand the scope of offenders required to submit samples for DNA analysis. These initiatives will only overwhelm the system even more, increase the processing and upload delays, and continue to weaken the deterrence potential of existing policies.

Second, state legislators should introduce legislation that reduces the scope of convicted felony offenders who are required to submit samples for DNA analyses. Legislators can start by removing arrestees and misdemeanants from the required lists and then move on to remove other minor felonies, including drug possession crimes.

Third, this reduction in scope should remain in effect until law makers have verified that collected samples are analyzed and uploaded to CODIS in a very short time. Only at that point should the expansion of relevant offenses be considered. Only when an offender knows his or her sample was collected yesterday, and the profile will be available nationally next week, is the threat of detection credible and the deterrence goal of the policy served. Those convicted and serving sentences outside of prison or jail need to be deterred as soon as possible.⁸

Once resources have caught up such that convicted offender samples generate uploaded DNA profiles in a very short time, legislators can reconsider expanding the pool of relevant offenders. In this discussion, however, they should bear in mind that the credibility of the deterrence threat is affected by the “size of the would-be offender population . . . if this population gets too large, it may overwhelm the system’s capacity to project a credible enforcement threat” (Nagin, 1998:35). Deterrence research provides past examples where this has occurred after policy implementation.

If state legislators genuinely care about deterrence goals, they need to explain to the public the need to reduce current offender sample collection mandates, why these policies are justified empirically, and why, despite compelling, heart-rending, and sobering individual stories to the contrary, these reductions will result in policies that in the long run will serve the public more effectively.

Fourth, if state legislators opt not to follow the above suggestions, they should rewrite enabling legislation to remove deterrence as a policy goal. To continue to include it, and to allow courts to refer to it, borders on intentional misleading, at a time when the policies as implemented are widely discrepant from what the research tells us is required (Zunno, 2005).

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8. It is not clear whether authorities are required to inform offenders when their profiles are uploaded. Information about the speedy detection of subsequent crimes through quickly uploaded profiles is likely to become common knowledge in offender networks, thus becoming part of indirect deterrence (Stafford and Warr, 2003).

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