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Commentary

Should DNA From Your Coffee Cup End Up in a Databank?

The juggernaut of technology, rather than constitutional analysis, is driving the collection of information

By Grayson Barber

We shed our DNA constantly, leaving behind skin cells, hair samples and saliva. Developments in technology have empowered law enforcement to collect, extract and analyze DNA from biological samples to identify crime suspects.

A number of crimes have been solved using surreptitious DNA collection. In New York, police recently made an arrest in a 30-year-old rape case after the suspect spat on the sidewalk, leaving a sample for collection and analysis. In Washington State, the police sent a letter on legal letterhead to a suspect, asking him to join a lawsuit aimed at recovering overcharges in traffic fines. When they received a return letter from the suspect, they lifted his DNA from the dried saliva where he had licked the envelope.

The principle argument in favor of such surreptitious activities is that the suspects' DNA was "abandoned," like garbage left at the curb. But there are big differences. We can destroy sensitive documents, for example. And there is no knowing or purposeful component to shedding DNA; we don't assume anyone will rummage through our genetic discards. To the contrary, DNA cannot be "read" or even seen unless it is collected and then subjected to expensive and sophisticated equipment.

Indeed, most of us probably think we do have a reasonable expectation of privacy in our DNA. New Jersey has a "Genetic Privacy Act," N.J.S.A. 10:5-43, et seq., which provides that genetic information should not be obtained without prior informed consent. Under federal law as well, such as the Health Insurance Portability and Accountability Act (HIPAA), a person's DNA information and tissue samples are protected.

But there are exceptions. HIPAA and state law have broad exceptions that permit disclosure to law enforcement officials. HIPAA permits disclosure of "protected health information," not only in compliance with court orders or grand jury subpoenas, but also without judicial review, in response to administrative subpoenas, summonses or civil investigation demands.

It is understandable that law enforcement should want to use DNA any way possible to solve crimes. In January 2007, our Supreme Court upheld the constitutionality of the New Jersey Database and Databank Act, N.J.S.A. 53:1-20.17 et seq., which permits the police to collect DNA samples from juveniles as well as adults convicted of crimes. And the New Jersey Legislature would expand the state's DNA databases under two bills, S-378 and A-2708.

It is deeply troubling, however, that the juggernaut of technology, rather than constitutional analysis and informed public decision making, is driving the expansion of DNA databanks. Vague standards like "reasonable expectation of privacy" create a policy vacuum, inviting abuse of police power.

New genetic techniques and practices are giving the law enforcement community unprecedented access to the private lives of innocent people. These include; 1) forensic databanks to retain genetic data permanently; 2) DNA dragnets; 3) "family searches" — searching for partial matches between crime scene evidence and DNA banks; 4) construction of perpetrator profiles from DNA collected at a crime scene; and 5) surreptitious collection and searches of DNA left behind on coffee cups and envelopes.

"Family searches" of databases, in the absence of an immediate "hit," are premised on the assumption that "partial matches" will lead to close relatives. The FBI changed its policy in 2006 and now allows states to share information related to "partial matches" upon FBI approval. This expands DNA databases to a whole new category of innocent people. The genetic data of tens, hundreds or even thousands of people with partial matches can be

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mined, even though they themselves are not suspects in any criminal case.

In addition, measures have been proposed to collect and bank DNA from innocents, including newborns, school children, suspects and arrestees. Developments in behavioral genetics will support arguments for identifying individuals who have a propensity to commit crime in the future.

In an August 2007 article for the American Constitution Society for Law and Policy — "A New Era of DNA Collections: At What Cost to Civil Liberties?" — Tania Simoncelli and Sheldon Krimsky point out that if we empower law enforcement to collect and analyze our DNA without knowledge or consent, we open the door to mass profiling of people who are perfectly law abiding.

So, do we — should we — have a reasonable expectation of privacy in our DNA? In my opinion, the answer lies in the concept of limited government power. The legal standard should not be a form of post hoc rationalization for police practices, but instead the subject of careful policy deliberation. ■