

## **RACIAL DISPARITIES IN DATABANKING OF DNA PROFILES**

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Of the hundreds of thousands of arrests every year in California on suspicion of a felony, nearly 320,000 in 2006, approximately 30% never lead to any conviction.<sup>1</sup> In the U.S. justice system, people who are arrested but never convicted are presumed innocent. A disproportionate number of these innocent arrestees are people of color. As of January 1, 2009, these people have been forced to let the State of California take a DNA sample, analyze it and include the resulting profile in a criminal database, to be compared evermore with crime-scene evidence. As discussed below, although there are procedures for some of these people to try to get the samples and profiles expunged, these procedures often will require that people wait three or more years before even requesting expungement and will need the help of a lawyer to navigate the procedures, which are not even available to people who have ever been convicted of a felony. As a result, the overwhelming majority of people arrested but not convicted of any crime are unlikely even to try to get their samples destroyed. Tens of thousands of profiles taken from innocent people will thus remain in these criminal databases. The consequence will be a magnification of the current racial disparities – at least in absolute terms -- in our criminal justice system, as more and more people of color's DNA are profiles included in databases that make them potential suspects whenever DNA is recovered from a crime scene.

The effects of this disproportionate inclusion of people of color in the databanks are made clear by the other papers in this series on genetics and race. What is perhaps less clear is how our criminal justice system, which promises equal justice under the law, can tolerate this injustice. This paper, after outlining the legal growth and transformation of DNA databanks, examines how various steps in our criminal justice system create and magnify racial disparities, and how the law makes it nearly impossible to effectively address the problem. It also looks at how taking DNA samples at various stages in this process may affect these disparities and the factors that cause them. I use as my primary example California's system because it is one of the world's largest criminal justice systems in one of the nation's most diverse states. It is also the system in which I have practiced law for the last decade, and is representative of where DNA databanks throughout the country will likely be in the next few years as more and more states and the federal government collect DNA from arrestees.<sup>2</sup>

### **A Very Brief Introduction to DNA Databanks**

DNA databanks comprise two distinct components: the actual biological samples and the computerized database of the profiles generated by analyzing these samples. In criminal-justice databanks, the biological samples are collected from crime scenes (forensic samples) and from known individuals (known samples). Until recently, known samples were usually obtained by

drawing blood, although now most states and the federal government primarily obtain samples by swabbing the inside of the person's cheek to collect skin cells.<sup>3</sup>

The government analyzes both forensic samples and known samples to create DNA profiles, which are essentially a digitized description of 26 parts of the DNA molecule. The profiles are then uploaded to the Combined DNA Index System ("CODIS"), a centralized, searchable law enforcement database accessible to state, federal, and international law enforcement agencies.<sup>4</sup> CODIS was created by the FBI in 1994 after Congress authorized it to establish a national DNA database to link existing state and local databanks.<sup>5</sup> The biological samples themselves are retained by the local police or crime lab for later testing.

Once an arrestee's profile is uploaded into CODIS, it is immediately compared to the thousands of crime-scene samples in the CODIS forensic database. As long as the arrestee's profile remains in CODIS, any new crime-scene samples will be searched against it. When an arrestee profile exactly matches a crime-scene profile, CODIS automatically notifies agencies that provided the sample. Then that agency will usually provide the identity of the arrestee to the agency with jurisdiction over the crime so that it can follow up.<sup>6</sup>

### **The Growth of DNA Databanks**

DNA databanks have grown exponentially in the last decade as new laws have expanded the range of people subject to having their DNA forcibly seized, analyzed, and the resulting profile databanked. California's databank is a good example of this. It was originally conceived as a way to connect people convicted of serious violent crimes with other such crimes in which DNA evidence is most useful. Thus, the original 1989 DNA-collection law established a databank and required people convicted of murder or a felony sex offense to provide DNA samples before they were released from custody.<sup>7</sup> The state department of justice had the authority to analyze these samples and include the resulting analysis in the new statewide databank.<sup>8</sup> From today's perspective, this program seems quite limited: the only people subject to having their DNA databanked had been convicted of very serious crimes, either by pleading guilty or after the charges had been proved beyond all reasonable doubt to a jury.

Because conviction of a serious felony has long resulted in serious consequences – incarceration, followed by a period of government supervision and surveillance during probation or parole, for example -- the additional intrusion of having to give a DNA sample was unlikely to be the most serious consequence from the conviction. On the other side of the equation, the benefits of requiring people convicted of serious crimes to provide DNA samples were substantial: society has a strong interest in solving serious violent crimes, and people who had been convicted of such offenses are statistically more likely than others to commit other violent crimes. In addition, crimes of violence that may involve struggles, including murder and sexual

assault, are more likely than most to involve DNA evidence from semen, blood, or other bodily tissue.

But the law soon began to expand to include more people. The first steps were modest: in the late 1990s, new crimes were added to the list of qualifying offenses, and the law was amended to require that samples be taken immediately after conviction, rather than just before release. The latter change was enacted as the focus shifted from preventing new crimes to solving old crimes.<sup>9</sup> In 2004, California voters enacted Proposition 69, drastically expanding the database. The two biggest changes were that, as of November 2004, every person convicted of *any* felony – which can include simple drug possession, shoplifting, or even intentionally writing a check without sufficient funds to cover it<sup>10</sup> -- has had to provide DNA samples. And, as of January 1, 2009, every person *arrested* for a felony in California must give a DNA sample. Prop. 69 thus radically changed the database from one comprising profiles of individuals *convicted* of violent felonies to one that includes profiles from *suspected* shoplifters.

These changes are leading to a huge increase in the number of people subject to DNA sampling. In 2006, about 55,000 people in California,<sup>11</sup> were convicted of offenses that would have qualified for inclusion in the database under the Pre-Prop. 69 version of the law. But when all felony convictions are included, this number quadruples to more than 221,000.<sup>12</sup>

The 2009 expansion to include all persons arrested for felonies will drive these numbers ever further up if it is fully implemented.<sup>13</sup> In California, as discussed below, approximately 30% of individuals arrested for a felony are never convicted. For example, the California Department of Justice reports that of the approximately 320,000 people arrested for felonies in California in 2006, more than 98,000 were not convicted of any crime.<sup>14</sup> Another 20,000 were convicted only of a misdemeanor.<sup>15</sup> Thus, the change from a database containing people convicted of violent felonies to those merely arrested for *any* felony goes from 55,000 to 320,000.

This huge increase is not distributed equitably among all people. African-Americans comprise 6.7% of California's population, but 21.5% of those arrested for felonies in the state.<sup>16</sup> Although, as discussed below, the possibility of race-based decision-making at all levels of the criminal justice system makes it impossible to know whether changing from a database of people convicted of felonies to one including everybody arrested for felonies will result in an increase in the *proportion* of people of color in the database it will clearly result in a significant increase in the absolute number of minorities included.

Once an individual's genetic information is entered into California's DNA database, it is difficult to get removed. An arrestee who is not convicted of a qualifying offense may petition for expungement of his or her DNA profile from the state's database.<sup>17</sup> However, the statute erects several procedural barriers. First, a person who is arrested but never charged with an

offense can only file a petition after the legal time limit for charging the crime has expired.<sup>18</sup> This time limit – the statute of limitations – is at least 3 years for any felony; serious felonies have longer limitations periods or no statute of limitation at all.<sup>19</sup> An arrestee thus cannot even begin the process of asking to have her sample and profile removed for at least three years after the arrest.

Even after a petition is filed, the court cannot rule on it until at least 180 days have passed and the court is satisfied that neither the California Department of Justice nor the local prosecutor objects to expungement, effectively providing the government with an absolute veto.<sup>20</sup> People with prior felony convictions – no matter how old – are ineligible.<sup>21</sup> Even after surmounting all these obstacles, a person – even one who has been found innocent by a court – is not assured of success: the court has the discretion to grant or deny the request for expungement, and the decision is final, with no appeal allowed.<sup>22</sup>

This statutory scheme means that arrestees will have their DNA analyzed, databanked and searched against the forensic database long before they can challenge it. Even if a person succeeds in obtaining a court order for the destruction of his sample, it is inconceivable that the government will truly expunge the profile not just from the current database but from the multiple backup copies that will have been made in the more-than three years of delay.<sup>23</sup>

Moreover, for very practical reasons, few arrestees, no matter how innocent, will be likely ever to return to court to wade through the process of getting their samples and profiles removed. This is particularly true for those without the resources to hire a lawyer to assist them. Just as few Californians take advantage of existing procedures to have prior convictions expunged for employment purposes or records of wrongful arrests sealed – despite the obvious advantages of doing so – it seems likely that few will be both willing and able to have their DNA removed from the databank, particularly since the benefits of doing so may not be at all obvious.

Because few people will have their DNA and profiles removed once they are included, the way we select people for initial inclusion becomes that much more important.

### **How Racial Disparities are Introduced into the System**

Racial disparities fluctuate depending on the stage of the criminal proceeding, from the high-level initial decision to make certain acts criminal, to a police officer's decision to contact or arrest an individual, to the decisions made by prosecutors, judges, jurors, and defense lawyers. Thus, the stage at which DNA samples are taken will affect the racial disparities in the databank, albeit in unpredictable ways.

### **Legislative Decision-Making**

The first and broadest stage at which racial disparities are introduced into the criminal justice system is at the legislative level, where crimes are defined and classified.

The basic question is, of course, what conduct is considered criminal: why is a person who possesses drugs subject to criminal sanctions while a business that puts its workers or consumers at risk with dangerous or unsanitary plants subject only to civil sanctions? But even beyond that basic issue, our criminal justice system treats very similar conduct differently in ways that create racial disparities. The most notorious example of this is the crack versus powder forms of cocaine disparity in the federal system, which for years punished people convicted of crack cocaine offenses (well over 80% of whom are African- American) much more severely than powder cocaine offenders (72% of whom are white or Hispanic).<sup>24</sup>

Although this gross disparity was recently partially eliminated, the same pattern is repeated in other laws. California, for example, continues to punish possession for sale of crack more seriously than it does possession for sale of powder, although the disparity in the danger of the drugs is fairly minor.<sup>25</sup>

Much more significant is California's differential treatment of other classes of drugs. California has long divided its felony drug-possession offenses into two general classes: those punished under Health and Safety Code § 11350 -- which include cocaine, cocaine base, and opiates ranging from heroin to codeine -- and those punished under § 11377, most commonly methamphetamine, but also including amphetamine ecstasy (MDMA), LSD, and other less-common drugs. This distinction was first created when the state decided to criminalize the latter class of drugs in 1965.<sup>26</sup>

California's treatment of these two classes of drugs follows the same lines as the federal crack-powder disparity. Of the more than 83,000 adults arrested in 2006 for violating § 11377, 43% were classified as white, and 6.5% as Black, almost exactly mirroring the state's general population.<sup>27</sup> In contrast, of the 56,000 adults arrested under § 11350, 22% were white, 29% Hispanic, and 46% Black. The percentage of black people arrested under § 11350, therefore, is seven times the percentage of black people in the general population. Moreover, the legal consequences of being convicted for § 11350 are greater than those for § 11377. Simple possession of methamphetamine can be either a felony or a misdemeanor. In many parts of the state, possession of small quantities by people without extensive records will almost always be charged as a misdemeanor. Even when prosecutors charge it as a felony, the court may reduce it at any time up until conviction, or even after conviction if the defendant receives probation. Simple possession under § 11350, however, is always a felony. Although the government will on occasion agree to reduce such a charge to a misdemeanor, this is a rare act of grace. Even defendants who successfully complete probation will have a felony on their record for life, with all the consequences for employment, education, and licensing. And, most relevant to this discussion, they will have their DNA databanked with no possibility of having it removed.

The legislative establishment of “drug-free zones,” often around schools, parks, or public-housing projects, can also have racially disparate effects.<sup>28</sup> These laws mean that people who live and commit drug crimes in dense urban areas, where few locations are *not* close to a school or park will be punished more harshly for the same conduct than are their suburban or rural counterparts. Because urban areas usually have higher proportions of people of color, these harsher punishments will reinforce racial disparities.<sup>29</sup>

Laws like these interact with seemingly race-neutral DNA collection laws to produce great disparities in the databank. A databank that includes all persons convicted of felonies will include every person – primarily people of color – convicted of possessing cocaine or heroin, not matter how small the amount -- but will not contain samples from people –primarily white -- convicted of minor methamphetamine offenses that were prosecuted as misdemeanors. Conversely, a databank that includes only violent crimes or sex crimes – as many originally did - - should result in fewer disparities than an all-felony database for the reasons just described. Excluding non-violent crimes is reasonable since DNA evidence is almost never involved in non-violent offenses. Thus, the move from databanks that include only serious crimes of violence to databanks that include all felonies will likely increase racial disparities.

Moreover, DNA databanks themselves create a feedback loop that further magnifies these disparities. Well over half of all serious crimes go completely unsolved, with the police never even identifying a suspect.<sup>30</sup> If DNA databanks work as they are intended, they will identify suspects for at least some – perhaps many -- of these crimes. But a racially skewed databank will produce racially skewed results: because racial disparities in the criminal-justice system have led to the inclusion of a disproportionate number of profiles of African-Americans in CODIS, the databank will return a disproportionate number of matches to African-American suspects. In contrast, crimes committed by members of groups that are underrepresented in CODIS will escape detection, particularly as the police spend an increasing amount of their limited time and resources focusing on cases where they have found a DNA match.

The U.S Constitution does not prohibit this shift, regardless of the racial disparities it introduces. The courts have held that the Fourteenth Amendment’s promise of equal protection of the law prohibits only intentional discrimination, which means that challenges to criminal laws that result in racially disparate impacts are extremely difficult. In the words of the U.S. Supreme Court, discriminatory intent means “more than intent as volition or intent as awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.”<sup>31</sup> If the body would have acted the same way even without the discriminatory intent, the law stands.

Thus, to invalidate the penalty disparities between different types of drug, a court would have to determine that the legislatures enacted these laws in order to punish African-Americans more harshly than whites rather than to deal with what was perceived as a dangerous epidemic related to the economics of the market and violence surrounding that market.<sup>32</sup> Even when the legislative record contains overt and coded racial language – references to an “invasion of Jamaican drug dealers” and “ghetto gangs” into the suburbs– courts are unwilling to find that the intent of the legislature as a whole was to discriminate.<sup>33</sup> Thus, after noting that the law was passed without much real consideration following the hysteria surrounding basketball star Len Bias’ death, (probably caused by powder, rather than crack), one court noted that Congress’ assumptions about the pharmacological differences between crack and powder have since been shown to be false. It stated that the “unjustifiably harsh crack penalties disproportionately impact on black defendants,” and introduces “irrationality and possibly harmful mischief into the criminal justice system,” but nonetheless concluded that “[o]nly Congress can correct the statutory problem.”<sup>34</sup> Without a true smoking gun evincing overt racism, legal challenges to laws on the grounds that they are racially discriminatory are lost causes.<sup>35</sup>

The United States Court of Appeals has applied these same principles to reject an argument that the racial disparities in the federal DNA database made it unconstitutional.<sup>36</sup> No matter how disparate the impact of the database, without a showing that Congress enacted it in order to adversely affect African-Americans, the challenge failed.

### **Allocation of Police Resources**

A second policy-level set of decisions also creates racial disparities: the allocation of law-enforcement resources. The clearest big-picture example of this is the so-called “war on drugs,” which is largely responsible for filling our prisons with men and women of color over the last 30 years.<sup>37</sup> A war on securities fraud or tax evasion would result in the arrest and prosecution of a very different demographic. But resources for combating these types of crimes have been cut, despite evidence that violations are common and devastating to our society, as evidenced by the current global impacts of finance fraud. On a smaller scale, police decisions to conduct buy-bust operations in specific neighborhoods – where undercover officers attempt to buy drugs from people on the street and then arrest anybody who sells them the drugs – mean that the police choose who will be targeted based on what neighborhood is chosen for the operation.<sup>38</sup> Mirroring the emphasis on drug crime rather than white-collar crime, these operations usually occur in poor, urban neighborhoods with large minority populations.

Because these types of mid-level resource-allocation decisions mostly affect the number of people legitimately arrested for crimes, they have the potential to create racial disparities that persist all the way through the criminal justice system. They will therefore affect the composition of DNA databanks regardless of what crimes are covered or at what stage of the process samples are taken.

## **Racial Profiling by Individual Officers**

Racial disparities also enter through racial profiling by individual officers. Studies have shown that some mixture of unconscious racism, conscious racism, and the middle-ground use of criminal profiles leads law enforcement to focus its attention and authority on people of color.<sup>39</sup> This can include everything from police officers disproportionately selecting people of color to approach, question and ask consent to search, to discriminatory enforcement of traffic laws, and detaining and arresting people of color without sufficient individualized suspicion.

The laxity of the legal requirements for this type of police action, coupled with a lack of supervision in the field, means that there are few checks against racial profiling. Police officers can lawfully approach and question a person without any reason to suspect that the person has done anything wrong, because *in theory* the person is free to ignore the officer and simply walk away. During one of these so-called consensual encounters, the police may lawfully ask the person to consent to a search.

Police officers do not need a lot of evidence in order to lawfully arrest a person: the standard is “probable cause,” which means that an officer who reasonably believes that there is a “fair probability” that a person has committed a crime may arrest the suspect.<sup>40</sup> This standard allows the police to arrest people who may be innocent, or even those who are probably innocent. Despite the use of the term “probable cause,” this does not mean that the person is probably guilty. The United States Supreme Court has held, for example, that if the police find drugs in a car they can lawfully arrest all the occupants.<sup>41</sup>

In practical terms, of course, the police have even greater discretion to arrest people they suspect of being involved in criminal activity, even without probable cause. An officer may unlawfully take somebody into custody based on a hunch. If the police subsequently uncover further evidence against the suspect, they will forward the case to the district attorney’s office for prosecution. If the police do not uncover sufficient evidence to support prosecution and simply release the person after a day or two, they will rarely face any consequences. Unless the officer’s actions were particularly egregious, few arrestees have the resources or the motivation even to file an internal-affairs complaint against the officer, much less bring a civil-rights lawsuit, particularly since very few lawyers will take such run-of-the-mill false arrest cases. Although the illegality of the arrest may – sometimes, if facts are clear – result in the suppression of a confession or other evidence that directly resulted from the wrongful arrest, it will not prevent prosecution based on other evidence. The police thus have a number of incentives, and few disincentives, to make an arrest even if they are not sure there is probable cause. As the current United States Supreme Court continues to roll-back the remedies available to criminal defendants who can show that the police violated their rights, these incentives will only expand.<sup>42</sup>

As with challenges to legislative actions, challenges to racial profiling under the Constitution are extremely difficult because of the need to show discriminatory intent. This is magnified because the law gives police officers so much discretion as to who they will or will not approach, stop, question, or search. The Supreme Court has held that the police may lawfully make pretextual stops – for example, singling-out one driver among many who is speeding and stopping them because the officer has a hunch that they may be carrying drugs. This means that, although the police may not stop a person just based on race, in the unlikely event an officer is called upon to explain the stop, there is always something that can justify their actions: the driver or passenger’s nervous glance at them, the driver reduced speed upon seeing the officer, a pedestrian wearing a heavy coat on a warm day, and other equally innocuous behavior. None of this behavior alone would justify the stop of a car, but such seemingly innocent actions are enough to justify the officer’s decision to stop this particular car for driving a few miles per hour over the speed limit, while ignoring all the others that did the same, or to stop this individual for jaywalking while ignoring similar violations. Even if a court determines that an officer did make a stop based on nothing more than the driver’s race, the only remedy is the possibility of a civil suit against the officer.<sup>43</sup> Unless serious harm was done, this is highly unlikely to occur so it is not a real deterrent to such police abuse of power.

These same considerations affect challenges to the way officers make so-called “consensual” encounters, ask drivers whom they have stopped for consent to search, detain them so that a drug-sniffing dog can come, or choose to arrest all of the occupants of a car where drugs are found rather than just the person closest to the drugs, the owner of the car, or the driver.<sup>44</sup> Unless the officer admits that s/he would not have acted the same way were the suspect of a different race, it is extremely difficult to prove that it was the cause.<sup>45</sup> In the absence of direct evidence of discriminatory intent, courts will occasionally accept statistical evidence of discriminatory enforcement. Again, though, the intent requirement has proved a nearly insurmountable obstacle. No matter how stark the statistics, the government can usually convince a court that in an individual case, this particular stop was nonetheless not the product of intentional discrimination. Officers may simply testify that they made the stop for a valid reason, not because of race, and if the judge believes them that can end the matter. For example, the court in one reported case accepted an officer’s testimony that he had stopped a car before seeing the race of the driver, and thus could not have been engaged in racial profiling, despite what the court called “disturbing” statistics that 34% of the officer’s traffic stops had involved Hispanic drivers.<sup>46</sup>

More commonly, officers will testify that something caught their attention and led them to stop this particular person. Thus, statistics that the police in a train station approached and questioned only African- American passengers over a ten-day period were deemed irrelevant when a federal agent testified that he had stopped the defendant because he had appeared

nervous, and the defendant could not produce any evidence that the agents had ignored white passengers who had similarly been “looking nervously over their shoulders.”<sup>47</sup>

This means that the only cases where statistical proof of racial profiling is successfully presented are those where the government is not in a position to explain the stops. For example, in New Jersey, a study of traffic stops on freeways that showed racial profiling resulted in a series of court decisions leading to the dismissal of a number of cases.<sup>48</sup> A federal court in California allowed a civil suit filed by the American Civil Liberties Union of Northern California to go forward based on a statistical analysis of stops by the California Highway Patrol.<sup>49</sup> In both cases, the government was not in a position to try to explain the disparities.

The low level of proof required to make an arrest, combined with the difficulties of preventing arrests that are illegal for lack of proof or for discriminatory enforcement of laws, means that allowing DNA collection immediately after arrest will lead to large databases full of innocent people. Furthermore, given the ubiquity of racial profiling, people of color will largely populate the databases. The bottom line is that police end up with enormous discretion to determine who is in a database, with absolutely no review of many of their arrests.

### **Genetic Surveillance**

Arrestee sampling adds another incentive for the police to make questionable or outright illegal arrests. Whether or not the arrest leads directly to charges being filed, the arrestee’s DNA profile will automatically be included in the database and run against all crime-scene evidence, now and in the future. Because of the barriers to having DNA samples removed, few arrestees will be able to have their samples and profiles expunged, thus allowing law enforcement the power to place people under lifetime genetic surveillance. To underscore, the consequence of the arrest of a plainly and indisputably innocent person will no longer be a short stint in jail – it will be a lifetime of genetic surveillance, turning the notion of a free and democratic society that protects civil liberties on its head.

Such surveillance constitutes a serious expansion of the consequences of an arrest and violates the 4th Amendment to the U.S. Constitution.<sup>50</sup> In recognition of the dangers to our liberty posed by the authority of a single officer to make an arrest, the Supreme Court has held that the Fourth Amendment prohibits the police from holding a person in custody for more than 48 hours unless a judge determines that the facts set forth in sworn declarations show probable cause that the person has committed a crime.<sup>51</sup> Many states – including California -- additionally require that a person arrested and held in custody be charged and brought to court to be arraigned within two working days of the arrest, or else released.<sup>52</sup> These protections mean that arrestees do not spend more than a few days in jail without having both a judge and a prosecutor review the facts underlying the arrest.

This judicial and prosecutorial review results in more than 50,000 arrestees in California – about 15% -- being released from custody without ever even being charged with a crime each year.<sup>53</sup> A system that took DNA samples only after one or both of these levels of review would thus reduce the absolute number of people included in the system substantially. Moreover, the people thus excluded would be those who are most likely to be innocent of any crime. A police officer's incentive to make an arrest without probable cause in order to get a DNA sample would also be substantially reduced, because unless the officer took the additional step of writing a false report and presenting it to the prosecutor the person would likely be released without any sample being taken.

### **Judicial and Prosecutorial Power**

The remaining 85% of arrestees are charged with crimes and begin what can be a long journey through the court system. The vast majority – close to 80% -- end up pleading guilty to some crime as part of a negotiated plea. For those in custody on fairly minor charges who cannot raise bail, a quick plea bargain is often the only way they can avoid spending months in custody awaiting trial. Others seek a plea bargain to ensure a lighter sentence than they would receive if convicted at trial. A small percentage are able to take advantage of alternatives such as drug-treatment programs that divert them from the standard punishment track and often entitle them to a dismissal of all charges at the end of the treatment.

What all these defendants have in common is that their fates will be determined by the highly discretionary judgments of prosecutors, defense lawyers, probation officers, judges, and, for a very small percentage, jurors. A prosecutor who thinks the defendant is a menace may search the criminal code and add every possible charge and then take a similarly hard line in plea negotiations. Conversely, a prosecutor who thinks that a particular defendant is particularly sympathetic, just made a mistake, or is not really the “criminal type” may offer to reduce a felony to a misdemeanor. In addition, a defense lawyer may fight harder for a client who can convince her that he is worth the extra trouble. On another level, probation officers recommend harsher or more lenient sentences based in part on the factors mandated by law but also on their overall estimate of a defendant's character and value to society. Judges may accept these recommendations or diverge from them based on any number of intangibles.

All of these human interactions require judgment, and thus provide room for prejudgment as well. Not surprisingly, many studies have shown that all too often race becomes a factor.<sup>54</sup> But, once again, the courts' refusal to address anything other than intentional, individualized discrimination presents an insurmountable barrier to change. The most sophisticated attempt to address this problem occurred in the 1980s, in a case called *McCleskey v. Kemp*.<sup>55</sup> A Georgia court had convicted Warren McCleskey, who was African-American, of killing a white police officer during a robbery and had sentenced him to death. Mr. McCleskey's lawyers presented the federal courts with a sophisticated study of 2,000 murder cases in Georgia that, after taking

into account 230 separate variables, showed racial disparities in the state's administration of capital punishment. Among the grim, uncontested numbers were comparisons in how differently a person charged with murdering an African-American would be treated based on the defendant's race: the death penalty was imposed in 22% of these cases involving black defendants, as opposed to 1% where the defendant was white.

When the Supreme Court decided the case, its response to these stark numbers was to raise the bar even higher; it stated that because so many decisions by so many actors based on so many different factors contribute to the final determination of whether a person will be sentenced to death, it is impossible to determine just where these disparities arise. Moreover, for the court to allow an investigation into the decision-making of prosecutors, judges, and jurors would be an undue invasion into the discretion that our system accords these actors. Thus, ruled the Court, the study was "clearly insufficient to support an inference that any of the decision-makers in [the] case acted with discriminatory purpose."<sup>56</sup>

More telling, perhaps, is the Court's statement that accepting the "claim that racial bias has impermissibly tainted the capital sentencing decision, [it] could soon be faced with similar claims" in all sorts of criminal cases.<sup>57</sup> In other words, allowing a challenge to racially discriminatory imposition of the death penalty would require the Court to address the broader issue of racism in the criminal justice system, a step that the five-member majority was unwilling to take. As a dissenting justice wrote, the words of the majority opinion "suggest a fear of too much justice."<sup>58</sup>

## **Conclusion**

The *McCleskey* case was decided in 1987, when the Supreme Court was still far less hesitant to step in to remedy what it saw as injustice, inequity, or unfairness in our criminal justice system than is the present Court. Twenty years later it still stands as a warning to those who look to the federal courts to protect our nation's civil rights and liberties. When states first started taking DNA from people convicted of serious crimes, there was some hope that the courts would bar the practice as unconstitutional. But in fact the federal appellate courts have unanimously, if over often-vigorous dissents, approved not only the collection of DNA from people convicted of violent felonies, but also laws mandating that people convicted of *any* felony, no matter how minor, provide samples.<sup>59</sup> Although the legal case against arrestee testing is much stronger, of the few courts that have addressed the issue, one has upheld it against constitutional challenge.<sup>60</sup> Even if arrestee testing is invalidated and DNA is taken only after conviction of a crime, with all the procedural protections enjoyed by those in control of the criminal justice system, racial disparities will continue and accelerate as forensic DNA databases grow throughout the United States, *unless* the voters and legislatures put a stop to it.

## References

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<sup>1</sup> California Department of Justice, Division of California Justice Information Services, Bureau of Criminal Information and Analysis, Crime in California 2006 Data Tables, Table 37, available at <http://ag.ca.gov/cjsc/publications/candd/cd06/dataTables.pdf> (hereinafter “Crime in California”). 2006 is the most recent year for which complete data are currently available.

<sup>2</sup> In the last 7 years, the number of states that require every person convicted of a felony to provide a DNA sample has gone from 22 to 50. *Compare* State Laws on DNA Data Banks Qualifying Offenses, Others Who Must Provide Sample (2009) *with* Fighting Crime with DNA (2002), both available from the National Conference of State Legislatures at <http://www.ncsl.org/programs/cj/dna.htm>.

<sup>3</sup> *See* Cal. Penal Code § 295(e), 28 C.F.R. § 28.12(f)(1); 73 Federal Register 74935 (December 10, 2008) (“the states that collect DNA samples from arrestees typically do so by swabbing the inside of the person’s mouth (“buccal swab”), and many states use the same method to collect DNA samples from convicts”).

<sup>4</sup> A description of the CODIS system can be found on the federal government’s DNA Initiative website, <http://www.dna.gov/dna-databases/codis>.

<sup>5</sup> DNA Identification Act of 1994, Pub.L. 103-322, Title XXI, § 210304, Sept. 13, 1994, 108 Stat. 2069, codified at 42 USCA § 14132. One consequence of this federal program was to make it easier and cheaper for states to develop their own programs for collecting and databanking DNA – the FBI provides the CODIS software for free – as well as to make individual state DNA collection and databanks more useful, because they would be linked to the national databank. The FBI also maintains the National DNA Index System (NDIS), which comprises all the DNA profiles in the CODIS system and automatically searches them every week to match crime-scene evidence to profiles taken from known individuals or to evidence from other crime scenes. <http://www.dna.gov/dna-databases/codis>.

<sup>6</sup> Law enforcement have also begun to use the databanks for so called “familial searches,” where a forensic sample is similar to a known sample, on the theory that it is likely that the culprit is related by blood to the person who provided the known sample. *See* Henry T. Greely, Daniel P. Riordan, Nanibaa' A. Garrison, Joanna L. Mountain, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, *Journal of Law, Medicine & Ethics*, 34:248-262 (Summer 2006) Recently both the California and federal Departments of Justice have authorized the use of partial matches to conduct so-called “familial searching.” California Department of Justice, Division of Law Enforcement Information Bulletin 2008-BFS-01, DNA Partial Match (Crime

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Scene DNA Profile to Offender) Policy (April 24, 2008), available at [http://ag.ca.gov/cms\\_attachments/press/pdfs/n1548\\_08-bfs-01.pdf](http://ag.ca.gov/cms_attachments/press/pdfs/n1548_08-bfs-01.pdf); CODIS Bulletin BT072007, Interim Plan for Release of Information in the Event of a “Partial Match” at NDIS (July 20, 2006.), available at [http://www.ndaa.org/publications/newsletters/codis\\_bulletin\\_2006.pdf](http://www.ndaa.org/publications/newsletters/codis_bulletin_2006.pdf); see Maura Dolan and Jason Felch, Tracing a crime suspect through a relative, Los Angeles Times (November 25, 2008), available at <http://www.latimes.com/news/local/la-me-familial25-2008nov25,0,3394236,full.story>.

<sup>7</sup> Former Cal. Penal Code § 290.2, enacted by Stats.1989, ch. 1304, § 1.5, pp. 5176-5178. For a discussion of the enactment, amendment, and eventual replacement of this provision see *People v. King*, 82 Cal.App.4th 1363, 1369-70 (2000).

<sup>8</sup> Former Cal. Penal Code § 290.2; see *People v. King*, *supra*, 82 Cal.App.4th at 1369-70.

<sup>9</sup> The list of qualifying offenses was expanded from murder and specified sex offenses to include voluntary manslaughter, felony domestic violence, aggravated assault, kidnapping, mayhem, torture, residential burglary, robbery, arson, and carjacking. See Cal. Penal Code § 296 historical note; Stats.1996, ch. 917, § 2; *People v. Brewer*, 87 Cal.App.4th 1298. See also CA LEGIS 696 § 2 (1998) (enacting PC 295(b)(3),(c))

<sup>10</sup> Cal. Health and Safety Code §§ 11350, 11377 (felony drug possession); Cal. Penal Code §§ 459 (felony to enter a store with the intent to shoplift), 666 (second-time shoplifting is a felony), 476a (felony to present check with insufficient funds).

<sup>11</sup> See *Crime in California*, *supra*, Table 42. Because these data do not distinguish between felony and misdemeanor convictions, they overstate the number of people who are convicted of felonies. Some of this overcount can be corrected by subtracting the number of people sentenced only to jail, which indicates that the person was convicted of a misdemeanor. See Cal. Penal Code § 17.

California’s total population is 36.5 million people, according to the most recent estimate by the U.S. Census. See <http://quickfacts.census.gov/qfd/states/06000.html>

<sup>12</sup> See *Crime in California* Table 37. This ratio comports with national statistics, nationally, less than 20% are violent crimes or residential burglaries. United States Department of Justice, Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2004 - Statistical Tables, Felony Sentences in State Court, available at <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04101tab.htm>.

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<sup>13</sup> There are serious questions about whether compulsory seizure of DNA from people who have merely been arrested for crimes violates the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable searches and seizures. *See In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006) and *United States v. Purdy*, 2005 WL 3465721 (D.Neb.,2005) (both holding that arrestee testing violates the Fourth Amendment).

<sup>14</sup> Crime in California, *supra*, Table 37.

<sup>15</sup> *Id.*

<sup>16</sup> Crime in California, *supra*, Table 31; U.S. Census quick facts, *supra*.

<sup>17</sup> Cal. Penal Code § 299.

<sup>18</sup> *Id.* § 299(b)(1) (person arrested but not charged may only file petition if “no accusatory pleading has been filed within the applicable period allowed by law.”).

<sup>19</sup> *Id.* §§ 799-801.

<sup>20</sup> *Id.* § 299(c)(2)(D).

<sup>21</sup> *See id.* § 299(b).

<sup>22</sup> *Id.* § 299(c)(1); *see Id.* § 299(b)(3) (procedure applies to those previously found factually innocent).

<sup>23</sup> In 2006 FBI reported to the U.S. Department of Justice Inspector General that it backs up the national database “routinely” onto tapes. Audit Report 06-32, Combined DNA Index System Operational and Laboratory Vulnerabilities, Findings § 1 (May 2006), available at <http://www.usdoj.gov/oig/reports/FBI/a0632/findings.htm#ID>.

<sup>24</sup> The law and figures are summarized in Crack vs. Powder Cocaine: a Gulf in Penalties, U.S. News and World Report, October 1, 2007.

<sup>25</sup> Possession for sale of crack cocaine carries a sentence of 3 to 5 years; of powder cocaine, 2 to 4 years. Cal. Health and Safety Code §§ 11351, 11351.5.

<sup>26</sup> *See* former Cal. Health & Safety Code § 11910, added by Stats.1965, c. 2030, p. 4603, § 1; *see generally Baker v. Superior Court*, 24 Cal.App.3d 124, 126 (1972). Heroin and cocaine had been illegal since 1939. *See* former Health & Safety Code § 11500, enacted by Stats.1939, c. 60, p. 758.

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<sup>27</sup> Crime in California, *supra*, Table 31. In 2006, California's population was 6.7% African American, 43.1 % white. U.S. Census quick facts, *supra*.

<sup>28</sup> See, e.g., Cal. Health & Safety Code § 11353.6 (adding addition sentence of 3-5 years for specified drug offense committed within 1000 feet of a school); id. § 11380.7 (additional sentence of 1 year for specified drug crimes committed within 1000 feet of a homeless shelter or drug program).

<sup>29</sup> This issue is discussed at length in a 2006 report by the Justice Policy Institute. See Judith Greene, Kevin Pranis and Jason Zeidenberg, Disparity by Design: How drug-free zone laws impact racial disparity – and fail to protect youth (2006), available at [http://www.justicepolicy.org/images/upload/06-03\\_REP\\_DisparitybyDesign\\_DP-JJ-RD.pdf](http://www.justicepolicy.org/images/upload/06-03_REP_DisparitybyDesign_DP-JJ-RD.pdf).

<sup>30</sup> According to the FBI, “Nationwide in 2007, law enforcement cleared 44.5 percent of violent crimes and 16.5 percent of property crimes” by identifying or arresting a suspect. United States Department of Justice--Federal Bureau of Investigation, Crime in the United States, 2007, available at <http://www.fbi.gov/ucr/cius2007/offenses/clearances/index.html>.

<sup>31</sup> *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>32</sup> *United States v. Williams*, 962 F.2d 1218C.A.6 (Mich.),1992. at 1227 Congress was clearly concerned that the special attributes of crack-its small size and cheap price per dose-could create other societal problems that required remedying. Senators noted that because crack is sold in small doses (called “rocks”) it is easier to transport and use, thereby increasing the difficulty of suppressing addiction. The cheap price of each “rock” also permits children to afford cocaine for the first time, thereby exposing another segment of American society to drug addiction.

<sup>33</sup> *United States v. Walls*, 841 F.Supp. 24 (D.D.C. 1994).

<sup>34</sup> *United States v. Smith*, 359 F.Supp.2d 771 (E.D.Wis. 2005).

<sup>35</sup> *United States v. Clary*, 34 F.3d 709, C.A.8 (Mo.),1994.

<sup>36</sup> *Wilson v. Collins*, 517 F.3d 421 (6<sup>th</sup> Cir. 2008).

<sup>37</sup> See Ryan S. King, Disparity by Geography: The War on Drugs in America's Cities (2008), available at [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp\\_drugarrestreport.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_drugarrestreport.pdf).

<sup>38</sup> *Id.* at 21.

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<sup>39</sup> See, e.g., Katherine Beckett, Race and Drug Law Enforcement in Seattle, available at <http://www.prisonpolicy.org/scans/Beckett-20040503.pdf>; Ian Aryes, Racial Profiling & The LAPD: A Study of Racially Disparate Outcomes in the Los Angeles Police Department, available at <http://www.aclu-sc.org/documents/view/47>.

<sup>40</sup> *United States v. Buckner*, 179 F.3d 834, 838 (9<sup>th</sup> Cir. 1999).

<sup>41</sup> *Maryland v. Pringle*, 540 U.S. 366 (2003).

<sup>42</sup> See, e.g., *Herring v. United States*, 129 S.Ct. 695 (2009) (refusing to exclude unlawfully obtained evidence because police acted negligently, not intentionally); *Hudson v. Michigan*, 547 U.S. 586 (2006) (refusing to exclude evidence that police obtained by unlawfully breaking down door of house). A majority of the court has suggested that the increase in professionalism among police departments may mean that the exclusionary rule may no longer be necessary. See *id.* at 598-99.

<sup>43</sup> *United States v. Nichols*, 512 F.3d 789 (6<sup>th</sup> Cir. 2008)] Unless serious harm was done, this is highly unlikely to occur so it is not a real deterrent to such police abuse of power.

<sup>44</sup> *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 308 F.3d 523 (6<sup>th</sup> Cir. 2002).

<sup>45</sup> Although officers sometimes do admit that they treat people of color differently from whites, or exhibit such overtly racist behavior that they cannot later hide their intent, such direct evidence of discriminatory intent by law enforcement “seldom exists.” *United States v. Avery*, 137 F.3d 343, 355 (6<sup>th</sup> Cir. 1997). For examples of cases where plaintiffs were able to present such direct evidence, see *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 308 F.3d 523 (6<sup>th</sup> Cir. 2002) in which officers “all testified that, in their experience, they would refer Hispanic motorists to the Border Patrol when, in precisely the same circumstances, they would not refer someone who was white (*i.e.*, not of Hispanic appearance” and *Carrasca v. Pomeroy*, 313 F.3d 828 (3<sup>d</sup> Cir. 2002) where the plaintiffs argued that the officer’s use of a racial slur, combined with the evidence he had singled the plaintiffs out for arrest, showed an intent to discriminate. In both cases the courts held that the plaintiffs had presented sufficient evidence to let a jury determine whether the police had been motivated by bias.

<sup>46</sup> *United States v. Alcaraz-Arellano*, 441 F.3d 1252 (10<sup>th</sup> Cir. 2006).

<sup>47</sup> *United States v. Barlow*, 310 F.3d 1007 (7<sup>th</sup> Cir. 2002). For a similar analysis by Massachusetts’s highest court see *Commonwealth v. Lora*, 451 Mass. 425 (2008).

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<sup>48</sup> *State v. Soto*, 734 A.2d 350 (N.J. Super 1996).

<sup>49</sup> *Rodriguez v. California Highway Patrol*, 89 F.Supp.2d 1131 (N.D.Cal. 2000).

<sup>50</sup> *See In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006) and *United States v. Purdy*, 2005 WL 3465721 (D.Neb.,2005) (both holding that arrestee testing violates the Fourth Amendment).

<sup>51</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

<sup>52</sup> Cal. Penal Code § 825.

<sup>53</sup> *Crime in California*, *supra*, Table 38.

<sup>54</sup> Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 Ohio State Journal of Criminal Law 19, 27 (2007).

<sup>55</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>56</sup> *Id.* at 297.

<sup>57</sup> *Id.* at 314.

<sup>58</sup> *Id.* at 339 (Brennan, J., dissenting).

<sup>59</sup> *See, e.g., United States v. Kriesel*, 508 F.3d 941, 946-47 (9<sup>th</sup> Cir. 2007) (collecting cases); *United States v. Weikert*, 504 F.3d 1, 10 (1<sup>st</sup> Cir. 2007).

<sup>60</sup> The Virginia Supreme Court has upheld arrestee testing, while a Minnesota Court of Appeals and a federal trial court have held that it violates the Fourth Amendment to the U.S. Constitution. *Compare Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007) with *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006) and *United States v. Purdy*, 2005 WL 3465721 (D.Neb. 2005).

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