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Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race

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Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race

DOROTHY ROBERTS*

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INTRODUCTION

This Article considers state and federal government expansion of genetic surveillance as a collateral consequence of a criminal record in the context of a new biopolitics of race in America. As I discuss more fully in my book *Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-First Century*, the emerging biopolitics of race has three main components.¹ First, some scientists are resuscitating biological theories of race by modernizing old racial typologies that were based on observations of physical differences with cutting-edge genomic research.² These scientists are redefining race as a biological category written in our genes.³ Second, the biotechnol-

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1. See generally DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011) (examining the political implications of the use of a biological definition of race in genomic science and biotechnologies).

2. *Id.* at 57-77.

3. *Id.* at 57-58.

ogy and pharmaceutical industries are converting the new racial science into products that are developed and marketed according to race and that incorporate assumptions of racial difference at the genetic level.⁴ Finally, government policies that appear to be colorblind are stripping poor minority communities of basic services, social programs, and economic resources in favor of corporate interests, while simultaneously imposing on these communities harsh forms of punitive regulation.⁵ Mass incarceration and its collateral consequences are the chief examples of the punitive regulation of African American communities. This Article contends that these dehumanizing policies of surveillance and control are obscured by the emerging genetic understanding of race, which focuses attention on molecular differences while ignoring the impact of racism in our society.⁶

Only a decade ago, the biological concept of race seemed to have finally met its end.⁷ The Human Genome Project, which mapped the entire human genetic code, proved that race could not be identified in our genes.⁸ Yet, there has been an explosion of race-based science and biotechnologies. For example in 2005, the United States Food and Drug Administration (“FDA”) approved the first race-specific drug, BiDil, to treat heart failure in black patients.⁹ In addition, fertility clinics solicit egg donations based on race and use race in genetic tests to determine which embryos to implant and which to discard.¹⁰ Consumers can send cheek swabs to dozens of online companies to find out not only their genetic ancestry, but also their racial identity.¹¹

4. *Id.* at 149-201, 226-57.

5. *Id.* at 300-08.

6. Dorothy Roberts, *Race and the New Biocitizen*, in *WHAT’S THE USE OF RACE? MODERN GOVERNANCE AND THE BIOLOGY OF DIFFERENCE* 259, 261 (Ian Whitmarsh & David Jones eds., 2010) [hereinafter *WHAT’S THE USE OF RACE?*].

7. *Id.* at 262.

8. OSAGIE K. OBASOGIE, *CTR. FOR GENETICS & SOC’Y, PLAYING THE GENE CARD?: A REPORT ON RACE AND HUMAN BIOTECHNOLOGY* vii (2009), available at http://www.geneticsandsociety.org/downloads/complete_PTGC.pdf.

9. Jonathan Kahn, *How a Drug Becomes “Ethnic”: Law, Commerce, and the Production of Racial Categories in Medicine*, 4 *YALE J. HEALTH POL’Y L. & ETHICS* 1, 1 (2004); see also Ian Whitmarsh & David S. Jones, *Governance and the Uses of Race*, in *WHAT’S THE USE OF RACE?*, *supra* note 6, at 7.

10. See Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 *AM. SOC. R.* 319, 327 (2007); Dov Fox, *Racial Classification in Assisted Reproduction*, 118 *YALE L.J.* 1844, 1853 (2009); see generally Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 *SIGNS* 783 (2009), available at http://www.law.suffolk.edu/academic/health/pdf/Roberts_RaceGenderandGeneticTechnology.pdf (exploring the role of race and racism in the emergence of reproductive technologies that incorporate advances in genetic science).

11. OBASOGIE, *supra* note 8, at 25; Charmaine D. Royal et al., *Inferring Genetic Ancestry: Opportunities, Challenges, and Implications*, 86 *AM. J. HUM. GENETICS* 661, 661 (2010).

Furthermore, one of these companies used the same forensic tools to help law enforcement agencies identify the race of suspects.¹²

Most relevant to the subject of this Symposium, in the last decade, federal and state governments have been rapidly expanding the collection of genetic information for law-enforcement purposes.¹³ With eight million offender samples, the U.S. federal government has stockpiled the largest database of DNA seized from its citizens of any country in the world.¹⁴ Because of rampant racial bias in arrests and convictions, the government's DNA databases, which are being amassed nationwide, effectively constitute a race-based biotechnology emerging from genetic science.¹⁵ Unlike voluntary genetic testing technologies that claim to help people cure their diseases, improve the genetic composition of their children, and find their identities, forensic DNA repositories are gathered by the state without consent and maintained for the purpose of implicating people in crimes.¹⁶ These repositories signal the potential use of genetic technologies to reinforce the racial order not only by incorporating a biological definition of race, but also by imposing genetic regulation on the basis of race.

Part I of this Article reviews the expansion of DNA data banking by states and the federal government, extending the collateral impact of a criminal record—in the form of becoming a permanent suspect—to growing categories of people. Part II argues that the benefits of this genetic surveillance in terms of crime detection, exonerations of innocent inmates, and public safety do not outweigh the unmerited collateral penalty of state invasion of individuals' privacy and the larger harms to democracy. These harms are exacerbated by the disproportionate collection of DNA from African Americans as a result of deep racial biases in law enforcement. Part III explains why DNA databases reflect and help to perpetuate a Jim Crow system of crimi-

12. Pamela Sankar, *Forensic DNA Phenotyping: Reinforcing Race in Law Enforcement*, in *WHAT'S THE USE OF RACE?*, *supra* note 6, at 49, 55; Duana Fullwiley, *Can DNA 'Witness' Race? Forensic Uses of an Imperfect Ancestry Testing Technology*, *GENEWATCH*, Nov.-Dec. 2008, at 12 (2008), available at <http://www.councilforresponsiblegenetics.org/pageDocuments/AJWLK7M1AV.pdf>.

13. See Justin A. Alfano, *Look What Katz Leaves Out: Why DNA Collection Challenges the Scope of the Fourth Amendment*, 33 *HOFSTRA L. REV.* 1017, 1039 (2005).

14. See SHELDON KRIMSKY & TANIA SIMONCELLI, *GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES* xvi (2011).

15. Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 *HARV. J.L. & TECH.* 309, 369-70 (2010).

16. D.H. Kaye & Michael E. Smith, *DNA Databases for Law Enforcement: The Coverage Question and the Case for a Population-Wide Databases*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE* 247, 268 (David Lazer ed., 2004).

nal justice. Finally, Part IV elaborates the racial harms that are caused by genetic surveillance that targets large numbers of African Americans, putting into practice deep-seated stereotypes about blacks' inherent criminality. Far from correcting racial bias in law enforcement, the state's use of DNA to designate millions of permanent suspects reinforces the roots of racial injustice.

I. EXPANDING COLLECTIONS

Genetic testing was first introduced as a type of supplemental evidence to help convict criminal suspects by comparing their DNA to crime scene samples.¹⁷ Data banking extended the purpose of DNA from confirming the guilt or innocence of particular suspects to detecting unknown suspects from crime-scene evidence.¹⁸ The theory was that law enforcement offenders could catch repeat offenders by running genetic information gleaned from semen, blood, saliva, or hair left by the perpetrator through a database containing genetic profiles of prior lawbreakers.¹⁹ The DNA profiles function as "genetic fingerprints" that can help match the crime scene sample with one in the DNA database.²⁰ A match—called a "cold hit"—might save police months of investigation or help them catch a criminal who would have otherwise eluded detection.²¹ Initially, DNA was collected only from violent felons and sex offenders on the theory that they were the most likely to commit crimes again and to leave genetic evidence at the scene.²² Taking and storing genetic information from these felons constituted a collateral penalty resulting from conviction of a narrow set of crimes.²³ The heinous nature of their crimes justified the state's interference in their privacy.

The reach of this collateral penalty has extended drastically in the last two decades. Not only have the categories of people subject to DNA seizure increased, but the government's use of the banked DNA has also broadened. Throughout the 1990s, Congress dramatically en-

17. See Jill C. Schaefer, *Profiling at the Cellular Level: The Future of the New York State DNA Databanks*, 14 ALB. L.J. SCI. & TECH. 559, 560 (2004).

18. See *id.* at 561.

19. See *id.* at 560-61.

20. *Id.* at 563.

21. Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 J. CRIM. L. & CRIMINOLOGY 635, 644 n.40 (2000).

22. Schaefer, *supra* note 17, at 560.

23. See *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) (defining a collateral consequence as "one that is not related to the length or nature of the sentence imposed on the basis of the plea"); see also *supra* text accompanying note 22.

hanced the federal government's authority to collect, analyze, and permanently store DNA samples.²⁴ The DNA Identification Act of 1994 provided funding for law enforcement agencies to amass DNA into a giant federal repository, the Federal Bureau of Investigation's ("FBI") Combined DNA Index Systems ("CODIS").²⁵ Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 and the Crime Identification Technology Act of 1998, which allocated federal funds for developing and upgrading DNA collection procedures.²⁶ The federal DNA databank contains not only samples gathered by federal agents but also genetic profiles submitted to the FBI by state law enforcement agencies. All states, in turn, have access to CODIS computerized data. By linking federal and state databases, law enforcement officers around the country can conduct interstate investigations, matching DNA evidence to suspects at the local, state, and national levels.

In the last decade, Congress passed a series of laws that gradually cast the federal DNA net even wider. The Patriot Act, passed in 2001 in the wake of the 9/11 attacks, extended the scope of federal DNA collection to terrorism-related crimes.²⁷ The Justice for All Act of 2004 further widened the reach to all federal felonies and to additional crimes of violence or sexual abuse.²⁸ On January 5, 2006, President George W. Bush signed into law, apparently without anyone noticing, the DNA Fingerprint Act of 2005—a stunning extension of government power.²⁹ Buried in the pages of the popular Violence Against Women Act reauthorization bill, the DNA Fingerprint Act authorizes U.S. agents to take and store DNA from anyone they arrest or detain and permits CODIS to retain profiles from arrestees that were submitted by the states that collected their DNA.³⁰ Citizens who have not been convicted or charged with any crime and immigrants de-

24. See *infra* text accompanying notes 25-26.

25. See DNA Identification Act of 1994, 42 U.S.C. §§ 14132-34 (2006).

26. See Crime Identification Technology Act of 1998, 42 U.S.C. § 14601 (2006); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 811, 110 Stat. 1214, 1312 (1996).

27. See United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT Act") Act of 2001, Pub. L. No. 107-56, § 503, 115 Stat. 272, 364 (2001).

28. See Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2261, 2270 (2004).

29. KRIMSKY & SIMONCELLI, *supra* note 14, at 34.

30. *Id.* at 34-35.

tained on suspicion of Immigration and Naturalization Service violations may also have their profiles retained.³¹

A similar escalation is taking place at the state level. All fifty states now extract DNA from at least some classes of offenders and send it to CODIS.³² Forty-seven states take a sample from anyone convicted of a felony, and some states include misdemeanor offenders.³³ In eighteen states, people who are only arrested are forced to submit DNA, even if they are never convicted of a crime.³⁴ Thirty-five states have extended their genetic collection law to children.³⁵ Most states retain the actual DNA samples and not just the genetic profiles derived from the samples, allowing investigators to mine them for additional genetic information in the future.³⁶ Half of states allow the stored DNA samples to be used for purposes other than law enforcement, such as biomedical research.³⁷

The State of California, which has amassed the third-largest DNA database in the world, behind only the U.S. and British governments, illustrates the cutting edge of state expansion.³⁸ In 1998, the California legislature passed the DNA and Forensic Identification Database and Databank Act to permit police to retrieve DNA from anyone, including children, convicted of a felony, sex offense, or arson.³⁹ By 2004, the California database had grown to 220,000 offender profiles.⁴⁰ However, law enforcement clamored for a wider net to stockpile even more DNA samples for the database.⁴¹ Also in 2004, Proposition 69, the DNA Fingerprint, Unsolved Crime, and Innocence Protection Act, was placed on the ballot.⁴² The ballot initiative took a giant leap beyond the current law; it broadened the scope of individu-

31. Julia Preston, *U.S. Set to Begin a Vast Expansion of DNA Sampling*, N.Y. TIMES, Feb. 5, 2007, at A1, available at http://www.nytimes.com/2007/02/05/washington/05dna.html?_r=1.

32. KRIMSKY & SIMONCELLI, *supra* note 14, at 29.

33. *Id.* at 38 (stating that only Idaho, Nebraska, and New Hampshire do not authorize DNA collection from all felons).

34. *Id.* at 39 tbl.2.2, 41.

35. *Id.* at 38.

36. *Id.* at 237-38.

37. *Id.* at 238.

38. Press Release, Office of the Att'y Gen., Brown Announces Major DNA Lab Expansion (May 5, 2008) (on file with author), available at <http://ag.ca.gov/newsalerts/release.php?id=1553>.

39. Tania Simoncelli & Barry Steinhardt, *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 33 J.L. MED. & ETHICS 199, 202 (2005). The felony of arson was added after 2002 in an expansion of the Act's list of qualifying offenders whom police were permitted to retrieve DNA. *Id.*

40. *Id.* at 200.

41. *Id.* at 203.

42. *Id.* at 199.

als in the state who are subject to warrantless DNA seizures to anyone, even children, arrested on suspicion of committing any felony.⁴³ The measure also applies retroactively to authorize collection of DNA from all five hundred thousand Californians who are in prison, or on probation or parole with a felony record.⁴⁴ Consequently, the state's DNA database is expected to mushroom to more than two million samples over the next five years.⁴⁵

There was strong opposition to the law. A range of advocacy groups, including the California American Civil Liberties Union ("ACLU"), the League of Women Voters, the Privacy Rights Clearinghouse, the Children's Defense Fund, and the American Conservative Union, objected to the initiative's inclusion of arrestees for undermining the principle of presumptive innocence, branding children with lifetime suspicion, and wasting taxpayer money on the monumental costs of DNA processing.⁴⁶ According to the California Department of Justice, of the approximately 332,000 people arrested for felonies in California in 2007, more than 101,000 were not convicted of any crime.⁴⁷ That means that roughly 30% of arrestees are subject to DNA seizure without a determination of guilt.⁴⁸

In 2009, the ACLU of Northern California filed a class-action lawsuit arguing that Proposition 69 is unconstitutional because it subjects innocent Californians to "a lifetime of genetic surveillance" that constitutes an unreasonable search under the Fourth Amendment.⁴⁹ The named plaintiff, Lily Haskell, was arrested at a peace rally in San Francisco and forced to provide a DNA sample, even though she was quickly released without being charged with a crime.⁵⁰ "When your DNA is taken after an arrest at a political demonstration, it can have a silencing effect on political action," Haskell later said.⁵¹ "Now my ge-

43. *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1190 (N.D. Cal. 2009); Simoncelli & Steinhardt, *supra* note 39, at 200.

44. Simoncelli & Steinhardt, *supra* note 39, at 200 tbl.2, 200-02.

45. *See id.* at 201.

46. *Vote No on Proposition 69*, LEAGUE OF WOMEN VOTERS OF CAL., <http://ca.lwv.org/action/prop0411/prop69.html> (last visited Feb. 7, 2011) (listing organizations supporting and opposing Proposition 69).

47. Complaint for Declaratory and Injunctive Relief at 3, *Haskell v. Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2009) (No. CV 09-4779), 2009 WL 3269641.

48. *See id.*

49. *Id.* at 19-20.

50. *ACLU Lawsuit Challenges California's Mandatory DNA Collection at Arrest*, ACLU (Oct. 7, 2009), <http://www.aclu.org/technology-and-liberty/aclu-lawsuit-challenges-california-s-mandatory-dna-collection-arrest>.

51. *Id.*

netic information is stored indefinitely in a government database, simply because I was exercising my right to speak out.”⁵² But the ACLU lost its case. A California federal judge ruled that the ACLU failed to show that individual privacy rights outweigh the government’s compelling interest in DNA profiling that works to “swiftly and accurately” solve past and present crimes.⁵³

In California, Colorado, and New York, the scope of genetic surveillance extends to another category of people who have never been suspected of a crime.⁵⁴ In what is known as “familial searching,” investigators question relatives of people whose DNA is stored in the government databank and pressure them to submit genetic samples to avoid being implicated in a crime.⁵⁵ Under this scheme, people become candidates for inclusion based merely on their relationship to someone previously profiled.⁵⁶ Familial searching is used when a crime scene sample fails to produce a perfect cold hit, but does provide a partial match to a DNA profile stored in the database.⁵⁷ The police track down close relatives, such as siblings, parents, or children, of the partial matches and ask them to provide a DNA sample through a cheek swab to compare with the crime scene evidence.⁵⁸ Although submitting a sample is voluntary, refusing to submit one looks suspicious. Gathering samples from family members extends state surveillance to yet another category of innocent citizens. These innocent citizens are trapped by a new form of suspicion based on familial association.

II. THE COST OF SURVEILLANCE

Government DNA data banking began as a targeted procedure to assist law enforcement in identifying perpetrators of a narrow set of crimes.⁵⁹ It has expanded into a form of state surveillance that ensnares innocent people or petty offenders who have done little or

52. *Id.*

53. *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1202-03 (N.D. Cal. 2009).

54. Jeremy W. Peters, *New Rule Allows Use of Partial DNA Matches*, N.Y. TIMES, Jan. 25, 2010, at A12, available at <http://www.nytimes.com/2010/01/25/nyregion/25dna.html>.

55. See KRIMSKY & SIMONCELLI, *supra* note 14, at 88.

56. *Id.*

57. KRIMSKY & SIMONCELLI, *supra* note 14, at 64–88; Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders’ Kin*, 34 J.L. MED. & ETHICS 248, 250 (2006).

58. See generally KRIMSKY & SIMONCELLI, *supra* note 14, at 64–88 (discussing the process of familial DNA searches and the policy issues surrounding the practice).

59. *Id.* at 28.

nothing to warrant the collateral intrusion into their private lives. Databanks no longer detect suspects—they create suspects from an ever-growing list of categories. Even so, the public shows little alarm about the massive retention of genetic information because the balance between protecting individual privacy and keeping the streets safe seems to fall in favor of more law enforcement. DNA profiling is a far more precise and objective method of identifying suspects compared to less sophisticated law enforcement techniques, such as eyewitness identification or smudge fingerprints found at a crime scene.⁶⁰ Far from feeling threatened by this gigantic storehouse of genetic data, many Americans see it as a surefire way of catching criminals and ensuring that only guilty people are convicted of crimes.⁶¹ Storing an innocent person's DNA seems a small price for such a great public good.

The countless cases where DNA data banking either yielded no benefit or produced erroneous identifications received little attention from the media. Moreover, the public does not hear from the thousands of innocent people whose DNA was seized and stored against their will. Although DNA testing has shed light on the injustice of false convictions, it cannot solve the underlying problems that lead innocent people to be convicted in the first place. Most wrongful convictions result from deep biases in the criminal justice system that make poor, minority defendants vulnerable to police abuse, misidentification, and inadequate representation.⁶² False confessions coerced by the police are one of the main causes of wrongful convictions.⁶³ According to the Innocence Project, “In about [twenty-five] percent of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”⁶⁴ Coerced

60. See John P. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 AM. J. CRIM. L. 119, 128-29 (2000).

61. See generally Akhil Reed Amar, Op-Ed., *A Search for Justice in Our Genes*, N.Y. TIMES, May 7, 2002, at A2, available at <http://query.nytimes.com/gst/fullpage.html?res=9E05E7DB1730F934A35756C0A9649C8B63> (stating that to minimize risks, a DNA statute should limit testing of parts of the DNA code that identify individuals without revealing other medical facts).

62. See Teressa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 692 (2008) (“[W]rongful convictions do not result from a single flaw or mistake; many factors can be at the root of a wrongful conviction. Such factors may include biased police lineups, mistaken eyewitness identification, faulty forensic science, coerced false confessions, and unreliable informants.” (internal citations omitted)).

63. *False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Feb. 5, 2011).

64. *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand> (last visited Feb. 5, 2011).

false confessions were a factor in fifteen of thirty-three exonerations won by the Center on Wrongful Convictions.⁶⁵ It makes no sense to correct a problem created by law enforcement's abuse of power by handing over even more authority to law enforcement in the form of DNA collection. The way to reduce wrongful convictions is to remove the biases based on race and class that corrupt our criminal justice system. Extending the reach of state surveillance does just the opposite. Besides, contrary to the public's belief that DNA evidence is infallible, there have been numerous cases of errors in the handling and analysis of DNA that have led to false accusations and convictions of innocent people.⁶⁶

These weaknesses in the state's use of DNA data banking as a tool for reducing crime make it harder to justify the resulting breach of individual privacy. Society recognizes that the government violates its civil liberties if it taps our telephones or secretly searches our homes without court permission.⁶⁷ Collecting and storing our DNA is also a serious intrusion into our private lives because DNA is a part of the body; taking it without consent violates our bodily integrity. In addition to this material aspect, DNA contains sensitive personal information that can be used to identify our family members and us, can be matched with other private records, including medical files.⁶⁸

Society tolerates the state forcibly extracting highly personal data from people convicted of serious crimes because these offenders have a diminished right to privacy as a result of their antisocial conduct.⁶⁹ But as the categories of people who are compelled to submit DNA broaden, it becomes less clear why the state should have so much power over them. Once compelled DNA collection goes beyond murderers, rapists, and armed robbers, law enforcement's need for a sus-

65. *About Us*, BLUHM L. CLINIC, CENTER ON WRONGFUL CONVICTIONS, <https://www.law.northwestern.edu/wrongfulconvictions/aboutus> (last visited Feb. 4, 2011).

66. KRIMSKY & SIMONCELLI, *supra* note 14, at 140-41.

67. *See generally* U.S. CONST. amend. IV (guarding against unreasonable searches and seizures when the searched party has a "reasonable expectation of privacy"); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (2006) (extending wiretap protections to include transmissions of electronic data by computers); Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711 (2006) (setting rules for obtaining wiretap orders in the United States).

68. *See generally* George J. Annas, *Protecting Privacy and the Public—Limits on Police Use of Bioidentifiers in Europe*, 361 N. ENG. J. MED. 196, 196-201 (2009) (explaining that bioidentifiers implicate privacy even more than answers on tax returns since they directly identify individuals).

69. FED. BUREAU OF INVESTIGATION, SUMMARY OF THE UNIFORM CRIME REPORTING ("UCR") PROGRAM 2 (2010), *available at* <http://www2.fbi.gov/ucr/cius2009/documents/aboutucrmain.pdf>.

pect's DNA lessens and the right to retain control over their private information strengthens.⁷⁰ Although people convicted of heinous crimes may forfeit their claim to privacy, there is no such justification for seizing genetic samples from someone who has, say, forged a check. State agents should be required to obtain informed consent to take or test DNA from anyone who has not been convicted of a serious crime.

Although U.S. courts have been slow to recognize this threat to civil liberties,⁷¹ in 2008, the European Court of Human Rights unanimously held that the United Kingdom's storage of DNA for purposes of criminal investigation infringed privacy rights protected by Article 8 of the European Convention.⁷² The European Court was especially troubled by the indefinite retention of genetic information taken from children and adults who were never convicted of a crime,⁷³ stigmatizing them as if they were convicted criminals. This equation of the innocent and the guilty disregards the presumption of innocence accorded to citizens in a democracy. Massive government collection of DNA transforms the relationship between citizens and their government in ways that contradict basic democratic principles.⁷⁴ Government becomes the watchdog of citizens instead of the other way around. Although they are guilty of no wrongdoing, huge segments of the population are perpetually under suspicion. Citizens can no longer rely on the state to safeguard their privacy by forgetting their past behavior because evidence about them is stored forever.⁷⁵ The state has the authority to take citizens' private property—in this case, their genetic information—without due process.⁷⁶ Those are features of a totalitarian state, not a liberal democracy.

III. JIM CROW DATABASES

These privacy violations are exacerbated by the racial inequities that plague every part of the U.S. criminal justice system. The most stunning aspect of this injustice is the mass incarceration of African

70. Sarah B. Berson, *Debating DNA Collection*, NAT'L INST. JUST. (Oct. 29, 2009), <http://www.ojp.usdoj.gov/nij/journals/264/debating-DNA.htm>.

71. Annas, *supra* note 68, at 198.

72. S. & Marper v. United Kingdom, 4 Eur. Ct. H.R. at 30562 (2008).

73. *Id.*

74. See Berson, *supra* note 70.

75. See generally Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 13 (2008) (arguing that "the rise of the National Surveillance State portends the death of amnesia").

76. See Berson, *supra* note 70.

American men.⁷⁷ Radical changes in crime control, drug, and sentencing policies over the last thirty years produced an explosion in the U.S. prison population from three hundred thousand to two million inmates.⁷⁸ Additionally, the United States has the highest rate of incarceration in the world at a magnitude unprecedented in the history of Western democracies.⁷⁹ The gap between black and white incarceration rates has increased along with rising inmate numbers.⁸⁰ Black men are eight times as likely as white men to be behind bars.⁸¹ One in nine black men aged twenty to thirty-four is in prison or in jail.⁸² In fact, most people sentenced to prison today are black.⁸³ In her 2010 book, *The New Jim Crow*, legal scholar Michelle Alexander demonstrates that black incarceration functions like a modern-day Jim Crow caste system because it “permanently locks a huge percentage of the African American community out of the mainstream society and economy,” replicating the subjugated status of blacks that prevailed before the civil rights revolution.⁸⁴

The targeted imprisonment of black men is translated into the disproportionate storage of their genetic profiles in state and federal databases. We can look to the United Kingdom to gauge the likely racial impact of our own federal database now that it has surpassed theirs in size. Their database reveals that 40% of all black men and 77% of black men aged fifteen to thirty-five, compared with only 6% of white men, were estimated to have genetic profiles in the UK national DNA database in 2006.⁸⁵ Also in 2006, Stanford bioethicist Hank Greely estimated that at least 40% of the genetic profiles in the U.S. federal database were from African Americans, although they

77. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-73 (2004).

78. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (2010); MARC MAUER, *RACE TO INCARCERATE* 1-2 (2006); Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74.

79. See Roberts, *supra* note 77, at 1272.

80. *Id.*

81. *Id.* at 1274.

82. *Why Are 1 in 9 Young Black Men in Prison?*, NAACP OF OTERO CNTY., N.M., <http://naacpoc.org/2008/03/why-are-1-in-9-young-black-men-in-prison/> (last visited Feb. 6, 2011).

83. See Roberts, *supra* note 77, at 1272.

84. ALEXANDER, *supra* note 78, at 13.

85. Ben Leapman, *Three in Four Young Black Men on the DNA Database*, TELEGRAPH, Nov. 5, 2006, at 1, available at <http://www.telegraph.co.uk/news/uknews/1533295/Three-in-four-young-black-men-on-the-DNA-database.html>; Matilda MacAttram, *How the Government's DNA Crusade Is Criminalising Innocent Black Britons*, VOICE ONLINE (July 13, 2009), <http://www.voice-online.co.uk/content.php?show=15859>.

make up only 13% of the national population.⁸⁶ Sheldon Krinsky and Tania Simoncelli arrive at a similar estimate in which 41% to 49% of CODIS profiles are from African Americans.⁸⁷

The extension of DNA collection by the federal government and a number of states to people who are only arrested—as opposed to charged or convicted—brings many more whites into the system, but it is also on its way to creating a nearly universal database for urban black men.⁸⁸ These men are arrested so routinely that upwards of 90% would be included in databases if the collection policy is strictly enforced.⁸⁹ In April 2010, Arizona Governor Jan Brewer signed a controversial law giving police broad authority to detain anyone suspected of being in the country illegally.⁹⁰ This law is held up as a model for immigration enforcement policy in other states.⁹¹ When combined with congressional authorization of DNA sampling from all federal detainees,⁹² these immigration laws will cause the number of Latino profiles in CODIS and state databases to skyrocket.

Police routinely consider race in their decision to stop and detain an individual.⁹³ A *New York Times*/CBS News Poll conducted in July 2008 asked: “Have you ever felt you were stopped by the police just because of your race or ethnic background?”⁹⁴ Sixty-six percent of black men said yes, compared to only 9% of white men.⁹⁵ The United States Supreme Court has authorized police to use race in determining whether there is reasonable cause to suspect someone is involved in crime.⁹⁶ Michelle Alexander calls the Court’s license to discriminate the “dirty little secret of policing.”⁹⁷ In recent decades, a conservative Supreme Court has eroded the Warren Court’s protections

86. Greely et al., *supra* note 57, at 258.

87. KRINSKY & SIMONCELLI, *supra* note 14, at 258.

88. *See id.* at 34-35, 257.

89. *See* Kaye & Smith, *supra* note 16, at 270.

90. *See* Julia Preston, *Political Battle on Illegal Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at A1, available at <http://www.nytimes.com/2011/01/01/us/01immig.html?nl=todaysheadlines>; *see generally* 2010 Ariz. Legis. Serv. 113 (West) (outlining Arizona’s attempt to discourage the entrance and presence of illegal aliens).

91. *See generally* Preston, *supra* note 90, at A1 (discussing the Arizona law’s strong influence on other states).

92. KRINSKY & SIMONCELLI, *supra* note 14, at 32-38.

93. ALEXANDER, *supra* note 78, at 128-36; *see* DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 16-55 (1999).

94. Charles M. Blow, Op-Ed., *Welcome to the ‘Club,’* N.Y. TIMES, July 25, 2009, at A23, available at <http://www.nytimes.com/2009/07/25/opinion/25blow.html>.

95. *Id.*

96. *See* U.S. v. Brignoni-Ponce, 422 U.S. 873, 884-87 (1975); ALEXANDER, *supra* note 78, at 128.

97. ALEXANDER, *supra* note 78, at 128.

against police abuse in ways that promote the arrest of blacks and Latinos—relaxing, for example, the standard for reasonable suspicion—and has blocked legal channels for challenging racial bias on the part of law enforcement.⁹⁸

There is overwhelming evidence that police officers stop motorists on the basis of race for minor traffic violations, such as failure to signal a lane change, often as a pretext to search the vehicle for drugs.⁹⁹ One of the first confirmations of this was a 1992 *Orlando Sentinel* study of police videotapes that discovered that, while blacks and Latinos represented only 5% of drivers on the Florida interstate highway, they comprised nearly 70% of drivers pulled over by police and more than 80% of those drivers whose cars were searched.¹⁰⁰ A study of police stops on the New Jersey Turnpike similarly found that, although only 15% of all motorists were minorities, 42% of all stops and 73% of all arrests were of black drivers.¹⁰¹ In Maryland, only 21% of drivers along a stretch of I-95 outside of Baltimore were African Americans, Asians, or Latinos, but these groups made up nearly 80% of those who were stopped and searched.¹⁰² Likewise, an Illinois state police drug interdiction program, known as Operation Valkyrie, targeted a disproportionate number of Latinos, who comprised less than 8% of the Illinois population but 30% of the drivers stopped by drug interdiction officers for petty traffic offenses.¹⁰³

Police officers also make drug arrests in a racially biased manner. Although whites use drugs in greater numbers than blacks, blacks are far more likely to be arrested for drug offenses—and, therefore, far more likely to end up in genetic databases.¹⁰⁴ The latest National Survey on Drug Use and Health, released in February 2010, confirms that young blacks aged eighteen to twenty-five years old are less likely to

98. See Jose Felipe Anderson, *Accountability Solutions in the Consent Search and Seizure Wasteland*, 79 NEB. L. REV. 711, 712-18 (2000); see also *Brignoni-Ponce*, 422 U.S. at 884-87 (approving race as a factor to determine whether probable cause exists).

99. See generally DAVID HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002) (reviewing studies showing racial profiling by police officers).

100. See Jeff Brazil & Steve Berry, *Color of Drivers Is Key to Stops on I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A1, available at http://articles.orlandosentinel.com/1992-08-23/news/9208230541_1_stop-and-search-sentinel-drivers-stopped.

101. See *State v. Soto*, 734 A.2d. 350, 353 n.3, 354 n.6 (N.J. Super. Ct. Law Div. 1996).

102. HARRIS, *supra* note 99, at 80.

103. DAVID A. HARRIS, ACLU, *DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS* 3, 27-28 (1999) available at <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways>.

104. See *Matching the Picture to the Protest*, QUILL, Mar. 1, 1991, at 6, available at 1991 WLNR 4670893.

use illegal drugs than the national average.¹⁰⁵ Yet, black men are twelve times more likely than white men to be sent to prison on drug charges.¹⁰⁶ This staggering racial disparity results in part from the deliberate decision of police departments to target their drug enforcement efforts on urban and inner-city neighborhoods where people of color live. Indeed, the increase in both the prison population and its racial disparity in recent decades are largely attributable to aggressive street-level enforcement of the drug laws and harsh sentencing of drug offenders.¹⁰⁷

A crusade of marijuana arrests in New York City in the last decade provides a shocking illustration.¹⁰⁸ Since 1997, the New York Police Department (“NYPD”) has arrested 430,000 people for possessing tiny amounts of marijuana, usually carried in their pockets.¹⁰⁹ In 2008 alone, the NYPD arrested and jailed 40,300 people for the infraction.¹¹⁰ Even more alarming is the extreme racial bias shown in whom the police target for arrest. Although U.S. government studies consistently show that young whites smoke marijuana at the highest rates, white New Yorkers are the least likely of any group to be arrested.¹¹¹ In 2008, whites made up over 35% of the city’s population but less than 10% of the people arrested for marijuana possession.¹¹² Instead, the NYPD has concentrated arrests on young blacks and Latinos. Police arrested blacks and Latinos for marijuana possession at seven and four times the rate of whites, respectively.¹¹³

The racist marijuana policing strategy is based on the routine police practice of stopping, frisking, and intimidating young blacks and Latinos. According to Harry Levine, the City University of New York

105. See NAT’L SURVEY ON DRUG USE & HEALTH REPORT, SUBSTANCE USE AMONG BLACK ADULTS 5 (2010), available at <http://www.oas.samhsa.gov/2k10/174/174SubUseBlackAdults.htm>.

106. HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 26 (2008), available at <http://www.hrw.org/en/node/62236/section/1>.

107. *Id.* at 16.

108. HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997–2007, at 5 (2008), available at http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf; Harry G. Levine et al., Drug Arrests and DNA: Building Jim Crow’s Database 6 (June 19, 2008) (unpublished paper) (on file with author), available at <http://dragon.soc.qc.cuny.edu/Staff/levine/Building-Jim-Crows-Database---Drug-Arrests-and-DNA—Levine.pdf>.

109. Harry G. Levine, *The Epidemic of Pot Arrests in New York City*, ALTERNET (Aug. 10, 2009), http://www.alternet.org/story/141866/the_epidemic_of_pot_arrests_in_new_york_city/.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

sociologist who exposed the arrest campaign, “In 2008, the NYPD made more than half a million recorded stops and frisks and an unknown number of unrecorded stops, disproportionately in black, Latino and low-income neighborhoods.”¹¹⁴ Although New York City is the “marijuana arrest capital of the world,” other cities like Atlanta, Baltimore, Denver, Houston, Los Angeles, Philadelphia, and Phoenix are also arresting and jailing huge numbers of blacks and Latinos for marijuana possession.¹¹⁵

The widespread arrests of young blacks and Latinos for marijuana possession and other petty offenses, such as truancy, skateboarding, and playing loud music, have devastating consequences. A first-time offender who pleads guilty to felony marijuana possession has a permanent criminal record that can block him or her from getting a student loan, a job, a professional license, food stamps, welfare benefits, or public housing.¹¹⁶ Even if they avoid prison on a first offense, those who are arrested a second time risk a harsh sentence for being a repeat offender.¹¹⁷ In addition to harsh sentencing, a lifetime of genetic surveillance can now be added to the long list of collateral consequences created by discriminatory arrests.

IV. RACIAL HARMS

Racial disparities in DNA databanks make communities of color the most vulnerable to state surveillance and suspicion.¹¹⁸ The disproportionate odds faced by blacks and Latinos of having their DNA extracted and stored will, in turn, intensify the racial disparities that already exist in the criminal justice system. People whose DNA is in criminal databases have a greater chance of being matched to crime scene evidence. While a guilty person may have no right to complain, that is no excuse for unfairly placing certain racial groups at greater risk of detection. Blacks and Latinos have greater odds of being ge-

114. *Id.*; see also Blow, *supra* note 94; Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 11, 2010, at A1, available at <http://www.nytimes.com/2010/07/12/nyregion/12frisk.html>.

115. LEVINE, *supra* note 108; see also Charles M. Blow, *Smoke and Horrors*, N.Y. TIMES, Oct. 22, 2010, at A19, available at <http://www.nytimes.com/2010/10/23/opinion/23blow.html>; Bob Herbert, *Anger Has Its Place*, N.Y. TIMES, July 31, 2009, at A15, available at <http://www.nytimes.com/2009/08/01/opinion/01herbert.html>.

116. ALEXANDER, *supra* note 78, at 139-40.

117. *Id.* at 140.

118. OBASOGIE, *supra* note 8, at 43.

netically profiled largely because of discriminatory police practices.¹¹⁹ Moreover, people whose profiles are entered in DNA databases become subject to a host of errors that can lead to being falsely accused of a crime. As the federal government and a growing number of states extend the scope of DNA collection to innocent people, they are imposing this unmerited risk primarily on minorities.

The problem is not only that all of these harms are placed disproportionately on people of color, but also that the dangers of state databanks are multiplied when applied to blacks and Latinos because these groups are already at a disadvantage when they encounter the criminal justice system. Blacks and Latinos have fewer resources than whites to challenge abuses and mistakes by law enforcement officers and forensic analysts.¹²⁰ They are stereotyped as criminals before any DNA evidence is produced, making them more vulnerable to the myth of DNA infallibility.¹²¹ “The experience of being mistaken for a criminal is almost a rite of passage for African-American men,” writes journalist Brent Staples.¹²² One of the main tests applied by a disturbing number of Americans to distinguish law-abiding from lawless people is their race.

Many, if not most, Americans believe that black people are prone to violence and make race-based assessments of the danger posed by strangers they encounter.¹²³ One of the most telling reflections of the presumption of black criminality is biased reporting of crime by white victims and eyewitnesses.¹²⁴ Psychological studies show a substantially greater rate of error in cross-racial identifications when the witness is white and the suspect is black.¹²⁵ White witnesses disproportionately misidentify blacks because they expect to see black criminals.¹²⁶ According to Cornell legal scholar Sheri Lynn Johnson, “This expectation is so strong that whites may observe an interracial

119. Simon A. Cole, *How Much Justice Can Technology Afford? The Impact of DNA Technology on Equal Criminal Justice*, 34 *SCI. & PUB. POL’Y* 95, 100 (2007).

120. See Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, in *RACE AND WEALTH DISPARITIES: A MULTIDISCIPLINARY DISCOURSE* 148, 159 (Beverly Moran ed., 2008).

121. Cole, *supra* note 119.

122. Brent Staples, *Even Now, There’s Risk in ‘Driving While Black,’* *N.Y. TIMES*, June 14, 2009, at A18, available at <http://www.nytimes.com/2009/06/15/opinion/15mon4.html>.

123. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 *CORNELL L. REV.* 934, 950 (1984).

124. *Id.*

125. *Id.* at 949.

126. *Id.*

scene in which a white person is the aggressor, yet remember the black person as the aggressor.”¹²⁷

In numerous carefully staged experiments, social psychologists have documented how people’s quick judgments about the criminal acts of others are influenced by implicit bias—positive or negative preferences for a social category, such as race or gender, based on unconscious stereotypes and attitudes that people do not even realize they hold.¹²⁸ Whites who are trying to figure out a blurred object on a computer screen can identify it as a weapon faster after they are exposed to a black face.¹²⁹ Exposure to a white face has the opposite effect.¹³⁰ Research participants playing a video game that simulates encounters with armed and unarmed targets react faster and are more likely to shoot when the target is black.¹³¹ The implicit association between blacks and crime is so powerful that it supersedes reality; it predisposes whites to see black people as criminals. Most wrongful convictions occurred after witnesses misidentified the defendant.¹³² Databanks filled with DNA extracted from guilty and innocent black men alike will enforce and magnify the very stereotypes of black criminality that lead to so many wrongful convictions in the first place.

Collecting DNA from huge numbers of African Americans who are merely arrested, with no proof of wrongdoing, embeds the sordid myth of black criminality into state policy. As databanks swell with DNA from black people who are arrested or convicted on petty offenses and as their relatives also come under suspicion in states with familial searching, the government effectively treats every black person in many communities as a criminal suspect. It seemingly also legitimizes the myth that blacks have a genetic propensity to commit crime.

In 2010, Florida State University criminologist Kevin Beaver published a widely reported study claiming to show that young men with the low-activity form of the monoamine oxidase A (“MAOA”) gene—dubbed by the press as the “warrior gene”—were more likely

127. *Id.* at 950.

128. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881 (2004).

129. *Id.* at 880.

130. *Id.*

131. *Id.* at 889.

132. Tanya Eiserer, *Faulty Eyewitness Identifications Leading Cause of Wrongful Convictions*, DALLAS MORNING NEWS (Oct. 4, 2009, 4:55 PM), <http://crimeblog.dallasnews.com/archives/2009/10/the-case-seemed-rock-solid.html>.

to join gangs than those who had the high-activity version of the MAOA gene.¹³³ He concluded that “male carriers of low MAOA activity alleles are at risk for becoming a gang member and, once a gang member, are at risk for using weapons in a fight.”¹³⁴ The public, who already implicitly associates blacks with violence, may link research claiming that genes cause gangbanging and aggression to the disproportionate incarceration of African Americans along with the disproportionate banking of African Americans’ genetic profiles, to reach the false conclusion that blacks are more likely to possess these crime-producing traits—or even that most blacks actually possess them. Americans will become even more indifferent to racial injustice in law enforcement if they are convinced that black people belong behind bars because of their genetic predilection to crime.

CONCLUSION

Despite the racial harms of DNA data banking, civil rights advocacy groups have done little to challenge the threat posed by government genetic surveillance. Their silence stems from a tension surrounding DNA testing. Although it is serving an unjust criminal justice system, DNA technology is also responsible for one of the biggest successes in criminal justice reform. As of 2010, more than half (151 out of 254) post-conviction DNA exonerations involved African Americans.¹³⁵ There could not be a better public-relations campaign for DNA than the compelling stories of falsely imprisoned people released after DNA testing. As criminologist Simon Cole notes, “At first glance, post-conviction DNA exonerations appear to be a powerful example of the use of technoscience to offset social inequality.”¹³⁶ Civil rights organizations that may have ordinarily opposed the expansion of DNA databanks because of their intrusion into communities of color instead embrace DNA technology as a result of its ability to exonerate victims of the system. However, while it appears DNA databanks would decrease mass incarceration, this Article has argued that DNA databanks are actually more likely to intensify it and its collateral consequences.

133. Kevin M. Beaver et al., *Monoamine Oxidase A Genotype Is Associated with Gang Membership and Weapon Use*, 51 *COMPREHENSIVE PSYCHIATRY* 130, 132 (2010).

134. *Id.*

135. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, www.innocenceproject.org/Content/Facts_on_PostConviction_ENA_Exonerations.php (last visited Feb. 7, 2011).

136. Cole, *supra* note 119, at 99.

Champions for racial justice who support expanded DNA databanks or are silent about them should not make the mistake of embracing DNA technology without analyzing its full role in the criminal justice system.¹³⁷ Although DNA testing can correct injustices when used narrowly to confirm a suspect's guilt or innocence, the massive genetic surveillance we are witnessing threatens to reinforce the racial roots of the very injustices that need to be corrected. Wrongful convictions are a symptom of our Jim Crow system of criminal justice, which is systematically biased against blacks and Latinos.¹³⁸ Creating a Jim Crow database filled with their genetic profiles only intensifies this travesty of justice, adding yet another collateral consequence of criminal injustice and fortifying a dangerous biopolitics of race.

137. See, e.g., Joel Stonington, *State All-Crimes Databank Proposed*, WALL ST. J., June 2, 2010, at A25, available at <http://online.wsj.com/article/SB10001424052748703961204575280732811781468.html> (illustrating elected officials, such as Governor David Paterson and President Barack Obama, who support expanded DNA collection).

138. Cole, *supra* note 119, at 100.