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The Wisdom of Universal DNA Collection: A Reply to Professor Meghan J. Ryan

Arnold H. Loewy*

I want to begin by thanking Professor Meghan J. Ryan for inviting me to respond to her important commentary on DNA evidence. I also want to thank the *SMU Science & Technology Law Review* for allowing me to share its pages with Professor Ryan regarding this topic.

My initial article was not designed to paint DNA as a perfect panacea to solve all the world's crimes with omniscient accuracy. No methodology in human hands is that efficient. What I did intend to say, and what I continue to maintain, is that the availability of universal DNA will greatly improve the resolution of crimes. I also maintain that the related cost to individual privacy will not outweigh the benefit conferred through the availability of universal DNA.

Professor Ryan suggests that "because we live in a system with limited resources, investing in the universal collection of DNA will likely result in scaling down law enforcement resources elsewhere, such as by reducing the number of crime scene investigators or police officers on the street."¹ If I thought that she were correct, I would be reluctant to advocate my DNA proposal. But I think Professor Ryan is incorrect.

DNA collection involves two principle elements: collecting and analyzing. Collection is easy under my proposal; DNA will simply be taken as part of the many procedures hospitals already perform on newborn babies. As for the already existing population, the cost of collection should be relatively minimal. How much expertise does it take to monitor somebody spitting into a cup?

Of course, there will be additional costs to analyze the DNA.² But the analysis is done by scientists, not detectives. To the extent that law enforcement has totally inflexible budgets, the cost of DNA scientists might contribute to a minor reduction in available detectives, but I doubt the reduction will be too significant.³ First, I do not believe that most municipal budgets are that inflexible. Second, the advent of universal DNA should reduce the need

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1. Meghan J. Ryan, *The Privacy, Probability, and Political Pitfalls of Universal DNA Collection*, 20 *SMU SCI. TECH. L. REV.* (forthcoming 2017).
2. *See DNA Testing Services*, TRINITY DNA SOLUTIONS (2011), http://www.trinitydna.com/index.cfm?fuseaction=services.viewItem&item_id=3.
3. *See DNA for Police Investigations*, CENTER FOR EVIDENCE-BASED CRIME POLICY (2013), <http://cebc.org/evidence-based-policing/what-works-in-policing/research-evidence-review/dna-for-police-investigations/>.

for as many detectives. Regardless, a careful budget planner could surely add DNA testers without breaking the budget.

Professor Ryan also discusses potential enforcement difficulties with getting people to willingly provide DNA.⁴ She criticizes my proposal by suggesting that those most likely to commit a crime will be the least likely to provide DNA.⁵ Of course, under my proposal, contribution of DNA is mandatory—not a choice.⁶ But for the sake of argument, suppose a hypothetical criminal (Joe) refuses to contribute his DNA. If Joe is later arrested for committing a rape where DNA evidence was found, Joe's DNA will be taken by law enforcement regardless of whether Joe consents. If Joe's DNA matches, he will be charged with both rape *and* failure to register his DNA.

More generally, Professor Ryan criticizes my reliance on the interests of the innocent, contending that the framers would have disagreed with the proposal⁷ and that reliance on the interests of the innocent “could exacerbate racial and other explicit and implicit biases on which police suspicion is often at least in part based.”⁸ Despite the fact that some of our framers may have been perceived as criminals by the British,⁹ I seriously doubt that they were concerned with making it harder to convict the guilty. If that were the concern, then why even allow warrant searches based on probable cause?¹⁰ Obviously, the framers sought to protect the innocent—not the guilty—from overbearing searches that were practically punitive even if no evidence of guilt was discovered. Providing DNA is in no way comparably punitive, intrusive, or harmful to the innocent.

Further, Professor Ryan's concern with exacerbating racial and other biases is both wrong and perverse.¹¹ Focusing on protecting the innocent will eliminate such biases. Suppose the most vehemently racist police officer discovers a murdered rape victim lying in the gutter of a city street. His reaction is: “Some [n-word] did this. We've got to find him, get him off the street, and make this a safer community.” If DNA evidence is found and testing reveals that the rapist is in fact white, all black men are immediately exonerated, regardless of the police officer's racism. Perhaps the officer will eventually begin to avoid drawing conclusions based on his biases. For some,

4. Meghan J. Ryan, Professor, SMU Dedman School of Law, Debate with Professor Arnold Loewy at the SMU Criminal Law Society DNA Database Debate: Should Feds Have Your DNA? (Oct. 2, 2015).

5. *Id.*

6. See Arnold H. Loewy, *A Proposal for the Universal Collection of DNA*, 48 TEX. TECH L. REV. 261, 262 (2015); Ryan, *supra* note 1, at 2 n.9.

7. Ryan, *supra* note 1.

8. *Id.*

9. *Id.*

10. U.S. CONST. amend. IV.

11. Ryan, *supra* note 1.

biases may even wane with time. Regardless, having more DNA evidence only helps to prevent the wrongful conviction of every person and of any race.

I absolutely share Professor Ryan's opposition to venous blood draws.¹² Thankfully, intrusive blood draws are unnecessary; saliva contains DNA. In *Birchfield v. North Dakota*, the Supreme Court held that blood draws require a warrant, but breathalyzers are not sufficiently intrusive to require a warrant.¹³ A breathalyzer test is similar to "collecting a DNA sample by rubbing a swab on the inside of a person's cheek."¹⁴ Yet, breathalyzers do not require a warrant.¹⁵ Neither should spitting in a cup.

Considering another perspective, thermal imaging in surveillance activities is prohibited due to the capability of detecting innocent activity in the home.¹⁶ But constant video surveillance is permissible¹⁷ and arguably more intrusive than universal DNA collection. An innocent person might not want a video recording for the world to see exactly when he was at Home Depot, particularly if he was holding hands with a woman other than his wife. Nonetheless, this constant public surveillance is constitutionally permitted.

So, is collecting DNA more intrusive than constant surveillance? I think that the answer depends on the permitted uses of the DNA. Of course, if the DNA can be given to an insurance company who can then determine that the person from whom the DNA was taken has a propensity for breast cancer, such an act would be patently unacceptable. But if strictly enforced rules limit the uses of DNA to identifying (or excluding) suspected criminals, identifying amnesiacs or dead bodies, or determining paternity, much of the objections to DNA collection disappear.

Additionally, Professor Ryan argues that universal collection of DNA is not particularly necessary because we already have the DNA of most criminals, and an innocent person can clear his name by simply providing a DNA sample.¹⁸ She further argues that frequently "too little DNA is found at crime scenes."¹⁹ Let us discuss each of these points.

The fact that law enforcement officials have the DNA of previously convicted (or even arrested) criminals is insufficient. DNA has been useful in getting vicious, but otherwise undetected, criminals off the street. Rufus

12. *Id.*

13. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2163 (2016).

14. *Id.* at 2164.

15. *See id.*

16. Ryan, *supra* note 1.

17. Orin S. Kerr, *Do We Need a New Fourth Amendment?*, 107 MICH. L. REV. 951, 954 (2009) (quoting CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 109 (2007)).

18. Ryan, *supra* note 1.

19. *Id.*

King, of *Maryland v. King* is a perfect example.²⁰ The DNA sample taken after King's 2009 arrest linked him to the DNA from a 2003 rape of which he was ultimately convicted. Serendipitous after-the-fact discovery of DNA linking to a prior crime is typical of those that originate from mandatory DNA sampling of criminals. But this in no way helps to solve the numerous crimes committed by people who are never caught committing a subsequent crime.

I enjoy watching an Investigation Discovery channel program called "Unusual Suspects."²¹ This program frequently features a person who committed a crime in year one.²² Then, in year thirty, that person is finally caught committing another crime. The DNA is then discovered and used to convict the person for the crime committed three decades prior.²³ If his DNA were available in the first instance, it would be unnecessary to wait thirty years to get the conviction. And, of course, those who never commit another crime will never be discovered, often getting away with horrible crimes.

It is good policy to allow a person to provide his or her DNA to law enforcement officials in order to establish his or her innocence. But a universal database could often end the most immediate suspicion of the innocent. Certainly, if I were a possible criminal suspect, I would be quite content if the police could simply compare my DNA to that of the perpetrator and, establish my innocence before ever even allowing a slight suspicion to possibly become an impression. Of course, under our current system, I could exculpate myself by providing a DNA sample. But a universal DNA database would yield a superior result by often saving the innocent from the stress and trouble of being wrongfully suspected in the first place.

Finally, Professor Ryan suggests that sometimes the perpetrator will leave insufficient DNA to test.²⁴ Of course, in that case, my proposal is unhelpful, though it also would do no harm. I began by noting that my proposal is not a panacea for solving all of the world's crimes. Obviously, when no (or an insufficient amount of) DNA is left, my proposal will not help. But the fact that universal collection of DNA will not help solve every crime does not mean that it will not help solve a lot of them.

Given the small cost and the large benefit, a universal DNA database should be implemented.

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

21. *Unusual Suspects* (Investigation Discovery).

22. *See generally id.*

23. *See generally id.*

24. Ryan, *supra* note 1.