

American Society of Law, Medicine & Ethics
DNA Fingerprinting and Civil Liberties

Report of Workshop 4

I. Background

A. Overview of Project:

The American Society of Law, Medicine & Ethics held the fourth of a series of four workshops as part of the project *DNA Fingerprinting and Civil Liberties* on September 16 and 17, 2005. The project is funded by an ELSI grant from the National Institutes of Health, grant no. 1R01 HG002836 -01. The workshops are the centerpiece of the project and are designed to bring together a multi-disciplinary group of experts and stakeholders to explore various positions on new and controversial privacy and civil liberties issues involved in the application of DNA technology to the criminal justice system.

Each workshop consists of a half-day Public Forum, followed by a full day invitation-only meeting devoted to more in-depth exploration of the workshop theme. Through discussion sessions, participant viewpoints are sought on key issues consistent with the workshop theme. The grant goals are to record these viewpoints, to document consensus where it exists and to otherwise clarify positions on issues, noting advantages and disadvantages of each. These positions will be disseminated at a national symposium for law and policy makers so that this two-year, four-workshop process may inform their work in this area.

B. Overview of Workshop 4:

Workshop 4 explored the theme of post-conviction DNA testing. On the first day of the Workshop a public forum was held featuring talks including lessons learned from 15 years of DNA testing, policy implications from DNA-based exonerations and innocence projects; DNA fingerprinting and individual rights, emerging issues of law, policy and ethics; post-conviction DNA review models; and effects of DNA forensics on families and communities. On the second day of Workshop 4, background talks and small group discussions explored issues of post-conviction review and the impact of DNA forensics on families.

The discussions were conducted in three groups of eight or fewer participants, including the group discussion leader. Project consultants Frederick R. Bieber, David Lazer, and Mark Rothstein served as discussion leaders. Rapporteurs recorded and summarized these discussions. The following is a summary of the breakout group sessions.

II. Summary of Workshop 4 Breakout Discussions

A. Breakout Session: Lessons Learned from DNA Exonerations

Questions considered:

- **What are the lessons learned from DNA-(and other) based exonerations over the last 15 years? Do these exonerations reflect “cracks” in the system, or simply the inevitable errors in a system that produces a million convictions per year?**
- **Is there an ongoing need for expansion of post-conviction efforts? (and beyond DNA?)**
- **Given the concept of legal finality, what should be the limits of post-conviction review?**

There appeared to be some agreement that the rate of exonerations did represent “cracks” to the system, but the extent of the cracks is not yet known. It is not clear whether the 162 exonerations to date represent the tip of an iceberg, or the iceberg itself. For a number of participants, the size or number of cracks was not as relevant as the fact that individuals have been failed by the system. Thus repairs are needed.

Moreover, the cracks are wider than those exposed by post-conviction DNA testing. DNA represents only a narrow part of broader innocence issues. New questions are emerging now that DNA evidence has demonstrated that individuals convicted of crimes are worthy of exoneration. Should this be limited to only DNA evidence, or expanded to include other types of evidence, such as unanalyzed latent fingerprints?

Post-conviction exonerations signify problems with the system that states should now be addressing. Examples of these problems include inadequate legal representation, barriers to obtaining truthful confessions, faulty line-ups, and problems with forensic laboratories. One group analogized this situation to that of medical error. In that context, errors are seen as opportunities for system improvement. Therefore, it is important to report the error, identify what caused the error, and determine what can be done to improve the system so as to reduce the likelihood of another such error occurring. With enhanced understanding of the system and its flaws, system improvement can take place by uncovering and eliminating flawed procedures in the pre-conviction phase, thereby reducing the likelihood of wrongful convictions.

Consensus: Lessons learned from the DNA-based exonerations about the inadequacy of certain types of evidence, such as eyewitness identification, should lead states to make system changes in areas such as lineup procedure. The need for pre-conviction procedures to reduce the rate of erroneous convictions should not be overlooked.

Consensus: DNA exonerations have shed light on the need for effective legal representation. The quality of representation varies and is not only linked to whether the representation is publicly or privately funded. In addition to adequate funding, training of counsel in issues of DNA evidence, as well as other scientific evidence, is needed to insure effective representation.

Consensus: Crime lab independence from police is crucial to support a culture of scientific objectivity within the lab.

B. Breakout Session: Post-Conviction Review

Questions Considered:

- **Is legislation needed for post-conviction issues? How should such efforts be organized/executed?**
- **Should post-conviction efforts be expanded to include review for those who have already served their sentences?**
- **To what extent should plea-based convictions be reviewed?**
- **How should post-conviction efforts be funded?**
- **Should compensation/social services be made available to those whose convictions were vacated/overturned via the post-conviction review process?**

Plea-based convictions should also be subject to review post-conviction. Discussants explained that an individual may plead guilty for a variety of reasons collateral to guilt or innocence. Reasons include avoidance of an extended prison term for a subsequent offense, registration in a sex offender database, etc. Thus, because factors beyond guilt or innocence influence this decision, a guilty plea should not be a barrier to post-conviction testing. The discussants did not, however, display significant support for post-conviction review for those who have already served their sentence. While it was recognized that the idea does not lack merit, giving priority to such applications is complicated by the presence of a significant backlog of untested DNA evidence in many states.

Expanding post-conviction review is a question of resource availability and priority setting. Most agreed that the post-conviction testing is not an expensive item. No hard data exists as to the costs of such programs, however, and they could expand over time with increased standards of eligibility.

One area where there was a strong consensus that funding should be made available was the compensation for the exonerated. It was pointed out that even parolees are given more support when reentering the community—such as health insurance and job

training—than are the exonerated. It was also stated that exonerees are, in a sense, victims of crime and should be eligible for benefits and compensation on that basis.

Consensus: Additional funding is needed for post-conviction DNA testing.

Consensus: Plea-based convictions should also be subject to review post-conviction.

Consensus: Thoughtful approaches to prioritizing expanded opportunities for post-conviction testing applications, given the mounting backlog, is needed.

Consensus: There is a need for compensation, social services, and, in particular, health insurance to assist exonerated individuals to reestablish themselves in the community following incarceration.

Consensus: There are lessons to be learned from exonerations, but to do so, research is needed to identify recurring errors during the pre-conviction phase that may lead to false convictions.

C. Breakout Session: DNA Forensics: Effects on Families and Communities

Questions Presented:

- **What are the intrusions that DNA databases pose at the family and community/group level? What (if any) are the policy implications?**
- **What community interests deserve more attention by legislative bodies concerned with DNA and the criminal justice system?**
- **Is there a case to be made for a universal DNA database, to avoid concerns about race/ethnicity?**

The discussions concerning the above questions touched on a number of issues, but did not evidence a consensus on any of the topics. In general, individuals were concerned with broad access to the forensic DNA database for purposes other than those of crime solving.

Privacy concerns were raised about using DNA to identify a family member of the profiled individual. Discussants were particularly concerned that individuals who voluntarily donate their DNA for exclusion purposes do not consent to such uses of their DNA, and that such uses would be improper.

Discussants recognized the limited information contained in the profile, but some expressed concern that samples are retained indefinitely. This raised privacy concerns, and concern that samples will be used for medical or other non-forensic research purposes. One group identified interests deserving legislative attention as “access” and

“use.” Who has access to the databank, for what purposes, and how will personal information in the databank be used for non-forensic purposes, such as medical research? It was recognized that such concerns will go away if the samples themselves are destroyed once the profile has been generated.

On issues of race/ethnicity, discussants considered the use of race/ethnic predictions based on DNA in crime solving, and concluded that such practices are not objectionable as long as such techniques are scientifically supportable. There was wide recognition that the current databank system is racially skewed, and a universal database would do little to change that reality.

IV. Conclusion

The success of this fourth Workshop was due in large part to the efforts and expertise of the project consultants, Drs. Frederick R. Bieber, David M. Lazer, Philip R. Reilly, and Mark Rothstein, and to the distinguished participants who attended and contributed so generously of their insights and perspectives. A listing of all Workshop 4 invitees follows as “Appendix A.” The Workshop 4 Agenda is attached as “Appendix B.” We also thank our rapporteurs, Seth Axelrad, Juliana Russo, and, Caleb Donaldson whose summaries informed this report.

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