

Timothy Schellberg
American Society of Law Medicine & Ethics
DNA Fingerprinting and Civil Liberties Project
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Workshop 1 Presentation
May 14-15, 2004

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Thank you, and thank you for having me. I'm going to talk about State experiences with offender registries. Mostly where my knowledge base comes from is the legislation aspect of this - and Kim talked about the legislation - which states have done what and what's going on with the federal legislation. But I'll talk about how we got from A to B and the policy issues along the way. She mentioned what Smith Alling Lane is so I won't spend any time on that.

I did want to mention that we do have this web site that is sponsored by my office where we take all the information that we've gained on this issue and post it with issues such as the legislation. The hallmark of the site, of course, is the weekly DNA Report, posted right here. Lisa Hurst, who many of you know of, actually goes out and gets all of the articles dealing with forensic DNA and the legislation. She puts it in a nice three- to five-page report that gets posted each week, and then it gets e-mailed out to about three thousand people each week. You get the notice that it's posted and you go here and download it. I encourage you if you have not visited this site to see it. It's a good resource.

I think it's good to start with a timeline of the legislation. It all started in 1983 when California was the first to say that they, with the legislature, require blood from people committing sex offenses. In 1988 Colorado became the first legislature who actually mentioned DNA to say they've shot out a database of sex offenses. Virginia, which was well ahead of everybody else in 1990, was the first to save DNA from all convicted felons. In 1991 the FBI established guidelines on sex offender registries, and about that time they started going out and talking to states about DNA databases and of course developed the CODIS concept at that time. In 1992 the majority of the states were actually passing these laws. In 1994 Congress enacted the DNA Identification Act.

In 1996 they passed the Anti-Terrorism and Effective Death Penalty Act. What's important is they said if the state does not have the DNA sex offender law in place, they lose their Burn funding. And of course in law enforcement that is the golden ticket to any law enforcement agency, so within a year all fifty states had this law in place. So that shows the power Congress has over you when they threaten to withhold funds.

Next - the majority of states in 1997 began expanding their databases. They realized, "Why do we only have the sex offense people in these databases? If we're going to want to use them and have hits against them then we need to expand." So they started doing violent crimes.

In 1999, which is when we started getting involved in the picture, we saw that all of the states had sex offense laws on the books; about half the states had violent offenses; but only six states had them for all felonies. At that time, as well, we assessed that the

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ACLU and criminal defense bar was basically opposing the expansion of DNA database laws in most of the states beyond the violent felony databases. In 2000 – we'll talk a little bit about this more later- Congress passed the DNA Backlog Elimination Act which committed about a hundred and forty million dollars to give states money to reduce their backlog and also gave them encouragement to pass bigger databases knowing that they had this money to spend on the analysis. 2001 was a very big year for the databases as that was the year that Virginia released most of its data showing the value of having all felons on the books.

The ACLU, at that point, had basically disappeared from the debate in most states, basically accepting that the states were going to all felons, as did the criminal defense bar. There was a surge that year of all felons in the United States. It went up from seven states to fourteen.

2002: The surge continued; it went up to twenty-two states and Congress began work on the Debbie Smith Act. 2003: We added nine states for a total of thirty one. The President's initiative was developed and introduced to Congress and – we'll talk about this moment later as well but – Louisiana enacted a United Kingdom style database law which is all arrestees.

So to show you kind of where we're headed with this issue and how the policy makers have reacted is that basically they were adding one a year, and then, with money, with information, and the advocacy went up from 13 to 22 to 31. I'm guessing that based on what I know today with the amount of money we're estimating going into the system, and the data we predict coming out, that about forty-five states will be all felons by 2006.

This is just a quick snapshot of what happened this year. These are the states that all introduced the bill this year. Three passed all felons: South Carolina, West Virginia and Missouri. And these are the ones that have them currently in play. We think Pennsylvania will pass it this year. California will likely pass an all felons bill this year. The legislature refused to pass it last year. The citizens introduced an initiative which many think will pass, particularly for arrestees. The legislature is worried about the arrestees' law, so they decided to pass the felons bill and hopefully suggest to the citizens that we've got a good law, let's not do the arrestees.

Next - Even though there are many states that have all felons on the books, there are a lot of states that really don't have the level of all felons as the others. They leave out various clauses which reduces the amount of samples that go into the database such as level of activity or juveniles. A few states – Texas, Colorado, and Georgia – say all felons that are currently in a state penitentiary, but not if you're doing your time in a county jail or in a corrections facility, for instance, which is where most of the felons do their time. So it's varied – the impact is whether or not you have various clauses in the law that decide how big your database can actually get.

What is driving the all felons' legislation? I kind of think these are the four main things: First is the recognition of the ability to solve crimes if you have a bigger database. The hit rate grows significantly higher depending on who is in the database. In the United Kingdom they go to a rape scene. They have no idea who did it. They take the DNA information and they put it in their database. Their hit rate is forty-five percent. They think that once it's completely matured perhaps it will get up towards fifty, fifty-five percent. And if you go down to an all felons database the estimates are the hit rate is somewhere in the twenty-five to thirty percent range, once mature. If you just have violent offenses database, they assume it's going to be about seven percent. Just sex offenders probably one or two percent. So that is why you want the bigger databases, to have a higher hit rate.

I'm going to come back to this. The Virginia data actually had a big impact on a lot of states with all felons. They looked at when they get a hit in the database, what was the person in the database for? So in drug offenses – they say if we do not have drug offenses in the database, we would have missed, in Virginia, thirty-five sex offenses and forty-two homicides. So that gave legislators reasons to say, "Okay, we want drug offenses."

And then in one particular case, it's actually Washington State, the governor said, "I'm not going to sign the bill, because we don't have proof that drug possession has any ability to solve crime." Then Paul (?) prepared this slide for Governor Locke, and said, "Look, if we didn't have drug possession in our database we would have missed twenty-five sex offenses and thirty-two homicides." And that's what caused the Governor to sign that bill in Washington State.

Now there's forgery, another one of many things that should be in the database. Twelve sex offenses, eight homicides. Juveniles: twelve sex offenses, 8 homicides.

The next main reason is the crime prevention capacity. We are involved in a study at Washington State University, through the NIJ, of looking at various issues such as the backlog. And one issue they want us to look at is crime prevention issues. And so the way we looked at it is what would happen with the ability of having bigger databases and aggressive case work to prevent crime? And so we looked at the states that had not done all felons, called prosecutors and said, "Do you have any case histories of people that were convicted of a drug possession or lower level crime, did time in prison, got out and then went on a rape, or a rape/homicide spree?" And we found – in just fifty hours of research at Washington State University, it took a person to do this – found a hundred people who would have never been raped or murdered if they would have had the all felon law in place. And so the crime prevention capacity is going to be very heavily debated and presented in the future.

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Federal money--of course, we've talked about that--that has a big increase on legislation. Cost-benefit analysis. There's a lot of talk about if you have these big hit rates, law enforcement doesn't have to spend as much time investigating crime and therefore saves money by doing the DNA tests.

Jim talked about this yesterday--arrestee proposals. There's many on the books or tries to get them on the books, but only 3 states have passed them.

These two are very carefully written, with bills such as it's just violent arrestees and it's purged if you're not found guilty of a crime. Louisiana, however, is all arrestees. No purging. And I think it's important to understand how that happened. With all of these states being very careful with arrestee provisions how did a legislature pass this law with no legislators voting no? It's a product of paranoia of the serial killer of Baton Rouge. That was a big thing on the mind of the legislature, of every citizen I've ever cared about. And that shows you what can happen with this paranoia. They put this bill right through the system without any "no" votes.

Again, Kim mentioned this is the DNA Initiative of California. It will be very interesting to see how the public reacts to this. And see what kind of privacy issues come up during the next six months during the campaign.

Real quickly, database legislation relationship to case work: The theory is to increase offender testing and increase case work. So if legislatures put these big databases in place, it's going to create a surge in case work and utility becomes strong. This is a very non-scientific study that we did, looking at what happens, and we said in the United States population, if we were to have an all suspects database, an all felons database, or a violent offense database, how many samples would actually be in there over a five year period? That is about the time that we think it takes to get things up and running. For suspect databases you could put in over twenty million. For felons it would be just about three million.

But look what happens to the case work. In the eighth year, which is about the time it takes to ramp up and get legislation through and law enforcement educated, we estimate that there would be over 900,000 case work samples in this database, and roughly 500,000 if you had felons, and see how much it drops off after that. And this was done by looking at the United Kingdom's use of case work against their all suspects' database, looking at Virginia's against all felons, and other states. So there is some scientific basis to this.

We know that the supporters of database expansion are the police, the prosecutors, the victims. The opposition--again, the American Civil Liberty Union, defense lawyers, legislators and citizens concerned with privacy. As I mentioned, the

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ACLU seemed to have, in many states, not been opposing the all felons expansion - but in most states they're opposed to the arrestees.

Problems slowing aggressive growth: the funding, the lack of funding. Another big issue is that law enforcement, even though this is becoming so successful, has not taken aggressive ownership in the initiative. I think a lot of that is lack of training. In the WSU study, it was found that fifty percent of law enforcement still sees DNA as in OJ Simpson use, and not as an investigation tool. This is use in trial like it was in OJ's. If not, we're not going to use a database (?)

Centralization of crime lab expenses--another problem I think. The local governments are expecting the state pay for it. They're willing to wait before they use their own money. If the utility became strong, or perhaps if there were more money in the system, they would take advantage of it.

The future. It is obvious that all felons are here. All arrestees are coming but there will be many clauses that perhaps make it more like Texas and Virginia. I think the law will definitely strike a balance between prejudice and privacy. I mentioned the crime prevention angles. I can imagine that you will have families going to legislators and saying "My daughter would still be alive if you only would have put this all arrestees in place." The statute has been very strong. There are many clauses you can add to protect against privacy struggles. I think the strongest we are talking about now is destroying samples after profiling, that would solve a lot of the problems but it also has some other issues.