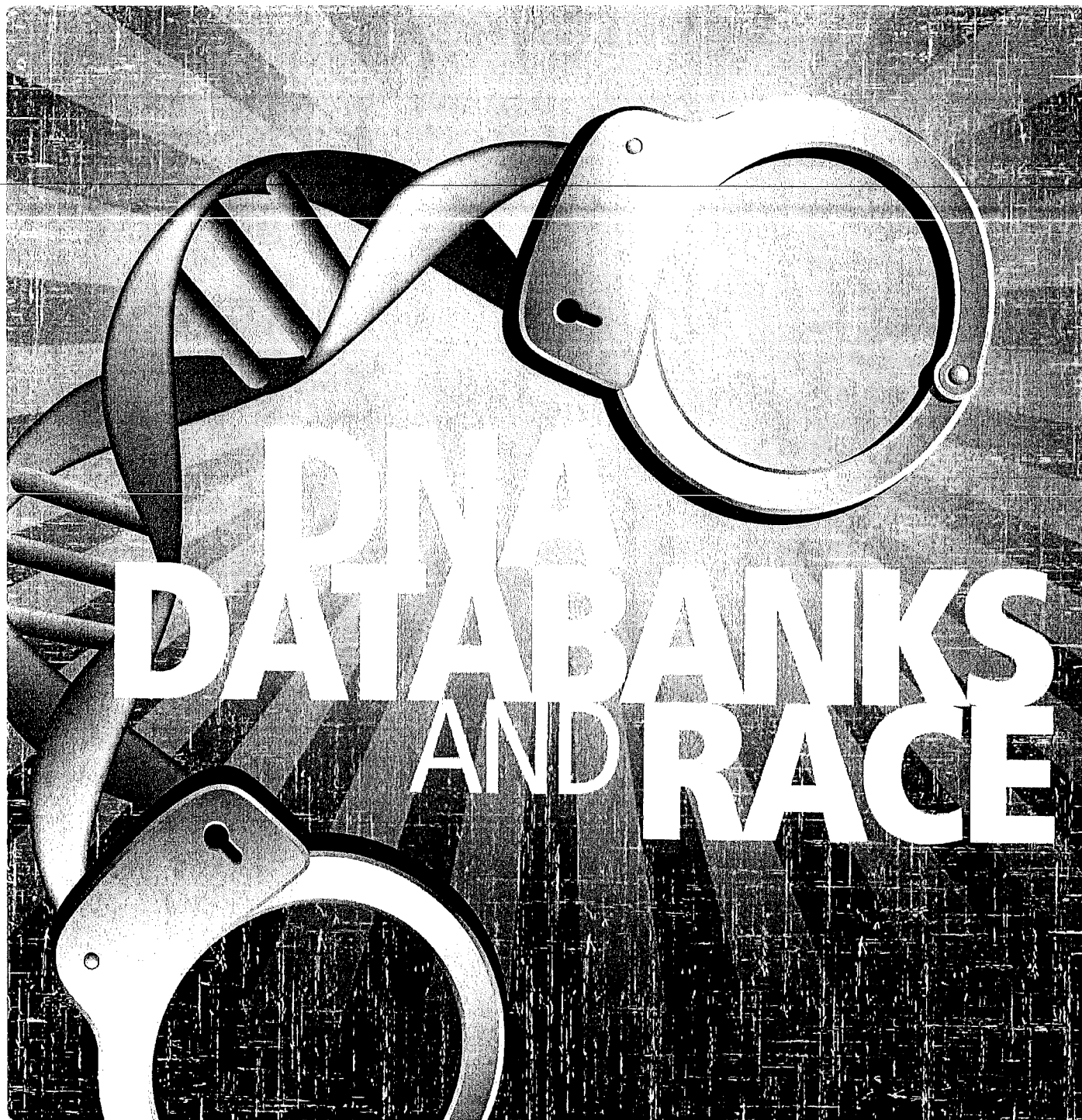


GENE WATCH

VOLUME 21 NUMBER 3-4 NOV-DEC 2008

THE MAGAZINE OF THE COUNCIL FOR RESPONSIBLE GENETICS • ADVANCING THE PUBLIC INTEREST IN BIOTECHNOLOGY SINCE 1983 | SPECIAL ISSUE



DNA DATABANKS AND RACE



IN THIS ISSUE • DNA Dragnets and Race TROY DUSTER 3 • **The Potential for Error in Forensic DNA Testing** WILLIAM C. THOMPSON 5 • **Drug Arrests and DNA: Building Jim Crow's Database** HARRY LEVINE ET AL. 9 • **Can DNA 'Witness' Race?** DUANA FULLWILEY 12 • **Prejudice, Stigma and DNA Databases** HELEN WALLACE 14 • **Direct-to-Consumer DNA Tests** SUE FRIEDMAN 17 • **PLUS A Citizen's Guide to Forensic DNA** 19

Drug Arrests and DNA: Building Jim Crow's Database

BY HARRY G. LEVINE, JON B. GETTMAN, CRAIG REINARMAN AND DEBORAH PETERSON SMALL

An extract from the full paper

Methodically collecting and storing evidence from crime scenes, especially for violent crimes like murder and rape, has long been part of good policing. In recent years scientific and laboratory techniques have increased investigators' ability to obtain DNA information from that evidence. Over two hundred people convicted of serious crimes have been found innocent, and useful leads for many other crimes have been developed, through the use of DNA contained in evidence collected at crime scenes. Scrupulous, professional collection of DNA and other forensic evidence at crime scenes is a wise and sensible policy.

Building huge and ever-growing criminal justice DNA databases of potential suspects - with DNA collected from people convicted of misdemeanors and non-violent felonies, or even just arrested for them - is another matter entirely.

As the collection of DNA at crime scenes has increased, collection of DNA from individuals has increased much more. In 2007 the *Washington Post* reported that "the nation's databank of DNA 'fingerprints' is growing by more than 80,000 people every month."¹ CODIS (Combined DNA Index System), the U.S. government's national DNA database, is the largest DNA databank in the world. As of January 2008, there were two hundred thousand forensic (crime scene) DNA profiles, but five and half million DNA profiles of individuals. This dramatic growth in DNA collected from individuals is the result of the federal government, states, and local jurisdictions making increasing numbers of crimes of decreasing severity DNA "swipeable."

In recent years, growing numbers of geneticists, criminologists, civil libertarians, journalists, academic researchers and others have voiced profound questions about the DNA "offender" databases, and especially about the collection of DNA for misdemeanors, non-violent felonies, and from people *merely arrested*

for petty misdemeanors.

Contrary to what many believe, DNA evidence is not infallible (see endnote 1). Knowledgeable observers and insiders have pointed out that errors occasionally appear even in the best laboratories and quite often in others. Problems include: mixing up and cross-contamination of DNA samples; the considerable judgment and misjudgment involved in DNA analysis; and biases in interpretation, which tend to favor the prosecution. As the size and number of DNA databases expand, so too does the potential for error and abuse.²

For understandable reasons, police departments and prosecutors have played key roles in pushing for expansion of DNA databases; expected to solve crimes, law enforcement wants to use any tool that holds promise of making their jobs easier and their work more effective. Police departments, especially in big cities, are large organizations with considerable resources to devote to promoting legislation and policy that they believe serve their interests and needs, and they have been very successful in pushing for DNA collection.

However, there is no equivalent public or private organization to effectively question police proposals and claims. The skeptics or critics of the expansion of DNA databases are generally individual academics, staff at small non-profit groups, or journalists who sometimes can briefly investigate a case or story - none of whom have even a small fraction of the public relations resources or political influence of law enforcement. As a result, there is at present little to stop or even slow down the drive to expand the DNA databases by including more crimes of decreasing severity and to require collection of DNA not just from individuals convicted of crimes but also from the far larger number of people arrested just for misdemeanors (see endnote 2).

Independent of the problems of error and the other ethical and civil liberties issues posed by the DNA databases, there is a separate, important question: who are the people most affected by rapid expansion of the DNA criminal justice databases? The answer - much more than has been discussed or even understood - is Blacks and Latinos, especially teenagers and young men. The great engine of these arrests is drug possession offenses, especially the large number of arrests for possession of small amounts (often just a few grams) of marijuana and other drugs, overwhelmingly for personal consumption (see Table 1).

Editorial (continued from page 2)

I would like to mention as a final note that as of the time this publication went to 'print' (electronically), close to a million DNA profiles of those suspected but not convicted of a crime may be facing removal from the U.K.'s national database. This is thanks to a decision by the European Court of Human Rights deciding that Britain's government "overstepped any acceptable margin of appreciation" in the expansion of its DNA database. Considering that Helen Wallace calls for limiting the U.K. database to convicted criminals in her extract in this very issue, forgive me if I take the news as a friendly omen for our other contributors and the new electronic era of *GeneWatch*.

This paper presents data from New York City and elsewhere in the U.S. showing that young Blacks and Latinos are arrested at much higher rates than Whites simply for possessing small amounts of marijuana and other drugs, *even though Whites use all drugs at higher rates than Blacks or Latinos* (See endnote 3). In New York City, Latinos are arrested for marijuana possession at over twice the rate of Whites, and Blacks are arrested at five times the rate of Whites. Misdemeanor marijuana possession arrests constitute over ten percent of all arrests in New York City. Most other large U.S. cities also arrest a great many people for marijuana possession and arrest Blacks at much higher rates than Whites.⁴

Why is this happening? Since Whites use and possess all drugs at higher rates than Blacks or Latinos, why are these drug arrests throughout the U.S., especially the misdemeanor possession arrests, so racially skewed? And why are there so many of them?

Patrol and narcotics police and their supervisors benefit from their departments' focus on misdemeanor offenses. Arrest

	Total Estimated All Arrests*	White %**	Total Estimated White Arrests	Black %**	Total Estimated Black Arrests
Property Crimes	1,540,297	68.20%	1,050,483	29.40%	452,847
Violent Crimes	611,523	58.50%	357,741	39.30%	240,329
All Drug Violations	1,889,810	63.60%	1,201,919	35.10%	663,323

Table 1 - White, Black and Total U.S. Arrests for Property, Violent, and Drug Crimes, 2006
Blacks make up about 13% of the U.S. population. Whites (including most Hispanics) are about 74% of the U.S. population.

Source: FBI Crime in the United States. *Table 29, Estimated Number of Arrests, http://www.fbi.gov/ucr/cius2006/data/table_29.html. ** Table 43, Arrests by Race, 2006. http://www.fbi.gov/ucr/cius2006/data/table_43.html

statistics are the metric by which police departments everywhere increasingly judge officer productivity and often supervisor productivity; when arrest numbers are high, many within the police department benefit. Misdemeanor arrests, especially drug possession misdemeanor arrests, are easy to make and, compared to other police work, they are relatively safe. Patrol and narcotics police in New York and some other cities can make overtime pay booking and processing the people they arrest for petty misdemeanors; in New York this is so common that among themselves officers call such overtime pay "collars for dollars." For patrol and narcotics police, these arrests also count toward promotions and choice assignments.

Most arrests of all kinds throughout the U.S. are for misdemeanors. For misdemeanor arrests - as for the much larger number of non-criminal offenses such as parking tickets - there is almost never a formal "victim" or a complainant other than the police. For misdemeanors as for parking tickets, officers are directed by their commanders to go looking for them, often to meet arrest quotas.

Urban police departments heavily deploy their patrol forces to "high crime" and low income neighborhoods, which in most large U.S. cities are disproportionately Black and Latino.

Because patrol officers and narcotics police are heavily concentrated in only certain neighborhoods, they make most stops, frisks, searches and misdemeanor arrests in those neighborhoods. The low-income Black and Latino young people who are arrested for misdemeanors tend not to know important people who can make trouble for the arresting officers or their supervisors. As a result of this policing strategy of making many arrests for petty offenses in only certain neighborhoods, the misdemeanor arrests for drug possession and other minor offenses are racially skewed throughout the U.S.

Police departments tend not to call public attention to their misdemeanor arrests and prefer that the media do not either - and police departments have considerable influence over what is reported in the local media about their routine activities. And partly because almost nobody knows about the great many misdemeanor arrests and their racial bias, there is very little political pressure to reduce them.

When CODIS, the U.S. criminal justice DNA database, was created in 1994, it was based on serious violent crimes such as

murder and rape. As the DNA databases have expanded to include more and more crimes of decreasing severity, they include more of what have conventionally been called victimless crimes, especially misdemeanor drug possession.

As the graphs and tables presented in this paper show, expanding the databases to allow DNA to be collected for more drug offenses, and especially to the large number of drug possession misdemeanors, has already added ever

greater numbers of Blacks and Latinos to the databases, far out of proportion to their percentage of the population or their percentage of drug users. This produces DNA databases that are increasingly and unfairly racially biased.

Some have argued that innocent people should not care that their DNA is in the criminal justice databases. If they are not guilty, it is said, they will have no problems. We recommend that legislators who claim the DNA databases are free from error - and who advocate including DNA from misdemeanor arrests, neighborhood sweeps, or familial searches - should be encouraged to put their own DNA and that of their immediate family members into the databases. Most are unlikely to do so because being in the DNA databases does indeed put one at risk of being falsely accused and even convicted of serious crimes. It is also revealing that police departments and police unions fiercely oppose putting police officers' DNA in the databases.

Despite the technical errors and errors of interpretation, DNA databases are now being used, and will be used ever more in the future, to identify suspects and to convict people. As a result, Black and Latino teenagers and young people who are disproportionately and unjustly arrested for marijuana possession and other misdemeanors are also disproportionately at

higher risk of being falsely suspected, accused and even convicted of more serious crimes - and so are their genetically similar relatives.

The racial segregation laws in the United States that ran for 89 years - from 1876 to 1965 - were commonly called Jim Crow laws. We suggest that continual expansion of CODIS and other racially-skewed DNA file and storage systems should be thought of as building Jim Crow's database. □□□

Harry G. Levine received his PhD in Sociology from the University of California, Berkeley, and his BA from Brandeis University. Much of his research has focused on drugs, alcohol, and food in historical context. He has won awards for his writings about addiction, alcohol prohibition, and the war on drugs. With Craig Reinerman he wrote Crack in America: Demon Drugs and Social Justice (University of California Press). In April 2008, he and Deborah Peterson Small published Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City, 1997-2007 which was released by the New York Civil Liberties Union and denounced by the NYPD.

ENDNOTES

1. For a state of the art discussion of the problems with the newest DNA evidence from a forensic perspective see: Erin Murphy, "The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence," *California Law Review*, 95, June, 2007.
At: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=89612.
Also see: William C. Thompson, "The Potential for Error in Forensic DNA Testing (and How That Complicates The Use of DNA Databases for Criminal Identification)." Paper produced for the Council for Responsible Genetics (CRG) and its national conference, *Forensic DNA Databases and Race: Issues, Abuses and Actions* held June 19 20, 2008, at New York University. Available at www.gene-watch.org.
2. As is often the case with highly-touted, expensive, large-scale, anti-crime measures advocated by law enforcement, the DNA databases also have a questionable track record compared to other uses of funds and resources. Simoncelli and Krinsky (2007) make this point very well: "While the prevailing notion with respect to these databanks is "the bigger the better," it is worth noting that the ability to use DNA in crime solving is limited by the ability to collect uncontaminated and un-degraded DNA at a crime scene, not by the number of people in the databank. As the databanks expand to people convicted of minor offenses or merely arrested, the chances that any given profile in the database will help resolve a future crime apparently diminish. In the United Kingdom, the enactment of arrestee testing in 2004, which has corresponded with a ballooning of the UK database from 2 million to 3 million profiles (including those of more than 125,000 people never charged with any crime), has actually corresponded with a slight decrease in matches with crime scene evidence.

Likewise, DNA dragnets have proven to be highly ineffective. In a study conducted by the University of Nebraska, only

one of eighteen dragnets conducted in the United States was found to have led to the actual perpetrator, and this was a dragnet that only involved 25 people who were all staff at a nursing home where repeated sexual offenses were taking place. In other words, the obvious small pool of suspects already existed. Worse still, some dragnets have even been found to interfere with crime-solving....

In the case of familial searching, it is perhaps too soon to tell how helpful this technique could be for law enforcement. But with this and surreptitious DNA sampling it is likely that only the successes will be made public. Law enforcement officials are unlikely to publicize failures or the dead ends or the number of people who are investigated without their consent or knowledge....

An over-reliance on these practices could well undermine law enforcement. Some law enforcement officials have expressed concern that the tremendous resources funneled into building and expanding forensic DNA banks are channeling money away that should be put into following up on investigational leads or placing police officers on the streets. In addition, crime laboratories all over the country are plagued by extraordinary backlogs resulting from the heedless expansion of the databanks."³

3. The New York State Division of Criminal Justice Services has on the web tables showing the arrests for four broad categories of felonies (Drug, Violent, DWI, Other) and four broad categories of misdemeanors (Drug, DWI, Property, Other). It shows this for all counties in NY State, as well as totals for the five counties of New York City, and for all counties other than New York City. It has tables showing the arrests for every year from 1997 through 2007. For 2007 see: "Adult Arrests: New York State by County and Region - 2007" At: <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year2007.htm>. The racial breakdown in New York City misdemeanor marijuana arrests is shown in Graphs 3, 4, 5, and 7. The racial breakdown in all other New York City misdemeanor drug arrests is shown in Graph 11.

REFERENCES

1. Rick Weiss, "Vast DNA Bank Pits Policing Vs. Privacy," *Washington Post*, June 3, 2006
2. See: Robert Perry, Testimony on "Legislation Addressing New York State's DNA Database" May 31, 2007, <http://www.nyclu.org/node/1028>. William C. Thompson et al., "How the probability of a false positive affects the value of DNA evidence," *Journal of Forensic Science*, Vol. 48, No. 1, January 2003.
3. Tania Simoncelli and Sheldon Krinsky, "A New Era of DNA Collections: At What Cost to Civil Liberties?" *American Constitution Society for Law and Policy*, August 2007. <http://www.acslaw.org/node/5338>
4. U.S. Dept. of Justice, Federal Bureau of Investigation. Uniform Crime Reporting Program Data [United States]: Arrests By Age, Sex, And Race, 2000 - 2004 [Computer files]. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor].