Barry Steinhardt

[Introduction: An excellent presentation of the issues that we're going to have to talk about in our small group and study that we were on. I'm pleased that Barry Steinhardt from the ACLU has joined us and he will give us his perspective on this. At the ACLU he Chairs the ACLU Cyber Liberty Task Force and is Assistant Director of the national office. He previously served as Executive Director of ACLU employees (?) in Pennsylvania and Vermont, and is Executive Director of a public research group. He has done a great deal of work in privacy and civil liberties, including DNA issues. So Barry, please…]

Thank you. I actually spent a little time last night and was looking over some earlier presentations I've made on the subject and I found a presentation I made to the National Conference of State Legislatures which was dated May 26, 1999. And in it I made a number of predictions about where this issue is likely headed what the likely issues were. I found actually, remarkably, that now five years had passed since I've made this presentation. But I needed to change about ten lines in about a twelve page document, because what we have suggested as the inevitable creep of DNA testing has in fact happened, as demonstrated to you. I think it's important to put this in some context. You've just heard that all fifty states now have legislation authorizing the taking of DNA samples from the wide variety of persons convicted of crimes. We are moving toward all felons and convictions and I will in a moment talk about the litigation around that issue.

But more importantly, we are rapidly moving towards a dramatic expansion of forensic DNA testing. Three states now--Virginia, Texas and Louisiana--have statutes providing for the collection of DNA samples from persons who have been arrested, as opposed to convicted, of a crime. There is a bill pending in Congress - we already passed the House, it's presently in the Senate - which would permit the results from those tests to be put into the CODIS databases and would dramatically increase funding for that.

Most remarkable is the Harrington Referendum in California, which will be on the fall ballot. It's called the Harrington Referendum because it's sponsored by a wealthy lawyer from Southern California named Bruce Harrington. It would have the effect in the nation's largest criminal justice jurisdiction of ultimately requiring the taking of DNA samples from virtually all arrestees for serious crimes. In the first year alone we estimate that this would result in five hundred thousand additional samples having to be taken. That is a ten fold increase from the number of samples taken in California in a given year. There are no provisions for automatic expungements, what happens to the results of DNA samples, let alone the destruction of the sample itself from persons who are not

convicted. The Harrington referendum--which I think is likely to pass--is probably the wave of the future because it is consistent with what we have seen in three southern states. And if it happens in California it will have a dramatic effect.

Just to give you some perspective--a growing phenomenon is what some people in the defense world refer to as the "usual suspect" databases. It means taking DNA samples from a large group of people because they may in some way fit a general description of the suspect.

The case I'm referring to here is the Baton Rouge case. It's a perfect example. In Baton Rouge, Louisiana, there was a serial killer. There was a description of a white male driving a white truck that was given at one of the crime scenes. As a result, officials in Louisiana went out and rounded up approximately a thousand white men with white trucks and subjected them all to DNA testing, many under very coercive circumstances. It was quite clear that they did not submit DNA samples voluntarily.

It turned out the arrest that they ultimately made was of a black man who happened to have a white truck, who was already in the system. At least now the concession on the part of law enforcement in Louisiana is that that description was wrong. It did not, in fact, describe the person who perpetrated the crimes. Those samples have never been returned, never been destroyed. They remain in various forms of storage in Louisiana. There is a law suit now pending in the courts of Louisiana over that very issue. But the private informal collection of DNA into databases which are outside of these statutory constructions that we are talking about is becoming increasingly common.

So let me talk about DNA for a moment and why DNA is different. DNA is often referring to DNA fingerprinting, that is, DNA testing done for the purposes of identification in analogies of the fingerprint. Of course, drawing a DNA sample is not like taking a fingerprint. Fingerprints are nothing more than two dimensional representations of somebody's fingers. DNA is, of course, far more powerful information than a fingerprint. A fingerprint in fact trivializes the DNA data banking we refer to as genetic fingerprinting.

Right now the CODIS databases contain only a limited amount of genetic information, basically a description of 13 loci. There are of course millions of samples undergoing identification tests. And the fact is that in every jurisdiction in this country I know of no exceptions to this. It's not just criminal justice system, it's also military and other governmental and non-governmental bodies where DNA samples are taken for the purposes of doing identification tests. The underlying biological samples of DNA are not destroyed, but are held and can be subjected to additional future testing.

We had this debate well before I gave this talk in 1999 about whether or not the samples ought to be destroyed. We have said for close to a decade that in the end, that's the only way we can be certain that these will not become general genetic databases, with some exceptions. I have yet to hear a convincing argument for why we should retain the samples. Usually a response to the argument for why the samples are not destroyed is we hear descriptions of the Innocence Project where many people have been exonerated as a result of DNA testing, of course after convictions. But that of course, now that doesn't work because of the fact that you don't need a big database.

We don't need the original sample from the accused person in order to conduct a second test of DNA or in some cases a first test of DNA against crime scene evidence. No one here is suggesting that we ought to destroy crime scene evidence. I'm thinking about samples taken from persons accused of crimes. If a person wants to layer a challenge to the original conviction, they would submit to another test against crime scene evidence, because they may have been wrongly accused. That is the most commonly preferred argument for why it is we cannot destroy samples. I think there is something else going on. And I challenge again advocates who are against the destruction of samples, to explain why it is that we cannot destroy the samples.

I would be happy to be proven wrong that these samples would not be used for other purposes. But there's a law of history in this country. When my parents were given a social security number back in the 1930's, federal law actually provided that that social security number was only to be used to administer its brand new pension program. When my children were given social security numbers – respectively twenty-two and fifteen years ago – it was essentially awarded to them at birth. And by that point it had become a nearly universal identification number required for a wide range of purposes.

That change occurred in a relatively short period of time and is illustrative of how databases that are created for one purpose will inevitably be used for other purposes. It's worth recalling that when Massachusetts legislature passed a statute that authorized the required taking of DNA samples from felons, there was some very specific discussion on the floor of the Massachusetts legislature about the future uses of the DNA. One of the things that was mentioned, for example, was searching for the (unclear), but nevertheless it was quite clear to the legislators who pushed it through that those samples would be used for other things. It was an important reason (unclear) samples for future use.

The only way to prevent misuse of the samples for other purposes is to destroy them. There is no adequate substitute for that. Laws can be passed that

don't now exist. There are no state laws. I'm familiar with the federal laws, and I'm familiar with the fact that we (unclear) the database use in a serious way. There are a wide variety of statutes around the country that describe how the DNA samples can be used, but generally they are very broad law enforcement exceptions in them. In some cases they are (unclear). They could be used in one state for any humanitarian purposes. It was clearly a wide range of possibilities.

The additional problem is that we have in this country very little in the way of legislation that even prohibits genetic discrimination. There is still no federal law prohibiting genetic discrimination. There are Executive Orders that pertain to federal employees but there is no federal law. Only roughly two dozen states have laws that cover the question of genetic discrimination, but they're for insurance reasons. The fact is that genetic discrimination is likely to become widespread in this country. It is likely to become more widespread with the creation of these databases (unclear) which presents the possibility of (?) additional information.

Finally I'd like to talk about the issue of arrestee testing, which I think is the question for the moment. As I said, the California referendum, is likely to create some change in the way that we address the question of arrestee testing. It is likely to bring that issue not only into law in California, but it is likely to bring that issue to the front and center. I don't think – I hope – that provision, which is likely to be passed by California voters, can withstand constitutional scrutiny .

The courts have unanimously moved toward (?) arguing expansion to all felons. We can read the judicial decisions just as easily as our opponents can. The courts have rejected arguments that taking samples from persons convicted of crimes violates the constitution. Essentially it is held that there is a lesser expectation of privacy when in prison convicted of a crime. At some point we are going to have--probably in the next year, as soon as California legislation passes next November--we are going to have serious litigation questions about whether or not arrestee testing violates the Constitution. And at a minimum, we have to see it as an affront to American values.

It is essentially the Alice-in-Wonderland approach to law enforcement. You are presumed to be guilty until acquitted. This was articulated well by former Mayor Giuliani of New York, who took that Alice-in-Wonderland approach of punishment first, trial later. He was quoted as saying, "Let's say somebody is acquitted. If one of those acquittals was a person who was guilty but there was not enough evidence beyond a reasonable doubt, then you have a situation like the practice of seizing cars when a person is convicted of a crime, then not returning those cars when the person is acquitted".

It's the same theory here, which is punishment first, and let (?) the D.A. set up a trial later. The fact is that many arrests do not result in conviction. In a California study of felony defendants in seventy-five of the largest counties dealing with felony assault cases, fifty percent of the charges were dismissed outright and fourteen percent were reduced down to misdemeanors. A study that was released in the 1990s by the California State Assembly's Commission on the Status of African American Males revealed that 64% of whites, 81% of Latinos, and 92% of black men arrested on drug charges were ultimately released for lack of evidence or inadmissible evidence. Now we're talking about taking DNA samples from these people, and putting them into the database for which there is very little restriction, and certainly no promise that they will ever be removed from the database.