

**Maria Murphy (BCL) (LLM)**

**University College Cork**

*New Technologies and the Right to Privacy*

**“Are the proposed legislative changes regarding DNA databases in the UK and Ireland compliant with the European Convention on Human Rights?”**

## Introduction

Ever since DNA's potential offerings to society became known it has "raised issues at the cutting edge of modern law and science."<sup>1</sup> Justice Stephen lauds the conversation that takes place between scientists, lawyers and legislators "in writing or at conferences, in articles or at lectures, likely prior to, though perhaps contemporaneously with, direct consideration by courts or by legislatures of major statutory changes."<sup>2</sup>

At this Conference the interactions between our health, privacy and technology are being considered and discussed. The issue of DNA and DNA Databases in criminal investigation raises interesting and interlinked question across these themes. DNA is the genetic coding of our very being and the collection and storing of that data by governments inevitably engages questions of privacy. Pro-privacy arguments are often undermined by dramatic allusions to Big Brother but this paper deals with the issue in a more pragmatic manner. It must be recognised that we live in a changed society where the citizen herself can be represented as a unit of information. This information and the associated technology can sometimes be used for the general and individual benefit. Police and other law enforcement officials often view the use of DNA sampling and databases as "no more problematic than fingerprinting," whereas the more extreme elements amongst civil liberties advocates can characterise the use as "unfettered government sponsored bioinvasion."<sup>3</sup>

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<sup>1</sup> Harlan Levy, *And the Blood Cried Out: A Prosecutor's Spellbinding Account of the Power of DNA* (New York: Basic Books, 1996) at 21.

<sup>2</sup> "Furthering the Conversation About Science and Society" in D. Lazer, ed., *DNA and the Criminal Justice System: The Technology of Justice* (Cambridge, Massachusetts: MIT Press, 2004) p.13, at 21] Liz Heffernan, "A DNA Database" (2008) 18(4) *Irish Journal of Criminal Law* 105 at 112 – 113.

<sup>3</sup> David H. Kaye, "Two Fallacies about DNA Databanks for law enforcement" (2001) 67 *Brooklyn Law Review* 1 at 179.

Accordingly, both sides of the debate will be considered, but the importance of the European Convention on Human Rights' protection of the "right to a private life" will drive the discussion. Legislation seeking to amend the law on DNA Databases in both the UK and Ireland is currently under consideration. It is a pertinent time to assess the approach of the Governments to the protection of their citizen's privacy and the broader issue of their responsiveness to European Court of Human Rights' judgment on an issue regarded as a significant area of national interest.

### **The Benefits of DNA and DNA Databases in Criminal Investigation**

The first step is to consider the benefits this technology has provided society and why we should continue to make the best use of it. Avoiding scientific complexity, DNA has been described as "a software code which encodes all the information necessary for an organism to function, as well as the information required for its development and procreation."<sup>4</sup> DNA fingerprinting is a tool whereby individuals can be identified by analysis of variations in genetic code. There was rapid adoption of DNA fingerprinting as a crucial tool in forensic police investigation following Dr. Alec Jeffrey's realisation of DNA fingerprinting in 1985. It is important to note "no other scientific technique has gained such widespread acceptance so quickly."<sup>5</sup>

The utility of DNA fingerprinting in criminal investigation and prosecution has long been recognised. Back in 1988 it was described as "the single greatest advance in the search for truth since the advent of cross-examination."<sup>6</sup>

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<sup>4</sup> Andrei Semikhodskii, *Dealing with DNA evidence – a legal guide* (2007: Routledge-Cavendish, London and New York) at 3.

<sup>5</sup> Paul C. Giannelli, "The DNA Story: An Alternative View" (1973) *The Journal of Criminal Law and Criminology* Vol. 88, No. 1 (1997) 380 at 381.

<sup>6</sup> *People v Wesley*, 140 Misc.2d 306, 533 N.Y.S.2d 643 (*Albany Co. St. 1988*) per Harris J. as cited in Liz Heffernan "A DNA Database" (2008) 18(4) *Irish Criminal Law Journal* 105 at 105

It is not surprising that DNA fingerprinting has attracted so much support, gaining advocates amongst investigators, judges, politicians and the public with its potential to prevent and punish crime. The probative value of DNA evidence is of the highest quality, “on a par with fingerprint evidence, in identifying an individual.”<sup>7</sup>

Due to the scientific, stable and uniquely identifiable nature of traditional fingerprints, it is tempting to analogise the use of DNA fingerprinting to traditional fingerprinting a touch too readily. There are limits, however, to what the use of DNA fingerprinting can achieve, it is not the “silver bullet” to crime that some proponents would argue it is. The application of DNA evidence in the justice system requires interpretation.<sup>8</sup>

As Andrei Semikhodskii points out:

A match between the defendant and a biological sample recovered from the crime scene does not and should not automatically mean conviction, even if it is a complete match. DNA is a means of identification and, as any other means of identification, it is prone to errors, uncertainties and conflicting interpretations.”<sup>9</sup>

In addition, DNA evidence is more pervasive to a person’s privacy rights than more traditional identifying techniques like fingerprinting and photographs. More sensitive

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<sup>7</sup> Andrei Semikhodskii, *Dealing with DNA evidence – a legal guide* – (London and New York: Routledge-Cavendish, 2007) at 1.

<sup>8</sup> Caroline Fennell, “DNA profiling: hidden agendas” (1991) 1(1) *Irish Criminal Law Journal* 34 at 1, discussing Eric Lander, “DNA Fingerprinting On Trial” 339 (1989) *NATURE* 501, 504.

<sup>9</sup> Andrei Semikhodskii, *Dealing with DNA evidence, a legal guide*. (2007: Routledge-Cavendish, London) at xii.

information including predictive health information and kinship can be derived from DNA that cannot be from fingerprints.<sup>10</sup>

The ability to electronically search a DNA database to identify a potential match is a powerful tool for the criminal investigator. Enabling police investigation through the use of broad DNA databases provides the opportunity of linking suspects to crime scenes and crime scenes to crimes scenes.<sup>11</sup>

Acknowledging the benefits of DNA investigation, it is necessary to evaluate various questions concerning the retention, storage and use of that data. Questions such as whether DNA profiling should be allowed, should DNA data be held indefinitely following conviction, and how should we treat the DNA of suspects not convicted must be answered.

It is therefore essential that in the face of positive assertions of DNA's and DNA databases' capacity to do good that we do not forget the importance of the individual rights and societal interests in maintaining a high level of privacy protection.

### **The European Court of Human Rights on DNA Databases**

It should come as no surprise that the *S. and Marper v The United Kingdom* case should serve as a keystone to this discussion.<sup>12</sup> While the details of the case have been widely discussed, it is appropriate to recount them briefly here.

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<sup>10</sup> The Law Reform Commission, *The Establishment of a DNA Database Consultation Paper* March 2004 LRC CP 29-2004 at 39 – 40.

<sup>11</sup> Liz Heffernan, "The Law Reform Commission's proposed DNA database: issues of scope." 12 (2006) *Medico-Legal Journal of Ireland* 2 56.

<sup>12</sup> *S and Marper v United Kingdom* (App. Nos 30562/04 & 30566/04), judgment of December 4, 2008 ECtHR. Hereinafter known as *Marper*.

The *Marper* decision was a clear and unanimous rejection by the European Court of Human Rights of the United Kingdom's blanket approach to the retention of individuals DNA who have not been convicted of any offence. The Court found the practices to be a disproportionate interference with Article 8 rights.<sup>13</sup>

S. was an 11 year old boy, arrested, charged and acquitted of attempted robbery. Michael Marper was arrested for harassment but charges were not pressed and his case was discontinued. Following typical UK police practice, both S. and Marper had their DNA samples taken after arrest, had profiles derived from these samples and had their DNA data entered on the National DNA Database. Both requested that their profiles be removed and following refusal of this request they sought judicial review. Following failure in the Divisional Court, the Court of Appeals and the House of Lords the applicants eventually had to seek protection of their privacy rights in Strasbourg. This illustrates the importance of the Convention and the Strasbourg Court in protecting privacy rights and accordingly close attention must be paid to the responsiveness of the governments to European judgment.

The relevant legislation to be considered by the European Court was the UK Police and Criminal Evidence Act (1984) (PACE). Under PACE the police are entitled to take fingerprints and DNA samples from a person arrested for a recordable offence.<sup>14</sup> A recordable offence includes any offence punishable by imprisonment in addition to other named offences. Accordingly a person's DNA may be taken following arrest for crimes as minor as begging.<sup>15</sup>

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<sup>13</sup> See Kate Beattie, "S and Marper v. UK: Privacy, DNA and crime prevention" (2009) *European Human Rights Law Review* 229.

<sup>14</sup> See sections 61 and 63 of PACE.

<sup>15</sup> Section 3 Vagrancy Act 1824.

## **The UK Situation and Background**

The UK has the largest DNA database *per capita* in the world.<sup>16</sup> Since a change in the law back in 2001 which allowed for the retention of profiles and cellular samples of persons who have been arrested but not convicted, the database has expanded rapidly.<sup>17</sup> With 7.39% of the population with profiles retained on the Database it dwarfs comparison with other database states.<sup>18</sup>

In response to *Marper*, the UK Government launched a consultation on DNA retention in May 2009. This initial consultation, entitled, “*Keeping the right people on the DNA database*” was quite flawed and evidenced little desire by the UK Government to be truly responsive to the European judgment.<sup>19</sup> Following widespread dissatisfaction with the introduction of the ill-considered amendments through Secondary Legislation (provided for as clauses in the Policing and Crime Bill) the Government has since introduced more detailed DNA Database provisions in the Crime and Security Bill<sup>20</sup>.

## **The Irish Situation and Background**

The Irish situation is very different, currently lacking a National DNA Database for use in criminal investigation. Heffernan points out that the benefits of DNA profiling in Ireland are currently limited to “confirming or eliminating known

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<sup>16</sup> Townsley and Laycock eds, *Beyond DNA: Integration and Harmonisation*. (London: Home Office Science Policy Unit, 2004)

<sup>17</sup> See Kate Beattie, “S and Marper v. UK: Privacy, DNA and crime prevention” (2009) *European Human Rights Law Review* 229.

<sup>18</sup> House of Lords Select Committee on the Constitution, *2<sup>nd</sup> Report of Session 2008-09, Surveillance: Citizens and the State*. HL Paper No. 18-II (Session 2008/09), Q1049 to Vernon Coaker MP, Minister of State for Policing, Crime and Security, at 370.

<sup>19</sup> Liberty’s response to the Home Office’s Consultation: Keeping the Right People on the DNA Database: Science and Public Protection August 2009. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-dna-database-consultation.pdf>

<sup>20</sup> Crime and Security Bill 2009-10. The Bill was sponsored by Alan Johnson, presented to Parliament on 19 November 2009. It is currently at Committee stage. The Bill is available at: <http://www.publications.parliament.uk/pa/cm200910/cmbills/003/2010003.pdf>

suspects. Where a serious offence has been committed and a biological stain has been left at the crime scene, the Gardaí may take a biological sample for purposes of forensic testing from a person arrested and detained in connection with the offence.”<sup>21</sup> Heffernan also identifies the main advantage of establishing a DNA Database in Ireland as being the Database’s ability to “generate suspects by identifying matches for the crime stain profile electronically.”<sup>22</sup> Back in 2005, the Irish Law Reform Commission recommended the establishment of a limited DNA Database in Ireland.<sup>23</sup> The initial introduction of the governing legislation<sup>24</sup> was delayed in an attempt to ensure compliance with the European Court of Human Rights’ *Marper* judgment.

With the new Irish DNA Database Bill<sup>25</sup> currently in the Dáil, it is an important time to assess the compatibility of the legislation with the European Convention on Human Rights and the responsiveness of the Irish Government to the Court’s guidance. Using the *Marper* judgment as guidance I will consider the UK and Ireland’s responsiveness to the European Court of Human Rights and the compliance of both sets of proposed legislation with the Article 8 right to private life. Examining the Irish approach will add additional insight to the consideration of the current UK proposals under the Crime and Security Bill.

## **European Convention on Human Rights Protection under Article 8**

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<sup>21</sup> Liz Heffernan, “A DNA Database” (2008) 18(4) *Irish Criminal Law Journal* 105 at 105.

<sup>22</sup> Liz Heffernan, “A DNA Database” (2008) 18(4) *Irish Criminal Law Journal* 105 at 105.

<sup>23</sup> The Law Reform Commission, *The Establishment of a DNA Database*, Report November 2005 LRC 78-2005.

<sup>24</sup> Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010.

<sup>25</sup> Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010. The Bill was sponsored by Dermot Ahern and presented to parliament 2010 on 15 January 2010. The Bill is available at: <http://www.oireachtas.ie/documents/bills28/bills/2010/0210/b0210d.pdf>



Article 8 of the European Convention on Human Rights declares, “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” This right is qualified in the same provision with the second paragraph stating:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is apparent from the structure of Article 8 that a “balancing approach” is employed when investigating the legitimacy of breaches of the right to private life. Due to the relatively intangible quality of the right to privacy that is affected by the retention of DNA data, it is important that the balance does not become skewed in favour of societal security interests, inflamed by fears of crime and terrorism. It is encouraging to note that the European Court does not characterise the balance as the individual’s interest versus the public good. The Court recognises that it is not just the individual, but “the community as a whole” whose interests are served by protecting the personal data associated with DNA databases.<sup>26</sup>

The European Court of Human Rights undertakes a sequential analysis to determine if Article 8 has been violated. The first step is to decide if there has been an interference with the right to private life. The next step the court determines is whether the interference is justified as permitted by the second paragraph of Article 8. In order to be justified the surveillance must be “in accordance with law”, must have a

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<sup>26</sup> *Marper* at para.103.

“legitimate aim” and “must be necessary in a democratic society” These elements in the justification analysis are crucial to the effective restraint of state interference with privacy rights.

### **Interference with the right to Private Life?**

Previous Article 8 case law has indicated that “private life” has a broad meaning, and can therefore cover multiple aspects of the person’s physical and social identity.<sup>27</sup> In its analysis, the Court chose to distinguish between the retention of (a) cellular samples and (b) DNA profiles<sup>28</sup>

#### ***Cellular Samples***

It has been acknowledged that the retention of cellular material poses particular threats to Article 8 rights due to the potential future uses of cellular material.<sup>29</sup> Accordingly, the systematic retention of samples was described in *Marper* as “sufficiently intrusive” to qualify as an interference with the right to respect for private life. While DNA profiles can be described as a string of numbers used for identification purposes, DNA samples, i.e. the actual genetic material obtained contain more unlimited genetic information.<sup>30</sup> A sample taken from a person can include, for example, a mouth swab, plucked hair roots or blood. Samples are taken by police from individuals and from crime scenes and then transferred to a laboratory

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27 *Marper* at para. 66 citing *Mikulić v Croatia*, no. 53176/99, § 53, ECHR 2002-I.” (See further *Pretty v the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III, and *Y.F. v Turkey*, no. 24209/94, § 33, ECHR 2003-IX).

28 *Marper* at para. 69.

29 *Marper* at para. 70, citing *Hendrik Jan Van Der Velden v the Netherlands* [2006] ECHR 1174.

30 “Marper goes to Europe” Timothy Pitt-Payne, *LNB News*, 2 February 2009, referencing Genewatch UK [www.genewatch.org](http://www.genewatch.org)

where the profile can be extracted.<sup>31</sup> As pointed out by Lord Justice Waller in the Court of Appeal, the “physical samples potentially contain very much greater and more personal and detailed information.”<sup>32</sup> The European Court drew attention to the Nuffield Council on Bioethics’ report which points out the greater ethical concerns of biological samples in contrast to digitised DNA profiles.<sup>33</sup> Concern about the potential future use is a relevant factor when determining the interference question.

The Court did point out, however, that the potential uses of the cellular material were not the only factor to be considered in the interference question. The Court drew attention to the sensitive information and unique genetic code contained in DNA samples.<sup>34</sup> The Court made a strong statement, regarding the retention of cellular samples as a *per se* interference with Article 8.

### ***The UK response to retention of DNA samples question***

The proposed legislation states that cellular samples must be destroyed once a DNA profile has been obtained or at the latest within six months of the sample being taken.

This is a positive response by the UK Government to the European assessment that the retention of samples is “particularly intrusive”<sup>35</sup> and should be welcomed. There is little justification for retaining DNA samples as they provide little additional investigative benefit over what DNA profiles provide.<sup>36</sup> Could this insight put a different slant on the UK Government’s decision to destroy all DNA samples within a

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<sup>31</sup> Home Office consultation, *Keeping The Right People On The DNA Database Science And Public Protection*. Available at: <http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/dna-consultation2835.pdf?view=Binary> PAGE 9

<sup>32</sup> [2003] EWCA Civ 1275

<sup>33</sup> *Marper* at para. 38– 40. Referencing the Nuffield Council on Bioethics’ report

<sup>34</sup> *Marper* at para. 72.

<sup>35</sup> *Marper* at para. 120.

<sup>36</sup> Liberty Crime and Security Bill Briefing, Second Reading, Commons - DNA Provisions at 10. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>.

short period? It could be argued that due to the lesser incentive to retain the samples the Government may be attempting to detract attention from the minimalist legislative response to the Court's criticism of the UK's profile retention policy.

### *The Irish response to retention of DNA samples question*

It is questionable whether the new Irish Bill's practices regarding samples can be considered Convention compliant. Labour M.P. Alan Johnson chose to characterise the UK amendments to genetic sample retention practices as an attempt to appreciate that "[m]any people find the idea of someone retaining their genetic material disturbing." In fact, he posited that the amendments were not "*required ...by the European Court judgment.*"<sup>37</sup>

Under the Irish Bill, an unconvicted person<sup>38</sup> must wait twelve months before applying to have their actual sample removed from the database.<sup>39</sup> While it might be arguable that the twelve month period (even though at least twice the length of time it will take for an innocent to have their sample destroyed in the UK) might be justifiable in some cases, the requirement that the unconvicted person must make an application for removal would appear to result in an unjustified invasion with that person's rights. After all, this person is innocent in the eyes of the law and an automatic removal of the genetic sample would be appropriate following a default time period.

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<sup>37</sup> Second Reading of the Crime and Security Bill, 18 January 2010 : Column 18 January 2010 : Column 34

Crime and Security Bill. Available at:  
<http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100118/debtext/100118-0004.htm#1001188000001>

<sup>38</sup> Person who was not proceeded against, or if proceeded against was acquitted or the proceedings were dismissed or discontinued.

<sup>39</sup> Section 72-74.

Further concern must be expressed regarding the proportionality of the retention period of convicted person's DNA material. *Section 76* of the Irish Bill indicates that a sample taken from a convicted person, if not previously destroyed, is subject to being destroyed not later than the expiration of three years from the taking of the sample.<sup>40</sup> While the person convicted of an applicable offence has to an extent given up the privileges of an innocent man, it is debateable whether a three year period is proportionate under the Convention, particularly in light of the limited utility of samples in the prevention of crime and increased pervasiveness of samples to the privacy right in comparison to the retention of profiles.

Accordingly, the UK approach is commended in this regard, and Ireland comes up short. The Court highlighted that the retention samples are a "particularly intrusive"<sup>41</sup> form of privacy invasion and Ireland should reconsider their approach if they wish to avoid European challenge on this issue in the future.

### ***DNA Profiles***

The Court in *Marper* recognised that DNA profiles contain a more limited amount of personal information "extracted from cellular samples in a coded form."<sup>42</sup> Notwithstanding the reduced privacy threat, the Court found the automated processing of the information contained on the profiles allows the Government authorities to do more than neutrally identify individual profiles. The Court stated that the capacity for the DNA profiles to be used to identify genetic relationships between individuals was

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<sup>40</sup> Section 76.

<sup>41</sup> *Marper* at para. 120.

<sup>42</sup> *Marper* at para. 74

alone sufficient evidence that retention of DNA profiles interferes with the right to private life.<sup>43</sup>

### **Justification for Interference?**

The European Court was unequivocal in its assertion that the retention of DNA profiles and cellular samples qualifies as an interference with the right to a private life. Interference will only be permitted where it can be justified as having a “legitimate aim”, being “in accordance with law” and being “necessary in a democratic society”

Due to the facts of the case, involving two non-convicted persons, the Court chose to limit the breadth of its holding. It did not make a definitive judgment on whether the retention of DNA profiles may in general be regarded as justified under the Convention and chose only to consider the retention of data of people who had been suspected but not convicted.<sup>44</sup>

### ***“Legitimate aim”***

The legitimate aim of Government retention of DNA information is quite clear, as the DNA Database is used in the detection and prevention of crime. The Court accepted that the retention of the data “pursues the broader purpose of assisting in the identification of future offenders.”<sup>45</sup>

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<sup>43</sup> *Marper* at para. 75.

<sup>44</sup> *Marper* at para. 106.

<sup>45</sup> *Marper* at para. 100

The UK Government has described “public protection” as being at the heart of the retention practices.<sup>46</sup> They cite the Database’s ability to detect offenders, eliminate the innocent from enquiries quickly and to clear cold cases on the basis of DNA left at the crime scene as an essential tool in the furtherance of the “public protection” goal.<sup>47</sup> The UK Government argues the statistics support them in their claims, stating that in 2007-08, there were 37,376 crimes with a DNA match which provided the police with an intelligence lead for further investigative follow-up.<sup>48</sup>

It is clear that the proposed Irish database would also offer such benefits and has been welcomed from across society as being in pursuit of a legitimate and desirable goal.<sup>49</sup> Heffernan points to the positive advance of utilising DNA databases in investigation by drawing comparison to traditional methods of policing which are “grounded in subjective, human practices.”<sup>50</sup> The Minister for Justice, Equality and Law Reform, Dermot Ahern, described the Bill as a “major step forward in the fight against serious crime. It will give the Gardaí access to intelligence on a scale and of a quality that has never before been available in this country.”<sup>51</sup>

***“In accordance with law”***

The ECtHR highlighted the importance of clear detailed rules concerning the scope and application of measures and safeguards concerning issues like duration, storage and procedures for destruction.<sup>52</sup> Due to the close relationship with these

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<sup>46</sup> Consultation page 8.

<sup>47</sup> Consultation page 8.

<sup>48</sup> Consultation page 9.

<sup>49</sup> RTE News, “Murphy Welcomes DNA Database” *RTE Website* 19<sup>th</sup> January 2010. Available at: <http://www.rte.ie/news/2010/0119/dna.html>.

<sup>50</sup> Liz Heffernan “A DNA Database” (2008) 18(4) *Irish Criminal Law Journal* ICLJ 105 at 106.

<sup>51</sup> “Minister Ahern Publishes new DNA Database Bill” 19/01/10 by Dermot Ahern <http://www.fiannafail.ie/news/entry/minister-ahern-publishes-new-dna-database-bill/>

<sup>52</sup> *Marper* at para. 99.

issues in the *Marper* case and the issue of whether the interference was necessary in a democratic society, the Court did not view it necessary to decide whether the UK regulation of the DNA Database met the legality requirement.<sup>53</sup>

***“Necessary in a democratic society”***

To meet the necessity test, the Article 8 interference must be designed to meet a “pressing social need” and be proportionate to the legitimate aim.<sup>54</sup>

When considering whether an interference is proportionate to the legitimate aim, the Court will generally consider whether the interference is a suitable means to achieve the objective, whether it is necessary to achieve the aim and whether it excessively burdens the individual compared with the benefits it is designed to provide.<sup>55</sup>

*Justification for use of DNA Database for the prevention of crime*

The UK Government argued that the retention of DNA profiles of innocent people was indispensable in the fight against crime.<sup>56</sup> The ECtHR recognised the Government’s presentation of statistical and other evidence of the high utility of the practices as impressive, but drew attention to criticisms of the statistics. The Court did not believe the evidence demonstrated that the high number of matches with

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<sup>53</sup> *Marper* at para. 99.

<sup>54</sup> *Marper* at para. 101.

<sup>55</sup> Stavros Tsakyrakis, “Proportionality: An Assault on Human Rights?” *Jean Monnet Working Paper* (09/08) at 8 Available at: <http://www.jeanmonnetprogram.org/papers/08/080901.html> Referencing Robert Alexis, “Constitutional Rights, Balancing, and Rationality” 16 *Ratio Juris* 135 (2003).

<sup>56</sup> *Marper* at para. 115.



crime-scenes could not have been possible without the indefinite retention of DNA records of innocent people.<sup>57</sup>

The Court drew particular attention to the necessity of ensuring that personal data, that is stored in automated DNA Databases, is necessary and not excessive for the purposes and is not retained for longer than is required for those purposes.<sup>58</sup>

The “intrinsically private” character of DNA data requires careful scrutiny of any interference justified in pursuit of the prevention of crime.<sup>59</sup> The Court expressed discontent with the “blanket and indiscriminate nature” of the power of retention in the UK.<sup>60</sup>

The Court drew attention to a number of areas of concern that illustrate the indiscriminate nature of the retention practices. In particular they criticised the lack of consideration for the “nature or gravity of the offence,”<sup>61</sup> the fact that “retention is not time-limited”<sup>62</sup> and the lack of differentiated treatment for minors. The Court also criticised the lack of respect for the presumption of innocence.

*“Nature or gravity”*

***UK response to the Court’s criticism of the indiscriminate regard for the nature and gravity of offences***

The *Marper* judgment called for consideration of the “nature and gravity” of offences when regulating for DNA storage. The UK Government rejects the notion that different crimes should be considered differently and provides for indefinite retention

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<sup>57</sup> *Marper* at para. 115.

<sup>58</sup> *Marper* at para. 103.

<sup>59</sup> *Marper* at para. 104.

<sup>60</sup> *Marper* at para. 119.

<sup>61</sup> *Marper* at para. 119.

<sup>62</sup> *Marper* at para. 119.

of the DNA profiles of individuals convicted of a wide range of crimes, including begging and public order offences.

In the prior Home Office consultation<sup>63</sup> two separate retention periods for innocent people were proposed. These retention periods were differentiated according to the offence for which the person was arrested. A person who was arrested for a serious offence would have their DNA profile retained for 12 years. A person arrested for any other offence would have their profile retained for six years.

The Committee of Ministers of the Council of Europe, in its initial discussion of the UK Government's response to *Marper*<sup>64</sup> welcomed the application of two different retention periods based on the nature of the offence for which an individual is arrested as this would appear to respond to the Court's criticism of an indiscriminate approach.

However, following the reworked proposals and the new blanket application of a six-year retention period to all unconvicted adults, the Government's apparent initial regard for applying differentiated treatment when dealing with different offences is undermined by their current proposed generally applicable retention period of six years.

### ***Irish response to the “nature and gravity of the offence” issue***

An advantage of the proposed Irish legislation is that it differentiates treatment according to the nature of the offence. While any retention on a DNA Database raises privacy questions, discriminate treatment is likely to lessen the privacy impact and

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<sup>63</sup> Home Office Consultation, *Keeping the Right People on the DNA Database*, May 2009 available at: <http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/dnaconsultation?view=Binary>.

<sup>64</sup> See Committee of Ministers, 1065th meeting (DH), 15-16 September 2009, section 4.2, available at: <https://valwcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH%282009%291065&Language=lanEnglish&Ver=section4.2public&Site=DG4>. Here the Committee were looking at the proposals contained in the Home Office consultation)

lead to a more proportionate outcome. While the proposed UK legislation<sup>65</sup> provides for the indefinite retention of DNA profiles of all convicted people, the Irish regulations will only apply to “relevant offences”, generally crimes carrying sentences of five years or more, and therefore considered more serious crimes.<sup>66</sup>

*“Retention is not time-limited”*<sup>67</sup>

#### ***UK response to the retention limits***

The proposed legislation in both jurisdictions can be criticised on the grounds that the retention period is excessive. Firstly, those convicted of relevant crimes are subject to have their DNA profiles retained indefinitely. While the Court chose not to address this issue, it did make clear that any retention of DNA data is an interference with private life under Article 8. There is an argument that this blanket approach might not strike the appropriate balance and calls for more individualised consideration. It is disappointing that neither Government gave much genuine consideration to whether a convicted person’s DNA profile should be retained indefinitely. This is particularly problematic in the UK situation where committing “any recordable offence” subjects a person to lifetime retention. It would indicate greater respect and regard for the Convention right if the implications of this were considered in more depth.

While the issue of indefinite retention of innocents’ profiles is addressed to an extent in both Governments’ proposed legislation, it could be argued that respect for the unconvicted is insufficient and the retention periods are disproportionate to the perceived crime prevention benefit.

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<sup>65</sup> Crime and Security Bill 2009-10.

<sup>66</sup> Section 9.

<sup>67</sup> *Marper* at para. 119.

The UK Government stepped down from its initial proscription of two retention periods (dependent on the categorisation of the crime accused) of six and twelve years. While it is positive that the Government recognised the initial error of the excessive 12 year retention period, it is less encouraging that the new six year period of general applicability appears to be founded in little evidence but more in a general inclination to believe that there is “no smoke without fire.” The statistics used to support the six year period draw attention to the greater likelihood of arrestees to be rearrested within six years. There is little merit in using these statistics to justify such an extended retention period. A person arrested twice and found innocent twice is just as innocent both times. Coupled with the fact that certain people in our society, including children, young males and certain minorities are more likely to be arrested as a matter of fact, these statistics have no place in the Government’s argument.

The European Court spoke with favour about the Scottish system where people arrested but not convicted of a limited number of offences will have their profiles retained for three years.<sup>68</sup> While the conflict of retaining the profiles of persons innocent in the eyes of the law remains, the more limited period reduces the harm and strikes a better balance in the protection of privacy alongside the prevention of crime.

The UK’s Crime and Security Bill is currently being debated at Committee level, with the report scheduled for the 8<sup>th</sup> March 2010. Some worthwhile points have been made by the Opposition and backbenchers, and particular attention should be paid to the proposed amendments which have been tabled by the Labour backbencher,

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<sup>68</sup> With the possibility for a further period of retention of two years following a procedure.

Robert Ffello and the Official Opposition.<sup>69</sup> In the tabled amendments the proposing M.P.s shows a potential path to greater compliance with the Government's obligations under Article 8 ECHR. The tabled amendments detail that when dealing with innocents regard should be had for the different nature of offences. The amendments accept that some compromise must be reached between crime prevention and the presumption of innocence and recommend that where a person is arrested with a sexual or violent offence a three year retention period should apply to the profile. It is submitted that if this approach was adopted, the UK would be closer to fulfilling its compliance duty.

### ***Irish response to the retention limits***

It now turns to examine the Irish approach to the retention periods of innocents. In the new Irish Bill, the default removal period of ten years appears excessive and does not give due respect to individuals' Article 8 rights.<sup>70</sup> The mistreatment is particularly evident when you consider the differentiated treatment of volunteers on the Database, where the default position is that a volunteer profile will not be placed on the Database without consent.<sup>71</sup> The default period of ten years actually shines some positive light on the already criticised six-year period that the UK amendments are proposing.

### **Undermining the Presumption of Innocence?**

On the basis that DNA retention qualifies as an interference with the fundamental right to private life, we look to two major justifications for storing the DNA data of

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<sup>69</sup> House of Commons Notices of Amendments given on Monday 1 March 2010 Consideration of Bill Crime and Security Bill, As Amended - Signatories Robert Ffello, Chris Grayling, Damian Green, James Brokenshire, Andrew Rosindell, Crispin Blunt and Patrick McLoughlin.

<sup>70</sup> Section 78.

<sup>71</sup> Section 27.

convicted persons. The justifications are that convicted persons are more likely to engage in repeated criminal activity and their “conviction of a ... crime forfeits certain rights of bodily integrity and privacy relative to the law enforcement system.”<sup>72</sup> Rothstein and Talbott argue that in a system that supports a more comprehensive database, such as one where persons innocent in the eyes of the law have their DNA profile retained, “neither of these justifications apply.”<sup>73</sup>

In *Marper*, the Government argued that the “mere retention” of data lawfully taken was unrelated to the fact that the person was originally a suspect, and instead is merely an attempt to collect as much data as possible to increase the possibility of an identification match in the future.<sup>74</sup> The issue of control appears to be important to the European Court’s rejection of this argument. The Court pointed out that, under the UK law,<sup>75</sup> the police were obliged to destroy the volunteer’s data at their request, “despite the similar value of the material in increasing the size and utility of the database.”<sup>76</sup> This differentiation in treatment suggests that the unconvicted people are treated with a higher level of suspicion than the average person.

Under the proposed UK legislation, adult DNA profiles of arrested but non-convicted persons must be destroyed six years following the taking of the material.<sup>77</sup> This six year period begins again if the person is rearrested. It is questionable whether this amendment addresses the European Court’s concerns regarding the presumption of innocence and stigmatisation. *Liberty* has described the proposal less as a

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<sup>72</sup> Mark A. Rothstein & Megan K. Talbott “The Expanding Use of DNA in Law Enforcement: What Role for Privacy?”(2006) *Journal of Law, Medicine & Ethics* 153 at 154.

<sup>73</sup> Mark A. Rothstein & Megan K. Talbott “The Expanding Use of DNA in Law Enforcement: What Role for Privacy?”(2006) *Journal of Law, Medicine & Ethics* 153 at 154.

<sup>74</sup> *Marper* at para. 122.

<sup>75</sup> Section 64(3) of the PACE.

<sup>76</sup> *Marper* at para. 123.

<sup>77</sup> See proposed new section 64ZD.

considered response to *Marper* but instead as a continuance of the Government's "clumsy, indiscriminate and disproportionate approach to DNA retention."<sup>78</sup>

The Government shows little intention to appreciate let alone respond to the European Court's fears regarding the undermining of the presumption of innocence. In fact, the Government maintains its line that retention of DNA profiles on the Database causes only "minimal" interference with the right to privacy.<sup>79</sup>

The Court identifies that the risk of stigmatisation is of particular concern,

stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons. In this respect, the Court must bear in mind that the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused's innocence may be voiced after his acquittal.<sup>80</sup>

While the Court makes clear that DNA retention should not be equated with the voicing of suspicions, the perception of not being treated as innocent is heightened by their data being retained in the same manner as a convicted person's data.<sup>81</sup> And yet, in blatant denial of the Court's concerns, the Explanatory notes contend that DNA retention "does not stigmatise ... as a past or future suspect in any public sense."<sup>82</sup>

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<sup>78</sup> Liberty Crime and Security Bill Briefing, Second Reading, Commons - DNA Provisions at 11. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>.

<sup>79</sup> Explanatory Notes reference the 2004 House of Lords decision in *Marper*. See paragraph 216 of the Explanatory Notes, quoting Lady Hale in *R (on the application of S and Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39.

<sup>80</sup> *Marper* at para. 122.

<sup>81</sup> *Marper* at para. 122.

<sup>82</sup> Paragraph 231 of the Explanatory Notes cited by Liberty Crime and Security Bill Briefing, Second Reading, Commons - DNA Provisions at 12. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>.

The old refrain “you have nothing to hide you have nothing to fear” seems to underlie the Government’s approach on this matter. This is an unprincipled approach which devalues the importance of privacy to human dignity and democratic society. Liberty points out that on a purely practical level, data loss scandals prove that we have plenty to fear when the Government has such vast access and control over our personal data.<sup>83</sup>

There is a constant danger that one will conflate the issue of arrest and conviction, and it is for this reason that principles like the presumption of innocence are so important. The Government attempts to take advantage of this fact in its “evidence-based” research justifying the long and arbitrary retention of the profiles of innocents. As aforementioned, the Government argues that the six year retention rate is justified by data which suggests that a person arrested is for six years at a higher risk of re-arrest than the general public.<sup>84</sup>

It should be obvious that an arrest is a very different thing than conviction. The Government itself acknowledges that future arrests are not indicative of criminal behaviour, yet they use this flawed information to justify infringement into its citizen’s fundamental rights. A related problem acknowledged by the European Court is the disparate impact on different groups of such a policy. The Home Affairs Select Committee has pointed out that “[a] larger proportion of innocent young black people will be held on the database than for other ethnicities given the smaller number of arrests which lead to convictions and the high arrest rate of young black people relative to young people of other ethnicities.”

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<sup>83</sup> Liberty Crime and Security Bill Briefing, Second Reading, Commons - DNA Provisions at 12. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>.

<sup>84</sup> Paragraph 234 of Explanatory Notes.



## **The European Court called for differentiated treatment for minors**

The European Court of Human Rights drew attention to the particular protection deserved of minors. Careful provision needs to be made in protection of minors' Article 8 rights, due to their recognised special place in the Criminal Justice system, International Human Rights Law and the likelihood of increased feelings of stigmatisation associated with a minor's data being placed on the Database.<sup>85</sup>

### ***The UK response to the European Court's concern regarding special treatment for minors***

Under the proposed UK Bill, if under 18 years of age, a person arrested but not convicted will have their profile retained for three years. However, if the minor is 16 or over and the arrested-for offence qualifies as sexual or violent the profile will be retained for six years.<sup>86</sup> The moderate concession made to unconvicted minors of limiting retention of profiles to three as opposed to six years where they have been arrested for a minor offence does not address the European Court's concerns about the treatment of minors' DNA data adequately.

The Court made strong statements on the vulnerability of children and the need for increased caution.

The Court further considers that the retention of the unconvicted persons' data may be especially harmful in the case of minors such as

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<sup>85</sup> See Article 40(1) of the UN CRC, available at: <http://www2.ohchr.org/english/law/crc.htm#art40>

<sup>86</sup> See proposed new sections 64ZE, 64ZF and 64ZG.

the first applicant, given their special situation and the importance of their development and integration in society. The Court has already emphasised, drawing on the provisions of Article 40 of the UN Convention on the Rights of the Child of 1989, the special position of minors in the criminal-justice sphere and has noted in particular the need for the protection of their privacy at criminal trials.

In the same way, the Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence. The Court shares the view of the Nuffield Council as to the impact on young persons of the indefinite retention of their DNA material and notes the Council's concerns that the policies applied have led to the over-representation in the database of young persons and ethnic minorities, who have not been convicted of any crime.<sup>87</sup>

Some special treatment is provided for an under 18 year old where convicted only once of a recordable but more minor offence.<sup>88</sup> Under the proposed Bill, convicted minors of a recordable non-qualifying offence will not have their profiles held indefinitely as under PACE. Instead there will be a retention period of five years. A second offence, of any character, will lead to the profile being retained indefinitely.<sup>89</sup>

*Liberty* acknowledges that this “second chance” is a positive step in the recognition of differential treatment appropriate for minors but argues that more must be done. They argue for a rebuttable presumption in favour of DNA profile removal once a child reaches 18.<sup>90</sup> Children have not reached full maturity and accordingly it

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<sup>87</sup> *Marper* at para. 124.

<sup>88</sup> If convicted of a sexual or violent offence, a minor will have their DNA retained indefinitely.

<sup>89</sup> See proposed new section 64ZH.

<sup>90</sup> Liberty Crime and Security Bill Briefing, Second Reading, Commons - DNA Provisions at 26. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>.

would be disproportionate to stigmatise them based on actions undertaken before they were capable of full responsibility.

*Liberty* puts forward the poignant example of the childhood shoplifter, cautioned once at ten and again at twelve, whose profile remains on the database for the rest of his life.<sup>91</sup>

***The Irish response to the European Court's concern regarding special treatment for minors***

*Section 78* of the Irish Bill proposes to make special provision for unconvicted minors by applying a reduced default DNA profile removal period of five years. An exception to the indefinite retention period is also put in place for minors in *Section 79* where child offenders (excluding those convicted of more serious offences<sup>92</sup>) will have their profile retained for a default period of 10 years.<sup>93</sup> With the Bill being in very preliminary stages, the Government has not had the opportunity to defend its “special provision” for minors as required by the European Court. It is submitted, however, that these minor concessions are not sufficient recognition of the special place of children in the justice system and the increased harm such retention may cause.

Both the Irish and UK response to the Court's concern about the retention of minor's DNA data seems slipshod and cobbled together in a superficial approach to

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<sup>91</sup> Liberty Crime and Security Bill Briefing, Second Reading, Commons - DNA Provisions at 27. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>.

<sup>92</sup> Offences triable by the Central Criminal Court or prescribed by the Minister having regard to their nature and seriousness.

<sup>93</sup> This is subject to certain qualifications such as the child avoiding conviction within the default period.

show some sort of recognition of the *Marper* stance on underage people and the DNA system.

### **Other Convention issues arising from the proposed legislation**

#### **“National security exception” for innocents’ profiles**

Both the Irish and UK Governments claim that their proposed legislation is responsive to *Marper* and consistent with their obligations under the European Convention of Human Rights. The fact that self-imposed limitations on Government interference with its citizens rights are brought about as a result of decisions such as *Marper* is testament to the positive influence of the Convention system and the benefits possible when the National Governments are not “the sole arbiters of the rights of their citizens.”<sup>94</sup> Sottiaux recognises the benefits of an international supervising body. The Strasbourg Court’s independent nature allows it to take a more “detached stance from domestic legislative and executive attempts to curb fundamental rights.”<sup>95</sup>

The less than ideal responses to the *Marper* judgment from both Governments is, perhaps, reflective of a general tendency of Governments to jealously guard any privileges they associate with the sensitive national interest. This conflict between Convention and Country is particularly acute when the issue of national security is at issue. The European Court has traditionally provided some deference in this area recognising the argument that “domestic political and judicial authorities are better

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<sup>94</sup> Karen C. Burke, “Secret Surveillance and the European Convention on Human Rights” 33 (1981) 1113-1140.

<sup>95</sup> Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Hart Publishing, Oxford, 2008) at 18.

placed to assess the seriousness of a security threat and the necessity of concomitant human rights restrictions.”<sup>96</sup>

It is contended, however, that the National Security exception in the UK Bill is not deserved of such deference. Regardless of new proscribed periods of retention for an innocent’s profile, an area’s chief officer of police can decide to impose a greater period of retention if he determines it is necessary “for the purposes of national security.” The decision to retain on these grounds can be made every two years and there is no limit on the number of subsequent times such a decision can be made.<sup>97</sup>

Accordingly, an innocent person could have their DNA retained indefinitely. It is questionable as to what faith we can have in the police not to abuse this power and from determining that a high proportion of profiles must be retained on vague notions of national security left unclear and undefined in the proposed legislation.<sup>98</sup>

Arguments might be made that the individual can seek protection through judicial review. The feasibility of judicial review in this circumstance is undermined not only by the cost and practical difficulties in gaining access to judicial review, but also the deference the domestic courts are likely to take when considering something like whether an action is truly in the interests of national security, when such questions are traditionally considered within the Executive’s remit.

If we must have this “national security” exception, greater provision for transparency could assist in readjusting the balance in favour of the protection of our privacy. However, Liberty points out that there is not even a requirement that the

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<sup>96</sup> Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Hart Publishing, Oxford, 2008) at 17.

<sup>97</sup> See proposed new section 64ZL.

<sup>98</sup> Liberty Crime and Security Bill Briefing, Second Reading, Commons - DNA Provisions at 23. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>.

police publicise a record of the number of times such a determination is made.<sup>99</sup> Such a provision would at least provide some public oversight and restrain Chief Officers from utilising the exception with no regard for public interests in privacy as the harm to society is not just the privacy interference but the lack of control over those who collect and retain the data.<sup>100</sup>

Whether it is related to the heightened terrorism risk in the UK in comparison to Ireland or not, there is no corresponding “national security exception” in the Irish Bill at present. *Section 88(3)* could be used to achieve some of the same effects but the safeguards in the section protect against the exception being used in less than essential circumstances. The section entitles the Commission to request that the District Court extend the retention of an innocent’s profile. If the judge is satisfied that there is a “good reason” he or she may authorise extended retention for a period “as he or she considers appropriate.” While the “good reason” standard is vague and dissatisfactory it does allow for some useful flexibility in the system. The judicial oversight is the clear benefit to the Irish approach, and it is believed such built-in out-of-branch review would be a positive addition to the UK exception as well as providing some increased transparency to the issue. However, there is a serious risk that such a check would become a mere rubber stamp, and we must be alert to potential abuse of the section.

### **The question of a Universal Database**

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<sup>99</sup> Liberty Crime and Security Bill Briefing, Second Reading, Commons - DNA Provisions at 24. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>.

<sup>100</sup> Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, Geo. Wash. L. Rev. Vol. 72:1701 at 1708.

There have been reports of UK Police arresting people simply to build up the database.<sup>101</sup> The wisdom behind such an approach would appear to be that with a larger pool of data, a match is more likely. Similar arguments are made regarding the retention of innocents' profiles who have been arrested, even with reasonable suspicion. However, this type of reasoning is less an argument supporting retention of unconvicted person's profiles, but instead for universal retention of the entire population's DNA data.<sup>102</sup>

There are arguments in favour of Universal Databases besides the potential benefits for criminal investigation. For example, some argue it is the only way to avoid the discriminatory disparities currently reflected in the disproportionate representation of certain sectors of society on the UK's Database. Kaye argues that a Universal Database would not only satisfy the demand for comparative justice but would "act as a mild antidote to conscious or unconscious racial biases. DNA evidence does not care about race."<sup>103</sup>

While there is some appeal to this argument, the implications for civil liberties are chilling. The proponents of Universal Databases underestimate the potential for human error, the abuse of power and the damage such a system would cause to privacy and human dignity.<sup>104</sup>

Thankfully, neither the Irish nor UK Government openly supports indefinite retention of the entire country's DNA data. However, it is questionable whether this is a principled stance. In fact, former Labour Prime Minister, Tony Blair, has

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<sup>101</sup> Kable, "Police arrest just for DNA" *The Guardian*, 24 November 2009. Available at: <http://www.kable.co.uk/national-dna-database-human-genetics-commission-24nov09>.

<sup>102</sup> Liberty's Committee Stage Briefing on the DNA provisions in the Crime and Security Bill in the House of Commons January 2010 at 47. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-committee-briefing-on-crime-and-security-bill-dna.pdf>

<sup>103</sup> David H. Kaye, "Two Fallacies about DNA Databanks for law enforcement" (2001) 67 *Brooklyn Law Review* 1 at 195.

<sup>104</sup> Liberty's Committee Stage Briefing on the DNA provisions in the Crime and Security Bill in the House of Commons January 2010 at 18. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-committee-briefing-on-crime-and-security-bill-dna.pdf>

commented that he saw “no reason why the DNA of everyone should not ultimately be kept on record.”<sup>105</sup> On Second Reading of the Crime and Security Bill, Alan Johnson ruled out a Universal Database on “reasons of sheer practicality.”<sup>106</sup>

We need to be wary that we are not moving towards a Universal Database by stealth – in principle if not in actuality. If the Government is attempting to collect as much DNA data as possible as cost-effectively as possible, it is essential that we demand principled safeguards to ensure such widespread and invasive practices do not become reality. It is expected that the European Convention on Human Rights will remain an essential safeguard in the development of DNA databases across the Council of Europe.

## **Evaluation**

It is submitted that the proposed legislative changes in both countries are insufficiently responsive to the European Court judgment in *Marper*. While it is positive that the initial introduction of the Irish database legislation was delayed to take account of *Marper*, an examination of the Bill exposes several areas where the minimalist approach was chosen. In sensitive areas of crime and security, promises of easy solutions are popular and “the nothing to hide, nothing to fear” mentality comes to the fore.

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<sup>105</sup> Nigel Morris “A 'chilling' proposal for a universal DNA database” *The Independent* 6 September 2007. Available at: <http://www.independent.co.uk/news/uk/crime/a-chilling-proposal-for-a-universal-dna-database-401503.html>

<sup>106</sup> Second Reading of the Crime and Security Bill, 18 January 2010 *Column 24* Crime and Security Bill. Available at: <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100118/debtext/100118-0004.htm#1001188000001>



The UK Bill, on the other hand is scheduled for its Third Reading on March 8<sup>th</sup>, but it appears unlikely that it will make its way through the House of Lords and back to the House of Commons in time for the General Election. For this reason, it is likely to be involved in parliamentary “wash-up”<sup>107</sup> Due to the controversial nature of the DNA provisions it is uncertain if the Crime and Security Bill will make it through the “wash-up” process and into the Statute Book. If it is unsuccessful, the new Government will have to start again to try to achieve Convention compliance on the DNA Database issue following the election.

Notwithstanding this complication, the amendments are clearly not satisfactory and betray reluctance on the part of the UK Government to truly embrace its privacy obligations under the Convention.

If the current UK and Irish Bills do develop into legislation, there is definite scope for a Strasbourg challenge. However, a European victory in several years time is not the most effective or expedient manner in which to protect human rights. The onus currently rests on rights-oriented members of the Houses of Government, interested commentators and interest groups as well as individuals at constituency level to work for the fullest possible compliance with our Convention obligations. With education and engagement, the privacy right can move from an intangible factor on a weighing scale to a valued protector of democratic society.

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<sup>107</sup> Legislation may not be “carried forward” from one parliamentary session to the next. As a result, to ensure that a lot of work is not in vain, the Party Whips enter into a process of negotiation over any legislation that has not yet made it all the way through both Houses of Parliament.

