

B465. "What Are We Afraid Of?" The National Law Journal, (October 18, 2004) p. 27.

During a recent meeting at the Kennedy School of Government at Harvard, defense lawyers chided-well, other defense lawyers-for being unduly impressed with the science of DNA. These critics pointed out that most defense attorneys, when told that their client left DNA samples at the crime scene, throw up their hands and plead out the case. However, leading DNA authorities at the meeting, such as George Castelle and Robert Gaensslen, pointed out that in some cases labs have faked results to help the police to make their case; in others, samples were switched. (And anyhow, an identical twin could have done it.) Thus they advised fellow defense lawyers who are unfamiliar with the science involved to turn to guide books that detail which questions to ask when challenging DNA evidence.

But by far the harshest criticism came from civil libertarians who stated that they did not object to DNA testing-as long as the findings are not stored, the samples from which the DNA profiles are derived are destroyed and access to the findings is severely limited. Otherwise, these libertarians feared that DNA data could lead to racism; cause good people to lose their jobs, insurance and homes; and possibly create a police state.

To defense lawyers, I say: Although it is quite necessary to question the human element of DNA testing (handling, mistakes, etc.), I would not challenge the science. Especially if an independent laboratory has re-run the test, come up with the same results, and then tested an additional DNA sample from the suspect and it matched the police sample. I would take it that the findings are solid. True, once in every 10 million cases or so, a mistake may occur. But judges and juries are unlikely to find such a minuscule error rate to be a cause for alarm. And to the extent that public interest enters into such deliberations, one must acknowledge that DNA evidence is more reliable than eyewitnesses, handwriting analyses and many other sources of evidence.

A more difficult question is raised by the fact that relatives share some DNA features. (Only identical twins share them all.) Hence without conducting a full DNA test-which often cannot be carried out on a crime scene sample-there is no way to know if that sample might actually belong to another member of the suspect's family. Crime families exist-and not only on television. This was demonstrated during the Kennedy School conference when data were presented showing that more than 30% of those "in the system" have a relative who is in jail or ought to be. Thus it is fair for defense lawyers to raise questions-in cases without a full DNA profile-about relatives as suspects or having access to crime scenes.

Still, we need more testing.

To the civil libertarians I say: If DNA evidence were not stored, it would be much more difficult to tie other crimes to the same offender. This, in turn, would prevent criminals from getting their full due. Police would try to solve cases when the actual perps were already in jail or at least well known. Without storing DNA evidence, it would be impossible to uncover mistakes; inmates could not use these data when making their appeals.

It is cardinal to our justice system never to jail an innocent person, let alone execute one. Indeed, we feel so strongly that we profess that it is better to let a hundred criminals go free than to jail one innocent person. The simple fact is: There is no law enforcement technique

that has liberated more innocent people from jail, including death row, than DNA tests. On this ground alone, civil libertarians should be demonstrating, pleading, for more DNA tests, rather than fighting to tie them up in knots.

While DNA tests might not be the final word, they are the best we have in the criminal justice system. Overall, DNA tests, more than any other kind of tests today, help justice rather than thwart it.