



TUNE IN TO THE
SOUND OF DEMOCRACY

Justice Talking Radio Transcript

DNA Testing: Will it Help or Hurt Law Enforcement?—Air Date: 7/31/06

In recent years over half the states have passed laws that require convicted felons and some convicted of misdemeanors to give DNA samples to law enforcement authorities. As a result, even those convicted of petty crimes such as shoplifting or loitering must give samples just as murderers and arsonists do. But now New York State wants to require all criminals to give DNA samples and other states, such as Kansas and California, want to go even further by sampling people who are arrested, but not necessarily charged with or convicted of a crime. On this edition of Justice Talking, we ask whether a larger DNA database will help police solve more crimes or increase the likelihood of mistakes and make a mockery of the right to privacy.

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MARGOT ADLER: From NPR, this is Justice Talking. I'm Margot Adler. In 1984, the world of criminal investigation radically changed when a scientist discovered DNA as a method of identification. On today's show, we'll look at what effect crime scene evidence and DNA collection has had on our criminal justice system. For some, it has meant freedom; almost 200 people have been exonerated through DNA evidence. A far greater number have been convicted. For still others, the hope is that with more DNA samples collected from criminals, there's a greater chance to prevent future crimes.

UNIDENTIFIED MALE: If we were allowed to get his DNA fingerprint after the petty larceny, we would have solved the rape and we would have stopped the other two murders.

MARGOT ADLER: The pros and cons of DNA collection, after the news.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Everywhere we go, we leave genetic traces of ourselves: a strand of hair, saliva, or sweat. And those traces have DNA in them. It's harmless genetic littering for most of us, but for criminals and crimefighters, that DNA can be the link between a conviction and an unsolved crime. Every state already collects DNA for certain criminal offenses, but more recently, some states have been collecting DNA from people convicted of any crime, or even just arrested for a crime. On today's show, a debate over DNA collection: what it means for crimefighting and whether it's a threat to our privacy. We'll also bring you a story about a man who was exonerated by DNA evidence after spending 17 years in prison for a crime he didn't commit. And later, a forensic scientist helps us separate truth from fiction in how TV shows like "CSI" depict physical evidence.

UNIDENTIFIED MALE: In general, there are two different kinds of "CSI effect." The show has influenced everybody. Very popular program. But it's entertainment; it's not reality.

MARGOT ADLER: Forty-four states now require that people convicted of all felonies submit DNA, New York the most recent. In June, the state passed a law expanding their DNA database collection efforts. I called Chauncey Parker, the New York State director of criminal justice, to tell us about the new law.

CHAUNCEY PARKER: Well, it dramatically expands the number of convicted offenders that we're allowed to get DNA from. Before the law, our databank was really dangerously incomplete. One out of every seven convicted criminals was required to provide a DNA fingerprint. Now it's one out of every two.

MARGOT ADLER: And why is that so important to have? CHAUNCEY PARKER: The reason why it's important--I'll give you one example. There was a case up at Albany, where there's a person named Raymond McGill who was convicted of petty larceny. We took his ink fingerprints, which was what we'd been doing for 100 years, but we weren't allowed to take his DNA. He then raped an 83-year-old woman. He then murdered a person who works in our office. He then murdered another person. Each of those crimes was connected to a DNA fingerprint, but the identity of the person who committed it was unknown, until finally Raymond McGill was convicted of a felony where we were allowed to get his DNA. If we were allowed to get his DNA fingerprint after the petty larceny, we would have solved the rape and we would have stopped the other two murders. It's really an opportunity to solve and prevent thousands of crimes.

MARGOT ADLER: The New York State Senate passed a DNA bill for seven straight years, but it went nowhere in the State Assembly. Why did the measure finally get passed?

CHAUNCEY PARKER: I think the reason why it passed this time is that Governor Pataki sent me to go statewide, crisscross the state to go from Syracuse to Rochester to Buffalo, community by community, to really build our partnership of our crimefighters, you know, whether it's the district attorneys, or the police, crime victims' advocates, mayors. Everybody joined together in New York State, including, the day before it was passed, the attorney general; Eliot Spitzer stepped forward and urged his own party to let this bill come to a vote. So it really was a

bipartisan, overwhelming, statewide effort at the governor's urging, that really, I think, pushed this over the top.

MARGOT ADLER: And when you went around the country urging the bill's passage, when you met with people, what was the reception you got?

CHAUNCEY PARKER: The first reaction, you know, if you go talk to a community group, was astonishment that this wasn't already being done. I think many people watch "CSI" or "Law & Order," and I think people are expecting that law enforcement's taking advantage of this technology, which is really sort of the 21st century fingerprint. And then when people found out that we weren't taking advantage of it, I think the next reaction was anger. I think when government has the ability to protect people and we don't take full advantage of the tools that we have, it's just unacceptable, and so I think that also was something that created a voice throughout the state. Where people are just, you've got to take advantage of this tool.

MARGOT ADLER: What makes DNA evidence an important issue? What makes it an effective crimefighting tool?

CHAUNCEY PARKER: Well, it really is the fingerprint of the 21st century. If you think of a typical crime scene, the way we traditionally have tried to connect the dots is by fingerprints. That depends whether somebody leaves a fingerprint, and they leave enough of a fingerprint that they can then be connected back to the person who owns this fingerprint. The DNA just really shatters the paradigm, shatters the boundaries for identification purposes. Because you can get DNA from hair, you can get DNA from saliva, they just got DNA from a bus ticket. As someone once described it, you could fill the 55,000 seats in Yankee Stadium every day for 55,000 years, and you're not going to get two people with the same DNA. So it's just a fantastic tool. It not only solves and prevents crimes, but also DNA is so important because it exonerates innocent people, whether it's at the end of the criminal process and we find someone who's been wrongly convicted, but I think even more often now, we're able to exclude people who may be a suspect--early on in a criminal investigation the DNA can say with a certainty that that person is not involved in this crime and they can be freed.

MARGOT ADLER: Do you think there are any reasonable civil liberties and privacy concerns?

CHAUNCEY PARKER: It's always important to balance civil liberties and public safety and public security. That balance is vital and it's very important that we should always very carefully examine it. Obviously, to somebody who has to give a DNA fingerprint after conviction, that's something that raises civil liberties concerns. I think that the fact that it's somebody who is convicted, that it's absolutely appropriate that on the one hand, we're only taking it from people who are convicted, and on the public safety side, it's an opportunity to solve and prevent thousands of crimes. I think that's the proper balance, and that's why we needed to expand it and why we should actually push even further to make sure it's all convicted criminals in New York State, not just one out of every two, but all convicted criminals.

MARGOT ADLER: Chauncey Parker is the New York State director of criminal justice. Thank you for talking with me today.

CHAUNCEY PARKER: Oh, my pleasure. Thank you.

MARGOT ADLER: What started in the 1980s as a crimefighting tool to catch sex offenders has grown into a national database with millions of DNA fingerprints. To talk about how law enforcement uses DNA evidence, I spoke with David Kaye. He's a law professor at the Arizona State University College of Law, and a fellow of the Center for the Study of Law, Science, and Technology. David, when is DNA collected--at the arrest, at conviction, at the crime scene? Give us a picture.

DAVID KAYE: Well, it comes in at different times in different ways. So at a crime scene, there may be a bloodstain. A technician, an investigator, will preserve that and bring it to a laboratory for analysis. And that--people would usually refer to it as a forensic sample, or an evidence sample--that itself might be used to check whether a given suspect would have the same DNA type. And that was the traditional use for DNA evidence. But after some time, people have discovered that they could collect DNA from individuals, put it on file, and then when a new sample arose from a crime scene, compare that to the existing database and see whether somebody whom they had no idea was a suspect would become the target of the investigation.

MARGOT ADLER: How does DNA testing work? Where can it be collected from?

DAVID KAYE: In terms of the forensic samples, the crime-scene kind of DNA, a very common source of DNA would be in rape cases, from vaginal smears, from seminal stains on underwear, bedsheets. Blood is a source of DNA in cases of violence, even breaking and entering, where someone might have cut his hand on a window, let's say. In less likely situations also, DNA is recovered. It's been recovered, for instance, from someone who blew out a candle in the course of breaking and entering and then raping a woman in her residence.

MARGOT ADLER: You mean they just blew and the air... Some of their spittle went on a wall, or on a table, or...

DAVID KAYE: Exactly. Enough saliva was left on the candlestick to permit DNA typing.

MARGOT ADLER: Tell us about DNA dragnets. That's when authorities ask for wide testing, for example to find a killer or a rapist in a community.

DAVID KAYE: These started in England and then in Europe, in a case where the police would run up against a complete blank wall. There would be... For example, in a notorious case, the first one in England, in the village of Narborough, involved two young women who were sexually assaulted and killed. No one knew who was responsible. The police conducted a long investigation. They had no leads. Then a detective came up with the idea--and this was very early, before DNA was commonly used at all--the detective came up with the idea of asking all the men in the village to give DNA samples to be analyzed at the university nearby, and nobody matched. Now it later turned out in that particular case that one individual had paid someone

else to show up with a forged passport suggesting it was he, and give a DNA sample that cleared him. And when the police discovered that, they obtained a sample from the individual, who was then prosecuted as well as the guy who gave the forged sample, who also was the subject of a different case. So that kind of investigation has also been used in dozens of cases now in the United States.

MARGOT ADLER: Does the federal government collect DNA?

DAVID KAYE: Yes. In the past, it did not. The FBI had set up a laboratory to assist states and to help develop some uniform standards, but it did not collect DNA itself. Instead, it just looked at samples that came from other law enforcement agencies.

MARGOT ADLER: And how do the state and federal databases interface?

DAVID KAYE: They interface through a system that the FBI administers. Before that, the FBI had set up as a demonstration project, really back in 1990 with some 14 laboratories, a system in which the states and localities would funnel their DNA types that they had found in their investigations or convicted offender databases, and those would go up to a central computer that the FBI ran, called the National DNA Index System. Every state now participates in that. And so that if a match is not found locally, or in the state's own database, a request can be made for the FBI to search the forensic sample against its database, and that system has led to some 34,000 hits in the database.

MARGOT ADLER: And how many samples are there?

DAVID KAYE: There are now over 3 million samples in what is called CODIS, in the federal database system.

MARGOT ADLER: If DNA evidence connects you with a crime, are you now guilty before proven innocent?

DAVID KAYE: Well, it's evidence that associates you with the crime. It is not the same as guilt. The question is, how did your DNA get there, and is this laboratory report... Did the laboratory do its job correctly? So it's not the end of the case.

MARGOT ADLER: David Kaye is a law professor at the Arizona State University College of Law, and a fellow at the Center for the Study of Law, Science, and Technology. Thanks for talking with me, David.

DAVID KAYE: It's been a pleasure.

MARGOT ADLER: Coming up on Justice Talking, a debate about DNA collection and DNA databases. Will a larger DNA database help police solve more crimes, or increase the likelihood of mistakes and make a mockery of the right to privacy? And a futurist gives his prediction for how our attitudes toward DNA may change in 50 years.

UNIDENTIFIED MALE: No powerful new technology ever comes into our lives without a hidden curse. And the more powerful the technology is, the more dangerous the curse is.

MARGOT ADLER: Don't go away.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. In recent years, over half the states have passed laws that require convicted felons, and some convicted of misdemeanors, to give DNA samples to law enforcement. Those samples are then kept in state and federal databases. But whose DNA should be added to the databases is a subject of much debate. Barry Scheck and Chris Asplen have joined me to talk about the benefits and drawbacks of DNA collection. Barry Scheck is co-founder and co-director of the Innocence Project at the Benjamin Cardozo School of Law. The Innocence Project works to exonerate the wrongfully convicted through post-conviction DNA testing, and works for reforms to prevent wrongful convictions. Chris Asplen is vice president of international public affairs of Smith Alling Lane. The lobbying firm's clients include biotechnology companies that process DNA samples. Before joining Smith Alling Lane, Chris was executive director of the National Commission on the Future of DNA Evidence. Barry and Chris, thank you both for joining me today.

CHRIS ASPLEN: Thank you.

BARRY SCHECK: Thank you.

MARGOT ADLER: Chris, states are adding thousands of DNA profiles a month to our nation's database. How effective is this type of DNA collection as a crimefighting tool? Are matches turning into convictions?

CHRIS ASPLEN: Well, they are, and it's extremely effective. If you look at the ability that law enforcement now has to not only solve crime, but solve crime more definitively than it ever could before, and you look at the number of hits, as we call them, identifications in the database, it's clearly a very effective tool, a very powerful tool for law enforcement.

MARGOT ADLER: Barry, DNA has become a powerful tool for your organization, the Innocence Project. You've used it to exonerate dozens of wrongly convicted individuals. Why shouldn't we promote the widest use of DNA throughout the criminal justice system?

BARRY SCHECK: Well, as Chris will tell you, I've always been a very strong proponent of DNA databanking. If you look at Innocence Project cases, they are really just the flipside of it. It's like doing a cold case. We have had 181 post-conviction DNA exonerations, but I think in 63 of the cases, DNA has also led to the identification of the real assailant, and most spectacularly, when we, you know, use the databank. I think the area of controversy is that the databank, in my judgment, on the one hand, is not being used effectively enough, because law enforcement has not been as aggressive as they should be in going out and getting DNA samples from crime scenes. If they were more aggressive in going out and getting DNA from burglaries,

which is a really good gateway crime to finding rapists, for example, and other serious felons, and you had more unsolved crimes in the database, you would get more hits.

MARGOT ADLER: Well, let me ask both of you. Several states collect DNA of people who have been arrested but not convicted on felony charges. Do you think that DNA should be collected from more and more individuals? Let's start with you, Chris.

CHRIS ASPLEN: Well, certainly for appropriate classes of individuals. I wouldn't go more and more and more, but there are studies and there is evidence, particularly from other countries, that that's a very effective way to pursue databasing. And yes, taking DNA profiles from individuals who are arrested has been proven exceedingly effective in other countries, such as the United Kingdom, and also in the states that currently do that, here in the United States.

MARGOT ADLER: Barry, do you think that DNA should be collected from people who are arrested but not convicted?

BARRY SCHECK: Well, I'm troubled by that. I think that there are certain civil liberties problems when you start extending it particularly to the people arrested on misdemeanor charges, people that are arrested on felony charges, before there's been any kind of probable cause finding, because there are problems of what's known as over-inclusive genetic surveillance. They are race effects, frankly, where you start targeting certain people in the population, and certain races as opposed to others, you know, certainly when people are arrested. If you're going to take their DNA, they shouldn't be permanently in the database if the charges are dismissed. But I have some problems. There's also the danger of pretext arrests. So I'm very wary about that.

MARGOT ADLER: What's that mean, pretext arrest?

BARRY SCHECK: In other words, that police officers would go out and they would arrest somebody on a charge just to get their DNA.

MARGOT ADLER: Well, there have been calls by some law enforcement officials for a national registry of every American's DNA profile. Chris, is this something you would advocate, or not?

CHRIS ASPLEN: Not at this point. There's still a lot that we need to do from a forensic databasing standpoint, and the public clearly has concerns about that. For example, with the concerns that were raised about the NSA database, and now what we've learned about the government looking into bank records and such. I don't think that at this stage that it's a necessary proposition.

MARGOT ADLER: But what do you mean by this stage?

CHRIS ASPLEN: Well, when we're databasing with individuals who are convicted of crimes, and databasing individuals who are arrested of particular crimes...

MARGOT ADLER: But I mean, are you saying there's a future stage when you'd accept this?

CHRIS ASPLEN: I think that there's... Potentially, in the future, yes. But I think that law enforcement and government would have to, number one, prove that they could do it without violating people's civil rights and civil liberties, that's step number one. But also, I would only advocate for it in the future if sample destruction was an absolute component of that. I agree with Barry that sample destruction is really the key to making sure that the government can't do other kinds of testing that people would be very concerned about.

BARRY SCHECK: And that's why I've become very cynical. And I have to tell you, Margot, that's a lot of the process. Because you would think that sample destruction is something that people would agree to. But they won't even agree to sample destruction when you get the digital DNA profile and then destroy the underlying biological sample. Even though I'm not by any means persuaded that even for quality assurance purposes or anything else it's really worth it, I mean, to just reassure people that there wouldn't be abuses. Because once you have somebody's saliva or blood, you literally have their whole human genome, and you could, if the state suddenly decided, well, for law enforcement or national security purposes, we want to start looking at other potential associations towards, I don't know, a predilection to violence, or to, you know, some other mental state, or even physical disease.

MARGOT ADLER: Chris, let's say we had a universal DNA database in the future. When someone's DNA is scanned, doesn't that act turn a person into a suspect every time? Does it violate, for example, our Fourth Amendment rights, protection against unreasonable searches?

CHRIS ASPLEN: No, I don't think so at all. It doesn't automatically turn someone into a suspect. Let's say, for example, that you have a crime scene and there's a getaway car. And the witness can identify the individual's plate as being from a particular state, and maybe knows the first one or two digits of the plate. Does that mean that everyone who owns a car and has a license plate number in that particular state is a suspect? Because the police are going to have to use that as evidence. Well, no, of course it doesn't. So, it doesn't turn everyone into a suspect. Another example would be, a lot of individuals who commit fraud have a number of different a.k.a.s and a whole lot of different Social Security numbers that they steal. Does that mean because you have a Social Security number, you're automatically a suspect in this big database? I don't think so at all. Now, I do think that technically, and I disagree with Barry on this, that a universal database would eliminate the racial bias. But that's very distinct from saying that for that reason, I think that we should travel down that path right now. It is a way to solve that problem, but again, not necessarily at this point in time. I don't think it's something that we should pursue.

MARGOT ADLER: Barry, if we had such a database, do you think that would-be criminals would be deterred from committing crimes?

BARRY SCHECK: Not any more than they are right now, because I think every criminal that's thinking about these things is aware, you know, that DNA testing could be used to identify individuals connected with rapes, murders, evidence that people were at crime scenes.

But if you had the universal database, a lot of people who just happened to have been in an area, you know, that left some kind of DNA, because we're getting increasingly what they call sensitive in these applications, in other words, we can find, with increasingly small amounts of DNA, you can get patterns, so that lots of people who may just have been in a particular place are going to be implicated, questioned, brought in. But, you know, I have to go back, Margot, to this whole notion of rogue databases. Because this, to me, is the take-home message.

MARGOT ADLER: Well, I guess I have to ask you, how many of such databases are there?

BARRY SCHECK: Well, that's what's so interesting. I think a lot more than we actually know about now, because there are limited authorizations under state and federal law for what can be databased. But what we found in New York City and other laboratories in New York State, and I strongly believe that it's probably going on in other places, is that once state and local crime labs had the ability to do DNA testing in their own computers, you know, they didn't need to hook into the national database if they can create their own. So just think of law enforcement without any authorization by statute, saying, aha, here are people who, you know, we've gone out, we've asked them for their DNA to assist in an investigation, in these sweeps--even in New York State they were taking samples from rape victims and their significant others, and they were putting them in a database, and people were not being told when they gave their DNA for elimination purposes that it was being kept in a permanent database. Now, if they can do that with impunity, and with very little shame, I get very worried when people start talking about collecting everybody's DNA.

MARGOT ADLER: Chris, when Barry talks about DNA dragnets, that's again when hundreds or even thousands of people are asked to volunteer a DNA sample to prove their innocence, if someone refuses to give their DNA, does that automatically make them a suspect?

CHRIS ASPLEN: Well, you know, I think the term we use now is a person of interest. I think that's probably the way it would be described. But, you know, it's fair to say, I think, that if police go and ask for a voluntary sample and the person says no, I think that it would be irresponsible for the police not to take that into consideration, any more so than if police went up to an individual who was in the area of a scene of a crime, and they said, you know, we'd like to talk to you, can you tell us where you were last night? And the guy says, no, I'm not going to tell you where I was. Well, should the police then turn heel and go away and say, oh well, that's a lost lead? No, I don't think so. So I think that they do become an individual of interest, but I think that that's entirely appropriate.

BARRY SCHECK: But you see, that's the problem, Margot, because if... When these dragnets are abused, and when these rogue databases are created, then that's going to discourage everybody from giving their DNA. Because if, you know, we ask you for DNA, and we don't tell you that we're permanently databanking it, then the next time, particularly in a high-crime neighborhood, the police come and they ask for samples, people are going to say, wait a second. I don't trust you with it.

CHRIS ASPLEN: I disagree.

MARGOT ADLER: So Chris, what would you do about that, and how long should DNA samples be kept?

CHRIS ASPLEN: In terms of what you do... Barry keeps using the word “rogue database”, you know, for a reason. They’re not rogue databases in that, number one, they’re not illegal. Nobody has found any of these to be illegal. However...

BARRY SCHECK: Well, there is some disagreement about that.

CHRIS ASPLEN: The way to solve this problem is kind of what I referred to before. It’s education, particularly of the police. And the way you solve this problem is everyone that you invite or ask to participate is a voluntary participant in the dragnet. You have a whole form, a whole consent form, that lays out specifically what this sample can and cannot be used for, what this profile can and cannot be used for. And then you hold police to that.

MARGOT ADLER: And does it say when it gets destroyed?

CHRIS ASPLEN: It certainly should. Now, to be honest, there’s not a whole lot of consistency, and that’s why I mentioned before, education of police is really important. But it certainly should say, just for this investigation, or for this investigation and potentially others, and that way, if an individual says, no, I don’t want to participate, or I agree to participate solely for this one, then again, that’s something that the police can be held to very specifically.

BARRY SCHECK: You see, but potentially more is kind of weasely. Because...

CHRIS ASPLEN: But the point is you can spell it out specifically.

BARRY SCHECK: Right, you have to say this. But you see, and this is where law enforcement... They’re not playing straight with people, and it’s not, in the long run, going to be in anybody’s self-interest, even theirs. Because you have to say to people, look, either I want your DNA to eliminate you in this investigation, and then we’re going to destroy it, or, if you begin to say to people, we want your DNA for this investigation, oh, and by the way, we’re going to permanently store it in a databank and any time there’s a new crime that’s committed, we’re going to run your sample against it. Now, if they say that, because that’s what they are doing in places like New York and other jurisdictions, because they sort of take this position, which I don’t think is legal, that once we get your DNA for one purpose, we can use it for all others, even if it exceeds the scope of your consent, I think that is illegal and a Fourth Amendment violation. But if you start sort of tricking people into having their DNA put into a database, then they’re not going to cooperate with law enforcement when they should. They should not put up with that.

CHRIS ASPLEN: I agree. And if police are tricking people, they shouldn’t be allowed to use the technology. I agree 100 percent.

MARGOT ADLER: Later on in the show we’ll hear from a forecaster, someone who looks

at the impact of current trends on the future. In an article he wrote, he describes a tomorrow where DNA becomes our official unique identifier, a genetic driver's license or a PIN number. But he warns that, in this future, health insurers will prune out risky individuals, DNA theft will be as common as stealing a credit card, and we'll walk around watching where we blow our noses. Will we look back on the issues we're debating here as the start to that kind of future? I'd like both of you to respond. I'll start with you, Chris.

CHRIS ASPLEN: Yes. We will look back and say, do you remember the good old days? Barry made a point earlier about the change in technology and our ability to identify DNA profiles from smaller and smaller pieces of evidence. And that is a genuine concern, that we could at crime scenes pick up evidence that was left by someone else that we didn't intend to get, but our technology is so sensitive that we can detect DNA in very, very tiny amounts. That is a very real, very genuine investigative dynamic that we will have to begin to deal with, and begin to deal with in a lot better way. Do I think that we're going to worry about where we blow our noses? No. I do, however, think that it would be a good identifying number, to make sure that we have the right person. Because you can always re-test someone to confirm that that is, in fact, their DNA profile. And that's what you can't do right now with things like a Social Security number.

MARGOT ADLER: Barry?

BARRY SCHECK: Well, I do think when we go back and look at this era, this debate is very important, and this is what distresses me. Because, you know, Chris and I can reach agreement, you know, as people that understand the technology and have dealt with it, about what these privacy limits should be. And he just says, oh, you know, and of course the samples should be destroyed. And he used to be in law enforcement. Now he's not, but, you know, they're not listening to him. And they're certainly not listening to me. And I have seen law enforcement continually take the position, with respect to DNA, if I get your DNA by some lawful means, then I can use it for any purpose whatsoever. That's the proposition that police and law enforcement stand on. And I think that that actually should not be the case, that if they take my DNA from a coffee cup that doesn't necessarily mean that the state has a right to see whether I'm going to get Alzheimer's, to see whether I have a sexually transmitted disease, and beginning to set these limits now, even getting the most rudimentary controls in place that law enforcement respects, in terms of the privacy of the DNA. You know, this is a turning point moment. If we just say, oh, let's database everybody, without really, really strict and thoughtful guidelines being enforced, we're in trouble.

MARGOT ADLER: Barry Scheck is co-founder and co-director of the Innocence Project at the Benjamin Cardozo School of Law. The Innocence Project works to exonerate the wrongfully convicted through post-conviction DNA testing, and works for reforms to prevent wrongful convictions. Chris Asplen is vice president of international public affairs of Smith Alling Lane. The lobbying firm's clients include biotechnology companies that process DNA samples. Before joining Smith Alling Lane, Chris was executive director of the National Commission on the Future of DNA Evidence. Thank you both for talking with me today.

BARRY SCHECK: Thank you, Margot.

CHRIS ASPLEN: Thank you.

MARGOT ADLER: Coming up on Justice Talking, we'll talk about the "CSI effect." Is TV's top drama changing how jurors examine the evidence? Don't go away.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. While post-conviction DNA testing has led to the exoneration of almost 200 prisoners in the U.S., the science has not always proven a quick route to freedom. Take the case of Darryl Hunt. He remained in a North Carolina prison for 10 years after DNA testing first suggested he might be innocent in a 1984 rape and murder. John Blythe has the story.

JOHN BLYTHE: On Christmas Eve, 2003, 38-year-old Darryl Hunt walked out of jail in Winston-Salem, North Carolina, to the cheers of supporters. Just days before, a DNA test had linked another man to the 1984 rape and fatal stabbing of a 26-year-old newspaper copy editor in that city. It was a crime for which Hunt had served almost 18 years in prison.

DARRYL HUNT: They say the darkest hour is before the dawn, and 2003 was pretty dark, until the DNA.

JOHN BLYTHE: That's Darryl Hunt in 2006, reflecting on the almost two decades he spent trying to prove his innocence. Hunt was 19, unemployed, and had had some minor run-ins with the law, when he was arrested and charged in the rape and killing of Deborah Sykes. Sykes was attacked shortly after daybreak as she walked the two blocks from her car to her job at Winston-Salem's afternoon newspaper. She was stabbed 16 times, raped, and beaten. The case was clouded by racial overtones from the start. Hunt is black, Sykes was white. At trial, prosecutors presented no physical evidence, but relied instead on several witnesses who placed Hunt at or near the scene of the crime. Mark Rabil represented Hunt throughout his long legal ordeal.

MARK RABIL: The quality of witnesses was horrible. The problem was, there were a number of them, and it was the coincidence that people found hard to believe. How do you get this many people from this many different walks of life to come in and say the same thing?

JOHN BLYTHE: Hunt was convicted of murder and sentenced to life in 1985. Four years later, an appeals court panel awarded him a new trial. Hunt faced a second trial for the Sykes murder in 1990, but an all-white jury found him guilty. Three years later, DNA raised a window of hope. By that time, science had advanced to allow testing of very small amounts of DNA evidence, so Hunt's attorneys asked for testing in the case. And in the spring of 1994, a judge ordered a comparison of Hunt's DNA with DNA taken from a vaginal swab of Sykes. The results showed no match. Darryl Hunt.

DARRYL HUNT: I was happy, because I thought this would be it. Finally I was able to prove my innocence, and I was just waiting to get back, to get on with my life.

JOHN BLYTHE: But Hunt's dreams of moving on were quickly squelched. In November 1994, a judge denied his motion for a new trial because of new evidence. The judge agreed with the state's assertions that Hunt was one of several people who attacked Sykes. And while he may not have raped the victim, he may still have been her killer. Prosecutors made that claim even though DNA tests done at the same time as Hunt's had ruled out the two men they said were his most likely accomplices. Hunt's attorney Mark Rabil.

MARK RABIL: There were all these theoretical Monday-morning quarterbacking justifications for why it wasn't Darryl's. The only reasonable explanation was because he wasn't guilty and because it was somebody else.

JOHN BLYTHE: Finally, in April 2003, Hunt's attorneys persuaded a trial court judge to order a comparison of DNA evidence from the Sykes case with 40,000 DNA profiles held in North Carolina's database of convicted violent felons. Mark Rabil knew this strategy was a long shot.

MARK RABIL: This crime occurred in 1984. The databases didn't start until 10 years or so later. And it's possible that the person who committed the crime in '84 was dead, without ever having a sample preserved or put into the database. It was also possible that this person went from one state to another.

JOHN BLYTHE: But in late December 2003, Hunt and his lawyers got the answer they were looking for. A partial DNA match with a felon in the state database led investigators to test that man's brother. And the DNA of the brother, Willard Brown, was a perfect match. Brown had a long criminal record, and was in jail on a probation violation when police took a DNA sample from him. Mark Rabil. MARK RABIL: It's amazing that Willard Brown was still alive, with the life he was leading. It's also a miracle that he happened to be sitting in jail where the police could find him without having to look too hard.

JOHN BLYTHE: In 1985, police had briefly considered Brown a suspect in the Sykes killing, but they never questioned him, mistakenly believing he was in prison at the time of the murder. After the DNA match in 2003, Brown confessed to raping and killing Deborah Sykes. And he told police he acted alone. In February of 2004, a judge overturned Darryl Hunt's conviction, and in April of that year, North Carolina Governor Mike Easley officially pardoned him. The state awarded Hunt just over \$358,000 in compensation.

DARRYL HUNT: They could have gave me \$365 million and it wouldn't have gave me back my 19 years in prison for something I didn't do.

JOHN BLYTHE: Hunt has used some of the state's payment to start the Darryl Hunt Project For Freedom & Justice, a group to help the wrongfully imprisoned. Married and 41 years old, Darryl Hunt lives in Winston-Salem and spends his days working with his foundation, and helping raise his 3 stepchildren. For Justice Talking, I'm John Blythe.

MARGOT ADLER: DNA evidence is known as the gold standard in forensics. We read about it in the news, we look for it in trials. Millions of people watch eagerly as investigators from their favorite TV crime show, like "CSI," lift DNA from the most unexpected places. And for these detective dramas, sometimes the DNA is more of a star than the actors themselves.

UNIDENTIFIED FEMALE: Mmm, I've seen this before. It's vomit.

UNIDENTIFIED MALE: Hers?

UNIDENTIFIED FEMALE: No. Her mouth is clear.

UNIDENTIFIED MALE: So if it's the killer's, he threw up on her. It means he's not used to killing.

UNIDENTIFIED FEMALE: Where there's vomit, there's bile. And where there's bile...

UNIDENTIFIED MALE: There's DNA.

MARGOT ADLER: Out of these fictional forensic TV shows has emerged the phenomenon known as the CSI effect. It refers to the notion that jurors now expect to be dazzled by DNA evidence in criminal investigations. To get clearer about what makes good drama on TV and what actually happens in reality, I called Lawrence Kobilinsky. He's a professor of biology and immunology at John Jay College of Criminal Justice. Lawrence, tell us about the so-called CSI effect.

LAWRENCE KOBILINSKY: The CSI effect, as you refer to it... There are really two different kinds of CSI effect. The one that most people are familiar with is the fact that people watch television and people become jurors. And so when they are asked to make decisions, to hear evidence, testimony at a criminal trial, they generally are holding prosecutors to a higher standard, which means that they fully expect to see forensic science, they fully expect to have technology working for the prosecution, and, you know, they're asking questions if that technology is not part of the case. The other kind of CSI effect, unfortunately, is the fact that criminals also watch television, and they learn that there are things that law enforcement does to collect evidence. And, of course, for every measure there's a counter-measure, and the bright criminals actually take steps to avoid being caught by law enforcement. And we see this in a very practical way when rapists, for example, will wear condoms. Or they will wear latex gloves so that they don't leave their fingerprints behind. So this show has influenced everybody. Very popular program. But again, as you rightfully pointed out, it's entertainment, it's not reality.

MARGOT ADLER: So, bottom line, how often is DNA found at a crime scene?

LAWRENCE KOBILINSKY: Well, it's found very often in different amounts, and that's the key here. Up until recently, crime labs were collecting DNA for major crimes, such as homicide, sexual assault, bank robbery.

MARGOT ADLER: So I can understand, for example, in a rape case, there would be an obvious DNA trail. But in a crime like burglary that doesn't necessarily include, you know, bodily contact, violence, you're saying that just what they might touch with their skin or...

LAWRENCE KOBILINSKY: That's correct.

MARGOT ADLER: Where would the DNA be found?

LAWRENCE KOBILINSKY: Well, for example, if somebody breaks into a home and breaks a window, it's not uncommon for them to become cut. Or breaking into a door. Criminals want to get in and out as quickly as they can, but they leave behind evidence inadvertently. The smarter criminals, as I say, are now using latex gloves, but that doesn't mean they haven't left evidence, because the average person will lose about 125 scalp hairs every day, and if a criminal drops that hair at a crime scene, that becomes crucial evidence that can be DNA tested.

MARGOT ADLER: And in rape cases, how often is DNA found?

LAWRENCE KOBILINSKY: It's found quite often. It's not always found, and I'm sure most of the listeners are familiar with the Duke rape case, in which everybody, or at least the prosecution, expected to find DNA evidence, based upon the allegations of this exotic dancer. And in fact, they did not find DNA from any of the suspects. They did find, however, DNA from the dancer's boyfriend. So the technology is good, but it's only as good as the evidence is to start out with.

MARGOT ADLER: There have been a number of thrillers, at least one that I can think of, where someone planted DNA to basically forge a certain crime.

LAWRENCE KOBILINSKY: Yes, indeed.

MARGOT ADLER: How possible is that, and has that actually happened?

LAWRENCE KOBILINSKY: It is quite possible. I am knowledgeable about a rape case where the perpetrator actually dropped a condom, where the semen was from another individual, in an attempt to throw off the police. So these things do indeed happen. It's quite simple to transfer DNA from one individual to another object, and therefore you would be vindicated.

MARGOT ADLER: So of course that makes me want to ask: How trustworthy can we consider this kind of evidence?

LAWRENCE KOBILINSKY: That's a good question. DNA is considered to be the gold standard. In other words, it is considered to be absolutely reliable. But that raises another issue. There are human beings that are doing work with DNA. They are labeling tubes, they are transferring very minute amounts of liquid from one tube to another, and any place where you have human beings involved in experimentation, there can be error, and we have to consider that.

MARGOT ADLER: Lawrence Kobilinski is a professor of biology and immunology at John Jay College of Criminal Justice. He also wrote the book "DNA: Forensic and Legal Applications." Thank you for talking with me today.

LAWRENCE KOBILINSKY: It's a great pleasure. Thank you for asking me.

MARGOT ADLER: To talk about what the future might hold for DNA collection and crimefighting, I called Paul Saffo. He's a director and fellow at the Institute for the Future, a forecasting organization based in Silicon Valley. Paul, your job is to study technologies, to make some educated guesses about how that technology will develop, and how it will impact society. We spent almost an hour talking about the use of DNA in the criminal justice system. So tell us how you think things will change in 10 years.

PAUL SAFFO: Well, the biggest change is that what is expensive and takes a bit of hassle today to collect DNA is going to get steadily cheaper and cheaper and cheaper. And it's going to be so easy to collect, and so easy to analyze it that the temptation is going to be to use it for everything. At the extreme, it may be you'll get pulled over for speeding and the cop will hand you a tongue depressor before he gives you a lecture about speeding, and say, here, lick this, and stick it into a machine.

MARGOT ADLER: So, the cop puts the tongue depressor into the person who he stops' mouth. What does he find?

PAUL SAFFO: Well, that's what's going to be interesting. Initially, it could identify you with some uniqueness as an individual, but National Geographic's already sponsoring a project where you can pay 25 bucks, they send you a tongue depressor in the mail, you send it back, and they tell you what your ancestral stock is. It was in the news this year about a guy in England who discovered he was related to Attila the Hun.

MARGOT ADLER: So if that happens in 10 years, what about in 50 years? PAUL SAFFO: In 50 years, we all get used to this stuff. You know, once upon a time, in this country, probably 50 years ago, in many parts of the country people would leave home and not think of locking their doors. And today, in most parts of the country, most people would leave home and not imagine leaving without also setting their alarm, much less making sure the doors are locked. There is a cultural memory of a way of life that disappears pretty quickly once things change. And I think people are going to become so used to being poked and prodded and having their DNA peered at that in 50 years it's not going to be a big deal.

MARGOT ADLER: Now, in an article that you wrote, you have this line: "DNA looks like fool's gold under close inspection." So, do you see a time when DNA as an identifier will become less and less useful, because people may find ways to manipulate, to falsify, to counterfeit the data?

PAUL SAFFO: Oh, absolutely. We already have, you know, stories out of Hollywood of young starlets carefully wiping their water glasses after lunch, for fear that someone's going to come over and

swipe off the little fragments of DNA from their cells on their lip, and...

MARGOT ADLER: And find what?

PAUL SAFFO: And use them to clone another starlet.

MARGOT ADLER: No. PAUL SAFFO: Yes. I mean, it's a little far-fetched, but less far-fetched than cloning a dinosaur out of cells found in a fossil record. People are being very careful about leaving little bits of themselves behind.

MARGOT ADLER: Now, we've mostly been talking about the downside of DNA collection. Do you see any positive potential for expanding the use of DNA?

PAUL SAFFO: The benefits are that over the next 50 years, this is going to revolutionize medical care. We will have mass customized drugs. You'll have a mass customized drug, tailored specifically to you and your specific condition. At least a decade away, probably longer, but in the next 50 years that'll happen. A deeper understanding of things like cancer, and other diseases, that will improve the quality of life for all of us.

MARGOT ADLER: And so that's going to be the choice; in other words, all these benefits, but maybe a loss of privacy.

PAUL SAFFO: Yes. The voices of God and the Devil are barely distinguishable, and no powerful new technology ever comes into our lives without a hidden curse. And the more powerful the technology is, the more dangerous the curse is.

MARGOT ADLER: Paul, thanks for helping us to peek into some of the possible futures in store for us in regard to DNA.

PAUL SAFFO: My pleasure.

MARGOT ADLER: Paul Saffo is a director and fellow at the Institute for the Future, a forecasting organization based in Silicon Valley.

Do you think everyone arrested for a crime should have to give a DNA sample? Or should it just be required for those convicted of violent offenses? Share your opinion at our website, justicetalking.org. While there, you can also listen to past shows, and you can sign up for our podcasting service. Thanks for joining me. I hope you'll tune in next week. I'm Margot Adler.
