

March 9, 2004

U.S. Senator Orrin G. Hatch
United States Senate
Committee on the Judiciary
104 Hart Office Building
Washington DC 20510

**Re: H.R. 3214; S.B. 1700 Advancing Justice Through
Technology Act of 2003**

Dear Senator Hatch:

We write on behalf of the New England Juvenile Defender Center (NEJDC) to oppose Section 103 of H.R. 3214 and S.B. 1700, the Advancing Justice Through DNA Technology Act of 2003, now pending before the Senate Judiciary Committee.

H.R. 3214, passed by the House of Representatives last year, has been referred to the Senate Judiciary Committee, which is also considering the Senate version, S.B. 1700. Both the House and Senate versions include Section 103 which would allow the addition of juvenile DNA information to the Combined DNA Index System (CDIS), so long as the information is collected pursuant to applicable state law. Although the House version of the bill has language that may exclude juveniles who have been charged but not convicted of an offense, the original language of the bill is retained in the Senate version and would allow inclusion of DNA information from juveniles who have been arrested but never convicted of any offense.

Although it includes some important measures which would help to remedy wrongful convictions, the Act also contains provisions which would damage the juvenile justice system without a commensurate increase in public safety. If passed in its current form, the bill would sanction the expansion of DNA collection at the state level to include juveniles adjudicated juveniles of even the most minor offenses. And it would support the permanent retention of samples from juveniles who are not adjudicated delinquent. Authorizing states to collect so much data would significantly erode the presumption of innocence, undermines the basic underpinnings of the juvenile justice system, while acutely jeopardizing the privacy of innocent persons.

These dangers to individuals would occur through passage of H.R. 3214 and S.B. 1700 without any proof that increases in collective public safety would result.

For these reasons and others delineated below, the New England Juvenile Defender Center (NEJDC) strongly opposes the legislation and urges you not to support its implementation as regards juveniles.

The New England Juvenile Defender Center

The NEJDC is an organization devoted to improving the quality of representation for court-involved youth and promoting justice for all children. One of several regional centers established by the American Bar Association, the NEJDC is specifically concerned with the youth of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Our volunteer board includes representatives of public defender agencies, law schools, non-profit organizations, and the private bar.

We believe that court-involved children benefit when we go beyond our traditional, narrowly defined roles within the courts to participate in cooperative efforts with schools, government agencies and community organizations to improve public health and safety through sensible reform of the juvenile justice system

Unfettered State Access to Juveniles' DNA Information Will Be Harmful

No one questions the enormous benefits that can come from proper use of DNA identification technology in criminal cases. Such evidence, often used in the most serious and violent cases, can make conviction of the guilty more likely. Moreover, DNA's role in proving the innocence of previously convicted persons has played a dramatic and vital part not only in achieving justice in individual cases, but in prompting a healthy re-examination of the functioning of the system.

Those benefits have contributed to the flurry of state legislation to expand DNA databanks in recent years. The existence of these databanks and the federal role in encouraging and supporting collection of samples from convicted adults, prompts the need for care in protecting associated rights and freedoms. The bill now under consideration, however, removes virtually all constraints on collection including limiting collection, to type of offense, likelihood of recidivism, or even adjudication in a juvenile court.

A. DNA Collection & Criminal Offender Data Status in New England States Today

Three states in New England, Maine, Massachusetts and New Hampshire, have enacted legislation to collect DNA samples from youth. Notably, the parameters for collection of the samples have been narrowly limited to juvenile sex and/or violent offenders.¹ Our concern is that the current legislation, would signal that such careful tailoring is no longer necessary.

Confidentiality and protection of juveniles through expunging and sealing their records is unevenly available in the New England region. What *is* consistent is inadvertent, inaccurate, and irremediable disclosures of juveniles' arrest information and court dispositions. This is typically due to states' ability to produce this data to authorized recipients as well as state's *inability* to ensure that the data is accurate and released appropriately to the proper recipients. It is many defenders' experience that the

¹ 25 M.R.S.A. Section 1572, M.G.L. ch 22E (3), N.H. Rev. Stat. Section 651-C:1.

states do not have the resources to ensure *appropriate* protection of this information. Giving states more power to collect more information at a time when they do not have the resources for ensuring quality control currently for the release of written data, is highly problematic.

B. Impact on New England Juvenile Justice Systems' Purpose & Success

Most juveniles report that they have been involved in minor (misdemeanor) violations of the law. About one third of males in the U.S. will be arrested before turning 18, but only about 6% of offenders are responsible for 50% of juvenile crime. Notably, study after study demonstrates that the majority of this small group of youth is incarcerated for nonviolent offenses. And recent studies on disproportionate minority confinement consistently show that apprehension and prosecution are often due to accidents of minority or disability status; single incidents are not reliable indicators of future criminality.

The traditional focus of the juvenile system on confidentiality, treatment and the supports necessary for rehabilitation carries significant benefits. While the juvenile justice system has been subjected to repeated attacks over the last several years, it has also been shown to produce better outcomes in terms of recidivism and public safety than the adult system.

Children tried and punished as adults are much more likely to commit new offenses than similarly situated children treated in the juvenile system. Former Senator Alan Simpson, reflecting on his *own* experience *as a young offender* in the justice system, said "Anybody in our society—unless they are totally out to lunch—can understand that a guy of 22 or 25 is not the same guy of 17 . . . I don't know what they [the juvenile justice system] are doing right, but it is sure a lot more right than what they were doing wrong."

Federal support of collecting juveniles' DNA sample would be inconsistent with the main purpose of the juvenile codes of the states in the New England region: rehabilitation. Rehabilitation relies on the premise that services and guidance to young people can offer them the "second chance" they need to turn their lives around. It would also erode the century-old belief that juveniles must be treated differently than their adult counterparts.

In these ways, this legislation would insidiously signal a reduced commitment to rehabilitative goals. As one scholar on the issue of the ethics of DNA sampling put it, court involved children will essentially become "suspects for life."

C. Disparate Impacts on Children in the New England Region

The addition of juveniles to the national DNA databank is likely to unfairly burden minority youth and youth with learning disabilities.

Minority juveniles are incarcerated at a higher rate than their white counterparts in Connecticut, Massachusetts and Rhode Island, even accounting for different offending rates. This means that entry of DNA information from the juvenile population may amplify pre-existing racial disparities through the use of a measure which will bring the lifelong identification as suspected criminal and raise equal protection issues.

Another likely victim of the addition of juvenile DNA to CODIS will be disabled students. Such children are much more likely to be caught up in the juvenile justice system. School behavior problems are increasingly being referred to juvenile courts in this era of zero tolerance policies, and students whose behavior is a manifestation of their disability are much more likely to encounter school authorities who find it more expedient and less expensive to send such children to the juvenile justice system, rather than provide them with appropriate and least restrictive services through the Individuals with Disabilities Education Act. Including samples from such children in a permanent national database would be the ultimate vote of no confidence in a population whose challenges in life are already profound. It is not the message the federal government should be sending.

In Conclusion

For these varied and many reasons—all of which go to the heart of the question, what tactic would best serve youth and public safety—we urge the Senate Judiciary Committee to set aside Section 103 of H.R. 2314 and S.B. 1700. This legislation risks too much and promises too little.

Very truly yours,

Michael Skibbie and George Oleyer, Chair
Board of Directors