

The Uncertain Consequences of EU Criminal Justice Cooperation: Treating Citizens as Criminals or Criminals as Citizens?

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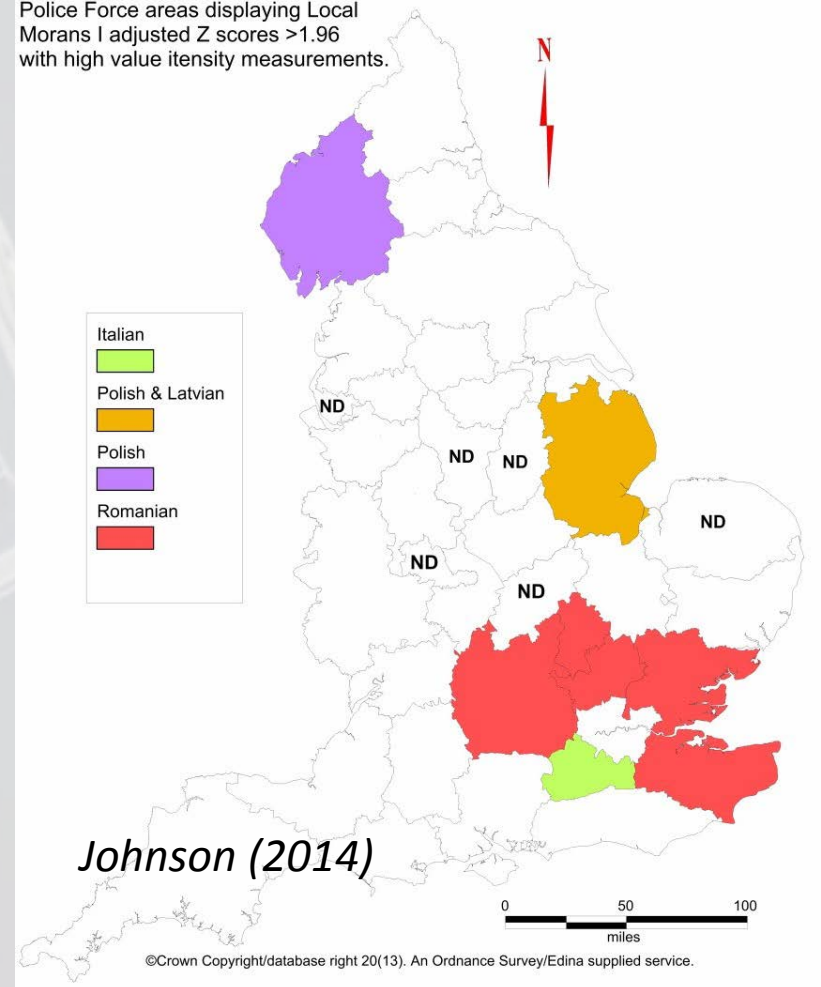


Cross-border crime & data exchange: a rich source of legal complexity

- A transactional externality resulting from increasingly globalised economies and societies
- In compliance with Austrian employment law the outsourcing firm G4S had to dismiss a Sri Lankan man it employed at Vienna Airport after he was charged with suspected involvement in human trafficking to UK and USA. *The Independent*, 27.05.15

Figure 3.

Police Force areas displaying Local Morans I adjusted Z scores >1.96 with high value intensity measurements.



Citizens, criminals, recidivists and suspects

- Generally speaking since the late nineteenth century the collection, retention & exchange of information has extended beyond investigation or trial purposes under judicial control:
 - Initially to cataloguing recidivists (e.g. in response to the migration of rural poor in France, Cole, 2001)
 - More recently to holding forensic biometric data in anticipation of potential offending (i.e. extending under national law to the statutorily regulated retention of some DNA profiles and fingerprints despite acquittal).
- Possibly the greater part of this retained and exchanged information, however, is held for investigation and prosecution purposes. This may be for enquiries that will go nowhere unless information is exchanged nationally or internationally (the focus of panel WED15).

Uncertain Consequences: Citizens as Criminals or Criminals as Citizens?

- Three interrelated socio-legal issues:
 - a) Might the Prüm forensic biometric exchange (i) reinforce the treatment of significant numbers of citizens as potential criminals or (ii) recognition that criminals are also citizens?
 - b) Contrasts questions about Prüm derived from bioethics and the sociology of science with an analysis based on the EU legal order?
 - c) Considers whether the EU legal order might have sting in its tail that could prolong any uncertainty?

Questions: a bioethical perspective

- Criminal justice bioethical issues ‘are likely to concentrate around relatively few issues; most of them issues of trust’. The mandatory collection of data should command public trust and use must conform to the purpose of collection (O’Neill, 2002).
- ‘.... a third principle, of equal importance, can either be inferred or developed from O’Neill’s analysis conclusions drawn from the use of forensic genetic data should be supported by rigorous, transparent and auditable technical (laboratory bench processes) and procedural (all non-laboratory-bench processes) standards’; also **(3a)** need for cost-benefit justification (McCartney, Wilson & Williams, 2011)

Questions: the possibly tangential under a Kantian lens

- [van der Ploeg] ... argues that the breach of bodily integrity – and thus dignity – that results from the taking of buccal swabs is a serious one, and one whose significance is acknowledged by legal debates ... in a number of criminal jurisdictions (quoted by Williams and Weinroth, 2014,b)
- Baroness O'Neill of Bengarve (2011): ‘... before we go further with the fantasy of newborn babies being separated from their mothers to be swabbed, let us remember that all newborn babies have a pinprick test of their heels in order to get a blood sample ... We should discuss the uses of databases rather than what exists or how samples are taken.’

Questions: a bioethical perspective refracted by a Kantian lens

- Baroness O'Neill of Bengarve (2011): '... information ... [on a DNA] database is not revealing information, such as susceptibility to disease ... It is a selection of the DNA evidence that used to be referred to as "junk DNA" In that respect it is what in other aspects of privacy legislation is called an identifier. That suggests that in some ways it is less personal than a photograph of someone's face.'
- This is wholly consistent with *Autonomy and Trust in Bioethics*, 2002, in which her position on the balance between individual and social goods includes the view that 'individual autonomy should be allowed its due place, but no more' and is generally sceptical about recourse to declarations of rights such as ECHR as a philosophically questionable reliance on authority.

Questions: the interrogation of promissory narratives

- (Prainsack and Toom, 2012) remind us that:
 1. Crime is a social phenomenon whose problems cannot be resolved by technology [alone]
 2. The development of the Prüm exchange technology has been more difficult than anticipated and 'hit' results in individual cases will require rigorous analysis
 3. To work effectively/justly requires resources
- There may be questions, however, about the extent to which such an analysis might be rooted in too a narrow definition of 'forensic' [science] and may exaggerate EU legal harmonisation vis-à-vis the margin of appreciation allowed by ECtHR/the Prüm regime's respect for differences in national laws.

'technologies of hubris' (Jasonoff, 2003): misrepresentation & focus risks

19th Century Conservatory at Chiswick House, west London, where it is pictured being tended by head gardener Fiona Crumley. It is thought to

be complete. Today the conservatory is home to 36 camellias, including seven so rare that they have not even been identified.

Revealed, how DNA solves just one in 1,300 crimes

By James Slack
Home Affairs Editor

TV crime shows may have created the myth that DNA can solve almost every grisly crime – but the reality is very different.

As few as one in every 1,300 crimes reported to the police is solved by the national DNA database, according to a report released by MPs yesterday.

The research shows that – despite the massive expansion in the Government database – only 3,666 crimes are detected every year with links to an existing DNA profile.

That is one in every 1,300 of the 4.9 million crimes carried out, and just one in 350, or 0.3 per cent, of the 1.3 million crimes solved by police, according to the home affairs select committee.

The very low figures will come as a surprise to viewers of TV programmes such as *Crimewatch*, *Waking the Dead* and *Cold Case*, where DNA is often vital to cracking the case.

They will also heap new pressure on ministers over their plans to continue to store the DNA of innocent people for up to six years. Critics believe the database is another step towards a Big Brother society.

During an investigation into the database – which now holds five

million samples – senior police officers told the committee that around 33,000 crimes are solved using DNA matches.

But many of those would be solved even without a national database, the report said. The figure included crimes where the DNA was taken from a suspect the police were already questioning, then matched to the crime scene.

Crimes that a suspect asked to be taken into consideration were also included, even though only the first

offence may have involved DNA. The campaign group Genewatch said removing these 'indirect detections' reduced the number of crimes solved by DNA to 3,666.

The MPs' report states: 'It is impossible to say with certainty how many crimes are detected, let alone how many result in convictions, due at least in part to the matching of crime scene DNA to a personal profile already on the database, but it appears it may be as little as 0.3 per cent.' The MPs say the

THE POLICE SHOWS THAT WOULDN'T HAVE A CLUE



A scene from *Waking the Dead*

■ **Silent Witness:** Police investigating the murder of a gay man find that DNA in his killer's skin cells contains evidence of a rare Jewish genetic disease. A married Jew whose DNA matches is arrested but it later emerges the killer was his estranged brother, exiled from the family because of his sexuality.

■ **Law & Order:** Police Investigator Daisy Chao is found murdered. Fraudster Emma

Kim is then attacked by a cab driver. DNA from both scenes implicates Emma, who killed Daisy before she could expose her fraud and then faked her own beating.

■ **Waking the Dead:** The daughter of a photographer refuses to believe his apparent suicide. Pathologists find the body's DNA does not match that of the daughter – and so it cannot have been her father after all.

whole point of the DNA database – which contains samples taken from up to one million innocent people – was supposed to be that those who gave samples could be convicted of crimes they commit later.

But they found that the Government does not have figures for the precise number of cases where DNA has solved a crime.

Committee chairman Keith Vaz said: 'DNA profiling and matching are vital tools in the fight against crime. However, especially in the

case of those who are arrested and have their DNA taken but are then never charged, or never convicted, it is a very complex issue to balance the potential benefit of retaining their data against the threat to individual privacy.'

Currently genetic profiles from such people are held indefinitely.

The European Court of Human Rights has ruled that it is illegal to store indefinitely their DNA.

In response, the Home Office is planning to store the DNA of innocent adults who are arrested but never convicted for six years, then delete it. The legislation is being debated by Parliament.

Former shadow home secretary David Davis said the report called into question the Government's claims about the effectiveness of the database. 'The Prime Minister is clearly wrong and is yet again guilty of publishing bogus statistics,' he added.

Alex Deane, director of campaigners Big Brother Watch, said: 'The case for further expansion of the database has been exposed as being totally unjustified.'

A Home Office spokesman said: 'Retaining profiles on the database helps provide thousands of crime scene matches every year, especially in the detection of many violent and serious acquisitive crimes.'

Questions: the apparatus of surveillance

- Little public support for the introduction of a Portuguese DNA database: lack of confidence in public institutions and a perception that criminal justice is corrupt, resulting in a comparatively restricted collection and retention regime (Machado and Silva, 2010).
- Also ‘criticisms of expansionary DNA profiling regimes have been voiced sporadically and in an insular manner, for example by the activist German ‘Campaign against DNA collection frenzy’ Williams and Wienroth (2014,a).
- In contrast to extensive and lengthy debate in the UK, Williams and Wienroth (2014,b) noted in general ‘an apparent absence of active and public policy debate in Europe’ about forensic genetics.

Cross-border crime/criminality/data exchange: the EU legal and

- Some legal instruments: EAW, EIO, SISII, ECRIS, **Prüm**, decisions/directives on data protection, disclosure of information to suspects and access to translations/legal assistance, ECHR and CFREU
- ... **Constitutional order** : EC/Council, EU Parliament, EDPS, Europol, Eurojust, ECJ, ECtHR and national equivalents
- *Alternatives*: international conventions/agreements and Interpol (variable transparency, governance and extent justiciable?)

Fortuitous developments in constitutional criminal jurisprudence

- The criminal law has always had special legal, moral and social significance for all citizens.
- The emergence of what is sometimes termed constitutional criminal jurisprudence, particularly in response to ECHR, has been a major influence in development of criminal justice procedures in approximately the same period as the emergence of modern forensic biometrics (i.e. including the digitization of fingerprints in AFIS technologies).
- This is timely because it has strengthened and refined principles ((i) proportionality (ii) lawful process, (iii) fair and timely proceedings, (iv) right to privacy, and (v) the prohibition of discrimination) that protect citizens generally and also provide the key elements for governing forensic biometric databasing (both use and consequences).

Fortuitous developments in constitutional criminal jurisprudence

- If we examine the operation and implications of Prüm against (i) a broader definition of ‘forensic’ [of, pertaining to a court of law ...] and (ii) the EU legal order as a whole, it is possible to see how the consequences of criminal justice cooperation might engage other rights, including the prohibition of inhuman or degrading treatment.
- For example, in a EAW rendition from the UK (*Florea v The Judicial Authority Carei Courthouse, Satu Mare County, Romania* [2014] EWHC 2528 (Admin) (30 July 2014) seeking an undertaking that a sentence would be served in a Romanian prison without contravening the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) space standards.

Potentially conflicting legal doctrines: Luxembourg v Strasbourg?

- ‘.... the Strasbourg Court has an important role to play in underlining that the EU principle of mutual recognition, although a lynchpin of European integration, must not threaten fundamental rights and subvert the very values of the EU. ...Whereas the ECJ usually balances mutual trust and fundamental rights by presuming human rights compliance by its member states, rebuttable only in severe cases of systemic violation, the ECtHR applies no such presumption’ (Douglas-Scott, 2015).

Conclusions (1)

- The 'deep seated normative tensions' in criminal justice procedures (Roberts , 2010) extend to related enquiries and initiatives such as Prüm.
- These tensions or anxieties can be understood most comprehensively (not necessarily exclusively) by the evaluation of Prüm as one element within the developing – but far from unproblematic - EU legal order for criminal justice cooperation.
- The socio-legal approach to such issues has a marked deontological orientation.

Conclusions (2)

- Common ground between the evaluation of Prüm as an element within the developing EU legal order and other modes of enquiry include:
 1. The test of proportionality as the keystone (suitability, necessity and fair balance)
 2. Supported also by (a) accurate and comprehensive information; (b) evidence of integrity/propriety in the use of the Prüm arrangements; (c) confidence that EU criminal justice cooperation will be treated and funded (adequately) as a global public good

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