

# Chapter 3

Ethical values  
and human rights





# Ethical values and human rights

## Introduction

- 3.1 The protection of the public from criminal activities is a primary obligation of the state. However, this obligation must be exercised with due respect for a number of fundamental ethical values and in the light of modern legislation on human rights. Our justifications for adopting one approach to forensic databases rather than another are framed in terms of these ethical values and the legal rights through which they are expressed in the United Kingdom. In this chapter we briefly introduce some of them.
- 3.2 The values with which we are primarily concerned are *liberty, autonomy, privacy, informed consent* and *equality* (paragraphs 3.4–3.16). These values are not absolute. There is a strong presumption in liberal democracies in favour of not restricting them, but the presumption can be overcome in appropriately circumscribed contexts for compelling reasons backed by appropriate empirical evidence. In the present context the most important overriding consideration is the public interest in the successful investigation, prosecution and conviction of those who commit crime, an aim that, moreover, seeks to promote the value of liberty for the population as a whole (paragraphs 3.4 and 3.19). The method by which we seek to balance these moral goods depends upon whether we take a *utilitarian, rights-based* or *duty-based* approach (see paragraphs 3.20–3.23). We broadly endorse a rights-based approach, which recognises both the fundamental importance to human beings of respect for their individual liberty, autonomy and privacy, and the need, in appropriate circumstances, to restrict these rights either in the general interest or to protect the rights of others. The principle of *proportionality*, which is relevant in both ethical and legal debates, is at the heart of many of the recommendations in this Report (paragraphs 3.27–3.28).
- 3.3 The legally enforceable human rights that are relevant to our justifications include the right to a *fair trial*, the right to *respect for private and family life*, and the right to *equal treatment*. Any interference with these last two rights must be *proportionate* (paragraph 3.32).

## Ethical values

### *Liberty*

- 3.4 In this Report we use the term ‘liberty’ in two distinct senses. The first is freedom from legal restraint, or what is usually called negative liberty. One could say that liberty in this sense is reduced by police powers to take and retain fingerprints and DNA profiles and samples without consent. Noting this infringement does not imply that one necessarily opposes such powers, provided that they are exercised reasonably and proportionately. The second sense in which ‘liberty’ is used is to describe the necessary conditions for the freedom which we believe people ought to be able to enjoy in modern liberal societies. For example, we might say that in order to promote the liberty of all citizens, each needs to act in ways that protect both them and others from criminal activities, or in such a way as to avoid unfair discrimination. As this second sense of ‘liberty’ makes clear, however, we do not equate liberty simply with licence: not every constraint on people to act as they might wish is an interference with liberty, and such constraints may indeed promote liberty in the second sense. For example, even the most minimal state is likely to recognise a responsibility to take action to prevent people from killing or robbing one another, and such action to promote the liberty of the wider population will inevitably involve some form of restriction on the freedom of action of the individual. Nevertheless, we do recognise that a justification must be shown for any infringement of the negative liberty of the individual (see paragraph 3.17).

### Autonomy

3.5 There is no single accepted definition of 'autonomy', although as Onora O'Neill notes, most are based on some notion of independence and personal responsibility.<sup>1</sup> For Kant, autonomy means the distinctively human capacity for rational thought and action in accordance with the moral law. It is this capacity which underlies the moral imperative to treat individuals as 'ends in themselves': "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means".<sup>2</sup> Moreover, "he is under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being".<sup>3</sup> Hence, according to Kant, human capacity for autonomy and the value we place on it underpin the moral requirement to treat all human beings with dignity. John Stuart Mill, while rarely using the actual term 'autonomy', places great weight on the 'free development of individuality' as being one of the leading essentials of well-being.<sup>4</sup> Frankfurt,<sup>5</sup> on the other hand, puts more emphasis on the idea of self-governance, describing autonomy as the ability to live our lives in the way we 'truly' wish them to be, instead of simply following our first, perhaps more basic, instincts. In all these definitions, it is useful to note the distinction between a human being's *capacity* for autonomy and the political and material conditions which make it possible for individuals to *exercise* their autonomy. This latter could be characterised either as a moral right arising out of the value placed on that capacity or as a duty to treat human beings in a particular way by virtue of their capacity for autonomous behaviour.

### Privacy

- 3.6 It is generally recognised that every one of us has a protected zone of privacy into which neither the state nor other persons should intrude without our permission. This can be seen as derived from a more basic right to autonomy, or as a precondition for the exercise of autonomy, or as an independent moral principle. The precise derivation of privacy does not matter for present purposes, but it does matter that protection of privacy is not an absolute moral principle. A balance between privacy and other ethical considerations has to be found.
- 3.7 The precise extent of this protected zone is difficult to define. There are two conceptions that are useful for our discussion: *spatial privacy* and *informational privacy*. *Spatial privacy* is "a state of non-access to the individual's physical or psychological self".<sup>6</sup> This is invaded by the non-consensual taking of biological samples and fingerprints, and, to a lesser extent, by unwanted surveillance of the individual. Clearly the principle of respect for bodily integrity comes into play, especially in considerations concerning how samples can be obtained. Activities that not only interfere with a person's privacy but also interfere with their actual body are usually thought to require stronger justification than those that merely infringe informational privacy. It is a basic ethical and legal principle that a person has the right to control access to his or her own body and that interventions in the body require explicit consent, or extremely strong justification.
- 3.8 *Informational privacy* refers to personal information about an individual that is ordinarily "in a state of non-access to others".<sup>7</sup> This encompasses all the kinds of information about ourselves (which are not already public knowledge) that we would reasonably regard as intimate or

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1. See, for example, the discussion in O'Neill O (2002) *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press), p28ff).

2. Gregor M (Translator and Editor) (1997) *Kant: Groundwork of the Metaphysics of Morals*, (Cambridge: Cambridge University Press), p38.

3. Gregor M (Translator and Editor) (1996) *Kant: The Metaphysics of Morals* (Cambridge: Cambridge University Press), p209 [first published 1797].

4. O'Neill O (2002) *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press), p30.

5. Frankfurt H (1971) Freedom of the will and the concept of a person *Journal of Philosophy* 68: 5–20, reprinted in Christman J (Editor) (1989) *The Inner Citadel: Essays on individual autonomy*, pp63–90 (Oxford University Press).

6. Laurie G (2002) *Genetic Privacy: A Challenge to Medico-Legal Norms* (Cambridge: Cambridge University Press), p6.

7. *Ibid.*

sensitive, and which we would therefore want to withhold or whose collection, use and circulation we would wish to control.<sup>8</sup> Some of the information in a person's genome falls within this category, for example information about risk factors for disease or family relationships, but it is disputed whether all genetic information merits strong protection. Where genetic information cannot be linked to a particular, identifiable individual, for example by being anonymised, then there is far less reason to object to its use for research. Similarly, a genetic profile does not in itself disclose sensitive medical information or reveal family relationships, but the related sample linked to an identifiable individual does have such potential. Accordingly, our privacy interests are less strong for a DNA profile compared with a biological sample, and our claims in respect of each likewise differ.

- 3.9 One aspect of privacy is *anonymity*: "the right of the individual to escape from the intense surveillance situations of small communities".<sup>9</sup> Anonymity gives individuals and families the opportunity to live down their past and to enter into new relationships. Those who have previously engaged in criminal activity may need this to become rehabilitated and to live a decent life. The indefinite retention of biological samples deprives those included on the National DNA Database (NDNAD) of some aspects of this freedom because a match between their genetic material found at any crime scene – and independent of their involvement in the offence – will result in their inclusion in a criminal investigation. Accordingly, there must be sound justification for depriving them of their anonymity.
- 3.10 'Genetic exceptionalism'<sup>10</sup> suggests that genetic information is qualitatively different from other personal information. This notion may be significant in other contexts, but it is largely irrelevant for our purpose, where what is important is simply that some genetic information is intimate and sensitive, and that the use of that kind of information should be justified.

### ***Informed consent***

- 3.11 In contrast to criminal justice samples taken from those arrested for involvement in a crime, elimination samples taken from witnesses or other volunteers may only be processed in accordance with the consent of the person concerned. The informed consent of individuals, of mature age and full mental capacity, removes any ethical objection based on liberty or autonomy to the taking, processing and retention of biological samples for DNA analysis and of fingerprints. Informed consent in this context operates as a form of legitimisation:<sup>11</sup> the individual may act freely and autonomously so as to give up their right to privacy to a specified extent. There is an important underlying element of trust in such an action, as the police and others with access to the genetic information or fingerprints are, in return, under a duty to respect the terms on which informed consent was given. As Onora O'Neill has said:

"First, it is important that data are obtained only by acceptable procedures, and in particular that there is no unacceptable coercion or deception... Second, it is important that data are held and disclosed in ways that prevent their use for purposes that lie outside the consent given, or outside the proper procedures of the relevant public authorities."<sup>12</sup>

- 3.12 Issues arise as a result of the irrevocability of any consent given: if consent to the taking and retaining of samples is to be regarded as a free decision to surrender a certain degree of privacy,

8. Wacks R (1994) *Personal Information: Privacy and the Law* (Oxford University Press), p26.

9. Wood DM (Editor) (2006) *A Report on the Surveillance Society for the Information Commissioner by the Surveillance Studies Network*, paragraph 11.2.1.

10. See the discussion by Manson NC and O'Neill O (2007) *Rethinking Informed Consent in Bioethics* (Cambridge: Cambridge University Press), pp133–45.

11. Beylveled D and Brownsword R (2007) *Consent in the Law* (Oxford: Hart Publishing), Chapter 11.

12. O'Neill O (2002) *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press), p107; and more generally, Manson NC and O'Neill O (2007) *Rethinking Informed Consent in Bioethics* (Cambridge: Cambridge University Press).

the justification for that invasion of privacy will be lost if the consent is withdrawn. We discuss this issue further in Chapter 4.

3.13 Additional issues arise if identifiable samples or profiles on a forensic database are used for research outside the narrow context of identification and police investigations. Normally any kind of research involving identifiable genetic information requires explicit informed consent from the persons from whom the genetic material or information has been derived.<sup>13</sup> The current presumption that consent is necessary in the (genetic) research context is the result of a long historical development where consent requirements have come to be seen as extremely important and one of the ways in which protection of personal interests in autonomy, privacy and bodily integrity can be secured. Although there is an ongoing debate about consent in research and the circumstances in which the consent requirement can be waived,<sup>14</sup> the burden of proof clearly falls on anyone who suggests that a particular kind of genetic research can take place without explicit consent. In Chapter 6 we contend that for non-operational research (that is research that is not directly related to a specific police investigation) using either DNA profiles or the biological sample, there must be safeguards in place that will ensure the irreversible anonymity of the samples. Non-operational research without consent on identifiable forensic samples cannot be justified.

### **Equality**

3.14 The possibility of intensified surveillance of those individuals whose profiles are retained on forensic databases, as potential suspects, leads to the possibility of increased social exclusion of certain groups, such as young males and black ethnic minorities, who are disproportionately represented on the NDNAD (see paragraphs 4.63–4.66). An important issue to be considered is whether this disproportionality is a reflection of police arrest, charge and cautioning processes, or other social or institutional factors, or whether it is a result of an inherent bias in the NDNAD. Police powers to take and retain biological samples and the resulting DNA profiles may aggravate social tensions by discriminating against those who live in police 'hot-spots' or belong to groups more likely than others to be targeted by police.

3.15 The principles usually called upon to help us resolve these issues are those of equality and non-discrimination. While it is difficult to identify a single meaning of these concepts that will be applicable in all circumstances,<sup>15</sup> one meaning, based on the moral premise that people's lives and fundamental interests are of equal worth, is that 'likes' should be treated alike unless there is justification for not doing so. This is regarded not only as a key ethical value, but also as a fundamental principle of justice,<sup>16</sup> and of good administration. It requires "that where the exercise of governmental power results in unequal treatment it should be properly justified, according to consistently applied, persuasive or acceptable criteria".<sup>17</sup> One difficulty is determining who are similarly situated 'likes'. Almost all processes in the criminal justice system involve drawing distinctions between people: those who are victims or witnesses and those who are suspects; those who are suspects and those who are charged; those who are charged and those who are convicted; those convicted of minor offences, and those of serious offences; and between those who are adults and those who are juveniles or children. Although all these distinctions are normally legitimate for the prevention and investigation of crime, other distinctions, notably those based on grounds of race, gender, sexual orientation, religion, age or

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13. Human Tissue Act 2004, Part 1.

14. Manson NC and O'Neill O (2007) *Rethinking Informed Consent in Bioethics* (Cambridge: Cambridge University Press).

15. McCrudden C (2002) Equality and Non-Discrimination, in *English Public Law*, Feldman D (Editor) (Oxford: Oxford University Press), p582.

16. See, for example, Lord Hoffmann in *Arthur J.S. Hall v Simons* [2000] 3 All ER 673 at 689.

17. McCrudden C (2002) Equality and Non-Discrimination, in *English Public Law*, Feldman D (Editor) (Oxford: Oxford University Press), p614.

disability, require strict scrutiny if and when they are used as the basis for differential treatment, so as to ensure that they are both appropriate and necessary to achieve a legitimate purpose.<sup>18</sup> This is heavily dependent on the context. For example, the inferring of ethnic appearance (if reliable, see Chapter 6) or evidence of gender from a DNA profile may be argued to be both appropriate and necessary in the search for a suspect.

- 3.16 A second meaning of equality is that social goods should in principle be distributed among everyone without distinction unless differences can be justified. Accordingly, the state should respect and protect the right of everyone to have an equal opportunity to partake in the 'goods' of social collaboration and no one should have more than an equal risk of suffering any 'evils' that arise through particular social arrangements. Deviations from this principle must be justified. In the context of forensic databases, any unequal distribution across social groups in the likelihood of having a sample taken or a profile entered into the NDNAD must be carefully scrutinised so as to make sure that an unequal burden is not being unjustifiably laid on some specific social group. Overrepresentation of a specific group on the NDNAD compared with other groups, whether defined by class, race, gender, age or some other characteristic, thus demands examination and needs a convincing justification. Indeed, public authorities are now legally obliged to ensure that they take active steps to promote equality in a range of areas, including race, disability and gender.<sup>19</sup> As a result, the Association of Chief Police Officers (ACPO) has recently commissioned an Equality Impact Assessment of DNA profiling, which should lead not only to an explanation of disparities in arrests and inclusions on the NDNAD, but also to active steps to remove any practices that unjustifiably cause those disparities (see paragraph 4.64).

### Justifications of invasions of liberty, autonomy and privacy

- 3.17 The ethical values we have been discussing are important when considering any restrictions that should be put on the ways in which biological samples and fingerprints are obtained, and whether, and for how long, they should be retained. They point towards a default ethical position of requiring consent to the taking and retaining of samples, on the basis that such consent legitimises what would otherwise be interference with an individual's negative liberty and autonomy (see paragraphs 3.11–3.12). Deviations from this default position can be justified in various ways, most notably by invoking the public interest in general. By calling this a 'public interest', we want to emphasise that this is not just an interest of 'the state'.<sup>20</sup> Alternatively, one may invoke a more specific interest in the efficient investigation of crime, or one may claim that someone who has committed a crime has forfeited the full extent of their rights to protection of liberty, autonomy and privacy.
- 3.18 It is clear that a well-functioning forensic database has the potential to promote the public interest to a significant degree, but to argue convincingly that this justifies overriding identifiable personal interests or rights requires a number of further steps. The different ways in which a forensic database can be managed means that we need to answer specific questions. Which of the different possible arrangements best balances public and private interests? Does retention of profiles or fingerprints until death, for instance, promote the public interest significantly more than, say, retention for 20 years, until the age of 50 or until ten years after last conviction? Conversely, are an individual's interests infringed to significantly different degrees, depending on the time-span? Alternatively, would the public interest be sufficient to justify a database covering *all* citizens, thus avoiding any concerns as to discrimination? (See paragraphs 4.73–4.78.) Like all other areas of

18. In the legal context, legislation prevents status harm from discrimination on particular grounds such as race, gender, sexuality, disability and age.

19. On the duty of the police in relation to racial equality, see paragraph 4.60.

20. For our purposes, it is not necessary to discuss whether this interest is in the final analysis reducible into individual interests or whether there is an irreducible element of a group or societal interest.

policy, it is important that the public interest that is adduced is not merely a hypothetical interest, but that there is convincing evidence that any specific expansion of the forensic Database will actually lead to a significant improvement in the prevention or investigation of criminal acts.

- 3.19 In modern liberal democracies there tends to be an emphasis on the need to achieve a careful balance between personal liberty and the common good.<sup>21</sup> The greater the threat to social order, the stronger are the arguments for the curtailment of personal freedom. This approach has been very prominent in political discourse in the United Kingdom over a range of issues concerning civil liberties, including the control of serious and organised crime and of terrorism. It is reflected in the case presented to us as part of our consultation by ACPO, the Home Office, the NDNAD, and the Scottish DNA Database and many others, that the relatively small loss of personal liberty involved in taking and retaining DNA samples and profiles is outweighed by the large gains in personal security and social order through the more effective detection and conviction of offenders. At the same time, critics of the increasing use of DNA profiling and the associated Database are concerned that the scientific and technical advances should be compatible with the 'due process' considerations that are of central concern in modern criminal justice systems, with appropriate emphasis on the value of protecting individual privacy, autonomy and liberty.
- 3.20 The method by which one seeks to resolve these conflicting interests depends on the philosophical approach adopted. Three major approaches are *utilitarian*, *rights-based* and *duty-based*. *Utilitarianism*, in its essential form, holds that there is just one moral principle: to seek the greatest benefit of the greatest number. It is thus one form of consequentialism, where the morality of any action is judged solely in terms of its consequences. A 'pure' utilitarian, therefore, would support increased DNA profiling and sampling if this could be shown to maximise aggregate social welfare. However, those who subscribe to a utilitarianism of the kind espoused by John Stuart Mill believe that 'the free development of individuality' is an essential element of human well-being, and that hence "there is a limit to the legitimate interference of collective opinion with individual independence".<sup>22</sup> They would therefore argue that a key factor in protecting the common good would be a strong emphasis on individual liberty. Thus, although a utilitarian approach does not explicitly include a 'balancing' of competing interests, the very attempt to maximise social welfare would in itself incorporate a balancing exercise.
- 3.21 The starting point of a *rights-based* theory is different. This holds that certain personal rights, for example the right to life, are so important that they should not be sacrificed for the greater good, nor be subject to coercive interference. Other rights are held to be still important, but subject to qualifications to permit them to be 'balanced' against competing rights held by others. The ethical values highlighted earlier in this chapter such as liberty, privacy and autonomy can readily be framed in the language of personal rights. However, rights-theorists do not always agree on the nature and scope of these rights, nor on the persons who are entitled to them, nor on how apparently conflicting rights should be balanced. An inevitable corollary of a rights-based approach is that, for a right to be meaningful, it must include a duty on another party to respect that right.<sup>23</sup>
- 3.22 A *duty-based* approach,<sup>24</sup> on the other hand, holds that we are subject to certain moral obligations irrespective of the rights of others, and irrespective of the consequences of our

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21. Etzioni A (2006) A communitarian approach: a viewpoint on the study of the legal, ethical and policy considerations raised by DNA tests and databases *Journal of Law, Medicine and Ethics* 34: 214–21.

22. Collini S (Editor) (1989) *J. S. Mill: 'On Liberty' and Other Writings* (Cambridge: Cambridge University Press).

23. For example, person A's right to respect for their privacy is only meaningful if persons B and C have a duty not to invade that privacy.

24. For an account of the advantages of an approach grounded in human obligations or duties, see O'Neill O (2002) *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press), pp78–82; see also Brownsword R (2007) Informed consent: to whom it may concern *Jahrbuch für Recht und Ethik* 15: 1, for a discussion of one variant of this approach, which he calls 'dignitarian'.



actions. One example would be Kant's absolute prohibition on using other human beings merely as a means to an end, regardless of any benefits that might be obtained. One variant of a duty-based theory is a *dignitarian* approach, in which it might be argued that certain actions compromise human dignity, and hence are not permitted, regardless of whether they cause harm to an identifiable individual and regardless of the possible good that might eventuate. Such an approach could, for example, be used when considering issues such as familial searching of DNA databases and the possible use of biological samples for medical and research purposes for which no explicit consent has been obtained: the unauthorised use of such sensitive personal information might be seen as undermining the inherent dignity of human beings, regardless of whether the individual concerned is ultimately aware of what is being done.

- 3.23 Utilitarian and rights-based theories clearly have quite different philosophical foundations. However, a utilitarian approach of the type put forward by Mill could potentially lead to the same outcome as a rights-based approach that privileged individual autonomy and liberty but recognised that these rights had to be subject to qualification in order to allow for competing rights (for example to protection from criminal activity) to be accommodated. The two approaches recognise, albeit for different reasons, the value to individuals of their personal liberty and their ability to exercise their autonomy, and hence recognise the need for appropriate justification for any interference in the enjoyment of these interests. The main alternative to this kind of liberalism could be said to come from the kind of duty-based approach outlined in paragraph 3.22 above which would not permit any potential benefits to be set in the balance against the fundamental value of human dignity. We believe that the most appropriate approach to the issues considered in this Report is one based on rights, while recognising that the key moral rights identified (to respect for individual liberty, privacy and autonomy) must all be subject to qualifications, to protect both the general interest and the individual rights of others.

### The 'no reason to fear if you are innocent' argument

- 3.24 In the public debate about forensic databases the argument is sometimes put forward that those who are innocent have nothing to fear from being on the NDNAD. This argument ignores any intrinsic value that might be placed on liberty, privacy and autonomy, and focuses solely on the more concrete forms of harm that might come to individuals as a result of inclusion on the NDNAD. Setting aside these broader concerns, however, we consider that the argument is fallacious on its own terms, even if we assume that the justice system is perfect and that no one who is innocent of a crime is ever convicted (an idealisation that has historically never been achieved). There are two principal reasons why the argument is fallacious. First, if innocent, simply being the subject of a criminal investigation by the police can cause harm, distress and stigma. For example, if a person is one of a number of persons investigated in connection with a rape because his DNA profile matches a partial profile of the perpetrator, he may well be harmed by the taint of suspicion, both personally and socially, even if he is never arrested or charged. These problems could be ameliorated if the police always behaved with the utmost sensitivity towards those they investigate, but as long as we cannot rely on that always being the case, harm may well eventuate.
- 3.25 Second, there are reasons to believe that erroneous implications concerning 'criminality' may be drawn from the mere fact that a person's profile is on the NDNAD, even if inclusion signifies only that they have once been arrested. Indeed, the explicit justification for the extent of the Database is precisely that it is intended to represent the actual or likely criminal community (see paragraphs 4.73–4.77). There is thus little doubt that it is not irrational for a person to object to the retention of their biological sample and DNA profile on the Database

if they have never committed a criminal act in their whole life nor will ever do so.

- 3.26 More substantively, however, the ‘nothing to fear if you are innocent’ argument cannot, alone, be a sufficient justification for the full extent of police powers. As outlined in paragraph 3.24, we suggest that one’s starting point should be the presumption of liberty, which is necessarily accompanied by the importance of keeping governmental and police power appropriately delimited and within the rule of law. Given this starting point, then the government always needs to show a strong reason, backed by objective evidence, that there is adequate justification for interfering with the lives of its citizens.

### Proportionality

- 3.27 The resolution of the antagonistic claims of public interests in crime control and individual interests can be approached through the principle of proportionality. This is a method of analysis in which the ends, means and effects of a particular policy are subjected to a detailed assessment, based on sound evidence. This kind of analysis has the advantages of being rational, coherent and transparent. There are three main formulations of the proportionality principle. The first balancing test requires a *balancing* between the *end* that a law or policy aims to achieve against the *means* used to achieve that end, including the impact on affected persons. Clearly some aims are more important than others, for example to combat serious crime as distinct from minor offences, and are given more weight; and some means are less acceptable than others, for example a law or policy which risks intruding on human rights. A second *necessity* test posits that if a particular objective can be achieved by more than one means, the least harmful of those means should be adopted, that is, one that causes minimum harm to the individual or community. A third *suitability* test is sometimes used: this asks whether the means used are appropriate to the accomplishment of a particular aim.
- 3.28 The outcomes of a proportionality analysis are a matter of judgment, depending on whether one adopts a standard of *strict scrutiny*, or simply seeks to ensure that the decision is a rational one, in the sense that it is supported by credible reasons. For example, a strict scrutiny approach might lead us to conclude that the indefinite retention of biological samples from those who are not convicted of any crime is a disproportionate means of crime control. On a less demanding rationality approach, one might acknowledge that keeping information on those who have been suspects is a credible way of balancing crime control and due process. Ultimately, these questions have to be determined by a detailed examination of the evidence in each situation. The soundness of the evidence available will be a key factor in determining whether a proposed action is, or is not, proportionate to its likely outcome. In reaching our conclusions on issues such as, for example, the extension of police powers to take biological samples or the retention of these samples, we have therefore looked carefully at the available evidence so as to form judgments about whether the means used are proportionate to the legitimate aim of crime control.

### Civil liberties and human rights

- 3.29 Rights such as privacy and equality were not entrenched in law in the United Kingdom until relatively recently. The classical British view, until at least the mid-20th Century, was that personal liberty is protected from arbitrary interference by the supremacy of Parliament and the rule of law. According to this view, despotic government is prevented by the balance between the Executive, Parliament and an independent judiciary that carries out the will of the elected Parliament. The judge-made principles of private law, such as trespass to the person (e.g. taking a body sample without consent), were applied by the courts to the police and public authorities in the same way as they were applied to private individuals. It was thought not to be necessary

or desirable either to enumerate certain freedoms in terms of legal or constitutional rights, or to safeguard them from parliamentary encroachment.

- 3.30 This classical view was increasingly called into question in the second half of the 20th Century, not only because it did not correspond with the more interventionist activities of the welfare state, but also because of growing disquiet about the capacity or will of Parliament to restrain the Executive. The post-war development of many international human rights instruments (ratified by the United Kingdom), including the European Convention on Human Rights (which the UK strongly influenced), stimulated a new rights-consciousness. This led to a growing body of equality and human rights legislation, including the Human Rights Act 1998. Membership of the EU has also resulted in an expanding body of legislation and case law, on subjects such as the protection of personal data, in the framework of police and judicial cooperation between Member States in criminal matters.
- 3.31 The Human Rights Act 1998 came into operation in 2000 and made most of the rights contained in the European Convention on Human Rights directly enforceable in the United Kingdom. One of the Convention rights that is relevant to the forensic use of bioinformation is the right to a fair trial (Article 6). Article 6(2) states that “everyone charged with a criminal offence shall be presumed innocent until proved guilty in accordance with law”. This reflects the common law principle – sometimes referred to as the ‘golden thread’ – that ‘no matter what the charge, or where the trial’, the prosecution must prove the guilt of the defendant beyond reasonable doubt.<sup>25</sup> Protection of the innocent from wrongful conviction has the status of a constitutional principle. This means that bioinformation should never be treated as infallible or conclusive; it must be subject to the same rigorous investigation as any other evidence, and if this process leads to reasonable doubt as to the guilt of the defendant, he or she must be acquitted. The ‘presumption’ of innocence means not only that the state has this burden of proof, but also that there must be no predisposition to find a person guilty simply because of the presence of bioinformation. Mistakes can happen and the process for dealing with bioinformation must be designed to minimise this risk.
- 3.32 A second Convention right of relevance is the right to respect for private and family life (Article 8). The Act and Convention reflect our earlier comments that rights are rarely absolute, and that a search for a balance of interests is what is important. Article 8 of the Convention provides an example. Article 8(1) states:
- “Everyone has the right to respect for his private and family life, his home and his correspondence.”
- However, this is qualified by Article 8(2) which provides that:
- “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.”
- 3.33 Since the implementation of the Human Rights Act, a key question to ask of any state policy is whether it engages a human right. This is self-evident in the current context, particularly when a biological sample is required from a suspect. It was stated by the European Court of Human Rights in the case of *Peters v Netherlands*<sup>26</sup> that “compulsory medical intervention, even if it is of minor importance, must be considered an interference with the right to respect for private life”.

25. *Woolmington v DPP* [1935] Appeal Cases 462 at 480 per Viscount Sankey.

26. Appln 21132/93, 77-A, DR 75.

3.34 Where a policy does interfere with a qualified right, such as Article 8, it is then necessary to ask whether the interference with the right is proportionate and necessary. Proportionality is about the policy being founded on relevant and not arbitrary considerations (see paragraph 3.27). Necessity implies that there do not exist any alternatives that achieve the same policy goal in a less intrusive manner. Together these concepts raise the question about whether the current extensive scope of measures in the United Kingdom is necessary to achieve the objectives in question. The possibility of different views on what is appropriate and necessary is shown by the differences between parts of the United Kingdom (see paragraphs 1.3–1.5). However, in the case of retaining bioinformation, the House of Lords held that the position in England and Wales, at least up until 2003, did not breach Article 8(1) (see Box 3.1).

### Box 3.1: Bioinformation and human rights: the case of *S & Marper*

In 2001, the Criminal Justice and Police Act removed the requirement to delete police records from those who were once charged but never convicted of a recordable offence. Subsequently, in the case of *S & Marper*<sup>27</sup> the claimants appealed against the decision to retain their fingerprints, biological samples and DNA profiles after they had been cleared of criminal charges. *S*, aged eleven, had been charged with, but acquitted of, attempted robbery. Mr Marper, 38 years of age and of good character, was arrested for harassment of his partner but the case was discontinued. The House of Lords held by a majority that retention of bioinformation does not breach Article 8 of the European Convention on Human Rights, because there were safeguards in place to protect against the misuse of retained profiles and biological samples and their retention did not have an impact on the private lives of individuals. Law Lord, Baroness Hale (dissenting on this point) said that there was a breach of informational privacy. However, she agreed with the other four Law Lords that, even if there was a breach of Article 8(1) of the Convention, the breach was proportionate and justified in the detection and investigation of crime. Lord Steyn regarded it as “of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity ... Making due allowance for civil liberties, this phenomenon has had beneficial effects.”

The House of Lords also ruled that there was no breach of Article 14, which guarantees equal treatment in the enjoyment of all the other rights protected by the European Convention: they held that the difference between those who have, and those who have not, been the object of police suspicion is sufficient grounds for a legitimate reduction in the privacy rights of the former group, at least as far as the retention of biological samples and profiles can be defined as such a reduction. Prior to changes resulting from the Criminal Justice and Police Act 2001 and the Criminal Justice Act 2003, such a distinction had been formulated in terms of a conviction for a recordable offence; however, the 2001 and 2003 Acts have reformulated the distinction so that one-time suspicion is now a sufficient basis to permanently retain bioinformation: the 2001 Act permitted retention once charges had been brought for a recordable offence, while the 2003 Act now permits retention following arrest for a recordable offence, with no further requirement for charges to be brought (see paragraphs 4.9–4.13). The House of Lords judgment relates to the position after the 2001 Act came into force, but before the further amendments to the retention rules in 2003.

The *Marper* case is soon to be considered by the European Court of Human Rights. In another recent case in the same Court, it was explained that: “As regards the retention of the cellular material and the subsequently compiled DNA profile, the Court observes that the former Commission on Human Rights held that fingerprints did not contain any subjective appreciations which might need refuting and concluded that the retention of that material did not constitute an interference with private life.<sup>28</sup> While similar reasoning may also apply to the retention of cellular material and DNA profiles, the Court nevertheless considers that, given the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material goes beyond the scope of neutral identifying features such as fingerprints, and is sufficiently intrusive to constitute an interference with the right to respect for private life set out in Article 8 § 1 of the Convention.”<sup>29</sup>

27. *R (on the application of S) v Chief Constable of South Yorkshire; R (on the application of Marper) v Chief Constable of South Yorkshire* [2003] 1 All ER 148.

28. See *Kinnunen v Finland*, no. 24950/94, Commission decision of 15 May 1996.

29. Decision as to the Admissibility of Application 29514/05, Hendrick Jan Van der Velden against the Netherlands.