

Device Detects Drug Use Through Fingerprints To See If You Get Public Benefits, Food Stamps or Immigration Entry, Raising A Host Of Constitutional Questions

*from the **defendant-has-indicated-gov't-will-receive-'two-fingers-while-he's-s** dept*

If this tech becomes a routine part of law enforcement loadouts, judicial Fourth and Fifth Amendment findings are going to be upended. Or, at least, they should be. I guess citizens will just have to see how this all shakes out.

A raft of sensitive new fingerprint-analysis techniques is proving to be a potentially powerful, and in some cases worrying, new avenue for extracting intimate personal information—including what drugs a person has used.

[...]

*The new methods use biometrics to analyze biochemical traces in sweat found along the ridges of a fingerprint. And those trace chemicals can quickly reveal **whether you have ingested** cocaine, opiates, marijuana, or other drugs.*

*One **novel, noninvasive forensic technique** developed by researchers at the University of Surrey in the United Kingdom can detect cocaine and opiate use from a fingerprint in as little as 30 seconds. The team collected 160 fingerprint samples from 16 individuals at a drug-treatment center who had used cocaine within the past 24 hours—confirmed by saliva testing—along with 80 samples from non-users. The assay—which was so sensitive that it could still detect trace amounts of cocaine after subjects washed their hands with soap—correctly identified 99 percent of the users, and gave false positive results for just 2.5 percent of the nonusers, according to a paper published in **Clinical Chemistry**.*

Let's discuss the phrase "non-invasive." It was relatively non-invasive when fingerprints were simply used to *identify* people. (That science **isn't exactly settled**, but we'll set that aside for now.) When smartphones and other devices used fingerprint scanners for ID, the "non-invasive" application of fingerprints was no longer non-invasive. An identifying mark, possessing **no Fifth Amendment protection**, gave law enforcement and prosecutors the option of using something deemed "non-testimonial" to obtain plenty of evidence to be used against the fingerprinted.

This opens up a whole new Constitutional Pandora's Box by giving officers the potential to apply fingerprints during traffic stops to see if they can't generate enough probable cause to perform a warrantless search of the car and everyone in it. It's generally criminal to possess drugs. Evidence of ingested drugs means suspects possessed them at some point in time, but evidence of drug use is generally only useful in driving under the influence cases. That's in terms of prosecutions, though. For roadside searches -- where officers so very frequently "**smell marijuana**" -- evidence of drug use is a free pass for **warrantless searches**.

That's just the Fourth Amendment side. The Fifth Amendment side is its own animal. Evidence obtained *through* fingerprints would seemingly make the production of fingerprints subject to Fifth Amendment protections. It should at least rise to the level of blood draws and breath tests, even though this is far more intrusive (in terms of evidence obtained) than tech normally deployed at DUI checkpoints. Blood draws **often require warrants**. Breath tests, depending on surrounding circumstances, aren't nearly as settled, with courts often finding obtaining carbon dioxide from breathing humans to be minimally testimonial.

As Scott Greenfield points out, the first tests of constitutionality will occur at street level. Cops will deploy the tech, **hoping to good faith their way past constitutional challenges**.

Precedent holds that the police are authorized to seize people's fingerprints upon arrest, as the Fifth Amendment does not apply to physical characteristics. But the rubric is "fingerprints can be seized" based on their limited utility as physical characteristics used for identification purposes.

If they should be used for entirely different purposes, for the ascertainment of whether a person ingested drugs, then the rationale allowing the seizure of prints under the Fifth Amendment no longer applies. It certainly won't be in the cops' best interests to draw this distinction, to limit their use of prints to the purpose for which they're allowed and to demonstrate constitutional restraint by not exceeding that purpose.

This means everything will get much worse for drivers and other recipients of law enforcement attention in the short-term. When the challenges to searches and seizures filter their way up through the court system, things might improve. But it won't happen rapidly and any judges leaning towards redefining the scope of fingerprint use will face strong government challenges.

It will probably be argued evidence of drug use obtained through these devices is no different than a cop catching a whiff of marijuana. On one hand, no cop could credibly claim to be able to detect drug use simply by touching someone's fingers. On the other hand, the reasonable reliability of the tech makes challenges more difficult than arguing against an officer's claim they smelled drugs during the traffic stop. The key may be predicating a challenge on the fact that the device actually tests *sweat*, not *fingerprints*, making it an issue of bodily fluids again and (slightly) raising the bar for law enforcement.

This news isn't disturbing for what it is. The obvious initial application is in workplaces, where random drug tests are standard policies for many companies. That tech advancements would progress to this point -- a 10-minute test that requires only the

momentary placement of a finger on a test strip -- was inevitable. It's what comes after that will be significant. Courts have often cut law enforcement a lot of slack and tend to lag far behind tech developments and their implications on Constitutional rights. A new way to obtain evidence using something courts generally don't consider to be testimonial is going to disrupt the Constitution. Hopefully, the courts will recognize the distinction between identification and evidence and rule appropriately.