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Life Sciences Learning Community

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Abstract:

California's Proposition 69 and the DNA Fingerprint Act both expand criminal DNA databases far beyond what is necessary to protect citizens and prosecute violent crime. DNA profiling techniques and databases have developed largely over the last fifteen years, and the recent expansions are only a part of an ongoing trend of 'function creep' that characterizes database expansion. Proposition 69 and the DNA Fingerprint Act expand DNA databases originally designed to house DNA samples from violent criminals to include samples from anyone arrested for a felony crime. This is unreasonable because many persons arrested for felonies are ever convicted or even tried, but under these expansions their DNA will be stored in a *criminal* DNA database alongside convicted rapists, murderers, and other felons.

**California Proposition 69 and the DNA Fingerprint Act:
Considerable Expansions in Criminal DNA Databases**

Proposition 69, passed last November by voters in California, and the DNA Fingerprint Act, passed recently in Congress, both significantly expand DNA databases designed to house and identify DNA samples from dangerous, violent criminals. These recent expansions are only part are only part of a 'function creep' phenomenon that has characterized DNA database expansion since states began keeping DNA profiles on record in the 1990s. Not until recently, however, have the expansions crossed the line between legitimate DNA profiling for law enforcement or forensic purposes and an invasion of privacy. Proposition 69 and the DNA Fingerprint Act do not significantly improve the ability of law enforcement agencies to prosecute violent criminals. Instead, they treat many innocent citizens as criminals, storing their respective DNA samples in the same databases.

When DNA profiling techniques were developed in the 1980s, their impending applications were not well recognized. It was generally accepted that a DNA sample from a crime scene could be analyzed and compared with a sample from a suspect. A match could place the suspect at the scene of the crime and likely would produce a conviction. But if there are not suspects in a case, an analyzed DNA sample from the crime scene does not significantly help prosecutors. This dilemma, along with the development of the polymerase chain reaction technique in 1985¹, led to the establishment of DNA databases. The polymerase chain reaction (PCR), which isolates small fragments of DNA that have a high degree of variability from individual to individual and copies them repeatedly, is the most effective and widely used forensic identification technique today¹. It is the case of analyzing and profiling a DNA sample with PCR that makes large-scale electronic DNA databases possible.

Although privacy advocates have not found any instance of database abuse since databases were created in the early 1990s⁴, DNA profiles contain sensitive genetic information that could still potentially be used for unethical genetic and eugenic experiments if the proper

restrictions are not placed on profiling. It may seem farfetched that a simple cheek swab could lead to such abuses, but it must be noted that twenty-five years ago the concept of DNA profiling was merely science fiction. Furthermore, the nature of DNA sampling is better suited for use in violent crimes such as rapes, assaults, and murders, where biological evidence is more likely to be left at the scene of the crime. The extent to which DNA sampling can be used in investigating and prosecuting non-violent crimes, including felonies, does not warrant the creation of comprehensive databases with samples from all persons arrested for felonies. Fingerprints, unlike DNA samples, reveal nothing concerning the physical characteristics of the individual and can be used to aid prosecution in minor, non-violent crimes in addition to violent crimes.

Defined by Simoncelli and Steinhardt² as when databases are “created for one discrete purpose,” but “despite the initial promises of their creators, eventually take on new functions and purposes²,” “function creep” has been the paradigm for the expansion of most national databases established by the federal government. Originally, when created in the 1930s, Social Security numbers were intended to aid in the implementation of the Social Security Administration but have slowly become the “universal identifiers” that we know today. DNA databases are undergoing a similar expansion. When first established in the early 1990s, DNA databases were designed to house DNA samples from sex offenders, as they are the most likely to leave biological evidence useful to forensic investigators at the scene of the crime². Since then, state and federal DNA databases have expanded to include all persons convicted of felonies, and now, with the passing of Proposition 69 and the DNA Fingerprint Act, all persons arrested for felonies in some jurisdictions whether they are ultimately convicted or not. If potential future expansions follow previous patterns of ‘function creep’, it is not out of the question that in the future DNA samples will be taken at birth and stored in a comprehensive national database³.

The passing of Proposition 69 in California last November is an affront to the citizens of California and their civil liberties. Intended to strengthen California’s criminal DNA database, the proposition “requires collection of DNA samples from all felons, and from adults and juveniles arrested for or charged with specified crimes, and submission to state DNA database; and, in five years, from adults arrested for or charged with any felony⁴.” It is unimaginable that DNA profiles from all persons arrested for a felony crime will be stored in a ‘criminal’ DNA database, when a large portion of those persons ultimately will not be convicted and some will never go to trial. Proponents of the act, including the Governor, the State Attorney General, and the Los Angeles County District Attorney, argue that “taking DNA during the booking process at the same time as fingerprints is more efficient and helps police conduct accurate investigations⁴.” If this is indeed true, there is no reason that DNA samples should not be taken at the time of arrest along with the fingerprints. But it is unjustified to store these samples permanently in the state criminal DNA database alongside samples from convicted murderers and sex offenders, as will be the case when Proposition 69 is fully implemented in 2009.

Furthermore, any racial profiling or bias at the time of arrest will directly and unfairly impact the racial composition of the database. The California State Assembly’s Commission on the Status of African American Males recently found that 92% of black men arrested on drug charges in California are ultimately released due to lack of evidence, compared with 64% of white men and 81% of Latino men². It is bad enough that this racial bias exists in arrests, but with the provisions of Proposition 69 in place it will exist in the state DNA database as well. When this many arrests are ultimately not upheld, submission of a DNA sample should be contingent on conviction, not arrest. Requiring all persons with prior felony convictions to submit to DNA testing is also unreasonable. Many of these persons have been convicted for

nonviolent felonies and have fully repaid their debt to society². It is true that far too many rapes and murders go unsolved, but retroactively sampling persons who have previously been convicted of a felony is not a step in the right direction. They were not required under law to submit a DNA sample at the time of their arrest or conviction, and they should not have to after the fact. There is no question that DNA profiling is a valuable tool for law enforcement agencies, but it is not guaranteed to work in every situation. Expansions such as those posed in Proposition 69 go further than is needed to adequately protect citizens from violent crimes.

Similar expansions in DNA databases are occurring at the federal level. The DNA Fingerprint Act, which passed recently in the Senate, eliminates prior restrictions on including DNA samples from persons arrested for felonies in the federal criminal DNA databases. It also gives the U. S. Attorney General the authority to “develop regulations for collecting DNA samples from federal arrestees and detainees⁵.” The act is conspicuously vague, which is dangerous, especially when dealing with something such as DNA profiling. Any expansion that includes persons who have not been convicted of any crime alongside dangerous, violent criminals in a *criminal* DNA database is unreasonable. Proponents of the act claim that storing DNA profiles at the time of arrest will facilitate criminal investigations and ultimately reduce the number of unsolved violent crimes⁴. While it is not unreasonable to take DNA samples at the time of arrest in order to aid criminal investigations, it is unreasonable to store these samples in a national criminal DNA database permanently - whether the suspect is convicted or not. The submission of a DNA sample to a national or state database should be a repercussion for persons convicted of felony crimes, not a routine procedure upon arrest. Our judicial system operates on the tenet that one is innocent until proven guilty by a court of law. Requiring a permanent, stored sample at the time of arrest blurs the line between innocent and guilty.

The recent expansions in both state and federal criminal DNA databases extend far beyond what is necessary to sufficiently prosecute violent crimes. Both Proposition 69 in California and the DNA Fingerprint Act infringe on the privacy rights of citizens, contradicting the idea of innocence by storing the DNA of the innocent in the same databases as that of convicted felons. The gradual expansion of DNA databases since their inception in the early 1990s is a disturbing trend, but only recently have the expansions crossed a precarious line between legitimate, ethical scientific advancement and a violation of privacy.

Works Cited

¹Gill, Peter. DNA as evidence - the technology of identification. The New England Journal of Medicine [Internet]. [cited 2005 Oct 30]. Available from: <http://content.nejm.org.proxy-remote.galib.uga.edu:2048/cgi/content/full/352/26/2669>

²Simoncelli, Tania. Steinhardt, Barry. California's Proposition 69: A dangerous precedent for criminal DNA databases. Journal of Law, Medicine, and Ethics. [Internet]. [cited 2005 Oct 3]. Available from: <http://search.epnet.com/login.aspx?direct=true&db=aph&an=17768646>

³Rothstein, Mark A. Genetic justice. The New England Journal of Medicine. [Internet]. [cited 2005 Nov 6]. Available from: <http://content.nejm.org/cgi/content/full/352/26/2667>

⁴Proposition 69: DNA samples, collection, database, funding, initiative statute. California Secretary of State. [Internet]. [cited 2005 Oct 15]. Available from:

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⁵Senate reauthorizes violence against women act. Senator Jon Kyl Press Office. [Internet]. [cited 2005 Oct 15]. Available from: <http://kyl.senate.gov/record.cfm?id=246925>