F5   A Proposal for Legislative Oversight of Genealogical Websites

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Learning Overview: After attending this presentation, attendees will understand the novel aspects of informational privacy for DNA and the importance of legislative regulation and oversight of DNA collection, retention, and distribution practices.

Impact on the Forensic Science Community: This presentation will impact the forensic science community by providing a framework for evaluating DNA data banking practices and responding to ethical concerns with legislation that balances legitimate law enforcement and public health objectives with individual and family privacy interests.

DNA databanks are proliferating outside of the Combined DNA Index System (CODIS) and the regulatory framework that presently governs the collection, retention, and distribution of DNA samples and records. These shadow DNA databanks primarily exist at the local level and are maintained by local police agencies, by private companies that sell databank related services to police, and by private companies that sell direct-to-consumer test kits for genealogical and medical information.

Underregulated DNA databanks are a concern precisely for the reasons that explain their existence and proliferation: (1) police are able to avoid regulation and oversight of who they collect DNA from and how they retain or use DNA to investigate crime; (2) police can broaden the types of crime DNA databanks are used to investigate to more discretionary-based offenses (e.g., property crimes and other quality of life offenses); (3) police can perform familial searching in a state such as Maryland that prohibits the practice in its statewide databank; and (4) private companies with large databanks of DNA can have disproportionate influence over the course of medical research.

Although individual cases of law enforcement searching of genealogical websites have been widely reported, the overall utility of these underregulated public and private DNA databases is presently unknown because there are no uniform standards for the reporting of data about whose profiles have been placed in local or private DNA databanks, why or how DNA samples have been collected, and how DNA samples are retained, used, or further distributed. Without such reporting, the public and state lawmakers cannot know whether local or private DNA databanks are being misused or further linked to other public or private databanks. Moreover, any disparate impact or effect by race, ethnicity, or class will not be known.

Courts have largely taken a hands-off approach to regulating DNA databanks. Legislatures have recognized the need to regulate DNA collected and retained for use in CODIS, but only a few states have expressly addressed local databanks and no state has addressed the regulation of private DNA databanks maintained for genealogical or medical purposes but are also used to facilitate criminal investigations.

This lack of legislative oversight for local DNA databanks is troubling. Since the beginning of law enforcement, DNA databanking with the enactment of the federal CODIS law in 1994, the importance of legislative regulation, and oversight of DNA collection practices have been widely recognized. DNA databases "inevitably reflect the race, class, and geographic biases imbedded in police and judicial practices," and as the former dean of the University of Maryland's law school has noted, "[f]rom 1990 to 2004, Blacks were five times more likely than Whites to be incarcerated, and in 2000, Blacks and Latinos comprised 63% of incarcerated adults, even though together they represented 25% of the total population"—trends that are attributable to "racial profiling, discriminatory sentencing, and general racial bias in the criminal justice system …."[1,2] Exactly because of the disproportionate representation of historically disfavored groups in the criminal justice system, they are also disproportionately represented in governmental DNA databanks.

On the other hand, it has been noted that private genealogical databases are skewed by race and class in the opposite direction. This has implications for the use of genealogical databanks to develop "personalized" medicine that target favored groups.

DNA is a powerful investigative tool to identify and apprehend criminal offenders, but its potential for abuse is real and must, therefore, be subjected to close legislative scrutiny and supervision. Statutory regulation of local police DNA collection and databank practices will clearly advance these ends. Model language is proposed for regulating local and genealogical DNA databanks.

Reference(s):
1. Simon Cole. Fingerprint Identification in the Criminal Justice System: Historical Lessons for the DNA Debate. In David Lazer (ed.), *DNA and the Criminal Justice System: The Technology of Justice*. (MIT Press, 2004), pp. 63-89.
2. Karen Rothenberg and Alice Wang. The Scarlet Gene: Behavioral Genetics, Criminal Law, and Racial and Ethnic Stigma. 78. *Law & Contemporary Problems*. 344, 352 (2006).

DNA, Databank, Genealogical