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Vast DNA Bank Pits Policing Against Privacy

By Rick Weiss

WASHINGTON _ Brimming with the genetic patterns of more than 3 million Americans, the nation's databank of DNA "fingerprints" is growing by more than 80,000 people every month, giving police an unprecedented crime-fighting tool but prompting warnings that the expansion threatens constitutional privacy protections.

With little public debate, state and federal rules for cataloging DNA have broadened in recent years to include not only violent felons, as was originally the case, but also perpetrators of minor crimes and even people who have been arrested but not convicted.

Now some in law enforcement are calling for a national registry of every American's DNA profile, against which police could instantly compare crime-scene specimens. Advocates say the system would dissuade many would-be criminals and help capture the rest.

"This is the single best way to catch bad guys and keep them off the street," said Chris Asplen, a lawyer with the Washington firm Smith Alling Lane and former executive director of the National Commission on the Future of DNA Evidence. "When it's applied to everybody, it is fair, and frankly you wouldn't even know it was going on."

But opponents say that the growing use of DNA scans is making suspects out of many law-abiding Americans and turning the "innocent until proven guilty" maxim on its head.

"These databases are starting to look more like a surveillance tool than a tool for criminal investigation," said Tania Simoncelli of the American Civil Liberties Union in New York.

The debate is part of a larger, post-Sept. 11 tug of war between public safety and personal privacy that has intensified amid recent revelations that the government has been collecting information on personal phone calls. In particular, it is about the limits of the Fourth Amendment, which protects people from being swept into criminal investigations unless there is good reason to suspect they have broken the law.

Once someone's DNA code is in the federal database, critics say, that person is effectively treated as a suspect every time a match with a crime-scene specimen is sought _ even though there is no reason to believe that the person committed the crime.

At issue is not only how many people's DNA is on file but also how the material is being

used. In recent years, for example, crime fighters have initiated "DNA dragnets" in which hundreds or even thousands of people were asked to submit blood or tissue samples to help prove their innocence.

Also stirring unease is the growing use of "familial searches," in which police find crime-scene DNA that is similar to the DNA of a known criminal and then pursue that criminal's family members, reasoning that only a relative could have such a similar pattern. Critics say that makes suspects out of people just for being related to a convict.

Such concerns are amplified by fears that, in time, authorities will try to obtain information from stored DNA beyond the unique personal identifiers.

"Genetic material is a very powerful identifier, but it also happens to carry a heck of a lot of information about you," said Jim Harper, director of information policy at the Cato Institute, a libertarian think tank in Washington concerned about DNA database trends.

Law enforcement officials say they have no interest in reading people's genetic secrets. The U.S. profiling system focuses on just 13 small regions of the DNA molecule — regions that do not code for any known biological or behavioral traits but vary enough to give everyone who is not an identical twin a unique 52-digit number.

"It's like a Social Security number, but not assigned by the government," said Michael Smith, a University of Wisconsin law professor who favors a national database of every American's genetic ID.

Still, the blood, semen or cheek-swab specimen that yields that DNA, and which authorities almost always save, contains additional genetic information that is sensitive, including disease susceptibilities that could affect employment and health insurance prospects and, in some cases, surprises about who a child's father is.

"We don't know all the potential uses of DNA, but once the state has your sample and there are not limits on how it can be used, then the potential civil liberty violations are as vast as the uses themselves," said Carol Rose, executive director of the ACLU of Massachusetts.

She and others want samples destroyed once the identifying profile has been extracted, but the FBI favors preserving them.

Sometimes authorities need access to those samples to make sure an old analysis was done correctly, said Thomas Callaghan, who oversees the FBI database. The agency also wants to be able to use new DNA identification methods on older samples as the science improves.

Without that option, Callaghan said, "you'd be freezing the database to today's technology."

Crime-Fighting Uses

Over the past dozen years, the FBI-managed national database has made more than 30,000 "cold hits," or exact matches to a known person's DNA, showing its crime-fighting potential.

In a recent case, a Canadian woman flew home the day after she was sexually assaulted in Mexico. Canadian authorities performed a semen DNA profile and, after finding no domestic matches, consulted the FBI database. The pattern matched that of a California man on probation, who was promptly found in the Mexican town where the woman had been staying and was charged by local authorities.

Congress authorized the FBI database precisely for cases like that, on the rationale that sexual predators and other violent felons tend to be repeat offenders and are likely to leave DNA behind. In recent years, however, Congress and state legislators have vastly extended the system's reach.

At least 38 states now have laws to collect DNA from people found guilty of misdemeanors, in some cases for such crimes as shoplifting and fortunetelling. At least 28 now collect from juvenile offenders, too, according to information presented last month at a Boston symposium on DNA and civil liberties, organized by the American Society of Law, Medicine and Ethics.

The federal government and five states go further, allowing DNA scans of people arrested. At least four other states plan to do so this year, and California will start in 2009.

Opponents of the growing inclusion of people arrested note that a large proportion of charges (fully half for felony assaults) are eventually dismissed. Blood specimens are not destroyed automatically when charges are dropped, they note, and the procedures for getting them expunged are not simple.

Even more controversial are DNA dragnets, which snare many people for whom there is no evidence of guilt. Given questions about whether such sweeps can be truly voluntary — "You know that whoever doesn't participate is going to become a 'person of interest,'" said Rose of the ACLU — some think they violate the Fourth Amendment.

Civil liberties issues aside, the sweeps rarely pay off, according to a September 2004 study by Samuel Walker, a criminology professor at the University of Nebraska. Of the 18 U.S. DNA dragnets he documented since 1990, including one in which police tested 2,300 people, only one identified the offender. And that one was limited to 25 men known to have had access to the victim, who was attacked while incapacitated in a nursing home.

Dragnets, Walker concluded, "are highly unproductive" and "possibly unconstitutional."

Familial searches of the blood relatives of known offenders raise similar issues. The method can work: In a recent British case, police retrieved DNA from a brick that was thrown from an overpass and smashed through a windshield, killing the driver. A near-match of that DNA with someone in Britain's criminal database led police to investigate that offender's relatives, one of whom confessed when confronted with the evidence.

Not investigating such leads ``would be like getting a partial license plate number on a getaway car and saying, 'Well, you didn't get the whole plate so we're not going to investigate the crime,' " said Frederick Bieber, a Harvard geneticist who studies familial profiling.

But such profiling stands to exacerbate already serious racial inequities in the U.S. criminal justice system, said Troy Duster, a sociologist at New York University.

``Incarceration rates are eight times higher for blacks than they are for whites," he said, so any technique that focuses on relatives of people in the FBI database will just expand that trend.

A Universal Database?

That's a concern that many in law enforcement raise, too _ as an argument in favor of creating a universal DNA database of all Americans. The system would make everyone a suspect of sorts in every crime, they acknowledge. But every criminal, regardless of race, would be equally likely to get caught.

Opponents cite a litany of potential problems, including the billions it would cost to profile so many people and the lack of lab capacity to handle the specimens.

Backlogs are already severe, they note. The National Institute of Justice estimated in 2003 that more than 350,000 DNA samples from rape and homicide cases were waiting to be processed nationwide. As of the end of last year, more than 250,000 samples were backlogged in California alone.

And delays can matter. In 2004, police in Indiana arrested a man after his DNA matched samples from dozens of rapes _ the last 13 of which were committed during the two years it took for the sample to get through the backlog.

A big increase in tests would also generate more mistakes, said William Thompson, a professor of criminology, law and society at the University of California at Irvine, whose studies have found DNA lab accuracy to be ``very uneven."

In one of many errors documented by Thompson, a years-old crime-scene specimen was found to match the DNA from a juvenile offender, leading police to suspect the teen-ager until they realized he was a baby at the time of the crime. The teenager's blood, it turned out, had been processed in the lab the same day as an older specimen was being analyzed, and one contaminated the other.

“A universal database will bring us more wrongful arrests and possibly more wrongful convictions,” said Simoncelli of the ACLU.

But Asplen of Smith Alling Lane said Congress has been helping states streamline and improve their DNA processing. And he does not think a national database would violate the Constitution.

“We already take blood from every newborn to perform government-mandated tests ... so the right to take a sample has already been decided,” Asplen said. “And we have a precedent for the government to maintain an identifying number of a person.”

While the debate goes on, some in Congress are working to expand the database a bit more. In March, the House passed the Children's Safety and Violent Crime Reduction Act.

Under the broad-ranging bill, DNA profiles provided voluntarily, for example, in a dragnet, would for the first time become a permanent part of the national database. People arrested would lose the right to expunge their samples if they were exonerated or charges were dropped. And the government could take DNA from citizens not arrested but simply detained.

The bill must be reconciled with a Senate, which contains none of those provisions.