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For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

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REGULATING DNA LABORATORIES: THE NEW GOLD STANDARD?

*PAUL C. GIANNELLI**

INTRODUCTION

Forensic science is facing a crisis—one in which DNA profiling is often cited as an exemplar. One aspect of this crisis concerns the lack of foundational support for many traditional forensic techniques. As a landmark 2009 report by the National Academy of Sciences (NAS) observed, "[a]mong existing forensic methods, only nuclear DNA analysis has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between an evidentiary sample and a specific individual or source."[1] The NAS report went on to note that "some forensic science disciplines are supported by little rigorous systematic

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1. COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL ACADEMY OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 100 (2009) [hereinafter NAS REPORT]. Two decades before the report was released, scholars had identified DNA as the new gold standard in forensic science. *See* Michael J. Saks & Jonathan J. Koehler, *What DNA "Fingerprinting" Can Teach the Law About the Rest of Forensic Science*, 13 CARDOZO L. REV. 361, 372 (1991) ("[F]orensic scientists, like scientists in all other fields, should subject their claims to methodologically rigorous empirical tests. The results of these tests should be published and debated. Until such steps are taken, the strong claims of forensic scientists must be regarded with far more caution than they traditionally have been.").

research to validate the discipline's basic premises and techniques. There is no evident reason why such research cannot be conducted."[2]

The NAS report identified several such disciplines in this category, including fingerprint examinations,[3] firearms (ballistics) and tool mark identifications,[4] document comparisons,[5] hair analysis,[6] and bite mark examinations.[7] Recent news accounts underscore the potential impact of this issue. In May 2013, the Mississippi Supreme Court stayed the execution of Willie Jerome Manning after the U.S. Department of Justice notified state officials that FBI experts had presented misleading testimony at his trial, including flawed hair and firearms evidence.[8] Days later, the FBI announced that Manning's case was but one of 120 cases—including twenty-seven death

2. NAS REPORT, *supra* note 1, at 22. At another point, the NAS report states,

> The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity. This is a serious problem. Although research has been done in some disciplines, there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods.

Id. at 8. *See also id.* at 53 ("The bottom line is simple: In a number of forensic science disciplines, forensic science professionals have yet to establish either the validity of their approach or the accuracy of their conclusions, and the courts have been utterly ineffective in addressing this problem.").

3. *Id.* at 144 (stating that research is needed "to properly underpin the process of friction ridge [fingerprint] identification.").

4. *Id.* at 154 ("Sufficient studies [on firearms identification] have not been done to understand the reliability and repeatability of the methods.").

5. *Id.* at 166 ("The scientific basis for handwriting comparisons needs to be strengthened.").

6. *Id.* at 161 ("[T]estimony linking microscopic hair analysis with particular defendants is highly unreliable.").

7. *Id.* at 174 ("No thorough study has been conducted of large populations to establish the uniqueness of bite marks . . . .").

8. *See* Campbell Robertson, *With Hours to Go, Execution Is Postponed*, N.Y. TIMES, May 8, 2013, at A17, *available at* http://www.nytimes.com/2013/05/08/us/willie-j-manning-granted-stay-of-execution.html ("A Mississippi man scheduled to be put to death on Tuesday was granted a stay of execution by the State Supreme Court, after the United States Department of Justice sent lawyers and officials involved in the case several letters disavowing the degree of certainty expressed by F.B.I. forensic experts at the man's trial."). Days earlier, the Court had rejected Manning's bid for a stay of execution in order to permit DNA testing. Campell Robertson, *Mississippi Inmate's Bid for DNA Tests Is Denied with Tuesday Execution Set*, N.Y. TIMES, May 4, 2013, at A11, *available at* http://www.nytimes.com/2013/05/04/us/dna-tests-rejected-for-inmate-facing-tuesday-execution.html (reporting that the "Mississippi Supreme Court, in a 5-to-4 decision . . . denied requests for DNA testing of evidence made by a prisoner set to be executed on Tuesday, potentially setting up what experts said would be a rare case in recent years in which a person is put to death with such requests unmet.").

penalty prosecutions—in which improper microscopic hair analysis had been introduced at trial.[9]

The second issue confronting forensic science concerns the regulation of crime laboratories. As explained below, DNA profiling is the most regulated forensic science discipline. Hence the paradox: the most scientifically valid procedure is also the most extensively regulated.

This essay briefly describes the regulatory scheme for DNA profiling. However, the regulation of DNA testing is inextricably tied to the regulation of crime laboratories in general.[10] Some lab reforms preceded the advent of DNA analysis, while others followed. Two reforms are examined in this essay: (1) the accreditation of forensic facilities; and (2) the establishment of forensic science commissions.

I.
CRIME LABORATORIES BEFORE DNA

Crime laboratories in the United States emerged in the 1920s, first in Los Angeles and later in Chicago; the FBI laboratory was established in 1932.[11] At the time, crime labs were considered a major reform—the police would use science to solve crimes. Because crime laboratories developed in police departments, they were imbued, unsurprisingly, with a law enforcement culture.[12] In the long

9. Spencer S. Hsu, *U.S. Reviewing 27 Death Penalty Convictions for FBI Forensic Testimony Errors*, WASH. POST (July 17, 2013), http://www.washingtonpost.com/local/crime/us-reviewing-27-death-penalty-convictions-for-fbi-forensic-testimony-errors/2013/07/17/6c75a0a4-bd9b-11e2-89c9-3be8095fe767_story.html ("[O]n the witness stand, several agents for years went beyond the science and testified that their hair analysis was a near-certain match."). *See also* Jack Nicas, *Flawed Evidence Under a Microscope: Disputed Forensic Techniques Draw Fresh Scrutiny; FBI Says It Is Reviewing Thousands of Convictions*, WALL ST. J., July 18, 2013, http://online.wsj.com/news/articles/SB10001424127887324263404578614161262653152; Norman L. Reimer, *The Hair Microscopy Review Project: An Historic Breakthrough for Law Enforcement and a Daunting Challenge for the Defense Bar*, CHAMPION, July 2013, at 16, 17–18.

10. DNA analysis makes up only a small portion of crime lab work. *See* Jan S. Bashinski & Joseph L. Peterson, *Forensic Sciences*, *in* LOCAL GOVERNMENT: POLICE MANAGEMENT 559, 562 (William A. Geller & Darrel W. Stephens eds., 4th ed. 2003) ("[R]equests for serology/DNA, arson, trace evidence, and questioned document cases represented only a small fraction (3.4 percent) of the cases . . . .").

11. For a more extended discussion of the history of crime laboratories, see Paul C. Giannelli, *Regulating Crime Laboratories: The Impact of DNA Evidence*, 15 J.L. & POL'Y 59 (2007).

12. *See* John I. Thornton, *Criminalistics—Past, Present, and Future*, 11 LEX ET SCIENTIA 1, 27 (1975) ("Most laboratories owe their existence, not to progressive attitude on the part of police administrators, but because the police agencies inau-

run, the lack of a scientific culture would hinder the development of forensic science.[13] The NAS report put it bluntly: "The law's greatest dilemma in its heavy reliance on forensic evidence . . . concerns the question of whether—and to what extent—there is *science* in any given 'forensic science' discipline."[14] The lack of rigorous oversight was an offshoot of this problem. Quality assurance, like written protocols, external audits, and proficiency testing, is ingrained in science but was not, until recently, part of forensic science.[15] Indeed, a leading authority on forensic science could write in 1983 that "[c]rime laboratories are unique among publicly supported scientific operations in that few participate in external quality assurance programs."[16]

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gurating laboratory services were shamed into it by adverse publicity or the threat of it [and] all to [sic] often the laboratory was poorly conceived, poorly equipped, and poorly staffed.").

13. *See* Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. Rev. 725, 731 (2011) ("[A] significant culture shift is required: Forensic science needs to focus more on science than on law, to shift from a quasi-adversarial perspective to a research orientation. In short, we call for the development and instantiation of what we will term a research culture within forensic science.") (emphasis omitted).

14. NAS Report, *supra* note 1, at 87. Crime labs generally lack the resources and the capability to conduct foundational research. As I have written elsewhere:

> First, the early crime labs, as is still true today, were operational, not research, laboratories. Second, basic research can be both time-consuming and expensive, and the underfunding of crime laboratories has been chronic. Third, even if research was perceived to be desirable, these laboratories were ill-equipped to conduct it. Police officers, whose skills were developed through on-the-job training, staffed these labs.

Paul C. Giannelli, *Forensic Science: Why No Research?*, 38 Fordham Urb. L.J. 503, 508 (2011). This, of course, does not mean research at the federal level has been effective. *See* Paul C. Giannelli, *Daubert and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research*, 2011 U. Ill. L. Rev. 53 (examining how the federal government has manipulated forensic science research).

15. Clinical laboratories are regulated under the Clinical Laboratory Improvements Act of 1988, 42 U.S.C. § 263a (2012), and commentators have argued that crime laboratories should also be regulated. *See* Randolph N. Jonakait, *Forensic Science: The Need for Regulation*, 4 Harv. J.L. & Tech. 109, 191 (1991) ("Current regulation of clinical labs indicates that a regulatory system can improve crime laboratories."); Barry Scheck & Peter Neufeld, Editorial, *Junk Science, Junk Evidence*, N.Y. Times, May 11, 2001, at A35, *available at* http://www.nytimes.com/2001/05/11/opinion/junk-science-junk-evidence.html ("There is a model for improvement. The 1988 Clinical Laboratory Improvement Act provided accountability for laboratories that perform medical tests. A mistake in health tests can have dire results—not only for the patient, but also for the lab, which risks losing accreditation.").

16. Joseph L. Peterson, *The Crime Lab*, *in* Thinking About Police 184, 196 (Carl B. Klockars ed.).

Two major reforms were initiated prior to the DNA era. First, the first external proficiency test of forensic disciplines was published in 1978.[17] This study revealed that "a disturbingly high percentage of laboratories are not performing routine tests competently."[18] 71% of the crime laboratories in the study provided unacceptable results on a blood test, 51.4% made errors in matching paint samples, 35.5% erred on a soil examination, and 28.2% made mistakes on firearms analysis. The report concluded that "[a] wide range of proficiency levels among the nation's laboratories exists, with several evidence types posing serious difficulties for the laboratories . . . ."[19] Proficiency testing continued after the 1978 study.[20] Although merely voluntary, it was now part of the lexicon of forensic science.

Second, as a consequence of the 1978 proficiency study, crime lab directors in 1982 established the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) to operate a laboratory accreditation program.[21] ASCLD/LAB accreditation requirements include ensuring the integrity of evidence, adhering to valid and generally accepted procedures, employing qualified examiners, and operating quality assurance pro-

17. Joseph L. Peterson et al., Crime Laboratory Proficiency Testing Research Program (1978).

18. William A. Thomas, *Symposium on Science and the Rules of Legal Procedure*, 101 F.R.D. 599, 645 (1983) (remarks of Professor Joseph L. Peterson). Although some laboratories performed exceptionally well, the performance of others was disturbing: "65 percent of the laboratories had 80 percent or more of their results fall into the acceptable category. At the other end of the spectrum, 3 percent of laboratories had less than 50 percent of their responses considered acceptable." Peterson, *The Crime Lab*, *supra* note 16, at 195. Similarly, certain types of examinations caused few problems, whereas others produced very high rates of "unacceptable proficiency." Unacceptable proficiency was most often attributed to: (1) misinterpretation of test results due to carelessness or inexperience; (2) failure to employ adequate or appropriate methodology; (3) mislabeling or contamination of primary standards; and (4) "inadequate data bases or standard spectra." Peterson et al., *supra* note 17, at 258.

19. Peterson et al., *supra* note 17, at 3.

20. *See* Joseph L. Peterson & Penelope N. Markham, *Crime Laboratory Proficiency Testing Results, 1978–1991, I: Identification and Classification of Physical Evidence*, 40 J. Forensic Sci. 994 (1995); Joseph L. Peterson & Penelope N. Markham, *Crime Laboratory Proficiency Testing Results, 1978–1991, II: Resolving Questions of Common Origin*, 40 J. Forensic Sci. 1009 (1995).

21. *See* American Society of Crime Laboratory Directors/Laboratory Accreditation Board, http://www.ascld-lab.org/ (last visited Sept. 18, 2013) [hereinafter ASCLD/LAB Online].

grams.[22] This program, however, was also voluntary. But the groundwork had been laid.

II.
THE ADVENT OF DNA PROFILING

DNA analysis was first introduced in a criminal investigation in the United Kingdom in 1985, and private laboratories in the United States began using it the following year.[23] At first, the technique was lionized.[24] It was not until *People v. Castro*[25] that the rush toward unquestioned acceptance was slowed. Eric Lander, a molecular biologist who was brought into the case, objected to how DNA profiling was used in *Castro*. In a subsequent article in *Nature*, he famously wrote: "At present, forensic science is virtually unregulated—with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row."[26] This controversy led to calls for the National Academy of Sciences to review the technique.[27] In 1992, the NAS published a report, noting the importance of certain practices: "No laboratory should let its results with a new DNA typing method be used in court, unless it

22. Bashinski & Peterson, *supra* note 10, at 578.

23. For a thorough history of DNA in court, see DAVID H. KAYE, THE DOUBLE HELIX AND THE LAW OF EVIDENCE (2010).

24. One court called DNA evidence the "single greatest advance in the 'search for truth' . . . since the advent of cross-examination." People v. Wesley, 533 N.Y.S.2d 643, 644 (Albany Cnty. Ct. 1988). The popular press trumpeted DNA evidence as "foolproof." *DNA Prints: A Foolproof Crime Test*, TIME, Jan. 26, 1987, at 66; *see also* Anastasia Toufexis, *Convicted by Their Genes: A New Forensic Test is Revolutionizing Criminal Prosecutions*, TIME, Oct. 31, 1988, at 74.

25. 545 N.Y.S.2d 985, 996 (N.Y. Sup. Ct. 1989) ("In a piercing attack upon each molecule of evidence presented, the defense was successful in demonstrating to this court that the testing laboratory failed in its responsibility to perform the accepted scientific techniques and experiments . . . ."); *see generally* Jennifer L. Mnookin, People v. Castro*: Challenging the Forensic Use of DNA Evidence*, *in* EVIDENCE STORIES 207, 209 (Richard Lempert ed., 2006) ("The substance of the preliminary hearing in *Castro* stands for the idea that the standards of *research scientists* ought to be the standards of *forensic science*—an idea that, if taken to its logical extreme, could make many kinds of commonly-used forensic evidence, from fingerprint identifications to expert document examination to ballistics analysis inadmissible in court until additional research is done to establish the validity of the claims to which forensic experts routinely testify.").

26. Eric S. Lander, *DNA Fingerprinting On Trial*, 339 NATURE 501, 505 (1989).

27. *See, e.g.*, KAYE, *supra* note 23, at 98 ("The consensus report of the experts on the DNA testing in Castro called on the National Academy of Science to convene a committee to study emerging technology.").

has undergone . . . proficiency testing via blind trials."[28] In the end, this scrutiny resulted in the robust DNA technology that we take for granted today.[29]

The most important legal development occurred in 1994 with the passage of the DNA Identification Act (DNA Act)[30]—the first federal legislation regulating a forensic science. The DNA Act authorized the creation of a national database containing both the DNA profiles of convicted offenders and of crime scene profiles: the Combined DNA Index System (CODIS).[31] Establishing CODIS was a monumental endeavor, and its successful operation required an effective quality assurance program.[32] To effectuate this goal, the statute created a DNA Advisory Board (DAB) to promulgate quality assurance standards.[33] The Act also required proficiency testing for the FBI's DNA analysts, as well as those in labs participating in the national database or receiving federal funding, which includes virtually all DNA analysts.[34] "The power of the DAB has been

28. National Research Council, DNA Technology in Forensic Science 55 (1992). A second NAS report later addressed population statistics. *See* National Research Council, The Evaluation of Forensic DNA Evidence (1996).

29. Even the DNA proponents subsequently conceded: "[M]ost would now agree that this extended debate has been good for the science." Ian W. Evett & Bruce S. Weir, Interpreting DNA Evidence: Statistical Genetics for Forensic Scientists xiv (Sinauer Assocs., Inc. 1998); *see also* Richard Lempert, *Comment: Theory and Practice in DNA Fingerprinting*, 9 Statistical Sci. 255, 258 (1994) ("[I]n this instance the importation of legal adversariness into the scientific world has spurred both valuable research and practical improvements in the way DNA evidence is analyzed and presented.").

30. 42 U.S.C. § 14131(a), (c) (2012).

31. *See id.* § 14132.

32. Office of the Inspector Gen., U.S. Dep't of Justice, Audit Report, The Combined DNA Index System ii (2001) [hereinafter 2001 IG Report] ("[T]he integrity of the data contained in CODIS is extremely important since the DNA matches provided by CODIS are frequently a key piece of evidence linking a suspect to a crime.").

33. 42 U.S.C. § 14131(a), (b) (2012). The legislation contained a sunset provision; the DAB would expire after five years unless extended by the Director of the FBI. *Id.* at § 14131(b)(4). The DAB was extended for several months and then ceased to exist. *See* Scientific Working Group on DNA Analysis Methods, History of SWGDAM 17–21 (2013), *available at* http://www.swgdam.org/History%20of%20QA%20%20SWGDAM%20Jan%202013.pdf. The Scientific Working Group on DNA Analysis Methods replaced the DAB when it expired. *See id.* at 21.

34. 42 U.S.C. § 14132(b)(2) (2006) (external proficiency testing for CODIS participation); 42 U.S.C. § 14133(a)(1)(A) (2004) (external proficiency testing for FBI examiners). DAB Standard 13 implements these requirements. DNA Advisory Board Standard 13.1 (1998) ("Examiners and other personnel designated by the technical manager or leader who are actively engaged in DNA analysis shall undergo, at regular intervals [ ] not to exceed 180 days, external proficiency testing

substantial, primarily because any agency requesting federal development funds for forensic DNA testing or DNA databasing must demonstrate compliance with the standards set by this group."[35]

The DAB quality assurance standards prescribed corrective action procedures and laboratory audits.[36] The DAB also promulgated standards governing (1) analytical protocols, (2) equipment calibration and maintenance procedures, and (3) administrative and technical reviews of test results.[37] Among other requirements, labs were required to (1) review their "procedures annually or whenever substantial changes are made to protocol(s)," and (2) compare their results with available National Institute of Standards and Technology (NIST) reference materials or materials traceable to NIST standards.[38] Nevertheless, the DNA Act suffered from one significant drawback: it failed to require the accreditation of DNA labs.[39] This omission was fixed a decade later with the enactment of the Justice for All Act, which required all DNA programs to be accredited.[40] This, in turn, meant labs were subject to external audits.[41]

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in accordance with the standards. Such external proficiency testing shall be an open proficiency testing program."). An open test is a non-blind test. NAS REPORT, *supra* note 1, at 207.

35. NORAH RUDIN & KEITH INMAN, AN INTRODUCTION TO FORENSIC DNA ANALYSIS 180 (2d ed. 2002).

36. *See* DNA Advisory Board Standard 15.1 (1998) ("The laboratory shall conduct audits annually in accordance with the standards outlined herein."); DNA Advisory Board Standard 15.2 (1998) ("Once every two years, a second agency shall participate in the annual audit.").

37. DNA Advisory Board Standard 9 (1998) (analytical procedures); DNA Advisory Board Standard 10 (1998) (equipment calibration and maintenance); DNA Advisory Board Standard 12 (1998) (administrative and technical review of all case files).

38. DNA Advisory Board Standard 9.5 (1998).

39. In an attempt to address this deficiency, the preface to the DAB Standards "recommend[ed] that forensic laboratories performing DNA analysis seek such accreditation with all deliberate speed." Some states require accreditation of DNA labs. *See, e.g.*, CAL. PENAL CODE § 297(d) (2007) (requiring accreditation by an organization approved by the National DNA Index System Procedures Board). Indiana, on the other hand, does not require accreditation, but does require a laboratory conducting forensic DNA analysis to implement and follow nationally recognized standards for DNA quality assurance and proficiency testing, such as those approved by ASCLD/LAB. IND. CODE ANN. § 10-13-6-14 (West 2013).

40. Pub. L. No. 108-405, 118 Stat. 2260 (2004).

41. The Justice for All Act amended the DNA Identification Act of 1994 to require accreditation "by a nonprofit professional association of persons actively involved in forensic science that is nationally recognized within the forensic science community" within two years and to "undergo external audits, not less than once every 2 years, that demonstrate compliance with standards established by the

Another important legislative initiative also occurred in 1994: New York created the first Forensic Science Commission.[42] The commission was created as the state was attempting to regulate DNA analysis, but its jurisdiction was not limited to DNA. The commission is authorized to (1) develop minimum standards and a program of accreditation for *all* state laboratories, (2) establish minimum qualifications for laboratory directors and other personnel, and (3) approve forensic laboratories for the performance of specific forensic methodologies.[43] This landmark legislation was the first to establish a commission and the first to require accreditation of all state crime labs.

III.
FORENSIC SCIENCE COMMISSIONS

Regrettably, only a few states followed New York and created commissions, and then, only as a result of major scandals.[44] This Section examines three states' commissions.[45]

A. North Carolina

North Carolina established a Forensic Science Advisory Board[46] after Greg Taylor became the first person freed by the state Innocence Inquiry Commission.[47] In the course of the innocence commission's investigation, the bench notes of the analyst who examined serological evidence in Taylor's original murder trial surfaced.[48] The serologist had prepared a lab report that was used at trial to connect the victim to Taylor's car.[49] The lab report stated that there were "chemical indications for the presence of blood."[50] However, the report revealed only the results of a preliminary (pre-

Director of the Federal Bureau of Investigation." § 302, 116 Stat. at 2272–73 (codified as amended at 42 U.S.C. § 14132(b)(2)(A)–(B) (2011)).

42. N.Y. Exec. Law § 995-a (McKinney 1994).

43. *See id.* § 995-b.

44. *See infra* Part III.A (Greg Taylor scandal in North Carolina) and III.B (Houston crime lab scandal).

45. Of states with commissions, only Texas's and New York's have existed long enough to develop a track record.

46. N.C. Sess. Laws 2011-19 (codified at N.C. Gen. Stat. Ann. § 114-61 (West 2011)).

47. N.C. Gen. Stat. Ann. § 15A-1461 (West 2006); Paul C. Giannelli, *The North Carolina Crime Lab Scandal*, 27 Crim. Just., Spring 2012, at 1.

48. Chris Swecker & Michael Wolf, An Independent Review of the SBI Forensic Laboratory 2 (2010).

49. *Id.* at 3.

50. *Id.*

sumptive) test for blood.[51] In contrast, the bench notes showed that a subsequent confirmatory test was negative, but these results were not disclosed to the prosecution or the defense.[52] Surprisingly, the serologist followed standard procedure at the lab in not disclosing negative confirmatory tests.[53] An independent investigation concluded:

> This report raises serious issues about laboratory reporting practices from 1987–2003 and the potential that information that was material and even favorable to the defense of criminal charges filed was withheld or misrepresented. The factors that contributed to these issues range from poorly crafted policy; lack of objectivity[;] the absence of clear report writing guidance; inattention to reporting methods that left too much discretion to the individual Analyst[;] lack of transparency; and ineffective management and oversight of the Forensic Biology Section from 1987 through 2003.[54]

In addition to creating the Forensic Science Advisory Board, the North Carolina legislature (1) removed ASCLD/LAB as the accrediting agency,[55] (2) specified that the laboratory's "client" is the "public and the criminal justice system" rather than the "prosecuting officers of the State,"[56] and (3) made the willful omission or misrepresentation of lab information subject to disclosure a crime.[57]

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51. *Id.*

52. *Id.*

53. Mandy Locke & Anne Blythe, *SBI to Review Old Lab Cases*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 28, 2010, *available at* http://www.newsobserver.com/2010/02/28/362437/sbi-to-review-old-lab-cases.html.

54. SWECKER & WOLF, *supra* note 48, at 4.

55. The statute now provides:

> A forensic analysis, to be admissible under this section, shall be performed by a laboratory that is accredited by an accrediting body that requires conformance to forensic specific requirements and which is a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement For Testing for the submission, identification, analysis, and storage of forensic analyses.

N.C. Sess. Laws 2011-19 amending N.C. GEN. STAT. ANN. § 8-58.20(b) (West 2013).

56. N.C. Sess. Laws 2011-19 (codified as amended at N.C. GEN. STAT. ANN. § 114-16 (West 2011)).

57. N.C. Sess. Laws 2011-19 (codified as amended at N.C. GEN. STAT. ANN. § 15A-903(d) (West 2011)).

B. Texas

Created in 2005, the Texas Forensic Science Commission's[58] first case involved Cameron Todd Willingham, who had been executed in 2004 for the arson-murder of his three young children.[59] Governor Rick Perry refused to stay the execution, despite serious questions about the arson testimony in the case.[60] The commission decided to consider the case after some of the nation's top arson experts reviewed the evidence and found it shockingly flawed.[61] In response, Perry and his allies launched a protracted campaign to prevent the commission from investigating the case, even going so far as to replace three members of the commission two days before a scathing report on the arson evidence was scheduled for consideration.[62] In the end, the commission issued a powerful report critiquing the type of arson evidence used in Willingham's case.[63]

58. TEX. CODE CRIM. PROC. ANN. art. 38.01(4)(a)(3) (West 2013) (among other duties, the Commission should "investigate, in a timely manner, any allegation of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by a crime laboratory").

59. *See* Report of Dr. Gerald Hurst, *In re* Cameron Todd Willingham, Trial Court No. 24,4670(B), Dist. Ct., 366th Judicial Dist., Navarro Cnty., Tex., Feb. 13, 2004 ("The fire investigation report of the Texas State Fire Marshal's Office in this case is a remarkable document. On first reading, a contemporary fire origin and cause analyst might well wonder how anyone could make so many critical errors in interpreting the evidence."); *see also* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sep. 7, 2009; Christy Hoppe, *Some Experts Question Science in Texas Arson Cases*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 20, 2009, at 11A ("Arson investigators in Texas have relied on old wives' tales and junk science to send men to prison, and perhaps even the death chamber, top experts on fire behavior say.").

60. *See supra* note 59.

61. *See* DOUGLAS CARPENTER ET AL., REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASES OF STATE OF TEXAS V. CAMERON TODD WILLINGHAM AND STATE OF TEXAS V. ERNEST RAY WILLIS 3 (2006), *available at* http://www.innocenceproject.org/docs/ArsonReviewReport.pdf ("[E]ach and every one of the [arson] indicators relied upon have since been scientifically proven to be invalid.").

62. *See* CRAIG L. BEYLER, ANALYSIS OF THE FIRE INVESTIGATION METHODS AND PROCEDURES USED IN THE CRIMINAL ARSON CASES AGAINST ERNEST RAY WILLIS AND CAMERON TODD WILLINGHAM 51 (2009) ("The investigators had poor understandings of fire science and failed to acknowledge or apply the contemporaneous understanding of the limitations of fire indicators. Their methodologies did not comport with the scientific method or the process of elimination."); *see generally* Paul C. Giannelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J.L. & LIBERTY 221 (2013).

63. REP. OF THE TEX. FORENSIC SCI. COMMISSION, WILLINGHAM/WILLIS INVESTIGATION (Apr. 15, 2011), *available at* http://www.newenglandinnocence.org/wp-content/uploads/2011/07/TFSC-Final-Report-Willingham-and-Willis.pdf.

Importantly, the report pointed out that forensic disciplines have several obligations: "(1) A duty to correct; (2) [a] duty to inform; (3) [a] duty to be transparent; and (4) [a duty to] implement[ ] . . . corrective action" when new scientific knowledge develops.[64] More recently, the commission sought a review of microscopic hair evidence after the U.S. Department of Justice announced problems with related testimony.[65]

C. New York

New York's commission, the first in the country, has a mixed record. In 2005, the commission required external mid-cycle inspections, instead of the five-year cycle mandated by ASCLD/LAB.[66] This was an important development. But the commission's supervision of the Nassau County Police Department's forensic laboratory, which was closed after alarming deficiencies were reported in the lab's testing for MDMA (Ecstasy), is troubling. The Nassau County lab was placed on probation by ASCLD/LAB twice in its eight-year history—in 2006 and in 2010.[67] According to the New York State Inspector General:

> [T]he Forensic Commission disregarded its mandate by failing to provide the [the lab] the assistance and monitoring it desperately needed. In particular, the Forensic Commission failed to impose its own sanctions once it learned that the [lab] was placed on probation in 2006 by ASCLD/LAB; it neglected to conduct its own inquiry into the reasons for the probation, or even take the minimal step of notifying County Officials of the lab's continued precarious status. Moreover, although the Forensic Commission possesses the authority to set forth requirements specifically tailored to promote uniformity, quality and excellence among forensic laboratories in New York State, it failed to do so. Instead, the Forensic Commission abdicated most, if not all, of its responsibility for oversight of the [lab]

64. *Id.* at 41.

65. *See supra* text accompanying note 9. *See also* Hsu, *supra* note 9, at 2 (the Texas Forensic Science Commission "directed all labs under its jurisdiction to take the first step to scrutinize hair cases").

66. ELLEN N. BIBEN, STATE INSPECTOR GENERAL INVESTIGATION INTO THE NASSAU COUNTY POLICE DEPARTMENT FORENSIC EVIDENCE BUREAU 160 (Nov. 2011) [hereinafter NEW YORK IG REPORT], *available at* http://www.ig.state.ny.us/pdfs/Investigation%20into%20the%20Nassau%20County%20Police%20Department%20Forensic%20Evidence%20Bureau.pdf.

67. *Id.* at 3–4.

and other forensic laboratories across the state to a private accrediting agency, ASCLD/LAB.[68]

In sum, the New York legal regime for oversight was merely a façade.

IV.
ACCREDITATION

I have argued elsewhere that the ASCLD/LAB accreditation program was one of the most significant reforms in the pre-DNA era.[69] Accreditation meant that crime labs were, for the first time, subject to some external supervision. ASCLD/LAB introduced nationwide standards into forensic science—most importantly, it introduced quality assurance programs. As noted in Part III.C, it twice placed the Nassau County lab on probation. In addition, it issued critical reports in several laboratory scandals.[70] A recent scandal at an unaccredited laboratory underscores the importance of regulation.[71] Annie Dookhan, an analyst at the Massachusetts State Crime Laboratory, is facing criminal charges for falsifying drug tests.[72] She periodically recorded the results of negative drug tests as positive and contaminated samples to conform the results to her guesses;

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68. *Id.* at 6.

69. Giannelli, *Regulating Crime Laboratories*, *supra* note 11, at 75.

70. For example, based on an ASCLD/LAB investigation, a judicial inquiry in West Virginia concluded that, "as a matter of law, any testimonial or documentary evidence offered by [the former serologist] at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible." In re Investigation of the W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 520 (W. Va. 1993). In the Earl Washington case, ASCLD/LAB made several negative findings, including that DNA tests had been interpreted erroneously. ASCLD/LAB Limited Scope Interim Inspection Report 16–17 (Apr. 9, 2005). In addition, "[p]ressures from outside the laboratory and excessive managerial influence from within the laboratory during the STR analyses phase had a detrimental affect [sic] on the analyst's decisions, examinations and reports in this case." *Id.* at 17. This pressure led to deviations from normal protocols. *Id.*

71. *See generally* Glenn A. Cunha, Office of the Inspector Gen., Investigation of the Drug Laboratory at the William A. Hinton State Laboratory Institute 2002–2012 (2014) (summarizing the facts and findings of the Massachusetts Office of the Inspector General's review of the lab where Annie Dookhan's misconduct took place and recommending state action to prevent future drug lab scandals).

72. *See* Eugenie Samuel Reich, *Boston Scandal Exposes Backlog*, 490 Nature, Oct. 2012 at 153; Sheri Qualters, *Judge Warns Lab Scandal Imperils Hundreds of Prosecutions*, Nat'l L.J. Oct. 22, 2012.

"[a]lready, nearly three hundred offenders have been released after evidence analyzed by Dookhan was questioned."[73]

A. Resistance to Accreditation

Because the ASCLD/LAB program was voluntary, many labs initially resisted accreditation. For example, the FBI Laboratory sought accreditation only after the release of a searing U.S. Department of Justice report on the laboratory's explosive unit in 1997.[74] In that report, the Inspector General documented numerous deficiencies, including: (1) inaccurate testimony; (2) testimony beyond the competence of examiners; (3) improperly prepared laboratory reports; (4) insufficient documentation of test results; (5) inadequate record management and retention; and (6) failure to resolve serious and credible allegations of incompetence.[75] Among other things, the Inspector General recommended that the laboratory seek accreditation.[76] Similarly, Texas required accreditation only af-

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73. Scott Allen & Andrea Estes, *More Signs of Disarray in Closed State Drug Lab*, Bos. Globe, Apr. 2, 2013; *see also* Kay Lazar, *How a Chemist Dodged Lab Protocols: Close Supervision is Key in a Lab, Specialists Say, and Annie Dookhan's Appeared to Lack It*, Bos. Globe, Sept. 30, 2012 ("Dookhan allegedly removed evidence from the lab's secure area without authorization, forged colleagues' initials on control sheets that record test outcomes, and intentionally contaminated samples to make them test positive, after they were sent back to her to re-check because she had 'dry-labbed' instead of completing the required preliminary tests. While colleagues were suspicious of her shoddy work habits and unusually high output and reported concerns to supervisors, little action was taken for more than a year, according to the police inquiry."); Associated Press, *Massachusetts Chemist Arrested in Drug Lab*, Hous. Chron., Sept. 29, 2012 ("State police say she tested more than 60,000 drug samples involving 34,000 defendants during her nine years at the lab. . . . Dookhan later acknowledged to state police that she sometimes would take 15 to 25 samples and instead of testing them all, she would test only five of them, then list them all as positive. She said that sometimes, if a sample tested negative, she would take known cocaine from another sample and add it to the negative sample to make it test positive for cocaine . . . .").

74. *See generally*, Office of Inspector Gen., U.S. Dep't of Justice, The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (Apr. 1997) [hereinafter OIG Lab Explosive Unit Report]; *see also* John F. Kelly & Phillip K. Wearne, Tainting Evidence 2 (1998) ("The findings were alarming. FBI examiners had given scientifically flawed, inaccurate, and overstated testimony under oath in court; had altered the lab reports of examiners to give them a pro-prosecutorial slant, and had failed to document tests and examinations from which they drew incriminating conclusions, thus ensuring that their work could never be properly checked.").

75. OIG Lab Explosive Unit Report at Executive Summary Part I.A.

76. The report's others recommendations included: (1) requiring examiners in the Explosives Unit to have scientific backgrounds in chemistry, metallurgy, or engineering; (2) mandating that each examiner who performs work prepare and

ter the Houston crime lab was shut down, causing a state senator to say, "[T]he validity of almost any case that has relied upon evidence produced by the lab is questionable."[77] The same is true of Oklahoma, which mandated accreditation after the gross misconduct of an analyst, Joyce Gilchrist, was publicized.[78] It appears that Gilchrist

> [U]sed her lab tests to confirm the detectives' hunches rather than seek independent scientific results. She also tried to control the results of her tests . . . . She treated discovery requests with contempt and kept evidence from the defense. She systematically destroyed evidence at the very time when she knew that much of that evidence might be retested.[79]

The same resistance occurred in other states. As late as 2002—two decades after the accreditation program commenced—the President of the American Academy of Forensic Sciences wrote: "Unfortunately, while the ASCLD/LAB program has been successful in accrediting over 200 Laboratories, a large number of forensic laboratories in the U.S. remain unaccredited by any agency. . . .

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sign a separate report instead of a composite report "without attribution to individual examiners"; (3) establishing report review procedures by unit chiefs; (4) preparing adequate case files to support reports; (5) monitoring court testimony in order to preclude examiners from testifying to matters beyond their expertise or in ways that are "unprofessional"; and (6) developing written protocols for scientific procedures. *Id.* at Executive Summary Part VII.

77. Rodney Ellis, *Want Tough on Crime? Start by Fixing HPD Lab*, HOUS. CHRON., (Sept. 5, 2004), http://www.chron.com/opinion/outlook/article/Want-tough-on-crime-Start-by-fixing-HPD-lab-1474986.php. Similarly, the chair of the legislative committee investigating the lab has stated: "It's a comedy of errors, except it's not funny." Adam Liptak, *Review of DNA Clears Man Convicted of Rape*, N.Y. TIMES, Mar. 11, 2003, *available at* http://www.nytimes.com/2003/03/11/national/11DNA.html (quoting state Representative Kevin Bailey).

78. *See* Mitchell v. Gibson, 262 F.3d 1036, 1064 (10th Cir. 2001) ("Ms. Gilchrist thus provided the jury with evidence implicating Mr. Mitchell in the sexual assault of the victim which she knew was rendered false and misleading by evidence withheld from the defense."); McCarty v. State, 765 P.2d 1215, 1217 (Okla. Crim. App. 1988) ("Ms. Gilchrist's delay and neglect in not completing her forensic examination and report until Friday, March 14, 1986 . . . was inexcusable, since she began her forensic examination in December of 1982.").

79. MARK FUHRMAN, DEATH AND JUSTICE: AN EXPOSE OF OKLAHOMA'S DEATH ROW MACHINE 232 (2003); *see also* James E. Starrs, *The Forensic Scientist and the Open Mind*, 31 J. FORENSIC SCI. SOC'Y 111, 132–33 (1991) ("[I]n her missionary zeal to promote the cause of the prosecution she had put blinders on her professional conscience so that the truth of science took a back seat to her acting the role of an advocate.").

Why have forensic laboratories . . . been so reluctant to become accredited . . . ?"[80]

Today, most labs are accredited. However, only a few states require accreditation,[81] and some delegate accreditation directly to ASCLD/LAB.[82] This is no small matter because, as with any accreditation program, the critical issue is the rigor of the regulatory regime and the efficacy of its enforcement mechanism. In other words, a private organization should not take the place of a public agency in setting standards. And, as discussed in Part IV.B, there are a number of defects in the ASCLD/LAB program.

B. Problems with Accredited Laboratories

Accreditation is not, however, a panacea—even for DNA analysis.[83] In 2004, a Department of Justice report documented the malfeasance of Jacqueline Blake, who had been hired by the FBI in 1988 as a serologist and later worked as a DNA analyst.[84] From March 2000 to June 2002, she worked with DNA-Polymerase Chain Reaction (PCR).[85] For two years, while performing analyses on

80. Graham R. Jones, *President's Editorial—The Changing Practice of Forensic Science*, 47 J. FORENSIC SCI. 437, 438 (2002).

81. As discussed in Part II *supra*, New York requires accreditation through its Forensic Science Commission. *See supra* notes 42–43 and accompanying text. *See also* N.C. GEN. STAT. ANN § 8-58.20(b) (West 2013) (requiring accreditation "by an accrediting body that requires conformance to forensic specific requirements and which is a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement For Testing"); TEX. CODE CRIM. PROC. ANN. art. 38.35 (2005) (requiring accreditation by the Department of Public Safety).

82. *See, e.g.*, OKLA. STAT. ANN. tit. 74, § 150.37 (West 2011) (requiring accreditation by the ASCLD/LAB or the American Board of Forensic Toxicology).

83. DAB standards mandate annual internal audits and biannual external audits for DNA labs. DNA Advisory Board Standard 15.1 (1998) ("The laboratory shall conduct audits annually in accordance with the standards outlined herein."); DNA Advisory Board Standard 15.2 (1998) ("Once every two years, a second agency shall participate in the annual audit."). Nevertheless, a 2001 Department of Justice Report found that the audit procedures for CODIS were defective. *See* 2001 IG REPORT, *supra* note 32. A review of eight state and local laboratories "disclosed that four laboratories did not fully comply with the FBI's quality assurance standards and national index requirements." *Id.* at iii. In addition, unallowable or incomplete profiles had been entered into CODIS. *Id.* at iv. The problem stemmed from the fact that the audit did not review the actual DNA profiles, so labs could certify their own compliance instead of reporting the audit results directly to the FBI. *See generally id.*

84. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FBI DNA LABORATORY: A REVIEW OF PROTOCOL AND PRACTICE VULNERABILITIES (2004) [hereinafter 2004 IG REPORT].

85. *Id.* at i.

crime scene evidence in more than 100 cases, she failed to complete negative control tests, a required part of the lab protocol designed to identify whether contamination has been introduced into the process.[86] This omission "rendered her work scientifically invalid and unusable in court."[87] In addition, she falsified lab documents to conceal her misdeeds.[88] In May 2004, she pleaded guilty to a misdemeanor charge of providing false information in her lab reports.[89]

Although the FBI lab was accredited at the time and thus subject to audits, her misconduct was revealed by accident rather than through the established safeguards.[90] As the 2004 Inspector General's report observed, "[W]eaknesses in DNA [Unit 1] procedures and protocols allowed a technician routinely to disregard required steps in the analysis of DNA, even while the Unit received clean audit reports from both internal and external auditors and while the Unit was accredited by ASCLD-LAB."[91]

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86. *Id.*

87. *Id.* at i. Blake was a technician, not an examiner, and therefore did not testify.

> By itself, however, the failure to process the negative controls does not change the test results or lead to a particular testing outcome (e.g., creating a match between a known and unknown evidence sample). The retesting of evidence in Blake's cases to date indicates that, while she did not properly conduct the contamination testing, the DNA profiles that she generated were accurate.

Id. In some cases, however, her testing consumed all of the available DNA in the case. *Id.*

88. *Id.*

89. *Id.* at ii.

90. *Id.* at ii ("In April 2002, a colleague of Blake was working late one evening after Blake had left the Laboratory for the day, and noticed that the testing results displayed on Blake's computer were inconsistent with the proper processing of the control samples.").

91. *Id.* at 21. Blake also failed to run the negative controls in her qualifying proficiency tests, but this was not detected. *Id.* at 40–41. Moreover, in reviewing the laboratory's protocols, the 2004 Inspector General's report identified several significant problems:

> [I]n approximately 20 percent of the protocol sections we reviewed we identified one or more of the following deficiencies: 1) the protocol lacks sufficient detail; 2) the protocol fails to inform the exercise of staff discretion; 3) the protocol fails to ensure the precision of manual notetaking; and 4) the protocol is outdated.

Id. at 130.

In addition, the FBI's response to this incident proved insufficient in some important respects. The agency's audit covered only the two years when Blake worked as a PCR biologist, but should have extended to the prior twelve years, during which she was a serologist and then a Restriction Fragment Length Polymorphism (RFLP) analyst. *Id.* at 67. In addition, the Office of the General Counsel

Perhaps the worst reported scandal involved the Houston Police Department Crime Lab. A 2002 state audit revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science.[92] As described by a subsequent investigation,

> [T]he DNA Section was in shambles—plagued by a leaky roof, operating for years without a line supervisor, overseen by a technical leader who had no personal experience performing DNA analysis and who was lacking the qualifications required under the FBI standards, staffed by underpaid and undertrained analysts, and generating mistake-ridden and poorly documented casework.[93]

Several defendants have been exonerated since the report. Indeed, Josiah Sutton was convicted of rape in 1999 based on flawed DNA evidence.[94] Retesting freed him.[95] As the Houston fiasco

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(OGC) failed to appreciate the seriousness of the problem when informed of it. *Id.* at 65 ("[T]he laboratory did not receive the quality of legal services that one would expect from FBI OGC, and Laboratory management was not sufficiently assertive when soliciting legal advice.").

92. QUALITY ASSURANCE AUDIT OF HOUSTON POLICE DEPARTMENT CRIME LAB—DNA/SEROLOGY SECTION (Dec. 12–13, 2002), *available at* http://www.scientific.org/archive/Audit%20Document—Houston.pdf; *see also* Nick Madigan, *Houston's Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES, Feb. 9, 2003, at L20, *available at* http://www.nytimes.com/2003/02/09/us/houston-s-troubled-dna-crime-lab-faces-growing-scrutiny.html (operations suspended in December 2002 after an audit found numerous problems, "including poor calibration and maintenance of equipment, improper record keeping and a lack of safeguards against contamination . . . . Among other problems, a leak in the roof was found to be a potential contaminant of samples on tables below.").

93. MICHAEL R. BROMWICH, THIRD REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 5 (2005) [hereinafter THIRD REPORT], *available at* http://www.hpdlabinvestigation.org.

94. Sutton v. State, No. 14-99-00951-CR, 2001 WL 40349, at *1–2 (Tex. Ct. App. Jan. 18, 2001) (denying appeal) ("Appellant filed a motion for new trial asserting ineffective assistance of trial counsel. At the hearing on the motion, appellant's trial counsel, Charles Herbert, testified that before trial he suggested to appellant's family that they obtain independent DNA testing. He stated that he collected some $600 to $650 from them, but told them they would need to raise a total of $1200 to $1500 for the testing. Herbert essentially testified that he never obtained DNA testing because: (1) appellant's family did not come up with the additional money, and (2) he did not believe there were any unadulterated samples remaining for testing. Two of appellant's family members contradicted Herbert, testifying that he took their money to have the test done but never told them they would need to pay more.").

95. *See* Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing in Houston Cases*, N.Y. TIMES, Aug. 5, 2004, at A19, *available at* http://www.nytimes

demonstrated, internal audits are often not robust. That lab passed its internal audits with flying colors, only to be shut down following an external audit.[96]

Similarly, recent news accounts reported lapses at the New York Medical Examiner's DNA laboratory, one of the premier DNA facilities in this country. In more than 800 rape cases, "DNA evidence may have been mishandled or overlooked by a lab technician, resulting in incorrect reports being given to criminal investigators."[97] During an investigation, supervisors discovered another serious problem—cross-contamination: "Sixteen pieces of evidence, generally swabs sealed in paper envelopes, were found in the wrong rape kit, commingling DNA evidence from 19 rape investigations, according to a letter from the medical examiner's office."[98]

C. Inadequate Standards

A related issue concerns ASCLD/LAB's standards and procedures, which have been criticized on several grounds.

.com/2004/08/05/national/05houston.html ("[P]rosecutors in Mr. Sutton's case had used [DNA] to convict him, submitting false scientific evidence asserting that there was a solid match between Mr. Sutton's DNA and that found at the crime scene. In fact, 1 of every 8 black people, including Mr. Sutton, shared the relevant DNA profile. More refined retesting cleared him."); *see also* Roma Khanna & Steve McVicker, *Police Chief Shakes Up Crime Lab; 2 Officials Quit, Others Disciplined*, HOUS. CHRON., June 13, 2003, *available at* http://www.chron.com/news/article/Police-chief-shakes-up-crime-lab-2-officials-quit-2108306.php ("Christi Kim is a DNA analyst who tested the DNA used to convict Josiah Sutton . . . . Police investigators cited her for incorrectly documenting the results of DNA profiles, failing to report the full set of DNA results in an unnamed case and making an incorrect data entry in an unnamed capital murder case.").

96. An internal review "performed at the end of 2000 and 2001 described a very different picture of the state of that Section than did the DPS [external] audit in December 2002." THIRD REPORT, *supra* note 93, at 64.

97. Joseph Goldstein, *New York Sees Errors on DNA in Rape Cases*, N.Y. TIMES, Jan. 11, 2013, at A11, *available at* http://www.nytimes.com/2013/01/11/nyregion/new-york-reviewing-over-800-rape-cases-for-possible-mishandling-of-dna-evidence.html.

98. *Id.* at A19; *see also* Joseph Goldstein, *Mishandling of DNA Evidence Is Found in Over 50 Cases at Crime Lab*, N.Y. TIMES, Feb. 1, 2013, at A11, *available at* http://www.nytimes.com/2013/02/01/nyregion/more-dna-problems-found-in-new-york-city-crime-lab.html ("The latest disclosure comes as the medical examiner's office is concluding a nearly two-year review of its handling of 800 rape cases. That review began after supervisors discovered that a longtime technician had overlooked DNA evidence on items from at least 26 rape kits, incorrectly reporting that they contained no relevant evidence. In addition, the technician is believed to have misplaced 16 pieces of evidence, returning them to the wrong rape kits, according to documents describing the office's review.").

First, from its inception ASCLD/LAB has been criticized because the program was run by insiders—crime lab directors. This raised the specter of the fox guarding the chicken coop.[99] Moreover, because inspectors can be employed by crime labs that are themselves reviewed by ASCLD/LAB, there may be "a tendency among examiners to go along to get along."[100] In other areas of law, the problem of "regulatory capture" is well established.[101] Regulatory capture often occurs over time. But here, it was built into the process from the beginning. In the long run, inspectors need to be independent.

Second, the five-year inspection cycle is inadequate for effective oversight.[102] Between inspections, ASCLD/LAB relies on annual self-audits. As noted in Part II, New York mandated a two-and-a-half-year cycle, and the American Bar Association's Standards on DNA Evidence recommend a two-year cycle.[103] The Justice for All Act of 2004 dictates that DNA "external audits, not less than once every 2 years, . . . [must] demonstrate compliance with standards

99. *See* Janine Arvizu, *Forensic Labs: Shattering the Myth*, CHAMPION, May 2000, at 18, 20 ("The ASCLD/LAB is essentially a trade organization of crime laboratory directors. The membership of the ASCLD/LAB delegate assembly consists solely of the laboratory directors of ASCLD accredited laboratories."); Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHI. TRIB., Oct. 21, 2004, *available at* http://www.chicagotribune.com/news/watchdog/chi-041021forensics,0,3075697.story (quoting James Durkin, a former Cook County prosecutor and former Republican state representative as saying, "I believe they are more of a fraternal organization than an authoritative scientific body").

100. Editorial, *Overlooked*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 29, 2010. Although the North Carolina crime lab had been accredited since 1988, a series of articles by *The News & Observer*, entitled "Agents Secrets," raised serious questions about ASCLD/LAB's accreditation procedures. *See* Mandy Locke & Joseph Neff, *Legislators: SBI Needs New Accrediting Agency*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 17, 2010 at 1A; *see also* Joseph Neff & Mandy Locke, *Forensic Groups' Ties Raise Concerns*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 26, 2010 ("Two leaders of the accreditation agency are retired [N.C. crime lab] agents who had key management roles at the lab at the time problems persisted.").

101. *See, e.g.*, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014).

102. ASCLD/LAB has two accreditation programs. *See Accreditation Programs*, ASCLD/LAB, http://www.ascld-lab.org/acreditation-programs/ (last visited Sept. 18, 2014). The older one ("legacy" program) requires inspections every five years. ASCLD/LAB, POLICY ON SECOND ACCREDITATION CYCLE AND BEYOND SURVEILLANCE VISITS 1 ("Near the end of the first five-year cycle of accreditation a full reassessment of the accredited laboratory shall take place.").

103. *See supra* notes 42–43 and accompanying test; ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE § 3.1(a)(i) (3d ed. 2007).

established by the Director of the Federal Bureau of Investigation . . . ."[104]

Third, ASCLD/LAB procedures permit each analyst to select five cases for review during an audit. As the New York Inspector General observed, "such practice is susceptible to abuse and might not reliably represent the actual quality of work of a laboratory."[105] Instead, the Inspector General recommended that the state forensic commission establish its own procedures—such as instituting random review.[106] This is not a new criticism. A newspaper editorial addressed the same point after the Gregg Taylor scandal in North Carolina:

> In reviewing analysts' work, ASCLD-LAB allows laboratory supervisors to pick cases to be examined at their labs. That saves time . . . but how likely would it be that a case involving, say, the SBI lab's failure to report a test for human blood that didn't pan out would be volunteered for outside review?"[107]

Fourth, the New York Inspector General also criticized ASCLD/LAB's policy of "requir[ing] inspectors to destroy their notes of inspections; only the reports are maintained."[108] The Inspector General recommended that the Forensic Commission require ASCLD/LAB to maintain any and all documentation that relates to inspections conducted in the state.[109]

CONCLUSION

There is no question that the regulation of crime labs has improved significantly, and the DNA regulatory regime has often provided a model. Most labs are now accredited by the ASCLD/LAB's voluntary program, and ASCLD/LAB is switching over to a new program.[110] Nevertheless, several further steps are needed.

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104. 42 U.S.C. § 14132(b)(2)(B) (2006).

105. NEW YORK IG REPORT, *supra* note 66, at 162.

106. *See id.*

107. *Overlooked*, *supra* note 100.

108. NEW YORK IG REPORT, *supra* note 66, at 163.

109. *Id.*

110. *See Accreditation Programs*, *supra* note 102. ("In 1996, the ASCLD/LAB Board of Directors passed a resolution to encourage the movement of the accreditation program to ISO 25 which later became ISO 17025. After several years of research and presentations to the Delegate Assembly, the 2003 Delegate Assembly approved a transition from the longstanding accreditation Legacy program to an accreditation program based on ISO/IEC 17025 which would be supplemented with the essential forensic elements of the Legacy program. At the end of 2003, it was announced that effective April 1, 2004, ASCLD/LAB would offer accreditation under two programs for a period of five years to end on April 1, 2009. The plan

First, accreditation should be mandatory, not voluntary.

Second, accreditation should be the responsibility of a public agency. Thus, statutes mandating accreditation by ASCLD/LAB are insufficient.[111] While it makes sense to employ an organization, such as ASCLD/LAB, that has special expertise in forensic audits, especially when there are few alternatives,[112] the regulation of crime labs is a public function; it should not be delegated to a private organization such as ASCLD/LAB without oversight. The establishment of forensic commissions in each state is critical for accountability.

Third, forensic commissions should not accept the minimum standards of ASCLD/LAB. For example, improved standards should include a two-year inspection cycle, and inspections should require the random selection of casework for review.

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was called dual track accreditation under which a laboratory could elect to apply for accreditation under the Legacy program or under the ISO/IEC 17025 based program which was named the ASCLD/LAB-International Accreditation Program.").

111. *See, e.g.*, OKLA. STAT. ANN. tit. 74, § 150.37 (West 2011) (requiring accreditation by ASCLD/LAB or the American Board of Forensic Toxicology).

112. After the Greg Taylor scandal, the North Carolina legislature amended its accreditation statute, no longer designating ASCLD/LAB as the accrediting agency. The statute now provides:

> A forensic analysis, to be admissible under this section, shall be performed by a laboratory that is accredited by an accrediting body that requires conformance to forensic specific requirements and which is a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement For Testing for the submission, identification, analysis, and storage of forensic analyses.

N.C. Sess. Laws 2011-19 (codified at N.C. GEN. STAT. ANN. § 8-58.20(b) (West 2013)).

SHADOW DWELLERS: THE UNDERREGULATED WORLD OF STATE AND LOCAL DNA DATABASES

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* Chief Attorney, Forensics Division, Maryland Office of the Public Defender; Adjunct Professor of Law, University of the District of Columbia David A. Clarke School of Law. I owe a debt for the idea to closely examine the DNA collection, retention, and distribution practices of state and local law enforcement agencies to my professor, colleague, and father-in-law, Professor William G. McLain, III. In remarks before the U.S. House of Representatives, Rep. Alcee L. Hastings memorialized Professor McLain as:

> [A] champion for the powerless and a brilliant legal mind. . . . He worked tirelessly—often without compensation or recognition—on behalf of death row inmates and other criminal defendants who faced trumped up charges or other government abuses. He deplored racism and homophobia and provided legal counsel to those who were victimized by discrimination. Will was also a staunch advocate for the freedom of the press.

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INTRODUCTION

To do her part to help law enforcement, a Louisiana rape victim voluntarily provided her DNA so that her genetic information might help bring her attacker to justice.[1] After all, DNA saves lives and helps solve crimes.[2] Much to her horror, her DNA did not lead law enforcement to her rapist; rather, her DNA sample led to her brother's conviction for a separate string of crimes.[3] In Louisiana, DNA profiles from victims and suspects remain warehoused in local DNA databases indefinitely.[4] As a result, this woman essentially became a genetic informant on her brother. At arguably her most vulnerable point, this rape victim felt betrayed, because the police "did everything behind [her] back."[5] Her brother's attorney cautioned that "[s]uch cases might make rape victims think twice before reporting an attack."[6]

Louisiana's unexpected use of crime victim DNA and local DNA databases[7] to investigate crimes is not unique. This also occurs in Maryland, where police in Baltimore City and Prince George's County retain crime victim DNA in underregulated local DNA

1. *See* Ellen Nakashima, *From DNA of Family, a Tool to Make Arrests: Privacy Advocates Say the Emerging Practice Turns Relatives into Genetic Informants*, WASH. POST, Apr. 21, 2008, at A01.

2. *See* Jessica D. Gabel, *Indecent Exposure: Genes Are More than a Brand Name Label in the DNA Database Debate*, 42 U. BALT. L. REV. 561, 561 (2013); *see also* DNASAVES, http://dnasaves.org (last visited Oct. 6, 2014).

3. Nakashima, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. For the purposes of this article, "databank" is used to refer to the repository of data at the national level of CODIS and "database" is used to refer to the state and local levels of CODIS.

databases from known persons that police cannot enter into the FBI's Combined Offender DNA Indexing System national DNA databank (CODIS).[8] These local police departments also maintain underregulated databases of DNA profiles from crime scenes that contain low-quality samples that are not permitted in CODIS.[9] Every week these local underregulated databases are compared to find complete or partial matches that link a known individual to crime scene evidence, or an unknown individual across multiple crime scenes[10]—with unintended consequences.

Louisiana and Maryland are not the exception, but rather the norm. The more than 190 public DNA laboratories that participate in the FBI's CODIS program also maintain databases at the state or local level[11] that may contain DNA from known persons or crime scenes that cannot be entered into the national databank.[12] The FBI closely regulates the categories of DNA profiles that can be entered into the national databank, but not the categories that partici-

8. *See, e.g.*, United States v. Davis, 657 F. Supp. 2d 630, 634–35 (D. Md. 2009) (describing unregulated operation of Prince George's County's local DNA database), *aff'd*, 690 F.3d 226 (4th Cir. 2012).

9. CECELIA CROUSE & D.H. KAYE, THE RETENTION AND SUBSEQUENT USE OF SUSPECT, ELIMINATION, AND VICTIM DNA SAMPLES OR RECORDS 2–5 (rev. ed. 2001) (discussing types of samples local and state databases contain).

10. *See* Brandon L. Garrett & Erin Murphy, *Too Much Information*, SLATE (Feb. 12, 2013, 8:22 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/?2013/02/dna_collection_at_the_supreme_court_maryland_v_king.html.

11. *See CODIS and NDIS Factsheet*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Nov. 8, 2014). Although CODIS is used as a generic term to describe the network of police DNA databanks, it is actually software developed by the FBI for DNA laboratories to operate state and local DNA databases and to manage the DNA information they upload to the national DNA databank. *Id.*

12. While the FBI does not collect data from state and local laboratories that participate in CODIS regarding retention practices of "nonoffender samples," such as crime victim, elimination, or suspect samples that cannot be entered into the national databank, in 2000, the National Commission on the Future of DNA Evidence surveyed participating CODIS laboratories regarding current retention practices for nonoffender samples. Of the nineteen laboratories that responded, "[h]alf . . . determined that DNA profiles would be entered into [local] and [state] databases based on court opinions and 'analyst discretion' (defined as 'we import what we're comfortable importing')." CROUSE & KAYE, *supra* note 9, at 3. Seven laboratories did not have an internal CODIS manual with guidelines for analyst discretion. *Id.* Over two-thirds of the laboratories had no written definition of what samples constitute an elimination sample or a suspect sample. *Id.* Two of the laboratories entered a victim sample into the database if police notified the laboratory that the victim "is known to be associated with criminal activity." *Id.* These two laboratories also offered a quality assurance rationale to justify the inclusion of victims' samples. *Id.*

pating laboratories can store and search in databases at the local and state levels, creating a gap in regulation.[13]

Precisely because of this regulatory gap, police may expand underregulated local and state CODIS databases using DNA samples from crime victims, individuals who voluntarily provide elimination samples to aid an investigation, or samples collected from persons pursuant to a court order or warrant.[14] Police may also expand underregulated databases using crime scene DNA samples that do not meet the FBI's quality standards for inclusion in the national databank.[15]

This is the next wave of DNA database expansion. Unfortunately, it is accompanied by the perverse consequences that flow from allowing law enforcement to decide which citizens should be subjected to lifelong genetic surveillance in databases that are trawled for matches or partial matches to crime scene DNA samples rejected by the FBI. These consequences could very well endanger public confidence in the core mission of the regulated national DNA databank without any corresponding utility.

To better understand the current legal environment, Part I of this Article reviews the existing regulations and uses of DNA databases. From there, Part II addresses the current wave of expansion of underregulated state and local DNA databases. Turning to the root cause of some potential problems, Part III identifies the existing gaps in statutory and judicial regulation of law enforce-

13. The FBI specifically requires laboratories participating in CODIS to: (1) be an accredited laboratory; (2) have the status of a criminal justice agency; (3) have the status of a laboratory audited to FBI quality assurance standards; (4) comply with federal expungement law; (5) comply with federal law restricting access to information; and (6) limit demographic or criminal justice information directly linked to a profile. *See* FBI, NDIS Operational Procedures Manual § 2.1 (2014), *available at* http://static.fbi.gov/docs/NDIS-Procedures-Manual-Final-1-31-2013-1.pdf. The FBI does not require participating laboratories to ensure the categories of DNA profiles that may be stored and searched in state and local databases conform to the permissible categories of profiles in the national databank. *See id.* § 3.1. Also, the FBI does not require participating laboratories to adhere to the data standards for DNA profiles submitted to the national databank. *See id.* § 4.2.

14. *See supra* note 12 and accompanying text; *see also* Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. Times, June 13, 2013, at A1.

15. *See* Crouse & Kaye, *supra* note 9. The FBI standards for data entered into the national databank require: (1) that crime scene samples be associated with a putative perpetrator; (2) limitations on mixtures of DNA; (3) a ban on low-template or low-copy-number profiles; and (4) the submitting laboratory to confirm that the data being submitted is sufficiently discriminating to result in only one match in the databank. FBI, NDIS Operational Procedures Manual, *supra* note 13, § 4.2.1.

ment agencies' DNA databases at the state and local level, with a particular focus on legal challenges to underregulated DNA databases in Maryland as a case example. Finally, the Conclusion identifies the objectives of regulation and makes specific proposals for legislatures to consider.

I.
EXISTING REGULATIONS AND USES OF DNA DATABASES

A. Background on Forensic DNA

Deoxyribonucleic acid (DNA) analysis is one of the most important advances in forensic science.[16] DNA testing provides police with an accurate and reliable method of comparing the DNA of a known person to DNA left at a crime scene by an unknown perpetrator.[17] The biological properties of DNA make it an ideal piece of evidence for police to focus on when investigating crime. Only a miniscule amount of biological material is needed to produce the DNA profile that law enforcement uses to compare crime scene DNA to DNA collected from a known person.[18] The crime scene DNA can be from different bodily fluids, such as blood, saliva, or semen, or any cell with a nucleus (including involuntarily shed skin cells) because an individual's entire DNA sequence can be found in the nucleus of any single cell.[19] Police can easily collect a DNA sample from a willing suspect with a cotton swab rubbed on the inside of the cheek,[20] and may also constitutionally collect DNA surreptitiously from involuntarily shed skin cells or other biological material.[21]

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16. *See generally DNA Evidence Basics*, NAT'L INST. JUST., http://nij.gov/topics/forensics/evidence/dna/basics/Pages/welcome.aspx (last visited Nov. 8, 2014) (providing an overview of what sorts of DNA analyses are conducted in criminal cases and how those analyses are used).

17. *See* JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 1–2 (2d ed. 2005).

18. *See DNA Evidence: Basics of Identifying, Gathering and Transporting*, NAT'L INST. JUST., http://nij.gov/topics/forensics/evidence/dna/basics/Pages/identifying-to-transporting.aspx (last visited Nov. 8, 2014).

19. BUTLER, *supra* note 17, at 29.

20. *See DNA Buccal Collection Kit Training and Procedures*, FBI (Aug. 8, 2014), http://www.fbi.gov/about-us/lab/biometric-analysis/federal-dna-database/buccal-collection-kit-information. The collection of cheek cells from within the mouth cavity is referred to as a "buccal swab." *Id.*

21. *See, e.g.*, Raynor v. State, 99 A.3d 753, 755 (Md. 2014) (holding that a Fourth Amendment search did not occur when police collected and analyzed ge-

Because an individual's full DNA sequence is very large, CODIS utilizes a DNA profile that consists of only thirteen locations on certain chromosomes (13 CODIS Core Loci).[22] The 13 CODIS Core Loci provide for easy comparison of DNA profiles of known individuals to DNA profiles collected from crime scenes, helping to find matches that may identify the perpetrator of a crime.[23] A matching sequence of 13 CODIS Core Loci is ordinarily a rare enough event to uniquely identify a person as the source of DNA collected at a crime scene.[24] A perfect match between two complete profiles shows a common source.[25] A partial match, on the other hand, may identify a family member as the source of crime scene DNA because related persons inherit their DNA profiles from the same family tree.[26] A partial match may also happen by chance because low-quality crime scene profiles may not have sufficient information to reliably discriminate between persons who may be potential contributors.[27]

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netic material from the armrest of a chair in which the defendant had been sitting during an interview).

22. BUTLER, *supra* note 17, at 94–97. This DNA profile is unique enough that when two of these DNA profiles are compared, "the average random match probability is rarer than one in a trillion unrelated individuals." *Id.*

23. *Id.* at 438. Police use of DNA is increasingly more sophisticated than just identifying suspects from visible stains of biological evidence like blood or semen found at crime scenes. Today, police are trained to collect biological evidence from a wide range of non-stained surfaces or articles that invisible cellular material may have been deposited on, such as doorknobs, steering wheels, hats, masks, or bandanas, to name a few. *See DNA Evidence: Basics of Identifying, Gathering and Transporting*, NAT'L INST. JUST., http://nij.gov/topics/forensics/evidence/dna/basics/Pages/identifying-to-transporting.aspx (last visited Nov. 8, 2014). Police are also trained to collect and use DNA for purposes beyond identification of a suspect. For example, DNA may change a defense in a rape case from alibi to consent by placing an individual at a location where he claims not to have been, or undermine a claim of self-defense by showing a suspect's DNA was collected from a weapon. *See id.*

24. *See* BUTLER, *supra* note 17, at 94–95. In the context of the federal DNA databank, "match" and "hit" are defined terms. A "match" occurs when a CODIS search results in an association between two or more DNA profiles, after which designated laboratory personnel from each affected laboratory start a process to confirm the match. *See* FBI, NDIS OPERATIONAL PROCEDURES MANUAL, *supra* note 13, § 6.1.1. A "hit" occurs when a confirmed or verified match aids one or more open investigations. *See id.* § 6.6.1.

25. Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. MED. & ETHICS 248, 251 (2006).

26. *See* FBI, NDIS OPERATIONAL PROCEDURES MANUAL, *supra* note 13, app. G.

27. PETER GILL, MISLEADING DNA EVIDENCE: REASONS FOR MISCARRIAGES OF JUSTICE 125 (2014) ("Random match probabilities are more likely with low-template DNA profiles that are multi-contributor mixtures. False positives can occur as a result of 'composite results' from two or more contributors.") (citations omit-

In the 1980s, police began to use DNA to investigate unsolved cases in which biological evidence from a crime scene could be analyzed to develop a DNA profile, which could then be compared to DNA profiles collected from a group of possible suspects.[28] DNA was also used in cases where a suspect was known. The police could compare a known suspect's DNA profile to biological evidence found at the scene of a crime.[29] The potential value of databases of DNA from known individuals to provide investigative leads for unsolved crimes—as well as the substantial privacy concerns implicated when law enforcement collects, retains, and distributes DNA of known persons—was recognized early on.[30]

The first generation of forensic DNA testing, however, had practical limitations that checked the growth of DNA databases and limited their use to crimes where the DNA evidence was highly relevant to the identity of the perpetrator: early tests were expensive;[31] they required a blood sample from the suspect;[32] and, relative to

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ted). In a mixed DNA profile of two or more persons, especially low-level mixtures of DNA, the "DNA data itself may demonstrate that different explanations are possible." Peter Gill et al., *DNA Commission of the International Society of Forensic Genetics: Recommendations on the Interpretation of Mixtures*, 160 Forensic Sci. Int'l 90, 100 (2006). For a plain-language explanation of the challenges of mixtures of low-quality DNA, see Norah Rudin & Keith Inman, *The Discomfort of Thought—A Discussion with John Butler*, CACNews, 1st Quarter 2012, at 8, 9–11.

The 2005–06 annual report for the United Kingdom's DNA databank further illustrates the problem of partial matches in a large database:

> Since May 2001, 182,612 crime scene profiles have been matched. A single suspect was reported for 132,178 of these match groups. A list of potential suspects was produced for the remainder. The identification of more than one potential suspect as the source of the DNA at some scenes is largely due to the significant proportion of crime scene sample profiles that are partial.

Nat'l DNA Database Strategy Bd., National DNA Database Annual Report 2005–2006, at 35 (2006) (U.K.), *available at* http://www.genewatch.org/uploads/?f03c6d66a9b354535738483c1c3d49e4/DNA_report2005_06.pdf.

28. Butler, *supra* note 17, at 2–4 (citing Joseph Wambaugh, The Blooding: The True Story of the Narborough Village Murders (1995)). Wambaugh tells the true story of an early use of DNA evidence: to solve the slayings of two teenage girls, the police in this case were the first to use Alec Jeffrey's discovery of a method to create a profile of the human genome with enough discrimination to exclude the entire target population of 4000 adult men as the source of semen at the crime scene except for the perpetrator of the crimes. *Id.* at 3.

29. *Id.*

30. *See, e.g.*, Nat'l Research Council, DNA Technology in Forensic Science 111, 113–16 (1992) (recognizing the value of DNA databases in investigating "crimes without suspects" as well as the potential for future misuse inherent in such databases).

31. Butler, *supra* note 17, at 325.

32. *See id.* at 4.

the subnanogram sensitivity of current technology, DNA profiles could only be developed from large amounts of biological evidence collected at a crime scene.[33] However, a visible amount of semen or blood meant certain identity evidence of the perpetrator.[34]

As awareness of the power of DNA grew, the increased demand for DNA analysis spurred the development of swifter, cheaper, and more sensitive tests.[35] The practical limitation of a blood draw as a means to collect a DNA sample from a person no longer exists; police can readily—and surreptitiously—collect a person's DNA sample from a discarded cigarette butt, chewing gum, saliva on a straw, or sweat on a chair.[36] Mass screenings of possible suspects can be accomplished with swabs of saliva.[37] A visible amount of a bodily fluid like semen, blood, or saliva at a crime scene is also no longer needed; police can collect and analyze trace amounts of "touch" DNA from surfaces like doorknobs, steering wheels, or windows.[38] "Touch" DNA is used in the prosecution of property crimes, drug offenses, and quality-of-life offenses like vandalism or trespass.[39] Unlike a visible amount of bodily fluid found at a crime scene, however, the relevance and reliability of low-level DNA profiles from surfaces likely to contain DNA from more than one person can be very uncertain.[40]

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33. *See id.*

34. *See* GILL, MISLEADING DNA EVIDENCE: REASONS FOR MISCARRIAGES OF JUSTICE, *supra* note 27, at 14.

35. *Cf.* Peter Finn, *Revolution Underway in Use of DNA Profiles; Bid to Link U.S. Databanks Is Crime-Solving Edge*, WASH. POST, Nov. 16, 1997, at B04 (reporting on how new DNA technology was poised to expand DNA databases).

36. *Id.*

37. Jeffrey S. Grand, Note, *The Blooding of America: Privacy and the DNA Dragnet*, 23 CARDOZO L. REV. 2277, 2278 (2002). Grand also notes that in a mass-screening situation—also called a "DNA dragnet"—police often do not have probable cause to obtain a search warrant for any one individual in a group and thus need consent. *See id.* at 2295 & n.81. Usually, consenting to DNA testing excludes the target, but if any individual refuses, he comes under suspicion. *See id.* at 2284 & n.31, 2297 & n.95.

38. *See, e.g.*, Max Houck & Lucy Houck, *What Is Touch DNA?*, Scientific American (Aug. 8, 2008), http://www.scientificamerican.com/article/experts-touch-dna-jonbenet-ramsey/; *DNA Evidence: Basics of Identifying, Gathering and Transporting*, *supra* note 23.

39. *See* JOHN K. ROMAN ET AL., URBAN INST. JUST. POL'Y CTR., THE DNA FIELD EXPERIMENT: COST-EFFECTIVENESS ANALYSIS OF THE USE OF DNA IN HIGH-VOLUME CRIMES (2008), *available at* http://www.urban.org/UploadedPDF/?411697_dna_field_experiment.pdf; Nancy Ritter, *DNA Solves Property Crimes (But Are We Ready For That?)*, NAT'L INST. JUST. J., October 2009, at 2.

40. *See* sources cited *supra* note 27. The FBI bans low-level DNA profiles from the national databank, but not from state and local databases that participate in

This revolution in forensic DNA technology has created an opportunity for law enforcement to aggressively expand the collection and retention of DNA samples from known persons and crime scenes.[41] The first wave of expansion occurred at the national and state levels of CODIS: Congress and nearly every state relentlessly expanded the categories of convicted offenders and arrestees subject to mandatory DNA collection laws;[42] the courts routinely upheld these laws against challenges;[43] and powerful special interest groups advocated for mandatory DNA sampling from all convicted offenders and arrestees.[44]

The second-generation expansion of forensic DNA testing is now occurring largely under the radar at the state and local levels of CODIS. Precisely because federal law limits DNA profiles of known individuals in the national databank to persons who must

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CODIS. *See* FBI, NDIS OPERATIONAL PROCEDURES MANUAL, *supra* note 13, § 4.2.1.10. The FBI also bans any partial or mixed profile that is likely to result in more than one match in the databank. *See id.* § 4.2.1.7.

41. *Cf. Rapid DNA or Rapid DNA Analysis*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/rapid-dna-analysis (last visited Nov. 9, 2014) (noting that the ongoing development of Rapid DNA technology will allow "automated extraction, amplification, separation, detection and allele calling without human intervention").

42. *See Forensic DNA Policy*, DNARESOURCE.COM, http://www.dnaresource.com/?policy.html (last visited Nov. 9, 2013). Twenty-eight states and the federal government now require DNA collection and analysis from at least some arrestees. *See* Maryland v. King, 133 S. Ct. 1958, 1968 (2013); Julie Samuels et al., *Collecting DNA from Arrestees: Implementation Lessons*, NAT'L INST. JUST. J., June 2012, at 19.

43. *See* Samuels, *supra* note 42; *see also, e.g.*, United States v. Kincade, 379 F.3d 813, 813 (9th Cir. 2004) (upholding the constitutionality of a federal statute authorizing the collection of DNA from certain federal offenders on parole, probation, or supervised release, absent individualized suspicion that the offenders had committed additional crimes); Green v. Berge, 354 F.3d 675 (7th Cir. 2004) (upholding the constitutionality of a Wisconsin statute authorizing the department of corrections to collect and store the DNA profiles of convicted felons); Groceman v. United States, 354 F.3d 411 (5th Cir. 2004) (upholding the constitutionality of a federal statute authorizing the collection of DNA from prisoners); United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003) (holding the collection of a DNA profile pursuant to a federal DNA collection statute constituted a reasonable search and seizure under the "special needs exception" to the Fourth Amendment); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992) (upholding the constitutionality of a Virginia statute authorizing the department of corrections to collect and store the DNA profiles of convicted felons); State v. Raines, 857 A.2d 19 (Md. 2004) (upholding the constitutionality of a Maryland statute authorizing the collection of DNA profiles of certain convicted persons).

44. *See, e.g.*, *About the DNA Resource Center*, NAT'L CTR. FOR VICTIMS OF CRIME, http://victimsofcrime.org/our-programs/dna-resource-center/about-the-dna-resource-center (last visited Nov. 9, 2014) (explaining the organization's commitment to increased use of DNA sampling from convicted offenders).

submit to DNA collection during a criminal prosecution,[45] police are exploiting the underregulated state and local levels of CODIS to retain DNA collected during investigations.[46] DNA profiles collected from a crime scene and analyzed during an investigation are called "casework" samples.[47] To be eligible for entry into the "forensic index" of the national databank, a casework sample must: (1) be reasonably probative of the identity of the perpetrator of a crime; (2) be not from a known person; and (3) not consist of complex mixtures or partial profiles that may hit to more than one person in

45. The Federal DNA Identification Act permits the FBI to operate a national databank to store and search DNA profiles collected from persons convicted of crimes, persons who have been charged in an indictment or information with a crime, persons detained under the authority of the United States, and relatives of missing persons who voluntarily provide a DNA sample in NDIS. 42 U.S.C. § 14132(a) (2012). The NDIS Operational Procedures Manual expressly bans the inclusion of victim DNA and DNA voluntarily submitted for elimination purposes in the national databank. FBI, NDIS Operational Procedures Manual, *supra* note 13, § 4.2.1.8. However, the Privacy Act Notice for the National DNA Index System suggests that the Department of Justice may have at one point considered retaining crime victim DNA to identify perpetrators of crimes who carried DNA of the victim away from the crime scene. 61 Fed. Reg. 37,495 (Jul. 18, 1996); FBI, NDIS Operational Procedures Manual, *supra* note 13, app. B (including in the "[c]ategories of individuals covered by [the National DNA Index System]: . . . Victims: Persons, living or dead, who have been victims of crimes where the perpetrator of the crime may have carried DNA of the victim away from the crime scene.").

46. *See* Goldstein, *supra* note 14. On a 2013 episode of National Public Radio's *Talk of the Nation*, a caller from Florida described an increasingly familiar scenario with casework samples:

> Yeah, I actually had exactly this experience that you were talking about. I have a small shop, and it was robbed in the night, and we called the police, and they came out and did the swabs, and they asked for samples from all of myself and my entire staff.
>
> They did not solve the crime . . . and they did not, in my opinion, fully explain that this DNA was going to go into a database for future use. And I feel like now, in effect, the police department, sheriff's department, has a, you know, a DNA of my entire staff. None of us are criminals. I don't think that they have a right to that information. I don't think they fully explained that we're going to keep this DNA and use it for future things.

Talk of the Nation: After SCOTUS DNA Ruling, What Changes for Police? (NPR radio broadcast June 17, 2013), *available at* http://www.npr.org/2013/06/17/192740045/after-scotus-dna-ruling-what-changes-for-police.

47. *See CODIS and NDIS Fact Sheet*, *supra* note 11 (describing "forensic (casework) DNA samples" as samples that are "attributed to the putative perpetrator" and collected from a crime scene as evidence, as opposed to samples taken directly from a suspect).

the databank.[48] These limitations do not exist at the state and local levels of CODIS.[49]

A regulatory gap allows state and local laboratories to collect, retain, and distribute their casework samples in the CODIS network at the state and local levels; federal law leaves to the states the regulation of these databases of DNA profiles that cannot be uploaded to the national databank.[50] All states mandate DNA collection from certain criminals, but only a few states regulate the collection, retention, or distribution of casework DNA samples.[51] The courts have similarly failed to develop new rules or faithfully apply existing rules to safeguard the privacy interests of persons who have volunteered their DNA to help police investigate a crime.[52] The result is that people who have not been convicted of a crime end up under lifelong genetic surveillance.[53]

New technology continues to expand the reach of underregulated databases. New advances, such as increases in the sensitivity of DNA testing, the lower cost of testing, simplified collection techniques, rapid results, and enhancements to the CODIS software create more opportunities for police to collect DNA from crime scenes and known individuals as a routine part of police work.[54] Increased

48. FBI, NDIS Operational Procedures Manual, *supra* note 13, §§ 4.2.1.7–4.2.1.8.

49. *Cf. id.* §§ 4, 6 (explaining that the FBI guidelines are statutorily authorized by Congress and apply to CODIS and the national databank).

50. *Cf.* 42 U.S.C. § 14132(b) (2012) (stating that the national databank can only contain samples that meet federal regulatory requirements); FBI, NDIS Operational Procedures Manual, *supra* note 13, §§ 4, 6.

51. Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767, 774–80 (1999).

52. *See, e.g.*, Varriale v. State, 96 A.3d 793 (Md. Ct. Spec. App. 2014) In *Varriale*, the defendant had "voluntarily provided DNA samples to the police in order to eliminate himself as a suspect in an alleged rape. Although the DNA sample cleared him of the alleged rape, it disclosed his involvement in an unrelated burglary that took place a few years earlier." *Id.* at 794–95. The defendant argued that his DNA profile should not have been retained in the state and local DNA databases once he had been "cleared of suspicion in the investigation in which the sample was obtained." *Id.* at 798. The court disagreed, and held that the Fourth Amendment does not regulate the retention of a DNA profile in a local CODIS database even when such retention exceeds the bounds of consent upon which the defendant agreed to have the sample removed from his body. *Id.* at 797–98.

53. *See id.*

54. *See* FBI, Codis: Combined DNA Index System (2010), *available at* http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-brochure-2010. The next generation of CODIS software will provide "enhanced kinship analysis tools" that will allow police to use CODIS databases—particularly at the state and local levels—to more effectively target family members of persons in the national databank. *Id.* at 1.

federal funding may encourage police to exploit these opportunities.[55] Accordingly, the number of profiles in underregulated state and local indices that cannot be uploaded to the national DNA databank is likely to continue to increase dramatically in the presence of lax database laws.

B. Federal Regulations

In 1990, the FBI launched a pilot piece of software to serve fourteen state and local DNA laboratories.[56] This software allowed police to generate investigative leads from biological evidence left at the scene of a crime.[57] The goal was to share DNA profile information in a databank described as a national DNA index system (NDIS).[58] Participating state and local laboratories could upload qualifying DNA profiles (also called DNA records) developed from crime scene evidence to the NDIS "forensic index" and DNA profiles of known individuals convicted of serious crimes to the NDIS "convicted offender" index.[59] This CODIS precursor searched for matches within the forensic index to identify crimes that might have been committed by a serial offender, as well as for matches between the forensic index and the convicted offender index to identify possible suspects.[60]

The software also provided participating local and state DNA laboratories with the ability to operate a local DNA index system (LDIS) and to share DNA profiles with other DNA laboratories in their state through a state DNA index system (SDIS).[61] The availability of the CODIS platform to retain and search DNA profiles provided local law enforcement laboratories the opportunity to compare DNA profiles from their casework that could not be

55. Over the past decade, the federal government has repeatedly increased funding to state and local laboratories to expand the reach of DNA collection and databases. In 2006, the federal government expanded the use of CODIS grants available for the creation of DNA profiles of arrested individuals. *See* DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1003, 119 Stat. 3085 (codified as amended at 42 U.S.C. § 14135(a)(1) (2012)). In 2013, Congress enacted a law that provides funding for up to the entire first-year cost of implementing a DNA arrestee testing program. Katie Sepich Enhanced DNA Collection Act of 2012, 112 Pub. L. No. 112-253, § 3, 126 Stat. 2407, 2408 (codified at 42 U.S.C. § 14137a (2012)).

56. *CODIS and NDIS Fact Sheet*, *supra* note 11.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. CROUSE & KAYE, *supra* note 9, at 3.

uploaded to the national DNA databank.[62] These databases may potentially include partial or mixed DNA profiles from crime scene evidence, of crime victims, of persons who voluntarily provided DNA samples to be eliminated from crime scene evidence, and of suspects who were not arrested or convicted.[63]

While CODIS was still in its pilot phase, the National Research Council published a seminal report on the use of DNA technology in the criminal justice system (NRC I).[64] NRC I presciently observed that "[i]f DNA profiles of samples from a population were stored in computer databanks (databases), DNA typing could be applied in crimes without suspects."[65] NRC I acknowledged the general similarity between a fingerprint databank and a DNA databank, but decisively rejected that analogy because "ordinary fingerprints and DNA profiles differ substantially in ways that bear on the creation and design of a national DNA profile databank."[66] NRC I explained:

> Confidentiality and security of DNA-related information are especially important and difficult issues, because we are in the midst of two extraordinary technological revolutions that show no signs of abating: in molecular biology, which is yielding an explosion of information about human genetics, and in computer technology, which is moving towards national and international networks connecting growing information resources.[67]

To address these concerns, NRC I recommended limiting the scope of who would be subject to DNA collection and avoiding testing genetic locations that are associated with traits and diseases.[68] NRC I also recommended maintaining identity information confidentially.[69] This would minimize the potential for misuse that could

62. *Cf. id.* at 2 (stating that while policies and procedures for including samples in the national databank are clear, policies and procedures for inclusion in state and local databases are much less clear).

63. *See id.*

64. *See* NAT'L RESEARCH COUNCIL, *supra* note 30.

65. *Id.* at 111.

66. *Id.* at 112–13.

67. *Id.* at 113–14.

68. *Id.* The 13 CODIS Core Loci are found on "non-coding" regions of an individual's chromosomes; that is, regions that do not store information that is used to make proteins. BUTLER, *supra* note 17, at 22, 94–97. The 13 CODIS Core Loci were selected to make up the standard CODIS DNA profile in the belief that they did not correspond to any particular traits or characteristics. *See* H.R. REP. NO. 106-900, pt. 1, at 27 (2000); BUTLER, *supra* note 17, at 22, 94, 443–44.

69. NAT'L RESEARCH COUNCIL, *supra* note 30, at 114–15.

occur if DNA identity information were linked to other databases that contain medical, criminal, social services, financial, or credit information.[70] It was precisely these privacy concerns that significantly influenced the earliest legislators authorizing the creation of a national DNA databank to include in the federal statute substantial restrictions on the collection, retention, and distribution of DNA and related information.[71]

Following the 1994 congressional authorization for a coordinated system of national, state, and local DNA databases, the FBI implemented the CODIS national DNA databank.[72] A relentless expansion of national, state, and local DNA databases quickly followed. By 1999, all fifty states required DNA collection and analysis from at least some convicted individuals.[73] In 2000, Congress followed suit and required DNA collection and analysis from individuals convicted of a limited set of federal offenses.[74] Congress extended that requirement in 2004 to all individuals convicted of federal felonies.[75] In 2004, Congress expressly permitted the FBI to accept into the national DNA databank DNA profiles of arrested individuals.[76] In 2005 and 2006, Congress extended federal DNA testing to all arrestees.[77] Similarly, today all fifty states require DNA collection from all individuals convicted of felonies, and twenty-eight states require DNA collection and analysis from at least some arrestees.[78]

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70. *Id.*

71. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210304(a)(1)–(3), 108 Stat. 2069 (codified as amended at 42 U.S.C. § 14132 (2012)).

72. *The FBI and DNA, Part 1—A Look at the Nationwide System that Helps Solve Crime*, FBI (Nov. 23, 2011), http://www.fbi.gov/news/stories/2011/november/?dna_112311.

73. *See* Hibbert, *supra* note 51.

74. *See* DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 3(a)(1)–(2), 114 Stat. 2728 (codified as amended at 42 U.S.C. § 14135a(a)(1)–(2) (2012)).

75. *See* Debbie Smith Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269–71 (codified as amended at 42 U.S.C. § 14135a(d) (2012)).

76. *See* § 203, 118 Stat. at 2269–71.

77. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 155, 120 Stat. 587 (codified as amended at 42 U.S.C. § 14135a(a)(1)(A) (2012)); DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1004, 119 Stat. 3085–86 (codified as amended at 42 U.S.C. § 14135a (2012)); 28 C.F.R. § 28.12 (2008).

78. *See* Hibbert, *supra* note 51; Samuels, *supra* note 42; *see also State DNA Database Laws—Qualifying Offenses*, DNARESOURCE (Sept. 2011), http://www.dnaresource.com/documents/statequalifyingoffenses2011.pdf.

In line with the expanding scope of persons subject to mandatory DNA collection, the number of laboratories using the CODIS software expanded to include over 190 state and local DNA databases.[79] Crime laboratories are also permitted to outsource DNA analysis to private companies that satisfy the FBI's quality assurance standards.[80] The combined effects of these expansions have caused the CODIS national DNA databank to grow exponentially: in 2000, there were about 400,000 offender profiles; by 2006, there were about four million offender profiles and 50,000 arrestee profiles.[81] According to the most recent available data, CODIS now contains over eleven million offender profiles and 1.9 million arrestee profiles.[82] The FBI claims to have produced over 219,700 hits assisting in more than 210,700 investigations, despite not tracking the number of convictions that are the result of a hit between DNA profiles from different crime scenes or a DNA profile from a crime scene and an offender profile.[83]

Nevertheless, the FBI is limited in what profiles it can include in the national databank.[84] NDIS can only include profiles authorized by statute.[85] Further, Congress expressly prohibited the FBI from including in NDIS any DNA samples that are voluntarily submitted for elimination purposes.[86] The FBI implemented additional quality standards that restrict the inclusion of profiles of known persons and from crime scenes.[87] The FBI does not allow state or local CODIS laboratories to upload enhanced DNA profiles created from very low-level amounts of human cells.[88] The concern is that part of the profile may be an artifact created during the testing process that enhanced testing techniques have amplified to seemingly detectable levels.[89] The imperative for reliable matches between DNA profiles in the national databank also means that the FBI limits state and local laboratories to uploading only profiles that are reasonably probative of the identity of a putative perpetra-

79. *See CODIS and NDIS Fact Sheet*, *supra* note 11.

80. *Id.*

81. *Id.*

82. *CODIS-NDIS Statistics*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics (last visited Sept. 7, 2014).

83. *See id.*

84. *See CODIS and NDIS Fact Sheet*, *supra* note 11.

85. *See supra* note 45.

86. *See id.*

87. FBI, NDIS Operational Procedures Manual, *supra* note 13, § 4.

88. *Id.* § 4.2.1.10.

89. *See id.*

tor.[90] Partial profiles and mixtures of DNA from crime scenes are also prohibited in the national databank unless the expected number of contributors to the mixture is fewer than the number of matches expected by chance from a search of the relentlessly expanding databank.[91]

C. State Regulation

States are responsible for developing their own regulations governing state and local DNA databases.[92] A minority of states regulate the categories of DNA profiles that can be stored and searched at the state or local levels. For example, Alaska permits only certain categories of DNA samples that cannot be uploaded to NDIS to be retained in the state database.[93] It also prohibits categories of samples from being entered in the state identification system that are not expressly permitted.[94] A local database practice that is in conflict with state law is preempted.[95] The only exemption to this regulation is that it must not prevent "a local law enforcement agency from performing DNA identification analysis in individual cases to assist law enforcement officials and prosecutors in the preparation and use of DNA evidence for presentation in court."[96]

By contrast, Michigan allows a suspect's DNA to be taken, but limits that "any other DNA identification profile obtained by the department shall not be permanently retained by the department

90. *See* 42 U.S.C. § 14132(a)(1)–(4) (2012); *see also* FBI, NDIS OPERATIONAL PROCEDURES MANUAL, *supra* note 13, §§ 4.2.1.8.

91. The FBI bans low-level DNA profiles from the national databank through its software licensing agreement with state and local CODIS laboratories. FBI, NDIS OPERATIONAL PROCEDURES MANUAL, *supra* note 13, § 4.2.1.10. The software agreement also includes the FBI ban on any partial or mixed profile that may result in more than one match in the databank. *Id.* at § 4.2.1.7.

92. *See supra* note 13 and accompanying text.

93. The Alaska statute allows the retention of DNA records from persons arrested or convicted in the state of a crime against a person or felony under certain statutes, certain minors adjudicated as delinquents, voluntary donors, certain persons required to register as sex offenders or child kidnappers, and anonymous donors for use in forensic validation, quality control, or population and statistical databases, as well as samples from crime scene evidence and unidentified human remains. ALASKA STAT. § 44.41.035(b) (2013).

94. *Id.* ("[S]amples not subject to testing . . . may not be entered into, or made a part of, the DNA identification registration system.").

95. *Id.* § 44.41.035(d)(3) (stating that local law enforcement may not establish or operate a DNA identification registration system unless the "procedure and rules for the collection, analysis, storage, expungement, and use of DNA identification data do not conflict with . . . [the] procedures and rules applicable to the [state] DNA identification registration system").

96. *Id.*

but shall be retained only as long as it is needed for a criminal investigation or criminal prosecution."[97] Vermont permits DNA profiles to be stored only at the state level and prohibits the entry into the state database of DNA "voluntarily submitted or obtained by the execution of a nontestimonial identification order . . . ."[98] Other states that subject local DNA databases to statutory requirements include Connecticut, Missouri, and Washington.[99] Yet other states appear to prohibit the use of local DNA databases altogether.[100]

The vast majority of states, however, do not curb or regulate the categories of DNA samples from known persons that may be stored in the state *or* local databases. These states allow the warehousing of far more DNA profiles and information than is allowed at the national level or by other states.[101] In the absence of affirmative statutory authorization for these local databases to contain DNA profiles that cannot be entered into the national databank, state law limiting the collection of DNA to qualifying offenders may implicitly prohibit the entry of such profiles.[102] Underregulated

97. MICH. COMP. LAWS § 28.176 (1990).

98. VT. STAT. ANN. tit. 20, § 1938 (1998).

99. CONN. GEN. STAT. § 54-102g (2012); MO. REV. STA. § 650.057 (2012); WASH. REV. CODE § 43.43.758 (2013).

100. *See, e.g.*, People v. Rodriguez, 764 N.Y.S.2d 305, 314–15 (Sup. Ct. 2003) (finding that because New York's expungement statute fails to mention local databases, local databases are improper).

101. *See, e.g.*, HAW. REV. STAT. § 844D-102(a) (2012) ("Nothing in this chapter shall be construed to restrict the authority of local law enforcement to maintain its own DNA-related databases or data banks."); IDAHO CODE ANN. § 19-5517 (2012) ("Nothing in this chapter shall limit or abrogate any existing authority of law enforcement officers to take, maintain, store and use DNA information or thumbprint impressions for law enforcement purposes."); LA. REV. STAT. ANN. § 15-620 (2012) ("Nothing in this Chapter shall limit or abrogate any existing authority of law enforcement officers to take, maintain, store, and utilize DNA samples for law enforcement purposes."); NEV. REV. STAT. § 176.0912(3)(a) (2012) ("An agency of criminal justice may establish procedures for . . . [r]etaining probative samples of biological evidence . . . ."); 44 PA. CONS. STAT. § 2336 (2013) ("Nothing in this chapter shall limit or abrogate any existing authority of law enforcement officers to take, maintain, store and utilize DNA samples for law enforcement purposes."). In Montana, when a suspect's profile is not allowed in the state DNA identification index, there is no regulation preventing the inclusion of a suspect profile in a separate suspect database by the crime lab. State v. Notti, 71 P.3d 1233, 1238 (Mont. 2003).

102. David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1185–86 (2014) (suggesting that state courts take advantage of the intrastate preemption doctrine to ban certain law enforcement activities, such as the use of underregulated local DNA databases).

DNA databases may also violate state privacy law.[103] Further, the passage of state statutes to regulate the mandatory collection of DNA from convicted offenders and arrestees is a legislative recognition of the potential for misuse of DNA databases.[104] Nevertheless, state and local governments are empowered, subject to constitutional limitations, to authorize official police agencies to investigate and prevent crime to further the health, general welfare, and safety of the community, which may include the use of underregulated state or local DNA databases.[105]

D. Creatures of the Court

In *Maryland v. King*, the U.S. Supreme Court decided the Fourth Amendment reasonableness of a state law requiring the programmatic "collection and analysis" of DNA from persons charged with a crime of violence.[106] *King* considered the reasona-

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103. For example, the Maryland Public Information Act limits categories of information that the state may retain:

> The State, a political subdivision, or a unit of the State or of a political subdivision may keep only the information about a person that: (1) is needed by the State, the political subdivision, or the unit to accomplish a governmental purpose that is authorized or required to be accomplished under: (i) a statute or other legislative mandate; (ii) an executive order of the Governor; (iii) an executive order of the chief executive of a local jurisdiction; or (iv) a judicial rule; and (2) is relevant to accomplishment of the purpose.

MD. CODE ANN., GEN. PROVISIONS § 4-102 (West 2014).

Further the act specifically addressed the collection of personal information by the government about its citizens:

> (1) Personal records may not be created unless the need for the information has been clearly established by the unit collecting the records. (2) Personal information collected for personal records: (i) shall be appropriate and relevant to the purposes for which it is collected; (ii) shall be accurate and current to the greatest extent practicable; and (iii) may not be obtained by fraudulent means.

Id. § 4-501. Finally, the act generally limits the information the state or a political subdivision can keep about a person to that information which is needed and relevant to accomplish a governmental purpose. *Id.* § 4-102. The obvious shortcoming to a claim under a state's public information law is the lack of a statutory suppression remedy.

104. *See supra* notes 93–100 and accompanying text.

105. *See* United States v. Kelly, 55 F.2d 67, 68 (2d Cir. 1932) (stating that law enforcement must be allowed to collect fingerprints of arrestees "for the good of the community," despite the "slight interference with the person involved in finger printing"); *cf.* Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (recognizing that local police officers engage in "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute").

106. 133 S. Ct. 1958 (2013).

bleness of the collection, analysis, and retention of an arrestee's cheek cells to determine the arrestee's "DNA identification" for use in a closely regulated database to identify other crimes (unrelated to the crime of arrest) that the arrestee may have committed.[107] Because an arrestee's legitimate expectation of privacy is sharply reduced when he is being processed into state custody, *King* did not apply a per se Fourth Amendment analysis to a search for evidence of criminality.[108] Instead, to determine reasonableness, *King* balanced the governmental interest in an arrestee's DNA identification against an arrestee's legitimate expectations of privacy in his bodily integrity and DNA identification.[109] *King* explained that an arrestee's reduced expectation of privacy informed both sides of the balance: it both strengthened the governmental interest in DNA identification and reduced the arrestee's legitimate privacy expectations in the collection of his DNA and use of his DNA identification.[110]

King observed that, unlike an average citizen, an arrestee in the custody of the police is on notice that the government has a legitimate interest in his identity, including his DNA identification, which assists police in the administrative task of determining his criminal history.[111] The strength of the governmental interest follows directly from a person's volitional status:

> The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. It is beyond dispute that "probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest."[112]

King then balanced the strength of this governmental interest in an arrestee's DNA identification against the physical *and* informational privacy interests upon which DNA collection, retention,

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107. *Id.* at 1967.

108. *Id.* at 1970. The "per se rule" requires that searches conducted outside the judicial process, without prior approval by a judge or magistrate, be considered presumptively unreasonable under the Fourth Amendment. *See, e.g.*, United States v. U.S. District Court (*Keith*), 407 U.S. 297, 317–18 (1972).

109. *King*, 133 S. Ct. at 1978.

110. *Id.*

111. *Id.* at 1971 ("When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.").

112. *Id.* at 1970 (internal quotation marks omitted).

and distribution intrude.[113] *King* concluded that the close statutory regulation of "DNA collection, retention, and distribution" eliminated the need for a warrant to check the power of the executive branch, and therefore held that the search was reasonable under the Fourth Amendment.[114] In these special circumstances, *King* concluded that "[t]he need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'"[115] *King* emphasized that "DNA collection is not subject to the judgment of officers whose perspective might be 'colored by their primary involvement in the often competitive enterprise of ferreting out crime.'"[116]

King did not directly address the collection, analysis, and retention of DNA samples from persons who have not been arrested for or convicted of a qualifying offense, leaving open the question of how the Fourth Amendment applies to crime victim, elimination, and suspect samples that have been volunteered to the police. *King* did confirm that a physical intrusion like a buccal swab rubbed against the inside of a cheek is a search under the Fourth Amendment.[117]

Because *King* considered the collection and use of an arrestee's DNA when considering the reasonableness of the search, one might presume that the Fourth Amendment applies to the use of DNA collected from persons with greater expectations of privacy than an arrestee or convicted offender. The privacy concerns for these individuals are amplified, because at each stage in the collection and use of volunteered DNA, a police officer must exercise his discretion without guidance from a generally applicable statute uniformly applied to all nonoffenders.[118] This fact distinguishes the rationales for the use of voluntarily obtained DNA from the administrative rationales of *King*. For nonoffender samples, there is no corresponding governmental interest to verifying the identity and criminal history of an arrestee being processed into state custody and considered for release pretrial. These factors demonstrate the need for a neutral and detached magistrate to determine whether

113. *Id.*

114. *Id.* at 1969–80.

115. Maryland v. King, 133 S. Ct. 1958, 1969 (2013) (quoting Treasury Employees v. Von Raab, 489 U.S. 656, 667 (1989)).

116. *Id.* at 1970.

117. *Id.* at 1969.

118. Due to the fact that most federal and state DNA statutes do not regulate the collection or use of nonoffender samples. *See supra* Part I.B–C.

probable cause—a "time-tested means of effectuating Fourth Amendment rights"[119]—justifies the use of a crime victim, elimination, or suspect sample beyond the specific use for which it was volunteered.

Notwithstanding these different circumstances, some courts equate the scope of a person's consent to the removal of a DNA sample for use in one investigation to the scope of a search warrant for DNA.[120] These courts have held that once police have determined a person's DNA profile from a "lawfully" collected sample, the Fourth Amendment does not constrain the police from using the profile in future investigations.[121]

Subsequent to *King*, in *Varriale v. State*, Maryland's intermediate appellate court broadened the definition of a "lawfully" obtained DNA sample to include biological samples that police obtain with a consent form that limits use of the samples to a particular purpose.[122] The court in *Varriale* did not view the defendant's conditional consent to a bodily intrusion, or the police exceeding the bounds of consent, as limiting the "lawfulness" of the initial collection of biological samples.[123] Instead, the *Varriale* court read *King* as establishing that a reasonable person has no expectation of privacy

119. United States v. U.S. District Court (*Keith*), 407 U.S. 297, 317 (1972) (stating that the probable cause standard "accords with our basic constitutional doctrine that individual freedoms will best be preserved through [the] separation of powers").

120. *See, e.g.*, Pace v. State, 524 S.E.2d 490 (Ga. 1999). In *Pace*, the defendant signed a consent form for the collection of blood and hair from his body that stated those items would be used against him in a prosecution, and that he was a suspect in a particular murder; the defendant did not restrict his consent to the removal of his biological samples to that particular murder investigation. *Id.* at 497. Later, police used these samples to link the defendant to a second murder. *Id.* The Supreme Court of Georgia considered the subsequent use of the defendant's DNA profile to come within the scope of the consent given because the only remaining privacy interest was to not have one's DNA compared to crime scene evidence. *Id.* at 497–98. The court cited *Bickley v. State*, which held that police were not required to obtain a second search warrant to make subsequent use of a DNA profile initially obtained by a warrant in an earlier, unrelated investigation. *Id.* at 498 (citing Bickley v. State, 489 S.E.2d 167 (Ga. Ct. App. 1997)). *Bickley* explained that where police do not perform further testing beyond the scope of a search warrant, there is no search for Fourth Amendment purposes. *Bickley*, 489 S.E.2d at 170.

121. *See* Bickley, 489 S.E.2d at 170.

122. 96 A.3d 793, 797–98 (Md. Ct. Spec. App. 2014) (permitting a secondary investigative use of a DNA profile collected by consent from a person who limited the scope of its use to clearing himself of suspicion in an earlier investigation).

123. *Id.*

in his DNA identification.[124] Under this reading of *King*, police can use a consent form that limits the purpose for collecting biological samples to a particular investigation and then retain the resulting DNA profile in underregulated local and state databases for any future use. DNA identification becomes like a photograph or fingerprint of a person that police can use without Fourth Amendment constraint if the collection of the identification information is lawful.[125]

Varriale appears to be grounded on a misrepresentation of the common law doctrine of consent. Police do not "lawfully" obtain a person's DNA identification for any additional purpose when consent to the physical intrusion restricts the purpose of the search.[126] When police exceed the bounds of consent, the entry into the consenter's body becomes invalid, a common law concept akin to tres-

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124. *Id.*

125. *See id.* at 797 (citing Wilson v. State, 752 A.2d 1250, 1272 (Md. Ct. Spec. App. 2000)) ("[T]he re-examination of the validly-obtained sample was no more of a search, for Fourth Amendment purposes, than is the reexamination of validly-obtained fingerprints."); *Wilson*, 752 A.2d at 1272 (holding that no Fourth Amendment search is implicated when police use DNA samples "lawfully obtained in the course of an earlier investigation . . . in the course of a new and unrelated investigation," and comparing lawfully obtained DNA samples to lawfully obtained "photographs, handwriting exemplars, ballistics tests, etc."); *cf.* Hayes v. Florida, 470 U.S. 811, 814 (1985) (stating that the fingerprinting process's lack of "repeated harassment" or "probing into private life" does not justify an unwarranted detention solely for the purpose of fingerprinting); Davis v. Mississippi, 394 U.S. 721, 723–28 (1969) (explaining that the Fourth Amendment prohibits the use in prosecution of fingerprints that were obtained during an unlawful detention). Courts that equate a DNA profile to fingerprints misapprehend two fundamental points: first, fingerprints impose the practical safeguard of a person *knowing* that police have collected his ten-print set of reference fingerprints; and second, unlike underregulated local and state DNA databases, national, state, and local fingerprint databases usually provide a procedure for a person to challenge the accuracy of the information stored in the database, and to seek expungement in appropriate circumstances. *See, e.g.*, 28 C.F.R. § 16.34 (2010) (detailing the procedure for an individual to change, correct, or update fingerprinting information retained by the FBI); MD. CODE REGS. 12.15.01.07 (2014) (giving an individual the right to inspect and challenge the completeness, content, accuracy, and dissemination of criminal history record information retained by state criminal justice agencies). Underregulated local and state DNA databases lack these minimal due process provisions, yet provide a much greater potential for future misuse. *See infra* Parts II-III.

126. *See* RESTATEMENT (SECOND) TORTS § 892A(3) (1979) ("Conditional consent or consent restricted as to time, area or in other respects is effective only within the limits of the condition or restriction."); *see also id.* § 168 ("A conditional or restricted consent to enter land creates a privilege to do so only insofar as the restriction is complied with."); *id.* § 168 cmt. b ("A consent to entry for a particular purpose confers no privilege to be on the land for any other purpose.").

pass or battery.[127] *Varriale*'s rationale illustrates how one court's view of the free-floating "expectation of privacy" test results in less personal security than the Fourth Amendment jurisprudence that is "tied to common-law trespass."[128] A decision that a person cannot limit the scope of consent to a bodily intrusion is consistent with one scholar's prediction that *King* will ultimately result in "less genetic privacy" by condoning a more "expansive use of DNA sampling."[129]

Before the explosion of DNA databases, however, some courts did recognize that a person could reasonably limit consent to a particular case. In *State v. Gerace*, a Georgia appellate court did not permit second uses of a DNA profile derived from a blood sample acquired by consent.[130] In that case, after a traffic accident, law enforcement read the defendant his implied consent rights and obtained consent to take a blood sample pursuant to state law, which allowed law enforcement to test for drugs and alcohol.[131] His blood sample was submitted for DNA testing, which led to his arrest for rape and aggravated sodomy.[132] The court recognized that "prior to receiving the DNA test results, [law enforcement] had no probable cause to arrest [the defendant] in connection with the rape."[133] Looking at the totality of the circumstances, however, the court held that "'[h]ad [the defendant] been cautioned that the results of the search and seizure of his blood would be used to supply evidence against him in an independent criminal prosecution, no consent might have been given.'"[134] The court declined to accept the state's proposal that, because the blood was obtained with consent, law enforcement was free to use it for any purpose.[135]

In a 1994 decision, the Oregon Court of Appeals read consent similarly. In *State v. Binner*, the defendant consented to having his

127. *See id.*

128. United States v. Jones, 132 S. Ct. 945, 949 (2012). *See also* Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan J., concurring) (explaining the contours of the "expectation of privacy" test); *Varriale*, 96 A.3d at 796–98.

129. Elizabeth E. Joh, Term Paper, Maryland v. King*: Policing and Genetic Privacy*, 11 Ohio St. J. Crim. L. 281, 294 (2013).

130. 437 S.E.2d 862 (Ga. Ct. App. 1993).

131. *Id.* at 862–63.

132. *Id.* at 862.

133. *Id.*

134. *Id.* at 863 (quoting Beasley v. State, 419 S.E.2d 92, 94 (Ga. Ct. App. 1992)).

135. *Id.* at 862. This result was consistent with an earlier Georgia Supreme Court holding that evidence obtained by consent cannot be used for purposes beyond the scope of that consent. Turpin v. Helmeci, 518 S.E.2d 887, 889 (Ga. 1999).

blood taken for alcohol testing, which returned a result within the legal limit, but he declined to give a urine sample for drug testing.[136] Without a warrant, his blood sample was then tested for drugs, and came back positive.[137] The court determined that the defendant had a privacy interest in the contents of his blood and had expressly limited his consent to a test for alcohol.[138] Thus, by implication, he did not consent to the drug testing.[139]

In a 1970 decision, the Fifth Circuit also read consent similarly. *Graves v. Beto* was an appeal from a Texas District Court's grant of a writ of habeas corpus.[140] After the defendant's arrest for being drunk in public, police received a report of a rape, and the victim's description of her assailant resembled the defendant.[141] Some blood was found at the scene of the rape and the chief of police requested that the defendant consent to a blood draw.[142] In making the request, however, the chief represented that his purpose was solely to determine the alcohol content of the blood, and the defendant consented to the bodily intrusion for a sample of blood based on that limitation.[143] The defendant's sample was then analyzed for blood type and compared to the blood recovered at the rape crime scene—it matched.[144] The evidence, though, was held to be inadmissible because the consent was based on the chief's misrepresentations.[145] Therefore, the police had only limited authority to test for the presence of alcohol in the blood.[146]

Consent is a very powerful tool capable of relieving law enforcement officers of the burden of obtaining warrants and establishing probable cause.[147] The reasonableness of consent, however, is debatable considering the fundamentally coercive nature of many police encounters.[148] Perhaps the more difficult question is

136. 886 P.2d 1056, 1057 (Or. Ct. App. 1994).
137. *Id.*
138. *Id.* at 1059.
139. *Id.*
140. 424 F.2d 524 (5th Cir. 1970).
141. *Id.* at 524.
142. *Id.* at 525.
143. *Id.*
144. *Id.* at 524.
145. *Id.* at 526.
146. Graves v. Beto, 424 F.2d 524, 526 (5th Cir. 1970).
147. Fred W. Drobner, Comment, *DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing*, 28 CAP. U. L. REV. 479, 503 (2000).
148. *Id.* at 504–05 ("The flat statement by police that a sample would be collected could be considered a claim of lawful authority . . . which would obviate . . . putative consent. The police station setting itself, with large numbers of armed uniformed officers displaying indicia of authority, as well as the physical isolation

whether courts will properly apply a settled doctrine like the law of consent to a new technology that is perceived to be infallible.

E. Uncertainty in the Application of the Doctrine of Consent When Applied to DNA Collection

Traditionally, in the absence of a valid warrant the "[s]tate assumes the burden of overcoming the presumption of invalidity by demonstrating . . . that the warrantless search satisfied one of the firmly established exceptions to the warrant requirement."[149] When the government seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was, in fact, freely and voluntarily given.[150] Because a person who consents to a search "may of course delimit as he chooses the scope of the search,"[151] the government must also prove that the search was within the actual scope of consent.[152] The allocation of the burden of proof means that "'*[w]here the evidence is inconclusive . . . the defendant wins*.'"[153]

In the context of DNA analysis, a court must decide between two basic consent scenarios: first, a nonoffender may have expressly consented to any future use of his DNA, or in the absence of express consent, the court may have determined that general consent to all future uses is implied;[154] and second, a nonoffender may have

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experienced by the subjects, can also be considered a coercive environment where an individual does not feel free to refuse a request, whether reasonable or not.").

149. Graham v. State, 807 A.2d 75, 87 (Md. Ct. Spec. App. 2002); *see also* Jones v. United States, 357 U.S. 493, 500 (1958).

150. Bumper v. North Carolina, 391 U.S. 543, 548 (1968); *see also* United States v. Mendenhall, 446 U.S. 544, 557 (1980); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Doering v. State, 545 A.2d 1281, 1290 (Md. 1988); Whitman v. State, 336 A.2d 515, 520 (Md. Ct. Spec. App. 1975).

151. Florida v. Jimeno, 500 U.S. 248, 252 (1991).

152. *Graham*, 807 A.2d at 88 (holding that a reviewing court must make its own de novo assessment of "1) the voluntariness of the ostensible consent and 2), even if voluntary, the actual scope of that consent").

153. *Id.* at 87 (quoting Duncan v. State, 340 A.2d 722, 725 (1975)).

154. *See Jimeno*, 500 U.S. at 252. The scope of consent—as it relates to genetic materials—plays an equally important role outside of the criminal justice system. One of the world's largest private DNA databases, Icelandic-based deCODE Genetics, Inc., wanted to use "genealogical records to estimate the genotypes of close relatives of its more than 120,000 research volunteers." *deCODE Denied*, GENOME WEB (June 21, 2013), http://www.genomeweb.com/blog/decode-denied. Iceland's Data Protection Authority required the company to obtain informed consent from all individuals whose genetic material would be used to conduct a genotype study of 280,000 living and dead relatives. Jocelyn Kaiser, *Agency Nixes deCODE's New Data Mining Plan*, 240 SCIENCE 1388, 1388 (2013). deCODE was founded in 1996 with the specific intention of establishing a "DNA database of the

expressly limited the scope of a consent search to a particular investigation or the court may imply such a limit from the circumstances. Under the traditional analysis, the government bears the burden of demonstrating either express consent, or that the use of the DNA was within the scope of implied consent as measured by the standard of objective reasonableness.[155] Objective reasonableness evaluates scope of consent as that which "an ordinary reasonable person would understand to be the scope of consent between the officer and the consenting person."[156]

The effectiveness of court regulation of local and state DNA databases is both uncertain and inconsistent, with perhaps too much focus on the particular facts of the instant case. For example, in *United States v. Kriesel*, a sharply divided panel of the Ninth Circuit addressed the government's interest in retention of a physical DNA sample.[157] After pleading guilty to a drug conspiracy charge, Edward Kriesel agreed to submit a blood sample for DNA analysis as a condition of his supervised release.[158] After his DNA profile was added to CODIS, Kriesel demanded the return of his actual blood sample, claiming the sample qualified as property.[159] The majority determined that although a blood sample qualifies as property, the government has a legitimate interest in retaining it.[160]

The Ninth Circuit aptly recognized that we live in a "rapidly changing world in which risks of undue intrusions on privacy are also changing."[161] The court stressed "that if scientific discoveries

whole Icelandic population and mining it for genetic markers linked to common diseases. The company never received legal approval for such a national database. But more than 140,000 volunteers agreed to allow the company to combine their medical and DNA information with Iceland's genealogy database." Jocelyn Kaiser, *Purchase by Amgen Won't Affect deCODE Genetics' Research, Founder Says*, SCIENCE MAGAZINE (Dec. 12, 2012, 5:05 PM), http://news.sciencemag.org/people-events/2012/12/purchase-amgen-wont-affect-decode-genetics-research-founder-says. After deCODE experienced significant financial difficulties, American company Amgen purchased deCODE with the intention of leading the industry in its ability to "identify and validate disease targets in human populations." Turna Ray, *With deCODE Purchase, Amgen Gains Genetics Expertise, Consumers Lose DTC Testing Option*, PHARMACOGENOMICS REPORTER (Dec. 12, 2012), http://www.genomeweb.com/clinical-genomics/decode-purchase-amgen-gains-genetics-expertise-consumers-lose-dtc-testing-option.

155. *See* State v. Binner, 886 P.2d 1056, 1059 (Or. 1994).

156. In re Tariq A-R-Y, 701 A.2d 691, 697 (Md. 1997) (Eldridge, J., dissenting) (citing Wilkerson v. State, 594 A.2d 597 (Md. Ct. Spec. App. 1991)).

157. 720 F.3d 1137 (9th Cir. 2013).

158. *Id.* at 1139.

159. *Id.* at 1142.

160. *Id.* at 1139–40.

161. *Id.* at 1147.

make clear that junk DNA reveals more about individuals than . . . previously understood, [the court] should reconsider the government's DNA collection programs."[162] It also noted that "[g]overnment and commercial entities enjoy increasing capacity to obtain, store, and analyze information about people, giving rise to increasing concerns about privacy."[163]

Recognizing that no single law enforcement investigation method is perfect—even one with "as good a record as CODIS"—the *Kriesel* dissent urged that investigative tools are "intended to aid in investigation, not to supplant it entirely."[164] The dissent strongly urged that "this case deal[t] not just with junk DNA or a CODIS profile derived from junk DNA, but the retention, for at least the remainder of an individual's lifetime, of his full genetic code."[165] In essence, the dissent urged that there is no justification for "the retention of the entirety of that individual's, and millions of others', private genetic information for the rest of their lives."[166] In opposition to the majority's dismissal of Kriesel's Fourth Amendment arguments, the dissent also observed, "We do not need scientists to discover anything new to know that a full specimen of an individual's DNA reveals private information about that individual's predisposition for certain diseases and disorders, paternity and other familial relationships, and racial ancestry."[167]

The *Kriesel* dissent underscores that the retention of a DNA profile and sample intrudes upon a privacy interest that extends beyond an interest in not getting caught. A "seized for one, seized for all" approach to volunteered DNA samples cannot be squared with the substantial privacy interests at stake. When police indefinitely retain consent samples in a database to search for evidence of criminality in unrelated cases, they must demonstrate that any con-

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162. *Id.*

163. United States v. Kriesel, 720 F.3d 1137, 1139 (9th Cir. 2013). The dissent in *Kriesel* emphasized the distinction between the retention of the DNA sample and the retention of the DNA profile derived from it. *Id.* at 1150 (Reinhardt, J., dissenting).

164. *Id.* at 1156 (Reinhardt, J., dissenting) ("Our criminal justice system successfully deterred and punished crime for hundreds of years before the use of DNA evidence became standard practice.").

165. *Id.* at 1150.

166. *Id.* at 1153. The *Kriesel* dissent apparently understood CODIS to require expungement upon the death of the qualified convictee or arrestee. That is not necessarily the case. In Maryland, for example, expungement only occurs automatically if no conviction ever occurs, the conviction is reversed or vacated, or an unconditional pardon is granted. MD. CODE ANN., PUB. SAFETY § 2-511 (West 2009).

167. *Kriesel*, 720 F.3d at 1157 (Reinhardt, J., dissenting).

sent to the bodily intrusion was, in fact, freely and voluntarily given.[168] Because a person who consents to a search "may of course delimit as he chooses the scope of the search," the police must also prove that the search was within the actual scope of consent.[169] Does that mean the police must give advice to the target of a consent search that is in his best interest? The Supreme Court has clearly stated that police do not have to tell a person that he can decline to consent.[170]

At the same time, courts should not tolerate incomplete or garbled explanations in response to a nonoffender's questions about the implication of consenting to the collection of a DNA sample to aid in an investigation. Courts are unlikely to apply the principles of informed consent to DNA collection, although it remains the current standard of consent outside of the field of criminal justice.[171] As noted by the UK Human Genetics Commission, "'the difficulties involved in tracing and securing re-consent for different forms of medical research may make obtaining fresh consent impractical and would seriously limit the usefulness of large-scale population databases.'"[172] Genetic material used in medical research focuses on consent laws that "provid[e] research participants with relevant information in order to allow autonomous decision-making."[173] Failure to provide accurate and complete information to individuals violates the "ethical principles that underlie much consent jurisprudence."[174] Collecting and storing DNA samples en masse creates the possible threat of myriad "social and ethical concerns, including

168. Bumper v. North Carolina, 391 U.S. 543, 548 (1968); *see also* United States v. Mendenhall, 446 U.S. 544, 557 (1980); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

169. Florida v. Jimeno, 500 U.S. 248, 252 (1991).

170. *Schneckloth*, 412 U.S. at 222.

171. Timothy Caulfield et al., *DNA Databanks and Consent: A Suggested Policy Option Involving an Authorization Model*, BMC MED. ETHICS, Jan 3, 2003, at 1. At the time of publication, only one state required informed consent for DNA samples volunteered to a statewide database. *See* ILL. ADMIN. CODE tit. 20, § 1285.40 (2012) ("Individuals may voluntarily provide samples for the Convicted Offender DNA database if they sign the informed consent section of the sample collection receipt contained in the collection kit, or by signing a separate consent form provided or approved by the Department of State Police. The voluntary sample will be used for criminal investigations by comparing the DNA profile from the individual with other DNA profiles in the database.").

172. Caulfield, *supra* note 171, at 2 (quoting HUMAN GENETICS COMM'N, INSIDE INFORMATION: BALANCING INTERESTS IN THE USE OF PERSONAL GENETIC DATA 94 (2002)).

173. *Id.*

174. *Id.*

possible genetic discrimination."[175] No reasonable person would consent to relinquishing his genetic material for any future use absent informed consent.

II.
SLEEPER CELLS: THE DEVELOPMENT OF LOCAL DNA DATABASES

In spite of the threat to individual privacy, law enforcement officials trumpet the value of local DNA databases as an effective crime-solving tool.[176] Local DNA databases "operate under their own rules," and as a result, they can catalogue a far greater number of DNA samples than their state and federal counterparts.[177] Laws regulating local DNA databases exist in a very small number of states.[178] Even among the limited laws regulating local DNA databases, there is "little consensus about what DNA retention policies are appropriate at the local level."[179] Without strict rules governing local DNA databases, local law enforcement agencies are able to exercise great discretion in the collection and use of DNA samples.[180] According to experts, with technological advances allowing for "rapid DNA testing," local DNA databases will continue to expand.[181]

A. "More is Better": Familial Searching and DNA Dragnets

The success of CODIS in generating investigatory leads from offender profiles stored in the national databank incentivizes police to expand state and local DNA databases to include more profiles.[182] Commentators have noted the opportunity for police to create "offline" DNA databases that are *not* connected to CODIS to target the "usual suspects" who are defined by demographics like race, class, and geographic location.[183] However, police are expanding state and local DNA databases that *are* connected to CODIS in ways that were probably never legislatively intended. Po-

175. *Id.* at 2–3.
176. *See, e.g.*, Goldstein, *supra* note 14.
177. *Id.*
178. *Id.* ("Alaska prohibits them. California and Hawaii are explicit in not precluding them. In many states, including New York, the law is silent on the issue.").
179. *Id.*
180. *See id.*
181. *Id.*
182. *See* Joh, *supra* note 129, at 287.
183. *E.g.*, *id.* at 286.

lice have discovered the backdoor to CODIS: federal law limits the DNA profiles that can be stored in the national databank, but these limits do not extend to state and local DNA databases.[184]

At the national level, DNA samples must adhere to federal requirements (including the offense and laboratory processing standards) before qualifying for inclusion in CODIS.[185] While many states have also adopted requisite standards for their own statewide DNA databases, some local police departments have established their own databases with little or no regulation.[186] In recent years, "a growing number of law enforcement agencies collect DNA for their own 'offline' databases."[187] Out of either frustration with the inefficiencies of state DNA laboratories or a desire to utilize DNA samples ineligible for collection under state or federal law, many local law enforcement agencies view local DNA databases "as valuable investigative tools."[188] Rather than limiting collection of DNA samples to convicted offenders and arrestees, many local law enforcement agencies also collect samples from "volunteers, victims, and suspects."[189] Innocent crime victims may "not necessarily realize their DNA will be saved for future searches."[190] Such collections are "profoundly disturbing" because DNA voluntarily given to the police to clear a name can be retained and used in the investigation of future crimes.[191]

Because of guidelines governing which samples are eligible for submission to the national databank, not all DNA profiles that are entered at the local and state levels will wind up being included at

184. *See* 42 U.S.C. § 14132(a) (2012) ("The Director of the Federal Bureau of Investigation may establish an index of—(1) DNA identification records of—(A) persons convicted of crimes; (B) persons who have been charged in an indictment or information with a crime; and (C) other persons whose DNA samples are collected under applicable legal authorities, provided that DNA samples that are voluntarily submitted solely for elimination purposes shall not be included in the National DNA Index System; (2) analyses of DNA samples recovered from crime scenes; (3) analyses of DNA samples recovered from unidentified human remains; and (4) analyses of DNA samples voluntarily contributed from relatives of missing persons."); *see also supra* note 13 and accompanying text. Note that federal law firmly requires that "DNA samples that are voluntarily submitted solely for elimination purposes shall not be included in the National DNA Index System." § 14132(a)(1)(C).

185. Joh, *supra* note 129, at 286.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Goldstein, *supra* note 14.

191. *Id.*

the national databank.[192] Local laboratories are free to decide what sorts of profiles can be stored only in the local database without running afoul of an inspection review, because these periodic inspections focus exclusively on samples that have been uploaded to the national databank.[193] In general, local databases warehouse two main types of samples: reference samples from known individuals and unknown crime scene samples.[194] While some local labs are proactive in their use of local databases, there are many that limit their own profiles to those that are permissible at the national level.[195] Those labs that are proactive in this regard—that is, those that include more legally obtained samples in the local database than may ultimately be submitted to the national databank—claim they are providing a more valuable service to their communities because they are likely to provide more investigative leads through CODIS.[196]

For example, during the course of the typical investigation, police will frequently collect many investigative reference samples.[197] Even if some of these samples are not eligible for entry into the national databank, some localities are allowed to keep the DNA profiles in their own local databases.[198] In addition, securing samples from otherwise ineligible defendants through plea bargains provides additional opportunities to solve crimes through CODIS.[199] Because criminals often commit crimes repeatedly in the same geographic area, local law enforcement is able to make the case for these local databases.[200] Little concern is expressed over the potential for gerrymandering the contours of a geographic area

192. Rockne Harmon, *The Power of LDIS*, Forensic Magazine (Apr. 16, 2013, 4:38 PM), http://www.forensicmag.com/articles/2013/04/power-ldis.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* CODIS has a 30% success rate, but forensic experts hypothesize that the use of local databases can "drive that success rate even higher" and "make our communities safer." *Id.*

197. *Id.*

198. Harmon, *supra* note 192.

199. *Id.*

200. *Id.* ("[D]ata released from the FBI indicates that in more than 87% of the offender hits in the database, the crime took place in the same state in which the offender provided a DNA sample. That follows the trend that police officers have seen for ages: criminals tend to offend locally, working the same area over and over—and, indeed, experience demonstrates that the offender may be convicted repeatedly in the same jurisdiction. Because of this behavior, having a geographically focused local database gives law enforcement agents an effective tool for solving crimes in their communities.").

to follow lines of race or class, the pooling of data between laboratories, the enhanced "CODIS-plus" profiles that include information necessary to identify a male's paternal line, or the cynicism of bartering for a young male's DNA that will permanently put him—and effectively his family—in a database with uncertain opportunities to expunge his genetic information.

Orange County, California, serves as a prime example of a city using a local DNA database on steroids. Law enforcement claims more is better, but is it? The Orange County local database has reached 80,000 offender profiles and shares information with neighboring jurisdictions.[201] Local officials tout a recently solved kidnapping and rape case from 2001 as an example of the database's effectiveness.[202] In 2012, a man was arrested for driving under the influence.[203] When his DNA sample was submitted to the local database following his conviction, it matched the DNA evidence collected from a 2001 crime scene, which was housed in the county lab.[204] Proponents, citing this example, argue that solving even one case justifies the expansion of underregulated local DNA databases at any cost.[205] But without greater transparency, it is not possible to determine whether data like this is being cherry picked. The lack of transparency in the demographics of the persons in the database and self-selected data about matches should make one skeptical of extraordinary claims of effectiveness.[206]

Underregulated DNA databases are also used to perform searches of familial DNA, a practice that the FBI does not routinely permit at the federal level.[207] In fact, a handful of states openly

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201. *Id.*

202. *Id.*

203. *Id.*

204. Harmon, *supra* note 192.

205. *Cf. id.* ("'This is exactly the type of crime we were targeting when we created the Orange County District Attorney's local DNA database. I am confident that many violent, serious crimes such as this will be solved as more samples from local offenders are entered into the database,' said Tony Rackauckas, District Attorney, in a statement on behalf of Orange County.").

206. *See id.*

207. *See Familial Searching*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/familial-searching (last visited Nov. 30, 2013) ("[F]amilial searching is not currently performed at the National DNA Index System."). "Familial searching" is a technique that relies on the similarities of DNA profile data between related persons to search for partial matches between crime scene evidence and profiles of known individuals in a database. *Id.* The partial matches may identify family members of the unknown individual from whom the reference DNA sample was collected at the crime scene. *Id.* In this way, the offender in the database functions as a "genetic beacon" that may point the way to family members as potential

practice familial DNA searches, while other states are silent or explicitly prohibit such use.[208] As of June 2011, California, Colorado, Texas, and Virginia are known to perform these familial searches.[209] Other states like Minnesota, Pennsylvania, and Tennessee have contemplated legislation pushing toward using familial DNA searches.[210] Whereas Maryland and the District of Columbia have explicitly prohibited such usage,[211] other jurisdictions have simply started employing familial searching based upon existing laboratory policies.[212] Local databases are a growing phenomenon, with little to no guidance and regulations as to search practices; local law enforcement agencies are governing themselves and creating in-house policies regarding DNA collection and sample usage.[213]

The scope of the problem is magnified when the casework of a local DNA laboratory intersects—as it often does—with DNA dragnets to identify the source of DNA collected at a crime scene.[214] When there is no hit of the unknown suspect profile to any offender profile in the national DNA databank, police may utilize a DNA dragnet—requesting DNA swabs from a target population that may largely be defined by economic class, race, or sex—to expand the collection of DNA to a selected group of individuals who are "associated" with the crime.[215] When these mass screenings of DNA sampling take place, typically the police have no particular-

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suspects. Jessica D. Gabel, *Probable Cause from Probable Bonds: A Genetic Tattle Tale Based on Familial DNA*, 21 HASTINGS WOMEN'S L.J. 3, 18 (2010).

208. Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 302 (2010).

209. *Familial Searching*, *supra* note 207.

210. *Id.*

211. *Id.*

212. *Id.*

213. *See* Goldstein, *supra* note 14.

214. Phillip Pan, *Pr. George's Chief Has Used Serial Testing Before; Farrell Oversaw DNA Sampling of 2,300 in Fla.*, WASH. POST, Jan. 31, 1998, at B1 (reporting on new Prince George's County Police Chief's use of "serial DNA testing" in a high-profile rape and murder case).

215. *See* Richard Willing, *Privacy Issue Is the Catch for Police DNA 'Dragnets,'* USA TODAY, Sept. 16, 1998, at A1. The DNA samples are collected from the "group" en masse and without a warrant. *Id.* The first known DNA dragnet consisted of 4500 men in the English village of Narborough in 1986. Angus J. Dodson, Comment, *DNA "Line-Ups" Based on a Reasonable Suspicion Standard*, 71 U. COLO. L. REV. 221, 223–24 (2000). Furthermore, the term "associated" is often used very loosely. For example, in the Narborough dragnet, the men sampled were "associated" with a rape of two teenage girls simply because each subject lived in the same town as the victims. *See* Sepideh Esmaili, Note, *Searching for a Needle in a Haystack: The Constitutionality of Police DNA Dragnets*, 82 CHI.-KENT L. REV. 495, 499–500 (2007).

ized suspicion of any individual and focus the dragnet on those who may have had access to the crime scene, were in the vicinity, were of the same race as the perpetrator, or simply knew the victim.[216] In a dragnet situation, police lack probable cause to obtain a search warrant of any one individual in the group and therefore need consent to collect a DNA sample from the target.[217] Usually, individual targets in the group are excluded as suspects through DNA testing.[218] Conversely, when any individual target refuses consent, he comes under the heightened suspicion of police who may try to obtain a search warrant or surreptitiously collect a DNA sample.[219] And while these voluntarily submitted samples cannot be uploaded to the national DNA databank,[220] police maintain that they may upload the profiles into local and state DNA databases that participate in CODIS to search for evidence connecting the person to other crimes beyond the purview of the dragnet.[221]

A major concern is that the profiles of the individuals excluded as the source of any crime scene evidence may be permanently retained in the local and state databases because these casework profiles are treated as evidence.[222] A Louisiana case provides a

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216. *See, e.g.*, Corbin v. State, 52 A.3d 946, 957 (Md. 2012) (stating that the police collected DNA samples from nine to twelve men who were deemed "associates of the victim"); *see also* Raynor v. State, 99 A.3d 753, 755 (Md. 2014) ("The victim contacted the police on numerous occasions throughout the next two years to inform them about potential suspects. During that time, the police obtained consensual DNA samples from approximately 20 individuals with possible connections to the 2006 rape, including several of the victim's neighbors. None of those DNA samples matched the DNA collected from the victim's home on the day of the rape.").

217. *See* Willing, *supra* note 215.

218. *See* Grand, *supra* note 37, at 2283–84.

219. *Id.* & n.31. Often, this is the goal of conducting the dragnet. *Id.* at 2278–79.

220. *See* FBI, NDIS Operational Procedures Manual, *supra* note 13, § 4.2.1. Although a DNA profile from a known person cannot be uploaded to the offender index unless collected pursuant to applicable state law, a state or local laboratory (like those in Maryland) that defines casework profiles from known persons as forensic samples may be able to exploit a regulatory exception that permits manual searches of forensic samples in the national DNA databank if exigent circumstances exist. *See id.* § 5.3.

221. *See* Grand, *supra* note 37, at 2279–80, 2283 & n.28.

222. Some courts have already refused to grant expungement requests from individuals who have been excluded as suspects in a criminal investigation. *See, e.g.*, Varriale v. State, 96 A.3d 793, 799 (Md. Ct. Spec. App. 2014) ("While it may seem anomalous that a volunteer like Varriale would have fewer statutory protections than someone who had been charged with or even convicted of a serious criminal offense, the anomaly is a result of the history and structure of the DNA Collection Act itself. When it was initially enacted in 1994, the Act authorized the collection,

prime example of the use of DNA dragnets and local DNA databases. Law enforcement in southern Louisiana launched an extensive manhunt for a serial killer who raped and murdered three women.[223] After recovering DNA evidence from the crime scenes, law enforcement attributed the murders to the same unknown male perpetrator.[224] In an effort to track down the killer, local and state law enforcement joined forces with the FBI to launch a task force "to generate leads on the serial killer's identity."[225] Two anonymous tips lead investigators to Shannon Kohler.[226] Although Kohler initially appeared willing to voluntarily provide law enforcement with a DNA sample, media reports caused him to refuse further cooperation.[227] Convinced of Kohler's involvement, law enforcement obtained a warrant and Kohler ultimately submitted to a cheek swab.[228] After law enforcement filed the warrant in the public records, local media quickly targeted Kohler "as a suspect in the serial killer investigation who was refusing to cooperate with police."[229] Kohler did not learn that his DNA was not a match to the killer until reading a local newspaper two months later.[230] After learning that he was no longer a suspect, Kohler requested the expungement of his DNA profile from "any place where it had been stored," including local databases.[231] The Fifth Circuit did not rule on whether Kohler's could seek expungement, and to date it is un-

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retention, and (in some cases) expungement of DNA only from persons who had been convicted of felonies or of other enumerated crimes. In 2008, the General Assembly amended the Act to extend its provisions, including the expungement provisions, to persons who had been charged with a crime of violence, an attempt to commit a crime of violence, burglary, or an attempt to commit a burglary. The General Assembly, however, has yet to extend the expungement provisions to persons like Varriale, who voluntarily consent to the taking of a DNA sample.") (citations omitted); Amato v. Dist. Att'y for the Cape and Islands Dist., 952 N.E.2d 400, 410 (Mass. App. Ct. 2011) (holding that law enforcement's refusal to expunge an elimination profile in a database derived from a DNA sample voluntarily provided to police during a homicide investigation constitutes "unreasonable, substantial, and serious interference with privacy" under state statute restricting extraneous collection and storage of information by governmental units).

223. Kohler v. Englade, 470 F.3d 1104, 1106 (5th Cir. 2006).

224. *Id.*

225. *Id.* at 1107.

226. *Id.*

227. *Id.* For example, media reports indicated that the killer wore a size ten or eleven shoe, whereas Kohler told law enforcement he wore a size thirteen or fourteen shoe. *Id.*

228. *Id.*

229. Kohler v. Englade, 470 F.3d 1104, 1107 (5th Cir. 2006).

230. *Id.* at 1107–08.

231. *Id.* at 1108.

clear whether his DNA profile remains in a state or local database.[232]

B. "More is Better": Low Quality Crime Scene DNA

The underregulation of state and local DNA databases also means that low-quality DNA profiles developed from crime scene samples that cannot be uploaded to the national DNA databank are placed in state and local databases.[233] The risk of misidentification increases when degraded, partial, or irrelevant crime scene profiles are stored in databases.[234] DNA analysis of low amounts of DNA, called "low-copy number DNA," often fails to detect a complete profile and can add erroneous information.[235] In addition, state and local DNA databases are now being expanded to include other poor-quality DNA samples like "touch" DNA, driven by the increasing sensitivity of DNA analysis and an insatiable demand for DNA testing in a wide array of cases from property and drug crimes to quality-of-life offenses.[236]

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232. Although the *Kohler* decision did not resolve Kohler's request for expungement, it does emphasize the need for thorough judicial scrutiny of decisions to obtain DNA samples from those suspected of, but not convicted of, committing a serious crime, and the constitutional requirement that these decisions satisfy the probable cause standard. *See id.* at 1109–12. *Kohler* also recognized that the intrusiveness of the search extends beyond the collection of a saliva sample to include an assessment of the analysis and storage of the sample. *Id.* at 1109 n.4 (noting that for Fourth Amendment purposes, a chemical analysis of lawfully obtained blood, breath, and urine samples, as well as the collection, analysis and storage of blood and saliva, constitutes a search).

233. *See, e.g.*, William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, *in* GENETIC EXPLANATIONS: SENSE AND NONSENSE 227 (Sheldon Krimsky & Jeremy Gruber, eds., 2012), *available at* http://ssrn.com/abstract=2214379.

234. *See* BUTLER, *supra* note 17, at 526; GILL, *supra* note 27, at 125 ("Random match probabilities are more likely with low-template DNA profiles that are multi-contributor mixes.").

235. *See* Peter Gill, *Application of Low Copy Number DNA Profiling*, 42 Croatian Med. J. 229 (2001); Carole McCartney, *LCD DNA: Proof Beyond Reasonable Doubt?*, 9 NATURE REVIEWS GENETICS 325 (May 2008).

236. *See* Thompson, *supra* note 233, at 232 (discussing how a "touch" DNA sample in a DNA database falsely implicated a California man in a rape case); *see also* John Butler, Nat'l Inst. of Standards & Tech., Presentation at the National Institute of Justice Conference: What We Have Learned (June 20, 2012), *available at* http://www.cstl.nist.gov/div831/strbase/mixture/NIJ2012-WhatLearned-Butler.pdf (recognizing the variation in how analysts in crime laboratories interpret complex mixtures); Charlotte J. Word, *Mixture Interpretation: Why Is It Sometimes So Hard?*, PROMEGA (2011), http://www.promega.com/resources/profiles-in-dna/2011/mixture-interpretation-why-is-it-sometimes-so-hard/ (explaining the challenges of interpreting multi-source DNA mixtures).

The number of partial crime scene profiles that matched multiple persons in Great Britian's national DNA databank illustrates the scope of the concern. Between May 2001 and September 2006, 182,612 crime scene profiles were matched.[237] A single suspect was reported for 132,178 of these match groups; for the remainder of matches (nearly 50,000), a list of potential suspects was produced.[238] In its annual report, the agency overseeing the database explained that "[t]he identification of more than one potential suspect as the source of the DNA at some scenes is largely due to the significant proportion of crime scene sample profiles that are partial."[239]

The existence of a database that contains low-quality DNA profiles developed from crime scene samples means that individuals whose profiles are contained in the database, and their family members, may be falsely connected to criminal investigations.[240] Whereas FBI regulations exclude these poor-quality samples from the U.S. national databank in an attempt to ensure the quality of investigative leads generated from a "hit" to an individual in the convicted offender or arrestee indices, many state and local

237. NAT'L DNA DATABASE STRATEGY BD., *supra* note 27.

238. *Id.*

239. *Id.*

240. *See* Thompson, *supra* note 233, at 232; SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS AND CIVIL LIBERTIES 300–04 (2011) (discussing the myth of objectivity in DNA interpretation and the myth that a mismatch between DNA profiles excludes a person from suspicion). For example, in a Sacramento, California rape case, a DNA analyst tested a swab of the victim's breast and identified a male DNA profile. *See* M.S. Enkoji, *DNA Lapse Puts Scrutiny on Lab Work*, SACRAMENTO BEE, Sept. 14, 2006, at B1. The profile did not meet the criteria for upload to the national DNA databank, but was included in the state DNA database. *Id.* It hit to the profile of a man who lived in the Sacramento area. *Id.* However, a subsequent police investigation cast doubt on the man's involvement in the crime. *Id.* A supervisor in the crime laboratory checked the analyst's interpretation and discovered the analyst made an incorrect assumption about the number of male contributors to the low level mixture of DNA recovered from the victim's breast swab that caused the false hit. *Id.*

Another recent example of low-level mixtures of recovered DNA comes from the highly publicized Amanda Knox trial. Renowned forensic expert Greg Hampikian of Boise State University has advocated for Knox's innocence based on DNA evidence. Eulonda Sklyes, *The Role of Alleged Trade Secret Forensic Evidence in the Amanda Knox Murder Case*, ORRICK TRADE SECRETS WATCH BLOG (Nov. 8, 2013), http://blogs.orrick.com/trade-secrets-watch/2013/11/08/the-role-of-alleged-trade-secret-forensic-evidence-in-the-amanda-knox-murder-case/. He claims the DNA evidence used at trial was contaminated through the "'casual transfer' of DNA evidence from one object to another." *Id.* The details of Hampikian's specific arguments remain unknown based on Boise State University's allegations that his arguments and research are protected trade secrets. *Id.*

databases may include them.[241] Furthermore, while the FBI audits the profiles that local and state laboratories upload to the national databank to further ensure the quality of its investigative leads and ensure compliance with its upload standards, these audits do not extend to profiles contained in the local and state laboratories.[242]

When there is uncertainty about the number of contributors to a crime scene DNA sample and whether all of the data is complete, a forensic analyst's interpretation of the data to identify profiles of the contributors becomes prone to subjective assessments, bias, and error. In a 2011 study, seventeen qualified DNA analysts from accredited crime laboratories were asked to evaluate DNA data that had actually been used to prove a Georgia man guilty of participating in a gang rape.[243] The analysts were provided with the scientific data necessary to interpret the results, but they were not provided with any contextual information about the facts of the case.[244] Twelve of the analysts concluded that the DNA profile of the Georgia man excluded him as a possible contributor, four found the data to be uninterpretable, and only one found that he was a contributor to the forensic mixture of DNA.[245] The wide variation of results "demonstrates that DNA mixture interpretation has subjective elements and may be susceptible to bias and other contextual influences."[246]

C. "More is Better": Turning to the Private Sector

The lack of effective regulation for CODIS-affiliated local DNA databases also encourages police to obtain DNA database software in the private market. The Local DNA Index System (LODIS) is one example of such software. It functions "to bring forensic DNA technology down to the average city or county level."[247] The Palm

241. FBI, NDIS Operational Procedures Manual, *supra* note 13, § 4.2.1.3; *see also supra* note 9 and accompanying text.

242. *See* FBI, The FBI Quality Assurance Standards Audit for Forensic DNA Laboratories (2011), *available at* http://www.ncdoj.gov/getdoc/95b5346d-dfa0-4bca-b423-1e186811895e/2012-NC-DNA-Database-Audit.aspx (describing the scope of the audits as the scope necessary to establish quality assurance requirements for samples included in CODIS).

243. Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 Sci. & Just. 204, 205 (2011).

244. *Id.*

245. *Id.*

246. *Id.*

247. Bill Berger et al., *LODIS, A New Investigative Tool: DNA is Not Just Court Evidence Anymore*, The Police Chief (April 2008), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1465&issue_id=42008.

Bay Police Department in Florida deployed LODIS in three separate phases.[248] The first phase, completed in November 2007, "had as its primary goal the training of patrol officers in DNA collection."[249] Police officers were "encouraged to collect samples at all crime scenes."[250] The second phase of the project allowed officers to "review DNA test results from a car computer over an encrypted, secure network."[251] Phase three culminated in the analysis of the "overall results in impact on crime" in order to "determine if the process is affordable for the average agency."[252]

"LODIS was designed specifically to provide local agencies with a system to create local DNA databases, which are flexible to meet the unique investigative needs of local law enforcement agencies."[253] Ultimately, local agencies benefit from LODIS by being able to "deploy CODIS at their agencies [ ] to be used in conjunction with other investigative techniques on more commonly committed crimes."[254] "As such, it provides an approach for implementing the local DNA index system (LDIS) component of CODIS on a broad scale and independent of any limitations in DNA testing capacity at the state laboratory level."[255]

D. Maryland as a Case Example

Maryland is home to two separate levels of underregulated DNA databases. First, each of the five local police agencies in the state maintains its own underregulated database.[256] These local police agencies operate DNA laboratories and upload profiles to CODIS.[257] Each LDIS retains DNA samples from known individuals that are not eligible to be uploaded to the state or national DNA

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. Berger et al., *supra* note 247.

254. *Id.*

255. *Id.*

256. *See History of Maryland's DNA Database*, MD. GOVERNOR'S OFF. CRIME CONTROL & PREVENTION, http://www.goccp.maryland.gov/dna/maryland-database.php (last visited Dc. 3, 2014); *see also* DEP'T OF MD. STATE POLICE, 2011 ANNUAL REPORT: MARYLAND STATE POLICE FORENSIC SCIENCES DIVISION STATEWIDE DNA DATABASE REPORT (2012). Those agencies are the police departments in Montgomery County, Prince George's County, Baltimore County, Baltimore City, and Anne Arundel County. *Id.*

257. *Id.*

databank.[258] The second level involves the "suspect" index within the Maryland State DNA database. The suspect index includes DNA samples collected pursuant to a search warrant from known individuals who are not already catalogued as arrestees or convicted offenders.[259] These suspect samples are not eligible for inclusion in the national DNA databank.[260] The suspect index also includes DNA samples collected from any individual that the police, at one time, labeled a "suspect"—even if the DNA evidence cleared the person of suspicion.[261] The Maryland DNA Databank Act does not authorize the "suspect" index and the Maryland State Police have issued no governing regulations, other than to define suspect DNA as crime scene DNA.[262] Casework evidence samples are also included within the definition of crime scene evidence.[263]

By defining the suspect index and casework evidence samples as crime scene evidence, the genetic privacy of crime victims, individuals who volunteer DNA samples to aid an investigation, and persons who provide a DNA sample to clear themselves of any suspicions—whether by consent or pursuant to a warrant—is intruded upon to a far greater degree than the privacy interest of convicted offenders and persons arrested for serious crimes; even convicted offenders and persons arrested for serious crimes are able to enjoy the statutory protections contained within the Maryland DNA Collection Act.[264] Important safeguards provided by the Maryland DNA Collection Act include:

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258. *See, e.g.*, Varriale v. State, 96 A.3d 793, 795–96 (Md. Ct. Spec. App. 2014) (recounting how Varriale had been cleared of suspicion by the Anne Arundel County Police Department during a prior investigation in which his DNA had been sampled, but that his DNA profile was uploaded into the "suspect index" anyway); *supra* note 8 and accompanying text.

259. *See id.*

260. *See supra* note 15 and accompanying text.

261. *See supra* note 258.

262. *See* MD. CODE REGS. 29.05.01.01(B)(17) (2012). In 2011, the Maryland Department of State Police submitted 1901 crime scene DNA evidence samples that "qualified for inclusion . . . in the Statewide DNA database." OFF. OF LEG. AUDITS, MD. GEN. ASSEMB., CRIME SCENE DNA COLLECTION AND ANALYSIS REPORTING BY LAW ENFORCEMENT AGENCIES 2 (2013).

263. *See* MD. CODE ANN., PUB. SAFETY § 2-501(i)(3) (West 2013); MD. CODE REGS. 29.05.01.01(B)(17) (2014). DNA samples collected from persons other than qualifying convictees or offenders—that is, persons who have *not* been arrested—are treated as a "forensic or evidence sample." MD. CODE REGS. 29.05.01.01(B)(17) (2014). A "forensic or evidence sample" means DNA obtained "from an item of evidence *or an individual, including suspect samples*, other than one required to be collected pursuant to [MD. CODE ANN., PUB. SAFETY § 2-501 *et seq.*]." *Id.* (emphasis added). For Maryland's definition of "DNA Sample," see § 2-501(i).

264. *See* §§ 2-501 to 2-514.

- Limitations on whose profiles are to be included in the database;[265]
- Restrictions on the use of DNA samples included in the database;[266]
- Limitations on whether the state DNA database may be used to conduct familial searches;[267]
- Reporting requirements to the legislature regarding the utility of the database and the racial demographics of the persons in the database;[268] and

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265. *Id.* In 1994, when the Maryland General Assembly established a state database of DNA profiles, it required DNA collection and analysis from individuals convicted of rape and other sexual offenses. *See* 1994 Md. Laws 2187. In 1999 and 2002, the General Assembly expanded the Act to cover individuals convicted of all felonies and some misdemeanors. *See* 2002 Md. Laws 3716; 1999 Md. Laws 2997. In 2008, the General Assembly temporarily expanded the Act to cover individuals who had been charged with, but not yet convicted of, crimes of violence and burglaries. § 2-504(a)(3); 2008 Md. Laws 3232. Under the current version of the Act, the collection of DNA samples from covered individuals is mandatory; with regard to individuals who have been charged but not convicted, the Act provides that the state is to collect the sample at the time of the charge. § 2-504(b)(1). In 2013, the General Assembly removed the Act's sunset provision. *See* H.B. 292, 433rd Gen. Assemb., Reg. Sess. (Md. 2013).

266. § 2-505(b)(2). The Act further provides that, "[t]o the extent fiscal resources are available," DNA samples "shall be . . . tested" for several purposes, including "as part of an official investigation into a crime," "to analyze and type the genetic markers contained in or derived from the [samples]," and "for research and administrative purposes," such as "develop[ing] a population database after personal identifying information is removed" and "support[ing] identification research and protocol development of forensic DNA analysis methods." *Id.* § 2-505(a). In aid of those purposes, the Act specifically authorizes the state to prepare and store "DNA records" (the Act's term for DNA profiles), which can be compared with similar profiles in national and state databases. *Id.* §§ 2-502(d), 2-504(d)(1), 2-505(b), 2-506(a).

267. *Id.* § 2-506(d) (prohibiting familial searches of the state DNA database). The Director of the statewide DNA database has expressly limited the ban on familial searching to DNA samples from arrestee and convicted offenders: "The Statewide DNA Data Base System may not be used for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the *DNA arrestee or convicted offender* sample was acquired." MD. CODE. REGS. 29.05.01.06(B) (2014) (emphasis added).

268. § 2-513. The reporting requirement is intended to gather data on whether the disproportionate representation of African Americans in the criminal justice system translates into African Americans also being disproportionately represented in governmental DNA databases. *See* § 2-513(b)(3); MD. GEN. ASSEMB. DEP'T OF LEGAL SERVS., THE 90 DAY REPORT: A REVIEW OF THE 2008 LEGISLATIVE SESSION, Gen. Assemb. 425, 2008 Sess., at E-14 (2008). In the first three years since Maryland has begun collecting data about racial demographics of arrestees from whom DNA samples were seized, minorities have consistently represented approximately 60% of the total number of individuals subject to the compelled collection

- Most importantly, expungement provisions.[269]

As discussed in Part III, the underregulated local and state indices in Maryland represent a substantial privacy intrusion upon individuals who have not (1) engaged in conduct that lessens their expectation of privacy, or (2) consented to the indefinite retention of their DNA in a law enforcement database that does not even offer the protections afforded convicted offenders or arrestees.

Although many states are following the Maryland trend, some jurisdictions are taking a closer look at the local use of DNA databases in response to *King*.[270] An Alabama official, for example, suggested that local law enforcement agencies should not have their own laboratories out of a concern over bias and insufficient resources.[271] The Montgomery Police Department collects DNA evidence, but must send samples to the Alabama Department of Forensic Sciences for analysis.[272] However, two Alabama counties collected voluntarily given blood and mouth swab samples at roadblocks to survey for the presence of alcohol and drugs in the drivers' samples.[273] Officials neglected to disclose whether or not the samples would be retained following the study.[274]

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of DNA merely upon being charged. *See* DEP'T OF MD. STATE POLICE, *supra* note 256, at 7–8.

269. MD. CODE REGS. 29.05.01.14(J) (2012) ("If an individual whose DNA sample is in the Statewide DNA Database System for a reason other than as a sample collected from an arrestee, any additional sample shall remain in the database and is not subject to automatic expungement."). As to individuals who have been charged and arraigned but not yet convicted, the Act authorizes the state to store both DNA samples and DNA profiles while charges remain pending. §§ 2-506(b), 2-511. If a charge results in a conviction, the DNA sample and DNA profile are retained indefinitely; if the charge does not result in a conviction (or the conviction is later overturned), the state is required to destroy the DNA sample and expunge the DNA profile from its database. *Id.* § 2-511(a)(1), (c).

270. *See* Erin Edgemon, *Law Enforcement Agencies Across Country Amassing DNA Databases; Some Alabama Police Collect DNA, But Don't Keep It*, AL.COM BLOG (updated June 14, 2013, 12:24 PM), http://blog.al.com/montgomery/2013/06/?law_enforcement_agencies_acros.html.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

III.
SLIPPING THROUGH THE CRACKS: ADVANCES IN TECHNOLOGY AMPLIFY LONG-STANDING DIVISIONS IN SOCIETY BETWEEN GROUPS LARGELY DEFINED BY RACE AND CLASS

The ease of collection, swift processing, and low cost, combined with the opportunity to indefinitely retain DNA samples in underregulated local or state DNA databases, creates a powerful incentive for police to target disfavored individuals for DNA collection. Courts have mostly been unwilling to scrutinize unwarranted search claims arising out of collection from persons who consent to a buccal swab, finding that consent constitutes a waiver of any privacy interest in DNA identification.[275] And, the lack of transparency shields underregulated databases from any meaningful legislative oversight on the utility or disproportionate impact of police collection practices.

As technology advances, lawyers, judges, and lawmakers struggle to deal with the associated changes.[276] The gap between the technology and the law often leads to scenarios that "can potentially conflict with existing social . . . and cultural values."[277] Legislative checks and balances are designed to ensure that laws are a reflection of discourse and debate—they safeguard against reactionary legislation. Emerging technologies do not yet have those safeguards. Once new technology is introduced to the market, the legislature must still follow its lawmaking processes. The rapid pace at which new technologies are created and integrated into society means that even newly enacted legislation may not truly reflect what

275. *See, e.g.*, Garcia-Torres v. State, 949 N.E.2d 1229, 1237–39 (Ind. 2011) (holding that there had been no Fourth Amendment violation because the defendant had voluntary consented to the buccal swab); Pharr v. Commonwealth, 646 S.E.2d 453, 456–58 (Va. 2007) (holding that "[the defendant's] reasonable expectation of privacy in [his buccal DNA] sample ended when he voluntarily provided it to the police for DNA testing and comparison").

276. *See* Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH. & POL'Y 239, 245 ("There is one aspect of technological change . . . that ha[s] the most direct impact on law. This is the capacity of new technology to enable new forms of conduct, including alteration of the means by which similar ends are achieved. . . . Some technological change has a significant impact on what is possible.").

277. *Id.* at 248.

is currently possible.[278] In turn, society is left dealing with legal uncertainty.[279]

Uncertainty is unacceptable when the technology calls into question basic rights—like the right to privacy—and whether or how the government is permitted to utilize new technologies to advance a legitimate governmental interest while still upholding the rights of those affected. Often, cases involving governmental use of new technology are litigated long before the legislature addresses the legal ramifications.[280] Consequently, courts must interpret and apply existing laws to rule on technology questions, but judges are often left trying to apply antiquated laws to novel issues.[281] Courts cannot use today's law to address tomorrow's technology—the courts are limited to interpreting the law as it applies to the facts

278. *Id.* at 249. Although the legislature may attempt to streamline legislation when technological advances demand doing so, the legislative processes themselves require significant time and cooperation among lawmakers holding differing political views. This time gap between technological advances and lawmaking may be interpreted by society as a failure to act in a sufficiently expedient manner, and as a "failure to take action where new technology is perceived to cause harm, threaten social values, or require central planning [and] might well lead to claims that law has fallen behind the times." *Id.*

279. *See id.* at 264 ("It has been said that 'law must be contemporary to be viable.'") (quoting ROBERT E. KEETON, VENTURING TO DO JUSTICE 17 (1969)).

280. *See, e.g.*, United States v. Jones, 132 S. Ct. 345, 962-63 (2012) ("[C]oncern about new intrusions on privacy may spur the enactment of legislation to protect against these intrusions. This is what ultimately happened with respect to wiretapping. After [Katz v. United States, 389 U.S. 347 (1967)], Congress did not leave it to the courts to develop a body of Fourth Amendment case law governing that complex subject. Instead, Congress promptly enacted a comprehensive statute . . . and since that time, the regulation of wiretapping has been governed primarily by statute and not by case law."). In the case of wiretapping, Congress did not enact a statute regulating the practice until forty years after the Court first addressed the issue. *See* Olmstead v. United States, 277 U.S. 438, 466–69 (1928) (holding that wiretapping does not constitute a Fourth Amendment search), *overruled in part by Katz*, 389 U.S. 347; Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801–04, 82 Stat. 197, 211–25 (codified as amended at 18 U.S.C. §§ 2510–22 (2012)).

281. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22, 28 (1977) (recognizing that legal rules have "furry edges," and that the rules that come from cases are grounded in certain legal principles, or standards, relied on by judges in articulating support for their legal arguments). Chief Justice Taft himself acknowledged this problem in *Olmstead*:

> Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.

277 U.S. at 465–66.

before it.[282] Accordingly, court decisions address social and legal issues arising from new technology relatively quickly, but often inadequately.[283] The decisions often predate legislation.[284] Once courts create new rules through judicial interpretation, the public is often left guessing how such rulings, based on narrow and specific factual circumstances, apply to other situations left unaddressed by courts and lawmakers. The legislature usually appears content to let the public bear this burden, allowing the judiciary to create laws that govern matters better suited for legislative action.

The task of shaping legal arguments is left, not to politicians, but rather to litigators, because courts necessarily craft legal standards dealing with technological advancements. Litigators craft creative arguments, draw parallels between policy considerations of yesterday's laws and today's problems, and react to issues lawmakers are unable to foresee or address in a timely manner. Laws that do not reflect the advances of society either restrict the way technology may be used or are effectively obsolete.[285]

A. Privacy, Information, and Technology

The indefinite retention in a police database of the DNA profile of a person who has not been arrested for a serious crime or convicted of a felony intrudes upon reasonable expectations of privacy. A person's loss of control over his or her DNA profile in a networked database of state and local databases is harmful because it stigmatizes an individual at the discretion of the police. The privacy interest includes a loss of control over a person's entire DNA sample, which contains highly sensitive, intimate information. For example, there are over 6000 genetic disorders that are severely

282. *See*, Maryland v. King, 133 S. Ct. 1958, 1980 (2013) (limiting its holding to the portion of Maryland's statute authorizing the state to collect DNA samples from arrestees and finding that portion constitutional under the Fourth Amendment).

283. *See, e.g.*, United States v. Jones, 132 S. Ct. 945 (2012) (holding that the attachment of a GPS device to the defendant's car absent a warrant constituted a Fourth Amendment violation); Kyllo v. United States, 533 U.S. 27 (2001) (holding that the use of a thermal imaging device to detect heat radiating from a house is a "search" in part because "the technology in question is not in general public use"); California v. Ciraolo, 476 U.S. 207 (1986) (holding that an expectation of privacy in a home's backyard is unreasonable because a backyard can be observed from an aircraft).

284. *See* Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 766 (2005).

285. *See* Moses, *supra* note 276, at 264.

debilitating and stigmatizing.[286] Future testing may include the rapidly expanding field of behavioral genetics in its search to establish causal relationships between genes and a host of adult behaviors related to criminality, such as mental illness, substance abuse, aggression, and impulsiveness.[287] As one commentator put it:

> In its most basic sense, having privacy is having control over our bodies, our possessions, our intimate environment, and the information—whether by watching, listening, touching, or reading—other people can gather about us. The wish for privacy is the wish to control what is revealed about ourselves and our intimate world. . . . Privacy is "the condition of being protected from unwanted access by others—either physical access, personal information, or attention."[288]

The basic notion of "privacy" generally "connotes . . . control over access to the self as well as things close to, intimately connected to, and about the self."[289] Control of one's identity must perforce include a privacy right to protect one's genetic information since DNA is arguably "the human essence—that is, the thing that makes individuals special and perhaps unique."[290] These are substantial and compelling aspects of DNA privacy interests.

New technologies, especially those that make personal information more accessible, make interaction among individuals quicker and more convenient, but they also create a risk to individual privacy—technology brings with it new risks as well as conveniences. Today, digital storage of information for indefinite periods of time increases the likelihood that a person's actions, conversations, or information intended as private may be obtained by

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286. GENETIC DISEASE FOUND., http://geneticdiseasefoundation.org (last visited Dec. 3, 2014); *see also* NICHOLAS WRIGHT GILLHAM, GENES, CHROMOSOMES, AND DISEASE: FROM SIMPLE TRAITS, TO COMPLEX TRAITS, TO PERSONALIZED MEDICINE 19 (2011) ("More than 6,000 single gene disorders are currently known . . . .").

287. *See* Moses, *supra* note 276, at 249.

288. JANNA MALAMUD SMITH, PRIVATE MATTERS: IN DEFENSE OF THE PERSONAL LIFE 59 (1997) (quoting SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 10–11 (1982)).

289. Sonia Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 746 (2004).

290. Anita L. Allen, *Genetic Privacy: Emerging Concepts and Values*, *in* GENETIC SECRETS: PROTECTING PRIVACY AND CONFIDENTIALITY IN THE GENETIC ERA 31, 49 (Mark A. Rothstein ed. 1997); *see also* Jonathan Kahn, *Biotechnology and the Legal Constitution of the Self: Managing Identity in Science, the Market, and Society*, 51 HAST. L.J. 909, 910 (2000) (arguing that autonomy and self-identity are essential components of the genetic privacy interest in DNA).

others.[291] Such recordkeeping practices allow information about people, in terms of both who they are and what they do, to be accessed by others for decades or perhaps longer.[292]

Although privacy has different meanings depending on the context in which the term is used, an overall concept of the existence of individual privacy is universal.[293] The law fails to keep pace with technology in numerous fields, even on the international stage.[294] In response, many governments have adopted privacy codes that "seek to regulate collection and use of personal data held on file by government and private institutions."[295] Recognizing the law's gross shortcomings has led to certain protections regarding DNA databases on the national and state levels; however, local governments have failed to follow suit and protect their citizens from DNA collection and storage processes that, if attempted at the federal level, would violate federal privacy rights.[296]

In the last century, technology has given the government the ability to peer into private areas of individuals' lives through the use of wiretapping,[297] thermal imaging,[298] GPS tracking,[299] and DNA collection,[300] forcing the Supreme Court to weigh in on whether or not these use of these technologies by law enforcement is constitutionally permissible. The law's inability to protect citizens from law

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291. *See* James B. Rule, *Privacy Codes and Institutional Record Keeping: Procedural Versus Strategic Approaches*, 37 LAW & SOC. INQUIRY 119, 120 (2012) ("Given the gravity of the consequences, it is no surprise that conflict and controversy have come to surround these [recordkeeping] processes and that legislation and policy have grown up in response.").

292. *Id.* ("Nearly everyone now appreciates how consequential such record keeping is for one's life chances—that is, how much it matters who compiles records, what information can be included, who can share access to such data, and what kinds of decisions can be made on their basis.").

293. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* http://www.un.org/en/documents/udhr/. The concept of a universal idea refers to the general agreement "about the most general and abstract propositions" about that idea. RONALD DWORKIN, LAW'S EMPIRE 70 (1986).

294. *See* Vivek Wadhwa, *Our Lagging Laws*, MIT TECH. REV., July/August 2014, at 11.

295. Rule, *supra* note 291, at 120. Because of the ability to collect and store personal information, "virtually all of the world's liberal societies have adopted some such measures." *Id.*

296. *See* discussion *supra* Parts II.A–B.

297. *See* Katz v. United States, 389 U.S. 347 (1967); Olmstead v. United States, 277 U.S. 438 (1928), *overruled in part by Katz*, 389 U.S. 347.

298. *See* Kyllo v. United States, 533 U.S. 27 (2001).

299. *See* United States v. Jones, 132 S. Ct. 945 (2012).

300. *See* Maryland v. King, 133 S. Ct. 195 (2013).

enforcement agencies' overreaching use of new technologies has led to outcries for protection, as the use of such technological advances often implicates the constitutional right to be free from unreasonable searches and seizures.[301] In the absence of legislative action, the courts have interpreted law enforcement's use of technologies against the backdrop of society's conception of privacy, and since societal conceptions evolve over time, the outcome of each case has been somewhat inconsistent and often unpredictable.[302]

B. Ethical Issues

1. Expansion of Underregulated DNA Databases Along the Lines of Race

Many factors may lead minorities to be disproportionately represented in local and state DNA databases. First, there are multiple studies that show that police officials on the local level, for example in San Francisco, underreport arrests of minorities.[303] Further, minorities and people of color are disproportionately represented in the criminal justice system.[304] This overrepresentation correlates directly with an overrepresentation of people of color in familial searches given that minorities have a greater and unequal probability of having their DNA collected and stored upon arrest.[305] With the known bias against minority groups and people of color, some scholars believe the familial searches themselves are discriminatory because collection of DNA and the arrest itself is dis-

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301. *See* cases cited *supra* notes 297–300 and accompanying text.

302. *Id.*

303. *See, e.g.*, *SF Police Underreport Arrest Rates for Latinos, Asians*, THE BAY CITIZEN (Aug. 14, 2012, 12:01 AM), https://www.baycitizen.org/news/policing/sf-police-underreport-arrest-rates/ (finding misclassification of arrestees was the reason for underreporting of minority arrests).

304. *See* Murphy, *supra* note 208, at 321.

305. *See id.* ("First, familial searches of convicted offender and arrestee databases exacerbate the actual and apparent disparities of the criminal justice system, in which people of color are disproportionately represented. Second, the dependence on racial categorization in interpreting DNA typing results transmits a biological determinism about race that is not supported by science and that risks formally inscribing within the justice system inaccurate biases under the legitimizing mantel of scientific truth. And lastly, this widespread acceptance of racial and ethnic categorization as a means of quantifying DNA results (say, allelic frequencies) opens the door to a kind of twenty-first century racial eugenics in which crime and criminology are viewed largely as functions of genetics and biology."); *see also Projects: DNA Databases and Justice*, GENERATIONS AHEAD, http://www.generations-ahead.org/projects/dna-databases-and-justice (last visited Nov. 9, 2014).

cretionary and based on criminal suspicion, which is led by a person's race or ethnicity alone in some cases.[306]

Although the fear of racial discrimination does exist, the U.S. Bureau of Justice Assistance (BJA) insists that DNA specimens in DNA databases do not indicate race and that there is no ability to specify a particular race in a search.[307] Moreover, the BJA emphasizes that law enforcement must comply with constitutional law and other legal ramifications to successfully seize biological evidence; if they do not comply, law enforcement runs the risk of "subsequent suppression of evidence at a trial."[308] The problem with the BJA's assertion is that many local law enforcement agencies have no guidelines directing the collection of DNA and the practice of familial searches.[309]

The concern regarding racial inequality in the criminal justice system has been evident for at least the past 200 years. Nonetheless, the Supreme Court has held that complaints about the personal motivations of the police are irrelevant under the Fourth Amendment.[310] Thus, if a local law enforcement agent detains an individual and collects DNA samples upon an arrest motivated by personal bias, there is the possibility that a court would find that the law enforcement agent would be justified by doing so and protected under the notion that he or she acted on the basis of probable cause.[311] This idea is also connected to the fear that crimes will be underreported: if minorities and people of color ran a higher risk of having their DNA profiles abused by the familial search process, it would be no surprise if they became less likely to report crime.

2. The Crime Gene

The resurgence of the idea of a biological root for criminality has resulted in a massive and disturbing potential for abuse of DNA databases. This troubling ethical question is yet another reason citi-

306. *See, e.g.*, Murphy, *supra* note 208, at 321; Jennifer Mnookin, *The Perils of Expanding DNA Searches to Relatives*, UCLA Newsroom (May 8, 2007), http://newsroom.ucla.edu/stories/070508_dna-perils.

307. *See* Global Just. Info. Sharing Initiative, An Introduction to Familial DNA Searching for State, Local and Tribal Justice Agencies: Issues for Consideration (2012) (analyzing the role of race in DNA databases and familial searches).

308. *Id* at 4.

309. *See* discussion *supra* Part II.A.

310. *See* Whren v. United States, 517 U.S. 806, 806 (1996) ("[T]his Court's cases foreclose the argument that ulterior motives can invalidate police conduct justified on the basis of probable cause.").

311. *See id.*

zens may find themselves targeted in criminal investigations. James Watson, one of the discoverers of the double helix structure of DNA, aptly commented on this possible concern:

> A DNA sample taken for fingerprinting purposes can, in principle, be used for a lot more than merely proving identity: it can tell you a lot about me—whether I carry mutations for disorders like cystic fibrosis, sickle-cell disease, or Tay-Sachs disease. Some time in the not so distant future, it may even tell you whether I carry the genetic variations predisposing me to schizophrenia or alcoholism—or traits even more likely to disturb the peace. Might the authorities, for instance, one day subject me to a more intensive scrutiny than would otherwise be the case simply because I have a mutation in the monoamine oxidase gene that reduces the activity of the enzyme? Some research suggests that this mutation may predispose me to antisocial behavior under certain circumstances. Could genetic profiling indeed become a new tool for preemptive action in law enforcement? Philip K. Dick's 1956 story (which inspired the 2002 movie) "The Minority Report" may not be such far-fetched science fiction as we like to imagine.[312]

In his provocative book, *The Anatomy of Violence*, Adrian Raine details how the scientific community is indeed now returning to a paradigm of human behavior—and in particular criminal behavior—that includes biological roots.[313] Raine argues that the study of the biological roots of criminal behavior, or "neurocriminology," will lead to "effective" techniques, such as preventive detention, that will reduce crime.[314] History is full of examples where science has been used to justify heinous mistreatment of groups of individuals. In the late 1800s, the Italian criminologist Cesare Lombroso proposed that criminals were evolutionary throwbacks who could be identified by primitive features like sloping foreheads and large jaws, and he went on to propose an evolutionary hierarchy of the races, with northern Italians at the apex.[315] Such ideas inspired Mussolini's racial laws in the 1930s and are at the core of some of the ugliest social movements of our time—including forced sterilization of "imbeciles" in the United States through the 1970s.[316] As

312. JAMES D. WATSON & ANDREW BERRY, DNA: THE SECRET OF LIFE 273 (2003).

313. *See* ADRIAN RAINE, THE ANATOMY OF VIOLENCE (2013).

314. *Id.*

315. *See generally* CESARE LOMBROSO, CRIMINAL MAN (1876).

316. *See, e.g.*, Frederick Kunkle, *Sometimes, Sorry May Not Be Enough*, WASH. POST, Jan. 30, 2013, at B1.

the pendulum continues to swing back to a biological basis for criminal behavior, the notion of a database of DNA from criminals is entirely foreseeable and will become an irresistible source of data to study for correlations between genes and criminal behavior.[317] The potential for misuse of DNA information is heightened when the executive branch is permitted, without legislative oversight or judicial approval, to engage in the DNA collection practices at issue in this Article.

C. Chilling Effects

Familial searching of an individual's DNA sample raises fears about intrusions of privacy and potential abuse at all levels. However, these fears are greater at the local level because of the lack of regulations governing local practices, especially because those practices are usually only limited by controlling constitutional authority.[318] Further, the chilling effect of underreporting crime would likely be more prominent at the local level where individuals are more likely to encounter their local law enforcement, as opposed to state or federal agencies. This would be especially likely for victims of crimes where DNA is needed to help catch the perpetrator, and for individuals who would likely turn themselves in for crimes they personally committed. Further, knowledge of familial search practices can hinder community support in crime investigations. Individuals may be less likely to persuade a family member to turn himself in if there is a chance that the individual will be personally tracked through a DNA sample given by the family member. Although there is a notion that innocent individuals have nothing to fear because familial DNA would not result in a hit, there is still the risk of wrongful convictions due to "the multitude of possible errors that can arise during laboratory analysis and data entry; and the great potential for corruption and fabrication."[319] Thus, underreporting of crimes could be an inevitable result of the natural desire to preserve one's privacy.

Moreover, courts have held that CODIS is not designed for intentional familial searches and that local DNA databases are modeled after CODIS. In *United States v. Mitchell*, the court relied on expert opinions that expressed familial searches would not pro-

317. It is noteworthy that the Maryland statute expressly states that one of the legislative purposes of the Maryland DNA Collection Act is to conduct "research." MD. CODE ANN., PUB. SAFETY § 2-505(a)(5) (West 2013).

318. *See* GLOBAL JUST. INFO. SHARING INITIATIVE, *supra* note 307.

319. Kirsten Edwards, *Cold Hit Complacency: The Dangers of DNA Databases Reexamined*, 18 CURRENT ISSUES CRIM. JUST. 92, 92 (2006–07).

duce useful information.[320] If courts have expressed skepticism about familial search practices, it would not be farfetched for individuals to feel the same. At the very least, individuals may feel personally violated as the most intimate aspect of their being—their genetic makeup—is exposed against their will.

Without regulation governing these local databases, people may fear that insurance companies will gain access to the databases. Civil rights and privacy groups are justifiably concerned that the local databases will heighten genetic discrimination and lead to individuals being denied coverage based on findings from stored samples.[321] Although these databases primarily serve law enforcement currently, it is not unconceivable that information may be shared or even sold in the future.

Local DNA databases can also hinder the advancement of clinical research. Individuals may be hesitant to produce their DNA for studies or research if there is a fear their sample could be shared with law enforcement. Individuals commonly volunteer to share their DNA for research advancements and to be used for other purposes. For example, in 2003, Comprehensive Drug Testing Inc. and Quest Diagnostics Inc. collected DNA samples as part of a Major League Baseball survey to study the use of steroids by baseball players.[322] The team owners and players involved voluntarily produced their DNA and agreed in their labor contracts that test results and players' identities would remain confidential.[323] Upon the government's investigation into a local lab cooperative and its role in distributing illegal steroids to players, the DNA samples were seized, leading to investigations of some of the players whose identities were disclosed to authorities.[324] Most importantly, the Ninth Circuit initially held that the government could do so, triggering a subsequent Ninth Circuit panel to raise concerns about the impact on players' privacy.[325]

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320. 652 F.3d 387, 409 n.19 (3d Cir. 2011) ("[M]ost experts acknowledge that the current iteration of the CODIS software does a poor job of identifying true leads in familial searches.") (citing Murphy, *supra* note 208, at 300).

321. *See* Phillip Bohannon et al., *Cryptographic Approaches to Privacy in Forensic DNA Databases*, *in* PUBLIC KEY CRYPTOGRAPHY 373 (2000) (suggesting that DNA samples can show an individual's health status and deter insurers from covering certain individuals based on their genetic makeup).

322. *See 9th Circuit: Feds Can Keep Seized MLB Drug Test Results:* United States v. Comprehensive Drug Testing, 5 ANDREWS PRIVACY LITIG. REP. 4 (2007).

323. *See id.*

324. *See id.*

325. *See* United States v. Comprehensive Drug Testing Inc., 473 F.3d 915, 919 (9th Cir. 2006) (ruling, as a divided court, that the U.S. government may retain

IV.
EXPANDED DATABASES REQUIRE EXPANDED REGULATION

Proponents of DNA databases have an easy argument. DNA analysis is an effective law enforcement tool,[326] but the analysis takes time, particularly if it has to be performed by a state-run lab that handles analyses for multiple local jurisdictions.[327] Local communities have a vested interest in getting criminals off the streets, a task that is better accomplished sooner rather than later. According to proponents, the tangible crime-fighting benefits of expanding DNA databases at the local level generally outweigh the intangible, fuzzy ethical and privacy problems such an unregulated expansion brings.[328] This expansion is not likely to slow in the wake of the Supreme Court's endorsement of DNA sampling as a type of standard booking procedure in *Maryland v. King*.[329]

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confidential drug test data seized during raids on two testing laboratories in 2004 for 110 athletes), *opinion withdrawn and superseded on reh'g*, 513 F.3d 1085 (9th Cir. 2008), *reh'g en banc*, 579 F.3d 989 (9th Cir. 2009), *opinion revised and superseded*, 621 F.3d 1162 (9th Cir. 2010). After extensive subsequent litigation, the district court ordered sequestration and the return of copies of the evidence, a ruling that was upheld by an en banc Ninth Circuit panel. *Comprehensive Drug Testing Inc.*, 621 F.3d at 1174 ("Apart from preclusion, however, we cannot see how Judge Mahan abused his discretion by concluding that 'equitable considerations' required sequestration and the return of copies. The risk to the players associated with disclosure, and with that the ability of the Players Association to obtain voluntary compliance with drug testing from its members in the future, is very high. Indeed, some players appear to have already suffered this very harm as a result of the government's seizure. Judge Mahan certainly did not abuse his broad discretion in balancing these equities.") (citations omitted).

326. *But see* Christine Rosen, *Liberty, Privacy, and DNA Databases*, NEW ATLANTIS, Spring 2003, at 37, 40 ("[T]he evidence of DNA's effectiveness as a crime-fighting tool is at once impressive and ambiguous, depending on how the genetic information is used."). A match in a database, on its own, indicates nothing about guilt or innocence but only that two samples are very similar. Guilt and innocence stand as conclusions at the end of an inference, aided by DNA analysis, made by a fallible human being, that may or may not be particularly strong. *See, e.g.*, Osagie K. Obasogie, *High-Tech, High-Risk Forensics*, N.Y. TIMES, July 25, 2013, at A27 (noting cases where DNA database hits and the results of crime scene contamination led to arrests of innocent persons).

327. *See, e.g.*, Goldstein, *supra* note 14 (noting the dramatic crime-solving benefits of local databases and the frustration among local law enforcement personnel regarding how long state crime labs can take to analyze and enter DNA samples, which can be months).

328. *Cf., e.g.*, *id.* (quoting Doug Muldoon, Palm Bay police chief, describing his city's database as "good for law enforcement and good for the community").

329. 133 S. Ct. 1958 (2013). New York University law professor Erin Murphy characterized the ruling this way: "'*King* is a green light. . . . It's a ringing endorse-

As more local law enforcement agencies face real or perceived exigencies regarding community-wide crime prevention, they will push for ever-expanding DNA data on those in their communities. Regulations setting the ethical parameters of the content and use of these databases must keep pace and must cover federal, state, *and* local databases. It is incongruous to think that the policies justifying federal or state regulation don't apply equally to local databases.

Effective regulation of DNA law enforcement databases must strike the right balance between ensuring effective law enforcement and guarding the concerns about the use of unregulated DNA databases.[330] DNA law enforcement databases give the government a unique and exclusive privilege to search a person's most intimately identifying data without that person's approval or knowledge. With that privilege comes the need to use the power appropriately and in line with an individual right of privacy. Appropriate regulations must be crafted to protect against government overreach. Where that institutional right goes largely unregulated, or is regulated in minimal and ineffective ways, there is a greater likelihood for both real and potential abuses of the genetic information stored in DNA databases. Effective regulation should safeguard privacy rights in genetic information and prevent, limit, or mitigate actual and potential abuses that result from institutional control over that information.

To varying degrees, every state regulates the genetic information it acquires, manages, and searches at the statewide level for law enforcement purposes. But, as previously discussed in this Article, the state statutes regulating the management of DNA databases are anything but uniform and most local databases are not subject to any regulatory guidelines.[331] At a minimum, the regulation of a local DNA database should be consistent with the regulation of that jurisdiction's statewide database. Amending an already-existing statutory scheme to achieve consistency across databases would not be

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ment of DNA testing, and many law enforcement agencies would see this as a dramatic opportunity to expand DNA collection.'" Goldstein, *supra* note 14.

330. *Cf.* United States v. Kincade, 379 F.3d 813, 871 (9th Cir. 2004) (Kozinski, J., dissenting) ("New technologies test the judicial conscience. On the one hand, they hold out the promise of more effective law enforcement and the hope that we will be delivered from the scourge of crime. On the other hand, they often achieve these ends by intruding, in ways never before imaginable, into the realms protected by the Fourth Amendment.").

331. *See supra* Parts I.C, II. According to the head of the Sacramento District Attorney's crime lab, Jill Spriggs, "There really are no rules as to what you can specifically keep. The forensic community is all over the board." Goldstein, *supra* note 14.

difficult, and Alaska, Missouri, and Washington have already explicitly done so.[332]

In order to prevent institutional abuse of local DNA databases and to help protect privacy interests in the genetic information stored in those local DNA databases, effective regulation should have both procedural and strategic components in place.[333] The procedural component should focus on already-acquired genetic samples and encompass the proper use, maintenance, and storage of samples in the database. The strategic component should deal with which genetic samples are entered into and remain in the database; its focus would thus be on policies affecting the acquisition and retention of genetic samples in the database.[334]

Regulations should contain robust expungement provisions to protect an individual's privacy interest in the government's use of her personally identifying information. These provisions could prevent many of the abuses of law enforcement DNA databases.[335] If a DNA sample that qualifies for expungement is removed from the database on the front end, there is nothing to abuse subsequently. The ideal expungement policy would give enough room for effective law enforcement while adequately protecting valuable privacy interests.

Criminal investigations may lead to the collection of a wide range of individually identifying DNA information, but casework samples of known persons should not be entered in a searchable local DNA database. DNA samples of known persons should only be permitted in local DNA databases that are collected pursuant to a state's DNA collection law. Biological samples of victims, mere suspects, and even those who voluntarily offer their cheeks for swab-

332. Alaska, Missouri, and Washington each have "no conflict" statutory provisions that ensure consistency in managing both the local and state DNA databases. ALASKA STAT. § 44.41.035(d) (2014); MO. REV. STA. § 650.057 (2013); WASH. REV. CODE § 43.43.758 (2014). Although the logistical cost is low, implementing consistency in a currently inconsistent system may be difficult, depending on the size of the database and the number of samples subject to expungement at the local level.

333. *See* Rule, *supra* note 291, at 121, for an explanation of strategic approaches.

334. While most statutes contain provisions relating to retention, few statutes provide for oversight of DNA sample collection. *See* Samuels, *supra* note 42, at 22.

335. *See, e.g.*, Amato v. Dist. Att'y for the Cape and Islands Dist., 952 N.E.2d 400, 410 (Mass. App. Ct. 2011) (holding that law enforcement's refusal to expunge an elimination profile in a database derived from a DNA sample voluntarily provided to police during a homicide investigation constituted an "unreasonable, substantial, and serious interference with [the defendant's] privacy" sufficient to state a claim under a state civil law restricting extraneous collection and storage of information by governmental units).

bing for elimination purposes should not be included without meeting statutory requirements. Such a statute should require informed consent confirmed in an authenticated writing, a reasonable basis for the police to request the consent, and the opportunity for the person consenting to qualify for expungement upon request. The state should bear the burden of expunging the record from all national, state, and local databases. Any match that occurs after the date the sample qualifies for expungement should not be used for any purpose. DNA samples collected pursuant to a warrant or court order should be searched in the local and state databases (and the national databank, if a one-time search is permitted) and should be destroyed if the person later qualifies for expungement or if no criminal action has begun within a defined period of time after the collection.

The application of a particular expungement policy to a particular type of DNA sample should be mapped along the spectrum between effective law enforcement and the extent of privacy interests implicated. At one end of the spectrum, convicted felons should receive the least amount of privacy protection and generally should not have the option of being removed from DNA databases. At the other end of the spectrum are voluntarily submitted samples collected for purely elimination purposes; these individuals should receive the most privacy protection since there is no reason to connect them with the crime being investigated. Once the criminal investigatory interest ends or the duration of the investigation reaches a defined point, DNA samples from non-qualifying individuals should qualify for automatic expungement.[336] The same expungement policy that is applied to elimination samples should apply to victim and suspect samples as well. Once a case is closed, there should be no legitimate law enforcement reason for retaining the sample beyond the specific context of the investigation for which the sample was drawn, analyzed, and centralized.

Arrested individuals are arguably entitled to less privacy protection than elimination, victim, or suspect individuals, but to more protection than convicted individuals. Just as the level of justification required to arrest someone for a serious crime is sufficient to warrant an intrusion upon their privacy interests in terms of search and seizure law, it should be sufficient to warrant a comparable in-

336. Retaining elimination samples may save time in investigating future crimes, and law enforcement certainly has an interest in preventing future crimes. However, the better policy would be to limit the retention of such samples to the investigation for which they were acquired. This would prevent open-ended genetic surveillance that would invade the privacy of non-suspected persons.

trusion regarding the retention of someone's genetic information in a public government database only after there has been a judicial finding of probable cause on the qualifying offense to detain the person for trial. If the qualifying charge does not result in a conviction, then the individual should qualify for automatic expungement.

The purpose of DNA analysis and recordkeeping in the law enforcement context is simply to provide a method of identification.[337] The goal is to determine, from the genetic information gathered, who the information belongs to—specifically, to identify an individual using a very basic genetic marker.[338] Conversely, the particular purposes to which DNA analysis and management are put in the private sphere vary, but the general goal is to extract as many details as possible about the person from the genetic sample to create a complete genetic profile.[339]

Private company DNA databases are likely among the most unregulated databases around and contain much more genetic information about the individual than is necessary or permitted for law enforcement purposes like identification.[340] Yet allowing law enforcement to tap into these databases essentially allows an end-run around regulations that pertain only to law enforcement-created samples and database inclusion. The genetic information from private databases is likely to contain much more comprehensive personal information than is necessary only to identify the individual.

Generally, only internal policies of private databases guide how and when they share information with law enforcement.[341] Regulations that restrict the flow of information between the private and law enforcement spheres would help safeguard against abuse and privacy violations. These regulations should prohibit law enforcement from buying, obtaining, or otherwise using private DNA information, whether through voluntary (e.g., direct solicitation) or involuntary (e.g., subpoena) means. This would prevent the criminal investigatory use of information obtained for non-criminal investigatory reasons.

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337. *See, e.g.*, 42 U.S.C. § 14132 (2012) (titling the section that authorizes the FBI to create and maintain CODIS "Index to facilitate law enforcement exchange of DNA identification information").

338. *See id.*

339. *See, e.g.*, *supra* note 154.

340. *See* Rosen, *supra* note 326, at 42.

341. *Cf.* Sarah B. Berson, *Debating DNA Collection*, NAT'L INST. JUST. J., November 2009, at 9 ("[F]ederal and state privacy laws and penalties that apply to crime labs are stringent—far more stringent than the rules governing private entities that collect blood and saliva for medical or insurance purposes.").

Similarly, law enforcement agencies should not be able to share information with private companies. At all levels, government DNA databases should be prohibited from selling, licensing, or otherwise making available for non-criminal investigatory purposes the genetic information under their control. Because the purposes for acquiring the genetic data should be consistent with their use, private companies should not be able to use compulsorily obtained DNA information used for criminal investigations.

Further, there must be reporting requirements on the collection practices of police to document the effect of different qualifying offense or convictions across various demographics of race, class, age, sex, and geography. The reporting requirements should include disclosure of any discrepancies in the collection of DNA samples and the management and security of the samples and data, such as whether information is stored in the cloud or on an internal server. Police department procedures that govern any DNA database should be deemed public documents that are subject to disclosure upon a public information act request. Additionally, an individual should have the right to inspect the information contained in the database and to challenge its accuracy. These procedural components are essential protections for individual rights.

CONCLUSION

There should be widespread public support for closely regulated DNA databases at the national and state levels. There should also be public acceptance of the premise that an individual who has been convicted or charged with a serious crime has a lesser interest in his DNA profile than the government. So long as law enforcement's focus is solving crimes with identifying genetic features that are not associated with any physical, medical, or behavioral trait, the public may be comfortable with this lesser expectation of privacy. Public support may shift, however, as awareness grows about underregulated state and local DNA databases expanding collection and retention practices to include crime victim DNA, voluntarily provided elimination samples, and surreptitiously collected DNA from persons of interest who may never be charged with a crime. However intermingled with good intentions, the expansion of underregulated local and state DNA databases represents:

> [An] alarming trend whereby the privacy and dignity of our citizens [are] being whittled away by . . . imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite

> unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will.[342]

These underregulated state and local DNA databases already intrude upon the privacy rights of crime victims, and the rest of us might not be far behind. As Judge Kozinski of the Ninth Circuit cautioned, "Privacy erodes first at the margins, but once eliminated, its protections are lost for good, and the resultant damage cannot be undone."[343]

In summary, regulation of both state and local DNA databases should exhibit certain minimum features in order to strike a healthy balance between effective law enforcement and the protection of individual privacy interests. Collection practices should include informed consent forms, limitations on future use, and the opportunity to expunge and/or automatic expungement. Regulatory policies should be consistently applied to both the state and local management and use of DNA databases. Automatic expungement policies should be coupled with statutory suppression and applied to different types of DNA samples as follows: elimination, victim, and suspect samples should not be retained or searched in LDIS and should be automatically expunged once the related criminal action has concluded; convicted offender samples and arrestee samples should be automatically expunged if a conviction does not result for the qualifying offense or a conviction is overturned, reversed, pardon, and there is no retrial; and convicted felon samples should be subject to automatic expungement at the conclusion of the sentence or probation. Finally, private entities should not be permitted to use DNA records stored in a law enforcement database for the purpose of predicting medical or behavioral traits or linking DNA records to other databases of information, whether government or private, such as financial records, voting records, motor vehicle records, and Choice Point style databases.

As DNA databases expand their coverage, so too will they continue to advance beyond subpar regulations that are poorly positioned to keep databases in check. In response, meaningful restrictions should balance the need to solve crimes with the otherwise overlooked privacy interests.

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342. Osborn v. United States, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting).

343. United States v. Kincade, 354 F.3d 813, 871 (9th Cir. 2004) (Kozinski, J., dissenting).

ANALYZING THE SOUTHERN DISTRICT OF NEW YORK'S AMENDED "RELATED CASES" RULE: THE PROCESS FOR CHALLENGING NONRANDOM CASE ASSIGNMENT REMAINS INADEQUATE

*KATHERINE MACFARLANE**

ABSTRACT

On October 31, 2013, the Second Circuit relied on a little-known rule pertaining to the Southern District of New York's (SDNY) assignment practices for related civil cases to remove Judge Shira A. Scheindlin, a seasoned and respected jurist, from two high-profile stop-and-frisk cases. This highly unusual and unexpected move was met with ardent public support—for Judge Scheindlin. But the catalyst for this series of unprecedented procedural twists and turns, the SDNY's old Division of Business Rule 13 (Old Rule 13), which governed the assignment of related civil cases, has been left unexamined. This Article refocuses the discussion on this overlooked rule.

First, this Article explains the consequences of Old Rule 13's division of business label. Unlike local rules of civil procedure, a division of business rule is not subject to review by the Second Circuit, nor is it open to public comment. Creation and enforcement of a district court's division of business rules are delegated to the court itself. Unsurprisingly, decisions made pursuant to such rules are largely unreviewable. Next, this Article explains that, precisely because it was a division of business rule, Old Rule 13 permitted case assignment decisions that might have raised red flags had they occurred pursuant to a local rule of civil procedure. This Article further argues that Old Rule 13 was only nominally a rule about relatedness; in actuality, it functioned as a mechanism by which judges could pull certain cases onto their dockets based on the cases' subject matter. Old Rule 13 is the reason so many high-pro-

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file stop-and-frisk cases were sent to Judge Scheindlin, as opposed to being divvied up at random amongst all the SDNY judges. This Article also tracks how the stop-and-frisk cases were assigned, their odd procedural histories on appeal, recent hints of settlements, and the police unions' attempts to intervene and halt any implementation of Judge Scheindlin's orders. On January 1, 2014, the SDNY adopted amendments to Old Rule 13, seemingly in reaction to the circumstances that caused Judge Scheindlin's removal. This Article ends with an analysis of the amendments, concluding that they do not do enough to explain why a judge decides to deem a case related to an earlier-filed matter, and that they do not create meaningful motion practice through which parties can challenge a relatedness decision.

The issues that presumably motivated the Second Circuit's actions have not been fixed. Rather than amend the rule even further, a far easier solution would be to eliminate Amended Rule 13 entirely. For now, the district's case assignment procedures remain shrouded in secrecy, and, most disturbingly, are still easy to manipulate. If a judge wants to overcome random case assignment and engage in subject matter specific case shopping, the SDNY's division of business rules will not stop the practice.

INTRODUCTION

On October 31, 2013, the Second Circuit relied on a little-known procedural rule to remove Southern District of New York (SDNY) Judge Shira A. Scheindlin from high-profile stop-and-frisk cases.[1] This unexpected move stirred up passionate defenses on Judge Scheindlin's behalf.[2] But the SDNY's old Division of Business Rule 13 (Old Rule 13),[3] the catalyst for Judge Scheindlin's removal,[4] has been left largely unexamined. This Article refocuses the academic discussion on the overlooked rule. It begins by explaining the consequences of Old Rule 13's "division of business" label. Unlike local rules of civil procedure, once adopted, the SDNY division of business rules are not reviewed by the Second Circuit and are not open to public comment;[5] creation and enforcement of a district court's division of business rules are delegated to the court itself.[6] Unsurprisingly, decisions made pursuant to such rules are largely unreviewable.[7] This is true even when division of business rules have the effect of diminishing the chances that a case will be assigned at random.[8] Precisely because it was a division of business

1. Ligon v. City of New York (*Ligon II*), 538 Fed. App'x 101, 102–03 (2d Cir. 2013), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

2. *See, e.g.*, Editorial Board, *Judge Scheindlin's Case*, N.Y. TIMES, Nov. 8, 2013, at A34, *available at* http://www.nytimes.com/2013/11/08/opinion/judge-scheindlins-case.html (arguing that the Second Circuit "erred badly" and "unjustly damaged Scheindlin's reputation" by removing her); Emily Bazelon, *Shut Up, Judge! A Misguided Appeals Court Tries to Silence—and Quash—Stop-and-Frisk Judge Shira Scheindlin*, SLATE (Nov. 1, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/?2013/11/nypd_and_judge_shira_scheindlin_2nd_circuit_appeals_court_judges_try_to.html (arguing that "the 2nd Circuit's move to remove [Judge Scheindlin] was . . . an overreach"); Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/10/?the-preposterous-removal-of-judge-scheindlin.html (arguing that Judge Scheindlin's removal was "preposterous," and that "[s]he should be honored for [her conduct in the case], not scolded").

3. S.D.N.Y. Div. Bus. r. 13 (amended Jan. 1, 2014) (on file with author). Because this rule was amended on January 1, 2014, after Judge Scheindlin's removal, this Article refers to the pre-January 1, 2014 version as "Old Rule 13" and the version currently in effect as "Amended Rule 13."

4. *See Ligon II*, 538 F. App'x at 102–03.

5. *See* 28 U.S.C. § 137 (2012) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.").

6. *Id.*

7. *See id.*

8. *See* discussion *infra* notes 23–31 and accompanying text.

rule, Old Rule 13 permitted case assignment decisions that might have raised red flags if undertaken pursuant to a local rule of civil procedure.[9] Old Rule 13, in fact, is the reason why so many stop-and-frisk cases were transferred to Judge Scheindlin, whether or not they were actually related to cases already on her docket.[10]

On January 1, 2014, the SDNY adopted amendments to Old Rule 13,[11] likely in reaction to Judge Scheindlin's removal. This Article analyzes the amendments, concluding that they do not do enough to establish a meaningful way for parties to challenge a relatedness determination or the transfer of their case to another judge. The district's case assignment procedures remain shrouded in secrecy, and, most disturbingly, are still easy to manipulate if a judge wants to circumvent the normal random case assignment process to engage in subject-matter-specific case shopping.

I.
THE SDNY'S RELATED CASES RULE (OLD RULE 13) GOVERNED RELATEDNESS IN NAME ONLY.

A. Old Rule 13 Was Not a Local Rule of Civil Procedure, But a Division of Business Rule Specific to the SDNY.

On October 31, 2013, the Second Circuit removed Judge Scheindlin from several cases challenging the New York Police Department's (NYPD) stop-and-frisk practices that she had presided over since their filing, asserting that Judge Scheindlin had improperly applied the "related cases rule."[12] The court referred to the rule as "S.D.N.Y. & E.D.N.Y. Local Rule 13(a)."[13] Yet the rule at issue applied solely to the SDNY; it was a "division of business" rule, not a local rule of civil procedure applicable to both the SDNY and the Eastern District of New York (EDNY).

The EDNY has its own "division of business" rules.[14] However, the SDNY and the EDNY share joint local civil rules.[15] The rule that caused Judge Scheindlin's removal was a division of business rule

9. *See infra* Part I.B.

10. *See infra* Part I.C.

11. *See* S.D.N.Y. Div. Bus. r. 13 (effective Jan. 1, 2014), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

12. Ligon v. City of New York (*Ligon II*), 538 Fed. App'x 101, 102–03 (2d Cir. 2013), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

13. *Id.* at 102.

14. *See generally* E.D.N.Y. Div. Bus. r. 50.1–50.7 (effective Sept. 3, 2013), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

15. *See generally* S.D.N.Y. & E.D.N.Y. Civ. r. 1.1–83.9 (effective Sept. 3, 2013), http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

and not a local civil rule, a distinction that matters. Division of business rules are adopted "for the internal management of the case load of the court" and to "govern the assignment and transfer of actions," as well as the court's operation.[16] By contrast, local civil rules "govern subjects including motions, orders and judgments, discovery, trial conduct, and costs and bonds."[17] In addition, pursuant to Federal Rule of Civil Procedure 83, local civil rules are adopted and amended "[a]fter giving public notice and an opportunity for comment."[18] Local civil rules also "must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075."[19] Otherwise, they may be abrogated by a circuit's judicial council.[20] "Copies of [local civil] rules and amendments must, on their adoption . . . be made available to the public."[21]

Division of business rules are not as closely scrutinized as local civil rules. In fact, a judicial council's power to abrogate a rule "does not extend to guidelines for the division of business."[22] In addition, there is no requirement that division of business rules be made subject to public notice and comment.[23] Nor must they be made available to the public at the time they are amended or adopted, as local civil rules are.[24] The circuit's judicial council steps

16. 1 MICHAEL SILBERBERG ET AL., CIVIL PRACTICE IN THE SOUTHERN DISTRICT OF NEW YORK § 1:3 (2013–2014 ed.).

17. *Id.*

18. FED. R. CIV. P. 83(a)(1).

19. *Id.* Section 2072 governs rules of procedure and evidence, whereas section 2075 governs bankruptcy rules. *See* 28 U.S.C. §§ 2072, 2075 (2012).

20. *See* 28 U.S.C. § 332(d)(4) (2012) (providing that "[e]ach judicial council shall periodically review [local rules prescribed by district courts] within its circuit" for consistency with, inter alia, the Federal Rules of Civil Procedure, and that "[e]ach council may modify or abrogate any such rule found inconsistent in the course of such a review"); *see also* FED. R. CIV. P. 83(a)(1). In addition, each judicial circuit meets at least twice a year, and consists of "the chief judge of the circuit . . . and an equal number of circuit judges and district judges of the circuit." 28 U.S.C. § 332(a)(1) (2012).

21. FED. R. CIV. P. 83(a)(1).

22. Jack B. Weinstein, Chief Judge, U.S. District Court, Eastern District of New York, Address to the Alexander Fellows of the Benjamin N. Cardozo School of Law: The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge, 120 F.R.D. 267, 270 (1988).

23. *See* 28 U.S.C. § 137 (2012) ("The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.").

24. *See id.*

in only if "the district judges in any district are unable to agree upon the adoption of rules or orders."[25] District judges adopt the division of business rules that govern how they assign their own cases and the chief judge of the district serves as the rules' enforcer.[26] As a result, a district court's division of business is self-created and self-regulated in a circular fashion that provides little opportunity for meaningful review.

The SDNY's rules regarding case assignment are division of business rules. SDNY Division of Business Rule 1 (Rule 1) describes the "individual assignment system," pursuant to which "[e]ach civil and criminal action and proceeding, except as otherwise provided, shall be assigned *by lot* to one judge."[27] The phrase "by lot" implies that case assignment is conducted randomly. Moreover, the rule expressly provides that case assignment is to be administered "in such a manner that all active judges, except the chief judge, shall be assigned an equal share of the categories of cases of the court over a period of time."[28] Despite this rule, and the much-heralded notion of random case assignment, parties have no right to random assignment of cases.[29]

The "related cases rule" referred to by the Second Circuit[30] was also a division of business rule, and hence, highly unregulated. Old

25. *Id.* At least one judicial council has stepped in to resolve division of business disputes among district judges. *See* Utah-Idaho Sugar Co. v. Ritter, 461 F.2d 1100 (10th Cir. 1972), In *Utah-Idaho Sugar Co.*, the Utah district court's "business of the court[ ]" had been supervised by the Tenth Circuit's judicial council for fifteen years because during that time, its judges could not agree on case assignment rules. *Id.* at 1101–02. The Tenth Circuit upheld the rules put in place by the circuit's judicial council that "require[ed] an equal and random division of civil cases," and as a result, the Chief Judge of the District of Utah was prevented from distributing cases, including the plaintiff's, as he saw fit. *Id.* at 1103–04.

26. *See* 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3505 (3d ed. 2013) ("[I]t is the function of the chief judge of the district to apportion the business of the court among the judges in the district, in accordance with such rules and orders as the court may promulgate.").

27. S.D.N.Y. Div. Bus. r. 1 (effective Jan. 1, 2014) (emphasis added), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

28. *Id.*

29. *See, e.g.*, Bd. of Sch. Dirs. of Milwaukee v. Wisconsin, 102 F.R.D. 596, 598 (E.D. Wis. 1984) ("The assignment of cases does not give or deny any litigant any due process rights."); United States v. Keane, 375 F. Supp. 1201, 1204 (D. Ill. 1974) (arguing that criminal defendants have no due process right to the manner in which their cases are assigned).

30. Ligon v. City of New York (*Ligon II*), 538 Fed. App'x 101, 102–03 (2d Cir. 2013), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

Rule 13 governed the transfer of related cases.[31] As explained below, transferring newly filed cases pursuant to Old Rule 13 caused a case to be assigned deliberately to a particular jurist, breaking Rule 1's promise of random assignment.

B. Old Rule 13 Gave Judges Limitless Power to Transfer Cases Under the Guise of "Relatedness."

The judges of the SDNY approved amendments to Old Rule 13 on December 18, 2013.[32] Old Rule 13 was characterized by certain hallmarks that facilitated the transfer of a newly filed case away from the judge to whom it was originally randomly assigned.[33] The case would then be forwarded onto the docket of a judge already presiding over a purportedly "related case."[34]

What qualified a case for transfer under Old Rule 13? Transfer of a newly filed case to a judge presiding over a purportedly related earlier-filed case was appropriate if the interests of "justice and efficiency" so required.[35] To determine relatedness, Old Rule 13 provided that a judge was required to consider whether: (1) substantial judicial resources would be saved; (2) "just, efficient and economical conduct of the litigations would be advanced"; (3) the "convenience of the parties or witness would be served"; or (4) there existed "a congruence of parties or witnesses or the likelihood of a consolidated or joint trial or joint pre-trial discovery."[36]

In practice, however, the relatedness factors were misleading. Though the rule appeared to require that a judge consider certain factors bearing on relatedness (stating that judges "will" consider the factors), the rule also stated that the factors were not intended "to limit the criteria considered in determining relatedness."[37] As a result, the criteria considered in determining relatedness were both undefined and theoretically limitless.

A party contending that its newly filed case was related to an earlier-filed case had to disclose its contention of relatedness at the time the case began.[38] For the purposes of most civil cases, this

31. *See* S.D.N.Y. Div. Bus. r. 13 (amended Jan. 1, 2014) (on file with author).

32. Order, *In Re* Rule 13 of the Rules for the Div. of Bus. Among Judges, No. 13-mc-432 (S.D.N.Y. Dec. 23, 2013), ECF No. 1.

33. *See* S.D.N.Y. Div. Bus. r. 13 (amended Jan. 1, 2014) (on file with author).

34. *See id.* r. 13(c)(ii) (directing that after a civil case was designated as related, it should be "forwarded to the judge before whom the earlier-filed case is then pending").

35. *Id.* r. 13(a).

36. *Id.*

37. *Id.* r. 13(a)(iii).

38. *Id.* r. 13(c)(i).

meant that the plaintiff had to file a contention of relatedness at the same time it filed its complaint with the the SDNY.[39]

Following such a designation, the case would automatically be "forwarded to the judge [presiding over] the earlier-filed case."[40] Despite the list of "relatedness" factors, the judge to whom the case was forwarded had "the sole discretion to accept or reject" the forwarded case.[41] This "sole discretion" aspect of the rule had the effect of eliminating any need to find actual relatedness between a newly received case and the one to which it was allegedly related. Most importantly, the accepting judge was not required to state his or her reasons for accepting a case as related.[42] Therefore, a case could be accepted under Old Rule 13 because it was actually related to a previously filed case, or alternatively for any reason whatsoever, proper or not.

If a party wanted to challenge a judge's decision to accept a case as related, the party's motion regarding the relatedness designation was heard by the same judge who deemed it related.[43] But the motion was not set for argument; rather, the judge who accepted the case also had "the sole discretion to accept or reject the motion."[44] Nor did the rule require that the party that previously designated the case as related oppose the motion challenging relatedness.[45]

As a result, the moving party challenging relatedness had no opportunity to be heard on its motion.[46] The judge to whom the case was forwarded could simply accept or reject the motion challenging relatedness, perhaps without even reading it.[47] This procedure varied significantly from the one applicable to motions to consolidate or motions for a joint trial, which Old Rule 13 stated were regulated by the Federal Rules of Civil Procedure.[48] Those motions, by contrast, were to be "noticed for hearing before the judge having the lowest docket number, with courtesy copies to be provided to the judge or judges having the cases with higher docket

39. S.D.N.Y. Div. Bus. r. 13(c)(i) (amended Jan. 1, 2014) (on file with author).

40. *Id.* r. 13(c)(ii).

41. *Id.*

42. *See id.*

43. *Id.* r. 13(c)(iv).

44. *Id.*

45. S.D.N.Y. Div. Bus. r. 13 (amended Jan. 1, 2014) (on file with author).

46. *See id.*

47. *See id.*

48. *Id.* r. 13(e); *see also* FED. R. CIV. P. 42.

numbers."[49] A party challenging relatedness, arguably a decision as important as the decision to challenge consolidation,[50] had less power than a party challenging consolidation.[51]

Just as it did not require a judge to state his or her reasons for accepting a case as related, Old Rule 13 did not require that a judge give reasons for rejecting a motion that challenged relatedness.[52] As a result, not only was a decision regarding relatedness effectively unreviewable, any reason justifying the decision to accept a case was never revealed.

Finally, nothing in Old Rule 13 was intended to limit intrajudicial transfer practices authorized by SDNY Division of Business Rule 14 (Rule 14). Old Rule 13 provided that "[n]othing contained in this rule limits the use of Rule 14 for reassignment of all or part of any case from the docket of one judge to that of another by agreement of the respective judges."[53] As Old Rule 13 suggested, Rule 14, which remains unchanged despite Old Rule 13's amendment, is a rule that allows two judges to agree to move a case from one judge's docket to the other's of their own accord.[54] Rule 14 states that "[a]ny judge, upon written advice to the assignment committee, may transfer directly any case or any part of any case on that judge's docket to any consenting judge".[55] Old Rule 13's failure to enforce any actual relatedness requirement, the lack of procedure through which to challenge, or even discern, the relatedness decision, and the effect of the nearly limitless transfer

49. S.D.N.Y. Div. Bus. r. 13(e) (amended Jan. 1, 2014) (on file with author).

50. A party challenging relatedness may be seeking to avoid the very practice described in this article: assignment to a judge with a clear desire to accumulate a certain category of cases on his docket in order to rule a certain way in each case so assigned. A party challenging consolidation may also be seeking to avoid assignment to a judge the party may view as an unfavorable audience for his case. Consolidation motions can be used for tactical purposes in order to have a particular portion of a case—for example, discovery—consolidated with the discovery of a separately filed case in order to slow down or speed up discovery in another case in which the attorneys have not acted diligently. Consolidation also allows a weak case to piggyback on a stronger one, for purposes of discovery or even trial.

51. *See* S.D.N.Y. Div. Bus. r. 13(e) (amended Jan. 1, 2014) (on file with author).

52. *Id.* r. 13(c)(ii).

53. *Id.* r. 13(f).

54. *Id.* r. 14.

55. *Id.* The only exceptions to Rule 14 transfers are those cases that implicate SDNY Division of Business Rule 16, a rule governing the transfer of cases in which a judge has been disqualified or "presided at a mistrial or former trial of the case." *See id.* r. 14, 16. As a result, there can be no Rule 14 transfer of a case to a judge who has been previously disqualified from the case in question or who presided over a mistrial or earlier trial of that case. *Id.* r. 16.

possibilities created by Rule 14 turned the related cases rule into one that had nothing to do with relatedness. Rather, it was a rule through which judges could pull certain cases onto their dockets without having to justify their reasons for doing so.

Old Rule 13 was an effective way for a judge to engage in subject-matter-specific case shopping.

C. The Effect of Old Rule 13 Was That High-Profile Stop-and-Frisk Cases Piled Up on Judge Scheindlin's Docket.

The most notorious example of how Old Rule 13 permitted the aggregation of a certain kind of case on one judge's docket despite an arguable lack of relatedness is a series of four high-profile stop-and-frisk cases, all assigned to Judge Shira A. Scheindlin. Media attention has focused on two of these cases,[56] *Daniels v. City of New York* (*Daniels II*)[57] and *Floyd v. City of New York* (*Floyd II*),[58] but two additional cases were assigned to Judge Scheindlin as a result of the original decision to deem *Floyd* related to *Daniels*: *Ligon v. City of New York* (*Ligon I*)[59] and *Davis v. City of New York*.[60] It remains unclear what links these four cases to each other, aside from the fact that they all involve high-profile challenges to NYPD policies.[61]

The cases' complicated procedural histories began in 1999, when Judge Scheindlin was randomly assigned *Daniels v. City of New*

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56. *See, e.g.*, Mark Hamblett, *Circuit Rebuffs Scheindlin on Stop/Frisk*, N.Y. L.J., Nov. 1, 2013, at 1 (discussing only *Daniels* and *Floyd*); *Judge Scheindlin's Case*, *supra* note 2 (same).

57. 138 F. Supp. 2d 562 (S.D.N.Y. 2001).

58. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

59. 925 F. Supp. 2d 478 (S.D.N.Y. 2013).

60. 959 F. Supp. 2d 324 (S.D.N.Y. 2010).

61. Not all stop-and-frisk policies are one and the same. For example, the *Davis* case challenged "vertical patrols" in public housing. *See* Complaint at 2, *Davis*, 959 F. Supp. 2d 324 (S.D.N.Y. 2013) (No. 10 Civ. 699), 2010 WL 9937605. "[V]ertical patrols are thorough sweeps of large apartment buildings by two or more police officers" that "provide an opportunity for the police to inspect public housing buildings for physical hazards" and "enable the police to sweep a building for potential lawbreakers." Adam Carlis, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2012 (2009). *Ligon*, by contrast, challenged the NYPD's trespass arrest policy, or "Operation Clean Halls," through which NYPD officers patrol *private* housing complexes across New York City. *Ligon I*, 925 F. Supp. 2d at 484–85; *see also* Complaint, *Ligon I*, 925 F. Supp. 478 (S.D.N.Y. 2012) (No. 12 Civ. 2274), 2012 WL 1031760. After receiving a landlord's permission to do so, Operation Clean Halls allowed the NYPD to enter private buildings enrolled in a program known as the Trespass Affidavit Program, through which "police officers . . . patrol[led] inside and around thousands of private residential apartment buildings throughout New York City." *Ligon I*, 925 F. Supp. 2d at 484–85.

York,[62] a case filed by the nonprofit Center for Constitutional Rights.[63] The suit, brought pursuant to 42 U.S.C. § 1983, alleged that the NYPD's stop-and-frisk practices violated the Fourth Amendment and sought to disband the NYPD's Street Crime Unit.[64] The *Daniels* plaintiffs negotiated a sweeping settlement, which required the NYPD to create a written policy regarding racial profiling and to train officers regarding the same.[65] The settlement also required police to complete a written form each time they conducted a stop-and-frisk (known as a UF-250 report), and to provide plaintiffs' counsel with quarterly data regarding these reports "from the last quarter of 2003 through the first quarter of 2007."[66]

The *Daniels* parties returned to Judge Scheindlin's courtroom in 2007.[67] The plaintiffs accused the NYPD of a "surge" in the kind of illegal stops at issue in their complaint.[68] Instead of reopening *Daniels*, Judge Scheindlin suggested another approach.[69] "If you got proof of inappropriate racial profiling in a good constitutional case, why don't you bring a lawsuit?," the judge asked.[70] "You can certainly mark it as related,"[71] she added. On January 31, 2008, the Center for Constitutional Rights and an attorney named Jonathan Moore, both of whom served as plaintiffs' counsel in *Daniels*, brought *Floyd v. City of New York*.[72] Like *Daniels*, *Floyd* was brought pursuant to § 1983 and alleged that the NYPD engaged in stop-and-frisk practices that violated the Fourth Amendment.[73] On the date *Floyd* was filed, a docket entry noted that *Floyd* had been referred to

62. Notice of Reassignment to Judge Shira A. Scheindlin, Daniels v. City of New York, No. 99 Civ. 1695 (S.D.N.Y. Mar. 23, 1999), ECF No. 5.

63. Complaint, Daniels v. City of New York (*Daniels II*), 138 F. Supp. 2d 562 (S.D.N.Y. 2001) (No. 99 Civ. 1695); *see also* Joseph Goldstein, *A Court Rule Directs Cases over Friskings to One Judge*, N.Y. TIMES, May 6, 2013, at A16; *Daniels, et al. v. the City of New York*, CENTER FOR CONST. RTS., http://ccrjustice.org/ourcases/past-cases/daniels,-et-al.-v.-city-new-york (last visited Nov. 11, 2014).

64. Complaint, *Daniels II*, 138 F. Supp. 2d 562 (No. 99 Civ. 1695); *see also* Goldstein, *supra* note 63.

65. Stipulation of Settlement, *Daniels II*, 138 F. Supp. 2d 562 (No. 99 Civ. 1695), *available at* http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf.

66. *Id.*

67. *See* Memorandum Opinion and Order, *Daniels*, No. 99 Civ. 1695 (S.D.N.Y. July 16, 2007), 2007 WL 2077150.

68. Goldstein, *supra* note 63.

69. *Id.*

70. *Id.*

71. *Id.*

72. Complaint, Floyd v. City of New York (*Floyd II*), 959 F. Supp. 2d 540 (S.D.N.Y. 2008) (No. 08 Civ. 1034), ECF No. 1.

73. *Id.* at 1–2.

Judge Scheindlin as "possibly related" to *Daniels*.[74] On February 15, 2008, a "Notice of Assignment" officially sent *Floyd* to Judge Scheindlin.[75]

The "Notice of Assignment" does not explain the reasons for deeming the cases related.[76] And none of the relatedness factors set out by Old Rule 13 seem to have applied. The first relatedness factor, "a substantial saving of judicial resources,"[77] did not apply. *Daniels* was a closed case; deeming *Floyd* related to *Daniels* would not have resulted in any judicial resource saving related to discovery, for example, or any other benefit derived from linking two active cases with overlapping questions of law or fact. Because *Daniels* was closed, there was nothing to combine with *Floyd*. The second factor, that "the just, efficient and economical conduct of the litigations would be advanced,"[78] would also have been inapplicable when the previously filed case was already closed. Between *Daniels* and *Floyd*, there was only one "litigation"—the just-filed and therefore active case, *Floyd*.

Similarly, the third factor, serving "the convenience of the parties of the witnesses,"[79] would not have supported a determination of relatedness between *Floyd* and *Daniels*. The plaintiffs in *Floyd* were not the same people as the plaintiffs in *Daniels*, and aside from the City, an institutional party sued almost daily, the defendants were likewise new. Also, the class certified in *Daniels* included "all persons subjected to suspicionless stops by the [Street Crimes Unit]."[80] By the time *Floyd* was filed, the Street Crimes Unit had been disbanded for several years.[81] Finally, the fourth factor, the likelihood of "a consolidated or joint trial or joint pre-trial discovery,"[82] could not have been applied to deem two cases, one of

74. Case Referred to Judge Shira A. Scheindlin as Possibly Related to 1:99-CV-1695, Floyd v. City of New York, No. 08 Civ. 1034 (S.D.N.Y. Jan. 31, 2008).

75. Notice of Assignment to Judge Shira A. Scheindlin, Floyd v. City of New York, No. 08 Civ. 1034 (S.D.N.Y. Feb. 15, 2008), ECF No. 4.

76. *See id.*

77. S.D.N.Y. Div. Bus. r. 13(a)(i) (amended Jan. 1, 2014) (on file with author).

78. *Id.* r. (a)(ii).

79. *Id.* r. 13(a)(iii).

80. Daniels v. City of New York (*Daniels I*), 198 F.R.D. 409, 416 n.6 (S.D.N.Y. 2001). The Street Crimes Unit was "an elite squad of police officers whose mission is to interdict violent crime in New York City and, in particular, remove illegal firearms from the streets." *Id.* at 411 n.1.

81. Floyd v. City of New York (*Floyd I*), No. 08 Civ. 1034, 2008 WL 4179210, at *4 (S.D.N.Y. Sept. 10, 2008).

82. S.D.N.Y. Div. Bus. r. 13(a)(iii) (amended Jan. 1, 2014) (on file with author).

which was no longer pending, related. As a result, nothing in the record or Old Rule 13 explains what rendered these two cases related.

On January 28, 2010, *Davis v. City of New York*, a case challenging the NYPD's "vertical patrols" in New York public housing on the grounds that certain detentions made during those patrols lacked reasonable suspicion, was also referred to Judge Scheindlin on the date it was filed.[83] It was accepted as related to *Floyd* several days later.[84]

Why *Floyd* and *Davis* were accepted as related is also unclear, especially given the difference in the stop-and-frisk policies at issue (street-level policing versus public housing and residential policing). The court itself noted that "[w]hat distinguishes [*Davis*] from the other two [cases, *Daniels* and *Floyd*,] is its focus on stop and frisk practices at public housing properties owned and operated by the New York City Housing Authority . . . ."[85] This key difference would, at *Davis*'s outset, seem to have suggested very different forms of discovery in the two cases, namely, a need for both different witnesses and different experts. It is unclear what substantial saving of judicial resources (the first relatedness factor) would have resulted from deeming the two cases related. Similarly, it is unclear how the second relatedness factor, "the just, efficient and economical conduct of the litigations"[86] would have been advanced based on the different policies at issue in *Floyd* and *Davis*. Again, aside from the City, the parties in the two "related" cases differed, rendering the third relatedness factor, "the convenience of the parties or witnesses,"[87] also irrelevant. Finally, as to the likelihood "of a consolidated or joint trial or joint pre-trial discovery,"[88] the fourth relatedness factor, the difference in the policies at issue must have made joint pretrial discovery seem unlikely. It is similarly unclear how a joint trial related to different NYPD policies, and stops and searches that occurred in very different contexts, would have been arranged. Indeed, the plaintiffs in *Davis* objected to participating in a joint

83. Complaint, *Davis*, *supra* note 61; Case Referred to Judge Shira A. Scheindlin as Possibly Related to 1:08-CV-1034, Davis v. City of New York, No. 10 Civ. 699 (S.D.N.Y. Jan. 28, 2010).

84. Case Accepted as Related, Davis v. City of New York, No. 10 Civ. 699 (S.D.N.Y. Feb. 8, 2010).

85. Davis v. City of New York, 959 F. Supp. 2d 324, 332 (S.D.N.Y. 2013).

86. S.D.N.Y. Div. Bus. r. 13(a)(ii) (amended Jan. 1, 2014) (on file with author).

87. *Id.* r. 13(a)(iii).

88. *Id.*

remedies hearing with the *Floyd* parties.[89] It is difficult to divine why *Davis* and *Floyd* were deemed related.

In 2012, yet another landmark class action stop-and-frisk case came before Judge Scheindlin. *Ligon v. City of New York* (*Ligon I*) challenged the NYPD's trespass arrest policy, or Operation Clean Halls, through which NYPD officers patrol private housing across New York City.[90] On March 28, 2012, the case was referred to Judge Scheindlin as potentially related to *Davis*, and soon after it was accepted as a related case.[91] Again, why this case was deemed related to *Davis* is not in the record. The parties differed, as did the claims: public housing in *Davis* versus private housing in *Ligon*.[92]

This policy difference between *Ligon* and *Davis* suggests that at *Ligon*'s outset, *Ligon* and *Davis* would have involved very different forms of discovery. There is no indication as to why deeming these cases related would have resulted in a substantial saving of judicial resources (the first relatedness factor). Likewise, though cases are deemed related based on the potential for "the just, efficient and economical conduct of the litigations,"[93] because the two cases involved different policies, this factor too would not have been satisfied. Again, aside from the City, the parties in the two "related" cases differed, rendering the third relatedness factor, "the convenience of the parties or witnesses,"[94] also irrelevant.

Finally, as to the likelihood "of a consolidated or joint trial or joint pre-trial discovery,"[95] the fourth relatedness factor, the advanced stage of the *Davis* litigation, as compared to the newly filed *Ligon* matter, must have made joint trial or pre-trial discovery seem unlikely. A January 9, 2012 order in *Davis* set March 5, 2012, as the

89. Order at 2, Davis v. City of New York, No. 10 Civ. 699 (S.D.N.Y. Feb. 11, 2013), ECF No. 265.

90. 925 F. Supp. 2d 478 (S.D.N.Y. 2013); *see also* Complaint, *Ligon I*, *supra* note 61. Many of the buildings subject to Operation Clean Halls, though private residences, were large apartment complexes where residents faced quality-of-life challenges, such as rampant crime, similar to those confronted by residents of New York City public housing. The operation allowed "police officers to patrol inside and around thousands of private residential apartment buildings throughout New York City." *Ligon I*, 925 F. Supp. 2d at 484–85.

91. Case Referred to Judge Shira A. Scheindlin as Possibly Related to 10-CV-699, Ligon v. City of New York, No. 12 Civ. 2274 (S.D.N.Y. Mar. 28, 2012); Case Accepted as Related, Ligon v. City of New York, No. 12 Civ. 2274 (S.D.N.Y. Apr. 3, 2012).

92. *See supra* note 61.

93. S.D.N.Y. Div. Bus. r. 13(a)(ii) (amended Jan. 1, 2014) (on file with author).

94. *Id.* r. 13(a)(iii).

95. *Id.*

date fact discovery would close;[96] that is, discovery in *Davis* was set to close before *Ligon* was even filed.[97] The *Davis* defendants moved for summary judgment on June 16, 2012.[98] By that date, there was no discovery left to complete in *Davis*, and, for purposes of relatedness, no discovery to join with *Ligon*. Indeed, the first scheduling order entered in *Ligon*, on April 23, 2012, pertained only to limited discovery related to the *Ligon* preliminary injunction hearing.[99] It is similarly unclear how a joint trial could have been contemplated in *Ligon* and *Davis*; the plaintiffs in *Davis* objected to participating in a joint remedies hearing with the *Ligon* parties.[100]

The only thread connecting these four cases was that they were each high-profile Fourth Amendment-related § 1983 class actions. *Daniels*, the first case, challenged the specific practices of the NYPD's Street Crimes Unit and was settled before a decision on the merits was reached.[101] By the time *Floyd* was filed, the Street Crimes Unit had been disbanded.[102] *Davis* pertained to stops-and-frisks happening in New York City public housing, which is a very different setting than those at issue in *Daniels* and *Floyd*.[103] *Ligon* challenged trespass arrests, and related stops-and-frisks, occurring in private residences.[104] The link between these four cases became increasingly attenuated as one after the other was assigned to Judge Scheindlin. The only discernible similarities are that in each case the plaintiffs suing the NYPD received favorable rulings, and two of the cases (*Floyd* and *Daniels*) involved the same plaintiffs' counsel.

D. Old Rule 13 Led, in Part, to Judge Scheindlin's Removal from Two Stop-and-Frisk Cases and a Procedural Nightmare Ensued.

On October 31, 2013, the Second Circuit removed Judge Shira A. Scheindlin from the *Floyd* and *Ligon* matters.[105] In a three-page order, it concluded that she "ran afoul of the Code of Conduct for

96. Order at 2, Davis v. City of New York, No. 10 Civ. 699 (S.D.N.Y. Jan. 9, 2012), ECF No. 139.

97. *Ligon* was filed on March 28, 2012. *See* Complaint, *Ligon I*, *supra* note 61.

98. Motion for Summary Judgment, Davis v. City of New York, 959 F. Supp. 2d 324 (S.D.N.Y. 2013) (No. 10 Civ. 699), ECF No. 173.

99. Scheduling Order, Ligon v. City of New York, No. 12 Civ. 2274 (S.D.N.Y. Apr. 23, 2012), ECF No. 14.

100. Order, *supra* note 89.

101. *See supra* notes 62–66 and accompanying text.

102. *See supra* note 81 and accompanying text.

103. *See supra* note 85 and accompanying text.

104. *See supra* note 90 and accompanying text.

105. Corrected Order, Floyd v. City of New York, No. 13-3524 (2d Cir. Oct. 31, 2013), ECF No. 96.

United States Judges" due to "the appearance of impartiality surrounding [the *Floyd* and *Ligon*] litigation [which] was compromised by the District Judge's improper application of the Court's 'related cases rule.'"[106] In support of this conclusion, the court referred to the hearing at which Judge Scheindlin had instructed the *Daniels* plaintiffs' attorneys on how to file a related case.[107] The court also concluded that Judge Scheindlin improperly applied the related cases rule by engaging in "a series of media interviews and public statements purporting to respond publicly to criticism of the District Court."[108] The reaction to Judge Scheindlin's removal was decidedly negative, and pundits and professors alike rallied behind her, supporting her right to speak publicly about the judicial process.[109]

Judge Scheindlin, represented by New York University law professor Burt Neuborne, sought leave in front of the Second Circuit to file a motion regarding her disqualification.[110] The City then sought modification of the Second Circuit's order staying Judge Scheindlin's *Floyd* and *Ligon* opinions (which had been stayed in the same order that removed the judge), asking that the court instead vacate her orders in service of the "appearance[ ] of fair and impartial administration of justice."[111] The Second Circuit denied

106. *Id.* at 2.

107. *Id.* at 2 n.1.

108. *Id.* at 2–3.

109. *See, e.g.*, Editorial Board, *Judge Scheindlin's Case*, N.Y. TIMES, Nov. 8, 2013, at A34, *available at* http://www.nytimes.com/2013/11/08/opinion/judge-scheindlins-case.html (arguing that the Second Circuit "erred badly" and "unjustly damaged Scheindlin's reputation" by removing her); Emily Bazelon, *Shut Up, Judge! A Misguided Appeals Court Tries to Silence—and Quash—Stop-and-Frisk Judge Shira Scheindlin*, SLATE (Nov. 1, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/?2013/11/nypd_and_judge_shira_scheindlin_2nd_circuit_appeals_court_judges_try_to.html (arguing that "the 2nd Circuit's move to remove [Judge Scheindlin] was . . . an overreach"); Jeffrey Toobin, *The Preposterous Removal of Judge Scheindlin*, NEW YORKER (Oct. 31, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/10/?the-preposterous-removal-of-judge-scheindlin.html (arguing that Judge Scheindlin's removal was "preposterous," and that "[s]he should be honored for [her conduct in the case], not scolded").

110. Movant Shira Scheindlin's Notice of Appearance at 1–2, Floyd v. City of New York, No. 13-3524 (2d Cir. Nov. 6, 2013), ECF No. 260; Movant Shira Scheindlin's Notice of Appearance at 1–2, Ligon v. City of New York, No. 13-3123 (2d Cir. Nov. 6, 2013), ECF No. 177.

111. Appellant's Motion for an Order Modifying the Stay Order Dated October 31, 2013 at 2, Ligon v. City of New York (*Ligon V*), 736 F.3d 231 (2d Cir. 2013) (per curiam) (No. 13-3088), ECF No. 265.

both requests.[112] First, it found that it knew of "no precedent suggesting that a district judge has standing before an appellate court to protest reassignment of a case."[113] Second, it denied the City's motion to vacate, albeit without prejudice.[114] In a separate order filed on the same date, November 13, 2013, the Second Circuit attempted to soften the blow of Judge Scheindlin's removal.[115] It noted that it had made no findings "of misconduct, actual bias, or actual partiality on the part of Judge Scheindlin," but that a review of the record caused the court to find:

> [H]er conduct while on the bench, which appears to have resulted in these lawsuits being filed and directed to her, in conjunction with her statements to the media and the resulting stories published while a decision on the merits was pending and while public interest in the outcome of the litigation was high, might cause a reasonable observer to question her impartiality. For this reason, her disqualification is required . . . .[116]

The court also addressed its position as to Old Rule 13, noting:

> [T]he gravamen of why reassignment of this case is necessary is not simply the use of Local Rule 13. It is the appearance of partiality that was created by Judge Scheindlin's conduct during the December 21, 2007 [*Daniels*] hearing in suggesting that the plaintiffs bring a lawsuit, outlining the basis for the suit, intimating her view of its merit, stating how she would rule on the plaintiffs' document request in that suit, *and* telling the plaintiffs that she would take it as a related case, as well as the media interviews she gave during the *Floyd* proceedings.[117]

In the meantime, on November 5, 2013, Bill De Blasio won the New York City mayoral race.[118] While campaigning, De Blasio promised to withdraw the City's appeals of the *Floyd* and *Ligon* matters.[119] This caused speculation that De Blasio's win would essen-

112. *Ligon V*, 736 F.3d 231; Ligon v. City of New York (*Ligon IV*), 736 F.3d 166 (2d Cir. 2013) (per curiam).

113. *Ligon IV*, 736 F.3d at 170.

114. *Ligon V*, 736 F.3d at 232.

115. Ligon v. City of New York (*Ligon III*), 736 F.3d 118 (2d Cir. 2013) (per curiam), *vacated in part by* 743 F.3d 362 (2d Cir. 2014).

116. *Id.* at 124.

117. *Id.* at 126 n.17 (emphasis in original).

118. Michael Barbaro & David W. Chen, *De Blasio Wins Mayor's Race in Landslide; Christie Coasts to 2nd Term as Governor*, N.Y. TIMES, Nov. 6, 2013, at A1.

119. Benjamin Weiser, *Judges Decline to Reverse Stop-and-Frisk Ruling, All But Ending Mayor's Fight*, N.Y. TIMES, Nov. 22, 2013, at A21.

tially end the *Floyd* and *Ligon* appeals, and that Judge Scheindlin's orders would stand.[120]

On January 30, 2014, the City asked the Second Circuit for a "limited remand of [*Ligon* and *Floyd*] to the District Court for the purpose of exploring a full resolution of the cases."[121] De Blasio also held a press conference signaling that the cases would settle and that the City would agree to have the NYPD monitored for three years.[122] Yet, on the same day the City's motion to remand was filed, the Second Circuit ordered the "Police Intervenors," a group of police unions still attempting to intervene in the *Ligon* and *Floyd* appeals, to respond to the City's motion, and ordered that the response be filed by February 7, 2014.[123] The Police Intervenors' response opposed the City's motion to remand, arguing that the City should not be able to prevent review of the District Court's "flawed and harmful rulings."[124]

On February 14, 2014, in a brief supporting the City's motion to remand, the plaintiffs claimed that "the parties have not reached a 'settlement agreement,'" only an agreement "to proceed towards resolving this litigation by negotiating the terms of the independent monitor."[125] On February 21, 2014, the Second Circuit granted the motion to remand and stayed the *Floyd* and *Ligon* appeals "for the purpose of supervising settlement discussions among such concerned or interested parties as the District Court deems appropriate."[126] Finally, on October 31, 2014, the Second Circuit denied the Police Intervenors' motions as untimely and failing to establish the legally protectable interests required to allow intervention, foreclos-

120. *Id.*

121. Declaration in Support of Appellants' Motion for a Limited Remand to the District Court at 2, Ligon v. City of New York (*Ligon VI*), 743 F.3d 362 (2d Cir. 2014) (No. 13-3088), ECF No. 459.

122. *See* Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. Times, Jan. 31, 2014, at A1.

123. Order at 1, Floyd v. City of New York (*Floyd III*), No. 13-3088, 2014 WL 5486552 (2d Cir. Oct. 31, 2014) (per curiam) (No. 13-3088), ECF No. 460. The Police Intervenors argued that if the City were to withdraw its appeals, they should be permitted to "vindicat[e] their own rights" and ensure that "the district court's flawed injunction . . . will not saddle the NYPD and its members for years to come." Movant Captains' Endowment Association et al.'s Motion to Intervene at 3, *Floyd III*, 2014 WL 5486552 (No. 13-3088), ECF No. 252.

124. Movant Captains' Endowment Association et al.'s Motion in Opposition to Appellants' Motion for a Limited Remand to the District Court at 3–8, *Floyd III*, 2014 WL 5486552 (No. 13-3088), ECF No. 465.

125. Appellees' Reply to Appellants' Motion for a Limited Remand to the District Court at 4, *Ligon VI*, 743 F.3d 362 (No. 13-3088), ECF No. 469.

126. *Ligon VI*, 743 F.3d at 365.

ing the possibility that they might raise successful challenges to Judge Scheindlin's orders.[127]

II.
THE SDNY HAS AMENDED OLD RULE 13, BUT LEFT MUCH UNCHANGED.

A. Chief Judge Preska Announced Changes to Old Rule 13.

This story took another unusual turn when, in a December 23, 2013 interview with the New York Times, Southern District Chief Judge Loretta Preska announced that the SDNY had amended its related cases rule.[128] According to the New York Times, "[t]he district court began its review after [the Times] reported in May about the use of a court rule to send the [*Floyd*] case to Judge Scheindlin."[129]

Judge Preska explained the highlights of the rule's amendments: "[A] judge being asked to accept a 'related' case will still make that decision alone, [however] the court's three-judge assignment committee, including the chief judge, will review every case where a claim of relatedness has been made."[130] In addition, if the committee disagrees with the judge's relatedness determination, "the matter will be assigned randomly to a new judge."[131] Moreover, "the statements seeking to designate a case as related and any objections would be docketed publicly."[132]

B. The Changes to Old Rule 13 Are Superficial.

What other changes does the rule's revision implement? Gone is the provision that the relatedness decision is left to the "sole dis-

127. *Floyd III*, 2014 WL 5486552. *Cf.* Michael C. Dorf, *What Are the Remaining Stakes in the NYC Stop-and-Frisk Litigation?*, DORF L. (Nov. 11, 2013), http://www.dorfonlaw.org/2013/11/what-are-remaining-stakes-in-nyc-stop.html. Before the Second Circuit's most recent opinion, the author had previously argued that the stop-and-frisk appeals were "still alive" because the district court lacked jurisdiction to hear them in the first place, and that withdrawing an appeal would have amounted to consenting to jurisdiction, which no party can do. *See* Katherine Macfarlane, *The Stop-and-Frisk Appeals Are Still Alive*, BROOK. L. SCH. PRACTICUM (Dec. 26, 2013), http://practicum.brooklaw.edu/articles/new-york-city's-stop-and-frisk-appeals-are-still-alive.

128. Benjamin Weiser & Joseph Goldstein, *Federal Court Alters Rules on Judge Assignments*, N.Y. TIMES, Dec. 24, 2013, at A19.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

cretion" of the judge to whom the earlier-filed case was assigned,[133] a provision which had the effect of rendering consideration of any of the listed relatedness factors meaningless. Importantly, and perhaps in reaction to what happened in the stop-and-frisk cases, Amended Rule 13 says that "[c]ivil cases shall not be deemed related merely because they involve common legal issues or the same parties."[134] As a result, the provision that the judge "will" consider certain factors to determine relatedness has some force. Also, in most instances, "civil cases presumptively shall not be deemed related unless both cases are pending before the Court (or the earlier case is on appeal)."[135] This portion of Amended Rule 13 appears to be a reaction to the determination that *Floyd* was related to *Daniels* even after *Daniels* had concluded.

What doesn't Amended Rule 13 do? Any judge who accepts a case as related still need not state his or her reasons for doing so.[136] Rather, the only record of why a case is related is the form on which the party that designated the case as related stated *its* reasons for doing so.[137] As a result, the assignment committee will review a judge's decision to deem a case related without the benefit of any hearing or adversarial proceeding that might explain why the judge ruled in a particular manner.

Also, Amended Rule 13 allows a party to "contest a claim of relatedness by any other in writing addressed to the judge having the case with the lowest docket number," meaning the earlier-filed case.[138] However, though this "submission" must be forwarded to the assignment committee, there is still no procedure in place to allow motion practice challenging the relatedness determination, either in front of the judge who made the decision or the assignment committee.[139] There is no opportunity for a relatedness hearing, nor is a party who wants a case to be deemed related required to respond to a submission opposing relatedness.[140]

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133. S.D.N.Y. Div. Bus. r. 13(c)(ii) (amended Jan. 1, 2014) (on file with author).

134. S.D.N.Y. Div. Bus. r. 13(a)(2)(A) (effective Jan. 1, 2014), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

135. *Id.* r. 13(a)(2)(B).

136. *See generally id.*

137. *See id.*

138. *Id.* r. 13(b)(1).

139. *Id.*

140. *See generally* S.D.N.Y. Div. Bus. r. 13(a)(2)(A) (effective Jan. 1, 2014), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

Moreover, despite the revisions to Old Rule 13, there are still myriad ways in which cases could be pulled to one judge's docket "merely because they involve common legal issues or the same parties" or happen to pertain to a judge's preferred subject matter.[141] Visiting judges and senior district judges decide what sort of cases they want to hear.[142] Judges can transfer cases amongst each other for almost any reason pursuant to Rule 14.[143] Until these rules are also amended in a meaningful manner, judges may still use them to accumulate a certain type of case on their dockets.

CONCLUSION

Despite recent amendments to Old Rule 13, random case assignment in the SDNY is still easily overcome. Amended Rule 13 may still be used as a vehicle through which to accumulate cases based on their subject matter. Nor do the amendments create any process that would bring a relatedness decision to light—there is still no requirement that a judge state his or her reasons for deeming a case related. The amendments also do not allow for actual motion practice challenging relatedness. A relatedness motion is not set for argument, nor is a response required.

There is at least one way to implement meaningful change to Amended Rule 13: open it up to public comment. The court should include a provision in Amended Rule 13 that mimics the motion practice available to parties challenging case consolidation. Moreover, the public deserves to know additional details regarding case assignment. For example, who sits on the assignment committee? Are judges initially assigned to a case that is later subject to a relatedness transfer allowed to vote on the transfer's appropriateness?

One more fundamental question lingers: do we need Amended Rule 13? Given the ability to combine all aspects of a case pursuant to Federal Rule of Civil Procedure 42's consolidation procedures, which afford motion practice and an opportunity for each

141. *See id.*

142. *Id.* r. 12 (effective Sept. 3, 2013) ("When a visiting judge is assigned to this district, that judge shall advise the assignment committee of the number and categories of pending cases which that judge is required or willing to accept."); *id.* r. 11 ("If a senior judge is willing and able to undertake assignment of pending cases from other judges, that judge may (1) accept assignment of all or any part of any case from any judge on mutual consent, or (2) advise the assignment committee of the number, status and categories of pending cases which that judge is willing to undertake.").

143. *Id.* r. 14.

party to be heard,[144] perhaps the best course is to eliminate Amended Rule 13 entirely. Overwhelming cases can still be transferred away from visiting and senior judges. Rule 14 provides ample opportunity to transfer cases from one judge to another. But given the seemingly insurmountable opportunity for Amended Rule 13 to be used as a vehicle through which to gather cases based on their subject matter, in a way that can never be meaningfully challenged, perhaps the best course is to do away with such a rule. This would send even more cases through the random assignment process.

Finally, any change that is meant to increase transparency with respect to case assignment should itself be transparent.[145] But the changes to Old Rule 13 were announced via an interview with the *New York Times* published online late on the Monday before Christmas. The amendments were not published on the SDNY's website until January 2014.[146] Though available in online databases as of April 2014, at the time this Article was originally drafted in February 2014, Amended Rule 13 could not be located on WestLaw. There was no notice to the bar regarding the changed procedures. If transparency is truly the goal, reaching out to members of the bar, who must adhere to case assignment procedures, would signal a good faith change to the manner in which this issue has been handled to date.

144. *See* FED. R. CIV. P. 42.

145. *See* Weiser & Goldstein, *supra* note 128 (highlighting Judge Preska's explanation that amendments to Old Rule 13 were intended to "increase transparency").

146. *See* S.D.N.Y. Div. Bus. r. 13 (effective Jan. 1, 2014), *available at* http://www.nyed.uscourts.gov/sites/default/files/local_rules/localrules.pdf.

PROBING THE PROCESS: SHOULD AGENCY INVESTIGATIONS PRECLUDE PLAINTIFFS FROM ACCESS TO A JUDICIAL REMEDY?

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INTRODUCTION

Kevin Murray was a quality assurance auditor with Alaska Airlines (Alaska).[1] During the course of his employment he brought safety concerns to the Federal Aviation Administration (FAA).[2] Subsequently, Murray's position with Alaska was outsourced and he was not rehired.[3] Murray voluntarily filed an administrative complaint pursuant to the Whistleblower Protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[4] The Secretary of Labor conducted an ex parte investigation, considering Murray's written complaint, as well as Alaska's written response and Alaska's witness testimony.[5] Murray was never contacted by the Secretary's investigator, was never given the chance to see the documents provided by Alaska, was never permitted to submit additional information, and was never given the opportunity to respond to Alaska's arguments.[6] After the conclusion of the investigation, Murray was notified that his complaint had been dismissed, and that he had thirty days to seek an appeal.[7] Instead, Murray filed a new action in California state court, and his complaint was subsequently dismissed by the California Supreme Court under the doctrine of issue preclusion.[8]

Murray's decision to seek an administrative remedy ultimately kept him out of court, despite the fact that he never had the opportunity to come face to face with his former employer, or even to respond to the arguments and evidence Alaska submitted in its de-

1. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 567 (Cal. 2010).
2. *Id.*
3. *Id.*
4. *Id.*; 49 U.S.C. § 42121 (2006).
5. *Murray*, 237 P.3d at 567.
6. *Id.*
7. *Id.* at 567–68.
8. *Id.* at 568.

fense.[9] The decision by the California Supreme Court seems undeniably harsh in a legal environment that values the adversarial system[10] and the notion that every person deserves his day in court.[11]

Murray is one of three individuals discussed in this Note who was denied access to the judicial system due to an investigative finding by an administrative agency. The validity of those denials is questionable in light of the Supreme Court's decision in *United States v. Utah Construction & Mining Co.*[12] *Utah Construction* is the seminal case legitimizing the application of administrative preclusion.[13] In *Utah Construction*, the Court noted three requirements essential to the validity of administrative preclusion:

(1) the administrative agency must be acting in a judicial capacity;
(2) the agency must resolve issues properly before it; and
(3) the parties must have had an adequate opportunity to litigate.[14]

The dissent in *Murray* expressly noted that the proceedings Murray was afforded were not nearly sufficient to support a finding of preclusion and pointed to missing elements that would have created an adequate opportunity to litigate: "[N]o California case has allowed what the majority countenances here—issue preclusion for

9. *Id.* at 567.

10. *See, e.g.*, Jerold H. Israel, *Cornerstones of the Judicial Process*, 2 KAN. J.L. & PUB. POL'Y 5, 12–15 (Spring 1993) (describing various justifications for the adversarial system); John Thibaut, Laurens Walker, Stephen LaTour & Pauline Houlden, *Procedural Justice as Fairness*, 26 STAN L. REV. 1271, 1287–88 (1974) (finding subjects in an experiment viewed adversarial procedures as "the most preferable and the fairest mode of dispute resolution.").

11. *See, e.g.*, Martin v. Wilks, 490 U.S. 755, 762 (1989) (noting "our deep-rooted historic tradition that everyone should have his own day in court") (internal quotation marks omitted); Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-In-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1877 (2009) (offering a theoretical explanation for the day-in-court ideal).

12. 384 U.S. 394 (1966).

13. The Court in *Utah Construction* specifically referred to the application of res judicata to administrative decisions, using the term "administrative preclusion" to indicate both res judicata and collateral estoppel (claim and issue preclusion, respectively). *Id.* at 422. For the sake of simplicity, this Note will refer to both claim and issue preclusion as they apply to administrative decisions as "administrative preclusion." Any distinctions as to which doctrine is the subject of the opinions analyzed will be noted in the summaries of the cases. Where the doctrines are specifically indicated, they will be referred to as "claim preclusion" and "issue preclusion," rather than the more traditional "res judicata" and "collateral estoppel."

14. *Utah Constr.*, 384 U.S. at 422.

findings rendered without any prior opportunity for a hearing, the submission of evidence, the confrontation of witnesses, or the presentation of argument."[15]

The aim of this Note is to determine exactly how courts[16] analyze and determine issues of administrative preclusion. Specifically, this Note examines the narrow question of how courts scrutinize administrative preclusion when faced with only an ex parte investigative finding.[17] This particular question was selected because, in theory, the inherently nonjudicial character of an agency investigation offers the best assessment of how faithfully courts adhere to the *Utah Construction* framework.[18] From the small number of cases analyzed (seven) it appears that courts are split on the interpretation of the *Utah Construction* framework. One approach requires the agency to have acted in a judicial capacity and the parties to have had an adequate opportunity to litigate *at the time the administrative decision was rendered*. Another approach simply requires those elements to have been available to the claimant *somewhere within the statutory scheme*. That is, the second approach would grant preclusive effect to a decision rendered after a mere investigation, provided that available procedures would have assured adequate opportunity to litigate the decision of an agency acting in a judicial capacity if the claimant had followed through with the statutory review provisions.

This Note argues that courts are right to preclude additional litigation where the statutory remedy comports with notions of due process and where the statute provides clear notice as to the finality

15. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 580 (Cal. 2010) (Werdegar, J., dissenting).

16. Due to the small number of opinions that discuss the application of administrative preclusion to agency investigative proceedings, this Note considers the opinions of both federal and state courts.

17. For the purposes of this Note, "investigative findings" and "investigations" will refer to ex parte proceedings in which no hearing took place. The basic procedures used in each investigation are discussed in the case summaries.

18. It is a potential concern that an analysis of seven cases discussing six different statutes may seem inadequate to address a tenet of administrative preclusion. This is worrying in the sense that administrative law centers on statutory interpretation and application, and the interpretation of any given statute can depend on the particular provision implicated by the case, the overall statutory scheme, or even other statutes that speak to the particular topic at issue. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000). On the one hand, this makes the idea of drawing broad generalizations about administrative preclusion from six different statutes quite concerning. On the other hand, this Note attempts to examine a doctrine that is *universally* applicable to administrative preclusion, regardless of organic statute. Thus, the fact that different statutes play a role in the analysis is irrelevant, because the concepts of *Utah Construction* and its attendant due process requirements must apply to all of them.

of the agency decision. Administrative preclusion should be considered proper even where the litigant has failed to follow through with available procedures, and thus has not experienced a proceeding that resembles litigation in court. What is needed is a clear articulation of the judicial policy of adhering to clear statutory mandates of repose. That is, litigants have the right to know that the judicial character of the agency decision is not the determinative factor when considering administrative preclusion. Rather, it is the presence of adequate remedial procedures within the statutory scheme, combined with sufficient notice to any claimant that initiation of some avenues, or failure to follow through with others, will result in a firmly closed door as far as judicial relief is concerned.

Part I offers a brief doctrinal background of claim and issue preclusion and their applications to administrative determinations. Part II outlines distinctive factors applied in court opinions that discuss whether administrative preclusion should be applied to a judgment or finding rendered by an agency after conducting an investigation. Part III offers an analysis of the more noteworthy factors from Part II, and considers whether the courts' determinations are in keeping with *Utah Construction*, the Due Process Clause, and the deference paid by courts to the legislative branch. Part IV suggests an approach to administrative preclusion that can be viewed as predictable and fair, yet still in line with the goals of efficiency and judicial economy that are so central to doctrines of preclusion.

I.
DOCTRINAL BACKGROUND

A. Claim and Issue Preclusion After Judicial and Administrative Determinations

The doctrines of claim and issue preclusion, traditionally referred to respectively as res judicata and collateral estoppel, have long been applied in courts in the United States.[19] Res judicata may be used broadly to refer to both claim preclusion and issue preclusion—two distinct doctrines that confer finality on decisions previously made by a court of law.[20] Claim preclusion refers to the preclusive effect of a prior *judgment*, and reflects the principle that

19. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398–99 (1981); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 322 (1979); Hart Steel Co. v. R.R. Supply Co., 244 U.S. 294, 297–99 (1917); S. Pac. R.R. Co. v. United States, 168 U.S. 1, 65 (1897).

20. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (2d ed. 2012).

a party cannot relitigate all or part of a previously litigated claim, nor raise in a second action any claims that could have been raised in the first action.[21] Issue preclusion refers to the preclusive effect of factual and legal *issues* previously decided, and binds the parties who litigated that issue to the findings made.[22]

The Supreme Court established the validity of applying preclusive doctrines to decisions made by administrative agencies in *United States v. Utah Construction & Mining Co.*[23] The Court noted that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."[24] This passage has been quoted often in both federal and state court opinions discussing administrative preclusion.[25] In *University of Tennessee v. Elliot*, the Supreme Court clarified that administrative preclusion applies to determinations by both federal and state agencies.[26] The *Elliot* Court reiterated the *Utah Construction* factors when it applied administrative preclusion to the state agency's finding.[27]

Although *Utah Construction* establishes conditions that attach to the application of administrative preclusion, there is no one-size-fits-all formula for determining when preclusion is appropriate. Commentators note that "[i]t is difficult to state a general formula to capture the essential elements of adjudicatory procedure that may entitle administrative decisions to preclusion effects in subsequent judicial proceedings."[28] The Restatement (Second) of Judg-

21. *See Migra*, 465 U.S. at 77 n.1; RESTATEMENT (SECOND) OF JUDGMENTS: EFFECTS OF FORMER ADJUDICATION—GENERAL RULES § 17 (1982).

22. *See Migra*, 465 U.S. at 77 n.1; RESTATEMENT (SECOND) OF JUDGMENTS: ISSUE PRECLUSION—GENERAL RULE § 27 (1982).

23. 384 U.S. 394 (1966). The Court held that the findings of the agency's adjustment board were final and conclusive within the meaning of the Wunderlich Act, Pub. L. No. 83-356, 68 Stat. 81 (1954) (repealed 2011), and were binding on the Court of Claims. *Id.* at 399.

24. *Id.* at 422.

25. *See, e.g.*, Miller v. Cnty. of Santa Cruz, 39 F.3d 1030, 1033 (9th Cir. 1994); Compton v. U.S. Dep't of Energy, 706 F.2d 260, 262 (8th Cir. 1983); Gear v. City of Des Moines, 514 F. Supp. 1218, 1220 (S.D. Iowa 1981); Indus. Comm'n v. Moffat Cnty. Sch. Dist. RE No. 1, 732 P.2d 616, 620 (Colo. 1987) (en banc); Lindas v. Cady, 515 N.W.2d 458, 466 n.6 (Wis. 1994).

26. 478 U.S. 788, 798 (1986) (noting that "both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources is equally implicated whether factfinding is done by a federal or state agency.") (internal citation omitted).

27. *Id.* at 797–98.

28. 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4475, at 483 (2d ed. 2002). *See generally* Lon L.

ments explains that an adjudicative finding by an administrative tribunal is conclusive under res judicata when five factors are present, indicating that the administrative proceeding "entailed the essential elements of an adjudication."[29] However, even the Restatement's summation of adjudicative elements is rounded off by a catchall factor: "[S]uch other procedural elements as may be necessary."[30] Thus, as with other common law doctrines of repose, the concept of administrative preclusion is decidedly (and necessarily) amorphous.[31]

Administrative preclusion should not be confused with administrative exhaustion, which is a doctrine requiring that a claimant fully complete available administrative remedies before a judicial claim becomes available.[32] The statute providing the remedy requires that a claimant first exhaust administrative remedies and delineates the procedures for doing so.[33]

Unlike administrative exhaustion, which derives purely from statutory authority, administrative preclusion has its origins in the common law and so has a potentially more flexible use as a bar to a judicial forum. Despite the common law foundation of preclusive

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Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 353 (1978) (discussing "adjudication in the very broadest sense.").

29. RESTATEMENT (SECOND) OF JUDGMENTS: ADJUDICATIVE DETERMINATION BY ADMIN. TRIBUNAL § 83(2) (1982).

30. *Id.* § 83(2)(e).

31. *See, e.g.*, Robert P. Morris, *How Many Bites Are Enough? The Supreme Court's Decision in* University of Tennessee v. Elliot, 55 TENN. L. REV. 205, 256 (1988) (noting that it was the practice of some courts to apply the administrative preclusion doctrine flexibly); Robert Ziff, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 953 (1992) (discussing the unforeseeable and flexible nature of preclusion and stating that "it is impossible to design a system of res judicata in which preclusion is both fully inclusive and foreseeable").

32. *See generally* 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES § 26:1, at 434 (1989) ("Exhaustion of administrative remedies before going to court is sometimes required and sometimes not."); Ralph F. Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817, 859–911 (1976) (describing how the administrative exhaustion is one prerequisite to the availability of judicial review); Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1 (1984) (examining the doctrine of administrative exhaustion in the context of environmental litigation).

33. *See, e.g.*, Sarbanes-Oxley Act, 18 U.S.C. § 1514A(b)(1)(A) (2002) (describing the procedure for filing a Sarbanes-Oxley Civil Enforcement Action); Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1326 (S.D. Fla. 2004) ("[B]efore an employee can assert a cause of action in federal court under the Sarbanes-Oxley Act, the employee must file a complaint with the Occupational Safety and Health Administration ('OSHA') and afford OSHA the opportunity to resolve the allegations administratively.") (internal quotation marks omitted).

doctrines, courts routinely consult and interpret the source of the claimant's remedy—the statute—when determining whether administrative preclusion is applicable. For example, in *Utah Construction*, the Supreme Court specifically referred to the statutory language in discussing the limits of issue preclusion as they applied them to the case:

> [T]he finality accorded administrative fact finding by the disputes clause is limited by the provisions of the Wunderlich Act of 1954 which directs that such a decision 'shall be final and conclusive unless the same is fra(u)dulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.'[34]

The importance of statutory interpretation and the adherence to statutory provisions by courts assessing administrative preclusion is considered more fully in Parts III and IV.

B. Due Process Protections for Those Facing Preclusion

Any decision that impacts or terminates a liberty or property right implicates the Due Process Clauses of the Fifth and Fourteenth Amendments.[35] One such property interest is the right to pursue a remedy in court, which is affected by a decision to enforce a preclusive doctrine.[36] Thus courts addressing the issue of administrative preclusion must ensure that the claimant was afforded due process.[37]

Determining whether due process has been afforded in a given proceeding is not a purely binary inquiry. As the Supreme Court

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34. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 399 (1966).

35. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 260 (1970) ("The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits.").

36. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 312–13 (1950) (holding that a cause of action is a form of intangible property protected by the Due Process Clause); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (finding that plaintiff's FEPA claim was a constitutionally protected property right); Jay Carlisle, *Getting a Full Bite at the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 84–85 (1986) ("Concepts of fair play and due process have consistently been important policy considerations for courts when considering issue preclusion.").

37. *See* Kremer v. Chemical Const. Corp., 456 U.S. 461, 482 (1982) (noting that a state's administrative remedy must comply with the minimum requirements of due process); Joel deJesus, *Interagency Privity and Claim Preclusion*, 57 U. CHI. L. REV. 195, 204 (1990) ("Due process considerations are also important to analyzing claim preclusion in the administrative context.").

stated in *Mathews v. Eldridge*, determining the standards of due process requires a consideration of:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[38]

Thus, the due process requirement in any administrative preclusion analysis will be very case specific. Given the amorphous nature of administrative preclusion, it would seem to be nearly impossible to predict what process a claimant is due when she decides to pursue an administrative remedy. On the one hand, Judge Friendly has said that "some kind of hearing" is necessary before properly depriving an individual of his property interests.[39] On the other hand, one court has noted, "we have never held that such a hearing is a precondition to administrative preclusion."[40]

Regardless of the inherent difficulty of articulating a predictable and inclusive due process standard for administrative remedies, the Due Process Clause provides the minimum requirements for administrative preclusion. A significant aspect of due process is the notice requirement: "[D]ue process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[41] In the context of administrative preclusion, the notice requirement could be considered applicable to the determination of whether preclusion is proper—that is, courts could look to whether claimants were on notice of the administrative proceeding's potential for finality

38. 424 U.S. 319, 335 (1976); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) ("[W]e are faced with what has become a familiar two-part inquiry: we must determine whether Logan was deprived of a protected interest, and, if so, what process was his due."); Pamela A. Mann, *Federalism Issues and Title VII:* Kremer v. Chemical Construction Corp., 13 N.Y.U. REV. L. & SOC. CHANGE 411, 436 (1984–1985) ("In resolving due process claims, the courts pursue a two part inquiry: (1) whether the interest asserted is a protected one, and (2) if so, what process was due prior to infringement of the interest.").

39. Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974). *See generally* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267 (1975) (discussing the development and elements of the hearing requirement).

40. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 549 (6th Cir. 2012).

41. Jones v. Flowers, 547 U.S. 220, 226 (2006) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

and subsequent preclusion when deciding whether to enforce repose.[42] The significance of this "notice floor" is considered further in Part IV.

II.
FACTORS CONSIDERED BY COURTS WHEN REVIEWING THE PRECLUSIVE EFFECT OF AN INVESTIGATIVE PROCEEDING

In order to determine whether courts look to the *Utah Construction* requirements—specifically, agency action in a judicial capacity and parties having an adequate opportunity to litigate—this Note analyzes opinions that discuss preclusive doctrines as they apply to an agency investigation. The rationale for this methodology is that an investigative proceeding (as opposed to an administrative hearing) bears little resemblance to pursuing litigation in court, and so, facially, an investigation would not satisfy the *Utah Construction* requirements.[43] "Investigation" refers generally to an ex parte proceeding, in which the parties submit a complaint and response to an agency official or employee (an investigator), and the investigator reviews the material and issues a finding.[44] The investigator is not an administrative law judge (ALJ), but rather an employee or official of the executive branch of the state or federal government.[45]

With this investigative requirement in mind, seven court opinions have addressed the narrow question of whether administrative preclusion should apply to an agency investigation.[46] Court opinions in which the claimant was granted or pursued an administra-

42. Mann, *supra* note 38, at 452 ("The due process cases, the administrative preclusion cases, and the full and fair opportunity cases all focus on whether the basic elements of notice and meaningful opportunity to be heard have been met.").

43. *See supra* note 13 and accompanying text.

44. *See, e.g.*, 49 U.S.C. § 42121(b)(2)(A) (2006) ("Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit . . . ."); Alaska Stat. § 18.80.110 (2006) ("The executive director or a member of the commission's staff designated by the executive director shall informally investigate the matters set out in a filed complaint."); Iowa Code § 88.9(3)(b)(2) (2008) ("Upon receipt of the complaint, the commissioner shall conduct an investigation as the commissioner deems appropriate.").

45. *See supra* note 44 and accompanying text.

46. Herrera v. Churchill McGee, LLC, 680 F.3d 539 (6th Cir. 2012); Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322 (S.D. Fla. 2004); Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210 (W.D. Wash. 2003); Parson v. State, 189 P.3d 1032 (Alaska 2008); Murray v. Alaska Airlines, Inc., 237 P.3d 565 (Cal. 2010); George v. D.W. Zinser Co., 762 N.W.2d 865 (Iowa 2009); Mac Home Improvement Co., Inc.

tive hearing were not used. The searches were conducted entirely on WestlawNext between September and November of 2012.[47] Three of the seven courts—*Murray*, *Herrera*, and *Fadaie*—applied administrative preclusion and prevented the claimants from pursuing all or part of their claims in court.[48]

After a careful reading of the seven court opinions, a pattern of factors discussed by the courts emerged, as shown in Appendix A.[49] The factors highlighted for discussion are: (1) whether the selection of an administrative remedy was voluntary or required by statute; (2) whether additional review procedures for the agency finding were available but not taken; (3) whether the factors from *Utah Construction* (or an analogous state opinion) were cited and how they were treated; (4) whether the claimant had an attorney; and (5) whether the agency finding became final under the statute. Factor five was found to correlate directly with a court's decision to apply administrative preclusion—if the statute mandated finality, the court would give the agency finding preclusive effect, regardless of the fact that the finding was rendered after a mere investigation. Factor four appeared in only three out of the seven opinions, but it is considered noteworthy because it was emphasized by two of the three courts that decided administrative preclusion was appropriate. The remainder of this Part summarizes the courts' treatment of each factor and notes any correlations with the existence of a particular factor and the application of administrative preclusion.

A. Voluntary Election of Administrative Remedy

The claimants in four of the seven cases voluntarily elected to pursue an administrative remedy before filing a claim in federal or state court.[50] Voluntary pursuit of administrative remedy did not correlate directly with the court's ultimate decision on whether or not to apply administrative preclusion: although all three applica-

v. Cuyahoga Metro. Hous. Auth., No. 75314, 2000 WL 336498 (Ohio Ct. App. Mar. 30, 2000).

47. Examples of search criteria include: (1) "administrative /s preclusion issue claim", search "investigat!" within results, in all state and federal jurisdictions; (2) "administrat! and investigat! and preclu!", search "utah cons!" within results, in all state and federal jurisdictions; and (3) "administrative agency judicial capacity", search "investigat! and preclu!" within results, in all state and federal jurisdictions. The above list of searches performed is not exhaustive.

48. *See Herrera*, 680 F.3d 539; *Fadaie*, 293 F. Supp. 2d 1210; *Murray*, 237 P.3d 565.

49. *See infra* Tables 1–2.

50. *See Herrera*, 680 F.3d 539; *Fadaie*, 293 F. Supp. 2d 1210; *Parson*, 189 P.3d 1032; *Murray*, 237 P.3d 565.

tions of administrative preclusion occurred in cases in which the claimant had pursued an administrative remedy by choice,[51] one of the cases that did not apply administrative preclusion also involved a voluntary administrative filing.[52]

The claimants in *Fadaie*, *Murray*, *Parson*, and *Herrera* all chose to file a complaint in pursuit of an administrative remedy despite having the option of pursuing a claim directly in court. Fadaie and Murray both filed administrative claims with the Department of Labor pursuant to the Whistleblower Protection Provision (WPP) of AIR 21,[53] and both made the decision voluntarily.[54] Herrera also decided to bring his complaint to a local agency, the Lexington-Fayette Urban County Human Rights Commission (FUCHRC), rather than file a claim in state court.[55] In Kentucky, victims of state civil rights violations can choose to file a claim either in state court[56] or with the FUCHRC.[57] Finally, Parson chose to file a claim with the Alaska State Commission for Human Rights, although he could have filed a claim in superior court.[58]

The claimant's pursuit of administrative rather than judicial relief in the *George* case is more difficult to categorize as either clearly voluntary or clearly involuntary. In *George*, the Supreme Court of Iowa was faced with an issue of first impression: whether Iowa's Occupational Safety and Health Act (IOSHA) provided an exclusive administrative remedy for a claim of retaliatory discharge.[59] Thus it is unclear whether George in fact chose to pursue an administrative remedy or whether he felt he was required to do so. After reading the statute, the court determined that the administrative remedy was not exclusive, and George was permitted to file a claim of retali-

51. *See Herrera*, 680 F.3d 539; *Fadaie*, 293 F. Supp. 2d 1210; *Murray*, 237 P.3d 565.

52. *See Parson*, 189 P.3d 1032.

53. 49 U.S.C. § 42121(b)(1) (2006).

54. *Fadaie*, 293 F. Supp. 2d at 1217; *Murray*, 237 P.3d at 567.

55. *Herrera*, 680 F.3d at 542.

56. KY REV. STAT. ANN. § 344.450 (1996) ("Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations.").

57. *Id.* at § 344.200 ("Any individual claiming to be aggrieved by an unlawful practice . . . may file with the commission a written sworn complaint . . . .").

58. Parson v. State, 189 P.3d 1032, 1036 (Alaska 2008) ("The Alaska Human Rights Act creates concurrent jurisdiction over discrimination claims; both the Commission and the superior court can hear a discrimination claim under the Act.").

59. George v. D.W. Zinser Co., 762 N.W.2d 865, 871 (Iowa 2009) ("Our court has yet to determine whether an individual can bring a private cause of action for wrongful discharge in violation of the public policy behind IOSHA.").

atory discharge in a court of law.[60] The court pointed out, "The language in section 88.9(3) is permissive. 'An employee who believes that the employee has been discharged . . . in violation of this subsection *may* . . . file a complaint with the commissioner alleging discrimination.'"[61]

The claimants in *Mac Home* and *Hanna* were required to first pursue an administrative remedy before filing a complaint in a court of law. The *Mac Home* dispute stemmed from a general contractor's (Mac Home Improvement Company) obligation to pay prevailing wage rates to its employees.[62] Disputes of this type must be resolved administratively through the Department of Labor.[63] Hanna was also required to seek an administrative remedy for the complaint that he filed seeking damages under the Sarbanes-Oxley Act for retaliatory discharge.[64] Neither Hanna nor the Cuyahoga Metropolitan Housing Authority (the claimant in *Mac Home*) was precluded from seeking a judicial remedy after receiving an adverse ruling from the administrative agency.[65]

Given the divergent results of *Herrera*, *Murray*, and *Fadaie*, where the court applied administrative preclusion, as opposed to *Parson* (and possibly *George*), where the court did not apply administrative preclusion, the voluntary election of an administrative remedy does not necessarily inform a court's decision regarding the application of administrative preclusion. The relevance of this factor lies in the emphasis the courts applying administrative preclusion placed on the claimant's choice. Although the *Herrera* court did not specifically discuss the implications of Herrera's choice to pursue an administrative remedy, both the *Fadaie* and *Murray* courts indicated that a claimant who chooses to file an administrative claim must deal with the consequences of not following through with available procedures. The *Fadaie* court pointed to Fadaie's decision to seek an administrative remedy when it ruled that he was precluded from further relief:

> The WPP procedures are not mandatory, however, and merely afford "an additional remedy for plaintiffs seeking to advance a

60. *Id.* at 871–72.

61. *Id.* at 872 (quoting IOWA CODE § 88.9(3)(b)(1) (1988)).

62. Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Housing Auth., No. 75314, 2000 WL 336498, at *1–2 (Ohio Ct. App. Mar. 30, 2000).

63. *Id.*, at *3–4 (citing Disputes Concerning Payment of Wages, 29 C.F.R. § 5.11 (2011)).

64. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1324 (S.D. Fla. 2004) (citing Sarbanes-Oxley Act, 18 U.S.C. § 1514A(b)(1)(A) (2002)).

65. *Id.* at 1330–31; *Mac Home Improvement Co., Inc.*, 2000 WL 336498, at *5–6.

> retaliatory discharge claim." . . . Mr. Fadaie could have elected to forego his administrative options and file his whistleblower claims directly in a court of law. However, this choice of remedies ended once plaintiff initiated the administrative complaint process and obtained a final decision from the Secretary of Labor.[66]

The *Murray* court made an even more pointed remark about Murray's voluntary selection of an administrative remedy when it pointed out that a failure to apply administrative preclusion would allow him an extra chance to get the result he wanted:

> By choosing to proceed under the AIR 21's federal administrative whistleblower protection scheme, Murray availed himself of these distinct advantages. To allow him to relitigate the factual issue of causation decided against him in the Secretary's final nonappealable order in this subsequent court action between the same parties would reduce the AIR 21 statutory scheme to a mere rehearsal for litigation . . . .[67]

It is of course worth pointing out that the opinions of only two courts (of different jurisdiction) are insufficient to conclusively point to a trend in judicial determinations. The inclusion of this observation is meant largely to serve as a caution to potential claimants and attorneys: courts may not be sympathetic to claims regarding the arguable insufficiency of procedures when the claimant chooses to pursue an administrative remedy and subsequently fails to follow through with it.

B. Availability of Additional Review Procedures

The claimants in all of the cases except *Mac Home* had the opportunity to pursue further review of the agencies' investigative findings but chose not to do so. For example, Herrera was notified of "his right to apply for reconsideration," and was told that a failure to seek reconsideration within twenty days would result in the issuance of "an Order of Dismissal."[68] Similarly, Murray was notified of his right to file objections with the Department of Labor and to seek a hearing before an administrative law judge.[69] The same is true of George and Fadaie.[70] In the case of Hanna, additional re-

66. Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1220 (W.D. Wash. 2003) (citations omitted).

67. *Murray*, 237 P.3d at 577 (internal quotation marks omitted).

68. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 543 (6th Cir. 2012).

69. *Murray*, 237 P.3d at 567–68.

70. *See Fadaie*, 293 F. Supp. 2d at 1219 ("Mr. Fadaie opted not to request a hearing before an Administrative Law Judge."); George v. D.W. Zinser, 762 N.W.2d

view procedures were available by statute, but the agency did not issue its finding within the required timeframe.[71] Thus Hanna did not have an agency finding to review at the time he decided to initiate a lawsuit.[72]

Parson's options for additional review were less clear. Under Alaska law, where the Commission for Human Rights (CHR) finds substantial evidence of discrimination, it is required to attempt to work towards conciliation.[73] The *Parson* court stated, "By implication, if the investigator determines that the allegations of the complaint are not supported by substantial evidence, the complaint is dismissed."[74] Thus it is not clear from the statute whether there is a specific statutory review process if the CHR determines that the complaint should be dismissed. Presumably the default provisions of the Alaska Administrative Procedures Act (AAPA) provided Parson with an avenue for judicial review.[75] After the CHR dismissed his complaint, Parson filed a complaint in state court.[76] The trial court granted summary judgment against Parson but converted his state claim into an administrative appeal so that he would have further opportunity for judicial review.[77] Parson voluntarily dismissed the administrative appeal in order to obtain a final judgment and then appealed that judgment to the Alaska Supreme Court.[78] Unless one argues that Parson should have pursued an administrative appeal under the AAPA, it seems that Parson pursued the avenues for review that were available to him without voluntarily forfeiting any additional review.

The claimant in *Mac Home*, the Cuyahoga Metropolitan Housing Authority (CMHA), did not have any additional review procedures available to it under the statute. In stating that "CMHA did not have an ample opportunity to litigate its position with the Department of Labor," the *Mac Home* court pointed to the Labor De-

865, 867 (Iowa 2009) ("George did not seek judicial review of the commissioner's decision under Iowa Code section 17A.19.").

71. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1326 (S.D. Fla. 2004) ("Contrary to the guidelines set forth in 29 C.F.R. § 1980.105(a), Mr. Hanna did not receive OSHA's preliminary findings 'within 60 days of the filing of [his administrative] complaint.'").

72. *Id.*

73. ALASKA STAT. 18.80.110 (2006).

74. Parson v. State, 189 P.3d 1032, 1034–35 n.1 (Alaska 2008).

75. *See* ALASKA STAT. 44.62.570 (1959).

76. *Parson*, 189 P.3d at 1034–35.

77. *Id.* at 1035.

78. *Id.* at 1036.

partment regulations.[79] The court explained that the Labor Department regulations did not afford CMHA a proper opportunity to litigate because the regulations only offered the "contractor and/or subcontractor" the option of requesting a hearing on the basis of the investigator's findings.[80] Therefore the CMHA had no additional administrative review options available.[81]

The availability of additional review procedures does not correlate perfectly with the decision of whether or not to apply administrative preclusion. Of the six claimants discussed above who had additional review procedures available, three had administrative preclusion enforced against them[82] and three did not.[83] Again, however, the courts applying administrative preclusion pointed out that the claimants had been notified of the additional procedures available,[84] and so this may have been a factor that those courts considered when conducting their analyses.

C. Interpretation of Utah Construction *or an Analogous Administrative Preclusion Requirement: "Past Procedures" Versus "Future Procedures"*

Courts addressing a question of administrative preclusion routinely cite and/or discuss the three *Utah Construction* factors (held applicable to state agencies in *University of Tennessee v. Elliot*).[85] The cases discussed in this Note are no exception. *Utah Construction* was cited directly in the following court opinions: *Murray*,[86] *Herrera*,[87] *George*,[88] and *Hanna*.[89]

The *Fadaie* court did not cite to *Utah Construction* or to *Elliot*, but did cite to a Washington Supreme Court case[90] noting that the state of Washington had adopted the Restatement (Second) of

79. Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Housing Auth., No. 75314, 2000 WL 336498, at *5 (Ohio Ct. App. Mar. 30, 2000).

80. *Id.* (citing 29 C.F.R. § 5.11(b)(2) (2011)).

81. *Id.*

82. Fadaie, Herrera, and Murray.

83. George, Hanna, and Parson.

84. *See* Herrera v. Churchill McGee, LLC, 680 F.3d 539, 549 (6th Cir. 2012); Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1219–20 & n.2 (W.D. Wash. 2003); Murray v. Alaska Airlines, Inc., 237 P.3d 565, 576 (Cal. 2010)

85. *See supra* note 26 and accompanying text.

86. *Murray*, 237 P.3d at 568.

87. *Herrera*, 680 F.3d at 547.

88. George v. D.W. Zinser, 762 N.W.2d 865, 868 (Iowa 2009).

89. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1330 (S.D. Fla. 2004).

90. Shoemaker v. City of Bremerton, 745 P.2d 858, 861 (Wash. 1987) (en banc).

Judgments § 83 to determine when an administrative adjudication is entitled to preclusive effect.[91] The section of the Restatement quoted in the opinion is analogous to *Utah Construction* for the purpose of comparing how courts interpret the requirements for administrative preclusion. The language resembles the *Utah Construction* requirements of "judicial capacity" and "opportunity to litigate"—the Restatement requires "the essential elements of adjudication," which include "[t]he right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties."[92] Similarly the *Parson* and *Mac Home* courts did not cite to *Utah Construction*, but did cite to or use analogous language.[93]

Where these cases differ is how the courts interpreted the requirements of *Utah Construction*. In *Herrera*, the Sixth Circuit noted the inherent ambiguity of the two factors relevant to this discussion: (1) that the agency acted in a judicial capacity; and (2) that the parties had an adequate opportunity to litigate.[94] The *Hererra* court noted:

> At the outset, we note that "[i]t is difficult to state a general formula to capture the essential elements of adjudicatory procedure that may entitle administrative decisions to preclusion effects in subsequent judicial proceedings." Likewise, a full and fair opportunity to litigate does not require any "single model of procedural fairness, let alone a particular form of procedure."[95]

The *Parson*, *Hanna*, *Mac Home*, and *George* courts interpreted the *Utah Construction* framework (or its doctrinal equivalent) to re-

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91. Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1219 n.3 (W.D. Wash. 2003). The law in Washington was relevant to the *Fadaie* court's opinion because the action was brought in diversity.

92. *Id.* at 1219 (quoting RESTATEMENT (SECOND) OF JUDGMENTS: ADJUDICATIVE DETERMINATION BY ADMIN. TRIBUNAL § 83 (1982)).

93. *See* Parson v. State, 189 P.3d 1032, 1037 (Alaska 2008) ("[T]he preclusive use of prior administrative findings must always be fair and that fairness at a minimum requires that the administrative process follow the essential elements of adjudication, including notice and an opportunity to present and rebut evidence, a formulation of issues of fact and law, and other procedural elements necessary for a conclusive determination of the issue.") (internal quotation marks omitted); Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Hous. Auth., No. 75314, 2000 WL 336498, at *5 (Ohio Ct. App. Mar. 30, 2000) ("Res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that: (1) are judicial in nature; and (2) where the parties have had an ample opportunity to litigate the issues involved in the proceeding.").

94. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 547 (6th Cir. 2012).

95. *Id* (citation omitted).

quire that the agency had actually acted in a judicial capacity and the parties had an adequate opportunity to litigate *at the time the decision was rendered*. This Note refers to this reading of *Utah Construction* as the "past procedures" interpretation. The *Parson* court stated, "[A]n informal investigation by Commission staff does not contain the essential elements of adjudication."[96] Similarly, the *Hanna* court observed:

> In this case, OSHA's "preliminary order" was not based on the resolution of disputed facts in a forum where both parties had a fair and adequate opportunity to litigate their theories of the case. According to OSHA's own regulations, preliminary orders are issued solely on the basis of an investigation of facts that OSHA deems relevant . . . . The only point in which a Sarbanes–Oxley Act plaintiff receives a "trial-court like hearing" is when that plaintiff appeals his "preliminary order" to an administrative law judge.[97]

The *Mac Home* court additionally found that "the administrative investigation by the Department of Labor was not judicial in nature" and that "CMHA did not have an ample opportunity to litigate its position with the Department of Labor."[98] Finally the *George* court stated:

> The Division, in investigating George's complaint and subsequently dismissing it, was not acting in a judicial capacity. Neither the procedure nor the investigation meets the requirements to be granted preclusive effect in a judicial proceeding. . . . George did not have a full and fair opportunity to present evidence or respond to D.W. Zinser's position.[99]

In contrast, the *Herrera*, *Murray*, and *Fadaie* courts interpreted *Utah Construction* as follows: the agency must render a decision in a judicial capacity and the parties must have an adequate opportunity to litigate in the course of the procedures that are *available*, as opposed to the procedures that the parties actually utilize. This Note refers to this gloss on *Utah Construction* as the "future procedures" interpretation. Courts using the "future procedures" interpretation emphasized the procedures made available by statute or regulation, as well as the claimants' voluntary choice to abandon their administrative remedy. In *Herrera* the court observed:

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96. *Parson*, 189 P.3d at 1038.

97. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1331 (S.D. Fla. 2004) (citation omitted).

98. *Mac Home*, 2000 WL 336498, at *5.

99. George v. D.W. Zinser, 762 N.W.2d 865, 869–70 (Iowa 2009).

> Herrera could submit evidence in support of his claim and, because the Fayette HRC rules do not contain a deadline for the submission of evidence, seemingly could have responded to any evidence submitted by or obtained from Churchill McGee with additional evidence of his own. The Fayette HRC can obtain subpoenas, though it is not clear whether Herrera could have asked the investigator to do so. Herrera could seek assistance from an attorney. Administrative reconsideration and judicial review are available.[100]

While all of these procedures arguably would have ensured that Herrera did in fact have an adequate opportunity to litigate before an agency acting in a judicial capacity, these were not procedures afforded to Herrera, but rather procedures he would have been afforded had he sought reconsideration of the agency's determination. The court emphasized its point that the *Utah Construction* requirements were satisfied when it stated, "The fact that the HRC's Order of Dismissal . . . received neither administrative reconsideration nor judicial review does not change this conclusion, because both options were available. Herrera's 'fail[ure] to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy.'"[101] The *Fadaie* court made an identical point when it noted that "the WPP provides complainants with an opportunity to fully and fairly litigate their claims: plaintiffs cannot now argue that the procedures utilized by the agency were insufficient when it was Fadaie's choice to forego the admittedly sufficient procedures to which he was entitled."[102]

The *Murray* court also emphasized the statutorily prescribed procedures that were available to Murray, as well as his voluntary decision to forgo them. Said the court, "The AIR 21 statutory scheme afforded Murray an absolute right to a full de novo trial-like hearing before an ALJ, a hearing we find would fully comport with the requirements . . . for establishing that the administrative proceedings were undertaken in a judicial capacity."[103] Emphasizing that the court interpreted *Utah Construction* to require "future procedures," the court explained that "it is the *opportunity to litigate* that is important in these cases, not whether the litigant availed himself

100. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 549 (6th Cir. 2012).

101. *Id.* at 550.

102. Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1220 (W.D. Wash. 2003).

103. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 569 (2010) (internal quotation marks omitted).

or herself of the opportunity."[104] The court hammered its point home when it stated:

> Focusing the inquiry on the *opportunity to litigate* issues in the prior administrative proceeding is particularly appropriate where the party who initiates an administrative complaint apparently abandons his action upon receiving an adverse ruling, thereby forfeiting his statutory rights to a formal de novo hearing of record before an ALJ, and then seeks to relitigate the same issues decided in the agency's final order against the same party in a subsequently filed court action.[105]

From the above, it is clear that the cases discussed in this Note are split on the question of whether the application of administrative preclusion requires adequate past procedures or adequate future procedures. In observing this disagreement, it is important to emphasize the point made in Part II.B, that additional review procedures were available to all except one[106] of the parties involved in these seven cases.[107] The implication is that the courts interpreting *Utah Construction* to require past procedures to comport with due process—*Parson*, *George*, *Hanna*, and *Mac Home*—did not do so because there was no additional review available for the claimants, but rather because they construed administrative preclusion to require adequate procedures to be in place at the time the administrative decision was rendered. The appropriateness of the past procedures and future procedures constructions is discussed in Part III.

D. Presence or Absence of an Attorney

As previously stated, three of the seven court opinions discussed in this Note applied administrative preclusion to a decision rendered by an agency after an investigation.[108] The presence or absence of an attorney on behalf of the claimant was only noted in three of the opinions—*Herrera*, *Murray*, and *Parson*[109]—but the factor nevertheless bears consideration. *Herrera* and *Murray* were two

104. *Id.* at 570.

105. *Id.*

106. The contracting authority in *Mac Home*, the Cuyahoga Metropolitan Housing Authority (CMHA), could not request a hearing under the applicable regulations. *See* Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Hous. Auth., No. 75314, 2000 WL 336498, *5 (Ohio Ct. App. Mar. 30, 2000); 29 C.F.R. § 5.11(b)(2) (2011).

107. *See supra* Part II.B.

108. *See supra* Part II.C.

109. *See* Herrera v. Churchill McGee, LLC, 680 F.3d 539, 549 (6th Cir. 2012); Parson v. State, 189 P.3d 1032, 1035 (Alaska 2008); Murray v. Alaska Airlines, Inc., 237 P.3d 565, 567, 568, 569, 576 (Cal. 2010).

of the three cases that found administrative preclusion appropriate, and in both instances the court emphasized attorney availability when denying the claimants further opportunity for relief.[110] The *Murray* court in particular made much of the fact that Murray was represented by counsel, referring to that fact no fewer than five times in the course of its opinion.[111]

In *Herrera* the Sixth Circuit appeared to place weight on the fact that Herrera was advised to seek assistance from an attorney when it determined that he had an adequate opportunity to litigate his claim. At the start of its analysis the court stated that "a full and fair opportunity to litigate does not require any 'single model of procedural fairness, let alone a particular form of procedure.'"[112] The court proceeded to cite relevant precedent and to describe the procedures available to a claimant who files a Kentucky state discrimination claim with the local agency (the Lexington-Fayette Urban County Human Rights Commission).[113] The court found that "the [agency] rules appear to have provided Herrera with a[n] . . . ability to present his claims,"[114] and listed five factors in support of its conclusion.[115] The fourth factor listed was: "Herrera could seek assistance from an attorney."[116] In driving home its point that Herrera had an adequate opportunity to litigate his claim but simply failed to avail himself of the opportunity, the court stated, "Both the investigator and the Executive Director advised Herrera that he might wish to consult an attorney."[117] So it seems that the court found the availability of attorney advice—regardless of the fact that Herrera never actually sought out an attorney—directly applicable to the decision to deny him another avenue for relief.

The court in *Murray* made a similar, even more pointed statement when it precluded Murray from obtaining a judicial remedy. The court emphasized that Murray had been "represented by counsel at every stage of the prior administrative and present court proceedings" when it determined that the agency's findings were final

110. *See Herrera*, 680 F.3d at 549; *Murray*, 237 P.3d at 567, 568, 569, 576.

111. *See Murray*, 237 P.3d at 567, 568, 569, 576.

112. *Hererra*, 680 F.3d at 547.

113. *Id.* at 547–49.

114. *Id.* at 549.

115. *Id.*

116. *Id.* The other four factors noted were: (1) ability to submit evidence in support of his claim; (2) ability to respond to evidence submitted by his adversary; (3) ability of the agency to obtain subpoenas; and (5) availability of administrative reconsideration and judicial review. *Id.*

117. *Id.*

and subject to preclusive effect.[118] The court referenced "[b]oth Murray and his attorney" again when it explained that Murray could have avoided preclusion by following the procedures for complaint withdrawal listed in the agency regulations.[119] Like the *Herrera* court, the California Supreme Court in *Murray* placed weight on the availability of attorney advice when it determined that the opportunity to litigate was sufficiently *available to*, albeit not properly utilized by, the claimant.

As previously noted in Part II.A, the musings of only two courts are not sufficient to indicate any trend in judicial decisionmaking. The inclusion in this Note of the presence or absence of an attorney as a factor is intended to serve as a caution to potential claimants and attorneys: courts may not be sympathetic to arguably insufficient procedures if an attorney was present or available and the party could have sought out additional review.

E. Finality of the Agency's Finding Under the Relevant Statute

The determination that an agency finding became final under the statute providing the remedy correlated directly with a court's decision to apply or not apply administrative preclusion in each of the seven opinions discussed in this Note. In the three cases finding administrative preclusion appropriate—*Murray*, *Fadaie*, and *Herrera*—the courts all determined that the statute had effectively provided an endpoint to the plaintiffs' claims.[120] In contrast, three of the courts refusing to apply administrative preclusion—*Hanna*, *Parson*, and *George*—did not find that the relevant statute had dictated finality given the circumstances of the case.[121] In *Mac Home*, the administrative procedures for the remedy were set by regulation, not by statute, so the court did not have occasion to determine whether a statute created finality.[122]

In the case of *Hanna*, the plain wording of the Sarbanes-Oxley Act provided that "a plaintiff may obtain *de novo* review of any Sarbanes-Oxley administrative complaint that has not been resolved by a Department of Labor final decision within 180 days of filing an

118. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 569 (Cal. 2010).

119. *Id.* at 576.

120. *See Hererra*, 680 F.3d at 549; Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210, 1219–20 (W.D. Wash. 2003); *Murray*, 237 P.3d at 574–75.

121. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1327–30 (S.D. Fla. 2004); Parson v. State, 189 P.3d 1032, 1036–37 (Alaska 2008); George v. D.W. Zinser, 762 N.W.2d 865, 869–70 (Iowa 2009).

122. *See* Mac Home Improvement Co., Inc. v. Cuyahoga Metro. Hous. Auth., No. 75314, 2000 WL 336498, at *4 (Ohio Ct. App. Mar. 30, 2000).

administrative complaint."[123] The court determined that the circumstances of Hanna's complaint did not satisfy the provision of the statute that would have made the Department of Labor's finding "final."[124] The court held that "on the date Hanna filed his complaint [in court], the Secretary had not issued a final decision within 180 days of the filing of Hanna's administrative complaint."[125] Thus under the plain wording of the statute Hanna was permitted to obtain review of his complaint *de novo* in a court of law.[126]

Similarly, the *Parson* court engaged in a statutory interpretation exercise when it addressed the question of whether Parson was barred from further opportunity for relief. The court noted that the Alaska Human Rights Act (AHRA) expressly provided circumstances under which a determination by the Alaska State Commission (ASC) would preclude further action in court.[127] Specifically, issue preclusion is appropriate under the AHRA if "the commission conducts a hearing and reaches a decision under [AHRA] 18.80.120 and 18.80.130," so long as only issues actually reached at the hearing are precluded in future litigation.[128] Claim preclusion is appropriate wherever there is an "acquittal of a person by the commission."[129] The *Parson* court interpreted the statute and determined that the ASC's decision to close Parson's case was not an "acquittal" within the meaning of the Act.[130] The court distinguished between the terms "dismissal" and "acquittal:"

> [A]n acquittal generally comes after a trial, while a dismissal generally comes before a trial. . . . The Commission never adjudicated the merits of Parson's discrimination claims and therefore did not acquit AHFC. Because the Commission did not acquit AHFC, Parson's superior court claims were not foreclosed by [AHRA] 18.80.280.[131]

The *George* court did not explicitly note the absence of statutory finality when it found in favor of George. It did, however, quote the relevant statutory provisions and comment on the proce-

123. Hanna v. WCI Cmtys., Inc., 348 F. Supp. 2d 1322, 1324 (S.D. Fla. 2004) (citing Sarbanes-Oxley Act, 18 U.S.C. § 1514A(b)(1)(B) (2002)).

124. *Id.* at 1327.

125. *Id.*

126. *Id.*

127. Parson v. State, 189 P.3d 1032, 1036 (Alaska 2008).

128. Johnson v. Alaska State Dep't of Fish & Game, 836 P.2d 896, 907 (Alaska 1991).

129. ALASKA STAT. § 18.80.280 (1965).

130. *Parson*, 189 P.3d 1032, 1036 (Alaska 2008).

131. *Id.* at 1037.

dural deficiency of the administrative proceedings.[132] For example, the court pointed out, "The statute instructs the commissioner to conduct an investigation and then to make a determination whether there has been a violation. Nowhere does the statute mention presenting evidence or weighing legal arguments."[133] The court's discussion of the procedures available to George indicated generally that it found the statutory scheme inadequate to create a final determination that would be properly preclusive.[134]

In contrast, the *Murray* court went to great lengths to explain that, due to Murray's own inaction, the Secretary of Labor's investigative findings had become a "final nonappealable order" subject to preclusive effect.[135] By the plain wording of the Whistleblower Protection Provision of the statute, the failure to request a hearing within thirty days of the Secretary's findings results in the preliminary investigative order becoming "final" and "not subject to judicial review."[136] The court observed that Murray had been represented by counsel, that both he and his counsel were on clear statutory notice of the implications of failing to appeal, and that the Secretary's letter of findings further explained that failure to appeal the preliminary order would result in it becoming final and unappealable.[137] Murray failed to appeal the Secretary's order within the time limit and instead filed a complaint in California state court one month later.[138] Given the clear meaning and intent of the statute, the court found that preclusion properly applied: "Where Congress evinces a clear intent to preclude judicial review of final administrative decisions, a failure to properly appeal a final order must be given preclusive effect."[139]

In the case of *Herrera*, the state statute under which Herrera sought an administrative remedy only explicitly indicated finality as to the state remedy. The relevant statutory provision reads:

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132. George v. D.W. Zinser, 762 N.W.2d 865, 869–70 (Iowa 2009).

133. *Id.*

134. *See id.*

135. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 577 (Cal. 2010). The *Murray* majority used the phrase "final nonappealable order" seven times in the course of its opinion, five times in the body, and twice in footnotes. *Id.* at 566 & n.2, 568, 569, 576 & n.8, 577. The *Fadaie* court applied preclusion in the context of the same statutory provision, but did not engage in a discussion of finality. *See* Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210 (W.D. Wash. 2003). Accordingly, the discussion by the *Murray* court is the focus, and is seemingly applicable to both cases given the identity of claims.

136. 49 U.S.C. § 42121(b)(2)(A) (2006).

137. *Murray*, 237 P.3d at 568.

138. *Id.*

139. *Id.* at 576.

> A final determination by a state court or a final order of the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other administrative action or proceeding brought in accordance with KRS Chapter 13B by the same person based on the same grievance.[140]

The Sixth Circuit determined that both Herrera's state claim and his federal claim under § 1981 were precluded.[141] The court based its decision to preclude the federal action in part on the fact that a final determination from the state agency would have barred a remedy under the Kentucky Civil Rights Act.[142]

Based on the above discussions, it is clear that the statutory intent regarding the existence of a clear endpoint to the administrative remedy was an essential factor for the *Hanna*, *Parson*, *George*, *Murray*, and *Herrera* courts in deciding whether administrative preclusion was appropriate. As will be argued in Part IV, adherence to the explicit intent of the statute should be considered a valid (and preferred) approach to the resolution of these types of cases.

III.
ANALYSES OF JUDICIAL OPINIONS: WHAT IS THE PROPER APPROACH TO ADMINISTRATIVE PRECLUSION AFTER AN AGENCY INVESTIGATION?

As discussed more fully in Part II.C, "past procedures" and "future procedures" are terms this Note uses to refer to the two ways courts apply the "judicial capacity" and "opportunity to litigate" factors of *Utah Construction*. Courts that interpret *Utah Construction* to require "past procedures" look to whether the *Utah Construction* factors exist when the agency decision is rendered. Such courts effectively take the stance that an agency decision possesses enough baseline validity to warrant respect by courts only if the decision itself resulted from adequate procedures. Courts that interpret *Utah Construction* to require "future procedures" look to whether the *Utah Construction* factors would have been present if the complainant had chosen to follow through with the original action. Both this discrepancy of past versus future procedures[143] and the uniform ad-

140. KY REV. STAT. ANN. § 344.270 (1996).

141. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 550 (6th Cir. 2012) (finishing the analysis of preclusion application by noting that "a final determination from the Fayette HRC would bar a subsequent KCRA lawsuit on election-of-remedies grounds").

142. *Id.*

143. *See supra* Part II.D.

herence to statutory insistence on finality[144] are the focus of this Part.

A. Distinguishing Murray, Herrera, *and* Fadaie *from* Kremer

It is first important to distinguish the seven cases discussed above from the Supreme Court opinion that is most relevant: *Kremer v. Chemical Construction Corporation*.[145] The Court determined that Kremer, who had obtained an adverse ruling from an administrative agency after an investigation, was properly precluded from obtaining a Title VII remedy in federal district court.[146]

Like Murray, Herrera, and Fadaie, Kremer filed a claim with an administrative agency (although Kremer did not pursue the state administrative remedy voluntarily).[147] Like the other claimants, Kremer received an adverse ruling after the agency conducted a mere investigation.[148] But unlike the other claimants, Kremer appealed the agency's decision in New York state court.[149] The investigative determination was deemed by the New York Human Rights Division Appeal Board to be "not arbitrary, capricious, or an abuse of discretion."[150] Kremer also filed a petition with the Appellate Division of the New York Supreme Court to set aside the agency determination.[151] Five Appellate Division justices unanimously upheld the agency's decision.[152] Kremer chose not to appeal the Appellate Division's decision to the New York Court of Appeals.[153]

Kremer is facially distinguishable from *Murray*, *Herrera*, and *Fadaie* in that the Supreme Court in *Kremer* relied on the decision rendered by the New York Appellate Division, a court of law, to preclude a subsequent federal claim.[154] In contrast, *Murray*, *Herrera*, and *Fadaie* involved courts that found preclusion appropriate based

144. *See supra* Part II.E.

145. 456 U.S. 461 (1982).

146. *Id.*

147. *Id.* at 463–64 ("Because the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter, the Commission referred Kremer's charge to the New York State Division of Human Rights (NYHRD).") (internal citation omitted). *See also* 42 U.S.C. § 2000e-5(c) (2006).

148. *Kremer*, 456 U.S. at 464.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Kremer*, 456 U.S. at 464.

only on the investigation by the administrative agency.[155] Although the claimants in *Murray*, *Herrera* and *Fadaie* could have obtained judicial review of their investigations, they chose not to, and so the doctrine of administrative preclusion was applied on the basis of an administrative investigation alone.[156] As the Supreme Court stated in *Kremer*:

> Here the Appellate Division of the New York Supreme Court has issued a judgment affirming the decision of the NYHRD Appeals Board that the discharge and failure to rehire Kremer were not the product of the discrimination that he had alleged. There is no question that *this judicial determination* precludes Kremer from bringing any other action, civil or criminal, based upon the same grievance in the New York courts.[157]

It is clear that no such "judicial determination" was in play when Murray, Fadaie, and Herrera were precluded from bringing their claims in court.

It is also notable that Kremer raised an argument very similar to those advanced by the three other claimants. Kremer contended that the issue he raised—the question of his discriminatory treatment by his employer[158]—was not actually decided by the New York courts, and the procedures made available to him in his initial action were inadequate.[159] The Court pointed out that the concerning aspect of Kremer's argument was his suggestion that "even though administrative proceedings and judicial review are legally sufficient to be given preclusive effect in New York, they should be deemed so fundamentally flawed as to be denied recognition under" the statute.[160] This issue gets to the heart of exactly what "feels wrong" about the decisions in *Murray*, *Herrera*, and *Fadaie*. The fundamental concern with denying a judicial remedy to claimants who have experienced a mere administrative investigation is that the minimum due process requirement—the floor for any preclusion doctrine—has not been met.

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155. *See* Herrera v. Churchill McGee, LLC, 680 F.3d 539 (6th Cir. 2012); Fadaie v. Alaska Airlines, Inc., 293 F. Supp. 2d 1210 (W.D. Wash. 2003); Murray v. Alaska Airlines, Inc., 237 P.3d 565 (Cal. 2010).

156. *See supra* note 155.

157. *Kremer*, 456 U.S. at 466 (internal quotation marks omitted) (emphasis added).

158. *Id.* at 463.

159. *Id.* at 479.

160. *Id.* at 480.

After noting the Due Process Clause requirement,[161] the Supreme Court determined that "Kremer received all the process that was constitutionally required in rejecting his claim."[162] The Court emphasized the procedures available to Kremer within the agency itself, as well as the opportunity for administrative and judicial review, both of which were obtained.[163] Finally, the Court stated, "The fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy,"[164] suggesting that it found the due process requirement to be fulfilled by the availability of future procedures, rather than the actual utilization of past procedures. However, it is undeniable that Kremer did in fact obtain administrative *and* judicial review of the agency's investigative finding, so there is a question as to whether the Court's apparent endorsement of the "future procedures" approach would hold up with claimants like Murray, Herrera, and Fadaie.

B. "Past Procedures" Versus "Future Procedures": Which Is More Faithful to Utah Construction *and Due Process?*

The plain language of the oft-quoted section of *Utah Construction* seems to suggest that the Court was indicating a preference for past procedures: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."[165] The wording suggests that, for preclusion to be properly applied, the agency must be acting in a judicial capacity when it resolves the disputed issues of fact. This would seem to cut against the idea that administrative preclusion is appropriate in circumstances involving an agency conducting an ex parte investigation. Additionally, the *Utah Construction* language indicates that the parties must "have

161. *Id.* at 482 ("The State must, however, satisfy the applicable requirements of the Due Process Clause.").

162. *Id.* at 483.

163. *Kremer*, 456 U.S. at 483–85. The agency procedures noted by the Court included the requirement of an investigation, the full opportunity to present charges against the respondent on the record, the right to present exhibits and witness testimony, the opportunity to rebut evidence presented by the respondent, the right to have the assistance of an attorney, and the right to request that the division issue subpoenas. *Id.*

164. *Id.* at 485.

165. United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (emphasis added).

had" an opportunity to litigate, as opposed to merely "having,"[166] and this again points to the notion that the opportunity must occur before the agency renders its decision.

If there is any ambiguity regarding the plain meaning of the language, placing the Court's determination in the context of the original case makes it clear that the Court intended that the factors mentioned be present when the agency makes its determination:

> In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings.[167]

Thus it is reasonable to state that the form of administrative preclusion blessed by the Supreme Court in *Utah Construction* properly applies to agency determinations made while the agency was acting in a judicial capacity, after the parties had an adequate opportunity to litigate.

The Restatement (Second) of Judgments § 83 also provides support for the past procedures interpretation.[168] Section 83(2) states that the determinations of an administrative agency are afforded preclusive effect "only insofar as *the proceeding resulting in the determination* entailed the essential elements of adjudication."[169] This indicates that the procedures actually used, as opposed to the procedures that were available, are the pertinent consideration. The Restatement view aligns with those of the *Mac Home*, *Hanna*, *Parson*, and *George* courts, but does not match those of the courts in *Herrera*, *Murray*, and *Fadaie*.[170]

The past procedures approach also appears to comport with due process considerations to a greater degree than the future procedures approach. As discussed in Part I.B, courts considering the application of administrative preclusion must ensure that the plaintiff's rights under the Due Process Clauses have been satisfied. Although there is not a rigid due process standard, and the procedures required depend on the interests involved,[171] there is support from commentators and the Supreme Court for the idea

166. *Id.*

167. *Id.*

168. RESTATEMENT (SECOND) OF JUDGMENTS: ADJUDICATIVE DETERMINATION BY ADMIN. TRIBUNAL § 83(3) (1982).

169. *Id.* (emphasis added).

170. *See supra* Part II.C.

171. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

that due process requires a hearing, or something resembling a hearing.[172] Further, some commentators argued that courts should carefully review those agency determinations that are particularly discretionary because those agency decisions are especially deserving of due process analysis.[173] Given that the past procedures approach taken by some courts ensures that the agency had been acting in a judicial capacity when its decision was rendered, it seems that such an approach is in line with notions of procedural fairness. At the very least, the past procedures approach is more in line with due process requirements than the future procedures approach.

C. Adherence to Clear Indications of Statutory Finality: Deference by the Judiciary to Legislative Schemes

As discussed previously, all of the courts addressing administrative preclusion after an agency investigation—except *Mac Home*—interpreted the relevant statutory provisions when conducting their analyses.[174] All of the courts that found indications of statutory finality decided to enforce administrative preclusion.[175] In contrast, those courts that determined the agency had not reached a conclusive determination under the statute rejected the application of preclusion.[176]

It is the practice of courts to defer to legislative findings and determinations.[177] This deference is generally considered appropriate because of the "structural separation of powers established by the Constitution and the appropriate functional division of tasks between the two branches."[178] In the area of administrative law, courts have long been in the practice of remaining faithful to the legislative intent of a statute, where it can be discerned, rather than

172. Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (holding that an agency must follow due process and hold an adequate hearing before stopping welfare payments); Friendly, *supra* note 39.

173. Tim Searchinger, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1018 (1986) ("Instead of viewing unlimited discretion as a reason to limit judicial review, courts should treat the breadth of discretion as a 'process' variable which they can influence and for which they can order compensating procedural checks.").

174. *See supra* Part II.E.

175. *See infra* Tables 2–3.

176. *Id.*

177. *See* Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195 (1997); United States v. Lopez, 514 U.S. 549, 604 (1995) ("The practice of deferring to rationally based legislative judgments is a paradigm of judicial restraint.") (Souter, J., dissenting) (internal quotation marks omitted).

178. Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312, 2315 (1998).

deferring to an agency interpretation that seems to contradict the legislature's objectives.[179] In light of these considerations, it seems proper that courts would defer to legislative intent regarding remedial finality when it is expressed through the plain language of the statute.[180]

The Restatement (Second) of Judgments also provides support for the idea that courts should defer to legislative policy when deciding whether or not to enforce preclusion. The Restatement provides:

> (4) An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:
>
> > (a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings . . . .[181]

This language squarely indicates that courts should not enforce administrative preclusion where legislative policy dictates that the agency determination should not be conclusive in subsequent proceedings. From this, one can infer that it is proper for courts to enforce administrative preclusion in those cases involving a legislative policy that clearly expresses that the agency determination be considered final.

Viewed in this way, the courts' decisions in *Murray*, *Herrera*, and *Fadaie* to adhere to a statutory grant of finality, despite an arguable lack of proper proceedings prior to the enforcement of preclusion, seem less unreasonable. As the *Murray* court stated, "Where Congress evinces a clear intent to preclude judicial review of final ad-

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179. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

180. Of course, the mere fact that judicial deference to implied legislative intent is an accepted practice is not enough, since this practice does not fulfill or replace the minimum procedural rights guaranteed by the Due Process Clause. Any legislative remedial scheme that impacts an individual's property interests would need to meet the floor due process requirement. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

181. RESTATEMENT (SECOND) OF JUDGMENTS: ADJUDICATIVE DETERMINATION BY ADMIN. TRIBUNAL § 83(4) (1982).

ministrative decisions, a failure to properly appeal a final order must be given preclusive effect."[182]

IV.
A SUGGESTED APPROACH TO ADMINISTRATIVE PRECLUSION

As discussed above, it appears that courts faced with a question of administrative preclusion adhere more carefully to the boundaries of the remedy provided by Congress in the relevant statute than they do to the framework provided in *Utah Construction*. Put another way, courts are more likely to engage in freeform due process review of actually employed procedures only in the absence of a legislative command that agency findings be treated as preclusive. Although this statutory approach may seem at odds with the principles of an adversarial approach to factfinding and the desire for a day in court, especially when the effect of its application is to preclude judicial review of the decision based on investigative proceedings, such an approach is in fact desirable—if it can be clearly expressed. The main danger in the statutory approach lies in any ambiguity and uncertainty felt by potential claimants and their attorneys. [183] If those individuals are concerned about an unpredictable judicial system that leads to administrative preclusion in some instances but not others, they may be driven to forgo an administrative remedy altogether and immediately file a claim in court. This would create a massive burden on an already strained judicial system.

Many statutes already provide that claimants must file a complaint with the appropriate agency before they may file a claim in court. Some require mere filing and then a waiting period, while others require administrative exhaustion before a judicial remedy will be available. Given the broad application of these administrative requirements, it is clear that administrative remedies are endorsed and encouraged by Congress. If Congress can properly determine that an administrative remedy is an appropriate first step (in instances where it is required) or an appropriate alternative (in instances where it is not), it seems logical that Congress can prop-

182. Murray v. Alaska Airlines, Inc., 237 P.3d 565, 576 (Cal. 2010).

183. Another danger of the statutory approach is, of course, that the statute itself will not provide avenues for relief that are procedurally sufficient to meet due process requirements. This is something that needs to be considered by courts on a statute-by-statute basis, and it is considered briefly in Part IV.C.

erly determine when the opportunity for an administrative remedy is at an end.[184]

Given these considerations, it is possible to outline a workable rule that will allow courts to both defer to the congressional will regarding agency remedies and to ensure that traditional administrative preclusion requirements are met.

When the statute providing remediation to the complainant establishes circumstances or procedures that create finality, courts should determine only whether those procedures were present in the administrative action when they conduct their preclusion analysis. If the circumstances dictate finality—as they did in *Murray*, *Fadaie*, and *Herrera*—courts should enforce repose. When the statute providing remediation to the complainant is silent as to finality, courts should engage the *Utah Construction* framework, adhering to a "past procedures" interpretation when addressing preclusion.

A. When to Use "Past Procedures": Where the Statute Does Not Clearly Create Finality

The "past procedures" interpretation is preferable where the statute does not address procedures creating finality for three reasons. First, as discussed in Part III.B, when the holding of *Utah Construction* is read in the context of the facts of the original case, it seems clear that the "past procedures" interpretation is more faithful to the intent of the Court in evaluating the appropriateness of administrative preclusion. Addressing the three factors emphasized in the exercise of administrative preclusion, the Court stated that all three factors had existed *prior to* the decision to enforce repose.[185]

Second, applying preclusion to administrative determinations that resemble judicial proceedings is more faithful to common law preclusion requirements. Common law res judicata requires a "final judgment on the merits."[186] Similarly, the Supreme Court has observed that "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair

184. *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 418–19 (1966) (noting that the agency's findings were "conclusive on the parties" because "finality is required by the language and policies underlying the disputes clause and the Wunderlich Act and by the general principles of collateral estoppel").

185. *See id.* at 422.

186. Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); Comm'r v. Sunnen, 333 U.S. 591, 597 (1948).

opportunity to litigate that issue in the earlier case."[187] It follows from these tenets that, where there is no legislative authority detailing the circumstances that create finality, an administrative proceeding must bear some resemblance to a judicial proceeding before it can be given preclusive effect.

Finally, as discussed in Part III.C, the past procedures approach better satisfies due process requirements than the future procedures approach. Even if the Due Process Clause does not dictate a single model of procedural fairness, surely the past procedures approach is preferable given that it ensures an adequate opportunity to litigate and a judicial character to the proceedings that actually occurred. The past procedures approach should better reduce the "risk of an erroneous deprivation" of property interests[188] because it guarantees that the individual with the interests at stake had an opportunity to actually voice arguments to the decisionmaker.

B. When to Adhere to the Statute: Where the Language Clearly Indicates When Agency Decisions Become Final

On the other hand, where the statute explicitly provides that the failure to appeal agency decisions will render them final and conclusive, and where the statute provides adequate procedures that, if pursued, create adequate opportunities for litigation and review, it should be the policy of courts and agencies to enforce administrative preclusion. This should be the standard approach even where the plaintiff has failed to avail herself of the full procedures available and has only received investigative review by the agency. This approach appropriately balances: (1) efficiency considerations; (2) proper deference to legislative intent; and (3) adequate satisfaction of due process requirements.

First, it is well established that administrative remedies ease the burden on the judicial system and promote efficient resolution of disputes.[189] Both courts and agencies are overwhelmed with plain-

187. Allen v. McCurry, 449 U.S. 90, 95 (1980) (internal quotation marks omitted). *See also* Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328–29 (1971).

188. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

189. *See, e.g.*, Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (stating that administrative remedies "aid[ ] judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding" and "promote[ ] judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency"); Almeida v. Plasters' & Cement Masons' Local 40 Pension Fund, 722 A.2d 257, 259 (R.I. 1998) (stating the same); Sonya Gidumal, McCarthy v. Madigan*:*

tiffs seeking restitution for actual or supposed injuries.[190] Given the undeniable strain already present in the legal system, it seems reasonable to limit and even wholly bar avenues to a remedy *where appropriate*. One place to start is with cases involving plaintiffs like Murray, Herrera, and Fadaie—plaintiffs who sought an administrative remedy, had clear statutory notice as to the repercussions of their failure to appeal the agency decision, and who, arguably, had relatively weak claims on the merits. The *Herrera* court pointed to the anomaly that would result if a hearing on the merits were a prerequisite to enforcing administrative preclusion:

> Moreover, Herrera's position would lead to the dubious result that a complainant with a weaker case (i.e., whose claim was dismissed without a hearing for lack of probable cause) would be in a more favorable position with respect to preclusion than a complainant with a stronger case (i.e., whose claim was supported by probable cause and thus merited a hearing).[191]

It may be argued that, although this approach would promote efficiency, it is inherently unfair to require unrepresented plaintiffs, who are not equipped to interpret statutes in order to determine exactly what circumstances create finality, to be aware of when they are facing preclusion and when they are not. This concerns the issue of whether adequate notice was provided and is considered below in the discussion of due process.

Second, as noted in Part III.C, judicial deference to legislative intent is the respected norm of the U.S. legal system, especially in the area of administrative law. The role of the court is to interpret and apply statutes as written, provided they are constitutional. As the Supreme Court has noted, "Once the meaning of an enactment

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Exhaustion of Administrative Agency Remedies and Bivens, 7 ADMIN. L.J. AM. U. 373, 381 (1993) (noting that exhaustion of administrative remedies promotes judicial efficiency).

190. A 2012 report issued by the Administrative Office of United States Courts provided statistics on the number of filings in federal courts for the fiscal year ending September 30, 2012. There were 57,501 filings in the regional courts of appeal and 278,442 civil filings in the U.S. district courts. HON. THOMAS F. HOGAN, ADMIN. OFFICE OF U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2012 ANNUAL REPORT OF THE DIRECTOR (2012), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx. Additionally, statistics from the Whistleblower Protection Program website, administered by the Department of Labor and OSHA, indicate that from 2005 to 2013, there have been 20,186 whistleblower cases received under various statutory schemes. *See* OSHA, *Whistleblower Investigation Data: FY2005–FY2013*, THE WHISTLEBLOWER PROTECTION PROGRAMS, http://www.whistleblowers.gov/whistleblower/wb_data_FY05-13-Q3.pdf (last visited Feb. 10, 2014).

191. Herrera v. Churchill McGee, LLC, 680 F.3d 539, 559 (6th Cir. 2012).

is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto."[192] Providing that a statute creating an administrative remedy meets minimum constitutional requirements, courts are right to adhere to the letter of the statute when it clearly states that an agency determination is final and conclusive in particular situations. The *Kremer* Court did exactly that:

> But for present purposes, *where we are bound by the statutory directive of § 1738*, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.[193]

Thus explicit legislative statements about available procedures are controlling where constitutionally sufficient.

Third, the approach of adhering to the clear mandate of the statute would satisfy the due process requirement of notice and the right to be heard if courts and agencies *clearly establish* their policy of following the letter of the statute when applying preclusion, even in cases where the prior proceedings lack judicial character and an adequate opportunity to litigate. Clarifying the primacy of the statutory scheme will, in turn, put potential claimants and their attorneys on notice of their own obligations and opportunities for litigation, which further bolsters the satisfaction of the Due Process requirement. A problem with the current practice of courts, which is to respect statutory finality despite nominally acknowledging adherence to the "judicial character" requirement, is that litigants do not expect, as a matter of popular understanding of the U.S. legal system, to be precluded after a mere investigation. If the policy of respecting legislative finality were explicitly stated, claimants and attorneys would take more care to follow statutory procedures when seeking administrative remedies.

C. Some Concerns Raised by the Statutory Approach

The suggested approach put forward by this Note finds support in the doctrinal and policy considerations outlined above. However, some underlying issues would need to be addressed if the approach were to be implemented. First, what is the correct result in the context of a statutory scheme that clearly indicates circumstances in which an agency determination will become final, but that also ar-

192. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194–195 (1978).

193. Kremer v. Chem. Const. Corp., 456 U.S. 461, 481 (1982) (emphasis added).

guably fails to provide adequate due process protections? Second, given the importance of notice to the claimant of finality to the satisfaction of the due process requirement, how can agencies better ensure that claimants are aware of the consequences of their actions in the administrative process?

Fully addressing these concerns is beyond the scope of this Note. The problem of statutory schemes providing finality with insufficient procedural protections is one that must be addressed by Congress each time it drafts new legislation creating private causes of action. Where Congress has failed to provide such protections, it is the role of the courts to enforce the Due Process Clause as necessary. As discussed in Part I.B, the Due Process Clause doctrine is amorphous in the context of administrative law and may require different protections in different circumstances. It seems clear that courts would and should uphold the constitutional right to due process, regardless of what a statutory scheme provides. The exact boundaries of that constitutional right are more difficult to quantify, and would require an in-depth analysis into the various causes of action provided by statutory law.

The statutory approach to administrative preclusion poses another problem: for the unrepresented plaintiff who will not read the applicable statute, how can it be ensured that notice of finality is properly provided? One solution that would put most, if not all, potential claimants on notice would be to implement semi-uniform agency procedures in the administrative offices handling claims subject to administrative preclusion. Such procedures and safeguards would include: verbal notice to the claimant given by an agency representative processing the administrative claim; written notices on claim forms and agency web pages that are written in plain language and presented in a large, bold font; and signs and posters inside agency offices alerting claimants to their rights and responsibilities. A concern with this approach is that, even with the warnings, claimants will not fully comprehend the meaning of preclusion or appreciate the procedures they must follow to avoid it. To address this, agencies could commission instructive film clips, ideally fifteen minutes or fewer in length, that are made readily available to individuals filing administrative claims. Claims filed online could easily require individuals to view the films by making their viewing a prerequisite to electronic claim submission. The procedure for claims filed in person in agency offices might, as part of the interview or waiting process, facilitate or strongly encourage the claimant to watch the explanatory film, which would be accessible online in the claimant's home or on screens at the agency.

These suggestions provide something of an answer to the drawbacks of the statutory approach, but if courts put this framework into practice, greater attention would be necessary—particularly to the problem of addressing statutes that create finality without satisfying due process requirements. At minimum, it would be important for claimants and attorneys to keep these concerns in mind while navigating the administrative process.

CONCLUSION

Plaintiffs and administrative claimants who have filed claims for relief are entitled to due process—protected by judicial oversight along the lines of *Utah Construction* and other frameworks—at a minimum. Due process can properly be satisfied by the availability of substantively adequate future procedures, such as the right to a thorough investigation, the right to appeal that investigation, the right to a hearing, and the right to appeal the ALJ's decision in a court of law. Where a statute clearly indicates that agency determinations will become final and not subject to judicial review, under certain circumstances it is proper for courts to adhere to the intent of the legislature and preclude further action, even if the agency proceedings leading to the determination lacked resemblance to a judicial proceeding. Courts should express this policy of remaining faithful to statutory schemes, despite the requirements created by *Utah Construction* and carried forward in *University of Tennessee v. Elliot*. If courts explicitly express that their practice is to respect statutorily crafted finality, this will put claimants and attorneys on notice of the importance of following through with administrative procedures so that they can avoid meeting an outcome like that of Kevin Murray.

APPENDIX

Cases Considering Applying Preclusion to an Investigative Finding

Table 1. Factors Discussed by Courts

(1) Whether the selection of an administrative remedy was voluntary or required by statute;
(2) Whether additional review procedures for the agency finding were available but not taken;
(3) Whether the factors from Utah Construction (or an analogous state opinion) were cited and how they were treated;
(4) Whether the claimant had an attorney; and
(5) Whether the agency finding became final under the statute.

Table 2. Factors Applied to Each Case Analyzed in This Note[194]

FACTOR	(1)	(2)	(3)	(4)	(5)
Murray	YES	YES	YES	**YES**	**YES**
Herrera	YES	YES	YES	**YES**	**YES**[195]
Parson	YES[196]	YES[197]	YES (analogous)	**YES**[198]	**NO**
Fadaie	YES	YES	YES (analogous)	Not discussed	**YES**
George	UNCLEAR[199]	YES	YES	Not discussed	**NO**
Hanna	NO	YES	YES	Not discussed	**NO**[200]
Mac Home	NO	YES[201]	YES (analogous)	Not discussed	**NO**[202]

194. Factors in bold are correlated with a court's determination as to preclusion.

195. The agency finding only became final as to the state claim, not the federal claim.

196. The statute provided for concurrent jurisdiction, on which the agency could intervene.

197. The court claim was converted into an administrative appeal.

198. Parson noted that he was unrepresented in the agency proceeding.

199. The availability of court action was decided as matter of first impression.

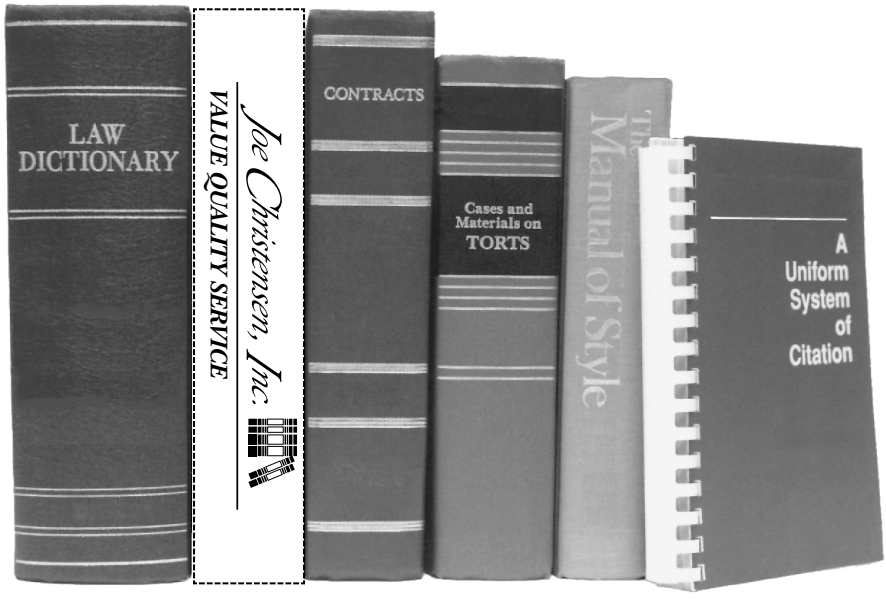
200. The agency finding only became final according to the court interpretation.

201. Additional review procedures were only available for the contractor, not for the contracting authority.

202. The procedure for finality was set by regulation; the regulation only made agency finding "final" if the contractor/subcontractor failed to timely appeal.

Table 3. Results in Each Case Analyzed in This Note

FACTOR	"Future Procedures" Interpretation Used?	Preclusive Doctrine Applied?
Murray	YES	YES
Herrera	YES	YES
Parson	NO	NO
Fadaie	YES	YES
George	NO	NO
Hanna	NO	NO
Mac Home	NO	NO



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