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## Fingerprints of Apartheid Residual Effects of the Former South African Government on Current DNA Legislation

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## NOTES

# FINGERPRINTS OF APARTHEID: RESIDUAL EFFECTS OF THE FORMER SOUTH AFRICAN GOVERNMENT ON CURRENT DNA LEGISLATION

*Alex D'Amico\**

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## INTRODUCTION

On March 23, 2004, Vanessa Lynch received a phone call of the worst kind—reporting news of her father’s murder.<sup>1</sup> When Lynch arrived at the house, she discovered a crime scene scrubbed clean.<sup>2</sup> Lynch learned that police failed to block off the crime area and discarded a bottle left by the murderers at the scene.<sup>3</sup> Lynch did not attribute this nonchalance toward evidence preservation to bad faith.<sup>4</sup> Instead, she blamed the nationwide lack of education regarding modern forensic techniques.<sup>5</sup>

In August 2004, Lynch founded the DNA Project, a non-profit organization with the mission to advance criminal justice in South Africa by expanding use of DNA evidence with a national DNA criminal intelligence database.<sup>6</sup> The DNA Project pursues this objective through three avenues: legislation, education, and building the infrastructure for a DNA database with capacity to grow.<sup>7</sup> In December 2008, the South African

1. See *Carte Blanche*, FORENSICS (Sept. 2, 2007, 12:00 PM), <http://beta.mnet.co.za/carteblanche/Article.aspx?Id=3379> (describing the murder of John Lynch); Moyiga Nduru, *South Africa: How Discarded Bottles Led to the ‘DNA Project’*, INTER PRESS SERV. NEWS AGENCY (Feb. 27, 2007), <http://www.ipsnews.net/afrika/nota.asp?idnews=36756> (identifying the incident as the catalyst for Vanessa Lynch’s emergence as the leader of the South African DNA movement).

2. See *Carte Blanche*, *supra* note 1 (describing the mismanaged murder investigation); Helen Bamford, *SA Way Behind on DNA Files: World’s Crime-Fighters Stunned by Lax Progress*, WEEKEND ARGUS (S. Afr.), Oct. 16, 2010, at 7 (providing Lynch’s account of the crime scene).

3. See *Carte Blanche*, *supra* note 1. (recalling police justification for the disposal of potential evidence because they “[d]id not have the technology to uplift DNA evidence from th[e] bottle,” but citing Lynch’s contention that even at the time, the authorities had the technology to lift a DNA sample from the bottle); Bamford, *supra* note 2 (conveying Lynch’s account of a flawed criminal investigation).

4. See *Carte Blanche*, *supra* note 1 (conveying Lynch’s belief that this was a case of ignorance rather than one of sabotage); Nduru, *supra* note 1. (quoting Lynch’s preference to not point fingers at the police).

5. See *Carte Blanche*, *supra* note 1 (discussing the shortfall of DNA education in South Africa); Bamford, *supra* note 2 (explaining Lynch’s insight into South African criminal investigation procedures).

6. See *Meet the Team*, DNA PROJECT, <http://dnaproject.co.za/about-us/meet-the-team> (last visited Oct. 9, 2012) (summarizing the founding of the DNA Project); *What We Do*, DNA PROJECT, <http://dnaproject.co.za/about-us/what-we-do> (last visited Jan. 7, 2013) (describing the mission of the DNA Project and the actions taken by the organization in pursuit of its mission).

7. See VANESSA LYNCH & CAROLYN HANCOCK, OPEN SOC’Y FOUND. FOR S. AFR., *DNA: THE 21ST CENTURY DETECTIVE* 41 (2009) (outlining the approach adopted by the

Cabinet adopted The Criminal Law (Forensic Procedures) Amendment Bill (“DNA Bill”), introducing the bill to Parliament in January 2009.<sup>8</sup> The DNA Bill remains in Parliament to this day and is unlikely to pass in the near future.<sup>9</sup> Issues such as mistrust of the government and privacy concerns present a particularly daunting challenge to lawmakers who wish to pass DNA legislation.<sup>10</sup>

Part I of this Note discusses the background of the DNA Bill. Next, Part II compares the issues facing the South African DNA movement with those encountered by the British and American programs and discusses the actions taken to address such issues in each case. Part II then explores the causes of the stagnation of the DNA Bill in the South African Parliament. Part III recommends a course of action for the future of the DNA Bill.

### I. THE DNA BILL AND SOUTH AFRICA

To fully illustrate the backdrop for the issues holding back the DNA Bill, Part I explores the South African government, both in terms of its history and current structure. Part I.A examines the government’s infrastructure and political

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DNA Project to expand the use of DNA evidence in South Africa); REPORT OF THE PORTFOLIO COMMITTEE ON POLICE: STUDY TOUR TO CANADA AND THE UNITED KINGDOM (Nov. 2, 2011) [hereinafter PORTFOLIO COMMITTEE REPORT] (providing a history of the DNA program).

8. See *A New DNA Bill*, DNA PROJECT, <http://dnaproject.co.za/legislation-homepage/legislation/a-new-dna-bill> (last visited June 12, 2012) (describing the bill and the issues that it addresses); *DNA: The Crime-Fighting Tool that Needs to Be Used*, WITNESS (S. Afr.) (Sept. 3, 2010), [http://www.witness.co.za/index.php?showcontent&global%5B\\_id%5D=46802](http://www.witness.co.za/index.php?showcontent&global%5B_id%5D=46802) [hereinafter *Crime-Fighting Tool*] (noting the importance of the DNA Bill); PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 3 (summarizing the history of the DNA Bill).

9. See Ernest Mabuza, *SA is Unlikely to Pass DNA Legislation Any Time Soon*, BUS. DAY (S. Afr.) (Feb. 28, 2011), <http://www.businessday.co.za/articles/Content.aspx?id=135709> (reasoning that the DNA Bill is unlikely to pass soon); Tcbogo Monama, *Stalled Bill Could Save Lives*, SOWETAN LIVE (S. Afr.) (Aug. 27, 2012), <http://www.sowetanlive.co.za/news/2012/08/27/stalled-bill-could-save-lives> (reporting the ongoing delay of the DNA Bill).

10. See Mabuza, *supra* note 9 (positing that someone could remove a DNA sample and plant it at a crime scene to frame someone else); see U.N. OFFICE ON DRUGS & CRIME, COUNTRY CORRUPTION ASSESSMENT REPORT: SOUTH AFRICA 2 (2003), available at <http://www.info.gov.za/otherdocs/2003/corruption.pdf> [hereinafter UN REPORT] (reporting on corruption in the South African government).

atmosphere to provide context for the DNA Bill. Part I.B examines the DNA Bill itself, discussing the key provisions and their purpose. Part I.C explains the benefits of a DNA database and identifies the effects of not passing DNA legislation.

#### A. *The South African Government*

South Africa's national government consists of three branches: executive, legislative, and judicial.<sup>11</sup> The legislative branch consists of Parliament, a bicameral law-making body.<sup>12</sup> The Cabinet, representing the executive branch, includes the President and numerous departments, each with the purpose of implementing legislation and providing designated services to the public.<sup>13</sup> In the judicial branch, the Constitutional Court and Supreme Court of Appeal serve as the highest appellate authorities for constitutional issues and non-constitutional issues respectively.<sup>14</sup>

The government structure as it exists today dates back to the fall of apartheid in 1994, which led to the adoption of a new constitution two years later.<sup>15</sup> The South African Constitution contains a bill of rights guaranteeing protection of enumerated

11. See S. AFR. CONST., 1996, ch. 4–5, 8 (creating the three branches of the new government).

12. See *How Parliament is Structured?*, PARLIAMENT OF THE REP. OF S. AFR., [http://www.parliament.gov.za/live/content.php?Category\\_ID=25](http://www.parliament.gov.za/live/content.php?Category_ID=25) (last visited June 12, 2012) (explaining that the National Assembly is the house elected directly by voters and the National Council of Provinces is elected by the provinces); *The Government of South Africa: Overview*, WESTERN CAPE GOV'T, [http://www.westerncape.gov.za/your\\_gov/595](http://www.westerncape.gov.za/your_gov/595) (last visited Oct. 3, 2012) [hereinafter *Government of South Africa Overview*] (noting that the National Assembly consists of 400 elected representatives and the National Council of Provinces consists of fifty-four permanent members and thirty-six special delegates representing the nine provinces).

13. See *Government of South Africa Overview*, *supra* note 12 (listing forty-one government departments as well as the names and positions of the officials in President Jacob Zuma's Cabinet); S. AFR. CONST., 1996, ch. 5, § 85 (outlining the role of the executive branch).

14. S. AFR. CONST., 1996, ch. 8, §§ 165–68 (distinguishing the authority of the two highest courts in South Africa). “Organs of [the] state . . . [such as Parliament and the Executive] must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.” *Id.* ch. 8, § 165(4).

15. See generally S. AFR. CONST., 1996 (memorializing the framework for the new South African government); *Our Constitution*, PARLIAMENT OF THE REP. OF S. AFR., [http://www.parliament.gov.za/content.php?Category\\_ID=11](http://www.parliament.gov.za/content.php?Category_ID=11) (last visited Nov. 2, 2011) (describing the “transition from apartheid rule to democracy”).

fundamental rights.<sup>16</sup> The South African Bill of Rights received international praise for two main reasons.<sup>17</sup> First, it affirms the idea of equality for all in post-apartheid South Africa.<sup>18</sup> Second, the Bill of Rights extends beyond traditional civil and political rights to protect second and third generation rights.<sup>19</sup> These rights include: the right to have the environment protected for future generations; health care, food, water, and social security; children's rights; education; and access to information.<sup>20</sup>

The framers of the South African Constitution took steps to ensure that future governments would recognize these protected fundamental rights.<sup>21</sup> The framers identified certain non-derogable rights such as equality, human dignity, and life.<sup>22</sup> The Bill of Rights creates a private right of action for infringement or threat to a protected right.<sup>23</sup> Demonstrating the

16. See S. AFR. CONST., 1996, ch. 2 (protecting the listed fundamental rights); see also David Kgosimore, *The Bill of Rights in the Constitution of the Republic of South Africa and Its Application Within the Criminal Justice System*, CRIME RESEARCH IN S. AFR. (2000), <http://www.crisa.org.za/volume1/rights.htm> (discussing the impact of the Bill of Rights).

17. See *Our Constitution*, *supra* note 15 (noting the positive changes introduced by the Bill of Rights); Kgosimore, *supra* note 16 (acknowledging the constitution's reputation as "the most liberal in the world").

18. See generally S. AFR. CONST., 1996, ch. 2 (representing both a symbolic and actual transition of great significance); *but cf.* Kgosimore, *supra* note 16, at 3–5 (arguing that in practice, the constitution falls short of equal protection for all).

19. See generally S. AFR. CONST., 1996, ch. 2 (guaranteeing protection of a series of fundamental rights); *but cf.* Kgosimore, *supra* note 16, at 1, 3–5 (positing that Bill of Rights protections have slighted crime victims). Second generation rights are socio-economic, while rights of the third generation are "collective," and often global in nature, such as the right to a healthy environment. See Frans Viljoen, *International Human Rights Law: A Short History*, UN CHRONICLE (Jan. 1, 2009), <http://www.un.org/wcm/content/site/chronicle/home/archive/issues2009/wcmustdisarm/internationalhumanrightslawashorthishistory> (defining the three generations of human rights).

20. See S. AFR. CONST., 1996, ch. 2, §§ 24, 27–29, 32 (protecting a series of fundamental rights).

21. See, e.g., *id.* ch. 2, § 37 (enumerating a series of non-derogable rights); *id.* ch. 2, § 38 (creating a right of action to enforce a protected right).

22. See *id.* ch. 2, §§ 36–37 (discussing the non-derogable rights). Protected rights may be limited only to the extent of what is "reasonable and justifiable . . . based on human dignity, equality and freedom, taking into account . . . a) the nature of the right; b) the importance of the purpose of the limitation; c) the nature and extent of the limitation; d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose." *Id.* ch. 2, § 36.

23. See *id.* ch. 2, § 38 (identifying five types of people who may approach the court: "a) anyone acting in their own interest; b) anyone acting on behalf of another person who cannot act in their own name; c) anyone acting as a member of, or in the

importance of these protected rights, the parliamentary committee report on the DNA Bill emphasized the rights applicable to the DNA Bill.<sup>24</sup>

The African National Congress (“ANC”) dominates the political landscape of the government.<sup>25</sup> Since the inception of the new government, the ANC has controlled the executive branch, from the first President Nelson Mandela to current President Jacob Zuma.<sup>26</sup> The party similarly controls the legislature, holding 264 seats within the National Assembly, or sixty-six percent of all seats, just one seat short of a decisive two-thirds majority.<sup>27</sup>

ANC prominence in South African government has transformed the political environment into a “de facto one-party system.”<sup>28</sup> The party has in the past held a powerful two-thirds “decisive majority,” giving it the power to unilaterally change

interest of, a group or class of persons; d) anyone acting in the public interest; and e) an association acting in the interest of its members”).

24. See PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 40–41 (identifying provisions from the Bill of Rights pertinent to the DNA Bill: human dignity (Section 10); privacy (Section 14); equality (Section 9); bodily and physical integrity (Section 12(2)(b)); the rights of arrested, detained and accused persons (Section 35); limitations of rights (section 36); and the rights of children (section 28)).

25. See *What Is the African National Congress?*, AFR. NAT’L CONG., <http://www.anc.org.za/show.php?id=172> (last visited Nov. 5, 2011) (describing that eight decades after its founding in 1912, the African National Congress achieved a breakthrough in the 1994 elections, when it received a mandate to construct a new constitution, which was adopted in 1996); *Members of Parliament*, ANC PARLIAMENTARY CAUCUS, <http://www.anc.org.za/caucus/mps.php> (last visited Nov. 5, 2011) (recognizing the ANC parliamentary majority).

26. Arnold Wehmhoerner, *Zanufication of South Africa’s ANC?*, FOUND. FOR EUR. PROGRESSIVE STUD. 3 (2012), <http://www.feps-europe.eu/uploads/documents/20120510-zanufication-of-ANC-wehmhoerner.pdf> (listing the four ANC presidents, also including Thabo Mbeki and Kgalema Motlanthe).

27. See Sebastian Berger, *South Africa Election: ANC’s 2/3 Majority Under Threat*, TELEGRAPH (Apr. 23, 2009, 10:26 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/5206189/South-Africa-election-ANCs-two-thirds-majority-under-threat.html> (explaining the significance of the two-thirds majority); *Members of Parliament*, *supra* note 25 (documenting the number of current ANC seats in the National Assembly and the National Council of Provinces).

28. Valery Ferim, *Flaws in Africa’s Dominant One-Party Democracies: The Case of Cameroon and South Africa*, 4 CAMEROON J. ON DEMOCRACY & H.R. 28, 34 (2010) (citing evidence that “people continue to vote for the ANC because of the lack of a credible alternative party”); Giovanni M. Carbone, *Political Parties and Party Systems in Africa: Themes and Research Perspectives*, 3 WORLD POL. SCI. R. 1, 9 (2007) (identifying the “liberation factor” as a key reason for continued public support of the ANC).

the Constitution.<sup>29</sup> Even without possession of the super majority, “there is a widespread perception that high-level corruption has become more overt and blatant under President Jacob Zuma” than during the Mbeki administration.<sup>30</sup>

Despite numerous well-documented successes in the transition to a democratic government, South Africa still faces the tall task of lessening “the harsh legacies of a century of segregation and apartheid.”<sup>31</sup> Racial tensions still exist in daily life and play a role in everyday social interaction.<sup>32</sup> Apartheid’s impact manifests itself in prominent feelings of public mistrust and animosity toward the State.<sup>33</sup> Stig Gezelius and Maria Hauck, authors of a study on compliance with state regulation as it pertains to world fisheries, assert that nation-building in South Africa depends on “redressing historical disparities” between racial groups “while simultaneously facilitating a single national

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29. Berger, *supra* note 27 (reporting the occurrence of this decisive majority, though conceding that the ANC has never actually exercised it to unilaterally change the Constitution). *But see Unit 8: Building Democracy After Apartheid*, S. AFR.: OVERCOMING APARTHEID, <http://overcomingapartheid.msu.edu/unit.php?id=16> (last visited Oct. 13, 2012) [hereinafter *Building Democracy*] (speculating that democracy is exercised uneasily in South Africa due to ANC “electoral domination” and that there are dangers of a “dominant party system,” citing former President Thabo Mbeki’s desire to expand executive power).

30. *South Africa: The Culture of Corruption and Intolerance in the ANC*, ALLAFRICA (July 26, 2012), <http://allafrica.com/stories/201207260987.html> (discussing the “scourge of corruption” that “has derailed the realization of [ANC] ideals”); *see also* UN REPORT, *supra* note 10, at 95, 107, 114 (reporting increasing corruption in South Africa).

31. *Building Democracy*, *supra* note 29 (contemplating the successes of South Africa since the end of apartheid, but also identifying the remaining problems: economic inequality, homelessness, violent crime, and a health crisis mainly caused by HIV/AIDS); *see also* James L. Gibson & Christopher Claassen, *Racial Reconciliation in South Africa: Interracial Contact and Changes Over Time*, 66 J. SOC. ISSUES 255, 271 (2010) (discussing racial tensions that remain in South Africa as a result of apartheid).

32. *See* Gibson & Claassen, *supra* note 31 (recognizing the impact that contact between racial groups has on racial reconciliation, but positing that consciousness of group identity correlates to increased prejudice and racial tension toward other groups); Stig S. Gezelius & Maria Hauck, *Toward a Theory of Compliance in State-Regulated Livelihoods: A Comparative Study of Compliance Motivations in Developed and Developing World Fisheries*, 45 LAW & SOC’Y REV. 435, 457 (2011) (describing the existence of lingering negative feelings caused by apartheid).

33. *See* Gezelius & Hauck, *supra* note 32 (discussing the phenomenon by which these negative feelings toward the government have caused new laws to be met with suspicion and have contributed to the absence of the legislature’s authority); Gibson & Claassen, *supra* note 31 and accompanying text (analyzing effects of these negative feelings toward the state).



identity.”<sup>34</sup> Arguably, South Africa has a long road ahead to reconcile these social tensions.<sup>35</sup>

Corruption by high-ranking and influential officials has stunted the reconciliation process between the people and the government.<sup>36</sup> A 2003 report by the United Nations Office of Drugs and Crime (“UN Report”) suggests that corruption in South Africa is a function of both a broken system and a sociological phenomenon of acceptance.<sup>37</sup> The UN Report cites poverty as a reason for widespread corruption.<sup>38</sup> Further, the UN Report specifically points to the media’s influence, to which some attribute the tendency to blame the person who accepts the bribe and not the one who gives it.<sup>39</sup> Prosecutors capitalize on this bias, often using the person who gave the bribe as a witness against the official who accepted it.<sup>40</sup> Though corruption was a major problem under the apartheid government, the public perception is that it has expanded further since the end of apartheid in 1994.<sup>41</sup>

34. Gezelius & Hauck, *supra* note 32, at 460–61 (characterizing the national identity as a “complicated manner,” and noting that in the two decades since apartheid ended, the nation has transitioned from a “complex legal system of racism” to “constitutional democracy.” (citing Kristina Bentley & Adam Habib, *Racial Redress, National Identity and Citizenship in Post-Apartheid South Africa*, in *RACIAL REDRESS AND CITIZENSHIP* (A. Habib & K. Bentley, eds. 2008)); *see also* S. AFR. CONST., 1996, ch. 1 (initiating this transition).

35. *See* Gezelius & Hauck, *supra* note 32, at 460–61 (contemplating the long-term effects of racial tension on the efficiency of government); *Building Democracy*, *supra* note 29 and accompanying text (identifying areas where South Africa can improve itself).

36. *See* Gezelius & Hauck, *supra* note 32, at 457–59 (drawing the connection between corruption and stifled reconciliation between the people and government); UN REPORT *supra* note 10, at 95, 107, 114, (painting a picture of increasing corruption in South Africa). The UN Report states that 13.3% of citizens living in Johannesburg reported experiencing corruption first hand at the city level, up from 7.6% in 1996 and that the perceived level of corruption within the ANC increased between 1995 and 2000. *See id.* at 123.

37. *See* UN REPORT, *supra* note 10, at 108 (suggesting that the South African mindset toward corruption has been warped, the public view of corruption allows it to be practiced, and the average South African views corruption as something condoned rather than reported).

38. *See id.* at 108–09 (analyzing social causes of widespread corruption in South Africa).

39. *See id.* (describing the hypocritical notion that giving a bribe is doing business, while accepting a bribe is criminal).

40. *See id.* (demonstrating the impact of the media’s bias in reporting on bribery).

41. Margot Rubin, *Perceptions of Corruption in the South African Housing Allocation and Delivery Programme: What It May Mean for Accessing the State*, 46 J. ASIAN & AFR. STUD.

### B. *The DNA Bill*

The DNA Bill establishes the National DNA Database of South Africa (“NDDSA”) and outlines database maintenance procedures for the South African Police Service (“SAPS”).<sup>42</sup> Section 15M authorizes a limited core of officials who may conduct DNA searches within the database and with whom analysts may share their findings.<sup>43</sup> Section 15O outlines a quality management system and guidelines for retention, storage, and destruction of samples in the database.<sup>44</sup> Section 15P establishes a penalty of a fine or up to fifteen years imprisonment for any party who misuses the database.<sup>45</sup>

Section 15Q requires the National Commissioner to issue instructions to carry out various aspects of the DNA program.<sup>46</sup> This provision addresses: 1) law enforcement procedures for sample collection, database maintenance, and use; 2) training courses to teach law enforcement officials proper procedures; and 3) development of information technology to facilitate database growth and efficient use of its contents.<sup>47</sup> Pursuant to Section 15S, the National Commissioner must submit to

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479, 483 (reporting that a 2010 survey rated South Africa as the fifty-fourth most corrupt nation out of 178 surveyed and citing a Public Services Commission Report which stated that “bribery, fraud, nepotism, and systematic corruption are common forms of corruption in contemporary South Africa”); *see also*, UN REPORT *supra* note 10, at 98 (reporting the perception that corruption has increased, and that statistics for serious crime support this belief).

42. *See* Criminal Law (Forensic Procedures) Amendment Bill, 2008, Bill 15F-G (S. Afr.) (outlining the composition of the database in terms of a crime scene index, reference index, convicted offenders index, and volunteer index, among others).

43. *See id.* § 15M (designating the National Commissioner as the appropriate authority to conduct the DNA search and listing the law enforcement officials privileged to DNA analysis results).

44. *See id.* § 15O (setting baseline provisions for the quality control and maintenance of the DNA database).

45. *See id.* § 15P (creating stiff penalties to protect against improper database use).

46. *See id.* § 15Q (listing the matters involved in the building and maintenance of the database for which the National Commissioner will issue further instructions).

47. *See id.* § 15Q (detailing the procedures to be implemented); *see also* Vivian Atwood, *Bill for DNA Database*, IOL NEWS (Jan. 16, 2009, 12:52 PM), <http://www.iol.co.za/news/south-africa/bill-for-national-dna-database-1.431348> (describing the procedure for sample collection: “Samples will be taken at the time of arrest. Each time a crime is committed, unknown samples gathered from the scene will be matched against those of known origin”).

Parliament an annual report on NDDSA operations and any additional reports that Parliament may request.<sup>48</sup>

South African DNA legislation will not require the construction of a program from scratch.<sup>49</sup> Substantial components of a national database already exist and have been used in South Africa for years.<sup>50</sup> South Africa uses DNA in other areas, such as to trace illegal rhinoceros horns and to maintain a database for the endangered cycad plant.<sup>51</sup> Yet, the expansion of DNA use for criminal investigation in South Africa has been significantly hindered in recent years by the current rules applied to DNA forensics.<sup>52</sup> The Criminal Procedure Act of 1977 (“1977 Act”), designed to apply to blood sampling, does not suffice to govern an entire DNA program.<sup>53</sup>

48. See Criminal Law (Forensic Procedures) Amendment Bill, 2008, Bill 15S (S. Afr.) (delegating to the National Commissioner the responsibility of reporting to Parliament).

49. See Helen Bamford, *Parly Team Embarks on DNA Database Fact-Finding Mission*, STAR (S. Afr.), June 18, 2011, at 8 (pointing out that South Africa currently has a DNA database containing 123,000 DNA profiles); LYNCH & HANCOCK, *supra* note 7, at 33 (observing that in the absence of DNA legislation, courts have applied Section 37 of the Criminal Procedure Act of 1977).

50. See Bamford, *supra* note 49 (identifying components of a future DNA program that already exist); Andrew Faull, *Forensic Science and the Future of Policing in South Africa*, ISS TODAY (Feb. 21, 2011), [http://www.issafrica.org/iss\\_today.php?ID=1235](http://www.issafrica.org/iss_today.php?ID=1235) (describing the capacity of a robotic DNA analyses facility in South Africa to analyze 800 DNA samples every day).

51. See Zani Magagula, *South Africa: Technology Catches Up with Rhino Poachers*, ALLAFRICA (Feb. 1, 2011), <http://allafrica.com/stories/201102011146.html> (lauding the advent of rhinoceros DNA sampling to aid prosecutors in tracking down suspects in possession of horns and to link a horn to its carcass); Erin Conway-Smith, *South Africa Protects Endangered Cycads: Beautiful Plants from the Time of the Dinosaurs Now Threatened By Thieves*, GLOBAL POST (May 30, 2010), <http://www.globalpost.com/dispatch/south-africa/100305/south-africa-endangered-cycad> (discussing a DNA database for the endangered and rare cycad plants, which in the past have been stolen, smuggled, and trafficked across borders).

52. See Tanya Waterworth, *Lobby to Cut Down on Rape: DNA Profiling Vital to Stopping Repeat Offenders, Says Expert*, INDEP. (S. Afr.), Nov. 27, 2010, at 9 (noting that “in South Africa DNA can only be taken via a full blood sample which must be drawn by a medical practitioner”); ANDREW D. THIBEDEAU, COUNCIL FOR RESPONSIBLE GENETICS, NATIONAL DNA DATABASES 2011 143–46 (2011) (describing the limitations on the taking and use of DNA evidence under the Criminal Procedure Act of 1977).

53. PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 9 (explaining provisions of the 1977 Act concerning blood sampling and the need for legislation to establish a DNA database); THIBEDEAU, *supra* note 52, at 143–45 (citing the statutes that comprise current South African DNA law).

Despite ongoing parliamentary scrutiny since January 2009, the legislature is unlikely to ratify the DNA Bill in the near future.<sup>54</sup> Portfolio committees in Parliament process legislation and oversee their designated government department.<sup>55</sup> The portfolio committee on police (“Portfolio Committee”) divided the original version of the DNA Bill into two separate bills: one for fingerprint collection and the other for the DNA database.<sup>56</sup> Shortly thereafter, Parliament passed the fingerprint collection and storage bill.<sup>57</sup> In early 2011, the Portfolio Committee put the DNA Bill on hiatus to prepare for a study tour to observe other nations’ procedures for maintaining a national database.<sup>58</sup>

In its report (“Committee Report”), the Portfolio Committee sought to understand “international best practices” both in terms of scientific and technological advancement in DNA analysis and legislation and policing advancements.<sup>59</sup> The Committee Report recognized the Cabinet’s intent for the DNA Bill to be an “integral part of the criminal justice system.”<sup>60</sup> The Portfolio Committee extended its time on the DNA Bill for two reasons: first, its belief that the public should actively participate in the process and second, to thoroughly study the legal

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54. See Mabuza, *supra* note 9 (“Legislation making it possible to collect DNA samples from suspects or convicted offenders is unlikely to be passed by Parliament any time soon.”); see also PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 40–44 (discussing factors that must be considered before passing the DNA Bill).

55. See *Committees*, PARLIAMENT OF THE REP. OF S. AFR. (Sept. 3, 2012), [http://www.parliament.gov.za/live/contentpopup.php?Item\\_ID=35](http://www.parliament.gov.za/live/contentpopup.php?Item_ID=35) (defining the role and functions of portfolio committees).

56. Mabuza, *supra* note 9 (noting the separation of the bill into two parts); see also *Crime-Fighting Tool*, *supra* note 8 (providing a history of the DNA Bill).

57. Mabuza, *supra* note 9 (documenting the DNA Bill’s delay in Parliament); see also *Crime-Fighting Tool*, *supra* note 8 (acknowledging that as of September 2010, the passage of the fingerprint bill had already resulted in the collection of about five million new fingerprints by the South African Police Force (“SAPF”).

58. See Mabuza, *supra* note 9 (quoting Diane Kohler Barnard, a member of the Portfolio Committee, who justified the study tour because the committee members “need to speak from an informed perspective”); see generally PORTFOLIO COMMITTEE REPORT, *supra* note 7 (describing the committee’s findings and recommendations from its study tour).

59. PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 4–5 (outlining the objectives for the study tour).

60. *Id.* at 5–6 (demonstrating the significance with which the executive branch views the DNA Bill).

challenges to DNA sampling faced by other nations.<sup>61</sup> The Portfolio Committee viewed the DNA Bill as a “priority” and “a matter of urgency,” yet wanted to devote extra time to the bill’s important issues.<sup>62</sup>

### C. *The Benefits of a DNA Database*

In the mid-1980’s, UK police became the first to use DNA profiling.<sup>63</sup> The world soon discovered several benefits from DNA databases: the ability to identify missing persons or unidentified human remains; use as an investigation tool for criminal intelligence; aid for the identification of persons alleged to have committed offenses; and evidence to be used in proving the innocence or guilt of accused persons in a court of law.<sup>64</sup> Before 2008, officials compared collected DNA samples to database samples on an ad hoc basis.<sup>65</sup> With the latest technological developments demonstrating the potential of DNA forensics, South African legislators gave new impetus to the development of a legislative framework for DNA analysis.<sup>66</sup>

Proponents of the DNA Bill view this as an opportunity to use DNA forensics as part of an initiative to reduce the high crime rate.<sup>67</sup> Many criminals in South Africa are repeat

61. See *id.* (discussing the committee’s interest in public hearings and a study tour).

62. *Id.* at 4 (explaining the Portfolio Committee’s dilemma).

63. See *Forensic DNA Crimeline*, DNA PROJECT: FIGHTING CRIME WITH SCIENCE, <http://www.dnaproject.co.za/content/content.php?type=article&section=20&id=13> (last visited Nov. 25, 2012) (recalling a 1988 case in which police linked one man to two separate rape and murders in order to exonerate another man who had confessed); LYNCH & HANCOCK, *supra* note 7, at 5 (summarizing the 1988 case).

64. See, e.g., LYNCH & HANCOCK, *supra* note 7 at 4, 16 (detailing anecdotes where DNA evidence served these purposes); Maya Shwayder, *To Catch a Killer: Examining the Policy Implications of Genomics*, HARV. GAZETTE, Feb. 17, 2011, available at <http://news.harvard.edu/gazette/story/2011/02/to-catch-a-killer> (documenting the process by which the Los Angeles Police Department used DNA analysis to solve the “Grim Sleeper” murder case).

65. See PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 8 (describing the status of the DNA program without legislation).

66. See *id.* (citing improvements to DNA technology during the 1990s); see also Faull, *supra* note 50 (describing the 2006 opening of the world’s first fully automated robotic DNA analyses facility in South Africa).

67. See, e.g., Waterworth, *supra* note 52, at 9 (asserting that a DNA database would aid the fight against crime in South Africa); see also Palash R. Ghosh, *South Africa: Murder Rate High, But Dropping*, INT’L BUS. TIMES (Oct. 17, 2011), <http://www.ibtimes.com/articles/232544/20111017/south-africa-crime-murder-rates->

offenders, and keeping evidence to convict them on the second or third offense may enable law enforcement to prevent unchecked crime sprees.<sup>68</sup> DNA evidence can also speed up trials because many defendants admit guilt when confronted with DNA evidence.<sup>69</sup>

The DNA Bill can serve as part of a broad movement to reduce the high crime rate in South Africa.<sup>70</sup> Currently, approximately 50 murders and 200 rapes occur every day.<sup>71</sup> Such crimes are often caused by repeat offenders who could be convicted with DNA evidence.<sup>72</sup> In the absence of standardized DNA procedures, the criminal justice system often does not hold criminals accountable for their misdeeds.<sup>73</sup> Additionally, the dearth of standardized DNA procedures due to the

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police-townships-courts-jails-drugs-gangs-apartheid.htm (noting the South African murder rate has declined since 1994, yet still is 4.5 times the global average).

68. See Waterworth, *supra* note 52 (citing Dr. Carolyn Hancock's statement that "South Africa has one of the highest rates of repeat criminal offenders in the world, with ninety percent of rapists likely to be repeat offenders"); Mabuza, *supra* note 9 (citing the statement of researcher Andrew Faull, of the Institute for Security Studies, that a small percentage of offenders account for a large percentage of all crimes).

69. See Waterworth, *supra* note 52, at 9 (noting that the presence of DNA evidence makes an admission of guilt more likely); Gill Gifford, *No Place to Hide for Criminals*, STAR (S. Afr.), Dec. 18, 2008 (citing Justice Ministry spokesperson Zolile Ngayi's prediction for an increase in plea deals caused by prosecutorial use of fingerprint and DNA evidence).

70. See PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 9–10 (stating that a DNA program should be part of a broad movement, along with other elements such as training police to have thorough investigative skills).

71. See Waterworth, *supra* note 52 and accompanying text (estimating the number of rapes at two hundred per day but insinuating that a significant number of rapes go unreported); Chris Asplen, *Girls Pay Price as Politicians Sit on Law Which Would Establish DNA Database*, INDEP. (S. Afr.), June 18, 2011, at 7 (criticizing politicians for sacrificing lives by failing to pass the DNA Bill).

72. See Attwood, *supra* note 47 (asserting that South Africa "ha[s] the highest rate of recidivism in the world. Most criminals don't commit just a single crime; they repeat their criminal activities over and over again"); LYNCH & HANCOCK, *supra* note 7, at 20 (stating that fifty-two percent of all criminals commit a second offense within six years of their initial arrest).

73. See Ghosh, *supra* note 67 (citing Dr. Johan Burger, senior researcher at the Crime and Justice Program Institute for Security Studies in Pretoria, South Africa, who estimated that only about twenty-seven percent of murders in South Africa are solved and fourteen percent lead to convictions); Asplen, *supra* note 71 (expressing dismay over the lack of criminal accountability).

nonexistence of DNA legislation risks irreparable damage to sensitive crime scene evidence in criminal investigations.<sup>74</sup>

Beyond the opportunity for the DNA Bill to quell recidivism, additional factors weigh on the Portfolio Committee's decision-making.<sup>75</sup> For instance, South Africa's DNA profile backlog continues to balloon.<sup>76</sup> The Portfolio Committee also must consider the bill's threat to personal liberties, an aspect upon which bill dissenters have seized.<sup>77</sup> Members of the Portfolio Committee have expressed their desire to stall the DNA Bill until they fully understand the problems nations with DNA legislation have encountered.<sup>78</sup>

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74. See NAT'L CRIM. JUSTICE REF. SERV., UNDERSTANDING DNA EVIDENCE: A GUIDE FOR VICTIM SERVICE PROVIDERS 4 (2001) (describing the threat of environmental contaminants, such as DNA from another source or bacteria, caused by heat and humidity); Nduru, *supra* note 1 (emphasizing Vanessa Lynch's belief that if South Africa had an effective DNA program in place at the time of her father's murder, the gang that killed her father could have been arrested and possibly linked to other crimes in the area); DNA PROJECT, DNA CSIS: FIGHTING CRIME WITH SCIENCE 6–12 (2009), available at <http://www.historybuffs.co.za/wp-content/uploads/2011/06/DNA-CAL-WATERMARKc.pdf> (identifying possible sources of contamination of DNA evidence and the proper procedures to handle DNA evidence at a crime scene).

75. See Nduru, *supra* note 1 (noting the extensive backlog of DNA samples); Karabo Kcepile, *DNA Proposal "Will Violate Rights"*, MAIL & GUARDIAN ONLINE (Feb. 19, 2009), <http://mg.co.za/article/2009-02-19-dna-proposal-will-violate-rights> (summarizing the position of opponents to the DNA Bill).

76. See Nduru, *supra* note 1 (asserting that South Africa's enormous backlog includes samples up to two year old, and implying that the small size of South Africa's DNA database in comparison to that of the United Kingdom's should be particularly bothersome considering the high South African crime rate); LYNCH & HANCOCK, *supra* note 7, at 46 (recognizing the problem of the increasing number of unanalyzed DNA samples).

77. See Kcepile, *supra* note 75 (quoting the South African Human Rights Commission, which said that "A person should not necessarily have a reduced expectation of privacy just by virtue of being arrested, as that would run contrary to the principle of the presumption of innocence"); LYNCH & HANCOCK, *supra* note 7, at 34 (recognizing the role of civil liberties in cautiousness toward the DNA Bill).

78. See *supra* note 58 and accompanying text (summarizing the desire of the committee members to become fully educated about DNA legislation before passing the DNA Bill); PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 5–6 (justifying the delay of the DNA Bill). *But see*, Press Release, Inkatha Freedom Party, South Africa: IFP Calls for Urgent Deliberation of DNA Bill (Aug. 28, 2012), <http://allafrica.com/stories/201208290257.html> (calling Parliament's attention to the negative impact caused by the DNA Bill's delay).

## II. THE ISSUES OF DNA LEGISLATION

Part II of this Note analyzes the issues pertaining to DNA legislation. It explores the DNA program development in the United Kingdom and United States to provide richer context for the issues facing South Africa's DNA program. Part II.A discusses the evolution of the DNA program in the United Kingdom. Part II.B describes the issues the United States DNA program has faced. Part II.C examines the factors causing the delay of the DNA Bill in South Africa.

### A. *The Evolution of the British National DNA Database*

Since the 1980s, the United Kingdom has been a world leader in the development of DNA profiling, both in the laboratory and the courtroom.<sup>79</sup> The British National DNA Database (“NDNAD”) has grown substantially, accumulating approximately five million profiles as of 2009, due to the DNA Expansion Programme (“Expansion Programme”), an initiative launched by the British government in April 2000.<sup>80</sup> The British government adopted the Expansion Programme pursuant to its aspiration to compile DNA samples of all “known active offend[ers].”<sup>81</sup> The enormously successful program exceeded its objective in approximately five years.<sup>82</sup> Two factors that

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79. See *Forensic DNA Crimeline*, *supra* note 63 (describing the history of DNA forensics in the United Kingdom); LYNCH & HANCOCK, *supra* note 7 at 5, 26 (documenting the first high-profile DNA conviction in 1988 and the establishment of the world's first DNA database in 1995). See also *S & Marper v. United Kingdom*, App. Nos. 30562/04 & 30566/04, 48 Eur. H.R. Rep. 1169, 1174 (2009) (holding that the retention of DNA samples from a broad range of individuals, including both convicts and the innocent, adults and youths, violated the “right to respect for private life”).

80. See LYNCH & HANCOCK, *supra* note 7, at 27 (attributing numerous successes to the Expansion Programme, including: enactment of DNA legislation; DNA awareness training; and the quadrupling of DNA detections over a five-year period); Graham Arnold, *A Presumption of Guilt: The Government's Response to S and Marper v UK*, 58 STUDENT LAW R. 12, 12 (2009) (stating that the British National DNA Database “NDNAD” contains DNA samples from 5.2% of the population, a remarkable proportion in comparison to the US database, which contains samples from just 0.5% of the population).

81. Carole McCartney, *The DNA Expansion Programme and Criminal Investigation*, 46 BRIT. J. CRIMINOLOGY, 175, 176 (2006) (reflecting upon the breadth of the Expansion Programme); see also LYNCH & HANCOCK, *supra* note 7, at 27–29 (discussing the far-reaching benefits of the Expansion Programme).

82. See McCartney, *supra* note 81 (documenting the success of the Expansion Programme through a massive government financial commitment (UK£240.8 million),



contributed to the rapid database growth are: 1) education, training, and experience for law enforcement, and 2) legislative reform and case law expanding authority for DNA collection.<sup>83</sup> These changes improved the turnaround time for DNA analysis from a year in 1997 to as fast as five days in 2001, yielding exponential database growth.<sup>84</sup>

The Expansion Programme also increased State authority to encroach upon personal liberties.<sup>85</sup> The Criminal Justice Act of 2003 (“Criminal Justice Act”) codified State authority to take DNA samples, allowing an officer to take a non-intimate sample such as a cheek swab “upon reasonable suspicion for an offence, regardless of whether it will indicate guilt or have any possibility of use during the investigation.”<sup>86</sup> Law enforcement used the intelligence screen, a controversial DNA analysis method known in the United States as the DNA dragnet, for which officials gather and analyze DNA samples from all individuals in a local area matching the description of a perpetrator at large.<sup>87</sup>

After two decades of virtually unabated growth for the NDNAD, the European Court of Human Rights (“ECtHR”)

an increase in personnel (650 additional jobs), and the automation of the DNA profiling processes); *see also* *DNA Expansion Programme 2000–2005: Reporting Achievement*, HOME OFFICE (2006), <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=246661> (reporting the tremendous growth of the NDNAD resulting from the Expansion Programme).

83. *See supra* note 81 and accompanying text (describing reasons for the success of the Expansion Programme). The expanded power for DNA collection pertained to the range of people from whom officials could take samples, the diminishing level of authority required to request a DNA sample, and permission for the indefinite sample retention. *See* McCartney, *supra* note 81.

84. *See supra* note 81 and accompanying text (identifying the positive results from the DNA Expansion Programme).

85. *See* Criminal Justice Act, 2003, c. 44 (U.K.) (expanding State authority to take DNA samples); McCartney, *supra* note 81, at 177 (noting the expansion of State authority).

86. Criminal Justice Act, 2003, c. 44 (U.K.) (initiating numerous changes in criminal procedure, including the taking of non-intimate samples without consent); McCartney, *supra* note 81, at 177 (describing the impact of the Criminal Justice Act).

87. *See* McCartney, *supra* note 81, at 179 (recognizing substantial criticism of the mass screen method because it is prone to profiling and assumptions of guilt, compelling individuals to prove their innocence by providing a non-matching DNA sample); Arnold, *supra* note 80, at 13 (demonstrating that the NDNAD is prone to racial profiling by citing the proportions of several racial populations included in the database: twenty-seven percent of the entire black population, forty-two percent of the black male population, seventy-seven percent of young black men, nine percent of the Asian population, and six percent of the white population).

challenged British sample retention procedures in the 2008 case of *S and Marper v. The United Kingdom*.<sup>88</sup> In 2001, police separately arrested Mr. S for robbery and Michael Marper for harassment of his partner.<sup>89</sup> Upon arrest, officials collected DNA samples and fingerprints.<sup>90</sup> Following the dismissal of charges, both Mr. S and Marper asked the police to destroy their fingerprints and DNA samples.<sup>91</sup> The police refused, and Mr. S and Marper brought breach of privacy claims to the ECtHR under Articles 8 and 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>92</sup>

The *Marper* Court analyzed the British system for “systematic and indefinite retention” of DNA materials from persons acquitted or who otherwise had their charges dropped.<sup>93</sup> The Court cited the Nuffield Council on Bioethics, which identified sample retention as significantly more troublesome than sample procurement.<sup>94</sup> The Court voiced concern with potential privacy issues, contemplating the invasive process of familial searching through which authorities could uncover previously unknown or concealed genetic

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88. See generally *S & Marper v. United Kingdom*, App. Nos. 30562/04 & 30566/04, 48 Eur. H.R. Rep. 1169, 1200 (2009) (concluding that through its “blanket and indiscriminate” sample retention policy, the United Kingdom had “overstepped” the acceptable level of power to take and retain DNA samples); see also *DNA Database: Campaigners Welcome Ruling that DNA-holding Breaches Human Rights*, TELEGRAPH (Dec. 04, 2008) [hereinafter *DNA Database Breaches Human Rights*], (describing the popular belief that the *Marper* Court properly found the indefinite NDNAD retention procedures to violate privacy rights of the innocent).

89. See *S & Marper*, 48 & Eur. H.R. Rep. at 1172. Mr. S was eleven years of age at the time of his arrest, causing the court to take extra care to protect his rights under the UN Convention on the Rights of the Child. See *id.* at 1182.

90. See *id.* at 1172 (conveying the facts of the case).

91. See *id.* (elaborating that authorities relieved both individuals of their charges—Mr. S due to an acquittal and Marper for reconciling with his partner—and summarizing the struggle of Mr. S and Marper to remove their DNA from the NDNAD).

92. See *id.* (describing the refusal to remove DNA from the NDNAD that led Mr. S and Marper to bring their cases to the European Court of Human Rights (“ECtHR”)). The ECtHR consolidated the two cases. See *id.*

93. *Id.* at 1174–75, 1184–85 (discussing the challenged protocols).

94. See *id.* at 1179–80 (citing NUFFIELD COUNCIL ON BIOETHICS, *THE FORENSIC USE OF BIOINFORMATION: ETHICAL ISSUES* (2007), available at <http://www.nuffieldbioethics.org/sites/default/files/The%20forensic%20use%20of%20bioinformation%20-%20ethical%20issues.pdf>).

relationships.<sup>95</sup> The Police and Criminal Evidence Act 1984 (“PACE”) originally required fingerprints or DNA samples taken from an individual suspected of an offense to be destroyed “as soon as practicable” if and when the person is no longer suspected of committing the offense or “as soon as [the fingerprints or samples] have fulfilled the purpose for which they were taken.”<sup>96</sup> The Court explained the changed standard under the Criminal Justice and Police Act 2001, permitting retention of fingerprints and samples “after they have fulfilled the purposes for which they were taken . . .”, so long as the prolonged retention is “for purposes related to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution . . . .”<sup>97</sup> Following its discussion of PACE, the Court turned to Article 8 of the European Convention of Human Rights, which protects the right to privacy.<sup>98</sup> The Court held that the indefinite retention of samples from persons not convicted of crimes encroaches too far upon the right to privacy guaranteed in Article 8.<sup>99</sup>

Human rights activists applauded the *Marper* decision, claiming it ushered the DNA movement away from the blanket retention policy for profiles of all arrestees regardless of innocence.<sup>100</sup> Parliament issued its response to *Marper* with the

95. See *id.* (referencing a host of ethical and logistical issues arising from DNA retention); see also *id.* at 1186–87 (noting that the National Council for Civil Liberties and Privacy International each made submissions to the Court, highlighting the privacy issue caused by retention of highly sensitive DNA information).

96. *Id.* at 1174–75 (summarizing the effect of PACE fingerprint collection).

97. *Id.* at 1174 (citing the shift in retention policy).

98. See *id.* at 1187 (citing Article 8); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, [hereinafter ECHR], available at <http://www.unhcr.org/refworld/docid/3ac6b3b04.html>. Article 9 of the ECHR states: “(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

99. See *S & Marper*, 48 Eur. H.R. Rep. at 1202 (rejecting the existing DNA retention policy).

100. See *DNA Database Breaches Human Rights*, *supra* note 88 (quoting Shami Chakrabarti, director of Liberty who said that *S & Marper* “is one of the most strongly worded judgments that Liberty has ever seen from the Court of Human Rights.”); see

Protection of Freedoms Act 2012 (“2012 Act”).<sup>101</sup> The 2012 Act provides for sample destruction within six months, and caps arrestee profile retention at three years.<sup>102</sup>

B. *DNA as Evidence and the DNA Database in the United States*

In the late 1980s, the US government created the Combined DNA Index System (“CODIS”), a compilation of national, state, and local DNA databases accessible to law enforcement agencies.<sup>103</sup> Laboratories from around the country can access the national collection of DNA samples, known as the National DNA Index System (“NDIS”) to conduct comprehensive DNA searches.<sup>104</sup> As of July 2012, the NDIS contained nearly 10 million offender profiles, 1.2 million arrestee profiles, and 450,000 forensic profiles.<sup>105</sup>

Courtroom acceptance of DNA evidence has evolved since DNA evidence emerged in the late 1980s. Originally, very few cases even questioned DNA admissibility.<sup>106</sup> Courts relied on the

also LYNCH & HANCOCK, *supra* note 7 at 29 (discussing the important changes to the retention framework).

101. See generally Protection of Freedoms Act, 2012, c. 9, part 1, c. 1 (U.K.) (reducing the scope of DNA retention); PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 33 (describing the legislative response to *Marper*).

102. See Protection of Freedoms Act, 2012, c. 9, part 1, c. 1, §3, 14 (U.K.) (outlining specific protocols for the retention and destruction of fingerprints, DNA, and similar types of samples).

103. See LYNCH & HANCOCK, *supra* note 7, at 30 (describing the composition of the CODIS in terms of its two main indexes: the Convicted Offender Index, containing the DNA profiles of individuals convicted of certain types of crimes, and the Forensic Index, containing DNA profiles obtained from crime scene evidence); Brandon L. Garrett, *DNA and Due Process*, 78 *FORDHAM L. REV.* 2919, 2931–32 (2010) (discussing the emergence of Combined DNA Index System (“CODIS”) as an important development in modern DNA testing).

104. See *supra* note 103 and accompanying text (explaining the framework for the US DNA database).

105. See *CODIS-NDIS Statistics*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/codis/ndis-statistics> (last visited Sept. 1, 2012) (reporting that CODIS has produced over 185,000 hits).

106. See Dan Krane & William Thompson, *Chapter 11: DNA in the Courtroom*, in *PSYCHOLOGICAL & SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS*, § 11:44 (2003) (providing three reasons for the American justice system’s initial unquestioning acceptance of DNA evidence: 1) lack of awareness of the potential problems with DNA testing; 2) standard defenses to DNA analysis had not yet emerged; and 3) private laboratories conducting most early DNA work did not openly share their data). *But see* Dist. Att’y Office v. Osborne, 129 S. Ct. 2308 (2009) (embracing the advent of DNA evidence into

“general acceptance” standard, which dated back to the 1923 case *Frye v. United States*.<sup>107</sup> Judge Josiah Van Orsdel of the United States Court of Appeals for the District of Columbia wrote that to be admissible at trial, scientific evidence “must be sufficiently established to have gained general acceptance” in its field.<sup>108</sup> In 1975, Rule 702 of the Federal Rules of Evidence codified guidelines concerning the admission of scientific or technical information for courts in civil and criminal litigation.<sup>109</sup> The Supreme Court clarified Rule 702 and superseded *Frye* in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>110</sup> *Daubert* held that the *Frye* standard was not necessary to admit scientific evidence.<sup>111</sup> *Daubert* vested power in the judge to assess, based on relevance and reliability, the validity of the scientific reasoning presented at trial.<sup>112</sup> In *Kumho Tire v. Carmichael*, the Supreme Court expanded the *Daubert* test to apply to technology and other areas of specialized knowledge.<sup>113</sup>

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criminal law, the Supreme Court nevertheless cautiously chose to avoid creating a broad liberty interest to post-conviction DNA testing).

107. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (disallowing the admission of evidence from the new and relatively untested polygraph machine); see also Christopher Lach & Thomas Patsis, DNA Fingerprinting 23 (Jan. 11, 2006) (unpublished project report, Worcester Polytechnic Institute), available at <http://www.wpi.edu/Pubs/E-project/Available/E-project-011306-130417/unrestricted/IQP.pdf> (recognizing *Frye* as the “golden standard” for the admission of new technical evidence into the courtroom).

108. *Frye*, 293 F. at 1014.

109. See Joseph Ferraro & Jacqueline M. Vernon, *Federal Rules of Evidence Amendments: Will Proposed Changes to 701, 702, Narrow Gate to Expert Testimony in Patent Trials?*, 224 N.Y.L.J. S4, S4 (2000) (documenting the 1975 adoption of Federal Rule of Evidence 702, “designed to liberalize the admission of scientific and technical evidence”); see also FED. R. EVID. 702 (permitting an expert witness to present “scientific, technical, or other specialized knowledge . . . if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case”).

110. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 597 (1993) (establishing the new standard for scientific evidence); see also Joseph T. Walsh, *Keeping the Gate: The Evolving Role of the Judiciary in Admitting Scientific Evidence*, 83 JUDICATURE 140, 140 (1999) (identifying the *Daubert* decision as a watershed event for the admission of scientific evidence).

111. See *Daubert*, 509 U.S. at 596–97.

112. See *id.*

113. 526 U.S. 137, 141 (1999). See Walsh, *supra* note 110, at 142 (characterizing *Kumho Tire* as the Court’s decision to champion the discretionary role of the trial judge as the “gatekeeper” for evidence).

Beyond the developments to the Federal Rules of Evidence, legislators have codified the role of DNA through both state and federal statutes.<sup>114</sup> The federal statute, comprised primarily of the DNA Identification Act of 1994, gives the Director of the FBI the power to establish a database consisting of DNA profiles from the convicted and the indicted along with other samples collected with proper legal authority.<sup>115</sup> The statute outlines necessary credentials for any laboratory that conducts DNA analysis for the database, and requires the laboratory to undergo a biannual external audit.<sup>116</sup> It enumerates permissible reasons for DNA information disclosure and expressly limits the power of individuals with access to such information.<sup>117</sup> The statute requires the Director of the FBI to “promptly expunge” DNA information in the database for any convicted or charged individual who receives a final court order overturning or dismissing all charges.<sup>118</sup> Many states follow a model similar to the federal statute.<sup>119</sup>

DNA evidence in the United States commands particular attention in the context of death penalty cases.<sup>120</sup> Statistics showing a trend of false convictions in capital cases demonstrate

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114. See 42 U.S.C. § 14132 (2006) (outlining rules for the establishment and maintenance of the national DNA database); see, e.g., N.Y. EXEC. LAW § 995-c (McKinney 2010) (establishing procedural rules concerning New York’s computerized DNA identification index).

115. See 42 U.S.C. § 14132(a) (permitting retention of analyses of DNA samples recovered from crime scenes, recovered from unidentified human remains, and voluntarily contributed from relatives of missing persons). The statute contains a caveat that those DNA samples submitted for the purpose of eliminating an individual from an investigation are not included in the NDIS. *Id.*

116. See *id.* § 14132(b) (regulating the necessary credentials for laboratories with access).

117. See *id.* §§ 14132(b)–(c) (restricting access to database information).

118. See *id.* § 14132(d) (emphasizing the important expungement procedure).

119. See, e.g., N.Y. EXEC. LAW § 995-c (McKinney 2010) (outlining New York State DNA procedures); FLA. STAT. § 943.325 (2012) (amending state DNA legislation passed between 2000 to 2009).

120. See Anne-Marie Moyes, *Assessing the Risk of Executing the Innocent: A Case for Allowing Access to Physical Evidence for Posthumous DNA Testing*, 55 VAND. L. REV. 953, 990–92 (2002) (quoting Supreme Court Justice Sandra Day O’Connor who in 2001, amidst the exoneration of a flurry of death row inmates due to DNA evidence, conceded that “the system may well be allowing some innocent defendants to be executed”); Greta Proctor, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211, 234–35, nn.121–22 (2007) (stressing the need for a higher standard of evidentiary proof in capital cases).

the importance of evidence that can more conclusively prove innocence or guilt.<sup>121</sup> Former US Supreme Court Justice Harry Blackmun, referencing the risk of putting the innocent to death, questioned whether the justice system should engage in capital punishment at all.<sup>122</sup> This risk of putting an innocent man or woman to death has caused the American justice system to contemplate the need for evidence which more conclusively proves guilt.<sup>123</sup>

One important component of the US DNA movement is the legal work of the Innocence Project, a student clinic at the Cardozo School of Law.<sup>124</sup> A non-profit organization created in 1992 by Barry Schreck and Peter Neufeld, the Innocence Project attempts to use DNA evidence to exonerate the wrongfully convicted.<sup>125</sup> Collaboration between the Innocence Project and legislators produced the Justice for All Act of 2004 (“Justice for

121. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 91–92 (2008) (commenting that “[f]alse capital convictions are of particular salience to the administration of the death penalty” and noting that most capital cases are reversed on appeal or post-conviction, with seven percent of defendants with an overturned sentence completely exonerated from the capital crime at the retrial); see also Proctor, *supra* note 115, at 234 n.121 (referencing a 1992 study identifying twenty-three specific instances in which the United States likely put an innocent man to death).

122. See Proctor, *supra* note 115, at 236 (quoting Blackmun’s 1994 concession that he would no longer tinker with the procedures for capital punishment after twenty years spent trying and failing to develop rules to “accurately and consistently determine which defendants ‘deserve’ to die”).

123. See Proctor, *supra* note 115, at 238–39 (referencing a bill proposed by former Massachusetts Governor Mitt Romney, reinstating the death penalty in Massachusetts by using modern forensics to instill a new heightened standard for capital punishment, changing the traditional “beyond a reasonable doubt” to a “beyond all doubt” or “absolute proof” standard in order to address concerns about putting the innocent to death); *supra* notes 115–22 and accompanying text (documenting the development of US death penalty law).

124. See *About the Innocence Project*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about> (last visited Oct. 19, 2012) (identifying the Innocence Project objectives to exonerate the wrongfully convicted with DNA evidence and to reform the criminal justice system to prevent further injustice); Samuel R. Gross & Michael Shaffer, EXONERATIONS IN THE UNITED STATES 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 33 (2012), available at [http://globalwrong.files.wordpress.com/2012/05/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](http://globalwrong.files.wordpress.com/2012/05/exonerations_us_1989_2012_full_report.pdf) (noting the correlation between the high number of exonerations in Illinois and New York and active innocence projects in those states).

125. See *supra* note 124 and accompanying text (explaining the background of the Innocence Project).

All Act”), which created a series of grants for programs that expand DNA use.<sup>126</sup>

Since its inception, the US DNA initiative has made significant progress.<sup>127</sup> The US DNA movement has produced more than 280 post-conviction exonerations and the ratification of DNA laws in all fifty states.<sup>128</sup> The DNA movement prevailed in *Skinner v. Switzer*, where the Supreme Court held that prisoners can compel prosecutors to turn over DNA evidence that may exonerate prisoners post-conviction.<sup>129</sup> Additionally, some courts have identified a defendant’s right to obtain DNA evidence post-conviction pursuant to the constitutional right to be released upon proof of actual innocence.<sup>130</sup> Despite this progress, commentators suggest gaps still exist in DNA legislation.<sup>131</sup>

126. See Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended in scattered sections of the U.S. Code) (outlining the government’s plan for expansion of DNA use for criminal forensics); see also *FAQs: How Much Does DNA Testing Cost?*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/How\\_much\\_does\\_DNA\\_testing\\_cost.php](http://www.innocenceproject.org/Content/How_much_does_DNA_testing_cost.php) (last visited Nov. 22, 2011) (demonstrating the importance of the grant programs under the Justice for All Act because DNA testing costs over US\$1,000 per test and the average cost of testing for a case is US\$8,500).

127. See *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Oct. 12, 2012) (summarizing this progress); Nina Morrison, *US Supreme Court: Inmate Can Seek DNA Testing*, INNOCENCE BLOG (Mar. 8, 2011, 5:50 PM), [http://www.innocenceproject.org/Content/US\\_Supreme\\_Court\\_Inmate\\_Can\\_Seek\\_DNA\\_Testing.php](http://www.innocenceproject.org/Content/US_Supreme_Court_Inmate_Can_Seek_DNA_Testing.php) (documenting a Supreme Court victory for the DNA movement in *Skinner v. Switzer*).

128. See Michelle Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 767 (1999) (exploring the rapid growth of DNA legislation in the states throughout the American nation, identifying weaknesses in state databanking laws concerning issues such as genetic privacy, and suggesting policies that could remedy those weaknesses); *Mission Statement*, *supra* note 127 (noting that seventeen of the exonerated individuals served time on death row).

129. See *Skinner v. Switzer*, 131 S. Ct. 1289, 1298–300 (2011) (establishing a claim to compel DNA evidence distinct from a post-conviction *Brady* claim, which entitles a defendant to all exculpatory evidence, because *Brady* evidence is by definition favorable to the defendant, whereas DNA evidence may or may not be favorable to the defendant); Morrison, *supra* note 127 (characterizing *Skinner* as a signal of the Court’s willingness to consider necessary change to incorporate DNA into the law).

130. *Dist. Att’y Office v. Osborne*, 129 S. Ct. 2308 (2009) (suggesting that such a liberty may exist); Garrett, *supra* note 103, at 2938 (recognizing that all sides in *Osborne* acknowledged the entitlement of a convict to DNA testing in “some circumstances” under the Due Process Clause).

131. See Hibbert, *supra* note 128, at 819–25 (recognizing areas for improvement in the DNA programs among the states); Jonathan F. Will, *DNA as Property: Implications on*



US DNA program expansion has faced significant opposition.<sup>132</sup> The First and Ninth Circuits have contemplated the long-term danger of affording the police dragnet power.<sup>133</sup> By definition, the DNA dragnet requires no probable cause or reasonableness for searches and seizures and is therefore difficult to reconcile with the Fourth Amendment.<sup>134</sup> Documented cases of prosecutorial misconduct and mishandling of evidence in the laboratory reflect the concerns of these circuit courts.<sup>135</sup>

Ninth Circuit Chief Judge Alex Kozinski suggested in dissent that there should be no expectation at all for DNA privacy protection.<sup>136</sup> Kozinski responded to criticism of increased police powers by noting that DNA privacy concerns resemble the concerns J. Edgar Hoover initially faced when he

*the Constitutionality of DNA Dragnets*, 65 U. PITT. L. REV. 129, 129–30 (2003) (asserting the need for a higher standard of constitutional protection for an individual's DNA).

132. See McCartney, *supra* note 81 and accompanying text (referencing criticism of the DNA dragnet, a product of US DNA program expansion); Will, *supra* note 131, at 130 (arguing that when the government seeks to deprive an individual of her DNA, a standard of constitutional protection greater than that provided during a dragnet must be provided).

133. See *United States v. Weikert*, 504 F.3d 1, 15 (1st Cir. 2007) (noting that DNA legislation could empower the government to conduct "DNA dragnets" that would channel George Orwell); *United States v. Kincade*, 379 F.3d 813, 849 (9th Cir. 2004) (Reinhardt, J., dissenting) (identifying the "gradual erosion" of Fourth Amendment protections in US DNA programs, which could lead to the common use of DNA dragnets).

134. See U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures); McCartney, *supra* note 81 and accompanying text (discussing the implications of the DNA dragnet on personal liberties); Will, *supra* note 131, at 130 (criticizing the unreasonable sweeping nature of the dragnet).

135. See Kevin C. McMunigal, *Prosecutors and Corrupt Science*, 36 HOFSTRA L. REV. 437, 437 (2007) (alluding to cases where prosecutors used corrupt scientific evidence to secure a conviction which was revealed later by post-conviction re-tests); Jane C. Moriarty, *Misconvictions, Science, & The Ministers of Justice*, 86 NEB. L. REV. 1, 6–9 (2007) (citing potential flaws in DNA evidence: false testimony by lab experts, uncertified laboratories handling critical DNA material, DNA analysis being conducted by individuals outside of scientific fields, and individuals who claim to be able to gauge information from the DNA analysis which traditionally members of the scientific community cannot).

136. See *Kincade*, 379 F.3d at 873 (9th Cir. 2004) (Kozinski, J., dissenting) (positing that because people leave behind a "bread crumb trail" of material useful for DNA testing virtually wherever they go, they cannot have a reasonable expectation of privacy as it pertains to their DNA); see also Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 875 (noting that "the Fourth Amendment does not appear to restrict the initial collection of abandoned DNA for any reason.").

pushed for fingerprinting before American society embraced it.<sup>137</sup> The positive publicity for exonerations of the wrongly convicted, along with the American precedent of embracing fingerprinting technology, indicates the likelihood that the American DNA program will continue to gain acceptance.<sup>138</sup> Nevertheless, these lingering unresolved issues suggest that *Marper*-like challenges to the US DNA program probably will temper its rapid expansion.<sup>139</sup>

*C. South African DNA Legislation: "It is Easier to Ask Forgiveness  
Than it is to Get Permission"*

The United Kingdom, United States, and South Africa each began using DNA for criminal investigation on an ad hoc basis, adopting it as a useful tool to aid the pursuit of justice.<sup>140</sup> All three nations had statutes regulating criminal evidence in general, which courts applied to DNA evidence.<sup>141</sup> Then, the US Congress and the British Parliament each passed specific DNA legislation.<sup>142</sup> South Africa has not yet been able to pass similar DNA legislation.<sup>143</sup> In Part II.C, this Note analyzes two main reasons for the slowdown of the DNA Bill: 1) public mistrust of

137. See *Kincade*, 379 F.3d at 873–74 (9th Cir. 2004) (Kozinski, J., dissenting).

138. See *supra* notes 127–30, and accompanying text (illustrating a generally positive American outlook toward new types of scientific evidence and DNA in particular as a tool to exonerate the wrongly convicted); *Skinner v. Switzer*, 131 S. Ct. 1289, 1298–300 (2011) (awarding a significant legal victory for the US DNA movement by recognizing a claim to compel DNA evidence distinct from a post-conviction *Brady* claim).

139. See, e.g., *Dist. Atty Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009) (recognizing the dearth of Supreme Court rulings thus far substantially weighing in on DNA issues); *Kincade*, 379 F.3d at 849 (9th Cir. 2004) (identifying potential future issues with the DNA program).

140. See *supra* notes 63–65 and accompanying text (documenting early DNA forensics success stories).

141. See LYNCH & HANCOCK, *supra* note 7, at 33, 41 (describing the application of pre-existing statutes to DNA evidence; see also *supra* notes 53, 96, 114, 106–19 and accompanying text (citing each nation's pre-DNA legislation)).

142. See 42 U.S.C. § 14132 (2006) (codifying the US DNA program); Protection of Freedoms Act 2012, ch. 9 (U.K.) (regulating UK DNA management for criminal investigation).

143. See *supra* note 9 and accompanying text (discussing the stagnation of DNA legislation in Parliament).

government and 2) cautiousness toward infringement upon the right to privacy.<sup>144</sup>

### 1. Public Mistrust Runs Deep

This Note identifies three sources of public mistrust of the government: 1) corruption; 2) vestiges of the apartheid era; and 3) the de facto one-party political system. Part II.C analyzes each of these factors and its effects. This Part concludes with a discussion of public mistrust and its effect on government.

The new Republic of South Africa emerged as an apartheid-free democracy in 1994.<sup>145</sup> The nation faced the arduous task of trying to shed the long-term effects of systematic racism and discrimination.<sup>146</sup> The resulting government has operated with a democratic infrastructure slowed by mistrust and suspicion.<sup>147</sup>

A major source of public mistrust toward the government is the perception of widespread corruption.<sup>148</sup> The UN Report stated that South Africans perceive corruption to be rampant and “one of the most important problems which should be addressed.”<sup>149</sup> Stemming corruption in the current government has proven difficult, and corruption has actually expanded in recent years.<sup>150</sup>

144. See *supra* notes 31–36 and accompanying text (analyzing apartheid-based tensions that still exist today); HELEN WALLACE, COUNCIL FOR RESPONSIBLE GENETICS, PREJUDICE, STIGMA, & DNA DATABASES 1 (2008), available at <http://www.councilforresponsiblegenetics.org/pageDocuments/PDAFXSTDPX.pdf> (considering the privacy threat DNA legislation poses).

145. See Gezelius & Hauck, *supra* note 32, at 444, 457 (contemplating the absence of a civic identity in post-apartheid South Africa); UN REPORT, *supra* note 10, at 108 (documenting successes and challenges in post-apartheid South Africa).

146. See *supra* notes 31–36 (describing South Africa’s post-apartheid difficulties).

147. See *supra* notes 36–41 and accompanying text (describing the effects of corruption upon government).

148. See *supra* notes 36–41 and accompanying text (documenting the perception of rampant corruption in South Africa); Wonbin Cho & Matthew F. Kirwin, *A Vicious Circle of Corruption and Mistrust in Institutions in Sub-Saharan Africa: A Micro-Level Analysis* 1–4 (Afrobarometer, Working Paper No. 71, 2007) (identifying the correlation between corruption and public mistrust).

149. See UN REPORT, *supra* note 10, at 3 (reporting the public perception of widespread corruption in South Africa).

150. See Cristina Bicchieri & John Duffy, *Corruption Cycles*, *XIV POLITICAL STUDIES* 477, 479–81 (1997) (asserting the existence of corruption cycles that keep corrupt politicians in power); Cho & Kirwin, *supra* note 148, at 1–4 (describing a self-perpetuating corruption phenomenon).

Corruption has a recognized slowdown effect on government operations.<sup>151</sup> In South Africa, it creates government inefficiencies in terms of lost revenue, misallocation of resources, and distortion of priorities dictated by public policy.<sup>152</sup> Corruption's residual effects, such as lost confidence in public institutions, form a second layer of lag in government processes.<sup>153</sup>

Post-apartheid public tension and changes to government structure meant to fix shortcomings in the former regime have produced unintended consequences in the current government.<sup>154</sup> The constitution's framers created protections against the flaws of the previous government.<sup>155</sup> Identifying the police as a threat to fundamental rights, the framers put particular constraints and audits on the SAPS.<sup>156</sup> They created

151. See Okori Uncke, *Corruption in Africa South of the Sahara: Bureaucratic Facilitator or Handicap to Development?*, 3 J. PAN AFR. STUDIES 111, 124 (2010) (recognizing that bloated and expensive bureaucracies, discouragement of investment, and other inefficiencies caused by corruption outweigh any potential efficiencies corruption could produce for a government); Cho & Kirwin, *supra* note 148, at 1–4 (noting that “[b]y distorting the delivery of public works, corruption decreases the efficiency and efficacy with which public administration performs its official function of enhancing the public good”).

152. See UN REPORT, *supra* note 10, at 131–32 (identifying the costs of corruption); Gaston Kalombo, *Understanding Political Corruption in Post-Apartheid South Africa: The Gauteng Experience (1994–2004)* (Oct. 2005) (unpublished Ph.D. thesis, University of Witwatersrand) (citing Kimberly A. Elliott, *Corruption as an International Policy Problem*, POLITICAL CORRUPTION: CONCEPTS & CONTEXTS, 925–41 (A. Heidenheimer & M. Johnston eds., 2001)) (describing the reasons for government slowdown caused by corruption).

153. See UN REPORT, *supra* note 10, at 132 (reporting the negative effects of corruption); Cho & Kirwin, *supra* note 148, at 16–17 (incorporating public perception of corruption and reaction to it as part of the “corruption cycle”).

154. See *supra* notes 31–36 and accompanying text (defining apartheid-based tension in terms of race and other factors); Kgosimore, *supra* note 16, at 2–3 and accompanying text (discussing the apartheid-period history of abuse toward the arrested and accused that has influenced an arguably overcompensatory emphasis by the new government to protect arrestee rights).

155. See S. AFR. CONST., 1996, ch. 1, (founding the Republic of South Africa on the value of non-racialism and protecting the freedom of expression); *Our Constitution*, *supra* note 15 (discussing the significant protections in the Bill of Rights).

156. See S. AFR. CONST., 1996, ch. 2, §§ 35–36, ch. 11 §§205–08, 1996 (protecting fundamental rights of the arrested and accused and creating the legal framework for the police force); DAVID BRUCE, CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, ACCOUNTABILITY & CIVILIAN OVERSIGHT OF POLICE IN SOUTH AFRICA: CASES RECEIVED BY THE INDEPENDENT COMPLAINTS DIRECTORATE 2–5 (2003) (describing increased accountability oversight directed at police).

Community Police Forums (“CPFs”) to improve crime control, reduce fear of crime and improve police service and legitimacy through collaboration between police and community members.<sup>157</sup> David Bruce, Senior Researcher at the Centre for the Study of Violence and Reconciliation, identified additional police accountability mechanisms in South Africa.<sup>158</sup> Despite these numerous measures, Bruce noted the marginal impact on police accountability.<sup>159</sup> Nevertheless, the emergence of reliable agencies to check government power could become a positive development in the effort to diminish post-apartheid suspicion.<sup>160</sup>

Beyond the initiative to improve accountability, the Bill of Rights signaled a commitment to protecting fundamental human rights.<sup>161</sup> During the apartheid era, state violence commanded attention and harsh criticism.<sup>162</sup> Due to resulting suspicion toward law enforcement, the Bill of Rights afforded significant protection to the arrested and accused.<sup>163</sup> As a result of frequent mistreatment committed by apartheid-period police, arrestees developed a reputation as victims of corrupt authority.<sup>164</sup> The framers intended for the Bill of Rights to

157. See *Community Police Forum*, COMMUNITY POLICE FORUM, [http://www.cpf.table.view.co.za/cpf\\_about.html](http://www.cpf.table.view.co.za/cpf_about.html) (last visited Nov. 24, 2011) (listing the objectives of the CPFs). But see BRUCE, *supra* note 156, at 3 (observing that the CPFs have not made a significant impact).

158. See BRUCE, *supra* note 156, at 4 (discussing accountability mechanisms such as the Department of Safety and Security, the Public Protector, the Human Rights Commission, the Independent Complaints Directorate and the media, among others).

159. See *id.* (describing the shortcomings of the accountability measures).

160. See BRUCE, *supra* note 156, at 4–5 (discussing the role of accountability mechanisms in the fight against corruption); Selby Baqwa, *Anti-Corruption Efforts in South Africa*, J. PUB. INQUIRY 22 (Fall/Winter 2001), available at <http://www.ignet.gov/randp/f01c06.pdf> (articulating the scope of the National-Anti-Corruption Forum).

161. See *supra* notes 16–24 and accompanying text (discussing the fundamental right protections under the Bill of Rights).

162. See Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 756–57 (1998) (documenting apartheid era state violence).

163. See Kgosimore, *supra* note 16, at 1 (describing the Bill of Rights as “offender-friendly”); *supra* notes 18–24 and accompanying text (outlining the new fundamental right protections that emphasize the rights of the arrested and accused).

164. See Kgosimore, *supra* note 16, at 2–3 and accompanying text (discussing the apartheid-period history of the arrested and accused that shaped perception of the

reform aspects of the government that allowed arrestee mistreatment, but the “offender-friendly” language in the Bill of Rights has had the derivative effect of slighting crime victims.<sup>165</sup>

Despite new safeguards against law enforcement misconduct, the South African police arguably still pose a threat to the public.<sup>166</sup> A February 2011 report (“Police Report”), commissioned by the Unit for Risk Analysis to determine the prevalence of police officer crimes or crimes committed by “people dressed in police uniforms” uncovered one hundred serious crimes occurring within a fifteen-month period.<sup>167</sup> The Police Report stated that the problem extends beyond corruption to a pattern of serious and violent crimes.<sup>168</sup> The prevalence of untrustworthy, corrupt, and violent law enforcement officials promulgates the government’s dubious

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arrested and accused today). *See generally supra* notes 17–24 and accompanying text (designing a new government that is responsive to occurrences of police brutality).

165. Kgosimore, *supra* note 16, at 1–4 and accompanying text (analyzing the impact of the Bill of Rights); *see also supra* notes 17–19 and accompanying text (summarizing the objectives of the Bill of Rights). *See generally supra* notes 1–5 and accompanying text (describing the botched criminal investigation which allowed John Lynch’s murderers to avoid detection).

166. *See* THUTHUKANI NDEBELE ET AL., S. AFR. INST. OF RACE RELATIONS, *BROKEN BLUE LINE: THE INVOLVEMENT OF THE SOUTH AFRICAN POLICE IN SERIOUS AND VIOLENT CRIMES IN SOUTH AFRICA* 5 (2011), available at <http://www.sairr.org.za/services/publications/occasional-reports/files/001%20-%20Broken%20Blue%20Line%20-11.02.2011.pdf> (studying 100 acts of police violence); Lydia Polgreen, *Mine Strike Mayhem Stuns South Africa as Police Open Fire*, N.Y. TIMES, Aug. 17, 2012, at A8 (noting that police use of deadly force against protestors drew comparisons to similar apartheid era massacres).

167. NDEBELE ET AL., *supra* note 166, at 5 (stating that the one hundred incidents occurring between January 2009 and April 2010 consisted of violent and often premeditated criminal behavior such as ATM bombings, armed robberies, home robberies, rapes, murders, and assaults).

168. *See id.* at 7, 8, 12 (highlighting the severity of the corruption problem by reporting that approximately thirty of the incidents were murders in which issued service weapons were used and eighteen of the incidents were rapes, usually when an officer used his official status to force himself upon a woman).

reputation in South African society.<sup>169</sup> Thus, South Africans are loath to put more power into government hands.<sup>170</sup>

ANC prominence in South African politics is another contributing factor to public mistrust.<sup>171</sup> By controlling the vast majority of power in the national government, the ANC jeopardizes the democracy itself.<sup>172</sup> The ANC maintains a large majority voting block due to the unwavering loyalty of its constituents.<sup>173</sup> The commanding ANC voting block stifles the voice of dissenters and diminishes the power of the public to dictate governing policies at the polls.<sup>174</sup> This substantial level of

169. See *id.* at 5 (stating that the public has become accustomed to media reports of police wrongdoing); Erin Conway-Smith, *South Africa Troubled by Corrupt Cops*, GLOBAL POST (May 10, 2010, 6:00 AM), <http://www.globalpost.com/dispatch/news/regions/africa/south-africa/120509/south-africa-crime-corruption-police-officers-law> (explaining that the high volume of police violence has “erod[ed] public trust” in the police).

170. See UN REPORT, *supra* note 10, at 116 (reporting South African feelings that corruption is a major problem); WALLACE, *supra* note 144, at 8 (demonstrating the threat to privacy from giving corrupt officials access to a DNA database).

171. See Siphso Hlongwane, *For Democracy's Sake, Mistrust the Government*, DAILY MAVERICK (Aug. 16, 2010 06:56 AM), <http://dailymaverick.co.za/opinionista/2010-08-16-for-democracys-sake-mistrust-the-government> (expressing fear for the development of a “cult of personality” perpetuated by the ANC similar to that embodied by Kim Jong Il in North Korea); Horand Knaup & Jan Puhl, “Architects of Poverty”: *The Self-Destruction of Africa's ANC*, DER SPIEGEL (Ger.), Aug. 27, 2012, available at <http://www.spiegel.de/international/world/corruption-violence-and-divisions-tears-at-anc-of-south-africa-a-852365.html> (citing Moeletsi Mbeki's dissatisfaction with the way the “political elite” run the country).

172. See Anthony Butler, *How Democratic is the African National Congress?*, 31 J. S. AFR. STUD. 719, 722–23, 736 (2005) (questioning the purity of the brand of democracy practiced by the ANC); see also Phil Mtimkulu, *One Party Domination, Transformation, and Democracy: Critical Challenges Facing the African National Congress (ANC) in the New Millennium*, MOTS PLURIELS (April 2000), <http://motspluriels.arts.uwa.edu.au/MP1300pm.html> (referencing the concern of the International Democrat Union about the ANC-dominated version of democracy).

173. See Julian Ortlepp, *Such Blind Loyalty Will Keep the ANC in Power*, STAR (S. Afr.) (Apr. 16, 2012), <http://www.iol.co.za/the-star/such-blind-loyalty-will-keep-the-anc-in-power-1.1276368#.UGZ6p65EOuI> (criticizing the blind support that many South Africans give to the ANC despite the dysfunctional and corrupt state of the government under ANC leadership); see also Justin McCarthy, *A Marketing Take on Brand ANC: 100 Years of Struggle Manhandled & Abused for Personal Gain*, JUSTININZA (Aug. 3, 2012), <http://www.justininza.com/2012/08/a-marketing-take-on-brand-anc-100-years.html> (arguing that the electorate does not differentiate between the former ANC role as liberator and its current role as governor).

174. See Mtimkulu, *supra* note 172 (explaining that the ANC fulfills some of the criteria discussed by T.J. Pempel on the necessary conditions for one-party dominance); see also *Lesson for the ANC: With Malema, Silence Is Not Golden*, TIMES LIVE (Sept. 12, 2012), <http://www.timeslive.co.za/opinion/editorials/2012/09/12/lesson-for-the-anc>

control creates the possibility that the party could pass legislation contrary to public policy or infringing upon protected rights.<sup>175</sup> This fear that the government will not act in the best interests of the public is a key facet of the public mistrust.<sup>176</sup>

The untrustworthy reputation of the South African government handcuffs its ability to increase law enforcement autonomy to handle and retain DNA samples.<sup>177</sup> The United States and United Kingdom are not free from corruption, but corruption is much more prevalent in South Africa.<sup>178</sup> South African suspicion toward infrastructural changes that afford increased power to the State is not unique for a new government.<sup>179</sup> This phenomenon is similar to American hostility toward the national bank in the nation's early years.<sup>180</sup> More recently, the Egyptian government following the regime of Hosni Mubarak faced similar suspicion during the transition of

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with-malema-silence-is-not-golden (reporting the ANC strategy to expel and ignore party dissenter Julius Malema).

175. See Robyn Dixon, *South Africa Secrecy Law Sparks Outcry*, L.A. TIMES (Nov. 22, 2011), <http://articles.latimes.com/2011/nov/22/world/la-fg-south-africa-secrets-20111123> (citing Amnesty International's position that a secrecy law passed in November 2011 would prevent the exposure of corruption); *Building Democracy*, *supra* note 29 (alluding to the dangers of a democracy with one dominant party).

176. See Gezelius & Hauck, *supra* note 32, at 458–61 (citing a combination of factors including corruption and the autonomous decision-making by the State as the cause of public mistrust); Mũmkulu, *supra* note 172 (tracing public mistrust to ANC domination of the restructured government following the apartheid era).

177. See *supra* notes 42–47 and accompanying text (outlining procedures that limit the power of officials conducting DNA databanking to minimize the opportunity for corruption); see also PORTFOLIO COMMITTEE REPORT, *supra* note 7, at 12 (expressing concern about the handling of DNA samples).

178. See TRANSPARENCY INTERNATIONAL: THE GLOBAL COALITION AGAINST CORRUPTION, ANNUAL REPORT 79 (2010) (ranking the United Kingdom and United States twentieth and twenty-second “cleanest” in the world respectively, while South Africa ranks fifty-fourth). On a scale of one to ten, with one being “highly corrupt” and ten being “very clean,” the United Kingdom received a 7.6 and the United States received a 7.1, while South Africa received a 4.5. See *id.*

179. See, e.g., FED. RESERVE BANK OF PHILADELPHIA, THE FIRST BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING, 2–3 (2009), available at <http://www.philadelphiafed.org/publications/economic-education/first-bank.pdf> (describing tumult in the United States caused by the advent of the National Bank in 1791).

180. See *id.* at 3 (documenting the Jeffersonian belief that the creation of a national bank for the newly formed United States was both in violation of the US Constitution and would dangerously give too much power to the federal government).



power from the military.<sup>181</sup> Measures installed to counter suspicious actions of a distrusted government often produce side effects that stymie valid pursuits.<sup>182</sup> Since its introduction to Parliament in December 2008, the DNA Bill has fallen victim to this phenomenon.<sup>183</sup>

## 2. The Right to Privacy

South Africa has taken substantial steps to protect the right to privacy.<sup>184</sup> Section 38 of the Bill of Rights gives individuals the ability to enforce in court their right to privacy.<sup>185</sup> Section 172 of the Constitution gives courts power to declare any law inconsistent with the Constitution “invalid to the extent of its inconsistency.”<sup>186</sup> Additionally, South Africa has a civil tort claim for invasion of privacy which has developed an extensive doctrine of law.<sup>187</sup>

181. See David D. Kirkpatrick, *Judge Helped Egypt Military to Cement Power*, N.Y. TIMES, July 4, 2012, at A1 (contemplating the existence of a conspiracy for the military to maintain authority even in light of its promise to cede power to elected leaders); see also Kareem Fahim, *Egyptian Leader Pushes Generals into Retirement*, N.Y. TIMES, Aug. 13, 2012, at A1 (recognizing concerns that by gaining power from the military, Egyptian President Mohamed Morsi and the Muslim Brotherhood would become dangerously strong).

182. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1959–60, n.106 (2011) (noting that the strict application of the separation of powers can produce inefficiencies); see also Nathan Myhrvold, *The Virtue of Inefficient Government*, SLATE MAG. (Oct. 18, 1996), [http://www.slate.com/articles/briefing/articles/1996/10/the\\_virtue\\_of\\_inefficient\\_government.2.html](http://www.slate.com/articles/briefing/articles/1996/10/the_virtue_of_inefficient_government.2.html) (arguing that a government framework with too many checks and balances creates inefficiencies).

183. See *supra* notes 76–77 (describing the slowing effect to the progress of the DNA Bill caused by pressure on the Portfolio Committee to properly evaluate all of the issues involved); see also *A New DNA Bill*, *supra* note 8 (noting the delay of the DNA Bill).

184. See S. AFR. CONST., 1996, ch. 2, § 14, (providing that “[e]veryone has the right to privacy.”); Jonathan Burchell, *The Legal Protection of Privacy in South Africa: A Transplantable Hybrid*, ELEC. J. COMP. L. 19–23 (2009), available at <http://www.ejcl.org/131/art131-2.pdf> (explaining the South African civil claim for invasion of privacy).

185. S. AFR. CONST., 1996, ch. 2, § 38 (vesting the power to bring an action on one’s own behalf, on behalf of another, as a member of a group, in the public interest, or as an association acting in the interests of its members).

186. See *id.* ch. 8, § 172 (delegating judicial review power to the courts); Mitra Ebadolah, *Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa*, 83 N.Y.U. L. REV. 1565, 1577 (2008) (summarizing the relief afforded to South Africans in constitutional matters).

187. See Burchell, *supra* note 184, at 6–13 (discussing the history and development of the invasion of privacy claim); see also LAW REFORM COMMISSION OF HONG KONG,

One privacy concern in the DNA context is the stigma for an individual whose information is in the database.<sup>188</sup> Stigmatization could come in the forms of racial, ethnic, or other profiling.<sup>189</sup> Further, retention of DNA samples may cause the proliferation of bias against the individuals whose samples are in the database.<sup>190</sup>

One emerging legal issue is whether the right to privacy protects South Africans from having sensitive personal information discovered through DNA analysis.<sup>191</sup> For example, the genetics community encourages women to undergo genetic counseling before taking the test for Huntington's Disease, yet DNA analysis could inadvertently circumvent that process.<sup>192</sup> Discovery of an individual's genetic defect through DNA analysis could lead to negative consequences such as discrimination by an employer or an insurance company.<sup>193</sup> DNA analysis could prove paternity, or lack thereof, causing domestic discord.<sup>194</sup>

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CIVIL LIABILITY FOR INVASION OF PRIVACY 6 (2004), available at <http://www.hkrcform.gov.hk/en/docs/rprivacys-c.doc> (identifying South Africa as one of the few nations that has developed a common law civil remedy for invasion of privacy).

188. See LYNCH & HANCOCK, *supra* note 7, at 21 (discussing the potential effect of such a stigma); WALLACE, *supra* note 144, at 8 (contemplating the evidence and reasons for stigmatization of innocent people whose DNA are contained in DNA databases in the United Kingdom).

189. See Shwayder, *supra* note 64 and accompanying text (recalling an instance where investigators made a familial match); *supra* note 188 and accompanying text (exploring the risk of stigmatization).

190. See WALLACE, *supra* note 144, at 13–15 (discussing the potential for systematic discrimination by a DNA program); Attwood, *supra* note 47 and accompanying text (describing the process by which an individual whose sample is in the database would in effect be treated as a potential suspect in every new DNA case).

191. See Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 HARV. J.L. & TECH. 309, 347–48 (2010) (pointing out that not all information is considered good—for example, some families might prefer paternity to remain undetermined); Gina Kolata, *Genes Now Tell Doctors Secrets They Can't Utter*, N.Y. TIMES, Aug. 26, 2012, at A1 (attesting that “[t]he question of how, when and whether to return genetic results to study subjects or their families ‘is one of the thorniest current challenges in clinical research’” (quoting Dr. Francis Collins, director of the National Institutes of Health)).

192. See Suter, *supra* note 191, at 347–48 (illustrating the Huntington's Disease dilemma); LYNCH & HANCOCK, *supra* note 7, at 19 (noting that genetic makeup can determine diseases and behavioral tendencies).

193. See Omphemetse Mooki, *DNA Typing as a Forensic Tool: Applications & Implications for Civil Liberties*, 13 S. AFR. J. ON HUM. RTS. 565, 573 (1997) (contemplating the effects that development in DNA evidence will have on civil liberties); Craig Timberg, *In S. Africa, Stigma Magnifies Pain of AIDS*, WASHINGTON POST, Jan. 14, 2005,

South African privacy concerns are not unlike concerns in the United States and the United Kingdom.<sup>195</sup> The government's effort to assuage these privacy concerns has been more difficult in South Africa because of the reputation of the government, the residual effects of apartheid, and unease caused by ANC power.<sup>196</sup> In spite of the setbacks, South Africa nevertheless possesses the components to produce a successful DNA program.<sup>197</sup>

### III. *THE PATH FORWARD: DIRECTLY THROUGH THE DNA BILL*

The South African Parliament should pass legislation to fill the legislative vacuum for the DNA program.<sup>198</sup> Part III.A asserts that the DNA Bill in its current form is ready for ratification. Part III.B discusses broad changes that could have a positive impact on the future of the DNA Bill.

#### A. *The DNA Bill is Ready for Ratification*

South Africans should trust their courts to properly evaluate fundamental right violations, including those violations in DNA legislation.<sup>199</sup> Mitra Ebadolahi of the American Civil Liberties Union explains that the judiciary has the responsibility of interpreting and enforcing human rights.<sup>200</sup> This division of

at A14 (documenting the stigma associated with carriers of HIV or AIDS in South Africa).

194. See Suter, *supra* note 191, at 365–66 (stating that misattributed paternity has been estimated as high as ten to thirty percent); Will, *supra* note 131, at 131–32 (recognizing the threat to privacy from the dissemination of genetic information).

195. See *supra* notes 94–95, 98–100, 132–37, 184–94 and accompanying text (summarizing the concerns in each of the respective nations).

196. See *supra* notes 147–83 and accompanying text (analyzing the role these factors play).

197. See *supra* notes 14–24 and accompanying text (describing protections in the South African Constitution that can facilitate the advent of a fruitful DNA program that does not violate the right to privacy); *supra* notes 49–51 (identifying components of a DNA program which South Africa already has).

198. See *supra* notes 41, 52–53 and accompanying text (identifying the void of DNA legislation).

199. See *supra* notes 11, 14 and accompanying text (outlining the role of the judiciary in the government).

200. See Ebadolahi, *supra* note 186, at 1579–84 (articulating this duty of the judiciary); *supra* notes 11–15 and accompanying text (outlining the separation of powers between the three branches of the government).

government power, arguably vesting extra authority with the judiciary, is the same type of system employed in the United States.<sup>201</sup> The framers of the South African Constitution intended to construct the government in this way.<sup>202</sup> The Portfolio Committee must develop the DNA Bill to fit within the framework of the current government structure, which allows individuals to utilize the courts to challenge any infringement on protected rights.<sup>203</sup>

The DNA legislation passed in the United Kingdom and the United States would not necessarily address all South African concerns.<sup>204</sup> Trust in the US and UK government systems enabled the legislature to pass DNA statutes with confidence that constitutional violations would be addressed by the judiciary.<sup>205</sup> To an extent, the absence of this confidence in the South African government may be attributed to the inexperienced government which still creates some discomfort for the population.<sup>206</sup> Structurally, South Africa's government is capable of passing legislation and maintaining a system of checks and balances.<sup>207</sup>

So long as the South African government's system of checks and balances functions properly, the DNA Bill contains the proper accountability measures to appropriately regulate the DNA program.<sup>208</sup> The text of the bill discusses in detail two main

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201. See U.S. CONST. arts. I–III (creating a three-branch government with a legislature, executive, and judiciary).

202. See *supra* notes 11–15 and accompanying text (describing the powers of each branch).

203. See *supra* notes 19–24 and accompanying text (creating a private right of action for infringement of or threat to a protected right).

204. See *supra* notes 88–100, 131–35 (illustrating the legal issues used by opponents to challenge the DNA legislation in the United Kingdom and United States, with these challenges coming long after the bill stage).

205. See, e.g., *supra* notes 88–99, 129 and accompanying text (referencing the *Marper* and *Skinner* cases, in which the European Court of Human Rights and US Supreme Court respectively properly protected fundamental human rights relating to DNA legislation).

206. See *supra* notes 31–36 (describing distrust of the still young government); see *supra* notes 179–82 (giving examples of distrust toward other young governments acting to increase power).

207. See *supra* notes 11–23 and accompanying text (creating the system of checks and balances permitting judicial review of legislation).

208. See *supra* notes 42–48 and accompanying text (outlining the key points of the DNA Bill).

aspects of the DNA database: 1) the formation and maintenance of the database, and 2) the power involved in operating the database.<sup>209</sup> First, concerning formation and maintenance, the DNA Bill outlines the indexes that will comprise the DNA database and describes the sources for DNA samples in each of the indexes.<sup>210</sup> The bill sets baseline standards, but also vests in the National Commissioner the authority to set other guidelines at his discretion.<sup>211</sup> Second, the DNA Bill sets several accountability mechanisms to temper state authority to run the database: 1) the baseline provisions in Section 15O to 15Q, 2) the provision for any rule changes by the National Commissioner to be tabled in Parliament within three months, and 3) the National Commissioner's report to Parliament.<sup>212</sup>

The substantial power vested in the National Commissioner is a weakness in the DNA Bill.<sup>213</sup> The accountability mechanisms, functioning properly, should create the means to sufficiently contain the National Commissioner's power.<sup>214</sup> Nevertheless, in a corrupt and distrusted state, the authority vested in the National Commissioner to operate the DNA program raises concern.<sup>215</sup> The DNA Bill can reduce this power by describing more specifically the details of the DNA program.<sup>216</sup> On the other hand, the particular details of running a DNA program are very technical in nature, so it may be wise to avoid legislating specific database details and instead to permit the experts in

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209. See *supra* notes 42–48 and accompanying text (structuring the DNA program and apportioning powers within it).

210. See Criminal Law (Forensic Procedures) Amendment Bill of 2008 § 15G (S. Afr.) (creating the set of indexes comprising the database).

211. See *supra* notes 43–47 and accompanying text (setting the baseline standards for the program and apportioning database-related authority).

212. See *supra* notes 42–48 and accompanying text (creating accountability measures to check the power of privileged officials).

213. See *supra* notes 43, 46, 48 and accompanying text (vesting significant power in the National Commissioner).

214. See Criminal Law (Forensic Procedures) Amendment Bill, 2008, Bill §§ 15M–S (S. Afr.) (describing the checks upon officials with power within the proposed DNA program).

215. See *supra* notes 36–38, 41, 147–53 and accompanying text (summarizing public perception of corruption by government officials).

216. See *supra* notes 42–48 and accompanying text (outlining the parameters of the DNA program).

database management to recommend appropriate procedures after statutory parameters are in place.<sup>217</sup>

Another way to limit the power of the National Commissioner is to give the database-management powers to a committee rather than to one official.<sup>218</sup> Nevertheless, the DNA program would likely function satisfactorily, even with one official's substantial power, within a government a system of reliable checks and balances.<sup>219</sup>

### B. *Changes to Facilitate DNA Bill's Success*

The DNA Bill must overcome public distrust to become law, as it necessarily encroaches upon personal liberties to collect and retain DNA samples in the database.<sup>220</sup> Proponents of the DNA Bill cannot quell all concerns about government usurpation of power because increased state power is inherent in the advent of the database.<sup>221</sup> By addressing privacy concerns and working to increase public trust in government, South Africa can improve its government system to both pass the DNA Bill and make the legislative process more efficient.<sup>222</sup>

Improving public trust of government surely is a tall task, but several methods might jump start the process. The passage of time will facilitate the easing of post-apartheid tension.<sup>223</sup> A relatively new government should expect public suspicion of any

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217. *See supra* notes 42–48 and accompanying text (focusing more on the structure of the database while providing limited technical detail).

218. *See supra* notes 43, 46, 48 and accompanying text (delegating database-management powers to the National Commissioner).

219. *See supra* notes 79–119, 124–38 (exemplifying the way that a government with proper checks and balances can sustain the ratification of a law that has the potential to compromise certain rights).

220. *See supra* notes 10, 77–78 (discussing the arguably irreconcilable considerations causing the Portfolio Committee to delay the DNA Bill).

221. *See supra* notes 10, 42–48, 77–78 (describing aspects of the DNA Bill which by their nature require increased government power).

222. *See supra* notes 54–62, 77–78 (illustrating the focused mindset of the committee on the DNA Bill, which may have clouded the view of broad and underlying issues in the government).

223. *See supra* notes 31–35 and accompanying text (documenting positive changes that already have occurred since the formation of the new government in 1994 such as substantial racial tension substantially subsiding due to the combination of interracial contact and the passage of time).

acts construable as usurpations of power.<sup>224</sup> Over time, a government that shows its stability and restraint of power can build public trust.<sup>225</sup>

Mistrust in government inhibits efficiency of the democracy.<sup>226</sup> The South African government can shed its negative reputation by emphasizing the enforcement of the checks of power built into the government.<sup>227</sup> Over time, the judiciary can increasingly endear itself to public trust with a pattern of protecting fundamental rights, invalidating portions of laws which violate protected rights, and expressing sound legal reasoning.<sup>228</sup> Similarly, the executive and legislative branches can improve public perception of the government by functioning properly and curbing their own actions that threaten protected rights.<sup>229</sup>

An affirmative anti-corruption initiative starting from the top-down could combat any real or perceived corruption trends regarding its prevalence at the national level.<sup>230</sup> The media has played a significant role in the perception of a corrupt State.<sup>231</sup> The media has further demonstrated its power by proliferating the public perception of rampant corruption in South Africa.<sup>232</sup> If government accountability measures take effect to reduce corruption, the media will play a key role in shaping public

224. *See supra* notes 179–81 (illustrating public cautiousness toward the usurpation of power by a young government).

225. *See supra* notes 166–77 and accompanying text (identifying current facets of the South African government with a dubious reputation where there is room for improvement).

226. *See supra* notes 148–76 (describing the current South African government and its systematic problems).

227. *See supra* notes 11–24 and accompanying text (citing the Bill of Rights and the accountability mechanisms within the government).

228. *See supra* notes 88–99, 129 and accompanying text (demonstrating this effect from the respective appellate tribunals that review UK and US legislation).

229. *See* Dixon, *supra* note 175 (describing the ratification of the secrecy bill which critics assert dangerously infringes upon freedom of expression); Polgreen, *supra* note 166 and accompanying text (illustrating another incident that diminished public trust in authority).

230. *See supra* notes 39–41, and accompanying text (drawing the connection between the media and the government's corrupt reputation).

231. *See* UN REPORT, *supra* note 10, at 10 (noting the role of the media in the public perception of corruption).

232. *See id.* (discussing media influence).

perception of this important development.<sup>233</sup> Public perception, and not just government functionality, will significantly influence future government effectiveness.<sup>234</sup>

### CONCLUSION

The DNA Bill is ready for ratification.<sup>235</sup> Its delay is partially based on concerns regarding privacy issues, but in large part, it represents the inefficiency of the South African government.<sup>236</sup> By activating accountability measures already in place to defeat corruption and human rights violations, the government can change public perception.<sup>237</sup> The eradication of corruption would help develop a healthier, more efficient South African government, and help to pass the DNA Bill.<sup>238</sup>

Recent events do not suggest that such change to the government's approach is imminent.<sup>239</sup> If changes to improve the government efficiency do not occur, the DNA Bill still should pass, but it will be met by the same suspicion facing other acts of the mistrusted government.<sup>240</sup> The accountability measures built into the DNA Bill, without an initiative to make effective such checks on government power, may not have the desired effect to curb law enforcement database privilege abuse

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233. See *supra* notes 40–41, and accompanying text (observing the media's influential power).

234. See *supra* notes 146–81 (analyzing the relationship between the actual functionality of government and the public perception).

235. See *supra* notes 199–224 and accompanying text (evaluating the text of the DNA Bill).

236. See *supra* notes 151–53 and accompanying text (discussing the slowing effect caused by public mistrust of government and concern for protection of privacy interests).

237. See *supra* notes 11–24, 156–60 and accompanying text (describing the accountability measures already in place).

238. See *supra* notes 147–77 and accompanying text (pointing to the corruption that currently deters the progress of the South African government).

239. See Dixon, *supra* note 175 (characterizing the ratification of the secrecy bill as a step backward for the legislature by desecrating the protected freedom of expression); Polgreen, *supra* note 166 (vilifying the massacre as a major blow to the already tenuous public perception of authority).

240. See *supra* notes 147–77 (demonstrating South African citizens' suspicion of government); *supra* notes 53, 64, 213–17 and accompanying text (illustrating the reasons for passing the bill).



or to improve confidence in criminal investigation.<sup>241</sup> If Parliament passes the DNA Bill but cannot reform the subsidiary aspects of the government necessary for the DNA Program to properly function, South Africa will probably realize some, but not nearly all of the benefits normally associated with a national DNA Program.<sup>242</sup>

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241. *See supra* notes 42–48 and accompanying text (outlining procedures and accountability measures for the DNA program); *supra* notes 151–53 and accompanying text (discussing the negative effects of public mistrust on government functionality and efficiency).

242. *See supra* notes 63–74 and accompanying text (describing the benefits of a DNA program); *supra* notes 146–77 and accompanying text (analyzing the negative impact of public mistrust on government effectiveness).