

PROSECUTING PERSEPHONE: PROTECTING RAPE VICTIMS FROM UNREGULATED LOCAL DNA DATABASES

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INTRODUCTION

Jane Doe did not hesitate to permit the San Francisco Police Department (“SFPD”) to enter evidence from her rape kit into a DNA database.¹ It was 2016 and she had just survived a violent sexual assault.² Doe trusted the SFPD to use her DNA to hunt down and prosecute her attacker.³ Six years later, the SFPD shattered that trust. After arresting Doe for an unrelated property crime, a newly elected district attorney discovered the SFPD stored Doe’s DNA in an unregulated “quality control” database. Over six years, the department ran her profile thousands of times, comparing her sample to evidence collected from unrelated crime scenes. Further investigation revealed the database included DNA of victims, children, and consensual sex partners; all subjected to the same intrusive surveillance.⁴

This gross violation of a victim’s privacy generated widespread outrage and horror.⁵ But the incident was not entirely surprising.⁶ State courts and legislatures have long known the problematic existence of unregulated “shadow” or “rogue”

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1. *Sexual Assault Victim Says DNA from Her Rape Kit Used Against Her by Police: “I Want to See Justice”*, CBS NEWS (Oct. 17, 2022, 11:15 AM), <https://www.cbsnews.com/news/sexual-assault-victim-says-dna-from-her-rape-kit-used-against-her-by-police/> [hereinafter “*I Want to See Justice*”].

2. Complaint for Damages and Injunctive Relief at 2, Doe v. City & Cnty. of S.F., No. 3:22-cv-05179-AGT (N.D. Cal. Sept. 12, 2022).

3. “*I Want to See Justice*”, *supra* note 1.

4. Tami Abdollah, *Rape Survivors, Child Victims, Consensual Sex Partners: San Francisco Police Have Used DNA from All of Them for 7 Years*, USA TODAY, <https://www.usatoday.com/story/news/nation/2022/02/23/san-francisco-police-rape-kit-dna-controversy/6854467001/> (Feb. 25, 2022, 1:58 PM).

5. *Id.*

6. See generally Jason Kreag, *Going Local: The Fragmentation of Genetic Surveillance*, 95 B.U. L. REV. 1491, 1521 (2015); see also Stephen Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. ANN. SURV. AM. L. 639, 668 (2014) (predicting that unregulated databases would result in the entry and retention of DNA from innocent parties).

databases that fall outside the federal and state regulatory scheme. While known by many names, the databases share a singular characteristic—they all permit the aggregation of DNA to create an unregulated local database that violates the guidelines of the federal Combined DNA Index System (“CODIS”).⁷ State legislatures have done little to curb the practice. But several recent high-profile cases have dragged shadow databases into the light, emphasizing the threat these databases pose to victims of sex crimes, and motivating states to intervene.

Part I explores the rise, benefits, and drawbacks of the unregulated local database. Part II addresses why gaps in the regulation of local databases are particularly harmful to rape survivors. Part III examines how state legislatures are best suited to regulate local databases and reviews various attempts to do so. Finally, Part IV suggests the most effective legislative approach to protect victims from the exploitation and traumatization that comes from the use of rogue databases.⁸

I. THE RISE OF THE UNREGULATED LOCAL DATABASE

A. State and Federal DNA Databases

At 9:05 a.m. on September 10, 1984, in a small laboratory in Leicester, England, Dr. Alec Jeffreys stood in astonishment, realizing he had dramatically changed the course of forensic science.⁹ After years of relentless experimentation and countless failures, the professor discovered a radio-active probe would attach to myoglobin gene sequences, creating a pattern forming a “DNA fingerprint.”¹⁰ By isolating individually distinct genetic sequences, law enforcement officials could compare evidence collected at crime scenes against a database of profiles to identify unknown criminals.¹¹

States were the earliest to devise and construct a DNA database as an investigative tool.¹² In 1987, Florida prosecutors used DNA for the first time in the United States to identify and convict serial rapist Tommie Lee Andrews.¹³ Following Andrews’s high-profile conviction, other states followed suit, implementing databases of their own. State legislation quickly followed, with Virginia requiring violent felons and sex offenders to enter DNA samples into a statewide database.¹⁴

7. Mercer & Gabel, *supra* note 6, at 641.

8. Because rape disproportionately affects women, the majority of this paper uses she/her pronouns. The use of female pronouns is not intended, in any way, to deny or mitigate the harsh and profound reality that rape impacts all genders and sexual identities.

9. Randy Alfred, *September 10, 1984: DNA Leaves Its Print*, WIRED (Sept. 10, 2008, 12:00 PM), <https://www.wired.com/2008/09/dayintech-0910/>.

10. *The ‘Eureka’ Moment That Revolutionized Crime Solving*, LABXCHANGE, <https://www.labxchange.org/library/items/lb:LabXchange:793cf91f:html:1> (June 30, 2023).

11. *Id.*

12. Statement of Amy S. Hess, FBI’s Plan for the Use of Rapid DNA Technology in CODIS, Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, 114th Cong. (June 18, 2015), <https://www.fbi.gov/news/testimony/fbis-plans-for-the-use-of-rapid-dna-technology-in-codis#>.

13. Michelle Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 773 (1999).

14. VA. CODE ANN. § 19.2-310.2 (West 2022).

Within nine years, the remaining forty-nine states had passed similar laws and executed comparable programs.¹⁵

Appreciating the investigative value of a national index, the FBI initiated the CODIS pilot program, interconnecting fourteen states and local laboratories to create a unified database.¹⁶ After the DNA Identification Act of 1994 formalized the FBI's authority to establish a national DNA index, the FBI developed uniform testing procedures and software.¹⁷ In 1998, Rhode Island became the fiftieth and final state to implement a CODIS-compliant statewide database.

To access CODIS, state and local entities must agree to comply with stringent guidelines implemented by the FBI.¹⁸ Because DNA contains massive amounts of personal chromosomal information, collecting and storing genetic material triggers immense privacy concerns.¹⁹ In response, the federal government tightly regulates CODIS, mandating participating laboratories to comply with the FBI's Quality Assurance Standards ("QAS") and the DNA Identification Act.²⁰ Proficiency testing requirements are mandatory, laboratories must submit to bi-yearly audits,²¹ lab technicians and police officers must comply with confidentiality standards,²² and steep penalties accompany knowingly violating privacy protections.²³

B. Local DNA Databases

The effectiveness of the CODIS system caught the attention of local municipalities, who recognized the unparalleled ability of DNA to identify criminals.²⁴ Police departments, however, grew frustrated with rigorous FBI guidelines that

15. Hibbert, *supra* note 13, at 775.

16. CODIS Combined DNA Index System, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION (Aug. 2008), https://ucr.fbi.gov/fingerprints_biometrics/biometric-center-of-excellence/files/btf_codis_0808_one-pager.pdf.

17. Nicolas Wade, *F.B.I. Set to Open Its DNA Database for Fighting Crime*, N.Y. TIMES (Oct. 12, 1998), <https://www.nytimes.com/1998/10/12/us/fbi-set-to-open-its-dna-database-for-fighting-crime.html>.

18. *The FBI's CODIS System: Testimony Before the Senate Judiciary Committee Subcommittee on Crime and Drugs*, 107th Cong. (2002) (statement of Dwight E. Adams, Assistant Director, Laboratory Division, Fed., Fed. Bureau of Investigations) (archived at <https://archives.fbi.gov/archives/news/testimony/the-fbis-codis-program>). CODIS initially limited the input of state and local DNA to samples collected from crime scenes, missing persons, or unidentified human remains. See H.R. REP. NO. 106-900(I), at 12 (2000). After the passage of the Justice for All Act of 2004, the FBI expanded eligible offenses to include all federal felonies, attempts to commit applicable felonies, and crimes of violence. H.R. 5107, 108th Cong. (2004) (enacted).

19. Ellen Wright Clayton et al., *The Law of Genetic Privacy: Applications, Implications, and Limitations*, J.L. & BIOSCIENCES, Oct. 2019, at 1, 2-5.

20. FED. BUREAU OF INVESTIGATION LAB'Y, NATIONAL DNA INDEX SYSTEMS (NDIS) OPERATIONAL PROCEDURES MANUAL 10 (2024).

21. *Id.* at 68.

22. *Id.* at 40-41.

23. *Id.* at 93-94.

24. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, N.Y. City Council 16 (2020) (statement of Rodney Harris, Chief of Detectives, New York Police Department).

rendered the database inaccessible.²⁵ Restraints on eligible offenses,²⁶ significant lag times,²⁷ and the high cost of processing samples prevented law enforcement from employing the highly valuable investigative tool.²⁸ By limiting eligible offenses for profile entry to felonies and violent crimes, municipalities could not address the bulk of criminal violations in their communities—theft and property crime.²⁹ Police departments wanted the power to choose which crimes to target, and the authority to analyze and compare evidence from those crime scenes.³⁰ By creating a local database that permitted profile entries for lesser, but more prevalent violations, suburban police departments could target the specific infractions plaguing their towns and cities.³¹ Additionally, while CODIS increased rates of criminal apprehension,³² overwhelming national participation resulted in substantial backlogs, with a processing time for cross-comparison ranging from weeks to months.³³ Because the local database did not have to compete with a national demand for genome sequencing, using an unregulated database could significantly decrease processing time.³⁴

Police departments sought unencumbered access to DNA technology, accelerated testing results, and a means to circumvent the layers of federal red tape surrounding CODIS.³⁵ In the early 2000s, local municipalities found the loophole they were looking for. At the time, all fifty states had legislation permitting and governing the creation of a state DNA database.³⁶ Like the FBI, state lawmakers regulated and oversaw the collection and use of DNA samples. Much to the fortune of local municipalities, state legislation was largely silent on the permissibility of law enforcement agencies creating independent databases. Recognizing an enormous opportunity, police began to partner with privately owned labs, which sought

25. See generally The Takeaway, *The Unregulated Databases of Local DNA*, WNYC STUDIOS (Sept. 15, 2016), <https://www.wnycstudios.org/podcasts/takeaway/segments/unregulated-databases-local-dna>.

26. Bill Berger et al., *A New Investigative Tool: DNA Is Not Just Court Evidence Anymore*, POLICE CHIEF, April 2008, at 150, 150.

27. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24.

28. Berger et al., *supra* note 26, at 155; see also Kreag, *supra* note 6, at 1549.

29. The Takeaway, *supra* note 25, at 07:53; see also Berger et al., *supra* note 26, at 152.

30. National Center for Victims of Crime, *Local DNA Databases: The Power to Solve and Prevent More Crime*, YOUTUBE, at 44:50 (April 22, 2011), <https://www.youtube.com/watch?v=jRZyxJPPciw>.

31. *Id.*

32. *CODIS-NDIS Statistics*, FED. BUREAU OF INVESTIGATION, <https://le.fbi.gov/science-and-lab/biometrics-and-fingerprints/codis/codis-ndis-statistics>, (last visited Oct. 21, 2024).

33. *How Long Will It Take and When Will the Results Be Available?*, NAT'L INST. OF JUST. (June 20, 2023), <https://nij.ojp.gov/nij-hosted-online-training-courses/principles-forensic-dna-officers-court/12-victim-issues/dna-evidence-testing/how-long-will-it-take-and-when-will-results-be-available>.

34. The Takeaway, *supra* note 25, at 07:39.

35. National Center for Victims of Crime, *supra* note 30, at 26:57.

36. Hibbert, *supra* note 15, at 773-74.

to monetize the demand for processing, storing, and comparing samples.³⁷ Working in tandem with the private sector, police departments began to construct DNA databases for departmental use free of state or federal regulation.

A DNA database is only as strong as the number of samples it contains. As such, precinct supervisors encouraged officers to collect DNA samples as liberally and often as possible to populate the shadow database.³⁸ Without legislative parameters restricting collection, officers freely and surreptitiously gathered DNA, accumulating a vast assortment of reference samples from a myriad of sources.³⁹ Samples gathered by police included DNA from witnesses, lab technicians, juveniles, stop-and-frisk encounters, low-level offenders,⁴⁰ and victims.

The unconstrained collection of DNA samples continues to this day. Erin Murphy, a law professor at the New York University School of Law, stated: “It’s a total wild west, a free-for-all. The understanding is police can sort of do whatever they want unless it’s explicitly prohibited.”⁴¹ Mark Barash, the forensic science program coordinator at San Jose State University, warns that when it comes to comparing victim DNA to evidence from an unrelated crime scene, “when a match occurs, police can simply get a separate sample from the individual, knowing full well it matches the suspect’s sample, and no one is the wiser.”⁴²

Because local databases are created and maintained outside the sanction of legislatures, it is exceedingly difficult to know precisely how many are currently in operation or contain victim DNA.⁴³ Research has shown that by 2017, at least sixty unregulated databases were in operation.⁴⁴ As with Doe, unregulated databases often only come to light when egregious police practices are revealed.⁴⁵ Unfortunately, by the time a shadow database surfaces, the damage to the victim is already done. This is particularly true in the case of sexual assault survivors, whose DNA is collected via an inherently intrusive procedure at a time when a rape victim is at her most vulnerable.

37. See *Introducing the Next Generation of DNA Profile Matching*, SMALLPOND, <https://www.smallpondllc.com/> (last visited Oct. 21, 2024); see also *Trusted Forensic DNA Analysis Services*, BODE TECH., <https://bodetech.com/> (last visited Oct. 21, 2024).

38. Berger et al., *supra* note 26, at 150.

39. *Id.*

40. *Id.* at 153.

41. Elizabeth Anne Brown, *Your DNA Can Now Be Pulled from Thin Air. Privacy Experts Are Worried*, N.Y. TIMES (May 15, 2023), <https://www.nytimes.com/2023/05/15/science/environmental-dna-ethics-privacy.html>.

42. Abdollah, *supra* note 4.

43. Krag, *supra* note 6, at 1546; see also Mercer & Gabel, *supra* note 6, 667-69.

44. Michael Balsamo, *US Police Agencies with Their Own Databases Stir Debate*, ASSOCIATED PRESS, <https://apnews.com/general-news-7ede9d78d6aa4de199c9309fcf7e50f8> (Mar. 4, 2017, 1:48 PM).

45. Krag, *supra* note 6, at 1546.

II. THE EFFECTS OF ENTERING RAPE KIT EVIDENCE INTO UNREGULATED DATABASES

Rape kit evidence is not like other evidence. It exists solely because a traumatized survivor was willing to submit to an intrusive examination. During this time, a rape survivor relinquishes her right to privacy, placing immense trust in law enforcement to handle her sample ethically and legally. When police store DNA evidence collected from a rape kit in a rogue database, they likely exceed the scope of a survivor's consent. She has no idea officers will indefinitely store her sample, with no duty to expunge her profile. Discovering she has unknowingly relinquished the right to her most intimately private property—her entire genome sequence—can exacerbate the assault trauma itself, undermining the trust placed in the system, and causing further psychological harm.

To fully appreciate the profound psychological and sociological damage caused by unethical storage of victim DNA, it is essential to examine the historical evidentiary requirements for establishing rape, the detrimental impact of those requirements on survivors, and the often-pernicious relationship between the law and the rape victim.

A. *History of Rape Evidence*

The evidentiary requirements for rape are idiosyncratic because sexual assault is one of the rare crimes where the law may require a victim to establish non-consent.⁴⁶ Allegations of rape are frequently met with a high degree of skepticism on a global scale.⁴⁷ Historically, proving rape has often been as precarious and dangerous as the attack itself.⁴⁸

In antiquity, many cultures considered women a form of chattel and the crime of rape was a property crime.⁴⁹ The married Babylonian woman was perceived as a bailee, holding her purity in trust for her husband.⁵⁰ When sexually assaulted, she breached that duty, and, under the law, was considered a defendant rather than a victim.⁵¹ If she failed to prove the breach occurred against her will, she was bound to her rapist and thrown into a river to drown.⁵²

46. *State v. Alston*, 312 S.E.2d 470, 475 (N.C. 1984) (“[T]he State ordinarily will be able to show the victim’s lack of consent to the specific act charged only by evidence of statements or actions by the victim which were clearly communicated to the defendant, and which expressly and unequivocally indicated the victim’s withdrawal of any prior consent and lack of consent to the particular intercourse.”); Sally Gold & Martha Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH. U. L. REV. 695, 695 (1978) (“Two elements are involved in the crime of rape: the penetration with force by the attacker and the lack of consent of the attacked. Each element is separate and distinct; one does not necessarily constitute evidence of the other. A rape victim, therefore, must prove her own innocence as to the requisite lack of consent. In reality, she becomes a co-defendant charged with the crime of consent.”).

47. Gold & Wyatt, *supra* note 46, at 711.

48. *See generally id.*

49. *Id.* at 696-99.

50. *Id.* at 697.

51. *Id.* at 696-98.

52. *Id.*

In ancient Hebrew law, raped virgins who did not cry out for help were subject to stoning, and married survivors were deemed adulteresses, deserving immediate death.⁵³ Young Greek and Roman girls heard mythological stories of Persephone and Medusa—both raped virgins condemned to live eternally as blood drinkers and monsters after failing to convince the gods of their purity.⁵⁴

Twelfth century rape law moved away from “rape as a property crime” and began to see sexual assault as a criminal act of violence.⁵⁵ Still, meeting the burden of proof in rape cases remained arduous, requiring physical evidence of sexual assault immediately following the attack.⁵⁶ To establish her innocence, a survivor had to submit to a public physical examination in the presence of four witnesses to establish she was no longer a virgin.⁵⁷

The early 1900s ushered in new conditions for verifying rape that over time would prove dangerous, even deadly.⁵⁸ Fixated on the prospect that women, and in particular unchaste women,⁵⁹ would feign rape, courts began to require victims to demonstrate they “resisted to the utmost.”⁶⁰ In *Brown v. State*, the Wisconsin Supreme Court detailed the evidentiary threshold for resistance:

53. *Id.*

54. HOMER, *THE ODYSSEY* 183, 194 (Ian Johnson trans., Vancouver Island University Richer Resources Publications) (2006) (describing a raped Persephone as “dread Persephone,” the goddess of the death and the underworld and commander of blood drinkers); Kelly Macquire, *Medusa*, *WORLD HIST. ENCYCLOPEDIA* (June 14, 2022), <https://www.worldhistory.org/Medusa> (detailing a raped Medusa’s transformation into snake-haired monster). Interestingly, the mythical Medusa has become so interlinked with her identity as a rape victim that sexual assault survivors have adopted her image as a symbol of resilience, often tattooing her image on their bodies; Jessica Sager, *Medusa Tattoos Have Been Everywhere Lately, and Here’s the Empowering Meaning Behind the Trend*, *PARADE*, <https://parade.com/living/medusa-tattoo-meaning> (Jan. 5, 2024).

55. Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, *ARK. J. OF SOC. CHANGE & PUB. SERV.* (Apr. 15, 2018), <https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states/>.

56. *History of Sexual Abuse and Harassment*, *COLUM. UNIV. CTR. FOR AMER. STUD.*, <https://freedomandcitizenship.columbia.edu/gender-equality-history-2021> (last visited Oct. 21, 2024).

57. *Id.*

58. Mary Ruffolo Rauch, *Rape - From a Woman’s Perspective*, 82 *ILL. B.J.* 614, 615 (1994); *Brooke Wilberger Found: Killer Gives Location of Remains to Avoid Death Penalty*, *ABC NEWS* (Sept. 21, 2009), <https://abcnews.go.com/US/remains-brooke-wilberger-found-years-disappearance/story?id=8632233> (noting killer “hadn’t decided to kill her until he saw how hard she fought against being raped.”); Alex Sunby, *Jordan Van der Sloot Admitted to Killing Natalee Holloway on Aruba Beach in Confession Revealed in Extortion Case*, *CBS NEWS*, <https://www.cbsnews.com/news/jordan-van-der-sloot-natalee-holloway-plea-extortion/> (Oct. 18, 2023) (noting killer confessed to murdering Natalee after she “defended herself against his unwanted advances... [enraging] an aggressive predator to the point of murder”).

59. Lucy Reed Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 *U. CHI. L. REV.* 613, 626 (1976); *see also* *People v. Dohring*, 59 *N.Y.* 374, 383 (N.Y. 1874) (“If a female, apprehending the purpose of the man to be that of having carnal knowledge of her person, and remaining conscious, does not use all of her own powers of resistance and defense... a jury may infer that, at some time in the course of the act, it was not against her will.”); *see also* *Reynolds v. New York*, 41 *How. Pr.* 179, 183-84 (N.Y. Gen. Term 1871) (holding an eleven-year-old girl’s plea to “stop” was insufficient to establish rape absent evidence of physical resistance).

60. *People v. Hulse*, 3 *Hill* 309, 316-17 (N.Y. Sup. Ct. 1842) (“In such cases, although the woman never said ‘yes’ nay more, although she constantly said ‘no,’ and kept up a decent show of resistance to the last, it may still be that she more than half consented to the ravishment. Her negative

Not only must there be an entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.⁶¹

The resistance requirement placed women in an impossible double-bind, forced to choose between punishment or danger. While studies have shown that women who resist are more likely to avoid a completed rape,⁶² resistance also results in a higher probability of injury or death.⁶³ To protect her life, a woman may choose not to resist.⁶⁴ But her failure to physically fight a perpetrator may have resulted in a court system that rejected the credibility of her accusation and friends and family who viewed her lack of resistance as morally deficient.⁶⁵

Throughout the 1900s, courts required corroborating evidence of rape, resulting in additional humiliation for survivors. In *State v. Blake*, the Utah Supreme Court aptly observed:

In addition to the resistance requirement, the law of many states has further failed victims by requiring evidentiary corroboration of a victim's testimony, allowing evidence of a victim's sexual past, and mandating jury instructions cautioning juries against giving too much weight to victims' testimony.⁶⁶

A 1973 Chicago police training manual warned, "[m]any rape complaints are not legitimate. It is unfortunate that many women will claim they have been raped in order to get revenge against an unfaithful lover or boyfriend with a roving eye."⁶⁷ Police interrogated women to determine what they were wearing, if they had provoked the attack by acting suggestively, or if they felt pleasure during the assault.⁶⁸ By the 1980s, police and the courts had "enshrined distrust of women in

may have been so irresolute and undecided, and she may have made such feeble fight as was calculated to encourage, rather than repel the attack. And yet a sense of shame, arising either from an apprehension of the consequences which may follow the illicit connection or from the fact that the matter has already become known to others, may stimulate the woman to call that a rape, which was in truth a sin of a much less odious character.").

61. *Brown v. State*, 106 N.W. 536, 538 (Wis. 1906).

62. Jennifer S. Wong & Samantha Balemba, *The Effect of Victim Resistance on Rape Completion: A Meta-Analysis*, 19 TRAUMA, VIOLENCE, & ABUSE 352, 356 (2018).

63. *Id.* at 360-61.

64. *Rusk v. State*, 406 A.2d 624, 629-30 (Md. Ct. Spec. App. 1979) (Wilner J., dissenting) ("But what is required of a woman being attacked or in danger of attack? How much resistance must she offer? Where is that line to be drawn between requiring that she either risk serious physical harm, perhaps death, on the one hand, or be termed a willing partner on the other?").

65. Devon Frye, *Paralyzed by Fear: Why Many Rape Victims Don't Resist*, PSYCH. TODAY (Oct. 2, 2023), <https://www.psychologytoday.com/us/blog/all-about-sex/202310/paralyzed-by-fear-why-many-rape-victims-dont-resist>.

66. *State v. Blake*, 63 P.3d 56, 59 (Utah 2002).

67. Pagan Kennedy, *The Rape Kit's Secret History*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/interactive/2020/06/17/opinion/rape-kit-history.html>.

68. *Id.*

the law... and ensured that rape trials would indeed be *real* nightmares—for the women victims.”⁶⁹

B. Reliance on Rape Kit Evidence

Current evidentiary requirements for establishing rape rely heavily on DNA collected from rape kits. In a case of sexual assault, there is an element of “he said/she said.” Without corroborating evidence, it can be difficult for officers to successfully establish probable cause or prosecutors to meet the burden of proof at trial.⁷⁰ Nearly seventy-five percent of cases in which a DNA profile collected via a rape kit linked a suspect to the assault resulted in a guilty plea or a trial, compared with less than a third of cases without DNA evidence.⁷¹ Moreover, popular culture has trained juries to expect DNA evidence in trials for violent crimes such as murder and rape.⁷² Some prosecutors assert that a victim’s willingness to undergo a rape examination bolsters the victim’s credibility with a jury.⁷³ This confluence of factors can apply immense pressure on survivors of sexual assault to submit to a rape examination.⁷⁴

A rape kit examination is a highly intrusive process. Because the odds of collecting DNA evidence dwindle significantly after five days, officers may inadvertently pressure victims to quickly submit to the process.⁷⁵ If a victim does consent, she endures a two-to-four-hour examination where a Sexual Assault Nurse Examiner (“SANE nurse”)⁷⁶ will scrape, photograph, swab, and inspect the very areas of a victim’s body recently violated by her attacker.⁷⁷ After gathering medical history and information on the nature of the assault, a survivor stands on a white sheet to collect fibers and hairs that may fall as she disrobes.⁷⁸ The nurse

69. Blake, 63 P.3d at 59.

70. Melissa S. Morabito et al., *Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.*, OFF. OF JUST. PROGRAM, NAT’L CRIM. JUST. REFERENCE SERV. 44 (Feb. 2019), <https://www.ojp.gov/pdffiles1/nij/grants/252689.pdf>.

71. Sharita Forrest, *Study Examines Impact of DNA Evidence in Sexual Assault Prosecutions*, UNIV. OF ILL. URBANA-CHAMPAIGN SCH. OF SOC. WORK (Apr. 8, 2022), <https://socialwork.illinois.edu/news/study-examines-impact-of-dna-evidence-in-sexual-assault-prosecutions/>.

72. Experts have theorized that the popularity of widespread television shows such as *CSI: Crime Scene Investigators* has instilled in jurors an unrealistic expectation of DNA evidence at trial before they will render a guilty verdict. Donald E. Shelton, *The CSI Effect: Does it Really Exist?* NAT’L INST. OF JUST., (Mar. 16, 2008) <https://nij.ojp.gov/topics/articles/csi-effect-does-it-really-exist>.

73. Forrest, *supra* note 71.

74. Taylor Gamble, Note, *Thinking Outside the Box: Limiting the Collection of Rape Kit Evidence in Acquaintance Rape Trials*, 20 CARDOZO J.L. & GENDER 743, 760 (2014).

75. NPR Radio Podcasts Society & Culture, *After the Assault: A Question of Evidence*, 09:25 (June 28, 2021), <https://www.npr.org/podcasts/1001297172/after-the-assault>.

76. *Sexual Assault Nurse Examiner*, INT’L ASS’N OF FORENSIC NURSES, <https://www.forensicnurses.org/page/aboutSANE> (last visited Oct. 21, 2024).

77. Charlotte Alter, *Here’s What Happens When You Get a Rape Kit Exam*, TIME MAG., <https://time.com/3001467/heres-what-happens-when-you-get-a-rape-kit-exam/> (July 22, 2014, 4:00 PM).

78. *What Is a Rape Kit and Forensic Medical Examination?*, END THE BACKLOG, <https://rb.gy/i9w7xw> (last visited Oct. 21, 2024).

conducts a pubic comb-through,⁷⁹ collecting any hairs from the assailant, and does a head-to-toe inspection of the body, documenting and photographing injuries.⁸⁰ The body is scanned with a blue light to find biological evidence such as semen, blood, urine, skin cells, hair, and saliva.⁸¹ The survivor undergoes an internal speculum exam, with swabs taken from the cervix, vulva, and anus.⁸² The nurse scrapes under the fingernails and uses a colposcope, a specialized medical camera, to take pictures of possible injuries on the genitals.⁸³ Some victims report that the examination is itself an additional trauma.⁸⁴

Unarguably, rape kit evidence is highly effective in apprehending and convicting violent offenders, provided police departments follow up testing with investigative measures.⁸⁵ After enduring the rape examination, survivors experience profound disappointment and distrust of the legal system when there is no resulting arrest or prosecution.⁸⁶ This distrust is significantly magnified when the officer involved in the rape investigation uses evidence against the victim.⁸⁷

C. *Psychological Trauma*

Because a rape victim often places significant faith in the officer and detective managing her case, improper handling and storage of her rape kit evidence can be uniquely scarring.⁸⁸ A law enforcement officer is typically the first authority figure a rape victim encounters and the initial person to whom she reports.⁸⁹ What that officer decides to do with the information obtained by a survivor will profoundly impact the resolution of her case.⁹⁰ Under the Violence Against Women Act, a victim is entitled to a rape examination and preservation of evidence at no cost.⁹¹ But an officer will only assign a victim to a detective if the officer finds the survivor credible.⁹² In many ways, this makes police the gatekeepers of a victim's case.⁹³ If a detective decides there is probable cause a

79. Alter, *supra* note 77.

80. *What Is a Rape Kit and Forensic Medical Examination?*, *supra* note 78.

81. *After the Assault: A Question of Evidence*, *supra* note 75, at 14:38.

82. Alter, *supra* note 77.

83. *Id.*

84. Nina Bahadur, *Want to Know Why Women Don't Report Sexual Assault?*, SELF (Oct. 13, 2016), <https://www.self.com/story/why-women-dont-report-sexual-assault#>.

85. Jericka Duncan, *Even After Backlogged Rape Kits Tested, Convictions Are Rare*, CBS NEWS (Dec. 21, 2016, 7:41 PM EST) <https://www.cbsnews.com/news/even-after-backlogged-rape-kits-tested-convictions-are-rare/>.

86. NPR Radio Podcasts Society & Culture, *After the Assault: Case Closed*, 16:19 (June 21, 2021), <https://www.npr.org/podcasts/1001297172/after-the-assault>.

87. *"I Want to See Justice"*, *supra* note 1.

88. *See generally After the Assault: Case Closed*, *supra* note 86.

89. *After the Assault: Case Closed*, *supra* note 86, at 06:35.

90. *Id.*

91. 34 U.S.C. § 10449(a)(1) (2017).

92. *After the Assault: Case Closed*, *supra* note 86, at 11:50.

93. *See generally After the Assault: Case Closed*, *supra* note 86.

rape occurred, the legal process begins. Often, victims work closely with detectives for years, placing their confidence and belief in law enforcement to provide a measure of justice.⁹⁴ If law enforcement violates that trust, the results can be demoralizing. In a society where reporting sexual assault is commonly termed “second rape,” the utilization of victim DNA as a tool to prosecute survivors exacerbates the problem.⁹⁵

When Jane Doe discovered police used her rape kit to connect her to a property crime, she felt “violated again.”⁹⁶ The loss of control over her bodily autonomy and the degradation she suffered at the hands of the police left her feeling subhuman.⁹⁷ Gaining a victim’s consent to obtain “the most personal thing” they have “at their most vulnerable moment” and then “storing, cataloging, and weaponizing” that evidence turns “the justice system and our legal principles on their very head.”⁹⁸

D. Decreased Reporting

Scholars, specialists, and not-for-profits fear that the use of unregulated databases will chill reporting by future victims.⁹⁹ The Rape, Abuse, and Incest National Network (“RAINN”) reports that two out of every three rapes currently go undisclosed.¹⁰⁰ One in five victims that do report will not be believed.¹⁰¹ Many choose not to report for fear of retaliation and lack of confidence that the police can or will help.¹⁰² Sixty-six percent of victims are frightened that loved ones will blame them for the assault.¹⁰³ Most worry the media will discover their identity, or that people outside their immediate family may learn of the attack.¹⁰⁴ Police use of DNA evidence against victims creates another incentive for sexual assault survi-

94. *Id.* at 15:37.

95. Abdollah, *supra* note 4.

96. Jonathan Edwards, *SFPD Used a Woman’s Rape Kit DNA to Arrest Her. Now She’s Suing*, WASH. POST (Sept. 13, 2022, 7:28 AM EDT), <https://www.washingtonpost.com/nation/2022/09/13/san-francisco-rape-dna-lawsuit/>.

97. “*I Want to See Justice*”, *supra* note 1. In an interview with CBS Mornings, Jane Doe stated, “I’m not an animal; I don’t want no specimen of me collected in any way. I’m not no one’s pet. I’m my own person.... I want to see women being protected. I want to see respect for humanity, for individuals. I want respect for myself.”

98. *Id.*

99. Jill Filipovic, *San Francisco Rape Controversy Will Have a Chilling Effect*, CNN (Feb. 16, 2022, 12:04 PM), <https://www.cnn.com/2022/02/16/opinions/san-francisco-rape-kit-dna-chesa-bou-din-filipovic/index.html>; Bryan Pietsch, *San Francisco Police Use Rape Kit DNA to Identify Survivors as Suspects in Other Crimes, District Attorney Says*, WASH. POST (Feb. 14, 2022, 11:54 PM), <https://www.washingtonpost.com/nation/2022/02/14/san-francisco-police-rape-kit-dna/>.

100. *The Criminal Justice System: Statistics*, RAINN, <https://rainn.org/statistics/criminal-justice-system> (last visited Oct. 21, 2024).

101. Jodie Murphy-Oikonen et al., *Unfounded Sexual Assault: Women’s Experiences of Not Being Believed by the Police*, 37 J. INTERPERSONAL VIOLENCE NP8916, NP8917 (2022).

102. RAINN, *supra* note 100.

103. Dean G. Kilpatrick, *The Mental Health Impact of Rape*, NAT’L VIOLENCE AGAINST WOMEN PREVENTION RSCH. CNTR., <https://mainweb-v.musc.edu/vawprevention/research/mentalimpact.shtml> (last visited Oct. 21, 2024).

104. *Id.*

vors to refuse a rape kit examination or to choose not to report.¹⁰⁵ Not-for-profit organizations predict that rogue databases will corrode public trust in law enforcement and further deter reporting.¹⁰⁶ Without the trust and cooperation of victims, district attorneys will be unable to prosecute attackers and hold rapists accountable.¹⁰⁷

Chilling effects are felt sharpest in communities of color. For every Black woman who reports a rape, fifteen do not.¹⁰⁸ Reticence to report stems from an extensive tradition of refusing to believe and protect Black rape survivors.¹⁰⁹ Throughout U.S. history, the legal system has failed to deliver justice for Black and indigenous women. Early colonial statutes defined “rape” as a crime that happened only to white women.¹¹⁰ Enslaved women and free Black women alike were considered “promiscuous by nature” and therefore unrapable.¹¹¹ “Rape, in this sense, was something that only happened to white women; what happened to Black women was simply life.”¹¹² The over-policing and profiling of Black communities creates a world in which Black women are two and a half times as likely to experience arrest and incarceration as their white counterparts.¹¹³ While in custody, Black women often experience physical abuse and rape at the hands of law enforcement.¹¹⁴ Systematic and continuous police violence in Black communities has resulted in nearly two-thirds of Black Americans stating they have very little to no confidence that police officers in their community will treat them justly.¹¹⁵ Skepticism towards police integrity is intensified by entry and retention of victim DNA into unregulated databases. By keeping and cross-referencing an innocent Black woman’s DNA time and again, the police send her a message that while she may be today’s victim, she will be tomorrow’s perpetrator.¹¹⁶

105. Pietsch, *supra* note 99.

106. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 7 (statement of Chairperson Donovan Richards, Public Safety)

107. *Id.*

108. *Black Women, Sexual Assault, and Criminalization*, NAT’L BLACK WOMEN’S JUST. INST., <https://www.nbwji.org/post/black-women-sexual-assault-criminalization> (Apr. 11, 2023).

109. *Id.*

110. Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 45 n.24 (2017).

111. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598-99 (1990).

112. *Id.*

113. Jacobs, *supra* note 110, at 58-59.

114. *Id.* at 68-69.

115. Laura Santhanam, *Two-Thirds of Black Americans Don’t Trust the Police to Treat Them Equally. Most White Americans Do*, PBS NEWS (June 5, 2020, 12:00 PM), <https://www.pbs.org/news/hour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do>.

116. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 187 (statement of Ann Ordaco, Supervising Attorney of the Racial Justice Unit, Legal Aid Society) (“Essentially, he [the police commissioner] was stating to the council that these communities, these members of this communities (sic) are criminals. They should be in expectation that some point, even if an individual did not commit a crime and has not

E. Fourth Amendment Implications

On July 12, 2024, Doe settled her case before going to trial.¹¹⁷ As such, the Fourth Amendment ramification of the SFPD's actions were not tested before a court a law. But the collection of victim DNA for indefinite storage and subsequent comparison triggers obvious and significant Fourth Amendment issues. The Fourth Amendment ensures "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures."¹¹⁸ In *Katz v. United States*, Justice Harlan voiced that officers violate the Fourth Amendment by conducting warrantless searches that infringe on a person's "reasonable expectation of privacy."¹¹⁹ Reasonableness is measured by a defendant's "subjective expectation of privacy," and society's preparedness to accept that expectation as objectively reasonable.¹²⁰

It is settled case law that the collection of DNA constitutes a search under the Fourth Amendment.¹²¹ The reasonableness of a search, however, is based on the totality of the circumstances-on a case-by-case basis.¹²² With very few exceptions, searches conducted without a warrant are per se unreasonable.¹²³

An established exception to the requirement for a search warrant is a search conducted under consent.¹²⁴ Professor Joshua Dressler notes that "consent almost certainly represents the dominant category of lawful warrantless searches. Put simply, there are few areas of Fourth Amendment jurisprudence of greater practical significance than consent searches."¹²⁵ For efficiency and convenience, officers often attempt to gather DNA samples via consent instead of going through the process of obtaining a warrant.¹²⁶ Effective consent must be voluntary, and officers must remain within the scope of the consent granted.¹²⁷

When an officer exceeds the scope of a victim's consent, the consent search is invalid.¹²⁸ The standard for measuring the scope of consent is reasonableness.¹²⁹ The court will look at the interaction between officer and victim and ask, "what

been convicted of a crime, has a no-hit on the case, that they're trying to solve, probably will eventually commit a crime and they need that DNA in their index to be able to go back and be able to trace it and link it in the future. They're saying my community, I'm a black woman in this country, is a criminal community. We should all be concerned and disgusted by that.").

117. Order Granting Conditional Dismissal, *Doe v. City & Cnty. of S.F.*, No. 3:22-CV-05179-AGT (N.D. Cal. July 12, 2024).

118. U.S. CONST. amend. IV.

119. *Katz v. United States*, 389 U.S. 347, 360 (1967).

120. *Id.* at 361.

121. *Maryland v. King*, 569 U.S. 435, 446 (2013).

122. *United States v. Knights*, 534 U.S. 112, 118-19 (2001).

123. *Coolidge v. New Hampshire*, 403 U.S. 443, 479 (1971).

124. *United States v. Salemi-Nicoloso*, 353 F. Supp. 3d 527, 537 (N.D. Miss. 2018); *see also* *Davis v. United States*, 328 U.S. 582, 593 (1946).

125. JOSHUA DRESSLER ET AL., *UNDERSTANDING CRIMINAL PROCEDURE, VOLUME 1: INVESTIGATION* 247 (Carolina Academic Press, 7th ed. 2017).

126. *Id.*

127. *Id.* at 249.

128. *Id.*

129. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

would the typical reasonable person have understood by the exchange between the officer and the suspect?”¹³⁰ Jane Doe alleges that SFPD told her police would only use her DNA to investigate her sexual assault, and that she signed a written agreement to that end.¹³¹ If such an understanding existed, the SFPD likely exceeded the scope of Doe’s consent by comparing her rape kit evidence against thousands of extraneous crime scenes.¹³² Without Doe’s consent, the SFPD’s multiple searches would violate the United States¹³³ and California State Constitution.¹³⁴ On its face, Doe’s claim of lack of consent appears credible, for as retired Chattanooga Police Chief, Fred Fletcher, noted, “I’ve never seen an informed consent that includes ‘We might use [your DNA] for the criminal prosecution of you.’”¹³⁵

Whether the court applies a “waiver” or “reasonableness” approach is a key factor in determining the legality of consent.¹³⁶ Before the 1970s, the Supreme Court interpreted consent as a waiver—the “intentional relinquishment or abandonment of a known right or privilege.”¹³⁷ If police wanted to compare a victim’s DNA against unrelated crime scene evidence, they had to obtain her informed consent by revealing their intention to do so.¹³⁸ Informed consent requires an “agreement to an interaction or action rendered with knowledge of relevant facts, such as the risks involved or any available alternatives.”¹³⁹ Under the “waiver” approach, failing to inform a victim that her DNA sample could be used in the future to charge her with an unrelated crime would render her consent invalid.¹⁴⁰

In *Schneekloth v. Bustamonte*, however, the Supreme Court dramatically shifted its attitude on consent, making “reasonableness” the measuring stick to determine the scope and legality of consent.¹⁴¹ Some courts have concluded a warrantless search does not require informed consent for future DNA comparison.¹⁴² Consent, once rendered, “permits the government to use the sample consistent with the reasonable understanding of the consent, including in unrelated investigations.”¹⁴³ Under the “reasonableness” approach, the court concluded the Fourth

130. *Id.*

131. Plaintiff’s Opposition to Defendant’s Motion to Dismiss at 14, *Doe v. City & Cnty. of S.F.*, No. 3:22-CV-05179-AGT (N.D. Cal. Nov. 10, 2022).

132. *Id.* at 14-15.

133. U.S. CONST. amend. IV.

134. CAL. CONST. art. I, § 13.

135. Abdollah, *supra* note 4.

136. DRESSLER ET AL., *supra* note 125, at 249-51.

137. *Id.* at 249.

138. *Id.*

139. *Informed Consent*, CORNELL L. SCH., https://www.law.cornell.edu/wex/informed_consent# (last visited Jan. 25, 2025).

140. *United States v. McWeeney*, 454 F.3d 1030, 1034 (9th Cir. 2006) (“It is a violation of a suspect’s Fourth Amendment rights for a consensual search to exceed the scope of the consent given.”)

141. *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

142. *Varriale v. State*, 119 A.3d 824, 838-39 (Md. 2015) (holding the Fourth Amendment did not preclude the State from warrantless testing and entry into the state DNA database after defendant consented to the initial collection).

143. *State v. McDonnell*, 297 A.3d 1114, 1129 (Md. 2023) (citing *Varriale*, 119 A.3d at 838-39).

Amendment does not preclude the police from retaining and using a DNA profile created from a sample lawfully obtained by consent.¹⁴⁴

While federal courts have shifted away from the waiver approach, not all states embrace this approach. Some states, like California, have enshrined the right to privacy in the state constitution and require informed consent whenever a party relinquishes a constitutional right.¹⁴⁵ Two cases exemplify how the judicial view of consent can drastically impact the outcome of a case—*Varriale v. State*, and the still pending case of *Thompson v. Spitzer*.¹⁴⁶

In *Varriale*, the defendant voluntarily consented to a DNA swab in order to exclude himself as a suspect in a rape case.¹⁴⁷ Varriale's DNA cleared him of involvement in the attack.¹⁴⁸ Regardless, the local lab added the defendant's sample into the "suspect index"—a county-owned unregulated database.¹⁴⁹ Varriale argued the comparison of his DNA to unrelated crimes exceeded the scope of his consent and violated his Fourth Amendment rights.¹⁵⁰ The court disagreed, reasoning the defendant was aware "law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched."¹⁵¹ Absent an express limitation of the consent, it was objectively reasonable for police to retain and compare Varriale's DNA against unrelated cases.¹⁵²

The ongoing case of *Thompson v. Spitzer* illustrates how dramatically different determining the validity and scope of consent can be when courts apply a "waiver" approach.¹⁵³ California State law views consent as a "waiver" of a constitutional right and requires permission be given "knowingly" with "sufficient awareness of the relevant circumstances and likely consequences."¹⁵⁴ In *Thompson*, the plaintiffs allege that Orange County violated the state constitution by pressuring misdemeanants to surrender DNA samples "without a full understanding of how their DNA will be used or their right to counsel."¹⁵⁵ The plaintiffs further allege Orange County violated the state constitution by shipping DNA samples to a third-party laboratory for processing and placement in an unregulated database, without first obtaining consent from donors.¹⁵⁶

144. *Varriale*, 119 A.3d at 830.

145. CAL CONST. art. I § 1.

146. See generally *Varriale*, 119 A.3d 824; *Thompson v. Spitzer*, 307 Cal Rptr. 3d 183 (Cal. Ct. App. 2023).

147. *Varriale*, 119 A.3d at 826.

148. *Id.*

149. *Id.* at 828.

150. *Id.*

151. *Id.* at 832 (quoting *Maryland v. King*, 569 U.S. 435, 464 (2013)); see also *Commonwealth v. Gaynor*, 820 N.E.2d 233, 244 (Mass. 2005) ("The object of the intended search was a sample of the defendant's blood and the identifying information that could be obtained by DNA testing of the sample.").

152. *Varriale*, 119 A.3d at 830.

153. See generally *Thompson v. Spitzer*, 307 Cal. Rptr. 3d 183 (Cal. Ct. App. 2023).

154. *Kelly v. William Morrow & Co.*, 231 Cal. Rptr. 497, 502 (Cal. Ct. App. 1986).

155. *Thompson*, 307 Cal. Rptr. 3d at 192-93.

156. *Id.*

Because police failed to inform consenting donors “as to the parties that will possess their DNA information or the potential purposes for which their DNA could be used,” the court found sufficient evidence to support a claim of constitutional infringement and invasion of privacy.¹⁵⁷

Under a reasonableness application of consent, a court could determine that once Doe voluntarily relinquished her DNA to officers, the SFPD was free to use that sample in any manner consistent with typical police procedures, which would include entry into a DNA database for cross-comparison. Under a waiver approach, the SFPD’s failure to disclose to Doe exactly how her sample would be retained and used would invalidate her consent and violate the California State Constitution.

III. STATE ATTEMPTS AT REGULATION

Unregulated databases pose distinct challenges that vary based on their form and applicable state laws. This section examines the specific issues presented by local databases and delves into efforts made by legislatures to address these concerns.

A. *New York*

New York City is home to the largest police force in the nation, with the New York Police Department (“NYPD”) boasting a force of approximately 36,000 officers.¹⁵⁸ With seventy-seven patrol precincts, twelve transit districts, nine police service areas (“PSAs”) and countless uniformed traffic and school safety agents, the NYPD forms a veritable hydra of law enforcement power, which presents unwieldy and unique challenges to legislative oversight.¹⁵⁹ Legislative efforts have struggled to strike the balance between forming community partnerships and preventing the erosion of trust that can come with over-policing.¹⁶⁰

New York Executive Law 995-c permits the establishment of a carefully regulated State DNA Identification Index.¹⁶¹ The law explicitly prohibits storing DNA prior to conviction, identifies “designated offenders” eligible for submission in the database, and closely regulates laboratories processing samples.¹⁶² Unbeknownst to state legislators, in 1997, New York City created a municipal DNA identification index system (“Suspect Index”) through the office of the Chief

157. *Id.* at 199, 202.

158. *About NYPD*, N.Y.C. POLICE DEP’T, <https://www.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> (last visited Nov. 11, 2024).

159. *Id.*

160. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 15-17 (statement of Rodney Harris, Chief of Detectives, New York Police Department).

161. N.Y. EXEC. LAW § 995-c(1) (McKinney 2012).

162. *Id.* § 995-c(3).

Medical Examiner.¹⁶³ The NYPD's unregulated database became "the least restrictive and most expansive DNA identification index in the country."¹⁶⁴

Where Executive Law 995-c limits state collection of DNA to persons convicted of felonies or misdemeanor and expressly prohibits the addition of samples taken from victims and juveniles, the Suspect Index has no such limitations.¹⁶⁵ Police can add anyone's DNA, for any reason, at any time.¹⁶⁶ Approximately fifty percent of the samples in the database come from informed consent, while the other half come from abandoned property.¹⁶⁷ The index operates completely outside state regulation, enabling officers to add samples from juveniles, individuals who have not been arrested or convicted, victims, and evidence obtained surreptitiously from discarded items left in interrogation rooms.¹⁶⁸ By 2020, the Suspect Index consisted of 82,000 profiles, 32,000 from individuals who were never arrested or convicted of a crime.¹⁶⁹

The tactics the NYPD deployed to populate the Suspect Index faced intense scrutiny, leading to a public hearing after the revelation that police had engaged in "race-based dragnets."¹⁷⁰ Criticism turned to outrage when it was discovered the NYPD databank potentially included profiles of victims, juveniles, and witnesses.¹⁷¹ When the New York City Council asked for justification for retaining and

163. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 11-12 (statement of Chairperson Rory I. Lancman, Justice System).

164. N.Y.C. BAR, REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE, THE CRIMINAL JUSTICE OPERATIONS COMMITTEE AND THE MASS INCARCERATION TASK FORCE 5 (2020), <https://www.nycbar.org/wp-content/uploads/2023/05/2020629-DNAIndexingNYC.pdf> [hereinafter REPORT ON LEGISLATION].

165. *See generally* N.Y. EXEC. LAW § 995-c (McKinney 2012); N.Y. COMP. CODES R. & REGS. tit. 9, § 6192.3 (2021).

166. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 170 (statement of Chairperson Rory I. Lancman, Justice System).

167. *Id.* at 29 (statement of Emanuel Katranakis, Deputy Chief, Forensic Investigation Division).

168. Aaron Morrison, *Hundreds of Victim and Witness DNA Profiles Removed from New York City Database*, THE APPEAL (Nov. 26, 2019), <https://theappeal.org/new-york-dna-database-victims-witnesses-removed/>.

169. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 19-20 (statement of Rodney Harris, Chief of Detectives, New York Police Department).

170. *Id.* at 40 (statement of Chairperson Donovan Richards, Public Safety). After the 2016 murder of Karina Vetrano, 384 unimplicated Black men were pressured to submit saliva samples for exclusion. In 2019, Chanel Lewis was tried and convicted of Vetrano's murder, and yet the 384 samples collected in the "genetic stop and frisk" remained in the municipal database and were compared to unrelated crimes. Anthony DiLorenzo, *Karina Vetrano Murder: Chanel Lewis Wants Conviction Tossed over DNA Evidence*, PIX11, <https://pix11.com/news/local-news/queens/karina-vetrano-murder-chanel-lewis-requests-new-trial-after-questions-over-dna-evidence/> (Aug. 24, 2023, 12:43 PM); *City Council Goes After NYPD's DNA Database of 32,000 New Yorkers, Its Secret 'Genetic Stop and Frisk' Files*, CBS NEWS (Feb. 25, 2020, 7:35 PM), <https://www.cbsnews.com/new-york/news/nypd-secret-dna-database/>.

171. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 22, 176 (statement of Rodney Harris, Chief of Detectives,

cross-referencing the DNA of innocent New Yorkers after an initial search failed to implicate the donor, Bob Barrows, the Director of Legal Operations and Projects for the NYPD stated, “I think the approach you’re talking about, it’s often called like a one and done.... But unfortunately, crime isn’t committed in a one and done fashion....”¹⁷² Chairperson for Public Safety, Donovan Richards, characterized Barrow’s sentiment as an act of “fortune telling” that presupposes that in the future “innocent people who have gone into a database may commit crimes later on.”¹⁷³

Believing the decision to retain DNA samples from innocent parties was racially motivated, the City Council demanded details on the racial demographics of the Suspect Index.¹⁷⁴ The NYPD was grossly unprepared and unable to provide basic facts on such demographics.¹⁷⁵ Infuriated by the lack of oversight and invasion of privacy, advocate groups urged state legislators to restrict the NYPD from operating the Suspect Index. They demanded immediate expungement of the database.¹⁷⁶ In contrast, the NYPD requested to retain the authority to self-regulate, promising to revise screening policies and review profiles for expungement every two-to-four years.¹⁷⁷ This policy, however, does not protect citizens from what the NYPD might do with samples during those years, nor does it ensure the removal of profiles from the index. The NYPD’s proposition fails to address the initial illegal collection of DNA and does not propose checks and balances to stop ongoing abuses. Without legislation, the NYPD can continue to do as they please to populate and maintain the Suspect Index.

In response, the Legal Aid Society has filed a class action lawsuit against the city, alleging that storing and repeatedly cross comparing the DNA of innocent New Yorkers violates the Constitution and leads to wrongful prosecutions and arrests.¹⁷⁸ Beth Haroules, a senior staff attorney at the American Civil Liberties Union, stated:

“The rogue database takes the presumption of innocence, one of the bedrock principles of our Constitution, and turns it on its head.” Every person in the database “is always a potential suspect, a perpetrator of crime that just hasn’t been discovered yet, or in the case of young people, a crime they just haven’t committed yet[.]”¹⁷⁹

New York Police Department and Terry Rosenblatt, Supervising Attorney of the DNA Unit, Legal Aid Society).

172. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 96 (statement of Bob Barrows, Director of Legal Operations and Projects, New York Police Department).

173. *Id.* at 96-97 (statement of Chairperson Donovan Richards, Public Safety).

174. *Id.* at 118 (statement of Chairperson Donovan Richards, Public Safety).

175. *Id.* at 119, 195 (statement of Lee Roland, Policy Director for New York Civil Liberties Union).

176. *Id.* at 183, 190 (statement of Shamari Ward, Attorney, Legal Aid Society Juvenile Rights Practice and unidentified advocate).

177. *Id.* at 23 (statement of Rodney Harris, Chief of Detectives, New York Police Department).

178. *Leslie v. City of N.Y.*, 2023 WL 2612688, at *2 (S.D.N.Y. 2023).

179. Andrea Flink, *New York City’s Unauthorized DNA Database*, WEST SIDE RAG (Aug. 8, 2022, 5:25 PM), <https://www.westsiderag.com/2022/08/08/new-york-citys-unauthorized-dna-database> (internal quotations omitted).

The NYPD argues since the state legislature did not explicitly ban the compilation of a local unregulated database when establishing the State DNA Index System, its local database is legally permissible.¹⁸⁰ The case is still pending as of early 2025.¹⁸¹

Because the New York City Council has yet to pass legislation permitting the NYPD to construct a database, some courts have struggled to decide if 995-c precludes the creation of an unregulated municipal database.¹⁸² While the court in *People v. Mohammed* interpreted the language of 995-c as applying only to the state and not municipalities,¹⁸³ the court in *People v. K.M.* disagreed, claiming the NYPD unregulated database violated New York law.¹⁸⁴ Courts continue to navigate the judicial labyrinth of NYC's database, and implore legislators to intervene.¹⁸⁵

Currently, members of the New York Senate, led by Senator Brad Hoylman, are attempting to pass Senate Bill 998; a bill to amend 995-c and establish a single computerized state identification index.¹⁸⁶ “The fact that New York City thinks it can have its own database outside of state laws frankly is an outrage and should give everyone pause about something that could not be more personal to them: their genetic material,” says Hoylman.¹⁸⁷ The proposed bill clarifies that the state's database is the only DNA database recognized under New York law,¹⁸⁸ and requires municipalities to expunge DNA records stored in a local internal index within ninety days of the bill's enactment.¹⁸⁹ By consolidating to a single database, legislators can efficiently regulate DNA collection and retention, obtain demographic information, and ensure the index is operating within the parameters of the law.¹⁹⁰

The bill is clear and direct, leaving no room for confusion by explicitly and repeatedly stressing that there will be only a *single* computerized state database.¹⁹¹ “No county, city, town, village, or municipality, or any entity thereof, may establish or maintain a computerized DNA identification index.”¹⁹² This unambiguous language prevents confusion surrounding legislative intent or preclusion. Provision 3(b)(4) allows police officers and law enforcement officials to continue collecting DNA, enabling local departments to contribute quality samples to the

180. *Leslie*, 2023 WL 2612688, at *10.

181. *Leslie v. City of New York* (1-22-cv-0235), COURT LISTENER, <https://www.courtlistener.com/docket/63176263/leslie-v-city-of-new-york/> (last visited Oct. 22, 2024).

182. *People v. Velez*, 2017 WL 162287, at *3 (N.Y. Sup. Ct. 2017).

183. *People v. Mohammed*, 6 N.Y.S.3d 460, 462 (N.Y. Sup. Ct. 2015).

184. *People v. K.M.*, 41 N.Y.S.3d 875, 879-80 (N.Y. Sup. Ct. 2016).

185. *People v. Flores*, 2018 WL 6037592, at *11 (N.Y. Crim. Ct. 2018) (stating “[u]ntil [there is a] legislative amendment, there will continue to be inconsistency in these rulings.”).

186. S.B. 998, 2023-2024 Reg. Sess. (N.Y. 2023).

187. Flink, *supra* note 178.

188. S.B. 998, 2023-2024 Reg. Sess. § 1 (N.Y. 2023).

189. *Id.* § 9(c).

190. REPORT ON LEGISLATION, *supra* note 164, at 9-10.

191. S.B. 998, 2023-2024 Reg. Sess. § 1-2 (N.Y. 2023).

192. *Id.* § 1.

state database.¹⁹³ But the amendment strictly prohibits entry of anyone other than designated offenders, providing added protection for sexual assault victims.¹⁹⁴

Even so, the language in Senate Bill 998 fails to expressly prohibit storing and using victim DNA to prosecute unrelated crimes. Senate Bill 8404, brought by Senator Holyman in the 2022 session, would have done just that.¹⁹⁵ Under the proposed legislation, adding a victim's sample collected from sexual assault offenses to a DNA database would have been strictly prohibited.¹⁹⁶ The bill died in committee. Given the NYPD's history of exploiting ambiguous statutory language, it is crucial to have precise wording strictly forbidding the storing and cross-comparison of victim DNA. As noted by retired Chief of Police Fred Fletcher, "[w]e still have a long way to go to bifurcate criminal behavior from victimization. But when people have been victimized, they should be valued and supported as victims, independent of whether or not they have engaged in criminal activity[.]"¹⁹⁷ Because the line between victim and criminal is often blurred, anything other than an express ban on the storing of victim DNA poses the risk of sexual assault survivors, once again, falling through regulatory cracks.

B. *Massachusetts*

Massachusetts has a healthy and vigorous policy surrounding the regulation of DNA laboratories and databases.¹⁹⁸ The Fair Information Practices Act states agencies may "not collect or maintain more personal data than are reasonably necessary for the performance of statutory functions."¹⁹⁹ In 2018, the state legislature formed the Forensic Science Oversight Board ("FSOB"), tasked with providing oversight "overall commonwealth facilities engaged in forensic services in criminal investigations" and to "initiate an investigation into any forensic science, technique or analysis used in a criminal matter upon... a determination... that an investigation of a forensic analysis would advance the integrity and reliability of forensic science in the commonwealth."²⁰⁰

The state has codified the right to privacy in Massachusetts by passing General Law c. 214, § 1B, which protects citizens "against unreasonable, substantial or serious interference" with privacy.²⁰¹ Massachusetts case law has interpreted this statute to apply to the improper use of DNA databases, viewing such use as a violation of the statute.²⁰²

Despite multiple safeguards, a 2021 investigation into the misuse of familial DNA searches revealed an alarming attempt by district attorneys to create an

193. *Id.* § 3(b)(4).

194. *Id.* § 3(c).

195. S.B. 8408, 2021-2022 Reg. Sess. § 1-3 (N.Y. 2022).

196. *Id.* § (1)(c).

197. Abdollah, *supra* note 4.

198. *See generally* MASS. GEN. LAWS ANN. ch. 22E, §§ 1-15 (West 2024).

199. MASS. GEN. LAWS ANN. ch. 66A, § 2(l) (West 2007).

200. MASS. GEN. LAWS ANN. ch. 6, § 184A(a), (d) (West 2018).

201. MASS. GEN. LAWS ANN. ch. 214, § 1B (West 2024).

202. *Amato v. Dist. Att'y for Cape & Islands Dist.*, 952 N.E.2d 400, 409-10 (Mass. App. Ct., 2011).

unregulated database.²⁰³ General Law Chapter 22E restricts DNA collection to individuals convicted of specific offenses.²⁰⁴ The FSOB found the Bristol County DA office had compelled the Massachusetts State Police Crime Laboratory (“MSPCL”) to aggregate samples and create a database that included victims, family members, consensual sexual partners, and profiles submitted for exclusionary purposes.²⁰⁵ Stored samples included the name and gender of the profile source—a clear violation of Massachusetts privacy law.²⁰⁶

In response, state legislators will likely pass Senate Bill 1528 in the next session.²⁰⁷ This legislation amends Section 10 of Chapter 22E, which addresses the regulation of the state DNA database.²⁰⁸ The proposed amendment reads, “[a]ggregation of DNA records outside of CODIS, including by law enforcement entities outside of the state police crime laboratory, shall be prohibited, and the development of an unregulated secondary DNA database shall likewise be prohibited.”²⁰⁹ Senate Bill 1528, however, contains flaws similar to Senate Bill 988, as it does not strictly prohibit indefinitely storing victim DNA, leaving the door open for future violations. Without such specificity, sexual assault survivors remain at risk that future law enforcement officials could exploit the legislative gap.

C. California

While California law enforcement officials have touted the success of local DNA collection practices, citing cases like the identification and conviction of the Grim Sleeper²¹⁰ and the Golden State Killer,²¹¹ California’s history of DNA collection is marred by questionable practices. In 2004, voters of the state of California passed the Innocence Protection Act, expanding sample entry to include “any felony offense” and select misdemeanors.²¹² In *People v. Buza*, the California Supreme Court upheld the Act’s constitutionality, paving the way for an ever-growing database.²¹³ Post *Buza*, local district attorneys and police officials began compiling one of the most extensive unregulated databases in the nation.²¹⁴

203. ACLU of Massachusetts v. Bristol District Attorney’s Office, ACLU MASS., <https://www.aclum.org/en/cases/aclu-massachusetts-v-bristol-district-attorneys-office> (last visited Oct. 22, 2024).

204. MASS. GEN. LAWS ANN. ch. 22E, § 3 (West 2019).

205. ACLU of Massachusetts v. Bristol District Attorney’s Office, *supra* note 203.

206. *Id.*

207. S.B. 1528, 193 Gen. Ct. (Mass. 2023).

208. MASS. GEN. LAWS ANN. ch. 22E (West 2019).

209. S.B. 1528, § 3(e), 193 Gen. Ct. (Mass. 2023).

210. *Dealing for DNA*, VOICE OF OC, <https://voiceofoc.org/2010/07/dealing-for-dna/> (Dec. 8, 2020).

211. Ray Sanchez, *California’s DNA Database Law Drew the Wrath of Privacy Rights Groups. It May Have Helped Nab the Golden State Killer*, CNN, <https://www.cnn.com/2018/04/26/us/golden-state-killer-dna-database-trnd/index.html> (Apr. 27, 2018, 7:48 PM).

212. CAL. PENAL CODE § 296 (West 2004).

213. *People v. Buza*, 413 P.3d 1132, 1152-53 (Cal. 2018).

214. Emma Ockerman, *Why Are Prosecutors Keeping a Huge, Secretive DNA Database in Orange County?* VICE NEWS (Feb. 26, 2021, 2:55 PM), <https://www.vice.com/en/article/4ade3g/why-are-prosecutors-keeping-a-huge-secretive-dna-database-in-orange-county>.

Orange County is “a prime example of a city using a local DNA database on steroids,”²¹⁵ operating completely unregulated. By 2014, the Orange County local database contained 80,000 DNA samples.²¹⁶ As of 2019, that number had climbed to 200,000, largely due to the “spit and acquit” program.²¹⁷ Aimed at low-level crimes such as trespassing, theft, and petty larceny, district attorneys agreed to drop charges if the suspect provided a DNA sample for entry into the database.²¹⁸ The program quickly devolved, with prosecutors offering plea deals or promises to drop charges in exchange for DNA samples.²¹⁹ Citizens cited for minor offenses like having a dog off a leash, driving without a license, or public intoxication were coerced into providing a DNA sample for indefinite storage.²²⁰ As mentioned above, a pending lawsuit challenges the constitutionality of Orange County’s DNA collection and storage practices.²²¹

Ultimately, it was the practices of the SFPD in Jane Doe’s case, including the creation of a “quality assurance” bank that included victim samples, that drew national criticism and prompted the California State Legislature to regulate local databases.²²² In an interview with *The Washington Post*, District Attorney Chesa Boudin expressed horror upon discovering the SFPD used Doe’s rape kit to secure her arrest warrant on an unrelated case:

“Rapes and sexual assault are violent, dehumanizing, and traumatic.... I am disturbed that victims who have the courage to undergo an invasive examination to help identify their perpetrators are being treated like criminals rather than supported as crime victims. We should encourage survivors to come forward—not collect evidence to use against them in the future.”²²³

Boudin immediately dropped all charges against Doe.²²⁴

Retired San Diego Police detective Carlton Hershman described the revelation as a “nuclear bomb.”²²⁵ Having investigated over thirteen hundred sexual

215. Mercer & Gabel, *supra* note 6, at 670.

216. *Id.*

217. Jennifer Lynch et al., *EFF Files Amicus Brief Challenging Orange County, CA’s Controversial DNA Collection Program* (Nov. 10, 2022), <https://www.eff.org/deeplinks/2022/11/eff-files-amicus-brief-challenging-orange-county-cas-controversial-dna-collection>.

218. *Dealing for DNA*, *supra* note 210.

219. *Id.*

220. Jordan Smith, *Orange County Prosecutors Operate “Vast Secretive” Genetic Surveillance Program*, *THE INTERCEPT* (July 3, 2021, 6:00 AM), <https://theintercept.com/2021/07/03/orange-county-prosecutors-dna-surveillance/>.

221. *See* Thompson v. Spitzer, 90 Cal. App. 5th 436 (Cal. Ct. App. 2023).

222. Annika Hom, *Police Explain How Rape Kit Ended Up in DNA Database*, *MISSION LOCAL*, (March 3, 2022, 9:00 PM EST), <https://missionlocal.org/2022/03/police-explain-how-rape-kit-ended-up-in-a-database/>.

223. Alisha Ebrahimji, *San Francisco Police Will Review Its Policies After DA Claims It Used Sexual Assault Victims’ DNA in Unrelated Investigation*, *CNN* (Feb. 15, 2022, 4:26 PM EST), <https://www.cnn.com/2022/02/15/us/sfpd-rape-kits-dna-victim-crimes-trnd/index.html>.

224. *A Woman Whose Rape DNA Led to Her Arrest Sues the City of San Francisco*, *NPR* (Sept. 13, 2022, 10:56 PM), <https://www.npr.org/2022/09/13/1122670742/rape-dna-san-francisco-lawsuit>.

225. Abdollah, *supra* note 4.

assault cases, Carlton commented, “[y]ou can’t just take a swath of people and throw them in a databank. I don’t care if you’re a career criminal, I don’t care if you’re a gang member and you’ve been shot. Your DNA should not be dumped in with suspects. That’s not how we operate.”²²⁶

The San Francisco Police Department acknowledged the problematic nature of the practice. Police Chief William Scott stated:

“We must never create disincentives for crime victims to cooperate with police, and if it’s true that DNA collected from a rape or sexual assault victim has been used by SFPD to identify and apprehend that person as a suspect in another crime, I’m committed to ending the practice[.]”²²⁷

True to his word, Chief Scott ended the policy of depositing victim DNA in the quality assurance database after an inquiry revealed seventeen victims had their DNA stored and compared against unrelated crimes. In eleven of those cases, police obtained the victim’s DNA from a rape kit.²²⁸

The local government acted quickly following Chief Scott’s decision. While SFPD argued that storing Doe’s and other victims’ DNA in a “quality assurance” database was necessary to prevent contamination,²²⁹ the San Francisco Board of Supervisors passed a measure limiting the storage of rape kit evidence in the database to sixty days.²³⁰ The State of California took immediate action by introducing and passing legislation laying out exact measures and perimeters for using victim DNA.²³¹

The California State Senate passed California Penal Code § 679.12 amendments, enacted in January 2024.²³² The provisions of the bill apply expressly to

226. *Id.*

227. Ebrahimji, *supra* note 223.

228. *SFPD Banned from Using Victim DNA To Investigate Them*, KRON4, <https://www.kron4.com/news/bay-area/sfpd-banned-from-using-victim-dna-to-investigate-them/> (Apr. 20, 2022, 10:16 AM).

229. In their Motion to Dismiss, SFPD argues the quality assurance database constitutes a “special need” falling outside the scope of the Fourth Amendment. Additionally, they argue that SFPD officers had no reason to believe that using the quality assurance database would violate a constitutional right, exempting the actions of SFPD staff under qualified immunity. District Attorney Chesa Boudin, however, has asserted in interviews with the press that an incident report about Doe’s property crime refers to the comparison of victim DNA against unrelated crime scenes as a “routine search.” If true, the incident report somewhat undercuts the claim that SFPD personnel were unaware of the practice. *See* Defendants’ Notice of Motion and Partial Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim at 1, *Doe v. City & Cnty. of S.F.*, No. 3:22-cv-05179-AGT (N.D. Cal. Oct. 27, 2022); Making The Case with Yodit, *D.A. Says San Francisco Police Used DNA Rape Kits to Arrest Victims*, YOUTUBE at 4:26 (Feb. 16, 2022), <https://www.youtube.com/watch?v=flqr7WzKSGA>; *see also* *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (noting the permissibility of administrative and special needs searches conducted for important non-law enforcement purposes, where adherence to traditional warrant and probable-cause requirements would be imprudent in the given circumstances); *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001).

230. *SFPD Banned from Using Victim DNA to Investigate Them*, *supra* note 228.

231. *See generally* CAL. PENAL CODE § 679.12 (2024).

232. *Id.*

DNA samples taken from victims of crime.²³³ Comparison of victim DNA to any unrelated case is prohibited, and victim profiles cannot be stored in a database capable of comparing the sample to an unrelated crime scene.²³⁴ Working in tandem with the Sexual Assault Victims' Bill of Rights, California Penal Code § 680, DNA reference samples collected directly from a sexual assault survivor and reference samples voluntarily provided for the purpose of exclusion must adhere to the limitations laid forth in § 679.12.²³⁵ DNA collected for exclusion purposes must be deleted from all public and private databased if the sample provider has no past, present, or pending charge that qualifies the sample for inclusion.²³⁶

The bill settles an issue raised by District Attorney Boudin, who argued that storing victim DNA violates the California Victims' Bill of Rights, which requires "the prompt return of property when no longer needed as evidence."²³⁷ Such an interpretation could prove disastrous for the wrongfully convicted who rely on DNA samples for exoneration—sometimes years, after the state determines evidence, is "no longer needed."²³⁸ Section 679.12 does not call for the return of victim DNA, but mandates proper and secure storage of remaining specimens that may be left after generating a DNA profile.²³⁹ By mandating the secured storage of remaining DNA samples, defendants can obtain a court order to access potentially valuable exculpatory evidence.²⁴⁰

The actions taken by the California Legislature are significant strides in furthering the protection of victims. Unfortunately, by the time the amendment to § 679.12 passed, the damage was done. Due to San Francisco's DNA database practices, Doe spent fourteen days in jail, and her story has traveled around the world, further injuring an already damaged sense of faith and certainty in the police. While Doe recently settled her claim against SFPD and the City of San Francisco, her case has broad ramifications. The possibility that a victim could have her rape kit used against her adds to a dark history surrounding the evidentiary requirements to establish sexual assault. The threat of re-victimization brought by misuse of DNA samples requires aggressive legislation to protect sexual assault survivors and restore confidence in law enforcement.

IV. RECOMMENDATIONS

The primary approaches for local database oversight include self-regulation by the police department or district attorney's office, partial legislative or city

233. *Id.* § 679.12(a) (2024).

234. *Id.* § 679.12 (a)(2)-(6) (2024).

235. CAL. PENAL CODE § 680(b)(7) (2024).

236. *Id.*

237. CAL. PENAL CODE § 679.026 (2008).

238. See Katie Worth, *Framed for Murder by His Own DNA*, MARSHALL PROJECT (Apr. 19, 2018, 7:00 AM), <https://www.themarshallproject.org/2018/04/19/framed-for-murder-by-his-own-dna>; see also Douglass Starr, *Forensics Gone Wrong: When DNA Snares the Innocent*, SCIENCE (Mar. 7, 2016), <https://www.science.org/content/article/forensics-gone-wrong-when-dna-snares-innocent> (highlighting wrongful convictions overturned by proper DNA analysis).

239. CAL. PENAL CODE § 679.12(a)(5) (2024).

240. *Id.* § 679.12(a)(6) (2024).

oversight, or a total prohibition on local databases. Every state should pass legislation based on California Penal Code § 679.12 and New York Senate Bill 988 to ensure the protection of sexual assault survivors.

A. Self-Regulation

Local police departments cannot be trusted to adequately self-regulate DNA databases. “It is inappropriate to ask the very institutions that are operating outside the bounds of the law to self-regulate how they will conduct their illegal practice. This is akin to asking the fox to guard the henhouse.”²⁴¹ Repeated infringements on privacy rights, further erodes an already strained relationship between the police and citizens.²⁴² DNA databases are part of a social contract, where the public agrees to surrender a portion of their right to privacy in exchange for a government that commits to restricting the use of genetic material to what is essential for public safety.²⁴³ When police break that social contract, public safety is compromised as communities become unwilling to call the police, report sexual assault, or assist in prosecutions.²⁴⁴

If law enforcement implements policy regulating local databases without legislative oversight, nothing will prevent the reinstallation of a database. As noted in *Leslie v. City of New York*, there is no indication that NYPD plans to discontinue the use of its internal index, “a complex system they have built and maintained for years.”²⁴⁵ Should the police department choose to do so, they are free to reinstate a similar database at any time. This unchecked power coupled with a history of problematic DNA collection and storage practices demonstrates the inadequacy of a self-regulation approach.

B. Courts

Courts are ill suited to regulate local databases. The judicial branch has authority to resolve “cases and controversies,” but policy decisions are the preveue of legislators.²⁴⁶ The rapidly changing landscape of DNA technology will require the examination and resolution of complex policy questions. DNA database rules and regulations have confounded courts, resulting in a myriad of inconsistent rulings. Loopholes in Fourth Amendment protections often leave survivors with little recourse. State and federal legislatures have the ability to address gaps in DNA database law in a manner the courts cannot.

241. *DNA Collection and Storage in N.Y.C.: Before the N.Y.C. Comm. on Pub. Safety, Jointly with Comm. on Just. Sys.*, *supra* note 24, at 209 (statement of Chairperson Donovan Richards, Public Safety).

242. *Trust in America: Do Americans Trust the Police?*, PEW RSH. CTR. (Jan. 5, 2022), <https://www.pewresearch.org/2022/01/05/trust-in-america-do-americans-trust-the-police>.

243. NANCY GERTNER ET AL., FORENSIC SCIENCE OVERSIGHT BOARD: WORKING GROUP ON FAMILIAL DNA SEARCHING 60 (Mar. 24, 2021).

244. *Id.*

245. *Leslie v. City of N.Y.*, 2023 WL 2612688, at *8 (S.D.N.Y. 2023).

246. U.S. CONST. art. III, § 2, cl. 1; U.S. CONST. art. I, § 1.

C. *Legislative Oversight*

States should fashion laws based on New York's Senate Bill 988 and California's § 697.12. Future legislation should eliminate the use of local municipal DNA databases and prohibit the entry of victim DNA into any database capable of cross-comparing victim samples against evidence collected at unrelated crime scenes. Expressly stating there shall be a *single* DNA database exclusively under state control would increase the legislature's ability to oversee the collection and storage of DNA. Such oversight will ensure law enforcement utilizes victim samples ethically and legally. Prohibiting the storage of victim DNA in databases capable of cross-comparison to unrelated crime scenes will add a layer of protection for sexual assault survivors and enhance confidence and trust in law enforcement. Mandating the secure storage of remaining DNA samples will ensure the erroneously convicted have a future opportunity at exoneration.

While some may argue that local DNA databases can continue to enhance the quick and efficient apprehension of criminals, the usefulness of the local database has outlived its time. Law enforcement agencies have historically cited frustration with delays in sample processing caused by CODIS regulations as a primary impetus for local databases. Efforts between the FBI, law enforcement, and private laboratories have significantly reduced processing time by using Rapid DNA technology. Rapid DNA automates DNA profiling in one to two hours.²⁴⁷ Current advancements in "DNA chip technology" using nanotechnology will eventually reduce analyzation time from several hours to several minutes.²⁴⁸

High genome sequencing costs traditionally prevented some local police departments from accessing the CODIS system. Those prices have dramatically dropped over the last fifteen years.²⁴⁹ In early 2015, the average cost to create a single human genome sequence exceeded \$4,500.²⁵⁰ By the end of 2015, the price had dropped below \$1,500.²⁵¹ In addition to a reduction in processing costs, federal and private funding focused on closing cold cases and addressing backlogs has lifted the financial burden of creating DNA profiles off the shoulders of local municipalities.²⁵² As DNA processing technology advances and funding increases, the usefulness of the local database will simultaneously decrease.

247. Tom Jackman, *FBI Plans "Rapid DNA" Network for Quick Database Checks on Arrestees*, WASH. POST (Dec. 13, 2018, 6:00 AM), <https://www.washingtonpost.com/crime-law/2018/12/13/fbi-plans-rapid-dna-network-quick-database-checks-arrestees/>.

248. *Advancing Justice Through DNA Technology: Using DNA to Solve Crimes*, U.S. DEP'T OF JUST., <https://www.justice.gov/archives/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes> (Mar. 7, 2017).

249. Kris A. Wetterstrand, *The Cost of Sequencing a Human Genome*, NAT'L HUM. GENOME RSH. INST., <https://www.genome.gov/about-genomics/fact-sheets/Sequencing-Human-Genome-cost#> (Nov. 1, 2021).

250. *Id.*

251. *Id.*

252. *Justice Department Awards Almost \$160 Million to Support Forensic Science*, U.S. DEP'T OF JUST. (Nov. 21, 2022), <https://www.ojp.gov/files/archives/pressreleases/2022/justice-department-awards-almost-160-million-support-forensic-science>; *Senate Moves to End Rape Kit Backlog*, RAINN (Nov. 3, 2023), <https://www.rainn.org/news/senate-moves-end-rape-kit-backlog>.

CONCLUSION

Balancing the declining usefulness of the local DNA database against the potential harm inflicted on sexual assault survivors by the misuse of their DNA, unregulated databases appear archaic and unnecessary. State lawmakers must devise and enact aggressive DNA database legislation to prohibit the entry of victim DNA into any database for extended storage and comparison. To cultivate a relationship of trust and solidarity between survivors and law enforcement, rape victims must know that their rape kit evidence is safe in the hands of police and that their state legislature will ensure the ethical and lawful use of their samples.

