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TO HAVE AND TO HOLD: THE FUTURE OF DNA RETENTION IN THE UNITED KINGDOM

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Abstract: The United Kingdom's National DNA Database, in existence since 1995, is now in jeopardy after the European Court of Human Rights ruled that the United Kingdom's DNA retention policy violates a person's right to a private life under the European Convention on Human Rights. The retention program is the most sweeping in the world and had previously withstood a number of challenges in British courts. The ECHR decision now presents the United Kingdom with the problem of complying with the judgment while protecting the Database it has built over the last three decades. The question that remains is whether the United Kingdom can do both.

INTRODUCTION

On December 4, 2008, the European Court of Human Rights (ECHR), sitting as a Grand Chamber, unanimously held that the United Kingdom (U.K.) had violated the right to a private life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) by retaining the fingerprints and DNA samples¹ of individuals "suspected but not convicted of offences."² The United Kingdom's National DNA Database (Database) is believed to be the largest in the world³ and had previously withstood a challenge in the House of Lords from the same applicants who have now suc-

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¹ For purposes of this Note, the term "DNA samples" refers to both DNA samples and profiles, unless otherwise indicated (i.e. "DNA profiles"). For a discussion of the difference between a DNA sample and a DNA profile, see *R (S & Marper) v. Chief Constable of the S. Yorkshire Police*, (2004) 1 W.L.R. 2196, 2200 (H.L.) (U.K.) ("The samples consist of what is taken by the police . . . , and any sub-samples or part samples retained from these after analysis. The DNA profiles are digitised information and it is this digitised information that is stored electronically . . . together with details of the person to whom it relates.").

² *S & Marper v. United Kingdom*, App. Nos. 30562/04 & 30566/04, 48 Eur. H.R. Rep. 50, 1202 (2009).

³ *DNA and Human Rights: Throw It Out*, *ECONOMIST*, Dec. 6, 2008, at 44.

ceeded in the ECHR.⁴ As a result of the Court's ruling, the U.K. must determine the appropriate method for implementing the decision so as to secure the right to privacy for the applicants and for other similarly situated persons.⁵

The contrasting decisions in the ECHR and in the House of Lords illuminate a tension that exists between ECHR jurisprudence and that of the national courts: namely, that when interpreting Convention rights, the ECHR considers the prevailing attitudes across the Contracting States,⁶ yet this may not accurately reflect the attitudes and concerns present in the forum state.⁷ The question that now remains is whether this recent decision has sounded the death knell for the United Kingdom's Database⁸ or whether the United Kingdom can modify its current retention procedures to comply with the decision.⁹

Part I of this Note traces the history of the statutory scheme that governs the taking and retention of DNA samples and provides the framework for the Database. This section also looks at public opinion in the United Kingdom with regards to the Database. Part II discusses both the House of Lords and the ECHR's reasoning in their respective decisions in the *Marper* case. It then contrasts the different understandings of a right to privacy in the United Kingdom and under the Convention and ECHR jurisprudence. Finally, Part III criticizes the ECHR's decision in *Marper* and analyzes whether there are feasible options for continuing to retain the DNA of individuals who have not been convicted.

I. BACKGROUND

A. *The Database Legislation*

The current state of the United Kingdom's National DNA Database is the result of a series of acts passed by Parliament that govern the collection and retention of samples.¹⁰ Beginning in 1984, these acts sought first to clarify the power of the police as it existed under the

⁴ See *Marper*, 1 W.L.R. at 2210 (H.L.).

⁵ See *S & Marper*, 48 Eur. H.R. Rep. at 1204.

⁶ See *Marper*, 1 W.L.R. at 2217 (H.L.) (Lord Rodger of Earlsferry).

⁷ See *id.* at 2216 (Lord Rodger of Earlsferry).

⁸ See *DNA and Human Rights: Throw It Out*, *supra* note 3, at 44.

⁹ See *DNA Database 'Breach of Rights'*, BBC NEWS, Dec. 4, 2008, http://news.bbc.co.uk/2/hi/uk_news/7764069.stm (last visited Mar. 9, 2010).

¹⁰ See GENETIC TESTING AND THE CRIMINAL LAW 187-88 (Don Chalmers ed., 2005).

common law¹¹ and second, to expand upon those powers.¹² Parliament's initial announcement of police power in this area was the Police and Criminal Evidence Act 1984 (PACE), which contained provisions granting the police the power to collect both fingerprints¹³ and intimate¹⁴ and non-intimate samples.¹⁵ The first section of PACE dealing with fingerprints provided for the collection of fingerprints from persons convicted of a recordable offense who had yet to have their prints taken.¹⁶ As a precondition for the taking of all fingerprints from suspects (as opposed to offenders), the police had to obtain appropriate consent except when certain conditions were met.¹⁷ A police officer of at least the rank of superintendent could authorize the taking of fingerprints¹⁸ if he had "reasonable grounds for suspecting the involvement of the person whose fingerprints [were] to be taken in a criminal offense"¹⁹ and if he believed "that his fingerprints [would] tend to confirm or disprove his involvement."²⁰

The taking of samples was governed by similar provisions, but with two notable differences.²¹ Samples, both intimate and non-intimate, could only be taken if there were a reasonable belief that the person was involved in a serious arrestable offense, as opposed to a recordable offense.²² Moreover, intimate samples could not be collected unless the

¹¹ See Mike Redmayne, *The DNA Database: Civil Liberty and Evidentiary Issues*, CRIM. L.R. 437, 442 (1998).

¹² See Explanatory Notes to the Criminal Justice and Police Act, 2001, para. 210 (explaining the new retention policy). See generally *id.* (noting that the Criminal Justice and Public Order Act 1994 widened the police's power to take samples).

¹³ Police and Criminal Evidence Act, 1984, c. 60, § 61.

¹⁴ *Id.* § 62. Parliament defined intimate samples as "a sample of blood, semen or any other tissue fluid, urine, saliva or pubic hair, or a swab taken from a person's body orifice." *Id.* § 65.

¹⁵ *Id.* § 63. Parliament defined non-intimate samples as:

a sample of hair other than pubic hair; a sample taken from a nail or from under a nail; a swab taken from any part of a person's body other than a body orifice; a footprint or a similar impression of any part of a person's body other than a part of his hand.

Id. § 65.

¹⁶ *Id.* § 27(1).

¹⁷ *Id.* § 61(1). For the definition of appropriate consent, see *id.* § 65.

¹⁸ *Id.* § 61(3)(a).

¹⁹ Police and Criminal Evidence Act, 1984, c.60, § 61(4)(a).

²⁰ *Id.* § 61(4)(b).

²¹ See *id.* §§ 62–63.

²² *Id.* §§ 62(2)(a), 63(3)(a). An arrestable offense for purposes of PACE is generally defined as an offense with a sentence fixed by law and any offense that carries a minimum sentence of five years imprisonment for persons over the age of 21. *Id.* § 24(1). A recordable offense is one "for which the conviction may be recorded in National Police Records.

person consented;²³ non-intimate samples could be taken absent consent under the same restrictions as fingerprints.²⁴ With the guidelines for collection laid out, Parliament next addressed the issue of retaining the fingerprints and samples.²⁵ The provision was very straightforward: fingerprints and samples were to be destroyed if the person were cleared of the offense, not prosecuted, or not suspected of having committed the crime.²⁶

While PACE provided the early foundation for sample collection, it took ten years before the proper framework was in place to support the creation of the Database.²⁷ In 1994, Parliament enacted the Criminal Justice and Public Order Act (CJPO 1994) in response to developments in DNA profiling and to ensure that criminal investigations were deriving “the maximum benefit from DNA.”²⁸ The CJPO 1994, which indirectly became the statutory foundation for the Database²⁹ and was the first set of amendments to PACE,³⁰ significantly expanded the power of the police in a number of ways.³¹ First, the police were now permitted to collect intimate (subject to consent) and non-intimate samples from a person suspected of any *recordable* offense.³² Since 1994, this provision

Currently, this includes any offense, which upon conviction, carries a sentence of imprisonment, and certain non-imprisonable offenses.” KENT POLICE, N53 POLICE REFERENCE: INTIMATE, NON-INTIMATE, AND DNA DATABASE SAMPLES § 3.7, <http://www.kent.police.uk/About%20Kent%20Police/policies/n/n053.html> (last visited Mar. 16, 2010).

²³ Police and Criminal Evidence Act, 1984, c.60, § 62(1)(b).

²⁴ *See id.* § 63(3).

²⁵ *Id.* § 64.

²⁶ *See id.* §§ 64(1)(a) (cleared of the offense), 64(2)(b) (not prosecuted), 64(3)(b) (not suspected of having committed the crime). In addition, Parliament provided an extra layer of protection by granting the person in question the right to witness the destruction of his/her samples and fingerprints upon request. *See id.* § 64(6).

²⁷ *See generally* Criminal Justice and Public Order Act, 1994, c. 33 (expanding police powers and redefining sample collection and retention procedures).

²⁸ HOME OFFICE, PROPOSALS FOR REVISING LEGISLATIVE MEASURES ON FINGERPRINTS, FOOTPRINTS, AND DNA SAMPLES 10 (1999), available at <http://www.nationalarchives.gov.uk/ERORRecords/HO/421/2/ppd/fingdna.pdf> [hereinafter HOME OFFICE PROPOSALS].

²⁹ *See* Helen Wallace, *The UK National DNA Database: Balancing Crime Detection, Human Rights and Privacy*, 7 EUR. MOLECULAR BIOLOGY ORG. REPS S26, S26 (SPECIAL ISSUE 2006). Despite the fact that the CJOP made the database possible, Parliament never enacted specific legislation to set up the Database. *See* PARLIAMENT OFFICE OF SCI. AND TECH., THE NATIONAL DNA DATABASE 2 (2006) [hereinafter NATIONAL DNA DATABASE].

³⁰ Robin Williams & Paul Johnson, *Inclusiveness, Effectiveness, and Intrusiveness: Issues in the Developing Uses of DNA Profiling in Support of Criminal Investigations*, 34 J.L. MED. & ETHICS, 234, 236 (2006).

³¹ *See* Redmayne, *supra* note 11, at 442.

³² *See* Criminal Justice and Public Order Act, 1994, c. 33, §§ 54(3)(b) (intimate samples), 55(3) (non-intimate samples). Interestingly, this provision was contrary to the suggestion by the Royal Commission on Criminal Justice that certain crimes be included under serious

has allowed sample collection for virtually any offense.³³ Second, the CJPO 1994 reclassified mouth swabs and non-pubic hair plucked from the root as non-intimate samples, thereby eliminating the need for consent.³⁴ This was in response to the recognition that the interests of justice would be better served by the collection of these samples, which could provide valuable DNA evidence.³⁵ Third, Parliament brought sample collection more in line with that of fingerprints by providing that non-intimate samples could be collected without consent from persons convicted of any recordable offense.³⁶ Finally, samples which were required to be destroyed under § 64 of PACE could now be retained if another person were convicted of the same offense, and that person had also given a sample in the course of the investigation.³⁷ Parliament was careful to explicitly prohibit the use of the newly retained samples as evidence against the person or for any investigative purposes.³⁸ Instead, the sample was retained and could be further analyzed only if the conviction of the third-party required subsequent review.³⁹

With the legal framework for collecting and retaining fingerprint and DNA samples established, the Database went into effect on April 10, 1995.⁴⁰ Since then, there have been three significant changes to PACE (as amended by the CJPO 1994) that were responsible for the expansion of the Database.⁴¹ In 1997, Parliament passed the Criminal Evidence (Amendment) Act, which increased the number of offenders in the database.⁴² The Act provided for the non-consensual collection of non-intimate (but now including mouth swabs) samples of any offender who had been convicted of a sexual or violent offense prior to

arrestable offenses, rather than simply open all criminal offenses to collection. See THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, 1993, Cm. 2263, ch. 2, para. 33.

³³ See NATIONAL DNA DATABASE, *supra* note 29, at 1 (defining recordable offenses as “most offenses other than traffic offenses”); see also LEONARD JASON-LLOYD, THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994: A BASIC GUIDE FOR PRACTITIONERS 43 (1995) (listing “loitering or soliciting for the purposes of prostitution” and “tampering with a motor vehicle” as other recordable offenses); Wallace, *supra* note 29, at S26 (listing begging, participating in an illegal demonstration, and being drunk and disorderly as recordable offenses).

³⁴ Criminal Justice and Public Order Act, § 58(3).

³⁵ See THE ROYAL COMMISSION ON CRIMINAL JUSTICE, *supra* note 32, ch. 2, paras. 28–29.

³⁶ See Criminal Justice and Public Order Act, § 55(2).

³⁷ See *id.* § 57(3).

³⁸ See *id.*

³⁹ See HOME OFFICE PROPOSALS, *supra* note 28, at 11.

⁴⁰ See Redmayne, *supra* note 11, at 437.

⁴¹ See NATIONAL DNA DATABASE, *supra* note 29, at 2.

⁴² See Redmayne, *supra* note 11, at 445.

April 10, 1995 and who was currently serving the sentence for those crimes.⁴³ This provision allowed the police to collect samples from some of the most serious offenders who had entered the system prior to the expansion of collection power under the CJPO 1994.⁴⁴ Parliament further relaxed restrictions on collecting samples by removing the requirement that the officer believe the sample would confirm or disprove his suspicion that the suspect had been involved in the investigated offense.⁴⁵ Under the Criminal Justice Act 2003, a non-intimate sample could be taken without consent so long as the person was “in police detention as a consequence of his arrest for a recordable offense” and the police had not yet taken a sample from him in the course of the investigation.⁴⁶ Thus, collecting a sample no longer had to be relevant to the investigation of the offense.⁴⁷

The most police-empowering change to the law as it existed under the CJPO 1994, however, came as a result of the Criminal Justice and Police Act 2001 (CJP 2001).⁴⁸ Prior to this Act, retention of samples had been expressly prohibited under PACE,⁴⁹ and, later, allowed under the CJPO 1994 for non-investigative purposes.⁵⁰ Despite these restrictions, the police had been illegally retaining samples, and in some cases, using them in investigations.⁵¹ A 1999 Home Office study of the existing legislation proposed that the retention policy should be amended to allow for retention of samples collected from volunteers (as opposed to actual suspects), subject to their written consent.⁵² The proposal, however, was not intended to cure the police violations of the current retention program; instead, it was focused on eliminating the need to re-collect samples from volunteers.⁵³ Furthermore, the study addressed

⁴³ Criminal Evidence (Amendment) Act, 1997, c. 17, § 1(1)–(3). The Act also provided sample collection from offenders who had been convicted of recordable offenses before April 10, 1995, and were now detained pursuant to the Mental Health Act 1983. *Id.* For a list of the offenses covered under the Act, which also included incitement or conspiracy to commit the enumerated offenses, see *id.*, sched. 1.

⁴⁴ See Redmayne, *supra* note 11, at 445.

⁴⁵ See Criminal Justice Act, 2003, c. 44, § 10(2).

⁴⁶ See *id.* Even if the police had taken a non-intimate sample, they were authorized to take another one if the first proved to be insufficient. See *id.*

⁴⁷ NATIONAL DNA DATABASE, *supra* note 29, at 2.

⁴⁸ See Criminal Justice and Police Act, 2001, c. 16, § 82.

⁴⁹ See Police and Criminal Evidence Act, § 64.

⁵⁰ See Criminal Justice and Public Order Act, § 57.

⁵¹ See Antony Barnett, *Fury at Police DNA Database*, GUARDIAN (London), June 11, 2000, at 4 (News), available at <http://www.guardian.co.uk/uk/jun/11/antonybarnett.theobserver>.

⁵² HOME OFFICE PROPOSALS, *supra* note 28, at 11.

⁵³ See *id.*

the need for adequate safeguards and recommended the ability of a person to withdraw his or her consent at any time.⁵⁴

The CJP 2001 expanded retention powers beyond those proposed by the Home Office.⁵⁵ Under section 82 of the CJP 2001, samples taken under the CJPO 1994 were no longer required to be destroyed and could be subsequently used for “purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.”⁵⁶ This provision, while authorizing the retention of all samples taken after the Act went into effect, also provided for the retention of illegally retained samples that should have been destroyed under the preexisting law.⁵⁷ The CJP 2001 adopted the Home Office’s proposal concerning consensual retention of volunteered samples but significantly departed from the proposal by providing that consent given by a volunteer could not be withdrawn.⁵⁸ Finally, the CJP 2001 expanded the power of the police to use the retained samples for speculative searches, whereby the sample is checked against the Database as well as records held by police forces outside the United Kingdom.⁵⁹

B. *Public Opinion and the DNA Database*

The DNA Database and the corresponding retention policy have drawn mixed reactions in the United Kingdom.⁶⁰ The first major expansion of the Database was proposed by Prime Minister Tony Blair in 1999 and called for the collection of DNA samples from all known offenders.⁶¹ Prior to the passing of the CJP 2001, government leaders pushed hard for retention of DNA from exonerated individuals⁶² after

⁵⁴ *See id.*

⁵⁵ Compare Criminal Justice and Police Act, § 82 (providing retention of samples from all suspects, regardless of the outcome of the investigation), with HOME OFFICE PROPOSALS, *supra* note 28, at 11 (proposing retention of volunteered samples only).

⁵⁶ Criminal Justice and Police Act, § 82(2). The Explanatory Notes indicate that this provision was a direct result of the decisions in the Court of Appeal and House of Lords concerning the admission of DNA evidence that had been illegally retained. *See* Explanatory Notes to the Criminal Justice and Police Act, 2001, para. 210. Prior to the Act, the House of Lords had ruled that the admission of such evidence was within the judge’s discretion. *See id.*

⁵⁷ *See* Criminal Justice and Police Act, § 82(6).

⁵⁸ *See id.* § 82(4).

⁵⁹ *See id.* § 81(2). The use of a sample, as provided in § 82(2), also includes the use of any information derived from the sample (“DNA profile”). *Id.* § 82(2).

⁶⁰ *See The DNA Database: Big, Bigger, Biggest*, ECONOMIST, Mar. 1, 2008, at 59.

⁶¹ HOME OFFICE, FORENSIC SCIENCE AND PATHOLOGY UNITY, DNA EXPANSION PROGRAMME 2000–2005: REPORTING ACHIEVEMENT 3 (2005).

⁶² Duncan Carling, Note, *Less Privacy Please, We’re British: Investigating Crime with DNA in the U.K. and the U.S.*, 31 HASTINGS INT’L & COMP. L. REV. 487, 492 (2008). Prime Minister

the Court of Appeal ruled two men accused of murder and rape, respectively, could not be convicted, despite “compelling evidence,” because the police had matched both suspects by using illegally retained DNA samples.⁶³ In contravention of the retention policy then in place, the police illegally retained the DNA samples of the two men, leading many civil liberty groups to voice their concern over the police action and its interference with the privacy of innocent people.⁶⁴ In 2001, Parliament responded to public concern over the existing law⁶⁵ with the CJP 2001, which provided for the retention of samples collected from individuals who had not been convicted.⁶⁶ The new policy was not without opposition, most notably from the human rights watchdog Liberty in its House of Lords Briefing on the CJP 2001.⁶⁷ While conceding that the government had a valid concern in effectively preventing crime, the group felt that many of the provisions of the Act presented a “serious extension of the state’s power and erosion of existing civil liberties.”⁶⁸ As of 2005, the CJP 2001 allowed the authorities to link samples collected before the new law with over 8,000 crime scene stains and samples from over 13,000 offenses.⁶⁹ Additionally, the government has been able to obtain convictions in a number of high-profile cold cases⁷⁰ and a pair of cases involving two of the most brutal murders in recent British history.⁷¹

The success of using retained DNA samples to bring a number of criminals to justice has led some to call for an even greater expansion

and Labour Party leader Tony Blair announced the expansion of the DNA program. *See id.* Interestingly, Tony Blair and the Labour Party committed early in the 1990s to drafting a Bill of Rights for Great Britain and incorporating the Human Rights Act into British Law. *See* Francesca Klug, *A Bill of Rights: Do We Need One or Do We Already Have One?*, 2001 PUB. L. 701, 704 (2007).

⁶³ *See* Barnett, *supra* note 51. The House of Lords subsequently ruled that evidence obtained as a result of the use of illegally retained samples was not automatically inadmissible, but was an issue for the trial judge to decide. *R (S and Marper) v. Chief Constable of the S. Yorkshire Police*, (2004) 1 W.L.R. at 2196, 2199 (H.L.) (U.K.).

⁶⁴ *See* Barnett, *supra* note 51.

⁶⁵ *Marper*; 1 W.L.R. at 2198 (H.L.).

⁶⁶ *See* Criminal Justice and Police Act, 2001, c. 16, § 82(2).

⁶⁷ *See* LIBERTY, CRIMINAL JUSTICE AND POLICE BILL: HOUSE OF LORDS BRIEFING 5 (2001), <http://www.liberty-human-rights.org.uk/pdfs/policy01/mar-cjpb.pdf> (last visited Mar. 9, 2010).

⁶⁸ *Id.* at 2.

⁶⁹ *S and Marper v. United Kingdom*, App. Nos. 30562/04 & 30566/04, 48 Eur. H.R. Rep. 50, 1195 (2009).

⁷⁰ Mark Townsend & Anushka Asthana, *How Two Brutal Killers Fuelled the DNA Debate*, OBSERVER (London), Feb. 24, 2008, at 28 (Focus), *available at* <http://www.guardian.co.uk/uk/2008/feb/24/ukcrime.forensicscience>.

⁷¹ *Id.*

of the Database.⁷² Britain's leading expert on police forensics has proposed the inclusion of children in the Database if they exhibit behavior that indicates that they may be future criminals.⁷³ Both the public⁷⁴ and members of the government⁷⁵ have lashed out against this proposal, especially after the Home Office revealed that almost 40,000 innocent children were in the Database.⁷⁶ Lord Justice Sedley advocated an equally unpopular suggestion of making the DNA Database universal for the purposes of crime prevention.⁷⁷ Despite the success of the Database in recent murder convictions, the Home Office has flatly rejected this proposal for a compulsory Database.⁷⁸

Taking into account the clearly controversial nature of the Database and retention program, many have declared that there needs to be more public debate on the issue.⁷⁹ In fact, the DNA Database was not submitted for public discussion at its creation, nor was there any public debate accompanying the extension of the Database and its

⁷² See Mark Townsend & Anushka Asthana, *Put Young Children on DNA List, Urge Police*, OBSERVER (London), Mar. 16, 2008, at 1 (News), available at <http://www.guardian.co.uk/society/2008/mar/16.youthjustice.children> [hereinafter "*Put Young Children on DNA List*"]; *The DNA Database: Big, Bigger, Biggest*, *supra* note 60, at 59.

⁷³ See *Put Young Children on DNA List, Urge Police*, *supra* note 72.

⁷⁴ See Matthew Squires, *Thousands of Kids on DNA Database*, LANCASHIRE EVENING POST, Dec. 29, 2008, <http://www.lep.co.uk/news/thousands-of-kids-on-DNA.4828460.jp> ("Community leaders and children's charities said it was 'unethical' for young people's DNA to be added and stored on the system.")

⁷⁵ *DNA Database Contains 39,000 Innocent Children, Home Office Admits*, GUARDIAN (London), Aug. 15, 2008, <http://www.guardian.co.uk/society/2008/aug/15/youthjustice.youngpeople>.

⁷⁶ *Id.*

⁷⁷ *Senior Judge: Put All of UK on DNA Database*, TIMES ONLINE (London), Sept. 5, 2007, <http://www.timesonline.co.uk/tol/news/uk/crime/article2390338.ece>. Lord Justice Sedley stated that the Database was "indefensible" because it only included those persons who happened to come into contact with the criminal justice system. Clare Dyer, *Anger Over Call to Widen DNA Database*, GUARDIAN (London), Sept. 6, 2007, <http://www.guardian.co.uk/uk/2007/sep/06/ukcrime.prisonsandprobation> (last visited, Mar. 31, 2010). The current system, according to Sedley, resulted in a disproportionate number of people from ethnic minorities being put in the database. See *id.* By including every citizen in the Database solely for the purpose of crime detection and prevention, the system would be fairer. See *id.*

⁷⁸ Ben Quinn, *Calls for Compulsory DNA Database Rejected*, GUARDIAN (London), Feb. 23, 2008, <http://www.guardian.co.uk/politics/2008/feb/23/ukcrime>.

⁷⁹ See HUMAN GENETICS COMMISSION, A CITIZENS' INQUIRY INTO THE FORENSIC USE OF DNA AND THE NATIONAL DNA DATABASE: EVALUATION REPORT 4 (2008), available at <http://www.hgc.gov.uk/UploadDocs/DocPub/Document/Citizens%20Inquiry%20-%20Citizens%20Report.pdf>; THE NATIONAL DNA DATABASE, *supra* note 29, at 4; GeneWatch UK, *The UK Police National DNA Database*, <http://www.genewatch.org/sub-539478> (last visited Mar. 9, 2010).

uses.⁸⁰ Any debate would likely focus on the proper way to balance the personal rights of individuals with the compelling interests of the government.⁸¹ Given Home Secretary Jacqui Smith's statement that "the existing law will remain in place while we carefully consider the judgment," the decision of the ECHR has created the opportunity for public debate to contribute to the future of the Database.⁸²

II. DISCUSSION

The *Marper* case is especially important to the discussion of the Database. The opposite outcomes in the House of Lords and the ECHR reveal the different ways in which privacy is viewed in the United Kingdom and under the Convention.⁸³ In rendering its decision in *Marper*, the ECHR continued its liberal approach towards protecting individual rights,⁸⁴ while the House of Lords focused more on the benefits of the Database and subsequent use of retained DNA.⁸⁵

A. A Difference of Opinion

In the early months of 2001, two British citizens, Michael Marper and S (a minor), were arrested for harassment and attempted robbery, respectively.⁸⁶ Following the arrests, the police took the fingerprints and DNA samples of each person.⁸⁷ Marper's partner, the victim of the harassment, decided not to press charges, and the Crown Prosecution Service discontinued the case;⁸⁸ S went to trial on his attempted robbery charge and was acquitted.⁸⁹ Both individuals were informed by the

⁸⁰ See NUFFIELD COUNCIL ON BIOETHICS, THE FORENSIC USE OF BIOINFORMATION: ETHICAL ISSUES 3 (2007).

⁸¹ See GeneWatch UK, The UK Police National DNA Database, *supra* note 79.

⁸² DNA Database 'Breach of Rights,' *supra* note 9.

⁸³ Compare R (S & Marper) v. Chief Constable of the S. Yorkshire Police, (2004) 1 W.L.R. 2196, 2210 (H.L.) (U.K.) (holding that retention did not engage Article 8(1)), with Case of S & Marper v. The United Kingdom, App. Nos. 30562/04 & 30566/04, 48 Eur. H.R. Rep. 50, 1189 (2009) (holding that the "mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8").

⁸⁴ See HELEN FENWICK, CIVIL LIBERTIES AND HUMAN RIGHTS 23 (4th ed. 2007) ("The Court has increased enormously in standing and efficacy over the last 30 years, partly due to its activism and creativity in interpreting the Convention and its willingness to find that Member states have violated the rights of individuals.").

⁸⁵ See *Marper*, 1 W.L.R. at 2210-11 (H.L.).

⁸⁶ R (S and Marper) v. Chief Constable of the S. Yorkshire Police, (2002) 1 W.L.R. 3223, 3226-27 (A.C.) (U.K.).

⁸⁷ See *id.* at 3227.

⁸⁸ *Id.* at 3227-28.

⁸⁹ *Id.* at 3227.

principal fingerprint officer of the South Yorkshire Police that their fingerprint and DNA samples would be retained by the police pursuant to the CJP 2001.⁹⁰ Marper and S applied for judicial review of the officer's decision in the Divisional Court, where Judge Leveson held that the retention of the fingerprints and DNA samples did not contravene the right to a private life under Article 8 of the Convention.⁹¹ On appeal, a majority of the Civil Division of the Court of Appeal upheld the decision of the Divisional Court; however, its reasoning was slightly different.⁹² The appellate court found that retention of the DNA samples violated the right to a private life under Article 8(1),⁹³ but that it was justified under Article 8(2) because it was in the interest of preventing and solving crime.⁹⁴

Three years after the initial arrests, the House of Lords returned to the reasoning of the Divisional Court and held that the retention of the fingerprints and DNA samples did not engage Article 8(1).⁹⁵ Without an ECHR decision to guide him,⁹⁶ Lord Steyn based his opinion on the explanations of Judge Leveson in his earlier decision and the findings of Dr. Bramley, the Chief Scientist of the Forensic Science Service and Custodian of the National DNA Database.⁹⁷ Dr. Bramley explained that

⁹⁰ See *id.* at 3227–28.

⁹¹ *Marper*, 1 W.L.R. at 2203 (H.L.). Leveson found that:

[A] person can only be identified by fingerprint or DNA sample either by an expert or with the use of sophisticated equipment or both; in both cases, it is essential to have some sample with which to compare the retained data. Further, in the context of the storage of this type of information within records retained by the police, the material stored says nothing about the physical make-up, characteristics or life of the person to whom they belong.

Id. at 2209.

⁹² See *id.* at 2204 (H.L.).

⁹³ *Marper*, 1 W.L.R. at 3234 (A.C.).

⁹⁴ See *id.* at 3237. Article 8(2) states:

There shall be no interference by a public authority with the exercise of this right except such as 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.

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(2), Nov. 4, 1950, 213 U.N.T.S. 221, 230 [hereinafter European Convention].

⁹⁵ See *Marper*, 1 W.L.R. at 2210 (H.L.).

⁹⁶ *Id.* at 2207. Had there been a decision by the European Court directly on this issue, the House of Lords would have at least had to take it into account under the Human Rights Act 1998. See *Marper*, 1 W.L.R. at 3233 (A.C.).

⁹⁷ See *Marper*, 1 W.L.R. at 2209 (H.L.).

the retained samples could only be used “for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.”⁹⁸

The Law Lords’ ruling was not without a “dissent” by Baroness Hale of Richmond, who agreed with the dismissal of the appeal⁹⁹ but sharply criticized the suggestion that retention did not violate Article 8(1).¹⁰⁰ Hale’s reasoning was rooted in the concept of informational privacy, which operates off the assumption that “information about a person is in a fundamental way his own,” and, therefore, that person should have control over who may be privy to such information.¹⁰¹ While acknowledging that an individual does not have absolute control over all of his or her information, Hale noted that a person’s genetic make-up is perhaps the most private type of information and should be protected by Article 8.¹⁰²

Despite their disagreement over whether retention constitutes a violation of the Convention, the Lords were in agreement that such a retention policy was justified under Article 8(2).¹⁰³ Given the limited purpose for which the retained samples could be used, Lord Steyn held that those purposes, namely prevention of crime and the government’s interest in protecting society’s right to be free from crime, were firmly established within Article 8(2).¹⁰⁴ In addition, the fact that the samples would be of no use without a crime scene sample with which to match it led Lord Steyn to conclude that retention was not disproportionate in its effect because individuals like the appellants would be unaffected unless implicated in a future crime.¹⁰⁵

⁹⁸ *Id.* The House of Lords was unconvinced by the appellants’ argument that the proscribed purposes for the use of retained samples were overly broad and would allow other uses. *See id.* at 2209–10.

⁹⁹ *Id.* at 2219.

¹⁰⁰ *Id.* at 2217. In the House of Lords, the Lords issue their opinions *seriatim*, which allows each Lord to express his or her own opinion as to how he or she would decide the case. *See* Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions (Oct. 21, 2007), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_10-21-07.html.

¹⁰¹ *See Marper*, 1 W.L.R. at 2217 (H.L.). Baroness Hale also quoted a report by the Canadian Privacy Commissioner, which succinctly stated that “[t]he measure of our privacy is the degree of control we exercise over what others know about us.” *Id.*

¹⁰² *Id.* at 2218.

¹⁰³ *Id.* at 2212, 2216, 2219. Having already decided that the appeal should be dismissed on Article 8(1) grounds, this portion of the court’s opinion was *dicta*. It is, however, important to the overall discussion of this case’s treatment in British courts and the ECHR. *See id.*

¹⁰⁴ *See id.* at 2210–11 (citing *Marper*, 1 W.L.R. at 3243 (A.C.)).

¹⁰⁵ *See id.* at 2211 (H.L.).

Having had no success in the United Kingdom, Marper and S petitioned the ECHR,¹⁰⁶ known for its liberal interpretation of Convention rights.¹⁰⁷ Almost nine years after their initial arrests, they prevailed.¹⁰⁸ The ECHR distanced itself from the judgment in the House of Lords in two ways. First, it held that retention and storing of data relating to an individual's private life was a *per se* interference under Article 8, regardless of any subsequent uses of the data.¹⁰⁹ Focusing on the content of the data, the court noted that the samples were of a "highly personal nature" and interfered with the right to privacy because they contained personal data unique to the specific individual.¹¹⁰

Second, the court held that the retention program did not satisfy the justification requirement under Article 8(2).¹¹¹ The crux of this part of the decision was the determination that the retention program was not "necessary in a democratic society,"¹¹² which requires that "the action taken is in response to a pressing social need, and that the interference with the rights protected is no greater than is necessary to address that pressing social need."¹¹³ The lack of support among the other Contracting States greatly influenced the court's conclusion that the U.K. was unable to strike a proper balance between the private interests

¹⁰⁶ *S & Marper*, 48 Eur. H.R. Rep. at 1169.

¹⁰⁷ DONALD W. JACKSON, *THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 29 (1997).

¹⁰⁸ *S & Marper*, 48 Eur. H.R. Rep. at 1202.

¹⁰⁹ *Id.* at 1189.

¹¹⁰ *Id.* at 1190–91.

¹¹¹ *See id.* at 1202.

¹¹² *Id.* The ECHR has recognized four general principles that underlie the "democratic society" requirement:

- (a) the adjective 'necessary' is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable', or 'desirable';
- (b) the Contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention;
- (c) the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued';
- (d) those paragraphs of Article of the Convention which provide for an exception to a right guaranteed are to be narrowly interpreted.

Silver v. United Kingdom, App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, & 7136/75, 5 Eur. H.R. Rep. 347, 376–77 (1983).

¹¹³ CLARE OVEY & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 232 (4th ed. 2006).

of the citizen and the public interests justifying interference.¹¹⁴ Still, the ECHR generally grants a margin of appreciation, but that margin is narrower when an intimate right is involved, and where there is a consensus among the Member States on the issue.¹¹⁵ Categorizing the retention program as “blanket and indiscriminate,”¹¹⁶ the ECHR concluded that although the detection and prevention of crime is a legitimate aim,¹¹⁷ the proper balance was not met given the failure of British authorities to consider, *inter alia*, the nature of the crime, the age of the suspect, and the indefiniteness of sample retention.¹¹⁸

B. *The Concept of Privacy in the Convention and British Law*

1. The Right to a Private Life

Under Article 8(1) of the Convention, “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”¹¹⁹ This right is qualified by Article 8(2), which allows a public authority to interfere with the right if it is necessary for the furtherance of certain public interests.¹²⁰ On a theoretical level, the ECHR based its interpretation of Article 8 on the notion that “boundaries can and should be placed around such aspects of an individual’s life, preventing such intrusion and thereby protecting personal autonomy.”¹²¹ This underlying theory, however, has never given rise to a fixed definition of what constitutes a private life.¹²² Instead, the ECHR has created an umbrella under which certain elements of a person’s physical and social identity are deemed part of a private life, such as that person’s name, gender, sexual orientation, health, ethnic identity, and an overall right

¹¹⁴ *See S & Marper*, 48 Eur. H.R. Rep. at 1199–1200. The court noted that England, Wales, and Northern Ireland were the only Contracting States that have an indefinite retention policy. *See id.* at 1199.

¹¹⁵ *See id.* at 1197. A margin of appreciation allows the ECHR to defer to the authorities in the forum state, who are likely to be better placed “to balance individual rights against general societal interests.” FENWICK, *supra* note 84, at 36. The ECHR’s application of the margin of appreciation doctrine has not been very consistent, making it difficult to predict the approach the court will take in determining the scope of the margin. *See id.*

¹¹⁶ *See S & Marper*, Eur H.R. Rep. at 1200.

¹¹⁷ *See id.* at 1197.

¹¹⁸ *Id.* at 1200–01.

¹¹⁹ European Convention, art. 8(1), Nov. 4, 1950, 213 U.N.T.S. 221, 230.

¹²⁰ *See id.* art. 8(2).

¹²¹ FENWICK, *supra* note 84, at 804.

¹²² *See* KAREN REID, *A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 443 (2d ed. 2004).

to his or her image.¹²³ Moreover, it covers the physical and psychological integrity of a person, and the right to personal development and the establishment of relationships with others.¹²⁴ The right to a private life is therefore seen as broader than the mere right to privacy¹²⁵ and is continuously being widened by the ECHR.¹²⁶

2. The History of Privacy Jurisprudence in English Law

Despite its rich legal tradition, which has served as a model for many legal systems around the world, the English common law has historically never embraced the idea of a right to privacy,¹²⁷ prompting one prominent jurist to state that “[i]t is well-known that in English Law there is no right to privacy.”¹²⁸ That is not to say that the necessary basis for such a right was lacking in early English legal history,¹²⁹ as evidenced by the classic observation that a man’s home is his castle.¹³⁰ Still, a sound law on privacy remained undeveloped, due in large part to the inability of the courts and Parliament to derive a clear definition of the right.¹³¹ Prior to the passing of the Human Rights Act (HRA) in 1998, British law offered an incomplete scheme of privacy protection, with any real protection coming from the ECHR.¹³² The HRA, which incorporated the Convention into United Kingdom law, afforded British citizens their first true right to privacy by making the Convention directly enforceable, in British courts, against the government.¹³³ A citizen could therefore challenge a piece of legislation on the grounds that it was incompatible with the Convention.¹³⁴

¹²³ See *S. and Marper*, 48 Eur. H.R. Rep. at 1189.

¹²⁴ *Id.*

¹²⁵ See REID, *supra* note 122, at 444.

¹²⁶ FENWICK, *supra* note 84, at 803.

¹²⁷ See DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* 381 (1993).

¹²⁸ *Kaye v. Robertson*, [1991] F.S.R. 62, 66 (A.C.) (U.K.).

¹²⁹ See FELDMAN, *supra* note 127, at 381–82.

¹³⁰ See WILLIAM MORRIS & MARY MORRIS, *MORRIS DICTIONARY OF WORD AND PHRASE ORIGINS* 374 (2d ed. 1988) (“This saying is as old as the basic concepts of English common law.”).

¹³¹ See FELDMAN, *supra* note 127, at 382.

¹³² See FENWICK, *supra* note 84, at 807–08.

¹³³ See *id.* at 808. It is uncontroverted that there was no right to privacy in the United Kingdom prior to the Human Rights Act; yet, it is interesting to note that Lord Hoffman of the House of Lords argued that “[t]he United Kingdom subscribed to the Convention because it set out rights which British subjects enjoyed under the common law.” See Williams & Johnson, *supra* note 30, at 237.

¹³⁴ See Human Rights Act, 1998, c. 42, § 4. Despite their ability to declare primary legislation incompatible with the Convention, British courts do not have the power to strike

The incorporation of the Convention, however, has done little to clarify the meaning of privacy in the United Kingdom because British courts are free to interpret the values of the HRA so long as such interpretation does not undermine the protections of the Convention.¹³⁵ British courts attempting to do so, however, are plagued by the lack of a domestic tradition of privacy and the unwillingness of the ECHR to clearly define the right to a private life.¹³⁶ As a result, persons alleging a violation of Article 8 may have greater success in the ECHR than in British courts.¹³⁷

III. ANALYSIS

The ECHR's decision in *Marper* left open the question of proper remedial action by the United Kingdom.¹³⁸ Under Article 46(1) of the Convention, "[t]he High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties."¹³⁹ In many cases, this requires no more than paying compensation and costs to the applicant through the process of just satisfaction.¹⁴⁰ There are instances, however, where enforcement of the judgment requires substantive changes to the violating law or practice of the forum state.¹⁴¹ In *Marper*, the ECHR noted that "[i]n these circumstances, the Court considers that the finding of a violation, with the consequences which will ensue for the future, may be regarded as constituting sufficient just satisfaction in this respect."¹⁴² Thus, it is clear that in order to comply with the judgment, the ECHR intends for the United Kingdom to make

down the legislation, and a declaration of incompatibility does not affect the validity or continued operation of the law. *See id.* § 4(6); HUMAN RIGHTS AND CRIMINAL JUSTICE 174 (Ben Emmerson et al. eds., 2d ed. 2007).

¹³⁵ *See Klug, supra* note 62, at 706.

¹³⁶ Andrew Roberts & Nick Taylor, *Privacy and the DNA Database*, 4 EUR. HUM. RTS. L. REV. 373, 376 (2005).

¹³⁷ *Compare S & Marper*, 48 Eur. H.R. Rep. at 1202, *with Marper*, 1 W.L.R. at 2210 (H.L.).

¹³⁸ *See Case of S & Marper v. The United Kingdom*, App. Nos. 30562/04 & 30566/04, 48 Eur. H.R. Rep. 50, 1204 (2009).

¹³⁹ European Convention, *supra* note 94, art. 46(1) (formerly art. 53).

¹⁴⁰ HUMAN RIGHTS AND CRIMINAL JUSTICE, *supra* note 134, at 60. Just satisfaction is granted when there is no total reparation in the domestic law of the forum country. REID, *supra* note 122, at 545. The ECHR will normally award just satisfaction for pecuniary loss, non-pecuniary loss (such as pain and suffering, or physical and mental injury), and costs and expenses. *See id.* at 546, 554. The underlying principle of just satisfaction is equity. *See id.* at 546.

¹⁴¹ HUMAN RIGHTS AND CRIMINAL JUSTICE, *supra* note 134, at 60 (noting that in a number of cases, "the judgment may require legislative, constitutional, administrative or regulatory amendment").

¹⁴² *S & Marper*, 48 Eur. H.R. Rep. at 1204.

some sort of change to its retention policy.¹⁴³ The question that remains is how far it must go, bearing in mind that a complete reversal of the retention legislation would essentially eliminate any usefulness of the Database,¹⁴⁴ while whole-hearted noncompliance with the judgment may subject the United Kingdom to expulsion from the Council of Europe.¹⁴⁵

A. Problems with the ECHR Decision

There are three key problems with the ECHR decision that undermine the validity of its reasoning.¹⁴⁶ First, the ECHR noted that acquitted individuals had very limited means by which they could have their data removed from the Database.¹⁴⁷ The big problem, according to the court, was the lack of “independent review of the justification for the retention according to defined criteria.”¹⁴⁸ Such criteria would include the seriousness of the offence, previous arrests, and the strength of suspicion against the person.¹⁴⁹ This type of review, however, would introduce a level of discrimination into the process that contravenes Article 14 of the Convention.¹⁵⁰ If the authorities were charged with making post-acquittal determinations on retention, those who had their samples retained would be singled out from the larger group as individuals who were really not as innocent, despite a not guilty verdict.¹⁵¹ In fact, this procedure was rejected by Lord Justice Waller in his Court of Appeal opinion in *Marper*:

¹⁴³ See *id.* Exactly what steps must be taken is for the forum state to decide, in conjunction with the Committee of Ministers, which is tasked with supervising the execution of judgments. See REID, *supra* note 122, at 545. “The Court has no express jurisdiction . . . to issue directions to Contracting States on the measures or steps which they should take to rectify violations.” *Id.*

¹⁴⁴ See DNA Database ‘Breach of Rights,’ *supra* note 9.

¹⁴⁵ See HUMAN RIGHTS AND CRIMINAL JUSTICE, *supra* note 134, at 61.

¹⁴⁶ See *S. and Marper*, 48 Eur. H.R. Rep. at 1199–1201.

¹⁴⁷ *Id.* at 1200.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* But see *R (S & Marper) v. Chief Constable of the S. Yorkshire Police*, (2002) 1 W.L.R. 3223, 3242 (A.C.) (U.K.) (“At the retention stage consideration of the circumstances of the offense of which the person has by this stage been acquitted seems to me almost certainly irrelevant.”) (Waller, L.J.).

¹⁵⁰ See European Convention, *supra* note 94, art. 14. Article 14 states “[t]he enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” *Id.*

¹⁵¹ See *Marper*, 1 W.L.R. at 3242–43 (A.C.) (Waller, L.J.).

If justification for retention is in any degree to be by reference to the view of the police on the degree of innocence, then persons who have been acquitted and have their samples retained can justifiably say this stigmatises or discriminates against me—I am part of a pool of acquitted persons presumed to be innocent, but I am being treated as though I was not.¹⁵²

When retention becomes conditional on a further determination of guilt, or a lesser degree of innocence, the message being sent is that a sample is kept in the Database because the person to whom it belongs is more likely to be a suspect in a later crime.¹⁵³ While some commentators have argued that the Database is intended to represent the likely criminal community,¹⁵⁴ such a position, if adopted by the government, would undermine the goal of preventing and solving crime, which has been greatly facilitated by police access to as large a database as possible.¹⁵⁵ Additionally, the use of the criteria suggested by the ECHR, whether at the time of collection or after an acquittal, would further defeat the purpose of the Database.¹⁵⁶ As demonstrated by the legislative progression of the retention program, the Database is more useful when the police have access to a larger class of citizens as opposed to only those suspected of committing the most serious offenses.¹⁵⁷

The second problem with the ECHR decision is its contention that innocent people who have their DNA retained are stigmatized by simply being in the Database.¹⁵⁸ This position is based on the notion that those who are acquitted are treated the same way as those who are convicted.¹⁵⁹ While it is true that both classes of people would have their samples retained, there is no merit to the idea that such a policy is actually harmful to the acquitted individuals.¹⁶⁰ To say that retaining the sample of an acquitted person equates them with a convicted offender is simply untenable, given the fact that the purpose of the Database is to

¹⁵² *Id.*

¹⁵³ See NUFFIELD COUNCIL ON BIOETHICS, *supra* note 80, at 33.

¹⁵⁴ *See id.*

¹⁵⁵ *See Marper*, 1 W.L.R. at 3243 (A.C.).

¹⁵⁶ *See id.*

¹⁵⁷ *See Marper*, 1 W.L.R. at 3242 (“The bigger the databank the better.”) (Waller, L.J.).

¹⁵⁸ *See S & Marper*, 48 Eur. H.R. Rep. at 1201.

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* at 1204. The ECHR found that it was not necessary to compensate the applicants for “distress and anxiety caused by the knowledge that intimate information about each of them had been unjustifiably retained.” *Id.* at 1203.

aid law enforcement with access to a larger class of citizens, not likely or actual offenders.¹⁶¹

Finally, the ECHR placed too much emphasis on the practices of the other Contracting States with regards to their retention policies.¹⁶² The development of DNA technology and the use of DNA in crime prevention and investigation are relatively recent.¹⁶³ In this respect, many of the Member States lag behind the United Kingdom in their use of DNA databases.¹⁶⁴ Furthermore, it can hardly be said that a true consensus exists among the Member States, except that no other state has indefinite retention.¹⁶⁵ But this is certainly not enough, in light of the fact that there are a number of differences between the retention policies of the other states.¹⁶⁶ In fact, many states place limitations on DNA retention that actually result in the type of discrimination and post-acquittal determinations of guilt that the United Kingdom policy has avoided.¹⁶⁷ Therefore, the ECHR appears to have found Member State consensus on an issue that is still being developed, and as such, should not have used the consensus as a basis for eroding the margin of appreciation that must be afforded to the United Kingdom.¹⁶⁸

B. A “Democratic Society” Means More Debate

In light of the analytical flaws in the ECHR opinion, it is the position of this Note that the judgment of the ECHR is incorrect with respect to its treatment of the justification question. As a result, the United Kingdom’s response should not include elimination of the Database or the retention program. Instead, proper compliance should focus on

¹⁶¹ *Cf.* R (S & Marper) v. Chief Constable of the S. Yorkshire Police, (2004) 1 W.L.R. 2196, 2219 (H.L.) (U.K.) (“The present system is designed to allow the collection of as many samples as possible and to retain as much as possible of what it has. The benefit of the aims of accurate and efficient law enforcement is thereby enhanced.”) (Baroness Hale).

¹⁶² *See S & Marper*, 48 Eur. H.R. Rep. at 1199.

¹⁶³ *See id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 1184.

¹⁶⁶ *See id.*

¹⁶⁷ *See id.* For example, Germany, Luxembourg, and the Netherlands allow retention, after acquittal, if “further suspicions remain about the person.” *Id.* In Poland, DNA samples are retained when the person has been acquitted of certain serious crimes. *Id.*

¹⁶⁸ *Cf.* FENWICK, *supra* note 84, at 38 (“[W]here practice is still in the process of changing and may be said to be at an inchoate stage as far as the Member states generally are concerned, the Court may not be prepared to place itself at the forefront of such changes . . .”).

a re-examination of the place of the Database in the United Kingdom's democratic society.

It has been maintained that the Convention is to be uniformly interpreted by the Member States.¹⁶⁹ At the same time, the ECHR has always interpreted the Convention in "light of present-day conditions" and with "regard to the changing conditions in contracting states."¹⁷⁰ These two maxims are seemingly inconsistent with each other because, under Article 8, the conditions within a particular state should not affect the interpretation of the substantive right, but those conditions are an important factor in determining whether valid justification exists under Article 8(2).¹⁷¹ This issue can be resolved by recognizing that democracy gives birth to rights,¹⁷² and the will of the people should therefore be afforded greater weight in the ECHR's analysis.¹⁷³

Despite its inclusion as a requirement for justification in Article 8(2), the ECHR has not formally adopted a definition for a "democratic society."¹⁷⁴ Instead, the court has simply acknowledged certain qualities as being important elements of such a society.¹⁷⁵ Democracy is a central theme of the Convention, and the ECHR should be willing to revert back to the traditional meaning of democracy when analyzing a state's interference with a protected right.¹⁷⁶ A democracy, in simplest

¹⁶⁹ See *Marper*, 1 W.L.R. at 2208 (quoting *R. v. Special Adjudicator*, (2004) 3 W.L.R. 23, 39–40 (H.L.) (U.K.)).

¹⁷⁰ Rabinder Singh, *Interpreting Bills of Rights*, 29 STATUTE L. REV. 82, 89 (2008).

¹⁷¹ Roberts & Taylor, *supra* note 136, at 377 (describing the House of Lords' treatment of this issue in *Marper*).

¹⁷² See Martin Loughlin, *Rights, Democracy, and Law*, in SCEPTICAL ESSAYS ON HUMAN RIGHTS 42 (Tom Campbell et al. eds., 2001).

¹⁷³ Concededly, the ECHR has noted that the will of the majority is not always the same thing as democratic values. See HUMAN RIGHTS AND CRIMINAL JUSTICE, *supra* note 134, at 71. Nevertheless, given the fact that the purpose of the retention program falls squarely within an acceptable use under Article 8(2), the expressed will of the majority should be of greater importance. Cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (stating that "I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law").

¹⁷⁴ See OVEY & WHITE, *supra* note 113, at 233.

¹⁷⁵ See *id.* The ECHR has regarded pluralism, tolerance, broadmindedness, equality, liberty, and self-fulfillment as "important ingredients of any democracy." *Id.* See generally *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, & 41344/98, 37 Eur. H.R. Rep. 1 (2003) (discussing what is necessary for a democratic society).

¹⁷⁶ See European Convention, *supra* note 94, pmbl. (noting that the signatories were "reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy").

terms, is a government by the people.¹⁷⁷ Every Member State in the Council of Europe, despite their diverse political histories, now exists as some form of a democratic society.¹⁷⁸ As such, the will of the citizens of each country is reflected in the legislation of that country.¹⁷⁹

The importance of the rights guaranteed by the Convention is not uniform because the legal status of the Convention in each state is different.¹⁸⁰ Thus, in light of the principles of democracy engrained in the Convention (and especially the justification requirement of Article 8), the ECHR should defer to the will of the people of the forum state when a piece of legislation (as opposed to a state practice) is alleged to violate a right.¹⁸¹ Granted, there has been little debate in the United Kingdom concerning the Database and it may be that the current retention policy runs contrary to the expressed will of the people.¹⁸² The ECHR's decision provides the citizens of the United Kingdom the opportunity to engage in a robust debate about the place of the retention program in their democratic society.¹⁸³

¹⁷⁷ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 600 (Philip Babcock Gove ed., 1986).

¹⁷⁸ See generally CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/> (describing the government structures of the countries).

¹⁷⁹ See Loughlin, *supra* note 172, at 42.

¹⁸⁰ See Frank Hoffmiesiter, *Germany: Status of European Convention on Human Rights in Domestic Law*, 4 INT'L J. CONST. L. 722, 726-27 (2006).

¹⁸¹ Cf. *Lochner*, 198 U.S. at 75.

¹⁸² See, e.g., James Slack, *Police in Retreat After Public Backlash over Their Demands for a DNA Database*, DAILY MAIL (London), Feb. 25, 2008, <http://www.dailymail.co.uk/home/index/html> (search "police in retreat"; follow first result hyperlink). But see TECHNIQUEST, THE NATIONAL DNA DATABASE: THE PUBLIC'S VIEW 5 (2007) (noting that after a presentation on the Database and the civil liberty implications, the majority of the participants of the public discussion "agreed with the current procedures in place concerning the circumstances for taking an individual's DNA").

¹⁸³ See Loughlin, *supra* note 172, at 44 ("Democracy is the expression not just of the will of a majority, but of a will that has been formed after wide-ranging and free discussion."). In May 2009, the Home Office published a consultation to "develop a DNA framework which has the support and confidence of the public and achieves a proportionate balance between the rights of the individual and protection of the public." See HOME OFFICE, KEEPING THE RIGHT PEOPLE ON THE DNA DATABASE 4 (2009). After a period of public response, the Home Office proposed a series of changes to the current blanket retention policy. See Alan Johnson, Secretary of State, Home Department, Ministerial Statement on DNA and Fingerprint Retention, Nov. 11, 2009, <http://search.homeoffice.gov.uk> (search "Ministerial Statement on DNA"; follow first hyperlink). Under the new policy, DNA samples are to be destroyed after six months, while DNA profiles may be kept for as little as three years (unconvicted juveniles under the age of sixteen) to as much as indefinite retention (convicted adults, juveniles convicted of serious crimes, or juveniles with two convictions for any offense). See *id.* Unconvicted adults and juveniles ages sixteen and seventeen will have their DNA profiles retained for six years. See *id.* These proposals have been placed in the Crime

CONCLUSION

The United Kingdom's National DNA Database has had a long and successful tenure, providing the rest of the world with an example for their databases. It has been built over the past two decades through a series of legislative amendments to the Police and Criminal Evidence Act 1984. These legislative changes reflect not only the will of the people but also the careful balancing of privacy rights with the public interest in preventing and solving crime. This has been demonstrated by the House of Lords' approval of the retention policy in place in the United Kingdom. Nevertheless, the full spectrum of police power under the retention program is less popular in the rest of Europe. The ECHR's decision in *Marper* highlights the problem that exists when the court determines what is necessary in a democratic society without considering that it was a democratic society in the first place that passed the legislation in question. There is no disputing that times and attitudes change, and what once carried favor among the public may now be out of touch with the reality of a society. In the United Kingdom, while most supported the retention policy in light of sensational convictions made possible by DNA retention, there has always been a lack of meaningful public debate over the extent of DNA retention and the Database. The *Marper* decision now gives the United Kingdom the opportunity to hold that debate and to determine whether its "democratic society" still supports the Database.

and Security Bill 2009 and are now before Parliament. See generally Crime and Security Bill, 2009, Bill [3] (Eng., W., N. Ir.). Despite the government's attempt to comply with the *Marper* decision, there are still those who perceive retention of DNA of unconvicted persons as a violation of human rights. See *DNA Database Is an Abuse of Our Rights*, TELEGRAPH (London), Nov. 11, 2009, <http://www.telegraph.co.uk/> (search "DNA Database is an abuse of our rights"; follow first hyperlink under "Most Relevant" list).